



THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319
TELEPHONE: 515/281-5164
FACSIMILE: 515/281-4209

October 20, 2004

The Honorable Chester J. Culver
Iowa Secretary of State
State Capitol Building
Des Moines, Iowa 50319

Dear Secretary Culver:

On October 12, 2004, you submitted a request for an opinion addressing two issues concerning the impact of the Help America Vote Act upon Iowa election practices. Because resolution of each of these issues has the potential to significantly impact procedures for the upcoming November 2, 2004; general election, we provide an expedited response through informal advice. This letter addresses only your first inquiry. We will be providing a separate advice letter addressing your second question as soon as possible.

In October of 2002, Congress passed the most comprehensive federal election reform legislation in American history, the "Help America Vote Act," or HAVA. 42 U.S.C. 15301, et seq. Title III of HAVA contains extensive requirements for uniform and nondiscriminatory election technology and administration, including voting system standards [HAVA § 301], provisional voting and voting information requirements [HAVA § 302], a requirement for each state to develop and maintain a statewide voter registration list [HAVA § 303(a)], procedural requirements for the processing of voter registration forms submitted by mail and additional content requirements for the mail-in voter registration form developed under section 6 of the National Voter Registration Act of 1993 [HAVA § 303(b)]. During the 2004 legislative session, the Iowa General Assembly enacted legislation intended to align Iowa election practices with the requirements of HAVA. 2004 Iowa Acts (80 G.A.), ch. 90 [S.F. 2269]. The issues you present require us to examine the interaction of HAVA and Iowa law.

Section 303(b)(4) of HAVA added new content requirements for the mail-in voter registration form developed under section 6 of the National Voter Registration Act of 1993.

(4) Contents of mail-in registration form.--

(A) In general.--The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form."

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms.-- If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

42 U.S.C. § 15483(b)(4).

In light of this section of HAVA, Iowa Code chapter 48A was amended to require the requisite questions regarding citizenship and age to be included on the Iowa voter registration form, establish procedures for notifying registration applicants when they failed to answer the citizenship question, and provide an opportunity for an applicant to submit the required information on a new voter registration form filed anytime before the day of the next federal election. Iowa Code §§ 48A.11(2A), 48A.26(3), 48A.26(3A), as amended by 2002 Iowa Acts, ch. 90 [S.F. 2269], §§ 10, 14, 15. The official Iowa Voter Registration Form was revised by the state voter registration commission to include the required citizenship check box. The Iowa

voter registration form also includes an affirmation of citizenship, as required by the NVRA.¹ The information immediately above the signature line on the form requires each applicant to "swear or affirm" under penalty of perjury, that the applicant is "a United States citizen."

The SF 2269 amendments to the Iowa laws governing voter registration went one step further than explicitly required by the terms of HAVA section 303(b)(4). In addition to notifying an applicant when the citizenship check box has not been completed and offering the applicant an opportunity to correct the error, the county commissioner of voter registration is directed to flag the registration record of each applicant who has failed to complete the citizenship check box with the "local" status code. Iowa Code § 48A.37(2), as amended by 2002 Iowa Acts, ch. 90, § 18. "A local record shall be valid for any election for which no candidates for federal office appear on the ballot, but the registrant may not vote in a federal election unless the registrant submits a new voter registration application before election day indicating that the applicant is a citizen of the United States." Id.

You correctly characterize this provision as establishing a dual registration system for voters who fail to complete the citizenship check box when registering to vote by mail in Iowa. These voters are designated as eligible to vote in state and local elections, but ineligible to vote in federal elections until the omission is corrected. You express concern that this practice may be inconsistent with HAVA, noting that several other states have concluded that failure to complete the check box should not prevent a voter registration from being processed for all elections and that the federal Election Assistance Commission has recently advised states that denying registration based upon failure to complete the check box would defeat the purpose of HAVA. You also express concern regarding whether this practice results in denial of the right to vote in federal elections based upon an immaterial error on the registration form, in violation of a provision of the federal Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B). Based upon these concerns, you ask whether county commissioners of elections should ignore the provisions of SF 2269 establishing the local registration status and fully register eligible voters who submit a registration form that is complete in all respects except marking the citizenship check box, and whether the Iowa Voter Registration Commission should amend its voter registration rules accordingly.

¹ Section 9(b) of the NVRA requires federal mail-in registration forms to include "a statement that - (A) specifies each eligibility requirement (including citizenship); (B) contains an attestation that the applicant meets each such requirement; and (C) requires the signature of the applicant, under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2). Section 6 of the NVRA requires states to accept and use the federal mail-in registration form and allows states "to develop and use a mail voter registration form that meets all of the criteria stated in section 9(b) for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a).

