

ELECTIONS: Grand Jury may open ballot boxes in any election for the purpose of investigating fraudulent elections.

August 16, 1939

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Hon. G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri.

Dear Sir:

In answering your request concerning the use of ballot boxes, ballots, poll books and other papers before a grand jury for the investigation of illegal elections in Versailles, Missouri, I am herein setting out your opinion upon which you ask the approval of this Department:

"1 - The only time that any ballots and election poll book can be opened and examined is by the county clerk and his committee in an election contest; and then all that is revealed is the result, as set out in his report to the court.

"2 - That even in a primary election, these ballots cannot be examined and as to how any voters may have voted."

"3 - A Grand jury cannot force the examination of these ballots and the poll books and disclose how any voter voted in the election. In fact the law seems to be that the grand jury is not entitled to have the ballots and books for examination."

"4 - And if the grand jury did get the ballots and poll books, and did vote and return a true bill for illegal voting, the evidence found in the grand jury room would not then be used as evidence in the trial of the case in the circuit court on the theory that as to how any voted may have voted cannot be disclosed as this would destroy the sacredness of the ballot."

Article 8, Section 3 of the Constitution of Missouri reads as follows:

"All elections by the people shall be by ballot. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter who presents it. All election officers shall be sworn or affirmed not to disclose how any voter shall have voted: Provided, That in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

This section amended a previous section in the matter and was passed in the Constitutional Convention of 1924. Previous to the enactment of Section 3 of Article 8 of the Constitution of Missouri, the previous section in this matter provided for the opening of ballot boxes on contested elections only. The previous section was passed by the Constitutional Convention of 1875, and could not be construed to apply to primary elections for the reason that primary elections were not held and were not authorized until Article 3 and Article 4, containing section 4756 and section 4795, Chapter 60, R. S. Mo. 1889, was enacted. In sections 4756 and 4795, as above mentioned, primary elections were first authorized.

As said above, Article 8, Section 3 of the Constitution of Missouri, supra, was passed by the Constitutional Convention of 1924, and specifically mentions that ballot boxes can be opened for the purpose of contested elections, grand jury investigations and the trial of all civil and criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation.

It was so held in the case of State ex rel. v. O'Malley, 117 S. W. (2d) 319, paragraph 8, and reads as follows:

"It has long been the law that before the 1924 amendment the proviso of section 3, art. 8, did not authorize the opening and use of ballots as evidence in grand jury investigations of election frauds, Ex parte Arnold, 128 Mo. 256, 30 S. W. 768, 1036, 33 L.R.A. 386, 49 Am. St. Rep. 557; State ex rel. Feinstein v. Hartmann,

supra, Mo. Sup., 231 S. W. 982;  
In Re Oppenstein, 289 Mo. 421,  
233 S. W. 440; State ex rel.  
Murphy v. Landwehr, supra, 290 Mo.  
loc.cit. 159, 234 S. W. loc.cit.  
658. Now, this may be done even  
in the investigation of fraud at  
primary elections. State ex rel.  
Dengel v. Hartmann, 339 Mo. 200,  
96 S. W. (2d) 329. And it is plain-  
ly intimated that the power extends  
to frauds in bond elections. State  
ex rel. Jackson County v. Waltner,  
supra, 340 Mo. loc.cit. 142, 100  
S. W. (2d) loc.cit. 274. We there  
held election contests are purely  
statutory, and cannot be maintained  
in the absence of an authorizing  
statute; but we added, 'the law  
affords other means of uncovering  
fraud in elections.' The present  
proviso says the ballots 'may be  
opened, examined, counted, compared  
with the list of voters and received  
as evidence' in (among other instan-  
ces) 'grand jury investigations.'  
The opening part of the section to  
which this proviso is appended as  
an exception guards the secrecy of  
the ballot in 'all elections by the  
people.' Bond elections come within  
that designation and are therefore  
subject to the proviso."

It is true that no statutory provision has  
been made to allow the opening of ballot boxes in  
grand jury investigations in which there is a viola-  
tion of any law relating to elections, but the Supreme  
Court of this state has held that Article 8, Section  
3 of the Constitution of Missouri is self-enforcing.

It was so held in the case of State ex rel.  
v. O'Malley, 117 S. W. (2d) 319, paragraphs 9 and 10,  
where the court said:

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"A constitutional provision may be self-enforcing in part and not so as to another part. State ex inf. Barker v. Duncan, 265 Mo. 26, 41-43, 175 S. W. 940, 944, Ann.Cas. 1916D, 1. Undoubtedly, the part of the section permitting the opening of ballots in election contests is not self-enforcing, in the sense that further provision must be made by statute for such contests. But the part which provides for the use of the ballots as evidence in grand jury investigations is self-enforcing, and no legislative default can thwart it."

## CONCLUSION

In view of the above authority it is the opinion of this department that your opinion, as set out in paragraphs 1, 2, 3 and 4, is not the present law of this state, and the grand jury may open the ballot boxes in any election, including a primary election, for the purpose of securing evidence in any case in which the violation of any law relating to elections is under investigation.

Respectfully submitted,

Approved;

W. J. BURKE  
Assistant Attorney General

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J. E. TAYLOR  
(Acting) Attorney General