Judging Elections, Returns and Qualifications of a Legislator

Peter S. Wattson
Senate Counsel
State of Minnesota

August 29, 2008

Contents

Table of Authorities

Constitutions

Statutes

Federal Cases

Minnesota Cases

Other State Cases

Legislative Materials

Other Authorities

I. Introduction

This paper reviews the history of a legislative body's power to judge the elections, returns, and qualifications of its members. It discusses both the English common law and the further development of the law by the U.S. Congress and state legislatures. It gives particular attention to election contests considered by the Minnesota Legislature in the last fifty years and by the Kentucky Senate in 2004. It explains why residents of each state should care about how election contests are judged in other states, and suggests procedures that a legislative body may wish to follow the next time it is presented with an election contest.

II. The Right of the People to Be Represented by a Candidate of Their Choosing Is Fundamental to Democracy

A. English Parliament

The right of the people to be represented by a candidate of their choosing is recognized by all as fundamental to democracy. It has not always been thus. In 18th-Century England, the people of London struggled for two decades to have the candidate of their choice seated in Parliament.

> While serving as a member of Parliament in 1763, [John] Wilkes published an attack on a recent peace treaty with France, calling it a product of bribery and condemning the Crown's ministers as "the tools of despotism and corruption.". . . Wilkes and others who were involved with the publication in which the attack appeared were arrested. Prior to Wilkes' trial, the House of Commons expelled him for publishing 'a false, scandalous, and seditious libel.' . . . Wilkes then fled to France and was subsequently sentenced to exile. . . .
>
> Wilkes returned to England in 1768 . . . . He was elected to the next Parliament, and he then surrendered himself to the Court . . . . Wilkes was convicted of seditious libel and sentenced to 22 months' imprisonment. The new Parliament declared him ineligible for membership and ordered that he be 'expelled this House.' . . . Although Wilkes was re-elected to fill the vacant seat three times, each time the same Parliament declared him ineligible and refused to seat him. . . .
>
> Wilkes was released from prison in 1770 and was again elected to Parliament in 1774. For the next several years, he unsuccessfully campaigned to have the resolutions expelling him and declaring him incapable of re-election expunged from the record. Finally, in 1782, the House of Commons voted to expunge them, resolving that the prior House actions were 'subversive of the rights of the whole body of electors of this kingdom.'

Powell v. McCormack, 395 U.S. 486, 527-28 (1969) (citations and footnotes omitted).

The struggle of Wilkes was seen as the struggle of everyman to have a say in his own government. As a defender of Wilkes asserted early on: "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution. . . ." 16 PARL. HIST. ENG. 589-590 (1769), *quoted in Powell v. McCormack*, 395 U.S. at 534 n.65 (1969).

B. United States Congress

John Wilkes was a hero to the American colonists:

> [T]he cry of 'Wilkes and Liberty' echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press . . . . Colonials . . . saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honour.

11 L. Gipson, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 222 (1956), *quoted in* 395 U.S. at 531.

At the Constitutional Convention in Philadelphia in 1787, the delegates settled on only the qualifications of age, citizenship, and residency. *See Powell v. McCormack*, 395 U.S. at 532-35 (1969). There was an antipathy toward imposing additional requirements, because they tended to restrict the right of the people to elect a candidate of their choosing.

As Robert Livingston said, "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." 2 DEBATES ON THE FEDERAL CONSTITUTION 292-293 (J. Elliot ed. 1876) *quoted in* 395 U.S. at 541 n.76. Or, as Alexander Hamilton said, "the true principle of a republic is, that the people should choose whom they please to govern them." 2 DEBATES ON THE FEDERAL CONSTITUTION at 257.

III. The Qualifications for a Member of a Legislative Body Are Set by the Constitution

As part of the debate on what the qualifications for a member of Congress should be, the delegates at Philadelphia debated whether the qualifications should be set forth in the Constitution, left to the Congress to establish from time to time, or some combination of the two. *See Powell v. McCormick*, 395 U.S. 486, 532-41 (1969). They ultimately decided to state them in the Constitution, for reasons articulated by James Madison: "The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 249-50 (M. Farrand rev. ed. 1966), *quoted in Powell v. McCormick*, 395 U.S. 486, 533-34 (1969).

IV. A Legislative Body Is the Judge of Whether a Candidate Meets the Constitutional Qualifications

A. U.S. Constitution

At the Constitutional Convention in Philadelphia, there was no debate on who should judge disputes over the qualifications of a member of Congress. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 254 (M. Farrand rev. ed. 1966), *Powell v. McCormack*, 395 U.S. at 536. What is now numbered as article I, § 5, provided that "Each house shall be the judge of the elections, returns and qualifications of its own members . . . ." No debate was necessary because legislative bodies had always judged the qualifications of their own members, both in England and in the colonies. *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986).

> The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth. A controversy arose over the election of a member of the House of Commons. The Queen ordered the Speaker to advise the House that it was the prerogative of the Lord Chancellor to determine who had been elected. The decision of the House is indicated by the following historic quotation: 'Nevertheless, the House appointed a committee to examine into the returns, and this committee reported that they had not thought it proper to inquire of the Chancellor what he had done, because they thought it prejudicial to the privilege of the House to have the same determined by others than such as were members thereof. And though they thought very reverently of the said Lord Chancellor and judges, and knew them to be competent judges in their places; yet in this case they took them not for judges in Parliament in this House.' Luce, *Legislative Assemblies*, 1924, p. 192.

Lucas v. McAfee, 217 Ind. 534, 539, 29 N.E.2d 403, 405 (1940).

As Justice Joseph Story observed:

> If [the power to judge qualifications is] lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America.

I Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 831, at 295 (1833 ed., *reprinted in* Const. Soc. online ed.1997) <http://www.constitution.org/js/js_311.htm>.

B. State Constitutions

The constitution of almost every state has language similar to the U.S. Constitution. Cases collected at 107 A.L.R. 205 (online database updated to June 2004). Since that language is a product of the English common law experience, *The Legislature's Power to Judge the Qualifications of its Members*, 19 Vanderbilt L. Rev. 1410 (1966), it is appropriate to construe each state constitution in light of the construction of those other constitutions.

V. Judging Qualifications: Residency

Of the three most common qualifications for membership in a legislative body—age, citizenship, and residency—the one most often contested is residency. In considering any challenge to a candidate's residence, it is helpful to distinguish between residence and domicile. A candidate may have only one domicile, but may have more than one residence.

A. A Candidate May Have More than One Residence

In this modern day, it is not uncommon for people of even modest means to have more than one residence. Residents of the Frost Belt have a winter home in the Sun Belt. City dwellers own a farmhouse, cabin, or vacation home in the country. Legislators from the far corners of the state live near the capitol during a legislative session. College students live on campus while their family lives at home. Having a second home does not cause a person to lose his or her permanent residence, as the courts have recognized. *E.g., Daley v. Morial*, 205 So.2d 213 (La. App. 1967); *Stavis v. Engler*, 202 So.2d 672 (La. App. 1967); *Boyd's Ex'r v. Commonwealth*, 149 Ky. 764, 149 S.W. 1022 (1912).

In *Daley v. Morial*, the residence of Ernest N. Morial of New Orleans (for whom the Convention Center was later named) was challenged after he was nominated in the Democratic primary for a seat in the Louisiana House of Representatives. A defeated opponent alleged that Morial was not a resident of the district for which he had filed for the two years preceding the primary and general election, so the opponent's name should replace that of Morial on the ballot for the general election. Morial had purchased a residence in 1961 outside the district, at 5732 Press Drive, where he lived with his family. In 1964, he purchased a two-story building at 1242 Magazine Street, inside the district, and remodeled it into an upper and lower residential apartment building.

> [Morial] testified that he established a residence at 1242 Magazine Street for the purpose of having a town house for the accommodation of his wife and himself when they went out for dinner or attended the theatre 'so we didn't have to return to the suburbs at night,' and for the additional purpose of establishing a legal domicile there because he intended to run for office. Defendant testified that he and his wife went out very often and on such occasions they left the children with their in-laws at 5752 Press Drive and slept at 1242 Magazine Street; that on other occasions he and his wife slept there just to be alone. He testified that he has slept at 1242 Magazine Street three or four nights a week since December 1964 and that since December

> 1964 his wife has lived at the Magazine Street address approximately 40% of the time.

205 So.2d at 216.

Morial applied for a homestead exemption for his residence at 5752 Press Drive, 205 So.2d at 217, and never filed a postal address change from there, 205 So.2d at 218, but he did register to vote and voted at 1242 Magazine Street. 205 So.2d at 216.

Morial's friends and neighbors (including Harry Connick, Sr., Assistant U.S. Attorney), testified as to the time he spent at 1242 Magazine Street and his activities there. The court found that Morial had two residences and that the residence at 1242 Magazine Street made him "an actual resident of Representative District No. 20 of the City of New Orleans for more than two years preceding the date of the election." 205 So.2d at 218.

Stavis v. Engler, 202 So.2d 672 (La. App. 1967), was a petition by William E. Stavis of New Orleans to have his name placed on the ballot for the Democratic primary for a seat in the Louisiana House of Representatives. The parish political party executive committee had refused to accept his qualifying papers and certify him. Stavis maintained a residence for his wife and children on Delery Street, outside the district, and a residence for himself on Decatur Street, inside the district. He claimed a homestead exemption at Delery Street and spent an average of two nights a week with his wife and children there. The other nights he spent at Decatur Street, in living quarters above his restaurant and bar, which operated 24 hours a day, seven days a week. His wife and children spent some nights with him on Decatur Street. For more then ten years, he had maintained his voter registration on Decatur Street (at three different locations in the same Ward). 202 So.2d at 674-75.

The court found that Stavis had two residences, one of which was within the district for which he sought the nomination. It noted the difference between "residence" and "domicile."

