

Subject: Memo re: the Crucial Importance of Birthdates in the Investigation of an Election
Date: July 19, 2014
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Background

1. There has been a great deal of controversy surrounding attempts by various parties to obtain access to unredacted voter rolls and poll books following the Mississippi Republican primary run-off for Senate on June 24, 2014. Circuit Clerks and the Mississippi Secretary of State have denied access to at least two parties³ based upon the claim that Mississippi election law requires birthdates to be redacted.
2. MCA § 23-15-165(6)(a) requires redaction of, among other things, the birthdates of voters from “Voter Registration Files” before they may be viewed by the public. There has been sharp disagreement over the meaning and scope of this requirement.⁴ In addition, the parties seeking the election records object to the cost and time required for redaction of the nearly 1.8 million voter birthdates from the poll books in all 82 counties during a very short deadline imposed upon candidates for the investigation of the election.⁵ These matters are not the subject of this memorandum.

Public objections to the necessity of birthdates to investigate elections

3. Certain elements of the media and members of the public have expressed concern that their “private information” is being sought by the various parties who seek unredacted election records. In addition, assertions have been made that birthdates in election and

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² The author did not vote for or support any candidate in either party’s primary for nominee for Senate, and has not worked for any of the candidates, parties, or organizations assisting such.

³ Representatives of Chris McDaniel, a candidate in the primary who wishes to investigate the election, and True the Vote, a non-profit organization that conducts deep data analysis on voter rolls and voting histories in order to detect voter fraud nationwide.

⁴ For example, the statute only requires “voter registration files” to be redacted, and those files have a particular statutory meaning, *viz.*, the voter registration forms, the books or other methods of storage in which they are kept, and the database in which they are indexed and stored. Poll books are also defined in Mississippi election law as a different set of documents primarily designed to record the voting activity of the registered voters. Voter Registration Files and poll books are entirely different documents. There are no Mississippi statutes that require poll books to be redacted before they may be viewed by the public.

⁵ MCA § 23-15-911 places a 12 day limit upon the inspection of the crucial ballot boxes by any candidate. This deadline commences, in the cases of primary elections, upon certification by the executive committee that canvassed the county’s ballot boxes and announced the nominee.

voter records are not necessary in order for a candidate to prepare an election challenge.⁶

4. For example, the Mississippi Attorney General represented to the Mississippi Supreme Court last Wednesday that birthdates are completely useless for a candidate preparing a challenge to an election. “Viewing or copying a voter’s date of birth is simply not necessary for any conceivable purpose in formulating an election challenge or otherwise.”⁷ Instead, the Attorney General urges the usefulness of the unique voter registration number that is assigned to each registration.⁸
5. That statement is incorrect, and betrays a lack of familiarity with the actual process by which an election is investigated and an election challenge is formulated to bring into court. The author has over twenty years of experience investigating elections and directing successful contests of elections, working with candidates and attorneys in some cases to defend an election against charges of illegality, or to overturn an election.⁹

The necessity of birthdates on voter records

6. Birthdates on election records, particularly voter rolls and poll books, are absolutely essential to allow a candidate to identify illegal or fraudulent votes, and to connect the documents and persons who voted or presented to vote with their official voter registrations.
7. In an election contest, the principal issue is the legality of the votes cast that determined the outcome of the election. A candidate seeking to contest an election must show that certain votes cast and counted were illegal and should not have been counted, or in the alternative that certain votes rejected were legal and should have been counted.
8. In practice, ascertaining these facts on a vote by vote basis is tedious and difficult. The candidate is faced with a morass of lists, poll books, names, and a host of

⁶ Whether or not birthdates are necessary for the detection of duplicate registrations or voter fraud by public advocacy organizations apart from a candidate seeking to challenge the election is not within the scope of this memorandum. The Secretary of State has in the past provided confidential voter registration data, including birthdates, to out-of-state entities for the purpose of detecting just such duplicate registrations and illegal multiple voting across state lines.

⁷ See “THE STATE OF MISSISSIPPI’S RESPONSE TO EMERGENCY PETITION FOR WRIT OF MANDAMUS” at page 12, July 16, 2014 in *McDaniel v. Parker* (MS SUP CT, 2014-M-00967, 2014).

