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The National Voter Registration Act: Fifteen Years On

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The National Voter Registration Act: Fifteen Years On

Estelle H. Rogers*

I. Introduction

“The Congress finds that: (1) the right of citizens of the United States to vote is a fundamental right; and (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right....”

The right to vote in the United States has been recognized as central to the essence of citizenship. Yet, voting has been encumbered by onerous procedures and gross inequities for many decades. In the late 19th and early 20th centuries, southern states routinely excluded the poor – particularly racial minorities – through a complex web of poll taxes, residency requirements, and literacy tests that often went unenforced against whites. In the north, party bosses, more frequently than laws, effectively controlled the size and color of the electorate.¹ Even after the monumental Voting Rights Act of 1965, which addressed some of the most glaring and invidious techniques used to exclude racial minorities, many of the elaborate state laws and administrative rules that discouraged voter registration and voting remained.

Concerned that nearly 44% of the eligible electorate did not vote in the 1992 election, the U.S. House of Representatives felt compelled to act. Although legislation could not address all of the factors that contributed to that discouraging statistic, it was believed that simplifying and improving the voter registration process would eliminate a major barrier to low participation in the future.

Congress passed the National Voter Registration Act of 1993 (NVRA) with four purposes:

- To increase the number of citizens who register;
- To encourage governments to enhance participation in voting;
- To protect the integrity of the electoral process; and
- To ensure accurate and current registration rolls.²

The primary means Congress chose to accomplish the first and second goals were mandates that voter registration be offered at venues not generally used for that purpose – e.g., motor vehicle offices³ and public assistance agencies – as well as other offices to be designated by the states; and that a simplified federal mail-in voter registration form be created to make registration

*Estelle Rogers, Consulting Attorney, Project Vote. This issue brief was first released by ACS in November 2009 and is adapted from a longer report: *The NVRA at Fifteen: A Report to Congress*. © 2009 by Project Vote/Voting for America, Inc. The full report is covered by the Creative Commons "Attribution-Non-Commercial-Share-Alike" license (see <http://creativecommons.org/>). It may be reproduced in whole or in part for non-commercial use. It may also be adapted for non-commercial use. Reproduction or adaptation must attribute Project Vote/Voting for America, Inc., and must bear the Creative Commons "Attribution-Non-Commercial-Share-Alike" license. Please notify Project Vote if reproducing or adapting this work.

¹ See Dayna L. Cunningham, *Who Are to be the Electors*, 9 YALE L. AND POL'Y REV. 370 (1991).

² 42 U.S.C. § 1973gg(b) (1993).

³ A small number of DMVs had already offered voter registration services.

widely accessible and easy to accomplish. The integrity of the electoral process and accuracy of the voter roll would be ensured by a duty imposed upon the states to engage in regular list maintenance procedures aimed at “cleaning” the voter list without disenfranchising eligible voters. In addition, the law imposed criminal penalties for intimidation and fraud.

Two caveats should be mentioned. First, the NVRA applies only to federal elections. However, states quickly learned that creating a dual registration system was unduly complicated and costly. Consequently, for all practical purposes, the NVRA is used by the states to govern voter registration across the board. Second, the law does *not* apply to states that have no voter registration at all (North Dakota) and certain states that have same-day registration for federal elections (Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming).⁴

While a number of states have challenged Congress’s authority to enact the NVRA, citing the Constitution’s broad grant of authority to the states in the conduct of elections, the courts have consistently upheld the constitutionality of the NVRA under the Tenth Amendment, and grounded it as well in Congress’s authority to enforce the 14th and 15th Amendments.⁵

This Issue Brief surveys, at the 15-year mark, the NVRA’s successes and failures as a statutory scheme designed to create a national policy on voter registration. There have been both, and it is important to assess what has been accomplished and to suggest what might be done to achieve the level of civic participation envisioned by the statute’s drafters in 1993. After a brief treatment of the historical context of the NVRA, this Issue Brief focuses on two of its most important provisions – voter registration at public agencies, and administration and voter list maintenance – where remedial action could significantly improve voter participation and election administration.⁶ The Issue Brief also discusses how increased enforcement could further the aims of the NVRA.

The NVRA has significant untapped potential to solve many of the problems we continue to experience in our voter registration system, problems that have profound consequences on Election Day. Although statutory reforms are one important way to address these problems, it would be prudent for policy makers and civic reformers to make full use of the law we already have, even as they consider other more elaborate and comprehensive proposals to totally revamp voter registration in the future.

⁴ 42 U.S.C. § 1973gg-2(b) (1993).

⁵ For an excellent survey of early challenges to the NVRA, see Kurtis A. Kemper, Annotation, *Validity, Construction and Application of National Voter Registration Act*, 185 A.L.R. FED. 155 (2003).

⁶ Two other significant sections of the statute do not receive extensive discussion here. Nevertheless, they should be noted briefly. First, Section 5, which gives the NVRA its popular name, requires motor vehicle agencies to offer voter registration services. Though not without its enforcement problems, the “motor voter” provision has been widely accepted by the states and has achieved dramatic results, generating millions of new and updated registrations. In some states, more than half of registrations routinely emanate from motor vehicle offices. On the other hand, Section 6, which created the mail-in voter registration form, has not been such a success story. While the intent of this provision was to simplify the registration process by devising an abbreviated “federal form” that would be acceptable in all jurisdictions, state-imposed restrictions have hampered this effort from the start. Onerous identification requirements and documentary proof of citizenship are only the latest state laws and procedures that complicate the process. Clearly, the “postcard” form envisioned by the NVRA’s authors has taken on a lot of excess baggage.

II. Agency registration (Section 7)⁷

“Each state shall designate agencies for the registration of voters in elections for Federal office.”

