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April 27, 1982

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ATTORNEY GENERAL OPINION NO. 82- 96

The Honorable Jack H. Brier
Secretary of State
2nd Floor, Statehouse
Topeka, Kansas 66612

Re: Elections -- Ballots -- Mail Ballots in Certain
Question Submitted Elections

Synopsis: The provisions of 1982 Senate Bill No. 778, which would require all qualified voters in certain question submitted elections to be furnished ballots by mail and would permit return of these ballots by mail or by personal delivery thereof to the county election officer, would not impose a poll tax in those instances where voters choose to return the ballots by mail, thereby incurring expense for postage. Moreover, such provisions would not, as a matter of law, discriminate in favor of the wealthy, in contravention of the Equal Protection Clause of the Fourteenth Amendment. Cited herein: U.S. Const., Amends. XIV, XXIV.

* * *

Dear Secretary Brier:

You have asked for our opinion regarding certain provisions of 1982 Senate Bill No. 778 (SB 778). In particular, you indicate that questions have been raised regarding the constitutionality of certain provisions of this bill "permitting a voter to mail a ballot to a county election officer," and you have inquired whether the necessity of paying postage in order for a voter to avail himself or herself of these provisions may be viewed as an "unlawful poll tax."

Senate Bill No. 778 is limited in scope, applying only to certain question submitted elections. In these elections,

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county election officers are required to mail ballots to registered electors, together with instructions for marking and returning the ballot. With regard to the latter, section 3(b) of the bill provides, in part:

"The elector may return the marked ballot to the county election officer by United States mail, if it is received by the county election officer by the date of the election, or personally deliver the ballot to the office of the county election officer before noon on the date of the election." (Emphasis added.)

In considering your inquiry regarding these provisions, it initially should be observed that the only prohibition against a poll tax having any apparent relevance to your request is the Twenty-fourth Amendment to the U.S. Constitution. Section 1 of that Amendment provides:

"The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

It is to be observed that SB 778 has no application to any election where candidates are nominated or elected; hence, its provisions are not within the purview of the foregoing constitutional requirements.

Of equal importance, it also should be observed that the above-quoted provisions of SB 778 do not impose a poll tax. In Black's Law Dictionary (5th Ed. 1979), a poll tax is defined as follows:

"A capitation tax; a tax of specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class (as, all males of a certain age, etc.) without reference to his property or lack of it." Id. at 1043.

Measured against this definition, it is readily apparent that the provisions of SB 778 do not provide for the imposition of a poll tax. However, such conclusion is not of itself determinative of your request. Looking beyond the language of your question to the underlying substantive issue, we believe the question for our consideration is whether the above-quoted provisions of SB 778 deny any elector equal protection of the law, as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

Pertinent to our consideration of this issue is Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 16 L.Ed.2d 169, 88 S.Ct. 1079 (1966). At issue in Harper was a poll tax imposed by the State of Virginia as a condition precedent to voting, i.e., payment of the poll tax was established as a voting qualification. In holding such requirement unconstitutional as an abridgement of the Equal Protection Clause of the Fourteenth Amendment, the U.S. Supreme Court held:

"A state violates the equal protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard, voter qualifications having no relation to wealth nor to paying or not paying a poll or any other tax." 16 L.Ed. 2d at 170 (Syl. ¶3).

In light of this decision, even though SB 778 does not impose a poll tax, per se, it must be decided whether the quoted provisions of section 3(b) establish wealth or affluence as an electoral standard.

The pertinent provisions of section 3(b) are alternative in nature. An elector may return a marked ballot to the county election officer either by mailing it or personally delivering it. All voters are afforded these same options. There is no requirement that some or all voters must mail the marked ballot in order to return it. If any voter declines to return the ballot by mail, because of the expense of postage or because of any other reason, the voter still has the option of personally returning the ballot to the office of the county election officer.

Although we recognize that there are also expenses attendant upon the travel required by the latter alternative, similar expenses are necessitated by our present system. Election laws currently require all voters (other than those who qualify for absentee ballots) to travel to the various polling places established by the county election officer in order to cast their ballots. Thus, both of the proposed alternatives potentially require some expense for all voters. However, we are unaware of any case law or other authority suggesting that it is improper for a state to establish a voting system whereby direct expenses are incurred by voters in exercising their franchise. The important consideration is whether the proposal discriminates as a matter of law in favor of the wealthy. In our judgment, no such discrimination exists.

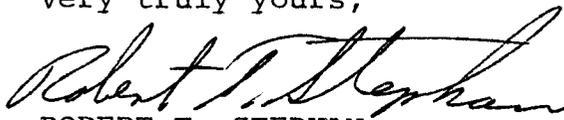
We acknowledge that expenses will vary for each voter, and that the burden of such expenses will be greater for some voters than for others. However, we believe it is axiomatic that "[a]ll voting laws treat some persons differently from

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others in some respects." Harper, supra at 176 (dissenting opinion). Further, we are unable to find that such disparity is irrational, arbitrary or results in invidious discriminations. If enacted, we believe SB 778 can be shown to evidence a legitimate state policy. And even though some voters may incur greater expenses than others, in our judgment there is nothing in the proposed voting scheme which inherently discriminates in favor of the wealthy.

In summary, therefore, it is our opinion that the provisions of 1982 Senate Bill No. 778, which would require all qualified voters in certain question submitted elections to be furnished ballots by mail and would permit return of these ballots by mail or by personal delivery thereof to the county election officer, would not impose a poll tax in those instances where voters choose to return the ballots by mail, thereby incurring expense for postage. Moreover, such provisions would not, as a matter of law, discriminate in favor of the wealthy, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



W. Robert Alderson
First Deputy Attorney General

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