COMMITTEE ON ELECTIONS AND REAPPORTIONMENT

SUBCOMMITTEE ON FAIR CAMPAIGN PRACTICES AND ELECTION CONTESTS

FINAL REPORT
1969-1970 Interim

State of Minnesota
House Research Department

Pursuant to the authority contained in House Resolution 32, passed on May 26, 1969, the House of Representatives Committee on Legislative Administration and Rules activated the House Committee on Elections and Reapportionment. In response to this direction, Representative Dwight Swanstrom appointed a subcommittee on Fair Campaign Practices and Election Contests and assigned the following members to serve:

Representative Delbert Anderson, Starbuck, Chm.

Representative Jon Haaven, Alexandria

Representative Thomas Newcome, White Bear Lake

Representative Martin Sabo, Minneapolis

Representative Andrew Skaar, Thief River Falls

Representative Thomas Ticen, Bloomington

The subcommittee was charged with the responsibility of studying the present Minnesota Statutory provisions pertaining to fair campaign practices and election contests with the objective of providing Minnesota with realistic and efficient fair campaign practices and election contest laws.

In accordance with this charge, the subcommittee directed the House Research Department to study the Corrupt Practices Acts and Election Contest Procedures of other states. A meeting was held on March 12, 1970 at which Dale Swanson presented a report of the study. Testimony was also received from various concerned individuals.

The recommendation which follows is based on information received at this meeting, supplemented by personal study undertaken by the individual members.

Recommendation

The subcommittee recognizes the multitude and complexity of problems involved in the area of corrupt practices and election contest procedures. Therefore, it commends the context of the House Research Department study to the full committee and recommends that further study and consideration be given in an effort to arrive at meaningful and pertinent legislation.

SUMMARY OF CORRUPT PRACTICES AND ELECTION CONTEST PROCEDURE

In accordance with its charge in House Resolution 32, the House Committee on Elections and Reapportionment has directed this study of Corrupt Practices Acts and election contest procedure of other states. An outline of the results of this study is as follows:

I. Corrupt Practices Act

A. Almost every state has some statement of election offenses whether included within a Corrupt Practices Act or not. These are all substantially the same with the exception of those provisions relating to campaign financing and the reporting of expenditures.

1) Some states place limitations only upon the amount spent by a candidate, others limit both the amount by and for a candidate.

2) Some states limit only the nature of expenditures, but many limit both the amount and nature of expenditures.

3) Some states' limitations are less restrictive by virtue of various exemptions from the limitations.

B. Most of the states with Corrupt Practices Acts have provisions relating to the making of false statements and to electioneering on election day.

1) These provisions may be in conflict with the First Amendment. (See New York Times v. Sullivan involving alleged false statements made regarding a police chief and Rose v. Koch involving alleged false statements regarding a public figure. The case of

Mills v. Alabama considers prohibitions of electioneering and the solicitation of votes on election day.)

2) The constitutional question which arose in the aforementioned libel and slander cases may apply to legislative election contests. Can the Legislature exclude a member for activities which the court has determined are protected by the First Amendment? This, of course, is unknown; however, in Bond v. Floyd the Supreme Court overruled the exclusion of Julian Bond by the Georgia legislature on the grounds that Bond's freedom of speech was thereby denied.

II. Election Contest Procedure

A. The results of the Election Contest Questionnaire have revealed no contests from other states brought for defamatory attacks made upon other candidates. Contests which did occur involved recounts, failure to file expense statements, and other irregularities in the conduct of elections and canvass of votes.

B. The other instances of contests are adjudicated by legislatures with varying degrees of judicial assistance, although in many states the courts have no jurisdiction at all.

C. Options to the present Minnesota procedure are:

1) Repealment of the courts' statutory jurisdiction leaving the burden upon the legislature to conduct the only hearings; or

2) Extending the jurisdiction of the courts to take testimony and make recommendations to the legislature for adjudication. (The proposal in H.F. 3066 for requiring conclusions from the court is discussed and some difficulties pointed out.)

D. The status of election certificates was reviewed as to possible difficulties they presented to election contest procedures, but as their status is only statutory there could be no possible restraint on a parliamentary body.

1) The question of whether a certificate of election may issue prior to the final adjudication by the legislature was considered in district court in the Wingard/ Slattengren case which ruled there was "no statutory impediment to the issuance of the Certificate by the County Auditor to the candidate receiving the highest number of votes."

