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Richard L. Hasen

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THE 2016 U.S. VOTING WARS: FROM BAD TO WORSE

Richard L. Hasen*

INTRODUCTION

If the “voting wars” that have broken out across the post-2000 election landscape in the United States could be characterized as a kind of trench warfare, the 2016 election saw a major escalation in weaponry—from the irresponsible rhetoric of a candidate who became commander in chief, to foreign interference and a flood of social media-driven propaganda, to troubling machine breakdowns and human error in election administration. The escalation threatens to undermine the public’s confidence in the fairness of the U.S. election process and, ultimately, American democracy itself. We live in dangerous times, which could get worse, and it is not easy to conceive of simple solutions for de-escalation and bolstering of legitimacy, especially given rapid technological change that has interfered with mediating and stabilizing democratic institutions.

This Article provides an overview of the legal and political integrity issues in the 2016 elections. It begins by describing the now “normal” voting wars between the hyperpolarized parties, a series of lawsuits aimed at shaping the rules for the registration of voters, the conduct of voting, and the counting of ballots. Restrictive voting laws have increased in number and severity in many states with Republican legislatures, and the judiciary itself often divides along partisan lines in determining the controversial laws’ legality. So far, the pace of litigation has remained at more than double the pre-2000 rate, and litigation in the 2016 election period is up twenty-three percent compared to the 2012 election period.

The Article then turns to the troubling escalation in the wars, from then-candidate Donald Trump’s unsubstantiated claims of fraud and election rigging, to Russian (and other) meddling in American elections and the rise of the “fake news” issue, to problems with vote counting machinery and election administration revealed by Green Party candidate Jill Stein’s self-serving recount efforts and further hyped through conspiracy theories. It concludes by considering the role that governmental and non-governmental institutions can play in attempting to protect American election administration from internal and external threats and to restore confidence in American elections.

* Chancellor’s Professor of Law and Political Science, UC Irvine School of Law. I presented an earlier version of this paper at the Electoral Integrity Project Pre-APSA Workshop, “Protecting Electoral Security and Voting Rights: The 2016 U.S. Elections in Comparative Perspective,” August 30, 2017, in San Francisco. Thanks to Bob Bauer, Bruce Cain, Doug Chapin, Ned Foley, and conference participants for useful comments and suggestions, and to Julia Jones for excellent research assistance.

I. THE “NORMAL” VOTING WARS OF 2016

American fights over the rules for conducting voting and recounts date back to the beginning of the Republic,¹ but the modern period of escalation dates to the disputed 2000 presidential election between George W. Bush and Al Gore, which the Supreme Court ultimately resolved in its controversial *Bush v. Gore* decision.² The very close election taught political operatives that the rules of the game matter, and in the post-2000 period we have seen a rise in new election legislation as well as litigation.³

In the period since 2000, the amount of election-related litigation has more than doubled compared to the period before 2000, from an average of 94 cases per year in the period just before 2000 to an average of 258 cases per year in the post-2000 period.⁴ See Figure 1.

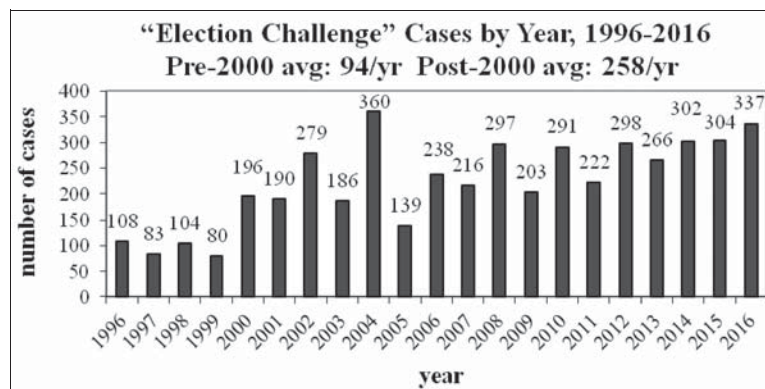


Figure 1⁵

¹ See generally EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016) (discussing the history of and process behind controversial American elections).

² 531 U.S. 98 (2000).

³ See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

⁴ The data and the list of cases for the full 1996–2016 period are posted at Richard L. Hasen, *Election Challenge Litigation, 1996–2016: Appendix to Hasen, The 2016 Voting Wars: From Bad to Worse*, ELECTION L. BLOG (2017), <http://electionlawblog.org/wp-content/uploads/Election-Litigation-1996-2016.xlsx> [<https://perma.cc/SQP3-28WS>] [hereinafter *Voting Wars Appendix*]. This is the latest update of a study first published in Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005). As I explained there regarding the methodology, the calculations are based on “the number of election-related cases in state and federal courts found through a Lexis search of cases containing the words ‘election’ and variations on ‘challenge,’ culling out cases that are obviously inapplicable.” *Id.* “The list is no doubt underinclusive of all election litigation during the period, but it provides a good rough comparison of the pre- and post-2000 period.” *Id.* at 958 n.81.

⁵ See *Voting Wars Appendix*, *supra* note 4.

Even compared to the 2012 presidential election cycle,⁶ litigation is up significantly; it was twenty-three percent higher in the 2015–16 presidential election season than in the 2011–12 presidential election season, and at the highest level since at least 2000 (and likely ever). See Figure 2.

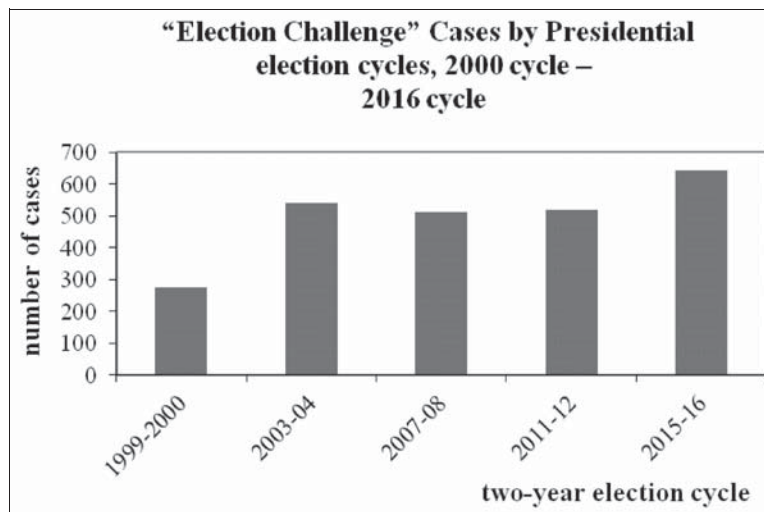


Figure 2⁷

Part of the reason for the increase in litigation over election rules is that in our hyperpolarized election environment, controversial election laws—such as voter identification laws or automatic voter registration laws—pass along party lines, and any restrictions invite litigation.⁸ This emergence of “red state election law” and “blue state election law” has meant that many states with Republican majorities have passed laws making it harder to register and vote, and those states with Democratic majorities have passed laws making it easier to register and vote.⁹ According to a count by the Brennan Center, since 2010, twenty-three states have passed laws making it harder to register and vote, three of which have been blocked by the courts.¹⁰

⁶ On the 2012 voting wars specifically, see Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1870–78 (2013).

⁷ See *Voting Wars Appendix*, *supra* note 4.

⁸ See Richard L. Hasen, *Election Law’s Path in the Roberts Court’s First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1601 (2016) (discussing how election fights can be both legal and political).

⁹ See *id.*

¹⁰ BRENNAN CTR. FOR JUSTICE, *NEW VOTING RESTRICTIONS IN AMERICA 1* (2017), https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf [<https://perma.cc/C8XG-NVPL>] (“Overall, 20 states have new restrictions in effect since then—10 states have more restrictive voter ID laws in place (and six states have strict photo

All but two of the twenty-three states, Illinois and Rhode Island, had majority Republican legislatures when they passed the laws.¹¹

Whether or not legislators actually believe the rhetoric about fraud prevention, public confidence, voter suppression, or enfranchisement that they sometimes espouse to support or oppose these laws, the partisan calculation appears to be that registration and identification barriers tend to fall hardest on voters likely to vote for Democrats (such as poor, minority, and student voters),¹² and that at the margins, these laws can make a difference.¹³

The 2015–16 election cycle litigation in some ways resembled battles in the past, and many of the cases involved issues not directly related to registration or the casting and counting of votes. Among the more notable cases during the period were cases over ever more restrictive voting and registration restrictions in Kansas,¹⁴ North Carolina,¹⁵ and Texas;¹⁶ redistricting battles in Alabama,¹⁷ Wisconsin,¹⁸ and Texas,¹⁹ and a fight over the constitutionality of redistricting commissions for congressional elections used in Arizona;²⁰ a campaign finance dispute over the constitutionality of limits on party

ID requirements), seven have laws making it harder for citizens to register, six cut back on early voting days and hours, and three made it harder to restore voting rights for people with past criminal convictions.”); *id.* at 11 (noting that Arkansas, North Carolina, and North Dakota also passed laws making it harder to vote, but those laws have been blocked by the courts). Montana voters rejected a referendum placed on the ballot by the Montana legislature to eliminate Election Day registration. *Id.*

¹¹ Aside from Montana, the states in the Brennan Center survey are Alabama, Arkansas, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See id.* at 1. A list of control of state legislatures as of 2017 appears on the website of the National Conference of State Legislatures. *2017 State & Legislative Partisan Composition*, NCSL (Mar. 27, 2017, 11:00 AM MT), http://www.ncsl.org/portals/1/documents/elections/Legis_Control_2017_March_27_11am.pdf [<https://perma.cc/6PF9-93ZT>].

¹² *See, e.g.,* Vann R. Newkirk II, *How Voter ID Laws Discriminate*, ATLANTIC (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/> [<https://perma.cc/SU22-UP6P>].

¹³ *See, e.g., id.* (discussing the racially disparate impact of voter ID laws on voting outcomes).

¹⁴ *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016).

¹⁵ *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

¹⁶ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

¹⁷ *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

¹⁸ *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *stay granted*, 137 S. Ct. 2289 (2017).

¹⁹ *Perez v. Abbott*, No. SA-11-CV-360, 2017 WL 3668115 (W.D. Tex. Aug. 24, 2017), *stay granted*, 138 S. Ct. 49 (2017).

²⁰ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015).

