

June 3, 2004

Via Facsimile and Mail

Mr. Edward C. Kast
Director
Division of Elections
Office of the Secretary of State
The Collins Building, Room 100
107 West Gaines Street
Tallahassee, FL 32399-0250
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Re: Compliance With the Voting Rights Act of 1965

Dear Mr. Kast:

We are writing to call your attention to several serious impending violations of the Voting Rights Act of 1965. Your Memorandum of May 5, 2004, directs Supervisors of Elections in counties subject to section 5 to make two voting changes that have not been precleared as required by federal law: (1) to purge voters who do not respond to the state notification procedure, without any actual determination that those voters are ineligible, and (2) to begin the statutory notification process without making the determinations, hitherto required by state law, of likely ineligibility. If it was your intent to cause such voting changes, you should withdraw your directive until those changes have received the required preclearance; if it was not your intent to direct the changes described below, you should take prompt and unequivocal action to correct that May 5 directive.

I. INTRODUCTION

Five counties in Florida, as you know, are subject to the preclearance provisions of section 5 of the Voting Rights Act. No new standard or procedure related to elections or voter registration may be administered in those counties unless it has first been precleared by either the United States Department of Justice or the United States District Court for the District of Columbia.

Earlier this month your office issued a list of approximately 47,000 voters, which you characterized as "potential felon matches", and directed county Supervisors of Elections to take steps that could lead to the purging of tens of thousands of those voters. This voter-purge procedure is occurring under section 98.0977(3), Florida Statutes. The relevant provisions of section 98.0977, in turn, derive from two recently enacted statutes, the Election Reform Act, adopted in 2001, and section 6 of Chapter 2002-189, enacted in April of 2002.

Both of these enactments were submitted for preclearance to the United States Department of Justice. In response to those submissions, the Department of Justice asked the Florida Attorney General to provide authoritative explanations of the manner in which the 2001 and 2002 statutes would be implemented. Then Florida Attorney General Robert Butterworth, acting on behalf of the state, set out in letters dated January 29, 2002 and July 10, 2002, the manner in which those statutes would be administered.

In the wake of and expressly relying on those representations, the Department of Justice then precleared the particular voting changes that had been set out in the Butterworth letters. That preclearance did not constitute approval of whatever steps might thereafter be taken in ostensible reliance on the statutes in question. Rather, the Department of Justice has precleared only administration of those statutes by means of the particular implementation procedures set out in Attorney General Butterworth's letters. Any administration of either law in a manner inconsistent with the representations in either of the Butterworth letters would fall outside the Department of Justice preclearance, and could not lawfully be implemented in any of the covered counties until and unless that new method of administration has been submitted for and obtained preclearance.

As we set out below, statements made by your office in connection with the proposed voter purge either direct or encourage actions by Supervisors of Elections that in several material respects would be inconsistent with representations made in one or both of the Butterworth letters. Until those changes in implementation procedures are precleared under section 5, such actions by officials in the covered jurisdictions would constitute a violation of federal law. The problem is not limited to those counties, because in its March 28, 2002, preclearance letter, the Department of Justice also expressly relied on the state's representation that the particular implementation procedures that had been described by Attorney General Butterworth would "apply to

the State of Florida as a whole and not just the Section 5 counties."

II. TREATMENT OF NON-RESPONDING VOTERS

Under section 98.0977(3), both as originally enacted in 2001 and as amended in 2002, Supervisors of Elections are under certain circumstances to send to voters a written notice that they are potentially ineligible to vote, and in specified circumstances must also publish notice in a local newspaper. Both versions permit the voter to respond on a form provided by the Supervisor, and state that any determination regarding eligibility to vote will be made in light of "the information provided by the voter." If the Supervisor subsequently determines "that the voter is not eligible to vote under the laws of the state," both versions of the statute direct that a voter be removed from the voter registration rolls.

