

**ANSWERING THE CLARION CALL TO ACTION:
CONGRESS’S ROLE IN PROTECTING ELECTION SECURITY**

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On November 9, 2016, a sleepless night was ahead of us. And when around 8 a.m. the most important result of our work arrived, we uncorked a tiny bottle of champagne . . . took one gulp each and looked into each other’s eyes. . . . We uttered almost in unison: “We made America great.”

Internet Research Agency Employee¹

If there has ever been a clarion call for vigilance and action against a threat to the very foundations of our democratic political system, this episode is it.

James R. Clapper²

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1. STAFF OF S. SELECT COMM. ON INTELLIGENCE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOL. 2: RUSSIA’S USE OF SOCIAL MEDIA WITH ADDITIONAL VIEWS 34 (Comm. Print 2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf [http://web.archive.org/web/20200718215006/https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf] [hereinafter SSCI RUSSIA REPORT, VOL. 2] (quoting from an “information warfare operative” at the Internet Research Agency, a Russia “troll farm” that was responsible for the Social Media campaign aspect of the Russian interference campaign). The Senate Select Committee on Intelligence notes that “‘information warfare’ refers to Russia’s strategy for the use and management of information to pursue a competitive advantage.” *Id.* at 3.

2. *Russian Interference in the 2016 United States Election: Hearing Before the Subcomm. on Crime & Terrorism of the S. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of James R. Clapper, Former Director, Office of the Director of National Intelligence), <https://www.judiciary.senate.gov/meetings/russian-interference-in-the-2016-united-states-election> [<http://web.archive.org/web/20200727161048/https://www.judiciary.senate.gov/meetings/russian-interference-in-the-2016-united-states-election>].

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INTRODUCTION

As the above quotes make abundantly clear, the Russian government interfered in the 2016 presidential election. This was the unanimous opinion of the U.S. Intelligence Community,³ both Congressional Intelligence Committees,⁴ and the Department of Justice’s Special Counsel, Robert Mueller.⁵ Mueller’s report concluded that Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the U.S. presidential election and that the interference was done in a “sweeping and systematic fashion.”⁶

3. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, NAT’L INTELLIGENCE COUNCIL, ICA 2017-01D, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (2017), <https://www.documentcloud.org/documents/3254239-Russia-Hacking-report.pdf> [<http://web.archive.org/web/20200727162711/https://assets.documentcloud.org/documents/3254239/Russia-Hacking-report.pdf>] [hereinafter ICA ON RUSSIA].

4. See STAFF OF H. PERMANENT SELECT COMM. ON INTELLIGENCE, 115TH CONG., REP. ON RUSSIAN ACTIVE MEASURES 1 (Comm. Print 2018), https://republicans-intelligence.house.gov/uploadedfiles/final_russia_investigation_report.pdf [http://web.archive.org/web/20200727163029/https://republicans-intelligence.house.gov/uploadedfiles/final_russia_investigation_report.pdf]; see also STAFF OF S. SELECT COMM. ON INTELLIGENCE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOL 1: RUSSIAN EFFORTS AGAINST ELECTION INFRASTRUCTURE WITH ADDITIONAL VIEWS 1–5 (Comm. Print 2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf [http://web.archive.org/web/20200727163334/https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf] [hereinafter SSCI RUSSIA REPORT, VOL. 1].

5. ROBERT S. MUELLER, III, REP. ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOL. I, at 4–10 (2019), <https://www.justice.gov/storage/report.pdf> [<http://web.archive.org/web/20200727163926/https://www.justice.gov/storage/report.pdf>].

6. *Id.* at 1.

The Russian cyber-enabled influence operation, or “active measures campaign,”⁷ had three prongs: 1) a social media campaign that disseminated information and disinformation;⁸ 2) a computer intrusion operation that hacked the Democratic National Committee and the Clinton Campaign and released those stolen documents through proxies like WikiLeaks and Guccifer 2.0;⁹ and 3) a computer intrusion operation¹⁰ that targeted “voting systems in at least [twenty-one] states [breaching at least two states’ voter registration databases] and sought to infiltrate the networks of voting equipment vendors, political parties, and at least one local election board.”¹¹

As the January 2017 Intelligence Community Assessment concluded, “Russia’s goals were to undermine public faith in the US democratic process.”¹² Two months later, in March 2017, former FBI Director James Comey warned that the Russians would be back, and they would conclude that the intrusion and disinformation operations were successful “because they introduced chaos and division and discord and sowed doubt about the nature of this amazing country of ours and our democratic process.”¹³ He went on to state, “[T]hey’ll be back . . .

7. *See generally* SSCI RUSSIA REPORT, VOL. 1, *supra* note 4.

8. SSCI RUSSIA REPORT, VOL. 2, *supra* note 1, at 9.

9. *Id.*

10. *See generally* SSCI RUSSIA REPORT, VOL. 1, *supra* note 4.

11. CONG. TASK FORCE ON ELECTION SECURITY, FINAL REPORT, at 3 (2018), <https://homeland.house.gov/imo/media/doc/TFESReport.pdf> [<http://web.archive.org/web/20200622051418/https://homeland.house.gov/imo/media/doc/TFESReport.pdf>] [hereinafter CONG. TASK FORCE ON ELECTION SECURITY REPORT]; *see also* OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, NAT’L COUNTERINTELLIGENCE & SEC. CTR., FOREIGN THREATS TO U.S. ELECTIONS: ELECTION SECURITY INFORMATION NEEDS, https://www.dni.gov/files/ODNI/documents/DNI_NCSC_Elections_Brochure_Final.pdf [http://web.archive.org/web/20200515214042/https://www.dni.gov/files/ODNI/document/s/DNI_NCSC_Elections_Brochure_Final.pdf]. These prongs track with the categories established by the Office of the Director of National Intelligence. The Office of the Director of National Intelligence describes foreign interference with U.S. elections as falling into “five distinct categories.” They are:

1. cyber operations targeting election infrastructure;
2. cyber operations targeting political parties, campaigns, and public officials;
3. covert influence operations to assist or harm political organizations, campaigns, or public officials;
4. covert influence operations to influence public opinion and sow division;
5. covert efforts to influence policymakers and the public.

Id.

12. ICA ON RUSSIA, *supra* note 3, at ii.

13. *Open Hearing on Russian Active Measures Investigation Before the H. Permanent Select Comm. on Intelligence*, 115th Cong. (2017), <https://advance.lexis.com/api/permalink/346c1cdc-1712-45ee-bee1-b51832776232/?context=1000516> [<http://web.archive.org/web/20200727165629/https://signin.lexisnexis.com/laccess/app/signin?back=https%3A%2F%2Fadvance.lexis.com%3A443%2F%2Fapi%2Fpermlink%2F>]

They'll be back in 2020. They may be back in 2018.”¹⁴ Former Director of National Intelligence Dan Coats echoed the same sentiment during his testimony in February 2018, warning, “[T]here should be no doubt that Russia perceives its past efforts have been successful and views the 2018 U.S. midterm elections as a potential target for Russian influence operations.”¹⁵ The warning about 2018 proved correct. As tech experts Delta and Matsuura noted, “There is significant evidence that in 2018, even before the election, Russian operatives attempted to engage in behavior similar to that of 2016 as part of an orchestrated effort to influence U.S. elections.”¹⁶

Finally, in February 2020, the Senate Intelligence Committee warned that “[t]he executive branch should be prepared to face an attack on U.S. elections in a highly politicized environment, either from the Russia[ns] or from elsewhere.”¹⁷ This warning is consistent with the information

346c1cdc-1712-45ee-bee1-b51832776232%2F%3Fcontext%3D1000516&aci=la]; see also Washington Post Staff, *Full Transcript: FBI Director James Comey Testifies on Russian Interference in 2016 Election*, WASH. POST (Mar. 20, 2017, 8:40 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/> [<http://web.archive.org/web/20200330202027/https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/>]; Patricia Zengerle, *FBI Head Confirms Russia Election Probe, Says Moscow Backed Trump*, REUTERS (Mar. 19, 2017, 11:05 PM), <https://www.reuters.com/article/us-usa-trump-russia/fbi-head-confirms-russia-election-probe-says-moscow-backed-trump-idUSKBN16R077> [<http://web.archive.org/web/20200727165844/https://www.reuters.com/article/us-usa-trump-russia/fbi-head-confirms-russia-election-probe-says-moscow-backed-trump-idUSKBN16R077>].

14. Justin Baragona, *‘They’ll Be Back in 2020’: Comey Says Russians Will Try to Interfere in Upcoming Elections*, MEDIAITE (Mar. 20, 2017, 1:16 PM), <https://www.mediaite.com/online/theyll-be-back-in-2020-comey-says-russians-will-try-to-interfere-in-upcoming-elections/> [<http://web.archive.org/web/20200727170355/https://www.mediaite.com/online/theyll-be-back-in-2020-comey-says-russians-will-try-to-interfere-in-upcoming-elections/>].

15. *Open Hearing on Worldwide Threats: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 9 (2018) (statement of Daniel R. Coats, Director, Office of the Director of National Intelligence), <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-0> [<http://web.archive.org/web/20200727170641/https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-0>].

16. GEORGE B. DELTA & JEFFREY H. MATSUURA, *LAW OF THE INTERNET* §17.05 (4th ed. 2016) [hereinafter *LAW OF THE INTERNET*].

17. STAFF OF S. SELECT COMM. ON INTELLIGENCE, 116TH CONG., *REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION*, VOL. 3: U.S. GOVERNMENT RESPONSE TO RUSSIAN ACTIVITIES 44 (Comm. Print 2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume3.pdf

provided to members of the House Intelligence Committee on February 13, 2020.¹⁸ There, intelligence community officials warned House Permanent Select Committee on Intelligence (HPSCI) members that not only was Russia continuing to interfere, but that “Russia intended to interfere with the 2020 Democratic primaries as well as the general election.”¹⁹

Interference by foreign governments was a primary concern of the Founding Fathers and framers of the U.S. Constitution.²⁰ In 1787, Thomas Jefferson wrote, “Wretched indeed is the nation in whose affairs foreign powers are once permitted to intermeddle!”²¹ That same year, Alexander Hamilton enlisted John Jay to devote four of the first five Federalist essays to warn against the dangers of foreign interference.²² During his second term as president, George Washington signed a treaty with Great Britain that enraged the French, who viewed it as a violation of its earlier treaty with the U.S.²³ The French government, through its

[http://web.archive.org/web/20200727171207/https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume3.pdf] [hereinafter SSCI RUSSIA REPORT, VOL. 3].

18. Adam Goldman et al., *Lawmakers Are Warned That Russia Is Meddling to Re-elect Trump*, N.Y. TIMES (Feb. 20, 2020), https://www.nytimes.com/2020/02/20/us/politics/russian-interference-trump-democrats.html?nl=todaysheadlines&emc=edit_th_200221&campaign_id=2&instance_id=15985&segment_id=21476&user_id=6daa52107c4affef9be374d7f79f944®i_id=460046180221

[http://web.archive.org/web/20200727171428/https://www.nytimes.com/2020/02/20/us/politics/russian-interference-trump-democrats.html?nl=todaysheadlines&emc=edit_th_200221&campaign_id=2&instance_id=15985&segment_id=21476&user_id=6daa52107c4affef9be374d7f79f944®i_id=460046180221].

19. *Id.*

20. See generally Ron Elving, *Fear of Foreign Interference in U.S. Elections Dates from Nation’s Founding*, NPR (June 14, 2019, 9:58 AM), <https://www.npr.org/2019/06/14/732571895/fear-of-foreign-interference-in-u-s-elections-dates-from-nations-founding> [<http://web.archive.org/web/20200727171716/https://www.npr.org/2019/06/14/732571895/fear-of-foreign-interference-in-u-s-elections-dates-from-nations-founding>].

21. Letter from Thomas Jefferson to Benjamin Vaughn (July 2, 1787), <https://founders.archives.gov/documents/Jefferson/01-11-02-0449> [<http://web.archive.org/web/20200728022233/https://founders.archives.gov/documents/Jefferson/01-11-02-0449>].

22. See generally THE FEDERALIST NOS. 2–5 (John Jay), <https://www.congress.gov/resources/display/content/The+Federalist+Papers> [<http://web.archive.org/web/20200728022403/https://guides.loc.gov/federalist-papers/full-text>].

23. See *Jay’s Treaty*, LIBR. CONG. (Sept. 6, 2017), <https://www.loc.gov/rr/program/bib/ourdocs/jay.html> (noting the treaty was “officially titled ‘Treaty of Amity Commerce and Navigation, between His Britannic Majesty; and The United States of America[.]’”); see also *Treaty of Alliance with France*, LIBR. CONG. (Apr. 25, 2017), <https://www.loc.gov/rr/program/bib/ourdocs/alliance.html>

ambassador, began to repeatedly interfere in domestic politics in an attempt to sway the public opinion against the nascent government and to forestall ratification of the treaty.²⁴ President Washington ultimately requested France to withdraw its ambassador.²⁵ His replacement was not much better and continued to interfere in the internal workings of the government.²⁶

On the heels of that experience, in 1796, President George Washington warned against the “insidious wiles of foreign influence,”²⁷ noting that it was, “one of the most baneful foes of republican government.”²⁸ The Founders recognized foreign interference as a threat to our national security precisely because of the risk it posed to the principle of “government . . . by the people.”²⁹ This principle is central to our republican form of government.³⁰ To help protect our elections, the Framers vested the U.S. Congress with powers to regulate federal elections.³¹

[<http://web.archive.org/web/20200712171330/http://www.loc.gov/rr/program/bib/ourdocs/alliance.html>].

24. Joseph F. Stoltz III, *The Genet Affair*, MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/genet-affair/> [<http://web.archive.org/web/20200728023013/https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/genet-affair/>].

25. *Id.*

26. Jordan E. Taylor, *The Founding Fathers Knew First-Hand That Foreign Interference in U.S. Elections Was Dangerous*, WASH. POST (Oct. 7, 2019, 5:00 AM), <https://www.washingtonpost.com/outlook/2019/10/07/founders-knew-first-hand-that-foreign-interference-us-elections-was-dangerous/> [<http://web.archive.org/web/20200728023318/https://www.washingtonpost.com/outlook/2019/10/07/founders-knew-first-hand-that-foreign-interference-us-elections-was-dangerous/>].

27. President George Washington, Washington’s Farewell Address (1796), https://avalon.law.yale.edu/18th_century/washing.asp [http://web.archive.org/web/20200728023604/https://avalon.law.yale.edu/18th_century/washing.asp].

28. *Id.*

29. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> [<http://web.archive.org/web/20200728023757/http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>].

30. See generally Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1993).

31. See U.S. CONST. art. I, § 4, cl. 1; see also *Congressional Power to Regulate*, JUSTIA, <https://law.justia.com/constitution/us/article-1/18-congressional-power-to-regulate.html> [<http://web.archive.org/web/20200728024039/https://law.justia.com/constitution/us/article-1/18-congressional-power-to-regulate.html>] (containing the above clause from the U.S. Constitution with annotations).

It was in recognition of Congress's power to act in this space that prompted the Congressional Task Force on Election Security in 2018 to conclude, "When a sovereign nation attempts to meddle in our elections, it is an attack on our country. We cannot leave states to defend against the sophisticated cyber tactics of state actors like Russia on their own."³²

This Article endorses that conclusion. First, it argues that the continuing threat of foreign interference in our elections has undermined public confidence in the legitimacy of the democratic process. Second, it argues that Congress can and must act swiftly and aggressively to strengthen the states' and federal government's abilities to counter this national security threat if there is any hope of restoring confidence.

To support this argument, Part I reviews constitutional and statutory authorities and concludes, based upon the text and caselaw, that Congress has broad authority to regulate federal elections and that federalism concerns are misplaced. Part II discusses the multiple threats to the integrity of our electoral systems—threats that undermine their legitimacy, pose a national security threat, and call for immediate action to remedy. This leads into Part III, which examines congressional recommendations, paying specific attention to the recommendations contained in the Report of the Congressional Task Force on Election Security.³³ This Article then reviews enacted and pending legislation to determine whether Congress has addressed the recommendations of the Task Force. The Article concludes that although Congress has made great strides since the 2016 election cycle, there is still much that needs to be done to protect the integrity of future elections.

A Final Word About Definitions and the Scope of This Article

This Article reviews proposed, enacted, and pending legislation impacting our electoral system. To that end, it relies on the typology developed by Dr. R. Sam Garrett of the Congressional Research Service (CRS). In his report,³⁴ he identified six broad policy areas, designating them as "Major Governmental Functions," and assigned to each area the governmental entity primarily responsible for it.³⁵ The six major governmental functions are: Campaign Finance; Election Administration;

32. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 39.

33. *Id.*

34. *See generally* R. SAM GARRETT, CONG. RESEARCH SERV., R45302, FEDERAL ROLE IN U.S. CAMPAIGNS AND ELECTIONS: AN OVERVIEW (2018), <https://crsreports.congress.gov/product/pdf/R/R45302> [<http://web.archive.org/web/20200728024547/https://crsreports.congress.gov/product/pdf/R/R45302>] [hereinafter CRS REP. ON FED. ROLE IN CAMPAIGNS AND ELECTIONS].

35. *Id.* at 5.

Election Security; Qualifications and Contested Elections; Redistricting; and Voting Rights.³⁶ This Article focuses on Election Administration and Election Security, two areas where states have the primary responsibility. These areas were the focus of foreign interference in 2016.³⁷ Because of that, these are the areas where Congress has most legislated.³⁸

Finally, despite having authored numerous reports in the area, even the CRS analysts admitted, “There is no single definition of ‘election security’”³⁹ However, this Article adopts the broad definition offered by those analysts—that “election security involves efforts to ensure fair, accurate, and safe elections.”⁴⁰ These efforts can occur “before, during, and after voters cast their ballots.”⁴¹ Despite settling on this definition, the analysts noted a possible further refinement of the term:

A narrow definition of election security might address only efforts to protect traditional election infrastructure such as voter registration databases, voting machines, polling places, and election result tabulations. . . . More expansive definitions might also address issues affecting candidates and campaigns. This includes, for example, regulating political advertising or fundraising; providing physical or cybersecurity assistance for campaigns; or combatting disinformation or misinformation in the political debate.⁴²

As will be demonstrated in Part III, Congress has legislated more within the “narrow definition” than in the “more expansive definition.”⁴³

36. *Id.*

37. *See generally* ICA ON RUSSIA, *supra* note 3.

38. R. SAM GARRETT ET AL., CONG. RESEARCH SERV., R46146, CAMPAIGN AND ELECTION SECURITY POLICY: OVERVIEW AND RECENT DEVELOPMENTS FOR CONGRESS Summary Page (2020), <https://crsreports.congress.gov/product/pdf/R/R46146> [<http://web.archive.org/web/20200728024807/https://crsreports.congress.gov/product/pdf/R/R46146>] [hereinafter CRS REP. ON CAMPAIGN AND ELECTION SEC. POL’Y].

39. *Id.* at 2.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*; *see also infra* Part III.

I. CONSTITUTIONAL AUTHORITY OVER ELECTION ADMINISTRATION AND
FEDERALISM CONCERNS

Constitutional Authorities

The U.S. Constitution, through the Elections Clause,⁴⁴ vests authority in both Congress and state legislatures. Although the states have primary responsibility for the administration of federal elections, the Constitution specifically provides for federal authority to regulate federal elections. Four constitutional provisions are generally cited as the bases for congressional authority: Article I, Section 4, Clause 1;⁴⁵ Article II, Section 1, Clause 4;⁴⁶ the Fourteenth Amendment's Equal Protection Clause;⁴⁷ and the Fifteenth Amendment.⁴⁸ However, as demonstrated below, congressional authority can be found in other provisions.⁴⁹ Courts have upheld broad authority for Congress to legislate and regulate in this area.⁵⁰ The scope of this authority is tied to the nature of the election.⁵¹

1. House Elections—Article I, Section 4, Clause 1

This provision states:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.⁵²

This provision establishes that although states have the primary responsibility, Congress has the ultimate power to set the time, place, and

44. U.S. CONST. art. I, § 4, cl. 1.

45. *Id.*

46. U.S. CONST. art. II, § 1, cl. 4.

47. U.S. CONST. amend. XIV, §§ 1, 5.

48. U.S. CONST. amend. XV, §§ 1–2.

49. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION (2001), <https://www.gao.gov/new.items/d01470.pdf> [<http://web.archive.org/web/20200728025108/https://www.gao.gov/new.items/d01470.pdf>] [hereinafter THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION].

