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The Election Assistance Commission ("EAC") considered the scope of its regulatory authority under the National Voting Rights Act of 1993 ("NVRA") at a public meeting today. It has been suggested that because the voter registration landscape has changed considerably since the passage of NVRA, the EAC should consider expanding its regulatory authority. I submit this statement to explain my position regarding the scope of EAC's regulatory authority.

Before the passage of the NVRA, restrictive registration laws and administrative procedures kept certain groups, especially minorities from registering to vote. In addition, a general decline in the numbers of people participating in Federal elections concerned Congress. The NVRA had four goals: (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, state, and local governments to implement the NVRA in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained. 42 U.S.C. § 1973gg (b).

Under the NVRA, the main responsibility of the EAC is to develop in consultation with the chief election officers of the States "a mail voter registration application form for elections for Federal office." 42 U.S.C. § 1973gg-7 a (2).[1] The EAC shall "prescribe such regulations as are *necessary to develop*" the form. § 1973gg-7a(1)(emphasis added). The NVRA conference report limited the Commission's authority to prescribing "*only those regulations necessary to carry out its specific responsibilities in designing the form and in reporting to Congress*." H.R. Conf. Rep. 103-66. (emphasis added).

Article 1 Section 2 and the Seventeenth Amendment of the Constitution reserve to the states the power to establish voter eligibility requirements. ACORN v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995). While NVRA directs the EAC to develop a federal mail voter registration application that must be accepted and used by the states, it does not usurp the states' ability to "fix the qualifications of voters in federal elections." Id. The NVRA was "an attempt to provide uniformity to the registration process, it was not attempt to preclude all determinations of voter qualifications by the states." Gonzalez v. Arizona, 435 F. Supp. 2d 997 at 1003 (D. Ariz. 2006). In fact, states may develop their own form pursuant to 42 U.S.C. § 1973gg-4 (a)(2) as long as the state form meets the criteria listed in 42 U.S.C. § 1973gg-7(b). Additionally, states may require "identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration."[2] § 1973gg-7 (b)(1)). **"**By permitting States to develop and use their own forms as well, the bill provides flexibility for the States. In those States that develop their own mail voter registration applications, an applicant may use, and the State must accept, either the national form developed by the Federal Election Commission or the State's own form." H.R. Rep. No. 103-9, at 10 (1993).

The FEC recognized that the scope of its regulatory authority was limited to an essentially administrative role of developing a form with state instructions (to account for the fact that states have

[1] Section 802 of the Help America Vote Act ("HAVA") transferred the responsibility for regulating under the NVRA from the Federal Election Commission ("FEC") to the EAC.

[2] The "motor voter" portion of the NVRA requires that a driver's license application "shall serve as an application for voter registration." 42 U.S.C. § 1973gg3(a). The voter registration portion of the form is a state form, not the federal form.

varying eligibility requirements) that all states must accept and use. Furthermore, as the FEC stated in its FEC Guide to Implementing the NVRA, "[t]he FEC does not have legal authority either to interpret the Act or to determine whether this or that procedure meets the requirements of the Act. Indeed, the civil enforcement of the Act is specifically assigned to the Department of Justice."

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). Many court cases involving NVRA are related to whether Congress had the constitutional authority to enact NVRA (See e.g. ACORN v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995);[3] Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995)), or whether states can adopt additional requirements and documentary proof above those required by NVRA. (See e.g. Gonzalez v. Arizona, 435 F. Supp. 2d 997 (D. Ariz. 2006) (stating that NVRA sets the floor, not the ceiling of a state's voter registration application)). If the federal government expands its regulatory authority there would be an obvious potential to impermissibly erode the states' rights to establish eligibility requirements and voter qualifications.

Furthermore, there is no legal justification for the proposition that the EAC may exercise its limited regulatory authority to promulgate regulations that, for example, dictate how a state should accept and use the federal form. To the contrary, the plain language of NVRA is clear that the EAC's rulemaking authority is limited to the extent that such rules are *necessary* to develop the federal form. While the EAC has taken an overly-expansive view of its regulatory authority in the past, I encourage my colleagues to exercise caution in promulgating regulations to ensure the EAC does not impermissibly erode the rights of the states or exceed the limited authority granted to it by the United States Congress.

[3] While Edgar held NVRA constitutional, the court stated that it would be a different case if the State of Illinois had demonstrated that NVRA would make it impossible for a state to enforce its voter qualification. See Edgar, 56 F.3d at 795.