October 31, 1976

MEMORANDUM FOR THE COMMITTEE
ON GOVERNMENTAL INSTITUTIONS

Subject: Restrictions on Eligibility for Office

The Committee on Governmental Institutions has voted to require ten years residence in the Commonwealth as a qualification for election as the Washington representative. The Committee is considering a further requirement of birth in the Northern Marianas. Similar requirements may be considered for offices in the legislative and executive branches of the new Commonwealth. At the request of the Committee, we have examined the legality of these requirements under the United States Constitution. We conclude that a ten-year residency requirement for Commonwealth-wide offices (such as Washington representative and governor) may be held unconstitutional, although a shorter period such as five years would probably be sustained. With respect to any requirement of native birth, we conclude that such a requirement would almost certainly be held unconstitutional.

Durational Residency Requirements

Although the Supreme Court has not ruled on the constitutionality of durational residency requirements for candidates for office, its approach to other limitations on candidacy makes clear that such requirements will be

examined carefully by the Court to determine whether the requirement is aimed at accomplishing a very important purpose and that it is the least restrictive way of accomplishing this purpose. Several cases illustrate this approach.

In Williams v. Rhodes, 393 U.S. 23 (1968), the Supreme Court struck down Ohio's requirements that made it almost impossible for parties other than the Democrats and Republicans to get on the ballot. Ohio tried to justify its action as encouraging the two-party system and as ensuring that a winning candidate would receive over half the votes cast. The Court held that this purpose was not sufficiently important to justify the complete exclusion of third parties from the ballot, since the exclusion limited both the rights of persons who wished to vote for such parties and of party members who wished to associate for political purposes. The Court emphasized that the rights to vote and to associate are considered fundamental and cannot be infringed except for very good reasons. 1/

1/ On the other hand, Jenness v. Fortson, 403 U.S. 431 (1971), and American Party v. White, 94 S. Ct. 1296 (1974), upheld requirements that third parties file petitions with certain numbers of signatures and organize themselves in a particular way in order to get on the ballot. The requirements involved in these cases were much less restrictive than those in Williams. They were held to be acceptable ways of serving the states' important interests in insuring that political parties conduct their affairs in an orderly way, and in making certain that political candidates are serious contestants rather than frivolous individuals whose names on the ballot would only confuse the voters. These restrictions on voting and association were thus considered justifiable.

In Bullock v. Carter, 405 U.S. 139 (1972), and Lubin v. Panish, 94 S. Ct. 1315 (1974), the Supreme Court struck down state laws requiring filing fees so large as to bar some candidacies. The fees in Bullock were justified by the state as saving money and as barring frivolous candidacies. The Court held that these interests could be met in ways that did not involve the limitations on voting inherent in the filing fee requirement. In Lubin the fee was also defended as a bar to frivolous candidacies. The Court did not deny that this was an important goal, but pointed out again that the goal could be achieved in less restrictive ways.

Another decision demonstrating the Supreme Court's approach to such restrictions is Storer v. Brown, 94 S. Ct. 1274 (1974). The Court there upheld a requirement that persons offering themselves as independent candidates not have been members of a political party for six months preceding the election. This was considered to be the only way to avoid loading the ballot with persons who had lost primary elections but wished to run in the general election.

To sum up, the Supreme Court has indicated that it takes restrictions on political candidacy very seriously. Although it does not condemn them out of hand, it requires strong reasons not connected with the special interests of any particular group to uphold such limitations. If the

restriction is too harsh, as was true in Williams or Lubin, it will be held unconstitutional.

We believe that the Supreme Court would apply a similar analysis to residency requirements for political office. Such requirements, like those in the above cases, can be viewed as restrictions on the rights of voters to be able to vote for particular candidates. Such residency requirements may also infringe the fundamental right to travel,[2/] and improperly discriminate between old and new residents of the Commonwealth. The Supreme Court has not yet discussed this issue, although it has summarily affirmed four cases upholding such requirements, two involving seven-year residency requirements.[3/] To find opinions on this subject, it is necessary to look to the lower courts whose decisions are still very recent and reach somewhat different results. Requirements of as long as seven years have been upheld by one court,[4/] while another has held that anything over thirty days will be struck down.[5/]

2/ Dunn v. Blumstein, 405 U.S. 330 (1972).