50. *Id.*

51. *Id.*

52. U.S. CONST. art. I, § 4, cl. 1.

manner of House elections.⁵³ Congress may exercise this power both through original legislation or legislation to alter a prior state action.⁵⁴

Congress's authority over elections involving members of the House of Representatives is considered the broadest because these elections "have historically always been decided by a system of popular voting."⁵⁵

Congress first exercised this power in 1842, when it passed a law requiring the election of representatives by districts.⁵⁶ In subsequent years, Congress passed additional measures to the districting requirements.⁵⁷ Although Congress eventually deleted these standards in the 1929 Reapportionment Act,⁵⁸ "no challenge to the seating of Members-elect selected in violation of these requirements was ever successful . . ."⁵⁹

Federal courts have consistently interpreted the "Times, Places and Manner" language to hold that "Congress has extensive power to regulate most elements of a congressional election."⁶⁰ The Supreme Court held that "the right to vote for Members of Congress is derived from the Constitution and that Congress therefore may legislate broadly under this provision to protect the integrity of this right."⁶¹ In describing the "function contemplated by Article I, [S]ection 4,"⁶² the Court stated:

53. *Id.*

54. *Ex parte Siebold*, 100 U.S. 371, 383–84 (1879).

55. KENNETH R. THOMAS, CONG. RESEARCH SERV., RL30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS 3 (2014), <https://crsreports.congress.gov/product/pdf/RL/RL30747> [<http://web.archive.org/web/20200728025258/https://crsreports.congress.gov/product/pdf/RL/RL30747>] [hereinafter CRS REP. ON CONG. STANDARDIZING NAT'L ELECTIONS] (citing to U.S. CONST. art. I, § 2, cl. 1, which states, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .").

56. *See* Act of June 25, 1842, 5 Stat. 491 (1842) (current version at 2 U.S.C. § 2c (2018)).

57. *See, e.g.*, Act of Aug. 8, 1911, ch. 5, 37 Stat. 13, (1911) (current version at 2 U.S.C. § 2c); Act of Jan. 16, 1901, ch. 93, 31 Stat. 733 (1901) (current version at 2 U.S.C. § 2c); Act of Feb. 2, 1872, ch. 11, 17 Stat. 28, (1872) (current version at 2 U.S.C. § 2c).

58. Reapportionment Act of 1929, ch. 28, 46 Stat. 21, (1929) (current version at 2 U.S.C. § 2a).

59. *ArtI.S4.C1.1.1.1.2 Role of Congress in Regulating Federal Elections*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI_S4_C1_1_1_1_2/ [http://web.archive.org/web/20200728025917/https://constitution.congress.gov/browse/essay/artI_S4_C1_1_1_1_2/].

60. CRS REP. ON CONG. STANDARDIZING NAT'L ELECTIONS, *supra* note 55, at 3.

61. *Id.*

62. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved . . . [i]t 'has a general supervisory power over the whole subject.'⁶³

This and other caselaw form the basis for the conclusion that Congress has broad authority to exercise control over House election procedures.⁶⁴

2. Senate Elections—Article I, Section 4, Clause 1

Based on the text, Congress's authority to impose regulations on the states in Senate elections is narrower than in House elections because of the limitation that Congress may not alter "the Places of chusing Senators."⁶⁵ This limitation reflected the role of state legislatures in choosing senators.⁶⁶ However, in 1913, the Seventeenth Amendment⁶⁷ was ratified, setting the number of senators from each state at two and establishing that senators would be "elected by the people thereof."⁶⁸

63. *Id.* at 366–67.

64. *Id.*; see also *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972) (state's authority to regulate recount of elections); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (authority to enforce the right to cast ballot and have ballot counted); *In re Coy*, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis congressional elections); *United States v. Simms*, 508 F. Supp. 1179, 1183–85 (W.D. La. 1979) (criminalizing payments in reference to registration or voting does not offend Tenth Amendment); *Prigmore v. Renfro*, 356 F. Supp. 427, 430 (N.D. Ala. 1972) (absentee ballot program upheld as applied to federal elections), *aff'd*, 410 U.S. 919 (1973); *Fowler v. Adams*, 315 F. Supp. 592, 594 (M.D. Fla. 1970), *appeal dismissed*, 400 U.S. 986 (1971) (authority to exact five percent filing fee for congressional elections).

65. U.S. CONST. art. I, § 4, cl. 1.

66. CRS REP. ON CONG. STANDARDIZING NAT'L ELECTIONS, *supra* note 55, at 4.

67. U.S. CONST. amend. XVII.

68. *Id.*

Popular voting for senators began in 1914.⁶⁹ Accordingly, one scholar argued that to the extent that Senate elections are also decided by popular vote, this textual limitation may be obsolete.⁷⁰ He cautioned that if Congress were to “establish legislation regulating where states must establish polling sites for Senate elections, such legislation might run afoul of textual limitations of this provision.”⁷¹ But this may be a distinction without real difference because, from a practical sense, if Congress imposed the same limitation on House elections, and if Senate elections were held at the same time, states would follow the federal regulation, “if [for] no other reason than administrative convenience.”⁷²

This reasoning is consistent with recent caselaw where the U.S. Supreme Court held that Congress’s power “over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient.’”⁷³

3. Presidential Elections—Article II, Section 1, Clause 4

Similar to the Elections Clause for congressional elections, Article II of the Constitution assigns responsibilities to both the states and Congress in presidential elections.⁷⁴ Article II, Section 1, Clause 2 provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁷⁵ Article II, Section 1, Clause 3 sets the procedures for how the electors shall vote, which includes identifying how the president and vice president are chosen.⁷⁶ Clause 4 provides that “[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes.”⁷⁷

This provision has also been changed by a subsequent amendment.⁷⁸ Although the Twelfth Amendment changed the original presidential and

69. *Electing Senators*, U.S. SENATE, https://www.senate.gov/general/Features/ElectingSenators_AHistoricalPerspective.htm [http://web.archive.org/web/20200728030158/https://www.senate.gov/general/Features/ElectingSenators_AHistoricalPerspective.htm].

70. CRS REP. ON CONG. STANDARDIZING NAT’L ELECTIONS, *supra* note 55, at 4.

71. *Id.*

72. *Id.*

73. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

74. U.S. CONST. art. II, § 1, cl. 2.

75. *Id.*

76. U.S. CONST. art. II, § 1, cl. 3.

77. U.S. CONST. art. II, § 1, cl. 4.

78. U.S. CONST. amend. XII.

vice-presidential election process, it did not confer additional powers to Congress to regulate the process.⁷⁹ Therefore, Congress is still limited to determining the “Time of choosing” presidential electors and to determining a nationwide date when “they shall give their Votes.”⁸⁰

Notwithstanding this perceived narrow scope, it has been noted that “Congress’s regulatory authority over presidential elections does seem to be more extensive than it might appear based on the text.”⁸¹ Primarily because of caselaw, those boundaries remain unclear, particularly regarding the extent to which Congress can regulate any given state’s administration of presidential elections.⁸² However, we can find guidance in other caselaw, as the courts have addressed Congress’s authority to regulate political committees and their influence over presidential elections.⁸³

In *Burroughs v. United States*, the Supreme Court upheld the constitutionality of a statute—the Federal Corrupt Practices Act—which mandated federal financial disclosures on political committees.⁸⁴ In arguing that Congress had authority to legislate in this area, the Court noted:

While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.⁸⁵

Moreover, the Court found that the legislation supported a valid need to preserve the integrity of such elections:

79. *Id.*

80. *Id.*

81. CRS REP. ON CONG. STANDARDIZING NAT’L ELECTIONS, *supra* note 55, at 5.

82. *Id.*

83. *Id.*

84. *Burroughs v. United States*, 290 U.S. 534, 540–44 (1934); Federal Corrupt Practices Act, Pub. L. No. 61-274, ch. 392, 36 Stat. 822 (repealed 1971).

85. *Burroughs*, 290 U.S. at 545.

The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states . . . It in no sense invades any exclusive state power.⁸⁶

Distinguishing third parties from states seems to have been dispositive and crucial to the regulations surviving constitutional scrutiny.⁸⁷ By concluding that the regulations did not “interfere with the power of a state to appoint electors” or otherwise invade “any exclusive state power,” the Court signaled that it was not expanding Congress’s powers to regulate in presidential elections, thereby making them coterminous with Congress’s powers in congressional elections.⁸⁸ Similarly, subsequent cases addressing campaign financing have also upheld Congress’s power to regulate, but those cases also involved third parties—campaigns, candidates, or political committees—and did not implicate the state’s power to appoint electors.⁸⁹

However, when confronted with regulations that could invade an exclusive state power—for example, voter registration qualifications—three federal courts of appeals blew right past the limitation identified by the *Burroughs* court.⁹⁰ In all three cases, states challenged the constitutionality of the National Voter Registration Act (NVRA) of 1993.⁹¹ Nicknamed the “Motor Voter” law, the Act imposed multiple obligations on states to make voter registration easier and more

86. *Id.* at 544–45.

87. *Id.*

88. *Id.*

89. *Id.* Forty-two years later, the Court similarly upheld the regulation of campaign financing by Congress in the Federal Election Campaign Act (FECA) of 1971. After reiterating that Congress has the constitutional power to regulate federal elections, the Court found that the “provisions limiting individual contributions to campaigns were constitutional despite First Amendment objections.” It held that the primary purpose of the FECA, which served “to limit the activity and appearance of corruption resulting from large individual financial contributions” was a sufficient justification for intruding on the freedom of political association. *Buckley v. Valeo*, 424 U.S. 1, WL Synopsis, 26 (1976).

90. *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 796–98 (7th Cir. 1995); *see also Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836–37 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1413–16 (9th Cir. 1995).

91. *Id.*; National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (current version at 52 U.S.C. §§ 20501–11 (2018)).

accessible.⁹² Several states challenged the law on constitutional grounds asserting that it infringed upon their Article I, Section 2 and Seventeenth Amendment authority to fix the qualifications for voters for senators and representatives, as well as the Tenth Amendment.⁹³ Surprisingly, in upholding Congress's authority to regulate, the courts cited *Burroughs* for the proposition that "[t]he broad power given to Congress over congressional elections has been extended to presidential elections . . . and to party primaries involving contestants for congressional positions."⁹⁴

In his opinion in *ACORN v. Edgar*,⁹⁵ Judge Posner, citing to *Burroughs*, directly addressed Congress's power vis-à-vis presidential elections. He wrote:

Article II section I provides that "Congress may determine the Time of chusing the Electors [for President], and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." *This provision has been interpreted to grant Congress power over [p]residential elections coextensive with that which Article I section 4 grants it over congressional elections.*⁹⁶

These cases are still good caselaw, so it appears that any regulation short of directly implicating the state's power to appoint presidential electors will likely be upheld.⁹⁷ For practical purposes then, Congress's powers are coextensive.⁹⁸

4. Civil War Era Amendments

Despite the expansive reading of Congress's "Times, Places and Manner" authority to impose regulations on states regarding federal elections, Congress does not have similar authority over state and local elections.⁹⁹ However, the Civil War Era Amendments, which include the

92. See *Miller*, 129 F.3d at 834–35.

93. *Edgar*, 56 F.3d at 796–98; see also *Wilson*, 60 F.3d at 1413–16; *Miller*, 129 F.3d at 836–37.

94. *Wilson*, 60 F.3d at 1414 (first citing *Burroughs*, 290 U.S. at 545; then citing *United States v. Classic*, 313 U.S. 299, 317 (1941)).

95. *Edgar*, 56 F.3d at 793.

96. *Id.* (emphasis added).

97. *Id.*

98. *Id.*

99. THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION, *supra* note 49, at 2.

Thirteenth,¹⁰⁰ Fourteenth¹⁰¹ and Fifteenth¹⁰² Amendments, along with the modern era voting amendments, which include the Nineteenth,¹⁰³ Twenty-Fourth,¹⁰⁴ and Twenty-Sixth¹⁰⁵ Amendments, provide Congress with the power to prevent various types of discrimination in access to voting.

The Civil War Era Amendments provide:

Thirteenth Amendment

§ 1. Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

Fourteenth Amendment

§ 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Fifteenth Amendment

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

100. U.S. CONST. amend. XIII.

101. U.S. CONST. amend. XIV.

102. U.S. CONST. amend. XV.

103. The Nineteenth Amendment provides: “The right of citizens . . . to vote shall not be denied . . . on account of sex.” U.S. CONST. amend. XIX.

104. The Twenty-Fourth Amendment provides: “The right of citizens . . . to vote . . . shall not be denied . . . by reason of failure to pay any poll tax . . .” U.S. CONST. amend. XXIV.

105. The Twenty-Sixth Amendment provides: “The right of citizens . . . to vote shall not be denied . . . on account of age.” U.S. CONST. amend. XXVI.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

Federal courts have interpreted the Enforcement Clause contained in each of these amendments as a “positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees” of such amendment.¹⁰⁶

a. Fourteenth Amendment

In *Katzenbach v. Morgan*, the Supreme Court upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965¹⁰⁷ and prohibited the use of English literacy tests against those who completed the sixth grade in American schools in which the predominant language was other than English, against a New York State challenge.¹⁰⁸ The Court directly addressed the question of whether Congress could “prohibit the enforcement of the state law by legislating under [Section] 5 of the Fourteenth Amendment[.]”¹⁰⁹

In holding that “[Section] 4(e) [was] a proper exercise of the powers granted to Congress by [Section] 5 of the Fourteenth Amendment,”¹¹⁰ the Court noted that “[b]y including [Section] 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause”¹¹¹ The Court went on to state that the test for evaluating those powers was established in *McCulloch v. Maryland*:¹¹² “Let the end be legitimate, let it be within the scope, and all means appropriate, which are plainly adapted to that end, which are not prohibited, but consists with the letter and spirit of the constitution, are constitutional.”¹¹³

Therefore, in determining what constitutes “appropriate legislation,”¹¹⁴ under Section 5 of the Fourteenth Amendment, the Court asserted that “[c]orrectly viewed, [Section] 5 is a positive grant of

106. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

107. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973q (2012) (current version in scattered sections of 52 U.S.C.).

108. *Katzenbach*, 384 U.S. at 658.

109. *Id.* at 649.

110. *Id.* at 646.

111. *Id.* at 650.

112. *Id.*

113. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

114. *Katzenbach*, 384 U.S. at 651.

legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”¹¹⁵

One could argue that *Katzenbach v. Morgan* stands for the proposition that Section 5 of the Fourteenth Amendment authorizes Congress with the power not only to enforce the doctrine of equal protection as defined by the courts, but also to help define it.¹¹⁶ The courts have similarly taken an expansive view of Congress’s authority under the Fifteenth Amendment.¹¹⁷

b. Fifteenth Amendment

The same year the Fifteenth Amendment was ratified, Congress passed its first comprehensive statute to enforce the anti-discrimination protections on the right to vote.¹¹⁸ The Enforcement Act of 1870, and subsequent legislation,¹¹⁹ made federal offenses of, “false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or federal law.”¹²⁰

When challenged in 1875 in *United States v. Reese*, the U.S. Supreme Court, in discussing the Enforcement Clause, upheld portions of the statute noting, “Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress.”¹²¹

Most significantly for this discussion, the Court held that “[t]he power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment.”¹²² The Court distinguished Congress’s power under Article I, Section 4 of the Constitution, noting

115. *Id.*

116. *Id.* at 647–50.

117. *See generally, e.g.*, *United States v. Reese*, 92 U.S. 214 (1875).

118. The Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140 (current version found in 18 U.S.C. §§ 241–249 (2018); 42 U.S.C. §§ 1981–83 (2018); 28 U.S.C. §§ 1343 (2018)).

119. The Force Act of February 28, 1871, ch. 99, 16 Stat. 433 (current version found in 18 U.S.C. §§ 241–249 (2018); 42 U.S.C. §§ 1981–83 (2018); 28 U.S.C. §§ 1343 (2018)); The Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13 (current version found in 18 U.S.C. §§ 241–249 (2018); 42 U.S.C. §§ 1981–83 (2018); 28 U.S.C. §§ 1343 (2018)).

120. *Regulation By Congress*, LEGAL INFO. INST. (2020), <https://www.law.cornell.edu/constitution-conan/article-1/section-4/clause-1/regulation-by-congress> [<http://web.archive.org/web/20200728030604/https://www.law.cornell.edu/constitution-conan/article-1/section-4/clause-1/regulation-by-congress>].

121. *Reese*, 92 U.S. at 217.

122. *Id.* at 218.

that “Congress can [only] interfere, and provide for its punishment” under the Fifteenth Amendment “when the wrongful refusal at such election is because of race, color, or previous condition of servitude.”¹²³

Over ninety years later, the Supreme Court once again addressed the Fifteenth Amendment’s Enforcement Clause in another challenge to Congress’s ability to impose regulations upon the states.¹²⁴ In *South Carolina v. Katzenbach*, the State of South Carolina challenged certain provisions in the Voting Rights Act of 1965 (VRA) seeking injunctive relief against enforcement.¹²⁵ The State argued that the law “exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution.”¹²⁶

The Court held that the challenged provisions were “appropriate means for carrying out Congress’ constitutional responsibilities and [were] consonant with all other provisions of the Constitution.”¹²⁷ The Court’s conclusion that the VRA was a valid exercise of Congress’s power is significant because with regard to Congress’s Article I, Section 4 powers, setting voting qualifications was generally considered a power reserved to the states pursuant to Article I, Section 2.¹²⁸ Yet in *South Carolina v. Katzenbach*, the Court upheld Congress’s power to legislate in this area.¹²⁹

The Court subsequently walked back its expansive reading in *Katzenbach* in *Shelby County v. Holder*, when it struck down the “coverage formula” of Section 4 of the Voting Rights Act of 1965.¹³⁰ Section 4 provided the coverage formula, defining jurisdictions subject to, or “covered”¹³¹ by, Section 5 (of the Act) as those that “maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s.”¹³² Section 5 required certain states and jurisdictions with a history of voting discrimination to obtain approval from either the U.S. Attorney General or the U.S. District Court for the District of Columbia before implementing any change to a voting practice or procedure.¹³³ The approval was called “preclearance.”¹³⁴

123. *Id.*

124. *See generally* *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

125. *Id.* at 307.

126. *Id.* at 323.

127. *Id.* at 308.

128. *Id.* at 326.

129. *Id.*

130. *Shelby Cty. v. Holder*, 570 U.S. 529, 529 (2013).

131. Voting Rights Act of 1965, 42 U.S.C. § 1973b (2012) (current version at 52 U.S.C. § 10303 (2018)).

132. *Shelby Cty.*, 570 U.S. at 529.

133. Voting Rights Act of 1965, 42 U.S.C. § 1973c (2012) (current version at 52 U.S.C. § 10304 (2018)).

Shelby County, AL challenged Section 4(b) and Section 5 as unconstitutional.¹³⁵

Although the VRA had been reauthorized multiple times, the coverage formula and preclearance requirement had not been updated.¹³⁶ This proved to be a fatal flaw.¹³⁷ In analyzing these sections, the Court discussed *Katzenbach*, noting that although the *Katzenbach* Court, “described the Act as ‘stringent’ and ‘potent[.]’”¹³⁸ it “upheld the Act, concluding that such an ‘uncommon exercise of congressional power’ could be justified by ‘exceptional conditions.’”¹³⁹ Turning to a later case, *Northwest Austin Municipal Utility District No. One v. Holder*, the Court noted that the Voting Rights Act “imposes current burdens and must be justified by current needs.”¹⁴⁰

The Court then reasoned that the conditions that justified Sections 4(b) and 5 had changed significantly in fifty years, so significantly that the Court struck down Section 4(b), holding that its formula was unconstitutional in light of the current conditions and, therefore, could no longer be used as a basis for subjecting jurisdictions to preclearance.¹⁴¹ Turning to Section 5 of the Act, the Court again cited *Northwest Austin*, noting that “[Section] 5 ‘imposes substantial federalism costs’”¹⁴² and “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.”¹⁴³

The *Shelby* Court relied on the *Northwest Austin* Court’s proposition that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”¹⁴⁴

Although expressing grave concerns, the *Northwest Austin* Court resolved the case on statutory grounds thereby allowing the VRA to stand.¹⁴⁵ However, the *Shelby* Court, without “holding on [Section] 5

134. *Shelby Cty.*, 570 U.S. at 529.

135. *Id.*

136. *Id.*

137. *Id.* at 530.

138. *Id.*

139. *Id.*

140. *Id.* at 536 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

141. *Id.* at 531–32.

142. *Id.* at 540.

143. *Id.* at 540. (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–03 (2009)) (internal quotations omitted).

