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## An Open Governor's Seat, Open Constitutional Question, and the Need for an Answer

Samuel Steele McLelland & James R. Baxter\*

Another election cycle always means a renewal of fresh lawsuits and legal questions, and 2022 is no exception. The 2022 election cycle for Arkansas's Constitutional Offices (Governor, Lt. Governor, etc.) started before the 2020 Presidential Election came to a close. Announcements for Gubernatorial campaigns by Attorney General Rutledge came before the 2020 ballots were even printed, and one candidate has switched horses—Tim Griffin started out seeking the Governor's office and is now seeking to be the Attorney General.<sup>1</sup> And of course, there's the front runner for Governor: Sarah Huckabee Sanders.

Now, this article is not here to take a side on what the Republican Party should do with its field of candidates. Instead, the announcement of Sarah Huckabee Sanders's run for Governor of Arkansas reignites an interesting aspect of Arkansas's Constitution: must a candidate for Governor live in the State of Arkansas for seven consecutive years, immediately preceding taking office?

The eligibility to run for Governor is set forth by the Arkansas State Constitution of 1874.<sup>2</sup> The state constitution places just three requirements on folks who want to run for Governor of Arkansas: (1) be a U.S. Citizen, (2) be at least thirty years old, and (3) be a resident of Arkansas for seven years.<sup>3</sup> That last requirement—residency for seven years—is not as settled as it may appear. Seven years immediately prior to taking office? Or can it be seven years from decades ago? Do the seven years

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1. *Lt. Gov. Tim Griffin Drops Out of 2022 Arkansas Governor Race*, KARK (Feb. 8, 2021, 8:50 AM), [<https://perma.cc/7P8J-5SY9>].

2. ARK. CONST. art. VI, § 5.

3. ARK. CONST. art. VI, § 5.

even have to be consecutive? Or is “three years here and four years there” enough? This article calls for an answer to these questions from the Arkansas Supreme Court which failed to address this important question previously.

### I. An Attempted Answer

The Arkansas Supreme Court had the opportunity to take on the immediately prior to and consecutive question in 2006. In *Clement v. Daniels*, the Court was presented with this question: does the residency requirement mandate seven consecutive years leading up to the election year?<sup>4</sup>

In that case, John Mark Clement sued to enjoin the Secretary of State from allowing Bill Halter to appear on the Democratic Primary ballot for Lt. Governor.<sup>5</sup> The residency requirement is the same for Lt. Governor and Governor—seven years.<sup>6</sup> Clement’s reasoning was twofold: (1) Bill Halter was not a resident of, nor domiciled in, Arkansas; and (2) Halter wasn’t a resident “for the seven years ‘immediately preceding’ the election.”<sup>7</sup> The Court found that Halter was a resident and domiciled in Arkansas, and had never “abandoned Arkansas as his domicile with the intent never to return to it.”<sup>8</sup> Because Halter never abandoned his residency or domicile in Arkansas, the Court felt that it did not need to address the second question about consecutive years preceding the election.<sup>9</sup> Here’s the Court’s reasoning:

In reaching this decision, we need not address Clement’s additional argument that the trial court erred in concluding that Halter was not required to have an actual place of abode in Arkansas for the seven years “immediately preceding” the election. As we uphold the trial court’s finding that Halter *never abandoned* his domicile in Arkansas, we must necessarily conclude that Halter clearly met the seven-year requirement in Ark. Const. art. 6, § 5, as amended, irrespective of whether those seven years must be spent in

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4. *Clement v. Daniels*, 366 Ark. 352, 359, 235 S.W.3d 521, 526 (2006).

5. *Id.* at 353, 235 S.W.3d at 522.

6. ARK. CONST art. VI, § 5; ARK. CONST. amend. VI, § 5.

7. *Clement*, 366 Ark. at 359, 235 S.W.3d at 526.

8. *Id.* at 359, 235 S.W.3d at 526.

9. *Id.* at 359, 235 S.W.3d at 526.

