SECOND NORTHERN MARIANAS CONSTITUTIONAL CONVENTION
HOUSE OF TAGA
SAIPAN, CM 96950

MEMORANDUM

Date: June 27, 1985

Legal Opinion No. 25

To : Attorney General

From : President of the Convention

Subject : Request for Legal Opinion re Residency, Domicile and Citizenship

Legal Opinion No. 1 addresses the subject, in part, relative to eligibility to vote and to hold public office; however, a number of issues remain unanswered.

(1) We understand the U.S. Constitution restricts our right to limit the rights of U.S. citizens. This is certainly true following termination of the Trusteeship, but is it also true prior to termination of the Trusteeship?

(2) Upon termination of the Trusteeship, are persons who gain U.S. citizenship by operation of the Covenant considered "native born?" Are persons becoming U.S. citizens by birth in the NMI following termination of the Trusteeship considered "native born?"

(3) What is the constitutional rationale for requiring the President of the United States to be native born when this is not required for other offices?

(4) What is the precise meaning of "native born?" Does it distinguish between citizenship by birth and citizenship by naturalization, or does it require birth on U.S. soil?

(5) Legal Opinion No. 1 defined the outer constitutional limits of residency requirements. What are the outer constitutional limits of domicile requirements?

(6) Our Constitution currently requires five years residency to hold public office. Apparently, the Legal Counsel for the First Constitutional Convention found no constitutional infirmity in this. Do the constitutional limits vary depending on whether it relates to voting, holding public office, or the particular office?

#. 25

(7) To the extent that the U.S. Constitution permits restriction of the rights of NMI citizens (e.g. native born requirements), cannot we do the same to non-NMI U.S. citizens?

HERMAN T. GUERRERO

SECOND NORTHERN MARIANAS CONSTITUTIONAL CONVENTION
HOUSE OF TAGA
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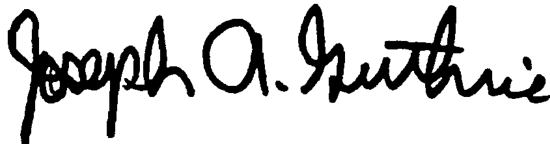
HERMAN T. GUERRERO

It is also well established that aliens can be denied the opportunity to hold office. 3 Am. Jur. 2d Aliens and Citizens, § Likewise, it is also well established that officeholding can be restricted to qualified voters; 3 Am. Jur. 2d Aliens and Citizen §39, hence persons in leased areas not being voters, could not h office.

The purpose of this memo has been to counteract any impression t may have been created by Opinion No. 1 that the Commonwealth pow to limit who can vote and hold office are more limited than they are. I have discussed imposing restrictions on aliens and milit personnel as examples of what you may do. Shortly to follow wil the answers to your specific questions.



JOSEPH A. GUTHRIE
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OFFICE OF THE ATTORNEY GENERAL

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
5TH FLOOR, NAURU BUILDING
SAIPAN, CM 96950
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REXFORD C. KOSACK
ATTORNEY GENERAL

TO : President of the Convention
Second Northern Marianas
Constitutional Convention

DATE: 7/2/85

FROM : Legal Counsel

SUBJECT: Introduction to Legal Opinion re: Residency, Domicile and Citizenship

You have asked a number of questions relating to the Commonwealth's power to regulate who can vote and hold public office. Opinion No. 1 answered whether office-holding could be limited to persons of Northern Marianas descent. That opinion may have created an impression that the Commonwealth's powers over who can vote and hold public office are limited to a much greater extent than they are. To the contrary, the United States Supreme Court has recognized that the states have broad powers to determine the conditions under which the right of sufferage and office-holding may be exercised. Lassiter v. Northampton Election Board, 360 U.S. 45, 50, 3 L.Ed. 2d 1072, 1076, 79 S.Ct. 985 (1959).

