

INDIANA'S 1988 GUBERNATORIAL RESIDENCY CHALLENGE

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Dedicated to the memory of my colleague and friend, Jon D. Krahulik

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INTRODUCTION

“No person shall be eligible to the office of Governor or Lieutenant Governor, who shall not have been five years a citizen of the United States, and also a resident of the State of Indiana during the five years next preceding his election ...”

1851 Constitution of the State of Indiana
Article 5, Section 7

In early summer of 1816, with Indiana’s impending admission to the Union, a constitutional convention, attended by forty-three delegates, was held in the state’s first capital, Corydon. Those in attendance drafted and ratified a state constitution. Included in that document were the eligibility requirements for the office of governor. Specifically, Article 4, Section 4, provided that a governor had to be thirty years old, a citizen of the United States for ten years, “and have resided in the state five years next preceding his election; unless he shall have been absent on the business of the state, or of the United States.”¹ Thus, the framers adopted a specific durational residency requirement for anyone seeking the office of governor. They did so for other offices and privileges under the law as well.

Durational residency requirements as a qualification for holding statewide elected office are not unusual. They still appear in some form in most state constitutions. In fact, in the original constitution for most states, language requiring durational residency for the office of governor was the rule and not the exception. At one time, as many as forty-three states had some form of residency requirement as a qualification to hold the office of

¹ Ind. Const. Art. IV, § 4 (1816).

governor. Of that number, twenty-nine states required at least five years of residence. Twelve other states required longer periods, ranging from seven years up to ten.

These requirements were thought to have a clear public purpose, particularly in the early days of our nation when states were young and their inhabitants relatively recent arrivals. The requirements were said to promote legitimate state interests or goals, including the goal of giving voters an extended period of time in which to get to know the individuals who were interested in holding public office. This allowed voters the opportunity to scrutinize a candidate's conduct, habits, and to learn his strengths and weaknesses. Correspondingly, being a resident of a state for a required period of time afforded a prospective candidate the opportunity to get to know the characteristics and ideologies of the people he sought to serve, to become familiar with the state's problems, finances, institutions, and laws. In essence, residency requirements promoted knowledgeable and responsive candidates who possessed clear ties to the community while, at the same time, discouraging candidacies by persons who were not seriously concerned with or, perhaps, even capable of serving their constituents.

Indiana was no different. As explained above, the original state constitution contained the requirement compelling a citizen to "have resided in the state five years" before election as governor. In a subsequent state constitutional convention in 1850, called for the specific purpose of revising the constitution in the midst of a catastrophic financial crisis, an amendment was offered to eliminate the residency requirement for governor altogether. It was unsuccessful.² Article 5, Section 7, of the new Constitution adopted in 1851 retained the five year durational period, although the requirement that an individual

² Journal of the Convention of the People of the State of Indiana to Amend the Constitution 537 (1851).

“have resided in the state five years” was changed to “have been a resident of” the state for that period of time. Also, the two explicit exceptions for being absent from the state – that is, being on the business of the state or on the business of the United States – were eliminated. Because an Indiana gubernatorial candidate’s satisfaction of it had never been questioned, neither the 1816 constitutional residency language nor its 1851 revision had ever been interpreted by Indiana courts – that is, until 1988.

In November of 1987, Indiana Secretary of State Evan Bayh announced his intention to seek the Democratic Party’s nomination for governor of Indiana in the upcoming 1988 election. To qualify constitutionally to hold office, therefore, Bayh was required to have been a resident of Indiana from November, 1983, to November, 1988. However, for sixteen months, from July, 1983 until December, 1984, Bayh lived in Washington, D.C., while he worked as a lawyer for the firm of Hogan & Hartson. Approximately thirteen of those sixteen months fell within the “five years next preceding the election” durational requirement of the Indiana constitution. Questions inevitably arose whether Bayh satisfied the express provisions of Article 5, Section 7 – that is, was Evan Bayh a resident of Indiana while he lived and worked in Washington, D.C.?

Consideration of the issue was not a mere academic exercise. The status of Bayh’s residency involved significant political as well as legal implications. In fact, the question dominated the early period of the gubernatorial campaign. Bayh’s qualification to serve as governor was formally challenged by leaders of the Indiana Republican Party, including Governor Robert D. Orr. The legal proceeding itself consumed almost four months of the campaign and was pursued through the judicial process to the point of final disposition by

the Indiana Supreme Court. Bayh's eligibility to serve as governor, if elected, was not ultimately resolved until five days before Indiana's May 3, 1988 primary election.

Long before the formal challenge to Bayh's candidacy was initiated there was considerable political speculation about his eligibility to serve and what implications that might have. Because an interpretation of Indiana's gubernatorial durational residency requirement would be a case of first impression – that is, a question not previously determined by a court – there was no established precedent upon which to rely. As a result, all opinions on the matter possessed some measure of validity for the simple reason that none was definitive. As one might imagine, opinions on the matter were plentiful.

For his part, Bayh asserted that he had been a resident of Indiana his entire life, though, admittedly, he had lived elsewhere. Bayh maintained that to be a resident of Indiana did not require continual physical presence in the state. Rather, residency was akin to domicile, a legal concept meaning the place that, once established, an individual considers to be his or her permanent home. Bayh argued that one's domicile cannot be terminated absent evidence of a clear intention to do so. Because there was no evidence of his intent to end his domicile in Indiana and establish it elsewhere, he had remained at all times a resident of Indiana.

Understandably, those who questioned Bayh's eligibility offered contrary interpretations. Some of Bayh's opponents argued that continued and uninterrupted physical presence for the entire five years was, in fact, the appropriate standard to be applied. Others alternatively alleged that Bayh's actions during the time he spent living and working in Washington, D.C., were sufficient to show that he possessed the requisite intent to abandon his residency in Indiana and re-establish it there. Accordingly, the argument was

that Bayh was not a resident of Indiana for at least part of the constitutionally required five-year period, disqualifying him from being eligible to serve as governor.

For almost eight months, Bayh's eligibility to serve was a focal point of public attention in the 1988 Indiana governor's race. While Bayh and his opponents pursued answers in several legal forums, they also were competing for advantage in the most important forum of all – the court of public opinion. As the story that follows will show, an enormous amount of posturing, both legal and political, was a necessary by-product of the affair. Finally, on April 28, 1988, the Indiana Supreme Court rendered a decision declaring Bayh eligible to serve as governor.³ It found that Bayh, even while living and working in Washington, D.C., had maintained his residency in Indiana. He, therefore, satisfied the constitutional durational residency requirement.

This thesis will consider not only what happened, but why. Were those who challenged Bayh's residency motivated by constitutionalism or were extra-legal reasons involved? What were the political implications of challenging Bayh's eligibility? What was the significance of the "forum-shopping" in which both parties engaged? Why did Bayh's opponents choose to pursue appeals despite initial setbacks? Finally, did the attempt to disqualify Bayh actually strengthen his candidacy and help propel him to victory in November of 1988?

Some things are certain. Bayh received an inordinate amount of public attention throughout the controversy, thereby gaining a level of exposure that his campaign would have been required to pay for otherwise. Similarly, the legal challenge afforded Bayh an early and unprecedented opportunity to emphasize certain themes that would become central

³ State Election Board v. Bayh, 521 N.E.2d 1313 (Ind., 1988).

to his candidacy. For example, because Republicans initiated the residency challenge, Bayh was able to portray himself as victim of a desperate partisan attempt to control the outcome of an election by taking away from voters the right to choose their next governor. This complemented another one of Bayh's arguments that, after twenty years of one party dominance of the State House, the time had come for change. The residency challenge also helped diminish – in two respects – the effectiveness of one of Bayh's perceived vulnerabilities: his relative youth and inexperience. How could Evan Bayh be too inexperienced or unprepared when, first, the Republican Party seemed so afraid of his political prowess that it was willing to wage war in court to keep him off the ballot and, second, after months of publicity, when both a trial court and Indiana's highest court had formally declared Evan Bayh "qualified" to serve as governor?

But, before presenting the story, some background information is necessary. Birch Evans Bayh, III was born in Terre Haute, Indiana, on December 26, 1955. He lived with his parents, Marvella and Birch E. Bayh, Jr. in Shirkieville, Indiana, while his father worked on the family farm. Although he bore the same name as his father and grandfather, his parents called him "Evan." Years later, his father recalled that Marvella had insisted on this because she wanted to avoid calling out for "Birch" and having three different men come running. In September 1958, Bayh's parents moved to Bloomington, Indiana, and his family lived there for three years while Bayh's father attended law school. Upon graduation, the Bayh family moved back to Terre Haute where they lived until Birch Bayh, Jr.'s election to the United States Senate in November of 1962. From 1962 until his graduation from high school in 1974, Bayh lived with his parents in Washington, D.C.

Upon graduation from high school, Evan Bayh entered Indiana University in Bloomington, Indiana, and pursued a bachelor's degree in business. He graduated in May of 1978 and, thereafter, enrolled at the University of Virginia School of Law in Charlottesville, Virginia. Bayh graduated in January of 1982 and returned to Indiana to serve as a law clerk for U.S. District Court Judge James E. Noland. Bayh sat for the Indiana bar examination in February of 1983. Upon conclusion of his federal district court clerkship in April of 1983, Bayh traveled for several months. Then, Bayh joined the Washington, D.C., law firm of Hogan & Hartson in July of 1983. On August 26, 1983, and one month after beginning employment with Hogan & Hartson, Bayh was sworn in as a member of the Indiana bar. Bayh continued working as an attorney in the District of Columbia until November 30, 1984.⁴

On December 1, 1984, Bayh returned to Indiana to join his father's law firm. He lived in Indianapolis and was engaged in the private practice of law until 1986, when he began his career in public life by launching a campaign for the office of Indiana secretary of state, an office for which there is no durational residency requirement. In November of that year, he enjoyed a significant election victory, and was sworn in as secretary of state on December 1, 1986. On the day of his swearing in, Evan Bayh was thirty years old and had never before held political office.

Before proceeding, there is also the need to declare an interest. I am an acquaintance of Evan Bayh. I served as a volunteer on his 1986 campaign for secretary of state and, most

⁴ Findings of Fact, Conclusions of Law and Judgment, Record of Proceedings, State Election Board v. Evan Bayh, (1988) Cause No. 73S01-8804-CV-380, Volume II, pp. 303-312, Office of the Clerk of the Supreme and Appellate Courts, State of Indiana (all subsequent non-consecutive references to the Record of Proceedings in State Election Board v. Evan Bayh will be referred to as "Record of Proceedings"). See also, State Election Board v. Bayh, 521 N.E.2d 1313 (Ind., 1988), 1314-15.

important to the integrity of this paper, was a paid member of the campaign staff in 1988. I happen to believe Bayh possesses a rare political mind which has been key to his electoral success – success that I believe has made a difference in the lives of many people in Indiana and in our country. I am also keenly aware that others do not share that point of view. In disclosing his relationship to the subject matter of his book, Robert Kennedy and His Times, the late historian Arthur M. Schlesinger, Jr. adapted a phrase A.J.P. Taylor used in his life of Lord Beaverbrook, “if it is necessary for a biographer of Robert Kennedy to regard him as evil, then I am not qualified to be his biographer.”⁵ With no pretense of being a biographer, but with similar sentiment, I disclose my own degree of “non-qualification.”

⁵ Arthur M. Schlesinger, Jr., Robert Kennedy and His Times (New York: Ballantine Books, 1978), xv.

Chapter One

THE EMERGENCE OF EVAN BAYH

“... if young Bayh does not mend the error of his ways, who knows, he could wind up ... well ... getting elected to some higher office.”

Editorial in the Indianapolis News
February 20, 1987

On August 8, 1974, Richard M. Nixon announced his resignation as president of the United States after three articles of impeachment had been issued against him by the Judiciary Committee of the U.S. House of Representatives. The scandal known as Watergate had consumed his presidency. Several weeks later, on September 8, 1974, Nixon's successor, Gerald R. Ford, issued a presidential pardon that gave Nixon immunity from prosecution. What followed thereafter, in political terms, was extraordinary. In the November, 1974 election, Democrats throughout the country were swept into office in overwhelming numbers.

In Indiana, incumbent U.S. Senator Birch E. Bayh, Jr., a two-term Democrat, won re-election in a hard fought contest against Indianapolis mayor Richard G. Lugar. Five of the seven incumbent Republican congressmen lost their bids for re-election as Indiana's eleven member delegation in the United States House of Representatives changed from seven Republicans and four Democrats to nine Democrats and two Republicans. Birch Bayh led his political party to the kind of sizable victory that is historically infrequent. But the euphoria was short-lived, for, on that night, neither Birch Bayh nor any other Democrat

could have envisioned the electoral futility that their political party would experience over the course of the next twelve years.

Rather than wallow in defeat, Indiana Republicans regrouped. Two years later, Republicans again nominated and, this time, successfully elected Lugar to the U.S. Senate. They also solidified their control of the Indiana State House by re-electing Governor Otis R. Bowen. In the following ten-year period, Indiana Republicans would elect another governor, elect another U.S. senator, and beginning with the 1978 election maintain majority control of both chambers of the Indiana legislature. Also, over this same period, the overwhelming advantage from 1974 that Indiana Democrats enjoyed in the United States House of Representatives steadily declined as Democrats experienced a net loss of four members of Congress and Republicans enjoyed a net gain of three. The devastation for the Democrats in 1980 was especially disheartening with the two most prominent members of the Indiana congressional delegation, Senator Bayh and Congressman John Brademas, going down to defeat. In fact, Republican electoral success was so consistent and overwhelming that, from 1976 through 1984, Republican candidates for statewide office won twenty-five out of twenty-six election contests, most with substantial margins of victory. Democrats won only one statewide race – Otis E. Cox as auditor of state in 1982.⁶

In November of 1984, Republicans celebrated their fifth consecutive gubernatorial victory when Governor Robert D. Orr was re-elected to a second four-year term. Orr's heir apparent was his running mate, Lieutenant Governor John M. Mutz. Most political observers assumed that Mutz would seek the Republican Party's gubernatorial nomination

⁶ Election Report of the State of Indiana, Office of the Indiana Secretary of State, 1982. All of the information regarding the outcomes of political election years can be accessed through the biannual election report compiled by the Office of the Indiana Secretary of State.

in 1988, just as Orr had done as lieutenant governor under Bowen. Clearly, Mutz was the choice of the party's establishment. Any question in that regard was answered on election night when Republican State Chair Gordon K. Durnil publicly endorsed Mutz for governor on the same platform and at nearly the same time that the newly re-elected Lieutenant Governor Mutz was thanking voters for their re-election support.

Mutz was a veteran lawmaker and had spent much of his adult life in public service – two terms as lieutenant governor and several terms in both houses of the Indiana General Assembly. Many Republicans believed that Mutz would be their party's most experienced candidate for governor ever. Given the level of success that Indiana Republicans enjoyed during the previous ten years, it would not have been foolhardy for a political prognosticator on election night 1984 to suggest that Mutz was the odds-on favorite for victory four years hence and would continue Republican occupation of the governor's office that the party had experienced for twenty uninterrupted years.

The political winds in Indiana began to shift in 1986 when Evan Bayh declared his candidacy for the office of secretary of state. Possessed of a well-known last name, Bayh was an energetic campaigner. Many viewed him as a figure around whom Indiana Democrats could rally to re-establish statewide electoral competitiveness. Andrew E. Stoner, biographer of Frank O'Bannon, described Bayh's style this way: "Bayh seemed to have a confidence and a natural ease to him that generated energy and excitement among already hopeful and excited Democrats, interested Independents, and terribly worried Republicans. Bayh seemed destined for greatness. He answered every question put to him with ease and comfort."⁷

⁷ Andrew E. Stoner, Legacy of a Governor: The Life of Indiana's Frank O'Bannon (Bloomington, Ind.: Rooftop Publishing, 2006), 135.

Durnil, initially, professed to be unimpressed. “His father never won an election by any large margin, and, in fact, was defeated the last time he ran (by [Dan] Quayle in 1980). Plus, the liberal perception of his father might be more of a negative.” Durnil explained that Hoosier voters were conservative and, largely, Republican. “You don’t just get Indiana votes based on a last name.”⁸

It was not very long before Durnil did an about-face on last names, however. In response to early momentum generated by Bayh’s candidacy, Durnil recruited Robert O. Bowen, son of former Governor Otis Bowen, to run for secretary of state. Bowen resigned his position as Marshall County court judge and the Republican State Central Committee hired him as a full-time employee to “conduct workshops for local candidates and precinct committeemen, assist in preparing the party’s convention platform and be the ‘communication link’ between the state organization and candidates for legislative office.”⁹

While shrewd, the recruitment of Bowen by the Republican hierarchy (as would be its challenge to Bayh’s residency two years later) lent even greater legitimacy to the notion that Bayh possessed considerable political potential. The name Bowen was the most recognized and politically popular in the state. But it also subjected the Republicans to criticism from the press. An editorial headline in the Gary Post-Tribune proclaimed that “GOP ‘hires’ a candidate.”¹⁰ Several other Republicans had expressed an interest in seeking the party’s nomination for secretary of state that year. All were persuaded to step aside for Bowen, even though Bowen had limited electoral experience. His only previous campaign

⁸ Indianapolis News, January 9, 1986.

⁹ Gary Post-Tribune, April 6, 1986.

¹⁰ Ibid.

had been for judge. The Franklin Daily-Journal argued that Bowen was getting “preferred treatment” in spite of the fact that these other less well-known Republicans actually wanted to seek the office. “Of course, none of them have the magic name Bowen – a name panicky GOP leaders are convinced is the only one to beat a Democratic candidate with another magic name – Evan Bayh.”¹¹

Patrick J. Traub, the senior political reporter for the Indianapolis Star commented that, “The name ‘Otis R. Bowen’ is considered so helpful in Indiana politics that many observers believe that Democrat Otis E. Cox benefited from having the same first name in 1982 when he became the only Democrat in 10 years to win a statewide election.” In fact, Bowen was identified on the November, 1986 ballot as “Robert Otis Bowen,” instead of the name by which he was commonly known, “Rob Bowen” or “Robert O. Bowen.” Unfortunately, Republican leaders, not Bowen himself, decided how his name would appear on the election ballot in 1986. Embarrassingly, Bowen was unaware how his name would be listed until it was called to his attention by reporters at a news conference in September.¹² In any event, the contest between these sons of two famous Indiana political figures created an unmatched level of public interest in a relatively unrecognized statewide office whose responsibilities were largely unknown by the electorate.

Throughout the campaign, Bayh pounded away on themes that would later become the watchwords of his public service. In May, 1986, he asserted that eliminating waste and mismanagement must be the top priority of state government. To emphasize this commitment, he bestowed on Gordon Faulkner, the head of the Indiana Department of

¹¹ Franklin Daily-Journal, April 24, 1986.

¹² Indianapolis Star, September 12, 1986.

Corrections, a “Golden Faucet Award” for spending thousands of dollars on an elaborate renovation of his state-owned residence, which included the addition of gold-plated faucets.¹³ Bayh’s presentation of a “Golden Faucet Award” for examples of wasteful spending became a staple of his campaign. Another instance was his questioning of excessive expenditures for overseas travel by state officials. Accordingly, he awarded a “Golden Faucet” to those responsible for spending \$700 to teach a foreign trade delegation how to eat with chopsticks.¹⁴

Bayh was also outspoken in his criticism of the continued use of license branch profits by the Republicans for political purposes. Bayh proposed that all license branch profits be returned to the public treasury.¹⁵ In addition, he proposed selling expensive state-owned aircraft used for travel by state officials and utilizing the proceeds to help pay the winter heating bills of 8,000 low income Hoosiers.¹⁶

It proved to be the most expensive and profiled election for Indiana secretary of state to date. Between them, the two candidates raised in excess of \$1.1 million and conducted statewide television campaigns, a political tactic unheard of in previous elections for that office. Bayh defeated Bowen by more than 123,000 votes and, in so doing, recorded the largest margin of victory by any Democratic candidate for statewide office in the preceding 25 years.¹⁷

¹³ Bayh Campaign Press Release, May 19, 1986, copy in possession of author.

¹⁴ Bayh Campaign Press Release, July 31, 1986, copy in possession of author.

¹⁵ Bayh Campaign Press Release, June 18, 1986, copy in possession of author.

¹⁶ Bayh Campaign Press Release, October 22, 1986, copy in possession of author.

¹⁷ Election Report of the State of Indiana, Office of the Secretary of State, 1986.

The importance of Bayh's 1986 election victory far outdistanced the importance of the office to which he was elected. Beyond the fact that it was the first Democratic victory in a marquee statewide election since his father's re-election in 1974, it was significant for other reasons as well. Bayh won despite Republican victories in every other statewide contest that year. In that sense, it was both a personal victory as well as a victory for his political party. His success helped restore Democrats' confidence that they could win statewide in Indiana again. Political consultant Dick Sykes had this observation about Democrats in Indiana before Bayh's 1986 victory: "the number one problem we constantly struggled against is that Democrats don't believe we can win any more. They're easily psyched out. So when Gordon Durnil releases a poll showing (the Democratic) candidate 20 points behind, they believe him."¹⁸ The fact that Bayh had prevailed over as formidable an opponent as the son of former Governor Bowen made Republican post-election efforts to downplay the significance of his election difficult, if not impossible.

The disappointment state Republicans felt was apparent. Governor Bowen openly complained that his son had not received the level of political support that he deserved. In turn, Durnil complained bitterly to Marion County Prosecutor Stephen Goldsmith that Bayh's campaign had committed criminal felonies by failing to timely report pre-election campaign contributions. The tenuous nature of these allegations caused an Indianapolis Star headline to ask rhetorically whether the Republicans had become "sore losers."¹⁹

Bayh's 1986 victory propelled him squarely into Indiana's political spotlight. Speculation emerged about Bayh running for governor almost immediately after the 1986

¹⁸ Jim Mellowitz, "In Search of a New Party," Indianapolis Magazine (November, 1985): 149-154.

¹⁹ Indianapolis Star, May 17, 1987.

election. Most acknowledged his political assets – his position as a newly elected statewide officeholder, his energy and vitality, his name recognition, and his proven fundraising prowess. Many Indiana Democrats viewed Bayh as their party’s best hope for success in the 1988 gubernatorial race.

Bayh’s performance in the first few months as secretary of state did not dampen that enthusiasm. He appeared to set a deliberate course designed to challenge the prevailing political orthodoxy. For years, Indiana Republicans had persuaded Hoosier voters that they were the party of fiscal integrity, economic restraint and discipline. Democrats, on the other hand, had been characterized as a party motivated by an agenda of social reform that fueled “tax and spend” economic policies. From the outset, Bayh was suspicious that the qualities of compassion and reform that had characterized the political liberalism of his father’s generation had lost their political potency. Bayh observed, in January, 1986, “I’m very proud of my father, but the issues he confronted – and the world he served as a public official – were much different than the ones today. My father and I share many values, but we differ somewhat on the way to achieve them.”²⁰

He openly challenged the idea that Democrats were either disinclined or incapable of providing prudent and restrained economic stewardship in government. In fact, in keeping with the campaign commitments he had made, Bayh quickly initiated marked cost-cutting measures within his office. He submitted a proposal to the Indiana legislature calling for an across-the-board 5 percent cut in his office budget and a 20 percent reduction in staff. Specifically, Bayh asked for \$435,000 less to operate his office than had been requested by

²⁰ Indianapolis News, January 9, 1986.

his Republican predecessor in the previous budget cycle and he recommended that the number of office employees be reduced from 81 to 64.²¹

He continued to rail against public waste and inefficiency and argued that government must be more responsive to the people it served. No longer constrained by the limitations of a campaign, Bayh was able to put his rhetoric into action. To that end, he announced that the secretary of state's office would be more accessible to the public by remaining open 45 minutes longer each weekday. In an unprecedented step for State House offices, he initiated Saturday office hours from 9:00 a.m. until noon.²² Bayh also refused the use of a state-provided automobile, arguing that public officials ought to be responsible for the costs of their own transportation.

In his effort to de-politicize the workings of government, he called for bold changes in the state's license branch system, viewed by the public as one of the last vestiges of institutional political patronage – changes that would, once and for all, take the control of the Indiana Bureau of Motor Vehicles out of partisan hands and place it in the hands of public reformers. He eliminated “voluntary” political payroll deductions from the paychecks of his office employees – a staple of Indiana political culture known as the Two Percent Club. In a wry editorial, the Indianapolis News observed that Bayh had already demonstrated his “misunderstanding” of the workings of government. The News highlighted several of Bayh's initiatives and suggested that “if young Bayh does not mend

²¹ Indianapolis Star, February 19, 1987.

²² Indianapolis News, December 11, 1986.

the error of his ways, who knows, he could wind up ... well ... getting elected to some higher office.”²³

Bayh also received favorable exposure for his oversight of the election recount of 1986’s closest congressional race in the nation. In Indiana’s Third Congressional District, incumbent Republican John P. Hiler was declared the election-day winner over Democratic challenger Tom Ward by 66 votes out of a total of 152,000 votes cast. Bayh, as secretary of state, served as the chairperson of the newly created State Recount Commission which, in turn, was charged with resolving disputed congressional and legislative elections. The State Recount Commission was a product of the debacle that had occurred two years earlier in Indiana’s Eighth Congressional District, a congressional district known in political circles as “the Bloody Eighth” because of its intense and perennial competitiveness.

In the 1984 congressional race, incumbent Congressman Frank McCloskey and Republican challenger Richard McIntyre battled to an election night standstill and were separated by just a handful of votes out of more than 233,000 cast. It was the closest congressional election of the century. Then-Secretary of State Edwin Simcox, a Republican, initially certified McIntyre as the winner by 34 votes. After a series of protracted and haphazardly conducted individual county recounts, McIntyre’s margin of victory increased to 418 votes. However, during those recounts, over 5,000 ballots were disqualified because they lacked the written initials of a precinct worker, the number of the precinct, or some other inadvertent error by precinct poll workers. That result was overturned by Democrats in the United States House of Representatives, who conducted their own “special recount”

²³ *Ibid.*, February 20, 1987.

and declared McCloskey the winner by a four-vote margin.²⁴ Partisan bitterness over the result did not quickly subside. McCloskey, for example, was thereafter derisively referred to by Republicans as “Landslide Frank.”

As a result of the confusion created by the 1984 post-election county-by-county recounting process, the 1985 Indiana General Assembly created a uniform procedure overseen by a State Recount Commission. The make-up of the commission itself was partisan. Members included the Republican and Democratic state chairs (or their designees) and the secretary of state. Thus, the commission was structured so that the political party that controlled the secretary of state’s office would enjoy majority status. Because Bayh, a Democrat, had replaced Simcox, a Republican, by virtue of Bayh’s election victory over Bowen in November, the partisan advantage on the State Recount Commission shifted from the Republicans to the Democrats in December of 1986.

The 1986 Hiler/Ward recount was the first time the State Recount Commission carried out its responsibility in a congressional race. At issue in the recount was the validity of several hundred ballots that had been challenged, primarily by Democrats, due to technicalities or poll worker error. The success (or failure) of an election recount had traditionally resided in a determination of the validity of allegedly defective ballots being challenged. Under Indiana law, a ballot was void if there were any deviations from prescribed election procedures for handling and counting ballots. The Indiana Supreme Court had repeatedly upheld the principle that strict compliance with election law was the

²⁴ Indianapolis Star, March 26, 1985; January 9, 1986.

prevailing consideration, even in the absence of any evidence of intentional wrongdoing or fraud.²⁵

After weeks of review and testimony, the commission had to decide whether to count the challenged ballots. The two partisan appointees on the commission split along partisan lines with the Republican member, Rex Early, arguing that all of the allegedly defective ballots should be counted – a position that put him directly at odds with his political party’s legal position two years earlier. Bayh provided the swing and decisive vote in favor of upholding the validity of the hundreds of ballots that had been challenged due to technicalities or poll worker error. While Bayh acknowledged that poll workers make mistakes, he found that in the absence of evidence of fraud or intentional wrongdoing, the ballots should be counted. Because the majority of these challenged ballots had been cast in favor of the Republican Hiler, his slim election night lead was affirmed and he was ultimately declared the winner.

The decision subjected Bayh to intense criticism from within his own political party.²⁶ Some Democrats argued that if Bayh had simply followed established legal precedent, the disputed ballots could have been justifiably disqualified and Tom Ward, the Democratic challenger, would have been elected. Also, according to the Democrats, this was entirely consistent with the way Republicans had interpreted and applied the law in previous election contests whenever Republicans controlled the recounting process. In other quarters, however, Bayh’s conduct was seen as elevating principle over political expediency. The Elkhart Truth opined that Bayh had decided “fairly,” and praised his

²⁵ Wright v. Gettinger, 428 N.E.2d 1212 (Ind., 1981); Schoffstal v. Kaperak, 457 N.E.2d 550 (Ind., 1984).

²⁶ Indianapolis News, January 7, 1987.

honesty and political courage.²⁷ Even the chief lawyer for the Indiana Republican Party, Daniel F. Evans, Jr., commented that the recount commission had acted in “not only ... a bipartisan manner, but in an almost non-partisan manner, much to my own surprise.”²⁸

Ironically, it was Bayh’s own conduct – his reasoned and impartial decision-making – that would later adversely impact his credibility when, during the course of the litigation challenging his own gubernatorial candidacy, he would assert that state administrative boards made up of political appointees were incapable of rendering judgments absent political bias or pressures. If nothing else, Bayh had shown himself to be one who could rise above purely partisan interest and make decisions according to what was in the best interest of the public as a whole.

Not all Hoosiers were overwhelmed by Bayh’s gubernatorial potential, however. Bayh’s youth and inexperience were repeatedly offered as significant political impediments to any gubernatorial aspirations. Indiana had occasionally elected young candidates to high statewide office. For example, Bayh’s own father was elected to the United States Senate at the age of 34, then replaced by a 33-year-old Dan Quayle. History, though, suggested that Hoosiers preferred their governors to be more seasoned – satisfying the so-called “gray line.” The average age of Indiana governors upon entering office was 50 years old. At the time, Robert Orr was one of the nation’s oldest governors at the age of 70. Of the twenty-one governors serving Indiana in the twentieth century, only five were under the age of 50

²⁷ Elkhart Truth, December 30, 1986.

²⁸ Indianapolis Star, January 22, 1987.

when inaugurated, with Governor Paul V. McNutt in 1933 the youngest at 41.²⁹ If elected, Bayh would be almost ten years younger than McNutt was when sworn in.

For all of these reasons, there was no lack of interest among Democrats in the 1988 governor's race and few potential candidates were inclined to simply concede the nomination to Bayh. Because Republicans had enjoyed twenty years of uninterrupted control of the governor's office, many Democratic politicians and their strategists were hopeful that voters would respond favorably to a "time for change" message, no matter who was the party's nominee. And there were indications that the "time for change" message possessed some measurable strength. In 1984, while President Reagan enjoyed a 535,000-vote plurality over former Vice President Walter Mondale in Indiana, Governor Orr defeated former state Senator W. Wayne Townsend by little more than 100,000 votes.

Pointing to the narrowness of the governor's re-election victory as an indication of voter discontent, Democrats argued that Hoosiers had grown weary of Republican leadership. Optimism among Democrats was widespread. Former U.S. Attorney Virginia Dill McCarty began her campaign for the Democratic Party's 1988 gubernatorial nomination as soon as the 1984 winner had been declared. In 1986, Kokomo Mayor Stephen J. Daily announced that he would not seek re-election as mayor because of his intention to campaign for governor – a decision that he made formal in January of 1987.³⁰ By early 1987, at least a half dozen prominent Democrats were being mentioned as legitimate candidates for the party's nomination.

²⁹ Linda C. Gugin and James E. St. Clair, eds., The Governors of Indiana (Indianapolis: Indiana Historical Society Press, 2006), 288. All information concerning the age of Indiana governors is contained in this biography.

³⁰ Ibid., December 20, 1986; January 23, 1987.

