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April 21, 1997

Opinion Committee

Honorable Dan Morales  
Attorney General of Texas  
Opinion Committee Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711

FILE # ML-39526-97  
I.D. # 39526

Re: Request For Attorney General's Opinion Regarding Constitutionality of Certain Provisions of Section 54.203, *Education Code*.

Dear General Morales:

A law student at The University of Texas at Austin, Mr. Joseph Jackson, has recently questioned the constitutionality of Section 54.203, *Education Code*. Mr. Jackson seeks a refund of his tuition and fees paid to date, as well as obtaining the benefit of the exemption for the future. This statute, known as the *Hinson - Hazelwood Fee Exemption Statute*, serves to exempt from payment of tuition and fees those military veterans that meet its various requirements: service in the U.S. armed forces; during a specified time period; a citizen of Texas at the time of entrance into the service; and resided in Texas for 12 months prior to registration.

I am attaching a copy of Mr. Jackson's letter challenging the requirement that the statute only applies to persons who were citizens of Texas at the time they entered the service. It is my understanding that Mr. Jackson does not contest the fact that he was not a resident of Texas at the time he entered the military service.

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Although numerous opinions have been written by the Attorney General over the years regarding the interpretation and application of this statute in its current and prior versions, the issue of the constitutionality of the statute has not been previously addressed by the Attorney General. Mr. Jackson argues that a distribution of state veterans' benefits, such as a tuition and fee exemption, cannot be conditioned upon Texas residency at a fixed point in the past without violating the Equal Protection Clause of the Fourteenth Amendment.

Mr. Jackson's brief cites two Texas cases - *Nuez v. Autry*, 884 S.W.2d 199 (Tex. App. - Austin, 1994) and *Smith v. Board of Regents*, 874 S.W.2d 706 (Tex. App. - Houston, 1994). Neither of these cases lend support to his position that Section 54.203, Education Code, is unconstitutional. The Austin Court of Appeals in *Nuez* declined to recognize non-residents as a suspect class for purposes of an equal protection analysis. The Houston Court of Appeals in *Smith* cites several cases for the proposition that residency requirements for tuition purposes do not burden the constitutional right to interstate travel.

However, Mr. Jackson cites a decision by the Supreme Court of California in *Del Monte v. Wilson*, 824 P.2d 632 (1992) which appears to be a comprehensive analysis of the constitutional issues and, due to the similarity of the provisions of the California and Texas statutes, appears to be directly on point. The California statute was deemed unconstitutional as a violation of the federal constitutional right to equal protection since it conditioned veteran's benefits to veterans who were natives or residents of California at the time they entered military service. On appeal, the U.S. Supreme Court denied certiorari and declined to review *Del Monte v. Wilson* and, according to Shepard's Citations, this case has not been cited as authority by any court outside the state of California to date.

After comparing the California decision in *Del Monte* with decisions by Texas courts in *Nuez* and *Smith*, it appears that the Texas Courts and the California courts have taken different approaches in resolving constitutional challenges to residency classifications contained in state statutes establishing tuition and fees for institutions of higher education. If the Texas statute should be deemed to be unconstitutional, it still remains unclear whether Mr. Jackson would be entitled to obtain any relief.

It appears to be the law in Texas that when part of a statute is unconstitutional, a court will sustain the remainder only if the result would be consistent with the original legislative intent. See *Anderson v. Wood*, 152 S.W.2d 1084, 1087 (Tex. 1941); *Black v. Dallas County Bail Bond Board*, 882 S.W.2d 434, 437 (Tex. App. - Dallas 1994); *Code Construction Act*, Section 311.032, *Government Code*.

Prior versions of this statute date back many years. It has been the intent of the legislature to restrict the veterans' benefits under these statutory provisions to the "citizens of Texas" since 1933. (Acts

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1933, 43rd Leg., 1st. C.S., p. 10, ch. 6). The specific language challenged by Mr. Jackson, which serves to further restrict the veterans' benefits granted by the statutory provisions to citizens of Texas "who were bona fide legal residents of this State at the time of entering such service" was added by the Texas Legislature in 1959. (Acts 1959, 56th Leg., 2nd C.S., p. 99, ch. 12).