E. A possible ambiguity with respect to contributions by non-profit corporations was considered and suggestions made.

II. CORRUPT PRACTICES ACTS

A. History

Largely as a consequence of the enactment of the Federal Corrupt Practices Law, (Sec. 2, U.S.C.A. s 241 et. seq.) most of the states now have their own Corrupt Practices Act, or Fair Campaign Practices Act as the Minnesota citation became in 1967. These acts have been defined by an intention to "preserve the purity of elections, to require an aspirant for office to resort to honest means to obtain it, and to prevent the improper influence on voters." (29 C.J.S. Elections s 216) Corrupt practices acts generally maintain a somewhat vague constitutional statute. Although the Act is penal in character, it may be used as a basis for challenging a candidate's right to his seat, a matter for legislative determination. In turn, it is unclear under the separation of powers doctrine as to what extent elements of this determination can be delegated to the courts.

B. Campaign Finance Limitations and Reporting

Every state makes provision for some statement of election offenses, whether within a corrupt practices act or not. These provisions are largely identical with respect to their enumeration of offenses, however, they differ markedly in their limitations and restrictions upon political campaign expenditures and the reporting thereof. In order to maintain the equal opportunity of candidates, states have employed the following four means of regulation of campaign expenses:

(1) limitations on the amount of money which may be expended; (2) restrictions on the source of the funds; (3) limitations on the purposes for which funds may be expended; and (4) filing and publishing of sources of campaign contributions. Of these four there are states which employ every one of them singlely; however, the rule is to employ several means of regulation. Of the fifty states, thirty provide limitations on amount of expenditures by candidates. Some of these have qualified their limitations by stipulating certain exemptions which make the limitations more reasonable to comply with. Arizona and South Dakota seemingly exempt all expense incurred for written or printed advertising materials. Wisconsin exempts the equivalent of a ¼ page ad in each paper in the district and one mailing of literature. West Virginia demonstrates the extreme by exempting all expenses save the renting of office space. If the problem with campaign expenditures be the fact that the actual amounts spent bear no relation to the limitations, then exemptions will diminish the incongruity. Although seventeen states provide limitations upon total expenditures, most of these, including Minnesota, do not subject volunteer campaign committees to limitations. Candidates are thus able to stay within the limitations, while the expenditures made in his favor may actually be so large as to give him an inordinate advantage.

Every state that has a corrupt practices act provides some statement of the legal purposes for which expenditures can be made, if only by prohibiting bribery and "undue influence." Some of these limit only the candidate and others more generally limit the purposes for which any money can be

spent.

The method of regulation which has received the most support by scholars of government is that of more effective reporting accompanied with repeal of the limitations on amount of expenditures which have been unenforcable. Nearly all of the states presently require the filing of financial statements, and most require statements from political committees; however, "committee" is often defined so as to exclude volunteer groups thus exempting them from public disclosure. Generally, financial statements must be filed by some particular date subsequent to the election, and some states go so far as to void nominations and withhold certificates of election when statements are not filed. In Dempsey v. Stovall 418 SW 2d 419 (1967), the Kentucky Supreme Court upheld action that voided a nomination for failure to file financial statements. Florida has similarly voided an election. The most well known reporting law is the so-called Florida "Who Gave It - Who Got It Law". Florida has no limitations on amount of expenditures, but requires periodic reporting of all campaign sources and expenditures throughout the campaign and a full accounting after the election. (Reports before elections in Florida have reflected more than 95% of the total contributions and expenditures.) The regulation function is performed by public surveillance within each district, employing its own standards of propriety, in contrast to reliance upon unenforceable statutes. In Florida, public regulation is assisted by centralizing the responsibility for receipt and

expenditure of funds in a single depository account under a campaign treasurer. (Since the passage of the Florida law, Kentucky and Connecticut have passed similar acts requiring single campaign depository accounts.)

