



October 8, 2004

Via Facsimile, E-mail, and Regular Mail

Honorable Chet Culver
Secretary of State
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Honorable Tom Miller
Attorney General
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Dear Secretary Culver and Attorney General Miller:

We write on behalf of the League of Women Voters, the League of Women Voters of Iowa, the National Voting Rights Institute, the Lawyers' Committee for Civil Rights Under Law, and the Southern Regional Office of the American Civil Liberties Union to request your immediate attention to several deficiencies in Iowa election procedures that threaten to unlawfully disenfranchise thousands of Iowa voters on November 2. We would like to work with you cooperatively to resolve these problems and assure that the right to vote is fully protected in Iowa.

Summary of Action Requested

To summarize, two separate problems require attention. First, we understand that some citizens who register to vote in Iowa are being granted the right to vote only in state and local elections, and not in federal elections, even though such voters are fully qualified to vote in all elections. This is because some voters who sign the oath on their voter registration form declaring that they are U.S. citizens (and otherwise qualified to vote) may have neglected to check a duplicative box on the form that also asks whether the voter is a U.S. citizen. There is no need under federal law for two declarations of U.S. citizenship on the same voter registration form. Denying the right to vote in federal elections based on such a technicality would violate the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B), and rights secured by the United States Constitution.

Second, we understand that if a voter in Iowa casts a provisional ballot because his or her name cannot be found on the precinct register, that vote will not be counted, even in the presidential election, if the voter inadvertently cast his or her vote in the wrong precinct. The League of Women Voters has been advised that these votes will be invalidated and excluded from the canvass of votes, even if the voter is duly registered in the county and is a fully qualified elector under Iowa law. The refusal to count such provisional ballots would conflict with the Help America Vote Act (“HAVA”), 42 U.S.C. § 15301, *et seq.*, and violate rights secured by the United States Constitution.

We trust that you share our interest in assuring that the right of Iowa citizens to vote in the upcoming election is protected to the fullest extent possible. To that end, we look forward to your prompt response to this letter. We request a response by October 14, 2004, to enable us to resolve these issues quickly in a way that fully protects the voting rights of Iowa citizens.

A. The Citizenship Check-Off

HAVA in Section 303 provides that “[t]he Mail Voter Registration form developed under [the NVRA] shall include the following: (i) The question ‘[a]re 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 . . .” 42 U.S.C. § 15483(b)(4)(A)(i). Subsection (4)(B) of the same provision states that “[I]f an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office.”

Iowa’s voter registration form, however, actually allows the voter to attest to his or her citizenship in two ways. The form (copy attached) includes the question and check-off box required by HAVA, above. It also separately asks the applicant to “Read the following and sign below: I swear or affirm that: I am the person named above . . . I am a United States citizen . . .” (emphasis added). The form also warns the applicant that signing the form with knowledge that it is not true is perjury and can subject the voter to incarceration for up to five years and/or a fine of up to \$7,500.

Clearly, if a voter signs an oath, under penalty of criminal perjury and imprisonment for five years, that he or she is a U.S. citizen, the voter has satisfactorily answered the question required by HAVA of whether the voter is a U.S. citizen. Nevertheless, we understand that, pursuant to I.C.A. § 48A.26(3A), Iowa designates such a registration as valid “only for elections that do not include candidates for federal offices on the ballot,” if the voter left blank the check-off box regarding citizenship included at the top of the form. The registrar then advises the registrant that he or she must fill out a new registration form in order to vote in federal elections. Moreover, if the original application is received less than 12 days before close of registration, it is not clear that the applicant will have any opportunity to register and vote for the federal elections on the ballot.

In essence, Iowa has established a dual registration requirement, denying voters the right to vote in federal elections even though the same voter is considered fully qualified to vote in state and local elections as a U.S. citizen. We know of no other state that has created such a dual registration requirement based on the citizenship check-off provision.

We understand that Iowa may have established this two-tiered registration system based on the mistaken belief that Section 303 of HAVA somehow requires an applicant to be barred from voting in federal elections even when he or she has sworn to being a U.S. citizen. Nothing in HAVA, however, requires such a result. Subsection 4(B) does not say that a voter registration form must be returned to the voter “[i]f an applicant for voter registration fails to check the box” regarding citizenship. It says that the form should be returned if the applicant “fails to answer the question” concerning citizenship. 42 U.S.C. 15483(b)(4)(B). No reasonable interpretation of HAVA requires rejection of a form in which the voter affirmatively swears to being a U.S. citizen. By doing so, the voter has clearly answered the question required by HAVA of whether he or she is a U.S. citizen. Indeed, HAVA’s principal House sponsor -- Rep. Steny Hoyer -- has made precisely this point in a recent letter to the U.S. Department of Justice (copy attached).

