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## The Illinois State Board of Elections: A History and Evaluation of the Formative Years, 11 J. Marshall J. Prac. & Proc. 321 (1978)

Charles R. Bernardini

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# THE ILLINOIS STATE BOARD OF ELECTIONS: A HISTORY AND EVALUATION OF THE FORMATIVE YEARS

CHARLES R. BERNARDINI\*

## CONTENTS

I.	Introduction .....	322
II.	The Constitutional Convention .....	323
	A. Impetus for Reform .....	323
	B. History of Article III, Section 5.....	324
	C. Constitutional Intent .....	327
III.	Legislative Implementation of the First State Board of Elections .....	329
IV.	Judicial Review of the Board's Performance .....	332
	A. Ballot Access .....	333
	B. The Conduct of Elections .....	338
	C. Campaign Finance and Economic Interests .....	339
V.	Judicial Review of the Board's Statutory Framework and Its Relationship to the Executive Branch .....	342
	A. <i>Lunding v. Walker</i> —Limits on the Governor's Removal Power .....	342
	1. The September, 1975 Decision .....	343
	2. Rehearing—November, 1976—Final Decision .....	344
	3. The Dissent .....	347
	B. <i>Walker v. State Board of Elections</i> — The Board is Declared Invalid .....	348
	1. Circuit Court Ruling—September, 1975 .....	348
	2. The Supreme Court Decision—November, 1976 .....	349
	3. The Effect of the <i>Walker</i> Decision .....	353
	C. The Import of the <i>Walker</i> and <i>Lunding</i> Decisions .....	357
VI.	The New State Board of Elections .....	359
VII.	Conclusion .....	361

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# THE ILLINOIS STATE BOARD OF ELECTIONS: A HISTORY AND EVALUATION OF THE FORMATIVE YEARS

## I. INTRODUCTION

"We should constitutionalize an election board, because its services in this state are needed. Illinois needs, and must be ready with a responsible, visible, bipartisan group of citizens to solve the foreseeable and the not-so-foreseeable questions. . . ."<sup>1</sup>

On May 14, 1970, Betty Ann Keegan,<sup>2</sup> a delegate to the Sixth Illinois Constitutional Convention, argued that the new constitution should include a central election authority to be called the State Board of Elections. Delegate Keegan's arguments carried the day. The convention proposed, and the people of Illinois adopted, the following constitutional provision:

A State Board of Elections shall have general supervision over the administration of the registration and election laws throughout the State. The General Assembly by law shall determine the size, manner of selection and compensation of the Board. No political party shall have a majority of members of the Board.<sup>3</sup>

This article describes how the concept of the State Board of Elections developed prior to and during the convention. It reviews the legislative implementation of the constitutional language, analyzes court decisions regarding the Board, and considers the performance of the Board from the date of its commencement until the Illinois Supreme Court held its statutory framework to be unconstitutional and during the period prior to the enactment of the new State Board of Elections bill. The article also discusses the constitutional options that remained open to the legislature after the court decisions and then highlights the new bill signed into law on January 12, 1978.

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1. 2 RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, at 1056 (1969-70) (remarks of Delegate Keegan) [hereinafter cited as PROCEEDINGS].

2. Betty Ann Southwick Keegan (1920-1974) was a delegate to the constitutional convention from the 34th Senatorial District, comprised of greater Rockford. Mrs. Keegan had long been active in civic and political affairs and had personally experienced the difficulties encountered by a minority party in an area dominated by another party. From 1963 until 1969 she was a member of the Illinois Election Law Commission, which had studied proposals for legislation creating a central state election authority. In 1972 she was elected Illinois State Senator (Dem.—34th District), the position she held at the time of her death.

3. ILL. CONST. art. III, § 5.

## II. THE CONSTITUTIONAL CONVENTION

### A. *Impetus for Reform*

The Sixth Illinois Constitutional Convention was called because most citizens were convinced that piecemeal attempts to amend the 1870 constitution had failed and would continue to fail. The convention assigned the task of recommending a workable amendment process and modern election provisions to the Committee on Suffrage and Constitution Amending. While convention sentiment favored an easier amendment process, there was little impetus to change the old suffrage article.<sup>4</sup>

One of the reforms suggested to the convention was a state-wide central election authority. During the 1960's, many observers of Illinois elections had argued that Illinois suffered from inefficient and inconsistent local administration of elections. Each of the 112 different local election authorities (102 county clerks and 10 city boards of election commissioners) administered the election laws in a different manner. To complicate matters, the Illinois Election Code prescribed three somewhat different sets of procedures for voter registration and election administration.<sup>5</sup> Since each election officer had his own rules and procedures, any consistency of practices within the state was a consequence of informal relationships among election officials, not the result of any statutory requirement.<sup>6</sup>

For a number of years, the Illinois Election Laws Commission, composed of legislators, election officials, and interested members of the public, voiced its criticism of the balkanization of election administration.<sup>7</sup> Prior to July 1, 1971, the effective

4. ILL. CONST. art. VII (1870).

[T]he suffrage article of the 1870 Constitution (Article VII) was very general in language and in concept. It, in fact, had not been a serious hindrance to the development of the election process. If the process was weak or defective, it was largely a consequence of General Assembly action or inaction.

The constitutional convention presented an opportunity, not so much to change the suffrage article, as to inject into it new mandates intended to stimulate, and, in certain cases, to compel the General Assembly to enact reform legislation.

A. GRATCH & V. UBIK, *BALLOTS FOR CHANGE: NEW SUFFRAGE AND AMENDING ARTICLES FOR ILLINOIS* 64 (1973).

5. ILL. REV. STAT. ch. 46, §§ 4-1 to 4-29, 5-1 to 5-39, 6-1 to 6-78, 13-1 to 13-16, 14-1 to 14-12, 17-1 to 17-29, and 18-1 to 18-17 (1971).

In 1970 Illinois had three different election codes, one applicable to counties with a population under 500,000 (i.e., all but Cook County), one applicable to counties with a population over 500,000 (i.e., Cook County), and one applicable to municipalities that have elected to establish a board of election commissioners.

GRATCH & UBIK, *supra* note 4, at 61 n.3.

6. GRATCH & UBIK, *supra* note 4, at 76-77. Gratch and Ubik further suggested that "[a] single administrative election authority would be in a position to eliminate undesirable or unfair differences and to institute good practices throughout the state." *Id.* at 77.

7. 2 PROCEEDINGS, *supra* note 1, at 1057 (remarks of Delegate Miller).

date of the new constitution, the state's highest ranking election authority was the State Electoral Board.<sup>8</sup> The duties of that body were essentially ministerial. The Electoral Board seldom did more than receive candidates' petitions, certify to county clerks the names of offices and candidates to appear on primary and general election ballots, certify nominations and elections to office, and canvass votes for state and national offices.<sup>9</sup> Local election authorities fell under the supervision of the State Electoral Board only to a very limited extent.

Unlike its predecessor, the State Board of Elections was not intended to be a purely ministerial agency.<sup>10</sup> Although many questions regarding the intent of the constitutional convention are not easily answered, it is clear from a reading of the debates that the convention favored a board with supervisory powers, designed to secure by one central authority the consistent interpretation and implementation of the general election laws established by the General Assembly.<sup>11</sup>

#### B. *History of Article III, Section 5*

The first delegate officially to propose that there be a state-wide central election authority was Peter A. Tomei, chairman of the Committee on Suffrage and Constitution Amending.<sup>12</sup> Chairman Tomei proposed to his committee that a chief election officer be established to administer the election laws. The committee members rejected the proposal, largely because they feared that a negative reaction by county clerks would jeopardize the fate of the entire constitution.<sup>13</sup> When the full convention

8. The State Electoral Board, consisting of the Governor, the Secretary of State, and the Auditor of Public Accounts, was responsible for state elections until 1951, when the Attorney General and the Treasurer joined the other three elected state officials, and the Governor was designated the chairman. In 1967 the chairmen of the state central committees of the Republican and Democratic parties were added.

9. The daily responsibility for administering these ministerial functions fell to the Index Division of the office of the Secretary of State. The Secretary of State was secretary to the State Electoral Board. *See* 1971 ILL. ATT'Y GEN. OP. No. S-372. *But see* *Daly v. Stratton*, 326 F.2d 340 (7th Cir. 1964) (holding that the State Electoral Board's duty to examine nomination petitions and certify candidates for inclusion on the ballot was not a mere ministerial power, and that the board was exercising an executive function in refusing to certify persons).

10. *See, e.g.*, 2 PROCEEDINGS, *supra* note 1, at 1057 (remarks of Delegate Cicero), 1061 (remarks of Delegate Wenum); GRATCH & UBIK, *supra* note 4, at 86.

11. *See* authorities cited note 10 *supra*.

12. For a biographical description of Chairman Tomei see GRATCH & UBIK, *supra* note 4, at xv-xxii.

13. *See* GRATCH & UBIK, *supra* note 4, at 77:

Many members believed that the clerks, who wielded significant patronage power and voter influence, would see the proposal as an infringement of their local autonomy and authority. If the proposal were included in the new constitution, these clerks might campaign

considered the suffrage article on first reading, Chairman Tomei renewed his proposal. He suggested that the General Assembly appoint a single, statewide election officer and designate the officer's jurisdiction, powers, and duties.<sup>14</sup> Delegate Keegan then offered a substitute proposal<sup>15</sup> which provided for a *bipartisan*<sup>16</sup>

against ratification. The more conservative members did not want to witness a shift of this electoral power away from the counties to the state, nor did they want to risk the success of the entire constitution for the uncertain benefits to be derived from this somewhat radical idea of the chairman's.

14. 2 PROCEEDINGS, *supra* note 1, at 1053-54. Chairman Tomei suggested that a central election authority's primary function should be "to facilitate efficient and fair election procedures on the local level." *Id.* at 1054.

15. 2 PROCEEDINGS, *supra* note 1, at 1056.

16. There is some confusion over whether the convention intended to create a *nonpartisan* or *bipartisan* board. The pertinent language of the proposal on first reading states simply that "no political party shall have a majority of members of the Board." 2 PROCEEDINGS, *supra* note 1, at 1055. However, as selected passages of the constitutional convention debates illustrate, the delegates used the two concepts almost interchangeably. Compare 2 PROCEEDINGS, *supra* note 1, at 1056 (remarks of Delegate Keegan):

Illinois needs, and must be ready with a responsible, visible, *bipartisan* group of citizens . . . .

. . . . We need a central election authority, bent to *no particular partisan* point of view . . . .

. . . . I strongly feel that no single Illinois official . . . can possibly serve in a *nonpartisan* posture in this highly partisan state, and God bless that characteristic. Only a multiple board can offer a *political balance* . . . .

. . . . I urge my fellow delegates to join Chairman Tomei in his expression of the need for a central election authority, but to substitute for his suggestion of an individual authority, a *balanced*, highly visible, *bipartisan*, and responsible board of elections . . . .

*Id.* (emphasis added) with 2 PROCEEDINGS, *supra* note 1, at 1057 (remarks of Delegate Cicero):

[T]here is some merit—more merit—in having regulations and so on promulgated by a state board. It lends greater prestige to them and, to a certain extent, *removes the charges of partisanship* or unfairness.

. . . . *Neutrality* in the administration of elections is particularly important.

. . . . Yet too often, at the top of such system [sic], we have vested general authority for administration in a single official who is a member of a particular—of one or the other particular parties.

*Id.* (emphasis added).

In *Lunding v. Walker*, 65 Ill. 2d 516, 526-27, 359 N.E.2d 96, 100-01 (1976), the Illinois Supreme Court concluded that in implementing the constitutional mandate establishing the State Board of Elections, the General Assembly sought to *negate partisanship* in order to guarantee the Board's political independence. Likewise, commentators have characterized the convention's proposal as providing for a *nonpartisan* Board. See, e.g., GRATCH & URBK, *supra* note 4, at 83.

In the final analysis, it is safe to say that the delegates wanted a "neutral" Board—one free from domination by any one political party. They attempted to accomplish this objective by prohibiting any political party from having a majority on the Board. The delegates did contemplate that the Board would be *bipartisan*, in the sense that the state's two major political parties would be equally represented, but neither this intention nor the language adopted would preclude the appointment of members not affiliated with the two major parties. Indeed, Delegate Elward suggested this possibility in his argument in opposition to the Board on second reading. 4 PROCEEDINGS, *supra* note 1, at 3632.

State Board of Elections responsible for general supervision of the administration of all registration and election laws throughout the state. Recognizing the constitutional merit and political appeal of a neutral election board, rather than a single, partisan election officer, Chairman Tomei withdrew his proposal and supported the Keegan proposal.<sup>17</sup>

The convention approved the Keegan proposal on first reading by a vote of 71 to 30.<sup>18</sup> However, some delegates thought that the proposal should be considered by the legislature rather than the constitutional convention.<sup>19</sup> Others voiced the concerns of county clerks who feared that a central authority would infringe upon the powers of their offices and "create a very large patronage office, which could send their particular delegates into the particular little counties and tell them how to operate elections."<sup>20</sup> All of the delegates affiliated with the Chicago Regular Democratic Organization voted against the proposal,<sup>21</sup> apparently because they were apprehensive that a central election authority would dilute the powers of the Chicago Board of Election Commissioners and the Cook County Clerk.<sup>22</sup>

Three months later, when the convention considered the Keegan proposal on second reading, opponents of the new Board had rallied their forces and attempted to delete the entire provision from the constitution.<sup>23</sup> Delegate Arthur Lennon, a Republican from Joliet, questioned the compatibility of such a board with the concept of home rule, which had been recently adopted by the convention for large cities and for Cook County.<sup>24</sup> Dele-

17. 2 PROCEEDINGS, *supra* note 1, at 1055-56.

