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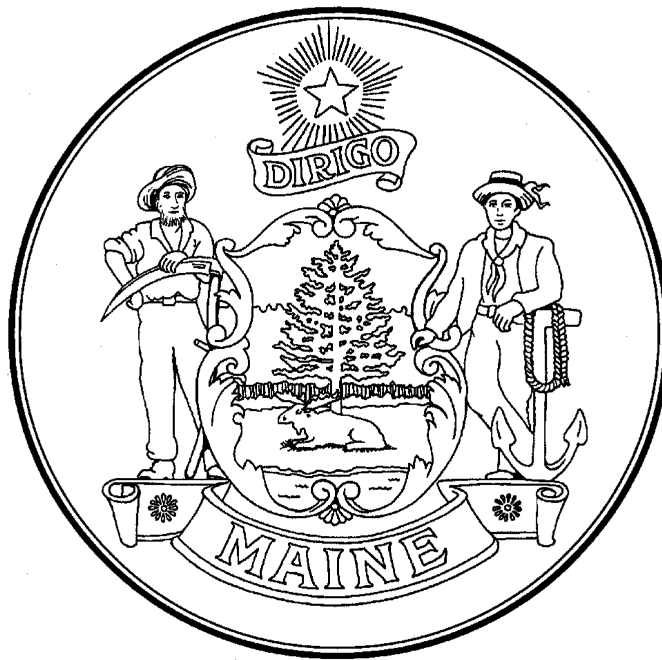

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May 6, 1974

Roberta M. Weil, Commissioner — Business Regulation

Martin L. Wilk, Ass't Atty. General — Attorney General

Maine Consumer Credit Code, § 103, Administration.

This will respond to your inquiry dated April 5, 1974 concerning the constitutionality of §103, Administration, of the Maine Consumer Credit Code, which provides:

> "No person shall be eligible for said office (Superintendent of Consumer Protection) unless he shall have been a resident of the State of Maine for at least two years."

For reasons which follow, it is our opinion that the provision should be regarded as being constitutional.

The law is well settled that acts of the legislature are entitled to a strong presumption of constitutionality, State v. Karmil Merchandising Corp., 158 Me. 450, 186 A 2d 352, Crommett v. City of Portland, 150 Me. 217, 107 A 2d 841. We cannot regard this presumption any more lightly than the Court, and are all the more constrained by it in the absence of a specific factual context under which the validity of the statute may be analysed and tested.

While no court has had an occasion to address itself to the precise question whether there is any constitutional infirmity to a two-year durational residency requirement for unclassified appointive state officers or employees, the weight of authority, at this juncture, appears to be that such a durational residency requirement is permissible. A brief review of the leading cases which have considered restrictive residency laws follows.

In the landmark case of Shapiro v. Thompson, 394 U. S. 618 (1969) the United States Supreme Court struck down a one-year residency requirement as a precondition to receipt of welfare assistance.

In Dunn v. Blumstein, 405 U. S. 330 (1972) the Supreme Court invalidated durational residency requirements as a prerequisite to voting in state and local elections.

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Other courts have ruled that durational residency requirements for candidacy for public office constitute a denial of equal protection. See Zeilenga v. Nelson, 4 Cal. 3d 716, 484 p. 2d 578 (1971) (five-year residency requirement for candidates for county supervisor); Camara v. Mellon, 4 Cal. 3d 714, 484 p. 2d 577 (1971) (three-year residency requirement for city council candidates); Bolanowski v. Raich, 330 F. Supp. 742 (E. D. Mich., 1971) (three-year residency requirement for mayor). See also, Sugarman v. Dougall, 413 U. S. 634 (1973) (restrictive provision barring aliens from holding permanent positions in competitive class of state civil service).

In both Shapiro and Dunn, the court reasoned that the residency requirements there in issue touched upon "the fundamental right of interstate movement" and that the state could show no compelling interest in the restrictive classification. While under traditional equal protection standards, a classification is constitutional if it bears a rational relationship to the objects of the classification (see e. g. McGowan v. Maryland, 366 U. S. 420 (1961), when the classification affects a "fundamental interest", the courts apply a more stringent standard: the classification is invalid unless it can be demonstrated that the law is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U. S. 618, 634 (1969).

Whether a court considering the statute in question would apply the "rational basis" test or the "compelling state interest" standard is difficult to determine. Suffice it to say that whichever standard is applicable, there is a significant difference between being denied welfare benefits or the right to vote, on the one hand, and being denied an opportunity to be immediately considered for one appointive state office or employment, on the other hand.

Notwithstanding the foregoing, the Supreme Court has, in at least one case, referred obliquely to a "right to work", Traux v. Raich, 239 U. S. 33 (1915), (the prevailing view is that the Constitution affords no such right, see "Residency Requirements for Municipal Employees: Denial of a Right to Commute?" 7 Univ. of San Francisco L. Rev. 508. 524) and in at least one other case the Supreme Court has recognized "a federal constitutional right to be considered for public service without the burden of invidiously discriminating disqualifications," Turner v. Fouche, 396 U. S. 346, 362-63 (1970).

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These cases did not involve durational residency requirements but would undoubtedly be relied upon by anyone attacking the statute under discussion.

We should further point out, parenthetically, that we are troubled by the fact that the residency requirement set forth in § 103 of the Consumer Credit Code does not apply universally to all state officers or employees holding comparable positions, or even to the other Bureau Superintendents of the several Bureaus of the Department of Business Regulation. This peculiarity would, on the surface, appear to raise some additional question about the legitimacy of the classification under traditional equal protection standards.

We trust the foregoing informal opinion will be of assistance to you. If you have any further questions, please let us know.

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