Voting and Election Law CLE: Reining in Election-Day Dirty Tricks

Benjamin E. Griffith*

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“Tactics of suppression have different effects depending on the communities they reach, and these effects are inextricably tied to past injustices. Unfortunately, these injustices continue in campaigns through more decentralized and subversive strategies of suppression.”

Introduction

A laundry list of linguistic fig leaves grew out of the Watergate era.

To the generation still in diapers (or not yet a twinkle in their parents’ eyes) in 1972, the euphemisms, mafia jargon, and double talk generated in the wake of the break-in of the Democratic Party’s headquarters at the Watergate Hotel (and its coverup by the Nixon Administration) are strange indeed.

These enduring icons in American political lore include

- dirty tricks,
- enemies lists,
- coverup,
- third-rate burglary attempt,
- Deep Throat,
- Saturday Night Massacre,
- Watergate plumbers unit,
- expletive deleted,
- operative and unoperative statements,
- 18 ½ minute gap,
- limited hangout solution
- CREEP, and
•smoking gun.

These and other terms associated with political corruption, deceit, blackmail, misbehavior and criminality became part of the lexicon of the American political process over three decades ago, but they are only a few of those used to characterize the underbelly of some of the worst political antics and campaigns in America. The typical Post-9/11 political campaign has morphed into a juggernaut that is anything but sober and responsible.

Today, based on anecdotal evidence\(^2\) of voter intimidation, voter caging operations\(^3\), false mailouts to predominantly minority population concentrations advertising voting on the wrong day, election day phone-jamming\(^4\), posted notices threatening minorities with arrest if they show up to vote, sleazy campaign tactics and dirty tricks, and reported instances of voter suppression, a compelling argument can be made that the credibility of our nation’s voting process is in jeopardy.\(^5\) Modern elections from 2000 to 2008 have been besieged by voter suppression efforts and assorted electoral shenanigans a/k/a “dirty tricks” that in turn have added to growing disillusionment in minority communities.\(^6\)

This surge in such voter suppression efforts has been mirrored by another phenomenon of American politics: the proliferation of seemingly unaccountable "independent" groups engaging in negative campaign tactics and the abuse of tax-exempt foundations for political purposes. Fast forward to 2008, a year in which America’s saturation with partisan politics reached an all-time high. Add to this toxic stew the elements of the anonymous blog with its instant smear campaign targeting a hapless candidate, the youtube.com attack ad, and the myspace.com rant from both left and right.

Given the long history of official and societal discrimination that led to enactment of such landmark legislation as the Civil Rights Act of 1957 and 1964 and the Voting Rights Act of 1965, it strains credulity to think that the very kind of voter suppression that plagued our nation before these legislative reforms were enacted has actually taken a turn for the worse. It has become more sophisticated. And, given our fascination with the darker side of the computer age, it seems to have no bounds, upper or lower.

**Voter Suppression Tactics Today**

Are the modern voter suppression tactics that we sense are behind today’s election-day dirty tricks beyond the reach of existing legal prohibitions and criminal laws? Are those prohibitions and laws meaningless, empty cannons that purport, but fail, to provide for the prosecution of voter intimidation? When we bemoan the extent to which minority voter suppression has grown over the past several decades, we must ask: Are there any teeth left in the Civil Rights Act and the Voting Rights Act, including its 2006 extension?

A credible case can be made that existing case law and the existing statutory framework fall short of providing an effective, full and available remedy for voter suppression efforts that have gone far beyond borderline “inappropriate” and should be considered well within the ambit of patently illegal pre-election and election day misconduct.
Reining in Dirty Tricks

This presentation will focus on reining in election-day dirty tricks and identifying ways to eliminate or minimize borderline, or plainly illegal, pre-election and election day conduct, particularly dirty tricks of the kind orchestrated by 527 committees, political organizations, “neutral” foundations, nonprofits, and PACs. What we can see is that political battles are no longer content to have the candidates roll around in mud, blood and beer. The modern attack ad is political assassination in its worst form.

Before we move too deeply into the conceptual and theoretical, let’s talk real time. Take a look at what is in the internet pipeline.

**Voter Suppression and Deceptive Practices:**
Deceptive flyers, fake sample ballots and efforts to suppress and intimidate minority voters through use of fake sample ballots in Maryland and intimidating letters in California. These were just some of the deceptive practices used to discourage voters during the 2006 election. Video the Vote was there to get the story.
http://current.com/items/88830864_election_day_dirty_tricks

**Political Free Speech or Blatant Exploitation of 9/11 image?**
Billboard displays burning World Trade Center with slogan, 'Please Don't Vote for a Democrat'
Billboard company defends right to host controversial message
http://www.wftv.com/video/16881749/index.html

**Rick Jacobs on dirty tricks by the "Sons of Nixon"**
Watch this YouTube video to hear Rick Jacobs talk about what the “Sons of Nixon” are doing and what you can do to stop it.
http://www.youtube.com/watch?v=8SKBKIzWphI

**David Dreier: Bush's Rubber Stamp**
http://youtube.com/watch?v=P4MMoJnsGC8

**The Republicans: California's Yacht Party: tax loopholes for Yacht owners**
http://youtube.com/watch?v=AISA-Rj2mzc&feature=related

