



Montana Legislative Services Division
Legal Services Office

TO: Representative Pat Ingraham
FROM: David S. Niss, Staff Attorney
RE: Constitutionality of Mail Ballot Postage Requirement
DATE: February 6, 2008

I
Introduction

You have requested an opinion as to whether a requirement of legislation that will be considered by the State Administration and Veterans' Affairs Interim Committee, imposing the cost of returning a mail-ballot-only election ballot to county election officials through the U.S. mail upon the elector casting the ballot, constitutes an unlawful poll tax. In order to allay any concern about the constitutionality of such a requirement generally, I've also included in my response a consideration of whether such a requirement would violate any federal or Montana state constitutional prohibition or requirement.

Before beginning the requested analysis, it's first necessary to point out that were the contemplated legislation enacted and then challenged in a court of law, the burden of proving that the legislation is unconstitutional is upon the person challenging the act's constitutionality. Moreover, persons challenging legislation as unconstitutional must prove beyond a reasonable doubt that the legislation is constitutionally unsound. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002). Any doubt about a statute's constitutionality is to be resolved in favor of the statute. St. v. Martel, 273 M 143, 902 P2d 14 (1995). These general principles concerning the constitutionality of statutes should be considered along with those specific legal considerations applicable to the right to vote that are discussed below.

II
Discussion

a. Poll tax.

The 24th amendment to the U.S. Constitution provides:

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

In order for the 24th amendment to apply its prohibition to the contemplated legislation at all, the requirement that the elector provide postage for the return mailing of the voted ballot would have to apply to a ballot cast in a federal election and for the cost of the stamp to fall within the definition of a "poll tax" or "other tax". It's assumed for the purposes of this opinion that the first of these prerequisites is satisfied because the contemplated legislation would apply in a federal election, as defined in 13-1-101, MCA, if for no other reason than because it would apply to a general election at which a Representative in Congress would be elected.

Whether the requirement that the elector pay the return postage for the ballot is a poll tax or other tax is doubtful for several reasons. Although I have found no general definition of "poll tax" or "tax" in the jurisprudence of the 24th amendment, it would seem axiomatic that the tax must be mandatorily applied to every person, on a "per head" basis. This definition was indicated in State ex rel. Pierce v. Gowdy, 62 M 119, 203 P 1115 (1922), in which the Montana Supreme Court held that a "tax" is an enforced contribution of money or other property. However, in the case of the contemplated legislation, the tax is not mandatory because the tax can be defeated by an elector, or someone else, taking the voted ballot to county election officials rather than returning it by mail. The contemplated legislation may also include a requirement that voted ballots be left at "dropoff" locations, which would also limit the mandatory effect of the "tax". Additionally, the size of the "tax" is both minimal and incidental. Although it's true that those persons not using the mails may suffer an increasing cost of getting to the voting place, there is no case law holding that expenses that small and incidental to voting constitute a "tax" prohibited by the 24th amendment. There are cases holding that a much larger cost, the \$20 cost for procuring a state photo I.D. card in order to vote, constitutes a poll tax prohibited by the 24th amendment¹, but in those cases, the expense was much higher than the cost of a stamp and there was evidence that other repetitive costs associated with the payment of the fee, such as the repetitive cost of transportation to the governmental office producing the identification, which impacted severely upon the poor, were additional "tax" factors in the cases. In any event, it's very doubtful, for all of these reasons, that the cost of a postage stamp constitutes a "tax" within the meaning of the 24th amendment.

¹Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006).

b. The Montana Constitution, Article II, section 13.

Article II, section 13, of the Montana Constitution provides:

All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

The issue under the foregoing language is whether an election that requires the voter to expend 41 cents to return a voted ballot to county election officials is a "free" election, within the meaning of the quoted provision. In analyzing this issue, it's clear that some of the same factual considerations reviewed in the foregoing poll tax analysis also apply here. Certainly, no one suggests that the Constitution requires that electors be able to vote without incurring any out of pocket expense whatsoever .

In 1983, the Attorney General of Oregon issued an opinion regarding a similar provision in the Oregon Constitution that "[a]ll elections shall be free and equal". That opinion, which concluded that the election was "free" if the cost of the election to the voter was kept "reasonably low", relied in part upon the opinion of the Kentucky Court of Appeals in Queena v. Russell, 339 SW 2d 475 (Ky. App. 1960), in which the Court of Appeals construed a similar provision of that state's constitution. The Court said:

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

I agree with this interpretation of the meaning of "free and equal" or, in the case of the Montana Constitution, "free and open", and reported judicial opinions from other jurisdictions, unmentioned by the Oregon Attorney General, hold likewise.²

However, the Oregon Attorney General also wrote that it was "perilous" to make any distinction based upon what a person could financially afford, pointing out that the U.S. Supreme Court wrote in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process". This language seems to indicate that any out-of-pocket cost, such as the cost of a postage stamp, would be looked upon unfavorably by the U.S. Supreme Court. However, as discussed below, that Court now employs a different method of analysis than it did when the Oregon Attorney General authored the

² See, e.g., Cothran v. West Dunklin Public School District No. 1-C, 189 S.C. 85, 200 S.E. 95 (1938); Shankey v. Staisey, 436 Pa. 65, 257 A2d 897 (1969).

opinion, and the Attorney General's fears are now unfounded.

c. Equal Protection Under the U.S. Constitution.

(1) No burden on right to vote.