Without question, the least successful provision of the NVRA is the requirement that social service agencies and offices serving the disabled provide voter registration services similarly to motor vehicle offices. While this requirement was a promising way of reaching out to citizens who didn’t interact with DMVs, such as those too impoverished to drive or own cars, the reality has not measured up to the promise.⁸ This disappointing track record is due to widespread non-compliance with the mandates of Section 7 and a failure of enforcement by the Department of Justice, particularly in recent years, not with any lack of clarity in the statute itself.

In 1995-96, although the NVRA was not fully implemented in all states, the 43 states and the District of Columbia that reported to the Federal Election Commission (the relevant agency at that time), managed to register 2.6 million new voters through public assistance agencies. But by 2005, that number had plummeted to 540,000, a drop of 79%.⁹ This lack of compliance and enforcement has perpetuated the disparities the statute sought to correct: In 2006, for example, only 60% of adult citizens in households earning less than \$25,000 were registered to vote, compared to over 80% in households making \$100,000 or more.¹⁰

In jurisdictions where agencies have been serious about voter registration, dramatic numbers of newly registered voters have been reported. In 2008, after a court order was entered in Missouri compelling the state to comply with Section 7, public assistance agencies in that state collected 26,000 voter registration applications from their clients in just six weeks.¹¹ After adopting plans in 2004 to improve agency-based registration, Iowa experienced an increase of 700 % over the previous presidential election cycle and 3,000% over the previous year.¹²

While no state laws directly prevent or impede the participation of state agencies in voter registration programs, the fact that the state’s chief election official, usually the secretary of state, does not exercise power over the heads of agencies is a structural problem that contributes to non-compliance. This problem was pointed out starkly in the trial court opinion in *Harkless v.*

⁷ A note about the numbering of the NVRA’s sections: Each is numbered in the statute as 1973gg-#, such as 1973gg-5. Each section of the NVRA, however, is numbered two greater than its “gg” equivalent. Thus, 1973gg-5 is the same as “Section 7” of the NVRA.

⁸ Unfortunately the public agency registration provision did not mirror the simple one-step DMV process, as advocates had hoped. A legislative compromise (which was necessary in order to avoid a gutted agency registration provision or no agency registration at all) created the more cumbersome multi-step process in Section 7. *See* H. R. REP. NO. 103-66, at H.2082 (1993) (Conf. Rep.).

⁹ DOUGLAS R. HESS AND SCOTT NOVAKOWSKI, PROJECT VOTE AND DEMOS, UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995-2007 3 (2008)

¹⁰ DOUGLAS R. HESS, PROJECT VOTE, REPRESENTATIONAL BIAS IN THE 2006 ELECTORATE Table 6 (2006), *available at* <http://www.projectvote.org>.

¹¹ STATE OF MISSOURI, NVRA REPORT FOR PERIOD ENDING 8/31/2008 (2008); STATE OF MISSOURI, NVRA REPORT FOR PERIOD ENDING 9/15/2008 (2008); STATE OF MISSOURI, NVRA REPORT FOR PERIOD ENDING 9/30/2008 (2008) (on file with the author).

¹² HESS AND NOVAKOWSKI, *supra* note 9, at 8.

*Blackwell*¹³ where the court found that the secretary of state could not be held responsible for the failure of agencies to offer voter registration in compliance with the NVRA. However, the Sixth Circuit reversed the trial court's decision, making it clear that the coordination function assigned by the NVRA to the state's chief election officer includes ensuring that state agencies comply with the statute.¹⁴ To the extent that there are shortcomings in the chief election officer's statutory responsibilities, those could be addressed by amendments to state laws.

Many states have been lax in complying with Section 7, and the registration figures from agencies reflect wide swings from year to year, county to county, and agency to agency. In addition, the reporting requirements have been widely disregarded.¹⁵ Consequently, even the degree to which states comply or are successful in registering new voters is largely unknown. State officials often reveal ignorance of the law, and training materials are inadequate.

In the early years of the NVRA, several states challenged the agency registration requirement in lawsuits testing the constitutionality of the NVRA generally, as well as more narrowly focused litigation to construe the meaning of particular terms in the statute ("offices," "public assistance," and "primarily engaged"). Advocacy groups sued several states for failing to provide agency registration. In *ACORN v. Miller*,¹⁶ for example, the Governor of Michigan had issued an executive order prohibiting state agencies from registering voters until the federal government paid the state's expenses for administering the program. The courts soundly rejected the state's position. In general, the upshot of the legal challenges from both directions was the validation of the constitutionality of agency registration and a broad reading of the language of Section 7.¹⁷

By and large, it has not been the courts that have stood in the way of agency registration programs but the agencies themselves, as well as both state and federal recalcitrance to enforce the law. Missouri, where a federal court issued an injunction ordering the state's largest public assistance agency to provide registration materials and assistance to its clients, provides a clear example of the importance of the Section 7 public agency provision of the Act and the immediate impact of compliance.¹⁸ As mentioned above, Missouri agencies registered over 26,000 voters in the first six weeks, and a total of over 79,000 Missourians in the six and a half months following the court's order, compared to only 15,568 registered by all Missouri public assistance agencies in all of 2005 and 2006.

¹³ 467 F. Supp. 2d 754 (N.D. Ohio 2006), *rev'd and remanded sub nom*, *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008).

¹⁴ *Brunner*, 545 F.3d at 452.

¹⁵ 11 CFR § 9428.7 (2009).

¹⁶ *ACORN v. Miller*, 912 F. Supp. 976 (W.D. Mich. 1995), *aff'd*, 129 F.3d 833 (6th Cir. 1997).

