

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date July 12, 1974

To Peter M. Damborg, Deputy Secretary of State

From Harrison B. Wetherill, Jr., Ass't. Attorney General

Subject Distinguishing Marks on Two Disputed Ballots

At the request of the Governor, the Council agreeing, you have asked whether two disputed ballots cast in the Republican primary election of June 11, 1974, in District 38 contain distinguishing marks, thus rendering the ballots void. As to the ballot containing the printed word "NO," whether this word is a distinguishing mark is a question of fact to be determined in the first instance by the local election officials and, upon recount and appeal under 21 M.R.S.A. §§ 1152 and 1153, by the Governor and Council. The Maine Supreme Court has provided guidelines as an aid to those who must make this factual determination, and these guidelines are outlined in some detail below.

As to the ballot containing the words "anyone but," these words constitute a distinguishing mark as a matter of law, and the ballot is void.

You have forwarded copies of the two disputed ballots to this office and both indicate the name of only one candidate running for the office of sheriff. Under the name of this candidate is a blank space. The voter who cast the first disputed ballot wrote the words "anyone but" in the blank space under the name of the candidate for sheriff and placed a check mark in the square to the left of these words. The voter who cast the second disputed ballot wrote the word "NO" in large letters following the name of the candidate for sheriff.

Under 21 M.R.S.A. § 925(3) "a void ballot must not be counted" and "if a voter places a distinguishing mark anywhere on his ballot the ballot is void." The purpose for this ban on distinguishing marks, as expressed by the Maine Supreme Judicial Court in Bartlett v. McIntire, 79 A. 525 (1911), is to prevent "the purchasable voter" from "intentionally [placing] such identifying marks upon his ballot that it can be recognized as his." In Bartlett, the Court indicated the importance of the question of what constitutes a distinguishing mark since upon the answer to this question "depends, in many cases, the disenfranchisement of a qualified and honest voter." The Court indicates, at p. 530, that "what constitutes a distinguishing mark is a question of fact to be determined by the tribunal whose duty it is to count the ballots." The Court set out three factors of which the appropriate tribunal must be satisfied before voiding a ballot due to distinguishing marks. First, there must be a "mark or device of such a character as to distinguish [the ballot under consideration] from others." Second, it must be apparent on the face of the ballot that the mark "was made intentionally and not accidentally." Thirdly, it must also be apparent that the mark was "intended to be a distinguishing mark." Elaborating on these three factors the Court said, "In other words, we think no ballot should be rejected on the ground of bearing a distinguishing mark, unless it

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is such a one as fairly imports upon its face design and a dishonest purpose."

In Bartlett, the Court indicated that it was adopting a narrow definition of distinguishing marks and that "few [marks would] fall within the ban" so as to void an entire ballot.

After the Bartlett decision, by Ch. 360, Public Laws 1961, distinguishing marks were defined by statute. 21 M.R.S.A. § 1(9) now defines distinguishing mark as "a mark on a ballot of a type or in a place not specifically permitted by [Title 21], indicating the apparent intent of the voter to make his ballot distinguishable." This definition incorporates the three-pronged test outlined in Bartlett. See Opinion of the Justices, 161 Me. 32, at 37-38 (1965).

In the Opinion of the Justices in Re Androscoggin County Ballots, 227 A.2d 303 (1967), several disputed ballots were considered. On one ballot the voter had placed the words "anyone but" in a blank space with a check mark in the square next to these words and an arrow pointing from the words to the name of an actual candidate for office. The voter had further filled in another blank space with the name "Santa Cl." and had put a check mark in the square next to this name. It was the opinion of the Justices that either or both of these marks constituted distinguishing marks thus voiding the ballot. The Justices stated that "the entry of 'anyone but' on the one hand and 'santa clause' on the other, serves no purpose, to elevate the right of franchise or retain the integrity of the written ballot." The Court then quoted Bartlett, "if a voter has placed such a mark or device or name, or initials, or figures upon a ballot as seen inconsistent with an honest purpose, such ballot should be rejected."


With respect to the two disputed ballots from the June 11, 1974, primary, the local election officials, charged with the duty of counting the ballots after the primary, determined that both ballots were valid. Upon recount conducted pursuant to 21 M.R.S.A. § 1152, it developed that the validity of the two ballots was disputed by the candidates. Since the validity of these two ballots could affect the result of the election, an appeal to the Governor and Council was brought under the provisions of 21 M.R.S.A. §§ 1152(8) and 1153, and it is at this point that the advice of the Attorney General has been requested.

Usually, where a mark is involved which is not specifically permitted by Title 21, the decision as to whether that mark constitutes a distinguishing mark is a question of fact for determination, after recount and appeal, by the Governor and Council, based upon the principles which have been outlined herein. The question of the validity of the ballot containing the printed word "NO" is such a question of fact; however, if the Governor and Council

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conclude this ballot contains a distinguishing mark, we believe such a conclusion would be sustained on appeal in court. In so saying, we do not mean to express as fact that the ballot does contain a distinguishing mark. This factual decision is for the Governor and Council to make.

It is the opinion of this office that the ballot containing the words "anyone but" is void as a matter of law in view of the above-discussed 1967 Opinion of the Justices.

  
HARRISON B. WETHERILL, JR.  
Assistant Attorney General

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