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STATE OF MAINE *SCW*

Inter-Departmental Memorandum Date May 19, 1972

To Joseph Edgar, Secretary of State

Dept. State

From James S. Erwin, Attorney General

Dept. Attorney General

Subject The effect of Dunn vs. Blumstein --U.S.-- (March 21, 1972) on
Maine's durational voting residence requirements.

Senator Elden H. Shute, Jr., has recently requested the advise of the Attorney General concerning the legal effect of the United States Supreme Court decision in the case of Dunn v. Blumstein, --U.S.-- (March 21, 1972), on the provisions of the Maine Election Law (21 M.R.S.A. § 241(4) and the Maine Constitution (Art. II, sec. 1) which require that in order for a person to be eligible to vote in an election he must establish a residence in this State for at least 6 months and in the municipality in which he resides for 3 months next preceding the election in question. Senator Shute has also asked for an indication from you as to what, if anything, would need to be done to bring the Maine law into conformity with the decision in Dunn v. Blumstein.

The Supreme Court in Dunn v. Blumstein held unconstitutional Tennessee's durational voting residence requirements which provide that a person must be a resident in the State of Tennessee for at least twelve (12) months and in the county in which he applied for registration for three (3) months, next preceding an election, before such person can be eligible as a registered voter. (See, Art. IV, § 1 of the Tennessee Constitution and sections 2-201 and 2-304 of the Tennessee Code Annotated).

In describing the constitutional question presented in the Blumstein case the Court, in the opinion delivered by Mr. Justice Marshall, stated, at page 4, that:

"Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote. The constitutional question presented is whether the Equal Protection Clause of the Fourteenth Amendment permits a State to discriminate in this way among its citizens."

And, at pages 12 and 13 of the Blumstein decision, the Court, again, speaking generally in terms of "durational residence laws," set forth the constitutional standard by which such laws must be judicially measured, as follows:

"Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Cf. United States v. Jackson, 390 U.S. 582-583 (1968). Absent a compelling state interest, a State may not burden the right to travel in this way.

In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest." Shapiro v. Thompson, supra, 394 U.S. at 634 (emphasis added); Kramer v. Union Free School District, supra, 395 U.S. at 627. Thus phrased, the constitutional question may sound like a mathematical formula. But legal "tests" do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," NAACP v. Button, 371 U.S. 419, 438 (1963); United States v. Robel, 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives.

Shapiro v. Thompson, supra, 394 U.S., at 631. And if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Shelton v. Tucker, 364 U.S. 479, 488 (1960)." (Emphasis supplied by Court).

In an attempt to demonstrate that durational residence laws are necessary to promote a compelling governmental interest, Tennessee relied upon the following two basic and general governmental purposes which it claimed were served by its durational residence requirements:

1. Insure purity of ballot box-Protection against fraud through colonization and inability to identify persons offering to vote, and
2. Knowledgeable vote - Afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently. Blumstein, pp. 14-15.

The Court stated at pages 15 and 16, with respect to the first of these two State interests or purposes, that,

"Preservation of the "purity of the ballot box" is a formidable sounding state interest. The impurities feared, variously called "dual voting" and "colonization," all involve voting by nonresidents, either singly or in groups. The main concern is that nonresidents will temporarily invade the State or county, falsely swear that they are residents to become eligible to vote, and by voting,

allow a candidate to win by fraud. Surely the prevention of such fraud is a legitimate and compelling governmental goal. But it is impossible to view durational residence requirements as necessary to achieve that state interest...

"Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States, this purpose is served by a system of voter registration." (Emphasis supplied).

And the Court said at pages 17 and 18, that,

"....the job of detecting nonresidents from among persons who have registered is a relatively simple one. It hardly justifies prohibiting all newcomers from voting for even three months.Tennessee itself concedes that "[i]t might well be that these purposes can be achieved under requirements of shorter duration than that imposed by the State of Tennessee" Appellants' Brief, p. 10. Fixing a constitutionally acceptable period is surely a matter of degree. 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. This was the judgment of Congress in the context of presidential elections." (Emphasis supplied).

