

FAIR ELECTIONS LEGAL NETWORK

TESTIMONY OF FAIR ELECTIONS LEGAL NETWORK
SUBMITTED TO THE ELECTION ASSISTANCE COMMISSION
SEPTEMBER 21, 2010
WASHINGTON, D.C.

Fair Elections Legal Network (FELN) appreciates the opportunity to submit this testimony regarding the EAC's proposed changes to the National Voter Registration Act (NVRA) regulations. FELN is a national, nonpartisan advocacy organization based in Washington, D.C. whose overall mission is to remove barriers to registration and voting for traditionally underrepresented constituencies and improve election administration through administrative, legal, and legislative reform.

1. Incorporating New Technologies

FELN would first like to focus on the following paragraph in the Notice of Proposed Rulemaking:

EAC has created a "fillable" Federal form available in an electronic format on its website for use by the public. Persons wishing to register to vote may access the form on the website, fill the form out, print the form, sign it, and mail it to the appropriate State address. At this time, EAC has not proposed an amendment to the current NVRA regulations to address the use of the Federal form in an electronic format. **EAC, however, seeks comment on amending the regulations to incorporate new technologies to facilitate applicants' use of the Federal form. EAC is particularly interested in receiving comments on how EAC's regulations may be amended to accommodate the use of new technologies in an accessible and usable format,** consistent with Federal statutes and regulations.

Notice at 15-16 (emphasis added).

One of the new technologies that could most benefit voters and election officials is the **touchscreen technology** now included on many mobile phones and other internet-capable mobile devices.¹ This technology is widespread, even among those with below-average incomes,² and is projected to increase dramatically in the next few years.³ Touchscreen technology would enable voters to provide a **handwritten electronic signature** on the federal form in the same way that handwritten electronic signatures are captured and accepted on electronic keypads throughout the commercial world. FELN published a piece on this subject in May.⁴

FELN proposes that the EAC amend its regulations to expressly permit an electronic version of the federal form to be filled out and signed by hand electronically, and then submitted via e-mail to the appropriate state election officials.

To be clear, we are not advocating a form of electronic signature that is triggered by a mouse click. The Supreme Court of Utah recently held that state law permitted that form of electronic signature on petitions to place a candidate on the ballot.⁵ We are suggesting that an electronic voter registration form could be made complete by signing with the voter's hand, just as the voter does using pen and ink, except that the image would be captured using technology that registers the signature electronically.

Santa Clara County, California has accepted federal voter registration forms submitted in this manner.⁶ At least two states – Delaware and Kansas – already accept this method of signing a voter registration form at their state motor vehicle agencies, where electronic keypads are used.⁷ Other states, including Arizona, Nevada, and Missouri, are moving in this direction.⁸ Moreover, at some point in the process, states digitize the voter registration signatures they receive, rendering what was once a signature on a piece of paper into an electronic file.

State Election Officials Would Benefit

Voter registration forms submitted electronically would offer tremendous benefits to state election officials. Electronic forms offer the same types of benefits that online voter registration offers to a state. The data within the applications can be automatically uploaded to state voter files, thereby eliminating all of the costs and errors that come when paper voter registration forms need to be keyed in by clerical staff.

Cost savings can be significant. In Arizona, an online registration form costs just \$.03 to process, versus \$.83 to process a paper registration form.⁹ In Washington State, the cost of an online voter registration application is estimated at \$.45 as opposed to \$1.55 for a paper registration.¹⁰ Similar savings could be had with electronic forms that come in a file that can be directly uploaded into state voter databases.

Eliminating errors is just as important.¹¹ A recent study found that in some counties in Florida and California, as many as 5% of registration applications were considered “incomplete” but were nonetheless entered into the state's system.¹² To fix this problem, an electronic form can be programmed so that it cannot be sent until all required fields are filled in. Officials in Maricopa County, Arizona found that paper-based forms were five times more likely to introduce errors into the registration process as compared to paperless registrations.¹³

The forms could be processed much more rapidly, with fewer personnel. Election officials strain under the weight of processing paper forms just prior to elections because it takes so much time to enter the data. With electronic forms, data upload is essentially instantaneous. There is no need to hire someone to enter the data.

