



Arizona State Senate Issue Brief

December 30, 2014

Note to Reader:

The Senate Research Staff provides nonpartisan, objective legislative research, policy analysis and related assistance to the members of the Arizona State Senate. The *Research Briefs* series is intended to introduce a reader to various legislatively related issues and provide useful resources to assist the reader in learning more on a given topic. Because of frequent legislative and executive activity, topics may undergo frequent changes. Additionally, nothing in the *Brief* should be used to draw conclusions on the legality of an issue.

ARIZONA ELECTIONS

INTRODUCTION

Elections are governed by federal and state law. The Voting Rights Act (VRA) and the Help America Vote Act (HAVA) are two federal laws with significant impact on Arizona elections. Additionally, the Arizona Constitution, Arizona statutes, the Secretary of State (SOS) Elections Procedures Manual (Procedures Manual) and court opinions have helped to shape election law in Arizona. This Issue Paper addresses the VRA, HAVA, and state legislation involving Equipment Testing and Manual Audits of Election Results, the Permanent Early Voting List and the Arizona Taxpayer and Citizen Protection Act (Proposition 200). Arizona's Citizen Clean Elections Act and Reapportionment and Redistricting are discussed in separate issue briefs.

FEDERAL LAW

THE VOTING RIGHTS ACT

The Voting Rights Act (VRA), adopted initially in 1965 and extended in 1970, 1975, 1982 and 2006, codifies and effectuates the 15th Amendment's permanent guarantee that, throughout the nation, no person shall be denied the right to vote on account of race or color. On July 27, 2006, President George W. Bush signed the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (H.R. 9) that, among other things, extends sections 4 and 5 of the VRA for 25 years. The VRA contains several special provisions including preclearance and minority language requirements that are imposed in certain jurisdictions, including Arizona.

The VRA's Impact in Arizona

Section 2 of the VRA closely follows the language of the 15th Amendment and applies a nationwide prohibition against the denial or abridgement of the right to vote. Section 4 of the VRA contains special enforcement provisions aimed at those areas of the country where

Congress believes the potential for discrimination to be the greatest.

In 1965, the VRA defined a “covered” jurisdiction as: 1) a jurisdiction that maintained a voting “test or device” as a prerequisite for voting or registration as of November 1, 1964; and 2) less than 50 percent of the voting aged residents in the jurisdiction were registered to vote or actually voted in the presidential election of 1964. The State of Arizona, prior to 1972, employed a “test or device” that required a person to show, in order to register to vote, that the person was able to read the U.S. Constitution in English in a manner that showed the person was neither prompted nor reciting from memory, unless the person was prevented from reading the Constitution due to a physical infirmity. Following the 1965 passage of the VRA, certain political subdivisions in Arizona became “covered” jurisdictions. In 1970, Congress renewed the VRA but referenced November 1968 as the relevant date for the coverage formula, which resulted in extending coverage to more political subdivisions in Arizona.

In 1975, the VRA was extended and the entire State of Arizona became a “covered” jurisdiction because “test or device” was expanded to include the practice of providing any election information only in English where members of a single language minority constituted more than five percent of the citizens of voting age. The coverage formula was also expanded to apply as of November 1972. Both in 1982 and 2006, Congress again extended the VRA for 25 years but did not change the coverage formula.

Preclearance

Under section 5 of the VRA, jurisdictions that are covered by section 4 cannot implement any change affecting voting until the Attorney General of the United States or the Department of Justice (DOJ) or the United States District Court for the District of Columbia determines that the change does not have a discriminatory effect, a process commonly called “preclearance.”

A covered jurisdiction must receive preclearance of any voting law changes or

practices, including redistricting changes, ballot formats, legislation amending election law statutes and other voting procedures, before the changes or practices can legally take effect. The covered jurisdiction must show that the voting law change does not have a racially discriminatory purpose and that the change is not retrogressive, *i.e.*, it will not make the minority voters worse off than they were prior to the change. A covered jurisdiction may apply for “bailout” to terminate coverage under the preclearance requirements if certain criteria are sustained during the ten years preceding the filing of the bailout action and during its pendency.