18. *Id.* at 1063. Two members voted "present" and one member voted "pass."

19. *Id.* at 1059 (remarks of Delegate Lennon).

20. *Id.* (remarks of Delegate Jaskula).

21. *Id.* at 1063.

22. See GRATCH & UBIK, *supra* note 4, at 84. For a discussion of the convention's political factions see S. GOVE & T. KITSOS, REVISION SUCCESS: THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 43-47 (1974); Anderson & Lousin, *From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution*, 9 J. MAR. J. 698, 703-04, 709 (1976).

There were five broad political factions at the convention:

- 1) the Cook County Democrats, often called the "regulars" or "Daley Democrats" because they were loyal members of the Cook County Regular Democratic organization chaired by Mayor Daley;
  - 2) the Independents, mostly non-Daley-organization Democrats from Cook County;
  - 3) the Cook County Republicans, a looser coalition whose base was suburban;
  - 4) the Downstate Democrats, a widely-scattered group of members who were in the minority in most areas downstate; and
  - 5) the Downstate Republicans, an equally diverse association of members whose party was in the majority downstate.
- Id.* at 709 (footnote omitted).

23. See GRATCH & UBIK, *supra* note 4, at 86.

24. 4 PROCEEDINGS, *supra* note 1, at 3632.

gate Paul F. Elward, a principal spokesman for the Chicago Democrats, criticized the broad, somewhat vague enabling language of the section, raising the specter of someone from other than the two major political parties having a major voice on election law matters.<sup>25</sup> Proponents of the proposal emphasized the neutral character of the Board and the benefits to be gained from establishing machinery that would insure fairness to all political parties and segments of the electorate and would provide for consistency of practices throughout the state.<sup>26</sup> A coalition composed primarily of Independents and Republicans joined to carry the proposal.<sup>27</sup>

### C. Constitutional Intent

The constitutional convention debates over the establishment of the Board leave the impression that the delegates, including the Board's proponents, had only a general idea of what they were creating. Notwithstanding this uncertainty, they had high hopes that it would be an improvement over what existed.<sup>28</sup>

Delegate Elward warned the convention that the provision was dangerously vague. He pointed out that it did little more than give the Board a name and the power to exercise "general supervision over the administration" of the state's election laws.

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25. *Id.* at 3629.

26. *See, e.g.*, 2 PROCEEDINGS, *supra* note 1, at 1057 (remarks of Delegate Cicero), 1059 (remarks of Delegate Butler), 1061 (remarks of Delegate Wenum).

Delegates who were of the minority party in their respective areas supported the proposed board early, because they had personally experienced difficulties in obtaining election information and assistance. Delegate Keegan remarked: "I think almost anyone who has been a candidate—unless his party takes the complete responsibility for him—at least the first time entering the political thicket, stands in need of guidance; and we have an uneven source of guidance and an uneven source of information . . . throughout this state." 2 PROCEEDINGS, *supra* note 1, at 1060-61. *See also* Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969), discussed in note 60 *infra*.

27. 4 PROCEEDINGS, *supra* note 1, at 3633. The final vote was 60 to 47. On third reading, on August 28, 1970, the vote on article III was 78-33 in favor of passage with 2 members voting "pass." 5 PROCEEDINGS, *supra* note 1, at 4302.

28. The Illinois Supreme Court subsequently commented in *Walker v. State Bd. of Elections*, 65 Ill. 2d 543, 559, 359 N.E.2d 113, 121 (1976) that:

The focus of the floor debates at the 1970 Constitutional Convention, insofar as they pertain to article III, section 5, concerned the need for a central election authority and the relative merits of including reference to such an authority in the Constitution. Little thought appears to have been given to the particular manner in which Board members might be chosen. The report of the Committee on Suffrage and Constitution Amending sheds no light, as the committee voted not to recommend inclusion of a provision for a State Board of Elections in the Constitution. Finally, in commenting upon article III, section 5, the authors of the explanation to the voters merely stated: "This section is new and self-explanatory."

*Id.* (citations omitted).



It neither established the size of the Board nor delineated its duties.<sup>29</sup>

A subsequent dialogue between Delegates Malcolm S. Kamin and Betty Ann Keegan evidences essentially the same point:

MR. KAMIN: As I understand your answer, you have said that there is no real vesting of sovereign power in the state electoral board initially; but similar to the state board of education, we are creating a board with general responsibility in the field, and it's more or less left to the legislature to fill in the void and give them exactly their powers and duties and then, secondly, up to them to exercise their powers and duties. Is that correct?

MRS. KEEGAN: I think that the substance of it is correct, yes.<sup>30</sup>

In short, the convention delegates had aspirations for the creation of a statewide agency to "reform" the election process in Illinois. They left to the General Assembly such matters as how such an agency would be set up, how it would operate, and what powers and duties it would have. The vague constitutional mandate for the Board has sparked heated debates in the legislature over the selection of its members, its duties, and its "independence."<sup>31</sup> It has also generated two Illinois Supreme Court decisions on those issues,<sup>32</sup> as well as intense newspaper commentary and public controversy over the Board's operations.<sup>33</sup>

The problems associated with the Board in its first years of operation may be due as much to the politically sensitive nature of the subject matter as to faulty or vague constitutional language. By their very nature, constitutional guidelines must be general. The convention delegates were often inclined to vote for broad principles of reform, the details of which they themselves could not agree upon, rather than for more specific proposals which some segment of the convention might have found

29. See 4 PROCEEDINGS, *supra* note 1, at 3630 (remarks of Delegate Elward):

I think we are kidding ourselves. We are setting up a board here. We are not providing its number, size, duties or anything else, really. We are just saying it shall have general supervision over the administration of the registration and election laws. And we haven't really issued any ukase or demand as to requirements of these election laws that they be the same for everybody.

*Id.*

30. 4 PROCEEDINGS, *supra* note 1, at 4300.

31. For a discussion of the legislature's struggle over the statutory framework of the board see text accompanying notes 42-53 *infra*.

32. See *Walker v. State Bd. of Elections*, 65 Ill. 2d 543, 359 N.E.2d 113 (1976); *Lunding v. Walker*, 65 Ill. 2d 516, 359 N.E.2d 96 (1976). For a discussion of these cases see notes 124-236 and accompanying text *infra*.

33. See, e.g., *Springfield State Journal-Register*, Feb. 22, 1976, at 1, col. 1; *Chicago Tribune*, July 18, 1975, at 6, col. 2; *Chicago Sun-Times*, Oct. 1, 1974, at 4, col. 3.

unacceptable.<sup>34</sup> Often the convention deliberately left the details to the legislature and the courts.<sup>35</sup> In the case of the State Board of Elections, the language compelling the General Assembly to enact this "reform legislation," albeit with somewhat vague guidelines, was probably the best that could have been achieved, and, indeed, a significant achievement in itself.<sup>36</sup>

Although it has been suggested that it is often impossible to discern the true intent of the delegates,<sup>37</sup> it is possible to surmise the intent of the convention regarding several key aspects of the State Board of Elections. First, the convention intended the Board to have more than the routine ministerial functions held by the old State Electoral Board.<sup>38</sup> Second, the convention did not want any one political party to control the Board.<sup>39</sup> Third, it wanted the Board to insure, or at least promote, consistency, fairness, and uniformity in the implementation of registration and election laws and practices throughout the state.<sup>40</sup> Fourth, the delegates intended the Board to be a part of the executive branch of government.<sup>41</sup>

### III. LEGISLATIVE IMPLEMENTATION OF THE FIRST STATE BOARD OF ELECTIONS

Article III, section 5 and most of the new constitution took effect on July 1, 1971.<sup>42</sup> For the next two years, as the General Assembly attempted to implement the constitutionally created Board, the arguments raised in the convention debates were repeated and elaborated upon in both the legislature and the media. The principal issues discussed involved the composition and powers of the Board. Should the Board consist of four members,

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34. See generally Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. 189 (1974-75) [hereinafter cited as Lousin].

35. *Id.*

36. See GRATCH & UBIK, *supra* note 4, at 76: "[h]istorically, election reform of the kind contemplated by the [Suffrage and Amending] committee's mandate has not sprung voluntarily from the General Assembly."

37. Lousin, *supra* note 34, at 191.

38. See, e.g., 2 PROCEEDINGS, *supra* note 1, at 1057 (remarks of Delegate Cicero), 1061 (remarks of Delegate Wenum); 5 PROCEEDINGS, *supra* note 1, at 4300 (remarks of Delegate Keegan).

39. See note 16 *supra*. The same concern has developed at the federal level. The Federal Election Commission has become the subject of controversy as a result of President Carter's efforts to appoint an acceptable replacement to fill a Republican vacancy on the Commission. See *The New York Times*, Dec. 13, 1977, at 39, col. 1; *id.*, April 22, 1978, at 7, col. 1.

40. See, e.g., 2 PROCEEDINGS, *supra* note 1, at 1057 (remarks of Delegate Cicero), 1058 (remarks of Delegate Butler), 1061 (remarks of Delegate Wenum); GRATCH & UBIK, *supra* note 4, at 83.

41. See 5 PROCEEDINGS, *supra* note 1, at 4300 (remarks of Delegate Keegan and Delegate Kamin).

42. See ILL. CONST. adoption schedule.

two from each major political party, or should it consist of five persons, the fifth being an "independent"? If five, how would the legislature choose or define an "independent"? If four, how would party-line deadlocks be broken? Should the Board have broad investigatory powers to seek out violations of election laws, or should it be merely a ministerial, advisory, record-keeping agency? Should Board members be appointed by the Governor, by the legislature, or by other means? Should they be elected instead of appointed?

Of course, the other two boards created by the constitution, the State Board of Education<sup>43</sup> and the Judicial Inquiry Board,<sup>44</sup> were also controversial and difficult to implement. However, the subject matter of the State Board of Elections went to the very heart of the political process—the winning of elections.<sup>45</sup> No State Board of Elections bill could be anything but controversial.

One of the major problems confronting the legislature was the constitutional prohibition against any political party having a majority on the board. The prohibition gave rise to the concern that if there were an even number of Republicans and Democrats on the Board, it would frequently be deadlocked, since Board members would probably vote along party lines on highly political issues.<sup>46</sup> On the other hand, if the Board had an odd number of members, the concern was that the extra member would be a non-party person who would rule as an "election czar" by casting

43. ILL. CONST. art. X, § 2.

44. ILL. CONST. art. VI, § 15.

45. Lousin, *The General Assembly and the 1970 Constitution*, 1 ILL. ISSUES 131, 133 (1975): "[c]ompared with the battle over the Board of Elections, the creation of the Board of Education was the result of civilized and reasonable compromise. But since winning elections is the primary concern of politicians and political parties, the creation of a State Board of Elections was more controversial."

46. This concern proved to be well-founded. See notes 97, 105 & 211 and accompanying text *infra*. The selection process finally enacted produced just such a Board. Legislative leaders were immediately criticized for nominating persons with partisan political backgrounds. See Manning, *State Board of Elections*, 3 ILL. ISSUES 12 (1977). Of the eight nominees, the Governor picked Don W. Adams (Springfield), Chairman of the Republican State Central Committee; William L. Harris (Marion), Chairman of the Williamson County Democratic Central Committee; Michael E. Lavelle (Chicago), assistant to Cook County Clerks Edward Barrett and Stanley T. Kusper, Jr.; and Franklin J. Lunding, Jr. (Winnetka), active in the Republican "Operation Eagle Eye."

Illinois is not the only state whose elections board has found itself deadlocked on highly political issues. The New York State Board of Elections, comprised of two Republicans and two Democrats, has been criticized for failing to act on campaign violations. That agency has occasionally found itself unable to act due to a provision in its enabling act that requires the vote of at least three members to pursue campaign financing irregularities. See *The New York Times*, May 20, 1975.

the deciding vote on all highly partisan issues. Generally speaking, House Republicans and independent Democrats (as well as then Governor Ogilvie) favored the concept of an odd-numbered Board appointed by the Governor and consisting of two Republicans, two Democrats, and an Independent. However, Regular Democrats from both Chicago and Downstate joined the Senate Republican leadership to oppose the inclusion of the fifth member. After much wrangling, the legislature arrived at a unique solution: the Board would consist of four members who would, in effect, be chosen from the two major parties; in the event of deadlocks, one member, chosen by lot, would abstain from voting.<sup>47</sup>

The second, and closely connected, major issue faced by the legislature was that of selection and control. Neither major party wanted the other to be able to obtain control of the state's election machinery or to harass or embarrass the other party with investigations.<sup>48</sup> When independent Democrat Daniel Walker was elected Governor in 1972, neither Republican nor Democrat legislators wished to give him total control over selecting the Board. The result was another unique formula designed to check both the Governor and the opposition parties. Each of the four legislative leaders, the Speaker and Minority Leader in the House and the President and Minority Leader in the Senate, would nominate two people, and the Governor would appoint one member from each pair of nominees.<sup>49</sup> The statute, section 1A-3 of the Illinois Election Code, further provided that all nominees "shall be persons who have extensive knowledge of the election laws of this state."<sup>50</sup>

The General Assembly adopted this compromise, Senate Bill 1198,<sup>51</sup> during the closing days of its spring, 1973 session and sent it to the Governor for signature. Governor Walker vetoed the bill,<sup>52</sup> but the veto was overridden by the legislature on October

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47. ILL. REV. STAT. ch. 46, §§ 1A-3, 1A-7.1 (1973).

