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Joel S. Summer

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CREATION OF THE ILLINOIS STATE BOARD OF ELECTIONS AND OTHER ELECTION FRAUD LEGISLATION

On September 10, 1972, the *Chicago Tribune* published the first in a series of articles on widespread election fraud in Cook County, Illinois and Chicago in particular.¹ The investigation uncovered some 838 violations of the Illinois Election Code² in 572 of the city's 3,205 precincts. Because of the limited nature of the investigation,³ it was speculated that only a small percentage of the infractions had been discovered and reported to the public.

The most common violations consisted of forged signatures on registration applications, "ghost" voting,⁴ and the practice of having registered Democrats appointed as Republican judges. As a result of the *Tribune* investigation, a special standing committee on election fraud was named by the Illinois General Assembly to study election practices in Illinois and to prevent future irregularities.⁵ During the first session of 1973, the General Assembly sent to the Governor a package of eight election bills sponsored by the reform committee and introduced by Representative Phillip W. Collins (R-Calumet City) in the House, and Senator Donald A. Moore (R-Midlothian) in the Senate.

1. This series of articles, written by William Mullen and George Bliss, appeared in the *Chicago Tribune* on September 10, 1972, and ran through September 13, 1972. The *Tribune* received the 1972 Pulitzer Prize for local investigative reporting for the series.

2. ILL. REV. STAT. ch. 46, §§ 1-1 *et seq.* (1971), *as amended*, (Supp. 1972).

3. William Mullen was the only *Tribune* staff writer working undercover as a clerk for the Board of Elections. Mullen discovered the violations in the course of his regular duties. Had there been a full scale investigation of election practices in Cook County under more ideal conditions, it is probable that many more violations would have been discovered.

4. "Ghost" voting is a term used when a ballot is cast for someone either deceased at the time of the election, unable to vote, or one who has moved from the precinct, but whose name has not been removed from the registration lists in that precinct.

5. Rep. Phillip Collins through his legislative aide, Charles Bernardini, in an interview July 27, 1973 credited the *Tribune* disclosures as the major motivation behind legislative passage of the election reform package.

Perhaps the most important of these bills was Senate Bill 1198 designed to create a State Board of Elections⁶ as provided by the 1970 Illinois Constitution.⁷ Illinois becomes the twelfth state to have created such a board.⁸

The State Board of Elections will replace the Secretary of State and the State Electoral Board, as the two administrative bodies that are presently charged with supervision of the registration of elections throughout the state under the Election Code of 1943.⁹ The new State Board of Elections possesses the power to inspect election procedures including all alleged violations of election laws. The Board will have the power to hire its own investigators and report violations to the appropriate State's Attorneys.¹⁰ Unfortunately, the extent of those powers was not included in the Bill and presumably will eventually be judicially determined.

Under Senate Bill 1198, the Board is to be composed of four members, two from each of the major political parties. The Speaker of the House, the House Minority leader, the President of the Senate, and the Senate Minority Leader would each nominate two members for a total of eight candidates. The Governor will then select one of the nominees chosen by each legislative officer as his appointee.¹¹ An attempt by the Independent Voters of Illinois to place an independent on the Board

6. S.B. 1198, 78th Ill. Gen. Assembly (1973) [hereinafter cited as S.B. 1198]. PA 78-918, amending ILL. REV. STAT. ch. 46, §§ 1A-1 to 1A-14 (1943), as amended, (Supp. 1972).

7. ILL. CONST. art. III, § 5 states:

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.

8. The other states which have a state board of elections are: Arkansas (ARK. STAT. ANN. §§ 3-501 to 3-508 (Supp. 1971)); Georgia (GA. CODE ANN. §§ 34-201 to 34-205 (Revision 1970)); Indiana (IND. ANN. STAT. §§ 3-1-3-1 to 3-1-3-8 (Code ed. 1972)); Maryland (MD. ANN. CODE art. 33, § 1A-1 (Replacement 1971)); Mississippi (MISS. CODE ANN. §§ 23-5-1 to 23-5-313 (Supp. 1973)); North Carolina (N.C. GEN. STAT. §§ 163-19 to 163-25 (Replacement 1972)); Oklahoma (OKLA. STAT. ANN. tit. 26, §§ 11 to 13 (1955), as amended, (Supp. 1973)); Rhode Island (R.I. GEN. LAWS ANN. §§ 17-7-1 to 17-7-10 (Reenactment 1969)); Tennessee (TENN. CODE ANN. §§ 2-1101 to 2-1112 Supp. 1972)); Virginia (VA. CODE ANN. §§ 24.1-18 to 24.1-28 (Supp. 1973)); West Virginia (W. VA. CODE ANN. §§ 3-2-4 to 3-2-9 (Replacement 1972)).

