

READY TO ROLL: HOW THE U.S. ELECTION ASSISTANCE COMMISSION CAN STRENGTHEN STATE COMPLIANCE WITH FEDERAL VOTER ROLL MAINTENANCE REQUIREMENTS

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INTRODUCTION

The only reason unjust systems exist is that the masses of people silently give their consent and believe these systems are necessary—whether for their security or survival. Or we believe that is “the way things are or have to be.” In other words, we believe they are the truth. . . . Power derives from the consent of the people and those who operate and participate in that system. The minute people withdraw their support, these systems will collapse.¹ —John Lewis

The 2020 election cycle and tenuous political transition brought election administration² to the forefront of national attention.³ Public health challenges from the COVID-19 pandemic and democracy challenges from persistent assertions of massive and determinative fraud seriously tested the various mechanisms integral to a peaceful transfer of power.⁴ U.S. electoral

1. JOHN LEWIS, *ACROSS THAT BRIDGE: A VISION FOR CHANGE AND THE FUTURE OF AMERICA* 137 (1st ed. 2012).

2. Election administration entails “making decisions about the rules of elections . . . conducting elections in accordance with those decisions and paying for the activities and resources required to conduct them.” KAREN L. SHANTON, CONG. RSCH. SERV., R45549, *THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES* 3 (2019).

3. See, e.g., *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> (July 22, 2021) (listing over 400 restrictive voting bills proposed in forty-nine states and thirty already enacted in eighteen states as a response to the 2020 election).

4. See R. SAM GARRETT ET AL., CONG. RSCH. SERV., R46455, *COVID-19 AND OTHER ELECTION EMERGENCIES: FREQUENTLY ASKED QUESTIONS AND RECENT POLICY DEVELOPMENTS* 15, 16, 19 (2020) (discussing COVID-19’s challenges to election administration); see also Suzanne Mettler & Robert C. Lieberman, *Four Deadly Threats to American Democracy are Raging All at Once*, L.A.

systems persevered in the face of formidable challenges due to committed election officials, public servants, organizers, volunteers, and voters.⁵ A record number of people cast their votes⁶ after a year of heightened civic engagement on critical issues, particularly systemic racial injustice.⁷ Yet the challenges that many voters faced, heightened skepticism about election integrity that persists, and the violent attack on the U.S. Capitol motivated by the claim that the presidential election was stolen highlight continued vulnerabilities in U.S. electoral systems.⁸ Bolstering electoral institutions is always an important part of a well-functioning democracy, but these recent challenges emphasize its urgency today.⁹

Reckoning with the 2020 election requires considering how to better

TIMES (Nov. 17, 2020), <https://www.latimes.com/opinion/story/2020-11-17/democracy-threats-crisis-donald-trump> (identifying four converging threats to American democracy: “political polarization; conflict over who belongs as a full member of the political community; rising economic inequality; and the concentration of power in the nation’s top leader.”).

5. See *Election Assistance Comm’n Oversight Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov’t Admin. of the H. Comm. on Appropriations*, 117th Cong. 1–2 (2021) (statement of Benjamin Hovland, Chairman, U.S. Election Assistance Comm’n) (recognizing the significant contribution of public servants that made the 2020 election the most secure in U.S. history, despite significant challenges) [hereinafter *HAC Subcommittee Hearing*].

6. See Domenico Montanaro, *President-Elect Joe Biden Hits 80 Million Votes in Year of Record Turnout*, NAT’L PUB. RADIO (Nov. 25, 2020, 9:06 AM), <https://www.npr.org/2020/11/25/937248659/president-elect-biden-hits-80-million-votes-in-year-of-record-turnout> (reporting the 156 million votes cast in the 2020 election, the highest number ever recorded).

7. See Rashawn Ray, *How Black Americans Saved Biden and American Democracy*, BROOKINGS INST. (Nov. 24, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/11/24/how-black-americans-saved-biden-and-american-democracy/> (observing the “clear rallying cries about systemic racism and a potentially better and more equitable America” in the 2020 election).

8. See e.g., Daniel P. Tokaji, *Voter Registration in a Pandemic*, U. CHI. L. REV. ONLINE 35, 35–37 (2020) [hereinafter Tokaji, *Voter Registration in a Pandemic*] (examining the obstacles to registration and voting in the 2020 election due to the COVID-19 pandemic and less frequent face-to-face interactions with government entities); James Oliphant & Chris Kahn, *Half of Republicans Believe False Accounts of Deadly U.S. Capitol Riot-Reuters/Ipsos Poll*, REUTERS (Apr. 5, 2021, 6:06 AM), <https://www.reuters.com/article/us-usa-politics-disinformation-idUSKBN2BS0RZ> (citing results from a March 30–31, 2021 poll showing that six in ten Republican voters believed claims that the November 2020 election was stolen “due to widespread voter fraud”); Lauren Leatherby et al., *How a Presidential Rally Turned into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html> (portraying a timeline of the January 6, 2021 insurrection at the U.S. Capitol).

9. See Zack Stanton, *What if 2020 Was Just a Rehearsal?*, POLITICO MAG. (Sept. 26, 2021) <https://www.politico.com/news/magazine/2021/09/26/trump-politics-american-democracy-threat-2021-2022-analysis-514180> (highlighting the dangers of election *subversion* that became clear in the 2020 election cycle in addition to the ongoing risk of voter suppression).

leverage government institutions to strengthen electoral resilience. While states have significant discretion to administer elections, federal statutes provide necessary parameters so that otherwise qualified individuals are not improperly denied the ability to vote.¹⁰ Part of the federal infrastructure to further this goal is the U.S. Election Assistance Commission (EAC), an independent commission that Congress established through the Help America Vote Act of 2002 (HAVA).¹¹ The EAC demonstrates lawmakers' reluctance to grant broad federal authority over elections. HAVA limits the EAC's rulemaking authority and does not enable the EAC to enforce federal requirements.¹² Nevertheless, the EAC has vital responsibilities as a clearinghouse of election administration information that reports on state practices and convenes necessary discussions.¹³ These functions further voluntary state compliance with federal election administration requirements—namely HAVA and the National Voter Registration Act (NVRA)—and provide information that the U.S. Department of Justice (DOJ) and private entities use to bring enforcement suits.¹⁴

Voter roll maintenance—how states manage their databases of registered voters—is a critical election administration function for which the federal government has set standards through the NVRA and HAVA.¹⁵ The 2020 election reemphasized the importance of ensuring that states comply with such federal requirements.¹⁶ Despite sizable popular vote margins, both the

10. KAREN L. SHANTON, CONG. RSCH. SERV., R45770, THE U.S. ELECTION ASSISTANCE COMMISSION: OVERVIEW AND SELECT ISSUES FOR CONGRESS 4 (2019) [hereinafter CRS EAC REPORT].

11. 52 U.S.C. § 20921; *see generally* H.R. REP. NO. 107–30, at 9 (2001); *see also* 148 CONG. REC. S10,488 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (“The 2000 election opened the eyes of many Americans to the flaws and failures of our election machinery, our voting systems, and even how we determine what a vote is.”).

12. 52 U.S.C. §§ 20929, 20508(a); H.R. REP. NO. 107–30, at 13 (2001).

13. *About the U.S. EAC*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about-the-useac> (last visited Nov.8, 2021).

14. The Help America Vote Act (HAVA) does not provide a private right of action itself. However, lower courts have recognized the possibility of individual enforcement under a § 1983 claim. *Compare* Brunner v. Ohio Republican Party, 555 U.S. 5, 5–6 (2008) (per curiam) (holding that the Republican Party of Ohio did not have standing under HAVA to challenge Ohio’s voter roll policies), *with* Colon-Marrero v. Velez, 813 F.3d 1, 4 (1st Cir. 2016) (recognizing Puerto Rican plaintiffs’ § 1983 claim under HAVA). For more discussion on when individuals can bring a § 1983 suit in the election law context, *see* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 133 (2010) [hereinafter Tokaji, *Public Rights and Private Rights of Action*].

15. 52 U.S.C. §§ 20501–20511, 20901–21145.

16. *See HAC Subcommittee Hearing*, *supra* note 5, at 2–3 (describing why Election Assistance

Electoral College victory and control of the Senate hinged on tens of thousands of votes in a handful of swing states.¹⁷ These decisive, relatively small margins yield two significant observations. First, unjust or incompetent election administration could have seriously impacted national results.¹⁸ It was essential that voters had the information they needed to register, cast their votes, and ultimately have their votes counted in systems that prioritized accuracy and participation over political pressure.¹⁹ Second, there is a direct link between resilient electoral structures and the ability to rebuff unsupported allegations of stolen elections.²⁰

States' processes for maintaining their voter rolls vary widely. Less than half of all states have same-day voter registration.²¹ Thus, in the majority of states, individuals may face additional obstacles to voting if they are removed from their state's voter rolls without adequate notice and an opportunity to re-register prior to the election.²² There are limited remedies in place for voters who attempt to exercise their right to vote on election day and discover that the state purged their registration.²³ Improper or incompetent state practices can thus lead to significant disenfranchisement, and even seemingly innocuous administration errors can have a sizeable impact on voters and results.²⁴ While states have discretion to maintain a wide range of practices,

Commission (EAC) coordination with election administrators at all levels is essential to ensuring effective election administration).

17. Benjamin Swasey & Connie Hanzhang Jin, *Narrow Wins in These Key States Powered Biden to the Presidency*, NAT'L PUB. RADIO (Dec. 2, 2020, 5:00 AM), <https://www.npr.org/2020/12/02/940689086/narrow-wins-in-these-key-states-powered-biden-to-the-presidency> (visualizing President Biden's wins of Arizona's eleven Electoral College votes by 10,457 popular votes, Georgia's sixteen votes by 12,670, Nevada's eight votes by 33,596, and Wisconsin's ten votes by 20,682).

18. *Id.* (describing the tight margin of victory).

19. See *HAC Subcommittee Hearing*, *supra* note 5, at 1 (commending public servants who "put their personal health on the line" and "worked countless hours for their voters and our democracy").

20. See, e.g., *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 Fed. App'x 377, 381–83 (3d Cir. 2020) (rejecting a challenge to counting 1.5 million mail-in ballots in Pennsylvania and detailing the Commonwealth's election infrastructure, including requirements to register and vote by mail).

21. See Tokaji, *Voter Registration in a Pandemic*, *supra* note 8, at 37–38 (observing that twenty-one states had some form of same-day registration as of June 2020 and most of these states allow election day registration).

22. See *id.*

23. See generally *id.* at 40 (explaining possible options such as provisional ballots or "failsafe voting" for those who have "moved within the same polling place area"). These mechanisms vary depending on the state and do not always guarantee ballots will be counted. *Id.* at 41–42.

24. RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 69–70 (1st ed. 2020) (examining whether incompetence

they must also adhere to national standards that reduce the risk of inaccuracy and suppression.²⁵

Ill-maintained voter rolls also impact public perceptions of electoral integrity. Due to the United States' deep-seeded legacy of voter suppression,²⁶ many identify aggressive state voter roll purges as continued tactics to disenfranchise specific communities.²⁷ On the other hand, a significant portion of the U.S. electorate lacks faith in the results of the 2020 presidential election and believes claims that widespread fraud diluted their votes.²⁸ States must therefore maintain their voter rolls with the objective to increase democratic participation, reduce obstacles for historically disenfranchised voters, and fortify democratic institutions against challenges to their integrity.²⁹ The EAC is uniquely situated to ensure that states advance these imperatives.³⁰

The EAC must utilize its reporting and convening abilities to further state compliance with federal election statutes, particularly the NVRA and HAVA requirements governing voter roll maintenance. Part I of this Comment discusses the federal government's authority to oversee and regulate state-run elections for federal office. It also considers the EAC's role in ensuring that states maintain

or intentional suppression caused Georgia's election administration challenges in the 2018 gubernatorial election); STACEY ABRAMS, *OUR TIME IS NOW: POWER, PURPOSE, AND THE FIGHT FOR A FAIR AMERICA* 66–68 (1st ed. 2020) (recalling how in 2019 alone, voting rights groups prevented erroneous purges of 10% of the over 300,000 voters that Georgia targeted for removal that year, obtained an injunction against an illegal purge of over 175,000 voters in Kentucky, and stopped the wrongful purge of over 40,000 voters in Ohio).

25. ABRAMS, *supra* note 24, at 64, 67–68.

26. *See id.* at 33–36 (chronicling the centuries-long disenfranchisement of Black Americans, Native Americans, Latinx Americans, and Asian Americans); JOHN LEWIS, *supra* note 1, at 44 (“During the voting rights struggle, we toiled for years in the vineyard of humanity to create change.”).

27. *See* Naila S. Awan, *When Names Disappear: State Roll-Maintenance Practices*, 49 U. MEM. L. REV. 1107, 1123 (2019) (highlighting voter purges in Beaufort, North Carolina, where Black individuals comprised 65% of the registrations canceled but only 26% of the overall population).

28. *See* Oliphant & Kahn, *supra* note 8, (citing poll results that six in ten Republican voters believed claims that the November 2020 election was stolen “due to widespread voter fraud”). *But see* Tom Perkins, *The Dead Voter Conspiracy Theory Peddled by Trump Voters, Debunked*, GUARDIAN (Nov. 18, 2020, 8:00 AM), <https://www.theguardian.com/us-news/2020/nov/18/dead-voter-conspiracy-theory-debunked> (refuting claims that large numbers of deceased individuals voted in the 2020 election).

29. U.S. ELECTION ASSISTANCE COMM'N, *ELECTION ADMINISTRATION AND VOTING SURVEY, 2018 COMPREHENSIVE REPORT* 41–42 (2018) [hereinafter 2018 EAVS REPORT], https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

30. *HAC Subcommittee Hearing*, *supra* note 5 (statement of Rosa DeLauro, Chair, H. Appropriations Comm.) (“The EAC is . . . the only federal agency completely dedicated to election administration.”).

their voter rolls in accordance with federal law. Part II assesses the NVRA and HAVA requirements for state voter roll maintenance, interpretations of ambiguous provisions, and obstacles to voter participation that can abound in the absence of clear and sufficient federal requirements. Part III analyzes federal and nongovernmental mechanisms to enforce the NVRA and HAVA, which demonstrate the need for greater federal guidance through the EAC.

Finally, Part IV provides recommendations for how the EAC should act within its existing authority to effectuate better state compliance with federal statutes and steps that Congress can take to support the EAC. First, the EAC should regularly include additional information in its biennial Election Administration and Voting Survey (EAVS) specifically focused on state practices and policies for maintaining their voter rolls. Second, the EAC should conduct targeted research and convene discussions on how states maintain their voter rolls and how their policies impact voter participation. Third, Congress should ensure that the EAC has the leadership and resources it needs to fulfill its duties. It should further expand the EAC's rulemaking and enforcement authority and reinforce the NVRA and HAVA. Given today's contentious political climate, it is essential for the EAC to maximize efforts to realize the goals of federal election administration statutes—and a well-functioning democracy writ large—to achieve widespread voter participation and confidence.³¹

I. FEDERAL AUTHORITY OVER ELECTIONS AND THE U.S. ELECTION ASSISTANCE COMMISSION

Congress alone holds the power to implement federal protections against retribution meted out at the ballot box. This body can and must respect the differences in states and allow them to decide how best [to] administer elections to meet the specific needs of its people. However, modern election laws demand a basis of uniformity to ensure election integrity—not election insincerity. Each American's ability to access our democracy should not rely on their state of residence.³²—Stacey Abrams

A. Federal Authority to Regulate Elections

There is inherent tension in the U.S. Constitution's allocation of election administration authority between federal and state governments. While states have the primary authority to designate the "times, places and manner" of federal elections, the Constitution grants Congress the power to

31. See *id.*; see also *Oversight of the U.S. Election Assistance Comm'n Hearing Before the S. Comm. on Rules and Admin.*, 116th Cong. 74 at 2–3 (2019) [hereinafter *Senate Rules Hearing*] (statement of Sen. Klobuchar).

32. *On Strengthening American Democracy Hearing Before the H. Comm. on H. Admin.*, 117th Cong. (2021) (statement of Stacey Abrams, Founder, Fair Fight Action).

“make or alter such regulations” at any time.³³ Congress may also legislate to ensure that states comply with the Amendments that protect against various forms of suppression.³⁴ Some view this constitutional grant of authority as a broad license for Congress to enact legislation governing election requirements necessary to prevent arbitrary or prejudicial disenfranchisement by states.³⁵ Others argue that Congress’s authority is much more limited.³⁶

Notable federal election legislation includes the Voting Rights Act of 1965 (VRA), Federal Elections Campaign Act of 1974 (FECA), the NVRA, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and HAVA.³⁷ Each of these laws sought to answer widespread calls for federal action that echoed from civil rights marches, the governance and corruption scandals of the Watergate era, and frustration with persistently low voter participation.³⁸ Debates over the scope of federal involvement in state-run elections pose an essential backdrop to these landmark legislative achievements. While the Supreme Court has primarily upheld these statutes, it has also curtailed federal authority to mandate state compliance in notable cases by citing concerns over federal authority infringing on state sovereignty.³⁹

Federal legislation to secure access to the ballot cannot be considered apart from the United States’ long history of disenfranchisement.⁴⁰ Congress expressly enacted the VRA to prevent states from denying the right to vote on the basis of race, and subsequent election administration laws—the NVRA

33. U.S. CONST. art. I, § 4, cl. 4.

34. See U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI (prohibiting disenfranchisement on the basis of race, sex, age for those over eighteen, inability to pay a poll tax, and other election practices that run afoul of equal protection and due process guarantees).

35. See Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 346–47 (2008) (describing Congress’s broad authority to legislate elections).

36. See *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (contrasting narrow congressional authority to establish the “time and manner” for federal elections with states’ broad powers to determine conditions for voting as intended by the Framers of the Constitution).

37. 52 U.S.C. §§ 10101–10702, 20301, 20501–20511, 20901–21145, 30101–30146.

38. See ABRAMS, *supra* note 24, at 36; *HAC Subcommittee Hearing*, *supra* note 5 (statement of Rosa DeLauro, Chair, H. Appropriations Comm.).

39. Compare *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966) (upholding § 4(e) of the Voting Rights Act (VRA) as a proper exercise of congressional authority under the Fourteenth Amendment), with *Shelby County*, 570 U.S. at 535 (finding the § 4(b) pre-clearance formula no longer justified and violative of states’ equal sovereignty).

40. ABRAMS, *supra* note 24, at 34–35 (describing the elusive hope of the Civil War Amendments as states resisted federal actions by invoking the Tenth Amendment as the “states’ rights” argument became an “unscalable barrier against civil rights for millions”).

and HAVA—maintain this fundamental commitment.⁴¹ Tension regarding federal and state authority over elections thus often centers around whether states impermissibly or unnecessarily restrict access to voting and to what extent the federal government can interfere to prevent such infringement.⁴²

Disenfranchisement on the basis of race and ethnicity has taken on new forms⁴³ and remains pervasive,⁴⁴ yet the Supreme Court has grown less likely to preserve the strength of federal laws that provide tools to challenge state suppression.⁴⁵ The Court’s latest opinion to weaken federal protections against discriminatory and suppressive voting laws, *Brnovich v. Democratic National Committee*,⁴⁶ made it even more difficult to challenge barriers to voting that the majority considered “mere inconvenience.”⁴⁷ This decision granted states more latitude to assert anti-fraud and election integrity interests to justify voting restrictions, even without demonstrating the prevalence of these asserted concerns or that there was no less discriminatory means to address them.⁴⁸ Reluctance from both the Court and some federal lawmakers to

41. 52 U.S.C. §§ 20507(b)(1), (c)(2); 21803(a)(2)(A)(i); *see also* Awan, *supra* note 27, at 1112–1113.

42. *See* Graham August Toney Floyd, *Federalism, Elections, Preemption, and Supremacy: The Aftermath of Inter Tribal Council*, 33 MISS. COLL. L. REV. 235, 239–53 (2014); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2366 (2021) (Kagan, J., dissenting) (refuting the majority’s description of the VRA as an undemocratic transfer of authority from states to federal courts).

43. *See Shelby County*, 570 U.S. at 563 (Ginsburg, J., dissenting) (expounding on second-generation barriers to voting, such as racial gerrymandering and at-large districting to “reduce the impact of minority voters, in contrast to direct attempts to block access to the ballot”).

44. *See, e.g., U.S. COMM’N ON CIV. RTS., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES* 82 (2018) (“[A]t least [twenty-three] states have enacted newly restrictive statewide voter laws since the *Shelby County* decision.”).

45. Instead of applying strict scrutiny to assess the constitutionality of state laws that make voting harder, courts now apply the *Anderson–Burdick* test—where the level of scrutiny depends on the burden placed on voters—to “evenhanded restrictions that protect the integrity of the electoral process itself.” *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

46. 141 S. Ct. 2321 (2021).

47. *Id.* at 2338. As Justice Kagan described in dissent, Arizona’s challenged out-of-precinct policy resulted in Hispanic and Black voters’ ballots being discarded at a statistically higher rate than white voters and its ballot-collection ban imposed a significant burden on Native American voters who, because of the ban, had to travel long distances to be able to vote by mail. *Id.* at 2366–2371 (Kagan, J., dissenting) (relying on EAC data to demonstrate how Arizona’s out-of-precinct policy resulted in significantly more ballots being discarded than any other state and expounding on the lack of mail access for many rural Native American voters, with only 18% having access to home mail delivery services compared to 86% of white voters in those counties).

