



U.S. Department of Justice

Civil Rights Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

October 26, 2004

Via Facsimile

The Honorable Thomas J. Miller
Attorney General
Hoover Building
Des Moines, Iowa 50319

Dear Mr. Attorney General:

I am writing in response to your October 22, 2004 letter to Chester J. Culver, Iowa Secretary of State ("Opinion Letter"). In your letter, you opine that, notwithstanding Iowa law to the contrary, Section 302(a) of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15482(a), requires Iowa election officials to count every provisional ballot cast in the wrong precinct if "the voter was registered in the county where the ballot was cast and met the basic eligibility requirements of state law." HAVA, however, does not preclude states from choosing precinct-based voting systems as Iowa has done in Iowa Code § 49.9 (2003). See Opinion Letter at 7.

As you are aware, HAVA assigns to the United States Department of Justice enforcement responsibilities for, among other things, the election administration requirements in Title III of the statute, including Section 302(a). See 42 U.S.C. § 15511. As the sole enforcer of HAVA, we provide counsel to state and local jurisdictions regarding their obligations under this relatively new statute.

HAVA was designed to supplement and improve States' voting systems for federal elections; it was not designed to supplant or to dramatically restructure them. In fact, the United States Constitution, practice, and tradition have long left the definition of voting jurisdictions and the establishment of voting locations to the States. When Congress has intended to alter that longstanding practice, such as by requiring preclearance under the Voting Rights Act, it has said so explicitly and not elliptically.

American elections have long been precinct based – prospective voters are registered by their home address and assigned to a precinct where they may vote a ballot containing all of the

candidates whose offices cover the area of the voter's residence. A well-understood premise of such a system is that a voter must appear at the correct polling place – the one to which the voter was assigned, and on whose rolls the voter appears – or else the voter will not be able to vote. HAVA neither requires nor preempts such a precinct-based system and its text (along with its legislative history) is clear on this issue.

Section 302(a) of HAVA requires a state to permit an individual to cast a provisional ballot if that individual declares that he/she “is a registered voter in the jurisdiction in which [he/she] desires to vote and that [he/she] is eligible to vote in an election for Federal office,” but his/her name “does not appear on the official list of eligible voters for the polling place or an election official asserts that [he/she] is not eligible to vote.” Critically, HAVA leaves it up to state and local election officials to determine if the individual is eligible “under State law to vote” and whether the provisional ballot “shall be counted as a vote in that election in accordance with State law.” 42 U.S.C. § 15482(a)(4). HAVA also leaves “the specific choices on the methods of complying with the requirements of [Title III] to the discretion of the State.” 42 U.S.C. § 15485.

Thus, contrary to your opinion, HAVA does *not* preempt State law with respect to the counting of votes cast via provisional ballot outside a voter's assigned precinct. Indeed, nothing in Section 302(a) forces state and local election officials to count such votes. HAVA simply defers this counting determination to state law.

As for the term “jurisdiction” in Section 302(a) of HAVA, Congress chose not to include a definition in the statute. Congress chose a flexible term like voting “jurisdiction” because it recognized that the delineation of the appropriate locale for casting a lawful vote will vary depending on state law. Congress was well aware that election laws differ widely from State to State, and rather than preempt the field, Congress respected the State's traditional role in this area and looked to state law to determine the appropriate jurisdiction under HAVA.

In your formal opinion letter, you reference the definition of “registrar's jurisdiction” in the National Voter Registration Act (“NVRA”), 42 U.S.C. § 1973gg *et seq.* But that NVRA definition does not apply to HAVA. Indeed, the term “registrar's jurisdiction” is not even present in HAVA. Moreover, neither the NVRA nor HAVA disturbed the long-held right of states to determine which precinct or other jurisdiction a voter must cast his ballot for it to be counted.