Voters Would Benefit

Voters would also benefit from fully electronic forms. The paper-based system generates errors, and these mistakes often cost people the right to vote.¹⁴

Voters would be able to complete a voter registration application at any time, and in virtually any place. Through the internet, voters would be able to access the federal form, read any state requirements, fill out the form properly, sign it, and submit it. Like many other online forms, prompts could be built into the system so that if a voter fails to complete a necessary box, the form cannot be forwarded. Voters would not need access to a printer or a stamp. They would only need access to a touchscreen mobile device. If they do not own one, they could borrow one for the few minutes it takes to register to vote. States could also make touchscreen devices available at public libraries, and third-party voter registration organizations could use touchscreen computers instead of paper forms to register voters.¹⁵

Voters could also receive instant feedback by submitting registrations electronically through automated responses to registration e-mails. Under paper-based systems, voters need to wait days and weeks before they know whether their registration form was received. If it is not received, and the voter registration deadline passes in the interim, they will be unable to register and vote in that election. With fully electronic registration, these delays can be eliminated.

This system would also allow for electronic registration in all NVRA states, not just the eight that currently offer online registration (Arizona, Colorado, Indiana, Kansas, Louisiana, Oregon, Utah, and Washington). Moreover, it would allow *all* voters to take advantage of electronic registration, not just those with current in-state driver's licenses or accessible signatures on file. That limitation, which is applied in all online registration states, leaves out thousands of voters in every state,¹⁶ a disproportionate number of whom are youths, seniors, or minorities.¹⁷ The U.S. Department of Transportation has found that 8-10% of all Americans over the age of 18 do not have a driver's license.¹⁸ When coupled with the requirement that the license be in-state, the percentage of voters unable to use online registration systems is certainly much higher.

Electronic Signatures Are Secure

From a security and verification standpoint, handwritten electronic signatures offer benefits that even inked signatures do not. Touchscreen technology makes it possible to collect data points throughout the signing process – like a mini-video – and encode this data in the electronic file sent to election officials. If officials need to, they can examine this data for verification purposes. The signature can also be rendered tamper-proof, such that any effort to alter the signature would immediately corrupt the data file.¹⁹

Electronic Signatures Will be Current

One concern that is often raised is how a handwritten electronic signature will compare with a handwritten inked signature when states match signed ballots with signatures on file. The comparison should work as well as current systems, for at least two reasons.

First, voters can have control over their handwritten electronic signature. If they do not like the appearance of a signature on the voter registration form, the system could allow them to erase it and start over before they submit it to election officials.

Second, handwritten signatures on new voter registration forms will be more current than the signature captured by online registration systems from driver's licenses, which may be years old.²⁰ Signatures can evolve over time, so it is better to have a more recent signature on file.

Electronic Signatures Are Consistent With Federal Law

The NVRA requires states to accept the federal voter registration form.²¹ Moreover, the federal form "may require only such identifying information (including the signature of the applicant) ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant ..."²² The federal form also "requires the signature of the applicant, under penalty of perjury."²³

A handwritten electronic signature meets both of these elements just as well as a signature inked on a piece of paper. It provides "identifying information" in that it is in the hand of the signer, and it supplies the necessary requirements to bind the applicant under penalty of perjury.

How to Implement a Fully Electronic Federal Form

There are a number of changes to the federal form that FELN would recommend for an electronic version that could be hand-signed electronically.

- The EAC should allow for third parties to create federal forms using their own software, as long as the substance of the form is copied faithfully. This will facilitate voter access to the form on the many different types of touchscreen mobile devices.
- In places where the form indicates it can be "mailed," it should be amended to indicate it can also be e-mailed.
- E-mail addresses should be provided for all states indicating where to send the form.
- Electronic links should be provided to each state instruction so that voters can jump directly to the relevant state by clicking on a link.
- The form should be designed so it cannot be sent until all the required sections have been filled out and an electronic signature provided.
- A place should be provided for the e-mail address of the voter.
- Regulations related to the format of the form need to be amended to accommodate an electronic version.
- Electronic signature could be defined, and further specifications for such signatures could be established.
- The cover of the form should drop the word "Postcard."
- An electronic version does not necessarily need the mailer side of the form.

