



OFFICE OF THE VICE CHAIR

U.S. ELECTION ASSISTANCE COMMISSION  
1225 NEW YORK AVENUE, N.W., SUITE 1100  
WASHINGTON, D.C. 20005

**POSITION STATEMENT  
COMMISSIONER RAY MARTINEZ III  
JULY 10, 2006**

**ON THE MATTER REGARDING EAC TALLY VOTE DATED JULY 6, 2006:  
“ARIZONA’S REQUEST FOR ACCOMMODATION”**

On Thursday, July 6, 2006, EAC Chairman Paul DeGregorio proposed, via a Tally Vote, that the EAC “...amend the Federal Form’s state specific instructions to accommodate Arizona’s proof of citizenship procedure.” In a letter from EAC Executive Director Tom Wilkey to the State of Arizona, dated March 6, 2006, the EAC had previously refused Arizona’s request to amend its state specific instructions affixed to the Federal Form and condition the use and acceptance of the Federal Form upon an applicant providing proof of citizenship.<sup>1</sup> Because of the significance of this proposed Tally Vote, I write today to briefly explain my rationale for disapproval.

**INAPPROPRIATE USE OF TALLY VOTE PROCEDURE**

Throughout its 32-month history, the EAC has utilized Tally Votes for routine matters, most typically, for disbursement of Requirements Payments to States under Title II of HAVA.<sup>2</sup> Never has the EAC utilized a Tally Vote procedure to overrule a decision of our executive director. To date, the EAC has recorded *public* votes on matters such as election of officers, adoption of the first set of voluntary guidance regarding statewide voter registration systems, and adoption of the Voluntary Voting System Guidelines of 2005. Moreover, on the one previous occasion when the EAC did consider a significant

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<sup>1</sup> See, *Letter from Thomas Wilkey to Arizona Secretary of State*, dated March 6, 2006.

<sup>2</sup> See generally, *EAC Annual Report to Congress for FY 2004*, Election Assistance Commission (2005); *EAC Annual Report to Congress for FY 2005*, Election Assistance Commission (2006).

matter related to the National Voter Registration Act of 1993,<sup>3</sup> the EAC took a public (and unanimous) vote to decide the issue. In my view, this decision is too significant to be taken without the benefit of a properly noticed and convened public meeting or hearing. This is particularly true in light of the fact that if the EAC were to approve this Tally Vote, we would be drastically altering our agency's interpretation of NVRA on a matter of fundamental importance to the American public.

Importantly, while each commissioner possesses the authority under rules adopted by the EAC to procedurally object to any Tally Vote, delay its final implementation and require it to be debated at a future EAC public meeting,<sup>4</sup> I will not exercise such authority today. In short, I stand by the EAC's previously articulated legal rationale on this matter and I believe no further EAC action is currently warranted, especially in light of the fact that the EAC is not a party to any litigation on this matter nor has the EAC been ordered to take specific action by any court.

My further rationale for disapproval of this proposed Tally Vote is stated below:

1. **Confusion for Arizona Voters.** Chairman DeGregorio contends that the EAC 's prior determination of this matter,<sup>5</sup> together with the "preliminary" decision by U.S. District Court Judge Roslyn Silver as well as Arizona's current position regarding the Federal Form "...have created significant confusion for the Arizona voters." As a result, Chairman DeGregorio proposes that we "...not allow this confusion to disenfranchise Arizona voters [and that] we amend the Federal Form's state specific instructions to accommodate Arizona's proof of citizenship procedure."

However, nothing has changed with regard to how Arizona treats the Federal Form, even after the opinion issued last month by Judge Silver. That is, Arizona Secretary of State Jan Brewer, pursuant to Proposition 200, has previously

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<sup>3</sup> See, *Statement of Policy Regarding National Mail Voter Registration Form*, Election Assistance Commission, August 10, 2004, at [http://www.eac.gov/statements\\_resolutions.htm](http://www.eac.gov/statements_resolutions.htm).

<sup>4</sup> See, EAC Tally Vote "Procedures for Voting by Circulation," certified by a vote of 4-0 on May 4, 2004.

<sup>5</sup> *Letter from Thomas Wilkey to Arizona Secretary of State*, dated March 6, 2006.

instructed Arizona county recorders to treat the Federal Form as incomplete if an applicant submits the form without appropriate proof of citizenship.<sup>6</sup> Judge Silver's opinion does not bar the State of Arizona from requiring proof of citizenship upon receipt of the Federal Form. Accordingly, any voter registration applicant utilizing the Federal Form in Arizona is today treated in the *exact same manner* as before Judge Silver's opinion. Furthermore, since continued litigation and/or appeals on this matter are likely – including a hearing currently pending before Judge Silver later this month to decide the merits of a preliminary injunction sought by the plaintiffs in *Gonzalez v. State of Arizona*, (No. CV 06-1268-PHX-ROS) – it is evident that any action today by the EAC may be premature.

