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May 16, 2008

The Honorable Mary Herrera
Secretary of State
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

The Honorable Jeff Steinborn
New Mexico State Representative
P.O. Box 562
Las Cruces, NM 88004

Re: Opinion Request – Definition of "Vote"

Dear Secretary of State Herrera and Representative Steinborn:

You have requested our advice regarding whether the definition of "vote" in Section 1-9-4.2 of the Election Code, NMSA 1978, Ch. 1, comports with the requirements of the federal Help America Vote Act, 42 U.S.C.A. §§ 15301 – 15545 ("HAVA"). As discussed below, we conclude that, to the extent it uses an "intent of the voter" standard, the Election Code's definition of "vote" is inconsistent with HAVA and vulnerable to challenge on constitutional equal protection grounds.

In pertinent part, HAVA provides:

> Each voting system used in an election for Federal office shall meet the following requirements:
>
> ...
>
> (6) Uniform definition of what constitutes a vote
>
> Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

42 U.S.C.A. § 15481(a)(6). States were required to comply with Section 15481 on or after January 1, 2006. Id. § 15481(d).

Section 1-9-4.2 of the Election Code, which applies to state and federal elections in New Mexico, was apparently intended to implement HAVA's requirement for a uniform definition of vote. It provides that when paper ballots are hand-tallied,

> a vote shall be counted if:
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> (1) the ballot is marked in accordance with the instructions for that ballot type;
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> (2) the preferred candidate's name or answer to a ballot question is circled;
>
> (3) there is a cross or check within the voting response area for the preferred candidate or answer to the ballot question; or
>
> (4) the presiding judge and election judges for the precinct unanimously agree that the voter's intent is clearly discernable.

NMSA 1978, § 1-9-4.2(B) (2007). The fourth item in Section 1-9-4.2(B), which allows a vote to be counted if the voter's intent is clearly discernable, is problematic under HAVA.

HAVA's requirement that each state adopt "uniform and nondiscriminatory standards" to define a vote appears to stem from the United States Supreme Court's decision in Bush v. Gore, 531 U.S. 98 (2000). That case overturned an order of the Florida Supreme Court directing a manual recount of 9,000 ballots in the 2000 presidential election on which voting machines failed to detect a vote. See Gore v. Harris, 772 So.2d 1243 (Fla. 2000). The Florida Supreme Court determined that a recount was necessary because of the closeness of the election and the likelihood that there were "legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." Id. at 1261. A "legal vote" under Florida law was "one in which there is a 'clear indication of the intent of the voter.'" Id. at 1257.

The U.S. Supreme Court found that the manual recount ordered in Gore v. Harris was "standardless," 531 U.S. at 103, led to arbitrary treatment of voters and was inconsistent with constitutional equal protection principles. Id. at 105. According to the Court, consideration of the voter's intent to determine whether a vote is legally cast

> is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent ... is practicable and, we conclude, necessary.

Id. at 106.[1]

The Election Code's direction in Section 1-9-4.2(B)(4) to count hand-tallied votes if the presiding judge and election judges in a precinct "unanimously agree that the voter's intent is clearly discernable" is virtually indistinguishable from the Florida standard at issue in Bush v. Gore and raises the same concerns. Absent more specific criteria, precincts in New Mexico attempting to implement Section 1-9-4.2(B)(4) could well apply different standards for discerning voter intent and accepting or rejecting votes. This would lead to the unequal treatment of voters found objectionable by the U.S. Supreme Court. Accordingly, we conclude that Section 1-9-4.2(B)(4) does not meet the requirement of 42 U.S.C.A. § 15481(a)(6) for "uniform and nondiscriminatory standards that define what constitutes a vote" in federal elections and should not be applied. In contrast, the remaining criteria in Section 1-9-4.2(B) for votes that may be counted appear sufficiently specific to ensure equal treatment of voters as required by HAVA and Bush v. Gore.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ELIZABETH A. GLENN
Assistant Attorney General

[1] As noted by the dissenters in Bush v. Gore, Florida's "intent of the voter" standard was consistent with the practice of the majority of states at that time. 531 U.S. at 124, n. 2 (Stevens, J. dissenting). Many of the state statutes cited by Justice Stevens have since been amended to incorporate more precise criteria for determining whether a vote should be counted.