## Wells, Kevin

**From:** Quinn, Thomas J
**Sent:** Thursday, January 23, 2014 5:05 PM
**To:** Wells, Kevin
**Cc:** Hamm, Bethany
**Subject:** Emailing: Memo re GA and undoc imm
**Attachments:** Memo re GA and undoc imm.docx

Hi Kevin:

Per our discussion today, I'm attaching the memo I sent to Dave Maclean back in June when we originally discussed the issue of GA and undocumented aliens. Let me know if you have any questions.

Tom

Your message is ready to be sent with the following file or link attachments:

Memo re GA and undoc imm

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*STATE OF MAINE*

*Office of the Attorney General*

*MEMORANDUM*

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**To:** **Dave Maclean, Office for Family Independence**

**From:** **Thomas J. Quinn, AAG, HHS Division**

**Date:** **June 12, 2013**

**Subject:** **Eligibility of undocumented aliens for General Assistance benefits**

Issue Presented & Basic Conclusions

Recently you posed the question of whether there is any obligation on Maine's part to provide undocumented immigrants and other non-qualified aliens with access to State and locally-funded programs, specifically General Assistance ("GA"). The short answer is, essentially, probably not, although with substantial caveats, including:

1. the impact of the Maine Human Rights Act is unclear, insofar as it precludes discrimination based on "national origin;"
2. it is unclear whether such a change could be imposed merely by rule change or whether it would require a statutory amendment, either or both of which might require legislative approval;
3. any change would be subject to potential attack on federal (and perhaps State) Equal Protection grounds;
4. Defense of such a challenge would presumably entail expensive and uncertain litigation, and expose the State to potential liability for attorneys' fees;
5. Successful defense would require meeting a fairly high standard of justification based upon past Supreme Court precedent;
6. Even if unsuccessful with respect to adult undocumented aliens, there is some reason to conclude that children of such aliens could nevertheless not be punished for the 'sins of the father' by the withholding of public benefits, presumably resulting in a

conclusion that assistance could be denied only proportionately to the undocumented individual .

Background

As you know, the passage under President Clinton of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) revolutionized welfare policy as it existed, including making dramatic changes to policies regarding aliens and immigrants.

PRWORA institutionalized the concept of immigrant exceptionalism—treating noncitizens differently from similarly situated citizens—to a new and unprecedented degree in social welfare policy.

For immigrants, the passage of federal welfare reform meant much more than ending the entitlement to cash assistance. The law restricted noncitizen eligibility for a wide range of public programs, including Temporary Assistance for Needy Families (TANF), food stamps, Supplemental Security Income (SSI), and Medicaid, and it gave states broad new authority to set social welfare policy for immigrants.

The new federal welfare law, moreover, allowed states to bar noncitizens from their own State cash and medical assistance programs and from TANF and Medicaid, which are funded with federal dollars[1].

Under PRWORA, aliens who were not "qualified aliens" (including undocumented immigrants) were made ineligible for "Federal Public Benefits," the definition of which included virtually any retirement, welfare, health, disability, food assistance, or any other similar benefit. (See section 401). With respect to state and local programs, the same legislation gave states authority to determine immigrants' eligibility for state and local programs, with some conditions:

**8 USC § 1621**

(a) In general
Subject to subsection (b) of this section and notwithstanding any other provision of law, a State or political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State.

[1] By limiting immigrants' access to federal assistance and vesting states with the authority to set eligibility rules for immigrants, the federal law implicitly gave states another choice: whether to create new state-funded substitute benefits for immigrants. Maine did so, for example, some years ago when, after certain classes of legal immigrants became ineligible for Medicare/MaineCare, it crafted a separate Maine-funded policy to supply the same benefits.

(b) Limitation
The authority provided for under subsection (a) of this section may be exercised only to the extent that any prohibitions, limitations, or restrictions imposed by a State or political subdivision of a State are not more restrictive than the prohibitions, limitations, or restrictions imposed under comparable Federal programs. For purposes of this section, attribution to an alien of a sponsor's income and resources (as described in section 1631 of this title) for purposes of determining eligibility for, and the amount of, benefits shall be considered less restrictive than a prohibition of eligibility for such benefits.