⁸ In fact, the Voter Number is practically worthless in connecting voters and documents in an election contest with the voter’s registration, because signatures in the receipt books, absentee applications and ballot envelopes with certificates, affidavit ballot certificates, registration records from other states, obituaries, and a host of other documents identifying the voters do not bear the Voter Number upon them by which to match them to the voter registrations.

⁹ The author’s experience in conducting and investigating elections is set forth in the Appendix.

documents that have to be connected together in order to ascertain the legality of each vote. The candidate dare not assume that a particular vote that was counted is legal. Instead, the candidate must investigate the legality of the vote to satisfy himself – and ultimately a court of law – that the vote was legal or not legal. A candidate defending his election from a challenge seeks to find proof that challenged voters were legal and proper, and that certain votes cast for the losing party were illegal and should not have been counted.

9. Illegal votes are cast and counted through error, mistake, or fraud, and this error, mistake or fraud may originate with the registrar / circuit clerk,¹⁰ the election commissioners or executive committee members, the voters themselves, the poll workers, and any other person who assists in the election process. Thus, the candidate cannot rely too heavily upon the decisions made by any of these individuals, but rather must diligently research and judge the evidence carefully for himself. It would be folly, for example, to take the decision by a registrar that a certain person who cast an affidavit ballot was a qualified registered voter, or to simply ask her to verify that fact, since her determination may well be wrong.

How birthdates were taken away from candidates / contestants

10. Before 1997, election records were public. The public could browse the poll books, which were official public records of the Circuit Clerk. The voter registration forms were public record without exemption.
11. Only the *content of the ballot boxes themselves* was protected from public view, because if there was an election contest, the ballots, affidavits, and other voting materials from election day in the boxes would be crucial evidence that had to be preserved for court. The ballot boxes had to be kept sealed until at least 21 days after the election took place.
12. Therefore, in order to allow candidates to examine the election and decide whether to file a challenge, MCA § 23-15-911 was enacted to provide access, to candidates only, during the period after the election, of the election materials which were sealed in the boxes. This statute meant, effectively, that *all* election records, including ballot box contents, were open to candidates, but only non-ballot-box election records were open to the public. Thus, § 23-15-911 provided comprehensive access to election records without exception for candidates seeking to overturn or defend an election. It created the method by which that part of the election proceedings that was hidden from the

¹⁰ Circuit Clerks and election commissioners are capable of committing outright fraud. In fact, the author's baptism by fire in election contests occurred in 1991, when he was asked to lead an investigation of suspicious absentee balloting in the Democrat primary held the fall of 1991. By a careful examination of absentee ballot application and certificates, as well as the postmarks thereupon, he was able to prove that the Circuit Clerk had engaged in the wholesale manufacture of several hundred forged absentee ballots, with the help of an election commissioner and various campaign workers and family members, all in a desperate attempt to retain office. The Circuit Clerk was indicted and pled guilty to voter fraud and embezzlement. See *State v. Jan Montgomery* (Leflore County Circuit Court, Cause Nos. 21945, 22097, etc., 1992).

public - the ballot box contents themselves - would be available to candidates in preparation for a contest.

13. Then, in 1997,¹¹ and again in 2002,¹² the legislature passed laws removing public access to birthdates, social security numbers, ages, and telephone numbers in the voter registration files, and requiring their redaction before they could be viewed by the public. The Secretary of State and Attorney General immediately extended the application of this redaction requirement to all other voter records, including poll books.¹³
14. Because it is costly and impracticable to redact tens of thousands of birthdates from a county's poll books, this change made it practically impossible for the candidates or the public to inspect the official record of which persons cast votes in the election. It also means that candidates contemplating an election challenge now no longer have access to birthdates in voter records, unless they happen to reside in the ballot boxes. But voter rolls and poll books are not kept in the ballot boxes.¹⁴

Specific examples of the necessity for birthdates in voter records

15. Birthdate is a crucial part of the proof of the legality of a voter's registration, because the election code requires the person to be 18 years of age on the date of the general election before registration is permitted.¹⁵ If a person's registration is illegal due to age, then any votes cast by that person are also illegal. In order to determine the legality of a person's registration according to law, the birthdate for each person casting a vote in the election must be available for review.¹⁶

¹¹ MCA § 23-15-140 [repealed].

¹² MCA § 23-15-165(6)(a).