144. *Id.* at 542 (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

145. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

itself,”¹⁴⁶ struck down Section 4(b) precisely because the coverage formula did not reflect the current conditions, and therefore, the violation of the principle of equal sovereignty could not stand.¹⁴⁷

Shelby, however, should not be read to stand for the proposition that Congress has no authority to legislate in the context of election regulations.¹⁴⁸ It does not stand for such proposition.¹⁴⁹ The Court clearly stated, “Congress may draft another formula based on current conditions.”¹⁵⁰ The only limitation was that any new formula would have to demonstrate that exceptional conditions exist to justify “such an ‘extraordinary departure from the traditional course of relations between the States and Federal Government.’”¹⁵¹ Accordingly, Congress’s broad authority to legislate in the context of election regulation using the Enforcement Clause of the Fifteenth Amendment remains intact.¹⁵²

However, the Court’s reliance on “equal sovereignty” is “[i]ndicative of recent caselaw limiting the reach of the Fourteenth and Fifteenth Amendments because of federalism concerns.”¹⁵³

c. Tenth Amendment and Federalism Concerns

The Tenth Amendment provides: “[P]owers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁵⁴

As previously discussed, Congress has plenary power to regulate under the Election Clause (Article I, Section 4, Clause 1), and courts have held that Congress’s power regarding presidential elections is coextensive.¹⁵⁵ However, states have asserted the Tenth Amendment to challenge Congress’s authority under these provisions as well as its Enforcement Clause powers—the same year the Supreme Court decided *Shelby*, it also decided *Arizona v. Inter Tribal Council of Arizona, Inc.*¹⁵⁶

146. *Shelby Cty.*, 570 U.S. at 557.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* (quoting *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 500–01 (1992)).

152. *Id.*

153. Franita Tolson, *Election Law Federalism and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2215 (2018).

154. U.S. CONST. amend. X.

155. *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 796–98 (7th Cir. 1995); *see also Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836–37 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1413–16 (9th Cir. 1995).

156. *See generally Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

There, the Court reviewed whether Arizona law, which required proof of citizenship to register to vote, was preempted by a federal law, the National Voter Registration Act (NVRA) (generally referred to as the Motor Voter Act).¹⁵⁷ At issue was the state's authority to set voter qualification standards, an authority rooted in Article I, Section 2 and the Seventeenth Amendment.¹⁵⁸

The Court acknowledged that the Elections Clause “empowers Congress to pre-empt state regulations governing the ‘Times, Places and Manner’ of holding congressional elections.”¹⁵⁹ Citing *Ex parte Siebold*, the Court noted that this power “is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”¹⁶⁰

Although the power is “paramount,” it does not confer upon Congress the power to set voting qualifications in federal elections.¹⁶¹ The Court ultimately concluded that the provisions of the NVRA did not preclude Arizona from obtaining the information necessary to determine a voter's eligibility.¹⁶² Moreover, despite Arizona's argument to the contrary, the Court refused to apply the presumption against preemption, stating that it had never applied the principle in Election Clause cases¹⁶³ and reasoning that the Election Clause, “confers [] none other than the power to pre-empt.”¹⁶⁴ The Court noted that the state's role in regulating—“while weighty and worthy of respect—has always existed subject to the express qualification that it ‘terminates according to federal law.’”¹⁶⁵

In holding that the NVRA provision preempted the state provision, the Supreme Court, yet again, upheld Congress's expansive power to regulate elections in the face of a state's challenge.¹⁶⁶ Not applying Tenth Amendment principles to Congress in the election regulation context is consistent with earlier federal jurisprudence. In *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, the Supreme Court found that the “Tenth Amendment commandeering

157. *Id.* at 4.

158. *Id.* at 15–16.

159. *Id.* at 8.

160. *Ex parte Siebold*, 100 U.S. 371, 392 (1880).

161. *Arizona*, 570 U.S. at 16.

162. *Id.* at 18.

163. *Id.* at 13.

164. *Id.* at 14.

165. *Id.* at 15 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.* 531 U.S. 341, 347 (2001)).

166. *Id.* at 15.

limitations were not applicable to congressional authority over congressional elections, as the Constitution contemplates that Congress can dictate the manner in which the states administer such elections.”¹⁶⁷

Hence, reading cases like *Shelby County* and *Arizona* and concluding that election law is federalism-based is misplaced.¹⁶⁸ That is why one scholar recently “challenge[d] the prevailing view that federalism best explains our system of elections”¹⁶⁹ and argued that “unlike the antidiscrimination framework of the Fourteenth and Fifteenth Amendments, Congress and the courts can disregard state sovereignty in enacting, enforcing, and resolving the constitutionality of legislation passed pursuant to the Elections Clause.”¹⁷⁰

d. Gap Fillers—The Spending Clause and the Necessary and Proper Clause

The Spending Clause, Article I, Section 8, Clause 1, provides that the “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”¹⁷¹ Congress has used this expansive power to make funds available to state and local governments to modify their election procedures.¹⁷² Additionally, Congress has conditioned the receipt of said grant money on state and local compliance with national election procedures.¹⁷³ The Help America Vote Act (HAVA) is a perfect example of this use of said authority.¹⁷⁴ HAVA has not been challenged on this basis.¹⁷⁵ Similarly, courts have upheld Congress, using the Necessary and Proper Clause to supplement its authorities found in Article I, Section 4, Clause 1.¹⁷⁶

The combination of Congress’s explicit and plenary authorities found in the Elections and Presidential Clauses, as well as its authorities under the Enforcement Clauses in the Fourteenth and Fifteenth Amendments, supplemented by the Necessary and Proper Clause and its

167. CRS REP. ON CONG. STANDARDIZING NAT’L ELECTIONS, *supra* note 55, at 15.

168. *See generally*, *Shelby Cty. v. Holder*, 570 U.S. 529, 529 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

169. Tolson, *supra* note 154, at 2216.

170. *Id.*

171. U.S. CONST. art. I, § 8, cl. 1.

172. *See, e.g.*, Help America Vote Act of 2002 (HAVA), 52 U.S.C. §§ 20901–21145 (2018).

173. 52 U.S.C. § 20901.

174. U.S. Const. Art. I, § 8, cl. 1.; 52 U.S.C. § 20901.

175. 52 U.S.C. §§ 20901–21145.

176. *See Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995).

spending powers, gives Congress ample authority to regulate both federal, state, and local elections.¹⁷⁷

II. THREATS TO INTEGRITY UNDERMINING LEGITIMACY

A. Public Perception

As previously noted, the goal of the Russian influence operation was to “undermine public faith in the US democratic process.”¹⁷⁸ The founding fathers and framers of the Constitution, fresh from the war for independence, understood the corrosive effect of foreign interference in the newly independent country.¹⁷⁹ To help protect against that, powers were granted to Congress in the Constitution to ensure the legitimacy of federal elections, which the Framers understood was dependent upon the electorate’s belief in the integrity of the election process.¹⁸⁰ Ten years later, fear and concern about French sympathizers during the Quasi-War with France (1798–1800) prompted the Federalist-led Congress to enact the Alien and Sedition Acts.¹⁸¹

These four laws tightened naturalization standards, making it harder for immigrants to become citizens (The Naturalization Act);¹⁸² authorized the president to imprison or deport non-citizens deemed dangerous (An Act Concerning Aliens);¹⁸³ or who were from a hostile nation (Alien Enemy Act of 1798);¹⁸⁴ and criminalized speech critical of the government (Sedition Act of 1798).¹⁸⁵ Fearful of the voices calling for a U.S. version of the French Revolution, the Federalists argued that

177. See generally CRS REP. ON CONG. STANDARDIZING NAT’L ELECTIONS, *supra* note 55.

178. ICA ON RUSSIA, *supra* note 3, at 1.

179. Elving, *supra* note 20.

180. *Id.*

181. An Act to Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) (current version at 8 U.S.C. §§ 1101–07, 1151–1382, 1401–1504 (2018)); An Act Concerning Aliens ch. 58, 1 Stat. 570 (1798) (expired in 1800); An Act Respecting Alien Enemies, ch. 66 1 Stat. 577 (1798) (derivative current version at 50 U.S.C. §§ 21–24 (2018)); An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790) (current version scattered in 18 U.S.C. §§ 2381–90 (2018) and Revised Statutes).

182. An Act to Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat 103 (1790) (current version at 8 U.S.C. §§ 1101–07, 1151–1382, 1401–1504 (2018)).

183. An Act Concerning Aliens, ch. 58, 1 Stat 570 (1798) (expired in 1800).

184. An Act Respecting Alien Enemies, ch. 66; 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24 (2018)).

185. An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), ch. 9, 1 Stat. 112 (1790) (current version at 8 U.S.C. §§ 1101–07, 1151–1382, 1401–1504 (2018)).

the laws were needed to stave off anarchy and to protect the fledgling nation's national security.¹⁸⁶ The Sedition Act was used to prosecute newspaper owners, most of whom were pro-Jefferson immigrants who disagreed with the government.¹⁸⁷ The backlash resulting from the Acts allowed Jefferson's party, the Democratic-Republicans, to win the 1800 elections.¹⁸⁸ Highly controversial, "Congress repealed the Naturalization Act in 1802, while the other acts were allowed to expire."¹⁸⁹

In hindsight, although heavy-handed, the laws were meant to address what is still a current concern: "The integrity of a political and electoral system depends on public perception that the system is untainted. If there is widespread public concern that the process has been compromised by actions of an outside party, political legitimacy can be undermined."¹⁹⁰ Such was the case in America after the 2016 elections.¹⁹¹ Americans' confidence in our system has been shaken.¹⁹²

In 2017, Carbon Black, a leading cybersecurity firm, conducted a nationwide survey "to gauge voters' sentiment regarding election cybersecurity, how their perception changed since the 2016 election, and how that perception may influence future voting patterns."¹⁹³ Fifty-four percent (54%) of the "U.S. voters said election cybersecurity is less secure than they thought prior to the 2016 election."¹⁹⁴ Another forty-seven percent (47%) said they "believe the 2016 U.S. election was

186. *Id.*

187. HOWARD GILLMAN ET AL., *AMERICAN CONSTITUTIONALISM* 174 (2012).

188. History.com Editors, *Alien and Sedition Acts*, HISTORY (Mar. 5, 2020), <https://www.history.com/topics/early-us/alien-and-sedition-acts> [<http://web.archive.org/web/20200728030939/https://www.history.com/topics/early-us/alien-and-sedition-acts>].

189. Ken Drexler, *Alien and Sedition Acts: Primary Documents in American History*, LIBR. CONG. (Sept. 27, 2019), <https://guides.loc.gov/alien-and-sedition-acts> [<http://web.archive.org/web/20200728031310/https://guides.loc.gov/alien-and-sedition-acts>].

190. LAW OF THE INTERNET, *supra* note 16, at 4.

191. *See generally Russian Interference in the 2016 U.S. Elections: Hearing Before the S. Comm. On Intelligence of the United States Senate*, 115th Cong. 49 (2017), <https://www.intelligence.senate.gov/sites/default/files/hearings/Russian%20Interference%20in%20the%202016%20U.S.%20Elections%20S.%20Hrg.%20115-92.pdf> [<http://web.archive.org/web/20200728031959/https://www.intelligence.senate.gov/sites/default/files/hearings/Russian%20Interference%20in%20the%202016%20U.S.%20Elections%20S.%20Hrg.%20115-92.pdf>].

192. *Id.*

193. CARBON BLACK, *ELECTION (IN)SECURITY* 3 (2017), https://www.carbonblack.com/wp-content/uploads/2017/07/ElectionInSecurity_Carbon_Black_July2017_Report.pdf [http://web.archive.org/web/20200728032142/https://www.carbonblack.com/wp-content/uploads/2017/07/ElectionInSecurity_Carbon_Black_July2017_Report.pdf].

194. *Id.*

influenced by foreign entities.”¹⁹⁵ Most disturbingly, one in four voters said they would consider not voting in future elections over cybersecurity fears.¹⁹⁶

Public sentiment had not improved a year later in the run-up to the 2018 midterms.¹⁹⁷ An NPR/Marist Poll taken in September 2018 revealed that “[one] out of every [three] American adults thinks a foreign country is likely to change vote tallies and results in the upcoming midterm elections.”¹⁹⁸ As one columnist noted, “The results give credence to what election officials have been worried about since at least the summer of 2016: that the intense focus by the media and the federal government on Russia’s election interference efforts could be eroding voters’ confidence in democratic institutions.”¹⁹⁹

Now, more than a year later and with less than one year to the 2020 presidential elections, a recent C-Span/IPSOS poll shows that voter confidence has not improved.²⁰⁰ Reid Wilson also reported this in his article:

Right now, there is a crisis of confidence in our democracy, said Cliff Young, the president of Ipsos. By and large, the American people do not believe our elections are safe from foreign interference, and there is a vast partisan disagreement over whether the next elections will be open and fair.²⁰¹

The C-SPAN/Ipsos statistics are startling. “Only [thirty-one] percent of Americans—including [fifty-four] percent of Republicans and just [sixteen percent] of Democrats—said the government has done enough

195. *Id.*

196. *Id.*

197. Miles Parks, *NPR/Marist Poll: 1 in 3 Americans Thinks a Foreign Country Will Change Midterm Votes*, NPR (Sept. 17, 2018), <https://www.npr.org/2018/09/17/647420970/npr-marist-poll-1-in-3-americans-think-foreign-country-will-change-midterm-votes> [<http://web.archive.org/web/20200728032343/https://www.npr.org/2018/09/17/647420970/npr-marist-poll-1-in-3-americans-think-foreign-country-will-change-midterm-votes>].

198. *Id.*

199. *Id.*

200. Chris Jackson, et al., *Americans Are Split on Election Fairness, Confidence in Voters to Make the Right Choice*, IPSOS (Oct. 8, 2019), <https://www.ipsos.com/en-us/news-polls/cspan-election-process> [<http://web.archive.org/web/20200728032455/https://www.ipsos.com/en-us/news-polls/cspan-election-process>] [hereinafter *Americans Split on Election Fairness*].

201. Reid Wilson, *New Poll Shows ‘Crisis of Confidence’ in US Elections*, HILL (Oct. 10, 2019, 6:00 AM), <http://thehill.com/homenews/campaign/465060-new-poll-shows-crisis-of-confidence-in-us-elections> [<http://web.archive.org/web/20200728032627/https://thehill.com/homenews/campaign/465060-new-poll-shows-crisis-of-confidence-in-us-elections>] (internal quotations omitted).

to protect elections from foreign interference.”²⁰² More discouragingly, “fifty-eight percent of voters said foreign governments pose a threat to American elections.”²⁰³

Voter jitteriness is well-founded.²⁰⁴ We already have early indications about Russian intentions regarding the 2020 elections.²⁰⁵ In January 2020, media reported that the Russian military hacked into Burisma, the Ukrainian Gas Company that previously employed Hunter Biden, son of Joe Biden, the 2020 Democratic presidential candidate and Former Vice President.²⁰⁶ Burisma is at the center of President Trump’s impeachment,²⁰⁷ as this was the company that President Trump pressured Ukrainian President Zelensky to investigate for alleged corruption in the hopes of obtaining “dirt” against his political rival, Joe Biden.²⁰⁸ The cybersecurity firm that detected the intrusions was headed up by a former expert from the National Security Agency, who stated that “[t]he timing of the Russian campaign mirrors the G.R.U. hacks we saw in 2016 against the D.N.C. and John Podesta.” He went on to say, “Once again, they are stealing email credentials, in what we can only assume is a repeat of Russian interference in the last election.”²⁰⁹

There is further evidence of a crises in confidence.²¹⁰ After the debacle of the Iowa Caucuses in February 2020, the nation’s top

202. *Id.*

203. *Id.*

204. Nicole Perloth & Matthew Rosenberg, *Russians Hacked Ukrainian Gas Company at Center of Impeachment*, N.Y. TIMES (Jan. 13, 2020), <https://www.nytimes.com/2020/01/13/us/politics/russian-hackers-burisma-ukraine.html> [<http://web.archive.org/web/20200728032748/https://www.nytimes.com/2020/01/13/us/politics/russian-hackers-burisma-ukraine.html>].

205. *Id.*

206. *Id.*

207. Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019), https://judiciary.house.gov/uploadedfiles/2019-12-18_-_resolution_h_res_755.pdf [http://web.archive.org/web/20200423230227/https://judiciary.house.gov/uploadedfiles/2019-12-18_-_resolution_h_res_755.pdf].

208. Memorandum of Telephone Conversation, Subjects: Telephone Conversation with President Zelensky of Ukraine 4 (July 25, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf> [<http://web.archive.org/web/20200728033033/https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf>].

209. Perloth & Rosenberg, *supra* note 204.

210. Eric Tucker, *After Chaotic Iowa Caucuses, Top U.S. Counterintelligence Official Urges Vigilance Against Foreign Election Interference*, DES MOINES REG. (Feb. 9, 2020, 6:18 PM), <https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2020/02/10/chaotic-2020-iowa-caucuses-spark-foreign-election-interference-concerns/4719116002/> [<http://web.archive.org/web/20200728033258/https://www.desmoinesregister.com/story/>

counterintelligence official expressed concern that “Russia or other foreign adversaries could exploit the chaos of the Iowa caucuses to sow distrust in the integrity of America’s elections.”²¹¹ And, as reported in the media, the Iowa Caucus “birthed a thousand conspiracy theories.”²¹² Rick Hasen, an election law expert from UC Irvine and author of a recently published book entitled “Election Meltdown,”²¹³ is quoted as saying, “The election system is more fragile than people believe. When things are this close and they’re this heated, because we’ve had so many debacles in how our elections are run, it becomes fodder for people to doubt the process.”²¹⁴

Each new report weakens trust in the electoral process.²¹⁵ Accordingly, if the goal of the Russians was to undermine faith in the U.S. democratic process, by every measure, they have achieved this goal.²¹⁶

news/elections/presidential/caucus/2020/02/10/chaotic-2020-iowa-caucuses-spark-foreign-election-interference-concerns/4719116002/].

211. *Id.*

212. David A. Graham, *Why the Iowa Caucus Birthed a Thousand Conspiracy Theories*, ATLANTIC (Feb. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/iowa-caucus-conspiracy-theories/606055/> [[<http://web.archive.org/web/20200728033600/https://www.theatlantic.com/ideas/archive/2020/02/iowa-caucus-conspiracy-theories/606055/>]].

213 RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* (Yale Univ. Press 2020).

214. Graham, *supra* note 212.

215. *Id.*

216. ICA ON RUSSIA, *supra* note 3, at 1.

*B. Cyber Operations Targeting Election Infrastructure*²¹⁷

The fact that the Russians conducted cyber operations “against U.S. election infrastructure at the state and local level”²¹⁸ during the 2016 election cycle is not seriously in dispute.²¹⁹ As early as “the late summer and fall of 2016,” DHS and the FBI alerted states to the threat of cyber-attacks.²²⁰ In mid-July 2016, Illinois discovered suspicious activity and the exfiltration of data from the Illinois Board of Elections voter registry.²²¹ They notified the FBI, who opened an investigation.²²² In August 2016, the FBI issued an “unclassified FLASH to state technical-level experts” flagging suspicious IP addresses.²²³ The DHS, working through its coordinating bodies, requested that states review their systems.²²⁴ This identified an additional “[twenty] states whose networks had made connections to at least one IP address listed in the FLASH.”²²⁵ Shortly thereafter, DHS issued guidance to states regarding effective

217. The Department of Homeland Security (DHS) defines “election infrastructure” as:

Voter registration databases and associated IT systems; IT infrastructure and systems used to manage elections (such as the counting, auditing and displaying of election results, and post-election reporting to certify and validate results); Voting systems and associated infrastructure; Storage facilities for election and voting system infrastructure; [and] Polling places, to include early voting locations.

The Dep’t of Homeland Sec., *Election Security*, OFFICIAL WEBSITE DEP’T HOMELAND SEC. (Feb. 27, 2020), <https://www.dhs.gov/topic/election-security> [<http://web.archive.org/web/20200728033703/https://www.dhs.gov/topic/election-security>]. Note, the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, Section 301(b)(1), uses the term “voting systems” instead of “election infrastructure,” but it includes the same elements, except HAVA does not include polling places in its definition. 52 U.S.C. § 21081(b).

218. SSCI RUSSIA REPORT, VOL. 1, *supra* note 4, at 3.

219. Ukraine Conspiracy Theories notwithstanding. SSCI investigated whether the government of Ukraine had interfered and concluded it had not. This “theory” is baseless. Natasha Bertrand, *Senate Panel Look into Ukraine Interference Comes up Short*, POLITICO (Dec. 2, 2019), <https://www.politico.com/news/2019/12/02/senate-panel-ukraine-election-interference-074796> [<http://web.archive.org/web/20200728033816/https://www.politico.com/news/2019/12/02/senate-panel-ukraine-election-interference-074796>].

