



**U.S. ELECTION ASSISTANCE COMMISSION**  
**1225 New York Ave. NW – Suite 1100**  
**Washington, DC 20005**

March 19, 2008

**MEMORANDUM**

**TO:** EAC Commissioners

**CC:** Thomas Wilkey, Juliet Hodgkins, Gavin Gilmour, Jeannie Layson, Tamar Nedzar, Bryan Whitener

**FROM:** Edgardo Cortés, Acting Director, Election Administration Support Division

**SUBJECT:** Staff Recommendations Regarding Pending State Requests to Change the Federal Form State Specific Instructions

There are currently eight requests for changes to the state specific instructions of the National Mail Voter Registration Form (Federal Form) that have been officially submitted to the EAC. The Chair has requested that I provide additional information regarding the four new requests. The staff has previously briefed the Commissioners on pending requests by Arizona, Colorado, New Jersey, and Rhode Island and therefore those requests are not included in this memo. This memo details the four new requests and provides recommendations for action.

Although the Election Administration Support Division is providing individual recommendations regarding the pending requests, the Division continues to recommend that an internal policy be established prior to acting on state requests. A formally adopted policy would ensure transparent, uniform, and nondiscriminatory decisions on pending and subsequent requests to update the state-specific instructions of the Federal Form, while the EAC works to take more formal action. This position is supported by the EAC General Counsel opinion provided to the Commissioners in a February 5, 2008 memo (Attachment 1, please note this document contains attorney-client privileged information).

## 1. Delaware

- a. The current state instructions for Delaware have the following voter registration deadline:
  - i. **“Registration Deadline** — 20 days prior to the general election and 20 days prior to any primary election.”
- b. Delaware has requested that the voter registration deadline information be changed to the following:
  - i. **“Registration Deadline** — The 4th Saturday before a primary or general election, and 10 days before a special election.”

**Staff Recommendation:** The NVRA sets requirements for voter registration deadlines in 42 U.S.C. §1973gg-6. The registration deadline submitted by Delaware is consistent with the requirements of NVRA and does not appear to conflict with any other Federal statute or regulation. The staff recommends updating the voter registration deadline for the state in order to provide voters with accurate information concerning the timely submission of voter registration forms.

## 2. Iowa

- a. The current state instructions for Iowa have the following voter registration deadline:
  - i. **“Registration Deadline** — Must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others. Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline.”
- b. Iowa has requested that the voter registration deadline information be changed to the following:
  - i. **“Registration Deadline** — Must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others.\* Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline.

\*If you fail to meet the voter registration deadlines above you can register and vote by following the guidelines for election day registration. You can find these on the Iowa Secretary of State’s website:  
<http://www.sos.state.ia.us/pdfs/elections/EDRbrochure.pdf>.”

**Staff Recommendation:** The NVRA sets requirements for voter registration deadlines in 42 U.S.C. §1973gg-6. The registration deadline submitted by Iowa is consistent with the requirements of NVRA and does not appear to conflict with any other Federal statute or regulation. The staff recommends updating the voter registration deadline for the state in order to provide voters with accurate information concerning the timely submission of voter registration forms.

### **3. Utah**

- a. The current state instructions for Utah have the following voter registration deadline:
  - i. **“Registration Deadline — 20 days before the election.”**
- b. Utah has requested that the voter registration deadline information be changed to the following:
  - i. **“Registration Deadline — 30 days before the election for mail-in applications; 15 days before the election for walk-in registrations at the county clerk’s office.”**

**Staff Recommendation:** The NVRA sets requirements for voter registration deadlines in 42 U.S.C. §1973gg-6. The registration deadline submitted by Utah is consistent with the requirements of NVRA and does not appear to conflict with any other Federal statute or regulation. The staff recommends updating the voter registration deadline for the state in order to provide voters with accurate information concerning the timely submission of voter registration forms.

#### 4. Georgia

- a. The current state instructions for Georgia have the following language concerning ID number:
  - i. **“6. ID Number.** Your full social security number is requested. Your social security number will remain confidential and will not be disclosed except as required by law. The number will be used to identify and verify the identity of voters (Georgia Election Code, O.C.G.A. Ch. 21-2-219, 21-2-220, 21-2-225).”
- b. Georgia has requested that the language in this section be changed to the following:
  - i. **“6. ID Number.** Federal law requires you to provide your full GA Drivers License number or GA State issued ID number. If you do not have a GA Drivers License or GA ID you must provide the last 4 digits of your Social Security number. Providing your full Social Security number is optional. Your Social Security number will be kept confidential and may be used for comparison with other state agency databases for voter registration identification purposes. If you do not possess a GA Drivers License or Social Security number, a unique identifier will be provided for you.”

