

ELECTION-RELATED SEARCH WARRANTS

Abstract

The Fourth Amendment protects against unreasonable searches and seizures. In most instances, that standard requires a warrant issued upon a presentation of probable cause. Some contexts demand less. But—just as important, and underrecognized—some contexts demand more.

An abundance of scholarship and caselaw explores the special circumstances in which searches or seizures may be constitutionally “reasonable” despite the absence of probable cause. But the alternative has drawn remarkably little attention: special circumstances in which searches or seizures may be unreasonable despite the presence of probable cause. This timely Essay explores one such application of that alternative: an application for a warrant to seize election materials while election results are pending.

The Essay, by faculty with U.S. Department of Justice experience on both the civil side and criminal side of election inquiries, reviews the reasonableness of a search warrant to seize election materials while results are pending. It articulates the unique imposition that a federal seizure of election materials would entail. It offers an analysis of the DOJ’s authority to enforce federal election statutes that reveals limits not before discussed in legal scholarship and relevant to the disposition of a warrant application in this context. And it examines, also for the first time in academic work, the specific constraints of a statute governing DOJ’s civil access to election records that should also bear on the DOJ’s authority to access records in the criminal sphere. Finally, in the event that federal access to election records is truly necessary while results are pending, the Essay closes with a recommendation for structuring warrants for election materials, consistent with the constitutional command and the statutory structure above.

ELECTION-RELATED SEARCH WARRANTS

Justin Levitt[†] and John Keller^{*}

The issuance of a search warrant is a meaningful responsibility. A warrant is the presumptive device mediating law enforcement entry into spaces where they are otherwise not permitted to be, and the seizure of items and data they are otherwise not permitted to obtain.¹ Judges with the obligation to review warrants are keenly attuned to the requirement that prosecutors and law enforcement officers must present articulable facts indicating that particular evidence of criminal activity will likely be found in a particular space before a warrant may issue.² But the regular application of this standard, across a wide variety of disparate contexts, may obscure the fact that there are discrete and less familiar circumstances in which further caution may be warranted, even beyond the requirement of probable cause. And while there is an abundance of both scholarship and caselaw exploring the special circumstances in which searches or seizures may be constitutionally “reasonable” despite the absence of probable cause, comparatively little attention has focused on the alternative: special circumstances in which searches or seizures—or at least, expansive searches and seizures—may be unreasonable despite the presence of probable cause. An application for a warrant to seize election materials while election results are pending offers fertile ground for exploration of this underappreciated side of the “reasonableness” inquiry, and counsels caution for conscientious magistrates.

[†] Professor of Law and Gerald T. McLaughlin Fellow, Loyola Law School, Los Angeles. I had the privilege to serve as the Deputy Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice, supporting (*inter alia*) career attorneys in enforcing federal voting statutes. We are grateful to Marie Beld, Avi Kapur, and David Kopelev for their research assistance and to Rich Bernstein, Rick Hasen, Jacob Humerick, Orin Kerr, Derek Muller, Sasha Natapoff, Chelsea Rice, Cameron Schroeder, Sam Trepel, and Shelby Wayment for their helpful comments and suggestions.

^{*} Partner at Walden Haran Williams LLP and Adjunct Professor at the Georgetown University Law Center. I was privileged to previously serve as the career Acting Chief and Principal Deputy Chief of the Public Integrity Section of the U.S. Department of Justice and as the Head of the Attorney General’s Election Threats Task Force.

¹ A warrant is not constitutionally or statutorily required, of course, for every law enforcement attempt to access particular spaces or items. *See, e.g.,* *Lange v. California*, 594 U.S. 295, 298 (2021); 18 U.S.C. § 2236.

² U.S. CONST. amend. IV; Fed. R. Crim. Pro. 41; *see, e.g.,* *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

I. SEARCH AND SEIZURE IN SPECIAL CIRCUMSTANCES

The Federal Rules of Criminal Procedure, authorized by statute³ and following the Constitution, create a general duty for federal judges⁴ to issue warrants when presented with facts establishing probable cause: “After receiving an affidavit or other information, a magistrate judge . . . must issue the warrant if there is probable cause to search for and seize a person or property”⁵

That said, the Federal Rules also acknowledge that the default standards for issuance of a warrant may give way in unusual situations. The same provision governing the general standards above additionally cautions that “[t]his rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.”⁶ Indeed, the acknowledgment of special circumstances is constitutionally required: the Fourth Amendment forbids “unreasonable” searches and seizures, even when supported by facts demonstrating probable cause.⁷

Scholars and courts have, of course, long recognized that the ultimate Fourth Amendment touchstone for the constitutionality of a search or seizure is reasonableness, rather than the textually distinct preconditions for

³ 28 U.S.C. § 2072.

⁴ While this piece reflects on the issuance of a federal warrant to federal officials, similar considerations will attend the issuance of a warrant in the context of state law enforcement.

⁵ Fed. R. Crim. Pro. 41(d)(1).

⁶ Fed. R. Crim. Pro. 41(a)(1) (emphasis added). While admittedly textually ambiguous, the emphasized language is best read to recognize that Rule 41 does not modify the issuance and execution of a warrant in special circumstances. The alternative—a provision that the Rule does not modify any statute regulating the issuance and execution of a warrant in special circumstances—would render that very provision superfluous. Every statute that regulates the issuance and execution of a search warrant is necessarily a statute that regulates search or seizure, and is already covered in full by the first phrase of the sentence.

⁷ U.S. Const. amend. IV; *e.g.*, *Winston v. Lee*, 470 U.S. 753, 759-63 (1985) (“A compelled surgical intrusion into an individual’s body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”); *Stanford v. Texas*, 379 U.S. 476, 480-81 (1965) (finding that a warrant for the seizing of unspecified literary material was “unreasonable” even if it “sufficiently specified the offense believed to have been committed and was issued upon probable cause”); *cf.* *Rochin v. California*, 342 U.S. 165 (1952) (invalidating an unreasonable search based on constitutional due process).

a warrant.⁸ In several special circumstances, the Supreme Court has held that a search or seizure is constitutionally reasonable even despite the absence of probable cause.⁹ The notion that the “reasonableness” of a search or seizure does not run in lockstep with a warrant issued upon probable cause, however, is not just a one-way ratchet. Just as searches or seizures in special circumstances may be constitutionally “reasonable” despite the absence of probable cause, searches or seizures in special circumstances may be constitutionally “unreasonable” even in the presence of probable cause. Perhaps because such circumstances are rare, they have provoked exceedingly little attention in academic scholarship. But “rare” is not “nonexistent.”