In order to determine whether the equal protection clause of the 14th amendment to the U.S. Constitution has been violated by placing an undue burden upon the fundamental right to vote, it must first be determined whether the right to vote has been burdened. In McDonald v. Bd. of Election Commissioners of Chicago, 394 U.S. 802 (1969), the Supreme Court ruled on a claimed violation of the right to vote by detainees imprisoned in Illinois who were denied absentee ballots for an election in that state. In McDonald, the Court pointed out that the detainees were denied only a convenient method of voting, not the right to vote itself. Similarly, the requirement for postage in the contemplated legislation will not deny any elector the right to vote. It only violates a claimed right to one free method of delivering a voted ballot. Other means exist by which an elector might have the ballot delivered free of charge--by delivering the ballot, or having it delivered, to county election officials or to one of the free dropoff locations. Under this rationale, a court could find that there would be no burden imposed upon a plaintiff and, therefore, no legal injury incurred.

(2) Minor burdens on the right to vote.

Even if a burden is found to be imposed upon a constitutional right to vote, the U.S. Supreme Court no longer applies a strict scrutiny analysis to every burden on that right. For years, after determining that a case before it involves the exercise of a fundamental right, such as voting, the Supreme Court held that a state enactment is to be given "strict scrutiny" and may be upheld only if the enactment serves a "compelling state interest". See, e.g., Harper, supra. However, later opinions of the Supreme Court on the subject of burdening the constitutional right to vote take a different approach. In Burdick v. Takushi, 504 U.S. 428 (1992), the Supreme Court directly held that more toleration was required of minor burdens imposed by modern election processes. In Burdick, the Court said:

Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects--at least to some degree--the individual's right to vote and his right to associate with others for political ends." . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . . Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.

* * * * *

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance". But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's most important regulatory interests are generally sufficient to justify" the restrictions. (citations omitted)

Under this analysis, the "character" and "magnitude" of the burden must be examined. The "character" of the burden placed upon the voter is monetary, but the "magnitude" of the burden, whether magnitude is measured in the number of people whom it will effect, given that the legislation will likely require free "dropoff" locations (and given that only the voted ballot needs to arrive at a free "dropoff" location and not the voter), or the size of the burden, as measured in the cost of postage, can't realistically be described as a "severe" burden, as used in Burdick. Thus, even if there is some burden on the right to vote caused by the mail ballot postage requirement, that requirement is likely to be looked at as a "reasonable, nondiscriminatory restriction", and the state's regulatory interests in making the requirement, including its traditional interest in encouraging electors to vote, are sufficient to uphold its constitutionality. For those reasons, it's extremely unlikely that the imposition of the postage requirement on the voter would be held unconstitutional under the more recently applied test of the U.S. Supreme Court to determine whether an equal protection violation has occurred in regulating the voting process.

d. Equal Protection Under the Montana Constitution.

The Montana Supreme Court has not adopted the method of analysis of voting rights issues used by the U.S. Supreme Court in its decision in Burdick. In one of the few voting rights case in which the Montana Supreme Court applied the provisions of Article II, section 4, of the Montana Constitution (the Montana equal protection requirement), Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003), the Supreme Court held that the right to vote is a fundamental right and that strict scrutiny analysis must therefore be applied. Applying this method of analysis to the contemplated legislation, the burden on the right to vote may be found constitutional only if there is a compelling state interest in requiring the elector to provide the postage stamp for returning the voted mail ballot. However, the Court has been clear that allegations alone of a burden on a fundamental right are insufficient, and, as pointed out in the introduction, a plaintiff must prove beyond a reasonable doubt that the plaintiff's right to vote was unconstitutionally burdened by a ballot postage requirement in the contemplated legislation.

Even if the Montana Supreme Court were to hold that a requirement for postage constitutes a substantial burden upon an elector's right to vote, there is precedent for finding that a compelling state interest exists in burdening that right. In Bruce v. City of Colorado Springs, 971 P2d 679 (Colo. App. 1998), the Colorado Court of Appeals addressed the allegation that Colorado Revised Statutes section 1-7.5-101, allowing mail-ballot-only elections, was unconstitutional because it required voters to affix a postage stamp to return a voted ballot. The Court of Appeals found, based in part upon legislative findings, that the state had a compelling state interest in increasing voter participation in an election, citing a California case, Peterson v. City of San Diego, 34 Cal. 3d 225, 666 P2d 975 (1983), holding that the state had a compelling state interest in reducing burdens on voting in order to increase participation of voters in representative government. In the case of the contemplated legislation, Montana has no less an interest in that legislation than was found in the Bruce and Peterson cases to justify the legislation at issue there.

III Conclusion

Whether analyzed under the 24th amendment to the U.S. Constitution, prohibiting poll taxes, Article II, section 13, of the Montana Constitution, requiring free and open elections, or under the equal protection provisions of either the U.S. or Montana Constitutions, it's extremely unlikely that a Montana Court would find the mail ballot postage requirement in the contemplated legislation to be unconstitutional. The burden of proof upon a complaining party is too high, the burden placed upon the elector is too minimal, methods of avoiding any burden are too easy, and what precedent there is finding a compelling state interest in burdening the right to vote by requiring postage is sufficiently applicable to prevent a successful constitutional challenge. However, to help protect against the possibility of a successful constitutional challenge, the legislation should contain legislative findings and a purpose statement similar to that reviewed in the Bruce opinion. The legislation should also require that as many free "dropoff" locations be made available as a political subdivision or precinct can reasonably support. More than one location for a dropoff collection will help reduce any burden on an elector's right to vote and thereby help ensure the constitutionality of the contemplated legislation.