220. SSCI RUSSIA REPORT, VOL. 1, *supra* note 4, at 4.

221. *Id.* at 22.

222. *Id.* at 24.

223. *Id.* at 6.

224. *Id.* at 7.

225. *Id.*

security for voter registration information.²²⁶ By October, DHS and the FBI issued a second FLASH²²⁷ “and a Joint Analysis Report that flagged suspect IP addresses, many unrelated to Russia.”²²⁸ None of these notices attributed the activity to Russia.²²⁹

The public became aware of the threat on October 7, 2016, after the Secretary of DHS and the Director of National Intelligence took the unprecedented step of issuing a joint statement revealing that multiple state-based election systems had been scanned and breached.²³⁰ The statement did not attribute the activity to Russia, although anyone reading it could so conclude.²³¹ Unfortunately, the joint statement was immediately overshadowed by the *Access Hollywood* video, which captured candidate Trump “bragging about kissing and groping women.”²³² Then, a mere hour later, Wikileaks began dumping emails stolen from the Democratic National Committee and the Hillary Clinton Campaign.²³³ The Obama Administration did attribute this to the

226. See generally *Security Tip (ST16-001), Securing Voter Registration Data*, U.S. ELECTION ASSISTANCE COMMISSION (Sept. 15, 2016), https://www.eac.gov/sites/default/files/eac_assets/1/28/ST16-001_Securing%20Voter%20Registration%20Data.pdf [http://web.archive.org/web/20200728034118/https://www.eac.gov/sites/default/files/eac_assets/1/28/ST16-001_Securing%20Voter%20Registration%20Data.pdf].

227. FBI FLASH, Alert Number T-LD1005-TT, TLP-AMBER.

228. SSCI RUSSIA REPORT, VOL. 1, *supra* note 4, at 8.

229. *Id.*

230. Press Release, Dep’t of Homeland Sec. and Office of the Dir. Nat’l Intelligence, Joint Statement from the Dep’t of Homeland Sec. and Office of the Dir. of Nat’l Intelligence on Election Sec. (Oct. 7, 2016), <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> [<http://web.archive.org/web/20200728034234/https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national>].

231. *Id.*

232. Matt Zapposky & Karoun Demirjian, *Homeland Security Official: Russian Government Actions Tried to Hack Election Systems in 21 States*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/world/national-security/homeland-security-official-russian-government-actors-potentially-tried-to-hack-election-systems-n-21-states/2017/06/21/33bf31d4-5686-11e7-ba90-f5875b7d1876-story.html?utm_term=.97c5fab34d90 [http://web.archive.org/web/20200728034539/https://www.washingtonpost.com/world/national-security/homeland-security-official-russian-government-actors-potentially-tried-to-hack-election-systems-in-21-states/2017/06/21/33bf31d4-5686-11e7-ba90-f5875b7d1876_story.html].

233. Amy Choizick, *John Podesta Says Russian Spies Hacked His Emails to Sway Election*, N.Y. TIMES (Oct. 11, 2016), <https://www.nytimes.com/2016/10/12/us/politics/hillary-clinton-emails-wikileaks.html> [<http://web.archive.org/web/20200728034814/https://www.nytimes.com/2016/10/12/us/politics/hillary-clinton-emails-wikileaks.html>]; see also Aaron Sharockman, *It’s True: WikiLeaks Dumped Podesta Emails Hour After Trump Video Surfaced*, POLITIFACT (Dec. 18, 2016), <https://www.politifact.com/factchecks/2016/dec/18/john-podesta/its-true-wiki-leaks-dumped-podesta-emails-hour-after/>

Russians, noting that the timing and nature of the dump were “intended to interfere with the U.S. election process.”²³⁴

Things began to accelerate post-election. On January 6, 2017, the Secretary of DHS designated election infrastructure as a critical infrastructure.²³⁵ The next day, the Intelligence Community issued its assessment,²³⁶ attributing the malicious cyber operations to Russia. Specifically, the assessment states, “Russian intelligence obtained and maintained access to elements of multiple US state or local electoral boards. DHS assesses that the types of systems Russian actors targeted or compromised were not involved in tallying.”²³⁷

During the summer of 2017, there was a steady drumbeat of news reports and public testimony fleshing out how extensive the breaches had been. In June 2017, a leaked National Security Agency (NSA) document revealed that the Russians had successfully targeted an American voting machine company as part of a spear-phishing attack.²³⁸ Days later, during testimony, a DHS official admitted that Russia had targeted twenty-one states.²³⁹ However, this was immediately disputed, as the media had earlier reported that potentially thirty-nine states had been affected.²⁴⁰

[<http://web.archive.org/web/20200728034948/https://www.politifact.com/factchecks/2016/dec/18/john-podesta/its-true-wikileaks-dumped-podesta-emails-hour-afte/>].

234. David E. Sanger & Charlie Savage, *U.S. Says Russia Directed Hacks to Influence Elections*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html>

[<http://web.archive.org/web/20200728035107/https://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html>].

235. Press Release, Statement by Sec’y of Homeland Security Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical>

[<http://web.archive.org/web/20200728035336/https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical>].

236. ICA ON RUSSIA, *supra* note 3, at ii–iii.

237. *Id.* at iii.

238. Matthew Cole et al., *Top-Secret NSA Report Details Russian Hacking Effort Days Before 2016 Election*, INTERCEPT (June 5, 2017), <https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election>

[<http://web.archive.org/web/20200728035603/https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/>].

239. *Russian Interference in the 2016 U.S. Elections: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 13 (2017) (testimony of Dr. Samuel Liles) <https://www.intelligence.senate.gov/hearings/open-hearing-russian-interference-2016-us-elections>

[<http://web.archive.org/web/20200320195010/https://www.intelligence.senate.gov/hearings/open-hearing-russian-interference-2016-us-elections/>]; *see also* Zapatosky & Demirjian, *supra* note 232.

240. Michael Riles & Jordan Robertson, *Russian Hacks on U.S. Voting System Wider Than Previously Known*, BLOOMBERG (June 13, 2017), <https://www.bloomberg.com/>

Not until a year later did DHS admit to the Senate Intelligence Committee that “the searches, [which were] done alphabetically, probably included all [fifty] states, and consisted of research on ‘general election-related web pages, voter ID information, election system software, and election service companies.’”²⁴¹

Everyone agrees that the federal, state, and local response to the Russian’s cyber attack was insufficient.²⁴² In its report, the Senate Select Committee on Intelligence noted:

State election officials, who have primacy in running elections, were not sufficiently warned or prepared to handle an attack from a hostile nation-state actor. . . . DHS and FBI alerted states to the threat of cyber attacks . . . but the warnings did not provide enough information or go to the right people.²⁴³

This last line highlights another factor that hampered the federal response—federal agencies’ lack of familiarity and understanding of election administration.²⁴⁴ As Neil Jenkins, the former director of the Office of Cybersecurity and Communications²⁴⁵ at the U.S. Department of Homeland Security, noted in mid-July 2016 (after they became aware of the Illinois State Election Board hacking), as they were trying to figure out how to contact state and local election officials to warn them, they stumbled upon the website of the U.S. Election Assistance Commission (EAC).²⁴⁶ As Neil admitted, he “didn’t know that the

news/articles/2017-06-13/94bama941-breach-of-39-states-threatens-future-u-s-elections [http://web.archive.org/web/20200728035846/https://www.bloomberg.com/news/articles/2017-06-13/russian-breach-of-39-states-threatens-future-u-s-elections].

241. SSCI RUSSIA REPORT, VOL. 1, *supra* note 4, at 8. The U.S. charged twelve Russian military intelligence operatives for, among other conduct, hacking into the election systems of multiple states and local voting precincts. Indictment at 1–3, United States v. Netyksho, No.1:18-CR-00215-ABJ (D.D.C. filed July 13, 2018), <https://www.justice.gov/file/1080281/download> [https://web.archive.org/web/20200708010642/https://www.justice.gov/file/1080281/download].

242. SSCI RUSSIA REPORT, VOL. 1, *supra* note 4, at 4.

243. *Id.*

244. Kim Zetter, *The Crisis of Election Security*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/magazine/election-security-crisis-midterms.html> [http://web.archive.org/web/20200708163430/https://www.nytimes.com/2018/09/26/magazine/election-security-crisis-midterms.html].

245. By statute, this office is tasked with preventing, detecting, analyzing, and mitigating cybersecurity threats and sharing cyber threat information with federal and nonfederal stakeholders. The Cybersecurity Act of 2015, 6 U.S.C. §§ 1501–10 (2018).

246. Zetter, *supra* note 244.

E.A.C. existed.”²⁴⁷ How little he knew was further reinforced in a subsequent meeting between DHS and E.A.C. officials and the executive director of the National Association of Secretaries of State.²⁴⁸ What he thought would be a brief discussion “bled into four hours, as he and his staff got a crash course in election administration.”²⁴⁹

He left that meeting understanding, as others did, that the structure of the U.S. election administration system itself posed a threat.²⁵⁰

States, territories and localities—which have primary responsibility for conducting elections in the United States—use different election equipment and processes, and they have varying levels of access to security resources and expertise. This decentralization may help guard against large-scale, coordinated attacks, but it also offers potential attackers multiple possible points of entry, some of which may not be as well-defended as others.²⁵¹

Further compounding the problem, and thereby delaying the response, was skittishness on the part of senior Obama Administration officials. They were concerned about perceptions that they may be favoring the democratic candidate over the republican candidate,²⁵² and they grappled with how best to respond, walking a fine line between being forthcoming to the public and protecting voter confidence. The recent SSCI Report (Volume 3) concurred.²⁵³ As Senator Burr, Chairman of the Senate Intelligence Committee, noted, “Frozen by ‘paralysis of analysis,’ hamstrung by constraints both real and perceived, Obama officials debated courses of action . . . without truly taking one.”²⁵⁴

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Karen F. Stanton, *Election Security: Federal Funding for Securing Election Systems*, CONG. RESEARCH SERV., (Mar. 12, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11286> [<http://web.archive.org/web/20200728040125/https://crsreports.congress.gov/product/pdf/IF/IF11286>].

252. Zapotosky & Demirjian, *supra* note 232 (quoting Secretary of Homeland Security Jeh Johnson).

253. SSCI RUSSIA REPORT, VOL. 3, *supra* note 17, at 3.

254. Richard Burr (@SenatorBurr), TWITTER (Feb. 6, 2020, 9:40 AM), <https://twitter.com/SenatorBurr/status/1225428994344017923> [<http://web.archive.org/web/20200330040558/https://twitter.com/SenatorBurr/status/1225428994344017923>].

C. Voting Machines and Voter Registration Systems

One of the most important conclusions contained in the first volume of the SSCI Report addressed the overall cybersecurity posture:

In 2016, cybersecurity for electoral infrastructure at the state and local level was sorely lacking; for example, voter registration databases were not secure as they could have been. Aging voter equipment, particularly voting machines that had no paper record of votes, were vulnerable to exploitation by a committed adversary. Despite the focus on this issue since 2016, some of these vulnerabilities remain.²⁵⁵

The above quote from the Senate Intelligence Committee Report highlights a disarming truth: a committed adversary did exploit our vulnerability. “Russia targeted voting systems in at least [twenty-one] states and sought to infiltrate the networks of voting equipment vendors, political parties, and at least one local election board.”²⁵⁶ As the Congressional Task Force on Election Security noted, “The unprecedented attack by Russia exposed serious national security vulnerabilities in our election infrastructure.”²⁵⁷

The reason why this is so disarming is because “[t]he practice of democracy begins with casting votes; its integrity depends on the inclusivity of the franchise and the accurate recording of its will.”²⁵⁸ Although there is no evidence “that votes were changed, vote-tallying systems were manipulated, or that any voter registration data was altered or deleted,”²⁵⁹ the mere fact that the Russians were able to accomplish this—a fact that eventually became public—helped them to achieve their goal of undermining confidence in the 2016 U.S. election.²⁶⁰

255. SSCI RUSSIA REPORT, VOL. 1, *supra* note 4, at 4.

256. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 3.

257. *Id.*

258. Sue Halpern, *How Voting-Machine Lobbyists Undermine the Democratic Process*, NEW YORKER (Jan. 22, 2019), <https://www.newyorker.com/tech/annals-of-technology/how-voting-machine-lobbyists-undermine-the-democratic-process> [<http://web.archive.org/web/20200330043905/https://www.newyorker.com/tech/annals-of-technology/how-voting-machine-lobbyists-undermine-the-democratic-process>].

259. SSCI RUSSIA REPORT, VOL. 1, *supra* note 4, at 38. *But see* Zetter, *supra* note 244 (quoting Matt Blaze, “a computer-science professor at the University of Pennsylvania and a voting-machine-security expert,” who challenges this assumption by asserting that no forensic examinations were done on the voting machines or election networks themselves. So, we really do not know.).

260. ICA ON RUSSIA, *supra* note 3, at 1.

Election security experts have been warning about vulnerabilities in voting machines, voter registration systems, and the infrastructure that supports them for quite some time.²⁶¹ They also have been urging Congress to exercise its authority in this area, for, “[i]n the absence of federal oversight, state and local election officials are responsible for identifying and remediating vulnerabilities in the nation’s voting machines and systems.”²⁶²

As we saw in 2016—and as documented in the Senate Intelligence Committee Report, Volume 1—when pitted against a hostile nation-state, states could not compete. However, it was not as if they were unaware of some vulnerabilities in their systems. As the Wall Street Journal reported, “[e]lection machines used in more than half of U.S. states [and made by the nation’s leading manufacturer of election equipment] carry a flaw disclosed more than a decade ago that makes them vulnerable to a cyberattack.”²⁶³ One election security expert stated that the “entire system—a Rube Goldberg mix of poorly designed machinery, from websites and databases that registered and tracked voters, to electronic poll books that verified their eligibility, to the various black-box systems that recorded, tallied and reported results—was vulnerable.”²⁶⁴ He hopes to work with the United States government on election security initiatives.²⁶⁵

Others echo his frustration with Washington’s stand-off approach. “Presently, the federal government does little in the way of oversight to act as a stopgap—whether by, for example, testing machines, software or

261. Zetter, *supra* note 244.

262. Kimberly Breeden & A. Christopher Bryant, *Counting the Votes: Electronic Voting Irregularities, Election Integrity, and Public Corruption*, 49 U. MEM. L. REV. 979, 1002 (2019).

263. Robert McMillian & Dustin Volz, *Voting Machine Used in Half of U.S. Is Vulnerable to Attack, Report Finds*, WALL ST. J. (Sept. 27, 2018, 8:40 AM), <https://www.wsj.com/articles/widely-used-election-systems-are-vulnerable-to-attack-report-finds-1538020802> [<http://web.archive.org/web/20200330054410/https://www.wsj.com/articles/widely-used-election-systems-are-vulnerable-to-attack-report-finds-1538020802>].

264. Zetter, *supra* note 244.

265. Joseph Marks, *The Cybersecurity 202: Is Trump’s Get-Tough Cyber Strategy Working? Former Officials Develop a Way to Find out*, WASH. POST (Jan. 14, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2019/01/14/the-cybersecurity-202-is-trump-s-get-tough-cyber-strategy-working-former-officials-develop-a-way-to-find-out/5c3b8a2e1b326b66fc5a1c30> [<http://web.archive.org/web/20200330063939/https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2019/01/14/the-cybersecurity-202-is-trump-s-get-tough-cyber-strategy-working-former-officials-develop-a-way-to-find-out/5c3b8a2e1b326b66fc5a1c30/>].

systems for security vulnerabilities; accrediting vendors, or requiring the reporting of security breaches.”²⁶⁶

In the past, Congress has acted to address flaws in voting technology that threatened to undermine the legitimacy of the 2000 presidential election. Presidential candidate Al Gore challenged the results of the Florida election because of failures in the punch-card system used to capture the votes.²⁶⁷ Presidential candidate George W. Bush challenged subsequent recounts, resulting in the U.S. Supreme Court having to rule on whether the recount comported with constitutional requirements in *Bush v. Gore*.²⁶⁸ The Supreme Court concluded that the recount violated Equal Protection, thereby ending the recount process and effectively handing the victory to George W. Bush.²⁶⁹ However, questions about the legitimacy of the victory plagued President Bush’s time in office. “The perception that the election system was broken had damaged our political system in the wake of *Bush v. Gore*”²⁷⁰ This in turn prompted Congress to pass the Help America Vote Act of 2002 (HAVA).²⁷¹

HAVA sought to modernize our elections by mandating federal requirements over various aspects of election administration to include: voting systems, provisional ballots, voter information, voter registration, and the provision of identification by certain voters.²⁷² HAVA also regulated the manner in which states maintain voter registration lists²⁷³ and mandated that jurisdictions adopt “assistive technology.”²⁷⁴ Most importantly, HAVA initially authorized \$3.86 billion to help states meet these new requirements.²⁷⁵ States used this money to purchase new

266. Breeden & Bryant, *supra* note 262, at 1002 (footnotes omitted).

267. Ron Elving, *The Florida Recount Of 2000: A Nightmare That Goes on Haunting*, NAT’L PUB. RADIO (Nov. 12, 2018), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [<http://web.archive.org/web/20200330065656/https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting>].

268. *See generally* *Bush v. Gore*, 531 U.S. 98 (2000).

269. *Id.* at 110.

270. Tolson, *supra* note 153, at 2255.

271. Help America Vote Act of 2002 (HAVA), 52 U.S.C. §§ 20901–21145 (2018).

272. *Id.*

273. 52 U.S.C. § 21083.

274. 52 U.S.C. § 21081.

275. *Oversight Hearing on the Election Assistance Commission, Hearing Before the H. Committee on House Administration*, 108th Cong. 2 (2004) (Opening Statement of Hon. Robert W. Ney, Chairman), <https://congressional-proquest-com.proxygt-law.wrlc.org/congressional/docview/t29.d30.hrg-2004-adh-0008?accountid=36339> [<http://web.archive.org/web/20200609164506/https://shibb-idp.georgetown.edu/idp/profile/SAML2/Redirect/SSO?execution=e1s1>].

voting equipment,²⁷⁶ and states still use much of that equipment today.²⁷⁷

There are primarily two types of voting machines—optical scan machines and direct-recording electronic machines (DREs):

With optical-scan machines, voters fill out paper ballots and feed them into a scanner, which stores a digital image of the ballot and records the votes on a removable memory card. The paper ballot, in theory, provides an audit trail that can be used to verify digital tallies. . . . [Whereas, with d]irect-recording electronic machines, or D.R.E.s . . . voters use touch screens or other input devices to make selections on digital-only ballots, and votes are stored electronically.²⁷⁸

The obvious problem with DREs is that there is no paper and, therefore, no paper trail. Concededly, some DREs have what is called a “voter-verifiable paper audit trail” that displays a scroll of paper behind the machine’s glass, which voters can review to verify the accuracy of the digital record.²⁷⁹ However, “election security experts contend . . . that these DREs ‘provide, at best, an obsolescent stopgap [because] most voters never check [the voter-verifiable paper trail to ensure their votes were correctly recorded]’”²⁸⁰

Why is this so problematic? Because “[a]bout [eighty] percent of voters today cast ballots either on D.R.E.s that produce a paper trail or on scanned paper ballots. But five states still use paperless D.R.E.s exclusively, and an additional [ten] states use paperless D.R.E.s in some jurisdictions.”²⁸¹ In other words, “[f]ourteen states [rely] upon electronic voting machines without paper backup.”²⁸² Moreover, one type of

276. 52 U.S.C. § 20901.

277. Eric S. Lynch, *Trusting the Federalism Process Under Unique Circumstances: United States Election Administration and Cybersecurity*, 60 WM. & MARY L. REV. 1979, 2002 (2019) (stating that “[i]n 2016, forty-three states used voting machines that were purchased at least ten years earlier, and fourteen states used machines that were purchased over fifteen years earlier.”) (footnote omitted).

278. Zetter, *supra* note 244.

279. *Voter Verified Paper Record Legislation*, VERIFIED VOTING FOUND., <https://www.verifiedvoting.org/resources/vvpr-legislation/> [<http://web.archive.org/web/20200330075239/https://www.verifiedvoting.org/resources/vvpr-legislation/>] (last visited Mar. 31, 2020).