¹⁷ *See also* Nat'l Coal. for Students with Disabilities Educ. and Legal Def. Fund v. Gilmore, 190 F.3d 600 (4th Cir. 1998); *United States v. New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003); Nat'l Coal. for Students with Disabilities Educ. and Legal Def. Fund v. Taft, No. Civ.A. 2:00-CV-1300, 2002 WL 31951263 (S.D. Ohio Nov. 18, 2002); *United States v. Tennessee*, No. 3-02-0938 (M.D. Tenn. Sept. 27, 2002); Nat'l Coal. for Students with Disabilities Educ. and Legal Def. Fund v. Scales, 150 F. Supp. 2d 845 (D. Md. 2001); *ACORN v. Fowler*, No. 97-0287, 1998 WL 42578 (E.D. La. Feb. 3, 1998), *aff'd*, 178 F.3d 350 (5th Cir. 1999).

¹⁸ *ACORN v. Scott*, No. 08-CV-4084, 2008 WL 2787931 (W.D. Mo. July 15, 2008)

In *United States v. Tennessee*,¹⁹ the parties entered into a consent agreement whereby Tennessee agreed to (1) implement uniform procedures for the distribution, collection, transmission and retention of voter registration applications; (2) implement mandatory, annual NVRA training programs for all counselors and employees whose responsibilities included providing Tennessee driver's licenses, public assistance, or services to residents with disabilities; and (3) ensure the timely collection of voter registration applications and transmittal to the appropriate county election officials. As a result, during 2005 and 2006, Tennessee agencies generated more than 120,000 voter registration applications – more than twice as many as the next highest performing state.

A. Recommendations for Section 7

The failure of Section 7 has largely been a failure of leadership. In general, state election officials have failed to notify agencies that they are not in compliance, let alone exercise any regulatory authority over them. Similarly, state agency directors have not made registration a priority with their employees. Many state offices admit to having no registration forms on hand for several years running; many workers do not even know they are required to offer registration. Even agency directors are often in the dark. Compounding the problem has been the Justice Department's lax enforcement of Section 7. Following are five suggestions that would ensure that Section 7 would function as Congress intended:

1. Fix Agencies' Administrative Procedures.

Many of the roadblocks to Section 7 compliance are due to administrative procedures within the agencies themselves. At a minimum, each agency should appoint an accountable NVRA coordinator to ensure that personnel are trained, that voter registration is consistently offered, that forms are properly transmitted, and that data is kept and reported to the Election Assistance Commission. Agencies should also institute improvements to their registration process. For example, requiring that a receipt be given to anyone filling out an application with a number to call in case the registration card doesn't arrive creates a "paper trail" showing an application was filed. Those voters might then be able to avoid voting by provisional ballot on Election Day.²⁰

2. Increase Department of Justice Enforcement of Section 7.

The Department of Justice must commit to enforcement of Section 7. Since 2001, the Department has filed only two lawsuits under Section 7; the case against Tennessee previously mentioned and one in New York that is still in litigation. Predictably, Tennessee's agency registration numbers dramatically improved after the settlement of the suit, proving once again that a little effort in this regard goes a long way. Although the Voting Section issued warning letters to 13 states in 2007, an agreement between the Justice Department and the Arizona Department of Economic Security in 2008 is one of only two other concrete achievements of that

¹⁹ *Tennessee*, No. 3-02-0938 (M.D. Tenn. 2002).

²⁰ For detailed recommendations on how public agencies can improve administration of voter registration responsibilities, see Douglas Hess and Scott Novakowski, *Unequal Access: Neglecting the National Voter Registration Act, 1995-2007*, Project Vote, 2008. available at www.projectvote.org/policy-reports-and-guides.

Section in enforcing the agency registration requirement in the past seven years.²¹ The other is a December 2008 Memorandum of Agreement with the Illinois Department of Human Services, which mandated that clients be offered the opportunity to register during “remote” (electronic or telephone) interactions with the agencies as well as in-person transactions, and required detailed tracking and reporting of declinations to register.²²

3. Expand the Number of Agencies that Offer Voter Registration.

The limited number of agencies that offer voter registration should be greatly expanded. The President should commit his administration to this goal, and issue an Executive Order, if necessary. It is possible that autonomous federal programs, such as the Veterans Administration and Social Security, could simply be directed to offer voter registration. Other agencies, operating in partnership with the states, could be ordered to agree to designation as voter registration sites.²³ The NVRA gives the states wide latitude to designate additional agencies, including both private and federal entities, with their consent. This power has not been widely utilized, and states should be encouraged to think creatively and reach out to programs that interact with the public, particularly traditionally disenfranchised groups. Unemployment agencies and job training sites, for example, would be opportune venues to reach many low-income citizens.

4. Clarify that Each State’s Chief Election Officer is Responsible for Implementing Section 7.

The states’ chief election officers must be accountable for Section 7 compliance, and indeed for NVRA compliance generally. While the statute makes this explicit in Section 10 by making the chief election official “responsible for the coordination of State responsibilities,” the courts have sometimes absolved them of real responsibility, apparently finding that “coordination” is something less than “responsibility.” It would be simple for the Department of Justice to issue guidelines to clarify this point.

5. Make Use of Technological Advances to Improve the Registration Process.

Improvements in technology have made the efficient, simultaneous registration process more realistic for agencies, as well as DMVs. As states upgrade their information systems, their obligations (and opportunities) to offer voter registration should be kept in mind.

²¹ Press Release, Arizona Dep’t of Economic Security, DES Enhances Voter Registration Outreach Efforts (May 15, 2008) (available at: https://egov.azdes.gov/CMS400Min/uploadedFiles/Office_of_Communications/news_release_2008_05_15.pdf).

