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ATTORNEY GENERAL OPINION NO. 80-93

The Honorable Ronald R. Hein
State Senator, 20th District
Room 128-S, State Capitol
Topeka, Kansas

Re: Elections--Registration of Voters--Purging of
Registration Lists

Synopsis: The provisions of new section 3 of 1980 House Bill No. 2964 (as amended by Senate Committee) that require the removal from the voter registration books the names of voters who have failed to vote in two consecutive state general elections do not offend pertinent state and federal constitutional requirements. They do not impermissibly expand upon the qualifications of electors specified in Article 5, Section 1 of the Kansas Constitution, nor do they offend either the equal protection or due process clauses of the Fourteenth Amendment to the U. S. Constitution, since they are in furtherance of a legitimate state interest in preventing fraudulent voting that outweighs the minimal and incidental, burden of re-registering imposed on purged voters who are duly notified thereof. Cited herein: §3 of 1980 House Bill No. 2964; Art. 5, §§1, 4, Kan. Const.; and U. S. Const. amend. XIV.

* * *

Dear Senator Hein:

You have requested our opinion regarding certain provisions of 1980 House Bill No. 2964 that require purging of voter registration lists. Specifically, you inquire as to the constitutionality of those provisions of this bill (as amended by Senate Committee) requiring removal from voter registration lists the names of voters who fail to vote in two consecutive state general elections.

The Honorable Ronald R. Hein
Page Two
April 15, 1980

These requirements are stated in new section 3, as follows:

"When a registered voter fails to vote in two consecutive state general elections beginning with the state general election in 1980, the voter registration of such person is hereby declared to be void. Thereupon, the county election officer shall remove from the registration books and the party affiliation lists in such officer's office the name of any such person. When a person's voter registration is declared void pursuant to this section, the county election officer shall send by nonforwardable first class mail a notice to that person indicating that the voter registration of that person has been declared void for failing to vote in two consecutive state general elections. This notice shall include a registration application and a party affiliation form."

In submitting your request, you have called to our attention a prior opinion of this office, dated November 28, 1972, wherein Attorney General Vern Miller concluded that certain provisions of K.S.A. 25-2316 (now repealed) were unconstitutional in voiding the registration of a voter who failed to vote at any state general election. There, it was determined "that such cancellation operates to deny to the affected voters the equal protection of the law, in violation of the Fourteenth Amendment to the United States Constitution."

In reaching that conclusion, Attorney General Miller relied principally upon two cases: Dunn v. Blumstein, 405 U.S. 330 (1972) and Michigan State UAW Community Action Program (CAP) v. Austin, 387 Mich. 506, 198 N.W.2d 385 (1972). The former, in conjunction with Bullock v. Carter, 405 U.S. 134 (1972), was relied upon for the proposition that any state's statutory restriction of the right to vote which has a "real and appreciable impact" upon the exercise of the franchise must be found to be necessary to serve a "compelling state interest," in order to withstand a constitutional challenge. The Austin case was a decision of the Michigan Supreme Court, wherein Dunn's "compelling state interest" test was applied in holding unconstitutional a Michigan statute that invalidated registrations of voters who failed to vote in any election during a two-year period.

The Honorable Ronald R. Hein
Page Three
April 15, 1980

Subsequent to the issuance of that Attorney General's opinion, the Supreme Court of Colorado had occasion to consider and pass upon a similar proposition. In Duprey v. Anderson, Colo., 518 P.2d 807 (1974), the court upheld the validity of a Colorado statute which required that "voter registration books be purged of those electors who fail to vote at a preceding biennial election." Id. at 808. In reaching that decision, the Colorado court rejected a number of allegations as to the constitutional infirmities of the Colorado statute. We are persuaded by the reasoning of this decision that alleged constitutional defects in the proposed Kansas statutes may be dismissed in similar fashion.

One of the contentions addressed in Duprey was that, because a purged voter must re-register before he or she can vote, "the purging statute has the effect of unlawfully adding this act of registration as a qualification to vote." Id. In dismissing this contention, the court stated:

"It is our view that whether initial registration, or registration after purging is involved, it is not a qualification to vote. It is merely an administrative process designed to facilitate rather than complicate participation in the election process.

