Responses for the Record from Ms. Jenny Rose Flanagan
Chairman Patrick Leahy
"Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S.1994"
June 26, 2012

Ms. Jenny Rose Flanagan – Common Cause

1. In recent years we have seen hundreds of voter ID bills introduced in state legislatures around the country in an effort to combat the same alleged voter fraud the Bush Justice Department could not find.

A. Is the need for the Deceptive Practices and Voter Intimidation Prevention Act based on assertions or on real documented attempts to infringe American's right to vote?

1. RESPONSE: The need for the Deceptive Practices and Voter Intimidation Prevention Act is based on real, documented attempts to infringe on the rights of everyday Americans to vote. The recently published joint report by Common Cause and the Lawyers' Committee for Civil Rights Under Law, *Deceptive Election Practices and Voter Intimidation* details numerous, documented attempts to infringe on the right to vote. Scores of calls come in to the Election Protection hotline with attempts to confuse voters about their rights. The full report can be found at:

http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/DECEPTIVEPRACTICESREPORTJULY2012FINALPDF.PDF

B. How would this legislation lead to proactive efforts that protect the vote?

1. RESPONSE: This legislation includes a critical component: corrective action. It requires the Attorney General to, pursuant to written procedures, communicate to the public, by any means (including written, electronic, telephonic communications) accurate information designed to correct materially false information when the Attorney General receives credible reports about deceptive practices and the State and local elections officials' responses are inadequate. Pursuant to the statute, in formulating written procedures, the Attorney General must consult with the Election Assistance Commission, State and local election officials, civil rights organizations, voting rights groups, voter protection groups and other interested community organizations. It also requires the Attorney General to submit a report to Congress compiling all deceptive practices

allegations. These are concrete examples of how this legislation will lead to proactive efforts to protect the vote.

C. In your opinion, how would this bill help us better respond to deceptive practices in the future?

1. RESPONSE: This legislation not only requires immediate corrective action to minimize the impact of deceptive voting practices, but also requires the Attorney General to take a hard look at deceptive practices, study how they are perpetrated, and formulate channels through which to issue corrective action for future elections. It also will also serve to deter some actors by strengthening penalties and clarifying the law. Importantly, S1994 will set up systems that states can look to in their efforts to combat these nefarious acts of voter suppression. The components of this legislation working in combination will put voters in a much better position to know their rights and responsibilities concerning voting than they are in now.

JENNY FLANAGAN'S RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

"Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S. 1994"

United States Senate Committee on the Judiciary

1. You raised concerns about the inability of federal law to address allegations of so-called deceptive statements in connection with the recent Wisconsin recall election.

    a. If enacted, would S. 1994 cover any conduct by anyone not acting under color of law in connection with a state election in which no federal candidate appeared on the ballot?

        a. RESPONSE: S. 1994, as currently drafted, applies to elections in which federal candidates appear.

    b. If not, why would S. 1994 be relevant to such elections?

        a. RESPONSE: S. 1994 is plainly relevant to elections in which no federal candidates appear. It will, among other things, require the Attorney General to publish written procedures and standards for determining when and how corrective action will be taken in the wake of deceptive election practices that may be used by other jurisdictions formulating similar programs. Such written procedures and standards, including consultations with the Election Assistance Commission, State and local election officials, civil rights organizations, voting rights groups, voter protection groups, and other interested community organizations – as is mandated by Section 4(b) of S. 1994 – will be relevant to addressing deceptive practices in non-federal elections. S. 1994 is also relevant to non-federal state elections because it requires the Attorney General to submit a public report to Congress on deceptive practices after each election. Compiling such a report will assist local and state authorities combat deceptive practices that appear in non-federal elections, because they will have a broader perspective on the types of deceptive election practices that perpetrators deploy.

    c. If so, on what basis does Congress have the constitutional authority to regulate conduct by individuals not acting color of law in connection with elections in which only state candidates appear on the ballot, unless the matter involves fraudulent registrations or voting by noncitizens?

no answer

    d. If so, how do you account for the conclusion to the contrary that is contained on page 7 of the Department of Justice Manual, "Federal Prosecution of Election Offenses"? no answer

2. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 36, current federal law, 18 U.S.C. 594 and 42 U.S.C. 1973gg-10(1), already prohibit intimidation of voters in federal (including mixed) elections.

a. Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

    a. RESPONSE: S. 1994 clarifies federal law with respect to communication of information that is knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions on voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election. It also strengthens penalties for those that seek to interfere with the right to vote. Moreover, it mandates certain corrective action mechanisms that the Attorney General will undertake to respond to deceptive election practices, create written procedures and standards for taking corrective action, and within 180 days after a general election, submit a report to Congress compiling all allegations received by the Attorney General of deceptive election practices.

b. Overruling the recommendations of career prosecutors, Department of Justice political appointees refused to prosecute members of the New Black Panther Party on charges of voter intimidation in violation of existing federal law. Given that the Department refuses to use the voter intimidation statutes already on the books, and has identified no inadequacy in those laws as a purported justification for its failure to bring the prosecution against the New Black Panthers, why should the Department be given new authorities to prosecute voter intimidation?

    a. RESPONSE: For the reasons discussed in my answer to Question 2(a), the Department of Justice should be required to take corrective action in the wake of deceptive election practices, author written procedures and standards for taking corrective action, and report to Congress after each election with a compilation of allegations of deceptive election practices. It also addresses the communication of knowingly false material information about voting with the intent to mislead, impede, hinder, discourage, or prevent persons from exercising the right to vote.

3. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 38, 18 U.S.C. 241 already permits federal prosecutions of schemes to intimidate voters in federal or mixed elections as well as to jam telephone lines of a political party that were used to get out the vote. The same manual, page 61, states that section 241 applies to "providing false information to the public – or a particular segment of the public – regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

    a. RESPONSE: S. 1994 clarifies federal law with respect to communication of information that is knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions on voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election. It also strengthens penalties for those that seek to interfere with the right to vote. Moreover, it mandates certain corrective action mechanisms that the Attorney General will undertake to respond to deceptive election practices, create written procedures and standards for taking corrective action, and within

180 days after a general election, submit a report to Congress compiling all allegations received by the Attorney General of deceptive election practices.

4. According to the Department of Justice Manual, "Federal Prosecution of Election Offenses," page 80, 2 U.S.C. 441(h) "prohibits fraudulently representing one's authority to speak for a federal candidate or political party." Why is enactment of S.1994 necessary in light of the current statutory prohibition of this conduct?

   RESPONSE: S. 1994 clarifies federal law with respect to communication of information that is knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions on voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election. It also strengthens penalties for those that seek to interfere with the right to vote. Moreover, it mandates certain corrective action mechanisms that the Attorney General will undertake to respond to deceptive election practices, create written procedures and standards for taking corrective action, and within 180 days after a general election, submit a report to Congress compiling all allegations received by the Attorney General of deceptive election practices.

5. S.1994 criminalizes a range of false statements, whether successful in dissuading voters from voting and whether the statements are made in public or in private. In its recent *Alvarez* decision, the plurality opinion stated, at page 11, "Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

   a. RESPONSE: To no extent does this statement render S. 1994 in its current form a "violation of the freedom of speech protected by the First Amendment." The very same paragraph cited in this question from *Alvarez* says that "[w]here false claims are made to effect a *fraud* … it is well established that the Government may restrict speech *without affronting the First Amendment*." *United States v. Alvarez*, 567 U.S. ___, slip op. at 11 (2012) (emphasis added). The plurality also held that "falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id.*, slip op. at 7. S. 1994, unlike the statute at issue in *Alvarez*, prohibits the communication of specific information if a person *knows* such information is *materially false* and has the *intent* to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote. The information must be regarding the time or place of holding an election or the qualifications for or restrictions on voter eligibility. Thus, S. 1994 comports with the First Amendment, because it includes false claims that are made to effect a fraud, and because falsity alone is not required. It requires a *knowing* falsehood about materially false information with specific intent.

6. S.1994 criminalizes speech that is not made to obtain a financial benefit. In its recent *Alvarez* decision, the plurality opinion stated at page 11, "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the

exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

a. RESPONSE: To no extent does this statement render S. 1994 in its current form a "violation of the freedom of speech protected by the First Amendment." S. 1994 is not justified by the government's interest in truthful disclosure alone. It is justified by the government's interest in protecting the right to vote. The very same paragraph cited in this question from *Alvarez* says that "[w]here false claims are made to effect a *fraud* … it is well established that the Government may restrict speech *without affronting the First Amendment*." *United States v. Alvarez*, 567 U.S. ___, slip op. at 11 (2012) (emphasis added). The plurality also held that "falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id.*, slip op. at 7. S. 1994, unlike the statute at issue in *Alvarez*, prohibits the communication of specific information if a person *knows* such information is *materially false* and has the *intent* to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote. The information must be regarding the time or place of holding an election or the qualifications for or restrictions on voter eligibility. Thus, S. 1994 comports with the First Amendment, because it includes false claims that are made to effect a fraud, and because falsity alone is not required. It requires a knowing falsehood.

7. S.1994 requires no showing of harm before the statements at issue can form the basis for a criminal prosecution. The plurality opinion in *Alvarez*, page 13, stated that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." To what extent does this statement render S.1994 in its current form a violation of the freedom of speech protected by the First Amendment?

a. RESPONSE: To no extent does this statement render S. 1994 a "violation of the freedom of speech protected by the First Amendment." In accordance with *Alvarez*, there is a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote).

8. One of the reasons that the Supreme Court struck down the Stolen Valor Act as violative of the First Amendment was an absence of a showing that counter-speech would not work to remedy the false speech at issue in *Alvarez*. The plurality opinion stated at page 15, "The remedy for speech that is false is speech that is true. That is the ordinary course in a free society." And Justice Breyer in his concurrence, at page 10, expressly agreed with the plurality that "in this area more accurate information will normally counteract the lie." Why is counter-speech by political opponents of those alleged to have made the false statements at issue in S.1994 not an effective alternative to criminalizing the making of those statements? Are these statements relevant in analyzing the constitutionality of S.1994 on First Amendment grounds?

a. RESPONSE: S. 1994 will lead to the dissemination of speech that is true, and will provide more accurate information to counteract a lie. Counter-speech by political opponents of

those alleged to have made false statements *alone* is inadequate. Deceptive election practices often impersonate official government officials. S. 1994 would install a process by which the Department of Justice would issue corrective action and establish procedures for corrective actions. Moreover, S. 1994 does not merely remedy "speech that is false," it remedies attempts to use fraud to prevent and impede people from exercising their right to vote. "Speech that is true" fails to fully remedy the scope of the harm in this case. Corrective procedures, reports to Congress, and an official response are necessary to remedy the harm. Moreover, those affected by deceptive election practices alone are often not in the best position to provide "counter-speech" correcting false information. S. 1994 would mandate DOJ procedures to provide the adequate "counter-speech."

9. S.1994 would require the Attorney General, upon receipt of a credible report of the dissemination of certain materially false information, to communicate "accurate" information to "correct" the false information. In *Alvarez*, the plurality opinion stated, pages 16-17, "Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates….Only a weak society needs government protection or intervention before its resolve to preserve the truth." Do you agree with this statement? To what extent does it bear on the constitutionality of the "corrective action" provisions of S.1994?

    a. RESPONSE: When perpetrators knowingly and intentionally impersonate government officials, or otherwise act on their own behalf, by utilizing materially false information to confuse voters about the place and manner of voting, or qualifications for voting, the government should respond. Deceptive election practices *prohibit* society from engaging in the civic duty of open, dynamic, rational discourse as expressed at the ballot box and in our political campaigns. The act of an Attorney General communicating correct information upon receipt of credible reports of the dissemination of materially false information does not in any way render our society "weak" and "in need of government protection." It is in keeping with our highest American values. It bears in favor of the constitutionality of S. 1994.

10. Justice Breyer's concurrence in *Alvarez* may also bear on the constitutionality of S.1994. He stated at page 3, "[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." Do you agree? If so, how does his statement relate to S.1994?

    a. RESPONSE: This relates to S. 1994 only to the extent to which this legislation prohibits the communication of information that a speaker knows is materially false, when the speaker intends to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote. The materially false information must be regarding the time or place of holding an election or the qualifications for voting. The threat of criminal prosecution for *materially false statements* about the process of voting – with the requirements of *knowledge, materiality, and intent* – should not chill true speech that lies at the heart of the First Amendment. S. 1994 is not merely about false statements in general, nor even about politics. S. 1994 is about protecting voters from deliberate misinformation campaigns that intend to confuse voters about the requirements and process of voting.

11. Justice Breyer professed concern in his *Alvarez* concurrence about false statement statutes that gave government the broad power to prosecute falsity without more. He voiced concern on page 5

that such statutes may lead "those who are unpopular [to] fear that the government would use that weapon selectively." Do you believe that such a concern is applicable to S.1994? If not, why not?

a. RESPONSE: It is not applicable to S. 1994, because this legislation does not give government the broad power to prosecute falsity "without more." S. 1994 gives the government a rather narrow power to prosecute false statements – those that seek to knowingly use materially false lies - intentionally – to mislead voters or impede them from exercising their right to vote based on specific information that is further defined by the legislation, including the time or place of holding an election or the qualifications for voting.

12. Justice Breyer's *Alvarez* concurrence noted at page 5 that other false statement statutes "tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to cause harm." And he added, *id.*, that fraud statutes "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

a. RESPONSE: Yes. These statements have a bearing on the constitutionality of S. 1994 as introduced and counsel in its favor. S. 1994 specifies that the lies be made in contexts in which a tangible harm is especially likely to occur. In this case, voting. It requires materiality; it requires intent; it requires a knowing *mens rea*.

13. Justice Breyer's *Alvarez* concurrence, pages 7-8, recognized that when a false statement statute applies only to "knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, … [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

a. RESPONSE: Yes. These statements have a bearing on the constitutionality of S. 1994 as introduced and counsel in its favor. S. 1994 is about knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker, and thus reduces the risk that valuable speech is chilled.

14. Justice Breyer noted in his *Alvarez* concurrence, page 8, that for false statements prohibited by statutes that apply in the political context, "although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is high." Additionally, he noted that in applying such statutes in the political context, "there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like." Do these statements have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

a. RESPONSE: Yes, these statements have a bearing on the constitutionality of S. 1994 and counsel in its favor. S. 1994 is about intentionally lying to voters with information that one

knows is materially false to impede their *right to vote* because the statements involve the *time or place of voting* or the *qualifications* of voting. These are different than statements about the substance of politics or "bar stool braggadocio" – these are lies about the right to vote.

15. Justice Breyer stated in his *Alvarez* concurrence, page 9, "In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas." Does this statement have any bearing on the constitutionality of S.1994 as introduced? If not, why not?

    a. RESPONSE: No, this statement does not bear on the constitutionality of S. 1994, because S. 1994 is not aimed at the political arena of ideas, but at the criminal arena that seeks to prevent citizens from exercising their right to vote.

16. Section 3(b) of S.1994 creates a private right of action, which creates a "civil action for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order."

    a. Does section 3(b) permit a United States district court that finds that an individual or entity may have committed or may be about to commit a violation of subsections (b)(2), (b)(3), or (b)(4), to issue an order restraining that individual or entity from committing any future violations of those provisions so as to prevent any such future violations? If not, why not?

        a. RESPONSE: Yes, section 3(b) grants the court the power to issue restraining orders.

    b. Would such an order constitute a prior restraint on speech? If not, why not?

        a. RESPONSE: Such an order would prohibit someone from engaging in the communication of knowingly materially false information when the speaker intends to mislead voters or impede, hinder, discourage, or prevent voters from exercising their right to vote.

    c. If so, why would such an order be consistent with the First Amendment guarantee of freedom of speech?

        a. RESPONSE: This comports with the First Amendment because the Supreme Court has long held that the scope of the Amendment is not absolute. Content-based laws concerning imminent lawless action; obscenity; speech integral to criminal conduct; so-called fighting words; and grave & imminent threats are all consistent with the First Amendment. As the plurality of the Court held in *Alvarez* on page 7 of its slip opinion, "falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." Here, S. 1994 deals squarely with *knowing* falsehoods and for the other reasons discussed above, and in the record, comports with the First Amendment.

DECEPTIVE PRACTICES 2.0: LEGAL AND POLICY RESPONSES

COMMON CAUSE, THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE CENTURY FOUNDATION

THE CENTURY FOUNDATION

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

COMMON CAUSE

This report was written with the enormous pro bono assistance of the law firms Morrison & Foerster L.L.P. and Ropes & Gray L.L.P.. For more information about Ropes & Gray L.L.P., please visit www.ropesgray.com, for more information about Morrison & Foerster, please visit www.mofo.com.

The myriad technological methods by which "e-deceptive practices" might be perpetrated are laid out in tremendous detail in the companion report to this produced by the Electronic Privacy Information Center, available at www.epic.org.

INTRODUCTION

In the last several election cycles, "deceptive practices" have been perpetrated in order to suppress voting and skew election results. Usually targeted at minorities and in minority neighborhoods, deceptive practices are the intentional dissemination of false or misleading information about the voting process with the intent to prevent an eligible voter from casting a ballot. It is an insidious form of vote suppression that often goes unaddressed by authorities and the perpetrators are virtually never caught. Historically, deceptive practices have taken the form of flyers distributed in a particular neighborhood; more recently, with the advent of new technology "robocalls" have been employed to spread misinformation. Now, the fear is deceptive practices 2.0: false information disseminated via the Internet, email and other new media.

In the past, the worst practices involved flyers distributed in predominantly minority communities. The 2004 presidential election cycle provides some particularly vivid examples. In Milwaukee, Wisconsin, fliers purportedly from the "Milwaukee Black Voters League" were distributed in minority neighborhoods claiming "If you've already voted in any election this year, you can't vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can't vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you." In Pennsylvania, a letter with the McCandless Township seal on it falsely informed voters that, to cut down on long lines, Republicans would vote on November 2 and Democrats would vote on November 3—the day after the election. Similar fliers were distributed at Ross Park Mall in Allegheny County. In Ohio, a so-called "Urgent Advisory" memo on phony Board of Elections letterhead warned voters that if they were registered by the NAACP, America Coming Together, the Kerry campaign, or their local Congressional campaign, they were disqualified and would not be able to vote until the next election.

More recently, automated calls, known as robocalls in the world of political campaigns, have been the weapon of choice. In 2006, the Secretary of State of Missouri, Robin Carnahan, reported that in one county, "robo-calls reportedly warned voters to bring photo ID to the polls or they would not be allowed to vote. There were also reports on the radio in Kansas City of automated telephone calls telling voters their polling places had been changed and giving incorrect polling place information."[1] According to the National Network for Election Reform, "Registered voters in Virginia, Colorado, and New Mexico reported receiving phone calls in the days before the election claiming that their registrations were cancelled and that if they tried to vote they would be arrested.[2] In Virginia, "Voters in Arlington, Accomack, Augusta, and Northampton counties in Virginia received phone calls on November 6 saying voters would be arrested if they attempted to vote on Election Day. Some of the phone calls also told voters that their polling locations had been moved, although none of the locations had changed."[3]

How might such activities translate online? Emails that appear to come from legitimate sources, such as a campaign, an elections office, a party or a nonprofit organization could be sent in a targeted fashion that contain false or misinformation about the voting time, place or process, or claiming that a poll site has been moved. Just at the time of this writing the first serious instance of email with bogus information came to light in Florida, where voters were receiving emails stating that voters whose ID failed to match a state database on Election Day would be turned away from the polls.[4]

Making matter worse, spyware could be used to collect information on a voter and their online behavior to better target deceptive emails.[5] Partisan mischief-makers with a bit of technological knowledge could spoof the official sites of secretaries of state, voting rights organizations or local election boards and advertise completely wrong information about anything from poll locations to voter identification requirements. Someone could also appropriate website names that are one letter off from the official site name—a typo domain or "cousin domain"—that appear to be an official site, and post phony information. Pharming—hacking into domain name system servers and changing Internet addresses—could be used to redirect users from an official site to a bogus one with bad information on it. As more and more people move from traditional phone lines to internet based calling platforms (known as VOIP or Voice Over Internet Protocol), deceptive robocalls might become even more pervasive as they will be virtually untraceable.

So far in this election cycle, these tactics have already been utilized to spread false information about candidates. Barack Obama has been the most prominent target of these attacks. Several emails have circulated widely which have titles such as "Who Is Barack Obama" and "Can a good Muslim become a good American." The content of the emails has often been the same, highlighting Obama's middle name of "Hussein" and incorrectly claiming he is of Muslim faith. While the Obama Campaign suffers through a seemingly unprecedented level of this activity, in 2004 supporters of Democratic Presidential candidate John Kerry were sent an email that looked almost exactly like official campaign emails, asking for donations. The email actually came from India and was a scam to steal people's money.[6]

Hillary Clinton did not fully escape such tactics either. The NAACP was forced to release on its website a statement from it's chairman Julian Bond stating that an email listing "10 Reasons Not to Vote for Hillary Clinton" supposedly authored by him was a hoax.

This year during the primaries, according to the online publication Wired, a series of false campaign websites materialized that appeared to be legitimate, such as FredThomsonForum.com, RudyGiulianiForum.com, and MittRomneyforum.com. Wired reported that these sites featured posts "under the impersonated names of popular political pundits and bloggers" and "promote misleading links to candidate sites that route to YouTube videos attacking them. Most posts adopt the persona of a supporter of the candidate, while offering views that amount to over-the-top parodies of genuine boosters."[7]

After the primaries, domain names with prospective and actual vice-presidential nominees' names popped up, leading to sites with unexpected information. For example, Obama-Biden.org and Obama-Biden.com diverted people to the website of the American Issues Project, an extremely anti-Obama third party organization. As reported by the Los Angeles Times, the McCain-Romney.com website took viewers to the "official home of the Hundred Year War…and Bush's Third Term!"[8]

An extensive analysis of abuse of campaign domain names found that, "Candidates have not done a good job at protecting themselves by proactively registering typo domains to eliminate potential abuse. In fact, we were only able to find one single typo web site that had been registered by a candidate's campaign - http://www.mittromny.com. All other typo domains were owned by other third parties that appeared unrelated to the candidate's campaign."[9]

This same study also enumerated several specific instances of "typo squatting" of domain names that were meant to look like actual campaign websites, including such gems as "narakobama.com" and mikehukabee.com."[10] These sites were either advertising sites or directed users to sites with "differing political views."[11]

Phony campaign websites have also been created to dupe people into making campaign donations that are really going into someone's pocket, not any campaign. In 2004, phishers (people who use e-mail to fraudulently obtain data from a user) set up a fictitious website purporting to be for the Democrats that stole the user's credit card number, and another site that had users call a for-fee 1-900 number.[12] This year, an Internet site was set up offering to register people to vote for $9.95, a process that is free.[13] In August 2008, the Federal Trade Commission issued a warning to consumers about voter registration scams. Prospective voters were receiving emails and phone calls from people claiming to be affiliated with an election board or civic group and asking for the person's social security number or credit card number to confirm eligibility or registration to vote. The FTC said the purpose was to commit identity theft.[14]

This report seeks to explore how such attacks might take place in the voting rights context and the measures that can be taken to contend with them effectively. The main focus of the report is an investigation into whether our existing state and federal legal structure is sufficiently equipped to deter and punish perpetrators of online deceptive practices. On the state level, we examine current anti-hacking and computer crimes laws, laws regarding the unauthorized use of state seals and insignia and impersonation of public officials, and voting rights laws. Each of these subsections is accompanied by recommendations for ways in which state laws can be improved to better address these types of serious transgressions. We also look extensively at current federal law, including the Voting Rights Act, copyright, trademark, anti-cybersquatting laws, the Computer Fraud and Abuse Act, the Wire Fraud Statute, Section 230 of the Communications Act, and the Can-Spam Act. Again, recommendations for improving federal law are offered.

We conclude with recommendations for those of us who are not prosecutors or technologists, especially elections officials, the campaigns, the media, including online media, voting rights and community groups, and of course, the voters.

STATE LAWS

I. VOTING RIGHTS LAWS

Each of the 50 states and the District of Columbia has laws involving voting rights and the administration of elections. Most states prohibit interference with the election process in some manner, but state statutes vary significantly in scope and application. For example, some state laws focus on interference with the physical act of voting by prohibiting "electioneering" within a certain proximity of the polling place. Others address manipulation of or tampering with ballots, voting machines, or registration logs. Still others outlaw behavior meant to harass, intimidate, or bribe voters. While these categories of laws are critical to ensuring the fair and effective administration of elections, some states have supplemented them with laws generally applicable to interference with the election process or dissemination of false information about voting procedures, candidates, or issues in the election. States that have these more general laws are better equipped to curtail deceptive practices, online or otherwise, in the voting process.

With the advent of online communications, the deceptive tactics once perpetrated through leaflets and phone calls may start to appear in e-mails and on websites. Many state legislatures have recently begun to enact laws that explicitly prohibit false statements or other types of voting fraud perpetrated in cyberspace, but if interpreted broadly, even most older statutes can effectively combat deceptive practices perpetrated online. The following sections detail general trends and important considerations associated with voting fraud laws in all 50 states and the District of Columbia.[15] The state statutes highlighted below are not necessarily models of best and worst practice, but they do provide examples of strong voting fraud provisions that can be used to combat electronic deceptive voting practices now and in the future.

LAWS PROHIBITING FALSE STATEMENTS

Almost all states have laws that prohibit false statements regarding elections, and these laws generally fall within 3 categories:

- ***Laws focused on process***: These laws typically prohibit the dissemination of false information relating to registration qualifications, election day identification requirements, polling place locations, and other procedural matters affecting the vote. For example, the Virginia statute makes it a misdemeanor to "knowingly communicate false election information to a registered voter about the time, date, or place of voting" and "to knowingly communicate false information concerning the voter's precinct, polling place, or a voter registration status." Va. Code Ann. § 24.2-1005.1.
- ***Laws focused on substance***: These laws typically prohibit the dissemination of false information about candidates or issues, rather than election or voting procedures. The Alaska and Wisconsin statutes both prohibit a person from knowingly making a false statement about a candidate that is intended to, or actually does, affect an election. Alaska Stat. § 15.56.14; Wis. Stat. § 12.05.
- ***Laws applicable to both process and substance***: The strongest state laws relating to false statements are those that are broadly applicable to false statements relating to an election, whether it be the procedural issues involved or the substantive issues relating to the candidate or ballot measures. For example, Louisiana law prohibits the distribution or transmission of any "oral, visual, or written material containing a false statement about a candidate. . . or proposition," La. Rev. Stat. Ann. §18:1463, as well as false information about any matter of "voting or. . . registration." *Id.* §18:1461, §18:1461.1.

Although the applicability of false statement provisions is somewhat limited by the process/substance constraints discussed above, these laws likely apply regardless of how the false statement is communicated. The statutes may not explicitly indicate that online or electronic communications are covered, but common terms found in the statutes such as "dissemination," "communicate," or "statement" are broad enough to encompass all forms of communication.

