

DISSENTING STATEMENT OF COMMISSIONERS GAIL HERIOT & PETER KIRSANOW

This report is not so much a serious effort to analyze the National Voter Registration Act (“NVRA”) as it is an exercise in partisanship. Its findings and recommendations are essentially a wish list for the Democratic Party.

The most serious problem is that a majority of members of the Commission insisted that we investigate only Section 7 compliance and that we ignore compliance with Section 8. The former was a part of the NVRA favored by Congressional Democrats, while the latter was a part backed by Congressional Republicans.¹ This was a strange choice for a commission that is charged with the responsibility to ensure that federal agencies properly enforce civil rights law. *The Commission had sworn testimony that the Department of Justice’s Civil Rights Division had made a decision not to enforce the Section 8; it had no evidence that the Civil Rights Division was falling down on the job in the enforcement of Section 7. Instead of including an investigation of the problem we had firm reason to believe existed, the Commission chose to investigate only the area the Civil Rights Division was already vigorously pursuing—even a bit too vigorously in that it was requiring jurisdictions to go above and beyond what Section 7 actually requires. With this report, the Commission urges the Civil Rights Division to push its Section 7 requirements even harder.*

One of the most important missions of the Commission, perhaps the most important, is to ensure that the federal bureaucracy is properly executing the law relating to civil rights and voting. As former Chairwoman Mary Frances Berry put it, “We are the watch dog that bites you on the leg, keep tugging at you and says, “How about this?”² While we seldom agree with Berry on matters of substance, we do at least agree with her that the Commission should always be a watchdog and never a lap dog. Too often over the last few years, however, it has been anything but vigilant, acting as a cheerleader for the Administration’s enforcement activities rather than as serious critics. This is disappointing.

Still, what is most disturbing is not the scent of partisanship in this report. The Commission is, after all, only a small part of the federal government, and its reports may or may not have a significant effect on policy. There is a greater tragedy. The nation is at a point at which the bad faith failure to enforce all sides of a legislative compromise makes future

¹ By contrast, when the Commission conducted a briefing in 2006, it was careful to consider the twin problems of voter fraud and voter intimidation, precisely because doing so was in the interest of non-partisanship. See Voter Fraud and Voter Intimidation: A Briefing Before the U.S. Commission on Civil Rights Held in Washington, D.C., October 13, 2006.

² Will Lester, Election Watchdog Riles Fla. Leaders, The Lakeland Ledger (April 16, 2001).

legislative compromises less likely. That could well have significant ramifications for the nation's future.

Twenty-three years ago, Democrats and Republicans agreed that making voter registration easier would be a good idea. They agreed that requiring states to provide for voter registration at division of motor vehicles offices would be helpful. Republicans, however, were concerned that the rapid expansion of the voting rolls would result in the compromised integrity of those rolls and that safeguards would be needed to prevent voter fraud. Democrats, on the other hand, were keen to expand the rolls further by making voter registration materials available at public assistance, unemployment insurance and disability services offices too. A compromise gave members of both parties what they wanted. For the Democrats, Section 7 required the above-mentioned state offices to provide voter registration, and for the Republicans, Section 8, which required states to keep their voting rolls up-to-date and uncluttered, was included.

Alas, Section 7 has not just been enforced more vigorously than Section 8. The Civil Rights Division insists that states go beyond what Section 7 actually requires. This, of course, makes it more difficult for public assistance, unemployment insurance and disability services offices to do the jobs they were created for. Meanwhile, Section 8 has received little attention.

No one should wonder why it is difficult for Congress to compromise. When legislative package deals are made, they must be enforced as package deals. If they are not, the party to the bargain who got burned won't be willing to enter into such a deal again. Nobody wants to be the chump.

A. The NVRA Was Intended as a Bipartisan Compromise with Section 7 and Section 8 Part of a Package Deal.

Democratic legislators tend to be very enthusiastic about making it easier to register to vote. Part of the reason is no doubt ideological—a belief that democracies are stronger when

more citizens participate as voters. But it is also worth pointing out that those segments of the population that are less likely to register to vote are more likely to vote Democratic.³

Insofar as Democrats have a conflict of interest that causes them to press for methods to register younger and lower-income voters, Republicans have the flip side of that conflict of interest. Nevertheless, many Republican legislators have agreed that increased citizen participation is a good thing. The difference has been that they have been more cautious than Democrats about the danger of voter fraud. The easier it is to register, the easier it will be to register fraudulently. Also, the more quickly and automatically an individual can register, the more likely a person who intends to stay in the area only briefly will be registered. Once that person leaves the area, his voter registration may remain on file for decades. The more cluttered the voting rolls with people who have left the vicinity, deceased people, etc., the easier it may be for unscrupulous persons fraudulently to cast votes on their behalf.