For example, the Constitutional Convention could adopt proposals denying the opportunity to vote and hold public office to aliens and residents of land leased to the United States for defense purposes under Section 802 and 803 of the Covenant. This memo will discuss these two examples to demonstrate the Commonwealth's broad powers in this area.

The Constitution of the Commonwealth could be amended to provide that only United States citizens, and interim U.S. citizens until termination of the T.T., may vote. The courts have held that a state limitation of the franchise to citizens is valid and does not work an invidious discrimination against aliens in violation of their rights under the due process and equal protection provisions of the United States Constitution. Citizenship is a valid and permissible criterion for determining who shall be allowed to vote and participate in the political process. People v. Rodriguez, 35 Cal. App. 3d 900, 111 Cal. Rptr. 238; Skafte v. Rorex, 553 P.2d 830, app. dismd. 430 U.S. 961, 52 L.Ed. 2d 352, 97 S.Ct. 1638. Hence the Convention could adopt a proposal denying noncitizens the right to vote.

Likewise, the Convention could adopt a proposal denying the right to vote to persons residing on land leased for defense purposes to the federal government under Sections 802 and 803 of the Covenant.

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While a constitutional provision simply prohibiting members of the United States military from voting in Commonwealth elections would violate equal protection, Carrington v. Rash, 380 U.S. 89, 94, 13 L.Ed. 2d 675, 680, 85 S.Ct. 775 (1965), the Commonwealth could deny voting to residents of the areas leased to the military if the Commonwealth renounced exercise of power over those areas. Therefore, a proposal denying residents of these areas from the right to vote would have to include language ceding all legislative jurisdiction which the Commonwealth may have over the land to the federal government.[1/]

By renouncing power over the areas leased to the federal government, the Commonwealth could deny residents of those areas voting on the grounds that the residents of those areas have no interest in the outcome of Commonwealth elections. The United States Supreme Court has held that states may limit voting to those who are primarily or substantially affected by the electoral decision. Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 69, 58 L.Ed. 2d 292, 99 S.Ct. 383. See also Evans v. Cornman, 398 U.S. 419, 422, 26 L.Ed. 2d 370, 90 S.Ct. 1752; Kramer v. Union School District, 395 U.S. 621, 632, 23 L.Ed. 2d 583, 592, 89 S.Ct. 1886 (1969); Cipriano v. City of Houma, 395 U.S. 701, 704, 23 L.Ed. 2d 647, 650, 89 S.Ct. 1897 (1969). By renouncing jurisdiction over leased land, the Commonwealth could thereby deny residents of those areas the opportunity to vote on the ground that they had no interest in the outcome of the decisions.

Congress has now, by statute, permitted the states to extend important aspects of state powers over federal areas. See discussion at 398 U.S. 423-424. A provision in the Commonwealth Constitution renouncing any jurisdiction which it may have under federal law over the leased areas should be sufficient to uphold a denial of the opportunity to vote under Evans insofar as such a restriction should establish the degree of disinterest in electoral decisions that might justify a total exclusion.[2/] See 398 U.S. at 426.

1/ Section By Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, Marianas Political Status Commission, February 15, 1975, p. 99 states that the lease of land was not intended to be a cessation of jurisdiction, but a constitutional amendment ceding jurisdiction would not be inconsistent with the Covenant.

2/ There is reason to believe that a constitutional provision, rather than a statute, would be necessary to survive the test enunciated in Evans v. Cornman, 439 U.S. 60, since a constitutional provision is not as easily changed as a statute.

OFFICE OF THE ATTORNEY GENERAL

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

5TH FLOOR, NAURU BUILDING

SAIPAN, CM 96950

PHONE: 6207•7111

REXFORD C. KOSACK
ATTORNEY GENERAL

TO : President, Second Constitutional Convention DATE: 7-10-85

FROM: Legal Counsel

RE : Outer Constitutional Limits of Domicile
Opinion No. 25

You have asked for an opinion describing the constitutional limits on the uses of the term domicile in discriminating between domiciliaries and non-domiciliaries of the Commonwealth.

