

LEGAL MEMORANDUM

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A Primer on “Motor Voter”: Corrupted Voter Rolls and the Justice Department’s Selective Failure to Enforce Federal Mandates

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Abstract

The National Voter Registration Act imposed sweeping changes on the conduct of American elections. These changes included significant federal mandates on state and local election officials that restricted the ability of those officials to maintain clean and accurate voter rolls while simultaneously obliging them to maintain clean and accurate voter rolls. For most of the history of the law, enforcement actions have been directed against election officials who sought to clean voter rolls and against states for insufficiently pushing voter registration among entitlement recipients. The U.S. Department of Justice, however, has refused to enforce the requirement that election officials maintain clean and accurate voter rolls. Only recently have private parties brought litigation to make up for DOJ’s failure.

The National Voter Registration Act (NVRA), or “Motor Voter,” was signed into law in 1993 by President Bill Clinton.¹ The architecture of the NVRA was strongly influenced by Professors Richard Cloward and Frances Fox Piven.² President George H. W. Bush had vetoed a similar bill in 1992, saying that it exposed “the election process to an unacceptable risk of fraud and corruption without any reason to believe that it would increase electoral participation to any significant degree.”³

With the support of the new President, the NVRA passed the House. In the Senate, however, the bill was subject to a filibuster over the extension of voter registration mandates to state welfare agencies and unemployment offices.⁴

Ultimately, Senator David Durenberger (R-MN) became the 60th vote to end debate after reaching an agreement that (1) unem-

KEY POINTS

- American voter rolls are polluted by millions of ineligible and invalid registrations because interest groups and the Justice Department have used the National Voter Registration Act to litigate against those who are pursuing efforts to ensure election integrity.
- The NVRA, fully utilized, provides important tools that progressive political interests can use to shape the voter rolls to their advantage. Only recently have a small number of conservative organizations recognized and utilized the potential of the NVRA to combat corrupted voter rolls and the voter fraud that can flourish because of those corrupted rolls.
- To fully enjoy the benefits of the legislative compromise struck in Congress in 1993, more organizations committed to election integrity and constitutionally limited government should utilize the NVRA.
- The NVRA was designed to encourage both voter registration and election integrity. Balance in NVRA enforcement requires simultaneous support of both aims.

This paper, in its entirety, can be found at <http://report.heritage.org/lm139>

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ployment benefit offices would be exempted from the list of welfare agencies required to offer voter registration and (2) language would be inserted to ensure that welfare recipients would not be coerced into registering to vote. These new provisions were inserted in the conference report that was passed by both the House and the Senate.⁵

NVRA Overview

The NVRA had several goals as outlined in Section 2 of the law.⁶ First, the primary purpose of the law was to increase voter registration rates. It sought to accomplish this goal by mandating that states affirmatively offer voter registration opportunities whenever residents had contact with state or county government service agencies.

While most people are familiar with the “motor voter” provisions of the law requiring that someone be given the opportunity to register to vote at motor vehicle or driver’s license facilities, this registration mandate is far broader. The requirement to offer voter registration services extends to all government social service facilities, including welfare offices, medical service facilities, and even drug-addiction treatment centers. Language advancing this purpose was included in Section 7 of the NVRA.⁷

The second goal of the law was to standardize and restrict the ability of states to remove inactive or potentially ineligible voters. The NVRA contains

federal mandates that restrict when states may remove dormant voter registrations. These complex requirements, discussed below, provide a sequence of steps that states and local election officials must take before a voter may be removed. Section 8 of the Act contains these mandates.⁸

The third goal of the law was to impose a minimal obligation on states and local election officials to maintain clean voter rolls through the implementation of a list maintenance program.

Finally, the NVRA rewarded states that had same-day voter registration systems in place. Same-day voter registration means that a voter may register and vote on the day of the election. This is usually accomplished inside the polling location, where a voter informs election officials that he or she wishes to register and vote simultaneously.

Seven states were effectively exempted from the NVRA when it became law because they already allowed same-day registration (Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming) or had no registration requirement at all (North Dakota).⁹ Today, Colorado, Connecticut, the District of Columbia, Hawaii, Iowa, and Montana also allow same-day registration.¹⁰ The exemption enjoyed by these states relieves them from having to comply with the obligations imposed by Section 7 and Section 8 of the NVRA. They need not offer voter registration at state and local social service agencies pur-

