

DE 98-13 - August 19, 1998

Absentee Voting

Art. I, §§ 1 and 2, Fla. Const., Art III, § 11, Fla. Const., Ch. 98-129, Laws of Fla., Voting Rights Act of 1965

TO: Mr. Ronald A. Labasky, Attorney At Law, Skelding and Labasky, Post Office Box 669, Tallahassee, Florida 32302

Prepared by: Division of Elections

This is in response to your request for an advisory opinion regarding chapter 98-129, Laws of Florida, on behalf of the Florida State Association of Supervisors of Elections. Chapter 98-129 made numerous revisions to Florida voter registration and absentee voting laws which, as late as August 14, 1998, were the subject of preclearance review at the United States Department of Justice. Critical matters regarding the impending election are understandably causing some concern on the part of the association and are in need of some clarification. As the association's general counsel, and pursuant to section 106.23(2), Florida Statutes, the division has authority to render this opinion to you as their representative in this matter. Specifically you ask:

1. As of this date, immediately prior to the first primary election for 1998, which sections of the law are not precleared or are otherwise unenforceable for this election; and,
2. Should sections of the law that the Justice Department failed to preclear be implemented for the first primary election?

As a preliminary matter, the division issued an opinion relating to these issues on August 6, 1998. *Op. Div. Elect. 98-12, August 6, 1998* (DE 98-12). In that opinion, we advised the Secretary of State that:

[U]ntil 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 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.

Id.

Therefore, to the extent this opinion conflicts with DE 98-12, we recede from the latter. DE 98-12 was promulgated under exigent circumstances resulting from the Justice Department's dilatory review of chapter 98-129, Laws of Florida. An opinion of the Division of Elections is legally binding on the person or persons who request it until amended or revoked by the division or a court of competent jurisdiction. *Smith v. Crawford, 645 So.2d 513, 521 (Fla. 1st DCA 1994)*.

As to your first question, the division received three separate notices from the Department of Justice on July 27, 1998, August 10, 1998, and a final response on August 14, 1998, identifying the sections of chapter 98-129, Laws of Florida, that either have, or have not, been precleared. As of August 14, 1998, the Justice Department has failed to preclear or has raised final objections to sections 9, 10, 14, 16 and parts of sections 20 and 26 of the new law. Section 14 provides additional requirements for the absentee voter certificate. Section 16 provides the corresponding instructions for completing the certificate. The portion of section 20 which has not been precleared provides that an absentee ballot is "illegal" if the voter does not include the last four digits of his or her social security number and comply with the witness requirements. The portion of section 20 which creates the supervisor's notice requirement with respect to ballots rejected by the canvassing board because of signature discrepancies was precleared. Subsection (3) of section 26 containing criminal penalties for persons, other than notaries, who witness more than five absentee ballots was not precleared. However, the Justice Department raised no objection to the remaining penalties provided in subsections (1), (2), (4), and (5) of section 26.

The Justice Department seemed to indicate in its August 10, 1998, letter to us that it had no objection to sections 9 and 10 of the new law, which impose identification requirements for voters appearing at the polls. However, at a later point in the letter, the Justice Department explained that, because each of the counties subject to preclearance may establish its own list of identification cards which are acceptable, each county's list will have to be separately precleared before the new identification requirements can be implemented. Thus, while the Justice Department raised no specific objection, the new identification requirements cannot be regarded as having been precleared.

Thus, to again summarize, sections 9, 10, 14, 16, the portion of section 20 which provides that an absentee ballot is illegal if it does not include the social security number information and correct witness information, and subsection (3) of section 26 have been finally determined by the United States Attorney General to be unenforceable with respect to the five preclearance counties of Collier, Hardee, Hendry, Hillsborough, and Monroe. *Letter to Florida Attorney General Robert A. Butterworth from Elizabeth Johnson, Chief, Voting Section, Civil Rights Division, United States Department of Justice, August 10, 1998.*¹ Application of new election laws are contingent upon preclearance by the Justice Department pursuant to the Voting Rights Act of 1965. Thus, the effective date of any such laws are delayed until such preclearance is obtained.