¹³ Attorney General's Opinion to Hon. Trey Evans, December 5, 1997, Op. No. 97-0760 (1997 WL 805196 Miss.A.G.).

¹⁴ We are now in the absurd position where the law allows candidates to paw through the ballot boxes, where the absentee applications, certificates, and affidavit certificates contain not only birthdates, social security numbers, and telephone numbers, but other deeply personal information such as disability status, evidence of illiteracy, sickness, and claims of denial of the voting rights of the voter. The candidates are therefore provided with unrestricted, special access to that part of the election record that is sealed from the public - the ballot box contents, the most sensitive materials in the entire process - while the very same candidates are denied free access to the election materials that formerly were freely available for view by everyone.

¹⁵ See MCA § 23-15-11.

¹⁶ The author once became entangled in a dispute concerning the qualifications of two persons to be placed upon the ballot as candidates. One candidate did not appear anywhere in the voter rolls of the county. The other candidate had falsified his voter registration by claiming to be one year older than he was, thereby enabling him to register illegally and vote in the 1960 presidential election. Without access to the birthdate on the original application, this fraud would have gone undetected.

16. Birthdate information on the official voter rolls and poll books is necessary to detect persons who cast votes in the names of registered voters who are deceased. A candidate investigating an election requires the birthdate of each voter to enable him to search newspaper obituaries and the Social Security death index to determine whether that voter has passed away. Because there are numerous persons in a county with the same name (not to mention nation-wide), the birthdate match from the registration record, or at least the age of the registered voter, is absolutely necessary to make the match with external death records. Once that match is made, corroborating evidence of death may then be sought, perhaps through subpoena.¹⁷
17. Birthdates on voter rolls and poll books are necessary for the candidate to search out conflicting registrations in other counties or out of state. Again, the existence of numerous persons with the same name, even in the same household, makes the birthdate essential to confirm a match, or (more often) to rule one out. Persons with the same name and conflicting registrations, but with different birthdates, can be eliminated as possible illegal registrants, thereby confirming the legality of their votes cast and removing them from suspicion. On the other hand, subsequent registrations outside the county by the same voter with the same birthdate are strong evidence of illegal votes cast.
18. Birthdate information on voter rolls and poll books is essential in detecting persons who are registered under the same or similar names more than once in the county, and who then cast multiple votes under those duplicate registrations. This is particularly true with very slight variations of the name (different middle initials) or in the case where females change their last names through marriage or divorce. Even if the voter is personally honest, the existence of old, stale registrations, which the registrar did not correct, but rather duplicated, allows dishonest persons to assume the stale registration and impersonate the voter. Birthdates on voter rolls are mandatory to make these matches and discover these illegal votes.
19. In some elections, it becomes necessary to match the individual signatures contained in the receipt book (which each voter presenting to vote in person is required to sign) with a valid voter registration.¹⁸ This is particularly true when the number of persons

¹⁷ The issue of matching a voter's birthdate from his registration with his age at time of death as shown in an obituary can become an issue even when the voter dies after the election. In one election, the author discovered a voter who cast two votes in the same election, and then died before the case came to trial. It was important to be able to show that the voter was deceased by matching his poll book birthdate with the age shown in his obituary in order to explain to the court why he could not be called as a witness.

¹⁸ One would think there would be a one-to-one match between the signatures and the record of voter participation as documented in the poll book at that particular precinct, because the election workers are required to write the word "voted" next to each voter who signs the receipt book. However, poll workers are fallible and sometimes corrupt, marking the wrong voter or failing to mark any voter. Although the poll book is supposed to record the identities of the persons who voted, in fact, it is sometimes necessary to determine who actually voted by matching the voter's signature with the correct voter registration. The list derived from such an analysis often reveals additional persons who actually voted but who were not recorded as doing so in the poll book. Candidates must know who *actually* voted in order to detect illegal votes and prepare any challenge.