Despite these conflicting perspectives, Democrats and a sufficient number of Republicans were able to come together and produce the NVRA. Often called the “Motor Voter Act,” it ensured that registering to vote would be as easy as getting a driver’s license. Each office of the Division of Motor Vehicles in each state would also be a place of voter registration. Furthermore, at the behest mainly of Democrats, state public assistance, unemployment insurance and disability services offices would also be places of voter registration as required by Section 7. At the behest of the Republicans who supported the bill, Section 8 required states to keep their voting rolls clean and uncluttered. This is how democracy is supposed to work—through painstaking compromise.

Note that without pairing Section 7 and Section 8, it is unlikely that the bill could have passed Congress. Indeed, many Republicans voted against the bill on the ground that it did not go far enough toward preventing voter fraud. No doubt more of them would have supported the bill had the safeguards against voter fraud been greater, but then the bill might have begun to lose support by Democrats, who were concerned that further safeguards against voter fraud

³ A Pew Research study, for example, indicates that members of the millennial generation (defined as persons between the ages of 18 and 33) are 51% Democratic/lean Democratic vs. 35% Republican/lean Republican. See Pew Research Center, “A Deep Dive into Party Affiliation: Sharp Differences by Race, Gender, Generation, Education,” April 7, 2015 (available at <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/>). Similarly, an exit poll conducted in 2012 found that 60% of voters between the ages of 18-29 voted for Barack Obama, whereas only 37% of this age group voted for Mitt Romney. See Cornell University, The Roper Center for Public Opinion Research, How Groups Voted in 2012, available at <http://ropercenter.cornell.edu/polls/us-elections/how-groups-voted/how-groups-voted-2012/>.)

The poor are also disproportionately likely to vote Democratic. Persons whose family income is lower than \$30,000 per year are more likely to be Democrats and less likely to be Republicans than members of any other income bracket. See Pew Research Center, 2014 Party Identification Detailed Tables, April 7, 2015, available at <http://www.people-press.org/2015/04/07/2014-party-identification-detailed-tables/>. Data from the Roper Center site also shows that, of persons with incomes under \$50,000 per year, 60% voted for Obama and 38% for Romney. For persons with incomes over \$50,000 but less than \$100,000, the relevant figures are 46% Obama/52% Romney. For persons with incomes over \$100,000, the figures are 44% Obama/54% Romney. See Cornell University, The Roper Center for Public Opinion Research, How Groups Voted in 2012, *supra*.

would lean too far in that direction and result is individuals being mistakenly prevented from voting.

As Senator Mark Hatfield (R-OR), a pivotal sponsor of the bill, put it:

In the 101st Congress, I withheld my approval from the National Voter Registration Act, S. 874, as considered by the Committee on Rules and Administration because, as I stated in a section of additional views in the report of S. 874, the bill remained “fatally flawed.”

The flaw in S. 874 was its lack of protection of the system. Yes, accessibility needs to be expanded within the voter registration process, but not at the cost of the integrity of the system. I firmly believe that the rights of individuals to vote must be protected. This in turn means that accessibility to registration must be protected. But this does not mean that the value of an individual's vote should be degraded by allowing fraudulent registrations to remain on the voting rolls. If I am a lawfully registered, eligible voter, I do not want my vote to be diluted by the vote of someone who is not a lawfully registered, eligible voter. S. 874 lacked a mandatory system for keeping the registration rolls clean and accurate, and therefore did not protect the integrity of the system.

Following the Committee's action on S. 874, I worked with the Committee Chairman in crafting an amendment which would address this flaw. We were prepared to offer this amendment on the floor at the end of the last Congress, but S. 874 did not come to the floor for consideration.

With the Committee Chairman, I introduced the National Voter Registration Act of 1991 at the beginning of the 102nd Congress. S. 250 included all of the provisions to which the Chairman and I had agreed in amending S. 874. We have mandated an address verification system which makes a “reasonable” attempt to clean the rolls; and we have allowed states to require mail registrants to vote in person the first time.⁴

Hatfield again described the spirit of compromise fundamental to the bill on another occasion:

⁴ Senate Report 102-60 (1991).

Mr. President, I rise again today to support the National Voter Registration Act of 1991 as one of its Republican cosponsors. I only repeat what has been said many times, but just perhaps to give it a little different perspective.

As we review the poor voter turnout over the last few years, I would like to just take 1988 as an example when only half of this Nation's eligible population took part in electing a President. During the 1990 congressional elections, the turnout of eligible voters was 36 percent, the lowest since 1942 and the second lowest since 1798.

It is interesting, Mr. President, these statistics drew jeers from the leaders of China's Tiananmen Square crackdown. Referring to the dismal turnout in our 1990 elections, the official Chinese Communist newspaper commented:

“Some people hold American democracy in the highest esteem, believing it to be the model for the free, democratic system. Actually, the American people don't care about their democratic rights or hold them in high regard.”

