

TO: Elections Officials
FROM: Brennan Center for Justice, Demos, and Lawyers' Committee for Civil Rights Under Law
DATE: November 20, 2017
RE: Voter List Maintenance and NVRA Compliance

Introduction

This memorandum provides guidance on state and county elections officials' obligations under the National Voter Registration Act (NVRA). The Public Interest Legal Foundation (PILF) has sent threatening and misleading letters to hundreds of local election officials in jurisdictions around the country urging actions that could in fact violate these legal requirements, creating an urgent need for clarification.¹ PILF's goal of removing voters from registration lists is inconsistent with the primary purpose of the NVRA, its claims of improper list maintenance are baseless, and its demands are not required by federal law.

A. The NVRA Was Enacted to Increase Voter Registration and Participation.

The NVRA was enacted first and foremost to “*increase* the number of eligible citizens who register to vote.” 52 U.S.C. § 20501(b)(1) (emphasis added). Thus, contrary to the tenor of PILF's letters, the purpose of the NVRA is *not* for states and localities to eliminate voters from the rolls. As the Third Circuit Court of Appeals has explained,

[o]ne of the NVRA's central purposes was to dramatically expand opportunities for voter registration and to ensure that, once registered, voters could not be removed from the registration rolls by a failure to vote or because they had changed addresses. To achieve this purpose, the NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using reliable information from government agencies....

Welker v. Clarke, 239 F.3d 596, 598–99 (3d Cir. 2001).

List maintenance is, of course, important. Accurate and up-to-date voter lists reflecting all eligible individuals benefit both election administrators and voters. But accuracy

¹ See Sample October 2017 “NVRA Violation” letter, available at <https://publicinterestlegal.org/files/Sample-2017-notice.pdf> (last visited October 25, 2017).

requires ensuring that eligible voters are not erroneously removed from the rolls while removing voters who have become ineligible. Removing the names of legitimate voters compromises the integrity of the voter rolls just as much—or more so—as leaving a voter’s name on the rolls when the person is no longer eligible to vote. To avoid putting legitimate voters at risk, efforts to remove ineligible voters from the rolls must be carried out in accordance with the NVRA and with appropriate protections against wrongful deletions. Hastily crafted removal programs based on unsupported allegations of bloated voter rolls, on the other hand, carry the risks of violation of federal law and disenfranchisement.

B. PILF’s Allegations of Improper List Maintenance Are Baseless.

Using an unreliable and inaccurate assessment of voter registration rates, PILF wrongly asserts that the jurisdictions it has targeted have more voters on the rolls than eligible residents. It then falsely claims these high registration rates alone provide strong evidence that a jurisdiction is not fulfilling its obligation to maintain accurate voter rolls.

United States Census data, which PILF apparently relies on to estimate the eligible voting population, is neither designed to measure eligible voters nor does in fact do so. Population for Census purposes is not the same as eligible population for voting purposes. For example, students, service members and others are eligible to vote in jurisdictions where they currently live, even if the Census may count them as part of the population in other areas.

The figures PILF relies on to estimate registration rates fare no better. These reflect only the high-water mark rates at “book closing,” the period immediately before an election when there are typically large numbers of new registrants, and when election officials are restricted from removing people from the rolls.

Even if a jurisdiction had more registered voters on its rolls than eligible population, there are many reasons why this might be proper and, indeed, evidence of compliance with the law. For example, when a registrant is thought to have changed residence, the law explicitly prohibits the removal of the voter’s name from the rolls unless either the voter has confirmed the change in writing *or* a sufficient waiting period has elapsed. A state complying with this requirement, then, will necessarily have ineligible voters on the rolls for a limited period of time. Likewise, in the three months prior to any federal election, states must halt most of their voter-removal efforts. At the same time, as the election approaches, new voters are registering in high numbers. This, too, will result in high registration rates when they are evaluated close to a federal election.

C. The Actions PILF Demands Are Not Required by the NVRA.

PILF demands that the targeted jurisdictions, regardless of their existing procedures, quickly take unspecified actions to reduce their voter registration rates or risk litigation. However, maintaining voter rolls in compliance with the NVRA requires careful attention. The NVRA allows certain actions while prohibiting others.