In fact, if Iowa chose to reject applications for voter registration based on such a non-material omission in the registration form, it would violate an independent provision of federal law. Under 42 U.S.C. § 1971(a)(2)(B) (enacted as part of the Civil Rights Act of 1964), it is illegal for an election official to deny “the right of any individual to vote in an election because of an error or omission on any error or paper relating to an application, registration, or other act requisite to voting, if such error is not material to determining whether such individual is qualified under state law to vote in such election.” When a voter swears, under penalty of criminal perjury, that he or she is a U.S. citizen, it is immaterial that the voter may have left unchecked a duplicative box that asks precisely the same question. Thus, if a county auditor denies the right to vote in a federal election to a registrant in these circumstances, he or she will be violating federal law and will be subject to suit by the Attorney General or by a private citizen.

Furthermore, the refusal to register a voter for federal elections based on such an immaterial omission also would violate the fundamental right to vote under the Fourteenth Amendment. “Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” Harper v.

Virginia State Bd. Of Elections, 383 U.S. 663. 665 (1966).

At least five other states with similar voter registration forms – Colorado, Ohio, Michigan, Washington, and Wisconsin – have already concluded that the failure to check the citizenship box should not prevent a voter registration from being processed for all federal, state and local elections, so long as the applicant signs the oath swearing that he or she is a U.S. citizen. These states are correct in understanding that a hypertechnical reading of HAVA would defeat the very purpose of HAVA and potentially violate other federal laws and constitutional requirements. Iowa should join these states in assuring the full recognition of the right to register and vote in the upcoming election.

B. Provisional Ballots

In the 2000 elections, poll workers in many states turned voters away from the polls without permitting them to cast a ballot because the poll workers could not find the voters' names on the official list of those eligible to vote in the given precinct. In certain cases, eligible voters' names were not on the precinct register because the voters recently moved. In other cases, names were missing simply due to election officials' failures to maintain accurate voter rolls or to inform registrants of their correct polling-place locations. Congress responded by passing certain provisions of HAVA, 42 U.S.C. §15301, *et seq.* HAVA requires that states permit "provisional" voting, which allows a voter whose eligibility to vote is in question to cast a special ballot that will be segregated from the regular ballots and will be counted later if election officials verify the voter's eligibility. 42 U.S.C. § 15482(a).

To comply with this requirement of HAVA, Iowa apparently relies in part upon I.C.A. § 49.77. However, I.C.A. § 49.77, read in tandem with the provisions of I.C.A. § 49.81, creates serious potential for voter confusion and is in conflict with HAVA's provisional voting requirements.

Under I.C.A. 49.77(1), all voters, before receiving a ballot, must sign a declaration of eligibility requiring them to swear or affirm, subject to criminal penalties, that "I am a resident of the precinct, ward or township, city of, county of, Iowa."

At the same time, I.C.A. § 49.77(4) recognizes that registered voters may sometimes be missing from the election register at the precinct due to errors in the election records, or may inadvertently appear at the incorrect precinct. Under these circumstances, the person "shall not be permitted to vote, unless the person affirms that the person is currently registered in the county and presents proof of identity, or the commissioner informs the precinct election officials that an error has occurred and that the person is a registered voter of that precinct." (emphasis supplied). I.C.A. § 49.77(4) further provides that "If the commissioner finds no record of the person's registration but the person insists that the person is a registered voter of that precinct, the precinct election officials shall allow the person to cast a ballot in the manner prescribed by section 49.81."

I.C.A. 49.81(4), in turn, allows a voter subject to § 49.77(4) to cast a provisional ballot, by signing an affirmation on the ballot envelope stating:

I believe I am a registered voter of this county and I am eligible to vote in this election. I registered to vote in county on or about at My name at that time was I have not moved to a different county since that time. I am a United States citizen, at least eighteen years of age.”

(emphasis supplied).