In June, 2013, the United States Supreme Court held that it is unconstitutional to use the coverage formula provided in Section 4(b) of the VRA to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the VRA. However, the Supreme Court did not rule on the constitutionality of Section 5 itself. The effect of the decision releases jurisdictions previously identified by the coverage formula in Section 4(b) from the preclearance requirement, unless they are covered by a separate court order entered under Section 3(c) of the VRA. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

Minority Language Election Requirements

The VRA also requires election information to be provided in more than one language, according to a two-part test. The first condition is satisfied if, in a state or jurisdiction, one of the following is true: 1) more than five percent of the voting-age citizens are members of a single language minority and are limited-English proficient; 2) more than 10,000 of the voting-age citizens are members of a single language minority and are limited-English proficient; or 3) in the case of a political subdivision that contains all or any part of an Indian reservation, more than five percent of the American Indian or Alaska Native voting-age citizens within the Indian reservation are members of a single language minority and are limited-English proficient. If the second condition, the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate, is also true, then the jurisdiction must provide

voting materials in other languages, in addition to the English language until August 6, 2032. Under these provisions of the VRA, the State of Arizona must provide all voting materials in the Spanish language and some counties must provide all voting materials in one or more Native American languages.

HELP AMERICA VOTE ACT

The United States Congress passed the Help America Vote Act (HAVA) in 2002 to establish a program to provide funds to states to replace punch card voting systems, establish the Election Assistance Commission (EAC) to assist in the administration of federal elections and to otherwise provide assistance with the administration of certain federal election laws and programs. Additionally, HAVA established minimum election administration standards for states and units of local government with responsibility for the administration of federal elections.

In order to receive HAVA monies, each state is required to develop and submit a state plan to the Federal Election Commission and the EAC to implement the new federal requirements. The SOS organized a 25-member committee to create Arizona's plan. The final Arizona plan was submitted on May 15, 2003, and is the official working document for implementation of the federal HAVA requirements.

In addition to the creation of a state plan, each state is required to create an election fund consisting of federal appropriations to implement HAVA to be used exclusively to carry out federal HAVA requirements.

Among other election law changes, HAVA requires each state to meet minimum election technology and administration requirements, including:

- ensuring that voting systems used in federal elections on and after January 1, 2006, meet certain voting system standards.
- employing provisional voting, for certain voters whose eligibility to vote is in

question, in federal elections held on and after January 1, 2004.

- posting certain voting information at the polls on the day of each election for federal office held on and after January 1, 2004.
- developing and maintaining a uniform computerized statewide voter registration database no later than January 1, 2004.
- implementing requirements for voters who register by mail on and after January 1, 2003.

As part of HAVA compliance, the SOS permitted counties to purchase direct recording equipment (DRE) for disability accessible voting systems. The SOS allowed counties to purchase DRE machines from one of three major voting system vendors. In Pima County, many citizen activists voiced concerns about the DRE machines the Pima County Board of Supervisors had selected for disabled voting, claiming they are unreliable and insecure. During the summer of 2006, the Pima County Board of Supervisors delayed its decision whether to approve the voting systems, causing concern that Arizona would not be in compliance with HAVA, which requires that the disabled have the ability to vote in secret, rather than with assistance. A group of citizens requested the Maricopa County Superior Court to issue an injunction to stop the use of these machines in 13 Arizona counties. The petitioners claimed that two of the three vendors' machines were unreliable and insecure. The Superior Court denied the injunction and granted the SOS's motion to dismiss the case. The Pima County Board of Supervisors then approved the DRE machines for use beginning in the 2006 primary election. The plaintiffs appealed and in July 2009, the Arizona Court of Appeals vacated the trial court's order of dismissal, affirmed in part and remanded the case to the trial court for further proceedings to determine whether: 1) a significant number of votes cast on the DRE machines will not be properly recorded or counted; and 2) the use of the DRE machines impermissibly burdens the plaintiffs' right to vote.

ARIZONA LAW**VOTING EQUIPMENT TESTING**

Both the SOS's Procedures Manual and statute contain instructions concerning the certification and testing of voting equipment. All voting machines and devices used in federal, state or county elections are certified if they are tested and approved by a laboratory accredited by the federal Election Assistance Commission (EAC). Additionally, the SOS certifies all election equipment, software and firmware to be used in the election. The Procedures Manual specifies that any card, tape or disc used in the programming or operation of vote tabulating equipment upon which votes are counted and used in compiling vote totals is required to be kept secure. The election management software is stored for three years following the official election canvass for each election.

