

Innovations in Election Administration 8

**Election
Document
Retention
in an Age
of High
Technology**



Election Document Retention in an Age of High Technology

Author:

Marie Garber
Consultant in Election Administration
10201 Grosvenor Place 3310
Rockville, Maryland 20852-4606

Managed and Edited by:

William C. Kimberling
National Clearinghouse on Election Administration

Published by:

National Clearinghouse on Election Administration
Federal Election Commission
Washington, D.C. 20463

April 1994

Introduction by the Clearinghouse

This report is another in the series on *Innovations in Election Administration* being published by the FEC's National Clearinghouse on Election Administration.

The purpose of this series is to acquaint State and local election officials with innovative election procedures and technologies that have been successfully implemented by their colleagues around the country.

Our reports on these innovations do not necessarily constitute an endorsement by the Federal Election Commission either of any specific procedures described or of any vendors or suppliers that might be listed within the report. Moreover, the views and opinions expressed in these reports are those of the authors and are not necessarily shared by the Federal Election Commission or any division thereof.

We welcome your comments on these reports as well as any suggestions you may have for additional topics. You may mail these to us at:

The National Clearinghouse on
Election Administration
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

or else contact us

Toll free 800/424-9530
Direct on 202/219-3670
By FAX on 202/219-8500.

Election Document Retention in an Age of High Technology

Definitions

Acknowledgment notice—Notice sent to a voter registration applicant to inform him of the disposition of his application.

Ballot image—Record of all the votes cast by a single voter. Also called “ballot set.”

Canvass sheet—Record of the aggregation of the vote from a number of precincts to obtain totals for various constituencies or entire jurisdiction.

Confirmation mailing—Outgoing mailing from election office to registrants who may have changed their address, and which includes a postage pre-paid and pre-addressed return card by which the registrant may verify or correct the address, or confirm that he or she has moved outside of the jurisdiction.

DRE—Direct recording electronic voting machine.

Election database—Electronically created documentation which defines parameters of the election, contests, candidates, ballot styles, etc.

Electronic medium—Magnetic tape, magnetic or optical disk, removable data storage device, etc.

List of voters—List of those eligible to vote in a precinct. May be a computer-generated or other printed list, or a binder of original affidavits. Those who vote are checked off or marked in some other way. Also called “checklist,” “roster,” “precinct roster,” “master index,” “incoming voting list,” “list of voters book,” “roster index,” “polling

place roster,” “precinct register,” “election register,” “printout,” etc.

Listing of those who voted—Made by pollworkers. Also called “poll book,” “signature poll book,” “voters poll list,” etc.

Machine-read ballot—Individual document ballot marked by the voter and counted by computer. Includes punchcard and mark sense ballots.

Original voter registration form—Document filled out by or for the voter at time of applying for voter registration; usually signed by voter.

Paper ballot—Individual document ballot that is manually marked by the voter and manually counted by election officials.

Pollwatcher—One who observes the conduct of the election in the polling place as a representative of an entity other than the election authority. Usually must have credentials issued by a political party, a candidate or the election office. Also called “watcher” or “challenger.”

Pollworkers—Official staff who conduct the election in the polling places. Does not include campaign workers, watchers, challengers, etc., who represent entities other than the election authority. Also called “inspectors,” “officers of election,” “judges of election,” “election judges,” “precinct board,” “clerks,” “commissioners,” etc.

Precinct tabulator—An electronic device on which votes are recorded and results reported in the polling place. Includes Precinct Ballot Counter (PBC); optical scanner; and Direct Recording Electronic (DRE) voting machine.

Provisional ballot—Used by a person whose qualification for voting is uncertain and must be confirmed in the central office before his ballot can be included in the vote count. Also called “special ballot” or “affidavit ballot.”

Removable data storage device—Read-only memory device which is programmed to record votes as they are cast on an electronic machine. The device is inserted into the machine before the polls open and removed after the polls close. It is computer-read along with other devices to obtain jurisdiction vote totals. Also called “memory pack,” “memory cartridge,” “EPROM,” “PROM,” “detachable recording compartment or unit.”

Tally sheet—A record of the manual tallying of ballots for a limited jurisdiction, usually a precinct.

Test deck—A pre-audited group of ballots voted with a pre-determined number of valid votes; used to test the correctness of electronic vote-counting software. Also called “certification deck.”

Verification mailing—Outgoing mailing from election office to applicant for voter registration to confirm the applicant’s eligibility before his name is added to the voter registry.

Voter registry—File of all voters in the jurisdiction, kept current by the election office.

Election Document Retention in an Age of High Technology

What election documentation should be saved, why should it be saved, and for how long? That's one of the most vexing questions facing election officials. This report seeks to provide guidance to them in formulating an answer to it.

We define documentation broadly. It includes not only such historically obvious items as ballots and voter lists but also the output of the computer, which has become an essential part of election administration and which produces a much fuller record of election activity than was available when records were produced by pencil, pen, or typewriter.

The old documentation was almost always on paper, the one obvious exception being the mechanical lever machine itself, the counters of which record the vote cast on that machine.

The new kinds of documentation may also be on paper, output of the computer printer, or may be punchcards which input data into the computer. Or they may be stored on an electronic medium—magnetic tape, magnetic or optical disk, PROM or EPROM. These electronically based documents are as much a part of the record of an election as are paper documents, and no analysis of what should be saved would be meaningful and complete without including the new documentation.

New technology has made it possible to achieve enormous savings in storage facilities and improvements in retrieval capabilities by

transferring data from original paper documents to an electronic medium. Digitized images, sometimes including signatures, are stored on optical disk and utilized to produce facsimiles as needed. Microfilm and microfiche have made it possible to store documents as tiny photocopied images of the original and later to project or print them at full size for reference.

Thus technological miracles have enabled the election administration profession to make quantum-leap progress in efficiency, and to discard tons of paper that formerly filled a large portion of their offices. But new questions have arisen about uses of these substitute documents. The U. S. Department of Justice does not, in many instances, consider copies of original documents, however produced, to be adequate for their purposes of law enforcement.

So what and how much to save, in what format and on what medium, remains a difficult question. If all records received or created by an election office were permanently retained, it would be possible to answer any question raised about the agency's work and to cite a reference to support that answer. As a practical matter, however, such a policy would be impossible to implement. First, to retain and store all records produced, and to catalog them for identification and retrieval, would require resources much beyond those available to local and State government offices. Second, voting devices must be periodically cleared for use in

subsequent elections. Finally, not everything is necessary or even desirable for retention. Election agencies produce mountains of documents. Many are repetitive or redundant, and some have no value once they have met the instant need for which they were created.

Kinds of Documentation

In the following listing, documentation produced in election administration is grouped under headings, each of which relates to an aspect of election activity. The term “record” is used interchangeably with “document” or “documentation.” Documentation can be either hard copy or on electronic medium. *Any and all election records should be dated; some should bear the time as well as the date.*

The list of kinds of documentation is lengthy, but even so it does not reflect the total dimension of election records. Excluded from this study are records for which retention requirements ordinarily are specified in State law, and records of a general management nature which are not unique to election administration. Among such documentation is that relating to

- Candidacy.
- Petitions and petition verification.
- Campaign finance; financial disclosure.
- Voting accessibility for elderly and handicapped persons; the biennial reporting requirements under this Act ended with the 1992 election.
- Publications and notices.
- Archives and reference materials.
- Budget; procurement; personnel; inventory; correspondence.
- Legislation; litigation; attorney general opinions.

Voter Registration

Voter registration documentation—of which there is a great deal—details who applied for voter registration, who was accepted or rejected, who qualifies for voting, and activity undertaken to keep the registry current and accurate.

- The **original voter registration form** filled out by or for the voter at the time of registration. This is the primary evidence of registration. Besides data to establish identity, residence, etc., it usually contains an oath of the applicant and the signature, the latter used to establish authenticity of a signature submitted subsequently and purported to be that of the same voter, as in check-in at the polls, in absentee voting, or on a petition. Election authorities in some States now digitize the original signature and store the image in a computer database so that a facsimile signature is available for reference on a screen for use in petition verification, or is printed on a voter list for election day check-in, thus making it unnecessary to transport to the polls the bulky binders containing the original records. The same imaging technology also can be used to create a facsimile of the entire voter registration form which can be stored on and accessed from electronic medium; original documents then can be archived and rarely if ever referenced. In at least one State, the voter registration record is microfilmed, after which the original record is destroyed.

