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ELECTION BOARDS AND VOTING MACHINES —STATE OF OKLAHOMA

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I. INTRODUCTION

11,294[1] voters were effectively disfranchised as a result of the Tulsa County senatorial contest controversy — all because of a mechanical malfunction in a single voting machine. Although the contest between the incumbent, Gene Howard, and Dwight Williamson, the apparent victor, received vast coverage by the news media, the true dimensions of the resulting problems went unnoticed. Deciding the election for this legislative office was merely incidental to the total case when placed in its proper perspective. It is remarkable that not a single branch of state government failed to eventually become involved in this pervasive controversy. Entanglement of the political, judicial and executive bodies so muddled the picture that the true issues were left in utter confusion.

Instead of merely resolving a disputed election, the Howard-Williamson controversy seriously weakened the basic constitutional premise of separation of powers. Before conclusion of the clash, one finds the judicial system, the legislature, and the executive department pitted against each other. Distilled down to the true issue, one is left to inquire into the authority of the respective branches of government. The political and legal implications of the Howard-Williamson conflict should be of great concern to

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* I wish to recognize and express my appreciation for the assistance of Margaret Reger in conducting research for this paper.

[1] *See infra* note 243 and accompanying text.

students of the law and politics, and it is with this in mind that I write this article.

Narrowed down to an analysis of state election laws as they apply to election contests of legislative offices, particular attention will be focused on the legal authority of election boards and the problems involving voting machine malfunctions. To comprehend the necessity of such a study, one must be made aware of the facts and events evolving from the clash between Gene Howard and Dwight Williamson. Following a discussion of these facts, a detailed analysis will be made of the relationship among the three principal branches of government. It will be from this foundation that one can intelligently assess the legal authority of election boards in cases involving legislative election contests.

From my study of election laws in general and the particular laws surrounding the contest here involved, it is concluded that the State Election Board should have reached a positive decision in the first instance. I feel that this conclusion is as objective as it could possibly be. It was with a noncommittal mind that I reviewed the Election Board's findings, the Oklahoma Supreme Court ruling, the Senate committee report, the opinion of the Attorney General and the law on the subject. With this same objectivity, I shall now attempt to transcribe my findings and conclusions.

II. Facts and Events of the Howard-Williamson Controversy

In the November 8, 1966 general election, candidates for the State Senate in District 36 of Tulsa County were Gene Howard, the incumbent Democrat, and Dwight Williamson, the Republican nominee. When all the votes had been cast and counted, Williamson was the apparent victor by a narrow margin — 5,687 to 5,607.[2] Within the time allowed by law, Howard challenged

[2] Tulsa County Election Board's Findings of Fact, November 19, 1966. All of the facts mentioned in this paper have been drawn from the following sources: Tulsa County Election Board's Findings of Fact; Williamson v. State Election Bd., 38 Okla. B. A. J. 41 (1967); Appellate briefs filed by Williamson, State Attorney General, and Howard as intervenor.

the correctness of the announced results by filing with the State Election Board a request for a recount of the ballots cast.[3] Forthwith the State Board referred the matter to the Tulsa County Election Board by transmitting a certified copy of all the proceedings incident to the contest involved.[4]

Pursuant to an order issued by the State Board, the Tulsa County Election Board, in conjunction with the Honorable Raymond W. Graham, District Judge,[5] conducted the recount requested, heard testimony and received evidence relevant to the election contest. On the recount of the votes cast in the general election, the tabulation remained the same with only a minor exception in the count of the absentee ballots. Williamson received 80 more votes than the incumbent Howard. From testimony and evidence gathered by the Election Board, it was concluded, however, that one voting machine in precinct 72 malfunctioned, causing some 94 votes possibly cast not to be recorded for either candidate. Two machines were used in precinct 72, to be referred to here as machine A and machine B. Machine B which functioned

[3] OKLA. STAT. tit. 26, § 392 (1961) — This section provides that any candidate for state ofice may file a request for recount with the Secretary of the State Election Board at any time before noon Saturday next following the general election.

[4] OKLA. STAT. tit 26, § 392 (1961) says that in an election challenge of a state office: "It shall be the *duty* of the State Election Board to transmit to the County Election Board . . . involved in such contest, a certified copy of all the proceedings incident to the contest involved, in the same manner provided by the laws of this State governing . . . election recounts in primary elections." (Emphasis added). OKLA. STAT. tit. 26, § 391 (1961) which covers primary elections, provides that the State Board shall have the *right* and *authority* to transfer the proceedings to the County Board. The conflict in wording is apparent. Section 392 uses a mandatory word, "duty," while section 391 uses permissive words, "authority" and "rights."

[5] OKLA. STAT. tit. 26, § 391 (1961) provides that the hearing shall be held in the court room of the district court and it shall be the duty of *a* judge of said court or in case of disqualification of a judge from another district assigned by the Chief Justice of the Supreme Court, that he attend and in *conjunction* with said election board, to conduct such recount. In Brief for petitioner at 1, 38 OKLA. B.A.J. 41 (1967), it was noted that Judge Graham was appointed by the Chief Justice of the Supreme Court. This is inconsistent with the statute.

properly showed a count of 86 votes for Howard, 68 for Williamson, and a total of 174. These figures indicate that 20 voters did not cast a ballot in the senatorial race. Machine A, on the other hand, recorded a total of 131 votes with 20 for Howard and 17 for Williamson. The difference between the total votes cast and the total votes recorded for the two candidates amounted to 94, representing the total number of votes left in question in this contest. There were 117 more votes cast in the senatorial race on machine B than were cast on machine A.

This discrepancy in total votes cast on machine A and the individual votes recorded was attributed to a malfunction of the voting machine. With machine voting a person has the choice of moving individual selector keys, thus voting for each candidate separately or using the party selector lever to vote a straight party ticket. However, to vote a straight party ticket, a voter must operate 3 different levers. This seemingly complicated step is made necessary by a requirement that certain categories of candidates be placed on separate ballots.[6] To satisfy the separate ballot, there is one party lever for candidates for county offices; candidates for state offices, and candidates for Congress. Column 1, with its individual party vote lever, contained candidates for congressional races; columns 3, 4, 5 and 6, with one party lever to record the vote for all of them, contained candidates for state offices; and columns 8, 9 and 10, also with one lever, contained candidates for county offices.

The senatorial race between Howard and Williamson was located in column 8 — so to vote a straight party ticket, one would work the single lever that recorded votes in columns 8, 9 and 10. With machine A, however, operation of the straight party lever would not center the selector lever on the candidate's name in column 8. Thus, persons voting a straight party ticket on machine A did not have their votes recorded in the senatorial race; although, electors aware of the defect could have their votes re-

[6] OKLA. STAT. tit. 26, § 227.1 (1961). Specifications for a lawful voting machine are enumerated at OKLA. STAT. tit. 26, § 274 (1961). It is there provided that the machine "must be so constructed as to permit straight party voting as well as mixed or split tickets. It must insure voting in absolute secrecy . . . ."

corded if they individually moved the selectors opposite the candidate's name. At approximately 4:00 P.M., the malfunction was discovered and reported by the precinct officials to Seiscor Corporation.[7] There was no evidence that the machine operated properly at any time of the day, nor was there evidence as to how many voters had used the defective machine before the problem was discovered.[8]

Evidence did indicate that precinct officials had advised voters that for their votes to be recorded in the senatorial race it would be necessary to operate the individual lever rather than the party selector lever. It was further shown that one of the general instructions given to voters was that they should be sure that the individual selector was opposite the name of each candidate for whom they wished to vote.

Findings of fact drawn from evidence and testimony received in the November 17 and 18, 1966 hearings conducted by the Tulsa County Election Board were certified to the State Election Board. Section 391 of the Oklahoma election laws provides that at the conclusion of the hearings, the County Board shall return all proceedings *together with its findings* to the State Election Board for final consideration. Upon this submission, Section 391 provides that the State Board "*shall at once enter its final order thereon.*"[9] From this statutory procedure, a material question is raised: What is the authority of the county election boards vis-a-vis the State Election Board? Williamson, in his petition filed with the Oklahoma Supreme Court, says that: "The State Election Board refused to accept the certificate and finding No. 1 of the Tulsa County Election Board."[10] One is led to believe that the county boards are required to certify the results of the election, or, in other words, to actually decide the contest. Actually this is a misconceived notion. The problem is that Williamson separated

[7] Seiscor Corporation was the servicing agent for the voting machines. Reply Brief for Petitioner, at 3, Williamson v. State Election Bd., 38 OKLA. B. A. J. 41 (1967).

[8] Williamson v. State Election Bd., *supra* note 7, at 43.

[9] OKLA. STAT. tit. 26, § 391 (1961) (emphasis added).

[10] Brief for Petitioner at 2, *supra* note 7. Finding No. 1 showed the tabulated vote of the recount — Williamson 5,687 and Howard 5,607.

the "certificate" and the "findings" of the County Board into two distinct things. There is really only one statutory act involved — the county boards are called upon to "certify the findings" to the State Board for final consideration. It is true that in the transcript of the hearing before Judge Graham, a board member declared that: "We're certifying to you that the Board is unable to reach any decision on who is the winner of this particular race. That the facts as given to us make it impossible for us to decide the winner of this contest."[11] Earlier, this member declared: "Your Honor, the Board unanimously agrees *and certifies* to the court that the winner of this election according to the counted votes is Mr. Williamson . . ."[12]

These statements generated a furor among counsel representing the opposing candidates.[13] In the dialogue between the parties and the Court absolute confusion as to the nature of these proceedings was made manifest. Williamson sought a clarification of the statement that the County Board was unable to reach a decision. The clarification was called for to determine if this was to be considered a final determination.[14] Howard's counsel raised an objection to this on the ground that it was an attempt to appeal from a decision heretofore made by the Board.[15] In this exchange of retorts, the District Court, presided over by Judge Graham, was looked upon as the *presiding tribunal* in the contested election. Judge Graham evidently recognized this for at one point, he questioned the scope of his jurisdiction.[16] Though questions have been raised on this point, the statute is quite clear that the judge plays a dual role in election proceedings. In one capacity, he does perform the apparent function of a judge in a judicial capacity — that is where he is charged with determining if ballots have been properly preserved and where fraud becomes

[11] Transcript at 2, *In re* Howard (Before Tulsa County Election Board, November 17, 1966).

[12] *Id.* (Emphasis added).

[13] *In re* Howard (Before Tulsa County Election Board, November 18, 1966).

[14] *Id.* transcript at 1.

[15] *Id.* transcript at 2.

[16] *Id.* transcript at 1.

an issue.[17] In his second capacity, the judge is called upon to conduct the recount *in conjunction* with the County Election Board.[18]

What transpired at the recount hearing merely indicates the common confusion of the state election laws. It also establishes the need for clarification of the legal duties imposed on the county boards and the district court judges respectively. An effort will be made to cover each of these in a later portion of this paper. Right now, however, I should regress to the problem of evolving the salient facts of the case.

As noted earlier, there was much confusion as to what the County Board should certify to the State Board. When the formal findings were finalized, no positive position was taken. There was no certification as to the conclusion reached in the controversy. From the formal findings, it was apparent that the County Board neither certified that Williamson had won nor that the Board was unable to reach a decision. But while this certification of the results was lacking in the formal findings of fact, the County Board's inability to decide was clear from the proceedings — the transcript forwarded to the State Board.

Some people who have closely followed this election contest might conclude that the County Election Board passed the buck to the State Board. From what has already been said, the parties involved in the controversy were of the opinion that the County Board had a duty to reach a positive decision. But the County Board had no statutory authority to certify the result of the election. In cases where the State Election Board holds primary jurisdiction, the county boards play a limited role. Their sole function is to certify their "findings of fact" to the State Board for final consideration. It is only after final consideration by the State Board that a final order will be issued.[19]

When the County Board's "findings of fact" were submitted the contestant, Howard, presented oral testimony and based upon this testimony and the proceedings at the county level, the State Board refused to reach a final decision.[20] Set out in its entirety

[17] OKLA. STAT. tit. 26, § 391 (1961).
[18] OKLA. STAT. tit. 26, § 391 (1961).
[19] *See* note 9 *supra.*
[20] Brief of Petitioner at 2, *supra* note 7.

there follows the formal findings and order of the State Election Board.[21]

BEFORE THE STATE ELECTION BOARD OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE PETITION OF GENE C. HOWARD FOR RECOUNT OF THE VOTES CAST AT THE GENERAL ELECTION HELD NOVEMBER 8, 1966, IN SENATE DISTRICT NO. 36, TULSA COUNTY

CAUSE NO. 20

FINDINGS AND ORDER

Now on this 7th day of December, 1966, after a hearing on the above styled cause, the State Election Board finds:

1. That Voting Machine No. 01046 in Precinct 72 failed to function properly in recording the votes cast in Senate District No. 36.

2. That an undetermined number of votes were cast by qualified electors which were not recorded on the counter of the machine.

3. That the number of uncounted votes could have been sufficient to change the announced results.

4. That it is now impossible to determine the winner of this election.

5. That the State Election Board has no further authority in this matter.

It is therefore ordered that no Certificate of Election for State Senator in District No. 36 be issued and that the matter with all records pertaining thereto be delivered to the Oklahoma State Senate for its disposition.

STATE ELECTION BOARD
GENE F. BLAKE, CHAIRMAN
BASIL R. WILSON, SECRETARY

It is obvious that these findings do not go beyond the naked facts developed in the recount — principally that there was a mal-

[21] *In re* Howard (State Election Board, Dec. 7, 1966, Cause No. 20).

function in the machine. The State Board then took the position that it had no authority to go beyond these stark facts. It therefore issued the order that no Certificate of Election be issued and that the matter be submitted to the Oklahoma State Senate for its disposition.