1. The National Voter Registration Act of 1993, 107 Stat. 77, as amended, 42 U.S.C. 1973gg *et seq.*
2. See Piven discuss her role in the development and passage of the NVRA at Frances Fox Piven, *On the 20th Anniversary of the NVRA*, YouTube (May 20, 2013), <http://www.youtube.com/watch?v=t2axaL6mEGE>.
3. *President Vetoes the “Motor Voter” Measure*, N.Y. TIMES, July 3, 1992, available at <http://www.nytimes.com/1992/07/03/us/the-1992-campaign-president-vetoes-the-motor-voter-measure.html>.
4. *Motor Voter Steers in Wrong Direction*, CHI. TRIB., Mar. 19, 1993, available at http://articles.chicagotribune.com/1993-03-19/news/9303200128_1_voter-mail-in-registration-welfare-offices.
5. The Senate amendments stripping unemployment benefit offices from the scope of the bill were later reinserted in the conference report as discretionary options. See *Congress Passes Bill Easing Voter Registration*, SUN-SENTINEL, May 12, 1993, available at http://articles.sun-sentinel.com/1993-05-12/news/9302110319_1_address-gop-fears-offer-voter-voter-registration. As a practical matter, however, states have been pressured to designate non-mandatory public assistance offices, such as unemployment benefit offices, as NVRA voter registration offices. See *Statement of Interest of the United States*, in *Georgia NAACP v. Kemp*, Case No. 1:11-cv-1849 (N.D. Ga.), pages 4-5, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/StatementinterestofUS.pdf> (last visited Aug. 31, 2014).
6. 42 U.S.C. §1973gg.
7. 42 U.S.C. §1973gg-5.
8. 42 U.S.C. §1973gg-6.
9. This exemption is contained in 42 U.S.C. §1973gg-2(b).
10. See *Same Day Voter Registration*, NCLS, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> (Aug. 31, 2014). Hawaii’s same-day registration was signed into law on June 30, 2014, and will be fully effective in 2018. Press Release, Governor Signs Bill Allowing Voter Registration on Election Day, Hawaii Gov. Neil Abercrombie (June 30, 2014), available at <http://governor.hawaii.gov/blog/governor-signs-bill-allowing-voter-registration-on-election-day/>.

suant to Section 7. Nor must they conduct a voter roll maintenance program under Section 8.

Tension Within the NVRA

Under Section 7 of the NVRA, state and local governments must affirmatively push voter registration opportunities whenever they have contact with the general public. Furthermore, “all offices in the State that provide public assistance” must be designated as voter registration agencies.¹¹ All offices “providing services to persons with disabilities” are also deemed voter registration agencies.¹² Other locations that “may” serve as voter registration agencies include “public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, [and] unemployment compensation offices.”¹³

The Voting Section of the Civil Rights Division at the Department of Justice, through litigation discussed below, has effectively mandated that these additional locations serve as voter registration agencies. An entirely separate section of the NVRA performs the more familiar and far more publicized function of designating motor vehicle license offices as voter registration agencies.¹⁴

The NVRA requires that all recruitment offices for the armed forces be designated as voter registration agencies and that every military installation have a voter assistance office.¹⁵ Despite this decades-old requirement, the Department of Defense Inspector General found in 2010 that only a fraction of these designated offices were functional.¹⁶

The NVRA also mandates that states accept voter registration applications by mail.¹⁷ If the confirmation of a mail registration is returned to an election official as undeliverable, the NVRA does not permit the election official to cancel and rescind the improper registration immediately.¹⁸ Instead, election officials must follow the time-consuming and complicated procedures outlined in Section 8 before the registration may be cancelled—a process that may take as long as two federal general election cycles.¹⁹

The National Voter Registration Act imposes strict limits on how states can remove inactive, ineligible, or deceased voters. Yet Section 8 of the NVRA broadly mandates that states maintain clean voter rolls by requiring a “reasonable” list maintenance program without defining what is reasonable.

NVRA list maintenance obligations are not confined to state officials. The NVRA imposes obligations on any local and county election official who serves as the voting registrar to maintain accurate voter rolls and to comply with the NVRA.²⁰ The NVRA states: “A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.”²¹

As discussed below, courts have found local election officials liable and have imposed various remedies against them under Section 8 of the NVRA. However, the Voting Section, where the author worked as a trial attorney, has an internal and informal policy of *not* enforcing Section 8 of the NVRA

11. 42 U.S.C. §1973gg-5(a)(2)(A).

12. 42 U.S.C. §1973gg-5(a)(2)(b).

13. 42 U.S.C. §1973gg-5(a)(3)(B)(i).

14. 42 U.S.C. §1973gg-3(a)(1).

15. 42 U.S.C. §1973gg-5(c).

16. INSPECTOR GENERAL, U.S. DEPARTMENT OF DEFENSE, 2009 EVALUATION OF THE DoD FEDERAL VOTING ASSISTANCE PROGRAM (FVAP), available at <http://www.fvap.gov/uploads/FVAP/Reports/dodig09.pdf>. These failures to comply with NVRA persist. See INSPECTOR GENERAL, U.S. DEPARTMENT OF DEFENSE, ASSESSMENT OF DoD VOTING ASSISTANCE PROGRAMS FOR CALENDAR YEAR 2013, available at <http://www.dodig.mil/pubs/documents/DODIG-2014-051.pdf>.