**The Political Puppet Pals-The Mysterious Ticking Noise**
http://youtube.com/watch?v=852H3-fhn50&feature=related

**Is Obama eligible to run for President or really African-American?**
http://youtube.com/watch?v=u9hD51Dqcjg&feature=related

**New Yorker Magazine Obama Cover**
http://youtube.com/watch?v=4nZAdMPb3sc&feature=related
New Yorker Cover of John McCain
Willfully misrepresenting ballot initiatives
[Link to video]

Bradley Whitford: No More Dirty Tricks!
Bradley Whitford, known for his role as "Josh Lyman" on The West Wing, reminds us of who has the most to lose if the Republicans steal the White House in 2008 for another four years.
[Link to video]

Bradley Whitford, Part Two of "No Dirty Tricks!"
In his second YouTube video for the Courage Campaign, Bradley Whitford talks about the danger posed by the dirty trick to steal the White House in 2008.
[Link to video]

Doh! Arnold won't "read or lead" on dirty tricks
In this YouTube clip, you'll see how incredibly prescient the new “Simpsons” movie is about Arnold's, er, "philosophy" on Republican dirty tricks.
[Link to video]

Dirty Tricks Then and Now

Kevin Phillips, an official in the Nixon Administration, once said that the key to success in politics was to determine "who hated whom" and then to exploit that. Richard Nixon, sadly remembered for such gimmicks as the “Enemies List” used to subject his perceived opponents to IRS audits, excelled at take-no-prisoners politics, but in the end his ruthlessness and paranoia would destroy his presidency. What was not destroyed, unfortunately, were the dirty tricks, abuses of power, illegal tactics and the cynical shrewdness underlying their deployment.

As a child of the 1960’s who came of age during the height of the Viet Nam War, just recounting these abuses is enough to make me wince. These included

1) fundraising on a huge scale, performing favors for businesses and industries that would provide monetary support, while using such government agencies as the IRS, the Justice Department, and the Commerce Department to threaten and blackmail more reluctant businesses into providing financial support;

2) political “dirty tricks” in which hundreds of thousands of dollars were used to discredit opponents through such means as campaign aides planting anonymous letters charging political foes with sexual misbehavior or with having made racial slurs, or having underlings infiltrate opponents’ campaign staffs and wiretap perceived enemies;
(3) obstruction of justice through use of raw political power of the highest office in the
country to thwart investigations of misbehavior, employing such means as destruction of
documents and bribing of witnesses to protect “Tricky Dick”;

(4) the Enemies List, a clandestine “official” list of individuals whom the President
considered to be political threats, using the power of the federal government, as with the
IRS, for example, to "screw our political enemies"; and

(5) personal financial improprieties, such as those that led to the revelation that the
President owed almost $475,000 dollars in back taxes and interest for the period 1969-
1971.

Enemies Lists: As Old As the Republic?

While Richard Nixon had his infamous enemies list, the Clinton's had their "The
Communication Stream of Conspiracy Commerce," a 331-page report allegedly co-
published and distributed by the Democratic National Committee and the White House
counsel's office.9

More recently, Free Republic published a blog stating that Democratic Presidential
Candidate Barack Obama had published an “enemies list” and conspiracy web on “Fight
the Smears,” his presidential campaign website. Noting that “paranoid presidents”
usually wait until they are elected and assume office “before they compile their enemies
list for their myrmidons to act on,” the Free Republic claims that the “Fight the Smears”
website

lists conservative activists David Bossie, Floyd Brown, Bob Perry, Craig Shirley,
Bruce Hawkins and James Lacy.10

The Obama campaign posted an accompanying graphic that lays out a web of
connections between the conservatives, groups they represent and their efforts
opposing liberals, including "Swift Boat", "Clinton Impeachment" and "Willie
Horton Ad".

The text never connects any of those listed to 'smears' against Obama, but instead
lists their political sins such as working with the Minutemen, Ann Coulter, Gary
Aldrich, donating to the Swift Boat Veterans for Truth and running the Willie
Horton ad. The worst that the Obama campaign says is that Bruce Hawkins was
recently disbarred in Washington state.11

The Smear of a Roving Journalist?

Smear by association seems to have no limits. According to Federal Election
Commission rules, coordination between a 527 group and a presidential campaign -- such
as discussing the content or timing of political ads -- is illegal. Despite legal prohibitions
against independent groups coordinating with campaigns, as the summer 2008 campaign
heated up, several political observers began to highlight former Bush senior political advisor Karl Rove’s connections to John McCain’s campaign and his alleged coordination of the campaign’s communications with Freedom’s Watch. The National Journal outlined Karl Rove’s to the 527 group Freedom's Watch, a new 527 conservative advocacy group whose donors have raised $200 million for this election to help Republicans. According to the National Journal,

But away from the spotlight, Rove has been busy pitching in by giving informal advice to McCain's team and spending a considerable amount of time as an outside adviser to Freedom's Watch, the conservative political group that is expected to spend tens of millions of dollars to help elect House GOP candidates. William Weidner, a Freedom's Watch board member, recently told National Journal that Rove has offered strategic advice to both the group and its major financial backer, Las Vegas casino tycoon Sheldon Adelson. Weidner, president of the Las Vegas Sands Corp., which Adelson chairs, called Rove "an invaluable asset" to the group.12

According to The Carpetbagger Report, the Rove-McCain relationship is coming under the spotlight.