²² See Memorandum of Agreement by and between the United States and the State of Illinois, Dep’t of Human Services (Dec. 15, 2008), available at http://www.usdoj.gov/crt/voting/nvra/il_nvra_agreement.php

²³ Several bills presently pending in Congress would add voter registration sites to those already mandated by Section 7. These include the Veterans Administration, military pay, personnel, and identification offices, and college campuses.

III. Administration and List Maintenance (Section 8)

“Each state shall insure that any eligible applicant is registered to vote... and conduct a general program that makes a reasonable effort to remove the names of ineligible voters.”

A. Submission and Acceptance of Forms

Section 8 sets a number of standards for the administration of federal elections that are widely misunderstood or ignored. First, it makes clear that forms filed through motor vehicle offices or state registration agencies are deemed submitted when given to such agencies, not when received at the state election office. Consequently, a lag in the transmission of forms by a state agency should not prejudice the voter. Nevertheless, were the agency to be so late that a form did not arrive at the election board prior to the election, presumably the voter would be required to vote provisionally. Given the wide variances in states’ and counties’ rules for counting provisional ballots, the voter should not be forced to take this chance.

A related “administration” issue was raised in *ACORN v. Edgar*, one of the early tests of the efficacy of the NVRA as a whole.²⁴ Plaintiffs challenged, among other things, Illinois’s regulation requiring that anyone submitting the federal registration form must also file an Address Verification Form before the registration could be effective. The court held that this provision violated Sections 8(a)(1) and 8(b)(1) of the NVRA.

...[W]hat controls here is that [the Illinois regulations] are indeed invalid because they violate [NVRA] §§ 8(a)(1) and 8(b)(1) by imposing a requirement that is not authorized by those provisions. If any question existed in that respect (and it does not), both H.Rep. 14 and S.Rep. 30 expressly provide that an applicant's “registration is *complete*” when the application form alone is tendered to the appropriate office (or on the postmark date if the application form is mailed).

In other words, the state is precluded from imposing additional formal requirements because 8(a)(1) defines registration as complete upon acceptance of a “valid voter registration form,” and 8(b)(1) requires state activities to protect the integrity of the electoral process to be uniform and nondiscriminatory. That said, the court in *ACORN v. Miller*, held that a voter was not properly registered if her voter identification card was returned as undeliverable. Plaintiffs had argued the state’s conduct was inconsistent with Section 8(a)(1), but the court held that section was inapplicable because the issue concerned voter eligibility and not time limits for submitting registration forms.²⁵

²⁴ *ACORN v. Edgar*, No. 95-C-174, 1995 WL 532120 (N.D. Ill. Sept. 7, 1995)

²⁵ For further discussion of this issue in *ACORN v. Miller*, see *infra* at p 11.

Section 8 also requires the state to send the voter a notice of the disposition of his registration application.²⁶ We have seen widespread violation of this law in recent years, when voter registration drives have submitted hundreds of forms at a time. Election officials in some jurisdictions, perhaps overwhelmed by the processing job ahead of them, have been known to hand forms back to the registration workers and tell them to correct real or perceived errors in the forms by contacting the applicants. This is not the responsibility of the registration workers, and is indeed inconsistent with the law.²⁷ Nonetheless, it continues to occur, and given the recent growth of registration drives, will likely happen with increasing frequency in the future.

It is also important to note that there is no federally-imposed time limit on the mailing of disposition letters, and some offices, particularly when faced with heavy registration, leave this task to the last minute, preventing any meaningful opportunity for the voter to correct errors or omissions.

B. Voter List Maintenance

On the subject of list maintenance, the removal of a voter from the roll may only be accomplished under certain narrowly defined circumstances. This may be the least understood and most contravened subsection of the NVRA as a whole. Several provisions have proven especially problematic for local election officials.

A general “list cleaning” program (to remove ineligible voters on the grounds of change in residence) may not be conducted within 90 days of a primary or general election. Such a program must be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act.”²⁸ For example, a mailing targeting a particular zip code, or only Spanish-surnamed voters, is not permitted.

In addition, the failure of a registered voter to actually vote cannot be, by itself, a ground for removal from the voter roll.²⁹ Nevertheless, there is a popular misconception that non-voting justifies purging. Just last year, a Mississippi bill would have required voters to “re-register” if they registered prior to October 1, 2008 and failed to vote in any election between November 3, 2008 and December 31, 2009.³⁰ Fortunately, this provision was later dropped from the bill, but the fact that a state senator could have seriously proposed it, in light of the obviously contrary federal law, is alarming.

One of the legitimate grounds for removal of a voter from the rolls under most states’ laws is a felony conviction. The embarrassing case of Florida’s felon list in 2000 provides an important object lesson in just how complicated the application of this seemingly simple procedure can be. In matching the Florida Voter Registration Database (VRD) to a national list of felons, the process matched the first four letters of the first name, middle initial, gender, and last four digits of the Social Security number (when available), and used approximate matches

²⁶ 42 U.S.C. § 1973gg-6(a)(1)(2).

²⁷ 42 U.S.C. § 1973gg-6(a)(2).

²⁸ 42 U.S.C. § 1973gg-6(b)(1).

²⁹ 42 U.S.C. § 1973gg-6(b)(2).