Section 1621 (d) also stated that undocumented immigrants were not eligible for state/local public benefits unless the state passed a new law after August 22, 1996 affirmatively making them eligible[2]. States could restrict the eligibility of qualified aliens, non-immigrants, and certain parolees; they could not restrict the eligibility of certain other classes of immigrant including refugees, asylees, military members, veterans and a few others. They could not deny access by any alien to certain benefits that met the definition of "excepted services" described in §1621(b)[3]. States could now require an applicant for state or local public benefits to provide proof of eligibility (§1625).

## Maine Practice

Like many states, Maine has not specifically excluded immigrants, documented or otherwise, from eligibility for general assistance. Indeed, the current on-line manual providing guidance to DHHS caseworkers essentially instructs them to not even inquire into such status:

***Question:*** *I have an applicant in the office who says he is here from Mexico. I don't think he is a U S citizen. Do I even take an application? What if he is not here legally—who do I report to?*

***Answer:*** *You should taken [sic]an application and provide assistance if the applicant is eligible for benefits. You should not inquire into the applicant's citizenship status in order to determine eligibility for general assistance benefits.*

***Discussion:*** *22MRSA§4305 states: "all individuals wishing to make application for relief shall have the opportunity to do so. One of the fundamental precepts of Maine's General Assistance program has been that General Assistance is available to anyone in the state at any particular*

[2] No such Maine law seems to have been passed in response, at least with respect to GA.
[3] These generally involve emergency medical situations, disaster relief, immunizations, in-kind services, and the life and safety protections. They do not include standard general cash assistance.

*time as long as he or she meets the eligibility criteria. There exist no citizenship or residency criteria in order to be eligible for General Assistance.*

*General Assistance does not receive any Federal monies/assistance so Title VI (the Civil Rights Act of 1964) may not apply to General Assistance, but the Maine Human Rights Act (MHRA) does apply. MHRA has non-discrimination requirements that require that public entities cannot deny an individual services or benefits because of race, color, or national origin. As a result, all persons, including those not from Maine and those who are not U S citizens must be provided the opportunity to apply and must be assisted if otherwise eligible.*

*http://www.maine.gov/dhhs/ofi/services/general-assistance/*

The Maine General Assistance statute, 22 M RS §4301 *et seq*., requires that each municipality operate a general assistance program (§4305 (1)) and that "municipalities may establish standards of eligibility, in addition to need, as provided in this chapter". (Id. at §4305 (3)[4]. Since the Federal government has delegated to Maine the right and responsibility to establish eligibility criteria for GA, and Maine has (even earlier) delegated such responsibility to the municipalities, it would appear both that municipalities on their own could establish criteria -- -- including being a "qualified alien" -- or that the State could amend Title 22 to specifically include being a "qualified alien" as a necessary criteria to qualify for GA.

To the extent that the Rules governing Maine's administration of the GA program have been deemed "major substantive" and not "minor procedural" any change would require legislative approval. Obviously, too, any amendment of the existing statutory scheme would require action by the Legislature.

Maine Human Rights Act & Equal Protection Issues

There remain, however, issues as to potential challenges based on either State law or Federal Equal Protection arguments.

As noted above, the Maine Human Rights Act prohibits discrimination on the basis of "national origin." However, a distinction based on being an "undocumented alien" does not necessarily equate to invidious discrimination based on "national origin." The distinction makes no mention of nationality *per se*, except to distinguish between citizens and non-citizens, or citizens and "qualified" aliens. That is, there is no discriminatory animus against, say, Bosnians, Swiss, or Mexicans. There is merely a legal restriction against aliens, of whatever national origin, who are undocumented. I do not think that a suit against the State based on alleged "national origin" discrimination as defined in the MHRA would succeed, although such results can never be guaranteed, and a lawsuit is expensive to defend whatever the outcome. Should such a challenge succeed, of course, it would open the State both to an award of attorneys' fees and the possibility that undocumented aliens who had previously declined to seek GA out of fear of exposure would be emboldened to make claims based on a court decision that they were entitled to such benefits.

[4] The standards of eligibility addressed include a prohibition against a durational residency requirement, 22 MRS s.4307(3).