[F]or several weeks, Bush’s former chief strategist — the man the president affectionately calls “Turd Blossom” — has been arguing that there really isn’t a relationship.

Just a couple of weeks ago, George Stephanopoulos identified Rove as an “informal adviser” to McCain before an ABC News interview. Rove denied it, and when Stephanopoulos suggested that Rove offers the McCain camp advice and information, Rove would only concede to “chit chat” with the Republican presidential campaign.

… Not only is McCain offering Bush’s foreign and domestic policies as his own, but he’s taking advice from the guy who shaped Bush’s campaigns.

… Rove has been hired to play the role of professional “journalist” for a variety of outlets, including Fox News, the Wall Street Journal, and Newsweek. No one seriously expects credible, independent, bias-free reporting from Rove, but no serious news outlet should be comfortable paying someone to offer commentary and analysis on a presidential campaign while simultaneously advising one of the candidates in the presidential campaign.

In early June My Direct Democracy’s website concluded that “[t] the Republicans want Karl Rove to stay out of the public eye. That isn’t going to happen, because you guys know what you have to do :-) We make Karl Rove stay in the public eye.”13
Opposition Researchers and Blackmail

Yet another weapon in the political campaign arsenal can be found in "opposition researchers" who have engaged in blackmailing opposing candidates with embarrassing personal and family information, obtaining such information easily through the internet or through the old-fashioned gumshoe, secretly employing private detectives. Dirty tricks have included illegal eavesdropping on cell telephone calls and unlawful raiding of credit files and medical records to obtain embarrassing information on candidates. Increasingly sleazy campaign tactics have been employed not to advance a candidate's campaign so much as to disrupt a political opponent.14

With this slice of political reality, can one seriously quibble over whether “dirty tricks” are still played in American politics? And can one honestly take issue with the proposition that voter suppression efforts, fraud, and intimidation have been carried out in recent elections in which one of the key goals was marginalization of the minority vote?

Lest there be a significant percentage of Doubting Thomases in this audience, let’s include some of the more consequential antics that have taken place during the last four years.

**Milwaukee Black Voters League flyers**

About a week before the 2004 election, fliers from a group calling itself the "Milwaukee Black Voters League" flooded an African-American neighborhood in Milwaukee, Wisconsin. The fliers appeared to be honest, informational leaflets designed to provide "warnings" about election-day procedures.

Not only were these "warnings" deeply inaccurate, they were also specifically designed to prevent African Americans from coming to the polls. This was a voter suppression tactic.

The fliers warned:
If you've already voted in any election this year ...
If you've ever been found guilty of anything, even a traffic violation ...
If anybody in your family has ever been found guilty 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.

The fliers ended by threatening: "If you violate any of these laws you can get ten years in prison and your children will get taken away from you."15

**Fake Letters and False Mailings to Voters**

As the past few federal elections have demonstrated, examples like the Milwaukee Black Voters League fliers are neither isolated nor insignificant.
During the 2004 campaign, a similar fake letter was mailed to newly registered voters in Lake County, Ohio, informing them that voters registered through the NAACP or Kerry campaigns were illegal.

Voters in Columbia, South Carolina received false mailings informing them that credit checks and handwriting samples were necessary to vote and that those with outstanding parking tickets or unpaid child support would be arrested at the polls.

In Orlando, Florida, people with clipboards traveled door-to-door, asking others how they intended to vote and telling them that they did not need to bother going to the polls because their votes had already been recorded.16

**United States v. Tobin: Phone Jamming**

A modern example of voter suppression can be found in *United States v. Tobin*17, in which federal prosecutors invoked a seldom-used federal phone harassment statute to successfully prosecute political operatives who were involved in an elaborate phone-jamming scheme.

A federal statute makes it a criminal offense to "make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number." 47 U.S.C. § 223(a)(1)(D) (2000)

47 U.S.C. §223(a)(1)(c) makes it illegal to “make a telephone call or utilize a telecommunications device, whether or not conversation or communication ensues, without disclosing one’s identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives communications.”

Prior to the 2002 election, Defendant James Tobin, the New England Regional Director of the Republican National Committee, traveled to New Hampshire to coordinate VIP visits to the state. During the visit Tobin was approached by the Executive Director of the New Hampshire Republican State Committee. What followed was a conversation regarding a plan by the Executive Director to disrupt the operations of the New Hampshire Democratic Party on election day.

During this conversation, the Executive Director asked for the name of someone who might be able to assist in a plan of this sort. Tobin provided the name of a longtime acquaintance who owned a business that coordinated and designed telephone services for candidates and campaigns. Tobin and the Executive Director did not speak again, but Tobin made a telephone call to his longtime acquaintance to alert him to expect the Executive Director's call.

