

The National Voter Registration Act Does Not Prevent States from Removing Aliens from Voter Registration Rolls at Any Time

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KEY TAKEAWAYS

States have a constitutional and statutory right to remove aliens who are ineligible to vote in federal and state elections from their voter registration rolls.

The 90-day deadline for systematic removal programs applies only to removing eligible registrants who have changed their residence.

It does not apply to aliens who were never eligible to register in the first place, and there is nothing in the National Voter Registration Act to the contrary.

No provision of the National Voter Registration Act of 1993 (NVRA),¹ including the 90-day pre-election deadline in Section 8(c)(2), prevents states from removing aliens who have illegally registered to vote from state voter registration rolls. The plain text of the statute does not require states to keep an individual registered who was never eligible to be registered in the first place, and any interpretation of the NVRA that would require states to keep an alien registered to vote when both state and federal criminal laws bar an alien from registering would render the NVRA unconstitutional.

Aliens Barred from Registering or Voting by Federal Law

Aliens are barred from registering or voting in federal elections. It is a felony under 18 U.S.C. § 1015 (f)

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for an alien to “claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum).” Another federal statute, 18 U.S.C. § 911, makes it a felony to “falsely and willfully” claim to be a citizen. Since all states require citizenship to vote in state elections,² with only a few exceptions for local elections in a small number of states, registering to vote for a state election while claiming to be a citizen violates both of these federal statutes as well. Voting by an alien is also a criminal violation of 18 U.S.C. § 611.

The NVRA implemented a federal form for voter registration that is promulgated by the U.S. Election Assistance Commission. Every state covered by the NVRA³ is required to “accept and use” the federal voter registration application.⁴ The law requires (1) that the form must state that citizenship is a requirement for eligibility to register and vote and (2) that an individual completing the form must attest that he meets each eligibility requirement, including citizenship. As a result, the federal Voter Registration Application form asks applicants: “Are you a citizen of the United States of America?”⁵

The NVRA requires⁶ that the applicant sign the Voter Registration Application attesting that “I am a United States citizen.” The application further states that “[t]he information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.”⁷ The NVRA provides that states may use their own voter registration forms for federal elections as long as the form “meets all of the criteria” required for the federal form, which would include the citizenship information.⁸

The NVRA itself has additional criminal penalties that apply to individuals unlawfully registering to vote, including aliens. 52 U.S.C. § 20511 makes it a felony punishable for up to five years in prison for any individual to submit “voter registration applications that are known by the person to be materially false, fictitious, or fraudulent.” Obviously, an alien asserting under oath in a voter registration application that he or she is a U.S. citizen is submitting “materially false, fictitious, or fraudulent” information in violation of the NVRA and is liable not only to criminal prosecution and penalties, but also to deportation as the form itself warns applicants.

NVRA Provisions on List Maintenance

Section 8 of the NVRA, 52 U.S.C. § 20507, contains general provisions on the maintenance of statewide voter registration lists used for federal

elections and the rules for removing ineligible individuals from those lists. In September 2024, the U.S. Department of Justice published “guidance” on the application of Section 8 to state list-maintenance activities.⁹

Multiple states, including Alabama, South Dakota, Virginia, and Texas, have recently removed aliens who were unlawfully registered from their voter rolls: 3,251 in Alabama, 273 in South Dakota, 6,303 in Virginia, and 6,500 in Texas.¹⁰ Critics are erroneously complaining that this violates a 90-day pre-election deadline contained in the NVRA for “systematic” list-maintenance programs,¹¹ and the Justice Department has sued Alabama over its transfer of aliens to “inactive status,” claiming that doing so violates the 90-day pre-election deadline that Justice has termed the “Quiet Period Provision,” a term that appears nowhere in the statute. Justice asserts in its lawsuit that this “provision” prevents all “systematic” removals this close to an election.¹² The Justice Department has filed an identical lawsuit against Virginia’s effort to clear up its voter rolls, asserting the same argument.¹³

Both the critics and the U.S. Justice Department are wrong.

The 90-day provision is contained in 52 U.S.C. § 20507(c), “Voter Removal Programs.” Part 1 of the two-part provision deals entirely with the removal of registered individuals who have moved to a new residence either within the state or in another state. Part 2 of that same provision then states that “any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters” must be completed “not later than 90 days prior to the date of a primary or general election for Federal office.”

