



## WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** February 11, 2022

**TO** Members, 66<sup>th</sup> Wyoming House of Representatives

**FROM** Matt Obrecht, Director, Wyoming Legislative Service Office

**SUBJECT** Legal Issues Surrounding Residency of a Wyoming Legislature and Qualifications to Serve in the House of Representatives

The Wyoming Secretary of State's Office forwarded a complaint filed by the Wyoming Republican Party against Representative Dan Zwonitzer to Speaker Eric Barlow and all of the members of the 66<sup>th</sup> Wyoming House of Representatives on January 27, 2022. The complaint alleges that Representative Zwonitzer may no longer reside within the legislative district from which he was elected.<sup>1</sup> The complaint further alleges that if Representative Zwonitzer no longer resides within the legislative district from which he was elected, he is no longer qualified to continue to represent that district in the 66<sup>th</sup> Wyoming House of Representatives.<sup>2</sup> Speaker Barlow asked the Legislative Service Office to produce this memorandum to assist members of the House of Representatives to understand the legal issues surrounding qualifications to serve in the Wyoming House of Representatives.

This memorandum addresses the question of what qualifications are required of a member of the Wyoming Legislature to serve the district from which the member was elected. It is not alleged in the complaint that Representative Zwonitzer was not qualified to be elected from House District 43 during the 2020 general election. The complaint alleges that Representative Zwonitzer may have failed to reside in the district from which he was elected at some point after the 2020 election and after being sworn in on January 12, 2021, as a member of the 66<sup>th</sup> Wyoming House of Representatives. Additionally, this memorandum does not address eligibility for office in a future election.

---

<sup>1</sup> The Complaint filed with the Secretary of State's Office by W. Frank Eathorne, Chairman of the Wyoming Republican Party, January 24, 2022. The complaint erroneously states, "that Representative Zwonitzer is not residing in House District 10, the district he is representing...." (emphasis added). In fact, Representative Zwonitzer represents House District 43 and has done so since 2005. <https://www.wyoleg.gov/Legislators/2021/H/1141>. The complaint is on file with the Legislative Service Office.

<sup>2</sup> The Legislative Service Office has since February 4, 2022, received additional complaints alleging that Representative Zwonitzer is no longer qualified to represent the district from which he was elected.

The analysis below is provided with the caveat that these are simply the views of the Legislative Service Office and are not binding on any individual legislator or committee, nor upon either house, the entire legislature or any court. The House of Representatives is the appropriate body to make the determination of whether Representative Zwonitzer is qualified to continue to serve as a member of the House of Representatives.

### **Who Determines the Qualification of a Member to Serve in the House of Representatives?**

The Wyoming Constitution, Article 3, Sections 10 and 12 provide that each house of the Wyoming legislature shall be the sole judge of the qualification of its members to serve in that house, to determine the rules of its proceedings and to expel a member:

#### **Article 3, Section 10 Presiding officers; other officers; each house to judge of election and qualifications of its members.**

The senate shall, at the beginning and close of each regular session and at such other times as may be necessary, elect one of its members president; the house of representatives shall elect one of its members speaker; each house shall choose its other officers, and shall judge of the election returns and qualifications of its members. (emphasis added)

#### **Article 3, Section 12 Rules, punishment and protection.**

Each house shall have power to determine the rules of its proceedings, and [to] punish its members or other persons for contempt or disorderly behavior in its presence; to protect its members against violence or offers of bribes or private solicitation, and with the concurrence of two-thirds, to expel a member, and shall have all other powers necessary to the legislature of a free state. A member expelled for corruption shall not thereafter be eligible to either house of the legislature, and punishment for contempt or disorderly behavior shall not bar a criminal prosecution for the same offense. (emphasis added)

All fifty states provide that the house to which a legislator is elected is the sole judge of that legislator's qualifications to serve.<sup>3</sup> Indeed, since 1908 the Wyoming Supreme Court has