marked “voted” in the poll book is different from the number who signed the receipt book, giving a strong inference that illegal votes were cast.¹⁹ The process of deciphering the signature and locating the correct voter registration is tedious and time consuming.²⁰ In some cases it requires dozens of hours of intense study to complete this task, but in the end, an accurate list of actual voters (different from those marked as voted in the poll books) will emerge.²¹ The birthdate is important to assist in the deciphering and assignment of signatures with voter registrations, because knowing the age of the potential matching registrations can help resolve ambiguities where, as is commonly the case, there are multiple registrations with the same or nearly similar names as the signature. For example, the comparative age of a voter can sometimes be inferred from the strength shown in the signature, or conversely, from a signature of a weak and trembling nature. If the voter has a firm fist, and the choices are between a very elderly registrant vs. a younger person, birthdates on the voter registrations can help to make an assignment through the process of logical deduction and elimination. Other instances where birthdates are necessary to ascertain the true identity of the voters from their signatures include cases where the voter adds additional information to the signature (such as a title or a suffix in the case of males) which implies relative age or youth, and allows the investigator to assign the proper signature to the proper voter registration.

20. In the case of absentee ballots, the issues are much the same as in matching receipt book signatures with voter registrations. Absentee ballots have been issued in contests the author has investigated for persons who were not registered voters. In other instances, voters have cast votes by absentee ballot and on the voting machines, and both were counted.²² Absentee ballot fraud is recognized as a major issue yet to be addressed successfully in Mississippi. Matching up ballots cast with the correct voter registrations, utilizing birthdates as described previously, is a crucial necessity.
21. In addition, one of the lawful bases for casting an absentee ballot is the age of the voter – any registered voter 65 years old or older is entitled to cast an absentee ballot.²³ Therefore, in order to determine the lawfulness of absentee votes cast under such a claim, the birthdate of the voter must be ascertained from the poll book or

¹⁹ A vote would be illegal if, for instance, the voter failed to sign the receipt book. See MCA §§ 23-15-541,547.

²⁰ The author designed and wrote special computer programs to analyze, manipulate, and annotate a copy of the voter registration database which greatly facilitated this process.

²¹ In one precinct, the author performed this analysis and documented a 4% error rate between the poll book record and the actual identity of the persons who cast votes. Most precinct workers do a better job than that, but errors are often made.

²² In this case, the absentee ballot application and certificate, as well as the receipt book signatures for the entire Ward were laboriously matched to the proper voter registrations as described previously. The illegal vote would not have been detected otherwise, since the number of persons marked “voted” in the poll books and the number of receipt book signatures matched.

²³ See MCA § 23-15-627.

voter registration records. If an absentee ballot is cast based upon the 65+ age provision by a person less than 65 years old, that vote is illegal.²⁴

22. Of all categories of ballots cast, birthdates are the most crucial for the proper discovery of illegal votes in the case of affidavit ballots. By design, these are almost always cast when the voter's name cannot be located on the precinct poll books. Usually, the address provided by the voter on his affidavit does not correspond to the address on his voter registration, and often the previous address provided by the voter does not match either. This means that the proper matching of the affidavit with the registration must be done based solely upon name and birthdate, which the voter provides on the affidavit. If the affidavit voter cannot be matched to a valid voter registration, the ballot should be rejected by law.²⁵
23. The candidate investigating the election has the right and the duty to independently establish whether or not the affidavit ballots were cast by lawfully registered voters. Because of the prevalence of multiple, often unrelated, registered voters with the same or nearly identical names in a county, it is impossible to determine the registration status of most affidavit ballots without access to voter registration birthdates.
24. Contrariwise, the candidate has the right to discover whether affidavit ballots that were rejected because the voters could not be located on the voter registration lists nevertheless are lawful and should be counted. Registrars make mistakes, both as to mis-identifying an affidavit voter as a registered voter, and failing to discover the valid registration of an affidavit voter. In the former case, an illegal vote is counted; in the later, a legal vote is rejected.
25. Not only does the existence of multiple voters with the same or similar names make birthdate matching essential to determine the lawfulness of an affidavit ballot, but the incidence of sloppy writing, use of nicknames, abbreviations, and middle names, as well as the change in last name by females who have married or divorced, only increases the necessity of birthdate information on the voter rolls to determine accurately the lawful registration of the affidavit voter.²⁶

²⁴ See also MCA § 23-16-631(1)(a), which describes the relaxed circumstances under which such a ballot may be cast. Had the voter been truthful in making application, he would have been required to appear at the Circuit Clerk's office to make application and cast his absentee ballot.