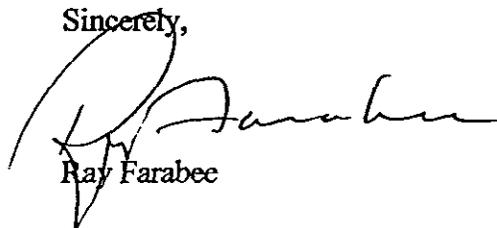
As part of the legislative intent issue, it seems appropriate to examine the fiscal impact of the language challenged by Mr. Jackson. Only Texas veterans can benefit from the tuition and fees exemption contained in Section 54.203, Education Code. Under the approach urged by Mr. Jackson, all U.S. veterans from any of the fifty states could enjoy the benefits of this statute after satisfying the relatively easy threshold requirement of a twelve month residency in Texas prior to registration in an institution of higher education. The current low tuition rates in Texas are made possible by the significant subsidies to higher education using tax dollars provided by Texas taxpayers. Opening the benefits of this tuition exemption statute to all military veterans would thwart the legislative intent to limiting the fiscal impact of this statute to benefit those Texas citizens who have served their country in the military.

Based upon the foregoing discussion of the issues raised by Mr. Jackson, your opinion is requested on the following questions:

1. Is Section 54.203, Education Code, unconstitutional ? If so, would the entire statute be unconstitutional ?
2. Would this determination be prospective or retroactive in application ?
3. If all or part of the statute is unconstitutional, would Mr. Jackson be entitled to a refund of his prior payments of tuition and fees ?

Thank you for your assistance in helping The University of Texas at Austin resolve the issues raised by Mr. Jackson regarding the constitutionality of this statute, as well as his eligibility for the veterans' benefits contained in Section 54.203, *Education Code*.

Sincerely,



Ray Farabee

KRF:co

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Enclosures

xc: Ms. Patricia Ohlendorf  
Dean Michael Sharlot  
Dr. James P. Duncan  
Ms. Francie Frederick  
Mr. W.O. Shultz II  
Mr. Joseph Jackson

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17 April, 1997

UNIVERSITY OF TEXAS SYSTEM  
Office of Vice Chancellor & General Counsel for the University of Texas System  
ATTN.: Bob Giddings; Fax: 499-4523; Tele.: 499-4462  
VIA FACSIMILE

RE: Hazelwood Exemption; Likely effect of Court finding particular provision unconstitutional.

Dear Mr. Giddings:

1. I have attempted to conduct a quick search of authorities supporting my contention that a court would likely strike the offensive provisions rather than the entire statute. Such research has further revealed why the case you cited in opposition is not applicable.

2. Your line of reasoning began with Black v. Dallas County Bail Bond Bd. Therein, the court wrote:

An unconstitutional provision in a legislative enactment does not invalidate the entire act. Harris County Water Control & Improvement Dist. No. 39 v. Albright, 153 Tex. 94, 263 S.W.2d 944, 947 (1954). An invalid provision does not void any remaining provisions that we can give effect to after deleting the contaminated provision. See Tex.Gov't Code Ann. S 311.032(c) (Vernon 1988). When part of a statute is unconstitutional, we sustain the remainder only if the result is consistent with the original legislative intent. See Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084, 1087 (1941). Agency rules are subject to the same constitutional limitations as legislative enactments. See Public Utility Comm'n v. Houston Lighting & Power Co., 715 S.W.2d 98, 104 (Tex.App.--Austin 1986), reversed in part on other grounds, 748 S.W.2d 439 (Tex.1987).

Black v. Dallas County Bail Bond Bd., 882 S.W.2d 434, 436 (Tex.App.-Dallas, Mar 30, 1994). Although you cited this case because of its reference to Anderson, it is appropriate to note that the Black court held the particular provision(s) at issue severable.

