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July 7, 2017

TO: Interested Media and Others  
FR: Douglas R. Hess, Assistant Professor of Political Science

RE: List Maintenance Letter to States from Voting Section of the Department of Justice

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### **What happened?**

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A June 2017 [letter](#) from the Voting Section of the Department of Justice (DOJ) regarding maintenance procedures for voter registration lists is [disconcerting](#) to many, including former attorneys in the Voting Section, because of its timing with the unusual letter sent to all states from the election commission set up by President Trump. That letter seeks voter registration files of an unusual breadth. (See [here](#) for a good analysis of the commission's letter by Professor Stewart at MIT.)

The DOJ letter, however, is asking states for information regarding how they maintain registration lists by removing, confirming, or updating voter registration records (e.g., address changes).<sup>1</sup> The request is largely based on the National Voter Registration Act (NVRA) of 1993, a civil rights law I have been studying and helping (and prodding) states to implement since 1994.<sup>2</sup>

### **Why is the letter controversial?**

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Part of the letter is based on Section 8 of the NVRA. This section regulates state procedures for adding and removing voters to the registration list. States' "list cleaning" or "list maintenance" procedures can be controversial because, when done poorly, they remove thousands of eligible voters. Procedures that wrongly remove many eligible voters (purges) are not uncommon and are often discriminatory. Section 8 was written, in part, to prevent states from cleaning lists based on too little information or if a registrant failed to vote in a single federal election.

Part of the letter is also based on Section 5 of the NVRA (which requires voter registration services in DMVs, hence the "motor voter" nickname for the NVRA, which I dislike because it ignores the complexity and importance of other sections of the Act). The DOJ letter refers to the part of Section 5 that requires states to update voter registrations records when citizens provide address changes to the DMV.

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<sup>1</sup> Because six states are exempt from the NVRA the DOJ letter (presumably) did not go to them. The exempt states are ID, MN, ND, NH, WI, and WY.

<sup>2</sup> A good summary of the NVRA by the Justice Department and their guidance on the NVRA can be found [here](#).



Other agencies required to offer voter registration—not mentioned in the letter, despite evidence of implementation problems—are to provide voter registration services when they receive address changes from the public. However, states are to use DMV address changes as automatic voter registration updates, unless the registrant requests otherwise ([52 U.S. Code § 20504\(d\)](#)). Many states, I suspect, are not following this requirement of the NVRA and haven't for years, if they ever did. *Thus, I welcome information on how this works and I can see a need for it to be enforced.*

## So What?

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To my mind, the letter does trigger warning bells, but some context is important. In fact, the evidence gathered by this letter could be helpful to those wanting to expand voter rolls. Here are my observations and concerns, as well as some background:

- 1) The DOJ has sent out letters to states requesting information on NVRA implementation before based on data that is missing or otherwise concerning in the US Election Assistance Commission's (EAC) biennial report to Congress on implementation of the NVRA. Attached is one such example from 2007.

*However, the 2007 letter went out to a limited number of states, 18 in total, not all states covered by the NVRA. Moreover, that 2007 letter followed years of pressure placed on DOJ by advocates and Congress to investigate states' failure to implement Section 7 of the NVRA, which requires that states actively offer voter registration to clients of government programs that serve low-income or disabled citizens. This pressure was warranted as there was considerable evidence—of the “smoking gun” variety—of widespread and reoccurring non-compliance with Section 7 of the NVRA. (Evidence of non-compliance with Section 5 of the NVRA, the more famous provision called “motor voter,” was later also uncovered by the same advocates.)*

- 2) Some of the information requested in the DOJ letter could help advocates wishing to expand access to voter registration lists and protect voter registration lists from unfair or illegal purges of eligible voters. I.e., public interest advocates should know how list cleaning operates and make sure it complies with [good practice](#). An advocacy group should make records requests like the DOJ letter to states that they suspect clean lists poorly.
- 3) *What's concerning about this 2017 letter is both that it is going out to so many states and the DOJ's history during the Bush Administration.* During President G. W. Bush's administration, the DOJ became infamously divided internally and, I think it is fair to say, subjected to abuse for political ends. Is this letter a return to those days?

For instance, as a consultant to Project Vote, I and others from Demos and People for the American Way met with DOJ attorneys to provide evidence of widespread non-compliance with Section 7 of the NVRA. To quote from [Pam Fellsler's report for NPR](#) in 2007:

Joe Rich, a former head of the Civil Rights Division's voting section, recalls a 2004 meeting that he and other Justice Department officials had with two voter-advocacy groups, Project Vote and Demos. The advocates had evidence that one section of the National Voter Registration Act (NVRA) — or motor-voter law — wasn't being enforced. That section requires states to make voter registration available at social-service



agencies to encourage voter registration among low-income and disadvantaged Americans. . . . After the meeting, Rich thought the groups' concerns should be investigated, but higher-ups at the Justice Department felt otherwise.

