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December 7, 1981

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ATTORNEY GENERAL OPINION NO. 81- 263

The Honorable Jack H. Brier  
Secretary of State  
2nd Floor - Capitol  
Topeka, Kansas 66612

Re: Elections--Electronic and Electromechanical Voting  
Systems--Approval of Systems by Secretary of State

Synopsis: Subsection (e) of K.S.A. 1980 Supp. 25-4406 requires that, to be approved for use in Kansas, an electronic or electromechanical voting system must prevent the voter from casting more votes for an office or candidate than that which the voter is entitled by law to cast for such office or candidate, and a voting system which does not prevent "overvoting" in the first instance, but merely rejects all votes for an office or candidate by a voter who has overvoted, does not meet these requirements.

Any such voting system which does not provide an enclosed voting station which conceals the voter from observation, view or detection while voting does not meet the requirements in K.S.A. 1980 Supp. 25-4406(h) that such voting system must provide for voting in "absolute secrecy."

In evaluating whether an electronic or electromechanical voting system should be approved for use in Kansas, the secretary of state is limited to a consideration of whether the voting system satisfies the requirements of K.S.A. 1980 Supp. 25-4406 and can be used safely. Cited herein: K.S.A. 1980 Supp. 25-1310, K.S.A. 25-2703 (as amended by L. 1981, ch. 169, §1), K.S.A. 1980 Supp. 25-4401, 25-4404, 25-4405 (as amended by L. 1981, ch. 172, §1), 25-4406.

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Dear Secretary Brier:

You have requested our opinion regarding the interpretation and application of certain provisions in Article 44 of Chapter 25 of Kansas Statutes Annotated. These statutory provisions regard the use of electronic or electromechanical voting systems in national, state, county, township, city and school primary and general elections. However, as provided in K.S.A. 1980 Supp. 25-4404, "no kind or make of such system shall be used at any election unless and until it received [sic] approval by the secretary of state."

Preliminary to rendering such approval, the Secretary of State is required by K.S.A. 1980 Supp. 25-4405 (as amended by L. 1981, ch. 172, §1) to examine such system upon the written application of "[a]ny person, firm or corporation desiring to sell any kind or make of electronic or electromechanical voting system to political subdivisions in Kansas." You advise that your office has received the first such application for approval of an electronic or electromechanical voting system, and your examination of this voting system, as provided in K.S.A. 1980 Supp. 25-4405 (as amended), has prompted several specific inquiries of this office as to the propriety of approving such system.

The application in question was submitted by Computer Election Services (CES) of Berkeley, California, which manufactures and markets the VOTOMATIC punch card voting system. This system is described by the National Scientific Corporation in Volume 1 of its publication, Voting Systems, Recommended Procurement Procedures and a Review of Current Equipment, as being "a punch card system which consists of the VOTOMATIC vote recorder which may be used in combination with one of four CES vote counting devices." Id. at 60. This publication further states:

"The VOTOMATIC vote recorder is a complete, self-contained voting station. It utilizes standard data processing 261, 228, 235 and 312 position computer cards as a ballot. The ballot slides into a slot at the top of the unit. Voting is accomplished by punching through the ballot card with an attached voting stylus." Id.

In order to assist your examination of the VOTOMATIC system, you have retained Richard A. Smolka, a professor at American University and a nationally-recognized expert in the field of election administration. The retention of Professor Smolka is authorized by K.S.A. 1980 Supp. 25-4405 (as amended), which empowers the secretary of state to "employ a competent person

or persons to assist in the examination." In his report submitted to your office, Professor Smolka indicates there is a "serious question" whether the VOTOMATIC system satisfies the requirements of K.S.A. 1980 Supp. 25-4406. This statute provides, in pertinent part:

"Electronic or electromechanical voting systems approved by the secretary of state:

. . . .

"(e) shall afford the voter an opportunity to vote for any or all candidates for an office for whom the voter is by law entitled to vote and no more, and at the same time shall prevent the voter from voting for the same candidate twice for the same office;

. . . .

