



U. S. Department of Justice

Civil Rights Division

Deputy Assistant Attorney General

Washington, D.C. 20530

April 15, 2005

VIA FACSIMILE AND REGULAR MAIL

Honorable Janice K. Brewer
Secretary of State
State of Arizona
1700 West Washington Street, 7th Floor
Phoenix, Arizona 85007-2888

Dear Secretary Brewer:

I am writing in response to your letter of April 5 to Steven G. Bradbury, Principal Deputy Assistant Attorney General in the Office of Legal Counsel, requesting a formal opinion from the Department of Justice on certain issues relating to the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. 15301-15545. Because the Office of Legal Counsel is not authorized to provide legal advice to persons outside the Executive Branch of the federal government, Mr. Bradbury has forwarded the request to the Civil Rights Division.

Although the Department of Justice states its formal positions with respect to the statutes it enforces only through case-by-case litigation, we do on occasion offer our general views on the manner in which we intend to enforce a particular statute or set of laws. As you know, HAVA vests the Attorney General with the responsibility of enforcing Title III of HAVA, which imposes uniform and nondiscriminatory election technology and administration requirements on the 55 States and Territories. The Attorney General, in turn, has delegated those enforcement functions to the Civil Rights Division. In light of this authority, we will attempt to answer the question posed in your letter to the extent we can, although it must be emphasized that the opinions expressed here are not binding.

Your letter focuses on the requirements of HAVA Section 302(a), 42 U.S.C. 15482(a), as that section relates to provisional ballots. Specifically, you question whether, under this section, it is permissible for a state to mandate that potential voters show identification at the polls prior to receiving a provisional ballot.

Section 302(a) of HAVA requires that a provisional ballot be given to individuals (i) whose eligibility is challenged by election officials, or (ii) whose name does not appear on the

official list of eligible voters for the polling place, if the "individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office." Section 302(a) then provides a series of steps that should be taken by poll officials to transmit the ballot and voter information to election officials for "prompt verification." Whether the individual is eligible to vote, and whether the provisional ballot will be counted, are matters to be determined by state and local election officials "in accordance with State law." See HAVA Section 302(a)(4).

Two other sections of HAVA are also relevant to your question. Section 304, 42 U.S.C. 15484, specifically states that "[t]he requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict." Further, Section 305, 42 U.S.C. 15485, provides that "[t]he specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State."

Taken together, all of these provisions make it clear that the determination of an individual's eligibility to vote is left to the states, and while Title III establishes minimum standards, states may impose stricter requirements as long as those requirements are uniform and nondiscriminatory. If a state such as Arizona wishes to impose identification requirements that are stricter than HAVA, it may do so without violating the statute. This flexibility includes the right to impose stricter requirements for voter eligibility (including eligibility to receive a provisional ballot).

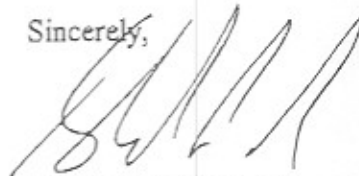
The major purpose of Section 302(a) is to allow individuals to vote who have taken all necessary steps to register to vote but whose registrations were not completed by election officials (or whose names were not added to the voter registration list) due to some administrative error. If a State requires a provisional voter, who has affirmed that he is registered and eligible to vote, to provide additional information (e.g., residence address, birth date, location where he attempted to register to vote, etc.) that may be needed for the jurisdiction to verify that the individual actually did register and is truly eligible to vote, nothing in HAVA would stand in the State's way. In other words, a State may refuse to issue a provisional ballot to an individual who refuses to provide such information.

While HAVA was passed by Congress to regulate federal elections, Sections 304 and 305 illustrate that Congress was well aware that the Constitution -- in particular, Art. I, § 4, cl. 1 -- explicitly commits the regulation of voting to the states. Indeed, a State may "provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Roudebush v. Hartke*, 405 U.S. 15, 23 (1972); see also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (States exercise "broad power to prescribe the 'Time, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for states offices."). In light of this broad grant of power, "state legislatures may without transgressing the Constitution impose extensive restrictions on voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).

In conclusion, it is our considered judgment that neither HAVA nor any other provision of federal law preempts states from imposing identification requirements at the polls, including identification requirements for the receipt of provisional ballots. In fact, insuring the security and integrity of elections is a logical and entirely legitimate objective of state regulation of the election process, which an identification requirement naturally facilitates.

We hope that this is responsive to your questions. If you have any additional concerns, please do not hesitate to contact us.

Sincerely,



Sheldon T. Bradshaw
Principal Deputy Assistant Attorney General