

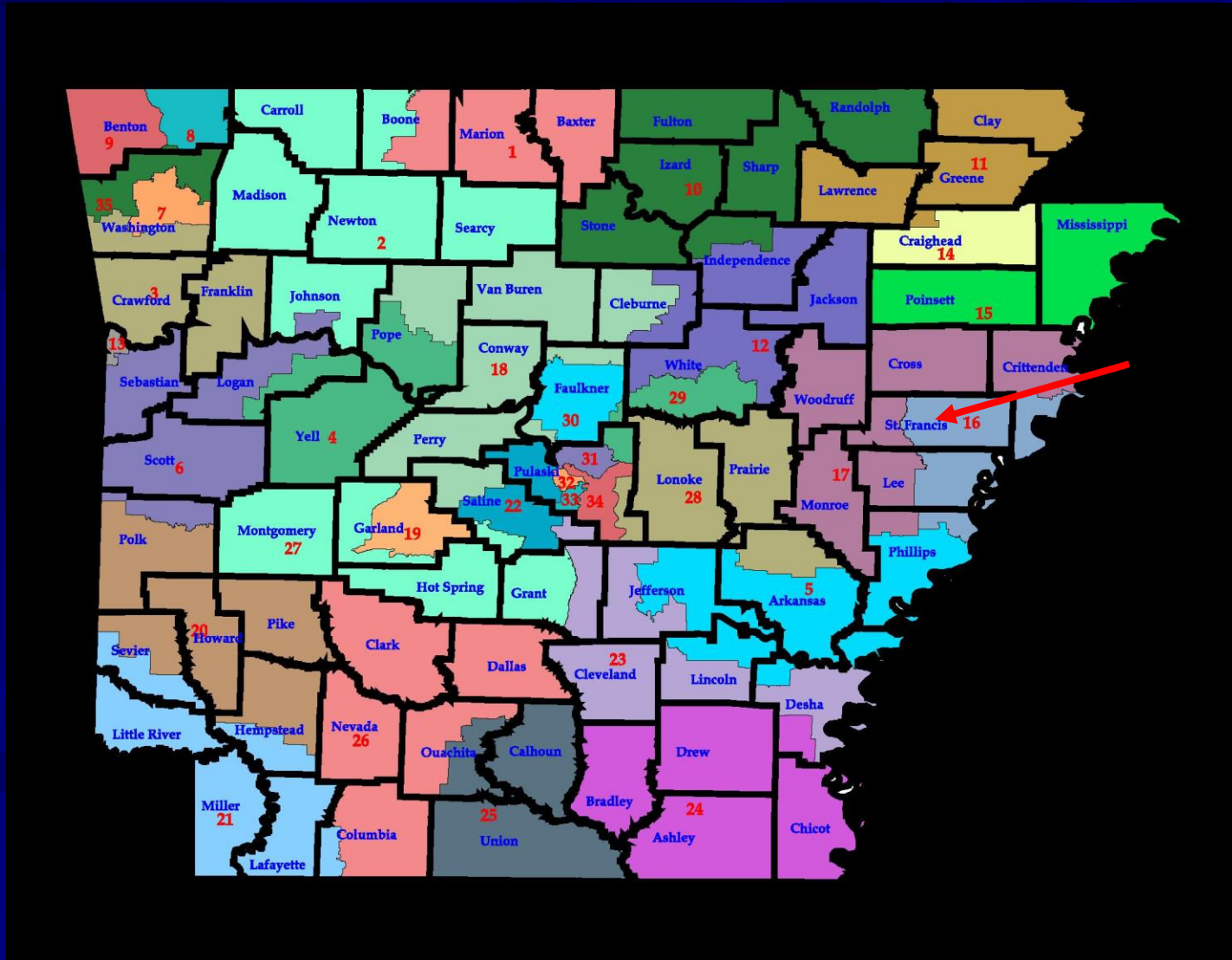
RESOLVING CONTESTED ELECTIONS WHEN EXISTING LAW DOESN'T GUIDE THE COURTS: A CASE STUDY

Steve Cook, Arkansas Senate Counsel

**Matthew Miller, Administrative Rules Counsel, Bureau of
Legislative Research**

**Jillian Thayer, Staff Attorney,
Bureau of Legislative Research**

Senate District Map



Primary Election 6/13/2006

Court Proceedings:

- 7/7/2006 Election Contest Filed (St. Francis County)
- 10/4/2006 St. Francis County 1st Trial Dismissal
- 11/6/2006 Arkansas Supreme Court Reverse & Remand
- 12/6/2006 St. Francis County Trial Begins
- 12/8/2006 St. Francis County 2nd Trial Dismissal (Bench)
- 5/29/2007 St. Francis County 2nd Dismissal Order
- 11/15/2007 Arkansas Supreme Court Reverse & Remand
- 1/23/2008 St. Francis County Pre-trial Hearing
Jurisdiction First Mentioned
- 2/2/2008 St. Francis County 3rd Trial Dismissal

No Appeal Filed at the Arkansas Supreme Court

Senate:

- 7/7/2006 Election Contest Filed
- 11/7/2006 Crumbly Elected to Senate
- 1/8/2007 Crumbly Sworn in at Senate
- 5/1/2007 2007 Legislative Session Adjourns

Senate Decides to Hear Election Contest

Arkansas Constitution, Article 5, § 11:

Each house shall appoint its own officers, and shall be sole judge of the qualifications, returns and elections of its own members. A majority of all the members elected to each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house shall provide.

Arkansas Code § 7-5-805(a)

(a) Any contest to the eligibility, qualifications, or election to serve as a member of the Senate shall be in accordance with the rules and procedures for election contests as established by that chamber under its governing rules.

Senate Rule 7.05(e)

(e) The Committee on State Agencies and Governmental Affairs of the Senate shall make a final report to the Senate on all contested election cases not later than two (2) weeks from the first day of the regular session.

Arkansas Case Law Concerning the General Assembly as Sole Judge of Qualifications

Evans v. Wheatley, 197 Ark. 997, 125 S.W.2d 101 (1939)

Matthews v. Bailey, 198 Ark. 830, 131 S.W.2d 425 (1939)

Irby v. Barrett, 204 Ark. 682, 163 S.W.2d 512 (1942)

Pendergrass v. Shied, 241 Ark. 908, 411 S.W.2d 5 (1967)

Reaves v. Jones, 257 Ark. 210, 515 S.W.2d 201 (1974)

Magnus v. Carr, 350 Ark. 388, 86 S.W.3d 867 (2002)

Developing Procedures

What do we do now?

Procedures

Problem 1

Respondent is a member of the committee charged with deciding an election contest.

Solution

Respondent voluntarily recuses.

Procedures

Problem 2

Exclusion or Expulsion?

Solution

Respondent is a sworn member – Expulsion.

Arkansas Constitution, Article 5, § 12:

Each house shall have power to determine the rules of its proceedings; and punish its members, or other persons, for contempt or disorderly behavior in its presence; enforce obedience to its process; to protect its members against violence or offers of bribes, or private solicitations; and, with the concurrence of two-thirds, expel a member; but not a second time for the same cause.

Procedures

Problem 3

We need a procedure.

Solution

Election contest akin to administrative hearing.
Prehearing briefs filed in advance.

Procedures

Problem 4

Are we going to get sued over this?

Solution

Arkansas case law states that a Senate seat is not a property right. (*Reaves v. Jones*)

Procedures

Problem 5

Can we issue subpoenas?

Solution

First subpoenas in the history of the Arkansas Senate.

Procedures

Problem 6

Should we allow cross examination?

Solution

Mason's says yes.

Procedures

Problem 7

Can a witness plead the Fifth Amendment?

Solution

Arkansas Constitution, Article 3, § 9, states that in election contest proceedings, “...no person may be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy: but such testimony shall not be used against him in any judicial proceeding, except for perjury in giving such testimony.”

Procedures

Problem 8

Can the Senate compel a person to testify or appear?

Solution

May use contempt.

Procedures

Problem 9

How do we swear in witnesses?

Solution

Use a court reporter.

Procedures

Problem 10

How to avoid ex parte communications.

Solution

Very carefully.

Procedures

Problem 11

Can the respondent vote on his own possible expulsion?

Solution

Precedent says “Yes.”