17. 42 U.S.C. §1973gg-4.

18. 42 U.S.C. §1973gg-4(d).

19. 42 U.S.C. §1973gg-4(d) requires election officials to follow the steps contained in 42 U.S.C. §1973gg-6(d), which could take years.

20. 42 U.S.C. §1973gg-6(d)(3).

21. 42 U.S.C. §1973gg-6(d)(3). The Help America Vote Act of 2002 also makes it clear that local election officials are required to complete the list maintenance obligations of Section 8. 42 U.S.C. §15483(a)(2)(A).

against local election officials, despite the statutory language to the contrary. This internal policy was implemented for the purported purpose of administrative efficiency, notwithstanding the gross failure by multiple local election officials to comply with Section 8 and the fact that it costs a lot more to litigate against states.²²

Section 8 Cleanup Mechanics

Section 8 imposes an obligation on covered states to conduct a reasonable list maintenance program. Election officials must “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters.”²³

Yet the mechanics of Section 8 can be confusing—even to election officials. Some election officials have ignored the list maintenance provisions of Section 8 and have allowed voter rolls to become bloated with voters who are no longer eligible to vote where they are registered.²⁴ On the other hand, some election officials have improperly removed inactive voters contrary to the mandates and procedures imposed by Section 8.²⁵

The Help America Vote Act (HAVA) of 2002 enhanced the obligations of Section 8.²⁶ Under HAVA, states must establish a statewide electronic database of voters to help maintain election integ-

rity.²⁷ HAVA provides that a state “election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly.”²⁸

Section 8 does not, however, define what constitutes a reasonable list maintenance program, and in the 21-year history of the statute, no court has defined what constitutes a reasonable effort for a list maintenance program. This absence of jurisprudence may be explained by the fact that no plaintiff ever brought a case to enforce these list maintenance obligations until the Department of Justice did so in 2005 against Missouri,²⁹ and no private-party plaintiff brought a case seeking to cleanse corrupted voter rolls until 2012.

While the list maintenance obligations of the NVRA sat gathering dust for decades, interest groups seeking to stop voter roll cleanup efforts and to demand welfare agency voter registration were busy litigating cases.³⁰

Despite the absence of statutory guidance or case law defining “reasonable,” in the few lawsuits that have been filed, plaintiffs have argued that failure to utilize one or more of the list maintenance tools that are currently available constitutes a violation of Section 8—especially when the voter rolls of particular jurisdictions show evidence of inaccuracies, duplications, ineligible voters, and other forms of

22. Even worse, the Justice Department under the Obama Administration has clearly abdicated its responsibilities by discouraging some conscientious public officials from complying with Section 8 by cleansing their voter rolls. See J. Christian Adams, *Millions of Dead Voters Brought to You by Eric Holder*, PJ MEDIA (Feb. 12, 2012), <http://pjmedia.com/jchristianadams/2012/02/14/millions-of-dead-voters-brought-to-you-by-eric-holder/>.

23. 42 U.S.C. §1973gg-6(a)(4).

24. See, e.g., *Judicial Watch v. King*, Case No. 12-cv-00800 (S.D. Indiana), a case brought against Indiana because several counties had in excess of 100 percent of voting-age population registered to vote; *American Civil Rights Union v. Jefferson Davis County, Mississippi*, Case No. 2:13-cv-87 (S.D.MS), where the rolls reached 105 percent of voting age population.

25. See Matt Fritz, *County Scrambles to Get Eligible Voters Back in System*, THE NEWS DISPATCH, Oct. 23, 2012, <http://www.thenewsd Dispatch.com/articles/2012/10/24/news/local/doc5085f15b0788d784162625.txt>.

26. 42 U.S.C. §15301 *et seq.*

27. 42 U.S.C. §15483.

28. 42 U.S.C. §15483(a)(4).

29. *U.S. v. Missouri*, Case No. 05-4391 (W.D. Missouri), Complaint available at http://www.justice.gov/crt/about/vot/nvra/mo_nvra_comp.php (last visited Sept. 2, 2014); see also *U.S. v. Missouri*, 535 F.3d 844 (8th Cir. 2008).