3. In Anderson v. Wood, the Court stated:

It is very well settled that a statute excepting certain counties arbitrarily from its operation is a 'local or special' law within the meaning of the above constitutional provision. Hall v. Bell County, Tex.Civ.App., 138 S.W. 178, affirmed by the Supreme Court, Bell County v. Hall, 105 Tex. 558, 153 S.W. 121; Webb v. Adams 180 Ark. 713, 23 S.W.2d 617; State ex rel. Johnson v. Chicago, B. & Q. R. Co., 195 Mo. 228, 93 S.W. 784, 113 Am.St.Rep. 661; 6 R.C.L. 129, 59 C.J. 736. This last proviso exempting counties with a population between 195,000 and 205,000 is a part of the original act, and is not an amendment thereto. Since it is void, the whole act must be declared void, because otherwise the court would have to apply the act to all counties having a population in excess of 125,000, and this would be giving the act a broader scope than was intended by the Legislature. The rule applicable in such cases is thus stated in Lewis' Sutherland, Statutory Construction, 2d Ed. vol. 1, sec. 306, as follows: 'If, by striking out a void exception, proviso or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part.' Substantially the same rule is announced in Ruling Case Law, vol. 6, p. 129. The above rule was followed by this court in Texas-

Louisiana Power Co. v. City of Farmersville, Tex.Civ.App., 67 S.W.2d 235, 238. See also, James C. Davis, Director General, v. George Wallace, 257 U.S. 478, 42 S.Ct. 164, 66 L.Ed. 325.

Anderson v. Wood, 137 Tex. 201, 207-208, 152 S.W.2d 1084, 1087 (Tex. 1941) (italics added). Hence, the Court was dealing with a very particular type of statute, a "local or special" law, enacted for the purpose of exempting "preferred" counties. Such "special" legislation occupies a peculiar place in statutory interpretation, often proscribed by state constitutions (as is the case in Texas), and always viewed with a critical eye by practitioners of state and local governance law. The rationale for such critical analysis of this type of legislation is based on concepts of "home rule" and democratic principles. See City of Fort Worth v. Bobbitt, 36 S.W.2d 470 (Tex. 1931). See also In re Belmont Fire Protection District, 489 N.E.2d 1385 (Ill. 1986).

4. Black, supra, appropriately cites V.T.C.A., Government Code S 311.032, which states Texas' rules of construction concerning severability, to wit:

- (a) If any statute contains a provision for severability, that provision prevails in interpreting that statute.
- (b) If any statute contains a provision for nonseverability, that provision prevails in interpreting that statute.
- (c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable

The Hazelwood provision falls within paragraph ( c ) above.

5. In Tex. Atty. Gen. Op. JM-289, December 31, 1984, Attorney General of Texas, Jim Mattox, rendered an opinion concerning the constitutionality of Texas requirement of United States citizenship for eligibility for participation in the Veterans Land and Housing Program. Concluding that certain provisions were offensive under the Fourteenth Amendment, the opinion stated:

"We think that a court, when presented with this issue, would invoke the "strict scrutiny" standard and strike down that part of article III, section 49-b of the Texas Constitution and sections 161.001(7) and 162.001(8)(C) of the Natural Resources Code which restricts applicants for certain veterans' assistance programs to citizens only."

As will be shown, a similar rationale would be applied to the offensive Hazelwood provision.

6. The leading Texas case on severability is San Antonio Independent School Dist. v. State. The following excerpt is informative:

Holding that the part of the local act of 1913, constituting the school board of San Antonio, is unconstitutional in so far as it endeavors to increase the tenure of office to more than two years, does not necessarily carry with it the decision that the whole act is unconstitutional and void, for where part of a statute is unconstitutional and the remainder is constitutional, if the two parts can be possibly separated courts should do so, and not permit the invalid part to destroy the whole law. If, after the elimination of the invalid part of the law, there remains an intelligible and valid statute capable of being placed in execution and conforming to the general purpose and intent of the Legislature, the law will not be destroyed, but held to be valid and binding except as to the excised part. Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; Willcox v. Consolidated Gas Co., 212 U. S. 54, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034. As said by Judge Cooley:

"Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall."

