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Federal Criminal Laws Prohibiting Unlawful Voting

Introduction

While the U.S. Constitution charges the states with primary responsibility for regulating federal elections, it also provides that the federal government play a significant role in overseeing such elections. The Supreme Court has held that this role includes enacting laws to protect the integrity of federal elections. *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932). This In Focus summarizes the federal government’s constitutional authority to criminalize conduct that undermines election integrity, provides a brief overview of the federal government’s jurisdiction to prosecute election crimes, and examines a few of the federal criminal laws that prohibit unlawful voting—fraudulent registration and voting, and unlawful voting by aliens. This In Focus also offers some considerations for Congress.

Federal Authority Over Elections

Article I, Section 4, cl. 1, of the U.S. Constitution, known as the Elections Clause, states, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.” State governments have initial and principal authority for administering elections within their jurisdictions, but the Supreme Court has recognized that the Constitution provides that the federal government maintains authority over elections, including guarding the safety and integrity of congressional elections. For example, the Supreme Court held that the Elections Clause embraces Congress’s authority to provide a complete code for congressional elections and that “Congress may supplement ... state regulations or may substitute its own,” including imposing “additional penalties for the violation of the state laws or provide independent sanctions.” *Smiley*, 285 U.S. at 366-67. The Court in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808–09 (1995) further observed that by providing Congress with override authority over the states, the Framers of the Constitution sought to avoid states potentially abusing their power over congressional elections.

With regard to presidential elections, the power to appoint electors belongs to the states under the Electors Clause, Article II, Section 1, cl. 2. The Supreme Court has held that, although Congress’s power in the realm of presidential elections under Article II, Section 1, cl. 4, appears more limited than either the states’ power under Article II or its constitutional power over congressional elections found in Article I, Section 4, cl. 1, Congress nonetheless has the constitutional authority to protect the integrity of such elections. In *Burroughs and Cannon v. U.S.*, 290 U.S. 534, 545 (1934), the Court held that “[t]he importance of [the presidential] election and the vital character of its

relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated” and that “Congress, undoubtedly, possesses that power ... to preserve the ... institutions of the general government from impairment or destruction[.]”

Congress does not have general regulatory authority over state and local elections, but it may still exercise its constitutional power over such elections in several contexts. For example, under the Fifteenth Amendment, Congress has exercised its authority to prevent unconstitutional voting discrimination in state or local elections. Furthermore, the Supreme Court has recognized that Congress’s power “to make regulations in national elections is augmented by [Article 1, Section 4, cl. 8] the Necessary and Proper Clause.” *Oregon v. Mitchell*, 400 U.S. 112, 120-121 (1970).

Federal Prohibitions of Unlawful Voting

Congress has enacted federal criminal laws that prohibit several categories of unlawful voting, including fraudulent registration and voting, and unlawful voting by an alien in a federal election. Additionally, federal law prohibits certain unlawful activities that may occur during the voting or registration process, such as lying to the government or making false claims of U.S. citizenship.

Federal Jurisdiction

Federal law enforcement jurisdiction over election crimes is established under most statutes through a variety of means including, but not limited to: requiring the presence of a candidate for federal office on the ballot in the election in question, interfering with the work of election officials, interfering with a constitutional right, or using interstate commerce in the accomplishment of a crime. Some federal laws can apply to purely nonfederal elections, while others apply only in the context of federal or mixed elections (elections with federal and nonfederal candidates).

Fraudulent Voting and Registration to Vote

Section 10307 of Title 52, passed as part of the Voting Rights Act of 1965, criminalizes several acts, including fraudulent voting and voting repeatedly in the same election. Section 10307(c) prohibits, in a federal or mixed election, knowingly or willfully giving false information to register or vote, conspiring with another individual for the purpose of encouraging false registration or unlawful voting, or paying or accepting payment either for registration or voting. Section 10307(e) prohibits voting more than once in a federal or mixed election. In April 2024, an individual was sentenced for a voting scheme where she submitted or had others submit dozens of false voter registrations, ballot request forms, and ballots in violation of 52 U.S.C. § 10307.

Section 20511(2) of Title 52, passed as part of the National Voter Registration Act of 1993 (NVRA, also known as “Motor Voter”), provides criminal penalties for the fraudulent procurement or submission of voter registration applications and ballots only in an election for federal office. Section 20511(2) requires that a person act knowingly *and* willfully in depriving, defrauding, or attempting to deprive or defraud the residents of a state of a fair and impartially conducted election process.