In the findings of fact issued by the Tulsa County Election Board, there is no indication than any consideration was given to the facts found in the subsequent brief of petitioner. Nor was there any apparent consideration given by the Board to certain legal issues presented by Williamson to the Oklahoma Supreme Court. One reason for this might be that Williamson took the strong position that the duties of the Board were purely ministerial and involve no exercise of discretion.[22] Under this position the State Election Board would be without authority to go behind the returns. And then Williamson later argued that: "there is no statutory authority to authorize a challenge of an election based on the malfunction of a voting machine."[23] Of course this hard line was necessary to support his petition for mandamus which was filed with the Oklahoma Supreme Court. He was faced with the many decisions which hold a writ of mandamus to be improper to force a tribunal to issue an order which is discretionary in nature.

Just how far the election boards can go in ascertaining the validity of an election is one of the basic questions presented in this paper. Can the boards resort to mathematical probabilities in determining how a group of people would vote? Can the boards receive parol testimony from persons who actually cast a ballot to determine for whom the votes were cast? There are many other questions that could be raised to shed light on the legal role of the election boards; however, at this point, I will leave the questions unanswered and refrain from raising others. A greater comprehension of the total process is needed before one can intelligently consider the scope of the boards' authority. I will say at this juncture that Williamson, in his briefs to the Supreme Court, did raise some interesting possibilities of a solution.

[22] Brief of Petitioner at 4, 6, *supra* note 7.
[23] Brief of Petitioner at 7, *supra* note 7.

As an alternative to his strict ministerial point, he argued that the election could have been decided in his favor with *mathematical certainty.* Evidence had been presented to the effect that Phillips Breckenridge, a Democrat for the office of Judge of the Court of Common Pleas, received 57 votes while his Republican opponent received 56.[24] The significance of this factor lies in the fact that this particular race was located in column 9 which was activated by the same party vote lever that operated column 8 and the senatorial contest. It was also argued that no Democrat in any race located in column 8, 9 and 10 received more than this 57.[25] Since the three columns, 8, 9 and 10 were connected to the same straight party voting lever, Williamson argued that the race could have been decided with mathematical certainty.[26] Even giving Gene Howard the maximum number of votes cast on the election machine in question for any Democrat on the November ballot, it would not be enough to swing the election for the incumbent.[27] From these facts, received in a hearing on December 7, 1966, before the State Election Board, the Oklahoma Supreme Court declared "that it is highly probable that Williamson received the majority of all votes cast in the Senate race."[28] Williamson, however, was required to show that he *did in fact* receive the majority of votes cast.[29] Thus, the burden of proof is shifted.

Before the Tulsa County and the State Election Boards, there was much evidence submitted to establish a high probability that Williamson had won the election. But though allowed to be introduced, the State Election Board, in its formal "findings and order," refused to reach a positive decision on the basis of proba-

[24] Reply Brief of Petitioner at 4, *supra* note 7.

[25] The next highest number of votes were cast for Harry H. Hamilton, a Democrat, for Justice of the Peace. He received 53 votes while his Republican opponent received 48 votes in column number 10. Reply Brief of Petitioner at 4-5, *supra* note 7.

[26] Reply Brief of Petitioner at 15-18, *supra* note 7.

[27] Leo Winters, in the race for State Treasurer, received 76 votes on the machine in question. This was the most votes that any Democrat received on the entire ballot. Reply Brief of Petitioner at 17, *supra* note 7.

[28] Williamson v. State Election Bd., 38 OKLA. B. A. J. 41, 46 (Okla. 1967).

[29] *Id.* at 47.

bility. In fact, there is no indication that the testimony was even considered, for without mentioning it the Board concluded that it was impossible to determine the winner of the election.

Without going into any more detail concerning the arguments presented by Williamson, it is enough to observe, at this point, that the Board simply refused to go beyond the *possibility* that Howard could have won the election except for the malfunction. This mathematical precision demanded by the Board and supported by the court makes a detailed analysis of the Board's function a necessity. A closer look at the probability argument will be made after the evolution of events is concluded.

III. Writ of Mandamus to Require State Election Board to Certify the Winner

After the State Election Board refused to issue a Certificate of Election in the contested senatorial race, Williamson filed a petition in the Oklahoma Supreme Court for a writ of mandamus against the State Election Board. He sought to have the Board forced to certify the winner of the election based on the tabulated vote in the recount. The contention was that neither the Board nor the Court had jurisdiction to go behind the ballots thus characterizing the Board's function as ministerial rather than quasi judicial or quasi legislative.

Generally speaking a mandamus is not the proper remedy where the action sought is discretionary in nature. The function of the writ is to compel a public official or agency to perform some legal duty. It cannot be used to control the exercise of discretion that has been vested in some other tribunal by statute or constitution. Where one has been given a full and complete hearing by an agency, the mandamus will not be available under an allegation that the agency arbitrarily and capriciously abused its discretion.[30] It is well established that the writ of mandamus cannot be used for the purpose of reviewing agency action — even where the decision reached is clearly erroneous. The court can compel an agency to exercise discretion, but once that discretion has been

[30] Zion Evangelical Lutheran Church v. City of Detroit Lakes, 221 Minn. 55, 21 N.W.2d 203 (1945).

actually exercised, the court is wholly without power through mandamus to change the results.[31] Where a decision is clearly erroneous as opposed to "error in discretion," the court might grant relief on the theory that the agency has not yet, in fact, exercised discretion.[32] But here the remedy would be limited — the agency would be ordered to go back and exercise discretion. *Mandamus will lie only to set discretion in motion.*[33]

Aside from the general nature of mandamus which is based on its historical evolution, the limited use of the writ is supported by the constitutional separation of powers concept. Under its ordinary use, this argument would be rejected since the mandamus merely requires the public official to carry out some ministerial duty. But should the court, through mandamus, exercise discretion then it would be exercising an administrative or legislative function. There is another reason against the use of mandamus in the case of administrative agencies. Such agencies must be free from judicial interference if the legislative purpose is to be accomplished.[34] It is a generally accepted fact that the specialized experience of agencies gives them an advantage over judges.

Determination of the nature of agency authority — whether ministerial or discretionary is another problem in mandamus cases. Regardless of how it might appear, this distinction is not an easy task. It is much like the question in the field of administrative law concerning the distinction between *fact* and *law.*[35] Whether the court rules a question to be one of *fact* or one of *law* will control the scope of judicial review that will be given.

[31] *Id.* at ——, 21 N.W.2d at 205. *See also* Marburg v. Cole, 286 N.Y. 202, 36 N.E.2d 113 (1941).

[32] *Id.*

[33] L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 103-104 (1965). For a court to exercise discretion in mandamus cases it is confronted with the same problems as trial "de novo."

[34] *See* Social Security Bd. v. Nierotko, 327 U.S. 358 (1946); N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944); Bureau of Mines v. Princess Elkhorn Coal Co., 226 F.2d 570 (6th Cir. 1955). These cases do not involve the mandamus; however, they do support the idea of judicial non-interference.

[35] B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 190-203 (2d ed. 1962).

If one of *fact* then there will be a limited review; if one of *law,* there will be an unlimited review — and there can be no fine distinction made. If courts are unwilling to review, they will label it *fact,* but when desirous of review, they call it *law.*[36] This same inability of identifying *law* and *fact* is present in distinguishing ministeral acts from discretionary acts. Because of this the mandamus should be granted reluctantly.

Looking more specifically at election contest cases, one finds that courts are even more reluctant to grant mandamus. The problem here is that another factor is thrown in and must be considered by the courts, especially in cases dealing with legislative offices. Following the federal example, most state constitutions provide that:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .[37]

In light of these words, most state courts have been unwilling to become entangled in any controversy concerning an election contest of a legislative race. It has been held that courts cannot force the legislative body to exercise this power through mandamus proceeding; nor can they declare the person with the greatest number of votes the winner.[38] But courts have generally upheld the power of the legislature to create a tribunal to handle vote recounts, and have shown a willingness to enfore this limited duty by mandamus.[39] It is reasoned that the duties of recount are ministerial and not judicial in nature.[40] However, if the special

[35] J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 55 (1927). This abstractness is supported in: GREEN, JUDGE AND JURY 270-271 (1930).

[37] U. S. CONST. art. 1, § 5; OKLA. CONST. art. 5, § 30.

[38] Goff v. Wilson 32 W.Va. 393, 9 S.E. 26 (1889). This case involved a contested election for governor. *See also* State *ex. rel.* Acker v. Reeves, 229 Ind. 126, 95 N.E.2d 838 (1951); *Ex parte* Dalton, 44 Ohio St. 142, 5 N.E. 136 (1886).

[39] Wilson v. Blake, 169 Cal. 449, 147 Pac. 129 (1915); Johnston v. State, 128 Ind. 16, 27 N.E. 422 (1891); Rosenthal v. State Canvassers, 50 Kan. 129, 32 Pac. 129 (1893); Rasure v. Sparks, 75 Okla. 181, 183 Pac. 495 (1919).

[40] Purely ministerial acts as distinguished from judicial or discretionary ones can be enforced by mandamus. *See* State *ex. rel.* Gandy v. Page,

tribunal's determination involves judgment or discretion, the writ will not lie.[41]

There is nothing strange about the limited function of courts in this area. At common law, there was no right to judicially contest any public election, the theory being that elections belong to the political branch of government, beyond the control of judicial power.[42] Courts have no inherent power to determine election contests, and in absence of statutory authority, they have no power to interfere with the declaration of election results.[43] Since an election contest is a special proceeding unknown to the common law, the provisions of election contest statutes must be strictly followed.[44]

To say that election contest statutes must be strictly followed does not mean that the statute should be given a constricted interpretation.[45] It means only that courts must recognize the line drawn between the separate and distinct political and judicial provinces. Election contests are legislative and not judicial proceedings,[46] and

125 Fla. 453, 170 So. 118 (1936); State *ex. rel.* Hudson v. Pigott, 97 Miss. 599, 54 So. 257 (1911); State *ex. rel.* Waggoner v. Russell, 34 Neb. 116, 51 N.W. 465 (1892).

[41] State *ex rel.* Lilienthal v. Deane, 23 Fla. 121, 1 So. 698 (1887); Copper v. Statler, 88 Kan. 387, 128 Pac. 200 (1912).

[42] Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948), *cert. denied* 336 U.S. 904; Griffin v. Buzard, 86 Ariz. 174, 342 P.2d 201 (1959).

[43] Walker v. Junior, 247 Ala. 342, 24 So.2d 431 (1945); Casey v. Burdine, 214 Ark. 680, 217 S.W.2d 613 (1949); Cipowski v. Calumet City, 322 Ill. 575, 153 N.E. 613 (1926); Cole v. Ridings, 271 Ky. 158, 111 S.W.2d 605 (1937); Christenson v. Allen, 264 Minn. 395, 119 N.W.2d 35 (1963); Stickney v. Salem, 96 N.H. 500, 78 A.2d 921 (1951); Montoya v. Gurule, 39 N.M. 42, 38 P.2d 1118 (1934); Cundiff v. Jeter, 172 Va. 470, 2 S.E.2d 436 (1939).

[44] Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).

[45] One of the dichotomies in the field of statutory construction is made manifest in the terms "strict construction" and "liberal construction." Historically it has been explained that a strict construction was based on the court's jealousy of the legislature. This, I suggest, is an erroneous concept of history. A more plausible explanation of this term, "strict construction," would be that through its use, the sovereign authority of Parliament was recognized. Instead of jealously it was a recognition of the line drawn between political matters and judicial matters.

[46] Duncan v. Willis, 157 Tex. 316, 302 S.W.2d 627 (1957).

courts have no authority to control political matters.[47] Though courts in recent years have become more willing to decide cases that were considered political in nature in another era,[48] they remain relunctant in election contest cases. Even with the latest case on this point, one must still recognize the Court's reluctance to enter an arena so closely aligned with politics.[49]

After the Georgia State Legislature refused to seat him because of his unpopular stand on Vietnam, Julian Bond filed an action in the Federal District Court for injunctive relief and a declaratory judgment that the House action was unauthorized by the Georgia Constitution and that it violated his First Amendment rights. The lower court accepted jurisdiction on the basis that Bond had asserted substantial First Amendment rights; though, on the merits of the case, the court ruled against him.[50] However, the Supreme Court disagreed with this and ruled unanimously that Bond's First Amendment rights were in fact violated. But even with this clear ruling and without any discussion, the Court did not enjoin the State Legislature to seat Bond.[51] I would not venture to speculate on the possibilities of the Court extending a supervisory arm over the legislative process in election contests. But with the election matter involving Maddox and Galloway, the Court upheld the power of the State Legislature to decide the election contest.[52]

Under the Georgia Constitution, the Governor shall be selected (1) by a majority of votes cast in a general election, and

[47] People v. McWeeney, 259 Ill. 161, 102 N.E. 233 (1913).

[48] Since Baker v. Carr, 369 U.S. 186 (1962 was decided, courts have freely taken jurisdiction in reapportionment cases. Until then, such were considered to involve political matters and being political in nature, there were no "rights" as such, which equity could come in and protect. *See* Taylor v. Beckham, 178 U.S. 548 (1900), which involved an election contest for the office of governor.

[49] Bond v. Floyd, —— U.S. ——, 87 S. Ct. 339 (1966).

[50] *Id.* at ——, 87 S. Ct. at 344.

[51] Without further judicial action, the Georgia Legislature gave Bond his oath of office and he took his seat.

[52] Fortson v. Morris, 35 U.S.L.W. 4086 (U.S. Dec. 12, 1966). Justice Black wrote the opinion for the majority of five, with Justice Douglas, joined by JJ. Brennan, Fortas and Chief Justice Warren, dissenting.

