Opinion No. 57-223

September 10, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General

TO: The Honorable Natalie Smith Secretary of State, Santa Fe, New Mexico

QUESTION

QUESTION

Is Laws 1957, Chapter 217, constitutional?

CONCLUSION

Yes.

OPINION

ANALYSIS

Laws 1957, Chapter 217, constitute the latest attempt at authorizing absentee voting in New Mexico. Passing over the details and mechanics of the law, it is seen that it authorizes absentee voting in primary and general elections by the following four classes of individuals:

1. Members of the armed forces;

2. Federal employees serving outside the territorial limits of the United States;

3. Members of religious groups or welfare agencies attached to the armed forces;

4. A spouse or dependent of one falling into any one of the foregoing three categories.

The law is restricted to voting for presidential electors, senators and congressmen.

At the outset we are confronted with a formidable array of cases holding unconstitutional absentee voting laws in New Mexico. See Thompson vs. Scheier, 40 N.M., 199, 57 P.2d 293; Baca vs. Ortiz, 40 N.M. 435, 61 P.2d 320, Chase vs. Lujan, 48 N.M. 261, 149 P.2d 1003; and State ex rel West vs. Thomas, 62 N.M. 103, 305 P.2d 376. Much the same result has been announced in Arledge vs. Mabry, 52 N.M. 303, 197 P.2d 884, and State ex rel Board of County Commissioners vs. Board of County Commissioners, 59 N.M. 9, 277 P.2d 960, holding that the vote must be cast in person in the precinct of residence. This under the provisions of Article VII, Section 1, Constitution of New Mexico, which insofar as material is as follows:

"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, except idiots, insane persons, persons convicted of a felonious or infamous crime unless restored to political rights, and Indians not taxed, **shall be qualified to vote** at all elections for public officers. . . ." (Emphasis ours.)

"The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting . . ."

Furthermore, some of the above cases specifically held that the second sentence above quoted constitutes no authority in the Legislature to enact general absentee voting laws.

The foregoing being so, we must address ourselves to the inquiry if Laws 1957, Chapter 217, is constitutional by virtue of its being restricted to but three classes of Federal officers, towit: Presidential electors, United States Senators and Congressmen. A searching resume of our cases is thus demanded.

Thompson vs. Scheier, supra, was concerned with the effect of the absentee voting law, in an election contest, upon the office of county sheriff. The holding was as aforesaid. In the opinion it was intimated that the **qualifications** of a voter and the **place** of voting are two different things. This is indicated by the court's reasoning at 40 N.M. 204, as follows:

"If that part of section 1 of article 7 of the Constitution which reads, '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. * * * The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and place of voting,' only fixes the qualification of voters, then the power to 'regulate the manner, time and place of voting' would authorize the Legislature to provide for the casting of the absentee ballots at the county seat, and this alone would not be constitutionally objectionable; **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."** (Empasis ours.)

And, at page 213, as follows:

"The principal reasons for requiring ballots to be cast in the precinct of the residence of one offering to vote are for his convenience, and that his neighbors, **acquainted with his qualifications,** may challenge his vote. **Both are indispensable** to an expression of the will of the people by its qualified voters. We hold that section 1 of article 7 of the Constitution requires a voter to cast his ballot in the precinct in which he resides. The law provides that it be cast in the county seat." (Emphasis ours.)

The law in question was a general law apparently not restricted to certain classes of voters as here.

Baca vs. Ortiz, supra, was concerned with a general absentee voters law, as well as one for the benefit of railroad employees. The Court adhered to the Thompson case, holding that under Article VII, Section 1, of the State Constitution personal presence at the polls was mandatory, and that any absentee voting law was unconstitutional.

Chase vs. Lujan, supra, concerned an absentee voters law enacted for the benefit of those in the armed forces. The Court reaffirmed its two prior cases above cited. In the Chase case it was perhaps indicated that personal presence at the polls in the precinct of residence was a **qualification** to vote, thus being **unlike** the opinion in the Thompson case. The importance of this point will be developed later in this opinion. In this regard the Court, at 48 N.M. 271, 272, stated:

"It makes no difference whether the conditions which must converge to the point of permitting a vote to be cast be called a power, qualification, authority, capability, essential, competency or requisite, they, nor the convergence of all of them in order to allow the citizen to vote, may neither be enlarged, diminished or dispensed with under the pretext of legislature regulation.