48. *See* Richard Hasen, *Opinion, The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-cali>

interfere significantly with state election administration gives essential context to assess the tools that the federal government has to further state compliance with national standards.⁴⁹ The EAC's inability to mandate state compliance with the NVRA and HAVA is a product of wariness that the federal government could overstep its constitutional bounds.⁵⁰

B. *The U.S. Election Assistance Commission*

HAVA established the EAC as an independent commission in 2002 to help ameliorate the election administration debacles that plagued the 2000 election and undermined voter confidence.⁵¹ The EAC embodies many of the vigorous debates about the federal government's role in overseeing elections.⁵² Its structure and statutory grant of authority, as well as limitations therein, reflect these tensions. Even though HAVA grants limited authority to the EAC, courts have found that when the Commission acts according to its statutory mandate, such actions can preempt conflicting state law.⁵³ These decisions affirm that the federal government has an important role in election administration, even if the scope of this authority is uncertain, and that the EAC is a valid instrument for the federal government to carry out its constitutional duties.⁵⁴

The EAC is led by four commissioners who are recommended by congressional leadership, nominated by the President, and confirmed by the

fornia.html?smid=tw-nytopinion&smtyp=cur (comparing the low burden on states to assert an interest in fraud-prevention without actually showing fraud is a significant risk with the high burden on voters seeking to challenge states' laws as discriminatory and suppressive).

49. CRS EAC REPORT, *supra* note 10, at 3–4.

50. *See id.* (highlighting congressional debates over whether the EAC should focus solely on supporting state and local governments as they administer elections or if the EAC should have more expansive authority to compel them to act).

51. *Supra* note 11 and accompanying text; *see also* Eliot Kleinberg, *Close Election? In 2000, All Eyes Were on Florida, and Palm Beach County Because of the Butterfly Ballot*, PALM BEACH POST (Oct. 16, 2020, 3:08pm), <https://www.palmbeachpost.com/story/news/history/2020/10/16/2000-election-george-bush-al-gore-and-butterfly-ballots/5938042002/> (recalling the difference of 537 votes in Florida that decided the 2000 presidential election amid confusion over the accuracy of ballot design).

52. CRS EAC REPORT, *supra* note 10, at 3–4.

53. *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 4–5, 15 (2013) (striking Arizona's law requiring documentary proof of citizenship for conflicting with the EAC's Federal Form).

54. *See* U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .”); *Inter Tribal Council of Ariz.*, 570 U.S. at 4–5 (explaining that the EAC prescribes the contents of the Federal Form for federal elections mandated by the National Voter Registration Act (NVRA)).

Senate to four-year terms that can be renewed once.⁵⁵ Commissioners must have election administration experience, a requirement that furthers the goal of having an independent, expert-led agency.⁵⁶ No more than two commissioners can be from the same political party.⁵⁷ Yet, the EAC's ideological split and need for a three-commissioner quorum for decisions also raise concerns over its functionality.⁵⁸

Some of the challenges to the EAC's effectiveness are due to its structure, while others are a result of Congress not prioritizing election administration.⁵⁹ Beyond attempts to defund the EAC, Congress has also left commissionerships vacant for years at a time.⁶⁰ From December 2011 through January 2015, the EAC lacked a quorum of commissioners, rendering it unable to take official

55. ARTHUR L. BURRIS & ERIC A. FISCHER, CONG. RSCH. SERV., RS20898, THE HELP AMERICA VOTE ACT AND ELECTION ADMINISTRATION: OVERVIEW AND SELECTED ISSUES FOR THE 2016 ELECTION 4 (2016).

56. *Id.* The EAC's four current administrators have experience as state election administrators, at the U.S. Department of Justice (DOJ), working on congressional committees, and leading advocacy efforts. *EAC's Commissioners*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about_the_eac/commissioners.aspx (last visited Nov. 8, 2021).

57. *Id.*

58. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 135 (2009) [hereinafter Tokaji, *The Future of Election Reform*] (describing both the EAC and the Federal Election Commission as "plagued by partisan deadlock"); Lee Drutman & Charlotte Hill, *America Needs a Federal Elections Agency*, NEW AM. 8–9, <https://www.newamerica.org/political-reform/reports/america-needs-federal-elections-agency/> (last updated Nov. 4, 2020) (highlighting how the EAC's "mandated bipartisanship translates into deadlock amidst hyper-partisan polarized politics").

59. Criticism of the EAC often results from a mix of its own actions and congressional challenges, including vacant commissionerships, insufficient funding, partisan stalemate, a failure to release information as part of its clearinghouse role, and agency capture. Tokaji, *The Future of Election Reform*, *supra* note 58, at 134–36; Jessica Huseman, *How Voter-Fraud Hysteria and Partisan Bickering Ate American Election Oversight*, PROPUBLICA (July 22, 2020, 5:00 AM), <https://www.propublica.org/article/how-voter-fraud-hysteria-and-partisan-bickering-ate-american-election-oversight>. Concerns that the EAC could be used as a vehicle to advance anti-democratic election and voting perspectives continue to exist and underscore the importance of ensuring that the EAC's leaders and staff are committed to protecting voter access and participation. See Alexandra Ulmer, *Lawyer Who Tried to Overturn Trump's 2020 Loss Appointed to a U.S. Election Board*, REUTERS (Nov. 19, 2021) <https://www.reuters.com/world/us/lawyer-who-tried-overturn-trumps-2020-loss-appointed-us-election-board-2021-11-19/> (discussing a recent appointment to the EAC's Advisory Board: "[a]lthough the 35-member board is an advisory body and does not have any specific powers over voting procedures, critics said the appointment gives legitimacy to someone they accuse of undermining faith in the democratic process in the United States.").

60. CRS EAC Report, *supra* note 10, at 19–20.

action and provide updated guidance on critical election administration issues.⁶¹ Until Fiscal Year 2021, the highest funding mark that Congress appropriated to the EAC was in 2010 at just under \$18 million.⁶² Funding challenges can seriously restrict the EAC's ability to provide guidance on new challenges that arise by hindering it from hiring the staff and experts it needs to support its researching, convening, and reporting responsibilities.⁶³

The EAC occupies a critical and unique space, yet HAVA limits its ability to act in an area of governance where states have significant authority and discretion.⁶⁴ It does so by generally restricting the EAC from engaging in rulemaking except under two circumstances: (1) developing the mail voter registration form, and (2) producing the biennial EAVS report.⁶⁵ The EAC's mandate to provide information to states about their responsibilities under the NVRA and HAVA does not fall under its rulemaking authority.⁶⁶ As a result, the EAC's guidance on state obligations is largely advisory and allows varying interpretations among states to persist.⁶⁷ In contrast to the Federal Election Commission's (FEC's) authority to enforce FECA, HAVA does not vest the EAC with the power to enforce the NVRA or HAVA.⁶⁸ Instead, the DOJ is responsible for enforcing both statutes.⁶⁹

The EAC's duties include dispersing election administration funds to states, serving as a clearinghouse of information on best practices for election administration, maintaining the mail voter registration form, developing voluntary voting system guidelines, and producing the biennial EAVS

61. *See id.* (attributing the nearly ten-year gap in updated EAC guidance on the Voluntary Voting System Guidelines to its lack of a quorum from 2011–2015).

62. Matthew Weil, *Now Is the Time to Fully Fund Election Assistance Commission*, BIPARTISAN POL'Y CTR. (Oct. 21, 2019), <https://bipartisanpolicy.org/blog/now-is-the-time-to-fully-fund-election-assistance-commission/>. These funding levels reflect the EAC's total budget; its operating budget for each of these years is even lower. *See* CRS EAC Report, *supra* note 10, at 16; Consolidated Appropriations Act, 2021, Pub. L. No. 116–260 (2020).

63. *Senate Rules Hearing*, *supra* note 31, at 146 (statement of Chairman Hovland).

64. 52 U.S.C. §§ 20929, 20508(a).

65. The EAC is unable to “issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government” besides enumerated exceptions. *Id.* § 20929.

66. *Id.* §§ 20929, 20508(a).

67. *See* Tokaji, *The Future of Election Reform*, *supra* note 58, at 137 (expounding on the general lack of EAC authority to promulgate regulations that would ensure consistent interpretation and implementation of federal statutes).

68. *See infra* Part III.A. (elaborating on DOJ enforcement of the NVRA and the Help America Vote Act (HAVA)).

69. *See id.* DOJ enforcement, while essential to ensuring that states comply with HAVA and NVRA requirements, is also criticized for being highly inconsistent across administrations. *Id.*

report.⁷⁰ Producing the EAVS report and otherwise serving as a clearinghouse for election administration information are especially significant to the federal government's ability to promote state compliance with national voter roll maintenance standards. Even with the EAC's statutory constraints, it can leverage its existing authority to further national goals.⁷¹

1. *The Election Administration and Voting Survey Report*

The EAC is statutorily mandated to submit a biennial report to Congress on how federal statutes impact election administration and provide recommendations for improvements.⁷² The EAVS details the NVRA's impact to fulfill this statutory requirement and to provide insight into registration practices and state policies.⁷³ HAVA states that the goals of this reporting are to: (1) promote convenient, accessible, and easy-to-use voting systems; (2) yield accurate and secure results; (3) ensure systems that are nondiscriminatory and provide equal opportunities for voter participation; and (4) promote efficient and cost-effective election administration.⁷⁴

HAVA outlines the information to be included in such reports, including states' methods for maintaining their lists of registered voters.⁷⁵ Yet, it also grants the EAC discretion to rely on its expertise to gather and report on data that it deems appropriate and useful for the federal government to improve election administration.⁷⁶ The EAC relies on this discretion to consider which EAVS and Election Administration Policy Survey (EAPS) questions to add, eliminate, or revise given current election practices.⁷⁷ Before finalizing its EAVS and EAPS questions for states to answer, the EAC must submit them to the Office of Management and Budget (OMB) and, while the

70. *About the U.S. EAC*, *supra* note 13.

71. *See infra* Parts IV.A., IV.B. (recommending that the EAC leverage its Election Administration and Voting Survey (EAVS) report and clearinghouse role to shed greater light on how state policies impact voter participation).

72. 52 U.S.C. § 20927.

73. 2018 EAVS REPORT, *supra* note 29, at 40.

74. 52 U.S.C. § 20981(a).

75. *Id.* at § 20981(b).

76. *Id.* at § 20981(b)(12), (b)(19).