³⁰ S.B. 2910, Reg. Sess. (Miss. 2008).

for last name (matching on 80 percent of the letters in the last name) and date of birth. Certain name variations were also explicitly taken into account (Willie could match William; John Richard could match Richard John). The result of this flawed “match” was that approximately 15 percent of the names removed from the VRD were not felons at all and were improperly removed.³¹

It is incumbent upon the state periodically to send “felon lists” to the Board of Elections, but based upon the Florida experience, several safeguards should be implemented. First, the lists must contain enough data, matched exactly, to ensure that the felon cannot be confused with any other voter of the same or similar name. Second, the state’s rule for re-enfranchisement (if any) must be well publicized to the prison authorities and the prison population. Upon exiting the penal system, the felon must be fully informed of his voting status, including what, if any, steps he may take to have his voting rights restored. An affirmative duty must be imposed on parole and probation officers to review these rules with their clients at appropriate junctures. In the razor-close Washington governor’s race in 2006, for example, it became clear that many former felons had never been apprised of their rights. The legislature subsequently acted to require authorities to brief all prisoners leaving the system.³²

The removal of a voter based on a change of address is the most complicated part of the statute. Of course, any voter may *request* to be removed, but this occurs rarely. People who move are apt to notify several government agencies, commercial entities, and friends before they ever think of the Board of Elections. Their failure to notify, therefore, is unlikely to have a nefarious motive – such as the intention to vote in two different jurisdictions. Overwhelmingly, it is due to inadvertence.

Fortunately, the NVRA provides safeguards to ensure that the board of elections removes a voter’s name only where it can be certain that she has left the jurisdiction. The law requires that removal of the voter from the voter roll on the ground of a change of residence can only occur (a) if the voter confirms in writing that she has changed address, **or** (b) if she fails to respond to a forwardable notice **and** then does not vote or appear to vote in the next two federal general elections after the notice is mailed.³³

In other words, the law requires **both** an attempt by the state to directly communicate with the voter **and** the passage of a substantial period of time thereafter in order to be satisfied that she has moved elsewhere. Unfortunately, as discussed below, the application of this process has been widely misconstrued by state and local election officials.

C. HAVA and Database Matching

The clear protocols mandated by the NVRA have been further undermined as an unintended consequence of the state database requirement of the Help America Vote Act (HAVA).³⁴ Now that states are required to create and maintain a statewide electronic database of

³¹ See Gregory Palast, *The Wrong Way to Fix the Vote*, WASH. POST, June 10, 2001, at B1.

³² WASH. REV. CODE § 29A.08.520 (2009).

³³ 42 U.S.C. § 1973gg-6(c)(1).

³⁴ Help America Vote Act of 2002, 42 U.S.C. § 15483.

registered voters, some states have attempted to match a new registrant's data with existing databases of drivers' license numbers, state identification numbers, or Social Security numbers, and deny registration to an applicant whose data does not match.

This use of databases is inconsistent with the purpose of the HAVA requirement, and is notoriously unreliable because of the proliferation of data entry and other errors in such databases.³⁵ A settlement and consent decree in *Washington Association of Churches v. Reed* put a stop to Washington's use of such a match process and made clear that the NVRA rules for registration and list maintenance are still in force, notwithstanding HAVA's database requirement.³⁶

In another variation on the misuse of the state database, some states have formed regional compacts to share voter registration information, with the object of rooting out duplicate entries – voters who have moved from one state to another without canceling registration in the prior state.³⁷

Again, it is important to note that the overwhelming majority of these duplications occur through inadvertence and not criminal intent. It is also obvious, in this mobile society, that there are bound to be duplicate registrations of the same voter, giving rise to the inference that the voter has changed residence. But that inference is only the *beginning* of the process. Two states that suspect they each have the same person on the rolls cannot unilaterally (or bilaterally, as the case may be) cancel the voter's registration in the state where he registered first. Rather, the first state is obligated by the NVRA to send a forwardable letter to the voter and follow the procedure set out in §1973gg-6(d). Instead, some states are simply dropping voters from the rolls in the mistaken assumption that their interstate matching process is a substitute for the NVRA.³⁸

Despite frequent violations of Section 8, it has been litigated relatively rarely. In *United States v. Pulaski County*,³⁹ for example, the parties entered into a consent decree in 2004, whereby the county, without admitting liability, agreed to take certain corrective actions that

³⁵ JUSTIN LEVITT, WENDY R. WEISER, & ANA MUNOZ, BRENNAN CTR. FOR JUSTICE, *Making the List: Database Marching and Verification Processes for Voter Registration*, (2006), available at http://brennan.3cdn.net/96ee05284dfb6a6d5d_j4m6b1cjs.pdf.

³⁶ *Washington Association of Churches v. Reed*, No. CV06-0726RSM (W.D. Wash. Mar. 16, 2007) (stipulated final order and judgment). *But cf.* *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

³⁷ The compact states include Iowa, Kansas, Missouri, and Nebraska in one agreement, joined later by South Dakota and Minnesota; and another spearheaded by Kansas, and including Arizona, Arkansas, Colorado, New Mexico, Oklahoma, and Texas. Louisiana, though not participating in any ongoing compact, did inquire of a number of far-flung jurisdictions soon after Hurricane Katrina, to determine whether displaced Louisianans had registered to vote in other states. By letter dated July 21, 2008, the voting rights organization Project Vote asked the Department of Justice to investigate Louisiana. To date, there has been no response. Letter from Estelle H. Rogers, Esq., to Christopher Coates, Chief, Voting Rights Section DOJ (July 21, 2008), available at http://www.projectvote.org/administrator/images/publications/Justice%20Department%20Correspondence/Coates_1etter_re_purging_7-21-08.pdf.

³⁸ Louisiana's process is especially problematic and clearly illegal. Instead of invoking the state equivalent of NVRA Sec. 8, the state has applied a different state statute explicitly intended for cases of suspected fraud, which provides a truncated notice process, for those voters identified as "matches" with the jurisdictions sharing registration data with Louisiana after Hurricane Katrina—many of them merely temporary residences for these "refugees."