- **Records of sending acknowledgment notices** to applicants for voter registration, as required by the National Voter Registration Act (NVRA). The notice informs the applicant of the disposition of the application.
- **Rejected applications for voter registration** and documentation associated therewith reflect judgments made by the election agency that the applicant does not qualify for voting in the jurisdiction, with the reasons specified.
- **Records of declination to register** will be generated under NRVA at public assistance agencies. Such records confirm that it was the citizen's own choice not to apply for voter registration. Failure to sign the application also constitutes a declination.
- The **voter registry** is the file of all voters in the jurisdiction, maintained and kept current in the election office. From a computerized voter registry many different voter listings can be produced.
- Many **documents associated with maintenance of the registry**. It is impossible to list all the documents used in registration file maintenance, because of the varying traditions and practices that have evolved in the States and have been incorporated into their statutes. The following listing is general, and each State can place its own particular documents in the broad categories. Records relating to file maintenance both authorize the actions taken to keep the voter registry accurate and current, and demonstrate that such activities do not compromise fairness and equity. The latter purpose has taken on greater significance with the enactment of the National Voter Registration Act of 1993 (NVRA), which will be effective starting January 1 1995.
 - Authorizations and/or requests for changes of address, name, party. Some change of address information may come from State drivers license authorities or from the U. S. Postal Service; the information may be on paper or electronic medium.
 - Authorizations to cancel (remove the voter from the registry), because of death, moving out of the jurisdiction, criminal offense, declaration of mental incompetence, request of the voter, etc. Reason for removal should be part of the record.
 - Records generated in mail verification or confirmation of voter status, including but not limited to lists of names and addresses of those to whom confirmation mailings were sent and whether or not each responded.
 - Notices returned to the election office by those responding to confirmation mailing.
- **Statistical and other information** necessary for the Federal Election Commission (FEC) to make the biennial report to Congress mandated by NVRA. The information required from the States will be specified to them in detail by the FEC well before the Act's implementation date. It will include voter registration as of election day; the number of new registrations since the previous federal general election; registration activity at various public agencies, and at other participating agencies; applications by mail, in person, and through community volunteers and organizations; file maintenance activity; and postal costs.

Ballots

Retention of **voted ballots and ballot-related documentation** is essential both to confirm correctness of the vote count and to detect corruption or other manipulation of the election. Ballots are specific to the type of voting system used. The category includes both ballots voted at the polls and absentee ballots; a single jurisdiction may use one kind of ballot at the polls and another for absentee voting, or may use more than one kind of voting system and therefore more than one kind of ballots in its polling places.

- **Paper ballots.**
- **Machine-read ballots**, punchcard or mark sense.

- **Strips or sheets placed on voting machines**, both lever and DRE, each annotated to indicate machine number and precinct where it was used. These are also called “ballot faces.”
- **Sets of assembled vote recorder pages**, each annotated to indicate precinct where it was used.
- **Provisional ballots**, and all documentation associated therewith. Also called “special” or “affidavit” ballots. Used to permit a person to vote when his qualification for voting is uncertain and must be established after election in the central office before his ballot can be included in the vote count.
- **Spoiled ballots.**
- **Disallowed ballots**, and all documentation associated therewith.
- **Ballot accounting reports**, documenting disposition of and accounting for all ballots printed.

Polling Place Records Other Than Ballots

Most of the records listed are created for and used in the polling place on election day. Their range is extensive, and all serve a purpose for applying various provisions of law and carrying out directives of election authorities. Some are associated with qualifying the voter at check-in; some with vote-counting; others with special circumstances that occur in the course of the voting day. All are necessary to reconstruct the election and provide an audit trail for election day activity at the polls.

Some polling place documentation is created in the between-election periods; e.g., records of recruitment and assignment of pollworkers, and credentials issued to poll watchers.

- **List of voters** eligible to vote in the precinct at that election. May be a computer-generated or other printed list, or a binder of original affidavits. The names of those who vote are checked off, or marked in some other way.
- Records containing **voter signatures** signed at the polls (if signature is other than on the list of voters), such as voting authority cards or signature cards.
- **Listing of those who voted** made by pollworkers.
- **Any other oaths executed by voters.**
- Any other **record reflecting identity of those who cast ballots.**
- Records of **challenges to any person’s right to vote.**
- Records of **implementation of “fail safe” provisions of NVRA**, including information to be used to update the voter registration record.
- **Pollworker attestations of status of premises and equipment at opening and closing of polls.**
- **Documentation produced by poll-workers in counting the vote**, such as tally sheets, canvass reports, statements of votes, etc.
- **Output of voting devices**, both hard copy and electronic:
 - AVM print-o-matic sheets, both zero reports at opening of polls and vote totals at end of the day.
 - The lever machine itself (except for print-o-matic machines, see preceding), locked at the end of election day with the counters showing the number of votes cast.
 - Reports produced before opening polls as electronic tabulators (DREs, scanners, PBCs, etc.) are set up and prepared for voting. Includes logic and accuracy tests and zero reports.
 - Reports produced by voting device at close of polls, including vote totals or results tape.

- Removable data storage device (memory pack, PROM or EPROM, memory cartridge) intact as removed from machine at close of polls. (See Appendix 1 for alternative requirement recently defined by the U. S. Department of Justice.)
- Write-in votes cast if recorded other than on ballots. May be on paper roll from lever machine, or printed as part of the results tape as on DRE machine.
- **Records of maintenance to voting equipment during election day.**
- **Records of appointment of pollworkers serving.**
- **Records of appointment of poll watchers present in polls.**
- **Records of assistance to voters, including identity of persons rendering assistance and of voters assisted.**
- **Records of assignment and delivery of voting equipment to polling places.**
- **Envelopes** in which ballots are returned by the voter—usually two for each ballot, the **return envelope** and the inner **ballot envelope**. By postmark and/or date stamp, envelopes document the time of return, and one or both of them usually contain an oath of the voter and his signature. Includes envelopes containing ballots returned too late to be counted. Does not include blank secrecy envelopes, if such are used.
- **Records of challenges to and rejection of absentee ballots**—because they were received late; because the voter did not sign the oath or otherwise fill out affidavit on envelope; because the person does not qualify for absentee voting; etc.
- **Election office record or log of the steps in administering absentee voting.** In its simplest form, notations are made on the application forms, or on a list of applicants, of the date of application, the type of ballot sent and the date sent, receipt of voted ballot, etc. Identity of person who keeps the record also should be indicated.

Absentee Voting, Records Other Than Ballots

Documentation produced to administer absentee voting is designed to assure that a person qualifies for voting and for voting absentee; that a person voting an absentee ballot, or one purporting to be him, will not be able both to vote that ballot and also vote at the polls; and that the correct ballot is sent to the person in a timely manner and returned to the election agency no later than the deadline set by law. Moreover, documentation should demonstrate that if a request for absentee voting is rejected, or if a voted absentee ballot is disallowed, such actions of the election authorities are justified.

- **Application** or request from the voter, which starts the process. Election officials review the application and then respond to the applicant, either by dispatching a ballot or informing him why a ballot cannot be sent.

In a computerized election management system, there may be an absentee voting module which includes this information and more. Commonly these systems create and maintain (1) an activity log for each individual absentee applicant, linked to his record in the registry; (2) a roster of all applications received, where status of each is indicated; and (3) activity reports, such as applications received, approved and rejected; ballots dispatched and returned; etc. The end result is a complete history of the administration of absentee voting for that election.

Voting System Preparation

Whether voting is by manually counted paper ballots or the most sophisticated electronic system, certain basics of the preparation of the system are critical to the integrity of the election. These processes should be documented in order to confirm that integrity. When preparation steps

are computerized, a hard copy record should be produced and retained.

- **Election definition records.** These specify offices and questions that will be on the ballot, candidates for each office, number to vote for in each contest, precincts or precinct portions that comprise each constituency, cross-filing, etc. With non-electronic systems, or even early electronic systems, this process is often a manual one.
- **Ballot design records.** Utilizing information from the election definition process, such documents define and identify the various ballot styles and placement of contests and candidates in positions on the ballot, thus providing copy and layout for ballot printing. For non-electronic systems and some early electronic systems, ballot design is done manually.
- **Election database.** Electronically created documentation which encompasses both election definition and ballot design (see preceding) as well as other election-specific data.
- **Records of programming lever machines and testing correctness of the set-up.** Such programming is done manually, drawing on the election definition and ballot design processes, and then tested to confirm the reliability of the machine and that it is set up to accurately reflect votes cast on it.
- **Records of specializing vote-counting software for the particular election.** Includes "coding the program" for the mainframe or microcomputer in the central office, as well as preparing or "burning" the removable data storage devices for polling place tabulators.
- **Records of pre-election testing of electronic vote-counting systems.** The in-house testing done in the weeks before election to ensure that the programs have been correctly specialized.
- **Test deck.** A pre-audited group of ballots voted with a pre-determined number of valid

votes, used in testing electronic systems to confirm the correctness of the vote-counting program. Also called "certification deck."