**Staff Recommendation:** Georgia previously claimed an exemption under section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), which allowed the state to require the full social security number of applicants on voter registration applications. This exemption was challenged in court and the state was ordered (Attachment 2) to implement the requirements for voter identification numbers contained in section 303(b)(2)(A) of HAVA. In addition, the state is not able to require the submission of a full social security number by applicants. This change in state procedures required changes in the statewide voter registration database. As part of the agreement between the parties, the state continued to request (not require) the full social security number of applicants. The EAC included this change on the Federal Form on September 12, 2006, the last time the Federal Form was updated.

The state has now completed implementation of the changes in its statewide voter registration database needed to process voter registration applications using the voter identification numbers required under HAVA. The state has requested a change on the Federal Form in order to fully implement the Court's order. The language requested by the state is pursuant to a court order, consistent with the requirements of HAVA and NVRA, and does not appear to conflict with any other Federal statute or regulation. Therefore, the staff recommends updating the ID number portion of Georgia's state instructions.

**ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**



**U.S. ELECTION ASSISTANCE COMMISSION  
1225 New York Ave. NW – Suite 1100  
Washington, DC 20005**

MEMORANDUM

TO: Commissioners Rodriguez, Hunter, Davidson and Hillman

FROM: Juliet Hodgkins, General Counsel

CC: Tom Wilkey, Executive Director  
Edgardo Cortes

DATE: February 5, 2008

RE: Questions regarding proposed disclaimer to be added to the National Mail Voter Registration Form

**Background**

On January 17, 2008, during the public meeting, a Commissioner asked a question regarding a proposal made by Commissioner Hunter to add a “disclaimer” to the National Mail Voter Registration Application to state, in conjunction with the specific state instruction, that the EAC has received a request from the state, but has not yet acted on the request. The specific language of the proposal is as follows:

“The state of \_\_\_\_\_ has requested a change to its state instructions. The Election Assistance Commission has not approved this request. For further information, please contact your state election official or refer to the following website: (website to be provided by the state).”

The specific question that was posed queried whether the act of inserting such a “disclaimer” on each state instruction for which a requested change has been made but not yet acted upon would constitute a change to the form and thereby require an act of rule making or regulating. While this is an important question, there is an underlying question that must be asked in conjunction with, if not prior to, answering the specific question posed: What impact does placing such a disclaimer in the state instructions have on the promulgation of the Federal Mail Voter Registration Application and what effect would it have on the requirement that states accept and use the Federal Form?

In order to answer these questions, some analysis of the governing statute, regulatory authority, regulatory history and nature of the Federal Mail Voter Registration Application are necessary.

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### **Statutory, Judicial and Regulatory Origins of the National Mail Voter Registration Application**

#### Statutory Requirements

The National Voter Registration Act (NVRA) was passed by Congress and signed into law in 1993. 42 U.S.C. 1973gg, et seq. The NVRA established a uniform method for handling certain voter registration activities, including requiring states to permit voter registration at motor vehicle licensing offices and public assistance officers (42 U.S.C. 1973gg-3 and 1973gg-5), uniform procedures for maintaining lists of registered voters (42 U.S.C. 1973gg-6), and a uniform application for voter registration (42 U.S.C. 1973gg-4 and 1973gg-7).<sup>1</sup> The NVRA charged the Federal Election Commission (FEC) with promulgating a uniform voter registration application, reporting on the impact of the NVRA and developing regulations necessary to carry out these functions. 42 U.S.C. 1973gg-7(a).

With respect to the Federal uniform application form, the NVRA specified some required elements (42 U.S.C. 1973gg-7(b)):

(b) CONTENTS OF MAIL VOTER REGISTRATION FORM. – The mail voter registration form developed under subsection (a)(2) –

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that –

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application –

(i) the information required in section 8(a)(5)(A) and (B);

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

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<sup>1</sup> The NVRA also authorizes states to create their own mail voter registration form, in addition to accepting and using the Federal form, as long as the state form met NVRA's minimum requirements. (42 U.S.C. 1973gg-4)

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(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

Finally, beyond describing minimum requirements of the form, the NVRA requires that the states “accept and use” the Federal Mail Voter Registration Application developed by the FEC and maintained, now, by the EAC.

(a) FORM. – (1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office.