"We hold that re-registration after purging is exclusively an administrative adjunct which is necessary in order to provide for the purity of elections and to guard against abuses." Id. at 809.

While the Kansas Supreme Court has not had the occasion to address the precise question under consideration here, it has held that registration per se does not constitute a qualification in addition to those specified in Article 5, Section 1 of the Kansas Constitution. The Court in The State v. Butts, 31 Kan. 537 (1884), held that "[r]equiring a party to be registered . . . is not in any true sense imposing an additional qualification, any more than requiring a voter to go to a specific place for the purpose of voting." Id. at 554. Moreover, in Butts the Court found that, under our constitution, "it is the duty of the legislature to provide for a registration of voters." Id. at 556. The constitutional reference prompting such conclusion is Article 5, Section 4 of the Kansas Constitution which, even though the wording was modified by amendment in 1974, remains substantially unchanged since the decision in Butts, requiring the legislature to "provide by law for proper proofs of the right of suffrage."

The Honorable Ronald R. Hein
Page Four
April 15, 1980

Based on the rationale in Duprey, buttressed by the decision in Butts, it is our opinion that the provisions of new section 3 of House Bill No. 2964, necessitating the re-registration of voters whose names are purged from voter registration lists for failure to vote in two consecutive general elections, are not unconstitutional by reason of expanding the provisions of Article 5, Section 1 of the Kansas Constitution, through the imposition of an additional qualification to vote.

The Duprey court also held that the Colorado statute in question withstood the challenge that it denied voters equal protection of the law, in derogation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. 518 P.2d at 809. In so holding, the court considered the decisions in Dunn and Austin, supra, that were relied upon in this office's prior opinion, distinguishing the former and totally rejecting the validity of the latter. As to the applicability of Dunn to a statute purging voter registration lists of voters who fail to vote, the Colorado court held:

"The long line of cases which culminate with Dunn and Jarmel [Jarmel v. Putnam, Colo., 499 P.2d 603 (1972)] do not constitute valid authority upon which the purging statute may be struck down as unconstitutional. In each of those cases, the state totally denied to a particular class of residents the right to vote and there was no way in which the members of that class could have made themselves eligible to vote under the provisions of law which were declared unconstitutional in those cases. In Dunn, for example, the state of Tennessee totally disenfranchised newly arrived residents, i.e., those who have been residents of the state less than a year or residents of the county less than three months before the election."
518 P.2d at 809.

As to the other cases urged upon the court as providing "ample authority to invalidate the purging statute as unconstitutional," the court went on to state:

The Honorable Ronald R. Hein
Page Five
April 15, 1980

"Like Dunn and Jarmel, all these cases involved statutory provisions which denied to certain classes of citizens their fundamental right to vote, and as previously indicated, such cases do not deal with the issue of this case. Here, the qualified electors whose names were purged from the registration books, were in no way barred from voting. To vote, they are merely required to re-register." Id. at 809, 810.

In concluding that equal protection of the law was not denied by the Colorado statute, since the duty of re-registration is not more than minimal and incidental as compared to the state's interest in preventing fraudulent voting, the case of Williams v. Osser, 350 F.Supp. 646 (D.C. Pa., 1972), was cited by the Duprey court in support thereof. Id. at 810. The Williams case involved a Pennsylvania purging statute that removed from voter registration lists the names of voters who have not voted in any election during the immediately preceding two years and who, after notice, have failed to re-register. The Pennsylvania statute was found constitutional, with the court finding that its provisions bear "a rational relationship to a legitimate state end," i.e., "maintenance of up-to-date, reliable lists of qualified voters." 350 F.Supp. at 653. In comparing this state interest to the duty of re-registration by a voter whose name has been purged, the court concluded in Williams that:

"This state interest is significant and the purge is closely related to its achievement. Preventing fraud and maintaining up-to-date, reliable registration lists is necessary to preserve the effectiveness of votes legitimately cast and outweighs the minimal burden on the individual's exercise of the franchise." Id.

