



SECRETARY OF STATE
STATE OF NORTH DAKOTA
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Date: November 30, 2009

To: Honorable Commissioners of the United States Election Assistance Commission (EAC)

From: Jim Silrum, North Dakota Deputy Secretary of State on behalf of the Executive Board of the EAC Standards Board

Re: Military and Overseas Voter Empowerment (MOVE) Act and its current impact on the States and Territories

As Vice-Chair of the EAC Standards Board and member of the EAC Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) Working Group, I have been asked by the Standards Board Chair to give the States' response to the MOVE Act specifically focusing on two items:

1. The implications of Section 588 to States and Territories; and
2. The ability of States and Territories to participate in FVAP's UOCAVA remote access electronic voting pilot project.

As election administrators we wish to affirm our readiness to carry out the duties of providing voting access to every qualified elector. Since the intent of the MOVE Act is to ensure UOCAVA voters have the opportunity to vote, we applaud the objectives of the Act even though some of the requirements conflict with current state laws and constitutions. As election officials we will work with our state legislatures and citizens regarding any conflicts, but ultimately laws are only changed by legislative assemblies and constitutions by a vote of the people.

One little word in the MOVE Act is a concern to States and Territories. Section 588 makes the word "only" a powerful word with its placement within an amendment to HAVA Section 251. As Section 588 of the MOVE Act is understood, HAVA Section 251(b) and HAVA Section 257(a) are changed as follows: (underlined text indicates new additions and highlighting for emphasis)

SEC. 251. REQUIREMENTS PAYMENTS.

(a) IN GENERAL.—The Commission shall make a requirements payment each year in an amount determined under section 252 to each State which meets the conditions described in section 253 for the year.

(b) USE OF FUNDS.—

(1) IN GENERAL.—Except as provided in paragraph (2) and (3), a State receiving a requirements payment shall use the payment only to meet the requirements of title III.

(2) OTHER ACTIVITIES.—A State may use a requirements payment to carry out other activities to improve the administration of elections for Federal office if the State certifies to the Commission that—

- (A) the State has implemented the requirements of title III; or
- (B) the amount expended with respect to such other activities does not exceed an amount equal to the minimum payment amount applicable to the State under section 252(c).

(3) ACTIVITIES UNDER UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT.—A State shall use a requirements payment made using funds appropriated pursuant to the authorization under section 257(a)(4) only to meet the requirements under the Uniformed and Overseas Citizens Absentee Voting Act imposed as a result of the provisions of and amendments made by the Military and Overseas Voter Empowerment Act.

(c) RETROACTIVE PAYMENTS.—

(1) IN GENERAL.—Notwithstanding any other provision of this subtitle, including the maintenance of effort requirements of section 254(a)(7), a State may use a requirements payment as a reimbursement for costs incurred in obtaining voting equipment which meets the requirements of section 301 if the State obtains the equipment after the regularly scheduled general election for Federal office held in November 2000.

(2) SPECIAL RULE REGARDING MULTIYEAR CONTRACTS.—A State may use a requirements payment for any costs for voting equipment which meets the requirements of section 301 that, pursuant to a multiyear contract, were incurred on or after January 1, 2001, except that the amount that the State is otherwise required to contribute under the maintenance of effort requirements of section 254(a)(7) shall be increased by the amount of the payment made with respect to such multiyear contract.

(d) ADOPTION OF COMMISSION GUIDELINES AND GUIDANCE NOT REQUIRED TO RECEIVE PAYMENT.—Nothing in this part may be construed to require a State to implement any of the voluntary voting system guidelines or any of the voluntary guidance adopted by the Commission with respect to any matter as a condition for receiving a requirements payment.

(e) SCHEDULE OF PAYMENTS.—As soon as practicable after the initial appointment of all members of the Commission (but in no event later than 6 months thereafter), and not less frequently than once each calendar year thereafter, the Commission shall make requirements payments to States under this part.

(f) LIMITATION.—A State may not use any portion of a requirements payment—

- (1) to pay costs associated with any litigation, except to the extent that such costs otherwise constitute permitted uses of a requirements payment under this part; or
- (2) for the payment of any judgment.

And

SEC. 257. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—In addition to amounts transferred under section 104(c), there are authorized to be appropriated for requirements payments under this part the following amounts:

- (1) For fiscal year 2003, \$1,400,000,000.
- (2) For fiscal year 2004, \$1,000,000,000.
- (3) For fiscal year 2005, \$600,000,000.

(4) For fiscal year 2010 and subsequent fiscal years, such sums as are necessary for purposes of making requirements payments to States to carry out the activities described in section 251(b)(3).

(b) AVAILABILITY.—Any amounts appropriated pursuant to the authority of subsection (a) shall remain available without fiscal year limitation until expended.