(2) if no candidate receives a majority then a majority of members of the Georgia General Assembly shall elect the Governor from the two persons having the highest number of votes.[53]

The Court ruled that there was no constitutional defect in this method of selecting a governor. In fact, there is no Federal Constitutional provision that requires a governor to be elected by the people. True, the State Constitution required an election but if no candidate received a majority, the General Assembly would decide.[54] Elections might never come to a halt if a state were required to hold elections in a futile effort to obtain a majority. As the Court declared:

> Statewide elections cost time and money and it is not strange that Georgia's people decided to avoid repeated elections.[55]

One can imagine the long delays that are associated with any judicial proceeding. So when the Court, in *Fortson v. Morris,* speaks of time and money connected with state-wide elections, one immediately sees another reason for removing jurisdiction from courts in election contests. Long delays in deciding election contests threatens the very existence of a representative form of government.[56] In view of its general control over elections and

[53] *Id.* In the general election for Governor, there were 955,770 votes cast:

Howard H. Calloway	449,894 votes or	47.07%
Lester G. Maddox	448,044 votes or	46.88%
Ellis G. Arnell	57,832 votes or	6.05%

[54] Substance of the attack on this election practice was that the General Assembly was not representative of the people. This Court, in fact, had so ruled in Gray v. Sanders, 372 U.S. 368 (1963). The Court ruled, however, that the State of Georgia had been given until May 1, 1968 to reapportion itself and eliminate the unit rule. Thus the General Assembly was not disqualified in the case. Fortson v. Morris, *supra* note 52 at 4087.

[55] Fortson v. Morris, *Supra* note 52 at 4086.

[56] For this same reason, we have seen the Court upholding certain legislative restrictions or preclusions of judicial review in the area of administrative law. In other cases, the Court has developed certain preclusions through analogy. For example: the courts have consistently held that one cannot obtain judicial review of an administrative decision until all administrative remedies have been exhausted. The leading case on the concept is Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). For discussion of the preclusion, *see* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, pp. 424-437 (1965). Preclusion takes on several different forms — "standing to seek review," Perkins v. Lukens

election contests, the legislature has the power to create a special tribunal and may exclude the courts from jurisdiction in the matter.[57]

Oklahoma: The Oklahoma Supreme Court has asserted jurisdiction in a number of cases involving election contests. With the use of fiction, the Oklahoma Court justifies its assertion of jurisdiction but in doing so, it grossly encroaches upon the exclusive province of the legislature. To start with, Oklahoma, like all the other states, has a constitutional provision that makes each House the judge of the elections, returns, and qualifications of its own members.[58] Furthermore, the legislature has, by statute, created a special tribunal which is charged with the duty of administering the election laws and adjudicating election contests.[59] And in providing for the procedure to be followed in election contests, the Oklahoma Legislature has specifically provided that the decision of the Election Board *"shall be final and conclusive of all rights involved."*[60]

With such exact wording, doubtless the Legislature was exclusively utilizing the special tribunal in election contests. And such preclusion must be upheld unless the constitution required judicial review as an indispensible part of due process.[61] A judicial hearing, though a vital part of due process, can be demanded only in cases involving a deprivation of life, liberty, or property. Even so, it has long been recognized that a claim to public office is not

Steel Co., 310 U.S. 113 (1940); "indispensable party," Williams v. Fanning, 332 U.S. 490 (1947); "sovereign immunity," Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); "privilege against personal liability." Barr v. Matteo, 360 U.S. 564 (1959); "limited scope of review — substaintial evidence rule," Universal Camera Corp v. N.L.R.B., 340 U.S. 474 (1951); and "summary action," North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

[57] Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Stafford v. Cook, 159 Ark. 438, 252 S.W. 597 (1923); Walls v. Brundidge, 109 Ark. 250, 160 S.W. 230 (1913); Saylor v. Duel, 236 Ill. 429, 86 N.E. 119 (1908).

[58] OKLA. CONST. art. 5, § 30.

[59] OKLA. STAT. tit. 26, §§ 1 - 559 (1961).

[60] OKLA. STAT. tit. 26, § 391 (1961) (emphasis added).

[61] *See* Estep v. U.S., 327 U.S. 114 (1946).

a right for which equity will make itself available.[62] Nor has there been any "right created by the Oklahoma statute which might support a judicial review."[63] In fact, the statute specifically provides that the: "Right to a certificate of election shall not be considered a property right to an extent whatsoever . . ."[64]

Yet the Oklahoma Supreme Court has assumed jurisdiction of election contests in a most novel fashion. Starting with *Daniel v. Bound,* involving a legislative election contest, one finds the Oklahoma Court declining to accept jurisdiction.[65] Citing the constitutional provision that the Legislature shall be judge of the election, returns and qualifications of its own members, the court ruled that neither the State Election Board nor the courts can assume jurisdiction to hear and determine proceedings challenging the correctness of general election returns in a legislative race.[66] "Only the House of Representatives may examine into the correctness of the ballots."[67] It was further observed that the Court is without power to restrain the issuance of the election certificate since whatever the Court should decide, it could not affect the title to the office.[68]

Daniel v. Bound evidently stood unchallenged until 1960 when the Oklahoma Court decided *Wickersham v. State Election Board.*[69] In its Per Curiam opinion, the Court distinguished the *Bound* case on the basis that the state election laws had been

[62] Taylor v. Beckham (No. 1), 178 U. S. 548 (1900).

[63] Leedom v. Kyne, 358 U.S. 184 (1958) —Here the Court speaks of rights created by statute.

[64] OKLA. STAT. tit. 26, § 392 (1961).

[65] Daniel v. Bound, 184 Okla. 161, 85 P.2d 759 (1938).

[66] *Id.* at 162, 85 P.2d at 760.

[67] *Id.*

[68] *Id.* Even where courts have been willing to accept jurisdiction in mandamus proceedings, they have refused to issue writ if the action would be vain or fruitless. Wilson v. Blake, 169 Cal. 449, 147 Pac. 129 (1915); Rosenthal v. State Canvassers, 50 Kan. 129, 32 Pac. 129 (1893).

[69] Wickersham v. State Election Bd., 357 P.2d 421 (Okla. 1960). For a discussion of the *Daniel v. Bound* case, *see* Brief of Intervenor — Gene Howard, at 6, Williamson v. State Election Bd., 38 OKLA. B. A. J. 41 (1967) where case is defended. But for argument that *Daniel v. Bound* had been overruled by implication, *see* Reply Brief of Petitioner, at 10, Williamson v. State Election Bd., *supra.*

subsequently amended.[70] The Court then reasoned that where the right to a recount is not provided by statute, a proceeding that has for its purpose the matter of recounting votes would constitute a challenge to the title to the office which is within the exclusive jurisdiction of the legislative body. But where machinery for a recount is provided by statute, "an election cannot be considered as over . . . until a recount is allowed, and until the election is final, the courts can and should exercise jurisdiction for the purposes of requiring lower tribunals to comply with the election statutes."[71] Actually, this idea of timing was drawn from a case decided in 1934, four years before *Daniel v. Bound.*

In *Cloud v. State Election Board,*[72] the Oklahoma Court ruled that Art. 5, sec. 30 of the Constutition did not divest the Court of jurisdiction to determine the question of a candidate's eligibility for election as a State Representative prior to the close of the election. It is the reasoning found in the *Cloud* case that is interesting. In this original action in mandamus, Cloud sought a judicial order which would require the State Election Board to issue to him a certificate of nominantion for the office of Representative.[73] Results of the run-off primary showed that Cloud had received 2,074 votes and V. L. Kiker had received 2,255. But the votes received by Kiker were alleged to be illegal votes on the ground the Kiker had previously been convicted of a felony. The court was then called upon to actually review the qualifications of one of the candidates.

Respondent Kiker argued that the court had no jurisdiction to review the qualifications of a candidate for legislative office since the Constitution gives each house the exclusive right to be the judge of the elections. The court, however, had little trouble getting around this constitutional provision. It merely declared that a plain and simple construction of this constitutional provi-

[70] Wickersham v. State Election Bd., 357 P.2d 421, 424 (Okla. 1960). In 1957, the Oklahoma Legislature amended the election laws to provide for a recount procedure — OKLA. STAT. tit. 26, § 392 (1961).

[71] Wickersham v. State, *supra* note 70 at 425.

[72] State *ex. rel.* Cloud v. Election Bd. of State of Oklahoma, 169 Okla. 363, 36 P.2d 20 (1934).

[73] *Id.* at 364, 36 P.2d at 21.

sion is that the section "has, and can have, no field of operation until after election."[74]

More important than the holding is the judicial reasoning. First, the court explained the purpose of the constitutional provision that allows each house to be the judge of the elections. While it was argued that the purpose here was to preserve the independence of the legislative branch of government and to prevent interference with the legislature by the courts,[75] the court came back and declared that the various provisions of the Constitution should be construed together and if possible should be harmonized. This construction and harmonization is to be done, of course, by the court. It was first observed that the legislature is essentially a law-making body.[76] And the judicial power of the state is vested in the courts.[77]

With these two sections, which create the separation of powers concept, the court added another section which provides that:

> The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.[78]

Actually, this section of the Constitution, which is found in Article 2 — titled "Bill of Rights," appears to do no more than restate the due process clause — that: "No person shall be deprived of life, liberty, or property, without due process of law."[79]

When the Constitution provided that the courts of justice shall be open to every person for every wrong, it did not mean that a "wrong," as the word is used in its generic sense, would support a standing to bring suit. A reasonable conclusion can be reached only when the word is used in a legalistic sense. The traditional meaning of the word requires that there be life, liberty, or

[74] *Id.* at 365, 36 P.2d at 22.
[75] *Id.* at 364, 36 P.2d at 21.
[76] OKLA. CONST. art. 5, § 1 — provides that: "The legislative authority of the State shall be vested in a Legislature . . . ."
[77] OKLA. CONST. art. 7 § 1.
[78] OKLA. CONST. art. 2 § 6.
[79] OKLA. CONST. art. 2 § 7.

property involved and that there be sufficient and direct injury to these elements.[80] Any other meaning given to the word would cause the doors of the courts to be open to every imaginable wrong. Not only would this disrupt the judicial process, it would seriously interfere with the exclusive province of the legislative body.

As discussed earlier, there is no inherent right to contest public elections since historically and necessarily elections belong to the political branch of government. The function of the courts is limited to the direct authority given to them by the legislature. Persons seeking to question the qualifications of candidates for legislative office are free to do so but they are bound by the machinery provided. Should the machinery prove deficient such person is left with no remedy. It is then up to the legislature to correct the deficiency or if they desire, to let it remain. With no legal right involved, the legislature is not bound to cover every conceivable situation that might arise. And courts, bound by the separation of powers concept, are not free to provide a remedy that was not created by the legislature.

In the *Cloud* case, the Oklahoma court did not agree with my reasoning. It declared that the candidate filing this election contest would be without any remedy unless the court took jurisdiction. Since at the time of the primary run-off involved, the legislature was not in session, this body could not pass upon the election or qualifications of the candidates. Thus, it was reasoned, Article 5, section 30 of the Constitution has no field of operation until after the election. Apparently recognizing that a person does have a right to contest an election, the court in the *Cloud* case ruled that it had the power to pass upon the qualifications of a candidate.[81]

[80] *See, e.g.,* Aero Desgin & Eng'r. Co. v. Oklahoma Emp. Sec. Comm'n, 151 F.Supp. 844 (W.D. Okla. 1956), *aff'd,* 353 U.S. 943 (1957) where the court held that employer contributing to Oklahoma unemployment compensation fund has no litigable interest in the fund. Party attacking validity of statute must have property interest which is directly affected. *See also* Black v. Geissler, 58 Okla. 335, 159 Pac. 1124 (1916).

[81] *Supra* note 72, at 365, 36 P. 2d at 22. The court ruled on the effect of a full pardon to a prior conviction of a felony.

Under the reasoning of the *Cloud* case, the Oklahoma court had no real trouble in assuming jurisdiction in the *Williamson* case.[82] But in the latter case, the assumption of judicial jurisdiction is most significant in light of the fact that the legislature had created a special tribunal to hear election contests. Where a special tribunal has been established by the legislature, it becomes even clearer that courts are without jurisdiction.[83] With the State Election Board, and the detailed procedure established for election contests, the legislature was providing the remedy to be used even when it was not in session.[84] And it was explicitly stated that the legislative remedy provided was exclusive.[85]

Assumption of jurisdiction in the *Williamson* case, on the grounds given at least, represents dangerous precedent for two reasons. First, the encroachment of the court upon the legislative province seriously weakens the constitutional separation of powers concept. The provision that each house shall be the judge of the elections and qualifications of its members has been reduced to a nullity. Showing a willingness to assume jurisdiction in election contests will cause unreasonable delays that could eventually prove disruptive to the political branch of government. As long as we live under a representative form of government, time will be of the essence in getting duly elected officials into office. The election machinery has been designed with such a principle in mind, and this becomes readily apparent from a cursory examination of the statutory election contest provisions.[86] But when the court assumes jurisdiction the machinery breaks down and results in unnecessary delay.

[82] *Supra* note 69.

[83] G. MCCRARY, AMERICAN LAW OF ELECTIONS §§ 378, 379 (4th ed. 1897).

[84] In the *Cloud* case, the court was concerned about the lack of any remedy during the time the legislature was not in session. *See supra* note 72, at 365, 36 P.2d at 22.

[85] OKLA. STAT. tit. 26, § 392 (1961).

[86] OKLA. STAT. tit. 26, §§ 391, 392 (1961). These sections provide that an election contest must be filed by the contestant by Thursday following the Tuesday election for county offices, and by Saturday following Tuesday election for State offices. The statute then places a duty on the Boards to act with speed in resolving the controversy.