Favorable reviews in several newspapers aside, not all Hoosiers were charitable in their early assessments of Bayh. Bayh's most persistent antagonist was Republican State Chair Gordon K. Durnil. Durnil's criticisms were strident and rife. As noted earlier, Durnil believed that Bayh's campaign for secretary of state had violated campaign finance laws by failing to disclose all campaign contributions by prescribed deadlines. Durnil asked Marion County Prosecutor Stephen Goldsmith to investigate his allegations. In response to the allegations, Goldsmith "reviewed" the campaign bank records that Bayh voluntarily produced. Once Goldsmith compared those records to the public disclosures, he found no criminal violation and closed the matter.³¹

Durnil contended that his allegations against Bayh were not "sour grapes," but were in furtherance of his responsibility as a political leader to ensure that all candidates for public office follow the rules. "If he [Bayh] is going to be a candidate in the future, I just want to make sure he adheres to the law."³²

For his part, Bayh protested that Durnil "has accused me of violating the Constitution ... as having said everything I said was a lie. He has called me a felon. I think he even accused me of beating my dog and I don't even own a dog." Traub, the Indianapolis Star's senior political reporter described Durnil's accusations as "part of an open and growing bitterness that has raged since Bayh defeated Republican Robert O. Bowen ... to become secretary of state."³³ Whether or not all notoriety was favorable, Bayh was receiving his fair share of attention as Indiana turned its political focus toward 1988.

³¹ Ibid., May 17, 1987.

³² Ibid.

³³ Ibid.

The first public acknowledgment that Bayh was seriously considering a run for governor came with the release of the results of a poll that he commissioned in the spring of 1987. On April 13, 1987, the Indianapolis Star reported that Bayh's own poll showed him with a commanding lead over all other potential Democratic gubernatorial primary opponents. In a multi-candidate primary, Democratic primary voters favored Bayh 46 percent to Townsend's 16 percent, McCarty's 8 percent, Fort Wayne Mayor Winfield Moses' 7 percent, Daily's 3 percent and Indiana State Senator Frank O'Bannon's 2 percent. Perhaps more importantly, the poll results suggested that Bayh would be the most competitive Democrat in the general election against either of the two likely Republican nominees – Lieutenant Governor John M. Mutz or Indianapolis Mayor William H. Hudnut. In a general election trial heat, likely voters preferred Bayh over Mutz, 51 percent to 37 percent, and Bayh over Hudnut, 45 percent to 40 percent. When asked why the poll had been commissioned, Bayh said “it is no secret that a lot of people have been talking to me about [running for governor], and I have been thinking about it and asking advice of people I respect.”³⁴

In the spring and summer of 1987, the political pace accelerated and the prospective Democratic gubernatorial field began to assume a more definite shape. Bayh began meeting privately with top party leaders as well as other potential primary opponents. The Indianapolis News reported that “the aim of the meetings seems clear – convincing potential rivals that he – and not them – has the best chance of defeating any Republican opponent in 1988.”³⁵ McCarty ended her campaign in April saying she did not have enough money to

³⁴ Ibid., April 13, 1987.

³⁵ Indianapolis News, May 5, 1987.

run.³⁶ In early May, Terre Haute Mayor P. Pete Chalos dropped his consideration of a gubernatorial run and expressed his support for an unannounced Bayh candidacy, while Evansville Mayor Michael D. Vandever declared that his immediate and sole political interest was limited to serving out the rest of his mayoral term.³⁷

Even among those Democrats who remained committed to actively pursuing their party's nomination, Bayh cast a long shadow. Daily's campaign warned that Bayh would be open to attacks about being inexperienced.³⁸ Frank L. O'Bannon, a five term state senator, announced his gubernatorial candidacy on May 17, 1987, declaring that his own "record shows I know how to hold office as well as run for office"³⁹ and that "you can't run a race based on what polls say or don't say."⁴⁰

On the other hand, Republicans were worried about Bayh. During the last week of June, 1987, representatives for both Mayor Hudnut and Lieutenant Governor Mutz released competing poll results. While the stated purpose of each was to identify the strongest Republican candidate, neither poll contained a head-to-head trial heat between Mutz and Hudnut among likely Republican primary voters. Rather, both polls tested the relative electoral strength of each individual against Bayh in a general election.⁴¹ In other words,

³⁶ Ibid., April 21, 1987.

³⁷ Ibid., May 5, 1987.

³⁸ Letter from John R. Whikehart, chair of the Howard County Democratic Central Committee, June 24, 1987, copy in possession of author.

³⁹ "O'Bannon for Indiana" campaign newsletter, Vol. 1, No. 1, Summer 1987, copy in possession of author.

⁴⁰ Indianapolis Star, May 18, 1987.

⁴¹ Ibid., June 25, 1987; Indianapolis News, June 26, 1987; "Hoosiers for John Mutz" press release, June 27, 1987, copy in possession of author.

Bayh had become the standard by which Republicans were judging the strengths and/or weaknesses of their party's own prospective candidates.

Significantly, on July 22, 1987, Townsend, the 1984 Democratic gubernatorial nominee, provisionally withdrew his name from further consideration and endorsed Bayh.⁴² According to Townsend, his decision was based in large part on the results of a statewide poll that he had commissioned. Townsend described the poll results as showing Bayh handily beating all other Democrats in a primary, including Townsend himself, and beating either Hudnut or Mutz in a general election. While Townsend made clear that he had no intention of opposing Bayh in a primary, he went on to assert that "if Evan does not run, I will."⁴³ Largely unreported by the press was Townsend's observation that "there have been those who have felt Evan's age and lack of governmental experience would be a detriment to his campaign. The best evidence that we have suggests that is not the case."⁴⁴ This affirmation was not lost on Bayh, however. Pointing to Townsend's twenty-two years of legislative experience, Bayh said that he was honored Townsend "feels I'm best-qualified to lead our party and our state forward."⁴⁵

In August, Bayh's momentum continued when former Democratic governor Matthew E. Welsh announced his support if Bayh chose to run. "I know what people expect of the governor and I know personally that not only does Evan have what it takes to be

⁴² Indianapolis News, July 22, 1987.

⁴³ Indianapolis Star, July 23, 1987.

⁴⁴ Public statement of former state Senator W. Wayne Townsend, July 22, 1987, copy in possession of author.

⁴⁵ Louisville Courier-Journal, July 23, 1987.

governor, he would not disappoint the people of Indiana.”⁴⁶ The Welsh and Townsend announcements directly addressed the issue of Bayh’s age and experience and both seemed designed to thwart criticism in that regard. Daily and O’Bannon dismissed the endorsements as “predictable” and declared that neither would have any effect on their campaigns.⁴⁷

Two days later, O’Bannon’s campaign responded with endorsements of its own. Five state Democratic legislative leaders declared their support for O’Bannon, citing his seventeen years of experience in the General Assembly. They characterized O’Bannon as “better prepared to be governor than his two likely primary opponents, who are relatively inexperienced in state government.”⁴⁸ The emphasis of the express criticism was clearly focused on Bayh’s age and lack of experience. House Minority Leader Michael K. Phillips indicated that he had personally encouraged Bayh to shift his focus and consider a run for the U.S. Senate. House Assistant Democratic Leader Chester “Chet” Dobis said Bayh should consider running for lieutenant governor to allow him time “to get the seasoning he needs to someday be governor.” Bayh’s spokesperson, Phil Schermerhorn, noted the irony in those who found Bayh to be sufficiently qualified to serve as a U.S. senator or as lieutenant governor, but not governor.⁴⁹

A more critical look at the specific comments made by these Democratic legislators at the O’Bannon endorsement is revealing. They foretell the emergence of an issue that had been quietly discussed in political circles as Bayh’s most significant (and, perhaps, only)

⁴⁶ Indianapolis Star, August 18, 1987.

⁴⁷ Ibid.

⁴⁸ Louisville Courier-Journal, August 20, 1987.

⁴⁹ Ibid.

political weakness – his eligibility to serve, if elected. Dobis warned that the race for governor would be “an entirely different race than last time” and that Republicans were “chomping at the bit” to run against Bayh.⁵⁰ If Dobis was referring only to the bruising nature of a campaign for governor, it is difficult to understand how O’Bannon, who had never run for statewide office, would be better prepared than Bayh. Additionally, why would Republicans be “chomping at the bit” to be matched against the individual whom all polls suggested would be the strongest Democrat?

Dobis also claimed that Durnil and the Republicans were “already gathering ammunition” against Bayh.⁵¹ If Dobis felt that Bayh’s age or experience were disqualifying vulnerabilities, why would Republicans have the need to gather “ammunition?” Perhaps most revealing were O’Bannon’s own comments in response to these endorsements. When asked if his campaign had considered the possibility of combining forces with Bayh to run as a ticket, O’Bannon dismissed the idea by saying that he was campaigning for governor “based on [his] strengths,” which included his life-long residency in Indiana.⁵²

According to public opinion polls, Bayh’s age and level of experience were not dampening the public’s enthusiasm for his candidacy. Those who sought to derail Bayh’s candidacy were forced to look elsewhere to find other, more compelling, arguments. In the late summer of 1987, one issue was gaining steam. There is a political truism that, if you do not run, you cannot win. Bayh’s skeptics seemed hopeful that 1987 might bring the following corollary: if you cannot run, you cannot win. Democrats themselves were

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Fort Wayne Journal-Gazette, August 20, 1987.

reluctant to raise the question because of an understandable fear of internal party backlash. For the most part, to date, Republicans had remained silent on the issue as well. As Bayh's potential candidacy continued to gain legitimacy, however, all of that would change. In September, 1987, a unique moment in Indiana's political history would begin to unfold.

Chapter Two

PRELUDE TO THE CHALLENGE

“I have paid taxes every year in Indiana. I have voted ever since I was 18 years old in Indiana. I registered with the Selective Service in Indiana. I went to college in Indiana. I am living here with my family. Unquestionably, I have always been a resident of the state of Indiana.”

Evan Bayh
September 17, 1987

Questions about Evan Bayh’s eligibility to serve as governor first surfaced publicly in September, 1987. On September 16, 1987, Gerry C. LaFollette, a political reporter for the Indianapolis News, disclosed the results of an investigation that he had conducted regarding facts surrounding Bayh’s “residency.” LaFollette explained that he initiated his investigation because “the Indiana Constitution requires that to become governor one must live here for five years preceding Election Day” and that, along with others, he was aware that Bayh had worked in Washington, D.C., until the fall of 1984. For LaFollette, “that raised a red flag.”⁵³

As part of his investigation, LaFollette made inquiry of voter registration records in those places where he knew Bayh had lived. LaFollette reported that Bayh registered to vote and had, in fact, voted in Vigo County in every election (both primary and general) since he turned 18, “although he has not lived on the family farm in Shirkieville since he was 7.”⁵⁴ Bayh’s voter registration was changed only when he registered to vote in Marion

⁵³ Indianapolis Star, March 28, 1988 (letter to the editor from Gerry C. LaFollette).

⁵⁴ Indianapolis News, September 16, 1987.

County on December 31, 1985, a date LaFollette found odd and which suggested to him that Bayh wanted little public notice of the change. “Normally, one does not register to vote or perform other civic duties on New Year’s Eve afternoon as they usually are planning that night’s activities,” LaFollette later observed.⁵⁵ LaFollette also checked with the Monroe County voter registration board and found no record of Bayh being registered there while a college student at Indiana University. Similarly, LaFollette reported that “there is no record of Evan Bayh voting in the District of Columbia going back to 1982, according to a clerk there.”⁵⁶

LaFollette also checked property records in both Vigo County and Marion County. The Center Township Assessor’s Office in Marion County confirmed that Bayh purchased a condominium in downtown Indianapolis from his father after he returned from Washington, D.C., in 1984. It would later be established that this was the first real estate Bayh owned. LaFollette reported that, although Bayh had voted in Vigo County from 1974 to 1984, “officials in the [Vigo] county assessor’s office checked and no property in Fayette Township [which is where the Bayh family farm is located] is in Evan’s name.”⁵⁷

LaFollette checked with the Indiana Bureau of Motor Vehicles and found that Bayh had obtained an Indiana driver’s license on March 8, 1986. In so doing, Bayh “turned in a Washington, D.C., drivers license, with two years left on it.” At the time of LaFollette’s investigation, there was no way of determining whether Bayh had ever previously possessed a license from Indiana. Bayh had obtained a driver’s license in the District of Columbia at

⁵⁵ Indianapolis Star, March 28, 1988 (letter to the editor from Gerry C. LaFollette).

⁵⁶ Indianapolis News, September 16, 1987.

⁵⁷ Ibid.

the age of 16 while living with his family in Washington, D.C., during his father's tenure in the United States Senate. In 1976, 1980, and 1984, Bayh renewed his driver's license in the District of Columbia until he applied for and was granted a driver's license from the State of Indiana in March of 1986, as reported by LaFollette. LaFollette's investigation also confirmed that Bayh had filed Indiana state income tax returns for the years 1982, 1983, and 1984.⁵⁸

Possessed with these facts and for the apparent purpose of giving his story some context, LaFollette asked the chairperson of the Marion County Election Board, former Marion County Superior Court Judge Charles W. Applegate, for his opinion on the definition of residency. Judge Applegate initially responded that residency was determined by where one pays taxes, but then added, "residence is also a matter of intent, supported by physical acts." LaFollette asked the same question of Thad Perry, a deputy attorney general and counsel to the Indiana State Election Board, who responded that "generally, your residence is where you live. If you get into fine questions, you can get hazy." While LaFollette's investigation only scratched the surface regarding Bayh's eligibility, LaFollette was already comfortable in offering one conclusion: "if Evan Bayh were unable to enter the race for governor, the political ramifications would be enormous. He is the only statewide Democrat holding office and the possessor of a famous Hoosier name." Lastly, LaFollette suggested that the question of eligibility "could be decided by the State Election Board."⁵⁹

Though LaFollette first broke the Evan Bayh residency story, he later acknowledged that, during the course of his investigation, it had become clear to him that he was not the

⁵⁸ Ibid.

⁵⁹ Ibid.

only one making inquiry about Bayh's background. LaFollette recalled that a Washington, D.C., election official had remarked, when answering one of LaFollette's questions, "that's funny, someone asked for that same information three weeks ago!"⁶⁰

Bayh was prepared when questions surrounding his eligibility surfaced. On the day that LaFollette's story went to print, Bayh held a press conference to refute any implication that his consideration of a run for governor was in legal jeopardy. The law was clear, according to Bayh. His residency in Indiana was established at birth and remained uninterrupted in spite of temporary absences because his intent, at all times, was to maintain it here. Furthermore, he insisted that his actions were consistent with that intent. "I have paid taxes every year in Indiana. I have voted ever since I was 18 years old in Indiana. I registered with the Selective Service in Indiana. I went to college in Indiana. I am living here with my family. Unquestionably, I have always been a resident of the state of Indiana."⁶¹

Bayh also released an undated memorandum prepared by D. William Moreau, Jr., a lawyer and political confidant, that provided legal analysis and supporting facts. In relevant part, the memorandum anticipated that "it will undoubtedly be suggested that the few months of legal training you had at the Washington law firm of Hogan and Hartson effected a change in your legal residency. Such an allegation would be based on the notion that one's physical location is synonymous with one's legal residence, a notion which even under the most cursory review, has absolutely no merit."⁶² Attached to the memorandum

⁶⁰ Indianapolis Star, March 28, 1988 (letter to the editor from Gerry C. LaFollette).

⁶¹ Ibid., September 17, 1987.

⁶² Legal memo by D. William Moreau, Jr., entitled "Gubernatorial Residency Requirement," undated, copy in possession of author.

were copies of several court opinions that Bayh suggested were instructive. One was a 1975 Indiana Supreme Court decision, captioned In re: Matter of Evrard, in which the court upheld the Indiana voting residency of a candidate for judge in Perry County, Indiana although he had lived outside the state for a considerable period. Another was a Missouri decision involving the 1972 gubernatorial candidacy of Republican Christopher “Kit” Bond.

Bayh dismissed as benign LaFollette’s journalistic interest in the question. Rather, Bayh took immediate aim at Republican officials and declared that they were the ones responsible for orchestrating the investigation into his eligibility. He suggested that, “there may be some people who hope to keep the election next year from being decided by the public by having it decided by the courts.”⁶³ While denying any complicity in the LaFollette investigation, Durnil admitted that he had been studying the issue. Durnil further acknowledged his affirmative intent to challenge Bayh’s eligibility, if and when Bayh declared his candidacy. Durnil disputed Bayh’s interpretation of the applicable law and argued that one’s absence from the state does interrupt residence for purposes of constitutional qualification. Durnil commented that Bayh “was [in Washington, D.C.] for private career purposes, he paid taxes in Washington, D.C., he had a driver’s license there. He was a resident of Washington, D.C.”⁶⁴ The Indianapolis Star reported that “a legal challenge to Bayh’s candidacy could be filed by any registered voter and would be heard by the State Election Board.”⁶⁵

⁶³ Indianapolis Star, September 17, 1987.

⁶⁴ Louisville Courier-Journal, September 17, 1987.

⁶⁵ Indianapolis Star, September 17, 1987.

The facts offered by Bayh in his public defense also caused Durnil to call on Marion County and Vigo County prosecutors to charge Bayh with felony violations of Indiana election law, similar to the allegations that served as the basis for the Evrard case. By admitting that he had voted in Vigo County in November 1984 while “living” in Marion County – i.e., at his father’s condominium – Durnil maintained that Bayh had violated Indiana laws that prohibited voters from unauthorized voting and from casting ballots in precincts where they do not live. “The guy thinks he’s above the law and now the Constitution,” Durnil said, referencing Bayh’s voting history and Bayh’s insistence on his gubernatorial eligibility.⁶⁶

In “The Chairman’s Memo,” a bi-weekly newsletter sent to Republican activists across the state, Durnil penned an article entitled “Evan Bayh: A Deliberate Fraud or Just Stupid.” In the article, Durnil repeatedly characterized Bayh as a liar who believed that the laws of the state and nation were inapplicable to him. Never straying too far from the issue of Bayh’s residency, Durnil asked rhetorically, “The question is, ... can Evan Bayh rely on an illegal act (voting in Vigo County, but not living there) to prove residence? The answer is no.... Every person who has sought the office of Governor and Lt. Governor since 1851 has had to meet the requirements of that constitution. What kind of arrogance does it take for Evan Bayh to claim that he is not subject to the Indiana Constitution?”⁶⁷

Durnil, however, was not alone in expressing concern about Bayh’s emerging predicament. Spokespersons for Bayh’s two potential Democratic primary opponents immediately underscored the political, if not legal, uncertainty that the residency issue

⁶⁶ Indianapolis News, September 17, 1987.

⁶⁷ “The Chairman’s Memo” from Gordon K. Durnil, Indiana Republican State Chair, September 17, 1987, copy in possession of author.

created. John Whikehart, Daily's campaign manager, characterized it as "a cloud that would hang over Evan's head." O'Bannon's campaign director, John R. Goss, was more circumspect but nonetheless conceded, "at this point there's definitely a question which needs to be clarified." Both men suggested that Democratic leaders and officials needed to give thought to the possibility of some kind of definitive resolution.⁶⁸ By week's end, O'Bannon issued a statement acknowledging the legitimacy of the issue, but defending Bayh as being unfairly attacked by Durnil. On the issue of Bayh's eligibility, O'Bannon declared, "I accept Evan at his word."⁶⁹

Though the initial public skirmishing over Bayh's eligibility lasted only a few days, it was already apparent that quick answers to the questions raised were going to prove elusive. However, the debate was taking shape. After having been discussed in closely held political circles for months, the issue had finally emerged for public consumption. And the Republicans, led by Durnil, went on the attack. As previously mentioned, the revelation of Bayh's voting history prompted allegations from Durnil that Bayh had committed myriad criminal election law violations. By unleashing these allegations against Bayh, Durnil unwittingly shifted the press corps' attention, in turn, to Governor Orr, who some suggested was doing the same thing – living in Marion County but voting in his home county of Vanderburgh. The Indianapolis Star reported that, "Indiana Republican Chairman Gordon K. Durnil thinks it's perfectly okay that Governor Robert D. Orr lives in Marion County but

⁶⁸ Indianapolis News, September 17, 1987.

⁶⁹ Ibid., September 19, 1987; "O'Bannon for Indiana" campaign press release, September 18, 1987, copy in possession of author.

votes elsewhere. But Durnil would like to see Democratic Secretary of State Evan Bayh prosecuted for the same thing.”⁷⁰

Republicans quickly responded that Governor Orr’s voting history was legally permissible because of the constitutional requirement that state officeholders “reside” in Indianapolis during their term of office for purposes of conducting state business. At the time, Article 6, Section 5, of the state constitution provided that, “the governor and the secretary, auditor and treasurer, shall severally reside and keep the public records, books and papers, in any matter relating to their respective offices, at the seat of government.”⁷¹ Republicans pointed out that, unlike Governor Orr who was a constitutional officer when he cast votes in Vanderburgh County while “residing” in Marion County, Bayh was a private citizen when he voted in Vigo County in 1984.

Yet the Republican defense of Governor Orr, in turn, led some in the press to question why then it was constitutionally permissible for State Auditor Ann DeVore, a Republican, to commute each day from her home in Columbus if, as a constitutional officer, she was required to “reside ... at the seat of government?” For that matter, press accounts pointed out that the same argument could have been made about former State Treasurer Julian Ridlen, a Republican, who had commuted from Logansport during his time in office, or former State Auditor Otis Cox, a Democrat, who had commuted from Anderson.

Durnil responded that a literal interpretation of the term “reside,” as used in that particular section of the Indiana constitution, was historically outdated and inapplicable. He

⁷⁰ Indianapolis Star, September 18, 1987.

⁷¹ Ind. Const. Art. VI, § 5 (1851). The Indiana constitution was amended in 1998 to remove the requirement that all statewide officeholders “reside” in Indianapolis. However, no change was made as to the requirement for governor.

argued that such a reading would have been relevant only for that period of time when travel made it impossible to do the job required of a state officeholder without living in the State House itself or, at least, the immediate community where the state capitol was located.⁷² In so doing, Durnil first encountered how difficult it would prove for him to remain logically consistent in this case. Durnil had previously argued that the term “reside” as used in Indiana’s durational requirement for governor should be interpreted narrowly – that Bayh was required to have maintained uninterrupted physical presence in the state for five continuous years preceding the election. Why then was it inappropriate or “historically outdated” to apply the same narrow reading to the exact same term when it appeared elsewhere in the constitution? Durnil either underestimated the coming challenge from the press on issues involving residency, or he failed to adequately understand or prepare for those challenges. Durnil was fond of reminding his audiences of his long and successful tenure as a political professional. Yet at a time when that experience would serve him best, he seemed unable to capitalize on or take advantage of it.

Durnil found himself faced with public relations battles on more than one front. Although he had made it clear that Republicans would challenge Bayh if no one else did, Durnil was reluctant to be seen as the antagonist in the matter any more than was already the case. Republicans wanted the issue to be litigated, but, as a matter of political strategy, they preferred litigation absent their own “fingerprints.” To accomplish that, Republicans wanted to generate a sufficient amount of concern among Democrats about the potential dire political consequences of Bayh being ruled ineligible that Bayh himself or other Democrats would feel compelled to take steps to resolve the matter.

⁷² Indianapolis Star, September 19, 1987. The question of what the word “reside” means in Article 6, Section 5 of the 1851 Indiana Constitution remains unresolved to this day.

The Republicans' first and easiest targets for encouraging litigation against Bayh would be from his primary opponents, who, in a narrow political sense, had the most to gain were Bayh to be ruled ineligible. Jack Colwell, a political reporter for the South Bend Tribune, observed: "But attention to the possible residency problem, even if it doesn't force Evan Bayh out of the race, could give pause to Democratic primary voters who might not want to pick a nominee with a question about residency, perhaps depriving Bayh of the landslide primary win he has hoped for to build momentum for a fall challenge to long-time Republican control of the governor's office."⁷³

Because the residency issue surfaced in September, 1987, and the period for candidate filings for governor did not close until March, 1988, Durnil had over five months to exert political pressure on Democrats. Initially, it appeared that his efforts might be successful. The more Durnil talked about filing a complaint challenging Bayh's eligibility in front of the Republican-controlled state election board, the more nervous Democrats became. Again, Colwell explained that, although Bayh insisted he was constitutionally eligible, "the State Election Board, however, is Republican controlled. It could see things in a different light. Decisions on election matters get pretty political in Indiana – even though Bayh, as chairman of the State Recount Commission, gave an honest count to Republican [John P.] Hiler at a time when he could have found ways to throw out Hiler votes and make a political decision to knock Hiler out of Congress."⁷⁴ It is fair to observe, therefore, in the fall of 1987, Bayh and his political opponents found themselves "eyeball-to-eyeball," waiting for the other to blink.

⁷³ South Bend Tribune, September 27, 1987.

⁷⁴ Ibid.

In October, the political pressure on Democrats intensified when Hudnut announced that he would not seek the Republican nomination for governor in 1988, thereby avoiding the possibility of a potentially divisive Republican primary. Hudnut had been consistently competitive in all previously released polls and had outpaced Mutz in head-to-head matchups with Bayh. Hudnut was charismatic, an outstanding public speaker, and credited with the urban renewal and revitalization that downtown Indianapolis had enjoyed. By any measure, he would have been a formidable candidate. However, Hudnut cited “personal reasons,” as well as his unfinished agenda for the city, as the impetus for his decision not to run.⁷⁵ Without question, Hudnut’s decision strengthened Mutz’s candidacy, as Republicans were able to coalesce around Mutz and begin focusing their time, money, and attention on the fall campaign. With the Republicans appearing united, pressure was increased on Democrats to get their own house in order if they were to be competitive.

Meanwhile, Bayh responded to inquiries about his eligibility, encountering questions nearly everywhere he went. At an event in South Bend, for example, Bayh expressed his hope that “state Republican Chairman Gordon Durnil makes an official challenge to [Bayh’s] meeting residency requirements for governor because such a ‘frivolous’ challenge ‘would not serve [the Republicans] well in the arena of public opinion.’”⁷⁶ Bayh was adamant that he would not initiate a lawsuit on his own. That being said, it was manifestly important for him to allay growing fears among worried Democrats.

For Bayh, the most effective way to instill internal party discipline was to project confidence in his legal position and, at the same time, create as much political momentum as

⁷⁵ *Ibid.*, October 19, 1987.

⁷⁶ *Ibid.*

possible in support of the inevitability of his own political success. Bayh's campaign staff believed that Democrats could be persuaded that the Republican threats of a legal challenge were a sign of weakness, not strength. But the strength of Bayh's candidacy needed to be underscored at every turn. Bayh described to a reporter that the "efforts to knock him out of the governor race are a sign of 'growing desperation' on the part of Republicans." He further argued that "Republicans, in control of the governor's office since the 1968 election, will 'resort to just about any tactic' to retain control."⁷⁷

Bayh took advantage of every opportunity to ratchet up the political momentum in his favor. In late October, his gubernatorial exploratory committee reported having raised \$330,000 in just five months, a figure that exceeded what any previous Democratic gubernatorial candidate had ever raised in a comparable period. Neither the O'Bannon nor Daily campaigns were required to file campaign finance reports at that time. Spokespersons for each campaign, however, conceded that neither had raised an amount equal to Bayh, and it was widely believed that Bayh's effort had significantly outpaced both. There was even speculation that Bayh's fundraising numbers nearly equaled those of Mutz. Michael D. McDaniel, manager of Mutz's campaign, characterized Bayh's finance report as "mildly impressive." "It sounds to me [that] what they're trying to do is scare O'Bannon and Daily out of the race," he said.⁷⁸ Durnil's reaction was not surprising. Because Bayh's committee was not a formal candidate's committee, Durnil claimed that contributions received by Bayh

⁷⁷ Ibid., November 13, 1987.

⁷⁸ Indianapolis News, October 27, 1987.

from corporations and labor organizations were illegal and had been accepted in violation of Indiana campaign finance law.⁷⁹

Shortly thereafter, and after months of speculation, Bayh made his decision official. On the chilly morning of November 12, 1987, from the front porch of his family's farmhouse in Vigo County, Bayh publicly declared his candidacy for governor.⁸⁰ Two days before, Mutz had done the same. On the day of the Mutz announcement, Durnil distributed a nine-page legal memorandum prepared by unnamed lawyers for the Indiana Republican Party which concluded that Bayh was constitutionally ineligible to serve as governor.⁸¹ The legal analysis cited Indiana law in support of the proposition that moving out of Indiana for an indefinite period of time divested one of residency "even if the person intends to return at some time."⁸² Thus, Republicans first argued that physical presence was required to maintain one's residency unless absence was for reasons of the business of the state or of the United States. "Evan Bayh's fifteen (15) month absence from the State of Indiana was not due to either of the enumerated constitutional reasons: business of the State of Indiana or business of the United States. Evan Bayh's absence from the State of Indiana occurred because he was pursuing a private career as an attorney in Washington, D.C."⁸³

The memo also suggested that Bayh's reliance on the court decisions cited in his previously released legal "white paper" was misplaced. Attached to the Republican memo

⁷⁹ Ibid.

⁸⁰ Terre Haute Tribune-Star, November 13, 1987.

⁸¹ Legal memo prepared for Republican State Central Committee, entitled "Questions Regarding Residency Requirements," undated, copy in possession of author.

⁸² Ind. Code § 3-7-1-5 (1987).

⁸³ Legal memo prepared for Republican State Central Committee, entitled "Questions Regarding Residency Requirements," undated, copy in possession of author.

were decisions from North Dakota and Arkansas standing for the proposition that one's intent to return does not, by itself, create or maintain residency within a state. The memo also examined the potential effect of someone winning a nomination or an election then later being judged ineligible to serve. Characterizing the consequences as "complicated" and, potentially, "severe," the memo implied that, absent some immediate resolution of the controversy, Bayh's candidacy could wreak havoc on the entire process. The Republicans also distributed a recently published editorial from the Democratic-leaning Fort Wayne Journal-Gazette admonishing Democrats to "get some sharp, independent legal advice instead of just conducting a primary campaign with the assumption that Evan Bayh is a qualified candidate for governor."⁸⁴

Democrats were listening. Bayh once again found himself under increasing pressure to initiate action on his own and resolve the concerns that some suggested would overwhelm his candidacy. While asserting that he had no intention of mounting a legal challenge, sources close to O'Bannon confirmed that he had been approached by lawyers who were willing to file such a challenge to Bayh. Goss, O'Bannon's campaign director, described the urgency of the matter: "It's imperative for the party that this question be cleared up as soon as possible. The burden is on the Bayh campaign to clarify this as soon as possible." Daily was even more succinct, declaring, "the residency problem should be resolved before the primary." State Democratic Chair John B. Livengood revealed that several Democratic state central committee members wanted Bayh to either initiate a resolution himself or consent to

⁸⁴ Fort Wayne Journal-Gazette, September 27, 1987.

the filing of a “friendly legal challenge” against him in order to “put the matter to rest, one way or the other.”⁸⁵

The calls by Democrats to dispel these doubts forced the Bayh campaign to seek “independent” legal support for their position. In November, 1987, Moreau, Bayh’s deputy secretary of state, announced that a panel of legal advisors had already been asked to conduct a thorough review of the matter and render an advisory opinion. Apparently, Bayh had convened the panel even before his official announcement. Work had been ongoing for several weeks. Furthermore, Moreau explained that “these are going to be folks who have a standing in the legal community, who have looked at it with a fresh eye and with a level of objectivity that hasn’t been voiced yet.”⁸⁶

Bayh was pushing back politically as well. The day after the formal announcement of his candidacy, Bayh received the near-unanimous endorsement of the Indiana State AFL-CIO, the state’s largest labor organization. Not only did the endorsement mean that Bayh would begin receiving a significant financial boost from labor union political coffers, the timing of the announcement was critical for political reasons. In the midst of the uncertainty caused by the residency issue, this particular endorsement sent the unequivocal message that a very important constituency of the Democratic Party – organized labor – was willing to assume the risks associated with Bayh’s candidacy because they were convinced that he had the best chance of winning in the fall election.⁸⁷

⁸⁵ South Bend Tribune, November 15, 1987.

⁸⁶ Indianapolis News, November 16, 1987.

⁸⁷ Indianapolis Star, November 14, 1987.

Bayh was also beginning to receive some discernible level of support in the court of public opinion. The release of the Republican legal memo at the same time as Bayh's declaration of candidacy prompted several newspapers' editorial boards throughout the state to begin weighing in. The Gary Post-Tribune observed that "State Republicans are reacting almost predictably to the Bayh announcement. They are shouting that he is a kind of alien who flunks the residency requirements. They even warn that he might be elected but could not serve These may indeed be weighty matters requiring legal decisions. But Republicans would do better if they prepared to take on the Democratic winner on issues that count"⁸⁸ Other editorial boards were more pointed. The Evansville Courier opined that "until the issue is put to rest, the campaign is likely to focus a disproportionate amount of attention on what is essentially a technicality."⁸⁹ The Marion Chronicle-Tribune called the Republican allegations a "cheap shot" that had the potential to backfire: "Republicans ought to challenge Bayh on the real issues that concern most Hoosiers instead of trying to raise the peripheral issue of residency."⁹⁰

For the first time, evidence also began to surface that even some Republicans were beginning to express quiet concern about Durnil's role in promoting the controversy. "It makes us look like we're paranoid about Evan Bayh," said one GOP state lawmaker from northern Indiana, who asked not to be identified. "This (the challenge) should be something the Democrats should be fighting about, not us."⁹¹

⁸⁸ Gary Post-Tribune, November 15, 1987.

