

# MAINE STATE LEGISLATURE

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May 26, 1977

Honorable Gerald E. Talbot  
House of Representatives  
State House  
Augusta, Maine

Dear Representative Talbot:

We have received from you a written request, dated May 16, 1977, for an opinion concerning the constitutionality of L.D. 1064. L.D. 1064 establishes a six-month residency requirement for voting in tribal elections held at the Indian Township Reservation of the Passamaquoddy Indian Tribe. According to your letter of request, the avowed purpose of the proposed residency requirement is to prevent Canadian Indians from voting in Indian Township elections.

Our opinion is that L.D. 1064, if enacted, would deprive new, but bona fide, residents of the Indian Township Reservation of the equal protection of the laws, guaranteed to them by both Article I, Section 6-A of the Constitution of Maine and the Fourteenth Amendment to the Constitution of the United States.

Your letter of request correctly indicates that durational residency requirements for voting are, in general, unconstitutional. See Dunn v. Blumstein, 405 U.S. 330 (1972), and cases cited therein. Durational residency requirements impair "the constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," Id., at 336, and "directly impinge on the exercise of a second fundamental right, the right to travel." Id., at 338.

The specific question which you wish to have answered, however, is whether the constitutional presumption against durational residency requirements applies to voting in tribal,

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as opposed to general, elections. Your question raises correlative issues concerning the unique status of the Passamaquoddy Tribe and its government in relation to the State of Maine.

Two relevant issues will be considered:

(1) Whether an aggrieved member of the Passamaquoddy Tribe could invoke the Constitutions of Maine and the United States in challenging the durational residency requirement on equal protection grounds?

(2) Whether the tribal offices, the elections for which are subject to voter durational residency requirements, are of such a status that the denial of the right to vote for tribal officers to new residents of the Indian Township Reservation deprives those residents of an interest cognizable under the Equal Protection Clause?

Respecting the first issue, it appears settled that members of the Passamaquoddy Tribe are entitled to the same constitutional protection against arbitrary governmental action as are other citizens of Maine. Although the Constitution of Maine creates for Maine Indians a special status in respect to some of its provisions, the Article I Declaration of Rights, and notably the guarantee of equal protection of the laws afforded by Section 6-A of Article I, applies to "men" and "persons" respectively, terms which are unquestionably inclusive of tribal members. Indeed, our Supreme Judicial Court of Maine has assumed the applicability of constitutional protections to Maine Indians when it observed that a Passamaquoddy Indian's "political and civil rights are enforceable only in the courts of the state." State v. Newell, 84 Me. 465, 468 (1892). In an analogous context, the Supreme Court of the United States recently held that the Congress does not have unbridled discretion in conducting its Indian affairs, but must satisfy the requirements of the Equal Protection Clause. Delaware Tribal Business Committee v. Weeks, 97 S.Ct. 911 (1977).

Given that the Equal Protection Clause applies to the State of Maine's activities in relation to the Passamaquoddy Tribe, questions remain as to whether and to what extent its guarantees are threatened by L.D. 1064.

The tribal offices which would be subject to the provisions of L.D. 1064 are not of a purely ceremonial character. The Governor and Joint Tribal Council exercise many of the

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governmental prerogatives of a municipality, including the appointment of executive and law enforcement officers, 22 M.R.S.A. §§ 4706, 4716, the setting of fines and penalties, 22 M.R.S.A. § 4717, and the appropriation of proceeds from the sale of reservation property, 22 M.R.S.A. § 4834. In addition, the elected representatives of the Tribe constitute the voice of the Tribe in the Maine Legislature. 22 M.R.S.A. §§ 4831, 4831-A.

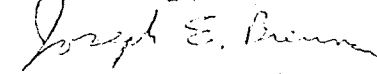
Because the outcome of a tribal election has a non-negligible impact upon the interests of all tribal members, any statute which selectively distributes the franchise must pass the exacting judicial standard of being "necessary to promote a compelling state interest." Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) (Equal Protection Clause violated by property-owning and public-school-children voting requirement in school board election).

"[T]he need for close judicial examination [of voting requirement is not] affected because [the elected representatives] do not have 'general' legislative powers. Our exacting examination is not necessitated by the subject of the election; rather it is required because some resident citizens are permitted to participate and some not." Id., at 629.

The durational residency requirements which would be imposed by L.D. 1064 do not hold up under strict judicial scrutiny under the Equal Protection Clause. Though the State of Maine has a legitimate interest in preventing non-resident Indians from participating in Indian Township elections, there are means of achieving this objective without encroaching upon the voting rights of new, bona fide residents of the reservation. Dunn v. Blumstein, supra, 343-354. The classification created by L.D. 1064 is not "tailored so that the exclusion of . . . [the] class [of new residents] is necessary to achieve the articulated goal [of excluding non-residents]." Kramer, supra, at 623 (emphasis added).

If we can be of further assistance to you in this matter, please let me know.

Sincerely,

  
JOSEPH E. BRENNAN  
Attorney General

JEB/ec

cc: Honorable A. Harold Fenlason