1974 WL 185651 (U.S.) (Appellate Brief)
Supreme Court of the United States.

William N. ANDERSON, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin, Petitioners,

v.

United States of America.

No. 73-346.
October Term, 1973.
January 24, 1974.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief for the Petitioners

David Ginsburg
Albert J. Beveridge, III
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for Petitioners

Of Counsel:
Robert H. Burford
418 Eighth Street
Huntington, West Virginia
and
Philip A. Baer
713 Fifth Avenue
Huntington, West Virginia

***i** INDEX

CITATIONS

CASES:

*1 OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A pp. 1a-27a) is reported at 481 F.2d 685.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 26, 1973 (Pet. App. A p. 1a). By Order dated July 13, 1973, the Chief Justice extended the *2 time for filing a petition for a writ of certiorari August 25,1973. The petition was filed on August 24 1973, and was granted December 10, 1973.

The jurisdiction of this Court rests on 28 U.S.C 1254(1).

QUESTIONS PRESENTED

1. Does an alleged conspiracy to cast fraudulent votes in a state primary election for the office o County Commissioner in Logan County, West Virginia state a federal offense under 18 U.S.C. Section 241?

2. Is an indictment under 18 U.S.C. 241 charging conspiracy to cast fraudulent votes in a local election defective if it identifies neither the office which is th?? object of the conspiracy nor the Constitutional right allegedly violated, and if it fails to allege that the con spirators were acting "under color of state law" ?

STATUTE INVOLVED

Section 241 of Title 18, United States Code:

If two or more persons conspire to injure oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws on the United States, or because of his having S?? exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with in tent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined not more than $10,000 ?? imprisoned not more than ten years, or both; ?? if death results, they shall be subject to impri??ment for any term of years or for life.

***3 STATEMENT**

Petitioners were indicted on January 12, 1971, for violation of Title 18, United States Code, Section 241. The indictment alleged that the defendants conspired together with other persons known and unknown to injure and oppress the qualified voters of Logan County, West Virginia, in the exercise of their Constitutional rights by causing fraudulent votes to be cast in a primary election (Pet. App. B).

There is no dispute about the facts. The alleged conspiracy involved the five named defendants and three election officials, Calvin Napier, Republican Election Clerk, Cecil Elswick, Republican Elections Commissioner, and Janet Sullins, Dennocratic Election Clerk. According to the testimony, the defendants and the three election officials, conspired to cast fraudulent ballots at the Mount Gay Precinct in Logan County to secure the Democratic nomination for County Commissioner for Okey Hager who was running against Neal Scaggs. Elswick and Sullins posted illegal votes on the precinct's voting machines and Elswick then threw away the poll slips each voter is required to sign so that it could not thereafter be determined how many persons actually voted (App. pp. 23-26, 35-37, 39-45).

According to official records, there were 541 registered voters in the Mount Gay precinct of whom 401 allegedly voted in the primary; not all the voters east ballots for the office of County Commissioner; of the ballots east for that office, Okey Hager received 294 votes to his opponent's 67. (Gov't Exhibits 1, 2, 4A, 1B, App. pp. 27, 34) More than 100 ballots were fraudulently cast; Okey Hager received a total of 5258 votes and Mr. Scaggs 5237. The Mount Gay vote thus determined ***4** the outcome of the Hager-Scaggs contest. (Gov't Exhibit 3)

There was no evidence that the conspiracy involved racial discrimination. Some fraudulent votes were apparently cast for Senator Byrd and Congressman Hechler, candidates for nomination as United States Senator and Representative on the Democratic ticket (App. p. 45), but the evidence introduced at trial showed that the conspiracy was limited to the Democratic nomination for County Commissioner.

The five defendants were all state officials at the time of the alleged conspiracy and trial. William Anderson was the Clerk of the County Court of Logan County. John Browning was Clerk of the Circuit Court of that county. Earl Tomblin was the Sheriff of Logan County, and Ernest “Red” Hager was one of his deputies. W. Bernard Smith was a State Senator from the Seventh Senatorial District. Only Anderson and Browning had any official duties in connection with the primary election; they were responsible for distributing election supplies, preparing election ballots, maintaining the voting records of the County, and issuing and receiving absentee ballots, Anderson and Browning did not use their state offices to carry out the alleged conspiracy; they discharged their election duties properly.

After a twelve-day trial, all of the defendants were found guilty of violating 18 U.S.C. § 241 (App. pp 68-72); each has been given a provisional maximum sentence of ten years.

SUMMARY OF ARGUMENT

This case involves a conspiracy whose sole purpose was to secure the nomination of Okey Hager a County Commissioner on the Democratic ticket ***5** Logan County, West Virginia. Congress did not intend IS U.S.C. Section 241 to cover a conspiracy limited to an election for state or local office.