The second reason that the *Williamson* case represents dangerous precedent is because under the doctrine of *stare decisis* it is a precedent. Both the State and County Election Boards will be plagued by this decision in all future election contests. The court ruled that the election contest between Howard and Williamson could not be determined with *mathematical certainty.* And since the State Election Board is not required to issue a certificate of election if it cannot determine the election with mathematical certainty, the application for the writ of mandamus was denied.[87]

Under this ruling, the election boards will likely follow the standard and require mathematical certainty in all future election contests. Lawyers and judges, better than anyone else, should appreciate the fact that mathematical certainty can never be attained. And this is especially true in the field of law. As the Supreme Court once stated:

> [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, *no more than a reasonable degree of certainty can be demanded.*[88]

The Court went on to say "that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[89] Obviously if there can be no mathematical certainty in the meaning of statutes, there can be none in the application of the statute. One must recognize that the rights and obligations of a party litigant will be determined, not necessarily by the true facts of the case but rather by the facts as seen by the jury or the trial judge.[90] Jerome Frank has observed that facts as found by judge or jury are at the most subjective because a statement made by a witness becomes a pertinent fact only if believed.[91] Thus, how can the Oklahoma Supreme Court give judicial efficacy to any such notion as mathematical certainty?

[87] Williamson v. State Election Bd., 38 OKLA. B. A. J. 41, 48 (1967).
[88] Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).
[89] *Id. Also* FTC v. Colgate-Palmolive Co. 380 U.S. 374, 393 (1965).
[90] J. FRANK, COURTS ON TRIAL, 167 (2d ed. 1950).
[91] J. FRANK, *Id.* at 22, 150.

Under this precise standard, if followed by the election boards, the state election machinery will be crippled. It is imperative that the court reconsider its position regarding election contests if the legal function of the election board is to be removed from the confused state which the Williamson case has created.

IV. The Oklahoma State Senate is Called Upon to Decide the Howard-Williamson Controversy

After the Oklahoma Supreme Court upheld the *indecision* of the State Election Board in the Howard-Williamson election contest, the matter was, in accordance with the Board's findings and order, submitted to the Oklahoma State Senate for disposition. Thus, this body was called upon to exercise its constitutional authority to be judge of the elections, returns, and qualifications of its own members. Such authority, derived from the constitution, is generally held exclusive, and courts have no jurisdiction in the matter.[92] The legislative body can proceed to inquire into the validity of an election in order to resolve an election contest commenced by one candidate or it may proceed without any formal contest having been instituted.[93]

Two basic reasons have been given in support of this exclusive legislative province. Both reasons while separately identified are closely related in nature and purpose. They are both equally important. The first reason is based on the idea that elections involve political matters and, thus, must be disposed of by the political branch of government.[94] It is the political matters, which represent the response of the people, that are separated from judicial matters by the constitution. And if this separation is to be maintained, matters belonging exclusively to the legislative branch must not be usurped by the judiciary. Recorded cases on this point indicate that courts have historically guarded, with jealousy, their exclusive authority to declare what the law "is."[95]

[92] G. McCrary, *supra* note 83, at § 369.

[93] G. McCrary, *supra* note 83, at § 371.

[94] Taylor v. Beckham (No. 1) 178 U.S. 548 (1900); Fletcher v. Tuttle, 151 Ill. 41, 37 N.E. 683 (1894).

[95] "To declare what the law *is, or has been,* is a judicial power; to declare

On the other hand, courts have readily encroached upon the exclusive legislative province.[96] And this judicial encroachment will continue as long as legislative bodies follow the example of the Oklahoma Senate in the Williamson case. Before commenting any further on this last point, I should raise the second reason supporting the exclusive legislative authority in judging elections.

This second reason is based on "time." A common ground for a court's refusal to take jurisdiction in election contests has been that: "time is of the essence." In *Jenkins v. Hughes* a petition filed in an election contest was dismissed because the hearing was not held within the statutory time period.[97] The statute required the court in an election contest to fix a time for hearing not *more* than 30 days after the petition was filed.[98] After a battle of pleadings, the parties mutually agreed to a continuance which caused the hearing to be postponed beyond the 30-day statutory date. Thereupon the court dismissed the petition on the ground that the authorized time limit had been exceeded. And the fact that the continuance was by mutual agreement was immaterial. Time for holding the hearing and deciding the election contest was of the essence. As the court declared:

> The public interest in having election contests speedily determined requires promptitude. Prompt action in hearing and determining election contests so as to end a status effected by an election contest or to terminate a holdover office-occupancy before a term has wholly or in great part expired seems to be the policy of the law.[99]

The court ruled that under this declared policy, the statutory hearing date is mandatory and directory, thus, the requirement

what the law *shall be,* is legislative. One of the fundamental prinicples of all our government is, that legislative power shall be separate from the judicial."—T. COOLEY, CONSTITUTIONAL LIMITATIONS 114 (5th ed. 1883). This language was taken from Ogden v. Blackledge, 2. Cranch 272, 277 (U.S. 1804).

[96] As Roscoe Pound once said: "It is fashionable to preach the superiority of judge-made law." Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908). *See also* Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution,* 3HARV. J. LEGIS. 191 (1966).

[97] Jenkins v. Hughes, 157 Ohio St. 186, 105 N.E.2d 58 (1952).

[98] *Id.* at 59.

[99] *Id.* at 60.

cannot be waived by the parties.[100] This same thought was expressed by the Oklahoma court in *Pinson v. Robertson.*[101] It was observed by the court that while in ordinary actions, delay might not be fatal, the same is not true with contests for public office.[102] An officer, litigating the title to his office, will not ordinarily be capable of giving his best service and the public is caused to suffer.[103] This public good demands that all election contests be resolved in the quickest order, thus the statutory time table designed to accomplish this speed must be rigidly followed. Speed in resolving election contests is a vital part of any representative form of government. As provided by the Oklahoma Constitution: "All political power is inherent in the people; and government is instituted for their protection . . . ."[104]

In a representative form of government, passage of laws by duly elected representatives amounts to consent by the people for the law. Maitland describing the early English Parliaments observed that the House of Lords gave the king advice and counsel and from the House of Commons, the king sought consent.[105] This consent proved most useful especially when a tax was imposed. When such a tax was imposed on the people *by consent* of the House of Commons, greater general acceptance was assured, and there would be greater ease in collections.[106]

Consent of the people is vital to the stability of the legal system for the legal order can stand only so long as there is suffi-

[100] *Id.*

[101] Pinson v. Robertson, 197 Okla. 419, 172 P.2d 625 (1946).

[102] *Id.* at 627. This case involved a contest for public office as provided for in OKLA. STAT. tit. 12 § 1531 (1941) and not the ordinary election contest. This statute provides for a civil action in the nature of *quo warranto* to be used in trying the title to a public office. The same reasons can, however, be applied to the ordinary election contest.

[103] *Id. See also* Ward v. Story, 258 S.W.2d 515 (Ky. 1953); Hunt v. Rolloff, 224 Minn. 323, 28 N.W.2d 771 (1947).

[104] OKLA. CONST. art. 2, § 1.

[105] F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 175-177 (1908).

[106] This historical practice perhaps explains why in the Constitution, revenue measures must originate in the House. U.S. CONST. art. 1, § 7; OKLA. CONST. art. 5, § 33.

cient general acceptance by the people, or in the absence of this acceptance, sufficient physical force to act as a sanction. In a representative form of government greater reliance is placed on this general acceptance with a minimum amount of physical force. This greater degree of general acceptance is assured only if the representatives respond to the consent of the people.[107] But there can be no consent of the people unless their duly elected representatives are allowed to take their seats.

It is under this general policy that the Oklahoma election laws must be examined. Basic to the election laws in regard to legislative offices is the constitutional provision that: "Each house shall be the judge of the elections, returns, and qualifications of its own members."[108] By placing this authority in the political branch of the government, there is greater assurance that the lawmaking body will be responsive to the people. Furthermore, when the inevitable election contests arise, disposition is accelerated through this constitutional process or through machinery provided for that purpose by the legislature.

An examination of the election machinery created by the legislature, indicates that the policy discussed earlier was carried into effect. Every person who shall possess the legal qualifications of an elector shall be entitled to register and such person will be qualified to vote only if registration is timely.[109] Booths or compartments must be provided in voting places so that electors, casting a ballot, are screened from observation.[110] Given the right to vote in secrecy, the people are responding or reacting to preceding history. Once this reaction is expressed, it becomes imperative that the elected candidates receive their official recognition

[107] And to insure this responsive action some constitutions require that all votes by the legislature shall be *viva voce*. Day v. Walker, 124 Neb. 500, 247 N.W. 350 (1933). In Oklahoma, the Constitution provides that every bill shall be read on three different days and that the yeas and nays be recorded in the Journal. Publicity is thus provided in each case.

[108] OKLA. CONST. art. 5, § 30.

[109] OKLA. STAT. tit. 26 § 93.1 (1961). For qualification of elector see: OKLA. CONST. art. 3, § 1.

[110] OKLA. STAT. tit. 26, § 190 (1961).

with dispatch.[111] The certificate of election, which represents the official recognition, cannot be issued before Thursday after the election for a county office, nor before Saturday for a state office.[112] This delay, which is indeed short, gives any candidate an opportunity to call for a recount or to contest the election. The election board is then required to set such contest down for hearing, and said time shall not be more than 24 hours after completion of service to contestee.[113]

Throughout the election contest sections, it is obvious that *time is of the essence.* Besides the short periods of time allowed for filing contest and the short time within which hearing must be scheduled, the statute provides that the Board's determination shall be final and conclusive of all rights involved. And it further provides that with an untimely filing of a challenge by one candidate, the contest shall be deemed abandoned.[114] With this detailed machinery provided by the legislature to expedite election contests, the political response of the people is recognized.

Perhaps in recognition that it is not in constant session or perhaps merely to provide efficient machinery to administer the state election laws, the Oklahoma Legislature created a special tribunal in the State Election Board[115] and the county election boards.[116] There is a split among the various states on the question of what authority can be delegated to these special tribunals.[117] But in Oklahoma, there is a constitutional provision that calls for the creation of election boards. It provides that: "The Legislature

[111] On election day, the County Boards are required to convene at the Court House by 5:00 p.m. for the purpose of receiving ballots. The Boards are required to remain in session until 11:00 p.m. and upon reconvening the next day they shall remain in session until all the ballots have been received. They are required to list the results of the election as the ballots are counted. After all the ballots are counted and the results recorded the appropriate County or State Board shall issue a certificate of election. OKLA. STAT. tit. 26, § 234 (1961).

[112] OKLA. STAT. tit. 26, § 391 (1961) — for primary elections.
OKLA. STAT. tit. 26, § 392 (1961) — for general elections.

[113] OKLA. STAT. tit. 26, §§ 391, 392 (1961).

[114] OKLA. STAT. tit. 26, §§ 391, 392 (1961).

[115] OKLA. STAT. tit. 26, § 11 (1961).

[116] OKLA. STAT. tit. 26, § 21 (1961).

[117] This will be covered in detail at a later point in this survey.

shall enact laws creating an election board . . . ."[118] And it goes on to provide that not more than a majority of the Board's members shall be selected from the same political party. This latter provision is designed to give the Board a certain degree of independence so that election contests can be decided on a rational basis, free to an extent from external and political influence.[119]

In the Howard-Williamson election contest involving Senate Seat No. 36, the election machinery broke down and the response and suffrage of the people were impaired. The State Election Board first ruled that it was unable to reach a decision in the case and the contest was forwarded to the Oklahoma Senate for disposition. I shall attempt to demonstrate at a later point in this paper that the Board, with its indecision, failed to exercise its legal authority. When the case reached the Senate it should have been sent back with a legislative mandate directing the Board to reach a positive decision. This remand would have preserved the integrity of the election machinery.

But the Senate apparently never considered this action and perhaps the procedural problems of the remand would have caused an even greater delay. As an alternative, the Senate should itself have reached a decision in the contest. Under the constitution, it surely had this power and in order that the policy behind this provision be accomplished, a positive decision was demanded. Recognizing that in the Senate there was a Democratic majority, it would have been better to decide the race on a partison basis than to cause any additional delay.[120] At least the contest would have been resolved and the people of that district would be represented.

[118] OKLA. CONST. art. 3, § 4.

[119] Similar provisions are found in federal statutes which create the so-called independent administrative agencies. An example of this is found in the Federal Trade Commission Act which was created in 1914 and upon which most of the subsequent agencies are patterned. The Act provides that there shall be five members of which only three can belong to the same political party. 38 STAT. 717 (1914); 15 U.S.C. § 41 (1958). With the FTC, Congress desired a strong commission that would be independent and free from the control of politics. *See* 51 CONG. REC. 8840-8843 (1914) (remarks of Mr. Covington). *See also* the remarks of Mr. Willis who said that the bill

But the Senate refused to make any decision which, I presume, they also had the constitutional power to do.[121] There is no apparent reason to keep the Senate from calling a special general election as was done. Once this decision had been reached, the Governor should have, as requested, called a special general election at the earliest possible date.[122] It was not the question of the existence of a vacancy as raised by the Governor.[123] The real question was whether the Senate could request the Governor to call the election under the power of each house to judge the elections of its own members.[124] The real problem presented by the Senate action does not concern its power to call the special general election. I do not question that power. What does concern me is the reasons given in support of this action. From the unpublished majority committee report the following remark is made:

> That your Committee has reviewed the findings of the Tulsa County Election Board, the Oklahoma State Election Board and the *Honorable Supreme Court of Oklahoma* and agrees with each of them in their findings that it is impossible to determine, with *mathematical certainty,* the winner of Senate Seat No. 36.[125]

And in the conclusion of the report, one finds:

"contemplates the creation of a commission that shall not be subject to anybody in the Government, that shall be *subject only to the people of the United States.*" 51 CONG. REC. 8973, 8981 (1914).