280. Breeden & Bryant, *supra* note 262, at 988.

281. Zetter, *supra* note 244.

282. Marc Schneider, *Protect Public Trust by Auditing Elections: It’s Easier Than You Might Think*, HILL (Nov. 3, 2018, 4:00 PM), <https://thehill.com/opinion/campaign/414631-protect-public-trust-by-auditing-elections-its-easier-than-you-might-think> [<http://web.archive.org/web/20200330080956/https://thehill.com/opinion/campaign/414631-protect-public-trust-by-auditing-elections-its-easier-than-you-might-think>]. Schneider,

HAVA-compliant “assistive technology” is the “Ballot-Marking Device” (BMD).²⁸³ These voting machines have the same deficiency as DREs, as they cannot create a reliable paper trail.²⁸⁴ In a recent statement, the Verified Voting Foundation cautioned against the use of BMDs for all in-person voting.²⁸⁵ Noting that not all paper ballots are created equal, the Foundation distinguished between hand-marked versus machine-marked ballots, stating that “[h]and-marked paper ballots are not subject to inaccuracies or manipulation from software bugs or malicious code. In contrast, machine-marked paper ballots produced using BMDs might not accurately capture voter intent if the software or ballot configuration is buggy or malicious.”²⁸⁶

The Foundation went on to say that:

Verified Voting specifically opposes the purchase and deployment of new voting systems in which all in-person voters in a polling place are expected to use BMDs. The trustworthiness of an election conducted using BMDs depends critically on how many voters verify their ballots, and how carefully they do it. All voters who vote on BMDs should be made aware of the importance of carefully and conscientiously verifying their ballots before casting them, and should be actively encouraged to do so. However, empirical research thus far shows that few voters using BMDs carefully verify their printed ballots. Moreover, if voters do verify BMD-marked ballots and find what they believe are discrepancies, there is no reliable way to resolve whether the voters made mistakes or the BMDs did. For these and other reasons (such as cost) Verified Voting recommends that the use of BMDs be minimized.²⁸⁷

a cybersecurity expert, lists paperless electronic voting machines as one of the “weak links” in our voting system. *Id.*

283. *Voting Equipment*, NAT’L CONF. STATE LEGISLATURES (Aug. 20, 2018), <https://www.ncsl.org/research/elections-and-campaigns/voting-equipment.aspx> [<http://web.archive.org/web/20200330082605/https://www.ncsl.org/research/elections-and-campaigns/voting-equipment.aspx>].

284. *Verified Voting Blog: Verified Voting Statement on Ballot Marking Devices and Risk-limiting Audits*, VERIFIED VOTING FOUND. (Dec. 18, 2019), <https://www.verifiedvoting.org/bmd-rla-statement-dec2019/> [<http://web.archive.org/web/20200330083508/https://www.verifiedvoting.org/bmd-rla-statement-dec2019/>].

285. *Id.*

286. *Id.*

287. *Id.*

The Verified Voting statement tracks with concerns expressed by other election security/computer security experts who agree on the manifold risks of any system based solely on technology that does not produce an auditable paper trail. Risks from hacking of public-facing systems or those systems connected to the internet, malicious code being inserted into programmable systems, physical security of transfer media and equipment, and even personnel security risks²⁸⁸ cause these experts to conclude that the “gold standard for ensuring both integrity of elections and public trust in election integrity is the use of paper ballots, including those recorded by optical-scan machines, and manual post-election audits based on the paper ballots.”²⁸⁹ Similar to the Verified Voting Foundation recommendation, the National Academy of Science (NAS) concluded in its recent report that “elections should be conducted with human-readable paper ballots” and DREs should be removed from the inventory.”²⁹⁰ NAS also recommended risk-limiting audits.²⁹¹

As noted earlier, prior to the 2016 election, many jurisdictions knew their aging voting machines were vulnerable.²⁹² A Brennan Center Report in 2015 estimated that it would cost \$580 million to replace the

288. Frank Bajak, *US Election Integrity Depends on Security-Challenged Firms*, ASSOCIATED PRESS (Oct. 29, 2018), <https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c> [<http://web.archive.org/web/20200330084651/https://www.apnews.com/f6876669cb6b4e4c9850844f8e015b4c>] (stating that “[n]o federal law requires [voting-machine vendors] to report security breaches or to perform background checks on employees or subcontractors.”).

289. Breeden & Bryant, *supra* note 262, at 991 (citing to Christopher DeLuzio, *Pennsylvania Commission Issues Urgent Call to Replace Vulnerable Voting Machines*, BRENNAN CTR. FOR JUST. N.Y.U. (Sept. 27, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/pennsylvania-commission-issues-urgent-call-replace-vulnerable-voting> [<https://web.archive.org/web/20200725054109/https://www.brennancenter.org/our-work/analysis-opinion/102bama102lvania-commission-issues-urgent-call-replace-vulnerable-voting>] (quoting Brennan Center Counsel Liz Howard’s testimony before a Pennsylvania legislative committee and noting that the “‘unanimous national security and scientific community consensus is that replacing all paperless voting machines with equipment that creates a paper record of every vote cast is the simple solution’ to bolster the security of elections.”)).

290. NAT’L ACAD. OF SCIS., *SECURING THE VOTE: PROTECTING AMERICAN DEMOCRACY*, 5–12 (2018), <https://www.nap.edu/read/25120/chapter/1> [<https://web.archive.org/web/20200725053822/https://www.nap.edu/read/25120/chapter/1>].

291. *Id.*

292. LAWRENCE NORDEN & CHRISTOPHER FAMIGHETTI, *AMERICA’S VOTING MACHINES AT RISK*, 6 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Americas_Voting_Machines_At_Risk.pdf [https://web.archive.org/web/20200725055003/https://www.brennancenter.org/sites/default/files/2019-08/Report_Americas_Voting_Machines_At_Risk.pdf].

vote tabulation machines that were being used in forty states and \$3.5 billion to replace the popular touchscreen voting machines that were being used in thirty states.²⁹³ Many states did not have the funds to replace the machines, or if funding was available, political will was lacking.²⁹⁴

With regard to funding, election security experts and state and local election officials agree: states cannot do this alone. A Politico Survey conducted in late 2017 of state election officials revealed that of those surveyed (twenty-one out of thirty-three), states overwhelmingly agreed they needed additional funding from the federal government “to strengthen [their] election security or replace voting machines.”²⁹⁵ One employee from Rhode Island’s state election authority said, “If we want to enhance people’s confidence in our elections, Congress should secure funding for the modernization and securing of voting systems.”²⁹⁶ Speaking on behalf of its member states in August 2017, the National Association of Secretaries of States (NASS) was more direct: “States would clearly benefit from the appropriation of the outstanding balance of federal HAVA [Help America Vote Act] funds to aid them in ensuring that they have sufficient equipment, technical support and resources to maintain a sound security posture for their computer-based systems.”²⁹⁷ NASS continued to press Congress for funding, adopting a Resolution that provided, in part, that “[t]he emergence of cyber threats to election

293. *Id.* at 17, n.102.

294. *Id.* at 17–19; see also Michael Wines, *Wary of Hackers, States Move to Upgrade Voting Systems*, N.Y. TIMES (Oct. 14, 2017), <https://www.nytimes.com/2017/10/14/us/voting-russians-hacking-states-.html> [<http://web.archive.org/web/20200330163328/https://www.nytimes.com/2017/10/14/us/voting-russians-hacking-states-.html>].

295. Cory Bennett, et al., *Cash-Strapped States Brace for Russian Hacking Fight*, POLITICO (Sept. 3, 2017, 5:08 PM), <https://www.politico.com/story/2017/09/03/election-hackers-russia-cyberattack-voting-242266> [<http://web.archive.org/web/20200330164132/https://www.politico.com/story/2017/09/03/election-hackers-russia-cyberattack-voting-242266>].

296. *Id.*

297. Letter from Connie Lawson, President, Nat’l Ass’n of Sec’y’s of States, to Congressman Bennie Thompson and Congressman Robert Brady, Co-Chairmen, Joint Task Force on Election Sec. (Aug. 3, 2017), <https://www.nass.org/sites/default/files/Election%20Cybersecurity/nass-response-house-taskforce-election-security-080317.doc.pdf> [<http://web.archive.org/web/20200330165021/https://www.nass.org/sites/default/files/Election%20Cybersecurity/nass-response-house-taskforce-election-security-080317.doc.pdf>].

systems require resources state and local governments may not sustain alone. Election security is equated with national security.”²⁹⁸

So, the question becomes, with less than a year from the 2020 presidential election, what has Congress done to strengthen our election infrastructure as a means of protecting our country from foreign interference in our elections?

III. CONGRESSIONAL ACTION

As the Russian interference in the 2016 elections demonstrated, state and local governments require federal assistance to protect themselves and their election systems from foreign adversaries’ interference. Congress plays a vital role in that regard. As demonstrated in Part I, Congress has ample authority to regulate federal elections and set standards for election administration. Part II established that the threats to the election infrastructure are national security threats. We turn now to how Congress has helped—and may further help—states ameliorate that threat.

A. Past Legislation

In discussing how Congress legislated in the past with regard to election security, the Congressional Research Service identified three policy goals. They were: “access—ensuring that eligible individuals can register to vote, receive ballots, and vote privately”; “integrity—ensuring that election administration and voting are perceived as legitimate across the political spectrum, with accurate, fair and transparent participation and results”; and “security—ensuring that campaigns and elections are free from criminal or malicious activity, foreign or domestic disinformation or cyber-interference[.]”²⁹⁹

The Research Service further noted that these policy goals are not exclusive to Congress. “A local election administrator . . . must decide

298. Resolution of the National Association of Secretaries of State on Principles for Federal Assistance in Funding Elections (adopted Feb. 4, 2019), <https://www.nass.org/node/1557>

[<http://web.archive.org/web/20200330171900/https://www.nass.org/node/1557>].

299. R. Sam Garrett, *Campaign and Election Security Policy: Brief Introduction*, CONG. RESEARCH SERV. (July 9, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF11265>

[<http://web.archive.org/web/20200330173650/https://crsreports.congress.gov/product/pdf/IF/IF11265>].

how to balance access, integrity, and security with a limited budget and deadlines set in law.”³⁰⁰

Using this typology, one can easily align the major election security bills against one of the three goals.

Policy Goal	Legislation
Access	<ul style="list-style-type: none"> • Voting Rights Act of 1965 (VRA): “Primarily devoted to voting access; prohibits intimidation, threats, or coercion in voting; authorizes deploying election observers and monitors to prevent discrimination based on race, color, or, in some cases, minority-language status.”³⁰¹ 52 U.S.C. §§ 10101–10702 (2018). • National Voter Registration Act (NVRA): “Primarily devoted to registration access; prohibits intimidation or coercion in registration, or knowingly providing false registration or tabulation information; establishes Chief State Election Official designation, which often is referenced in campaign and election security legislation.”³⁰² 52 U.S.C. §§ 20501–20511 (2018).
Integrity	<ul style="list-style-type: none"> • Help America Vote Act (HAVA): HAVA was the only federal statute specifically enacted to assist states with election administration. In addition to providing grant money to modernize voting machines, HAVA created the Election Assistance Commission (EAC). “Congress charged the agency with overseeing a voluntary voting system testing and certification program, and providing states and localities with voluntary election administration guidance, research and best practices.”³⁰³ 52 U.S.C. §§ 20901–21145 (2018).
Security	<ul style="list-style-type: none"> • Federal Election Campaign Act (FECA): FECA was enacted in 1971 to regulate political campaign spending and fundraising. Its disclosure provisions were meant to prevent political corruption. However, “[t]he Act also contains a wide-ranging prohibition on foreign-national involvement in federal, state, or local U.S. elections.”³⁰⁴ The Act created the Federal Election Commission as the nation’s civil campaign finance enforcement agency. 52 U.S.C. §§ 30101–30146 (2018). • Foreign Agents Registration Act (FARA): Although not an

300. *Id.*

301. CRS REP. ON FED. ROLE IN CAMPAIGNS AND ELECTIONS, *supra* note 34, at 9.

302. *Id.*

303. *Id.* at 6.

304. *Id.* at 7.

	<p>“election security” law per se, it provides for the “disclosure of certain activity by foreign entities, or domestic entities with certain foreign ownership interests.”³⁰⁵ 22 U.S.C. §§ 611–621 (2018). As part of the Mueller Investigation, prosecutors used this statute to charge multiple individuals who failed to register as agents of a foreign government yet were involved in either the 2016 presidential or 2018 midterm elections.³⁰⁶</p> <ul style="list-style-type: none"> • Lobbying Disclosure Act (LDA): This law is not an “election security” law, but it focused on identifying lobbyists who were paid “to influence the public decision making process in both the legislative and executive branches of the Federal government,”³⁰⁷ with the intent that those disclosures would “increase public confidence in the integrity of Government.”³⁰⁸ Like FARA, one can use the LDA to identify foreign agents as well as foreign contributions to campaigns and candidates (i.e., campaign finance violations).³⁰⁹ 2 U.S.C. §§ 1601–1604 (2018).
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All of the above laws were in place when the First Session of the 115th Congress began on January 3, 2017.³¹⁰ Four days before, on December 29, 2016, the Obama Administration had imposed sanctions against Russia to punish it for its interference in the 2016 elections.³¹¹ The executive order “order[ed] the expulsion of ‘Russian intelligence’ operatives”³¹² and imposed “new sanctions on state agencies and

305. *Id.* at 8.

306. *Recent FARA Cases*, U.S. DEP’T JUST., (Nov. 13, 2019) <https://www.justice.gov/nsd-fara/recent-cases> [<http://web.archive.org/web/20200330182432/https://www.justice.gov/nsd-fara/recent-cases>]; *see also* *Indictment, United States v. Internet Research Agency, et.al.*, No. 1:18-cr-00032-DLF (D.D.C. Feb 16, 2018), <https://www.justice.gov/file/1035477/download> [<http://web.archive.org/web/20200330182657/https://www.justice.gov/file/1035477/download>].

307. Lobbying Disclosure Act, 2 U.S.C. § 1601 (2018).

308. *Id.*

309. CRS REP. ON FED. ROLE IN CAMPAIGNS AND ELECTIONS, *supra* note 34, at 9.

310. 163 CONG. REC. D1 (daily ed. Jan. 3, 2017).

311. Exec. Order No. 13,757, 82 Fed. Reg. 1 (Dec. 28, 2016).

312. Missy Ryan et al., *Obama Administration Announces Measures to Punish Russia for 2016 Election Interference*, WASH. POST (Dec. 29, 2016), https://www.washingtonpost.com/world/national-security/106bama-administration-announces-measures-to-punish-russia-for-2016-election-interference/2016/12/29/311db9d6-cdde-11e6-a87f-b917067331bb_story.html

[http://web.archive.org/web/20200330190708/https://www.washingtonpost.com/world/national-security/106bama-administration-announces-measures-to-punish-russia-for-2016-election-interference/2016/12/29/311db9d6-cdde-11e6-a87f-b917067331bb_story.html].

individuals suspected in the hacks of U.S. computer systems.”³¹³ Then, three days after the congressional session began, on January 6, 2017, the Department of Homeland Security Secretary designated election infrastructure as critical infrastructure.³¹⁴ This was followed by the Director of National Intelligence (DNI) releasing the Intelligence Community Assessment, which expressed the unanimous opinion of the Intelligence Community that the Russian President, Vladimir Putin, had “ordered an influence campaign in 2016 aimed at the U.S. [p]residential election . . . [in order to] undermine public faith in the U.S. democratic process, denigrate Secretary [Hillary] Clinton, and harm her electability and potential presidency.”³¹⁵ The report further stated that “the Russian government aspired to help President-elect Trump’s election chances when possible by discrediting Secretary Clinton and publicly contrasting her unfavorably to him.”³¹⁶

The Congressional Intelligence Committees immediately responded by opening investigations in January 2017.³¹⁷ Two months later, during an open hearing before the House Intelligence Committee on March 19, 2017,³¹⁸ the former FBI Director revealed that the FBI was “investigating

313. *Id.*

314. Press Release, Statement by Sec’y of Homeland Security Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector, *supra* note 235.

315. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, BACKGROUND TO “ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS”: THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION iii (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [http://web.archive.org/web/20200330192426/https://www.dni.gov/files/documents/ICA_2017_01.pdf].

316. *Id.* at ii.

317. Press Release, U.S. Select Comm. on Intelligence, Joint Statement on Committee Inquiry into Russian Intelligence Activities (Jan. 13, 2017), <https://www.intelligence.senate.gov/press/joint-statement-committee-inquiry-russian-intelligence-activities> [<http://web.archive.org/web/20200330194316/https://www.intelligence.senate.gov/press/joint-statement-committee-inquiry-russian-intelligence-activities>]; Press Release, U.S. House of Representatives Permanent Select Comm. on Intelligence, Joint Statement on Progress of Bipartisan HPSCI Inquiry into Russian Active Measures (Jan. 25, 2017), <https://republicans-intelligence.house.gov/news/documentsingle.aspx?DocumentID=758> [<http://web.archive.org/web/20200330195206/https://republicans-intelligence.house.gov/news/documentsingle.aspx?DocumentID=758>]; *see also* Evelyn Rupert, *Senate Intel Panel to Probe Trump Team’s Ties to Russia*, HILL (Jan. 13, 2017, 6:23 PM), <https://thehill.com/policy/cybersecurity/314298-senate-intel-committee-to-probe-russian-interference-in-election> [<http://web.archive.org/web/20200330195536/https://thehill.com/policy/cybersecurity/314298-senate-intel-committee-to-probe-russian-interference-in-election>].

318. *See Hearing on Russian Active Measures Investigation Before the H. Permanent Select Comm. on Intelligence*, 115th Cong. (2017), <https://advance.lexis.com/api/perma>

the Russian government's efforts to interfere in the 2016 presidential election and that include[d] investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was coordination between the campaign and Russia's efforts."³¹⁹

The fallout from this bombshell announcement culminated in President Trump firing Director Comey on May 9, 2017.³²⁰ Two days later, the President admitted in an interview that he was "thinking of 'this Russia thing with Trump,'" when he decided to fire Director Comey.³²¹ Within a week, the Department of Justice appointed former FBI Director Robert Mueller to oversee the investigation into Russia's interference in the 2016 election.³²²

link/346c1cdc-1712-45ee-bee1-b51832776232/?context=1000516
[<http://web.archive.org/web/20200728042036/https://signin.lexisnexis.com/laccess/app/signin?back=https%3A%2F%2Fadvance.lexis.com%3A443%2F%2Flaapi%2Fpermalink%2F346c1cdc-1712-45ee-bee1-b51832776232%2F%3Fcontext%3D1000516&aci=la>]; see also, Austin Wright & Martin Matishak, *Comey Confirms FBI Probe into Trump-Russia Collusion*, POLITICO (Mar. 20, 2017), <https://www.politico.com/story/2017/03/adam-schiff-trump-twitter-wiretapping-russia-ties-236249>
[<http://web.archive.org/web/20200330201125/https://www.politico.com/story/2017/03/adam-schiff-trump-twitter-wiretapping-russia-ties-236249>].

319. *Id.*; see also Washington Post Staff, *Full Transcript: FBI Director James Comey Testifies on Russian Interference in 2016 Election*, WASH. POST (Mar. 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/>
[<http://web.archive.org/web/20200330202027/https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/>].

320. Letter from Donald Trump, President of the U.S., to James Comey, Dir., Fed. Bureau of Investigation (May 9, 2017), <https://assets.documentcloud.org/documents/3711116/White-House-Fires-James-Comey.pdf>
[<http://web.archive.org/web/20200330203000/https://assets.documentcloud.org/documents/3711116/White-House-Fires-James-Comey.pdf>].

321. Devlin Barrett & Philip Rucker, *Trump Said He Was Thinking of Russia Controversy When He Decided to Fire Comey*, WASH. POST (May 11, 2017, 8:09 PM), https://www.washingtonpost.com/world/national-security/trump-says-fbi-director-comey-told-him-three-times-he-wasnt-under-investigation-once-in-a-phone-call-initiated-by-the-president/2017/05/11/2b384c9a-3669-11e7-b4ee-434b6d506b37_story.html
[http://web.archive.org/web/20200330203430/https://www.washingtonpost.com/world/national-security/trump-says-fbi-director-comey-told-him-three-times-he-wasnt-under-investigation-once-in-a-phone-call-initiated-by-the-president/2017/05/11/2b384c9a-3669-11e7-b4ee-434b6d506b37_story.html].

322. Mike Levine & Adam Kelsey, *Robert Mueller Appointed Special Counsel to Oversee Probe into Russia's Interference in 2016 Election*, ABC NEWS (May 17, 2017, 7:32 PM), <https://abcnews.go.com/Politics/robert-mueller-appointed-special-counsel-oversee-probe-russias/story?id=47472673>
[<http://web.archive.org/web/20200330203745/https://abcnews.go.com/Politics/robert-mueller-appointed-special-counsel-oversee-probe-russias/story?id=47472673>].