Cooley Const. Lim. SS 177, 178.

That doctrine is always recognized by all courts.

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We cannot presume that the Legislature would not have passed the act if the tenure of office of the trustees had not been extended to six years. On the other hand, it may be presumed that the extension of the privilege of being members of the board to the women of the city, as well as the increase in the membership thereof, would have been sufficient incentive for the passage. No other portion of the law is dependent on the second paragraph of section 2, and that paragraph can be removed without marring the perfection of the bill. The only effect of the removal is to cause the election of a full board every two years. The board was duly and constitutionally elected on the second Tuesday in April, 1913, as provided by law, and form the de jure San Antonio school board until the expiration of their constitutional term of two years, or when their successors are duly elected and qualified. The manner, means, and machinery of the election are fully prescribed in the valid parts of the act, and there is nothing to cast a cloud upon the due and constitutional election of the trustees. The law is capable of being executed fully and satisfactorily to carry out the main legislative intent without the aid of the invalid paragraph.

The opinion in the case of Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120, holding that the act of 1899 (Acts 26th Leg. c. 51) was invalidated by the clause which increased the tenure of office of the trustees, is based upon the hypothesis that the Legislature would not have passed the law except to obtain an increase in the length of terms of school trustees. That supposition--for it can be nothing but a judicial hypothesis--is based, we suppose, upon the fact that the only material difference between the former act and that of 1899 was in regard to tenure of office. The opinion on the point declaring that the invalidity of one part of the act destroyed the whole is quite unsatisfactory, no reasons being given for the statement that the law would not have been passed without the increased tenure clause.

The opinion in the case of Rowan v. King (Sup.) 55 S. W. 123 [FN1], was written by the same judge who wrote the opinion in the Kimbrough Case, and we can readily understand that the part of the law increasing the tenure of office beyond the constitutional limit would completely destroy an act which had no other purpose than to provide for the election of trustees. The court said: "Without the void portion the act would have no value, and we conclude that the Legislature would not have so framed it."

FN1. Reported in full in the Southwestern Reporter, reported as a memorandum decision without opinion in 94 Tex. 650.

Of course, if the invalid part of the law destroys its value, the whole act fails. In the case under consideration, the usefulness of the act is not destroyed or impaired, and we have the right to indulge in the presumption that the act would have been passed although there had been no increased tenure of office. The last act was materially different from preceding acts, in that it provided that women should be members of the board, and that the board should be composed of nine members instead of seven, besides other changes. Knowing, as we do, of the agitation of the question of equal political rights of women with those of men, we could reasonably presume that this agitation was behind the proposition to have a new law, and that the main object of the law was to place three women upon the board. The power propelling the enactment of the law to place women on the board was sufficient to have procured the enactment of the law if tenure of office had not been mentioned in it. No reason can be offered why the Legislature would not have passed the local act without the obnoxious clause as to office tenure. The leading object was to place the management and control of the schools of San Antonio in the hands of nine trustees, three of whom should be women, and the tenure of office was a mere incident to the enactment of the law. Ex parte Henson, 49 Tex. Cr. R. 177, 90 S. W. 874. If the law is to be destroyed, the schools of San Antonio demoralized, and inextricable confusion created, upon the mere theory that the Legislature would not have enacted the law without the tenure of office clause, some other governmental agency than this court must be called upon to do it. It has been doubted that courts have the power and authority to destroy a law enacted by another branch of the government; but, conceding that right to the courts, every reasonable doubt should be indulged in favor of the validity of a statute, and the whole should not be destroyed on merely a presumption that the law would not have been passed had the invalid part been left out. As said by the Supreme Court of the United States in the Presser Case, hereinbefore cited:

"It is a settled rule that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable."

