



A New Attack on Civil Liberties by Florida's Secretary of State

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Florida's Department of State is proposing a few strategically placed words that would gut Florida Statute 104.29, a brief but powerful law that currently offers Florida citizens their greatest protection for election observation. The altered language is buried on page 61 of a 68-page elections bill¹ still in draft form, which, as soon as it is finalized, will be presented to the State Legislature for approval.

Transparent elections are an essential component of a democratic society. Only transparency can guarantee that elections are fair and accurate and ensure that citizens can hold their elected officials accountable. Yet, for several years, Florida's Department of State has consistently sought changes to Florida laws that reduce transparency. In 2005, a few strategically placed words in a bill proposed by the Department of State/Division of Elections eliminated full manual recounts of paper ballots in close races,² thus removing any comprehensive check on votes counted by electronic voting systems. A January 2008 opinion letter³ issued by the Division of Elections states that counting does not occur in the central counting room and that observation should thus be curtailed, even though such observation is authorized by §101.5612(2). This opinion letter has been used by some Supervisors of Elections to keep observers out of the central counting room.

The proposed amendment to §104.29 is the latest attack on civil liberties by the Department of State. If passed, it would have sweeping negative effects in four specific ways:

1) Reduce transparency in Florida Elections by restricting citizen observation of ballot counting and vote tallying to polling places only; prevent observation of ballot counting and vote tallying for early voting, absentee, provisional, overseas,

¹ A copy of the draft bill, not yet assigned a bill number, may be viewed on line at the Florida Fair Elections Coalition home page, www.ffec.org

² The definition of manual recount was changed in 2005 to read "the manual recount of overvotes and undervotes" only, resulting in a prohibition against the full manual recount of paper ballots in any race for any reason. The revised definition of manual recount was stealthily inserted into § 102.166 in 2005 by the Department of State as part of a huge elections bill presented to the Legislature and approved virtually overnight. Most legislators had no idea they were approving the end of manual recounts in Florida.

³ Opinion letter, Sarah Jane Bradshaw, Interim Director, Division of Elections, Jan. 24, 2008, available on the Florida Division of Elections website at <http://election.dos.state.fl.us/opinions/new/2008/de0801.pdf>

unscanned and duplicated ballots, all of which take place at the main elections office.

2) Remove the penalty clause for Supervisors of Elections and other election officials at the main elections office who obstruct observation and limit such penalties to precinct officials only.

3) Eliminate the right of citizens to “see whether votes [are] correctly tallied.”

4) Blur the legal definition of “polling place” in Florida election laws

Both the first and second drafts of the proposed amendment are included below to shed light on DOS' purpose in making these changes.

January (first) draft of proposed amendment to §104.29 by the Department of State:

Section 31. Section 104.29, Florida Statutes, is amended to read:

104.29 Inspectors refusing to allow watchers while ballots are counted.--The inspectors or other election officials at the polling place shall, at all times while the ballots are being counted, allow as many as three persons near to them to see whether the ballots are being counted ~~correctly read and called and the votes correctly tallied~~. Any ~~and any~~ official who denies this privilege or interferes therewith is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

This amendment clarifies that this provision pertains to ballot accounting done at the polls.

February (second draft) of proposed amendment to 104.29 by the Department of State:

Section 34. Section 104.29, Florida Statutes, is amended to read:

104.29 Inspectors refusing to allow watchers while ballots are counted.--The inspectors or other election officials at the polling place shall, after the polls close ~~at all times while the ballots are being counted~~, allow as many as three persons near to them to see whether the ballots are being reconciled correctly. ~~read and called and the votes correctly tallied, and~~ Any official who denies this privilege or interferes therewith commits ~~is guilty~~ of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

1. Reduce transparency by restricting citizen observation to polling places only

Currently, § 104.29 allows citizens to observe the tallying of *all* votes (including precinct, early voting, absentee voting, provisional, and unscanned ballots) as well as the procedures to tally duplicated ballots where “voter intent” must be determined by election officials.

The proposed amendment by the Department of State, however, would *restrict* observation of vote tallying to *polling places only*, thus eliminating the right of citizens to observe the tallying of early, absentee, provisional, overseas, unscanned, and duplicated ballots, which represented over 50% of ballots cast in Florida in the 2008 election⁴. These votes are tallied at the main elections office, not at a precinct.

The Secretary of State’s explanatory line, found in italics at the end of the January (first) draft of the proposed amendment, is revealing in itself. It states, “This amendment clarifies that this amendment pertains to ballot accounting done at the polls.” The proposed amendment is not a clarification – it is a complete reversal of the intent of the original statute, which gave citizens the right to observe the tallying of all ballots.

While there are protections in the election law for citizens to observe activities of the Canvassing Board, many counties do not process, count or tally ballots in the same room where the Canvassing Board meets.

Limiting the observation to “polling places” only would deny citizens the right to observe the tallying of early voting, absentee, and overseas, unscanned, and duplicated ballots, all of which are tallied at the main elections office.

