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DATE: March 23, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
RULES, ETHICS, & ELECTIONS (PRC)
ANALYSIS**

BILL #: HB 171

RELATING TO: Requests for Absentee Ballots

SPONSOR(S): Representative Brutus

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) RULES, ETHICS, & ELECTIONS (PRC)
- (2) CRIME PREVENTION, CORRECTIONS & SAFETY (HCC)
- (3) PROCEDURAL & REDISTRICTING COUNCIL
- (4)
- (5)

I. SUMMARY:

HB 171 provides that it is a felony of the third degree for any person, including any absent elector, to remove a request for an absentee ballot from the main or any branch office of the supervisor of elections for any reason, including the correction or addition of any information, after the request has been submitted to the supervisor of elections. Additionally, the bill provides that it is a felony of the third degree for any person other than the absent elector, a member of the elector's immediate family, or the elector's legal guardian to make any corrections or additions to the request after it has been submitted to the supervisor of elections.

Under the current sentencing structures, a person convicted of a felony of the third degree may be punished by a term of imprisonment not to exceed five years, and may be sentenced to pay a fine in addition to a prison sentence, not to exceed \$5,000.

The bill does not have a significant fiscal impact on state or local governments.

This act has an effective date of July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

The bill creates a new criminal penalty with respect to the election code, which would require the involvement of the local state attorney's office upon receipt of a complaint involving the prohibited activities. To that extent, the bill does not support less government.

B. PRESENT SITUATION:

Section 101.62, F.S., sets out the procedure for requesting an absentee ballot. A supervisor of elections may accept a written or telephonic request for an absentee ballot from the elector, or, if directly instructed by the elector, a member of the elector's immediate family, or the elector's legal guardian. One request is sufficient to receive an absentee ballot for all elections that are held within a calendar year, unless the elector or the elector's designee indicates otherwise. A request may be considered cancelled when any first-class mail sent by the supervisor to the elector is returned as undeliverable.

The person requesting an absentee ballot must disclose certain items of information:

- The name of the elector for whom the ballot is requested.
- The elector's address.
- The last four digits of the elector's social security number.
- The registration number on the elector's registration identification card.
- The requester's name.
- The requester's social security number and, if available, the driver's license number.
- The requester's relationship to the elector.
- The requester's signature (written requests only).

[s. 101.62(1)(b), F.S.]. For each request for an absentee ballot received, the supervisor records the date the request was made, the date the absentee ballot was delivered or mailed, the date the ballot was received by the supervisor, and any other such information he or she deems necessary. This information is confidential and exempt from public record, and shall be made available to or reproduced only for a canvassing board, an election official, a political party or official thereof, a candidate who has filed qualification papers and is opposed in an upcoming election, and registered political committees, or registered committees of continuous existence, for political purposes only. [s. 101.62(3), F.S.].

To each absent qualified elector overseas who has requested an absentee ballot, the supervisor of elections must mail an absentee ballot not fewer than 35 days before the first primary election, and not fewer than 45 days before the second primary and general election. [s. 101.62(4)(a), F.S.]. As soon as the remainder of the absentee ballots are printed, the supervisor shall provide an absentee ballot to each elector by whom a request for that ballot has been made. [s. 101.62(4)(b), F.S.].

Chapter 104, F.S., sets forth those violations of the Florida Election Code that are subject to criminal penalties. Section 104.047, F.S., sets forth specific prohibited acts related to absentee voting:

- Providing or offering to provide, or accepting, a pecuniary or other benefit in exchange for distributing, ordering, requesting, collecting, delivering, or otherwise physically possessing an absentee ballot, except as provided in ss. 101.6105 – 101.694, F.S., constitutes a felony of the third degree.
- Requesting an absentee ballot on behalf of an elector, except as provided in ss. 101.62 or 101.655, F.S., constitutes a felony of the third degree.
- Marking or designating a choice on the ballot of another person, except as provided in ss. 101.051, 101.655, or 101.661, F.S., constitutes a felony of the third degree.
- Returning more than two absentee ballots in violation of s. 101.647, F.S., constitutes a misdemeanor of the first degree.
- Witnessing more than five absentee ballots in any single election, with exceptions, constitutes a felony of the third degree. [Note: this provision was not precleared by the Department of Justice and is not being enforced].

Although the election code sets forth what must be disclosed by the person requesting an absentee ballot, there is no statutory directive regarding the treatment of absentee ballot requests which do not contain all of the information required under s. 101.62(1)(b), F.S.

The Florida Supreme Court has held that “unless the absentee voting laws which have been violated . . . expressly declare that the particular act is essential to the validity of the ballot . . . the statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot or election.” [*Boardman v. Esteve*, 323 So.2d 259, 265 (Fla. 1975)]. The First District Court of Appeal addressed this issue in *McLean v. Bellamy*, 437 So.2d 737, 742-743 (Fla. 1st DCA 1983), stating: “our examination of Section 101.62 leads us to conclude that its provisions are directory. We are unable to glean from the provision of the section a legislative intent that the failure to follow the letter of its provisions should result in the invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee.” Notwithstanding, the Florida Supreme Court has held that if a court finds substantial noncompliance with statutory election procedures, and also makes a factual determination that reasonable doubt exists as to whether a certified election expressed the will of the voters, then the court in an election contest is to void the contested election even in the absence of fraud or intentional wrongdoing. [*Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720, 725 (Fla. 1998)].

Five counties in Florida are subject to the preclearance provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c: Collier, Hardee, Hillsborough, and Monroe. The federal Voting Rights Act of 1965 prevents state election laws which impact voting rights from going into effect until the United States Department of Justice reviews the law and determines that it will not have a discriminatory effect. Florida 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.]. Therefore, laws that are objected to by the Justice Department and not precleared, will not be enforced in any of Florida’s counties. Because of time considerations involved in completing the elections process, the staff of the Attorney General’s office has typically recommended that such bills be given an effective date of January 1 of the following year, or later.