⁸⁹ Evansville Courier, November 18, 1987.

⁹⁰ Marion Chronicle-Tribune, November 13, 1987.

⁹¹ Fort Wayne Journal-Gazette, November 29, 1987.

Not all political commentary was favorable for Bayh, however. Mary Dieter, a political reporter for the Louisville Courier-Journal, noted that though Bayh claimed to be unconcerned about the residency issue, his actions indicated otherwise. She observed that Bayh had conspicuously refrained from mentioning his work history in Washington, D.C., in the political biography that he had provided during his campaign for secretary of state. She also noted that, in an interview she had with Bayh before news of the residency issue first surfaced, “he hedged when asked the dates of his various jobs. The subject at that moment was not whether Bayh was eligible to be a candidate, but whether he had lived in Indiana long enough to know the state.”⁹²

Similarly, Jim Mellowitz, a political columnist for the Fort Wayne News-Sentinel, noted that the debate over Bayh’s residency had “brought to light some intriguing facts about Bayh, facts that clearly irritate Bayh’s staff when they are brought up.” Most notably, Mellowitz pointed out that Bayh had not yet released his 1983 or 1984 Indiana state income tax forms. State tax forms require taxpayers to declare themselves as a “resident,” “non-resident,” or “part-time resident.” When specifically asked about Bayh’s tax forms by Mellowitz, Bayh’s staff claimed that they had not seen them. Mellowitz observed, “this convenient lack of knowledge is troubling.”⁹³

By the first week of January, 1988, reporters began pressing about the public commitment Bayh’s campaign had made in November to produce a definitive legal analysis prepared by dispassionate experts that would “settle questions over [his] eligibility to be

⁹² Louisville Courier-Journal, November 15, 1987.

⁹³ Fort Wayne News-Sentinel, November 30, 1987.

governor.” When no report had been released by early January, Bayh’s opponents, both Republican and Democratic, were quick to raise questions about reasons for the delay.

Durnil claimed no surprise at all that a report supporting Bayh’s legal position had not been released. “I don’t expect them to ever have any kind of report ... because if they do, and it’s a legitimate report, it’s going to be negative to them.” Durnil emphasized that Bayh had yet to release his 1984 federal tax return or his Indiana state or District of Columbia tax returns for 1983 and 1984. Durnil argued that the release of those tax returns would prove determinative with respect to the question of Bayh’s eligibility: “If they really do have a group of people looking at it, and he shared his Indiana tax returns and his Washington tax returns with them, they would tell him he’s not eligible to run.”⁹⁴

As for the Democrats, Steve Daily claimed personal disinterest in Bayh’s residency problems. The O’Bannon campaign, on the other hand, expressed serious concern about Bayh’s delay in the release of a definitive legal analysis. O’Bannon reiterated his intention to refrain from filing a lawsuit. However, his campaign director echoed reservations some Democrats had been expressing since the formal declaration of Bayh’s candidacy in early November. “I think it’s important to clear up the issue,” John Goss said. “Many people in the party are concerned about clearing up the issue as soon as possible.”⁹⁵

As pressure for a legal resolution of the issue continued to mount, Bayh received significant political support from the release of findings of a statewide poll commissioned by the Indianapolis Star and conducted during the first week of January. In its January 10, 1988, edition, under a headline entitled “Bayh leads Mutz, Democrats in governor’s race,”

⁹⁴ Indianapolis News, January 9, 1988.

⁹⁵ Ibid.

the Star reported that, in a head-to-head match-up, Bayh enjoyed a 10 percentage point lead over Mutz among likely voters who had already made a decision. The poll also revealed that Bayh was favored by 60 percent of those self-identified Democrats surveyed when asked who they supported in their party's primary. From those same likely Democratic primary voters, O'Bannon received 8 percent and Daily received 5 percent of support. In addition, while Bayh polled ahead of Mutz, both O'Bannon and Daily trailed Mutz by 14 percentage points when matched with him head-to-head. The Star observed that the poll's findings "indicate the powerful Republican state committee might have to come from behind to extend its 20-year domination of the governor's office" and that "a 31-year old with a 1-year old career in government is in a strong position to upset a veteran politician who is completing his second term as lieutenant governor."⁹⁶

Also accelerating the political dynamics facing Bayh and his opponents was the January 15 deadline for filing year-end campaign finance reports. O'Bannon filed first. On January 13, his campaign committee revealed that, during 1987, it had raised a total of \$367,000 – about the same amount that Bayh had reported raising three months earlier. More importantly, O'Bannon's disclosure revealed that his committee had only \$90,371 remaining as his campaign entered the new year.⁹⁷ On January 14, the reports filed by Bayh and Mutz showed that each had raised a nearly equal amount of money in 1987 – Bayh reported raising \$773,702, while Mutz raised \$790,639. Additionally, they were neck-and-neck as far as cash-on-hand at the end of 1987 – Bayh reported \$661,138 in the bank, while

⁹⁶ Indianapolis Star, January 10, 1988.

⁹⁷ Ibid., January 14, 1988.

Mutz had \$773,910 (which included monies Mutz had raised in 1986 and 1987).⁹⁸ These reports confirmed that Bayh was financially competitive with Mutz, that he was significantly outpacing both of his primary opponents, and he was establishing at each milepost new records for the amount of money raised by an Indiana Democrat running for governor.⁹⁹ The Bayh campaign also highlighted the fact that Bayh’s fundraising had come from over 3,100 contributors, which it characterized as evidence of widespread and “significant encouragement to seek the governorship.”¹⁰⁰

The Star’s poll results combined with the fundraising figures made it nearly impossible to reach any conclusion other than that Bayh’s candidacy was going to be extremely competitive against the Republicans. In the wake of these disclosures, internal Democratic party concern over Bayh’s eligibility quieted significantly. Though poll numbers and fundraising figures did not alter Bayh’s legal position, their release solidified party support behind Bayh’s candidacy. Talk that a challenge to Bayh’s eligibility would come from Democrats – whether by way of a “friendly lawsuit” or from a primary opponent – almost entirely disappeared. O’Bannon’s own polling revealed that, after almost a year of campaigning, O’Bannon’s net positive rating was only 7 percent, with 73 percent of those polled unable to recognize his name. This was in stark contrast to the 54 percent of voters who gave Bayh a positive rating. Most notably, O’Bannon’s polls confirmed that, while voters generally regarded experience in government as important, they did not apply that standard to Bayh, or if they did, they did not care and “liked him anyway.”¹⁰¹

⁹⁸ Indianapolis News, January 15, 1988.

⁹⁹ Indianapolis Star, January 15, 1988.

¹⁰⁰ Louisville Courier-Journal, January 15, 1988.

¹⁰¹ Stoner, Legacy of a Governor, 121.

Durnil's desire to convince Democrats to mount their own challenge against Bayh had all but vanished. If someone were going to initiate a legal challenge, Durnil remained the only outspoken proponent. It remained possible that Bayh could be forced to initiate his own legal proceedings, but such effort to "quiet title" was becoming less likely by the day. Bayh would only do so to protect or preserve advantageous legal position in response to any preemptory action taken by Durnil and the Republicans.

As if he sensed the inevitable, Durnil became more animated and provocative in his attacks on Bayh. When asked to comment on Bayh's January 14 fundraising report, Durnil accused Bayh of hiding campaign contributions in out-of-state banks. Durnil characterized these contributions as "unreported cash ... from organized labor and New York Jewish money."¹⁰² A firestorm erupted immediately. A spokesperson for the Indianapolis Jewish Community Relations Council called the comment "reprehensible" and having "no place in American public life." Livengood called it "an appeal to bigotry" and accused Durnil of being obsessed with Bayh.¹⁰³ Durnil apologized and explained that he had used or intended to use, the term "Eastern liberal money" rather than "New York Jewish money." A Mutz spokesperson expressed shock and made clear that the Mutz campaign "would gladly accept contributions from members of the Jewish faith who did not live in Indiana."¹⁰⁴

Though Durnil remained the principal public advocate of pursuing a residency challenge against Bayh, Mutz's campaign closely monitored the effect of the issue on voters. To that point, Mutz had refrained from taking any direct role. That changed on

¹⁰² Indianapolis Star, January 16, 1988.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

January 18 when Mutz, during a press conference, released his own personal income tax forms for the previous five years and called on Bayh to do the same. McDaniel, Mutz's campaign manager, argued that the release of the lieutenant governor's tax information was prompted solely by the release of similar forms by the 1988 Republican presidential candidates, and not as a pretext to pressure Bayh to disclose what could be critical evidence for an impending challenge to Bayh's eligibility. McDaniel noted that Republican statewide candidates in both 1984 and 1986 had released tax information. Thus, Mutz was merely being consistent with precedent previously established.¹⁰⁵

Nonetheless, the timing of the Mutz release appeared calculated. In 1984 and 1986, tax returns by Republican statewide candidates had been released in August, not January. In addition, no explanation was offered as to why Mutz had chosen to release five years worth of tax information. During his campaign for secretary of state in 1986, Bayh had released tax information for 1985, his first full year of employment in Indiana after his return from Washington, D.C. While release of candidate tax information had become standard political fare, Republican sources conceded that their previously identified interest in Bayh's income tax returns for 1983 and 1984 was growing: "[the Republicans] say the tax forms will help prove that Bayh considered Washington his residence in 1984." McDaniel asserted that "all we are asking is for [Bayh's campaign] to release their returns. If they don't, you can draw your own conclusions."¹⁰⁶

Bayh charged that the release by Mutz of five years worth of tax records along with Mutz's call for Bayh to do likewise was evidence that Mutz himself was part of an

¹⁰⁵ *Ibid.*, January 19, 1988.

¹⁰⁶ *Ibid.*

organized effort by Republicans to keep Bayh off the ballot. Bayh reiterated what was becoming his standard mantra: “Gordon Durnil is not confident enough in his candidate to have the people decide this election. And now John Mutz is trying to take the case away from a trier of fact (a judge) by challenging me to release this information bit by bit I have consistently said I am not going to dribble out the information. We will release all of the information concerning my residency at once.”¹⁰⁷

Politically, the 1988 election shifted into overdrive on January 20 when, together, Bayh and O’Bannon announced that O’Bannon would discontinue his seven-month-old campaign for governor and join forces with Bayh by running as his lieutenant governor. The political realities facing O’Bannon had caused him to conclude that he could only wage a campaign against Bayh that was “negative” in tone – something he was unwilling to do.¹⁰⁸ Democrats were exuberant. The party could now unite behind the two individuals most believed were their strongest candidates. The potential of a divisive primary would be avoided. Bayh and O’Bannon’s candidacies seemed to complement each other. As Bayh remarked during the press conference announcing the decision: “I don’t know a public official who is more respected and honored and has more integrity than Frank O’Bannon I hope we can provide the best of fresh leadership and seasoned experience.”¹⁰⁹

Years later, Bayh would recall that O’Bannon was “someone who cared about the state and who cared about the Democratic Party He wanted to do what was best for [us] both, even if that meant subordinating his own ambitions Frank O’Bannon was a man

¹⁰⁷ Ibid.

¹⁰⁸ Indianapolis Star, January 21, 1988.

¹⁰⁹ Louisville Courier-Journal, January 21, 1988.

who cared very deeply about the greater good more than he cared about his own narrow self-interest.”¹¹⁰ O’Bannon’s biographer, Andrew E. Stoner, writes, “to describe Democrats in Indiana as jubilant at the Bayh-O’Bannon announcement would be an understatement. State Senator Carolyn Mosby of Gary declared it ‘the happiest day of my political life. For the first time ever, I really believe we Democrats can control the Statehouse.’ State Representative Earline Rogers of Gary ... took fellow Democrats aside and persuaded them to sing and dance in the statehouse halls following the announcement.”¹¹¹ The Indianapolis News observed, “both the announcement and the gesture, understandably, touched off jubilation among Indiana Democrats. Democrats have had the Statehouse doors shut to them for many years. Children have been born, gone through school and voted since the last time a Democrat sat in the governor’s chair. Now, after many cold winters, Indiana Democrats feel they will be able to warm themselves at the fireplace in the governor’s mansion next January.”¹¹²

The Mutz campaign claimed to be elated by the development, characterizing the Bayh-O’Bannon ticket as a “dream” for Republicans. “It will make it much easier to point out that this campaign is [between] the most qualified candidate ever for governor (Mutz) versus the least qualified candidate ever (Bayh),” said Mike McDaniel.¹¹³ Privately, the story was altogether different, as McDaniel later conceded. “We would have preferred to run against Frank O’Bannon ... (the partnership) was troublesome, certainly The big difference for us would have been that Frank O’Bannon had a voting record, and Evan Bayh

¹¹⁰ Stoner, Legacy of a Governor, 120.

¹¹¹ Ibid., 128.

¹¹² Indianapolis News, January 23, 1988.

¹¹³ Indianapolis News, January 26, 1988.

had no record at all”¹¹⁴ The Mutz campaign also preferred O’Bannon as a prospective opponent because O’Bannon had never run statewide, whereas Bayh had just won the race for secretary of state. Mutz also appreciated the advantage that Bayh possessed in name recognition, in large measure because of his father. McDaniel feared that the Bayh-O’Bannon ticket provided advantageous geographic balance. “With O’Bannon, ‘you had someone who could probably deliver a good part of southern Indiana, which is always very important for the Democrats.’”¹¹⁵

How formation of the Bayh-O’Bannon ticket would affect the residency issue was not immediately clear. Most observers assumed that, with O’Bannon firmly ensconced as the party’s presumptive lieutenant governor nominee, he was positioned to assume the party’s mantle of leadership should Bayh be ruled ineligible. Such a conclusion was not accurate, however. Daily remained a candidate for governor. The question then became one of timing. If O’Bannon did not file for governor and if Bayh were declared ineligible after the close of the filing period (March 4), but before the primary election (May 3), then Daily would be the only remaining eligible gubernatorial candidate on the ballot and would win the Democratic nomination by default.

As a result, even at a time when Democrats were rallying behind their newly formed ticket, consideration had to be given to filing O’Bannon’s name in the gubernatorial primary.¹¹⁶ To qualify for placement on the ballot, a candidate for governor was required to obtain certifiable signatures from 500 registered voters in each of the state’s ten

¹¹⁴ Stoner, Legacy of a Governor, 127-128.

¹¹⁵ Ibid., 128.

¹¹⁶ Evansville Courier, January 23, 1988.

congressional districts. Goss, O'Bannon's campaign director, explained "we are completing the petitions for Frank and they will be ready to be filed so that Frank can be on the ballot (for governor), in case he needs to be."¹¹⁷ All of this could have been avoided if Daily could have been persuaded to discontinue his candidacy as well. In point of fact, on the day of their joint announcement, Bayh and O'Bannon invited Daily to join their team, albeit in an unspecified capacity.¹¹⁸ O'Bannon confirmed that his offer to Daily was not specific, but that other Democrats had suggested to Daily that he consider running for state superintendent of public instruction because he was a former teacher and could add valuable insight to the debate about the future of public education. Daily declined and continued his quest for the party's nomination for governor. Stoner writes that, "Daily says he recalls hearing directly from O'Bannon that he was planning to withdraw, but if Daily ever considered dropping out, at that point, it didn't show publicly. Describing himself as a 'pit bull terrier', Daily dug in"¹¹⁹

On January 23, a formal challenge to Bayh's eligibility inched closer when Durnil admitted that Bayh's "whereabouts" for the last five years had been under investigation for more than a year. Apparently, at Durnil's direction, Republicans had been pursuing this investigation since shortly after Bayh had assumed office as secretary of state in December of 1986. Durnil further asserted that he was "certain" that Bayh did not satisfy the constitutional qualifications. The Republican effort had been directed toward "accumulating evidence from a network of volunteers who ... have supplied more than 50 pieces of

¹¹⁷ Indianapolis Star, January 30, 1988.

¹¹⁸ Ibid., January 21, 1988.

¹¹⁹ Stoner, Legacy of a Governor, 127.

information indicating Bayh gave up his Hoosier residency.” Durnil bragged to Chuck Clark, a reporter for the Evansville Courier, that he had in his possession “a two inch thick file, stuffed with clippings and reports on Bayh, at his fingertips in his office” Durnil announced that Republicans would challenge Bayh’s candidacy shortly after Bayh formally entered the race because “when it comes to the Constitution and somebody tries to bluff their way through, you’ve just got to stop them.”¹²⁰

On Monday, February 1, Bayh once again took the offensive on the residency issue by issuing the long-awaited report submitted by three legal advisors. Members of the panel included Dean David T. Link of the University of Notre Dame School of Law, Indiana University constitutional law professor Patrick L. Baude, and former Indiana Supreme Court Justice Dixon W. Prentice. All three possessed legal resumes that could not be dismissed lightly. Yet, it should be noted that all three were Democrats and all had been asked by Bayh to review the law and offer their opinion. In addition, Justice Prentice had been a member of the Evrard court in 1975 and had joined the majority opinion, finding Evrard eligible to vote in the Perry County primary although he had not yet moved home.

The panel’s partisan orientations aside, they offered a thorough and thoughtful legal analysis. They concluded that a “candidate for governor need not be physically present in the state to meet the Indiana Constitution’s residency requirement.” Rather, they said, a judge, or judges, must consider evidence “indicating how Bayh lived and where he intended to permanently live.” According to the panel, a review of the decisions of the Indiana Supreme Court revealed that a person must first abandon Indiana and then establish a new residence elsewhere in order to lose residency. On behalf of the panel, Baude explained that Bayh would have had to “buy a house in Washington, enter into long-term commitments,

¹²⁰ Evansville Courier, January 23, 1988.

changing his voter's registration to Washington, making Washington his home, the center of his civil, political, personal, family and religious life."¹²¹

Because it was undisputed that Bayh was domiciled in Indiana at birth, and because the panel was not aware of any facts that would show that Bayh had affirmatively abandoned Indiana and established a new domicile in Washington, D.C., during his 1983-84 stint with a law firm, the panel concluded that Bayh was "a 'resident' of Indiana during that period for purposes of complying with Article 5, Section 7."¹²² Baude further observed that "a person keeps whatever domicile he has until he changes it. In light of a century of unbroken interpretations in the Indiana Supreme Court, it is just difficult, in fact, impossible, to see how there could be any serious question about Evan Bayh's eligibility."¹²³ Baude explained that "the question of residence under the Indiana Constitution does not mean what your mailing address is. It refers to those deep bonds and connections between an individual and his state that link him in the long run to the state."¹²⁴ Bayh characterized the report as "an exhaustive study." He also expressed his hope that the report would put the residency matter to rest, but he acknowledged that, in all likelihood, the matter was headed to court.¹²⁵

While the panel's report could be categorized as just another opinion, it was the joint and considered judgment of individuals who were undeniably legal scholars. The report did have one important additional effect. For the first time, the concept of "residency as

¹²¹ Indianapolis Star, February 2, 1988.

¹²² Record of Proceedings, Volume I, pp. 183-184.

¹²³ Indianapolis Star, February 2, 1988.

¹²⁴ Ibid.

¹²⁵ Indianapolis News, February 1, 1988.

domicile” was publicly explained. This explanation began to delineate the contrast between “residency as domicile” and the “physical presence” standard upon which some Republicans were insisting. Among contemporaneous press accounts, there was a growing recognition that, as a legal matter, the mere fact that Bayh had not been physically present in Indiana for the entire five-year period was insufficient to render him ineligible. Rather, the determinative issue might very well turn on whether evidence existed to prove that Bayh had “intended” to change his residency.

Republican reaction to the findings of this panel was immediate. Durnil’s lawyer, Daniel F. Evans, Jr., focused on the panel’s unsubstantiated factual assumption that Bayh intended to maintain residency in Indiana through the time he spent in Washington, D.C. Evans said, “the problem is the facts. They [the panel] had to assume certain facts to reach this conclusion. Overt acts must be examined by a trier of the facts (a judge or judges).” Evans argued that Bayh’s own previous characterizations of where he lived and worked would prove that he had divested himself of his Indiana residency.¹²⁶ Furthermore, in an attempt to cling to the idea that continued physical presence was not irrelevant, Evans reiterated that Indiana law regarding “voter eligibility” unquestionably provided that voters who move to another state for an indefinite period do, in fact, lose their eligibility to vote. Evans reiterated the position he had first articulated in the Republican legal memorandum of November 10, 1987, wherein he had written: “Evan Bayh moved to Washington and maintained a residence there for an indefinite time. Based solely on those facts, he lost his residency in the State of Indiana.”¹²⁷

¹²⁶ Indianapolis Star, February 2, 1988.

¹²⁷ Indianapolis News, February 2, 1988.

The only “new evidence” presented by Bayh’s panel of legal advisors was oral confirmation that Bayh had filed “part-year” Indiana income tax returns for both 1983 and 1984. The tax returns themselves were not released as a part of the panel’s press conference. Dean David Link acknowledged that, once released, Bayh’s returns would show that he claimed tax status in 1983 and 1984 as a “part-year” Indiana resident, not “full-year.” Link said that tax returns were “not that determinative.” He did concede, however, that filing taxes as a part year resident would constitute a “confusing factor” to Bayh’s assertion that he intended to remain a resident of Indiana.¹²⁸

Republicans picked up on this distinction and magnified it. They asserted the tax returns and other documents were “highly damaging to Bayh’s case.” Durnil argued that Bayh’s refusal to provide his tax returns was proof that he was avoiding the release of damaging evidence. Durnil repeated his intention to challenge Bayh’s eligibility before the state election board and suggested that the tax returns would serve as the best evidence that Bayh did not consider himself an Indiana “full-time” resident during 1983 and 1984. “He signed his name in 1984 to something in which he admitted he was less than a full-time resident” of Indiana. Beyond the tax returns, though, Durnil continued to assert that he had compiled substantial evidence, including the testimony of witnesses, that would prove that Bayh terminated his Indiana residency when he moved to Washington.¹²⁹ “I’m surprised that they [the panel] didn’t give any facts,” said Durnil. “Those things are important. I’m surprised that they didn’t have a hat to hang it on.”¹³⁰

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ South Bend Tribune, February 2, 1988.

Republican efforts to investigate all aspects of Bayh's background during the 1983-84 period continued unabated. On February 2, 1988, Clerk of the Courts Daniel R. Heiser wrote Bayh informing him that a review of Heiser's office records revealed that Bayh had failed to pay the required annual registration fee in 1983 to maintain his status as a lawyer in good standing in Indiana. Bayh had been admitted to practice law in Indiana on August 26, 1983 and, according to Heiser, had until October 1, 1983 to pay the \$25 fee. Bayh's failure to pay the fee was not detected at the time but, if it had been, Bayh could have been suspended from the practice of law. On February 4, 1988, Bayh paid the fee along with a \$40 late charge. Heiser, who provided the press with copies of this exchange of correspondence, claimed that he checked Bayh's records after reading about questions surrounding Bayh's eligibility to run for governor.¹³¹ Later records also showed that Heiser called Durnil when Heiser made the discovery and provided Durnil with "copies of a letter Heiser sent to Bayh reminding him he owed the money and copies of Bayh's response, Bayh's check, and the receipt Heiser issued for the payment." He defended his decision to share all of the information about Bayh with Durnil because "it was public record and I would be happy to provide a copy to the Star."¹³²

In early February, the Indianapolis News editorial page offered its analysis of the situation. While the News did not directly refute the legal conclusions drawn by Bayh's experts, it also noted that "even Al Capone could always find a lawyer to argue before a jury that his client was clearly not guilty." However, the newspaper encouraged Bayh to seek a prompt resolution of the matter by way of filing a "friendly lawsuit" so a resolution could be

¹³¹ Ibid., February 5, 1988.

¹³² Indianapolis Star, March 5, 1988.

obtained and the gubernatorial campaign could focus on issues, not “arcane legal doctrines and interpretation.” While not recommending it as a course of action, the editorial also observed that the politically expedient course for Republicans was to simply let the issue remain unresolved and make it the primary issue against Bayh in the fall campaign.¹³³

At the same time, however, evidence began to grow of the unease among Republicans about whether challenging Bayh was politically wise. “Some say the Republicans are trying to hook the Bayh campaign, which is moving like a political steamroller in the early going, on a technicality. Others, though, say it is a legitimate question that should be resolved.”¹³⁴ Traub argued in his February 7 political column in the Indianapolis Star that the Republicans were winning the “political” battle because “their accusation is simple, straightforward and easily understood” – Bayh had to live in Indiana for five years prior to the election and he did not. “To defend himself, Bayh and his supporters are forced into long, complicated explanations of Indiana Supreme Court decisions that define residency. Bayh’s attorneys use words such as ‘dispositive,’ ‘domicile,’ ‘trier of fact’ and other terms seldom heard in neighborhood taverns. (In order, those words mean ‘proven or settled,’ ‘the place you consider your home’ and ‘a judge’). Bayh and his supporters must explain that a person can live and work somewhere else but still be considered to have proper legal connections.”¹³⁵

However, having said that, Traub argued that Republicans would eventually lose the “legal” war because Bayh would ultimately be adjudged eligible by a court of law. Traub

¹³³ Indianapolis News, February 3, 1988.

¹³⁴ Evansville Courier, January 23, 1988.

¹³⁵ Indianapolis Star, February 7, 1988.

warned that the Republicans would eventually pay a significant political price because they risked being viewed as wanting to take choice out of the hands of the voters and would be seen by the public as such.¹³⁶

In the end, Traub suggested that the Republicans would be better off to focus on Bayh's qualifications – his youth and inexperience – not on his residency or his eligibility.

Keeping such a choice from voters indicates weakness, something the Republican Party should not be concerned with. John Mutz is a strong candidate. He has a record, and he should campaign on it. The Republican Party has an obligation to describe the difference between its likely candidate and the Democrats' likely candidate. That difference is simple. Bayh was still going to school when Mutz was elected lieutenant governor of the state. Bayh had yet to actually live in Indiana until Mutz was seeking re-election. Those are simple political judgments. And voters understand that. In fact, Republicans will be better served by political arguments than by the legal arguments of residency. If the legal argument is lost, and it should be, the political argument will be weakened.¹³⁷

By mid-February, the tide had turned and some in the Mutz campaign were beginning to agree with Traub's assessment. There was growing concern that formally challenging Bayh's residency might backfire. Confirmation of that occurred on February 14, when it was reported that, during the previous week, a group of Mutz supporters had gathered in Indianapolis to discuss the campaign's overall strategy. Much of the discussion was dominated by how the Republicans should handle the residency issue. Apparently, a "spirited debate" ensued with some Mutz supporters arguing against a legal challenge. It was clear that Durnil lacked the full and enthusiastic support of Mutz and his campaign for

¹³⁶ Ibid.

¹³⁷ Ibid.

the challenge. “The Mutz camp is trying to separate itself from the fray without appearing disloyal or unsupportive of Durnil until it can make up its mind.”¹³⁸

Such hesitancy may very well have proved fatal. By mid-February, 1988, the controversy had been unfolding in the public arena for five months. The Mutz campaign had surely monitored the public’s reaction by both scientific means – polling data – and unscientific anecdotal testimony. By any measure, it would have been impossible to conclude that the issue was breaking decidedly in Mutz’s favor. At best, it might be said that both sides were still unsure what the public’s ultimate conclusion would be. Yet even in the face of significant reluctance and doubt, the Mutz campaign offered no public objection to Durnil’s resolve to pursue the process he had repeatedly laid out. There seemed to be no turning back. Durnil was convinced that, if pursued, the Republicans would be successful in their effort to have Bayh declared ineligible. Perhaps Mutz had been convinced of that as well.

¹³⁸ *Ibid.*, February 14, 1988.

Chapter Three

THE LEGAL CONTEXT

“A person running for office from a particular area should be so closely associated with the problems of that area that he can effectively represent the inhabitants thereof; that having the candidate live in the area assures the accomplishment of such objective; and that the question is not what group of people the candidate wishes to represent, but where the law considers him best qualified to exercise his political rights and privileges.”

Moore v. Tiller, 409 S.W.2d 813 (1966)

As discussed above, the Indiana Constitution requires the governor to “have been a resident” of the state for five years preceding election. Ironically, the question of whether Evan Bayh satisfied this residency requirement surfaced at a time when the validity of similar requirements in other states were being challenged. Because Republicans appeared determined to pursue the issue, Bayh had several legal options to consider. On one hand, he could argue that he satisfied the requirement of being a resident of Indiana for the five years prior to the November, 1988 general election, although he had not lived in Indiana the entire period. This option was dependent on two things. First, it required a determination that one’s continued physical presence was not the way the law measured or defined residency. If it were, he would not be a “resident.” Secondly, it was dependent on the likelihood that an impartial fact-finder could be persuaded that Bayh had taken no action to abandon his Indiana residency and establish it elsewhere – that he had been a resident of Indiana for the full five years.

On the other hand, rather than argue that he met the Indiana Constitution’s residency requirement, he could argue that the Indiana requirement violated the United States

Constitution and was, therefore, invalid. This option would admittedly involve a less fact-sensitive determination, but would require Bayh to convince a court that, as a matter of law, the requirement should be invalidated. Court decisions from other jurisdictions supported consideration of both options. In order to understand the dilemma Bayh faced in deciding which path to choose, a review of some of those relevant decisions is helpful.

Throughout the last half of the twentieth century, durational residency requirements around the country were being challenged. The challenges were constitutional in nature; that is, they alleged that state residency requirements violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or that they infringed on the exercise of other federally protected constitutional rights, like the right to vote, to travel, of free expression, and to associate freely with others.¹³⁹ If and when courts were asked to review an alleged unconstitutional classification, such as a durational residency requirement, the United States Supreme Court had established two analytical tests. The first, the “rational basis” test, required only that the court determine the classification to be rationally related to a state’s legitimate goal. However, if a reviewing court found the classification impeded a fundamental constitutional right, a “strict scrutiny” test was to be used to determine whether the state had a higher or a “compelling interest” justifying the classification.¹⁴⁰ Over time, courts using these two tests had reached various conclusions regarding the validity of state-mandated durational residency requirements for state and local offices.

In those cases where durational residency requirements were declared invalid, the requirement was found by the court to be overly broad, imprecise or ineffective in satisfying

¹³⁹ Joseph v. City of Birmingham, 510 F.Supp. 1319 (E.D. Mich. 1981), 1322.

¹⁴⁰ Dunn v. Blumstein, 405 U.S. 330 (1972).

its sought-after goals, thus rendering it constitutionally impermissible. For example, in Zeilenga v. Nelson, a California court struck down a five-year residency requirement for the office of county board of supervisors.¹⁴¹ The court held the requirement to be a denial of equal protection in that citizens were required to wait “an unreasonable length of time” before being eligible to run for office. No compelling state interest was found to support it.¹⁴²

Similarly, in Mogk v. City of Detroit, a federal district court in Michigan declared unconstitutional a one-year residency requirement for membership on a Detroit city commission because “the right to candidacy is inextricably intertwined with the right to vote.”¹⁴³ Likewise, in Cowan v. City of Aspen, the Colorado Supreme Court found that, absent the necessary compelling state interest to justify it, a durational residency requirement for candidates for office in Colorado was unconstitutional because holding public office “is one of the valuable and fundamental rights of citizenship” that cannot be infringed upon unless there exists “a reasonable relation to the object sought to be accomplished by the imposition of the qualification.”¹⁴⁴

As has been previously mentioned, the common principle traditionally supporting the need for such requirements was the idea that lawmakers should have a sustained presence within a community in order to familiarize themselves with local issues and problems. Even this historical basis came under assault in light of modern technology. For example, the court in Mogk observed that a residency requirement, enacted in 1909, had

¹⁴¹ Zeilenga v. Nelson, 484 P.2d 578 (Ca., 1971).

¹⁴² But see, Beil v. City of Akron, 660 F.2d 166 (6th Cir. 1981), 169.

¹⁴³ Mogk v. City of Detroit, 335 F. Supp. 698 (E.D. Mich. 1971).