---

<sup>3</sup> Procedural Fairness in Election Contests, 88 Ind. L.J.1, 5–6 (2013). Noting that the constitutions of North Dakota and Hawaii are the only two state constitutions that do not allow its own members to resolve an election contest of

recognized that "The last and final arbiter of such question [of the qualification or right to a legislative seat] is the legislature itself and each house is the sole and exclusive judge of the election and qualification of its own members."<sup>4</sup> More recently, the Wyoming Supreme Court in a divided opinion of four justices held that it had no authority to hear an election contest against Representative Dean Prosser concerning whether Representative Prosser met the residence requirements of Art. 3, Section 10.<sup>5</sup> The Supreme Court based its holding on the separation of powers doctrine enshrined in Article 2, Section 1 of the Wyoming Constitution:

**Article 2, Section 1 Powers of government divided into three departments.**

The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

While holding that the House of Representatives was the proper constitutional entity to determine the qualifications of its members to serve, the Court left open the possibility, based on United States Supreme Court precedent, that the Wyoming Supreme Court could review action of the House of Representatives in determining qualifications of its membership if that determination was contrary to the requirements of the constitution.<sup>6</sup>

---

its members, although they both do provide that each house is the judge of the qualifications of its members. This law review article also cites "three historical and theoretical reasons" that state constitutions provide a house of the legislature with the authority to judge the election contests of its members:

[T]he conceptual relationship between legislative independence and legislative privilege, the connection between control of a legislature's membership and its independence among the branches of government, and tradition in allowing legislatures to seat members whom the voters choose even if the members do not meet the precise qualifications for service.

<sup>4</sup> State ex rel. Sullivan v. Schnitger, 16 Wyo. 479, 514, 95 P. 698, 705 (1908).

<sup>5</sup> State ex rel. Schieck v. Hathaway, 493 P.2d 759, 763 (Wyo. 1970).

<sup>6</sup> The Schieck court relied on the United States Supreme Court cases of Bonds v. Floyd, 385 U.S. 116 (1966) and Powell v. McCormick, 395 U.S. 486, 89 S. Ct. 1944 (1969) to state that the judicial branch does have a role to play if a body of the legislature (either state or federal) attempts to disqualify a member for a qualification which is not contained in the constitution:

[T]he important constitutional question is whether the Congress has the power to deviate from or alter the qualifications for membership as a Representative contained in Art. I, § 2, cl. 2, of the Constitution. Up to now the understanding has been quite clear to the effect that such authority does not exist. To be sure,

**What are the Constitutional Requirements to Serve as a Member of the Wyoming House of Representatives?**

There are three constitutional provisions which contain the qualifications to serve as a member of the Wyoming House of Representatives:

**Article 3, Section 2 Members' terms and qualifications.**

... No person shall be a senator who has not attained the age of twenty-five years, or a representative who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state and who has not, for at least twelve months next preceding his election resided within the county or district in which he was elected.

**Article 6, Section 5 Electors must be citizens of United States.**

No person shall be deemed a qualified elector of this state, unless such person be a citizen of the United States.

**Article 6, Section 15 Qualifications for office**

No person except a qualified elector shall be elected or appointed to any civil or military office in the state. "Military office" shall be limited to the offices of adjutant general, assistant adjutant general for the army national guard and assistant adjutant general for the air national guard.

Article 3 § 2, quoted above, speaks of residing in a district as a qualification for election. It does not speak to maintaining residency through a member's term of office. The Constitution also addresses vacancies in legislative offices, in Article 3, § 51, but neither that provision nor its predecessor, give an indication as to whether moving from a legislative district creates

---

Art. I, § 5, provides that: 'Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members \* \* \*.' Contests may arise over whether an elected official meets the 'qualifications' of the Constitution, *in which event the House is the sole judge*. But the House is not the sole judge when 'qualifications' are added which are not specified in the Constitution."

Schieck, 493 P.2d at 763, quoting Powell, 89 S.Ct. at 1979–80 (Douglas, J. concurring).

a vacancy.<sup>7</sup> Article 3 § 51, speaks to vacancies occurring in legislative offices, through death, resignation or other cause.