The term "domicile" is used in section 301(a)(b)(c) and in section 8 of the schedule of transitional measures in the Constitution in aid of defining who is a citizen or interim citizen, respectively.

The Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands, December 6, 1976, p. 204, states that "domicile" has the meaning it is given in the Covenant. Section 1005(c) of the Covenant defines "domicile" as

> that place where a person maintains a residence with the intention of a continuing such residence for an unlimited or indefinite period, and to which such person has the intention of returning for an unlimited or indefinite period, and to which such person has the intention of returning whenever he is absent, even for an extended period.

Discriminations on the basis of domicile must withstand scrutiny under the Privileges and Immunities Clause of Article IV, sec. 2, rather than the Equal Protection Clause of Amendment 14. A basic rule is that every person has a domicile somewhere; hence, if a person is domiciled elsewhere than where he claims to be a resident, he can hardly be a resident of that jurisdiction. Consequently, the term domicile does not describe a difference between persons who are residents of the Commonwealth, as does the definition of Northern Marianas descent or a durational residency requirement.

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Therefore, the term domicile describes differences between residents and nonresidents of the Commonwealth; consequently, the Privileges and Immunities Clause of Article IV, sec. 2, rather than the Equal Protection Clause of the 14th Amendment is the standard against which discriminations based on domicile are measured. The Privileges and Immunities Clause is applicable to the Commonwealth by section 501 of the Covenant, and reads as follows:

> The citizen of each state shall be entitled to all Privileges and Immunities of Citizens in the several states.

The purpose of the Clause, as described in Paul v. Virginia, 8 Wall. 168, 180, 19 L.Ed. 357 (1869) is "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Application of the Privileges and Immunities Clause to a particular instance of discrimination against out-of-state domiciliaries entails a three-step inquiry.

As an initial matter, the court must decide whether the ordinance burdens one of those privileges and immunities protected by the Clause. Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383, 56 L.Ed. 2d 354, 98 S.Ct. 1852 (1978). Not all forms of discrimination against domiciliaries of other states are constitutionally suspect.

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they burden the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally.

436 U.S. at 383.

Once the Court ascertains that discrimination burdens one of the privileges and immunities protected by the Clause, it will test the constitutionality of the discrimination under the second part of the two-part test. Under this part of the test, the Court must determine whether there is "something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed".* Toomer v. Witsell, 334 U.S. 385, 398, 92 L.Ed. 1460, 68 S.Ct. 1156. In Toomer, the court reasoned that although the Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," id., at 396, 92 L.Ed. 1460, 68 S.Ct. 1156. "[i]t does ban discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States", id., at 396, 92 L.Ed. 1460, 68 S.Ct. 1156.

In Hicklin v. Orbeck, 437 U.S. 518, 57 L.Ed. 2d 397, 98 S.Ct. 2482, the court held that a law giving persons domiciled in Alaska hiring preference over persons not domiciled in Alaska to be deficient under this part of the test. The court found that no showing was made on the record that nonresidents were "a peculiar source of the evil". Alaska Hire (the hiring preference Law) was enacted to remedy, namely, Alaska'a "uniquely high unemployment". Instead, the Court found that the major cause of Alaska's high unemployment was not the influx of nonresidents, but the fact that Alaska residents were unqualified for the jobs. 437 U.S. 526-527.

If the court finds that a substantial reason for the discrimination exists, a court will apply the third part of the test. A court must find a "substantial relationship" exists between the evil and the discrimination practiced against the noncitizen", 437 U.S. at 527, 57 L.Ed. 2d 397, 98 S.Ct. 2482. In Hicklin v. Orbeck, 437 U.S. 518, 57 L.Ed. 2d 397, 98 S.Ct. 2482, the court found that the discrimination which the local hire law worked against non-domiciliaries did not bear a substantial relationship to the particular "evil" they were said to present.

> Alaska hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act.