9. The Bill amends ILL. REV. STAT. ch. 46, §§ 1-3, 7-9, 7-10, 7-11, 7-12, 1-14, 7-56, 7-58, 7-60, 7-63, 8-9, 8-10, 8-15, 10-2, 10-6, 10-7, 10-9, 10-10, 10-14, 11-2, 21-1, 21-2, 22-5, 22-6, 22-7, 22-9, 23-13, 23-16, 23-17, 24-3, 24a-4, 24a-5, 24a-16 (1943), as amended, (Supp. 1972).

10. S.B. 1198, §§ 1A-8(7), 1A-9.

11. S.B. 1198, § 1A-3.

was defeated, with the strongest opposition coming from the Cook County Democrats.¹² The Chicago Democrats successfully blocked any attempt to get an independent as the "swing" member of the Board.

Thus a watered-down bill was presented to the General Assembly as a compromise to assure passage. With an even-numbered Board, it is a virtual certainty that ties will result. Unfortunately, the Illinois General Assembly has created its own unique and totally inadequate method of breaking a tie vote.

Section 1A-7.1 of Senate Bill 1198 calls for the clerk of the Board to select the name of one of the members of the Board by lot. The member selected shall be disqualified from voting on the particular proposition and the remaining qualified members shall then proceed to decide the proposition. The vote on any proposition decided pursuant to the tie-breaking procedure shall not be reconsidered nor shall any policy be revised for nine months except by the unanimous vote of the Board. The Rhode Island State Board of Elections, the only other Board with an even-numbered membership¹³ has no provision for breaking a tie and so Illinois is left without any precedent for a workable solution.

Whatever merits Senate Bill 1198 may have will be overshadowed by the absurdity of this tie-breaking procedure. The State Board of Elections will have myriad difficulties in attempting to administer elections and make policy concerning future elections with an even-numbered Board. The State of Illinois is known nationally for its heavily partisan political split. With a strong Democratic party led by Chicago Mayor Richard J. Daley, a very powerful and wealthy Republican party situated in suburban Cook County and downstate areas, and an ambitious group of independent voters wearing the Democratic label but like their proclaimed leader, Governor Daniel Walker, opposed to what they term the "Daley machine," it is almost certain that political infighting will cause a virtual standoff on the Election Board. However, to take a politically unsolvable situation and attempt to cure it by having four men sit at a conference table and pick straws was certainly not the intent of the members of the 1970 Constitutional Convention.

Supporters of Senate Bill 1198 claim these tie-creating, tie-breaking provisions of the Bill were needed to appease Chicago Democrats and to assure passage of the Bill in time for the 1974 elections. It is doubtful, however, that such a compromise would please an independent governor

12. The sponsors stated that the exclusion of the fifth member of the Board was a necessary compromise in order to insure passage of the Bill.

13. R.I. GEN. LAWS ANN. § 17-7-1 (Reenactment 1969): . . .

and a veto is the possible outcome even though the substantive measure of this Bill are badly needed to correct the improprieties brought to light in the *Tribune* series.¹⁴

It was clearly the intent of the 1970 Illinois Constitutional Convention to create a non-partisan Board. Many of the Bill's provisions are designed to assure exactly this. The Bill states, "No employee of the State Board of Elections shall engage in any partisan political activity whatsoever, except to vote at elections. . . ."¹⁵ While this may be a noble goal, the realities of the political climate indicate members nominated and selected might possibly be expected to follow the wishes of their respective parties. In Senate Bill 1198 there seems to be a fine line of difference between what is partisan and what is non-partisan. Even if the Board members themselves are considered non-partisan under the provisions of the Bill, the manner of selection by the state's top political leaders insures some degree of partisanship in the Board. The provision for an appointee to earn \$22,500 a year plus all actual expenses¹⁶ would lead one to believe that a member will not ignore the wishes of the people who selected him regardless of the Bill's non-partisan provisions.