**What are the Statutory Requirements for Vacancies for Members of the Wyoming House of Representatives?**

W.S. 22-18-101(a) contains provisions of when there is a “vacancy” in an elected office:

- (a) A vacancy shall occur in an elective office if during his term the incumbent either:
  - (i) Dies;
  - (ii) Resigns;
  - (iii) Is determined by a court having jurisdiction to be mentally incompetent;
  - (iv) Is disqualified from holding office for any reason specified by law;
  - (v) Is convicted of a felony or constituting a breach of his oath of office;
  - (vi) Refuses to take the oath of office or to give or renew an official bond if required by law; or
  - (vii) Has his election voided by court decision.

For state legislators, subsection (f) was added to W.S. 22-18-101 in 2003 (2003 Wyo. Sess. Laws, Ch. 94). It reads:

- (f) In addition to subsections (a) through (c) of this section, a vacancy shall occur in the office of a member of the state legislature when the person fails to reside in the legislative district from which he is elected.<sup>8</sup>

---

<sup>7</sup> **Article 3, Section 51 Filling of vacancies.**

When vacancies shall occur in the membership of either house of the legislature of the State of Wyoming through death, resignation or other cause, such vacancies shall be filled in such manner as may be prescribed by law, notwithstanding the provisions of section 4 of article III of the constitution which is by this section repealed.

<sup>8</sup> While a similar provision existed previous to 2003 for municipal officers, for state legislators there was no specific provision addressing the failure to meet a continuing residency requirement until 2003. (See W.S. 15-1-107 for the municipal provision.)

**What does “Reside” Mean for Purposes of W.S. 22-18-101(f) and Article 3, Section 2 of the Constitution?**

The term “reside” is not defined in the Constitution or in the election code (Title 22 of the Wyoming Statutes). “Residence” is defined for purposes of the election code at W.S. 22-1-102(a)(xxx), as:

(xxx) "Residence" is the place of a person's actual habitation. The construction of this term shall be governed by the following rules:

(A) Residence is the place where a person has a current habitation and to which, whenever he is absent, he has the intention of returning;

(C) A person shall not lose his residence by leaving his home to go to another state, another district of this state, or to another country for temporary purposes, with the intent of returning, if he has not registered in the other state, district or country;

(F) A person who takes up or continues his abode at a place other than where his family resides, shall be a resident of the place where he actually abides. (emphasis supplied).

In rendering an informal opinion issued in late 2010 related to the facts resulting in the election contest involving Representative Matt Greene, the Attorney General determined the above definition was appropriate to use in determining the meaning of “reside” for purposes of the election code.<sup>9</sup> The Attorney General further stated:

The touchstone of the Code’s definition of “residence” is “actual habitation.” Since these two words are not also defined within the Code, we turn again to the dictionary:

Actual...existing in reality or in fact; not merely possible but real; as it really is...existing at present or at the time[.]

Habitation...the act of inhabiting; occupancy ... a place in which to life; dwelling; home[.]

---

<sup>9</sup> Opinion of Wyoming Attorney General to Representative Pete Illoway, November 1, 2010, and on file with LSO.

*Webster's New World College Dictionary* 14, 637 (4<sup>th</sup> ed. 2005). Thus, the term "residence" when used within the Code means a person's dwelling or home which he actually occupied (i.e., in which he physically resided). This definition is consistent with the plain meaning of the term "resided" as used in the Wyoming Constitution noted above.

The question of residency as a qualification for membership in the state Legislature is thus actually quite unambiguous and straight-forward. The first step is to identify the person's place of "actual habitation." W.S. 22-1-102(a)(xxx). Then, if, for whatever reason, a person is absent for that place for any period of time then the question becomes, under subsections (B) through (F) of W.S. 22-1-102(a)(xxx), whether the person possessed the subjective intent to return to his place of residence—i.e., a person's place of actual habitation.

If, for example, a person resides in a home in Laramie County, Wyoming but then goes off to college in another state, the person's place of "actual habitation" is that home in Laramie County and, despite his absence; it remains so as long as the person has the intent to return to that home. W.S. 22-1-102(a)(xxx)(C).

