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Voter Registration Transparency

by Michelle Kanter Cohen

Election officials are responsible under federal and state law for maintaining accurate and complete voter registration rolls. In this context, one important value is that election officials make their processes transparent.

Transparent processes are important for three reasons. First, transparency promotes accountability in the process, allowing organizations to make sure that election officials are properly executing their responsibilities in a way that is fair to all voter registration applicants and voters.

Second, it is important that all voting-eligible citizens understand the process by which they can be added to the rolls and remain on them.

Third, the ability to obtain information regarding the voter registration process allows advocates to rely on better information to understand election officials' processes and help them meet voters' needs. Through these means, transparency makes elections more fair, credible and accessible to all.

This policy brief addresses the importance of transparency in the voter registration and list maintenance process, discusses current law and efforts to ensure public access to voter registration information, and reviews some best practices for making information available to the public.

A Check on the System

In nearly all states, registration is the first step to voting and is a prerequisite to casting a valid ballot. Voters cannot cast valid ballots if they cannot remain on the voting rolls. Members of the public and their representatives must be able to make sure that eligible citizens are properly added to the voter rolls, and that those eligible citizens remain on the rolls.

Although it is important for election officials to conduct list maintenance, it is also important that efforts to maintain the voter rolls are consistent with federal and state law to protect legitimate voters from wrongful removals. Unfortunately, history demonstrates that election officials do not always comply with and enforce voter registration laws fairly and accurately, and voters are sometimes removed from the rolls through opaque and error-ridden procedures.¹

In this context, transparency of the voter registration process plays an important role in protecting voters. As a result, public inspection of voter registration records contributes to the legitimacy of our democracy. Accountability requires transparency of relevant records and information: in examining such records, private organizations can make sure that election officials are fulfilling their duties. For example, using copies of submitted applications as well as the list of registered voters, advocates can ensure that careless, or worse, discriminatory practices are not keeping legitimate voters from being added to or kept on the voter registration rolls. Similarly, records regarding systematic list maintenance procedures allow advocates to understand election officials' procedures, make those officials more accountable to voters and communities, and, when necessary, litigate to enforce voting rights laws such as the Voting Rights Act and the National Voter Registration Act of 1993.

Without access to such records, groups cannot determine whether voter registration applications are properly rejected, or whether any systemic election administration problems exist that require correction.

Educating Voters

Public inspection of voter registration records allows advocates to better educate voters. For example, Project Vote recently inspected several hundred rejected voter registration applications and determined that nearly a third of the individuals whose applications were examined were rejected solely for omission of a single piece of information on Virginia's voter registration form.

This concrete information is useful to educate applicants directly, as well as organizations and individuals conducting voter registration drives. Voter registration drives can communicate such information to potential applicants in the field when assisting them in submitting complete and valid applications. These communications then result in more eligible voters being added to the rolls and able to cast a valid ballot.

Fact-Based Advocacy

Inspection of records allows advocates to rely on better information to advocate for policies that help voters register and vote.

For example, gaining an understanding of how election officials administer programs, such as the Interstate Cross Check² and other list maintenance protocols, is critical to understanding the practices involved and thereby the first step to improving them.

Similarly, information regarding rejected voter registration forms can be useful to advocate for a clearer design of a form that ensures more eligible individuals will submit complete, valid applications.

The Legal Context

Federal law requires public disclosure of voter registration activities. Specifically, with limited exceptions, each state subject to the National Voter Registration Act (NVRA)³ must “maintain for at least two years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.”⁴ The law further provides specific items that must be maintained regarding list maintenance processes described in the NVRA.⁵

The scope of this language requiring “all records” to be maintained and made available is broad. Indeed, the U.S. Court of Appeals for the Fourth Circuit recently agreed, finding the law requires “all records” to be made available, which “plainly” requires disclosure of completed voter registration applications. Specifically, the Court held that “completed voter registration applications are subject to disclosure under the NVRA, as they are unquestionably ‘records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.’”⁶

Further, as the unanimous opinion indicated, “Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections.”⁷ The court rejected the argument that only records specifically related to removal of voters were required to be made available.⁸

The handful of states not subject to the NVRA may have different disclosure laws, and advocates in those states must rely on state practices and procedures regarding voter registration records.⁹

Transparency Litigation

Transparency under the NVRA is a relatively new issue being litigated in court. As noted above, the U.S. Court of Appeals for the Fourth Circuit held in *Project Vote/Voting for America v. Long* that rejected voter registration applications are records that must be made available to the public under the NVRA.

The case originated following the 2008 presidential election. Project Vote and Advancement Project obtained information from local community partners in the Norfolk, Virginia area that the registrar had rejected large numbers of voter registration applications, particularly from students at the historically African-American Norfolk State University. The organizations then sought to review Norfolk’s rejected registration applications to ascertain if qualified persons were unlawfully being kept off the voting rolls; however, access to those applications was denied, and the local voter registrar and the State Board of Elections took the position that rejected voter registration applications were not covered by the NVRA and could not be disclosed under Virginia law. Project Vote successfully sued under the public disclosure provision of the NVRA, prevailing in both the district court and on appeal to the Fourth Circuit, which held that rejected voter registration applications are records that the NVRA requires election officials to disclose, with Social Security numbers redacted.

