

PURGED FROM THE VOTER ROLLS: HUSTED V. A. PHILIP RANDOLPH INSTITUTE



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Members of the American Federation of Government Employees labor union demonstrate in support of the A. Philip Randolph Institute at the U.S. Supreme Court on the day of oral arguments in the *Husted* case in January 2018.

What if you were registered to vote but missed an election? What if you missed elections for six years? Would it be fair for your state to then deny your eligibility to vote? The Supreme Court had to decide this issue when an Ohio man tried to vote but couldn't in 2015.

Larry Harmon is a U.S. Navy veteran. He has lived at the same address in Ohio for over 16 years. Harmon normally votes in presidential elections, but in 2012, he decided not to vote because he did not like either Barack Obama or Mitt Romney. However, a ballot initiative about legalizing cannabis brought him to the polls in 2015, and he looked forward to making a difference with his vote.

Unfortunately, when Harmon arrived at his local polling place, he was shocked to find that his name did not appear on the list of registered voters. Harmon discovered that his name did not appear because he had not voted since the presidential election of 2008.

Under Ohio law, if a resident has not voted in two years, then the Ohio secretary of state sends

that resident a notice asking the resident to confirm his or her address. The state provides the resident with a pre-stamped return card. If the resident responds, then they remain on the state's voting lists (aka voter rolls). If the resident does not respond, and if the resident then does not vote for two more federal election cycles (four years), then the state assumes the resident has moved. The state then removes the resident from the voter rolls.

The state had sent Harmon the required notice in 2011 to confirm his eligibility. Harmon did not mail back the return card, so his name was removed from the voter rolls. Harmon, however, did not remember receiving the notice. Moreover, he thought it was unfair for the state to remove his name from the list of eligible voters simply because he had not voted for a few years.

Harmon sued Ohio's secretary of state, Jon Husted, in federal court. Harmon was joined as a plaintiff by the A. Philip Randolph Institute (APRI), a civil rights

Vocabulary

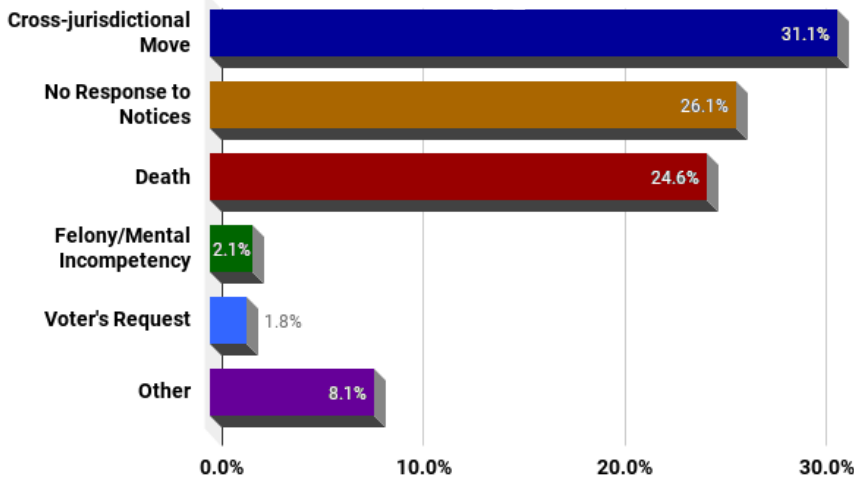
disenfranchisement (n.) - removal of a person's eligibility to vote in elections.

poll (n.) - the place where a voter shows up to vote on Election Day; also called a polling place.

regulation (n.) - a government's rule controlling a procedure; a rule of an executive agency that has the force of law.

voter roll (n.) - a list of people eligible to vote in an electoral district; also called a voting list.

Reason for Removal from Registration Rolls Nationwide, 2016



Source: 2016 National Voter Registration Act Survey, Election Assistance Commission

organization. (A. Philip Randolph was a labor leader and organizer during the civil rights movement.) The case involved federal law.

Federal Voter Registration Law

In 1993, Congress passed the National Voter Registration Act (NVRA). The law had four purposes:

- to increase the number of registered voters;
- to enhance the participation of voters in federal elections;
- to protect the integrity of elections; and
- to help states keep accurate lists of registered voters.