42 U.S.C. 1973gg-4(a)(1).

Upon the passage of the Help America Vote Act of 2002 (HAVA), responsibility for maintaining the National Mail Voter Registration Application and regulations pursuant to NVRA fell to the Election Assistance Commission (EAC). 42 U.S.C. 15329 and 15532. Furthermore, HAVA amended the requirements of the Federal Form. HAVA added two questions to the form:

- (A) IN GENERAL. – The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973 gg-4) shall include the following:
- (i) The question “Are you a citizen of the United States of America?” and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.
  - (ii) The question “Will you be 18 years of age on or before election day?” and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

42 U.S.C. 15483(b)(4)(A).

### Judicial Challenges

Following the passage of NVRA, there were several challenges to its constitutionality and reach. Cases were heard in the Seventh and Ninth Circuit Courts of Appeal to consider whether Congress overstepped its authority to regulate the times, places and manner of holding elections for Senators, Representatives and the President pursuant to Article I, Section 4 and Article II, Section 1 of the Constitution. Association of Community Organizations for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (7<sup>th</sup> Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9<sup>th</sup> Cir. 1995). In each case, the



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Court upheld the constitutionality of the NVRA and Congress' efforts there under to regulate the voter registration process as it applies to elections for federal office.

In ACORN v Edgar, plaintiffs sued seeking an injunction and consent decree forcing the state of Illinois to comply the NVRA. Illinois questioned the constitutional authority under which NVRA was enacted and whether the law as enacted exceeded that constitutional authority. The Court found that while the framers of the Constitution likely did not contemplate voter registration in the sense that we understand it, that the "manner" of holding elections includes the system of registering persons to vote. ACORN, 56 F.3d at 793-794, citing Smiley v. Holm, 285 U.S. 355, 366, 52 S.Ct. 397, 399, 76 L.Ed. 795 (1932); Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1879); United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 351-55 (E.D. La. 1965). Further, the Court found that altering inconsistent state law regarding voter registration processes prescribed in NVRA is exactly what was contemplated by Article I, Section 4 of the U.S. Constitution.

Laying to one side, therefore, a possible conflict between Article I section 4 on the one hand and the Constitution's provisions regarding the qualifications of voters in federal elections on the other, we have a case in which Congress has exercised its power under the former provision to alter state regulation of federal elections. A state might already have had exactly the same provisions in its registration law (a law, let us say, equally applicable to state and federal elections) as are found in the "motor voter" law, and then that law would not alter state law. But, if, as is true in Illinois, the state law regulating registration for federal elections differs from the "motor voter" law, the latter does alter state law. This seems, however, to be exactly what is contemplated by Article I section 4. The provision confers on Congress as "general supervisory power," *Ex parte Siebold, supra*, 100 U.S. at 387, under which it may "supplement ... state regulations or may substitute its own." *Smiley v. Holm, supra*, 285 U.S. at 366-67, 52 S.Ct. at 399. See also *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884).

ACORN, 56 F.3d at 795.

Similarly, in Voting Rights Coalition v. Wilson, plaintiffs sought an order directing the state of California to comply with the NVRA. The Court found the limiting effects of the NVRA on state law governing registration of voters for federal elections to be a constitutional exercise of its power under Article I, Section 4.

Clearly, the Constitution denies to the states any power to "make or alter" the "Times, Places and Manner" of electing "Senators and Representatives," nor does it impose on the United States the burden, always heretofore borne by the states, of defraying the costs incurred by such alterations.

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Voting Rights Coalition, 60 F.3d at 1416.

Furthermore, the Court rejected a more limited reach of Article I, Section 4 as contained in the Federalist Papers. “[Hamilton] saw [Article I, Section 4] as a means by which Congress could preserve itself from states seeking its destruction by refusing to conduct elections.” Voting Rights Coalition, 60 F.3d at 1414.

This array of authorities supporting a broad reach of Article I, section 4 does not permit this court to limit its meaning to that given it by Hamilton in Federalist No. 59.

Id.

Last, one court has considered the very relevant question of what it means for the NVRA to require that the states “accept and use” the Federal Mail Voter Registration Application developed by the FEC and maintained, now, by the EAC. The meaning of this clause was addressed by the Eleventh Circuit Court of Appeals in Charles H. Wesley Education Foundation v. Cox, 408 F.3d 1349 (11<sup>th</sup> Cir 2005). In Charles H. Wesley Education Foundation, plaintiffs sued after election officials refused to accept voter registration applications submitted by the organization following a voter registration drive. The election officials refused to accept the forms based upon a state law that only permitted registrars and deputy registrars or otherwise authorized persons to accept or collect voter registration forms. Plaintiffs argued that the “accept and use clause” of NVRA preempted the state law. The Court agreed.

By requiring the states to accept mail-in forms, the Act does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates.

Charles H. Wesley Education Foundation, 408 F.3d at 1354.