Vote Count in Central Office

Both to resolve disputed elections and to respond to allegations of fraud, the documentation of vote count and canvass activity in the central office is critical. When the precinct totals are produced at the polling place, the central office count is limited to aggregating precinct results, manually or by machine, to obtain totals for the jurisdiction. When ballots are brought directly from the polls, the entire process from tally to canvass and certification takes place in the central office, and again may be manual or by machine.

- **Tally sheets.**
- **Canvass sheets** and other tabulations.
- **All computer software used in vote-counting.**
- **Output of the computer printer.** From the time the system is deemed ready for vote-counting on election day and starting with the testing done immediately before counting, through the last tabulation and post-count testing, one copy of each report printed should be compiled sequentially.
- **System log.** A sequential record of all entries to the system made through the console, from the time the system is readied for testing just prior to tabulation until after the count has been completed, the system is tested again, and results are ready for certification. Each entry should include date, time, person executing, and action(s) taken. May be either a manual listing or computer-produced.
- **Ballot images.** Records of votes cast on individual ballots; also called ballot sets. Particularly important with DRE machines where there is no paper ballot for each voter. Hard copy or electronic medium.

- **Verification of the count before certification.** If such verification is done, it should be documented. Examples of such verification include recounting all or a portion of the computerized ballots; re-reading and proofing lever machine vote totals; conducting an “automatic recount” (usually with a very close result); and the scrutiny by the State election authority of canvass documents submitted by local election boards, and retabulation of local results.
- **Security plan.** Arrangements for ensuring security of all appropriate election materials and premises, and documentation to demonstrate that the plan was carried out. Should also include record of any breaches of security.
- Records reflecting **certification of the outcome of the election, and notifications sent to winning candidates.**

Contested Elections and Recounts

Because federal officials have found that evidence of civil rights abuse and other election fraud often comes to light when an election result is challenged, the conduct of a recount or other means of resolving a contest should be documented. State regulations governing contested elections and recounts should require such documentation.

The obligations cited here will fall on the election office, State or local, if it is the authority responsible for resolving the dispute. Often the forum for resolution is a court or a quasi-judicial authority, where a full record is kept as a matter of course.

A contest or recount will utilize some of the documentation of the original election. In addition, there are certain records that are created anew, or specific to, the contest/recount. For example,

- **Procedures and guidelines.** These detail how, when and where the contest or recount

is to be conducted, and by whom; provisions for notice to parties and for observers; standards for disallowance of ballots; etc. May be in the form of State rules or regulations.

- **Log or diary** recording the activity.
- **Records created in the recount.** Some will document repetition of the processes of the original election such as pre-count testing of vote-counting equipment; output of voting devices; tally sheets; statements of votes; canvass reports; output of computer printer; system log; etc.

Redistricting

If a redistricting plan is challenged—and such challenges are not uncommon—election office data will be important in defending it. Accordingly, a cumulative file of the following should be maintained:

- **Election results by precinct** for each election;
- **Voter registration statistics by precinct** for each election;
- **Voter turnout statistics by precinct** for each election;
- **Precinct map or maps** defining boundaries at time of each election;
- **Computerized file of the voter registry** at time of each election.

Why Save Election Records?

The range and quantity of election documentation makes it clear that its retention imposes a substantial burden on election offices, and that no recommendation or requirement for retention should be made without good reason. By examining the purposes election documentation serves, it is possible to identify those records which should be retained.

Resolution of Election Disputes

Resolving election disputes through contests or recounts is the most familiar of all reasons for keeping election documentation. State election laws invariably contain provisions for resolving disputed elections. The deadline for initiating such an action is soon after election results are known because there is more than a little urgency to settle the dispute and determine the winner—after a primary so general election preparations can commence and after a general election so the new officeholder can begin his term.

Although the retention period for documentation to be used in a contest action is short, the amount of documentation affected is extensive. Here the appropriate rule is “Save everything” until the State’s deadline for filing a request for recount or contest has passed and, if there is such a filing, until the dispute is resolved. Records should be retained in their entirety and original format so that the election can be quickly reconstructed.

Lever machines should remain locked with the counters reading as they did when the polls closed. If the machines must be cleared and reset for another election while a contest procedure is still pending, the counter face can first be photographed to preserve the record of the vote in the contested election.

From electronic voting devices and systems, both hard copy output and data on electronic media—including the data in memory in DRE machines—are critical to a prompt determination. Removable data storage devices from DREs and scanners should be retained intact until the deadline for initiating a contest or recount has passed. Data preserved and available for use only as hard copy would have to be reentered, thus delaying completion of the resolution process.

Federal Law: The Civil Rights Act of 1960

Enacted by Congress at a time when the right to vote was emerging as an important civil right, and codified at 42 USC 1974-1974e, these provisions focus on abuse or violation of civil rights that occurs in the election process, and on election fraud that is not related to civil rights. The law applies only to elections in which a federal office is on the ballot, and is enforced by the Election Crimes Branch, Public Integrity Section of the Criminal Division, U. S. Department of Justice. The unit is well-grounded in the myriad ways elections can be, and have been, corrupted.

To carry out their responsibilities in assuring that the federal elective process is fairly and properly conducted, law enforcement officials must have the requisite evidence to conduct a criminal inquiry and either to prove or to disprove allegations of abuse or fraud. Accordingly, this federal law requires that election administrators preserve for 22 months after an election ". . . all records and papers which came into [their] possession relating to an application, registration, payment of poll tax, or other act requisite to voting." The Department interprets the language "records and papers" to include a wide range of specific election records, all of which are included in the listing presented as Appendix 1 of this report. ***The law does not require that the specific documentation listed be generated in connection with a federal election. However, if a record of any such type is submitted to or produced by the election authority, it must be retained.***

While the requirements are far-reaching, the Department points out that the law itself is comprehensive and its purpose vital. The document retention requirement assures that ". . . physical evidence needed to resolve legitimate public questions concerning the proper performance of the American electoral process is preserved intact for a sufficiently long period that it will be available to election administrators and investigators when questions arise." The statutes have been interpreted in keeping with the Congressional objective.

A recent Justice Department publication (see Appendix 2) emphasizes that ". . . These retention requirements are backed up with criminal misdemeanor penalties that apply to election officers and document custodians who willfully destroy covered federal election records before the expiration of the 22-month federal retention period. . . . Specifically, Section 1974 provides that any election administrator or document custodian who willfully fails to comply with the statute is subject to imprisonment for up to one year . . ." and ". . . election officers or other persons who willfully steal, destroy, conceal, or alter federal voting records required to be retained by § 1974 are also subject to one year of imprisonment."

Storage of materials during the 22 month period must be either in the direct custody of election officials or at least under their administrative supervision. For example, a jurisdiction may determine that the records generated in motor vehicle and social service agencies, in compliance with NRVA, would best be kept in those offices. If so, the law requires that the jurisdiction "have in place administrative procedures giving election officers ultimate management authority over the retention and security of those election records," and those procedures "should also contain provisions to hold those election officers responsible for retention and security breaches."

Section 1974 further requires that *original* documents be retained. Jurisdictions which digitize signatures and use facsimiles produced therefrom for election day voter lists or for verifying petition signatures, or States which microfilm the voter registration form, must also retain the original document for use, if need be, by federal investigating authorities. This is because handwriting analysis cannot at present be performed on digitized facsimiles or microfilmed reproductions.

Justice Department officials find that the retention periods specified in State election laws (typically six months, often less) are not usually long enough to assure that necessary voting records will be preserved until more subtle forms of federal civil rights abuses and election crimes have been detected. It normally takes longer than 60 days for evidence to surface that fraudulent voting practices took place in connection with a given election, or that federally secured voting rights were not sufficiently protected.

The length of the federal retention period is further explained by the Department's commitment to federalism, reflected in this instance by deference to the State process for resolving election disputes. They believe it should run its course before federal authorities step in. When an election result is challenged and resolved through the State's prescribed process, evidence of wrongdoing sometimes is revealed which can be the basis for a

federal prosecution. This is especially true in contested elections in which "irregularities" are alleged.

Finally, the federal prosecutors remind, it often takes a number of months for *reliable* information about an election to come forth. What surfaces at the time of the election and soon thereafter often is more rumor and gossip than fact, and sometimes no more than the grumbling of a loser who wants the election result questioned on the chance that he could turn into a winner.

