

VOLUME NO. 34

Opinion No. 40

ELECTIONS - Electors, qualification, residence; ELECTIONS - Registration, residence of elector; RESIDENCE - Qualification as elector. Article IX, section 2, Constitution of Montana; sections 11-716, 23-2701 and 23-3724, R.C.M. 1947.

HELD: 1. Durational residence requirements for elector qualification contained in Art. IX, sec. 2, Constitution of Montana, and in sections 11-716 and 23-2701, R.C.M. 1947, are unconstitutional.

2. Any person, who otherwise qualifies, must be allowed to register and vote if such person is a resident of Montana prior to the close of registration for a given election.

April 13, 1972

Mr. J. Fred Bourdeau
Cascade County Attorney
County Courthouse
Great Falls, Montana 59401

Attention: Michael T. Greely

Dear Mr. Boudeau:

You have requested my opinion as to the effect of the recent United States Supreme Court decision in **Dunn v. Blumstein**, 40 L. W. 4269, on the Montana durational residence requirements for voting purposes.

In **Dunn v. Blumstein**, supra, the U.S. Supreme Court struck down Tennessee's voter qualification requirements of one-year residence within the state and three months within the county. In so doing, the court examined those provisions of the Tennessee constitution and Tennessee statutes relating to durational residence requirements. The court discussed at great length the purpose of residence laws, and the state interest involved. The court summarized at p. 4273:

“Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions upon only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. (Citing authority) Absent a compelling state interest, a state may not burden the right to travel in this way.”

Residence requirements for voting purposes in Montana are set forth in Article IX, section 2, Constitution of Montana, which provides in pertinent part:

“Every person of the age of nineteen (19) years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are, or hereafter may be, elective by the people, and, except as hereinafter provided, upon all questions which may be submitted to the vote of the people or electors: First, he shall be a citizen of the United States; second, he shall have resided in this state one year immediately preceding the election at which he offers to vote, and in the town, county or precinct such time as may be prescribed by law.” (Emphasis supplied)

In addition to the Montana constitutional provisions set forth above, section 23-2701, Revised Codes of Montana, 1947, provides in pertinent part:

“(1) No person may be entitled to vote at general and special elections for officers which are elective, and upon questions submitted to the vote of the people unless he has the following qualifications:

* * *

(c) He has met the residence requirements for voting provided in the constitution of the state of Montana and has resided in the county thirty (30) days immediately preceding the election at which he offers to vote, except that if he has resided in the state for thirty (30) days immediately preceding the election at which he offers to vote, he shall be allowed to vote for president and vice president of the United States;”

* * *

An additional residence requirement to vote in municipal elections is set forth in section 11-716, R.C.M. 1947, which provides:

“All qualified electors of the state who have resided in the city or town or an area which has been annexed by such city or town for six months and in the ward or an area which has been annexed and placed in a ward for thirty days next preceding the election are entitled to vote at any municipal election, including elections involving or held under the commission form of government, commission-manager plan or other form of municipal government.”

As previously quoted, the United States Supreme Court in **Dunn v. Blumstein**, *supra*, held that durational residence requirements of one year within the state and three months within the county are void as an impermissible burden on the right to travel. On the basis of this decision, it is apparent that the above-quoted Montana constitutional and statutory provisions requiring one year residence within the state and thirty days' residence within the county as a qualification of being eligible to vote are unconstitutional. Also unconstitutional are the requirements of section 11-716, *supra*, that a person be a resident of a city or town for six months and of a ward for thirty days before being eligible to vote in a municipal election.

The question then becomes one of what residence requirement, if any, will now apply in Montana as a result of the unconstitutionality of the Montana constitutional and statutory provisions relating to durational residence requirements. In **Dunn v. Blumstein**, the United States Supreme Court did not strike down the requirements of resi-

dence as a condition placed on exercising the right to vote, but rather the court struck down durational residence requirements which set a specific period of time that a person must reside within a state or subdivision thereof before being eligible to vote. The court stated at p. 4276:

“The State’s legitimate purpose is to determine whether certain persons in the community are bona fide residents. A durational residence requirement creates a classification which may, in a crude way, exclude nonresidents from that group. But it also excludes many residents. Given the state’s legitimate purpose and the individual interests which are affected, the classification is all too imprecise.

