

**STATEMENT OF
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**before the
COMMITTEE ON HOUSE ADMINISTRATION SUBCOMMITTEE ON
ELECTIONS**

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I have spent almost 50 years working with the law of the political process. First working for the Ohio Secretary of State running the election division, then I moved to Washington as Counsel to the RNC for 10 years.

When I left the RNC, I joined Baker Hostetler as a partner. The firm had worked since the early 80's as outside counsel to the Republican members of this Committee on contest and election law issues. For more than two decades my partner, Bill Schweitzer, and I worked for the Committee on many election contests and revisions of election laws. It is likely that I have been involved in more recounts and election contests than any other lawyer. I believe contests and recounts provide a unique vantage point for observing election system problems.

When I was working with the Committee, many versions of NVRA like legislation were discussed. The earliest versions had significant bipartisan support. Although the idea of bipartisan election law now may seem impossible today, it was not during some prior Congresses.

The single most important election bill of my lifetime was the 1964 Voting Rights Act. It had Democrat and Republican sponsors with a majority support of each party caucus. The various VRA extensions had bipartisan support as did some campaign finance legislation (HR 5010) and HAVA.

The issues addressed in the NVRA were considered by this Committee in the 101st Congress. HR 2190, a bipartisan compromise bill, passed the House. It addressed the voter registration and list issues. There was no action in the Senate. In the 102nd Congress, a bill (S. 250) virtually identical to the NVRA was passed by Congress but vetoed by President Bush. When Bill Clinton was elected President, he signed HR 2 NVRA in early 1993.

The bill was opposed by all Republican members of the Committee: Bill Thomas, Newt Gingrich, Bob Livingston, Pat Roberts, and John Boehner.

When the NVRA passed thirty-two years ago, there were two principal reasons offered: (1) increasing levels of voter registration (Section 6 & 7), and (2) improving the quality of voter registration lists (section 8).

I have no reason to dispute that increasing the locations and methods for voter registration in many states led to more individuals registering. Methods or means of registration undoubtedly have some impact on voter turnout. But, it is clear there are numerous other factors that impact voter turnout. The expansion of locations for voter registration means many offices would be registering individuals as a secondary activity to their principal purpose. It requires information transfer to actual election offices. The resulting problems were predictable. Direct online registration access will provide better control of list quality versus systems farmed out to various agencies with principally other interests. This adds to the importance of the second reason for the NVRA: improving the quality of voter lists.

The quality of state voter lists remains a mixed bag across our country. Voter lists are certainly better in many jurisdictions than in 1990, but remain concerning, especially in mail exclusive systems. Many observers fail to understand the vital importance of quality lists to trust in our elections. Registration-list problems fan

the fires of election distrust. The county-clerk letter sent to the long dead aunt, or ballots addressed to unknown individuals on a table in an apartment building lobby, is gasoline for election conspiracy bonfires.

Voter fraud can be divided into two broad classifications- retail and wholesale. Retail fraud is a person voting in the name of another or an undocumented individual illegally casting a ballot. Does it happen, yes. Bad, yes. However, this Committee should primarily focus on wholesale voter fraud with its wider impact on the legitimacy of our government.

All wholesale voter fraud involves either corruption of poll workers or the mail. The vast expansion of mail voting with its key starting point being registration lists, should highlight for this Committee, the vital importance of list maintenance. Getting an individual to a polling place to commit an illegal act, is immensely more difficult than mailing thousands of fraudulent applications for ballots. Good voter lists, carefully maintained, can be an important guardrail against mail fraud schemes.

In the thirty plus years since the passage of the NVRA, other changes have occurred which warrant modifications of the law. Vastly more voters are being registered online and voting by mail.

Our campaigning process may be subject to nefarious online interlopers, but our actual voting systems generally are not connected to the internet. Our North Korean friends have no path to hack into in-person voting and polling place tabulations. However, there are potential paths into voter registration records and materials. These records are the spine of any all-mail balloting system.

The NVRA has an exemption or a carve-out for election day registration and no registration states. I suggest a carve-in for states which have exclusive or

principal mail voting systems. In those states, requirements for registration and ballot request forms could be modified with some requirements like those for obtaining a “Real ID”, such as the last 4 of SSN, photos and thumb prints. The technology is available. It seems reasonable for these states to have email addresses available for their registrants.

An additional significant change in our society, since the 1993 passage of the NVRA, is the number of non-citizen residents in the United States. The number is subject to widely varying estimates, but is undoubtedly much larger than in 1990. Not surprisingly this has increased concerns about aliens registering and voting.

Although I know of no evidence that large numbers of aliens are casting votes in our elections, my personal lack of such evidence is not a reason to ignore the very real perception problem. The perception of aliens voting is a problem; whether the perception is correct is secondary to the indisputable need to address this issue. Again, we want a safe system and one understood to be safe.

The Federal government has information on resident aliens which should be shared with state election officials. States should be tasked with using this information to confirm eligibility of individuals on their polling lists. The removal of confirmed non citizens from registration lists should not be subject to any time constraints. List matching is sometimes a difficult task. Mistakes will occur, but this should not deter this vital confidence building activity. State provisional balloting procedures provide safeguards for most problems arising from an eligible voter improperly dropped from the rolls. The new Real ID requirement should also ease the process.

Technological changes in the years since 1993, have made it somewhat easier for election officials to update voter records; but, these changes introduce new data security challenges.

Recently the President issued an executive order attempting to ban mail voting. The order is based on no Presidential authority of which I am aware. States and Congress have the authority to make or change election laws, not the President.

The President's executive order was wrong but the President was right. His concerns about exclusive mail voting are not wrong. Mail voting presents many very serious problems. Very few Western style democracies use the mail for any voting other than traditional absentee voters. In person balloting is the standard method in most nations. Why?

Voting by mail lacks the guarantee of secrecy afforded by in-person polling places. No secret ballot is an invitation for undue influence- vote buying and coercion. However, the simplest problem to understand arises from the fact that some first-class mail is not delivered timely or delivered at all. The actual number is unclear. In an all-mail state like California, there will be millions of ballots mailed to the state's registered voter list. Even with properly maintained and updated lists, it is certain that thousands of ballots will not be timely delivered nor counted.

Nevertheless, I understand the popularity of mail voting with the electorate and local jurisdictions seeking to save money. For these reasons, I do not propose that Committee attempts to end mail voting. However, recognizing the unique importance of lists in mail states, some modifications to the NVRA might mediate some concerns.

The US Postal Service is less dependable in poor urban and rural areas. So mail delivery of ballots should be a concern for both Republicans and Democrats equally.

I would suggest to this Committee, that the traditional lens for examining the partisan impact of election changes, maybe a little clouded with rapidly shifting voter behavior.

Importantly, election legislation passed with support from both parties may help to raise confidence in our balloting system. So, I hope the Committee will seriously consider such a course.

Conclusion

There are two prime directives for any election system: (1) The winners win. The candidate with the most lawful votes takes the office. And, (2) The rational supporters of the losing candidate believe the winner won.

There are many other important considerations in designing an election system or in drafting legislation for elections, but all must be subordinate to these two paramount goals. Based on my personal experience our present system works well on the first directive. The second prime directive appears less secure today. In my fifty years of administrating, recounting and contesting elections, I can remember only two elections where I believe the candidate with the most lawful votes was not certified the victor, and only a handful of races where it was not possible to determine who received the most lawful votes.

This does not mean our system works perfectly. It is designed and run by men and women, not Gods and angels. People make mistakes and some people will steal votes if given the opportunity. Our election laws must provide for a secure voting process and one that is obviously secure to our citizens.