[120] The Georgia Legislature just recently decided the Governor's race between Maddox and Calloway on a partisan basis. *See supra* notes 52, 53 and 54.

[121] There is nothing in the Constitution that requires a decision to be made. By reaching no decision, the Senate is judging the election. There was a minority report, of the sub-committee on Privileges and Elections, filed in which it was argued that Williamson should be declared the winner. The main premise of the minority was that the voters, whose ballots were not counted, were placed in the same position as voters who use the paper ballot. In such case, the ballot would merely be rejected if either marked wrong or mutilated. Cited from unpublished Minority Report, Okla. State Senate.

[122] From the conclusion of the Majority Committee Report — unpublished.

[123] Governor Bartlett requested the State Attorney General to rule on the question of the existence of a vacancy.

[124] OKLA. CONST. art. 5, § 30.

[125] Majority Committee Report — unpublished (emphasis added). I wish to express my thanks to Senator Finis W. Smith of Tulsa, who was chairman of the special committee, who furnished to me a copy of the majority and minority report.

> In consideration of the fact that a winner cannot be determined with *mathematical certainty* . . . the Honorable Dewey F. Bartlett . . . is requested to call a special general election . . . .[126]

The emphasized words from the Senate Report indicate that the Committee accepted as proper, the standard created by the Oklahoma Supreme Court. It was the court that gave judicial efficacy to the "mathematical certainty" standard which, as I have demonstrated, is impossible to attain.[127] Even more revealing in this confrontation of authority between the Senate and the judiciary is the newspaper report which indicated that: "Senate leadership had been privately hoping the court would settle the dispute."[128] The obtrusive effect of this is that there was a willingness to give up exclusive legislative authority to the judiciary. In fact, by relying on the judicially created standard, the Senate was allowing the court to control that decision. And by this a serious affront was made to the constitutional separation of powers concept. If the legislative process is ever to be elevated to its rightful status, the legislative bodies must guard their exclusive authority with the same jealously that courts guard their province.[129]

When Judge Corcoran of the Federal District Court of D.C., at the request of the American Civil Liberties Union, issued a temporary order restraining the House Un-American Activities Committee from conducting hearings into demonstrations against the Vietnam war, he was making a direct attack on the legislative process. Incenses by this flagrant attack, Congressman Buchanan of Alabama declared:

> I think the time has come at last . . . for Congress to take a long, sober look at the powers of the Congress and their relation to some things the judicial and executive branches of government have been doing.[130]

I have explained the judicial encroachments made into the legislative province in the Howard-Williamson case. In the next section, an equally serious encroachment by the Executive department will be discussed.

[126] Majority Committee Report—Unpublished (emphasis added).
[127] *See supra* notes 88 and 89 with accompanying text.
[128] Tulsa Tribune, Jan. 11, 1967, at 1, col. 5.
[129] Refer to: *supra* note 95 with accompanying text.
[130] The Birmingham News, Aug. 16, 1966, at 1, col. 7.

7. The Governor Usurps Legislative Authority in Howard-Williamson Contest

If the legislature's determination of its constitutional authority to judge the elections, returns, and qualifications of its own members is subject to executive approval, then the line dividing legislative and executive authority vanishes. The importance of this line is equal to the line separating the legislative and judicial departments. Each in its own individual sphere must remain independent if the separation of powers concept is to have any meaning. Especially is this true when matters political in nature are involved. If the Governor were to exercise any authority over membership in either house, the political integrity of the legislature would be destroyed. To preserve this integrity and to assure that each member can operate freely and independent of the other branches, the Constitution places exclusive authority in the legislative branch over its own members.

Historically legislative bodies led by the ideals of early English Parliaments, have fought to gain independence from the executive. But the gallant struggles of the English Parliaments made it easier for Congress and the state legislatures in this country. For many years, a battle was waged over the respective powers of King and Parliament. It was during the reign of James II that the controversy climaxed with the claim that the King by his prerogative could dispense individual cases from the operation of a statute. Plucknett observes that it was upon this clear issue of authority that the conflict was fought out in what has been described as "the great and glorious revolution" of 1688.[131] From this revolution came the Bill of Rights which settled the question of authority forever. Among other things it provided: "That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parlyament is illegall." "That elections of members of Parlyament ought to be free." "That the freedom of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament."[132] The Act of Settlement which was passed in 1701

[131] F. Plunknett, A Concise History of the Common Law 59 (5th. ed. 1956).
[132] F. Plucknett, *Id.* at 59-60.

went so far as to provide that no person who held office under the King or recived a pension from the Crown could serve as a member of the House of Commons. This demonstrates the desire to preserve absolute independence of the House of Commons from the influence of the Crown.[133]

Perhaps the struggle between the Crown and Parliament can better be appreciated if we witness some of the earlier royal efforts to retain control. The House of Lords was composed of people who had, through the use of a patent, been bestowed a title from the King. With the title so bestowed, these individuals were entitled to be summoned to Parliament. Through this practice, the King could stack the upper house of Parliament, for he had unlimited power to create new peers.[134] Over the House of Commons, the King did not have the same power, for the members of this lower house were elected by the people. More direct measures of control were used here under the theory that the King had absolute power over this house. Charles I, for example, had six Commons members arrested. They were charged with seditious speeches, contempt against the King in resisting adjournment, and conspiracy to keep the Speaker forcibly in the chair. At their trial all six refused to plead on the ground of parliamentary privilege against arrest. Two of the six chose to remain in prison (where they stayed for 11 years) instead of submitting to the King.[135]

In this country, the Constitution preserves legislative independence from undue influence and pressure. The Federal Constitution provides that:

> They shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.[136]

It goes on to provide that no Senator or Representative, during term of office, shall be appointed to a civil office which was created or for which the salary was increased during that time.

[133] F. PLUCKNETT, *Id.* at 60. This was, however, subsequently changed.
[134] F. MAITLAND, *Supra* note 105 at 166-172.
[135] C. BOWEN, THE LION AND THE THRONE, 522 (1957).
[136] U.S. CONST. art. 1 § 6.

And further it provides that "no person holding any office under the United States, shall be a Member of either House during his continuance in office."[137]

The Oklahoma Constitution has a provision similar to that found in the Federal.[138] In light of constitutional history regarding purpose of legislative privilege and immunity, the meaning of these provisions is obvious. To have an effective legal system under a representative form of government, that body which is most responsive to the people must remain independent. And to insure this independence, the legislative body must be the *absolute judge* of the elections of its own members.[139]

This body, in the Howard-Williamson contest, was exercising its constitutional authority. If it chose to call a special general election between Howard and Williamson then this should have been the final disposition of the case. When the Governor was requested to set dates for the election, he should have complied. Instead he questioned his authority to call a special general election and sought advice from the Oklahoma Attorney General. The question in his mind was not whether the Senate had the authority to dispose of the case in the manner that it did. His question concerned the existence of a vacancy in the Senate office which would authorize him to call a special general election.[140]

Proceeding on the limited question of the existence of a vacancy, the Attorney General Opinion completely ignored or refused to consider the true issue of the case. The aberration is made manifest by the statement that:

> There is no explicit provision in the Constitution or statutes of Oklahoma authorizing the Governor to call a Special General Election restricted to the two candicates of the November 8, 1966 election. Nor can such authority be implied from the statutes (26 O.S. 1961 secs. 541-545) governing special elections.[141]

In conclusion, the Attorney General ruled that there is a va-

[137] U.S. CONST. art. 1 § 6.

[138] OKLA. CONST. art. 5 § 22.

[139] *See In re* Opinion of the Justices, 88 A.2d 151 (Maine, 1948); Lessard v. Snell, 155 Ore. 293, 63 P.2d 893 (1937).

[140] Op. Okla. Att'y Gen. 67-110 (1967) (Unpublished).

[141] Op. Okla. Att'y Gen. 67-110 (1967) (Unpublished).

cancy in Senate District No. 36, and that the Governor is authorized to call a Special Election. Further: "It is the opinion of the Attorney General that the Governor has no authority to call a Special General Election."[142]

The defect in the Attorney General's Opinion should be immediately apparent. His attention is focused on the authority of the Governor under the Constituition and statutes. In order to find the legal authority for the Governor, he was required to find that a vacancy did exist. Legal authority to call an open special election could be traced to a statute.[143] There is nothing in the special election statute that indicates its purpose to cover situations arising out of election contests. The basic section provides that:

> Whenever a vacancy shall occur by death, resignation, removal or otherwise in the office of a member of the legislature, such vacancy shall be filled at a special election to be called by the Governor.[144]

For the Attorney General to construe this statute to cover vacancies caused by election contest, where the incumbent holds over,[145] he reduces to a futility the constitutional provision that places exclusive authority to judge the elections of its own members in the House. The power to call a special open election by the Governor in an election contest allows him to influence the ultimate outcome of the contest. Previously, the Senate had ruled that the special election to resolve the contest would be between Howard and Williamson. This decision at least respected the earlier response of the people when each was respectively nominated by his party. But with the Governor's decision, under advice of the Attorney General, the power to judge the elections was taken from the legislature and assumed by the Executive Department.

The cause of this serious invasion of exclusive legislative powers must be credited to the approach taken by the Attorney General, and the blind adherence to his advice by the Governor. There was confusion clouding the true issue of the case. Instead

[142] Op. Okla. Att'y Gen. 67-110 (1967) (Unpublished).
[143] OKLA. STAT. tit. 26, §§ 541-545 (1961).
[144] OKLA. STAT. tit. 26, § 541 (1961).
[145] OKLA. CONST. art. 23 § 10.

of focusing attention on the authority of the Governor, the Attorney General should have considered the authority of the Senate. The proper question was not whether a vacancy existed — rather it was: Can the Senate call for a "special general election?" Raised in this fashion, the real issue emerges and the solution becomes clearly exposed. When the issue is properly framed, there can be but one solution and that is in favor of the legislative authority to judge the election in the fashion it did.

Williamson should have contested the validity of the Attorney General's opinion. But he didn't. In fact, after the Governor announced that the special election would be open to all, Williamson was reported to have said:

> In calling this special election, the Governor and Attorney General took the *only lawful* course in an attempt to rectify an error created by a Democrat-dominated state Senate which voided a completely satisfactory election vote.[146]

Immediately upon the opening of the filing period, Williamson, confident that he could win the primary, filed. The reported results of the primary, however, proved otherwise, for Lahman Jones, the Republican opponent of Williamson, won the nomination.[147] Thus a bizarre collection of events that started with an apparent victory for Williamson ended with his complete exclusion from the contest.[148]

There have been only a few cases where the authority of the Governor and Attorney General has been considered. In one case, decided by the Maine Court in 1948, a candidate for the House of Representatives filed an election contest and alleged that none of the absentee ballots should be counted.[149] The Governor and Executive Council had grave doubts as to validity of absentee ballots

[146] The Tulsa Tribune, Jan. 23, 1967, at 23, col. 3.

[147] The Tulsa World, Feb. 8, 1967, at 1, col. 4.

[148] After his defeat in the special primary election, Williamson sought to block certification of Jones on the ground that he was the duly certified nominee of the Republican Party. This bid was rejected by the Board, and Williamson took no further action. The dispute was thus finally closed.

[149] *In re* Opinion of the Justices, *supra* note 139, at 152. It was contended that the City Clerk, election officials and the voters failed to comply with statute relating to absent voting.

but were unsure of the manner of counting or disposing of them. Advice was then sought from the Supreme Judicial Court. In a brief paragraph, the Court advised that the power of the Governor and the Executive Council is limited by the constitutional authority making the legislature the sole judge of the elections and qualifications of its own members.[150]

Even more significant to the Howard-Williamson controversy is *Lessard v. Snell* which involved the power of the Secretary of State to declare the *existence of a vacancy* in a legislative office.[151] Acting pursuant to an opinion of the state *Attorney General,* the Secretary of State declared a vacancy to exist on the ground that the elected legislator had assumed an incompatible office.[152] The court declared:

> With all deference to the opinion of the Attorney General — pursuant to which the Secretary of State acted — we think such administrative officer has no authority to pass upon the eligibility of a member of the Legislature. Certainly if the court has no such power, the Secretary of State has not.[153]

Interference by either the executive or judicial departments, in matters expressly reserved for the legislature, strikes a blow at the foundation of government itself.[154] The court in *Lessard v. Snell* reasoned that there is no principle more fundamental than that the three branches of government — legislative, executive and judicial — are co-ordinate and independent.[155]

Furthermore, even if the executive did render a decision regarding the qualifications of legislative candidates, the decision would be vain and idle since it would be unenforceable. The legislature, under its constitutional authority, could merely ignore the decision.[156]

[150] *Id.* at 154.
[151] Lessard v. Snell, 155 Ore. 293, 63 P.2d 893 (1937).
[152] *Id.* at 895.
[153] *Id. See also* Raney v. Stovall, 361 S.W.2d 518 (Ky. 1962).
[154] *Supra* note 151, at 894.
[155] *Id.*
[156] *Id.*

VI. DELEGATION OF LEGISLATIVE AUTHORITY TO SPECIAL ELECTION TRIBUNALS

Understanding the legal role of election boards is possible only as it is examined in light of the constitutional authority of the legislature. Repeating again, at the expense of being redundant, each House shall be the judge of the elections, returns, and qualifications of its own members.[157] The question to be specifically discussed in this section is: To what extent can the legislative authority be delegated on a special tribunal? Or to be more precise: Exactly what authority has been delegated to the State Election Board by the Oklahoma Legislature?