However, Part 2 also states that the 90-day deadline does *not* apply to or prevent the removal of individuals who have requested that they be removed, who have died, who are ineligible to vote because of a criminal conviction or mental incapacity, or for “correction of registration records pursuant to this chapter.”

The 1993 report of the U.S. House of Representatives Committee on House Administration on the NVRA also clarifies that the 90-day deadline “does not prohibit a State, during that 90-day pre-election period from removing names from the official list of eligible voters on the basis of the request of the registrant, as provide by State law for criminal conviction or mental incapacity, death, or any other correction of registration records pursuant to the Act.”¹⁴

In other words, not only is the 90-day deadline contained in the provision dealing solely with systematic programs to remove voters based on their change of address, but both the statute and the House report state that the deadline does not apply to individuals who may have been eligible to vote

when they registered but have become ineligible due to death, criminal conviction, or mental incapacity. This 90-day limitation has no applicability whatsoever to an alien *who was never eligible to register in the first place* and was committing a criminal act by registering to vote. In fact, by keeping that alien registered, the state is enabling the alien's continuing violation of criminal law.

Moreover, the 90-day deadline does not apply to the "correction of registration records pursuant to" the NVRA. As noted, the NVRA itself makes certification of citizenship by an applicant under penalty of perjury a legal requirement and imposes criminal penalties on any alien who falsely claims to be a citizen. Thus, removing aliens also falls within the "correction of registration records" exception in the NVRA, and this "correction of registration records" exception would apply even if the alien correctly noted on the registration form that he was not a citizen and election officials mistakenly registered him. His removal would be a correction of the alien's registration record, which should have been rejected when it was first received.

The statute and the House report also show that, for example, the systematic removal of individuals who have died or have been convicted of a disqualifying felony by comparing the state's voter registration list to the state's department of vital records or corrections department databases is very specifically *not* prevented by this provision. This is contrary to the Justice Department's claim in the lawsuits filed against Alabama and Virginia that all "systematic list maintenance" is barred. That claim has no basis in the text of the statute.

Court Decisions

In 2012, federal district courts in the Southern and Northern Districts of Florida correctly interpreted this language to hold that the 90-day deadline did not apply to the state's removal of ineligible aliens from its statewide voter registration list.¹⁵ As the court in the Southern District concluded in a case brought by private parties, the 90-day provision applies only to removals "based on a change in the residence of the registrant."¹⁶

The court rejected the argument that the exceptions within Part (c) for felons, the deceased, the mentally incapacitated, and a registrant who has been asked to be removed were the "exclusive" grounds for removing a registrant, and Florida therefore could not remove aliens from the registration list. In doing so, the court said, that interpretation would "stand in direct contravention of Florida law" and would "produce an absurd result." It

would mean that election officials could “not remove from its voting rolls minors, fictitious individuals, individuals who misrepresent their residence in the state, and non-citizens.”¹⁷ The 90-day prohibition “simply does not apply to an improperly registered non-citizen.”¹⁸

According to the court, another “way to understand” these provisions is that:

[T]hey only address the removal of once-eligible voters—those who were at one time *bona fide* registrants, yet because of personal request, criminal conviction, mental incapacity, death, or change in residence, became thereafter ineligible. It is indeed notable that these provisions are silent as to the removal of those registered voters who were never *bona fide* registrants, and whose registration was *void ab initio* by virtue of their status as minors, non-citizens, fictitious persons, or any other factor nullifying their registration.¹⁹

Because Florida did not raise the exception for “correction of registration records,” the court did not address its applicability.