### FEC Regulations

NVRA required FEC to develop a Federal Mail Voter Registration Application and authorized FEC to promulgate regulations sufficient to effectuate creating the form. 42 U.S.C. 1973gg-7(a). Based upon this directive, FEC issued an Advanced Notice of Proposed Rule Making “to seek comments from the regulated community (election officials) and other interested parties on the specific items of information that it proposed to include on the mail registration form.” National Voter Registration Act of 1993, Final Rules, 59 Fed. Reg. 32311 (June 23, 1994). In addition, it conducted several surveys of state election officials regarding their intentions to develop and use their own “state” forms as authorized by NVRA. Id.

In developing the regulations and the Federal Form, it is clear that FEC used the statute as its base. However, the statute set forth very few specific requirements:

- Signature of the applicant

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- A statement specifying each eligibility requirement, attesting that the applicant met the requirements, and signed by the applicant under penalty of perjury<sup>2</sup>
- A statement identifying the voter registration eligibility requirements and penalties for submitting a false application;
- A statement that if the applicant declines to register to vote that fact will remain confidential
- A statement that the location where the application was submitted will remain confidential
- Only such other identifying information as is necessary to assess the applicant's eligibility and administer the voter registration and other election processes.

It was up to FEC to define what was meant by the limiting clause in NVRA that restricted the required information on the form to only those items of information that were “necessary” to assess the eligibility of the voter. See 42 U.S.C. 1973gg-7(b)(1).

In developing the regulations for the national form, the Commission considered what items are deemed necessary to determine the eligibility to register to vote and what items are deemed necessary to administer voter registration and other parts of the election process in each state.

\* \* \*

The Commission has determined that the following information items are necessary to assess the eligibility of the applicant or to administer voter registration or other parts of the election process and thus has included them on the national mail voter registration form as specified at 11 C.F.R. 8.4.

- A. Full Name of Applicant ...
- B. Former Name, If Applicable ...
- C. Address Where You Live ...
- D. Address Where You Get Your Mail (If Different from the Address Where You Live) ...
- E. Former Address, If Applicable ...

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<sup>2</sup> It is important to note that the Courts have distinguished between the concept of “eligibility requirement” and procedure for registering to vote. In ACORN v. Edgar, 56 F.3d 791 (7<sup>th</sup> Cir. 1995), the Court draws a distinction between the qualification of voters and the process of registering to vote. “The ‘motor voter’ law does not purport to alter the qualifications fixed by the State of Illinois for voters in elections for the Illinois Assembly. If direct effects are possible: the law may, as the state argues, make it more difficult to enforce some of the qualifications, for example those relating to residency, by making it more difficult to strike non-residents from the rolls. But the existence of such effects cannot by itself invalidate the law. Such effects are bound to follow from any effort to make or alter state regulations of the times, places and manner of conducting elections, including the registration phase.” ACORN, 56 F.3d at 794-795. Similarly, the Court in Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9<sup>th</sup> Cir 1995) recognized the ability of Congress to regulate the registration of voters even when state law established registration as a qualification or eligibility requirement. “Article I, section 2 and the Seventeenth Amendment, in vesting the power to fix the qualifications of voters for Representatives and Senators in the states, do not explicitly remove the registration of voters by the states from the reach of the power of Congress, provided by Article I, section 4. The fact that some states include registration in their enumeration of qualifications does not alter this conclusion.” Voting Rights Coalition, 60 F.3d at 1413.

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- F. Date of Birth ...
- G. Telephone Number (Optional) ...
- H. Voter Identification Number (for States That Require or Request It) ...
- I. Political Party Preference (for States Where it is Required to Participate in Partisan Nominating Procedures) ...
- J. Signature of Applicant Under Oath ...
- K. Date of Signature ...
- L. If You Are Unable to Sign Your Name, The Name, Address and (Optional) Telephone Number of the Person Who Assisted You In Completing This Form ...
- M. Race/Ethnicity ...

National Voter Registration Act of 1993, Final Rules, 59 Fed. Reg. 32312-32316.

FEC then went on to identify information requested by states that were not included as a part of the Federal Form. Id., 59 Fed. Reg. 32316-32317. These items included:

- A checkbox to identify whether the application is a new registration, address change, name change or a party change;
- Information on former party affiliation;
- Gender;
- Information regarding naturalization;
- Place of Birth;
- Occupation;
- Specific information regarding criminal conviction or mental incapacity;
- Height, weight, hair and eye color, or other physical characteristics;
- Marital status;
- Other name; and
- Miscellaneous items (e.g., language preference, assistance needs, desire to serve as a poll worker).