Arkansas in the years immediately preceding the election or in any given seven years.<sup>10</sup>

Halter never left. So, according to the Arkansas Supreme Court, there was no reason to address the immediately preceding question, even though the domicile question was its own fact-intensive constitutional question.

But the Court could have, and should have, answered the immediately preceding question. The Court's ruling in *Clement*—that Halter satisfied the residency requirement because he never left—would've been undisturbed even if it included a ruling on the question. How? Because Halter satisfied both standards. According to the Court, Halter had lived in Arkansas any given seven years and had lived in Arkansas for the seven years immediately preceding the election.<sup>11</sup> Remember, he never left. So, the Court could have just as easily answered both constitutional questions and kept the same result. The Court's partial answer failed to provide lasting clarity or significant guidance.

## II. A Possible Re-Answer

So, the question still remains: does the residency requirement mean seven *consecutive* years *immediately* preceding the election or any given seven years?<sup>12</sup> This article will divide these questions as standards and refer to them as the “immediately preceding standard” and the “any-seven-years standard.”

The first standard is what Sarah Huckabee Sanders's campaign could bump into if a willing litigant were to bring suit challenging her eligibility. Now, there is no question Sanders satisfies the open question of “any-seven-years.” She was born in Hope, went to Little Rock Central High School, lived in the Governor's Mansion when her father was Governor, and attended college in Arkadelphia at Ouachita Baptist University.<sup>13</sup> She satisfies the “any-seven-years” standard. But what about since

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10. *Id.* at 359, 235 S.W.3d at 526.

11. *See id.* at 355–59, 235 S.W.3d at 524–26.

12. *Clement*, 366 Ark. at 359, 235 S.W.3d at 526.

13. *See Meet Sarah*, SARAH FOR GOVERNOR, [<https://perma.cc/HEZ6-CBUK>] (last visited Oct. 10, 2021).

March 2015, which is seven years immediately preceding the filing deadline for the 2022 election?<sup>14</sup>

### III. Divergent on Domicile

This is where Halter's and Sanders's paths diverge and why the immediately preceding question is likely to emerge. When the Court dealt with Halter's eligibility, it found that Halter never left.<sup>15</sup> Yes, Halter physically left, but the Court found that he never stopped being an Arkansawyer.<sup>16</sup> The Court listed a mountain of uninterrupted evidence to prove the point: Halter maintained an Arkansas address, had an Arkansas driver's license, he owned and paid taxes on cars tagged in Arkansas, and he always voted in Arkansas.<sup>17</sup> It was this evidence that allowed the Court to punt on the immediately preceding question. But for Sanders, things are different.

Sanders's evidence of residency and domiciliary may have more substantial and recent interruptions than Halter. Five years ago, in 2017, Sanders went to Washington D.C. to serve as the Principal Deputy White House Press Secretary in Donald Trump's administration.<sup>18</sup> She sold her home in Arkansas and moved her family to the D.C. area.<sup>19</sup> And her family, former Governor Mike Huckabee, moved to Florida years ago and only recently returned.<sup>20</sup> Now, the authors make no such disclosures of her personal life, but for sake of argument, recognize that her recent decision to leave Arkansas makes her set of facts different

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14. If the residency requirement for Governor means the seven years directly preceding the election year, then the clock runs backwards from the filing date. ARK. CODE ANN. § 7-5-207(b) (2021); *Clement*, 366 Ark. at 355, 235 S.W.3d at 523 (“Once the election takes place, the issue of a candidate’s eligibility under § 7-5-207(b) becomes moot.”); *Arkansas Governor*, RUN FOR OFFICE, [https://perma.cc/2G2Z-2ZZN] (last visited Oct. 10, 2021).

15. See *Clement*, 366 Ark. at 356–59, 235 S.W.3d at 524–27.

16. The authors acknowledge that “Arkansan” is the more common term, but nonetheless disregard this to use the more historical term of “Arkansawyer,” because that is what people from Arkansas would have been called at the drafting of the 1874 Constitution. See Ethel C. Simpson, *Arkansans versus Arkansawyers*, ENCYC. OF ARK. (Feb. 26, 2016), [https://perma.cc/HF5T-G5U8].