(1) The 2001 Election Reform Act

It will foreseeably occur in a large number of cases that voters to whom notice has been directed under section 98.0977(3) will not respond. The 2001 Election Reform Act contained no language which expressly addressed how the Supervisor of Elections was to deal with such a situation. In response to written questions from the Department of Justice regarding the meaning and implementation of that 2001 act, Attorney General Butterworth unequivocally represented that a non-responding voter would not be purged unless the Supervisor of Elections actually made an affirmative determination, based on information in his or her possession, that the voter was in fact ineligible to vote.

If a voter fails to contest the suggestion of removal indicated by state records the decision must be made on the basis of other available information. Any final decision, however, is no longer based on a presumption created by a record-keeping system, but rather is based on a fair evaluation of all available information relevant to the voter's continued eligibility.

(Letter of Robert Butterworth to Joseph D. Rich, January 29, 2002, p. 6). In making any determination of ineligibility, "[t]he supervisor bears the burden to demonstrate ineligibility by the highest degree of proof consistent with the fact that the fundamental right to vote is at stake." (Id. at p. 5).

In preclearing voting changes to occur under the 2001 Election Reform Act, the Department of Justice expressly relied on all the representations in that January 29, 2002 letter, and specifically cited Attorney General Butterworth's assurance

that if a voter fails to contest the suggestion of ineligibility indicated by state records, the final decision is no longer based on a presumption created by the record-keeping system but is based on a fair evaluation of all available information relevant to the voter's continued eligibility.

(Letter of Joseph Rich to Attorney General Robert A. Butterworth, March 28, 2002, p. 2.)

(2) Chapter 2002-189

Shortly after the above described voting changes under the 2001 Act was precleared, Florida adopted Chapter 2002-189. Section 6 of chapter 2002-189 altered the language of section 98.0977 in two respects. First, section 6 authorized a voter who had received notice of potential ineligibility to respond by appearing in person at a hearing at a time and place fixed by the Supervisor. Second, section 6 contained the following sentence:

The supervisor of elections shall remove from the voter registration rolls the name of any voter who fails to respond within 30 days to the notice sent by certified mail or to attend the hearing.

Section 98.0977(3)(d), Florida Statutes. The problem at hand concerns the meaning of this sentence.

On April 23, 2002, Attorney General Butterworth submitted what was to become¹ Chapter 2002-189 for preclearance by the Department of Justice. The submission expressly followed the format of 28 C.F.R. § 51.27, which calls for "a clear statement of the change explaining the difference between the submitted change and the prior law or practice." That submission letter set out what the Attorney General Butterworth represented were all the changes that would occur if Chapter 2002-189 were implemented. With regard to

¹On that date the legislation had been passed by both the Florida House and Senate but had not yet been signed by the governor.

the section 98.0977 purge procedure, Attorney General Butterworth's letter described only a single, ameliorative change:

[The legislation] [e]stablished a hearing procedure for voters who have been identified by supervisors as potentially ineligible to vote because of a felony conviction or adjudication as mentally incapacitated. The hearing procedure is designed to track the list maintenance procedures in section 98.075, Fla. Stat., for other persons who have been identified as potentially ineligible to vote.

(Letter of Attorney General Robert Butterworth to Joseph Rich, April 23, 2002, addendum, p. 1). This submission letter contained no reference to any change in the procedures regarding non-responding voters. The reference to section 98.075 was significant, because that provision clearly provides, regardless of whether a notified voter makes any response, that the voter cannot be removed from the rolls (e.g. on the grounds that he or she is not a U.S. citizen) unless the Supervisor actually makes a determination of ineligibility. Section 98.075(3)(b), Florida Statutes.

Notwithstanding the fact that the April 23 submission letter implicitly characterized Chapter 2002-189 as making no other change, the Department of Justice refused to preclear section 6, which contained the new provisions regarding section 98.0977. In its letter of June 24, 2002, the Department of Justice asked the state to

provide a detailed explanation of how the requirements and procedures established by Section 6 of Chapter 2002-189 compare with those established by Fla. Stat. § 98.0977 as it was precleared on March 28, 2002. In particular, please address whether and how the new requirements and procedures are consistent with the State's prior representations in its letter dated January 29, 2002, and upon which preclearance was based, that:

* * *

--if a voter fails to contest the suggestion of ineligibility indicated by State records, the final decision is no longer based on a presumption created by the record-keeping system but is based on a fair evaluation of all available information relevant to the voter's continued eligibility.

