AGO 2002-17 CONSTITUTIONAL LAW; ELECTIONS; CANDIDATES: The State of Nevada may not, through its state constitution or through state statute, require a candidate for the United States House of Representatives or the United State Senate to reside in the State of Nevada prior to being elected.

Carson City, April 9, 2002

The Honorable Dean Heller, Secretary of State 101 North Carson Street, Suite 3, Carson City, Nevada 89701-4786

Dear Mr. Heller:

You have requested an opinion from this office regarding whether candidates for the United States House of Representatives or the United States Senate may be required to actually reside in the State of Nevada prior to being elected to either one of those offices.

QUESTION

May the State of Nevada require that candidates for either the United States House of Representatives or the United States Senate actually reside in the State of Nevada prior to being elected to office?

ANALYSIS

Your question is raised in response to the recent case of *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000); *cert. denied* 532 U.S. 904 (2001). The *Schaefer* case considered the constitutionality of a California law that required a candidate for the United States House of Representatives to establish residency in California prior to being elected. *Id.* at 1032. The *Schaefer* court concluded that requiring the residency of a candidate for the United States House of Representatives prior to election was in violation of the United States Constitution. *Id.* at 1039.

In *Schaefer,* a Nevada resident sought to file as a candidate in a special Congressional election in California. *Id.* at 1032. The Registrar of Voters refused to give the Nevada resident the nomination papers because he was not registered to vote in California as required by State law. *Id.* In order to be qualified to vote in California, an individual is first required to establish residency. *Id.* In California, an individual must ordinarily file nomination

papers at least 83 days before an election and be a resident in the election precinct at least 29 days prior to the election. *Id. at 1034.*[1]

At issue in the *Schaefer* case was the Qualifications Clause of the United States Constitution that states:

> No Person shall be a Representative who shall not have attained the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, *when elected, be an Inhabitant of that State in which he shall be chosen*.

Id. at 1034, *citing* U.S. Const. art. I, § 2, cl. 2 (emphasis added).[2]

The *Schaefer* court took guidance from the United States Supreme Court's most recent examination of the Qualifications Clause, in the case of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In *U.S. Term Limits*, the Supreme Court considered the constitutionality of an amendment to the Arkansas State Constitution imposing term limits on the state's congressional delegation. *Schaefer*, 215 F.3d at 1034, *citing U.S. Term Limits, Inc*., 514 U.S. at 783. In *U.S. Term Limits*, the U.S. Supreme Court reviewed the case of *Powell v. McCormack*, 395 U.S. 486 (1969), in which the Court held "that in judging the qualifications of its members Congress is limited to the standing

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[1] As *Schaefer* involved a special election, the candidate would only have been required to be a resident of the State of California for 43 days prior to the election. *Schaefer,* 215 F.3d at 1034, n. 2.

[2] The *Schaefer* case reviewed the Qualifications Clause as it related to election to the United States House of Representatives. However, there is also a Qualifications Clause for those seeking election to the United States Senate. U.S. Const. art. I, § 3, cl. 3 states:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, who shall not, *when elected, be an Inhabitant of that State for which he shall be chosen.* [Emphasis added.]

This office believes that the analysis of *Schaefer* is equally applicable to the requirements for the election of United States Senators. The main case relied upon by the *Schaefer* court was *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The *U.S. Term Limits* case involved an analysis of the Qualifications Clauses for both members of the House of Representatives and the Senate. *Id. at 782.*

qualifications prescribed in the Constitution." *Schaefer*, 215 F.3d at 1034, *citing Powell,* 395 U.S. at 550.

