



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

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).

Secretary of State Mary Herrera
State Representative Jeff Steinborn
May 16, 2008
Page 2

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:

- (1) the ballot is marked in accordance with the instructions for that ballot type;
- (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.


Secretary of State Mary Herrera
State Representative Jeff Steinborn
May 16, 2008
Page 3

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.




STATE OF NEW MEXICO

MARY HERRERA
SECRETARY OF STATE

INSTRUCTION 2008-10

DATE: August 22, 2008

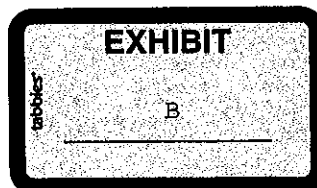
TO: County Clerks

FROM: Mary Herrera 
Secretary of State

RE: Absentee and Provisional Ballots
What Constitutes a Vote?

To ensure uniform application when processing absentee ballots that cannot be read through the voting system and hand tallying provisional ballots; absentee ballots will be hand tallied if the M-100 or the central tabulator rejects a ballot because the voter's marking cannot be registered. Provisional ballots shall be hand tallied using the following examples that are enclosed.

Examples are on pages 2-16.



**Standards for
What Constitutes a Vote**
Optical Scan
Electronic Voting Systems

Optical Scan Ballots

All optical scan ballots that are read by a ballot scanner shall be counted in accordance with applicable provisions of the New Mexico Election Code. The following standards shall apply in determining whether a ballot has been properly voted and whether a vote should be counted for any office or ballot question when counting ballots by hand. In the event of a recount, a court should provide guidance as to whether the recount shall be conducted by a ballot scanner or by hand. These standards have been adopted in accordance with the New Mexico Election Code, where applicable.

PAGE 2

Optical Scan 1

A ballot that is properly marked, as specified by the legally valid ballot instructions, in the target area for an office or ballot question shall be counted as a vote for that candidate or ballot response.

For Governor (Vote for one)



George Washington



Abraham Lincoln



John Adams

Valid Vote for Lincoln

Optical Scan 2

A ballot containing a clear mark indicating the intent of the voter, any portion of which is contained in the target area and does not enter into another target area, shall be counted as a vote for that candidate or ballot response.

For Governor (Vote for one)



George Washington



Abraham Lincoln



John Adams

Valid Vote for Washington

**For Governor
(Vote for one)**



George Washington



Abraham Lincoln



John Adams

Valid Vote for Lincoln

Optical Scan 3

A ballot that has any mark in the target area that partially extends into another target area or areas shall not be counted for that office or ballot question.

**For Governor
(Vote for one)**



George Washington



Abraham Lincoln

John Adams

Invalid vote

Optical Scan 4

A ballot that has any mark in the target area that partially extends into an area surrounding a candidate or ballot response, other than its target area, shall be counted as a vote for the candidate or ballot response so marked.



**For Governor
(Vote for one)**

George Washington



Abraham Lincoln



John Adams

Valid Vote for Washington

Optical Scan 5

A ballot properly marked with any device other than the marking device provided to the voter shall be counted.

Optical Scan 6

A ballot marked with more than one type of marking device shall not be counted for any office or ballot question on the ballot.

Optical Scan 7

A ballot with marks for more candidates in an office or more responses to a ballot question than permitted shall be deemed an over-vote, and no vote shall be counted for that office or ballot question.

PAGE 5



**For Governor
(Vote for one)**



George Washington



Abraham Lincoln



John Adams

Invalid vote

Optical Scan 8

A ballot with a proper mark in the straight party target area and with additional marks for candidates or ballot responses elsewhere on the ballot shall be counted for those candidates or ballot responses properly marked outside the straight party area. For the other offices on the ballot, the ballot shall be counted for the candidates of the political party for which the voter cast a straight party vote.



Straight Democrat



Straight Republican

**For Governor
(Vote for one)**



George Washington (Democrat)



Abraham Lincoln (Republican)



John Adams (Green)

Valid Vote for Lincoln

**For Senator
(Vote for one)**



Bill Clinton (Democrat)



George Bush (Republican)



Dwight David Eisenhower (Green)

Valid Vote for Clinton

Optical Scan 9

A ballot with marks for more than one party in the straight party target areas, and with additional marks in the target areas of candidates or ballot responses elsewhere on the ballot, shall be counted only for those candidates or ballot responses properly marked.