There will certainly be many other problems facing the State Board of Elections. It is conceded by the Bill's sponsors that the powers of the Board ultimately will have to be determined by the courts. The Bill's provisions *tend* to provide the Illinois State Board of Elections with strong investigatory powers, but on closer examination there exist serious questions as to the extent of those powers.

For example, among the Board's enumerated powers is the power to: "[R]eview and inspect procedures and records relating to the conduct of elections and registration as may be deemed necessary and to report violations of election laws to the appropriate State's Attorney."¹⁷ It is clear from this section that the Board may investigate alleged election irregularities and report their findings to the appropriate State's Attorney. Subsequent action is unclear. Must the Board wait for a court determination before it can hold up certification of the winner in a contested race, or does the Board have the implied quasi-judicial power to prevent

14. In fact, Governor Walker vetoed S.B. 1198 on September 18, 1973 and called for a special legislative session to write a new bill. On October 16, 1973, the Senate overrode Walker's Veto 53 to 1. By a vote of 158 to 4 the House overrode the Governor's veto, meaning the measure becomes law in the compromise form agreed to by legislative leaders. The enactment became law effective October 22, 1973.

15. S.B. 1198, § 1A-13.

16. S.B. 1198, § 1A-6.1.

17. S.B. 1198, §§ 1A-8(7).

one from taking office *pending an appeal* to the circuit court? Who has primary jurisdiction in such matters—the State Board of Elections or the circuit court? These questions of enforcement powers are left unanswered, couched in vague terminology.

Sponsors have admitted that the vagueness in Senate Bill 1198 was intentional in order to give the courts the opportunity to clarify its provisions.¹⁸ One can only look upon the General Assembly's motives with suspicion. It seems that the Bill's built-in vagueness was another way of appeasing those dissident factions of the General Assembly, assuring passage and purportedly satisfying the mandate of the 1970 Constitutional Convention. In reality Senate Bill 1198 is a non-bill. In an effort to please everybody, the General Assembly has passed such a watered down piece of legislation that it is in fact only paying lip service to constitutional intent.

Senate Bill 1198 has an enabling clause that will allow it to take effect immediately.¹⁹ With a major election scheduled for 1974, it is almost certain that the Bill's provisions will face immediate court action. Those who advocate broad election board powers will find case law favoring their position. Even under the old state Electoral Board, (a mere certifying body composed of the Governor, Secretary of State, Attorney General, State Treasurer, Auditor of Public Accounts and the two central committee chairmen from the two leading political parties), the courts gave the Electoral Board the implied power to investigate in order to carry out its expressed powers to certify candidates.

The most important Illinois decision concerning these implied powers was *Daly v. Stratton*,²⁰ rendered by a Federal district court in 1963. Lar Daly brought suit against the State Electoral Board and its chairman, Governor William G. Stratton, when the Board turned down Daly's petition to be placed on the Republican ballot in the 1960 senatorial primary.

Daly claimed the Electoral Board did not have the power to investigate his petition to determine whether the required 5,000 signatures were genuine. He claimed that the Board must certify him if the necessary signatures were present. The Electoral Board had refused Daly's petition, stating that it had found 266 of the 5,125 signatures invalid because names appeared two or three times in the petition, each time with a different address. The federal district court, citing the 1921 Illinois case of

18. As stated in an interview on July 27, 1973. See note 5, *supra*.

19. S.B. 1198, § 2.

20. 215 F. Supp. 244 (N.D. Ill. 1963).

*People ex rel. Brundage v. Righemier*²¹ said that: "An election official whose obligation is to 'examine' and to 'certify' a petition has authority at least to determine whether the paper is genuine and such as he is required to receive and make [this] the basis of his action."²²

In the *Daly v. Stratton* appeal, the Seventh Circuit cited *People ex rel. DuPage County v. Smith*²³ in ruling:

While it is true that it [the Electoral Board] had only such powers as were conferred upon it by the General Assembly of Illinois, it has been recognized as a commonplace principle of statutory construction that the legislative grant of power carries with it *the right to use all means and instrumentalities necessary to the beneficial exercise of the expressly conferred powers.*²⁴

Using the same principles of construction, it can be said that the State Board of Elections, which has the duty to certify nominees and the eventual winners, has the implied powers of investigation to carry out those powers.