“soft money” fundraising;²¹ and Supreme Court rulings on the constitutionality of limiting judicial candidates’ personal solicitation of campaign funds,²² the meaning of “official action” for bribery laws,²³ and the scope of the “one person, one vote” rule.²⁴

In litigation most closely tied to the voting wars, there is no escaping the fact that judges appointed by presidents of different parties often tend to have differing views on the legality of, and the costs and benefits of, laws making it harder to register and vote.²⁵ I do not believe this is because judges consciously vote the interests of their party; it is that these judges are chosen because of their background and ideological views that make them predisposed to favor one side or another.²⁶

Consider, for example, *North Carolina State Conference of the NAACP v. McCrory (NC NAACP)*,²⁷ a high-profile litigation over North Carolina’s strict 2013 voting law, commonly known as HB 589.²⁸ Among other things, the law imposed a strict voter identification requirement, cut back on the days of early voting before elections, eliminated same-day voter registration, banned the counting of votes cast by a voter in the wrong precinct even for those races in which the voter was eligible to vote, and ended the practice of pre-registering sixteen- and seventeen-year-olds as voters.²⁹ Voting rights groups and the United States government filed cases in federal court raising both constitutional and Voting Rights Act claims.³⁰

The district court judge, an appointee of Republican President George W. Bush,³¹ refused to put any of the challenged provisions on hold pending a trial on the merits,³² a decision reversed in part by the U.S. Court of Appeals for the Fourth Circuit in a panel made up of three Democratic appointees,³³ and then reversed again by the

²¹ *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86 (D.D.C. 2016), *aff’d*, 137 S. Ct. 2178 (2017).

²² *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

²³ *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

²⁴ *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

²⁵ See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 302–03.

²⁶ See *id.* at 303–04.

²⁷ 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017). This Article cites to the District Court opinion and the Fourth Circuit opinion. For abbreviation purposes, the District Court decision will be cited as “*NC NAACP I*” and the Fourth Circuit opinion will be cited as “*NC NAACP II*.”

²⁸ 2013 N.C. Sess. Laws 381. Portions of the next few paragraphs draw from Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. (forthcoming 2018), <https://ssrn.com/abstract=2912403>.

²⁹ *NC NAACP I*, 182 F. Supp. 3d 320, 331–32 (M.D.N.C. 2016).

³⁰ *Id.* at 331.

³¹ *Schroeder, Thomas D.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/schroeder-thomas-d> [<https://perma.cc/UC9E-J5B5>] (last visited Feb. 21, 2018).

³² *NC NAACP I*, 182 F. Supp. 3d at 349.

³³ *Floyd, Henry Franklin*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/floyd-henry-franklin> [<https://perma.cc/3WFV-D7EN>] (last visited Feb. 21, 2018); *Motz, Diana Jane*

Supreme Court for the 2014 elections.³⁴ Two of the Supreme Court's most liberal Justices, Ruth Bader Ginsburg and Sonia Sotomayor, dissented from the Court's decision to put the law back into place in the interim.³⁵

The district court then held two trials, ultimately rejecting the plaintiffs' arguments and concluding that North Carolina had a non-discriminatory, good government purpose in passing the law.³⁶ The Fourth Circuit reversed the trial court, holding that the court committed clear error in rejecting the plaintiffs' argument that North Carolina passed HB 589 with racially discriminatory intent.³⁷ The State of North Carolina then moved to put the Fourth Circuit's ruling on hold pending full Supreme Court review.³⁸ The motion came during the period after the death of Justice Antonin Scalia, when the Court was comprised of only eight Justices.³⁹ The Court split 4–4 on granting the stay, with the four conservative, Republican-appointed Justices voting to stay all or most of the ruling, and the four liberal, Democratic-appointed Justices voting against the stay.⁴⁰ In May 2017, the Supreme Court voted to deny review, and Chief Justice John Roberts wrote an unusual separate statement noting procedural problems with the case as a reason for denying a hearing and emphasizing that the denial should not be read as a ruling on the merits.⁴¹ There is every reason to believe the partisan divide in voting wars cases endures on the Supreme Court.⁴²

Gribbon, FED. JUD. CTR., <https://www.fjc.gov/history/judges/motz-diana-jane-gribbon> [<https://perma.cc/V9RJ-B6F2>] (last visited Feb. 21, 2018); *Wynn, James Andrew, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wynn-james-andrew-jr.> [<https://perma.cc/TN6M-ZE76>] (last visited Feb. 21, 2018).

³⁴ *NC NAACP I*, 182 F. Supp. 3d at 349–50.

³⁵ *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6, 6–7 (2014) (Ginsburg, J., dissenting).

³⁶ *NC NAACP I*, 182 F. Supp. 3d at 501–02.

³⁷ *Id.* at 349. One of the three judges partially dissented on the question of remedy.

³⁸ *Id.* at 349–50.

³⁹ See Robert Barnes, *Supreme Court Won't Let North Carolina Use Strict Voting Law*, WASH. POST (Aug. 31, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-wont-let-north-carolina-use-strict-voting-law/2016/08/31/b5187080-6ed6-11e6-8533-6b0b0ded0253_story.html [<https://perma.cc/EXF7-598W>].

⁴⁰ *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 27, 28 (2016) (mem.) (denying stay and noting: “THE CHIEF JUSTICE, Justice KENNEDY, and Justice ALITO would grant the stay, except with respect to the preregistration provision. Justice THOMAS would grant the stay in its entirety.”).

⁴¹ *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1400 (2017) (statement of Chief Justice Roberts respecting the denial of certiorari) (“Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that “[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.” (alteration in original) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923))).

⁴² See generally Devins & Baum, *supra* note 25 (analyzing political party polarization and how it contributes to partisanship on the Court).

The continued hyperpartisanship surrounding rules for conducting elections and the increased litigation has enmeshed the courts in ever more difficult decisions about the scope of voting protections under U.S. constitutional and statutory law. This turn of events would be bad enough for both the legitimacy of the election system and respect for courts and the rule of law, especially as judicial decisions in the hardest cases seem to break down across party lines, and as all the conservative Justices currently on the Supreme Court were appointed by Republican Presidents and all the liberal Justices were appointed by Democratic Presidents.⁴³

But these normal, if accelerating, voting wars seemed of secondary importance in the 2016 elections, in which conflict over voting rules and campaigns reached new, unprecedented heights—including efforts at delegitimization by a major party presidential candidate, Donald Trump, the rise in foreign interference and social media-driven propaganda, and new concerns over the accuracy of voting technology and election administration.

II. DONALD TRUMP AND DELEGITIMIZATION OF THE ELECTORAL PROCESS

Among the most surprising and unusual developments in the 2016 election season was Republican presidential candidate (and now President) Donald J. Trump repeatedly making outrageous and completely unsupported statements about the extent of the voter fraud problem in the United States.⁴⁴ The remarks continued even after Trump won the election—stunning for an election winner—perhaps reflecting the unusual candidate’s unhappiness with losing the U.S. popular vote (while winning the electoral college vote).⁴⁵

In an important article discussing stresses to American elections stemming from polarization, increased propaganda, and partisan election administration, Professor Anthony J. Gaughan summarized some of the statements Trump made on the issue of election integrity:

Throughout the campaign, and even after his victory, Donald Trump impugned the integrity of the electoral process. For example, when he lagged in the polls in mid-October, Trump claimed without evidence that the election was “rigged” against him “at many polling places” by “large scale voter fraud happening on and

⁴³ See *id.* at 309 (“On the current Supreme Court, ideological lines coincide with party lines . . .”).

⁴⁴ See, e.g., Sean Gorman, *Trump’s Pants on Fire for Claiming ‘Serious Voter Fraud’ Occurred in Virginia*, POLITIFACT (Nov. 29, 2016, 2:33 PM), <http://www.politifact.com/virginia/statements/2016/nov/29/donald-trump/trumps-pants-fire-serious-voter-fraud-claim-virgin/> [https://perma.cc/4QDS-Q43S].

⁴⁵ *Id.*

before [E]lection [D]ay.” Even more remarkable were allegations that Trump made after the election. When the states’ certified election results revealed that Hillary Clinton had won the popular vote by nearly 3 million votes, Trump baselessly claimed that “millions” of people had voted illegally for Clinton. On Twitter he declared, “In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.” In a subsequent Tweet he wrote, “Serious voter fraud in Virginia, New Hampshire and California—so why isn’t the media reporting on this? Serious bias—big problem!” Without offering evidence, Trump later told congressional Republicans that three to five million illegal votes were cast against him in the election, a figure that conveniently exceeded Clinton’s popular vote margin of victory.⁴⁶

It was not just that Trump claimed, without evidence, that voter fraud was a problem in the United States; he insinuated that the fraud was more prevalent in minority communities.⁴⁷ At a campaign rally in Pennsylvania a few weeks before the November 2016 presidential election,

⁴⁶ Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 71 (2017) (alterations in original) (citations omitted). Gaughan also collected evidence demonstrating that Trump’s claims were “completely baseless”:

A post-election investigation by the *Washington Post* found only four confirmed cases of voter fraud in the entire 2016 election. Likewise, Dartmouth College researchers conducted a comprehensive study of the 2016 election and found no evidence to support Trump’s allegations. Even leading Republicans, such as House Speaker Paul Ryan and Senator Lindsay Graham, admitted that “no evidence” had been found to support Trump’s allegations. Jon Husted, the Republican Secretary of State of Ohio, responded to Trump’s voter fraud claims by observing that while it was “[e]asy to vote” in American elections, it was “hard to cheat.” As Husted explained, voter fraud “is rare and when it happens, we hold people accountable.” Similarly, the National Association of Secretaries of State, an organization whose membership is made up primarily of Republicans, announced that it was “not aware of any evidence that supports the voter fraud claims made by President Trump.” Most remarkable of all, during the 2016 recount in Michigan, Trump’s own legal team admitted that “all available evidence suggests that the 2016 general election was not tainted by fraud or mistake.”

Id. at 71–73 (alteration in original) (citations omitted).

⁴⁷ Maggie Haberman & Matt Flegenheimer, *Donald Trump, a ‘Rigged’ Election and the Politics of Race*, N.Y. TIMES (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/us/politics/donald-trump-a-rigged-election-and-the-politics-of-race.html>.