To fulfill the fourth purpose, the NVRA requires states to make reasonable efforts to remove the names of voters who have died or changed residence (moved) without re-registering to vote. Those voters are ineligible to vote.

The NVRA provides specific procedures for voters who change residence, which can seem a little tricky at first. Under the law, a state may not remove a voter's name based on change-of-residence unless the voter does one of two things. Either the voter confirms in writing (usually with a form from the post

office) that he or she has moved, or else the voter fails to mail in a preaddressed, postage-paid return card issued by the state. The voter will still have a chance to vote in the next two federal elections instead of mailing back the card, and the card must inform the voter of that option.

The idea behind the NVRA is that if a voter fails to mail back the return card and fails to vote in one of the next two federal elections, the state can assume the person has moved. But the NVRA explicitly bars any state from removing someone's name from a voter roll

“by reason of the person's failure to vote” (the failure-to-vote clause).

In response to the NVRA, states adopted various programs to remove ineligible voters from their official lists based on change-of-residence. Thirty-six states followed the first option set out by the NVRA: allowing residents to submit change-of-address information with the U.S. Postal Service. Ohio opted to have return cards by mail and monitor residents' failure to respond and failure to vote.

At trial in district court, the plaintiffs argued that Ohio's program violated the NVRA's failure-to-vote clause. They argued that a person's failure to vote illegally triggers the removal process by triggering the mailing of the return card. Husted countered that Ohio's procedures mirrored the NVRA's procedures and never removed anyone based “solely” on the failure to vote.

The district court agreed with Husted and ruled in his favor. The plaintiffs appealed, and the Sixth Circuit Court of Appeals reversed the district court's decision. Husted then appealed the case to the U.S. Supreme Court.

Indiana's Photo ID

The state of Indiana passed a bill requiring voters to show a photo ID to vote. Democrats opposed the bill, arguing that it disproportionately affected poorer voters who could not afford the expense of getting photo IDs. Republicans argued that it would prevent fraudulent voting. The photo ID bill was upheld by the Seventh Circuit Court of Appeals. In 2008, the U.S. Supreme Court also upheld the photo ID bill.

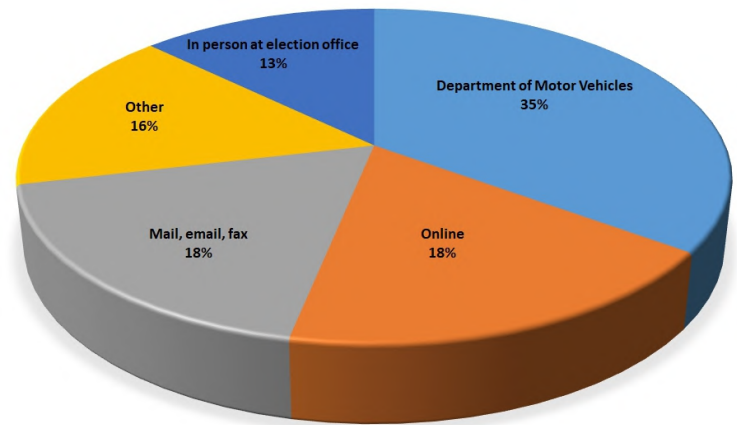
Judge Richard Posner, a judge appointed by Republican President Ronald Reagan, was on the Seventh Circuit Court of Appeals and voted in favor of the photo ID law. Writing in 2013, however, he said he had gotten it wrong:

There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens.



Rob Crandall / Alamy Stock Photo

Source of New Voter Registration Nationwide, 2016



2016 National Voter Registration Act Survey, Election Assistance Commission

The Majority Opinion

In June 2018, the U.S. Supreme Court issued a 5-4 opinion written by Justice Samuel Alito. The court held that Ohio's change-of-residence removal program did not violate the NVRA. Justices Thomas, Gorsuch, Roberts, and Kennedy joined Alito's opinion. The majority on the court identified the "most important part" of the NVRA regulations as the "prior notice obligation."

