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Lynn A. Jenkins v. State of Utah et al : Brief of Amicus Curiae

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LYNN A. JENKINS,)
)
Plaintiff-Respondent,)
)
vs.)
)
STATE OF UTAH,)
)
Defendant-Appellant,)
)
vs.)
)
UTAH LEGISLATIVE COUNSEL,)
)
Third-Party Intervenor.)

Case No. 16034
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BRIEF OF AMICUS CURIAE,
UTAH EDUCATION ASSOCIATION

On Appeal from the Third Judicial District
of the State of Utah
Honorable G. Hal Taylor, Judge

MICHAEL T. MCCOY, ESQ.
Attorney for Amicus
Curiae, Utah Education
Association
414 Walker Bank Building
Salt Lake City, Utah 84111

FILED

SEP 14 1978

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BRIEF OF AMICUS CURIAE,
UTAH EDUCATION ASSOCIATION

STATEMENT OF NATURE OF CASE

This is an action by a private citizen against the State of Utah challenging the lawfulness of legislation enacted by the 1977-78 Utah Legislature and further challenging the right of persons employed by boards of education to serve in the Utah Legislature.

DISPOSITION IN LOWER COURT

The lower court granted the State's Motion for Summary Judgment holding that the laws enacted by the 1977-78 Utah Legislature and that the revenues collected were lawful and that educators could not serve in the Utah legislature.

RELIEF SOUGHT ON APPEAL

Amicus requests that this Court find that the trial court lacked jurisdiction over the parties and subject matter, that

the issues were improperly brought in the district court and that educators are not constitutionally prohibited from serving in the legislature.

STATEMENT OF FACTS

On or about August 9, 1978, Lynn A. Jenkins filed a Complaint against the State of Utah alleging, among other things, that employees of the Utah public schools had been elected and had served in the 1977-78 state legislatures and that Article VI, section 6 of the Constitution of Utah provides in part that "No person holding any public office of profit or trust under authority of. . .this state, shall be a member of the Legislature; . . ." The prayer for relief requested:

1. That "All laws passed by the 1977-78 Utah State Legislature shall be declared null and void."

2. That "All money collected by virtue of laws which are declared null and void shall be returned to the people."

3. That the Legislature shall certify all their membership to be constitutionally correct. Those members of the Legislature which cannot certify shall forfeit any and all benefit which the office of Legislator holds.

4. "For costs and disbursements of this action."

5. "For such other and further relief as the court seems just in the premises."

Following the State of Utah's Motion for Summary Judgment held August 30, 1978, the district court held that the laws enacted by the 1977-78 legislature were valid, that the revenues

collected were lawful, and that the revenues were not to be returned to the people. The court also held that the revenues collected were lawful, and that the revenues were not to be returned to the people. The court also held that the revenues collected were lawful, and that the revenues were not to be returned to the people.

school administrators could not serve in the Utah legislature.

The State of Utah appealed the District Court's judgment that school teachers and administrators cannot lawfully serve in the Utah Legislature, although Amicus is unable to understand how the State of Utah has become a proper party defendant to represent educators whose right to be elected by the voters of Utah has been challenged.

ARGUMENT

POINT I

PLAINTIFF HAS NO STANDING BEFORE THE COURTS.

Mr. Jenkins alleged that he is a resident of Salt Lake County. Mr. Jenkins does not allege that he is a taxpayer. There is no allegation that Mr. Jenkins is represented in the Utah legislature by a person employed by a public school or that his voting privileges are affected by the candidacy of such person.

59 Am Jur 2d, Parties, §30 provides:

Public wrongs or neglect or breach of public duty generally cannot be redressed at a suit in the name of an individual or individuals whose interest in the right asserted does not differ from that of the public generally, or who suffers injury only in common with the public generally, and not peculiar to himself, even, it seems, though his loss is greater in degree, unless such right of action is given by statute.