The Supremacy Clause of the United States Constitution mandates that the Constitution and "the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Since the United States Supreme Court decision in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), "it has been settled that state law that conflicts with federal law is 'without effect.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, ____ (1992).

In 1992 Iowa Op. Att'y Gen. 123, this office discussed basic principles governing the concept of federal preemption, as follows:

In general, Article VI of the United States Constitution, the so-called "Supremacy Clause," establishes the supremacy of federal law over state law. "It is a familiar and well-established principle that the Supremacy Clause invalidates state laws that 'interfere, or are contrary to' federal law." Hillsborough County v. Automated Laboratories, Inc., 471 U.S. 707, 713, 85 L.Ed.2d 714, 721, 105 S.Ct. 2371 (1985). This may occur in several different ways. First, when acting within constitutional limits, Congress may pre-empt state law by so stating in express terms. Id. In the absence of such express language, congressional intent to pre-empt state law may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary regulation. Id. Pre-emption of a whole field will also be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Id. Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." Id. Moreover, it is now firmly settled that "state laws can be pre-empted by federal regulations as well as by federal statutes." Id.

Id. at 124-25, quoting 1990 Iowa Op. Att'y Gen. 11, 12-13.

HAVA contains no express preemption clause and there is no evidence that Congress intended to "occupy the field" of election law requirements. To the contrary, several provisions

within the act make it clear that Congress intended to allow the states to determine how best to implement the HAVA requirements. See 42 U.S.C. § 15403(d) [HAVA § 253(d)] ("specific choices on the methods of complying with the elements of the State plan [for HAVA compliance] shall be left to the discretion of the State"); 42 U.S.C. § 15484 [HAVA § 304] (allowing states to establish election technology and administration requirements that are more strict than the requirements of HAVA Title III "so long as such State requirements are not inconsistent with federal requirements under [HAVA Title III] or any law described in [HAVA] section 906"); and 42 U.S.C. § 15485 [HAVA § 305] (indicating that "specific choices on the methods of complying with the requirements of [Title III] shall be left to the discretion of the State").

The preemptive scope of Title III of HAVA is defined by the terms of section 304. See Freightliner Corporation v. Myrick, 514 U.S. 280, 288, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 384, ___ (1995) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."), quoting Cipollone v. Liggett Group, Inc., 505 U.S. at 517, 112 S.Ct. at 2618, 120 L.Ed.2d at ___. Therefore, our analysis is limited to determination of whether the dual registration scheme contained in the Iowa statute is "inconsistent with federal requirements" under HAVA. 42 U.S.C. 15484 [HAVA § 304]. Therefore, the dual registration system established under Iowa Code chapter 48A may not be found inconsistent with HAVA unless it "actually conflicts" with the requirements of HAVA. An actual conflict exists if "it is impossible to comply with both state and federal law, or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581, 107 S.Ct. 1419, 1425, ___ L.Ed.2d ___ (1987) (quotations and citations omitted).

As set forth above, section 303(b)(4)(A)(i) of HAVA unambiguously requires inclusion of the citizenship check box on the federal mail-in voter registration form developed under the NVRA, as well as on state mail-in forms developed pursuant to section 6 of the NVRA. Section 303(b)(4)(B) is equally unambiguous in requiring election officials to provide notice to voter registration applicants who fail to complete the check box and to afford the applicants an opportunity to complete the form prior to the next federal election. No explicit direction is provided by Congress regarding whether an applicant may be registered to vote based upon submission of a registration form which is complete in all other respects, but upon which the applicant has failed to mark either yes or no to the citizenship question. As a result, we understand that states across the country are split in how they are addressing this issue. Some states have interpreted HAVA as implicitly requiring rejection of such forms. Other states have determined that registration forms without the check box question answered will be accepted and the applicants considered fully registered to vote in all elections, as long as the voter has signed the affirmation of citizenship.

In examining HAVA to determine legislative intent, we find significant the fact that Congress did not explicitly require states to reject these registration forms. This omission is

especially relevant to determination of congressional intent, given that within the same section of HAVA, Congress did explicitly require rejection of registration forms which were lacking other required information. The voter registration information verification requirement of section 303(a)(5), provides that "an application for voter registration for an election for Federal office *may not be accepted or processed* by a State unless the application includes [the applicant's driver's license number or the last four digits of the applicant's social security number]." 42 U.S.C. § 15483(a)(5)(A)(i) [HAVA § 303(a)(5)(A)(i)] (emphasis added). The only exception to this directive applies to registration applicants who do not have a driver's license number or social security number. 42 U.S.C. § 15483(a)(5)(A)(ii) [HAVA § 303(a)(5)(A)(ii)]. The drafters of HAVA could have enacted a similar requirement for rejection of voter registration forms upon which the applicant had failed to complete the citizenship check box. They did not. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Bates v. United States, 522 U.S. 23, 29-30, 118 S.Ct. 285, ___, 139 L.Ed.2d 215, 222 (1997), quoting Rusello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, ___, 78 L.Ed.2d 17, ___ (1983). In light of the omission of a direct requirement for rejection of registration forms upon which the citizenship check box is not completed and given the expressed congressional intent to leave "specific choices on the methods for complying with the requirements of Title III . . . to the discretion of the State" [42 U.S.C. 42 U.S.C. § 15485], we must conclude that Congress intended this issue to be resolved according to state law.

