



Judicial Watch

Because no one is above the law!

VIA FACSIMILE (804) 371-0194
AND U.S. MAIL

October 29, 2008

Virginia State Board of Elections
Suite 101
200 North 9th Street
Richmond, Virginia 23219-3485

Re: Electioneering Text Messages Within Polling Places

Dear Sir/Madam:

Virginia, like many states, imposes restrictions on political speech around and within polling places. The U.S. Supreme Court has reaffirmed the constitutionality of these statutes because "a long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect" what the Court calls a "fundamental right" to "cast a ballot in an election free from the taint of intimidation and fraud." *Burson v. Freeman*, 504 U.S. 191, 211 (1992). To achieve this end, Virginia law specifically states, "During the times the polls are open and ballots are being counted, it shall be unlawful for any person ... within [40 feet of any entrance of any polling place] to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote." VA. CODE ANN. § 24.2-604(A).

Judicial Watch, Inc. is a non-partisan educational foundation that promotes transparency, accountability, and

integrity in government and fidelity to the rule of law. Through its educational endeavors, Judicial Watch advocates high standards of ethics, law, and morality in our nation's public life and seeks to ensure that government officials do not abuse the powers entrusted to them by the American people. Judicial Watch, Inc. is concerned that Senator Barack Obama and his presidential campaign may violate the "Prohibited activities at polls" statute on November 4, 2008 by text messaging voters while they are at Virginia polling places.

According to media reports, Senator Barack Obama's presidential campaign sent text messages to New Hampshire voters on primary day encouraging them to vote for Senator Obama. See Exhibit 1. Because the campaign found this strategy particularly effective in influencing 18 to 24 year old voters, it appears that the campaign intends to text message voters on Election Day again encouraging them to vote for Senator Obama. See Exhibit 2.

Many of these voters will be voting in Virginia. Because a great many individuals carry cellular telephones and are able to receive text messages anywhere and almost instantaneously upon transmission, it is highly likely that Virginia voters will receive and read Obama campaign text messages inside Virginia polling places and even in voting booths.

When drafting the statute, legislators focused on the popular and prevalent method of electioneering on Election Day: signs and face-to-face contact between campaign workers and voters. Since that time, electioneering has drastically changed. Modern technology, such as text messaging, has become a fundamental component of campaigning. Throughout the past year, Senator Obama and his presidential campaign have sent out countless text messages informing voters of developments in the Senator's campaign, including dates/times of the Senator's public appearances and the selection of the Senator's running mate, and encouraging them to vote for Senator Obama.

Even if an individual is planning on voting for Senator Obama on Election Day, a voter should be able to enter a polling place and cast his or her vote without being subjected to yet more electioneering. Secrecy, privacy, and freedom from outside influence in the polling place are fundamental to ensuring a fair voting process.

The people of Virginia must be free to cast their votes without electioneering text messages inside polling places. Virginia law requires no less.

Judicial Watch, Inc. requests that the Virginia State Board of Elections conduct an inquiry into this matter. If the Board determines that text messaging a voter within a polling place violates VA. CODE ANN. § 24.2-604(A), Judicial Watch, Inc. requests that the Board ask Senator Obama and his campaign to forego their plans to text message Virginia voters after the polls open on Election Day, or fashion some other, equally effective remedy.

Thank you for your attention to this matter.

Sincerely,

JUDICIAL WATCH, INC.

Thomas J. Fitton (PSD)

Thomas J. Fitton
President

Enclosures

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