"(h) shall provide for voting in absolute secrecy, except as to persons entitled to assistance;

"(i) shall reject all votes for an office or upon a question submitted when the voter has cast more votes than the voter is entitled to cast . . . ." (Emphasis added.)

In his report, Professor Smolka submits that the VOTOMATIC system does not comply with the literal wording of 25-4406(e) quoted above, stating that

"there is nothing in the system that prevents the voter from voting for more candidates than permitted by law . . . Nor does the system prevent the voter from voting for the same candidate twice for the same office. This can be done by voting for a candidate on the ballot and then writing in the name of that candidate and the office on the write-in section of the ballot envelope."

However, he adds that, even though a voter can, in fact, use the VOTOMATIC system to "overvote," any resulting "ballot box stuffing" is avoided by virtue of safeguards built into the system. These safeguards automatically reject all multiple votes cast by a voter for a single office.

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As a result of this portion of Professor Smolka's report, you have initially inquired whether the VOTOMATIC system complies with the requirements of K.S.A. 1980 Supp. 25-4406(e). However, before responding to this and your other questions regarding the VOTOMATIC system, we must note that our interpretations of the pertinent statutory provisions will be applied to the facts as you have presented them. We have not made any independent evaluation of the VOTOMATIC system, since such factual determination is your statutory responsibility.

Our understanding of the pertinent statutory provisions is guided by well-established rules of construction. Of principal significance is the following statement in Southeast Kansas Landowners Ass'n v. Kansas Turnpike Auth., 224 Kan. 357 (1978):

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. Easom v. Farmers Insurance Co., 221 Kan. 415, Syl. 2, 560 P.2d 117 (1977); Thomas County Taxpayers Ass'n v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978); Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978)." 224 Kan. at 367.

Also of relevance are the following principles enunciated in Brown v. Keill, 224 Kan. 195 (1978), as follows:

"In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various constructions suggested. (State, ex rel., v. City of Overland Park, 215 Kan. 700, Syl. ¶10, 527 P.2d 1340 [1974].) In order to ascertain the legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof in pari materia. When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary the

literal import of words or phrases which conflict with the manifest purpose of the legislature. (Kansas Commission on Civil Rights v. Howard, 218 Kan. 248, Syl. ¶2, 544 P.2d 791 [1975].)" Id. at 200.

Arguably, the fact that a voting system ultimately rejects all votes cast by a voter for an office or a particular candidate where the voter has "overvoted" for such office or candidate satisfies the requirements of 25-4406(e). However, in our judgment, such interpretation is possible only by considering subsection (e) of 25-4406 in isolation from the remaining portions of this statute. Such interpretation contravenes the rules of construction quoted above, which prohibit a determination of legislative intent from a consideration of an isolated part or parts of an act and require that all parts of an act be construed together in pari materia.

Specifically, in this instance, when subsection (e) of 25-4406 is considered in conjunction with subsection (i) of that statute, we believe it clear that the legislature intended that an electronic or electromechanical voting system prevent the voter in the first instance from "overvoting." In subsection (e), the legislature has required that such a voting system "afford the voter an opportunity to vote for any or all candidates for an office for whom the voter is by law entitled to vote and no more." (Emphasis added.) That subsection also requires a voting system to "prevent the voter from voting for the same candidate twice for the same office." (Emphasis added.) However, in subsection (i), the legislature has required that the voting system "shall reject all votes for an office . . . when the voter has cast more votes for such office . . . than the voter is entitled to cast." (Emphasis added.) Thus, to construe the provisions of subsection (e) as requiring only that a voting system ultimately reject all votes cast by a voter who has overvoted ignores these provisions of subsection (i). In fact, such construction makes these provisions of subsection (i) meaningless.

We note that the phrase "and no more" was added to 25-4406(e) by amendment in 1980 (L. 1980, ch. 115, §4). In our judgment, the addition of this language further clarifies the legislative intent that a voter not be afforded "an opportunity" to cast more votes for an office than the voter is legally entitled to cast for such office.