Similarly, the fact that Congress seems to have given the states the right to prohibit undocumented aliens from receipt of even state (GA) benefits does not necessarily (a) immunize the State from suit, or (b) mean that if sued, it would win. The Congress has great power over matters relating to immigration, but it has no power to authorize States to violate the Equal Protection clause. As the Court noted in *Graham v. Richardson*, 403 U.S. 365, 382 (1971):

> Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. Shapiro v. Thompson, 394 U.S., at 641, 89 S.Ct., at 1335. Under Art. I, s 8, cl. 4, of the Constitution, Congress' power is to 'establish an uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.

The laws at issue in the *Richardson* case involved General Assistance programs in several states which distinguished between potential recipients based on either citizenship or residency. The Supreme Court invalidated them on Equal Protection grounds[5], finding that alienage was to be treated as a "suspect classification" requiring a "strict scrutiny" analysis. The Court found that the subject laws could not be sustained by any of the States' rationales.[6]

The present issue is different, in that a distinction between citizens and *undocumented* (i.e., 'illegal') aliens does not present precisely the same form of analysis. The Supreme Court has made clear that the standard is different; it has been vague about the precise analysis. In *Plyler v. Doe, et al.*, 457 U.S. 202 (1982) the Court invalidated a Texas law which withheld from local school districts any state funds for education of the children of 'illegal aliens.' In the first part of their analysis, the court noted that the equal protection clause applies to "any person within its jurisdiction," therefore, whatever his status under immigration laws, an alien is a "person" in any sense of the term and thus entitled to equal protection. Turning to the issue of the

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[5] The Equal Protection Clause basically states that all persons similarly situated must be treated alike. However, where a State legislature chooses in fact to treat them differently, in most instances the Court will apply only the so-called 'rational basis' test, i.e., will ask if the classification at issue *bears some fair relationship to a legitimate public purpose.* However, where the classification either effects a 'suspect class' or impinges on the exercise of a 'fundamental right' the analysis is more rigorous. There, the Court will apply a 'strict scrutiny' test requiring the State to demonstrate that the classification has been *precisely tailored to serve a 'compelling governmental interest.'* Further, in a few cases, the Court has detected a sort of middle ground, finding "that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." 457 U.S. at 217-218.

[6] If an effort to eliminate GA payments to undocumented aliens impacted citizen children, an argument could be made that a different -- and more rigorous -- standard would apply since it would now discriminate against citizens whose only offense was to be born of 'illegal' parents.

proper framework for analysis, the court held that undocumented resident aliens could not be treated as a "suspect class[7]" so as to require the state to justify its action by showing that it served the compelling state interest. Nevertheless, the court said, the case was problematic in that the onus fell upon the *children* of such persons:

> The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 770, 97 S.Ct. 1459, 1465, 52 L.Ed.2d 31 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.
>
> Id. at 219-220.

The children having little control over their situation, the Court held, "it is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States." Id. at 220.

Significantly, too, the court went on to say that while public education is not a "right" granted by the Constitution, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." Id. Instead, it is a preeminent function of government, access to which is critical to the basic goals of equal protection itself. Summing up, the Court concluded that weighing all of these interests led to this conclusion:

> These well-settled principles allow us to determine the proper level of deference to be afforded [the statute]. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. ... But more is involved in these cases than the abstract question whether [the law] discriminates against a suspect class, or whether education is a fundamental right. [The law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the

[7] "We reject the claim that 'illegal aliens' are a 'suspect class.' 457 U.S. 219 at note 19.

progress of our Nation. In determining the rationality of [the law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the law] can hardly be considered rational *unless it furthers some substantial goal of the State*.

457 U.S. at 223-224 (Emphasis added).

Thus, excluding the 'illegal immigrant' children from the same educational opportunities enjoyed by citizens could not be considered rational unless it furthered some substantial goal of the state.