Section 241 of Title 18, based on a provision originally passed as part of the Enforcement Act of 1870, makes it unlawful to “conspire to injure, oppress, threaten, or intimidate any person” exercising a constitutional or legal right, including the right to vote. The Enforcement Acts were an early example of legislation passed to effectuate the purposes of the Reconstruction Amendments—i.e., the Thirteenth, Fourteenth, and Fifteenth Amendments—and combat voter suppression against racial and language minority groups. Since that time, the statute has been applied to conduct such as ballot box stuffing and falsifying or destroying ballots. After the 2016 presidential election, Section 241 was applied to prosecute an individual for allegedly conspiring to spread election misinformation online in a case pending appeal before the U.S. Court of Appeals for the Second Circuit after a conviction. *United States v. Mackey*, No. 21-CR-80 (AMD)(SB), 2023 WL 6879613 (E.D.N.Y. Oct. 17, 2023), *appeal pending*.

Unlawful Voting by Aliens

Section 611 of Title 18 prohibits “any alien to vote” in a federal or mixed election for candidates for “the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner.”

There are exceptions to this prohibition, including when an alien is authorized to vote by state or local law for nonfederal candidates or issues and if the ballot is formatted in a way that the alien has the opportunity to vote solely for nonfederal candidates or issues. For example, the District of Columbia enacted D.C. Law 24-242, the Local Resident Voting Rights Amendment Act of 2022, to allow “eligible non-citizen residents” to vote in D.C. local elections. San Francisco allowed “a non-citizen resident of San Francisco” who is otherwise eligible to vote in certain local elections as a result of a 2016 ballot measure.

Additionally, 18 U.S.C. § 611 does not apply when: (1) each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization); (2) the alien permanently resided in the United States prior to attaining the age of 16; and (3) the alien reasonably believed at the time of voting in violation of such subsection that he or she was a citizen of the United States. These exceptions were added in an amendment to the Immigration and Nationality Act, the Child Citizenship Act of 2000, which provides protections for certain aliens who vote based on reasonable

belief of citizenship. The law made similar exceptions to other provisions of the criminal code, including 18 U.S.C. § 1015(f), discussed below.

Other Criminal Laws Related to Unlawful Voting

Beyond criminal laws that prohibit the act of unlawful registration or voting, federal law prohibits several acts that may occur in the course of unlawful voting. For example, Section 1015 of Title 18 criminalizes several activities related to naturalization, citizenship, or alien registry. Subsection (f) criminalizes making “any false claim that [the individual] is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election.” Similarly, Section 911 of Title 18 criminalizes falsely and willfully representing oneself to be a citizen of the United States. However, Section 911 may apply regardless of whether the conduct is part of voting or registering to vote. In addition, several other federal criminal laws prohibit making false statements to the government and to government officials, such as the general prohibition found in 18 U.S.C. § 1001. Lastly, depending on whether illegal voting conduct is part of a conspiracy, the Department of Justice may also pursue prosecution of certain election crimes as conspiracies to defraud the United States under 18 U.S.C. § 371.

Considerations for Congress

Congress may provide additional criminal penalties for unlawful conduct in federal elections or may amend existing laws to provide exceptions, such as the exceptions in 18 U.S.C. § 611 based on reasonable belief of citizenship discussed above. Additionally, while it is already prohibited in federal elections, Congress may also choose to set new election requirements addressing “noncitizen” or aliens voting. For example, the American Confidence in Elections (ACE) Act, H.R. 4563, introduced in the 118th Congress, would require any state or locality allowing noncitizens to vote to maintain separate voter registration lists for noncitizens and separate ballots for elections in which noncitizens are allowed to vote, prohibit states from using federal funding to implement those requirements, and reduce a state’s share of Help America Vote Act funding provided by Congress by 30% if the state allows noncitizens to vote, among other proposals. In the 118th Congress, the House passed H.R. 8281, the SAVE Act, which would amend the NVRA to require individuals to provide documentary proof of U.S. citizenship to register to vote in federal elections and require states to remove noncitizens from registration rolls, among other reforms. The House also passed H.R. 192, which would repeal the District of Columbia Local Resident Voting Rights Amendment Act of 2022 and prohibit individuals who are noncitizens from voting in elections in the District. Both bills have been placed on the Senate legislative calendar under general orders.

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