The Elections Crimes branch will soon publish, for the benefit of the U. S. Attorneys and Federal Bureau of Investigation, a detailed description of the work of the branch and of the application of these statutes. *Federal Prosecution of Election Offenses*, 6th Edition, will be available sometime in 1994 from the U. S. Government Printing Office. In addition, Branch Director Craig Donsanto has written a summary of the particular federal statutes that relate to election documentation. This piece is directed to elections administrators and is included with this report as Appendix 2.

Federal Law: The National Voter Registration Act of 1993

The National Voter Registration Act of 1993 (NVRA), "Motor Voter," which will be effective in most States starting January 1 1995, requires a number of changes in methods of voter registration, registration file maintenance and polling place procedures. Among the changes are requirements for the creation and retention of certain election documentation.

As the States and the Federal Election Commission gain experience in administering the new law, new documentation will be developed and new determinations made as to which should be retained. Accordingly, insofar as they relate to NVRA, the retention requirements and recommendations of this report are tentative and subject to revisions as operational experience dictates.

The law itself includes some documentation mandates. One provision requires voter registra-

tion officials to maintain for at least 2 years and to make available for public inspection (and, where available, for photocopying at reasonable cost) "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered." The purpose of such record-keeping is two-fold. First, such records enable the registrar to maintain an accurate "inactive" file to support the "fail safe" process by which one who has been removed from the list in error can be restored and can vote on election day. Second, they make it possible to demonstrate that the methods by which a list is kept accurate and current ("list cleaning" activities) are nondiscriminatory and are otherwise in accordance with NVRA. The reason for the close scrutiny of list cleaning procedures is that such programs have often been applied unevenly or administered arbitrarily, and thereby have discriminated against certain segments of the electorate.

Other documentation retention requirements, implied but not specifically identified in the law, will enable the Federal Election Commission to make a mandated biennial report to the Congress on the impact of NVRA. The FEC will issue regulations to specify what information must be supplied by State and, in turn, by local election officials to meet this requirement and to comply with other provisions of NVRA.

Federal Law: The Uniformed and Overseas Citizens Absentee Voting Act of 1986

This law guarantees to members of the Uniformed Services and Merchant Marine, their spouses and dependents, and to civilian U. S. citizens residing abroad, the right to register and vote absentee in elections for federal offices. To facilitate that purpose, the law also provides for a Federal Post Card Application (FPCA) for registration

and absentee voting; it is widely distributed throughout the world. U. S. election authorities are required to respond to any application that is correctly filed by sending, in a timely manner, the appropriate absentee ballot.

The Act is administered by The Federal Voting Assistance Program in the Pentagon, and is enforced by the U. S. Department of Justice. To investigate charges that qualified applicants were not sent absentee ballots, or that ballots were dispatched too late to allow for a timely return, and other allegations of violations of the Act, the Justice Department often relies on absentee voting documentation in local election offices—absentee applications, ballots, and envelopes; records of challenges to and rejections of absentee ballots; and the record or log of the administration of absentee voting. Dating of such documents is crucial, since many of the violations charged involve ballots sent too late—because ballot-printing was delayed; because the election office did not respond promptly enough after the application was received, etc.

A ballot sent to an overseas location needs a number of weeks to make the round trip to the voter and back to the election office in time to be included in the vote count. Late dispatch by the election office can deprive the citizen of his franchise. Where cases involving delayed delivery to the voter have been litigated, courts have held 30-45 days to be the minimum time required between dispatch of the ballot and deadline for receipt of the returned ballot.

In the rare instances where qualified voters are at remote locations, or in situations where contact with the States can be made only infrequently, the Act also provides for a Federal Write-in (“blank”) ballot which the voter can obtain from U. S. embassies, consulates or military installations. On such a ballot the voter can write in the candidates and offices for which he chooses to vote.

Redistricting Support

Redrawing of constituency boundaries, and defending those changes against challenges, is dependent on election-related documentation which is created and maintained by election administrators. Mostly statistical, but also graphic and narrative in nature, these documents are the essential underpinning, along with census data, to demonstrate compliance with the constitutional requirement for “one person, one vote” and the statutory mandate that boundaries be drawn in a nondiscriminatory manner. For the latter purpose, a computerized registration file for each election is recommended for retention. It will make possible a computer analysis of the electorate.

Documentation to support redistricting is not voluminous. Such records are statistical reports, election results, maps and/or other boundary descriptions, and voter registration data, all of which can be summarized at each election time, and accumulated so as to provide an up-to-date history. Permanent retention of these records is recommended, since redistricting challenges sometimes come as a result of a court decision or enactment of new legislation years after boundaries are drawn, and investigators often need a progression of records going back a number of years in order to discern a pattern of activity.

State Retention Policies and Practices

In General

Like everything else in election administration, the retention of election documentation varies widely among the States.

In some States the guidelines for retention of documents is only what is in the State code. It may be quite detailed or it may include only a few references to what must be saved, for how long, and by whom.

Whether they are embodied in law, regulations, or directives, State policies usually are directed to local election officials and relate to records over which they have control. Seldom do these policies include documentation under the control of the State election office. For example, State law usually provides for retention of tally sheets from the polling place, but not for retention of canvass records made up at State level. At the other extreme, one State election authority recently developed a "comprehensive and current policy for the purpose of document retention," but it applies only to the Secretary of State's office and does not include such items as ballots, voter registration records, absentee voting materials, tally sheets and voter lists for check-in at the polls.

Finally, policies in most States do not reflect the technological transformation in election record-keeping, and fail even to mention documentation on electronic media and/or to provide for its retention.

Specifics of State Retention Policies Currently in Place

A survey of the 50 States and the District of Columbia to determine their current retention requirements reflects the wide variance in their practices, and—in most instances—their limited scope. A number of States do not retain, or do not retain for 22 months, all the documentation specified by the Justice Department as requisite for compliance with federal law.

Voter Registration

In almost all the States, *the original voter registration document* is preserved for the entire time the registration is on the active file and for a period of time thereafter. Only five States reported a post-cancellation retention period less than 22 months; in 14 States the period is 22 to 25 months, in another 14 it is 3 to 10 years, and 14 retain the originals permanently. One State microfilms the original after the data been entered into the computer file, destroys the original and retains the microfilm permanently.

Retention of the *documentation which authorizes changes* in voter registration data, or of programs and activity conducted for the purpose of ensuring the accuracy and currency of addresses of eligible voters is not common. This will change as NVRA is implemented, and as the Justice Department's updated election documentation retention requirements become known.

Ballots

Ballots cast are retained in most of the States, and usually for 22 months or more—at least in federal elections. Seven States, however, reported that ballots are saved only a shorter period—ranging from 10 to 90 days.

About half the States save the **challenged ballots**, and about a third create and retain **ballot accounting** records.

Polling Place Records

Voter lists on which voters are checked off when they come to the polls are retained by most of the States, and for federal elections the period is usually 22 months or more. A few respondents reported periods as long as five or ten years.

Tally sheets and canvass reports are retained for the 22 month period, as are printed output of lever machines and hard copy records generated by the various electronic precinct tabulators including DREs. Less commonly held for 22 months are records relating to **challenges to voters**, records of **appointment of pollworkers** and poll watchers, and records of **assistance to voters**. Where voter assistance records are made and retained, they usually consist only of the record of the assisted voter, not of the person who rendered the assistance—an omission that could handicap post-election detection of improper influence or intimidation. Only a few States report that they keep records of **maintenance and/or repairs of voting equipment** during election day.

One type of documentation that is typically not retained more than a short time is the **removable data storage device used in electronic precinct tabulators** (scanners, PBCs, DREs) to record and cumulatively tabulate the vote as it is cast. The reason is obvious: these units—cartridges, memory packs, PROMs, etc.—are expensive, ranging in price from \$250 to \$500 each. Following an election they sometimes are retained intact for use in a recount, but after that they must be erased and reprogrammed for a subsequent election. To require that the memory pack be retained with election

results on it for 22 months would mean buying four such microprocessors for each machine, a considerable increase in the price of the equipment.

Data on these removable storage devices are important principally for two purposes: (1) to verify and validate the vote count in the event of a contest or recount, and (2) as original evidence useful, even crucial, to federal law enforcement officials if a civil rights abuse or election fraud is charged.

For the first-listed purpose, it is recommended that the data storage device be retained, intact as it was removed from the precinct tabulator at the close of the polls, until the deadline for initiating a contest or recount action has passed.

For the other purpose—to serve as evidence in a post-election investigation initiated by federal law enforcement officials—the question of how long to save the data storage device becomes more difficult to answer. Federal criminal investigations often do not start until months after election and the primary focus is not “who won” but “was the process corrupted and who did it.”

