



**Project Vote**  
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August 14, 2006

Juliet T. Hodgkins  
General Counsel  
U.S. Election Assistance Commission  
1225 New York Avenue N.W, Suite 1100  
Washington DC 20005

Re: National Voter Registration Act

Dear Ms, Hodgkins

I am writing to express Project Vote's disagreement with the conclusion you reach in your letter to Ms. Sarah Ball Johnson, Executive Director, Kentucky State Board of Elections, on May 11, 2006. Specifically Project Vote believes you are mistaken when you conclude that the National Voter Registration Act of 1993 (NVRA) permits Kentucky to "remove a voter based upon electronic notification via a comparison of Kentucky's state-wide voter registration database with another state's database that a person previously registered in Kentucky has since registered in the other state . . . without any further or additional notification or documentation."

The NVRA recognizes only four instances when a state can remove a voter from the list of eligible voters without attempting to notify the voter by letter. The first is when the voter requests to be removed.<sup>1</sup> The second is when the voter dies.<sup>2</sup> The third is when a voter applies for a driver's license in a different jurisdiction and does not specifically state they do not wish to change their registration.<sup>3</sup> The fourth is when an intervening event happens, such as a felony conviction or adjudication of mental incompetence,<sup>4</sup> which disqualifies the voter. The NVRA does not authorize removing a voter without notice if a state determines that the voter's name and identifying information matches the name and identifying information of a voter in another state.

42, U.S.C. 1973gg6-(d)(1)(a) states:

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant -

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered;

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<sup>1</sup> 42, U.S.C. 1973gg-6(a)(3)(A)

<sup>2</sup> 42, U.S.C. 1973gg-6(a)(4)(A)

<sup>3</sup> 42, U.S.C. 1973gg-3(d)

<sup>4</sup> 42, U.S.C. 1973gg-6(a)(3)(B)

Even the Federal Election Commission (FEC) guide cited in your letter states:

This suggests that **cancellation notices** received from voter registrars in other jurisdictions would be sufficient for removing a registrant's name (emphasis added).

Nothing in the NVRA or the FEC guide gives any indication that Congress intended wholesale matching of a person's name and birthday to replace a "request" by the registrant or written notice from a registrar that a registrant intended to register in another jurisdiction.<sup>5</sup> In fact, the FEC guide recognizes that it would be folly to do so when it states the "[r]egistrars might want to have, or at least have access to, the registrant's original signature on such notices" before sending the notice.<sup>6</sup>

To the extent the NVRA addresses using matching information to determine if a voter has moved out of the jurisdiction, it requires the state to notify the voter before removing them from the roll. When a state uses information provided by the National Change of Address (NCOA) program to remove a voter when it appears from the information provided by the Postal Service that a registrant has moved to a different residence address, the registrar must send a letter to the registrant to confirm the change of address.<sup>7</sup> Since "matching" voters between two or more statewide databases is more akin to the section describing change of address than to the section describing notification from the voter, the proper application of the NVRA to this situation is for states to adhere to the change of address procedures.

While Congress did not envision database matching when it passed the NVRA, it could not have intended to allow states to use the name and birthday of a person to conduct mass purging of voter lists. The conclusion reached in your letter appears to authorize this. While Kentucky, the state requesting the guidance, and South Carolina, the state Kentucky intends to use to match databases, use a voter's full social security number as the voter identification, most states do not. Since many voter's provide their drivers license number as a voter identification number, when they register in a different state, that number will change. Since the voter's address will change, the only constant identifying information that can be matched between states is the voter's name and date of birth.<sup>8</sup>

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<sup>5</sup> The guidance also does not address how the new jurisdiction determines where the voter was previously registered. In 1993 most counties did not have access to the voter list from other counties, much less other states. Therefore it is unlikely the FEC guidance intended to authorize one county to unilaterally match the new applicant with the voter rolls of another county and send the old county a cancellation notice for any voter whose name and birthday matched. It is far more conceivable that the FEC intended the new jurisdiction to pass on information it obtained from the new applicant, whether from the application or in person, related to applicant's prior registration. This, while not a formal request from a voter to the old jurisdiction to remove themselves from the rolls, is the type of efficiency that the FEC would have considered acceptable to Congress when it passed the NVRA.

<sup>6</sup> The common practice of an election official in one jurisdiction to notify the election official in another jurisdiction of a change in registration is based on the election official in the new jurisdiction obtaining information from the voter that the voter was previously registered in another jurisdiction, not the election official in the new jurisdiction conducting a database search to determine if the voter was previously registered.

<sup>7</sup> 42, U.S.C. 1973gg-6(c)

<sup>8</sup> To the extent the NVRA authorizes the state to remove an applicant applying for a driver's license from the rolls based on an electronic match, this will only happen if the name and unique driver's license number matches, which, absent a data entry error, would be virtually all the time.

The pitfalls of this matching methodology were demonstrated in New Jersey, where a political party charged that numerous voters had voted twice in the 2006 elections. The party submitted a list of approximately 4,397 individuals that allegedly “double voted” in the 2004 election. An analysis of the list by the Brennan Center for Justice at NYU School of Law showed the approximately 887 of those on the list had the same name and date of birth but different addresses, a situation similar to a match of voter registration databases between states.<sup>9</sup> The Brennan Center concluded that with over a million voters in New Jersey that it was more likely than not that there would be that many matches between different people.<sup>10</sup> For example, in a group of 150 people there is a 50% chance that two or more would have the same exact day, month and year birth date. In a group of 400 people with the same name, the chance of two or more of them having the same birth date is 90%.<sup>11</sup>

Some names are common enough so that there are a substantial number of voters with the same name.<sup>12</sup> For example, there were 417 Robert Smiths and 368 James Smiths on the voter roll in New Jersey in 2004, making virtually 100% that two of them would have the same name and birth date. If two states match millions of names, it is certain that some of them will match, even with middle initials. Under the procedure approved in your letter, those people would be removed from the voter rolls without notice.

What Kentucky has requested is, in effect, a systematic way to purge its voting list. The NVRA addresses this issue and provides procedures for doing so. These procedures are not onerous or unreasonable and were designed to protect voters from being unfairly removed from the voter list. Since NVRA places a higher value on protecting voters over the ease and efficiency of list maintenance, it seems incongruent to exempt from the NVRA’s list maintenance procedures such an inherently flawed means of purging voters as matching between two or more statewide databases.

Project Vote requests that you formally withdraw your letter and advice to Kentucky and issue a letter stating that a voter cannot be removed from a voter list through a matching of two statewide databases.

Sincerely,

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<sup>9</sup> The remaining “double voters” were the same name at the same address, implying that either the registrar had made an administrative error or the persons were senior and junior members of the same family. In either case it is highly unlikely that the same person could have voted twice at the same polling place signing the same poll book.

<sup>10</sup> The statistical analysis has a common name “the Birthday Problem” used to introduce students to counterintuitive results in statistics and probability.

<sup>11</sup> As an example of the absurdity of the party’s claim the individuals on the list voted twice, one person was a 63 old woman who allegedly voted in Cape May and then drove 161 miles to vote in Burgess County.

<sup>12</sup> As the Brennan Center points out, this is especially true because certain names were very popular during certain years.