



## STATE OF INDIANA

Todd Rokita, Secretary of State

J. Bradley King, Co-Director  
Pamela Potesta, Co-Director

Indiana Election Division  
302 West Washington Street, Room E204  
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Phone: (317) 232-3939  
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To: Vote Indiana Team Members  
From: Pamela Potesta, Co-Director, Indiana Election Division  
Re: VIT Meetings  
Date: April 23, 2009

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Like many of you, this is my first year to serve on the Vote Indiana Team, and I'll admit, I was a bit unsure of what to expect from the first meeting. However, I cannot continue to participate in these meetings. The Secretary has convened these meetings illegally and continues to conduct them in a manner not permitted by state law. I have tried on several occasions to communicate my concerns to the Secretary, but he has rejected my requests.

I've learned that the Secretary does not possess the statutory authority to appoint members to the Vote Indiana Team. IC 3-6-4.2-12(7) requires that the Co-Directors of the Indiana Election Division shall appoint members of the committee under 42 USC 15405 in order to adopt a state plan for HAVA purposes. Additionally, IC 3-6-3.7-2(4) requires the Secretary to "consult and coordinate" with the Co-Directors of the Indiana Election Division "in the development and implementation of the state plan under HAVA (42 USC 15401 through 15406)" (as added by PL 209-2003).<sup>1</sup> Several other statutory provisions require the Secretary to act with the "consent" of the Co-Directors to perform all duties required by the Help America Vote Act. This language was added as a compromise in a conference committee when the Senators and Representatives worked to determine who should implement HAVA.

The Secretary has taken several actions in what appears to be violation of state law. He has appointed members and convened the meeting on his own. He has planned the agendas, sent out communications, held strategy sessions<sup>2</sup> and taken action regarding the Vote Indiana Team without consulting or coordinating with the Democratic Co-Director. Without the coordination and consultation of both Co-Directors, any action taken on behalf of the VIT has been done illegally.

In an attempt to keep the process moving forward and avoid a prolonged litigation, I have approached the Secretary, through my legal counsel, to ask for recognition to name replacements of members who are unable to serve. I have asked to be included in future strategy sessions. I have asked for communications sent to or received by the Secretary regarding VIT issues. The Secretary has rejected each of these requests.

Until yesterday, I held out hope that we might reach an understanding moving forward, but the Secretary has made no effort to consult or coordinate with me in the development of the State Plan or the conduct of the VIT meetings. It is for this reason that I cannot serve on the Vote Indiana Team and would ask that you consider taking similar action.

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<sup>1</sup> I have attached the applicable statutes for your reference.

<sup>2</sup> See attached documents in which the Secretary has initiated and held 5 "VIT Strategy Meetings" with the Republican Co-Director and HAVA members without including the Democratic Co-Director.



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To: Vote Indiana Team Members  
From: Pamela Potesta, Co-Director, Indiana Election Division  
Re: Statement Regarding VIT Meetings  
Date: July 22, 2009

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### Summary of Democratic Co-Director's Objections

Federal and State law require that the Secretary of State and the Co-Directors of the Election Division work in concert to develop and implement the Help America Vote Act. The Secretary of State has taken unilateral action in violation of state and federal law, jeopardizing Indiana's receipt of federal money and putting the state at risk for litigation.

In March 2009, the Secretary of State convened the Vote Indiana Team (VIT), made appointments to the committee, sent out agendas, and conducted meetings. Since that time, the committee has met four (4) times and stands ready to vote on the State Plan<sup>1</sup> and accept public comment.

Following a 30-day comment period, the committee will reconvene, consider the public comments, and adopt a final state plan which will then be published in the federal register as required by federal law. Following publication in the Federal Register for another 30 day period, the "executive officer of the State or designee" will submit a certified statement to the Elections Assistance Commission indicating that the state is compliance with federal law and eligible to receive federal money.<sup>2</sup>

State and federal law require that Co-Directors of the Election Division appoint members to the VIT committee and that the Co-Directors "consult and coordinate" with the Secretary in the development and implementation of the State Plan. The Democratic Co-Director has taken the following actions: (1) sought recognition to name replacements of members who are unable to serve; (2) asked to be included in future strategy sessions; and asked for communications sent to or received by the Secretary regarding VIT issues. The Secretary has rejected each of these requests and continues to regard the Democratic Co-Director as simply another member of the VIT committee.

The Secretary and Democratic Co-Director have not been able to agree on how to interpret state and federal law, so until the proper authorities determine otherwise, the Democratic Co-Director will remain a member of the VIT member under protest.