Since the statute defines "residence" as "actual habitation," if a person temporarily leaves the state with the intent to return but to a different location within the state, his "residence," for purposes of qualification as a member of the legislature, must be the place he last actually resided. If not, then "residence" would mean "actual habitation" and the statute's plain and unambiguous meaning would be negated.

It should be noted that the Special Investigative Committee reviewing Representative Matt Greene's qualifications for election in 2011 and ultimately the entire House of Representatives disagreed with substantial portions of the 2010 Informal Attorney General Opinion, including whether a "residence" is an "actual habitation" for purposes of determining a legislator's qualifications under Article 3, Section 2 of the Constitution.

### **Who Decides if a Vacancy Exists?**

Under general law, a vacancy is not automatically created until declared by an appropriate governing body or a court. In Wyoming, W.S. 22-18-102 provides:

The officer or governmental body having the power to fill a vacancy in the office shall determine whether a vacancy exists in the office.

Prior Legislative Service Office memoranda on the issue have cited a Wyoming Attorney General advisory letter of February 18, 2002, stating this provision is not applicable to legislator vacancies. In answering the question of whether redrawn district boundaries require resignations following redistricting, the Attorney General stated the above statute cannot be applied to legislators because the Wyoming Constitution addresses who determines when there is a vacancy in the Senate or House even though there has been no resignation. The Attorney General was of the opinion that if there had been no resignation, it is each house which must declare the existence of vacancies in membership.

If this view is correct, without a resignation, there can be no declaration of a vacancy in a House District seat absent action by the House. This memorandum noted previously that the Wyoming Supreme Court also relied upon Article 3, § 2, to disclaim the authority to determine the residence of a legislator in Schieck, supra. The question of a representative's residency qualification was for the Legislature to decide.

If the House were to declare a vacancy in a House district, then the Laramie County Board of Commissioners would need to follow the provisions of W.S. 22-18-111(a)(iii) to fill the vacancy.<sup>10</sup>

**Are There Potential Constitutional Concerns with the Application of W.S. 22-18-101(f) to a Sitting Member of the Wyoming House of Representatives?**

<sup>10</sup> W.S. 22-18-111(a)(iii) provides in part:

(iii) If a vacancy occurs in the office of a member of the state legislature:

(A) For vacancies other than resignations, the board of county commissioners of the county or counties in which the vacancy occurs shall immediately notify in writing the chairman of the state central committee of the political party which the former incumbent represented at the time of his election under W.S. 22-6-120(a)(vii), or at the time of his appointment if not elected to office.

(D) If the legislative district is in more than one (1) county, the vacancy shall be filled by the combined vote of the boards of county commissioners for those counties. The vote of each county commissioner in attendance shall be weighted so that the total vote of the commissioners from each county shall be in proportion to the population of the legislative district within that county. For vacancies created other than by resignation, if the legislative district is in more than one (1) county, the determination of the vacancy shall be made in accordance with this subparagraph.

W.S. 22-18-101(f) was added in 2003. By that time, the Legislative Service Office had provided advice on at least two occasions that moving from a legislative district did not create a vacancy in office.<sup>11</sup> In 2004 the Wyoming Supreme Court decided the term limits case. In that case, the Court held statutorily imposed legislative term limits unconstitutional, stating:

Rather, the precise question is whether the constitutional qualifications are unambiguously meant to be exclusive. .... The general rule, and the better-reasoned rule, is that constitutionally prescribed qualifications for holding a constitutional office are exclusive. Even without the assistance of that rule, however, the conclusion is unavoidable that Wyo. Const. art. 1, § 3—one of the earliest sections in the Declaration of Rights forbids the passage of any law making the exercise of Wyoming citizens' political rights dependent upon a circumstance or condition otherwise than as provided.<sup>12</sup>

W.S. 22-18-101(f), like all enacted statutes, is presumed constitutional until held otherwise. The question of residency of the legislators was not at issue in the term limits case. One interpretation is that the requirement to continue to reside in a legislative district in W.S. 22-18-101(f) is the legislative enactment of the “other cause” language in Article 3 § 51 for vacancies in legislative office. Another interpretation is that the requirement to continue to reside in a legislative district is a logical extension in the requirement to have resided in the district at the time of election.