30. The American Civil Liberties Union and the Advancement Project sued Michigan on the eve of the 2008 election to stop voter roll maintenance. See *Advancement Project and ACLU Sue Michigan Secretary of State Over Unlawful Voter Purging*, ACLU, <https://www.aclu.org/voting-rights/advancement-project-and-aclu-sue-michigan-secretary-state-over-unlawful-voter-purging> (last visited Sept. 2, 2014). ACORN sued Missouri in 2008 to bolster welfare agency voter registration. See *Voting Rights: ACORN vs. Scott*, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, http://www.lawyerscommittee.org/projects/voting_rights/page?id=0017 (last visited Sept. 2, 2014). These are just two examples of many such cases.

corruption. For example, states can use a statewide database to track intra-state voters registered in multiple counties.³¹

Many states are now part of the Interstate Voter Registration Crosscheck Program, a compact administered by the Kansas secretary of state.³² Participating states share voter rolls with each other and produce a temporary database, which detects potential duplicate registrants across state lines. The Electronic Registration Information Center (ERIC) provides similar functionality and is utilized by seven states.³³

States can also obtain and cross reference voter rolls with the Social Security Administration death index, which contains the names of nearly all voters who have died. The Electronic Verification of Vital Events (EVVE) database³⁴ and State and Territorial Exchange of Vital Events (STEVE) database³⁵ maintained by the National Center for Health Statistics provide additional tools to verify the existence and eligibility of registrants.

States can also access a variety of other locally produced information databases such as death records, obituaries, and jury duty declination forms to enhance the reliability of their voter rolls. In states where a criminal conviction suspends voting rights, states can review court records and prison records.

By law, the United States attorney for each federal district is obligated to provide election officials the names of all those who have been convicted of disqualifying crimes,³⁶ but a 2005 Government Accountability Office report found that “federal

felony information was not always provided in a standard format” to state and local election officials and that “the information was sometimes difficult to interpret, untimely, or incomplete.”³⁷ Federal authorities are also required to provide data to states seeking to verify the citizenship of individuals, and election officials can utilize these data to check the eligibility of registrants.³⁸

While there is no specific formula for what constitutes a violation of Section 8, a court may consider the wide range of tools available to a state, whether these tools are being used effectively, and the condition of the voter rolls in determining whether a defendant has violated Section 8.

Section 8 also contains a powerful public records provision.³⁹ Under this provision, election officials “shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.”⁴⁰ This includes “lists of the names and addresses of all persons to whom [inactivity] notices ... are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.”

This rarely used disclosure requirement acts as a federally created freedom of information law pertaining to voter roll list maintenance records. In some instances, this NVRA right to information will be more robust than state freedom of information

31. The statewide database is a requirement of the Help America Vote Act of 2002. California is the only state that, even after 12 years, has failed to comply with HAVA by implementing a statewide database. The United States Department of Justice has provided California multiple waivers excusing California from compliance with the law.

32. See NAT'L ASS'N OF STATE ELECTION DIRECTORS, INTERSTATE VOTER REGISTRATION PROGRAM, <http://www.empowerthetotetx.org/uploads/KANSAS.pdf> (last visited Sept. 2, 2014).

33. See CO: *Cheaper, cleaner voter rolls! Now available in 7 states!*, WATCHDOG.ORG, <http://watchdog.org/tag/electronic-registration-information-center/> (last visited Sept. 2, 2014). ERIC's website is located at <http://www.ericstates.org>.

34. See *Electronic Verification of Vital Events*, NAPHSIS, <http://www.naphsis.org/Pages/EvvE.aspx> (last visited Sept. 2, 2014).

35. See *State and Territorial Exchange of Vital Events (STEVE) System Overview*, NAPHSIS, http://www.naphsis.org/about/Documents/STEVE%20System%20Overview_2013.pdf.

36. 42 U.S.C. §1973gg-6(g).

37. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-478, ADDITIONAL DATA COULD HELP STATE AND LOCAL ELECTION OFFICIALS MAINTAIN ACCURATE VOTER REGISTRATION LISTS 38 (2005), 38, available at <http://www.gao.gov/assets/250/246628.pdf>.

38. 8 U.S.C. §1373(c).

39. 42 U.S.C. §1973gg-6(i).

40. 42 U.S.C. §1973gg-6(i)(1).

rights to the same information. Moreover, voter roll maintenance records include not only basic information, such as the names and associated data for registrants, but also the voting history of those registrants because voting inactivity is used to trigger various list maintenance activities.

Section 11 of the NVRA allows an “aggrieved” party—in addition to the Attorney General of the United States—to file suit for failure to comply with Section 8 or any other provision of the NVRA, thus creating a private right of action.⁴¹ A “failure” to comply with Section 8 could mean improperly removing a voter, failing to conduct a reasonable list maintenance program to clean the rolls, or failing to provide information that the NVRA mandates as public information. Before filing suit, an aggrieved party must provide notice of the violation to the election official and give the potential defendant 90 days to cure.⁴²

As discussed below, an aggrieved party may be a citizen or organization harmed by a failure to comply with Section 8. This could include an individual or organization that suffers pecuniary loss from corrupted voter rolls⁴³ or a plaintiff who was denied inspection of registration records. Section 8 provides for an award of attorneys’ fees for a prevailing party.⁴⁴ Therefore, if private actions were filed against jurisdictions with problematic registration rolls, Section 8 could serve as a powerful tool for ensuring electoral integrity.