The Tension Between Free Speech and Laws Prohibiting False Statements:

Spotlight on Nevada

A concern surrounding laws dealing with political speech is the possible infringement on First Amendment freedom of speech rights. Accordingly, while voting fraud laws must be inclusive and apply broadly, legislatures must be careful to limit the laws' scope to speech not protected by the constitution. In addition to the content of the speech, due process (i.e., the way in which the law is enforced) concerns must also be considered.

In *Nevada Press Association v. Nevada Commission on Ethics*, the U.S. District Court for Nevada ruled that Nevada's voting fraud law was unconstitutional because the manner in which the law was enforced did not survive the strict judicial scrutiny required by First Amendment jurisprudence. Nevada Revised Statute § 294A.345 "prohibit[ed] any person from making a false statement, with actual malice, about a candidate for political office with the intent and effect of impeding the success of the candidate's campaign." Instead of resolving a claim through the state court system, a candidate claiming to be the victim of a false statement could file a request with the Nevada Ethics Commission within ten days of the alleged false statement. The Commission was required to hold a hearing within fifteen days of the request and give an opinion within three days of the hearing as to whether the statement was true or false. Although the false statement/actual malice framework of the statute survived the court's scrutiny, the court ultimately held the statute unconstitutional because the abbreviated dispute resolution procedure led by the Ethics Commission significantly deviated from civil and criminal standards of due process and greatly increased the chance of an erroneous decision.

In short, *Nevada Press Association* makes two clear points. First, any model statute that could potentially encroach on First Amendment protections should expressly include constitutionally required elements such as "actual malice," and, second, the manner in which a statute is enforced, i.e., due process, must be considered when analyzing the effectiveness and constitutional validity of a voting fraud statute.

LAWS THAT BROADLY PROHIBIT DECEPTIVE PRACTICES

The most effective way to combat online voting fraud is to broadly prohibit deceptive practices relating to an election or the casting of a vote. Many states have implemented laws to combat deception in the voting process, but no state's statute has emerged as a clear model for other states. The following state statutes, however, have provisions that would apply broadly to deceptive practices in the context of online voting fraud and may be useful for other states to consider:

- ***Alabama***: The Alabama statute prohibits "any person . . . by any [] corrupt means, from attempting to influence any elector in giving his/her vote, deterring the elector from giving the same, or disturbing or hindering the elector in the free exercise of the right of suffrage . . . ." Ala. Code § 17-17-38.

- ***Colorado***: The Colorado statute provides: "It is a crime to knowingly make, publish or circulate or cause to be made, published or circulated in any writing any false statement designed to affect the vote on any issue submitted to voters at any election or relating to any candidate for election to public office." Colo. Rev. Stat. § 1-13-109.

- ***Maine***: The Maine statute prohibits "any interference with a voter attempting to cast a ballot, or any attempt to influence a voter in marking his/her ballot." Me. Rev. Stat. Ann. tit. 21-A, § 674(1).

The above statutory provisions are not only broad enough to encompass nearly all *types* of deceptive practices (e.g., dissemination of false registration and polling place information, creation of phony "official" materials, or the spread of unfounded rumors about candidates), but are also expansive enough to cover deceptive practices perpetrated solely online. Also, the statutes featured above apply to deceptive practices generally regardless of whether the tactics are accompanied by bribery, intimidation, or harassment. While it is certainly understandable for state legislatures to focus on the most egregious types of voter interference, voters may also be disenfranchised as a result of simple misinformation disseminated by wrongdoers. Virginia and Missouri also have strong deceptive practices laws on the books.[16]

An Innovative Approach: Spotlight on California

In addition to the broadly applicable laws discussed above, California's "political cyberfraud" law is specifically designed to deter and penalize deceptive practices perpetrated online. Cal. Penal Code §§ 18320-23. California's political cyberfraud law makes it "unlawful for a person, with intent to mislead, deceive, or defraud, to commit an act of political cyberfraud." Political cyberfraud is defined as a knowing and willful act concerning a political website that is committed with the intent to deny a person access to a political website, deny a person the opportunity to register a domain name for a political website, or cause a person reasonably to believe that a political website has been posted by a person other than the person who posted the website, and would cause a reasonable person, after reading the website, to believe the site actually represents the views of the proponent or opponent of a ballot measure.

Political cyberfraud includes, but is not limited to, the following acts:

- Intentionally diverting or redirecting access to a political website to another person's website by the use of a similar domain name, meta-tags, or other electronic measures.
- Intentionally preventing or denying exit from a political website by the use of frames, hyperlinks, mousetrapping, popup screens, or other electronic measures.
- Registering a domain name that is similar to another domain name for a political website.
- Intentionally preventing the use of a domain name for a political website by registering and holding the domain name or by reselling it to another with the intent of preventing its use, or both.

While California's law should be expanded to cover all aspects of online election fraud rather than limiting it to political websites, it provides a fairly comprehensive framework for addressing online voter fraud.

LAWS THAT PROHIBIT TAMPERING WITH ELECTION OR CAMPAIGN MATERIALS

Even states that do not specifically prohibit false statements or deceptive practices perpetrated online may have provisions that combat misinformation in the voting process. Many states, for example, have laws addressing either election or campaign materials, such as prohibitions on the destruction of ballots, ballot box stuffing, or interference with the distribution of election or campaign information. The strongest statutory provisions in this category explicitly include electronic activity.

- ***Illinois***: The Illinois statute not only prohibits tampering with voting machines and placing anything other than a ballot in a ballot box, but it also makes it a felony to "destroy, mutilate, deface, falsify, forge, conceal or remove any record, register of voters, affidavit, return or statement of votes, certificate, tally sheet, ballot, or any other document or computer program . . ." in connection with an election. *See* 10 Ill. Comp. Stat. §§ 5/29-6, 5/29-7.

Not all statutes plainly cover electronic materials; a few are even explicitly restricted to physical materials and contain limiting terms such as "paper" or "card." For the most part, however, statutes that prohibit tampering with election materials can be interpreted to include electronic materials, such as e-mails, databases, documents, and websites. Below are examples of statutes that may be interpreted so as to apply to online tactics.

- ***Arizona***: Arizona law prohibits the delivery or mailing of "any document that falsely simulates a document from the government of this state, a county, city or town or any other political subdivision," where such mailing is done in an attempt to influence the outcome of an election. Ariz. Rev. Stat. § 16-925(A). Although the provision does not explicitly apply to online communications, the terms "mailing" and "document" could easily be interpreted by a creative prosecutor to include e-mails, websites, and the like.
- ***New Mexico***: New Mexico's law prohibits "printing, causing to be printed, distributing or displaying false or misleading" information relating to the voting or election process. N.M. Stat. Ann. § 1-20-9. This law was enacted in 1979, long before online communications, but could encompass printing from a computer rather than with a printing press, posting false information online that someone else subsequently prints, disseminating false information through e-mail, or displaying false information on a website or message board.

In general, a survey of state election laws indicates that most states have provisions that, if creatively applied, could serve to deter and to penalize many of the deceptive practices perpetrated online. Nevertheless, nearly all state laws in this context would benefit from close examination by their state legislatures, which should consider enacting laws to broadly prohibit those deceptive practices that have the potential of interfering with the campaign or election process.

RECOMMENDATIONS

- States *without* laws prohibiting deceptive practices in the context of an election should *enact* laws that explicitly cover such practices perpetrated online.
- States with laws *already* prohibiting deceptive practices in the context of an election should *amend* their laws to explicitly include such practices perpetrated online.
- States with content-specific false statements laws should expand their laws to explicitly include false statements about election and voting procedure.
- States prohibiting only bribes, threats, or other overtly coercive acts should expand their statutes to cover more clandestine practices (such as dissemination of false statements online).

State Laws Regarding Deceptive Voter Practices

State	False Statements Prohibited	Interference with or Fraud in the Election Process Prohibited	No Requirement that Intimidation, Bribery, or Threats be Present	Tampering with Election Materials Prohibited	Voting Laws Explicitly Applicable to Electronic or Online Activity
AL		1			
AK	2				
AZ	3				
AR					
CA					
CO		4			
CT	5				
DE					
DC					
FL					
GA					
HI					
ID					
IL					
IN					
IA					
KS					
KY					
LA					
ME					
MD					
MA				6	
MI	7				
MN					
MS	8				
MO					
MT					
NE		9			
NV					
NH					
NJ				10	
NM					
NY					
NC					
ND					
OH					
OK					
OR					
PA		11			
RI					
SC					
SD					
TN					
TX					
UT					
VT					
VA					
WA					
WV					
WI					
WY					

1. Alabama does not have specific fraud statutes related to the election, but it does prohibit official authorities and employers from unduly influencing voters' ability to vote freely.
2. Alaska's false information laws do not apply to attempts to spread false information about an election or registration; they only apply to false information about a candidate.
3. ARIZ. REV. STAT. §16-925(A) prevents the delivery or mailing of deceptive election documents in an attempt to influence the election.
4. COLO. REV. STAT. §1-13-201 prohibits interference with registration, but does not mention interference with the actual election.
5. Connecticut law prohibits issuing misleading instructions to voters.
6. The Massachusetts statute explicitly deals with voting lists, or registrations, and does not mention the actual election process.
7. This only applies to false statements about candidates.
8. The relevant statute also requires that someone be knowingly defrauded through the use of a false statement.
9. NEV. REV. STAT. §32-1538 prevents the fraudulent assistance of an illiterate voter. There are also statutes dealing with interference with the election process.
10. New Jersey law prohibits the dissemination of false election materials.
11. Pennsylvania primarily prohibits interfering with elected officials.

State	Abbreviation	Statute Reference(s)
Alabama	AL	Ala. Code §§ 13A-11-8, 17-17-4, 17-9-50, 17-5-17, 17-17-38, 17-17-39, 17-17-44, 17-17-45, 17-24-4
Alaska	AK	Alaska Stat. §§ 15-56-14, 15-56-25
Arizona	AZ	Ariz. Rev. Stat. §§ 16-1006(A), 16-1017(6), 16-925(A)
Arkansas	AR	Ark. Code Ann. §5-42-102
California	CA	Cal. Elec. Code §§ 18320, 18500, 18540, 18564
Colorado	CO	Colo. Rev. Stat. §§ 1-13-109, 1-13-112, 1-13-201, 1-13-713
Connecticut	CT	Conn. Gen. Stat. §9
Delaware	DE	Del. Code. Ann. §§ 5161, 5162, 5123, 5116, 5117, 5118, 5125, 5139
District of Columbia	DC	
Florida	FL	Fla. Stat. §§ 104.012, 104.041, 104.0515, 104.061, 104.091
Georgia	GA	Ga. Code Ann. §21-2-567
Hawaii	HI	Haw. Rev. Stat. §§ 19-3, 19-4, 19-6
Idaho	ID	Idaho Code Ann. §§ 18-2305, 18-101
Illinois	IL	Ill. Comp. Stat. §§ 5/29-1, 5/29-2, 5/29-4, 5/29-6, 5/29-7, 5/29-10–13, 5/29-17–18
Indiana	IN	Ind. Code §§ 3-14-3-10, 3-14-3-21.5
Iowa	IA	Iowa Code §39
Kansas	KS	Kan. Stat. Ann. §§ 24-2415, 25-2407, 25-2414, 25-2426, 25-2433
Kentucky	KY	Ky. Rev. Stat. Ann. §§ 119.155, 119.255, 119.275, 119.305, 119.315, 119.345, 119.335
Louisiana	LA	La Rev. Stat. Ann. §§ 18:Et Seq, 18:1463, 18:1461, 18:1461.1
Maine	ME	Me. Rev. Stat. Ann. tit. 17-A, §§ 603, 2931, Me. Rev. Stat. Ann. tit. 21-A, § 674(1)
Maryland	MD	Md. Code Ann., Elec. Law §16
Massachusetts	MA	Mass. Gen. Laws ch. 56, § 29, Mass. Gen. Laws ch. 56, § 42, Mass. Gen. Laws ch. 56, § 39, Mass. Gen. Laws ch. 56, § 43, Mass. Gen. Laws ch. 56, § 10, Mass. Gen. Laws ch. 56, § 23, Mass. Gen. Laws ch. 56, § 30.
Michigan	MI	Mich. Comp. Laws §§ 168.931, 168.932(A), 168.944
Minnesota	MN	Minn. Stat. §§ 204C.06, Subd., 1, 204C.06, Subd., 3, 204C.035
Mississippi	MS	Miss. Code Ann. §§97-13-37, 97-13-39, 97-45-3, 97-13-21
Missouri	MO	Mo. Rev. Stat. §§ 115.631, 115. 633, 115.635, 115.637
Montana	MT	Mont. Code Ann. §§ 13-35-206, 13-35-208, 13-35-217, 13-35-218, 13-35-103
Nebraska	NE	Neb. Rev. Stat. §32
Nevada	NV	Nev. Rev. Stat. §§ 293.700–293.840
New Hampshire	NH	N.H. Rev. Stat. Ann. §§ 652–671
New Jersey	NJ	N.J. Stat. Ann. §§ 2C:28-8, 19:34-29, 19:34-1.1, 19:34-28, 19:34-46, 19:34-66, 19:34-68
New Mexico	NM	N.M. Stat. §1-20-9
New York	NY	N.Y. Elec. Law §17-166
North Carolina	NC	N.C. Gen. Stat. §163-275
North Dakota	ND	N.D. Cent. Code §12.1–14-02
Ohio	OH	Ohio Rev. Code Ann. §3599
Oklahoma	OK	Okla. Stat. §§ 76-3–4, 16-113
Oregon	OR	Or. Rev. Stat. §164.377
Pennsylvania	PA	25 P.S. §§ 3527, 3547
Rhode Island	RI	R.I. Gen. Laws §§ 17-19-42, 19-19-43, 17-19-46, 17-23-1, 17-23-2, 17-23-17
South Carolina	SC	S.C. Code Ann. §§ 7-25-80, 7-25-190, 7-25-180
South Dakota	SD	S.D. Codified Laws §§ 12-26-10-11, 12-26-15, 12-26-12
Tennessee	TN	Tenn. Code Ann. §§ 2-19-142, 1-19-116, 2-19-103
Texas	TX	Tex. Elec. Ann. § 61
Utah	UT	Utah Code Ann. §§ 20A-4-501(1)(C), 20A-3-502(1)(B)
Vermont	VT	Vt. Stat. Ann. tit. 17, §§ 2017, 2019, 1972
Virginia	VA	Va. Code Ann. §24.2-1005.1
Washington	WA	Wash. Rev. Code §29A.8.630
West Virginia	WV	W. Va. Code §§ 3-8-11, 3-9-10
Wisconsin	WI	Wis. Stat. §§ 12.05, 12.09

II. PROHIBITING THE IMPERSONATION OF PUBLIC OFFICIALS

Most states have laws that prohibit the impersonation of public officials/public servants. Notably, certain of these states have impersonation laws directly related to the election process.

GENERAL STATE IMPERSONATION LAWS

Many states have general laws regarding the impersonation of public officials/public servants that merely prohibit such impersonation. Such state laws appear to be quite broad and there appears to be no case law on point addressing whether such laws would apply to impersonation of public officials/public servants in connection with voter deception practices. Presumably, these laws could be applied to online voter deception practices. For example, such laws may apply if an impersonator via a website or email communication deceives voters by 1) impersonating a public official, including an election official, where the impersonator distributes false information relating to polling places, voting requirements, or the like, or 2) creating a website that is made to appear as the official site of a state's Secretary of State or claiming to be the state's Secretary of State. Notably, effective November 1, 2008, New York will have a new law that makes it a violation of its Penal Law to impersonate another "by communication by Internet website or electronic means with intent to obtain a benefit or injure or defraud another, or by such communication pretends to be a public servant in order to induce another to submit to such authority or act in reliance on such pretense." NY Penal Law § 190.25.

STATE IMPERSONATION LAWS SPECIFIC TO THE ELECTION PROCESS

As previously mentioned, there are a few states that have enacted impersonation laws specifically related to the election process. For example, Alabama prohibits fraudulently misrepresenting oneself or other persons/organizations as speaking, printing, acting for or on behalf of a candidate, political campaign committee or political party in a manner that is damaging/intended to damage such person/entity. ala. code § 17-5-16. Maryland prohibits the impersonation of a voter and attiring/equipping someone to give the impression of performing a government function in connection with an election. Md. code ann. elec. law §§ 16-101 and 16-903. Massachusetts prohibits interference with election officials. mass. gen. laws ch. 56, § 48. Impersonation of an election official may qualify as interfering. Nebraska prohibits the impersonation of an elector to register voters. Neb. Rev. stat. § 32-1503. Presumably, such laws may apply to online voter deception practices.

STATES WITH NO LAWS PROHIBITING IMPERSONATION OF PUBLIC OFFICIALS

There are a handful of states that do not have any laws regarding the impersonation of public officials. See the corresponding chart entitled "*State Laws Prohibiting Impersonation of Public Officials*" for the identification of such states.

RECOMMENDATIONS

Based on the existing state laws prohibiting the impersonation of public officials, the following is recommended:

- States *without* laws prohibiting the impersonation of public officials should *enact* laws that cover the impersonation of public officials, explicitly prohibiting the impersonation of public officials a) online or by other electronic means and b) in connection with the election process.

- States with laws *already* prohibiting the impersonation of public officials not expressly related to the election process should *amend* their laws to explicitly prohibit the impersonation of public officials a) online or by other electronic means and b) in connection with the election process.

- States with laws *already* prohibiting the impersonation of public officials in connection with the election process should *amend* their laws to enhance such prohibitions and explicitly prohibit the impersonation of public officials online or by other electronic means.

State Laws Prohibiting Impersonation of Public Officials

State	Fraudulently misrep. self or another/org. as printing, acting for/on behalf of a candidate, political party or committee that damages/ is intended to damage such person/org.	Prohibited from impersonating a public servant or official, i.e. officer/ employee of gov't *(Eff. 11/1/08, NY law will specifically cover comm. by web/electronic means)*	Assuming false identity with intent to defraud; or pretending to be rep. of person/ org. with intent to defraud	Prohibited from impersonating a public officer	General false impersonation with intent to gain a benefit for self or another or to injure, or defraud another	Prohibits impersonating a political party officer
AL	■					
AK		■				
AZ		■	■			
AR						
CA				■		
CO		■			■	
CT						
DE						
DC				■		
FL						
GA				■		
HI						
ID		■				
IL				■		
IN		■				
IA						
KS				■		■
KY		■				
LA					■	
ME		■				
MD						
MA						
MI						
MN				■		
MS		■				
MO						
MT		■				
NE		■	■			
NV				■		
NH						
NJ						
NM						
NY		■				
NC						
ND		■				
OH						
OK						
OR		■				
PA		■				
RI				■		
SC		■				
SD				■		
TN		■				
TX		■				
UT		■				
VT				■		
VA						
WA		■				
WV				■		
WI				■		
WY						

State	Prohibited from impersonating a voter	Prohibited from attiring/ equipping someone to give impression performing gov't function in connection with an election	Prohibited from impersonating state officers	Prohibited from disguising oneself to obstruct law, disguising oneself as an election official to violate election law	Prohibits interfering with election officials	Prohibits impersonation of an elector to register voters	None
AL							
AK							
AZ							
AR							
CA							
CO							
CT							
DE							
DC							
FL							
GA							
HI							
ID							
IL							
IN							
IA							
KS							
KY							
LA							
ME							
MD							
MA							
MI							
MN							
MS							
MO							
MT							
NE							
NV							
NH							1
NJ							
NM							
NY							
NC							2
ND							
OH							3
OK							
OR							
PA							
RI							
SC							
SD							
TN							
TX							
UT							
VT							
VA							1
WA							
WV							
WI							
WY							1

Statute References

State	Abbreviation	Statute Reference(s)
Alabama	AL	Ala. Code § 17-5-16
Alaska	AK	Alaska Stat. Tit. 11, ch. 56, Art. 5
Arizona	AZ	Ariz. Rev. Stat. §§ 13-105(33)(a), 13-2006 and 13-2406
Arkansas	AR	N/A
California	CA	Cal. Penal Code § 538(g)
Colorado	CO	Colo. Rev. Stat. §§ 24-80-902 and 24-80-903
Connecticut	CT	N/A
Delaware	DE	N/A
District of Columbia	DC	D.C. Code § 22-1403
Florida	FL	N/A
Georgia	GA	Ga. Code Ann. § 16-10-23
Hawaii	HI	N/A
Idaho	ID	Idaho Code Ann. §§ 18-3005 and 34-108
Illinois	IL	Ill. Comp. Stat. 5132-5
Indiana	IN	Ind. Code § 35-44-2-3
Iowa	IA	Iowa Code Tit. XVI, Subtit. 1, ch. 718.2
Kansas	KS	Kan. Stat. Ann. §§ 21-3824 and 25-2424
Kentucky	KY	Ky. Rev. Stat. Ann. §§ 519.010(3) and 519.050
Louisiana	LA	La Rev. Stat. Ann. § 14:112
Maine	ME	Me. Rev. Stat. Ann. tit. 17-A, § 457
Maryland	MD	Md. Code Ann., Elec. Law §§ 16-101, 16-201 and 16-903
Massachusetts	MA	Mass. Gen. Laws ch. 56, § 48 and ch. 268 §§ 33 and 34
Michigan	MI	Mich. Comp. Laws § 750.217
Minnesota	MN	Minn. Stat. § 609.475
Mississippi	MS	Miss. Code Ann. § 97-7-43
Missouri	MO	N/A
Montana	MT	Mont. Code Ann. § 45-7-209
Nebraska	NE	Neb. Rev. Stat. §§ 28-608, 28-609 and 32-1503
Nevada	NV	Nev. Rev. Stat. Ann. § 199.430
New Hampshire	NH	N/A
New Jersey	NJ	N/A
New Mexico	NM	N/A
New York	NY	N.Y. Penal Law § 190.25
North Carolina	NC	N/A
North Dakota	ND	N.D. Cent. Code § 12.1-13-04
Ohio	OH	N/A
Oklahoma	OK	N/A
Oregon	OR	Or. Rev. Stat. § 162.365
Pennsylvania	PA	18 Pa. Cons. Stat. § 4912
Rhode Island	RI	R.I. Gen. Laws § 11-14-1
South Carolina	SC	S.C. Code Ann. § 16-17-735
South Dakota	SD	S.D. Codified Laws § 3-1-9
Tennessee	TN	Tenn. Code Ann. § 39-16-301
Texas	TX	Tex. Penal Code Ann. § 37.11
Utah	UT	Utah Code Ann. § 76-8-512
Vermont	VT	Vt. Stat. Ann. tit. 13, ch. 67 §§ 1705 and 3002
Virginia	VA	N/A
Washington	WA	Wash. Rev. Code § 9A.60.040
West Virginia	WV	W. Va. Code § 61-5-27
Wisconsin	WI	Wis. Stat. § 946.69
Wyoming	WY	N/A

1: State law is limited to impersonation of a police officer;
2: State law is limited to impersonation of police officers and emergency personnel;
3: State law is limited to impersonation of state representatives and police officers.

III. THE UNAUTHORIZED USE OF STATE SEALS AND INSIGNIA

Approximately half of the states have laws regarding the unauthorized use of state seals and insignia. Of these states, most of them broadly prohibit the unauthorized use of state seals. Accordingly, such laws could be applied to disenfranchisement efforts such as use of online and digital communications that bear a seal or insignia that is deceptively similar to an official seal in an effort to deceive voters. Certain states have gone even further to specifically address the unauthorized use of a state seal in a political advertisement or campaign. On the other hand, there are a few states that do not broadly prohibit the unauthorized use of a state seal and only prohibit the use of a state seal for advertising or a commercial purpose. The state laws referenced above are summarized in more detail below and in the corresponding chart entitled "*State Laws Regarding Unauthorized Use of State Seals and Insignia.*"

PROHIBITING USE OF STATE SEAL FOR COMMERCIAL V. NON-COMMERCIAL PURPOSE

A few states such as Alaska, Massachusetts, Rhode Island and South Dakota prohibit the use of their state seals for advertising or a commercial purpose. Such state laws do not appear to be applicable to disenfranchisement efforts unless there is some other commercial purpose to such efforts. All of the other states that have laws regarding the unauthorized use of state seals do not limit such laws to prohibiting the use of a state seal for a commercial purpose. Accordingly, the unauthorized use of such a state seal in an effort to disenfranchise voters via websites, email communications or otherwise could presumably fall within these states' statutes.

PROHIBITING USE OF STATE SEAL ON DOCUMENTS V. ELECTRONIC SOURCES

A few states limit their laws regarding the unauthorized use of a state seal to use of the state seal on a document. For instance, in relevant part, Florida prohibits sending any letter, paper or document which simulates the state seal with the intent to mislead. Fla. Stat. § 817.38(1). On its face, Florida's law does not appear to apply to websites or email communications.

A number of states, however, have state laws regarding the unauthorized use of a state seal that broadly prohibit the unauthorized/improper use of such seal and do not appear to be similarly limited. Such state laws presumably would cover disenfranchisement of voters via websites or email communications. For instance, such laws may prohibit the use of a state seal in connection with deceptive online and digital communications that bear a seal or insignia that is deceptively similar to an official seal. Such state laws may be useful tools against false websites or electronic communications that use a state seal in order to convey the appearance of authenticity.

PROHIBITING USE OF A STATE SEAL IN A POLITICAL ADVERTISEMENT/CAMPAIGN

A few states have laws that, under certain circumstances, prohibit the use of a state seal in a political advertisement or campaign. For instance, Washington prohibits the use of the state seal in political campaigns to assist/defeat any candidate. Wash. Rev. Code § 43.04.050. In addition, Texas makes it is a criminal offense for a person other than a political officeholder knowingly to use a representation of the state seal in political advertising. Tex. Elec. Code § 255.006(d), (e) "'Political advertising' is defined as a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that (A) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or (B) appears: (i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or (ii) on an Internet website." Tex. Elec. Code § 251.001(16). If any website or electronic communication incorporating the Texas state seal qualifies as political advertising, it would be reached by this statute.

STATES WITH NO LAWS REGARDING UNAUTHORIZED USE OF STATE SEALS

Approximately half of the states do not have any laws regarding the unauthorized use of state seals and insignia. As referenced above, see the corresponding chart entitled "*State Laws Regarding Unauthorized Use of State Seals and Insignia*" for the identification of such states.

RECOMMENDATIONS

Based on the existing state laws regarding the unauthorized use of state seals, the following is recommended:

- States *without* laws prohibiting the unauthorized use of their state seals should *enact* laws that cover the unauthorized use of their state seals, explicitly prohibiting the unauthorized use of their state seals a) online or by other electronic means and b) in connection with a political advertisement or political campaign.

- States with laws *already* prohibiting the unauthorized use of state seals that do not expressly relate to the use of a state seal in a political advertisement or political campaign should *amend* their laws to explicitly prohibit the unauthorized use of their state seals a) online or by other electronic means and b) in connection with a political advertisement or political campaign.

- States with laws *already* prohibiting the unauthorized use of state seals in connection with the use of a state seal in a political advertisement or political campaign should *amend* their laws to explicitly prohibit the unauthorized use of their state seals online or by other electronic means.