"I was told by Mr. Hans Von Spakovsky, who was then the primary supervisor of the voting section — he was a political appointee — that he really didn't think there was any merit to this, and he brushed it off without any action at all," Rich says. Rich says that a few months later, Von Spakovsky directed the office to push another part of the motor-voter law — an effort that focused more on taking names off the lists, rather than putting them on.

During President's Obama Administration there was a return to enforcement of Sections 5 and 7, as well as efforts to ensure that Section 8 was not abused or neglected, depending on how you look at it, by officials engaging in what appeared to be voter registration "purges." Sadly, DOJ never increased its work on NVRA enforcement to the level advocates felt needed.<sup>3</sup>

- 4) This letter was likely the result of carefully negotiated discussions by career lawyers and political appointees. These appointees can set some of the priorities for the Voting Section, but cannot dictate action as much as some observers may fear without paying a heavy cost of causing tensions within DOJ to rise. We haven't seen evidence of that yet; given recent history, it should be watched for.
- 5) There is nothing wrong with list cleaning per se. However, if done poorly it can "cost" (remove eligible voters) more than it "benefits" (removing ineligible records) society. Indeed, considering how rare it is for an ineligible person to vote, the cost of cleaning needs to be extremely low (i.e., extremely unlikely to remove an eligible voter) before there is any net benefit. In the end, Section 8 of the NVRA regulates list cleaning. The information gathered could be used to stop poor cleaning policies or to push states to make poor decisions on cleaning. However, see the prior point on dictating action.

In the end, the big questions, to me, are these:

- 1) Will similar letters go out re: repeated failures of states to pro-actively offer voter registration as required by the NVRA? And will states update registrations based on DMV updates, as required?
- 2) Will DOJ realize that *one of the best ways to improve lists right now is to enforce the various voter registration services required under the NVRA?* (Election officials, journalists, and others should note this as well.)
- 3) If none of the above happen, is the Voting Section being misused as it was under President Bush? Signs of tension in DOJ should be monitored to see if that is the case.

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<sup>3</sup> This was always a mystery as advocates have filed numerous NVRA lawsuits in the past decade and the evidence that there had been years of non-compliance with the NVRA was overwhelming. Often a simple review of states' policy manuals was enough to indicate non-compliance with federal law. Perhaps DOJ decided, as a sort of triage, to leave most of the state-by-state NVRA work to the non-profit sector?



U.S. Department of Justice

Civil Rights Division

Voting Section - NWB  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

August 31, 2007

The Honorable Jesse White  
Secretary of State of Illinois  
213 State Capitol Building  
Springfield, Illinois 62756

Dear Secretary White:

We write to you as the chief elections official for Illinois to request information concerning Illinois' compliance with Section 7 of the federal National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.* ("NVRA").

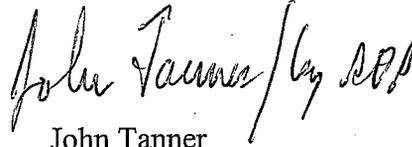
Section 7 of the NVRA sets forth federal requirements with respect to voter registration services to be offered by the states. In particular, the NVRA requires that states offer voter registration services at all offices that provide public assistance. *See* 42 U.S.C. §1973gg-5(a). As part of a nationwide effort to assess compliance with Section 7 of the NVRA, we reviewed state information submitted to the Election Assistance Commission during the period following the November 2004 election through the November 2006 election. According to our data, Illinois was among the ten states with the lowest percentage of voter registration applications received from offices providing public assistance.

We write to request the following information: (1) a list of all offices in Illinois that provide public assistance; (2) the number of voter registration applications received from each of these offices; and (3) a description of Illinois' program to provide voter registration services required by Section 7 of the NVRA at offices providing public assistance.

Please provide this information no later than two weeks from the date of this letter. Any materials may be sent by Federal Express to Robert Popper at the following address: U.S. Department of Justice, Civil Rights Division, Voting Section, 1800 G Street N.W., Washington, D.C. 20006. We will be happy to provide you with our Federal Express account number. You may also submit the materials by email to [Robert.Popper@usdoj.gov](mailto:Robert.Popper@usdoj.gov). If you have any questions

regarding our request, please contact Mr. Popper at (202) 305-0046 or Amanda Gregory at (202) 305-7540. We very much appreciate your cooperation in our efforts to monitor the nationwide progress of NVRA compliance.

Sincerely,

A handwritten signature in cursive script that reads "John Tanner / by POP".

John Tanner  
Chief  
Voting Section