As a result, with respect to your second question and for the reasons set forth below, it is the opinion of the Division of Elections that all 67 Florida counties should instruct absentee voters, issue absentee ballots, count voted absentee ballots, canvass absentee ballots, and require polling place identifications pursuant to the 1997 Florida Election Code, and not penalize persons who are determined to have witnessed more than five absentee ballots as provided in subsection (3) of section 26, chapter 98-129 Laws of Florida, for the entire 1998 election cycle. To do otherwise, in our opinion, has the potential to cause widespread voter confusion, affect the integrity of the elections process, impair uniform application of the election laws and could violate Federal and State laws and both the Florida and United States Constitutions. *See, U.S. Const. amend XIV and XV, Art. I, §§ 1 and 2, Fla. Const., Art. III, § 11(a), Fla. Const., 42 U.S.C. § 1973c (1982), 42 U.S.C. 1973(a), (b) (1982), § 97.012(1), Fla.*

DISCUSSION OF SECTIONS WHICH CAN BE IMPLEMENTED IMMEDIATELY

We begin with a chronological summary of what is now a law in effect in the State of Florida, and the 67 counties therein. Chapter 98-129, Laws of Florida, section 1 provides that the Secretary of State can establish a voter fraud hotline and election-fraud education to the public.

Section 2 requires the supervisors of elections to provide certain homestead address information to the county property appraiser as disclosed to the supervisor on the uniform statewide voter registration application as provided in section 4 of chapter 98-129. However, since section 4 does not require homestead information on the voter registration application until 1999, supervisors are not required to comply with this section at this time. *See, Johnson v. Presbyterian Homes of the Synod of Florida, Inc., 239 So.2d 256 (Fla. 1970). City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983).* (Statutes need not be interpreted to lead to an unreasonable or ridiculous conclusion.)

Section 3 defines absentee elector. However, as stated above, essentially the same definition appearing on the absentee ballot certificate in section 14 is unenforceable, which results in this definition being of no practical value, with respect to the five counties. Sections 4, 5 and 6 do not take effect this election cycle. Therefore, there is no need to discuss these provisions.

Section 7 imposes additional requirements for use in conjunction with list maintenance activities employed by the supervisors of elections. The mailing of a voter ID card is a method of notifying a registrant that the supervisor has approved the voter's registration application and allows for a notice of denial. § 97.073(1), Fla. Stat. New section 97.071, Florida Statutes, merely says that if the voter ID card mailed out by a supervisor is returned as undeliverable, and the applicant has indicated a different mailing address on the application, the supervisor must send a notice to that mailing address advising that the voter must appear in person to pick up the card. If the applicant appears in person to pick up the card, he must produce certain identification or execute the affidavit provided in section 101.49, Florida Statutes, in order to receive the card. If the applicant does not appear in person to pick up the voter ID card, the applicant is still to be considered a registered voter. However, because the voter failed to respond to the notice, the voter's name should be placed on the inactive list. Because these procedures constitute mere list maintenance activity, immediate implementation of this provision will not impact the voting process in any negative way. Therefore, this provision should be implemented immediately.

Section 8 relates to the central voter file which is a list maintenance tool. The central voter file has been a work in progress for two and one half months in all the counties and does not directly affect the administration of the election. Moreover, if the supervisor has reason to believe that someone should not be removed from the list of eligible voters, we recommend that the person be allowed to remain a registered voter until his status can be verified. Therefore, we believe this section should immediately be implemented on a statewide basis.

Section 11 related to the terms of office for county commissioners is not critical to the present election

cycle; therefore, there is no need to address this provision.

Section 12 provides for a voter fraud poster at each polling place. This provision should be implemented immediately.

Section 13 provides procedures for requesting absentee ballots and mandates that electors, or a person making a request for an absentee ballot on behalf of an elector, must provide certain identifying information such as social security numbers and voter ID numbers. This provision should be implemented immediately. However, absentee ballot requests received prior to August 14, 1998, and requests from overseas voters pursuant to *42 U.S.C. 1973 ff*, should be treated under 1997 Florida Law. *See §§ 101.62, 101.694, Fla. Stat.*

Section 15 limits the number of absentee ballots that can be returned on behalf of an elector by a person designated by the elector to two. This provision should be implemented immediately.

Section 17 allows a person to appear at the supervisor's office and vote an absentee ballot, notwithstanding the definition of absent elector in section 97.021, Florida Statutes, as amended by chapter 98-129, Laws of Florida, if they are unable to appear at the polls on election day. We see no reason this cannot be done for all election cycles, notwithstanding DE 98-12.

Section 18 provides for certain assistance to absentee voters with certain disabilities. This provision should be implemented immediately.

Section 19 allows persons designated by the supervisor to administer oaths. This provision can be implemented immediately.