Section 241 was originally enacted as part of The Enforcement Act of 1870. At that time Congress did not believe it had Constitutional authority to police noting frauds in elections for state or local office except ill cases of racial discrimination it therefore deliberately limited the scope of the Act to areas where it believed it had clear Constitutional authority.

Congress dealt with voting frands in sections of the Act other than Section 241, and in those other sections only made fraudulent voting in Congressional elections a federal crime. The broad language of Section 241 should not now be held to apply to matters specifically covered elsewhere in The Enforcement Act.

In Voting cases, this Court and other federal courts have consistently held that the provisions of The Enforcement Act are limited to voting frauds in Congressional elections and to denial of voting rights because of racial discrmination. No case has held that Act applicable to voting frauds in elections for state and local office.

Since 1870 the Congress has several times considered the proper role of the federal government in state and local elections, most recently in The Voting Rights Act of 1965; it has invariably limited that role to prevention of racial discrimination.

U.S. v. Guest and U.S. v. Price are consistent with this view; they do not require the Court to interpret Section 241 to include voting frauds related solely to state and local elective officers.

***6** This case was tried on the theory that the defendants conspired to dilute the value of validly cast votes for the office of County Commissioner and that the conspiracy resulted in a denial of Fourteenth Amendment rights because it included three election officials acting “under color of state law”. The indictment identified neither the office which was the object of the con spiracy nor the Constitutional right allegedly violated nor did it identify the conspirators or allege than they were acting “under color of state law”. It failed, moreover, to give details of the offense with which defendants were charged. The indictment was so lacking in specificity that it failed to inform the defendants of the charges against them sufficiently to enable them to prepare an adequate defense, and it failed to inform the Court sufficiently to enable the Court to decide whether the facts would legally support a conviction, if one should be had.

ARGUMENT

I. CONGRESS DID NOT INTEND 18 U.S.C. SECTION 241 TO COVE A CONSPIRACY TO CAST FRAUDULENT VOTES IN A ELECTION FOR STATE OR LOCAL OFFICE.

This case involves a new application of an old law to an old crime. For more than 100 years Section 241 of Title 18, U.S.C. has been part of the crimina laws of the United States [1] and conspiracies to “stuf?? ***7** ballot boxes” are as old as the electoral process. [2] However, we have found no reported decision which holds that a conspiracy to cast fraudulent ballots in an election for a state or local office is a federal crime under Section 241. We believe we have found no such case because Congress did not intend the Section to reach such conspiracies.

This case was tried as a conspiracy to east illegal ballots for the office of County Commissioner of Logan County. The purpose of the conspiracy, as the Assistant United States Attorney clearly stated in his opening remarks, was to secure the Democratic nomination as County Commissioner for Okey Hager (App. pp. 2122). He was explicit in his closing argument:

> "I think from the evidence you can conclude by now that the theory behind the government's case actually is that these votes were cast and counted by going through the contest and all in order to get Okey Hager elected to the County Court, in order to get Red Hager's father elected to the County Court, that these defendants, along with others, got the votes east and got the votes counted in the long drawn-out procedure that was involved over there. (App. p. 54; see also pp. 55-57)

The Fourth Circuit also concluded that the conspiratorial purpose "... was to secure the Democratic nomination of Okey Hager for County Judge ...." (Petition App. A p. 15a).

If the conspiracy had had multiple objectives-- the casting of fraudulent ballots for both state and federal ***8** offices--and the evidence supported the existence of such a conspiracy, an offense could be stated under Section 241. *U.S. v. Rabinowich,* 238 U.S. 78 (1915); *Ingram v. U.S.,* 360 U.S. 672 (1959); *U.S. v. Gallishaw,* 428 F.2d 760 (CA 2, 1970)

Here there was no evidence of a multiple conspiracy. The defendants were seeking the nomination of Okey Hager for County Commissioner. The case was tried and the conviction affirmed by the Fourth Circuit on this theory, and the issue is now squarely before this Court. [3]

In nearly 2000 pages of trial transcript there is only a single brief reference which might be read as suggesting that one objective of the conspiracy might have been related to federal office (App. pp. 39-40). If a conspiracy with multiple objectives was the theory or the prosecution, it escaped the District Judge since his charge did not present that issue properly to the jury (App. pp. 59-65). See *Ingram v. U.S., supra;* cf. *U.S v. Kantor,* 78 F.2d 710 (CA 2, 1935).