Courts have recognized several situations in which the normal conditions for issuing or executing a warrant, even given probable cause, must yield to special circumstances in order to ensure that the resulting search or seizure is reasonable. Those include contexts with constitutional provenance, like searches or seizures implicating the First Amendment,¹⁰ or the Speech or Debate Clause,¹¹ or the common-law attorney-client privilege given constitutional resonance by the Fifth and Sixth Amendments.¹² They

⁸ See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 202-07 (1993).

⁹ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-40 (2000) (cataloguing several of these contexts); see also *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (border search); *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (search incident to arrest); *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968) (brief investigatory stop); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449-453 (1990) (sobriety checkpoint); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009) (schools); *Florence v. Bd. of Freeholders of Burlington*, 566 U.S. 318, 330 (2012) (jails).

¹⁰ See, e.g., *Stanford*, 379 U.S. at 480-81, 485 (requiring “the most scrupulous exactitude” in describing the things to be seized when the things to be seized are books); *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (“Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved.”).

¹¹ See, e.g., *United States v. Rayburn House Office Bldg., Rm. 2113*, 497 F.3d 654, 661-63 (D.C. Cir. 2007) (carefully structuring the procedure for executing a warrant to search a sitting Congressman’s office to accommodate Speech and Debate Clause concerns).

¹² See, e.g., *In re Sealed Search Warrant*, 11 F.4th 1235, 1249-51 (11th Cir. 2021) (approving a carefully structured procedure — and reviewing other circuits’ approval of carefully structured procedures — for executing a warrant to search an attorney’s office to accommodate concerns over the breach of attorney-client and work-product privileges).

also include searches and seizures using “technologically supercharged surveillance techniques” that risk simple warrants becoming general warrants.¹³

Congress has codified some of those special circumstances—in the federal wiretap statutes, for instance¹⁴—and also expanded to others protections beyond probable cause. For example, federal law restricts the issuance of a warrant in most circumstances for work product or recordings in the possession of a would-be author who is not personally involved in committing the pertinent crime.¹⁵ And in another example, federal law restricts the issuance of a warrant for records relating to federally supported education, prevention, or treatment of substance use disorder, without a special consideration of good cause over and above the probability of finding pertinent evidence, including a weighing of injury to the patient, to the physician-patient relationship, and to treatment services.¹⁶

The ongoing conduct or resolution of an election represents another special circumstance with constitutional imprimatur,¹⁷ counseling rigorous attention in the evaluation of a search warrant for election-related materials to ensure that an authorized search or seizure is constitutionally “reasonable.”¹⁸ To be sure, there is little caselaw concerning the issuance

¹³ See generally, e.g., Susan Freiwald & Paul Ohm, *Supervarrants*, 68 ARIZ. L. REV. 359 (2026) (discussing the ways in which courts require officials executing such a warrant to abide by specific procedures over and above a showing of probable cause, including minimizing the collection of nonresponsive information, articulating the specific necessity for substantially invasive means, and following a strict search protocol with a requirement to seek further judicial authorization in the event of a claimed need to deviate from that protocol); see also Ric Simmons, *Technology-Enhanced Surveillance by Law Enforcement Officials*, 60 N.Y.U. Ann. Surv. Am. L. 711, 722-26 (2005).

¹⁴ Title III of the Omnibus Crime Control and Safe Streets Wiretap Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211, *codified in relevant part as amended at* 18 U.S.C. 2518, contains several requirements over and above standard probable cause, including procedures designed to ensure the sort of minimization, necessity, and iteration described by Professors Freiwald and Ohm, *supra* note 13.

¹⁵ 42 U.S.C. § 2000aa.

¹⁶ 42 U.S.C. § 290dd-2(b)(2)(C), (c); 42 C.F.R. §§ 2.63, 2.65(d), 2.66(c) (implementing that mandate); see also 38 U.S.C. § 7332(b)(2)(D) (providing similar protections for recipients of Veterans’ Administration services).

¹⁷ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (reiterating that voting “is regarded as a fundamental political right, because preservative of all rights”).

¹⁸ Some may wonder whether Fourth Amendment rights are even implicated in an application for a search warrant for materials like election records held by counties or

municipalities. To some degree, the presence or absence of these rights in election records may not be the most pertinent question in the context of a real-world dispute: federal officials are prohibited by statute from searching any building or property “without reasonable cause” in the absence of a warrant, *see* 18 U.S.C. § 2236, and the Rule 41 procedures governing issuance of a warrant require attention to special circumstances, *see* text accompanying note 6, so the same considerations required by the constitution also seem to be required by federal statute.

The theoretical question, though, is intriguing. And while there is insufficient space to address the matter at length in this short paper, there are several reasons to believe that the Fourth Amendment protects local government records like election materials. First, common sense: if the Fourth Amendment provided no protection at all, the ability of federal law enforcement to forcibly enter any municipal building at will and seize whatever municipal property they chose would rest solely with the whim of Congress (and Congress’s views on both substantive authorization of the federal executive and sovereign immunity against common-law conversion), sizably upending most understandings of “Our Federalism.”

Second, whether or not local governments may assert federal constitutional rights against the states that created them, *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907), counties and municipalities may have Fourth Amendment rights of their own against the federal government. *See, e.g.*, Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. Rev. 1197, 1201, 1206 (1994) (reviewing the prosecution of local governments over 150 years, and finding that though explicit discussion of constitutional rights was sparse, “[a] municipality named as a criminal defendant enjoyed procedural rights similar to those enjoyed by natural persons”). *Cf.* *United States v. 50 Acres of Land*, 469 U.S. 24, 30-31 (1984) (allowing local governments to assert Fifth Amendment claims against the federal government); *United States v. American Library Ass’n*, 539 U.S. 194, 211 (2003) (noting that local government assertion of First Amendment claims is an open question); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (concluding, albeit with little analysis, that “a municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.”); Dave Fagundes & Darrell A.H. Miller, *The City’s Second Amendment*, 106 Cornell L. Rev. 677, 693-96 (2021) (noting that local governments may assert Tenth Amendment claims against the federal government); *cf. generally* Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389 (2013) (reviewing pockets of doctrine in which local governments assert constitutional rights even against their own states); Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C.L. Rev. 591 (2020) (articulating a theory of when local governments should be able to assert such rights); Fagundes & Miller, *supra*, at 705-07 (suggesting an approach to municipal personhood more generally), Green, *supra*, at 1215-20 (same, in the context of federal statutes creating criminal liability for “persons”).

