

## **Hazlewood Act's Requirement of Texas Residence at Time of Enlistment Is Not Unconstitutional**

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Update on Sam Wright

8.0—Veterans' preference

11.0—Veterans' claims

***Harris v. Cantu*, 81 F. Supp. 3d 566 (S.D. Tex. 2015), reversed sub nom. *Harris v. Hahn*, 827 F.3d 359 (5<sup>th</sup> Cir. 2016), cert. denied 2017 U.S. LEXIS 640 (Jan. 9, 2017).**

### **Bottom Line Up Front (BLUF)**

The United States District Court for the Southern District of Texas struck down as unconstitutional Texas' requirement that a veteran must have been a resident of Texas when he or she enlisted in the armed forces, to be eligible for free college tuition under the Hazlewood Act. Texas appealed, and the United States Court of Appeals for the Fifth Circuit reversed and upheld the constitutionality of the requirement. The plaintiff (Harris) applied to the Supreme Court for a writ of certiorari (discretionary review). The Supreme Court denied certiorari on January 9, 2017, thus making the decision of the Court of Appeals final. This case is over.

### **Origin and outcome of this case**

Keith Harris, the plaintiff in this case, was born in Georgia in 1978. In 1996, while still living in Georgia, he graduated from high school and enlisted in the United States Army. He served honorably and was honorably discharged. In 2000, he left active duty, returned home to Georgia, married, and started a family. He moved to Houston, Texas in 2004.

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1600 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

<sup>2</sup> <sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For six years (6/1/2009 through 5/31/2015), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015) concerning the accomplishments of the SMLC.

Harris began taking college courses while he was on active duty. After he left active duty, he used his federal GI Bill educational benefits to continue his college education. He received a bachelor's degree in business from the University of Houston-Downtown in December 2011. He enrolled in the University of Houston Law School in August 2012. He exhausted his federal GI Bill educational benefits before he started his third year of law school in 2014.

For almost a century, Texas has provided free college education at state-supported colleges and universities to certain veterans of the United States armed forces. This law is called the Hazlewood Act. The current statutory provision is as follows:

The governing board of each institution of higher education [supported by the State of Texas] shall exempt the following persons [veterans] from the payment of tuition, dues, fees, and other required charges but excluding general deposit fees, student services fees, and any fees or charges for lodging, board, or clothing, providing the person seeking the exemption currently resides in this state *and entered the service at a location in this state*, declared this state as the person's home of record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for purposes of Subchapter B [in-state tuition rates] at the time the person entered the service.<sup>3</sup>

Harris met all the requirements for free tuition under the Hazlewood Act, after he exhausted his federal GI Bill educational benefits, except the requirement of having been a resident of Texas as of his enlistment in the Army (1996). The University of Houston denied him the free tuition for his final year of law school based on his residence in Georgia (not Texas) at the time of his enlistment.

Harris sued the trustees of the University of Houston and other state defendants in the United States District Court for the Southern District of Texas. He asserted that the Hazlewood Act's requirement of having been a Texas resident at the time of enlistment (the fixed point of residence requirement) violated two separate provisions of the United States Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.<sup>4</sup>

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

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<sup>3</sup> Texas Education Code, section 54.341(a) (emphasis supplied).

<sup>4</sup> United States Constitution, Article IV, Section 2, Clause 1. Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>5</sup>

The first provision quoted above is called the “right of interstate travel” and the second provision is called the “Equal Protection Clause.”

Harris’ case was assigned to Judge Ewing Werlein. In a scholarly and well-written opinion,<sup>6</sup> Judge Werlein found that the fixed point of residence rule violated the Equal Protection Clause, and he found it unnecessary to reach the argument that the rule also violated the right of interstate travel.

The defendants appealed to the United States Court of Appeals for the Fifth Circuit.<sup>7</sup> As in all federal appellate cases, the case was assigned to a panel of three appellate judges. In this case, the three judges were Carl E. Stewart,<sup>8</sup> Edith Brown Clement,<sup>9</sup> and Jennifer Walker Elrod.<sup>10</sup> Judge Elrod wrote the opinion, and the other two judges joined in a unanimous panel decision that the fixed point of residence rule does not violate either the Equal Protection Clause or the right of interstate travel.

In her opinion, Judge Elrod wrote that there is not clear guidance from the Supreme Court in upholding or striking down state law distinctions between long-term residents and more recent residents, in conferring state benefits, and she found that the binding Supreme Court precedent did not clearly point to overturning the Texas rule here. In her opinion, she stressed the *portable* nature of the benefit at issue in this case (free college tuition).

This benefit is portable in the sense that a person who has received a free college education (undergraduate or graduate) can leave the state after graduation, in which case the state receives no benefit for the expenditure. Of course, a person who was born in Texas and has spent his or her entire life in Texas except for four years in the Army could also decide to leave the state after graduation. The state cannot prevent such a departure, but presumably a person who lived in Texas at the time of enlistment in the armed forces is more likely to remain in the state after graduation than a person who moved to Texas after military service.

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<sup>5</sup> United States Constitution, Amendment 14, Section 1 (emphasis supplied).

<sup>6</sup> In Law Review 16041 (May 2016), I reported on Judge Werlein’s decision, expressed my agreement, and predicted that the 5<sup>th</sup> Circuit would uphold the decision. My prediction was wrong, but I adhere to my opinion that Judge Werlein got it right. Of course, I am not a judge.

<sup>7</sup> The 5<sup>th</sup> Circuit is the federal appellate court that sits in Houston and hears appeals from district courts in Louisiana, Mississippi, and Texas.

<sup>8</sup> Judge Stewart is the Chief Judge of the 5<sup>th</sup> Circuit. He was appointed to the court by President Bill Clinton and confirmed by the Senate in 1994.

<sup>9</sup> Judge Clement was appointed to the court by President George W. Bush and confirmed by the Senate in 2001.

<sup>10</sup> Judge Elrod was appointed to the court by President George W. Bush and confirmed by the Senate in 2007.

The final step in the federal appellate process is to apply to the United States Supreme Court for a writ of certiorari. Four of the nine (currently eight) Justices must vote for certiorari, or it is denied. Certiorari is denied more than 99% of the time. The Supreme Court denied certiorari on January 9, meaning that the decision of the 5<sup>th</sup> Circuit is final and the case is over.

There is now no point in bringing a new challenge to the Hazlewood Act's requirement that the veteran must have been a resident of Texas at the time of enlistment. The district judge will be bound by the 5<sup>th</sup> Circuit precedent that the rule is not unconstitutional, and it is most unlikely that the 5<sup>th</sup> Circuit would reconsider this recent precedent.

It is also most unlikely that this specific issue will ever reach the Supreme Court. The Court is much more likely to grant certiorari if the applicant can show a conflict among the circuits on the specific issue. Only one other state (Illinois) gives free college tuition to veterans, and Illinois does not make a distinction based on residence at the time of enlistment.