Mr. President, in the 101st Congress, I withheld approval initially from the National Voter Registration Act, because I considered that the Senate Rules Committee should look at what I thought to be a fatal flaw in the bill. The Rules Committee and the chairman, the chief author of this bill, Senator FORD, did take another look at this bill, and we began to see where we had to strengthen the protection of the voters who do turn out. In other words, we want to liberalize the registration system to draw more voters into the process, but we certainly did not want in any way to create the possibility of fraudulent votes being cast. So this bill was changed to provide for purging of the voting rolls and to require mail registrants to vote in person the first time.⁵

In the House, Representative Bill Thomas (R-CA) described the NVRA in similar terms:

⁵ 138 Cong. Rec. S6858-02.

H.R. 2190 was a compromise. As in most compromises, there were wins and there were losses on both sides. As in most compromises, there was an evenhanded handling of difficult areas of conflicts. H.R. 2190 provided an outreach program. A portion of it is known as motor-voter. That was mandated. There was also an extension to other agencies. There were no specific agencies mandated, but rather a general charge that we open up the opportunity for people to register.

The other part of the evenhanded compromise was the acknowledgment that if we are going to add more people to the rolls through this outreach program, there should be a nonpunitive method of voter verification. One of the growing difficulties in almost every precinct across the United States is the fact that Americans are very mobile. We move a lot. Aside from the difficulty in getting on the rolls is the virtual impossibility of removing people from the rolls.⁶

Representative Stokes (D-OH) likewise said:

Mr. Chairman, I rise in support of H.R. 2190, the National Voter Registration Act, which seeks to remove existing barriers to voter registration, and encourage eligible individuals to register to vote.

Mr. Chairman, H.R. 2190 will encourage voter registration by making the registration process as easy and quick as possible, while ensuring the integrity of the voting rolls and the election process. H.R. 2190 will mandate mail-in registration, and registration at many Federal and State offices, such as public libraries, public assistance offices, city and county clerks' offices, and public schools. H.R. 2190 also provides for a process known as motor-voter registration, which would allow citizens to register to vote when applying for or renewing their driver's license.

Each of the registration methods called for in the bill is a proven method of increasing registration in an efficient and cost-effective manner. Linking voting registration with application for a driver's license would reach about 90 percent of the voting age population.

⁶ 138 Cong. Rec. H4702-05. Thomas claimed in the same speech that H.R. 2190 was different from the version of NVRA that actually passed Congress because H.R. 2190 provided funding for the states to carry out its requirements, whereas the final version of NVRA did not. Nonetheless, the compromise he describes here – between making registration easier and verification harder – is reflected in the final bill.

This bill will not increase voter fraud, as some opponents have claimed. Many of these opponents used this same argument 25 years ago, in the debate over the Voting Rights Act, which eliminated discriminatory registration practices, and extended the right to vote to many black Americans for the first time. In fact, several features of the bill would actually decrease the likelihood of voter fraud, including the requirement that the voting lists be verified periodically. In addition, the bill includes penalties for people who fraudulently register.

In short, Mr. Chairman, this will make tremendous progress toward increasing voting registration and voter participation. It is a measure which is long overdue.⁷

Outside the legislature, prominent leaders of advocacy groups and journalists similarly understood the NVRA as a bipartisan compromise. In a letter to Congress, President of the American Bar Association Talbot D'Alamberte wrote:

We hope members from both parties will put aside their fears of the unknown to support S. 250. It offers the best opportunity to balance the sensitivities of both political parties and to adopt a bill that will provide the opportunity to vote to many persons now faced with unnecessary barriers to exercising their franchise.⁸

And an editorial published in The New York Times read:

A major threat to passage of the Senate version is the Republicans' concern that a provision requiring registration by mail in all states would encourage fraud: one person might register several names.

Actually, the greatest threat to clean elections lies in fraudulent use of "deadwood"—millions of registrations left on the books by people who have moved and neglected to notify election officials.

Conservatively, 10 to 20 percent of all current registrations represent citizens who no longer live where they are registered. No

⁷ 136 Cong. Rec. H262-02

⁸ 138 Cong. Rec. H4702-05.

state's arrangements for purging nonvoters work fast enough-and some states have no such provisions at all.

This weakness would be repaired by the National Voter Registration Act, which resulted from more than a year of painstaking bipartisan negotiations in the House.⁹

B. The Obama Administration Has Nonetheless Decided to Ignore The Compromise and Enforces Only the Sections of the NVRA That Happen to Serve Its Partisan Interest.