The broad general principle is asserted that in the absence of a statute imposing liability, an action will not lie in behalf of an individual who has sustained a private injury by reason of the neglect of a public corporation to perform a public duty. When the duty of taking appropriate action for the enforcement of a statute is entrusted solely to a named public officer, private citizens cannot intrude upon his functions. In cases of purely public concern and in actions for wrongs against the public, whether actually committed or only apprehended, the remedy, whether civil or

instituted by the state in its political character, or by some officer authorized by law to act in its behalf, or by some of those local agencies created by the state for the arrangement as may be entrusted to them by law. If a mere public right is to be vindicated, or enforcement or evasion of a law is to be restrained, the action should be brought by the attorney general or district attorney, or some public officer or body especially charged with the duty of enforcing the law. The right of a citizen or taxpayer to restrain acts of public officials is in some instances granted or regulated by statute, but ordinarily, and in the absence of statute, private citizens or corporations must possess something more than a common concern for obedience to law before they will be permitted to maintain injunction suits against public officers. A private person who wishes to restrain an official different in character from that sustained by the public generally, although there is an exception in regard to taxpayers' action.

* * *

It is, however, only when the injury from the violation of a public duty is general and public in its effect, and no private right, in contradistinction to the rights of the rest of the public, is violated, that individuals are precluded from bringing private suit for the violation of their individual rights. When an individual or a private citizen suffers an injury peculiar to himself from a public wrong which is not sustained by the public in general, he may sue in his own name and for his own benefit for such wrong.

In Jenkins v. State of Utah, Plaintiff does not allege that he has any special interest to protect or that he has suffered any unique injury. Indeed, he appears to seek redress of a problem reserved by the Constitution of Utah to the Legislature. See Point IV below.

74 Am Jur 2d, Taxpayers Actions, §46 provides:

A taxpayer may not maintain a petition for declaratory judgment to question the eligibility of a candidate for, or the title of, an office.

An action relating to election matters cannot be maintained by one whose interest is only that of the public generally in

the absence of a statute authorizing the action. Yett v. Cook, 281 S.W. 837 (Tex. 1926).

A private citizen may not maintain an election contest in his capacity as a citizen and a taxpayer. Freemen v. Felts, 344 S.W. 2d 550 (Tenn. 1961); Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir. 1972) cert. den. 410 U.S. 910 (1973).

The right to contest office of mayor held by the apparent winner lies only in the defeated candidate. Marden v. City of Waterville, 226 A.2d 369 (Me. 1967).

In Porter v. Bainbridge, 465 F. Supp. 83 (D.C.Ind. 1975) the court held that the challenge to the election of a person to the Indiana House of Representatives was "in essence a contest between two opposing candidates for a section in the Indiana House of Representatives. . .accordingly plaintiffs Porter and Zimmers, who claim an interest in the case only in their capacity as voters, lack standing to maintain the action under the principles of Schlesinger v. Reservists' Committee to Stop War, 418 U.S. 208 . . .and Ex Parte Levitt, 302 U.S. 633...."

The issue before the court is really a back-door effort to bring an election contest of the right and qualification of a certain class of persons to serve in the Utah legislature. Election contests are regulated by the Constitution or by statute. 26 Am Jur 2d, Elections, §31. Section 20-15-1, Utah Code Annotated, 1953, sets forth nine grounds to contest the "election of any person to any public office, or in the case of a primary, to a nomination." Subsection (2) of section 20-15-1 provides that an election may be

contested "When incumbent was not eligible to the office at the time of the election." The pleadings in Jenkins v. State of Utah do not allege and there are no facts before the court showing that there are candidates for election to the state legislature not eligible to secure as state legislators at the time of their election. Moreover, the statute clearly indicates that the contest must be brought after the election. In the Jenkins case, the matter was brought before the election.

POINT II

THE COURTS HAVE NO JURISDICTION AS THE
"STATE OF UTAH" HAS SOVEREIGN IMMUNITY
IN THIS CASE AND THERE WERE NO PROPER
PARTY DEFENDANTS.

Amicus submits that the persons whose interests to this matter would be affected, i.e., educators, have never been made a party. Moreover, although the State of Utah by and through the office of the Attorney General have not raised the issue, the State of Utah is neither a proper party nor may it be a party defendant.

Unfortunately, the impetus to this action is a \$50,000,000 bond issue which appears to have been stalled as a result of this action. Amicus submits that if the validity of the bonds are at issue, the proper course of action would be to have the governor sue the state treasurer raising the issues raised in the Jenkins suit.

