

Testimony of
Myrna Pérez, Counsel
Brennan Center for Justice at NYU School of Law
Before the
Election Assistance Commission
September 6, 2007

Good afternoon Commissioners and thank you for the opportunity to address you today. My name is Myrna Pérez, and I am an attorney at the Brennan Center for Justice at NYU School of Law. The Brennan Center for Justice is a nonpartisan think tank and advocacy organization that focuses on issues of democracy and justice. We are deeply involved in efforts to encourage full and fair participation in elections, to open opportunities for voter registration, and to ensure secure, accurate, and accessible voting.

We are pleased that the Election Assistance Commission (“EAC”) has invited public comment on the scope of its authority under the National Voter Registration Act of 1993 (“NVRA”). Many of the reforms promoted by the Brennan Center are designed to effectuate the policies reflected in the NVRA and the Help American Vote Act (“HAVA”), which are the two principle sources of authority for the EAC’s powers and functions.

HAVA limits the EAC’s rulemaking authority to those activities set forth under section 9 of the NVRA, 42 U.S.C. § 1973gg-7(a). That provision charges the EAC with three responsibilities: (1) submitting a report to Congress assessing the impact of the NVRA on the administration of elections for federal office during the preceding two-year period (sometimes referred herein as the “biannual report”); (2) developing and maintaining a mail voter registration application form for elections for federal office, and (3) providing information to the states with respect to their responsibilities under the NVRA. HAVA, however grants express regulatory authority to the EAC only with respect to the first two responsibilities.

The limits on the EAC’s regulatory authority under the NVRA are not my focus today. Instead, I will discuss the ways the EAC can effectuate the NVRA’s goals, consistent with its powers, through both formal rulemaking and informal procedures. Specifically, I focus upon: (1) the information the EAC can provide to states to encourage NVRA compliance, and (2) if the need arose, the categories of changes to the National Voter Mail Registration Form (sometimes referred herein as the “Federal Form”) for which formal rulemaking is unnecessary and impractical.

1. Measures Should Be Taken To Improve NVRA Compliance

As set forth in its text, the NVRA's primary purpose is to establish procedures that will increase the number of eligible citizens who register to vote in elections for federal office. Today's reality is that this goal is not being achieved. In fact, statistics suggest the country is regressing with respect to registration of eligible persons. As evidenced by the EAC's June 30, 2007 report to Congress on the NVRA's impact, a majority of states experienced a decrease in registration between the 2004 and 2006 elections. Nationally, the percentage of the voting age population that is registered also decreased.

While some of these declines may be attributable to more accurate registration rolls, such as rolls with fewer duplicate registrations, the studies suggest there is cause for worry that states are not heeding their NVRA responsibilities. For example, the EAC's report found noteworthy variation among states with respect to the provision of voter registration applications by state public assistance agencies. Additionally, a recent study by ACORN, Demos, and Project Vote found a steep decline in voter registration applications from public assistance agencies governed by Section 7 of the NVRA from 1995 to 2005.

There are measures the EAC can take pursuant to its information-providing authority that would go far in encouraging states to honor their NVRA obligations. These measures would encourage NVRA compliance and give the public information with which to hold states accountable for deficiencies.

a. Give States Report Cards of their Progress

The EAC already collects NVRA information from states for the biannual report to Congress. The information is presented to Congress by state, and some of the metrics show results over a period of years. The information already gathered could be presented to states in a way that clearly and concisely shows, with respect to certain relevant metrics, how: (1) a state progressed in a given biannual period compared with previous periods; (2) a state's absolute performance ranks compared with other states for that period, and (3) a state's relative progress compares with other states for that period. The "report card" could be distributed to the state's chief election officer, and all of the state report cards could be compiled for distribution to Congress and the public, perhaps as an appendix to the biannual report.

We believe information presented in this way would go a long way toward encouraging state goal-setting and allowing the public to hold the relevant state officials accountable for any lapses or shortcomings. Because information conducive to this presentation format is already collected, preparation of the report cards would require minimal additional expenditures.

b. Encourage States to Share Information with Each Other with Respect to Training Activities

The EAC rightfully noted in its biannual report that many states do not provide training to all agencies involved in voter registration. To ensure that untrained individuals are not involved in processing registration applications, the EAC already recommended that states provide training to all agencies involved in voter registration. To encourage this practice, the EAC, consistent with both its information-providing and “clearinghouse” capacities, could request materials, course syllabi, and training schedules from the states that do provide training to all agencies involved in voter registration. The EAC could then catalogue and post that material for public access.

