Connecticut Attorney General Opinion No. 1990-12

April 11, 1990

Mr. Joseph C. Barber
Commissioner
Department of Veterans' Affairs
287 West Street
Rocky Hill, Connecticut 06067

Dear Commissioner Barber:

We are writing in response to your letter dated February 22, 1990, in which you request our advice about the constitutionality of the residency requirements and waiting periods contained in Conn. Gen. Stat. ee 27-103 and 27-122b, two state statutes concerning veterans' benefits. We are also responding to your oral request, based upon your responsibilities under Conn. Gen. Stat. e27- 102l(c)(4),[1] for our opinion on the constitutionality of the residency requirement found in Conn. Gen. Stat. e 27-104, which is contained in Part II of Chapter 506.

Whenever the constitutionality of legislative action is questioned, the matter must be approached with great caution and examined with infinite care. 24 Conn. Op. Atty. Gen. 312 (1946). Except in rare cases, it is not the province of the Attorney General to pass upon the constitutionality of an Act which became a law in the prescribed manner. 22 Conn. Op. Atty. Gen. 228, 229 (1941). While it is a basic rule of construction that every reasonable intendment be made in favor of the constitutionality of a statute, if the invalidity of the enactment is clear beyond a reasonable doubt, it is our duty, no matter how delicate the task may be, to advise our client agencies that the statute should not be enforced. See

Cahill v. Leopold, 141 Conn. 1, 10 (1954); 16 C.J.S. Constitutional Law e 86. This obligation exists, irrespective of the consequences, no matter how desirable or beneficial the legislation may be. 16 C.J.S. Constitutional Law e 86.

For the reasons discussed below, it is our opinion that the residency requirements and waiting periods found in Sections 27-103(b) and 27-122b, which are contained in Part Ia of Chapter 506, are unconstitutional. We also conclude that the residency requirement found in Conn. Gen. Stat. e 27-140 is unconstitutional.

I. Veterans' Home and Hospital Statutes

The benefits contained in Part Ia of Chapter 506 all relate to care, treatment and services provided by the state Veterans' Home and Hospital to eligible veterans. Benefits include such things as hospital and medical care, housing, food, clothing, social and rehabilitation services, headstones and grave markers, burial expenses, and employment services. See Conn. Gen. Stat. ee 27-108, 27-109, 27-118, and 27-122b.

The definition of "veteran" for Part Ia of Chapter 506 is contained in Section 27-103(b) and applies to all the benefits described above, except for the burial benefits found in Section 27-122b. That definition provides:

"veteran" means any veteran who served in time of war, as defined by subsection (a), and who is a resident of this state, provided, if he was not a resident or resident alien of this state at the time of enlistment or induction into the armed forces, he shall have resided continuously in this State for at least two years; ….

The definition of "veteran" for Section 27-122b, which has a longer waiting period for eligibility than Section 27-103(b), states:

"veteran" means any person honorably discharged from, or

released under honorable conditions from, active service in the armed forces after service in time of war and who at the time of entering the armed forces was domiciled in this state or who was domiciled in this state at the time of his death and had been so domiciled for a period of not less than five years since such discharge or release; ….

In looking at the constitutionality of a statute which contains a residency requirement, it is important to distinguish "between bona fide residence requirements, which seek to differentiate between residents and non-residents, and residence requirements, such as durational, fixed dated, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State." Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903 n.3 (1986).

"[A] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement … [generally] does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residence."

Id., quoting Martinez v. Bynum, 461 U.S. 321, 328-29 (1974) (upholding a Texas statute that permits a school district to deny tuition-free admission to any student who lives apart from his parent or guardian for the primary purpose of attending the district's public schools.) See also Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd, 401 U.S. 985 (1971).

In cases where the United States Supreme Court has declared residency requirements to be unconstitutional, the Court has

held that the challenged statutes violated newer residents' right to equal protection of the law. U.S. Const. amend. XIV, e 1. See generally Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986); Hooper v. Bernalillo County Assessor, 472 U.S. 611 (1985); Zobel v. Williams, 457 U.S. 55 (1982); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); and Shapiro v. Thompson, 394 U.S. 618 (1969). The Court's approach to analyzing such constitutional claims, however, has varied from case to case. Compare Hooper, 472 U.S. 611 (1985) with Soto-Lopez, 476 U.S. 898 (1986). "Few areas of constitutional jurisprudence have proven more intractable to the judiciary – in terms of establishing both a coherent and consistent analytical framework – than analysis under the Equal Protection Clause." Baccus v. Karger, 692 F. Supp. 290, 293 (S.D.N.Y. 1988).