17. See *Clement*, 366 Ark. at 356–58, 235 S.W.3d at 524–26.

18. See *Meet Sarah*, SARAH FOR GOVERNOR, [https://perma.cc/HEZ6-CBUK] (last visited Oct. 10, 2021).

19. Pulaski County Land Records, Instrument # 2017012641.

20. Jack Flemming, *Mike Huckabee hauls in \$9.4 million for Florida beach house*, L.A. TIMES (Feb. 24, 2021, 11:39 PM), [https://perma.cc/YKP9-X9JQ].

than that of Halter. Therefore, if pressed with an eligibility challenge, the Arkansas Supreme Court may not be able to (and hopefully will not) punt like it did in *Clement*.<sup>21</sup>

And although the Arkansas Supreme Court punted on the immediately preceding question in *Clement*, the trial court did not.<sup>22</sup> The trial court ruled that “the seven-year residency requirement does not need to be met immediately preceding the election.”<sup>23</sup> After extensive briefing, the trial court came to this conclusion based on this primary reason—the drafters omitted “immediately preceding” on purpose, as the Arkansas Constitution of 1874 was the first Arkansas Constitution to omit the immediately preceding language.<sup>24</sup> Because the drafters of the 1874 constitution *knew* that they *could* have put such a requirement into the new constitution, as done previously, then by omitting it they meant to remove it.<sup>25</sup> And without a definite ruling from the Arkansas Supreme Court on this question, the trial court’s ruling stands as the only legal precedent on the issue.<sup>26</sup>

This is why any litigation surrounding Sanders’s residency qualification must put the constitutional issue to bed.

## IV. Rationales on the Residency Requirement

### A. Any-Seven-Years

The trial court’s ruling that any seven years would satisfy Arkansas’s constitutional requirement is rooted in solid legal reasoning. With any interpretation analysis, the inquiry must always start at a plain reading of the text. The plain text does not provide for any “immediately preceding” language.<sup>27</sup> The plain text merely states that: “No person shall be eligible to the office

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21. See *Clement*, 366 Ark. at 359, 235 S.W.3d at 526.

22. *Clement v. Daniels*, No. CV-2006-5265, 2006 WL 4536036, at \*3 (Ark. Cir. Ct. May 10, 2006).

23. *Id.* at \*4.

24. *Id.*

25. *Id.* (citing *Bennett v. Lonoke Bankshares*, 356 Ark. 371, 155 S.W.3d 15 (2004) for support of drafter’s intent).

26. See *id.* at \*5. As an aside, the Arkansas Supreme Court would be forced to answer the constitutional questions presented in this article if litigation arises and the new trial court rules the *exact opposite* way of the prior trial court. This would be an intra-trial court split. Such a split could only be resolved by the Arkansas Supreme Court.

27. See ARK. CONST. art. VI, § 5.

of Governor except a citizen of the United States, who shall have attained the age of thirty years, and shall have been seven years a resident of this State.”<sup>28</sup> Nowhere does it say “immediately preceding.” But it is important to note that the 1868 Constitution provided an “immediately preceding” clause in its eligibility requirements for Governor, as did the three other previous state constitutions.<sup>29</sup> The 1868 provision reads as follows:

No person shall be eligible to the office of Governor or Lieutenant Governor who shall not . . . at the time of his election, have had an actual residence in this State for one year next preceding his election, and who shall not be a qualified elector as prescribed in this Constitution.<sup>30</sup>

Next, there is the context which gives even more force to a plain reading approach. The drafters of the 1874 Constitution were “[a]lways haunted by the fear that what they attempted to do might be misinterpreted or misunderstood by future legislatures or overruled by Republican presidents and Republican congresses in Washington.”<sup>31</sup> Thus, the drafters “attempted to make the new constitution detailed and explicit beyond any misunderstanding” which manifested itself in “code-like” tendencies throughout the document.<sup>32</sup>

