THE ATTORNEY GENERAL OF TEXAS

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May 27, 1975

The Honorable William T. "Bill" Moore
Chairman, State Affairs Committee
State Senate
Austin, Texas 78711

Letter Advisory No. 108

Re: Constitutionality of House Bill 316

Dear Senator Moore:

You have requested our opinion regarding the constitutionality of House Bill 316, which would permit students and military personnel to select their place of residence for purposes of eligibility to vote.

The proposed bill would amend subsections (j) and (k) of article 5.08, Texas Election Code, as follows:

> (j) A person on active duty in the military service of the United States may choose whether to claim his residence to be where his home was before he was placed on active duty status or to be where he is living while on active duty.
>
> (k) A student in a school, college, or university may choose whether to claim his residence to be where his home was before he became a student or to be where he is living while attending school.

In Whatley v. Clark, 482 F. 2d 1230 (5th Cir. 1973), cert. denied, 415 U.S. 934 (1974), the Court of Appeals for the Fifth Circuit struck down former subsection (k) as infringing rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Subsection (k) had provided that "a student in a school, college, or university" shall not be considered to have acquired a voting residence at the place where he lives while attending school "unless he intends to remain there and to make that place his home indefinitely

after he ceases to be a student." The Court held that the statute created a rebuttable presumption of student non-residency which was not necessary to promote a compelling state interest. 482 F. 2d at 1234.

The Court conceded that the statute applied to students the "same substantive standard" for determining residence -- intent to remain permanently or for an indefinite time -- as was applied to other voters. But because it required students to overcome a presumption of non-residency which was not applied to other voters, the statute was deemed unconstitutional.

In our opinion, House Bill 316, as applied to students, could be construed by the courts essentially to codify the holding of Whatley. It permits a student to register at the place of his college residence on the basis of his mere presence there and present intent to remain, and it permits him the alternative choice of registering at the place where he was resident before becoming a student. Although the Court in Whatley did not specify what sort of residency test would satisfy the constitutional requirement, the holding of the case makes it difficult to devise any standard other than mere presence coupled with present intent to remain.

The rational basis for establishing a physical presence and present intent test for students is illuminated by a similar case, Wilkins v. Bentley, 189 N. W. 2d 423 (Mich. Sup. 1971), in which the Supreme Court of Michigan noted that the difficulty with a rebuttable presumption of non-residency is that it "grants a constitutionally prohibited discretion to local clerks." Id. at 427. The Whatley court found that "there is a wide variance in the quantum of proof demanded by voter registrars. . ." Whatley, supra, at 1233, fn. 6.

Ballas v. Symm, 494 F. 2d 1167 (5th Cir. 1974), does not require a different conclusion. There the Court of Appeals, while approving the general use of a questionnaire to determine residency, found it unnecessary to determine whether discrimination had existed in any particular instance. Furthermore, the Court affirmed the district court's finding that:

> [t]he standard for registration is the same for all applicants. . .: they must be residents of the county. The practices or procedures utilized in determining the residency of applicants appear to be uniform. 494 F. 2d, at 1172.

See also Frazier v. Callicutt, 383 F. Supp. 15 (N.D. Miss. 1974).

It has been argued that House Bill 316 confers upon students a right -- that of selecting their voting residence -- not enjoyed by the general voting population, and thus contravenes the Equal Protection Clause of the Fourteenth Amendment. The Court in Whatley implies, however, that non-students already possess this right; the only test apparently required of them is a simple declaration of residence.

In making these observations, we have interpreted the word "choose" in House Bill 316 to be tantamount to "expressing a preference" or "declaring an intention." We believe that the courts would so construe the language of the bill and that such construction would render the bill constitutional. It is therefore our opinion that House Bill 316, since it would probably be interpreted by the courts as evidencing a standard of residency in terms of physical presence and present intent to remain, does not deny to any other group the equal protection of the laws guaranteed by the Fourteenth Amendment.

We also believe that House Bill 316 is constitutional as applied to military personnel. As with students, servicemen have in the past been the victims of discriminatory voting legislation [see, e.g., Carrington v. Rash, 380 U.S. 89 (1965)]; and although the Whatley court was scrupulous to "intimate no view as to [the]validity [of article 5.08] as applied to servicemen," the Whatley rationale appears to be applicable to military personnel as well as to students.

Very truly yours,

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APPROVED:

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Opinion Committee

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