State Laws Regarding Unauthorized Use of State Seals and Insignia

State	Cannot use state seal for advertising or commercial purpose, unless obtain written permission	Prohibits persons other than political officeholders from using state seal in political advertising	Cannot use state seal, without obtaining permission, or otherwise allowed by statute	Cannot willfully use insignia of a state with intent of fraudulently impersonating a state	Only Secretary of State can use/affix state seal	Prohibits counterfeiting seal of state, county, etc.
AL						
AK						
AZ						
AR						
CA						
CO						
CT						
DE						
DC						
FL						
GA						
HI						
ID						
IL						
IN						
IA						
KS						
KY						
LA						
ME						
MD						
MA						
MI						
MN						
MS						
MO						
MT						
NE						
NV						
NH						
NJ						
NM						
NY						
NC						
ND						
OH						
OK						
OR						
PA						
RI						
SC						
SD						
TN						
TX						
UT						
VT						
VA						
WA						
WV						
WI						
WY						

State	Cannot send paper document which simulates seal with intent to mislead to obtain more things of value	Prohibits unauthorized / improper use of state seal	Cannot affix state seal on docs	Cannot register mark if it comprises state insignia	Prohibits false alteration of a gov't record and use of/ tampering with a gov't record	Prohibits use of state seal in political campaign to assist/ defeat any candidate	None
AL							
AK							
AZ							
AR							
CA							
CO							
CT							
DE							
DC							
FL							
GA							
HI							
ID							
IL							
IN							
IA							
KS							
KY							
LA							
ME							
MD							
MA							
MI							
MN							
MS							
MO							
MT							
NE							
NV							
NH							
NJ							
NM							
NY							1
NC							
ND							
OH							
OK							
OR							
PA							
RI							
SC							
SD							
TN							
TX							
UT							
VT							2
VA							
WA							
WV							
WI							
WY							

1: New York has a statute that prohibits intentional alteration of object to give it source of authorship it does not actually possess (could apply to creation of phony website or election information)

2: Vermont only has a statute regarding use of state seal for commemorative medals or for public displays not connected with any advertisements.

State	Abbreviation	Statute Reference(s)
Alabama	AL	N/A
Alaska	AK	Alaska Stat. Tit. 44, ch. 9
Arizona	AZ	Ariz. Rev. Stat. § 41-130
Arkansas	AR	N/A
California	CA	Cal. Penal Code § 538(g)
Colorado	CO	Colo. Rev. Stat. §§ 18-5-113 and 18-8-113
Connecticut	CT	Conn. Gen. Stat. ch. 942 § 53-153
Delaware	DE	N/A
District of Columbia	DC	N/A
Florida	FL	Fla. Stat. § 817.38(1)
Georgia	GA	Ga. Code Ann. § 50-3-32(c)
Hawaii	HI	Haw. Rev. Stat. § 5-6
Idaho	ID	Idaho Code Ann. § 18-3603
Illinois	IL	N/A
Indiana	IN	N/A
Iowa	IA	Iowa Code Tit. XVI, Subtit. 1, ch. 718.5
Kansas	KS	N/A
Kentucky	KY	N/A
Louisiana	LA	N/A
Maine	ME	N/A
Maryland	MD	Md. Code Ann., Crim. Law § 8-607
Massachusetts	MA	Mass. Gen. Laws ch. 264, § 5
Michigan	MI	N/A
Minnesota	MN	N/A
Mississippi	MS	N/A
Missouri	MO	N/A
Montana	MT	N/A
Nebraska	NE	N/A
Nevada	NV	Nev. Rev. Stat. Ann. § 235.010
New Hampshire	NH	N/A
New Jersey	NJ	N.J. Stat. Ann. § 52:2-4
New Mexico	NM	N/A
New York	NY	N/A
North Carolina	NC	N/A
North Dakota	ND	N.D. Cent. Code § 47-22-02
Ohio	OH	N/A
Oklahoma	OK	N/A
Oregon	OR	Or. Rev. Stat. § 186.023
Pennsylvania	PA	N/A
Rhode Island	RI	R.I. Gen. Laws § 11-15-4
South Carolina	SC	N/A
South Dakota	SD	S.D. Codified Laws § 1-6-3.1
Tennessee	TN	Tenn. Code Ann. § 39-16-504
Texas	TX	Tex. Elec. Code Ann. §§ 251.001(16) and 255.006(d), (e)
Utah	UT	Utah Code Ann. § 76-8-512
Vermont	VT	N/A
Virginia	VA	Va. Code Ann. § 1-505
Washington	WA	Wash. Rev. Code §§ 43.04.040 and 43.04.050
West Virginia	WV	W. Va. Code § 61-4-2
Wisconsin	WI	N/A
Wyoming	WY	N/A

IV. ANTI-HACKING AND COMPUTER CRIMES LAWS

Each of the 50 states has some form of computer crimes or anti-hacking laws on the books.[17] Most states broadly prohibit any unauthorized access to a computer, for any purpose. Almost without exception, these laws could be creatively applied to hacking or to any use of spyware that would redirect search queries or deny voters access to legitimate websites. There are many ways in which these laws could be expanded, from proscribing harsher penalties to covering different types of electronic devices and deceptive behaviors. Presently, many states reserve their harshest penalties for unauthorized access to a computer that results in damage, involves certain types of malicious intent, or interferes with vital government or public services. It is not always clear whether these laws would apply to online deceptive practices. Finally, 13 states have stand-alone statutes specifically prohibiting the installation and use of spyware.

LAWS PROHIBITING UNAUTHORIZED ACCESS TO A COMPUTER OR NETWORK

The most common form of computer crimes law prohibits, at minimum, any "unauthorized access" to a computer, computer system, or computer network. In most states, the unauthorized access is illegal regardless of the defendant's intentions or damage caused. It seems clear that most spyware and hacking activities would qualify as "unauthorized access" and would be illegal, because this type of online deceptive practice usually involves the clandestine installation of software on the voter's computer.

A small number of states require that the perpetrator actually "use" the victim's computer in some way before triggering a penalty. Even in these states, the installation of software would likely qualify as "use" of the voter's computer, because the perpetrator is using the voter's computer to redirect search queries or domain names. The application of generic "unauthorized access" laws to electronic voting fraud is in question only in a few states. In eight jurisdictions, penalties are available only if the perpetrators intended to cause some type of damage. In these states, prosecutors must prove that the perpetrators' access was not only unauthorized, but that it was accompanied by a specified level of intent (e.g., malicious intent, intent to defraud, etc .).

In addition to the baseline unauthorized access laws, most jurisdictions have also defined several more serious computer crimes. These statutes typically carry enhanced penalties, but it is not always clear whether voter deception tactics would be actionable under these provisions. Categories of computer crime are generally distinguished based on the following considerations:

The perpetrator's mental state (i.e., did the perpetrator act willfully, knowingly, maliciously, or with intent to defraud?).

Whether the perpetrator caused any damage to the computer, or to the computer's owner.

The amount and type of damage caused.

Whether the unauthorized access interfered with certain public services (e.g., medical or emergency services).

Whether the access was designed to facilitate identity theft.

Punishments for unauthorized access vary significantly from state to state and may become more severe based on the above considerations. In general, jurisdictions treat mere "unauthorized access" as a misdemeanor-level offense.

Spotlight on Pennsylvania

Pennsylvania presents a good example of the types of behaviors contemplated by state computer crimes laws. 18 Pa. Cons. Stat. § 7611 prohibits mere unauthorized access or use of a computer. Section 7612, on the other hand, prohibits any scheme to block or impede a user's access to computer services. Other sections prohibit the theft of data (§ 7613), possession of unauthorized copies of computer data (§ 7614), and any unauthorized interference with another person's computer (§ 7615). Someone who hacked into a computer or used spyware to redirect search queries could be prosecuted under any of these sections. Each of these offenses is a third degree felony, subject to up to seven years' imprisonment.

The names used by each state to describe the computer crime laws also vary significantly. Some examples include:

Arizona: "Computer tampering."
Alabama: "Offenses against intellectual property."
Kentucky: "Unlawful access to a computer."
Montana: "Unlawful use of a computer."
Oregon: "Computer crime."
Washington: "Computer trespass."

OPTIONS FOR EXPANDING THE SCOPE OF LAWS ALREADY ON THE BOOKS

Although the great majority of the unauthorized access laws can be applied to deceptive practices based on their plain meaning, a creative prosecutor could interpret the following commonly-used statutory terms so as to enhance the penalties available against perpetrators.

"Scheme or artifice to defraud": This phrase could be defined to include schemes to defraud a voter of his or her constitutional right to vote. At present, most states treat fraud as a purely financial or property-based crime. An expansive interpretation of fraud could include schemes to deprive persons of their *civil* rights as well as schemes to defraud persons of property. In many states, proving a perpetrator's intent to defraud opens the door to much harsher penalties than for mere unauthorized access to a voter's computer.

Spotlight on Ohio

Ohio's "defraud" definition is a model for broad applicability of the computer crimes laws. " 'Defraud' means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." Ohio Rev. Code Ann. § 2913.01(B). There is a strong argument that the loss of one's voting rights would qualify as a detriment to the voter under this definition.

"Computer, computer system, or computer network": This phrase could be defined to include all sorts of electronic devices, including PDAs and cell phones. As the variety of devices capable of connecting with the internet expands, computer crimes laws should be expanded to keep pace with technology.

"Interference with governmental operations": At present, seven states allow for enhanced penalties if unauthorized access to a computer interrupts or interferes with a "governmental operation." At present it is unclear whether an election would be considered a governmental operation. Some states seem to focus on vital public and governmental services such as police, fire and emergency medical services, and will only enhance penalties if the perpetrator's actions put the public at risk.

Another option for strengthening the deterrent effect of the already broad unauthorized access laws is to define each redirected search query or installation of software as a separate, chargeable offense. Very few states define what constitutes a single chargeable event. South Carolina treats each affected computer as a separate violation. S.C. Code Ann. § 16-16-20(5). Tennessee groups all of the violations resulting from any single action and treats them as one chargeable event. Tenn. Code Ann. § 47-18-5204(e). If a prosecutor were willing to take a more expansive view, she could charge each redirected search query or each installation of software as a separate offense. Even though the maximum fines and jail times are generally low for unauthorized access to a computer, these penalties could quickly add up if violators were charged separately for each offense.

Many states reserve the harshest penalties for computer crimes that result in significant financial loss. In these jurisdictions, fines and jail time escalate depending on the amount of monetary damage caused by the perpetrator. Because it is difficult to attach a dollar value to one's voting rights, however, penalties based on the amount of monetary loss are not easily applied to online deceptive practices. Instead, states should expand the harshest penalty provisions to include computer crimes that disrupt elections or interfere with voting rights.

Similarly, many states have laws restricting the creation of false websites, or the transmission of messages from false addresses. At present, these laws focus almost exclusively on the collection of identifying personal financial information (credit card numbers, bank account numbers, etc.), and could not easily be applied to the deceptive practices context. With a little tweaking, however, these laws could be used to prosecute individuals who create phony Secretary of State websites, or send false information about polling places. Because the framework is already there, it is just a matter of expanding these laws to address non-commercial deceptive practices.

Spotlight on Louisiana

Louisiana's Anti-Phishing Law is a good example of a web-crimes statute that is prohibitively limited to the commercial context. La Rev. Stat. Ann. § 2022 prohibits the creation of a web page or a domain name for fraudulent purposes. Unfortunately, the offense is only chargeable if the defendant created the website with the intent to collect identifying information (a term of art, narrowly limited to financial data) about the computer user.

STATES WITH INNOVATIVE LAWS

Several states have stepped outside of the "unauthorized access" computer crimes mold and have enacted innovative electronic "false statements" laws that may be applicable to online deceptive practices other than mere "unauthorized access."

Georgia: Georgia prohibits the transmission of any data over the internet that includes false identification or representation. GA. CODE ANN. § 16-9-93.1 This statute is not limited to the commercial context, and explicitly prohibits the use of a logo or legal or official seal. Prosecutors in Georgia would have no trouble using this law to go after individuals creating phony Secretary of State websites, or individuals who send e-mails purportedly from the Election Board, police department, or other official source. A 1997 United States District Court opinion enjoined the application of this statute on First Amendment grounds (*American Civil Liberties Union of Georgia v. Miller*, 977 F.Supp. 1228 (N.D. Ga. 1997)), but the statute remains on the books and may still be enforceable in Georgia state courts.

Mississippi: Mississippi broadly prohibits the posting of any message through electronic media for the purpose of causing injury to any person. MISS. CODE ANN. § 97-45-17. If spyware is installed on a voter's computer with the intention of causing injury (either by keeping that voter from exercising his or her constitutional right to vote, or by influencing the voter to vote for a candidate through fraudulent means), this statute could be used to prosecute those online deceptive practices.

Ohio: Ohio prohibits tampering with electronic writings or records, and also punishes the transmission or use of falsified electronic documents. OHIO REV. CODE ANN. § 2913.42. At present, this statute has primarily been used to prosecute corruption and schemes to defraud the government (e.g., money laundering and theft in office, submission of false daily activity reports, etc.). But it could conceivably be used to prosecute creators of false official websites or senders of false e-mails from candidates, election authorities, or other official sources.

Pennsylvania: Pennsylvania's generic computer crimes statute contains a prohibition on unauthorized access to a website or telecommunications device. PA. CONS. STAT. § 7611(a)(2). Pennsylvania also prohibits schemes to disrupt service to a website. PA. CONS. STAT. § 7612. This broad definition of unauthorized access covers online deceptive practices without requiring installation of software onto the voter's computer. As hacking techniques evolve and become more sophisticated, this type of broad-based definition may be necessary.

Rhode Island: In Rhode Island, the intentional transmission of false data for any purpose is illegal. R.I. GEN. LAWS § 11-52-7. This law could be used to prosecute anyone who creates a false website or sends an e-mail with false voting information.

Tennessee: It is illegal to duplicate or mimic any portion of a website in Tennessee. TENN. CODE ANN. § 47-18-5203(c). The statute also prohibits false use of a trademark, logo, or name on a website, as well as the creation of false links that redirect users to a different website. This law would easily cover most online deceptive practices that do not involve unauthorized access to the voter's computer.

STATES WITH SPYWARE LAWS

Although spyware could be prosecuted under most states' generic computer crimes laws, 13 states have stand-alone statutes specifically addressing spyware. These statutes generally prohibit installation of software that does one or all of the following things:

- Modifies browser settings.
- Collects personal identifying or financial information.
- Collects keystroke information.
- Prevents removal of the software.
- Misrepresents that the software has been removed.
- Modifies security settings on the user's computer.
- Takes control of the computer in some way.

The uniformity of state law on this issue indicates that many states are following some form of model statute to enact their spyware laws. A representative example of this model statute format is ARIZ. REV. STAT. § 44-7301 *et seq*. An example of a particularly ineffective spyware law is ALASKA STAT. § 45.45-.792 *et seq*. Alaska prohibits only spyware that causes pop-up ads to appear on the user's computer screen.

In general, the states that have spyware laws would be good test-states for prosecuting online deceptive practices involving use of spyware. Although the unauthorized access statutes would likely also cover this deceptive behavior, the statutory violation in states with spyware laws would seem to be easier to prosecute.

RECOMMENDATIONS

- Most states' generic computer crimes laws *could* apply to spyware, but it would be better if this were not left up to prosecutors to decide. States that do not have separate laws could generally benefit from having a separate, well-defined statute prohibiting spyware.

- State fraud statutes should explicitly address fraud related to voting rights (most states focus only on financial harm, not on harm to the victim's constitutional rights).

- Statutory definitions of computers, computer systems, and/or computer networks should be expanded to include cell phones, blackberries, and other portable electronic devices.

- Computer crimes committed with intent to disrupt an election should be subject to harsher penalties than other types of "unauthorized access" to a computer. For example, statutes should provide enhanced penalties for interference with essential government functions and should make clear that an election is included within that definition. The existence of enhanced penalties increases the deterrent effect of these laws.

- Many states have anti-spyware and anti-phishing statutes that apply only in the commercial context. These laws should be expanded to cover non-financial online criminal activity.

- States should enact laws explicitly prohibiting interference with web sites (see e.g. Pa. Cons. Stat. sections 7611(a)(2) and 7612). Current computer crimes laws focus on interference with an actual computer, and may not cover unauthorized access to a website.

State	Unauthorized access prohibited	No additional minimum behavior requirements	Additional protection from online deceptive practices	Enhanced penalties for interference with governmental operations	Private cause of action	Separate spyware statute	No state law
AL	■	■		■			
AK	■					■	
AZ	■	■				■	
AR	■	■	1	■	■	■	
CA	■	■			■	■	
CO	■	■					
CT	■		2		■		
DE	■	■			■		
DC							■
FL	■	■		■	■		
GA	■		3		■	■	
HI	■	■					
ID	■	■					
IL	■	■			■		
IN	■	■				■	
IA	■	■			■	■	
KS	■	■					
KY	■	■					
LA	■	■				■	
ME	■	■					
MD	■	■					
MA	■	■					
MI	■	■					
MN	■	■					
MS	■		4				
MO	■	■			■		
MT	■						
NE	■	■					
NV	■	■		■	■		
NH	■	■				■	
NJ	■	■					
NM	■	■					
NY	■	■					
NC	■	■					
ND	■	■					
OH	■	■	5	■			
OK	■	■			■		
OR	■	■					
PA	■	■	6				
RI	■		7		■	■	
SC	■	■			■		
SD	■	■					
TN	■	■	8		■		
TX	■	■				■	
UT	■	■	9			■	
VT	■	■			■		
VA	■				■		
WA	■	■				■	
WV	■		10		■		
WI	■	■	11	■	■		
WY	■	■		■			

1: Prosecuting attorney may ask for Attorney General's assistance to investigate and/or prosecute this crime. Ark. Code Ann. § 5-41-107.
2: Attorney General may bring a civil enforcement action. Conn. Gen. Stat. § 53-453.
3: Use of a false name, logo, seal, or symbol to identify oneself in a computer transmission is prohibited. Ga. Code Ann. § 16-9-93.1. Attorney General and district attorney have power to investigate computer crimes. Ga. Code Ann. §§ 16-6-108 and 16-9-109.
4: Posting a message in electronic media with the intent to cause injury to another person is prohibited. Miss. Code Ann. § 97-45-17.
5: Falsifying electronic records or writing with intent to defraud is prohibited. Ohio Rev. Code § 2913.42. The computer crimes laws also contain enhanced penalties for falsifying government records or writings.
6: Unauthorized access to a World Wide Web site or telecommunication device is also prohibited.
7: Intentional transmission of false data for any purpose is prohibited. R.I. Gen. Laws § 11-52-7.
8: Unauthorized duplication or mimicking of a website is prohibited. Tenn. Code Ann. § 47-18-5203(c).
9: Individuals have an affirmative duty to report violations of the computer crimes laws. Utah Code Ann. § 76-7-705. Utah also directs the Attorney General, county and district attorneys to prosecute computer crimes laws. Utah Code Ann. § 76-7-704.
10: False documents transmitted via computer can be prosecuted under the forgery laws. W. Va. Code § 61-3C-15.
11: Penalties are enhanced for defendants who conceal that identity and location of their computer.

V. DISTRIBUTION VIA SPAM EMAIL OF FALSE INFORMATION ABOUT VOTING MECHANICS

A majority of states have enacted legislation aimed at curbing unsolicited bulk electronic mail ("e-mail"); however, most of these statutes are designed to protect consumers. Many of these statutes can be found in their respective state's consumer protection laws. These statutes generally prohibit the unsolicited distribution of e-mails that are "commercial" in nature and do not apply to non-commercial activities. Commercial e-mails are generally defined in these statutes as electronic messages with the purpose of promoting real property, goods or services for sale or lease. Accordingly, without some commercial component in the e-mails, it is unlikely that the distribution of spam e-mail used to spread false information about candidates or voting mechanics would violate these statutes.

A number of states have not enacted any legislation regarding unsolicited bulk or commercial electronic mail. These states include Alabama, Hawaii, Kentucky, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, South Carolina and Vermont. However, many of these states rely on the Controlling the Assault of Non-Solicited Pornography and Marketing Act, or the CAN SPAM Act. The CAN-SPAM Act took effect on January 1, 2004 and requires unsolicited commercial e-mail messages to be labeled (though not by a standard method) and to include opt-out instructions and the sender's physical address. It prohibits the use of deceptive subject lines and false headers in such messages. The Federal Trade Commission is authorized (but not required) to establish a "do-not-email" registry. State laws that require labels on unsolicited commercial e-mail or prohibit such messages entirely are pre-empted, although provisions merely addressing falsity and deception would remain in place. However, the CAN SPAM Act appears to protect individuals from unsolicited commercial e-mails, and therefore is unlikely to apply to the distribution of spam email to spread false information about candidates or voting mechanics.

There are some states, however, whose anti-spam laws may reach non-commercial activity. For example, in Virginia, it is illegal to send unsolicited bulk e-mail containing falsified routing information, if the sender thereby violates a provider's policies, or distributes software designed to falsify routing information. Va. Code §18.2-152.3:1 (Transmission of unsolicited bulk electronic mail). The statute does not distinguish between commercial and non-commercial activity and was amended in April 2003 to increase the penalties for sending a high volume of messages containing falsified routing information.

Nevada is another state whose anti-spam laws are not limited to e-mails that are commercial in nature. In Nevada it is a misdemeanor to willfully falsify or forge any data information, image, program, signal or sound that is contained in the header, subject line or routing instructions of an item of electronic mail with the intent to transmit or cause to be transmitted the item of electronic mail to any Internet or network site or to the electronic mail address of one or more recipients without their knowledge of or consent to the transmission. Nev. Rev. Stat. Ann. §205.492. Furthermore, if a violation of this subsection causes an interruption or impairment of a public service, the person may be guilty of a category C Felony.

Lastly, many states prohibit the unauthorized use of a computer or a computer network to send unsolicited bulk email containing falsified routing information. The unlawful sale or distribution of software designed to facilitate falsification of electronic mail or routing information is also prohibited in many of these states. Persons or entities who distribute spam e-mail to spread false information about candidates or voting mechanics may violate these statutes but only if the sender a) accesses a computer or computer network without authorization, or b) distributes software that is designed to facilitate falsification of electronic mail or routing information. States that have enacted laws similar to these are Connecticut, Iowa, Illinois, Pennsylvania, Rhode Island and Texas.

The statutes referenced above are summarized in more detail in the corresponding chart entitled *"State Anti-Spam Statutes"*.

RECOMMENDATIONS

- Most states do not have adequate or any legislation that address the concerns implicated by deceptive practices and voter intimidation through electronic mail. The states and the Federal Government would benefit greatly by adopting legislation specifically targeted toward addressing these issues.
- New legislation must be tailored to so as to not be pre-empted by the CAN SPAM Act. This is easily accomplished since the CAN SPAM Act revolves around "commercial" activity.
- New legislation must be flexible enough to encompass the various mediums of sending electronic messages such as e-mail, text messages and other forms of digital transmissions over the internet and wireless networks.
- New legislation should also be broad enough to anticipate new forms of electronic distribution.

- The type of prohibited activity should include knowingly distributing false information regarding (1) the time, place, or manner of conducting state elections; (2) the qualifications for or restrictions on voter eligibility for any such election; and (3) false information regarding candidates.
- New legislation should be clearly delineated, preferably, in the state's already existing election laws. Currently, a few state's computer crime laws *may* be broad enough to prosecute those who use spam mail to spread false information about voting mechanics, however, any ambiguity about the application of the laws currently adopted by the states would be cleared up by specifically prohibiting the abuse of false or misleading spam-mail in the states already existing election laws.

State	State has Anti-Spam Legislation Specifically Enumerated in Election Laws	Sate Has Anti-Spam Legislation Enumerated in Computer /Criminal Laws	State Has Anti-Spam Legislation Enumerated in Consumer Protection Laws	State Has No Anti-Spam Laws	Anti-Spam Laws ONLY Prohibit Commercial Activity	Anti-Spam Laws Prohibit Non-Commercial Activity	Statute May Be Used To Prohibit False Information Re: Voting Mechanics*	Prohibits the misrep. of the point of origin or routing information	States that have relied on/ pre-empted by the CAN SPAM Act (Commercial Activity)	General Election Laws May Be Broad Enough To Prohibit Deceptive Spam Re Elections
AL				■						
AK			■		■			■		
AZ			■		■					
AR			■		■			■		
CA			■		■			■		
CO			■		■			■		
CT		■				*	*	■		
DE		■	■		■	*	*	■		
DC				■						
FL			■		■			■		
GA			■		■					
HI				■						
ID			■		■			■		
IL			■		■			■		
IN			■		■					
IA		■				***	***			
KS		■				*	*	■		
KY				■					■	
LA			■		■					
ME			■		■					
MD		■	■		■					
MA				■					■	
MI			■		■					
MN			■		■					
MS				■						
MO			■		■					
MT				■						
NE				■						
NV			■		■			■		
NH				■						
NJ				■						
NM				■						■
NY				■						
NC				■						■
ND		■		■		■	**			
OH			■		■					
OK				■					■	
OR				■						
PA		■				*	*	■		
RI			■		■					
SC				■						
SD			■		■					
TN		■	■			*	*	■		
TX			■		■					
UT				■						
VT				■						
VA		■				*	*	■		
WA			■		■					
WV			■		■					
WI		■								
WY			■		■					

*Requires unauthorized access to a computer network and falsified routing information.
**Statute criminalizes false and misleading emails, however, the false nature of the message must be used to induce the intended recipient to provide property or identifying information ("phishing").
***Requires the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail

Unauthorized access to a computer network is not required to prosecute under this particular statute.

Statute References

State	Abbreviation	Statute Reference(s)
Alabama	AL	N/A
Alaska	AK	Alaska Stat. § 45.50.479 (2008)
Arizona	AZ	Ariz. Rev. Stat. § 44-1372..01(A) (2008)
Arkansas	AR	A.R.S. § 44-1372.01 (2008)
California	CA	Cal Bus & Prof Code § 17529.2 (2008)
Colorado	CO	C.R.S. 6-2.5-103 (2007)
Connecticut	CT	Conn. Gen. Stat. § 53-451 (2008)
Delaware	DE	11 Del. C. § 937 (2008)
District of Columbia	DC	N/A
Florida	FL	Fla. Stat. § 668.602 (2008)
Georgia	GA	O.C.G.A. § 16-9-101 (2008)
Hawaii	HI	N/A
Idaho	ID	Idaho Code § 48-603E (2008)
Illinois	IL	815 ILCS 511/10 (2008)
Indiana	IN	Ind. Code. § 24-5-22-8 (2008)
Iowa	IA	Iowa Code § 716A.2 (2008)
Kansas	KS	K.S.A. § 50-6,107 (2006)
Kentucky	KY	N/A
Louisiana	LA	La. R.S. 51:1741.2 (2008)
Maine	ME	N/A
Maryland	MD	Md. CRIMINAL LAW Code Ann. § 3-805.1 (2008); Md. COMMERCIAL LAW Code Ann. § 14-3002 (2008)
Massachusetts	MA	N/A
Michigan	MI	MCLS § 445.2504 (2008)
Minnesota	MN	Minn. State. § 325F.694 (2008)
Mississippi	MS	N/A
Missouri	MO	§ 407.1135 to 407.1141 R.S.Mo. (2008)
Montana	MT	N/A
Nebraska	NE	N/A
Nevada	NV	Nev. Rev. Stat. An. §§ 41.705 to 41.735 (2007)
New Hampshire	NH	N/A
New Jersey	NJ	N/A
New Mexico	NM	N/A
New York	NY	N/A
North Carolina	NC	N.C. Gen. Stat. § 163-274 (2008)
North Dakota	ND	NDCC § 51-27-10
Ohio	OH	ORC Ann. 2307.64 (2008)
Oklahoma	OK	N/A
Oregon	OR	N/A
Pennsylvania	PA	18 Pa.C.S. § 7661 (2008)
Rhode Island	RI	R.I. Gen. Laws § 6-47-2 (2008)
South Carolina	SC	N/A
South Dakota	SD	SDCL §§ 37-24-41 to 37-24-48 (20008)
Tennessee	TN	Tenn. Code Ann. § 39-14-603 (2008);
Texas	TX	Tex. Bus. & Com. Code § 46.001 (20008)
Utah	UT	N/A
Vermont	VT	N/A
Virginia	VA	Va. Code Ann. § 18.2-152.3 (2008)
Washington	WA	Rev. Code Wash. (ARCW) §§ 19.190.005 to 19.90.110 (20008)
West Virginia	WV	W. Va. Code § 46A-6G-2 (2008)
Wisconsin	WI	Wis. Stat. § 947.0125 (2007)
Wyoming	WY	Wis. Stat. § 947.0125

FEDERAL LAW

There is no clear authority as to whether federal law presently contains criminal penalties against deceptive practices. For example, a classic "dirty trick" is to post fliers in targeted neighborhoods providing incorrect information about the date of an impending election. Even where a person posting such fliers knows that information to be false, and regardless of how many voters are deceived, the current federal law may not subject that person to criminal prosecution or civil injunction.