Lastly, it is possible to interpret the historical context in a way that promotes the idea that the drafters wanted the any-seven-years standard. The 1874 constitution is considered the “redemption constitution” because it was drafted to drive out carpetbaggers and reconstructionists, who had drafted the 1868 constitution.<sup>33</sup> The 1874 constitution was to “make Arkansas great again,” if you will.<sup>34</sup> As such, the drafters wanted “real” Arkansawyers to be elected to office and did not want them to have to wait around to do so.<sup>35</sup> This argument and rationale holds

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28. ARK. CONST. art. VI, § 5.

29. ARK. CONST. of 1868, art. VI, § 3; ARK. CONST. of 1836, art. V, § 4; ARK. CONST. of 1861, art. V, § 4; ARK. CONST. of 1864, art. VI, § 4.

30. ARK. CONST. of 1868, art. VI, § 3.

31. Cal Ledbetter, Jr., *The Office of Governor in Arkansas History*, 37 ARK. HIST. Q. 44, 63 (Spring 1978).

32. *Id.*

33. KAY COLLETT GOSS, *THE ARKANSAS STATE CONSTITUTION, A REFERENCE GUIDE* 119 (G. Alan Tarr ed., 1993).

34. The authors apologize if the pun is offense, but it was too good to pass up.

35. See generally Ledbetter, *supra* note 31, at 63-65.

water if you view the 1874 Constitution as driving carpetbaggers out and letting Arkansawyers come home; it's a different story if you view the 1874 Constitution as stopping the carpetbaggers from coming at all.<sup>36</sup>

## B. Immediately Preceding

The counter argument, and the one made by the challenger in *Clement*, is that the drafters meant for the requirement to mean immediately preceding.<sup>37</sup> This “implied argument” has more logical force behind it than other challenges asking courts to read words into constitutional or legislative provisions. In fact, one scholar wrote that the Arkansas Constitution has proclaimed that the provision in question requires seven immediately preceding years.<sup>38</sup>

First, when viewing the 1874 Constitution in its historical context, it seems unlikely that the 1874 drafters wanted to allow Northerners, or other outsiders, to sashay in and become Governor. Under an any-seven-years standard, one could spend seven years in Arkansas as a child, run off to the North, fight for the Union in the Civil War, move back to Arkansas, and become Governor of Arkansas. This possibility is quite at odds with the spirit of the “Redeemer” nature of the 1874 Constitution.<sup>39</sup> The drafters were trying to protect Arkansawyers from non-Arkansawyers, and the way to do that was to make folks move here, live here, and then run for Governor. As one Arkansas historical scholar put it when explaining the rationale behind the increased residency requirement: “Seven years residency rather than one were required to guard the office against newcomers from out of state.”<sup>40</sup>

Next, the 1874 Constitution was passed after the end of reconstruction in Arkansas when Democrats had taken back

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36. *Id.* at 63-64.

37. *See generally* *Clement v. Daniels*, No. CV-2006-5265, 2006 WL 4536036 (Ark. Cir. Ct. May 10, 2006).

38. GOSS, *supra* note 33, at 58.

39. *See generally* Rodney Waymon Harris, *Arkansas's Divided Democracy: The Making of the Constitution of 1874* (2017) (Ph.D. dissertation, University of Arkansas, Fayetteville), [<https://perma.cc/3ZDZ-BLPN>].