Mr. Trump began the day urging the almost entirely white crowd outside Pittsburgh to show up to vote, warning about “other communities” that could hijack his victory. “So important that you watch other communities, because we don’t want this election stolen from us We do not want this election stolen.” Later, at the evening rally in Wilkes-Barre, Mr. Trump raised more concerns about voting fraud. “I just hear such reports about Philadelphia, . . . I hear these horror shows, and we have to make sure that this election is not stolen from us and is not taken away from us.” He added for emphasis: “Everybody knows what I’m talking about.”⁴⁸

Trump later claimed, offering no evidence whatsoever, that *all* the illegal voting in the United States benefitted Hillary Clinton.⁴⁹ He told ABC News anchor David Muir soon after inauguration, “Of those [supposed three to five million fraudulent] votes cast, none of ‘em come to me. None of ‘em come to me. They would all be for the other side. None of ‘em come to me.”⁵⁰

Over the last two decades, the public heard this type of rhetoric from some other Republicans hyping a false scourge of voter fraud,⁵¹ but Trump’s comments were a grave escalation. The parade of Republican election officials and others coming forward during and right after the 2016 election to debunk Trump’s unsupported rhetoric of massive voter fraud⁵² was a welcome respite, but Trump’s remarks were deeply troubling.

In addition to hyping the supposed dangers of voter fraud from urban areas such as Philadelphia, the Trump campaign set up a sign-up sheet on his campaign website for supporters to organize against fraud at the polls.⁵³ Trump allies such as Roger Stone, Jr. also purported to set up “poll watching activities,” via the website StoptheSteal.org.⁵⁴ It was not clear whether these efforts were serious, or just means to raise

⁴⁸ Ashley Parker, *Donald Trump, Slipping in Polls, Warns of ‘Stolen Election,’* N.Y. TIMES (Oct. 13, 2016), <https://nyti.ms/2q72Q8H>.

⁴⁹ See Aaron Blake, *Donald Trump Claims None of Those 3 to 5 Million Illegal Votes Were Cast for Him. Zero.*, WASH. POST (Jan. 26, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero/> [<https://perma.cc/9U7L-4Y3V>].

⁵⁰ *Id.*

⁵¹ Ryan J. Reilly, *Trump Supporters Have Been Primed for His Bogus Voter Fraud Claims for Years*, HUFFPOST (Oct. 19, 2016), http://www.huffingtonpost.com/entry/trump-voter-fraud_us_58062ef6e4b0b994d4c16848 [<https://perma.cc/7CVU-6CAV>].

⁵² See, e.g., *In Their Own Words: Officials Refuting False Claims of Voter Fraud*, BRENNAN CTR. FOR JUST. (Apr. 13, 2017), <https://www.brennancenter.org/quotes-on-voter-fraud> [<https://perma.cc/WVW7-9DPZ>].

⁵³ *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. 81-03876, 2016 WL 6584915, at *6 (D.N.J. Nov. 5, 2016).

⁵⁴ *Id.* (“The DNC additionally cites press reports and social media posts which indicate

funds, rile up supporters, and collect names. Nonetheless, the activities attracted the attention of Democrats and inspired new legal maneuvering.⁵⁵

Since the 1980s, the Democratic National Committee (DNC) and the Republican National Committee (RNC) have been involved in litigation, whereby the DNC argued that the RNC's "ballot security" operations were illegal efforts to suppress minority voting.⁵⁶ The RNC settled the case in 1982, with a set of rules for permissible and impermissible RNC activity embodied in a consent decree.⁵⁷ The decree was modified and extended in 1987 and 2009.⁵⁸ The 2009 changes came after an unsuccessful attempt by the RNC to vacate the decree.⁵⁹

In the run-up to the 2016 election, Democrats sought to enforce and extend the RNC consent decree by pointing to Trump's activities, arguing he was working in concert with the RNC on anti-voter-fraud activities.⁶⁰ A few days before Election Day, the federal court held that the DNC had presented inadequate evidence that the RNC was working in concert with Trump on poll watching or similar activities and rejected the relief sought by the Democrats,⁶¹ leaving open the opportunity for the DNC to return to court after the election to present more evidence about coordination or to otherwise argue for extension of the consent decree.⁶²

that certain supporters of Mr. Trump have interpreted the Trump Campaign's statements as a call to engage in voter intimidation. For example, one gentleman from Ohio indicated that he was planning on going to voting precincts to engage in 'racial profiling' to make those voters 'a little bit nervous.' Another man posted on Twitter that he was going to be watching for 'shenanigans' and 'haul [] away' certain voters. The tweet included a picture of a pickup truck with a cage built into the bed." (alteration in original) (internal citations omitted)).

⁵⁵ See *id.* (discussing the various "shenanigans" that concerned the DNC).

⁵⁶ *Id.* at *2–4 (tracing the background of the Consent Decree back to 1982, when the original decree was entered).

⁵⁷ *Id.* at *2 ("The Decree was the result of the settlement of a lawsuit which claimed that, in connection with the 1981 New Jersey Gubernatorial election, the RNC and the New Jersey Republican State Committee attempted to intimidate the minority voters, in violation of the Voting Rights Act. Specifically, the RNC sent sample ballots to areas where a large portion of the voters were ethnic minorities, then asked that the name of each voter whose ballot was returned as undeliverable be removed from New Jersey's voter rolls. In addition, in an alleged effort of intimidation, the RNC hired off-duty law enforcement officers to patrol polling places in minority precincts. The officers wore armbands that read: 'National Ballot Security Task Force,' and some carried two-way radios and firearms." (internal citations omitted)).

⁵⁸ *Id.* at *1.

⁵⁹ *Id.* at *4.

⁶⁰ *Id.* at *6–7.

⁶¹ *Id.* at *12–19.

⁶² *Id.* at *18 n.18. In January 2018, after considering additional evidence, the trial court dissolved the consent decree. Rick Hasen, *Breaking: Court Ends Consent Decree Against RNC "Ballot Security" Activities, Raising New Risks of Voter Suppression*, ELECTION L. BLOG (Jan. 9, 2018, 7:56 AM), <http://electionlawblog.org/?p=96810> [<https://perma.cc/S6XA-H8L6>]; *Decades-Old Consent Decree Lifted Against RNC's 'Ballot Security' Measures*, NPR (Jan. 9, 2018, 4:18 PM), <https://www.npr.org/2018/01/09/576858203/decades-old-consent-decree-lifted-against-rncs-ballot-security-measures>.

During that same period just before the election, the Democratic Party brought other lawsuits against Trump, Stone, and state Republican parties⁶³ seeking similar injunctions against voter intimidation. In response to the lawsuits, the defendants produced some documents and represented they would not engage in such activities.⁶⁴ Federal courts in Arizona and Pennsylvania denied the injunctions.⁶⁵ A federal district court in Ohio granted an injunction, only to have it put on hold by an appeals court.⁶⁶ The Supreme Court refused to intervene.⁶⁷ The losses in these cases nonetheless were something of a win for Democrats, who got to see some internal campaign materials from the Trump/Republican side and got promises on the record from campaigns and entities not to engage in certain activities that could intimidate voters.⁶⁸

After the election, President Trump issued an order creating an “Election Integrity” Commission to study the “voter fraud” issue.⁶⁹ He named Vice President Mike Pence as Chair⁷⁰ and Kansas Secretary of State Kris Kobach as Vice Chair.⁷¹ Kobach has been a controversial figure, known for exaggerating the amount of voter fraud and for seeking to tighten voter registration rules to prevent (the small amount of

⁶³ Mich. Democratic Party v. Mich. Republican Party, No. 2:16-CV-13924-MAG-RSW (E.D. Mich. Nov. 17, 2016) (Order of Dismissal); Pa. Democratic Party v. Republican Party of Pa., No. 16-5664, 2016 WL 6584832 (E.D. Pa. Nov. 7, 2016); Ariz. Democratic Party v. Ariz. Republican Party, No. CV-16-03752-PHX-JJT, 2016 WL 8669978 (D. Ariz. Nov. 4, 2016); Ohio Democratic Party v. Ohio Republican Party, No. 16-CV-02645, 2016 WL 6542486 (N.D. Ohio Nov. 4, 2016), *stayed*, No. 16-4268, 2016 WL 6608962 (6th Cir. Nov. 6, 2016), *application to vacate stay denied*, 137 S. Ct. 15 (2016) (mem.); N.C. Democratic Party v. N.C. Republican Party, No. 1:16-CV-01288 (M.D.N.C. Nov. 9, 2016) (Notice of Voluntary Dismissal); Nev. State Democratic Party v. Nev. Republican Party, No. 2:16-CV-02514 -RFB-NJK (D. Nev. Nov. 9, 2016) (Notice of Voluntary Dismissal).

⁶⁴ Emily Cadei, *Trump Adviser Roger Stone Promises Not to Harass Voters, as Parties Battle over Poll Watchers*, NEWSWEEK (Nov. 7, 2016, 9:13 AM), <http://www.newsweek.com/trump-voter-harass-517701> [<https://perma.cc/Z33P-6CVZ>].

⁶⁵ *Ariz. Democratic Party*, 2016 WL 8669978, at *1; *Pa. Democratic Party*, 2016 WL 6584832, at *1. The Democrats eventually dismissed their Nevada lawsuit before a court decision. See *Nev. State Democratic Party*, No. 2:16-cv-02514-RFB-NJK.

⁶⁶ *Ohio Democratic Party*, 2016 WL 6542486, at *2, *stayed sub nom.* Ohio Democratic Party v. Donald J. Trump for President, Inc., No. 16-4268, 2016 WL 6608962, at *1 (6th Cir. Nov. 6, 2016).

⁶⁷ *Donald J. Trump for President*, 137 S. Ct. 15 (2016) (mem.).

⁶⁸ Thomas Moriarty, *Federal Judge Turns Down Democrats in Trump Voter Intimidation Case*, NJ.COM (Nov. 5, 2016, 5:23 PM), http://www.nj.com/news/index.ssf/2016/11/democratics_argue_to_hold_rnc_in_contempt_for_trum.html [<http://perma.cc/6H29-5HT8>]; Andy Sullivan, *U.S. Court Deals Trump a Setback in Poll-Monitor Fight*, REUTERS (Nov. 3, 2016, 1:32 PM), <http://www.reuters.com/article/us-usa-election-monitors/u-s-court-deals-trump-a-setback-in-poll-monitor-fight-idUSKBN12Y2BR> [<https://perma.cc/TYP7-JQ2X>].

⁶⁹ Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017).