Thus, under Iowa law, a voter casting a provisional ballot is required only to affirm that he or she is “a registered voter of this county” (I.C.A. § 49.81(4)), not that he or she is a resident of the precinct. Indeed, prior to 2004, I.C.A. § 49.81(4) required an attestation affirming that the voter is “a registered voter of this precinct,” but that provision was deliberately amended through Ch. 1083 (S.F. 2269) of the 2004 session laws, the legislation adopted by Iowa to bring its laws into compliance with HAVA. Yet, according to our information, a provisional ballot cast by an Iowa voter in the 2004 general election will not in fact be counted (even for the presidential election) if an otherwise eligible voter is later determined to have voted in the right county but the wrong precinct.

A state’s refusal to count a ballot for a federal election merely because the voter has voted in the wrong precinct conflicts with HAVA and is therefore unlawful under the Supremacy Clause of the United States Constitution. HAVA mandates that states collect and count provisional ballots for a federal election from any voter who affirms that he is registered “in the jurisdiction” in which he desires to vote and is eligible to vote in that federal election. 42 U.S.C. § 15482(a)(2). Although HAVA does not define “jurisdiction,” Congress directed that HAVA be construed in harmony with the National Voter Registration Act of 1993 (“NVRA”), which does define jurisdiction. See 42 U.S.C. § 15545(a)(4). The NVRA uses the term “registrar’s jurisdiction” to refer to the geographic scope of the unit of government that maintains the voter-registration rolls. 42 U.S.C. § 1973gg-6(j).

HAVA in § 302(4) states that “[i]f the appropriate State or local election official to whom the ballot or voter information is transmitted . . . determines that the individual is eligible under State law to vote, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.” 42 U.S.C. § 15482 (emphasis supplied). Section 302(4) does not state *where* the individual must be “eligible under state law to vote.” However, as noted above, a proper construction of § 302 must be informed by the NVRA. HAVA was enacted against the backdrop of the NVRA’s settled definition of “jurisdiction” and addresses the same subject as the NVRA: procedures for registering to vote and voting in elections for federal office. Accordingly, the two statutes should be construed *in pari materia* because “when a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the precursor in fathoming the new law.” Johnson v. United States, 529 U.S. 694, 710 (2000); see Branch v. Smith, 538 U.S. 254, 281 (2003) (plurality opinion of Scalia, J.) (reading two federal election-law statutes consistently with one another, even though they were enacted 26 years apart, because “courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes”). Construed in this way, § 302(4) of HAVA means that if the state official determines that the individual is eligible to vote within the geographic scope of the unit of government that maintains the voter-registration rolls, the

provisional ballot must be counted.

Under Iowa law, the unit of government that maintains the voter registration rolls is the county. I.C.A. § 47.2(1) (providing that county auditor shall serve as county commissioner of elections and shall administer voter registration and conduct elections). Further, Iowa's Constitution sets forth the requirements for being eligible to vote in Iowa, with specific reference to residence in a county: "Every citizen of the United States of the age of twenty-one years¹ who shall have been a resident of this State for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law." Iowa Const., Art. II, § 1 (emphasis supplied). Similarly, by statute, the only requirements to be "an eligible elector" in Iowa are that the voter be a citizen of the United States, an Iowa resident, at least 18 years of age, and not claim the right to vote in more than one place. I.C.A. § 48A.5(2). Although I.C.A. § 49.9 states that "[n]o person shall vote in any precinct but that of the person's residence," that is not a requirement of eligibility to be an elector under Iowa law, but merely a provision regarding the location where a vote should be cast. This distinction is underscored by the fact that Iowa law creates "special precincts" in each county for the express purpose of counting absentee and special votes, I.C.A. § 53.20, the jurisdiction of which "shall be coterminous with the borders of the county[.]" Provisional ballots "shall be considered as having been cast in the special precinct established by section 53.20 for purposes of the postelection canvass." I.C.A. § 48.81(1). Thus, the provisional ballots cast for federal elections within the county can readily be "counted in accordance with State law," as contemplated by HAVA Section 302(4), by counting them in the special precincts established by state law.

Because HAVA's requirement for provisional balloting is intended to assure the right of voters to vote in federal elections, and is keyed to voter eligibility within the "registrar's jurisdiction," a provisional ballot cast by an Iowa voter must be counted with respect to federal elections if it is cast in the correct county.

The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Pursuant to the Supremacy Clause, Congress has the authority to preempt state law. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986). In determining whether the Congress has preempted state law, a reviewing court's "task is to discern congressional intent." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381-82 (1992). "Implied" or "conflict" preemption occurs where there is an actual conflict between federal and state law. English v. General Elec. Co., 496 U.S. 72, 78-79 (1990); see also Crosby v. National Foreign Trade Council, 530 U.S. 363, 373-74 (2000) (invalidating as "an obstacle to the accomplishment of Congress's full objectives" a state law that "undermines the intended purpose and 'natural effect'" of federal legislation) (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)). Thus, since it is the "clear and manifest purpose of Congress" to permit those voters meeting the requirements of HAVA to have their vote counted, Iowa state laws to the contrary are preempted.