In *U.S. Term Limits*, the U.S. Supreme Court considered whether a state had the authority to add qualifications to those specified in the United States Constitution. *Schaefer*, 215 F.3d at 1035, *citing U.S. Term Limits*, 514 U.S. at 798. The Court first considered whether the Tenth Amendment to the United States Constitution reserved to the states the power to place qualifications on congressional delegations. *Schaefer*, 215 F.3d at 1035, *citing U.S. Term Limits*, 514 U.S. at 800-803.[3] The *Schaefer* Court summarized the Tenth Amendment analysis of *U.S. Term Limits* in this way:

> After reaffirming the holding in *Powell*, the *Term Limits* Court proceeded to determine whether the States had the power to add qualifications. *See* [*U.S. Term Limits*] 514 U.S. at 798. The Court first noted that such power could not have been reserved to the States under the Tenth Amendment as no federal government existed until the Constitution was ratified; the Tenth Amendment, therefore, could not have reserved a power to qualify delegates to a congressional body which did not yet exist. *See id.* [*U.S. Term Limits*] at 800-03. Concluding that the right to elect federal representatives was a "new right, arising from the Constitution itself," the *Term Limits* Court then examined additional historical evidence specifically addressing the preclusion of States' power to qualify congressional delegates. *See id.* [*U.S. Term Limits*] at 805. Despite the fact that "term limits or 'rotation' was a major source of controversy, the draft of the

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[3] U.S. Const. amend. X states: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

> Constitution that was submitted for ratification contained no provision for rotation." *Id.* [*U.S. Term Limits*] at 812. The Court was especially persuaded by "the Framers' wariness over the potential for state abuse" and the need for national uniformity. *Id.* [*U.S. Term Limits*] at 811. Over a powerful dissent written by Justice Thomas and joined by three other justices, the Court concluded "that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications." *Id.* [*U.S. Term Limits*] at 800-01.

Schaefer, 215 F.3d at 1034-35, *citing U.S. Term Limits*, 514 U.S. at 798-811 (footnote omitted).

After its review of the *U.S. Term Limits* decision, the *Schaefer* Court concluded that California did not posses the power to supplement the Qualifications Clause. *Schaefer*, 215 F.3d at 1035, *citing U.S. Term Limits*, 514 U.S. at 827. Using *U.S. Term Limits* as its guide, the *Schaefer* Court adopted a two-pronged analysis for determining whether California's residency requirement violated the Qualifications Clause. First, the Court considered whether California law created an absolute bar to candidates who were otherwise qualified under the Qualifications Clause. *Schaefer,* 215 F.3d at 1035. Second, if there was not an absolute bar to otherwise qualified candidates, the Court asked whether the California residency requirement would have the likely effect of handicapping an otherwise qualified class of candidates. *Id.*

The *Schaefer* Court noted that the district court found that the residency requirement did not create a permanent and absolute bar to candidacy. *Id.* at 1036. However, the *Schaefer* Court found that the district court should have continued its analysis and determined whether the residency requirement would have an indirect effect of handicapping a class of nonresident

candidates. *Id.* Using a historical analysis, the *Schaefer* Court concluded that "[t]he Framers discussed and explicitly rejected any requirement of in-state residency before the election." *Id.*

The Court did find that a state can require the filing of a registration form to maintain order in its election proceedings. *Id.* at 1037, *citing Storer v. Brown*, 415 U.S. 724, 730 (1974). However, the Court found that requiring candidates to establish in-state residency prior to election hampers and burdens out-of-state residents. *Schaefer*, 215 F.3d at 1037. The *Schaefer* Court stated:

> We therefore hold that California's requirement that candidates to the House of Representatives reside within the state *before* election, violates the Constitution by handicapping the class of nonresident candidates who otherwise satisfy the Qualifications Clause.

Id.

The *Schaefer* Court rejected California's argument that the residency requirement fell within its power to prescribe the times, places, and manners of elections for Senators and Representatives.[4] The *Schaefer* Court stated that "California's residency requirement falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of the election nor requires some initial showing of support." *Id.* at 1038. Citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986), the *Schaefer* Court stated: "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights . . . ." *Id.*

The *Schaefer* Court squarely held that an in-state residency requirement for candidates to the position of the United States House of Representatives prior to election was unconstitutional. In determining whether the *Schaefer* decision and analysis is applicable in the State of Nevada, it is necessary to review Nevada law to determine the residency requirements for individuals seeking election to the United States House of Representatives and the United

[4] U.S. Const. art. I, § 4, cl. 1 states: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; . . .

