



The Florida Senate

Interim Project Report 2001-014

September 2000

Committee on Ethics and Elections

Senator Burt L. Saunders, Chairman

FEDERAL PRECLEARANCE AND FLORIDA'S

1998 VOTER FRAUD ACT

SUMMARY

In 1998, the Florida Legislature enacted Chapter 98-129, Laws of Florida, a comprehensive anti-voter fraud measure which included an overhaul of the State's absentee ballot process. The Voting Section of the U.S. Department of Justice's ("USDOJ") Civil Rights Division refused to "preclear" a number of absentee ballot provisions which it determined violated the 1965 federal Voting Rights Act. USDOJ found that the provisions might have an unintended discriminatory effect. Under federal law, these absentee ballot provisions are not enforceable in five counties in Florida, and by opinion of the Secretary of State will not be enforced statewide. Thus, the Florida Statutes contain several provisions of law, duly enacted by the Florida Legislature and tacitly approved by the Governor, which are not enforceable due to constraints of federal law. This situation has resulted in a great deal of confusion, particularly for Florida's supervisors of elections and other political groups. This project discusses the preclearance requirement of the Voting Rights Act of 1965 and its impact on Florida election lawmaking; details the history of Florida's 1998 absentee ballot changes and USDOJ's decision not to preclear certain statutory provisions; identifies and discusses the provisions which were not precleared; and, recommends specific statutory changes.

BACKGROUND

In 1965, the United States Congress enacted the Voting Rights Act. 42 U.S.C. s. 1973 *et seq.* The Act was adopted in the midst of the civil rights movement. One of the purposes of the Act was to insure that election laws passed by states did not discriminate against black voters and minorities. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). The U.S. Supreme Court has upheld the Act as a valid exercise of Congress' powers.

Section 5 of the Voting Rights Act, as amended, is known as the "preclearance" provision. 42 U.S.C. s.

1973c. The preclearance provision suspends the implementation of all new voting laws pending review by federal authorities and a determination that the law will not result in voting discrimination. Specifically, it prohibits certain states and counties from putting any new voting practices or procedures into effect without first obtaining a declaratory judgment from the Federal District Court for the District of Columbia or giving the U.S. Attorney General an opportunity to object. The court or the Attorney General may object to the election law on the grounds that the change has the *purpose* or *effect* of "denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 C.F.R. 51.52(a). (Because the Attorney General must act to approve or object to proposed voting changes within 60 days after the date of submission, virtually all preclearance requests go first to the Attorney General.) If the Attorney General objects to a particular provision, the voting change cannot become effective until either the Attorney General withdraws the objection or the U.S. District Court determines that the provision is not discriminatory.

Five counties in Florida have been subject to preclearance since the 1970s --- Collier, Hardee, Hendry, Hillsborough, and Monroe. 28 C.F.R. s. 51.67. Under the 1975 amendments to the Voting Rights Act (89 Stat. 400), a county would be covered if:

- It provided voting materials or any other information pertinent to voting in English only;
- More than 5% of the voting age citizens were members of a single language minority; and,
- Less than 50% of voting age residents were registered to vote or that less than 50% actually voted in the presidential election.

Memorandum from Debbie Romanello, Legislative Intern, Florida House of Representatives Select Committee on Reapportionment to Mark Herron, Staff Director, Florida House of Representatives Select

Committee on Reapportionment, p. 2 (February 21, 1981). All five Florida counties are covered because the Attorney General determined that as of November 1, 1972, each county maintained all-English voting procedures, and the Director of the Census determined that more than 5% of the voting age population were members of a single-language minority --- Spanish heritage. *Id.* Additionally, the Census Director determined that either less than 50% of the voting age population were registered to vote as of November 1, 1972, or that less than 50% actually voted in the presidential election on that date. *Id.*

In January 1985, the U.S. Attorney General filed an objection to a Florida absentee ballot provision in House Bill 619 (1984). *Letter from William Bradford Reynolds, Assistant U.S. Attorney General to The Honorable Jim Smith, Attorney General, State of Florida* (January 15, 1985). The provision in question (s. 101.051, F.S.) prohibited a supervisor of elections or any of the supervisor's deputies or staff from assisting blind, disabled, or illiterate voters in casting an absentee ballot in the office of the supervisor. The State's concern was that the supervisor, a partisan elected official, would be in a prime position to exert undue influence over a voter. USDOJ rejected this rationale, and the State amended the statute in 1985 to remove the prohibition. Ch. 85-226, s. 12, at 1531, Laws of Fla.