48. See text accompanying note 87 *infra*.

49. ILL. REV. STAT. ch. 46, § 1A-3 (1973).

50. *Id.*

51. 2 FINAL LEGISLATIVE SYNOPSIS AND DIG., 571-72 (1973).

52. Governor Walker's veto letter, filed Sept. 16, 1973, said that a fifth member of the board—a political "independent—should be appointed. He also questioned the constitutionality of the tie-breaking procedure and the restrictions on the Governor's power to appoint executive officers, stating that the Governor should not be limited to a restricted list of individuals. He argued further:

Since the Board would have an even number of persons from each party—persons certain to be highly partisan—deadlocks could be expected if there were strong efforts to change local practices considered to be unfair or discriminatory. Under the bill the most likely result would be political compromise preserving the status quo.

*Id.*

22, 1973.<sup>53</sup> It soon became apparent, however, that the mere constitutional and statutory prescriptions of a statewide agency to monitor the election process would not eliminate the underlying controversy.

#### IV. JUDICIAL REVIEW OF THE BOARD'S PERFORMANCE

Pursuant to the broad constitutional mandate creating the State Board of Elections, the General Assembly, in addition to providing the manner of selection of Board members and the Board's tie-breaking procedure, enacted legislation granting the Board considerable authority. Section 1A-8 of the Illinois Election Code<sup>54</sup> directs the Board to assume duties of both a ministerial<sup>55</sup> and a supervisory<sup>56</sup> nature, which encompass the entire election process. In addition, the Campaign Financial Disclosure Act confers upon the Board broad investigatory powers in the area of campaign finance.<sup>57</sup>

On December 7, 1973, the State Board of Elections held its first meeting. From the outset, the Board was faced with policy

53. 2 FINAL LEGISLATIVE SYNOPSIS AND DIG., 571-72 (1973).

54. ILL. REV. STAT. ch. 46, § 1A-8 (1973).

55. The Board's ministerial duties under ILL. REV. STAT. ch. 46, § 1A-8 (1973) included: all responsibilities previously assumed by the State Electoral Board and the Secretary of State, *id.* at § 1A-8(1); the dissemination of election information, *id.* at § 1A-8(2); the compilation of a manual of uniform instructions for election authorities (to be prepared after consultation with local authorities and with special provisions adapted to the peculiar needs of the different jurisdictions), *id.* at § 1A-8(3); the prescription of uniform forms, notices, and election supplies (this function would presumably prevent the type of abuses exemplified in *Flamm v. Kusper*, 384 F. Supp. 1364 (N.D. Ill. 1974) *vacated and remanded without op.*, 525 F.2d 695 (7th Cir. 1975), in which a county clerk who was a candidate for reelection was enjoined from displaying his name on various forms and official election day signs and posters posted at precinct polling places on the day of a general election), *id.* at 1A-8(4); the compilation of election records and statistics, *id.* at 1A-8(6); and the preparation and certification of ballots for proposed referendums and amendments to the constitution, *id.* at 1A-8(5).

56. The Board's supervisory responsibilities under ILL. REV. STAT. ch. 46, § 1A-8 (1973) included: the review and inspection of all records of the administration of election laws throughout the state, *id.* at § 1A-8(7); the reporting of violations of the election laws to the State's Attorney, *id.*; the adoption of all rules and regulations necessary for the performance of its duties, *id.* at § 1A-8(9); the recommendation of appropriate legislation to the General Assembly, *id.* at § 1A-8(8); and the determination of the validity and sufficiency of petitions filed under article XIV, § 3 of the 1970 Constitution, *id.* at § 1A-8(10).

While many states and the federal government have enacted legislation regulating campaign disclosure, expenditure, and practices, and have established separate administrative agencies to implement such legislation, relatively few agencies have supervisory powers over the actual conduct of the elections as in Illinois. See generally FEDERAL ELECTION COMMISSION, HANDBOOK OF STATE ELECTION AGENCIES AND OFFICIALS (R. Smolka ed. 1976); *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1242, 1272-73 (1975) [hereinafter cited as *Elections*].

57. ILL. REV. STAT. ch. 46, § 9-18 (1975) confers upon the Board the authority to hold investigations, administer oaths, and issue subpoenas with respect to alleged violations of the Act.

choices which had potentially great political impact. As a result, many of the Board's decisions have been tested in the courts.<sup>58</sup> The role of the judiciary in defining the actual parameters of the Board's authority was both inevitable and indispensable.

#### A. Ballot Access

Crucial to the fair and impartial administration of election procedures is the means by which access to and positioning of candidates' names on election ballots is provided. The positioning of candidates' names on the Illinois ballot has generated numerous courtroom battles.<sup>59</sup> Historically, the Illinois Secretary of State had great influence on ballot positioning.<sup>60</sup> However, recognition that a first ballot position may give a candidate a significant advantage over candidates whose names are listed below<sup>61</sup> has caused state law in this area to be subjected to federal equal protection guidelines.<sup>62</sup>

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58. In the federal courts, jurisdiction over election-related disputes is generally premised upon 28 U.S.C. §§ 1343(3), (4) (1970). In Illinois, election disputes may be brought in the state circuit courts in the form of a petition for injunctive or declaratory relief or a writ of mandamus. The Illinois Supreme Court may entertain petitions for an original writ of mandamus under ILL. REV. STAT. ch. 37, § 8-13 (1975). Certain actions of the board under the Campaign Financial Disclosure Act, ILL. REV. STAT. ch. 46, §§ 9-1 to 9-27 (1975), are subject to review by the appellate courts pursuant to the Administrative Review Act, ILL. REV. STAT. ch. 110, § 246 (1975). See generally ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, ATTORNEY'S GUIDE TO ILLINOIS ELECTION LAW, ch. 3 (1976).

59. See, e.g., *Baum v. Lunding*, 535 F.2d 1016 (7th Cir. 1976); *Bohus v. Bd. of Election Comm'rs*, 447 F.2d 821 (7th Cir. 1971); *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969); *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972); *Mann v. Powell*, 314 F. Supp. 677 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970); *Bradley v. Lunding*, 63 Ill. 2d 91, 344 N.E.2d 472 (1976); *Huff v. State Bd. of Elections*, 52 Ill. 2d 74, 309 N.E.2d 585 (1974).

60. See, e.g., *Weisberg v. Powell*, 417 F.2d 388, 390-91 (7th Cir. 1969); *Mann v. Powell*, 314 F. Supp. 677, 678-79 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970). In *Weisberg*, Illinois Secretary of State Paul Powell testified that he had given personal preference to persons whom he knew in breaking ties for first filing among candidates for the position of delegate to the state constitutional convention. Powell further testified that his office had arranged to receive certain candidates' petitions by special mail delivery on the Sunday preceding the first filing date. 417 F.2d at 391 n.4. The Secretary's actions were held to violate equal protection of the laws, and the court of appeals enjoined certification of the ballot until ties for first filing could be broken by lot and the names of the candidates listed accordingly. 417 F.2d at 394. In *Mann*, the court held that breaking ties for first filing among candidates for the position of delegate by any means other than by lot or other nondiscriminatory means violated equal protection of the laws. 314 F. Supp. at 679.

61. See Note, *California Ballot Position Statutes: On Constitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365, 376 (1972). See generally H. BAIN & D. HECOCK, *BALLOT POSITION AND THE VOTER'S CHOICE* (1957). See also *Sangmeister v. Woodard*, Nos. 77-1365, 77-1366, 76-1953 (N.D. Ill., filed Nov. 7, 1977).

62. See, e.g., *Weisberg v. Powell*, 417 F.2d at 393-94; *Mann v. Powell*, 314 F. Supp. at 679; *Sangmeister v. Woodard*, Nos. 77-1365, 77-1366, 76-1953 (N.D. Ill., filed Nov. 7, 1977).

During its first meeting, the State Board of Elections adopted, pursuant to section 7-12 of the Illinois Election Code,<sup>63</sup> a regulation which provided the ground rules for a lottery to determine ballot placement.<sup>64</sup> Ballot placement was to be based upon the order in which nominating petitions were filed, and a lottery was to be scheduled to break ties for first filing.<sup>65</sup> The lottery would include all petitions received by mail after midnight of the day preceding the first date of filing and on hand when the doors of the Secretary's office opened the following morning and, in addition, all petitions which had been filed in person or by a representative in line that morning when the Secretary's doors opened.<sup>66</sup>

In a similar factual setting, the Seventh Circuit Court of Appeals in *Weisberg v. Powell*<sup>67</sup> had determined that any intentional discrimination by election officials against candidates seeking ballot placement constituted a violation of the equal protection clause of the fourteenth amendment of the United States Constitution. Two federal district court decisions, *Mann v. Powell*<sup>68</sup> and *Netsch v. Lewis*,<sup>69</sup> had respectively enjoined the certification of a candidate's position on the ballot by any means other than by lottery or a similar non-discriminatory scheme and invalidated an Illinois statute which allowed ballot placement to be based upon a candidate's seniority and incumbency.

In *Huff v. State Board of Elections*,<sup>70</sup> the Illinois Supreme Court ultimately upheld the lottery scheme as defined by the Board's regulation. The court found that the scheme was a fair and impartial means of determining ballot placement, because it afforded no advantage to those candidates who filed their petitions by mail rather than in person. The court also held that

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63. ILL. REV. STAT. ch. 46, § 7-12(6) (1975), provides that: [t]he State Board of Elections and the various clerks with whom such petitions for nominations are filed shall specify the place where filings shall be made and upon receipt shall endorse thereon the day and hour on which each petition was filed. Petitions filed by mail and received after midnight and on hand upon the opening of the office involved, shall be deemed as filed as of 8:00 a.m. of that day or as of the normal opening hour of such day, as the case may be, and all petitions received thereafter shall be deemed as filed in the order of actual receipt. Where 2 or more petitions are received simultaneously, the State Board of Elections or the various clerks with whom such petitions are filed shall break ties and determine the order of filing, and such determination shall be conclusive.

64. See *Huff v. State Bd. of Elections*, 57 Ill. 2d 74, 77-78, 309 N.E.2d 585, 587 (1974).

65. *Id.* at 78, 309 N.E.2d at 587.

66. *Id.*

67. 417 F.2d 388, 393-94 (7th Cir. 1969). See note 60 *supra*.

68. 314 F. Supp. 677 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970). See note 60 *supra*.

69. 344 F. Supp. 1280 (N.D. Ill. 1972).

70. 57 Ill. 2d at 78-79, 309 N.E.2d at 587.

the regulation was a valid interpretation of the legislative intent underlying section 7-12 of the Election Code.<sup>71</sup>

In 1975, the Board again became involved in a dispute concerning a Board regulation related to the lottery to break ties for first filing. The regulation in question provided that group nominating petitions could be filed and could compete against individual petitions in the lottery.<sup>72</sup> The effect of a group petition being drawn first in the lottery was to place the names of those candidates who were members of the group first and the names of the individual candidates below according to the order the lots were drawn.<sup>73</sup>

The Illinois Supreme Court, in *Bradley v. Lunding*,<sup>74</sup> held that individual candidates were not purposefully discriminated against since the scheme could increase the odds that an individual would be drawn first, depending on the number of group and individual petitions filed. The court reasoned that since the regulation was necessarily drawn in advance of filing, and before the number of group and individual petitions that would be filed simultaneously could possibly be determined, any unfair result could not be due to intentional and purposeful discrimination.<sup>75</sup> The argument that a group position on the ballot could make the group's endorsers readily identifiable did not raise an equal protection problem in light of the overriding interest of the voter in readily identifying the candidates for whom he wishes to vote.<sup>76</sup> The *Bradley* decision was followed by the Seventh Circuit Court of Appeals in *Baum v. Lunding*.<sup>77</sup>

Equal protection guidelines have also been applied to the procedure for qualifying for a position on the ballot. In every state, minor parties and independent candidates face greater hardships in obtaining ballot placement than major parties and incumbents.<sup>78</sup> Although some legitimate state interest may be present in restricting ballot access to those candidates who are able to demonstrate a certain level of popular support,<sup>79</sup> the means by which a state effects this goal have been subject to constitutional limitations.<sup>80</sup>

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71. *Id.*

72. *Bradley v. Lunding*, 63 Ill. 2d 91, 94, 309 N.E.2d 474 (1975).

73. *See Baum v. Lunding*, 535 F.2d 1016, 1018 (7th Cir. 1976).

74. 63 Ill. 2d at 97-98, 309 N.E.2d at 476.

75. *Id.*

76. *Id.* at 98, 309 N.E.2d at 476.

77. 535 F.2d 1016, 1019-20 (7th Cir. 1976).

78. *See Elections*, *supra* note 56, at 1123.

79. *Id.* at 1141.

80. *See, e.g., American Party v. White*, 415 U.S. 767 (1974); *Stover v. Brown*, 415 U.S. 724 (1974). *See generally Elections*, *supra* note 56, at 1130-51.



