# 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.

Rec'd 7/15/85

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.

---

*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.

Joseph A. Guthrie

JOSEPH A. GUTHRIE
Assistant Attorney General