However, it is important to note the qualification to reside in a legislative district in Article 3, Section 2 is written in terms of where one resides prior to being elected to office. The Constitution does not speak to continuing to reside in the district thereafter.<sup>13</sup> While some might consider such a reading overly restrictive, the Wyoming Supreme Court has adopted the view that statutory and constitutional provisions which tend to limit the candidacy of any person from public office must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered.<sup>14</sup>

---

<sup>11</sup> LSO has provided similar guidance while noting the addition of W.S. 22-18-111(a)(iii), when asked for at least 20 years, if not longer.

<sup>12</sup> Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050.

<sup>13</sup> Senator Charlie Scott argued on the floor of the Senate during passage of 2003 SF70 (which created W.S. 22-18-101(f) in 2003 Wyo. Session Laws, Ch. 94) that the legislature could not constitutionally add an additional qualification to be a member of the legislature through statute. Audio recording of debate of the Senate, February 10, 2003. Audio recording on file at the Legislative Service Office.

<sup>14</sup> Brimmer v. Thomson, 521 P.2d 574 (Wyo. 1974).

An extension of that holding would be to allow a person elected to continue to serve in office unless the prohibition was clear, not implied.<sup>15</sup> The Court stated in the term limits case, “[t]he question is simply whether it was the framers’ intent to allow the legislature to add qualifications to those established in the constitution. In reading the pertinent provisions *in pari materia*, and in light of the general spirit of the instrument, we have concluded there was no such intent.”<sup>16</sup>

### **Are There Recent Occurrences in Which the House of Representatives Determined the Qualifications of One of Its Members?**

#### **Prosser – Election Contest**

The election of Dean Prosser in 1970 was challenged by Laramie County voters alleging that Representative-Elect Prosser failed to meet the requirements of Article 3, Section 2 that he reside within the county or district from which he was elected for at least twelve months next preceding his election. The voters filed an action in the District Court in Laramie County challenging Prosser’s qualifications. It was uncontroverted in evidence provided to the District Court and before the House of Representatives in 1971 that the home in which Representative-Elect Prosser had lived since 1940 was in Weld County, Colorado. However, the district court opinion listed seventeen items showing Representative-Elect Prosser’s connections with Wyoming. On the other side the court stated, “is the single, small incident of his living in a house he does not own, a hop and a skip into Colorado, but even fastened to Wyoming by power and telephone lines to Cheyenne.....”<sup>17</sup>

Based on these facts, the district court concluded that Representative-Elect Prosser had for over twelve months “resided in Laramie County.” Despite this finding, the district court held the decision rested solely with the House of Representatives to determine whether Prosser was qualified to serve. Upon review the Wyoming Supreme Court determined that the district court had no jurisdiction as the Constitution vested the House with the sole power to judge the qualifications of its members.<sup>18</sup> The Court noted that the parties had not placed

---

<sup>15</sup> “[T]he basic and universally accepted rule that statutory and constitutional provisions which tend to limit the candidacy of any person for public office or exclude any citizen from participation in the elective process must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered thereby.” Brimmer v. Thomson, 521 P.2d at 580. See also Keiter and Newcomb, The Wyoming State Constitution a Reference Guide, (1993).

<sup>16</sup> Cathcart, 88 P.3d at 1068.

<sup>17</sup> Schieck v. Hathaway, No. 67-225 First Judicial District, Laramie County, January 6, 1971 (Found on page 413 of the Digest of the Journal of the 41<sup>st</sup> Wyoming House of Representatives.)

<sup>18</sup> State ex rel. Schieck, 493 P.2d.

enough importance on the fact that Prosser had been elected by a large majority, and the will of the people should not be thwarted unnecessarily.<sup>19</sup>

The House of Representatives took up the Prosser election contest on the first day of the 1971 session on January 12, 1971.<sup>20</sup> There does not appear to have been any investigation into the allegations in the complaint by a legislative committee prior to consideration of the contest by the entire House. The complaint, evidence and affidavit were submitted to the House and included in the Digest. Representative-Elect Prosser was allowed to provide an answer to the complaint. He submitted an affidavit and the district court decision to the House. Representative Ed Whitehead moved that the election contest be upheld and presented testimony as to why Prosser was not qualified to serve in the House of Representatives from Laramie County. Representative Alan Simpson provided the rebuttal to the motion to uphold the election contest.