The call took place, followed by numerous e-mails in which it was agreed that the means of disruption would consist of telemarketers inundating specified numbers with hang-up calls. The Executive Director provided Tobin’s longtime acquaintance with six telephone numbers: five for Democratic Party phones and one for the firefighters union, which was offering rides to the polls.
Just as the polls were opening on election day, the operation was called off, but for about 85 minutes, the phones at the targeted numbers rang almost continuously and the six telephone lines were blocked by repeated hang-up phone calls. Police contacted Tobin's longtime acquaintance about the phone jamming, and following an investigation, Tobin and others were indicted for conspiracy under the cited statutes. Tobin was convicted by a federal jury in the U.S. District Court for the District of New Hampshire of conspiracy to make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number, and in aiding and abetting another in doing so, in violation of 47 U.S.C.S. § 223(a)(1)(D).

This scheme was designed to stifle the get-out-the-vote efforts of a political opponent. In doing so, the scheme also arguably infringed upon the constitutionally protected right to vote. Tobin involved a unique application of a federal phone-harassment statute to the campaign arena, as well as the defendant's puzzling acquittal on charges of conspiring to suppress New Hampshire citizens' votes.

Following his conviction, the defendant political party director appealed.

The First Circuit reversed in United States v. Tobin, 480 F.3d 53 (1st Cir. 2007), siding with the defendant on the claim of error relating to the proper meaning of § 223(a)(1)(D)'s "intent to harass" requirement.

The First Circuit held that the district court's jury instruction broadened the statute unduly, and that to equate harassment with any repeat calling done in bad faith was to enlarge the scope of the statute. The First Circuit read subsection (D) of § 223(a)(1) to require an intent to provoke adverse reactions in the called party and held that a bad motive of some other kind standing alone was not enough.

The First Circuit also pointed out, however, that testimony adduced at trial would have allowed a properly instructed jury to conclude that defendant knew that the disruption was to be caused by multiple phone calls made in order to tie up phone lines. Also, the First Circuit noted that the defendant knew that the scheme if carried out would have disrupted communication; but, he may not have cared about the subjective reaction of the persons at the receiving end. However, according to the Court of Appeals, a jury could have convicted defendant under subsection (D) on the evidence unless a purpose to harass was required; the purpose issue, not developed by either side on appeal, was left for remand.

Reversing the judgment of conviction and sentence, the First Circuit remanded the case to the district court for further proceedings consistent with the court's opinion.

The First Circuit had already made it clear that the issue was a close call.

On remand, the District Court granted a defense motion for judgment of acquittal, holding in United States v. Tobin, 545 F. Supp. 2d 189, 2008 DNH 42, 2008 U.S. Dist. LEXIS 13267 (D.N.H. 2008), that § 223(a)(1)(D) required a specific purpose to cause
emotional upset in a person at the telephone number called. In this case, the District Court reasoned, Defendant Tobin had engaged in a conspiracy to jam phone lines, attempting to prevent Democratic voters needing a ride to the polls from getting through to those providing them. If the statute required a purpose to harass, the evidence produced at trial was insufficient to sustain a conviction, and defendant would be entitled to acquittal.

The District Court had this to say about the conduct and objective of the New England Regional Director of the Republican National Committee:

[T]he court notes that the court of appeals observed that prosecution of Tobin under subsection (D) was not a good "fit" despite his "unattractive conduct." While I would not describe Tobin's conduct in so benign a way, I do agree that prosecution under subsection (D) is not a good fit since the court of appeals has construed "harass" to mean "provoke an adverse emotional reaction," and the term does not cover disruption of telephone communications standing alone or resulting from any other bad motive. … His objective, like that of his charged co-conspirators, was dispassionate and insidious: to suppress as many votes for Democratic candidates as possible by sabotaging efforts to get citizens with transportation problems rides to polling places -- citizens who the conspirators thought would largely vote for Democratic candidates. (emphasis added)

In ruling for Defendant Tobin, the District Court on remand reasoned that the legislative history was not decidedly favorable either way and was hardly conclusive with respect to Congressional intent, but it did suggest that the basic evil that the statute sought to prevent was the use of repeated phone calls to upset the person called.

The District Court also suggested that the statute was not directly aimed at preventing the disruption of communications or phone jamming. And some qualifications or exceptions would have to be read into a mere knowledge requirement to exclude legitimate repeated calling that still would likely provoke adverse emotional reactions in those called. Otherwise, legitimate use of the telephone would be subject to criminal prosecution. On this basis the District Court granted the Defendant's motion for judgment of acquittal.

Tobin illustrates how modern campaigns may attempt to defraud citizens of their fundamental right to vote, and its holding, including the ultimate acquittal of the defendant James Tobin, illustrates the difficulty in proving that a political campaign has violated existing voting laws. At the same time, in those Circuits other than the First Circuit Court of Appeals, the application of a seldom-used federal statute to the election context offers an alternative approach to the successful prosecution of voter suppression.

527 Groups

527 groups are named for an Internal Revenue Code section governing political organizations that primarily attempt to influence election campaigns. 527s are products of a loophole recently carved in Section 527 of the Internal Revenue Code and have
proliferated in modern political campaigns. 527s often serve as conduits for soft money and are exempt from federal campaign law restrictions on donations from corporations, unions and individuals. 

Politician 527s and Non-Politician 527s

Two kinds of 527s have become active in federal politics and come in two basic flavors, politician 527s, the ones that promote certain politicians, and non-politician 527s, the ones that promote certain ideas, interests and partisan orientations in election campaigns.