San Antonio Independent School Dist. v. State, 173 S.W. 525, 529-530 (Tex.Civ.App. - San Antonio 1915), error refused (1915); cited by City of Taylor v. Taylor Bedding Mfg. Co., 215 S.W.2d 215, 217 (Tex.Civ.App. - Austin, Oct 27, 1948) (NO. 9740), error refused:

("The rule to be applied is well stated in San Antonio Independent School District v. State, Tex.Civ.App. San Antonio, 173 S.W. 525, 529, writ ref., as follows: " \* \* where part of a statute is unconstitutional and the remainder is constitutional, if the two parts can be possibly separated courts should do so, and not permit the invalid part to destroy the whole law. If, after the elimination of the invalid part of the law, there remains an intelligible and valid statute capable of being placed in execution and conforming to the general purpose and intent of the Legislature, the law will not be destroyed, but held to be valid and binding except as to the excised part.")

and cited by Harris County Water Control and Imp. Dist. No. 39 v. Albright, 153 Tex. 94, 98, 263 S.W.2d 944, 947 (Tex., 1954):

("The remainder of Article 7880-3a falls as a result of the Deason opinion and judgment only if it appears that the offending provision is not separable from the remainder. We will hold it separable unless it appears that the legislature would not have enacted the section without the offending provision, or that the remainder does not present an independent, complete and workable whole without it. City of Dallas v. Love, Tex.Civ.App., 23 S.W.2d 431, affirmed 120 Tex. 351, 40 S.W.2d 20; San Antonio Ind. School Dist. v. State, Tex.Civ.App., 173 S.W. 525, writ refused; 9 Tex.Jur., Constitutional Law, s 56, pp. 473-474; City of Taylor v. Taylor Bedding Mfg. Co., Tex.Civ.App., 215 S.W.2d 215, writ refused.")

7. For the foregoing reasons, a Texas court would find the offensive provision of the Hazelwood Act severable from the remaining provisions in order to effectuate the Texas policy of recognizing services rendered by veterans and, particularly, by rewarding such services with tuition exemption at Texas institutes of higher education.

Sincerely,

*J. D. Jackson*

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18 March, 1997

UNIVERSITY OF TEXAS AT AUSTIN

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ATTN.: Ray Farravee, Vice Chancellor & General Counsel for the University of Texas System

Fax: 499-4523; Tele.: 499-4462

ATTN.: Patty Ohlendorf, Counsel to the President and Vice Provost for the University of Texas at Austin

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VIA FACSIMILE

Dear Sirs / Madam:

This memorandum is intended to serve two primary purposes: 1) to inform the policy-making officials of the University of Texas at Austin of their potential liability resulting from certain unconstitutional acts or omissions and 2) to extend to such officials a good faith opportunity to expediently redress said wrongs in a manner that is equitable to all concerned parties. As a proud Longhorn, Veteran and Citizen of Texas, it is my desire to avoid litigation against the University while ensuring both correction of Constitutional deficiencies and obtaining compensation for wrongs personally suffered. To these ends, I continue.

As a bona fide legal resident of Texas and as a U.S. veteran, I have been wrongfully denied tuition exemption pursuant to Texas Education Code, Title 3, Subtitle A, Chapter 54, Subchapter D, Section 54.203 (a) (4) (A), otherwise known as the Hazelwood Exemption. Further, monetary sums have been wrongfully collected from me, under duress and protest, by the University of Texas at Austin, among others. Consequently, I believe that I am entitled to exemption status and compensation for tuition fees paid pursuant to 28 United States Code, Section 1343 (a) (3) and/or (4), 42 United States Code, Sections 1981, 1983, 1985(3) and/or 1988; and/or various State causes of action.