> Residence which a person can maintain in more than one place is not to be confused with domicile of which he can have only one. This is simply a case in which a party maintains two places of 'actual residence' in the City of New Orleans. Obviously he could not legally register and qualify as an elector in both wards and precincts. His choice of one instead of the other was for him to make.

202 So.2d at 676.

As the Louisiana Supreme Court had said in *Caulfield v. Cravens*, 138 La. 283, 70 So. 226 (1915), which involved the residence of a voter:

> One does not . . . lose his status, as an actual, bona fide, resident of a place, either because he finds it necessary to establish his family elsewhere, or because, in the absence of his family, he does not maintain a domestic establishment at such place.

> The question is one largely of intention, and the intention of a person, in that respect, is determined by his expressions thereof, at times not suspicious, and his testimony, when called on, considered in connection with his conduct and the circumstances of his life.

138 La. at 285-86, 70 So. at 227.

B. A Challenge to the Residence of a Candidate May Be Considered by a Court Before the Election

Questions of the residency of a voter for the purpose of voting may be decided by a judge. *See, e.g., Caulfield v. Cravens*, 138 La. 283, 70 So. 226 (1915).

Likewise, whether a candidate meets the residency requirement so that her name may be placed on the ballot is a question that may in some states be decided by a judge, either before the primary, e.g., *Piepho v. Bruns*, No. C4-02-1354, 652 N.W.2d 40 (Minn. 2002); *Hayes v. Gill*, 52 Haw. 251, 473 P.2d 872 (1970); *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70 (Mo. 1972); *Stavis v. Engler*, 202 So.2d 672 (La. App. 1967); or before the general election; *e.g., Stephenson v. Woodward*, 182 S.W.3d 162, 164-65 (Ky. 2005); *Daley v. Morial*, 205 So.2d 213 (La. App. 1967). *Contra*, e.g., *Markwort v. McGee*, 36 Cal.2d 592, 226 P.2d 1 (1951); *State ex rel. McGrath v. Erickson*, 203 Minn. 390, 281 N.W. 366 (1938); *Allen v. Lelande*, 164 Ca. 56, 127 P. 643 (1912).

C. After the General Election, a Court Has No Power to Judge That a Candidate Is Not Qualified

Before the Kentucky case of *Stephenson v. Woodward, supra,* in 2005, it was the uniform rule that, once the general election has been held, whether a candidate has met the residency requirements became a nonjusticiable political question to be decided by the house to which she was elected. *See, e.g., State ex rel. Schieck v. Hathaway*, 493 P.2d 759 (Wyo. 1972); *Covington v. Buffet*, 90 Md. 569, 45 A. 204 (1900).

In *Powell v. McCormack*, 395 U.S. 486 (1969), where the Court took jurisdiction to rule that the House of Representatives could not add qualifications not stated in the Constitution, the Court recognized that ruling on whether a candidate met those qualifications might still be for the House alone. Chief Justice Warren, writing for the majority, said that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications." *Id.* at 521 n.42. And Justice Douglas said, "Contests may arise over whether an elected official meets the 'qualifications' of the Constitution, in which event the House is the sole judge." 395 U.S. at 552 (Douglas, J., concurring). Any doubt was removed three years later, when the Court ruled that "[w]hich candidate is entitled to be seated in the Senate is . . . a nonjusticiable political question . . . ." *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972).

The Kentucky Supreme Court has likewise recognized that "a state court has no power to determine the right or to adjudge that a particular candidate has been elected." *Burchell v. State Bd. of Election Comm'rs*, 252 Ky. 823, 68 S.W.2d 427, 428 (1934) (petition by candidate for Congress to be issued a certificate of election).

D. The Judgment of a Legislative Body May Differ from That of a Court

The risk that the judgment of a legislative body may differ from the judgment of a court on a similar question is inherent in the constitutional structure. Whereas the power to judge cases generally is assigned to the judiciary, the power to judge the qualifications of a legislator is assigned to two separate houses of the legislature. Where the constitution provides that three separate judges may rule on similar challenges to the residency of a candidate, there is always the possibility of three separate results. Just as there is no constitutional mandate that the judgment of the Senate in an election contest follow the precedents established by election contests in the House of Representatives, there is no mandate that the judgment of the Senate in an election contest follow the precedents established by a court.

As Judge Cooley explained in the early case of *People ex rel. Drake v. Mahaney*, 13 Mich. 481, 1865 WL 2115 (1865):

> [W]hile the constitution has conferred the general judicial power of the state upon the courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers; and among them is the power to judge of the qualifications, elections and returns of members of the legislature. The terms employed clearly show that each house, in deciding, acts in a judicial capacity, and there is no clause in the constitution which empowers this, or any other court, to review their action. The 'general superintending control' which the Supreme Court possesses . . . 'over all inferior courts,' does not extend to the judicial action of the legislative houses in the cases where it has been deemed necessary to confer judicial powers upon them . . . .
>
> * * *
>
> If we have the power to review the decision in one case, we have in all. If we can correct their erroneous construction of a law, we have the same power to correct any erroneous decision upon returns, qualifications or majorities. It is sufficient for us to say that the constitution has not conferred upon us this jurisdiction, and whether the decision made is right or wrong, we shall leave it where it has been left by the fundamental law of the state.

1865 WL 2115 at *7-8.

As the Supreme Court of Iowa has conceded:

> In the exercise of its power, the House could construe [statutes relating to absentee ballots] as it did even though we might or might not construe the sections differently. Likewise in the exercise of its power, the House could decide that certain statutory ballot requirements are mandatory and that deviation from these requirements invalidates the ballots, even though we might hold otherwise in other election contests held in the courts. The House exercised sovereign power, and the courts must respect the prerogative of the House to do so just as the legislature must respect the prerogatives of the executive and the judiciary in the exercise of sovereign powers given to them by the constitution.
>
> * * *
>
> We may assume that in the view of the courts, the House erred . . . . Those differences of opinion by the House and the courts would not be of constitutional dimensions permitting the courts to interject themselves into an express constitutional function of the House.

Luce v. Wray, 254 N.W.2d 324 (Iowa 1977).

The structure created by the constitution, while not neat, is practical. In a case that arose out of the 2004 general election, the Kentucky Senate reached a final judgment on the question of candidate Stephenson's qualifications within four days after convening. Its first session was over before the Kentucky Supreme Court, acting as expeditiously as it could, reached a final judgment almost a year later. The electors of District 37 went unrepresented all that time. *See Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005).

E. A Challenge to the Residence of a Candidate May Not Be Considered by a Court after the Candidate Has Been Duly Seated by the Body, Except as Expressly Provided in the Constitution

The power to review is the power to reverse. If a court has the power to reverse the judgment of the Senate or the judgment of the House of Representatives on the qualifications of a member, then each house is not the final judge of those qualifications.

As Justice Scalia said when sitting as a judge of the D.C. Circuit:

> [T]he Constitution . . . unambiguously proscribes judicial review of the proceedings in the House of Representatives that led to the seating of [a representative] . . . .
>
> It is difficult to imagine a clearer case of 'textually demonstrable constitutional commitment' of an issue to another branch of government to the exclusion of the

> courts than the language of Article I, section 5, clause 1 . . . . The exclusion of others—and in particular of others who are judges—could not be more evident. Hence, without need to rely upon the amorphous and partly prudential doctrine of 'political questions,' we simply lack jurisdiction to proceed.
>
> * * *
>
> As far as we are aware, in none of the discussions of the clause [in the constitutional convention nor in the state ratification conventions] did there appear a trace of suggestion that the power it conferred was not exclusive and final.
>
> In almost two centuries of numerous election contests resolved by the House and Senate, beginning in the very first Congress, no court, as far as we are aware, has ever undertaken to review the legislative judgment or (until the present litigation) even been asked to do so.

Morgan v. United States, 801 F.2d 445, 446-48 (D.C. Cir. 1986) (citations omitted). *Accord*, *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985).

The Court of Appeals for the Seventh Circuit has likewise found that the same congressional election contest was not justiciable in federal court: "The House is not only 'Judge' but also final arbiter. Its decisions about which ballots count, and who won, are not reviewable in any court." *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985).

In *Stephenson v. Woodward*, neither Kentucky statutes nor Kentucky rules of court provided for appeal of a judgment of the Senate. The Kentucky Supreme Court justified the action of the lower court disqualifying Stephenson by saying that she never was a member, since she was ruled ineligible before her term began and that ruling was not appealed. *Stephenson v. Woodward*, 182 S.W.3d 162,167-68 (Ky. 2005). The Court's logic seems to have been that, since she was never a member, the Senate had no right to determine her qualifications, so there was no Senate decision being appealed.

Once a candidate has been duly seated by the body to which she was elected, a challenge to her qualifications is not justiciable, except as specifically provided in the constitution. *E.g., Raney v. Stovall*, 361 S.W.2d 518 (Ky. 1962) (incompatible offices); *McPherson v. Flynn*, 397 So.2d 665 (Fla. 1981) (not a resident); *State ex rel. Turner v. Scott*, 269 N.W.2d 828 (Iowa 1978) (not a resident for one year); *Buskey v. Amos*, 294 Ala. 1, 310 So.2d 468 (1975) (residency); *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554 (Me. 1973); *Lee v. Lancaster*, 262 So.2d 124 (La. App. 1972) (residency); *State ex rel. Danforth v. Hickey*, 475 S.W.2d 617 (Mo. 1972) (moving residence out of district after elected); *State ex rel. Danforth v. Banks*, 454 S.W.2d 498 (Mo. 1970) (unchallenged evidence that candidate had not met one-year residence requirement); *Brown v. Lamprey*, 106 N.H. 121, 206 A.2d 493 (1965) (not an inhabitant on election day); *Reif v. Barrett*, 355 Ill. 104, 188 N.E. 889 (1933) (in default on debt to state). As the New Hampshire Supreme Court said, "If the framers of our organic

law had intended that some court or other tribunal should have the power, by writ of *quo warranto* or *mandamus,* or other process, to reverse the action of the senate, they would have so expressed themselves, in language which could not be misunderstood." *In re Opinion of the Justices*, 56 N.H. 570, ___,1875 WL 4843, *3 (1875) (not a resident for seven years).

