



March 25, 2014

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RE: Interstate Crosscheck Voter Registration Program

It is regrettable that the Department of State has refused to share with the American Civil Liberties Union (ACLU) information about how Pennsylvania intends to purge registrations for voters identified as potential duplicates by the Interstate Crosscheck Voter Registration Program. We have made two requests for a meeting to discuss the program: a February 12 email to Jonathan Marks and a March 12 email to Mr. Marks, Kathleen Kotula and General Counsel Kevin Schmidt. The first produced an evasive email from Ms. Kotula and for the second the officials have not had the courtesy to favor us with a reply. Documents produced two weeks ago by DOS in response to a Right-to-Know-Act request have raised more questions than they answer, and no details of how voter registrations would be canceled were provided. Indeed, the letter accompanying the documents stated that the ACLU's request for documents regarding "the purging of voter records" is denied." We hope this third effort to learn how Pennsylvania will be handling records identified as duplicates by the Crosscheck Program facilitates the exchange of essential information so we can avoid litigation.

Background

In August 2013, you signed a "Memorandum of Understanding for Interstate Voter Registration Data Comparison" (MOU). The program, commonly referred to as the Interstate Voter Crosscheck Program, began in 2005 and is administered by the Kansas Secretary of State. By signing the MOU Pennsylvania agreed to "share voter registration information for the purposes of cross checking and identifying duplicate registrations and instances of multiple votes by the same individuals." The MOU joined Pennsylvania with twenty-three other states (believed now to include about thirty states).

Cleaning voter-registration rolls of inaccurate and duplicate information is important, but it must be achieved in a way that does not improperly or wrongly purge voters from the rolls. The National Voter Registration Act (NVRA) governs both list maintenance and voter-registration cancellations. 42 U.S.C. §§ 1973gg, *et seq.* On the latter, the NVRA requires written notice to the voter of impending cancellation, written confirmation from the voter that he or she has changed residence and thus the registration can be canceled, or if the voter does not respond a mandatory waiting period of two federal elections after the notice is sent but before the registration is actually canceled and the voter is removed from the rolls. 42 U.S.C. § 1973gg-6(d). The NVRA also expressly prohibits purging voter records within ninety days of a federal primary or general election. 42 U.S.C. § 1973gg-6(c)(2).

The ACLU's Concerns

While the theory behind the Interstate Voter Crosscheck Program is sensible, how it is to be applied and executed is important because even lawful systems can be flawed in application or misused. As the saying goes, the devil is in the details. Unfortunately, the documents DOS produced on March 10 in response to the ACLU's Right-to-Know-Act request fail to provide sufficient detail about the process of voter cancellations to allow the ACLU to conduct an informed assessment. The documents, in fact, do more to raise than allay our concerns about Pennsylvania's voter-purging process.

DOS has refused to produce records about how it will purge voter records

The DOS has refused to produce any documents about how and when Pennsylvania will purge voter records identified as potential duplicates by the Crosscheck Program. The March 10, 2014, letter from Heidi L. Barry, the DOS Open Records Officer, that accompanied the document production stated that the ACLU's request for documents regarding "the purging of voter records" is denied." The letter posits several justifications, including that the records may not exist, are protected by a legal "deliberative process privilege," or are protected by "attorney-client" and "attorney-work product privilege." There are no details in the 81-page production discussing how Pennsylvania intends to handle voter records identified by the Crosscheck system as being potential duplicates.

DOS documents acknowledge a change to the purging process but fail to provide details.

The documents we received acknowledge that Pennsylvania is changing its process for handling information about duplicate registrations, but those documents do not explain the changes or include copies of the revised forms. A "talking points" memo from a December 6, 2013, presentation on "list maintenance" delivered by Jonathan Marks to the Eastern County Association Conference says that "the Department [of State] has decided to make some changes to the [Duplicate Voter] notice itself and how the program is conducted." Dec. 5, 2013, email from Jonathan Marks to Shannon Royer re Conference Presentation, at 1, 3. But the DOS has declined thus far to produce either the revised Duplicate Voter Notice or provide

details about the “changes” to the program.

