

ELECTIONS: Public Act 712 of Congress does not relieve
WAR BALLOTS and Election officials of duty to furnish absentee
ABSENTEE BALLOTS: ballots to persons in military service.

October 9, 1942

Mr. William H. Tellman
Clerk of the County Court
Cole County
Jefferson City, Missouri

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Dear Sir:

This is in reply to yours of recent date which is
as follows: "

"We are faced with a legal question
upon which we are asking you to rule.

"We are in receipt of a request from
a citizen of Cole County, who is now
in the military service, asking us to
forward an absentee military ballot to
him. We find that the Secretary of
State of Missouri has reported to us
that this voter has applied for the
Official War Ballot, provided under
Public Law 712, Seventy-seventh Con-
gress, Second Session, and that that
ballot has been forwarded. We are in
doubt as to our right to forward the
Missouri absentee military ballot. We
have communicated with the Secretary
of State concerning the matter. He
explains that his office has no auth-
ority for giving legal advice, that
being the function of the Attorney
General, and he suggests that we ask
you for an opinion in which request he
joins."

Public Law 712, which is an act of the 77th Congress,
provides for a war ballot for absentee voters in military

service. Such voters by this ballot may vote for electors for President and Vice President, or for Senator or Member of the House of Representatives. Request for the War Ballot is made to the Secretary of State.

Sec. 5. (a) of said Public Law 712 provides as follows:

"The secretary of state of each State shall cause to be prepared and printed, for use in voting under this Act, an appropriate number of official war ballots. Such ballots shall provide for voting for electors of President and Vice President of the United States, United States Senators and Representatives in Congress, and may, in case the State legislature of his State shall have authorized it, also provide for voting for candidates for State, county, and other local offices, and with respect to any proposed amendment to the State constitution or any other proposition or question which is to be submitted to a vote in the State. Such ballots shall be uniform in size and in style of type, and the type and paper shall conform generally to that used for the regular official ballots of the State. Such ballots shall be printed in such form as may be appropriate for carrying out the provisions of this Act."

Since our legislature has made no provision for such voters to use the "war ballot" to vote for any officers then we look to the Constitution and statutes for further consideration of the question.

Section 4 of Article I of the Constitution of the United States is as follows:

"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 Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day."

Section 1 of Article II of said Constitution provides in part as follows:

"The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same time, be elected as follows:

"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.

"Time of choosing electors. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

By these provisions it will be seen that the time and manner for electing the President, Vice President, Senators and Congressmen has been left to Congress. Public Law 712 was enacted by virtue of this authority.

In *Ex Parte Siebold*, 100 U. S. 371-399; 404-422; 25 L. ed. 717, the Supreme Court of the United States had before it for consideration the question of whether or not both Congress and a Legislature could legislate on the subject of the mode and manner of electing Presidents, Vice Presidents and Members of Congress, and the court said, 1. c. 722:

"So in the case of laws for regulating the elections of Representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such."

Since, therefore, Congress has, by Public Law 712, made regulations as to the method by which soldiers and sailors may vote absentee ballots for members of Congress, such regulations must be followed by the Secretary of State. It is, therefore, that official's duty to furnish soldiers and sailors, upon request, absentee ballots by which they can cast their vote for members of Congress.

However, nothing in Public Law 712 in any way undertakes to regulate the method by which soldiers and sailors can vote for State, county, and local officers. Therefore, the State statutes on such absentee voting will prevail as to voting for such officers. It would, therefore, be the duty of the County Clerk to furnish, upon request, to soldiers and sailors absentee ballots in accordance with the State regulations.

The absentee ballots which the County Clerk has, will, no doubt, include the candidates for members of Congress. In this connection attention is directed to Sec. 9 of Public Law 712, which reads as follows:

"The votes cast as provided in this Act shall be canvassed, counted, and certified in each State by its proper canvassing boards in the same manner, as nearly as may be practicable, as the votes that were cast within its borders were canvassed, counted, and certified,

but 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 the State, or if it is received by the appropriate election officials of the district or precinct or county of the voter's residence after the hour of the closing of the polls on the date of the holding of the election."

It will be observed from the foregoing section that the official war ballot, which is the one issued by the Secretary of State, shall not be valid nor counted for candidates for Federal offices if such voter has either voted in person or by absentee ballot in accordance with the provisions of the State laws. Therefore, should a soldier or sailor by oversight vote both the official war ballot and the absentee ballot furnished by the County Clerk for a candidate for Congress, the vote for such candidate for Congress, as shown by the absentee ballot furnished by the County Clerk, would be the one to be counted.

CONCLUSION

It is, therefore, the opinion of this department that the County Clerk should furnish to absentee soldiers and sailors, upon request, absentee ballots in accordance with the State law, notwithstanding the provisions of Public Law 712 of the 77th Congress.

Respectfully submitted,

TYRE W. BURTON

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APPROVED:

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