The Fourth Circuit reasoned that *U.S. v. Guest* 383 U.S. 745 (1966) and *U.S. v. Price,* 383 U.S. 787 (1966) establish that Section 241 encompassed Fourteenth Amendment rights including those protected by The Equal Protection Clause. One such right is th?? right not to have validly cast votes diluted by "state action" or "under color of state law", *Reynolds v Sims,* 377 U.S. 533 (1964). In this view, a conspiracy ***9** to cast fraudulent ballots in which state election officials take part results in a denial of equal protection under color of state law and states a crime under Section 241. See *Screws v. U.S.,* 325 U.S. 91 (1945) [4] Although the Fourth Circuit's reasoning is consistent, it is at odds with history and the intent of Congress in enacting Section 241.

(a) Congress Did Not Intend the Provisions of The Enforcement Act To Apply to Voting Frauds in Local Elections Because in 1870 It Acted on the Assumption that, Absent Racial Discrimination, Its Authority Was Limited to Congressional Elections.

Section 241 was part of The Enforcement Act of 1870, 16 Stat. 140. The Act provided "for the first time, a comprehensive system for dealing with Congressional elections" *U.S. v. Gradwell,* 243 U.S. 476, 482-483 (1917). Of its 23 sections, ten dealt specifically with the right to vote and punished interference with that right; six other sections gave jurisdiction to federal courts and federal officials over persons who violated the Act. Congressional debates make clear that Congress did not intend

the sections dealing specifically with voting to apply to nonfederal elections unless some form of racial discrimination ***10** was involved. The general language of Section 241 should not be interpreted inconsistently with this Congressional purpose.

Congress did not intend the Act to cover voting frauds for state and local office, absent racial discrimination, because it did not believe then that it had Constitutional authority to operate in this area. This Court has noted the limited Congressional debate about Section 241, [5] but there was substantial debate over the other provisions in the Act especially those involving protection of the right to vote. [6] Critics of the bill in both houses repeatedly argued that the voting sections of the Act were unconstitutional because the federal government had no authority over elections, even federal elections.

Proponents had little difficulty in justifying federal jurisdiction over federal elections under Section 4, Article 1 of the Constitution [7]; they were considerably more troubled by the prospect of federal interference ***11** in local elections. The only Constitutional authority these proponents could invoke was the Fifteenth Amendment, which had been ratified only a few months previously; even the strongest supporters of the bill conceded that absent racial discrimination the federal government had no authority over local elections. The following colloquy between Senators Morton and Edmonds is typical.

"MR. MORTON.... Our theory is that the question of suffrage is under the control of the States, and was left to the several States by the Constitution of the United States; and that being the case, Congress had no power to pass a law conferring suffrage on colored men, and it was necessary to amend the Constitution of the United States for that purpose. We therefore provided in the fifteenth amendment that '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.' The proposition to which I call attention is this: that the question of suffrage is now, as it was before, completely under the control of the several States to punish violations of the right of suffrage, just as they had the power before, except that we take away their power to deny suffrage on account of race, color, or previous condition of servitude, and have given to Congress the power to enforce this amendment.
The question now to which I call the attention of the Senate is whether it is in the power of Congress to make provision for punishing violations of the right of suffrage except those violations go to the question of color, race, or previous condition of servitude.

MR. EDMUNDS. But it does not make any difference which the color is, black or white.

MR. MORTON. Not a bit. It does not make any difference which; but if a man is denied the ***12** right of suffrage because he is a white man, if any State shall assume to deny a man the right of suffrage because he is a white man, then we have a right to interfere; or if because he is a colored man, then we have a right to interfere. But suppose the denial of the right of suffrage by a board of registration or a board of inspectors has nothing whatever to do with color; suppose it is for an offense that existed by State law before the enactment of this fifteenth amendment, what power have we got to interfere with that any more than we had before?

MR. EDMUNDS. Nobody, I think, would claim that we have. I should not say so.

(Cong. Globe 41st Cong., 2nd Sess. 3571)

Whether Congress had too narrow a view of its own powers is not in issue; we are aware, now, that under the Fourteenth Amendment the federal government has power to punish conspiracies to dilute the right to vote in state or local elections. [8] But when Congress passed The Enforcement Act in 1870, it did not believe that it had such power. The debates make clear that it did not consider that any of the provisions of the Act granted the federal government authority to punish voting frauds--as contrasted with racial discrimination-- involving only local offices.

Congress specifically addressed itself in the original Act to the problem of fraudulent voting and registration in Section 19 and 20.[9] Those sections were limited ***13** to "any election for representative or delegate in the Congress of the United States" and supporters emphasized they were intended to cover only frauds in the election of representatives to Congress.[10]

We ask the Court to follow its own rule that "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment ... Specific terms prevail over the ***14** general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932); *MacEvoy v. U.S.* 322 U.S. 102 (1944); *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222 (1957).