Concerns have been raised that the new procedures enacted by Section 6 of Chapter 2002-189 rely on a presumption that the database is correct . . . and value process over substantive rights.

(Letter of Joseph Rich to Attorney General Robert Butterworth, June 14, 2002, pp. 3-4).

The manifest concern of the Department of Justice letter was that the language in section 6 could be construed, in a manner very different from the state's January 29, 2002, representations, to mandate removal of any non-responding voter, without any independent determination having been made by the Supervisor as to whether the voter was actually ineligible to vote. If the state intended to implement section 6 in that manner, the Justice Department's pointed inquiry imposed on the Attorney General of Florida an unavoidable obligation to disclose that the state would so construe and administer section 6.

To the contrary, Attorney General Butterworth emphatically assured the Department of Justice that no such automatic purge of non-responding voters would occur². In his detailed response of

²This is a plausible interpretation of the new language added by section 6.

Two distinct questions arise regarding non-responding voters: (1) how should the case of such a voter be resolved? (e.g., should the Supervisor proceed to determine, on the basis of available information, whether the voter is ineligible?), and (2) when should a voter be deemed non-responding (e.g., when would a Supervisor be able to resolve a case based on information in his or her possession without waiting any longer for a response from the voter?). The Election Reform Act directed the Supervisor, in the absence of a voter response, to make a decision based on whatever other information was available, but did not address when a Supervisor could do so without continuing to wait for a response. Chapter 2002-189 provides that a Supervisor may do so after the later of the date of the hearing or 30 days after the certified letter was sent.

As we note below, text at nn. 3-5, a statute that mandated removal in all cases in which a voter failed to respond would have a number of implausible consequences which the Florida legislature could not have intended. The problem with such an extreme interpretation of Chapter 2002-189 is illustrated by a case in which there are two John Does, with the same birth date, registered in a county, and the Division of Elections database indicates that

July 10, 2002, Attorney General Butterworth made no reference whatever to any automatic purge of non-responding voter. Rather, the Attorney General reiterated in the broadest terms that no voter could be removed from the rolls unless a Supervisor had made an affirmative determination of ineligibility.

The point here is that even as greater and more profound efforts are in place to assure the complete accuracy of the statewide voter database as described below, the burden always remains on the supervisor to establish ineligibility. . . .

By way of reiteration, there is no longer a presumption favoring the accuracy of the computer database; the presumption now favors the voter. . . .

There must be sufficient evidence to remove the name from the rolls with the burden remaining on the supervisor. . . .

there are two John Does with that birth date who committed felonies, one of whom has had his civil rights restored. The Supervisor, lacking information about which John Doe is which, sends both notification letters, and neither voter responds. If a purge of all non-responding voters were mandatory, the Supervisor would have to purge both voters, even though it was certain that at least one of the voters was eligible to vote.

The burden of proof remains on the supervisor of elections in the determination of whether or not a person is ineligible to vote.

(Letter of Robert Butterworth to Joseph Rich, July 10, 2002, pp. 5-6) (Emphasis added). Moreover, Attorney General Butterworth reaffirmed the representations made in his January 29, 2002, letter, insisting that "The representations made in my earlier letter are consistent with those set out with respect to the 2002 amendments." (Id. at 4). Attorney General Butterworth characterized the language in section 6 regarding non-responding voters as merely permitting a supervisor of Elections to proceed to make an eligibility determination if a voter failed to respond. "[A] voter's name can be removed only if he or she fails to respond within 30 days to the notice sent by certified mail or fails to attend the hearing." (Id. at 5) (Emphasis added). Removal of a non-responding voter was described as permissive (to occur if there is an actual finding of ineligibility), not mandatory (to occur regardless of the absence of any such finding).

