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July 29, 2002

TO: City and Town Attorneys

FROM: Catherine F. Connolly, Executive Director

SUBJECT: **ATTORNEY GENERAL OPINION ON ELECTION EQUIPMENT**

The Attorney General has issued a written opinion on the authority of the Secretary of State to decertify election equipment. The opinion concludes that the Secretary of State does not have this authority under current state law. For those cities and towns which have purchased their own election equipment, the opinion should be welcome news financially. A copy of the opinion is enclosed.

As always, call if we can be of assistance.

cc: City and Town Clerks



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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL —

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>JANET NAPOLITANO ATTORNEY GENERAL</p> <p>July 25, 2002</p>	<p>No. I02-006 (R02-015)</p> <p>Re: Election Equipment Certification</p>
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TO: The Honorable Betsey Bayless
Arizona Secretary of State

Questions Presented

You have asked whether the Arizona Secretary of State has the authority to decertify election equipment, such as punch card equipment, that the Secretary of State previously adopted under Arizona Revised Statutes ("A.R.S.") § 16-442.

Summary Answer

No. Section 16-442 provides the Secretary of State with the authority to adopt the types, makes, or models of vote recording or tabulating machines or devices. That statute, however, does not give the Secretary of State the authority to decertify those same machines or devices.

Background

Counties, cities, and agricultural improvement districts may "adopt for use in elections any kind of electronic voting system or vote tabulating device approved by the Secretary of State." A.R.S. § 16-442(B).¹ The process by which the Secretary of State approves electronic voting equipment is set forth in A.R.S. § 16-442(A). The Secretary of State appoints a three-person committee, which includes "a member of the engineering college at one of the universities, a member of the state bar of Arizona and one person familiar with voting processes in the state, no more than two of whom shall be of the same political party." A.R.S. § 16-442. This committee investigates and tests the various types of electronic voting equipment. The committee submits its recommendations to the Secretary of State "who shall make final adoption of the type or types, make or makes, model or models to be used." *Id.*

The Legislature has also established standards for electronic voting systems. Electronic voting systems must provide secrecy in the voting booth, and they must prevent the elector from voting for the same person more than once. A.R.S. § 16-446(B). They must be "suitably designed for the purpose used" and "when properly operated" the equipment is to "record correctly and count accurately every vote cast." *Id.*

The Legislature established this statutory framework in 1966 and it has not changed significantly since that original legislation. *See* 1966 Ariz. Sess. Laws ch. 92 (formerly codified as

¹"Vote tabulating equipment" is defined to include "apparatus necessary to automatically examine and count votes as designated on ballots or ballot cards and tabulate the results." A.R.S. § 16-444(A)(8). An "electronic voting system" is "a system in which votes are recorded on a paper ballot or ballot cards by means of marking or punching, and such votes are subsequently counted and tabulated by vote tabulating equipment at one or more counting centers." A.R.S. § 16-444(A)(6). In this Opinion, an electronic voting system and vote tabulating equipment are referred to collectively as "electronic voting equipment."

A.R.S. §§ 16-1021 to -1038).² Local governments purchase voting equipment based on the established statutory requirements and procedures. The Legislature permits a county to pay for such equipment "by such method as it may deem for the best local interests." A.R.S. § 16-451.

Analysis

The powers and duties of the Secretary of State are prescribed by law. Ariz. Const. art. V, § 9. Her powers include those expressly or necessarily implied by statute. *Cf. Cracchiolo v. State*, 146 Ariz. 452, 457, 706 P.2d 1219, 1224 (App. 1985) (describing powers of administrative agencies).

The first issue is whether the Legislature has expressly given the Secretary of State the authority to decertify electronic election equipment. Section 16-442, A.R.S., establishes a process for the Secretary of State to adopt electronic voting equipment that counties and other political subdivisions may purchase. That statute does not, however, establish a process for decertifying equipment that the Secretary of State has previously adopted. Thus, the statutes do not give the Secretary of State express authority to decertify election equipment.