On this question of delegation, there is a jurisdictional split. One line of cases holds to a rigid and inflexible rule that there can be no delegation of the legislative-exclusive authority to judge elections of its own members. *State ex rel. Acker v. Reeves*[158] involved an original prohibition action against Reeves, a lower court judge, to prohibit him from ordering a recount in the election contest of a legislative office. The prohibition was issued on the ground that the judge had no lawful jurisdition or authority to order a recount. Even in light of the existence of a statute that authorized the recount, the result cannot change. As observed by the court: the constitution is the supreme law and must be followed by the legislature as well as courts and executive. It was held that the statute is necessarily unconstitutional and void to the extent that the legislature seeks to grant this exclusive authority to the courts.[159] Supporting this holding the court reasoned that: "The right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches.[160]

Of all the cases examined, the *Reeves* case represents the most rigid position for even the delegation of authority to merely administer a recount was prohibited. Other courts have been equally

[157] OKLA. CONST. art. 5 § 30.
[158] State *ex rel.* Acker v. Reeves, 229 Ind. 126, 95 N.E.2d 838 (1951).
[159] *Id.* at 840.
[160] *Id.*

strict where an attempt is made to rule on the qualifications of legislative members. For example, in *Lessard v. Snell,* the court ruled that if any existing statute could be construed to permit the Secretary of State to rule on the qualifications of legislative members, "there would be an unlawful delegation of legislative authority to an administrative officer."[161] Rigidity in the area of delegation depends on how the court views the constiutional authority which makes the legislature exclusive judge of the elections, and further to whom the power is delegated. When one examined *Lessard v. Snell,* the holding against delegation becomes obvious from the remark that such strikes "a blow at the foundation of government itself."[162] Other courts recognize a need to uphold a certain degree of delegation. Thus, they have upheld the delegation of authority for recount, with perhaps some slight deviation where a discretionary decision is required.

This was the situation in the *Ainsworth* case.[163] In this case, a state statute provided that any unsuccessful candidate could, within the time permitted, apply to district court for an order directing the canvassing board to make a recount of the votes cast.[164] As provided for in this statute, Ainsworth filed an application for recount; however, the district court dismissed the application on the constitutional ground that the legislature shall be judge of the elections of its own members.[165] Reversing this lower court decision, the State Supreme Court made an interesting distinction between what can and what cannot be delegated.

It is first noted that any effort on the part of the canvassing board to pass upon the qualification of candidates would clearly infringe upon the constitutional authority of the legislature. This court supported what it referred to as the universally recognized rule that courts have no voice in contests involving legislative seats.[166] Then comes the fine distinction that borders on the fringes

[161] *Supra* note 151, at 895.

[162] *Supra* note 151, at 894.

[163] State *ex rel.* Ainsworth v. District Court, 107 Mont. 370, 86 P.2d 5 (1938).

[164] *Id.* at 6.

[165] *Id.*

[166] *Supra* note 163, at 7.

of fiction. While recognizing that courts cannot try "contests for legislative office," it ruled that the recount statute does not involve a contest. To say that a contest and a recount are different, the court was merely saying that it could not pass upon the qualifications of the candidates.

Narrowed down to the recount of ballots cast in the election, it ruled that the court was acting in a ministerial capacity.[167] By classifying the authority delegated as ministerial, the courts actually escape the more serious question of delegation. As the court in *Van Winkle v. Caffrey* noted: the legislature cannot invest a justice of the Supreme Court with the power of determining the election as a member of the legislature.[168] This would be an illegal delegation of legislative authority; however, the court went on to rule that the legislature may determine the source from which the certificate of election shall issue.[169] With this statement, the court was resorting to the same fiction that had historically been used to support a certain degree of delegation. As early as 1813, the U. S. Supreme Court used what would be labeled as the contingency theory.

In the case *The Brig Aurora,*[170] a statute was involved which imposed an embargo on goods shipped from countries that violated the neutral commerce of the United States. Upon the expiration of the act, the President was given authority to revive it by issuing a proclamation declaring that a certain country continues to violate our neutral commerce. Appealing from the sentence condemning the cargo of the Brig Aurora, it was argued that the power granted the President was an illegal delegation of legislative authority. The Court, however, resorting to fiction, declared that there was no delegation of legislative authority. Congress itself ordered the revival of the statute upon the happening of a certain event. All the president did was to ascertain the happening of the

[167] *Supra* note 163, at 8. The Montana Court, in support of the ruling, cited an Oklahoma case: Whitaker v. State *ex rel.* Pierce, 58 Okla. 672, 160 Pac. 890 (1916). *See also* State *ex rel.* Scott v. Helmick, 35 N.M. 219, 294 Pac. 316 (1930).

[168] Van Winkle v. Caffrey, 12 N.J. Misc. 834, 175 A. 362 (Sup. Ct. 1934).

[169] *Id.* at 363.

[170] The Brig Aurora, 7 Cranch 382 (U.S. 1813).

event upon which the revival was contingent.[171] This was no more than a ministerial act that called for no discretion.

The court in the *Van Winkle* case,[172] using the same fiction as found in *The Brig Aurora,* reasoned that the court in election contests was merely being used as an electoral adjunct. As such, the duties of the court are ministerial and involve no legislative discretion. The courts were looked upon as being the source from which the certificate of election would issue. There was no discretion given to the court in deciding to whom the certificate should issue. Issuance would depend on the happening of a "contingency"[173] or upon the "ascertainment of particular facts."[174] Even after the court exercised its ministerial function, the legislature would remain the judge of the election of its own members, and could go behind the certificate and finally decide the contest.[175] *An even if the court should exceed the limits of the authority delegated, the particular house could annul the judicial election.*[176]

Speaking of deviations from the strict limits of the delegated authority, the court in the *Ainsworth* case[177] said that in making the recount, there may be times when the judges of elections are required to use some discretion in deciding questions arising in the course of counting votes. The court declared that:

> While the duty is ministerial, generally speaking, the judges of elections are required to observe the election laws and to that end have excerpts therefrom in their prossession. These slight deviations from pure ministerial duties do not render the position judicial in the proper or general sense.[178]

As in the *Van Winkle* case, the court in *Ainsworth* observed that there was nothing final in the certificate of election. The legislative body under its constitutional authority may elect to disregard the certificate and decide for itself who shall be entitled to the

[171] *Id. See also* Field v. Clark, 143 U.S. 649 (1892).
[172] *Supra* note 168.
[173] *Supra* note 170.
[174] Field v. Clark, *supra* note 171.
[175] *Supra* note 168, at 363.
[176] *Id.*
[177] *Supra* note 163, at 8.
[178] *Id.* (Emphasis added).

seat.[179]

Moving on the premise supported by the *Van Winkle* case, that courts are not the final arbiter and that exclusive power to finally judicially determine election contests is held by the legislature, the court in *In Re Hunt,* recognized a significant role of the judiciary in election contests.[180] Viewing the court's role as an electoral adjunct, the delegation issue was narrowly construed. It was reasoned that the legislature cannot constitutionally convey to the judicial department the power to *finally judicially determine* the election contest.[181] Whatever the court does is merely tentative or advisory and is subject to legislative review, modification, or annulment.[182]

The procedure to be followed by courts in election contests which has been provided by legislative act is to be regarded simply as part of the apparatus for organizing the government. In view of a pressing public necessity, this apparatus temporarily supplies the law making body with its necessary members.[183] Emphasis was placed on the idea that the responsibility of the court in election contests can be appreciated only when the manifest design and purpose of the election laws are examined. Basic to these election laws is the earnest desire to insure fair and honest elections. As stated by the court:

> A public election bears such a vital relationship to a representative form of government that it must be supervised and governed as an institution for the welfare of our citizens.[184]

Election laws must be liberally construed to the end that a thorough investigation may be had in cases involving alleged malconduct, fraud, corruption, mistake and irregularities.[185] And every court (or board) given legislative authority to act must lend its aid in an effort that the legislative purpose can be achieved.

[179] *Id.*
[180] *In re* Hunt, 15 N.J. Misc. 331, 191 A. 437 (Cir Ct. Cape May Co. 1937).
[181] *Id.* at 440.
[182] *Id.* at 442.
[183] *Id.*
[184] *Supra* note 180, at 443.
[185] *Supra* note 180, at 444. And we might add malfunction of voting machines.

That there is no finality in what the court does actually supports the statute's constitutionality.[186] The proceeding should be recognized as a mere step in the election operation with the final authority to judicially determine resting in the legislature.

The court in the case, *In Re Hunt,* then explained, with great particularity, the role of the judiciary.[187] In any recount and election contest, the court or board must initially ascertain the *legal* votes cast at the election and for which candidate these votes were cast. But at the most, this initial step can furnish only prima facie evidence of the accuracy of the election. The chief aim in reviewing election returns should be to determine if the will of the people is given recognition.[188] To insure the purity of an election, secrecy is demanded, for only then will the results represent a true public response.[189] Furthermore, the legislature has outlawed almost every conceivable corrupt practice and fradulent activity in elections.[190]

But the force of law is not so great that the legislative prohibition of certain evils will execute itself. There must be an active interposition by those responsible to see that fradulent, corrupt and illegal practices will be exposed. Obviously, the legislature did not intend to exempt these evils from exposure; otherwise, there would never have been any prohibition. To insure adequate exposure of anything that might ultimately affect the election results, the courts have been invested with suitable power

[186] *Id.* In support, *see* State v. South Kingstown, 18 R.I. 258, 27 A. 599 (1893).

[187] *Supra* note 180, at 443-444.

[188] Recognizing the will of the people, every reasonable presumption will be indulged in favor of the validity of an election. Leasure v. Beebe, 32 Del. Ch. 210, 83 A.2d 117 (1951); State *ex rel.* Dugas v. Lehmann, 220 La. 864, 57 So.2d 750 (1952); Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381 (1954).

[189] Jones v. Glidewell, 53 Ark. 161, 13 S.W. 723 (1890); Dennis v. Caughlin, 22 Nev. 447, 41 Pac. 768 (1895). This desire for secrecy is so great that in some jurisdictions a distinguishing mark which identifies the voter will cause the ballot to be rejected. State *ex rel.* Law v. Saxon, 30 Fla. 668, 12 So. 218 (1892); Hodgson v. Knoblauch, 268 Ill. 315, 109 N.E. 338 (1915).

[190] *In re* Hunt, *supra* note 180, at 443.

and authority to ascertain the facts.[191] Only by giving some tribunal — courts or boards — authority to ascertain the presence of errors, frauds, irregularities and illegalities will the purity of elections be assured.

Even where the Senate adopted a resolution to inquire into and investigate the election involved in the *In Re Hunt* case, the court held that its jurisdiction was not lost. Since the judicial proceeding is only a requisite step in the election operations, it has no such final and conclusive effect as to interfere with the full and free investigation of the legal result of the election by the Senate.[192]

The *In Re Hunt* case represents the most sophisticated approach to the delegation problem. Its sophistication lies in the fact that the court refused to resort to fiction for jurisdictional support. By classifying the action as ministerial, courts close their eyes to the basic legislative purpose in election statutes. There could never be any effective election machinery if the court or board was strictly limited to ministerial duties.[193] To insure the purity of elections, the appropriate tribunal must be allowed to go behind the election returns.

Though specific reference has been made of election matters, the problem of delegation exists throughout the area of administrative law. Starting with the early cases in which fiction was used to justify a certain degree of delegation, courts eventually made a more realistic evaluation of the problem. With the *Hampton v. United States* case,[194] the Court recognized that the individual branches of government must seek assistance from the others, and the extent of this assistance must be fixed according to common sense and the inherent necessities of government. A certain degree

[191] *Id. See also* Phillips v. Ericson, 248 Minn. 452, 80 N.W.2d 513 (1957). It was recognized that courts could exercise jurisdiction to the extent that authority is expressly conferred upon them by the legislature.

[192] *Supra* note 180, at 445.

[193] For an interesting case involving ministerial duties being assigned to a state judge by legislature, *see* Galloway v. Truesdell, 35 U.S.L.W. 2421 (Nev. Jan, 5, 1967). *But see* Hobson v. Hansen, 35 U.S.L.W. 1124 (D.D.C. Feb. 9, 1967).

[194] Hampton v. United States, 276 U.S. 394 (1928).

of delegation becomes imperative once there is recognition of these inherent necessities. And as long as the legislative act provides an intelligible principle which the agency is bound to follow, such legislation will not be considered as a forbidden delegation of power.

The intelligible principle, created in the *Hampton* case,[195] actually prescribes the approach to be taken in delegation cases. Foremost we are told to use common sense in seeking to resolve delegation issues. Through this common sense, one is then expected to recognize the inherent necessities of government. With this recognition, courts finally reach the point of realism by holding that if Congress holds a constitutional power then there is necessarily an implied power to delegate authority sufficient to effectuate the legislative purpose.[196]

One significant element of the intelligible principle, which is more substantive in nature, is the presence of a primary standard.[197] The purpose of a primary standard is to provide some legislative guidance to the person or agency to whom power has been delegated. The more specific the standard, the less discretion the agency will have. Assuming that all discretion could be eliminated, there would then be no serious delegation problem. It is discretion that is creative and thus constitutionally within the legislative province. But as the administrative process developed into a legal institution, the Court would not require any detail or specific standard. The standard will be adequate as long as it can be reasonably ascertained if the agency is acting within its authority.[198]

State courts have not yet reached the sophistication found in federal courts in cases involving delegation issues. They have exhibited an inclination significantly greater than federal courts to hold the delegation invalid where the agency is vested with uncontrolled discretionary power.[199] Generally speaking, however,

[195] *Id.*
[196] Lichter v. United States, 334 U.S. 742 (1948).
[197] Buttfield v. Stranahan, 192 U.S. 470 (1904).
[198] Yankus v. United States 321, U.S. 414, 426 (1944).
[199] 1 COOPER, STATE ADMINISTRATIVE LAW 31 (1965).

state courts merely require greater legislative standards.[200] Recognition of the administrative process has been manifested in Oklahoma by the enactment of the state administrative procedure acts.[201]

Where election contests are involved, few, if any, courts have approached the problem on the same basis that is used in delegation problems in the general area of administrative law. However, I can see no real difference in an election contest and a rate making case. On the one hand, election matters fall within the constitutional provision that creates exclusive legislative authority to judge the elections of its own members. Rate making cases, however, come under the police power of the state or commerce power of the Congress. But common to each is the fact that the authority involved comes from the constitution. With this common denominator, there is no reason why the delegation problem should be different. Only by following the same reasoning, can one appreciate the legal authority of a special tribunal created by the legislature to hear election contests.