States Senate. The Nevada Constitution provides that "No person shall be eligible to any office who is not a qualified elector under this constitution." Nev. Const. art. 15, § 3, cl. 1. Article 2, § 1 of the Nevada Constitution specifies the requirements of a qualified elector as:

> All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of eighteen years and upwards, who shall have actually, and not constructively, *resided in the state six months, and in the district or county thirty days next preceding any election,* shall be entitled to vote for all officers that now or hereafter may be elected by the people . . . [Emphasis added.]

The residency requirements for persons seeking election are tied to the requirements of being a qualified elector in the State of Nevada. Therefore, under the language contained in the Nevada Constitution, an individual seeking election to public office would be required to actually reside in this State for six months and in the district or county wherein he was seeking election for 30 days preceding the election. However, this office has already opined that the state residency requirements for entitlement to vote in state elections are preempted by the Fourteenth Amendment to the United States Constitution. *See* Op. Nev. Att'y Gen. No. 85 (March 21, 1972); *see also Dunn v. Blumstein*, 405 U.S. 330 (1972). Therefore, the six-month residency requirement specified in the Nevada Constitution is unconstitutional.

The Legislature of the State of Nevada has placed into statute the residency requirements of candidates for the United States House of Representatives and the United States Senate. Specifically, Nevada law requires that candidates for the elected office of a United States Senator must be nominated and elected in the manner provided by law for the nomination and election of state officers. NRS 304.010. Likewise, candidates for the elected office of Representative in the United States House of Representatives must be nominated in the same manner as state officers are nominated.
NRS 304.040.

NRS 293.1755(1) specifies the residency requirements for candidates as:

> In addition to any other requirement provided by law, no person may be a candidate for any office unless, for at least the 30 days immediately preceding the date of the close of filing of declarations of candidacy or acceptances of candidacy for the which he seeks, he has, in accordance with NRS 281.050, actually, as opposed to constructively, resided in the state, district, county, township or other area prescribed by law to which the office pertains and, if elected, over which he will have jurisdiction or which he will represent.[5]

NRS 281.050(1) puts forth the requirement that a candidate have an actual residence within the state, county, or district in which he is to run for political office in order to qualify as a candidate. Therefore, upon review of the Nevada Constitution, a former opinion from this office, and the relevant provisions of the Nevada Revised Statutes, it is clear that Nevada law requires a candidate for either the United States House of Representatives or the United States Senate to actually reside in the State of Nevada 30 days immediately preceding the date of the close of filing of declarations of candidacy or acceptances of candidacy for the office which he seeks.

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[5] NRS 293.177(2)(a) requires a candidate to file a sworn declaration of candidacy which must include a statement that the individual has resided in the state, district, county, township, city or other area prescribed by law at least 30 days preceding the date of the close of filing of declarations of candidacy for the office. NRS 293.177(1) states:

> Except as provided in NRS 293.165, a name may not be printed on a ballot to be used at a primary election unless the person named has filed a declaration of candidacy or an acceptance of candidacy, and paid the fee required by NRS 293.193 not earlier than the first Monday in May of the year in which the election is to be held nor later than 5 p.m. on the third Monday in May.

Under the *Schaefer* decision, the Ninth Circuit Court of Appeals, whose jurisdiction includes the State of Nevada, has clearly held that requiring residency of a candidate for the United States House of Representatives prior to the candidate being elected violates the Qualifications Clause of the United States Constitution. The United States Supreme Court has not decided this specific issue. However, the United States Supreme Court has held that a state does not have the power to add to the Qualifications Clause of the United States Constitution. *U.S. Term Limits*, 514 U.S. at 827.