According to the majority opinion, Ohio's program satisfied the prior-notice obligation by sending the pre-stamped return cards to residents before it started the clock on four years of failing to vote. It removed a resident from the voting lists *only* after that four years. Justice Alito also wrote that "no provision of federal law" specified how a state may send a return card. Different states have adopted different programs for removing ineligible voters from their lists, and all of them are valid. For example, the NVRA states that sending return cards to those who have submitted change-of-address information to the U.S. Postal Service suffices. Likewise, states may send notices to every registered voter over intervals of time. Ohio opted for the method of sending cards to those who have not voted for some period of time. All of these methods were legal, according to the court.

The Supreme Court held that the reason for sending the return card was not important. A state's program only violates the NVRA if, after the card is mailed and the resident does not reply, the state does not wait the mandated two general elections (four years) before removing the voter from the official lists. Thus, the Supreme Court held that Ohio's program follows the NVRA "to the letter."

Justice Clarence Thomas wrote a concurring opinion. He agreed with the majority's conclusion. But he added that he thought that there was a fundamental constitutional issue at play. In his view, the majority opinion avoided constitutional concerns, but according to him, under the Constitution, "States have the exclusive authority to set voter qualifications."

Dissenting Opinions

Justice Stephen Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented from the majority opinion in this case. According to Justice Breyer, the failure-to-vote clause of the NVRA "generally prohibits" states from using registrants' failure to vote as a trigger for removing their names from official voting lists. In other words, states cannot use failure to vote as confirmation that a voter has moved.

Also, Justice Breyer looked at the NVRA as a "Confirmation Procedure" rather than the first thing that should identify whether a registrant has moved. Ohio's program necessarily used the return cards as the first thing to determine whether a registrant had moved. Since the Confirmation Procedure was to *confirm*, not identify, voters who had moved, Justice Breyer argued that Ohio's program was an unconstitutional violation of the NVRA.

Justice Breyer pointed out that even if Ohio's program satisfied the failure-to-vote clause and the Confirmation Procedure, Ohio's program violated the NVRA because it was an "unreasonable" method for identifying voters who had moved. Justice Breyer noted that "most people who receive confirmation notices from the State simply do not send back the 'return card' attached to that mailing — whether they have moved or not."

Furthermore, Justice Breyer pointed to a study that found that there were more registered voters who failed to vote and failed to respond to the return cards than voters who moved outside their county each year. In other words, wrote Breyer, "The fact that the State hears nothing from the registrant essentially proves nothing at all."

Justice Sonia Sotomayor wrote a separate dissenting opinion. She joined Justice Breyer's dissent "in full," but wanted to emphasize the first two purposes of the NVRA: to increase voter registration and to enhance voter participation in federal elections. In her opinion, Ohio's law violated the purposes of the NVRA as well as the failure-to-vote clause. "Congress enacted the NVRA," Justice Sotomayor wrote, "against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters." In her opinion, the majority on the court ignored this history.

Why This Case Matters

The case reflects two conflicting visions of what the main problem is in our federal elections. The two visions divide along partisan lines.

For Jon Husted, a Republican, the problem is voter fraud. He has argued that the Ohio voting procedures “make it easy to vote and hard to cheat.” The concern is that a fraudulent voter might assume the name of a deceased person or someone who has moved out of a particular county. Then, that fraudulent voter might vote in their name. Though extremely rare, voter fraud concerns the governments of several politically conservative states.

For others, the problem is voter suppression. In 2016, the Reuters news agency found that at least 144,000 people’s names were removed from voter rolls in Ohio’s largest three counties, and more specifically from Democratic-majority, black-majority neighborhoods. Hence Justice Sotomayor emphasized that the NVRA’s legislative history shows that the NVRA was meant to prevent just that kind of disenfranchisement.

In light of the *Husted* case, other states might follow Ohio’s example for their own programs. This would likely significantly increase the number of names purged from voting lists across the country. In 2019, an Arizona state legislative committee passed a bill to purge voters’ names from the early mail-in ballot list if those voters miss two federal elections. Mail-in ballots are often used by poorer voters who cannot take time off from work to vote on Election Day. Even so, the voters could still vote in person. Republicans approved the bill. Democrats rejected it.