Collecting and disseminating this information would serve two functions: (1) providing the public with the opportunity to review the material that is being used to train state and federal employees for the critically important function of processing voter registration applications, and (2) providing states which currently do not provide training a starting point upon which to build. By facilitating the distribution of well-designed training materials, the EAC would promote better education of agency officials responsible for delivering registration assistance, help arrest the declining rate of registration by state agencies, and improve NVRA compliance.

c. Collect and Distribute Information as to Why Voter Registration Applications Are Rejected

To develop the recommendations set forth in its biannual report, the EAC surveys states with respect to their list maintenance processes and procedures. The EAC’s survey instrument inquires whether applicants are notified and provided a reason when their registration applications are rejected or denied. The EAC’s survey instrument also asks the reasons for the rejection of the absentee ballots. What is missing in the instrument, and is critical to informed discussions of list maintenance practices, is a statewide analysis of why applications are being rejected. This practice would bring much sunlight to a process that occurs largely outside the public eye. The data would permit and encourage officials and public advocates to take a critical look at the limitations of their state’s list maintenance practices and help them to identify errors in lists used to verify voter information, inadequate matching criteria, and other flaws.

2. Formal Rulemaking Is Not Essential for Every Change to the Federal Form

The formal rulemaking process exists to give the public notice and opportunity to comment upon rules or regulations prior to their implementation. Rulemaking provisions, such as those of the Administrative Procedures Act (“APA”), seek to “guarantee to the public an opportunity to participate in the rule making process.”¹

Public notice and opportunity to comment are essential to promoting transparency and public participation and guarding against due process violations or overreaching by regulatory agencies. By design, the rulemaking process introduces time-consuming

¹ Attorney General’s Manual on the Administrative Procedure Act 26 (1947), available at <http://www.law.fsu.edu/library/admin/1947cover.html>.

deliberation into the regulatory arena. Deviations from the process, which reduce the accountability and transparency of the government to its people, should not be undertaken lightly.

Nevertheless, administrative law recognizes that not every agency activity should be subject to the formal rulemaking process. In fact, the APA lists three specific exemptions from the notice requirements of its rulemaking provisions: “Except when notice or hearing is required by statute, this subsection does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” 5 U.S.C. § 553(b)(A). Additionally, under Section 553(b)(B), the APA also allows agencies to bypass the notice and comment rulemaking provisions with “good cause.”

The categorical exceptions seem simple enough, but it is not always easy to figure out whether a particular activity falls within the scope of an exception. The situation is less thorny for the EAC than for other agencies because the regulatory limits imposed by HAVA narrow the situations in which the exceptions would even apply. Although rulemaking should be the presumptive mechanism for changes, we suggest that some actions taken by the EAC with respect to the Federal Form could occur outside the formal rulemaking process.

The Federal Form is a 25-page document consisting of a cover with a stylized map, two voter registration applications, and instructions divided into three categories: (1) General Instructions, (2) Application Instructions, and (3) State Instructions. The General Instructions provide background information, the Application Instructions provide an explanation of each box on the registration form, and the State Instructions provide the registration deadline, the state mailing address to which one should send the completed form, and specific state rules regarding boxes 6-9 on the registration form.

This form is of great consequence to the public. Indeed, the EAC’s biannual report revealed that 8.2 million applications were submitted by mail. The Brennan Center believes, however, that some changes made to the Federal Form need not be subject to the rulemaking process. Specifically, there are certain narrow and discrete categories of changes that, if identified and designated in advance, could be exempted from the rulemaking process without running afoul of the public’s right to comment. Allowing such limited exemptions would promote efficiency and reduce confusion.

Below we describe discrete categories of changes that we believe could be made to the Federal Form outside a rulemaking process, should the need for such changes arise. To preserve transparency, promote public participation, and prevent future inefficiencies, the EAC should consider providing the public notice and the opportunity to comment on the topic of which categories of changes to the Federal Form could be made outside the rulemaking process.