¹ Of course, the 26th Amendment to the United States Constitution lowered the voting age to 18, as reflected in I.C.A. § 48A.5(2)(c).

Furthermore, we believe that the refusal to count a provisional ballot for federal elections merely because the vote was cast in the wrong precinct would be an arbitrary and irrational restriction on the franchise that violates the fundamental right to vote under the Fourteenth Amendment. Because HAVA requires election officials to examine each provisional ballot and research the voter's eligibility in any event, no appreciable additional burden is imposed on the state by counting the ballot for all elections not affected by the voter's precinct.

In addition, because Iowa law specifically allows a voter casting a provisional ballot to do so by affirming that he/she is "a registered voter of this county" (not "precinct"), I.C.A. § 49.81(4), it would violate the due process rights of voters to provide such a ballot to voters making this attestation and then invalidate the ballot for federal elections even when state officials confirm that the voter was, indeed, registered in the county. The Due Process Clause of the Fourteenth Amendment mandates that states shall not "deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 2. "Due process" generally requires that the party attempting to abridge a citizen's rights must, at a minimum, provide adequate notice. Due process is denied where a voter relies to his detriment on statements or representations by state officials. Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (sustaining a due process claim where Secretary of State publicized to voting public that absentee and shut-in ballot laws applicable to general election would also be made available for primary, but votes were then not counted).

Finally, it is important to note that if election officials refuse to provide a provisional ballot to a voter merely because the voter is unsure whether he or she is in the correct precinct, and thus does not wish to sign the declaration of eligibility (in light of the criminal penalties for a mistaken attestation), the refusal to provide a provisional ballot also would constitute a clear violation of HAVA, which requires states to allow every voter who comes to the polls to cast a ballot. 42 U.S.C. § 15482(a).

We greatly appreciate your response to this letter by October 14.

Very truly yours,

/s/
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cc: Joseph D. Rich, Department of Justice, Voting Section

Instructions

Qualifications:

To register to vote in Iowa, you must:

- Be a citizen of the United States.
- Be a resident of Iowa.
- Be at least 17 ½ years old (you must be 18 to vote).
- Not have been convicted of a felony (or you must have had your rights restored).
- Not currently be judged by a court to be “incompetent to vote.”
- Give up your right to vote in any other place.

Use this form to apply to register to vote or to make changes in your registration.

Filling out the form – Use a pen and print neatly.

Required: ID number, date of birth, sex, name, address and signature. If you do not include these, your registration will be rejected. Your name, birth date and ID number will be checked. If they don't match, your registration will be rejected and you will be notified by mail.

ID number: Iowa driver's license number (DL#) is required, if you have one. If not, put the number of your Iowa non-driver ID card. If you have neither of these, put the last 4 numbers of your social security number.

If your DL# is your social security number, you are required to give it. Social security, driver's license and ID numbers are not printed on voter registration lists sold to candidates and others. But those numbers may be on original records in county auditor's offices and open for public viewing. Iowa law (Sec. 48A.11) requires the state to ask for your DL# on this form.

Name: Put your name on the form the same way it is on your ID.

Address where you live: This is the address that is used to decide where you go to vote. If you do not have a street address, describe where you live in the box below your signature.

Read the form carefully before you sign it.

Tear off the Registration Form, fold it, tape it together and mail it to your county auditor. You must put a postage stamp on the form.

Within two weeks you should get a notice in the mail that your registration was received. If you don't, contact your county auditor.

Deadlines

10 days before a primary or general election and 11 days for all others. You may register after a deadline, but the registration will not be effective until after that election. A registration form postmarked at least 15 days before an election will be accepted for that election even if it is received after the deadline to register to vote. Registration is permanent. After you register, you do not have to register again unless you move.

Iowa Voter Registration Form

Are you a citizen of the United States of America? ☐ Yes ☐ No
Will you be 18 years of age on or before election day? ☐ Yes ☐ No

NOTE: If you checked “No” in response to either of these questions, do not complete this form.

* Please print information on form.