A. The State of Utah is sovereign and is immune to process. Rule 4(e)(9) of the Utah Rules of Civil Procedure provides that

service of process may be made on the State of Utah, in such
as provided to the State of Utah by the Utah State Library and Archives, under the
Library Services and Technology Act, administered by the Utah State Library.
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cases as by law are authorized to be brought against the state...." There is no law authorizing the type of action which was brought against the State of Utah by Mr. Jenkins. Accordingly, the district court acquired no jurisdiction on which to enter a judgment.

In Campbell v. Pack, 15 Utah 2d 161, 389 P.2d 464 (1964) this Court held that the activities, operations and contracts of state government have sovereign immunity. While the attorney general has entered his appearance in Jenkins v. State of Utah, his appearance does not constitute a waiver of immunity. In Bailey Service and Supply Corp. v. State By and Through State Road Commission, 533 P.2d 882 (Utah 1975) this court held that only the legislature could waive sovereign immunity. The Court may take judicial notice of lack of jurisdiction and improper parties. Bruno v. Kenosha, 412 U.S. 507 (1974).

B. Rule 17(a) in the Utah Rules of Civil Procedure requires that "Every action shall be prosecuted in the name of the real party in interest." In this case only the State of Utah was served or made a defendant. Subsequently, the Office of Legislative Counsel intervened, but no teacher or school administrator was ever made a party. Moreover, not until the State's Motion for Summary Judgment, at the direction of the trial court judge, did the prayer for relief become amended to request a decision

on whether or not educators may serve in the legislature.^{1/}

Although the State has not previously objected to jurisdiction for the reasons suggested in this Point II, it is submitted that this Court may take notice of the lack of jurisdiction. Jurisdictional defects can be raised at any time. 26 Am Jur 2d, Elections, §328. Bruno v. City of Kenosha, 412 U.S. 507 (1974).

POINT III

SCHOOL TEACHERS AND ADMINISTRATORS
ARE NOT OFFICERS WITHIN THE MEANING
OF ARTICLE VI, SECTION 6, OF THE
CONSTITUTION OF UTAH.

Article VI, Section 6 of the Constitution of Utah provides:

No person holding any public office of profit or trust under authority of the United States, or of this State shall be a member of the Legislature; provided, that appointments in the State Militia, and the offices of notary public, justice of the peace, United States commissioner, and postmaster of the fourth class, shall not within the meaning of this section be considered offices of profit or trust.

A. This Court has never decided whether a school teacher holds an "office" of profit or trust within the meaning of the constitutional language.

^{1/} At page 16 of the Transcript the court states, "Now, I don't understand about-I am not sure I understand Paragraph 3." "Legislature shall certify all their membership to be constitutionally correct." At page 17 of the Transcript the Court states, "And with regard to the fourth issue, while as I have indicated I have some doubts as to what the Supreme Court will decide, I am going to hold that a school teacher does hold an office of profit trust-or an educator-and therefore cannot be seated in the Legislature." Plaintiff's fourth prayer for relief was for "costs and disbursements of this action." Even if an educator had received a copy of the Jenkins Complaint the educator would not have known that the Complaint requested that educators be determined ineligible to serve in the legislature.

In an unreported case styled Davie v. Messinger, No. 8272 (1954) this Court dismissed an action brought by the defeated candidate for a seat in the Utah House of Representatives. Davie had challenged the qualification of Messinger on the ground that Messinger was the clerk of the board of education of the Beaver County School District. The pleadings show that Mr. Messinger had alleged grounds as to why his occupation as clerk of the school board did not disqualify him. First, he argued he was not holding an office of profit or trust. Second, the Legislature was the sole and exclusive judge of the qualifications of its members. Unfortunately, the minute entry of the court does not indicate the basis of its decision to dismiss Davies petition.^{2/}

In Eliason v. Miller et al., No. 13130, (Utah 1972), an unreported case, petitioner, the defeated candidate in an election for membership on the Utah State School Board, sought to prohibit the certification of Steven L. Garrett from serving on the Utah State School Board for the reason that Mr. Garrett held an incompatible office, i.e., he was an educator employed by the Iron County School District at the time of his election and therefore the office to which he had

^{2/} A clerk of a board of education is an office established by statute, §53-6-3, Utah Code Annotated, is bonded, Id. at §53-6-4 and takes an oath of office. Id. at §53-6-6. It would appear under the criteria below suggested by Amicus that Messinger was an "officer" of the board. Accordingly, the Court must have concluded that Article VI, Section 10 of the Constitution of Utah reserved to the Legislature the jurisdiction to determine the election and qualification of the membership.

been elected was incompatible with his office as an educator. Mr. Garrett argued that a school teacher is not an "officer" but rather an "employee" and that constitutional limitations regarding eligibility for public office should be strictly construed in favor of eligibility. This Court dismissed Mrs. Eliason's petition for Extra Ordinary Writ.