In *Brown v. Lamprey*, 106 N.H. 121, 206 A.2d 493 (1965), the New Hampshire Senate had disqualified two candidates who had received the largest number of votes in their district because they were not an inhabitant of the district at the time of election, and seated the candidates with the next highest numbers of votes. In a challenge to that action, the Court ruled:

> [T]his court has not been invested with the power to pass upon the wisdom of the legislative branch of the government in determining the qualifications of its members. Hence we have no authority to approve or disapprove the action thus taken by the Senate. For this court to interfere would be a usurpation of the authority of the Senate granted to it by the Constitution.

106 N.H. at 124, 206 A.2d at 495.

In *Reif v. Barrett*, 355 Ill. 104, 188 N.E. 889 (1933), the parties had stipulated that a representative seated by the House had later become disqualified and ineligible to hold office, but the House had not ruled him ineligible. The court found his eligibility beyond review.

> When the House exercises the prerogatives so granted it, regardless of whether its decision is right or wrong, the matter is forever placed at rest. No court has the right to review the decision of the House or command it to take action or nonaction upon the qualifications of its own members. When the House once acts upon the qualifications of its membership, the matter is beyond further controversy.

355 Ill. at 127, 188 N.E. at 899.

As an illustration of how easy it would be to provide for judicial review of the decision of a house in an election contest, the voters of North Dakota amended their constitution in 1984 to do just that. *See Timm v. Schoenwald*, 400 N.W.2d 260, 264 (1987). The Constitution provides: "Each house is the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law." N.D. CONST. art. IV, § 12. The implementing statute takes election contests out of the legislature completely. It provides that an election contest may be used to challenge the qualifications of a legislator in court at any time, N.D. Cent. Code § 16.1-16 (2005), and that "[l]egislative election contests must be determined in court as provided in this chapter for other contests. No legislative election may be contested before either house of the legislative assembly." N.D. Cent. Code § 16.1-16-10 (2005).

Hawaii has specifically provided in its constitution that the courts, rather than the houses of the legislature, will determine election contests. *See Akizaki v. Fong*, 51 Haw. 354, 461 P.2d 221

(1969). The Constitution provides: "Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law." HAW. CONST. *renumbered* art. 2, § 10. The implementing statute provides that the contest is filed in, heard, and conclusively decided by the Supreme Court. Haw. Rev. Stat. § 11-174.5 (2004).

VI. Judging Qualifications: Holding an Incompatible Office

Various states have additional qualifications beyond age, citizenship, and residency. The common law that applies to contests over residency applies to these other qualifications. One of the most litigated is a prohibition against holding certain other offices that have been deemed to be incompatible with the office of legislator.

As with a challenge to a candidate's residency, candidate's name may be stricken from the general election ballot before the election if it appears on the public record that the candidate currently holds an incompatible office. *Wentworth v. Meyer*, 837 S.W.2d 148 (Tex. App. 1992).

After the general election, whether a candidate is disqualified from receiving an election certificate because of currently holding an incompatible office is solely for the legislative body to decide. *Calif. War Veterans for Justice v. Hayden*, 176 Cal.App.3d 982, 222 Cal.Rptr. 512 (1986); *Bowling v. Weakley*, 181 Md. 496, 30 A.2d 791 (1943); *State ex rel. Biggs v. Corley*, 36 Del. 135, 172 A.415 (1934); *Attorney Gen. v. Board of Canvassers*, 155 Mich. 44, 118 N.W. 584 (1908).

After a legislative body has rejected an election contest alleging incompatible offices, a court will not interfere with the body's decision. *State v. Evans*, 735 P.2d 29 (Utah 1987).

Whether a court should oust legislators from their seats because they hold allegedly incompatible offices as employees in the executive branch is a nonjusticiable question because for the court to do so would violate the separation of powers. *Heller v. Legislature*, 120 Nev. 51, 93 P.3d 746 (2004).

Whether a seat has become vacant upon a legislator having begun to discharge the duties of an incompatible office is solely for the legislative body to decide. *State ex rel. Shumate*, 172 Tenn. 451, 113 S.W.2d 381 (1938).

A determination by a legislative body that an individual's employment in the executive branch does not prohibit the individual from taking a seat in the legislature does not prevent a court from finding that the seat in the legislature prohibits a member from continuing the member's employment in the executive branch. *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991).

A legislative body's exclusive right to judge the qualifications of its members does not prevent a court from authorizing a school district to terminate the member's employment as a teacher

in the public schools because of the incompatibility of the employment. *Monaghan v. School Dist. No. 1*, 211 Or. 360, 315 P.2d 797 (1957).

A court, and therefore also a secretary of state, lacks authority to declare a state senate seat vacant because the senator has accepted two allegedly incompatible offices as a notary public and as an attorney for a state agency. *Lessard v. Snell*, 155 Or. 293, 63 P.2d 893 (1937).

VII. Judging Qualifications: Conviction of an Infamous Crime

Another qualification that has been the subject of litigation is that a convicted felon may not vote or hold office, unless the felon's civil rights have been restored.

A legislative body is the sole judge of whether a member is ineligible because of conviction for "embezzlement of public money, bribery, forgery or other infamous crime." *State ex rel. Evans v. Wheatley*, 197 Ark. 997, 125 S.W.2d 101 (1939).

After the primary but before the general election, a court may determine whether a pardon has removed the ineligibility of a candidate previously convicted of embezzlement. *State ex rel. Cloud v. Election Bd.*, 1934 OK 481, 36 P.2d 20 (1934).

VIII. Judging Elections and Returns

A. Judicial Authority Over Elections and Returns is Statutory

Courts do not have general authority to regulate the conduct of campaigns for election to a legislative body. That general authority rests with the legislative body, which may regulate the conduct of election campaigns by statute. *Jones v. McCollister*, 159 Cal.App.2d 708, 324 P.2d 639 (1958).

Absent specific constitutional and statutory authorization, a court may not fix irregularities in an election for a member of the legislature. *Scott v. Thornton*, 234 S.C. 19, 106 S.E.2d 446 (1959).

A state may provide by law for an administrative recount of a congressional election. *Roudebush v. Hartke*, 405 U.S. 15 (1972); *People ex rel. Brown v. Bd. of Sup'rs*, 216 N.Y. 732, 110 N.E. 776 (1915). *Contra, Opinion of the Justices*, 152 Me. 212, 142 A.2d 532 (1956), *overruled by Rudebush v. Hartke*.

B. A Court May Compel Executive Officials to Carry out Ministerial Duties

A court may issue a writ of mandamus to compel election officials to carry out ministerial duties, such as counting or recounting the ballots and issuing a certificate of election to the candidate who received the most votes. *See, e.g.*, *Wickersham v. State Election Bd.*, 1960 OK 245, 357 P.2d 421 (1960); *State ex rel. Schmeding v. Dist. Court*, 67 N.D. 196, 271 N.W. 137 (1937); *Price v. Ashburn*. 122 Md. 514, 89 A. 410 (1914); *Bradley v. Bd. of State Canvassers*, 154 Mich. 274 (1908);

Vance v. Bd. of Canvassers, 95 Mich. 462, 54 N.W. 1084 (1893); *State ex rel. Norton v. Van Camp*, 36 Neb. 9, 36 Neb.91, 54 N.W. 113 (1893); *O'Farrall v. Colby*, 2 Minn. 180, 1858 WL 2544. *Contra, State ex rel. Acker v. Reeves*, 229 Ind. 126, 95 N.E.2d 838 (1951); *State ex rel. Beaman v. Circuit Court*, 229 Ind. 190, 96 N.E.2d 671; *Dalton v. State ex rel. Richardson*, 43 Ohio St. 652, 3 N.E. 685 (1885).

Where 526 ballots were set up improperly before being given to voters, and therefore not counted, and the outcome of a legislative race depended on how those voters had voted, the district court was authorized to order an election limited to those 526 voters. *State ex rel. Olson v. Bakken*, 329 N.W.2d 575 (N.D. 1983).

If a legislative body has determined that an individual is a member pending resolution of an election contest against the member and should continue to be paid until the final determination of the contest, a writ of mandamus may be issued to compel the state auditor to pay the member. *State ex rel. Boulware v. Porter*, 55 Mont. 471, 178 P. 832 (1919).

C. A Court May Not Compel Election Officials to Change the Vote Count

A legislative election contest may not be used to order election officials to change the vote count. *Ellison v. Barnes*, 23 Utah 183, 63 P. 899 (1901). A writ of mandamus may not be used as a writ of error to compel election officials to change the vote count in a legislative election. *Ex parte Scarborough*, 34 S.C. 13, 12 S.E. 666 (1891).

Where the state election board has determined that there may be enough "unaccounted for" votes to change the result of an election, but has certified the winner, mandamus will not lie to order the state board to change the result. *Williamson v. State Election Bd.*, 1967 OK 13, 431 P.2d 352 (1967).

D. A Court May Not Fix Irregularities in an Election After a Legislative Body Has Taken Up the Matter

A state's constitution may authorize a court to fix irregularities in an election, but once the house has decided which candidate will be seated, the court's authority ends, whether the court action is to recount certain ballots, *see, e.g., State ex rel. Batchelet v. DeKalb Circuit Court*, 248 Ind. 481, 229 N.E.2d 798 (1967); *Greenwood v. Registrars of Voters*, 282 Mass. 74, 184 N.E. 390 (1933); to rule certain ballots illegal, *McKye v. State Election Bd.*1995 OK 15, 890 P.2d 954 (1995); or to order a new election; *see, e.g., Wheatley v. Secretary*, 439 Mass. 849, 792 N.E.2d 645 (2003).