ID Number, see Instructions	Date of Birth / / Mo/Day/Year	Sex <input type="checkbox"/> Female <input type="checkbox"/> Male	Iowa county where you live
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Full Name - Last	First	Middle	Suffix
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Address where you live.	Number	Street	Apt, Lot, etc.	City, State, Zip
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Mailing address (if different from above.)	Number	Street	Apt, Lot, etc.	City, State, Zip
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Party Affiliation <input type="checkbox"/> Democratic <input type="checkbox"/> Republican <input type="checkbox"/> No Party	Telephone number (Optional) ()	School District
Email (Optional)		

Read the following and sign below:

I swear or affirm that:

- I am the person named above.
- I am a United States citizen.
- I live at the address listed above.
- I am at least 17 1/2 years old.
- I have not been convicted of a felony. (or have received a restoration of rights).
- I am not currently judged by a court to be “incompetent to vote”.
- I do not claim the right to vote anywhere else.

X

Signature

Date

WARNING: If you sign this form and you know it is not true, you can be convicted of perjury and fined up to \$7,500 and/or jailed for up to 5 years.

If you have no street address because you use a rural route address, or because you are homeless, please list your township _____ and section number. _____

Or describe where you live:

_____ and _____ of _____
(Mi or blks) (N,S,E,W) (Mi or blks) (N,S,E,W) (Landmark or highway junction)

If you have ever been registered to vote before, complete this section:

Your name then: _____

Your address then: _____

City, State, Zip Code: _____

Name of the County: _____



Congress of the United States
House of Representatives
Washington, DC 20515-2005

September 23, 2004

R. Alexander Acosta
Assistant Attorney General for the Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Office of the Assistant Attorney General, Main
Washington, D.C. 20530

Dear Mr. Acosta:

A rumor has come to my attention that I hope with your assistance I can quickly put to rest. It has been reported to me that one or more representatives of the Civil Rights Division have told state election officials that the Help America Vote Act (HAVA) precludes a state from processing a voter registration form on which the voter fails to check the citizenship box even if the voter has expressly attested on the form to his or her citizenship.

As the principal sponsor of HAVA in the U.S. House of Representatives, I can assure you that is not what HAVA requires. In fact it is contrary to the letter and the spirit of HAVA and the National Voter Registration Act (NVRA).

Subparagraph (b)(4)(A)(i) of Section 303 of HAVA requires that voters be asked on the mail-in registration form the question "Are you a citizen of the United States of America?" Subparagraph (B) provides:

If an applicant for voter registration **fails to answer the question** included on the mail registration form pursuant to subparagraph (A)(i) the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office. (Emphasis added)

It is inconceivable that a voter who has attested on the form to being a citizen has not answered the question. Only if a state form does not provide for a specific attestation of citizenship and the citizenship box is unchecked should a state consider the question unanswered and the registration incomplete. Even in that circumstance a voter should be able to answer the question in any reasonable manner under state law, including but not limited to answering the question on election day at the polls.

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GREENBELT DISTRICT OFFICE:

U.S. DISTRICT COURT HOUSE
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WALDORF DISTRICT OFFICE:

401 POST OFFICE ROAD, #202
WALDORF, MD 20602
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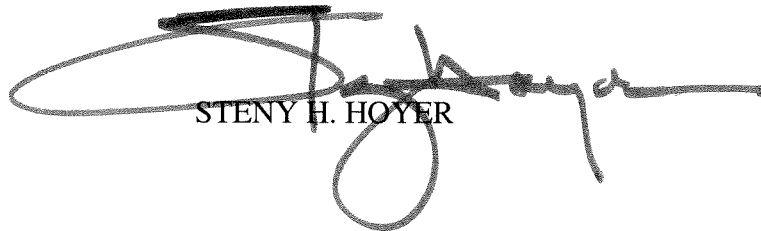
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It should be noted that HAVA expressly did not supercede the National Voter Registration Act. NVRA provides that the mail registration form developed for federal elections may "require only such identifying (including the signature of the applicant) and other information (including data relating to previous registrations 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"¹. Requiring redundant information surely violates this provision.

I am confident that the Department has not adopted this incorrect reading of HAVA and NVRA. It would be a sore on the fine reputation of the Civil Rights Division if such rumors proved to be true. I would hope for an immediate response from you to restore my confidence that the rumor is false.

Thank you for your attention and with kindest regards, I am

Sincerely yours,



STENY H. HOYER

¹ Paragraph (b)(1) of section 9 of NVRA. This paragraph is made applicable to state developed mail-in registration forms by paragraph (a)(2) of section 5 of NVRA.