¹⁴⁴ Cowan v. City of Aspen, 509 P.2d 1269 (Colo. 1973).

outlived the vast changes that had since taken place. “In 1909, Marconi’s wireless was in its infancy; that the vacuum tube and radio had not yet arrived and carriage makers were just turning to making automobiles ... if a short sojourn in the community is considered to be a disqualification, the electorate may voice its sentiment at the ballot box.”¹⁴⁵ Similarly, in Zeilenga, the court said, “perhaps in the horse and buggy days the five year requirement could have been reasonable, but in these days of modern public transportation, the automobile, newspapers, radio, television, and the rapid dissemination of news throughout all parts of the country, the requirement is unreasonable.”¹⁴⁶

That is not to suggest, however, that constitutional challenges were routinely successful. In fact, for the most part, constitutional residency requirements for candidates for office (particularly state office) have been upheld. The reasons vary. Most courts have, at least as a preliminary matter, acknowledged that they exist in most state constitutions. In addition, courts have also found that they possess a long-held political and historical significance and that they are supported by reasonable objectives. And the United States Supreme Court has never expressly held that the federal constitution prohibits state residency requirements.¹⁴⁷ Not surprisingly, several lower reviewing courts have pointed out, with some degree of irony, that our federal constitution contains provisions of similar character – the president must be a resident of the United States for fourteen years, a senator must possess a nine year residency, and a seven year residency is required for members of the House of Representatives.

¹⁴⁵ See, e.g., Mogk, 701.

¹⁴⁶ Zeilenga, 581.

¹⁴⁷ Zobel v. Williams, 457 U.S. 55 (1982).

In 1973, the United States Supreme Court let stand without comment a federal district court decision upholding a seven-year durational residency requirement for governor of New Hampshire. In Chimento v. Stark, a three judge lower court found that New Hampshire's seven-year requirement was not an impermissible method of prohibiting new citizens of the state from becoming candidates and officeholders. Rather, the court held that the requirement was intended to ensure highly qualified and knowledgeable candidates for state office. It also ensured that "the chief executive of New Hampshire is exposed to the state and its people, thereby giving him familiarity with and awareness of the conditions, needs and problems of both the state of New Hampshire and the various segments of the population within the state, while at the same time giving the voters of the state the opportunity to gain by observation and personal contact some firsthand knowledge of the candidates for governor." That court did not, however, write a blank check for all such requirements. Even in finding seven years to be "reasonable," the court noted that such length may approach the constitutional limit. Thus, the court left open the question of what constitutes an excessive duration.¹⁴⁸

Thereafter, in Hankins v. State of Hawaii, the plaintiff, John Hankins, asked a federal district court to compel election officials in Hawaii to include his name on a gubernatorial primary ballot, even while conceding that he failed to satisfy the state's constitutional durational residency requirement.¹⁴⁹ Hankins sought the Republican nomination for governor in 1986. The state constitution required candidates to "have been a resident of this State for five years immediately preceding" election. Although he claimed

¹⁴⁸ Chimento v. Stark, 353 F. Supp. 1211 (D. N.H. 1973); judgment aff'd., 414 U.S. 802 (1973).

¹⁴⁹ Hankins v. State of Hawaii, 639 F. Supp. 1552 (D. Hawaii, 1986).

to have resided in the state for an aggregate total of seventeen years, Hankins did not challenge the assertion that he had not been “a resident of” Hawaii for the five years immediately preceding the election. Rather, he asked the court to declare him eligible because the durational residency requirement violated his right to equal protection under the law – that is, he questioned whether a state “may discriminate against recently-arrived residents who wish to enter an upcoming gubernatorial election.”¹⁵⁰

The court in Hankins found that the state constitutional requirements did not impact a fundamental constitutional right (such as the right to travel). Thus, the court applied traditional “rational basis” analysis. In that regard, the court said, “at issue here is more than simply a desire on the part of the chief election officer that gubernatorial candidates be known to the electorate. The State has a strong interest in the assurance that its governor will be a person who understands the conditions of life in Hawaii.”¹⁵¹ Hankins had spent a significant period of time away from Hawaii. The court found he had “arguably lost contact with the crises, the culture, and the people of Hawaii.”¹⁵²

While the durational residency requirement was found to be constitutional, the court did express some reservation. “Employing the complete arsenal of strict scrutiny techniques, it would be next to impossible to justify any particular period of residence, since there would always be conceivable exceptions and counterexamples, and there would always be less burdensome alternatives (such as some yet shorter period of residency, or else leaving the question of a candidate’s fitness for office to the political process).”¹⁵³

¹⁵⁰ Ibid., 1554.

¹⁵¹ Ibid., 1556.

¹⁵² Ibid.

¹⁵³ Ibid., 1557.

A residency requirement for the office of state senator was considered by the Missouri Supreme Court in State ex rel. Gralike v. Walsh. The court held that, insofar as the constitutional concepts relate to durational residency requirements, the right to vote and the right to be a candidate cannot be equated. Because there is no constitutionally protected “right” to be a candidate, the application of a “strict scrutiny” analysis was inappropriate. Rather, the “rational basis” test should be applied. The court sustained the one-year requirement finding that the citizenship, age and residency requirements for public office are nationally-based because they “have been provided throughout the history of our country.”¹⁵⁴

Six years later, when a federal appellate court was asked to review Missouri’s ten-year durational residency requirement for office of state auditor, it affirmed a lower court ruling that the requirement was not reasonably related to any asserted state interests. In Antonio v. Kirkpatrick, the Eighth Circuit Court of Appeals found that the requirement “only minimally” infringed on voter’s rights and, in addition, did not “irretrievably foreclose a person from running” for auditor.¹⁵⁵ The court also held that the requirement had “some rational relationship” to the state’s interest in having candidates for statewide office “demonstrate their interest as citizens in the welfare and problems of the State.”¹⁵⁶

However, despite these findings and according to the court, the decision rested on whether “the requirement so imposed violates constitutional standards as being arbitrary or so restrictive as to erase any rational relationship to the legitimate State interest of having

¹⁵⁴ State ex rel. Gralike v. Walsh, 483 S.W.2d 70 (Mo., 1972).

¹⁵⁵ Antonio v. Kirkpatrick, 579 F.2d 1147 (8th Cir. 1978).

¹⁵⁶ Ibid., 1150.

qualified and knowledgeable candidates.” Acknowledging it to be a close question, the court upheld the lower court’s decision to invalidate the requirement as it related to Mr. Antonio’s desire to be a candidate for state auditor.¹⁵⁷

In summary, by 1987, when Evan Bayh began considering a run for governor of Indiana, lawsuits challenging the constitutionality of durational residency requirements were not unusual in other parts of the country. From a legal standpoint, the validity of Indiana’s gubernatorial residency requirement was as vulnerable to challenge as any similar requirement in any other state for the same or similar legal reasons. But Bayh had to also consider the political ramifications of a constitutional challenge to the requirement’s validity.

In challenging the validity of a durational residency requirement, one must all but concede that insufficient evidence exists to satisfy its provisions. Accordingly, an attack on the validity of a requirement could be characterized as an attempt to “change the rules in the middle of the game.” As a matter of law, an effort to “change the rules” may be appropriate and defensible. But as a matter of public opinion, it is unlikely that it would be viewed the same way. At bottom, by challenging the legality of Indiana’s constitutional residency requirement under the federal constitution, Bayh would open himself up to the charge that he did not want to be held accountable to the same standards that every candidate for governor of Indiana before him had been required to satisfy.

Unless it is unavoidable, no candidate for public office wants to appear to be arguing that the law should be changed in order to allow him or her to run. Beyond its obvious

¹⁵⁷ *Ibid.* As a matter of legal oddity, while the Eighth Circuit Court of Appeals struck down Missouri’s ten-year residency requirement for state auditor, the language remains in the Missouri state constitution to this day.

disadvantages, that position would be contrary to a predominant theme of Bayh's campaign. In short, to the extent that a formal challenge to his residency was initiated, Bayh would be best served politically if it appeared that it was being pursued by his political opponents. This is not to suggest that Bayh ever considered himself to be constitutionally ineligible to serve as governor. Rather, it is meant to underscore the fact that legal and political determinations often are made in a vacuum. A candidate's ability to recognize, assess and respond to the political implications of any particular legal decision has a premium attached to it that defies measurement. If nothing else, Evan Bayh intuitively appreciated, perhaps as well as anyone could have, the political implications of various legal strategies contemplated.

The alternative to challenging the provision's constitutionality was for Bayh to argue that he actually satisfied the requirement. He could point to court decisions from other jurisdictions that supported such a conclusion. In those cases, the primary legal issue reviewed was not the validity of the requirement, but whether sufficient evidence existed to satisfy that particular state's required residency period. Because Bayh eventually chose this option, it is the analytical framework developed in these cases that captured the focus of attention during the ensuing legal process.

In 1926, the Supreme Court of Alabama was asked to decide the issue of residency in the case of Baker v. Conway. Calloway, a member of the Chilton County, Alabama, board of education, moved to Florida in December 1923 to work there under a four-year contract. The relevant state statute provided that "any office in this state is vacated ... by [the incumbent's] ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed." Although the evidence at trial suggested

that Calloway might have only been absent for “three months, six months,” rather than the four-year contract period, the court was asked to determine, in light of this uncertainty, whether Calloway had ceased to be a resident upon moving to Florida.¹⁵⁸

As a harbinger of decisions that followed, the Alabama Supreme Court acknowledged that the definition of the terms “reside,” “residence” and “resident” were elusive and subject to various interpretations. “For some purposes, a merely constructive residence, resting chiefly upon the intention of the citizen, is sufficient For other purposes, an actual residence is intended or required.”¹⁵⁹ The court then took notice of a Colorado decision where the phrase “shall reside within his district” was held to require actual or continuous physical presence. In light of that particular precedent, the court interpreted the relevant statutory language as clear direction by the Alabama legislature that officeholders must physically reside in their districts or face having their office declared vacant. The fact that Calloway had contracted to work in Florida for four years was sufficient evidence for the court to conclude that Calloway ceased to be a resident of Chilton County, Alabama. However, the court did caution that “we do not mean to hold that any temporary absence by a public officer would have that [same] effect. Each case must be decided on its own facts, with due regard for the elements of intention and actual absence.”¹⁶⁰

¹⁵⁸ Baker v. Conway, 108 So. 18 (Ala., 1926). The caption of this case is confusing since the individual whose “residency” was at issue is named Calloway. A year after Calloway moved, he tendered his resignation. His vacancy was filled by Conway in late October, 1924. Baker was a candidate for the school board in the November, 1924 election. Besides Calloway’s residency, the court also had to determine how the November, 1924 election affected Conway’s appointment to fill the unexpired two-year term of Calloway.

¹⁵⁹ Ibid., 18.

¹⁶⁰ Ibid., 19.

A decade later, the North Dakota Supreme Court was called upon to determine residency in the context of an explicit state constitutional durational requirement. In State ex rel. Sathre v. Moodie, the court interpreted a state constitutional provision that prohibited persons from qualification for governor who have not “resided five years next preceding the election within the state.”¹⁶¹ Thomas Moodie was the owner of a newspaper in Mohall, North Dakota. In August, 1929, Moodie sold the newspaper and moved to Minneapolis, Minnesota. Moodie lived in Minneapolis for approximately two years and was employed by the Minneapolis Tribune. He testified that he used this period of employment to search the Minneapolis area for opportunities to purchase newspapers back in North Dakota because he possessed the intention of returning once a purchase had been made. Therefore, Moodie claimed that his residence in Minneapolis was temporary and that his primary purpose for being in Minneapolis was not employment, but to find opportunities that would provide him the opportunity to return to North Dakota in the newspaper business. Moodie did, in fact, return to North Dakota in April of 1931. He then ran for governor in 1934 and won. Shortly after that, his eligibility to serve as governor was challenged.

The North Dakota Supreme Court declined to embrace a “physical presence” test for residency. If so, Moodie would have failed to satisfy it by virtue of the time he spent in Minnesota. Rather, it held that legal residence is established or abandoned as a result of a union between one’s action and intent. That is to say, for residence to change, there must be a literal change, together with an intention to make such change. The court said, “a person’s residence is the place of his domicile, or place where his habitation is fixed without any present intention of removing therefrom. The words ‘inhabitant,’ ‘citizen,’ and ‘resident,’ as

¹⁶¹ State ex rel. Sathre v. Moodie, 258 N.W. 558 (N.D., 1935).

employed in different constitutions to define the qualifications of electors mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home. Every person at all times must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place.”¹⁶²

After reviewing all of the relevant facts, the court concluded that Moodie “did intend to return to the state of North Dakota some time.”¹⁶³ However, Moodie had voted in a primary and general election in 1930 in Minnesota, though North Dakota had an absent voter’s ballot law, of which Moodie had been aware, but had failed to take advantage. Consequently, the court found that “his moving to Minneapolis and establishing a voting residence there deprived him of his legal residence in North Dakota during the time he was in Minneapolis, and it necessarily follows that he was not a resident of North Dakota for the five years next preceding the election in November, 1934”¹⁶⁴ While the court found that Moodie did “intend” to maintain his North Dakota residency, certain acts, on his part, deprived him of the ability to prove that there had been no break in legal domicile. Thus, in a dramatic turn of events, Moodie was declared ineligible to serve as governor, despite already having been elected to the post.

A few years later, the Montana Supreme Court, in the case of Snyder v. Boulware, adopted a “physical presence” standard, at least with respect to the “establishment” of one’s residency. Like the Moodie case, this matter involved a challenge to serve in office after

¹⁶² Ibid., 564-565.

¹⁶³ Ibid.

¹⁶⁴ Ibid., 566.

someone had been elected. The Montana constitution provided that “no one shall be elected as a member of [the county commission], who has not resided in said district for at least two years next preceding the time when he shall become a candidate for said office.”¹⁶⁵

W. F. Boulware was elected county commissioner in November of 1938. However, the court found that he had not established his residence within the appropriate district until November 14, 1936 – five days short of the required two-year period. While Boulware conceded that he had not physically resided in the district until November 14, 1936, he argued that, as early as March 1936, he had announced his intention to reside in the district and, in addition, took affirmative steps to purchase a home there. Yet, the court found that, even if one leaves a residence “with the intention of making his home in another place, he is, while in itinere [a Latin phrase meaning “on a journey”] from the old to the new, a resident of the place he had left, and remains so until he reaches the new abode.” Because there was no evidence that Boulware was physically present in his new residence until November 14, he was declared ineligible.¹⁶⁶

In a 1966 decision by the Court of Appeals of Maryland, Secretary of State v. McGucken, an individual’s “residency” was not considered but, rather, the candidate’s satisfaction of the required period of “citizenship.”¹⁶⁷ Maryland’s constitution required candidates for governor to have been a citizen of the state for ten years and “for five years

¹⁶⁵ Snyder v. Boulware, 96 P.2d 913 (Mont., 1939).

¹⁶⁶ Ibid., 915. The court had been presented evidence that the electricity serving Boulware’s previous residence had not been disconnected until November 14, 1936. The meterman testified to having observed Boulware load furniture on that day with the obvious intention of moving out. The court also found that Boulware did not pay a water bill in his new home until December, 1936.

¹⁶⁷ Secretary of State v. McGucken, 222 A.2d 693 (Md., 1966).

next preceding his election, a resident of the state.”¹⁶⁸ On November 2, 1965, William Albaugh filed papers confirming his intention to seek the Republican nomination for governor of Maryland in 1966. In his certificate of candidacy filed with the secretary of state, Albaugh asserted that he had been a citizen of Maryland for eight years and a resident of the state for more than ten years. When his candidacy was challenged, Albaugh explained that his eight-year citizenship denoted the extent of his “continuous residence” and that his statement regarding residency “for more than ten years” was intended to confirm his “discontinuous total citizenship.” The court said that, as those terms appear in Maryland’s constitution, “citizen” and “resident” are not synonymous, nor were their requirements interchangeable.¹⁶⁹ Because Albaugh had revealed on the face of his own certificate of election that he had not been a “citizen” for the required ten year period, he was not qualified to be a candidate.

An analogous precursor to the Bayh case occurred in 1972 when Christopher S. (Kit) Bond announced his intention to seek the Republican nomination for governor of Missouri. Bond was born and raised in a small town outside of St. Louis. After his sophomore year in high school, he enrolled in the Deerfield Academy in Deerfield, Massachusetts, and, thereafter, completed his secondary, undergraduate and graduate education outside the state. Factually, the case was quite similar to Bayh’s because Bond graduated from the University of Virginia School of Law in 1963, and went to work as a clerk to a federal judge in Atlanta, Georgia, during 1963 and 1964. Thereafter, he was employed by a Washington, D.C., law firm for three years. In October 1967, Bond returned

¹⁶⁸ *Ibid.*, 696.

¹⁶⁹ *Ibid.*

to Missouri, established a law practice and immediately entered politics. He unsuccessfully ran for the U.S. House of Representatives in 1968, but, in November of 1970, Bond was elected Missouri State Auditor.¹⁷⁰ In 1972, Bond declared his candidacy for governor. R.J. “Buzz” King, Jr., a Republican primary opponent, filed a lawsuit charging that Bond failed to satisfy Missouri’s durational residency requirement for candidates for governor.

In State ex rel. King v. Walsh, the Missouri Supreme Court was asked to interpret the state constitutional requirement that “the governor ... shall have been ... a resident of this state at least ten years next before the election.”¹⁷¹ Bond admitted he had been physically absent from Missouri for nearly five of the constitutionally-required ten-year period. Instead, he argued that, despite his physical absence, he had never abandoned his residence in Missouri nor had he established it elsewhere. All parties agreed at the outset that “residency,” as referred to in the Missouri state constitution, was synonymous with the concept of “domicile.” One’s residence “is largely a matter of intention, to be determined not only from the utterances of the person whose residence is in issue but in light of all of the facts and circumstances of the case.”¹⁷² As a result, the court quickly dismissed the notion that the state’s durational residency requirement meant “actual, physical presence, continuous and uninterrupted for ten years.”¹⁷³ The case turned on whether Bond, by his

¹⁷⁰ As previously referenced in the case of Antonio v. Kirkpatrick, Missouri’s state constitution had a 10-year residency requirement for auditor as well as governor. It is unclear why the durational residency issue was not raised when Bond sought election as auditor. Apparently, it never came up. It was not until Bond sought the office of governor that concerns were expressed about how long he had been a “resident” of the state. It should also be noted that the decision in Antonio v. Kirkpatrick, which invalidated Missouri’s ten year durational residency requirement for the office of state auditor, was not issued until 1978, six years after the Missouri Supreme Court’s decision in the Bond case.

¹⁷¹ State ex rel. King v. Walsh, 484 S.W.2d 641 (Mo., 1972).

¹⁷² Ibid., 644.

¹⁷³ Ibid.

acts or by the manifestation of his intentions, abandoned his Missouri domicile, acquired at birth, and established a new one at any point while away from the state.

The court reviewed the evidence presented by the parties, which included Bond's applications for bar examinations, his purchase and titling of automobiles, the application for a marriage license, Bond's state income tax returns, his voter registration records and voting history, his payment of annual bar enrollment fees, records pertaining to his church membership, Bond's social security and selective service records, his acquisition of hunting and fishing licenses, and contributions to political campaigns. Several witnesses testified that, throughout Bond's time in Atlanta and Washington, D.C., he made it known that he was interested "only in temporary employment for the purpose of gaining experience, ... and that he intended to return to Missouri to practice law."¹⁷⁴

The court found that evidence existed that Bond "did not abandon his residence in Missouri and acquire a new one; that although he lived for brief periods in Virginia, Georgia and the District of Columbia during the ten years before the 1972 general election and made statements which, on the surface, were consistent with an intent to choose a new residence, [Bond] intended to and did continually maintain his domicile of origin."¹⁷⁵ Because the court concluded that Bond satisfied the durational residency requirement, "we need not, should not, and do not rule on the question of whether these durational residence requirements violate the First, Fifth and Fourteenth Amendments to the Constitution of the United States ..."¹⁷⁶

¹⁷⁴ *Ibid.*, 648. Bond even introduced evidence that from 1952 through 1965, he returned to the same Missouri dentist for treatment one or more times a year.

¹⁷⁵ *Ibid.*, 646.

¹⁷⁶ *Ibid.*, 648.

The acknowledgement of inconsistent statements reveals that the court's eventual decision was not easily reached. Five judges joined the majority opinion, but two filed strongly worded dissents. In dissent, Judge Donnelly re-affirmed his oath to support the state's constitution, then proceeded to recount Bond's inconsistent positions or statements. Donnelly emphasized that Bond had not physically resided in Missouri from 1954 until 1967. "I do not believe this type of 'sporadic residence' is what the people of Missouri had in mind when they adopted Art. IV, s. 3, Constitution of Missouri."¹⁷⁷

The dissent filed by Judge Bardgett was more extensive. Bardgett argued that Bond's acquisition of a Georgia law license, though not required for his federal clerkship, made clear his intent to establish his "residency" in Georgia. "The only way that [Bond] could have been allowed to take the Georgia Bar examination and thereafter be admitted to the Georgia Bar under the Georgia statutes was to be a citizen and a bona fide resident of the State of Georgia"¹⁷⁸ Also relevant to Bardgett was the fact that Bond failed to file Missouri income tax returns for years 1964, 1965 and 1966. "The non-filing of Missouri income tax returns for the years 1964, 1965 and 1966 is consistent with intent to maintain residency outside Missouri and in the District of Columbia. It is inconsistent with Missouri residency during those years."¹⁷⁹

Another case considering the question of gubernatorial residency was Ravenel v. Dekle, decided by the Supreme Court of South Carolina in 1975.¹⁸⁰ The previous year,

¹⁷⁷ Ibid., 649.

¹⁷⁸ Ibid., 650.

¹⁷⁹ Ibid., 656.

¹⁸⁰ Ravenel v. Dekle, 218 S.E.2d 521 (S. Car., 1975). While it is not clear from the South Carolina Supreme Court's opinion who Dekle or the other respondents were, they clearly had to have been voters in the state with appropriate legal standing to challenge Ravenel's eligibility.

Charles D. “Pug” Ravenel announced he would seek the Democratic nomination for governor of South Carolina. In March of 1974, his candidacy was “attacked” by way of a “friendly lawsuit,” naming Charles D. Ravenel and Donald L. Fowler, chair of the South Carolina Democratic Party, as defendants. That lawsuit led to a judgment being entered ruling Ravenel “eligible” to enter the Democratic primary for governor. Subsequently, that judgment was challenged by Ben H. Dekle and Milton J. Dukes as having been a “sham” and “invalid” insofar as adjudicating Ravenel’s eligibility. Eventually, Ravenel’s representatives conceded that the earlier order was not binding. Dekle and others were not prevented from asserting that Ravenel was ineligible. Ravenel’s candidacy was alleged to violate the constitution of South Carolina, which provided that, “no person shall be eligible to the office of Governor who ... shall not have been ... a citizen and resident of this State for five years next preceding the day of election.”

Ravenel was born in South Carolina in 1938. He graduated from high school in Charleston in 1956. He attended college and business school outside of the state, and from 1964 until March, 1972, Ravenel was employed by the investment banking firm, Donaldson, Lufkin and Jenrette, in New York City. He returned to South Carolina in 1972, started his own business, and made the decision in 1974 to campaign for governor. Like many of the other cases previously reviewed, Ravenel argued that his fifteen-year absence from South Carolina “was of a temporary nature and for the purpose of attending school and procuring training desirable and necessary for the avocation [sic] which he intended to pursue”¹⁸¹

¹⁸¹ *Ibid.*, 524.

At trial, the evidence revealed that Ravenel, while employed in New York, purchased real estate there, registered to vote and voted there, filed New York state income tax returns and joined several social and country clubs. He also registered his automobile in Connecticut. Ravenel did not pay taxes, register to vote or obtain a driver's license in South Carolina until his return in 1972.

The court initially noted that Ravenel's challenge was not a challenge to the validity of the residency requirement. Rather, Ravenel's legal argument was that he had considered South Carolina to be his place of domicile his entire life. In a lengthy decision, the Supreme Court declared Ravenel ineligible because it found the language of the state constitution to require actual physical presence for the five-year period prior to the gubernatorial election. The court found the terms "citizen" and "resident" to have separate meanings, both of which must be satisfied for the required time. "In view of the plain language of the Constitution and the long standing concept of the distinction between the terms 'citizen' and 'resident', we think it clear that the framers of the constitutional provision intended to require actual physical residence in the state rather than mere domicile as one of the prerequisites to be eligible for the office of Governor."¹⁸²

The court found that requiring actual physical presence in the state for a five-year period satisfied a compelling purpose. "By requiring a durational five-year actual residency, the people have reserved to themselves the right to scrutinize the person who seeks to govern them [T]hey wanted a candidate to actually live in the state for five years immediately preceding the election in order that he might become acquainted with the state's problems, its people, its industries, its finances, its agencies, its laws and its

¹⁸² *Ibid.*, 526-527.

Constitution, and become acquainted with other officials with whom he must work if he is to serve effectively.”¹⁸³ Dismissing Ravenel’s argument regarding domicile, the court found that, “despite his sincere intention to return to his native state some day, the overwhelming weight of the evidence is to the effect that in November, 1969, the crucial period of time, Mr. Ravenel was an actual resident of, domiciled in and a citizen of the State of New York.”¹⁸⁴

While, prior to the Bayh case, no Indiana case had ever considered application of the gubernatorial durational residency requirement, a review of relevant case law would be incomplete without referencing a case in which the Indiana Supreme Court considered the concept of “residency” for purposes of the application of Indiana state election law. In 1975, the Indiana Supreme Court was asked to determine the “voting residence” of a candidate for judge of a county circuit court. More specifically, a petition for removal had been filed against the judge of the Perry County circuit court alleging various violations of Indiana election law which occurred during May of 1970 when the judge was first a candidate for office in the primary election.

In the fall of 1969, the judge of Perry County circuit court announced his intention to resign. David E. Evrard, a Tell City, Indiana, native, who had moved out of Indiana after college and lived, as a result of military service and employment with the federal government, in the Washington, D.C., area, decided to return to Perry County because he had interest in running for the opening on the bench. Evrard did not physically move back to Indiana until July, 1970. However, he announced his candidacy for judge on February

¹⁸³ *Ibid.*, 528.

¹⁸⁴ *Ibid.*, 528-529.

10, 1970, registered to vote in Perry County on March 7, and returned periodically to Tell City throughout January, February, March and May of 1970 in order to promote his candidacy. He also voted in the May, 1970 primary in the precinct where his parents had their family home. The petitioner's challenge in the matter focused on the allegation that Evrard had no legal residence in Perry County either when he filed his declaration of candidacy in March nor when he voted in the primary in May of 1970. Thus, the question presented to the Indiana Supreme Court was the standard by which one's "voting residence" is established.¹⁸⁵

The Indiana Supreme Court said that "the law requires that the person definitely intend to make a particular place his permanent residence and act upon that intention in good faith."¹⁸⁶ In this case, the court found that the steps Evrard took were sufficient to establish a voting residence in Perry County, thereby validating his declaration of candidacy for judgeship and his act of voting in the primary election. "To require a person in respondent's position to have sold his house in Virginia and acquired one in Tell City, given up his employment abruptly and entirely, moved his wife's children from their school to Indiana, obtained an Indiana driver's license, and accomplished all such other odds and ends as would have severed completely all connections with Virginia and the Washington area, as a condition of establishing a residence in Indiana, would be unreasonable."¹⁸⁷

The involvement of the Indiana Supreme Court in Judge Evrard's case presaged its role in the Bayh residency case. As will be discussed later, Chief Justice Givan, Justice

¹⁸⁵ In re: Matter of Evrard, 333 N.E.2d 765 (Ind., 1975).

¹⁸⁶ Ibid., 767-768.

¹⁸⁷ Ibid., 769.

Hunter, and Justice Norman Arterburn (the fifth member of the court when it decided Evrard, he did not participate in the decision) were Republicans; Justices DeBruler and Prentice were Democrats. (Judge Evrard was also a Democrat). Along with Justice Prentice, Justices Hunter and Arterburn had retired by the time the Bayh case reached Indiana's high court; each was succeeded by a Republican.

The Indiana Supreme Court majority in Evrard did not measure or define residency by "physical presence." Instead, Evrard's intention, made manifest by his acts, was deemed sufficient to establish the minimum residency required to be considered an eligible voter. Therefore, even in light of those cases from other jurisdictions where "physical presence" was required (most notably, the Ravenel decision in South Carolina), Evrard provided a precedent from which to predict that the Indiana courts would apply the law in a way more akin to the Kit Bond case in Missouri.

Justice Donald Hunter, in a stinging and lengthy dissent, argued that Evrard was not a qualified voter in the May, 1970 primary. Justice Hunter suggested that the majority's legal conclusion was motivated by the acknowledgment that Judge Evrard had acquired an excellent reputation since his election as judge and was held in high regard by the bar in southern Indiana. Justice Hunter wrote, "it is unfortunate that [Evrard] did not adhere to the same high standards [of ethics] when he was a candidate"¹⁸⁸ Hunter, minimally, called for a public reprimand. "Only then would we announce with judicial vehemence that the office of circuit judge is not yet a prize in a race where no holds are barred."¹⁸⁹

¹⁸⁸ Ibid., 785.

¹⁸⁹ Ibid.

If the “residency as domicile” standard was applied, and if Bayh could persuasively establish that he had not taken sufficient action to become divested of his Indiana residency and establish it in the District of Columbia, then he stood a good chance of being found eligible to serve. Bayh’s road ahead was neither straight nor paved. Refraining from a federal constitutional challenge to the validity of the Indiana constitutional requirement was the right thing to do. But the choice that was taken left little room for error. As a legal matter, the eventual outcome was not predictable. As a political matter, the parties to the action would be sailing in uncharted territory.

Chapter Four

THE STATE ELECTION BOARD V. THE COURTS

“Can you imagine having the ... Constitution of the State of Indiana passed upon by a Realtor?”

Evan Bayh
February 20, 1988

“I resent the hell out of it; that’s how I feel I’m going into this thing with an open mind, but I’ll have to admit it’s a little difficult with [Bayh] throwing accusations that I’m dishonest and unqualified.”

Donald Cox
February 20, 1988

If a formal challenge was inevitable, several critical issues of legal strategy and political tactics loomed as noted in the previous chapter. The timing for the initiation of a challenge had nearly reached the point of no return. Durnil had repeatedly committed to waiting until Bayh filed his formal declaration of candidacy before initiating a lawsuit. Candidate filings in 1988 were open from February 3 through March 4. As a legal matter, any registered voter in Indiana could contest Bayh’s constitutional qualifications. However, it was widely assumed that Bayh must file an official declaration of candidacy before Durnil or any other citizen possessed legal “standing” to file a lawsuit challenging his eligibility. The filing of a declaration of candidacy was a predicate to having something to contest. Therefore, in some measure, Bayh controlled the timing of a challenge. By waiting to file,

Bayh was able to increase pressure on those who wanted the issue litigated. The longer Bayh waited, the narrower the window became for a timely resolution in advance of what was viewed as a critical date – the primary election on May 3.

As has been previously referenced, Bayh could have expedited a resolution by initiating his own lawsuit. That action would have afforded Bayh the advantage of being able to exercise initial control over both the timing and the choice of forum. Yet, Bayh was reluctant to institute such action. It would be contrary to his repeated public assertions that he had nothing whatsoever to prove. It would also compromise his ability to characterize the entire matter as an attempt by his political opponents to “keep him off the ballot.” For purposes of public consumption, it was important that Republicans be seen as promoting the effort to keep him off the ballot and, thereby, denying the voters the right to make their own choice for governor.

Besides timing, a pre-eminent strategic issue was the choice of forum. Who would make the initial decision of this sensitive, highly public constitutional controversy? Bayh was confident that a decision rendered by a court of law would find him eligible. However, most contemporaneous press accounts mimicked the general assumption promoted by Durnil that a legal challenge to Bayh’s eligibility must first be heard and decided by the Indiana state election board.

Created by statute, the state election board was an administrative body of state government charged with the responsibility of overseeing Indiana election law. The board was authorized to conduct investigations and pass upon questions concerning the qualifications of persons seeking to have their names placed upon the ballot for the general

election.¹⁹⁰ Specifically, Indiana law provided that “all questions concerning the validity of a declaration made to the Secretary of State shall be referred to and determined by the State Election Board.”¹⁹¹ The declaration requires a candidate to certify that he or she is a registered voter in Indiana and that the candidate resides (at the time the declaration is filed) at a given address. The declaration also requires that the candidate be a member of a particular political party and state that he or she wishes to be placed on the primary ballot of that party. Governor Orr, by virtue of his position, served as the board’s chairperson. In most instances, Governor Orr was represented at board meetings by John Whitaker, an aide who served as the governor’s proxy. Other members of the board included Donald B. Cox, a member of the Republican National Committee and a realtor from Evansville, and Kevin Butler, an attorney from South Bend and a Democrat. Both Cox and Butler were appointed to their positions by their respective state party chairs – Durnil and Livengood.

