STATEMENT ON THE SEIZURE OF BALLOTS AND OTHER ELECTION MATERIALS

I. INTRODUCTION

In an October 15, 2026 article headlined "Trump's Attacks on Voting Rights Raise Fears He Will Try to Challenge Midterm Results," the New York Times wrote:

> President Trump has warned that the country's election systems are vulnerable to foreign meddling. Federal agents are scouring state rolls and federal data bases to try to find noncitizen voters. And the Homeland Security Chief has asked the Justice Department to examine whether commonly used voting machines can be trusted.

(Zolan Kanno-Youngs, *Trump's Attacks on Voting Raise Fears He Will Try to Challenge Midterm Results*, N.Y. Times (Oct. 15, 2026), https://www.nytimes.com/2026/10/15/us/politics/trumps-attacks-voting-midterms.html)

In January 2026, the President told the Times that "he regretted not ordering the National Guard to seize voting machines in swing states . . ." (Alan Feuer & Ashley Ahn, *Trump Regrets Not Seizing Voting Machines After 2020 Election*, N.Y. Times (Jan. 11, 2026), https://www.nytimes.com/2026/01/11/us/trump-voting-machines-2020-election.html). This raises the question of whether, for the first time in American history, there will be an effort to seize voting machines, ballots, and related materials before state and local officials can complete counting the ballots and certifying the results of the 2026 midterm elections.

It would be unlawful for armed members of the military or civilian agents to be at polling places except to repel an armed enemy. See 18 USC 592. Therefore, the only lawful way for voting machines and ballots to be seized would be pursuant to a judicial warrant.

An application for a warrant would present judges with novel and difficult issues to be decided in order to:

1. Ensure the election proceeds to its conclusion;
2. Ensure that any legitimate, substantiated concerns about election integrity are addressed;

and

3. Ensure that the integrity of the election materials is safeguarded.

II. THE POTENTIAL HARMS OF SEIZING BALLOTS

Unlike the execution of a search warrant for contraband such as drugs or for the records of a criminal enterprise, executing a search warrant for ballots or voting machines before an election is certified would cause irreparable harm to a vital public process: our elections.

The issuance of a warrant for the seizure of voting machines or ballots before an election is concluded would be uniquely serious as well as unprecedented because, as a Justice of the California Supreme Court recently wrote, it would involve "not just any documents, but the most precious documents of the citizenry in a democracy: their votes." Cervantes v. Bianco, 2026 WL 2871925, at *16 (Cal. Sept. 24, 2026) (Liu, J., concurring) (finding unlawful seizure of ballots pursuant to a state court warrant after an election was concluded).

State and federal statutes establish strict rules for how ballots and other voting materials must be maintained and preserved by the state authorities who, under our Constitution, manage elections, and have statutory duties to maintain custody of those materials. Interrupting that chain of custody through a federal search warrant would not only disrupt the election process, it would undermine public confidence in election integrity that existing laws governing the care and custody of ballots are designed to foster.

III. MATTERS TO BE CONSIDERED IF A WARRANT TO SEIZE BALLOTS, VOTING MACHINES, OR RELATED RECORDS ARE REQUESTED

A. The Fourth Amendment And Federal Rule Of Criminal Procedure 41

The Fourth Amendment prohibits "unreasonable searches and seizures by the government." The context of a proposed seizure is important to determining whether it would be reasonable. "A seizure as to one type of material in one setting may be unreasonable in a different setting or with

respect to another kind of material." Roaden v. Kentucky, 413 U.S. 496, 501 (1973); see also Edley Center on Law & Democracy Election Resources, Questions for Assessing a Search Warrant for Election Materials, at 1 (Sept. 2026) https://acrobat.adobe.com/id/urn:aaid:sc:US:7b4a57e1-4201-42d8-aafa-98cc87102587.

Federal Rule of Criminal Procedure 41 provides judges with tools that, properly used, will ensure that any search warrant for election materials is supported by the required probable cause and has terms that are adequate to make the seizure reasonable in the special circumstances of the matter, which include federal and state laws concerning custody of election-related materials. See e.g. Justin Levitt & John Keller, *Election-Related Search Warrants*, 74 U.C.L.A. L. REV. (forthcoming, reviewed 13 Sep 2026) at 25, https://papers.ssrn.com/abstract=7227158 (hereinafter Levitt).

There are federal statutes that are intended to strike a proper balance between both the need to ensure the integrity of elections and to ensure that the electoral process is not disrupted by the Department of Justice. As explained in detail in Levitt, "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," Id. at 13. (emphasis in original) (citing, among other things, Section 601 of the Civil Rights Act of 1960, Sections 12(d)-(e) of the Voting Rights Act of 1965, and Section 6 of the Voting Rights Act Amendments of 1970). There is no statute that authorizes the seizure of ballots, voting machines, or election materials while an election is ongoing.