The FEC then set forth the format, layout, size, weight and color of the form. The FEC also determined that some of the items on the form may require additional explanatory information from the states and provided a mechanism by which states would report certain information to the FEC which would be included as state-specific instructions to the corresponding boxes on the form. The FEC required the following information to be provided by the states within 30 days of the promulgation of the final rule and within 30 days following a change to any of the following information:

- State's voter eligibility requirements
- What, if any, voter identification number the state requires or requests (and privacy statement if the state required a full social security number)
- Whether the state requires or requests a declaration of race/ethnicity
- Designation and address of the state election office where completed national mail registration applications should be sent.

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Id., 59 Fed. Reg. 32320

The information referred to above is what makes up the state-specific instructions to the National Mail Voter Registration Application. FEC defined these as being a part of the form.

(a) The national mail voter registration form shall consist of three components: An application, which shall contain appropriate fields for the applicant to provide all of the information required or requested under 11 CFR 8.4; general instructions for completing the application; and accompanying state-specific instructions.

11 C.F.R. 8.3(a).

The result of this rule making was the promulgation of FEC's regulations on NVRA (11 C.F.R. Part 8) and the creation of a National Mail Voter Registration Application.

### **Nature and Effect of the National Mail Voter Registration Application**

The National Mail Voter Registration Application is a uniform document for the registration of voters for elections for Federal office. The form is created by regulatory action of the FEC, now the EAC, in consultation with the States. It is distinct from its state-created counterparts.<sup>3</sup> The form as it is developed and promulgated by the Federal government must be accepted and used by the States. In this way, it preempts state law, altering any state registration procedures that would preclude the state from accepting it in its current form.

#### Regulatory Authority – In General

An agency must have specific statutory authority to issue rules which have the force of law.<sup>4</sup> This type of rulemaking is considered to be a legislative<sup>5</sup> or quasi-legislative function<sup>6</sup> because it is largely concerned with questions of policy.<sup>7</sup> Thus, inherent in the

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<sup>3</sup> NVRA specifically allows the states to create forms that comply with the same requirements as are imposed on the Federal Form. "In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 9(b) for the registration of voters in elections for Federal office." 42 U.S.C. 1973gg-4(a)(2). The state form is different and distinct from the form that is created by the Federal government. The state form is adopted through a different process. And, unlike the Federal form, it is not controlled by the Federal government.

<sup>4</sup> U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956); National Broadcasting Co., v. U.S., 319 U.S. 190 (1943).

<sup>5</sup> Shoreline Transp., Inc. v. Robert's Tours and Transp., Inc., 779 P.2d 868 (1989); Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992). See Tahoe-Sierra Preservation Council v. State Water Resources Control Bd., 259 Cal. Rptr. 132 (3d Dist. 1989), reh'g denied and opinion modified, (June 28, 1989) (an administrative rule is legislative in character).

<sup>6</sup> Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Booker Creek Preservation, Inc. v. Southwest Florida Water Management Dist., 534 So. 2d 419 (Fla. Dist. Ct. App. 5th Dist. 1988); People v. Samel, 115 Ill. App. 3d 905, 71 Ill. Dec. 738, 451 N.E.2d 892 (2d Dist. 1983).

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rulemaking function granted an agency is the authority it exercise discretion and make policy. This authority is, in turn, ultimately limited by the specific requirements of the authorizing statute.<sup>8</sup> Regulations which are not in harmony with the plain language of the underlying statute are invalid.<sup>9</sup> “If the delegation of rule-making is unconstitutional, the legislature in making it has acted ultra vires, and regulations issued in pursuance thereof are void. If the delegation is found to be constitutional, the *second requirement* is that the administrative authority act strictly in accord with its terms. Otherwise, the administrative authority has acted ultra vires, and its regulations are void.”<sup>10</sup>

As for the ultimate limits of an agency’s discretion, it is the agency’s duty to interpret its own statutes. Judicial review indicates that such an interpretation, so long as it is reasonable, will be upheld. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court stated: “With regard to judicial review of an agency’s construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>11</sup> Thus, courts afford an agency’s interpretation of its statute “Chevron deference” and uphold that interpretation if it is reasonable.

### Regulatory Authority – NVRA

The FEC’s, and now EAC’s, regulatory authority derives from the text of the NVRA.