(b) Federal Courts Have Uniformly Limited the Scope of the Enforcement Act to Election Frauds Involving Federal Office.

Under The Enforcement Act, we believe the issue of Congressional authority over local elections first came to the federal courts in *U.S. v. Cruikshank,* 25 F. Cas. 707 (No. 14,897, C.C.D.La., 1874) aff'd 92 U.S. 542 (1876). An indictment brought under The Enforcement Act specifically charged the defendants with conspiracy under Section 241 to hinder certain citizens in the exercise of their right to vote. The indictment was dismissed. In his opinion for the Court, Mr. Justice Bradley, sitting on circuit, said that Congress had no authority to punish conspiracies to interfere with a person's right to vote in state elections except for cases of racial discrimination:
"No interference with a person's right to vote, unless made on account of his race, color or previous condition of servitude, is subject to congressional animadversion. There may be a conspiracy to prevent persons from voting having no reference to this discrimination. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the parties. All such conspiracies are amenable to the state laws alone." *U.S. v. Cruikshank,* at 713.

Two years later that view was upheld in *U.S. v. Reese,* 92 U.S. 214 (1876). In *Reese* this Court held ***15** section 3 and 4 of The Enforcement Act[11] unconstitutional stating:

"The power of Congress to legislate at all upon the subject of voting at state elections rests upon this [15th] Amendment."
92 U.S. at 218.

The principle of *Reese* was reaffirmed three years later in *Ex Parte Sicbold,* 100 U.S. 371 (1879)[12] when this Court stated:

"We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they [judges of election] will be amenable to federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts."
100 U.S. at 393.

All cases that have reached this Court under The Enforcement Act, involving prosecution for fraudulent voting practices, have either involved racial discrimination or interference with elections for federal office. *Ex Parte Yarbrough,* 110 U.S. 651 (1884); *U.S. v. Mosley,* 238 U.S. 383 (1915); *U.S. v. Gradwell,* 243 U.S. 476 (1917); *U.S. v. Bathgate,* 246 U.S. 220

(1918); *U.S. v. Classic,* 313 U.S. 299 (1941); *U.S. v. Saylor,* 322 U.S. 385 (1944); cf. *Logan v. U.S.,* 144 U.S. 263 (1892); *Blitz v. U.S.,* 153 U.S. 308 (1894); *Burroughs v. U. S.,* 290 U.S. 534 (1934). [13]

***16** We do not suggest that *Cruikshank, Reese or Ex Parte Siebold* necessarily reflect existing constitutional limitations on the power of Congress to deal with fraudulent voting practices in local elections. The cases under The Enforcement Act do show, however, that in 1870 Congress knew it was dealing with a clearly marked constitutional danger zone. This Court should not now assume that the Congress chose to disregard the Constitutional limitation which it so clearly recognized. See *Yates v. U.S.,* 354 U.S. 298, 319 (1957).

For the past 100 years there have been no prosecutions under Section 241 related solely to state or local elections. We believe this strongly suggests that Section 241 was not meant to reach such practices.
"The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 370-371 (1959)

***17** The Court's comment in *Romero,* about judges, lawyers or scholars, would seem equally applicable to ambitious--or perhaps inadvertent--prosecuting attorneys.

(c) Since Passage of The Enforcement Act, Congress Has Several Times Considered the Proper Role of the Federal Government in State and Local Elections and Has Confined Thai Role to the Prevention of Racial Discrimination.

The 41st Congress in 1870 was not the only Congress that undertook to define the proper role for the federal government in state and local elections. The 53rd Congress considered the matter in 1894 and repealed those sections of the Revised Statutes which gave federal courts, marshals and supervisors authority to supervise Congressional elections and which punished voting and registration frauds in those elections. Act of February 8, 1894, 28 Stat. 36. Congress felt that federal interference in the elective process gave rise to unwarranted friction between state and federal authorities. [14]

***18** Congress recently reconsidered the matter in the Civil Rights Acts of 1957 [15] and 1964 [16] and The Voting Rights Act of 1965. [17] Those Acts, the Committee Reports accompanying them, and the debates about them show that Congress carefully distinguished between the disparate powers available to it under the Fourteenth and Fifteenth Amendments and was constantly aware of the potential friction which can arise from federal involvement in local elections [18] It carefully identified the Amendment it wished to implement by legislation and the activities it believed should be subject to federal criminal prosecution. It specifically rejected a proposal to enact a comprehensive law to provide criminal penalties for voting frauds unrelated to racial discrimination. [19]

FN

We are dismayed by the refusal of the majority in the committee to support our efforts to meet this obvious need. We are unable to understand how anyone could oppose a clean elections law when his vote is subject to public scrutiny, and we shall make every effort to achieve its adoption in the House of Representatives. H.Rep. No. 439, 89th Cong. 1st Sess. pp. 43, 49-50.

