

ELECTIONS:
VOTING MACHINES:
ELECTRONIC VOTING MACHINES:
SECRETARY OF ELECTIONS:
STICKERS:
BLACK STICKERS:

Electronic voting systems may be used in second class counties containing part of city of more than 350,000 when ballot card placed in envelope, envelope number entered in poll books, second envelope number placed on ballot card and sticker placed on both numbers on envelope.

OPINION NO. 320

August 22, 1967

Mr. Lee Laramore
Clay County Board of Election
Commissioners
Courthouse
Liberty, Missouri



Dear Mr. Laramore:

This is in answer to your request for an opinion of this office concerning whether voting done under the provisions of House Bill No. 25 of the 74th General Assembly must comply with the provisions of Section 111.620, RSMo 1959, and what constitutes compliance. You have stated that automatic tabulating equipment will not work if the black sticker required by Section 111.620, supra, is placed directly on the ballot card used in the electronic voting system.

The method that you propose for voting under the provisions of House Bill No. 25 and also complying with Section 111.620, supra, is as follows:

1. Every ballot card will be placed in a ballot envelope;
2. Every ballot envelope will be numbered in numerical order in which received and this number will be entered in the poll books;
3. Every ballot envelope will also have marked thereon another number and this number will be placed on the ballot card;
4. A black sticker will be placed over both numbers on the ballot envelope so as to cover or conceal securely those numbers.

Article VIII, Section 3, Constitution of Missouri, reads as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law.

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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. All election officers shall be sworn or affirmed not to disclose how any voter 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."

Chapter 111, RSMo, provides for the conduct of elections. Section 111.510, RSMo 1959, provides for poll books to be kept by the judges and clerks of election. Section 111.630, RSMo 1959, provides for ballots to be placed in a ballot box and that the "clerks of election shall enter the names of voters and the number of the ballots, in the order in which they were received, in the poll books." Section 111.430, RSMo 1959, provides for ballots and the printing and numbering of such ballots.

Section 111.620, RSMo 1959, provides a procedure for maintaining secrecy of the ballot and yet to allow an election to be contested. This section reads as follows:

"Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eighths of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the county clerk or board of election commissioners of each county or city, and no sticker shall be removed except in case of contested election, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which

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the names or initials of the judges as herein provided for, do not appear."

House Bill No. 25 provides for an electronic voting system so as to allow vote counting by special data processing machines. Section 2 of House Bill No. 25 provides that this voting procedure may be used in certain second class counties. We note that House Bill No. 25 applies to Clay County.

The electronic voting system and what it is comprised of can best be described by Section 1, the definition section, of House Bill No. 25 which reads as follows:

"Section 1. As used in this act, unless otherwise specified:

- (1) 'Automatic tabulating equipment', includes apparatus necessary to automatically examine and count votes as designated on ballots and data processing machines which can be used for counting ballots and tabulating results;
- (2) 'Ballot card', a ballot which is voted by the process of punching;
- (3) 'Ballot labels', the cards, papers, booklet, pages or other material containing the names of offices and candidates and statements of measures to be voted on;
- (4) 'Ballot', may include ballot cards, ballot labels and paper ballots;
- (5) 'Counting location', a location selected by the board of election commissioners for the automatic processing or counting, or both, of ballots;
- (6) 'Electronic voting system', a system of casting votes by use of marking devices and tabulating ballots employing automatic tabulating equipment or data processing equipment; and
- (7) 'Marking device', either an apparatus in which ballots or ballot cards are inserted and used in connection with a punch apparatus for the piercing of ballots by the voter or any approved device for marking a paper ballot with ink or other substance which will enable the ballot to be tabulated by means of automatic tabulating equipment."

An electronic voting system may be used as follows, Subsection 4, Section 2, House Bill No. 25:

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"The board of election commissioners of any second class county containing all or part of a city or more than three hundred fifty thousand inhabitants may with the consent and approval of the county court adopt, experiment with, or abandon any electronic voting system herein authorized and approved for use in the state, and may use such system in all or part of the precincts within its boundaries, or in combination with paper ballots. It may enlarge, consolidate, or alter the boundaries of the precincts where an electronic voting system is to be used."

The Secretary of State has certain authority under House Bill No. 25 as follows, Subsection 1, Section 5:

"1. The secretary of state may promulgate rules for the administration of this section, and shall approve the marking devices and automatic tabulating equipment used in electronic voting systems."

However, no electronic voting system shall be used unless it fulfills certain requirements, two of which are as follows, Subsection 2, Section 5, House Bill No. 25:

"(1) It shall permit voting in absolute secrecy.