³⁹ *United States v. Pulaski County*, No. 4-04-CV-389 SWW (E.D. Ark. 2004).

ensure compliance with the list maintenance requirements of section 8. The specific actions included an agreement not to remove a registrant from the list of eligible voters (1) except at the registrant's request; (2) as provided by Arkansas law by reason of criminal conviction or mental incapacity; or (3) as provided in the NVRA at Section 1973gg-6. Defendants agreed to provide the United States with a list of all registrants listed as inactive in the county and to send confirmation cards to each registrant on the list, postage prepaid by forwardable mail, as part of a process intended to restore to the active list any voter who had been improperly purged and to prevent future improper removal from the voter rolls. The decree also required Defendants to conduct certain pre-election mailing and media campaigns to provide information on registration and polling locations. Finally, the parties agreed that Defendants would take actions on Election Day to ensure that poll workers had the tools to help voters to vote in their correct precinct, correct their registration address and vote a regular ballot, or, failing that, to vote a provisional ballot.

Not all Section 8 litigation has had such a positive outcome. For example, the issue in *United States v. Missouri*⁴⁰ turned on whether the state or local election officials have authority over the list maintenance process. Under Missouri law, the court held that the state was not responsible for enforcement of the NVRA as against local election authorities.⁴¹ However, the degree of local compliance would be a factor to be weighed in assessing whether the state is reasonably conducting a general list maintenance program. Needless to say, this decision casts doubt on the import of the NVRA's requirement that the state designate a responsible "chief election official," and potentially requires aggrieved parties to mount lawsuits against multiple local governmental entities to ensure statewide compliance.

Some jurisdictions cancel a registration if the letter notifying the applicant of its disposition comes back as undeliverable. Michigan, Maryland, and Colorado statutorily require cancellation under those circumstances. As discussed earlier, the court in *Miller* held that Michigan's statute to that effect was consistent with Section 8 (a)(1). In doing so, the court failed to recognize that an eligible voter's identification card might be returned for reasons other than ineligibility. Yet such a voter, who has no way of knowing of the non-delivery, may show up at the polls on election day and have no recourse, no matter what the reason for the non-delivery.⁴² Interestingly, last year the U. S. District Court for the Eastern District of Michigan issued a preliminary injunction against the same practice in *United States Student Assn. Fd. v. Land*, and the Sixth Circuit refused to issue an emergency stay of the injunction, holding, among other things, that the state was unlikely to prevail on the merits.⁴³ Similarly, in *Common Cause v. Coffman*,⁴⁴ a preliminary injunction was entered to stop election officials from removing from

⁴⁰ *United States v. Missouri*, 535 F. 3d 844 (8th Cir.2008).

⁴¹ The Missouri litigation relates to the Secretary of State's responsibility for Section 7 agency registration compliance, discussed more fully in the prior section. See text accompanying footnote 13.

⁴² *ACORN v. Miller*, 912 F. Supp. at 987. This issue does not appear to have been raised on appeal. 129 F. 3d 833 (6th Cir. 1997).

⁴³ *United States Student Assn. Fd. v. Land*, No. 08-2532 (6th Cir. 2008). An appeal of the injunction is currently pending in the Sixth Circuit.

⁴³ *United States Student Assn. Fd. v. Land*, No. 08-2532 (6th Cir. 2008). An appeal of the injunction is currently pending in the Sixth Circuit.

⁴⁴ No. 08-CV-02321-JLK (D. Colo. 2008).

the statewide database, within 90 days of the election, the names of voters whose address confirmation postcards were returned undelivered.

Although Section 6(d) of the NVRA provides that a non-deliverable disposition notice “may” be followed by the protocol described in the list maintenance section (Section 8) of the NVRA, well-intentioned voters are shut out of the process routinely. If the “may” in this section is really intended as a “must,” as would better serve the intent of the statute as a whole, then the statute should be amended accordingly.

D. Recommendations for Section 8

The registration administration provisions of Section 8 are, for the most part, drafted clearly but nevertheless have been widely ignored. Significantly increased awareness and enforcement of these provisions is necessary to fulfill the potential of Section 8. The Department of Justice should (1) promulgate interpretive guidelines to clarify the mandates of the statute, and (2) file lawsuits against states and counties, if necessary. In addition, certain portions of Section 8, including the list maintenance provisions (Section 8 (b)-(d)), have been so widely misunderstood that they may need to be amended if improved enforcement efforts fail to yield a concrete change in states’ practices.

1. Ensure Applications are Forwarded in a Timely Manner.

Receipt of an application at a motor vehicle or other designated agency is deemed to be the date of application, irrespective of when (or if) it is received by the appropriate election office, and this provision should be enforced if violated.⁴⁵ In addition, the statute should be amended to provide a remedy in this situation, so that a voter is not unfairly penalized and forced to vote by provisional ballot, which may or may not be counted. Instead, if the voter affirms that she applied at a specific office on a specific date, and affirms that she meets all of the eligibility requirements, she should be permitted to vote by regular ballot. Only if some of these facts are in doubt should a provisional ballot be offered.

2. Enforce States’ Obligation to Send Applicants Disposition Notices.

Second, the statute charges the “appropriate State election official” with sending a disposition notice to the applicant.⁴⁶ As noted earlier, some election authorities have flouted this duty by handing registration forms back to those who submitted them on behalf of applicants. This is clearly prohibited by the law, and must be enforced against state or county election officials.

3. Issue Guidance Clarifying the Narrow Circumstances Permitting Removal of Voters from the Rolls.

Election authorities are constrained from removing the name of a registrant except under certain limited circumstances – either at the request of the registrant, under state law by reason of

⁴⁵ 42 U.S.C. § 1973gg-6(a)(1)(A) and (C).

⁴⁶ 42 U.S.C. § 1973gg-6(a)(2).

criminal conviction or mental incapacity, or under a general list maintenance program to remove names because of death or change of residence.⁴⁷ The Department of Justice should issue clear guidelines as to the meaning of “uniform, nondiscriminatory” list maintenance programs to give notice to election administrators as to what the law requires.

