

OPINION NO. 72-082**Syllabus:**

1. As a matter of practice, the Secretary of State may find, and give notice of insufficient signatures on an original petition, proposing a constitutional amendment under Article II, Sections 1a and 1g, Ohio Constitution, at any time reports from the counties are received by him and he is able to determine the insufficiency. In no event, under the provisions of Article II, Section 1g, Ohio Constitution, may he make a general finding of insufficiency later than the fortieth day prior to the election, at which the issue is to appear on the ballot.

2. The filing of additional signatures, after an initial finding and notification of insufficient signatures by the Secretary of State, does not cause the postponement of the issue to a later election.

To: Ted W. Brown, Secretary of State, Office of Secretary of State, Columbus, Ohio

By: William J. Brown, Attorney General, September 20, 1972

I am in receipt of your request for my opinion, respecting certain matters that have arisen in connection with an initiative petition filed with you, proposing an amendment to the Constitution of Ohio.

It appears from the body of your letter and from later supplied information, that such petition was presented to you on August 9, 1972, and was accepted for filing (apparently under authority of Thraillkill, et al. v. Smith, 106 Ohio St. 1 (1922), as to timeliness) on the basis that the petition contained sufficient ostensibly valid signatures to warrant forwarding the various part-petitions to the boards of elections pursuant to Section 3519.16, Revised Code. Thereafter, the various boards examined and checked the part-petitions and signatures and communicated their findings to you by means of their official certifications, transmitting therewith the part-petitions previously received from you. Protests, by both opponents and proponents of the measure, were filed in various counties, questioning the findings of the boards in such counties and, it appears, you returned the part-petitions affected by the protests to the appropriate counties, retaining in your possession, however, the certifications by the local boards. As of the date of your letter, there appeared to you to be basis for belief that the petition was supported by an insufficient number of valid signatures.

In light of those facts, your questions were stated as follows:

"1. May I now notify the committee as to the insufficiency of the petition or must I wait until all of the protests have been resolved so that I can determine the full extent of the insufficiency?

"2. If at the time of the first publication of the advertising required by Article II, Section 1g, of the Ohio Constitution the signatures on the petition are still proven insufficient am I authorized to advise the boards of elections not to advertise the issue and to remove the issue from the ballot until and if it subsequently becomes qualified by virtue of the filing of additional signatures within the 10 day period?

"3. If I notify the committee that their petition does not contain a sufficient number of valid signatures and inform them of the extent of the insufficiency, shall the issue be submitted at the first regular or general election that occurs more than 90 days after the date when the additional signatures are filed during the 10 day period, or must the issue be presented at the 1972 general election because the petition was initially filed on August 9, 1972?

"4. Is the first Tuesday after the first Monday in May, 1972, a regular election within the meaning of Article II, Section 1a, of the Ohio Constitution?"

The questions relate to the provisions of Article II, Sections 1a and 1g, Ohio Constitution, and to Section 3519.16, Revised Code. Section 3519.15, Revised Code, is also a part of the overall procedure. In pertinent part, these are as follows:

Section 1a

"The first aforesated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding, regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: 'Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors.'" (Emphasis added.)

Section 1g

"Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. * * * The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. * * * The law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, shall be published once a week for five consecutive weeks preceding the election, in at least one newspaper of general circulation in each county

of the state, where a newspaper is published. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. * * *

Sections 3519.15 and 3519.16, Revised Code, read as follows:

Section 3519.15

"Whenever any initiative or referendum petition has been filed with the secretary of state, he shall forthwith separate the part-petitions by counties and transmit such part-petitions to the boards of elections in the respective counties. The several boards shall proceed at once to ascertain whether each part-petition is properly verified, and whether the names on each part-petition are on the registration lists of such county, or whether the persons whose names appear on each part-petition are eligible to vote in such county, and to determine any repetition or duplication of signatures, the number of illegal signatures, and the omission of any necessary details required by law. The boards shall make note opposite such signatures and submit a report to the secretary of state indicating the sufficiency or insufficiency of such signatures and indicating whether or not each part-petition is properly verified, eliminating, for the purpose of such report, all signatures on any part-petition which is not properly verified.

