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No. 8286

This opinion responds to a series of questions posed by the Honorable Peter Courtney, President of the Oregon State Senate, related to the Guarantee Clause provision of the United States Constitution. The Guarantee Clause is set out in Article IV, section 4 of the United States Constitution. In full, that section provides, "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

FIRST QUESTION PRESENTED

Does the United States Constitution obligate the State of Oregon to maintain a republican form of government?

SHORT ANSWER

Yes.

SECOND QUESTION PRESENTED

If so, is this legal obligation binding on all state public officials, irrespective of whether or how the obligation is judicially enforced?

SHORT ANSWER

Yes.

THIRD QUESTION PRESENTED

If so, may state officials obtain the legal opinion or advice of the Oregon Attorney General on questions of compliance with the obligation?

SHORT ANSWER

Appropriate state officials may present questions about compliance with the Guarantee Clause to the Attorney General.

FOURTH QUESTION PRESENTED

In the absence of modern substantive decisions by the United States Supreme Court, may answers to such questions be derived from historic sources and opinions of courts in Oregon and in other states?

SHORT ANSWER

The listed sources may provide useful guidance in answering this type of question.

FIFTH QUESTION PRESENTED

May the Legislature by statute set impartial standards and procedures for assuring adherence to a republican form of government, so long as the statute does not contravene the United States Constitution?

SHORT ANSWER

The Oregon legislature may establish impartial standards and procedures intended to assure a republican form of government, so long as the legislation does not contravene the Oregon Constitution, the United States Constitution, or governing federal law.

DISCUSSION

I. The Guarantee Clause imposes obligations on states.

By its terms, the Guarantee Clause describes only federal obligations toward the states. Its command is that "[t]he United States shall guarantee" a republican form of government and protect the states from various kinds of violent strife. But the courts have determined that, properly understood, the Guarantee Clause also imposes corresponding obligations on states. Thus, in ***Minor v. Happersett***, 88 US (212 Wall.) 162, 175, 22 L Ed 627 (1874), the United States Supreme Court held that the Guarantee Clause "necessarily implies a duty on the part of the States themselves to provide such a government." The Oregon Supreme Court has also recognized this implication of the Guarantee Clause. In ***Kadderly v. City of Portland***, 44 Or 118, 144, 74 P 710 (1903), the court noted that one function of the Guarantee Clause is "to prevent [the people of the several states] from abolishing a republican form of government."

These judicial interpretations appear to mesh with the original intentions underlying the Guarantee Clause. Discussing the Guarantee Clause at the Constitutional Convention, Edmund Randolph indicated that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." 1 Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand) at 206 (1911). The Guarantee Clause, in substantially its final form, was later adopted after Nathaniel Gorham

expressed concerns that in the absence of such a guarantee, "an enterprising Citizen might erect the standard of Monarchy." 2 Farrand at 48-49. Other discussion preceding the adoption of the Guarantee Clause rejected James Madison's formulation that would have guaranteed "the Constitutional authority of the States," out of concern that such a clause could enshrine existing constitutions while failing to explicitly prohibit monarchy. 2 Farrand at 47-48. In addition to suggesting that the founders intended that the Guarantee Clause be flexible enough to permit change and variation, this history indicates that the courts have properly understood the clause to require states to implement and maintain republican forms of government.

Moreover, the historical record contains examples of consequences to states for the failure to maintain sufficiently republican forms of government. These examples arose during the period of Reconstruction following the Civil War, when the federal government took an active role in re-designing the governments of recalcitrant states of the defeated Confederacy. In Texas, for example,

> [T]he President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Texas v. White, 74 US (1 Wall.) 700, 729, 19 L Ed 227 (1869). The United States Supreme Court recognized that authority to "re-establish[] the broken relations of the State with the Union" in this manner "was derived from the obligation of the United States to guarantee to every state in the Union a republican form of government." *Id.* at 727.