⁷⁰ *Id.*

⁷¹ Julie Hirschfeld Davis, *Trump Picks Voter ID Advocate for Election Fraud Panel*, N.Y. TIMES (May 11, 2017), <https://nyti.ms/2pBuE3G>.

detected) non-citizen voting.⁷² Kobach was the only prominent election official to support Trump's claims of massive voter fraud in the 2016 elections, telling a reporter in late November 2016 that Trump "is absolutely correct when he says the number of illegal votes cast exceeds the popular vote margin between him and Hillary Clinton at this point."⁷³ He offered no evidence for his outrageous claim.⁷⁴

The Commission did not follow the format of earlier post-election commissions, each of which had been co-headed by leading Democratic and Republican figures.⁷⁵ Although the executive order called for a commission of up to fifteen members, it initially had only seven members, and, rather than having party parity, only two of the seven members were Democrats.⁷⁶ Trump later added more names, including three more Democrats who were not nationally known in the election administration field.⁷⁷ He later named three more controversial Republican members: Hans von Spakovsky, who was well known for making incendiary and unsupported claims about the extent of the voter fraud problem;⁷⁸ Ken Blackwell, who was involved in a

⁷² Ari Berman, *The Man Behind Trump's Voter Fraud Obsession*, N.Y. TIMES MAG. (June 13, 2017), <https://nyti.ms/2siFKzB>.

⁷³ Hunter Woodall, *Kris Kobach Agrees with Donald Trump that 'Millions' Voted Illegally but Offers No Evidence*, KAN. CITY STAR (Nov. 30, 2016, 12:18 PM), <http://www.kansascity.com/news/politics-government/article117957143.html> [<https://perma.cc/NGE9-7VNM>].

⁷⁴ *Id.*

⁷⁵ Richard L. Hasen, *Trump's Voting Investigation Is a Great Idea: As Long as It Looks Like This*, SLATE (Jan. 25, 2017, 11:31 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/trump_s_voting_fraud_investigation_is_a_great_idea.html [<https://perma.cc/QF62-LR56>] ("[M]embers of the commission should be bipartisan and well-respected on all sides. This was the model of the Carter-Ford [C]ommission that investigated problems with the 2000 election, the Carter-Baker Commission that investigated problems with the 2004 election, and the Presidential Commission on Election Administration that was led by leading Democratic lawyer Bob Bauer and leading Republican lawyer Ben Ginsberg and that investigated problems with long lines and election administration after the 2012 election.").

⁷⁶ Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017); Davis, *supra* note 71 ("Ms. Sanders said the commission would also include the Republicans Connie Lawson, the secretary of state of Indiana, and Kenneth Blackwell, who formerly held that post in Ohio, as well as two top Democratic election officials: William M. Gardner of New Hampshire and Matthew Dunlap of Maine. Christy McCormick, a Republican member of the nonpartisan U.S. Election Assistance Commission appointed by President Barack Obama, has also been selected to serve on the panel.").

⁷⁷ Sam Levine, *Some of Trump's New Election Investigators Don't Seem to Have Much Election Experience*, HUFFPOST (June 22, 2017, 3:31 PM), http://www.huffingtonpost.com/entry/trump-voter-fraud-commission_us_594c1068e4b01cedf01e75e?3pa [<https://perma.cc/F6ZU-Y4CK>] (discussing addition of Democrats David Dunn and Matt Rhodes, along with Republican Luis Borunda); Chris Geidner (@chrisgeidner), TWITTER (July 10, 2017, 6:11 PM), <https://twitter.com/chrisgeidner/status/884550746037002241> [<https://perma.cc/2FK7-72TN>] (noting appointment of Democrat Alan Lamar King of Alabama).

⁷⁸ Jane Mayer, *The Voter-Fraud Myth*, NEW YORKER (Oct. 29 & Nov. 5, 2012), <http://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth> [<https://perma.cc/AJC5-LHG4>]

notorious incident when he served as Ohio Secretary of State and issued an order rejecting voter registration forms which were not printed on heavy enough paper (a decision he later reversed);⁷⁹ and J. Christian Adams, who was a former U.S. Department of Justice lawyer who later led efforts to increase purges of voters from the voting rolls.⁸⁰

Critics worried that the Commission would issue a report that could be used as a pretext for Congress or states to pass new restrictive voting rules.⁸¹ It was a reasonable concern, given the President's incendiary statements, the composition of the Commission, and the continued belief that making it harder to register and vote helps Republicans. However, although he continued to claim there was "substantial evidence of voter fraud," President Trump disbanded the Commission in the first days of 2018.⁸²

III. FOREIGN MEDDLING AND "FAKE NEWS"

At the same time that Donald Trump was telling people on the campaign trail that the election was "rigged"⁸³—a vague term which could mean anything from complaining about a legal but unfair aspect of the electoral process (such as the electoral college or campaign finance rules)⁸⁴ to someone illegally manipulating vote

(drawing from von Spakovsky and his co-author John Fund's book as concluding that electoral fraud is a "spreading" danger).

⁷⁹ Hasen, *supra* note 4, at 939.

⁸⁰ Ari Berman, *Meet the Vote Suppressors and Conspiracy Theorists on Trump's 'Election Integrity' Commission*, THE NATION (July 11, 2017), <https://www.thenation.com/article/meet-the-liars-and-conspiracy-theorists-on-trumps-election-integrity-commission/> [<https://perma.cc/6VC9-2YLQ>]. Luis Borunda, a Republican named to the Commission, quit without explanation. See Luke Broadwater, *Maryland Official Resigns from Trump Voter Fraud Panel*, BALT. SUN (July 3, 2017, 6:50 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-borunda-resigns-trump-20170703-story.html>.

⁸¹ See Michael Waldman, *Trump's Commission on 'Election Integrity' Could Instead Restrict Voting*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/opinions/trumps-commission-on-election-integrity-could-instead-restrict-voting/2017/05/12/b9d4fdde-3698-11e7-b373-418f6849a004_story.html [<https://perma.cc/L8YH-G3X5>].

⁸² Josh Gerstein & Matthew Nussbaum, *Trump Disbands Voter Fraud Commission*, POLITICO (Jan. 3, 2018, 9:51 PM), <https://www.politico.com/story/2018/01/03/trump-disbands-voter-fraud-commission-322621> [<https://perma.cc/AJ7R-SN9B>].

⁸³ See *supra* notes 46–47 and accompanying text (quoting Trump).

⁸⁴ E.g., Dan Abrams, Opinion, *The System Is Rigged, Which Is Why It's Finally Time to Retire the Electoral College*, ABC NEWS (Nov. 10, 2016, 8:14 AM), <http://abcnews.go.com/Politics/opinion-system-rigged-finally-time-retire-electoral-college/story?id=43441156> [<https://perma.cc/7NK3-FTYG>]; Adam Eichen, *The System Is Just This Rigged: The Kochs, Citizens United and the Real Reason Why Corrupt Big Money Must Be Kicked Out of Politics*, SALON (Feb. 8, 2016, 5:56 AM), https://www.salon.com/2016/02/08/the_system_is_just_this_rigged_the_kochs_citizens_united_and_the_real_reason_why_corrupt_big_money

totals⁸⁵—foreign agents from Russia and perhaps elsewhere were engaged in unprecedented interference in the 2016 U.S. elections.⁸⁶ Russian agents unleashed cyber-attacks on election registration databases and other election systems across the United States.⁸⁷ And, thanks to Russian hacking, websites posted stolen emails and other electronic files from the DNC and spread false propaganda as a means of trying to influence the outcome of the presidential vote.⁸⁸ Russian agents ran social media campaigns, apparently to try to tilt the election to Donald Trump, buying at least \$100,000 in Facebook ads for the purpose.⁸⁹ As of this writing, an investigation continues into whether any members of the Trump campaign colluded with Russian agents on any of this activity.⁹⁰ While all available evidence indicates that vote totals and reporting were not affected by cyber-attacks, it is impossible to say whether the stolen DNC emails and false propaganda affected election results.⁹¹ It seems likely, however, that the chicanery will contribute to decreased legitimacy of the American electoral system.

A joint report issued in January 2017 by the United States Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Agency

_must_be_kicked_out_of_politics/ [<https://perma.cc/H9LE-HEYD>] (arguing that “[l]arge private [campaign] donations must be made ‘toxic’”).

⁸⁵ Steve Peoples & Calvin Woodward, *Trump Claims ‘Millions’ Voted Illegally, Without Evidence*, PBS NEWSHOUR (Nov. 27, 2016, 5:16 PM), <https://www.pbs.org/newshour/politics/trump-claims-millions-voted-illegally> [<https://perma.cc/HNJ7-TQUB>].

⁸⁶ Michael McFaul, Opinion, *Let’s Get the Facts Right on Foreign Involvement in Our Elections*, WASH. POST (Dec. 10, 2016), https://www.washingtonpost.com/news/global-opinions/wp/2016/12/10/lets-get-the-facts-right-on-foreign-involvement-in-our-elections/?utm_term=.a1ad3083409c [<https://perma.cc/4D8N-LJZ9>] (discussing that though Russian involvement is apparent, the extent of such involvement is unclear).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://nyti.ms/2xPJ0m9>; see also Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://nyti.ms/2xdVuXM> (describing fake profiles of Americans backed by Russians tweeting campaign messages).

⁹⁰ Marshall Cohen, *By the Numbers: The Trump Orbit’s Contact with Russians*, CNN (Nov. 22, 2017, 2:08 PM), <http://www.cnn.com/2017/11/21/politics/trump-russia-by-the-numbers/index.html> [<https://perma.cc/EHB7-R6JC>] (“At least 12 Trump associates had contacts with Russians during the campaign or transition.”).

