
OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2018-1

January 23, 2018

OFFICIAL OPINION 2018-1

The Honorable Connie Lawson
Indiana Secretary of State
Indiana State House, Room 201
200 West Washington Street
Indianapolis, IN 46204

RE: The Constitutionality of 2018 Indiana Senate Bill 155

Dear Secretary Lawson:

You have requested an opinion on the constitutionality of Senate Bill 155, a proposed law which has been introduced by Senator Greg Walker in the current session of the General Assembly.

REQUESTOR STANDING

Ind. Code § 4-6-2-5 contemplates that a state officer may request an official opinion of the Attorney General "touching upon any question or point of law concerning the duties of the officer." The question presented pertains to a provision of election law, and "The secretary of state shall perform all ministerial duties related to the administration of elections by the state." Ind. Code § 3-6-4.2-2(a). The manner in which elections are conducted, therefore, is an issue within the jurisdiction of the Office of the Indiana Secretary of State, at whose request this opinion is rendered.

QUESTION PRESENTED

May the General Assembly enact legislation that would allow the absentee ballot of a person who dies before election day to be counted on election day?

BRIEF ANSWER

No. A deceased individual is not a resident of a precinct. Counting that person's absentee ballot would effectively rewrite the residency requirements for the Indiana electorate as set out in Article 2, § 2(a) of the Indiana Constitution and a change in what constitutes the electorate may only be made by amending the constitution.

BACKGROUND

Under existing law an absentee ballot is not counted on election day if the person who filled out the ballot dies before election day. The current law is quoted below.¹

If proof is given to a precinct election board that an absentee voter marked and forwarded an absentee ballot but died before election day, then the inspector shall return the ballot of the deceased voter with the other defective ballots to the officer issuing the ballots. However, the casting of an absentee ballot by a deceased voter does not invalidate an election.

Ind. Code § 3-11-10-23.

(a) If proof is given to the absentee ballot counters that an absentee voter marked and forwarded an absentee ballot but died before election day, the ballot of the deceased voter shall be rejected under section 13 of this chapter and retained with the other rejected ballots under section 14 of this chapter.

(b) The casting of an absentee ballot by a deceased voter does not invalidate an election.

Ind. Code § 3-11.5-4-17.

The proposed legislation would change the law to provide the following

- (a) This section applies if an absentee voter:
 - (1) marked and forwarded an absentee ballot; and
 - (2) subsequently dies.
- (b) The deceased voter's absentee ballot would be otherwise counted if the voter had not died.

Proposed Ind. Code § 3-11-10-23.

- (a) This section applies if an absentee voter:
 - (3) marked and forwarded an absentee ballot; and
 - (4) subsequently dies.
- (b) The deceased voter's absentee ballot shall be counted if the absentee ballot would otherwise be entitled to be counted if the voter had not died.

Proposed Ind. Code § 3-11.5-4-17.

ANALYSIS

Indiana's Constitution sets forth the basic requirements for being eligible to vote. These qualifications are delineated in Ind. Const. Art. 2, § 2:

Section 2. (a) A citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.

(b) A citizen may not be disenfranchised under subsection (a), if the citizen is entitled to vote in a precinct under subsection (c) or federal law.

(c) The General Assembly may provide that a citizen who ceases to be a resident of a precinct before an election may vote in a precinct where the citizen previously resided if, on the date of the election, the citizen's name appears on the registration rolls for the precinct.

Most importantly for the question before us, "The principle is elementary that when the constitution defines the qualification of voters, that qualification *cannot be added to or changed by legislative enactment.*" *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221, 223 (1890) (emphasis supplied).

In interpreting the word "resident" as it appears in the Constitution, Art. 2, § 2, the courts have concluded that residence means a "bodily residence in a place coupled with an intention to make such place a home which establishes a domicile or residence." *Brownlee v. Duguid*, 93 Ind. App. 266, 178 N.E. 174, 175 (1931). The plain meaning of this constitutional clause requires the voter to be a "resident" of the precinct on the date of the election. To our best earth-bound knowledge, a deceased person is not a "resident" of any precinct, and therefore, is ineligible to vote according to the forgoing provisions of the Indiana Constitution.