Finally, at least with respect to ballots, local registrars may be acting as guarantors of each voter’s (admittedly unusual) Fourth Amendment interest in the integrity of her own ballot, which she gives to the registrar for the sole purpose of processing her vote. *Cf.* *Carpenter v. United States*, 585 U.S. 296, 309, 314-15 (2018) (noting, in the context of cell-site location data, that “the fact that [] information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.”); *Chatrue v. United States*, 609 U.S. ___, 2026 WL 1855568, at *15-16 (June 29, 2026) (rejecting the

of a search warrant in the context of an ongoing election. That absence exists at least in part because, in the modern era, the authors of this piece—former attorneys in the U.S. Department of Justice supporting work on election-related matters on both the civil and criminal side of the government’s efforts—are unaware of any federal application for a search warrant for election-related data or materials while voting, tabulating, certification, or the resolution of disputes concerning election results was still underway.¹⁹ Forbearance by federal law enforcement has thus far left the courts no direct opportunity to weigh in. Given the regularity of warrants issued in countless other circumstances, the unprecedented nature of a federal warrant for election-related materials before results are final would represent its own basis for courts to apply caution to such an application. But there are legal reasons beyond novelty to subject such applications to particularly close scrutiny.

notion that sharing information with a third-party provider so that a particular service may be rendered deprives that information of Fourth Amendment protection); Fagundes & Miller, *supra*, at 704 (articulating a local government’s ability to claim protection for voting rights to the extent that residents’ voting rights had been infringed). That is, a voter’s completed ballot, as a means to register that voter’s preferences, may be considered that voter’s “effect” for Fourth Amendment purposes even without a property interest in the ballot, *cf.* *Katz v. United States*, 389 U.S. 347, 352-53 (1967) (“[T]he premise that property interests control the right of the Government to search and seize has been discredited.”); *United States v. Jones*, 565 U.S. 400, 411 (2012) (noting that property interests do not define the exclusive test of a Fourth Amendment intrusion); *id.* at 414 (Sotomayor, J., concurring); *Carpenter*, 585 U.S. at 304 (same). And even if that voter has no reasonable interest in keeping the contents of her completed ballot private from the local government assigned to tally her preference, the voter might well have a constitutional interest in ensuring the “security” of their ballot—which is the textual guarantee in the Fourth Amendment itself—against an unreasonable seizure by another government preventing a registrar from properly effectuating the voter’s choice. *Cf. Chatrue*, 609 U.S. ___, 2026 WL 1855568, at *20-22 (Gorsuch, J. concurring in the judgment) (adopting a similar approach to location data).

¹⁹ Even federal warrants for election-related materials issued well after those election results are finalized may comprise a class of one. A federal warrant issued in early 2026, for a search of election records pertaining to the 2020 election in Fulton County, Georgia, was sufficiently unusual to be the source of substantial controversy, and appears to be the first of its kind. *See* *Pitts v. United States*, __ F. Supp. 3d __, 2026 WL 1970785 (N.D. Ga. May 6, 2026). And in adjudicating a motion for the return of the property pursuant to the Fulton County warrant, the court repeatedly noted that the records seized were not integral to the resolution of a pending or future election. *Id.* at *14, 24 & n. 26. A federal warrant for election-related materials while election results are still pending would appear to be truly unprecedented.

II. FACTORS BEARING ON THE “REASONABLENESS” OF ELECTION-RELATED SEARCH WARRANTS

A. Local Need(s) for Election Materials to Resolve Elections

Even when there is probable cause to believe that election-related materials may reveal evidence of a violation of federal criminal law, the nature of the election process militates strongly in favor of privileging local custody over those materials while an election is pending. To the extent that there are legitimate federal interests in election-related materials, those interests can be satisfied through access and reproduction supervised by local election officials, rather than exclusive federal custody over originals.²⁰

1. State and Local Control of the Elections Process

First, the Constitution places state and local election officials in charge of the elections process, both for federal elections and for state and local elections. The Constitution puts primary responsibility on states to prescribe the rules and run the process,²¹ within constitutional constraints.²² Congress is granted the authority to modify those rules—with more bases to modify the rules for federal elections than for their state counterparts²³—and it has utilized this power on several occasions.²⁴ However, each of those federal statutes (and constitutional provisions) sets standards for state and local officials to implement. While federal officials may ask courts to hold state and local officials to their legal obligations, no current statute allows the federal executive to displace state and local officials from their role in administering the process of running elections and tallying the

²⁰ See *infra* text accompanying notes 55-69.

²¹ U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; *id.* amend. X.

²² U.S. CONST. amend. I, V, XIV, XV, XIX, XXIV, XXVI.

²³ U.S. CONST. art. I, § 4, cl. 1; *id.* art. IV, § 4; *id.* amend. XIV, § 5; XV, § 2; XIX, § 2; XXIV, § 2; XXVI, § 2.

²⁴ See, e.g., Civil Rights Act of 1960, Pub. L. No. 86-449, *codified in relevant part at* 52 U.S.C. §§ 10101, 20701 *et seq.*; Civil Rights Act of 1964, Pub. L. No. 88-352, *codified in relevant part at* 52 U.S.C. § 10101 *et seq.*; Voting Rights Act of 1965, Pub. L. No. 89-110, *codified at* 52 U.S.C. § 10301 *et seq.*; Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, *codified at* 52 U.S.C. § 20301 *et seq.*; National Voter Registration Act, Pub. L. No. 103-31, *codified at* 52 U.S.C. § 20501 *et seq.*; Help America Vote Act, Pub. L. No. 107-252, *codified at* 52 U.S.C. § 20901 *et seq.*; Americans with Disabilities Act, Pub. L. No. 101-335, *codified in relevant part at* 42 U.S.C. § 12101 *et seq.*; Electoral Count Reform Act, Pub. L. No. 117-328, div. P, *codified in relevant part at* 3 U.S.C. § 1 *et seq.*

results.²⁵ Indeed, several federal statutes carefully confirm that state and local officials are responsible for administering elections and reporting the electoral outcomes.²⁶

2. Election Materials' Role in Dispute Resolution for State and Federal Office

In administering elections, every state creates a procedure for the resolution of disputes. Before election day and on election day, states may allow the resolution of disputes around voter eligibility; after election day, there may be further resolution of disputes around voter eligibility, and resolution of disputes around the disposition of votes or ballots. Federal law occasionally sets standards pertinent to the resolution of those disputes, but as with the front-line administration of the election, federal law leaves the dispute resolution process largely in state and local hands.²⁷ On occasion, federal courts will hear federal claims relevant to those disputes. But no statute permits federal administrative or law enforcement officials a role in resolving disputes over electoral outcomes.