In November of 1997, the City of Miami held an election for mayor. The candidates were Xavier Suarez and Joe Carollo. In the general election, Carollo won a majority of the poll voters (over 51.41%), but lost the absentee ballot count by a sizeable margin --- especially in certain voting districts. When the absentee ballot count was factored into the precinct count, Carollo received 49.65 percent of the total vote to Suarez's 46.8 percent. Because no candidate obtained a majority, a run-off election was held on November 13, 1997. Suarez won the run-off with 53 percent of the vote. Carollo protested the general election results, claiming that the absentee ballot process was tainted and that he should be declared the winner since he garnered a majority of the precinct vote in the general election.

The courts agreed with Carollo. Florida's Third District Court of Appeal threw out all the absentee ballots and declared Carollo the winner. *In re Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami*, 707 So.2d 1170 (Fla. 3rd DCA 1998) [hereinafter, *In re Miami Election*]. The court agreed with the circuit

court's conclusion that there was "massive absentee voter fraud" by Suarez supporters which affected the results of the general election. There was no evidence, however, linking Suarez personally with the fraud.

In 1998, the Florida Legislature enacted Chapter 98-129, Laws of Florida [hereinafter, "Voter Fraud Act"]. The Voter Fraud Act was the result of a Senate subcommittee investigation into alleged voter fraud and absentee ballot abuses in Miami and throughout Florida.

Many of the abuses highlighted in Miami involved so-called "vote brokering" activities --- third parties who had interjected themselves between the supervisor of elections and the voter by requesting, handling, delivering, or returning absentee ballots. One of the purposes of the Act was to reduce these "vote brokering" activities by restricting the ability of third parties to request and return ballots for voters. The absence of reported absentee ballot fraud in the 1998 election cycle and in subsequent special legislative elections suggests that the Act may have had its desired effect, although it is still too early to draw any definitive conclusions.

The Voter Fraud Act made sweeping changes in the area of voter registration and absentee balloting, and increased criminal penalties for election fraud. The problematic changes made by the Act with regard to absentee balloting included:

- Requiring the elector to include the last four digits of his or her social security number on the Voter's Certificate on the absentee ballot mailing envelope.
- Limiting absentee ballot witnessing to either a notary, an officer authorized to administer oaths, an absentee ballot coordinator, or a *registered* Florida voter.
- Limiting *registered* Florida voters to witnessing no more than 5 absentee ballots per election, except for notaries, officers authorized to administer oaths, or absentee ballot coordinators.
- Authorizing limited numbers of "absentee ballot coordinators," appointed by the political parties, with the authority to witness an *unlimited number of ballots*.
- Re-instituting, at least for appearance sake, the "for cause" reasons for voting absentee.
- Limiting persons to returning two absentee ballots per election, either in-person or by mail, *provided* that if the person is personally delivering the ballot to the supervisor the person have a letter from the

elector designating him or her to return the ballot.

USDOJ refused to preclear the first three of these provisions. In a piecemeal and confusing series of correspondence with the State, it determined that these provisions would have an unintended discriminatory impact on minority voters. The factual basis for a number of USDOJ's legal conclusions was suspect.

USDOJ's analysis noted that more minority electors than white electors vote by absentee ballot. *Letter from Bill Lann Lee, Assistant U.S. Attorney General to Honorable Robert A Butterworth, Florida Attorney General*, p. 4 (August 14, 1998). It also focused on the Voter Fraud Act's witnessing requirements and the 5 ballot per election witnessing limit. *Id.* at 3-5. USDOJ concluded that "it may be more difficult for minority voters to locate registered voters to be witnesses because the pool of available witnesses is made smaller by the fact that minority voters have lower registration rates and tend to live in areas with high minority concentrations." *Id.* at 4. It also stated that the ability of Hispanic voters to meet the proposed requirements was made more difficult due to inadequate Spanish language translation in a number of the preclearance counties. In addition, USDOJ cited the fact that minorities would be less likely to participate in the absentee ballot process for fear of the threat of criminal penalties being "enforced disproportionately against minorities." Unfortunately, USDOJ failed to provide specific data and information to support many of its assertions. Taken as a whole, USDOJ's reasoning appears to have been grounded largely in conjecture and speculation, and stereotypes about minorities which may or may not hold true in Florida's five preclearance counties.

