ELECTIONS:
PRIMARY ELECTIONS:
VOTERS:

A person voting in a primary election morally obligates himself to support the nominee of the primary in which he participates. However, this obligation cannot be enforced by any court of law.

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June 17, 1954

Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

By letter dated April 29, 1954, you requested an official opinion as follows:

> "This question has been propounded to me in view of the coming primary:
>
> "May a voter ask for and receive for purpose of voting any party ticket he desires without obligating himself as to General Election?"

The qualifications required for a person offering to vote in a primary election are prescribed by Section 120.460, RSMo 1949. Said Section reads as follows:

> "No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, if registration thereat be required by law, and known to affiliate with the political party named at the head of the ticket he calls for and attempts to vote, or obligates himself to support the nominees of said party at the following general election."

Under certain circumstances, a voter in a primary election is required to take an oath. This requirement is made by Section 120.470, RSMo 1949, which reads as follows:

> "It shall be the duty of the challenger to challenge and the duty of the judges

> of election to reject the ballot of any person attempting to vote other than the ticket of the party with which he is known to be affiliated, unless such person, when challenged, obligates himself, by oath or affirmation administered by one of the judges, to support the party nominees of the ticket he is voting in the following general election. All judges of the election shall have authority and are empowered to administer such oath or affirmation, and any person offering to vote who shall fail or refuse to take or make such oath or affirmation when demanded by such challenger, or required by any judge, shall not be allowed to vote at such primary election."

We are unable to find a Missouri case pertaining to the enforceability of the two above statutes. However, in the State of Texas there is a requirement that the following "test" be printed on each ballot in a primary election:

> "I am a _____(inserting the name of the political party or organization of which the voter is a member) and pledge myself to support the nominees of this primary."

The Supreme Court of Texas in 111 Tex. 29, Westerman et al. v. Mims, 227 S.W. 178, discussed the effect of the Texas provision at some length. That discussion is quoted herewith (l.c. 180, 181):

> "If the entire purpose be not accomplished in determining whether the voter is a member of the party, having a subsisting intent to support the nominees, still we cannot say that the pledge imposes an executory legal obligation. The specific statutory pledge is to 'support' the primary nominees. As stated by Webster, to 'support' is 'to uphold by aid or countenance.' The Legislature must have given such an interpretation to the pledge, if they considered it binding on future conduct, in exacting it of women

voters, when extending suffrage to them in primaries and conventions only.

"The vital distinction between a legal obligation and a moral obligation is that it is practicable to enforce the former and impracticable to enforce the latter. To give effect to the distinction is to deny that the pledge imposes a legal obligation on the voter. It is utterly impracticable to enforce an obligation to uphold another by aid or countenance through either a decree for specific performance or an award of damages.

"Of the decisions relied on by the contesting respondents to sustain the view that the pledge imposes a legal obligation on the voter, the case of State ex rel. Labauve v. Michel, Secretary of State, 121 La. 374, 46 South. 434, seems nearest in point. In disposing of the objection that the statute requiring the voter to declare his affiliation with the party holding the primary violated the article of the Constitution of Louisiana which secured the voter the right to prepare his ballot in secrecy, the court said:

"'The answer to this is that the voter, by participating in a primary, impliedly promises and binds himself in honor to support the nominee, and a statute which exacts from him an express promise to that effect adds nothing to his moral obligation and does not undertake to add anything to his legal obligation. The man who cannot be held by a promise which he knows he has impliedly given will not be held by an express promise.'

"We do not regard this opinion as contrary to our conclusion. The court affirmed that the primary voter, with or without the statute, incurred a moral obligation binding on his honor. The court concluded that the obligation was no greater with than without the statute. In our opinion, the court did not

declare or mean to declare that there is any legal obligation with or without the statute. On the contrary, the court found that there had been no attempt by the Legislature, in enacting the statute, to impose on the voter anything in the way of a legal obligation.

"In our opinion, a voter cannot take part in a primary or convention of a party to name party nominees without assuming an obligation binding on the voter's honor and conscience. Such obligation inheres in the very nature of his act, entirely regardless of any express pledge, and entirely regardless of the requirements of any statute. The obligation, like the promise exacted by the statute when treated as governing future conduct, is for co-operation in good faith to secure the success of the nominee. There is no reasonably certain measure of bona fide co-operation in matters of this sort. The voter's conduct must be determined largely by his own peculiar sense of propriety and of right. It is for such reasons that the courts do not undertake to compel performance of the obligation. Being unenforceable through the courts, the obligation is a moral obligation. Herriott v. Potter, 115 Iowa, 648, 89 N.W. 91, 92. As stated by the Supreme Court of Pennsylvania:

"'A moral obligation in law is defined as one "which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice."' Bailey v. Phila., 167 Pa. 573, 31 Atl. 925, 926, 46 Am. St. Rep. 693.

"(6) Moreover, we think the legislative intent ought to be plain before ballots are held forbidden which reflect conscientious changes in party fealty. Grave doubt might arise as to interference with the privilege of free suffrage guaranteed by our Constitution should the statute be construed as invariably requiring the casting of certain ballots. In rejecting

> that construction, we avoid any serious question of the validity of the statute and follow the rule:
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> "'That where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter.' U. S. v. Del. & H. Co., 213 U. S. 408, 29 Sup. Ct. 536, 53 L. Ed. 849.
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> "We do not say that circumstances might not arise under which one who had participated in a primary would be relieved of the moral obligation which is ordinarily incurred not to undertake the nominee's defeat.* * * * * * * *"

We concur in the conclusion of the Supreme Court of Texas that the obligation incurred by a voter in the primary election is an obligation that is completely unenforceable. We also concur that a moral obligation is created. Whether or not a voter wishes to ignore this obligation is a matter which must be decided by his own conscience and sense of honor.

CONCLUSION

It is, therefore, the opinion of this office that a person voting in a primary election morally obligates himself to support the nominee of the primary in which he participates. However, this obligation cannot be enforced by any court of law.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

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