1. The Model Campaign Reporting Law

After an extensive study of the 1952 election in Florida, Prof. Elston E. Roady published a favorable analysis in the American Political Science Review in 1954. In 1957, Dr. Roady prepared a first draft of a Model Campaign Reporting Law for the National Municipal League styled largely from the Florida law. This draft was revised three times and circulated for review to experts and election officials in 1958, 1959, and 1960 by the League. Principal features of the model law include (1) centralized responsibility for receipts and expenditures and provision that all transactions must clear the campaign treasurer; (2) enforcement responsibility placed upon the secretary of state and the attorney general; (3) accountability and reporting to begin when an individual is identified as a candidate; (4) no limit on total campaign expenditures or on the amount of individual contributions; (5) prohibition against campaign indebtedness; (6) no anonymous appeals to voters; (7) a written record of all contributions and expenditures, and audit thereof, and the preparation of a summary to be distributed to the news media; (8) provision that contributors of $100 or more must certify that the donation is their own money.

The model law offers a number of substantial differences with respect to Minnesota law and election policy.

This law avoids limitations on amounts of expenditures which are constantly evaded and thus fail of enforcement. By allowing for public regulation, differences between constituencies in terms of size, population, and affluence are accounted for in a manner which limits, no matter how liberal, can not duplicate. The publicity required discourages candidates from becoming too indebted to any special interest group and the uniform enforcement by state officers rather than county removes the political complications of sanctioning delinquents or failing to do so. As all campaign committees must go through the campaign treasurer for funds, financial responsibility is secured down to a lower level. By establishing financial responsibility, there would also be increased accountability by campaign groups in their advertising and other promotion. In brief, the model law simply repeals what is unrealistic and unenforced and submits to public watchfulness what had been incognito.

(Copies of Florida financial statements, Citizens' Research Foundation suggestions for financial statements, and the National Municipal League "Model Law" are available.)

2. M.S.A. 211.17 and 317.05

It has been suggested that there is an inconsistency between 211.27 of the Fair Campaign Practice Act and 317.05 of the Minnesota Non-profit Corporation Act. Section 211.27 prevents a corporation from contributing money, services, or property for any political purpose. Section 317.05 states that a non-profit corporation may organize for any lawful

purpose and lists among others political purposes. Political purposes would include presumably the use of money and services to advance political campaigns.

M.S. 317.05 was intended to solve the problem of non-profit incorporators who were unable to find an applicable statute to incorporate under. (In the 1952 case of In re Red River Valley Livestock Ass'n. 235 Minn. 267, 50 N.W. 2d 287, the court noted that non-profit corporations could not incorporate under the Business Corporation Act since it was clearly aimed at industrial and commercial corporations organized for profit.) The statute authorizes incorporation for all 'lawful purposes', qualified of course by those which are non-profit. The difficulty arises by way of the list of lawful purposes included in the statute. A brief look at several other states (New York, Michigan and Wisconsin) reveals that the language which authorizes incorporation of non-profit organizations is limited to "lawful purposes", controlled by "non-profit", which are defined by the body of case law and other relevant statutes.

3. Defamatory Attacks

One of the areas of particular concern to members of the legislature is the boundaries of 'fair political comment' in the proper conduct of campaigns. The importance of distinct guidelines was forcefully presented to the House during the 1969 session in the determining of two election contests

false information. The statutes cited in the Fena/Bischoff and Smaby/Brandt cases were Minnesota Statutes 210.11 and 211.08.

M.S. 210.11 is a penal provision directed toward anyone writing, printing, or distributing false information regarding the personal or political character or acts of any candidate. M. S. 211.08, included in the Fair Campaign Practices Act, relates to any person or committee who shall knowingly make or publish any false statement regarding a candidate intended to or which tends to affect the voting.

The Supreme Court in New York Times Co. v. Sullivan (376 U.S. 254, 84 S. Ct. 710 (1964)) established essentially new constitutional requisites for state libel laws. A state law that fails to provide safeguards for freedom of speech and of the press is constitutionally deficient. Moreover, it was pointed out that unshackled debate on public institutions and public officials was one of the necessary foundations upon which a strong democracy rests. In the words of Justice Brennan speaking for the majority in New York Times "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments - leads to a comparable 'self-censorship'." (376 U. S. 279) A mere showing, that statements about a public official are false should not suffice, but only the demonstration that false statements were made with actual malice. Actual malice is knowledge that a statement is false or reckless disregard of whether it was false or not. (Friedell v. Blakely Printing Co. 163 Minn. 226, 203 N.W. 974 (1925))

See Rose v. Koch 278 154 N.W. 2d 409 (1967).