⁹¹ Other factors, such as Comey’s announcement of a reopening of an investigation into Hillary Clinton’s handling of emails during her time as Secretary of State and Clinton’s decision not to personally campaign in Wisconsin also could be pointed to as contributing to Clinton’s loss. See cf. MJ Lee, *Clinton Slams New York Times, DNC, Comey for Her Loss*, CNN (May 31, 2017, 7:53 PM), <http://www.cnn.com/2017/05/31/politics/hillary-clinton-recode-loss/index.html> [<https://perma.cc/LM8F-HNYT>] (“[T]he ex-secretary of state again alleged that former FBI Director James Comey’s decision on October 28, 2016, to send a letter to Congress about her email controversy was simply devastating.”).

confirmed Russian attempts to influence the outcome of the 2016 U.S. elections, to create instability, and to favor Trump over Democratic candidate Hillary Clinton:

We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election. Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump. We have high confidence in these judgments.⁹²

As to the specific means employed by the Russian government during the 2016 elections, the report concluded: "Moscow's influence campaign followed a Russian messaging strategy that blends covert intelligence operations—such as cyber activity—with overt efforts by Russian Government agencies, state-funded media, third-party intermediaries, and paid social media users or 'trolls.'"⁹³ The two most prominent

⁹² OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [<https://perma.cc/96H7-2K8Z>] (emphases omitted). The "key judgments" also included the following: "We also assess Putin and the Russian Government aspired to help President-elect Trump's election chances when possible by discrediting Secretary Clinton and publicly contrasting her unfavorably to him. All three agencies agree with this judgment. CIA and FBI have high confidence in this judgment; NSA has moderate confidence." *Id.* (emphases omitted); see also Greg Miller et al., *Obama's Secret Struggle to Punish Russia for Putin's Election Assault*, WASH. POST (June 23, 2017), https://www.washingtonpost.com/graphics/2017/world/national-security/obama-putin-election-hacking/?utm_term=.a3f43885b602 [<https://perma.cc/X7DV-5X63>] ("[American] intelligence captured Putin's specific instructions on the operation's audacious objectives—defeat or at least damage the Democratic nominee, Hillary Clinton, and help elect her opponent, Donald Trump.").

⁹³ OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *supra* note 92, at ii (emphases omitted). The assessment continued, reporting that:

Russia's intelligence services conducted cyber operations against targets associated with the 2016 US presidential election, including targets associated with both major US political parties. We assess with high confidence that Russian military intelligence (General Staff Main Intelligence Directorate or GRU) used the Guccifer 2.0 persona and DCLeaks.com to release US victim data obtained in cyber operations publicly and in exclusives to media outlets and relayed material to WikiLeaks. Russian intelligence obtained and maintained access to elements of multiple US state or local electoral boards. DHS assesses that the types of systems Russian actors targeted or compromised were not involved in vote tallying. Russia's state-run propaganda machine contributed to the influence campaign by serving as a platform for Kremlin messaging to Russian and international audiences.

Id. at ii–iii (emphases omitted).

Russian activities that achieved broad public attention during the 2016 elections (that we know of at this point) were the release of stolen emails of the DNC and the infiltration of many state election databases.⁹⁴

The DNC emails revealed embarrassing facts about the party and the Clinton campaign strategy.⁹⁵ Specific emails about the party's poor treatment of Senator Bernie Sanders during the Democratic primary season when Sanders faced Clinton led Representative Debbie Wasserman-Shultz to resign as the DNC chair.⁹⁶ The revelations dripped out when released over a period of months by Wikileaks,⁹⁷ D.C. Leaks,⁹⁸ and a hacker associated with the Russian government under the name Guccifer 2.0.⁹⁹ Trump advisor Roger Stone admitted contact with the person tweeting as Guccifer 2.0 as well as (through an intermediary) Julian Assange of Wikileaks.¹⁰⁰ "In August [2016], Mr. Stone wrote on Twitter that John D. Podesta, Hillary Clinton's campaign chairman, would soon go through his 'time in the barrel.' Weeks later, WikiLeaks began publishing a trove of Mr. Podesta's hacked emails, the daily release of which was seen as damaging to the campaign."¹⁰¹

⁹⁴ On how the Russians gained access and the controversy over whether the DNC and FBI did enough to deal with the hacks, see Eric Lipton et al., *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016), <https://nyti.ms/2jASgpt>.

⁹⁵ E.g., Sam Frizell, *What Leaked Emails Reveal About Hillary Clinton's Campaign*, TIME (Oct. 7, 2016), <http://time.com/4523749/hillary-clinton-wikileaks-leaked-emails-john-podesta/> [<https://perma.cc/M8X8-AMCE>] (stating that although most of the emails contain "mundane campaign communications," they also reveal some real concerns such as disclosure of Clinton's paid speeches and campaign manager Robby Mook's worries about the Clinton Foundation's ties to banks).

⁹⁶ Jonathan Martin & Alan Rappoport, *Debbie Wasserman Schultz to Resign D.N.C. Post*, N.Y. TIMES (July 24, 2016), <https://nyti.ms/2kTxyT7>.

⁹⁷ *Id.*

⁹⁸ Michael Sainato, Opinion, *DC Leaks Exposes Clinton Insider's Elitist and Embarrassing Emails*, OBSERVER (Oct. 7, 2016, 10:07 AM), <http://www.observer.com/2016/10/dc-leaks-exposes-clinton-insiders-elitist-and-embarrassing-emails> [<https://perma.cc/XU3V-P5UN>] (attributing leaks to "[t]he anonymous hacker organization").

⁹⁹ Cory Bennett, *Guccifer 2.0 Drops More DNC Docs*, POLITICO (Sept. 13, 2016, 5:36 PM), <https://www.politico.com/story/2016/09/guccifer-2-0-dnc-docs-228091> [<https://perma.cc/R7LA-6LAK>] (describing the trove of information leaked that detailed information about the DNC's finances, network infrastructure, and personal data regarding DNC donors).

¹⁰⁰ See Matthew Rosenberg & Maggie Haberman, *Trump Adviser Had Twitter Contact with Figure Tied to Russians*, N.Y. TIMES (Mar. 11, 2017), <https://nyti.ms/2mdQtFx> ("Roger J. Stone Jr., an off-and-on adviser to President Trump for decades, has acknowledged that he had contact on Twitter with Guccifer 2.0, the mysterious online figure that is believed to be a front for Russian intelligence officials."); *id.* (Stone admitted contact with Assange through an intermediary). In addition, Donald Trump Jr. exchanged direct messages over Twitter with Wikileaks. See Julia Ioffe, *The Secret Correspondence Between Donald Trump Jr. and WikiLeaks*, ATLANTIC (Nov. 13, 2017, 10:28 PM), <https://www.theatlantic.com/politics/archive/2017/11/the-secret-correspondence-between-donald-trump-jr-and-wikileaks/545738/> [<https://perma.cc/R2U8-FTPC>].

¹⁰¹ Rosenberg & Haberman, *supra* note 100.

As to the infiltration of state voter registration databases, the best information available at this time indicates that the attempted cyber-attacks were widespread, with one report claiming that the hacking hit systems in thirty-nine states, and the government confirming attacks in twenty-one states.¹⁰² “In Illinois, investigators found evidence that cyber intruders tried to delete or alter voter data. The hackers accessed software designed to be used by poll workers on Election Day, and in at least one state accessed a campaign finance database.”¹⁰³ The level of attacks was so high that Obama administration officials used the “red phone” to contact Moscow and to warn them against further attacks.¹⁰⁴ Following the involvement of and assistance from the U.S. Department of Homeland Security (DHS), “[t]hirty-seven states reported finding traces of the hackers in various systems In two others—Florida and California—those traces were found in systems run by a private contractor managing critical election systems.”¹⁰⁵ According to one report, in one (unnamed) state, hackers successfully changed voter data in a county database, but the database was corrected before the election.¹⁰⁶

Jeh Johnson, who served as Secretary of DHS during the election period, explained in a June 2017 testimony the nature and extent of the Russian cyber-attacks, as well as the efforts he took to help state and local election officials.¹⁰⁷ He also detailed the push-back he received over trying to designate the U.S. election system as “critical infrastructure” for DHS purposes. State and local officials feared loss of their power over running elections.¹⁰⁸ DHS nonetheless later gave infrastructure the “critical” designation, which the Trump Administration then reaffirmed after Trump took office.¹⁰⁹

Secretary Johnson concluded:

To my current knowledge, the Russian government did not through any cyber intrusion alter ballots, ballot counts or reporting

¹⁰² Michael Riley & Jordan Robertson, *Russian Cyber Hacks on U.S. Electoral System Far Wider than Previously Known*, BLOOMBERG (June 13, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-06-13/russian-breach-of-39-states-threatens-future-u-s-elections> [<https://perma.cc/ME58-TREC>]. A DHS official testified in June 2017 that hackers targeted twenty-one state election systems. See Dustin Volz & Julia Edwards Ainsley, *Russians Targeted 21 Election Systems, U.S. Official Says*, REUTERS (June 21, 2017, 10:41 AM), http://www.reuters.com/article/us-usa-cyber-congress-idUSKBN19C1Y3?utm_campaign [<https://perma.cc/A3WB-SV5X>].

¹⁰³ Riley & Robertson, *supra* note 102.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Massimo Calabresi, *Election Hackers Altered Voter Rolls, Stole Private Data, Officials Say*, TIME (June 22, 2017), <http://time.com/4828306/russian-hacking-election-widespread-private-data/> [<https://perma.cc/D86K-R33P>].

¹⁰⁷ *Hearing Before the H. Permanent Select Comm. on Intelligence*, 115th Cong. 2–6 (2017) (statement of Jeh Charles Johnson, former Secretary of Homeland Security).

¹⁰⁸ *Id.* at 2–3, 5–6.

¹⁰⁹ *Id.* at 5–6.

of election results. I am not in a position to know whether the successful Russian government-directed hacks of the DNC and elsewhere did in fact alter public opinion and thereby alter the outcome of the presidential election.¹¹⁰

Russia also undertook an extensive propaganda effort, which involved more than publishing negative stories about Clinton and U.S. interests.¹¹¹ It also spread “fake news,” false stories aimed at influencing the outcome of the election for Trump.¹¹² “For example, [Russian news website] Sputnik published an article that said the [John] Podesta email dump included certain incriminating comments about the Benghazi scandal, an allegation that turned out to be incorrect. Trump himself repeated this false story” at a campaign rally.¹¹³ Russia paid at least \$100,000¹¹⁴ to Facebook to spread false reports to specific populations, including aiming certain false reports at journalists who might be expected to further spread the propaganda and misinformation.¹¹⁵

¹¹⁰ *Id.* at 5.

¹¹¹ See OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *supra* note 92, at 3 (“Russia’s state-run propaganda machine—comprised of its domestic media apparatus, outlets targeting global audiences such as RT and Sputnik, and a network of quasi-government trolls—contributed to the influence campaign by serving as a platform for Kremlin messaging to Russian and international audiences. State-owned Russian media made increasingly favorable comments about President-elect Trump as the 2016 US general and primary election campaigns progressed while consistently offering negative coverage of Secretary Clinton.”); *id.* at Annex A, at 6 (describing Russian propaganda activities aimed at the United States). For example, RT America “portrayed the US electoral process as undemocratic and featured calls by US protesters for the public to rise up and ‘take this government back.’” *Id.*

¹¹² See Lauren Carroll, *Russia and Its Influence on the Presidential Election*, POLITIFACT (Dec. 1, 2016, 5:25 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/01/russia-and-its-influence-presidential-election/> [<https://perma.cc/6UFD-QKUF>].

