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Federal Law Constraints on Post-Election "Audits"

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The U.S. Department of Justice is committed to ensuring full compliance with all federal laws regarding elections. This includes those provisions of federal law that govern the retention and preservation of election records or that prohibit intimidation of, or interference with, any person's right to vote or to serve as an election official.

The Department is also committed to ensuring that American elections are secure and reflect the choices made on the ballots cast by eligible citizens. "The November 3rd election was the most secure in American history," according to a Joint Statement issued by federal and state officials and released by the federal Cybersecurity & Infrastructure Security Agency. In many jurisdictions, there were automatic recounts or canvasses pursuant to state law due to the closeness of the election results. None of those state law recounts produced evidence of either wrongdoing or mistakes that casts any doubt on the outcome of the national election results.

In recent months, in a number of jurisdictions around the United States, an unusual second round of examinations have been conducted or proposed. These examinations would look at certain ballots, election records, and election systems used to conduct elections in 2020. These examinations, sometimes referred to as "audits," are governed, in the first instance, by state law. In some circumstances, the proposed examinations may comply with state law; in others, they will not. But regardless of the relevant state law, federal law imposes additional constraints with which every jurisdiction must comply. This document provides information about those federal constraints, which are enforced by the Department of Justice.

Constraints Imposed by the Civil Rights Act of 1960

The Civil Rights Act of 1960, now codified at 52 U.S.C. §§ 20701-20706, governs certain "[f]ederal election records." Section 301 of the Act requires state and local election officials to "retain and preserve" all records relating to any "act requisite to voting" for twenty-two months after the conduct of "any general, special, or primary election" at which citizens vote for "President, Vice President, presidential elector, Member of the Senate, [or] Member of the House of Representatives," 52 U.S.C. § 20701. The materials covered by Section 301 extend beyond "papers" to include other "records." Jurisdictions must therefore also retain and preserve records created in digital or electronic form.

The ultimate purpose of the Civil Rights Act's preservation and retention requirements for federal elections records is to "secure a more effective protection of the right to vote." State of Ala. ex rel. Gallion v. Rogers, 187 F. Supp. 848, 853 (M.D. Ala. 1960) (citing H.R. Rep. 956, 86th Cong., 1st Sess. 7 (1959)), aff'd sub nom. Dinkens v. Attorney General, 285 F.2d 430 (5th Cir. 1961) (per curiam). The Act protects the right to vote by ensuring that federal elections records remain available in a form that allows for the Department to investigate and prosecute both civil and criminal elections matters under federal law. The Federal Prosecution of Election Offenses, Eighth Edition 2017 explains that "[t]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes." Id. at 75. It provides that "all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained if the documents or records were generated in connection with an election that included one or more federal candidates." Id. at 78.

The Department interprets the Civil Rights Act to require that covered elections records "be retained either physically by election officials themselves, or under their direct administrative supervision." Federal Prosecution of Elections Offenses at 79. "This is because the document retention requirements of this federal law place the retention and safekeeping duties squarely on the shoulders

of election officers." *Id*. If a state or local election authority designates some other individual or organization to take custody of the election records covered by Section 301, then the Civil Rights Act provides that the "duty to retain and preserve any record or paper so deposited shall devolve upon such custodian." 52 U.S.C. § 20701.

Therefore, if the original election official who has custody of records covered by the Act hands over those election records to other officials (for example, to legislators or other officeholders) or the official turns over the records to private parties (such as companies that offer to conduct "forensic examinations"), the Department interprets the Act to require that "administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records, including the right to physically access" such records. *Id*. In other words, the obligation to retain and preserve election records remains intact regardless of who has physical possession of those records. Jurisdictions must ensure that if they conduct post-election ballot examinations, they also continue to comply with the retention and preservation requirements of Section 301.

There are federal criminal penalties attached to willful failures to comply with the retention and preservation requirements of the Civil Rights Act. First, Section 301 itself makes it a federal crime for "[a]ny officer of election" or "custodian" of election records to willfully fail to comply with the retention and preservation requirements. 52 U.S.C. § 20701. Second, Section 302 provides that any "person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper" covered by Section 301's retention and preservation requirement is subject to federal criminal penalties. *Id*. § 20702. Violators of either section can face fines of up to $1000 and imprisonment of up to one year for each violation.

Election audits are exceedingly rare. But the Department is concerned that some jurisdictions conducting them may be using, or proposing to use, procedures that risk violating the Civil Rights Act. The duty to retain and preserve election records necessarily requires that elections officials maintain the security and integrity of those records and their attendant chain of custody, so that a complete and

uncompromised record of federal elections can be reliably accessed and used in federal law enforcement matters. Where election records leave the control of elections officials, the systems for maintaining the security, integrity and chain of custody of those records can easily be broken. Moreover, where elections records are no longer under the control of elections officials, this can lead to a significant risk of the records being lost, stolen, altered, compromised, or destroyed. This risk is exacerbated if the election records are given to private actors who have neither experience nor expertise in handling such records and who are unfamiliar with the obligations imposed by federal law.