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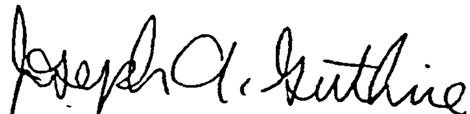
*While the Clause refers to "citizens", the U.S. Supreme Court has found that "the terms 'citizen' and 'resident' are essentially interchangeable '. . . for purposes of analysis of most cases under the Privileges and Immunities Clause". Hicklin v. Orbeck, 437 U.S. 518, 524, n. 8, 57 L.Ed. 2d 397, 98 S.Ct. 2482 (1978) (quoting Austin v. New Hampshire, 420 U.S. 656, 662, n. 8, 43 L.Ed. 2d 530, 95 S.Ct. 1191 (1975).

> A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Artic Eskimo enrolled in a job-training program. If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents -- again, a policy which may present serious constitutional questions -- the means by which it does so must be more closely tailored to aid the unemployed that the Act is intended to benefit. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska hires across-the-board grant of a job preference to all Alaska residents clearly is not.

437 U.S. at 528.

Therefore, a classification based on domicile in the Commonwealth will be invalid under the Privileges and Immunities Clause if it burdens a fundamental right, and if the non-domiciliaries do not constitute a particular source of the evil at which the statute is aimed or there is no substantial relationship between the evil and the discrimination practiced against non-domiciliaries.



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REXFORD C. KOSACK
ATTORNEY GENERAL

TO : President,
Constitutional Convention

DATE: 7/11/85

FROM : Attorney General

SUBJECT: Whether persons conferred citizenship by the Covenant upon termination of the Trusteeship will be "native born" citizens within the meaning of the Article I, Section 2(1) of the United States Constitution

You have asked whether persons conferred citizenship by the Covenant are "native born" citizens within the meaning of Article II, Section 2(1) of the United States Constitution, which requires that candidates for President be native born United States citizens.

The answer to this question requires a determination whether citizenship conferred by the Covenant is citizenship acquired by operation of birth, rather than by naturalization. It also requires a determination as to whether "native born" refers to all United States citizens who acquire citizenship by birth, or just those who are born within the territorial limits of the United States. The short answer is that persons conferred citizenship by Article III, Section 301 of the Covenant will be naturalized citizens, whereas, citizenship conferred by Section 303 of the Covenant on persons born in the Commonwealth on or after the date of the termination of the Trusteeship is citizenship acquired by operation of birth. Moreover, the phrase "native born" used in Article II, Section 2(1) of the United States Constitution refers to citizenship acquired by operation of birth, whether or not the person was born on United States soil. Therefore, persons acquiring citizenship by naturalization under Article III, Section 301 of the Covenant may not run for president, but persons acquiring citizenship by birth under Article III, Section 303 of the Covenant can run for president.

Citizenship can be acquired in the following ways:

1. By birth

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a. In the United States or one of its outlying possessions (jus soli)
b. Outside of the United States (jus sangrunis).

2. By derivation

a. Through parentage (i.e. upon naturalization of parents
b. Through marriage

3. By political incorporation

a. Of the original States
b. Of sovereign States (Texas, 1845; California, 1850)
c. Of territories through admission to Statehood.

4. By treaty

a. With foreign countries
b. With the American Indian tribes

5. By naturalization

a. Of groups (such as Hawaiians, 1900; Puerto Ricans, 1917; Indians, 1924; Virgin Islanders, 1927)
b. Of individuals
   i. By special Acts of Congress
   ii. Under naturalization conventions
   iii. Under general naturalization laws.

Henry B. Hazard, D.C.L. The Immigration and Nationality Systems of the United States of America, 14 F.R.D. 105, 121 (1953).

Citizenship conferred by Article III, Section 301 of the Covenant by virtue of the Trust Territory citizenship or domicile in the Northern Mariana Islands is citizenship granted by naturalization on a group, analogous to that granted to Hawaiians in 1900; Puerto Ricans, 1917; Indians, 1924; and Virgin Islanders, 1927).