Although responsible for highly sensitive politically matters, the state election board resembled in many respects the myriad of administrative agencies through which the work of modern government is conducted. These agencies – with names like Department of Environmental Management, Department of Labor, and Department of Natural Resources – make regulations, grant permits, and resolve disputes within their respective areas of expertise. A substantial body of law, usually referred to as “administrative law,” dictates how agencies are to decide these matters and, importantly, how courts are to review agency decisions.

¹⁹⁰ Ind. Code §§ 3-6-4-1, et seq. (Burns, 1987). See also, State ex rel. State Election Board v. The Superior Court of Marion County, 519 N.E.2d 1214 (Ind., 1988), 1215.

¹⁹¹ Ind. Code § 3-8-2-14 (Burns, 1987).

Under the law, the state election board holds a hearing, considers all of the evidence presented, makes its own determination as to the applicable law and, then, renders a final decision. Assuming normal rules of administrative law apply to the state election board, a final decision by the board is subject to review by the courts, but such review is limited and narrow in scope. Courts are, by law, required to grant particular deference to the administrative agency's findings of fact.¹⁹² "When a trial court ... or an appellate court, on appeal, reviews the decision of an administrative agency, the court is bound by the findings of fact made by the agency if those findings are supported by substantial evidence."¹⁹³ That is to say, decisions made by the board regarding the facts of the case are not subject to change even if a reviewing court comes to a different conclusion.

The standard of review of agency conclusions of law is different. "The court is not bound by the agency's interpretation of law, and the court is free to determine any legal question which arises out of an administrative action."¹⁹⁴ While an administrative agency's interpretation of law is entitled to "great weight," it is not controlling. However, throughout the 1980's, courts had used generic language to describe the level of judicial review to be given to administrative decisions. The overarching principle was that the determination of a state administrative agency on a question of law would be upheld so long as it was "reasonable" in light of the findings of fact.¹⁹⁵ And there was very little disagreement by anyone involved in the Bayh case that this was going to be a highly fact-sensitive matter. A

¹⁹² LTV Steel Co. v. Griffin, 730 N.E.2d 1251 (Ind., 2000).

¹⁹³ Hamilton County Dept. of Pub. Welfare v. Smith, 567 N.E.2d 165 (Ind. Ct. App., 1991), 167-168.

¹⁹⁴ Ibid., 168.

¹⁹⁵ Cornell v. Review Bd. of Indiana Employment Sec. Division, 383 N.E.2d 1102 (Ind. Ct. App., 1979); see also, L.S. Ayres & Co. v. Indianapolis Power & Light Co., 351 N.E.2d 814 (Ind. Ct. App., 1976).

1981 decision by the Indiana Court of Appeals described the standard as “whether the determination comports with applicable law.”¹⁹⁶

One might well imagine that courts would not defer to administrative agencies on matters of constitutional law, on the theory that, while administrative agencies may have expertise when it comes to their particular area of law, courts have more expertise than any administrative agency could have when it comes to constitutional law. But even here, court precedent supports the idea that courts are willing to defer constitutional issues to administrative bodies. In the case of Drake v. Indiana Natural Resources Commission, a landowner claimed that he was denied his constitutional right to due process by an administrative body because he did not receive notice of the ruling following a final hearing.¹⁹⁷ The court held that the landowner’s constitutional rights had not been violated because administrative law “provides adequate means for review of constitutional issues”¹⁹⁸ Further, in Midwest Steel Erection Co. v. Commissioner of Labor, the court was asked to review an administrative agency’s determination concerning occupational safety and health regulations which a contractor alleged were unconstitutionally vague.¹⁹⁹ While the Indiana Court of Appeals agreed with the contractor, in so doing, it looked favorably upon a hearing officer reviewing the constitutionality of a rule.²⁰⁰

¹⁹⁶ Dale Bland Trucking, Inc. v. Calcar Quarries, Inc., 417 N.E.2d 1157 (Ind. Ct. App., 1981), 1158.

¹⁹⁷ Drake v. Indiana Natural Resources Commission, 453 N.E.2d 288 (Ind. Ct. App., 1983).

¹⁹⁸ Ibid., 293.

¹⁹⁹ Midwest Steel Erection Co. v. Commissioner of Labor, 482 N.E.2d 1369 (Ind. Ct. App., 1985).

²⁰⁰ Ibid.

In sum, a court reviewing a decision of an administrative body will reverse or change the decision only if the court finds the decision to be arbitrary, capricious, an abuse of discretion, unsupported by the facts or contrary to law. Even if the court, on review, comes to a different conclusion, a decision by an administrative body is to be affirmed, or upheld, as long as it comports with judicial concepts of reasonableness. Appeals from decisions of administrative agencies, then, are not trials in the usual sense. A court does not consider the case “de novo” and reach its own conclusions. Rather, the court only reviews the record of the proceeding before the agency.

On the other hand, if the matter starts in a court of law, then the court (or a jury on its behalf) hears all of the testimony and other evidence and makes the initial determination based on application of relevant law, as established by the court, to the relevant facts, as established in the court. The key point is that if the election board made the initial determinations of the facts concerning Bayh’s residency, the authority or “jurisdiction” of a court to make any subsequent decision would be subject to limitations that would not apply if the court itself were responsible for the initial determination.

It is important to understand, however, that the parties to a dispute do not necessarily have a choice as to whether an administrative agency or a court makes the initial determinations concerning their dispute. Legal principles, often framed using terms like “exhaustion of remedies,” “exclusive jurisdiction,” and “primary jurisdiction,” dictate when a case must begin in an administrative agency, must begin in a court, or can begin in either.²⁰¹

²⁰¹ Austin Lakes Joint Venture v. Avon Utils., 648 N.E.2d 641 (Ind., 1995).

Whether the case went to the election board or to a court first had enormous implications on the eventual outcome of the Bayh case. The strategy for success by both parties depended on who was the initial decision maker. While Republicans offered arguments that administrative law dictated that the matter start with the state election board, the board was, by its nature, partisan. The decision makers would be its members – Governor Orr (or his designee), Donald Cox (appointed by Durnil) and Kevin Butler (appointed by Livengood). For Republicans, this presented the proverbial “good news/bad news” dilemma. A state election board decision motivated by partisanship would ensure that Bayh would be declared ineligible. In addition, given the extremely limited standard of review by any reviewing court, a board decision would be difficult to overturn. Therefore, in a highly fact-sensitive case, all relevant evidence would be presented to and considered by the fact-finder. Bayh’s ineligibility could be established by a partisan 2 to 1 vote. Then, this “fact-sensitive” decision could be sustained on appeal as a result of the limited standard of review afforded the courts. But the “bad news” was that a decision motivated by partisanship ran the risk of being viewed with suspicion, if not with hostility, by the press and public. The question was, therefore, how much political controversy were Republicans willing to absorb in order to guarantee a favorable outcome.

Most observers understood that both sides were doing everything possible to find the forum most likely to render a favorable decision. The primary Republican legal strategy had, all along, depended on an initial favorable decision rendered by the state election board, then vigorously defended and upheld through trial and appellate consideration in reliance on the well-established and narrow standard of judicial review. Accordingly, Republicans could argue that because Bayh could insist of a “judicial review” of any decision by the

board, then his rights were fully protected. In other words, Bayh would have been afforded his “day in court” by having the board’s decision scrutinized by several layers of both trial and appellate court review.

With Bayh apparently content to wait until the last day for filing his declaration of candidacy, it is not surprising that on Thursday, February 18, Governor Orr announced that he was directing the state election board to determine whether Evan Bayh met the constitutional residency requirement to be governor.²⁰² Orr insisted that the state election board had sole authority to make the initial determination because it possessed the jurisdiction to decide questions of candidate eligibility. Consistent with that jurisdiction, Orr explained, “all of the pertinent facts and the resulting ‘official record’ are established by law at the Election Board level. Subsequent appeals deal only with the facts and conclusions determined by the Board.”²⁰³

Orr insisted that this action was necessary and should be completed immediately because, by waiting for Bayh to formally file his declaration of candidacy, insufficient time might remain for a decision to be rendered prior to established primary election deadlines. “While the Secretary of State has not yet officially filed for the gubernatorial race, ‘there has been a tremendous amount of debate and confusion over the constitutional question of Evan Bayh’s residency as it relates to his candidacy for Governor,’ Orr said.”²⁰⁴

Pursuant to Indiana law, the secretary of state in his official capacity was required by March 11 to certify to county clerks the names of all persons who had filed declarations of

²⁰² Indianapolis Star, February 19, 1988.

²⁰³ Press Release, dated February 18, 1988, Public Papers of Governor Robert D. Orr, Indiana State Archives, Commission on Public Records AAIS #049582, A4647, Box 25, Folder 3-A (hereinafter cited as “Orr Papers” with appropriate AAIS, box and folder numbers).

²⁰⁴ Ibid.

candidacy to be on the primary ballot. According to Governor Orr’s press release, the full 53-day period between March 11 and the date of the primary election was necessary in order for county clerks to have enough “time for printing ballots ... for absentee voting 30 days before the election (April 3), and ultimately in time for distribution to the polling locations for the May 3 Primary Election.”²⁰⁵ In point of fact, Indiana law allowed the state election board until March 17 to determine questions brought before it regarding the eligibility of candidates for office. But regardless of the operative deadline, little more than six weeks existed between the end of all filing deadlines and primary day – a day before which, most people agreed, some decision on the Bayh question needed to be made.

In addition, Orr claimed that his action was necessary to avoid what he termed constitutional chaos. “Now is the time to lift any cloud from the 1988 gubernatorial race and to insure that the integrity of the election process is maintained,” Orr said. “We must begin the process now to avoid the chaos that may result if the matter is not resolved as quickly and fairly as possible.”²⁰⁶ There is some truth to the assertion that chaos can result where courts are not asked to determine a candidate’s eligibility to hold public office until after a candidate has been elected to serve and can lead to so-called “quo warranto” lawsuits (a concept to be discussed at length later). Governor Orr insisted that he was not motivated by partisan considerations. Rather, he argued that it was the integrity of the process that needed protection. Orr denied that Durnil had asked him to take action, although the

²⁰⁵ Ibid.

²⁰⁶ Ibid.

governor admitted that he had consulted with Durnil on the matter prior to the announcement.²⁰⁷

In an effort to remove the appearance of a partisan conflict of interest, Orr recused himself or any member of his staff from participating in the state election board's deliberations. Orr appointed former Wayne County Circuit Judge James C. Puckett, a Republican, to serve as the governor's special proxy for the limited purpose of considering the question of Bayh's eligibility.²⁰⁸ Orr said that he had intentionally sought out an experienced jurist to ensure that the board's proceedings would be fair and proper: "I decided three or four weeks ago it was time to take the matter out of the political realm and into the government realm." In the same press release, Judge Puckett announced that the board would meet the following Monday, February 22, at 5:30 p.m. to determine how to proceed with an investigation of Bayh's eligibility.²⁰⁹

Judge Puckett had many of the qualities that Governor Orr ascribed to him. He had achieved an excellent reputation while serving as a judge in the Richmond City Court from 1964 to 1966 and in the Wayne County Circuit Court from 1967 to 1984. At the time he was called on by Governor Orr, he was serving as a member of the prestigious Indiana Supreme Court Disciplinary Commission. But he was a Republican in private law practice with two of the state's leading Republicans, former long-time Republican Congressman David W. Dennis and former Republican State Chairman Thomas S. Milligan, and so had a partisan image.

²⁰⁷ Indianapolis Star, February 19, 1988.

²⁰⁸ Agreement between Governor Robert D. Orr and James Puckett, dated February 22, 1988, Orr Papers, AAIS #049582, A4647, Box 25, Folder 3.

²⁰⁹ Indianapolis News, February 19, 1988.

Attorney General Linley Pearson also recused himself and his office from its obligation to provide legal representation to the board.²¹⁰ Because he would also be on the ballot as the Republican candidate for attorney general in 1988, Pearson recommended that outside or “independent” counsel be retained to represent the board. Pearson then hired David F. McNamar and sent him a letter on February 19 confirming McNamar’s agreement to serve as counsel for the state election board for the pendency of the investigation as well as “all subsequent hearings involving the residency requirement question.”²¹¹ McNamar was a partner in the law firm of former three term Republican Attorney General Edwin K. Steers and had served for eight years as a Master Commissioner to Republican Judge Patricia Gifford of the Marion County Superior Court. McNamar, too, had a partisan profile.

Bayh’s reaction to Governor Orr’s announcement was predictable. Bayh had earlier argued he would not get an impartial hearing before the state election board because two of the three members were Republicans, and, therefore, political opponents to his candidacy. “Do you think they would give me a fair hearing,” Bayh asked rhetorically. “There are no rules of judicial ethics governing the State Election Board There are none of the normal protections of rights governing this body. They [the state election board] are solely a political body I am not naive.”²¹² In the wake of Orr’s announcement, Bayh charged that “the Republicans do not want this election to be decided by the voters, so they have

²¹⁰ Correspondence from Attorney General Linley E. Pearson to Governor Robert D. Orr, dated February 19, 1988, Orr Papers, AAIS #049582, A4647, Box 25, Folder 3.

²¹¹ Correspondence from Attorney General Linley E. Pearson to David F. McNamar, *ibid.*

²¹² Evansville Courier, January 23, 1988.

selected a political tribunal to prevent me from running.’²¹³ “I didn’t know they’d go to such lengths to try to remove me from the ballot before I’ve even filed.”²¹⁴

Furthermore, Bayh challenged the competency of the board to rule on a question of constitutional interpretation. One of the board members, Donald Cox, was a real estate agent, not a lawyer. Bayh argued that Cox was not particularly well-suited to make rulings on questions of constitutional interpretation. “Can you imagine having the ... Constitution of the state of Indiana passed upon by a Realtor?” Bayh said.²¹⁵ When asked for his response, Cox said angrily: “I resent the hell out of it; that’s how I feel.” Cox denied that his judgment on the question of Bayh’s eligibility was “a done deal” even in light of his position as a member of the Republican National Committee from Indiana and he claimed “I’m going into this thing with an open mind, but I’ll have to admit it’s a little difficult with [Bayh] throwing accusations that I’m dishonest and unqualified.”²¹⁶ Responding to a similar question by a different political reporter, Cox said that Bayh “is a kid who needs to grow up.”²¹⁷

Not surprisingly, Durnil supported the governor’s decision to order the election board to consider the question. Durnil admitted that he had discussed the use of the election board with Orr, but said that the governor had made the final decision. “The only thing I’ve ever wanted out of this process is a hearing, a quick and fair hearing and get it over with,”

²¹³ Indianapolis Star, February 19, 1988.

²¹⁴ Lafayette Journal and Courier, February 19, 1988.

²¹⁵ Evansville Courier, February 20, 1988.

²¹⁶ Ibid.

²¹⁷ Indianapolis News, February 20, 1988.

Durnil said. “We will not appeal the decision of the state election board.”²¹⁸ This latter statement is interesting. At that point, at least technically, Durnil was not involved in the state election board’s investigation. Yet Durnil felt that he, as the Republican state chair, had some authority to make decisions regarding how the matter would be handled by the board after it rendered a final decision. This is further evidence how, throughout the entire affair, it was never entirely clear who was “calling the shots” and who was reporting to whom.

Early the next day, Friday, February 19, lawyers for Bayh responded to Governor Orr’s announcement by filing a declaratory judgment lawsuit in the Marion County Superior Court.²¹⁹ A declaratory judgment seeks a legal decision on a question that may not yet be fully in dispute, but will be. Such lawsuits are authorized by, and subject to special rules contained in, a special law called the Uniform Declaratory Judgments Act. In filing the declaratory judgment action, Bayh was asking for a determination of his eligibility by a court of law. He requested an expedited trial and offered to consent to a direct appeal of any verdict to the Indiana Supreme Court. Bayh maintained that “allowing the election board to act first would assure that the Indiana Supreme Court would not be able to render a verdict ‘until it was too late to give the voters a choice.’”²²⁰

The institution of Bayh’s lawsuit added one interesting element that had not yet been discussed to any wide degree. Bayh claimed that he was entitled not only to a decision rendered in a court of law, but also to a trial by jury. In other words, Bayh believed that

²¹⁸ Ibid., February 19, 1988.

²¹⁹ Record of Proceedings, Volume I, pp. 32-39.

²²⁰ South Bend Tribune, February 20, 1988.

neither a partisan-controlled administrative body nor a partisan trial court judge, should make the initial determination concerning his residency. Rather, Bayh insisted that the Indiana constitution allowed this decision to be made by a jury of his peers – in Bayh’s words, not a decision by the politicians, but by the people. “I place my political fortunes squarely in the hands of my fellow citizens. Any candidate for a state’s highest office should be willing to do as much. It is to them that the process belongs. It is in them that my faith resides. I ask only that the people’s will – not that of the politicians – be done.”²²¹

Bayh’s legal team, made up of Jon D. Krahulik, Robin L. Babbitt and Paul J. Knapp of the Indianapolis law firm Bingham Summers Welsh & Spilman, insisted that the right of an individual to “hold” office had traditionally been determined by the remedy of quo warranto, not by a procedure before the election board. Bayh’s lawyers pointed to the section of Indiana law that provided that “any information may be filed against any person or corporation in the following cases: (1) when any person shall usurp, intrude into, or unlawfully hold or exercise any public office or any franchise within this State”²²²

Previously, the Indiana Supreme Court had identified a writ of quo warranto as a proper procedure to determine the right to an office.²²³ Because a quo warranto action was civil in nature, Bayh insisted that he was entitled to have his case decided by a jury. A jury trial is not contemplated or afforded by administrative law. Under the state election board’s jurisdictional scenario, according to Bayh, he would be deprived of his “right” to a jury trial.

²²¹ Bayh Campaign Press Release, February 20, 1988, copy in possession of author.

²²² Ind. Code § 34-1-59-1 (Burns, 1987).

²²³ Hovanec v. Diaz, 397 N.E.2d 1249 (Ind., 1979).

Therefore, where a right to jury trial exists, an administrative body simply could not exercise jurisdiction.

A demand for jury trial as part of their action for declaratory judgment was a critical tactical move by Bayh's lawyers. To that point, the debate about jurisdiction had been solely focused on whether the case would be considered by the Republican-dominated state election board or by a Republican or Democratic trial court judge. In either case, Durnil had a reasonably high level of confidence that the initial decision in the Bayh matter would be controlled by Republicans. A jury trial demand had now been added to the mix. The only thing certain about jury verdicts is their unpredictability. Bayh had complicated the litigation strategies for both sides with the addition of this possibility.

Republicans insisted that the jury trial demand was a canard. Bayh was not entitled to a jury trial – pure and simple. To Republicans, even debating the issue was a waste of time and energy. But what if Bayh could persuade a judge that he was entitled to a jury trial? The political implications would be unmeasurable. It would eliminate any “partisan” control over the process because the ultimate decision would no longer be in the hands of partisans – the election board or a politically elected judge. It was a nearly impregnable political position as well. If nothing else, in the American system of justice, the public believes in and values the idea that, as individuals, we are entitled to a trial by a jury of our peers. This demand would become an invaluable bargaining chip as the litigation evolved over the course of the following weeks.

Under the supervision of Marion County Clerk Faye I. Mowery, a Republican, the case was assigned at random to Judge Gerald S. Zore, a Democrat. The lawsuit named as defendants the Indiana State Election Board and Gordon K. Durnil, in his capacity as chair

of the Indiana Republican Party.²²⁴ Upon receiving his copy of Bayh's Complaint, Durnil remarked that "it's a pretty amateurish effort at putting together a lawsuit The governor hopes to resolve the issue as quickly as possible, and I said I wouldn't appeal the decision of the election board. The only person who can slow it down is Evan Bayh."²²⁵ Durnil's claim that he was not at all involved in the governor's action before the election board belied his repeated suggestion that he had authority to control whether an appeal would be taken from the board's decision. Perhaps unintentionally, Durnil sounded as if he had reason to be certain of the outcome before the board.

At a press conference on the morning of February 19 announcing the filing of his lawsuit, Bayh explained that "this is not an action of my choosing. We have been forced literally to take this step by people who are intent on taking the right of choosing the next governor away from the voters."²²⁶ Bayh insisted that the state election board possessed neither the jurisdiction nor the requisite temperament or discernment to determine questions of constitutional significance. The decision, he argued, should be made by a jury of citizens "and not some political tribunal appointed by my opponent's supporters."²²⁷

Attached to Bayh's Complaint for Declaratory Judgment were several exhibits, including Bayh's 1983 and 1984 "part-year" state income tax returns. Those exhibits revealed that Bayh had filed an amendment to his 1983 Indiana State tax return on November 6, 1987, six days before he publicly declared his intent to seek the office of governor. On this amended return, Bayh conceded that he owed an additional \$243 on 1983

²²⁴ Record of Proceedings, Volume I, p. 95.

²²⁵ Evansville Press, February 20, 1988.

²²⁶ Indianapolis Star, February 20, 1988.

²²⁷ Ibid.

income he had earned while living in Indiana. There was no amendment for the 1984 return wherein he listed himself as a “part-year” Indiana resident from November 30 to December 31, 1984.²²⁸

Bayh also sharply attacked Mutz for trying to distance himself from the Republican efforts to have Bayh declared ineligible: “I think it is a sad day when someone who wants to be governor isn’t willing to take on all comers. No one should become governor of Indiana by clinging to the skirts of his predecessor or hiding behind legal arguments.”²²⁹ In response, Mutz acknowledged that he approved of Governor Orr’s action asking the state election board to investigate Bayh’s eligibility. Mutz argued that he was willing to run against anyone, but “it is impossible to drop this matter when clearly there is a question and there are legal means to settle it.”²³⁰ Mutz affirmed his desire to run a campaign on the issues and denied that he had participated in any way in decisions leading up to Governor Orr’s announcement. He claimed that he had no knowledge of questions surrounding Bayh’s eligibility until reading about them in the newspaper. He also denied being aware that his own campaign manager had asked lawyers, including Daniel F. Evans, Jr., to research Bayh’s eligibility.²³¹

On the Friday that the Bayh lawsuit was filed, Judge Zore scheduled a pre-trial conference for 9:00 a.m. the following Monday, February 22. That, of course, was the same day that Judge Puckett had ordered the state election board to begin its investigation.²³² The

²²⁸ Record of Proceedings, Volume I, p. 95.

²²⁹ Indianapolis Star, February 20, 1988.

²³⁰ Ibid.

²³¹ Ibid.

²³² Record of Proceedings, Volume I, p. 90.

contest to determine Evan Bayh's eligibility to run for the office of governor was now being pursued simultaneously on two separate fronts in two different forums.

Although the state election board, at that point, had neither decided nor taken an official position with respect to the validity of Bayh's prospective candidacy, McNamar announced that he, on the board's behalf, would seek to have Bayh's lawsuit dismissed at the pre-trial conference. "Primary jurisdiction (of election matters) is with the election board," he insisted. Further, if Judge Zore denied his motion to dismiss, McNamar was prepared to take an immediate appeal to the Indiana Supreme Court and ask that Judge Zore be ordered to send the case to the election board for a determination.²³³ In so doing, it could be argued that McNamar was only protecting the board's jurisdictional authority to decide a question of this nature. Yet, it is inescapable that Republicans, who professed to want nothing more than a quick resolution, were insisting that the process involve an additional step. It was also with strained credibility that Republicans argued that a partisan state administrative board, comprised in part of non-lawyers, was better suited to decide questions of constitutional interpretation than a court of law. As Bayh's legal team would later argue, "it is difficult to understand how the Board can take the position that it is more competent to act like a court than the court itself."²³⁴

On that same day (February 19), Durnil announced that "a legal attempt [by the state election board] may be made at the pretrial hearing Monday to have the residency jurisdiction placed squarely with the election board, effectively postponing any legal action

²³³ Indianapolis News, February 20, 1988.

²³⁴ Bayh's Preliminary Response to Petition for Writ of Prohibition and Writ of Mandamus, undated, copy in possession of author.

by Bayh until the election board has acted.”²³⁵ Again, Durnil apparently possessed some authority over the course and direction of the legal proceeding. Governor Orr and Attorney General Pearson had gone to great lengths to minimize the perception that the process was in any way partisan. Orr had appointed a special judge. In fact, Orr appointed a new member to the board to hear this particular matter so that, ostensibly, the proceeding could mirror, as completely as possible, the proceeding that would take place in a “real” court of law. Pearson had hired outside legal counsel for the specific purpose of disavowing partisan motivation. Yet, Durnil consistently bungled their carefully orchestrated effort to avoid the appearance of partisanship with his public comments about the residency challenge and about Bayh himself.

If it appeared that Governor Orr was willing to go to considerable lengths to see that the election board maintained control over the initial decision-making, he was equally adamant that his efforts in that regard were not motivated by political considerations. Governor Orr’s aides conceded that Bayh had a right to appeal his case in a court of law after a ruling by the state election board, but they insisted that the election board was a step that could not be skipped. “The governor is committed to having this done in a quick and fair fashion,” said James E. Knoop. “The only thing that can slow that up now is some sort of legal proceeding somewhere that gets it off track. That puts in jeopardy an organized primary election.”²³⁶

For his part, Durnil insisted that the election board was the forum designed to hear election disputes. “The law is the law,” Durnil said. “The Legislature has devised a way to

²³⁵ South Bend Tribune, February 20, 1988.

²³⁶ Ibid.

resolve these situations.”²³⁷ To another reporter, Durnil went even further: “The [Marion County] superior court has no jurisdiction.”²³⁸

On Bayh’s behalf, Krahulik acknowledged that Indiana law provided that the election board had the authority to make determinations on questions concerning the “validity of candidate declarations.” However, according to Krahulik, that power was limited to the information requested on the declaration itself. “The candidate fills in the office for which he is running; his address, including the precinct, ward and county; and the date of the primary. There are no questions pertaining to the office’s constitutional qualifications.”²³⁹

Because the election board intended to proceed with its investigation late Monday afternoon, Bayh’s legal team prepared to ask Judge Zore at the pre-trial conference early Monday morning for an injunction that would prohibit the election board from proceeding in any way with an investigation or hearing.²⁴⁰ Bayh appeared resolute. “Despite the hopes of some and the fears of many, there will not be a coronation or a crowning this November. The next governor of the state of Indiana will be elected by the citizens of our state.”²⁴¹

On Saturday, February 20, Democratic State Chair John B. Livengood upped the political ante by releasing the results of a Democratic poll that showed the joint Bayh-O’Bannon ticket leading a prospective Mutz-Goldsmith ticket by a margin of 52 percent to

²³⁷ Indianapolis News, February 20, 1988.

²³⁸ Lafayette Journal and Courier, February 20, 1988.

²³⁹ Louisville Courier-Journal, February 20, 1988.

²⁴⁰ Record of Proceedings, Volume I, pp. 101-110.

²⁴¹ Evansville Press, February 20, 1988.

40 percent. (Stephen Goldsmith, the Republican prosecutor in Marion County, would later be selected as Mutz's running mate). It also purported to identify overwhelming disapproval by voters of "efforts to remove Bayh from the ballot." The poll, conducted by a Washington, D.C., public opinion research firm, interviewed approximately five hundred randomly sampled voters between January 29 and February 7 and suggested that 41 percent of voters would "look less favorably on the Republican Party if Bayh is forced off the ballot."²⁴² Livengood charged that, "the Mutz campaign wants to avoid a fair election process, apparently at any cost." Livengood also repeated Bayh's earlier assertion that a fair hearing before the Republican-dominated state election board was unlikely. "This 2-to-1 control of the board makes it impossible for that body to have any credibility." He said that Governor Orr's action was motivated by his support for Mutz and was "an act of desperation by the Republicans."²⁴³ McDaniel, Mutz's campaign manager, responded by arguing that the Bayh campaign was trying to direct people's attention away from the real issue—Bayh's eligibility. "He's [Bayh] clearly tried to skirt the process by taking this to court," McDaniel said. "The state law is clear that the election board decides these matters."²⁴⁴

Mutz personally disputed the findings of the Democratic poll and, not surprisingly, took issue with Livengood's assertions. He argued that voters would not react unfavorably to the legal challenge because "thoughtful people ultimately will recognize this is a constitutional question." Mutz also directed criticism at Bayh, calling his lawsuit "the

²⁴² Press release by John Livengood, Indiana Democratic Party State Chair, February 20, 1988, copy in possession of author.

²⁴³ Louisville Courier-Journal, February 21, 1988.

²⁴⁴ Indianapolis Star, February 21, 1988.

strangest thing I've ever seen." For Mutz, Indiana law was clear in that the state election board was the proper venue for questions of candidate qualification. Mutz questioned the timing of Bayh's lawsuit and suggested that Bayh was interested only in slowing down a ruling by the election board, which was "the fastest way to get the question settled."²⁴⁵

In truth, the matter was becoming increasingly complicated for Mutz. He obviously believed that the challenge to Bayh was legitimate enough to pursue, but he also must have been fearful that the public's impression of the motivations involved, particularly those of Durnil, could adversely affect his candidacy. There is little doubt that Mutz wanted the questions answered, but not in ways that would compromise his campaign. As Traub observed, "it's a tough leap for Mutz to try to stay above this battle."²⁴⁶ Traub had argued all along that "the political issues of experience and talent should not be washed away in the confusion of a Supreme Court decision over eligibility. It is too easily confused with qualification."²⁴⁷

Thus, the first week of the Bayh residency challenge came to a close. It had been a tumultuous week, filled by legal maneuvering and political accusations. Adding to the political intrigue were rumors of the existence of other public opinion polls commissioned by the candidates themselves that confirmed what Livengood's partisan poll had suggested – the gap in public support between Bayh and Mutz was widening. This apparently prompted several Republican leaders from around the state to approach newly re-elected Indianapolis Mayor William Hudnut about reconsidering his decision to stay out of the 1988

²⁴⁵ Louisville Courier-Journal, February 21, 1988.

²⁴⁶ Indianapolis Star, February 21, 1988.

²⁴⁷ Ibid., February 7, 1988.

gubernatorial race. Hudnut acknowledged that he had been contacted by some Republican leaders, but he insisted that his decision would not change.²⁴⁸

On Monday, February 22, an Indianapolis newspaper reported that “the trials of Evan Bayh began today, in legal hearings so unusual that few people will ever have to weather them.”²⁴⁹ An expedited pre-trial hearing was held before Judge Zore at 9:00 o’clock a.m. in the Marion County Superior Court. Prior to the hearing, and as promised, McNamar, on behalf of the state election board, filed a motion asking the court to dismiss Bayh’s lawsuit. McNamar argued that the board had “exclusive” jurisdiction over the matter because Indiana law provided that the board was solely empowered to administer the election laws of the state. In addition, the board had “primary” jurisdiction because Bayh was required to exhaust all administrative remedies before the law allowed him to proceed to court, and he had failed to do so. “The State Election Board falls within the purview of the new Indiana Administrative Adjudication & Court Review Act. I.C. 4-21.5. It is also well settled in Indiana that where administrative remedies and judicial review are available, the initial determination shall be made at the administrative level and a court of law will only have jurisdiction to judicially review the same in accordance with the Adjudication & Court Review Act.”²⁵⁰

Krahulik countered that “the issue of constitutional qualifications is a judicial matter, and there is no state law that allows the election board to make that determination.”

²⁴⁸ Ibid., February 21, 1988.

²⁴⁹ Indianapolis News, February 22, 1988.

²⁵⁰ Record of Proceedings, Volume I, pp. 114-115.

