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REGARDING THE NATIONAL VOTER REGISTRATION ACT**

NATIONAL VOTER REGISTRATION ACT

The National Voter Registration Act (NVRA) was enacted under Congress' authority pursuant to Article I, Section 4 and Article II, Section 1 of the United States Constitution, which empower Congress to regulate the time, manner and place of elections for Federal office.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such meeting shall be on the [first Monday in December], unless they shall by Law appoint at different Day.

Section 1. ... the Congress may determine the Time of chusing the Electors, and the Day on which they shall give their votes; which Day shall be the same throughout the United States. ...

Furthermore, the courts have interpreted Article I, Section 4 as giving Congress the same authority over Presidential elections as it has over elections for Senator and Representative.

NVRA regulates the time, place and manner of voter registration which is considered to be one portion of the Federal election process. Several cases have considered and upheld the constitutionality of NVRA under Article I, Section 4 of the Constitution. See ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995).

In Section 9 of NVRA (42 U.S.C. 1973gg-7), the Federal Election Commission (FEC) is given limited regulatory authority:

- (a) IN GENERAL.-- The Federal Election Commission –
- (1) In consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);**
 - (2) In consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;
 - (3) Not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this Act on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this Act; and
 - (4) Shall provide information to the States with respect to the responsibilities of the States under this Act.

Furthermore in Section 802 of the Help America Vote Act (42 U.S.C. 15532), all of the FEC's responsibility for regulating under NVRA are transferred to EAC.

The statutory language in the NVRA granting regulatory authority has never been litigated as to its meaning, scope or breadth. However, there are several statements that may influence any court that considers the issue. First, Congress made a statement with regard to the regulatory authority that was granted in its conference report on NVRA.

SECTION 9. FEDERAL COORDINATION AND REGULATION

House bill

The House bill provides the Federal Election Commission the general authority to promulgate appropriate regulations necessary to carry out the Act. In addition, the Commission is to consult with chief election officers of the States to develop a mail voter registration application form for Federal elections and to submit to Congress, by June 30 of each odd-numbered year, a report assessing the impact of the Act on the administration of elections for Federal office and recommendations for improvements in procedures, forms or other matters.

Senate amendment

The Senate amendment is identical to the House bill, except that it limits the Commission's regulatory authority to prescribing only those regulations necessary to carry out its specific responsibilities in designing the mail registration application form and in reporting to the Congress.

Conference substitute

Adopts the Senate amendment. Although the Senate amendment narrows the provision contained in the House bill, the conferees expect the Commission to play an advisory role to the States and to facilitate the exchange of information among the States.

Second, the FEC promulgated regulations under its authority pursuant to NVRA. 11 CFR Part 8. Those regulations primarily reiterate the language of NVRA and dictate the content and format of the National mail voter registration application form. While these regulations provide some guidance as to what must be on the form, they provide little information as to what it means that the States must “accept, use and make available the form.” See 11 C.F.R. 8.3(c).

Since its inception, EAC has not promulgated its own regulations under its NVRA/HAVA authority. HAVA did not make the FEC’s regulations *de facto* those of EAC – as compared to the situation wherein HAVA made the 2002 VVS, which were adopted by FEC, EAC’s voting system guidelines until the VVSG was developed. As such, EAC has not made any regulatory statement as to its authority under NVRA. EAC has, however, made statements in letters to both Florida and Arizona concerning its perceived authority and responsibilities under NVRA.

Federal Authority. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a State’s voter registration process for Federal elections. Voting Rights Coalition v. Wilson, 60 F.3d 1411,1413-1414 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996) (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)); Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791, 793-794 (7th Cir. 1995) (citing Smiley, 285 U.S. at 366, Ex parte Siebold, 100 U.S. 371 (1879) and United States v. Original Knights of the Ku Klux Klan, 250 F.Supp. 330, 351-355 (E.D. La. 1965). The Constitution “explicitly grants Congress the authority either to ‘make’ laws regarding federal elections...or to ‘alter’ the laws initially promulgated by the states. Thus...article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections.” Miller, 129 F.3d at 836.

In this way, while it is clear that Article I, Section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election (Edgar, at 794), this does not limit the Federal authority to set voter registration procedures for such elections. Voting Rights Coalition, at 1413. This is true even where States have declared voter registration to be a voting qualification (Wilson, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (Edgar at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA's regulation of the voter registration process has specifically and consistently upheld as constitutional by the Courts. Voting Rights Coalition, 60 F.3d 1411; Edgar, 56 F.3d 791; Miller, 129 F.3d 833. The NVRA mandates that States “*shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission pursuant to Section 9(a)(2) for the registration of voters in elections for Federal office.*” 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

See Attachment 2, Letter from Tom Wilkey to Secretary Brewer dated March 6, 2006; Attachment 4, Letter to Florida.

What is EAC’s authority to regulate under the NVRA?

HAVA transferred FEC’s authority under NVRA to EAC. The Court decisions relating to NVRA are instructive as to the extent of regulatory authority. The Courts have upheld the notion that the Federal government is authorized by the Constitution to regulate the procedure by which voter registration occurs, even when such regulation makes it difficult to enforce a state’s voter registration requirements. Edgar at 794-795. The Federal government may not, however, establish the requirements for registering to vote. U.S. Constitution, Article I, Section 2; U.S. Constitution, Amendment Seventeen; Edgar at 794. Congress, however, statutorily limited the regulatory authority of the responsible

government agency to two things: the Federal mail voter registration application form and the biennial report to Congress on the NVRA.