"In order to vote a person must possess certain qualifications and he must do certain things. Elections are determined by those who vote, not by those merely potentially qualified to vote. Davy v. McNeill, 31 N.M. 7, 240 P. 482; Fabro v. Town of Gallup, 15 N.M. 108, 103 P. 271, 273. In White v. Commissioners of Multnomah County, 13 Or. 317, 10 P. 484, 486, 57 Am. Pep. 20, it was stated:

"'Every definition of the qualification of voters' said Mr. Drake, the author of the Law of Attachment, arguing in Blair v. Ridgely, 41 Mo. 63 (97 Am. Dec. 248), 'is but a statement of the terms on which men may vote; and in every instance such definitions refer to what a party has done as well as to what he is. They say to the voter: "If you have done certain things you can vote." He who does not register is not qualified to vote, and hence is not a "qualified elector," -- a phrase that is used five times in the constitution to signify those who are entitled to go to the polls on election day and legally vote. See Byrne v. State, 12 Wis. 519, 524; Sanford v. Prentice, 28 Wic. (358), 363. But under this act he who goes to the polls on election day, possessing every constitutional qualification, may find that the legislature has stepped in between him and the constitution. He finds his vote denied because he has not done something which the legislature has required him to do. He discovers that he is not a qualified elector, and yet he is told that his omission to do the act which had effect to disqualify him is not itself a disqualification; or if he have performed the act, that his performance does not constitute a qualification. **This will not square with the logic of facts.** The distinction between what is substantive and what is model is confounded. He who has a right to something tomorrow can never be secure of his right before tomorrow comes.'" (Emphasis supplied.)

To further illustrate that the Court in the Chase case may have held that personal presence was a qualification, attention should be directed to the dissenting opinion, not because it reflects the law, but because it points out what the dissenters thought was held by the majority. At 48 N.M. 275, it was said:

"As Mr. Justice Threet and I view it, the prevailing opinion, in brief, achieves these unfortunate results: (1) This court becomes committed to an interpretation of the Constitution which will, perhaps, forever prohibit absentee voting in New Mexico as to any New Mexico officials; and likewise for members of the Congress regardless of any form of Federal ballot proposed. Since the language 'in which he offers to vote' is, by the majority's interpretation, made a part of the right, **the qualification,** to vote, any effort to amend the article in which the language is found -- the article on franchise -- would be a useless gesture, as the legislature has, itself, doubtless felt."

Further, at page 278:

"And it is clear that the **qualifications** which confer the **right** to vote, and the **place** at which that right may be exercised, are things quite distinct from each other. * * *"

More importantly, the dissent pointed out at page 281:

"We know it to be generally held that a state may provide for **absentee voting for presidential electors** under the power given to the legislatures of the various states under the Federal Constitution. Sec. 1, Art. 2. The same result is to be achieved under Section 4 of Article 1 as to representatives and senators, **excepting that the qualifications** for electors voting for members of Congress 'shall have the Qualifications requisite for Electors for the most numerous Branch of the State Legislature.' Sec. 2, Art. 1. **This would indicate rather clearly that under the majority opinion neither the Congress nor our state legislature, under any character of legislation, could now provide for New Mexico's absentees participation in the election of such congressional officers."** (Emphasis supplied.)

Despite the fact that the dissenting opinion strongly indicated that the majority opinion in the Chase case stood for the proposition that personal presence was a qualification, it seems to us, upon reflection, that the majority opinion rather carefully avoided such a holding. Notwithstanding that a dissenting opinion may be employed to clarify or interpret a majority opinion, we must bear in mind that a dissent is not the law and we hold that Chase v. Lujan is not a holding that personal presence is a qualification. We must say, however, that we are not absolutely free from doubt on this question, and reach this result only after considerable deliberation on our part.

State ex rel West v. Thomas, supra, was a reaffirmance of the general doctrine in New Mexico against absentee voting.

So much for the New Mexico cases. However, since the United States Constitution is the supreme law of the land, we must turn to that instrument to see if Chapter 217, being confined to **Federal** officers, is constitutional.

Article I, Section 2, paragraph 1, Constitution of the United States is as follows:

"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. . . ." (Emphasis ours.)

The first paragraph of Article I, Section 4 of said Constitution reads:

"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 chosing Senators. . . ."

As to the express provision dealing with United State Senators, which is here material, Amendment XVII in its first paragraph reads:

"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 legislatures (Emphasis ours.)

As to Presidential electors, Article II, Section 1, in its second paragraph provides:

". . . Each State shall appoint, **in such Manner as the Legislature thereof may direct,** a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. . . ." (Emphasis ours.)

Keeping such quoted language before us, we turn to cases interpreting the same.