77. 52 U.S.C. § 20927. *See* U.S. ELECTION ASSISTANCE COMM'N, A GUIDE TO THE ELECTION ADMINISTRATION AND VOTING SURVEY 11 (2020) [hereinafter EAVS GUIDE], https://www.eac.gov/sites/default/files/Research/A_Guide_to_the_Election_Administrati_on_and_Voting_Survey.pdf (discussing the factors that the EAC considers when deciding which questions to propose for the Election Administration Policy Survey (EAPS), including how answering the questions would burden state and local administrators).

EAC awaits OMB approval, there is an opportunity for public comment.⁷⁸ The EAC then publicly releases the final versions of the questions on their project websites.⁷⁹ States then submit answers to these questions and the EAC uses this data to produce its report.⁸⁰

In assessing the NVRA's impact, the 2018 EAVS report presents its state-by-state data within the context of federal goals to promote widespread voting access.⁸¹ The report reiterates the requirement that states maintain accurate and current lists in compliance with the NVRA.⁸² It presents data about the number of voters that states purged in 2018 and compares active and inactive registrations to total Citizen Voting Age Population (CVAP).⁸³ The EAVS report also provides state- and territory-specific data about residence confirmation notices sent as part of removal processes.⁸⁴ This data is necessary so that the DOJ can enforce the NVRA and so that nongovernmental entities can track, report on, and bring suit to further NVRA compliance.⁸⁵

In addition to quantitative data, the EAVS report also includes information on state voter roll maintenance practices captured in its EAPS.⁸⁶ The 2018 EAPS only discusses in detail state policies to remove voters based on felony convictions and how such individuals can regain the right to vote,

78. EAVS GUIDE, *supra* note 77, at 11; *see also* Proposed Information Collection—2020 Election Administration and Voting Survey, Comment Request, 85 Fed. Reg. 7,758 (Feb. 11, 2020) [hereinafter EAVS Comment Request] (inviting the public to comment on the draft 2020 EAVS questions); Proposed Information Collection—2020 Election Administration and Voting Survey, Comment Request, 84 Fed. Reg. 53,709 (Oct. 8, 2019) [hereinafter EAPS Comment Request] (inviting public comment on EAPS questions specifically).

79. EAVS GUIDE, *supra* note 77, at 10–11. The EAC released its 2020 EAVS report on August 16, 2021, after initially giving notice and an opportunity for public comment on the EAVS and EAPS questions in 2019–2020. *Id.* at 11.

80. *Id.* at 8–10.

81. 2018 EAVS REPORT, *supra* note 29, at 41–42. Voting rights, according to the NVRA and 2018 EAVS report, can be infringed when “discriminatory and unfair registration laws and procedures” reduce voting and “disproportionately harm voter participation by various groups, including racial minorities.” *Id.* at 42.

82. *See id.* at 51 (explaining that while states and territories have “considerable freedom” to choose how to maintain their voter rolls, their practices must still follow NVRA guidelines).

83. *Id.* at 18, 55–61. “Citizen Voting Age Population (CVAP) is an estimate of the number of U.S. citizens 18 years of age or older in the state.” *Id.* at 62.

84. *Id.* at 78–79, 82–83.

85. *See infra* Part III.A.; EAVS GUIDE, *supra* note 77, at 2 (explaining how EAVS data is vital to help “identify trends, anticipate and respond to changing voter needs, and invest resources to improve election administration and the voter experience.”).

86. 2018 EAVS REPORT, *supra* note 29, at 117 (highlighting how examining laws and policies is important to give context to quantitative data from state and local election officials).

if at all.⁸⁷ However, the 2020 report includes more targeted questions on state policies for identifying voters for removal, such as which voters receive confirmation notices and what data sources states use to identify potentially ineligible voters.⁸⁸ This information gives greater insight into how states understand the NVRA and it aids enforcement efforts.⁸⁹ Reporting on state voter registration, removal rates, and practices illuminates how different policies impact participation and could highlight potential NVRA violations.⁹⁰

2. *Serving as a Clearinghouse for Election Administration Information*

One of the EAC's main duties is to serve as a national clearinghouse for compiling and reviewing election administration information.⁹¹ The EAC conducts research on election administration practices and gives election administrators opportunities to share their experience and expertise.⁹² In addition to producing the EAVS, the EAC also has discretion to research other election administration issues.⁹³ Entities that rely on EAVS data to

87. *See id.* at 124–25 (explaining that every state disenfranchises people convicted of felonies in some form, but only thirty-four states automatically restore voting rights after the disenfranchisement period ends).

88. *See* U.S. ELECTION ASSISTANCE COMM'N, 2020 ELECTION ADMINISTRATION POLICY SURVEY 12–13 (2020) [hereinafter EAPS QUESTIONNAIRE], https://www.eac.gov/sites/default/files/Research/2020EAVS_Policy_Survey.pdf.

89. *See infra* Part IV.A. (recommending that the EAC maintain and expand on its 2020 EAPS questions to provide greater insight into the impact of specific state voter roll policies).

90. *See The National Voter Registration Act of 1993 (NVRA)*, U.S. DEP'T OF JUST. [hereinafter *DOJ NVRA Webpage*], <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last visited Nov. 8, 2021) (explaining that states must keep records of their voter registration activities and report on them and that the DOJ considers these records in enforcing NVRA compliance). A 2018 Brennan Center report, citing EAVS data, found that since 2013, at least four states conducted illegal purges and another four had written policies that violated the NVRA on their face. These eight states contained over a quarter of registered voters nationwide. JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1–2 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

91. 52 U.S.C. § 20922.

92. *See id.* HAVA established three advisory boards for the EAC comprised of a range of federal, state, and local officials as well as experts. *See* CRS EAC REPORT, *supra* note 10, at 13–14. The Board of Advisors has thirty-five members representing a mix of state and local officials, federal entities, science and technology experts, and voter representatives appointed by Congress. *Id.* at 14. The Standards Board has two representatives from each state and territory. *Id.*

93. CRS EAC REPORT, *supra* note 10, at 8; *see also Research & Data: White Papers*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/research-and-data/white-papers> (last

analyze, report on, and bring suit to enforce the NVRA would benefit from additional targeted research.⁹⁴

The EAC convenes discussions among election administrators and experts on timely election administration issues.⁹⁵ Leading up to the 2020 election, the EAC held virtual roundtables on critical topics including election-night reporting, voter registration during the pandemic, how the pandemic impacted the UOCAVA, and voting accessibility issues.⁹⁶ It also held a public hearing on lessons learned in the 2020 primaries where state and local officials testified about issues that impacted voter experiences and were likely to recur in the November general election.⁹⁷ The EAC had the unique ability to identify challenges in the 2020 cycle and provide a platform for experts and election administrators to discuss potential solutions.⁹⁸

Former EAC Chair Benjamin Hovland recently remarked in congressional testimony that despite the challenges related to the 2020 election, it was the best election he had seen administered in his career—a “herculean” task.⁹⁹ He recalled that throughout the 2020 cycle, the EAC leveraged partnerships with state, local, and federal bodies to provide quick guidance on election administration challenges that arose.¹⁰⁰ It is essential that the EAC continues to provide mechanisms for such discussions, especially related to voter roll maintenance, in the aftermath of the 2020 election. These conversations are critical to addressing the substantial lack of confidence in electoral outcomes, reactionary efforts to enact voter

visited Nov. 8, 2021) (listing reports on provisional ballots, early, absentee, and mail voting).

94. See *DOJ NVRA Webpage*, *supra* note 90 (explaining that the DOJ has enforcement jurisdiction over NVRA violations and that it uses EAVS data to ensure state compliance); BRATER ET AL., *supra* note 87, at 2 (referencing past and current litigation efforts); see also Douglas R. Hess, *States Are Ignoring Federal Law About Voter Registration. Here’s Why*, WASH. POST (July 4, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/04/states-are-ignoring-federal-law-about-voter-registration-heres-why/> (citing EAVS data that showed evidence of poor NVRA compliance).

95. CRS EAC REPORT, *supra* note 10, at 7.

96. See, e.g., *EAC to Host Roundtable Discussion on Election Night Reporting for the 2020 Election*, U.S. ELECTION ASSISTANCE COMM’N (Oct. 19, 2020), <https://www.eac.gov/news/2020/10/19/eac-host-roundtable-discussion-election-night-reporting-2020-election>.

97. See, e.g., *EAC to Host Public Hearing on the Election Response to the Coronavirus (COVID-19)*, U.S. ELECTION ASSISTANCE COMM’N (Apr. 20, 2020), <https://www.eac.gov/news/2020/04/20/eac-host-public-hearing-election-response-coronavirus-covid-19>.

98. See *HAC Subcommittee Hearing*, *supra* note 5 at 2–3 (statement of Chair Benjamin Hovland) (explaining the essential role that the EAC played in administering the 2020 election).

99. *Id.* at 1 (statement of Chair Benjamin Hovland) (emphasizing the “unprecedented” election administration adjustments required in the 2020 election cycle due to the COVID-19 pandemic).

100. *Id.* at 2.

suppressive laws, and heightened focus on election administration reforms.¹⁰¹ They are also necessary to ensure that proposals to address election administration issues are informed by experts and best practices instead of purely political considerations.¹⁰²

II. FEDERAL VOTER ROLL MAINTENANCE REQUIREMENTS—INTERPRETING AND APPLYING AMBIGUOUS STATUTORY PROVISIONS

Strongly held views on the federal government’s role in election administration are an unavoidable undercurrent to discussions about voter roll maintenance. This is evident in the restraint HAVA imposes on the EAC’s ability to issue binding interpretations of the NVRA and HAVA requirements.¹⁰³ These statutes are specific in some regards, but several provisions also yield a range of interpretations from states, election law experts, and nongovernmental organizations.¹⁰⁴ The broad latitude that states retain to set their own voter roll systems under both statutes furthers

101. See Amy Gardner, *State GOP Lawmakers Propose Flurry of Voting Restrictions to Placate Trump Supporters, Spurring Fears of Backlash*, WASH. POST (Feb. 20, 2021, 8:02 AM), https://www.washingtonpost.com/politics/gop-voting-restrictions/2021/02/19/d1fab224-72ca-11eb-85fa-e0cb3660358_story.html (discussing state proposals to alter voting and election laws in the name of bolstering electoral integrity and confidence); Amy Gardner, *In Wake of 2020 Election, Democratic Senators Urge Biden to Expand Voting Rights Protections*, WASH. POST (Feb. 17, 2021, 4:15 PM), https://www.washingtonpost.com/politics/in-wake-of-2020-election-democratic-senators-urge-biden-to-expand-voting-rights-protections/2021/02/17/0ef97cb4-7140-11eb-93bec10813e358a2_story.html (reporting on a letter from twenty Senate Democrats urging the Biden Administration to increase voter participation by executive action).

102. Compare CRS EAC REPORT, *supra* note 10, at 14 (detailing the bipartisan EAC Standards Board), with Philip Bump, *The Blurry Line Between Combating ‘Fraud’ and Just Making Voting Harder*, WASH. POST (Mar. 15, 2021, 3:29 PM), <https://www.washingtonpost.com/politics/2021/03/15/blurry-line-between-combating-fraud-just-making-voting-harder/> (highlighting partisan proposals to curtail voting across states).