E. Whether the Courts May Take Evidence in Contested Cases May, or May Not, Be for the Legislature to Decide

1. Delegation Permitted

A state constitution may authorize the legislature to delegate to the courts the task of taking evidence in contested cases. The authorization may be by specific language in the constitution. *See, e.g.*, MINN. CONST. art. IV, § 6 ("The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house."); *State ex rel. Haines v. Searle*, 59 Minn. 489, 61 N.W. 553 (1894); PA. CONST. art. VII, § 13 (1968) ("The trial and determination of contested elections of . . . members of the General Assembly . . . shall be by the courts of law, or by one or more of the law judges thereof."); *In re Contested Election of Senator*, 111 Pa. 235, 2 A. 341 (1886) (construing PA. CONST. art. VIII, § 17 (1874)).

In the absence of specific language, the authorization may have been construed into the constitution by the courts. See, e.g., *Lamb v. Hammond*, 308 Md. 286, 518 A.2d 1057 (1987) (construing MD. CONST. art III, § 19); *People ex rel. Brown v. Board of Sup'rs*, 216 N.Y. 732, 110 N.E. 776 (1915) (construing N.Y. CONST. art. III, § 9).

Even if a delegation might be permitted by the constitution, in the absence of a statute specifically granting the courts the power to take evidence in contested cases, the courts have no jurisdiction over contested elections to the legislature. *Harden v. Garrett*, 483 So.2d 409 (1986); *Pendergrass v. Sheid*, 241 Ark. 908, 411 S.W.2d 5 (1967).

2. Delegation Prohibited

On the other hand, some courts have said that a statute authorizing the courts to decide election contests and order a new election is an unconstitutional delegation of a legislative power to the judiciary. *See, e.g., Kennedy v. Chittenden*, 142 Vt. 397, 457 A.2d 626 (1983); *Combs v. Groener,* 256 Or. 336, 472 P.2d 281 (1970). In some states, even a statute merely authorizing a court to take evidence for presentation to the legislative body is unconstitutional. *See, e.g., Dinan v. Swig*, 223 Mass. 516, 112 N.E. 91 (1916); *State ex rel. Smith v. Dist. Court*, 50 Mont. 134, 145 P. 721 (1914); *State ex rel. O'Donnell v. Houston*, 40 La.Ann.598, 4 So. 482 (1888) (constitutional provision that "a contested election shall be determined in such manner as shall be directed by law" had been omitted from revised constitution); *State ex rel. Redon v. Spearing*, 31 La.Ann. 122, 1879 WL 7224 (1879) (statute did not provide separate and special procedure for legislative elections).

F. A Legislative Body May Initiate a Contest on its Own Motion at Any Time

A legislative body may initiate a contest on its own motion at any time. *Auditor General v. Bd. of Sup'rs of Menominee County*, 89 Mich. 552, 51 N.W. 483 (1891).

IX. Various Writs are Not Available for Testing the Right of a Legislator to Hold Office

A. Injunction

An injunction is not an appropriate writ to test the right of a legislator to hold office. *Waid v. Pool*, 255 Ala. 441, 51 So.2d 869 (1951); *Wilkinson v. Henry*, 221 Ala. 254, 128 So. 362 (1930).

B. Mandamus

Mandamus is not an appropriate writ to test the right of a legislator to hold office. *McKye v. State Election Bd.*1995 OK 15, 890 P.2d 954 (1995); *English v. Bryant*, 152 So.2d 167 (Fla. 1963); *see, also, State ex rel. Grant v. Eaton*, 114 Mont. 199, 133 P.2d 588 (1943).

C. Quo Warranto

Quo warranto is not an appropriate writ to test the right of a legislator to hold office. *State ex rel. Rigby v. Junkin*, 146 Fla. 347, 1 So2d 177 (1941); *Rainey v. Taylor*, 166 Ga. 476, 143 S.E. 383 (1928); *Alexander v. Pharr*, 179 N.C. 699 103 S.E. 8 (1920); *Brit v. Board of Canvassers*, 172 N.C. 797, 90 S.E. 1005 (1916); *State ex rel. Attorney Gen. v. Tomlinson*, 20 Kan. 692, 1878 WL 986 (1878); *State ex rel. Martin v. Gilmore*, 20 Kan. 551, 1878 WL 955 (1878); *People ex rel. Vejar v. Metzker*, 47 Ca. 524, 1874 WL 1280. *Contra, State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 265 P.2d 447 (1953) (quo warranto granted on application of Senate President to oust individual claiming membership by virtue of appointment by the governor to fill an alleged vacancy created by constitutional amendment increasing the number of members of the Senate by nine).

X. A Court May Not Enjoin a Member from Performing Duties

Once a member has been lawfully seated, a court may not enjoin the member from performing the duties of the office.

Even when the U.S. Supreme Court took jurisdiction to declare that Adam Clayton Powell had been unconstitutionally excluded from the House of Representatives, it found that legislative immunity under the Speech or Debate Clause, U.S. CONST. art I, § 6, required that the action be dismissed against the members of Congress. *See Powell v. McCormick*, 395 U.S.486 (1969). It found that legislative immunity, an aspect of the separation of powers as well as of the Speech or Debate Clause, prohibited a court from enjoining a member of a legislative body from the performance of the member's duties, even when that performance was found to be unconstitutional. 395 U.S. at 501-06.

The courts of South Carolina and Tennessee have refused to enjoin the performance of duties by a legislator whose constitutional qualifications for office have been challenged. *Culbertson v. Blatt*, 194 S.C. 105, 9 S.E.2d 218 (1940); *State ex rel. Ezzell v. Shumate*, 172 Tenn. 451, 113 S.W.2d

381 (1938). The New Hampshire Supreme Court refused to enjoin a legislator from continuing legislative business while an election contest was pending. *Brown v. Lamprey*, 106 N.H. 121, 206 A.2d 493 (1965).

The Kentucky Supreme Court has held that a member of the Senate is immune from suit relating to the performance of the duties of the legislator. *See Wiggins v. Stuart*, 671 S.W.2d 262, 264 (Ky. App. 1984). In setting forth the procedural history of *Stephenson v. Woodward*, the Kentucky Supreme Court noted that the Franklin Circuit Court had temporarily enjoined Ms. Stephenson from performing the duties of a senator and that the temporary injunction had been affirmed by the Supreme Court. 182 S.W.3d 162, 166 (Ky. 2005). The Court did not specifically address why it was proper for the circuit court to enjoin a person who had been found qualified and sworn in by the Senate. Presumably that was covered by the Court's holding that Ms. Stephenson had never become a member of the Senate because she had been finally adjudicated to be ineligible before her term began. *See* 182 S.W.3d at 167-68.

XI. Any Error by the Body Is for the People to Correct

It is conceivable that a legislative body may err in applying its constitutional requirements to the facts of a particular case. Under the common law of England and the United States, any error by the body must be corrected by the people at a future election, not by the courts. *Lucas v. McAfee*, 217 Ind. 534, 29 N.E.2d 403 (1940); *State ex rel. Elfers v. Olson*, 26 Wis.2d 422, 132 N.W.2d 526 (1965). As the Wisconsin Supreme Court has said:

> Under our system of government this is one decision which the constitution leaves to the legislature alone to make. We do not endorse the assembly verdict; neither do we reject it. Under the circumstances this decision, simply, is none of our business. Full responsibility for that decision rests on the legislature. If the people in this assembly district or elsewhere do not like the assembly verdict . . . their recourse is at the polls.

26 Wis.2d at 431, 132 N.W.2d at 531.

As illustrated by the case of John Wilkes, the people's will may be frustrated by the action of a legislative body after one election, but there will be another election. The people will have an opportunity to bring the body to account if they believe its decision to seat a member was in error.

XII. Minnesota Election Contests

It is clear that legislative bodies have responsibility for judging the elections, returns, and qualifications of their members, but how do they do it? What procedures have they established to hear election contests, and how have those procedures worked in particular cases? This portion of the paper will examine the procedures established by the Minnesota Legislature for judging election contests.

A. Minnesota Constitution, Article IV, § 6

The Minnesota Constitution, article IV, § 6, provides in part that "Each house shall be the judge of the election returns and eligibility of its own members. The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house."

Note the punctuation of the first sentence: "election returns" not "elections, returns" as in the U.S. Constitution. This suggests that, while each house of the U.S. Congress may have exclusive jurisdiction over the campaign conduct of its members, the houses of the Minnesota Legislature may be confined to deciding which candidate received the most votes and whether the winner is eligible to serve. The Minnesota Supreme Court has rejected that interpretation. It has said:

> [T]he constitutional provision . . . makes the legislative body "judge of the election returns" of its members. To judge election returns surely extends to ascertaining if they reflect a fair vote. Thus, not only does the legislature have the power . . . to regulate the conduct of election campaigns by statute, presumably enforced and applied by the executive and judicial branches, but under Article IV, Section 6, it also has the power to itself review the fairness of the election campaigns of legislative candidates.

Pavlak v. Growe, 284 N.W.2d 174, 180 n.4 (Minn. 1979). *See, also, Saari v. Gleason*, 126 Minn. 378, 148 N.W. 293 (1914) (approving statutory regulation of unfair campaign practices).

This language was the product of a constitutional convention so divided that Democrats refused to sign a document with Republican signatures and Republicans refused to sign a document signed by Democrats. So, there were two handwritten documents, one signed by the delegates from each party. 1 Minn. Stat. Ann. 151-52 (1976). The two constitutions were said to be identical, but an examination of the facsimiles of the two shows that they differed on this point: the Democratic document reads "election, returns," similar to the U.S. Constitution; the Republican document reads "election returns" without any commas. The published constitution uses the Republicans' punctuation, but the courts have construed it as if it had the Democrats' punctuation.