Although the Intelligence Committees' investigations continued, other committees of jurisdiction, particularly the House Administration Committee (which has jurisdiction over federal elections),³²³ were not investigating. After a lack of action by the GOP-led House, in June 2017, House Democratic Leader Nancy Pelosi created the Congressional Task Force on Election Security, co-chaired by Representative Bennie Thompson and Representative Robert Brady, the Ranking Members of the Homeland Security Committee and House Administration Committee, respectively.³²⁴

The Task Force's mandate was to "investigate the vulnerabilities in our voting systems and create common sense solutions to close any security gaps."³²⁵ Eight months later, the Task Force issued its Final Report.³²⁶ The Final Report included "ten specific recommendations on what the federal government and states can and should be doing to secure our nation's elections."³²⁷ Members of the Task Force also introduced legislation, the Election Security Act (H.R. 5011),³²⁸ to implement the recommendations of the Report.

Sadly, the bill never made it out of the House Administration Subcommittee, where it had been referred.³²⁹ Such was the fate of multiple election security bills introduced during the 115th Congress.³³⁰ As will be discussed later, the 115th Congress did implement the most important recommendation—which was for increased funding—by appropriating \$380 million in election security funding.³³¹

323. *Committee History and Jurisdiction*, COMMITTEE ON HOUSE ADMIN., <https://cha.house.gov/about/committee-history-and-jurisdiction> [<http://web.archive.org/web/20200330205545/https://cha.house.gov/about/committee-history-and-jurisdiction>] (last visited on Mar. 31, 2020).

324. Press Release, Election Security Task Force Releases Final Report and Recommendations (Feb. 14, 2018), <https://cha.house.gov/press-release/election-security-task-force-releases-final-report-recommendations> [<http://web.archive.org/web/20200330210114/https://cha.house.gov/press-release/election-security-task-force-releases-final-report-recommendations>].

325. *Id.*

326. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11.

327. Press Release, Election Security Task Force Releases Final Report and Recommendations, *supra* note 324.

328. H.R. 5011, 115th Cong. (2018).

329. *Id.*

330. Jacqueline Thomson, *Congress Falls Flat on Election Security as Midterms Near*, HILL (Sept. 30 2018, 7:30 AM), <https://thehill.com/policy/cybersecurity/409049-congress-falls-flat-on-election-security-as-midterms-near> [<http://web.archive.org/web/20200330212000/https://thehill.com/policy/cybersecurity/409049-congress-falls-flat-on-election-security-as-midterms-near>].

331. Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, 132 Stat. 561 (2018).

The 2018 midterm elections brought a change in House leadership.³³² Almost immediately, the Democratic-led 116th Congress began to work on passing bills that addressed the various aspects of the Congressional Task Force's recommendations. The 116th Congress has introduced "at least [forty] bills related to security for campaigns and elections."³³³ Of those, as of January 2020, twenty bills advanced beyond introduction in at least one chamber.³³⁴ Of those twenty, two are now enacted law: the Fiscal Year 2020 National Defense Authorization Act (NDAA) (S. 1790)³³⁵ and the Consolidated Appropriations Act of 2020 (H.R. 1158).³³⁶ The NDAA "contains several provisions aimed at securing U.S. election infrastructure."³³⁷ In addition to containing numerous provisions regarding reporting to Congress and federal or state officials in election interference matters, "[i]t also requires the Director of National Intelligence, in coordination with several other agencies, to develop a strategy for countering Russia cyberattacks against U.S. elections."³³⁸ Most significantly, the Consolidated Appropriations Act authorized an additional \$425 million "for payments to states, territories, and the District of Columbia to make general improvements to the administration of federal elections, including upgrades to election technology and security."³³⁹ Although not designated as an election security bill, in late March 2020, in response to the coronavirus pandemic, Congress appropriated an additional \$400 million in Election Security Grants for

332. Clare Foran & Ashley Killough, *Nancy Pelosi Elected House Speaker, Reclaims Gavel to Lead Democrats' New Majority*, CABLE NEWS NETWORK (Jan. 3, 2019), <https://www.cnn.com/2019/01/03/politics/nancy-pelosi-house-speaker-vote-new-congress/index.html>

[<http://web.archive.org/web/20200330220535/https://www.cnn.com/2019/01/03/politics/nancy-pelosi-house-speaker-vote-new-congress/>].

333. GARRETT ET AL., *supra* note 299, at 1.

334. CRS REP. ON FED. ROLE IN CAMPAIGNS AND ELECTIONS, *supra* note 34, at ii.

335. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

336. Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019).

337. Andrew Eversden, *Several Election Security Provisions Are in the Massive Defense Bill*, FIFTH DOMAIN (Dec. 10, 2019), <https://www.fifthdomain.com/congress/capitol-hill/2019/12/10/several-election-security-provisions-are-in-the-massive-defense-bill/>

[<http://web.archive.org/web/20200330222841/https://www.fifthdomain.com/congress/capitol-hill/2019/12/10/several-election-security-provisions-are-in-the-massive-defense-bill/>].

338. CRS REP. ON FED. ROLE IN CAMPAIGNS AND ELECTIONS, *supra* note 34, at ii.

339. *Id.*

states “to prevent, prepare for, and respond to coronavirus . . . for the 2020 Federal election cycle.”³⁴⁰

To assess whether the pending legislation has addressed the security vulnerabilities identified by the Congressional Task Force, the table in the Appendix breaks out the Congressional Task Force’s recommendations, aligning them to the applicable sections in the Election Security Act (H.R. 5011).³⁴¹ It then lists the pending legislation (those bills that have passed at least one chamber), providing a summary and also the latest action.³⁴² Looking at the current status, one can easily assess whether Congress has adequately addressed the vulnerabilities identified by the Congressional Task Force on Election Security. The discussion below summarizes the current status.

B. Task Force Recommendations

*1. Recommendation One: Federal Funds Should Be Provided to Help States Replace Aging, Vulnerable Voting Machines with Paper Ballots*³⁴³

As noted, by January 2020, Congress had appropriated over \$800 million towards voting system security.³⁴⁴ However, this is not enough. As discussed previously, the 2015 Brennan Center Report estimated that it would cost \$580 million to replace the vote tabulation machines that were being used in forty states, and \$3.5 billion to replace the popular touchscreen voting machines that were being used in thirty states.³⁴⁵ More recently:

[I]n 2018, the Center for American Progress issued its “Election Security Report” [that evaluated] the state of election system cybersecurity on a state-by-state basis. That report indicated that none of the states merited a grade of “A” for election cybersecurity and only five states and the District of Columbia earned a grade of “B.” According to the Center, all of the other

340 The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 132 Stat. 281 (2020).

341. H.R. 5011, 115th Cong. (2018). The table is adapted, as described, from the Appendix contained in this Article.

342. *See infra* Appendix.

343. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 34.

344. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); *see also* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019).

345. NORDEN & FAMIGHETTI, *supra* note 292, at 6, 10.

states earned grades of “C” or “D” for the election cybersecurity.³⁴⁶

Although the money is sorely needed, the timing of the funds is also problematic. Election security experts have been critical of this, with one expert tweeting, “A year late & a billion dollars short on #electionsecurity.”³⁴⁷

Quite unexpectedly, states received additional assistance. The coronavirus pandemic came on the heels of the Iowa Caucus debacle in February 2020.³⁴⁸ The pandemic wreaked havoc on the presidential primaries,³⁴⁹ spurring a national debate about states’ abilities to conduct elections in the midst of the pandemic.³⁵⁰ Congress responded by appropriating an additional \$400 million as part of the CARES Act,³⁵¹ for states “to prevent, prepare for, and respond to coronavirus . . . for the 2020 Federal election cycle.”³⁵² House Democrats have gone further by passing the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act,³⁵³ which would provide \$3.6 billion for election resilience grants to states “for contingency planning,

346. LAW OF THE INTERNET, *supra* note 16, at § 17.05. (footnote omitted).

347. Miles Park, *Congress Allocates \$425 Million for Election Security in New Legislation*, NAT’L PUB. RADIO (Dec. 16, 2019, 5:02 PM), <https://www.npr.org/2019/12/16/788490509/congress-allocates-425-million-for-election-security-in-new-legislation>

[<http://web.archive.org/web/20200330231435/https://www.npr.org/2019/12/16/788490509/congress-allocates-425-million-for-election-security-in-new-legislation>].

348 Tucker, *supra* note 210.

349 Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here’s a List*, N.Y. TIMES (May 27, 2020),

<https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html?smid=em-share>

[<https://web.archive.org/web/20200807145323/https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html?smid=em-share>].

350 Amanda Becker, *Seven Confirmed COVID-19 Cases Linked to Wisconsin’s April Elections*, REUTERS (Apr. 21, 2020), <https://www.reuters.com/article/us-health-coronavirus-wisconsin-election/seven-confirmed-covid-19-cases-linked-to-wisconsin-april-elections-idUSKCN223397>

[<https://web.archive.org/web/20200712231919/https://www.reuters.com/article/us-health-coronavirus-wisconsin-election/seven-confirmed-covid-19-cases-linked-to-wisconsin-april-elections-idUSKCN223397>]; *see also* Bill Whitaker, *Voting Safely in a Pandemic*, CBSNEWS.COM (June 28, 2020), <https://www.cbsnews.com/news/election-voting-2019-20-coronavirus-pandemic-60-minutes-2020-06-28/> [<https://web.archive.org/web/20200801224717/https://www.cbsnews.com/news/election-voting-2019-20-coronavirus-pandemic-60-minutes-2020-06-28/>].

351 The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 132 Stat. 281 (2020).

352 *Id.*

353 H.R. 6800, 116th Cong. (2020).

preparation, and resilience of elections for Federal office.”³⁵⁴ If passed by the Senate,³⁵⁵ combined, these two pieces of legislation would cover the \$4 billion in replacement costs projected by the Brennan Center.³⁵⁶

The Coronavirus Relief highlights another challenge: election officials need a predictable year-to-year appropriation so they can budget for upgrades, training, and the like.³⁵⁷ Currently, the sporadic lump sums do not allow for that.³⁵⁸

2. Recommendation Two: States Should Conduct Risk-Limiting Post-Election Audits³⁵⁹

H.R.1, the For the People Act of 2019,³⁶⁰ would authorize federal funding to assist states to upgrade election equipment or otherwise enhance security, including by implementing risk-limiting audits.³⁶¹ Although the bill passed the House, it is stalled in the Senate.³⁶² The Consolidated Appropriations Act for the Fiscal Year of 2020 did provide additional funding to the Election Assistance Commission and states, which could be used to improve the administration of elections for federal office.³⁶³ Several states are conducting risk-limiting audits as pilots.³⁶⁴

354 *Id.*

355 The House passed the Bill on May 15, 2020. It has languished in the Senate since May 20, 2020. *See H.R. 6800 – The Heroes Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/6800/all-actions-without-amendments>

[<https://web.archive.org/web/20200716062314/https://www.congress.gov/bill/116th-congress/house-bill/6800/all-actions-without-amendments>] (follow “Actions” tab link; then filter actions by “All Actions”).

356 NORDEN & FAMIGHETTI, *supra* note 292.

357. *Id.*

358. *Id.*

359. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 35.

360. H.R. 1, 116th Cong. (2019).

361. *Id.*

362. Maggie Miller, *GOP Punches Back in Election Security Fight*, HILL (Aug. 2, 2019, 5:45 AM), <https://thehill.com/policy/national-security/455871-gop-punches-back-in-election-security-fight>

[<http://web.archive.org/web/20200330232232/https://thehill.com/policy/national-security/455871-gop-punches-back-in-election-security-fight>].

363. Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019).

364. Editorial Board, *A Simple Step Every State Could Take to Safeguard Elections*, WASH. POST (Oct. 21, 2019, 7:31 PM), https://www.washingtonpost.com/opinions/election-security-that-mitch-mcconnell-should-get-behind/2019/10/21/319eec70-f1d7-11e9-8693-f487e46784aa_story.html

[<http://web.archive.org/web/20200330234345/https://www.washingtonpost.com/opinions>

*3. Recommendation Three: Federal Funds Should Be Provided to Help States Upgrade and Maintain IT Infrastructure, Including Voter Registration Databases*³⁶⁵

As the Task Force Report noted, “Russia’s targeting of [twenty-one] states’ voter registration systems, and the successful breach of the Illinois database . . . [and potential breach of an Arizona voter registration database] makes abundantly clear that our voter registration systems are vulnerable.”³⁶⁶ As discussed earlier, the 2017 Politico Survey³⁶⁷ revealed that in addition to needing money to replace aging machines, “[s]tates need money to upgrade digital voter registration systems that alleged Russian hackers probed and infiltrated in 2016. They need money to provide cybersecurity training to local county officials . . . [a]nd they need money to adopt new post-election audit procedures that can detect vote tampering.”³⁶⁸ Funds were provided in the Consolidated Appropriations Act of 2020³⁶⁹ as well as in the CARES Act.³⁷⁰ The HEROES Act,³⁷¹ which is currently pending, would provide another \$3.6 billion for states to use to further election resilience.

*4. Recommendation Four: Election Technology Vendors Must Secure Their Voting Systems*³⁷²

The Task Force found that “[election vendors] are unregulated at the federal level.”³⁷³ “There is no federal law that governs what steps election vendors must take to safeguard their systems from attack.”³⁷⁴ As one election security expert has noted, “[N]o federal law requires [voting machine vendors] to report security breaches or to perform background checks on employees or subcontractors.”³⁷⁵ In addition to endorsing the need for legislation addressing these issues, the Task Force also

/election-security-that-mitch-mcconnell-should-get-behind/2019/10/21/319eec70-fl1d7-11e9-8693-f487e46784aa_story.html].

365. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 35.

366. *Id.*

367. Bennett, et al., *supra* note 295.

368. *Id.*

369. Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019).

370. The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 132 Stat. 281 (2020).

371. H.R. 6800, 116th Cong. (2020).

372. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 36.

373. *Id.* at 30.

374. *Id.*

375. Bajak, *supra* note 288.

highlighted that “[voting machine vendors] are not subject to use cybersecurity best practices.”³⁷⁶ The House addressed this by passing H.R. 2722, the Securing America’s Federal Elections (SAFE) Act,³⁷⁷ which, among other things, would mandate that machines be manufactured in the United States and that they “meet specified cybersecurity requirements, including the prohibition of the connection of a voting system to the internet.”³⁷⁸ The legislation is stalled in the Senate, despite two attempts to try to pass the legislation through “unanimous consent.”³⁷⁹

The Committee on House Administration, however, remains seized of the matter. On January 9, 2020, the Committee held a first-of-its-kind hearing with the presidents of the three main voting machine companies, Election Systems and Software (ES&S), Dominion Voting Systems, and Hart InterCivic.³⁸⁰ Combined, these three companies account for more than eighty percent of the 350,000 voting machines used in the United States.³⁸¹ The presidents were pressed on issues regarding machine security, funding for research and development, and supply chain security.³⁸² Representative Zoe Lofgren, Chairperson of the Committee on House Administration is also the sponsor of the SAFE Act (H.R. 2722). There is parallel legislation in the Senate sponsored by Senator Amy Klobuchar, the SAFE Act (S. 2238)³⁸³ and the Election Security Act (S. 1540).³⁸⁴ Senator James Lankford, who has been working with Senator Klobuchar on the stalled election bill, believes the election security measures can be in place by the 2022 midterms.³⁸⁵ Obviously, this is too late for the 2020 presidential election.

376. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 4.

377. H.R. 2722, 116th Cong. (2019).

378. *Id.*

379. Jordain Carney, *Senate GOP Blocks Three Election Security Bills*, HILL (Feb. 11, 2020, 1:25 PM) <https://thehill.com/homenews/house/482569-senate-gop-blocks-three-election-security-bills> [<http://web.archive.org/web/20200331012753/https://thehill.com/homenews/house/482569-senate-gop-blocks-three-election-security-bills>].

380. *2020 Election Security-Perspectives from Voting System Vendors and Experts: Hearing Before the H. Comm. on House Administration*, 116th Cong. (2020).

381. *Id.*

382. *Id.*

383. S. 2238, 116th Cong. (2019).

384. S. 1540, 116th Cong. (2019).

385. Niels Lesniewski, *Election Infrastructure Bill Remains Stalled as Senate Intelligence Panel Releases First Volume of Russia Report*, ROLL CALL (July 25, 2019, 6:41 PM), <https://www.rollcall.com/2019/07/25/election-infrastructure-bill-remains-stalled-as-senate-intelligence-panel-releases-first-volume-of-russia-report/> [<http://web.archive.org/web/20200331015010/https://www.rollcall.com/2019/07/25/electi>

*5. Recommendation Five: The Federal Government Should Develop a National Strategy to Counter Efforts to Undermine Democratic Institutions*³⁸⁶

In making this recommendation, the Task Force noted that “[p]ast attacks of this magnitude have served as a catalyst for major strategic changes and a re-orientation of federal policy.”³⁸⁷ The Task Force Report urged that the President create a “9/11-style” commission³⁸⁸ “to help identify the various ways in which the Russians are seeking to undermine democracy and develop a plan to confront them.”³⁸⁹

The National Defense Authorization Act for Fiscal Year 2020³⁹⁰ requires the DNI, in consultation with various other agency heads, to develop a “whole-of-government” strategy for protecting U.S. “electoral systems and processes” from Russian interference.³⁹¹ This “whole-of-government” strategy, however, is not all encompassing as it may not include other attacks on democratic institutions. Moreover, although the National Security Strategy³⁹² acknowledges that “[t]hrough modernized forms of subversive tactics, Russia interferes in the domestic political affairs of countries around the world”³⁹³ and commits to “the United States and Europe [working] together to counter Russian subversion and aggression,”³⁹⁴ the National Security Strategy itself does not address how the U.S. will “ensure the security of the U.S. election infrastructure going forward.”³⁹⁵ To date, neither the President nor Congress has established a “9/11-style” commission. Accordingly, there is still no strategy addressing the larger threat to democratic institutions.

on-infrastructure-bill-remains-stalled-as-senate-intelligence-panel-releases-first-volume-of-russia-report/].

386. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 37.

387. *Id.*

388. Pub. L. No. 107-306 created the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) on Nov. 27, 2002. CONG. RESEARCH SERV., R40076, CONGRESSIONAL COMMISSIONS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 4 n.21 (2019).

389. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 37.

390. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

391. *Id.* at § 6504.

392. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<http://web.archive.org/web/20200331021524/https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>].

393. *Id.* at 26.

394. *Id.* at 48.

395. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 32.

Lastly, the National Defense Authorization Act required the DNI to designate a national counterintelligence officer within the National Counterintelligence and Security Center to coordinate election security counterintelligence.³⁹⁶ The DNI designated the officer in July 2019.³⁹⁷

*6. Recommendation Six: The Intelligence Community Should Conduct Pre-Election Threat Assessments Well in Advance of Federal Elections*³⁹⁸

This requirement was codified in the National Defense Authorization Act of Fiscal Year 2020.³⁹⁹ The Fiscal Year 2020 NDAA included the Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act (IAA) for Fiscal Years 2018, 2019, and 2020 (hereinafter FY 2018–2020 IAA).⁴⁰⁰ This Act within the NDAA (included as Division E) mandated the threat assessments, and the threat assessments have begun.⁴⁰¹ In mid-February 2020, intelligence officials briefed members of Congress on the continuing Russian threat to the 2020 elections.⁴⁰² Later, intelligence officials briefed presidential candidate Senator Bernie Sanders.⁴⁰³

396. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 6508, 133 Stat. 1198 (2019).

397. Julian E. Barnes, *Intelligence Chief Names New Election Security Oversight Official*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/us/politics/intelligence-election-security.html> [<http://web.archive.org/web/20200331034222/https://www.nytimes.com/2019/07/19/us/politics/intelligence-election-security.html>].

398. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 37.

399. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 6507, 133 Stat. 1198 (2019).

400. Press Release, U.S. Senate Select Comm. on Intelligence, Burr, Warner Praise House and Senate Passage of Three-Year Intel Authorization Act (Dec. 17, 2019), <https://www.intelligence.senate.gov/press/burr-warner-praise-house-and-senate-passage-three-year-intel-authorization-act> [<http://web.archive.org/web/20200331041453/https://www.intelligence.senate.gov/press/burr-warner-praise-house-and-senate-passage-three-year-intel-authorization-act>].

401. National Defense Authorization Act for Fiscal Year 2020 § 6503.

402. Maggie Miller, *Russian Interference Reports Rock Capitol Hill*, HILL (Feb. 22, 2020, 12:18 PM), <https://thehill.com/policy/national-security/484156-russian-interference-reports-rock-capitol-hill> [<http://web.archive.org/web/20200331035123/https://thehill.com/policy/national-security/484156-russian-interference-reports-rock-capitol-hill>] [hereinafter *Russian Interference Reports Rock Capitol Hill*].