Section 21 allows each political party to designate absentee ballot coordinators who can witness an unlimited number of absentee ballots. In order to qualify as an absentee ballot coordinator, a person must submit to a criminal background check conducted by the Division of Elections. Since ballot coordinators do not have to be appointed until 28 days prior to the general election, this law should be implemented immediately.

Section 22 allows persons who are preregistered voters to serve on election boards. This provision should be implemented immediately.

Sections 23, 24, and 25 provide for enhanced penalties for certain criminal activity. These provisions should be implemented immediately.

Sections 27 through 37 deal with additional or enhanced penalties and the jurisdiction of the Florida Elections Commission. These provisions should be implemented immediately.

Section 38 relating to activity by the property appraiser has been withdrawn from preclearance. Moreover, this provision relates back to the above discussion regarding section 2 which points out that homestead information is not available on the voter registration application until 1999.

Sections 39 and 40 are in effect and require no discussion.

**DISCUSSION OF SECTIONS WHICH SHOULD
NOT BE ENFORCED IN ANY COUNTY UNTIL PRECLEARED
FOR USE IN ALL COUNTIES**

Sections 9 and 10 of the new law require voters to produce a Florida Driver's License or other form of picture ID at the polling place. The division has addressed these sections in workshops and informal communications with supervisors. As stated in our workshops and other communications, the division has not established an all inclusive list of acceptable ID and we believe that supervisors should be allowed some latitude to develop their own lists of acceptable identification. In addition to drivers licenses, we have suggested passports, employee badges, and club cards as acceptable forms of picture ID cards. In some cases picture ID cards may not have a signature which may mean that the voter will have to produce another card or document of some type that bears the voter's signature.

We have also reminded supervisors that the voter has a right to substitute an affidavit for the ID. We have also informally approved the use of a "blanket affidavit" in conjunction with the precinct register. Of course, use of a blanket affidavit requires that poll workers be trained to direct voters' attention to the blanket affidavit and inform voters that by signing the register they are attesting to their identity. Because of these fail-safe measures we see no risk to the integrity of the election process from the implementation of these provisions.

However, as previously noted, while the Justice Department has not raised any specific objection to sections 9 and 10 of the new law, it has indicated that because those counties subject to the Voting Rights Act are free to establish their own lists of identification, each of those counties' lists must be separately precleared. The Justice Department's review is limited to an examination of whether the provisions in question have a discriminatory motive or effect. Thus, we can only deduce that the Justice Department still considers that such a determination may be made based on the nature of the lists developed in individual counties. Because that is the case, and because the State of Florida cannot maintain a dual voting system and because of the potential for adverse litigation, see *discussion infra*, these provisions should not be implemented in any county at this time. However, we will continue our discussions with the Justice Department. If preclearance is granted at some future time, we will evaluate the impact on any remaining elections at that time and consider whether these provisions can be safely implemented.

As previously noted, the Justice Department has raised specific objections to sections 14, 16, the portion of section 20 which provides that an absentee ballot is illegal if it does not include the social security number information and correct witness information, and subsection (3) of section 26. These provisions have been finally determined by the United States Attorney General to be unenforceable with respect to the five preclearance counties of Collier, Hardee, Hendry, Hillsborough, and Monroe. While the Justice Department's determination does not directly control the application of these provisions to the 62 counties that are not subject to section 5 preclearance, we note that the Justice Department's refusal to grant preclearance was based on a determination that these provisions may

have a discriminatory effect. We do not believe that it would be appropriate to apply these provisions to any voter in the State of Florida in the face of this determination. While most Florida counties are not subject to the preclearance requirement, all counties are subject to the other laws relating to elections and discrimination. Any county that moved to implement these provisions could be subject to a legal action by the Justice Department or others. Similarly, the State could conceivably be subject to suit for allowing that implementation.

Without considering any potential discriminatory effect, disparate implementation may cause voter confusion, affect the integrity of the election, and may violate both the United States and Florida Constitutions. Under Florida's Constitution "all political power is inherent in the people" and "all natural persons are equal before the law" regardless of which county they live in. *Art. I, §§ 1 and 2, Fla. Const.* We also note that, except for charter counties, the Florida Constitution prohibits the enactment of any general law of local application with regard to elections. *Art. III, § 11(a), Fla. Const.*

Section 14 prescribes a voter certificate to be used for the absentee mailing envelope. When the voter signs the certificate, he or she is attesting that he or she meets the definition of absent elector. In addition, the voter is required to include the last four digits of their social security number. The ballot must then be witnessed by either a notary or any witness who is a registered voter in this state. Such witness must also include his voter registration number, county of registration, and address. Section 16 repeats these same requirements in the form of instructions to the voter and warns the voter that the ballot will not be counted if the social security information is missing or if the ballot is not properly witnessed. The unprecleared portion of section 20 requires that absentee ballots not containing the social security information or meeting the witness requirements must be declared illegal by the county canvassing board. The unprecleared portion of section 26 provides a criminal penalty for witnessing more than five absentee ballots.

