

How States Can Protect Voters While Keeping Their Voter Rolls Up to Date

BY CAMERON BELL

Introduction

For our democratic system of government to reflect the will of the people, our elections must include the voices of as many eligible voters as possible. Maintaining up-to-date registration rolls and ensuring that eligible persons remain on the rolls once they are registered are essential to a well-functioning election system that promotes broad participation. Up-to-date voter rolls both protect eligible voters from problems at the polls if their addresses or other information are out of date and promote efficient election administration.

To serve these goals, all states employ processes—often referred to as “list maintenance”—to update the registrations of voters whose names or addresses have changed and to remove from the rolls voters who have died, moved away, or otherwise become ineligible. List maintenance aids election administrators by allowing them, among other things, to better anticipate the number of ballots to print and poll workers to hire, to define precinct boundaries, and to calculate turnout more accurately.

Importantly, the goal of accurate voter rolls also requires that any eligible voter who has completed the registration process *remains* on the registration rolls until that voter dies, moves out of state, becomes ineligible under state law, or affirmatively requests to be removed from the rolls. Put another way, a voter roll that is missing the name of an eligible voter who has made the effort to register is just as inaccurate as a roll that includes the name of a voter who has

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died or moved away. After all, an erroneous removal or omission of a voter often is not discovered until it's too late—either on Election Day or after the registration deadline has passed. That inaccuracy—which can result in disenfranchising people who, through no fault of their own, were de-registered to vote—threatens our democracy.

The National Voter Registration Act of 1993 (NVRA) includes provisions that govern how states conduct list maintenance, including both affirmative requirements for maintaining up-to-date rolls and protections to ensure that eligible persons are not improperly removed. This explainer describes the legal requirements states must follow when maintaining voter rolls and offers some recommendations for best practices for ensuring that states keep their voter rolls up to date without improperly removing eligible voters.

Are Election Officials Required to Keep the Voter Rolls Up to Date?

Yes. The NVRA—specifically, NVRA Section 8—mandates that states take steps to keep their voter rolls up to date by removing voters who have died or moved out of state, but it contains a number of restrictions on how states can carry out that mandate.¹ It also permits—but does not require—states to remove voters who have become ineligible under state law (such as when an individual is convicted of a felony).² The key to Section 8 is that voters cannot simply be removed haphazardly. Only *ineligible* voters can be removed.

What Is the Process for Removing a Voter Who Has Moved?

The NVRA sets out a multi-step process for removing a voter who has become ineligible because of a move outside of the jurisdiction in which the voter is registered (“jurisdiction” is legalese that here usually means a county, parish, township, or city—whichever governmental unit within the state is responsible for registering voters). First, a state or local election official must have a reasonable basis for believing a voter has moved, such as a forwarding address the voter filed with the Postal Service. Once there is reliable information that a person may have moved, what happens next depends on whether the voter’s new address, if it is available, is within the same jurisdiction or in another jurisdiction. If the move is within the same jurisdiction, the voter rolls must be updated with the new address, and the election official must send a notice to the voter allowing the voter to confirm or correct the change.

If the new address is outside the jurisdiction or if no new address is available (such as where mail to the voter was returned as undeliverable but without a forwarding address), the election official must attempt to confirm that the voter has really moved. The official does so by sending

a confirmation notice asking that the voter either update her address or let the official know if the address has not changed. According to the law, this notice—because it carries with it the consequence of being removed from the rolls—*must* be sent by forwardable mail to maximize the probability that the voter will receive it.