403. Shane Harris et al., *Bernie Sanders Briefed by U.S. Officials That Russia Is Trying to Help His Presidential Campaign*, WASH. POST (Feb. 21, 2020, 4:16 PM), <https://www.washingtonpost.com/national-security/bernie-sanders-briefed-by-us-officials-that-russia-is-trying-to-help-his-presidential-campaign/2020/02/21/5ad396a6->

*7. Recommendation Seven: DHS Should Maintain the Designation of Election Infrastructure as a Critical Infrastructure Subsector*⁴⁰⁴

In January 2017, the Secretary of DHS, Jeh Johnson, designated election infrastructure as a critical infrastructure subsector pursuant to his authorities in the Homeland Security Act of 2002.⁴⁰⁵ Provisions in H.R.1, the For the People Act, would codify this designation. H.R.1 is stalled in the Senate.⁴⁰⁶

*8. Recommendation Eight: Empower Federal Agencies to Be Effective Partners in Pushing out Nationwide Security Reforms*⁴⁰⁷

This recommendation provided, “DHS must conduct a comprehensive assessment of the funding, resources, and personnel it needs to deliver the services state and local elections officials request to secure the election infrastructure, and make a request to Congress.”⁴⁰⁸ It also recommended that Congress fund DHS and the EAC at a level where they can provide expanded resources.⁴⁰⁹ Both the Consolidated Appropriations Acts for Fiscal Year 2018 and Fiscal Year 2020 included increased funding for DHS and the EAC.⁴¹⁰

*9. Recommendation Nine: Establish Clear and Effective Channels for Sharing Threat and Intelligence Information with Election Officials*⁴¹¹

To implement this recommendation, the Task Force suggested that “[c]hief election officials in each state should have expedited access to

54bd-11ea-929a-64efa7482a77_story.html

[http://web.archive.org/web/20200331041810/https://www.washingtonpost.com/national-security/bernie-sanders-briefed-by-us-officials-that-russia-is-trying-to-help-his-presidential-campaign/2020/02/21/5ad396a6-54bd-11ea-929a-64efa7482a77_story.html].

404. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 37.

405. Press Release, Statement by Sec’y Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector, *supra* note 235.

406. Miller, *supra* note 362.

407. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 37–38.

408. *Id.*

409. *Id.* at 38.

410. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, 132 Stat. 561 (2018); *see also* Consolidated Appropriations Act, 2020, Pub. L. No. 116–93, 133 Stat. 2317 (2019) (showing that the FY 2020 Consolidated Appropriations Act increased the EAC staff budget by approximately \$5 million from the past two years; DHS received additional funds over the same time period).

411. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 38.

security clearances.”⁴¹² This recommendation was implemented in the FY 2018–2020 IAA; the Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act required the DNI to assist DHS in providing security clearances to and sharing information with state election officials.⁴¹³ It also required the DNI, in consultation with various agency heads, to make publicly available pre-election reports on counterintelligence and cyber threats to federal campaigns.⁴¹⁴ As Congress was debating these provisions, Politico reported that because of the massive backlog, “no members of the four-person Election Assistance Commission had clearances during the past two election cycles,” which included the 2016 presidential election.⁴¹⁵

However, long before the NDAA authorization, DHS had been processing the clearances for state and local officials, but the process was slow.⁴¹⁶ H.R. 1 would mandate expedited security clearances for these officials.⁴¹⁷

The final portion of the recommendation provided that “entities involved in administering elections, as well as political organizations, should consider forming an information sharing and analysis organization to share data on cyber threats.”⁴¹⁸ This is already being done through DHS’s coordinating bodies: the Government Coordinating Council (GCC) for the Election Infrastructure Subsector⁴¹⁹ and the

412. *Id.*

413. The IAA was codified under Division E of the National Defense Authorization Act for Fiscal Year 2020. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

414. *Id.* at § 6506.

415. Eric Geller, *Lack of Security Clearances Hampers Federal Election Panel*, POLITICO (Apr. 5, 2019, 5:19 PM), <https://www.politico.com/story/2019/04/05/security-clearance-election-panel-1259704> [http://web.archive.org/web/20200331050242/https://www.politico.com/story/2019/04/05/security-clearance-election-panel-1259704].

416. Zack Whittaker, *Homeland Security Hasn’t Done Enough to Protect Election Infrastructure, Says Watchdog*, TECHCRUNCH, (Mar. 6, 2019 11:55 AM), <https://techcrunch.com/2019/03/06/homeland-security-election-infrastructure/> [http://web.archive.org/web/20200331050735/https://techcrunch.com/2019/03/06/homeland-security-election-infrastructure/]

417. H.R. 1, 116th Cong. (2019).

418. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 38.

419. Press Release, U.S. Dep’t of Homeland Sec., DHS and Partners Convene First Election Infrastructure Coordinating Council (Oct. 14, 2017), <https://www.dhs.gov/news/2017/10/14/dhs-and-partners-convene-first-election-infrastructure-coordinating-council> [http://web.archive.org/web/20200331051859/https://www.dhs.gov/news/2017/10/14/dhs-and-partners-convene-first-election-infrastructure-coordinating-council]; *see also* Press Release, U.S. Election Assistance Comm’n, Elections Government Sector Coordinating Council Established, Charter Adopted (Oct. 14, 2017), <https://www.eac.gov/news/2017/10/14/elections-government-sector-coordinating-council-established-charter->

Election Infrastructure Information Sharing and Analysis Center (EI-ISAC).⁴²⁰ S. 1846, the State and Local Government Cybersecurity Act of 2019, would codify these relationships.⁴²¹

*10. Recommendation Ten: States Should Prioritize Cybersecurity Training*⁴²²

The recommendation asserts that “[t]he federal government should provide training support either through the EAC or by providing funding to states to assist with their training programs.”⁴²³ Funding support is provided in the Consolidated Appropriations Act⁴²⁴ as well as the CARES Act.⁴²⁵ The HEROES Act,⁴²⁶ which is pending, would provide additional funding. Additionally, the Election Assistance Commission has partnered with Harvard University’s Belfer Center to develop training modules for state cybersecurity/IT personnel.⁴²⁷

C. What Remains

As demonstrated in the above discussion, although the comprehensive election security bill, the Election Security Act (H.R. 5011), failed during the 115th Congress, the Democratic-led 116th House has passed most of its provisions in separate bills.⁴²⁸ Recently,

adopted

[<http://web.archive.org/web/20200331052107/https://www.eac.gov/news/2017/10/14/elections-government-sector-coordinating-council-established-charter-adopted>].

420. *EI-ISAC*, CTR. INTERNET SECURITY, <https://www.cisecurity.org/ei-isac/> [<http://web.archive.org/web/20200331052622/https://www.cisecurity.org/ei-isac/>] (last visited Mar. 31, 2020) (stating that the EIS-GCC established the EI-ISAC “to support the cybersecurity needs of the elections subsector.”).

421. S. 1846, 116th Cong. (2019).

422. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 38.

423. *Id.*

424. *See, e.g.*, Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019).

425. The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 132 Stat. 281 (2020).

426. H.R. 6800, 116th Cong. (2020).

427. BELFER CTR. FOR SCI. AND INT’L AFF., *THE STATE AND LOCAL ELECTION CYBERSECURITY PLAYBOOK* (2018), <https://www.belfercenter.org/publication/state-and-local-election-cybersecurity-playbook> [<http://web.archive.org/web/20200331055441/https://www.belfercenter.org/publication/state-and-local-election-cybersecurity-playbook>].

428. H.R. 5011, 115th Cong. (2018); *see also* Maggie Miller & Juliegrace Brufke, *House Passes Sweeping Democrat-backed Election Security Bill*, HILL (June 27, 2019, 5:00 PM), <https://thehill.com/homenews/house/450737-house-passes-sweeping-democrat-backed-election-security-bill>

during an interview, Representative Eric Swalwell (who is a member of both the House Judiciary and Intelligence Committees), was asked whether he had “any concern that the results could -- are under threat at all from foreign interference in 2020, or have steps been taken, necessary steps, to protect the election process?”⁴²⁹ Representative Swalwell responded, “We have taken all the steps we need to in the House with the bills we’ve passed for election security. Senate Majority Leader Mitch McConnell won’t take up those bills.”⁴³⁰

Representative Swalwell is just the most recent Democratic member of Congress complaining about Senate GOP inaction. In December 2019, GOP Senator Marsha Blackburn blocked three bills that Democrats had asked to pass under unanimous consent.⁴³¹ The three bills would have “[required] campaigns to alert the FBI and the Federal Elections Commission (FEC) about foreign offers of assistance, as well as . . . provide more election funding and ban voting machines from being connected to the internet.”⁴³² The bills’ supporters criticized this latest action.⁴³³ A separate press release blasted Senate Majority Leader Mitch McConnell for a “legislative graveyard” and included a list of ten election security-related bills that have stalled in the upper chamber.⁴³⁴ Those ten bills are:

[<http://web.archive.org/web/20200331060513/https://thehill.com/homenews/house/450737-house-passes-sweeping-democrat-backed-election-security-bill>].

429. *Dow Drops on Coronavirus Warning; Rep. Eric Swalwell (D-CA) Is Interviewed on Coronavirus Response; Shooting at Milwaukee Brewery*, CABLE NEWS NETWORK (Feb. 27, 2020, 9:30 AM), <http://transcripts.cnn.com/TRANSCRIPTS/2002/27/cnr.02.html>

[<http://web.archive.org/web/20200331060708/http://transcripts.cnn.com/TRANSCRIPTS/2002/27/cnr.02.html>].

430. *Id.*

431. Carney, *supra* note 379.

432. *Id.*

433. Press Release, Senate Democrats, Senate Republicans Block Democrats’ Requests to Consider Election Security Legislation (Feb. 11, 2020), <https://www.democrats.senate.gov/newsroom/press-releases/senate-republicans-block-democrats-requests-to-consider-election-security-legislation>

[<http://web.archive.org/web/20200331065636/https://www.democrats.senate.gov/newsroom/press-releases/senate-republicans-block-democrats-requests-to-consider-election-security-legislation>].

434. Press Release, Senate Democrats, State of the 116th Congress: Majority Leader McConnell’s Legislative Graveyard Continues to Grow as a National Embarrassment (Feb. 10, 2020), <https://www.democrats.senate.gov/newsroom/press-releases/state-of-the-116th-congress-majority-leader-mcconnells-legislative-graveyard-continues-to-grow-as-a-national-embarrassment>

[<http://web.archive.org/web/20200331062038/https://www.democrats.senate.gov/newsroom/press-releases/state-of-the-116th-congress-majority-leader-mcconnells-legislative-graveyard-continues-to-grow-as-a-national-embarrassment>].

S.2238/H.R.2722, Securing America's Federal Elections Act, legislation to help safeguard elections from foreign interference, which passed the House with bipartisan support.

S.2242, Foreign Influence Reporting in Elections Act, bipartisan legislation to require presidential candidates to report contact from foreign state actors to the FBI.

S.1247, Duty to Report Act, legislation to require candidates to report offers of assistance from foreign state actors to the FBI and FEC.

S.1540, Election Security Act, legislation to require paper ballots and provide election security grants.

S.2669, [Stopping Harmful Interference in Elections for a Lasting Democracy (SHIELD)] Act, legislation to prevent foreign interference in elections.

S.1060, [Defending Elections from Threats by Establishing Redlines (DETER)] Act, legislation to combat foreign interference in our elections.

S.1356, Honest Ads Act, bipartisan legislation to apply the existing rules on disclosures in political ads on TV to those on social media platforms.

S.949, For the People Act, a sweeping package of pro-democracy reforms that aims to: make it easier, not harder, to vote; end the dominance of big money in politics; and ensure that public officials work for the public interest.

S.890, Senate Cybersecurity Protection Act, bipartisan legislation to provide cybersecurity assistance to the Senate.

S.1834, Deceptive Practices and Voter Intimidation Protection Act, legislation to stop practices designed to prevent Americans from voting.⁴³⁵

In the current political climate, it is highly unlikely that the GOP-led Senate will pass all ten bills. Even the Senate Rules Committee

435. *Id.* (VIDEO links omitted).

Chairman, Senator Roy Blunt admitted that the Senate Majority Leader is blocking the bills.⁴³⁶ However, in light of the most recent intelligence threat briefings warning that the Russian government intends to interfere in both the Democratic presidential primary as well as the general election,⁴³⁷ at a minimum, the Senate needs to pass bills that protect the voting process and implement some of the most critical of the Congressional Task Force's recommendations.

The SAFE Act would accomplish much of this.⁴³⁸ It would: "amend HAVA to authorize grants to states for upgrading election equipment cybersecurity, and risk-limiting audits; require use of voter-verified paper ballots; specify ballot print and accessibility requirements; and require steps to 'seek and ensure' that voting equipment is manufactured in the United States."⁴³⁹

The SAFE Act's provisions are more narrowly focused than the broad sweeping For the People Act⁴⁴⁰ and probably stand a better chance at ultimately getting passed, particularly as the Senate version was drafted by Senators Klobuchar and Lankford, indicating bipartisan support. Passage of the SAFE Act would implement Recommendations One through Four of the Congressional Task Force Report.⁴⁴¹

Similarly, the Senate should adopt legislation requiring candidates and campaigns to report offers of assistance from foreign state actors.⁴⁴² Admittedly, this may be too politically sensitive for Senate Republicans, particularly as the President contradicted the earlier testimony of FBI Director Wray that one has an obligation to report any offer of assistance⁴⁴³ and has publicly stated that he would accept any such

436. *Id.*

437. Harris et al., *supra* note 403.

438. H.R. 2722, 116th Cong. (2019); *see also* S. 2238, 116th Cong. (2019).

439. CRS REP. ON FED. ROLE IN CAMPAIGNS AND ELECTIONS, *supra* note 34, at 31.

440. H.R. 1, 116th Cong. (2019); S. 949, 116th Cong. (2019).

441. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 34–36.

442. *See, e.g.*, S. 949, 116th Cong. (2019); S. 1247, 116th Cong. (2019); S. 1060, 116th Cong. (2019).

443. *Review of the FY2020 Budget Request for the FBI, Hearing Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the H. Comm. on Appropriations*, 116th Cong. (2019) (responding to a question, FBI Director Christopher Wray replied, "I think my view is that, if any public official or member of any campaign is contacted by any nation-state or anybody acting on behalf of a nation-state about influencing or interfering with our election, then that is something that the FBI would want to know about."). <https://www.appropriations.senate.gov/hearings/review-of-the-fy2020-budget-request-for-the-fbi>

[<http://web.archive.org/web/20200331234435/https://www.appropriations.senate.gov/hearings/review-of-the-fy2020-budget-request-for-the-fbi>].

offer.⁴⁴⁴ This prompted an additional statement from the Commissioner of the Federal Elections Commission clarifying federal election law.⁴⁴⁵

However remote, there may be an opening for this legislation. To the extent that Senate Republicans “distance themselves from” the President for his statement that he would accept a foreign offer,⁴⁴⁶ combined with the statements of several Republican senators during the impeachment proceedings regarding the impropriety of the President leveraging his official powers to pressure a foreign government to investigate his political rival,⁴⁴⁷ some Republicans may seize this opportunity to send a strong message that the aforementioned behavior is unacceptable.⁴⁴⁸ A

444. Lucien Bruggeman, *‘I think I’d Take It’: In Exclusive Interview, Trump Says He Would Listen If Foreigners Offered Dirt on Opponents*, ABC NEWS (June 13, 2019 6:58 AM), <https://abcnews.go.com/Politics/id-exclusive-interview-trump-listen-foreigners-offered-dirt/story?id=63669304>

[<http://web.archive.org/web/20200331170608/https://abcnews.go.com/Politics/id-exclusive-interview-trump-listen-foreigners-offered-dirt/story?id=63669304>]; see also James Hohmann, *The Daily 202: ‘The FBI Director Is Wrong’: Trump’s Willingness to Accept Foreign Help Keeps Him at Odds with Wray*, WASH. POST (June 13, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2019/06/13/daily-202-the-fbi-director-is-wrong-trump-s-willingness-to-accept-foreign-help-keeps-him-at-odds-with-wray/5d012c87a7a0a4030c3fda7b/>

[<http://web.archive.org/web/20200331170840/https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2019/06/13/daily-202-the-fbi-director-is-wrong-trump-s-willingness-to-accept-foreign-help-keeps-him-at-odds-with-wray/5d012c87a7a0a4030c3fda7b/>].

445. Matthew Choi, *‘Let Me Make Something 100% Clear’: FEC Chair Lays Down the Law on Foreign Help*, POLITICO (June 13, 2019, 8:32 PM), <https://www.politico.com/story/2019/06/13/fec-election-foreign-trump-1364598>

[<http://web.archive.org/web/20200331172858/https://www.politico.com/story/2019/06/13/fec-election-foreign-trump-1364598>].

446. Jordain Carney, *Senate GOP Blocks Bill to Require Campaigns Report Foreign Election Assistance*, HILL (June 13, 2019, 4:10 PM), <https://thehill.com/blogs/floor-action/senate/448452-senate-gop-blocks-bill-to-require-campaigns-report-foreign-election>

[<http://web.archive.org/web/20200331171652/https://thehill.com/blogs/floor-action/senate/448452-senate-gop-blocks-bill-to-require-campaigns-report-foreign-election>].

447. Jacob Rosenberg, *Republican Senators Are Now Admitting Trump’s Pressure on Ukraine Was Wrong*, MOTHER JONES (Feb. 2, 2020), <https://www.motherjones.com/politics/2020/02/republicans-senators-are-now-admitting-trumps-pressure-on-ukraine-was-wrong/>

[<http://web.archive.org/web/20200331172528/https://www.motherjones.com/politics/2020/02/republicans-senators-are-now-admitting-trumps-pressure-on-ukraine-was-wrong/>].

448 The Intelligence Authorization Act for Fiscal Year 2021 incorporates a “Duty to Report Counterintelligence Threats to Campaigns.” S. 3905, 116th Cong. § 506 (2020); see also S.3905 – *Intelligence Authorization Act for Fiscal Year 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/3905?q=%7B%22search%22%3A%5B%22S.+3905%22%5D%7D&s=5&r=1>

chance to revisit this issue may come up in the context of the House of Representatives reviewing S.1321, the Defending the Integrity of Voting Systems Act.⁴⁴⁹ The Senate passed this legislation, which would make it a criminal offense to hack a computer designated as part of a voting system or for the administration of a federal election.⁴⁵⁰ The legislation has been referred to the House Judiciary Committee.⁴⁵¹

Lastly, Congress needs to continue to prioritize funding for election security and develop a way to make it predictable and sustainable for states (i.e., include it as part of annual appropriations).

IV. CONCLUSION

As the Congressional Task Force on Election Security noted: Russian interference in the 2016 [p]residential election was a watershed moment in our democracy. By weaponizing the information we consume, eroding confidence in our political institutions, and pressure-testing the equipment we use to cast our ballots on Election Day, the Kremlin was able to use the democratic process as an attack vector.⁴⁵²

In arguing for congressional action, the Task Force stressed that Congress must understand three vital truths: “Election Security is National Security”; “Election Infrastructure is Critical Infrastructure”; and “Russia Will Continue its Efforts to Undermine Western Democracies and Sophisticated, State-sponsored Actors Will Continue to Pursue Cyberattacks.”⁴⁵³ The paper argued that Congress has the authority, the means, and the mandate to protect our electoral infrastructure. Election security IS national security.

Throughout the most recent impeachment debates, several members—including the Speaker of the House of Representatives, Representative Nancy Pelosi—recited the oft-quoted anecdote regarding Benjamin Franklin.⁴⁵⁴

[<http://web.archive.org/web/20200728042153/https://crsreports.congress.gov/product/pdf/R/R46146>] (follow “Text” tab link). The Bill has been reported out from the Senate Select Committee on Intelligence. *Id.*

449. S. 1247, 116th Cong. (2019) (“[broadening] the definition of ‘protected computer’ for purposes of computer fraud and abuse offenses, to include a computer that is part of a voting system”).

450. *Id.*

451. *Id.*

452. CONG. TASK FORCE ON ELECTION SECURITY REPORT, *supra* note 11, at 32.

453. *Id.* at 32–33.