VII. Authority of the Oklahoma State Election Board

Doubtless the Oklahoma legislature was seeking to delegate a certain amount of legislative authority to be used in resolving election contests. In great detail, the legislature provided a primary standard to be followed by the boards in disposing of a controversy. To begin with, the legislature provided that any candidate may contest the election by filing a petition with the secretary of the State Board of Elections.[202] The act then requires, as an initial step in the contest, that the district court and judge shall hear evidence to determine if the ballots have been tampered with.[203] Votes to be recounted must be the identical ballots cast

[200] Bell Tel. Co. of Pa. v. Driscoll, 343 Pa. 109, 21 A.2d 912 (1941); Chapel v. Commonwealth, 197 Va. 406, 89 S.E.2d 337 (1955). *But see* International Ry. Co. v. Public Service Comm., 264 App. Div. 506, 36 N.Y.S.2d 125 (1942), *affd.* 289 N.Y. 830, 47 N.E.2d 435 (1943).

[201] Okla. Stat. tit. 75 §§ 251-257 (1961); Okla. Stat. tit. 75 §§ 301-325 (1963 Supp.).

[202] Okla. Stat. tit. 26 § 391 (1961). Candidates for county office would file with secretary of county board.

[203] If the votes have been tampered with, the recount would be vain or

by the elector; otherwise they would not represent the response of the people.

After the district court has found that the ballots for recount have been preserved, the county board shall proceed to recount the ballots. At the recount hearing, the parties may "offer legal evidence in support of and in opposition to such contest . . . and, upon the completion of such hearing, the election board shall render its decision, and such decision shall be final and conclusive of all rights involved."[204] From these statutory words, it is obvious that the role of the election boards includes more than a mechanical recount. Their function is to resolve all issues pertinent to the contest.[205] One limitation on the election boards is where the election is contested upon an allegation of fraud. Where fraud is alleged, it is the district judge who hears the case and his decision shall be final as to any changes in the total votes. But it is provided that this authority granted the district judge should not be construed to authorize him to throw out any *lawfully cast ballots* where fraud has been alleged and proved.[206]

With this limitation, the election boards are free to decide all issues of law and fact. This is an obvious conclusion drawn from the statutory words, for what other reason would there be for the statute to authorize the contestant to introduce legal evidence at the hearing? Upon this evidence, compiled by the county boards, the State Election Board is obligated to reach a positive decision. To say that no conclusion can be reached is an admission that all the facts were not brought out in the hearing. It is the responsibility of the county boards to gather sufficient evidence upon which an intelligent decision could be made.

fruitless, and recount would be denied. *See* Wilson v. Blake, 169 Cal. 449, 147 Pac. 129 (1915); Rosenthal v. State Canvassers, 50 Kan. 129, 32 Pac. 129 (1893).

[204] OKLA. STAT. tit. 26 § 391 (1961) — Section 391, which pertains specifically to primary elections, is being reviewed here because by reference section 392, dealing with general elections, incorporates it. Furthermore, when I refer to the county board, I include the state board since the latter uses the county boards as fact finders.

[205] OKLA. STAT. tit. 26 § 391 (1961).

[206] OKLA. STAT. tit. 26 § 391 (1961).

In the Howard-Williamson election contest, the conclusion was that no decision could be reached. From reading the official findings of fact, it becomes apparent that the Tulsa County Election Board failed in its responsibility to collect sufficient data upon which the State Board could reach a conclusion as the statute required. It is specifically provided by statute that "upon these findings, (submitted by County Boards) the State Election Board after final consideration shall at once enter its final order."[207] If there were insufficient facts upon which the State Board could enter its final order, then the case should have been sent back to the county board for additional evidence.

The difficulty experienced by the election board in the Howard-Williamson case can best be explained by one factor — the use of voting machines. There was no prior experience or precedent involving the malfunction of voting machines that could be used by the election board. With 94 votes not recorded, due to the malfunction, in an election where the vote difference between the two candidates amounted to only 80 votes, there was a slim possibility that the election results could have changed. And because there could be no *mathematical certainty* in deciding the issue, the election board refused to reach a final order.

Compounding the State Election Board's aberrant position, the Oklahoma Supreme Court first accepted jurisdiction to review and then upheld the Board's indecision for the reason that there was a lack of *mathematical certainty.*[208] Emphasis was placed on the right of *each* elector to have his vote counted as was manifest in the judicial remark that each elector is entitled to presume that the voting machine will function properly.[209] It is the *emphasis* plus the *unfamiliarity with voting machine problems* that best explains the erroneous conclusion of the Tulsa County Election Board, the State Election Board, and the Supreme Court.

Voting machines actually don't present any problems that have not previously been present with the old traditional paper ballots. In all the cases found where a defective machine was involved, not

[207] OKLA. STAT. tit. 26 § 391 (1961).
[208] Williamson v. State Election Board, 38 OKLA. B. A. J. 41, 48 (1967).
[209] *Id.* at 47.

once was an entire election voided.[210] To the contention that different rules must be applied to voting by a machine, the court in *People ex rel. Deister v. Wintermute* declared: "In this reasoning we do not concur."[211] This case is similar to the Howard-Williamson contest, thus, it should be closely examined.

The *Wintermute* case involved an election contest for the title to the office of county treasurer. Results of the canvass showed that the incumbent won the election by two votes, but the relator claimed that the canvass was erroneous and that in truth he had received a plurality. At the trial, evidence was introduced to show that there had been a failure of voting machines to properly register the votes of the electors.[212] The machine failed to record votes that were cast. On the machine, the votes cast and recorded were 27 for the relator; however, testimony of 51 electors of the district affected showed that they had all voted for him. Similar testimony was introduced on behalf of the defendant. The trial court refused to submit the question to a jury or to decide the winner of the election. Instead, the court held the because the voting ma-

[210] Humphreys v. McAuley, 187 N.E. 262 (Ind. 1933); *In re* Creedon, 264 N.Y. 40, 189 N.E. 773 (1934); Application of Ingamells, 259 App. Div. 36, 18 N.Y.S.2d 247, *motion granted,* 259 App. Div. 791, 18 N.Y.S.2d 1014 (1940); Ryan v. Kalin, 48 Misc. 2d 27, 263 N.Y.S.2d 961 (Sup. Ct. 1965); Ginsberg v. Heffernan, 186 Misc. 1029, 60 N.Y.S.2d 875 (Sup. Ct. 1945); Rattigan v. Searing, 105 Misc. 155, 172 N.Y. Supp. 804 (Sup. Ct. 1918); Duncan v. County Court of Cabell County, 75 S.E.2d 97 (W.Va. 1953).

[211] People *ex rel.* Dieister v. Wintermute, 194 N.Y. 99, 86 N.E. 818, 820 (1909). Since deciding the *Wintermute* case in 1909, the New York Court seems to have changed its view on this position. The position taken in Hogan v. Sup. Ct. of N.Y., 258 App. Div. 174, 16 N.Y.S.2d 351 (1939), *rev'd.,* 281 N.Y. 572, 24 N.E.2d 472 (1939) is that in case of a defective voting machine when the total election is not affected, there is no blank ballot. By so holding, the N.Y. Court says that it is without jurisdiction to consider the evidence of individual voters. But even though the court refused to consider testimony of voters, it did not void the entire election. Since the *Wintermute* reasoning is sounder and more consistent with the purpose of elections, I will accept it as the basis of my discussion. Furthermore, though the N.Y. view seems to have somewhat shifted, it has not yet specifically overruled the *Wintermute* position.

[212] Wintermute, *supra* note 211, at——, 86 N.E. at 819.

chine malfunctioned there was no valid election.[213]

On appeal, the trial court was reversed. The reasoning was that the lower court should have considered credible testimony of voters as for whom their ballots were cast. It was observed as a well supported rule that an official canvass is only prima facie evidence of title to an office.[214] But this canvass can be impeached by relevant and admissible evidence. The defendant in the *Wintermute* case contended that parol testimony of voters is not permissible evidence because such would violate the secrecy of the ballot.

It was noted in the *Wintermute* case that voters have long been held competent to testify as to whom they cast their ballot. Moreover, such testimony would not violate the secrecy of the ballot.[215] There is no need to go into a detailed discussion of the historical foundation of the secret ballot. Secrecy is defended on the ground that it prevents hypocrisy and tends to preserve an individual sense of responsibility.[216] Absolute secrecy in voting reaches effectively a great number of evils — violence, intimidation, bribery, dictation by employers or unions, fear of ridicule or dislike, and social or commercial injury.[217]

Secrecy of voting which guarantees independent electors is vital to the preservation of our representative form of government. But it is only through the measure of public response that one can ever appreciate the advantages of this type of government. To assure an effective response, the people's right to vote in privacy must be protected at all costs. On the other hand, once this response has been exercised, its results in naming men as representatives cannot be taken lightly. Every effort must be exerted to insure that the person receiving the largest number of votes is allowed to take office. Thus, the dichotomy created by opposing interest. On the one hand we desire to preserve secrecy, and on the other, we recognize that there will be times when the people will be asked for whom they voted in an effort to give the

[213] Wintermute, *supra* note 211, at——, 86 N.E. at 819.
[214] Wintermute, *supra* note 211, at——, 86 N.E. at 819.
[215] Wintermute, *supra* note 211, at——, 86 N.E. at 820.
[216] Jones v. Glidewell, 53 Ark. 161, 13 S.W. 723 (1890).
[217] Taylor v. Bleakley, 53 Kan. 1, 39 Pac. 1045 (1895); Dennis v. Caughlin, 22 Nev. 447, 41 Pac. 768 (1895).

title of office to that person receiving the favorable response of the people.

Many jurisdictions, in an effort to preserve secrecy and thus the purity of elections, have prohibited electors from making marks on the ballot that might be used as identification of voters.[218] Nor can legal voters be required to testify as to the candidate for whom they voted.[219] However, this privilege of a legal voter may be waived, but being personal, it can be waived only by the voter.[220] Through this balance of interest, the independence of the voter is preserved while at the same time greater assurance in identifying public response.

Inevitably there will be close elections in which questionable ballots could change the outcome. The question is: How will these elections be determined? One could say that the election boards should merely accept the mechanical count without exercising any discretion in going behind the ballots. This solution would be accepted by any jurisdiction that blindly followed a strict interpretation of the delegation issue; but to follow such a strict approach, the tribunal charged with administering the election laws would be failing in its responsibility. As the court in *In re Hunt*[221] observed; it has, in election contests, a responsibility to look behind the ballot in order that the purpose of the election laws is carred out. It recognized the close relationship between public elections and the representative form of government which obligated the tribunal to supervise the proceedings.[222] Clearly the responsibility of the supervising tribunal is not satisfied by a mechanical count.

On might then say that in close elections where the result

[218] State *ex rel.* Law v. Saxon, 30 Fla. 668, 12 So. 218 (1892); Hodgson v. Knoblauch, 268 Ill. 315, 109 N.E. 338 (1915).

[219] Dixon v. Orr, 49 Ark. 238, 4 S.W. 774 (1887); Gaiennie v. Druilhet, 143 La. 662, 79 So. 212 (1918); Wood v. State, 133 Tex. 110, 126 S.W.2d 4 (1939).

[220] McRobbie v. Registrars of Voters, 322 Mass. 530, 78 N.E.2d 498 (1948); Torkelson v. Byrne, 68 N.D. 13, 276 N.W. 134 (1937); Hamilton v. Marshall, 41 Wyo. 157, 282 Pac. 1058 (1929).

[221] *Supra* note 180.

[222] *Supra* note 184 and accompanying text.

cannot be determined with mathematical certainty, the tribunal should merely void the entire election and force the parties into another contest. This is exactly what the State Election Board did in the Howard-Williamson contest. Such was also the decision of the lower court in the *Wintermute* case.[223] But on appeal, as was previously discussed, this harsh remedy was rejected. The *Wintermute* court — as the *In re Hunt* court — recognized a responsibility to look behind the ballot in an effort to discover the true response of the people. Voidance of an election is just as mechanical as acceptance of the raw count.

Failure of an election board to make a decision which would resolve the contest is comparable to a judge who declines to make a decision because the evidence does not clearly mark his path. All would agree that such a judge had failed his judicial duties. An so with an election board. The election boards in Oklahoma have been made an indispensable part of the state election laws for the purpose of providing a speedy solution to election contests. Such was clearly recognized by the Oklahoma Court in *State ex rel. Cloud v. Election Board* when it observed that the legislature might not even be in session when the election contest arose.[224]

The third possibility in resolving election contests would require the election board to receive all the credible evidence available and necessary for the board to reach a rational decision which would resolve the dispute. In considering the evidence there are two basic principles that one should always consider. The first principle that should affect the board's conclusion from the evidence is that the burden of proof in an election contest always rests on the contestant.[225] Where fraud, intimidation, bribery, or violence is alleged to have been present in the election, the contestant must still show that neither he nor the other candidate could have been fairly elected.[226] And where illegal votes have been cast, the burden of proof fails unless the contestant can prove

[223] 194 N.Y. 99, 86 N.E. 818 (1909).

[224] 169 Okla. 363, 36 P.2d 20, 22 (1934).