The timing of this dispute resolution varies by state, and to some degree, by the nature of the office impacted. (Because of the unique constitutional imperative in the presidential context for an electoral vote and an inauguration, the schedule for resolving disputes over presidential electors

²⁵ A limited provision in the Civil Rights Act of 1960 allows courts to appoint voting referees, akin to special masters, to facilitate the registration of qualified individuals in circumstances where jurisdictions are engaged in the pattern or practice of depriving the right to vote on account of race or color. Civil Rights Act of 1960, § 601, Pub. L. No. 86-449, 74 Stat. 86, 90, *codified at* 52 U.S.C. § 10101(e). That practice proved ineffective, and was effectively superseded by a provision in the Voting Rights Act for the appointment of Federal examiners, which has since been repealed. Voting Rights Act of 1965, § 6, Pub. L. No. 89-110, 79 Stat. 437, 439, *codified at* 42 U.S.C. § 1971, *repealed by* Fannie Lou Hamer, Rosa Parks, Coretta Scott King, Cesar E. Chavez, Barbara Jordan, William Velazquez and Dr. Hector Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, § 3(c), Pub. L. No. 109-246, 120 Stat. 577, 580 (2006).

²⁶ *See, e.g.*, 52 U.S.C. § 21085 (“The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State.”); 3 U.S.C. § 5(a)(1) (“[T]he executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.”).

²⁷ *See, e.g.*, 52 U.S.C. § 21082(a)(4) (“If the appropriate State or local election official . . . determines that the individual is eligible under State law to vote, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.”).

is established by federal law and may proceed on a different timeline.²⁸) Each state has a procedure for tabulating votes cast by mail or in an early voting period, and a procedure for tabulating votes cast at precincts or polling places or local elections offices on election day—these tabulations produce preliminary results, expressly designated as such.²⁹ Each state has a procedure for resolving initial disputes over particular ballots or particular votes, and a procedure for resolving initial disputes over the tally of those preliminary results.³⁰ Each state has a procedure for certifying election tallies to produce a presumptive result more definitive than that preliminary total offered in the immediate aftermath of the close of polls.³¹ And each state has a procedure for challenging that certification before the results are truly finalized.³² Normally, states allow for several days or weeks after election day until certification (with the opportunity in most cases for certification earlier if officials are ready).³³ Post-certification challenges may take additional weeks or months to resolve.³⁴

Materials like registration records, voting and tabulation equipment, mail envelopes, and ballots are essential to the proper tallying of election results and the resolution of these disputes. In every state but Arizona, virtually all of these materials relevant to elections featuring both state and federal races necessarily pertain to both state and federal elections. When voters are registered, they are registered to participate in both state and

²⁸ See, e.g., 3 U.S.C. § 5(a)(1).

²⁹ See Election Law Program, Election Law Manual 175-78 (Alexandra Amado ed., 2d ed. 2022), <https://www.electionlawprogram.org/sites/default/files/media/document/ELM-FALL-2022.pdf>; Nat'l Ass'n of Secretaries of State, Summary: State Election Canvassing Timeframes and Recount Thresholds (updated Oct. 2024), <https://www.nass.org/sites/default/files/reports/summary-canvass-certification-laws-oct2024.pdf>.

³⁰ See Election Law Manual, *supra* note 29, at 178-81, 182-87.

³¹ See *id.* note 29, at 182.

³² See *id.* note 29, at 198-234; see generally Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEGIS. 265 (2007).

³³ See Nat'l Conference of State Legislatures, Election Certification Deadlines (updated Jan. 20, 2025), <https://www.ncsl.org/elections-and-campaigns/election-certification-deadlines>.

³⁴ See, e.g., *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009) (resolving a post-election contest to a U.S. Senate seat on June 30, close to eight months after Election Day); *Griffin v. N.C. State Bd. of Elections*, 781 F. Supp. 3d 411 (E.D.N.C. 2025) (resolving a post-election contest to a seat on the North Carolina Supreme Court on May 5, close to five months after Election Day).

federal elections; when voters check in to the polling place, they check in to participate in both state and federal elections; when voters cast their ballots, they are voting on both state and federal elections. Arizona, uniquely,³⁵ maintains a structure in which some voters may be registered to vote on federal races only, but this structure pertains to a limited pool of voters;³⁶ like voters in every other state, the vast majority of Arizona voters use materials pertaining to both state and federal elections.

This means that election-related materials are almost always relevant to more than one electoral race or contest, across multiple jurisdictions: municipal, state, and federal. Consequently, segregation of materials or removal of those materials from the proper chain of custody for one race or contest during the dispute resolution process will often have impacts on the whole.

In particular, separating local election officials from materials related to the conduct of federal elections during the time allotted for the resolution of electoral disputes will in almost all circumstances also inevitably separate those local officials from materials related to the resolution of state and local elections. And if results in just one race are the subject of the asserted need to segregate materials, separating local election officials from materials related to that contest during the time allotted for the resolution of electoral disputes will in almost all circumstances also inevitably separate those local officials from materials related to the resolution of all other contests. Separating the officials from the materials that allow them to resolve elections at a minimum delays the proper resolution of those elections. But in many circumstances, the damage might well be permanent.

3. The Limits of Federal Officials' Training

³⁵ In Arizona, every voter must be a citizen, but some voters who have not shown documentary proof of their citizenship are registered to vote on federal races only. Washington, DC, also maintains a distinct voter roll for a limited pool of voters: because noncitizens may vote in local elections (but not federal elections), some voters may be registered to vote on non-federal races only. See Nat'l Conference of State Legislatures, Legislative Approaches to Ensuring Only Citizens Vote (Apr. 27, 2026), <https://www.ncsl.org/elections-and-campaigns/legislative-approaches-to-ensuring-only-citizens-vote>.

³⁶ See Ariz. Sec'y of State, Proof of Citizenship Requirement, <https://azsos.gov/elections/voters> (last visited June 7, 2026).

Federal law enforcement agents are not trained or experienced in the proper handling of state election records or equipment in a manner that would preserve their forensic integrity or utility in properly evaluating results. (As noted above, federal law enforcement agents have no role in administering an election or resolving election disputes.) And simply collecting and preserving “the” materials would be woefully insufficient. Local election officials review registration records, pollbooks, ballot applications, and ballots to carefully separate the eligible ballots that may be counted from those that may not, and both are further separated from the provisional ballots that may require further review. Officials identify damaged ballots that must be addressed and remade before they can be accurately tabulated, and ensure that ballots already tabulated are not commingled with those that have not yet been counted. In local offices with many tens or hundreds of thousands of ballots—or local offices with millions of ballots, like Los Angeles—even the location of records within an election office may be an important part of the system designed to ensure orderly administration and accurate results. Even when operating in good faith, federal law enforcement agents untrained in these nuances may compromise rather than facilitate the resolution of an election simply in moving materials from place to place.

Federal agents are similarly not equipped to accurately tabulate ballots on varied state equipment or resolve marking errors pursuant to each state’s law and policy.³⁷ If a federal government agency were to obtain a federal search warrant to deprive a state or local election office of custody and control of voting records or equipment, the federal authorities would be unable to confidently and properly tabulate the votes and certify the result.