The usual standard of review for a statute or regulation challenged on equal protection grounds is the rational-basis test. City of Cleburne v. Cleburne Living Center,Inc., 473 U.S. 432 (1985). Under this test, legislation is presumed to be valid and will be sustained as long as the classification drawn by the statute is rationally related to a legitimate state interest and neither discriminates against a suspect classification nor impinges on a fundamental right. Id. at 440. Nevertheless, "[i]t is well established that where a law classifies by race, alienage, or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required." Soto-Lopez, 476 U.S. 898, 906 n.6 (1986).

The Supreme Court has consistently recognized a constitutional right to interstate travel. See e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). Although the Court has never determined the precise textual source of this privilege, it has nevertheless asserted that

"[f]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution …. And it is clear that freedom to travel includes the 'freedom to enter and abide in any State in the Union.'" Soto-Lopez, 476 U.S. at 904-05, quoting Dunn v. Blumstein, 405 U.S. 330, 388 (1972). The Court has explained that "[i]n addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982).

Recent decisions of the Court have differed, however, as to whether the right to travel is a fundamental right independent of the equal protection clause; see Shapiro v. Thompson, 394 U.S. 618, 630-31, quoting United States v. Guest, 383 U.S. 745, 757-58 (1966); or merely one aspect of the equal protection guarantee. See Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982) ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and long term residents.") In each of the cases where the right to travel has been treated as an independent fundamental right, the Court has subjected the challenged statute to heightened scrutiny from the outset and has struck down the statute if it did not serve a compelling state interest. See Soto-Lopez; 476 U.S. 898, Memorial Hospital, 415 U.S. 250; Shapiro, 394 U.S. 618. In other cases, where the Court has treated the right to travel merely as an aspect of the right to equal protection, the Court has used a rational-relationship analysis before considering whether heightened scrutiny was merited. See Hooper, 472 U.S. 611; Zobel, 457 U.S. 55. The Court has noted, however, that "[t]he analysis in all of these cases … is informed by the same guiding principle – the right to migrate protects residents of a State from being disadvanataged, or

from being treated differently, simply because of the timing of their migration, from other similarly situated residents." Soto-Lopez, 476 U.S. at 906.

To begin our evaluation of the constitutionality of the definition of "veterans" in Conn. Gen. Stat. e 27-103(b) and 27-122b, it will be helpful to review a few of the critical United States Supreme Court cases that have invalidated state residency requirements. One of the first Supreme Court cases to apply the right to migrate analysis to statutory residency requirements was Shapiro v. Thompson, 394 U.S. 618 (1968). In Shapiro, the Court invalidated three statutes from different jurisdictions which denied welfare benefits to residents who had not resided in their respective jurisdictions for at least a year. The Court held that each of the three statutes created a classification which constituted an "invidious discrimination" denying equal protection of the laws.[2] Id. at 627-28. The Court stated that moving from one State to another or to the District of Columbia is a constitutional right which the individual states may not unreasonably burden or restrict by statute, rule or regulation. Id. at 629.

The Shapiro Court explained that the mandatory waiting period in each of the statutes divided needy resident families into two classes that were indistinguishable from each other except that one was composed of residents who had resided in the jurisdiction a year or more, and the other was made up of residents who had resided there less than a year. Shapiro, 394 U.S. at 627. "On the basis of this sole difference, the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist – food, shelter, and other necessities of life." Id.

The States advanced several interests that allegedly justified the one-year residency requirements. These interests included preserving the fiscal integrity of state public assistance

programs by deterring immigration of indigents, distinguishing between new and old residents based on past tax contributions, aiding in planning the budget, providing an objective test of residency, minimizing the opportunity for fraud, and encouraging early entry of new residents into the labor force. Id. at 628-34. The Court held that the first two interests were unconstitutional state objectives and that the next four, while legitimate objectives, were either not furthered by the imposition of a one-year waiting period or could easily be achieved by less drastic means. Id. at 634-38.

At the outset, the Shapiro Court rejected the States' argument that a mere showing of a rational relationship between the waiting period and the "admittedly permissible state objectives" would justify the classification. Id. at 634. The Court asserted that "since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." Id. at 638. The Court proceeded to hold that none of the state interests advanced to support the statutes were compelling. Moreover, the Court stated that even under the traditional equal protection test, which requires only a rational relationship between the challenged statute and a legitimate state objective, the one-year residency requirement seemed "irrational and unconstitutional." Id. at 638.

In a subsequent "right to travel" decision, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), the Court struck down an Arizona statute requiring a year's residence as a condition to receiving nonemergency medical care at the County's expense. The Court reasoned that medical benefits are as much a basic necessity of life as welfare benefits, and that their denial therefore constitutes a penalty on the right to migrate. Id. at 259. The Court held in Memorial Hospital, as it had in Shapiro, that a durational residency requirement must be justified by a compelling state interest, and that the

State had been unable to articulate a satisfactory justification.