Krahulik further observed that the Indiana Constitution should not be trivialized by characterizing it as an election law.²⁵¹

Krahulik also pointed to a recent decision by the Indiana Court of Appeals, which had also originated in the Marion County Superior Court, as being instructive. It, too, dealt with the issue of a trial court's jurisdiction over questions of candidate eligibility. In Mason v. Gohmann, a Marion County voter had filed a declaratory judgment action challenging Goldsmith's qualifications to be a candidate for Marion County Prosecutor.²⁵² Mason argued that Goldsmith was not a duly registered voter and, therefore, was not qualified to be a candidate. The Indiana Court of Appeals eventually affirmed the decision by the Marion County Superior Court that Goldsmith was, indeed, qualified to be a candidate for prosecutor. In finding for Goldsmith, Judge Anthony J. Metz, III of the Marion County Superior Court, a Republican, rejected Goldsmith's motion to dismiss, which had argued that Mason had failed to exhaust his administrative remedies. In other words, Goldsmith had asserted that, before a court of law could properly consider the question of his eligibility, Mason should have first filed his complaint before the county election board. Judge Metz concluded that the trial court had primary jurisdiction over the subject matter. Metz also denied Goldsmith's assertion that Mason's lawsuit should be dismissed because "the issue of the validity of Goldsmith's Registration [was] pending before another court."²⁵³ While the Court of Appeals did not explicitly address the jurisdictional issues in its opinion, it did append all of Judge Metz's findings to its opinion.

²⁵¹ Ibid., Volume I, p. 128; Indianapolis News, February 22, 1988.

²⁵² Mason v. Gohmann, 498 N.E.2d 1344 (Ind. Ct. App., 1986).

²⁵³ Record of Proceedings, Volume I, p. 142; Mason v. Gohmann, 1353.

Next, Daniel F. Evans, Jr., the attorney for the Republican Party, entered his appearance on behalf of Durnil. As noted above, Bayh had sued Durnil, as chair of the Republican Party, as well as the election board. Evans asked the court to dismiss the lawsuit against Durnil on the grounds that there did not exist a real or actual “legal” controversy between Bayh and Durnil. In a sworn affidavit attached to the motion, Durnil conceded that he had made repeated public statements about his intention to challenge Bayh’s eligibility. However, the initiation by Governor Orr of the state election board’s investigation “remove[d] the need for myself or anyone else to initiate a proceeding to challenge or question Bayh’s qualifications” Bayh’s lawyers responded by offering, at the court’s request, to produce “numerous articles and documents which clearly show that there are ‘antagonistic claims’ being actively pressed on one side and opposed on the other which create an ‘actual’ controversy or, at the very least, that the ‘ripening seeds’ of such a controversy exist.”²⁵⁴ Judge Zore took all of the motions under advisement.

Later that day, Judge Zore issued a terse two-paragraph order denying the state election board’s motion to dismiss by citing the precedent established in the Mason v. Gohman case. Judge Zore did, however, grant Durnil’s request that he be dismissed from the lawsuit.²⁵⁵ Zore also indicated that, on Tuesday, February 23, he intended to set a date for a three-day trial to be conducted sometime the following week.²⁵⁶

Late that same Monday afternoon, February 22, the state election board convened its own special meeting and began its investigation into Bayh’s eligibility. The board, acting as

²⁵⁴ Ibid., Volume I, pp. 119, 129-130.

²⁵⁵ Ibid., Volume I, p. 132.

²⁵⁶ Ibid., Volume I, pp. 102, 106-110.

an administrative law judge, consisted of James C. Puckett, chair and proxy for the governor, and Donald B. Cox and Kevin J. Butler, as appointed members. In its first order of business, McNamar presented to the board a formal Petition for Investigation, which requested board authorization for McNamar to investigate “whether Birch Evans Bayh, III, has engaged in or is about to engage in any acts or practices which might constitute a violation of state election laws.”²⁵⁷ By a 2 to 1 vote, along party lines, the board approved the petition and, in so doing, made a finding that it had “exclusive jurisdiction” over the matter. The board also approved, by a 2 to 1 party line vote, the issuance of a 19 point subpoena requiring Bayh to produce a series of documents, including tax records, motor vehicle registrations, driver’s licenses, employment applications, and “copies of any documents you intend to produce at a hearing on this matter to demonstrate your Indiana residency for five (5) years immediately preceding November 8, 1988.”²⁵⁸ Bayh was given until 4:00 p.m. on Thursday, February 25 (or about three days) to produce all of the requested documents.

Lastly, the board voted along party lines to hold a pre-hearing conference on Friday, February 26, at 10:00 a.m. and scheduled a formal evidentiary hearing on Wednesday, March 2. Judge Puckett, the board’s chair, promised to provide a judicial-like hearing. “‘That is my intent, to the best of my ability,’ Puckett said.” The board, aware that Judge Zore had earlier in the day denied its motion to dismiss Bayh’s lawsuit, directed McNamar to immediately appeal that decision to the Indiana Supreme Court. Specifically, McNamar

²⁵⁷ Petition for Investigation, February 22, 1988, Minutes of the Indiana State Election Board, 1983-1989, Indiana State Archives, Commission on Public Records, AAIS #100832, A7387, Box 1, Folder 5.

²⁵⁸ Subpoena Duces Tecum, February 22, 1988, *ibid.*

was to ask the high court to remove Bayh's action from the Marion County Superior Court and transfer it to the board.²⁵⁹

Krahulik requested that the board issue a subpoena requiring Durnil to respond to questions and to produce documents.²⁶⁰ Bayh's attorneys had presented Judge Zore with the same request earlier in the day, but that request had been denied as part of Judge Zore's dismissal of Durnil as a defendant from Bayh's lawsuit. This information was requested from Durnil because Bayh's campaign believed that Republicans had hired International Investigators, Inc. of Indianapolis or its president, C. Tim Wilcox, to conduct a private investigation into Bayh's past. If true, Bayh's legal team believed that had they had the right to see the results of any investigation that may have been conducted.

Years before, Wilcox had gained local notoriety as a personal private investigator for Indianapolis Police Department officials and high-ranking Republicans. In furtherance of that task, Wilcox had electronically monitored the telephones and offices of prominent Democratic lawyers and political figures.²⁶¹ Wilcox, when asked by reporters, denied he was involved in the Bayh matter, but added this caveat: "even if we were hired by them (Republicans), we wouldn't admit it ... I'd lie to you ... Draw your own conclusions."²⁶² The board tabled Krahulik's request. In response, Durnil denied hiring anyone to conduct investigations on Bayh and insisted that the Republican case against Bayh could be established on Bayh's admissions alone. Evans, Durnil's attorney, indicated that Durnil

²⁵⁹ Indianapolis News, February 23, 1988.

²⁶⁰ Indianapolis Star, February 23, 1988.

²⁶¹ Ibid.

²⁶² Indianapolis News, February 24, 1988.

would eventually be willing to answer under oath any and all questions asked of him
“because it is in his best interest to make sure the truth gets out.”²⁶³

²⁶³ [Indianapolis Star](#), February 23, 1988.

Chapter Five

THE FIRST APPEAL

“The effect of the majority position is to allow both forums to go forward on the same issue simultaneously. I find this to be unjudicial and confusing.”

Justice Alfred Pivarnik
March 1, 1988

First thing Tuesday morning, February 23, Krahulik asked Judge Zore to issue an injunction to prohibit the state election board from proceeding with its investigation on the matter of Bayh’s qualifications. Krahulik argued that the board was exercising quasi-judicial power for which it had no authority. In addition, allowing the board to proceed would deny Bayh his constitutional right to a jury trial because the hearing procedure contemplated by the board would not afford one.²⁶⁴

Meanwhile, McNamar submitted his request for the Indiana Supreme Court to expeditiously consider an appeal of Judge Zore’s earlier order. By Tuesday mid-day, the Supreme Court had agreed to accept an immediate appeal, and it set the matter for a hearing the following Monday, February 29, at 1:30 p.m. The Supreme Court’s administrator, Karl L. Mulvaney, indicated that “a ruling probably would be issued the same day.”²⁶⁵ Thus, it appeared that a determination by the Supreme Court as to which forum would initially review the Bayh case would be made no later than the following Monday.

²⁶⁴ Record of Proceedings, Volume I, pp. 101-110.

²⁶⁵ Indianapolis Star, February 24, 1988.

McNamar was confident that the Supreme Court's acceptance of his appeal from Judge Zore's court would be enough to convince Zore to halt all judicial proceedings: "If I were a judge, I'd wait to see what the Supreme Court says one way or another."²⁶⁶ While it appeared, at least initially, that the board would continue its investigation, by Tuesday afternoon the lawyers were back in Zore's court arguing whether the board should be formally restrained from going forward. After lengthy arguments in open court, the lawyers themselves agreed to halt all proceedings, both judicial and administrative, until a ruling could be issued by the Supreme Court.²⁶⁷ However, the parties also agreed that Bayh's response to the board's discovery request for documents would not be delayed so that preparation for an eventual hearing on the merits would continue. Although he approved the open-court agreement reached by the lawyers, Zore made clear that he would not hesitate to issue a restraining order if, in the interim, the board proceeded to take any additional action.²⁶⁸ To that end, McNamar agreed that the board's scheduled February 26 pre-hearing conference and March 2 evidentiary hearing would be temporarily postponed.

The "truce" reached by the parties as they awaited a decision by the Indiana Supreme Court allowed editorial boards from major daily newspapers around the state to comment on the controversy. The Indianapolis News commended Governor Orr for acting "properly" and called on the Supreme Court to allow "the Election Board to do its duty." As for Bayh's contention that he could not receive a fair hearing before an administrative board dominated by Republican members, the News observed, "it is up to the members of

²⁶⁶ Indianapolis News, February 23, 1988.

²⁶⁷ Indianapolis Star, February 24, 1988.

²⁶⁸ Ibid.

that Election Board to faithfully and impartially carry out their duty, just as Bayh and other members of the State Recount Commission carried out their duties several years ago.”²⁶⁹ The South Bend Tribune disagreed. “The Election Board is designed to be biased toward the party in power. Courts are supposed to be unbiased. Also, it seems that a constitutional question by its very nature should be a court province We think it is in the interest of the state to have the matter determined fairly, in court.”²⁷⁰ The Indianapolis Star underscored the importance of the issue, but refrained from offering its preferred forum: “Indiana’s voters and the cause of justice can be served rightly only by a decision based on the merits of the case – a decision that is non-partisan, legal and fair.”²⁷¹ The Gary Post-Tribune characterized the controversy surrounding Bayh’s residency as “the most exciting issue in the Democratic campaign for governor so far, which says something about the state of politics in the state of Indiana.” The editorial went on to opine that neither the election board nor a jury is the appropriate way to settle an issue of this nature. “Why can’t a judge check the constitutional requirements for residency against Bayh’s record, using all the documents available, and decide whether he is enough of a Hoosier to run for governor? Because that is logical, probably. Eventually, a court probably will make the final determination anyway.”²⁷²

Beyond the burgeoning editorial commentary, there were several other developments in the litigation. The parties exchanged previously requested documents on Friday, February 26. Bayh turned over information that responded to the election board’s

²⁶⁹ Indianapolis News, February 24, 1988.

²⁷⁰ South Bend Tribune, February 24, 1988.

²⁷¹ Indianapolis Star, February 25, 1988.

²⁷² Gary Post-Tribune, February 26, 1988.

19-point subpoena, and in so doing, argued that the only documents produced that were likely to be used by his adversaries were his Indiana part-time resident tax returns. He insisted that they were insufficient to prove that he had abandoned his residency in the state.

More immediately newsworthy, though, was the response Bayh's lawyers received from Durnil as a result of their request for production of documents from him. Bayh explained, "they, in essence, gave us nothing but some newspaper articles."²⁷³ On earlier occasions, Durnil had confidently asserted that he possessed the names of key witnesses and a file folder full of information that would prove Bayh's ineligibility. According to Bayh, when forced to produce what he claimed to have, Durnil "had to sign on the line that he had nothing."²⁷⁴ The file contained little more than "newspaper clippings, television newscast tapes and personal notes written on message pads." Durnil had written memos to himself, one of which read, "what kind of office application has Bayh filled out where he would have had a drug question?" Another memo considered what federal income tax documents Bayh would have prepared.²⁷⁵ Durnil's lawyer, Daniel F. Evans, Jr., downplayed the significance of Durnil's response to the document request. "I don't know what they're talking about. He (Durnil) doesn't have 50 items. There is no file. There is a file of newspaper clippings."²⁷⁶

On Sunday, February 28, the Indianapolis Star reported that the Bayh residency challenge was "creating a quiet but deep split among state Republicans." An increasing number of Republican activists were expressing the fear that, no matter how meritorious the challenge actually was, the public's ultimate perception would be that Republicans were

²⁷³ South Bend Tribune, February 27, 1988.

²⁷⁴ Ibid.

²⁷⁵ Indianapolis Star, March 5, 1988.

²⁷⁶ South Bend Tribune, February 24, 1988.

guilty of “dirty politics” and that it would “unify Democrats, anger the electorate and open the GOP to charges of arrogance.” “‘I don’t understand why they’re doing this,’ said one GOP strategist close to the 1988 campaign. ‘We’ve got a good candidate and we’ve got a good organization. Why take the risk of turning Evan Bayh into a martyr?’”²⁷⁷

Governor Orr defended his action as prudent and necessary. While acknowledging the political risks involved, Orr argued that questions of Bayh’s eligibility were not simply going to go away and someone had to do something about it. “‘If we don’t do this and Bayh wins, (Republicans) are going to blame me or the party hierarchy for not having acted.’” But anonymous Republican sources confirmed that many party faithful were nervous that the challenge would backfire. These sources identified Frank O’Bannon as the only beneficiary of a Supreme Court ruling declaring Bayh to be ineligible, since the common presumption was that O’Bannon would then get the Democratic nomination. One Republican officeholder commented, “if that happens, there would be hell to pay That’s when the uproar would come from people who think this is crass. Then Bayh would go around the state and tell all of his supporters that he got screwed and that they should support O’Bannon.” Even a Republican member of Congress from Indiana, again anonymously, indicated that spending time challenging Bayh’s qualifications was “bad judgment and that Mutz ought to just get on with his campaign.”²⁷⁸

Mutz defended Governor Orr’s decision to initiate the investigation. He argued that it was better to address the problem early in the campaign and have it resolved than to allow it to linger over the summer and into the fall. “‘My frank feeling about this is that if this is

²⁷⁷ Indianapolis Star, February 28, 1988.

²⁷⁸ Ibid.

resolved quickly, this issue disappears,’ said Mutz. ‘What makes it a problem is if it hangs over the election clear up until November. You do things at the risk of creating a martyr if it hangs on for a long period of time.’” While not conceding the point, Mutz seemed resigned to the fact that the public would view any decision by the state election board as motivated by partisan considerations. But, in Mutz’s mind, what militated against that perception was the stature that a decision by the Indiana Supreme Court would command. “I think that people in this country, while they may have all kinds of emotional feelings about one thing or another, do believe that the Supreme Court stands above partisan political bickering,’ Mutz said.”²⁷⁹

Traub reported that all Republicans were becoming concerned that Durnil had become so tainted as to be “obsessed” with Bayh. Traub also reported growing evidence that the residency controversy was hurting, not helping the Republicans. In January, a voter from Bartholomew County had indicated he was supporting Mutz for governor. By late February, that same voter was not so sure. “I think it’s a petty issue,” he said. “If anything, it makes them look bad ... it looks like they’re grabbing at straws.” He added, “It isn’t like we have Ho Chi Minh running against Mutz.”²⁸⁰ Much later, Mutz himself would maintain that he had cautioned Orr that the legal challenge could backfire.²⁸¹

That same weekend, other newspapers commented on this emerging dilemma facing the Republicans and Mutz. The Louisville Courier-Journal asked rhetorically how the challenge would affect voters’ perceptions as they went to the polls in November. The

²⁷⁹ Ibid. This statement pre-dated by twelve years the United States Supreme Court’s decision in Gore v. Bush, 531 U.S. 98 (2000).

²⁸⁰ Ibid.

²⁸¹ Television documentary, “The Making of a Governor,” WTHR-TV, January 9, 1989.

paper reported that “since the governor’s request to the board, Bayh’s name has been featured prominently in newspapers throughout the state. The Courier-Journal, for example, carried stories about him on the front page of the Indiana section five of the six days immediately after Orr’s request.” Durnil responded that such publicity had little if any effect since Bayh already enjoyed widespread name recognition. To the contrary, Durnil questioned how many people actually read stories that closely. Of those who did, Durnil believed that promoting the idea of Bayh’s time away from Indiana and, by inference, his relative inexperience in the public arena when compared to Mutz, inured to the benefit of Republicans.²⁸²

Commenting on the editorial page of the South Bend Tribune, Jack Colwell suggested that, if Bayh were ruled eligible, “his chances could be boosted by the eligibility dispute if Republicans look as though they were trying unfairly to take the race out of the hands of the voters.” Colwell also observed that, if Bayh were ruled ineligible, O’Bannon might be the real beneficiary of all the attention surrounding the challenge. While acknowledging Bayh’s status as a stronger candidate against Mutz than O’Bannon would be, Colwell characterized O’Bannon as “a highly respected legislative leader who could win in a situation in which there was a voter backlash against Republicans for knocking Bayh off the ballot.”²⁸³

As oral argument before the Indiana Supreme Court drew nearer, the parties engaged in final preparation. The Court would be hearing a case of “first impression” – that is, a case involving a set of circumstances never before presented to the Supreme Court for its review.

²⁸² Louisville Courier-Journal, February 28, 1988.

²⁸³ South Bend Tribune, February 28, 1988.

In addition to the unique nature of the legal issues confronting the Supreme Court, several points need to be made about the Court itself in early 1988. When the Supreme Court had decided the residency case of Judge Evrard in 1975, the Court was in the early years of a dramatic historical transformation. Ever since the enactment of the second Indiana Constitution in 1851, the justices on the Supreme Court had been elected by the voters of the state. The Evrard court consisted of three Republicans – Chief Justice Givan, Justice Hunter, and Justice Norman Arterburn. The other two members were Democrats – Justices DeBruler and Prentice.

But in 1970, the voters of Indiana had approved a constitutional amendment that would fundamentally change the method of selecting justices for the state’s high court. Vacancies on the court would now be filled by “merit selection” – appointment by the governor from a list of three names submitted by a state judicial nominating commission. At the end of the terms of those justices who were serving on the court when the 1970 constitutional amendment became effective, those justices would stand for re-election not against a candidate of the opposing political party, but on a “retention ballot” on which the voters of the state would be entitled to vote “yes” or “no” as to whether the justice would be “retained” in office. Once retained for the first time, a justice would stand for such a retention vote every ten years thereafter. Under the new system, the Chief Justice was to be chosen by state judicial nominating commission every five years from among the justices on the court.

By 1988, this transformation was well underway. While Chief Justice Givan (first elected in 1968) and Justice DeBruler (appointed to the Court in 1968 and elected in 1970) who had participated in the Evrard case continued to be members of the Court, Justices

Arterburn, Hunter, and Prentice had retired. Each of those three had been replaced using the new merit selection system. Justice Arterburn had been replaced when Governor Otis Bowen, a Republican, appointed Justice Alfred J. Pivarnik. Justice Hunter had been replaced in 1985 when Governor Orr appointed Justice Randall T. Shepard. Justice Prentice was replaced shortly thereafter when Governor Orr appointed Justice Brent Dickson who took office in early 1986. And later in 1987, Shepard had replaced Givan as Chief Justice after a protracted contest with Pivarnik.

Although the partisanship of justices is not identified under the new merit selection process, the three new justices had been appointed by Republican governors and each of the three was known to be a Republican. Thus the Court to which the politically charged residency dispute had come consisted of four Republicans and one Democrat. But it was impossible to tell what role, if any, partisanship would play, especially because under the merit selection process, a justice would not have to seek re-nomination by his party, seek re-election on a party ballot, or face a candidate from the opposite party. In point of fact, just like Durnil and the Republicans and Bayh and the Democrats, the Supreme Court had a lot riding on the outcome of the residency case. Merit selection had been sold to the people of Indiana as a way to take partisanship out of high court adjudication. Court observers, as well as committed partisans, would be watching the residency case closely to see if that had in fact occurred.

As a technical matter, the state election board's appeal of Judge Zore's ruling was not an "appeal" at all but rather what the Supreme Court calls an "original action." Under Indiana court rules, only certain decisions of a trial court can be appealed and only at certain times. Judge Zore's ruling did not qualify as an "appealable order." (Furthermore, most

appeals must first go to the Indiana Court of Appeals for decision before they can be appealed to the Supreme Court.) However, Supreme Court rules do permit one side in a lawsuit to file a challenge directly in the Supreme Court (hence, an “original action”) that contests the authority of the judge to act in the case at all.²⁸⁴

In legal terms, the election board was “alleg[ing] the absence of jurisdiction” of the Marion Superior Court and seeking an order (called a “writ of mandamus and prohibition”) prohibiting Judge Zore from ordering the board not to act and prohibiting him from considering the matter. This explains the unusual name for the case: “State of Indiana, on the relation of the State Election Board, Relator, v. The Superior Court of Marion County, Civil Division, Room No. 7, and the Honorable Gerald S. Zore, Judge thereof, Respondents.” Bayh’s name did not even appear. That is, the nominal parties or contestants in this “original action” were not the election board and Bayh but the election board and Judge Zore – the election board was asking the Supreme Court to take action not against Bayh but against Zore. Of course, because Bayh opposed what the election board was seeking, his lawyers actually argued the case. But as a technical matter, Judge Zore and his court were “parties” to this particular original action or dispute being litigated in the Supreme Court.

Sometimes called “writ proceedings,” Supreme Court rules provided that “original actions are viewed with disfavor and may not be used as substitutes for appeals.”²⁸⁵ As such, there was a slight bias in the Court’s rules against granting the order or “writ” that the Republican majority on the election board sought here.

²⁸⁴ Ind. Original Action Rule 1(B)(2005) (see http://www.in.gov/judiciary/rules/orig_act/orig_act.pdf).

²⁸⁵ Orig. Act. R. 2(E), *ibid.*

And, in addition Bayh had not yet formally filed a declaration of candidacy. Therefore, the election board would need to argue that the dispute was “ripe,” that is, it possessed the authority to decide the appropriateness of a candidacy that, in a technical sense, did not exist.

Because of the unprecedented level of interest in the case, the Supreme Court made special arrangements to increase the seating capacity of its chambers from 80 to 250. Mulvaney, the Court’s administrator, commented, “in my 11 years, we’ve probably filled the courtroom only 5 or 10 times.”²⁸⁶ Coincidentally, the Court’s hearing was scheduled for the same day that the Indiana General Assembly was set to adjourn. There was common belief that many, if not most, of the state’s legislators wanted to attend. Although the jurisdictional question had made its way to the Supreme Court in only ten days, most observers recognized that the case would quickly find its way back to the Court for final review. To that end, Indiana Supreme Court Chief Justice Randall T. Shepard was reported to have already assigned the Court’s law clerks to delve into the legal issues presented by the residency question on the merits.²⁸⁷

The Supreme Court was not the only venue making preparations for Monday, February 29. While the state election board had agreed to forego any action pending the Supreme Court’s decision, the board announced that it intended to re-convene at 4:00 p.m. on Monday afternoon, anticipating that the 1:30 hearing before the Court would be concluded and a decision rendered by that time. The board’s stated purpose was to discuss

²⁸⁶ Indianapolis Star, February 29, 1988.

²⁸⁷ Ibid., February 28, 1988.

how it would proceed with the scheduling of an evidentiary hearing.²⁸⁸ McNamar had already prepared a comprehensive legal memorandum for all members of the state election board. He did so pursuant to his own suggestion at the board's organizational meeting the previous week. The memorandum was McNamar's "analysis and thoughts as to the question of Bayh's eligibility for the office of Governor of the State of Indiana",²⁸⁹

McNamar summarized the relevant constitutional history and then concluded that the drafters defined physical presence in the state as being the standard by which "residency" was to be determined as opposed to the mere claim of intent to reside. "Concerning the analysis of physical presence in the State, the South Carolina language [in the Ravenel case] ... states the rationale for such a requirement." Therefore, McNamar, in an effort to help the board understand the criteria they might use to determine whether Bayh met the constitutional requirement, suggested that "one indicia of residency is an address of where the individual ... usually sleeps." Other criteria that courts have considered in determining residency were listed: "drivers licenses and addresses on those; registration of motor vehicles; place of registration to vote; place of employment, and 'where he sleeps' the proximity thereto; addresses used for (a) clubs, (b) other organizations, (c) receipt of mail, (d) addresses used on applications for official documents; tax returns and indications utilized on those types of documents; marriage certificates and addresses used therein."²⁹⁰ To the extent that McNamar was suggesting that the list was exhaustive in terms of the criteria to be used in determining residency, based on information already in the public domain, it was

²⁸⁸ *Ibid.*, February 29, 1988.

²⁸⁹ Record of Proceedings, Volume I, pp. 208-216.

²⁹⁰ *Ibid.*, Volume I, p. 215.

clear that Bayh would be declared ineligible. Remember, at the time, the state election board remained purportedly a “neutral” fact-finder and impartial decision maker. Moreover, the role of counsel to the board was not to prosecute, but to advise. To do otherwise would be to compromise the board’s impartiality.

On Monday, February 29, at 1:30 p.m., in packed chambers, oral argument was conducted before the Indiana Supreme Court for two hours. Only four of the Court’s five justices took part in the proceeding. The Court’s only Democrat, Justice Roger O. DeBruler, mysteriously disqualified himself from participation citing a conflict of interest. That the only Democrat on the Court was not participating was a source of great distress to the Bayh legal team. But it also created a great irony for the Republicans: what the Supreme Court would decide would be solely the decision of Republican justices. There was no possibility that the four Republicans could be split such that the sole Democrat’s vote would be outcome determinative and shift the political onus of the decision to the Democrats. The “good news/bad news” decision of whether the election board or the court decided the case rested entirely in the hands of the four Republican members of the Court.

Attorneys for Bayh and the board were questioned extensively by members of the Court. With respect to the issue of ripeness, McNamar conceded that the board’s claim of jurisdiction was unique because Bayh had not yet filed a declaration of candidacy. Nonetheless, he argued that the board’s authority was clear. “I know of no other statute allowing a board to anticipate a law violation,” McNamar said.²⁹¹

The justices expressed concerns about proceeding before either forum, and how the case would be prosecuted thereafter. Justice Dickson observed that, if the election board

²⁹¹ Indianapolis Star, March 1, 1988.

were to find in Bayh's favor, the constitutional question might remain unanswered. Similarly, the justices asked the lawyers to respond to the possibility that, in a case before Judge Zore, the election board might choose not to defend itself because it would no longer have any decided interest in the outcome. Krahulik argued that Bayh would be prepared to find a voter who could challenge his eligibility if that were required. Krahulik also left open the possibility of seeking to re-name Durnil as a defendant in the lawsuit.

Following the hearing, the Court retired and deliberated for three and one-half hours. At the end of the day, the Court announced that its deliberation would continue into Tuesday because no decision had been reached. Chief Justice Randall T. Shepard said "I'd rather be right than quick." The fact that the Court was unable to make a prompt decision was unusual. According to court personnel, jurisdictional decisions were often made quickly, usually being disposed of by the Court within half an hour. "But, this is not your normal case," said one of the court employees.²⁹²

The 4:00 p.m. meeting of the state election board was initially delayed, then postponed altogether while the Court continued its deliberations. By agreement with lawyers representing Bayh, the board indefinitely stayed the scheduling of a pre-hearing conference until after a Court decision was formally rendered. McNamar relayed to the board that he had been told by Justice Givan that the Court had finished its deliberations for the day without a decision and that those deliberations would resume at 9:30 a.m. the following morning.²⁹³

²⁹² Ibid.

²⁹³ Ibid.

Then, on Tuesday, March 1, faced with the question of whether the election board or the Marion County court should proceed, the Supreme Court issued a decision that was really no decision at all. “An apologetic Indiana Supreme Court said ... it could not decide which authority should rule first on a residency eligibility dispute involving Secretary of State Evan Bayh.”²⁹⁴ The decision was issued at mid-day and confounded all of the parties involved. The Court held that both the state election board and the Marion County Superior Court could proceed simultaneously with consideration of the case.²⁹⁵

We know from the written record that Justice Pivarnik agreed with Bayh’s position. “[T]he [Marion County] Court is the only forum which can conclusively put this issue to rest,” Pivarnik wrote. “Because this requires decisions on legal and constitutional issues, the Election Board is not in a position to do this.”²⁹⁶

Justice Givan took the opposite position, the one advocated by the Republican majority on the election board.

In the case at bar, Evan Bayh is like all candidates seeking to have their name placed before the voting public. He is subject to the constitutional and statutory qualifications for whatever office sought. It is the responsibility of the State Election Board to determine that each candidate whose name is placed on the ballot is in fact qualified for such placement. If Evan Bayh or any other candidate in like circumstance is dissatisfied with the decision made by the State Election Board, they may seek judicial review from such decision.

As some of the other members of this Court have pointed out, under certain circumstances, including questions pending before administrative boards, it is proper to invoke the Uniform Declaratory Judgments Act. However, I do not perceive that this is one of those situations. This situation does not require an interpretation of the Indiana Constitution nor is the State Election

²⁹⁴ Ibid., March 2, 1988.

²⁹⁵ State ex rel. State Election Board v. The Superior Court of Marion County, 519 N.E.2d 1214 (Ind., 1988).

²⁹⁶ Ibid., 1216.

Board threatening to take any action which it is not authorized to take. If the State Election Board's action would be adverse to Evan Bayh's interest, he could take his appeal. Therefore during the course of such action, the Uniform Declaratory Judgments Act should not be invoked. If, on the other hand, the State Election Board rules that Evan Bayh's name may go on the ballot and he is still concerned that he may be faced with a quo warranto action challenging his qualification to assume the office of Governor, he may invoke the Uniform Declaratory Judgments Act to obtain a judicial determination of his qualifications.²⁹⁷

The problem was that the remaining two justices participating in the decision, Chief Justice Shepard and Justice Dickson, apparently could not see their way clear to join either of these two positions. Instead, they issued a joint statement allowing both the election board and the court to consider the matter. (Justice Givan agreed with that portion of the Shepard-Dickson statement allowing the board to proceed, thereby providing the majority vote needed for that result. Similarly, Justice Pivarnik agreed with that portion of the Shepard-Dickson statement allowing the court to proceed, thereby providing the majority vote needed for that result.)

The joint Shepard-Dickson statement read as follows:

It is important to emphasize that the question before the Court is not whether Evan Bayh meets the constitutional residency requirement for the office of Governor. That is a question for another day, a question all too likely to return to this Court for a final determination. In effect, the current proceedings are but a way to define the path by which the final question will work its way back to this Court.

The State Election Board seeks a writ prohibiting the Marion Superior Court from proceeding further in the action for declaratory judgment filed there by Evan Bayh. Though we have some reservations about the impact of today's decision on the state's administrative law, the necessity that this Court come to a conclusion about the procedure to be used in determining Mr. Bayh's eligibility for the office of Governor leads us to join in denying the relief requested by the Board. In so doing, we join in holding that under some circumstances a declaratory judgment is an available alternative to exhaustion of administrative remedies and judicial review.

²⁹⁷ Ibid., 1215-16.

We also conclude that a candidate's eligibility for placement on the ballot is a question which the statutes direct should customarily be decided by the Board. The Indiana Code requires that such questions be resolved by a week from Friday when the Secretary of State is directed under the statutes to certify to the county clerks the names of those who should be on the ballot. We have substantial doubt that a trial court can bring to a final judgment the question presented to it within that time frame and thus believe it is appropriate to let the Board's processes go forward. Hence, we have joined in prohibiting the Marion Superior Court from entering injunctions against the Board without further proceedings in this Court.

Even a decision by the Board favorable to Mr. Bayh's candidacy, however, cannot "bring to rest" the constitutional question of his eligibility for the office. Declaratory judgment is an excellent vehicle to bring about a final decision on that question. Both Evan Bayh and the people of Indiana have an interest in an early and authoritative answer to that constitutional question.

Whether the question of Evan Bayh's eligibility under the Constitution returns to this Court as an appeal from an administrative determination or as an appeal from a declaratory judgment, all deliberate speed will be required. We wish that a majority of this Court could be mustered for a more orderly path back here for a final resolution. As a Court functioning with only four members, today's order seems to us the best available.²⁹⁸

Several points are worth emphasizing about this statement. First, the Court denied the election board's request for an order prohibiting the Marion County Superior Court from proceeding further on the Bayh case. The Court said that "under some circumstances a declaratory judgment is an available alternative to exhaustion of administrative remedies and judicial review." Second, the Court also expressly prohibited the Marion County Superior Court from enjoining or preventing action by the election board because "a candidate's eligibility for placement on the ballot is a question which the statutes direct should customarily be decided by the Board." Because of the timing constraints of ballot preparation, the Court reasoned that "we have substantial doubt that a trial court can bring to

²⁹⁸ *Ibid.*, 1214-15.

a final judgment the question presented to it within that time frame and thus believe it is appropriate to let the Board's processes go forward."²⁹⁹ Third, Shepard and Dickson expressed frustration "that a majority of this Court could [not] be mustered for a more orderly path" and that the Court had been required to "function with only four members."