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<sup>7</sup> Shoreline Transp., Inc. v. Robert's Tours and Transp., Inc., 779 P.2d 868 (1989); Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992)

<sup>8</sup> "In the first place, every agency must conform precisely to the statute which grants the power... ." State v. Whitman, 220 N.W. 929 (1928). Miller v. United States, 294 U.S. 435, 439, (1935); United Air Lines v. Civil Aeronautics Bd., 155 F.2d 169 (App. D.C. 1946); Port of Boston Marine Terminal Ass'n v. Boston Shipping Ass'n, 420 F.2d 419 (1st Cir. 1970), cert. granted, 397 U.S. 1035, (1970) and judgment rev'd on other grounds, 400 U.S. 62, (1970); Day v. U. S., 611 F.2d 1122 (5th Cir. 1980); Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); Watson Bros. Transp. Co. v. U.S., 59 F. Supp. 762 (D. Neb. 1945); Combs v. U.S., 98 F. Supp. 749 (D. Vt. 1951); U.S. v. Park Motors, 107 F. Supp. 168 (E.D. Tenn. 1952); Seagrave v. U. S., 131 Ct. Cl. 790, 128 F. Supp. 400 (1955); Cutler v. Kennedy, 475 F. Supp. 838 (D.D.C. 1979). "A regulation which ... operates to create a rule out of harmony with the statute, is a mere nullity." Lynch v. Tilden Produce Co., 265 U.S. 315, 320-322 (1924).

<sup>9</sup> U. S. v. Coates, 526 F. Supp. 248 (E.D. Cal. 1981), order aff'd in part, rev'd in part on other grounds, 692 F.2d 629 (9th Cir. 1982).

<sup>10</sup> Hart, *An Introduction to Administrative Law* (1940) p. 170; Ickes v. Underwood, 141 F.2d 546 (App. D.C. 1944); Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871 (E.D. N.Y. 1955), judgment aff'd, 238 F.2d 812 (2d Cir. 1956).

<sup>11</sup> Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (the Environmental Protection Agency (EPA), issued regulations implementing a permit requirement to allow a state to adopt a plant-wide definition of the term stationary source. The regulation, as interpreted by EPA, would allow states to treat all of the pollution-emitting devices within one industry the same. Chevron sued, contending that the EPA’s interpretation of what a stationary source was contrary to the law. In finding for EPA, the Supreme Court held that the EPA’s plant-wide definition was a permissible construction of the statutory term “stationary source” because it was a reasonable interpretation.)

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The Election Assistance Commission in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3)<sup>12</sup>

Paragraph (2) of the NVRA requires that the EAC, “in consultation with the chief election officers of the States, shall develop a mail voter registration application for elections for federal office.”<sup>13</sup> Read together, the EAC’s grant of authority is clear. The NVRA grants authority to the EAC to prescribe such regulations as are necessary to develop a mail voter registration application for elections for federal office.

The EAC is a regulatory agency. The term “such regulations as are necessary” grant full authority to the EAC to issue regulations and is language commonly used by Congress to grant this authority.<sup>14</sup> As noted above, EAC’s NVRA regulations will be statutory regulations and have the force of law. The agency is expected to make policy determinations and exercise discretion in its rulemaking. However, EAC rulemaking discretion is limited by the explicit prohibitions and requirements of the NVRA. For example, the NVRA explicitly prohibits the Mail Voter Registration Form from “including any requirement of notarization.” (42 U.S.C. 1973gg-7(a)(3)). As such the EAC has no authority to place in any part of the form or its instructions a notary requirement. Similarly, EAC’s form must meet the minimum requirements the NVRA places on the form at 42 U.S.C. 1973gg-7(b) (form must include only such information as is necessary, eligibility requirements, attestation, signature and the inclusion of specific statements). Additionally, the EAC may not through regulation or otherwise limit state’s obligation under the NVRA to accept and use the form.

To the extent these requirements require interpretation or serve as minimum requirements, it is the EAC’s responsibility to provide such interpretation or otherwise determine exactly what is necessary to promulgate the Form. EAC determinations in these matters will be afforded Chevron deference by the courts and upheld as long as they are reasonable.

### Regulatory Authority – FEC Regulations

FEC acted in 1994 to promulgate regulations under the authority granted it by the NVRA. Those regulations embraced the authorities and limitations discussed above. FEC began with the statute’s requirements. However, these requirements were few and the real work was in determining what the NVRA meant by “only such information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and

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<sup>12</sup> 42 U.S.C. § 1973gg-7(a)(1).

<sup>13</sup> 42 U.S.C. § 1973gg-7(a)(2).

<sup>14</sup> For Example: The Crop Insurance Corporation, in conjunction with the Secretary of Agriculture was granted authority to issue such regulations as are necessary to carry out its duties under its enabling legislation. 7 U.S.C. § 1506(p); The Coast Guard was also given authority to issue such regulations as are necessary to implement Annexes II-IV to the Protocol (international treaty provisions). 16 U.S.C § 2405(1)-(2); Federal banking agencies were given authority to issue such regulations as are necessary to carry out the provisions of the enabling legislation relating to accounting fees for international loans 12 U.S.C. § 3905(a)(2)(A).

## ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

to administer voter registration and other parts of the election process.” 42 U.S.C. 1973gg-7(b)(1).