What happens next depends on the voter’s response to the notice. There are four possibilities:

- If the voter responds and indicates that her address for voting purposes has not changed, the election official must leave the voter on the rolls.
- If the voter responds to the notice and confirms a move within the jurisdiction, the election official must update the voter’s address and may not remove the voter from the rolls.
- If the voter responds and confirms a move to another state or another jurisdiction within the state, the voter may be removed from the rolls. Some states update the registration rolls for moves to a new jurisdiction within the state, rather than removing the voter.
- If the voter does not respond and then does not vote over the course of the next two federal election cycles, the voter may be removed from the rolls.³

And of course, a voter may be removed if the voter requests to be taken off the rolls, proactively notifies election officials of the move, or submits a new registration form at a new address and provides enough information for election officials to accurately locate her prior registration.⁴

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Are There Limits on the Reasons for Which Voters Can Be Removed?

Yes. First and foremost, voters cannot be removed for failure to vote.⁵ That means that no matter how many elections a voter may sit out, the voter’s name cannot be automatically stricken from the rolls.⁶ It also means election officials can’t assume that a voter’s failure to vote in one or more elections means the voter has moved or died. That is, the voter’s failure to cast a ballot in an election (or two or three) cannot trigger the NVRA address confirmation notice that will result in the voter’s registration being cancelled after continued inactivity.

These rules are illustrated by the following examples:

Scenario 1

Alice, a voter from State A, votes in the 2008 presidential election. Then Alice decides not to vote in 2010 or 2012, or in any of the state or local elections in between. State A cancels Alice's voter registration. **This is prohibited by the NVRA.**

Scenario 2

Bob, a voter from State B, votes in the 2008 presidential election. Then Bob decides not to vote in 2010 or 2012, or in any state or local elections in between. In December 2012, State B decides that, based on Bob's inactivity, it will send Bob a forwardable "confirmation notice," asking him if he's moved. The notice informs Bob that if he does not return the notice or vote in any election between December 2012 and November 2016 (the period encompassing two general federal elections), State B will cancel his registration. **This is prohibited by the NVRA.⁷**

Scenario 3

Carol, a voter from State C, votes in the 2008 presidential election. Then Carol decides not to vote in 2010 or 2012, or in any local elections in between. Just before the 2012 election, the state sends sample ballots by nonforwardable mail to all registered voters, including Carol. Carol has moved, so the sample ballot is returned to the sender as "undeliverable as addressed." Because the 2012 sample ballot was returned, in April 2013, State C sends an address confirmation notice to Carol and other voters whose nonforwardable sample ballots were undeliverable. This notice is sent by forwardable mail so that if Carol has a forwarding address on file with the Postal Service, the notice will be forwarded to her new address. The notice requests that Carol update her voter registration and informs her that if she does not return the notice or vote in any election between April 2013 and December 2016 (the period encompassing two general federal elections), State C will cancel her registration. **This is permitted by the NVRA.**

What Other Limits Does the NVRA Put on Voter Purges?

There are additional limits to how states may remove voters from the rolls. Any list-maintenance procedure must be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965. Simply put, this means a list-maintenance process must be conducted uniformly across the entire jurisdiction and cannot target voters for removal on an impermissible basis, such as race. For example, a county election official cannot check for forwarding addresses only for Asian voters or only for voters residing in a particular part of the county.

Finally, any program that systematically removes voters must be complete at least 90 days before a primary or general election for federal office.⁸ Individual entries may be corrected, but voters cannot be removed or targeted under a systematic program in those final months before an election.

Ohio's List-Maintenance Process Was Recently Deemed Unlawful. What Was Ohio Doing Wrong?

Until 2016, the State of Ohio used two processes to remove voters who may have moved: the “NCOA Process” and the “Supplemental Process.”

- **NCOA Process:** Ohio's NCOA Process used information from the National Change of Address program, which is conducted by the United States Postal Service and its licensees. Using this information as a source is acceptable and is explicitly permitted by the NVRA.
- **Supplemental Process:** Ohio's Supplemental Process presumed that two years of voter inactivity was an indication the voter had moved. If a voter did not vote in a two-year period, the voter was sent a forwardable confirmation notice requiring the voter to take action to remain on the voting rolls. If the voter did not return the notice or vote in the subsequent four-year period, the voter was removed from the rolls. In carrying out the Supplemental Process, Ohio relied on failure to vote—an impermissible criterion—to begin the list-maintenance process.