Although having opposite positions on the case, Justices Pivarnik and Givan both expressed scorn for the result. Pivarnik wrote: "The effect of the majority position is to allow both forums to go forward on the same issue simultaneously. I find this to be unjudicial and confusing,"³⁰⁰ Givan opined that it was an "unsavory situation [for] the State Election Board and a court of law [to] act simultaneously on the same subject."³⁰¹

The Court's seeming indecision led the Indianapolis Star to declare in its March 2 headline "Stumped Supreme Court 'punts' on Bayh issue."³⁰² The Court's decision was met with surprise and bewilderment. McNamar, the board's counsel, observed that "it really doesn't decide anything, except both sides go ahead." After having read the Court's decision, Bayh commented, "it's getting a little metaphysical here."³⁰³ Legal observers were critical. The Supreme Court is "required to make a decision. They are the Supreme Court. They should rule and they didn't," said one source, who asked for anonymity.³⁰⁴

What are we to make of the Court's behavior in this case? Faced with a test of whether the merit-selected Court could handle a highly politically charged case, the Court

²⁹⁹ Ibid., 1215.

³⁰⁰ Ibid., 1216.

³⁰¹ Ibid.

³⁰² Indianapolis Star, March 2, 1988.

³⁰³ Indianapolis News, March 2, 1988.

³⁰⁴ Indianapolis Star, March 2, 1988.

had failed. While the Court had not rendered a partisan decision, nor had its members broken out in partisan bickering, neither did the Court provide a workable answer to the key question that the election board, Governor Orr, Gordon Durnil, the Republican Party and Bayh had all asked.

Given the outcome and the three statements that accompanied it (one by Pivarnik, one by Givan, and the joint statement from Shepard and Dickson), it seems most likely that Chief Justice Shepard and Justice Dickson initially had had different views from one another – that one had been aligned with Justice Givan, the other with Justice Pivarnik – as to how the matter should be resolved. But with Justice DeBruler not participating, this difference of opinion produced a 2-2 tie vote. The fact that Justices Givan and Pivarnik each expressed his views in a separate statement suggests that they were dug into their respective positions and unwilling to compromise. This situation likely gave Shepard and Dickson three choices. First, they could continue to negotiate, trying to win a third vote for one position or the other. The fact that their negotiations continued over parts of two days suggests that this choice was intensely pursued.

Second, the Court could simply have announced that it was split 2-2 and so could render no decision on the election board's request. If the Court had taken this path, the practical effect would have been favorable to Bayh. With the Court not granting the election board's request, the case could go forward in Judge Zore's court. Most importantly, Judge Zore would not be constrained from enjoining proceedings before the election board. There was, of course, no assurance that Zore would grant Bayh's request to enjoin the board or, if he did, there was no assurance that the injunction would remain in place. But it would have been both a legal and moral victory for Bayh if the Republican majority of the election

board, having requested action from a court consisting only of Republicans, got absolutely nothing of what it asked for.

The third choice open to Shepard and Dickson was the path they apparently ended up taking, namely, compromising with each other to allow both the election board and the court to proceed. It was as if Solomon, when faced with the two women both claiming to be the mother of the same child, had resolved the case by saying, “I declare both of you to be the mother of the child. You go and figure it out.” Both the Republican majority on the election board and the Bayh forces faced uncertainty, but neither faction’s preferred route had been blocked by the decision.

The Court’s decision set off a flurry of new activity as both sides attempted to accelerate the process in their preferred venue—Bayh in the Marion County Superior Court and the Republicans before the state election board. Reaction to the Court’s decision was so quick that both parties were back in Judge Zore’s courtroom by Tuesday afternoon. Bayh’s lawyers filed a motion requesting an immediate trial setting and proposed that a trial commence at 8:30 a.m. Wednesday, the very next day. The board’s attorneys filed a motion to move the court case outside of Marion County. This request, known as a motion for change of venue, provides each party to a lawsuit with one opportunity, automatically granted, to have a case moved out of the county where it was originally filed. Judge Zore granted the board’s motion and ordered the parties to agree or otherwise determine where the case would be transferred. After conferring, McNamar reported to Judge Zore that the parties had struck from a list of contiguous counties and selected the Shelby County Circuit Court. The Shelby County Circuit Court was presided over by Charles D. O’Connor, a Republican. The transcript and record of the proceeding of the Marion County Superior

Court were certified and transmitted. By 1:00 p.m. on Wednesday, March 2, Nora D. VanNatta, the Clerk of the Shelby County Circuit Court, acknowledged receipt of the record. Judge O'Connor assumed jurisdiction and set a pre-trial conference for 8:30 a.m. on Thursday, March 3.³⁰⁵

At the time he received the Bayh residency case in March, 1988, Judge O'Connor was serving his first term as judge. He had been appointed by Governor Orr to fill a vacancy on the bench in 1982 and had been elected to a full six-year term later that year. He would be standing for re-election on the November, 1988 ballot. At the age of 42, this graduate of Notre Dame and the Indiana University Law School at Indianapolis had a reputation for fairness and hard work.

Also in the wake of the Supreme Court's March 1 decision, the state election board announced that it would re-convene at 10:00 a.m. on Wednesday morning, March 2. At that meeting, the board discussed the implications of the Supreme Court's decision and whether, in light of that decision, it should proceed with its investigation into Bayh's eligibility. McNamar argued for an immediate hearing because of the Supreme Court's concern that questions of candidate eligibility be resolved by March 11. "We have substantial doubt that a trial court can bring to a final judgment the question presented to it within that time frame."³⁰⁶

Krahulik then requested that, rather than proceed with its own investigation, the board join with Bayh to ensure that the Shelby County Circuit Court set the matter as

³⁰⁵ Record of Proceedings, Volume I, pp. 151-154, 156-158.

³⁰⁶ Transcript of March 2, 1988 Hearing, Minutes of the Indiana State Election Board, 1983-1989, Indiana State Archives, Commission on Public Records, AAIS #100832, A7387, Box 1, Folder 5, pp. 4-5 (all subsequent non-consecutive references to this document will be referred to as "Transcript of Hearing").

expeditiously as possible and, thereby, “avoid the confusion that would result if this board goes forward and the trial court simultaneously goes forward, with perhaps different opinions being reached in the two different forums and the procedural quagmire that would be encompassed there.” Krahulik expressed Bayh’s intent to waive his right to ask for change of venue and also waive any notice of hearing requirements in order to obtain the earliest possible trial date in the Shelby County Circuit Court.³⁰⁷ Lastly, Krahulik contradicted McNamar’s assertion that March 11 was the operative deadline. Rather, Krahulik argued the board had until Thursday, March 17, before it must act on challenges to declarations of candidacy. Thus, the Shelby County Circuit Court had a little over two weeks to render a decision on the merits.³⁰⁸

Judge Puckett responded to counsels’ arguments by noting that, in his opinion, the Supreme Court’s primary interest was in finding the most timely resolution of the issue. He concluded, therefore, that the board, as a precautionary measure, needed to set the matter for hearing so as to ensure that some decision would be made before any deadline was reached. However, Puckett expressed an open-mindedness about how best to achieve a prompt decision. “If somehow [the Shelby County Circuit Court] can get on a track that will allow us to deal with it or allow them to deal with it in an appropriate way to meet this timeliness consideration of the Supreme Court, I can see that being an appropriate approach.”

Puckett moved that the board set the matter for a hearing on Wednesday, March 9, and Thursday, March 10, with the commitment that the conduct of a hearing be reconsidered

³⁰⁷ Ibid., 7.

³⁰⁸ Ibid., 14-15.

“if there is a report back to us with full cooperation that somehow the court can deal with it in a timely fashion.” Puckett’s intention was “to avoid this race to judgment that the two-track approach might give us.”³⁰⁹ Donald Cox concurred with Puckett saying “I think we would be shirking our responsibility and possibly setting a precedent if we do not hear this.”³¹⁰ Thus, on another party-line vote, Puckett’s motion was approved. The board gave each side until Friday, March 4, to file pre-trial statements along with legal briefs outlining the issues to be presented to the board as well as the anticipated testimony and evidence. Lastly, the board scheduled one final pre-hearing conference for 10:00 a.m. on Monday, March 7.³¹¹

Kevin Butler, the board’s Democratic member, then asked why the board was so insistent on moving forward given the lawyers’ acknowledgment that the court case was in the process of being moved to Shelby County and that no further procedural changes would be requested. Butler’s concern about the process itself was not new. In a previous meeting on February 22, Butler made the observation that, “I think I am tainted, as I think every member of this board is tainted.”³¹² Butler pointed out that not all members of the board were attorneys and he wondered whether they, as a board, were truly qualified to be deciding the “critical legal issues” presented by constitutional interpretation.³¹³

Consistent with this concern, Butler raised questions about the weight that board members were to give the previously submitted legal opinions and interpretations offered by

³⁰⁹ Ibid., 17-19.

³¹⁰ Louisville Courier-Journal, March 3, 1988.

³¹¹ Transcript of Hearing, 17-19.

³¹² Louisville Courier-Journal, March 3, 1988.

³¹³ Transcript of Hearing, 16.

the board's outside or "independent" counsel, particularly now that McNamar's role had changed from that of board advisor to advocate. In an opinion memorandum that had been distributed to the members of the board, McNamar opined that "if the rationale of having a residency requirement is met by a person living elsewhere for a duration of time and indicating his intent is always to return then there is no reason for the drafters of the constitution to put in the requirement" and he cited extensive case law which supported the idea that the term "residency" requires one's physical presence.³¹⁴ McNamar expressly admonished that the memo not be shared with those outside of the board because it was protected by the attorney-client privilege.

Butler directly asked McNamar, "... if I understand your memorandum correctly, David – that the board is to look at the issue of residency in the restrictive sense of habitation as opposed to domicile."³¹⁵ McNamar quickly retreated: "I think that matter may be for your final determination on how you look at it. I am merely, one, giving you my opinion; and, two, giving you the authorities from Indiana, as well as the United States, on how similar questions have been decided. Again, that is your ultimate determination on how you view it. Again, you are perfectly capable of interpreting the law of the State of Indiana. There is a more ultimate authority to say whether you are right or wrong, but you have the initial authority and responsibility to do that."³¹⁶

In spite of this qualification, others acknowledged this conflict. As the Louisville Courier-Journal reported, "if the State Election Board follows its attorney's

³¹⁴ Louisville Courier-Journal, March 3, 1988.

³¹⁵ Transcript of Hearing, 64.

³¹⁶ Ibid., 64-65.

recommendation, it likely will find Evan Bayh ineligible to run for governor.”³¹⁷ The newspaper also pointed out that “since the election board delved into the matter of Bayh’s eligibility on February 18, it has followed all recommendations from McNamar, who was appointed by Attorney General Linley Pearson to represent the board in this case.”³¹⁸

Krahulik then asked, “if that is in the nature of a brief, are we going to exchange?” Puckett suggested that the board provide Bayh’s lawyers with copies of McNamar’s legal analysis. Butler’s questions highlighted the fundamental tension underlying the decision-making responsibility and process now confronting the board. While board members were charged with interpreting the law, to what extent would their decisions be shaped by the legal opinions and authority previously provided to them by their “independent” legal counsel? Abandoning the neutrality often associated with a legal advisor, McNamar had become an advocate, arguing for a particular legal position and for a particular outcome. From that point forward (and arguably, even earlier in the proceeding), McNamar was the principal legal proponent of the position that Bayh was constitutionally unqualified to serve as governor. Election board member Butler observed that, in light of these changing circumstances, the board had now become “prosecutor and judge and jury.”³¹⁹

Toward the end of the board’s hearing, McNamar caused some additional controversy, but this time among members of the press. Prompted by another question from Butler, McNamar declared that the board’s deliberations in this matter would be privately conducted because they were not, in his opinion, subject to the Indiana Open Door law.

³¹⁷ Louisville Courier-Journal, March 3, 1988

³¹⁸ Ibid.

³¹⁹ Transcript of Hearing, p. 68.

McNamar advised the board that, while all aspects of the investigation and hearing would be public, “your deliberations on this particular matter are your deliberations; so that at that point where you decide you want to meet and discuss items in the adjudication itself, the [Administrative Adjudication and Court Review Act] would take precedence over the Open Door Act and you certainly are entitled to do that.”³²⁰

A coalition of news organizations immediately took exception to this opinion. Robert P. Johnstone and Jan M. Carroll, attorneys for the Indianapolis Star and Indianapolis News, warned that a decision reached behind closed doors might not be valid. “I am confident that after Mr. McNamar has had an opportunity to review the state’s Open Door Law and review the court decisions we have sent him, he will conclude the deliberations cannot be held in private Certainly, they don’t want that further complication,” Johnstone said.³²¹ Similarly, Richard W. Cardwell, attorney for the Hoosier State Press Association, warned that “there’s no exception to the Open Door Law in the adjudication process”³²² In response, McNamar insisted that “there comes a point in the decision process where the board has a right – the internal obligation – to close themselves off and say, ‘What does the evidence mean?’ They do need the privacy to reflect among themselves.”³²³ Furthermore, McNamar contended that the election board would, in this regard, be acting no differently than other similarly-situated state administrative agencies. Later that same week, however, a legal showdown with news organizations was averted when McNamar conceded that the board would conduct its discussions in public.

³²⁰ Ibid., 56-57.

³²¹ Indianapolis Star, March 3, 1988.

³²² Indianapolis News, March 3, 1988.

³²³ Ibid.

Early the next day, the parties found themselves in Shelby County Circuit Court. At 8:30 a.m., on Thursday, March 3, Judge O'Connor held a ninety-minute pre-trial conference. Bayh's counsel re-filed a request for a jury trial.³²⁴ The board filed a motion to dismiss the action in its entirety. Reflecting on the series of questions that the Supreme Court had asked during its oral argument, McNamar based his motion on the fact that, since the state election board had yet to make any ruling in the matter, it had nothing to defend. McNamar said that the election board should be allowed to reach its own decision on the Bayh question before a trial began.

McNamar's motion drew the immediate ire of Krahulik who argued that McNamar was violating the agreement that the parties had reached before the election board the previous evening when the commitment was made, in good faith, to work together to see if the court could hear the matter earlier than the date that the board had already set. Krahulik argued that McNamar's motion was intended to accomplish little but slow down the process in court.³²⁵ McNamar also moved to strike Bayh's jury trial request, arguing that Bayh was not entitled to one. Judge O'Connor set both of the board's motions for legal argument the next day, March 4, at 8:30 a.m.

Judge O'Connor also informed the parties that his court's docket was filled with previously scheduled criminal proceedings. The earliest the court's calendar would allow for a "first choice" jury trial was Monday, March 14. O'Connor gave the parties a "second choice" setting for Tuesday, March 8. A "first choice" setting ensures that the trial will be heard that particular day. A "second choice" setting holds out the potential of a trial date,

³²⁴ Record of Proceedings, Volume I, pp. 161-165.

³²⁵ Indianapolis Star, March 4, 1988.

but makes the case subject to some other matter previously calendared. In the alternative, a bench trial (a trial decided by judge and not jury) could be scheduled to begin on Friday, March 11.³²⁶ If the parties would accept a bench trial, Judge O'Connor expressed his willingness to hear testimony through Saturday, March 12 and Sunday, March 13, if need be. Even with these accommodations, it appeared as if the board would win the race to judgment since it was scheduled to begin its hearing on Wednesday, March 9, and the earliest that the Shelby County Circuit Court would be sure to hear the case was either Friday, March 11, or Monday, March 14, depending on how the court ruled on the issue of whether Bayh was entitled to a jury trial. McNamar confirmed that the board intended to go forward with its hearing because it was the earliest scheduled. "The (trial) dates we have at this point would be after the board decides," McNamar said.³²⁷

On Friday, March 4, the parties were back in the Shelby County Circuit Court where Judge O'Connor heard oral argument on Bayh's request for a jury trial and on the board's motion to dismiss. After argument, O'Connor denied the board's motion and asserted that the board should remain a defendant in the case. "It's more than abundantly clear there is a significant controversy' over Bayh, O'Connor said. 'The people in this state certainly do have an interest in an early resolution.'"³²⁸ Judge O'Connor took Bayh's jury trial request under advisement and indicated that he would issue a decision no later than Monday.

After the hearing, however, Kraulik offered to withdraw Bayh's request for a jury trial if the board agreed in return to halt its investigation and postpone its March 9 hearing.

³²⁶ Record of Proceedings, Volume I, p. 159.

³²⁷ Indianapolis News, March 3, 1988.

³²⁸ Ibid., March 4, 1988.

Bayh explained that he authorized Krahulik's offer because the election board was "dragging its feet" and he wanted to speed up the process. "As much as I've wanted a jury trial, they've forced us to give up our request."³²⁹ If required to choose, Bayh preferred letting a trial judge decide the issues rather than the election board. Because the board was not scheduled to meet again until March 7, McNamar claimed that he was not authorized to respond to Bayh's offer. However, McNamar did express his own lack of enthusiasm for the offer. "I don't think they're giving up anything," because, in his opinion, the court would find that Bayh was not entitled to a jury trial anyway.³³⁰

Meanwhile, in Indianapolis, at 10:00 a.m. in the office of the secretary of state, Bayh formally filed his declaration of candidacy for governor, along with all supporting petitions. Just before the close of business on the previous evening, O'Bannon had done the same thing. As previously noted, O'Bannon's filing for governor was encouraged by Bayh as a "precautionary measure." Bayh said, "if the effort to keep me off the ballot is successful, then I think Frank is the best candidate."³³¹

Later that afternoon, in the offices of Bayh's attorneys, McNamar took Bayh's deposition.³³² McNamar interrogated Bayh for almost three hours. Bayh was asked questions about his "residency intentions during 1983 and 1984."³³³ He was also asked to comment on a variety of different documents, including his tax returns, driver's licenses, personal correspondence, voter registration, professional memberships, and political

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Record of Proceedings, Volume II, pp. 218-298.

³³³ Indianapolis News, March 5, 1988.

activity. McNamar focused a series of questions as to why Bayh amended his 1983 Indiana state tax return just weeks before formally announcing his candidacy for governor. McNamar questioned Bayh about taking a deduction for moving expenses when he moved to Washington, D.C., to begin his work with the law firm of Hogan & Hartson in the summer of 1983. McNamar also established that Bayh had driven a BMW while employed in Washington, D.C., and that he had never served in the military. In spite of the deposition's length, Bayh's lawyers claimed that very little was uncovered that was not previously known. "There was nothing surprising about it," Krahulik said. "It was everything you've heard about."³³⁴

As another weekend approached, editorial writers and political columnists analyzed the previous week's activities. Several newspapers declared victory in their insistence that board deliberations be open and accessible. Pat Traub of the Indianapolis Star reviewed the board's intention to conduct closed deliberative conferences and pointedly declared, "it's not the bureaucrats' government. It's ours."³³⁵ The Indianapolis News was even more direct, characterizing the state election board's position as "nonsense." "How can election board members ask the people of Indiana to believe they acted openly and fairly if the board's deliberations take place behind closed doors."³³⁶ Just two days earlier, this same editorial page had strongly supported the state election board's desire to press forward with its investigation of Bayh. "An axiom of jurisprudence is that courts should defer to legislative and executive agencies unless there are clear and compelling reasons to do otherwise. If

³³⁴ Ibid.

³³⁵ Indianapolis Star, March 6, 1988.

³³⁶ Indianapolis News, March 5, 1988.

Bayh believed he was not given a fair hearing by the Election Board, or if the Election Board was dragging its heels or delaying a decision, obviously Bayh should have the recourse of going to the courts. But that has not been shown to be the case.”³³⁷ Obviously, while the editorial board had supported the state election board’s jurisdiction to hear the case, when it became apparent how they intended to do that, their editorial tone changed appreciably.

Morris D. Wildey, the Indianapolis Star’s reporter on the economy, expressed his frustration with the time being spent on the residency challenge. In his Sunday column entitled, “Campaign focus should be on jobs,” Wildey wrote that “until the nonsense about whether Secretary of State Evan Bayh meets the state’s residency requirements to run for governor is cleared up” there would not be a serious substantive discussion on the issue that was, in his opinion, the most critical to voters – jobs. “For those who are interested in things such as who’s the best candidate, this whole mess seems ridiculous.”³³⁸ Also for the Indianapolis Star, Traub observed that Durnil’s own poll “shows that about half the state’s voters are familiar with the issue. Not even some state politicians in office for eight years are known to the voters that well.”³³⁹

In addition, Mary Dieter, Indianapolis bureau chief for the Louisville Courier-Journal, took the state election board to task for a series of decisions that, in her opinion, “smacks of a railroad job, carefully engineered and scripted to ensure that Bayh’s name doesn’t appear on the November ballot.” Specifically, Dieter challenged McNamar’s self-

³³⁷ Ibid., March 3, 1988.

³³⁸ Indianapolis Star, March 6, 1988.

³³⁹ Ibid.

proclaimed role of simply protecting “the integrity of the system” by pointing out that he had “pulled every legal maneuver he can find to stall a lawsuit filed to settle the matter, instead of promoting the election board’s efforts to decide it.” Dieter also found disingenuous McNamar’s assertions that “until the board makes a decision and I am asked to defend that decision, I really don’t have a position on this.”³⁴⁰

WTHR television station in Indianapolis later reported that, immediately prior to the weekend of March 4 to 6, Bayh’s campaign called television and radio stations throughout Indiana and asked about the availability for purchase of advertising time in the coming week – a fact that would certainly be picked up by the Republicans. According to WTHR, Bayh’s campaign planned to launch a comprehensive statewide media blitz against the Republicans if the state election board went forward with its hearing.³⁴¹ Bayh was prepared to bypass the process controlled by the politicians and make his case directly to the people of Indiana by way of television. Spending precious financial resources so early in a campaign was unorthodox and risky. However, in the end, if Bayh were right about the partisan motivation of the election board, it might be the only remaining available option.

On Monday, March 7, at 10:00 a.m., the election board convened its previously scheduled pre-hearing conference and Judge Puckett stunned the audience by announcing that, after consulting with Governor Orr the previous day, he was prepared to recommend that the board suspend its investigation and defer to the Shelby County Circuit Court. Puckett said his recommendation was based solely on the fact that Bayh’s offer to withdraw his request for a jury trial meant that Judge O’Connor would begin a bench trial on Friday,

³⁴⁰ Louisville Courier-Journal, March 6, 1988.

³⁴¹ Television documentary, “The Making of a Governor”, WTHR-TV, January 9, 1989.

March 11, only two days after the board had scheduled its hearing to begin. “‘I think it’s chaotic’ for both the board and court to proceed on the Bayh matter ‘It must look ridiculous to the people of this state.’”³⁴² As a result, the board unanimously agreed to drop its March 9 hearing date.

What, if any, effect that the threatened media blitz had on this decision is purely a matter of speculation. What is clear, however, is that the Republicans appreciated how precarious their position was becoming in the eyes of the public. Irrespective of the Republican motivation, the decision made by Judge Puckett (and apparently agreed to by Governor Orr) to let the court go first, was the single and fundamental turning point in the Bayh residency litigation. Up to that time, the debate was over the appropriate forum. Now the debate shifted to the merits of the case and in the forum that Bayh had wanted all along. Almost certain defeat had been avoided. While the outcome was still unclear, Bayh’s legal and political fortunes were thereafter inalterably changed.

Governor Orr, who had prompted and insisted on the board’s action less than three weeks before, praised the board’s decision to defer to the court: “I am pleased by the action the board took. It is clear evidence that we made the right decision to have the state election board begin this process because it has forced an early resolution of this matter.”³⁴³ He insisted that the board’s decision was not motivated by the potential political backlash. “Those who suggest that Republicans were trying to cut their losses ‘would be wrong,’” the governor said.³⁴⁴

³⁴² [Indianapolis News](#), March 7, 1988.

³⁴³ [Indianapolis Star](#), March 8, 1988.

³⁴⁴ [Louisville Courier-Journal](#), March 8, 1988.

Bayh, too, was pleased by the board's decision. "We get a hearing before a judge we think is fair So, a week from today it will all be decided. I think that's good news for everybody."³⁴⁵ Bayh's reference to the court's timetable was based on Judge O'Connor's assurance that a bench trial would be scheduled for Friday and, if necessary, Saturday, and that O'Connor would attempt to issue his ruling by Monday, March 14. The election board did warn that, if Judge O'Connor were unable to adhere to that schedule, they would resume jurisdiction over the matter. However, according to Puckett, once he heard that Judge O'Connor's calendar would allow him to conduct a bench trial before the end of the week, he was convinced that it would be better for a ruling to come from the court.

Interestingly, at Governor Orr's request, the board authorized McNamar to take an immediate appeal of Judge O'Connor's decision, whatever it was, to the Indiana Supreme Court. Orr said, "it would be in Evan Bayh's best interest' for an appeal to be made 'on a totally impartial basis, a non-political basis.'"³⁴⁶ While indicating that he was not surprised by the governor's call for an appeal, Bayh observed "I would never be one to call for an appeal of a court decision before I've read it."³⁴⁷ By the end of the board's twenty minute hearing, McNamar and Krahulik had agreed to cooperate in seeking an expedited appeal of O'Connor's decision directly to the Supreme Court.³⁴⁸

Both sides spent the rest of the week preparing for trial. McNamar repeated the assertion that, because the board had never adopted a formal position in the case, his role in court would be limited to testing Bayh's evidence. McNamar also argued that Bayh bore

³⁴⁵ Indianapolis Star, March 8, 1988.

³⁴⁶ Louisville Courier-Journal, March 8, 1988.

³⁴⁷ Ibid.

³⁴⁸ Indianapolis Star, March 8, 1988.

the burden of proof in establishing that he met the constitutional residency requirements. “He made the allegation,” McNamar said. “He should prove it.”³⁴⁹ The board was prepared to argue in the alternative. First, McNamar asserted that a plain reading of the language of the Constitution required uninterrupted physical presence in the state for five years prior to the election. Since it was uncontraverted that Bayh could not meet that standard, McNamar was confident that the court would find Bayh ineligible. However, if the standard were Bayh’s intent as demonstrated by outward acts, McNamar intended to challenge the evidence presented by Bayh. Taken as a whole, McNamar argued that the evidence with respect to intent would show Bayh to be at best non-committal about his residency and, at worst, not credible. McNamar believed that the facts and the law would prove Bayh’s ineligibility.

Bayh accepted that he bore the burden of proving his case. “I feel the facts are overwhelming,” Bayh said. “It seems to me the burden of proof has been on me from the beginning. I’ve never believed this was a legitimate issue.”³⁵⁰ Bayh’s lawyers planned to establish through evidence and testimony an unbroken expression of intent on Bayh’s part to maintain his residency in Indiana. Krahulik explained that “Evan, as the son of an Indiana senator, was an Indiana resident And he is (a resident) until he, as an adult, changes it. And he, as an adult, has never done that.”³⁵¹ Krahulik argued that evidence of Bayh’s acts would show by a preponderance that his intent to remain a resident was manifest and believable.³⁵²

³⁴⁹ Indianapolis News, March 8, 1988.

³⁵⁰ Ibid.

³⁵¹ Ibid., March 10, 1988.

³⁵² Ibid.

Mutz did not comment in the week leading up to trial. His campaign manager, Michael D. McDaniel, simply repeated that Bayh's eligibility was "a question we believe should be heard."³⁵³ Durnil remained adamant, however, that the trial would find Bayh ineligible because he did not keep his residency when he moved to Washington, D.C. "It's not what you say now, it's what you did then," he argued. Durnil admitted, though, that he would be pleased just to have the matter resolved. "The question wasn't 'if' we have to go through this, Durnil said. It was 'when' we have to go through this."³⁵⁴

³⁵³ Ibid.

³⁵⁴ Ibid.

Chapter Six

THE TRIAL

“The Court hereby FINDS AND ADJUDGES that Plaintiff, Evan Bayh, is qualified, as prescribed by Article 5, Section 7, of the constitution of the State of Indiana, to be eligible to hold the office of Governor of the State of Indiana.”

Opinion of the Shelby County Circuit Court
March 14, 1988

On Friday morning, March 11, in the Shelby County Circuit Court, the long-awaited residency trial of Evan Bayh began. Bayh entered the courtroom at 8:30 a.m., accompanied by his spouse, Susan, and, upon seeing all the photographers, observed, “my goodness, an active day in Shelby County.”³⁵⁵ With Judge O’Connor presiding, a full gallery of spectators had gathered to observe the proceedings – over half of whom were members of the statewide press corps. After an opening statement by Krahulik, McNamar moved to separate all witnesses so they could not listen to each other’s testimony. The motion was granted.

McNamar then offered to introduce into evidence 58 documents, ranging from Bayh’s tax returns to his personnel file from the law firm of Hogan & Hartson in Washington, D.C. Bayh’s lawyers objected to the mass introduction of exhibits, arguing that they were entitled to preserve the opportunity to object to specific items on grounds of relevance or hearsay. McNamar claimed that the introduction of all documents at the beginning of trial would expedite matters and would allow members of the press corps to follow the testimony more closely. Judge O’Connor deferred ruling on the admissibility of

³⁵⁵ Indianapolis Star, March 11, 1988.

exhibits until such evidence was introduced through a particular witness. With that, McNamar surrendered his opportunity to make an opening statement. “Judge, the documents will speak for themselves, and speaking for the State Election Board, we’re ready to proceed.”³⁵⁶

Bayh called Sherry Perk Reider as his first witness. Ms. Reider, who described herself as a lifelong friend of Bayh, testified that she and her husband, Jeff, spent a considerable amount of time with Bayh while he was clerking in Indianapolis for U.S. District Court Judge James Noland from March, 1982 through March, 1983. While socializing together, Bayh discussed his personal goals and explained to the Reiders that, at the end of his clerkship, he wanted to obtain some “practical, hands-on kind of experience in a large Washington, D.C. firm.” Bayh told the couple, however, that this would only be a temporary move and that he eventually wanted to return to Indiana “to pursue a career in public service.” Reider also testified that, after having moved to Washington, Bayh came back to Indiana often in order to attend political functions. At no point did Bayh ever indicate that he wanted to sever ties with Indiana.³⁵⁷

Bayh next called Robert D. MacGill, a lawyer and friend who characterized himself as an active Republican. MacGill testified that he had first met Bayh while they were undergraduates at Indiana University and that the two had enjoyed a close friendship since that time. During Bayh’s clerkship with Judge Noland, Bayh and MacGill socialized often and, in the course of doing so, Bayh shared with MacGill some aspects of the decision-making that Bayh was facing as he considered his next career steps.

³⁵⁶ Record of Proceedings, Volume III, p. 355.

³⁵⁷ Ibid., Volume III, pp. 358, 361.

MacGill explained that, during the fall of 1982 and early winter of 1983, Bayh expressed to MacGill his desire to one day practice law with his father. In early 1981, after leaving the United States Senate, Bayh's father had helped found the Indianapolis law firm, Bayh, Tabbert & Capehart. Yet, Bayh told MacGill that, for a period of time, Bayh also wanted to avoid his father's shadow and seek opportunities that would allow him to obtain "major litigation experience."³⁵⁸ While Bayh considered joining several Indianapolis law firms, he ultimately accepted employment with Hogan & Hartson in Washington, because he felt that going to work for another firm in Indianapolis would put him in competition with his father. Additionally, MacGill testified that, to his knowledge, Washington law firms viewed short-term employment commitments as "ordinary" and "the general rule, not the exception."³⁵⁹ Eventually, Bayh wanted to return to Indiana, practice law with his father, and pursue a career in public life. According to MacGill, that was why Bayh sat for the Indiana bar examination in February of 1983 in the final months of his clerkship with Judge Noland. MacGill testified that Bayh returned to Indiana often while working in Washington. He also recalled an occasion in April, 1984, when he had dinner with Bayh while in Washington on business. Bayh expressed how anxious he was to return to Indiana.³⁶⁰

During his cross-examination of MacGill, McNamar established that, unknown to MacGill, Bayh had written a letter of acceptance of employment to several partners at Hogan & Hartson on October 15, 1982. In that letter, Bayh expressed his interest in

³⁵⁸ *Ibid.*, Volume III, p. 375.

³⁵⁹ *Ibid.*, Volume III, p. 377.