The Procedures Manual articulates the period of time before an election that the automatic tabulating equipment and programs must be tested to ascertain that the equipment and programs will correctly count the votes cast. Diagnostic testing of all equipment begins 90 days before an election. As each device is successfully tested, it is identified, certified, loaded into the unit and sealed with a numbered seal. Any failure of the equipment is corrected before using the equipment for election processing. The public is given at least 48 hours' notice of the testing. The test is observed by at least two election inspectors who are not of the same political party and is open to representatives of the political parties, the candidates, the press and the public. The test is conducted by processing a preaudited group of ballots marked to record a predetermined number of valid votes. If any error is detected, the cause must be ascertained and corrected and an errorless count must be made before the equipment is approved. The same testing procedures are repeated immediately before the start of the official count of the ballots. Additionally, electronic ballot tabulating systems are tested for logic and accuracy within ten days before their use in an election or, in the

case of voting devices used for early voting, seven days before their use for early voting.

MANUAL AUDITS OF THE ELECTION

As soon as the polls are closed and the last ballot has been deposited in the ballot box, the election board or the tally board must immediately count the votes cast. All proceedings at the counting center are under the direction of the board of supervisors or other officer in charge of elections and may be observed by representatives of each political party and the public. Legislation in 2008 created a selection procedure to allow for three additional observers who represent a candidate for nonpartisan office or a political committee in support of or in opposition to a ballot measure, proposition or question. If for any reason it becomes impracticable to count all or a part of the ballots with tabulating equipment, the officer in charge of elections may direct that they be counted manually. The public can view live video of the ballots at the counting center through a link on the SOS's website. Disruptions in the live video feed will not affect or prevent the tabulation of ballots but the county recorder or officer in charge of elections must attempt to reinstate video coverage as soon as practicable. The recordings must be retained as a public record through the challenge period for the general election.

Concerns about election fraud with electronic tabulating machines prompted the Legislature to classify the counterfeiting of election returns as a class 3 felony and to establish a procedure for manually auditing certain randomly selected election results. For each countywide primary, general and presidential preference election, the county officer in charge of the election conducts a hand count of at least two percent of the precincts in that county, or two precincts, whichever is greater, selected at random from a pool consisting of every precinct in that county. Up to five contested races must be hand counted, which must include one federal race, one statewide office race, one statewide ballot measure, one state legislative office race and additional contested federal statewide or

legislative races or ballot measures until four races have been selected or no additional races or ballot measures are available for selection on those ballots. If a presidential race is on the ballot, it also must be hand counted. A hand count is not conducted for a precinct if there are no contested races. All selections of races are chosen by lot without the use of a computer, after the primary ballots are separated by political party.

If the randomly selected races result in a difference in any race that is less than the assigned designated margin when compared to the electronic tabulation of those same ballots, the results of the electronic tabulation constitute the official count for that race. If the randomly selected races result in a difference in any race that is equal to or greater than the designated margin when compared to the electronic tabulation of those same ballots, further hand counts must be performed. If there are sufficient discrepancies between the hand count and the electronic tabulation, all the ballots from an entire county may be hand counted.

The designated margin of error is determined by the Vote Count Verification Committee (Committee) within the office of the SOS. The designated margin is used in reviewing the hand counting of votes and to set the acceptable variance rate between the machine and hand counts. The Committee established the designated margin for early ballots to be five ballots or two percent, whichever is greater. The Committee established the designated margin for ballots cast at the polling place to be three ballots or one percent, whichever is greater. These designated margins were precleared on October 19, 2006, and were officially used for the first time in the 2006 general election. The Committee met again on August 12, 2008 and retained the 2006 margins for the next two years. On March 25, 2011, the Committee voted to keep the designated margins the same as they have been since 2006.

EARLY VOTING

A voter may vote early by mail or in person at a designated early voting location. A voter

may make a request for an official early ballot to be received by mail as early as 93 days before any election through 5:00 p.m. on the second Friday before the election. Additionally, a voter may appear personally at an on-site early voting location, which opens the same day the county begins to send out the early ballots and closes at 5:00 p.m. on the Friday preceding the election.

A voter may obtain an early ballot through an oral or written request to the County Recorder or other officer in charge of elections by providing a name, address, date of birth and state or country of birth or other information to confirm the identity of the voter. The early ballot and envelope is mailed postage prepaid to the voter 26 days prior to the election. The early ballot and envelope must be returned by 7:00 p.m. on election day.

Legislation in 2007 created a Permanent Early Voting List (PEVL) for voters in Arizona. In order to be included on the PEVL, a voter must make a written request or complete an application containing the voter's name, residence address, mailing address in the voter's county of residence, date of birth and a signature to compare the signature on the voter's registration form. Not less than 90 days prior to any polling place election scheduled in March or August, the voter will be mailed an election notice that includes the election dates, early ballot mailing date, the address where the ballot will be mailed and instructions on changing a voter's information or requesting that an early ballot not be sent. If the voter is not registered as a member of a political party recognized in a partisan open primary election, the election notice must also provide information regarding the procedure for the voter to designate a political party ballot. Early ballots are mailed to voters on the PEVL no later than the first day of early voting.