In 1974, the District Court for the Northern District of Illinois invalidated a ruling by the State Board of Elections which had rejected nominating petitions submitted by the Communist Party.<sup>81</sup> The Board had applied a statutory requirement that any political party seeking statewide ballot placement must submit petitions containing not less than 25,000 signatures of qualified voters with not more than 13,000 signatures from any one county.<sup>82</sup> Yet, that very statutory requirement had been declared unconstitutional two years earlier in *Communist Party v. Ogilvie*,<sup>83</sup> which in turn had followed the United States Supreme Court's decision in *Moore v. Ogilvie*.<sup>84</sup>

The Board argued on appeal that the statutory requirement was necessary to fulfill the legitimate state objective that "multifarious political associations with little or no support do not blemish the electoral process."<sup>85</sup> However, the Seventh Circuit Court of Appeals held that the provision violated the equal protection clause of the fourteenth amendment, because it discriminated against residents of populous counties in favor of residents of sparsely populated counties, upsetting the one man-one vote basis of our representative government.<sup>86</sup>

The burden placed upon the Communist Party by the application of this unconstitutional statute evidences the potential for harassment by an agency such as the State Board of Elections, even though convention delegates sought to avoid the potential for harassment by the creation of a *neutral* Board.<sup>87</sup> Although a minor party may rely on the courts to safeguard its constitutional rights, the inference may be drawn that a purely *bipartisan* Board is more likely to safeguard only the rights of the two major parties represented on the Board.

In *Williams v. Butler*,<sup>88</sup> a state appellate court upheld a pro-

81. See *Communist Party v. State Bd. of Elections*, 518 F.2d 517, 518-19 (7th Cir. 1975), *cert. denied*, 423 U.S. 986 (1976).

82. ILL. REV. STAT. ch. 46, § 10-2 (1973).

83. 357 F. Supp. 105 (N.D. Ill. 1972).

84. 394 U.S. 814 (1969). *Moore* invalidated ILL. REV. STAT. ch. 46, § 10-3 (1967), which required that candidates submit nominating petitions containing at least 25,000 signatures of qualified electors, 200 of which were required to come from each of at least 50 counties. For a discussion of minimum signature requirements for independent candidates and new political parties in the context of citywide elections, see *Socialist Workers Party v. Chicago Bd. of Election Comm'rs*, 433 F. Supp. 11 (N.D. Ill.), *aff'd sub nom. Socialist Workers Party v. Illinois State Bd. of Elections*, 566 F.2d 586 (7th Cir. 1977), *appeal docketed*, No. 77-1248 (U.S. Mar. 9, 1978).

85. 518 F.2d at 519.

86. *Id.* at 520. The discriminatory effect lies in the dilution of voting strength in the populous counties.

87. See notes 16 & 39 and accompanying text *supra*.

88. 35 Ill. App. 3d 532, 341 N.E.2d 394 (1976). Douglas L. Butler, a private citizen, challenged Dakin William's petitions before the State Board of Elections pursuant to ILL. REV. STAT. ch. 46, § 10-9 (1975), which authorized the Board to hear and pass on objections to the nomination

vision of section 10-4 of the Election Code which requires that circulators of nominating petitions submit a notarized statement to the effect that they personally circulated the petitions and that the signatures on the petition were signed in their presence and are genuine. This provision was held to be a valid requirement relating to the preservation of the integrity of the election process and not a mere technicality.<sup>89</sup> However, a Board ruling that the misnumbering of the pages of a nominating petition constituted a valid ground for refusing to certify a candidate's name for the ballot was overruled.<sup>90</sup> Such a technical requirement in no way relates to the integrity of the election process.

The scope of the Board's authority to determine the validity and sufficiency of petitions to place constitutional amendments on the ballot, under section 1A-8(10) of the Election Code, came into question in *Coalition for Political Honesty v. State Board of Elections*.<sup>91</sup> A controversy ensued when the Board sua sponte undertook the determination of the validity and sufficiency of petitions to place a proposed constitutional amendment on the ballot.<sup>92</sup> Since no objection to the petitions had been filed, proponents of the amendment contended that the Board's action violated their federal constitutional rights.<sup>93</sup> Subsequently, this issue became moot when the Illinois Supreme Court struck down the petitions on the ground that the substance of the proposed amendments went beyond the scope of article XIV, section 3 of the 1970 Illinois Constitution, which permits initiative amendments to the legislative article only if they are "limited to the structural and procedural subjects."<sup>94</sup> The court also stated that "the determination of whether a proposed amendment meets the Constitution's requirements is a question for the courts, not for an agency."<sup>95</sup> Thus, the Board's power under section 1A-8(10) is apparently limited to determinations going to the form rather than the substance of such petitions.

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of candidates for state office. The Board had stricken Williams' name from the ballot because his petitions were out of numerical sequence due to the omission of a page 191 out of 323 pages, because certain petitions had been improperly notarized, and because certain signatures had been challenged as forgeries. 35 Ill. App. 3d at 534-35, 341 N.E.2d at 396.

89. *Id.* at 536, 341 N.E.2d at 397-98.

90. *Id.* at 535, 341 N.E.2d at 397.

91. 65 Ill. 2d 453, 359 N.E.2d 138 (1976).

92. Although ILL. REV. STAT. ch. 46, § 28-1.2 (1975), requires that the Board shall hear and pass on objections to petitions for submission of questions of public policy to the electorate just as under ILL. REV. STAT. ch. 46, §§ 10-8 to 10-10.1, which apply to nominating petitions, no objection was timely filed in this instance.

93. Complaint, *Coalition for Political Honesty v. State Bd. of Elections*, No. 76-0096 (S.D. Ill., filed Aug. 4, 1976).

94. 65 Ill. 2d at 472, 359 N.E.2d at 147. This action was filed subsequent to the federal court action, note 93 *supra*, by a group of concerned citizens seeking to prevent the board from spending tax dollars to investigate the petitions. The Coalition intervened as a defendant.

95. *Id.* at 463, 359 N.E.2d at 143.

### B. *The Conduct of Elections*

The first significant dispute over the conduct of elections which involved the Board stemmed from its decision to structure elections to fill judicial vacancies on a "head-to-head" basis rather than on a "field" basis. A field contest pits all candidates for all judicial vacancies against each other in one contest with those candidates receiving the greatest number of votes being declared elected. However, a head-to-head contest pits against each other only those candidates who are seeking to fill a specific vacancy and requires a separate contest for each vacancy to be filled.<sup>96</sup>

The issue of how to structure the judicial election was decided by lottery because Republican and Democratic Board members split along party lines.<sup>97</sup> The Board's ruling was subsequently challenged by a candidate in *Johnson v. State Board of Elections*,<sup>98</sup> in which the Illinois Supreme Court ultimately upheld the Board's decision. The court's decision was based upon the lack of any definitive action on the matter by the legislature<sup>99</sup> and the fact that 90 percent of all nominating petitions had been filed prior to the Board's first meeting, on the basis of instructions issued by the Secretary of State which had indicated that the contests would be held on a head-to-head basis.<sup>100</sup>

Another Board regulation was challenged in *Zavala v. Lund-ing*,<sup>101</sup> in which the Circuit Court of Sangamon County invalidated a Board regulation concerning section 7-34 of the Election Code, which provides that candidates may appoint poll-watchers for each precinct.<sup>102</sup> Section 7-34 states that pollwatchers may serve in any precinct or ward in the county in which they reside. The pollwatcher is not required to live in the township or municipality in which he is a pollwatcher unless a candidate has two watchers, and then only one of the watchers must reside in the precinct or ward. The Board's regulation required, in effect, that both pollwatchers be registered in the town or municipality where they wish to be pollwatchers. One effect of such

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96. See *Johnson v. State Bd. of Elections*, 57 Ill. 2d 205, 206, 311 N.E. 2d 123 (1974).

97. The Board's Democratic members supported the *head-to-head* method while the Republican members pushed for the *field* method. A Republican member drew the short straw, and the issue was decided in the Democrats' favor.

98. 57 Ill. 2d 205, 311 N.E.2d 123 (1974).

99. *Id.* at 213, 311 N.E.2d at 126. Under ILL. CONST. art. VI, § 12, the Illinois General Assembly is to provide by law the requirements for nominating petitions in elections to fill judicial vacancies.

100. 57 Ill. 2d at 213, 311 N.E.2d at 127.

101. No. 138-77 (7th Cir. Ill., filed March 24, 1977).

102. ILL. REV. STAT. ch. 46, § 7-34 (1973).

a regulation would be to prevent suburban residents from serving as pollwatchers in Chicago. The court held that although the Board has rule-making authority, it has no authority to issue rules and regulations which are contrary to the election statutes.

### C. Campaign Finance and Economic Interests

The Board has been involved in several controversies over its performance in relation to the Governmental Ethics Act<sup>103</sup> and the Campaign Financial Disclosure Act.<sup>104</sup> The major issues encountered have been in determining who must file disclosure statements under the respective acts and in how the board should conduct hearings on alleged non-compliance with statutory requirements.

On September 27, 1974, the Board narrowly construed the reach of the Campaign Financial Disclosure Act when, after again resorting to a tie-breaking lottery, it adopted rules<sup>105</sup> narrowly defining what constitutes a "political committee" and is therefore subject to the disclosure requirements of the Act.<sup>106</sup> As interpreted by the Board, only those political committees which endorsed specific candidates by name were required to make financial disclosures.<sup>107</sup> This interpretation would allow most political committees to avoid disclosure requirements simply by collecting contributions before endorsing specific candidates.

The Board's action was subjected to judicial scrutiny in *People ex rel. Scott v. Lavelle*.<sup>108</sup> The circuit court invalidated the Board's rules after finding that they were in conflict with the very sections of the Election Code which they purported to implement.<sup>109</sup> The Board's argument that the criminal nature

103. ILL. REV. STAT. ch. 127, §§ 601-101 to 608-101 (1975).

104. ILL. REV. STAT. ch. 46, §§ 9-1 to 9-27 (1975).

105. The "provisional rules and regulations" referred to here are set forth in *People ex rel. Scott v. Lavelle*, No. 547-74 (7th Cir. Ill., filed Oct. 15, 1975). In adopting the rules, the Board was forced to resort to its tie-breaking lottery after again deadlocking along party lines, and a Republican member lost the drawing.

106. ILL. REV. STAT. ch. 46, §§ 9-1.7, 9-1.8, 9-1.9 (1975) define "local political committee", "state political committee", and "political committee" respectively. The disclosure requirements of the Act are set out in ILL. REV. STAT. ch. 46, §§ 9-3, 9-10 (1975).

107. See *People ex rel. Scott v. Lavelle*, No. 547-74, slip op. (7th Cir. Ill., filed Oct. 15, 1975).

108. *Id.*

109. See note 105 and accompanying text *supra*. The court reasoned that:

[t]he rule provides an exclusion that is not mentioned in the Statute and in effect completely abolishes campaign disclosure. Sections 9-1.7(a) and (b), 9-1.8(a) and (b) and 9-1.9 of the Act specifically mention the words candidate or candidates and questions of public policy but the addition of the word particular before candidate or candidates or question of public policy constitutes a Rule in direct conflict with the Act . . . . A declaration of the court finding the

of the Act required its narrow construction was met by the circuit court's assertion that any constitutional defect stemming from the overbreadth of the Act should be corrected by the legislature, not the Board.<sup>110</sup> The extent of the Board's authority to promulgate rules and regulations necessary for the implementation of the Campaign Financial Disclosure Act is, therefore, limited by the Act itself.<sup>111</sup>

A similar controversy over interpretation resulted from the Board's ruling that, under section 604A-105 of the Governmental Ethics Act,<sup>112</sup> certain nonincumbent candidates who had filed statements of economic interest along with their nominating petitions were required to file such statements again after winning nomination in the March, 1974 primary or be stricken from the November, 1974 general election ballot. This followed from an earlier Board determination that nominees for elective office held a "position" under the Act, which required that a new statement of economic interest be filed every April 30.<sup>113</sup> The Board's ruling could have had the effect of barring from the ballot the names of several hundred nonincumbent nominees for various state and local government offices.<sup>114</sup> In *People ex rel. Downs v. Adams*, the Illinois Supreme Court held that the April 30 filing date applied only to persons holding *positions of employment falling within the Act on that date*, that a nominee for an elective office did not hold such a position, and that candidates were required only to file their statements no later than the date by which a candidate must have taken all action necessary to qualify for nomination, election, or retention of such office.<sup>115</sup>

The Board's function under the Campaign Financial Disclosure Act was again the subject of litigation when its narrow interpretation of the Act made it practically impossible for a com-

rules valid would be tantamount to stating that the General Assembly in passing and the Governor in approving Public Act 78-1183 had no purpose nor logic.

*People ex rel. Scott v. Lavelle*, No. 547-74, slip op. at 3.

110. *People ex rel. Scott v. Lavelle*, No. 547-74, slip op. at 2.

111. *Id.* at 3.

112. ILL. REV. STAT. ch. 127, § 604A-105 (1975). The Board is required, under ILL. REV. STAT. ch. 46, § 7-12(8) (1975), to consider whether candidates who have filed nominating petitions have complied with the requirements of the Illinois Governmental Ethics Act.

113. ILL. REV. STAT. ch. 127, § 604A-105 (1975), provides in relevant part:

On April 30 of each year after 1972 a statement must be filed by each person whose *position* at that time subjects him to the filing requirements of Section 4A-101 unless he has already filed a statement in relation to the same unit of government in that calendar year.

*Id.* (emphasis added).

114. *People ex rel. Downs v. Adams*, 59 Ill. 2d 178, 179, 319 N.E.2d 465, 466 (1974).