Amicus submits that a school teacher is not an office of trust or profit within the meaning of the Constitution. At 35 Words and Phrases, Public Officers, page 405 there are many cases holding that a school trustee, a member of the school board or a school committee are public officers. There is a split of authority as to whether superintendents are public officers or employees. Compare Rowan v. Board of Education of Logan County, 24 S.E.2d 583 (W. Va. 1943) with State ex rel. Harvey v. Stanley, 138 So. 845 (La. 1931).

In Malone v. Hayden, 197 A. 344 (Pa.1938) the court held that a school teacher is not a public officer within the meaning of the constitutional provision prohibiting the creation of any office the appointment to which shall be for a longer term than of any "public office" after his election or appointment since the duties of school teachers are not created by statute, but rise strictly from their employment contracts. It is generally held that a school teacher is an employee and not a public officer; Gelson v. Berry, 250 N.Y.S. 577 (1931); Regents of University System of Georgia v. Blanton, 176 S.E. 673 (Ga.App.1934); Coble v. Metal Tp. School District, 3 Cumb. 43 (Pa. 1955); 78 C.J.S. Schools

B. The courts have distinguished an officer from an employee.

In Northwestern Nat. Life Ins. Co. v. Black, 383 S.W.2d 806 (Tex.Civ.App.1964), the Court held that the determining factor which distinguishes public officers from employees is whether any sovereign function of government is conferred on the individual to be exercised by him for the public largely independent of the control of others.

In Romney v. Barlow, 24 Utah 2d 226, 469 P.2d 497 (1970), this court considered the definition of "civil office." It noted that Black's Law Dictionary defines "civil office" as:

An office, not merely military in its nature, that pertains to the exercise of the powers of authority of civil government. Requisites are continuity, creation and definition of powers and duties by Constitution or Legislature, or their authority, possession or governmental power, and independence unless controlled by superior officers.

The Court then analyzed the creation and membership of the legislative council as follows:

1. The Council was created by the Legislature.
2. Members had a definite tenure, to wit, until the convening of the next regular session of the Legislature following the appointment.
3. The duties of the Council are set forth by the Legislature.
4. The Council is given power to administer oaths, issue subpoenas, compel attendance of witness and to take testimony.

5. The Council performs its work according to

its own rules and regulations independent of any supervision.

6. The Council possesses governmental powers.

Based on the foregoing test, the Court concluded that membership on the Council constituted holding a public office.

Educators, by contrast, possess almost none of the foregoing. The position of teachers is not created by statute. Section 53-4-14, Utah Code Annotated, 1953, provides:

Board of education of local school districts may enter into written contracts for the employment of personnel for terms not to exceed five years....

In Brough v. Board of Education, 23 Utah 2d 174, 460 P.2d 336 (1969) and 23 Utah 2d 353, 463 P.2d 567 (1970) this court made clear that a school teacher is entirely subject to the control and direction of the board of education and the district superintendent and that a school teacher who attempts to controvert the policies of the school district may be terminated for insubordination absent a showing that the board's action was not capricious, arbitrary, or unreasonable. 23 Utah 2d at 354.

School teachers do not have definite terms of office, but may acquire tenure according to the policies of local boards of education. Abbott v. Board of Education 558 P.2d 1307 (Utah 1977). Nor do teachers and lower level "administrators" take or subscribe to an oath of office or post a bond.

Based on the foregoing, it is clear that school teachers and school administrators are not officers of the State of Utah or

of the school district. Indeed, if school teachers were found to be officers, they could not be fired except by a vote of four or more members of a five member board of education. Section 53-6-7, Utah Code Annotated, 1953.