B. Minn. Stat. Ch. 209

1. Grounds

Minn. Stat. ch. 209 prescribes "the manner for taking evidence in cases of contested seats in either house" of the Minnesota Legislature, as well as for all other federal, state, and local offices. A contest may be brought over:

(1) who received the largest number of votes legally cast;

(2) the number of votes legally cast in favor of or against a question;

(3) an irregularity in the conduct of an election or canvass of votes; or

(4) a deliberate, serious, and material violation of the Minnesota Election Law.

Minn. Stat. § 209.02, subd. 1. The statute has been upheld as applying to legislative elections, *Phillips v. Ericson*, 248 Minn. 452, 80 N.W.2d 513 (1957); *State ex rel. Haines v. Searle*, 59 Minn. 489, 61 N.W. 553 (1894), even though the Court has said it might someday find the provision in the statute authorizing an appeal to the Supreme Court to be an unconstitutional delegation of legislative responsibility. *Scheibel v. Pavlak*. 282 N.W.2d 843, 853 (1979). The statute will be enforced with respect to a primary for a seat in Congress, *Flaten v. Kvale*, 146 Minn. 463, 179 N. W. 213 (1920), but not with regard to a general election, over which Congress has exclusive jurisdiction. *Odegard v. Olson*, 264 Minn. 439, 119 N.W.2d 717 (1963); *State ex rel. 25 Voters v. Selvig*, 170 Minn. 406, 212 N.W. 604 (1927).

2. Who May Bring

The contest may be brought by any eligible voter who had the right to vote for the person whose election is contested. Minn. Stat. § 209.02, subd. 1. The contest may relate to either the nomination of a candidate who has been nominated at a primary or to the election of a candidate at the general election. *Id.*

3. When Commenced

A contest based on a deliberate, serious, and material violation of the election laws that was discovered from a campaign finance report filed by a candidate may be commenced after the filing of the report. Minn. Stat. § 209.021, subd. 1. Those reports are filed 15 days before the primary, ten days before the general election, and seven days before a special primary or special election. Minn. Stat. § 10A.20, subd. 2. Otherwise, a contest may not be commenced until the candidate has been declared nominated at the primary or elected at the general election. Minn. Stat. § 209.021, subd. 1.

4. Notice of Contest Served and Filed

Notice of the contest must be served on the contestee in the same manner as a summons in a civil action and must also be served on the official authorized to issue the certificate of election. Minn. Stat. § 209.021. Once served, notice of a legislative election contest must be filed with the district court administrator in the county where the contestee resides. Minn. Stat. § 209.021, subd. 2. It must be filed within five days after a pre-primary campaign finance report is filed or the canvass of the primary is completed, within seven days after the canvass of a general election is completed, or within ten days after a pre-general election campaign report is filed. If a notice of contest questions only which candidate received the highest number of votes legally cast at the election, a contestee who loses may serve and file a notice of contest on any other ground during the

three days following expiration of the time for appealing the decision on the vote count. Minn. Stat. § 209.021, subd. 1.

Within three days after the notice of contest is received, the district court administrator must submit a copy of it to the Chief Justice of the Supreme Court by certified mail, and must do the same with a copy of the answer. Minn. Stat. § 209.10, subd. 1.

5. Contestee's Answer

The contestee need not answer a notice of contest that questions only which of the parties to the contest received the highest number of votes legally cast at the election. Minn. Stat. § 209.03, subd. 1. For all other election contests the contestee's answer must be served and filed within five days after service of the notice of a contest relating to a primary or seven days after service of the notice of a contest relating to a general or special election. Minn. Stat. § 209.03, subd. 2.

6. Guarding the Ballots

> In any election, upon demand made of the custodian of the ballots and upon notice to the candidate's opponent, a candidate may keep a continuous visual guard over the ballots until the expiration of the time for instituting contests. In case of a contest, the contestant or contestee may keep a visual guard over the ballots. The guard may be maintained either by the candidate, contestant, or contestee, or by their duly authorized agents, not exceeding two at a time for each party to the contest. If a candidate, contestant, or contestee seeks to guard the ballots, the custodian of the ballots shall appoint some suitable person to guard the ballots so they are not in the sole custody of the candidate, contestant, contestee, or their agents.

Minn. Stat. § 209.05.

7. Inspection of Ballots

Either party to a contest may petition the court to have the ballots inspected before preparing for trial. The court appoints as many sets of three inspectors as are needed to count and inspect the ballots expeditiously, one selected by each party and the third selected by the first two. The petitioner must post a bond to cover the costs of the inspection in case the petitioner loses the contest. The inspection is done in the office and in the presence of the legal custodian of the ballots and a written report of the results of the inspection is filed with the court. Minn. Stat. § 209.06.

8. Selection of Judge

> In cases where an unfair campaign practice is alleged, within five days of receipt of a notice of contest, the chief justice shall submit to the parties a list of all the district judges in the state, except those involved in a trial that would interfere with serving

as a judge in the election contest and those whose health precludes serving as judge in the election contest. Within two days after receiving the list of judges the parties shall meet together and, by alternating strikes they shall remove the names of all judges until only one remains. If no unfair campaign practice is alleged, the parties shall follow the same procedure using only the names of judges of the judicial district or districts covering the area served by the contested office.

Minn. Stat. § 209.10, subd. 2.

9. Trial

Within 15 days after notice of contest has been filed, the judge shall convene the proceeding at an appropriate place within the county, or, if the district includes all or portions of more than one county, a county within the legislative district, and hear testimony of the parties under the ordinary rules of evidence for civil actions. The judge shall decide the contest, issue appropriate orders, and make written findings of fact and conclusions of law. Unless the matter is appealed to the Supreme Court, the judge, by the first day of the legislative session, shall transmit the findings, conclusions, orders, and records of the proceeding to the chief clerk of the house of representatives or the secretary of the senate, as appropriate.

Minn. Stat. § 209.10, subd. 3.

10. Results of Contest

If the contest involved an error in the counting of ballots, the official authorized to issue the certificate of election shall issue the certificate to the person entitled to it, but if a contestant succeeds in a contest where there is no question as to which of the candidates received the highest number of votes cast at the election, the contestant is not, by reason of the disqualification of the contestee, entitled to the certificate of election.

Minn. Stat. § 209.07, subd. 1.

11. Appeal

The judge's decision may be appealed to the Supreme Court no later than ten days after its entry in the case of a general election contest or five days after its entry in the case of a primary contest. The record on appeal must be made, certified, and filed in the Supreme Court within 15 days after service of notice of appeal. The appellant shall file in the district court a bond of $500 for the payment of respondent's costs if appellant fails on appeal. The appeal from an election contest relating to the office of state senator or representative takes precedence over all other matters before the

> Supreme Court. A copy of the decision must be forwarded to the chief clerk of the house of representatives or the secretary of the senate, as appropriate.

Minn. Stat. § 209.10, subd. 4.

12. Legislative Procedure

When the records of the contest have been transmitted by the court to the House of Representatives or Senate , the statute requires the body to permit the contestant to present evidence before the contestee and to open and close the argument. The vote on the contest must be viva voce, and no party to the contest may vote on any question relating to it. Minn. Stat. § 209.10, subd. 5. The statute also says that it "does not limit the constitutional power of the house of representatives and the senate to judge the election returns and eligibility of their own members." Minn. Stat. § 209.10, subd. 6.

C. Legislative Precedents

The Minnesota House of Representatives and Senate have considered at least eight election contests within the last half century. This portion of the paper will discuss the procedures they have used and some of the procedural questions that have arisen.

1. Certificate of Election; Swearing In

No sooner than seven days after the canvassing board has declared the result of the election, the Secretary of State must prepare a certificate of election for each candidate for the Legislature who is declared elected. The Secretary of State must deliver the original certificate to the Chief Clerk of the House of Representatives or the Secretary of the Senate, as appropriate. The Chief Clerk or Secretary must give a copy of the certificate to the member-elect. If a recount is undertaken under Minn. Stat. § 204C.35, no certificate is prepared or delivered until after the recount is completed. Minn. Stat. § 204C.40. On the first day of the legislative session following an election, the Chief Clerk and Secretary place the election certificate on the desk of each member in the chamber and, as the roll is called, the members-elect carry their certificates to the front of the chamber and present them to the clerk pro tem. "All whose certificates are so presented shall then stand and be sworn." Minn. Stat. § 3.05.

What happens to the certificate for a legislator-elect if there is an election contest? Minnesota's answer to this question has changed over the years.

In 1945, Minnesota election law was amended to require that "In case of a contest, the certificate shall not be issued until the district court has finally determined the contest." Minn. Laws 1945, ch. 229, § 3, *coded as* Minn. Stat. § 206.38 (1945).

At the 1956 election, George E. Ericson received 3,919 votes and Seth R. Phillips received 3,170 votes for representative from District 52, Cass County. Phillips filed an election contest against Ericson for making false statements during the campaign. In 1957, when the roll was called by district on opening day, no one answered for the 52nd District, Cass County, presumably because no one had yet received a certificate of election. *See* JOURNAL OF THE HOUSE 6 (Jan. 8, 1957).

At the 1964 election, Linn Slattengren received 11,270 votes for representative from District 30, East Half, and John P. Wingard received 10,931 votes. JOURNAL OF THE HOUSE 455 (Feb. 25, 1965). Wingard filed an election contest against Slattengren for making false statements during the campaign. *Id.* at 456-58. In 1965, Slattengren was not sworn in. The Journal does not say why, but again it was presumably because he had not received an election certificate.

In the next four election contests considered by the House and Senate, the candidate with the highest number of votes presented an election certificate to the body, presumably because the district court had completed its work.

