

Opinion No. 45-4668

March 5, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Fulton J. Cox, Member House of Representatives Santa Fe, New Mexico

{*26} We have your letter of February 14, 1945, wherein you refer to your letter of October 11, 1944, wherein you request an opinion of this office concerning the constitutionality of House Bill No. 1, passed by the Sixteenth Legislature in the Special Session, commonly known as the Soldiers' Absentee Voting Law. On October 25, 1944, we questioned whether, at that time, we had jurisdiction to give you an official opinion, for the reason that under Section {*27} 3-302 of the 1941 Compilation we are only authorized to give official opinions to members of the Legislature on any subject pending before them, or under their control, with which they have to deal officially, or with reference to their duties in office. However, in view of the fact that the Legislature is now in session, and you may have to officially consider this question, as indicated by your letter, we are now issuing an official opinion on this question.

Our Supreme Court has held that Article 7, Section 1, of the Constitution of the State of New Mexico, in addition to fixing the qualifications of electors, also fixes the place of voting as in the precinct and, therefore, since the place of voting is fixed in the precinct, it would be unconstitutional to provide for voting at a different place than in the precinct wherein the person is a resident; and, therefore, under our Constitution, the person must present himself at the polls and there offer to vote. See *Thompson v. Scheier*, 40 N.M. 199, 57 P. 2d 293; *Baca v. Ortiz*, 40 N.M. 435, 61 P. 2d 320; and *Chase v. Lujan*, 149 P. 2d 1003, 48 N.M. 261.

It is, however, at this point, noted that in the above cases the Supreme Court was, in all instances, considering voting for State or County officials, and has never considered the question of whether our Legislature could pass a statute providing for absentee voting for members of Congress and presidential electors under the United States Constitution, which question is alone involved in your request, and is the sole constitutional question which you raised concerning our Absentee Voting provision.

The cases dealing with this matter have been extensively briefed by this office, and we unhesitatingly state that there has never been a reported case or proceeding that has held that the Legislature of any state did not have the power to provide for the qualified electors of such state to vote for presidential electors or Congressmen, by absentee ballot, where the State Constitution involved, like ours, otherwise prevents absentee voting. See cases set out in 14 A. L. R. at Page 1257 in addition to cases decided by various courts.

This question was passed upon by the House of Representatives of the United States, which is the sole judge of its own members, in 2 *Bartlett Contested Election Cases* 46.

This case involved the election of a member of the House of Representatives by absentee ballot during the Civil War from the State of Michigan, the Supreme Court of which had held, in *Twitchell v. Blodgett*, 13 Mich. 127, that the place of voting was fixed by the State Constitution. The House of Representatives nevertheless held that under the Constitution of the United States the Legislature of Michigan had the power, insofar as a member of the House of Representatives is concerned, to provide for absentee voting under the provisions of the United States Constitution.

The case of *Twitchell v. Blodgett*, *supra*, has been interpreted by our Supreme Court, in the case of *Chase v. Lujan*, *supra*, as being an identical holding under an identical constitutional provision as the New Mexico holding and constitutional provision.

In the New Hampshire case of *In Re Opinion of Justices*, 45 N. H. 595, the Supreme Court of New Hampshire found that the Constitution of that state specifically required all persons to vote in person. It was, nevertheless, held that under the provisions of the United States Constitution, which the State Constitution of New Hampshire could not limit, that the Legislature of each state had been granted the right to provide for the election of presidential electors and representatives to Congress in any manner in which they may choose, including absentee voting.

This case was followed in principle in the case of *In re Opinion of Justices*, 113 Atl. 293.

{*28} At the present time there are only two states in the United States whose constitutions, at present, are construed to prevent absentee voting. One is Kentucky and the other is New Mexico. Recently, the identical question which you present was passed upon by the Supreme Court of Kentucky in the case of *Commonwealth v. O'Connell*, 298 Ky. 44, 181 S. W. 2d 691, wherein the cases cited above were cited and discussed, together with other cases which are not set out in detail or specifically cited for the reason that they are referred to in this opinion. The Court held that the act involved authorized absentee voting in presidential and congressional elections by constitutionally qualified citizens of the state, absent from their voting precincts during a state of war, is valid under the Federal Constitution, notwithstanding provisions of state constitutions.

Article 1, Section 4, Constitution of the United States, provides:

"The time, 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."

Article 2, Section 1, Constitution of the United States, provides:

"Each state shall appoint, in such **manner as the Legislature thereof may direct, a number of electors** * * *" (Emphasis ours.)

In view of the above provisions, courts passing upon this question have universally held that the Legislature had the right to provide the manner of voting by absentee ballot for congressmen and presidential electors, subject only, in the case of congressmen, to the power of Congress to change.

In view of the foregoing, it is my opinion, in accordance with the recent opinion of the Supreme Court of Kentucky and the opinions of other states, that a Legislature may constitutionally provide for absentee voting for congressmen and presidential electors by the qualified electors of such state, by absentee ballot, even though the Constitution otherwise prohibits voting by absentee ballot for other officers.

The opinions of our Supreme Court have not held that a person, to be a qualified elector, must be personally present at the polls, and therefore the requirement of the above rule is fully met in this instance.

If our court should, in the future, hold that it was a qualification of an elector to be personally present, it would automatically follow that we could have no qualified electors in this state except upon the day of election, and that therefore our registration laws, passed pursuant to Section 1 of Article 7, would be unconstitutional for the reason that the Legislature can only provide for the registration of qualified electors, which there would be none, except upon the day of election and, further, under Section 2 of Article 7, we would have no qualified electors on January 1, or any other date, except upon election day at the particular moment of offering to vote, who could take and assume office.

Hoping that the foregoing completely answers your questions, I remain

By HARRY L. BIGBEE,

Asst. Atty. General