It is clear from the *Schaefer* decision that should the Nevada residency requirements of candidates for either the United States House of Representatives or Senate ever be presented to the Ninth Circuit Court of Appeals, they would be found to be unconstitutional. Further, there would most likely be no legal impediment to a candidate bringing such an action in federal court. Federal courts will abstain from hearing certain cases only "where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973), *citing Zwickler v. Koota*, 389 U.S. 241, 249 (1967), *Harrison v. NAACP*, 360 U.S. 167, 176-177 (1959). As the Nevada residency statutes are clear, and not reasonably susceptible of an interpretation that might avoid constitutional adjudication, federal courts would most likely not abstain from rendering a decision, as they are required to guard and protect the rights granted under the United States Constitution. *Kusper*, 414 U.S. at 55, *citing Robb v. Connolly,* 111 U.S. 624, 637 (1884).

The Nevada Supreme Court has not been silent on the issue of the Qualifications Clause. In the case of *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120 (1992), the Court considered the issue of whether the Secretary of State should be required to remove from the ballot an initiative proposal that sought to place term limits on the number of terms that a United States Congressman or Senator from Nevada may serve. The Nevada Supreme Court stated:

> Opponents to the mandamus petition now before us made little or no argument urging that the people of this state have the power to alter the qualifications or terms limits of federal offices created by the Constitution

> of the United States. Not even Congress has the power to alter qualifications for these federal constitutional officers. *See Powell v. McCormack*, 395 U.S. 486 (1969). As this court noted in *State ex rel. Santini v. Swackhamer*, 90 Nev. 153, 155, 521 P.2d 568, 569 (1974) (quoting 1 Story on the Constitution, (5th Ed. § 627)), "[t]hose officers owe their existence and functions to the united voice of the whole, not of a portion of the people." Further, as Justice Story has observed, "the States can exercise no powers whatsoever which exclusively spring out of the existence of the national government…." *Id.* Thus, the initiative petition, whether it enacts a law or amends the state constitution, can have no effect on the terms of members of the United States Congress.

Id. at 830.

The *Stumpf* Court went on to state that: "As Justice Steffen pointed out at oral argument, the obvious and proper way of going about effecting changes in the terms of federal constitutional officers is to amend the Constitution of the United States." *Id.* at 834-35.

In *Santini v. Swackhamer*, 90 Nev. 153, 521 P.2d 568 (1974), the Nevada Supreme Court considered whether to hold art. 6, § 11 of the Nevada Constitution, which provides that judges are ineligible for certain offices, applicable to federal elections. The Court noted that the weight of the case law held that a state may not impose additional qualifications upon federal offices. *Id.* at 155-156, n. 3. The Court went on to state that art. 6, § 11 of the Nevada Constitution was not applicable to federal offices. *Id.* at 157. The *Swackhamer* Court also correctly pointed out that this office opined long ago that no state may add qualifications for federal office. *Id.* at 156, n. 7, *citing* Op. Nev. Att'y Gen. No. 897 (March 29, 1950).

After carefully considering the *Schaefer* decision, the decision of the United States Supreme Court in *U.S. Term Limits*, and the language from the Nevada Supreme Court in the *Stumpf* decision, this office opines that it is unconstitutional for a state to require a candidate for the United States House of Representatives or the United States Senate to reside in that state prior to election to office.

Therefore, to the extent that the Constitution of the State of Nevada and state statutes require the residency of a candidate for the United States House of Representatives or the United States Senate prior to election, they are unconstitutional. Further, it is the advice of this office that the applicable state statutes be amended to reflect that a candidate for the United States House of Representatives or the United States Senate is not required to reside in the State of Nevada prior to election.

CONCLUSION

Pursuant to U.S. Supreme Court and Ninth Circuit Court of Appeals decisions, state law may not add to the qualifications specified in the United States Constitution for election to a United States congressional office.

The State of Nevada, therefore, may not, through its state constitution or through state statute, require a candidate for the United States House of Representatives or the United States Senate to reside in the State of Nevada prior to being elected. It is recommended that the Nevada Legislature revisit state laws imposing such residency requirements and consider amending state law to conform to federal constitutional mandates.

Sincerely,
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