The most recent version of the Department of Justice's manual for criminal election prosecutions states that:

> Voter suppression schemes are designed to ensure the election of a favored candidate by blocking or impeding voters believed to oppose that candidate from getting to the polls to cast their ballots. Examples include providing false information to the public – or a particular segment of the public – regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct. Currently there is no federal criminal statute that expressly prohibits this sort of voter suppression activity.

United States Department of Justice, Criminal Division, Public Integrity Section, *Federal Prosecution of Election Offenses*, Seventh Edition (May 2007) at 61. The manual goes on to state that:

> The Criminal Division believes that the prosecution of voter suppression schemes represents an important law enforcement priority, that such schemes should be aggressively investigated, and that, until Congress enacts a statute specifically criminalizing this type of conduct, 18 U.S.C. § 241 is the appropriate prosecutive tool by which to charge provable offenses.

Federal Prosecution of Election Offenses at 63. Under 18 U.S.C. § 241, it is a felony to "conspire to injure, oppress, threaten, or intimidate any person in any state, territory or district in the free exercise or enjoyment of any right or privilege secured by the Constitution or law of the United States." The right to vote is a right that is protected under 18 U.S.C. § 241. However, while the Department of Justice has brought one prosecution for phone-jamming under this theory, it has not brought any such cases for deceptive practices. The key question would likely be whether a deceptive practice constitutes an injury to the right to vote. The requirement of a criminal conspiracy also limits the reach of this as-yet-untested theory.

In some cases deceptive information may be one aspect of a scheme to intimidate voters in violation of the Voting Rights Act. A prominent example of such a case involved the 1990 re-election campaign of then-Senator Jesse Helms of North Carolina. The Voting Section of the Civil Rights Division in the U.S. Department of Justice brought a case against the Helms campaign under Section 11(b), the principal civil anti-intimidation provision of the Voting Rights Act. The Justice Department charged that the Helms campaign had targeted heavily-black precincts with mailings that provided misleading information threatening criminal prosecution for voting. The case was settled by a consent decree prohibiting such targeted mailings. In the Helms case a deceptive practice was embedded within a larger scheme to intimidate targeted African-American voters. The deceptive practice itself did not constitute a separate claim.

The substantive purpose of digital voter suppression will be the same as its lower-technology counterpart: that is, to furnish misleading information concerning voter qualifications, possible adverse consequences of voting, dates of elections, locations and hours of polling places, and the like. However, the use of the Internet and networked technologies for these purposes raises the possibility of recourse to statutes and regulations, such as the CAN-SPAM Act and the Computer Fraud and Abuse Act, that may not be available when more traditional methods are used. As part of our research concerning statutes and regulations that furnish possible causes of action for digital voter suppression, we identified the following potential federal remedies (apart from violations of federal election laws and civil rights laws): (1) copyright violations; (2) trademark violations; (3) anti-cybersquatting law violations; (4) Computer Fraud and Abuse Act violations; (5) Wire Fraud claims; and the (6) the CAN-SPAM Act. We also considered the availability of Section 230(c)(1) of the Communications Act as a "shield" for liability of Internet service providers ("ISPs") and website operators for legal violations by persons using their facilities or services.

COPYRIGHT VIOLATIONS

A voter suppression campaign that sends emails or posts online information purporting to originate with a government agency or private organization might support a cause of action for copyright infringement.[18] Such an action ordinarily may be brought by any person or entity (whether organized for profit or otherwise) that owns or has license rights to the material that was misappropriated and may include requests for damages and/or injunctive relief, as appropriate.[19] More rarely, violations of copyright are punished under the criminal provisions of the United States Code.

Not all *governmental* organizations, however, may own copyrights and sue for infringement. The Copyright Act expressly disclaims copyright protection for "any work of the United States Government . . .,"[20] and also may prevent state and local governments from claiming protection for statutes or other "edicts of government" to which citizens are entitled to have unrestricted access.[21] However, state or local governments that publish materials other than "edicts of government," along with private organizations (whether or not organized for profit) may bring civil actions under the Copyright Act.

Where allegedly infringing materials are placed on the Internet, an important supplement to traditional copyright remedies is provided by section 512 of the Digital Millennium Copyright Act ("DMCA"), which permits rights holders to ask website hosts and other providers of online services promptly to take down, or disable access to, infringing materials posted to their services by customers or others.[22] Compliance with DMCA requests is not mandatory, but such compliance does give online service providers certain immunity from copyright infringement claims, and most reputable online companies has a policy of complying with DMCA requests. For this reason, and because the DMCA provides an expedited remedy that does not require the claimant to locate and serve the (often-elusive) provider of the misleading information, the DMCA process is a promising tool for stopping a voter suppression campaign that misappropriates copyright material.

Recommendations

Litigation Strategies

Except for the unlikely event of a criminal prosecution, copyright remedies must be sought by the holder of one of the exclusive rights (reproduction, public display, public distribution, etc.) recognized by the Copyright Act. Recommended relief might include a suit for injunctive relief and/or damages. Also, a take-down demand under the DMCA, directed to the website host or other online service provider that made the infringing material available is also an option. The summary DMCA procedure is quick and does not require the Committee or the rights holder to identify and serve a complaint upon the creator of the infringing content.

As noted earlier, copyright claims brought by federal agencies might be dismissed as prohibited by copyright law, but claims on behalf of state and local governmental agencies and private parties are not barred, at least where the materials for which protection is claimed are not statutes or other "edicts of government" published by or on behalf of governmental bodies.[23]

Legislative

The rights granted by the Copyright Act are generally adequate to the purpose of responding to misuse of materials owned by local elections boards, political parties, advocacy groups and other entities for voter suppression purposes. The only significant limitation that might be addressed by statutory amendment is the exception from copyright protection for certain governmental works. This exception, however, is based upon the strong policy concern that tax-payer funded works of authorship should be freely available to the public. Unless a statutory amendment is confined specifically to cases in which a work of government is exploited for fraud or other wrongful purposes, a proposed amendment to the Copyright Act to close this loophole will have little prospect of success.

FEDERAL TRADEMARK RIGHTS

Persons or organizations engaged in online voter deception might use the seals, insignia, names or other devices of governmental organizations, charitable organizations or political parties in order to confuse voters as to the origin of email messages or materials posted on spurious websites. Even where those misappropriations are not sufficiently extensive to support copyright infringement claims, they might give rise to causes of action under trademark law. Trademarks, service marks and trade names are names, symbols and other devices used by makers and vendors of goods to distinguish their products from those made and sold by others.[24] When a person has adopted and used a trademark in commerce, he or she may prevent others from using that trademark in ways that cause confusion as to

the origin of goods or that harm the property rights associated with the trademark. Remedies are available under the common law of unfair competition and under federal law under the Lanham Act.

Recommendations

Litigation

First, federal law precludes trademark registration of "the flag, or coat of arms, or other insignia" of federal, state, local or foreign governments.[25] Accordingly, a phony website that used such governmental insignia to mislead voters would not, on that basis alone, trigger a cause of action for trademark infringement.

However, federal, state and local governments may own and assert infringement of certification marks used to identify the source of government-supplied goods and services.[26] Accordingly, a governmental body might have a federal trademark infringement claim for misuse of a mark associated with a good or service supplied by that agency. Protection under federal trademark and common-law unfair competition law also is available for the names and marks of non-profit charitable groups, political groups and religious institutions.[27]

In some cases brought under federal trademark law, however, courts have denied protection to particular non-profit groups on the ground that those groups' activities did not use their marks "in commerce" or in connection with "goods or services."[28]

Also, even where the "commerce" requirement is satisfied, a claim for trademark infringement by a non-profit organization must satisfy the usual requirements for an infringement claim, including likelihood of confusion.

Legislative

The Lanham Act provides generally that:

> Any person who shall, without the consent of the registrant . . . use in commerce any reproduction, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided.[29]

The requirement that a mark be used in commerce has caused some confusion as to the trademark rights of political, charitable and nonprofit organizations, especially where those groups do not engage in membership drives or fundraising activities.[30] An amendment to the Lanham Act, providing that use in commerce includes use of a mark to identify an organization engaged in any lawful, ongoing activity, would clarify the availability of trademark protection for nonprofits of all kinds.

ANTI-CYBERSQUATTING VIOLATIONS

An impostor that creates a deceptive website will want to ensure that online searches for the legitimate site will result in "hits" for the phony site. The most effective way to achieve this goal is to register a URL that is similar to that of the legitimate site, or that uses a name or mark similar to that of the organization the impostor seeks to impersonate.

Registration of an Internet domain name that is confusingly similar to a name or mark of an unrelated organization may be challenged in two ways: by a lawsuit brought under the Anticyberquatting Consumer Protection Act ("ACPA"),[31] or by recourse to the Uniform Domain Name Dispute Resolution Policy ("UDRP").[32]

Relief under the ACPA, which requires recourse to the courts, has largely been displaced in practice by the efficient arbitration procedures available under the UDRP. The UDRP is an arbitration-based dispute resolution policy adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN"). All persons who apply to register a domain name, or ask a registrar to maintain or renew a domain name registration, are required to warrant that: (a) the statements made in the registration agreement are complete and accurate; (b) that to the registrant's knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party; (c) that the registrant is not registering the domain name for any unlawful purpose; and (d) that the registrant will not knowingly use the domain name in violation of any applicable laws or regulations.[33]

Domain name registrants also agree that in the event certain complaints are made concerning their use of a domain name, they will submit to a mandatory arbitration procedure. A finding that the complaint is meritorious may lead to cancellation or transfer of the registrant's domain name.

Recommendations

Litigation

First, there should be no reason for an aggrieved party to use the cumbersome procedure of the ACPA when the UDRP procedure is available. If an organization becomes aware of an apparent misuse of a domain name for voter suppression purposes, it should notify one of the domain name dispute resolution providers approved by ICANN, such as the National Arbitration Forum or the World Intellectual Property Organization.[34]

Second, in stating its complaint under the UDRP, the organization should emphasize any evidence that the bad-faith registrant intended to disrupt the complainant's operations generally or the orderly conduct of an election in particular. The UDRP is tailored primarily to reach misuse of trademarks by competitors for commercial purposes, but permits a general claim of "disrupting the business of a competitor" that at least one arbitrator has upheld as applied to a registrant's attempt to disrupt elections.[35]

Legislative

Both the ACPA and the UDRP are aimed primarily at domain name registrations that exploit trademarks to the detriment of commercial competitors. Both would benefit from amendments that recognize misuse of domain names to mislead and confuse for noncommercial purposes.

Changes to the UDRP procedure, which is nonstatutory and has taken the larger role in domain name enforcement would have an even greater practical effect. Specifically, it would be worthwhile for ICANN to add an additional ground of liability, such as registration "primarily for the purpose of disrupting the right of others to engage in lawful conduct."

COMPUTER FRAUD AND ABUSE ACT

The Computer Fraud and Abuse Act ("CFAA") prohibits the hacking into, or the use of worms, viruses and other malware to infiltrate government computers or websites.[36] The CFAA also makes it illegal to hack into private parties' computers, so long as the intrusion causes certain kinds of cognizable harm.[37]

Recommendations

Litigation

The principal limitation on private rights of action under the CFAA is the requirement for proof of more than $5,000 in damages for any one-year period. The Act limits damages for losses to economic loss only (and does not allow recovery for death, personal injury, mental distress, and the like); but "damages for loss of business and business goodwill" are recoverable as economic damages. *Creative Computing v. Getloaded.com, LLC.*[38] Moreover, "[w]hen an individual or firm's money or property are impaired in value, or money or property is lost, or money must be spent to restore or maintain some aspect of a business affected by a violation, those are 'economic damages.'"[39] Accordingly, it may be that a loss in reputation and business goodwill (perhaps indicated by reduced web traffic?) of a voter registration or information site provides legitimate grounds for a CFAA cause of action. The damages will, however, need to be quantifiable, which may be difficult to prove in the context of nonprofit voter information sites

Legislation

Elimination of the $5,000 damages threshold, or expansion of the categories of damages recognized to include noneconomic harms, would expand the usefulness of the CFAA to public interest groups.

THE WIRE FRAUD STATUTE

The federal crime of wire fraud is codified at 18 U.S.C. § 1343. Mail fraud and wire fraud both are proved by showing a scheme or artifice to defraud, combined with either mailing or electronic communication for purpose of executing the scheme.[40] In addition, the falsehood must be material.[41] Wire fraud has been found to apply to Internet communication.[42]

Recommendations

Litigation

There is no private right of action for violations of the wire fraud statute. Accordingly, any organization aggrieved by voter suppression actions that involve wire fraud would have to refer the matter to law enforcement.

Most frequently, mail and wire fraud apply to attempts to defraud a person of money or property. However, 18 U.S.C. § 1346 extends the category of applicable fraud objectives to the attempt to deprive a person of "honest services" besides property. However, since 1987, all courts but one (*DeFries*, below) have refused to apply wire fraud or this "honest services" argument to prosecutions of election fraud or deprivation of the "right to an honest election" under 18 U.S.C. §§ 1341 or 1343. *See United States v. Turner*, 459 F.3d 775 (2006) (stating that § 1346, adopted after a 1987 Supreme Court case invalidated the use of mail and wire fraud to prosecute election fraud, does not apply in the election fraud context). In fact, there is legislative history supporting the notion that Congress never intended the wire fraud statute to criminalize the deprivation of "inhabitants of a State, or political subdivision of a State, of a fair and impartially conducted election process," since that provision was proposed in the Anti-Corruption Act of 1988 around the time of the § 1346 addition, and was ultimately rejected. 134 Cong. Rec. S16315-01, 1988 WL 177972 (daily ed. Oct. 14, 1988) (statement of Sen. Biden).

There also appears to be no caselaw or legislative history expressly supporting the argument that the wire fraud statute may be used where the fraud deprives a person of the use of their computer equipment or services to receive email messages. Indeed, such limited deprivation may not rise to the appropriate level of materiality. If a problematic election influenced by fraudulent behavior results in additional costs, however, it might satisfy the requisite requirement of harm. *See United States v. DeFries*, 43 F.3d 707 (D.C. Cir. 1995) (holding that a scheme to cast fraudulent ballots in a labor union election tainted the entire election, and was a scheme to defraud the election authority charged with running the election of the costs involved).

SECTION 230 OF THE COMMUNICATIONS ACT

In many cases, the persons who actually create false websites and populate them with deceptive information may be difficult to locate. If the website hosting companies or other online service providers are suspected of complicity with the impostors or of negligence in permitting them to operate, aggrieved parties might usefully consider bringing actions those service providers.

Where such a claim is based upon intellectual property theories, there is no impediment to the claim if the elements of direct, vicarious or contributory infringement can be made out. If the claims are be based upon other grounds of liability, however, Section 230(c)(1) of the Communications Act,[43] which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" must be taken into consideration. The courts have interpreted this language as providing a comprehensive, if not impregnable, barrier against an online service provider's liability for harmful material posted by others that does not involve violations of copyright or other intellectual property rights.

Recommendations

Litigation

Because of the section 230 exemptions, and because of the cost and delay of litigation generally, an aggrieved party's first approach to a website host or other service provider should be a request to disable or remove offending material voluntarily. Deceptive sites that facilitate voter suppression will be contrary to the terms of use of all or most reputable online service providers, and most businesses will be eager to disassociate themselves from such activity.

In the event that litigation aimed at a service provider appears necessary, the plaintiff should assess the degree of the provider's involvement with creating the offending content, and whether the third-party material involves any colorable intellectual property violations that will not be covered by the section 230 exception. However the complaint is framed, the plaintiff must be prepared to respond to a prompt motion to dismiss under section 230.

Legislative

Section 230, as expansively interpreted by the courts, is a deeply flawed statute that has been persuasively criticized as fostering irresponsible practices by website hosts and online publishers. Section 230 should be amended.

CAN-SPAM ACT OF 2003

Email messages that purport to be from governmental agencies, non-profit organizations that endorse candidates and other senders, but that in fact are sent by persons hoping to mislead voters, should be scrutinized for possible violations of the CAN-SPAM Act of 2003.[44]

Recommendations

Legislative

The CAN-SPAM Act has been widely criticized for its lack of effectiveness in dealing with abusive email marketing practices. Most of those criticisms fault the statute's failure to prohibit all commercial email that recipients have not specifically requested.

With respect to online deceptive practices, the statute's primary flaw is its limitation to messages that promote the sale of commercial products or services. The law should be amended to expand the definition of "commercial electronic mail message," or prohibit misleading practices engaged in by senders and initiators of noncommercial email.

CONCLUSION

In addition to the recommendations made throughout this report, there are steps that can be taken before the election to try to defray the potential damage of online deceptive practices.

First, law enforcement, especially attorneys general, district attorneys and the United States Department of Justice should make clear that these acts will be treated seriously and prosecuted to the full extent of the law. Press statements to this effect should be broadly disseminated before Election Day.

As related at the outset of this report, both Republicans and Democrats have been victimized by e-deceptive practices campaigns. For example, during the primaries a series of false campaign websites materialized that appeared to be legitimate, such as FredThomsonForum.com, RudyGiulianiForum.com, and MittRomneyforum.com. These sites featured posts with misinformation by people impersonating known pundits and promoted links that appeared to be candidate sites that actually routed users to YouTube videos attacking them.[45] The McCain-Romney.com website took viewers to the "official home of the Hundred Year War…and Bush's Third Term!"[46]

Yet, as the most frequent target of viral deceptive information in the context of the political campaign, Barack Obama's operation devised some methods for combating them that may provide voting rights advocates some lessons.

For example, the Obama campaign established a link on its campaign web site that addresses the rumors and fights fraud with fact. On this site www.fightthesmears.com, the Obama campaign provided concise, bulleted points of attack under each summarized smear headline followed by the truth which allows readers to quickly ascertain the facts. From here the reader could continue on and delve into each instance of lies or rumor for a more detailed description of the facts.

Secretaries of State and other election administrators can utilize such methods, as has already been done by the Maryland Board of Elections. At http://www.elections.state.md.us/, the Board has a section on the site called "Rumor Control." The page looks like the following:

RUMOR CONTROL
Get the Facts!

Foreclosure
Rumor: *If my home is in foreclosure, will I be allowed to vote?*
FACT: Maryland's Constitution (Art. I, § 1) guarantees each citizen who is 18 years old and a resident of the State the right to vote. The fact that your home is in foreclosure has no bearing on your right to vote. It may, however, effect where you vote. If you have left your home and taken up a new residence, you will need to update your voter registration (by October 14, 2008) and vote in the election district and precinct for your new residence.
Supporting Documentation:

- Letter from the Attorney General to Linda Lamone regarding reports of voter challenges of persons whose homes have been foreclosed 9-24-2008.

Campaign Merchandise
Rumor: *If I wear a campaign button or t-shirt into the polling place, will I be allowed to vote?*
FACT: A voter may wear campaign paraphernalia (buttons, t-shirts, or stickers) into the polling place while he or she is there to vote (the voter may not linger in the polling place after voting). However, an election judge, challenger and watcher, or other person stationed inside the polling place or within 100 feet of the polling place may not wear or display campaign materials.

Voter Registration Card
Rumor: If the name that appears on the voters registration card does not match exactly as it appears on your driver's license you will not be allowed to vote on November 4th. The authorities at the polls will turn you away, flat out.
FACT: This is not correct for several reasons:

- For voter registration purposes, the voter must use his or her legal name. However, there is no requirement that it be the full legal name. For example, you are not required to use your middle name on your voter registration application.
- Most voters in Maryland are not required to show any identification such as their voter registration card or their driver's license. (Some first time voters and voters who did not provide certain information on the voter registration application are are required to show identification).
- Voters are only required to provide their name when they check in to vote. A pollworker will confirm the voter's identity by having the voter provide his or her month and day of birth.
- No voter in Maryland is simply turned away. Instead, all voters are given the opportunity to vote a provisional ballot.

Rumor: I need my voter registration card to vote.
FACT: You do not need your voter notification card to vote. When you check in to vote, you'll be asked to provide your name, month and date of birth, and address.

College Students
Rumor: If a college student registers to vote at the student's college address the student's parents will not be able to claim the student as a dependent for tax purposes.
FACT: Registering to vote in Maryland alone will not jeopardize a parent's ability to claim a student as a dependent for tax purposes.

Absentee Ballots
Rumor: Election officials **automatically** send out absentee ballot applications to voters who previously voted by absentee ballot.
FACT: Election officials do not automatically send out absentee ballot applications to voters who have previously voted by absentee ballot. Voters can obtain an absentee ballot application on this website or by calling the voter's local election office.

Rumor: Election officials **automatically** send out absentee ballots to voters who previously voted by absentee ballot.
FACT: A voter has the option on the absentee ballot application to request an absentee ballot for a primary election, a general election, or both. A voter who indicated that he or she wanted an absentee ballot for both the 2008 Primary and General Elections will automatically receive an absentee ballot for the upcoming general election. A voter who

only requested an absentee ballot for the 2008 Primary Election will not automatically receive an absentee ballot. He or she will have to submit an absentee ballot application to his or her local election office to receive an absentee ballot for the 2008 General Election.

Registering before each Election

Rumor: Even though you are registered to vote, you still need to register again before the election.
FACT: If you have already registered to vote, you do not need to register again in order to vote in the upcoming General Election. You can check here to make sure you are registered to vote and that your information is up-to-date.

Provisional Voting

Rumor: I can go to any polling place in the State, vote a provisional ballot, and have my vote for President counted.
FACT: If you do not vote at the polling place where you reside, in most cases you will not be voting in your election district or ward and therefore your provisional ballot will not be counted. According to advice from the Office of the Attorney General, a voter must cast his ballot in the election district or ward in which the voter resides.

All chief elections officers should use their websites in this helpful fashion.

In addition to using the website, the Obama campaign utilized the viral nature of the web by encouraging supporters to send emails to their friends debunking the lies and rumors surrounding his candidacy so that the truth may become what is common knowledge. The campaign provided an email address to which anyone who came across an email with phony information could forward it to the campaign so that it could be addressed quickly and correctly.

Common Cause and Election Protection are undertaking a similar project, requesting that anyone who receives an email with false information or sees a spoofed website with misinformation forward that information on to by going to www.commoncause.org/DeceptivePractices or forwarding suspect email messages to DeceptivePractices2008@gmail.com.

There are also several existing websites dedicated to the debunking of misleading statements and rumors on and offline. Such sites include FactCheck.org, PolitiFact.com, and Snopes.com. Snopes has a section specifically dedicated to political myths http://www.snopes.com/politics/politics.asp. BreaktheChain.org is especially dedicated to setting straight email chain rumors spread through forwarded messages. A similar type site could be constructed regarding misleading information about the voting process.

Elections officers too, through whatever other online or offline megaphones they have at their disposal, provide detailed accurate information. They can use the media access available to them to inform people, ahead of time, of their rights and to advise them not to be taken in by any emails they may receive about the process.

They must also be in a position to quickly and loudly debunk false online rumors through the web and the mainstream media, as well as through the networks of voting rights and community organizations, and make sure that accurate information is disseminated through those same mechanisms. Moreover, bloggers and other online journalists can play a role by quickly spotting malicious campaigns and exposing them.

There may be some technology tools that we can use in the future to combat these challenges to our voting system. But for now, it is as it has always been: the best way to fight bad information will be by drowning it out with good information.

ENDNOTES

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12 Oliver Friedrichs, "Cybercrimes and Politics," in Crimeware, Markus Jackobsson, Zulfikar Ramzan, eds., Symantec Press, 2008
13 Erik Larsen, "Clerk Warns of Internet Deception," Asbury Park Press, July 29, 2008
14 "FTC Cautions Consumers About Voter Registration Scams," Federal Trade Commission, News Release, August 7, 2008
15 The reference to "states" or "state laws" generally should be understood as including the District of Columbia.
16 Voting in 2008: Ten Swing States, The Century Foundation and Common Cause, September 2008
17 The District of Columbia does not have any form of computer crimes law.
18 17 U.S.C. § 106.
19 *See* Melville B. Nimmer and David Nimmer, *Copyright* §§ 14.01 *et seq.* (1996).
20 17 U.S.C. § 105.
21 *See* Library of Congress Copyright Office, Compendium II, Compendium of Copyright Office Practices § 206.03; *see also* L. Ray Patterson & Craig Joyce, "Monopolizing the Law: the Scope of Copyright Protection for Law Reports and Statutory Compilations," *36 UCLA Law Rev. 719* (1989).
22 Pub. L. No. 105-304, 112 Stat. 2877 (1998), codified at 17 U.S.C. § 512.
23 Copyright plaintiffs also must be prepared for defenses based upon fair use, including the claim that a voter suppression site was merely engaged in parody or comment.
24 15 U.S.C. § 1127.
25 15 U.S.C. § 1052(b).
26 *New York State Office of Parks and Recreation v. Atlas Souvenir & Gifts*, 207 U.S.P.Q. 954 (1980).
27 *Missouri Federation of Blind v. National Federation of Blind, Inc.,* 505 S.W.2d 1 (Mo. Ct. App. 1973); *see also* 1 *McCarthy on Trademarks and Unfair Competition* §§ 9:5-9:7 (West 2008).
28 15 U.S.C. § 1141(1). *See Tax Cap Committee to Save Our Everglades,* 933 F.Supp. 1077, 1091 (S.D. Fla. 1996).
29 *Id.* The anti-dilution and passing-off provisions of the Lanham Act also include a "commercial" requirement. The statute states that "[a]ny person who shall affix . . . a false designation of origin, or any false description, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or designation." *Id.* § 1125(a).
30 *See* n. 14, *supra.*
31 15 U.S.C. § 1125(d).
32 *See* http://www.icann.org/udrp/udrp.htm.
33 *See* http://www.icann.org/udrp/udrp-policy-24oct99.htm.
34 Under the UDRP, a domain name registrar also many cancel or transfer a registration pursuant to agreement of the parties. In cases where the offending registrant is known and might be amenable to settlement, a demand for voluntary transfer or cancellation might be worth making before, or simultaneously with, notice to the domain name dispute resolution provider.
35 *Citizens Clean Elections Committee v. Schaffer,* 2003 CPRIDR LEXIS 6 (Mar. 24, 2003).
36 The CFAA is codified at 18 U.S.C. § 1030.
37 *Id.*
38 386 F.3d 930, 935 (9th Cir. 2004).
39 *Id.*
40 *VanDenBroeck v CommonPoint Mortg. Co.,* 210 F.3d 696 (6th Cir. 2000).
41 *Neder v United States*, 527 U.S. 1 (1999).
42 *See, e.g., United States v. Curry*, 461 F.3d 452 (4th Cir. 2006).
43 47 U.S.C. § 230(c)(1).
44 Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003).
45 Stirland, Sarah Lai. "Decoy Election Websites Pretend to Root for Your Candidate". *Wired* ,July 21 2008. <http://www.wired.com/politics/onlinerights/news/2007/11/ spoof_forums>.
46 Dan Morain, "Misleading Web Addresses Lead to Anti-Obama Site," Los Angeles Times, August 30, 2008

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Deceptive Election Practices and Voter Intimidation

The Need for Voter Protection

Common Cause
Holding Power Accountable

Lawyers' Committee for Civil Rights Under Law

Deceptive Election Practices and Voter Intimidation

The Need For Voter Protection

BACKGROUND

This report, "Deceptive Election Practices and Voter Intimidation: The Need for Voter Protection," follows the 2008 report, "Deceptive Practices 2.0: Legal and Policy Responses," issued by Common Cause, the Lawyers' Committee for Civil Rights Under Law, and the Century Foundation.