It seems then that despite the controversy that will undoubtedly be stirred by Senate Bill 1198, the courts are more apt to allow the State Board of Elections, with a constitutional directive as well as an express statutory purpose, to perform a quasi-judicial function in order to carry out its expressed powers. While precedent exists affirming the boards quasi-judicial powers, no Illinois cases exist determining the extent of those powers. Other jurisdictions are split as to whether a state election board has the quasi-judicial power to investigate fraud and take such legal action as necessary to punish the offender and prevent him from taking office.

The North Carolina court favored a "strong" election board in the case of *Ponder v. Joslin*.²⁵ In that 1964 case, Clyde M. Norton and Zeno H. Ponder were opposing candidates for the Democratic nomination for state senator. Ponder won the nomination, but Norton filed a protest with the State Board of Elections, alleging illegal voting in the primary election, fraud and other irregularities. The State Board of Elections canvassed all results, conducted extensive investigations, and held numerous hearings. The State Board certified all candidates except Ponder, and Ponder filed a writ of mandamus demanding he be certified claiming that the State Board did not have the power to investigate, but only to tabulate.

In dismissing the writ, the court said:

21. 298 Ill. 611, 132 N.E. 229 (1921).

22. 215 F. Supp. at 245.

23. 21 Ill. 2d 572, 173 N.E.2d 485 (1961).

24. 326 F.2d 340, 342 (7th Cir. 1964) (emphasis added).

25. 262 N.C. 496, 138 S.E.2d 143 (1964).

We do not construe General Statute 163-10(11) to limit authority of the State Board of Elections merely to investigation of alleged "frauds and irregularities in elections in any county," for the sole purpose of making such report of frauds and irregularities to the Attorney General or solicitor for further investigation or prosecution. The State Board of Elections is a quasi-judicial agency and may . . . investigate alleged fraud and irregularities in elections in any county . . . and may take such action as the findings of fact may justify, and may direct a county board of elections to amend its returns in accordance therewith.²⁶

The rationale of the North Carolina court followed closely that of the Illinois district court in giving their election authorities the power to investigate and make quasi-judicial decisions concerning the status of a candidate. However, other states with election boards have interpreted the scope of their respective statutes narrowly. Oklahoma, for example, has not given its State Election Board the expressed authority to investigate election irregularities. In *Brickell v. State Election Board*,²⁷ the court ruled against the Board's attempt to investigate alleged fraudulent election returns and refused to grant an injunction to halt a candidate from taking office. The court said: "An election board has only such power and authority as is directly vested in it by the legislature. The authority it may exercise and the duty it may be required to perform must appear in the Legislative Act which it purports to act under."²⁸

In Kentucky, a 1901 state court decision has blocked any attempt by the Board to investigate irregularities. In *Pratt v. Breckenridge*,²⁹ the court held the quasi-judicial function of the election board unconstitutional because the legislature attempted to create a court not authorized by the state's constitution. As a result, the Kentucky legislature repealed its state board in 1972. However, it is not anticipated that the Illinois courts will go as far in restricting the powers of the Board by reason of *Daly v. Stratton*. In fact it is expected that the Illinois courts will favor broad Election Board powers.

Senate Bill 1198 may be looked upon as the most important of the eight³⁰ election fraud bills placed on Governor Walker's desk this past

26. *Id.* at 501, 138 S.E.2d at 147.

27. 203 Okla. 362, 221 P.2d 785 (1950).

28. *Id.* at 365, 221 P.2d at 788.

29. 112 Ky. 1, 65 S.W. 136 (1901).

30. Four of the eight election reform bills will not be covered in this discussion. The four House Bills are merely procedural in nature.

House Bill 214 amends the Election Code by providing that at least one election judge from each of the two major political parties be required to take a training course and satisfactorily pass an examination. The Bill also provides that each judge will receive a \$5 raise in pay.

House Bill 216 amends the Election Code by providing that selections or ap-

session in terms of long range goals. But in the final analysis, at least three of the remaining seven bills might prove more effective as tools to curb election fraud. House Bill 213³¹ demands that registration record cards shall be open to public inspection during regular business hours except for the twenty-eight days immediately preceding any election.