Ultimately, the House voted 43-16 to reject the election contest against Mr. Prosser. Representative-Elect Prosser was then immediately sworn in as a member of the 41<sup>st</sup> House of Representatives.

### **Greene – Election Contest**

Following the 2010 General Election, the election of Matt Greene was challenged by voters from House District 45. It was undisputed that Representative-Elect Greene previously resided in House District 13. He had searched for an apartment in House District 45, but was called into military service prior to ever physically residing in an abode in House District 45. He rented a storage unit in House District 45 and while in military service out-of-state changed his address to a friend's house and registered to vote in House District 45. He returned approximately four months before the election to rent an apartment in House District 45.<sup>21</sup>

At the beginning of the session, a Special Investigative Committee was assigned to review the merits of the election contest and report back their findings to the House pursuant to Joint Rule 15-1.<sup>22</sup> The Special Investigative Committee on the election contest reported its findings back to the House on the fourth day of session, January 16, 2011. The majority of the Committee, and ultimately the House, rejected the election contest assertion that

---

<sup>19</sup> Id. (See also Brimmer v. Thomson, 521 P.2d).

<sup>20</sup> See The Digest of the Senate and House Journals of the Forty-First State Legislature of Wyoming, pp. 405–434.

<sup>21</sup> See Report of the Special Investigative Committee on the Election Contest, Journal of the House of Representatives of the Sixty-first Legislature of Wyoming, pp. 37-43 and 46-48.

<sup>22</sup> Id. at 18.

Representative-Elect Greene had not met the constitutional twelve months residency requirement for election from House District 45. In doing so the Committee found unpersuasive significant portions of the Attorney General's opinion requested by the Special Investigative Committee Chairman. The Committee found a difference between the definition of "residence" as that term is defined in the statute, referencing "habitation" and noted the term is not used to define a person's eligibility for election. Instead, the Committee noted, the legislature chose a different word "resident" to describe the eligibility requirement. The Committee further noted that even if it were to rely upon the definition of "residence" instead of "resident," the definition spoke clearly of an "intention of returning."

The Committee majority specifically rejected the conclusion that without taking actual habitation in House District 45, Representative-Elect Greene's residence had to be his last place of actual habitation in House District 13. The Committee noted the Attorney General's conclusion defied the law and common sense as the record showed he had zero intent on returning to House District 13. The Committee concluded that "when there are two applicable interpretations of a provision within the Wyoming Constitution and one application undermines the will of the people while one supports the will of the people, that which recognizes the power of the voters should be sustained."

Three of the nine members of the Committee dissented and relied upon and quoted heavily from the Attorney General opinion for their contrary conclusion.

Ultimately, Representative-Elect Greene was found by the House to be qualified to serve House District 45 by a vote of 42-16. The Legislative Service Office has advised consistently since the House decision in 2011 that the Greene case seems to stand for the following propositions:

1. It is not clear that the statutory definition of "residence" applies to the Constitutional requirement to "reside" in a district.<sup>23</sup> To the extent it does, a simple literal reading of a portion of the statutes is not sufficient, but the entire statute must be applied to the facts at hand;

2. Application of the "reside in" requirement is not a rigid, isolated point in time, but the totality of the circumstances must be considered in determining whether one resides in a district;

---

<sup>23</sup> The terms "reside" and "residence" are both used in the Constitutional provision addressing qualifications of electors: "Every citizen of the United States of the age of twenty-one years and upwards, who has resided in the state or territory one year and in the county wherein such residence is located sixty days next preceding any election, shall be entitled to vote at such election, except as herein otherwise provided." Wyo. Const. Art. 6, § 2.