The 2008 report examined the sufficiency of state and federal laws in protecting voters from deceptive election practices, with a focus on false information disseminated via the Internet, email and other new media. At the state level, our examination focused on anti-hacking and computer crime laws, as well as laws on the unauthorized use of state seals and insignias, and impersonation of public officials.

On the federal level, we examined the utility of copyright, trademark, and anti-cybersquatting laws, the Computer Fraud and Abuse Act, the Wire Fraud Statute, Section 230 of the Communications Act, and the Can-Spam Act. We also explored the power of state and federal election laws in combating deceptive online practices.

"Deceptive Practices 2.0" recommended a number of ways that existing laws could potentially protect voters from deceptive election practices and be updated to combat the growing problem of electronic deceptive election practices.

To read the 2008 report, please visit ***www.commoncause.org/deceptivepracticesreport*** and ***http://www.866ourvote.org/newsroom/publications/body/0064.pdf***

ACKNOWLEDGEMENTS

This report was written with the enormous pro bono assistance of the former law firm Dewey & LeBoeuf LLP.

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EXECUTIVE SUMMARY

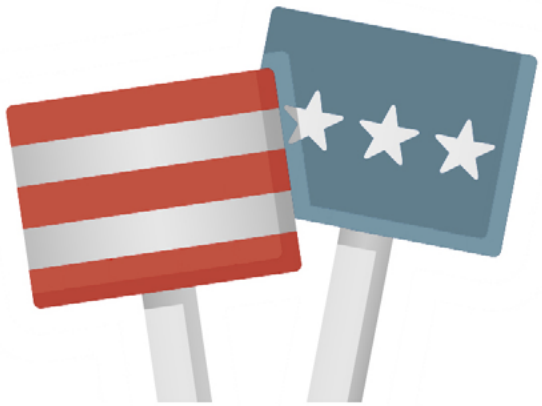
Almost fifty years after the passage of the Voting Rights Act, historically disenfranchised voters remain the target of deceptive election practices and voter intimidation. The tactics employed, however, have changed; over time, they have become more sophisticated, nuanced, and begun to utilize modern technology to target certain voters more effectively.

The right to vote should be unimpeded by deception and intimidation. Yet, the freedom to exercise this right is compromised when voters encounter trickery, fraud, or intimidation before and during the voting process. Deceptive election practices occur when individuals, political operatives, and organizations intentionally disseminate misleading or false election information that prevents voters from participating in elections.

These tactics often target traditionally disenfranchised communities – communities of color, persons with disabilities, persons with low income, eligible immigrants, seniors, and young people. These "dirty tricks" often take the form of flyers or robocalls that give voters false information about the time, place, or manner of an election, political affiliation of candidates, or criminal penalties associated with voting. Today, with a majority of Americans receiving information via the Internet and social media platforms like Facebook and Twitter, and given the viral nature of such communication tools, the potential is greater than ever that these tactics will deprive even more voters of the right to vote.

State and federal lawmakers have an obligation to create strong laws that protect voters from deceptive election practices and voter intimidation so that these schemes do not undermine the integrity of elections. Congress and some states have made attempts to address deceptive election practices, but few laws have passed that directly address this type of conduct.[1]

A small number of states prohibit conduct that interferes with an individual's ability to vote, which may result in ambiguity about its application to the intentional dissemination of materially false information about the time, place, or manner of voting.[2] While other states narrowly proscribe only certain kinds of deceptive election practices (such as false statements about a candidate or ballot initiative), the majority do not have any law which captures this type of voter suppression.[3] Regardless, law enforcement authorities often fail to investigate and prosecute deceptive election practices.



1 The Deceptive Practices and Voter Intimidation Prevention Act of 2011, S. 1994, was reintroduced by U.S. Senators Charles Schumer (D-NY) and Ben Cardin (D-MD) in December of 2011. See also S.B. 12-147, 68th Leg., 2d Sess. (Colo. 2012), S.B. 1009, 2011-2012 Sess. (N.Y. 2011), and S.B. 1283, 82d Leg., Reg. Sess. (Tex. 2011).

2 See e.g., Ariz. Rev. Stat. § 16-1006.

3 See e.g., Colo. Rev. Stat. § 1-13-109.

EXAMPLES OF DECEPTIVE ELECTION PRACTICES AND INTIMIDATION

Deceptive election practices take many different forms, and it is critical that reform proscribes the various ways deceptive election practices can deceive or confuse voters. The following are examples of the types of misinformation that voters have been forced to deal with during recent elections:

Flyers with bogus election rules.

In 2004, flyers were distributed in minority neighborhoods in Milwaukee, Wisc., from a non-existent group called the "Milwaukee Black Voters League claiming that, "If you've already voted in any election this year, you can't vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can't vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you."

Flyers advertising the wrong election date.

In 2008, fake flyers alleging to be from the Virginia State Board of Election were distributed falsely stating that, due to larger than expected turnout, "[a]ll Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th...All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th."

Deceptive online messages.

In 2008, an email was circulated at 1:16 AM on Election Day to students and staff at George Mason University, purportedly from the University Provost falsely advising that the election had been postponed until Wednesday.

Robocalls with false information.

On Election Day in 2010, robocalls targeted minority households in Maryland. The calls told voters: "Hello. I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We're okay. Relax. Everything's fine. The only thing left is to watch it on TV tonight. Congratulations, and thank you."

RECOMMENDATIONS/MODEL LEGISLATION

Such nefarious tactics often target certain voters and result in depriving these citizens of their fundamental right to vote and the perpetrators of these pernicious forms of voter suppression must be held accountable. In order to address ongoing suppression practices, state election laws must be amended to directly target the dirty tricks that disenfranchise voters year after year.

To this end, we propose a model statute which:

Explicitly makes it unlawful, within 90 days of an election, to intentionally communicate or cause to communicate materially false information regarding the time, place, or manner of an election, or the qualifications for voter eligibility with the intent to prevent a voter from exercising the right to vote when the perpetrator knows the information is false;

Requires the Attorney General of the state to:

- Investigate all claims of deceptive voter practices;
- Use all effective measures to provide correct election information to affected votes, such as public service announcements and emergency alert systems; and
- Refer the matter to the appropriate federal, state, and local authorities for prosecution;

Provides a private right of action for any person affected by these practices; and

Requires the state Attorney General to provide a detailed report within 90 days of an election describing any deceptive election practice allegations, a summary of corrective actions taken, and other pertinent information.

Given the hyper-polarized political climate, technology providing new and innovative ways of communication, and narrow election margins, we have seen a rise in attempts to disseminate false and misleading information and expect this trend to continue through the 2012 election cycle. For these reasons, it is more important than ever that state and national legislators take action to strengthen current laws and fill existent gaps so that their constituents are not prevented from fully participating in our democracy.

This report focuses exclusively on the power of state election laws to effectively combat deceptive election practices. Having reviewed data reported from all fifty states about deceptive election activity and the relevant state laws, we conclude that not only has law enforcement largely failed to prosecute this conduct under existing statutory frameworks, but that more action is needed – including the passage of additional laws to ensure that voters are fully protected.

Introduction

Deceptive election practices continue to prevent eligible voters from casting their ballots. These fraudulent acts include the dissemination of false or misleading information about voter qualifications; false information about the time, place, or manner of voting; and intimidation or threats to voters at polling places. The tactics have become more sophisticated and nuanced, employing modern technology to target certain voters. Targeted voters—predominantly people of color, the elderly, young voters, low-income individuals, naturalized citizens, and people with disabilities—fall prey to those who wish to intimidate or trick them into not voting.

After the controversial 2000 presidential election, the nation's largest non-partisan voter protection coalition, Election Protection, now led by the Lawyers Committee for Civil Rights Under Law, was created to assist voters with questions or problems before and on Election Day. Thousands of calls to the 866-OUR-VOTE hotline and requests for assistance at voting precincts are made each year and are logged into a database.

The data show that blatant barriers of the past have been replaced with more subtle—but just as insidious—tactics to prevent specific blocs of voters from casting a meaningful ballot.

Common Cause and its state chapters have worked with election officials for years to monitor the proliferation of deceptive practices and reform state laws to more adequately address the harms that such activities cause. Combining the data collected through the Election Protection hotline and in-person voter protection programs with the knowledge gained by Common Cause's activities on the ground has enabled us to capture the extent of intimidation and deceptive election practices confronting voters around the nation.

The data show that blatant barriers of the past have been replaced with more subtle—but just as insidious—tactics to prevent specific blocs of voters from casting a meaningful ballot. Intentionally communicating false election information to voters, especially new voters and those with specific presumed political leanings, has emerged as a leading strategy of disenfranchisement. Section 11(b) of the Voting Rights Act does provide some recourse against intimidation but does not address all of the deceptive practices voters experience today.[4] Voters who face these barriers need laws that not only penalize such conduct but also provide the opportunity to remedy the damage caused in a timely manner.

4 No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e) [of the Act]. Voting Rights Act of 1965 sec. 11(b) The penalty for violation is as follows:Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

HOW IT WORKS: EXAMPLES OF DECEPTIVE ELECTION PRACTICES AND INTIMIDATION

Deceptive election practices take many different forms, and it is critical that reform proscribes the various ways deceptive election practices can deceive or confuse voters. The following are examples of what voters faced during recent elections:

- **Individuals using official-looking seals or insignias to intimate voters.** In 2003, men with clipboards bearing official-looking insignias and 300 cars with decals resembling those of federal agencies were dispatched in black neighborhoods in Philadelphia to ask voters for identification.

- **Flyers with bogus election rules.** During the 2004 election, flyers purporting to be from a non-existent group called the "Milwaukee Black Voters League," were distributed in Milwaukee, Wisconsin. The flyers were distributed in minority neighborhoods and claimed, "If you've already voted in any election this year, you can't vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can't vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you."

- **Flyers advertising the wrong election date.** In 2008, fake flyers alleging to be from the Virginia State Board of Election were distributed in the southern part of the state, and on the Northern Virginia campus of George Mason University falsely stating that, due to larger than expected turnout, "[a]ll Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th...All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th."

- **Deceptive online messages.** In 2008, an email falsely claiming to be from the University Provost was circulated at 1:16 am on Election Day to students and staff at George Mason University. The email advised recipients that the election had been postponed until Wednesday. Later, the Provost sent an email stating that his account had been hacked and informing students the election would take place that day as planned.

- **Robocalls with false information.** During Election Day in 2010, robocalls targeted minority households in Maryland. The calls told voters: *"Hello. I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We're okay. Relax. Everything's fine. The only thing left is to watch it on TV tonight. Congratulations, and thank you."* It was later discovered that aides to former Governor Bob Ehrlich's campaign against Governor O'Malley paid for these calls. In this instance, the perpetrator behind the deceptive robocalls was prosecuted under a Maryland election law that prohibits a person from willfully and knowingly influencing or attempting to influence a voter's decisions whether to go to the polls and cast a vote through the use of fraud.

- **Facebook messages.** A pastor at a church in Walnut, Mississippi posted false information on his Facebook page in 2011 stating, "I just heard a public service announcement. Because of amendment 26 and the anticipation of a record [turnout], the [Secretary of State's] office has had to devise a plan as to how to handle the record numbers. The [Secretary of State's] office just announced that if you are voting YES on Ms26, then you are to vote on Tuesday [November eighth]. If you are voting NO on Ms26, then they ask that you wait until Wednesday [November ninth] to cast your vote."

THE SOLUTION: FEDERAL AND STATE REFORM IS NEEDED NOW

While some legislators at the federal and state level have begun to recognize the need for stronger laws prohibiting these fraudulent election practices, more action is needed to safeguard voters and remedy their effects.

Although uniformity in such election laws would be preferable, any reform addressing deceptive practices should include:

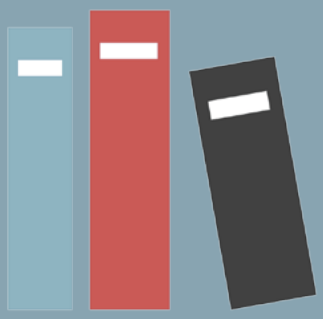
- Criminal and civil penalties to deter, prevent, and penalize deceptive election practices.
- Authorization of the appropriate law enforcement authority to pursue and prosecute individuals who knowingly communicate false election information or seek to intimidate voters with the intent to deny the right to vote.
- Direction to appropriate federal or state agencies to take corrective action by providing affected voters or communities with the correct election information.
- A private right of action so victims can seek immediate redress and protect themselves against such intimidation efforts.
- Transparency in the process through mandated public reporting processes.

Case Studies: Existing State Laws Should be Strengthened

With the notable exception of the Schurick case in Maryland (discussed below), state laws that address deceptive practices have been largely ineffective in deterring or punishing deceptive election practices and voters continue to pay the price.

Although some states have laws in place that address certain variations of deceptive election practices, they tend to be either too narrow in scope or are ambiguous in their application to deceptive election practices concerning the time, place, or manner of voting. As a result, deceptive election practices are not prosecuted, corrective information is not disseminated in a timely manner or at all, and these practices continue to negatively influence elections because bad actors are not deterred.

The following examples are not exhaustive, but provide a sampling of reports from the Election Protection hotline and media sources that illustrate the need for additional administrative and legislative action to ameliorate deceptive election practices. Each section provides examples of deceptive election practices that have occurred, a summary of the current law in each state, an analysis of the deficiencies in each state law as well as policy recommendations for each specific state and generally for states with no such laws currently on the books.



Case Study: Arizona

ISSUE

Report #1. On November 2, 2004, a message was left on a voter's phone telling him to go to the wrong polling place in Pima County. The voter used the "last number called" phone service which identified the number of a major political party's headquarters. The voter called the number back and gave them the name of his son, who was registered with the party. The voter was told that it was a "terrible mistake" and was given the correct polling information.[5]

Report #2. On Election Day in 2004, a voter reported a flier being distributed in Pima County that stated, "Republicans vote on Tuesday, Democrats vote on Wednesday."[6]

Report #3. In 2006, a Phoenix voter received a phone call telling him where to vote, which was 30 miles away from the correct polling place. Using Caller ID, the voter returned the call and was greeted by a person identifying himself as affiliated with a major political party.[7]

Report #4. On Election Day in 2008, voters in Arizona's Legislative District 20 received robocalls directing them to a polling location that was incorrect and far from their actual polling place.[8]

Report #5. On November 4, 2008, a voter from Kingman called to report a text message received from an unknown number saying that, because of the long lines at the polls, supporters of one major presidential candidate should vote on Wednesday instead of Election Day. The text also advised recipients to forward the message to all of their friends.[9]

CURRENT LAW

Current Arizona law broadly prohibits a person from using force, threats, menaces, bribery or "any corrupt means" to (1) attempt to influence an elector in casting his vote or to deter him from casting his vote; (2) "attempt to awe, restrain, hinder or disturb an elector in the free exercise of the right of suffrage;" and (3) "defraud an elector by deceiving and causing him to vote for a different person for an office or for a different measure than he intended or desired to vote for."[10] A person who violates any provision of this section is guilty of a class 5 felony.

ANALYSIS

The broad language used in this section could cover many different types of corrupt election-related conduct, possibly extending to cover deceptive election practices in the scope of prohibited activities. Yet, it is uncertain whether the acts described above would definitely fall within its scope. The statute fails to define the phrase "corrupt means" and, because no case has been brought by law enforcement agencies to challenge deceptive practices under the law, Arizona courts have not had occasion to explain its meaning. In fact, the law – which has been on the books in its current form since 1979 – has never been the subject of any state appellate litigation.[11]

RECOMMENDATION

- Clear and concise definition of the terminology, i.e. "corrupt means", in order to ensure proper and effective enforcement by authorities, and proscribing the specific conduct of disseminating false election information regarding the time, place, and manner of voting and voter qualifications.

5 Our Vote Live, 2004-11-02, 06:36:59 PST, Report no. 31308; Our Vote Live, 2004-11-02, 06:56:29 PST, Report no. 31651.

6 Our Vote Live, 2004-11-02, 12:28:36 PST, Report no. 40342.

7 Our Vote Live, 2006-11-07, 12:47:47, Report no. 1222.

8 Our Vote Live, 2008-11-04, 21:52:00 PST Report no. 94980.

9 Our Vote Live, 2008-11-04, 17:53 PST, Report no. 88447.

10 Ariz. Rev. Stat. § 16-1006.

11 In federal court the law has only been implicated in vote-buying cases. See e.g. United States v. Bowling, 2010 U.S. Dist. LEXIS 129708 (Eastern District of Kentucky, Southern Division).

Case Study: Colorado

ISSUE

Report #1. During the 2004 Presidential Election, a Denver voter living in a historically African-American district received a phone call from a person purporting to represent a major political party. The caller told the voter to be sure to vote for that party's candidate and gave her an address for the wrong polling place.[12]

Report #2. In 2006, in Aurora a voter received two phone calls stating that her polling location had changed and gave her of the location of her new polling place. The voter went to that "new" polling place and was told she was at the wrong location.[13]

Report #3. In the lead up to the 2008 Presidential Election, signs appeared in front of a low-income housing apartment complex, among other places, directing Alameda voters to incorrect polling locations.[14]

Report #4. On November 2, 2008, two days prior to Election Day, a voter in Boulder received a call urging him to vote for a major presidential candidate and falsely stating that the election was going to be held on November 11.[15]

Report #5. The day before the Presidential Election of 2008, a voter in Durango received a robocall telling him to vote for a major presidential candidate at an incorrect polling place (a non-existent elementary school).[16]

Report #6. On Election Day 2008, voters received text messages stating that supporters of a major presidential candidate should vote the next day, on Wednesday, due to long lines.[17]

CURRENT LAW

Under current Colorado law, it is uncertain whether these examples would constitute election violations. Colorado Revised Statutes section 1-13-713, entitled "Intimidation" provides that it is "unlawful for any person directly or indirectly . . . to impede, prevent, or otherwise interfere with the free exercise of the elective franchise of any elector or to compel, induce, or prevail upon any elector either to give or refrain from giving his vote at any election . . . ." Though the deceptive election practices described in the above examples could fall within the prohibited conduct of this statute, it is not clear whether Colorado courts would consider the delivery of false election information as "imped[ing], prevent[ing] or otherwise interfere[ing]" with a voter's free exercise.

ANALYSIS

Colorado also broadly proscribes conduct that interferes with the right to vote – a proscription which could theoretically be used to prosecute deceptive election practices but which also leaves much ambiguity about what type of conduct it reaches. The ambiguity in the law may explain why Colorado law enforcement agencies have not prosecuted such acts under this statute despite the chronic nature of the problem in the state.

In 2012, a bill was introduced in the Colorado legislature to explicitly prohibit deceptive election practices and require corrective action. It passed one chamber.[18]

RECOMMENDATIONS

- Greater clarity about the type of conduct covered under the current statue through a more precise definition.
- Mandated immediate corrective action by state authorities to remedy misinformation.

12 Our Vote Live, 2004-11-01, 16:54:16 PST, Report no. 26329.

13 Our Vote Live, 2006-11-07, 12:04:00, Report no. 4086.

14 Our Vote Live, 2008-10-30, 20:34:00 PM, Report no. 17212.

15 Our Vote Live, 2008-11-02, 15:54:00 PM, Report no. 33994.

16 Our Vote Live, 2008-11-03, 19:06:00 PM, Report no. 39341.

17 Our Vote Live, 2008-11-04, 14:47:00 PM, Report no. 70637.

18 S.B. 12-147, 68th Leg., 2d Sess. (Colo. 2012)

Case Study: Connecticut

CURRENT LAW

Signed by Connecticut Governor Daniel P. Malloy on June 15, 2012, House Bill No. 5022 (also known as "An Act Increasing Penalties for Voter Intimidation and Interference and Concerning Voting by Absentee Ballot") goes into effect on July 1. The law builds on previous state law[19] by increasing the penalty imposed on private citizens and employers that intentionally attempt to disenfranchise voting or registering to vote.[20] The legislation increased fines for violations from a maximum of five hundred or $1,000 dollars and imprisonment of no more than five years to a Class D felony, which is punishable with up to $5,000 in fines and up to five years in prison. Furthermore, the new law characterizes as a Class C felony punishable by up to $10,000 in fines and 10 years imprisonment any behavior that attempts to influence by threat or force the right to vote or speak in a primary, caucus, referendum convention, or election.

The legislation was passed in response to the unacceptable number of documented examples where voting rights were threatened by deceptive voter practices. For example, in 2011, Middletown police, a candidate for public office, and then-Mayor Sebastian Guiliano provided Wesleyan University students false and misleading information regarding their eligibility to vote. The Middletown Office of the Registrar of Voters failed to provide requesting students with a clear picture of their rights and incorrectly stated that the aforementioned misinformation may have merit, resulting in the likely disenfranchisement of hundreds of voters.[21]

ANALYSIS

The new law only increases the possible fine imposed on offending parties and increases possible jail time for offenses that involve force or threats. This increased deterrent against voter disenfranchisement is commendable and a step in the right direction. Unfortunately, the law fails to address existing insufficient voter protections provided for in our model legislation. First, state law provides no mechanism for private parties to hold offending parties accountable if the government fails to prosecute for any reason instances of deceptive voter practices. Moreover, the Connecticut Attorney General is not required to investigate claims of deceptive voter practices and refer such matters to the appropriate law enforcement authorities. Despite the fact that deceptive voter practices often pervade elections quickly and thoroughly, there is no obligation for the Attorney General to publicly correct misinformation. The law also does not require its Attorney General to publish a post-election report detailing deceptive election practice allegations and a summary of corrective actions taken – thus increasing the likelihood that previously identified deceptive voter practices will be repeated and voters will be unaware of past deceptive activity.

RECOMMENDATION

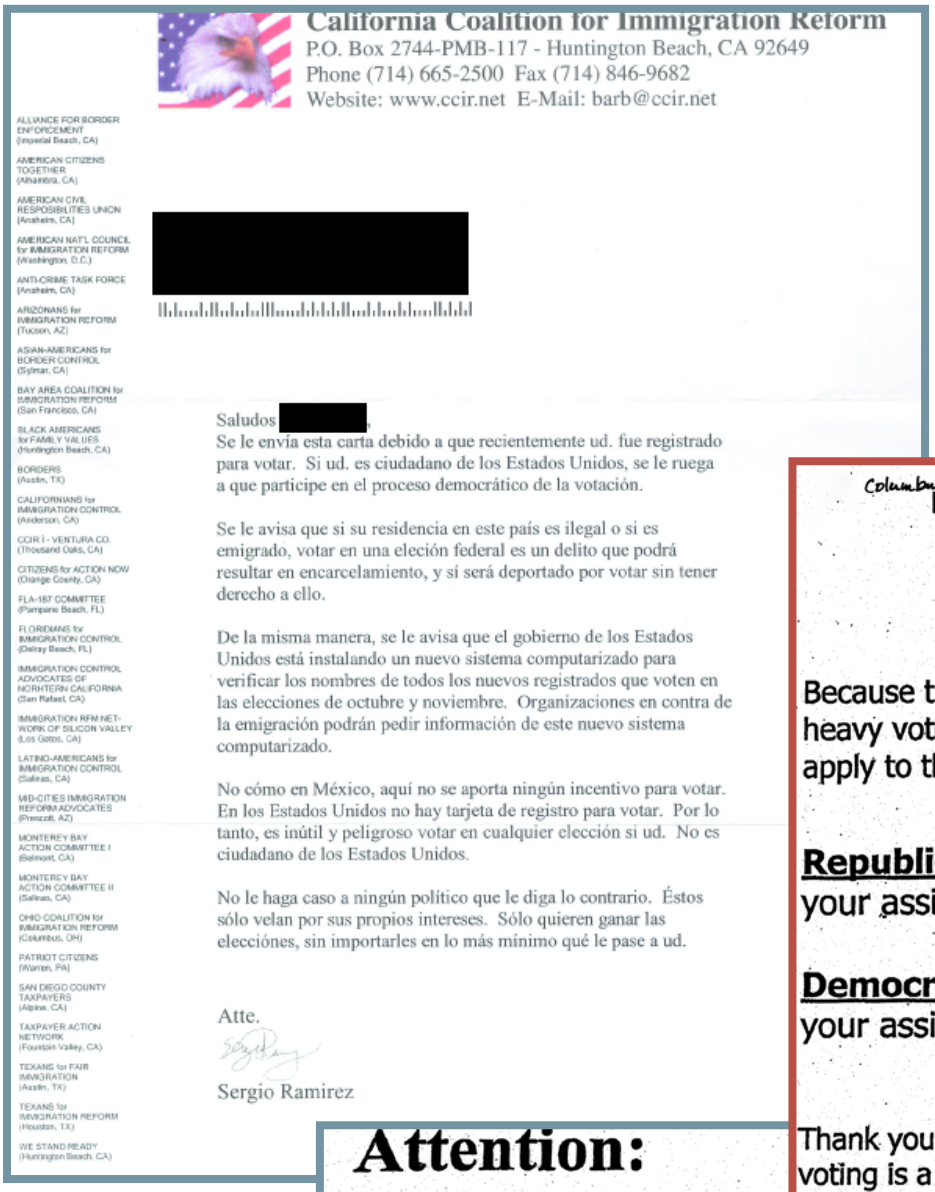
- Create a much stronger deterrent while empowering citizens by providing a private cause of action for those affected by deceptive election practices and voter intimidation.
- Require the state Attorney General to immediately combat deceptive election practices through a campaign of public education that utilizes all available and effective means.
- Mandate the Attorney General investigate all claims of deceptive election practices and refer such matters to the appropriate federal, state, and local authorities.
- Obligate the publication of a post-election report that lists all substantive allegations of deceptive election practices and voter intimidation and the remedial actions taken.