As the *Tribune* articles³² graphically illustrated, most of the violations at the Cook County Election Board consisted of forged signatures on the registration cards. Until now, the actual signature cards were not a matter of public record and thus no comparison could be made between the signatures on the cards and those whom the election officials claimed to have signed the cards. Furthermore, signature cards could not be inspected on election day by poll watchers. Under House Bill 213, poll watchers would be given the opportunity to inspect such cards. At no time, however, would poll watchers be allowed to physically handle the registration record cards.³³

Under House Bill 213, three common frauds could be cured. First, it could be discovered whether a voter who has moved from the precinct has his signature card on file in his former precinct. Secondly, it could be discovered whether a voter has died before the election and action could be taken to remove his card from the registration records for that precinct. Thirdly, the amended provision, allowing poll watchers and judges the opportunity to inspect the cards on the day of the election, could better insure a voter that he will not be disenfranchised on election day by an unscrupulous judge who claims that the voter has already cast his ballot—a practice which was brought to light in the *Tribune* series.

According to the author of House Bill 213, the only way one can prove his right to vote in an election is to compare his signature with that on the registration card. Thus the section of the Election Code that provided that only the name and address of the voter and the name of the political party in whose primary the voter cast his ballot was deleted from

pointments from supplemental lists of names of potential election judges shall not be made more than 21 days prior to the date of precinct registrations and more than 28 days prior to the day of election.

House Bill 217 provides that county chairmen submitting certified lists specify the names and number of names on the lists.

House Bill 218 requires election authorities who remove election judges specify in writing the reasons for the removal and make such writings a matter of public record.

31. H.B. 213, 78th Ill. Gen. Assembly (1973) [hereinafter cited as H.B. 213]. If enacted would amend ILL. REV. STAT. ch. 46, §§ 4-8, 4-11, 5-7, 5-28, 6-35 and 6-65 (1943), as amended, (Supp. 1972).

32. See notes 1-4 and accompanying text, *supra*.

33. H.B. 213, §§ 4-8 and 6-35, as amended.

the Code.³⁴ That information was not regarded as adequate. The actual signature had to be inspected also.

The Bill's sponsors, fearing the possibility of election fraud within the twenty-eight days preceding an election, amended House Bill 213 to provide that registration cards may be inspected within the twenty-eight days before an election, but only upon approval of the officer in charge of the cards permission is required to provide the necessary balance between preventing fraud and the last-minute difficulties of administering an election.³⁵

House Bill 215 is designed to amend the Election Code by adding an article that clearly describes acts prohibited by the Code and provides penalties for commission of those acts.³⁶ Under the unamended Code certain acts were clearly listed as criminal offenses while corollary acts were conspicuously absent from the Code's provisions. For instance, under the unamended version of the Election Code, it was an offense to buy a vote, but it was not an offense to sell a vote. Under the proposed amended version, both buying and selling of a vote would be a Class 4 felony.³⁷ With the passage of House Bill 215, criminal acts will be more clearly and fully defined. There will be a provision for tampering with a voting machine³⁸ and there will also be a provision for stuffing a ballot box.³⁹ All such acts would be categorized as Class 4 felonies.

Also passed last session was a bill that will make it more feasible to contest an election in larger counties. House Bill 219⁴⁰ would amend chapter 46, section 23-23 of the Election Code and provides that monies deposited as security for costs by a petitioner contesting an election must be returned to the petitioner if the challenge is successful, and similarly, monies deposited by a respondent in opposition to a recount petition must be returned if the election is upheld.

House Bill 219, was introduced as a direct result of the 1970 race for Cook County Sheriff. In that race, Democrat Richard Elrod narrowly defeated Republican Bernard Carey. Carey alleged various acts of election fraud and demanded a recount. A circuit court judge ruled that Carey would have to deposit with the court a sum equal to one-half the approximate cost to finance a recount. That sum was valued at \$250,000

34. H.B. 213, §§ 4-11 and 6-65, *as amended*.

35. H.B. 213, §§ 4-8 and 6-35, *as amended*.

36. H.B. 215, 78th Ill. Gen. Assembly (1973) [hereinafter cited as H.B. 215].

37. H.B. 215, §§ 29-1 and 29-3.

38. H.B. 215, § 29-7.

39. H.B. 215, § 29-8.

40. H.B. 219, 78th Ill. Gen. Assembly (1973).

and there was no assurance that had Carey been successful in the recount effort, he would have received the monies back. As a result, Carey withdrew his petition.