2. Remove penalties for Supervisors of Elections who obstruct observation

Currently, §104.29 contains a criminal penalty (misdemeanor of the first degree) for any election official who attempts to obstruct observation by citizens. A direct penalty contained in a statute is relatively rare and offers great protection to citizens. To apply this penalty only to polling-place officials would mean that citizens would have no direct recourse against election officials at the

⁴ Vote totals by vote category are shown on the Excel Spreadsheet that is part of the *Overvote/Undervote Report* issued annually by the Florida Division of Elections, available on line in the Reports section of the Division of Election website at: <http://election.dos.state.fl.us/reports/pdf/generalOverUndervote08.xls>

main elections office who obstruct observation of vote-tallying procedures for early, absentee, provisional, overseas, unscanned, and duplicated ballots, since these procedures take place at the main elections office. The insertion of the phrase “at the polling place” is misleading in its apparent simplicity. In fact, it would allow election officials to avoid accountability by eliminating a stated penalty for denial of citizen rights if that denial of rights happens anywhere except at a polling place. ***All election officials should continue to be accountable for a transparent process rather than limiting accountability to polling-place officials only.***

The proposed amendment could also be used to reinforce restrictions on the right of observers designated by political parties to observe in the central counting room, as currently allowed under § 101.5614(2). This right has already been curtailed by an opinion letter⁵ issued by the Florida Division of Elections in January 2008 that resulted in lawfully designated observers being barred from the central counting room in Volusia and other counties. The DOE argues in its letter that “counting” only occurs in the precincts, not in the central counting room. The DOE’s opinion letter was referred to as “garbage” by Leon County Supervisor of Elections Ion Sancho, who said, “It’s vitally important that citizens see how open and transparent our process is.”⁶

By removing penalties for election officials at the main elections office, the proposed amendment would remove penalties for a Supervisor of Elections who attempts to interfere with observation at the main elections office or in the central counting room.

Supervisors of Elections and other election officials should not be given a “free pass” to avoid accountability when they attempt to obstruct lawful observation and prevent transparency. Transparency and accountability are essential to the integrity of the elections process – they should not be sacrificed for the sake of expediency.

3. Eliminate citizens’ ability to “see whether votes [are] correctly tallied”

The proposed change to §104.29 strikes through the phrase that provides citizens the ability to see “whether votes [are] correctly tallied.” To “tally” is defined in *Webster’s Unabridged Dictionary* as “to reckon” or “to match.” As § 104.29 is currently written, allowing citizens to see if votes are correctly tallied is very powerful since tallying the votes includes all the procedures involved to

⁵ Opinion letter, Sarah Jane Bradshaw, Interim Director, Division of Elections, Jan. 24, 2008, available on the Florida Division of Elections website at <http://election.dos.state.fl.us/opinions/new/2008/de0801.pdf>

⁶ Sarasota Herald Tribune, “Sarasota Elections Chief Drawing More Fire,” by Doug Sword, Feb. 8, 2008; available on line at <http://www.heraldtribune.com/article/20080206/NEWS/802060442>

achieve correct vote totals. In the first draft of the proposed amendment, the Secretary of State strikes through the line that allows citizens to “see whether...votes [are] correctly tallied,” and instead proposes a meaningless sentence that says “while the ballots are being counted,” citizens can see “whether the ballots are being counted.” The second draft changes the language to “while the ballots are being counted,” citizens can see “whether the ballots are being reconciled correctly,” which still could be used to eliminate the right to observe such important procedures as the printing of results tapes from each voting machine, a crucial right that is currently allowed.

Furthermore, the right to have “ballots called and read” should not be eliminated. If any change is to be made, it should be simply to update “ballots called and read” to “results tapes called and read,” a process that occurred at the 2006 Sarasota recount only after citizen observers used §104.29 to override the supervisor’s original announcement at 9 am on the first day of the recount that no “updates” would be given until 3 pm.⁷ The calling out of totals on the results tapes made the Sarasota recount a far more transparent process and would not have happened if it were not for this provision in § 104.29.

The right of citizens to “see whether all votes have been correctly tallied” should not be abridged.

4. Blur the definition of “polling place”⁸

The seemingly benign insertion of the phrase “at the polling place” has another serious ramification. As Florida election laws currently are interpreted, many activities are allowed before the polls open and after the polls close that are not allowed while voters are present. For example, § 102.031 states that “no photography is allowed in the polling room or early voting area.” The intent of this law was to protect the privacy of voters and their ballots. Photography is currently allowed after all voters have finished voting and the polls are closed. The period of time before the opening of the polls and after the closing of the polls is currently interpreted as a public meeting of the Election Board (composed of the poll clerk and poll workers), where any citizen may observe and where photography of opening and closing procedures is permitted. The use of the term “polling place” in the proposed amendment blurs the line between activities allowed

⁷ A video of the Sarasota Supervisor of Election’s statement that no “updates” will be made until 3 pm and the use of § 104.29 by citizens to bring sunshine to the recount process may be viewed on-line at:

<http://www.youtube.com/watch?v=cQv7CmBp5kk>

⁸ “Polling place” is currently defined in § 97.021(25) as “the building which contains the polling room where ballots are cast.”

while voters are present and those activities allowed before the polls open or after the polls close. Once the definition of “polling place” has been expanded to include the period of time after the polls close, it will be a short step to extend other restrictions that now apply only when voters are present. The current right of citizens to photograph such items as the poll tapes (results tapes) that are printed from each voting machine and the logs that record seal numbers is an important right. If there is a discrepancy, a photograph is essential for back-up documentation. Expanding the definition of “polling place” to include the period of time after the polls close could lead to a prohibition on photography and other restrictions that would affect both citizens and the media.

Blurring the definition of “polling place” could lead to the prohibition of photography and other restrictions before the polls open and after the polls close.

Summary

“Government in the sunshine” includes elections in the sunshine. We are counting on Florida legislators to stand up to this creeping attack on Floridians’ civil liberties and to protect transparency, openness, and accountability in Florida elections for citizens, candidates, political parties, and the media. We urge the Department of State to withdraw its proposed amendment to §104.29 and further urge all legislators to oppose it if it is not withdrawn.