The previous law only required the voter's signature and the signature and address of one witness 18 years of age or older on an absentee ballot and the instructions were consistent with this requirement. A ballot could only be declared illegal if it failed to include a voter's signature and the signature and address of an attesting witness. There was no criminal penalty for witnessing more than five absentee ballots. Thus, if the new provisions of sections 14, 16, 20, and 26 are applied in 62 counties, but not in the five covered counties, the state will be applying a double standard with regard to its absentee voting procedures.

The net result of the application of this double standard is that the state will have made it easier to vote absentee in some counties than in others, and easier to gather absentee ballots in some counties than in others. This situation is further exacerbated by the fact that elections for state office, congressional elections and all statewide elections involve voters from more than a single county.

For example, State Senate District 29 includes the covered counties of Collier and Hendry and the uncovered counties of Broward and Palm Beach. If the provisions to which the Justice Department has objected were applied in nonpreclearance counties, the voters in Broward and Palm Beach -- where witness requirements would be applied under the new law -- would be less likely to have their absentee ballots counted than in Collier and Hendry where the more liberal standards of prior law

would be in force. Similarly, a person who witnesses more than five absentee ballots in Collier County would not be subject to criminal penalties, while a person who witnesses more than five ballots in Broward County would be subject to criminal penalties. According to our records, when one considers just state senate districts which include both covered and noncovered counties, the differing voting standards and penalties affect voters in 16 counties, and voters in 21 counties would be subjected to disparate treatment in congressional elections.

This differing treatment would no doubt disenfranchise some voters simply based on where they live in violation of federal¹ and state law. Additionally, disparate implementation may deny persons equal protection of the law under both our state and federal constitutions.

Needless to say, under such a dual system of voting, a person could show that it was far easier to vote an absentee ballot in Collier County than in Broward or Palm Beach, thus, making it easier for voters located in one county to elect the representative of their choice than voters located in another county -- even though both are voting in the same election. Finally, we have already noted in DE 98-12 that the Secretary of State has a legal duty to maintain uniformity and consistency with regard to the application and operation of the state's election law. Therefore, the Secretary cannot sanction such a dual voting system for both federal and state law reasons.

For the foregoing reasons, it is the opinion of the Division of Elections that sections 9, 10, 14, 16, that portion of section 20 which provides that an absentee ballot is illegal if it does not include the last four digits of a social security number and certain witness requirements, and that portion of section 26 of chapter 98-129, Laws of Florida, which impose a criminal penalty for persons who witness more than five absentee ballots, **should not be enforced in any county in the state until preclearance has been granted by the Justice Department or the courts.** To enforce these provisions in some counties but not others would, in our opinion, violate both state and federal law and possibly violate the Florida and federal Constitutions.

SUMMARY

Sections 9, 10, 14, 16, that portion of section 20 which provides that an absentee ballot is illegal if it does not include the last four digits of a social security number and certain witness requirements, and that portion of section 26 which imposes a criminal penalty for witnessing more than five absentee ballots, of chapter 98-129, Laws of Florida, should not be enforced in any county until precleared by the Department of Justice or the courts. All other sections can be enforced.

¹ Interestingly, in a letter to General Butterworth, Acting Assistant United States Attorney General Bill Lann Lee, without mentioning the 5 counties, simply states that "sections 14, 16, ... 20..., and 26 are unenforceable." *Letter to Florida Attorney General Robert A. Butterworth from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, August 14, 1998.*

² Preclearance of chapter 98-129, Laws of Florida, involves application of section 5 of the voting rights act of 1965. Section 5 of the act requires states with covered jurisdictions (counties) to preclear any changes to their election laws through the United States Department of Justice. *42 U.S.C. 1973c (1982).* Section 2 prohibits any state or political subdivision from imposing a voting practice which

results in the denial of the right to vote. *42 U.S.C. 1973 (a) (1982)*. A person can prove a violation of section 2 if they can show that they did not have an equal opportunity to participate in the political process and elect representatives of their choice. *42 U.S.C. 1973 (b) (1982)*.