In reaching its preclearance decision, USDOJ also relied on *preliminary* data from a number of Florida's preclearance counties indicating that a higher percentage of minority voters than white voters submitting absentee ballots under the new requirements had filled them out incorrectly. *Id.* at 3-4. USDOJ speculated that racial disparities in literacy and socio-economic circumstances may be partly to blame. The Florida Division of Elections attributed many of these original errors to "confusion created by the preclearance process, and the unusually short time period in which to implement the new ballot requirements." *Letter from Emmett Mitchell IV (Bucky), Assistant General Counsel, Florida Division of Elections to Bill Lann Lee, Assistant U.S. Attorney General*, p.1 (August 30, 1999). The Division asserted that at such an early stage in the implementation

process "one would expect a high rejection rate for absentee ballots from *all* voters, minority and non-minority," and that USDOJ's conclusion that the preliminary data represented evidence of a disproportionate impact on minority voters "appears unfounded and rather speculative." *Id.* at 1.

Recall that only five counties in Florida are subject to preclearance. However, then Florida Secretary of State Sandra Mortham decided not to enforce any of the provisions which had not been precleared in *any* county in Florida for the 1998 elections in order to maintain consistent election laws statewide. The law requires the Secretary of State to "maintain uniformity in the application, operation and interpretation of the election laws." s. 97.012(1), F.S. The Secretary's decision meant that the pre-1998 signature and witnessing requirements were in effect for the 1998 elections, and that any person could witness an unlimited number of absentee ballots. The current Secretary of State has adopted the same approach for the 2000 elections.

METHODOLOGY

Committee staff researched the 1965 Voting Rights Act and the federal preclearance requirement; reviewed Florida's 1998 Voter Fraud Act and the correspondence between USDOJ and state officials relating to preclearance; conducted interviews with state officials concerning preclearance; and, reviewed glitch bills from the 1999 and 2000 Florida legislative sessions designed to address problems with the Voter Fraud Act.

FINDINGS

As a result of USDOJ's decision not to preclear some provisions of the Voter Fraud Act, the Florida Statutes contain a number of unenforceable provisions which have been duly enacted by the Legislature and tacitly approved by the Governor. This unusual situation, plus the fact that only five counties in Florida are technically subject to preclearance, has resulted in confusion for election officials, campaign workers, voters, and the media. Also, some of the Act's absentee balloting provisions which were precleared have either been rendered moot by USDOJ's decision or proven administratively problematic.

Voter Signature & Witnessing Requirements/Voter's Certificate

The Voter Fraud Act changed the voter signature and witnessing requirements for absentee ballots. Prior to the Act, Florida law required the Voter's Certificate on

the absentee ballot mailing envelope to include the voter's signature and the signature and address of a witness over 18 years of age.

The Voter Fraud Act mandated that the voter also provide the last four digits of his or her social security number. In addition, it limited absentee ballot witnessing to either a notary, officer authorized to administer oaths, absentee ballot coordinator, or a *registered* Florida voter.

USDOJ refused to preclear these provisions of the Act. Staff recommends amending Florida Statutes to return to the pre-1998 voter signature and witnessing requirements. These requirements --- the voter's signature and the signature and address of one witness over 18 years of age --- continue to be implemented *de facto* by the supervisors of elections at the direction of the Secretary of State. Also, the use of the last four digits of the voter's social security numbers serves no practical fraud deterrence purpose.

Penalties for Witnessing More than 5 Absentee Ballots

Prior to the adoption of the Act, Florida law allowed *any person* to witness an *unlimited number* of absentee ballots. The Act limited *registered* Florida voters to witnessing no more than *5 absentee ballots per election*, except for notaries, officers authorized to administer oaths, or absentee ballot coordinators.