With respect to New York Times, it is clear a state may not include a statute in its Corrupt Practices Act which sanctions the mere making of false statements and it may not permit a judgment awarding damages where actual malice has not been shown. Substantial unclarity exists though, as to what effect these stipulations have as regards legislative activity, especially the adjudication of legislative election contests. In the past the Supreme Court has avoided confrontations with the legislative branch under the "political question" doctrine; however, in recent years with the cases of Baker v. Carr (legislative apportionment), Powell v. McCormack (Congressional exclusion), and Bond v. Floyd (state legislative exclusion), the court has extended the perimeters of its review and we have no reason to suppose that trend will not continue.

The determinations of election contests are singular among the acts of government in that they at once determine eligibility and whether a violation of the law has occurred. Furthermore, in so far as legislative action is not vindicated step by step as the judgments of courts are, it is never quite clear at what point the legislature is doing the one or the other. Especially since the recent Bond case in which exclusion by a state legislature was declared unconstitutional when First Amendment Freedoms are denied, it may be important to consider what limits exist in adjudicating contests and to what extent the limitations upon candidates are distinguishable from those of others.

Until 1965, Florida required any individual publishing and circulating a charge against any candidate within the 18 days preceding the election to furnish that candidate with a copy of the attack at least 18 days before the election. Answers to a charge or attack were not considered to be attacks under this statute. (F.S.C. 1955) sec. 104-34. Such a law would prohibit the last minute attack upon a candidate and reduce the number of fallacious charges made. Florida repealed this statute in 1965 as a result of its questionable constitutionality.

Note the Red Lion case decided by the Supreme Court in which those sections of the Communications Act administered by the FCC under the name of the Fairness Doctrin withstood a challenge based upon alleged abridgment of freedom of speech and the press. The Fairness Doctrine requires radio and television broadcasters to provide advance notice and a transcript prior to the broadcast of any attack.

Another confrontation between Corrupt Practices Acts and the First Amendment Freedoms occurred in Mills v. Alabama. In Mills v. Alabama (384 U.S. 214), the Supreme Court declared unconstitutional a provision of the Alabama Corrupt Practices Act proscribing election evening or solicitation of votes on election day for or against any proposition or candidate involved in the election. The decision reversed the Alabama Supreme Court's holding that the restriction met the test of being "within the field of reasonableness." The Court pointed out that the state's argument for this provision was that "last-minute" charges incapable of reply would be

prevented; however, the statute served to preclude any response made to a charge leveled the last minute of the day before the election.

Of importance is the fact that Sec. 285 of the Alabama Corrupt Practices Act, Ala. Code, 1940, Tit. 17, Secs 268-286 is practically identical to M. S. 211.15, Sub. 2.

III. LEGISLATIVE ELECTION CONTESTS

Legislative election contests present some of the most difficult questions for analysis in government. The legislative election contest takes place in what the political scientists have called an area of "comingling of powers", partaking of both the legislative and judicial functions. Contests in states having Corrupt Practices Acts may determine both the qualifications of a member and whether he has violated the law. At once, delicate questions of constitutional law, legislative procedure, and political fact must be considered; and furthermore, it will not be clear in any individual case what considerations ought to prevail.

A. Constitutional Provisions

The constitutions of the federal and all of the state governments contain provisions similar to Minnesota Constitution Art. 4, Sec. 3, declaring each house to be the judge of elections, returns and qualifications of its members. (See Appendix A for listing of state constitutional provisions relating to powers to judge qualifications and expel members). In addition, most state constitutions contain provisions for the expulsion of members upon the vote of 2/3 of the members. (Art. 4, Sec. 4). Although the Minnesota legislature has delegated to the state courts some authority in ancillary matters dealing with appointment of election officers and the conduct of recounts, the separation of powers between the legislature and the judiciary has precluded abdication of constitutional responsibility. (See In re Election Contest (1894) 59 Minn. 489, 61 N.W. 553 and 16 Am Jur 2d Conflict of Laws s 226).

The extent of the legislature's responsibility has recently been discussed concerning the question of whether the legislature is the sole judge of elections, returns and qualifications. Authorities point out that with respect to the impeachment powers, the constitution explicitly places the "sole impeachment power" in the House of Representatives. With the absence of similar constitutional language relating to election contests, some have argued that determination by the courts in these matters does not violate separation of powers so long as the legislative determination is final. The consequence of this point is far reaching since there would be psychological pressure upon the legislature to accede to any prior determination made in a court of law. In Alaska, all election contests are brought to superior court for determination. Although this determination could be reversed by the legislature under the constitution, that has not been the experience in that state.