Most States that use DREs and other electronic precinct tabulators have no retention requirement for the removable data storage devices. Their practices vary, and for the most part are not included in written regulations or procedures. Some States do retain the machines and the removable devices intact until the recount or contest deadline has passed; for any investigation after that time, they rely for documentation on the “paper work” produced by the system as the database is created and the storage devices are prepared for each machine. Even States that have a comprehensive retention policy, saving all other polling place documentation for 22 months or more, report that PROMs or other memory cartridges are erased soon after election, typically thirty days but sometimes less. For example, “the detailed and regulations in Oklahoma, where electronic scanners are used in every precinct in the State, include no retention requirement for PROMs. The established practice is to save the

data "3 days or until a contest is resolved." (Deadline for initiating a contest in Oklahoma is 3 days after election.)

Only one State, in its written policies, recognizes that the removable data storage device could be critical to establishing the integrity of the election. The Wisconsin statute was amended in 1992 to provide as follows in this regard:

Detachable recording units and compartments for use with electronic voting machines may be cleared or erased 14 days after any primary and 21 days after any other election. Before clearing or erasing the units or compartments, a municipal clerk shall transfer the data contained in the units or compartments to a disk or other recording medium which may be erased or destroyed 22 months after the election to which the data relates. (7.23 (1) (g) Wis. Stat. Emphasis supplied.)

Wisconsin election officials report that some of the scanner systems used in the State, those where ballots are tabulated at a central location with a high speed reader, are able to transfer the data to disk or other recording medium, but the data from precinct tabulators cannot be transferred. Those user jurisdictions have had to retain the chip or the entire PROM, and bear the considerable expense of buying additional PROMs for the elections that occur during the 22 month retention period.

The Department of Justice, in updating its retention requirements to reflect the realities of the widespread use of computerization in elections, has specified retention requirements for the data storage device as follows:

"With respect to electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices ('PROMs'), or other similar memory storage devices, [retain] the following:

a. The 'PROM' or electronic memory storage device itself, intact, and as removed from the voting machine at the close of the polls; *or*,

b. An electronic record of the program by which votes are to be recorded or tabulated, which is captured *prior* to the election, and which is stored on some alternative medium (e.g., floppy disks) simultaneously with the 'burning' of the PROM or other memory storage device, *and*,

c. With respect to the output from a PROM or other memory storage device *after* the election has been concluded—

i. In voting systems utilizing individual Precinct Ballot Counters (PBCs) or optical scanners: the hard copy output from the PROM or other electronic memory storage device used to record and/or to tabulate votes, (*i.e.*, the 'results tape'), *or*

ii. In voting systems using centralized counting devices wherein the results of several PROMs or other memory storage devices are synthesized into a single consolidated output report or 'results tape': the hard copy output from the PROM or other electronic memory storage device, and the hard copy consolidated output report or 'results tape,' and the electronic program used to read the individual PROMs or other electronic memory storage devices and by which the consolidated output report was produced."

(Source: "Categories of records covered," in *Retention of Voting Records under 42 USC §§ 1974 et seq.*, by Craig Donsanto, included in this report as Appendix 2.)

Absentee Voting Documentation (other than ballots)

Federal law requires the retention of *applications* for absentee voting and of the *envelopes* in which the ballots are returned. Almost all the States do so, and only a few of them specify a period less than 22 months.

Logs of absentee voting activity, often computerized, are created in a number of States and retained to provide a history of absentee voting in an election.

Voting System Preparation Records

Fewer than half the States retain any records of voting system preparation. If anything is saved, it is the *pre-election testing* of the system for reliability and counting accuracy, in the central office, the polling place, or both. Virginia, where DREs have replaced mechanical lever machines in a number of localities, reports that the electronic machines provide greater assurance of adequate testing because they automatically produce their own documentation of the process; for the lever machines, Virginia has to depend on a manually marked check list to confirm that the tests were performed.

Few States maintain records of *specializing the vote-counting software* for an election, and very few document their *provisions for security* of equipment, materials and premises.

Documenting the Central Office Vote Count

States that count votes manually maintain their *tally sheets and canvass reports* for periods varying from 10 days to permanently. Computer *vote-counting programs* usually are retained for a period varying from 10 days to 10 years, as are the *output of the computer printer* and the *system log*. In many of the retention requirements, 22 months is a common duration, reflecting the standard set in federal law.

Problems in Documentation Retention

The biggest problem in administering a documentation policy is space for storage. Ohio laments "Storage! Storage! Storage! Counties that have central record centers are fortunate." Michigan reports that shortage of storage is most acute in rural townships with outdated township halls, where many documents are retained at the clerk's residence. And Oklahoma notes that "many counties have had to adapt filing cabinets and other storage systems designed for manual records to computer-generated reports, which are larger than the old records."

Divided authority between State and local offices is a recurring problem; policy is set by the State election office but most implementation is at the local level where the documentation is produced. A number of States report that they cannot compel local officials to supply data so they can conduct oversight of retention practices. Iowa finds "It is hard to convince counties that have never had a contested election that there is a need to keep things 'just in case'." Minnesota reports that there is "no quality control" in many local offices, and that "administrative recounts occasionally disclose poor retention of peripheral materials such as absentee ballot return envelopes or write-in tally sheets."

Other problems reported include (1) confusion because retention requirements vary among the types of documentation and with the kind of election; (2) the need to use voting equipment and materials for an election which occurs within the documentation retention period after a previous election; (3) difficulty in retrieval.

In West Virginia's observation on documentation retention problems one can detect more than a little frustration: "Lack of clarity in law. Lack of space at county level. Lack of security. Lack of time to focus on records management and no personnel to spare for the project."

Supervision of Documentation Retention

State election officials exercise a varying measure of supervisory authority over local election boards, ranging from almost none to close monitoring. In some instances the State authority does not even know what the practices are at the local level and suspects that there is little uniformity between and among the jurisdictions. One New England state reported that matters of documentation retention are “handled individually at the local level” and the “Secretary of State’s office does not get involved.” A western State reported simply that “no official election document retention policy is in place at this time.”

State policies, usually statutory provisions, often ignore the federal law requiring retention of ballots and other election records for 22 months, and provide in their code for lesser periods—though at least four times in each two year period these requirements are superseded because a federal office is on the ballot. It is hard to believe that State authorities are unaware of a federal requirement enacted more than thirty years ago. Perhaps they do not consider it their responsibility to inform or direct local officials regarding their retention responsibilities in federal elections. Other States *have* accepted their obligation to direct and inform; their codes have been amended or annotated, and their regulations updated, to encompass the longer retention requirements. Indiana decided in 1993 to regularize election document retention policy and now “requires all election documentation to be kept for 22 months following the election for which the documents were generated.” Before 1993 “. . . state law provided a different retention schedule for almost every type of election document . . .” and there was a considerable amount of confusion among county officials. The State has solved the problem by “. . . creating a uniform retention time, and by providing training to officials who administer the law.”

The Retention Schedule

An effective instrument for administering documentation retention policy is the document retention schedule. About half the States now have such a schedule, sometimes developed in cooperation with a State records management or archives agency. The schedule facilitates compliance with retention requirements in the local election offices, where most of the election documentation is created and must be saved. It supports those officials by assuring that they are aware of the requirements of law, both State and federal, and of other State directives or guidelines, that they know what has to be saved and for how long, and when records can be discarded.

No doubt some local officials whose State authorities do not supply a retention schedule develop one for themselves. But such a method means that there will be no uniform understanding of and compliance with retention requirements, and that there will be needless duplication of effort in policy formulation.

Characteristics and content of State retention schedules vary:

- Some are comprehensive, some sketchy.
- Some include only documents mentioned in the state code, and the retention requirements cited therein; some include these and also the records related to compliance with federal law.
- Some States supplement legal requirements with regulations and administrative directives.
- Most apply only to local elections offices; a few apply only to the State election authority or to both State and local.
- Few make any reference to documents on electronic media.

Some of the good retention schedules are cited here, both to indicate the various approaches

taken in the States and to suggest where models can be obtained for a State developing or revising its own retention policies:

Connecticut: Comprehensive and detailed retention schedule. Applies to both State and local officials. Begins with a references to 42 USC 1974, cites its application to elections for federal office and notes that "This requirement supersedes any state statute or regulation." In addition, the detailed, day-by-day "Election Calendar" prepared by the Secretary of State for each election includes discard dates for specified election records.

Delaware: Retention schedule produced by State Archives. Listing divided into paper documents and computer output.

Iowa: Schedule is simple and clear, quite comprehensive, and recently revised. Includes only documents for which there is a State statutory provision for retention. A few of the listed documents are computer output.

New York: Retention schedule created by State for use by local election boards. Comprehensive listing of records by type, rather than specific name; local board is to adapt it to fit its own systems and terminology. Applies to records on paper and on electronic media. Recognizes the essentiality of electronic records, and the need to ensure that they are created and maintained properly. Good introduction on purposes of retention and implementing the schedule.