The Supreme Court's description of the importance of the Guarantee Clause in relation to events in Texas comports with the historical record of the federal government's approach to Reconstruction in the post-war South. President Lincoln's Proclamation of Amnesty and Reconstruction, 8 December 1863, indicated that the steps outlined in the proclamation would result in Southern states receiving "the benefits of the Constitutional provision which declares that 'The United States shall guaranty [*sic*] to every State in this union a republican form of government.'" Similarly, President Johnson's appointments of provisional governors for Southern states relied explicitly on the necessity to "enforce the obligations of the United States * * * in securing [for the people of the states] the enjoyment of a republican form of government" and authorized appointees to instigate proceedings for the development of republican constitutions. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (Wiecek), at 189 (1972). Finally, the Military Reconstruction Act of 1867 authorized the occupying Northern military commanders to begin the process of establishing popularly ratified constitutions in the Southern states that would extend suffrage to black men. This process was a precursor to the elimination of military government and federal recognition of a state's congressional delegation. Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867). Scholars believe that "the guarantee clause's importance * * * was so considerable that the Military Reconstruction Act may properly be considered the fruition of it." Wiecek at 206 (citing McKitrick, ANDREW JOHNSON AND RECONSTRUCTION (1960)).

In light of the above, we conclude that Article IV, section 4 of the United States Constitution obligates Oregon to maintain a republican form of government. The federal and state Supreme Courts have recognized such an obligation. The history surrounding the adoption of the Guarantee Clause indicates the correctness of those judicial decisions. And historical examples of consequences attaching to states' failures to provide adequately republican governments confirm the existence of Oregon's duty.

II. The obligation to maintain a republican form of government binds state officials.

Having concluded that the Guarantee Clause imposes a duty on the state to maintain a republican form of government, we have no difficulty concluding that the obligation binds state officials. We begin by noting that Article VI of the United States Constitution establishes that the Constitution, along with other aspects of federal law, "shall be the supreme Law of the Land." Article VI also specifically provides that "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Consequently, the obligation to maintain a republican form of government is binding on Oregon's public officials.

The Oregon Constitution requires similar oaths. Article IV, section 31 specifies that legislators' oaths must include a commitment to "support the Constitution of the United States, and the Constitution of the State of Oregon." A similar requirement applies to judges under Article VII (Amended), section 7. More generally, Article XV, section 3 provides that "[e]very person elected or appointed to any office under this Constitution, shall * * * take an oath or affirmation to support the Constitution of the United States, and of this State."

III. State officials may present questions concerning compliance with the Guarantee Clause to the Attorney General.

The obligation to maintain a republican form of government is a legal obligation that arises under law. Pursuant to ORS 180.060(2), the Attorney General shall provide a written opinion on questions of law in which the State or any of its subdivisions has an interest when requested by certain state officers. Consequently, we conclude that those state officials who come within the parameters of those listed in ORS 180.060(2) may obtain the legal opinion of the Attorney General on questions of compliance with the obligation to maintain a republican form of government.

We note, however, that as to federal courts, the United States Supreme Court has held that questions of a state's compliance with the Guarantee Clause are not justiciable in federal courts but instead lie with Congress to resolve. ***Pacific Telephone & Telegraph Co. v. Oregon***, 223 U.S. 118, 151, 32 S. Ct. 224, 56 L.Ed. 377 (1912). The Oregon Supreme Court has inferred from this holding that Oregon courts, as a matter of federal law, are also unable to decide issues of compliance with the Guarantee Clause. ***Oregon ex rel. Huddleston v. Sawyer***, 324 Or 597, 626, 932 P2d 1145 (1997); *see also*, ***Baum v. Newbrey et al.,*** 200 Or 576, 584-585, 267 P2d 220 (1954).[1/] Because of these court decisions as to the justiciability of Guarantee Clause compliance issues there is little, if any, judicial guidance about the contours or boundaries of the reach of the republican form of government guarantee. Consequently, there are no well-defined standards against which to measure whether any particular situation comports with or violates the Guarantee Clause.

The Attorney General is the chief legal officer of state government, however, and conformance of all operations of state government with state and federal law is perhaps the paramount responsibility of the position. Uncertainty about the meaning of the Guarantee Clause may well temper the ability of the Attorney General to answer definitively questions about compliance with the Guarantee Clause, and it may well mitigate the level of helpful guidance that the Attorney General can provide. And, indeed, there may well be questions that arise under the Guarantee Clause that do not present legal questions at all, but rather present political questions not resolvable through legal analysis. These uncertainties will need to be addressed when they arise and they will govern the proper response of the Attorney General to the specific questions presented. As a general proposition, however, we conclude that appropriate state officers can seek the counsel of the Attorney General on questions of compliance with the Guarantee Clause.