I. FEDERAL CONSTITUTIONAL CLAIMS

The Hazelwood Exemption, as written by the Texas Legislature, interpreted by the Department of Veterans Affairs Regional Office and the University of Texas Office of the Registrar (Certification and Veterans Services), and disseminated by U.T. in literature, including the Veterans Educational Benefits Handbook, to wit:

*"... shall exempt ... provided the persons seeking the exemptions were citizens of Texas at the time they entered the services indicated and have resided in Texas for at least the period of 12 months before the date of registration...."*

conditions distribution of state veterans' benefits on Texas residency at a fixed point in the past in violation of, among other things, the Fourteenth Amendment's guarantee of equal protection.

Recognition of this view is found, among other places, in Nunez v. Austry, 884 S.W.2d 199 (Tex.App. - Austin, 1994) (holding that an action brought by nonresidents failed to raise an equal protection claim). Therein, the court took particular notice of the following cases:

Shapiro v. Thompson, 394 U.S. at 633, 89 S.Ct. at 1330 (1969) (Explaining that a state may not accomplish an otherwise valid purpose "by invidious distinctions between classes of its citizens.")

Dunn v. Blumstein, 405 U.S. at 342, 92 S.Ct. at 1003 (1972) ("Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right.")

Zobel v. Williams, 457 U.S. at 65, 102 S.Ct. at 2315 - 16 (1983) (Holding that favoring established residents over new residents was a constitutionally impermissible justification for a statute.) (The Court struck down the Alaska statute because it "creates fixed, permanent distinctions" between classes of its citizens based on the length of their residency. Zobel at 59.)

The Nunez court correctly observed that "Shapiro and its progeny reason that durational residency requirements raise equal protection concerns because they divide a state's citizens into two classes."

A very articulate expression of this view is found in Del Monte v. Wilson, 4 Cal.Rptr.2d 826 (1992, *en bank*) (Justice Mosk), in which the California Supreme Court found itself "constrained" by recent Supreme Court cases to invalidate provisions of the California codes that limited certain benefits to veterans who "[were] at the time of entry into active duty a native of or bona fide resident of this state." To the line of cases noted by the Nunez court, the Del Monte court further noted:

Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) (Invalidating a preferential property tax exemption for veterans of the Vietnam War who had been residents of the State of New Mexico since May 8, 1976. The court observed that the statute created two classes of Vietnam War veterans: those who established residency before May 8, 1976, who qualified for the exemption, and those who arrived later, and thus did not qualify for the exemption.)

Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985) (Although it recognized that the highest level of deference is owed to state taxation schemes, the court found no legitimate purpose could be furthered by the challenged distinction. "A State may not treat those within its borders unequally solely on the basis of their different residences.... [R]esidence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants....")

Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986) (Six justices agreed that a system granting civil service preference points to veterans who entered active military service while residents of the State of New York violated the guaranty of equal protection of the laws; four of the six justices agreed that the system also violated the constitutional right to travel; the plurality opinion pointed out that the statutory scheme deprived veterans who had joined up outside New York of the preference permanently).

The aforementioned cases are readily distinguished from Smith v. Board of Regents of the University of Houston System, 874 S.W.2d 706 (Tex.App. - Houston [1st Distr.], 1994) (holding "that the reclassification rules [pertaining to *nonresident* students] promulgated by the Coordinating Board, Texas College and University System, do not set up an irrebuttable presumption of nonresidency, but in fact create a test of bona fide residency for purposes of tuition."). In Smith, the court observed that:

Smith's claim is based on the landmark case of Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). In Vlandis, the Court declared a Connecticut statute unconstitutional because it permanently classified students as nonresidents for tuition purposes on the basis of their legal address at the time they applied to the university.

[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means for making the crucial evaluation. Vlandis, 412 U.S. at 452, 93 S.Ct. at 2236.

Unlike the Connecticut statute, the reclassification rules in Texas do not permanently "freeze" a student in a nonresident status based on the student's classification at the time of application to the university. A student may obtain reclassification in any number of ways.

Smith is distinguishable from the issue at hand in at least two respects: 1) the Hazelwood Exemption does not seek merely to impose legitimate residency requirements; rather, it seeks to discriminate between long-term residents and newly established legal residents who have immigrated from another state; 2) the Hazelwood Exemption creates an irrebuttable presumption of nonentitlement, in spite of the fact that a claimant has established both legal residence and domicile in Texas; thus, creating "second-class" Texas citizens.