Despite this legislative history, there is overwhelming evidence – including sworn testimony before this very Commission at a previous briefing – that Obama political appointees at DOJ have decided to in effect to turn a blind eye to evidence of Section 8 violations. Christopher Coates, the former Chief of the Voting Rights Section of the Civil Rights Division, submitted written testimony to this Commission that reads as follows:

In November 2009, a ... lunch meeting was held by Ms. [Julie] Fernandes on the subject of the National Voter Registration Act (NVRA)... In discussions specifically addressing the list maintenance provision of Section 8 of the NVRA, Ms. Fernandes stated that list maintenance had to do with the administration of elections. She went on to say that the Obama administration was not interested in that type of issue, but instead interested in issues that pertained to voter access. During the Bush Administration, the Voting Section began filing cases under the list maintenance provision of Section 8 to compel states and local registration officials to remove ineligible voters. These suits were very unpopular with a number of the groups that work in the area of voting rights. When Ms. Fernandes told the Voting Section was not interested in Section 8 list maintenance enforcement activity, everyone in the room understood exactly what she meant. We understood that she was not talking about Section 8 cases in which there is a claim that the removal procedures of Section 8 were not being complied with; instead, she was talking about the types of cases that the Voting Section filed during the Bush administration whose purpose was to compel the states to comply with the Section

⁹ Raymond E. Wolfinger, "How To Raise Voter Turnout," *The New York Times*, June 6, 1990.

8 directive that they do list maintenance by removing ineligible from the list.¹⁰

Christian Adams, also a former lawyer for the Department of Justice's Voting Section of the Civil Rights Division, testified under oath before the Commission about the same topic. Under questioning by the Commission's General Counsel, he stated:

MR. BLACKWOOD: You mentioned Ms. Fernandes. There is a press report also that in front of the entire Voting Section all of the career staff, she explicitly told them this administration would not be enforcing Section 8 of the National Voter Registration Act. Were you there, and did—

MR. ADAMS: I was there—

MR. BLACKWOOD: --she say that?

MR. ADAMS: I was there for that, and it—I can tell you more about that

MR. ADAMS: ... [A] meeting of the entire Voting Section was assembled to discuss NVRA 8. This occurred in November of 2009.

Deputy Assistant Attorney General Julie Fernandes, when asked about Section 8 said, "We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it."

Everybody in the Voting Section heard her say this. Mr. Coates heard her say it. ...

MR. BLACKWOOD: And you heard it as well, though.

MR. ADAMS: I was shocked. It was lawlessness.¹¹

After the Commission's report was published, an investigation by DOJ's Office of the Inspector General essentially confirmed Coates' and Adams' account. Although some of the

¹⁰ Written Testimony of Christopher Coates at 14-15.

¹¹ U.S. Commission on Civil Rights, Briefing Transcript, July 6, 2010 at 64-65.

lawyers interviewed interpreted Fernandes merely as strongly discouraging them from bringing Section 8 list maintenance cases, rather than flat-out forbidding them, all agreed that she was more interested in pursuing cases under Section 7 than Section 8 because Section 8 does not expand voter access. It stated:

“Ten attorneys who attended the meeting told the OIG that they interpreted Fernandes’s comments to be a clear directive that Division leadership would not approve Section 8 list maintenance cases in the future. One Section attorney told the OIG that he understood Fernandes’s statements to mean that proposing a Section 8 case would be futile and that he believed proposing Section 8 would be detrimental to attorneys. Seven Voting Section attorneys told the OIG, however, that they did not believe that OIG would not enforce Section 8 of the NVRA. Among these were three Deputy Chiefs who told the OIG that they believed Fernandes meant that Section 7 cases would be prioritized over Section 8 matters, but that they did not construe her statement to mean that Section 8 cases would not be approved.”¹²

Coates and others have pointed to two specific incidents indicating under-enforcement of Section 8. There was evidence that many counties in Missouri were not properly doing required Section 8 list maintenance. DOJ brought a suit, in which the major legal issue was whether the state was responsible for ensuring that local officials followed Section 8 list maintenance procedures.¹³ The appellate court found that the state was required to have a reasonable program in place for ensuring that localities were following Section 8 and remanded the case back to the district court to “consider any lack of [Local Election Authority] compliance and determine whether any such noncompliance renders Missouri’s effort to conduct a general program’ unreasonable in removing the names of ineligible voters.”¹⁴ Yet instead of letting the district court sort out this factual issue, DOJ leadership ordered the case to be dismissed – which it was.¹⁵

¹² U.S. Department of Justice, Office of the Inspector General, A Review of the Operations of the U.S. Civil Rights Division, March 2013, at 100: Id. at 100-101.

¹³ *U.S. v. Missouri*, 535 F.3d 844 (2008).

¹⁴ 535 F. 3d at 851.

¹⁵ U.S. Commission on Civil Rights, Transcript of Commission Business Meeting, September 24, 2010 at 129 (Christopher Coates testifying); Unopposed Motion for Voluntary Dismissal by Lena Bashir, filed March 4, 2009.