115. *Id.* at 183, 319 N.E.2d at 468.

plainant to establish "justifiable grounds" for holding a public hearing on his complaint. Under the Act, the Board is to hold a closed preliminary hearing on all complaints. At the hearing, a complainant, without the aid of subpoena power, must demonstrate that the complaint was filed on "justifiable grounds"<sup>116</sup> and that a public hearing on the matter should be held. After such a showing has been made, subpoena power is authorized.<sup>117</sup> However, the definition of "justifiable grounds" appears neither in the Act nor in the Board's provisional rules and regulations.

In the fall of 1975, the Better Government Association (BGA)<sup>118</sup> brought a complaint before the Board alleging that two organizations of Cook County Democrats<sup>119</sup> had failed to file statutorily required statements.<sup>120</sup> In a closed preliminary hearing, the Board found that the BGA's evidence was insufficient to demonstrate "justifiable grounds," and a public hearing with use of subpoena powers was denied.<sup>121</sup> The BGA appealed from the Board's ruling and, relying on the legislative history of the Act, argued that "[a] showing of justifiable grounds for the filing of a complaint is the equivalent of a showing that there is some 'reasonable basis' for it; it is a standard designed to weed out scurrilous complaints."<sup>122</sup> Before the court could act, the Illinois Supreme Court handed down its decision in *Walker v. State*

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116. ILL. REV. STAT. ch. 46, § 9-21 (1975).

117. ILL. REV. STAT. ch. 46, § 9-18 (1975). The provisional rules and regulations of the State Board of Elections do not provide for any discovery prior to the granting of an order for a public hearing. See Provisional Rules and Regulations of the State Board of Elections, Rules 17.03-17.05 (1975).

118. The BGA is a not-for-profit, private citizens' organization with the avowed purpose of discovering, disclosing, and thereby inhibiting corruption and inefficiency in government. See Pensoneau, *Government Reform: BGA's Controversial Crusade*, 2 ILL. ISSUES 7 (1976). The BGA's co-complainant was William L. Hood, Jr.

119. The two organizations charged in the complaint were the Democratic Party of Chicago and Cook County and the Democratic Organization of Cook County, Inc.

120. The complaint alleged that the defendants had failed to file statements of organization required by ILL. REV. STAT. ch. 46, § 9-3 (1975) and annual reports of contributions and expenditures required by ILL. REV. STAT. ch. 46, § 9-10 (1975). See Memo. Op. of Hearing Examiner, No. C75-8-20-1 C.D. (order filed Sept. 5, 1975) [hereinafter cited Memo. Op.].

121. The Board explained that "[t]o loosely apply the statute to entities which do not meet all of the internal requirements for filing might unfairly subject innocent persons to criminal prosecution and place the Board in the untenable position of having initiated those criminal prosecutions." Memo op., *supra* note 120, at 10. This argument is similar to the one made by the Board in *People ex rel. Scott v. Lavelle*, No. 547-74, slip op. at 2, in which the Sangamon County Circuit Court struck down an attempt by the Board to adopt rules narrowly interpreting the disclosure and filing requirements of the Campaign Finance Disclosure Act. See notes 108-10 and accompanying text *supra*.

122. Brief for Appellants, *Better Gov't Ass'n v. State Bd. of Elections*, No. 62610, at 25 (1st Dist. Ill., filed Sept. 10, 1975).

*Board of Elections*,<sup>123</sup> and, consequently, the appellate court dismissed the BGA appeal, leaving the issues unresolved.

As the preceding discussion illustrates, the Board could do little in its early years without ending up in court. The courts necessarily played an active role in defining the permissible limits of the Board's authority, and the resort to the courts has been especially significant to minor parties and independent candidates who are not represented on the Board. In any event, the nature of the Board's duties dictates that litigation will arise again as additional questions surface. The following section of this article will review the two major decisions of the Illinois Supreme Court regarding the Board—decisions which went beyond questions of the validity of the Board's ministerial and supervisory functions to the constitutionality of the agency and the offices held by its members.

#### V. JUDICIAL REVIEW OF THE BOARD'S STATUTORY FRAMEWORK AND ITS RELATIONSHIP TO THE EXECUTIVE BRANCH

##### A. *Lunding v. Walker*— *Limits on the Governor's Removal Power*

In May, 1975, Franklin J. Lunding, Jr., was formally notified that he was being removed from the State Board of Elections for failing to comply with Governor Walker's 1973 executive order requiring officers of the executive branch to file economic disclosure documents with the State Board of Ethics.<sup>124</sup> The legal and political issues involved went to the heart of the Board's operation and illustrate the dilemmas faced by both the constitutional convention and the legislature in structuring the Board. The most critical issue presented was whether the Governor's power to remove officers of the executive branch extended to members of the Board.

The Illinois Supreme Court had previously upheld the Governor's right to order state officers to file financial reports.

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123. 65 Ill. 2d 453, 359 N.E.2d 113 (1976) (holding that the selection procedure under which acting Board members had been appointed was unconstitutional). Although both the BGA and the respondents felt that the decision in *Walker* prevented the Board from proceeding on complaints filed under the Campaign Financial Disclosure Act, the Board took the view that that decision had no effect on the BGA's appeal. After considering the views of all parties, the appellate court dismissed the appeal. *Better Gov't Ass'n v. State Bd. of Elections*, No. 62610 (1st Dist. Ill., filed Jan. 31, 1977) (order of dismissal). See notes 214-22 and accompanying text *infra*.

124. Exec. Order No. 4-73. See *Lunding v. Walker*, 65 Ill. 2d 516, 359 N.E.2d 96 (1977).

with the Board of Ethics.<sup>125</sup> Governor Walker contended that Lunding's failure to file constituted "neglect of duty." According to article V, section 10 of the Illinois Constitution of 1970, "[t]he Governor may remove for incompetence, neglect of duty, or malfeasance in office any officer who may be appointed by the Governor." This provision had already been interpreted by the courts as giving the Governor extremely broad removal power over his appointees.<sup>126</sup> Governor Walker contended that, because he appointed members of the Board, he could dismiss them also. Lunding's response was that the Governor did not "appoint" State Board of Elections members in the same sense that he appoints his own cabinet officers; under the statute creating the Board, the Governor's authority was limited to the selection of four Board members from a list submitted to him by the House and Senate leaders of both parties, in the hope that this sharing of responsibility for the selection of Board members between the executive and legislative branches would keep the Board independent. Lunding further argued that in the absence of any statutory provision for the removal of Board members, the legislature intended impeachment to be the only method for their removal.

### 1. *The September, 1975 Decision*

Lunding obtained an order restraining Governor Walker from carrying out his removal order, but on September 26, 1975, the Illinois Supreme Court unanimously vacated the order.<sup>127</sup> The court, relying on both federal and state court precedent, upheld the Governor's virtually absolute power to remove any officer whom he has appointed.<sup>128</sup> The *Lunding* case presented two issues for decision. The first issue, whether the Governor's removal power extended to members of the Board, was decided in the affirmative; the second issue, whether the exercise of the power must meet such state and federal due process requirements as prior notice, a hearing, and an opportunity for judicial review, was decided in the negative.<sup>129</sup>

In reaching its decision on the first issue, the court relied on *Wilcox v. People ex rel. Lipe*.<sup>130</sup> *Wilcox*, an 1878 decision,

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125. *Illinois State Employees Assn. v. Walker*, 57 Ill. 2d 512, 517-18, 315 N.E.2d 9, 12-13 (1974).

126. See, e.g., *Adams v. Walker*, 492 F.2d 1003, 1007-08, 1010 n.1 (7th Cir., 1974). See also *Wilcox v. People ex rel. Lipe*, 90 Ill. 186, 197, 202-05, 207 (1878) (construing similar provision in the 1870 constitution).

127. *Lunding v. Walker*, No. 47607, slip op. at 12 (Ill. S. Ct., filed Sept. 26, 1975).

128. *Id.* at 7-8.

129. *Id.* at 3, 7-8, 12.

130. 90 Ill. 186 (1878).



considered the scope of the Governor's power of removal under section 12 of article V of the 1870 constitution, which provided that "[t]he Governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office. . . ." In *Wilcox*, the court held that the constitutional language plainly gave the Governor the power to remove any officer whom he might have appointed and that no room for construction existed.<sup>131</sup> In *Lunding*, the court reviewed the 1970 constitutional convention debates and concluded that the delegates were fully aware of the nonreviewable, summary power of removal held to have been vested in the Governor by the language of the 1870 constitution.<sup>132</sup> Based upon that conclusion, the court found that the delegates deliberately chose to retain that removal power in the new constitution.<sup>133</sup>

The due process issue was decided after an extensive discussion of the concepts of "property" and "liberty" under the fourteenth amendment of the United States Constitution.<sup>134</sup> The court concluded that no protected "property" or "liberty" interest existed in any position filled by gubernatorial appointment,<sup>135</sup> reasoning that, since the framers of the 1970 Illinois Constitution left room for the establishment of other means of selection of Board members, the Governor's removal power was unrestricted by due process requirements.<sup>136</sup>

## 2. *Rehearing—November, 1976—Final Decision*

Two days before the Illinois Supreme Court decision in *Lunding*, a circuit court had declared the statutory method of selecting members of the Board unconstitutional in *Walker v. State Board of Elections*.<sup>137</sup> That decision was immediately appealed to the supreme court. On November 22, 1975, the court granted *Lunding* a new hearing to consider his argument that the Board, being a creature of the legislature, was not subject to the Governor's control, a point that was obviously related to the court's deliberations in *Walker v. State Board of Elections* and would have to be decided consistently with its ultimate decision in that case.

On November 15, 1976, almost one year after it had issued an order staying its decree "pending clarification" in *Lunding v. Walker*, the supreme court reversed its initial decision and af-

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131. *Id.* at 197.

132. *Lunding v. Walker*, No. 47607, slip op. at 4.

133. *Id.* at 4.

134. *Id.* at 9-12.

135. *Id.* at 12.

136. *Id.*

137. No. 364-75 (7th Cir. Ill., filed Sept. 24, 1975).

firmed the circuit court holding which had reinstated Lunding.<sup>138</sup> The court held that because of the unique character of the office held by Lunding, the Governor could remove him only for cause. The court further held that the determination of the adequacy of cause for removal was judicially reviewable.<sup>139</sup>

Although it had relied on *Wilcox* in the first *Lunding* decision, upon reconsideration the court found that a closer reading of *Wilcox* raised doubts about the actual breadth of the holding in that case.<sup>140</sup> The court cited *Ramsay v. Van Meter*<sup>141</sup> and certain language from the *Wilcox* decision<sup>142</sup> as support for its conclusion that the Governor's removal power was limited by the scope of his power to appoint.<sup>143</sup> In reaching this conclusion, the court considered persuasive analogous federal decisions interpreting the President's removal power.<sup>144</sup>

Noting that several exceptions had been carved out of the President's summary power of removal since *Wilcox* was decided,<sup>145</sup> the court distinguished "ordinary" departments within the executive branch itself, over which the President has complete removal power, from "independent" agencies, whose mem-

138. *Lunding v. Walker*, 65 Ill. 2d 516, 359 N.E.2d 96 (1976).

139. *Id.* at 518-19, 359 N.E.2d at 97.

140. *Id.* at 520, 359 N.E.2d at 97-98.

141. 300 Ill. 193, 133 N.E. 193 (1921) (dealing with the validity of the Governor's removal of the public administrator of Cook County): "[i]t was the intention of the framers of the Constitution of 1870 to adopt the rule which had been established under the Constitution of the United States . . . that the power of removal . . . was incident to and coextensive with his [the President's] power of appointment." *Id.* at 201-02, 133 N.E. at 196.

142. 90 Ill. at 198:

[w]e think the intention was to adopt the rule which had become established under the Constitution of the United States with respect to appointments made by the President, but was denied in this State in the case of *Field v. The People*, 2 Scam. 79, arising under the constitution of 1818, namely, that the constitution of 1870 makes the power of removal from office by the Governor co-extensive with his power of appointment.

*Id.*

143. *Lunding v. Walker*, 65 Ill. 2d at 521, 359 N.E.2d at 98:

[T]he true holding of *Wilcox* was not that the Governor's removal power was unlimited and unbridled, but that it was "incident to and co-extensive with his power to appoint." And in determining the extent of the power, it was clear that the courts in both *Wilcox* and *Ramsay* had found supreme court interpretations of the President's removal power to be analogous and persuasive.

*Id.* (emphasis added).

144. *Wiener v. United States*, 357 U.S. 349 (1958) (holding that the President's summary power of removal does not extend to members of the War Claims Commission, whose quasi-judicial function requires absolute freedom from executive interference); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that members of the Federal Trade Commission were not subject to the President's summary removal power due to its nonpartisan, independent nature); *Myers v. United States*, 272 U.S. 52 (1926) (establishing an "illimitable" Presidential power to remove all appointees except federal judges).