This use of a standard stronger than the "rational basis" approach, as well as the other lessons of *Richardson* and *Phyler*, suggests several conclusions with respect to the potential exclusion of undocumented aliens from receipt of GA:

1) Even where the Court concedes that a 'right' being disparately provided might not be a 'fundamental' right, or a Constitutional 'right' at all, it is still possible that the Court will view the loss (of education, of general assistance) as so fundamental as to invoke a standard higher than a mere 'fair relationship' to a 'legitimate public purpose,' and require instead that the State show that it "furthers some substantial goal of the State,' a formulation clearly meant to be more arduous a burden;

2) That it would be the burden of the State to demonstrate such a goal, and to substantiate it with evidence and not simply argument, i.e., that the State would need to quantitatively establish that the burden is real and not merely presumed;

3) That while it is much easier to make legitimate legislative distinctions between citizens and illegal immigrants than citizens and legal aliens, in certain contexts even illegal aliens, as persons entitled to some measure of 'equal protection,' may not be invidiously discriminated against with impunity; and

4) That insofar as the impact of such a distinction might be felt not merely by the undocumented alien but by his family, both (perhaps) citizen and non-citizen, the Court would likely find such impact either impermissible (in the case of citizens) or difficult to defend( in the case of innocent noon-citizen children).

Please let me know if you would like to discuss this further.

## Wells, Kevin

**From:** Quinn, Thomas J
**Sent:** Thursday, January 02, 2014 11:27 AM
**To:** Wells, Kevin
**Subject:** RE: GA rule
**Attachments:** JBarnard EP memo re GA.docx

Hi Kevin:

Apropos of this issue, Dori, Justin and I are scheduled to discuss this with the AG this afternoon at 3:00. If we could chat before then it would be helpful. I'm attaching for your review a copy of Justin's recent memo in which he sets out his concerns about the potential EP issues here. Apparently my mistake was in accepting the fed's suggestion in Section 1624 that the states could limit immigrants' rights in this area so long as they were not more restrictive than the feds. Justin believes that in fact the sates can't do this (at least as we propose to) given that (a) the standard for the state would be strict scrutiny rather than rational basis, and (b) saving money has never been found to be a sufficient basis for discrimination of this sort.

The rule could be redrafted to exclude solely undocumented aliens, which frankly I think was closer to the original purpose. As currently drafted it sweeps in too many people (such as certain qualified aliens) who have EP rights. Undocumented aliens basically have none (although their children might). It might make sense to consider withdrawing and redrafting this rule to be more narrowly focused and avoid these EP arguments.

I'd like to discuss this with you as soon as possible. Thanks.

Tom

Thomas J. Quinn
Maine Assistant Attorney General
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**From:** Quinn, Thomas J
**Sent:** Tuesday, December 31, 2013 11:12 AM
**To:** Wells, Kevin
**Subject:** GA rule

Hi Kevin:

Dori, Justin and I have met this morning to discuss the issues around this rule. I'd like to arrange a time to meet and discuss with you. If at all possible it might be helpful to have Karen Curtis and Dawn Mulcahey either there or at least available to consult if need be concerning how the rules for the SNAP/TANF (and State equivalents) are administered. I am available on Thursday pretty much all day except for (assuming it is on) our Eligibility/Red Flags meeting at noon. I'm available this afternoon, as well, although that may be short notice to get anyone else involved.

Tom

Thomas J. Quinn
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# STATE OF MAINE
# OFFICE OF ATTORNEY GENERAL

## MEMORANDUM

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**To:** Dori Harnett, Assistant Attorney General
Thomas Quinn, Assistant Attorney General

**From:** Justin B. Barnard, Assistant Attorney General

**Date:** December 26, 2013

**Subject:** Equal Protection Implications of Citizenship-Related Changes to General Assistance Eligibility Regulations

**********

This memorandum is intended to briefly and informally summarize my views on the federal Equal Protection Clause implications of the recent proposed changes to Maine's General Assistance eligibility regulations. My views are informed almost exclusively by past research on related subjects; I have not performed any new case law research. As discussed below, I believe that there is a high likelihood that the proposed changes would violate the Equal Protection Clause, notwithstanding the apparent discretion granted to the States by the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").

**Overview of the General Assistance Changes**

The Department describes the proposed changes to the General Assistance eligibility regulations (found at 10-144 C.M.R. ch. 323, section V) as an effort to "align Maine's General Assistance citizenship eligibility requirements with those applicable to legal non-citizens who are covered under other federal and state funded programs such as Temporary Assistance for Needy Families (TANF) and the Maine Food Supplement (SNAP) program." The effect is quite simple. Currently, General Assistance eligibility for legal noncitizens residing in Maine is determined without reference to citizenship status. The proposed rule would impose on most[1] legal noncitizens the more restrictive, citizenship-based eligibility restrictions that apply to federal programs, but would not change or restrict the eligibility of citizens for General Assistance in any way.