It was incumbent upon FEC to define what was “necessary” to administering voter registration and election processes. Based upon their final rule, FEC clearly considered a variety of state registration information practices, identifying practices it would accommodate as “necessary” and those it would exclude as not.

The FEC’s regulations list both the information required by the NVRA (42 U.S.C. 1973gg-7(b)) and a separate list of information it deemed “necessary” to the administration of voter registration and elections through the rule making process. 11 CFR §8.4(a) &(b). It also included other requirements necessary for the administration of the process such as definitions, format of the form and state reporting requirements. 11 CFR §§ 8.4-8.6.

Conversely, FEC identified a number of items that were not necessary. These were practices required by certain states, but rejected by the FEC. This list is contained in the agency’s final rulemaking and described above. As an example, the list includes a requirement for information regarding the applicant’s naturalization or place of birth. FEC specifically considered requiring additional information in order to demonstrate citizenship, an eligibility requirement. However, it rejected this proposal that the naturalization information was a necessary item on the form, stating: “While U.S. citizenship is a prerequisite for voting in every state, the basis of citizenship, whether it be by birth or naturalization, is irrelevant to voter eligibility. The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury.”

### NVRA’s Accept and Use Requirement.

Beyond EAC’s authority under the NVRA to issue regulations necessary to develop the voter registration form, the statute explicitly requires that the form be “accepted and used” by the states. In doing so, it creates a force to which contrary state law must bend. The Courts have found that this exercise of power by Congress was constitutional, being permitted by Article I, Section 4 and Article II, Section 1 of the United States Constitution. See ACORN, supra; Voting Rights Coalition, supra. Moreover, the question of whether this section preempts contrary state law has been tested and upheld by the Eleventh Circuit.

By requiring the states to accept mail-in forms, the Act does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates. The [NVRA] simply requires that valid registration forms be delivered by mail and postmarked in time to be processed. 42 U.S.C. §§1973gg-2(a)(2), gg-6(a)(1)(D).

Charles H. Wesley Education Foundation, Inc., supra at 1354.



## ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

This is the same principle codified in FEC regulations requiring that “States shall accept, use, and make available the form described in this section.” 11 C.F.R. 8.3(c). The Federal Form must be accepted and used by the states as it exists and is promulgated by the EAC.

### **Addition of a Disclaimer Erodes the Validity of the Federal Form**

The proposed “disclaimer” would be attached to the language of each state-specific instruction for which EAC has received a requested change and on which EAC has not acted.

As set forth above, the National Mail Voter Registration Application exists as it was promulgated first by the FEC, and now as it is maintained by the EAC. That form consists of three components according to the language of FEC regulation establishing the form: the application, general instructions and state-specific instructions. 11 C.F.R. 8.3(a). One can reach no conclusion other than the fact that the state-specific instructions are part of and otherwise inextricably linked to the application form. Each item for which state-specific instructions may apply is explicitly prescribed by FEC’s regulations. Each state specific instruction makes reference to a box on the form itself and gives the application meaning through the instruction’s explanatory language. Thus, a change to the state-specific instructions must be made consistent with regulations and has a direct impact on the meaning of the form.

Ultimately, adding the proposed disclaimer language would call into question the validity, applicability, and authority of the form, as it would suggest that the form is incomplete, incorrect, unofficial or otherwise subject to some outside or undisclosed requirement. Neither applicants, nor election officials could act with certainty as to whether the form was properly completed and should be accepted. The statutory mandate that the form be “accepted and used” would be at best rendered unenforceable or at worst perceived as suspended by action of the EAC. The Federal Form is what the EAC says that it is. Adding language suggesting that the form’s promulgating authority views it as somehow incomplete adds confusion to the registration process and effectively removes the protection the NVRA grants to the form’s users. The users will have no legal assurance that their application form will be accepted and used by states. To change the “accept and use” mandate would require Congressional action, not regulatory action and certainly not unilateral action by the Commission.

I recommend that the Commission focus its efforts on issuing regulations and policies by which it can adopt changes to the state-specific instructions, particularly those changes which require no exercise of discretion on the part of the Commission. The addition of disclaimer language will only cause more harm in a situation that is already likely to result in confusion and uncertainty on the parts of the voter and the election official.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FILED IN CLERK'S OFFICE  
U.S.D.C. Atlanta

JUN 27 2006

DEBORAH SCHWIER, )  
THEODORE SCHWIER, )  
and MICHAEL CRAIG )

Plaintiffs, )

v. )

CATHY COX, in her official )  
Capacity as Secretary of State )  
of Georgia, )

Defendant. )