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(Emphasis added.)

Section 3519.16

"If the circulator of any part-petition, the committee interested therein, or any elector files with the board of elections a protest against the board's findings made pursuant to section 3519.15 of the Revised Code, then the board shall proceed to establish the sufficiency or insufficiency of the signatures and of the verification thereof in an action before the court of common pleas in the county. Such action must be brought within three days after the protest has been filed, and the case shall be heard forthwith by a judge of such court whose decision shall be certified to the board. The signatures which are adjudged sufficient or the part-petitions which are adjudged properly verified shall be included with the others by the board, and those found insufficient and all those part-petitions which are adjudged not properly verified shall not be included. The properly

verified part-petition, together with the report of the board, shall be returned to the secretary of state not less than fifty days before the election, provided that in the case of an initiated law to be presented to the general assembly the boards shall promptly check and return the petitions together with their report. The secretary of state shall notify the chairman of the committee in charge of the circulation as to the sufficiency or insufficiency of the petition and the extent of the insufficiency. If the petition is found insufficient because of an insufficient number of valid signatures, such committee shall be allowed ten additional days after such notification by the secretary of state for the filing of additional signatures to such petition. The part-petitions of the supplementary petition which appear to the secretary of state to be properly verified, upon receipt thereof by the secretary of state, shall forthwith be forwarded to the boards of the several counties together with the part-petitions of the original petition which have been properly verified, and shall be immediately examined and passed upon as to the validity and sufficiency of the signatures thereon by each of such boards and returned within five days to the secretary of state with the board's report. No signature on a supplementary part-petition which is the same as a signature on an original part-petition shall be counted. The number of signatures in both the original and supplementary petitions, properly verified, shall be used by the secretary of state in determining the total number of signatures to the petition which he shall record and announce. If they are sufficient, then such amendment, proposed by law, or law shall be placed on the ballot as required by law. If the petition is found insufficient, the secretary of state shall notify the committee in charge of the circulation of the petition."
(Emphasis added.)

In a decision announced September 7, 1972, State, ex rel. Tulley, et al., v. Brown, Case No. 72-623, The Supreme Court of Ohio had occasion to consider provisions of the same constitutional and statutory Sections. The majority indicated no question concerning the constitutionality of such statutory provisions. Accordingly, and also in keeping with my own duties as a nonjudicial officer of the state, I must assume the provisions of Section 3519.16 to be valid in all respects.

Your first question pertains to the date on which you may determine, and give notification, that the initiative petition is, or is not, supported by sufficient valid signatures. Related to that general question is the effect, if any, of the pendency of protest actions on the establishment of such date.

It appears from the procedure set out in Section 3519.16 and the language of Article II, Section 19, that your finding and notification of insufficiency must be made on or before the fortieth day prior to the election. Section 3519.16 is silent on that time limit. It must therefore be concluded that a determination of the fact of insufficiency of the initiative petition may

be made no later than the fortieth day prior to the election.

At the other end of the time period, however, stands the provision of Section 3519.16, allowing the boards of elections, at least where protests become involved, up to fifty days before the election to report to the Secretary of State. It follows that, as a practical matter in most circumstances, the determination of sufficiency must be made between the fiftieth and the fortieth day prior to the general election.

It is conceivable, of course, that some counties may not be able to complete the work in time to report on or before such fiftieth day before the election. It would be inappropriate, however, to speculate on such contingency, particularly in light of my understanding that your questions do not contemplate any legal problems that might arise on failure of the county authorities to comply with the clear mandate of the law.

On the other hand, situations can arise in which a determination might be made before the fiftieth day, so that delay until that time is not necessary in all cases. For example, all certifications and reports could be received from the boards of elections earlier than required. In that case, the basic data would be the same on the fifty-first day as on the forty-ninth or even the fortieth day before the election.