C. Article IV, Section 10 of the Constitution of Utah provides in part that:

All officers made elective or appointive by the Constitution or by the laws made in pursuance thereof, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation. . .

Petitioner respectfully submits that the criteria of taking an oath of office was foremost in the minds of the drafters of Article VI, Section 6 of the Constitution of Utah. Article VI, Section 6 prohibits persons holding a public office of profit or trust under the United States or the State of Utah from serving in the Utah Legislature. Excepted from that prohibition are appointments in the state militia, notaries public, justices of the peace, United States commissioners and postmasters of the fourth class.

Pursuant to the Territorial Laws of Utah, 1888, commissioners and notaries public were required to take and subscribe to the oath of office. Territorial Laws of Utah, 1888, §§225, 227 and 231. Justices of the peace were elected and had to take the oath of office. Id. at §162.

The officers of the state militia were appointed by the governor, Id. at §1436, except that field officers of battalions and regiments were elected. Id. at §1439. All commissioned officers were required to "take and subscribe the required oath." Id. at §1440.

Spotted by and J. Subscribing the required oath. Provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
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Section 1854 of the Territorial Laws, p.54 provides in part:

. . .no person holding a commission or appointment under the United States, except postmasters, shall be a member of the Legislative Assembly, or shall hold any office under the government of any Territory.

Amicus submits under the principal of noscitur a sociis, the five offices listed in section 6 of Article VI of the Constitution of Utah show that the word "office" is intended to mean persons appointed by the president of the United States, the governor of Utah or holding elected office all of whom took an oath of office and filed a bond. Moreover, the offices of each was expressly established by statute as an "office."

Amicus submits that given the legislative background, educators were not intended to be included within the prohibition of Article VI, §6 of the Constitution of Utah as they are not appointed by the president of the United States, the governor of Utah and they are not elected by the people.

The lower court entirely relied on Monaghan v. School District No. 1, Clackamas County, 315 P.2d 797 (Ore.1977) for the proposition that an educator holds an office of profit or trust. Yet Monaghan, Supra at 315 P.2d 801 holds:

We are inhibited from passing upon Mr. Monaghan's qualifications as a member of the legislature. That power reposes exclusively in the branch of the legislative assembly to which he was elected to serve. (Oregon Constitution, Art. IV, §2)....

Article IV, §2 of the Oregon Constitution is substantially the same as Article VI, §10 of the Constitution of Utah.

D. Article VI, Section 6, of the Constitution of Utah is a limitation of the right of otherwise qualified persons to serve in the Utah Legislature. It is also a limitation of the right of the people to vote for the person they believe can best represent them in the legislature. In State v. DuBuque, 413 P.2d 972 (1966), the court held that where eligibility for public office is in question and where the constitution and the context of the language permits, those provisions should be construed so as to preserve eligibility.

In Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829 (1964) this court held that:

The foundation and structure which give it (government) life depend upon participation of the citizenry in all aspects of it's operation. On patriotic occasions we hear a great deal of oratory declaiming how precious is the right and how essential is the duty to vote for the candidate of one's choice. The emphasis is placed on the first clause-the right to vote; and the second clause-for the candidate of one's choice, is minimized or forgotten. Lost sight of is the fact that the two rights are correlative, and that to make the first meaningful, the second must also be assured. Furthermore, the natural corollary of the right to vote is the right to seek and to serve in public office.

Petitioner submits that the issue of whether or not an educator should serve the people in the Utah legislature is a political question. If the public does not want educators to represent them, they can vote for other candidates. Candidates for the legislature have "full exposure to public view, and. . .

have full exposure to the elective process. Months before suit was filed they had announced their candidacies for office. They had to run before and obtain the approval of the conventions of their respective parties. They were obliged to run in the public primaries against formidable opponents; and must face candidates of the opposing party in the general election. All of this with the public fully aware of all of the circumstances so they are free to approve or disapprove what the candidates have done." Shields v. Toronto, 16 Utah 2d at 65. Amicus submits that the issues raised by Mr. Jenkins should be resolved by the electorate, not by the courts.