Under such circumstances, if materials relevant to the resolution of an election were seized subject to a federal warrant, results of both federal and state elections affected by the seized materials would remain in doubt. If federal officials were perceived to be acting in good faith, the potential for unintended commingling of valid and invalid ballots would still seriously undermine public confidence in the accuracy of eventual results. And if federal officials were not perceived to be acting in good faith, the damage to our democracy’s adherence to the fundamental principle of free and fair elections would be deeper still.

³⁷ Even federal law enforcement forensic standards for comparing or validating signatures—like those on ballot envelopes or registration cards—may be different from the standards that state law provides for comparing or validating signatures in the election process.

Even setting aside the imposition on the resolution of federal contests, such federal interference with the resolution of state and local elections should bear heavily on the decision to issue or decline to issue a warrant. The constitutional allocation of authority in the electoral realm, including the protection afforded by both the Guarantee Clause and the Tenth Amendment to the essential sovereign acts that include the constitutional resolution of elections to state government office,³⁸ would seem to limit federal authority to displace state self-governance in this fashion.

B. DOJ's Role in the Election Process

The particular role of the Department of Justice in enforcing election laws—also underappreciated in extant scholarship, which focuses more on the substance of the statutes than the nature of the authority they grant to federal law enforcement—also bears on the appropriate disposition of a federal application for a warrant for election-related materials.

The Department of Justice operates pursuant to two sets of authorities in the elections arena. One set of authorities is civil in nature; the other is criminal. Careful attention to these statutes shows that the Department of Justice's only authorization to impact the validity of discrete ballots on or after election day is through civil suits to ensure the enfranchisement of individuals who would otherwise unlawfully be excluded. In contrast, DOJ's role in addressing election misconduct and the improper participation of ineligible individuals is through criminal prosecution, not invalidation of ballots or modification of election results. Those limits, in turn, bear on the proper use of a warrant for election materials in the criminal context—and therefore the propriety of a warrant issued for election materials while results are still pending.

Federal statutes not only regulate election process, but also regulate the ways in which DOJ may enforce their substantive provisions. In the civil realm, the Civil Rights Division of the DOJ has authority to supervise enforcement of most of the federal statutes concerning election administration,³⁹ including the Civil Rights Act of 1960, the Civil Rights Act of 1964, the Voting Rights Act, the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, the Americans

³⁸ *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 918-20 (1997).

³⁹ 28 C.F.R. § 0.50.

with Disabilities Act, and the Help America Vote Act. Most of these statutes authorize the Attorney General to seek injunctive relief ensuring general compliance with the terms of federal substantive structural regulations: broad mandates setting a floor for how state and local jurisdictions conduct voter registration, authorize and send and receive mail ballots, set up polling locations, and the like. These authorizations exist to ensure that state and local procedures comply with federal requirements.

In contrast, there are relatively few civil statutes that provide the Attorney General with authority to seek injunctive relief with respect to particular voters or particular ballots. And all of those provisions authorizing injunctive relief regarding individual voters or ballots are written in one direction only: to enfranchise qualified voters who have been unlawfully excluded. So, for example, the Civil Rights Act of 1964 provides that the Attorney General may seek an injunction to prevent officials from unequally excluding qualified voters or from excluding voters on the basis of immaterial errors.⁴⁰ It does not authorize the Attorney General to seek an injunction requiring the exclusion of unqualified voters. Similarly, the Voting Rights Act of 1965 specifically authorizes the Attorney General to seek “an order directed to the State and State or local election officials to require them (1) to permit [specified] persons . . . to vote and (2) to count such votes.”⁴¹ A subsequent provision specifically authorizes the Attorney General, in a jurisdiction in which observers have been authorized, to seek “an application for an order providing for the marking, casting, and counting of the ballots of [specified qualified] persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto.”⁴² Neither provision authorizes the DOJ to discount ballots, even if cast by voters who are ineligible. Other federal statutory public enforcement authorities are similarly framed toward inclusion.⁴³ No comparable provision authorizes

⁴⁰ 52 U.S.C. § 10101(a), (c), (e). Section 10101(e) provides a particularly vigorous example: if a person has been deprived of their right to vote on account of a pattern or practice of racial discrimination, the Attorney General is required to facilitate orders specifically permitting those qualified individuals the right to vote.

⁴¹ 52 U.S.C. § 10308(d).

⁴² 52 U.S.C. § 10308(e).

⁴³ See, e.g., 52 U.S.C. § 10504 (authorizing the Attorney General to seek injunctive relief against an unlawful test or device denying citizens the right to vote, or against practices unlawfully seeking to deny the right to vote in specified ways).

the Attorney General to seek an injunction requiring the exclusion of unqualified persons.

To be sure, federal statutes preclude participation by unauthorized persons: they do not leave jurisdictions (or voters) defenseless. But the Department of Justice specifically has a different role here, with a different set of remedies. With respect to pre-election procedures, federal law speaks mostly in general terms consistent with the above: DOJ can bring injunctive relief to effectuate the provisions of the NVRA requiring states to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists,”⁴⁴ for example, or the provisions of the HAVA requiring states to execute “a system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.”⁴⁵ It is notable that those provisions concern “general program[s]” and “system[s],” not individual voters or individual ballots.

The sole capacity of the Department of Justice to address the submission or inclusion of particular unauthorized or unlawful ballots is not through invalidation of the ballots but instead through prosecution of wrongdoers to punish and deter criminal election law violations, largely under the supervisory purview of the DOJ’s Criminal Division.⁴⁶ The federal statutes offer no similar authorization of injunctive relief to exclude or invalidate particular voters or votes and do not contemplate or authorize the use of federal criminal enforcement to intervene in or assume control of the administration of an ongoing election.

This bifurcation of DOJ authority with respect to individual voters or ballots—Civil Rights Division authority to seek injunctive relief to include qualified voters in the final tally, and Criminal Division authority to prosecute unqualified voters—leaves the responsibility under federal law for injunctive efforts to exclude individual voters or ballots in the hands of private citizens, *i.e.* voters or candidates, beyond DOJ authority. These private actors have remedies, including constitutional rights subject to

⁴⁴ 52 U.S.C. § 20507(a)(4).

⁴⁵ 52 U.S.C. § 21083(a)(4).

⁴⁶ 28 C.F.R. §§ 0.50(a); 0.55(m). The sole exception for authority over election-related prosecution involves prosecution relating to voting-related discrimination or intimidation on the basis of race or color, which is handled by the Civil Rights Division. 28 C.F.R. § 0.50(a)(2).

injunctive relief under 42 U.S.C. § 1983, that are unavailable to the Department of Justice.