19 Conn. Gen. Stat. Ann. §§ 9-363, 9-364, 9-365.

20 ELECTION OFFENSES--VOTERS AND VOTING--SENTENCE AND PUNISHMENT, 2012 Conn. Legis. Serv. P.A. 12-193 (H.B. 5022).

21 Connecticut Joint Favorable Committee Report, , Connecticut Joint Favorable Committee Report, H.B. 5022, 3/30/2012.

CALIFORNIA



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AMERICAN CITIZENS TOGETHER (Alhambra, CA)
AMERICAN CIVIL RESPOSIBILITIES UNION (Anaheim, CA)
AMERICAN NAT'L COUNCIL for IMMIGRATION REFORM (Washington, D.C.)
ANTI-CRIME TASK FORCE (Anaheim, CA)
ARIZONANS for IMMIGRATION REFORM (Tucson, AZ)
ASIAN-AMERICANS for BORDER CONTROL (Sylmar, CA)
BAY AREA COALITION for IMMIGRATION REFORM (San Francisco, CA)
BLACK AMERICANS for FAMILY VALUES (Huntington Beach, CA)
BORDERS (Austin, TX)
CALIFORNIANS for IMMIGRATION CONTROL (Anderson, CA)
CCIR I - VENTURA CO. (Thousand Oaks, CA)
CITIZENS for ACTION NOW (Orange County, CA)
FLA-187 COMMITTEE (Pompano Beach, FL)
FLORIDIANS for IMMIGRATION CONTROL (Delray Beach, FL)
IMMIGRATION CONTROL ADVOCATES OF NORHTERN CALIFORNIA (San Rafael, CA)
IMMIGRATION RFM NETWORK OF SILICON VALLEY (Los Gatos, CA)
LATINO-AMERICANS for IMMIGRATION CONTROL (Salinas, CA)
MID-CITIES IMMIGRATION REFORM ADVOCATES (Prescott, AZ)
MONTEREY BAY ACTION COMMITTEE I (Belmont, CA)
MONTEREY BAY ACTION COMMITTEE II (Salinas, CA)
OHIO COALITION for IMMIGRATION REFORM (Columbus, OH)
PATRIOT CITIZENS (Warren, PA)
SAN DIEGO COUNTY TAXPAYERS (Alpine, CA)
TAXPAYER ACTION NETWORK (Fountain Valley, CA)
TEXANS for FAIR IMMIGRATION (Austin, TX)
TEXANS for IMMIGRATION REFORM (Houston, TX)
WE STAND READY (Huntington Beach, CA)

[redacted]

Saludos [redacted],
Se le envía esta carta debido a que recientemente ud. fue registrado para votar. Si ud. es ciudadano de los Estados Unidos, se le ruega a que participe en el proceso democrático de la votación.

Se le avisa que si su residencia en este país es ilegal o si es emigrado, votar en una eleción federal es un delito que podrá resultar en encarcelamiento, y si será deportado por votar sin tener derecho a ello.

De la misma manera, se le avisa que el gobierno de los Estados Unidos está instalando un nuevo sistema computarizado para verificar los nombres de todos los nuevos registrados que voten en las elecciones de octubre y noviembre. Organizaciones en contra de la emigración podrán pedir información de este nuevo sistema computarizado.

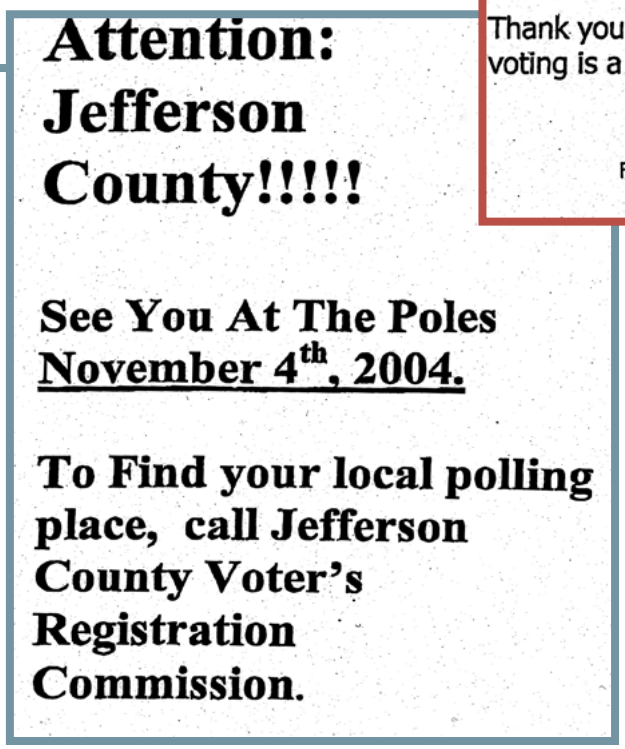
No cómo en México, aquí no se aporta ningún incentivo para votar. En los Estados Unidos no hay tarjeta de registro para votar. Por lo tanto, es inútil y peligroso votar en cualquier elección si ud. No es ciudadano de los Estados Unidos.

No le haga caso a ningún político que le diga lo contrario. Éstos sólo velan por sus propios intereses. Sólo quieren ganar las elecciónes, sin importarles en lo más mínimo qué le pase a ud.

Atte.

Sergio Ramirez

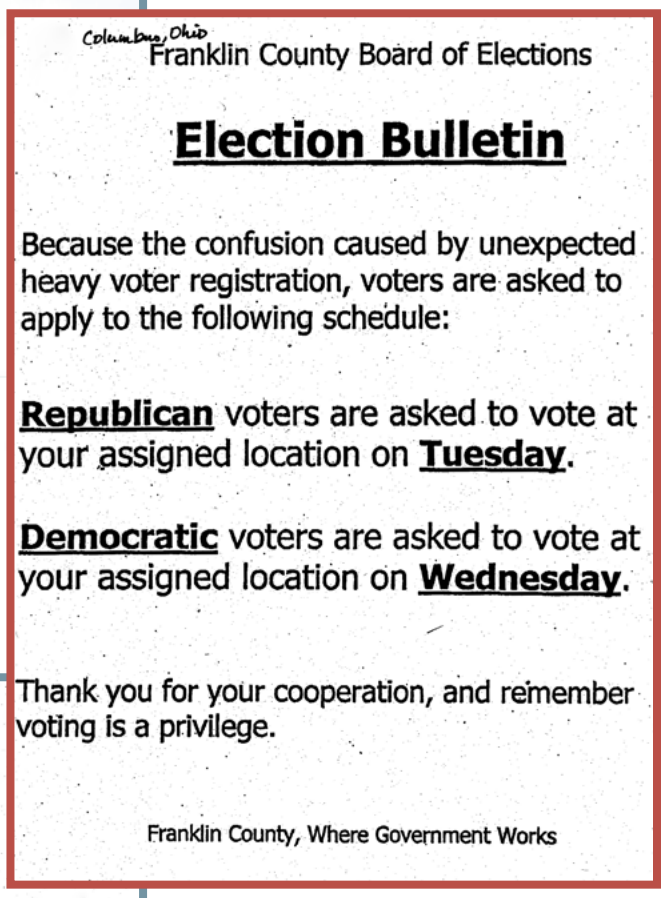
ALABAMA



Attention: Jefferson County!!!!!

See You At The Poles November 4th, 2004.

To Find your local polling place, call Jefferson County Voter's Registration Commission.



Columbus, Ohio
Franklin County Board of Elections

Election Bulletin

Because the confusion caused by unexpected heavy voter registration, voters are asked to apply to the following schedule:

Republican voters are asked to vote at your assigned location on **Tuesday**.

Democratic voters are asked to vote at your assigned location on **Wednesday**.

Thank you for your cooperation, and remember voting is a privilege.

Franklin County, Where Government Works

OHIO

NOTE: The fliers included in this report were obtained by the Lawyers' Committee for Civil Rights Under Law, and exemplify the sort of tactics used by perpetrators of deceptive election practices.

Case Study: Florida

ISSUE

Report #1: On Election Day in 2008, students at the University of Florida received text messages falsely instructing voters supporting Senator Obama to vote the following day, November 5, because lines at the polls were too long. One text read: "Due to high voter turnout Republicans are asked to vote today and Democrats are asked to vote tomorrow. Spread the word!" Another read: "News Flash: Due to long lines today, all Obama supporters are asked to vote on Wednesday. Thank you!! Please forward to everyone." The school sent a corrective email to all students warning that the text was a hoax.[22]

Report #2: Also on Election Day 2008, it was reported that students also received text messages delivering a similarly misleading message that purported to be from the vice president of the university.[23]

CURRENT LAW

Section 104.0615 of the Florida Statutes, which is entitled the "Voter Protection Act," prohibits any person from "knowingly us[ing] false information to. . . induce or attempt to induce an individual to refrain from voting. . . ."

In addition to Florida's Voter Protection Act, Florida's election code contains several laws intended to prevent interference with voting, or fraud in the election process. Its statutes prohibit, among other things, interference with voter registration (Fla. Stat. §104.012), fraud in connection with casting a vote (Fla. Stat. §104.041), interference with or deprivation of voting rights (Fla. Stat. §104.0515), corruptly influencing voting (Fla. Stat. §104.061), voter intimidation or suppression (Fla. Stat. §104.0615) and aiding, abetting, advising or conspiring in violation of the code (Fla. Stat. §104.091). A violation of many of these provisions is considered a second or third degree felony.

ANALYSIS

Although these text messages appear to have been sent to deter certain voters from voting, no one was prosecuted under the statute for sending them.

Though Florida is an example of a state with strong laws prohibiting the type of conduct associated with deceptive election practices, the failure to prosecute egregious acts as noted above demonstrate the need for a private right of action. When law enforcement authorities fail to act, voters who have had their rights violated should be able to hold the perpetrators accountable for their acts.

RECOMMENDATIONS

- Create a private right of action for individuals in case state and local officials are unwilling to prosecute bad acts under the current law.
- Mandate immediate corrective action by state authorities to remedy misinformation.

22 Dominick Tao, Students Receive Misleading Information on Election Day, ABC News (Nov. 4, 2008), http://abcnews.go.com/Politics/Vote2008/story?id=6182271&page=1.

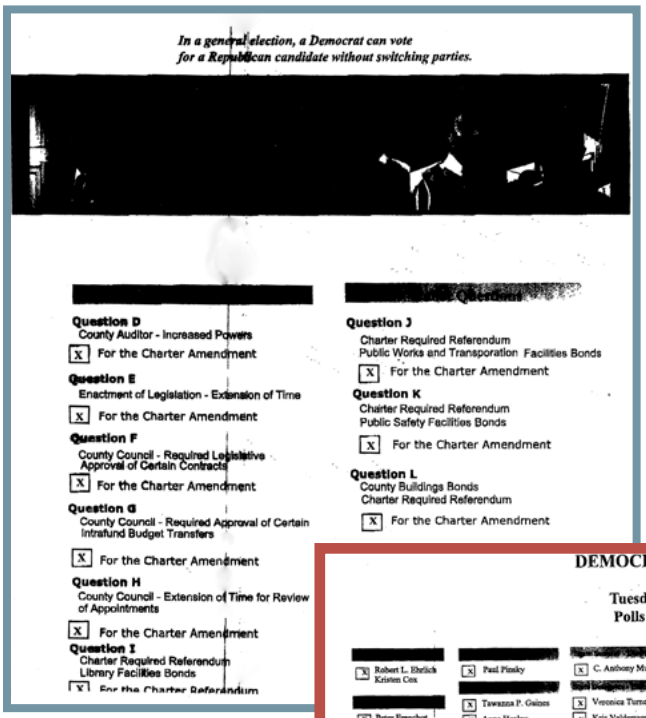
23 Id.

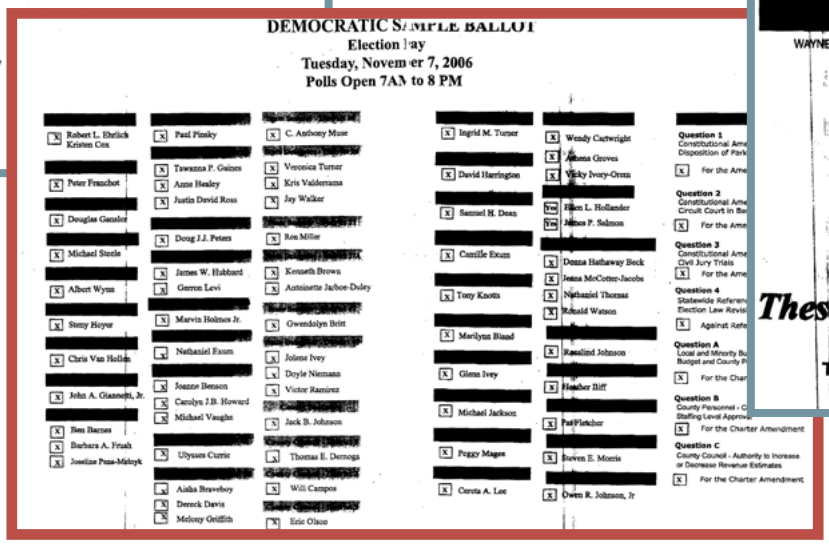
Case Study: Maryland

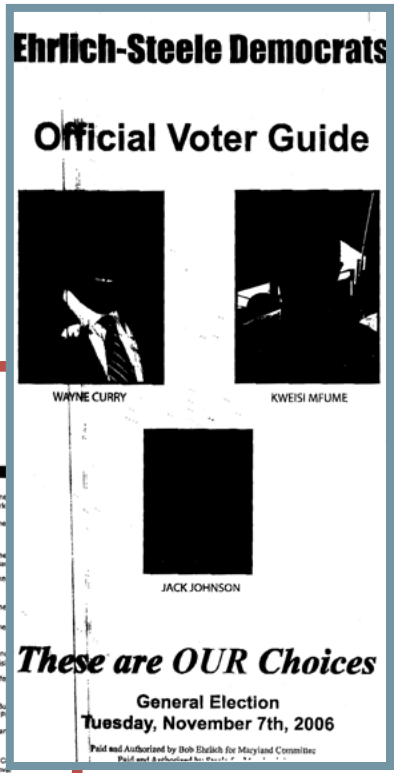
ISSUE

Report #1. In Maryland during the 2006 election cycle, Republican Robert Ehrlich's gubernatorial campaign funded the "Ehrlich-Steele Democrats Official Voter Guide," featuring a sample ballot falsely suggesting that Ehrlich and his running mate were Democrats. In Prince George's County, their sample ballot featured pictures of Kweisi Mfume, Jack B. Johnson, and Wayne K. Curry (all well-known former Democratic elected officials from that county) with the words "These are OUR Choices," suggesting that they were endorsing the Ehrlich-Steele campaign.[24]

Report #2. On Election Day in 2010, voters in predominantly African-American jurisdictions of Maryland received robocalls authorized by Paul Schurick, Republican Robert Ehrlich's campaign manager, telling them that the Democratic candidates had won the election and that they no longer needed to vote. The call said, "I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We're OK. Relax. Everything is fine. The only thing left is to watch on TV tonight. Congratulations and thank you."[25]







24 Democrats Blast Ehrlich-Steele Sample Ballot as a Dirty Trick, Washington Examiner, Nov. 8, 2006, http://washingtonexaminer.com/local/2006/11/democrats-blast-ehrlich-steele-sample-ballot-dirty-trick/54123; Deceptive Practices and Voter Intimidation Prevention Act of 2011, S. 1994, 112th Cong. § 2 (2011).

25 Susan Milligan, Maryland Fraud Conviction is an Important Warning, U.S. News and World Report, Dec. 7, 2011, *http://www.usnews.com/opinion/blogs/susan-milligan/2011/12/07/maryland-voter-fraud-conviction-is-an-important-warning*; Cardin Bill findings.

CURRENT LAW

It is questionable whether current Maryland law prohibits the first example of a misleading flyer because it falsely suggested support for the candidate rather than making deliberate attempts to confuse voters about the time, place, or manner of the election. Maryland's election statute has provisions that address "influenc[ing] a voter's decision" through intimidation (Section 16-201(5)), "influenc[ing] a voter's decision whether to go to the polls to cast a vote" through fraudulent activity (Section 16-201(6)), and "denial or abridgement of the right to vote on account of race, color or disability" (Section 16-201(7)). However, only the second of these provisions specifically addresses fraud, and that provision is limited to fraudulent activity designed to suppress the vote. The sort of misleading information described in Report #1 sought to confuse voters about their choice of candidates as opposed to attempting to keep them from casting their ballots in the first place.

The second example of how deceptive election information was spread gave rise to one of the very few prosecutions and convictions based on such activity. This case attracted widespread media attention and serves an important example to officials from other states as the defendant was convicted of violating a broadly worded statute that is similar in scope to the voter intimidation statutes in other states. Schurick was successfully prosecuted under the Maryland Election Code and convicted on four counts, including under § 16-201(7),[26] and on February 16, 2012, he was sentenced to 30 days of in-home detention, 4 years of probation, and 500 hours of community service.[27] Of particular interest is the fact that Schurick's conviction rested on his violation of Section 16-201(7), which prohibits conduct that results in "the denial or abridgement of the right of any citizen … to vote on account of race," whereas the indictment[28] cites fraud to influence the decisions of voters to go to the polls.

ANALYSIS

What makes the Maryland case so critical to combating deceptive practices generally is that it exemplifies how a broadly worded fraud statute concerning interference with the electoral franchise allowed for the successful prosecution of a deceptive robocall. Because such "interference" statutes are already on the books in many states, they should continue to be used to prosecute bad actors who employ these deceitful tactics. It is important to note, however, that the prosecution in the Schurick case was supported by exceptionally strong evidence that demonstrated the defendant's intent to suppress the vote. For example, a campaign memorandum included explicit references to the "Schurick Doctrine," which it boasted is "designed to promote confusion, emotionalism, and frustration among African American democrats [sic], focused in precincts where high concentrations of AA [African Americans] vote." The campaign memorandum explicitly stated that "[t]he first and most desired outcome is voter suppression. The goal is to have as many African American voters stay home as a result of triangulation messaging." Such strong evidence strengthened the hand of the prosecution in using the broadly-worded fraud statute, because the goal of voter suppression through "confusion" was explicitly outlined in the evidence introduced to trial.[29]

However, given the almost nonexistent use of interference laws to prosecute deceptive election practices, we recommend a more specific statute along with a private right of action in states where officials might be more hesitant to act.

RECOMMENDATIONS

- A clear and specific definition in the law to enable prosecution of deceptive election practices, i.e. clarification of legislative intent to combat deceptive election practices.
- Provide for a private right of action to allow for a remedy when federal or state authorities fail to respond.

26 Note that the charges in Schurick's indictment cited § 16-201(7), but used language more consistent with § 16-201(6) ("using fraud to influence the decision of voters whether or not to go to the polls to cast a vote").

27 Peter Hermann, Schurick Will Not Serve Jail Time in Robocalls Case, The Baltimore Sun, Feb. 16, 2012, http://articles.baltimoresun.com/2012-02-16/news/bs-md-ci-schurick-sentenced-20120216_1_schurick-doctrine-judge-lawrence-p-fletcher-hill-robocalls.

28 Indictment, Maryland v. Schurick, available at *http://www.wbal.com/absolutenm/articlefiles/74883-Hensonindictment.pdf*.

29 Documents from Robocall Trial, Wash. Post (June 27, 2012), *http://www.washingtonpost.com/wp-srv/metro/documents/maryland-robocall-documents.html*.

Case Study: Pennsylvania

ISSUE

Report # 1. During the 2004 elections, multiple voters across Pennsylvania reported receiving robocalls from a person stating he was a major political party figure and that the members of his party should vote the day after Election Day.[30]

Report #2. Over a month before the 2008 Presidential Election, a Philadelphia voter reported that people were hanging flyers stating that individuals who had outstanding warrants or parking tickets would be arrested when they went to vote.[31]

Report #3. On October 24, 2008, a voter from Shavertown received a robocall instructing her to vote between 11 am to 1 pm or 2 pm to 4 pm that day – more than a week before Election Day (Pennsylvania does not have early voting).[32]

Report #4. On October 30, 2008, canvassers reported that voters from the 8th Ward of Philadelphia's 3rd District and the 10th Ward of its 1st District were receiving calls telling them that Latinos would only be allowed to vote from 2pm to 6pm on Election Day.[33]

Report #5. In the run-up to the 2008 Presidential Election, multiple voters reported receiving calls and fliers containing incorrect polling place information that were supposedly from a presidential candidate's campaign.[34] For example, a Pittsburg voter received a call from someone purporting to be "Terry" of the Obama Campaign. "Terry" urged the voter to vote for Obama at the incorrect polling place. No return number was left. The voter knew that the polling location given was incorrect and verified that his correct polling place was, in fact, at a different location.[35]

Report #6. Prior to Election Day 2010, a voter reported receiving a notice in her mailbox falsely advising of a change in her polling location.[36]

Report #7. On Election Day 2010, a voter was advised to "vote tomorrow" even though the election was that day.[37]

CURRENT LAW

As in the previous state examples, under current Pennsylvania law it is unclear whether these examples constitute violations. 25 P.S. § 3527 directs that no person may use "intimidation, threats, force or violence with design to. . . prevent him from voting or restrain his freedom of choice." Dissemination of false election information has not been prosecuted under this law.

25 P.S. § 3547 may be more on point, which prohibits use of a "fraudulent device or contrivance" to "impede[], prevent[], or otherwise interfere[] with the free exercise of the elective franchise of any voter."

ANALYSIS

Despite having some clarity in the statute regarding which acts will qualify as deceptive election practices, key phrases in this provision are left undefined. For example, what must be demonstrated to prove that a misleading flyer is a fraudulent device that interfered with a voter's right to vote? Again, none of the reported acts of deceptive election practices were prosecuted under this law.

RECOMMENDATION

- Clear and concise explanation of what is needed to demonstrate a deceptive election practice interfered with the right to vote.

30 Our Vote Live, 2004-11-02, Report no. 31375; Our Vote Live 2004-11-02 06:59:35 PST, Report no. 31926; Our Vote Live, 2004-11-02, 07:10:30 PST, Report no. 32198; Our Vote Live, 2004-11-02, 09:33:26 PST, Report no. 35968; Our Vote Live, 2004-11-02, 12:53:16 PST, Report no. 41467.

31 Our Vote Live, 2008-09-24, 9:51:00 AM, Report no. 284

32 Our Vote Live 2008-10-31, 11:50:00 AM, Report no. 18084.

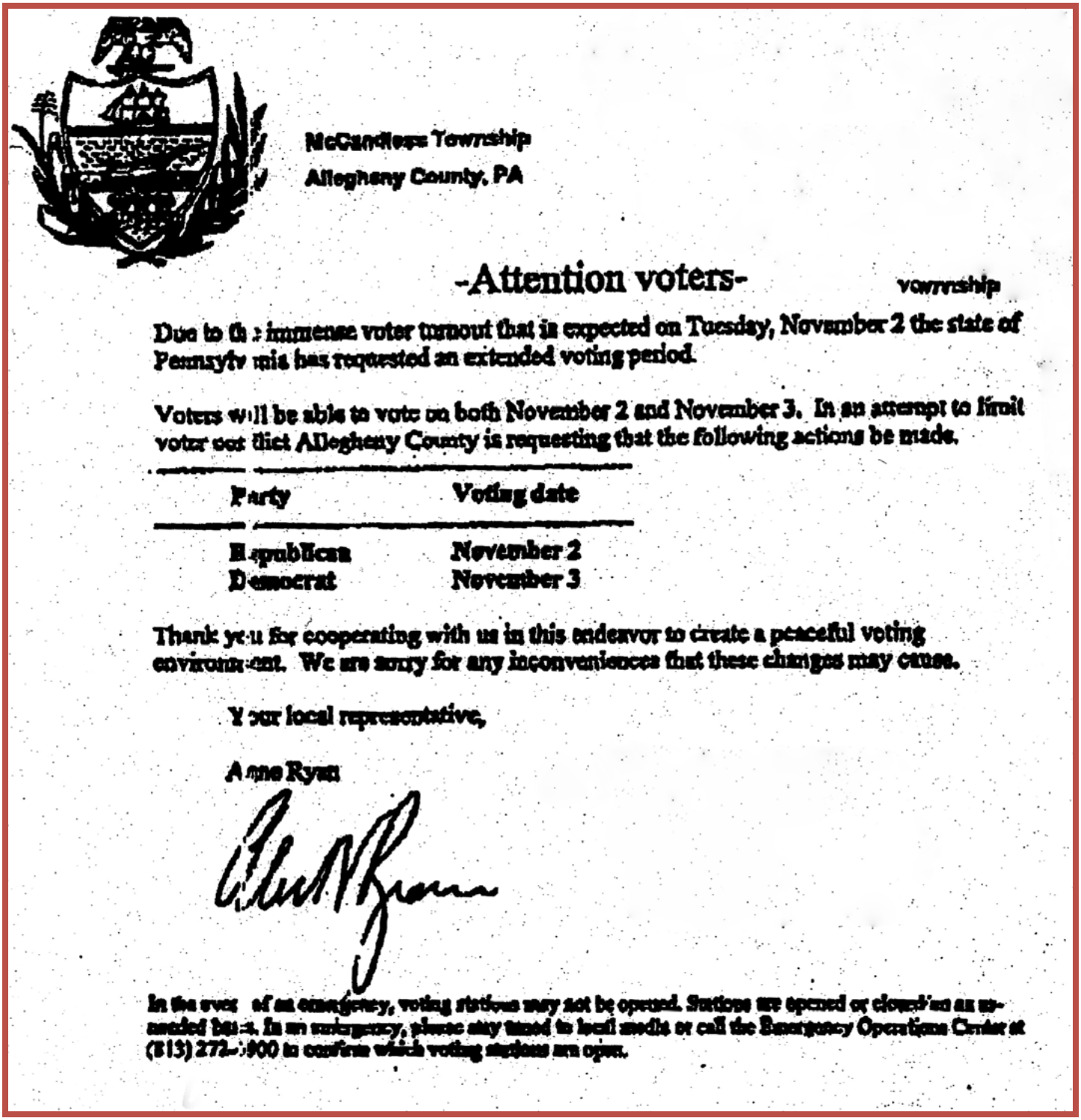
33 Our Vote Live, 2008-10-30, 9:30:00 PM , Report no. 17330

34 Our Vote Live, 2008-11-02, 13:22:00 PM, Report no. 23014; Our Vote Live 2008-11-02, 13:44:00 PM, Report no. 23080; Our Vote Live, 2008-11-03, 10:42:00 AM, Report no. 26895; Our Vote Live, 2008-11-03, 12:30:00 PM, Report no. 28786; Our Vote Live, 2008-11-04, 6:46:00 AM, Report no. 43397; Our Vote Live, 2008-11-04, 10:17:00 AM, Report no. 56685.