145. *Lunding v. Walker*, 65 Ill. 2d at 521, 359 N.E.2d at 98.

bers were insulated from unfettered removal.<sup>146</sup> Special emphasis was placed on *Humphrey's Executor v. United States*,<sup>147</sup> in which the Supreme Court held that the President's removal power did not extend to members of a federal agency which was required by the nature of its duties to be a "nonpartisan commission . . . free from executive control."<sup>148</sup>

The *Lunding* court's reason for reviewing the federal decisions was that it had indicated in both *Wilcox* and *Ramsay* that it was disposed to follow the federal rule. The court found that the facts in several federal cases regarding "independent" agencies<sup>149</sup> made the holdings of those cases particularly persuasive, even though they were admittedly not directly on point.<sup>150</sup> However, the distinguishing feature of the *Lunding* case is that, unlike the federal cases which involved "independent" federal agencies established as such by Congress, the State Board of Elections was mandated by the Illinois constitution. There are only vague references to the Board's "independence" in the convention debates,<sup>151</sup> and, indeed, the debates clearly indicate that the Board was intended to be a part of the executive branch.<sup>152</sup>

The *Lunding* court turned to the convention debates for further consideration of the extent of the Governor's removal power and noted that an unsuccessful attempt had been made to delete "for proper cause" from the section conferring the removal power on the Governor. The proponent of the deletion contended that the court decisions which had upheld summary dismissal powers made the phrase superfluous.<sup>153</sup> The court concluded that the convention had retained "for proper cause" to indicate that the Governor's removal power should not be absolute in all cases.<sup>154</sup>

The court also concluded that careful reading of the convention transcripts indicated that the delegates contemplated a "highly independent board,"<sup>155</sup> and that in implementing the constitutional mandate, the General Assembly "sought to negate

146. *Id.* at 521-25, 359 N.E.2d at 98-100.

147. 295 U.S. 602, 624-28 (1935). See note 144 *supra*.

148. *Lunding v. Walker*, 65 Ill. 2d at 522-23, 359 N.E.2d at 98-99 (emphasis added).

149. See note 144 *supra*.

150. 65 Ill. 2d at 524-25, 359 N.E.2d at 99-100.

151. See, e.g., 2 PROCEEDINGS, *supra* note 1, at 1056 (remarks of Delegate Keegan), 1057 (remarks of Delegate Cicero).

152. 5 PROCEEDINGS, *supra* note 1, at 4300 (remarks of Delegate Keegan and Delegate Kamin). In *Walker v. State Bd. of Elections*, 65 Ill. 2d 543, 562, 359 N.E.2d 113, 122 (1976), the court held that members of the State Board of Elections are officers of the executive branch.

153. 3 PROCEEDINGS, *supra* note 1, at 1325.

154. 65 Ill. 2d at 526, 359 N.E.2d at 100.

155. *Id.*

partisanship as much as possible and to guarantee the board's independence."<sup>156</sup> This statement is particularly perplexing considering the background of the nominees for the Board.<sup>157</sup> Nevertheless, the court summarized the rationale for its decision as follows:

It is plain that the legislators intended, and the public interest demands, that Board members not be amenable to political influence or discipline in the discharge of their official duties. To subject a neutral, bi-partisan and independent board to the unbridled whim of the Governor under the *Wilcox* rule would destroy its purpose and its efficacy. . . . If the holding of this court in *Wilcox* were extended and applied to the removal of the state board of elections, the political independence of that body envisioned by the delegates to the constitutional convention and sought to be achieved by the legislature would be jeopardized. We therefore hold that the Governor can only remove a member of the State Board of Elections for cause.<sup>158</sup>

The cause of Lunding's removal was, according to Governor Walker, Lunding's "neglect of duty" in failing to file a financial disclosure statement. The court held that the adequacy of the grounds for his removal was properly reviewable by the judiciary.<sup>159</sup> However, since the question presented at that time was the propriety of the circuit court's issuance of a temporary injunction, the supreme court did not consider the sufficiency of the cause cited by the Governor in his letter of removal.<sup>160</sup>

### 3. *The Dissent*

Chief Justice Underwood, author of the majority's slip opinion in the first *Lunding* decision, dissented from the majority's reversal on rehearing. He found no indication in the convention transcripts that the Governor's removal power was intended to be judicially reviewable or that the Governor's power should be any less absolute than *Wilcox* had held it to be.<sup>161</sup> He also attached less significance to the language of the delegates urging an independent, bipartisan Board.<sup>162</sup>

As pointed out by Chief Justice Underwood, the rationale given by the court for its decision seems to be strained. Although the opinion was couched in terms of limitation,<sup>163</sup> it went

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156. *Id.* at 527, 359 N.E.2d at 101.

157. See note 46 *supra*. ILL. REV. STAT. ch. 46, § 1A-13 (1975), prohibits political activity by Board employees.

158. 65 Ill. 2d at 527, 359 N.E.2d at 101.

159. *Id.* at 529, 359 N.E.2d at 102.

160. *Id.*

161. *Id.* at 533-37, 359 N.E.2d at 103-06 (Underwood, C.J., dissenting).

162. *Id.* at 538, 359 N.E.2d at 106-07.

163. *Id.* at 518-19, 529, 359 N.E.2d at 97, 102 (majority opinion) (emphasis added): "[W]e hold that in this particular instance, because of the unique character of the office held by plaintiff, the Governor could

against all seemingly applicable precedent, at least precedent involving other state agencies, and may have fundamentally changed the meaning of article V, section 10 of the 1970 constitution. The *Lunding* court veered away from past decisions in this area, basing its opinion on federal precedent not directly on point and on general debate language stressing the need for a bipartisan, independent agency. In *Walker v. State Board of Elections*, the court referred to the fact that neither the constitutional language nor the debates made clear the intent of the drafters regarding this Board.<sup>164</sup> Yet, in *Lunding*, the debates were found to be clear enough to set new precedent regarding the Governor's removal power—presumably for this Board alone, but arguably for any board or agency referred to either in the constitutional convention or legislative debates as having a need for "independence" or "bipartisanship" or "freedom from political interference."

One factor to which the *Lunding* opinion did not refer but which may not have gone unnoticed by the majority is that the legislature, in a joint resolution, had expressed its intent that the State Board of Elections not be a part of the executive branch.<sup>165</sup> Perhaps also the presence of the four legislative leaders as amici curiae on *Lunding's* behalf had an effect on the court's decision. Regardless of the reason, the *Lunding* decision is important, if somewhat unsettling, not only for this Board, but possibly for other state agencies.

#### B. *Walker v. State Board of Elections: The Board Is Declared Invalid*

##### 1. *Circuit Court Ruling—September, 1975*

As mentioned before, two days prior to the initial Illinois Supreme Court decision in *Lunding*, the Sangamon County Circuit Court declared unconstitutional the statutory method of selecting members of the Board.<sup>166</sup> The decision came in an action brought by Governor Walker and the All-Illinois Democratic Committee after the Board had scheduled a hearing on a complaint of the Better Government Association alleging that Walker and the committee had not complied with the Campaign Finance Disclosure Act. The plaintiffs sought a declaratory judgment

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only remove plaintiff for cause. Further, we hold that the determination of the adequacy of the cause for removal is, *in this case*, judicially reviewable."

164. 65 Ill. 2d 543, 559, 359 N.E.2d 113, 121 (1976).

165. S.J. Res. 41, 79th Gen. Assembly (1976).

166. *Walker v. State Bd. of Elections*, No. 364-75, memo. op. (7th Cir. Ill., filed Sept. 24, 1975).

that section 1A-3 of the Illinois Election Code,<sup>167</sup> regarding the appointment of Board members, violated article V, section 9 (a) of the Illinois constitution, which prohibits legislative appointments to the executive branch. The plaintiffs also contended that the Board's tie-breaking procedure, authorized by section 1A-7.1 of the Election Code,<sup>168</sup> violated the due process and equal protection clauses of the Illinois and United States Constitutions as well as article III, section 5 of the Illinois constitution, which prohibits any party from having a majority of the membership of the Board.

On September 24, 1975, the trial court entered a memorandum opinion stating that the provision of the Election Code providing for selection of Board members from a list of nominees chosen by the legislative leaders "contravenes the constitutional prohibition against appointment of executive officers by the General Assembly."<sup>169</sup> The court also determined that the "tie-breaker" provision of the Election Code violated due process because "any decision which involves individual rights may not be based on a flip of the coin or by lot."<sup>170</sup>

In granting relief, the circuit court held that the Campaign Finance Disclosure Act remained in full force, but that the Board could perform only ministerial duties under the Act "until this cause becomes final and until the legislature has had a reasonable time to act."<sup>171</sup> In early October, 1975, a decree and order were entered pursuant to the memorandum opinion. The defendants filed a notice of appeal with the Illinois Supreme Court, and the circuit court issued an order staying its decree and order with certain exceptions relating principally to proceedings on the BGA complaint. Because of the serious impact of its order, the circuit court suggested that the parties seek an expedited appeal to the supreme court.

## 2. *The Supreme Court Decision—November, 1976*

On December 17, 1975, the supreme court granted the plaintiffs' motion for an expedited schedule, and the parties awaited the anticipated "early decision" by that court. Approximately eleven months later, the supreme court handed down its decision affirming the circuit court ruling that both the statutory method

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167. ILL. REV. STAT. ch. 46, § 1A-3 (1973).

168. *Id.* at 1A-7.1.

169. *Walker v. State Bd. of Elections*, No. 364-75, memo. op. at 9.

170. *Id.* at 11.

171. *Id.* at 14.

used to select Board members and the tie-breaker provision were unconstitutional.<sup>172</sup>

The primary issue in *Walker* was the validity of the appointment section of the Election Code.<sup>173</sup> The Board contended that the manner of selecting its members did not violate the constitutional proscription of legislative appointments,<sup>174</sup> because the General Assembly as a whole did not participate in the selection process. The court relied on *King v. Lindberg*<sup>175</sup> for the proposition that the prohibitions of section 9(a) applied with equal force to indirect appointments by the General Assembly through its legislative leaders.<sup>176</sup>

The Board also argued that the participation of the legislative leaders in the selection process did not constitute an "appointment" of Board members within the meaning of article V, section 9(a) of the Illinois Constitution of 1970, since the legislative leaders only selected permissible appointees from whom the Governor made the actual appointment.<sup>177</sup> The court responded that, while technically the Governor retained the power to appoint Board members, that power was so limited by the statutory scheme that the legislative leaders did participate substantially in the de facto exercise of the appointive power.<sup>178</sup> Ironically, the General Assembly had itself provided the court with support for this holding by its passage of Senate Joint Resolution 41 on May 27, 1975.<sup>179</sup> This resolution declared that it was the "clear intent" of the General Assembly that the power "to appoint" given to the Governor under the Election Code was limited to a "selection" between two appointees of each respective leader

172. *Walker v. State Bd. of Elections*, 65 Ill. 2d 543, 359 N.E.2d 113 (1976).

173. ILL. REV. STAT. ch. 46, § 1A-3 (1975).

174. ILL. CONST. art. V, § 9(a) provides:

The Governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by record vote, shall appoint all officers whose election or appointment is not otherwise provided for. Any nomination not acted upon by the Senate within 60 session days after the receipt thereof shall be deemed to have received the advice and consent of the Senate. *The General Assembly shall have no power to elect or appoint officers of the Executive Branch.*

*Id.* (emphasis added).

175. 63 Ill. 2d 159, 345 N.E.2d 474 (1976) (holding that members of the interim state fair board are officers of the executive branch subject to the constitutional prohibition of legislative appointments).

176. *Walker v. State Bd. of Elections*, 65 Ill. 2d at 555, 359 N.E.2d at 119.

177. *Id.*

178. *Id.*

179. S.J. Res. 41, 79th Gen. Assembly (1975): "Resolved, That it is . . . the clear intent of the Illinois General Assembly that the power given under Public Act 78-918 to the Governor to 'appoint' was limited in fact to a selection between 2 appointees by each respective leader of the General Assembly . . ." *Id.* (emphasis added).

of the General Assembly.<sup>180</sup> The lawmakers apparently felt that this *ex post facto* explanation would impress upon the courts the intended independent nature of this agency and its members, as the resolution also declared that the Board was neither part of nor subject to the executive branch.<sup>181</sup> However, the supreme court in *Walker* relied on the resolution as evidence of a violation of the constitutional prohibition against legislative appointment of executive officers.<sup>182</sup>

The Board further argued that even if section 9(a) of article V<sup>183</sup> contains a general prohibition of legislative appointments of executive officers, article III, section 5<sup>184</sup> creates a specific exception to that rule in the case of the State Board of Elections.<sup>185</sup> It pointed out that article III, section 5 states, in pertinent part: "[t]he General Assembly by law shall determine the size, manner of selection, and compensation of the Board." The Board argued that if separate parts of a constitution appear to be in conflict, courts should favor a construction which will render every provision operative.<sup>186</sup> It also contended that a specific constitutional provision should prevail over a general section if the two are incompatible.<sup>187</sup> Both contentions are standard canons of interpretation.<sup>188</sup>

The court, however, relied upon the report of the 1970 Constitutional Convention Committee on the Executive, which stated that section 9(a) "carries forward existing language which would block *any* effort at legislative selection of an officer in the executive branch."<sup>189</sup> The court also concluded that no language in the convention debates indicated that article III, section 5 was intended to be an exception to the limits on the legislature's power to appoint.<sup>190</sup> The court acknowledged that if the terms of the statute establishing the method for choosing members of the Board had been incorporated into section 5 of article III itself, it would have regarded that section as creating an exception to the general rule against legislative appointments of executive officers.<sup>191</sup> As it was drafted, however, article III,

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180. *Id.*

181. *Id.*

182. 65 Ill. 2d at 556, 359 N.E. 2d at 119: "[w]e hold that section (a) is applicable to this case, notwithstanding the Governor's retention of at least nominal power to appoint Board members."

183. See note 174 *supra*.

184. ILL. CONST. art. III, § 5.

185. 65 Ill. 2d at 556, 359 N.E.2d at 119.

186. *Id.*

187. *Id.*

188. See, e.g., *People ex rel. Ogilvie v. Lewis*, 49 Ill. 2d 476, 274 N.E.2d 87 (1971); *People ex rel. Nauert v. Smith*, 327 Ill. 11, 158 N.E. 418 (1927).