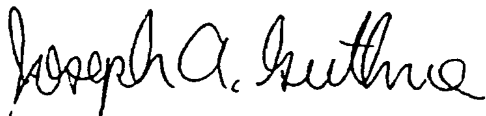
By process of elimination, naturalization would seem to be the term that describes the grant of citizenship under Article III, Section 301 of the Covenant. The only other possibility - acquisition of citizenship by treaty - would seem to be ruled out because the Covenant is not a document by which political ties to a former sovereign were transferred to the United States. There is no other sovereign power involved. Thus, the citizenship conferred by Article III, Section 301 of the Covenant was conferred by naturalization of a group, and not by operation of birth. This also follows because "Naturalization" is the conferring of nationality of a state

upon a person after birth. Act of October 14, 1940, 54 Stat. 1137. Since Section 301 does not confer citizenship by operation of birth, it would seem to be a naturalization process.

Section 303 on the other hand, makes all persons born in the Commonwealth after the date of the termination of the Trusteeship citizens at birth, therefore, by its terms, citizenship conferred by section 303 is citizenship conferred by operation of birth.

Turning to the question at hand, it seems that persons granted citizenship by Article III, Section 301 of the Covenant are not "native born" within the meaning of Article II, Section 2(1) of the United States Constitution, whereas citizenship granted by virtue of birth under Article III, Section 303 are 'native born' within the meaning of that United States Constitution provision. There are no cases on the meaning of the phrase "native born"; however, a legislative declaration in a 1790 statute indicates that the scope of "native born" is not limited to citizenship acquired by being born within the limits of the United States. The 1790 statute, the first general naturalization law enacted by the Congress, included the following "And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States shall be considered as natural born citizens" (1 Stat. 103-104). This indicated that the first Congress, at least, did not consider that the phrase "native born" to be limited to citizens born within the limits of the United States.

Therefore, persons acquiring citizenship by naturalization under Article III, Section 301 of the Covenant may not run for president, but persons acquiring citizenship by birth under Article III, Section 303 of the Covenant can run for president.



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REXFORD C. KOSACK
ATTORNEY GENERAL

TO: President
Second Constitutional Convention

DATE: 7/15/85

FR: Attorney General

RE: How courts evaluate whether durational residency requirements for voting and office holding are too lengthy
Legal Opinion No. 25

You have asked for an opinion indicating how courts evaluate whether durational residency requirements for voting or office holding are too lengthy.

VOTING

In Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed. 2d 274, 92 S.Ct. 994 (1972), the United States Supreme Court held that the proper yardstick by which to measure the validity under the Federal Constitution of durational residency requirements imposed by the states on voting is the "compelling state interest" test. Under this test, the state must justify any restriction upon the fundamental right to vote by a showing that it serves some compelling state interest. Interests that have been advanced in support of statutes establishing durational residency requirements are as follows: (1) the statutes insure the "purity of the ballot box" by preventing non-residents from fraudulently voting, and they eliminate the threat of colonization, that is, the possibility of great masses of outsiders suddenly descending upon a state or one of its subdivisions solely for the purpose of influencing a particular election, and then just as suddenly returning after the election; (2) the statutes insure that voters will be knowledgeable, informed, and interested, and that they will exercise their right to vote intelligently; and that the statutes are administratively necessary to insure that elections will be carried out in an orderly fashion.

The United States Court has held that the imposition of durational residency requirements on the right to vote was ineffective to achieve the desirable goal of maintaining the "purity of the

ballot box" by preventing fraud in elections 405 U.S. at 345. Likewise, the United States Supreme Court has held that durational residency requirements for voting may not be justified on the ground that they insure knowledgeable voters or the intelligent casting of votes, 405 U.S. at 354-359.