IV. Historic sources and opinions from state courts may provide guidance about compliance with the obligation to provide a republican form of government.

Our answer to the fourth question presented is necessarily informed by the pronouncements of the United States Supreme Court and the Oregon Supreme Court indicating that questions of compliance with the Guarantee Clause are "exclusively committed to Congress' judgment." ***Huddleston***, 324 Or at 622. In general, the political branches have extensive discretion when called upon to address such political questions; by definition, the courts do not interfere with the resulting decisions. To the extent that the fourth question presented seeks authoritative "answers" to political questions through examination of the materials described in the question, the inherently discretionary nature of political power presents a significant barrier. Simply put, Congress may not be bound to reach the results suggested by any particular authority.

Nevertheless, the fact that questions concerning compliance with the requirements of the Guarantee Clause are not justiciable does not eliminate the duty of elected officials to uphold the United States Constitution. Historical decisions of the United States Supreme Court, along with decisions by other state courts and various historic sources may be variously persuasive with regard to the contours of that duty. Consideration of those sources would seem to provide the best available guidance for concerned officials. Of course, given the well-documented ambiguity of the meaning that the founders attached to the Guarantee Clause, *see generally*, Wiecek, *above*, it seems likely that different officials may have good faith differences regarding the content of the obligations imposed by the clause. Indeed, the United States Congress's authoritative understanding of those obligations may well change over time. By way of example, Wiecek documents a number of competing understandings of the clause that were expressed in Congress around and during the period of the Civil War. Wiecek at 166-243.

We note that there may be extreme examples where the failure to comply with the Guarantee Clause is readily apparent. Examples would be attempts to institute monarchy or a permanent military dictatorship. Regardless of the precise meaning of the Guarantee Clause, the history of the adoption of the clause confirms what common sense tells us, namely that those forms of government are anathema to the federal constitution.

In short, we conclude that authoritative answers to questions of compliance with the Guarantee Clause cannot reliably be derived from the sources recited in the question, or from any other authority, with narrow exceptions. However, we believe that those sources provide the best guidance to public officials who are concerned about such matters.

V. The Oregon State Legislature may enact laws intended to ensure Oregon's compliance with requirements of the Guarantee Clause.

Our answer to the fifth question presented begins by noting the broad legislative authority of the Oregon State Legislature. Article IV, section 1 of the Oregon Constitution states that "The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly." There is nothing that would categorically prohibit the legislature from enacting laws intended to assure the republican form of Oregon's government. There are, however, two relevant caveats.

First, we observe that the legislature's lawmaking authority is subject to various limitations. The question presented acknowledges the necessity of complying with the United States Constitution. The legislature is also without power to enact laws that contravene treaties of the United States, federal statutes or regulations in substantive fields where the federal government's authority is paramount, or the Oregon Constitution. In addition to establishing some substantive limitations to the authority of the legislature, the state constitution also establishes procedural requirements that must be followed.

Second, the ultimate authority of the United States Congress to determine whether the state's government is adequately republican makes it impossible to state with certainty that such laws would be necessary or sufficient to achieve their intended purpose. Assuming that they are properly enacted and do not overstep any of the limitations on legislative authority previously discussed, such state laws would, of course, be operative. Thus, the Oregon Legislature could establish impartial standards and procedures in an attempt to ensure adherence to a republican form of government. But under the existing judicial decisions discussed above "[i]t rests with Congress to decide what government is the established one in a state * * * as well as its republican character," ***Luther v. Borden***, 48 U.S. (7 How.) 1, 42, 12 L Ed 581 (1849).

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[1/] The United States Supreme Court, however, has not yet decided whether that is a correct extension of its decision in ***Pacific Telephone & Telegraph***. In addition, the United States Supreme Court has suggested willingness to revisit the issue of whether claims under the Guarantee Clause are justiciable, at least in some circumstances. *See*, ***New York v. U.S.***, 505 US 144, 184-186, 112 S Ct 2408, 120 L.Ed2d 120 (1992). We express no opinion here as to how the United States Supreme Court might resolve the question of state court authority to decide issues of a state's compliance with the obligation to maintain a republican form of government should the Court examine the issue. We also express no

opinion as to the position the State of Oregon should take on the merits if the United States Supreme Court were to consider that issue.