The Duprey court expressly agreed with this rationale. 518 P.2d at 810. We, also, concur, and, applying the rationale adopted by the Duprey and Williams courts to the provisions of House Bill No. 2964 here under consideration, we have concluded that these provisions promote and are in furtherance of a legitimate state interest--an interest which outweighs the minimal and incidental burden of re-registration imposed on voters whose names have been purged from registration lists. As a result, it is our opinion that these legislative provisions are not violative of the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution.

While such opinion is directly contrary to the Austin case relied upon in the 1972 opinion of this office, we believe, as did the courts in the Duprey and Williams cases, that the "compelling state interest" standard

The Honorable Ronald R. Hein
Page Six
April 15, 1980

applied to the Michigan purging statute in Austin was far too stringent, and does not reflect the result to be achieved when there is a "balancing of interests." Thus, the Duprey court expressly rejected Austin's rationale (518 P.2d at 810), and in Williams the court declined to follow Austin. 350 F.Supp. at 652. In this regard, we have noted the concurrence of the author of a case note which expressed the view that "Austin is an example of the questionable results that occur through mechanical application of the 'compelling state interest' test." 21 K.L.R. 224, 235 (1973). After an analysis of the Austin decision and a discussion of the "rational basis" and "compelling state interest" tests for determining validity of state statutes in light of the Equal Protection Clause, this author suggested that

"[a]pplication of the 'compelling state interest' rule will often result in rationally unjustifiable results. Since in every case the rights involved and the burdens imposed vary, each case should be looked at separately. Austin is a typical situation where, if the court had balanced the interests, the result might well have been more soundly based on reason and logic." Id. at 233.

With the foregoing judicial and scholarly criticism of Austin in mind, we believe it appropriate to disregard the Michigan court's decision. It appears to be thoroughly divorced from the current trend and mainstream of legal comment on voter registration purging statutes.

Finally, we have examined the purging provisions of new section 3 of House Bill No. 2964 from the standpoint of due process considerations. Here, too, we have found the decision in Duprey to be of assistance in determining the absence of any constitutional deficiency by reason of denial of due process.

"At most, constitutional due process requires that upon purging a name from the registration book, a notification of that fact is sent to that person at the address shown on the registration book. If that person is still living, and has not moved to another address, he thereupon has the minimal burden of re-registering to vote at future elections. Williams v. Osser, supra." 518 P.2d at 810.

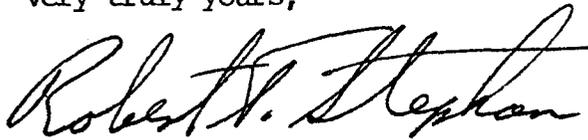
The Honorable Ronald R. Hein
Page Seven
April 15, 1980

We have no concern that the proposed statutory provisions embodied in new section 3 of House Bill No. 2964 satisfy these minimal due process requirements. Upon removal of a voter's name from the registration lists, this section directs the appropriate election officer to notify such voter of that fact by nonforwardable mail, including therewith a registration application and party affiliation form. We believe such provisions afford due process protection to a purged voter.

In summary, therefore, it is our opinion that the provisions of new section 3 of House Bill No. 2964 that require the removal from the voter registration books the names of voters who have failed to vote in two consecutive state general elections do not offend pertinent state and federal constitutional requirements. They do not impermissibly expand upon the qualifications of electors specified in Article 5, Section 1 of the Kansas Constitution, nor do they offend either the equal protection or due process clauses of the Fourteenth Amendment to the U. S. Constitution, since they are in furtherance of a legitimate state interest in preventing fraudulent voting that outweighs the minimal and incidental burden of re-registering imposed on purged voters who are duly notified thereof. We believe, as did the Colorado Supreme Court,

"the election list becomes more authentic and is not as susceptible to fraudulent voting practices or other abuses of the franchise. This is the legitimate state interest involved in the purging procedure and in our view, it far outweighs the light burden of re-registering."
518 P.2d at 810.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

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