After Slattengren was found to have violated the Corrupt Practices Act and his seat declared vacant, JOURNAL OF THE HOUSE 455, 57 (Feb. 25, 1965), a special election was held, at which Wingard received 4,535 votes and Slattengren received 4,053 votes. JOURNAL OF THE HOUSE 1289 (Apr. 19, 1965). Each candidate filed an election contest against the other for violations of the Corrupt Practices Act by making false statements in the campaign, but a certificate of election for Wingard was delivered to the House. JOURNAL OF THE HOUSE 1138 (Apr. 12, 1965). After Wingard was found not to have violated the Act, JOURNAL OF THE HOUSE 1289-90 (Apr. 19, 1965), Wingard was sworn in the next day. JOURNAL OF THE HOUSE 1355 (Apr. 20, 1965).

At the 1968 election, Barney Bischoff received 10,412 votes for representative from District 63 and Jack Fena received 8,503 votes. JOURNAL OF THE HOUSE 278 (Feb. 6, 1969). Fena filed an election contest against Bischoff for making false statements during the campaign. *Id.* at 278-79. On opening day, Bischoff was sworn in. JOURNAL OF THE HOUSE 4-5 (Jan. 7, 1969).

Also at the 1968 election, Edward R. Brandt received 9,069 votes for representative from the 41st District and Alpha Smaby received 8,371 votes. JOURNAL OF THE HOUSE 1648 (Apr. 18. 1969). Smaby filed an election contest against Brandt for making false statements during the campaign. *Id.* at 1648-50. On opening day, Brandt was sworn in. JOURNAL OF THE HOUSE 4-5 (Jan. 7, 1969).

At the 1970 election, Richard F. Palmer defeated Francis LaBrosse to become senator for District 59. LaBrosse filed an election contest against Palmer for making false statements during the campaign. At the opening of the 1971 session, Palmer presented an election certificate, but Rudy Perpich, the Lieutenant Governor and President of the Senate, refused to accept it on the ground that an election contest was pending against him. The 67-member Senate was tied, 33 to 33, plus Palmer, who had said during the campaign he would "caucus with the majority." Amidst a parliamentary struggle over who controlled the Chamber, the Chief Justice of the Supreme Court, who was there to swear in all the members, departed, and Palmer was sworn in by a notary public. *See* JOURNAL

OF THE SENATE 5-9 (Jan. 5, 1971). The Minnesota Supreme Court ruled that the presiding officer had no authority to refuse to accept an election certificate nor to order its possessor to stand aside and not be sworn in. *State ex rel. Palmer v. Perpich*, 289 Minn. 149, 182 N.W.2d 182 (Jan. 13, 1971) (per curiam).

During the 1971 session, candidates elected to the Legislature were exempted from the prohibition against issuing a certificate of election to a candidate against whom an election contest has been filed. *See* Minn. Laws 1971, ch. 733, § 2, *coded as recodified and amended at* § 204C.40, subd. 2 (2006). The candidate with the highest number of votes has since received a certificate, notwithstanding that an election contest may have been filed.

At the 1978 election, Robert L. Pavlak received 4,454 votes for representative from House District 67A and Arnold Kempe received 4,133 votes. JOURNAL OF THE HOUSE 2576 (May 18, 1979). Kempe filed an election contest against Pavlak for making false statements during the campaign. Pavlak presented his certificate of election and was sworn in on opening day. *See* JOURNAL OF THE HOUSE 5-6 (Jan. 3, 1979).

2. Receipt of Record from the Court

Notwithstanding Minn. Stat. § 209.10, subd. 3, in only one of these eight contests was the record made by the trial court, or by the Supreme Court on appeal, received by the first day of session (either the first Tuesday after the first Monday in January or, if the first Monday is January 1, on the first Wednesday after the first Monday). In *Phillips v. Ericson*, the record was received January 24, 1957. JOURNAL OF THE HOUSE 144. In 1965, the record in *Wingard v. Slattengren* relating to the general election was received February 8, 1965, JOURNAL OF THE HOUSE 259 (Feb. 8, 1965); and the record in *Slattengren v. Wingard* relating to the March 27 special election was received April 12. JOURNAL OF THE HOUSE 1139 (Apr. 12, 1965). In 1969, the record in *Fena v. Bischoff* was received January 14, *see* JOURNAL OF THE HOUSE 71 (Jan. 14, 1969); and the record in *Smaby v. Brandt* was received February 14, *see* JOURNAL OF THE HOUSE 393 (Feb. 14, 1969). In 1979, the decision of the Supreme Court on the appeal in *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979) was not transmitted to the House of Representatives until May 14. *See* JOURNAL OF THE HOUSE 2246 (May 14, 1979).

In *Derus v. Higgins*, 555 N.W.2d 515 (Minn. 1996), the notice of contest relating to the September primary was dismissed by the Supreme Court before assigning the contest to a judge for trial, so there was no record made in the trial court. The contestant filed the record from the Supreme Court proceedings with the Senate on December 18, 1996, after the Senate had adjourned *sine die* the previous spring. It was not filed with the President, but rather with the Majority Leader and Minority Leader, and never appeared in the JOURNAL.

3. Referral to Committee

Whenever the record is received, it is invariably referred to committee.

In the House it has been received under the order of business of Petitions and Communications and referred to either the Committee on Elections, JOURNAL OF THE HOUSE 144 (Jan. 24, 1957); or the Committee on Elections and Reapportionment, JOURNAL OF THE HOUSE 71 (Jan. 14, 1969), 393 (Feb. 14, 1969); or to a special committee appointed to hear the contest, JOURNAL OF THE HOUSE 259 (Feb. 8, 1965), 1138-39 (Apr. 12, 1965).

In the Senate, in *LaBrosse v. Palmer* the record from the trial court was received under the order of business of Executive and Official Communications and referred to the Rules Committee by motion of the majority leader. *See* JOURNAL OF THE SENATE 56 (Jan. 19, 1971). The Rules Committee then recommended it be referred to the Committee on Elections and Reapportionment. JOURNAL OF THE SENATE 68 (Jan. 20, 1971).

In *Derus v. Higgins*, the Senate Majority Leader referred the record in the election contest to the Committee on Election Laws on or about January 13, 1997, without action by the Senate.

4. Hearing in Committee

In committee, the procedure sometimes has been to hear only from the parties and their attorneys concerning the record made in the trial court, *see Smaby v. Brandt*, JOURNAL OF THE HOUSE 1648 (Apr. 18, 1969); *Wingard v. Slattengren*, JOURNAL OF THE HOUSE 455 (Feb. 25, 1965). It is not clear from the JOURNAL whether any evidence outside the court record was considered in either the *Palmer* case, *see* JOURNAL OF THE SENATE 371 (Feb. 22, 1971), the *Pavlak* case, *see* JOURNAL OF THE HOUSE 2574 (May 18, 1979), or the case of *Fena v. Bischoff*, *see* JOURNAL OF THE HOUSE 278 (Feb. 6, 1969). In *Slattengren v. Wingard*, following the special election held to fill the vacancy declared as a result of *Wingard v. Slattengren*, the select committee appointed to hear the contest did hear from additional witnesses. *See* JOURNAL OF THE HOUSE 1289 (Apr. 19, 1965). In *Phillips v. Ericson*, the House committee authorized "either party [to] call witnesses to appear before the committee with respect to any new testimony not contained in the said transcript of evidence," JOURNAL OF THE HOUSE 227 (Feb. 1, 1957), but it is not clear from the JOURNAL whether either party did.

In *Derus v. Higgins*, 555 N.W.2d 515 (Minn. 1996), the contest alleged unfair campaign practices by the local newspaper, the *StarTribune*, which had accidentally published a picture of Derus under the headline "Charity Fraud" and above a story unrelated to Derus, on the morning of the state primary. The Supreme Court had dismissed the contest as not justiciable, since it did not allege any wrongful conduct by Higgins, the candidate who had received the most votes at the primary. The Court had emphasized that the Senate was the judge of the eligibility of its members and invited the Senate to consider the matter further. The Committee on Election Laws held two hearings at which it heard arguments from Derus, the *StarTribune*, and Higgins, on why it should or should not order discovery and an evidentiary hearing. Minutes, Jan. 27, 1997; Feb. 10, 1997. At its third meeting, the committee dismissed the complaint. Minutes, Feb. 12, 1997.

5. Committee Report

a. Majority Report

Upon reaching a decision, the committee reports to the floor its findings and conclusions. The committee report has sometimes included a description of its hearings, *see, e.g.*, *Scheibel v. Pavlak ,* JOURNAL OF THE HOUSE 2574-75 (May 18, 1979); *Wingard v. Slattengren*, JOURNAL OF THE HOUSE 455 (Feb. 25, 1965); sometimes has included detailed findings of fact, *see, e.g., Phillips v. Erickson*, JOURNAL OF THE HOUSE 227-32 (Feb. 1, 1957); *Fena v. Bischoff*, JOURNAL OF THE HOUSE 278-79 (Feb. 6, 1969); sometimes has included an explanation of the reasons for its recommendations, *see, e.g., LaBrosse v. Palmer*, JOURNAL OF THE SENATE 371-72 (Feb. 22, 1971); *Smaby v. Brandt*, JOURNAL OF THE HOUSE 1649-50 (Apr.18, 1969); *Wingard v. Slattengren*, JOURNAL OF THE HOUSE 458-62 (Feb. 25, 1965); and sometimes has had no recommendation, *see Scheibel v. Pavlak ,* JOURNAL OF THE HOUSE 2574 (May 18, 1979).

b. Minority Report

The committee report has sometimes been accompanied by a minority report. *See, e.g., Fena v. Bischoff*, JOURNAL OF THE HOUSE 283-84 (Feb. 7, 1969); *LaBrosse v. Palmer*, JOURNAL OF THE SENATE 371-72 (Feb. 22, 1971); *Scheibel v. Pavlak*, JOURNAL OF THE HOUSE 2574-78 (May 18, 1979).

c. Concurring Views

The committee report has sometimes been accompanied by concurring views. *See, e.g., Wingard v. Slattengren*, JOURNAL OF THE HOUSE 458-62 (Feb. 25, 1965); *Slattengren v. Wingard*, JOURNAL OF THE HOUSE 1290-91 (Apr. 19, 1965)

6. Action by the Body

Although the statute would seem to suggest that the parties appear before the full Senate or House, the Journals seem to show that the parties appearances were confined to committee and that the action on the floor has consisted exclusively of members debating and voting on the committee report. A party to the contest may not vote, and the final vote must be by a voice roll call. Minn. Stat. § 209.10, subd. 5.