E. The Court's attention is directed to Utah Attorney Opinion 72-038 which states in part:

An opinion of the Attorney General issued Jan. 10, 1961 and number 61-006, covers this question: "It should be noted that what is prohibited by Sec. 6, Art. IV is the holding of 'public office of profit or trust,' while serving in the legislature. . . In an earlier opinion of the Attorney General, Feb. 29, 1944, it was said that the constitutional prohibition applies only to officers and not to employees. Although this is probably more general than intended, it is essentially correct. Unless the person holds 'an office' as distinct from mere employment the prohibition of Art. VI is inapplicable. . . employment as a teacher. . . would not be within the constitutional prohibition. . . From this we must conclude in general terms that the constitutional prohibition set out in Art. VI, Sec. 6 of our State Constitution applies only to persons holding public office, which based on the facts of each case, must be distinguished from mere employees."

Under the foregoing we see no compelling reason why a school teacher cannot be a member of the Legislature as far as Art. VI, Sec. 6 of the Utah Constitution is

concerned.

F. Amicus further anticipates that this court will be urged on the basis of Monaghan, supra, to find that educators who are elected to the legislature are not eligible to continue their employment as educators. It is submitted that this issue was not raised by the plaintiff in the court below and it should not now be considered by this court for the first time on appeal. State By and Through Road Commission, 27 Utah 2d 295, 482 P.2d 702 (1972); In re Ekker's Estate, 19 Utah 2d 414, 432 P.2d 45 (1967); Riter v. Cayias, 19 Utah 2d 358, 431 P.2d 788 (1967).

Moreover, amicus submits that Utah educators occupy a relationship to the executive department substantially different than that of Oregon educators.

Before this court addresses the issues raised by Monaghan, there should be proper parties and the issues should be fully developed. In distinguishing Monaghan, the Utah Attorney General suggests among other reasons:

Only if its reasoning is compelling then would it influence a similar decision in Utah. It could be argued that there is, in fact, more weight in the "unwritten precedent," which tacitly endorses the employment of legislators as public school teachers. Op. Atty. Gen. 72-038.

G. While it was not raised in the pleadings below, Amicus anticipates that it may be urged that Article VI, §6 of the Constitution of Utah is a general prohibition on conflicts of interest. Had the drafters of the constitution intended a prohibition on conflicts of interest, the language would have extended to include employees of the state and would not have excepted the five named classes of officers. It has been suggested that retired educators have a conflict of interest and should not serve in the legislature. There are 76,000 retirees participating in the Utah State Retirement program. There are at least 20,000 persons employed by higher education. Amicus submits that any effort to extend the exclusions of Article VI, §6 of the Constitution of Utah to conflicts of interest would eliminate from eligibility for service in the Utah legislature a group of people large in number than the number of votes cast for the candidate elected governor in Utah in 1976.

ARGUMENT

POINT IV

EACH HOUSE OF THE LEGISLATURE IS THE EXCLUSIVE HOUSE TO DETERMINE THE ELECTION AND QUALIFICATION OF ITS MEMBERS.

Amicus respectfully submits that the courts do not have jurisdiction to decide the qualifications or election of members to the Utah legislature. Article VI, §10 of the Constitution of Utah provides in part:

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"Each house shall be the judge of the election and qualifications of its members. . ."

This issue was set to rest early in Utah law in the case of Ellison v. Barnes, 23 Utah 183, 63 Pac. 899 (1901). There an action was brought contesting the election of the respondent to the office of state senator. A demurrer to the complaint was sustained by the trial court on the ground that the court had no jurisdiction to try and determine the same. The Supreme Court in a decision per Justice Baskin, with Chief Justice Miner and Justice Bartch concurring, upheld the lower court's decision explaining:

The powers conferred upon each house of the legislature under section 10, art. 6, are forbidden to be exercised, by article 5, §1, by any person in the exercise of powers belonging to a different department of the government. Neither is it anywhere declared in the constitution that the power conferred upon each house to judge of the election and the qualifications of its members is otherwise than prohibitory in respect to the other departments. Chief Justice Bartch, in the opinion in the case of Kimball v. City of Grantsville 19 Utah, 368, 57 Pac. 1, 45 L.R.A. 628, said, "The apportionment of distince power to one department of itself implies an inhibition against its exercise by either of the other departments." It therefore follows that the power is exclusively lodged in each house of the legislature, and the courts have no jurisaiction to try and determine contests for seats in the legislature.