The federal courts have declined to review such state legislative determinations until the recent case of Bond v. Floyd 385 U.S. 116 (1966) which asserted the court's jurisdiction when a denial of first amendment rights has been alleged. With this precedent set, it must be assumed that further review will take place.

B. Minnesota Statutory Law

The present Minnesota Election Law has resulted largely from the recommendations of legislative interim committees. In 1939 the legislature codified all prior election laws in Laws 1939, Chapter 345, according to the recommendations of the interim commission reporting on it. Included in the revised Election Code was an article relating to the conduct of election contests, the present Chapter 209. Upon the recommendations of another interim committee, the 1959 legislature substantially revised the Election Law, though retaining the chapter on election contests. Minnesota and the several other states which have compiled statutes on election contests have thereby demonstrated the intent to reduce these inherent ambiguities and certainly have experienced fewer problems and uncertainties while legislating a degree of orderliness into the adjudication procedure.

As a part of the recodification of Minnesota Election Law which passed during the 1959 session, Chapter 209 relating to election contests set forth the statutory jurisdiction of the state courts in hearing election contests and the grounds under which they may be initiated. (Footnote - Minn. Const. Art. 4 Sec. 17 provides that the legislature shall prescribe by law the manner in which evidence in case of contested seats shall be taken). Briefly, any voter may contest the nomination or election of a successful candidate on the grounds of an irregularity in the conduct of an election or canvass of votes or the deliberate, serious, and material violation of the provisions of the Minnesota Election Law. (209.02 sub. 1) Notice of contest must be filed

in the district court within a specific time in order to confer jurisdiction on the court, (Footnote - Franson v. Carlson 272 Minn. 376, 137 N.W. 2nd 835) and the contestee may file an answer to the contestants notice within similar time limitations (209.03).

The contest proceedings are brought on for trial within 20 days after the filing of the notice of contest, (209.04) and in the case of a contest relating to the office of State Senator or Representative, the only question to be tried by the court is which of the parties to the contest received the highest number of votes legally cast at the election, and as to who is entitled to receive the certificate of election. (209.10 Subd 1). Practically speaking, the legislature has tended to treat the judgment of the court in these matters as final. Further evidence upon the points specified in the notice and answer is taken, but the judge can make no finding or conclusion thereon (209.10 sub 1). Subsequent to an adverse determination of the district court, an aggrieved party may take an appeal to the Supreme Court (209.09); however, the only question before the court is which party received the most votes legally cast. (Fitzgerald v. Morlock (1963) 264 Minn. 520, 120 N.W. 2d 339). The notice of appeal must be filed no later than ten days in case of a general election and five days in case of a primary election after the determination of the district court, and return of such appeal must be within fifteen days after service of notice of appeal. (209.09). The successful party to the contest is not entitled to issuance of the certificate of election until expiration of the

time to appeal from the district court's decision or until after final judicial determination in the event of appeal, (Fitzgerald v. Morlock (1963) 264 Minn. 417 120 N.W. 2d 336) unless such appeal is waived. In a 1963 case, Henry Morlock Representative from the Twelfth District was not issued his certificate of election or administered the oath of office until February 13, 1963, the 25th legislative day. (Journal of the House February 13, 1963, page 292).

Certificates of Election

Election contests involving some violation of the Corrupt Practices Act pose some questions regarding the certificate of election and the legislature's seating of members. Section 204.32 sub. 2 provides that in the event of a contest the county auditor or the Secretary of State, as the case may be, may not issue the certificate of election until the proper court has determined the contest; however, the judge in these contests is directed to make no finding or conclusion (Footnote 209.10 sub. 1) The determinative forum is the appropriate legislative body itself. It is unclear just what the responsibilities are of the official issuing election certificates under these circumstances. A case in point is the Brandt - Smaby contest during the 1969 session. The grounds for this case were alleged violations of the Corrupt Practices Act regarding which the district court only takes evidence and submits the court transcript to the legislature for final determination. (209.10 sub 1). Canvass of votes following the general election was completed on November 13, and shortly thereafter notice of contest was filed by Alpha Smaby in Hennepin District Court.

