

BALLOTS: Ballot cards used in an electronic
ELECTIONS: voting machine should be initialed
ELECTION JUDGES: by two judges of opposite politics.
VOTING MACHINES: However, if ballots are cast which
are not initialed by the election
judges, such ballots are to be counted if otherwise in com-
pliance with legal requirements.

OPINION NO. 308

October 23, 1974

Honorable Ed Bohl
Representative, District 115
Box 325
Harrisonville, Missouri 64701

Dear Representative Bohl:

This is in response to your request for an opinion from
this office as follows:

"When the electronic voting system as pro-
vided for in Sections 111.291 to 111.331,
RSMo. is used at an election, must the
initials of two judges of opposite poli-
tics be written on the back of the ballot
card in order for the ballot to be valid?"

Section 111.301, RSMo Supp. 1973, provides in part as
follows:

"1. Electronic voting systems may be used
in any election if such systems enable the
voter to cast a vote in secrecy for all of-
fices and on all measures on which he is en-
titled to vote, and if the automatic tabu-
lating equipment may be set to reject all
votes for any office or measure when the
number of votes therefor exceeds the num-
ber which the voter is entitled to cast, or
when the voter is not by law entitled to
cast a vote for the office or measure.

"2. Electronic voting systems may be used
at any primary election if the automatic
tabulating equipment will count only votes
for the candidates of one party, and will

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reject all votes for an office when the number of votes therefor exceeds the number which the voter is entitled to cast and will reject all votes of a voter cast for candidates of more than one party.

"3. So far as applicable, the procedure provided for voting paper ballots shall apply except that no requirement regarding the placement of the voter's identification number nor the covering thereof with a black sticker on the back of the ballot card shall be applicable."

Subdivision 3 of the above statute provides that the procedure for voting paper ballots shall apply so far as applicable except there shall be no requirement regarding the placement of the voter's identification number nor the covering thereof with a black sticker on the back of the ballot card.

Section 111.291, RSMo Supp. 1973, provides for ballot cards to be used in electronic voting systems.

Since the procedure provided for voting paper ballots so far as applicable shall apply to the electronic voting system, it is necessary to determine the procedure to be followed for using paper ballots when electronic system for voting is not used.

Section 111.441, RSMo, provides in part as follows:

"1. On any day of election any person desiring to vote shall give his name and, if required to do so, his residence to the judges of election, one of whom shall thereupon repeat the name in a distinct tone of voice, clear and audible. Where there is a registration of voters if the name is found in the register of voters by the officer having charge thereof, he shall likewise repeat the name and the voter shall be allowed to enter the space enclosed by the guard rail. When the voter's name is found on the register list, a mark shall be entered beside it to indicate that the voter has presented himself for the purpose of voting. No voter shall receive a ballot until his name is found on the register of voters.

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"2. One of the judges shall then give one and only one ballot, on the back of which two judges of opposite politics have written their initials with ink or indelible pencil, to the judges in charge of the poll books prescribed by section 111.521. One of them shall enter the voter's name, in the order in which he presents himself, in the poll books and shall write the number of the line on which the name is written in the poll book on the back of the ballot. In the presence of the voter they shall then cover or conceal securely the identifying number placed on the ballot by placing over the number, and pasting down, a black sticker so as to conceal but not destroy the number placed thereon. The sticker shall be two inches square with gummed edges extending three-eighths of an inch towards the center of the square. The ballot shall then be handed to the voter to be voted as prescribed by section 111.451. If numbered ballots are used all ballots shall be delivered in consecutive order."
(Emphasis supplied)

It is our view that under the above statute it is the duty of the judges of the election to give one and only one ballot, on the back of which two judges of opposite politics have written their initials in ink or indelible pencil. It is our opinion this applies as well to ballots used in connection with use of election machines.

Since the statutes require the ballot to be initialed on the back by two judges of opposite politics, you inquire whether such ballot is valid and should be counted when not initialed.

In Kasten v. Guth, 395 S.W.2d 433 (Mo. 1965), the issue before the court was an election contest in which some ballots cast and counted did not contain the judge's or clerk's initials as provided by statute. In discussing this matter the court stated, l.c. 435:

"First, appellant urges that the returns from the Longtown District should be voided because the evidence showed that the election there was not conducted in compliance with the provisions of Section 111.620 RSMo 1959, V.A.M.S. Some of the ballots cast

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and counted did not contain the Judge's or Clerk's initials and did not have black stickers placed over the numbers marked on the ballots. '* * * The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. Gass v. Evans, 244 Mo. [329] loc. cit. 353, 149 S.W. 628; Hehl v. Guion, 155 Mo. 76, 55 S.W. 1024. "Such a construction," says this court, speaking through Barclay, J., in Bowers v. Smith, 111 Mo. [45] loc. cit. 55, 20 S.W. 101, 16 L.R.A. 754, 33 Am.St. Rep. 491, "of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted, where the language in question is fairly susceptible of any other Wells v. Stanforth (1885), 16 Q.B. Div. 245." Again (pages 61, 62, of 111 Mo., page 105 of 20 S.W. [16 L.R.A. 754, 33 Am. St.Rep. 491]): "If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. Ledbetter v. Hall (1876), 62 Mo. 422. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial." Nance v. Kearbey, 251 Mo. 374, 383, 384, 158 S.W. 629, 631 [3]. See also Riefle v. Kamp, 241 Mo.App. 1151, 247 S.W.2d 333; and Bernhardt v. Long, 357 Mo. 427, 209 S.W.2d 112. Sec. 111.620, supra, does not itself make the specified irregularities fatal. The point is without merit."

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The court further stated that as a general rule an election will not be annulled even if certain provisions of the law regarding elections have not been strictly followed in the absence of fraud. While the irregularities referred to in this case should not be encouraged, they are not sufficient to constitute fraud, and in the absence of fraud, the court will not deprive the voters of their votes.

The statutes at this time regarding this matter are the same as they were when the Supreme Court decided Kasten v. Guth, supra. We find no statute at the present time which expressly states that ballots cast without the initials of the judges should not be counted.

CONCLUSION

It is the opinion of this office that ballot cards used in an electronic voting machine should be initialed by two judges of opposite politics. However, if ballots are cast which are not initialed by the election judges, such ballots are to be counted if otherwise in compliance with legal requirements.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General