4. Ensure Accurate Lists of Felons.

Section 8 should impose an explicit, affirmative duty upon states to provide adequately detailed felon lists to the election board and regularly to supply lists of prisoners exiting the system (in states where re-enfranchisement is possible). Given recent experience with significant error rates in “felon purges,” the same 90-day rule applicable to purges based on address changes should be applied to felon purges as well. In other words, any list cleaning process designed to systematically remove felons may not be conducted within 90 days of a federal election. The Department of Justice should issue guidelines explicating which systems for maintaining lists of felons do (and do not) comply with the NVRA. Upon release, all prisoners must be informed of their right to be re-enfranchised, where applicable, and the process for achieving that status. (In light of the importance of voting rights in the prisoner’s reintegration into society, administrative burdens to accomplish re-enfranchisement should be kept to a minimum. Unfortunately, even amending the NVRA will probably have no impact on this state-law issue.)

5. Clarify that a Failure to Vote is Not Grounds for Removing a Voter from the Rolls.

The Department of Justice should issue guidelines clarifying the circumstances under which purging is (and is not) allowed and bring litigation against jurisdictions that fail to comply with the law. The relevance of one’s failure to vote in two federal elections is misconstrued by the public at large, and frequently by election officials, as if it were an independent basis for removal from the rolls rather than a delineation of a time period. For example, in 2008 in Miami-Dade County, a number of African American voters who had not voted in many years and had not moved in all that time were told they were not on the rolls at all. This is a particularly important clarification demanded by the past 15 years’ experience with the NVRA, and the statute may need to be amended to clarify this provision if increased enforcement does not remedy the problem.

6. Make the Purge Protocol Mandatory When Mail is Returned as Undeliverable.

As noted previously, the NVRA should be amended to require that the Section 8 purge protocol be observed when a disposition letter or voter registration card is returned as undeliverable. Currently, election officials “may” use this process but are not required to.

7. Enforce the Purge Protocol Against States that Purge on the Basis of Matching Lists.

⁴⁷ 42 U.S.C. § 1973gg-6(a)(3-4).

The current tendency by election administrators to reject registrations or purge voters on the basis of the matching of lists – both intrastate and interstate – is in clear contravention of the NVRA. The Department of Justice should issue guidelines reiterating the statute’s requirements and file suit against jurisdictions that fail to comply. If enforcement efforts fail to curb these practices, new language should be added to the NVRA or to HAVA to clarify the legally permissible uses of the match process.

8. Require an Exact Match and Provide Meaningful Notice.

Finally, it is essential that there be an exact match, using adequate data fields, before anyone is removed from the voter roll, whether on account of death, felon status, or change of residence. The Department of Justice should issue guidelines to this effect, though statutory changes may be necessary if states or localities fail to comply. In addition, meaningful notice to the voter must be required before removal. The right to vote is too important, and the opportunities to correct such errors too limited, to permit anything less. Experience has shown the match processes used by some states to be too error-prone to allow them to continue, and the law should be clarified and, if necessary, amended in light of this experience.

IV. Enforcement of the NVRA

Although it is tempting to conclude that the dearth of litigation under the NVRA over the past 15 years is evidence that the statute’s meaning is clear and its goals are being attained, that is far from true. Instead, particularly in the last decade, the Department of Justice has shown little will to enforce the law against the states, despite widespread and obvious violations. Nor have the states done much to keep their own houses in order. To cite only one glaring example, agency and DMV registration in many localities have suffered from a lack of oversight across the board, and the states’ chief election officials must be held accountable for NVRA implementation, as the statute requires. It is also noteworthy that the Department of Justice has never utilized the criminal penalties of Section 12,⁴⁸ which provides for fines and imprisonment in cases of intimidation or fraud perpetrated upon voters, even though instances of such conduct have been documented.⁴⁹

Further, the private right of action provided in Section 11⁵⁰ has been shown, as a practical matter, to be a highly imperfect vehicle for enforcing the law. (It is important to note here that

⁴⁸ 42 U.S.C. § 1973gg-10.

⁴⁹ See, e.g., PEOPLE FOR THE AMERICAN WAY AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *THE LONG SHADOW OF JIM CROW: VOTER INTIMIDATION AND SUPPRESSION IN AMERICA TODAY* (2004); Bob Herbert, Opinion, *Suppress the Vote?*, NEW YORK TIMES, August 16, 2004; Garance Franke-Ruta and Harold Meyerson, *The GOP Deploys*, THE AMERICAN PROSPECT, February 1, 2004; *Judge Limits Some S.D. Poll-Watcher Activity*, ASSOCIATED PRESS, November 2, 2004; Judy Normand, *Controversy Greets Early Voting*, PINE BLUFF COMMERCIAL, October 22, 2002; Kevin Duchschere, *Callers Question Registered Minnesota Voters’ Eligibility*, STAR TRIBUNE, October 29, 2004. In 2006, for example, Project Vote contacted the FBI in Dallas to report an incident in which an intimidating postcard was sent to a voter, threatening him with incarceration if he was a victim of voter fraud or was brought to the polls by a political group suspected of voter fraud. The FBI declined to investigate, much less prosecute the offense. A subsequent complaint to the Department of Justice Office of Professional Responsibility, dated April 21, 2008, has never been answered. A copy of the letter may be found at http://www.projectvote.org/images/publications/Justice%20Department%20Correspondence/OPR_Complaint.pdf.

