

Rescinded in part, see 98-13

DE 98-12 - August 6, 1998

Duties of the Secretary of State § 98.012, Fla. Stat.

TO: Honorable Sandra B. Mortham, Secretary of State, The Capitol, Tallahassee, Florida

Prepared by: Division of Elections

This is in response to your request for an advisory opinion regarding chapter 98-129, Laws of Florida, and recent action taken by the United States Department of Justice with respect thereto. You are the Secretary of State and Florida's chief election officer. Therefore, pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to render this opinion to you.

You have asked for an opinion and recommendations based upon recent notice from the United States Department of Justice that the antifraud provisions of chapter 98-129, Laws of Florida, have yet to receive preclearance from that agency. This notice was received via a copy of a letter to Florida Attorney General Robert A. Butterworth, dated July 27, 1998 and received by the Division of Elections on July 31, 1998. The letter contains an admonishment that the antifraud provisions of state law at issue are unenforceable until preclearance is forthcoming from the Justice Department.

On or about May 28, 1998, the relevant legislation was forwarded to the Justice Department by the Florida Attorney General's office as has been the procedure in Florida for many years. The submission included a copy of the law, a summary of the law, and a copy of the Third District Court of Appeals decision in *In Re: The Matter of the Protest of Election Returns, Case No. 98-507 (Fla. 3d DCA 1998)*. This case upheld and chronicled the invalidation of the 1997 City of Miami Mayoral election due to rampant fraud with respect to the absentee balloting which occurred during this election. These abuses were the subject of a grand jury investigation, an investigation by the Florida Department of Law Enforcement, and widespread media coverage, including a segment on CBS's *60 Minutes*. Further investigation by a select committee of the Florida Senate ensued resulting in the law at issue now.

Sixty days have elapsed since this material was presented to the Justice Department and during that time your staff in the Division of Elections has had numerous workshops and meetings with county supervisors of elections to acquaint them with the new provisions. During this same time period, neither you, the Florida Attorney General, nor the Division of Elections, received any indication, not even a phone call, indicating that there were questions about the bill until late July, whereupon representatives of the Justice Department spent approximately 4 hours on the telephone with division attorneys, in two separate conversations, discussing the provisions and intent of this new law. After this telephone conversation, the division provided the Justice Department with additional background information on the law in the form of newspaper articles and a legislative staff analysis of the law. Subsequent phone calls to the Justice Department as late as August 5, 1998, have yielded no response in terms of whether they can complete their review. In the meantime, plans have been made, a major

statewide election looms in less than 27 days, and you now have on your hands a potential crisis which endangers the integrity of the election.

Based on the foregoing you have essentially asked what your options are with respect to this dilemma.

You are the State's chief election officer and it is your responsibility to maintain uniformity in the application, operation, and interpretation of the election laws, and provide for the equitable implementation of such laws. § 97.012, *Fla. Stat.*

With regard to Florida's election process, the Florida Supreme Court has stated that it is certainly the intent of the constitution and the legislature that elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded. *Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975). More important to the situation at hand, the court also stated that the electorate is the real party at interest in an election;

p>They are possessed of the ultimate interest and it is they to whom we must give primary consideration. ...Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly it is the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. ...By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Id at, 263.

While *Boardman* does not deal with the precise issues you are confronted with at present, it was an elections case and the principles and guidance it offers with respect to the right to vote is nevertheless a sound counsel in the face of adversity and you are now called upon to act in the face of adversity.

Accordingly, the Division recommends that under your authority as the State's chief elections officer, the following actions be taken.

Supervisors of elections should be advised that until further notice the provisions of chapter 98-129, Laws of Florida, as identified in the July 27, 1998 notice from the Justice Department are unenforceable and that all elections are to be conducted under the election laws of the state as existed prior to chapter 98-129 becoming a law. However, if preclearance is received no later than August 10, 1998, a date which we believe to be the point of no return in terms of election preparation, ballots received by voters on that date and thereafter should comply with the new law.

SUMMARY

The provisions of chapter 98-129, Laws of Florida are unenforceable until precleared by the United

States Department of Justice. Until preclearance occurs, elections must be conducted pursuant to the law as it existed prior to the amendments in chapter 98-129, Laws of Florida. If preclearance is not obtained by August 10th, a date which we believe to be the point of no return in terms of election preparation, you have the authority to conduct the elections under the old law.