However, a durational residency requirement for voting may be imposed to the extent necessary to insure the orderliness of the election process. In Burg v. Canniffe, 315 F.Supp. 380 (D.C. Mass. 1970), aff'd 405 U.S. 1034, 31 L.Ed. 2d 575, 92 S.Ct. 1303, the court said that considerations of an administrative nature may require a time period to allow for the paperwork involved in registering new voters and for establishing a time for closing voting lists prior to any given election; time is also required to allow voting officials to determine the number of registered voters and the number of ballots that must be provided, and to enter into a contract for the requisite number of ballots. See also, Smith v. Climer, 431 F.Supp. 123 (1972 D.C. Ark) In Dunn, the court said "it is sufficient to note here that 30 days appears to be an ample period of time for the state to complete whatever administrative tasks are necessary to prevent fraud - and a year, or three months, too much 405 U.S. at 348.

Thus, a durational residency requirement can be imposed on voting to the extent that such a requirement can be justified by the administrative exigencies of registering people to vote.

OFFICEHOLDING

While the Supreme Court of the United States has not yet ruled directly on the validity of durational residency requirements for candidacy or public office, numerous state courts and Federal district and appellate courts have been squarely faced with this question. In some of these cases, it has been argued that durational residency requirements for candidates and public officers are violative of equal protection, in that they infringe upon the exercise of fundamental constitutional rights, such as the right to vote, to travel interstate freely, to be a candidate for public office or to associate freely with others and express oneself as guaranteed by the First Amendment to the United States Constitution.

The type of public office involved and the length of the required residency has frequently been a critical factor in the courts' determination.

In Chimento v. Stark, 353 F.Supp. 1211 (D.C. N.H. 1973), aff'd. 414 U.S. 802, 38 L.Ed. 2d 39, 94 S.Ct. 125, the imposition of a residency requirement of exactly seven years upon the right to run for governor was held permissible under the Federal Constitution.

In Bay Area Women's Coalition v San Francisco, 78 Cal. App. 3d 961, 144 Cal. Rptr. 591 (1978), a provision of a city charter which mandated as a pre-requisite for eligibility for appointment to a board or commission that an individual must have been a city resident for a period of at least five years was held to be violative of the equal protection clause of the Fourteenth Amendment. A five year requirement for city offices was also invalidated in Lawrence v. Cleveland, 91 Cal. Rptr. 863 (1970 Cal. App.); Teilenga v. Nelson, 4 Cal. 3d 716, 94 Cal. Rptr. 602, 484 P.2d 578 (1971); Bird v. Colorado Springs, 507 P.2d 1099 (1973 Colo.); McKinney v. Kaminsky, 340 F.Supp. 289 (D.C. Ala. 1972); Wellford v. Battaglia, 485 F.2d 1151 (C.A. 3 Del. 1973); Alexander v. Kamma, 363 F.Supp. 324 (D.C. Mich. 1973).

A durational residency requirement of exactly four years imposed upon candidates for municipal office failed to withstand equal protection challenges in Martinez v. Newton, 8 Cal. 3d 756, Cal. Rptr. 105, 505 P.2d 529 and Bill v. Carter, 455 F.Supp. 172 (D.C. Md. 1978).

In the following cases, the impositions of a residency requirement of exactly three years upon the right to run for state-level office were held permissible under the Federal Constitution: Gilbert v. State, 526 P.2d 1131 (Alaska 1974); Walker v. Yucht, 352 F.Supp. 85 (D.C. Del. 1972); Hayes v. Gill, 473 P.2d 872 (1970) app. dism'd 401 U.S. 968, 28 L.Ed. 2d 319, 91 S.Ct. 1200.

In DeHond v. Myquist, 65 Misc.2d 526, 318 N.Y.S.2d 650 (1971), the imposition of a residency requirement of exactly three years for municipal office was held not to violate equal protection; whereas the courts in Camera v. Mellon, 484 P.2d 577 (1971); Cowan v. Aspen, 509 P.2d 1269 (Colo. 1973); Bolanski v. Rauch, 330 F.Supp. 724 (D.C. Mich. 1971); Mogk v. Detroit, 335 F.Supp. 698 (D.C. Mich. 1971).

