THE ATTORNEY GENERAL
OF TEXAS

December 23, 1988

JIM MATTOX
ATTORNEY GENERAL

Honorable Ernestine Glossbrenner   Opinion No. JM-998
Chairman
Elections Committee   Re: Effect of a straight
Texas House of Representatives   party vote under certain
P. O. Box 2910   circumstances   (RQ-1610)
Austin, Texas   78769

Dear Representative Glossbrenner:

You ask two questions about the counting of ballots on
which a voter indicates a straight-party vote for two
political parties. You provide examples, which we summarize
as follows:

Example (1)   A voter marks a straight-party vote for
Party A and a straight-party vote for Party B. No other
marks appear on the ballot. In the race for a particular
office Party A has a nominee on the ballot but Party B does
not.

In this example you ask whether Party A's candidate for
the particular office is entitled to have a vote tallied for
him since there is no opponent in Party B.

Example (2)   A voter marks a straight-party vote for
Party A and a straight-party vote for Party B.   Both parties
have a nominee on the ballot for a particular office.   The
voter also places an individual mark next to the name of the
nominee for Party A indicating a vote for that candidate for
the particular office.

In this example you ask how the ballot is to be tallied
for the particular office.

The provisions governing ballot instructions and ballot
counting are found in the Election Code. Section 52.070
prescribes the instructions that are to appear on a ballot
on which candidates' names appear.   Pertinent portions of
that section provide:

> (a)   A square for voting shall be printed to the left of each candidate's name on a ballot.
>
> (b)   Immediately below 'OFFICIAL BALLOT,' the following instruction shall be printed: 'Vote for the candidate of your choice in each race by placing an "X" in the square beside the candidate's name.'   (Emphasis added.)

Additional ballot instructions are prescribed by section 52.071 of the code for use on a ballot on which political party columns are to appear. That section states:

> (a)   On a ballot on which a party column appears, a square larger than the square prescribed by Section 52.070(a) shall be printed to the left of each political party's name.
>
> (b)   The following instruction shall be added to the instruction required by Section 52.070(b): 'You may cast a straight-party vote (that is, cast a vote for all nominees of one party) by placing an "X" in the square beside the name of the party of your choice. If you cast a straight-party vote for all the nominees of one party and also cast a vote for an opponent of one of that party's nominees, your vote for the opponent will be counted as well as your vote for all the other nominees of the party for which the straight-party vote was cast.'   (Emphasis added.)

"Straight-party vote" is defined by section 1.005(20) of the Election Code as "a vote by a single mark, punch, or other action by the voter for all the nominees of one political party and for no other candidates." The method of tallying straight-party votes is provided in section 65.007 of the Election Code:

> (b)   Except as provided by Subsection (c), each straight-party vote shall be tallied for the party receiving the vote instead of being tallied for the individual candidates of the party . . . .

(c) If a ballot indicates a straight-party vote and a vote for an opponent of one or more of that party's nominees, a vote shall be counted for the opponent and for each of the party's other nominees whether or not any of those nominees have received individual votes. (Emphasis added.)

The paramount statutory rule on ballot counting is prescribed by section 65.009:

(a) Failure to mark a ballot in strict conformity with this code does not invalidate the ballot.

(b) Marking the ballot by marking through the names of candidates for whom . . . the voter does not desire to vote does not invalidate the ballot.

(c) A vote on an office or measure shall be counted if the voter's intent is clearly ascertainable unless other law prohibits counting the vote.[1] (Emphasis added.)

The Election Code proscribes the counting of a vote in a particular office when a voter marks a ballot for more candidates for the office than the number to be elected. This prohibition does not affect the combined straight-party plus individual-candidate voting provided for in section 65.007(c) quoted above. See Elec. Code § 65.011.

The two examples you present raise questions of the voter's intent. By marking two straight-party votes, the voter has marked the ballot in a manner that does not strictly conform to law; the Election Code makes no reference to straight-party votes for two political parties.

We have found no Texas cases addressing the question of ballots marked for two political parties. Other jurisdictions have confronted this issue and different conclusions

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1. The Election Code describes several types of ballots which are not to be counted. See § 65.010. None of these instances is relevant to the questions at issue in this opinion.

were reached.   The Illinois Supreme Court in <u>Winn v. Blackman</u>, 82 N.E. 215 (1907) held that two straight-party markings reflected the voter's intent to vote for candidates of both political parties.   The court reasoned, therefore, that the unopposed candidates in each party were entitled to have votes counted in their races. A state statute that provided a result identical to the ruling in <u>Winn</u>, <u>supra</u>, was confirmed by the New York Supreme Court in <u>In Re Holmes</u>, 61 N.Y.S. 775 (1899).

A contrary result was reached by the South Dakota Supreme Court in <u>McMahon v. Polk</u>, 73 N.W. 77 (1897) and   in <u>Moody v. Davis</u>, 82 N.W. 410 (1900). The <u>McMahon</u> and <u>Moody</u> courts held the entire ballot a nullity when both political party columns were marked. <u>See also</u>, <u>McNally v. Board of Canvassers of Wayne County</u>, 25 N.W.2d 613 (1947).

This split of authority on this issue confirms an earlier determination of this office that reasonable minds may differ on the voter's intent in indicating a preference for two political parties.

Your examples are among the situations listed in the secretary of state's published guidelines on   counting ballots. <u>See</u> <u>Paper Ballot Handbook for Election Judges and Clerks 1988-1989</u>.