In Commonwealth ex rel. Dummitt, Attorney General, vs. O'Connell, Secretary of State, 298 Ky.44, 181 S.W.2d 691, there was challenged the Kentucky absentee voters law, as to the **presidential and congressional elections, insofar as members of the armed services were concerned. Such right to absentee voting was denied by the State Constitution.** The Court then directed its attention to the above quoted provisions of the Federal Constitution, and upheld the statute as to **presidential** and **congressional** elections, saying at 298 Ky.52 and 53:

"'It will be observed, however, **that if a provision of the state Constitution may properly be regarded as relating to the qualifications of the electors** of the most

numerous branch of the state legislature, **an act of the state legislature in violation thereof is invalid as to Representatives and United States Senators, since the Federal Constitution, with reference to Representatives (U.S. Const. art. 1, sec.2) and United States Senators (art. 17, Amendment U.S. Const.) provides that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.** And so, while the legislature was advised in Opinion of Justices, 1921, 80 N.H. 595, 113 A.293, supra, that a proposed absentee voting bill, if enacted, would be a valid exercise of legislative power so far as applicable to the choice of presidential electors, the opinion was expressed (contrary to the advice given in Opinion of Justices, 1864, 45 N.H.595, as to Representatives) that it would not be so as to Representatives and Senators in Congress, since, in the opinion of the Justices, the provisions of the State Constitution, **construed to require the voting to be in person at the place and time specified, which would render the proposed act invalid as to state officers related to the qualifications of electors, and would therefore invalidate the proposed act even as applied to Senators and Representatives in Congress.'**

"Of course, if being present at the polls and casting one's ballot in person is a 'qualification,' within the meaning of Clause 1, Sec. 2 of Article I of the Federal Constitution, which provides that voters in each state for members of the House of Representatives (and since the 17th Amendment, United States Senators) shall have the qualifications requisite for electors of members of the most numerous branch of the State Legislature, **so much of the Act under consideration as pertains to absentee voting in Congressional elections, is unconstitutional,** since it permits absent members of the State's Electorate who are prohibited by the State Constitution from voting for State Legislators to vote in Congressional elections. But, notwithstanding the last of the several Opinions of the Justices of New Hampshire (80 N.H. 595, 113 A.293) negating their former and opposite conclusions (45 N.H.595), and their expression of doubt on the subject (80 N.H.595, 113 A. 293), **we are inclined to the belief that qualifications as used in Sect.2 of Art. I of the Federal Constitution means natural endowments or requirements which fit a person for a place, office or employment, or as an elector, and that restrictions on the right of a voter to vote because of of his failure to register or to vote in a particular manner at a certain time and place, are limitations on the right, and not on the qualification to exercise it.** Under this concept, the Congress has the power to abrogate all State laws and Constitutional provisions which prescribe the method by which an otherwise qualified elector may cast his ballot in Congressional elections, although it may not interfere with the method designated by a State Legislature for the appointment of Presidential Electors. Ex Parte Siebold et al., 100 U.S. 371, 25 L. Ed. 717. And that Congress must have so construed the meaning of 'qualifications' as used in Section 2 of Article I is at least presumable from the fact that by the Act of September 16, 1942, Chap. 561 Title 1, Sects. 3 to 15, 50 U.S.C.A. secs. 303-315, it attempted to confer on members of the Armed Forces in time of War the right to vote for Presidential Electors, United States Senators and Representatives, regardless of the provisions of State laws, and by the amendment of March 31, 1944, recommended to the states the adoption of legislation which would authorize such 'absentee voting' in all elections."

Thus the Kentucky Court pointed out the distinction between what powers the United States Constitution gives state legislatures (that is to say directly, without regard to state constitutions) over election provisions for presidential electors, and what powers the United States Constitution gives state legislatures over election provisions for members of the House and Senate of the United States.

Thus the importance of determining whether personal presence at the polls in New Mexico is a qualification. We do not believe that our Court has ever so held, and bearing in mind the principle that statutes are presumable constitutional until **clearly** shown to be otherwise, we believe that Chapter 217, Laws 1957, is constitutional as to presidential electors as well as congressional officers. We believe that the Kentucky Court was correct in both its holding and its reasoning applicable thereto, including the meaning of the term "qualifications" as used in the Federal Constitution.

Yet another matter must be pursued. You will notice that we are not dealing with a general absentee voting law, but instead one which is limited to four categories, above summarized by us, and the question arises as to whether such violates the equal protection of the laws clauses of the Federal or New Mexico Constitutions. Our research discloses very little litigation on this point. Where challenged on this basis, absentee voting laws have been sustained against the argument that they constitute "class legislation." 14 A.L.R. 1265; 18 Am.Jur., Elections § 214. Some of the cases gave the right to an even narrower class than Laws 1957, Chapter 217.

In conclusion, we again state that we are not absolutely certain as to the answers herein given, for the reason that we have had repeated decisions by our Supreme Court denying constitutionality to absentee voting laws. Our conclusions herein are based upon the principle that statutes are presumably constitutional, and on the fact that our Supreme Court has never expressly held personal presence to be a qualification. We hold Laws 1957, Chapter 217 constitutional as to voting for presidential electors, as well as congressional officers.