HAVA is notably changed by mandating States and Territories to only use any future HAVA requirements payments to accomplish the state specific initiatives of the MOVE Act. These initiatives are important, but they are no more important than any other election administration improvement encouraged by HAVA and detailed in State Plans. (See attachment for a brief summary of the MOVE Act sections.) Of course, it may be that this restriction was not the intent

of any one at all, but is simply an unintended consequence of the hasty drafting that occurs under the pressure of legislative deadlines. If that is the case, the potential problems identified in this testimony may be averted by a legislative solution: An amendment to Section 588 to strike the word "only" and make any necessary conforming changes to ensure that the States and Territories will be able to properly and fully implement the requirements of MOVE without endangering the ongoing implementation of other HAVA initiatives under their State Plans.

As HAVA State Plans were crafted in 2003, most were written with the belief that all funding detailed in HAVA Section 257(a) would be distributed so long as the required 5% match was provided. Although \$3,000,000,000 was to be distributed to the States and Territories by the end of federal fiscal year 2005, only \$2,534,360,618 has been made available to States and Territories through 2009. According to HAVA Section 257 and information extracted from the EAC website http://www.eac.gov/election/HAVA%20Funds/docs/hava-paymts-to-states-rev-09-01-08/attachment_download/file:

Federal Fiscal Year	HAVA Sec. 257	Congressionally Appropriated	Difference – 257 vs. Appropriated	Distributed By EAC
2003	\$1,400,000,000	\$ 829,999,999	\$(570,000,001)	\$ 829,999,999
2004	\$1,000,000,000	\$1,489,360,619	\$ 489,360,619	\$1,489,360,619
2005	\$ 600,000,000		\$(600,000,000)	
2006				
2007				
2008		\$ 115,000,000	\$ 115,000,000	\$ 54,406,316
2009		\$ 100,000,000	\$ 100,000,000	\$ 26,301,550
2010				
Totals	\$3,000,000,000	\$2,534,360,618	\$(465,639,382)	\$2,400,068,484

States and Territories are still waiting for full funding of HAVA to the tune of \$465,639,382 to complete the election administration improvements detailed in HAVA State Plans. This undistributed money is critically necessary to bring these advancements to reality. And if the lack of full funding weren't enough, now Section 588 of the MOVE Act derails any possibility of those improvements and forces States and Territories to do one of the following:

- Make new plans detailing lavish expenses for accomplishing the intentions of the MOVE Act with the money that is hoped for in future requirements payments; (*the MOVE Act authors certainly must not believe it will cost States and Territories \$465,639,382 to implement the state specific initiatives of the Act*);
- Request only the amount necessary from future requirements payments to accomplish unfinished items in state plans that also meet the intentions of the MOVE Act; (*the MOVE Act authors certainly must know States and Territories have been working on election administration improvements benefiting UOCAVA voters since these voters are full members of the electorate*); or
- Apply for future requirements payments, use only the amounts necessary to accomplish the good intentions of the MOVE Act, leave the remainder of the payments in long-term interest earning accounts, and spend the interest on the other State Plan items. (*the MOVE Act authors certainly must know this will cause a severe slowdown in election administration improvements*)

If improvements have already been made to election administration for the benefit of UOCAVA voters, how many of the MOVE Act initiatives remain unfinished in States and Territories? As a representative example, North Dakota:

- Already utilizes electronic transmission of absentee ballot applications to and from voters
- Already transmits blank ballots to UOCAVA voters
- Has ballots ready 40 days prior to elections and allows absentee ballots to be accepted up to six days after an election provided they were mailed before the election (the 40 day deadline for absentee ballots to be available is tied to measure timelines specified in the North Dakota Constitution, for which a change would require a vote of the people)
- Already allows every voter to track the status of their absentee ballot from the submittal of the application, to the mailing of the ballot to the voter, the receipt of the ballot envelope from the voter, and the acceptance of the absentee ballot into the tally
- Already expanded the use of the FWAB to allow voters to use it for all offices that would be on their ballot in their precinct of residence and to simultaneously submit the FWAB as their absentee ballot application and ballot
- Does not have notarization or witness requirements for absentee voting
- Already tracks requested data concerning UOCAVA voters

If North Dakota and other States and Territories already provide these to UOCAVA voters, what is left from the MOVE Act requirements and what would it cost? Not half a billion dollars!

It is possible the authors of the MOVE Act are under the impression States and Territories have a great deal of unobligated HAVA money. If this is true, perhaps the reason for this incorrect assumption is due to a misreading of the HAVA requirements payments reports submitted by the States and Territories each year.

Congressional committee members have asked how much HAVA money is left unspent in state election funds and the amounts reported have been interpreted as money without a purpose. However, the remaining funds do have purposes, but the invoices for those obligations have not been sent since they are not due until dates yet in the future.