3/ Hadnott v. Amos, 320 F. Supp. 107 (N.D.ALA.) (1970) aff'd 401 U.S. 968 and 405 U.S. 1035 (a year for state circuit judges); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.) (1974) aff'd, 414 U.S. 802 (seven years for governor of N.H.); Sununu v. Stark, 383 F. Supp. 1287 (D.N.H.) (1974) aff'd 95 S. Ct. 1346 (1975) (seven years for N.H. state senators); Kanapaux v. Ellison, 419 U.S. 891 (1974) (five years for governor of S.C.).

4/ Chimento v. Stark, supra.

5/ Thompson v. Mellon, 9 Cal. 3d 96, 507 P.2d 628, 65 ALR. 3d 1029 (1973).

Almost all the courts have examined residency requirements in the same way the Supreme Court examined the candidate restrictions discussed above. That is, they have insisted that such requirements be justified by very important and legitimate public purposes. The courts have differed, however, as to whether particular purposes are sufficiently important to support such limitations. Thus, the courts have differed on whether such requirements ensure that candidates will be familiar with the unit of government and its problems;[6/] whether they give the voters a chance to acquaint themselves with the candidates;[7/] and whether they help prevent frivolous candidacies.[8/] No residency requirement for a state governmental office has yet been struck down, but residency requirements for county and city offices (including very short term requirements) have been disapproved.[9/] The

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6/ Accept justification: e.g., Gilbert v. State, 526 P.2d 1131 (Alaska, 1974) (three years for state legislature); Reject justification: Cowan v. Aspen, 509 P.2d 1269 (Colo. 1973) (three years for city officers).

7/ Accept: Hadnott v. Amos, supra; Reject: Alexander v. Kramer, 363 F. Supp. 324 (D. Mich. 1973) (five years for city commissioner).

8/ Accept: Chimento v. Stark, supra: Reject: Cowan v. Aspen, supra.

9/ The courts upholding the state level requirements have sometimes referred to this state/local distinction, Chimento v. Stark, supra; Draper v. Phelps, 351 F. Supp. 677 (D. Okla. 1972). Those striking down local requirements have rarely commented on this distinction. In Walker v, Battaglio, 485 F.2d 1151 (3rd. Cir. 1973), however, the court struck down a five-year requirement for mayoral candidates in a Delaware city but distinguished the case from an earlier one upholding a three-year requirement for state legislators, describing the latter as involving a shorter period and a larger unit of government.

reasoning of the cases is as important as the actual result in evaluating the validity of residency requirements being proposed for executive and legislative offices of the Commonwealth.

Chimento v. Stark upheld a seven-year residency requirement for the office of governor of New Hampshire. The court's decision is of particular interest because it dealt with the longest requirement yet passed upon by any court and because the decision was affirmed (without opinion) by the Supreme Court. The United States District Court in Chimento first reviewed the compelling interests that New Hampshire put forward to justify its requirement: the need for the candidate to be familiar with the state, the need for the voters to be familiar with the candidate, and the state's desire to prevent frivolous candidacies. The court recognized that the first two justifications were particularly important in a state with a small, widely dispersed population. After quoting Bullock v. Carter to the effect that "in approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters," 405 U.S. at 143, the court concluded that the restrictions infringed a prospective candidate's right to effective participation only slightly and would constitute at most a hypothetical restriction on voters. In this connection, the court noted that other qualifications, such as age, operated

to reduce the candidate pool even more drastically, and that the disqualification was only temporary, with those ineligible for the governorship available for lesser offices. The court went on to emphasize that the requirement here affected only the governorship and the state senate, which were more important positions than the lesser local offices involved in cases invalidating residency requirements.[10/]