¹¹³ See *id.*; see also Louis Jacobson, *Donald Trump Incorrectly Pins Benghazi Criticism on Sidney Blumenthal*, POLITIFACT (Oct. 11, 2016, 2:34 PM), <http://www.politifact.com/truth-o-meter/statements/2016/oct/11/donald-trump/donald-trump-incorrectly-pins-benghazi-criticism-s/> [<https://perma.cc/5ZWJ-XGDP>].

¹¹⁴ Shane & Goel, *supra* note 89.

¹¹⁵ Massimo Calabresi, *Inside Russia’s Social Media War on America*, TIME (May 18, 2017, 3:48 PM), <http://time.com/4783932/inside-russia-social-media-war-america/> [<https://perma.cc/7KGG-9YWR>] (“Congressional investigators are looking at how Russia helped stories like these spread to specific audiences. Counterintelligence officials, meanwhile, have picked up evidence that Russia tried to target particular influencers during the election season who they reasoned would help spread the damaging stories. These officials have seen evidence of Russia using its algorithmic techniques to target the social media accounts of particular reporters, senior intelligence officials tell *Time*. ‘It’s not necessarily the journal or the newspaper or the TV show,’ says the senior intelligence official. ‘It’s the specific reporter that they find who might be a little bit slanted toward believing things, and they’ll hit him’ with a flood of fake news stories. Russia plays in every social media space. The intelligence officials have found that Moscow’s agents bought ads on Facebook to target specific populations with propaganda. ‘They buy the ads, where it says sponsored by—they do that just as much as

Russia also used automated “bots” to spread false news across social media platforms such as Facebook and Twitter.¹¹⁶

The so-called “Fake News” problem extended beyond Russia and beyond anti-Clinton propaganda. A group of young Macedonians spread a huge amount of pro-Trump fake news as a way of making money on social media advertising.¹¹⁷ A false story from one of the Macedonians saying that Hillary Clinton would be indicted in 2017 got 140,000 shares and comments on Facebook, generating good revenue.¹¹⁸ An American from Clearwater, Florida, started a fake news site as a joke and gained one million views in two weeks.¹¹⁹

One fake news story led to actual violence. A false story under the so-called “Pizzagate” scandal stated that a D.C. restaurant “Comet Ping Pong” was being used by Hillary Clinton associates to run a child sex ring.¹²⁰ The reports led a twenty-eight-year-old man to go to the restaurant to check things out.¹²¹ He ended up firing an AR-15 rifle, though fortunately no one was hurt.¹²²

anybody else does,’ says the senior intelligence official. (A Facebook official says the company has no evidence of that occurring.) The ranking Democrat on the Senate Intelligence Committee, Mark Warner of Virginia, has said he is looking into why, for example, four of the top five Google search results the day the U.S. released a report on the 2016 operation were links to Russia’s TV propaganda arm, RT. (Google says it saw no meddling in this case.) Researchers at the University of Southern California, meanwhile, found that nearly 20% of political tweets in 2016 between Sept. 16 and Oct. 21 were generated by bots of unknown origin; investigators are trying to figure out how many were Russian.”)

¹¹⁶ Gabe O’Connor & Avie Schneider, *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017, 4:53 PM), <http://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

¹¹⁷ Craig Silverman & Lawrence Alexander, *How Teens in the Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED (Nov. 3, 2016, 8:02 PM), https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm_term=.vrAjGwJRZB#.raLAaGKvpP [<https://perma.cc/WH5F-7DKX>] (discussing Macedonian teenagers’ widespread scam enacted by using American-sounding domain names and posting decidedly conservative content).

¹¹⁸ *Id.*

¹¹⁹ Joshua Gillin, *Fake News Website Starts as Joke, Gains 1 Million Views Within 2 Weeks*, PUNDITFACT (Mar. 9, 2017, 12:17 PM), <http://www.politifact.com/punditfact/article/2017/mar/09/fake-news-website-starts-joke-gains-1-million-view/> [<https://perma.cc/M8X4-MSS9>].

¹²⁰ *Id.*

¹²¹ Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 2016), <https://nyti.ms/2h8nPmp>.

¹²² *See id.* Facing a potential libel suit over false claims in the “Pizzagate” scandal, InfoWars personality Alex Jones apologized and retracted charges about a child sex ring being run out of the restaurant. *See* Paul Farhi, *Conspiracy Theorist Alex Jones Apologizes for Role in Fake ‘Pizzagate’ Story*, CHI. TRIB. (Mar. 24, 2017, 10:11 PM), <http://www.chicagotribune.com/news/nationworld/ct-alex-jones-pizzagate-apology-20170324-story.html> [<https://perma.cc/Q6Z5-K6QG>].

Now, with Trump in power, Democrats and others on the left are increasingly falling for fake news. Senator Ed Markey of Massachusetts made false claims on CNN about grand juries being empaneled to look into the Trump campaigns ties to Russia.¹²³ Harvard Law professor Laurence Tribe also spread false claims on Twitter, including a false claim that then–White House advisor Steve Bannon was physically assaulting White House staffers.¹²⁴ Both Markey and Tribe fell for false reports coming from a group of sources allied with Louise Mensch.¹²⁵ It does not appear that “fake news” has yet spread on the left as widely as it has on the right,¹²⁶ but that is likely to change over time.

Meanwhile, the term “fake news” risks becoming devoid of meaning, as many people, including President Trump, have attached the label to any news or reporting with which they disagree.¹²⁷ Trump used the term at least 124 times on Twitter,¹²⁸

¹²³ Jeet Heer, *No, Liberals Are Not Falling for Conspiracy Theories Just Like Conservatives Do*, NEW REPUBLIC (May 23, 2017), <https://newrepublic.com/article/142828/no-liberals-not-falling-conspiracy-theories-just-like-conservatives>.

¹²⁴ See McKay Coppins, *How the Left Lost Its Mind*, ATLANTIC (July 2, 2017), <https://www.theatlantic.com/politics/archive/2017/07/liberal-fever-swamps/530736/> [<https://perma.cc/8E2U-RPJJ>] (“Laurence Tribe, the renowned Harvard scholar of constitutional law, has been an especially active booster for the [Louise Mensch] site, routinely tweeting links to highly questionable, unverified news stories about Trump.”); see also Andy Grewal (@andygrewal), TWITTER (June 17, 2017, 3:51 AM), <https://twitter.com/AndyGrewal/status/876029507840462848> [<https://perma.cc/A8VG-ZC7E>]. On the Bannon claim, Tribe quickly apologized once he realized his sources were not reputable. Laurence Tribe (@tribelaw), TWITTER (June 17, 2017, 7:44 PM), <https://twitter.com/tribelaw/status/876269401754017792> [<https://perma.cc/TRC7-EEEE>].

¹²⁵ Zack Beauchamp, *Democrats Are Falling for Fake News About Russia*, VOX (May 19, 2017, 8:30 AM), <https://www.vox.com/world/2017/5/19/15561842/trump-russia-louise-mensch> [<https://perma.cc/8TW4-LZFT>] (“Twitter is the Russiasphere’s native habitat. Louise Mensch, a former right-wing British parliamentarian and romance novelist, spreads the newest, punchiest, and often most unfounded Russia gossip to her 283,000 followers on Twitter. Mensch is backed up by a handful of allies, including former NSA spook John Schindler (226,000 followers) and DC-area photographer Claude Taylor (159,000 followers). There’s also a handful of websites, like Palmer Report, that seem devoted nearly exclusively to spreading bizarre assertions like the theory that Ryan and Sen. Majority Leader Mitch McConnell funneled Russian money to Trump—a story that spread widely among the site’s 70,000 Facebook fans.”); see also Brendan Nyhan, *Why More Democrats Are Now Embracing Conspiracy Theories*, N.Y. TIMES (Feb. 15, 2017), <https://nyti.ms/2IOTYCV>.

¹²⁶ Heer, *supra* note 123.

¹²⁷ See, e.g., Henri Gendreau, *The Internet Made ‘Fake News’ a Thing—Then Made It Nothing*, WIRED (Feb. 25, 2017, 7:00 AM), <https://www.wired.com/2017/02/internet-made-fake-news-thing-made-nothing/> [<https://perma.cc/A4CZ-E48T>] (“Like its forebear ‘political correctness,’ the protean meanings of ‘fake news’ have made the term meaningless.”).

¹²⁸ A Twitter search was conducted using the query “Fake News,” and returned 124 positive results in which Trump tweeted about Fake News. See <https://twitter.com/search?l=&q=%22fake%20news%22%20from%3Arealdonaldtrump&src=typd> [<https://perma.cc/967T-PWBB>] (conducted November 25, 2017).

such as in a June 2017 tweet proclaiming “The Fake News Media has never been so wrong or so dirty. Purposely incorrect stories and phony sources to meet their agenda of hate. Sad!”¹²⁹

IV. A NEW ROUND OF VOTING MACHINE CONCERNS, ELECTION ADMINISTRATION SNAFUS, AND CONSPIRACY THEORIES

In the final report of the Obama-appointed Presidential Commission on Election Administration headed by Bob Bauer and Ben Ginsberg, which the Trump Administration inexplicably removed from government servers after Trump took office,¹³⁰ the Commission warned about an “impending crisis” with voting technology reaching the end of its useful life.¹³¹ Many jurisdictions in the United States replaced their voting machines after Congress provided funding in the 2002 Help America Vote Act following the 2000 Florida voting debacle, but now the replacement machines need replacing.¹³² Poor voting machine technology, in the era of hyperpolarization, hacking, and “fake news,” would be a disaster in another razor-thin presidential election.

A post-election recount that began (but was not completed) in Michigan right after the 2016 presidential election nicely illustrates the point. Trump was able to put together a surprising Electoral College victory by narrowly winning three Midwestern states that had previously trended Democratic in presidential races—Michigan,

¹²⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 13, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/874576057579565056> [<https://perma.cc/WKP5-MXF5>].

