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Mr. Will Garwood, Jr.
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Election Law Opinion MAM-2
Re: Whether the working hours
of an election clerk
nominated by a political
party may be limited, and
whether a poll watcher
may use a hand-held tape
recorder in the polling
place.

Dear Mr. Garwood:

This is in response to your October 16, 1984 letter in which
you asked:

1. May the working hours of an election clerk appointed from a list properly submitted by the chairman of a political party pursuant to article 3.01 of the Texas Election Code be limited; and
2. May a poll watcher carry a hand-held tape recorder into the polling place?

This official election law opinion is rendered by me as
chief election officer of the state in accordance with Tex.
Elec. Code Ann. art. 1.03, subd. 1 (Vernon Supp. 1984).

In the fact situation presented, a Republican Party county
chairperson submitted the names of two qualified individuals
to a presiding judge in a county. The presiding judge
appointed one of the nominees to serve as an election clerk
from noon until 3 p.m. on the day of the next general

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election. Two other clerks, not "from the Republican Party" were appointed to serve from the time the polls open until the ballots have been counted, you assert.

Although election clerks in general may be assigned to work for different lengths of time and may begin work at different hours, "[c]lerks who begin work at any time before closing of the polls shall remain on duty without leaving the polling place while the polls are open, except for such periods of absence for meals and other necessary reasons as may be permitted by the presiding judge." Tex. Elec. Code Ann. art. 3.02 (Vernon Supp. 1984). No election clerk appointed pursuant to article 3.01 of the Texas Election Code may be lawfully assigned to work for a time inconsistent with the foregoing provisions of said code.

The central purpose of the Election Code is to "safeguard the purity of the ballot box against error, fraud, mistake and corruption. . . ." Tex. Elec. Code Ann. art. 1.01 (Vernon 1967).

To the extent practicable, election judges must select their clerks from different political parties. Tex. Elec. Code Ann. art. 3.01(a) (Vernon Supp. 1984). To facilitate this, the Code provides a procedure by which the chairman of each of the two political parties whose candidates for governor received the most votes in the last gubernatorial election may nominate two qualified persons to serve as election clerks. Id. An election judge who receives such a list at least 30 days prior to a general election must appoint at least one clerk from each list submitted. Id.

Restricting the hours that a clerk appointed under these statutory procedures works is contrary to the clear purpose of the Election Code and would avoid its directives. Accordingly, a clerk appointed by party nomination pursuant to article 3.01 of the Texas Election Code must be permitted to serve from the time the polls open until the ballots have been counted, or until the vote totals have been recorded, or until the ballots have been delivered to the central counting station, as appropriate, depending upon the voting system used, and the business of the polling place is completed.

Your second question was whether it is permissible for poll watchers to use hand-held tape recorders in the polling place.

Access to a polling place while an election is being conducted is limited by law. No one is permitted to enter a polling place except as expressly authorized by law.

Persons authorized to enter a polling place are those persons admitted to vote, judges, clerks, persons admitted by the presiding judge to preserve order, state inspectors, poll watchers, children under 10 accompanying a parent who is admitted to vote. Tex. Elec. Code Ann. art. 8.17 (Vernon Supp. 1984).

In addition, other provisions of law may provide a privilege for a person to enter a polling place for a specific purpose. For example, section 208 of the Federal Voting Rights Act of 1965, as amended, provides that certain voters are entitled to assistance in voting. Therefore, in the circumstances described by that statute, a person may be admitted into a polling place for the purpose of assisting a voter. 42 U.S.C.A. §1973aa-6 (West Supp. 1983).

Another example is a provision of the Texas Election Code which specifically authorizes admitting representatives of the press to a polling place where voting has been conducted by the use of lever-type mechanical voting machines. The representatives of the press may be admitted only after the polls are closed and during that time that the counter compartments of the voting machines are open. Tex. Elec. Code Ann. art. 71.4, subd. 18(b) (Vernon Supp. 1984). This authorization is strictly limited and applicable only to polling places in which voting machinery authorized by art. 7.14 of the Election Code have been used. No such authorization exists for polling places in which voting has been conducted by paper ballot or ballots which will be electronically tabulated.

As the foregoing discussion illustrates, persons are admitted into a polling place only for the purpose of exercising certain explicit rights or duties as provided by statute. I believe it also illustrates that such statutes are specifically and narrowly drafted.

The services, duties and privileges of poll watchers are set out specifically in the Election Code. The Code permits a watcher to call the attention of the election officers to any fraud, irregularity, mistake, or violation of the election law. Tex. Elec. Code Ann. art. 3.07 (Vernon Supp. 1984). "[S]uch complaint shall be reduced to writing and a copy delivered to the election judge." Id. A written record, specifically authorized by the Election Code, is thereby established. The watcher must also report to the canvassing authority and may report to the grand jury. Id.

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The Texas Election Code specifically provides that "[n]o watcher shall . . . interfere with any voter in any manner whatever." Tex. Elec. Code Ann. art. 3.07(e) (Vernon Supp. 1984). Any further intrusion into the sanctity of the polling place, especially any intrusion which may work to intimidate qualified voters in the exercise of their right to vote, must await the considered judgment of the Legislature.

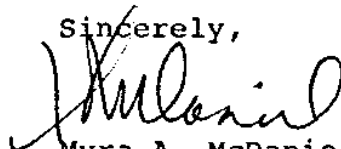
In view of the strict statutory safeguards, the very real potential for abuse, and the risk that some voters may be intimidated, whether such intimidation is intended or not, it is my opinion that the use of a tape recorder in the polling place by a poll watcher is not sanctioned by law.

This interpretation is consistent with the longstanding position of the Secretary of State's Office with regard not only to tape recorders, but also in regard to such devices as cameras and "walkie-talkies". Prior practice in polling places throughout the state of Texas has been in accord with this opinion.

SUMMARY

1. A clerk appointed by party nomination pursuant to article 3.01 of the Texas Election Code must be permitted to serve from the time the polls open until the ballots have been counted, or until the vote totals have been recorded, or until the ballots have been delivered to the central counting station, as appropriate depending upon the voting system used, and the business of the polling place is completed.
2. A poll watcher may not use a tape recorder in the polling place.

Sincerely,



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Prepared by Sharon K. Hanko
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