The allocation of authority described above is relevant to the disposition of search warrants for election materials. Enforcement of federal laws with direct impact on the validity or tallying of particular ballots is largely a matter for civil process. Conversely, criminal enforcement of the federal election laws is not designed to have a direct impact on the validity of any individual ballot. And attempts to use the federal criminal process to further others' efforts to impact the validity of individual ballots should be viewed with an eye to the DOJ's limited authorization to seek that impact directly only in an enfranchising direction.

This basic limitation on federal criminal activity has been confirmed in the longstanding internal "bible" of the Department of Justice with respect to election-related criminal process: *Federal Prosecution of Election Offenses*. This reference has served the DOJ for 50 years.⁴⁷ It was most recently revised in 2017 by Richard Pilger, who served as a career public corruption prosecutor for 30 years, and as the Director of the Election Crimes Branch of the Criminal Division for 12 of those years.⁴⁸ As that latest edition notes, with respect to federal prosecution:

It is the states that have primary authority to ensure that only qualified individuals register and vote, that the polling process is conducted fairly, and that the candidate who received the most valid votes is certified as the winner.

The federal prosecutor's role in matters involving corruption of the process by which elections are conducted, on the other hand, focuses on prosecuting individuals who commit federal crimes in connection with an election. Deterrence of future similar crimes is an important objective of such federal prosecutions. However, this

⁴⁷ See Election Crimes Branch, Public Integrity Section, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (1st ed., 1976).

⁴⁸ Richard C. Pilger, Director, Election Crimes Branch, Public Integrity Section, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed., 2017). The manual was available through the DOJ's website on the Election Crimes Branch of the Public Integrity Section up until January 14, 2026; the link there now yields a "Page Not Found" error. The manual is still available in hard copy or online through, inter alia, the U.S. Gov't Printing Office: <https://www.govinfo.gov/app/details/GOVPUB-J-PURL-gpo145659>.

deterrence is achieved by public awareness of the Department's prosecutive interest in, and prosecution of, election fraud—not through interference with the process itself.

Because the federal prosecutor's function in the area of election fraud is not primarily preventative, any criminal investigation by the Department must be conducted in a way that minimizes the likelihood that the investigation itself may become a factor in the election. The mere fact that a criminal investigation is being conducted may impact upon the adjudication of election litigation and contests in state courts. Moreover, the seizure by federal authorities of documentation generated by the election process may deprive state election and judicial authorities of critical materials needed to resolve election disputes, conduct recounts, and certify the ultimate winners. Accordingly, it is the general policy of the Department not to conduct overt investigations, including interviews with individual voters, until after the outcome of the election allegedly affected by the fraud is certified.⁴⁹

Consistent with these principles, it has been the policy of the Department for decades to generally refrain from taking any overt investigative steps during an election and instead, covertly coordinate with trusted state and local law enforcement partners if overt investigative steps (by any law enforcement body) are necessary.⁵⁰ Doing otherwise runs the risk of chilling legitimate voting and of interjecting the federal investigation itself into the adjudication of any election or ensuing contest.

⁴⁹ *Id.* at 7-8.

⁵⁰ See Justice Manual 9-85.300, Non-Interference in Elections When Conducting Federal Criminal Investigations Involving Ballot Fraud (“The Department’s role is limited to investigating and prosecuting violations of federal election laws and deterring criminal conduct. Accordingly, the Department should not engage in overt criminal investigative measures in matters involving alleged ballot fraud until the election in question has been concluded, its results certified, and all recounts and election contests concluded. Doing otherwise runs the risk of chilling legitimate voting and campaign activities and of interjecting the investigation itself into ongoing campaigns and the adjudication of any ensuing election contest. It may, however, often be appropriate, in consultation with the Public Integrity Section, to share information and allegations involving such matters with state or local authorities where an immediate need for overt measures exists.”)

C. Custody of Election Materials Under Federal Statute

The general principles above help to construe the only federal statutory provisions speaking affirmatively to the retention and preservation of election materials. These provisions, found in the Civil Rights Act of 1960, speak to civil, not criminal, process. But they show that Congress expressly provided a specific structure for the custody and maintenance of election materials, and for DOJ access to those materials under certain conditions—and that legislative judgment may inform the judicial disposition of a search warrant for the same materials. In particular, this statutory structure may be relevant to whether (and when) an application for a search warrant during the period before election results are finally resolved becomes the sort of “special circumstances” or “unreasonable” seizure requiring more stringent review, tailoring, or rejection of that warrant. And it, too, has received exceedingly little academic attention.

Section 301 of the Civil Rights Act of 1960 requires any state or local election official to “retain and preserve, for a period of twenty-two months from the date of a [federal] election, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election.”⁵¹ It permits state law to allow other state-designated custodians to manage that retention and preservation, but otherwise permits no exception.⁵² This retention requirement ensures that records will be available for state administrative process, and for state and federal judicial process if necessary, to resolve electoral disputes.

Indeed, cognizant of the state interests in facilitating the resolution of state elections, it is striking that even as the Civil Rights Act of 1960 established new authority for the Department of Justice to prosecute,⁵³ and even as it established new authority for the DOJ to enfranchise unduly excluded voters,⁵⁴ it simultaneously allowed the Department access to election records but denied the Department exclusive custody over those

⁵¹ 52 U.S.C. § 20701. The Civil Rights Act itself applies to any local, state, or federal official charged with administering an election; with the 2006 repeal of the statutory provisions providing for federal examiners, no such federal officials exist. *See* 52 U.S.C. § 20706; *supra* note 25.

⁵² 52 U.S.C. § 20701.

⁵³ *See, e.g.*, Title I of the Civil Rights Act of 1960, *codified at* 18 U.S.C. § 1509.

⁵⁴ *See* Title VI of the Civil Rights Act of 1960, *codified at* 52 U.S.C. § 10101(c), (e).

records. Section 303 of the Civil Rights Act of 1960 provides that on a sufficient statement of basis and purpose, retained election records and papers must “be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative.”⁵⁵ These authorities—to inspect, reproduce, and copy—are exclusive, not parts of an exemplary or inclusive list.⁵⁶ The location—at the principal office of the local custodian of the records, where the records are to remain, and not at either local or central DOJ facilities—is not happenstance.⁵⁷ And the choice of those particular activities at that particular location reflects a deliberate congressional policy determination. They are designed to ensure that DOJ has access to election records without establishing exclusive federal control or depriving local officials of the access they also legitimately need.

That structure—access for inspection and copying but not exclusive custody—makes sense in light of DOJ’s substantive authority.⁵⁸ To the

⁵⁵ 52 U.S.C. § 20703.

⁵⁶ In his message to Congress underscoring the need for the Civil Rights Act of 1960, President Eisenhower noted that the federal government needed “access” to election-related records in order to effectuate investigations, and therefore recommended “legislation to give the Attorney General power to inspect Federal election records, and to require that such records be preserved for a reasonable period of time so as to permit such inspection.” H.R. Doc. No. 86-75, at 2 (1959), 105 Cong. Rec. 1922 (1959).