Politician 527s serve as soft money arms of leadership PACs and are used by incumbents to help other candidates, help create a farm team of successful state and local candidates, and spur partisan GOTV efforts.

Origin of 527s

The genesis of the 527 loophole can be found in the campaign expenditure limitations federal election law. Under that law members of Congress may raise only limited amounts of hard money for their own campaign committees or leadership PACs which aid other candidates. While members of Congress may accept no contributions of more than $1,000 per election from an individual and $5,000 per election from a PAC, they can raise unlimited soft money from individuals, corporations and unions if they set up a politician 527.

Newer 527s such as the ones that surfaced during the 2004 Presidential Election do not use express terminology that advocates election or defeat of a candidate, nor do they directly subsidize federal campaigns.

Disclosure: How to “Follow the Money”

While campaign committees and leadership PACs of members of Congress report to the Federal Election Commission, 527 groups report to the IRS, and the IRS posts on its website basic information about their contributions and expenditures.

A public disclosure law was passed in July 2000 for all 527 groups, but both that law and the disclosure system established by the IRS have serious shortcomings that make it difficult to get all of the relevant facts about which politicians have 527s and what they spend their 527 money on. This inadequate disclosure mechanism also hinders the tracking of soft money flowing to non-politician 527s that attempt to influence federal elections.

Who are the 527s and Who Do They Help and Hurt?

Republican-inclined 527 committees include Stop Her Now, Americans United to Preserve Marriage, National Rifle Association, Republican Governors Association, Swift Boat Veterans for Truth, and Veterans for Truth.

527s are not limited to one political party. Four years ago, when the 527 group Swift Boat Veterans launched their craft and helped sink the John Kerry candidacy, some said Kerry responded indecisively and weakly. He did more than that. Kerry’s campaign benefitted from independent 527 groups opposed to George W. Bush, groups that pumped far more cash into the race than the anti-Kerry groups, making their share of irresponsible assertions. One commentator noted that

What Kerry and the Democrats do not have is an explicitly ideological cable network, a dedicated publishing house and a pantheon of sympathetic, wildly popular talk radio shows that essentially function as 527 groups.

The non-Fox networks and major newspapers covered the Kerry charges just as they did the charges about Bush’s National Guard service – they tried to dig out the truth. The Democrats have plenty of rich donors, 527 groups, Air America and, for the sake of argument, reporters infected by liberal bias. They wish they had the media propaganda apparatus the Republicans have, but they don’t.19

The Deceptive Practices and Voter Intimidation Act of 2007

The Deceptive Practices and Voter Intimidation Act of 2007, S. 453, was proposed last year by Senators Barack Obama and Charles Schumer. It offers a disciplined and sensible approach for restoring greater legitimacy to the voting process.20 On the House side, at the time the House of Representatives passed H.R. 1281 on June 25, 2007, the bill followed what House Speaker Nancy Pelosi (D-Calif.) called "voter suppression tactics using misinformation and deception targeted at minority voters," when she declared that "disenfranchising voters through deception about time, place, or eligibility for voting must be illegal."n21 Democrats cited allegations that during the 2006 elections minorities, immigrants, and other legal voters were misled about election dates, guided toward incorrect polling sites, and told they were simply ineligible to vote.22 The Deceptive Practices and Voter Intimidation Prevention Act of 2007 attempted to address such problems by imposing criminal and civil penalties for violations. The Act would also increase the penalties for voter intimidation from one year to five.

Highlights of S. 453

The Deceptive Practices and Voter Intimidation Prevention Act of 2007, S. 453, is a bold legislative response by Congress to the threat to the integrity of modern federal elections posed by election-related practices designed to mislead, confuse or intimidate potential voters. S. 453 adds several new prohibitions to the federal voter intimidation statute, 18 U.S.C. § 594:

(A) False or misleading information: S.453 criminalizes specifically the distribution,
or production with intent to distribute, within 60 days before an election, of false or misleading information regarding (1) the time, place or manner of a federal election; (2) the qualifications for or restrictions on voter eligibility for such an election; and (3) the explicit endorsement by any person or organization of a candidate running for office. Distribution of such information would be criminalized under S. 453 when the distributor both knows the information is false and intends to prevent another person from exercising his or her right to vote.

(B) Fine & Imprisonment: Violators of this prohibition would be subject to up to a $100,000 fine and 5 years in prison. Attempts and conspiracies to violate the proposed statute would be punished the same.

(C) Voter intimidation and deceptive practices: S. 453 would also expand the penalty for voter intimidation as currently defined in 18 U.S.C. § 594 from 1 to 5 years in prison, thus transforming the crime from a misdemeanor to a federal felony. Additionally, it would direct the Sentencing Commission to review and, if appropriate, amend the Federal sentencing guidelines with respect to voter intimidation and deceptive acts.23

Private civil right of action

S. 453 creates a private civil right of action for any person aggrieved by a violation of the its prohibitions. It also permits any person to report the communication of any prohibited material to the Attorney General and directs the Attorney General, upon receipt of such a report, to determine whether there is a reasonable basis to find that false election information has been distributed.