The next issue, then, is whether the statutes imply the Secretary of State has such authority. To determine whether authority is implied in statutes, courts examine the statutory language and overall statutory scheme. *Cf., e.g., Home Builders Assoc. of Central Ariz. v. City of Apache Junction*, 198 Ariz. 493, 11 P.3d 1032 (App. 2000) (city not authorized to impose development fee to finance school capital costs); *Goode v. Alfred*, 171 Ariz. 94, 95, 828 P.2d 1235, 1236 (App. 1991) (Legislature implicitly authorized Board of Regents to establish a police force). The statutory

²The statutes in this 1966 legislation were renumbered in 1979. *See* 1979 Ariz. Sess. Laws ch. 209 (now codified at A.R.S. §§ 16-441 to 16-453).

scheme at issue here does not suggest that the Legislature intended to give the Secretary of State the authority to decertify electronic election equipment. Section 16-442(C) permits a local governing body to provide for the experimental use of vote tabulating equipment that has not been adopted by the Secretary of State. The use of that experimental equipment at an election "is as valid as if the machines had been *permanently adopted*." A.R.S. § 16-442(C) (emphasis added). This language indicates that when the Secretary of State adopts election equipment, the Legislature considered this decision to be permanent.

In addition, the overall statutory scheme establishes a State system for approving election equipment *before* counties and other political subdivisions purchase the equipment. See A.R.S. § 16-442. Counties and other jurisdictions purchase their equipment in reliance on the fact that the equipment is properly adopted in accordance with the statutory process. The statutes suggest a deliberate effort to balance local decision making authority and financial responsibility with the need for statewide standards. Cf., e.g., A.R.S. § 16-441 (article governing electronic voting equipment applies only in counties in which board of supervisors has provided, by resolution, that it shall apply). Permitting the Secretary of State to decertify equipment that local jurisdictions purchased in reliance on the fact that the equipment was properly approved is a significant power for the Secretary of State not necessarily implied by the Legislature's statutory scheme. To ensure the integrity of the State's election equipment, a procedure for decertifying election equipment may make sense, but this is a policy decision for the Legislature.³

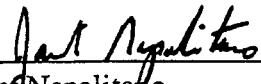
³As for decertifying punch card ballots, it is interesting to note that the definition of "electronic voting system" expressly includes punch card ballot systems. See A.R.S. § 16-444(A)(6) (electronic voting system includes "a system in which votes are recorded on a paper ballot or ballot cards by means of marking or punching").

As your opinion request indicates, the continued use of punch card systems raises some potential legal issues in light of technological advances since those systems were developed and adopted. *See Bush v. Gore*, 531 U.S. 98, 126 n. 4 (2000) (Stevens, J., dissenting) (punch card system has a 3.92% error rate compared to the optical scan system's error rate of 1.43%). Your opinion request specifically referred to a federal district court ruling that nine counties in California may not use punch card voting equipment for the 2004 elections. *Common Cause v. Jones*, No. 01-CV-3470 (C.D. Cal. Feb. 19, 2002) (order requiring decertification of punch card voting systems). The California Secretary of State had decertified punch cards by the 2006 elections. The California statutes, however, expressly give the California Secretary of State the authority to withdraw approval of a voting system. Cal. Elec. Code § 19222 (West 2002) ("The Secretary of State shall review voting systems periodically to determine if they are defective, obsolete, or otherwise unacceptable. The Secretary of State has the right to withdraw his or her approval previously granted. . . of any voting system or part of a voting system should it be defective or prove unacceptable after such review."). The Arizona Secretary of State lacks such authority under our statutes.

The primary role of statutory construction is to discern the intent of the Legislature, and the best indication of the Legislature's intent is statutory language. *See e.g., Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). These principles support the conclusion that the Secretary of State cannot decertify equipment that has been previously adopted.

Conclusion

Although Section 16-442 provides the Secretary of State with the authority to adopt the types, makes, or models of vote recording or tabulating machines or devices, it does not authorize her to decertify those same machines or devices.



Jane Napolitano
Attorney General