

## Opinion No. 42-4156

September 23, 1942

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Mrs. Jessie M. Gonzales Secretary of State Santa Fe, New Mexico

{\*250} You have submitted to this office the question whether or not HR 7416, as passed by the Congress of the United States and signed by the President, is of any force and effect in New Mexico.

Such Act provides a method for the qualified voters to cast a ballot for electors for President and Vice - president of the United States, and senators and representatives in Congress.

Since the only pertinent question at this time is whether or not absentee voting for senators and representatives to Congress by qualified New Mexico voters who are now in the Armed Forces will be possible in the coming general election under this Act. I therefore limit my opinion to this problem alone and do not consider such portion of the Act that pertains to voting for electors for President and Vice-President of the United States.

It is pertinent to note that never before, as brought out in the Congressional debate on this bill, has the Congress of the United States ever attempted to pass a bill which would supersede any state election law. Therefore, the present Act raises a question which has never been directly passed on by any of the courts of this country.

Article I, Section 2 of the Constitution of the United States provides in part:

"The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

The Seventeenth Amendment to this Constitution provides:

"The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

In view of these two portions {\*251} of the United States Constitution, it seems clear that the various states have the power to prescribe the qualifications of their voters, subject only to the prohibitions of the Fourteenth, Fifteenth and Nineteenth Amendments, which are not involved in this question. Since the states have such power, the Federal

Government cannot interfere and prescribe different qualifications than those prescribed by the various states.

Article I, Section 4 of the United States Constitution provides:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Under this article it is equally clear that **only in the absence** of Federal legislation concerning the times, places and manner of holding elections, (except as to the places of choosing senators) may the states prescribe laws governing the time, place and manner of holding elections. Therefore, any legislation of Congress pertaining to such matters would, by the express provisions of the United States Constitution, supersede all state laws regulating such matters, whether prescribed by statute or in the constitution of this state.

Article VII, Section 1 of our New Mexico Constitution provides in part:

"Every male citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, \* \* \* shall be qualified to vote at all elections for public officers."

Our Supreme Court has held that under this pertinent part of Article VII, Section 1, above cited, that actual physical presence at the polls was required and that a statute authorizing voting by absentee ballot was therefore unconstitutional. *Thompson vs. Scheier*, 40 N.M. 199, 50 P. (2d) 293; *Baca vs. Ortiz*, 40 N.M. 435, 61 P. (2d) 320.

The Court stated in the *Thompson* case at 40 N.M. 204:

"\* \* \* but if in addition to fixing the qualification of voters that section of the Constitution also fixes the place of voting in the precinct of the voter's residence, then the legislative act in question is unconstitutional."

The decision then went on and held such statute authorizing absentee voting unconstitutional for the reason that Article VII, Section 1 also prescribed the **place** to vote. In other words, under this decision a qualified voter cannot vote by absentee ballot under a statute so providing because the Constitution of New Mexico has been construed to prescribe the **place** he must vote. Under this Act of Congress the Federal Government has now seen fit to exercise its power given in Article 1, Section 4, and in Article 1, Section 8, Subsection (18), of the Constitution of the United States, which provides:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

They have legislated accordingly. Congress has, by passing an Act inconsistent with our provisions relating to the place and manner of holding elections superseded all of our state provisions inconsistent with the present legislation and it can no longer be held, so far as voting for senators {\*252} and representatives to Congress is concerned, that our constitutional provision relating to the **place** of voting for such officers is still in effect.

Article VII, Section 4 of the New Mexico Constitution, provides:

"No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school."

Under this express constitutional provision, a man in the Armed Forces of our country does not lose his residence in this state and therefore remains a qualified voter the same as a state employee who is allowed to return once every two years to the precinct wherein he maintains his legal residence and casts his ballot, even though he has been physically absent from his precinct and county for the prescribed time.

It is noted that HR 7416 also supersedes our registration laws which are or might be in conflict with this bill. Section 2, Chapter 152, New Mexico Session Laws of 1939, provides:

"Any qualified elector may register by filling out and executing the affidavit of registration in triplicate hereinafter provided for and filing the original and duplicate of same with the county clerk of the county in which such elector resides in the manner hereinafter provided."

In view of this, it is plain that a person must be a qualified elector before he can register and therefore whether or not he is registered does not affect his qualifications as an elector of this state. Our law does not provide that before a person may become a qualified elector that he must register. It in fact provides only for the registration of qualified electors and not those who are otherwise qualified. Therefore, registration is a certain manner provided by our state for the conducting of elections and is superseded by HR 7416, insofar as it is inconsistent with such Act.

It is therefore my opinion that ballots should be printed in conformity with this Act, the manner of registration therein provided for should be complied with and any ballots cast pursuant to this Act should be counted in the coming general election.