



COMMISSIONER OF
POLITICAL PRACTICES

STATE OF MONTANA

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August 3, 2018

Audrey McCue
Elections Supervisor
Lewis and Clark County
316 N Park Ave, Rm 168
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Re: Ballot Selfies in Polling Place on Election Day

Dear Ms. McCue;

In May of this year, you wrote the Commissioner inquiring into the legality of citizens taking "ballot selfies" in polling places on Election Day.

ISSUE PRESENTED

Different election judges and officials had interpreted the prohibitions found in Montana law in different ways and would like guidance on how to handle citizen requests to take photos of themselves with their marked ballots prior to placing it in the ballot box.

Mont. Code Ann. § 13-35-201^[1] (2017) provides:

- (1) An elector may not show the contents of the elector's ballot to anyone after it is marked. An elector may not place any mark upon the ballot by which it may be identified as the one voted by the elector.
- (2) An elector may not receive a ballot from any person other than an election judge and may not vote any ballot except one received from an election judge. A person other than an election judge may not deliver a ballot to an elector.
- (3) A person may not solicit an elector to show the elector's ballot after it is marked.

¹ The statute is among those on the [warning poster](#) required to be hung in polling places on election day, Mont. Code Ann. § 13-13-113.

- (4) An elector who does not vote a ballot delivered to the elector shall, before leaving the polling place, return the ballot to an election judge.

SHORT ANSWER

Voluntarily taking a picture of yourself (a “selfie”) with your marked ballot and sharing the image on social media or with family and friends does not violate the prohibitions of Mont. Code Ann. § 13-35-201.

ADVISORY OPINION

The Commissioner is limited to issuing advisory opinions that address campaign finance reporting and disclosure questions within the Commissioner of Political Practices’ (COPP) jurisdiction, Mont. Admin. R. 44.11.102. The consideration of the questions and facts in this matter are limited to the information which was provided to the COPP in your request and information which is publicly available and specifically referenced herein. Based upon the foregoing identified scope of information, the Commissioner issues the following Advisory Opinion:

HISTORICAL BACKGROUND

In June of 1889, a constitutional convention was held in Helena to write a constitution for Montana voters to ratify and submit to the US Senate to qualify Montana for statehood. “All elections by the people shall be by ballot,” Mont. Const. art. IX, sec. 1 (1889). Today the Montana Constitution requires that “[a]ll elections by the people shall be by secret ballot,” Mont. Const. art. IV, sec. 1 (1972). Why was the word “secret” added to our Constitution?

In 1888, Montana Copper King William A. Clark ran as a candidate to become a territorial delegate to the United States Congress.² Having handily won the democratic primary in the spring and presuming a win in the fall, he packed his bags and began moving to Washington DC. When the results came in from the polls in November, Clark called foul in his paper the Butte Miner:

There was a combination against me which could not be defeated. On Saturday the foreman of the night shift in the Anaconda Mine^[3] ordered his men to vote for Carter. The day shift on Sunday also received the same

² Condensed version of a better telling of the story by K. Ross Toole in *Montana: An Uncommon Land*, at 177-181 (University of Oklahoma Press 1984).

³ The Anaconda Copper Mining Company was founded in 1881 by Marcus Daly. It later became known as the Amalgamated Copper Mining Company.

orders, and five bosses were stationed at one of the polling places to see that the orders were carried out. The employees of the Missoula Mercantile Company received similar orders, and their employers saw to it that they obeyed...The employees of the Northern Pacific Railroad in the territory numbered about 2,000. They were under instructions to vote for Carter.^[4]

In 1889, Clark lobbied Montana Legislators for their vote to send him to D.C. as a US Senator for Montana. “But just as the state senate met to vote, a young state senator from Flathead County named Fred Whiteside stood up, waived four envelopes containing \$30,000 in case, and said a representative of Clark had paid four senators to vote for Clark for US Senate.”⁵ A grand jury declined to indict Clark, and a few weeks later the Legislature voted to send Clark to the U.S. Senate. Once there, the US Senate investigated and found Clark guilty. Clark resigned the seat in the US Senate and in 1900 he referred to the loss of 1888 again:

At the opening of the polls his [Daly’s] employees came flocking down the hill with Democratic tickets in their hands except that the name of the Republican nominee was pasted over mine. The Australian ballot system had not then been established and there were shift bosses at the polls who knew the men and made them show their tickets before depositing them.^[6]

The difference is in how the ballots were provided to voters, and how they were delivered to the election judges.⁷ In the 1888 election, the political parties printed ballots of different colors containing the names of their candidates for office. These political party pre-printed ballots were handed out to voters to take to the polls and cast their vote. Employers posted supervisors at the polls to ascertain how their workers were voting in the election. Not only were voters bribed with cigars, beer, whiskey, and money; but voters were also threatened with losing their jobs and livelihoods if they

⁴ The Butte Miner, Nov. 28, 1888, second column on the page:

<https://www.newspapers.com/image/343207182> (last accessed Aug. 2, 2018).

⁵ Krys Holmes, Susan C. Dailey, Dave Walter, *Montana: Stories of the Land*, 196 (Montana Historical Society Press 2008).

⁶ Toole, at 180.

⁷ “Every elector shall deliver, in full view of one of the judges of election, a single ballot or piece of paper, on which shall be written or printed the names of the persons voted for, with a pertinent designation of the office which he or they may be intended to fill; said ballots may be open or folded, as the voter may choose.” Montana Territory Compiled Statutes of 1887, § 1018, p. 926.

voted for the “wrong” candidate. Mont. Code Ann. §§ 13-35-214, 215, 217, 218, 220, and 226.

In response, the 1889 Legislature enacted the Australian Ballot Law providing for a mandatory secret ballot in elections, Session Laws 1889, p. 145. As a result of this enactment, Montana became the first state in the nation to hold an election using the so-called Australian ballot whereby the voters would be provided with a uniform ballot by an election judge at the polling place, to be filled out in a voting booth, and returned by the voter to the ballot box in a secrecy folder. The Australian ballot law was in place at the time of the ratification of the original Constitution in 1889 and was explicitly provided for in the current Constitution in 1972.

CURRENT BACKGROUND

Times have changed, and people have become more accustomed to publicly sharing information on how they cast their ballot. Knowing the historical reasons for laws providing a voter with the right to secrecy in how they cast their ballot are important considerations for voters to consider in determining whether to waive their right to privacy in their ballot.

While one might think that the dangers of illegal influence and threats to voters no longer exists, it is important to note that intimidation and coercion still occurs.

[S]tudents at Chelyabinsk State University were informed that, to express their gratitude for government-issued scholarships, they should support United Russia, Putin’s party. To verify that support, officials required students to use their cell phones to photograph their ballot as they voted. Some students complied with a twist: they placed a thread in the shape of a check mark next to ‘United Russia,’ photographed the ballot, and then removed the thread and voted as they pleased.

Benjamin Nathans, *The Real Power of Putin*, New York Review of Books (Sept. 29, 2016).⁸ *Accord Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir. 2016) (Crookston tries to minimize the risk of vote buying as a relic of a bygone electoral era. But plenty of cases—in this circuit alone—show otherwise. [Citing cases.]⁹ The links between these

⁸ Available at <http://www.nybooks.com/articles/2016/09/29/real-power-vladimir-putin/> (last visited Aug. 2, 2018).

⁹ See *United States v. Robinson*, 813 F.3d 251, 254 (6th Cir. 2016) (affirming a vote-buying conviction); *United States v. Turner*, 536 F. App'x. 614, 615 (6th Cir. 2013)

problems and the prohibition on ballot exposure are not some historical accident; they are ‘common sense.’”