¹³⁰ Rick Hasen, *Report of Presidential Commission on Electoral Administration Appears Gone*, ELECTION L. BLOG (Jan. 27, 2017, 2:45 PM), <http://electionlawblog.org/?p=90741> [<https://perma.cc/T645-XDJS>]. The material has now been posted on a mirror site, <http://web.mit.edu/supportthevoter/www/> [<https://perma.cc/AF8Y-9J7T>]. See Charles Stewart III, *A Mirror Site of the PCEA Is Now Up*, ELECTION UPDATES (Jan. 31, 2017), <http://electionupdates.caltech.edu/2017/01/31/a-mirror-site-of-the-pcea-is-now-up/> [<https://perma.cc/AZ34-CCPK>]. It is worth noting that the Caltech/MIT Voting Technology Project was one of the earliest NGOs working on a professional and non-partisan basis to improve American election administration. See generally CALTECH/MIT VOTING TECHNOLOGY PROJECT, <https://www.vote.caltech.edu> [<https://perma.cc/E66T-ZP4F>] (last visited Feb. 21, 2018).

¹³¹ PRESIDENTIAL COMM’N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATION OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 62 (2014), <http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [<https://perma.cc/5QQR-VT2B>] [hereinafter PCEA REPORT] (“Perhaps the most dire warning the Commission heard in its investigation of the topics in the Executive Order concerned the impending crisis in voting technology. Well-known to election administrators, if not the public at large, this impending crisis arises from the widespread wearing out of voting machines purchased a decade ago, the lack of any voting machines on the market that meet the current needs of election administrators, a standard-setting process that has broken down, and a certification process for new machines that is costly and time-consuming. In short, jurisdictions do not have the money to purchase new machines, and legal and market constraints prevent the development of machines they would want even if they had the funds.” (citation omitted)).

¹³² *Id.* at 62–63.

Pennsylvania, and Wisconsin.¹³³ The vote difference was roughly 80,000 votes among the three states.¹³⁴ The Clinton campaign calculated that there would be no reason to request a recount, as the relatively close margin was not close enough that a recount would likely change the results.¹³⁵ But Green Party candidate Jill Stein, who many Democrats blamed for siphoning votes away from Clinton and helping Trump, raised millions of dollars for recounts in these states.¹³⁶ The call for recounts came after some on the Left raised concerns that Russia could have hacked voting systems to change election results, even though there was no evidence such hacking actually took place.¹³⁷ Some Trump and Clinton supporters believed Stein was engaging in the recount for her own purposes (such as to build up her mailing list for future solicitation),¹³⁸ but the Clinton campaign participated in the recounts as observers of the process.¹³⁹

¹³³ Philip Bump, *Donald Trump Will Be President Thanks to 80,000 People in Three States*, WASH. POST (Dec. 1, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/donald-trump-will-be-president-thanks-to-80000-people-in-three-states/> [<https://perma.cc/2Z8L-LGX6>].

¹³⁴ *Id.*

¹³⁵ Chris Cillizza, *Hillary Clinton's Campaign Wants to Make One Thing Very Clear: They Don't Want a Recount*, WASH. POST (Nov. 29, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/29/hillary-clintons-campaign-didnt-want-this-recount-and-doesnt-think-it-will-change-anything/> [<https://perma.cc/2PUZ-8BRC>] (quoting Clinton campaign lawyer Marc Elias: "If the campaign thought that the results could change based on a recount, we would have sought them. We didn't.").

¹³⁶ Eric Geller, *Citing 'Reported Hacks,' Jill Stein Says She'll File for Recounts in Three States*, POLITICO (Nov. 23, 2016, 4:44 PM), <http://www.politico.com/story/2016/11/jill-stein-recount-three-states-election-hacks-231814> [<https://perma.cc/RZ24-CL56>]; Matt Rocheleau, *Stein Raises \$2.3 Million for Recount Requests in Three Key States*, BOS. GLOBE (Nov. 23, 2016), <https://www.bostonglobe.com/metro/2016/11/23/jill-stein-seeks-recount-wisconsin-michigan-and-pennsylvania/gmziuhamGOjDgYitbQpWSJ/story.html>.

¹³⁷ Geller, *supra* note 136 (citing a *New York Magazine* article and statements of Michigan computer science professor Alex Halderman regarding concerns about the reliability of the vote counting).

¹³⁸ Scott Bauer, *Stein Still Stands to Benefit Under Losing Recount Effort*, AP (Dec. 5, 2016), <https://apnews.com/000b42099c524f069ecd71d4065e05ca/stein-still-stands-benefit-under-losing-recount-effort> [<https://perma.cc/52ZY-R2RP>] ("Stein's critics also argue that her true motivation is to raise money and build a donor database that can be tapped later by her or others in the Green Party.").

¹³⁹ Marc Erik Elias, *Listening and Responding to Calls for an Audit and Recount*, MEDIUM (Nov. 26, 2016), <https://medium.com/@marceelias/listening-and-responding-to-calls-for-an-audit-and-recount-2a904717ea39> [<https://perma.cc/YCJ6-ECQF>] ("Because we had not uncovered any actionable evidence of hacking or outside attempts to alter the voting technology, we had not planned to exercise this option ourselves, but now that a recount has been initiated in Wisconsin, we intend to participate in order to ensure the process proceeds in a manner that is fair to all sides. If Jill Stein follows through as she has promised and pursues recounts in Pennsylvania and Michigan, we will take the same approach in those states as well.").

The recounts proceeded to various points in the three states, and, unsurprisingly, the results did not change.¹⁴⁰ But the Michigan recount, where the final tally showed Trump beating Clinton by 10,704 votes out of approximately 4.8 million votes cast, hit a snag in the City of Detroit before courts called it off as unauthorized by state law.¹⁴¹ The recount revealed very disconcerting facts about the state of U.S. voting technology and inadequate training of election workers, and the problems led to a quick spread of conspiracy theories.¹⁴²

Under Michigan law, votes from a particular precinct may be included in a recount only if the number of voters recorded as having voted in the electronic poll book listing voters' names matches the number of votes tabulated by its corresponding optical scan voting machine.¹⁴³ In Detroit, however, approximately 392 precincts had mismatched numbers¹⁴⁴ (in election administration parlance, they were not "in balance"). Under Michigan law, these precincts could not be included in a recount.¹⁴⁵ In one of the worst examples, in Precinct 152, 306 voters were recorded as having voted, but there were only 50 ballots in the sealed ballot box.¹⁴⁶

The anomalies were very concerning and sparked claims of widespread fraud by the Right. *WorldNetDaily*'s headline blared: "Stealing the Vote: Recount Uncovers Serious Fraud in Detroit."¹⁴⁷ The story reported a ballot potentially being recast six times.¹⁴⁸ *Fox News Insider* declared: "Oops! Stein's Recount Turns Up More Votes than Voters in Detroit."¹⁴⁹ The report included the link to a "Fox & Friends" video as well as a *Fox & Friends* tweet reading: "Jill Stein's crusade to expose voter fraud

¹⁴⁰ Joseph Ax, *Jill Stein's Recount Bid Is Over*, HUFFPOST (Dec. 12, 2016, 7:17 PM), http://www.huffingtonpost.com/entry/jill-stein-recount-over_us_584f3b71e4b0bd9c3dfe612e [https://perma.cc/72SM-QZKS].

¹⁴¹ See MICH. DEP'T OF STATE, EXECUTIVE SUMMARY OF AUDITS CONDUCTED IN DETROIT AND STATEWIDE IN RELATION TO THE NOVEMBER 8, 2016 GENERAL ELECTION 1 (2017), http://www.michigan.gov/documents/sos/Combined_Detroit_Audit_Exec_summary_551188_7.pdf [https://perma.cc/D4ZX-QMQJ] [hereinafter MICHIGAN REPORT] (containing both an executive summary of two reports, as well as the audit of the Detroit problems); Joel Rosenblatt, *Michigan Presidential Ballot Recount Ended by Court Ruling*, BLOOMBERG (Dec. 7, 2016, 9:41 PM), <https://www.bloomberg.com/news/articles/2016-12-08/michigan-allowed-by-judge-to-end-recount-sought-by-greens-stein> [https://perma.cc/8JLB-3P68].

¹⁴² See, e.g., *Stealing the Vote: Recount Uncovers Serious Voter Fraud in Detroit*, WORLD NETDAILY (Dec. 8, 2016, 5:28 PM), <https://www.wnd.com/2016/12/recount-uncovers-serious-fraud-in-detroit/> [https://perma.cc/2QRK-7845] [hereinafter *Stealing the Vote*].

¹⁴³ MICHIGAN REPORT, *supra* note 141, at Audit Report, at 1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at Summary, at 2.

¹⁴⁷ *Stealing the Vote*, *supra* note 142.

¹⁴⁸ *Id.*

¹⁴⁹ *Oops! Stein Recount Turns Up More Votes than Voters in Detroit*, FOX NEWS INSIDER (Dec. 14, 2016, 9:14 AM), <http://insider.foxnews.com/2016/12/14/steins-recount-turns-more-votes-voters-detroit> [https://perma.cc/9LJY-7EK8].

blows the lid off ballot box fraud in Detroit where Hillary Clinton won big.”¹⁵⁰ Even the sober *Detroit Free Press* had a headline: “Detroit’s Election Woes: 782 More Votes than Voters.”¹⁵¹

At first, it was unclear exactly what went wrong in Detroit, but even at the beginning of the recount it appeared likely that a combination of machine failure, such as numerous instances of optical scan ballots jamming in the tabulation machines, and human error were major culprits.¹⁵² A subsequent investigation by the Michigan Secretary of State’s Board of Elections (BOE) placed the blame more squarely on human error.¹⁵³

“BOE found no evidence of pervasive voter fraud or that widespread voting equipment failure led to the imbalances, yet the audit uncovered a multitude of human errors that prevented (or would have prevented) the presidential recount from proceeding in a significant number of precincts”¹⁵⁴ Many of the problems stemmed from election workers not knowing how to properly record information in the electronic poll books, such as recording a spoiled ballot, as well as mishandling of provisional ballots.¹⁵⁵ Furthermore, many ballots were not properly put in the tabulation machines.¹⁵⁶ During the later audit, BOE was able to balance almost half of the 392 unbalanced precincts by figuring out the election workers’ errors on election night.¹⁵⁷

The report continued:

In other instances, BOE determined that election workers left counted ballots in the tabulator bin at the end of the night instead of placing all ballots in a sealed container. The example of Precinct 152, widely cited in news media reports, is illustrative. When the sealed ballot container for this precinct was opened at the recount, it was found to contain only 50 ballots despite the fact

¹⁵⁰ FOX & Friends (@foxandfriends), TWITTER (Dec. 14, 2016, 3:55 AM), <https://twitter.com/foxandfriends/status/809003930516496384> [<https://perma.cc/AY6R-6AZF>].