- a. Obvious Spelling Errors, Grammatical Errors, and Format Deviations Should Be Promptly Corrected

Correcting an unintended and obvious mistake, such as the misspelling of a word, simple grammatical errors such as verb-noun agreement or improper punctuation, unintended deviations from the formatting pattern of the document, or other errors arising out of human fallibility, is a ministerial task. Mistakes such as these, which cause confusion and depress confidence in the country's election administration, should be corrected promptly upon discovery.

b. Changes to Mailing Addresses and Cover Art Do Not Require Notice and Opportunity for Comment

In most circumstances, items designed to be unique to a particular printing, for example the cover art and the state addresses to which the forms should be sent, do not require notice and comment to be changed. The cover art, rather than being of a substantive nature, is more related to the EAC's branding. State addresses, in addition to being non-controversial and administratively related, are easily verified. Changes made to both of these items will usually be administrative or ministerial in nature and will not require notice and comment, provided that a majority of the Commissioners agree that the change will not be misleading to the public or create confusion. If the changes are later determined to have an unintended negative effect on usability or accessibility, there should be a swift and simple process for reverting to an earlier version.

c. Changes Made to the Application Should Almost Always Be Subject to Notice and Comment

The application is an extremely important element of the Federal Form. In most circumstances, it will be the only part of the Federal Form that will be read. Not only must putative voters be able to read, understand, and complete the form, the contents must be easily understood by registration workers, registrars, and others circulating or processing the form. Obvious spelling errors, grammatical errors, or unintended format deviations may be correctable without notice and comment, but changes of a substantive nature should undergo the formal rulemaking process. Such changes go to the issue of readability and access and would include alterations to: design, wording, box placement, font type, font size, or color.

d. Non-Ministerial Changes Made to the General Instructions Should be Subject to Notice and Comment

While there is some support for excepting changes made to the General Instructions from the rulemaking process, under the doctrine exempting interpretive rules from the usual notice requirement, exercising such an exception would be imprudent. Election laws are often complicated and cover unfamiliar topics. Accordingly, there will be no definitive and uncontroversial interpretation of laws pertaining to registration until one is set forth by the courts. It therefore would be more appropriate for the EAC to act with an abundance of caution and solicit the opinions of experts when choosing the phrasing and substance that is to become part of the General Instructions.

e. Changes Made to the State Instructions Should be Subject to Notice and Comment

For the reasons explained above, the EAC will best protect eligible citizen's right to register if changes made to the State Instructions take place in the context of notice and comment. Before making changes of this nature, the EAC should solicit the State's interpretation of state law, especially if the state law has been revised. This formal process is crucial in building a record when there is disagreement about whether a particular state is appropriately interpreting its own law in the context of federal law, as there was in Arizona, when the state of Arizona requested amendment of the Arizona instructions as they pertain to the Federal Form to reflect documentary proof of citizenship requirements for Arizona voter registration.

Conclusion

The primary impetus for the NVRA is to establish procedures that will increase the number of eligible citizens who register to vote in elections for federal office. The EAC, along with the Department of Justice and others, share responsibility for achieving this objective. At the same time, federal action is limited in many ways under the U.S. Constitution.

The task that the EAC is uniquely qualified to perform with respect to advancing the goals of the NVRA is providing states with the best information available. This is a job the EAC should execute faithfully and vigorously. Because the EAC was created to perform a clearinghouse function, it should recognize those opportunities to disseminate information from experts, legislators, and the public.

In addition, the EAC should examine how rulemaking requirements affect its ability to revise the National Mail Voter Registration Form. The formal rulemaking process may not be warranted in every circumstance because there will be instances in which the benefits of minimizing public confusion and promoting administrative efficiency outweigh the benefits of public participation. The EAC should consider which changes to the National Mail Voter Registration Form absolutely require notice and comment, and which are of a ministerial nature that, with proper advance identification and designation, could be adopted outside the formal rulemaking process.

We urge the EAC to consider our recommendations as it seeks to advance the goals of the NVRA and fulfill its obligations under the Act.

Thank you.