



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 27, 2007

The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

This letter addresses a series of questions you posed to the Attorney General at the Senate Judiciary Committee hearing on July 24, 2007 regarding the Seventh Edition of the Department of Justice manual, Federal Prosecution of Election Offenses ("Seventh Edition"), a copy of which is enclosed for your review.

The Seventh Edition, published in May of this year, replaces the Sixth Edition, sometimes referred to as the "Red Book," which the Department published in 1995. The decision to revise the Sixth Edition was made several years ago by the management of the Public Integrity Section. There had been a number of significant changes in the laws since the publication of the Sixth Edition, including the enactment by Congress of the landmark Bipartisan Campaign Reform Act of 2002 (BCRA), which included, among other provisions, enhanced penal consequences for criminal violations of the Federal Election Campaign Act. In addition, there had been a number of significant court decisions since the publication of the Sixth Edition, including the Supreme Court's decision in McConnell v. Federal Election Commission, 543 U.S. 93 (2003).

These changes in the statutory and case law made the Sixth Edition both incomplete and out of date. Therefore, in 2004 the Public Integrity Section and its Election Crimes Branch undertook a long term project to substantially update and expand the manual. The Seventh Edition is the product of that effort. Whereas the Sixth Edition is 135 pages long, the Seventh Edition is 241 pages (excluding appendices). There are thus over 100 pages of additional text, and this text is spread throughout the entire book.

Two chapters—chapter five, which addresses campaign financing crimes, and chapter six, which addresses the sentencing of election crimes—received more extensive revision and expansion than other chapters. This additional text was necessary to address effectively the changes to the Federal Election Campaign Act, and in particular the enhancements to the Act's criminal enforcement that were legislated by Congress in BCRA.

The Seventh Edition also reflects the Department's renewed commitment to addressing election crimes and voting rights violations, as exemplified by the Ballot Access and Voting Integrity Initiative established in October 2002. As a result of this

renewed commitment, the Seventh Edition of the manual removes the Sixth Edition's guidance that the Department "generally does not favor prosecution of isolated fraudulent voting transactions." 6th Ed. at 59. While the Seventh Edition does reflect a change in the Department's policy regarding the prosecution of individual acts of fraudulent voting, it is nevertheless important to note that in prosecuting these cases the Department is making use of a broad array of enforcement tools provided by Congress to combat precisely this type of conduct. See, e.g., 42 U.S.C. § 1973i(c) (false information in registering or voting and vote buying in a federal election); 42 U.S.C. § 1973i(e) (voting more than once in a federal election); 42 U.S.C. § 1973gg-10 (fraudulent registering or voting in a federal election); 18 U.S.C. § 611 (voting by aliens); 18 U.S.C. § 911 (false assertion of United States citizenship); 18 U.S.C. § 1015(f) (false assertion of United States citizenship to register or vote in any election).

There has been no substantive change, however, to Department's policies regarding noninterference with elections. In fact, far from being "watered down" or weakened, the Department's noninterference guidance has been expanded in the Seventh Edition to offer more explanation, assistance, and guidance, and was developed as a result of the Department's ongoing criminal enforcement efforts in the area of election and campaign finance crimes. Chapter One of the Seventh Edition states, in pertinent part:

E. FEDERAL ROLE: PROSECUTION, NOT INTERVENTION

The principal responsibility for overseeing the election process rests with the states. With the significant exception of violations of the Voting Rights Act involving denigration of the right to vote based on race, ethnicity, or language minority status, the federal government plays a role secondary to that of the states in election matters. [Footnote omitted] It is the states that have primary authority to ensure that only qualified individuals register and vote, that the polling process is conducted fairly, and that the candidate who received the most valid votes is certified as the winner. [Footnote omitted]

The federal prosecutor's role in matters involving corruption of the process by which elections are conducted, on the other hand, focuses on prosecuting individuals who commit federal crimes in connection with an election. Deterrence of future similar crimes is an important objective of such federal prosecutions. However, this deterrence is achieved by public awareness of the Department's prosecutive interest in, and the prosecution of, election fraud—not through interference with the process itself.

Because the federal prosecutor's function in the area of election fraud is not primarily preventative, any criminal investigation by the Department must be conducted in a way that minimizes the likelihood that the investigation itself may become a factor in the election. The mere fact that a criminal investigation is being conducted may impact upon the adjudication of election litigation and contests in state courts. Moreover, the seizure by federal

authorities of documentation generated by the election process may deprive state election and judicial authorities of critical materials needed to resolve election disputes, conduct recounts, and certify the ultimate winners. **Accordingly it is the general policy of the Department not to conduct overt investigations, including interviews with voters, until after the outcome of the election allegedly affected by the fraud is certified.** [FN: This rule does not apply to covert investigative techniques.]