Upon determining that a reasonable basis exists, the Attorney General would be required to undertake all effective measures necessary to provide correct information to the voters affected and to refer the matter to Federal or state authorities for prosecution or possible civil action.

Status of S. 453


In the Senate, The Senate Committee on the Judiciary passed S. 453 on September 6, 2007. Hearings on S. 453 focused on several well-publicized incidents of the distribution of false or misleading election materials preceding recent federal elections. Of particular concern was the dissemination of false information apparently designed to target minority voters. Senators Cardin, Leahy and Schumer, among others, spoke in favor of the bill. Questions were raised, however, about the potential scope of the bill, the Senate’s reliance on anecdotal evidence of deceptive practices in drafting the bill, and potential problems associated with both the bill’s attempt to define what constitutes a criminal “deceptive practice” and its authorization of federal prosecutors to make instantaneous and unilateral judgments about who should be charged under the bill in the days immediately preceding a federal election.
While this legislation awaits action by the full Senate, its primary sponsor has his hands full with a Presidential Campaign. Other sponsors of S.453 are in a position to move ahead with hearings on S. 453 that will provide Americans with a front-row seat as they listen to the viewpoints of Republican and Democratic legislators debating how best to resolve the conflicting perspectives on voter access and voter security in the name of electoral integrity and constitutional fidelity.

This legislative proposal and similar recommendations can provide the means for a long-overdue public debate on race and politics. In commenting on S. 453 at the time of its introduction, People For the American Way President Ralph G. Neas emphasized the crucial need for reforms to ensure that every American’s right to vote is protected. Noting that this legislation was intended to crack down on deceptive practices and bring greater accountability to the electoral process, Neas added.

In 2006 as in so many years before, we saw examples of unscrupulous political operatives trying to mislead and deceive voters, and attempting to hold down voter turnout for political gain. Some voters were told the date of the election had shifted. Others were told that their polling place had changed. Some were given misinformation about voter I.D. requirements. Others were the victims of inaccurate or misleading campaign flyers, or annoying robo-calls with deceptive information.

Enough is enough. Americans deserve elections that are clean and fair. We may not be able to stop dirty tricks in campaigns, but we can make it harder for them to succeed—and we can make the consequences very serious for those who carry them out. Senator Obama’s bill is an important step forward. His Deceptive Practices and Voter Intimidation Prevention Act proposes strong, effective procedures to prevent deceptive practices in the future, and to ensure that the individuals responsible for such practices are held to account. Senator Obama should be commended for introducing this legislation.

… The bill is an important component of the comprehensive election reform that Americans are demanding after suffering an avalanche of problems in the 2006 elections—most notably the inexplicable disappearance of 18,000 votes in a congressional race in Sarasota County, Florida.24

Through the course of legislative factfinding, hearings and thorough analysis under the spotlight of public scrutiny, American voters are entitled to this kind of legislative remedy. Through it they will be given a realistic means of mounting criminal prosecutions of voter suppression.25

A strengthened and emboldened criminal prosecutorial framework can and should incorporate the well-documented historical context of voter suppression in this country. It can also provide an understandable source of examples from modern election practices
that will enable the average American voter to understand “the delegitimizing effects of minority disenfranchisement in a contemporary liberal democracy.”

Congress is up to the task of building a full legislative history supported by a thorough congressional record, supplemented by anecdotal accounts of instances of voter suppression and how it will otherwise continue to fuel cynicism in minority communities. Such remedial legislation would necessarily be narrowly tailored, a measured, but dramatic, response to what has made a mockery of the Equal Protection Clause, the Civil Rights Act and the Voting Rights Act. Such legislation is essential to curb widespread abuse that will otherwise continue to cast a shameful blight on the foundations of our society.

It is time for a change in hearts and minds, a point driven home by Senator Obama in his testimony given in support of S. 453:

It’s hard to imagine that we even need a bill like this. But, unfortunately, there are people who will stop at nothing to try to deceive voters and keep them away from the polls. What’s worse, these practices often target and exploit vulnerable populations, such as minorities, the disabled, the elderly, or the poor.

We see these problems year after year and election and after election, and my hope is that this bill will finally stop these practices in time for the next election.

*The Deceptive Practices and Voter Intimidation Prevention Act* makes voter intimidation and deception punishable by law, and it contains strong penalties so that people who commit these crimes suffer more than just a slap on the wrist. The bill also seeks to address the real harm of these crimes—people who are prevented from voting by misinformation — by establishing a process for reaching out to these misinformed voters with accurate information so they can cast their votes in time.

There are some issues in this country that are inherently difficult and political. Making sure that every American can cast a ballot shouldn’t be one of them. There is no place for politics in this debate – no room for those who feel that they can gain a partisan advantage by keeping people away from the polls. As the members of this Committee know all too well, politics have colored some of the recent actions of the Department of Justice, so our bill includes a private right of action to ensure that individuals who are victims of deceptive information have legal recourse if an Attorney General turns a blind eye to these types of practices.