The significance of the 30-day period referred to by the Court in the above quotation is twofold. First, section 2-304 of the Tennessee Code Annotated provides that voter registration shall not be permitted within thirty (30) days of any primary or general election. (In comparison, the Maine Election Law, Title 21 M.R.S.A. §§ 631 and 632, provides for the closing of voter registration for periods of from 1 day, in municipalities

of 2,500 or less, to 9 days in municipalities of 24,001 or more, prior to a regular or special election). The second significance of the 30-day period is described by the Court in footnote 19, at pages 18 and 19 of the Blumstein decision as follows:

"In the Federal Voting Rights Act of 1970, Congress abolished durational residence requirements as a precondition to voting in presidential and vice-presidential elections and prohibited the States from cutting off registration more than 30 days prior to those elections. These limits on the waiting period a State may impose prior to an election were made 'with full cognizance of the possibility of fraud and administrative difficulty.' Oregon v. Mitchell, 400 U.S. 112, 238 (opinion of Brennan, White and Marshall, J.J.). With that awareness, Congress concluded that a waiting period requirement beyond 30 days 'does not bear a reasonable relationship to any compelling state interest in the conduct of presidential elections.' 42 U.S.C. § 1973 aa-1(a)(6). And in sustaining § 202 of the Act, we found 'no explanation why the 30 day period between the closing of new registration and the date of election would not provide, in light of modern communications, adequate time to insure against ...frauds.' Oregon v. Mitchell, supra, 400 U.S., at 239 (opinion of Brennan, White and Marshall, J.J.). There is no reason to think that what Congress thought was unnecessary to prevent fraud in presidential elections should not also be unnecessary in the contest of other elections." (Emphasis supplied).

The Court further held in Blumstein at pages 27 and 28, with respect to the second major governmental purpose submitted by Tennessee - the assurance of knowledgeable voters - that,

"...The durational residence requirements in this case founder because of their crudeness as a device for achieving the articulated state goal of assuming the knowledgeable exercise of the franchise. The classifications created by durational residence requirements obviously permit any long-time resident to vote regardless of his knowledge of the issues - and obviously many long-time residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new residents who have become minimally, and often fully informed about the issues... Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is necessary' to reside for a year in the State and three months in the county in order to be minimally knowledgeable about congressional, state or in purely local elections."

I believe that the statements and holdings of the Supreme Court in Dunn v. Blumstein, which I have cited and quoted at length above, demonstrate conclusively that the Maine durational residence requirements provided by Title 21 M.R.S.A. § 241, sub-§4 and Art. II, Sec. 1 of the Maine Constitution are constitutionally invalid for the reason that they fail to satisfy the standards and tests set forth and applied by the Supreme Court in the Blumstein decision.

Although it might be argued that only the parties to the Dunn v. Blumstein case are technically bound by the rulings of the Court in that case and that, therefore, Maine's election officials should continue to follow and enforce the durational requirements of the Maine Constitution and the Maine Election Law until such time as the Maine law is either specifically declared by a court to be unconstitutional or is changed by amendment, I would advise against taking such a position for the following reasons:

1. There does not appear to be any question but that the Maine durational requirements of six (6) months in the State and three (3) months in the municipality are as constitutionally invalid, under the holdings in Dunn v. Blumstein, as the Tennessee durational requirements of one (1) year in the State and three (3) months in the county which were held unconstitutional in that case.

2. Under the Supremacy Clause of the United States Constitution (Article VI, cl. 2), any state law or constitutional provision which is contrary to a provision of the United States Constitution is invalid and the decisions of the United States Supreme Court interpreting and applying clauses of the Federal Constitution are conclusive and binding on state courts. Duncan v. Robbins, 159 Me. 339, 193 A.2d 362, 364 (1962); Higgins v. Carr Bros. Co., 138 Me. 264, 271, 25 A.2d 214, 217 (1942); Waterville Realty Corp. v. City of Eastport, 136 Me. 309, 315, 8 A.2d 898, 901 (1939).

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