The office of the secretary of state has published guidelines to assist election judges in the counting of ballots for approximately twenty years. The first secretary of state to publish the guidelines submitted them to this office for approval in 1968. In Attorney General Opinion M-284 (1968) this office was asked about the validity of certain rules for counting election ballots promulgated by then secretary of state Roy Barrera.   Those rules were prompted by a 1967 amendment that changed the manner of marking a ballot from the "scratch" method to the "check" method that is described in section 52.070(b) quoted above.

In promulgating the original ballot counting rules in 1968, the secretary of state relied on the authority provided to the secretary of state in article 1.03, sub-division 1, of the Election Code (now repealed and re-codified in section 31.003)   "to obtain and   maintain uniformity in the application, operation, and interpretation of the election laws."

The two examples about which you inquire were among the situations described by the secretary of state in 1968 and

considered in the earlier opinion. In Attorney General
Opinion M-284 this office found that the authority vested in
the secretary of state by article 1.03 to issue directives
on the counting of ballots was limited by article 6.06 of
the Election Code (now repealed and recodified in relevant
part as section 65.009(c)) to those situations in which the
voter's intent is "clearly ascertainable." The opinion
stated:

> we cannot sanction directives promulgated by
> the Secretary of State . . . unless as a
> matter of law, based upon the fact situation
> presented, reasonable minds could not differ
> in the application of a chosen rule to that
> specific fact situation.

Attorney General Opinion M-284 at 7.

Regarding your first example (a straight-party mark in
two party columns with no other marks on the ballot) the
secretary of state's rule in 1968 as well as the 1988
guideline indicate that no vote is counted for any candidate
in either party. The ·rule makes no exception for the
offices for which one party has no nominee.

Similarly, a suggested method of counting the ballot
you describe in your second example (a straight-party mark
in two party columns with some individual candidates marked)
appeared in the 1968 rules and is found in the current
guidelines. Both suggest ignoring the straight-party marks
and counting individual marks in some circumstances.

After careful consideration of the original ballot
counting rules, then Attorney General Crawford Martin
concluded that the secretary of state was only authorized to
promulgate rules that illustrated statutorily expressed
counting provisions. Regarding the rules that illustrated
ballots not marked in conformity with the law, this office
concluded that it could not as a matter of law say that the
"rules contained no questions of fact about which reasonable
minds could not differ." Accordingly, the attorney general
refused to sanction those rules.

We agree with the earlier opinion of this office that
it is the responsibility of the election judge, initially,
and the trier of fact in an election contest, ultimately, to

examine the ballots to determine the intent of the voter.[2] The secretary of state's interpretive responsibility under section 31.003 of the Election Code does not authorize the secretary of state to prescribe rules for counting ballots that are marked in such a manner as to allow for multiple interpretations of voter intent.

We have found only one reported judicial decision discussing the secretary of state's ballot counting guide- lines. In Dodd v. Wyatt, 656 S.W.2d 564 (Tex. App. - Corpus Christi 1983, writ dism'd), the court rejected a guideline that permitted the counting of a ballot where a voter marked a straight-party vote and then voted individually for an opponent of that party's nominee for a particular office. Wyatt preceded the 1984 amendment reflected in section 65.007(c) of the Election Code that now expressly provides for this method of marking a ballot. The reasoning in Wyatt mirrored the rationale in Attorney General Opinion M-284. If the statute provides specific instruction in the counting of a ballot, it is to be followed. In all other instances, the determination of voter intent must be left to the determination of the election judge. Neither the secretary of state nor any other authority is authorized to declare the manner in which an ambiguous or imperfectly marked ballot is to be counted.

Neither the secretary of state nor any other officer attempting to issue an anticipatory counting rule is in the position of an election judge. The judge will be confronted not only with the actual markings on the ballot but may also

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2. Election Code Section 221.002 establishes jurisdiction of election contests in the following tribunals: (1) the senate and house of representatives, in joint session, have exclusive jurisdiction in a contest of a general election for governor, lieutenant governor, comptroller of public accounts, state treasurer, commissioner of the general land office, or attorney general; (2) the senate has exclusive jurisdiction of a contest for state senator; (3) the house of representatives has exclusive jurisdiction of a contest for state representative; (4) the state board of canvassers has exclusive jurisdiction of a contest of the election of presidential electors; and (5) the district court has original jurisdiction and the court of appeals has appellate jurisdiction of contests for other offices.

consider circumstances such as the text of the instructions printed on the ballot (or the absence thereof), the ballot format and layout, the method of voting used in the election, and other factors about which a rule-maker cannot be cognizant during the rule-making process.

Until the legislature directs by statutory mandate how ballots marked in the manner described in your two examples are to be counted, it is our opinion that an election judge or the trier of fact in an election contest has the duty to determine whether the voter's intent is ascertainable.   If so, the ballot must be counted in a way that gives effect to the voter's intent. If not, the portion of the ballot for which the voter's intent cannot be ascertained may not be counted.

S U M M A R Y

The secretary of state has no authority to issue rules governing the counting of ballots that are not marked in strict conformity with law.

An election judge or the trier of fact in an election contest has the duty to determine whether the voter's intent is clearly ascertainable and, if so, to count the ballot in a manner that gives effect to the voter's intent.

Very truly yours,

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