3. If contrary interpretations exist, the one which supports the vote of the people should prevail.

**Is the House Bound by Statutory Provisions When Determining the Qualifications of Its Members?**

In this instance, it is for the members of the House to first decide whether a statute as applied to a duty or procedure of the House is constitutional.<sup>24</sup> The 66<sup>th</sup> Wyoming House of Representatives solely has the power to determine the qualifications of its members. When determining those qualifications, the House of Representatives is guided by the following recognized authority listed in their order of precedence as follows:

- (a) Constitutional provisions and judicial decisions thereon.
- (b) Adopted rules.
- (c) Custom, usage and precedents.
- (d) Statutory provisions.
- (e) Adopted parliamentary authority.
- (f) Parliamentary law.<sup>25</sup>

This memorandum has already discussed the constitutional provisions and judicial decisions relevant to this issue. There does not appear to be a rule of the House of Representatives in which to follow in this instance. This memorandum also discussed the House's recent past practice in determining election contests for members that involve residency. Finally, this memorandum discussed the statutory requirements in W.S. 28-18-101(f).

The precise question is whether the House of Representatives is bound by W.S. 28-18-101(f), which relates to the power of the House to determine the qualifications of its members. Other states have recognized that a statute passed by a prior legislature cannot bind the current legislature for matters that are solely within the power of the legislature.<sup>26</sup> The House of

---

<sup>24</sup> Masons Manual of Legislative Procedure (2010), Sec., 232, Par. 1 and Sec. 2, Par. 3: "The constitutional right of a state legislature to control its own procedure cannot be withdrawn or restricted by statute, but statutes may control procedure insofar as they do not conflict with the rules of the house or with rules contained in the constitution."

<sup>25</sup> Mason's, Sec. 4, Par. 2. (Citing Cushing's Legislative Assemblies, Sec. 614; Des Moines Register. v. Dwyer, 542 N.W.2d 491, 505 (Iowa 1996)).

<sup>26</sup> Des Moines Register, 542 N.W. 2d at 505 citing the following cases: League of Women Voters, 743 P.2d at 338, (whether legislative business should be conducted in open session was a procedural question within the sole constitutional power of each house to determine notwithstanding open meetings statute); Opinion of the Justices,

Representatives could determine that the statutory provision modifies or limits one of its constitutional duties and as such, is not controlling as one legislature cannot bind a future legislature.<sup>27</sup> In determining how to proceed, it would appear that the members of the 66<sup>th</sup> House of Representatives can be guided by the principle that they are the sole judges of the qualifications of one its members to continue to serve, limited only by the explicit requirements of the federal and Wyoming Constitutions.<sup>28</sup>

### **What Procedures Could the House of Representatives Use to Address Complaint Regarding a Member's Qualifications to Serve?**

There are no clear processes for handling a complaint challenging a sitting member's qualifications to serve in the House of Representatives. First, it should be noted that the complaint currently before the House is not self-executing. It stands to reason that because only the House can judge the qualifications of its members, only a member of the House can properly present such a challenge on the floor. And it then logically follows that the House of Representatives can only act on such a complaint when officially convened in session.

There are no Rules of the House of Representatives, or Joint Rules of the House of Representatives and Senate which control the procedure for resolving such a complaint. Joint Rule 15-1 specifies the process for a house of the legislature to address an election contest and Joint Rule 22-1 specifies the process to address an ethics allegation against a legislator for misconduct involving legislative duties.<sup>29</sup> Both of those rules may provide guidance on

---

157 Me. 98, 170 A.2d 657, 659 (Maine 1961) (the legislature's jurisdiction continues to rest on the authority vested in it by the constitution and may not be made to depend on any technical compliance or failure to comply with such statute); State ex rel. La Follette v. Stitt, 114 Wis. 2d 358, 338 N.W.2d 684, 687 (Wis. 1983) (legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution); Coggin v. Davey, 233 Ga. 407, 211 S.E.2d 708, 710 (Ga. 1975) (state open meetings law does not apply to the legislature).