* * *

“In general, it is not very difficult for Tennessee to determine on an individual basis whether one recently arrived in the community is in fact a resident, although of course there will always be difficult cases. Tennessee has defined a test for bona fide residence, and appears prepared to apply it on an individualized basis in various legal contexts. That test could easily be applied to new arrivals.”

Montana has also adopted rules for determining residence of potential voters in section 23-3022, R.C.M. 1947. The United States Supreme Court has found that the application of these rules to prospective voters without applying a durational residence requirement is sufficient to protect the interest of the state in guaranteeing the purity of the vote.

In *Dunn v. Blumstein*, *supra*, the court recognized and accepted an enactment by the Tennessee legislature closing registration for a period of thirty days preceding an election. While recognizing that a period of closed registration would deny recent arrivals the right to register and vote, the court stated at p. 4275:

“Fixing a constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that thirty days appears to be an ample period of time for the state to complete whatever administrative tasks are necessary to prevent fraud — and a year, or three months, too much. This was the judgment of Congress in the context of presidential elections. And, on the basis of the statutory scheme before us, it is almost surely the judgment of the Tennessee lawmakers as well. As the court below concluded, the cutoff point for registration thirty days before an election

‘reflects the judgment of the Tennessee legislature that thirty days is an adequate period in which Tennessee’s election officials can effect whatever measures may be necessary, in each particular case confronting them, to ensure purity of the ballot and prevent dual registration and dual voting.’”

The Montana legislature has also adopted statutory provisions relating to the close of registration. These provisions are contained in section 23-3016, R.C.M. 1947, which provides in pertinent part:

“(1) The Registrar shall:

(a) Close registrations as follows: (i) thirty (30) days before any federal election; (ii) at noon the day before election for voters entitled under the provisions of section 23-3724, R.C.M. 1947, to register at that time; (iii) for forty (40) days before any election other than hereinabove provided.”¹

In **Dunn v. Blumstein**, *supra*, the court stated at p. 4278:

“... since Tennessee creates a waiting period by closing registration books thirty days before an election, there can be no basis for arguing that any durational residence requirement is also needed to assure knowledgeability.”

However, the court also recognized that the state has an interest in assuring that voters are bona fide residents, as is stated at page 4274:

“We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the states have the power to require that voters be bona fide residents of the relevant political subdivision.”

Thus, the United States Supreme Court has struck down durational residence requirements for voting as not being a valid state interest, but has accepted a requirement of bona fide residence and a period of closed registration as necessary to protect the interests of the state.

The Montana legislature has provided in section 23-3016, *supra*, for a statutory period when registration shall be closed. Under the decision in **Dunn v. Blumstein**, *supra*, this requirement appears valid. Thus, if a person desires to register to vote, he must be a resident at the time he registers, and such registration must be accomplished within

¹The provisions of section 23-3724, R.C.M. 1947, relating to registration of persons serving in the armed forces of the United States, are exceptions to the general registration requirements and these specific provisions would control over the general close of registration statutes when applicable.

the statutory period set forth in section 23-3016, supra; i.e., thirty days before a presidential election and forty days before any other election, unless otherwise provided by law.

THEREFORE, IT IS MY OPINION that:

1. The durational residence requirements for voter qualification set forth in Article IX, section 2, Constitution of Montana, and in sections 11-716 and 23-2701, R.C.M. 1947, are unconstitutional; and
2. Any person, who otherwise qualifies, must be allowed to register and vote if such person is a resident of Montana prior to the close of registration for a given election.

Very truly yours,

ROBERT L. WOODAHL
Attorney General