These distinctions, creating tension between the Hazelwood Exemption and the Constitution, are emphatically resolved in favor of the Constitution by the California Supreme Court in Del Monte, *infra*, and must be similarly construed by Texas and federal courts. The Texas Legislature, having bestowed certain benefits upon legal residents of Texas who have served our Country's armed forces, cannot further seek to discriminate against certain veterans based on fixed durational requirements beyond those required to ascertain bona fide legal residency.

As to bona fide legal residency, it would appear that Texas Admin. Code, Title 19, Section 21.28, provides "adequate" assurance (See Vlandis, *infra*) of a veteran's intent to become a citizen of Texas, without the addition of such irrebuttable presumptions such as that created by the Hazelwood Exemption. In this regard, my personal efforts to establish Texas citizenship may be of some interest:

While stationed in Korea during the Persian Gulf War, I requested assignment to Texas intending to remain after completion of my active duty commitment. During my three-year terminal duty assignment at Fort Hood, Texas, I invested in a H.U.D. home and claimed a homestead exemption thereon, registered to vote, voted in local elections, registered automobiles and paid personal taxes thereon, obtained a Texas driver's license, maintained checking accounts and savings accounts in Texas banks, executed wills and other legal documents indicating residence in Texas, changed permanent address on military service personnel records, fathered a child cared for in a non-military Texas hospital, and exclusively requested admittance to the University of Texas School of Law. Furthermore, my wife was certified by the Texas Board of Nursing Examiners and became vested in her employment in Texas. Continuing this trend upon discharge from active duty shortly before and subsequent to enrollment at U.T., I invested in two duplexes, claimed a homestead exemption, executed leases, sold a mobile home taking a five-year lien thereon, and entered into a business partnership.

Despite these factors and the fact that the University of Texas recognized my status as a bona fide legal resident of Texas prior to my enrollment in the U.T. School of Law, I have been denied benefits available to other resident Texas veterans because I did not establish a bona fide legal residence in Texas *prior to the time I entered military service*.

## II REIMBURSEMENT OF TUITION WRONGFULLY COLLECTED

NOTE 1: This section is applicable in the event that subsequent litigation is pursued and consent to be sued is granted by the State of Texas.

Decisions of the Texas Supreme Court operate retroactively unless the court expressly exercises its discretion to make the judgment prospective only. Bowen v. Aetna Cas. and Sur. Co., 837 S.W.2d 99, 100 (Tex.1992) (per curiam). In exercising such discretion, the Court has adopted a three-part test to determine whether a decision striking down a particular statute should be applied both retroactively and prospectively or only prospectively. The test provides as follows:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Second, ... [the court] must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Finally, [the court must] weigh [the] inequity imposed by retroactive application, for where a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity

Carrollton-Farmers Branch Ind. Sch. Dist. v. Edgewood Ind. Sch. Dist., 826 S.W.2d 489, 518 (Tex.1992) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971)). The Court further noted that: "We share the view of the First Circuit, that '[t]he [Chevron] factors are not discrete, disembodied tests, but rather offer three perspectives on the central question of retroactivity: was reliance on a contrary rule so justified and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity.'" Carrollton-Farmers at 519 (quoting Simpson v. Director, Office of Workers' Compensation, 681 F.2d 81, 85 (1st Cir.1982).

As applied to the issue at hand, the listed factors do not support deviation from the standard policy of applying decisions retroactively. First, any judicial decision which may invalidate the challenged Hazelwood requirement would not be based on a new principal of law. The principles that invalidate fixed-point durational residency requirements have been clearly established by the U.S. Supreme Court since, at least, 1986. Second, the purpose of the Hazelwood Exemption may be found in Texas Natural Resource Code, Title VII, Section 164.001 (a) "Purpose and Policy", wherein: "The legislature declares that it is the policy of the state to provide financial assistance to veterans of the state in recognition of their service to this state and the United States." Clearly, this policy is served by the retroactive application of any decision which may invalidate an unconstitutional requirement constricting the availability of benefits to an arbitrary and limited class of veterans. Finally, it is doubtful that any inequity would be imposed by retroactive application, particularly where the University, among others, has been on notice of such unconstitutionality since, at least, 1986.