***19** The history of Congressional action in protecting the right to vote during the past 100 years demonstrates that Congress believes it is a matter which does not "call for the most striking exercise of such [Constitutional] power as might exist", see *U.S. v. Mosley,* 238 U.S. 383, 387 (1915). Raising as it does "fundamental questions of federal state relationship", [20] this Court should not interpret Section 241 to reach conspiracies relating solely to voting frauds involving only state and local offices; such a construction would provide federal prosecuting attorneys with authority which Congress has deliberately and consistently withheld from them.

(d) *Guest* and *Price* Do Not Require This Court To Interpret Section 241 To Include Voting Frauds Related Only to State and Local Elective Offices

The Fourth Circuit felt that *U.S. v. Guest,* 383 U.S. 745 (1966) and *U.S. v. Price,* 383 U.S. 787 (1966) ***20** "compel" an interpretation of Section 241 contrary to the one urged here. We disagree. Both those cases involved the denial by violence of well-established Constitutional rights in situations in which Negroes and white civil rights workers were asserting traditional civil rights. The Enforcement Act, and its predecessor, the Act of April 9, 1866, [21] were clearly intended to reach such situations. This case involves neither racial discrimination nor violence.

Guest and *Price* were consistent with the legislative history of The Enforcement Act and with prior federal court decisions. The Fourth Circuit's construction of Section 241 is not.

Guest involved rights under the Equal Protection Clause "firmly and precisely established by a consistent line of decisions in this Court" 383 U.S. at 754. This is not true of rights under the Equal Protection Clause involving state and local elections. The applicability of the Equal Protection Clause to state and local elections was finally determined only a few years ago in *Baker v. Carr,* 369 U.S. 186 (1962), and this Court has still to define the full scope of rights protected thereunder. See *Gray v. Sanders,* 372 U.S. 368 (1963); *Wesberry v. Sanders,* 376 U.S. 1 (1964); *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969); *Wells v. Rockefeller,* 394 U.S. 542 (1969) and *Mahan v. Howell,* 404 U.S. 1201 (1971). Only *Guest* involved a prosecution for violation of the Equal Protection Clause. This Court has not yet determined how and whether rules established in civil litigation to safeguard ***21** voting rights may be enforced in criminal conspiracy prosecution. [22]

Action by this Court approving the use of Section 241 to punish isolated irregularities by local precinct officers in the election of local officials will greatly expand the jurisdiction of the federal courts in an area traditionally reserved to the States. We have found no published statistical data which reveal the magnitude of the potential problem, [23] but we doubt that U.S. attorneys throughout the United States will use this authority to police state and local elections in any general and systematic manner. [24]

It is peculiarly the kind of authority which lends itself to partisan political direction.

In these circumstances and since the subject is a matter of demonstrated Congressional concern, it is appropriate for Congress itself to decide whether the federal government should undertake to supplement the effort of the states to punish voting conspiracies which have as their sole objective election of a state or local official.

*22 II. THE CONVICTION SHOULD BE REVERSED BECAUSE THE INDICTMENT DID NOT INFORM THE DEFENDANTS OF THE CHARGES AGAINST THEM WITH SUFFICIENT PRECISION TO ENABLE THEM TO PREPARE AN ADEQUATE DEFENSE.

The indicted in paragraph 6 stated that on May 12, 1970, a primary election was held within the State of West Virginia "for the purpose of nominating candidates for the offices of United States Senator, Representatives to Congress, and various state and county public officers." This statement was purely factual. In paragraph 9 the indictment proceeded to charge the defendants with a conspiracy to injure the qualified voters of Logan County by denying them their Constitutional right to have their votes fully counted in the May 1970 primary "for the aforesaid offices" (Pet. App. B).

The form of the indictment was similar to those used in other Section 241 prosecutions, e.g., *U.S. v. Kantor,* 78 F.2d 710 (CA 2, 1935); *Walker v. U.S.,* 93 F.2d 383 (CA 8, 1937); *Ledford v. U.S.,* 155 F.2d 574 (CA 6, 1946), cert. den. 329 U.S. 733 (1946). All of those prosecutions involved prosecutions for interference with elections for federal office.

Defendants moved to dismiss the indictment (App. pp. 8-9); the District Court denied the motion on the grounds that it adequately charged "Defendants with the offense under Title 18 U.S.C. Section 241" (App. p. 17). We agree that the indictment charged an offense under Section 241. The Fourth Circuit correctly observed:

"[It] described with as much particularity as the indictment in *United States v. Saylor* (1944) 322 U.S. 385, the wrongful acts intended to be accomplished by the conspirators." (Pet. App. A, p. 2a)

***23** *Saylor,* however, like all other prosecutions for voting irregularities under Section 241, involved a conspiracy whose object was the election of a federal official. Although in this case the government alleged a conspiracy to cast fraudulent votes in a federal primary election--in order to bring the case within Section 241--it disregarded this allegation at trial and sought to prove a. conspiracy that had as its object the election of a county commissioner.