[225] Webb v. Bowden, 124 Ark. 244, 187 S.W. 461 (1916); Gross v. West, 238 S.W.2d 358 (Ky. 1955); Fugate v. Buffalo, 348 P.2d 76 (Wyo. 1960).

[226] Justice v. Whitt, 302 Ky. 319, 194 S.W.2d 665 (1946).

that the alleged illegal votes actually affected the election.[227] In *Hamilton v. Marshall,*[228] the contestant lost the election by 10 votes, but in a subsequent election contest, it shown that 14 votes had been cast after closing time of the polls. Now under the Howard-Williamson theory developed by the election boards and the Supreme Court and adopted by the Senate, there could be no mathematical certainty in deciding this case. The apparent result in Oklahoma would be to void the election. The *Hamilton* court, however, held that the contestant's showings were inconclusive where it was not alleged for whom the votes were cast.[229] It was recognized in this case that in satisfying the contestant's burden of proof, it would have been permissible to offer the parol testimony of the 14 late voters.

The second basic principle affecting the board's examination of the evidence is closely related to the burden of proof principle. In fact, this latter principle explains why the burden of proof is on the contestant. Basically it is that every reasonable presumption must be made in favor of the validity of an election.[230] As the court stated in *Justice v. Whitt*: the purpose of an election is to determine the sense of the voters, and public policy demands that one not be lightly set aside."[231] Where an election has been legally held, and fairly conducted, nothing will justify the exclusion of the vote of an entire precinct except the impossibility of ascertaining for whom the majority of votes was cast. The validity of the election must be proven by primary evidence such as poll books, tally sheets and ballots themselves. But where these fail, the tribunal should look to secondary evidence, including the *voluntary* testimony of voters.[232]

In the *Wintermute* case, which involved a defective voting machine, the public policy in preserving the election was clearly

[227] Hamilton v. Marshall, 41 Wyo. 157, 282 Pac. 1058 (1929).

[228] *Id.*

[229] *Id.*

[230] Leasure v. Beebe, 32 Del. Ch. 210, 83 A.2d 117 (1951); State *ex rel.* Dugas v. Lehmann, 220 La. 864, 57 So. 2d 750 (1952); Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381 (1954).

[231] Justice v. Whitt, 302 Ky. 319, 194 S.W.2d 665, 666 (1946).

[232] Dixon v. Orr, 49 Ark. 238, 4 S.W. 774 (1887).

manifested through the actions of the court.[233] The court observed that the use of a voting machine was no different than any other method of voting. The fact that one machine failed to work properly was no reason to destroy the effect of the elector in the exercise of his constitutional right. Even if a machine was totally destroyed by fire or other hazard, this should not render the election nugatory. Ascertainment of the vote cast would work a great difficulty; however, *"the difficulty of the inquiry would be no valid objection to entering upon it."*[234]

Simplicity of administration was a subject considered by the Supreme Court in *Phelps Dodge Corp. v. NLRB.*[235] Having held the discharge of certain employees to be an unfair labor practice, the Board ordered them reinstated with back pay. In calculating this back pay, the Board ruled that an amount equal to what these individuals *actually* earned could be deducted. It refused, however, to allow an additional deduction in the amount equal to the sum that the workers failed without excuse to earn. Justification was based on simplicity of administration. But the Court rejected this simple process, and declared that:

> [The] advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness.[236]

In the Howard-Williamson election contest, the Tulsa County and the State Election Boards overestimated the administrative difficulties and underestimated their administrative resourcefulness. Seeking mathematical certainty clearly indicates that the election boards lost sight of the purpose and policy of the election machinery created by the legislature. Had recognition been given to the basic policy that calls for the preservation of a legal election, there would have been no trouble in finding a solution.

Fear of disfranchising the 94 voters, whose votes in the senatorial race were apparently not recorded, clouded the real

[233] *Supra* note 223.
[234] *Id.* at 821.
[235] 313 U.S. 177 (1941).
[236] *Id.* at 198.

issue in the case. It is not the rights of individual voters that should be controlling. In *Spickerman v. Goddard,*[237] involving a liquor referendum, the poll lists indicated that 6,821 voters cast their ballot in voting machines. The tabulated result showed 3,393 "yes" votes and 2,931 "no" votes, for a total of 6,324 or 497 short of the poll list. Since a majority of the votes was necessary for the measure to carry, it would have failed if the 497 votes were merely counted as votes cast. The court, however, considered them a nullity and treated them as if they had never been cast. It was observed that ballots cast on a machine were no different than paper ballots. Had paper ballots been used, the 497 blank ballots would have been rejected on the presumption that the persons intentionally refrained from voting. Such a presumption is reasonable since it is consistent with the presumption in favor of a valid election.

There is nothing uncommon about rejecting ballots cast in an election. It has been held that blank, illegal and unintelligible ballots should be rejected in computing the total votes.[238] A distinction, however, has been made between legal but unintelligible ballots and illegal ballots. With the former, they will be counted to determine a majority while the latter will be totally rejected.[239] Even where a voter makes an honest mistake, his ballot will be rejected, though it may count toward a majority.[240] To further support the idea that the individual voter is not the major factor in an election contest, one should examine cases concerning mutilated votes. It has been held that ballots that are defaced, torn or marked otherwise than prescribed by law are void. And it is immaterial whether the marking occurred from the act of the elector, the act of election officials, *or by accident.*[241]

[237] 182 Ind. 523, 107 N.E. 2 (1914).

[238] Stembridge v. Newton, 213 Ga. 304, 99 S.E.2d 133 (1957); Spickerman v. Goddard, 182 Ind. 523, 107 N.E. 2 (1914); Murdock v. Strange, 99 Md. 89, 57 A. 628 (1904).

[239] Eufaula v. Gibson, 22 Okla. 507, 98 Pac. 565 (1908); Lawrence v. Ingersoll, 88 Tenn. 65, 12 S.W. 422 (1889). In the *Gibson* case, the Oklahoma court classified blank ballots with illegal ballots and held that they be rejected even in determining a majority.

[240] City of Blackwell v. City of Newkirk, 31 Okla. 304, 121 Pac. 260, 265 (1912), *error dismissed,* 232 U.S. 718 (1912).

[241] State *ex rel.* Harris v. Breighaupt, 220 La. 1042, 58 So.2d 332 (1952).

The cost of protecting individual voters and their right of franchise is too great if it calls for voiding an entire election. These individual rights can best be protected by preserving the total election which represents the response of the people. It is too easy for a zealous partisan of a candidate to fabricate a technical error and if such is allowed to void an entire election, the will of the electors will be defeated.[242] Such was the case in the Howard-Williamson contest.

In the November 8, 1966 general election for the office of State Senate, Dwight Williamson received 5,687 votes and the incumbent Gene C. Howard received 5,607. The response or will of 11,294 people declared that Williamson was to be their new representative. But due to a defect in a voting machine, 94 votes were not recorded on the machine. Since Williamson led Howard in the tabulated count by 80 votes, it would have been necessary to ascertain that only 15 of the unrecorded votes went to Williamson. This would have given the Board the mathematical certainty that it was seeking.

Exercising the discretion it had at its disposal, the Board could have easily made sufficient findings to support a decision. And even if such were not possible, the 94 votes should have been rejected in order to save the 11,294 valid votes cast. As it turned out, the response of these 11,294 people was rejected and the issue was finally determined by 4,445 electors.[243] For whatever reason the State Election Board had in support of the failure to assume its full responsibility in deciding the election contest, the results will long be remembered as a critical blow to the representative form of government. If the precedent is carried forward to future cases, that are bound to arise, it will inflict permanent injury.

If the Tulsa County Election Board had decided against rejecting the 94 unrecorded ballots, it should have accumulated all the evidence necessary to support a rational decision. Circumstan-

[242] City of Blackwell v. City of Newkirk, *supra* note 240, at 263.

[243] Tulsa Daily World, Feb. 15, 1967, at 1, col. 1. After the Governor called the open special election, Williamson lost in the primary to Lahman D. Jones. In the special general election, Howard defeated Jones by a vote of 2,434 to 2,011.

tial evidence could have been introduced to show how the unrecorded votes were cast.[244] The Board could have polled all the voters of precinct 72 and if the individual votes waived their personal right of secrecy the contest could have been swiftly disposed of. Only a few questions would have been necessary: Did you cast your ballot on machine A? What time did you vote? Did you operate an individual lever? Did you use a straight party lever? If from these questions, it was determined that the person's vote was not recorded, the final question would be: For whom did you cast your vote? This would not be any great burden for there were only 131 votes cast on machine A and 174 votes cast on machine B. Furthermore, the polling could stop as soon as an additional 15 votes had been accounted for Williamson. But even if the burden was great, it was the responsibility of the Board in order to effectuate the response of the people.

An alternative method of resolving the contest would be to distribute the unrecorded votes to each candidate on a proportionate basis. As the court stated in *People v. Birdsong*:

> The established rule is that where the evidence fails to show for which candidate illegal votes were cast, these votes will be eliminated by dividing them between the candidates in the proportion the number cast for each bears to the total legal votes cast.[245]

McCrary recognized this as an established rule, however, he did say that it woul be more conducive to the ends of justice to order a new election if the tribunal hearing the contest had such power.[246] He would thus support the conclusion in the Howard-Williamson election contest. But this position cannot be supported when an election contest is decided on the same policy basis that supports elections. The purpose of elections is to record the response of the people and this cannot be done if entire elections are voided in cases where there are doubtful votes sufficient in number to change the results. McCrary recognized this to some extent when he said that the election should be voided only if there is insufficient evidence to determine for whom the illegal

[244] Dowley v. Orleans Parish Democratic Comm., 235 La. 62, 102 So.2d 755 (1958).

[245] 398 Ill. 455, 76 N.E.2d 185 (1947). *See also* Hamilton v. Marshall, 41 Wyo. 157, 282 Pac. 1058 (1929).

[246] G. MCCRARY, AMERICAN LAW OF ELECTIONS 364-366 (4th ed. 1897).

or blank votes were cast.[247]

In some jurisdictions where fradulent votes cannot be identified so that they can be individually rejected, the rule is that all the votes in the precinct where fraud occurred should be rejected and the election decided on the basis of the vote tabulated in the remaining precincts.[248] The error in the Howard-Williamson case could have been resolved with less drastic action than voiding all the votes cast in the one questionable precinct. It would have been sufficient and consonant with the public policy of election laws to have merely rejected the unrecorded votes. There was no necessity for the Board to have exceeded steps taken hundred of times in other jurisdictions. Rather than exercising any degree of discretion that was lawfully available, the Board chose to remain mute. Thus the response of the people went unrecorded.

VIII. CONCLUSION

Many issues that are relevant to the problems discussed in this paper have had to go unanswered for the sake of time and space. But the need for research in the area of election laws became manifest from the Howard-Williamson election contest. And it was true manifestation for as I began to research the problems and record my findings, it became apparent some limitation had to be imposed on the scope of the article. Consequently, I only scratched the surface of certain problems while not even mentioning others. For example, one unrecorded problem was the effect that the Oklahoma Administrative Procedure Act has on the State Election Board. Without discussing the issue here, my first impression would be that it is not covered. To remove it from the provisions of this act, it would be necessary to classify the Board as a legislative agency.

Another problem which was discussed in some detail, but which was not related to the Howard-Williamson contest, involved the use of the mandamus. As was noted this writ cannot be used by a court to exercise discretion held by an agency. It would, however, be available to force the agency to exercise discretion. In-

[247] G. MCCRARY, *Id.*, at 366.
[248] Lopez v. Holleman, 60 So.2d 903, 910 (Miss. 1954).

stead of classifying the Board action as ministerial, Williamson should have sought the remedy to force the Board to exercise discretion in disposing of the question regarding the 94 unrecorded votes.

With these and other limitations on the coverage of the problems created by the Howard-Williamson contest, one thing is clear. The precedent established by all the branches of government must not be allowed to stand. The Oklahoma Supreme Court must recognize its limited role in election matters and when issues arise, this court must decide the case in a manner that will force the election boards to accept and carry out their responsibilities. Likewise, the State Election Board must insure the effectuation of the sound purpose and policy envisioned by the legislature through the detailed state election laws. Only through recognition and acceptance of the Board's legal responsibility to the people can the separation of powers within state government be preserved.

In the Howard-Williamson case, each branch of the government struck a blow at this constitutionally conceived separation of powers. The Oklahoma Supreme Court usurped legislative authority in assuming jurisdiction to review the Board's decision. Based on pure fiction, its decision is contrary to all the well reasoned views in other jurisdictions. But worse than the court's action, the Oklahoma Senate accepted the judicially created standard of mathematical certainty, thus weakening the election machinery previously created.

Finally, the executive department — the Governor upon the advise of the Attorney General — violated the exclusively legislative province. Where the Senate was exercising constitutional authority to judge the elections of its own members, the Governor should never have questioned it. Without question, the Governor should have called the special general election.

While I have criticized each branch for the manner in which the Howard-Williamson contest was conducted, it must be made clear that I have not questioned the integrity of these departments. It is obvious that the many inherently erroneous decisions were the product of misunderstanding. Had the Board understood its responsibilities, the problem would never have been compounded.

And if this paper will add any clarity to election contest problems, it will have served its purpose.

In closing, I should like to make and emphasize one point concerning any new election legislation. It has been suggested that corrective legislation is needed to cover cases like the one presented in the Howard-Williamson contest. It has been suggested that the legislature should enact a law to cover election machine malfunctions. To these suggestions, I strongly dissent. There is no reason to enact new legislation, for the present election laws are quite adequate to cover election machine problems. Better understanding by the boards of the present laws and the purpose and policy behind them is more than adequate. If the legislature is to be called upon in every case that presents a difficult problem, the statutes would soon become so cluttered that they would eventually be junked. Only by wording such a statute in general terms can there be flexibility sufficient to solve unforseen situations.