In June 2009, the Election Assistance Commission issued a biennial report regarding which states appeared to be out of compliance with Section 8's list maintenance requirements. The report identified eight states that reported that no voters had been removed from their lists in the past two years.¹⁶ Coates testified before the Commission that, as chief of DOJ's Voting Section, he assigned attorneys to look into this matter. In September, he sent a memo based on their work to the Civil Rights Division's front office, asking for approval to go ahead with Section 8 list maintenance investigations in these states.¹⁷ DOJ senior leadership took no action in response to that memo for fifteen months, at which point they finally authorized the sending of these eight Section 8 list maintenance letters.¹⁸ A team of DOJ attorneys did review the states' responses, but ultimately concluded that the investigation was moot due to the release of new Election Assistance Commission data in June 2011.¹⁹

In response to a question from me, Coates clarified that he did not think that Fernandes' NVRA enforcement policies were racially motivated.²⁰ Coates added that the consequence of this policy was "to favor in certain jurisdictions the Democratic party and to favor racial minorities because, in a number of area, the bloated lists, are at [sic] areas where there are large numbers of minorities."²¹ Needless to say, the propriety of an enforcement policy that just happens to advance the interests of the current President's political party and of a particular racial group ought to be very much in question.

It is deeply unfortunate that we did not address this important question squarely in this briefing. Instead, the briefing lost its way looking at the details of Section 7 enforcement and neglected to notice the forest.

¹⁶ Election Assistance Commission, *The Impact of the National Voter Registration Act: 2007-2008* at 58 (Table 4a).

¹⁷ U.S. Commission on Civil Rights, *Transcript of Briefing*, July 6, 2010 at 35-6.

¹⁸ Office of Inspector General Report at 104-5.

¹⁹ *Id.* at 105. The NVRA provides a private right of action. Some private advocacy groups have therefore filed suits to enforce Section 8 of the NVRA. See Hans von Spakovsky, *Suit Filed Over DOJ Refusal to Clean Up Voter Rolls*, *The Daily Signal*, available at <http://www.heritage.org/research/commentary/2013/4/suit-filed-over-doj-refusal-to-clean-up-voter-rolls>.

²⁰ U.S. Commission on Civil Rights, *Transcript of Briefing*, September 24, 2010, at 95.

²¹ Office of Inspector General Report at 104-5. The report raises the possibility that the Department delayed acting on the memo until it was criticized in a December 15, 2010 editorial for under-enforcement of Section 8. Assistant Attorney General Tom Perez told the OIG that this was untrue and that DOJ instead wanted to wait to send list maintenance letters until the 2010 elections were over, so as to avoid giving the impression that DOJ wanted to influence the elections. Perez pointed to a November 30 e-mail he sent staff asking about the list maintenance letters as proof of this assertion. Still, given the length of the delay, it is plausible that public scrutiny played some role (even if it was not the sole cause) of the Department's sudden willingness to send Section 8 list maintenance letters.

C. The Department of Justice Is Requiring States to Take Actions That Are Beyond Section 7's Actual Requirements.

Section 7 is very specific about what it requires for state offices. Each state office that provides “public assistance, unemployment compensation or related services” as well as each office that provides “[s]tate-funded programs primarily engaged in providing services to persons with disabilities” shall, pursuant to paragraph 4(A), make available the following services:

- (i) *Distribution of mail voter registration application forms in accordance with paragraph (6).*
- (ii) *Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.*

In turn, paragraph (6), referenced in paragraph 4(A), states that these offices shall:

- (A) *distribute with each application for [public assistance, unemployment compensation or related services or services to persons with disabilities], and with each recertification, renewal, or change of address form relating to such service or assistance—*
 - (i) *the mail voter registration application described in section 9(a)(2), including a statement that—*
 - (I) *specifies each eligibility requirement (including citizenship)*
 - (II) *contains an attestation that the applicant meets each such requirement; and*
 - (III) *requires the signature of the applicant, under penalty of perjury; or*
 - (ii) *the office's own form if it is equivalent to the form described in section 9 (a) (2),*

unless the applicant, in writing, declines to register to vote;
- (B) *to the greatest extent practicable, incorporate in application former and other forms used at those offices for purposes other than voter registration a means by which a person who completes the form may decline, in writing, to register to vote in elections for Federal office; and*
- (C) *provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of its own forms, unless the applicant refuses such assistance.*

Unfortunately, consent decrees entered into by the Civil Rights Division and the jurisdiction it has sued often require much more than this. For example, in *United States v.*

Rhode Island, Civil Action No. 11-113S, the State of Rhode Island was prevailed upon to agree to costly training, supervision, and recordkeeping in order to avoid even more costly litigation. As witness Jason Torchinsky, who testified at our briefing, stated in his prepared statement:

[W]ith respect to Rhode Island, the notion that the state is now required to fund—in a time of struggling state and local government budgets—specially trained site coordinators at every public assistance office, and maintain detailed records of every instance in which a potential voter declines voter registration assistance, appears to go well beyond what is needed to ensure proper enforcement of the statute.²²

As to training, the Rhode Island Consent Decree states:

2. Defendant Board of Elections shall develop and implement mandatory, annual NVRA education and training programs for each counselor, employee, or representative responsible for providing public assistance to Rhode Island residents.