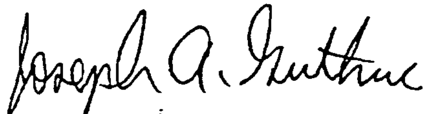
Two year durational residency requirements imposed upon candidates for city level office were held, in the following cases, to be unconstitutional and void, Lentini v. Kenner, 479 F.Supp. 966 (La. E.D. 1979); Wise v. Lentini, 374 So.2d 1286 (1979 La.App); Castner v. Clerk of Gorsse Pointe Park, 272 N.W.2d 693 (1978) ind.

In the following cases, the imposition of a residency requirement of exactly one year upon the right to run for statewide office was held not violative of provisions of the Federal Constitution, Russell v. Hathoway, 423 F.Supp. 833 (D.C. Tex. 1976); Brewster v. Johnson, 541 S.W.2d 306; Ammond v. Keating, 150 N.J. Super 5, 374 A.2d 498.

In the following cases, the imposition of a residency requirement of exactly one year upon the right to run for municipal office was held permissible under the Federal Constitution, Daves v. Longwood, 423 F.Supp. 502 (D.C. Fla.); Joseph v. Birmingham, 510 F.Supp. 1319 (1981 E.D. Mich.); Castner v. Homel, 598 P.2d 953 (1979 Alaska); Johnson v. Hamilton, 541 P.2d 881; Akron v. Bell, 660 F.2d 166 (1981); C.A. 6 Ohio.

In each of these cases, the interests vindicated by the residency requirement are balanced against the interests of persons who wish to run for office. The nature of the office determines the weight of the government's interests in the residency requirement is accorded; whereas, the length of the period of required residency determines the burden on the would-be candidates' right to run for office which must be justified.

The foregoing cases will give you an indication as to how the courts have balanced these interests.



JOSEPH A. GUTHRIE
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REXFORD C. KOSACK
ATTORNEY GENERAL

TO: President
Second Constitutional Convention

DATE: 7/15/85

FR: Attorney General

RE: The Historical Rationale for requiring the President of the United States to be native born when this is not required for other offices
Legal Opinion No. 25

We were unable to determine why the founding fathers inserted the requirement that the President of the United States be "native born" in Article I, section 2(a) of the United States Constitution.

Joseph A. Guthrie

JOSEPH A. GUTHRIE
Assistant Attorney General

Rec'd 7/15/85 – [illegible]

OFFICE OF THE ATTORNEY GENERAL

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TO: President, Second Constitutional Convention

DATE: 7-15-85

FR: Legal Counsel

RE: Does the U.S. Constitution permit interim U.S. citizens to be treated differently than U.S. citizens until termination of the trusteeship; and if so, may the Commonwealth Constitution treat U.S. citizens differently than interim U.S. citizens prior to the termination of trusteeship?
Legal Opinion No. 25

You have asked whether the U.S. Constitution permits interim U.S. citizens to be treated differently than U.S. citizens until termination of the trusteeship; and if so, whether the Commonwealth Constitution treat U.S. citizens differently than interim U.S. citizens prior to the trusteeship.

The equal protection principles of Amendments 5 and 14 of the U.S. Constitution, made applicable to the NMI by section 501 of the Covenant since approval of the Constitution, apply to all persons within the territorial limits of the Commonwealth. Thus, discriminatory treatment of U.S. citizens, vis-a-vis interim U.S. citizens under the Commonwealth Constitution, must satisfy the standards established by the Equal Protection Clause of the U.S. Constitution.

Implicit in the question posed is the assumption that the equal protection language of the Fourteenth Amendment applies only to people who are "citizens" of a government. Furthermore, this develops a belief that the Equal Protection Clause can be limited in its application to "citizens" of the NMI before termination of the Trust Territory -- in particular, interim U.S. citizens as defined in section 301 of the Covenant.

