



U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

September 1, 2005

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

Dear Secretary Brewer:

I am writing in further response to your April 5, 2005 correspondence 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. As you know, because the Office of Legal Counsel is not authorized to provide legal advice to persons outside the Executive Branch of the federal government, your request was assigned to the Civil Rights Division. Although we initially replied to you in a letter dated April 15, 2005, we feel it necessary to clarify our earlier interpretation in order to ensure an accurate representation of the Justice Department's views.

At the outset, let me reiterate that, while the Department of Justice does on occasion offer its general views on the manner in which it intends to enforce a particular statute or set of laws, the Department states its formal positions with respect to the statutes it enforces only through case-by-case litigation. 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, but we emphasize that the opinions expressed here are not binding.

Your letter focused on the requirements of HAVA related to provisional ballots in elections for Federal office. Specifically, you inquired whether it is permissible under HAVA for a state to mandate that potential voters show identification at the polls prior to receiving a provisional ballot. The short answer is that HAVA requires States to allow voters who meet certain specified conditions the opportunity to cast a provisional ballot. States, however, are free to prescribe their own rules for deciding whether to count those provisional ballots. Thus, if an

individual who casts a provisional ballot does not comply with a State's identification requirement, the State is under no obligation to count the ballot. *See Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 576-78 (6th Cir. 2004); *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079-81 (N.D. Fla. 2004); *Hawkins v. Blunt*, No. 04-4177, slip op. at 17 (W.D. Mo. Oct. 12, 2004).

HAVA Section 302(a), 42 U.S.C. 15482(a), sets forth the eligibility requirements and mechanics for administering provisional ballots. In relevant part, this statute provides:

PROVISIONAL VOTING REQUIREMENTS --- If an 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, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) 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.

* * *

Taken together, we construe these provisions of HAVA to require that individuals be permitted to cast a provisional ballot if they present themselves to vote at a polling place in an

election for Federal office and either: (i) do not appear on the official list of eligible voters for that polling place but claim to be registered, or (ii) have their eligibility challenged by an election official, *so long as* they execute a written affirmation to the effect that they are registered and eligible to vote in the jurisdiction in which they seek to cast their ballot.¹

All that having been said, whether an individual is allowed to *cast* a provisional ballot and whether that provisional ballot must be *counted* are two distinct questions. There is a *federal law* requirement in HAVA that, in elections for Federal office, an individual who meets the conditions set forth in Sections 302(a) or 303(b) must be offered, and allowed to cast, a provisional ballot. However, HAVA further provides that the question of whether the person casting a provisional ballot is actually eligible to vote, and whether the cast provisional ballot should be counted, are to be determined by the appropriate state or local election official *pursuant to state law*. Thus, if a State adopts a law providing that no voter, including a provisional voter, is eligible to have his/her ballot counted unless proper identification is presented to election officials on or after election day, the State is entirely free to do so.²

In addition to tracking the statutory text, the interpretation articulated herein fulfills the purposes behind HAVA's provisional ballot requirements, *i.e.*, ensuring that individuals are not deprived of the opportunity to vote because of some administrative error or delay or overzealous poll official, while at the same time respecting the traditional authority of the States to regulate the administration of elections. *Cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (States exercise "broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' . . . which power is matched by state control over the election process for state offices."); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (States 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.").

We apologize for any confusion generated by our earlier response. We hope that this letter clarifies our answer and is responsive to your questions. If you have any additional concerns, please do not hesitate to contact us.

¹ Incidentally, also included in this category of persons entitled to a provisional ballot are individuals who present themselves to vote at a polling place in an election for Federal office who are covered by, and have not met, the HAVA identification requirements on or before election day. *See* HAVA Section 303(b), 42 U.S.C. 15483(b) (requiring presentation of identification at the polls by certain individuals who registered to vote for the first time by mail).

² On this point, we note that the Department of Justice recently pre-cleared Arizona's election law amendments adopted by the State as part of Proposition 200, which mandate that individuals seeking to vote must present certain specified forms of identification at the time they cast their ballot. *See* Ariz. Rev. Stat. 16-579(A).

Sincerely,

A handwritten signature in black ink, reading "Bradley J. Schlozman". The signature is written in a cursive style with a large, stylized initial "B".

Bradley J. Schlozman
Acting Assistant Attorney General