Senator Jeanette White, Chair
Senate Government Operations Committee
Vermont Legislature
115 State Street
Montpelier, VT 05633

January 31, 2016

Dear Senator White,

Now I see the issue. I should have checked the papers before I sent that note to you on Friday through Cheryl Ewen, legislative assistant to Senate Government Operations. I am not sure you still want me to come up to testify, although I am happy to do so, but let me see if I can be of help to you with the question I think you are primarily concerned with.

I. Durational Residency Requirements in Vermont Constitution are not Unconstitutional Restrictions on Right to Travel under the U.S. Constitution

First, let me separate out two distinct questions. The first – which I have come to believe you were not interested in – is whether the durational residency requirements for statewide office in Chapter II, Sections 15 and 23 of the Vermont Constitution might be open to challenge for violating the constitutionally protected "right to interstate travel" and "right to equal protection" under the U.S. Constitution. I mention this because there have been cases in which candidates for statewide office in other states have challenged state constitutional residency requirements for running for office on those grounds. The courts have consistently rejected those challenges however. See *In re Contest of November 8, 2011, New Jersey General Assembly*, 210 N.J. 29 (2012). At least 40 states have residency requirements as a condition for eligibility for the office of state governor and of those 29 require a period of residency of five years or more. In *Chimento v. Stark*, 353 F.Supp. 1211, a federal district court upheld against challenge a New Hampshire durational residency requirement of seven years for the office of governor. I could get into this in more detail, but the simple answer is a challenge to the durational residency requirements in the Vermont constitution for holding statewide office on grounds those requirements violate the U.S. Constitution would not succeed. Those requirements are perfectly constitutional.

So requiring a candidate, as a condition for running for office, to certify in writing that he or she "meets any constitutional residency requirements for the office,"

Section 2361(b)(1), and the elaboration in Section 2361(b)(2) of the meaning of "constitutional residency requirements," and limiting names listed on the primary ballot to those who sign the consent form in Section 2361(c), pose, in my judgment, no constitutional problem.

I do encourage you to remove the requirement that the candidate state that he or she "is a registered voter," Section 2361(b)(1), because that would be open to the challenge that the legislature has sought to add to the qualifications for eligibility for office above and beyond those established by the Vermont constitution. As indicated in my note to you through Cheryl, it is probably an academic concern, since it is highly unlikely that anyone who is not a registered voter would seek statewide office, but still, the courts have consistently struck down legislation imposing additional eligibility requirements for public office above and beyond those established in either state or federal constitutions.

II. <u>The Meaning of "Has Resided In" in the Durational Residency Requirements Established in Chapter II, Section 15 and 23 of the Vermont Constitution: The "Proof of Residency" Problem</u>

There is however a second question, one that I take it from reports in the press is of primary concern to the Committee in its consideration of S.234. That is the question of what "has resided in" *means* when the relevant section of the constitution requires that a candidate "has resided in" the state for "[X] consecutive years preceding the date of the election." Since S.234 simply restates the constitutional requirement as laid out in Chapter II, Section 15 and 23, it is not a problem from a constitutional standpoint. But it basically kicks the question of what "has resided in" means down the road. That is not necessarily a problem. It leaves to the courts the question of whether a particular candidate meets this standard in light of the particular circumstances of the case. As I suggest below, that may be not only inescapable but also perhaps the most sensible way to deal with the question.

On the surface, the question of what "has resided in" seems like a fairly straightforward matter: "has resided in" means in all cases "has physically resided in" but when you look at the court cases involving challenges to similar state durational residency requirements for statewide office, it turns out to be more complicated than that. Although we might tend to think that "has resided in" means "*unbroken physical presence in"* that is not how the courts have interpreted that phrase. They have not made proof of unbroken physical presence the sole litmus test for determining

residency. Generally, the courts have treated "has resided in" as meaning the same thing as "has established residence in." That is how the problem arises.

Let me illustrate with a simple example: Mary Jones, a university professor in Burlington, has lived in Vermont her entire life. She has been a registered voter in the state for the past twenty years. She has maintained a residence in Waterbury since 1996. In 2014-15, she received a Fullbright scholarship allowing her to spend the entire year studying criminal punishment practice in Denmark. She rented her house in Waterbury for the year. Upon return in September 2015, she learns that the State Senator for her district is retiring and she would like to run for the office he has vacated. Would she be eligible to do so?