(3) The May 5, 2004 Memorandum

In your memorandum of May 5, 2004, to the Supervisors of Elections, however, you describe "the steps required by [section 98.0977(3)]" as including the following:

You must remove from the registration rolls the name of any voter who fails either to respond within 30 days to the first notice sent by certified mail or to attend the hearing.

(Emphasis added). This directive appears to instruct supervisors that they must purge every voter who did not respond within 30 days or the date of the hearing, regardless of whether (a) the supervisor has not actually made any independent determination one way or the other regarding eligibility³, (b) the supervisor has concluded that the voter is actually eligible to vote, even though the state database "suggests" the voter might not be⁴, (c) the

³That might occur, for example, where the supervisor had requested but not yet received additional verifying or other relevant material from the Clerks of Court.

⁴That might occur, for example, where the supervisor, after sending out the initial notification, learned additional facts which removed the basis for believing that the voter was

supervisor believes that the voter did not respond because he or she never got actual notice⁵, or (d) on the 31st day after the letter was sent (and after the hearing date), but before his or her name has actually been removed, the voter responds with incontrovertible proof of eligibility (e.g. a civil rights restoration certificate).

If this were a matter of first impression, unconfined by the strictures of section 5 of the Voting Rights Act, that might be a conceivable interpretation of section 98.0977(3)(d). But under the Voting Rights Act, your actions, and those of the Supervisors in the covered counties, are necessarily constrained by the prior representations of Attorney General Butterworth, and by the fact that the Department of Justice has precleared only the voting changes set out by Attorney General Butterworth in connection with the section 5 submission.

Attorney General Butterworth's letters of January 29, 2002 and July 10, 2002, both indicate that the Division of Elections was well aware of the representations that were being made on those letters.⁶ If in 2002 your office disagreed with those representations, it was then incumbent on you either to dissuade the Attorney General from making those representations, or to

ineligible. Such a situation would arise if, after the issuance of the notification letter, the Division of Elections had corrected a mistake in its earlier database, additional materials from the Florida Department of Law Enforcement revealed that the voter in question was not the same person as an ex-felon with a similar name, information from a Clerk of Court revealed that the voter in question had only been arrested for (but not convicted of) a felony, or the Supervisor obtained other relevant information, such as a civil rights restoration certificate for the voter in question. This problem would also arise if the Supervisor concluded that the available information was sufficient to "suggest" that a voter was ineligible, but was insufficient to persuade the Supervisor that the voter was actually ineligible.

⁵That might occur, for example, where the Supervisor knows that the voter in question is serving with the armed forces in Iraq; such a voter would likely not receive a certified letter sent to his/her Florida address or read his or her hometown newspaper.

⁶The January 29 letter advised the Department of Justice that additional information could be obtained from Amy Tuck at the Division of Elections. The January 10 letter referred the Department of Justice to Amy Tuck Whitman (presumably the same individual) in that Division.

disclose that disagreement at the time to the appropriate officials at the United States Department of Justice. At this juncture, it is your legal obligation to desist from instructing Supervisors of Elections to implement voting changes that are inconsistent with those representations and that thus have not been precleared under, and that are therefore forbidden by, section 5 of the Voting Rights Act.

III. PRE-NOTIFICATION DETERMINATIONS

(1) The Election Reform Act

Florida law establishes a notification process to be utilized in connection with a reassessment of whether a registered voter is in fact eligible to vote. Supervisors of Elections, however, are not authorized to subject voters to that process in the absence of substantial justification. Institution of that process is only contemplated

[w]hen the supervisor of elections finds information through the database that suggests that a voter has been convicted of a felony and has not had his or her civil rights restored or has been adjudicated mentally incompetent and his or her mental capacity with respect to voting has not been restored

Section 98.0977(3)(d) (Emphasis added).

In his letter of January 29, 2002, Attorney General made clear that the mere existence of a database analysis, such as your recently released "felon match list", is by itself insufficient to compel, or even to permit, the requisite finding. A Supervisor cannot act merely because a voter's name appears in a database match; the Supervisor must make his or her own independent finding that information "suggests" that the voter is ineligible.