Procedures

Problem 12

Whether a committee's deliberations are required to occur in public?

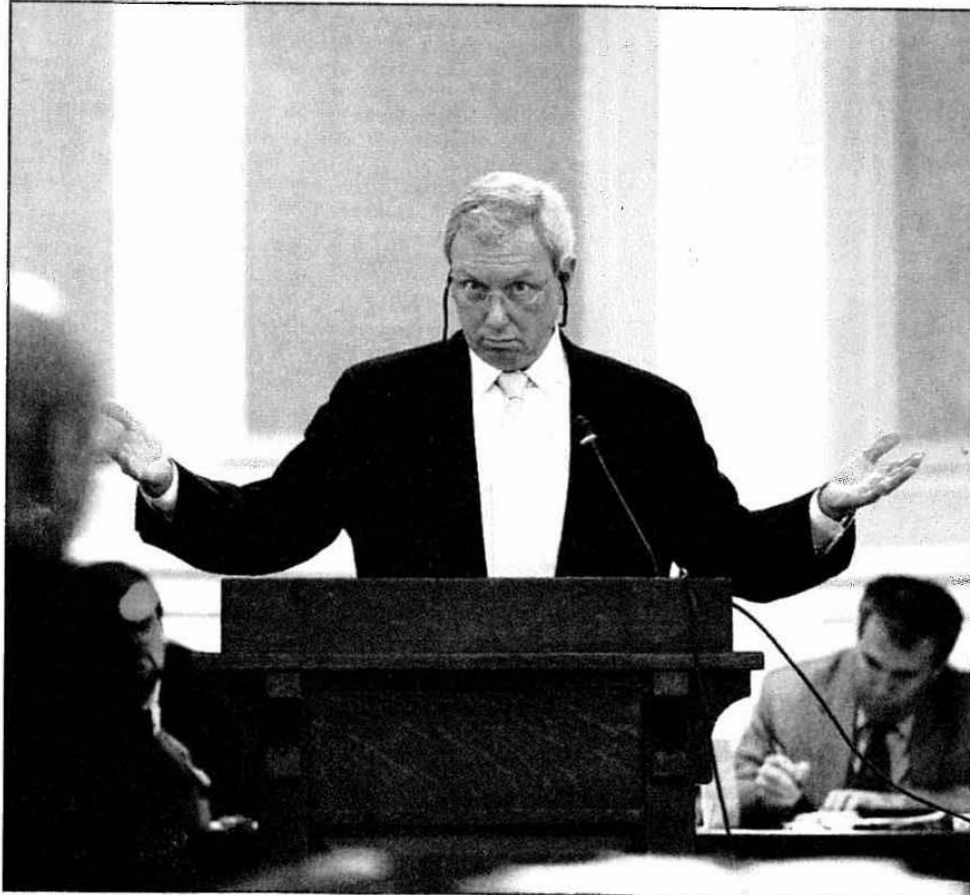
Solution

Arkansas Constitution, Article 5, § 13, provides for business in "secret."

Senate Proceedings

- 3/25/2008 SAGA Committee Meeting
- 3/26/2008 Committee Hearing Concludes & Deliberations Begin
- 4/18/2008 Recommended Decision of Committee Issued
- 6/12/2008 Senate Debate & Vote

March 26, 2008



Arkansas Democrat-Gazette/STATON BREIDENTHAL

Attorney Mike Easley (center) questions Frederick Freeman, chairman of the St. Francis County Election Commission, during a contested election hearing before a state Senate committee Tuesday.

Ex-lawmaker challenges loss in Senate race

During historic session, Willis questions legality of election

BY MICHAEL R. WICKLINE
ARKANSAS DEMOCRAT-GAZETTE

Former state Rep. Arnell Willis told a state Senate committee on Tuesday that he's challenging the 2006 election of Sen. Jack Crumbly because it was "un-American" for him to be declared the loser of a race that he had won.

"It was downright shameful," the Democrat from Helena-West Helena said. "This is not a Third World banana republic. This is the United States of America."

Crumbly's attorney, Robin Carroll of El Dorado, told the committee it should focus on facts because "allegations are just allegations."

"When you shine the light of truth on them, they vapor-

ize. They vanish," he said.

