

ELECTIONS:
PRESIDENT AND
VICE-PRESIDENT:
VOTING:
"WRITE-IN" VOTES:

Under Sections 111.420 and 111.580, RSMo 1959, write-in votes for president and vice-president which are properly cast must be counted, and do not invalidate a ballot nor any portion thereof.

OPINION NO. 414

October 31, 1968



Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri 65201

Dear Mr. Conley:

This is in reply to your request for an opinion as to whether a ballot is invalidated insofar as votes for presidential and vice-presidential electors are concerned, when a voter writes in names of candidates for president or vice-president.

Section 111.420, RSMo 1959, provides in part:

"1. Every ballot printed under the provisions of this chapter shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of chapter 120, and no other names. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, except that in place of the names of candidates for electors of president and vice-president of any political party or group of petitioners, there shall be printed within a bracket, immediately below the circle in the column of said party, with a square to the left of such bracket, the names of the candidates of each political party for president and vice-president. The names of the candidates of the several political parties for electors of president and vice-president shall not be printed on the ballot, but shall after nomination, be filed with the secretary of state.

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2. A vote for any of such candidates for president and vice-president shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state. The respective party state committees shall certify in writing the nominations of such presidential and vice-presidential candidates to the secretary of state at some time before the secretary of state is required by law to certify the candidates of the several political parties and groups of petitioners to the several clerks of the county court or to election commissioners. In presidential years an instruction shall be on the ballot as follows: 'A vote for names of candidates for president and vice-president is a vote for the electors of that party, the names of whom are on file with the secretary of state.'

Section 111.580, prescribing voting procedure, provides in part as follows:

"(2) If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such canceled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle.

(3) Where there are two or more candidates for like office in a group, a cross (X) mark in the square to the left of a candidate's name automatically votes against the candidate whose name appears within the same horizontal lines in the column under the circle in which appears the cross (X) mark, unless the voter indicates another candidate to be voted against by drawing a line through such candidate's name."

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Balloting for president and vice-president is unique among the various offices because Section 111.420 declares that "A vote for any of such candidates for president and vice-president shall be a vote for the electors of the party" (emphasis added). A vote cannot be cast for one of such candidates without voting for the other, and this vote in turn is in reality a vote for the electors representing the party which has nominated the candidates who are on the ballot, rather than a vote for the candidates themselves. The federal courts have held consistently that the matter of selecting presidential electors is up to the states. Walker v. United States, 1937, Mo., 8th Cir., 93 F. 2d 383, cert. den. 58 S.Ct. 642, 303 US 644, 82 L.Ed. 1103; Ray v. Blair, 1952, Ala., 72 S.Ct. 654, 343 US 214, 96 L.Ed. 894.

Although there are obvious difficulties in recording and counting write-in votes for candidates for president and vice-president who in reality only represent party presidential electors as provided in the United States Constitution, Article II, Section 1, Clause 2 and Amendment 12, we nevertheless feel that the mandate of Section 111.580 above quoted and cases construing it clearly allows a voter to freely express his choice in the voting booth, and does not limit a voter to the names printed on the ballot. In Kasten v. Guth, Mo. Sup. 1964, 375 S.W. 2d 110, a case involving write-in votes for a school superintendent, the Missouri Supreme Court, while not ruling specifically on the constitutionality of the election statute there involved, nevertheless referred to Missouri constitutional provisions and stated, l.c. 114:

"It is the majority rule in this nation that statutory provisions expressly stating that no person shall be voted for unless his name is printed on the ballot are unconstitutional under constitutional provisions similar to [ours] . . ."

The court also referred to Section 111.580 as quoted above, and concluded its discussion of the legality of write-ins on school elections by stating that the legislature:

" . . . intended that any elector [voter] could vote for a person of his own selection by drawing a line through the names printed on the ballot and writing in the name of his candidate. Any other conclusion would attribute to the legislature an intent contrary to our established public policy to the effect that a qualified voter be permitted to vote for any person of his choice and that the will of a majority of the voters should prevail. * * *"

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It is therefore the opinion of this office that write-in votes for either president or vice-president do not invalidate the vote for these offices, but to the contrary must be counted by the election officials substantially in the manner prescribed by Sections 111.510, 111.660, and 111.670, RSMo 1959. While we have previously ruled in Opinion No. 345 to the Honorable Thomas O. Pickett, 10/15/64, that write-in votes must be counted and totaled without regard to party ticket, we believe that in the case of candidates for president and vice-president who actually represent their respective party presidential electors, that write-in votes must be "enumerated" for each pair of candidates as well as for the "party" under whose ticket the write-ins are made.

It is important not only to tabulate the total number of votes, including write-ins cast for a particular party slate of electors, but also to tabulate the total number of votes, including write-ins which particular presidential and vice-presidential pairs of candidates receive under each party, so that the electors can be informed of the will of the majority of the voters on their preference of candidates. Any name can, of course, conceivably be written in place of the printed name of the candidates for president or vice-president, on any of the three party tickets appearing on the 1968 Missouri ballot, "Democratic", "Republican", or "American".

As an example, and to avoid confusion on tabulating and certifying the results of votes for the three national tickets, we recommend the following procedures be used.

County clerks can certify results to the secretary of state by using the present form supplied election officials in Missouri by the secretary, Form "G". A facsimile of this form is attached to this opinion, marked Sample "A". Write-ins can be tabulated on the present form by writing the names of the other pairs of candidates under the proper party (represented by the words "WRITE-INS" on Sample "A") and drawing additional vertical lines (represented by the dotted lines on Sample "A") separating the tabulated votes of any such write-in pairs of candidates. The total number of votes for all pairs of candidates including write-in votes under a particular party, constitutes the total vote for the presidential and vice-presidential electors of that party. This total party electoral vote can be entered at the bottom of "Form G" in the regular place.

The various precinct judges and clerks can report to the county clerks in similar fashion, by inserting the names of write-in pairs of candidates in the blank spaces near the pairs printed on the forms supplied for their use, as shown by the words "WRITE-INS" on the attached form samples -- Sample "B", the actual tally sheet; Sample "C", the certification in the poll book; and Sample "D", the precinct return sheet.

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Electors are then, under the language of the United States Constitution, Article II, Section 1, free to vote as they choose, although "History teaches that the electors were expected to support the party nominees" and ". . . they give their vote, or bind themselves to give it, according to the will of their constituents." Ray v. Blair, supra, 96 L.Ed. 903, and footnote 15.

CONCLUSION

It is the opinion of this office that under Sections 111.420 and 111.580, RSMo 1959, write-in votes for president or vice-president which are properly cast must be counted, and do not invalidate a ballot nor any portion thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William L. Culver.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

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