<sup>27</sup> “If a legislature wishes to bind future legislatures, it must invoke the constitutional amendment process.” Pinckney v. Peeler, 434 S.C. 272, 287 (S.C. 2001) (quoting Charles L. Black Jr., Amending the Constitution: A Letter to a Congressman, 82 Yale L. J. 189, 191 (1972); See also Mason’s Sec. 4, Par. 1, “Rules of procedure passed by one legislature or statutory provisions governing the legislative process are not binding on a subsequent legislature.”; State ex rel. Wyoming Farm Loan Bd. v. Herschler, 622 P.2d 1378, 1389-1390:

In this respect, it has been declared that it is the function of the legislature, and of the legislature alone, to change rules of law, that each subsequent legislature has equal power to legislate upon the same subject, and that one legislature cannot abridge the power of a succeeding legislature. It is a well-established principle that legislative power includes the power to amend existing laws, as well as the power to enact laws, *subject, of course, to constitutional restrictions and inhibitions*.[.]

<sup>28</sup> Schieck, 493 P.2d at 76.

<sup>29</sup> JR 22-1(a)(i) defines misconduct involving legislative duties as “violation of Article 3 of the Wyoming Constitution; the Ethics and Disclosure Act, W.S. 9-13-101, et seq; any of the Wyoming Conflict of Interest

how the House could handle a complaint regarding qualifications, but neither rule appears controlling in this instance. Mason's Manual of Legislative Procedures states that a house of the legislature may appoint a committee to investigate the allegations that a member is not qualified to be elected or to continue to serve but does not require the creation of such a committee.<sup>30</sup>

Past practice of the House of Representatives could guide, but not control, the actions of the 66<sup>th</sup> Legislature when deciding what procedures to use to decide the complaint. In the Representative-Elect Greene election contest, a special investigative committee was formed. That process was not used in the election contest involving Representative-Elect Prosser. In the Prosser election contest, a motion was made on the floor of the House that Prosser did not have the necessary qualifications to serve in the House of Representatives under Article 3, Section 2. Evidence was presented on the floor by the bringer of the motion and also by the member offering rebuttal to the motion. The House then voted on the motion.

For election contests under Joint Rule 15-1, the burden of proof is on the contestant challenging the election of a member to prove the facts alleged by a preponderance of the evidence. The House may find a similar or more stringent burden of proof is appropriate to determine a member is not qualified to serve after the member's election. A vote to disqualify a member would have the effect of denying the voters of their chosen representative and the Wyoming Supreme Court has held that such a determination must be construed in favor of the right of the voter to exercise their choice.<sup>31</sup>

If a member of the House believes the complaint is an issue that should be brought to a decision of the body, it appears that the 66<sup>th</sup> House of Representatives could employ either a direct motion or an investigative committee to address a complaint against a House member's continuing qualifications to serve.

---

Statutes; violence or disorderly conduct during legislative meetings, sessions, or during the performance of legislative duties; or bribes or offers of bribes." The allegation in the complaint is that Representative Zwonitzer is no longer qualified to serve if he moved from his district, not that misconduct on the part of Representative Zwonitzer (such as being convicted of a felony violation of the Ethics and Disclosure Act, W.S. 9-13-101, et seq.) render him unqualified to serve.

<sup>30</sup> Mason's, Section 560, Par. 15 (2010).

<sup>31</sup> Murphy v. State Canvassing Bd., 12 P.3d 677, 682 (Wyo. 2000) (quoting Brimmer, 521 P.2d at 580).

## **Conclusion**

It is clear under the Wyoming Constitution and Wyoming Supreme Court precedent that the House of Representatives is the appropriate constitutional entity to determine a complaint alleging that a member of the House is no longer qualified to serve. The Wyoming Constitution does not require a member to continue to reside in his district after his election for purposes of being qualified to continue to serve in the House of Representatives. W.S. 22-18-101(f), by its plain language, requires that a vacancy be declared when a member no longer resides in the district from which he was elected. However, the Wyoming Supreme Court has held that a statute cannot add qualifications to hold a constitutional office. The 66<sup>th</sup> Wyoming House of Representatives is constitutionally authorized to determine the procedures to resolve the question of the qualifications of one of its members to serve and is not bound by past actions of a legislature when making those determinations. The only precedent which binds the House are the requirements of the federal and Wyoming constitutions.