For states and local jurisdictions that wish to conduct a regular voter roll maintenance program in conformity with Section 8, cleaning the rolls can be slow and complicated, particularly if officials follow the plodding methods outlined in Section 8. The NVRA mandates two separate methods to cancel voter registrations if the registrants no longer reside at the registered address. The first method is the notice mailing and two-cycle wait;⁴⁵ the second

is using postal records and actively mailing voters a notice requesting them to cancel their registration or correct their address.

Notice Mailing and Two-Cycle Wait. A state or county may cancel registrations for inactivity in two consecutive federal elections, but before it may do so, the jurisdiction must provide by U.S. Postal Service a forwardable notice to the registered voter with a postage-prepaid reply card requesting the registrant to confirm the existing registration. The content of the notice is prescribed by Section 8.⁴⁶

If no confirmation is received, a registrant may still vote on Election Day if he provides an affirmation that he still resides at the registration address. If the registrant does not respond to the forwardable notice described in Section 8 and does not attempt to vote, the registration may be cancelled only after the individual fails to vote in two more consecutive federal elections that occur after the notice was mailed.⁴⁷ Some states, such as California, have failed to cancel registrations even in those circumstances, instead reclassifying the registrations as “inactive” but making “reactivation” a pro forma event upon the inactive registrant’s attempting to vote even after two election cycles have passed.

Postal Records and Active Mailings. The second, more active method involves a mailing to registered voters utilizing the Postal Service’s National Change of Address (NCOA) database.⁴⁸ This method allows election officials to use the NCOA database to determine which voters may have moved. Election officials then mail these voters, through forwardable mail, a notice containing a postage-prepaid card asking them to confirm their new residence address.⁴⁹ If no response is received, the election official must again wait two federal election cycles during which the voter does not attempt to vote before the registration may be cancelled.⁵⁰ If the voter happens to

41. 42 U.S.C. §1973gg-9.

42. 42 U.S.C. §1973gg-9(b)(2).

43. *Judicial Watch, Inc. v. King*, 2012 WL 6114897 (S.D. Indiana 2012).

44. 42 U.S.C. §1973gg-9(c).

45. Steps are described at 42 U.S.C. §1973gg-6.

46. 42 U.S.C. §1973gg-6(d)(2)(A).

47. 42 U.S.C. §§1973gg-6(d)(1)(B)(i) and 1973gg-6(d)(1)(B)(ii).

48. 42 U.S.C. §1973gg-6(c)(1).

49. 42 U.S.C. §1973gg-6(d)(2)(A).

50. 42 U.S.C. §1973gg-6 (d)(1)(B).

return the card admitting that he or she no longer lives at the registered address, the registration may be cancelled immediately.⁵¹

Election officials are free to craft communication programs that result in registrants' affirmatively writing that they no longer reside at the registered address or requesting cancellation of obsolete registrations. Some election officials routinely communicate by mail with registrants in an effort to root out obsolete registrations. After a voter responds to one of these active mailings that he or she has moved, the obsolete registration may be cancelled immediately—but only if the communication from the voter is in writing.⁵² In fact, any time a registrant provides a writing saying that he or she resides outside of the jurisdiction of the registrar, the registration may be cancelled immediately.⁵³

The NVRA freezes these regular maintenance activities inside 90 days of a federal election, meaning that no such general maintenance program can be conducted within 90 days of an election.⁵⁴ Notwithstanding the 90-day freeze, election officials may strike from the rolls any registrant who has died or who has requested cancellation or to correct a mistaken registration.⁵⁵

Section 7 Litigation: State Agency Registration Requirements

The National Voter Registration Act has generated a great deal of litigation. Soon after passage of the NVRA, several states challenged the constitutionality of the mandates contained in the law. Most of the litigation has focused on Section 7

and efforts to widen and bolster the obligation that public assistance agencies offer registration. These challenges have been uniformly unsuccessful.⁵⁶ For example, in *Acorn v. Miller*, Michigan refused to comply with Section 7 until the federal government agreed to reimburse all costs imposed on Michigan. Michigan lost.⁵⁷

On the other hand, the Department of Justice, particularly during the Obama Administration, has filed or threatened to file Section 7 litigation on multiple occasions. In Louisiana, for example, the Justice Department, citing statistical declines in registration rates at public assistance agencies, filed a Section 7 lawsuit against state officials.⁵⁸ Three months earlier, the NAACP Legal Defense Fund and Project Vote had filed a similar lawsuit citing similar evidence.⁵⁹ A federal district court judge issued a permanent injunction against Louisiana in 2013, directing various state officials to implement policies and procedures designed to achieve substantial compliance with the NVRA.⁶⁰

None of these lawsuits acknowledged the fact that, as a 2011 Heritage Foundation study showed, the decline in certain welfare caseloads from 1996 to 2006 “contributed substantially to the decline in public assistance voter registrations.”⁶¹ The decline in welfare participation was directly attributable to the Personal Responsibility and Work Opportunity Reconciliation Act, the welfare reform legislation passed in 1996.