First, the NVRA does not mandate a particular registration rate and does not require rushed adoption and completion of removal efforts prior to any particular election; to the contrary, it merely requires “a reasonable effort” pursuant to a “general program” of list maintenance and permits removal only for enumerated reasons. Second, the NVRA places several restrictions on any efforts a jurisdiction makes to comply with its general list maintenance obligation. These include prohibiting programs that remove voters on non-uniform or discriminatory grounds and requiring confirmation before removing voters who the jurisdiction believes have change residence. *See, e.g.*, 52 U.S.C. §§ 20507(b), (d). Third, the NVRA establishes a “safe harbor” program that is sufficient to fully satisfy a jurisdiction’s list-maintenance obligations. Finally, the NVRA requires this reasonable effort only with respect to those who have died or have changed residence. 52 U.S.C. § 20507(a)(4). It merely permits, but does not require, States to make an effort to remove those with criminal convictions or mental incapacity. *See* 52 U.S.C. § 20507(b).

1. *The NVRA Prohibits Removal of Registrants Except for Enumerated Reasons, and Imposes Limited Affirmative List Maintenance Obligations.*

Section 8 of the NVRA requires states to place eligible voters on the rolls when they submit a complete and valid voter registration application, and it prohibits states from removing validly registered voters unless the voter requests removal or has become ineligible for one of four enumerated reasons: death, change in residence, felony conviction, or mental incapacity. 52 U.S.C. §§ 20507(a)(3)-(4). It does not mandate a particular registration rate or require additional list maintenance on account of any registration rate, nor does it require continual efforts to scour the rolls to identify and remove registered voters the instant they become ineligible. It only affirmatively requires states to adopt a “general program” that makes a “reasonable effort” to remove voters who are ineligible by reason of death or change in residence. *Id.* The NVRA does not mandate that particular procedures or sources of information be included as part of this general program, but rather, leaves states with a level of discretion to design their list-maintenance programs. That discretion is not unlimited, however, and, in order to reduce the chance that citizens eligible to vote will be removed from the rolls, several other provisions of Section 8 impose limits and requirements on a state’s list-maintenance programs.

2. *Voter Removal Programs Must Comply with the NVRA’s Requirements.*

The NVRA requires that voter removal programs be uniform, non-discriminatory, and in compliance with the Voting Rights Act of 1965, and it prohibits programs that result in removal of voters simply because they fail to vote. These restrictions prohibit, for example, relying on unsubstantiated information from third parties claiming that certain voters on a jurisdiction’s rolls are ineligible, because there is no way for the jurisdiction to verify that the information was obtained uniformly across the jurisdiction or that it was obtained in a non-discriminatory way. Likewise, they prohibit presuming that a voter who

fails to vote is ineligible for one of the valid bases for removal without some affirmative evidence of ineligibility.

In addition, the NVRA provides that “a State *shall not remove* the name of a registrant . . . on the grounds that the registrant has changed residence unless” (i) he or she “confirms in writing” that he or she has changed residence to one outside the election official’s jurisdiction, or (ii) he or she has failed to respond to an address-change confirmation notice *and* has failed to vote in an election in a time period running from the date of the notice to the day after the second consecutive federal general election thereafter. *Id.* § 20507(d)(1) (emphasis added). This means there will often be a legally mandated delay in many circumstances before removing registrants who has become ineligible.

Further, any list-maintenance program must be completed ninety days before any federal election. The NVRA prohibits States from conducting any program “the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters” during the ninety-day period preceding an election—including the period preceding a primary, special, or runoff election. 52 U.S.C. § 20507(c)(2); *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014). Any removal of voters for alleged ineligibility during this ninety-day period must be based “upon individualized information or investigation.”² *Arcia*, 772 F.3d at 1344. Under the NVRA’s clear requirements, then, the removal of *any* names from the voter rolls within ninety days of a federal election must be based on specific, individualized information.

These strict requirements effectuate Congress’s “concern that [removal] programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing.”³

As noted above, these restrictions on a State’s ability to simply remove the name of voters from the voter rolls as soon as it suspects the voter has changed residence will inevitably result in voters being on the rolls after they have moved while they are in the process of being removed. It is therefore unsurprising to find that there are more names on the voter rolls in some jurisdictions than there are eligible citizens—especially in jurisdictions with highly transient populations, such as college towns, areas dependent on seasonal or periodic labor (for example, where the economy is based on mineral or petroleum extraction), or those with large numbers of part time residents. As one court explained, “The NVRA makes it inevitable that voter registration lists will be inflated because of its requirement that States wait to remove a voter’s name who has not responded to an [NVRA Section] 8(d)(2) notice until that voter fails to vote in two successive federal elections.” *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *4 n.7 (W.D. Mo. Apr. 13, 2007), *aff’d in part, rev’d in part and remanded*, 535 F.3d 844 (8th Cir. 2008).

