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May 13, 1938.

Arthur T. Vanderbilt, Esq.,
744 Broad Street,
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Dear Mr. Vanderbilt:

With further reference to the suggestion that the Section of Criminal Law of the American Bar Association appoint a Committee on Federal Election Laws, I wish to give you my personal observations.

I am a member of the Criminal Law Council. From 1925 to 1929 I was a member of the Board of Police Commissioners of this City. In 1936, when registration and election scandals in St. Louis became a natter of intense public indignation, the then members of the Board of Election Commissioners were removed by the Governor of Missouri for cause, and I was appointed member of the Board to succeed the removed members. In November, 1937, our Election Board received the St. Louis Civic Award, generally recognized here as a high honor "for extraordinary public service in giving St. Louis an honest election". I trust that the foregoing will not be misinterpreted as a seeming desire to inflate myself, for I merely want to give you this background, which is responsible for my approach to the problem at hand.

While I was a member of the Board of Election Commissioners, I made some little study of the federal laws pertaining to elections. I did this for the reason that I anticipated general frauds here and in most of the large cities in the November, 1936, elections.

The situation in Kansas City is now nationally notorious, and I am personally convinced that what went on there was carried out in substance in the majority of the large cities of this country, in sufficient numbers, perhaps, to have carried the national election if the vote had been close. The local enforcement machinery is usually a part of the organization responsible for election

frauds, and it is too much to expect that the machine will prosecute its own members for doing its express bidding. For example, in Kansas City the Democratic machine has publically announced that it will pay all fines and court costs assessed against any person fined or consisted by the federal courts for vote frauds, and this service applies equally to Democrats and Republicans. Further, the same organization will support the members of families of all persons sentenced to jail or prison for the duration of such service. No person has been indicted or convicted in the State Courts of Missouri for fraud at the 1936 general election. Almost two hundred have been convicted in the federal courts at Kansas City. No person indicted has been acquitted.

The only federal law on the subject of election frauds, except those provisions of the Corrupt Practices Act (2U.S.C.A. secs. 241-254) is Section 19 of the Criminal Code (Sec. 5508, R.S., 18 U.S.C.A. par. 51), a conspiracy section, which reads as follows:

> "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 of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of

another, with intent to prevent hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

This is the only federal law on the subject of fraud in federal elections, and it is the section upon which the indictments in the Kansas City prosecutions were based. The opinions of the United States Circuit Court of Appeals (8th Cir.) are:

Walker v. United States, 93 Fed. (2d)
Lutheran v. United States, 93 Fed, (2d) 395;
Little V. United States, 93 (2d) 401;

Neeper v. United States, 93 Fed. (2d) 409; and
Cartello v. United States, 93 Fed. (2d) 412.

Certiorari was denied by the United States Supreme Court in each of these oases (822 L. Ed. 604).

It will be seen from the section that it does not specifically apply to election offenses; it does not denounce as a crime, the impersonation of voters, multiple voting, bribery or intimidation of voters, or the numerous other devices and practices common to vote stealing. Further, and what is of utmost importance, it does not define as an offense a conspiracy to fraudulently affect the vote for the President of the United States. It was held in the Walker case, supra, 93 F. (2d) 388 l.c., that inasmuch as the Federal Constitution does not provide that the selection of electors shall be by popular vote, nor that electors shall be voted for upon a general ticket, nor that the majority of those who

exercise the elective franchise can alone choose the electors, a conspiracy to fraudulently select electors at an election does not come within the purview of the present federal statute. It was pointed out in that opinion that the Federal Constitution leaves it to the state legislatures to define the methods of effecting the object and that as an elector is a state office the federal act referred to does not pertain to the office of an elector for the President or Vice President of the United States without the violation of any federal law.

