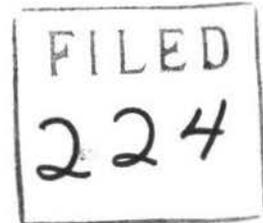


ELECTIONS: A voter using a voting machine in  
PRIMARIES: a state primary election must de-  
POLITICAL PARTIES: clare the political party for which  
VOTING MACHINES: he desires to vote or that he wishes  
to vote a nonpartisan ballot before  
entering the voting booth. The voting machine must be set so that  
the voter can vote only according to such choice.

OPINION NO. 224

July 11, 1973

Mr. James S. McClellan, Chairman  
Board of Election Commissioners  
City of St. Louis  
208 South 12th Boulevard  
St. Louis, Missouri 63102



Dear Mr. McClellan:

This opinion is in response to your question asking:

"Legality of eliminating the necessity of voters declaring party affiliation in the primary elections where voting machines are used and where the voting machines have been adapted so that the voter is able to select the political party after the curtain is drawn and further that the voter cannot vote on the machine for candidates of more than one political party."

Section 121.230, RSMo, provides that voting machines may be used at primary elections.

It appears that part of the difficulty in determining the intent of the legislature in the premises lies in the provisions of Section 122.810, RSMo, which states:

"No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, and known to affiliate with the political party named at the head of the ticket he calls for, or will make affidavit or furnish proper proof that he is affiliated with the party whose ticket he calls for, or obligates himself under oath to support the nominee of said party at the following city election."

Mr. James S. McClellan

The above provisions which relate to municipal primaries in the City of St. Louis are the same as they were in the Revised Statutes of 1939 and have not been amended since then. By comparison the provisions of Sections 120.460 and 120.470, RSMo 1959, of the general laws respecting primary elections were respectively amended and repealed to eliminate the requirement, similar to that of Section 122.810, that the voter be known to affiliate with the party whose ticket he calls for and obligates himself to support the party nominees. While the failure of the legislature to amend Section 122.810 may have been an oversight, we believe that any interpretation based on these sections would be misleading.

We note that the legislature has not seen fit to amend the general laws respecting primary elections where paper ballots are used to allow the voter a multiple party ballot from which he can pick and choose the party ballot he wishes to vote. (Cf. House Bill Nos. 285, 323, 382, First Regular Session, 77th General Assembly, which did not pass.) Quite the contrary, the latest enactment of Section 120.450, as part of Senate Bill No. 135, 75th General Assembly (Laws 1969, p. 237) which bill also repealed Section 120.470 and amended Section 120.460, provides in part:

"1. At all primary elections there shall be as many separate ballots as there are parties entitled to participate in the primary election. There shall also be a nonpartisan ballot upon which, under appropriate title of each office, shall be printed the names of all persons by whom declaration papers have been filed as required by sections 120.300 to 120.650 who do not announce by such declaration papers as candidates for any political party as defined by sections 120.300 to 120.650. The names of all candidates shall be arranged under the appropriate title of the respective offices and under the proper party or nonpartisan designation upon the party ballot or upon the nonpartisan ballot, as the case may be.

\* \* \*

"7. In any primary election each qualified voter shall be entitled to receive from the judge of the election one ballot of the political party participating in the election for which he desires to vote. The judges of the election shall deliver the ballot to the voters. Before delivering any ballot to

Mr. James S. McClellan

the voter, the two judges of election having charge of the ballot shall write their names or initials upon the back of the ballot with indelible pencil, and no other writing shall be on the back of the ballot except as provided by law."

The question then is whether we can say that the legislature intended that voters using voting machines would be able to select the party for which they desire to vote in secret after the curtains have closed in the voting booth. In order to reach a conclusion that voters using the voting machines would not have to declare the party for which they desire to vote we would have to also conclude that the legislature intended to treat such voters differently than voters using paper ballots, or to express it in another way, that the legislature intended to allow the voters using machines to be treated differently than voters using ballots. A strange and unusual construction of a statute is not indulged in unless compelled. A change in established practice is not to be found by mere implication.

In view of the fact that the legislature has not changed the requirements for voters using paper ballots at primaries and in light of the fact that the general laws apply unless inconsistent with the laws respecting the use of voting machines, Section 121.260, RSMo, we are of the view that such voters must declare the party for which they desire to vote and that the voting machines must be set accordingly before the voters use the machines.

In reaching this conclusion we bear in mind that there is an obvious historical and present difference between nominating elections and general elections. The nominating election is essentially a party election. Although the primaries are an integral part of the election machinery of the state, and as such, subject to the control and regulation by the state and not solely a concern of a particular political party, Totton v. Murdock, 482 S.W. 2d 65 (Mo. banc 1972), the primary is nevertheless a fundamental political process of a political party. Thus in the absence of a clear expression to the contrary by the legislature which applies uniformly to all voters alike we conclude that voters using voting machines, as well as those using paper ballots, in primary elections, must declare the party for which they desire to vote or that they wish to vote a nonpartisan ballot before voting. The voting machine must be set so that the voter can vote only according to such choice.

We note that the question we have considered involves something more than mere technical procedure. Clearly, any such change in the voting procedure at state primary elections must be made by the General Assembly.

Mr. James S. McClellan

CONCLUSION

It is the opinion of this office that a voter using a voting machine in a state primary election must declare the political party for which he desires to vote or that he wishes to vote a nonpartisan ballot before entering the voting booth. The voting machine must be set so that the voter can vote only according to such choice.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General