The judge in the Northern District case brought by the U.S. Justice Department came to the same “inescapable” conclusion, holding that the 90-day removal deadline “does not apply to an improperly registered non-citizen.”²⁰ As the judge observed:

[W]hat Congress had in mind when it drafted these sections was removing a person on grounds that typically arise *after* an initial proper registration. Congress was not addressing the revocation of an improperly granted registration of a noncitizen.... During the 90-day quiet period, a state may pursue a program to systematically remove registrants on request or based on a criminal conviction, mental incapacity, or death but not based on a change of residence. What matters here is this: none of this applies to removing noncitizens who were not properly registered in the first place.²¹

As the court in that case pointed out, the NVRA imposes a duty on a state “to maintain an accurate voting list.” That “can and should” be done “on the front end.” If a state finds it has mistakenly registered aliens “and wishes to correct the problem, it should do so well in advance.” But “the NVRA does not require a state to allow a noncitizen to vote just because the state did not catch the error more than 90 days in advance.”²²

Unfortunately, in a deeply flawed, cursory analysis, a divided panel of the 11th Circuit Court of Appeals overturned the decision of the Southern District in *Arcia v. Florida* and held that the 90-day provision does apply to

the removal of aliens from voter registration rolls.²³ It focused on the “any program” language in Part (c) without acknowledging its use in a provision that deals only with removals based on a change of residence.

The panel termed the list of exceptions to the 90-day deadline “exhaustive” despite the fact that it clearly is not, emphasizing that it did not list aliens. But the appeals court panel entirely failed to address the many other reasons the Southern District court cited for which an individual could potentially be removed such as being a minor, a fictitious registration, or the resident of another state who fraudulently claimed residence in Florida.²⁴ Because the list is supposedly exhaustive, the fact that aliens are not listed as an exception is “good evidence that such removals are prohibited,” claimed the two judges who were in the majority.²⁵

Under this bizarre and unjustified holding, if a state discovered a month before the election, for example, that a group of 10-year-olds had become registered to vote as part of a class project, the state would be prohibited from removing them from the voter registration list and would have to allow them to vote. Or if a state discovered two months before an election that, as part of an election interference plot, the Russian government had successfully registered all of the diplomats and staff of a Russian consulate in a state, once again, election officials would have to allow those aliens to vote.

That result makes no sense, as the Southern District court correctly held and as the dissenting 11th Circuit judge agreed by adopting all of “the reasons set forth in the district court’s opinion.”²⁶ Congress could not have intended such a result that would allow ineligible aliens to commit criminal violations of state and federal law by registering and voting in state and federal elections.

The appeals court panel acknowledged that an interpretation of the NVRA’s general removal provisions “that prevents Florida from removing non-citizens would raise constitutional concerns regarding Congress’s power to determine the qualifications of eligible voters in federal elections.”²⁷ But it refused to consider that constitutional issue because it said that, with regard to the 90-day provision, “[n]one of the parties before us have argued” that claim.

However, that is a serious issue. As the Supreme Court said in 2013 in *Arizona v. Inter Tribal Council of Arizona, Inc.*, “the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them.”²⁸ Any interpretation of the NVRA that claims the 90-day removal provision requires states to allow ineligible aliens to remain registered and to vote would likely render the NVRA unconstitutional as a prohibited intrusion into the right of states to determine the qualifications and eligibility of individuals to vote in federal elections.²⁹

It should be noted that in a different 11th Circuit panel decision in 2019 also arising out of Florida, the court said that while the NVRA “affirmatively requires states to register eligible voters...Congress would not have mandated that the state register any applicant—if an applicant is not eligible to vote, a state would be under no obligation to register the applicant.”³⁰ That case involved a dispute over what constituted “reasonable” efforts by election officials to remove ineligible individuals from the voter rolls, although not during the 90-day period. But if the NVRA does not require a state to register an ineligible alien, it cannot be construed to require a state to maintain and continue the registration of an ineligible alien.

Alabama is within the jurisdiction of the 11th Circuit, so the adverse holding in *Arcia* applies to the new lawsuit filed against the state by the Justice Department. However, Florida never requested *en banc* review by the entire 11th Circuit Court of Appeals or otherwise appealed this erroneous decision as it should have. Thus, while Alabama may lose in the lower court that follows this opinion, the state should appeal and be willing to take this case all the way to the U.S. Supreme Court—as should Virginia and any other state targeted by the Justice Department—because of the vital importance of this issue to the integrity of our election process.

Aliens should not be allowed to defy state and federal criminal law barring their registration and participation in U.S. elections, and the Justice Department should not be using its law enforcement authority to force states to keep unlawfully registered aliens on their voter registration rolls.