So, what is EAC's authority to regulate the Federal mail voter registration application form? This regulatory authority extends not only to the content and format of the Federal mail voter registration application form, as exercised by the FEC, but also to what it means to "accept" and "use" the Federal form. Legislation that gives an agency authority to regulate a form that must be accepted by the states and local governments must by that power give the agency the authority to determine what information and proof provided on or with that form constitutes a completed form that can be accepted and used. The latter portion of this authority was not exercised by the FEC in promulgating its regulations, but was within their discretion to regulate. EAC may promulgate regulations regarding the content, format, acceptance and use of the Federal mail voter registration application.

The Commission must determine whether and to what extent it will exercise its authority to regulate under the NVRA. The Commission may desire to be more expansive than FEC, issuing regulations relating to the acceptance and use of the form such as:

- What constitutes a complete Federal voter registration form that must be "accepted" and "used" by the state;
- What documentation, if any, must accompany the Federal form in order for it to be deemed complete;
- How long the form is valid;
- What, if any, additional information must be provided with forms submitted by voter registration agencies and/or groups conducting voter registration drives.

Or EAC may desire to exercise its authority in a more limited capacity such as the position and authority exercised by FEC. However, it is important to note that the regulations and guidance issued by FEC preceded many of the difficult questions that have arisen about voter registration, identification, and immigration/citizenship. EAC may not have the luxury of avoiding these difficult questions. This is, however, a policy decision for the Commission to make. Once that decision is made, EAC must take steps to develop and promulgate its own regulations under NVRA.

TRANSFERRING FEC REGULATIONS

EAC has not previously acted to regulate under the NVRA. In addition, the regulations promulgated by FEC still appear in Title 11 of the Code of Federal Regulations. While the Commission may desire to undertake a more extensive rule making activity under NVRA, that sort of

undertaking whether minor or major will take a good deal of time and there are pressing questions that must be answered in the interim. It will also involve public input throughout the process.

One way for EAC to establish some authority for answering questions such as whether to change a state's instruction on the National Form is to transfer the regulations promulgated by the FEC. The regulations could be transferred in whole or in part and with or without administrative changes. Other Federal government agencies including the Department of Justice and Treasury have used this technique to transfer regulations when new agencies are formed or when responsibility for functions are transferred.

The rule making provisions of the Administrative Procedure Act (APA) creates an exception to the notice and comment requirements:

when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

See 5 U.S.C. 553(b)(3)(B). The APA likewise provides an exception to the 30-day publication requirement for good cause established by the agency.

Section 802 of HAVA transfers to EAC the responsibilities that FEC had under the National Voter Registration Act. The current NVRA regulations were adopted by the FEC with notice and comment from the public. The transfer that would be contemplated would involve moving the FEC's regulations from 11 CFR Part 8 to a CFR location designated for EAC regulations. This movement would not change the substance of the rules that were previously subjected to notice and comment. As such, additional comment on these rules is not necessary and would be contrary to the public interest in that it would delay EAC's ability to consider questions regarding needed or desired changes to state instructions. Furthermore, transfer of the regulations would not change the reporting requirements currently imposed upon states and local governments. As such, the provisions of the Paperwork Reduction Act would not come into play.

FUTURE NVRA ACTIVITY

While EAC should take some immediate action to facilitate making decisions on state instructions to the National Voter Registration Form, transferring the FEC regulations alone will not suffice. First, the FEC

regulations are vague as to how state instruction changes will be handled. EAC should adopt further implementation policies to discuss how EAC will consider requests for state instruction changes. Second, the FEC regulations do not comport with the requirements of HAVA. While the FEC did change the National Form to conform to the new requirements for voter registration as stated in HAVA, it did not change its regulations to reflect these changes in the law. Some changes must be made in order to make the regulations comply with HAVA. Third, the FEC regulations do not address some of the difficult issues that face election officials, voters and advocacy groups today. Many issues related to voter registration have arisen in the past five years. Immigration and citizenship are publicly debated and impact the registration of eligible voters. Many states have passed or are contemplating new voter identification laws. Furthermore, groups and agencies other than the county registrar of voters are now more engaged in registering voters. While some perform this function quite well and timely, others have come under scrutiny for their untimely return of voter registration forms or return of falsified registrations. These issues may deserve additional debate, discussion, and potentially regulation.

In order to fill the gaps that are left by FEC's regulations, EAC should take one or more of the following actions under NVRA:

1. Adopt a policy to consider state specific instructions on the National Voter Registration Form.
2. Make changes to the current FEC regulations to make those regulations consistent with existing law.
3. Undertake a comprehensive review of the voter registration process under the NVRA and issue substitute or additional regulations that will address some of the more pressing issues that face voter registration today.

These are merely concepts at this point and concepts that need additional explanation and planning. My colleague, Edgardo Cortes, will discuss the steps, timelines and resources needed to undertake each of these activities.