The Government's theory was that the five defendants and three election officials conspired to dilate the value of validly cast votes for the office of county comissioner in a primary election ; that this conspiracy resulted in a denial of the Fourteenth Amendment rights of the qualified voters of Logan County because it included three election officials acting under color of state law. In the indictment, however, there was no suggestion that the defendants or their co-conspirators were acting "under color of state law," no identification of the Constitutional right allegedly denied and no specification of the office which was the object of the conspiracy. The indictment thus failed clearly to inform the accused of the charges against them so that they could prepare their defense and not be taken by surprise by the evidence offered at trial, *Berger v. U.S.,* 295 U.S. 78 (1935); *Hallman v. U.S.,* 208 F.2d 825 (CA D.C., 1953). [25]

The defendants did attempt to discover the nature of the charges against them prior to trial. Counsel filed a Motion for Discovery and Inspection (App. pp. 10-11); a Motion for a Bill of Particulars (App. ***24** pp. 11-13) and a Motion for Full Disclosure as Provided Under the Omnibus Hearing Project (App. pp. 18-19). All motions were denied (App. pp. 17, 20).

Since the indictment alleged that each defendant was a state official, and named no other co-conspirators, each reasonably assumed that the alleged conspiracy involved only the duties of the two named co-conspirators (Anderson and Browning) who did have official election functions. This assumption proved to be wrong. Because the indictment rested on Section 241, the defendants also assumed that it charged, and that the prosecution would seek to prove, a conspiracy to influence the outcome of an election for federal office, and they prepared their defense accordingly. It was not until the beginning of the trial that the defendants and their counsel learned that the alleged conspiracy involved a state office, and it was not until late in the fourth day of trial that they learned who the unnamed co-conspirators were, and where the alleged conspiratorial acts took place. As a practical matter it was then too late to prepare an adequate defense.

The form of the indictment in this case is in marked contrast to the indictments under Section 241 in *U.S. v. Price,* 383 U.S. 787 (1966) and *U.S. v. Guest,* 383 U.S. 745 (1966). In *Price* the indictment specifically charged that the defendants were acting "under color of the laws of Mississippi." In *Guest* the Court held that the allegation that the defendants had conspired to intimidate Negroes in their equal use of state facilities "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts" was a sufficient allegation of state action to prevent dismissal of the indictment. In both cases the indictments also gave important details ***25** of the offenses with which defendants were charged.

Under modern rules of pleading indictments are no longer dismissed for minor and technical deficiencies. That principal, however, cannot be used to deny the fundamental safeguard that a properly drawn indictment gives to those charged with serious crimes. *Smith v. U.S.,* 360 U.S. 1 (1959) ; *Russell v. U.S.,* 369 U.S. 749 (1962). The deficiencies of this indictment are not mere technicalities of pleading. They go to the heart of the requirement that the government must inform persons charged with serious crime of the charges against them so they can prepare an adequate defense.

An important corollary purpose is served by the requirement that all indictment set out the specific offense used to invoke federal jurisdiction and the broad provisions of Section 241. This purpose, as stated in *U.S. v. Cruikshank,* 92 U.S. 5421, 558 is "to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a convicton, if one should be had." See *Russell v. U.S., supra.* By this standard also the indictment was deficient. Au indictment so lacking in specificity as this one, if sustained, would first enable the Government to defeat a motion to dismiss by arguing that a conspiracy to east fraudulent votes in a Congressional election clearly states an offense under Section 241. The Goverment could then proceed to try the case on the basis of a conspiracy to cast votes in an election for local office. And this was in fact done. [26] On appeal ***26** the Government would be free to urge affirmance on whatever basis appeared desirable after trial.

Section 241 is a conspiracy statute which requires no overt act as an element of the offense. [27] If prosecutions under such statute are to be free from the potential for abuse which this Court has previously identified, [28] the Government should be required to allege the specifics of the offense charged under Section 241 with sufficient particularity to meet the standards set forth in *Cruikshank* and *Russell.* [29] Tested by these standards, the indictment in this case was substantially and substantively defective.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed.

Appendix not available.