189. 65 Ill. 2d at 559, 359 N.E.2d at 121.

190. *Id.*

191. *Id.* at 556-57, 359 N.E.2d at 119.



section 5 specified no particular method of selection and therefore could not be considered a specific exception to the general proscription of article V, section 9(a). Indeed, the court found that even if an inconsistency did exist, the proscription of section 9(a) had to be accorded primacy.<sup>192</sup> The court held that article III, section 5 imposed upon the General Assembly the responsibility for determining the manner by which Board members were to be selected; but, although section 5 gives the General Assembly wide discretion, the manner of selection of Board members is limited by the specific prohibition of legislative appointments to the executive branch.<sup>193</sup>

Besides invalidating the appointment section of the Election Code, the court also held that the provision for the unusual and controversial tie-breaking procedure was unconstitutional.<sup>194</sup> The plaintiffs had advanced two principal contentions in this regard: (1) that the tie-breaking provision violated due process of law because it caused decisions concerning fundamental rights to be made by lot or by chance in some cases; and (2) that it contravened the mandate of article III, section 5 of the 1970 Illinois Constitution that "no political party shall have a majority of members of the board."<sup>195</sup>

The court agreed that the tie-breaking scheme did cause decisions to be made on an arbitrary basis. The court found that the arbitrary character of the scheme was underscored by the statutory prohibition of reconsideration by the board of any vote or policy determined pursuant to the tie-breaker for a period of nine months, except by unanimous vote.<sup>196</sup> In invalidating the tie-breaking provision, the court relied upon previous decisions regarding the application of due process safeguards to administrative hearings before governmental entities.<sup>197</sup> Those cases had held that "[a]dministrative proceedings are 'governed by the

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192. *Id.* at 557, 359 N.E.2d at 120:

Applying the same rules of construction utilized by defendants, we note that article III, Section 5, imposes upon the General Assembly the responsibility for determining the manner by which Board members are to be selected. Section 5 thus recognizes in the General Assembly a wide discretion to choose an appropriate method of selection. To be measured against this general recognition of authority, nevertheless, is the specific prohibition against legislative appointment found in section 9(a). It follows that, if we are to give logical effect to both provisions, we must treat article V, section 9(a), as a limitation upon the otherwise broad authority recognized in the General Assembly by article III, section 5.

193. *Id.*

194. *Id.* at 565, 359 N.E.2d at 123-24.

195. *Id.* at 563, 359 N.E.2d at 122-23.

196. *Id.* at 564, 359 N.E.2d at 123.

197. *Ellis v. Illinois Commerce Comm'n.*, 44 Ill. 2d 438, 255 N.E.2d 417 (1970); *Brown v. Air Pollution Control Bd.*, 37 Ill. 2d 450, 227 N.E.2d 754 (1967); *Smith v. Dep't of Regis. and Educ.*, 412 Ill. 332, 106 N.E.2d 722 (1952); *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934).

fundamental principles and requirements of due process of law,'"<sup>198</sup> that "[t]he object of this constitutional safeguard is to preserve the personal and property rights of any person against the arbitrary action of public officials,"<sup>199</sup> and that "[d]ue process presupposes a fair and impartial hearing before a fair and impartial tribunal."<sup>200</sup>

Chief Justice Underwood dissented from the court's invalidation of the tie-breaker. He took exception to the majority's suggestion that a fifth "independent" member be appointed as a means of avoiding deadlocks:

Assuming that individuals of reasonable intelligence exist who are truly "independent," who have been so unconcerned with the qualifications of their public officials and the functioning of their government as to have never voted in any primary election or supported one or the other of the major political parties, the General Assembly might well have thought the public interest best served by leaving to chance the resolution of deadlocked issues rather than to the vote of so politically sterile an individual.<sup>201</sup>

### 3. *The Effect of the Walker Decision*

As a result of the *Walker* decision, the Board was, in effect, "legally dead." However, the court stayed the effect of its judgment in order to "allow sufficient opportunity for legislative response."<sup>202</sup> The principal effect of the ruling was that the legislature would have to try again to fulfill the mandate of the 1970 constitution that a strong, independent board be established to run the state's election machinery.<sup>203</sup>

The supreme court in *Walker* thus recognized the General Assembly's "great discretion to provide methods of selection other than gubernatorial appointment," as well as deciding that the Board and its members are "officers of the executive branch" within the meaning of article V, section 9(a). While it gave no specific examples of how the legislature could exercise its discretion, it did make it clear that the legislative leaders could not appoint themselves to the Board,<sup>204</sup> and that the General As-

198. *Ellis v. Illinois Commerce Comm'n*, 44 Ill. 2d 438, 446, 255 N.E.2d 417, 422 (1970); *Brown v. Air Pollution Control Bd.*, 37 Ill. 2d 450, 454, 227 N.E.2d 754, 756 (1967).

199. *People v. Belcastro*, 356 Ill. 144, 147, 190 N.E. 301, 303 (1934).

200. *Smith v. Dep't of Regis. and Educ.*, 412 Ill. 332, 341, 106 N.E. 2d at 722, 726 (1952).

201. 65 Ill. 2d at 567, 359 N.E.2d at 124 (Underwood, C. J., dissenting).

202. *Id.* at 565, 359 N.E.2d at 124 (majority opinion). When the legislature had not responded by March 15, 1977, the Court granted a series of stays effective until May 11, 1977, June 30, 1977, November 30, 1977, January 13, 1977, and July 1, 1978, respectively.

203. *Chicago Daily Law Bull.*, Nov. 15, 1976, at 1, col. 4.

204. 65 Ill. 2d at 560, 358 N.E.2d at 121.

sembly could not confer appointive power upon private individuals and organizations.<sup>205</sup> The court stressed that, in addition to those officers listed in the Illinois constitution as executive officers of the state,<sup>206</sup> there were other officers in the executive branch of government.<sup>207</sup>

Under the *Walker* decision, the legislature could provide that the Governor is to appoint members of the State Board of Elections. If the legislature decided to structure the appointment procedure in this fashion, it presumably would not be bound by the language of article V, section 9(a), which provides that "the Governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by elective vote, shall appoint all officers whose election or appointment is not otherwise provided for." In other words, since the court has made it clear that the constitution has "otherwise provided for" a State Board of Elections within the meaning of section 9(a), the language requiring the advice and consent of a majority of the Senate would not operate; likewise the language in the same section providing that "[a]ny nomination not acted on by the Senate within 60 session days after the receipt thereof shall be deemed to have received the advice and consent of the Senate" would not operate. The remaining portion of that section, forbidding the legislative appointment of executive officers, would continue to operate.<sup>208</sup> The legislature could merely require gubernatorial appointment of the Board without the advice and consent of the Senate, or it could require advice and consent to gubernatorial appointments by either a simple or extraordinary majority of the Senate, the House, or both.

In the alternative, the legislature could provide that any other officer of the executive branch, or a combination of officers, could appoint Board members, with or without confirmation by the respective houses of the General Assembly. However, article V, sections 17 and 18, listing the duties of the Comptroller and Treasurer, respectively, do not contain language permitting those officers to "perform other duties that may be prescribed by law," whereas article V, sections 14, 15, and 16, respectively describing the duties of the Lieutenant Governor, Attorney General, and Secretary of State, do contain such language. It might follow, then, that the Treasurer and Comptroller could not constitutionally be given the power to appoint members to the Board.

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205. *Id.*

206. Those officers listed in the constitution as executive officers are the Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller, and Treasurer. ILL. CONST. art. V, § 1.

207. 65 Ill. 2d at 560-61, 359 N.E.2d at 120.

208. *Id.* at 558-59, 359 N.E.2d at 120.

Neither the constitution nor the supreme court has set any restriction on the number of members who could be appointed, other than that "no political party shall have a majority of members of the board."<sup>209</sup> The legislature could, therefore, provide for the appointment of an even number of members with no tie-breaker scheme, in effect forcing the members to agree among themselves or to have their disagreements decided by the courts.<sup>210</sup> A member of a third political party could be appointed, providing an uneven number of board members, or, notwithstanding the dissent of Chief Justice Underwood, the legislature could provide for the appointment of someone affiliated with no major political party. It could define "affiliation" in the statute, or simply leave it open for determination on an ad hoc basis.<sup>211</sup> The constitutional language would allow ties to be broken neither by the vote of the governor nor by any other officer of the executive branch, since such a tie-breaker would certainly contravene the prohibition against any political party having a majority on the Board,<sup>212</sup> nor would it allow for appointment or nomination by political party officials.<sup>213</sup>

The effect of the *Walker* decision on the actual operations of the Board was left somewhat unclear. The Sangamon County Circuit Court, on September 24, 1975, issued a declaratory judgment limiting the Board to "ministerial" as opposed to "investigative" and "quasi-judicial" functions.<sup>214</sup> A notice of appeal was filed, and the trial court granted a stay which permitted the

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209. ILL. CONST. art. III, § 5.

210. A study by the Illinois Legislative Council of thirteen state boards and commissions with various degrees of authority over the conduct of elections in their respective states indicates that of those thirteen states, only New York, Rhode Island, and Illinois have an even number of voting members. The study does not include the Wisconsin Board of Elections, which is comprised of eight members. "State Boards of Elections in Selected States," Illinois Legislative Council memo., No. 9-686, April 20, 1976. For a comprehensive overview of other state agencies relating to elections see *generally* FEDERAL ELECTION COMMISSION, HANDBOOK OF STATE ELECTION AGENCIES AND OFFICIALS (R. Smolka ed. 1976).

211. For further discussion on this point see Bernardini, *State Board of Elections*, 3 ILL. ISSUES 15 (1977). An odd-numbered board, containing one member affiliated with neither major party, could have prevented such difficulties as the Board's month-long inability to agree on a new chairman in 1976, the arguably arbitrary decision on the major question of how elections for judicial vacancies would be structured in early 1974, and the split over political committee financial disclosure requirements in September, 1974. However, the prospect of an independent on the Board has so far been politically unpalatable, as each political party is apparently convinced that an independent would side with the other party.

212. See 65 Ill. 2d at 564-65, 359 N.E.2d at 123.

213. See *People ex rel. Rudman v. Rini*, 64 Ill. 2d 321, 356 N.E.2d 4 (1976); *People v. Kramer*, 328 Ill. 512 (1928); *Lasher v. People*, 183 Ill. 226, 55 N.E. 663 (1889).

214. *Walker v. State Bd. of Elections*, No. 364-75, at 14 (7th Cir. Ill., filed Sept. 24, 1975).

Board to exercise all of its functions except for hearing the complaint before it against the plaintiffs in the *Walker* case, pending the appeal. The supreme court decision reversed that portion of the trial court decision which allowed the Board members to stay in office until the General Assembly could act.<sup>215</sup> The supreme court, however, permitted the same practical result, by staying the effect of its judgment "to allow sufficient opportunity for legislative response."<sup>216</sup>

The court affirmed the trial court order in all other respects, including that provision of the order stating that "the board may not act under the Campaign Finance Disclosure Act where its acts are investigative or quasi-judicial, rather than ministerial."<sup>217</sup> The question then arose as to whether the supreme court stay prevented the Board from acting in an investigative or quasi-judicial function under the Act. The Board took the position that it was not so hindered,<sup>218</sup> and, in fact, it conducted several investigations and hearings during 1976 and 1977 under that Act. However, the two court decisions which touched on this issue in 1977 indicated that the Board did not have the authority to enforce the Act by conducting investigations, holding hearings, or issuing findings.<sup>219</sup> Although the Board continued to conduct such investigations, it is clear that a party threatened with such an enforcement action by the Board could raise the same constitutional issues as did the defendants in *Walker*.

A further result of *Walker* was the apparent inability to fill vacancies on the board until new legislation was enacted, an issue that arose when a Board member submitted his resignation, effective January 12, 1977.<sup>220</sup> Speaker of the House William Redmond submitted the names of two nominees to Governor Thompson on January 19, 1977, and asked him to select one to fill the vacancy.<sup>221</sup> Governor Thompson, citing *Walker*, responded that

215. 65 Ill. 2d at 565, 359 N.E.2d at 124.

216. *Id.*

217. *Walker v. State Bd. of Elections*, No. 364-75, at 14-15 (7th Cir. Ill., filed Sept. 24, 1975).

218. See, e.g., *Better Gov't Ass'n v. State Bd. of Elections*, No. 62610 (1st Dist., Ill., filed Jan. 31, 1977) (order of dismissal).

219. *Id.*; *Reid v. State Board of Elections*, mem. op., at 5 (N.D. Ill., Feb. 11, 1977) (action filed by a campaign committee of the Illinois Socialist Workers Party and one of its candidates challenging the Campaign Finance Disclosure Act was dismissed as moot on the ground that *Walker* rendered the Board illegally composed and powerless to enforce the Act).

220. Board member William Harris was appointed to fill the legislative vacancy which occurred when Rep. Clyde Choate (Dem.-Anna) resigned after being elected in the 59th legislative district in November of 1976.

221. ILL. REV. STAT. ch. 46, § 1A-5 (1975), authorizes such appointments to fill vacancies. The nominees were Jerry Corbett of Hardin and John Gianulis of Andalusia.

vacancies could not be filled by him in the absence of remedial legislation.<sup>222</sup> Thus, from January 12, 1977, to July 1, 1978, the Board has operated with only three members, in violation of the constitutional prohibition against one political party having a majority of the members.