A voter can be removed from the list by written request or if the voter is placed on the inactive list because the initial election notice is returned undeliverable and the voter is unable to be contacted. A voter can be placed back on the PEVL by submitting a new request. A voter is not removed from the PEVL for failing to vote an early ballot. An absent uniformed services

voter or overseas voter is eligible to be placed on the PEVL.

ARIZONA TAXPAYER AND CITIZEN PROTECTION ACT (Proposition 200)

Proposition 200 was a citizen's initiative placed on the 2004 general election ballot and approved by the voters. In addition to other requirements, it requires that evidence of United States citizenship be submitted by every person to register to vote and that proof of identification be presented by every voter at the polling place prior to voting.

History

In July of 2003, Protect Arizona NOW and Yes on 200, both political committees, filed an application to circulate the initiative petition for the Arizona Taxpayer and Citizen Protection Act. There were a sufficient number of valid signatures on the petitions to place the initiative on the ballot, whereby it was subsequently numbered Proposition 200. Prior to the election, Proposition 200 was subject to two unsuccessful challenges attempting to remove it from the ballot.

Proposition 200 was approved by the voters in the 2004 general election. The election was canvassed on November 22, 2004. On November 30, 2004, the Mexican American Legal Defense and Educational Fund sought a temporary restraining order (TRO) to prevent Proposition 200 from becoming law. The TRO was granted, but expired on December 22, 2004. On December 22, 2004, Governor Napolitano officially proclaimed the election results.

The AG then submitted the portion of Proposition 200 modifying election laws to the DOJ for preclearance. When the DOJ precleared Proposition 200 on January 24, 2005, the portions relating to election law became legally enforceable.

Proof of Citizenship to Register to Vote

For persons registering to vote or re-registering to vote in a different county on or after January 24, 2005, Proposition 200 requires

the person to provide proof of citizenship. A person is not registered to vote until the person provides satisfactory proof of citizenship.

Statute defines the acceptable forms of identification for proving citizenship. Satisfactory evidence of United States citizenship includes one of the following:

- An Arizona driver's license number or nonoperating identification license number, issued after October 1, 1996.
- A driver's license or nonoperating identification license from another state that identifies United States citizenship.
- A legible photocopy of a birth certificate with the name of the applicant that verifies United States citizenship. Supporting documentation, like a marriage license, may be needed if the name on the birth certificate is not the same as the person's current legal name.
- A legible photocopy of the pertinent pages of the United States passport.
- United States naturalization certificate number or the presentation of the original certificate of naturalization.
- Bureau of Indian Affairs Card Number, Tribal Treaty Card Number or Tribal Enrollment Number.

Identification at the Polls

Proposition 200 contains a provision requiring a voter at the polls who wishes to obtain a ballot to present one form of identification that contains the voter's photograph or two different forms of identification without the voter's photograph. However, there may be times in which the voter does not possess an acceptable form of identification. In February 2005, the AG advised the SOS that regulations guiding poll workers regarding acceptable forms of identification should be put in place and state statutes should be amended to allow a voter who lacks sufficient identification to vote a provisional ballot. Also, on February 4, 2005, the AG issued a formal opinion stating that a

driver or nonoperating identification license issued in Arizona after October 1, 1996, is satisfactory evidence of United States citizenship to register to vote.

During the 2005 legislative session, the Legislature approved an act to allow a qualified elector, whose name is on the precinct register but who does not present the proper forms of identification, to vote a provisional ballot if the elector presents one other specified form of identification. This legislation was vetoed by the Governor. After the legislative session, the SOS developed new procedures for proof of identification at the polls and the AG and Governor, as required by law, approved the changes to the SOS's Procedures Manual. In August 2005, the AG requested that these procedural changes be precleared by the DOJ.