¹⁵¹ John Wisely & JC Reindl, *Detroit’s Election Woes: 782 More Votes than Voters*, DETROIT FREE PRESS (Dec. 18, 2016, 10:28 PM), <http://www.freep.com/story/news/local/michigan/detroit/2016/12/18/detroit-ballots-vote-recount-election-stein/95570866/> [<https://perma.cc/Q7SV-XX8Q>].

¹⁵² Lawrence Norden, *Michigan Recount Exposes Voting Machine Failures*, BRENNAN CENT. FOR JUST. (Dec. 8, 2016), <https://www.brennancenter.org/blog/michigan-recount-exposes-voting-machine-failures> [<https://perma.cc/MRT3-EUEM>].

¹⁵³ The audit focused on the 136 precincts with the greatest anomalies, “the ‘worst of the worst,’ . . . including those having a significant number of misplaced ballots and those with unexplained mismatches in the number of voters compared to the number of ballots (plus or minus 3 or more).” MICHIGAN REPORT, *supra* note 141, at Audit Report, at 2.

¹⁵⁴ *Id.* at Summary, at 2.

¹⁵⁵ *Id.* at Audit Report, at 3.

¹⁵⁶ *Id.* at 3–4.

¹⁵⁷ *Id.* at 2.

that the poll book included the names of 306 voters. During the audit, BOE was able to confirm that all but one of the voted ballots had been left behind in the tabulator on Election Night. The audit refutes suspicions that the relatively small number of ballots placed in the ballot container could have been illegally tabulated again and again.¹⁵⁸

The Detroit situation recalls the Election Administrator's prayer, "Lord, let this election not be close."¹⁵⁹ It is hard to imagine how much worse the 2016 election would have been had the results come down to a Michigan recount and social media-driven stories of ballot snafus, poorly trained poll workers, and aging technology—all in a heavily African-American city that voted overwhelmingly for Hillary Clinton over Donald Trump.

V. THE TOUGH ROAD TO DE-ESCALATION AND IMPROVEMENT TO AMERICAN ELECTION ADMINISTRATION AND DEMOCRACY

As terrible as the 2016 voting wars were compared to the past, it is important to have no illusions about the future. Things could get much, much worse. Next time, cyber-attacks could try to alter or erase voter registration databases, bring down our power grids or transportation infrastructure, or do something else to interfere with actual voting on Election Day;¹⁶⁰ the next hacks could include malicious, false information interspersed with accurate stolen files, which could influence election outcomes; public confidence in the fairness of our electoral process could decrease further, as incendiary and unsupported claims about voter fraud, cheating, and altered vote totals spread via social media. Already, public confidence in the fairness of the election process is largely driven by who wins and who loses elections.¹⁶¹ If

¹⁵⁸ *Id.* at Summary, at 2.

¹⁵⁹ *Election Administrator's Prayer*, TAEGAN GODDARD'S POL. DICTIONARY, <http://politicaldictionary.com/words/election-administrators-prayer/> [<https://perma.cc/8843-XNWK>] (last visited Feb. 18, 2018).

¹⁶⁰ Nicole Perlroth, *Hackers Are Targeting Nuclear Facilities*, *Homeland Security Dept. and F.B.I. Say*, N.Y. TIMES (July 6, 2017), <https://nyti.ms/2tRVPNq>; Richard L. Hasen, Op. Ed., *What an Election Law Expert Worries About on Election Day*, L.A. TIMES (Nov. 7, 2016, 10:15 AM), <http://www.latimes.com/opinion/op-ed/la-oe-hasen-election-day-worries-20161108-story.html> [<http://perma.cc/M78N-PS53>].

¹⁶¹ Charles Stewart III, *Graphic of the Week # 1: Polarization in State Voter Confidence*, ELECTION UPDATES (June 5, 2017), <http://electionupdates.caltech.edu/2017/06/05/graphic-of-the-week-1-polarization-in-state-voter-confidence/> [<https://perma.cc/5G5K-6MW9>] ("With only three exceptions (Maine, Michigan, and Pennsylvania), the more-confident partisans in a state match the party of the presidential candidate who won the state. On average, there is a 34-point net jump [in voters reporting they are very confident that their votes were accurately counted] associated simply with living in a state won by Trump compared to being a state won by Clinton.").

increased mischief accompanies a razor-thin election, social media-driven anger threatens the peace of our democracy.¹⁶²

What is to be done? There are no easy answers to these unique challenges now facing U.S. democracy, and longer-term solutions to deal with some of the problems, such as moving to national, nonpartisan election administration,¹⁶³ seem further away than ever.

In the short to medium term, we need cooperation among federal, state, and local officials, assisted by technology companies and non-governmental organizations, to deal with internal and external threats to the integrity of voting systems and the threat that such hacks bring to public confidence in election legitimacy. Officials should ensure that voter databases and vote-casting machinery is secure and free from hacking.¹⁶⁴ Votes should only be cast on systems producing a paper ballot that can be recounted. Adequate resources and professionalization and training of local election officials is essential. Transparency in every stage of the vote counting process, followed by random post-election audits to ensure accuracy and fairness, guards best against both malfeasance and incompetence.¹⁶⁵

Irresponsible rhetoric (from the President on down) about massive voter fraud needs to be repeatedly condemned across the political spectrum, with attention driven to provable facts and not innuendo. Media and non-governmental organizations (NGOs) need to provide timely and accurate information to counter both deliberate and unintentional misinformation.

Given the rhetoric of the President, NGOs need to take the lead on fostering cooperation across levels of government and parties. Efforts of the Bauer-Ginsberg Commission, Pew, the Bipartisan Policy Center, and others show that this kind of work can be effective.¹⁶⁶ NGOs should begin by fostering bipartisan cooperation on areas of agreement to improve voting processes, as we saw with the Presidential Commission on Election Administration. Online voter registration, for example, ensures voters are more likely to be correctly listed in voter registration systems, empowers voters, and saves money.¹⁶⁷ By December 6, 2017, thirty-seven states and the District of

¹⁶² See generally HASEN, *supra* note 3, at 183–201 (discussing how social media impacts elections in a chapter entitled “Tweeting the Next Meltdown”).

¹⁶³ *Id.*; Gaughan, *supra* note 46, at 119–24.

¹⁶⁴ For thoughts on how to improve the security of the U.S. election system, see LAWRENCE NORDEN & IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, SECURING ELECTIONS FROM FOREIGN INTERFERENCE (2017), https://www.brennancenter.org/sites/default/files/publications/Foreign%20Interference_0629_1030_AM.pdf [<https://perma.cc/W9JP-DYV8>] (discussing concerns about cyber attacks on voting machines, potential attacks on voter registration systems, and how costs might be shared at the federal and state levels).

¹⁶⁵ See R. James Woolsey, *Foreword* to NORDEN & VANDEWALKER, *supra* note 164, at 1 (“The key security measures detailed in this report are the right place to start: replace paperless electronic machines, upgrade the hardware and software that supports voter registration, and conduct post-election audits to confirm the results.”).

¹⁶⁶ See, e.g., *supra* note 131 and accompanying text.

¹⁶⁷ See PCEA REPORT, *supra* note 131, at 23–27.

Columbia had adopted online voter registration programs.¹⁶⁸ It is a win-win prospect, and the same coalition that has had success with online voter registration needs to move next to issues of cybersecurity. This is an area where Democrats and Republicans should have reason to cooperate.

But even here there are issues. Pew, which has been a leader in this area, has announced it is leaving this policy area.¹⁶⁹ The U.S. Election Assistance Commission, which should provide a clearinghouse and coordination role for state and local governments, has been continually attacked by the National Association of Secretaries of State (for intruding on their turf) and has been targeted for defunding by House Republicans.¹⁷⁰ Push-back from the demand for voter data by Trump's now-disbanded "Election Integrity" Commission has made states more suspicious of federal intervention.¹⁷¹

The judiciary also needs to struggle with conflicting world views coloring voting wars cases in the federal courts, looking for means of assuring that states have the capacity to run fair elections without unnecessarily burdening voting rights. When possible, judges should strive for decisions that cross party lines.

Perhaps the most difficult question is how to combat the rise of social media-driven propaganda and false information in the face of declining mediating institutions like political parties and the mainstream media.¹⁷² I address that issue in a companion paper.¹⁷³

Things are not likely to get easier as we approach the twentieth anniversary of *Bush v. Gore*.¹⁷⁴ We cannot wait until 2020 to make improvements. Those who would manipulate voting and our elections are not taking a few years off to rest on their laurels.

¹⁶⁸ *Online Voter Registration*, NCSL (Oct. 2, 2017), <http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx> [<https://perma.cc/WDK3-FDZE>].

¹⁶⁹ Pew Charitable Trusts, *Request for Applications Signals Next Step in Voting Information Project Transition*, VOTING INFO. PROJECT (June 14, 2017), <http://www.votinginfo.org/news/request-applications-signals-next-step-voting-information-project-transition/> [<https://perma.cc/J7MA-BHKV>].

¹⁷⁰ Eric Katz, *House Republicans Want to Eliminate Federal Election Assistance Agency*, GOV'T EXECUTIVE (June 30, 2017), <http://m.govexec.com/management/2017/06/house-republicans-want-eliminate-federal-election-assistance-agency/139123/> [<https://perma.cc/6QXT-N9V6>].

¹⁷¹ Rick Hasen, *Derek Muller: The Kobach Fallout on Election Security*, ELECTION L. BLOG (July 1, 2017, 4:03 PM), <http://electionlawblog.org/?p=93501> [<https://perma.cc/HN3X-SGTS>] (comments of Professor Derek Muller) ("That single request has likely done long-lasting damage to the political ability of the federal government to regulate elections. In particular, any chance that meaningful election security issues would be addressed at the federal level before 2020 worsened dramatically this week.")

¹⁷² See, e.g., Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017).

¹⁷³ Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, FIRST AMEND. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017598.

¹⁷⁴ 531 U.S. 98 (2000).