Responses to Freedom of Information Act requests have revealed that the Justice Department has engaged in extensive coordination with outside

51. 42 U.S.C. §1973gg-6 (d)(1)(A).

52. 42 U.S.C. §1973gg-6(d)(1)(A).

53. 42 U.S.C. §1973gg-6(d)(1)(A).

54. 42 U.S.C. §1973gg-6(c)(2)(A).

55. 42 U.S.C. §1973gg-6 (c)(2)(B).

56. See Kurtis A. Kemper, Annotation, *Validity, Construction and Application of National Voter Registration Act*, 185 A.L.R.FED. 155 (2003).

57. *Acorn v. Miller*, 912 F.Supp. 976 (W.D. Mich. 1995), *aff'd*, 129 F.3d 833 (6th Cir. 1997).

58. *United States v. State of Louisiana*, Case No. 3:11-cv-00470 (M.D. La.); Complaint available at http://www.justice.gov/crt/about/vot/nvra/la_nvra_comp.pdf.

59. *Ferrand v. Schedler*, Case No. 2:11-cv-00926 (E.D. La.); Complaint available at <http://www.projectvote.org/images/publications/Litigation/Ferrand%20v.%20Schedler/LouisianaComplaint-April-19-2011.pdf>.

60. Order available at http://www.projectvote.org/images/publications/Litigation/Ferrand%20v.%20Schedler/ferrand-v-schedler_permanent_injunction.pdf.

61. David B. Muhlhaupt and Patrick Tyrrell, *Welfare Reform a Factor in Lower Voter Registration at Public Assistance Offices*, HERITAGE CENTER FOR DATA ANALYSIS REPORT No. CDA08-03 (June 11, 2008).

interest groups when it comes to Section 7 enforcement.⁶² Moreover, in these Section 7 investigations, the DOJ Voting Section utilized (for the first time ever in an election case) electronic surveillance methods, including DOJ employees going into state offices wearing concealed recording equipment and collecting evidence as to whether the DOJ employees were offered voter registration materials.⁶³ In investigating Section 7 cases, DOJ lawyers even lurk outside state welfare agencies to ask departing individuals whether they were offered voter registration materials.

The Justice Department also reached Section 7 settlements with Georgia and Rhode Island. In Rhode Island, the settlement documents acknowledge that the terms of the settlement may go beyond the existing legal obligations of Section 7.⁶⁴ The consent decree in Rhode Island required expansion of aggressive voter registration activities in drug treatment centers; mental health facilities; WIC (Women, Infants, and Children supplemental nutrition program) offices; child care facilities; cash assistance offices; and utility payment grant centers, among other locations. The decree mandated Motor Voter “site coordinators” and reporting requirements that detail all of the instances when offers of voter registration materials were rejected. The decree further required that if any welfare services are conducted through private entities, such as a church or other charitable institution, any contract between the state and the private charity must be amended to conform to the consent decree.

Section 8 Litigation: Purging of Ineligible Voters and Maintaining Accurate Voter Rolls

Section 8 litigation to stop election officials from cleaning up voter rolls has also been brought by special-interest groups as well as by the Justice Department.

For example, in October 2008, the Advancement Project, Colorado Common Cause, Mi Familia Vota, and the Service Employees International Union sued Colorado officials, seeking to stop Colorado from cancelling voter registrations received by mail after confirmation mailings were returned to election officials as undeliverable at the purported registration address.⁶⁵ Similarly, in September 2008, the Advancement Project and the American Civil Liberties Union sued Michigan Secretary of State Terry Lynn Land, seeking to stop Michigan from removing from the rolls registrants who obtained driver’s licenses outside of Michigan and also to stop the cancellation of voter registration applications received by mail when the confirmation mailings were returned as undeliverable.⁶⁶ Injunctions were entered against both Michigan and Colorado.⁶⁷

In June 2012, the Justice Department and private plaintiffs sued Florida under Section 8 to stop the state from taking steps to identify and remove potential non-citizens from the voter rolls, including within the 90-day freeze period before a federal election. Florida responded that ineligible non-citizens were invalid registrations *ab initio* (that is, from the outset) and therefore could be removed with-

62. See Press Release, Judicial Watch, New Documents Show Department of Justice Coordination with ACORN-Connected Project Vote (Dec. 14, 2011), available at <http://www.judicialwatch.org/press-room/press-releases/new-documents-show-department-of-justice-coordination-with-acorn-connected-project-vote/>.