Straight Democrat



Straight Republican

**For Governor
(Vote for one)**



George Washington (Democrat)



Abraham Lincoln ((Republican)



John Adams (Green)

Valid Vote for Adams

~~For Governor~~

PAGE 7



Straight Democrat



Straight Republican

**For Governor
(Vote for one)**



George Washington (Democrat)



Abraham Lincoln ((Republican)



John Adams (Green)

Valid Vote for Lincoln



Straight Democrat



Straight Republican

**For Governor
(Vote for one)**



George Washington (Democrat)



Abraham Lincoln (Republican)



John Adams (Green)

Invalid vote

Optical Scan 10

A ballot on which writings or remarks in the target area appear to be ranking candidates (letters, numbers, etc.) shall be considered valid marks only if they do not exceed the number of candidates permitted to be elected for that office.

**For Governor
(Vote for one)**

George Washington

1 Abraham Lincoln

John Adams

Valid Vote for Lincoln

**For Governor
(Vote for one)**

2 George Washington

1 Abraham Lincoln

3 John Adams

Invalid vote

**For Governor
(Vote for two)**

2 George Washington

1 Abraham Lincoln

John Adams

Valid Votes for Lincoln & Washington

Optical Scan 11

A ballot with any writings or remarks regarding one or more candidates or ballot responses shall not be counted as a vote for that office or question, unless clarified by an additional mark or marks in the target area(s) that indicate support for those candidates or ballot responses.

For Governor
(Vote for one)

- George Washington
- Abraham Lincoln
- John Adams

Valid Vote for Adams

For Governor
(Vote for one)

- ^{yes} George Washington (Democrat)
- Abraham Lincoln (Republican)
- John Adams (Green)

Valid Vote for Adams

10

Optical Scan 12

A ballot on which the voter casts a vote on the ballot and properly writes in a different candidate in the write-in area shall be considered an over-vote for that office if the number of chosen candidates exceeds the number permitted to be voted for in that office and no vote shall be counted, except as provided by Optical Scan 13.

For Governor (Vote for one)



George Washington



Abraham Lincoln



John Adams



Write-In Franklin Roosevelt

Invalid vote

Optical Scan 13

A ballot on which the voter casts a straight party vote and properly writes in a candidate in the write-in area shall be counted only for the write-in candidate in that office. For the other offices on the ballot, the ballot shall be counted for the candidates of the political party for which the voter cast a straight party vote.



Straight Democrat



Straight Republican

For Governor (Vote for one)



George Washington (Democrat)



Abraham Lincoln (Republican)



John Adams (Green)



Write-In Thomas Jefferson

Valid Vote for Jefferson

PAGE 11

Optical Scan 14

A properly cast write-in vote shall contain a mark in the target area and, in the space provided, the written name of a candidate whose name does not otherwise appear on the ballot for that office.

For Governor
(Vote for one)



George Washington



Abraham Lincoln



John Adams



Write-In Thomas Jefferson

Valid Vote for Jefferson

For Governor
(Vote for one)



George Washington (Democrat)



Abraham Lincoln (Republican)



John Adams (Green)



Write-In Thomas Jefferson

Invalid Vote

**For Governor
(Vote for one)**



George Washington



Abraham Lincoln



John Adams



Write-In Abraham Lincoln

Invalid Vote

**For Governor
(Vote for one)**



George Washington



Abraham Lincoln



John Adams



Write-In A. Lincoln

Invalid Vote

**For Governor
(Vote for one)**



George Washington



Abraham Lincoln



John Adams



Write-In John Adams

Invalid Vote

Optical Scan 15

All properly cast write-in votes must be counted exactly as they appear on the ballot.

**For Governor
(Vote for one)**



George Washington



Abraham Lincoln



John Adams



Write-In H. Truman

Valid Vote for H. Truman only

Optical Scan 16

If a voter designates a vote for a named candidate on the ballot and also properly writes in the same candidate in the write-in area, no vote shall count for that candidate.

**For Governor
(Vote for one)**



George Washington



Abraham Lincoln



John Adams



Write-In John Adams

Invalid Vote

PAGE 1A

Optical Scan 17

A ballot on which the voter does not mark the voting response area but instead marks the ballot in a consistent manner, such as placing some type of consistent mark (other than a circle), on or around a candidate's name, shall be counted as a vote for that candidate or ballot response.

Example 1)

For Governor
(Vote for one)



George Washington *YES*



Abraham Lincoln



John Adams

For Auditor
(Vote for one)



Jane Smith



John Doe *YES*



Jane Doe

Valid vote for George Washington & John Doe