Furthermore, reversing our current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue. Already, at least one state is considering legislation in the wake of Arizona's decision to require proof of citizenship upon voter registration.<sup>7</sup> Other states are likely to follow. For the EAC to reverse its position at a time when the courts have only just begun to contemplate this important issue is untimely at best. What about the confusion that will be caused if today we grant Arizona its request for an accommodation and other States are left wondering whether they too, should (or can) be requiring proof of citizenship with the Federal Form? Will each State need to specifically come before the EAC to request an accommodation? Will each State need to pass a law or promulgate an administrative rule requiring proof of citizenship with the Federal Form before requesting an accommodation from the EAC? Or, will this specific decision for Arizona be deemed by the EAC as applicable across the board for all NVRA-covered jurisdictions? These are but a few of the many questions which will inevitably arise if we were to approve this Tally Vote – questions, by the way,

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<sup>6</sup> See, *Letter from Secretary Jan Brewer to Chairman DeGregorio*, dated March 13, 2006.

<sup>7</sup> April Washington "Election Officials Split on Voting Bill," Rocky Mountain News, July 4, 2006 (referencing Colorado election officials responding to the proposed 'proof of citizenship' bill).

which this Tally Vote does not address. State and local jurisdictions are best served by an EAC that exercises its limited authority under both NVRA and HAVA in a measured, deliberate and *consistent* manner.

Given that the EAC is not a party to the specific litigation referenced by Chairman DeGregorio; that the EAC has not been ordered by Judge Silver or any other court to take any specific action on this matter; that a voter registration applicant in Arizona is treated exactly the same today as before last month's opinion by Judge Silver; that other States will be influenced by actions taken on this matter both by the courts and the EAC; and, that continued litigation and appeals are likely on this matter, it is clear that the EAC should today refrain from any further action that may ultimately cause even greater uncertainty not just for voters in Arizona, but for the entire country.

2. **EAC Precedent Already Established.** Last year, the EAC was presented with an analogous situation as that which confronts us today regarding the citizenship requirement in Arizona. That is, after passage of a new Florida law mandating that a voter registration applicant check a box attesting to the applicant's mental capacity, the State of Florida requested that the EAC amend its state-specific instructions affixed to the Federal Form to condition the use and acceptance of the Federal Form in a similar manner as is now done on the state-issued Florida voter registration form.

In rejecting Florida's request to allow conditional use and acceptance of the Federal Form, the EAC general counsel's office, with the unanimous consent of the EAC commissioners, wrote the following:

“...Florida's proposed policy, to treat all Federal Mail Registration Forms as incomplete, violates the provisions of the NVRA. The NVRA requires States to both “accept” and “use” the Federal Form. Under Florida's policy, State officials would take in the Federal Form, only to turn around and require its user to re-file or otherwise supplement their

federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither “accepted” nor “used” by the State. That language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. *Such acceptance and use of the Federal Form is subject only to HAVA’s verification mandate.* 42 U.S.C. 15483.”<sup>8</sup> (Emphasis added.)

Clearly, in refusing Florida’s request last year, the EAC not only established its own interpretive precedent regarding the use and acceptance of the Federal Form, but it also upheld established precedent from our predecessor agency, the Federal Election Commission. It is difficult for me to understand how today, we could reverse our agency’s position on this matter as it relates specifically to Arizona, and yet, somehow distinguish why Florida should not also be allowed to similarly condition the Federal Form. And, if this were to result, we would find ourselves headed down that perilous “slippery slope” where registration requirements would be markedly different from state to state for any applicant using the Federal Form – one of the principle reasons why Congress passed NVRA and created the Federal Form in the first place.

3. **Break from Consensus Decision-Making by the EAC.** This proposed Tally Vote will mark the first time that a decision by the EAC commissioners will be decided by a less than unanimous basis.<sup>9</sup> As such, regardless of the ultimate outcome, I am deeply troubled that a Tally Vote on this matter could produce a fundamental turning point in how present and future EAC commissioners approach contentious election administration issues. This, in my view, would be an unfortunate development for this agency. While public opinion among EAC

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<sup>8</sup> See, Letter from Gavin Gilmour, Associate General Counsel, to Dawn Roberts, Director of the Division of Elections, July 26, 2005.

<sup>9</sup> At least one hundred Tally Votes have been recorded by the EAC, with all Commissioners voting in the affirmative for each of the prior Tally Votes.

stakeholders is still mixed as to the benefits and drawbacks of a federal agency such as the EAC, there has been praise from nearly all fronts for the way the EAC has previously navigated difficult, politically-tinged issues while still maintaining unanimity on such matters.