Zobel v. Williams, 457 U.S. 55 (1982) was the first of two recent Supreme Court cases that have treated the right to migrate as a simple adjunct of the right of equal protection. See also Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), discussed infra. Zobel presented a challenge to Alaska's method of allocating among its residents a portion of the state's annual petroleum revenues. Under the State's distribution plan, each citizen eighteen years of age or older annually received one dividend unit for each year of residency subsequent to 1959, Alaska's first year of statehood. The Court, noting that execution of the scheme would permit Alaska "to divide citizens into expanding numbers of permanent classes, " 457 U.S. at 64, struck down the plan. The Court asserted:

The only apparent justification for the retrospective aspect of the program, "favoring established residents over new residents," is constitutionally unacceptable … [citation omitted]. In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then.

We hold that the Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment.

Id. at 65. Because the Court determined that the law could not survive even the minimal rational-relationship test, it decided there was no need to consider whether enhanced scrutiny was merited. Id. at 60-61.

In Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), the Court reviewed the constitutionality of a New Mexico statute that granted a small tax exemption to any Vietnam

veteran who was a resident of New Mexico before May 8, 1976. Although the Court did not explicitly consider whether the statute burdened the right to travel and did not examine the law with strict scrutiny, the Court nevertheless concluded:

The State may not favor established residents over new residents based on the view that the State may take care of "its own", if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's "own" and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976.

Id. at 623.

In Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) (plurality opinion), the latest Supreme Court decision that is pertinent to our analysis, the Court declared unconstitutional a New York civil service rule giving bonus points on the state civil service examination to those veterans who were residents of New York at the time they joined the military. In reaching its decision, the plurality returned to the analytic approach of Shapiro and Memorial Hospital. The Court began its review by noting that its first task was to determine whether the law in question operated to penalize those persons who had exercised their right to migrate. Soto-Lopez, 476 U.S. at 906.

Although the Court cautioned that not all waiting periods or residency requirements are impermissible, the Court asserted, as it had in Shapiro, that once a burden on the the right to migrate is found, the law which burdens that right is subject to strict scrutiny, and a State must present a compelling justification to support the statute. Soto-Lopez, 476 at 904, n.4. Justice Brennan, writing for the plurality, stated: "While the benefit sought here may not rise to the same level of importance as the necessities of life [welfare and medical benefits] and the right to vote, it is unquestionably substantial." (Emphasis added). Soto-Lopez, 476 U.S. at 908.

The Court went on to hold that the statute "clearly" operated "to penalize appellees for exercising their rights to migrate". Id. at 909. It noted that, unlike the statutes challenged in Shapiro and Memorial Hospital, which were "temporary deprivations of very important benefits and rights", the New York statute permanently deprived appellees of the benefits they sought in that it never allowed them to qualify for the bonus points, no matter how long they resided in the State. Soto-Lopez, 476 U.S. at 909-10.

The State argued that its method of awarding bonus points was warranted by the following objectives: (1) The encouragement of New York residents to join the armed services; (2) the compensation of residents for service in time of war; (3) the inducement of veterans to return to New York; (4) the employment of a uniquely valuable class of public servants. Id. The Court, however, concluded that these goals were inadequate to justify the burden the statute placed on freedom of travel.

Chief Justice Burger, in his concurring opinion, chose to follow the analytical framework of Hooper and Zobel. Accordingly, he did not reach the question of whether strict scrutiny was triggered because he felt that the State's purported interests did not even survive a rational-relationship test. 476 U.S. at 912. Justice White, in his concurring opinion, also concluded that heightened scrutiny was not triggered. He agreed with the judgment because he believed that the statute at issue denied equal protection of the laws by employing a classification that was irrational. Id. at 916. Thus, although there was no majority on what standard of review to apply, a majority of the Court did rule the New York statute unconstitutional; four did so because it did not pass strict scrutiny, and two because the statute did not pass rational-relationship review.

Following the analysis outlined in Shapiro and its progeny, therefore, we note that Sections 27-103(b) and 27-122b

establish three classes of veterans in the State: those who were residents of the State at the time of their induction; those who have resided continuously in the State for at least two years or five years respectively; and those who meet neither of the previous residency criteria. Veterans in the first two categories are eligible for the aid described in Part Ia of Chapter 506, while veterans in the third category cannot obtain any of the statutes' benefits.