Some of the plans for the remaining money seem more exciting than others, but none have greater importance. For example, is it more exciting to purchase and utilize electronic poll books in polling places than it is to use funding for voting machine maintenance contracts and gradually pass that financial burden on to local election jurisdictions so they have time to prepare for these expenditures in future budgets? Yes, but neither detail is more important than the other. Both exciting and mundane improvements are obligating the money remaining in election funds because it takes both to run elections. States and Territories will be able to accomplish less of these important plans if HAVA isn't fully funded or new Acts such as the MOVE Act bring new demands for use of the money.

With regard to the remote kiosk pilot project we are working on as a part of the UOCAVA Working Group, I will confess initial disappointment when I learned the limitations of the project goals. Time and again the message election administrators receive from UOCAVA voters is that they want the ability to use their own computers to receive their absentee ballot and deliver their marked ballot back to the election official for inclusion in the tabulation on Election Day. I stuck with the Working Group despite my disappointment because I made a promise to the Standards Board to represent the interests of election officials. I'm glad I held true to that promise because I now see that this kiosk pilot project is the first necessary step toward providing full remote

access voting in the manner desired by those serving their country so far away from home. If we are ever to get to full remote access voting, we must see success with remote kiosk voting first.

North Dakota will not be able to participate in the kiosk pilot project because our law defines the conceptualized kiosk stations as polling places rather than absentee voting. This means we would be required to staff those kiosk stations with election boards for the entire time the stations would be available to UOCAVA voters, which is neither practical nor possible. Perhaps my state's inability to participate has given me the opportunity to be a more objective participant and allowing me to see the benefits and pitfalls for any state and not just my own.

The Working Group still has a long way to go to achieve a successful pilot project, but I am confident many valuable lessons will be learned, the privacy of the voter will be maintained, the votes will remain secure, and the tabulation of the votes will be accurate—provided we are given the opportunity to proceed.

The opportunity to proceed is not as easy as it may seem. In our conversations with various states, the critical factors identified for participation are:

1. Authorization for participation under state law
2. Availability of funding

Section 589 of the MOVE Act states that money will be appropriated to FVAP to run one or more pilot projects of the type envisioned by the Working Group. Yet since no money has been given to FVAP so far for this purpose, states are having difficulty giving more than a statement of interest in participation. Given the amount of time and energy already expended for these pilot projects (much of the time spent has been that of the volunteer variety), I certainly hope the necessary funds will be made available to bring them to reality.

On a more personal note, I have been, I am now, and I will continue to be passionate about doing whatever we can to grant access to voting to our nation's UOCAVA voters. I have not experienced life in the military or living overseas, but I am passionate because my father served in World War II and survived 7 first wave invasions to liberate islands in the South Pacific, my cousin flew combat missions and survived the duration of the Vietnam War as a POW, my wife's brother served a tour as a member of the ND National Guard in Iraq, my nephew stands ready for deployment whenever his ND National Guard Unit is called into active duty, and my fellow ND citizens who serve their country in such high percentages. If these people and many more like them have been and are willing to put themselves in harm's way for the sake of our freedom, then we can certainly do our best to give them the opportunity to express their opinions through voting concerning the people who will lead us and the laws under which we live.

Respectfully Submitted,

Jim Silrum
North Dakota Deputy Secretary of State
Vice-Chair EAC Standards Board

MOVE Act

(Synopsis)

- Section 577 – State implementation of electronic transmission of voter registration and absentee ballot application for UOCAVA voters
- Section 578 – State implementation of electronic transmission of blank absentee ballots to UOCAVA voters
- Section 579 – States to make absentee ballots available 45 days prior to election
- Section 580 – Federal Voting Assistance Program (FVAP) to work with United States Postal Service (USPS) to establish procedures for collection and delivery of voted absentee ballots from UOCAVA voters to appropriate election officials
 - Improved outreach by FVAP to UOCAVA voters
 - FVAP is authorized an appropriation to carry out this section
 - States must implement a free access for UOCAVA voters to track the status of their absentee ballot
- Section 581 – Expanded use of Federal Write-In Absentee Ballot (FWAB) by states for UOCAVA voters and FVAP will be given an appropriation to make sure this can be done electronically
- Section 582 – Limiting the restrictions a state may use to reject voter registrations, absentee ballot applications, marked absentee ballots, and FWAB
- Section 583 – Improvements to FVAP
 - Designation of Voting Assistance Offices on Military Installations
 - Expanded outreach to UOCAVA voters
 - FVAP will be given an appropriation for the specified improvements
- Section 584 – FVAP to work with EAC and states to develop standards for UOCAVA reporting requirements
- Section 585 – Repeal of provisions for use of single absentee ballot application for subsequent elections through the next two general elections
- Section 586 – FVAP's reporting requirements to Congress
- Section 587 – Attorney General's reporting requirements to Congress
- Section 588 – How states may use HAVA requirements payments disbursed from 2010 and beyond
- Section 589 – FVAP technology pilot programs for UOCAVA voting defined and appropriation for pilot programs authorized