North Carolina: Standard 4 and Standard 6, respectively, apply to electronic media records and to records on paper.

Oklahoma: Election administration in the State is highly centralized; the State Board has a broad grant of supervisory authority over the county election boards. The Oklahoma Election Management System (OEMS), statewide and computerized, is used in all counties and linked with the State office. There is a listing of all reports produced by OEMS, and for each report the retention period, if any, is indicated. Applies only to output on paper. In addition, the "Secretary's

Digest" is published regularly to update the rules and regulations of the State Election Board; some updates are documentation retention requirements relating to both paper and electronic records.

Virginia: Retention and Disposition Schedule for election records produced by State Archives and Records Division for use by local election authorities. Includes records specifically cited in Virginia code and certain other records, retention of which is required for compliance with 42 USC 1974-1974e. Does not include electronic documentation—e.g., "memory cartridges" for DRE machine.

West Virginia: Retention schedule first produced 1993. Simple and clear in format; comprehensive. Includes only records cited in State code, which has been amended to include the 22 month retention period required by federal law. Little reference to documentation related to electronic voting systems.

Wisconsin: Schedule produced by State Elections Board for use by local election officials. Clear and comprehensive. Includes only the items specified in State law, but requires the 22 month retention period in federal elections for certain of them. Also includes the "detachable recording units" on electronic voting equipment.

Guidelines for a State Election Documentation Retention Policy

Deciding what should be saved is a trade-off between what might possibly be needed in the future and what can be accommodated given the manpower and storage resources available—except that in some instances State or federal law dictates specifics of the policy.

Most of the burden of retention falls on the local election authority, but the retention policy should be established at the State level in order to ensure uniform application. Moreover, the State authority, exercising its supervisory responsibility, should support and monitor the work of

local offices to ensure that the standards are uniformly applied.

Responsible retention policy should recognize that the computer is a major factor in election administration, and should utilize the full potential of computerized systems to generate documentation. When documentation is on electronic media, storage conditions should be such that the integrity of data will be maintained for the required length of time.

A documentation retention schedule is essential. It should be kept current as new kinds of records come into use, new laws are passed, and new programs implemented. It should be comprehensive and specific, and training should be provided for local officials to ensure their understanding and guarantee compliance.

Appendix 1 to this report makes recommendations for documentation to be included in a retention schedule, the purpose served by such records, the applicable federal law (if any), and the period for retention. It could be a useful starting point for a State establishing retention policy, tailoring the content to be appropriate to its own law, practices, and traditions.

Appendix 1

Election Documentation Requirements and Recommendations

ELECTION DOCUMENTATION

Requirements and Recommendations

Introductory notes:

All documentation should be *dated*; in some instances, *time* also should be indicated.

Records on electronic medium (magnetic tape, disk, etc.) should be stored in such a way that their integrity is ensured for the duration of the retention period.

Certain kinds of election office records are excluded from this study (see text, Chapter I) and therefore are not included in the following listing.

Rationale for recommendations is in the text of the report, Chapter II.

State law or directives may require retention of documents other than those listed, or may require retention of a listed document for a longer period than is specified in this table.

Footnotes are at the end of the table.

Symbols used in last column, "Purpose or Applicable Federal Law:"

- 1 Civil Rights Act of 1960, 42 USC 1974 et seq. This law does not *require* that any particular record be generated. But if generated, and if it is on this list, it must be retained for the 22 month period.
 - 2 NVRA, National Voter Registration Act of 1993 ("Motor Voter"). 42 USC 1973 gg-6(i).
 - 3 Federal Election Commission regulations pursuant to NVRA, to be published 1994.
 - 4 Uniformed Overseas Citizens Absentee Voting Act of 1986. 42 USC 1973ff et seq; 39 USC 3406; and 18 USC 608-609.
- A Contested elections and recounts.
B Redistricting support.

Kind of documentation	Retention Period	Purpose or Applicable Federal Law
VOTER REGISTRATION		
Original voter registration form	22 mos. past the last federal election in which the voter was eligible to vote	1
Authorization/request for change of address, name, party, etc.	22 mos.	1
Authorization/request to cancel registration.	22 mos.	1
All records generated in course of producing acknowledgment notices, confirmation mailings, mail verification or any other confirmation of voter status.	2 yrs.	1, 2
Notices returned to election offices by registrants responding to verification or confirmation mailings.	2 yrs.	1, 2
Rejected applications for voter registration.	22 mos.	1

Kind of documentation	Retention Period	Purpose or Applicable Federal Law
Declinations to register at public assistance agencies.	22 mos.	1
Statistical records of registration, voting and file maintenance activity required for biennial reporting to FEC.	2 yrs.	2

BALLOTS AND RELATED DOCUMENTATION

All voted ballots, paper or machine-read, including absentee ballots.	22 mos.	1, A
Strips or sheets mounted on lever or DRE voting machines (ballot faces), each identified by machine number and precinct.	22 mos.	1, A
Assembled vote recorder pages (Votomatic), each identified by precinct.	22 mos.	1, A
Provisional ballots and documentation associated therewith.	22 mos.	1, A
Spoiled ballots.	Until State deadline for initiating contest or recount has passed.	A
Rejected or disallowed ballots and documentation associated therewith.	22 mos.	1, A
Ballot accounting report.	Until State deadline for initiating contest or recount has passed.	A

POLLING PLACE RECORDS OTHER THAN BALLOTS

List of voters used in each polling place.	22 mos.	1
Records containing voter signature, including any oath executed by voter.	22 mos.	1
Listing of those who voted, made by pollworkers.	22 mos.	1
Any other record reflecting identity of those who cast ballots.	22 mos.	1
Records of challenge to any person's right to vote.	22 mos.	1
Records of implementation of "fail safe" provisions of NVRA.	22 mos.	1
Voter assistance records, identifying both voter assisted and person(s) rendering assistance.	22 mos.	1
Tally sheets, canvass reports, statements of votes.	22 mos.	1
Lever machine, locked at close of polls (non-printer machines only)	Until State deadline for initiating contest or recount has passed. ¹	A

Kind of documentation	Retention Period	Purpose or Applicable Federal Law
AVM Print-o-matic report sheets, opening and closing of polls.	22 mos.	1
Removable data storage device (PROM, memory pack, cartridge,, etc.)	For purpose of recount or contest resolution, retain intact until State deadline for initiating contest or recount has passed.	A
	For compliance with USC 42 1974 et seq., retention period is 22 mos. <i>Either</i> save the data storage device itself, or save, on electronic medium, record of programming the device, and the post-election hard copy of its output plus the program used to read the device. For detail, see. ²	1
Pollworker attestations of status of premises and equipment at opening and closing of polls.	22 mos.	1
Reports produced by electronic voting device at opening and	22 mos.	1, A
Records of write-in votes, if cast other than on a ballot.	22 mos.	1, A
Records of ballot images, or ballot sets, produced by electronic voting devices.	22 mos.	1, A
Records of service or maintenance to voting equipment at the polling place.	cumulative, permanent	1 ³
Records of pollworker appointment and service.	22 mos.	1
Records of pollwatcher/challenger appointment and service.	22 mos.	1
Records of assignment and delivery of voting equipment.	22 mos.	1

ABSENTEE VOTING OTHER THAN BALLOTS

Applications for absentee voting.	22 mos.	1, 4, A
Envelopes in which absentee ballots are returned, including those returned too late to be counted, but excluding blank secrecy envelopes if such are used.	22 mos.	1, 4, A
Records of challenges to and rejection of absentee ballots.	22 mos.	1, 4, A
Records or log of the administration of absentee voting.	22 mos.	1, 4, A

Kind of documentation	Retention Period	Purpose or Applicable Federal Law
VOTING SYSTEM PREPARATION		
Election database, election definition, ballot design.	22 mos.	1, A
Records of programming and testing of lever machines.	22 mos.	1, A
Records of specialization of vote-counting software.	22 mos.	1, A
Records of programming ("burning") removable data storage devices for precinct tabulators.	22 mos.	1
Records of pre-election testing of electronic vote-counting systems.	22 mos.	1, A
Test deck(s).	22 mos.	1, A
VOTE COUNT IN CENTRAL OFFICE (or at regional site)		
Tally sheets, canvass sheets.	22 mos.	1, A
All vote-counting software.	22 mos.	1, A
One copy of all output of computer printer.	22 mos.	1, A
System log.	22 mos.	1, A
Ballot images, or ballot sets, produced by electronic voting devices.	22 mos.	1, A
Records of any verification of the count done before certification.	22 mos.	1, A
Records documenting plan and activity to ensure security of records, ballots, equipment and premises, including any breaches of security.	22 mos.	1, A
Records reflecting the certification of the outcome of the election, and copies of notifications sent to winning candidates.	22 mos.	1
CONTESTED ELECTIONS AND RECOUNTS		
Procedures and guidelines.	22 mos.	1, A
Log or diary of activity.	22 mos.	1
Records created for and during the recount.	22 mos.	1
REDISTRICTING		
Election returns by precinct for each election	permanent	B
Voter registration statistics by precinct for each election.	permanent	B
Voter turnout statistics by precinct for each election.	permanent	B

Kind of documentation	Retention Period	Purpose or Applicable Federal Law
Precinct map or maps, with boundaries in effect at time of each election.	permanent	B
Computerized file of the voter registry at time of each election.	permanent	B

¹ If machine must be cleared and reset for subsequent election before expiration of retention period, the face of the machine showing the counters with vote totals can be photographed before clearing.