² The U.S. Court of Appeals for the Eleventh Circuit recently interpreted this prohibition to broadly apply to “any program”—not merely ones aimed at removing “voters who have moved.” *Arcia*, 772 F.3d at 1349. In fact, the Court rejected efforts by Florida to systematically remove alleged noncitizens from the voter rolls during the 90-day period pursuant to this provision. *Id.*

³ H. Rep. No. 103-9, at 15, *reprinted in* 1993 U.S.C.C.A.N. 105.

3. *For Registrants Who Have Moved, States Can Use Change-of-Address Information From the U.S. Postal Service But Must Still Comply with the NVRA's Notice Provisions.*

The NVRA provides a model procedure, sometimes called the NVRA's "safe harbor," by which a State may remove the names of registrants who have changed residence. Under that procedure, the state begins with change-of-address information obtained through the Postal Service's National Change of Address system. *Id.* § 20507(c)(1)(A); *see also Welker*, 239 F.3d at 598–99.

Even when the State has received change-of-address information from the Postal Service, however, and even when the information indicates that individuals have moved out of the jurisdiction, the NVRA prohibits States from simply removing these individuals. The State still must confirm the change by following a specific procedure set forth in the statute. 52 U.S.C. §§ 20507(c)(1), (d).

- *First*, if it appears the registrant has moved *within* the same jurisdiction in which he or she is already registered to vote, the election official is to "change[] the registration records to show the new address and send[] the registrant a notice . . . by which the registrant may verify or correct the address information." *Id.* §§ 20507(c)(1)(B)(i). The obligation is to correct the voter registration list, not to remove the voter from the list.
- *Second*, if it appears based on reliable second-hand information, such as information received through the Postal Service's National Change of Address program, that the voter has moved *outside* the election official's jurisdiction, the NVRA sets forth specific notice requirements intended to verify the data from the Postal Service. *See id.* § 20507(c)(1)(B)(ii). The notice must include a pre-paid return card allowing the voter to confirm the change or correct the address information from the Postal Service. *See id.* § 20507(d)(2)(A). If the card is not returned, the registrant "may" be required to provide affirmation or confirmation of residence in order to vote the next time she appears, but the registrant *may not* be removed from the list of registered voters.⁴ *See id.* The State may remove the registrant from the voter rolls only the voter fails to respond to the notice and then fails to vote in any election during the next two consecutive federal general cycles. *See id.* The notice must also inform the registrant about how he or she may continue to be eligible to vote if he or she has in fact moved outside the jurisdiction.

⁴ The NVRA sets forth detailed procedures governing the circumstances in which a voter who has failed to respond to an address confirmation must be permitted to vote. *See* 52 U.S.C. § 20507(e).

A jurisdiction that complies with these requirements has fully satisfied its obligation to conduct a reasonable effort to remove voters who are ineligible due to a change in residence and need do no more.

4. *The NVRA Does Not Require States to Remove Voters Convicted of Felonies or Adjudged Mentally Incompetent.*

The NVRA “reasonable effort” requirement applies only with respect to those who are ineligible by reason of death or changed residence. 52 U.S.C. § 20507(a)(4). It permits, but does not require, states to make an effort to remove those with criminal convictions and those declared mentally incompetent. *See* 52 U.S.C. §20507(b). States can—and some do—choose to allow those with criminal convictions to remain eligible to vote, and if the States make them ineligible, it is up to the States to determine what, if any, effort they will make to remove them from the rolls. *See ACRU v. Philadelphia*, No. 16-3811, slip op. (3rd Cir. Sep. 25, 2017).

Conclusion

PILF’s allegations of poor list maintenance in hundreds of jurisdictions around the country is baseless. Jurisdictions are not required under the NVRA or any other federal statute to take the actions PILF urges. Indeed, hasty and ill-considered list-maintenance programs are more likely to give rise to violations of the NVRA, and could put voters at risk of improper removal and, ultimately, disenfranchisement.