²⁵ This matching should be done by the Registrar / Circuit Clerk during the canvass process. However, in a recent contest, the election commission opened and counted every single affidavit ballot without ascertaining whether any of them were registered to vote or not. The author investigated the election and was the first person to actually match up affidavits with registrations. Birthdate information was essential to make the matches. After diligent search, only half the affidavit ballots were found to be registered voters. The election was overturned.

²⁶ In some instances, the only way to discover the registration of an affidavit voter is to search the entire voter roll database by birthdate, and then compare every voter registration matching the birthdate provided by the affiant to determine the correct spelling of his name and to locate his true voter registration. Database searches of the entire voter roll based upon birthdate and a legible fragment of the voter's name

Conclusions

26. While some illegal votes can be discovered without the use of birthdate information, illegal votes of many types cannot be discovered without it. The birthdate information on the poll books and voter rolls is absolutely essential for a candidate to discover many of the illegal votes in preparation for an election contest. Without the birthdate information, an election investigator is extremely limited in the discoveries that he can make. Birthdates are required to tie signatures, applications, ballots, etc. to the proper voter registration – or to discover that they were prepared and cast by persons who are not registered voters at all. Birthdate information is required to discover duplicate registrations and registrations of deceased voters that have been assumed by unscrupulous persons to cast illegal votes.
27. Up until this election, the requirement that birthdate information be concealed from candidates had not been widely followed throughout the state. Circuit Clerks and election commissioners have assumed that a candidate is entitled to the full voter records.²⁷ In fact, the author has never before heard of an instance in which candidates inspecting the ballot boxes were denied full access to unredacted poll books.
28. The impossibility of conducting a proper investigation of an election without access to voter registration birthdates will rapidly become apparent across the state. Provision for access to candidates will have to be made if confidence in our electoral process is to be maintained. Denial of basic, critical voter information necessary to detect errors and outright fraud in close elections will conjure up legitimate suspicion that the process is rigged by the powers that be. In one tragic sense, it has been.
29. In addition, more candidates will be inclined to err on the side of caution and consider all affidavit ballots, in particular, to be unlawful. More contests will be filed than necessary, with the candidates attempting to obtain the basic birthdate information necessary to prove up their cases by subpoena through the court process.²⁸

from the affidavit will either locate the proper match, or determine that the affidavit voter is unregistered in the county.

²⁷ After all, knowledge of birthdates is critical to the performance of their duties in properly matching voters and their registrations in many circumstances identical to those described in this memorandum!

²⁸ In several instances, the author has inspected ballot boxes and advised his client that there is no valid basis to file a contest. That will be harder to justify if crucial birthdate information is concealed by custom or by law.

Appendix – Election Resume

The author's experience in election matters is as follows:

- Poll worker
- Appointed poll watcher on numerous occasions
- Member, Leflore County Republican Executive Committee, 1991-1995
- Directed the all-party investigation of voter fraud in Leflore County, MS, 1991, which resulted in the arrest, indictment, and conviction of Leflore County Circuit Clerk Jan Montgomery for absentee ballot fraud.
- Conducted party primaries in Leflore County in 1994, 1995
- Principle election contest investigator for various plaintiff and defendant parties:
 - Turner v. Moore (Leflore County, 1991)
 - Fratesi v. Palmer (Greenwood, 1993)
 - Graves v. Stewart (Tunica County, 1995)
 - Ray v. Simmons (Bolivar County, 1999)
 - Farmer v. Artman (Greenville, 1999)
 - Winters v. Lewis (Arcola, 2001)
 - Thomas v. Brooks (Leland, 2001)
 - Stevens v. Roberts (Humphreys County, 2003)
 - Ellis v. Jordan (Greenwood, 2005)
 - Perkins v. Smith (Greenwood, 2005)
 - Kilpatrick v. Burchfield (Drew 2013)

In six of the cases in which the author represented the contestant, the elections were overturned.

In several cases, in addition to directing the investigation and preparation of the contest, the author also provided testimony in court or by affidavit for purposes of summary judgment.

- Conduct of numerous ballot box inspections on behalf of both election winners and potential contestants that did not proceed to challenge/trial
- Design and implementation (1992 – 1998) of Leflore County's election/voter roll computer system, one of the first full-featured voter registration/election software packages used in Mississippi; it included management of registrations, automatic precinct assignment based upon computerized street locators, changes of address, jury wheel and venires, absentee ballots, and preparation of poll books.