In sum, the court in Chimento concluded that the residency rule did not violate the state's duty of equal protection in light of the interests it protected, though its duration might approach the maximum permissible. The court rejected the proposition that the rule violated anyone's right to free expression or association, and rejected the suggestion that the right to such public office was protected by the First Amendment. The court also held that the restriction did not violate the right to travel, reasoning that even the few individuals

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10/ The court noted that the requirement was embodied in the state constitution, and had been adopted in 1784 long before any discriminatory purpose was imagined. The court also remarked on the fact that 43 states imposed such requirements on gubernatorial candidates.

affected were not forced to choose between travel and a fundamental right.[11/]

In contrast, the Supreme Court of California in Thompson v. Mellon struck down a residency requirement of two years that applied to the offices on a city council within the state. The court concluded that the right to seek public office was itself a fundamental right. Since the residency requirement limited both the right to seek office and the right to travel, the court examined the requirement closely. The only justification considered was that of ensuring knowledgable candidates. The court rejected this rationale, stating that residency requirements would exclude knowledgable newcomers but not ignorant old residents, and were therefore too crude to serve their alleged purpose.

11/ In Sununu v. Stark, also affirmed without opinion by the Supreme Court, New Hampshire's seven-year residency requirement for state senators was upheld. The court relied on Chimento in holding that the state interest involved was compelling, and refused to decide whether seven years was too long, in light of the voters' recent refusal to repeal the requirement in a referendum and the scheduling of another vote on the matter within a few years. The court rejected a challenge based on the candidate's right to travel, pointing out that the situation of a candidate differed from that of a voter. Few qualifications and no scrutiny by others were necessary to act as a voter, but the qualifications of a public official must be examined by the electorate, which needs time to form an opinion. Any minor limitation on the voters' right to an effective vote was also outweighed by the compelling interests involved.

The conflicting decisions on the legality of state and local residency requirements for candidates and the lack of any authoritative Supreme Court ruling complicate the task of evaluating the residency requirements under consideration by the Convention. In making their decision on such requirements, the delegates should consider three separate issues: (1) the validity (or invalidity) of a residency requirement of ten years or more under the decided cases discussed above; (2) the level of risk of unconstitutionality that the delegates are willing to assume; and (3) the alternatives available to the Convention.

A residency requirement of ten years or more for Commonwealth offices is of questionable legality under the decided cases. Such a requirement is nearly 50% longer than the longest term -- seven years -- that has been upheld by any court and several times greater than many restrictions on local candidates that have been invalidated. Any challenge to such a requirement of ten years would also stress the limited population of the Commonwealth, the fact that the Commonwealth is more analogous to a city or county government in the United States than a state, and that the decisions invalidating much shorter residency terms for local offices should therefore be followed. On the other hand, a term of ten years for Commonwealth-wide elective positions can be defended as necessary to make certain that a candidate

knows the Northern Marianas and is known by the people of the Commonwealth. The difficulty with this justification is the absence of any real experience with which to support such a ten-year requirement and the likely inference that the longest possible term has been picked to exclude outsiders from office -- not because they are unfamiliar with the Commonwealth but because they are outsiders who represent a threat to continued political control by the current Northern Marianas leadership. If the court draws this inference from the action of the Convention, it will certainly declare the residency requirement unconstitutional.

Since any residency requirement of more than a year raises some legal question, the issue for the delegates is the degree of legal risk they are willing to assume in drafting the constitution. The stakes are high: if the Constitution includes residency requirements that are perceived in the United States, either in the Executive Branch or in Congress, as being clearly (or even probably) unconstitutional, then the Commonwealth Constitution will not be approved and a delay in commencing the new Commonwealth of some six to twelve months will result. In our opinion, the risks can be scaled as follows: a residency requirement of 15 years or more is clearly unconstitutional; a residency requirement of 10 years is probably unconstitutional; a residency requirement of five years is probably

constitutional; and a residency requirement of three years or less is clearly constitutional.