Shortly before the 2016 elections, voters in several states¹⁰ challenged laws preventing the taking of and sharing of ballot selfies. In some states, voters won their arguments that the restrictions were unconstitutional: *Rideout v. Gardner*, 838 F. 3d 65 (1st Cir. 2016) (New Hampshire ballot selfie prohibition violates the First Amendment); *Ind. Civ. Liberties Union Found. Inc. v. Ind. Sec’y of State*, 229 F. Supp. 3d 817 (S.D. Ind. 2017) (Indiana ballot selfie prohibition unconstitutional). In some states, the laws were upheld and voters were prevented from taking ballot selfies: *Crookston v. Johnson*, 841 F.3d 396, (6th Cir. 2016) (not reaching the merits, upholding Michigan ban on ballot selfies, violators ballot not counted); *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp 3d 454 (S.D.N.Y. 2017) (upholding prohibition on ballot selfies at polling place).

Montana’s law was not challenged in court, but it is important that the state and county election officials interpret its application to facts in a way that upholds the law, while providing for a citizen’s right to freedom of speech.

BALLOT SELFIES IN MONTANA

Voters may wish to voluntarily take a photo of themselves with their marked ballot to encourage others to vote or to demonstrate their civic engagement in our Democracy. In Montana, Mont. Code Ann. § 13-35-201 has been interpreted by COPP to allow an individual to photograph their marked absentee ballot and voluntarily share the image on social media, *Olsen and Eaton v. Van Dyk* (Dep. Commissioner Colburg, June 30, 2011). If an absentee voter can post a ballot selfie without violating the law, voters at the polls on election day must be allowed the same right of expression so long as their photography does not disturb the conduct of the election.

A polling place is not a public forum and election officials have the right and obligation to regulate the “time, place and manner” of an election. *Burson v. Freeman*,

(same); *United States v. Young*, 516 F. App'x. 599, 600-01 (6th Cir. 2013) (same).” *Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir. 2016).

¹⁰ Matt Novak, *Your Vote Can Be Revoked If You Take a Ballot Selfie in Michigan*, Gizmodo.com (Nov. 7, 2016) (available at <https://gizmodo.com/your-vote-can-be-revoked-if-you-take-a-ballot-selfie-in-1788664542> (last visited Aug.2, 2018)).

504 U.S. 191, 197 (1992). This allows for laws like the prohibition on engaging in electioneering within a certain zone around polling places on election day, Mont. Code Ann. § 13-35-211. It allows for election officials to regulate conduct within the polling place, Mont. Code Ann. § 13-35-206.

The concern for election officials is that the picture taking might be disruptive at the polling place, or that the photographer might capture images of the ballots of other voters. To alleviate this possibility, some states appear to have set up a ballot selfie zone¹¹ within the polling place which would allow an individual to take a photograph without interfering with other voters or photographing non-consenting individual's ballots. However an election official chooses to accommodate a voter's right to take a ballot selfie in a polling place, a citizens' right to engage in political speech must be allowed so long as the voter's behavior does not disrupt the election taking place.

The Commissioner continues the standing interpretation of the law to allow individuals to voluntarily take a photograph of themselves with their ballot wherever they are, and to share it with whomsoever they chose, *Olsen and Eaton v. VanDyk*, and Mont. Code Ann. § 13-35-201. This interpretation does not extend to any instance indicating a voter is intimidated or coerced into sharing how they voted without their consent. At that point the Commissioner would work with the appropriate law enforcement officials to pursue enforcement of the law.

CONCLUSION

We appreciate the opportunity to discuss how the law applies to a citizen's right to political expression, the ability of election officials to regulate the manner of an election in a non-public forum, and the application of Montana's law to ballot selfies.

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¹¹ Patrick Hogan, *A New Hampshire court ruled that banning voting-booth selfies is unconstitutional*, Business Insider (Sept. 29, 2016) (available at <https://www.businessinsider.com/new-hampshire-ruled-banning-voting-booth-selfies-is-unconstitutional-2016-9> (last accessed Aug. 2, 2018)).

LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

Sincerely,



Jaime MacNaughton
Attorney for the
Commissioner of Political Practices

I agree with this Advisory Opinion and afford it the full weight of the Commissioner's authority.

DATED 3rd day of August, 2018.



Jeffrey A. Mangan
Commissioner of Political Practices