63. *DOJ Sting Targets Bobby Jindal and Ignores the Law*, WASH. EXAMINER, Feb. 24, 2011, <http://washingtonexaminer.com/doj-sting-targets-bobby-jindal-and-ignores-the-law/article/39198>.

64. *U.S. v. Rhode Island*, Case No. 11-113S (D.R.I. March 25, 2011); consent decree available at http://www.justice.gov/crt/about/vot/nvra/ri_nvra_cd.pdf.

65. Complaint available at <http://www.advancementproject.org/page/-/esjt/files/resources/Complaint.pdf>.

66. Complaint available at https://www.aclu.org/files/pdfs/votingrights/ussafvland_complaint_blehm.pdf.

67. Orders available at https://www.aclu.org/files/pdfs/votingrights/ussaf_v_land_order.pdf and <http://www.advancementproject.org/page/-/esjt/files/resources/CO%20Common%20Cause%20v.%20Buescher%20Order%20and%20Memo%20Opinion.pdf>.

in the 90-day freeze period pursuant to 42 U.S.C. 1973gg-6(c)(2)(B). The district court agreed with Florida and ruled that efforts to remove non-citizens from the rolls constituted an effort to correct erroneous registrations and that such an effort was not subject to the 90-day freeze.⁶⁸ A three-judge panel of the 11th Circuit Court of Appeals, however, reversed and held that Florida's citizenship verification procedures violated Section 8.⁶⁹

Efforts to utilize Section 8 to enforce reasonable list maintenance obligations did not commence until 2005 when the Justice Department sued both Missouri and Indiana. According to a former counsel to the Assistant Attorney General for the Civil Rights Division, the Voting Section had an unofficial policy, implemented by the career staff, of not enforcing this provision. This policy changed under the Bush Administration.⁷⁰

One-third of Missouri counties had more registered voters than citizens old enough to vote. Similar problems plagued Indiana's rolls. In 2006, a consent decree was entered against Indiana that required an extensive program of voter roll maintenance and reporting.⁷¹

Soon after the inauguration of President Barack Obama in 2009, the Justice Department dismissed the Section 8 case against Missouri without any public explanation.⁷² However, a new political appointee with supervisory authority over the Voting Section told the author, who was working in the Voting Section of the Civil Rights Division at the time, and other staff lawyers that the new Administration had "no interest" in enforcing the list maintenance requirements of Section 8 because it supposedly created a "barrier to the ballot box."⁷³ The Clinton-era

policy of not enforcing Section 8 to enforce reasonable list maintenance obligations was thus reinstated in 2009 by the Obama Administration.

The first cases enforcing Section 8 obligations to maintain accurate voter rolls brought by private parties were filed by True the Vote and Judicial Watch in 2012, almost 20 years after Republicans in Congress inserted the list maintenance obligations into Section 8.

True the Vote and Judicial Watch sued Indiana state election officials (who, as mentioned, had previously been sued by the Justice Department) under Section 8.⁷⁴ Multiple Indiana counties had more voters registered than citizens eligible to vote, according to U.S. Census data, and they still do. Indiana election officials had also failed to respond to requests for public records made under 42 U.S.C. § 1973gg-6(i). The lawsuit was dismissed on June 4, 2014, after the Indiana Secretary of State conceded that "at least one in eight voter registrations contains inaccurate information" and announced that Indiana would send out address confirmation postcards to 4.4 million registered voters to "identify outdated and inaccurate voter registration information."⁷⁵

True the Vote and Judicial Watch next sued the Ohio Secretary of State in August 2012 under Section 8 for access to election records and because multiple Ohio counties had more registered voters than citizens eligible to vote.⁷⁶ The parties jointly dismissed the case in January 2014 after Ohio agreed to implement heightened review of the accuracy of its voter rolls.

In 2013, the American Civil Rights Union (ACRU) sued and obtained consent decrees against two Mississippi counties for violating Section 8. Walthall

68. *Arcia v. Detzner*, 908 F. Supp. 2d 1276 (S.D. Fla. 2012); *U.S. v. Florida*, 870 F. Supp. 2d 1346 (N.D. Fla. 2012).

69. *Arcia v. Florida Secretary of State*, 746 F.3d 1273 (11th Cir. 2014); Florida did not appeal this decision.

70. Interview with Hans A. von Spakovsky (July 1, 2014).

71. Consent Decree available at http://www.justice.gov/crt/about/vot/nvra/in_nvra_cd.php.

72. Hans von Spakovsky, *Politics? What Politics?* NATIONAL REVIEW (May 14, 2009), <http://www.nationalreview.com/articles/227501/politics-what-politics/hans-von-spakovsky>.