In September 2016, the Sixth Circuit Court of Appeals held that the Supplemental Process—part of Ohio's then-existing list-maintenance process—violated the NVRA. The Court held that the state's use of failure to vote as a trigger to send an address confirmation notice was “perhaps the plainest possible example of a process that results in removal of a voter from the rolls by reason of his or her failure to vote.”⁹

Were Any Eligible Voters Actually Taken Off the Rolls or Prevented from Voting in Ohio?

Yes. Prior to the lawsuit, eligible voters who had been removed for non-voting tried to vote in Ohio's 2015 statewide election and the 2016 presidential primary, but were turned away or forced to cast provisional ballots that were subsequently rejected. In the 2016 presidential election in November, a court order required the state to count provisional ballots cast by voters purged under Ohio's Supplemental Process. As a result, more than 7,500 eligible voters, who would otherwise have been deprived of their right to vote, were able to have their voices heard.

How Can States Be Sure They Keep the Voter Rolls Up to Date Without Violating the NVRA?

Section 8 of the NVRA describes a procedure that uses information from the United States Postal Service's National Change of Address (NCOA) program to identify voters who have moved and may be candidates for removal. The USPS's NCOA program collects change-of-address information provided by individuals who ask the Postal Service to forward their mail when they move. States or localities may purchase this information from commercial vendors licensed by the Postal Service. Election officials can use this information to identify whether residents of their jurisdiction may have moved.

Once an election registrar obtains this address change information, the registrar's next action depends on whether the new address is within the registrar's jurisdiction. If the voter has moved within the jurisdiction, the registrar must update the registration and then send the voter a mailing by which the voter may "verify or correct the address information." If the voter has moved outside of the jurisdiction where she is registered, the registrar must send the voter a confirmation notice. As explained above, the registrar may not remove the voter unless the voter confirms the address change or fails to respond to the notice *and* fails to vote for two federal election cycles.

A state's use of this NCOA-based procedure, which the Department of Justice has called a "safe harbor," satisfies its obligation to maintain the accuracy of its rolls and to remove voters who have become ineligible because of a change in residence. The state has no obligation to do more to identify and remove voters who have moved, and it cannot be held accountable for mistakes in the NCOA information.

Not All Voters Who Move Provide a Forwarding Address. How Can State and Local Election Officials Remove Those Individuals from Their Voter Rolls Without Violating the NVRA?

There are many different roll-maintenance strategies that can be used to identify voters who move, without using failure to vote as a basis for targeting voters. In all instances, once the state has reliable information that a voter may have moved out of the jurisdiction, the state (or local registrar) must send a forwardable notice to the voter and then wait the requisite period under the NVRA¹⁰ before that voter can be removed. Some examples are below.

- An election-related mailing returned undeliverable, followed by a forwardable confirmation notice:
 - Any mailing from the Board of Elections that is returned undeliverable can be a source of information to initiate the confirmation notice-and-removal process required by subsection 8(d)(2) of the NVRA. Examples of such a mailing are sample ballots or absentee ballot applications that, in many states, are sent to all registered voters. If this mailing is returned undeliverable, the state has sufficient evidence to believe the voter has moved. The state must then send a confirmation notice to initiate the notice-and-waiting procedure that may result in the voter's removal.
 - For a detailed example of this process in action, see "Scenario 3," above.
- Motor vehicle agency databases:
 - The NVRA requires that motor vehicle agencies provide election officials with change-of-address information provided by driver's license and identification card holders, unless the individual indicates that the address change should not be used for voter registration purposes. When the election officials receive this information, they must update the voter rolls to reflect the new address.
- Interstate data-sharing agreements:
 - A number of states have entered interstate agreements under which they share information from their motor vehicle agencies about voters who have transferred driver's licenses or identification cards from one state to another. This information can be used to identify voters who may have moved out of state and to send them an address confirmation notice.
 - The Electronic Registration Information Center (ERIC) is a program that aggregates NCOA, DMV, voter registration data, and other information from multiple states, allowing states to identify voters who have moved out of state as well as voters who have moved to the state but have not yet registered.¹¹

What Else Can States Do to Help Keep Their Voter Rolls Current Without Removing Eligible Voters?