2. Other Issues

Registrants Who Will Not Be 18

Pre-registration of voters when they are 16 or 17 years old is a vital tool to increase the participation of young voters in elections. Therefore, FELN supports the proposed addition of

new language to 11 C.F.R. § 9428.4(b)(3). However, FELN believe this could be made clearer by changing the whole paragraph as follows:

Before filling out the body of the form, please answer the questions on the top of the form as to whether you are a United States citizen and whether you will be 18 years old on or before Election Day. If you checked ‘no’ in response to either of these questions, do not complete this form. **Exception:** if you are 16 or 17 years old, you may still be able to complete this form if your State-specific instructions for item 9 on the form indicate you are eligible to vote now.

The change to the sentence highlighted in gray complies with HAVA, 42 U.S.C. § 15483(b)(4)(A)(iii). The sentence highlighted in yellow provides clearer notice that 16 and 17-year-old voters may be eligible to complete and submit the form in their state..

Identification for First-Time Voters

Federal law allows first-time voters who register by mail to provide necessary identification either when the application is submitted, or before the voter votes for the first time, whether in person or by mail. However, this identification requirement can be satisfied by voters who include on the form the number of their in-state driver’s license, or the last four digits of their social security number, if a state or local election official can match that number to the name and date of birth supplied in the registration. Other exceptions also apply.

The current instruction in the federal form for “First Time Voters Who Register By Mail” does not reflect the law accurately, as EAC’s notice indicates. We would suggest that the instruction read:

If you are registering to vote for the first time in your jurisdiction and are mailing this registration application, Federal law requires you to show proof of identification the first time you vote, unless you have submitted an in-state driver’s license number or the last 4 digits of your social security number on your registration form and a State or local election official has been able to match that information with an existing state record bearing the same number, name and date of birth as provided in your registration.²⁴ Proof of identification includes:

- A current and valid photo identification or
- A current utility bill, bank statement, government check, paycheck, or government document that shows your name and address.

Voters are exempt from this requirement if they are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act, the Voting Accessibility for the Elderly and Handicapped Act, or any other Federal law. You may also be exempt from this requirement if you submit a COPY of this identification with your voter registration form, or, if you vote by absentee ballot, at the time you request or submit an absentee ballot. If you wish to submit a COPY, please keep the following in mind:

- Your state may have additional identification requirements which may mandate you show identification at the polling place even if you meet the Federal proof of identification.
- Do not submit original documents with this application, only **COPIES**.

These changes track HAVA. The highlighted text is new.

Format

We discussed this above. The formatting rules need to be able to accommodate a fully electronic form that is submitted via e-mail with a handwritten electronic signature. One way to do this would be a new subheading for an “e-mailable federal form” that sets out the format requirements for that version of the form.

EAC Reporting to Congress

FELN concurs with the comments submitted by the AAPD, Lawyers’ Committee for Civil Rights Under Law, League of Women Voters, and Project Vote on August 18, 2010, in Orlando, Florida regarding EAC’s biennial reports to Congress.

Fair Elections Legal Network appreciates the opportunity to present its views on these important matters. We are available to work with EAC staff to clarify any of the points in our recommendations and to improve and refine the regulations.

Endnotes

¹ In 2010, touchscreen devices will comprise about 47% of overall mobile phone sales in North America, with the percentage expected to reach 80% by 2013. *Gartner Says Touchscreen Mobile Device Sales Will Grow 97 Percent in 2010*, March 4, 2010, available at <http://www.gartner.com/it/page.jsp?id=1313415>.

² *Mobile Access 2010*, Pew Research Center, July 7, 2010, at 8, available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Mobile_Access_2010.pdf.

³ See *supra* note 1.

⁴ Brian J. Siebel, *Electronic Signatures Could Revolutionize Voter Registration*, Huffington Post, May 22, 2010, available at http://www.huffingtonpost.com/brian-j-siebel/electronic-signatures-cou_b_586030.html.

⁵ *Anderson v. Bell*, 2010 UT 47 (2010).

⁶ Ken McLaughlin, *Santa Clara County Accepts Nation’s First Electronic Voting Registrations*, SAN JOSE MERCURY NEWS, May 14, 2010.

⁷ Steven Rosenfeld, *Paperless Voter Registration: Innovations in Three States*, Project Vote (2010) at 4, 6-7, available at <http://projectvote.org/images/publications/2010%20Issues%20in%20Election%20Administration/Paperless%20Registration%20Case%20Study%20FINAL.pdf>.