C. EFFECT OF PROPOSED CHANGES:

HB 171 creates s. 104.046, F.S., to prohibit any person, including an absent elector, from removing an absentee ballot request from the main or branch office of the supervisor of elections for any reason, including the correction or addition of any information, after the request has been submitted to the supervisor. The bill also makes it unlawful for any person other than the absent elector, a member of the elector's immediate family, or the elector's legal guardian, to make any corrections or additions to a request for an absentee ballot after it has been submitted to the supervisor of elections. The bill provides that a violation of any provision of the new section would constitute a third degree felony.

Under current sentencing structures, a person convicted of a felony of the third degree may be punished by a term of imprisonment not to exceed five years, and may be sentenced to pay a fine in addition to a prison sentence, not to exceed \$5,000.

The bill does not provide an exception for either the supervisor of elections, or an employee of the supervisor of elections, to be able to correct an error or add omitted information even with the express permission of the absent elector.

While the bill does provide for potential criminal prosecution of individuals, including a supervisor of elections, the bill does not express legislative intent that either the removal of an absentee ballot request from a supervisors' office or the correction or addition to an absentee ballot request by someone other than the absent elector, a member of the elector's immediate family or the elector's legal guardian would invalidate the absentee ballot itself.

HB 171 is an act that does change voting or elections procedures and may affect voting rights and therefore, would be subject to federal preclearance review.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Election laws are exempt from the mandates of Art. VII, s. 18, of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Election laws are exempt from the mandates of Art. VII, s. 18, of the Florida Constitution.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Election laws are exempt from the mandates of Art. VII, s. 18, of the Florida Constitution.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

During the 2000 election cycle, both the Florida Republican Party and the Florida Democratic Party disseminated pre-printed absentee ballot request forms to registered voters of their respective parties. In at least two counties, Seminole and Martin, the pre-printed absentee ballot request forms mailed out by the Republican Party did not include the requestor's voter registration identification number, or a space for the requestor to put the number. The Republican Party form also did not instruct the recipients that their voter registration identification number was needed or required.

In both Seminole County and Martin County, the respective Supervisors of Elections received a number of Republican absentee ballot request forms that had either missing or incorrect voter registration identification numbers. After discovering the errors, Republican Party representatives were granted access to the office of the Seminole County Supervisor of Elections to add the missing voter identification numbers. Once the voter registration numbers were added, the requests were accepted, processed, and absentee ballots sent to the requestors. In Martin County, the Supervisor of Elections allowed one or more representatives of the Republican Party to remove absentee ballot request forms from the office to allow the missing or corrected voter identification numbers to be added. Once the forms were returned as changed, the requests were accepted again, processed, and absentee ballots were sent to the requestors.

Following the certification of the 2000 Presidential Election, two separate contest actions were brought seeking to invalidate all, or at least a portion of, the absentee ballots cast in Seminole and Martin Counties. [*Taylor v. Martin County Canvassing Board*, No. 00-2850 (Fla. 2d Cir. Ct., Dec. 8, 2000) and *Jacobs v. Seminole County Canvassing Board*, No. CV-00-2816, 2000 WL 1793429 (Fla. 2d Cir. Ct., Dec. 8, 2000)]. The issues in these two cases were, primarily, as follows:

- Whether the absentee voting laws require strict compliance with all of its' provisions, or whether substantial compliance is sufficient to give validity to the absentee ballots. Stated differently, "[d]id the addition of voter registration numbers on the request forms after they were submitted to the Supervisor constitute such an irregularity that the ballots cast thereafter should be invalidated, or did the addition of that information constitute a violation of the absentee voter election laws that did not impugn or compromise the integrity of the ballots cast or ultimately the election itself?" [*Jacobs v. Seminole County Canvassing Board*, No. CV-00-2816, at 4, 2000 WL 1793429 (Fla. 2d Cir. Ct., Dec. 8, 2000)].
- Whether the Supervisors of Elections treated the representatives of the Florida Republican Party differently than representatives of other political parties to the extent that the integrity of the ballots or election was compromised. In other words, did the actions of the Supervisors constitute illegal disparate treatment in violation of s. 104.0515, F.S., or equal protection under the law under Article I, Section 2, of the Florida Constitution? [See, *Jacobs v. Seminole County Canvassing Board*, at 8.].

In both cases, the court found that while the Supervisors did not exercise good judgment, there was no basis in the evidence offered to conclude that any of the irregularities affected the "fair expression of the will of the people" in those respective counties. In sum, there was no evidence of substantial noncompliance with the election laws sufficient to invalidate the absentee ballots that were cast. Both cases were subsequently appealed to the First District Court of Appeal, which certified the orders to be of great public importance and to require immediate resolution by the Florida Supreme Court. The Florida Supreme Court affirmed both orders of the trial court, finding substantial evidence to support the trial court's conclusion that the evidence in either case did not support a finding of fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots. [*Jacobs v. Seminole County Canvassing Board*, No. SC00-2447 (Fla. Dec. 12, 2000) and *Taylor v. Martin County Canvassing Board*, No. SC00-2448 (Fla. Dec. 12, 2000)].

The bill provides for an effective date of July 1, 2001. Bills which create new criminal offenses or which increase the penalties for existing offenses should ordinarily be delayed long enough for the general public to have the printed text of the law readily available and for law enforcement agencies to prepare for enforcement.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON RULES, ETHICS, & ELECTIONS (PRC):

Prepared by:

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