There is no longer a presumption favoring the accuracy of any computer database. . . . Each supervisor compares voter registration information with information provided by the Florida Department of Law Enforcement, the Board of Executive Clemency, Office of Vital Statistics and other relevant sources as noted above. At that point, if the supervisor finds information suggesting ineligibility to vote, the person shall be notified by certified United States mail.

(Letter of Robert Butterworth to Joseph Rich, January 29, 2002, pp. 3-5) (Emphasis added). In determining whether a voter is potentially ineligible, and that the notification process must therefore be utilized, a Supervisor is required to seek to confirm independently the accuracy of the information in the database.

To determine that a voter is potentially ineligible to vote, a supervisor must attempt to verify the information provided on the C[entral]V[oter]F[ile] pertaining to deaths, felonies and mental incapacitation.

(Id. at p. 4).

(2) The May 5, 2004, Memorandum

Your Memorandum of May 5, 2004, contains two sentences regarding the required pre-notification determination.

Once the felon filtering matching component of the database is deployed and identifies a potential match with a voter registered in your county, you must follow the notification procedures required by section 98.0977(d), Florida Statutes. For your convenience, we are summarizing the steps required by that section in the event that you find that the database suggests that a voter has been convicted of a felony and has not had his or her civil rights restored or has been adjudicated mentally incompetent and has not had mental capacity with respect to voting restored.

(Emphasis added). The first sentence is squarely inconsistent with the language of section 98.0977(3)(d) and with the Butterworth representations. It directs Supervisors to begin the notification process solely based on the inclusion of a name in the list of computer-based "potential felon matches", and does not permit a Supervisor to refrain from initiating the notification procedure either (a) because the Supervisor regards the felon match database as insufficiently reliable, or (b) because the Supervisor wants to attempt to verify the information on which it is based.

The second quoted sentence could be read in a manner consistent with section 98.0977(3)(d) and the Butterworth representations, but a Supervisor could do so only if he or she entirely disregarded the command in the first sentence. The sole apparent way to reconcile these two sentences would be to understand the first to mean with regard to anyone on the list that

supervisors are legally required to make the requisite finding that information "suggests" that person is not eligible to vote. Such a construction of your memorandum, however, would be palpably inconsistent with Attorney General Butterworth's January 29, 2002, representations.

On May 6 and 7, 2002, a large number of Florida newspapers quoted a spokesperson for the Secretary of State as stating that the felon match list "has the approval of the U.S. Department of Justice and the National Association for the Advancement of Colored People."⁷ That is factually incorrect; neither the Department of Justice nor the NAACP has approved, or even been given a copy of, the list. To the contrary, in your May 12, 2004, memorandum, you emphatically insisted that Florida law did not even permit giving that list to civil rights organizations like the NAACP. On May 7, 2004, the Lieutenant Governor was quoted as asserting that "the administration [of Governor Bush] had no choice in ordering the purge, that it was complying with the federal election law."⁸ That assertion too is incorrect. These statements appear calculated to induce supervisors to initiate the purge process in reliance on no more than the database analysis, an action which Attorney General Butterworth in 2002 assured the Department of Justice would not occur.

The actions taken by your office, unless corrected, will foreseeably lead supervisors to administer section 98.0977 in a manner that has not been precleared by the Department of Justice. If it is your intent that the statute be administered in this new manner, you must first submit that voting change for preclearance under section 5 of the Voting Rights Act. If, on the other hand, it is your intent that section 98.0977 be administered in the manner represented by Attorney General Butterworth, you should take prompt and unequivocal action to correct the misstatements that have been made to supervisors regarding their obligations under Florida law.

Yours sincerely,

Lawyers' Committee for Civil Rights
Under Law

⁷2004 WL 74124663 (Bradenton Herald, May 7, 2004); 2004 WL 77357065 (Miami Herald, May 6, 2004); 2004 WL 74088997 (Tallahassee Democrat, May 7, 2004).

⁸2004 WL 74088997 (Tallahassee Democrat, May 7, 2004).

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