This conclusion is consistent with guidance recently issued by the federal Election Assistance Commission [EAC]. See *BEST PRACTICES IN ADMINISTRATION, MANAGEMENT AND SECURITY IN VOTING SYSTEMS AND PROVISIONAL VOTING: A Tool Kit for Election Administrators and Stakeholders: Issue One*, section X(A) at p. 64 (published by the EAC on July 30, 2004, available at the EAC website: www.eac.gov/bp) (noting that HAVA § 303(b)(4) "is 'subject to state law,' so the state may choose to honor the affirmation of citizenship and age that goes with signing of the registration form and register a person who did not check the 'yes' box"). The EAC is created under HAVA to serve as "a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections." 42 U.S.C. § 15322 [HAVA § 202]. Although the EAC is precluded from issuing rules or regulations, or taking "any action which imposes any requirement on any State or unit of local government" (42 U.S.C. § 15329 [HAVA § 209]), the commission is empowered to conduct studies and issue reports regarding election administration issues, with the goal of promoting methods for voting and election administration which "will be the most convenient, accessible, and easy to use for voters . . ." 42 U.S.C. § 15381(a) [HAVA § 241].

The Iowa legislature, in approving the dual registration system set forth in SF 2269, apparently assumed that HAVA required rejection of the incomplete forms for purposes of registration for federal elections. Despite this assumption, the legislature determined that the forms should be accepted under state law for purposes of registering for state and local elections.

In this context, we believe that the dual registration system was likely an attempt to enfranchise Iowa voters to the greatest degree allowed by HAVA. As detailed above, we do not agree that HAVA requires rejection of these registration applications for purposes of registration for federal elections. HAVA leaves the question of whether these forms will be accepted to the states. However, nothing within HAVA supports a conclusion that Congress intended states to adopt distinct registration requirements for state and federal elections, in which the requirements for voting in federal elections are more difficult.

The dual registration system established by SF 2269 presents an obstacle to accomplishing the purpose of HAVA. In effect, the Iowa dual standard creates a barrier to federal voting that is not applied to state elections. This outcome is clearly inconsistent and in conflict with the intent of HAVA. Therefore, we must conclude that HAVA preempts the provisions of Iowa Code chapter 48A which require the county commissioner of voter registration to flag the registration record of an applicant who has failed to complete the citizenship check box with the "local" status code and which prohibit "local" status voters from participating in federal elections. Iowa Code § 48A.37(2), as amended by 2002 Iowa Acts, ch. 90, § 18. Voter registration applicants who submit a registration form which is complete in all other respects, but upon which the applicant has failed to mark either yes or no to the citizenship question, should be treated as fully registered for state, local, and federal elections.

In addition, the imposition of different registration requirements for state and federal elections would violate the Civil Rights Act of 1964. 42 U.S.C. 1971(a)(2)(B). That provision mandates that:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election . . .

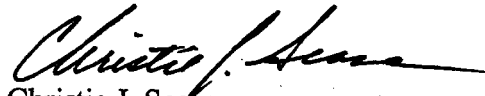
42 U.S.C. 1971(a)(2)(B). Failure to check the box concerning citizenship may be viewed as immaterial in light of the signed affirmation concerning citizenship. The Iowa legislature found failure to check the box immaterial for state registration purposes, but material for purposes of federal registration. This cannot be done consistent with the Civil Rights Act of 1964.

This conclusion does not negate the obligation of county commissioners to comply with the notification provisions of HAVA and Iowa Code section 48A.26(3A), as amended by 2002 Iowa Acts, chapter 90, section 15. A registration applicant who applied by mail and did not answer the yes or no citizenship check box question must be notified that the application was

The Honorable Chester J. Culver
Iowa Secretary of State
Page 8

technically incomplete, provided a new registration application, and provided an opportunity to complete the form prior to the next federal election.

Sincerely,

A handwritten signature in black ink, appearing to read "Christie J. Scase", with a long horizontal flourish extending to the right.

Christie J. Scase
Assistant Attorney General