CIVIL ACTION NO.  
1:00-CV-2820-JEC

ANTHONY D. TILMONES  
*Gates*  
CLERK

CONSENT DECREE

The above-captioned action was filed on October 20, 2000, against Cathy Cox, naming her as a Defendant in her official capacity as the Secretary of State of the State of Georgia. [Dkt 1.] As amended, Plaintiffs' complaint seeks declaratory and injunctive relief pursuant to Section 7 of the Privacy Act (5 U.S.C. § 552a note) and the Voting Rights Act (42 U.S.C. § 1971(a)(2)(B)). [Dkt. 16] In an order dated January 31, 2005 this Court granted summary judgment to the Plaintiffs; that order was upheld on appeal for the reasons stated in this Court's memorandum opinion. *Schwier v. Cox*, 412 F.Supp. 2d 1266 (N.D.Ga 2005), *affirmed* 439. F.3d 1285 (11th. 2006) [Dkt. 60.]

The parties have jointly requested that this Court enter an order resolving all issues, and, for good cause shown, the Court now enters its final decree as follows:

**A. Injunctive Relief**

1.

For the reasons discussed in the Court's January 31, 2005 order and pursuant to the terms of Section 7 of the Privacy Act (5 U.S.C. § 552a note) and the Voting Rights Act (42 U.S.C. § 1971(a)(2)(B)), the State of Georgia, including the election officials in its political subdivisions (hereinafter, "the State"), by and through its Secretary of State, is enjoined from requiring that voter registration applicants provide their full nine digit social security number when registering to vote. This injunction does not preclude actions according to, nor does it anticipate, subsequent changes in federal law that may allow States to collect a voter's full nine digit social security number.

2.

In order to comply with the requirements of the Help America Vote Act (HAVA), 42 U.S.C. § 15481, et seq., on or after January 1, 2007, the State shall be authorized to require and collect a voter registration applicant's state issued driver's license number, state issued identification card number, or the last four digits of the applicant's social security number in order to register the applicant to vote. If the

applicant does not have a driver's license or a state issued identification card or a social security number, the State shall be authorized to issue a unique identifying number assigned by the State.

3.

The Secretary of State is in the process of modifying the statewide registration system so that it does not rely on social security numbers. Under the new system, Georgia's registration system will utilize driver's license numbers, the last four digits of social security numbers, or the state issued identification card number. However, in the future the State may also request and collect the full nine digit social security number on a voluntary basis from voter registration applicants, provided the State informs the registrant, as required by Sec. 7(b) of the Privacy Act, that, while the full nine digit social security number is requested, it is not required by law, the authority the number is requested (which authority shall include this order if the number is collected on a purely voluntary basis), and the use or uses that will be made of the number.

4.

Upon collecting the applicant's state issued driver's license number, state issued identification card number, the last four digits of the applicant's social security number, or nine digits of the applicant's social security number, the state

shall verify the accuracy of information provided by the applicant through the voter verification process as required by Section 303(a)(5) of the Help America Vote Act of 2002 (42 U.S.C. 15483(a)(5)).

5.

Between the time of this order and January 15, 2007, the terms of this Court's order of June 27, 2005, [dkt. 78] shall continue to apply.

6.

The social security numbers of Plaintiffs Deborah Schwier, Theodore Schwier, and Michael Craig, shall be expunged from the records on file at the Office of the Secretary of State and within their respective county voter registration offices. The Office of the Secretary of State is authorized to collect the driver's license number or the last four digits of the Social Security number of the Plaintiffs.

7.

The State is authorized to require and collect the driver's license number, state issued identification card number, or the last four digits of the Social Security number of any voter who may not have provided the full social security number. No voter will be removed from the list of registered voters solely for failure to respond to the request for an alternate number; however, at any time that an elector

changes his or her registration status, precinct, or residence, the State is authorized to require and collect the driver's license number, state issued identification card number, or the last four digits of the Social Security number of any voter who may not have provided the full social security number and may remove any voter from the voter registration rolls at that time if he or she refuses to provide such a number.


8.

The Office of the Secretary of State is authorized to remove the full nine digit social security number from the voter registration system of any person who requests and completes a new voter registration application for the purpose of removing the full nine digit social security number from the voter registration system and replace with any one of the authorized numbers described herein this Consent Order.

**B. Attorney's Fees**

The parties have reached an agreement settling plaintiffs' claim for attorneys' fees and costs. Defendant is liable for \$175,000.00 in attorneys' fees and costs in this action, payable to plaintiffs counsel. No costs or fees are owed to the clerk of court.

SO ORDERED, this 27<sup>th</sup> day of June, 2006.

  
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 JULIE E. CARNES  
 United States District Judge

Consented:

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