Another example: Tom Smith, an environmental engineer, who also has lived in Vermont his entire life, is sent by his company to direct a special project in Venezuela for an initial period of nine months, but, when problems develop, the period of stay in Venezuela is extended to fourteen months. During the time he is abroad, he sublets his apartment to another. A registered voter in the state, Tom has participated by absentee ballot in local and state elections, made the primary payments on his apartment, and maintained Vermont registration of his car. Upon return, he learns that the position of state representative for his district is open. Is he eligible to run for that office?

What the courts, and in some cases states by statute, have done is to adopt a somewhat more flexible standard for what "has resided in" (or "has established residence in") means in order to give effect to the large purposes of the durational residency requirement. New York, for example, defines by statute the term "residence" as "that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return." New York Election Law Sec. 1-104[22]. By that definition, both Tom and Mary in the above examples would qualify under the requirement that a candidate must have "resided in" Vermont for the requisite number of "consecutive years" prior to the election even though neither could establish "unbroken physical presence" in the state for that period.

The problem becomes even more complex because, in dealing with challenges to candidates on grounds they do not meet a state's durational residency requirements, the courts have recognized "that in this modern and mobile society, an individual can maintain more than one bona fide residence," see *New York v. O'Hara*, 96 N.Y.2d

378. ["There is no rule which prohibits a candidate for public office from having two residences; and, where the record is clear, . . . that both residences are places where he maintains significant and legitimate attachments." *Id.*] This sometimes has given a candidate an opportunity to choose which of two residences to claim for purposes of establishing eligibility to run for office. But that does not mean the choice can be made without check.

Whether the residency requirement has been met in an individual case often depends on consideration of a number of factors of which the following two factors are probably the most significant:

> (1) physical presence, the place where one actually lives and works; and
>
> (2) intent to maintain residency as manifested by such things as voting practice, payment of state income taxes, automobile registration, maintaining a place of residence in the state, etc.

One thing is clear: neither mere physical presence nor the mere expression of intent by itself is sufficient to establish residency. If the individual seeking to run for office has been absent from the state for a considerable period, courts are likely to consider the length and nature of - and explanation for - the absence, whether in fact it can be fairly be regarded as only "temporary."

In making the residency determination, it is helpful to consider the underlying purposes for establishing such a requirement for public office. The courts have recognized three large purposes: Durational residency requirements: (1) operate as a curb on carpetbagging; (2) ensure that the candidate can become familiar with the constituency and the issues facing the people to be represented; and (3) ensure that voters have time to develop familiarity with the candidate. See *Contest of November 8, 2011 General Election of Office of New Jersey General Assembly*, *supra*. Thus one crucial question, though not the only one, becomes: How are these large purposes furthered, or undermined, by allowing a particular candidate to run for election in a particular case?

So where does this all lead? What are the implications for what to do about the residency requirement provisions in S.234?

One thing this survey of court cases suggests, I think, is that there is no simple litmus test for determination of what "has resided in" means and there probably ought

not to be one. The question in each case is whether an individual has established residency in a state for a consecutive period of years prior to election and that determination inescapably involves consideration of (1) a number of factors and (2) the larger purposes for establishing a residency requirement for public office. An additional complicating factor derives from recognition that the world we live in - "this modern and mobile society" - is different from the world inhabited by the framers of the Vermont constitution. Today it is possible, and much more likely, as the courts have recognized, for individuals to have more than one residence. Thus each case needs to be considered on its own particular terms. You can find in the cases the key factors and considerations that courts are likely to apply in determining whether a particular candidate for office meets the durational residency requirements established by statute or by a state constitution, but I think it would be difficult for the legislature – and maybe unwise to try - to resolve that issue definitively in advance of a particular challenge.

I may be getting out on thin ice here, but my own recommendation therefore is that S.234 simply require an individual seeking to run for office to certify in writing that he or she meets the durational residency requirements for that particular office, leaving it to the courts to determine, if eligibility is challenged, whether those durational residency requirements are met in a particular case.

I am not sure this solves your problem, but I hope it has been at least a little helpful.

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