The changes to the SOS's Procedures Manual were precleared by the DOJ in October of 2005. Under the new procedures, all voters, regardless of whether they provide sufficient identification, will be allowed to vote using one of three types of ballots:

- The first type of ballot that may be issued is a regular ballot. This will be issued to voters who present sufficient identification and the information on the identification reasonably appears to be the same as the signature roster or the recorder's certificate.
- The second type of ballot that may be issued is a provisional ballot. The provisional ballot will be set aside and verified at the recorder's office following the election. A provisional ballot will be issued to voters who present sufficient identification, but the voter's name does not appear on the signature roster or the information on the voter's identification does not reasonably appear to be the same as the signature roster or the recorder's certificate. A provisional ballot will also be provided to voters who do not present sufficient identification but do present identification that is issued by a recognized Native American Tribe.
- The third type of ballot that may be issued is a conditional provisional ballot given with

instructions to return to the county recorder's office with proper identification. The conditional provisional ballot will be issued to voters who do not present sufficient identification. The poll worker must notify the voter that he or she must provide sufficient identification to the county recorder and provide the voter with instructions on how, when and where the voter may provide proof of identification. The ballot will not be counted unless the voter provides the county recorder proof of identification by 5:00 p.m. on the fifth business day after a general election that includes an election for a federal office, or by 5:00 p.m. on the third business day after any other election.

In 2009, the Legislature codified and expanded the acceptable forms of identification for a voter to obtain a ballot. The expanded forms of identification include a U.S. military identification card, a U.S. passport or any mailing that is "Official Election Material." The identification is deemed valid unless it can be determined on its face that it has expired.

Recent Litigation

Proposition 200 continues to be under scrutiny and subject to litigation. In 2006, a group of citizens and community groups challenged Proposition 200's requirement for proof of citizenship to register to vote and the requirement to provide identification at the polls. The United States District Court did not grant the plaintiff's requested temporary restraining order to prevent Arizona officials from enforcing the election provisions of Proposition 200. On October 5, 2006, the Ninth Circuit Court of Appeals enjoined the implementation of Proposition 200's voting identification requirement in connection with the 2006 general election and enjoined Proposition 200's registration proof of citizenship requirements so that voters could register before the October 9, 2006, registration deadline without having to show proof of identification. However, on October 20, 2006, the United States Supreme Court vacated the order of the Ninth Circuit; therefore identification at the polls was

necessary during the 2006 general election. On appeal, the Ninth Circuit refused to enjoin the citizenship requirement finding that plaintiffs had demonstrated little likelihood of success of proving that Arizona's registration identification requirement is a poll tax. The court also found that the plaintiffs failed to demonstrate that Proposition 200's identification requirement imposes a severe burden on the right to vote and therefore was justified as an even-handed and politically neutral law aimed at preserving the integrity of the election process. Following a six-day bench trial in July 2008, the United States District Court denied the plaintiff's request for a permanent injunction on August 20, 2008. Plaintiffs appealed to the Ninth Circuit Court of Appeals.

In April 2012, the Ninth Circuit Court of Appeals filed an opinion that upheld Proposition 200's requirement that voters show identification at the polling place, but concluded that the National Voter Registration Act supersedes Proposition 200's registration provision as that provision is applied to applicants using the National Mail Voter Registration Form to register to vote in federal elections. In June 2013, the Supreme Court held that the NVRA precluded Arizona from requiring anyone registering to vote using the federal voter registration form to submit any additional information not required by the federal form. However, the Court concluded that Arizona could request that the Elections Assistance Commission (EAC) add language requiring documentary proof of citizenship to each state's instructions on the federal voter registration form. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (U.S. 2013). The EAC concluded that the additional language was unnecessary and denied the request. In November, 2014 the Tenth Circuit Court of Appeals filed an opinion that reversed the ruling of the District Court and remanded the case to the District Court with instructions to vacate the order requiring the EAC to modify the federal form.

ADDITIONAL RESOURCES

- Arizona Secretary of State
www.azsos.gov
- Arizona Attorney General
www.azag.gov
- U.S. Department of Justice, Civil Rights Division, Voting Section
<http://www.usdoj.gov/crt/voting/>
- U.S. Election Assistance Commission
<http://www.eac.gov>
- Joseph Kanefield, *Election Law in Arizona*, Arizona Attorney (Nov. 2006)
<http://www.myazbar.org/AZAttorney/>
- National Conference of State Legislatures, Elections
<http://www.ncsl.org/programs/legismgt/elect/elect.htm>
- *Chavez v. Brewer*, 222 Ariz. 309, 214 P.3d 97, Ariz.App. Div. 1, 2009
<http://azcourts.gov/Portals/89/opinionfiles/CV/CV060575.pdf>
- *Gonzalez v. Arizona*, 677 F.3d 383, C.A.9 (Ariz.), 2012
<http://www.ca9.uscourts.gov/datastore/opinions/2012/04/17/08-17094.pdf>
- *Kobach et al v. The United States Election Assistance Commission*
<http://www.justice.gov/crt/about/app/briefs/kobachopinion.pdf>