⁵⁷ See, e.g., *Civil Rights: Hearings before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 86th Cong., 1st Sess. 211 (1959) [*House Hearings*] (“In actual operation, production would normally be at the usual place of custody of the voting records. Because of the importance of voting records and the frequent need to refer to them, we believe it preferable that the legislation [to become the Civil Rights Act of 1960] should provide for inspection at their location rather than to have them removed by subpoena to some other location.”) (statement of Attorney General Rogers); 106 Cong. Rec. 6959 (Mar. 30, 1960) (noting that a provision allowing the production of records at the local office of the United States Attorney was deleted).

⁵⁸ The structure of the Civil Rights Act’s provision for access to documentation is also consistent with the DOJ’s own regulations for obtaining documentary materials in the possession of a “disinterested third party,” like a local elections office. DOJ regulations make clear that “[a] search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought.” 28 C.F.R. § 59.4(a). An order permitting government (non-exclusive) access to election materials for purposes of making copies would seem to be a less intrusive alternative of the sort contemplated by the regulation. In the even rarer circumstance when the elections office is itself the target of the criminal investigation and not merely a disinterested third party, warrant procedures may still be modified to protect the public’s

extent that the Department of Justice seeks to exercise its authorities through civil process, the ability to inspect, reproduce, and copy election records satisfies any legitimate law enforcement need without unduly interfering with state and local officials' other election duties. And to the extent that the Department of Justice seeks to exercise its authorities through criminal process, the same should ordinarily be true. In the rare circumstances in which copies will not suffice,⁵⁹ and physical custody of original documents is required for a prosecution—and cannot be obtained through the subpoena of an election official to provide records and testimony to a court while still allowing the official to maintain custody of those records—those originals can be preserved for delivery to federal officials after the 22-month statutory period has elapsed. Federal election

interest, by requiring the involvement of an alternative local election official, *see infra* text accompanying notes 65-69.

⁵⁹ In shaping revisions to the basic search warrant procedure, the Advisory Committee responsible for the 1989 Amendments to the Federal Rules of Criminal Procedure also recognized that copies of documents would normally suffice for most prosecutorial purposes, particularly when there might be special reason to safeguard possession of the originals. In their analysis:

As amended, Rule 41(e) avoids an all or nothing approach whereby the government must either return records and make no copies or keep originals notwithstanding the hardship to their owner. The amended rule recognizes that reasonable accommodations might protect both the law enforcement interests of the United States and the property rights of property owners and holders. In many instances documents and records that are relevant to ongoing or contemplated investigations and prosecutions may be returned to their owner as long as the government preserves a copy for future use. . . . The amended rule contemplates judicial action that will respect both possessory and law enforcement interests.

Amendments to the Federal Rules of Criminal Procedure 30-31, H. Doc. No. 101-55, 101st Cong., 1st Sess. (1989). This commentary was attached to Rule 41(e), which was at the time the rule for return of property seized pursuant to a warrant. (That provision is now found at Rule 41(g).) It contemplates federal government retention of copies rather than originals, when long-term custody of originals is unnecessary but short-term custody for copying purposes is not particularly problematic. When even short-term exclusive custody for copying purposes would itself amount to public harm, as in the case of a warrant involving election materials, the flexibility embraced by the Rule would seem to similarly countenance an order precluding exclusive custody but permitting copying in the first instance. *See also* Ramsden v. United States, 2 F.3d 322, 327 (9th Cir. 1993) (noting that “the most appropriate outcome in this case is to allow [the owner of seized property] to retain the original documents, but to ensure that the Government is afforded copies of these documents,” which would be sufficient to “advance[] the Government’s legitimate law enforcement interest”).

crimes are generally subject to the same five-year statute of limitations that govern most federal crimes,⁶⁰ allowing sufficient opportunity for federal custody of election materials in proper law enforcement proceedings without any conflict with the Civil Rights Act of 1960.⁶¹

That basic structure also makes sense in light of other restrictions on federal officials. Federal statutes strictly prohibit the use of official authority for the purpose of interfering with a federal election.⁶² As noted above, given the state and local role in determining final election results, removing most election-related materials from state or local custody before results are finalized would constitute rather dramatic interference with the election. The Attorney General recognized exactly this in testimony over the legislation that became the Civil Rights Act of 1960.⁶³ And because alternative tools like inspection and copying are readily available to satisfy legitimate law enforcement interests, a claimed need for exclusive custody may yield an inference that interference is in fact the desired result. Thus, the execution of nearly any search warrant for election materials while election results are still pending should be limited to inspection and/or copying while the original materials remain in the shared custody of a state or local election official.

That said, there is one context in which federal criminal process may appropriately interfere with local custody of election materials during the statutory period. The records retention requirements of the Civil Rights Act of 1960 are themselves subject to criminal penalties.⁶⁴ And if local

⁶⁰ 18 U.S.C. § 3282.

⁶¹ In recent proceedings over the propriety of a 2026 search warrant in Fulton County, Georgia, to obtain materials from the 2020 election, the court noted specifically that the 2026 seizure “did not interfere with Fulton County’s ability to carry out the 2020 election because it happened over five years after the election took place.” *See* *Pitts v. United States*, ___ F. Supp. 3d ___, 2026 WL 1970785 at *14 (N.D. Ga. May 6, 2026); *see id.* at 14 n.26 (“Importantly, the seizure at issue in this case did not interfere with the State’s ability to conduct the 2020 election or certify election results, nor have Petitioners shown that it will hinder the State’s ability to conduct future elections.”).

⁶² 18 U.S.C. § 595.

⁶³ *See House Hearings*, *supra* note 57, at 212 (“In other words, we thought the subpoena power might be construed as an interference with the State’s power over voting, and we wanted to limit it merely to the right of inspection so we couldn’t be accused of requiring the people to produce the records in Washington or somewhere else.”) (testimony of Attorney General Rogers).

⁶⁴ 52 U.S.C. §§ 20701, 20702.

officials were inclined to violate their federal obligations with respect to preserving records, such action would frustrate not only electoral dispute resolution processes, but also federal enforcement of election laws in both the civil and criminal context. That is, the federal law requiring local officials to retain election records is a means to preserve all other procedures and electoral rights dependent on those records. An attempt to violate that very preservation obligation is thereby a first-order records custody problem.