103. 52 U.S.C. §§ 20929, 20508(a).

104. Compare Memorandum from the Brennan Ctr. For Just., Demos, and Laws.’ Comm. For Civ. Rts. Under L. to Election Officials on Voter List Maintenance and NVRA Compliance 1 (Nov. 20, 2017) [hereinafter NVRA Compliance Memorandum], <https://lawyerscommittee.org/wp-content/uploads/2017/11/NVRA-List-Maintenance-Memo-11-20-17.pdf> (describing the NVRA as limiting circumstances for purging voters), with Hans A. von Spakovsky & Jason Snead, *Supreme Court Gives States Green Light to Clean Up Voter Rolls*, HERITAGE FOUND. (June 11, 2018), <https://www.heritage.org/election-integrity/commentary/supreme-court-give-states-the-green-light-clean-voter-rolls> (iterating an urgent need for states to aggressively “clean up” voter rolls that remain “rife with inaccuracy”).

uncertainty in their requirements.¹⁰⁵ As long as states do not enact practices that violate basic due process requirements or lead to arbitrary or prejudicial removals, they have significant flexibility.¹⁰⁶ The question that garners debate, and would benefit from increased guidance from the EAC, is: When do state policies fall outside these federal limits?

A. *The National Voter Registration Act and The Help America Vote Act*

The NVRA is the primary federal statute that governs how states maintain their voter rolls. Congress passed the NVRA in 1993 as a response to low voter participation—50.16%—in the 1988 election, when voter registration issues were a significant reason for non-voting.¹⁰⁷ The NVRA aims to boost electoral participation by requiring states to offer citizens increased opportunities to register to vote and preventing arbitrary or discriminatory voter purges.¹⁰⁸

Section 8 of the NVRA sets parameters for when states can remove registered voters from their rolls.¹⁰⁹ The NVRA requires states to make a reasonable effort to identify and remove ineligible voters.¹¹⁰ One way they can fulfill this obligation is to establish a program based on change of address information from the U.S. Postal Service (USPS).¹¹¹ Section 8 restricts the manner in which states may remove voters, mainly preventing states from purging individuals simply for their failure to vote.¹¹² Additionally, it puts forth procedures that states must follow to remove voters due to a change in residence.¹¹³ The NVRA requires states to send a written notice to voters suspected of being ineligible and remove

105. See Tokaji, *Voter Registration in a Pandemic*, *supra* note 8, at 37–38 (observing variances in timing for when states allow their residents to register to vote and how this impacts the risk of erroneous disenfranchisement).

106. 2018 EAVS REPORT, *supra* note 29, at 39–40.

107. Awan, *supra* note 27, at 1112.

108. *Id.* at 1112–13. In addition to interactions with motor vehicle departments, the NVRA requires “voter registration agencies” involved in public assistance and disability services to provide registration materials to individuals. ROYCE CROCKER, CONG. RSCH. SERV., R40609, *THE NATIONAL VOTER REGISTRATION ACT OF 1993: HISTORY, IMPLEMENTATION, AND EFFECTS* 3–4 (2013).

109. 52 U.S.C. § 20507.

110. *Id.* § 20507(a)(4).

111. *Id.* § 20507(c). This refers to the U.S. Postal Service’s National Change of Address (NCOA) program, known as the safe harbor provision in the NVRA. U.S. POSTAL SERV., OFF. OF THE INSPECTOR GEN., NATIONAL CHANGE OF ADDRESS PROGRAM: AUDIT REPORT NO. IT-AR-14-010 at 6–7 (2014) [hereinafter NCOA PROGRAM].

112. 52 U.S.C. § 20507(b)(2). *But see* *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) (holding that the NVRA prohibits states from using failure to vote as the “sole criterion” for purging registered voters from a state’s voter rolls, but not as an initial identifier).

113. 52 U.S.C. § 20507(d).

them only if they either (1) confirm that they have moved, or (2) do not respond nor vote for at least two subsequent, consecutive general elections.¹¹⁴ It further prevents states from engaging in large scale purges within ninety days prior to an election and requires state programs to be uniform, nondiscriminatory, and compliant with the VRA.¹¹⁵

Following the 2000 election that was rife with election administration challenges, Congress built upon the NVRA and enacted HAVA in 2002.¹¹⁶ HAVA maintained that voters may be removed only in accordance with the NVRA.¹¹⁷ It also strengthened election administration by requiring states to develop a single, uniform, statewide database of registered voters and established the EAC to support state compliance with HAVA and the NVRA.¹¹⁸ At its passage and ever since, lawmakers have strongly debated HAVA's scope and potential impact on the balance of power between the state and federal role in election administration.¹¹⁹

B. Ambiguities in National Voter Registration Act Provisions on Voter Roll Maintenance

1. Reasonable Efforts

The requirement that states make reasonable efforts to maintain their voter rolls is subject to different understandings.¹²⁰ Some groups seeking to increase voter removals challenge or threaten to challenge states for not aggressively purging voters from their rolls.¹²¹ Others see this provision as a minimal requirement and are more concerned with states violating the

114. *Id.* § 20507(d)(1).

115. *Id.* §§ 20507(c)(2), (b)(1).

116. *Supra* note 48 and accompanying text.

117. 52 U.S.C. § 21083(a)(2)(A)(i).

118. *Id.* § 21083; *About the U.S. EAC*, *supra* note 13.

119. *See About the U.S. EAC*, *supra* note 13 (noting concerns from members of Congress that HAVA would shift the balance of election authority from states to the federal government).

120. NVRA Compliance Memorandum, *supra* note 104, at 3, 6, and accompanying text. Views about what constitutes a reasonable effort range from interpreting this provision as a check against unnecessary or erroneous purges to considering it a mandate for wide-scale removals. *See id.* at 6. Some states use the U.S. Postal Service's NCOA data to identify voters who may have moved while others use nongovernmental sources such as the Electronic Registration Information Center (ERIC). NCOA PROGRAM, *supra* note 111; BRATER ET AL., *supra* note 90, at 6–7.

121. *See* Press Release, Pub. Int. Legal Found., 248 Counties Have More Registered Voters Than Live Adults (Sept. 25, 2017), <https://publicinterestlegal.org/blog/248-counties-registered-voters-live-adults/> (announcing that the Public Interest Legal Foundation “placed 248 counties on notice” for having “more registered voters” than residents, citing concerns over twenty-four states with “bloated voter rolls” in the 2016 election).

NVRA's protections against large scale purges based on unreliable data.¹²² These perspectives often hinge on the interpreter's view toward the relative risks of suppression compared to the potential for widespread and undetected voter fraud.¹²³ Both views inherently rely on a strong federal presence in state-run elections, even if they would use federal authority for different reasons. As in many areas of law, federalism arguments are often a tool for whoever is challenging or defending state voter roll maintenance practices.¹²⁴

The timing and frequency of removals are central to debates over NVRA requirements. Hasty and large scale removals can both violate the NVRA's prohibition against conducting such acts in the ninety days prior to an election and run the risk of erroneously removing qualified voters.¹²⁵ Many argue that the NVRA's safe harbor provision also indicates that the Act does not intend for states to conduct aggressive and frequent purges.¹²⁶ Under this provision, states are presumed to comply with the NVRA's minimal requirements if they do no more than rely on USPS change of address data to identify potentially ineligible voters.¹²⁷

The Interstate Voter Registration Crosscheck Program (Crosscheck) provides an example of attempts made by states to take reasonable efforts to maintain their voter rolls that can actually violate the NVRA and undermine its goal to boost voter participation.¹²⁸ Kansas established Crosscheck in 2005 to identify possible "double voters" by comparing voter rolls in participating states.¹²⁹ However, the program received much criticism for targeting large numbers of voters for removal solely by matching first name, last name, and date of birth information.¹³⁰ Significant concerns that

122. See NVRA Compliance Memorandum, *supra* note 104 and accompanying text.

123. *Supra* note 104 and accompanying text.

124. See generally Am. Compl. at ¶¶ 7, 19, Pub. Int. Legal Found. v. Boockvar, 1:20-cv-1905 (M.D. Pa. Nov. 5, 2020) (challenging Pennsylvania's voter roll maintenance practices as being "unreasonably inadequate"). *But see* Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1849 (2018) (Thomas, J., concurring) (arguing that the Constitution reserves to states the "exclusive authority to set voter qualifications").

125. ABRAMS, *supra* note 24, at 67.

126. NVRA COMPLIANCE MEMORANDUM, *supra* note 104, at 5; BRATER ET AL., *supra* note 90, at 2.

127. NVRA COMPLIANCE MEMORANDUM, *supra* note 104, at 5; BRATER ET AL., *supra* note 90, at 2.

128. BRATER ET AL., *supra* note 90, at 6–8.

129. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-485, VOTER REGISTRATION: INFORMATION ON FEDERAL ENFORCEMENT EFFORTS AND STATE AND LOCAL LIST MANAGEMENT 52 (2019) [hereinafter GAO REPORT]; see also BRATER ET AL., *supra* note 90, at 7 (noting the twenty-eight states that submitted data to the Interstate Voter Registration Crosscheck Program (Crosscheck) as of 2017).

130. GAO REPORT, *supra* note 129, at 52; see also Christopher Ingraham, *This Anti-Voter-*

Crosscheck had a disproportionate racial impact also existed and elicited a successful challenge to the program by voting rights groups that resulted in Crosscheck's indefinite suspension.¹³¹

The Electronic Registration Information Center (ERIC) provides another mechanism for thirty participating states and the District of Columbia to identify possible ineligible voters for removal.¹³² While some argue that ERIC is more reputable and thorough than Crosscheck,¹³³ similar concerns about erroneous matches and disproportionate racial impacts exist with this system as well.¹³⁴ The EAC should provide greater research, discussion, and reporting on these systems and whether they accomplish or hinder NVRA goals of sustained voter participation.¹³⁵

2. *Failure to Vote Clause*

NVRA § 8(b)(2) prohibits states from purging voters from their rolls because of their failure to vote.¹³⁶ The clause states that non-voting cannot be used to remove voters from a state's rolls except in conjunction with § 8(c)–(d).¹³⁷ Yet, recent decisions interpreting this language add uncertainty to

Fraud Program Gets It Wrong Over 99 Percent of the Time. The GOP Wants to Take It Nationwide, THE WASH. POST (July 20, 2017, 5:29 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nationwide/> (citing studies showing that of 240,000 paired registrations that Iowa received from Crosscheck, there were only six instances where the same person registered and voted twice).