In addition, the federal prosecutor has no authority to send FBI Special Agents or Deputy U.S. Marshals to polling places. In fact, a federal statute makes it a felony for any federal official to send "armed men" to the vicinity of open polling places. 18 U.S.C. § 592. In light of these considerations, **Department and FBI policy requires that any investigative action that involves an intrusion by federal investigators into the area immediately surrounding an open polling place be approved by the Criminal Division's Public Integrity Section.**

G. INVESTIGATIVE CONSIDERATIONS IN ELECTION FRAUD CASES

When investigating election fraud, three considerations that are absent from most criminal investigations must be kept in mind: **(1) respect for the primary role of the states in administering the voting process, (2) an awareness of the role of the election in the governmental process, and (3) sensitivity to the exercise of First Amendment rights in the election context. As a result there are limitations on various investigative steps in an election fraud case.**

In most cases, election-related documents should not be taken from the custody of local election administrators until the election to which they pertain has been certified, and the time for contesting the results has expired. [FN: This non-interference policy assumes there is no evidence that local election administrators seek to retain the election records for a corrupt purpose or to further an ongoing election fraud scheme.] This avoids interfering with the governmental processes affected by the election. [FN: In cases in which physical custody may interfere unnecessarily with local election procedures, law enforcement may still take reasonable steps to ensure that such records retain their integrity and are effectively made available to federal law enforcement. Such steps may include the issuance of a grand jury subpoena, and formal and informal agreements concerning the custody, control, and integrity of such records.]

Another limitation affects voter interviews. Election fraud cases often depend on the testimony of individual voters whose votes were co-opted in one way or another. **But in most cases voters should not be interviewed, or other voter-related investigation done, until after the election is over.** Such overt

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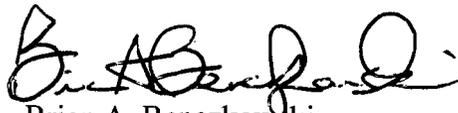
investigative steps may chill legitimate voting activities. They are also likely to be perceived by voters and candidates as an intrusion into the election. Indeed, the fact of a federal criminal investigation may itself become an issue in the election. [FN: **Accordingly, the Public Integrity Section must be consulted prior to any voter interviews in the preelection or balloting period. USAM 9-85.210.**]

7th Ed. at 9-13 (emphasis added). Like the Sixth Edition before it, the Seventh Edition clearly warns federal prosecutors to take care to conduct election fraud investigations in such a way as to avoid affecting the election itself. Compare 7th Ed. at 10 (“Accordingly, it is the general policy of the Department not to conduct overt investigations, including interviews with voters, until after the outcome of the election allegedly affected by the fraud is certified.”) with 6th Ed. at 61 (“Thus most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates.”)

Similarly, the Seventh Edition, like the Sixth Edition, clearly advises against conducting interviews of voters in election fraud cases in the pre-election or balloting period, so as to avoid chilling legitimate voting activities and intruding into the election in question. Compare 7th Ed. at 12 (“But in most cases voters should not be interviewed, or other voter-related investigation done, until after the election is over.”), 7th Ed. at 12 n.6 (“Accordingly, the Public Integrity Section must be consulted prior to any voter interviews in the preelection or balloting period.) (citing U.S. Dep’t of Justice, U.S. Attorneys’ Manual § 9-85.210), and 7th Ed. at 92 (“The Department views any voter interviews in the pre-election and balloting period, other than interviews of a complainant and any witnesses he or she may identify, as beyond a preliminary investigation. A United State’s Attorney’s Office considering such interviews must therefore first consult with the Public Integrity Section. This consultation is also necessary before any investigation is undertaken near the polls while voting is in progress.”) with 6th Ed. at 61 (“The Criminal Division views any voter interviews in the preelection and balloting periods—other than interviews of a complainant and any witnesses he or she may identify—as beyond a preliminary investigation. Accordingly, a United States’ Attorney’s Office considering such interviews must first consult with the Public Integrity Section.”)

I hope that this information is helpful. Please do not hesitate to contact this office if we can be of any further assistance.

Sincerely,



Brian A. Benczkowski

Principal Deputy Assistant Attorney General