If there is probable cause to believe that election officials will imminently destroy election records in violation of the Civil Rights Act of 1960, federal officials must be allowed to pursue expedited civil or criminal process to preserve such records—including a federal warrant for the seizure of such materials. This exception reflects the legislative history behind the records retention requirement in the Civil Rights Act itself, which was designed to thwart precisely this sort of spoliation.⁶⁵ This exception also reflects several other federal statutory or regulatory provisions restricting reliance on search warrants in sensitive situations—unless there is reason to believe that the records would be destroyed, altered, or hidden if sought by other means.⁶⁶

That said, in the event of a need for such extreme measures, a federal judge would also be empowered to attach conditions to the storage and preservation of such materials to ensure the “reasonableness” of the seizure. Such conditions might include holding the materials in joint custody with other state or local officials not subject to concerns about

⁶⁵ Hearings leading to the Civil Rights Act of 1960 explored the experience of the DOJ and the newly established Commission on Civil Rights, which were repeatedly thwarted by Alabama and Louisiana in pursuing investigations and litigation under the precursor Civil Rights Act of 1957—including state legislation authorizing the destruction of election records necessary to federal action. See *Report of the United States Commission on Civil Rights* 95 (1959) [CCR Report], <https://www.usccr.gov/files/historical/1959/59-001-U.pdf>; *Civil Rights: Hearings before Subcomm. No. 5 of the H. Comm. on the Judiciary* 212, 86th Cong., 1st Sess. (1959) (statement of Attorney General Rogers); *id.* at 229-30 (colloquy between Rep. Rogers, Rep. McCullough, and Attorney General Rogers); *Civil Rights—1959: Hearings before Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary* 159, 86th Cong., 1st Sess. (1959) (statement of Sen. Clark).

⁶⁶ See 42 U.S.C. § 2000aa(b)(3); 28 C.F.R. § 59.4(a)(1) (“A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought”).

spoliation, who are at the same time still able to facilitate the accurate resolution of electoral results according to state process. Even if one election official happens to be the source of the concern occasioning a warrant, judges may wish to direct that another member of the staff in the same administrator's office—or an election administrator from a neighboring jurisdiction—take custody long enough to provide federal law enforcement with relevant copies and to guide the election itself to a smooth resolution.

Again referring to the *Federal Prosecution of Election Offenses* guide, this is precisely the line that career prosecutors have long urged as internal DOJ policy:

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

In most cases, election-related documents should not be taken from the custody of local election administrators until the election to which they pertain has been certified and the time for contesting the election results has expired. This avoids interfering with the governmental processes affected by the election.⁶⁷

And as a caveat explaining which cases might not be “most cases,” the guide drops a footnote, explaining that “This non-interference policy assumes there is no evidence that local election administrators seek to retain or destroy the election records for a corrupt purpose or to further an ongoing election fraud scheme.”⁶⁸ A following footnote explains that when

⁶⁷ *Federal Prosecution of Election Offenses* (8th ed.), *supra* note 48, at 11; *see also id.* at 83 (“Federal custody of election materials is normally obtained by grand jury subpoena. In taking custody of election documents, election officials should not be deprived of documents necessary to tally and recount the ballots and to certify the election results. Accordingly, copies in lieu of originals should be accepted until the state’s need for the documentation expires.”).

⁶⁸ *Id.* at 11 n.3; *see also id.* at 83 n.39 (same).

preservation of evidence against a corrupt local administrator is necessary but might interfere unnecessarily with local election procedures, law enforcement may “still take reasonable steps to ensure that such records retain their integrity and are effectively *made available to* federal law enforcement” through structured subpoenas or agreements without exclusive federal control.⁶⁹ It is worth emphasizing that to our knowledge, this scenario is hypothetical: in the 65 years since Title III of the Civil Rights Act of 1960 prevented administrators’ destruction of records, we are unaware of a claimed federal need to seize records for this purpose before results are finalized. But even if such a need arose, those records could be “made available to” federal law enforcement while respecting the balance in the Civil Rights Act: through a process providing for a local election official’s supervision of access for inspection and/or reproduction.

D. Past Practice

Caselaw interpreting the provisions in this Essay is, admittedly, exceedingly sparse. And it appears to be nonexistent in the specific context of a warrant for election-related materials while results are still to be finalized. That absence exists in part because internal controls at the Department of Justice have not provided the occasion for such judicial construction. To our knowledge, federal officials have in the modern era never sought a warrant for election-related materials while results are pending.

Federal law enforcement officials have certainly sought (non-exclusive) access to or copies of various election-related records. Federal law enforcement personnel have also asked for consent to take custody of election-related materials, though to our knowledge any exclusive custody has been similarly outside of the period in which election returns were pending. Federal officials have occasionally sought subpoenas for election-related materials (sometimes with the cooperation of local officials, and sometimes without), subject to deliberation informed by responsive briefing and motion practice, and consequently subject to judicially-imposed safeguards for care, retention, and disposition of the records.⁷⁰ But to our knowledge, the search warrant issued in Fulton County in early

⁶⁹ *Id.* at 11 n.4 (emphasis added).

⁷⁰ Indeed, when records are held by a disinterested third party, federal regulations privilege “a subpoena, administrative summons, or governmental request” over a search warrant, precisely because they are more structured and less intrusive. 28 C.F.R. §§ 59.1; 59.4(a)(1).

2026⁷¹ represents the first federal search warrant sought for election-related records in any circumstance; there appears to be no known precedent whatsoever for a federal warrant issued for election-related records while results had not yet been finalized. There may be no such occasion for courts to confront the issue in the future. But if such an application arrives, the analysis above suggests a host of special circumstances requiring active management by a reviewing magistrate in order to ensure the “reasonableness” of any resulting search or seizure.

III. CONCLUSION

The Fourth Amendment’s prohibits searches and seizures that are “unreasonable.” The hallmark of “reasonableness” in this context is often a warrant issued on probable cause, but some special circumstances may suggest that a search can be constitutional with less, and some special circumstances may suggest that a search will be unconstitutional without more. The constitutional and statutory context around the disposition of election-related materials during the period when results are not yet final suggests a special circumstance of the latter sort. In most situations, a federal warrant seeking exclusive federal custody and control of state election records or equipment during the pendency of an election will be not only contrary to federal statutory design but also constitutionally unreasonable given the impact on the remainder of the election process—even if the warrant application shows probable cause. Legitimate federal law enforcement objectives of deterrence and retribution can be satisfied after the election has concluded. Where immediate disruption of an ongoing criminal scheme by an election official is necessary, and evidence suggests legitimate reason for concern that materials may be destroyed if other means of preservation are sought, a federal warrant may be justified. But even in these profoundly unusual circumstances, judges may have to impose conditions on the execution of the warrant in order to make the resulting search and seizure constitutionally reasonable. Designating an alternative election administrator to assume possession allows preservation of the materials sufficient to allow inspection or provide copies for federal law enforcement, without depriving the office of its ability to see the election through to an accurate resolution.

⁷¹ See *supra* notes 19 and 61.