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<sup>1</sup> The "State Plan" refers to the written plan the state must adopt in order to receive federal Help America Vote Act dollars. 42 USC 15403 et seq.

<sup>2</sup> 42 USC 15403, 15404 15405, and 15406

## Applicable State and Federal Statutes

Federal law requires that the state do two things to be eligible to receive federal HAVA money: (1) adopt a state plan designating how the money will be spent and monitored; and (2) file a statement with the Election Assistance Commission certifying that the state has complied with federal laws for adopting a state plan. *42 USC 15403*.

42 USC 15405 provides that “(t)he chief State election official shall develop the State plan under this subtitle [42 USCS 15401 et seq.] through a committee of appropriate individuals . . . “ 42 USC 15403(e) defines the “chief State election official” as the “individual designated by the State under section 10 of the National Voter Registration Act of 1993 to be responsible for coordination of the State’s responsibilities under such Act.”

Each state designates its own official(s) to be responsible for implementing NVRA. In Indiana, the individuals designated as the NVRA officials are the two co-directors of the Election Division. *IC 3-7-11-1*. However, in 2003, the Indiana General Assembly adopted Public Law 209, which designated the Secretary of State the “state’s chief election official” for all purposes except administration of NVRA. *IC 3-6-3.7-1* The remainder of PL 209-2003, went on to require that the Secretary of State shall obtain the consent of the Co-Directors of the Election Division for various tasks, including performing all duties required by the state or the chief state election official under HAVA. The state law further stipulates that the Secretary “**shall** . . . consult and coordinate with (and provide administrative support to) the co-directors of the election division in the development and implementation of the state plan under HAVA . . .” *IC 3-6-3.7-2(4) and (5)*.

In other words, the Co-Directors are the state’s election official for NVRA purposes, and the Secretary along with the Co-Directors are to work together to develop and implement a plan for carrying out the state’s responsibilities under HAVA.

Despite efforts to be involved in the planning process, the Secretary has rejected the Democratic Co-Director’s requests to be involved. The Democratic Co-Director sought to understand why the Secretary believed he had the authority to act unilaterally. The Secretary admits no written offer to join in the planning was ever extended to the Democratic Co-Director. Instead the Secretary contends that a member of his staff mentioned the VIT meetings in passing to the Co-Director at a meeting on unrelated business. Hearing no immediate objection, the Secretary took this as consent and proceeded to propose changes to the State Plan. Since the initial VIT meeting in March, the Co-Director has sought to be included, fill vacancies, and coordinate in the development of the State Plan. These efforts have been rejected.

The Democratic Co-Director agrees with the need to amend the State Plan but cannot agree with the manner in which the Plan is being developed. PL 209-2003 requires the Secretary and Co-Directors work in concert to take action concerning HAVA. Any action taken on behalf of the VIT committee by one member without the consent and consultation of all, is taken illegally. The Secretary’s unilateral actions taken over the objection of the Democratic Co-Director therefore jeopardize the state’s receipt of federal money.



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### **READ INTO RECORD ON JULY 24, 2009, DURING VOTE INDIANA TEAM MEETING**

To: Vote Indiana Team Members  
From: J. Bradley King, Co-Director, Indiana Election Division  
Re: Response to Ms. Potesta's Memo Dated April 23, 2009  
Date: July 24, 2009

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Mr. Chairman and Fellow Committee Members:

I appreciate my fellow Co-Director's participation in the work of the Vote Indiana Team, and I value her opinions, even when I don't agree with them.

But I am afraid that in jumping to the conclusion that the Secretary of State has "taken unilateral action in violation of federal and state law", she has not considered some of the law and the facts in this case.

Let's talk about the law first. The federal law that we are working with does not spell out in great detail how the HAVA planning committee goes about its work or (except in a few cases), who must serve as members; instead, federal law provides that a "committee of appropriate individuals" work to develop the State Plan. I believe that every person sitting around this table is here appropriately and legally as a member of the Vote Indiana Team.

Indiana has not taken the approach of writing the State Plan in a corner of a dark room. HAVA does not require a Vote Indiana team with more than two dozen members, representing all three political parties or military and overseas voters, for example. But that's what we have, and it works well.

When Ms. Potesta says in her statement that "any action taken on behalf of the Vote Indiana Team by one member with the consent...of all is taken illegally", she forgets that in its work this year, this Team has not always had consensus, but instead has had close votes regarding the adoption of more than one recommendation concerning the Plan. There is no law anywhere which requires an action to have the consent of **all** members of this Team.

She also states that the Democratic Co-Director has "sought recognition to name replacements of members who are not able to serve." This contradicts her own legal argument. If both Co-Directors are responsible for developing the State Plan through the

HAVA committee, then both Co-Directors must jointly consent to name replacement members.

