

No. 497

**ELECTIONS—ABSENT VOTERS—REGISTRATION FOR
ELECTIONS—VOTING AND VOTERS—ARMY—NAVY—
MARINE CORPS—COAST GUARD—ARMY NURSE
CORPS—WOMEN'S NAVY RESERVE—WOMEN'S ARMY
AUXILIARY CORPS—CONGRESSMEN, elections for—
REPRESENTATIVES IN CONGRESS, elections for—
SENATORS (U. S.), elections for.**

Held: Every Montanan absent from the place of his residence and serving in the land or naval forces of the United States, including the members of the Army Nurse Corps, the Navy Nurse Corps, the Women's Navy Reserve, and the Women's Army Auxiliary Corps, who is or was eligible to register for and is qualified to vote at the coming election under the laws of the state, shall be entitled—as provided in Public Law 712 of the Seventy-Seventh Congress of the United States—to vote at the election on November 3, 1942, for United States Senator and Representative in Congress from Montana, notwithstanding the registration laws of this state. No opinion is expressed herein in regard to the right of such persons to vote for presidential electors under said law.

October 1, 1942.

Honorable Sam W. Mitchell
Secretary of State
State Capitol
Helena, Montana

Dear Mr. Mitchell:

You have requested an opinion from this office regarding the power of the National Congress to pass legislation giving to members of the

armed forces the right to vote for certain offices, notwithstanding the provisions of Montana law relating to the registration of qualified voters.

Public Law 712 was passed last month by the Seventy-Seventh Congress of the United States and was approved on September 16, 1942. It is entitled, "An Act to provide for a method of voting, in time of war, by members of the land and naval forces absent from the place of their residence." Section One of the Act provides:

"In time of war, notwithstanding any provision of State law relating to the registration of qualified voters, every individual absent from the place of his residence and serving in the land or naval forces of the United States, including the members of the Army Nurse Corps, the Navy Nurse Corps, the Women's Navy Reserve, the Women's Auxiliary Corps, who is or was eligible to register for and is qualified to vote at the election under the law of the State of his residence, shall be entitled, as provided in this Act, to vote for electors of President and Vice-President of the United States, United States Senators, and Representatives in Congress."

Although no registration prior to casting a vote is required of the elector to show his qualifications, Section Six of the Act prescribed a form of affidavit to be executed by the voter:

"OATH OF ELECTOR

"I do hereby swear (or affirm) that I am a citizen of the United States and am now of the age of at least twenty-one years, or will be on the.....(here insert the date of the election); that I will have been an inhabitant of the State of..... for.....years next preceding this election and for themonths preceding such election a resident of the county of....., residing at (street and number, if any).....in the city (or town) of.....; that I am in the active military (or naval) service of the United States; and that I have not received or offered, do not expect to receive, have not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding of a vote at this election, and have not made any promise to influence the giving or withholding of any such vote; and that I have not been convicted of bribery or any infamous crime, or, if so convicted, that I have been pardoned or restored to all the rights of a citizen, without restriction as to the rights of suffrage.

.....
"Voter MUST sign here and oath

MUST BE administered and attested.

"Subscribed and sworn to before me this.....day of
.....

.....
"Commissioned Officer."

This procedure obviously differs from the requirements of registration of electors in the State of Montana, where they must register in person. (Chapter 172, Laws of 1937.) Hence, this question presents itself: Does the National Congress have the power and authority to supercede the laws of Montana with regard to registration of qualified electors who desire to vote for candidates for the office of United States Senator and Representative in Congress from Montana at the coming election?

Section Two of Article One of the United States Constitution provides:

"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."

Section One of the Seventeenth Amendment to the Constitution of the United States 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 the electors of the most numerous branch of the state legislature."

Section Four of Article One 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."

The Montana Constitution, in Section Two of Article Nine, and Section 540, Revised Codes of Montana, 1935, set forth the qualifications entitling a person to vote at all general elections and for all officers elective by the people. The National Congress has made no attempt to alter or set aside these qualifications, for Public Law 712 specifically applies only to "every individual . . . who . . . is qualified to vote at any election under the law of the State of his residence . . ."

Section Nine of Article Nine of the Montana Constitution gives to the Legislative Assembly the power "to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise." But our Supreme Court has said:

"It is a principle long established that registration is no part of the qualifications of an elector and adds nothing to them; it is merely a method of ascertaining who the qualified electors are, in order that abuses of the elective franchise may be guarded against."

State ex rel. Lang v. Furnish, et al., 48 Mont. 28, 32, 33, 134 Pac. 297.

State ex rel. Fadness v. Eie, et al., 53 Mont. 138, 145, 162 Pac. 164.

The United States Supreme Court, in the case of *Ex Parte Yarbrough* (1884), 110 U. S. 651, 660, 663, has used the following language in interpreting Sections Two and Four of Article One of the United States Constitution:

" . . . the Congress (has) been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the Constitution. . . ."

"It was not until 1842 that Congress took any action under the power here conferred, when, conceiving that the system of electing all the members of the House of Representatives from a State by general ticket, as it was called, that is, every elector voting for as many names as the State was entitled to representatives in that house, worked injustice to other States which did not adopt that system, and gave an undue preponderance of power to the political party which had a majority of votes in the State, however, small, enacted that each member should be elected by a separate district, composed of contiguous territory. 5 Stat. 491.

"And to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States, Congress, by the act of February 2, 1872, thirty years later, required all the elections for such members to be held on the Tuesday

after the first Monday in November in 1876, and on the same day of every second year thereafter. . .

"Will it be denied that it is the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it shall be done, and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud? . . .

"It is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.

"The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election. . .

"The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications, thus furnished as the qualification of its own electors for members of Congress.

"It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State. . ."

Therefore, it is my opinion every Montanan absent from the place of his residence and serving in the land or naval forces of the United States, including the members of the Army Nurse Corps, the Navy Nurse Corps, the Women's Navy Reserve, and the Women's Army Auxiliary Corps, who is or was eligible to register for and is qualified to vote at the coming election under the laws of this state, shall be entitled—as provided in Public Law 712 of the Seventy-Seventh Congress—to vote at the election on November 3, 1942, for United States Senator and Representative in Congress from Montana, notwithstanding the registration law of this state. No opinion is expressed herein in regard to the right of such persons to vote for Presidential Electors.

It should be pointed out Montana's absent voter's law (Sections 715-735, Revised Codes of Montana, 1935; Chapter 32, Laws of 1941) permits qualified Montana electors who have complied with the laws in regard to registration to vote by absent voter's ballot; and Chapter 144, Laws of 1941, provides the procedure to be followed by any elector who votes by absent voter's ballot by reason of his active service in the armed forces of the United States to insure his registry card shall not be removed from the official register or cancelled as provided by Chapter 147, Laws of 1937. (Opinion number 463, Volume 19, Report and Official Opinions of the Attorney General.) Such qualified Montana elector who has complied with the registration laws of this state and who votes by absent ballot will be able to vote for all elective offices to be filled at the election. Public Law 712, *supra*, provides no official war ballot shall be valid if the voter has voted in person or by absentee ballot in accordance with the procedure provided by the laws of Montana.

Sincerely yours,

R. V. BOTTOMLY
Attorney General