131. Awan, *supra* note 27, at 1121–22 (discussing studies that show the higher percentage of Asian-Americans who share surnames compared to white Americans and raising concerns that Crosscheck violated § 2 of the VRA and the Equal Protection Clause); *infra* Private Right of Action.

132. See *Ensuring the Efficiency and Integrity of America's Voter Rolls*, ELEC. REGISTRATION INFO. CTR., <https://ericstates.org/> (last visited Nov. 8, 2021). ERIC is a non-profit established by the Pew Charitable Trusts in 2012. *Id.*

133. ADVANCEMENT PROJ., QUESTIONS & ANSWERS: INTERSTATE CROSSCHECK PROGRAM (“CROSSCHECK”) & ELEC. REGISTRATION INFO. CTR. (“ERIC”) (2015).

134. See Gregory A. Huber et al., *The Racial Burden of Voter List Maintenance Errors: Evidence from Wisconsin's Supplemental Movers Poll Books*, 7 SCI. ADV., 1, 5 (2021) (analyzing the higher percentage of Black and Hispanic voters that ERIC flagged as duplicative due to change of address as compared to white voters).

135. *About the U.S. EAC*, *supra* note 13.

136. 52 U.S.C. § 20507(b)(2).

137. Section 8(c)–(d) lists non-voting in two subsequent elections after receiving written notice as a sufficient way to confirm that registrations are no longer valid, but it does not state that non-voting can be used as an initial way to identify possibly ineligible voters. *Id.* at § 20507(c)–(d).

when the failure to vote can be used as a basis for removal.¹³⁸ In *Husted v. A. Philip Randolph Institute*,¹³⁹ the Supreme Court considered whether Ohio's reliance on non-voting to *initially identify* voters for possible removal was permissible under NVRA § 8.¹⁴⁰ The Court held that Ohio's system was reasonable despite using non-voting as a means to identify voters because it provided additional procedural protections before ultimately purging them.¹⁴¹

Opponents of Ohio's system argued that § 8(b)(2) expressly prohibits states from using non-voting as a basis to remove voters except when confirming a change in residence following § 8(d)(2)'s notice requirement.¹⁴² Voting rights advocates argued, and Justice Sonia Sotomayor agreed in her dissent, that such a practice would have a disproportionate effect on individuals who already face obstacles to voting and therefore are more likely to be identified for potential removal.¹⁴³

The Court's decision in *Husted* yields uncertainty as to what extent non-voting can be used in state voter roll maintenance programs. Notably, it frustrates the NVRA and HAVA's purpose to expand access to democratic participation nationwide by allowing states to enact a wider range of policies to purge voters from their rolls.¹⁴⁴ While the EAC has issued helpful resources reiterating and summarizing NVRA provisions, it should provide greater insight into how states interpret NVRA requirements and the impact this has on voter participation.

C. *Statutory Ambiguities Illustrate the Need for Greater Federal Guidance Through the U.S. Election Assistance Commission*

The EAC is unable to issue binding interpretations of vague or ambiguous

138. See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1839–40 (2018) (upholding a process for purging voters even though voters were initially identified for possible removal based solely on their failure to vote).

139. 138 S. Ct. 1833 (2018).

140. *Id.* at 1838.

141. *Id.* at 1839–41, 1848. Ohio's system *identified* voters for possible removal if they did not vote in the past two years, then Ohio followed NVRA procedures for removing these voters from its rolls if the voters did not respond to a notice or vote for the following two general elections. See *id.* at 1836.

142. Jennifer Safstrom, *The Right to Decide When to Vote: Husted v. A. Philip Randolph Inst.*, ACLU (Sept. 13, 2017, 1:30 PM), <https://www.aclu.org/blog/voting-rights/right-decide-when-vote-husted-v-philip-randolph-institute>; Awan, *supra* note 27, at 1119–22.

143. *Husted*, 138 S. Ct. at 1864 (Sotomayor, J., dissenting) (voicing concern that such policies will disenfranchise “many minority, low-income, disabled, homeless, and veteran voters . . .”).

144. See generally BRATER ET AL., *supra* note 90, at 6–10 (expanding on the latest practices used to disenfranchise voters, such as “challenge” laws which allow for questioning voter registrations on a case-by-case basis).

NVRA and HAVA provisions, but it can still leverage its existing functions to provide greater clarity on what these statutes require. By enhancing its research, reporting, and convening on state policies that interpret the NVRA and HAVA, the EAC would highlight areas of these statutes that need clarification and aid enforcement efforts. This is especially necessary now given the increased public attention on election administration reform, wide variety of state voter roll maintenance practices, and concern over discriminatory or otherwise improper voter purges.¹⁴⁵

In the EAVS, the EAC reiterates NVRA and HAVA voter roll maintenance requirements, yet it does not further clarify ambiguous provisions.¹⁴⁶ HAVA gives the EAC discretion to include in its reports information it deems helpful to lawmakers and election administrators, and the EAC should use that authority to add greater insight into state voter roll maintenance policies and their impact.¹⁴⁷ In the absence of greater federal guidance, either by congressional action or agency clarification, significant variations in NVRA and HAVA interpretations and applications persist, leading to varied risks of disenfranchisement across states.

The range of approaches to election reforms and priorities throughout states as they grapple with the 2020 election is illustrative.¹⁴⁸ For example, Georgia Secretary of State Brad Raffensperger announced in mid-2021 that the state will undertake a major list maintenance effort to purge over 100,000 “obsolete and outdated voter files” to “ensur[e] the integrity” of Georgia’s elections.¹⁴⁹ The majority of these voters—67,286 individuals—were identified by the USPS National Change of Address (NCOA) program, and another 34,227 had election mailings returned to sender.¹⁵⁰ 18,486 voters were removed based on data from Georgia’s Office of Vital Records and ERIC.¹⁵¹ A much smaller number of voters, 276, were identified by a no-contact list, meaning the individual did not have contact with election officials for five years—they failed

145. See *Voting Laws Roundup: July 2021*, *supra* note 3; BRATER ET AL., *supra* note 90, at 3 (observing the rise in purge rates between 2008 and 2014–2016 and contrasting the less than 0.1% of voters Salt Lake City purged in 2008 with the 34% of voters purged in Milwaukee).

146. See, e.g., 2018 EAVS REPORT, *supra* note 29, at 51–52 (listing NVRA requirements for voter roll maintenance as they are included in the statute).

147. *Id.*

148. See *Voting Laws Roundup: July 2021*, *supra* note 3 and accompanying text.

149. Press Release, Secretary Raffensperger Takes Action to Uphold Ballot Integrity with Major List Maintenance Effort (June 18, 2021). https://sos.ga.gov/index.php/elections/secretary_raffensperger_takes_action_to_uphold_ballot_integrity_with_major_list_maintenance_effort.

150. *Id.*

151. *Id.*

to vote.¹⁵² Notably, Raffensperger stated that the number of voters identified by this no-contact method was low only because the state was unable to use this approach in 2017, pending a legal challenge.¹⁵³ In future purging initiatives, Georgia plans to resume using this failure to vote identifier.¹⁵⁴

These mechanisms to identify and purge over 100,000 voters from Georgia's rolls run the gambit of practices that are widely seen as permissible—using NCOA data—to those that have garnered more scrutiny for violating or undermining the NVRA's purpose.¹⁵⁵ The reliance on a no-contact list in particular is concerning because of the risk that voters already facing barriers to participation will be further disenfranchised.¹⁵⁶ Federal guidance on which state election practices comply with or violate the NVRA and HAVA is essential so that state election reform efforts are based on expert guidance on how to maintain voter rolls without disenfranchising voters.

III. ENFORCING COMPLIANCE WITH THE NATIONAL VOTER REGISTRATION ACT AND THE HELP AMERICA VOTE ACT

Federal election law enforcement mechanisms vary across statutes. Unlike the FEC, which has the primary ability to enforce FECA, the EAC lacks authority to enforce the NVRA and HAVA.¹⁵⁷ Instead, the DOJ bears primary federal responsibility for enforcing these statutes.¹⁵⁸ In addition to providing for DOJ enforcement, the NVRA includes a private right of action by which voting rights and other nongovernmental groups can raise claims against state practices.¹⁵⁹ HAVA does not explicitly provide a private right of action, but individuals may be able to raise § 1983 claims under this Act.¹⁶⁰ While the EAC is not able to enforce the NVRA or HAVA itself, it still provides information that

152. *Id.*

153. *Id.*

154. *Id.*

155. *See supra* Part II.B. (comparing state reliance on NCOA data as a safe harbor to using inter-state programs, such as ERIC and controversial initiatives, to identify voters for removal based solely on their failure to vote).

156. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1863–64 (2018) (Sotomayor, J., dissenting); *supra* Part II.B.2.

157. 52 U.S.C. §§ 20929, 20508(a); Audra L. Wassom, *The Help America Vote Act of 2002 and Select Issues in Election Law Reform*, 28 T. MARSHALL L. REV. 345, 360–4 (2003).

158. *DOJ NVRA Webpage*, *supra* note 90; CRS EAC REPORT, *supra* note 10, at 4.

159. *See* Wassom, *supra* note 157, at 357–64 (comparing NVRA and HAVA enforcement mechanisms with other federal election laws).

160. Tokaji, *Public Rights and Private Rights of Action*, *supra* note 14, at 126, 147–54. HAVA also provides a state administrative remedy for alleged violations of the Act. *See* Wassom, *supra* note 157, at 365.

the DOJ and private entities use to tailor their enforcement efforts.¹⁶¹

A. *Department of Justice Enforcement*

The DOJ enforces the NVRA by monitoring state compliance with the statute, conducting investigations, and bringing enforcement suits in federal court.¹⁶² It considers data from the EAVS when it determines which states to bring suit against for alleged NVRA violations.¹⁶³ DOJ enforcement suits can yield insight into how the Department understands NVRA requirements, yet varied approaches across administrations can also perpetuate uncertainty.¹⁶⁴ Unlike the EAC, which is designed to be an independent commission led by bipartisan experts, the DOJ approach to NVRA enforcement can depend on an administration's views about whether the NVRA is a check against improper purges or an impetus for zealous state action to prevent potential fraud.¹⁶⁵

The DOJ has successfully brought suit against states for failing to comply with the NVRA § 8 requirements in a handful of cases.¹⁶⁶ For instance, it joined a suit against the New York City Board of Elections for violating NVRA § 8 in 2016.¹⁶⁷ The challenged practices included purging individuals based solely on their failure to vote, purging voters without providing proper notice, failing to maintain lists in a uniform and nondiscriminatory manner, and violating the reasonable effort requirement.¹⁶⁸ As a result of this suit, the Board entered into an agreement to remedy its conceded § 8 violations.¹⁶⁹ The voting rights groups that initially brought this suit continue to monitor

161. 2018 EAVS Report, *supra* note 29 at 124–25.

