

OPINION NO. 74-103

Syllabus:

1. A witness at an election recount may suggest to the judges that a ballot should be challenged, and the reason therefor;
2. If three judges do not agree as to how any part of a ballot should be counted, it should be segregated for a later determination;
3. Witnesses have a right to see each ballot, including those designed to be counted by automatic tabulating equipment.

To: John F. Holcomb, Butler County Pros. Atty., Hamilton, Ohio
By: William J. Brown, Attorney General, December 10, 1974

I have before me your request for my opinion, which can be summarized as follows:

"1. Can a witness at an election recount suggest a challenge to the judges?

"2. Who has the right to challenge a ballot, which is then segregated from the others to await a ruling on its validity?

"3. When ballot cards are used, and were counted by automatic tabulating equipment pursuant to R.C. Chapter 3506., do the witnesses at the recount have a right to see each ballot card?"

The Secretary of State, as chief elections officer of the state, has issued certain instructions to all boards of elections concerning the conduct of the recount. However, certain specific questions remain unanswered, among them the three stated above, which have been presented to your office by the county board of elections.

Each person for whom votes were cast at the election has the right to appoint a witness to observe the recount. R.C. 3515.03. R.C. 3515.04 provides further that "[w]itnesses

shall be permitted to see the ballots but they shall not be permitted to touch them * * *."

R.C. Chapter 3515, which concerns recounts, does not speak directly to the question of who can challenge a ballot. Consequently, there can be little doubt that the provisions of R.C. 3505.27 apply. This Section provides as follows, with respect to the counting of votes:

"If there is any disagreement as to how a ballot should be counted it shall be submitted to all of the judges. If three of the judges do not agree as to how any part of the ballot shall be counted, that part of such ballot [upon] which three of the judges do not agree shall be counted and a notation made upon the ballot indicating what part has not been counted, and shall be placed in an envelope provided for that purpose, marked "Disputed Ballots" and returned to the board."

Thus, in answer to your second question, any two of the four judges charged with conducting the recount may challenge a ballot and cause it to be segregated for a determination of how it should be counted. I find no authority for any other person or persons to make such a challenge.

In answer to your first question, the Secretary of State noted in a letter to boards of elections dated November 22, 1974, that "[t]he recount should be open and the witnesses be permitted to observe the ballots and the recount procedure. However, they shall not interfere with or impede the progress of the recount." This language neither acknowledges nor denies the right of a witness to suggest to the judges that a ballot ought to be challenged, and the basis for such challenge, but the more reasonable interpretation is that witnesses have such a right. I can see no reason why witnesses should be required to sit in absolute silence during a recount; on the contrary, part of their usefulness is in pointing out invalidities which the judges may have overlooked. However, as I mentioned previously, the right to challenge ballots rests with the judges alone, and a witness has no right to require a ballot to be segregated or to require extended debate on the validity of a ballot.

Finally, you ask whether witnesses have a right to see each ballot, even those designed to be counted by automatic tabulating equipment. Those ballots on which a vote is registered by punching a hole, and which are designed for automatic counting, are clearly "ballots". R.C. 3506.01 provides as follows:

"As used in Chapters 3501., 3503., 3505., 3506., 3507., 3509., 3511., 3513., 3515., 3517., 3519., 3521., 3523., and 3599. of the Revised Code:

"(A) 'Marking device' means an apparatus operated by a voter to record his choices through the piercing or marking of ballots enabling them to be examined and counted by automatic tabulating equipment.

"(B) 'Ballot card' and 'ballot' may be used interchangeably, and shall include labels containing names of offices and candidates and statements of questions and issues, where such labels form a part of the marking device, and shall also include envelopes of similar content and function. Where appropriate, a ballot shall permit write-in voting.

"(C) 'Automatic tabulating equipment' means a machine or interconnected or interrelated machines that will automatically examine and count votes recorded on ballots.

* * * * *

It will be recalled that R.C. 3515.04 provides that "[w]itnesses shall be permitted to see the ballots but they shall not be permitted to touch them * * *." It seems clear that witnesses have the right to observe every ballot, if they so desire, to look for mutilation or other invalidities, whatever method of recounting is used.

In specific answer to your questions, it is my opinion and you are so advised that:

1. A witness at an election recount may suggest to the judges that a ballot should be challenged, and the reason therefor;
2. If three judges do not agree as to how any part of a ballot should be counted, it should be segregated for a later determination;
3. Witnesses have a right to see each ballot, including those designed to be counted by automatic tabulating equipment.