* * *

The power thus given to the houses of the legislature is a judicial power, and each house acts in a judicial capacity when it exerts it. The express vesting of a judicial power in a particular case so closely and vitally affecting the body to whom that power is given takes it out of the general judicial power, which is at the same time, in pursuance of a general plan that has regard in each part to every other part, bestowed upon another body; both bodies being contemporaneous in origin, and equal in dignity, degree, and proposed duration." The senate, under the provisions of the constitution, has the exclusive jurisdiction to try, determine, and declare which of the parties to this action were illegally elected.

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This concept is not unique to Utah, but rather, constitutes the generally accepted approach by other jurisdictions.

Each house is the sole judge of the election and qualification of its members. Burge v. Tibor, 397 P.2d 235 (Idaho 1964); Harris v. Shanahan, 387 P.2d 771 (Kan. 1963).

The state constitutional provision that each House shall judge the qualifications, elections and returns of its own members deprives the state courts of jurisdiction to decide contests for state legislative offices. Laxalt v. Cannon, 397 P.2d 466 (Nev. 1964); In re McGee, 226 P.2d 1, (Cal. 1951), remittitur amended 229 P.2d 780 (Cal. 1951); Monaghan v. School Dist. No. 1, Clackamas County, 315 P.2d 797 (Ore. 1957).

72 Am Jur 2d, States, §44 provides:

The constitutions of most, if not all, of the states contain provisions to the effect that each house in the state legislature shall be the judge of the election and qualifications of its own members. Such a declaration is a grant of power and constitutes each house the ultimate tribunal as to the qualifications of its own members. The two houses acting conjointly do not decide, but each house acts for itself and by itself, and from its decision there is no appeal, not even to the two houses. This power is not exhausted when once it has been exercised and a member admitted to his seat; it is, on the contrary, a continuous power, and at all times during the term of office, each house is empowered to pass on the present qualifications of its own members. The power extends to determining the absence of disqualifications, as well as the presence of qualifications.

* * *

It is well settled that a constitutional provision of this kind vests the legislature with sole and exclusive power over the matters covered and deprives the courts of jurisdiction. And any action or decision taken by a house of the legislature in the exercise of this power is final and conclusive and not subject to review or revision by the courts.

To the same effect, see 81A C.J.S. States §44 and 107 A.L.R. 209, which concludes:

The constitutions of most if not all, of the states contain provisions similar to Art. 1, §5, of the Federal Constitution, to the effect that each house of the state legislature shall be the judge of the election and qualifications of its own members. And it is well settled that such a provision vests the legislature with sole and exclusive power in this regard, and deprives the courts of jurisdiction of those matters.

This concept remains in force even where the courts may feel that the legislative decision is wrong in a given case. Raney v. Stovall, 361 S.W.2d 518 (Ky. 1962).

Amicus respectfully submits that the Courts are without jurisdiction to hear or determine the subject matter raised in Jenkins v. State of Utan and that, the determination of the qualifications of the legislators of this state is solely and exclusively within the jurisdiction of the respective houses of the legislature.

CONCLUSIONS

1. Plaintiff has no standing to bring this suit.
2. There was no proper party defendant as the State of Utah has immunity and the State of Utah, as such, is not the

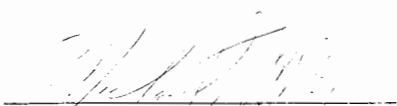
real party in interest to defend the right of educators to serve in the legislature.

3. School teachers and educators are not "officers" within the prohibition of the meaning of Article VI, Section 6 of the Constitution of Utah.

4. The Constitution of Utah specifically reserves to each House of the Legislature the authority to determine the election and qualifications of its membership.

5. The real impetus for this suit is the problem it creates in marketing the state's bonds. Amicus suggests that the Court hold that even if Plaintiff could show that certain members of the legislature were not properly qualified, the determination by the legislature that its members were elected and qualified is conclusive and the laws enacted by the legislature were lawfully enacted and not void by the reasons suggested by Plaintiff.

Respectfully submitted this 19th day of September, 1978.



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CERTIFICATE OF DELIVERY

I hereby certify the two copies of Amicus Brief,
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