In *Phillips v. Ericson*, the House struck the detailed findings made by the committee and substituted a terse statement that Ericson was not legally elected and not entitled to be seated and that the seat for his district was vacant. JOURNAL OF THE HOUSE 227, 232, 251 (Feb. 1, 1957).

In *Wingard v. Slattengren*, the House found that Slattengren had committed "serious, deliberate and material" violations of the corrupt practices act, that he was not legally elected and not entitled to be seated, and that the seat for his district was vacant. JOURNAL OF THE HOUSE 457

(Feb. 25, 1965). In *Slattengren v. Wingard*, the House found no violations of the Corrupt Practices Act by either candidate. JOURNAL OF THE HOUSE 1290 (Apr. 19, 1965).

In *Fena v. Bischoff*, the House found that Barney Bischoff had published a newspaper ad and radio broadcasts that "were false, serious and of a material nature deliberately made with the intention to deceive the electorate," that they had affected the election results, that he was not legally elected and not entitled to retain his seat, and that the seat for his district was vacant. JOURNAL OF THE HOUSE 279 (Feb. 6, 1969).

In *Smaby v. Brandt*, the committee first reported that a survey question and pamphlet circulated by Brandt "contained false, serious and material misstatements of fact which did deceive the electorate;" that "[t]he fact that he was a political novice, not experienced in political campaigns, while an extenuating circumstance, [was] not a defense in this instance;" that he was not legally elected and not entitled to retain his seat; and that the seat for his district was vacant. JOURNAL OF THE HOUSE 1649 (Apr. 18, 1969). The House returned the report to the committee and directed it to take additional testimony about the conduct of a third candidate in this multi-member district. JOURNAL OF THE HOUSE 1717-18 (Apr. 25, 1969). When the committee reported to the floor a second time, the report, as amended, was adopted. JOURNAL OF THE HOUSE 2562-63 (May 10, 1969).

In *LaBrosse v. Palmer*, the Senate Committee on Elections and Reapportionment recommended that the contest be dismissed, but also recommended "disapproval" of articles appearing in two newspapers that reflected "unfairly on the character and the motives of the candidates, Francis LaBrosse and Richard Palmer." JOURNAL OF THE SENATE 371 (Feb. 22, 1971). The motion to adopt the committee's report failed on a tie vote, 33-33, with Palmer not voting. JOURNAL OF THE SENATE 427-28 (Feb. 25, 1971). So Palmer kept his seat, and continued to "vote with the majority" on 34-33 votes on almost every major issue for the rest of his term.

In *Scheibel v. Pavlak*, the 1978 election had left the House divided 67-67. The contest against Pavlak was brought, not by his opponent, but by another eligible voter in the district as permitted by the statute. With Pavlak disqualified from voting on his own election contest, the House adopted on a vote of 67-66 the Minority Report, which found that Pavlak knew that certain statements in a newspaper editorial with regard to the personal and political character and acts of Arnold Kempe, his opponent, that Pavlak had reprinted and circulated in his district were false; that Pavlak was not legally elected and was not entitled to retain his seat; and that there was a vacancy in the seat for his district. JOURNAL OF THE HOUSE 2575-78 (May 18, 1979).

7. Protest and Dissent

Even after the body has acted, it is possible for the minority to enter their views on the public record. In *Scheibel v. Pavlak*, Pavlak's supporters entered into the JOURNAL a protest and dissent

that he should not have been excluded from the House except on a two-thirds vote. JOURNAL OF THE HOUSE 3006-07 (May 21, 1979).[1]

XIII. Kentucky Case - *Stephenson V. Woodward*

A. What Happened in Kentucky?

1. Summary

The general election of 2004 featured a challenge to the residency of a candidate for the Kentucky Senate that left the voters of Senate District 37 without a senator until February 17, 2006. The candidate who received the most votes claimed to have resided in Kentucky while owning a home, registering her car, and voting in Indiana. The President of the Senate asserted the hypothetical right of the Senate to rule that a candidate met the 30-year age requirement of the Constitution, even if the candidate were only 23. The Senate found her to be a qualified resident of Kentucky and swore her in as a senator, but she was enjoined from performing her duties for virtually all her time in office. The Kentucky Supreme Court held that no election had occurred. Senator Stephenson resigned. Neither she nor her challenger was a candidate in the special election to fill the vacancy. Her successor was sworn in on February 17, 2006.

A detailed account of these events follows.

2. Challenge to Qualifications

At 4:00 p.m. on the day before the general election of 2004, Virginia L. Woodward, a Democratic candidate for the District 37 seat in the Kentucky State Senate, commenced a challenge to the qualifications of her opponent, Republican candidate Dana Seum Stephenson. The challenge was in the form of an action in Jefferson Circuit Court in the city of Louisville, where her district was located, under KRS § 118.176, which allows a voter or an opposing candidate to challenge the "bona fides" (the qualifications) of a candidate. The action sought both a declaration that Ms. Stephenson did not meet the requirement of § 32 of the Kentucky Constitution that she have "resided in this State six years next preceding [her] election" and an order that local election officials not count votes cast for her at the general election. The court did not rule on the challenge before the election. At the general election, Ms. Stephenson received more votes than Ms. Woodward, 22,772

[1] The legal reasoning on which the protest and dissent was based was soon rejected by the Minnesota Supreme Court. In a lawsuit related to his eligibility to run in the special election to fill the vacancy created by his exclusion, the Court observed that the House had the constitutional authority to exclude a member from the House for violating the Fair Campaign Practices Act, since that meant he had not been elected in a fair election, and being "validly elected in a fair election [is] certainly a prerequisite for membership." *Pavlak v. Growe*, 284 N.W.2d 174, 180 (Minn. 1979).

to 21,750 (51 percent to 49 percent). At an evidentiary hearing on November 3, Senator David L. Williams, President of the Senate, intervened to argue that the court lacked jurisdiction. On November 22, the Jefferson Circuit Court issued an order to the effect requested by Ms. Woodward. Neither Ms. Stephenson nor Senator Williams appealed the order. *See Stephenson v. Woodward*, 182 S.W.3d 162, 164-65 (Ky. 2005).

3. Election Contest

Section 38 of the Kentucky Constitution provides that:

> Each House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law.

On December 7, Ms. Stephenson filed an election contest with the Kentucky Senate under KRS § 120.195. On December 15, Ms. Woodward brought an action in Franklin Circuit Court in the city of Frankfort, where the State Capitol is located, seeking to enjoin Senator Williams from seating Ms. Stephenson and requiring Senator Williams to seat Ms. Woodward. On December 21, the court refused to enjoin Ms. Stephenson from pursuing the election contest or Senator Williams from considering it. On order of the Franklin Circuit Court, the State Board of Elections and the Secretary of State issued a certificate of election to Ms. Woodward on December 28. On December 30, the Franklin Circuit Court denied Ms. Woodward's motions to require Senator Williams to seat her and to reject the election contest. 182 S.W.3d at 165.

On January 1, 2005, a judge administered the oath of office to Ms. Woodward. When the Senate convened on January 4, 2005, Ms. Woodward took the oath of office along with the other senators-elect. On a voice vote, the Senate then moved to refuse to recognize her certificate of election because she had not received the most votes. The same day, in accordance with § 38 of the Kentucky Constitution and KRS §§ 120.205(1) and 120.215, the Senate randomly selected an Election Contest Board of nine members to consider the election contest filed by Ms. Stephenson. 182 S.W.3d at 165-66.

The Senate held open public hearings on the election contest, receiving both testimony and documentary evidence. The record made by the Senate showed as follows:

"Dana Seum Stephenson was born in Kentucky and lived in her district, where she obtained her primary and secondary education." Report No. 2 of the Election Contest Board (Jan. 6, 2005) (hereinafter "Report"). From 1995 to the date of her election, she had owned a home in Louisville, Kentucky. Report ¶ 14 at 2. During that time, she had used her Louisville home to sleep and conduct other activities commonly associated with a residence. Report ¶ 15 at 2-3. During the two and one-half year period before May 2001, Ms. Stephenson and her husband had purchased a house in Jeffersonville, Indiana, and "had many of the indications of a legal resident or citizen of Indiana, including licensing her vehicle in Indiana and voting as a citizen of Indiana." Report ¶¶ 16, 18 at

3. While attending night-school classes at Indiana University Southeast and living in her Indiana residence, Ms. Stephenson had continued to work as a teacher from 7:15 a.m. to 5:00 p.m. on weekdays and to teach and coach at night and on weekends at Pleasure Ridge Park High School in Louisville, Kentucky, napping and often spending the night at her Kentucky residence. Report ¶¶ 15, 17, 28 at 2-4. During the time Ms. Stephenson was living in Indiana, she continued to attend church in Louisville. Report ¶ 15 at 3.

On January 7, 2005, the Senate debated the evidence submitted and the governing law. The majority report, signed by five of the nine members of the Election Contest Board, determined that Ms. Stephenson failed to meet the six-year residency requirement of the Kentucky Constitution and that Ms. Woodward was the duly elected and certified winner in the 37th District. During the debate, Senator Williams asserted the exclusive right of the Senate to judge the qualifications of its members. Referring to the constitutional requirement that a senator be at least 30 years of age, he said:

> Well, what if someone wasn't 30 or not . . . what if they were 23 and someone seated them. It is my position that . . . if 20 people in this body voted that someone was 30 years old, no court in this land could overturn that.