The type of residency requirements contained in Conn. Gen. Stat. ee 27-103(b) and 27-122b bear greater resemblance to the residency requirements at issue in Shapiro, Memorial Hospital and Soto-Lopez than those at stake in Zobel and Hooper. Sections 27-103(b) and 27-122b each use duration of residency and place of residency at the time of induction as criteria in their respective definitions of "veteran". Shapiro and Memorial Hospital both considered the validity of durational residency requirements, and Soto-Lopez reviewed the constitutionality of a system that classified veterans according to where they lived when they entered the service. In contrast, Zobel examined the grouping of residents into an ever-growing number of permanent, unequal categories, while Hooper analyzed the classification of persons according to their place of residence on a fixed date in the past.

The benefits at stake in Conn. Gen. Stat. ee 27-103(b) and 27-122b – medical care, food, shelter, clothing, employment services and burial services – all relate to the "basic necessities of life" identified by the Court in Shapiro and Memorial Hospital. By denying those benefits to veterans who have recently settled in Connecticut, the statutes single out such newcomers and place them at a disadvantage.

These laws plainly burden the right to travel and we believe that any court considering their constitutionality would examine them with strict scrutiny, the most intense kind of judicial review. The State would then be required to present a compelling justification to support the statute. As discussed

above, all attempts by other jurisdictions to find an acceptable compelling justification for similar statutes have failed, and we know of no compelling justification, not previously asserted, that would be sufficient to support the residency requirements in Sections 27-103(b) and 27-122b. Since every reasonable intendment is to be made in favor of the constitutionality of a statute, we have also examined Sections 27-103(b) and 27-122b under the rational-basis test to determine if there exists a legitimate state interest which would sustain their validity. As Zobel and Hooper demonstrate, favoring established residents over new residents based on the view that a state may take care of "its own" is constitutionally unacceptable.

We conclude, therefore, that the durational residency requirements contained in Conn. Gen. Stat. e 27-103(b) and 27-122b are unconstitutional.

II. Soldiers, Sailors and Marines Fund

Conn. Gen. Stat. e 27-140 provides for funds to be expended by the American Legion "in furnishing food, wearing apparel, medical or surgical aid or care or relief to, or in bearing the funeral expenses of, soldiers, sailors or marines who served in any branch of the military service" of the United States or its allies during a time of war. Under this statute the American Legion may also give such aid to the spouses or dependent children of eligible veterans.

The benefits provided in Section 27-140 are limited to veterans who were "citizens or resident aliens of the state at the time of entering said armed forces …." The residency limitation in this statute is even more restrictive, therefore, than those in Sections 27-103(b) and 27-122b. There is no waiting period that would allow veterans, who are otherwise eligible for benefits but were not residents of Connecticut on a particular past date, to become eligible sometime in the future after completing a period of residency.

For the reasons already discussed in regard to the residency requirements contained in Part 1a of Chapter 506, it is our opinion that the classification system in Section 27-140 is unconstitutional. The residency requirement in Section 27-140 is substantively identical to the one which the United States Supreme Court struck down in Soto-Lopez. Furthermore, the benefits provided in Part II of Chapter 506 – food, wearing apparel, medical or surgical aid, and funeral expenses – like those benefits established in Part 1a, are all "basic necessities of life". See Shapiro, 394 U.S. 618, and Memorial Hospital, 415 U.S. 250, discussed supra. We expect that a court, in reviewing this residency requirement, would subject it to strict scrutiny and would find that there is no state interest adequate to justify it.

Furthermore, even the application of the rational-basis test would not save the residency requirement contained in Section 27-140. Shapiro and Memorial Hospital made it clear that preserving the fiscal integrity of state public assistance programs by deterring immigration of indigents was an unconstitutional state objective. Similarly, Shapiro, Memorial Hospital, Zobel, and Hooper made it clear that distinguishing between new and old residents based on past tax contributions or on the view that a state may take care of "its own" is also an unconstitutional objective. We cannot discern any legitimate state objective to which the statute would be rationally related.

We conclude, therefore, that the residency requirement in Conn. Gen. Stat. ee 27-140 is unconstitutional.

Very truly yours,

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

Michael J. Jarjura
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[1] Conn. Gen. Stat. e 27-102l(c)(4) provides that the Commissioner of Veterans' Affairs shall "assist veterans, their spouses and eligible dependents and family members in the preparation, presentation, proof and establishment of such claims, privileges, rights and other benefits accruing to them under federal, state and local laws;".

[2] One of the statutes the Court held unconstitutional was Conn. Gen. Stat. e 17-2d, which denied Aid to Families with Dependent Children (AFDC) to women who had been in the state less than a year. See Shapiro v. Thompson, 394 U.S. 618, 622 (1968).