40. Ledbetter, *supra* note 31, at 65.



control of the state legislature.<sup>41</sup> The 1874 Constitution is riddled with provisions showing a large distrust of government, and a particular distrust of the Governor's Office.<sup>42</sup> Specifically, the 1874 Constitution limited the governor's appointment power to less positions, cut the term of office from four years to two, provided a set sum for the salary of governor in the constitution itself, limited the governor's power to regulate the state's militia, and allowed vetoes to be overridden by a simple majority.<sup>43</sup> In sum, "the 1874 draftsmen wrote in fear and distrust of executive power."<sup>44</sup>

This argument is also in line with the rest of the 1874 Constitution. The residency requirements to run for Senator and Representative in the General Assembly include "immediately preceding" language:

No person shall be a Senator or Representative who, at the time of his election, is not a citizen of the United States, nor any one who has not been for two years next preceding his election, a resident of this State, and for one year next preceding his election, a resident of the county or district whence he may be chosen.<sup>45</sup>

It would seem odd to require members of the General Assembly to pass a stricter residency requirement than that for the Chief Executive of the State. Even more telling though is that the drafters of the 1874 Constitution required voters to be residents of the State for twelve months immediately preceding the election in which they were voting<sup>46</sup>—hence under the any-seven-years standard, a person could be elected Governor in an election they were not eligible to vote in. Absurd, right? But again, the inclusion of "immediately preceding" in one provision may mean it was expressly excluded from the other provision.<sup>47</sup>

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41. Kay C. Goss, *Arkansas Constitutions*, ENCYC. OF ARK. (June 15, 2020), [<https://perma.cc/8G3R-ZHEG>].

42. *Id.*

43. *Id.*; Ledbetter, *supra* note 31, at 65.

44. Ralph C. Barnhart, *A New Constitution for Arkansas?*, 17 ARK. L. REV. 1, 7 (Winter 1962-63).

45. ARK. CONST. art. V, § 4.

46. GOSS, *supra* note 33, at 40.

47. *Buonaiuto v. Gibson*, 2020 Ark. 352, at 8, 609 S.W.3d 381, 386.

## V. Boots on the Ground Implications

Such competing arguments can be put to rest by the Arkansas Supreme Court, as it should have done in 2006. The domicile question and the immediately preceding question are both constitutional questions. There is no well-reasoned judicial philosophy that supports answering only the fact-intensive, yet constitutional, domicile question and not the general constitutional question that will bring certainty and stability—the immediately preceding question.<sup>48</sup>

Obviously, the Court will do what it wants as it relates to answering this question or any litigation challenging Sanders's eligibility as to the residency requirement. These authors just hope the Court does not evade this question and finally tells us what the law is: any-seven-years or seven years immediately preceding? And no matter which way the Court goes, both rationales and rulings have real world implications. Here are two:

(1) If the residency requirement does not mean immediately preceding, then Sanders is for sure eligible to run for Governor, regardless of her move to D.C.<sup>49</sup> But so is someone like Hillary Clinton. She lived in Arkansas for over seven years in the 80s and 90s and maintains an apartment in Little Rock, above her husband's library. But most Arkansawyers would not consider her a person who should be eligible for a gubernatorial run, given her time in New York.

(2) But if the residency requirement does mean immediately preceding, then Sanders may not be eligible yet. Given the enthusiasm and national attention of her race, the Arkansas Supreme Court could come under fire as being partisan. Such scrutiny affects the Court's legitimacy.

No matter the outcome, Sarah Sanders's race presents a unique situation in election and state constitutional law. These

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48. Additionally, there is well reasoned school of thought "it is the duty of the court to answer questions presented . . . when they are likely to arise again." *Wilson v. Martin*, 2016 Ark. 334, at 10, 500 S.W.3d 160, 167 (Brill, C.J., concurring); *Gray v. Mitchell*, 373 Ark. 560, 572, 285 S.W.3d 222, 233 (2008) (quoting *Owens v. Taylor*, 299 Ark. 373, 374, 772 S.W.2d 596, 597 (1989)) ("Where considerations of public interest or prevention of future litigation are present, this court may, at its discretion, elect to settle an issue, even though moot."). The general question of "immediately preceding" is almost certain to arise again, whereas almost certainly no case with the exact facts will arise under the domicile question.

49. See *supra* text accompanying notes 13-14.

cases and controversies are few and far between. A final ruling by the Arkansas Supreme Court will give clarity and stability going forward for the most important elected position in the state.