Indiana's Plan contains a provision (Section 11) which recognizes a special role for the Secretary of State when it comes to amending the Plan. The Secretary, not the Democratic Co-Director, determines if the State Plan requires a "material change", which would require a meeting of the Vote Indiana Team. The Secretary, not the Co-Director, proposes changes to the Plan, and submits the revised Plan to the federal Election Assistance Commission.

With the consent of the Democratic and Republican Election Division Co-Directors, the Secretary of State invited individuals to fill vacancies on the Vote Indiana Team in 2005. Both Co-Directors supported the original Plan adopted in 2003, and its amendments in 2005, including Section 11.

I understand that Ms. Potesta is not required to agree with the actions taken by her predecessor as Democratic Co-Director. But that's where the facts come in. Like many things in life, we can't have it both ways.

The facts are that my colleague has acted in ways that a reasonable person would understand as consent to your serving as members of this Committee and the actions you have taken. I would like to defer to Joe McLain, HAVA Administrator, to provide more detailed information regarding this. **[Please see attached statement of facts prepared by HAVA Administrator, Joe McLain.]**

It is unfortunate that my colleague did not share these concerns with fellow Team members when we began our work more than four months ago. It is the responsibility of everyone on this Team to work together to do our jobs, whatever our differences of opinion may be. I hope that we can all do that, and get this job done.

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Secretary of State

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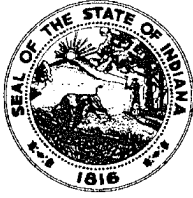
To: Vote Indiana Team Members  
From: Joseph McLain, Help America Vote Act Administrator  
Re: Facts in Response to Ms. Potesta's Memo Dated April 23, 2009  
Date: July 24, 2009

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Below are a series of facts regarding the third rendition of the Vote Indiana Team:

- I met with Ms. Potesta on February 25 and 26, 2009. At one of those meetings, I explained to her that the Vote Indiana Team needed to be reconvened to obtain federal funds, and further explained that: (1) the Team needed to have new members to replace former Team members, that in 2005, the Secretary had asked new members to serve, and that both the Democratic and Republican Co-Directors had agreed with who the Secretary had asked to serve; and (2) the Team would likely have 4-6 meetings, which we would attempt to webcast, or to "take the show on the road."
- I hand-delivered a roster of Vote Indiana Team members to Ms. Potesta with a packet of other VIT information on March 13, 2009. I did not receive any questions or concerns from her about Team membership during the days and weeks that followed, leading up to the first meeting, and assumed that she concurred with the makeup of the Vote Indiana Team.
- All Vote Indiana Team members were mailed packet of information on March 13, which included a roster of VIT members. There was a follow up email of all of this material to Team members by email on March 25, 2009. No Team member contacted me in response to these communications declining to serve, or questioning their appointment.
- I announced at the Northern and Southern Association of Clerks' district meetings held in mid-March 2009 that the Vote Indiana Team was being reconvened, and named all of the local election officials who had agreed to serve as members. Ms. Potesta, or her legal counsel Ms. Barnes, was present at both of those Clerks meetings, and had an opportunity to hear my remarks. Neither one raised any question to me about these members.

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- Ms. Potesta participated in the first Team meeting on March 27, 2009, and raised no objection to this Team's composition or actions, either then or before the second Team meeting.
- Ms. Potesta participated in the second Team meeting on April 3, 2009, and raised no objection to the Team's composition or actions.
- Ms. Barnes attended the third Team meeting on April 17, 2009, as Ms. Potesta's proxy, and raised no objection to the Team's composition or actions.
- The evening before the fourth Team meeting on April 23, 2009, Ms. Potesta sent an email to all Team members making her argument that the Team was not meeting or acting in accordance with the law, and suggesting that other Team members consider not serving on the Team. Almost every Team member did attend the April 24, 2009, meeting. No other Team member, either during that meeting or since then during the last 3 months, has made any public statement or provided any written statement to the Team questioning the actions of the Team or the Secretary.
- Each Team member, including Ms. Potesta, has received a draft agenda several days (or even weeks) before each meeting. No objection to the planned work of the Team or suggested changes to any agenda have been received from Ms. Potesta until shortly before this meeting.
- Ms. Potesta has signed all claim vouchers for expenses incurred by the Vote Indiana Team for its meetings this year, including mileage reimbursements for members, Indiana Higher Education Telecommunications System (IHETS) services, and refreshments. Included on this voucher is the statement, "I certify this claim is correct and valid and is a proper charge against the State Agency, Fund, and center indicated."