Still other provisions of Indiana law lend support for the notion that the document universally referred to as an "absentee ballot" is not in itself a "vote" that has been "cast" by or on behalf of the person delivering it. Rather, an absentee ballot is simply a document evincing the intent of the would-be voter to cast his/her ballot on election day in the manner delineated on the document. In this way, an absentee ballot is not unlike a proxy vote in the corporate setting and, as Indiana election law clearly holds, an "absentee ballot is not deposited in the ballot box until election day." Ind. Code § 11-10-16(b).² See also Ind. Code § 3-12-2-1. More to our point, the absentee ballot is a notice of electoral intent until after the polls close on election day when, its secured envelope having been unsealed and the document within adjudged to be valid, it becomes a vote. It stands to reason, then, that if the voter is deceased on the day that the provisional document is opened—deriving its legal significance as a vote—the intended "vote" is clearly void, having been delivered by the lifeless hand of a non-citizen. See, generally, *2016 Election Administrator's Manual*, p. 50-73 (provisions regarding proper handling of absentee ballots so as to be held valid).

The General Assembly cannot by legislation alter who constitutes the electorate. *Fritch v. State*, 199 Ind. 89, 155 N.E. 257 (1927); *Bd. of Election Comm'rs of City of Indianapolis v. Knight*, 187 Ind. 108, 117 N.E. 565 (1917)

The history of the *Knight* case is particularly instructive. The Indiana Constitution of 1851 provided that only males could vote. That proscription remained in the constitution until 1921 but in 1917 the General Assembly enacted the Partial Suffrage Act (Acts 1917, c. 31). The new law would allow women to vote in certain elections, however, prior to the elections of November 1917, a citizen challenged it as being unconstitutional. The Court

issued a decision before the election and commented initially that "no matter how we may feel or think as to the principal of universal suffrage, the solution of the question before us may not rest on or be influenced by considerations of social policy or political expediency, but must be reached in strict accordance with recognized canons of constitutional construction." *Knight, supra*, at 566.

Ultimately, though, the Court in *Knight* declared the Partial Suffrage Act unconstitutional, holding that "any effort of the General Assembly to establish a public electorate which would differ from that defined in article 2, § 2, of the Constitution must necessarily be in conflict with the manifest purpose of that section to designate the voters entitled to participate in all elections 'not otherwise provided in this Constitution'" *Id.* at 569.

Eventually the U.S. Constitution was amended in 1920, allowing women to vote. The 19th Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or any other state on account of sex." In 1921 the Indiana Constitution was amended, dropping the requirement that all voters be male.

The advent of universal suffrage in Indiana provides the clearest example of the idea that the delineation of who counts as the electorate is a matter that can be fundamentally altered only by constitutional enactments and ratification, and not simply by statute. That measure could only be accomplished by the passing of an amendment to the Constitution.

CONCLUSION

Allowing the counting of absentee ballots of individuals who expire before election day is contrary to the Indiana Constitution, and any proposed statutory enactment that purports to do so is unconstitutional. The Constitution provides that only residents may vote and a dead person is not a resident of this earth. Because the electorate is defined exclusively by the Constitution, and Senate Bill 155 alters those who would comprise the electorate, the proposed law is unconstitutional.

SUBMITTED and
ENDORSED FOR PUBLICATION:

Curtis T. Hill, Jr.
Attorney General

Scott C. Newman, Chief Counsel
Gordon E. White, Deputy Attorney General

¹ IC § 3-11-10-23 deals with elections in general while IC § 3-11.5-4-17 concerns elections in pilot counties.

² In plain writing, there are other legal and administrative provisions that allow for absentee ballots to be physically opened before the close of the polls on election day. These are efficiency measures, and as such do not change the fundamental proposition here as to the legal significance of the unapproved absentee ballots.

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