Constraints Imposed by the Federal Laws Prohibiting Intimidation

Federal law prohibits intimidating voters or those attempting to vote. For example, Section 11(b) of the Voting Rights Act of 1965 provides that "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...." 52 U.S.C. § 10307(b). Similarly, Section 12 of the National Voter Registration Act of 1993 makes it illegal for any person, "including an election official," to "knowingly and willfully intimidate[], threaten[], or coerce[], or attempt to intimidate, threaten, or coerce, any person for . . . registering to vote, or voting, or attempting to register or vote" in any election for federal office. *Id.* § 20511(1)(A). Likewise, Section 131 of the Civil Rights Act of 1957 provides that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate" for federal office. 52 U.S.C. § 10101(b).

The Attorney General is authorized to file a civil action seeking preventative relief, including a temporary or permanent injunction, against any person who engages in actions that violate these statutes. See 52 U.S.C. §§ 10308(d); 20510(a). And there are criminal penalties as well. *See, e.g., id.* § 10308(a); 18 U.S.C. §§ 241, 242, 594; *see generally* Federal Prosecution of Election Offenses, at 33-38, 49-54, 56-58.

Judicial decisions have established that voter intimidation need not involve physical threats. In certain contexts, suggesting to individuals that they will face adverse social or legal consequences from voting can constitute an impermissible threat. Here are a few examples of the types of acts that may constitute intimidation:

- Sending a letter to foreign-born Latino registered voters warning them that "if they voted in the upcoming election their personal information would be collected … and … could be provided to organizations who are 'against immigration'" was potentially intimidating. *See United States v. Nguyen*, 673 F.3d 1259 (9th Cir. 2012).
- Having police officers take down the license plate numbers of individuals attending voter registration meetings contributed to intimidating prospective voters. *See United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).
- Sending robocalls telling individuals that if they voted by mail, their personal information would become part of a public database that could be used by police departments to track down old warrants and credit card companies to collect outstanding debts could constitute intimidation. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020).
- Linking individual voters to alleged illegalities in a way that might trigger harassment could constitute intimidation. *See League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018).
- Conducting a "ballot security" program in which defendants stand near Native American voters discussing Native Americans who had been prosecuted for illegally voting, follow voters out of the polling places, and record their license plate numbers might constitute intimidation. *See Daschle v. Thune*, No. 4:04 Civ. 04177 (D.S.D. Nov. 1, 2004).

See also United States v. North Carolina Republican Party, No. 5:92-cv-00161 (E.D.N.C. Feb. 27, 1992) (approving a consent decree in a case where the United States alleged that it violated Section 11(b) to send postcards to voters in predominantly African American precincts falsely claiming that voters were required to have lived in the same precinct for thirty days prior to the election and stating that it is a "federal crime to knowingly give false information about your name, residence or period of residence to an election official").[1]

[1] While voter intimidation need not involve physical threats, federal law of course prohibits using "force or threat of force" to intimidate or interfere with, or attempt to intimidate or interfere with, any person's "voting or qualifying to vote" or serving "as a poll watcher, or any legally authorized election official, in any primary, special, or general election." 18 U.S.C. § 245(b)(1)(A). The Deputy Attorney General recently issued Guidance Regarding Threats Against Election Workers.

There have been reports, with respect to some of the post-2020 ballot examinations, of proposals to contact individuals face to face to see whether the individuals were qualified voters who had actually voted. *See, e.g.*, Cyber Ninjas Statement of Work ¶ 5.1 (proposing to select three precincts in a large urban county to collect information from individuals through "a combination of phone calls and physical canvassing").

This sort of activity raises concerns regarding potential intimidation of voters. For example, when such investigative efforts are directed, or are perceived to be directed, at minority voters or minority communities, they can have a significant intimidating effect on qualified voters that can deter them from seeking to vote in the future. Jurisdictions that authorize or conduct audits must ensure that the way those reviews are conducted has neither the purpose nor the effect of dissuading qualified citizens from participating in the electoral process. If they do not, the Department will act to ensure that all eligible citizens feel safe in exercising their right to register and cast a ballot in future elections.

If jurisdictions have questions about the constraints federal law places on the kinds of post-election audits they can conduct, they should contact the Voting Section of the Civil Rights Division. If citizens believe a jurisdiction has violated the Civil Rights Act's election record retention and preservation requirements, or believe they have been subjected to intimidation, they can use the Civil Rights Division's online complaint form to report their concerns or call (800) 253-3931.