For example, in the months leading up to the November 2004 presidential election, the issue regarding “casting” and “counting” of provisional ballots received much media scrutiny, as well as significant litigation in both state and federal courts throughout the country. Rather than wade directly into the issue by utilizing our voluntary guidance authority under Sections 311 and 312 of HAVA<sup>10</sup> and, despite significant pressure to do so from various partisan interests, the EAC was able to deftly navigate this contentious issue. Ultimately, the EAC unanimously passed a timely resolution regarding provisional voting<sup>11</sup> and prudently allowed the courts to decide this controversial and politically-charged matter.

Likewise, the EAC faced similar issues on at least two occasions last year. In March of 2005, the EAC was apprised of a decision by the State of Arizona to condition the casting of provisional ballots in federal elections to the showing of proper voter identification as required by Proposition 200. In response, the EAC commissioners unanimously agreed to initiate collaborative discussions with the Department of Justice (DOJ) to interject our agency’s view that such conditioning of provisional ballots was inconsistent with HAVA. Ultimately, DOJ clarified its previously-issued pre-clearance letter to Arizona and Arizona in turn, eliminated the conflict between Proposition 200 and HAVA’s provisional voting requirements.

Similarly, as has already been explained, the EAC was asked last year by the State of Florida to amend its state-specific instructions affixed to the Federal Form in order to condition the use and acceptance of the Federal Form upon the applicant

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<sup>10</sup> See 42 U.S.C. § 15501; 42 U.S.C. § 15502.

<sup>11</sup> See, EAC Resolution 2004-002: “Provisional Voting,” October 12, 2004, at <http://www.eac.gov/docs/Resolution%20-%20Provisional%20Voting.pdf>.

furnishing additional information regarding mental capacity. After careful analysis, the EAC's general counsel, with the unanimous support of EAC commissioners, issued a determination to Florida which upheld the 13-year precedent of the NVRA – that the Federal Form, as promulgated by the EAC, must be unconditionally used and accepted by all NVRA-jurisdictions.

What is significant about the examples cited above – which involve issues that touch upon both the voluntary guidance and limited regulatory authority possessed by the EAC – is that when faced with these politically difficult decisions, the EAC commissioners have heretofore chosen a consensus-driven path that *does not* seek to alter the carefully crafted balance of federal/state roles regarding election administration. Such a measured and deliberate approach is most appropriate at this particular time for the EAC, especially as we approach a contentious 2006 general election in which state and local election administrators will need the support, resources and *credibility* of a fully functioning EAC. My strong concern is that this particular Tally Vote may lead the EAC down a path that many EAC stakeholders have explicitly said they do not want: an overly partisan federal agency that is more prone to deadlock than to fulfilling its ultimate and, in my view, most important promise of serving as a national clearinghouse and creating the “gold standard” in national voting system standards and certification.

## CONCLUSION

Lastly, I would like to reiterate my ongoing commitment to the essential role played by state and local governments in administering the process of election administration. As an EAC commissioner, I have made it my priority to build a genuine and lasting partnership with election officials at all levels of government – irrespective of political party affiliation – and I have actively sought their input to guide my work on the EAC. I will continue to honor and support the strong tradition of state and local control over the process of election administration. I would also like to specifically mention the high personal regard I have for Arizona Secretary of State Jan Brewer. She and I have had a chance to extensively discuss this matter and, despite our obvious policy disagreement, I

believe she is committed to serving the people of Arizona with integrity and fairness – as she has throughout her extensive and notable career in public service.

Perhaps it is inevitable that someday, Congress will decide to vest greater authority upon the EAC, particularly as politically-charged issues become more frequent. While I reserve judgment today on whether or not such a development merits consideration, the EAC that currently exists – as envisioned by nearly all who participated in the development of HAVA – was one relegated largely to voluntary guidance and an advisory role on matters of election administration. As such, when any matter comes before this agency which would significantly alter the carefully crafted balance of federal/state authority that is implicit in laws such as NVRA and HAVA, I believe the EAC has an obligation to exercise its voluntary guidance *and regulatory authority* in the most limited, deliberative and transparent manner possible.

For the reasons put forth in Mr. Wilkey’s letter to Arizona dated March 6, 2006, and, after careful and due consideration of Judge Silver’s opinion, I continue to believe that our current agency position accurately reflects the plain language of NVRA, as well as Congressional intent in passing this historic law.

While I respect Chairman DeGregorio’s right to bring this matter before the EAC, for the reasons stated above, I respectfully disapprove of this proposed Tally Vote.

Respectfully Submitted,

A handwritten signature in black ink that reads "Ray Martinez III". The signature is written in a cursive, slightly slanted style. The "III" is written as three distinct vertical strokes.

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**COMMISSIONER RAY MARTINEZ III**

**July 10, 2006**