² Specifically, the Justice Department has defined the requirement is as follows:

“With respect to electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices (‘PROMs’ or other similar memory storage devices), [retain] the following:

- a. The ‘PROM’ or electronic memory storage device itself, intact, and as removed from the voting machine at the close of the polls; *or*,
- b. An electronic record of the program by which votes are to be recorded or tabulated that is captured *prior* to the election, produced on some alternative medium (e. g., floppy disks) simultaneously with the ‘burning’ of the PROM or other memory storage device, *and*,
- c. With respect to the output from a PROM or other memory storage device *after* the election has been concluded:
 - i. In voting systems utilizing Precinct Ballot Counters (PBCs) or optical scanners, the hard copy output from the PROM or other electronic memory storage device used to record and/or to tabulate votes (*i. e.*, the ‘results tape’, *or*
 - ii. In voting systems using centralized counting devices, wherein the results of several PROMs or other memory storage devices are synthesized into a single consolidated output report or ‘results tape’ the hard copy output from each PROM or other electronic memory storage device, *and* the hard copy consolidated output report or ‘results tape,’ *and* the electronic program that was used to read the individual PROMs or other electronic memory storage devices and by which the consolidated output report was produced.”

(Source: “Categories of records covered”, in *Retention of Voting Records under 42 U. S. C. §§ 1974 et seq.*, by Craig Donsanto, included with this report as Appendix 2.)

³ These records are essential also for post-election attention, to ensure that the equipment will be functioning correctly in subsequent elections.

Appendix 2

Retention of Voting Records Under 42 U.S.C § 1974

By Mr. Craig C. Donsanto

Director, Election Crimes Branch
Public Integrity Section
Criminal Division
U.S. Department of Justice

Retention of Voting Records Under 42 U.S.C. § 1974

By Craig C. Donsanto¹

The purpose of this article is to provide guidance to election administration professionals and to state legislatures on the practical application of the federal election document retention requirements of 42 U.S.C. §§ 1974 through 1974e (hereafter referred to as “Section 1974”) to the modern election administration process.

Section 1974 is a federal statute that requires election administration officials to retain intact and in a secure environment all records developed by the voting process that are “requisite to voting” in elections where federal candidates were voted upon. This statute contains criminal penalties for those who violate it intentionally in election involving federal candidates. Those penalties are enforced by the Public Integrity Section, Criminal Division, United States Department of Justice.

Section 1974 was enacted in 1960. This was prior to the development of computer voting technologies which today are common features of the modern election administration process in most states. It was also long before the passage of the National Voter Registration Act (NVRA) in 1993,² which sets federal standards and procedures for registering voters throughout the United States, and imposes document retention requirements of its own. These significant—and recent—developments in the procedural aspects of American election processes have created a need on the part of election administrators for an updated exposition of the reach of the federal election document requirements of Section 1974 to modern election technologies. That is the objective of this article.³

The last article that I wrote concerning these statutes appeared in the Federal Election Commission’s “Journal” in 1986. This paper will update the discussion in that earlier piece in light of the developments just noted. In addition, it is my hope that the remarks that follow will provide the election administration community with more definitive guidance concerning the reach of these important election document retention laws in the context of modern election administration.

¹Director, Election Crimes Branch, Public Integrity Section, Criminal Division, United States Department of Justice. The assistance of Marie Garber, former Chair of the Maryland State Election Board, and William C. Kimberling of the Federal Election Commission in the preparation of this article is acknowledged and appreciated.

²42 U.S.C. §§ 1973gg through 1973gg-10 inclusive.

³Nothing contained in this article is intended to confer substantive or procedural rights on members of the public, or upon those whose activities may fall within the scope of the criminal provisions of the statutes discussed.

■ Legislative purpose and background

The voting process generates voluminous documents and records, ranging from voter registration forms and absentee ballot applications to ballots and tally reports. If election fraud occurs, these records often play an important role in the detection and prosecution of the crime. Documentation generated by the election process also plays an equally important role in the detection, investigation and proof of federal civil rights offenses.

State laws generally require that voting documents be retained for sixty to ninety days. Those relatively brief periods are usually insufficient to make certain that voting records will be preserved until more subtle forms of federal civil rights abuses and election crimes have been detected.

Congress therefore included in the Civil Rights Act of 1960 a legislative provision that extended the document retention period for elections where federal candidates were on the ballot to *twenty-two months* after the election. Pub. L. 86-449, Title III, § 301, 74 Stat. 88 (May 6, 1960); 42 U.S.C. §§ 1974-1974e. This election documentation retention requirement is backed-up with criminal misdemeanor penalties that apply to election officers and document custodians who wilfully destroy covered election records before the expiration of the 22-month federal retention period.⁴

The retention requirements of Section 1974 are aimed specifically at election administrators. In a parochial sense, these laws place criminally sanctionable duties on election officials. However, in a broader context, this federal retention law assists election administrators perform more efficiently the tasks of managing elections, and determining winners of elective contests. It does this by requiring election managers to focus appropriate attention on the types of election records under their supervision and control that may be needed to resolve challenges to the election process, and by requiring that they take appropriate steps to insure that those records will be preserved intact until such time as they may become needed to resolve legitimate questions that frequently arise involving the election process. In this way, Section 1974 serves the election administrators by better equipping them to respond to legitimate questions concerning the voting process when they arise.⁵

■ The basic requirements of Section 1974

Section 1974 requires that election administrators preserve for twenty-two months "all records and papers which come into their possession relating to any application, registration, payment of poll tax, or other act requisite to voting." This retention requirement applies to all elections in which candidates for federal offices were on the ballot. Federal elective offices mean the United States Senate, the United States House of Representatives, President of the United States, Vice President of the United States, and Presidential Elector). Section 1974 does not apply to records generated in connection with purely local or state elections.

⁴ Specifically, Section 1974 provides that any election administrator or document custodian who wilfully fails to comply with the statute is subject to imprisonment for up to one year. Under § 1974a, election officers or other persons who wilfully steal, destroy, conceal, or alter voting records required to be retained by § 1974 are also subject to one year of imprisonment.

⁵ Indeed, the federal courts have recognized that the purpose of this federal document retention requirement is to protect the right to vote by facilitating the investigation of illegal election practices. *Kennedy v. Lynd*, 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963).

Retention and disposition of records in purely nonfederal elections (those where no federal candidates were on the ballot) are governed by state document retention laws.

However, Section 1974 does apply to all records generated in connection with the process of registering voters and maintaining current electoral rolls. This is because voter registration in virtually all United States jurisdictions is “unitary,” in the sense that a potential voter registers only once to become eligible to vote for both local and federal candidates. *See United States v. Ciancuilli*, 482 F.Supp. 585 (E.D.Pa. 1979). Thus, registration records must be preserved as long as the voter registration to which they pertain is considered an “active” one under local law and practice, and those records cannot be disposed of until the expiration of 22 months following the date on which the registration ceased to be “active.”

This statute must be interpreted in keeping with its congressional objective: Under § 1974, all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained if the documents or records were generated in connection with an election which included one or more federal candidates.

■ Section 1974 requires document preservation, not document generation

Section 1974 does *not* require that states or localities produce records in the course of their election processes. However, if a state or locality chooses to create a record that pertains to voting, it is the Criminal Division’s position that this statute requires that documentation to be retained if it pertains to voting in an election covered by the statute.