On May 31, 1870, Congress passed a law containing a series of sections, the whole act being entitled, "An Act To Enforce The Right Of Citizens Of The United States To Vote In The Several Cities Of This Union And For Other Purposes", 16 Stat. at Large, 140 to 146. Section 6 of this Act included what, with some alterations, is now Section 19 of the Criminal Code. Among the substantive acts which were prohibited and made offenses were those interfering with any election officer or inducing any such

officer, whose duty it was to ascertain, announce, or declare the result or to make any certificate, document or evidence relative thereto, to violate his duty (Sec. 19). It was made an offense for any such election officer to neglect or to refuse to perfom any of his duties, or to do any unauthorised act with intent to "affect such election, or the result thereof", or to "fraudulently make any false certificate of the result of such election", or to withhold, conceal or destroy any required certificate pertaining to such election, or to neglect or refuse to make a return the same as required by law, or to omit to do any required duty, or to counsel, procure, etc. the same to be done (Sec. 22). It was also made an offense to impersonate and vote for any person, living, dead or fictitious, to vote more than once, to vote without lawful right, to bribe a voter, etc. (Sec. 19).

There were numerous other provisions dealing with the elective franchise,

fraudulent registration, obstructing execution of process, conspiracy to deprive persons of the equal protection of the laws, conspiracy to prevent the support of any candidate, provisions relative to supervisors of elections, etc.

July 14, 1870, and more extensively later, on June 10, 1872, Congress passed laws making provision for the supervision of elections by supervisors appointed by the federal coarts. 16 Stat. at L. 254-255; 17 Stat. at 347-349.

Section 6, the present Section 19 of the Criminal Code, remained in its original until the revision of 1874, when the laws of the United States were revised and codified. In the revision it became Section 5508, Revised Statutes.

However, on February 8, 1894, Congress repealed all of the portions of the May 31, 1870, Act which made offenses the various substantive acts in connection with the election franchise, and also repealed the lavs providing for federal supervisors of elections. 28 Stat. at L. 36.

The history of this legislation and kindred

legislation is traced in the opinions in United States v. Gradwell, 243 U.S. 476; United States v. Bathgate, 246 U.S. 220; and United States v. Mosley, 238 U.S. 383.

It is, of course, well recognized that a great deal of fraud in elections having to do with federal officers is committed at primary elections, and I need not point out the importance of primary elections in the selection of proper officials. It has been suggested that federal election laws should properly have to do not only with the general election of federal officers, but at the primary election for such officers. There is some doubt about the constitutional right of the United States to enact legislation having to do with the primary

election of Representatives for Congress, and in view of Newberry v. United States, 256 U.S. 232, there may be some doubt about the right of the Government to regulate the primary election of United State Senators. But I believe that a strong position could be taken that the United States has the right to denounce fraud at primary elections for Representatives and Senators as a crime, and in the present flux of Supreme Court opinions it is entirely possible that the Supreme Court might so hold.

A mere reading of the conspiracy section (Section 19), demonstrates its present inadequacy to fulfill the objects we are discussing here. Indictments based upon the same section have been drawn where homesteaders were interfered with in their rights, Buchanan v. United States, 233 Fed, 257; where there was a conspiracy to deprive a postmaster of his right to enjoy his office, McDonald v. United States, 9 fed. (2d.) 506; and where conspirators attacked a rancher on public land scattering and killing sheep, Janes v. United States, 6 Fed. (2d) 545. A statute so general in its terms is quite inadequate to cover our present situation regarding fraudulent elections.

I have discussed this matter confidentially with some of the judges who participated in the Kansas City election eases and they feel that the work which I suggested is extremely necessary.

In writing to a friend of mine, who wrote at some length on this subject to ex-President Hoover, Mr. Hoover

replied, "I have long thought that the only hope for redemption was through further federal authority and control of elections". This information is, of course, not to be quoted outside of our own particular group and should not under any circumstances be made public in fairness to persons involved.

There is a great mass of law on this problem, which I have not attempted to discuss in this letter, because it would require a paper of considerable length to exhaust this subject. An excellent piece of work along these lines has been done in the Government briefs and in the briefs for the defendants in the Kansas City election cases. I have these briefs in my office. They, of course, will be of great value if a complete study of the subject is to be made.

It seems quite obvious that if vote stealing at federal elections is to become further widespread, or if such practices are to become a national policy, the last hope of a democracy has failed. I believe that there is no constructive piece of work which could be undertaken by the American Bar Association which would transcend in importance a thorough study of this subject, with appropriate recommendations for new legislation, and a concerted and positive effort to enact such recommendations into federal law.

Respectfully,
Arthur J. Freund
AJF:MC