As to supervision by specially trained site coordinators, the Rhode Island Consent Decree states:

5. As part of ensuring this compliance with Section 7, not later than 30 days from the date of entry of this decree, Defendants [Department of Human Services, Department of Health, Executive Office of Health and Human Services and the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals] shall appoint a NVRA “site coordinator” at each office covered by this Decree.

a. The site coordinator’s responsibilities include:

- (i) ensuring that voter registration opportunities are provided to each applicant for services at the time of his or her initial application, recertification, renewal, or change of address,*
- (ii) maintaining, or supervising the maintenance of, the site’s voter registration application data,*
- (iii) supervising the administration and storage of the site’s declination forms,*
- (iv) preparing a report in January and June of each year for the NVRA agency coordinator, who shall forward a copy of the agency report to the Rhode Island Board of Elections, which shall forward to the counsel for the United States documentary evidence of each site’s*

²² Prepared Testimony of Jason Torchinsky 4 (April 19, 2013).

implementation of NVRA compliance, ending at the termination of this decree. The United States may request, in writing, all agency reports without exception from the Board of Elections. The Board of Election must provide those reports within 20 days of the United States' written request.

- b. Site coordinators shall attend training provided by the State Board of Elections no later than 30 days from the date of entry of this decree that explains their NVRA duties unless such training was already received from the State Board of Elections in calendar year 2011.*
- c. Within 30 days of receiving this training, site coordinators shall, in turn, coordinate/provide NVRA training to all employees at their site who have NVRA responsibilities.*
- d. Site coordinators shall coordinate/provide this training to all new employees at the site within 45 days after the new employee's start date.*
- e. For the purposes of appointing site coordinators in compliance with this provision:*
 - (i) Defendant [Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals] shall appoint an NVRA site coordinator at its Division of Developmental Disabilities;*
 - (ii) Each Behavioral Healthcare Treatment Provider that provides state-funded programs primarily engaged in providing services to persons with disabilities shall appoint an NVRA site coordinator at its mail clinical office; and*
 - (iii) These site coordinators shall ensure NVRA compliance at all the treatment program and treatment facility site locations licensed and funded by Defendant [Department of Behavioral Healthcare Developmental Disabilities, and Hospitals].*

As to recordkeeping, the Rhode Island Consent Decree states:

9. Defendant Board of Elections shall develop methods of tracking, in detail, the extent to which local, on-site agency counselors, employees, and representatives responsible for providing public assistance and disability services in Rhode Island are complying with the NVRA and the individual provisions of this Decree, along with methods of ensuring compliance. ...

10. The tracking discussed above shall include, but is not limited to:

- a. *Inclusion of NVRA compliance into [Department of Human Services', Department of Health, Executive Office of Health and Human Services' and the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals'] ongoing, continuous evaluation of its subsidiary agencies and local offices; and*
- b. *Annual formal auditing by the Board of Elections to determine compliance with the NVRA and this Decree.*
- c. *Such audits and information collection shall not violate any state and federal confidentiality laws.*

11. On May 1 of each year this Decree is in effect, Defendant Board of Elections shall submit to Plaintiff a report, including: (1) a general summary of compliance efforts detailing all steps taken to implement each of the provisions and requirements of this Decree. Including any significant implementation problems, staff training needs, and recommendations for improvement; (2) the results of the tracking described in Paragraphs 8 and 9; and (3) copies of all NVRA procedures and educational and training materials both used in the preceding years and to be used in the next year.

12. For the six months following the date of entry of this decree, on a monthly basis, Defendant Board of Elections shall provide counsel for the United States with a numerical count, for each public assistance and disability-related services covered by this Decree (a) the aggregate number of public assistance applications, renewals, recertifications, and changes of address for that month; (b) the number of completed voter registration applications completed by a client and transmitted from that office to appropriate election officials for that month; and (c) the number of declination forms collected from clients for that months. After the initial six months of reporting, such information shall be submitted on a quarterly basis.

There's more in the Rhode Island Consent Decree, but we suspect the reader gets the idea: There's a lot in there that is not mandated by NVRA at all. Imposing that level of additional work on these agencies almost certainly keeps them from providing the services that constitute their core duties.

The tragedy of all this is that, as Mr. Torchinsky testified, litigation is usually unnecessary in these cases. Most state government agencies want to comply with federal law and would cooperate fully with federal authorities in getting to that point.²³

D. The Commission’s Recommendations Make It Clear that Some of Its Members Are More Interested in Getting Out the Vote for the Democratic Party Than They Are In Providing Needed Services at Public Assistance Offices.

The report candidly admits that:

“Some states experienced resistance to implementing Section 7 from local public assistance agencies. Some agencies expressed resentment at Section 7 being an “unfunded mandate.” They claimed not to have the time or resources needed to offer registration and assist citizens with registration.”