The U.S. Supreme Court has decisively rejected the idea that a state government can define the class of people under its jurisdiction for purposes of equal protection of the laws, while leaving other people beyond the protection of the Equal Protection

Clause. In Plyler v. Doe, 457 U.S. 202, 72 L.Ed. 2d 786, 102 S.Ct. 2382, the state of Texas sought to avoid paying for the education of children of illegal aliens on the ground that the children were not "within the jurisdiction" of Texas within the meaning of the Fourteenth Amendment's mandate that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". The State of Texas argued that illegal aliens, because of their immigration status, were not "persons within the jurisdiction of the State of Texas", and that they, therefore, had no right to equal protection under Texas law. The court rejected this contention as follows:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the pledge of the protection of the laws is a pledge of the protection of equal laws. Yick Wo., supra, at 369, 30 L.Ed. 220, 6 S.Ct. 1064 at 72 L.Ed. 2d at 212.

Therefore, the court held the Equal Protection Clause to require equal application of the laws to all persons within the territorial jurisdiction of the government. Governments are, within the territorial jurisdiction of the government, not allowed to define who its laws will apply to.

> To permit a State to employ the phrase 'within its jurisdiction' in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The equal protection clause was intended to work nothing less than the abolition of all caste based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection." 457 U.S. at 213.

Thus, the Commonwealth could not limit the application of the Equal Protection Clause to those people it considered its citizens -- whether interim citizens as defined by section 301 of the

Covenant or any other group -- and put U.S. citizens beyond the reach of the Fourteenth Amendment. Likewise, by section 501 of the Covenant, the U.S. government is constrained in its treatment of interim U.S. citizens by the requirements of the Equal Protection Clause.

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike". F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L.Ed. 989, 40 S.Ct. 560 (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same". Tegner v. Texas, 310 U.S. 141, 147, 84 L.Ed. 1124, 60 S.Ct. 879 (1940).

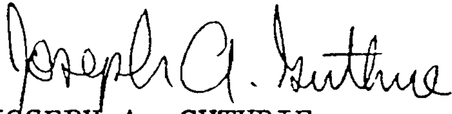
Therefore, the Equal Protection Clause requires that differential treatment of U.S. citizens vis-a-vis interim U.S. citizens must be based on differences in the circumstances of U.S. citizens and interim U.S. citizens. It doesn't matter whether the U.S. government or the Commonwealth is making the discrimination; as pointed out above, the same principle applies.

In Pyler, the Court said the mere fact of one's immigration status is not sufficient basis, without more, to justify denying one benefits the State might choose to afford other residents. 457 U.S. at 224. Therefore, the mere fact that a class of people are not defined as citizens, whether U.S. or interim U.S., is not sufficient basis to discriminate against them. Nor may the state justify its classification with a concise expression of an intention to discriminate. Examining Board v. Flores de Otero, 426 U.S. 572, 605, 49 L.Ed. 2d 65, 96 S.Ct. 2264 (1976). Rather, the classification must be reasonably adopted to "the purposes for which the state desires to use it". Oyama v. California, 332 U.S. 633, 664-665, 92 L.Ed. 249, 68 S.Ct. 269 (1948) (Murphy, J. concurring).

Section 8 of the Constitution defines interim citizenship in terms of when certain people have been born, domiciled or voted in the NMI on certain dates.

As described above, the Equal Protection Clause of Amendment Fourteen would apply to discriminations based on the definitions of U.S. citizen -- interim U.S. citizen. Any such discriminations, under equal protection principles, would have to be logically related to the definitions of interim U.S. citizens being born, domiciled, or voted in the NMI as of certain dates, as opposed to U.S. citizens, who are not born, domiciled, or voting in the NMI on those dates.

Therefore, a restriction on the right to vote or run for office applied to U.S. citizens and nationals must be clearly justified.



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