Conclusion

States have both a constitutional and statutory right—if not an obligation—to remove aliens who are ineligible to vote in both federal and state elections from their voter registration rolls. The 90-day deadline for systematic removal programs applies only to removing eligible registrants who have changed their residence. It does not apply to aliens who were never eligible to register in the first place, just as it does not apply to minors, fictitious registrations, fraudulent registrations of any kind, decedents, felons, and mentally incompetent individuals. There is nothing in the NVRA to the contrary.

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Endnotes

1. National Voter Registration Act, 52 U.S.C. § 20501 et. seq.
2. See *Federal Prosecution of Election Offenses*, U.S. Dept. of Justice (Jan. 1995), at 53.
3. At the time of its passage, the NVRA exempted states that allowed same-day registration or had no registration requirement at all, effectively exempting seven states from coverage under the act: Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming. 52 U.S.C. § 20503(b).
4. 52 U.S.C. § 20505(a).
5. *Register to Vote in Your State by Using This Postcard Form and Guide*, U.S. Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf.
6. 52 U.S.C. § 20508 (b)(2).
7. *Register to Vote in Your State*, *supra* note 5 (emphasis added).
8. 52 U.S.C. § 20505 (a)(2).
9. Voter Registration List Maintenance: Guidance Under Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507 (Sept. 2024).
10. Press release, Secretary of State Wes Allen Implements Process to Remove Noncitizens Registered to Vote in Alabama, Sec. of State Wes Allen, <https://www.sos.alabama.gov/newsroom/secretary-state-wes-allen-implements-process-remove-noncitizens-registered-vote-alabama>; Shawn Fleetwood, *South Dakota Removes 273 Noncitizens from Its Voter Rolls*, THE FEDERALIST (Oct. 8, 2024), <https://thefederalist.com/2024/10/08/south-dakota-removes-273-noncitizens-from-its-voter-rolls-ahead-of-2024-election/>; Comprehensive Election Security Protecting Legal Voters and Accurate Counting, Gov. Glen Youngkin, Executive Order No. 35 (2024), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-35-Comprehensive-Election-Security-Ensuring-Legal-Voters-and-Accurate-Counting---vF---8.7.24.pdf>; press release, Governor Abbot Announces Over 1 Million Ineligible Voters Removed from Voter Rolls, Governor Greg Abbott (Aug. 26, 2024), <https://gov.texas.gov/news/post/governor-abbott-announces-over-1-million-ineligible-voters-removed-from-voter-rolls>.
11. Raquel Coronell Uribe, *Justice Department Sues Alabama over Effort to Purge Voter Rolls Within 90 Days of Election*, NBC NEWS (Sept. 27, 2024), <https://www.nbcnews.com/politics/2024-election/justice-department-sues-alabama-effort-purge-voter-rolls-90-days-elect-rcna173107>.
12. U.S. v. Alabama, Case No. 2:24-01329 (N.D. AL Sept. 27, 2024).
13. U.S. v. Virginia, Case No. 1:24-01807 (E.D. VA Oct. 11, 2024).
14. *National Voter Registration Act of 1993*, Comm. on House Admin., U.S. House of Representatives, Rep. 103-9, 103rd Cong., 1st Sess. (Feb. 2, 1993), at 16.
15. *Arcia v. Detzner*, 908 F. Supp. 2d 1276 (S.D. FL 2012); *U.S. v. Florida*, 870 F. Supp. 2d 1346 (N.D. FL 2012).
16. *Arcia*, 908 F. Supp. 2d at 1282.
17. *Id.*
18. *Id.* (citation omitted).
19. *Id.* at 1283.
20. *U.S. v. Florida*, 870 F. Supp. 2d at 1350.
21. *Id.*
22. *Id.*
23. *Arcia v. Florida*, 772 F.3d 1335 (11th Cir. 2014). The decision by the Northern District was not appealed because Florida “suspended the program” and said it would “not resume.” *Id.* at 1350–51.
24. *Id.* at 1345.
25. *Id.*
26. *Id.* at 1348.
27. *Id.* at 1346.
28. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S.Ct. 2247, 2257 (2013).
29. See U.S. Const. art. I, § 2, cl. 1.
30. *Bellito v. Snipes*, 935 F. 3d 1192, 1201 (11th Cir. 2019).