It is apparent that the principal legislative purpose underlying the enactment of 25-4406 is to ensure that the use of electronic or electromechanical voting systems will preserve the integrity of the election process. Precluding the tabulation of votes cast by a voter who has "overvoted" is certainly an essential aspect of this overall objective, and it

is to this end that subsection (i) is addressed. However, an equally significant aspect of the election process is the preservation of an individual's constitutional right of suffrage. In our judgment, this objective is not achieved if a voting system permits a voter, through mistake or inadvertence, to cast more votes for an office or candidate than the voter is entitled to cast and all such votes are rejected by the voting system. Only if the voter is prevented from overvoting in the first instance can the individual's right to vote be adequately protected; and in our judgment, it is partially to this end that the legislature has included the requirements of subsection (e). Obviously, the other objective of subsection (e) is to ensure that only votes which are lawfully cast are tabulated.

Therefore, it is our opinion that subsection (e) of K.S.A. 1980 Supp. 25-4406 requires that, to be approved for use in Kansas, an electronic or electromechanical voting system must prevent the voter from casting more votes for an office or candidate than that which the voter is entitled by law to cast for such office or candidate, and a voting system which does not prevent "overvoting" in the first instance, but merely rejects all votes for an office or candidate by a voter who has overvoted, does not meet these requirements.

In reaching this conclusion, we are mindful of the argument that, if 25-4406(e) is construed as requiring the prevention of overvoting by the voter, there is no need for the requirement in 25-4406(i) that a voting system reject all votes cast by a voter for an office when such voter has overvoted. We cannot agree. In our judgment, these requirements of subsection (i) must be viewed as a safeguard in the event that a voting system malfunctions in the first instance and permits overvoting. Regardless of the manner of voting, whether it be by paper ballot, mechanical voting machine or an electronic or electromechanical voting system, the prevention of "ballot box stuffing" is essential to the integrity of the election process. As previously noted, it is most desirable if this objective can be achieved and, at the same time, a voter is prevented from losing his or her vote entirely as a result of overvoting due to mistake or inadvertence. However, in no event should excessive votes cast by a voter for an office or candidate be tabulated, and the requirements of subsection (i) are clearly directed toward this objective.

Before proceeding to your other questions, we note that K.S.A. 1980 Supp. 25-1310 contains a list of requirements to be met by mechanical voting machines before being approved for use in Kansas. These requirements are similar to those contained in 25-4406. However, even though 25-1310 contains requirements

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substantially the same as those in 25-4406(e), the former does not contain requirements similar to those contained in 25-4406(i). We suggest that this might reflect the legislature's recognition of a greater possibility of an electronic or electromechanical voting system malfunctioning and permitting overvoting.

You next have inquired whether the VOTOMATIC system satisfies the requirements of 25-4406(h), which requires that an electronic or electromechanical voting system "shall provide for voting in absolute secrecy, except as to persons entitled to assistance." (Emphasis added.)

Professor Smolka indicates that a curtain is rarely supplied with the VOTOMATIC system and that the failure to provide such curtains may be interpreted as a failure to guarantee absolute secrecy. The CES voting booths consist of a flat panel which is elevated on four legs, but only three sides of the panel are enclosed. While using the CES booth, the voter is, with the exception of his or her hands and a portion of the upper torso, completely visible to any bystander. Thus, while not actually being able to see which hole on the ballot the voter punched or which name he or she wrote in, such bystander could conceivably detect from the voter's torso or arm movement certain things about the manner in which his or her vote was cast. For example, Professor Smolka indicates in his report that a bystander might, were he or she close enough, be able to detect whether a voter is casting a write-in ballot, voting for few or many candidates or casting a vote for a particular office. The question, then, is whether the CES booth, as described above, meets with the "absolute secrecy" standard set by the statute. We are of the opinion that it does not.