The Senate's State Agencies and Governmental Affairs Committee opened a historic session, listening to 4½ hours of testimony and questioning attorneys for Crumbly and Willis for a half-hour in what committee Chairman Sen. Steve Faris, D-Central, said is Senate's first-ever election contest.

Faris said he hopes the committee makes a recommendation to the full Senate today after finishing testimony in the case. The proceedings resume today at 9 a.m. About a dozen other senators attended the hearing. Attorney General Dustin McDaniel sat in on more than an

Senate Interim Committee on State Agencies & Governmental Affairs Hearing on March 25 & 26, 2008

Format:

- Opening Statements
- Petitioner's Case
- Questions by Committee Members
- Respondent's Case
- Questions by Committee Members
- Closing Statements
- Questions by Committee Members
- Deliberations

District 16 Hearings



District 16 Hearings



District 16 Hearings



District 16 Hearings



District 16 Hearings



March 27, 2008

Throw out 881 votes, Willis' lawyer urges

BY MICHAEL R. WICKLINE
ARKANSAS DEMOCRAT-GAZETTE

An attorney for former Rep. Arnell Willis urged a historic state Senate committee hearing Wednesday to throw out 881 votes in the election of Sen. Jack Crumbly, whose attorney sharply disagreed, saying the disputed number of votes should be much, much smaller.

Willis of Helena-West Helena lost to Crumbly of Widener by 68 votes in the June 13, 2006, Democratic primary runoff.

Willis attorney Michael Eas-



Willis



Crumbly

ley said the Senate should throw out 100 absentee votes for such things as failure to provide voters' birth dates.

"I contend that you will find

plenty of ammunition in there to void the 100 votes that we talked about," he said.

Crumbly attorney Robin Carroll said Easley, in an opening statement, promised evidence of fraud that would be as clear as "rabbit tracks in the snow," but "I must submit to you that I think instead all we got was the Easter bunny.

"I have got a 5-year-old daughter. Just because I tell my 5-year-old daughter that there is such a thing as an Easter bunny doesn't mean that there really is

an Easter bunny," Carroll said. "Just because you make allegations, it doesn't mean that the facts back them up."

Carroll and Easley's remarks closed the State Agencies and Governmental Affairs Committee's second day of hearings on what the committee chairman, Sen. Steve Faris, D-Central, called the first-ever election contest heard in the Arkansas Senate.

Faris said the committee would meet this morning to begin deliberations toward making a recommendation to the full

Senate. The Arkansas Constitution requires a two-thirds vote of the Senate to expel a senator.

The Senate has not expelled anyone in 34 years. It last did so in 1974 when it removed a senator who had been found guilty in a federal income-tax case. Legislative expulsions are rare across the nation.

Only nine state lawmakers in other states have been expelled since 1980, according to the National Conference of State Legislatures.

See **VOTES**, Page 8B

Committee Recommendations

- 1. If the evidence indicates fraud or irregularities influenced the results of the June 13, 2006, runoff election and the fraud or irregularities rose to a level that would have changed the outcome of the election, the committee shall recommend the respondent be expelled from the Senate seat in question and the petitioner be placed in the Senate set in question.**
- 2. If the evidence indicates fraud or irregularities influenced the results of the June 13, 2006, runoff election to the extent that it is impossible to determine the true winner of the Senate race, the committee shall recommend the respondent be expelled from the Senate seat in question and the Senate seat be declared vacant.**
- 3. If the evidence indicates fraud or irregularities that existed with regard to the June 13, 2006, runoff election did not rise to a level that influenced the results of the election and the respondent was duly elected to the Senate seat in question, the committee shall recommend the respondent maintain his or her current position in the Senate.**
- 4. If the evidence indicates no fraud or irregularities existed with regard to the June 13, 2006, runoff election and the respondent was duly elected to the Senate seat in question, the committee shall recommend the respondent maintain his or her current position in the Senate.**

Decision on April 18, 2008

- 4 of 7 voted for Option 3
- 3 voted for Option 2

April 19, 2008

4-3 vote supports Crumbly in Senate

Panel seeks inquiry,
election monitoring

BY MICHAEL R. WICKLINE
ARKANSAS DEMOCRAT-GAZETTE

In a 4-3 decision released Friday, an Arkansas Senate committee recommended that Jack Crumbly retain his Senate seat in a historic election contest case brought by a former House member.

