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State of California

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OPINION	:	No. CV 78-140
	:	
of	:	<u>July 13, 1979</u>
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SUBJECT: ENFORCEMENT OF RESIDENCY REQUIREMENT—The Secretary of State is not authorized to enforce the provision of the California Constitution imposing a one year residence prerequisite for membership in the Legislature.

The Honorable March Fong Eu, Secretary of State, has requested an opinion on the following question:

In view of the provisions of article III, section 3.5 of the California Constitution, is the Secretary of State required to enforce the provisions of article IV, section 2, subdivision (c) of the California Constitution imposing a one year residence prerequisite for membership in the Legislature, where said provision has never been determined by an appellate court to be unconstitutional?

CONCLUSION

The Secretary of State is not authorized to enforce the provision of article IV, section 2, subdivision (c) of the California Constitution imposing a one year residence prerequisite for membership in the Legislature.

ANALYSIS

California Constitution, article IV, section 2, subdivision (c) provides as follows:

“A person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year, and a citizen of the United States and a resident of California for 3 years, immediately preceding the election.”

The constitutional validity of restrictions on the right to be a candidate for public office has been the subject of numerous judicial decisions. It has been held that the right to hold public office, either by election or appointment, is a fundamental right which the First Amendment of the federal Constitution protects against infringement. (*Zeilenga v. Nelson* (1971) 4 Cal. 3d 716, 720; *Thompson v. Mellon* (1973) 9 Cal. 3d 96, 99.) Moreover, restrictions on the right of candidacy for public office impinge on other fundamental rights, such as the right to vote and the right to travel. (*Thompson v. Mellon, supra*, at 101–102; *Johnson v. Hamilton* (1975) 15 Cal. 3d 461, 468.) Consequently, any impairment of such a right must be justified by a compelling governmental interest. (*Zeilenga v. Nelson, supra*, at 721; *Thompson v. Mellon, supra*, at 102; *Johnson v. Hamilton, supra*.) In the absence of any compelling governmental interest, it has been held that durational residence requirements in excess of thirty days violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. (*Camara v. Mellon* (1971) 4 Cal. 3d 714, 715; *Zeilenga v. Nelson, supra*, at 722; *Johnson v. Hamilton, supra*, at 472.)¹

All of the above-cited cases concerned elections for local public office. The durational residence requirement for statewide office set forth in section 2 of article IV of the California Constitution has never been determined by an appellate court to be unconstitutional. (*Cf. Johnson v. Hamilton, supra*, 15 Cal. 3d at 471–472.) Nevertheless, based upon a considered analysis of the above cases in conjunction with other cases therein cited relating to the constitutional validity of durational residence restrictions on the right to vote in statewide elections (see *Dunn v. Blumstein* (1972) 405 U.S. 330; *Young v. Gness*

¹ These issues have not been finally resolved in the federal courts. In *Johnson v. Hamilton, supra*, 15 Cal. 3d at 471, the court noted two cases in which the United States Supreme Court, by summary affirmance, declined invitations to strike down lengthy durational residence requirements imposed upon candidates for state office. (*Cf. Kanapaux v. Ellisor* (D.S.C. 1974) affd. (1974) 419 U.S. 891; *Sunune v. Stark* (D.N.H. 1974) 383 F. Supp. 1287, affd. (1975) 420 U.S. 958.) The *Johnson* court expressed the view that summary affirmance by the United States Supreme Court is not necessarily dispositive of that court’s position with respect to the constitutional issues raised in the case. (*Id.*, at 471; but see *Hicks v. Miranda* (1975) 422 U.S. 332, 344.)

(1972) 7 Cal. 3d 18) and of other cases relating to the right to elect legislators in a free and unimpaired fashion (see *Reynolds v. Sims* (1964) 377 U.S. 533, 562), the Secretary of State formally decided in a written opinion dated February 4, 1976 (number 76 505 1 (E/PR)) that the one year residence requirement contained therein is constitutionally deficient. In accordance with these views, the Secretary has declined to enforce such provision.

On June 6, 1978, section 3.5 of article III of the California Constitution (hereinafter, “section 3.5”), known as Proposition 5 at the 1978 primary election, was adopted by the people. This amendment, proposed by Senate Constitutional Amendment number 25 (Stats. 1977, res. ch. 48), provides as follows:

“An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

“(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

“(b) To declare a statute unconstitutional;

“(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.”