…
It’s time to get this done in a bipartisan fashion, and I believe this bill can make it happen. I look forward to working with you, Chairman Cardin, Senator Schumer, Chairman Leahy and Ranking Member Specter, and the other members of the Committee, as well as the many co-sponsors of this bill, to pass this legislation this Congress.28

Conclusion

The history of voting rights is a nightmare for many minorities, one from which they are still trying to awake. S. 453, The Deceptive Practices and Voter Intimidation Act of 2007, can provide a legal framework more responsive to the needs of minority voters.29 Indeed, for far too long it has been minority voters who have been subjected to rampant voter suppression tactics, subtle intimidation efforts and other actions that should be beneath the dignity of any political worker in a modern electoral campaign in this nation.

True enough, we may be on the cusp of some real mudslinging in the 2008 presidential campaign, and both Senator McCain and Senator Obama will have to develop thick skins as political pundits on the left and right start sharpening their “satirical” pencils. Politics has always been rough and tumble, but the process goes beyond mere politics or politics as usual and enters into the realm of fraud and criminality when it consists of wrongful affirmative conduct designed to suppress the political participation and electoral access of an entire segment of the electorate. Voter suppression is not, and should never be, politics as usual.

As members of the bench and bar, each of us, whether as lawyer, judge or lawmaker, holds a unique place in our societal and legal system. It is a place in which we can and should use the most effective means at our disposal in this ongoing experiment in Democracy, as we mount an effective challenge to the historical effects of discrimination and the most abusive of intimidation and suppression tactics in modern election campaigns.

*Partner in Griffith & Griffith, Attorneys, Cleveland, MS; Immediate Past-Chair of the ABA Section of State & Local Government Law and currently the Section’s Delegate to the ABA House of Delegates; Editor, America Votes! A Guide to Modern Election Law and Voting Rights (ABA 2008); Member of the ABA Standing Committee on Election Law; World Jurist Association’s National President for the United States; Local Government Fellow, International Municipal Lawyers Association.
1 Jordan T. Stringer, CRIMINALIZING VOTER SUPPRESSION: THE NECESSITY OF RESTORING LEGITIMACY IN FEDERAL ELECTIONS AND REVERSING DISILLUSIONMENT IN MINORITY COMMUNITIES, 57 Emory L.J. 1011, 1015 (2008)[hereinafter Criminalizing Voter Suppression]

2 “Anecdotal evidence is obviously not ideal and thus cannot be determinative of the ultimate impact that voter intimidation is having on minority communities. However, it is probative of whether the existing legal structure is effectively safeguarding democratic institutions so that the United States can continue to function as a liberal democracy.” CRIMINALIZING VOTER SUPPRESSION, 57 Emory L.J. 1011, 1047 n. 14 (2008).

3 Truthout.org posted a news blog on September 27, 2007, entitled “GOP Says They’ll Continue Racist Voter Suppression Tactics,” in which it noted: “Caging and other ballot security measures have their roots in the South after the Civil War when "former Confederate states reacted to strong political participation" by African-Americans. …The Southern system had five salient features: burdensome residency requirements, periodic registration, imposition of poll taxes, literacy or understanding requirements and stringent disqualification provisions. … Today's push by Republicans for new voter identification laws, aggressive voter roll purges, and more elaborate voter registration requirements are seen as continuing this political legacy, according to the report's authors.”


5 “Caging” refers to a direct mail industry practice of sending out mass mailings and culling the responses according to categories that are useful to the sender, such as positive responses, no responses, or returned mail. Caging is an important first step in challenging the eligibility of voters during a political campaign. It has been described as a component of many Republican anti-fraud campaigns that historically target heavily minority and Democratic voting populations.

A report by Project Vote, "Caging: A Fifty-Year History of Partisan Challenges to Minority Voters" (Sept. 2007), detailed a half-century of Republican "ballot-security" efforts, culminating in a multi-state effort in 2004 to disenfranchise likely Democratic voters through a tactic called "caging," an effort that begins with a mailing Republicans send to newly registered voters. If those letters are returned, the GOP assumes the recipient's address on their voter registration form is incorrect and the registration is fraudulent. Republicans identified 500,000 individuals whose registrations were to be challenged on Election Day in 2004, Project Vote reported. The GOP, usually at the state party level, recruited thousands of volunteers to monitor who signs in to vote at local precincts with the goal of contesting the registrations of the people who did not respond to its mailing. This practice is legal and allowed in most states.”


The entire report on Caging by Teresa James can be found online at http://projectvote.org/fileadmin/ProjectVote/Publications/Caging_Democracy_Report.pdf

See generally Democratic National Committee v. Republican National Committee, Civil Action No. 81-3876. N. J. District Court and Consent Order, 1982 Exhibit A (New Jersey Republican Party agreed under consent order to “refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose.”);