* * * * *

(4) It shall comply with all other requirements of the election laws so far as they are applicable."

The first question to be answered is whether the provisions of Section 111.620, supra, apply at all.

In *Straughan v. Meyers*, 268 Mo. 580, 187 S.W. 1159, the Supreme Court of Missouri said that the purpose of Article VIII, Section 3, Constitution of Missouri, "is to provide a means of contesting elections and so preserve evidence that it may be used for this purpose." Section 111.620, supra, was enacted to accomplish that purpose, while at the same time maintaining secrecy. The legislature declared its intent that House Bill No. 25 comply with Article VIII, Section 3, by making it a requirement in Subsection 2 of Section 5 that no electronic voting system be used unless there is absolute secrecy and that all other requirements of the election laws be complied with so far as applicable.

Therefore, it is our opinion that Section 111.620, supra, applies to an electronic voting system as provided in House Bill No. 25. However, the next question is whether there must be literal compliance to the extent of applying a black sticker on the ballot card used in an electronic voting system. You have stated that if such a black sticker is applied directly to the ballot card that the automatic tabulating equipment will not work.

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The St. Louis Court of Appeals in State ex rel Beach v. Sutton, 3 Mo.App. 388, said that, 1.c. 407:

"* * * the mere omission to number the ballots does not have the effect of invalidating the ballot and depriving the voter of his vote.
* * * One of the primary objects is to preserve the purity of the ballot. Without this, elective government is at an end. Another important object is to secure the secrecy of the ballot. The voter has a right to vote as he pleases, and is not to be subjected to any control or interference on the part of others. These two things, to a certain extent, clash. If there were to be contested elections, ballots must be examined, and, on investigation, it may become known how voters voted."

In Riefle v. Kamp, 241 Mo.App. 1151, 247 S.W.2d 333, the Court Appeals held, 1.c. S.W.2d 336:

"The omission of the election officials or the unaccounted for absence of a sticker should not deprive the voter of his right to have his ballot counted. Hehl v. Guion, 155 Mo. 76, 55 S.W. 1024."

Finally, in Kasten v. Guth, Mo., 395 S.W.2d 433, 435 [2, 3], it was held that the fact certain votes did not contain the proper initials nor have the black sticker did not make the votes void.

Thus, it is not a fatal irregularity even for "paper ballots" not to be in literal compliance with Section 111.620, supra.

Subsection 3 of Section 2 of House Bill No. 25 provides that "[S]o far as applicable, the procedure provided for voting paper ballots shall apply."

It is our opinion that voting by an electronic voting system must comply with the purposes of Section 111.620, supra, as well as and as required by Subsection 2, Section 4, House Bill No. 25. This means that there must be secrecy of the ballot and also purity of the ballot or a means to examine the ballot if there is a contested election. This does not mean, however, that there must be literal compliance with Section 111.620, supra, by placing a black sticker on the ballot card.

It is our opinion that the method proposed in this opinion request fulfills the requirements of House Bill No. 25 and Section 111.620, supra.

It is our further opinion that under the authority of Subsection 1, Section 4, House Bill No. 25, the Secretary of State shall approve

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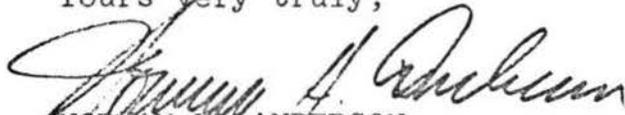
the marking devices and automatic tabulating equipment used in electronic voting systems.

CONCLUSION

It is the opinion of this office that an electronic voting system as provided for in House Bill No. 25 of the 74th General Assembly must comply with Section 111.620, RSMo 1959, in that there must be secrecy of the ballot and also a means to examine the ballot if there is a contested election. However, there does not have to be literal compliance with Section 111.620, RSMo 1959, by placing a black sticker on the ballot card. It is our opinion that in a voting system in which every ballot card is placed in a ballot envelope; every ballot envelope is numbered in numerical order in which received and this number is entered in the poll books; every ballot envelope has also marked thereon another number and this number is placed on the ballot card; a black sticker is placed over both numbers on the ballot envelope so as to cover or conceal securely those numbers, the requirements of House Bill No. 25 and Section 111.620 are fulfilled. Under the authority of Subsection 1, Section 4, House Bill 25, the Secretary of State shall approve the marking devices and automatic tabulating equipment used in such electronic voting systems.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



NORMAN H. ANDERSON
Attorney General