The principal inquiry is whether, in view of the provisions of section 3.5, the Secretary of State is required to enforce the provision of article IV, section 2, subdivision (c) of the California Constitution imposing a one year residence prerequisite for membership in the Legislature, notwithstanding her determination that the latter provision is repugnant to the United States Constitution, where said provision has never been determined by an appellate court to be unconstitutional. The inquiry is predicated upon the assumption that the Secretary of State is authorized to enforce article IV, section 2, subdivision (c) of the California Constitution. We have previously determined, however, that the Secretary of State is without authority or jurisdiction to refuse to file the declaration of candidacy of a candidate for the Assembly or Senate on the grounds that the candidate failed to reside within the district for one year. (56 Ops. Cal. Atty. Gen. 365 (1973).) The conclusion was based in part upon the absence of any express or implied grant of authority. Thereafter, in 1975, the Legislature enacted section 12172.5 of the Government Code, as follows:

“The Secretary of State is the chief elections officer of the state, and shall administer the provisions of the Elections Code. The Secretary of State shall see that elections are efficiently conducted and that state election laws are enforced. The Secretary of State may require elections officers to make reports concerning elections in their jurisdictions.

“If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elections officer in discharging his duties.

“In order to determine whether an elections law violation has occurred, and notwithstanding Sections 17132, 17133, and 17135 of the Elections Code, the Secretary of State may examine voted, unvoted, spoiled and canceled ballots, vote-counting computer programs, absent voter envelopes and applications, and supplies referred to in Section 17022 of the Elections Code. The Secretary of State may also examine such other records of elections officials as he or she finds necessary in making such a determination, subject to the restrictions set forth in Section 6253.5.

“The Secretary of State may adopt regulations to assure the uniform application and administration of state election laws.”

Section 55 of the Elections Code was also added to provide, *inter alia*, that the Secretary of State is the chief elections officer of the state. The denomination of the Secretary as “chief elections officer” does not operate to confer additional powers not otherwise provided expressly or by necessary implication. In a similar vein, the California Supreme Court recently held that the Attorney General, constitutionally denominated the “chief law officer of the state,” could not refuse to prepare and issue the title and summary for a proposed initiative measure on the ground that said proposed initiative failed to meet certain constitutional standards. (*Schmitz v. Younger* (1978) 21 Cal. 3d. 90, 92–93.)

Nothing in the new enactments provides the authority found lacking in our earlier opinion. Even assuming that article IV, section 2, subdivision (c) of the California Constitution, pertaining to *membership* in the Legislature, is an “election law” within the meaning of Government Code section 12172.5, the statute prescribes the action which may be taken by the Secretary of State upon the conclusion that state election laws are not being enforced. Specifically, the Secretary “shall call the violation to the attention of the district attorney of the county or to the Attorney General,” and “may assist the county elections officer in discharging his duties.” The Secretary of State is not authorized thereby to refuse

to file a declaration of candidacy, or to refuse to include a candidate within the certified list of candidates for transmission to each county clerk. (*Cf.* Elec. Code §§ 6580–6584.) It is reasonable to assume that had the Legislature, being cognizant of the views set forth in our previous opinion (*cf. Southwest Exploration Co. v. County of Orange* (1955) 44 Cal. 2d 549, 554; *California Correctional Officers' Association v. Board of Administration* (1978) 76 Cal. App. 3d 786, 794; *Henderson v. Board of Education* (1978) 78 Cal. App. 3d 875, 883) intended to confer such authority upon the Secretary of State, it would have done so expressly and unequivocally.

In any event, article IV, section 5 of the California Constitution provides in part that each house of the Legislature “shall judge the qualifications and elections of its members.” Even in view of an express statute conferring authority upon the courts to adjudicate the right of a candidate to nomination to the office of member of the State Assembly, the California Supreme Court held that the Legislature has exclusive jurisdiction to judge the qualifications and elections of its members. (*In re McGee* (1951) 36 Cal. 2d 592.) We remain convinced that the decision in that case is dispositive of this matter. (56 Ops. Cal. Atty. Gen. 365, 368 (1973).)

It is concluded that the Secretary of State is not authorized to enforce the provision of article IV, section 2, subdivision (c) of the California Constitution imposing a one year residence prerequisite for membership in the Legislature. Consequently, we do not reach the question of the effect of article III, section 3.5 of the California Constitution upon the exercise of such authority.