There are several ways states can help keep their voter rolls current and prevent the accumulation of stale or out-of-date registration records. One of the simplest ways states can do this is to update, rather than cancel, the registrations of voters who move from one jurisdiction to another within the state. This not only ensures that the voter does not fall off the rolls; it also prevents an out-of-date record from persisting in the voter's old jurisdiction when the voter re-registers at her new address. States are already required to make such updates when the change-of-address information comes from the state's motor vehicle agency, and states can and should do the same when receiving change-of-address information from other, similar government sources. While such updates may have once required coordination between wholly separate local voter registration systems, every state now has a statewide voter registration database that can be used to facilitate such changes.

A more ambitious means of ensuring the voter rolls are as inclusive and accurate as possible that has gained traction in recent years is "Automatic Voter Registration." Automatic Voter Registration uses information a state's residents already provide to various government agencies with which they interact, such as motor vehicle or public assistance agencies, to identify eligible voters and either automatically place them on the voter registration rolls or update the rolls if the individual is already registered.¹²

Conclusion

Maintaining up-to-date registration rolls must be done in a way that protects eligible voters from being erroneously removed, while also ensuring that ineligible voters do not linger on the rolls. States should use practices that serve both of these goals to ensure that all those who wish to participate can have their voices heard.

Endnotes

1. 52 U.S.C. § 20507(a)(3)-(4).
2. *Id.*
3. *Id.* § 20507(d).
4. *Id.* § 20507(a)(3), (d).
5. *Id.* § 20507(b)(2); see also *A. Philip Randolph Institute et al. v. Husted*, 838 F.3d 699 (6th Cir. 2016) (holding that the NVRA prohibits a roll-maintenance process that removes voters due to their failure to vote).
6. Prior to the passage of the NVRA, some states employed a practice of removing any voter who failed to vote in a four-year period. The NVRA strictly prohibits that activity. This is illustrated in Scenario 1, above.
7. The Sixth Circuit Court of Appeals recently affirmed this position in *Ohio A. Philip Randolph Inst. et al. v. Husted*, 838 F.3d 699 (6th Cir. 2016).
8. 52 U.S.C. § 20507(c)(2).
9. *Ohio A. Philip Randolph Inst. et al. v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016). Ohio has filed a Petition for Writ of Certiorari seeking review of this decision. *Husted v. A. Philip Randolph Inst et al.*, No. 16-980 (U.S. Feb 3 2017).
10. Subsection 8(d)(2) describes this time requirement. See 52 U.S.C. § 20507(d)(2).
11. Another interstate program, known as Interstate Crosscheck, aggregates only voter registration data from member states. It purports to identify voters registered in more than one state, but the criteria it uses for cross-referencing the voter registration data from different states is so loose and leads to so many false matches that a number of states have found it too unreliable to use for voter-roll maintenance. *E.g.*, Peggy Lowe, *Kansans Caught In Crosscheck System Singled Out For Kobach's Voter Fraud Campaign*, KMUW, February 8, 2017, <http://kmuw.org/post/kansans-caught-crosscheck-system-singled-out-kobach-s-voter-fraud-campaign>.
12. For a more comprehensive discussion of Automatic Voter Registration, see Liz Kennedy, et al., *Automatic Voter Registration: Finding America's Missing Voters*, Demos, 2016, <http://www.demos.org/publication/automatic-voter-registration-finding-americas-missing-voters>.



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