Well, of course they did. We wonder whether any of our fellow commissioners have ever been inside a public assistance office (or, for that matter, whether they have taken a good look at the Division of Motor Vehicles offices, which have similar mandates under Section 4 of NVRA). The ones we have seen were crowded and apparently tightly-budgeted. Just to be sure that things hadn’t changed lately, one of us (Heriot) decided to take a tour of a couple of Washington, D.C. area public assistance offices while writing this statement. Sure enough, they are still crowded and dreary. There does not appear to be a lot of extra money lying around to fund anything but necessary functions. Nor do the staff members look like they have time for extra

²³ An additional point concerns the Civil Rights Division’s excessive bargaining power relative to jurisdictions that were subject to pre-clearance under the Voting Rights Act of 1965 (“the VRA”) prior to the Supreme Court’s decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The VRA placed certain jurisdictions, mainly though not exclusively in the South, under special (and quite onerous) rules, requiring them to “pre-clear” any change in their law or practices relating to voting. Even tiny changes, such as the change in the location of the polling station for a particular precinct—from the Methodist Church on Elm Street to the Presbyterian Church across the street—would have to undergo a long process of pre-approval either from the Department of Justice or by the United States District Court for the District of Columbia.

The VRA allowed jurisdictions subject to pre-clearance to “bail out” of that category provided their record of conduct for several years prior to requesting that bailout had been unblemished. This gave the Civil Rights Division unusual leverage over these jurisdictions. They would do almost anything to avoid ruining their chance to bail out.

Shelby County put a stop to this by holding that the method by which jurisdictions were subjected to preclearance was outdated and hence unconstitutional. Consequently, this leverage is not an issue at this time. But if Congress decides to adopt a new formula for determining which jurisdictions will be subject to preclearance, the problem could return.

tasks. Large numbers of unhappy people were waiting patiently for their turn. Things were not moving quickly.

Nevertheless, in Recommendation 1, the Commission recommends that states “regularly review procedures in place at all agencies covered by Section 7 to ensure ongoing compliance, including unannounced checks.” We suspect this will not please the public assistance offices that have to undergo these compliance procedures and unannounced checks. It seems likely that they will only increase the amount of time those offices must spend on NVRA compliance.

Recommendation 1 goes on to suggest that states “implement procedures for regular data collection on National Voter Registration Act-required activities.” All too often, bureaucrats forget that data collection is not free. First, it takes times and energy to design and implement a data collection. After that, the sheer day-to-day input of data diverts resources away from the public assistance offices primary function—ensuring the public assistance in extended in a timely manner to the all those who qualify and not to those who don’t.

Recommendation 2 recommends that States “[i]mplement expanded and creative technology roles” and “[m]ove to electronic voter registration.” Something tells me that the Commission is not the first to think of these points. If it would help relieve the pressure on public assistance offices to expand the role of higher technology, there is no reason that they would not press for such an expansion. We note that in our experience, high-tech solutions are not always all they are cracked up to be.²⁴

We are left to wonder whether our colleagues have not lost sight of the important functions public assistance offices carry out and of the world of limited resources in which we live. The more public assistance offices are required to do to comply with Section 7, the less they will be able to do in administering public assistance. We suspect that if one were to ask public assistance recipients which service they would prefer to prioritize, they would reply that, first and foremost, public assistance offices should be public assistance offices. This is one of those (many) situations in which politicians and high-level government functionaries have a conflict of interest with the individuals that seek to represent.

E. Legislative Compromises Often Depend Upon the Future Cooperation of the Executive and Judicial Branches to Effectuate those Compromises. If the Executive and Judicial Branches Act in Such a Way as to Unravel the Bargain and Make One Side the “Winner” and the Other the “Loser,” Fewer Legislative Bargains Will Be Entered into in the Future.

²⁴ The rollout of the healthcare.gov is a recent notorious example. See, e.g., Louise Randofsky, “More Problems Expected on Federal Health-Insurance Site in New Year,” *The Wall Street Journal*, November 4, 2014, *available at* <http://www.wsj.com/articles/more-problems-expected-on-federal-health-insurance-site-in-new-year-1415147396>.

NVRA was signed into law with great fanfare by President Clinton on May 20, 1993. Republican supporters felt that Section 8 would adequately protect against the risk of voter fraud. Perhaps they realized that the Civil Rights Division would be unwilling to enforce Section 8 with the same level of energy that it employs to enforce Section 7. Perhaps that is why they allowed for private rights of action to enforce both sections. Alternatively, perhaps they were simply naïve. It was a time of less partisanship in law enforcement. Perhaps they failed to realize that such times do not always last.

It is unclear what the best course for ensuring evenhanded enforcement would be. There are many things that could have been done—some of them controversial, other less so. All of them would have been highly imperfect. For example, Congress could have simply commanded evenhanded enforcement. If, in the course of its oversight duties, it had detected a failure of evenhandedness, it could have earmarked funding for Sections 7 and 8 separately or commanded the Civil Rights Division to spend equal amounts on both. Indeed, even in the absence of an explicit statutory command that the Civil Rights Division evenhandedly enforce Sections 7 and 8, Congress could have used its appropriations power to ensure at least a modicum of evenhandedness.