Rule 41(c) expressly states that it "does not modify any statute regulating search or seizure, or

the execution of a search warrant in special circumstances." Therefore a judicial officer presented with a request for a warrant to seize election records while an election is ongoing must consider whether doing so would be inconsistent with the balance struck by the relevant statutes, including Title III of the Civil Rights Act of 1960, and be unreasonable in view of the uniquely special importance of elections being conducted and concluded to American democracy.

B. Applications For Search Warrants For Election Materials Should Be Subject To Exacting Scrutiny

In the unprecedented context of an application for a search warrant for election materials while an election is ongoing, judges should exercise exacting scrutiny of the Department of Justice's representations, particularly if the judge elects to consider the application ex parte. In view of the fact that a search warrant could interfere with and even prevent a citizen from voting, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) (discussing search warrant seeking materials to be seized that might be protected by the First Amendment).

The need for such exacting scrutiny is magnified by the fact that many judges have found the representations recently made by the Department of Justice to be unreliable. They have chastised the current Department for "unlawful," "unethical," and "unseemly" conduct. See J. David McSwane, Pratheek Rebala & Carla Astudillo, *Federal Judges Chastise Trump's Justice Department for "Unlawful," "Unethical" and "Unseemly" Conduct*, ProPublica (July 28, 2026), https://www.propublica.org/article/justice-department-presumption-of-regularity. In one case, U.S. District Judge Mary McElroy wrote that "'[t]he discrepancy between the honorable conduct expected of prosecutors and DOJ's tactics in this case is unsettling' …The Court cannot help but share the sentiment that 'the presumption of regularity that has been extended to the DOJ that it

could be taken at its word — with little doubt about its intentions and stated purposes — no longer holds." Id.

Similarly, in several cases, including recently in Trump v. Cook, 146 S. Ct. 2234 (2026), the Supreme Court too has rejected the presumption of regularity. Chief Justice Roberts wrote in 2019 in Commerce v. New York, 588 U.S. 752, 785 (2019), and Justice Brett Kavanaugh reiterated in Cook, that Justices and Judges "are not required to exhibit a naivete from which ordinary citizens are free." See Cook 146 S. Ct. at 2249. Therefore, in view of the importance of not disrupting the electoral process, and the Department of Justice's recent performance, ex parte applications for warrants for election materials should be carefully scrutinized.

However, the exacting scrutiny required to make the most consequential decision concerning whether ballots should be seized during an ongoing election should not be made in an ex parte proceeding based solely on a written application even if state election officials are the targets of the requested warrants. To reduce the risk of being misled or not fully informed judges may, as expressly authorized by Rule 41(d)(2), require that the applicant and other government witnesses testify concerning their knowledge of the relevant law and the factual bases for their claims that a warrant is justified. As the Advisory Committee Note to the 1972 Amendment to the Rule states, this provision is intended to assure the judge the opportunity to make a careful decision.

As a request to seize election records before ballots are counted and certified would be unprecedented, and in any event because of the unique importance of elections, this would be a special case in which it may also be appropriate to give election officials notice of the requested warrant and an opportunity to be heard in order to assure that the judicial officer can make a fully informed decision. Indeed, in view of the importance of elections, it may be reversible error, causing irreparable harm, not to give the election officials with custody of the records to be seized

an opportunity to be heard before a warrant is issued and executed. Cf. In re Search Warrant Issued June 13, 2019, 942. F.3d 159, 176, 178-81 (4th Cir. 2019), as amended (Oct. 31, 2019) (reversing the granting ex parte of a warrant for seizure of documents possibly protected by the attorney-client privilege from a law firm and authorizing a DOJ "Filter Team" to review them).

It is ordinarily appropriate to allow applications for a search warrant to be sealed and considered ex parte to avoid giving the target of the search an opportunity to destroy or hide the evidence being sought. See Franks v. Delaware, 438 U.S. 154, 169 (1978). However, federal law requires that state and local officials retain all election records for 22 months. See Civil Rights Act of 1960, Pub. L. 86-449, Title III, § 301 (1960), codified at 52 U.S.C. § 20701. "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." Levitt at 18. Many if not all states have procedures to satisfy this requirement and verify the chain of custody. See id. at 10. Therefore, there will usually be little risk that giving election officials notice and an opportunity to be heard will result in the loss of evidence.

The court can also appoint amicus to assist it in making a properly informed decision concerning whether a warrant should be issued. See Edley Center on Law & Democracy Election Resources, "Search Warrants for Election Materials," at 5 (June 2026) https://acrobat.adobe.com/id/urn:aaid:sc:US:5c2c1c79-f912-4c90-b245-36e29c13c93d. Amici may include both experts in election law and experienced defense lawyers. Amici could also include election officials from other jurisdictions with the experience and expertise to explain the procedures that exist to assure election integrity, the disruption issuance of a warrant would cause, and means to mitigate that disruption.