■ Categories of records covered

In keeping with the wording and legislative purpose behind this election document retention statute, it is the writer’s opinion that Section 1974 covers the following categories and types of records generated by the modern voting process:

1. All voter registration records, including applications for voter registration that were rejected;
2. Registration documents developed under the NVRA, as well as records of declinations to register under the NVRA;
3. Authorizations and requests for cancellation of, or changes to, voter registration records, including any documentation generated in connection with assessing or adjudicating a change or cancellation action;
4. Voted ballots, including absentee ballots and all records of write-in votes cast;
5. Applications for ballots, including applications for absentee ballots;
6. Envelopes in which voted absentee ballots are returned to election officers, including absentee ballot envelopes and absentee ballots that are returned too late to be tabulated;
7. Ballots that have been rejected, and records associated therewith;
8. Ballots that were voted under state “challenge-voting” or “provisional-voting” proce-

dures (*i.e.*, “affidavit” or “special” ballots), and all documentation associated therewith;

9. All records pertaining to the making and the adjudication of challenges to voters;
10. Poll lists and similar records reflecting the identity of individuals voting at the polls, whether in hard copy or stored on electronic media;
11. Records pertaining to voters being assisted in voting;
12. Logs and other records pertaining to the administration of absentee voting, whether in hard copy or stored on electronic media;
13. All documents containing the signatures of voters (including poll lists, challenge affidavits, registration records, voting authority cards, etc.);
14. Tally sheets and reports of canvasses of votes, whether in hard copy format or stored on electronic media;
15. Records reflecting the appointment and service of persons to act as poll officials or poll watchers;
16. Records, whether in hard copy format or stored on electronic media, reflecting election definition (for example, computerized “election data bases,” and records reflecting constituency boundaries, ballot design, polling place staffing, voting equipment assignment, etc.);
17. Records, whether in hard copy format or recorded on electronic media, pertaining to the programming and/or testing of mechanical and electronic voting equipment and systems, including the “test decks” in jurisdictions where they are used;
18. Records, whether in hard copy format or stored on electronic media, pertaining to the specialization or particularization of vote counting software;
19. With respect to electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices (“PROMs”), or other similar memory storage devices, the following:
 - a. The “PROM” or electronic memory storage device itself, intact, and as removed from the voting machine at the close of the polls; *or*
 - b. An electronic record of the program by which votes are to be recorded or tabulated, which is captured *prior* to the election, and which is stored on some alternative medium (*e.g.*, floppy disks) simultaneously with the “burning” of the PROM or other memory storage device, *and*
 - c. With respect to the output from a PROM or other memory storage device *after* the election has been concluded—
 - i. In voting systems utilizing individual Precinct Ballot Counters (PBCs) or optical scanners: the hard copy output from the PROM or other electronic memory storage device used to record and/or to tabulate votes (for example, the “results tape”),
or

-
- ii. In voting systems using centralized counting devices wherein the results of several PROMs or other memory storage devices are synthesized into a single consolidated output report or "results tape": the hard copy output from each PROM or other electronic memory storage device, *and* the hard copy consolidated output report or "results tape," *and* the electronic program that was used to read the individual PROMs or other electronic memory storage devices and by which the consolidated output report was produced.
 20. All other computer programs utilized to tabulate votes electronically;
 21. All records generated during recounts, whether in hard copy format or stored on electronic media;
 22. The strips or sheets mounted on mechanical lever and electronic voting machines containing candidate names and ballot positions (the "ballot face"), each identified by machine number and ballot face;
 23. The assembled vote recorder pages in precincts using Votomatic equipment, each assembly being identified by precinct;
 24. All records bearing upon plans for, and implementation of, premises security for areas where voting equipment is stored, where voting and vote tabulation is conducted, and where voting documentation is stored pursuant to Section 1974, including all records of breaches of security;
 25. Reports on the status of polling sites at the opening and closing of the polls;
 26. Reports produced by voting devices at the opening and the closing of the polls, including testing reports, the zero report, and the results tape;
 27. Records pertaining to the service and maintenance of voting equipment at the polling site;
 28. Records of the assignment and delivery of voting equipment to the polling site;
 29. Records of ballot images, or ballot sets, produced by electronic voting devices.
 30. All records representing output of computer printers generated in connection with elections using electronic voting equipment;
 31. The "system log" that keeps a record of each entry into the tabulation system (sometimes called the "console log"), in elections using electronic tabulation equipment;
 32. Records of the process used to verify the vote-count prior to election certification, in elections using electronic voting equipment (*e.g.*, random sample hand-counts of ballots); and
 33. Records reflecting the certification of the outcome of elections, and copies of notifications sent to winning candidates (*i.e.*, "Certificates of Election").

■ Originals versus copies

Section 1974 further requires that the original documents be maintained, even in those jurisdictions that have the capability to reduce original records to digitized replicas. This is because handwriting analysis cannot at present be performed on digitized reproductions of signatures, and be-

cause the legislative purpose advanced by this statute is to preserve election records for their evidentiary value in criminal and civil rights lawsuits. Therefore, in states and localities that employ new digitization technology to archive election forms that were originally manually subscribed by voters, Section 1974 requires that the originals be maintained for the requisite 22-month period.

■ Election officers must supervise storage

Section 1974 requires that covered election documentation be retained either physically by election officials themselves, or under the direct administrative supervision of election officers. This is because the document retention requirements of this federal law place the retention and safe-keeping duties squarely on the shoulders of election officers, and Section 1974 does not contemplate that this responsibility be shifted to other government agencies or officers.

An electoral jurisdiction may validly determine that election records subject to Section 1974 would most efficiently be kept under the physical supervision of government officers other than election officers (*e.g.*, motor vehicle departments, social service administrators). This is particularly likely to occur following the enactment of the NVRA, which for the first time in many states gives government agencies other than election administrators a substantive role in the voter registration process.

If an electoral jurisdiction makes such a determination, Section 1974 requires that administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records. Those administrative procedures should insure that election officers retain ultimate responsibility for the retention and security of covered election documents and records, and that election officers retain the right to physically access and dispose of them.

■ Retention not required for certain records

Section 1974 does not apply to surplus voting materials that are not used in elections where federal candidates were on the ballot. Examples of such surplus materials include unused ballots and forms, inventories of supplies, payroll and personnel records pertaining to the hiring, training or payment of election officials, and other documents that do not reflect or embody a step in the registration or the voting process. Section 1974 only requires the retention of documentation that results in, or which reflects, an act of registering to vote or voting, or a step in the vote tabulation and election certification process.

Documentation generated in the course of elections held *solely* for local or state candidates, or bond issues, initiatives, referenda and the like, is not covered by Section 1974 and may be disposed of within the usually shorter time periods provided under state election laws. However, if there is a federal candidate on the ballot in the election, the 22-month federal retention requirement applies.

■ Section 1974 interfaces with the NVRA

Finally, the retention requirements of Section 1974 interface significantly with somewhat similar retention requirements contained in the NVRA, 42 U.S.C. § 1973gg-6(i).

The differences between these two provisions are threefold:

First, Section 1974 applies to all records generated by the election process, while Section 1973gg-6(i) applies only to registration records generated under the terms of the NVRA.

Second, Section 1974 requires only that records subject to its terms be retained intact for the requisite 22-month period, while Section 1973gg-6(i) requires that registration records be both retained and—with certain specifically noted exceptions—be made available to the public for inspection for 24 months.

Third, violations of Section 1974 by election administrators are subject to criminal sanctions, while violations of Section 1973gg-6(i) are subject only to noncriminal remedies.

■ Conclusion

The main rule of Section 1974 warrants repeating:

This statute does not require that state or local election officials or election procedures generate any specific type or classification of election record. However, if a record is generated, Section 1974 comes into play and requires that the record be retained for 22 months if it falls into one or more of the grouping presented above.

Compliance with these document retention laws undoubtedly can present administrative challenges for election executives. However, the American democracy depends on the integrity of its voting processes. The federal document retention law advances that objective by assuring that physical evidence needed to evaluate and prove defects in the electoral process is available to election executives, investigators, prosecutors and courts. Thus, the quick answer to whatever administrative challenge compliance with these laws may in the short term place on election executives is that democracy does not come cheaply.

The goal of this paper has been to make that task easier by providing guidance with respect to many of the important questions that have been presented to me over the past several years by my colleagues in the election administration community.

Undoubtedly, I have not been able to answer every question that might arise concerning this subject in this brief piece. That would have been impossible to do. Moreover, as new technologies are increasingly developed and brought to bear on the election administrative process, new types of “election records” will invariably be “born,” and additional questions will continue to arise concerning the application of these election document retention laws to specific types of records produced by the voting process.

It is not possible for me to answer all of these questions individually. Thus, future requests for formal answers to questions concerning the application of Section 1974 should be directed to the Clearinghouse on Election Administration, Federal Election Commission. The Clearinghouse, in turn, will coordinate with me the task of providing additional public guidance to the election administration community concerning any significant document retention issues that may remain unresolved.