⁸ See generally Steven Rosenfeld, *Voter Registration Modernization and the NVRA*, Project Vote (2010), available at <http://projectvote.org/images/publications/Policy%20Reports%20and%20Guides/Voter-Registration-Modernization-and-the-NVRA.pdf>; Christopher Ponoroff, *Voter Registration in a Digital Age*, Brennan Center for Justice (2010), available at http://brennan.3cdn.net/806ab5ea23fde7c261_n1m6b1s4z.pdf.

⁹ Matt A. Barreto, *Online Voter Registration (OLVR) Systems in Arizona and Washington: Evaluating Usage, Public Confidence and Implementation Processes*, A Joint Research Project of the Washington Institute of the Study of Ethnicity and Race (WISER) University of Washington, Seattle and the Election Administration Research Center (EARC) University of California Berkeley, April 1, 2010, at 92, available at, http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/MVW/online_voter_reg.pdf?n=2908.

¹⁰ Bill Graves, *Oregon Offers Online Voter Registration*, Oregonlive.com, Feb. 28, 2010, http://www.oregonlive.com/politics/index.ssf/2010/02/oregon_offers_online_voter_reg.html.

¹¹ See Committee on State Voter Registration Databases, National Research Council, *State Voter Registration Databases: Immediate Actions and Future Improvements*, Part C (Data Issues) (2008).

¹² Stephen Ansolabehere, Alan Gerber, et al., *Voter Registration List Quality Pilot Studies: Report on Detailed Results*, June 8, 2010, p. 8, available at, http://www.pewcenteronthestates.org/uploadedFiles/voter_registration_list_results.pdf?n=7473.

¹³ Christopher Ponoroff, *Voter Registration in a Digital Age*, Brennan Center for Justice, July 13, 2010, p. 1, available at, http://brennan.3cdn.net/806ab5ea23fde7c261_n1m6b1s4z.pdf.

¹⁴ Ansolabehere at 2 (explaining finding that 12% of Florida and 9.6% of Los Angeles County survey respondents identified a discrepancy in their registration records).

¹⁵ Nick Judd, *Mobile Voter Registration Apps May Be Ready for Midterms*, Personal Democracy Forum, April 13, 2010, available at, <http://techpresident.com/blog-entry/mobile-voter-registration-apps-may-be-ready-midterms>.

¹⁶ See, e.g., Robin Carnahan, Secretary of State, State of Missouri. *Testimony for US Senate Rules Committee*, (estimating that 240,000 Missouri residents do not have government-issued photo ID) available at, www.sos.mo.gov/elections/carnahan_senate_rules_testimony.pdf. There is no reason to believe this problem is limited to Missouri.

¹⁷ See John Pawasarat. *The Driver License Status of the Voting Age Population in Wisconsin*. Employment and Training Institute, University of Wisconsin-Milwaukee (June 2005) (demonstrating that high percentages of Wisconsin residents do not have valid in-state driver's licenses), available at, <http://www4.uwm.edu/eti/barriers/DriversLicense.pdf>;

¹⁸ U.S. Department of Transportation, Federal Highway Administration, *Licensed Total Drivers, By Age, 2003*, Table DL-22, Oct. 2004, at www.fhwa.dot.gov/policy/ohim/hs03/htm/dl22.htm, and U.S. Census Bureau, *Annual Estimates of the Population by Selected Ages Groups and Sex for the United States: April 1, 2000 to July 1, 2004*, (June 2005), available at www.census.gov/popest/national/asrh/NC-EST2004-sa.html.

¹⁹ Russell Nichols, *Will Touchscreen Devices Transform Voter Registration Systems*, Government Technology, May 19, 2010, available at <http://www.govtech.com/e-government/Will-Touchscreen-Devices-Transform-Voter-Registration.html>.

²⁰ In Arizona, for example, a driver's license does not expire until the driver turns 65, even if it was issued at age 16. A.R.S. § 28-3171(A).

²¹ 42 U.S.C. §§ 1973gg-4(a)(1).

²² 42 U.S.C. §§ 1973gg-7(b)(1).

²³ 42 U.S.C. §§ 1973gg-7(b)(2)(C).

²⁴ Much of this language is taken straight from HAVA, 42 U.S.C. § 15483(b)(3).