

RESIDENCE: (1) The St. Louis Board of Election  
ELECTIONS: Commissioners should not send absentee  
ABSENTEE VOTING: ballots listing the names of candidates  
for state and local offices (includ-  
ing Congressional candidates) to legal residents of St. Louis tem-  
porarily living outside Missouri who are not registered voters.  
(2) The St. Louis Board of Election Commissioners must send ab-  
sentee ballots listing the names of Presidential and Vice Presi-  
dential candidates to legal residents of St. Louis temporarily  
living outside Missouri who are not registered voters.

OPINION NO. 277

October 16, 1972

Mr. John T. Wiley, Chairman  
Board of Election Commissioners  
City of St. Louis  
208 South 12th Boulevard  
St. Louis, Missouri 63102



Dear Mr. Wiley:

This official opinion is in response to your request for a ruling on whether two formerly-registered voters in the City of St. Louis now living in London, England, should be sent absentee ballots from the City of St. Louis.

The facts as they appear in your request are as follows: A man and his wife lived in St. Louis City and were registered voters therein for ten years prior to 1964, but left in that year and for undisclosed reasons lost their registration. They currently live in London, England, and have retained their American citizenship. They state, in separate affidavits, that they intend to retain their domicile in Missouri and to return here in the future and have each requested absentee ballots for the November 1972 election.

In general, the laws of the state govern the operation of elections, defining who is eligible to vote, who must register and when, and who may receive absentee ballots. McDonald v. Board of Election Commissioners, 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969). However, these laws may not conflict with federal constitutional provisions or with valid Acts of Congress; if there is a conflict, federal law prevails. United States Constitution, Article VI, section 2 (Supremacy Clause).

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In the Voting Rights Act of 1970, Congress enacted laws controlling absentee voting in presidential elections, but not in state elections. In this opinion, we will examine first the law of Missouri governing state and local elections, and then we will see the modifications upon that law created by the federal statute.

I.

Missouri State and Local Elections

The issuance of absentee ballots for Missouri elections is governed by Chapter 112 of the Revised Statutes. Section 112.010 (House Bill No. 1167, 76th General Assembly, Second Regular Session), provides that:

"Any duly qualified voter of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified voter on the day of any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day or any person whose religious beliefs prevent him from personally going to the polls to vote on election day, may vote at such election as provided in sections 112.010 to 112.110."

Further, Section 112.030(2), RSMo, provides that:

"The election authority shall not furnish a ballot to any person who is not lawfully entitled to vote. . . ."

Thus, an absentee ballot for a Missouri election can only be sent to one who is eligible to vote. Voter eligibility in St. Louis City is defined by Sections 118.020, RSMo and 118.030 (House Bill No. 1216, 76th General Assembly, Second Regular Session) and those sections require registration as a qualification of voting. The applicants here are unregistered. We assume that the applicants are qualified to vote in all other respects, but without

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registration they are not qualified voters in St. Louis eligible to vote for state or local candidates. From this it follows that they are not eligible to receive an absentee ballot listing the names of state and local candidates, and their application should be denied to that extent.

## II.

### Presidential Elections

In 1970, the United States Congress amended the Voting Rights Act by adding a section dealing with the conduct of presidential election, P.L. 91-285, Section 6, 84 Stat. 316, which appears at 42 U.S.C., Section 1973aa-1. Among its other provisions, this section requires the issuance of absentee ballots for presidential elections. The paragraphs relevant to this opinion are (c), (d) and (f), which provide as follows:

"(c) No citizens of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President

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and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

\* \* \*

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration."

42 U.S.C., Section 1973aa-1 was challenged in the United States Supreme Court, and the Court specifically held that the law requiring absentee ballots in presidential elections was within the power of Congress to enact. Oregon v. Mitchell, 400 U.S. 112, 27 L.Ed.2d 272, 91 S.Ct. 260 (1970).

The Act requires that Missouri "shall provide by law" for absentee ballots available to "all duly qualified residents" of Missouri, and that Missouri may not deny absentee ballots to unregistered residents where Missouri law "does not include a provision for absentee registration." The Act is made enforceable by the Attorney General of the United States, 42 U.S.C., Section 1973aa-2, and failure to obey the law is made a criminal offense, 42 U.S.C., Section 1973aa-3.

Despite this mandatory language, Missouri statutes have not been amended to conform to the provisions of the Voting Rights Act. The Presidential "short ballot" can only be voted in person (except in those cases in which the voter has moved his residence from the state within thirty days of the election). Sections 111.031, RSMo Supp. 1971, to 111.061, RSMo; 112.040(2) (House Bill No. 1167, 76th General Assembly, Second Regular Session). No provision for absentee registration of voters in St. Louis has been added to the laws. It is the opinion of this

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office that the failure of the Legislature to act does not relieve election officials in Missouri of the obligation of granting absentee ballots to persons eligible for them under the federal law.

A state statute which restricts a right granted or guaranteed by an Act of Congress is in conflict with that Act and therefore is invalid under the Supremacy Clause of the United States Constitution, Article VI, Section 2. Motor Coach Employees v. Missouri, 374 U.S. 74, 10 L.Ed.2d 763, 83 S.Ct. 1657 (1963). Where a federal law defines the right of certain persons to vote, state laws setting different standards may not be enforced. Katzenbach v. Morgan, 384 U.S. 641, 16 L.Ed.2d 828, 86 S.Ct. 1717 (1966). These cases control the present question. Eligibility for absentee ballots for the presidential election is a matter of federal law, and Missouri has no choice but to follow the federal mandate.

The federal statute leaves the mechanism of issuing absentee ballots to the states. Although no specific forms are set out in the Missouri statutes, this does not prevent absentee voting, for there are many affidavits found in the election laws, and an appropriate form should be drafted by the Board of Election Commissioners.

One further question remains, and that is whether the applicants meet the test of residency under the statute. The question of the residency of a person absent from Missouri was recently explored fully in the case of State ex rel. King v. Walsh, No. 58037 (Mo. banc 8-5-72), which ruled that Christopher (Kit) Bond was eligible to run for Governor of Missouri. The Court there said that "residence is largely a matter of intention," and that one's domicile "when once established, continues until he renounces it and takes up another in its stead," (Slip Opinion at 7), even though he is absent from his domicile for a period of years. Intent, of course, is shown by deeds as well as words, and it is proper to consider all relevant facts before reaching a conclusion.

The applicants herein have been absent from St. Louis for eight years. Nevertheless, they state that they intend to maintain a Missouri domicile and to return here, and no facts are shown which contravene that intent. The Board of Election Commissioners may have cause to challenge that intent. However, it is the opinion of this office that, if these statements are true and no contrary intent is proven, the applicants meet the standards of residency under Missouri law and they are eligible to receive absentee ballots under 42 U.S.C., Section 1973aa-1.

#### CONCLUSION

Therefore, it is the opinion of this office that:

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(1) The St. Louis Board of Election Commissioners should not send absentee ballots listing the names of candidates for state and local offices (including Congressional candidates) to legal residents of St. Louis temporarily living outside Missouri who are not registered voters.

(2) The St. Louis Board of Election Commissioners must send absentee ballots listing the names of Presidential and Vice Presidential candidates to legal residents of St. Louis temporarily living outside Missouri who are not registered voters.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General