In most large counties, the cost of administering a recanvass, recount, or investigation of a candidate's election is almost always prohibitive. There is always some element of risk involved in a recount. If the defeated candidate comes up on the short end of the recount, he will normally lose his security deposit. Thus he must weigh the risks involved. He must either feel that he really did win the election, or that he wants the position enough that he will chance losing the recount effort and his security deposit with it. Hopefully, House Bill 219 will give the defeated candidate more security in asking for a recount, especially where there is alleged fraud involved in the election, while at the same time, discourage frivolous claims.

Political analysis may be frowned upon in traditional legal reasoning, but when the subject matter is election law, it is particularly difficult to remove oneself from the "political thicket." In fact, it would probably be a mistake to do so. Election law governs the political process. The creators of election laws are legislators. And legislators are politicians. As overly simplistic as that may seem, it points out the insuperable barrier in analyzing any election law. In every other area of law, it is always possible to achieve some degree of separation between the concept of "lawmaker" from the concept of "politician." In this area one can not successfully analyze a law without analyzing the personality behind the law. There is something pure in analyzing law in the confines of a courtroom. The imperfections arise when the *personality* behind the law is at issue—what was the *real intent* of the legislators. When dealing with election law, it is impossible to separate the pure *law* from the *personality*. One cannot separate the lawmaker from the politician. In the final analysis, the election fraud package will be far from the most important legislation passed by the General Assembly as every lawmaker would readily admit. But to the assemblymen, *themselves politicians*, the election fraud package, and the creation of the State Board of Elections in particular, was *the* most important legislation passed in 1973.

Senate Bill 1198 was first introduced as legislation in 1970 following the Constitutional Convention of that year. It has taken three years for the Bill to be enacted in its final form. But it would be naive to believe that the debate that started in 1970 will end in 1973. As long as lawmakers are also politicians, they will force the State Board of Elections to justify its own existence on every issue it faces and it is inevitable that the Board's future will be steeped in controversy. In order to be effective, initial selection to the Board would have to be a truly bipartisan en-

deavor. It is doubtful that this will become a reality.

In the final analysis, the framers of the new Illinois Constitution may decide that creation of an Election Board was a mistake. Much of this article has dealt with whether this Board *will* have quasi-judicial powers. This article has not dealt with whether the State Board of Elections *should* have quasi-judicial powers. The unexpressed presumption throughout has been that quasi-judicial determination is good for "the people." There is no doubt that in certain areas of the law quasi-judicial determination by a public administrative agency is both good and necessary, but that may not hold true in a political context. The whole concept of a quasi-judicial agency is to remove the major brunt of conflict-resolving processes from the courts. The courts are removed from a certain body of laws, or at least a certain body of laws is placed one step further away from the court's supervision. Under the Board of Elections, a political agency would have judicial-like power over a body of political laws. There is a suspicious absence of checks-and-balances in the political process. In light of the Watergate controversy, it may very well not be in the best interests of the state to remove politics a step further from the court's supervision.

Perhaps the most defective part of the legislation creating a State Board of Elections is the manner in which the members will be selected. As enacted, the political leaders of this state will nominate and select the Board's membership. In essence, then, politicians are choosing those people who will have supervision over the election of politicians. That, of course, creates a built-in conflict. For there to be a truly non-partisan and independent Board of Elections, initial selection and supervision must come from somewhere else—the judiciary preferably—in order for there to be a true system of checks-and-balances.

While Senate Bill 1198 may not be the most satisfactory piece of legislation in all respects, that does not mean it will not work. The Board of Elections will face some stormy times ahead. Many of the Board's powers and duties will have to be clarified and delineated by the courts. Its actions will rarely please everybody. Its value as a fraud-rectifying body may not be fully felt for many years. But the justification behind the Board's creation and existence is proper: to properly administer state elections and to assure the people of Illinois that the candidates they elect are elected fairly. However, controversial the Board's existence may be, its existence *is* justified and one must be hopeful that the Board will see some fruitful years ahead in carrying out its constitutional mandate.