WRITING & DISCUSSION

1. Whose arguments do you find more compelling, Jon Husted’s or the A. Philip Randolph Institute’s? Why?
2. Why do you think the Supreme Court was divided on this issue, resulting in a 5-4 ruling?
3. If you were a justice on the Supreme Court, would you have agreed with the majority or the dissenting opinions? Why?

ACTIVITY: Getting Voters to the Polls

You are a legislator in your state. Form a committee with three other legislators. Your committee must decide on a reform proposal for federal elections in your state:

1. Decide which proposal, if any, your committee will recommend that your state adopt.
2. Determine if your chosen proposal fulfills one or more of the four purposes of the National Voter Registration Act of 1993.
3. Be ready to share your committee’s decision and give reasons for the decision, using evidence from the main article. If your committee does not choose any listed proposal, explain why.
4. Proposals:
 - **Automatic Voter Registration.** Once citizens of a state interact with a state government agency (e.g., the Department of Motor Vehicles), they are automatically registered to vote. Citizens may opt out of being registered if they want. State agencies must (1) inform the citizen of their right to opt out, and (2) pass the registration information to local election officials.
 - **Change-of-Address Cards.** Every time a person fills out a change-of-address card for the U.S. Postal Service (USPS), the USPS passes that information to local election officials.
 - **National Census Registration.** In this procedure, census-takers in your state would be able to register voters every 10 years while updating census information.
 - **Return Cards.** This program is identical to Ohio’s.
 - **Photo ID Requirement.** Voters must show a photo ID on Election Day in order to vote. The name on the ID must match the name on the local voter roll, and the photo must match the person presenting the ID. (See the sidebar “Indiana’s Photo ID” for more information.)



San Mateo County Assessor-County Clerk-Recorder & Elections

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The Arab Spring and the Challenge of Nation-Building

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Standards Addressed

The Arab Spring and the Challenge of Nation-Building

National World History Standard 44: Understands the search for community, stability, and peace in an interdependent world. High School Benchmark 2: Understands rates of economic development and the emergence of different economic systems around the globe (e.g., patterns of inward, outward, and internal migration in the Middle East and North Africa, types of jobs involved, and the impact of the patterns upon national economies). High School Benchmark 5: Understands the role of political ideology, religion, and ethnicity in shaping modern governments (e.g., how successful democratic reform movements have been in challenging authoritarian governments in Africa, Asia, and Latin America).

California History-Social Science Standard 10.10: Students analyze instances of nation-building in the contemporary world in at least two of the following regions or countries: the Middle East, Africa, Mexico and other parts of Latin America, and China. (2) Describe the recent history of the regions, including political divisions and systems, key leaders, religious issues, natural features, resources, and population patterns. (3) Discuss the important trends in the regions today and whether they appear to serve the cause of individual freedom and democracy.

Common Core State Standards: SL.9-10.1, SL.9-10.3, RH.9-10.1, RH.9-10.3, WHST.9-10.10.

Purged From the Voter Rolls: Husted v. A. Philip Randolph Institute

National Civics Standard 15: Understands how the United States Constitution grants and distributes power and responsibilities to national and state government and how it seeks to prevent the abuse of power. High School Benchmark 8: Knows current issues concerning representation (e.g., term limitations, legislative districting, geographical and group representation).

California History-Social Science Standard 12.6: Students evaluate issues regarding campaigns for national, state, and local elective offices. (4) Describe the means that citizens

use to participate in the political process (e.g., voting, filing a legal challenge).

Common Core State Standards: SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

Suppressing the Vote

National U.S. History Standard 15: Understands how various reconstruction plans succeeded or failed. High School Benchmark 2: Understands the 14th and 15th amendments to the Constitution.

California History-Social Science Standard 11.10: Students analyze the development of federal civil rights and voting rights. (6) Analyze the passage and effects of civil rights and voting rights legislation (e.g., 1964 Civil Rights Act, Voting Rights Act of 1965) and the Twenty-Fourth Amendment, with an emphasis on equality of access to education and to the political process.

Common Core State Standards: SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

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