7 Some critics of the Republican Right have suggested that during and after the 1994 Republican takeover of Congress, Newt Gingrich's GOPAC, the NRA, Americans for Term Limits, the Christian Coalition and a variety of other conservative groups engaged in tactics that may be legitimately criticized as deceptive, and they evaded campaign finance laws and other laws through dubious, if not illegal, practices. While these same critics suggest that the Christian Coalition's political involvement during the turbulent period of the Republican Party’s Contract with America violated its tax exemption, however, they fail to note that the National Education Association's political activities
might have done the same. See Bradley A. Smith, BOOK REVIEW: REAL AND IMAGINED REFORM OF CAMPAIGN CORRUPTION: A Review of Larry J. Sabato and Glenn R. Simpson’s DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS, 6 Cornell J. L. & Pub. Pol'y 141,144 (1996) [hereinafter Dirty Little Secrets]. To be sure, a compelling case can be made that questionable tactics were used by Republicans to capture Congress in 1994, but the liberals basking in today’s Democratic majority actually have very little room to wag "I told you so" fingers, particularly in light of the fact that Democrats were guilty of "the original sin" of “driving competition out of congressional elections through gerrymandered political districts, abuse of the congressional frank, the expansion and unlawful use of congressional staffs for campaign purposes, the manipulation of the subcommittee system to extort money from interest groups, and the rigging of campaign finance reform measures to benefit pro-Democratic groups.” Dirty Little Secrets, 6Cornell J. L. & Pub. Pol'y at 145.

According to a recent L.A. Times editorial published on July 15, 2008 following the much-ballyhooed New Yorker’s “satirical” cover with its over-the-top portrayal of Barack and Michelle Obama, one that many agreed was tasteless and offensive, “People sophisticated enough to read, say, newspaper editorials are smart enough to know that the New Yorker's cover art this week -- portraying Barack Obama as a be-turbaned Muslim and wife Michelle as an Afro-sporting terrorist with an AK-47 across her back -- is a work of satire. But what about the millions of dumb Americans who will think otherwise?” Cover Charges, L.A. Times, July 15, 2008, at http://www.latimes.com/news/opinion/commentary/la-ed-newyorker15-2008jul15,0,984408.story

The opening lines of the Report noted that the Communication Stream of Conspiracy Commerce “refers to the mode of communication employed by the right wing to convey their fringe stories into legitimate subjects of coverage by the mainstream media. This is how the stream works. First, well-funded right-wing think tanks and individuals underwrite conservative newsletters and newspapers such as the Western Journalism Center, the American Spectator and the Pittsburgh Tribune-Review. Next the stories are reprinted on the Internet where they are bounced all over the world. From the Internet, the stories are bounced into the mainstream media through one of two ways: 1) The story will be picked up by the British tabloids and covered as a major story, from which the American right-of-center mainstream media (i.e. the Wall Street Journal, Washington Times and New York Post) will then pick the story up; or 2) The story will be bounced directly from the Internet to the right-of-center mainstream American media. After the mainstream right-of-center American media covers the story, congressional committees will look into the story. After Congress looks into the story, the story now has the legitimacy to be covered by the remainder of the American mainstream press as a 'real' story.” Joseph Farah Between the Lines, Hillary Clinton, Conspiracy Theorist, http://www.wnd.com/news/article.asp?ARTICLE_ID=14676

In a section of “Fight the Smears” entitled “Who is Behind These Lies,” one of these operatives, James Lacy, “co-founded the United States Justice Foundation, an
organization that got its start in "reverse-discrimination" suits.”

http://my.barackobama.com/page/content/behindthesmears

11 http://www.freerepublic.com/focus/f-news/2042974/posts
12 http://www.mydd.com/story/2008/6/13/21413/7566
15 CRIMINALIZING VOTER SUPPRESSION, 57 Emory L.J. 1011 (2008)

16 CRIMINALIZING VOTER SUPPRESSION, 57 Emory L.J. 1011, 1012 (2008)

25 See The Voter Suppression Toolbox is Expanding,
http://www.progressivestates.org/content/844/the-new-voter-suppression-and-the-progressive-response#5

26 Id. at 1048.

27 See Efforts to Suppress the Vote are Strengthening and Diversifying,
http://www.progressivestates.org/content/844/the-new-voter-suppression-and-the-progressive-response#5 (“Traditional voter suppression efforts have been reinvigorated and broadened to include other tactics such as voter ID requirements, registration drive restrictions, and allocating insufficient resources to precincts with a high concentration of minority voters. For the first time since the passage of the Voting Rights Act, America is on a path of restricting the franchise. While voter ID requirements have received much of the attention, 2004 saw the most well coordinated voter suppression campaign in our nation’s history. At the same time, independent misinformation and voter intimidation campaigns continue to sprout up in every election.”)

28 http://obama.senate.gov/press/070607-obama_bill_woul_1/

29 Professor Rick Hasen, who consulted with Senator Obama on this bill, addressed the question whether S. 453 is likely to pass. In his Election Law Blog, Hasen states:
I don't know. Certainly the fact that it is being introduced by Democrats, with findings focused mainly on acts of voter suppression that Democrats in the past have highlighted, will make the bill appealing to many Democrats. I wonder whether Republicans will come on board. In some sense, this is a "voting integrity" bill, an issue that has been trumpeted by many Republicans. But it targets speech, not voters who vote illegally. We'll see if this is perceived as a partisan or bipartisan bill. I think this bill, if it passed, would likely beat a constitutional challenge under the First Amendment, especially that part of the bill that would punish violators after the fact for fraudulent conduct. No doubt the ability of a court to grant an injunction would be challenged as a prior restraint of speech, and that raises a more difficult question. R. Hasen, *Election Law Blog* at [http://electionlawblog.org/archives/007743.html](http://electionlawblog.org/archives/007743.html)