C. If Necessary, Alternatives To Immediate Seizure Should Be Considered

A judge may consider alternatives to immediate seizure of ballots before an election is concluded and the results certified. If the Department of Justice proves that there is probable cause to believe that one or more election officials will soon destroy or alter election records, issuing a warrant to seize those records before the election is concluded may nevertheless not, as required by the Fourth Amendment, be reasonable in view of the available alternatives. The judge could, for example, issue an order requiring that the records be preserved in the manner required by law. If there is a proven basis for concern that the usual custodian is not trustworthy the judge could order that the records be held in joint custody with state and local officials as to whom there are no concerns about impropriety. This would both preserve the integrity of the records and facilitate the timely, accurate counting of ballots and certification of results required by state law.

In addition, if a proper basis is proven, the election records sought to be seized may be made available for inspection, reproduction, and copying by the DOJ, at the principal office of the state or local custodian of the records, where the records must at all times remain, as required by Section 303 of the Civil Rights Act of 1960. See Levitt at 19; see also Richard Hasen & Shelby Wayment, *A Judicial Guide to Search Warrants Seeking Election Materials*, UCLA School of Law Safeguarding Democracy Project (9 Sep 2026) at 12. Enforcing this statutory retention requirement should assure that the original records are available to the election officials responsible for counting the ballots and certifying the results. It should also maintain the chain of custody necessary to ensure that the records will be available in reliable form to resolve any electoral disputes.

If there is reason to doubt that ballots will be counted properly, a judge could allow observers to note any perceived questionable conduct and inform the court. See 52 USC § 10302(a). The observers could watch the tabulation of votes, but not unilaterally stop it.

In addition, judges may consider whether to defer the execution of any warrant until ballots are counted, any disputes are resolved, and results are certified. Doing so would minimize the risk that any search or seizure, even on some or all of the foregoing conditions, will injure the ability of state and local officials to conclude an election — a result that would deprive citizens of their right to representation.

IV. CONCLUSION

It is fortunate that in the United States there has never been a request for a federal warrant to seize ballots, voting machines, or related materials before an election has been concluded. Thus, there is no precedent on which judges can rely if the past is not prologue. Therefore, again, we former judges hope that our reflections will be helpful to all involved if it becomes necessary for judges to decide quickly and correctly matters that are of fundamental importance to American democracy and the rule of law.

Respectfully,

Judge Michael Luttig, U.S. Circuit Judge,
U.S. Court of Appeals for the Fourth Circuit
(Ret.)

Judge Nancy Gertner, U.S. District Judge,
District of Massachusetts (Ret.)

RESOURCES REGARDING SEARCH WARRANTS FOR BALLOTS, VOTING MACHINES, AND OTHER ELECTION MATERIALS

Bite-sized blog posts:

Election Law Blog, New Report Offers Judges Guidance on Potential Law Enforcement Efforts to Seize Election Materials During an Ongoing Election

Election Law Blog, Search Warrants for Election Materials Get Their Day in Court

Election Law Blog, Election-Related Search Warrants

Election Law Blog, Congress Has Precluded Seizure of Ballots or Voting Machines During the Counting and Certification Process

Short narrative pieces:

John Keller and Chelsea Rice, The Last Check: Magistrate Judges and Federal Seizures of Election Records, Just Security (June 16, 2026)

Justin Levitt, Search Warrants for Election Materials Get Their Day in Court, Lawfare (Sept. 2, 2026)

Gary Restaino, Preparing for Law Enforcement Demands for Election Materials (Apr. 22, 2026)

Short fact sheets: (most here)

Protect Democracy, Understanding Federal Demands for Election Records (Sept. 30, 2026)

Edley Center on Law & Democracy, Search Warrants for Election Materials (June 2026)

Edley Center on Law & Democracy, Questions for Assessing a Search Warrant for Election Materials (Sept. 2026)

Edley Center on Law & Democracy, Sample Attachment B to a Warrant Application (June 2026)

Edley Center on Law & Democracy, Requesting Amicus Briefing (June 2026)

White papers:

Safeguarding Democracy Project @ UCLA Law, A Judicial Guide to Search Warrants Seeking Election Materials (Sept. 2026)

Richard Bernstein, Congress Has Precluded Seizure of Ballots or Voting Machines During the Counting and Certifying Processes (Sept. 2026)

Derek Clinger, State Democracy Research Initiative, How State Laws May Constrain Law Enforcement Seizures of Election Materials (Aug. 25, 2026)

Public Rights Project, Preparing for Potential Election Materials Seizures (Oct. 2026)

Maureen O'Connor & Hayne Yoon, State Court Report, Judges' Critical Role in Evaluating Election-Related Search Warrants (Aug. 26, 2026)

Short law review article:

Justin Levitt & John Keller, Election-Related Search Warrants (forthcoming, UCLA L. Rev. Discourse)

Podcast:

Coming soon - UCLA Law Review did a podcast on the piece above

Webinar:

National Judicial College, Election Cases: The Evidence (Oct. 14, 2026) (I don't think the video is linked there yet, but it should be later this week)