Former Rep. Arnell Willis contended he defeated Crumbly in a 2006 Democratic Party runoff in Senate District 16, but his election victory was snatched away by election fraud.

The seven committee members said "flagrant" fraud and irregularities existed but that there was no evidence that Crumbly personally committed any of it.

The panel agreed to ask the U.S. attorney for the Eastern District of Arkansas to investigate.

It also agreed to ask the Arkansas State Police and state Board of Election Commissioners to monitor all elections in St. Francis County until convinced election officials followed state law for elections, handling ballots and counting votes.

Four members of the State Agencies and Governmental Affairs Committee concluded that fraud or irregularities in the runoff "did not rise to a level that influenced the results."

They are Sens. Gilbert Baker,

See **CRUMBLY**, Page 10B

The Period Between Committee Recommendation & Senate Vote

- Entire record, including transcript, made available for review by all Senators.
- All Senators notified of availability of record for review and of upcoming Senate debate and vote.
- Primary elections held.

June 12, 2008

2006 election case in Senate's lap

Body to decide if Crumbly keeps seat after fraud-marred vote

BY MICHAEL R. WICKLINE
ARKANSAS DEMOCRAT-GAZETTE

In a historic election contest case filed by former Rep. Arnell Willis, the Arkansas Senate convenes today to take up a Senate committee's 4-3 recommendation that Jack Crumbly of Widener retain his Senate seat despite allegations that he won it thanks to fraud.

Willis of Helena-West Helena said Wednesday that he doesn't plan to attend.

"I am not hopeful they are going to correct the wrong that happened to me," he said in a telephone interview. "I haven't gotten justice. I won the election. At least, they should have called a special election."

The Senate would have to expel Crumbly and declare the seat vacant to clear the way for the governor to call a special election.



Willis

Crumbly

The Senate's State Agencies and Governmental Affairs Committee has filed a report after investigating Willis' claims and finding that Crumbly defeated Willis in a 2006 Democratic primary runoff election fraught with election irregularities.

The evidence did not demonstrate that Crumbly was personally responsible for fraudulent election actions, the committee found.

Never before has the Arkansas Senate taken up an election contest

case, said the committee chairman, Sen. Steve Faris, D-Central.

Not since 1974 has the Senate expelled any member, and that was one who had been found guilty in federal court on tax charges.

Faris said the Senate session was scheduled after a court reporter's transcript of the committee's hearings was completed, clearing the way for him and Senate President Pro Tempore Jack Critcher, D-Batesville, to schedule the meeting.

He said he hopes the Senate votes today on whether to accept the committee's recommendation.

A senator may be expelled only upon a two-thirds majority vote. That's 24 votes in the 35-member Senate.

Willis contended that he defeated Crumbly in the 2006 run-

See **SENATE**, Page 10B

Senate Debate

- June 12, 2008
- Majority & minority opinions presented by authors.
- Other members given the opportunity to speak.

Final Vote

19-12 for respondent to retain seat

June 13, 2008



Arkansas Democrat-Gazette/CHRIS DEAN

State Sen. Jack Crumbly (left) is congratulated by his wife, Johnetta, his attorney Leon Johnson (right) and Johnson's son James, 13, after the Senate vote Thursday.

Senate vote lets Crumbly keep his seat

BY MICHAEL R. WICKLINE
ARKANSAS DEMOCRAT-GAZETTE

State Sen. Jack Crumbly on Thursday survived the first-ever election contest filed in the Arkansas Senate.

After 1½ hours of often emotional debate, the Senate voted 19-12 to accept a committee's 4-3 recommendation that the Democrat from Widener retain the District 16 seat, despite allegations that he won it because of election fraud.

Former state Rep. Arnell Willis of Helena-West Helena contended that he defeated Crumbly in the June 13, 2006, Democratic Party runoff but the outcome was reversed through trickery.

A senator may be expelled by a two-thirds vote (24 votes) in the 35-member Senate.

The last time the Senate expelled a member was 1974

See **CRUMBLY**, Page 6A

Post-Election Contest Cleanup