454. Gillian Brockell, ‘A Republic, If You Can Keep It’: Did Ben Franklin Really Say Impeachment Day’s Favorite Quote?, WASH. POST (Dec. 18, 2019, 6:36 PM),

On the final day of the Constitutional Convention in 1787, when our Constitution was adopted, Americans gathered on the steps of Independence Hall to await the news of the government our Founders had crafted. They asked Benjamin Franklin, ‘What do we have: a republic or a monarchy?’ Franklin replied: ‘A republic, if you can keep it.’⁴⁵⁵

During her remarks announcing the impeachment inquiry, Speaker Pelosi flatly stated that it was Congress’s “responsibility to keep it.”⁴⁵⁶ If we are to protect our republic from the threats of foreign interference, Congress must act immediately to address the vulnerabilities to our election infrastructure in order to restore confidence in our democratic process. The Founding Fathers would expect nothing less.

<https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote/>
[<http://web.archive.org/web/20200331064542/https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote/>].

455. Press Release, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), <https://www.speaker.gov/newsroom/92419-0>
[<http://web.archive.org/web/20200331065111/https://www.speaker.gov/newsroom/92419-0>].

456. *Id.*

APPENDIX: LEGISLATION ADDRESSING RECOMMENDATIONS FROM THE
CONGRESSIONAL TASK FORCE ON ELECTION SECURITY⁴⁵⁷

Recommendation One: Federal Funds Should be Provided to Help States
Replace Aging, Vulnerable Voting Machines with Paper Ballots

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 101: Voting system security grants	H.R. 1	For the People Act of 2019	- Would require paper ballots in federal elections - Would authorize federal funding to assist states to upgrade election equipment or otherwise enhance security, including by implementing risk-limiting audits	Passed House (234- 193), 03/08/2019.
	H.R. 1158	Consolidated Appropriations Act, 2020	- Appropriated \$425m to EAC for election security grants	Became Pub. L. No. 116-93, 12/20/2019.

457. R. SAM GARRETT ET AL., CONG. RESEARCH SERV., R46146, CAMPAIGN AND ELECTION SECURITY POLICY: OVERVIEW AND RECENT DEVELOPMENTS FOR CONGRESS 31 (2020), <https://crsreports.congress.gov/product/pdf/R/R46146> [<https://web.archive.org/web/20200728042153/https://crsreports.congress.gov/product/pdf/R/R46146>]. This Table was adapted from a Table listed in this publication. A column was added identifying H.R. 5011, the Election Security Act, and the pending legislation was aligned against the recommendations contained in the Congressional Task Force Report.

			to states to “improve the administration of elections for Federal office, including to enhance election technology and make election security improvements”	
H.R. 748	Coronavirus Aid, Relief, and Economic Security (CARES) Act		- Appropriated \$400m to EAC for election security grants for states “to prevent, prepare for, and respond to coronavirus, . . . for the 2020 Federal election cycle.”	Became Pub. L. No. 116-136, 03/27/2020.
H.R.6800	Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act		- Would appropriate \$3.6bn to EAC for election resilience grants to states “for contingency planning, preparation, and resilience of elections for Federal.”	Passed House (2008-199), 05/15/2020.
H.R. 2722	Securing America’s Federal Elections		- Would require use of voter-verified paper ballots	Passed House (225-184), 06/27/2019.

		(SAFE) Act	- Would specify ballot printing and accessibility requirements	
	H.R. 3351	Financial Services and General Government Appropriations Act, 2020	- In addition to providing some relevant agency appropriations, appropriate funds (Title V) to EAC for disbursement to obtain “qualified” election equipment (including voter-verified paper audit trail)	Passed House (224-196), 06/26/2019; <i>see also</i> Pub. L. No. 116-93.
	S. 2524	Financial Services and General Government Appropriations Act, 2020	- In addition to providing some relevant agency appropriations, would appropriate funds (Title V) to EAC for disbursement to states to “improve the administration of elections for Federal office, including to enhance election technology and make election security improvements”	Reported (S. REP. 116-111, (2019); <i>see also</i> Pub. L. No. 116-93).

Recommendation Two: States Should Conduct Risk-Limiting Post-Election Audits

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 111: Grants to states for conducting risk-limiting audits of results of elections	H.R. 1	For the People Act of 2019	- Would authorize federal funding to assist states to upgrade election equipment or otherwise enhance security, including by implementing risk-limiting audits	Passed House (234-193), 03/08/2019.
Sec. 112: GAO analysis of effects of audits	H.R. 1158	Consolidated Appropriations Act, 2020	- In addition to providing some relevant agency appropriations, appropriated \$425m to EAC for election security grants to states to “improve the administration of elections for Federal office, including to enhance election technology and make election security improvements”	Became Pub. L. No. 116- 93, 12/20/2019.
	H.R. 2722	Securing America’s Federal Elections	- Among other provisions, would amend HAVA to authorize grants to	Passed House (225-184), 06/27/2019.

		(SAFE) Act	states for upgrading election equipment cybersecurity, and risk-limiting audit	
	S. 2524	Financial Services and General Government Appropriations Act, 2020	- In addition to providing some relevant agency appropriations, would appropriate funds (Title V) to EAC for disbursement to states to “improve the administration of elections for Federal office, including to enhance election technology and make election security improvements”	Reported (S. REP. 116-111, (2019); <i>see also</i> Pub. L. No. 116-93).

Recommendation Three: Federal Funds Should Be Provided to Help States Upgrade and Maintain IT Infrastructure, Including Voter Registration Databases

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
<p>Sec. 101: Voting system security grants</p> <p>Sec 102: Coordination of voting system security activities with use of</p>	H.R. 2722	Securing America’s Federal Elections (SAFE) Act	- Among other provisions, would amend HAVA to authorize grants to states for upgrading election equipment cybersecurity, and risk- limiting audit	Passed House (225- 184), 06/27/2019.
<p>requirements payments and election administration requirements under Help America Vote Act of 2002</p> <p>Sec 121: Election Infrastructure Innovation Grant Program</p>	H.R. 1158	Consolidated Appropriations Act, 2020	- Appropriated \$425m to EAC for election security grants to states to, “improve the administration of elections for Federal office, including to enhance elections technology and make security improvements.”	Became Pub. L. No. 116-93, 12/20/2019.

H.R. 748	Coronavirus Aid, Relief, and Economic Security (CARES) Act	- Appropriated \$400m to EAC for election security grants for states, “to prevent, prepare for, and respond to coronavirus, . . . for the 2020 Federal election cycle.”	Became Pub. L. No. 116-136 03/27/2020.
H.R. 6800	Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act	- Would appropriate \$3.6bn to EAC for election resilience grants to states, “for contingency planning, preparation, and resilience of elections for Federal office.”	Passed House (208-199) 05/15/2020.
S. 2524	Financial Services and General Government Appropriations Act, 2020	- In addition to providing some relevant agency appropriations, would appropriate funds (Title V) to EAC for disbursement to states to “improve the administration of elections for Federal office, including to enhance	Reported (S. REP. 116-111, (2019); <i>see also</i> Pub. L. No. 116-93).

			election technology and make election security improvements”	
	H.R. 4990	Election Technology Research Act of 2019	- Would direct NIST, in collaboration with National Science Foundation, to carry out a research program on voting systems, including cybersecurity; end-to-end verifiable systems; accessibility and human-technology interface; voter privacy and data protections; and audit methods	Science, Space, and Technology Committee ordered to complete report, 11/14/2019.

Recommendation Four: Election Technology Vendors Must Secure Their Voting Systems

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 101: Voting system security grants	H.R. 2722	Securing America’s Federal Elections (SAFE) Act	- Would require states to “seek to ensure” that voting equipment is manufactured in the United States	Passed House (225-184), 06/27/2019.
	H.R. 4990	Election Technology Research Act of 2019	- Would direct NIST, in collaboration with the EAC, to update the HAVA voting system certification process - Would amend HAVA voting systems definition to include other elements of the election system; and for other purposes.	Science, Space, and Technology Committee ordered to complete report, 11/14/2019.

Recommendation Five: The Federal Government Should Develop a National Strategy to Counter Efforts to Undermine Democratic Institutions

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 301: National strategy to protect United States democratic institutions	H.R. 1	For the People Act of 2019	- Would require developing a national strategy to safeguard democratic institutions	Passed House (234-193), 03/08/2019.
Sec. 302: National commission to protect United States democratic institutions	S. 1589	Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020	- Would require DNI, in consultation with various other agency heads, to develop “whole-of- government” strategy for protecting U.S. “electoral systems and processes” from Russian interference (§ 504) - Would require DNI designation of counterintelligence officer to coordinate election security counterintelligence (§ 509)	Reported (S. REP. 116-47 (2019); <i>see also</i> Pub. L. No. 116- 92).
	S. 1790	National Defense Authorization Act for Fiscal Year 2020	- Required DNI, in consultation with various other agency heads, to develop “whole-of- government”	Became Pub. L. No. 116- 92, 12/20/2019.

			<p>strategy for protecting U.S. “electoral systems and processes” from Russian interference (§ 6504)</p> <p>- Required DNI designation of counterintelligence officer within National Counterintelligence and Security Center to coordinate election security counterintelligence (§ 6508)</p>	
H.R. 3494	Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020	<p>- Among other provisions, would require (Title XXV) development of national strategy for countering Russian interference in U.S. election</p> <p>- Would require DNI designation of counterintelligence officer to coordinate election security counterintelligence</p>	Passed House (397-31), 07/17/2019; <i>see also</i> Pub. L. No. 116-92.	
H.R. 753	Global Electoral Exchange Act of 2019	- Would direct Secretary of State to establish a Global Electoral Exchange Program to promote and exchange international best election practices (including, among other practices, cybersecurity;	Passed House (voice vote), 05/20/2019.	

			transmitting results; data transparency; and election dispute resolution)	
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Recommendation Six: The Intelligence Community Should Conduct Pre-Election Threat Assessments Well in Advance of Federal Elections

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 202: Timely threat information Sec. 203: Security clearance assistance for election officials Sec. 204: Pre-election threat assessments	H.R. 4617	Stopping Harmful Interference in Elections for a Lasting Democracy Act (SHIELD Act)	- Among other provisions, would require political committees to report to the FBI and FEC offered or proposed contributions, coordination, or collaboration with foreign nationals - Would require FBI reporting to Congress of foreign interference - Would require FEC to notify states of foreign national disinformation campaigns	Passed House (227-181), 10/23/2019.
	H.R. 3494	Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal Years 2018,	- Would specify various reporting and congressional briefing requirements concerning election interference	Passed House (397-31), 07/17/2019; <i>see also</i> Pub. L. No. 116-92.

		2019, and 2020		
S. 1060	Defending Elections from Threats by Establishing Redlines Act of 2019		- Among other provisions, would require regular federal government assessments of foreign interference in U.S. elections, and would require imposing sanctions in such cases	Hearing held, 07/18/2019.
H.R. 1	For the People Act of 2019		- Would require election-threat reports among federal and state governments	Passed House (234-193), 03/08/2019.
S. 1589	Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020		- Would require (Title IV) assessments by DNI of foreign interference in elections (§ 408) and (Title V) reports to Congress from Under Secretary of Homeland Security for Intelligence and Analysis on anticipated future attacks (§ 501); and DNI, in consultation with various other agency heads, pre- election foreign intelligence threats (§ 503) - Would require DNI, in consultation with various other agency heads, to	Reported (S. REP. 116-47 (2019); <i>see also</i> Pub. L. No. 116- 92).

			<p>make publicly available pre-election reports on counterintelligence and cyber threats to federal campaigns (§ 506)</p> <p>- Would require DNI, FBI Director, and Secretary of Homeland Security to brief Congress if they jointly determine that “significant cyber intrusion or active measures campaigns” intended to influence federal elections (§ 508)</p>	
S. 1790	National Defense Authorization Act for Fiscal Year 2020	<p>- Among other provisions, would require reports to Congress from Under Secretary of Homeland Security for Intelligence and Analysis on cyberattacks on anticipated future attacks (§ 6501); DNI, in consultation with various other agency heads, on pre-election foreign intelligence threats (§ 6503)</p> <p>- Would require DNI, FBI Director, and Secretary of Homeland Security to brief Congress if they jointly determine that</p>	Became Pub L. No. 116-92, 12/20/2019.	

			“significant cyber intrusion or active measures campaigns” intended to influence federal elections (§ 6507)	
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Recommendation Seven: DHS Should Maintain the Designation of Election Infrastructure as a Critical Infrastructure Subsector

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 103: Incorporation of definition of election infrastructure [into the Help America Vote Act of 2001]	H.R. 1	For the People Act of 2019	- Would codify DHS “critical infrastructure” designation	Passed House (234-193), 03/08/2019.
Sec 201: Election infrastructure designation [into the Homeland Security Act of 2002]	S. 482	Defending American Security from Kremlin Aggression Act of 2019 (DASKA)	- Among other provisions, would prohibit damaging a critical infrastructure computer, including those related to voter registration and voting machines	Reported, 12/18/2019.

Recommendation Eight: Empower Federal Agencies to Be Effective
Partners in Pushing out Nationwide Security Reforms

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec 101: Voting system security grants Sec. 205: Security risk and vulnerability assessments	H.R. 1	For the People Act of 2019	- Would expedite security clearances for election officials	Passed House (234-193), 03/08/2019.
	S. 1846	State and Local Government Cybersecurity Act of 2019	- Among other provisions, would add “entit[ies]” that collaborate with state and local “election officials” as permissible participants in DHS National Cybersecurity and Counterintelligence Center (NCCIC)	Passed Senate (unanimous consent), 11/21/2019.
	S. 1589	Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal	- Would require DNI to assist DHS in providing security clearances and share information with state election officials (§ 507) - Would require	Reported (S. REP. 116-47 (2019); <i>see also</i> Pub. L. No. 116- 92).

		Years 2018, 2019, and 2020	DNI, in consultation with various other agency heads, to make publicly available pre-election reports on counterintelligence and cyber threats to federal campaigns (§ 506)	
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Recommendation Nine: Establish Clear and Effective Channels for Sharing Threat and Intelligence Information with Election Officials

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 301: National strategy to protect United States democratic institutions	S. 1846	State and Local Government Cybersecurity Act of 2019	- Among other provisions, would add “entit[ies]” that collaborate with state and local “election officials” as permissible participants in DHS National Cybersecurity and Counterintelligence Center (NCCIC)	Passed Senate (unanimous consent), 11/21/2019.
Sec. 203: Security clearance assistance for election officials				
	S. 1589	Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal Years 2018,	- Would require DNI to assist DHS in providing security clearances and share information with state election officials (§507) - Would require DNI, in consultation with	Reported (S. REP. 116-47 (2019); <i>see also</i> Pub. L. No. 116-92).

		2019, and 2020	various other agency heads, to make publicly available pre-election reports on counterintelligence and cyber threats to federal campaigns (§ 506)	
	H.R. 1	For the People Act of 2019	- Would expedite security clearances for election officials	Passed House (234-193), 03/08/2019.

Recommendation Ten: States Should Prioritize Cybersecurity Training

H.R. 5011– Election Security Act	Bill Number	Short Title	Summary	Latest Action
Sec. 101: Voting system security grants Sec 102: Coordination of voting system security activities with use of requirements payments and election administration requirements under Help America Vote Act of 2002	H.R. 1158	Consolidated Appropriations Act, 2020	- Appropriated \$425m to the EAC for election security grants to states to “improve the administration of elections for Federal office, including to enhance election technology and make election security improvements.”	Became Pub. L. No. 116- 93, 12/20/20 19.

	H.R. 748	Coronavirus Aid, Relief, and Economic Security (CARES) Act	Appropriated \$400m to EAC for election security grants for states “to prevent, prepare for, and respond to coronavirus, . . . for the 2020 Federal election cycle.”	Became Pub. L. No. 116-136 03/27/2020.
	H.R. 6800	Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act	- Would appropriate \$3.6bn to EAC for election resilience grants to states, “for contingency planning, preparation, and resilience of elections for Federal.”	Passed House (2008-199) 05/15/2020.

Additional Efforts Beyond the Recommendations

Bill Number	Short Title	Summary	Latest Action
H.R. 1	For the People Act of 2019	- Would include electronic poll books in HAVA voting systems standards - Would require FEC reporting to Congress on foreign funds in federal elections - Would amend FECA foreign national prohibition to include state and local ballot initiatives	Passed House (234-193), 03/08/2019.
H.R. 4617	Stopping Harmful	- Would require political committees to establish	Passed House (227-181),

	Interference in Elections for a Lasting Democracy Act (SHIELD Act)	foreign contact reporting compliance system - Would require FEC independent report on “media literacy” and “online political content” consumption	10/23/2019.
S. 482	Defending American Security from Kremlin Aggression Act of 2019 (DASKA)	- Would require Secretary of State and DNI to report to Congress on Russian election interference	Reported, 12/18/2019.
H.R. 2500	National Defense Authorization Act for Fiscal Year 2020	- Among other provisions, would require DNI, in consultation with FBI, NSA, and CIA directors, to report to Congress on Russian interference with U.S. elections (§ 1240B)	Passed House (220-197), 07/12/2019; <i>see also</i> Pub. L. No. 116-92).
S. 2065	Deepfake Report Act of 2019	- Would require reports from Secretary of Homeland Security about the state of “digital content forgery technology”	Passed Senate (unanimous consent), 10/24/2019.
H.R. 3501	Safeguard Our Elections and Combat Unlawful Interference in Our Democracy Act (SECURE Our Democracy Act)	- Would impose financial and immigration sanctions on all foreign individuals who have engaged in U.S. election interference since January 2015; State Department would identify individuals who have engaged or assisted in interference efforts to appropriate congressional	Foreign Affairs Committee ordered to complete report, 07/17/2019.

		committees	
H.R. 4617	Stopping Harmful Interference in Elections for a Lasting Democracy Act (SHIELD Act)	<ul style="list-style-type: none"> - Contains Honest Ads Act provisions, which would extend certain disclaimer requirements to online political advertising, and require online platforms to maintain publicly available advertising data - Would clarify various aspects of FECA foreign-national prohibition; amend FECA foreign national prohibition to include providing or offering nonpublic campaign material - Contains Deceptive Practices and Voter Intimidation Prevention Act of 2019 provisions, which would prohibit providing false elections information or interference with registration - Would amend Immigration and Nationality Act to prohibit U.S. admission for persons believed to have interfered with elections - Would amend FECA to prohibit “materially deceptive media” (including “deepfakes”) sixty days before elections, unless media contains a disclaimer noting such manipulation 	Passed House (227-181), 10/23/2019.
H.R. 4782	National Commission on Online Platforms and Homeland Security Act	<ul style="list-style-type: none"> - Would establish National Commission on Online Platforms and Homeland Security to examine how, or whether, online platforms have been used to promote violence, terrorism, or 	Homeland Security Committee ordered to complete report, 10/23/2019.

		foreign influence campaigns (including in elections) - Would require DHS Under Secretary for Science and Technology to conduct research on such topics	
S. 482	Defending American Security from Kremlin Aggression Act of 2019 (DASKA)	- Would impose immigration restrictions and financial restrictions for foreign interference in U.S. elections	Reported, 12/18/2019.
S. 1321	Defending the Integrity of Voting Systems Act	- Would amend Computer Fraud and Abuse Act (CFAA) to add voting systems and elections	Passed Senate (unanimous consent), 07/17/2019.
S. 1328	Defending Elections Against Trolls from Enemy Regimes (DETER) Act	- Would designate foreign persons as ineligible for entry to the United States, or subject to deportation, if those persons are believed to have interfered with U.S. elections or to be seeking entry to interfere in U.S. elections	Passed Senate (unanimous consent), 06/03/2019.
S. 1589	Damon Paul Nelson and Matthew Young Pollard Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020	- Would require (Title IV) assessments by DNI of foreign interference in elections (§ 408) and (Title V) reports to Congress from (1) Under Secretary of Homeland Security for Intelligence and Analysis on cyberattacks on election infrastructure during 2016 U.S. presidential election	Reported (S. REP. 116-47 (2019); <i>see also</i> Pub. L. No. 116-92).

		foreign interference; (2) DNI on Intelligence Community posture and analytical capabilities during 2016 election interference (§ 502); and (3) DNI, in consultation with various other agency heads, on Russian influence campaigns directed at non-U.S. elections (§ 505)	
S. 1790	National Defense Authorization Act for Fiscal Year 2020	- Among other provisions, required reports to Congress from (1) Under Secretary of Homeland Security for Intelligence and Analysis on cyberattacks on election infrastructure during 2016 U.S. presidential election foreign interference; (2) DNI on Intelligence Community posture and analytical capabilities during 2016 election interference (§ 6502); and (3) DNI, in consultation with various other agency heads, on Russian influence campaigns directed at non-U.S. elections (§ 6505)	Became Pub. L. No. 116-92, 12/20/2019.