USDOJ refused to preclear this provision. However, it never clearly articulated why it rejected the 5-ballot witnessing limit. Presumably, it was because the limit was tied to the requirement that the witness be a *registered Florida voter*. USDOJ's speculative argument that minority voters in urban areas will not be able to find an absentee ballot witness falls if you allow any person over 18 to witness the ballot. Therefore, the Legislature might consider re-adopting the 5-ballot witnessing limit if it removes the registered Florida voter witnessing requirement from the Florida Statutes. Another alternative would be to return to the pre-1998 law which will be in effect for the upcoming elections, allowing any person over 18 years of age to witness an unlimited number of absentee ballots.

Absentee Ballot Coordinators

The Voter Fraud Act created an exemption to the 5-ballot witnessing limit. Political parties were authorized to appoint specific numbers of persons as "absentee ballot coordinators," who were then certified by the

Division of Elections. Absentee ballot coordinators were entitled to witness an *unlimited number of ballots* per election.

As discussed in the previous section, USDOJ refused to preclear the 5-ballot witnessing limit. This decision has made the absentee ballot coordinator exemption unnecessary. Under pre-1998 law, any person over the age of 18 may witness an unlimited number of absentee ballots. If the Legislature chooses to re-adopt pre-1998 law and eliminate the 5-ballot witnessing requirement, staff recommends repealing this provision.

Definition of "Absent Elector"

The issue of who may vote by absentee ballot in Florida is open to interpretation.

Prior to the adoption of the Voter Fraud Act in 1998, any person who was "unable to attend the polls on election day" could vote absentee. This law was only about two years old. Until 1997, an elector had to have a *statutory reason* for voting absentee. Except when mandated by federal law, the ability to *vote by absentee ballot*, as opposed to the right to vote, is a *privilege conferred by statute and not a constitutional right*. *In re Miami Election*, 707 So.2d at 1173. Until the law changed in 1997, Florida's "for cause" statutory reasons for voting absentee were that the elector:

- Was unable without another's assistance to attend the polls on election day;
- Was an inspector, poll worker, deputy voting machine custodian, deputy sheriff, supervisor of elections, or deputy supervisor assigned to a different precinct than that in which he or she is registered to vote;
- On account of the tenets of his or her religion, cannot attend the polls on election day;
- Had changed residency to another county in the state after the books are closed for the election;
- For presidential ballots, had changed residency to another state and is ineligible under the laws of that state to vote in the general election; or,
- **Will not** be in the precinct of his or her residence during the hours the polls are open for voting on the day of the election.

Ch. 96-57, s. 1, at 45-46, Laws of Fla.

The Voter Fraud Act essentially re-adopted the "for cause" reasons for voting absentee with one notable exception. Instead of having the elector swear that he or she will not be in the precinct during voting hours on election day (assuming none of the other reasons

apply), the Voter Fraud Act mandates only that the elector swear that he or she may not be in the precinct during voting hours.

Staff believes that this change effectively authorizes unlimited absentee voting in Florida. *Any person* who fills out an absentee ballot and Voter's Certificate in advance of an election can justifiably claim that he or she "may" not be in the precinct on election day, even if he or she has no present intention of being absent at the time he or she fills out the Certificate. It is always possible that someone "may" not be in their precinct on election day --- unexpectedly called out of town on business, need to visit a relative who is suddenly hospitalized in Atlanta, hurricane evacuation, etc. However, there is no judicial or administrative opinion on this point.

USDOJ precleared the new definition of "absent elector" in section 97.021, Florida Statutes. Unfortunately, USDOJ refused to preclear the section of the Act amending signature and witnessing requirements to the absentee ballot Voter's Certificate. The "for cause" reasons for voting absentee which were to be included on the Voter's Certificate were, therefore, also not precleared. Thus, no elector is currently required to swear that he or she is qualified to vote absentee. And, even if they were, the "for cause" requirements as currently written do not serve any practical purpose since any person can justifiably vote absentee.