The 12 day waiting period for issuance of election certificates being over on November 25, the county auditor was temporarily restrained from issuing the certificate. Four days later, upon the advice of the county attorney, the election certificate was issued. Edward Brandt received his certificate of election before the District Court proceedings even began (Dec. 10) and before final judgment was rendered (May 10) some 176 days after the election. (Footnote - See time tables attached, Appendix B). As election certificates are only statutory (see M.S. 3.02 and 3.05) the legislature could seat any candidate it chose if the certificate were not issued. This circumstance has not arisen because, as with both Brandt and Bischoff, the county auditor has issued the certificate before the opening day of the session.

The question of the status of a legislative contestee who has received his certificate of election and been seated which became an issue in the Fena-Bischoff contest, was discussed in 1965 by the Wisconsin Supreme Court in State ex. rel. Elfers v. Olson. (26 Wis. (2d) 422) The court held that although the seating of the contestee may not be explicitly 'provisional', the contestee does not become a member in the sense that only a 2/3 vote can remove him.

North Dakota, by legislative precedent admits a contestee only as a 'provisional' member, thereby distinguishing the member for purposes of necessity of the 2/3 vote for exclusion.

C. Alternative Contest Procedures

The present legislative procedure for determining an election contest, which dates back to 1893, (Laws 1893, c. 4, Sec. 184) directs the final stages of the contest hearing including the vote to exclude, but does not stipulate the procedure to be followed prior to the hearing on the floor of the House. Several suggestions have been made which will be considered by the House Subcommittee which have as their purpose to facilitate prompt and fair adjudication by the legislature of contests alleging violation of the Corrupt Practices Act.

With variations, these suggestions reduce to basically two concepts. These include:

1. Limitation or removal of the court's jurisdiction to take evidence, thereby increasing the responsibility of the legislature in this connection.
2. Bolster the district court's responsibility under 209.10 sub. 1 by requiring findings of fact or recommendations to be submitted to the legislature.

1. Limiting the Courts

The jurisdiction of the district court to take evidence is purely statutory, (Phillips v. Ericson 248 Minn. 452, 80 N.W. 2d 513, 1957) and the function of this assignment has been to provide for the gathering of evidence. Among the implications of directing the courts to gather evidence were presumably the saving of time, since proceedings could begin before the session began, and the psychological and political advantage was to be

gained by providing judicial antecedents to the final legislative determination. This last advantage lies in that judicial proceedings are considered by many to be aloof from discretionary and political considerations, which has the effect of diverting attention from such determinants of the legislature's judgment.

Among the results of the Legislative Election Questionnaire sent to the other states, was the fact that of the 34 responses only three other states employed a court procedure similar to that of Minnesota. (Alaska, Georgia, and New Jersey) Since the recent cases in these states involved only recounts, it is open to question whether these courts would hear contests brought for violations of Corrupt Practices Acts. In all of the other states replying to the questionnaire, the responsibility for taking evidence in election contests was solely that of the legislature. (An exception to both legislative and judicial fact-gathering is the state of Vermont where the attorney general investigates election contests, takes depositions, and presents to the legislature an opinion on the law and facts.) If the statutory jurisdiction of the courts was repealed, all proceedings would take place before the legislature. Some of the judicial aura would be lost, but this effect can alternatively be viewed favorably or not so.

Analysis of the role of the district courts in recent election contests suggests that little time, if any, is saved by judicial fact gathering. The present procedure is duplicative in that hearings take place both in the district court and in the appropriate legislative committee. In addition, M.S. 209.10, sub. 2 provides for a further hearing on the floor of the House before

final adjudication. Of these hearings, the one in district court must by its nature be the longest and most involved. The ambiguous nature of this 'special statutory proceeding' provides judges with few guiding procedural precedents, resulting in long and involved proceedings. Further, if transcripts are to be of any use they must be duplicated and read which is time consuming in itself.

Assuming there to be some advantage in gathering the evidence prior to the session, it would be possible for a legislative interim committee to serve this function. Though one level of duplication and time delay is removed by this alternative, there are also the problems of changing majorities in the House and Senate and the defeated committee members to be considered. On a somewhat personal note, members of such a committee would have to conduct hearings during a holiday season subsequent to their own campaigns and elections which would surely be emotionally and physically taxing. Nevertheless, the growing amount of interim work already is beginning to make this same kind of demand.