Footnotes

1 Section 241 originated as Section 6 of the Act of May 31 1870, 16 Stat. 140, commonly referred to as The Enforcemen Act. There were 23 sections in that Act. Section 6 thereafter became Section 5508, Revised Statutes of 1874-1878 (48 Stat. 1067) Section 19 of the Criminal Code of 1909 (35 Stat. 1092); Section 51 of the United States Code, 1926 Codification, (44 Stat. 462; and finally Section 241, United States Code (62 Stat. 696). For convenience, we shall refer

to it as Section 241 throughout the brief. Prior versions of Section 241, and other relevant statutes are reprinted in the Statutory Appendix.

2 A conspiracy to east fraudulent ballots is a felony in West Virginia, §§ 3-9-1 and 3-9-17 W.Va. Code.

3 The central issue in this case was not framed until the argument before the Fourth Circuit (Pet. App. A at p. 19a). On. reason is that the indictment itself failed to specify that the objec of the alleged conspiracy was the nomination for County Commissioner (Pet. App. B); another is that all of the defendants' severe attempts at discovery were denied (App. 10-20).

4 Unlike the law enforcement officials involved in *Screws* and *Price,* West Virginia election officials have only the most tenuous relationship with the state. They are selected by the executive committee of the two political parties receiving the highest votes at the preceding general election, and the County Court, which makes the official appointment, has no authority to select any other person; § 3-1-28 W.Va. Code; *Williamson v. Mingo County Court,* 56 W.Va. 38, 48 S.E. 835 (1904); *State ex rel. Bullard. v. County Court,* 141 W.Va. 675, 92 S.E.2d 452 (1956); *State ex rel. Tomblin v. Bivens,* 150 W.Va. 733, 149 S.E.2d 284 (1966). Their appointment lasts for one week and a single election; they receive nominal compensation; § 3-1-44 and by way of training are required to see one training film; § 3-1-46 W.Va. Code.

5 See *United States v. Williams,* 341 U.S. 70 at pp. 74-75 (1951) and *United States v. Price,* 383 U.S. 787 at p. 805 (1966).

6 For the debate in the House see Cong. Globe, 41st Cong., 2nd Sess. pp. 3521-26, 3853-55, 3871-84; in the Senate see pp. 3558-71, 3607-16, 3654-3705, 3752-61, 3801-09.

7 See Stat. App. p. la.

See also remarks of Congressman Bingham, the floor manager of the bill:

"... The amendments proposed to prevent fraudulent registration or fraudulent voting, in so far as I am advised, do not alter any of the existing regulations of the States touching registration; they are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress. They are expressly limited to elections of those officers. I do not deem it important to say anything further on that point." Cong. Globe, 41st Cong., 2nd Sess., 3871-2.

8 For a discussion of the legislative history of the Fourteenth Amendment as it relates to federal authority over state and local elections see *Reynolds v. Sims,* 377 U.S. 593 (1964) (Harlan, J., dissenting opinion); Van Alstyne, The Fourteenth Amendment, *The "Right" To Vote and the Understanding of the Thirty-Ninth Congress,* 1965 Supreme Court Review 33.

9 Stat. App. pp. 5a-6a; these sections became §§ 5511 and 5512 of the Revised Statutes of 1874-1878 and were repealed by The Act of February 8, 1894, 28 Stat. 36.

10 "MR. LAWRENCE: ... Now, sir, if the laws of the States were adequate to protect the citizens of the United States in the exercise of the elective franchise, then it might not be necessary for us to enact any law upon the subject here. But we know that the State laws have not protected the citizens of the southern States against violence, and have not protected the citizens against fraud and force and wrong in more than one of the cities of the northern States. And if the States have failed to enact laws necessary to secure what we all, I trust, have so much at heart, to wit, the purity of the ballot-box, or have failed to execute those already enacted, then it is the highest duty of this Congress to intervene and protect tile citizens of the United States in the enjoyment of the elective franchise against force and fraud in the election of Representatives in Congress, leaving the States to provide such legislation as they may deem necessary in the election of local and State officers.... It will reach any officer who improperly tampers with the election of a Representative in Congress; but it does not reach any State officer or any citizen in connection with any local or State election.

And now a few words as to the constitutional power to enact this bill ....

MR. JONES, of Kentncky: I have not read all the provisions of this bill, and as the gentleman seems to have done so I desire to ask him whether they apply to other elections than those for members of Congress?

MR. LAWRENCE: They apply only to the elections for Representatives and Delegates to Congress. The bill does not propose to interfere with State elections at all."

(Cong. Globe 41st Cong., 3rd Sess. 1.276)

11 Sec Stat. App., pp. 2a-3a.

12 The case involved indictments under Section 5515 and 5522 of the Revised Statutes (see Stat. App.). These sections were repealed by the Act of February 8, 1894, 28 Stat. 36.