It appears that a determination and notification of insufficiency cannot be made, as contemplated in Section 3519.16, without also certifying the extent of the insufficiency. The word "extent" would seem to contemplate a determination of the number of signatures by which the petition falls short of the required total. That determination, of course, would not be possible under Section 3519.16, until all certifications and reports have been returned by the boards of elections, and, as stated, we may reasonably assume that such certifications and reports will be received on time. If, in the remote contingency, such reports are not received on time, however, it may be that such Section cannot be fully implemented by you. I express no opinion on that possibility.

I must conclude that where protests are filed, the determination and notification of insufficiency of the petition and the extent thereof must ordinarily be made between the fiftieth and fortieth day before the election. The fact of insufficiency (perhaps without reference to the extent thereof) may not be determined, however, later than the fortieth such day.

Your second question relates to the propriety of initiating the publication of the proposal, and the arguments for and against it, at sometime before determination is made of the sufficiency or insufficiency of the petition. Since receiving your letter, it appears that you have resolved that issue to your satisfaction by instructing the boards of elections to prepare to make such publication and have also taken related action respecting the preparation of arguments and the form of ballot. Under these circumstances, I must conclude that you have withdrawn your request for opinion on that question. I must add that no criticism of your decision, or agreement or disagreement with it, should be inferred from the immediately foregoing recitation of facts.

Your third question has to do with the date of the election at which a petition with sufficient signatures may cause an issue to be placed on the ballot. More particularly, I understand you to ask whether or not the submission of additional signatures,

within ten days after a determination of insufficiency respecting the original number, begins a new ninety-day period under Article II, Section 1a.

Both Article II, Section 1g and Section 3519.16, contemplate the submission of additional signatures within a ten-day period, following a determination that a petition initially accepted for filing by the Secretary of State, is later found to contain an insufficient number of valid signatures. In The State ex rel. Ilg v. Myers, 127 Ohio St. 171 (1933), it was held that the date of the filing of the petition established the number of valid signatures required in terms of the gubernatorial election preceding that date, which number could be reached by totalling the original and additional signatures, even though the additional ones were filed after an intervening gubernatorial election. The court said, at page 173:

" * * * The provision of Section 1g of Article II of the Constitution, that 'ten additional days shall be allowed for the filing of additional signatures to such petition,' must be considered in construing Section 1a of the same Article, and it must therefore be determined that but a single petition is contemplated, for any supplemental action of the proponents is referred to as 'filing of additional signatures to such petition.' * * *"

Therefore, the ninety-day period referred to in Article II, Section 1a, commenced in the present case on August 9, 1972, when the petitions were filed, and is not affected by the filing of additional signatures pursuant to Article II, Section 1g, for the purposes of correcting an insufficiency. In the present case, therefore, the submission of additional signatures would not act to postpone the date the issue would be placed on the ballot, assuming, of course, that total valid signatures, original and additional, were sufficient in number. See Opinion No. 753, Opinions of the Attorney General for 1949.

I must conclude, therefore, that the submission of additional signatures within the ten-day period prescribed, would not operate to postpone the placing on the ballot of an issue supported ultimately by a sufficient number of valid signatures, i.e., total valid signatures contained in both the original and additional part-petitions.

In light of my response to your third question, no reply to the fourth question is required.

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

1. As a matter of practice, the Secretary of State may find, and give notice of insufficient signatures on an original petition, proposing a constitutional amendment under Article II, Sections 1a and 1g, Ohio Constitution, at any time reports from the counties are received by him and he is able to determine the insufficiency. In no event, under the provisions of Article II, Section 1g, Ohio Constitution, may he make a general finding of insufficiency later than the fortieth day prior to the election, at which the issue is to appear on the ballot.

2. The filing of additional signatures, after an initial

finding and notification of insufficient signatures by the Secretary of State, does not cause the postponement of the issue to a later election.