35 Our Vote Live, 2008-11-02, 12:02:00 PM, Report no. 22781

36 Our Vote Live, 2010-11-02, 13:34:56, Report no. 5504.

37 Our Vote Live, 2010-11-02, 16:52:35, Report no. 9053.



McCandless Township
Allegheny County, PA

-Attention voters-

vownship

Due to th : immense voter turnout that is expected on Tuesday, November 2 the state of Pennsylv nia has requested an extended voting period.

Voters will be able to vote on both November 2 and November 3. In an attempt to limit voter con flict Allegheny County is requesting that the following actions be made.

Party	Voting date
Republican	November 2
Democrat	November 3

Thank yo u for cooperating with us in this endeavor to create a peaceful voting environm ent. We are sorry for any inconveniences that these changes may cause.

Your local representative,

Anne Ryan

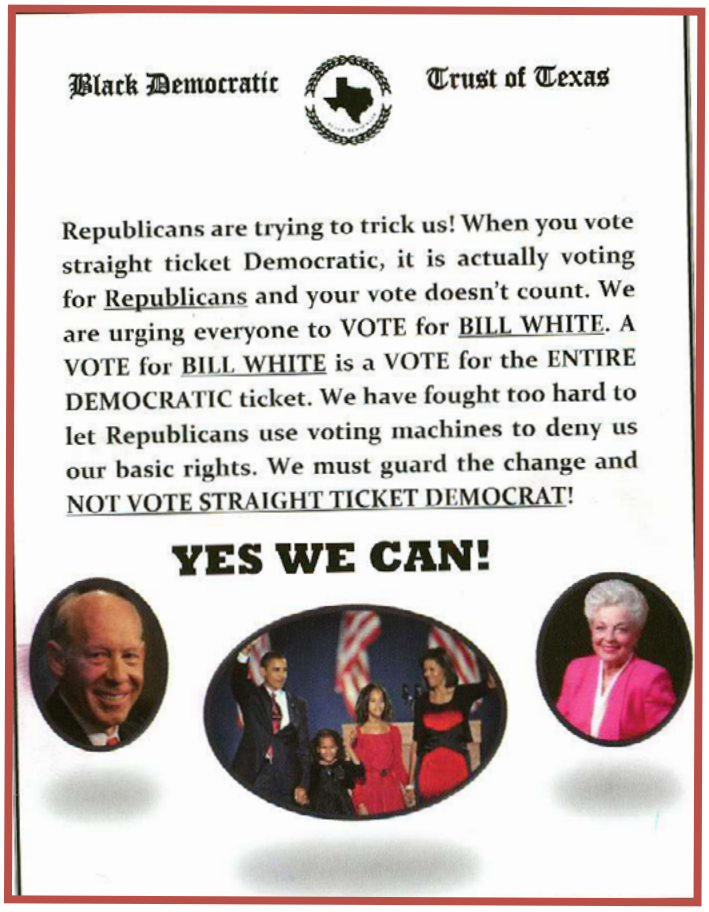
In the even of an emergency, voting stations may not be opened. Stations are opened or closed on an as-needed basis. In an emergency, please stay tuned to local media or call the Emergency Operations Center at (313) 272-1900 to confirm which voting stations are open.

PENNSYLVANIA

Case Study: Texas

ISSUE

Report #1: In 2010, misleading flyers stating that the "Black Democratic Trust of Texas" (a non-existent organization) produced them were distributed at various polling sites in predominantly African-American neighborhoods of Houston. The flyers falsely warned voters that voting the straight Democratic ticket would actually cast their ballots for Republicans. They indicated that voters should instead vote for the Democratic gubernatorial candidate Bill White, as a vote for him would be a vote for the entire Democratic ticket. The flyers read, "Republicans are trying to trick us!. . .We have fought too hard to let Republicans use voting machines to deny us our basic rights," and included photos of Mr. White, President Obama and his family, and former Texas governor Ann Richards.[38]


Black Democratic Trust of Texas

Republicans are trying to trick us! When you vote straight ticket Democratic, it is actually voting for Republicans and your vote doesn't count. We are urging everyone to VOTE for BILL WHITE. A VOTE for BILL WHITE is a VOTE for the ENTIRE DEMOCRATIC ticket. We have fought too hard to let Republicans use voting machines to deny us our basic rights. We must guard the change and NOT VOTE STRAIGHT TICKET DEMOCRAT!

YES WE CAN!

CURRENT LAW

Texas law is woefully inadequate in addressing the most common forms of deceptive election practices. Its statutes do not address intentionally false statements concerning the time, place, or manner of voting. The closest Texas law comes to addressing deceptive practices is a statute on concerning impersonation of public servants.[39]

ANALYSIS

The Texas statute prohibits the impersonation of government officials with the intent to induce someone to submit to a pretended official authority or rely on official acts. However, application within the context of voting and elections is ambiguous and attenuated from the act of voting, and a strong deceptive election practices statute would clarify the scope of the law. This statute has not been litigated at the appellate level as applied to deceptive voter practices.

In 2009, a Texas legislator introduced a bill to prohibit deceptive election practices, but it died in committee.[40]

RECOMMENDATION

- Pass comprehensive deceptive practices legislation.

38 Caught: Fake Voting Flyers Distributed to African Americans in Texas, The Raw Story (Oct. 28, 2010), *http://www.rawstory.com/rs/2010/10/28/fake-fliers-aim-mislead-texas-voters*.

39 See Tex. Penal Code Ann. § 37.11.

40 HB 283, 81st Regular Session (2009).

Case Study: Virginia

ISSUE

Report #1. In 2008, one week before the Election Day, Virginia State Police issued a press release announcing that it was investigating "the source responsible for an erroneous election flyer circulating in the Hampton Roads region and via the Internet. The one-page flyer falsely claims to be from the State Board of Elections and provides incorrect voting dates. The same flyer has apparently been scanned and is now circulating by email."[41]

Report #2. During the 2008 Presidential Election, the email account of George Mason University Provost was hacked and used to send a deceptive email. The email went to the entire George Mason University community at 1:16 am on Election Day and stated that the election had been moved to the following day.

A George Mason University student forwards over a pair of emails that went out to the student body of the Virginia school:

First:

-----Original Message-----
From: ANNOUNCE04-L on behalf of Office of the Provost
Sent: Tue 11/4/2008 1:16 AM
To: ANNOUNCE04-L@mail04.gmu.edu
Subject: Election Day Update

To the Mason Community:

Please note that election day has been moved to November 5th. We apologize for any inconvenience this may cause you.

Peter N. Stearns
Provost

And then:

-----Original Message-----
From: Office of the Provost on behalf of Office of the Provost
Sent: Tue 11/4/2008 8:08 AM
To: PROVOSTOFFICE-L@mail04.gmu.edu
Subject: Urgent Voting Information

Dear Colleagues,

It has come to my attention early this morning that a message was hacked into the system fraudulently stating that election day has been moved. I am sure everybody realizes this is a hoax, it is also a serious offense and we are looking into it. Please be reminded that election day is today, November 4th.

Peter N. Stearns
Provost

41 Press Release, Virginia State Police, Virginia State Police Investigate Source of Erroneous Election Flyer (Oct. 29, 2011), available at *http://www.vsp.state.va.us/News/2008/NR-57%20VSP%20BCI%20Investigates%20Source%20of%20Erroneous%20Election%20Flyer.pdf*

The school sent a corrective email to all recipients advising them that the prior email contained false information and that the election was still being held that day.[42]

Report #3. In the lead-up to the 2008 elections, a local registrar of elections issued misleading warnings aimed at Virginia Tech students stating that students who registered to vote at their college addresses would no longer be eligible to be claimed as dependents on their parents' tax returns, could lose scholarships, and could lose coverage under their parents' car and health insurance policies. The statement about students' tax status was incorrect, and it is unclear what basis the registrar had for the statements about scholarships and insurance policies.[43]

CURRENT LAW

Laudably, in 2007, Virginia passed legislation aimed at reducing deceptive election practices by creating penalties for engaging in the communication of false information to a registered voter. The statute makes it unlawful for any person to knowingly communicate false information about the date, time, and place of an election or about a voter's precinct, polling place, or voter registration status to a registered voter in order to impede the voter in the exercise of his or her right to vote.[44] In addition, section 24.2-607 of the Virginia Code, a preexisting provision, makes it unlawful for any person to "hinder, intimidate, or interfere with any qualified voter so as to prevent the vote from casting a secret ballot."

ANALYSIS

In the first example, the Virginia State Police press release announcing its investigation into the fake flyers from election officials specifically cited Virginia's deceptive practices law. However, one week later, the State police issued a follow-up press release stating that "[a]fter a thorough investigation into the origins of a fake election flyer ... no criminal activity occurred and no charges

42 Ben Smith, A Fake Email at George Mason, Politico, Nov. 4, 2008, *http://www.politico.com/blogs/bensmith/1108/A_fake_email_at_George_Mason.html*.

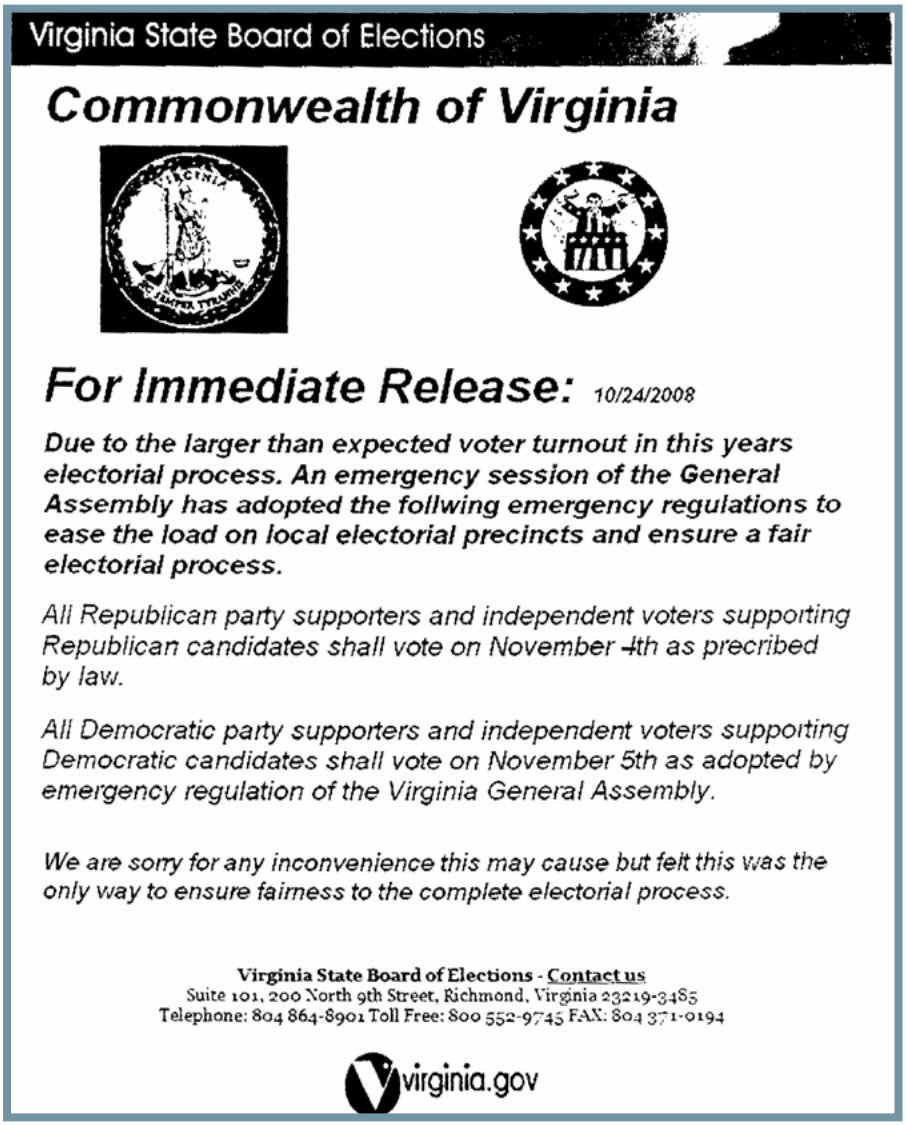
43 Elizabeth Redden, Warning for College Student Voters, Inside Higher Ed, Sept. 3, 2008, *http://www.insidehighered.com/news/2008/09/03/voting*; Tamar Lewin, Voter Registration by Students Raises Cloud of Consequences, N.Y. Times, Sept. 7, 2008, *http://www.nytimes.com/2008/09/08/education/08students.html*.

44 Va. Code Ann. § 24.2-1005.1.

will be filed" because the Police determined it was an "office joke."[45] A private right of action in Virginia's otherwise strong deceptive election practices law may have resulted in a more thorough investigation as other parties would have been responsible for investigating the matter.

In the second example, the email falls within the scope of Virginia's new law because it was providing false information about the date of the election. However, to our knowledge, no one was prosecuted for the activity described in Report #2. This also strengthens the need for a private right of action and a legal directive for law enforcement agencies to take corrective action to protect voters from the false information.

In Report #3, the local registrar who issued the warnings about tax statuses for campus voter registration might not be liable under Virginia law because the information communicated did not fall specifically within the categories enumerated in the deceptive practices statute. As for Virginia's broader law prohibiting interference with the right to vote, it is unclear whether the registrar's conduct would be deemed by courts as prohibited under that statute. If Virginia law required state officials to conduct a review of deceptive practices in the wake of an election, however, officials would be in a better position to correct the record and disseminate correct information if other dubious claims about tax status come up in subsequent elections.



Virginia State Board of Elections

Commonwealth of Virginia

For Immediate Release: 10/24/2008

Due to the larger than expected voter turnout in this years electorial process. An emergency session of the General Assembly has adopted the follwing emergency regulations to ease the load on local electorial precincts and ensure a fair electorial process.

All Republican party supporters and independent voters supporting Republican candidates shall vote on November 4th as precribed by law.

All Democratic party supporters and independent voters supporting Democratic candidates shall vote on November 5th as adopted by emergency regulation of the Virginia General Assembly.

We are sorry for any inconvenience this may cause but felt this was the only way to ensure fairness to the complete electorial process.

Virginia State Board of Elections - Contact us
Suite 101, 200 North 9th Street, Richmond, Virginia 23219-3485
Telephone: 804 864-8901 Toll Free: 800 552-9745 FAX: 804 371-0194

virginia.gov

RECOMMENDATIONS

- Require a review of deceptive election practices after an election.
- Create a private right of action for individuals to advocate for themselves in the absence of state enforcement.

45 Press Release, Virginia State Police, No Charges Filed in Bogus Election Flyer Investigation (Nov. 3, 2008), available at *http://www.vsp.state.va.us/News/2008/news_release_11-03-08.shtm*.

Case Study: Wisconsin

ISSUE

Report #1. During the 2004 Presidential Election, a Milwaukee voter reported receiving a robocall delivering a message in what she believed to be the fake voice of a major presidential candidate; the message gave her the wrong polling place.[46]

Report #2. In 2006, a voter from Kenosha received a call from someone identifying himself as being affiliated with a major political party. The caller gave the voter incorrect polling place information which was very far from the voter's residence. Fortunately, the voter checked her polling location online and discovered that the caller had given her incorrect information.[47]

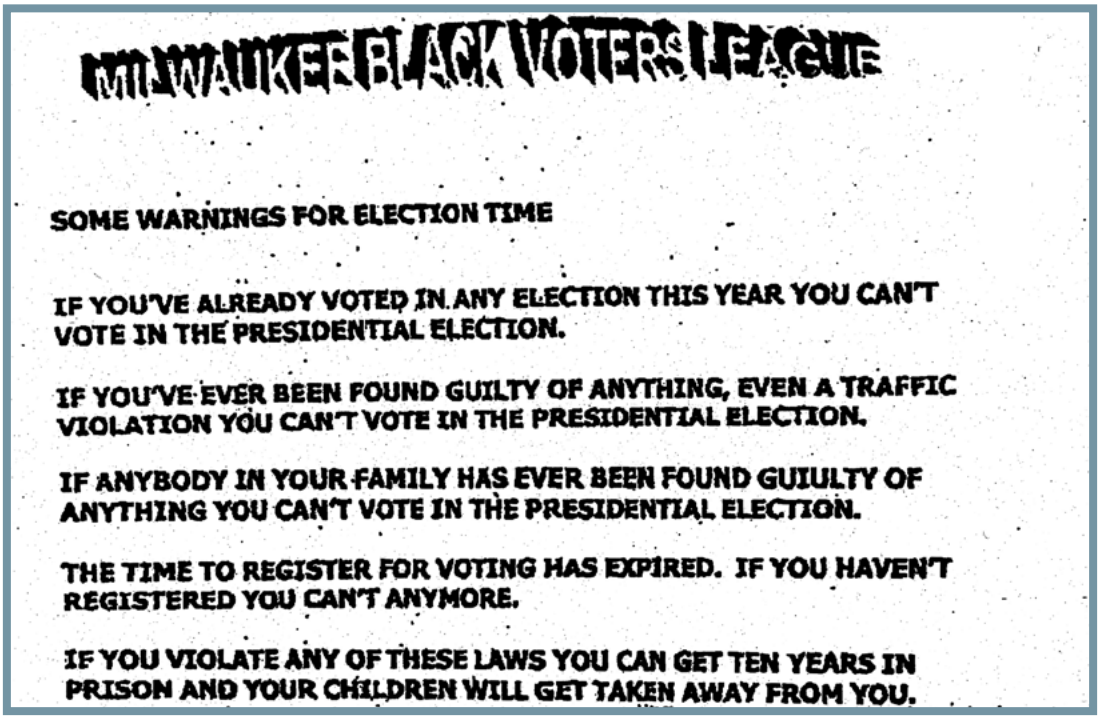
Report #3. In July 2011, voters registered with one major political party received robocalls claiming to be from an anti-abortion rights group saying that they did not need to go to a polling place to vote because their absentee ballot was in the mail. The calls came on the last day that polling places were open for the Democratic primary and a recall election—too late to submit an absentee ballot.[48]

CURRENT LAW

Current Wisconsin law could apply to these examples, but the breadth of the applicable statutes render their applicability vague and therefore potentially ineffective. For example, one broadly worded statute provides that "[n]o person may personally or through an agent, by abduction, duress, or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise at an election."[49] No definition is provided for the phrase "fraudulent device or contrivance," nor has it been litigated, and it is unclear how broadly courts will interpret it. Another statute prohibits the knowing false representation "pertaining to a candidate or referendum which is intended or tends to affect voting at an election."[50] This is exceptionally broad but is aimed at statements about candidates rather than the time, place or manner of voting and would be inapplicable to these examples.

RECOMMENDATION

- Clearly and concisely define terms in the current law.


MILWAUKEE BLACK VOTERS LEAGUE

SOME WARNINGS FOR ELECTION TIME

IF YOU'VE ALREADY VOTED IN ANY ELECTION THIS YEAR YOU CAN'T VOTE IN THE PRESIDENTIAL ELECTION.

IF YOU'VE EVER BEEN FOUND GUILTY OF ANYTHING, EVEN A TRAFFIC VIOLATION YOU CAN'T VOTE IN THE PRESIDENTIAL ELECTION.

IF ANYBODY IN YOUR FAMILY HAS EVER BEEN FOUND GUIULTY OF ANYTHING YOU CAN'T VOTE IN THE PRESIDENTIAL ELECTION.

THE TIME TO REGISTER FOR VOTING HAS EXPIRED. IF YOU HAVEN'T REGISTERED YOU CAN'T ANYMORE.

IF YOU VIOLATE ANY OF THESE LAWS YOU CAN GET TEN YEARS IN PRISON AND YOUR CHILDREN WILL GET TAKEN AWAY FROM YOU.

46 Our Vote Live, 2004-11-02 15:32:21 PST, Report no. 45803.

47 Our Vote Live, 2006-11-07, 12:32:39 AM, Report no. 705.

48 Kase Wickman, Robocalls Spam WI Democrats, Telling Them Not to Vote in Recall Elections, The Raw Story (July 12, 2011), *http://www.rawstory.com/rs/2011/07/12/robocalls-spam-wi-democrats-telling-them-not-to-vote-in-recall-elections*.

49 Wis. Stat. § 12.09.

50 Id. § 12.05.

Summary and General Policy Recommendations

As is clear from the various examples, there are many recurring themes with respect to deficiencies in state laws.

THE NEED FOR A CLEAR LEGAL DEFINITION

These examples show that although the laws which broadly prohibit interference with the right to vote could be read as proscribing deceptive election practices, they are not being applied or used to prosecute such activity. This may be due to a few reasons: the broad sweep of these interference laws and resulting confusion about their application; the challenge associated with prosecuting anonymous communications; and perhaps even the lack of incentive to prosecute deceptive election practices. Regardless, there remains an exigent need for a clear basis in the law to combat this type of election fraud. Such laws would provide attorneys with the clarity they need to pursue these acts as election crimes and serve as a warning to the perpetrators themselves that their deceptive election practices are subject to prosecution.

To be effective and protect voters, it is critical that the law provide a clear and exacting legal definition prohibited deceptive practice: that disseminating materially false information concerning the time, place, or manner of voting with the intent to prevent a voter from exercising his or her right to vote is prohibited.

To be effective and protect voters, it is critical that the law provide a clear and exacting legal definition prohibited deceptive practice: that disseminating materially false information concerning the time, place, or manner of voting with the intent to prevent a voter from exercising his or her right to vote is prohibited. First, the information must be materially false, which means that there must be a false statement of fact or a factual omission resulting in a false statement. Second, the statement must be made with the intent to prevent a voter from voting. This is essential to ensuring that only those who intentionally communicate false election information are prosecuted and that honest mistakes made without the intent to disenfranchise voters do not fall within the scope of the law.

Additionally, an effective law should be precise enough to include the different modes of communication that can be used to disseminate false information to the public – written, electronic, and telephonic – so that the prohibition will extend not only to robocalls and neighborhood flyers, but also to online deceptive election practices (such as emails or spyware) that could rapidly spread false information under the guise of official communications from a campaign or election administrators.[51] This provision is especially important as electronic communication is quickly becoming the preferred method of disseminating false election information.

REQUIRE CORRECTIVE ACTION

Protecting voters from deceptive election practices requires more than a prohibition on the conduct; jurisdictions should also take measures to counteract deceptive election practices with accurate information. While it may be impossible to fully neutralize deceptive election practices, it would be helpful for jurisdictions to establish policies and procedures by which all reasonably available means of communication could be employed to disseminate correct voting information. All avenues and channels of transmission should be utilized to disseminate correct information, including outreach via news media, the press, social media, phone calls, and canvassing.

51 See additional recommendations on false information disseminated via the Internet, email and other new media in "Deceptive Practices 2.0," published by Common Cause and the Lawyers' Committee on Civil Rights Under Law in 2008, available at *www.commoncause.org/deceptivepracticesreport*.

Election officials need not wait for state legislators to act to clarify criminal penalties and prohibited behavior in jurisdictions in which such acts are proscribed by law.

Deceptive election practices are a continual threat in all elections, and they occur most often in the run-up to Election Day when there is little time to react and correct misinformation. Secretaries of state and law enforcement agencies can and should coordinate with voting rights and other civil rights organizations on the ground to plan a coordinated and rapid response to deceptive election practices when they occur.

This plan should include the creation of a system designed to monitor deceptive election practices and intake reports. There may also be avenues for political parties or attorneys general to obtain an injunction against deceptive election practices from a known perpetrator (for example, to shut down robocalls from known numbers).

Voter education is also a critical component to combating deceptive election practices. In communities where such activity is known to occur frequently, election administration officials should preemptively address these practices as part of their voter engagement and outreach plans. Information about voting procedure should be placed clearly and conspicuously in areas where the community gathers, in the local media, and online so that people know what to expect.

ENFORCEMENT

Law enforcement officials should use every tool at their disposal to prosecute individuals and campaign entities responsible for perpetrating deceptive election practices. Enforcement entities should also make known their intent to fully prosecute those who intend to mislead voters about their rights.

From the examples provided in the case studies section, the need for an effective enforcement mechanism to empower voters who are deprived of their right to vote are a result of the actions of others is clear. Even in states with some type of law to protect against deceptive election practices, there is a slim record of enforcement by any state authority. Therefore, any successful model to curb deceptive election practices must include a private right of action so victims can immediately seek redress and provide an effective defense against such intimidation efforts.

TRANSPARENCY

Finally, to further document deceptive election practices and refine an effective response in subsequent elections, attorneys general or other data-collection agencies should compile a post-election report of deceptive election practices utilized during the election that details the critical components of such activities for follow-up investigation.

This data should include the geographic location and the racial, ethnic, and/or language-minority group toward whom the alleged deceptive election practice was directed. Corrective actions, referrals to prosecutors, litigation, and criminal prosecution should also be analyzed.

Federal Legislative Action

DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT OF 2005

In 2005, then Senator Barack Obama (D-IL) introduced S. 1975, the Deceptive Practices and Voter Intimidation Prevention Act of 2005 which would have made it 1) a federal crime to knowingly deceive another person regarding the time, place, or manner of conducting any federal election; 2) a criminal offense to knowingly misrepresent the qualifications on voter eligibility for any such election; 3) created a private right of action for any person aggrieved by a violation of the prohibition; and 4) requirement that the Attorney General investigate any report of a deceptive election practice within 48 hours after its receipt and provide correct information to affected voters. Additionally, it would require the Attorney General to conduct an immediate investigation and take all effective measures necessary to provide correct information if the deceptive activity took place within 72 hours of an election. Congressman Rush Holt (D-NJ), Congressman John Lewis (D-GA), and others introduced a companion bill in the U.S. House of Representatives.

DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT OF 2007

In 2007, Senators Barack Obama (D-IL), Charles E. Schumer (D-NY), Ben Cardin (D-MD) and others re-introduced the Deceptive Practices and Voter Intimidation Prevention Act of 2007 (S. 453). This version of the bill, introduced in the 110th Congress, was identical to the bill originally proposed by Obama in 2005. It continued to emphasize the importance of ensuring that voters had access to correct and valid information in order to protect the integrity of our election process and ensure that all eligible votes are counted. It was voted out of the Senate Judiciary Committee and was placed on the Senate Calendar. During that year, the U.S. House of Representatives passed a similar version of the Senate bill. Introduced by then-Congressman Rahm Emmanuel (D-IL) and Chairman John Conyers (D-MI), the House bill, H.R. 1281, passed unanimously on the House floor. With this momentum coming out of the House of Representatives, S. 453 was poised to be passed on the Senate floor until its lead co-sponsor announced his run for the Presidency which stalled further deliberations in the Senate.

DECEPTIVE PRACTICES AND VOTER INTIMIDATION PREVENTION ACT OF 2011

In 2011, Senators Chuck Schumer and Ben Cardin introduced the Deceptive Practices and Voter Intimidation Act of 2011, S.1994. Senators Cardin and Schumer worked with Department of Justice officials and civil rights organizations to make minor adjustments from the previous bills. Among the changes, the revised Schumer-Cardin bill added extensive legislative findings, specified that prohibited conduct includes any means of communication (written, electronic, and telephonic), and expands the corrective action required by the Department of Justice.