13 Lower courts have consistently followed these principles. *U.S. v. Nicholson,* 27 F. Cas. 143 (No. 15,877 C.C. D.La., 1878); *U.S. v. Amsden,* 6 F. 819 (D.Ind., 1881); *U.S. v. Belvin,* 46 F. 381 (E.D.Va., 1891); *Karem v. U.S.,* 121 F. 250 (CA 6, 1903); *U.S. v. Kantor,* 78 F.2d 710 (CA 2, 1935); *Walker v. U.S.,* 93 F.2d 383, (CA 8, 1937) cert. den. 303 U.S. 644 (1938); *Devoe v. U.S.,* 103 F.2d 584 (CA 8, 1939), cert. den. 308 U.S. 571 (1939); *U.S. v. Nathan,* 238 F.2d 401 (CA 7, 1956), cert den. 353 U.S. 910 (1957); see also *U.S. v. Lackey,* 99 F. 952 (D.C.Ky., 1900), cert. den. 181 U.S. 621 (1901); *Mullen v. U.S.,* 106 F. 892 (CA 6, 1901); *U.S. v. Aczel,* 219 F. 917 (D.C.Ind., 1915); and *Steedle v. U.S.,* 85 F.2d 867 (CA 3, 1936).

14 "The object of legislation should be to prevent conflicts between the State and Federal authorities. These statutes have been fruitful in engendering them. Enacted in reconstruction times, when it was deemed necessary to carry out those measures, the purpose for which they were framed having happily passed away, we feel that they cannot he too quickly erased from the statute hooks.

But we regard these statutes as chiefly inimical to the best interests of the people because they are in effect *a vote of lack of confidence* in the States of the Union ....

Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it ....

Finally, these statutes should be speedily repealed because they mix State and Federal authority and power in the control and regulation of popular elections, thereby causing jealousy and friction between the two governments; ... because their enactment shows a distrust of the States, and their inability or indisposition to properly guard the elections, which, if ever true, has now happily passed away; and last, but not least, because their repeal will eliminate the judiciary from the political arena, and restore somewhat, we trust, the confidence of the people in the integrity and impartiality of the Federal tribunals."

H.Rep. No. 18, 53rd Cong. 1st Sess. pp. 7-8.

15 P.L. 85-315.

16 P.L. 88-352.

17 P.L. 89-110.

18 See also Act of August 2, 1939, 53 Stat. 1147.

19 As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely, it will be in the form of fraud, intimidation, and corruption. Therefore, we maintain that any effective voting rights bill must include a comprehensive clean elections section. The public record is replete with endless instances of vote frauds, including stuffing the ballot box, tombstone voting, multiple easting of votes by one individual in several precincts or districts, threats and coercion of voters, destruction or alteration of ballots, willful miscounting of votes, and buying votes. These conditions do not exist in just one part of the country, but can be found in many States across the length and breadth of this land.

20 *U.S. v. Price,* 383 U.S. at. 806.

21 14 Stat. 27; presently, Section 242, Title 18, United States Code.

22 Would, for example, a conspiracy by election officials to open the polls late or close them early be subject to § 241? Would an agreement among State legislators to establish unequal state legislative districts subject them to prosecution under § 241?

23 But see Note, *Illegal Election Practices in Philadelphia,* 106 U.Pa.L.R. 279 (1957).

24 On the question of prosecutorial discretion, see Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion,* 13 Law and Contemporary Problems 64 (1948). If federal officials did undertake this function, it could well involve unwarranted federal intervention in state affairs. cf. *O'Shea v. Littleton,* -- U.S.L.W. -- (U.S. Jan. 15, 1974).

25 The indictment was, we believe, specific enough to plead a formal acquittal or conviction in the event defendants were indicted a second time for alleged criminal activity in connection with the 1970 primary election.

26 The vagueness of a one-count indictment like the present one would also defeat a motion of judgment of acquittal at the close of the Government's evidence.

27 *Williams v. U.S.,* 179 F.2d 644 (CA 5, 1950), aff'd 341 U.S. 70 (1951).

28 See *Krulewitch v. U.S.,* 336 U.S. 440 (1949) (Jackson, J. concurring opinion).

29 A Proper indictment would also have considerably sharpended the issues for trial. For example, the indictment charged that the purpose of the conspiracy was to obtain “certification” of fraudulent votes. After “certification” and before the indictment was handed down, two of the defendants had testified in a state election contest. Over objection, the trial court permitted the government to introduce their testimony and other evidence of post-certification activities against all of the defendants.

Admission of such evidence was erroneous and contrary to this Court's holding in *Krulcwitch v. U.S., supra;* *Lutwak v. U.S.,* 344 U.S. 604 (1953); and *Grunewald v. U.S.,* 353 U.S. 391 (1975).

These errors have their origin in the vagueness of the indictment.