162. *Id.*

163. *Id.* The DOJ considers EAVS data when deciding which enforcement suits to bring. *See id.* It also previously requested information from states subject to the NVRA about their policies, evoking concern that it would use responses to “force states to purge more aggressively.” BRATER ET AL., *supra* note 90, at 2.

164. *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 483 (2008) (discussing the DOJ's limited enforcement of NVRA protections to prevent the “wrongful exclusion of voters from registration lists.”); BRATER ET AL., *supra* note 90, at 2.

165. For example, the Obama Administration initially filed a brief in *Husted* to support plaintiffs challenging Ohio's law, but then the Trump Administration reversed this position and supported Ohio before the Supreme Court. *See* BRATER ET AL., *supra* note 90, at 6.

166. *Cases Raising Claims Under the National Voter Registration Act*, U.S. DEPT OF JUST. [hereinafter *DOJ NVRA Cases*] (June 9, 2020), <https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act>.

167. *United States v. N.Y.C. Bd. of Elections*, Case No. 1:16-cv-06122-NGG-RML (E.D.N.Y. 2016).

168. *Id.* at 2.

169. *Id.* at 2–3.

New York City's compliance with this agreement.¹⁷⁰

While the DOJ succeeded in rectifying New York City's NVRA violations in this case, even under administrations that prioritize NVRA enforcement to prevent impermissible purges, the DOJ has a limited capacity to bring such suits.¹⁷¹ This emphasizes the importance of the NVRA's private right of action and ensuring that nongovernmental entities that seek to enforce NVRA provisions have adequate information about state practices.

DOJ actions are critical; yet, given its changing approach to NVRA enforcement across administrations, its actions do not often yield consistent guidance on how to interpret ambiguous provisions.¹⁷² It is necessary for the EAC to use its expertise and convening ability to provide better insight into what these statutes require.

B. Private Right of Action

A private right of action for NVRA enforcement has intrinsic value as a means to ensure that state and local entities comply with federal requirements.¹⁷³ It is also critical to effectively enforce federal election statutes and account for the risk of partisanship influencing government enforcement.¹⁷⁴ Further, those who bring suit under private rights of action amplify federal efforts to enforce federal requirements given resource and bandwidth constraints.¹⁷⁵

The many challenges to Crosscheck demonstrate the importance of the NVRA's private right of action.¹⁷⁶ Kansas's Secretary of State agreed to

170. *Common Cause New York et al v. Board of Elections in the City of New York, et al.*, <https://www.latinjustice.org/en/cases/common-cause-new-york-et-al-v-board-elections-city-new-york-et-al> (last visited Nov. 8, 2021).

171. See BRATER ET AL., *supra* note 90, at 6 (discussing DOJ challenges to six state NVRA violations under the Obama Administration).

172. See *id.* at 2, 6 (comparing DOJ priorities under the Obama Administration where the Department brought suit against states for conducting illegal purges to the Trump Administration where the Department worked to lay the foundation for challenges to states that did not aggressively clear names off of rolls).

173. See generally Tokaji, *Public Rights and Private Rights of Action*, *supra* note 14, at 119 (describing the federal judiciary as a "vital check upon the otherwise decentralized and partisan administration of U.S. elections.").

174. See *id.* at 157–58 (arguing for a private right of action to enforce HAVA following *Brunner*).

175. See, e.g., *Voting Rights Litigation 2020*, (July 28, 2020), <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020#top>.

176. See *Indiana NAACP & League of Women Voters of Indiana v. Lawson*, [hereinafter BRENNAN CTR. on *Lawson*], <https://www.brennancenter.org/our-work/court-cases/indiana-naacp-and-league-women-voters-indiana-v-lawson> (last updated July 19, 2021) (explaining how voting rights groups successfully sued Indiana under the NVRA's private right of action). Indiana amended its law in 2020 but voting rights groups continued to challenge it as violating

suspend Crosscheck in 2019 after the American Civil Liberties Union brought suit on behalf of hundreds of voters who had their information improperly disclosed by the program.¹⁷⁷ Following Kansas's suspension of Crosscheck, its future is unknown, but nongovernmental entities continue to bring suit challenging comparable state-specific programs that raise similar concerns.¹⁷⁸

Litigation brought by nongovernmental entities to enforce federal election laws is an indispensable corollary to federal government enforcement through the DOJ. In terms of challenging state practices for violating the NVRA, these initiatives are critical. However, enforcement suits alone are insufficient to provide insight into the range of state voter roll maintenance policies that exist, how they impact voter participation, and whether they undermine or achieve the NVRA and HAVA's goals to ensure effective election administration and access to the ballot. It is therefore imperative for the EAC to fill this gap and bolster mechanisms to promote democratic resilience.

IV. RECOMMENDATIONS

The heightened public focus on election administration following the 2020 election underscores the importance of reinforcing the EAC's ability to further state compliance with federal statutes governing voter roll maintenance. The EAC can act within its existing authority to accomplish this goal. Congressional action is also critical to enhance these efforts.

First, the EAC should consistently include additional information about state voter roll maintenance policies in the EAPS section of its EAVS reporting. Second, the EAC should leverage its clearinghouse role to conduct additional detailed research and convene discussions on important voter roll maintenance questions. Third, Congress should ensure that the EAC has the funding and staffing that it needs to be effective. It should also pursue legislation to reinforce the EAC and federal election administration statutes. These actions are necessary to provide an expert-led alternative to contentious political discussions related to election reform. While these recommendations alone will not remedy the significant challenges to U.S. democratic processes that peaked in the 2020 cycle, they provide necessary steps to address underlying vulnerabilities and strengthen U.S. electoral institutions.

the NVRA. *See id.* at 103–04. The U.S. Court of Appeals for the Seventh Circuit ultimately affirmed a district court ruling granting summary judgment against Indiana and remanded the case for the lower court to issue a permanent injunction on August 24, 2020. *See id.*

177. Roxana Hegeman, *Multistate Voter Database Suspended in Lawsuit Settlement*, ASSOCIATED PRESS NEWS (Dec. 10, 2019), <https://apnews.com/article/2c82eb782e578bbb81c121ec453fbee8>.

178. BRENNAN CTR. on *Lawson*, *supra* note 176 (discussing concerns with the Indiana Data Enhancement Association (IDEA), “an organization functionally identical to Crosscheck”).

A. *Providing Greater Insight into State Voter Roll Maintenance Policies in the Election Administration and Voting Survey Report*

The EAC should consistently incorporate detailed information about state policies for maintaining their voter rolls in the EAPS portion of its biennial EAVS report by asking states to answer specific EAPS questions about how they manage their voter rolls. The 2020 EAPS includes more questions related to how states purge voters than the 2018 survey, and in future reports, the EAC should expand on these questions to provide greater insight into state policies and their impact on voter participation.¹⁷⁹

The 2020 EAPS asks states about which voters receive confirmation notices and how they identify potentially ineligible voters.¹⁸⁰ The first of these questions demonstrates how states make reasonable efforts to maintain their rolls by removing voters who have moved, are deceased, were convicted of a disqualifying felony, or are declared mentally incompetent.¹⁸¹ The second demonstrates how states initiate efforts to remove voters from their rolls, including whether they rely on the NVRA's safe harbor provision or actively seek extra means to identify potentially ineligible voters.

In developing future surveys, the EAC should continue to include and expand on these questions. It should identify additional information that would be useful from its own research as well as public input. The EAC should ask specific questions about how states use data from interstate sharing compacts and whether states use non-voting to identify voters for removal. The EAC should then continue its model of comparing these answers to voter participation metrics to demonstrate the impact of these policies.

This additional information would give useful context to quantitative data that the EAC already captures, including the number of notices sent to voters, active and inactive registrations, and voters ultimately removed in proportion to CVAP.¹⁸² More specificity in the EAPS section is useful for three reasons. First, it will help the DOJ and private entities enforce federal provisions. With a change in administrations and renewed focus on voting rights, the DOJ may now prioritize challenging states for violating NVRA provisions by improperly purging voters.¹⁸³ Nongovernmental entities would

179. 2020 EAPS QUESTIONNAIRE, *supra* note 88, at 12–13.

180. *Id.*

181. *See* 52 U.S.C. § 20507(a)(3)–(4).

182. 2018 EAVS REPORT, *supra* note 29, at 40–41.

183. *See* Katie Benner, *Merrick Garland Announces Justice Dept. Plans to Protect Voting Access*, N.Y. TIMES

similarly benefit from having enhanced data that they can use to concentrate their enforcement efforts. Second, this information would educate lawmakers and the public about various election administration practices and their impact. This is especially significant as states consider significant election administration reforms.¹⁸⁴ Third, it would consolidate information that the EAC can share as best practices with state and local election administrators according to its clearinghouse role.¹⁸⁵ While states have already answered the 2020 EAPS¹⁸⁶ and the EAC already released the 2020 EAVS, the EAC should plan to further develop these questions in future years.

B. Conducting Targeted Research and Discussions on Specific Voter Roll Maintenance Topics

In addition to incorporating more specific policy questions in future EAPS, the EAC should use its discretion to research and facilitate discussions on timely voter roll maintenance topics as election reform debates continue nationwide.¹⁸⁷ The EAC can determine which issues merit additional research and discussion by drawing from answers to the 2020 EAPS, consulting with its Advisory and Standards Boards, and identifying issues in election reform proposals that states are now considering.¹⁸⁸ The EAC's ability to further develop analysis from nationwide data in the 2020 EAVS and EAPS and convene discussions among experts and election administrators is essential now as election reform debates abound.¹⁸⁹

The EAC should use insights from the 2020 EAPS to inform future research and discussions on how states use data from interstate sharing compacts to identify voters for possible removal. It should also compare this information

(June 11, 2021) <https://www.nytimes.com/2021/06/11/us/politics/merrick-garland-voting-rights.html>; see also Remarks by President Joseph R. Biden on Voting Rights in Philadelphia, Pennsylvania, 2021 DAILY COMP. PRES. DOC. 581, (July 13, 2021) (discussing the Biden Administration's initiatives to counter the "unconscionable" rise in suppressive voting laws, especially by strengthening DOJ enforcement efforts).

184. See, e.g., *Voting Laws Roundup: July 2021*, *supra* note 3 (stating that over 400 restrictive voting bills have been introduced in forty-nine states).

185. *About the U.S. EAC*, *supra* note 13.

186. See *Events: EAVS Comment Period Opens*, U.S. ELECTION ASSISTANCE COMM'N (Feb. 11, 2020, 2:11 p.m.), <https://www.eac.gov/events/2020/02/11/eavs-comment-period-opens> (providing notice for the EAC's rulemaking process to adopt its 2020 EAVS survey instruments).

187. See *Voting Laws Roundup: July 2021*, *supra* note 3; Kashatus, *supra* Part I.B.2. (discussing the EAC's ability to solicit expert and practitioner input on a range of timely election administration topics according to its clearing house role).