ADDRESSING FIRST AMENDMENT CONCERNS

Some concerns have been raised that criminalizing deceptive election practices unconstitutionally restricts freedom of speech. The importance of freedom of speech to democracy is immeasurable and should be fiercely guarded by courts and legislators. The constitutional right to free speech, however, cannot be used to prevent another person from exercising an equally fundamental right: the right to vote. The model law we propose does not infringe on freedom of speech because it captures only unprotected speech.

Supreme Court jurisprudence has long established that certain categories of low-value speech are outside the realm of First Amendment protection.[52] Obscenity, defamation, incitement, and fraud have historically been considered by the Court as unworthy of First Amendment protection. Deceptive election speech regarding voting is fraudulent and therefore unprotected.

This is for good reason. False statements have little constitutional value.[53] They do little to contribute to the "uninhibited, robust, and wide-open debate" on public issues, the key principle underlying freedom of speech protection.[54] Spreading lies about an election to prevent certain people from voting certainly does not comport with this principle. The distinguishing element between false statements which are protected and those which are unprotected is the existence of a malicious intent.[55] The Court has steadfastly

52 U.S. v. Stevens, 130 S.Ct. 1577, 1584 (2010).

53 Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

54 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

55 United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010). aff'd, 567 U.S. ____ (June 28, 2012), available at *http://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf*.

held that when an individual communicates a false statement of fact about a matter of public concern, the speaker can be held to account only upon a showing of intent; this avoids the risk of punishing innocent mistakes.[56] The model law proposed in this report regulates only unprotected speech because, in addition to a false statement, it requires the showing of intent to deprive another of the right to vote. To hold a person accountable under the model law, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false and demonstrate that the defendant made the representation with the intent to mislead the audience.[57]

Even where unprotected speech is concerned, a statute must be carefully crafted to target only the proscribed conduct so as not to chill protected speech. The model law does exactly that: it prohibits specific communications – materially false statements about the time, place, or manner of elections or qualifications for voting – and applies only to the 90 days prior to an election, during the height of election activity such as voter registration and early voting. By prohibiting only unprotected speech, the model law mirrors provisions in the National Voter Registration Act of 1993 that criminalize fraudulent registration and voting.[58]

Even if analyzed under heightened scrutiny, the model law would pass constitutional muster because states have a compelling interest in protecting the right to vote. In Burson v. Freeman, the Court upheld a provision of the Tennessee Code, which prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place.[59] The Court reasoned that the 100-foot boundary served a compelling state interest in protecting voters from interference, harassment, and intimidation during the voting process.[60] It clearly follows from this holding that the state has a compelling interest in protecting the actual act of voting, which is precisely what deceptive election practices seek to prevent. Losing the opportunity to vote through no fault of the voter is an irreparable harm. Once polls close on Election Day, there is nothing that a victim of deceptive election practices can do; that person has lost his or her vote and their loss cannot be recovered or remedied.

56 Id. at 1206-07 (citing Sullivan, 376 U.S. at 283).

57 See Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600 (2003).

58 42 U.S.C.A. § 1973gg-10 (West).

59 504 U.S. 191, 210 (1992).

60 Id.

Conclusion

Five decades after the passage of the Voting Rights Act, the examples highlighted in this report demonstrate that the right to vote remains under attack. The examples of deceptive election practices contained within this report paint a grim picture of what voters may face when heading to the polls in November.

Although many states have enacted laws that arguably address some of the pernicious campaigns designed to confuse voters, very few states have unambiguous statutes prohibiting the use of deception concerning the time, place, or manner of voting, voter qualifications, or other forms of interference in the election process.

Some states have narrowly construed laws prohibiting the impersonation of election officials or use of fraudulent documents that appear to come from official government sources. Other states have attenuated laws regarding traditional deceptive election practices as they pertain to the process of voting that also cover false statements about a candidate or ballot initiative intended to affect the outcome of an election. Law enforcement and election officials need a clear direction to address deceptive election practices.

In the short term, before laws can be officially reformed, election administrators should use their regulatory authority to promulgate policies that will combat deceptive election practices and disseminate corrected information to voters in a timely manner. The policy recommendations in this report provide common sense reforms that will address a problem that has persisted in elections for far too long and will continue to persist unless decisive action is taken. It is time for our leaders to ensure that the rights of all voters are protected without ambiguity to ensure they can fully participate in our democracy.

It is time for our leaders to ensure that the rights of all voters are protected without ambiguity to ensure they can fully participate in our democracy.

Appendix

SECTION 1. SHORT TITLE.

This act shall be known and may be cited as the 'Deceptive Practices and Voter Intimidation Prevention Act'

SECTION 2. DECLARATION OF POLICY

The General Assembly finds and declares as follows:

1. Deceptive practices, which are the intentional dissemination of false or misleading information about the voting process with the intent to prevent an eligible voter from casting a ballot, have been perpetrated in order to suppress voting, intimidate the electorate, and skew election results.

2. This type of voter suppression often goes unaddressed by authorities and perpetrators are rarely caught. New technology makes the spread of these false information campaigns particularly widespread and egregious through the use of robocalls, electronic mail, and other new social media such as Facebook, Twitter, and microblog websites.

3. The right to vote is a fundamental right and the unimpeded exercise of this right is essential to the functioning of our democracy.

4. Those responsible for deceptive practices and similar efforts must be held accountable, and civil and criminal penalties must be available to punish anyone who seeks to keep voters away from the polls by providing false information.

5. Moreover, this State's government must take a proactive role in correcting such false information and preserve the integrity of the electoral process, assist voters in exercising their right to vote without confusion and provide correct information.

SECTION 3. THE LAW _____ IS AMENDED TO READ:

1. It shall be unlawful for any person within 90 days before an election:

   A. Intentionally communicate or cause to be communicated by any means (including written, electronic, or telephonic communications) materially false information regarding the time, place, or manner of an election, or the qualifications for or restrictions on voter eligibility (including any criminal penalties associated with voting, voter registration status or other) for any such election with the intent to prevent a voter from exercising the right to vote in such election, when the person knows such information is false.

   B. Make to the public, or cause to be made to the public, a materially false statement about an endorsement if such person intends to mislead any voter and knows that the statement is false.

2. Immediately after receiving a credible report concerning materially false information described in subsection (1) or is otherwise aware of false information described in subsection (1), the [Attorney General or other chief law enforcement official designated by the Attorney General] shall investigate all claims and [the Attorney General or other chief law enforcement official designee .or Secretary of State] shall undertake all effective measures including where available public service announcements, emergency alert systems, and other forms of public broadcast, necessary to provide correct information to voters affected by the deception, and refer the matter to the appropriate federal, state, and local authorities for civil and criminal prosecution.

   A. The Attorney General shall promulgate regulations concerning the methods and means of corrective actions to be taken under paragraph (2).

   B. Such regulations authorized by (2)(a) shall be developed in consultation with civil rights organizations, voting rights groups, State and local election officials, voter protection groups and other interested community organizations.

Appendix continued

3. DEFINITIONS

   A. For purposes of this Section, an election is a general, primary, run-off, or special election held for the purpose of nominating or electing a candidate for the federal, state, or local elected office.

   B. For purposes of this Section, a statement about an endorsement is materially false if:

      i. In an upcoming election, the statement states that a specifically named person, political party, or organization has endorsed the election of a specific candidate for an elected office; and

      ii. Such person, political party, or organization has not stated that it supports the election of a candidate, or supports the election of another candidate.

4. CIVIL RIGHT OF ACTION: Any person aggrieved by a violation of this section may institute a civil action or other proper proceeding for preventive relief, including a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. The court, in its discretion, shall have the power to include in its judgment recovery by the party from the defendant of all court costs and reasonable attorney fees incurred in the legal proceeding [as well as punitive damages where consistent with state law].

5. CRIMINAL PENALTY: Any person who violates paragraph (1) shall be fined not more than [$100,000], imprisoned not more than 5 years, or both.

SECTION 4. REPORTS TO STATE LEGISLATURE

1. In General, Not later than 90 days after any general election, the Attorney General shall submit to the appropriate committees of the state legislature a report compiling and detailing all allegations of deceptive practices received pursuant to this Act that relate to elections held in the previous two years.

2. Contents – In general – each report submitted shall include:

   A. Descriptions of each allegation of a deceptive practice, including the geographic location and the racial and ethnic composition, as well as language minority group membership, of the persons toward whom the alleged deceptive practice was directed;

   B. Descriptions of each corrective actions taken in response to such allegations;

   C. Descriptions of each referrals of such an allegation to other Federal, State, or local agencies;

   C. Descriptions of any civil litigation instituted in connection with such allegations; and

   E. Descriptions of any criminal prosecution instituted in connection with the receipt of such allegations.

3. Report Made Public – On the date that the Attorney General submits the report required under this subsection, the Attorney General shall also make the report publicly available through the Internet and other appropriate means.

SECTION 5. EFFECTIVE DATE

This act shall take effect within 90 days of its passage.

SECTION 6. SEVERABILITY

If any provision of this Act or any amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of the provisions and amendments to any person or circumstance, shall not be affected by the holding.

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY FOR MS. FLANAGAN

"Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S. 1994"

1. In your answer to a previous question for the record, you contended that page 11 of the Alvarez plurality opinion supported your view that S.1994 would be constitutional on the ground that government can suppress "fraud." While government can indeed target fraud, the speech at issue does not fall within that category. The plurality opinion on p. 11, found constitutionally problematic with the Stolen Valor Act the same point that applies to S.1994: its applicability "without regard to whether the lie was made for personal gain." As the Court plurality at page 11 stated and I quoted in my earlier question to you, "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain *a material advantage,* it would give the government a broad censorial power unprecedented in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom" (emphasis added). In your earlier answer, you contended that the plurality opinion raised no issues for S.1994 because the bill requires that the information be "materially false." But the plurality found that the Stolen Valor Act was unconstitutional not because the speech might not be *material* in the sense of being relevant to the listener, as you suggested, but because the speaker was not making the statement for his own *material advantage, i.e.,* financial gain. Does not S.1994 suffer from the same constitutional defect as the Stolen Valor Act in that it punishes a new category of false speech and unconstitutionally chills speech because it targets speech not made to "gain a material advantage" and "without regard to whether the lie was made for personal gain"?

    a. **RESPONSE**: S. 1994 (112th Congress) does not suffer from the same constitutional defect as the Stolen Valor Act. "Personal gain" and "material advantage" are not dispositive. The Alvarez plurality recognized that "[e]ven when considering some instances of defamation and fraud, the United States Supreme Court has been careful to instruct that falsity alone may not suffice to bring speech outside the First Amendment. **The statements must be a knowing or reckless falsehood**." United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (emphasis added). S. 1994 clarifies federal law, and consistent with First Amendment jurisprudence, including Alvarez, requires the speech to be knowingly made and materially false.

2. With respect to your position that S. 1994 can be constitutionally justified as an anti-fraud measure, Justice Breyer's concurrence in Alvarez stated that fraud statutes "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury." How is S. 1994 based not on mere

supposition, but requires proof that a victim relied on a misrepresentation and that such reliance caused actual injury of the kind the Alvarez Court demanded?

a. **RESPONSE**: The Alvarez Court made no such demand of post-hoc injury. Moreover, Justice Breyer's concurrence recognizes the constitutionality of prohibiting false statements where "someone was deceived into following a 'course of action he would not have pursued but for the deceitful conduct,'" such as statutes forbidding impersonation of public officials. Alvarez, 132 S. Ct. at 2554 (Breyer, J., concurring) (internal citation omitted).

3. As I noted in my earlier question, the plurality, at page 11, concluded that allowing criminalization of false statements that were not within a traditionally proscribed category of speech "would endorse government authority to compile a list about which false statements are punishable." The Court did not uphold the Stolen Valor Act as prohibiting such a traditionally proscribed category of speech, even though the misrepresentation made in that case occurred in an effort to affect the outcome of an election. Is it not the case that the speech that would be proscribed by S.1994 would represent an unprecedented content-based restriction and thus would fail the strict scrutiny that such novel content-based speech restrictions would face under the plurality's analysis?

a. **RESPONSE:** No. It is my opinion that S. 1994 would survive strict scrutiny and is consistent with Alvarez. In accordance with the decision, S. 1994 provides a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote). There is nothing "novel" about regulating speech related to fraud or integral to criminal conduct, particularly when such speech "undermines the function and province of the law and threatens the integrity" of our democratic form of government. See Alvarez, 132 S. Ct. at 2540.

4. In your answer to a previous question for the record, you argued that S. 1994's prohibition on false statements was constitutional under Alvarez because the bill requires the speaker to know of the statement's falsity and to "ha[ve] the *intent* to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote." But as I asked you to comment on earlier, the concurrence stated at pages 7-8 that even though a statute's applicability only to "knowing and intentional acts of deception" "reduc[es] the risk that valuable speech is chilled… it still ranges broadly. And that breadth means that it creates a significant risk of First Amendment harm." Nonetheless, your answer to my earlier question did not address the applicability of that statement from the concurring opinion to S.1994. Please address whether this statement means that S.1994 "creates a significant risk of First Amendment harm" despite the bill's intent requirement.

a. **RESPONSE:** For the reasons discussed in my response to Question 3, the statement from Justice Breyer's concurrence does not mean that S. 1994 creates a significant risk of First Amendment harm.

5. Earlier, I asked you to address the applicability of the following statement from page 13 of the Alvarez plurality to the constitutionality of S.1994: "There must be a direct causal link between the restriction imposed and the injury to be prevented." You responded that the bill's restriction of a false statement was directly connected to "the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote)." But your discussion of the supposed injury to be prevented is not an injury at all. Rather, it repeats the bill's standard of intent of the speaker who made the false statement. As noted above, the Court stated that the injury to be prevented is the material gain of the speaker. How are the restrictions on false statements in S. 1994 connected to the material gain of the speaker?

    a. **RESPONSE:** Material gain is not dispositive of S. 1994's constitutionality. See, for example, Alvarez, 132 S. Ct. at 2544 (outlining content-based restrictions on speech with no requirement of material gain such as speech "to incite imminent lawless action"; "obscenity"; "defamation"; and "speech integral to criminal conduct"). Deceptive voter practices are intended to prevent people from exercising their right to vote, thereby skewing election results and undermining the legitimacy of our democratic processes.

6. As noted, the plurality at page 15 and the concurrence at page 10 found First Amendment violations with the Stolen Valor Act because there was no showing that counter-speech would not work to remedy the false speech at issue in Alvarez. What factual support that would satisfy the strict scrutiny test applied by the plurality or intermediate scrutiny of the concurrence can you offer for your statements that in the context of S.1994, "[c]ounter-speech by political opponents of those alleged to have made false statements *alone* is inadequate" and that "'[s]peech that is true' fails to fully remedy the scope of the harm in this case"?

    a. **RESPONSE:** For factual support, please see two enclosed reports, *Deceptive Election Practices and Voter Intimidation: The Need for Voter Protection* and *Deceptive Practices 2.0*. Both reports provide numerous examples of deceptive practices that would be better addressed with comprehensive legislation such as S. 1994.

7. You stated that the government should respond when individuals utilize false information to confuse voters about the place, manner, or qualifications of voting. You state that the "Attorney General communicating correct information" "is in keeping with our highest American values." How do you square that point of view with the position of the Alvarez plurality, at page 11, that "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth"? What if

the statement is made honestly in error or was in fact true even if that were not known to the Attorney General or to the private party that sought such corrective speech?

a. **RESPONSE:** Our constitutional tradition stands against deliberate attempts to deprive or impede eligible Americans from exercising their right to vote.

   If someone lies about the time or place of holding an election, or the qualifications of voting, then disseminating truthful information in the lie's wake is not an illegitimate, Orwellian exercise of power. Rather, providing truthful information about voting is in keeping with bedrock democratic values of civic participation.

   It would be bizarre, indeed, if correcting lies about the time or place of an election led to hyperbolic accusations of installing Oceana's Ministry of Truth.

   If a statement is "honestly" made in error or is "in fact true," then the statement not be made with an intent to mislead voters or materially false, respectively, as required by S. 1994.

8. Earlier, you argued that counter-speech was ineffective in combating certain forms of deceptive political speech, and was a justification for the Department of Justice to provide some official "corrective action" against such speech. You wrote, "Counter-speech by political opponents of those alleged to have made false statements *alone* is inadequate. Deceptive election practices often impersonate official government officials [sic]."

   a. Are S. 1994's content-based speech restrictions limited only to deceptive practices in which an individual impersonates a government official?

      a. **RESPONSE**: No.

   b. Is it not the case that S. 1994 applies to individuals who are not government officials and do not hold themselves out to be government officials, as well as to endorsements other than from government officials?

      a. **RESPONSE**: Yes.

   c. How do you reconcile your justification of S. 1994 on grounds of impersonation of government officials with this statement from page 6 of the Alvarez concurrence (citation and quotations omitted): "Statutes forbidding impersonation of a public official typically focus on *acts* of impersonation, not mere speech, and may require a showing that, for

example, someone was deceived into following a course of action he would not have pursued but for the deceitful conduct"?

a. **RESPONSE**: Deceptive practices sometimes focus on acts of impersonation, not mere speech, and may deceive voters into following a course of action – for example, voting on the wrong day or driving to the wrong polling place – that the voter would not have pursued but for the act of impersonation. For example, sometimes deceptive practices take the form of phony mailings or phony memos using the official seal of a state government or agency, falsely informing voters of Election Day, or warning voters that they may not be registered to vote. These are acts of impersonation and would be covered by S. 1994.

9. You dismissed the fear expressed at page 3 of the concurring opinion that "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." You claimed that under S. 1994, the elements of knowledge, materiality, and intent "should not chill true speech." Justice Breyer, however, wrote at page 8 of his concurring opinion, "[G]iven the haziness of individual memory…, there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to make him liable." What basis do you have for disagreeing with the Supreme Court's view that prosecutions of false statements, even when intent is required, will produce a chilling effect? Would not speakers fear that they might misspeak and be prosecuted for violating S. 1994, even if an actual conviction could not be obtained, despite their lack of intent?

a. **RESPONSE**: It is my opinion that S. 1994 will not chill genuine political speech, because S. 1994 is not about false statements in general, nor even about politics and policy. S. 1994 is about protecting voters from deliberate misinformation campaigns that intend to confuse voters about the requirements and process of voting.

10. S. 1994 applies to core political speech related to election for office in the period preceding an election. A person who would violate S. 1994 would be subject to prosecution for making false statements about politics, which is, as the concurrence said in Alvarez at page 3, "a kind of speech that lies at the First Amendment's heart." On what basis do you rest your earlier response that "S. 1994 is not merely about false statements in general, nor even about politics. S. 1994 is about protecting voters from deliberate misinformation campaigns that intend to confuse voters about the requirements and process of voting"?

a. **RESPONSE:** I based my response on the text of S. 1994. The bill would prohibit false statements about information s/he knows to be materially false and has the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote. The information must be about the time or place of holding certain elections or the qualifications for or restrictions on voter eligibility for certain elections or in other circumstances information concerning public endorsements.

11. Justice Breyer's concurrence, at pages 7-8, wrote that when a false statement statute applies only to "knowing and intentional acts of deception about readily verifiable facts within the knowledge of the speaker… [this] reduc[es] the risk that valuable speech is chilled. But it still ranges very *broadly*. And that *breadth* means that it creates a significant risk of First Amendment harm" (emphasis added).

(a) In response to my previous question, you said that "S. 1994 gives the government a rather *narrow* power to prosecute false statements," (emphasis added), and referred to intentionally false statements. How do you square that characterization with the belief stated in the concurrence that even false statement statutes limited to knowing and intentional acts of deception within the knowledge of the speaker "range very broadly[,] and that breadth means that it creates a significant risk of First Amendment harm"?

a. **RESPONSE:** Justice Breyer "concede[s] that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions … tend to be narrower than the statute before us, in that they limit the scope of their application … sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm. Alvarez, 132 S. Ct. at 2554-55 (Breyer, J., concurring). Unlike the Stolen Valor Act, S. 1994 is far narrower because the bill provides a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote).

(b) When I asked you earlier about this statement, you replied that S. 1994's limitations to knowing and intentional acts of deception about readily verifiable facts meant that the bill raised no free speech concerns. How do you reconcile that statement with the language of the concurrence quoted above?

a. **RESPONSE**: S. 1994 is not nearly as broad as the statute at issue in Alvarez; it is a far narrower statute and does not raise the "breadth" concerns of Justice Breyer's concurrence.

12. In your earlier responses, you wrote that S. 1994 did not raise any concerns of selective enforcement. You relied on the bill's requirements of knowledge and intent to support your conclusion. However, Justice Breyer's concurrence, page 5, raised concerns that a false statement statute concerning political speech, even with knowledge and intent requirements, may lead "those who are unpopular [to] fear that the government would use that weapon selectively," and on page 8, that "a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to make him liable" (emphasis in original). Given the political advantage that would be available to a prosecutor to bring charges of violation of S.1994 against his opponent, whether or not well-founded, and the ability of private parties to bring lawsuits in the period immediately before the election against candidates with whom they disagreed, how does S.1994 withstand Justice Breyer's constitutional concerns of "censorious selectivity by prosecutors"?

    a. **RESPONSE**: Speculation about an overzealous prosecutor could be cited to defeat passage of a whole host of bills. Fortunately, for the reasons discussed in my oral testimony, in my previous answers to questions for the record, and in these questions for the record, S. 1994 is narrowly tailored to address intentional efforts to disseminate materially false information about the process of voting and, in my view, comports with the First Amendment.

13. In responding to Justice Breyer's concern expressed at page 8 of his concurrence that a false statement statute, even one requiring knowledge and intent, "may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like," you wrote that the statements prohibited by S.1994 "are different from the substance of voting or 'bar stool braggadocio.'"

    a. Justice Breyer's point in this excerpt was the chilling effect that false statement statutes cause in contexts in which they should not apply, such as "in the political arena," as S. 1994 undoubtedly does. Given that S. 1994 applies to statements made by campaigns in the period leading to an election, how is your claim that S. 1994 is inapplicable to "statements about the substance of politics" at all responsive to Justice Breyer's point?

        a. **RESPONSE:** S. 1994 is not merely applicable to "statements made by campaigns" – it is a generally applicable law. S. 1994 applies to materially false, intentionally disseminated statements that concern the *process and qualifications for voting* – not substantive policy matters.

    b. Justice Breyer also wrote that false statement statutes could not constitutionally be applied to "bar stool braggadocio" because of the absence of the kind of harm arising from such statements that could justify such a prohibition. Your earlier answer stated that the statements at issue

in S. 1994 "are different than statements about … 'bar stool braggadocio.'" Does not section 3(b) of S. 1994 apply to prohibited communications made "by any means," including statements made in barrooms?

a. **RESPONSE:** Yes, S. 1994 would apply to communications made – even in barrooms - that are knowingly materially false about the time or place of holding a federal election or the qualifications or restrictions voter eligibility for any such election, with the intent to mislead voters, or the intent to impede, hinder, discourage, or prevent another person from exercising the right to vote in an election could include communications made in barrooms. However, such communications are not, in my view, "bar stool braggadocio" – they are deliberate efforts to confuse voters about the process of voting.

14. The Alvarez concurrence at page 5 stated that other false statements statutes "tend to be narrower .. sometimes by specifying that the lies be made in contexts in which a tangible harm is likely to occur…." You wrote that you believed that this statement "counseled in … favor" of the constitutionality of S. 1994 since the bill "specifies that the lies be made in contexts in which a tangible harm is especially likely to occur. In this case, voting." But inherent in anything having a status as "tangible" is that it can be touched. How is a lie about voting "made in contexts in which a tangible harm is likely to occur"?

a. **RESPONSE:** Merriam-Webster's *Dictionary* defines "tangible" as a) "capable of being perceived especially by the sense of touch," and b) "**capable of being precisely identified or realized by the mind**" (emphasis added). Lying about the time or place of an election could absolutely lead to a tangible harm of impeding or preventing someone from voting – the harm being tangible in that reliance on the lie, which results in not voting, is "capable of being precisely identified or realized by the mind."

15. Your earlier response denied that the following statement from page 9 of Justice Breyer's concurrence had any bearing on S. 1994: "In the political arena a false statement is likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas." Your rationale was that "S. 1994 is not aimed at the political arena of ideas, but at the criminal arena that seeks to prevent citizens from exercising their right to vote." Whatever its aims, S. 1994 criminalizes political speech on the basis of its content in the period before an election, and without regard to whether such speech actually prevents any citizens from exercising their right to vote. And, in any event, any effects on voting are not the kinds of tangible harm or material gain that the Court required for the constitutionality of a false statements statute. Would you care to revise your answer?

a. **RESPONSE**: No, except to say that "material gain" is not the sole determinative factor on a speech-related law's constitutionality.

16. Previously, you agreed that section 3(b) of the bill "grants the power to issue restraining orders." You did not answer directly my question whether such an order would constitute a prior restraint on free speech. You replied, "Such an order would prohibit someone from engaging in the communication of knowingly materially false information when the speaker intends to mislead voters or impede, hinder, discourage, or prevent voters from exercising their right to vote." Does such an order constitute a prior restraint on free speech?

    a. **RESPONSE**: No. If S. 1994 were law, such orders would constitute restraints on lies about the process of voting if the lies fall within the contours of the statute. By withstanding First Amendment scrutiny, restraints on these lies would not constitute a prior restraint on free speech.

17. In response to my question whether such an order would be consistent with the First Amendment guarantee of free speech, you replied that such an order would be consistent. You stated that "the Supreme Court has long held that the scope of the Amendment is not absolute. Content-based laws concerning imminent lawless action; obscenity; speech integral to criminal conduct; so-called fighting words; and grave & imminent threats are all consistent with the First Amendment."

    a. How do you reconcile your response with the Alvarez plurality, which, while acknowledging the categories of unprotected speech contained in your answer, refused to add as an additional category "any general exception to the First Amendment for false statements," page 5, and from page 10 (citation omitted), that "[b]efore exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with 'persuasive evidence that a novel restriction is part of a long (if heretofore unrecognized) tradition of proscription'"?

        i. **RESPONSE**: S. 1994 does not add a "general exception to the First Amendment for false statements." It is prescriptive in what it prohibits, and comports with Alvarez because it provides a direct causal link between the restrictions imposed (on the knowing communication of materially false information concerning the time or place of holding an election or the qualifications for or restrictions on voter eligibility) with the injury to be prevented (the intent to mislead voters or impede, hinder, discourage, or prevent another person from exercising the right to vote).

        Nor is it a "novel proscription." As you pointed out in Question 3 of your original questions for the record, there

are "current statutory prohibition[s] of this conduct" proscribed by S. 1994, albeit in less comprehensive statutes.

b. If such an order would constitute a prior restraint on speech, please explain how such an order would be constitutional under established First Amendment jurisprudence.

    i. **RESPONSE:** As I wrote in my original responses to your questions for the record, the Supreme Court has long held that the scope of the First Amendment is not absolute, and S. 1994 complies with the requirements of Alvarez for the reasons discussed in my answer to Question 17(a) and Question 3.