### C. *The Import of the Walker and Lunding Decisions*

Although *Lunding* dealt with issues entirely separate from those in *Walker*, the cases are similar in two respects. First, when read together, they establish the Board as a very special twig on the executive branch of state government. When it ruled that the General Assembly could not appoint Board members because they are part of the executive branch, the court declared that the Board performed an executive function and was really part of that governmental branch. However, when it refused to allow the Governor to remove a Board member without a showing of "cause," the court declared that the Board must be "neutral, bi-partisan and independent." The Board is thus an executive agency, the powers and functions of which are protected and governed by the constitution, as are those of the several elected state officers. Neither the Governor nor the Attorney General nor any other governmental office can infringe upon the constitutionally-protected powers and duties of the Board, just as the Board cannot infringe upon theirs.

Second, the cases furnish a unique illustration of the canon of construction that a constitution must be read as a whole to give each section or article full effect.<sup>223</sup> In *Lunding* the court held that the broad mandate in article V, section 9(a), giving the Governor the power to remove officers he appointed, was limited by the exception inherent in article III, section 5, creating a "highly independent" State Board of Elections. In *Walker* the court held that the broad mandate in article III, section 5, giving the legislature the power to determine the method of selecting members of the Board, was limited by the exception in article V, section 9(a), prohibiting the legislature from appointing officers of the executive branch.

This canon was also recently employed by the court in *People ex rel. Scott v. Briceland*.<sup>224</sup> In *Briceland*, the Environ-

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222. Letter of Feb. 15, 1977.

223. See, e.g., *People ex rel. Wellman v. Washburn*, 410 Ill. 322, 102 N.E.2d 124 (1951); *People ex rel. Nauert v. Smith*, 327 Ill. 11, 158 N.E. 418 (1927); *Reed v. People ex rel. Hunt*, 125 Ill. 592, 18 N.E. 295 (1888); *Wilcox v. People ex rel. Lipe*, 90 Ill. 186 (1878).

224. 65 Ill. 2d 485, 359 N.E.2d 149 (1976), noted in 11 J. MAR. J. 441 (1977-78).

mental protection Agency contended that the environment article<sup>225</sup> provided a broad general mandate to protect the environment, a mandate the state had implemented in the Environmental Protection Act. The court ruled that even a statute implementing a constitutional provision must comply with other parts of the constitution,<sup>226</sup> such as the provision delineating the powers of the Attorney General.

In short, the Board has all the powers and protections inherent in the departments of the executive branch, including protection from encroachment by the legislature or by other executive officers and departments. The General Assembly must remember that the State Board of Elections is created by article III, section 5, but that its powers and duties are defined by many other sections of the constitution, including article V, section 9(a). Indeed, article III itself limits the Board's powers. For example, no State Board of Elections could redefine voting qualifications,<sup>227</sup> or abrogate the right to free and equal elections,<sup>228</sup> since both subjects are covered in other sections of article III. Because the constitution specifically grants the General Assembly the power—and also the responsibility—to define “permanent residence for voting purposes” and to protect other safeguards of elections, the Board could not usurp that power.<sup>229</sup> It is likewise doubtful that the legislature could delegate that power to the Board, which is an administrative or executive body, not a law-making one.

Other articles of the constitution limit and protect the powers and duties of the Board as well. Certainly no statute granting the Board powers and duties may contravene the due process and equal protection clauses of the state constitution.<sup>230</sup> Since the Board may not infringe upon the Attorney General's power as “the legal officer” of the state, it must turn to that office for legal representation.<sup>231</sup> Although the Board could be empowered by statute to make quasi-judicial determinations in its hearings, it cannot encroach upon “the judicial power” vested in the courts.<sup>232</sup> Since the Board clearly uses public funds, its budget must be submitted by the Governor,<sup>233</sup> its funds

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225. ILL. CONST. art. XI.

226. 65 Ill. 2d at 501-02, 359 N.E.2d at 157.

227. ILL. CONST. art. III, §§ 1, 2.

228. *Id.* § 3.

229. *Id.* § 4.

230. *Id.* art. I, § 2.

231. *Id.* art. V, § 15. Cf. *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 359 N.E.2d 149 (1976).

232. ILL. CONST. art. IV, § 1.

233. *Id.* art. VIII, § 2(a).

must be appropriated by the General Assembly,<sup>234</sup> and its obligation, receipt, and use of funds must be audited by the Auditor General.<sup>235</sup> In fact, one section of the constitution specifically requires all members of the Board to file statements of economic interest.<sup>236</sup> No statute enacted by the General Assembly or order issued by the Governor could ever contradict these restrictions upon, or protections of, the Board's powers and duties. The chief lesson to be learned from *Lunding* and *Walker* may be that the Board is not only a creature of article III, section 5, but of the entire constitution as well.

## VI. THE NEW STATE BOARD OF ELECTIONS

The 1975 courtroom developments, combined with the controversies of the previous two years of the Board's existence, prompted new demands for legislative action in the fall of 1975.<sup>237</sup> To some observers, particularly those who had supported the concept of a strong and effective Board since before the constitutional convention, the 1975 decisions in *Lunding* and *Walker* appeared to offer a chance to start anew.<sup>238</sup> However, a special legislative session which convened in the spring of 1976 for the purpose of responding to those decisions adjourned *sine die* without passing any legislation on June 3, 1976.<sup>239</sup>

The Illinois Supreme Court rendered its ultimate decisions in *Lunding* and *Walker* on November 15, 1976. Since the effect of the *Walker* decision was to invalidate the Board as then constituted, the court granted a series of stays of that judgment, extending over a period of twenty months.<sup>240</sup> As judicial patience wore thin, the General Assembly convened for a second special session on October 24, 1977, and again the net result was failure to reconstitute the Board.<sup>241</sup>

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234. *Id.* § 2(b).

235. *Id.* § 3.

236. *Id.* art. XIII, § 2.

237. See, e.g., Chicago Tribune, Oct. 1, 1975, at 8, col. 4; Chicago Sun-Times, Sept. 26, 1975, at 6, col. 3.

238. See authorities cited note 237 *supra*.

239. S.B.1 (Dougherty) was passed by the Senate and was referred to the Rules Committee in the House, which never took a vote on it; S.B.2 (Netsch) was never called for a vote on third reading in the Senate; H.B. 1-7 (Kempiners) were voted "Do Pass" by the House Elections Committee. They were subsequently tabled and the sponsor was defeated in a motion to remove them from the table. H.B. 8 (Collins) was defeated in the House Elections Committee.

240. See note 202 *supra*.

241. On November 23, 1977, the General Assembly passed and sent to the Governor a bill providing for an eight member board and splitting appointment power between the Governor and the highest ranking executive officer of the political party whose nominee for Governor in the most recent general election had received the second greatest number of votes. H.B. 26 (Redmond-Dem., Bensenville), 1st Special Sess.,



Finally, on January 11, 1978, the legislature, in a spirit of compromise generated by the rapidly approaching expiration of the last stay of the *Walker* judgment, passed a bill creating an eight member Board which was signed into law by Governor Thompson the following day, with an effective date of July 1, 1978.<sup>242</sup> The new Board is to be composed of four members residing within Cook County and four residents of Illinois residing outside of Cook County.<sup>243</sup> The Governor shall appoint four members from his own political party and four from a list of twelve nominees, three for each vacancy, to be submitted by the highest ranking executive officer of the party whose nominee for Governor in the most recent general election received the second largest number of votes.<sup>244</sup> This provision presumably avoids the constitutional prohibition of legislative appointments of executive officers involved in *Walker*.

The new legislation further provides that the Governor may initially reject the out party's list of nominees in whole or in part; however, the second list is final.<sup>245</sup> Also, in the event that there is no elected officer of the out party eligible to make nominations, the Governor will appoint all eight members, subject to confirmation of the Senate by an extraordinary two-thirds

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80th Gen. Assembly (1977), as amended, December 3, 1977. Governor Thompson issued an amendatory veto of the bill, complaining that the proposed appointment procedure was a "mischievous dilution of the executive power of the Governor." Amendatory Veto Letter (Dec. 3, 1977). The legislature did not override the Governor's veto nor was it willing to accept the Governor's amendments.

Another stay of the *Walker* judgment was granted in the end of November, 1977. *Walker v. State Bd. of Elections*, No. 47981 (Ill. S. Ct., filed Nov. 31, 1977). For the first time in the series of stays granted, one of the justices dissented. Justice Ryan predicted that the January 13, 1978, deadline would not be met. He stated:

The order of the Supreme Court of the State of Illinois should carry with it the force and effect of finality and should be accepted by the other branches of government as being final and binding. I find it hard to understand how something can be held invalid and yet continue in effect simply because the legislative branch of our government fails to perform its constitutional duties.

*Id.* (Ryan, J., dissenting).

242. H.B. 2271 (Kempiners, Rep., Joliet) 80th Gen. Assembly (1978). ILL. REV. STAT. ch. 46, § 1A-2 (1978), as amended. Once again the supreme court extended the stay of the *Walker* decision, this time until July 1, 1978.

243. Of the four members from each area, two are to be chosen from the same political party with which the Governor is affiliated, and two are to be chosen from the political party whose nominee for Governor received the second greatest number of votes in the most recent general election. *Id.*

244. *Id.* § 1A-3(1) to (7). The executive officers who may submit nominations are ranked in the following order of preference: Attorney General, Secretary of State, Comptroller, and Treasurer. *Id.* § 1A-3(2). Four members of the new Board will serve one year terms, and four will serve three year terms. Subsequent members will serve for four years. See note 255 *infra*.

245. *Id.* § 1A-3(3).

vote.<sup>246</sup> The confirmation provision assures a final check by the out party against appointments which it finds objectionable.

In contrast to the former law, the new law provides no tie-breaking procedure and thereby avoids the constitutional dilemma presented by the old lottery system. However, the enlarged number of Board members makes the prospect of deadlocks less likely than before. The prospect of a purely partisan split on highly political issues may also be lessened by the provision prohibiting Board members from holding political party offices and from running for public office.<sup>247</sup>

Additional "reforms" included in the bill reflect the recommendations of early observers of the Board.<sup>248</sup> These include lower salaries for Board members,<sup>249</sup> prescription of an executive director,<sup>250</sup> restrictions on outside consultants,<sup>251</sup> and the return of Board employees to the jurisdiction of the State Personnel Code.<sup>252</sup>

## VII. CONCLUSION

During the constitutional convention debates on the State Board of Elections, Delegate Robert L. Butler offered the following argument in support of the Board and in opposition to a motion to delete the provision:

I think—and I have long felt that Babe Ruth wouldn't have set any home run records if he hadn't taken the bat and gone to the plate to swing it—I think if we don't defeat the motion to delete, we will be doing the same as taking the bat out of Babe Ruth's hands. I think there is an opportunity to do some good here, at the risk of doing little, if any, harm. I think it would be a tragic mistake if we knocked this one out of the park.<sup>253</sup>

Viewing in retrospect Delegate Butler's allusions, one is tempted to reflect on the fact that the Babe set records for strikeouts as well as home runs. Unfortunately, Delegate Butler apparently chose not to remind his fellow delegates of those less optimistic statistics. In any event, in the parlance of Delegate Butler, the Illinois Supreme Court decisions in *Lunding* and *Walker* resulted in "a brand new ball game" for the Illinois State Board of Elections.

The leading study of the development of the suffrage and

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246. *Id.* §§ 1A-3(4), 1A-4. All other appointees are subject to confirmation by a three-fifths vote of the Senate. *Id.*

247. *Id.* § 1A-14.

248. See Bernardini, *State Board of Elections*, 3 ILL. ISSUES 15 (1977).

249. ILL. REV. STAT. ch. 46, § 1A-6.1 (1978), as amended.

250. *Id.* § 1A-9.

251. *Id.*

252. *Id.* § 1A-12.

253. 4 PROCEEDINGS, *supra* note 1, at 3631.

amending article at the constitutional convention concludes with the following observation:

The State Board of Elections, mandated by section 5 of Article III, may prove to be the most significant idea for good government advanced by the suffrage article. Many of the shortcomings of the election system involved procedure. A forthright and aggressive State Board of Elections could do much to open the election process and establish consistent and uniform practices throughout the state. It could neutralize the election machinery so that it does not work to the advantage of any particular group or political party. The Board of Elections represents a threat to the established order. No one knows what it will be. Of course, the unknowns are not something that will go away or resolve themselves with time.<sup>254</sup>

Since that writing in 1973, the "threat to the established order" has been kept in check, primarily because the selection process has resulted in the appointment of persons with close ties to, and interests in, that established order. The potential remains, nevertheless, for the Board to do the things that it was originally intended to do: to open up the election process and to establish consistent and uniform election practices throughout the state. With appropriate statutory changes and with the appointment of people who will provide the necessary leadership, the goals of Delegate Keegan and Chairman Tomei may yet be achieved.<sup>255</sup>

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254. GRATCH & UBIK, *supra* note 4, at 99.

255. On March 31, 1978, as this article went to print, Governor Thompson announced his appointees to the new Board: John W. Countryman (Rep.-DeKalb); Richard A. Cowan (Rep.-Arlington Heights); John J. Lanigan (Rep.-Palos Hills); J. Phil Gilbert (Rep.-Carbondale); Michael E. Lavelle (Dem.-Chicago); Theresa Petrone (Dem.-Chicago); Carolyn Chamberlain (Dem.-Springfield); Joshua Johnson (Dem.-Madison).