188. *Supra* note 187.

189. See *id.*

to voter participation metrics—registration notices sent and returned, and voters ultimately removed—to better illustrate the impact of such programs.

Further, the EAC can build on insights gleaned from its 2020 EAPS by convening discussions on interstate sharing compacts, including Crosscheck and ERIC, to ascertain the challenges with using these systems and their impact on voters. While Crosscheck is currently suspended, the EAC can still highlight aspects of this program that were incompatible with the NVRA so that federal and state lawmakers, the DOJ, and nongovernmental entities can identify similar concerns with existing and proposed state programs.¹⁹⁰ This is necessary so that the DOJ and private entities can effectively enforce the NVRA and so that lawmakers have greater guidance on permissible election practices.

The EAC should also cultivate insight into ERIC through its research, reporting, and convening functions. Many find ERIC to be a more reliable system than Crosscheck, as evidenced by the thirty states as well as the District of Columbia who are members, but questions about its processes and impact remain.¹⁹¹ The EAC should examine how states that use ERIC data fare in terms of voter participation and purges as compared to states with other systems. It should especially focus its research on highlighting risks and instances of such programs having a discriminatory racial impact so that states can better comply with both the VRA and the NVRA.¹⁹²

The EAC should also convene discussions that include election administrators from states that use ERIC and election law experts to give useful information for enforcement and election reform efforts. With state and local governments already pursuing substantial alterations to their election administration practices, greater guidance on available information systems is essential.¹⁹³

C. Congressional Action to Sustain and Strengthen the U.S. Election Assistance Commission and Clarify Federal Statutes

While the EAC should act within its existing authority to further state compliance with federal statutes and bolster electoral resilience and participation, congressional action is also critical to address the serious challenges to representative governance that exist. Congress can maximize the EAC's efforts to strengthen democratic processes in three ways. First, it should ensure that the EAC is able to function to the fullest extent that its current structure and authority

190. See BRENNAN CTR. on *Lawson*, *supra* note 176 (comparing IDEA to Crosscheck).

191. See *Ensuring the Efficiency and Integrity of America's Voter Rolls*, *supra* note 132 (listing the thirty states who use ERIC in addition to the District of Columbia); see also Huber et al., *supra* note 134, at 1–2 (discussing how the consequences of using ERIC for voter role maintenance are not fully known).

192. See generally Huber et al., *supra* note 134, at 4 and accompanying text.

193. Bump, *supra* note 102.

allow. Second, Congress should consider expanding the EAC's authority so that it can provide more authoritative interpretations of federal requirements to meet current national needs.¹⁹⁴ Third, Congress should either clarify federal election administration requirements related to voter roll maintenance in the NVRA and HAVA itself or delegate this authority to the EAC.

If Congress is unable to strengthen the EAC or clarify federal voter roll maintenance provisions legislatively, it must at least ensure that the EAC is able to function as effectively as possible under its current framework. To do so, Congress should ensure that the EAC commissionership vacancies are promptly filled if they arise. Because Congress initially proposes candidates for commissionerships and ultimately confirms presidential nominees, it has an important say in whether vacancies are timely filled.¹⁹⁵ Two of the current commissioners first confirmed in 2014 are currently serving their second four-year term.¹⁹⁶ When these positions ultimately become vacant, Congress should work with the President to fill these critical positions with reputable experts who have a demonstrated record of protecting voter participation quickly. Additionally, Congress should continue to fund the EAC at or above its requested appropriations level. Congress has increased the EAC's funding in the past two fiscal years and it should continue this trajectory.¹⁹⁷

Beyond equipping the EAC with the tools it needs to function effectively as it currently exists, Congress should consider whether the EAC's current authority is adequate. Congress established the EAC in 2002 within the context of election administration challenges of the 2000 election, but the democratic landscape has shifted in the subsequent two decades, especially after *Shelby County v. Holder*¹⁹⁸ severely weakened a key provision of the VRA in 2013.¹⁹⁹ The full impact of the Court's decision in *Brnovich* is not yet known, but election law experts warn that it will only raise already high barriers to challenging suppressive state policies.²⁰⁰

194. See CRS EAC REPORT, *supra* note 10, at 3–4 (describing how lawmakers compromised on the EAC's scope of authority when it was initially established).

195. *Supra* Part I.B.

196. BURRIS & FISCHER, *supra* note 55, at 4.

197. See Weil, *supra* note 62; U.S. COMM'N ON CIV. RTS., *supra* note 44, at 332.

198. 570 U.S. 529 (2013).

199. *Shelby County* has proven extremely consequential as previously covered states and political subdivisions have since been able to change their election laws without first ensuring they will not have a discriminatory or disproportionate racial impact. See *id.* at 535.

200. See e.g., Hasen, *supra* note 48. But see Marc Elias, *Confronting the Most Significant Test to Our Democracy*, Democracy Docket (July 16, 2021), <https://www.democracydocket.com/2021/07/grappling-with-the-most-significant-test-to-our-democracy/> (articulating the urgency of continuing to challenge voter suppressive laws in court and maximize legal tools that remain even with significant weakening from the Court).

Additionally, the ongoing challenges related to the 2020 election cycle—and the widespread efforts among states to reform election administration based on the belief that voter fraud had a substantial and determinative effect—merit reconsidering whether existing federal mechanisms are sufficiently equipped to ensure democratic resilience. Congress is already debating legislation to address election challenges and should further consider options to strengthen the EAC.²⁰¹

Congress should strengthen the EAC by allowing it to prescribe regulations regarding states' obligations related to national voter registration.²⁰² The EAC already has the authority to make rules, in consultation with state election officials, regarding the mail voter registration form and the EAVS report.²⁰³

Yet, the EAC's inability to provide guidance to states about their NVRA obligations that carry the force of law is significant. Not only does this constrain the EAC's ability to give the clarity that states need, but it perpetuates significant disparities in voters' abilities to participate in democratic processes. This frustrates the purpose of national legislation aimed at preventing arbitrary and prejudicial disenfranchisement.²⁰⁴ Congress should therefore permit the EAC to rely on its expertise to issue reasoned, authoritative, and legally binding guidance to states about their NVRA obligations.

In addition to expanding the EAC authority to fill certain NVRA gaps, Congress should also clarify requirements in the NVRA provisions governing voter roll maintenance in light of current circumstances. It can do so by amending the NVRA to further elaborate on provisions that have garnered significant disagreement among states, experts, and courts. For instance, Congress should clarify whether NVRA § 8 prevents states from using non-voting except when confirming removal for voters otherwise identified or if non-voting can also be used as an initial identifier.²⁰⁵

Congress should also give greater guidance on what constitutes a reasonable effort to maintain a state's voter rolls. It should address concerns about states conducting wide scale purges based on faulty data by elaborating on when practices become unreasonable for having too great a risk of improperly disenfranchising voters. The NVRA has detailed provisions about how voters may be removed if they become ineligible, but its provisions

201. H.R. 1 was passed by the House and is awaiting Senate action as of Fall 2021. For the People Act, H.R. 1, 117th Cong. § 1921 (2021). Among provisions related to the EAC, H.R. 1 would mandate that states submit data to the EAC for the EAVS report. *Id.* Currently, states voluntarily submit data to the EAC to comply with their NVRA reporting requirements. 52 U.S.C. § 20508.

202. *See* 52 U.S.C. § 20508(a)(4).

203. *Id.* § 20508(a)(1)–(3).

204. *See* 2018 EAVS REPORT, *supra* note 29, at 42–43.

205. 52 U.S.C. § 20508(b).

about what practices are permissible to initially identify voters for suspected ineligibility are apparently more ambiguous.²⁰⁶ Congress should provide greater guidance about which means of initial identification are permissible.

Legislative action to strengthen the EAC and reinforce the NVRA would likely face challenges in Congress.²⁰⁷ Yet, the significance of the issues at stake—the ability to participate in democracy and public confidence in electoral results—merit sustained efforts to improve electoral processes despite these obstacles. At a minimum, Congress should ensure that the EAC maintains full leadership and funding to accomplish its goals as it currently stands.

CONCLUSION

Somehow, we've weathered and witnessed A nation that isn't broken, but simply unfinished And yes, we are far from polished, far from pristine. But this doesn't mean we're striving to form a union that is perfect. We are striving to forge our union with purpose Because being American is more than a pride we inherit—It's the past we step into, and how we repair it.²⁰⁸—Amanda Gorman, National Youth Poet Laureate

The 2020 election tells two seemingly opposite stories about the quality, resilience, and integrity of U.S. electoral institutions.²⁰⁹ In many ways, the election was a democratic inspiration for succeeding in the face of formidable public health and logistical challenges.²¹⁰ Not only did the election occur despite a confluence of threats and roadblocks,²¹¹ but it witnessed the most participation to date.²¹² However, it also demonstrated that democratic perseverance is not inevitable.

The claim that the election was stolen and mired in rampant fraud was not just voiced in public debates over election reform, but it also culminated in a violent attack on the democratic transition itself.²¹³ The January 6, 2021, insurrection at the U.S. Capitol demonstrates the serious consequences of perpetuating unfounded claims of stolen electoral results and inadequate election administration.

206. *See id.* § 20507(c). *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1839–41 (2018).

207. *See* Sahil Kapur & Jane C. Timm, 'An Inflection Point': Congress Prepares for Battle Over Massive Voting Rights Bill, NBC NEWS (Mar. 28, 2021, 11:57 AM), <https://www.nbcnews.com/politics/congress/inflection-point-congress-prepares-battle-over-massive-voting-rights-bill-n1262172> (chronicling challenges to enacting new election laws).

208. AMANDA GORMAN, THE HILL WE CLIMB 13, 15, 19 (1st ed. 2021).

209. *See* Oliphant & Kahn, *supra* note 8 (iterating divisions in public perception of the 2020 election cycle).

210. *See HAC Subcommittee Hearing*, *supra* note 5, at 1–3.

211. *See* Mettler & Lieberman, *supra* note 4 and accompanying text.

212. Montanaro, *supra* note 6.

213. *See* Leatherby et al., *supra* note 8.

Such conditions make this a critical time to examine core aspects of democratic resilience and electoral strength. The challenges to rebuilding voter confidence in election administration and preserving the goal of widespread participation are significant. The federal government must therefore ensure that it fully leverages its tools to meet this responsibility. The EAC must use its existing authority to help states better comply with federal voter roll maintenance requirements. Additionally, Congress should ensure that the EAC is able to function effectively in its current form and consider both expanding the EAC's authority and strengthening federal statutes. The recent tumultuous, inspiring, and consequential election cycle, followed by reactionary election reform proposals across states, demonstrates that well-functioning election administration aimed at preserving democratic participation is core to maintaining the U.S. system of government and must be a national priority.