H. F. 3066, to be discussed later, suggested the authorization of a commission composed of three district court judges to hear the contest. This is similar to the procedure used in Arizona which calls for a commission of justices of the peace to take evidence. Both of these would require the court's statutory jurisdiction to be modified, yet in turn, both would suffer the same criticisms previously directed at present procedure.

As a consequence of making the legislature responsible for taking evidence, provision would have to be made for the taking of depositions. In most states depositions may be taken before any officer authorized to administer oaths or before any person otherwise appointed to do so by the court though in Vermont, authority to take depositions in election contests is restricted to the Attorney General. Some states make other stipulations regarding depositions such as restricting parties to the points set out in the notice and answer. (Delaware, Nebraska) restricting the time for the taking of depositions (Colorado) setting the time by which depositions must be transmitted to the legislature (Kansas, Nevada, West Virginia, and Wyoming) and restricting the evidence which the legislature will consider to that submitted prior to a certain date. (New Hamshire) As previously noted, statutory restrictions of any kind cannot bind the legislature, but could serve as a form by which contests could be adjudicated in a timely and just manner.

2. Expanding the Courts Role

The other basic concept of procedural change is that of providing for findings of fact or recommendations from the district court in contests alleging violations of the Corrupt Practices Act. If the court was directed to make findings of fact, the same rules of procedure could be invoked as obtained in all other proceedings of a civil nature. Furthermore, as these findings could not bind the legislature, the designated committee could choose to add or subtract from these findings, though on the other hand, regardless of the extent to which the

court kept judgments out, the findings would have a psychologically compelling effect. Again this would be favorable insofar as it transfers the onus of judgment to the courts, and perhaps unfavorable to the extent that legislative discretion is narrowed. Pennsylvania is one state providing for judicial findings of fact in election contests. (Penn. 25, Sec. 3473). These findings of fact are not a basis for appeal to any higher court. (See the discussion of judicial fact-finding and recommendations included in the analysis of H. F. 3066.)

In spite of the efforts to provide for adjudication of election contests in a prompt and fair manner, the legal and political justaposition of the legislature had precluded a definitive treatment of the problem. Anytime discretion is preserved, vagueness must be a consequent. It is the degree of timing of legislative discretion which determines the form of legislative contest procedure.

H. F. 3066

Due to the criticism of election contest procedure and the concern voiced by members of the legislature over the two prolonged contests during the 1969 session, H. F. 3066 was introduced by a special bipartisan subcommittee as an alternative to present law. This proposal was of the variety that favored increased responsibility on the part of the courts, though there appear to be some difficulties with its particular provisions.

This bill, which passed the House and was not acted upon by the Senate, provides that in contests based upon alleged deliberate, serious, and material violation of the election laws notice must also be served upon the chief justice of the supreme court who then appoints three district court judges to hear the case. The judges are directed to begin proceedings within five days and submit a written report with recommendation before the Friday preceding the first day of the next session. The recommendation submitted is to include a statement as to whether the contestee should be allowed to assume his seat.

The effect of this bill would be to broaden the responsibility of the courts in the adjudication process while at the same time enlarging the source from which it issues. A single judge would continue to hear cases based upon alleged irregularities in the conduct of an election or canvass of votes, and the three judge panel would hear the rest. The question arises whether any alleged irregularity would not also be alleged violations of the election code. It remains unclear whether the legislature intends the three judge panel to determine which of the parties received the highest number of votes and is entitled to the certificate of election, which judgment presently is made by a single district court judge.

Several constitutional questions are presented by the suggested changes in H. F. 3066. The conduct of legislative election contests are deemed "special proceedings", but they are nevertheless judicial in nature. There seem to be no clear guidelines indicating the extent to which the legislature can prescribe procedures for the court and restrict it with time

limitations. The court either responds affirmatively to legislative intent or asserts judicial prerogative under the separation of powers doctrine almost as it sees fit. The foremost problem lies with the provision for a report with recommendation from the court. First, to determine qualifications of members of the legislature is clearly unconstitutional under separation of powers. If the report is intended to only be in substance suggestive, then it must be borne in mind that our supreme court has consistently refused to issue advisory opinions. Secondly, the recommendations are to be submitted by a panel of three district court judges who hold elective positions in the same district which voted upon the candidates involved in the contest. Just as the supreme court has avoided the 'self-inflicted wounds' of deciding political questions, the district court judges would surely avoid any possibility of sustaining unnecessary public antagonism. Even findings of fact would likely be tempered by the judges for this reason, though this certainly is better than a statute that would fail of implementation.