Here, also, your question is to be resolved by a determination of the legislature's intent in accordance with established rules of construction. Pertinent here is the Court's pronouncement in Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211 (1976):

"[T]his court must ascertain and give effect to the intent of the legislature. In so doing we must consider the language of the statute; its words are to be understood in their plain and ordinary sense. (Hunter v. Haun, 210 Kan. 11, 13, 499 P.2d 1087; Roda v. Williams, 195 Kan. 507, 511, 407 P.2d 471.) When a statute is plain and unambiguous this court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. (Amoco Production Co. v. Arnold, Director of Taxation,

213 Kan. 636, 647, 518 P.2d 453; Jolly v. Kansas Public Employees Retirement System, 214 Kan. 200, 204, 519 P.2d 1391.)" 221 Kan. at 214.

With these rules in mind, we have considered the phrase "absolute secrecy," which is the key to an understanding of the scope of this statutory provision. In Webster's Third New International Dictionary, "secrecy" is defined as "maintaining privacy or concealment." Id. at 2052. That same dictionary defines "absolute" in terms of being free from imperfections or faults, free from qualification, perfectly realizing or typifying the nature of the thing in question. Id. at 6. Thus, in our judgment, a voting system which provides for voting in "absolute secrecy" is one which provides that the voter is perfectly concealed from observation, view or detection while voting. It is our opinion that the VOTOMATIC system does not meet this standard. As previously indicated, the CES booth would conceivably allow a bystander to detect whether a voter has cast a write-in ballot, has voted for few or many candidates, or has or has not voted for a particular office. This, we believe is an unacceptable intrusion upon an individual voter's privacy.

An 1889 volume entitled The Australian Ballot System, by John H. Wigmore (The Boston Book Company), discusses in much detail the development of the Australian or secret ballot and sets forth some of the reasons for its evolution out of a system wherein voters had previously gone to the polls to openly and orally, if not freely, declare their choices for political office. As Wigmore states:

"The marking of the vote in seclusion reaches a great class of evils including violence and intimidation, improper influence, dictation by employees or organizations, the fear of ridicule and dislike, or of social or commercial injury -- all coercive influence of every sort depending on a knowledge of the voter's political action." Id. at 52. (Emphasis added.)

Doubtless, the legislature was concerned with some of those very evils of which Wigmore spoke in the above passage when it enacted K.S.A. 1980 Supp. 25-4406(h). By use of the term "absolute" to qualify secrecy leaves little doubt but that the legislature had every intent that the privacy of the voter be preserved.

Moreover, we think it scarcely could be contended that a person using an electronic or electromechanical voting system should be afforded any less privacy than a person voting by means of



a paper ballot. In this connection, we note that K.S.A. 25-2703 (as amended by L. 1981, ch. 169, §1) requires county election officers to furnish voting places with a "sufficient number of booths, shelves and pencils, to enable the voters to prepare their ballots, screened from observation." (Emphasis added.) This statute further requires that "[e]ach booth shall have three sides enclosed, one side in front to open and shut." It is abundantly clear that voting booths meeting these standards provide for greater privacy for the voter than does the VOTOMATIC system.

Your final question concerns the scope of the secretary of state's authority in approving or disapproving electronic or electromechanical voting systems. Specifically, you have asked whether your evaluation of any such system is limited to a consideration of the criteria set forth in K.S.A. 1980 Supp. 25-4406. Although it sets forth criteria which must be satisfied by any such voting system approved by the secretary of state, nothing in that statute itself indicates that such criteria are to be exclusive of other factors. However, we believe the scope of the secretary of state's evaluation of these voting systems is defined by K.S.A. 1980 Supp. 25-4405 (as amended by L. 1981, ch. 172, §1). As previously noted, this statute provides that the secretary of state is to examine a voting system upon written request of any person, firm or corporation desiring to sell such system to political subdivisions in Kansas, and it further provides as follows:

"The secretary of state may require such person, firm or corporation to furnish a competent person to explain the system and demonstrate by the operation of such system that it will do all the things required by article 44 of chapter 25 of Kansas Statutes Annotated and amendments thereto and can be safely used. The secretary of state may employ a competent person or persons to assist in the examination and to advise the secretary as to the sufficiency of such machine . . . ."