The ruling has important implications for transparency of registration records. As the unanimous appeals court opinion recognized, “[s]tate officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. . . Without such transparency, public confidence in the essential workings of democracy will suffer.”¹⁰

Several cases in other jurisdictions have been filed related to the disclosure of voter registration records. One, in Ohio, resulted in a settlement that requires the state to “keep online, and available for public access, a current voter registration list.”¹¹ Additional cases, including claims under the NVRA’s public disclosure provision, remain pending.¹²

Best Practices

State laws should be clear that all records related to voter registration are maintained and available for public inspection consistent with the National Voter Registration Act's public disclosure provision.

Records should include lists of registered voters, lists of voters who have been inactivated or cancelled, disposition notices, rejected voter registration applications, and procedural manuals and guidance governing registration and list maintenance procedures.

State laws and regulations regarding costs imposed for obtaining copies of public records should be clear that those copies be provided at a reasonable cost.

Election officials should respond promptly to requests to ensure both that information is current, and that organizations and individuals following up on voter registration issues can do so in a timely way to assist applicants prior to registration deadlines.

Conclusion

In sum, through transparency, advocates can encourage accountability, help identify and stop controversial and inaccurate list maintenance, educate voters on how to complete applications and remain on the rolls, and support appropriate policy improvements.

Disclosure thus enhances our democracy, making voting more accessible by improving voters' ability to register, stay on the rolls, and cast ballots that count.

Notes

1. See, e.g., Myrna Pérez, *Voter Purges* (Brennan Center for Justice 2008), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/VoterPurges.f.pdf>; *Arcia v. Fla. Sec’y of State*, 746 F.3d 1273 (11th Cir. Apr. 1, 2014) available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Arcia79.pdf>; Ruling on Motion for Reconsideration of Review on the Merits, *ACLU of Iowa v. Schultz*, No. CV009311 (Iowa Dist. Ct. Mar. 5, 2014).
2. “Virginia Offers Lessons for Voter List Maintenance,” <http://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance> (Nov. 25, 2013).
3. Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming are exempt from the NVRA because, on and after August 1, 1994, they have had no voter registration requirement or have had Election Day voter registration at polling places. See 42 U.S.C. § 1973gg-2(b).
4. National Voter Registration Act of 1993 (NVRA) Section 8(i)(1), 42 U.S.C. § 1973gg-6(i)(1).
5. National Voter Registration Act of 1993 (NVRA) Section 8(i)(2), 42 U.S.C. § 1973gg-6(i)(2).
6. *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 339-40 (4th Cir. 2012). Project Vote and the state defendants later entered into a final consent decree in which the parties agreed that certain protected classes of voters under Virginia statute could also have their residential street addresses redacted. See Consent Decree, No. 2:10-cv-00075-RBS-DEM (E.D.Va. Jan. 30, 2013) available at http://projectvote.org/images/publications/Litigation/Project%20Vote%20v.%20Long/Consent_Decree_Project-Vote-v-Long_1.30.13.pdf.
7. *Project Vote/Voting for America v. Long*, 682 F.3d at 339-40.
8. *Id.* at 336-337.
9. Similarly, states may have statutes that relate to public access to voter registration records; however, each state covered by the NVRA must comply with it regardless of that state’s laws.
10. *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 339 (4th Cir. 2012).
11. Settlement Agreement, *Judicial Watch, Inc. and True the Vote v. Husted*, No. 2:12-cv-0792 (S.D. Ohio filed Aug. 30, 2012), available at <http://www.judicialwatch.org/document-archive/01-14-ohio-voter-rolls-settlement>.
12. See, e.g., *True the Vote, et al. v. Hosemann*, No. 3:14-cv-532 NFA (S.D. Miss. filed July 9, 2014); *Voting for America et al. v. Berry*, No. 3:12-cv-0044 (S.D. Tex. filed Feb. 13, 2012). Judicial Watch has also sent pre-suit notice letters to jurisdictions including Colorado, Iowa, and D.C. that appear to relate to the NVRA disclosure provision. See Press Release, Judicial Watch, “Judicial Watch Warns Iowa, Colorado, DC of Potential Election Integrity Lawsuits” (Mar. 24, 2014), available at <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-warns-iowa-colorado-dc-of-potential-election-integrity-lawsuits/>.

Project Vote is a national nonpartisan, non-profit organization that promotes voting in historically underrepresented communities. Project Vote takes a leadership role in nationwide voting rights and election administration issues, working through research, litigation, and advocacy to ensure that our constituencies can register, vote, and cast ballots that count.

About the Author

Michelle Kanter Cohen is an Election Counsel with Project Vote, where her work includes litigation, advocacy, and research related to election administration, and providing assistance in administering voter enfranchisement programs. Ms. Kanter Cohen earned her JD, magna cum laude, from Boston College Law School, and a Bachelor of Arts in Political Science, cum laude, from Yale University.

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