The one thing that can be said for sure is that the more difficult it becomes to enforce the terms of legislative bargains, the more difficult it will be to reach such bargains in the future. In *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, Daniel B. Rodriguez and Barry R. Weingast discuss this point in a different context—that of Title VII the Civil Rights Act of 1964. They conclude that many of the crucial compromises made by key Members of Congress were essentially unraveled by overly expansive interpretations of the statute in the decades following its passage. They state:

“Our view offers a new perspective on the growing polarization of the modern Congress in the area of social policy. Because the courts frequently rewrote the terms of legislative bargains, there were decreasing incentives for moderate behavior and, thus, fewer moderate legislators. With greater polarization, there are fewer opportunities for historic breakthroughs; we would expect to see less social legislation passed.”²⁵

We are concerned about the ability of Congress to pass legislation like NVRA today. Has compromise indeed become less likely than it was in 1993?

Statutory Appendix

Sec. 7. VOTER REGISTRATION AGENCIES

²⁵ Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. Penn. L. Rev. 1417, 1535 (2003)(discussing the ways in which the grand bargain that resulted in Title VII was unraveled by various executive and judicial interpretations of that statute).

(a) DESIGNATION-

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies--

(A) all offices in the State that provide public assistance, unemployment compensation, or related services; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3)(A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.

(B) Voter registration agencies designated under subparagraph (A) may include—

(i) State or local government offices such as public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities; and

(iii) Federal and nongovernmental offices, with the agreement of such offices.

(4)(A) At each voter registration agency, the following services shall be made available:

(i) Distribution of mail voter registration application forms in accordance with paragraph (6).

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not—

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance; or

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall—

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance

(i) the mail voter registration application form described in section 9(a)(2), including a statement that—

- (I) specifies each eligibility requirement (including citizenship);
- (II) contains an attestation that the applicant meets each such requirement; and
- (III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 9(a)(2),

unless the applicant, in writing, declines to register to vote;

(B) to the greatest extent practicable, incorporate in application forms and other forms used at those offices for purposes other than voter registration a means by which a person who completes the form may decline, in writing, to register to vote in elections for Federal office; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) FEDERAL GOVERNMENT AND PRIVATE SECTOR COOPERATION- All departments, agencies, and other entities of the executive branch of the Federal Government shall, to the greatest extent practicable, cooperate with the States in carrying out subsection (a), and all nongovernmental entities are encouraged to do so.

(c) TRANSMITTAL DEADLINE-

(1) Subject to paragraph (2), a completed registration application accepted at a voter registration agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

(d) ARMED FORCES RECRUITMENT OFFICES-

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(2) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) for all purposes of this Act.

SEC. 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION.

(a) IN GENERAL- In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 5, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 6, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 5, 6, and 7 of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) CONFIRMATION OF VOTER REGISTRATION- Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

(c) VOTER REMOVAL PROGRAMS- (1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3) (A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this Act.

(d) REMOVAL OF NAMES FROM VOTING ROLLS- (1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) 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.

(e) PROCEDURE FOR VOTING FOLLOWING FAILURE TO RETURN CARD- (1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(ii)(II), voting at the former polling place as described in subparagraph (A)(i) and at a central location as described in subparagraph (A)(ii)(I) need not be provided as alternative options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) CHANGE OF VOTING ADDRESS WITHIN A JURISDICTION- In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) CONVICTION IN FEDERAL COURT- (1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 10 of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification

to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) REDUCED POSTAL RATES- (1) Subchapter II of chapter 36 of title 39, United States Code, is amended by adding at the end the following:

Sec. 3629. Reduced rates for voter registration purposes

'The Postal Service shall make available to a State or local voting registration official the rate for any class of mail that is available to a qualified nonprofit organization under section 3626 for the purpose of making a mailing that the official certifies is required or authorized by the National Voter Registration Act of 1993.'

(2) The first sentence of section 2401(c) of title 39, United States Code, is amended by striking out 'and 3626(a)-(h) and (j)-(k) of this title,' and inserting in lieu thereof '3626(a)-(h), 3626(j)-(k), and 3629 of this title'.

(3) Section 3627 of title 39, United States Code, is amended by striking out 'or 3626 of this title,' and inserting in lieu thereof '3626, or 3629 of this title'.

(4) The table of sections for chapter 36 of title 39, United States Code, is amended by inserting after the item relating to section 3628 the following new item:

'3629. Reduced rates for voter registration purposes.'

(i) PUBLIC DISCLOSURE OF VOTER REGISTRATION ACTIVITIES- (1) Each State shall maintain for at least 2 years and 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, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) 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.

(j) DEFINITION- For the purposes of this section, the term 'registrar's jurisdiction' means--

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

(k) CHANGE OF ADDRESS OF REGISTRANT- Any provision of this Act to the contrary notwithstanding, if State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address, at the polling place described in section 8(e)(2)(A)(i), or at a central location as described in section 8(e)(2)(A)(ii)(I), or at a polling place described in section 8(e)(2)(A)(ii)(II), voting at the other locations described in section 8(e)(2)(A) need not be provided as options.