

ELECTIONS:  
BALLOTS:

When absentee ballots omit the name of a candidate of one party for an office and contain in place of such name, the name of another individual, who is not a candidate, that all straight party ballots of that particular party are to be counted as if the ballots contained the correct name of the candidate.

OPINION NO. 52

March 2, 1971

Honorable Buddy Kay  
Representative, District 58  
Room 301, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Kay:

You have requested an opinion from this office as follows:

"Recently, in an election in St. Louis, absentee voters received the wrong ballots. In explaining this further and for clarification, the ballots had the correct state candidates but as you read down the ballot for lesser offices such as state representatives and magistrates the name appearing on the ballot was incorrect.

"The question that I desire an opinion on is: If the voter voted a straight ticket for either political party would the candidate for that office in that district be entitled to the vote even though his name did not appear on the ballot?"

We find that in *Bradley v. Cox*, 197 S.W. 88 (Mo. banc 1917) a similar question was before the Supreme Court. There had been an election to elect a judge for the Springfield Court of Appeals. Bradley was the Democratic candidate and Cox the Republican candidate. After the election it was discovered that some Democratic ballots bore the name Johnson, who was not a candidate, rather than Bradley. If ballots voted for Johnson were counted for Bradley, he would be the winner, otherwise Cox was the winner. In a decision approved by two judges of the Supreme Court, and concurred in by two other judges, with three judges dissenting, it was determined that the straight party ballots voted for Johnson could properly be counted as votes for Bradley, and Bradley was determined to be the winner. In arriving at this result, the court observed:

". . . Each of the more than 2,000 voters of that county was handed, among others, the official ballot prepared by the clerk, headed 'Democratic Ticket,' and required by the law

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to contain the names of every Democratic nominee, including that of contestant. 1,311 of those voters desiring to vote the Democratic ticket returned the official Democratic ballot to the judges of election without erasing the printed name appearing on the ballot as that of the Democratic candidate for the Springfield Court of Appeals, and without writing in the name of any other person as their choice for that office. Without attempting to change it, these voters cast the printed official ballot, properly headed as the ballot of the Democratic party. They selected it as the particular party ballot they desired to vote. They knew the law required that ballot, as given them by the judges, to contain the names of every one of the numerous Democratic nominees for office, including that of the nominee for the Court of Appeals. Knowing this, each delivered the ballot to the judges in the form in which it was officially printed and in which he received it from the election officials, so far, at least, as concerns the office in question. The state had taken out of the hands of these voters the preparation of these ballots. It had prohibited them from using any ballots except those it furnished. It furnished them ballots which lawfully could contain no names other than those of the regular nominees. By so delivering them these ballots it, in effect, said to them:

'This printed ballot, headed with the name of the Democratic party, contains the names, under proper headings, of the Democratic nominees. You must use this ballot if you desire to vote the Democratic ticket. You can use no other. If for some office you wish to vote for some person other than a nominee, you must erase the name of the nominee, printed on the ballot, and write in such other person's name.'

"In effect, therefore, the act of delivering of such ballot also meant that, if the voter desired to vote for all Democratic nominees, all that was necessary for him to do was to redeliver the Democratic ticket to the receiving judges." 197 S.W. at 90-91

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The concurring opinion agreed with the result reached in the majority opinion, but went on to note that if the failure to print the proper names on the ballot could be proven to be fraudulent, which was not done in that case, the result would be different.

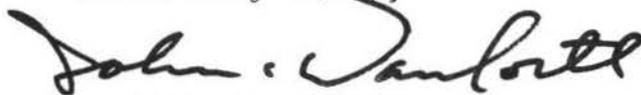
We shall assume for the purposes of this opinion that you are not requesting an opinion on the question as to what would be the result if the candidate's name had been excluded from the absentee ballot because of fraud. Therefore, we believe it is safe to say that four judges of the Supreme Court, a majority of that court, have determined the controlling law on the question which you ask in your opinion request. When a candidate's name is excluded from an absentee ballot by mistake and the name of another individual (who is not a candidate for the particular office by which his name is listed) is placed on the ballot in the location where the candidate's name would properly belong, the votes of voters voting a straight party ticket should be counted for the candidate whose name properly belongs on the ballot, even though another name appears in its place.

#### CONCLUSION

It is the opinion of this office that when absentee ballots omit the name of a candidate of one party for an office and contain in place of such name, the name of another individual, who is not a candidate, that all straight party ballots of that particular party are to be counted as if the ballots contained the correct name of the candidate.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH  
Attorney General