Stephenson v. Woodward, No. 2005-SC-603-T, Record on Appeal at 950, Ex. 1 (Ky. 2005).

The Senate voted to reject the majority report and instead adopted Report No. 2, signed by three members, which found that Ms. Stephenson had received the most votes and met the constitutional qualifications for the office of senator. It then seated her as a member. *See* 182 S.W.3d at 166.

4. Injunction

On January 14, the Franklin Circuit Court temporarily enjoined Senator Stephenson from performing her duties as a state senator.

> Stephenson is hereby ENJOINED from sitting as a State Senator, from performing any official duties of the office as State Senator; from receiving or accepting any pay for the office of State Senator, and from participating in the affairs of the General Assembly, including, but not limited to, participation of [sic] committee meetings, hearings, any votes, as well as, meetings, hearings, and votes of the full body of the Senate.

Woodward v. Stephenson, No. 04-CI-01676, slip op. at 5-6 (Franklin Cir. Ct. Jan. 14, 2005).

On March 17, the Kentucky Supreme Court affirmed the issuance of the temporary injunction without ruling on whether the circuit court had jurisdiction to make a final determination in the case. 182 S.W.3d at 166.

On June 1, though concluding that the Jefferson Circuit Court's judgment was not binding on the Senate, the Franklin Circuit Court held that the Senate's action in declaring Senator Stephenson to have resided in Kentucky for the six years preceding her election was arbitrary and therefore in violation of § 2 of the Kentucky Constitution, which says that, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." It permanently enjoined her from performing the duties of a senator, but did not order the Senate to seat Ms. Woodward. *Id.*

5. Appeal

Ms. Stephenson, Senator Williams, and Ms. Woodward each appealed the decision of the Franklin Circuit Court to the Kentucky Supreme Court. The National Conference of State Legislatures, represented by Peter S. Wattson, Senate Counsel for Minnesota, and Douglas L. McSwain, an attorney in private practice in Lexington, Kentucky, filed a brief as amicus curiae in support of Ms. Stephenson and Senator Williams.

Ms. Stephenson and Senator Williams argued that the court lacked jurisdiction, since § 38 of the Kentucky Constitution grants the Senate the exclusive power to judge the qualifications of its members. Ms. Woodward argued that the judgment of the Jefferson Circuit Court finding Ms. Stephenson to be an unqualified candidate for state senator was binding on all the parties and prevented her from being seated, and that the Supreme Court should order that Ms. Woodward be seated instead. *See* 182 S.W.3d at 166-67.

On December 22, 2005, the Kentucky Supreme Court held that the Jefferson Circuit Court had acted properly, as authorized by the General Assembly under KRS § 118.176, to determine the qualifications of a candidate before the general election. While the statute explicitly requires the challenge to be commenced before the general election, it does not require it to be adjudicated before then. The challenge was adjudicated November 22, 2004. The term of a new member begins January 1. So, the Jefferson Circuit Court was judging the qualifications of a candidate, not the qualifications of a member. By the time the Senate convened in January, Ms. Stephenson had been ruled ineligible to take the oath of office, so she never became a member.

> [T]he mere happening of the election does not instantly transform this Senator-elect into a sitting member of the Senate. Rather, a Senator-elect only becomes a member of the Senate when his or her term commences "upon the first day of January of the year succeeding [the] election." KY. CONST. § 30. This proscription exists for an obvious reason: so that the terms of the departing Senator and the Senator-elect do not overlap.
>
> Here, though, when the Jefferson Circuit Court rendered its order finding that Stephenson was not a bona fide candidate and therefore ineligible to appear on the ballot, she lost all rights to that office. This determination was made on November 22, 2004 — before Stephenson had taken the oath of office, before she had been

> sworn in as a State Senator, and before the term of office which she sought commenced on January 1, 2005. There is simply no legal or logical authority for the proposition that Stephenson was a member of the Senate when the Jefferson Circuit Court rendered its decision, a point conceded by all parties. Because she was not a member, the Jefferson Circuit Court's order in no manner violated Section 38 of the Kentucky Constitution.

182 S.W.3d at 167-68.

The Court affirmed the decision of the Franklin Circuit Court refusing to enjoin Senator Williams to seat Ms. Woodward as a member. When the winning candidate is disqualified, the loser does not take her place. Rather, there must be a new election.

> Kentucky courts have long recognized the principle that votes cast for an unqualified candidate are not in and of themselves void. Stephenson did, in fact, receive the most votes in this election. However, the fact that she has been disqualified does not render Woodward the winner nor grant her a right to the office. Rather, the effect of the disqualification of a candidate subsequent to the election is that no election has occurred and the true and legitimate will of the people has not yet been expressed.

182 S.W.3d at 173.

The Court did not order a new election.

6. Special Election

Under KRS § 118.730, a vacancy in either house of the General Assembly when it is in session is filled by the presiding officer calling a special election. After giving it some thought, on January 4, 2006, almost a year after she had been sworn in, Senator Stephenson resigned her seat and Senator Williams called a special election for February 14. Neither Ms. Stephenson nor Ms. Woodward was selected by her party to be a candidate. The special election was won by a Democrat, who was quietly sworn in on February 17, 2006.

B. What Does the Kentucky Case Mean for Other States?

Stephenson v. Woodward was a setback for the right of a legislative body to judge the qualifications and elections of its members. That right was first asserted by the English Parliament and was brought to America by her first colonists. It is part of the common law, and thus its interpretation by the Supreme Court of Kentucky will influence how similar language in the constitution of almost every other state is interpreted by its own courts.

C. Lessons from Kentucky for the Future

1. Amend the Statute

The Kentucky statute authorizes a suit to be "commenced at any time prior to the general election," KRS § 118.176 (2). But the relief it authorizes is *solely* that "the candidate's name shall be stricken from the written designation of election officers filed with the board of elections or the court may refuse recognition or relief in a mandatory or injunctive way." KRS § 118.176 (4).

Stephenson v. Woodward was commenced at 4:00 p.m. on the day before the election, 182 S.W.3d 162, 164 (Ky. 2005), obviously too late to allow election officials to strike the candidate's name from the ballot. Under the statute, its only basis of jurisdiction, the Jefferson Circuit Court should have denied relief as impossible to accomplish at that late hour. *Noble v. Meagher*, 686 S.W.2d 458, 460 (Ky. 1985) (Kentucky election statutes must be strictly construed). With her name on the ballot, the people chose Ms. Stephenson as their senator. Had the court simply followed the statute, the *Stephenson* spectacle—the people choosing a candidate that a single judge of the trial court prevents from performing her duties—would have been avoided.

Indeed, Ms. Woodward admitted that she had been gathering materials on Ms. Stephenson's residency flaws for months before the general election. 182 S.W.3d at 201 (Scott, J., dissenting). Had it been clear that a suit filed too late to strike the candidate's name from the ballot was moot, she might have decided to file her challenge much earlier.

One easy solution for this problem is for the General Assembly to amend the statute to make clear that a challenge filed too late to get a candidate's name stricken from the ballot is moot. Other states should likewise review their election laws and court decisions to ensure that they do not permit a court to disqualify a candidate after the people have chosen her.

2. Respect the Courts

In hindsight, the decision not to appeal the decision of the Jefferson Circuit Court finding Ms. Stephenson not qualified would appear to have been a mistake. The Supreme Court might still have ruled that Ms. Stephenson was not qualified, but the expedited procedure provided for by KRS § 118.176 might have enabled the Court to reach that decision much sooner than it did.

Courts demand respect. Not appealing through the proper channels shows a lack of respect for their jurisdiction. Not respecting the courts probably did not help the Senate's case once it finally came before the Supreme Court. Future litigants would be well advised to give due deference to the institution that, in disputes over the meaning of the constitution, usually has the final say.

3. Respect the Court of Public Opinion

It is not helpful to say a legislative body is above the law. Senator Williams' hypothetical statement that the Senate could vote a 23 year-old into office notwithstanding the 30-year age requirement and "no court in this land could overturn that," *Stephenson v. Woodward*, No. 2005-SC-603-T, Record on Appeal at 950, Ex. 1, proved to be untrue.

The Senate had some of the law on its side: the purpose underlying the residency requirement. The purpose of the residency requirement is to ensure that a candidate will have knowledge of the district and its needs. *McConnell v. Marshall*,467 S.W.2d 318 (Ky. 1971). Dana Seum Stephenson had two residences: a permanent, lifelong residence in her district in Kentucky and a temporary residence while she attended college in Indiana. She may have voted in her college town while she was a student, as many college students do, but that did not demonstrate an intent to sever her permanent attachment to her district in Kentucky. Her lifetime of living in the district gave her the constitutionally required knowledge of the district and its needs.

While § 32 of the Constitution requires a senator to have "resided in this State six years next preceding [her] election," it only requires her to be a "citizen" of Kentucky at the time of her election, which Ms. Stephenson clearly was. An individual may have more than one residence, but only one domicile where they are a citizen entitled to vote. *Stavis v. Engler*, 202 So.2d 672, 676 (La. App. 1967). Even when Ms. Stephenson was voting in Indiana, she maintained a residence in Kentucky.

There was a credible legal argument to be made on behalf of the Senate's position that she met the residency requirement. Unfortunately, it was drowned out by the furor over Senator Williams' assertion that the Senate was above the law.

Senator Williams would have stood on firmer ground in justifying the Senate's right to judge the qualifications of its members if he had stressed the Senate's devotion to the constitution and the principles underlying its residency requirement—if he had asserted that the Senate was at least as concerned about effectuating the will of the Framers as were the courts. The Kentucky case should be a lesson for us all.