⁵⁰ 42 U.S.C. § 1973gg-9.

the Department of Justice may sue on its own behalf, without a private plaintiff, making the Department's role even more indispensable in vindicating violations of voting rights under the law.) Individual plaintiffs are almost impossible to identify until it is too late for them to achieve a meaningful remedy – the ability to register and to vote. Often, an individual who has been harmed by an NVRA violation will not know it until she appears at the polling place and is told she is not on the roll because, for example, her form was never sent from the disability agency to the election board. Conversely, an individual who eventually registers successfully is, arguably, no longer injured by the earlier violation of the NVRA, and would then have no standing to sue under the Act.

As a way of circumventing the difficulty of finding individual plaintiffs, some organizations – such as unions or civic groups – have sued on behalf of their members. However, this strategy has also been far from universally successful. For example, in *ACORN v. Fowler*, the Fifth Circuit upheld the Louisiana District Court's judgment that ACORN lacked standing to enforce the NVRA list maintenance provisions on behalf of its members against the state because it could not demonstrate it had suffered any harm as an organization or as a representative of its members that was traceable to the actions of the defendant election official.⁵¹ Similarly, in *Diaz v. Hood*, the union plaintiff was dismissed by the District Court on the ground that it had failed to identify any member who was personally aggrieved by the conduct complained of. Eventually, however, the appellate court reversed this decision.⁵²

In *Harkless v. Blackwell*,⁵³ the trial court held that ACORN did not have standing to make a Section 7 claim because it “failed to allege anything except ‘a setback to its abstract social interests.’”⁵⁴ Fortunately, the Sixth Circuit reversed this decision, but without substantively addressing the organizational standing issue.⁵⁵

Clearly, the combination all of these factors constitutes a “perfect storm” to deny meaningful relief for NVRA violations. If the Department of Justice fails in its duty to enforce the law, *and* organizational standing is denied, *and* individual plaintiffs are difficult to identify until they have been irrevocably deprived of their rights – the promises of the NVRA are hollow indeed. Surely, some remedial action must be taken.

V. Conclusion

The National Voter Registration Act was heralded as a landmark law that would usher in a new era of universal, or nearly universal, enfranchisement and political participation. Yet,

⁵¹ *ACORN v. Fowler*, No. 97-0287, 1998 WL 42578 (E.D. La. Feb. 3, 1998), *aff'd*, 178 F.3d 350 (5th Cir. 1999)

⁵² *Diaz v. Hood*, 342 F. Supp. 2d 1111 (S.D. Fla. 2004); *Diaz v. Sec'y of Fla.*, No. 04-15539, 2005 WL 2402748 (11th Cir. Sept. 28, 2005).

⁵³ *Harkless v. Blackwell*, 467 F. Supp. 2d 754 (N.D. Ohio 2006), *rev'd and remanded sub nom*, *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008).

⁵⁴ *Harkless*, 467 F. Supp. 2d at 761.

⁵⁵ Although standing was ultimately decided in favor of organizational plaintiffs in two of the cases noted above, a recent decision by the U.S. Supreme Court in a challenge to certain environmental regulations, *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009) could prove problematic in the future, as it establishes a stringent test for organizational standing, requiring a claim of actual or imminent harm to named individuals that would result from the challenged regulations.

fifteen years later, registration problems were widely believed to be the most important issue of the 2008 election, as hanging chads were in 2000 and long lines in 2004. Clearly, the promise of the NVRA is a long way from fulfillment.

Without reiterating the recommendations included in the foregoing report, we note that there are several categories of improvements that would greatly enhance the efficacy of the NVRA, and thus the enfranchisement of previously unreached voters.

The President of the United States, himself a former voter registration organizer and NVRA litigator, has extensive executive authority to breathe new life into the NVRA by exercising leadership over the Department of Justice and over other cabinet-level departments whose programs are or should be voter registration agencies. Even without addressing the contours of the president's power to issue Executive Orders to expand the number of voter registration agencies, he could accomplish a great deal merely by convening the relevant agency and program directors and making it clear what the law requires of them right now. He should also direct additional agencies to accept designation as voter registration sites by states – something the Veterans Administration, under the previous administration, refused to do.

The Department of Justice, in particular, is key to the success or failure of the NVRA, and should provide much needed guidance and enforcement of Sections 7 and 8. The Department has the duty to sue states that are out of compliance, and, to date, lawsuits have been few and far between. The Department also has the ability to issue guidance that explains what is expected of the states under the law, elucidates the standards that will be used in assessing compliance, and sets out best practices, such as agency procedures that have yielded large numbers of new voter registrations under Section 7. The Department of Justice simply has not taken advantage of its substantial authority, and the voters have suffered as a result. Were the Department to take full advantage of its powers, including litigation, registration and list maintenance procedures could be significantly improved.

Many state election officials have likewise taken a rather passive approach to their responsibilities under the NVRA. Each state's chief election official must ensure that the state's registration form is easy to use, that election administrators do not impose unreasonable restrictions on registration drives, and that motor vehicle, disability, and social service agencies consistently fulfill their duties under the NVRA. In addition, some states have not fully availed themselves of the opportunity under the NVRA to designate additional state, federal, and private agencies as voter registration sites, and they should be encouraged to do so. Experience has shown that entities that serve low-income and minority citizens can be very effective voter registration agencies when they are committed to compliance with the law. This program can and should be expanded.

Finally, legislative changes could give the law more clarity – and more teeth. There are specific sections of the NVRA that, experience has shown, would benefit from changes in language. However, a caveat is in order. Legislation is generally a long, hard road, and its outcome is often unexpected, and sometimes unwelcome.

As the debate unfolds in the coming months over “universal registration,” “automatic registration,” “internet registration,” and a plethora of other ambitious proposals to expand enfranchisement and streamline the process, the NVRA remains a powerful tool that should not be ignored. If it were – finally – vigorously enforced and properly interpreted, this 15-year old statute could well be the transformative law that its authors envisioned.