### III. INJUNCTIVE RELIEF

NOTE 2: This section is applicable in the event that subsequent litigation is pursued and consent to be sued is not granted by the State of Texas.

Although the University of Texas at Austin may invoke limited immunity from suit as an agency of the State, such immunity does not extend to prospective injunctive relief for claims brought pursuant to 42 USC 1983. Therefore, the University may be enjoined from enforcing the offensive requirements of the Hazelwood Act. Further, Section 1983 limits immunity as to attorney's fees of a prevailing plaintiff. United Carolina Bank v. Board of Regents of Stephen F. Austin State University, 665 F.2d 553, 565 (5th Cir. 1982).

### IV. DAMAGES

NOTE 3: This section is applicable in the event that subsequent litigation is pursued and consent to be sued is not granted by the State of Texas.

"State officials, such as the defendants here, enjoy a qualified immunity when sued for damages in their individual capacity under section 1983. When this immunity is involved a plaintiff must prove that the defendants knew or reasonably should have known that they were acting in violation of the plaintiff's clearly established constitutional rights, or that the defendants acted with a malicious intention to harm the plaintiff or deprive him of his rights." United Carolina Bank at 561, citing Procunier v. Navarette, 434 U.S. 555, 562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) and Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975). Having stated the rule, the Fifth Circuit held "that the defendants were liable on the 'reasonably should have known' prong of Wood v. Strickland." United Carolina Bank at 564. CF. Jagnandan v. Giles, 538 F.2d 1166, 1173 (5th Cir. 1976) ("Defendants were not on notice of the statute's unconstitutionality prior to payment and acceptance of the money. They were acting in complete good faith.")

As to whether the rights alleged to have been violated were "clearly established" law at the time of the action, the Supreme Court has noted:

[O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (citations omitted). As noted previously, the principles that invalidate fixed-point durational residency requirements have been clearly established by the U.S. Supreme Court since, at least, 1986.

## V. CONCLUSION

The "second-class" citizenship created by the Hazelwood Exemption is irrebuttable and permanently disadvantages certain Texas citizens based on their prior residency in other states at the time of their entrance into military service. The decisions listed herein by the U.S. Supreme Court clearly establish that fixed-point durational residency requirements arbitrarily discriminate between bona fide legal residents of a particular state.

Texas courts apply decisions retroactively unless certain factors weigh in favor of limiting applicability to prospective application. Such factors do not weigh in favor of mere prospective application in the instant matters at hand. Therefore, given consent to sue, tuition fees wrongfully collected should be reimbursed.

In the absence of consent to sue, a plaintiff challenging the offensive requirements of the Hazelwood Act is likely to obtain injunctive relief prohibiting enforcement of such restriction as well as an award for attorney's fees pursuant to 42 USC 1983. Furthermore, University officials are subject to joint and several liability for wrongful collection of fees in light of clearly established precedent.

## VI. RELIEF SOUGHT

For the foregoing reasons, I request:

- 1) that the policies of the University of Texas at Austin be modified to reflect the views suggested herein,
- 2) that I be awarded exemption status pursuant to the overriding purpose of the Hazelwood Exemption - to provide tuition free education to resident Texas veterans, and
- 3) that I be compensated, in full, for tuition fees wrongfully collected.

I further expect resolution of this matter to be reached expeditiously with the University maintaining weekly contact with me concerning progress on the issue. I currently foresee no reason why this matter should not be resolved decisively by 15 April 1997.

Sincerely,

**J. D. Jackson**

J. D. Jackson  
Student, U.T. School of Law