Staff recommends re-adopting the pre-1998 definition of "absent elector" to mean someone who is "unable to attend the polls on election day," unless the Legislature intends to reverse its policy direction and only allow absentee voting on the basis of *necessity* as opposed to *convenience*. Alternatively, the Legislature could choose to maintain the current "for cause" requirements and amend the Voter's Certificate to include them, but this presents some serious space problems for supervisors in counties like Miami-Dade who print the Voter's Certificate in more than one language.

Return of Absentee Ballots

Prior to the Voter Fraud Act, any person could personally return an *unlimited number* of absentee ballots to the supervisor of elections. This allowed, and in some cases encouraged, third parties to physically handle absentee ballots. This third-party involvement increased the likelihood of fraud and ballot tampering. It also arguably allowed local political "bosses" to

increase their power base. By "delivering" votes *en masse* for politicians who they helped elect, so the argument goes, these local bosses could garner special access to those politicians in order to promote their local agendas.

The Voter Fraud Act restricts the return of absentee ballots to personal delivery by the elector or mail delivery, except that electors unable to return the ballot in person or by mail may designate someone in writing to return their ballots. Designees are limited to returning *two ballots per election*, other than the designee's own ballot and ballots for members of the designee's immediate family. Each designee must present the supervisor with a *written authorization* from the elector and a picture identification. s. 101.647, F.S. (1999).

This provision *was precleared* by USDOJ, but has proven administratively unworkable. In the 1998 election cycle, the requirement that a designee produce a written note from the elector in order to personally return a ballot to the supervisor of elections did not have any practical voter fraud deterrent effect.

While supervisors could not accept ballots presented to them by designees without a written authorization from the voter, nothing prevented the designee from simply mailing the ballot for the voter. Also the requirement appears to be overkill, since each designee is limited by law to returning only two ballots for non-family members.

Staff recommends replacing the "note-from-your-mother" approach with a procedure currently in law for *picking up* absentee ballots for electors. The designee would still be limited to returning two ballots other than the designee's own ballot and ballots for members of the designee's immediate family. But instead of providing a written note from the elector, the designee would be required to provide a picture identification and sign an oath attesting to the fact that:

- the designee is authorized to return the ballot; and,
- the designee has not and will not return more than two ballots in the election, except for his own ballot and those of members of his or her immediate family.

Any designee who swears a false oath would be guilty of a third-degree felony under the election code.

RECOMMENDATIONS

The Voter Fraud Act appears to have had a positive impact on reducing absentee ballot election fraud in Florida. The 2000 election cycle will either lend support to this assertion or provide insight into other issues that need to be addressed by the Legislature.

In any event, USDOJ's decision not to preclear a number of provisions of the Act has resulted in the unusual situation whereby duly-enacted Florida election laws are not being enforced. These statutory sections should be amended to take account of the federal preclearance decision. In addition, the 1998 elections demonstrated that the procedure for returning ballots by designees could be improved.

Staff recommends the following statutory changes:

Voter Signature & Witnessing Requirements/Voter's Certificate

- ✓ Return to pre-1998 law, requiring that the Voter's Certificate include *only* the signature of the elector and signature and address of one witness over 18 years of age (amend ss. 101.64, 101.65, 101.68, F.S.).

Penalties for Witnessing More than 5 Absentee Ballots

- ✓ **Eliminate or re-adopt** the first degree misdemeanor penalty for persons who witness more than 5 absentee ballots per election (repeal or re-adopt s. 104.047(3), F.S.).

Absentee Ballot Coordinators

- ✓ **If** the Legislature elects to eliminate the 5-ballot witnessing limit, repeal the absentee ballot coordinator exemption (repeal s. 101.685, F.S.).

Definition of "Absent Elector"

- ✓ Go back to the pre-1998 definition of "absent elector" to mean someone who is "unable to attend the polls on election day," **unless** the Legislature intends to reverse its policy direction and only permit absentee voting on the basis of *necessity* as opposed to *convenience* (amend ss. 97.021(1), F.S., 101.657 (to conform)).

Return of Absentee Ballots

- ✓ Eliminate the requirement that a designee returning an absentee ballot provide a written note from the elector. Replace it with a requirement that the designee sign an oath attesting to certain facts, similar to the current statutory procedure for picking up absentee ballots for electors (amend s. 101.647, F.S.).

COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

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MEMBER OVERSIGHT

Senator Sebesta