The legislative history of HAVA further underscores this point. Indeed, Senator Christopher Bond of Missouri, who was one of the floor managers for the statute, stated emphatically that “[t]his provision is in no way intended to require any State or locality to allow voters to vote from any place other than the polling site where the voter is registered.” 148 Cong. Rec. S10488-02, S10493 (daily ed. October 16, 2002). Senator Christopher Dodd of Connecticut, another HAVA sponsor, similarly noted that “nothing in this bill establishes a Federal definition of when a voter is registered or how a vote is counted. . . . Whether a

provisional ballot is counted or not depends solely on State law, and the conferees clarified this by adding language in Section 302(a)(4) stating that a voter's eligibility to vote is determined under State law." 148 Cong. Rec. at S10510.

It appears that you based your opinion in large part on the district court opinions issued in *Sandusky County Democratic Party v. Blackwell*, 2004 WL 2308862 (N.D. Ohio Oct. 14, 2004), and *Bay County Democratic Party v. Land*, 2004 WL 2345560 (E.D. Mich. Oct. 19, 2004). However, after your opinion was issued, the United States Court of Appeals for the Sixth Circuit reversed the Ohio federal district court decision. In its order dated October 23, 2004, the appellate panel overturned the trial court decision that would have required Ohio election officials to count as a valid ballot a provisional ballot "if it is cast anywhere in the county in which the voter resides, even if it is cast outside the precinct in which the voter resides." The Sixth Circuit also consolidated the Michigan and Ohio cases and stayed the Michigan federal district court opinion.

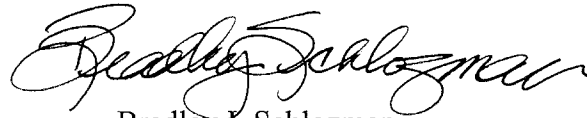
I would add as well that the Sixth Circuit's order is also in accord with federal district court opinions in *Florida Democratic Party v. Hood*, Case No. 4:04CV395 (N.D. Fla. Oct. 21, 2004) and *Hawkins v. Blunt*, Case No. 04:4177CV-C-RED (W.D. Mo. Oct. 12, 2004) and a state court opinion in *Colorado Common Cause, et al. v. Davidson*, Case No. 4CV7709 (D. Ct., City and County of Denver, State of Colorado, October 18, 2004). Thus, all of the courts that have addressed the issue, with the exception of two courts, one of which has been reversed, the other of which has been stayed, have agreed with the Department's position that States are not precluded from choosing precinct-based voting systems under HAVA and that HAVA does not require the counting of votes cast via provisional ballots at the wrong precinct.

Moreover, the United States Election Assistance Commission ("EAC") also recently issued guidance on this issue. The EAC is a federal agency established by Section 201 of HAVA, see 42 U.S.C. § 15321, and is charged with assisting the States in meeting the requirements of Title III by adopting "voluntary guidance consistent with such requirements," 42 U.S.C. § 15501. On October 12, 2004, the EAC adopted Resolution 2004-02. In this resolution, the EAC encourages States to take all actions necessary to make certain that provisional balloting is administered effectively and with clarity and "[i]n States where a provisional ballot is validly cast only when cast at the voter's assigned polling place or precinct, that these States make information available to poll workers at all precincts and/or polling places that will allow the poll workers to determine the voter's assigned precinct and polling place." Election Assistance Commission, Resolution 2004-02 Provisional Voting, *available at* <http://www.eac.gov/docs/Resolution%20-%20Provisional%20Voting.pdf>. Thus, the EAC also explicitly recognized that HAVA does not preempt precinct-based elections systems.

If Iowa wants to pass legislation or regulations requiring election officials to count as valid any provisional ballot cast outside of a voter's assigned precinct, it is certainly free to do so. However, HAVA does not require such legislation or regulations, nor does it preempt Iowa's current laws and regulations on this matter. Instead, the statute permits a state like Iowa to

continue its long tradition of only counting votes (cast provisionally or otherwise) that were cast in a voter's assigned correct precinct.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley J. Schlozman". The signature is fluid and cursive, with the first name "Bradley" being particularly prominent.

Bradley J. Schlozman
Deputy Assistant Attorney General

cc: The Honorable Chester J. Culver
Richard J. Sapp