73. J. CHRISTIAN ADAMS, *INJUSTICE: EXPOSING THE RACIAL AGENDA OF THE OBAMA JUSTICE DEPARTMENT 189-190* (2011).

74. Complaint available at <http://www.scribd.com/JWatchDC/d/96745375-JWvK-Doc-1-Complaint-f061112#fullscreen>.

75. Press Release, Judicial Watch, *Judicial Watch, True the Vote Historic Indiana Lawsuit Forces Statewide Clean-Up of Voter Registration Lists, Permanent Changes in Election Law Procedures* (Aug. 7, 2014), available at <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-true-vote-historic-indiana-lawsuit-forces-statewide-clean-voter-registration-lists-permanent-changes-election-law-procedures/>. The author has served as counsel for the plaintiffs in this litigation.

76. Complaint available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/complaint_027.pdf. The author served as counsel for the plaintiffs in this case.

County had allowed voter rolls to exceed 124 percent of eligible residents. The county entered a consent decree with the ACRU on September 4, 2013.⁷⁷ Jefferson Davis County had allowed voter rolls to exceed 105 percent of eligible residents. The county entered a consent decree with the ACRU on October 18, 2013.⁷⁸

The ACRU is currently litigating against two Texas counties—Terrell County and Zavala County—for failure to comply with Section 8. Shockingly, over 200 other counties in the United States have more registered voters than citizens eligible to vote in those counties.⁷⁹

So far, no political party, no campaign, no candidate, no political mail-shop⁸⁰—indeed, no organization other than True the Vote, Judicial Watch, or the American Civil Rights Union—has brought a Section 8 case seeking to force election officials to clean up inaccurate voter rolls. Moreover, the Justice Department has been entirely absent for the past six years in enforcing this requirement.

True the Vote also utilized the public records provisions of the NVRA in a lawsuit against the St. Lucie County, Florida, supervisor of elections.⁸¹ The lawsuit sought to obtain a wide variety of election records arising out of the 2012 election for Florida's 18th Congressional District. The case was settled, and the defendants agreed to provide records including purge lists, list maintenance notices, election tabulation records, provisional ballot envelopes used in the congressional election, and more.⁸²

Finally, in 2012, the Fourth Circuit Court of Appeals affirmed the use of Section 8's public information requirements against local election officials in *Project Vote v. Long*. The expansive ruling held that local election officials in Virginia were required by Section 8 to provide completed voter registration forms to requesting parties. The court noted that Section 8's public information disclosure obligations

require the disclosure of “all” information related to voter registration and list maintenance activities.⁸³

Conclusion

Throughout the history of the National Voter Registration Act, liberal interest groups that have regularly opposed election integrity efforts have conducted an aggressive litigation campaign against state and local election officials. States with a large number of Electoral College delegates or where important statewide races occurred have been subjected to lawsuits brought under the NVRA by progressive groups.

The NVRA, fully utilized, provides important tools that progressive political interests can use to shape the voter rolls to their advantage. Only recently have a small number of conservative organizations recognized and utilized the potential of the NVRA to combat corrupted voter rolls and the voter fraud that can flourish because of those corrupted rolls.

To fully enjoy the benefits of the legislative compromise struck in 1993 between Republicans and Democrats in Congress, more organizations committed to election integrity and constitutionally limited government should utilize the NVRA. The NVRA was designed to encourage both voter registration and election integrity. Balance in NVRA enforcement requires simultaneous support of both aims.

American voter rolls are polluted by millions of ineligible and invalid registrations because interest groups advocating for only one side of the 1993 compromise, as well as the Justice Department, have been active in using the NVRA to litigate against those who are pursuing efforts to ensure election integrity. It is long past time for the NVRA's provisions that are intended to guarantee accurate voter registration rolls to be enforced with equal rigor.

77. Consent Decree available at http://theacru.org/Walthall_County_Consent_Decree.pdf.

78. Consent Decree available at <http://defendelectionintegrity.org/pdfs/ACRU-v-Walthall-Co-Court-Approved-Decree.pdf>. The author served as counsel for the plaintiffs in both Mississippi cases.

79. The author serves as counsel for the plaintiffs in these Texas cases.

80. Political mail shops are vendors who send out campaign brochures and other mailings to registered voters on behalf of candidates. They would obviously have a commercial interest in making sure that the registered voter lists they use are accurate and up-to-date.

81. Complaint available at <http://www.scribd.com/doc/123699267/True-the-Vote-v-Florida>. The author served as counsel for True the Vote in this case.

82. Settlement document available at <http://www.scribd.com/doc/140043848/TTV-v-St-Lucie-County-Settlement>.

83. *Project Vote v. Long*, 682 F.3d 331 (4th Cir. 2012).

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