[1] The proposed rule imports the citizenship eligibility provisions from Maine's SNAP and TANF rules, which extend state-funded benefits to some narrow classes of federally ineligible aliens (e.g., the disabled or elderly). Thus, the effect of the proposed rule would not be as sweeping as would be the case if Maine adopted the federal eligibility provisions outright.

The relevant language is as follows:

> **NONFINANCIAL ELIGIBILITY FACTORS: Citizenship Status:** Individuals who are not eligible for federal or state TANF or SNAP benefits due to citizenship status are not eligible for General Assistance.
>
> To determine eligibility for TANF or SNAP benefits, s~~S~~ee:
>
> Maine Food Supplement Certification Manual, 10-144 CMR, Ch. 301, FS-111-2 and FS-444-1; or
>
> Maine Public Assistance Manual, 10-144 CMR, ~~332~~, Ch. 331, Ch. II, beginning on page 3 and Ch. VII, beginning on page 9;
>
> for state-funded and federal eligibility factors.

Note that, while there are many similarities between the eligibility standards that apply to TANF and those that apply to SNAP, federal law imposes only a five-year mandatory bar on qualified alien eligibility for TANF, *see* 8 U.S.C. §§ 1612(b), 1613(a), but entirely bars most qualified aliens from the SNAP program, *see id.* § 1612(a). Presumably, given the disjunctive language in the proposed amendments, most qualified aliens who do not fall within an exception would only be excluded from General Assistance for five years from time of entry (applying the more lax TANF standards).

**Relevant Provisions of PRWORA**

In the *Bruns* case, we have been dealing with the provisions of PRWORA that apply to federal public benefits programs. PRWORA also includes an entire subchapter relating to state and local benefits programs. Two provisions are relevant here.

First, 8 U.S.C. § 1622 provides that, subject to certain exceptions, "a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien . . ., a nonimmigrant under the Immigration and Nationality Act, or an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year." *Id.* § 1622(a). Thus, as a general matter, Congress intended to give states discretion as to coverage of noncitizens in state public benefits programs.

Second, 8 U.S.C. § 1624 basically reiterates the same principle, with some amplification, for state and local general assistance programs. It provides that "a State or political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State," *id.* § 1624(a), so long as such limitations are no more severe than the limitations imposed on comparable federal programs, *id.* § 1624(b).

**Equal Protection Analysis**

As set forth above, we have (a) a proposed rule that would treat noncitizens differently and less favorably than citizens with respect to eligibility for General Assistance benefits and (b) a federal statute that purports to authorize such disparate treatment. The question, then, is whether a state may, with Congressional authorization, treat noncitizens differently from citizens with respect to state-only benefits. The relevant Constitutional principles, in outline form, are as follows:

(1) States generally may not enact laws that subject individuals to disparate treatment on the basis of alienage. *Graham v. Richardson*, 403 U.S. 365 (1971). Strict scrutiny applies to state laws that make alienage-based distinctions.

(2) The federal government may, pursuant to its broad authority over immigration and naturalization, enact laws establishing different rules for aliens than those that apply to citizens. *Mathews v. Diaz*, 426 U.S. 67 (1976). Rational basis review applies to federal laws that make alienage-based distinctions.

(3) A state may treat aliens differently than citizens where it does so pursuant to a uniform federal immigration rule. *Plyler v. Doe*, 457 U.S. 202, 219 n. 19 (1982) ("[I]f the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction")

(4) BUT: Other than through a uniform rule, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

Based on this last principle, I do not believe that PRWORA's purported grant of discretion to the States to limit alien eligibility for general assistance would immunize Maine's law from an Equal Protection challenge. I am unaware of any cases upholding a state-only program that serves citizens but excludes noncitizens. *Cf. Aliessa ex rel. Fayad v. Novello,* 754 N.E.2d 1085 (N.Y. Ct. App. 2001) (applying strict scrutiny to law applying PRWORA's eligibility standards to exclude aliens from state medical assistance program that continued to serve citizens).