The Interstate Crosscheck Program uses a relaxed standard for identifying potentially duplicate registrations that produces a large number of false positives

The documents also reveal that Pennsylvania will be applying a relaxed standard to identify *potential* duplicate voter records in other states under the Interstate Crosscheck Program, requiring just a match on first name, last name and date of birth. *Id.* at 4. The system is not requiring a match of middle initial or social security number, even though in many instances that information is available. Such a low standard will yield a large number of matches. A powerpoint presentation contained in the DOS document production, from December 2013 by the Kansas Secretary of State, included a table showing the number of potential duplicate voters identified in 2013 by the Crosscheck system. The number of potential duplicates identified in five states with smaller populations than Pennsylvania ranged from 387,599 in Michigan, to 403,384 in Ohio, to 610,786 in Georgia. Many of those *potential* duplicates will be false positives, as the materials from the Kansas Secretary of State candidly acknowledge: “Experience in the crosscheck program indicates that a significant number of apparent double votes are false positives and not double votes. Many are the result of errors - voters sign the wrong line in the poll book, election clerks scan the wrong line with a barcode scanner, or there is confusion over the father/son voters (Sr. and Jr.).” The program thus flags a huge number of voters as potential duplicates, but admits a high error rate, elevating the ACLU’s concerns about how precisely Pennsylvania will handle voter-registration cancellations.

Advice on how potentially duplicate voter registrations can be purged violates the NVRA.

Finally, but most importantly, several passages in the documents produced by the DOS heighten the ACLU’s concerns about whether Pennsylvania will comply with the NVRA.

1. Instructions from the Office of the Kansas Secretary of State, dated March 2013, to county election officers about Interstate Voter Registration Data Crosscheck provide the following advice:

“If the CEO (Chief Elections Officer) obtains a copy of a registrant’s registration record from another jurisdiction and the registrant listed an address that was on file in the CEO’s county as “previous address” on the other jurisdiction’s voter registration application form, the CEO may cancel the registration. Also, if the CEO receives a notice from a registrar in another jurisdiction indicating that a registrant has re-registered in that registrar’s jurisdiction and has indicated a previous address that was on file in the CEO’s county, the CEO may cancel the registration without reviewing the actual voter’s registration application submitted by the registrant.”

The ACLU believes that a state following this advice, as it pertains to information

received from another state through the Interstate Voter Crosscheck Program, would violate the NVRA because it fails to comply with the clear notice requirements applicable to registration cancellations under 42 U.S.C. § 173gg-6(d).

2. The most recent directions from the Kansas Secretary of State to Crosscheck Program participants, which now for the first time includes Pennsylvania, titled "2014 Participation Guide" and dated December 2013, advise that states may "cancel" a duplicate record "if the following conditions are met":

- "a. the records match on first name, last name, and date of birth, and
- b. One of both of the following data elements match:
 - last four digits of Social Security number and
 - signature and
- c. Data in the middle name field either matches or is not a mismatch."

or

"[I]f the three fields match as specified above," the jurisdiction possessing the older registration date may simply follow the process outlined in the NVRA."

Shockingly, this tells states receiving Interstate Crosscheck data that there is an alternative to following the NVRA, a claim that sets alarm bells off at the ACLU and sends lawyers scurrying to draft legal papers.

3. Another paragraph in the same 2014 Instructions contains more legally suspect advice. The advice, under a heading entitled, Cancellations by Confirmation Between Jurisdictions, reads as follows:

"Pursuant to NVRA Sec. 8(d)(1)(A), the jurisdiction possessing the record with the older registration data may cancel the record (and send a cancellation notice if state law or regulations require it), if another jurisdiction confirms that the registrant has registered to vote in the new jurisdiction and has indicated on the voter registration application form an address in the former jurisdiction."

The ACLU believes that a state following this advice would violate the NVRA because it fails to comply with the clear notice requirements of 412 U.S.C. § 173gg-6(d).

Conclusion

It is possible that Pennsylvania intends to comply with the NVRA and other laws protecting voters, and that it has designed a program that will adhere faithfully to the law, but the documents produced thus far have merely increased the ACLU's concerns about how DOS intends to handle the purging of voter records under the Interstate Voter Crosscheck Program.

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We would like to meet with you, or with appropriate individuals you may identify, to review how Pennsylvania intends to proceed under the Crosscheck Program. Hopefully, our concerns will be assuaged. If not, we will gladly share with you our concerns. But without a meeting and additional information, we will have no choice but to consider federal court litigation. I look forward to hearing from you.

Respectfully,



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