APPENDIX A

ALA. CONST. art. 4, §§ 51, 53; ALASKA CONST. art. II, § 12; ARIZ. CONST. art. 4, pt. 2, § 11; ARK. CONST. art. 5, §§ 11, 12; CAL. CONST. art. 4, §§ 7, 9; COLO. CONST. art. V, §§ 10, 12; CONN. CONST. art. III, §§ 6, 11; DEL. CONST. art. 2, §§ 8, 9; FLA. CONST. art. 3, § 6; GA. CONST. art. III, § 7; HAWAII CONST. art. III, § 13; IDAHO CONST. art. III, §§ 9, 11; ILL. CONST. art. 4, § 9; IND. CONST. art. 4, §§ 10, 14; IOWA CONST. art. 3, §§ 7, 9; KAN. CONST. art. 2, § 8; KY. CONST. §§ 38, 39; LA. CONST. art. 3, § 10; ME. CONST. art. IV, pt. 3, §§ 3, 4; MD. CONST. art. III, § 19; MASS. CONST. pt. 2, §§ 40, 55; MICH. CONST. art. IV, § 16; art. V, § 15; MINN. CONST. art. 4, §§ 3, 4; MISS. CONST. art. 4, §§ 38, 55; MO. CONST. art. 3, § 18; MONT. CONST. art. V, §§ 9, 11; NEB. CONST. art. III, § 10; NEV. CONST. art. IV, § 6; N.H. CONST. pt. II, arts. 22, 36; N.J. CONST. art. IV, §§ 4-2, 4-3; N.M. CONST. art. 4, §§ 7, 11; N.Y. CONST. art. 3, § 9; N.C. CONST. art. II, § 22; N.D. CONST. art. II, §§ 47, 48; OHIO CONST. art. 2, §§ 6, 8; OKLA. CONST. art. 5, § 30; ORE. CONST. art. IV, §§ 11, 15; PA. CONST. art. II, § 11; R.I. CONST. art. 4, §§ 6, 7; S.C. CONST. art. 3, §§ 11, 12; S.D. CONST. art. 3, § 9; TENN. CONST. art. II, §§ 11, 12; TEX. CONST. art. III, §§ 8, 11; UTAH CONST. art. VI, § 10; VT. CONST. ch. II, § 14; VA. CONST. art. IV, § 47; WASH. CONST. art. 2, §§ 8, 9; W. VA. CONST. art. VI, §§ 24, 25; WIS. CONST. art. 4, §§ 7, 8; WYO. CONST. art. 3, §§ 10, 12.

APPENDIX B

TIME TABLE

BRANDT-SHABY ELECTION CONTEST

Nov. 5	Election
Nov. 13	Canvass of votes completed
Nov . 25	County auditor temporarily restrained from issuing certificate of election
Nov. 29	Certificate of election issued persuant to advice of county attorney
Dec. 10	Court proceedings began
Jan. 7	Brandt administered the oath of office and seated
Jan. 14	Court proceedings conclude
Feb. 11	Transcript filed
Feb. 14	Records received by Speaker of the House and referred to Elections Committee
Feb. 20	Sub-committee appointed
April 17	Sub-committee report presented to full committee
April 19	Reported to House
April 26	Report laid over to investigate eligibility of John Skeate
May 9	Amended report presented to the House
May 10	Report adopted declaring Brandt and Skeate legally elected and entitled to their seats.

(Total time 176 days)

TIME TABLE

FENA-BISCHOFF Election Contest

Nov. 5	Election
Nov. 12	Canvass of votes completed
Dec. 9	Proceedings began
Dec. 27	Certificate issued
Jan. 7	Bischoff administered oath of office
Jan. 14	Records received by House
Jan. 16	Sub-committee appointed
Feb. 6	Sub-committee report adopted by committee
Feb. 7	Reported to the House. Report adopted excluding Bischoff from the House

(Total time - 94 days)