Before deciding on the question, the delegates should consider their alternatives. It is possible to minimize the risks of non-approval of the Constitution by selecting a residency requirement that is most likely constitutional and authorizing the legislature to increase it in the future if that appears both necessary and legal. Such an approach does not endanger the start of the new Commonwealth and preserves the flexibility to increase the residency requirement for certain Commonwealth offices after more experience is at hand and the law on the subject may have been clarified by more court decisions. In addition, the delegates may wish to consider the other means available to the new Commonwealth to limit the participation of non-Marianas persons through laws enacted by the Commonwealth legislature. A separate memorandum will review a possible legislative program, outside of the Commonwealth Constitution, that might be used to further the objectives of those delegates proposing long residency requirements.

It is our recommendation that the Constitution contain residency requirements of no more than five years for Commonwealth-wide offices and that the legislature be given the authority to increase these requirements. We believe that a five-year requirement can be defended as

constitutional in light of the present state of the law and the particular circumstances of the Northern Marianas. We attach a high priority to avoiding any significant risk that the Constitution produced by this Convention will not be approved by the United States. The grant of legislative authority seems desirable for the reasons discussed above and seems an appropriately flexible approach to this problem under the circumstances.

Requirement of Northern Marianas Birth

Several proposals are before the Committee suggesting that candidates for Commonwealth office -- in addition to residing in the Commonwealth for a specified number of years -- must also be born in the Northern Marianas. We believe that any such requirement in the Commonwealth Constitution would almost certainly be held unconstitutional.

In the first place, such a place-of-birth requirement would probably be viewed as in effect a restriction based on race by the courts. It would not only be contrary to the principles tentatively incorporated in the Constitutional article on personal rights but also the pertinent provisions of the Fourteenth Amendment to the United States Constitution. In Anderson v. Martin, 375 U.S. 399 (1964), the Supreme Court invalidated a state statute requiring the race of candidates to appear on the ballot because it amounted to impermissible encouragement by the state to voting on the basis of race. Numerous court decisions have invalidated state laws or political party

rules which in effect denied participation in the political process to persons of a particular race.

Secondly, the courts may consider the place-of-birth requirement to be the equivalent of a residency requirement of 30 years or more, depending on the minimum age required to run for the Commonwealth position involved. Under the decisions discussed earlier in this memorandum, a place-of-birth requirement could not be sustained. Native birth, without more, cannot contribute to a candidate's familiarity with the area or to the voter's familiarity with the candidate. The disqualification of ineligibles is not temporary, unlike the durational residency requirements sustained by the courts. Thus, the burden on the right to travel appears greater than in residency cases, since those entering the Commonwealth would be second class citizens permanently. Also, the burden on the right to vote is greater, since the candidate pool is permanently limited.

Third, the principal defect in such a place-of-birth requirement is its lack of any rational relationship to a public objective of the Commonwealth which the courts will consider permissible. A place-of-birth requirement alone would deny the right to run for office to a person born in California even if that person has lived 20 or more years in the Northern Marianas but grant such a right to a person born in the Northern Marianas who lived his entire life in

California. It might operate to deny the right to run for office to a person born of Northern Marianas parents because he or she happened to be born at the hospital in Guam. Faced with these possibilities, a court is likely to conclude that the classification by birth cannot be rationally defended as necessary to meet any acceptable public purpose. If the place-of-birth requirement is defended as needed to keep "outsiders" from gaining public office in the Commonwealth, a court is likely to reason as follows: (1) there is no rational basis for such a fear; (2) a reasonable residency requirement can be imposed; (3) it is most unlikely that anyone will be nominated (much less elected) to high office in the Commonwealth without having lived in the community for many years and being able to speak Chamorro or Carolinian fluently; (4) it is ultimately up to the voters to assess the qualifications of candidates; and (5) one of the costs (and privileges) of being part of the United States is the Constitutional protection of certain basic rights, including the rights to vote, to travel and to participate without discrimination in the political process.

For these reasons, we recommend that the Convention not include any place-of-birth requirement in the Commonwealth Constitution.

Wilmer, Cutler & Pickering