Although approval of electronic or electromechanical voting systems requires the exercise of discretion by the secretary of state, and the legislature has not expressly stated the parameters of such discretionary authority, we believe the foregoing quoted provisions of 25-4405 adequately indicate the legislature's intended limits on such authority. From these provisions it is apparent that the secretary of state may properly consider evidence that the voting system satisfies the requirements of K.S.A. 1980 Supp. 24-4401 et seq. and that it can be used safely. The only specific requirements made of an electronic or electromechanical voting

system by K.S.A. 1980 Supp. 25-4401 et seq. are prescribed by K.S.A. 1980 Supp. 25-4406, some of which were previously discussed. Thus, we believe it abundantly clear that, in determining whether to approve any such voting system, the secretary of state may base his decision on whether the voting system satisfies the requirements of K.S.A. 1980 Supp. 25-4406 and on whether it may be used safely, i.e., voters may use the system without great risk of personal injury or harm.

In our judgment, these factors represent the sole criteria for the secretary of state's decision to approve or disapprove an electronic or electromechanical voting system. These factors have been specifically identified by the legislature, and it is an accepted rule of construction that the expressed mention of one thing operates as an implied exclusion of others (expressio unius est exclusio alterius). This maxim was discussed extensively in Johnson v. General Motors Corporation, 199 Kan. 720 (1967), as follows:

"Generally, this maxim may be used in the interpretation and construction of statutes when the intention of the lawmaking body is not otherwise clear (82 C.J.S. Statutes, §333a). However, it is merely an auxiliary rule of statutory construction which is not conclusive; it should be applied only as a means of discovering legislative intent not otherwise manifest, and should never be permitted to defeat the plainly indicated purpose of the legislature. Accordingly the maxim is inapplicable if there is some special reason for mentioning one thing and none for mentioning another which is otherwise within the statute, so that the absence of any mention of such other will not exclude it. Where the statute contains an enumeration of certain things to which the act applies and also a general expression concerning application of the act, the general expression may be given effect if the context shows that the enumeration was not intended to be exclusive. So the maxim does not apply to a statute the language of which may clearly comprehend many different cases in which some only are mentioned expressly by way of example, and not as excluding others of a similar nature (82 C.J.S. supra, §333b; see also Breedlove v. General Baking Co., 138 Kan. 143, 23 P.2d 482, and Priestly v. Skourup, 142 Kan. 127, 45 P.2d 852).

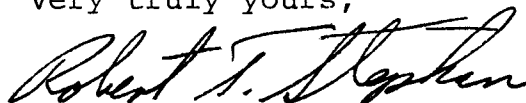
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"The extent to which the doctrine should be applied depends in any event on how clearly legislative intent is otherwise expressed."  
Id. at 722.

Based on the above discussion, we think it appropriate to apply the maxim of express mention and implied exclusion in this instance. We find no indication that the enumerated criteria are exemplary only. Nor do we find from the statutes that the legislature intended a broader authority. Therefore, without application of the maxim in this instance, the legislature's intent as to the scope of the secretary of state's authority would not otherwise be apparent. Accordingly, it is our opinion that, in evaluating an electronic or electro-mechanical voting system, the secretary of state is limited to a consideration of whether the voting system satisfies the requirements of K.S.A. 1980 Supp. 25-4406 and can be used safely.

In reaching this conclusion, we have considered the additional language of 25-4405 quoted above, providing that the secretary of state may employ a competent person or persons "to advise the secretary as to the sufficiency of such machine." Nothing in that language bestows any additional authority upon the secretary of state. Again, the only expressed criteria for measuring a voting system's "sufficiency" are those previously discussed, i.e., satisfaction of the requirements of 25-4406 and safety of operation. Hence, the extent of the advice and counsel provided by any person retained by the secretary of state under 25-4405 is circumscribed by these criteria.

Very truly yours,



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