³⁶⁰ *Ibid.*, Volume III, p. 383.

establishing a “lengthy and mutually beneficial relationship” with that firm.³⁶¹ This fact stood in contrast to MacGill’s belief that Bayh remained undecided about his future employment throughout 1982 and into the early winter of 1983. McNamar also challenged the suggestion that Bayh wanted to avoid competing with his father by pointing out that Bayh’s father worked out of the Washington office of Bayh, Tabbert & Capehart.³⁶²

Bayh next called United States District Court Judge James E. Noland. Judge Noland testified that, while Bayh clerked for him, the two often talked about Bayh’s career plans. Noland was aware that Bayh was contemplating offers from several Indianapolis firms, but that he had refrained from accepting them because of his desire to one day practice law with his father. Based on his conversations with Bayh, Noland believed that Bayh’s acceptance of employment with Hogan & Hartson was “temporary” and “for a period of time before he returned to the Indianapolis office of Bayh, Tabbert & Capehart.”³⁶³

During cross-examination, McNamar established that Judge Noland had been appointed to the federal bench in 1966 by President Lyndon Johnson, a Democrat, with support from Senator Birch Bayh. In response to McNamar’s questions, Noland drew laughter from the crowd when he conceded, “I think I used to be a Democrat, yes.” McNamar also called to Judge Noland’s attention Bayh’s personal history statement, submitted to the court upon beginning his clerkship, on which Bayh listed his present address as “2919 Garfield Street, Washington, D.C.” Noland responded that he understood that to be the address of Bayh’s father.³⁶⁴

³⁶¹ *Ibid.*, Volume III, p. 394.

³⁶² *Ibid.*, Volume III, p. 396.

³⁶³ *Ibid.*, Volume III, pp. 406-407.

³⁶⁴ *Ibid.*, Volume III, pp. 408, 411.

Bayh next called Don Tabbert, a Republican, a former United States Attorney, and a founding partner of Bayh, Tabbert & Capehart. Tabbert testified that, at the end of Bayh's clerkship with Judge Noland, Tabbert recruited Bayh to join the firm. Bayh told Tabbert that he wanted "to practice law with a firm that would give me the opportunity for substantial expertise, more than what Bayh, Tabbert & Capehart could offer at the time." Bayh expressed to Tabbert that he intended to return to Indiana after a short period and join his father's firm. Bayh asked Tabbert if his decision to go to Washington would diminish his opportunity to return to practice there. Tabbert assured him that "if you want to come back at anytime, if you go away and don't practice with us immediately, you know there's a place waiting for you."³⁶⁵

McNamar, during cross-examination, established that Tabbert, like MacGill, was unaware that Bayh had already accepted employment with Hogan & Hartson when Tabbert was recruiting him. Tabbert also conceded that his law firm would not be interested in hiring associate lawyers for periods of short duration. On re-direct, Tabbert acknowledged that he was unaware of how the hiring committees at Washington law firms viewed that issue. On re-cross, Tabbert admitted that, although Bayh had expressed a desire to return to Indiana, he had not established any certain date of return.³⁶⁶

Former United States Congressman Paul G. Rogers was called as Bayh's next witness. Rogers was, at the time, a senior partner at Hogan & Hartson. Rogers testified that employing associates for temporary periods of one or two years was "not unusual in our firm at all." Rogers observed, "we try to get outstanding young lawyers ... we think they're

³⁶⁵ *Ibid.*, Volume III, pp. 425, 426.

³⁶⁶ *Ibid.*, Volume III, p. 451.

competent when they come in And so that association of doing business with wherever they may go, with that law firm, that association, we think, is good for the future of our firm, and it's proved to be so." Rogers recalled that Bayh had clerked at Hogan & Hartson during a summer while he was still in law school. After Bayh's clerkship with Judge Noland, Rogers encouraged him to "come up here for a little while, and then you'll get this experience, and then you can go on and run for office." Rogers also remembered Bayh returning to Indiana often during the time he was employed in Washington.³⁶⁷

Rogers' testimony was reinforced by Bayh's next witness, Daniel Cohen, who was also an associate lawyer at Hogan & Hartson during Bayh's tenure there. In fact, Cohen's office was located right next door to Bayh's and the two talked frequently about their futures. Cohen testified it was clear from conversations they shared that Bayh "had no intention of staying in Washington very long, and had every intention of moving back to Indiana and running for, either running for office or doing something in public service."³⁶⁸ Cohen also reiterated Rogers' previous testimony that turnover among associates at Hogan & Hartson was very high. Several associates, including Cohen himself, worked with the firm for a short while and then returned to their homes to begin new chapters in their careers.

Bayh next called Judge Robert H. Staton of the Indiana Court of Appeals, who testified that he had arranged a private swearing-in ceremony for Bayh in the chambers of the Indiana Supreme Court on August 26, 1983, upon Bayh's successful completion of the

³⁶⁷ *Ibid.*, Volume III, pp. 455-456, 459, 461.

³⁶⁸ *Ibid.*, Volume III, pp. 517-518.

Indiana bar examination.³⁶⁹ Judge Staton had initiated the arrangements when he found out that Bayh had missed the regular admissions ceremony. Staton said that, in conversations the two shared, Bayh made clear that his work in Washington was temporary and that he intended to return to Indiana to practice law.

Staton also testified that he had signed Bayh's Affidavit of Intent to Practice in Support of Application for Admission, upon which Bayh had affirmed under oath that he promised "within two years of the date of my application, to engage actively in the practice of law in the State of Indiana."³⁷⁰ On cross-examination, McNamar established that, at the time he signed Bayh's affidavit, Staton was aware that Bayh was living and working in Washington, D.C. McNamar later argued that such affidavits are unnecessary unless the applicant "is not a bona fide resident of Indiana."³⁷¹ According to McNamar, the fact that Bayh signed this "non-resident affidavit" clearly established that Bayh conceded he was not a resident of the state, but merely intended to return within two years.³⁷² At the close of Staton's testimony, Judge O'Connor adjourned for lunch and informed the parties that testimony would resume at 1:15 p.m. that afternoon.

In the afternoon, Bayh took the witness stand to testify in his own behalf. Krahulik began his questioning of Bayh by outlining Bayh's personal history. Bayh testified that he was born in Terre Haute and had always considered his family's farm to be his residence during his father's years in the United States Senate. For that reason, in 1974, Bayh registered to vote and registered for the Selective Service in Vigo County. Bayh then

³⁶⁹ Ibid., Volume III, p. 525.

³⁷⁰ Ibid., Volume III, p. 523-524.

³⁷¹ Louisville Courier-Journal, March 12, 1988.

³⁷² Record of Proceedings, Volume I, p. 15.

attended Indiana University as an undergraduate and paid in-state tuition. He decided to pursue his law studies at the University of Virginia where he paid out-of-state tuition. While in law school, during one summer, he clerked at Hogan & Hartson and became acquainted with the lawyers there. Upon his graduation from law school in January, 1982, he sat for the Washington, D.C. bar examination. Bayh explained that he wanted to “keep the option open of working for Hogan & Hartson, but also, from my father’s experience, I saw that a career in public service ... that it was important to be admitted to the D.C. bar and to, uh, be familiar with administrative law there”³⁷³

Bayh then responded to questions about his clerkship with Judge Noland from March 1982 to March 1983. When asked by Krahulik why he had not changed the Washington D.C., license plates on his car during this time, Bayh responded, “frankly, it never occurred to me.” Bayh explained that, while clerking with Judge Noland, he interviewed with three Indianapolis law firms for employment but decided on accepting Hogan & Hartson’s offer for a variety of reasons. First, he was interested in the high quality of legal experience that Hogan & Hartson would afford him. Secondly, he wanted to be independent from his father. Finally, he chose to go to Washington because he did not want to directly compete with his father’s law firm. “I wanted to practice at a law firm where it didn’t matter my last name was Bayh. My last name may [as] well have been Smith or Jones.”³⁷⁴

Bayh asserted that his employment with Hogan & Hartson was intended to be temporary in duration although he had written to lawyers expressing his interest in

³⁷³ *Ibid.*, Volume III, p. 556.

³⁷⁴ *Ibid.*, Volume III, pp. 558, 560.

establishing a “lengthy and mutually beneficial relationship.” Bayh explained that he fully intended to maintain a good relationship with the members of that law firm for the duration of his legal career irrespective of how long he remained in their employ. “I consider that I have had and still have a long and mutually beneficial relationship with men like Paul Rogers and friends of mine like Dan Cohen and some of the others. As a matter of fact, after I left Hogan & Hartson, two members of that law firm served as groomsmen in my wedding and I still talk on the phone with some members of the firm and consider that many of them are still good friends of mine.”³⁷⁵

Bayh testified that, even after his October 15, 1982 letter of acceptance to Hogan & Hartson, he applied on November 8, 1982, to take the Indiana bar examination and sat for the examination in February of 1983. At the end of his clerkship with Judge Noland, Bayh traveled extensively for four months and then went to Washington to begin work. He never intended to make Washington his home.³⁷⁶

As further evidence of this intent, Bayh recalled the return trips he made to Indiana while working for Hogan & Hartson. In August 1983, he was sworn in as a member of the Indiana bar. On that same trip, he attended the Indiana Democratic Editorial Association’s (“IDEA”) annual meeting in French Lick. In April 1984, he attended the Indiana Democratic Party’s annual dinner in Indianapolis. In June 1984, he returned for the Indiana Democratic Party’s State Convention. In August of 1984, he once again returned to the IDEA Convention in French Lick. And finally, in October 1984, he took a leave of absence

³⁷⁵ *Ibid.*, Volume III, p. 562.

³⁷⁶ *Ibid.*, Volume III, p. 571.

from Hogan & Hartson and came back to Indiana for several weeks to campaign on behalf of the statewide Democratic ticket.

While he worked in Washington, D.C., Bayh continuously subscribed to the Indianapolis Star to keep abreast of what was happening in Indiana, he paid dues to join the Indiana State Bar Association, and he paid the required Indiana Supreme Court disciplinary fee. In May 1984, Bayh cast an absentee ballot in the Indiana primary. That same month, Bayh was approached by Bill Moreau, then a representative of the campaign of Democratic gubernatorial nominee Wayne Townsend, and was asked if he would join the statewide ticket as the Democratic nominee for attorney general. Bayh considered the offer, but, in the end, he declined. He recalled observing that “in a year or two when I have married, settled and been tempered further – both personally and professionally – by life’s experience, then with an open heart and a clear conscience the answer may be yes. But not today.”³⁷⁷

Bayh acknowledged that in both 1983 and 1984, he filed Indiana state income tax returns as a “part-year resident.” Specifically, in 1983, Bayh paid Indiana state income tax on income derived from his employment with Judge Noland. In 1984, Bayh paid state tax on income earned as an associate lawyer with Bayh, Tabbert & Capehart during the final month of that year. He also filed income tax returns in the District of Columbia for 1983 and 1984 reporting the income he earned from Hogan & Hartson.

Bayh explained that he did all of this because that was what he thought he was supposed to do. “It is my understanding that the appropriate way to handle a situation like this was to take the income that you earned in one jurisdiction and pay tax on that in that jurisdiction and take the income you earned in the second jurisdiction and pay income tax on

³⁷⁷ Ibid., Volume III, p. 590-3.

that income in the other jurisdiction. And that the appropriate way to handle that was to get a part-year resident form that allowed for the bifurcated reporting of income and to handle it that way.”³⁷⁸ In neither year did Bayh intend the “part-year resident” declaration on his tax forms to be “an expression of intent to change domicile.”³⁷⁹ While the filing of “part-year resident” state income tax returns by Bayh garnered the lion’s share of attention, the fact that he even filed state tax returns during the years in question distinguished him from some of the other individuals profiled in analogous “residency” cases. Neither Kit Bond in Missouri nor Pug Ravenel in South Carolina filed any state income tax returns at all during the durational residency period at issue in their cases. Bond clearly generated taxable income within Missouri during the years when he was living outside the state. Although he failed to file any state tax returns for any of those years, the court still found him eligible.

On cross-examination, McNamar attacked Bayh’s assertion that he had always considered Indiana his home. Bayh admitted that he had never owned real estate in Indiana prior to June 1985, that he had not possessed an Indiana’s driver’s license until March 1986, and that he did not obtain Indiana license plates for any vehicles he owned until 1986.³⁸⁰ And while Bayh had entered into several leases for various apartments in and around the Washington, D.C., area over the years, Bayh had never even leased real estate in Indiana. McNamar argued that, in his application to take the bar examination, Bayh applied as a “non-resident” because he requested the application be sent to Marion County, the county where he intended to practice, rather than Vigo County, the county where he claimed a

³⁷⁸ *Ibid.*, Volume III, p. 601.

³⁷⁹ *Ibid.*, Volume III, pp. 601, 605.

³⁸⁰ *Ibid.*, Volume III, pp. 613.

voting residence. According to McNamar, if the county where you send the application is not the county of your claimed voting residence, then you are conclusively making application as a “non-resident.”³⁸¹

McNamar focused his remaining cross-examination on several documents – Bayh’s acceptance letter of October 15, 1982, to Hogan & Hartson wherein he referred to his interest in establishing a “lengthy and mutually beneficial relationship” and his income tax returns. Besides identifying himself as a “part-year resident” for the payment of 1983 and 1984 Indiana state income tax, Bayh admitted mailing his 1983 federal income tax return to the Internal Revenue Service’s processing center in Philadelphia. McNamar argued that this was a legally significant point. Income tax returns for residents of Washington, D.C., were sent to Philadelphia. Indiana “residents” sent their federal income tax returns to a different IRS processing center.³⁸² Bayh also acknowledged that, in 1983, he took a deduction on his federal income tax return for the cost of moving to Washington, “something that is allowable only if a move is considered permanent.”³⁸³ Under federal tax law, one is not eligible for the moving expense deduction if the move is only temporary. McNamar also later pointed out that Bayh should not have taken the deduction under any circumstance because it is not allowed when one moves out of Indiana.³⁸⁴ McNamar also questioned Bayh about the several documents listing Washington as his “current” or “present” address. After two and one half hours on the witness stand, Bayh was finally excused. Krahulik declared that Bayh would rest his case.

³⁸¹ Ibid., Volume I, p. 15.

³⁸² Louisville Courier-Journal, March 12, 1988.

³⁸³ Ibid.

³⁸⁴ Record of Proceedings, Volume I, p. 13.

When asked by the court to proceed with the case on behalf of the state election board, McNamar offered only a statement. He asked the court to recognize the board's role as the administrative agency of state government charged with the responsibility of determining the validity of declarations of candidacy, that Governor Orr had asked the board to investigate Bayh's declaration, and that the board had deferred its jurisdiction to the court. McNamar then declared, to the extent that those matters were stipulated to, "the documents that have been presented into evidence in the Plaintiff's case in chief will constitute the Defendant's case in chief, and at this time, your Honor, we rest."³⁸⁵ The court informed the parties that it would take the matter under advisement. After that, court was adjourned.

The trial itself had lasted only one day. Bayh presented a total of eight witnesses, including himself. McNamar, on behalf of the state election board, offered no witnesses and no additional testimony beyond those documents entered into evidence through Bayh's witnesses. At the conclusion of the trial, Bayh noted the absence of evidence presented on behalf of the state election board and commented, "I thought that's about all there was to their case from the beginning."³⁸⁶ McNamar disagreed. "The smoking gun was the documents from Hogan & Hartson in Washington. They clearly show his intentions" – a reference to the letters from Bayh declaring his interest in a lengthy and mutually beneficial relationship.³⁸⁷ Furthermore, McNamar pointed to MacGill and Tabbert's admissions that Bayh had led them to believe that he had not made up his mind regarding future employment when, in fact, he had already accepted employment. "Intention is too slippery

³⁸⁵ Record of Proceedings, Volume III, p. 680.

³⁸⁶ Indianapolis Star, March 12, 1988.

³⁸⁷ Ibid.

an item. One must look to the acts of the individual.”³⁸⁸ For his part, Judge O’Connor left the courthouse late that Friday afternoon and informed lingering reporters, “I’ll be here the better part of the weekend.”³⁸⁹

At 9:15 a.m. on the morning of Monday, March 14, Judge O’Connor issued his opinion, declaring that Evan Bayh “meets all constitutional qualifications to hold the office of governor of the State of Indiana as prescribed by Article 5, Section 7, of the Indiana Constitution.”³⁹⁰ O’Connor’s opinion, ten pages in length, included 35 individual findings of fact that he had adduced from the testimony presented the previous Friday. Specifically, O’Connor made findings regarding Bayh’s biographical history from birth to present day and reiterated the facts concerning Bayh’s actions which made manifest his intent, as well as testimony presented by other witnesses regarding conversations with Bayh. The court’s findings of fact also acknowledged and incorporated evidence emphasized by and relied on by McNamar, such as Bayh’s October 15, 1982, letter of acceptance of employment with Hogan & Hartson, Bayh’s 1983 and 1984 Indiana “non-resident” tax returns, and Bayh’s “moving deduction” for expenses associated with his move to Washington in 1983.

The court also made 23 separate conclusions of law which served as the basis for its ultimate judgment. The court began by recognizing “domicile” as the threshold legal principle presented by the case. The court acknowledged that the term “domicile” was not used in the Indiana constitution. However, it found that the term “resident,” as used in Article 5, Section 7, should be considered as “requiring the same degree of permanent

³⁸⁸ Louisville Courier-Journal, March 12, 1988.

³⁸⁹ Indianapolis News, March 12, 1988.

³⁹⁰ Record of Proceedings, Volume II, p. 312.

attachment to the State as is usually recognized in the definition of the word ‘domicile.’”³⁹¹ In fact, the court concluded that the two terms could be used interchangeably. In support of this conclusion, the court cited the language and rationale contained in the Indiana Supreme Court’s decision in the Evrard case.

The court then defined domicile to mean that place “where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning.”³⁹² Furthermore, in order to change one’s domicile a person must affirmatively abandon it, acquire a new residence in another place and go there with the intent to remain and not return to his/her old domicile. Judge O’Connor then described certain assumptions in law about “domicile”: (1) domicile is acquired at birth, (2) an unemancipated minor’s domicile is that of his/her parents, (3) domicile is not lost if you are away on business of the state, and (4) domicile is not lost if, as a student, you go away to school. Thus, Indiana was Bayh’s domicile by virtue of birth and was not lost simply because he grew up in Washington, D.C., while his father served in the United States Senate nor was it lost by his attending law school at the University of Virginia.

After emancipation, Bayh’s domicile would, therefore, be determined by Bayh’s intent, manifest by his acts and conduct. That is to say, his conduct would determine whether he abandoned his domicile and acquired a new one in a new place. O’Connor then held that “personal presence from one’s place of domicile is insufficient to change one’s domicile.” Therefore, O’Connor rejected the “physical presence” test. Rather, the court ruled that “one must move to another place with the intent to make it his home and without

³⁹¹ Ibid., Volume II, p. 310.

³⁹² Ibid.

the intention of returning to this home as such.” The court couched its conclusion in negative, not affirmative terms. The judge said he was unable to conclude “that Plaintiff formed the unequivocal intent to abandon his Vigo County, Indiana, domicile and create a new domicile in the District of Columbia with the intent to remain thereafter and not to return to his Indiana domicile.”³⁹³

The decision ensured that Bayh’s name would at least appear on the ballot in the Democratic Party’s primary for governor on May 3, because the decision had been issued in advance of the ballot printing deadline imposed by Indiana law. Upon hearing the news of Judge O’Connor’s decision, Bayh joked that “it looks like I am not going to have to apply for my green card after all.”³⁹⁴ On a more serious note, Bayh expressed his hope that “we can now deal with the issues (of the governor’s race) and put these peripheral matters behind us.”³⁹⁵ Bayh was hopeful that he would not have to endure the additional process of appeal.

Interestingly, Bayh’s desire in that regard was beginning to meet with little opposition from the Mutz campaign. To that point, Mutz had tried to remain a “dispassionate observer” as the residency issues had unfolded. Now, however, it was unequivocally clear to the Mutz campaign that his gubernatorial effort was being side-tracked by all the attention paid to Bayh and the residency challenge. Mutz declared, “let’s get on with the campaign This should not influence the selection of the person to fill the single most important governmental post in the state of Indiana.” As for an appeal of the decision, Mutz was ambivalent. “I don’t know whether it should be appealed or not,” he

³⁹³ Ibid., Volume II, p. 311.

³⁹⁴ Indianapolis Star, March 15, 1988.

³⁹⁵ Louisville Courier-Journal, March 15, 1988.

said. “There may have been a very good legal reason for doing so, but I’m not sure it’s the best thing to do politically.”³⁹⁶ The Indianapolis Star reported that the Mutz campaign had been increasingly “frustrated by the media attention Bayh and the residency question have received” and that they had been “mired in political quicksand since the residency issue surfaced.” Many Republicans now feared that the residency challenge had become a “public relations nightmare” which had eviscerated Mutz’s desire to make the campaign about Bayh’s lack of experience.³⁹⁷

Some of Mutz’s Republican colleagues did not share his ambivalence. Upon learning of Judge O’Connor’s decision, Governor Orr’s executive assistant, John Hammond, commented for the governor: “most likely there’ll be an appeal to the Indiana Supreme Court by the State Election Board which reserved the right to do so. And, certainly Governor Orr is in agreement with that.”³⁹⁸

Durnil’s public reaction was uncharacteristic. He expressed satisfaction that the process was moving forward. “Our goal all along is to get this thing resolved as early as we can.” Durnil did admit that, “I would have preferred it go the other way There’s enough fact in there it can go either way.”³⁹⁹ This, of course, was a dramatic turnabout for Durnil who had insisted all along that Bayh had forfeited his residency when he moved to Washington. When asked whether furthering the residency challenge was hurting Republican chances in the fall, Durnil refuted the suggestion. “A lot of people have been getting queasy in the last couple of months, saying that we’re doing nothing but helping

³⁹⁶ Indianapolis Star, March 15, 1988.

³⁹⁷ Ibid.

³⁹⁸ Indianapolis News, March 14, 1988.

³⁹⁹ Louisville Courier-Journal, March 15, 1988.

build [Bayh's] name recognition," Durnil said. "But he already had that. None of this has improved his name recognition or his standing in any way."⁴⁰⁰

Democratic State Chair Livengood disagreed and contended that the entire affair had created enormous voter backlash. "It's not often that Republicans walk up to the Democratic state chairman and say, 'I'm going to vote for a Democrat because of this.' And I've had that happen to me." Livengood predicted that the residency issue would remain on the minds of voters throughout the rest of the campaign.⁴⁰¹

Predictably, the attorneys for the parties offered contradictory assessments of Judge O'Connor's decision. Krahulik argued that the decision was well-reasoned and should end the controversy because "when you have the facts and you have the law, usually you win."⁴⁰² McNamar argued that the decision was flawed because it had failed to adequately address the requirement that one must be physically present to support a finding of residency. Although he was unable to cite any Indiana authority for the proposition, McNamar steadfastly maintained that a standard of physical presence was intended by the constitutional authors. "The bottom line of his decision, in my opinion, is we no longer have a residency requirement."⁴⁰³ Finally, McNamar argued that Judge O'Connor had placed too much reliance on Bayh's own testimony to the exclusion of other evidence, which, McNamar suggested, showed that Bayh's intent was not so clear.⁴⁰⁴

⁴⁰⁰ Indianapolis Star, March 15, 1988.

⁴⁰¹ Ibid.

⁴⁰² Louisville Courier-Journal, March 15, 1988.

⁴⁰³ Ibid.

⁴⁰⁴ Indianapolis Star, March 15, 1988.

McNamar pledged to immediately appeal the Shelby County Circuit Court decision. Krahulik expressed Bayh's desire to fully cooperate in expediting an appeal. While there was no expectation that the Indiana Supreme Court would be able to rule before the printing of primary ballots, McNamar hoped that an appellate decision could be announced before the primary so that "Democrats will not waste their votes."⁴⁰⁵

In the meantime, Bayh was taking full political advantage of the unfolding circumstances, including incorporating the residency challenge as a fundraising tool. Bayh's campaign had previously mailed fundraising re-solicitations to Bayh donors on an average of once every six weeks. Once the residency litigation began, that schedule was accelerated. From February on, every Bayh fundraising re-solicitation emphasized the lengths to which the Republicans were going to deny Bayh the opportunity to run. In fact, while the legal proceeding was pending, financial support to help fight the Republican challenge became the only message. On the very same day that Judge O'Connor issued his decision, Bayh donors received "Urgent Cables" announcing that "we just won a critical victory." The cablegram warned, though, that "while our campaign has been forced to wage legal battles, John Mutz has been busy stockpiling a huge campaign war chest."⁴⁰⁶ The response was significant. Nearly \$15,000 in small dollar contributions were returned in the first few days alone. In comparison, a similar re-solicitation mailed out to coincide with Bayh's November 1987 announcement had returned only \$6,200 in the same amount of time. Bayh was experiencing a threefold increase in financial support.⁴⁰⁷

⁴⁰⁵ Ibid.

⁴⁰⁶ Bayh campaign fundraising solicitation, entitled "Urgent Cable," March 14, 1988, along with attending handwritten notes prepared by author, copies in possession of author.

⁴⁰⁷ Ibid.

Bayh's campaign also used phone banks to reach out to previously uncommitted potential donors asking them to join with Bayh in fighting the Republican effort to take away the right of voters to choose their next governor. Throughout March and April, Bayh's campaign "prospected" thousands of voters through telemarketing trying to persuade the voters to support Bayh's candidacy and help defray the costs associated with the legal battle by contributing to the campaign.⁴⁰⁸

The residency challenge was affording Bayh an unprecedented amount of public exposure. It had dominated the political discussion surrounding the governor's race to the exclusion of, arguably, more pertinent issues. In addition, it was compromising John Mutz's ability to argue that Evan Bayh was not experienced enough to serve as governor and, at the same time, giving a significant boost to the Bayh fundraising machine. The Mutz campaign realized painfully that all of this was going to continue during the process of appeal. A Republican trial court judge had ruled Bayh eligible after having reviewed all the evidence that the Republican Party could accumulate. Now the case would return to a Supreme Court made up of four Republicans and one Democrat. The Indiana high court was Durnil's and the Republican Party's last hope if they were to avoid Evan Bayh's presence on the November 1988 general election ballot.

⁴⁰⁸ Bayh campaign telemarketing records, scripts and notes, March - April, 1988, copies in possession of author.

Chapter Seven

THE SECOND APPEAL

“The people of Indiana have been well served because both the Governor and the Secretary of State sought a prompt resolution of the issue of Bayh’s eligibility.”

Opinion of the Indiana Supreme Court
April 28, 1988

On March 18, four days after Judge O’Connor’s decision, the state election board initiated an appeal by filing a motion to correct errors, which allows a trial court to reconsider its decision. In most instances, these motions are routinely denied and are viewed as the required procedural step before a case can be transferred to the appellate court. Nothing was routine in the Bayh residency case, however. In the motion to correct errors, McNamar alleged that “newly discovered and material evidence has been discovered since the trial, namely Plaintiff’s application for a passport in which Plaintiff declares that his permanent residence is in Washington, D.C.”⁴⁰⁹ In February 1983, before beginning several months of travel abroad, Bayh made application for the issuance of a new passport, upon which he listed Indianapolis as his “mailing address” and 2919 Garfield Street in Washington, D.C., as his “permanent address.” In addition, Bayh acknowledged on the application that he had lost his previous passport as a result of “moving from one residence to another.”⁴¹⁰ The court took the motion to correct errors under advisement and permitted Bayh’s lawyers until March 22 to file a statement in opposition.

⁴⁰⁹ Record of Proceedings, Volume II, pp. 316-317.

⁴¹⁰ *Ibid.*, Volume II, pp. 318-319.

Even the passport disclosure created controversy. Apparently, McNamar had used a subpoena issued by the Shelby County Clerk to obtain a copy of the passport application from the United States Department of State. According to law, however, only court-ordered subpoenas can be honored by the State Department. In spite of these federal privacy protections, McNamar somehow obtained the document and, in so doing, caused embarrassment to the State Department. While this fumble's value was marginal, it gave Bayh the opportunity to renew his themes about the process. "I think the important thing here is the whole process is political They're trying to take this election away from the voters."

While the parties were satisfying the legal prerequisites for appeal, reaction to the Shelby County Circuit Court's decision emerged in the press. Several editorial pages throughout the state questioned the wisdom of the decision to appeal the trial court decision. The Gary Post-Tribune characterized "continuing the hassle" over the Bayh residency issue as "foolish." "What the Republican leaders are doing is proclaiming that they see Bayh as a candidate to be feared. The more they yell, the worse they look."⁴¹¹ The Ball State Daily News in Muncie observed that the Republicans were "giving Bayh several opportunities for free publicity" and that, ultimately, "the election should be about voting for the guy with the best credentials and ideas, not for the team that tries to eliminate the opponent."⁴¹² The Lafayette Journal and Courier suggested that the Republicans who wanted to appeal should "shut up, and get on with the campaign." "Politically, the Republicans have been fools all

⁴¹¹ Gary Post-Tribune, March 16, 1988.

⁴¹² Ball State Daily News, March 16, 1988.

along to be that picky about Evan Bayh's Hoosier pedigree. And they will be bigger fools to belabor and prolong that pickiness by appeal."⁴¹³

Indianapolis News columnists, Richard K. Shull and Ed Ziegner, also questioned the Republican strategy. Shull's column, which reflected on the residency trial and its outcome, was entitled "If this was a victory, who needs a defeat?"⁴¹⁴ Ziegner observed that Bayh had become Durnil's "obsession." "The ceaseless attacks on Bayh strongly remind one of the old story about the man who kept hitting himself over the head with a hammer 'because it feels so good when I stop.'"⁴¹⁵ The Shelbyville News, not surprisingly, supported the "good sense, non-political decision" of one of its own – Shelby Circuit Court Judge O'Connor. The editorial writer went on to say, "perhaps the new Republican strategy is to keep the voters confused as long as possible, believing that their smoke-screen will tarnish the Bayh charisma enough to keep some Democrats and cross-over Republicans at home on election day The issue – if there ever was a legitimate issue in the first place – has been resolved. The voters should pick the next governor, not the courts."⁴¹⁶

In his weekend political column, Jack Colwell of the South Bend Tribune asked rhetorically, if a Shelby County judge who happens to be a Republican ruled in Bayh's favor, why then are the Republicans pursuing an appeal? Colwell answered his own question with the observation: "Bayh does seem to be coming out ahead in this. But there still is a chance, although perhaps now slim, that the five justices on the Supreme Court, four

⁴¹³ Lafayette Journal and Courier, March 17, 1988.

⁴¹⁴ Indianapolis News, March 16, 1988.

⁴¹⁵ Ibid., March 19, 1988.

⁴¹⁶ Shelbyville News, March 31, 1988.

of whom happen to be Republicans, will overturn the lower court decision and throw Bayh out of the race.”⁴¹⁷

The complaints expressed by editorial writers and political columnists were shared by Republican activists, including the Mutz campaign staffers. The rift between those in support of Durnil’s attacks and those who feared a backlash against Mutz was widening and becoming increasingly open. Mutz publicly expressed displeasure that he had not been consulted when the decision was made to proceed with an appeal and admitted his frustration that his campaign was being “sidetracked” by the residency case and all of the public attention that it was affording Bayh. While Mutz acknowledged that Orr had previously indicated an appeal would be taken regardless of the trial court outcome, Mutz was upset that more reflection had not been given once the Shelby County court decision was finally issued. “I heard what the governor said But it’s still my assumption those decisions were made one-by-one.” Durnil countered that there really was no choice but to pursue an appeal, observing that “if it doesn’t go through the appeal process, we’ll still be talking about it all summer.”

Bayh expressed confusion about the public disagreement between Mutz, Durnil, and Orr. “He (Mutz) should have more control over the actions of one of his main supporters – the man who started all this – and his partner in government.”⁴¹⁸ Colwell of the South Bend Tribune reported that “Lt. Gov. John Mutz, who will be the Republican nominee for governor, says he asked Gov. Bob Orr not to pursue the appeal. ‘I don’t think it’s very good politics,’ Mutz says of all the preoccupation with the Bayh residency issue. But Mutz says

⁴¹⁷ South Bend Tribune, March 20, 1988.

⁴¹⁸ Indianapolis News, March 16, 1988.

he understands the governor's argument that the issue ought to be resolved at the state's highest court level. And you can bet that Mutz would shed no tears over a decision that knocked out his most formidable foe for governor."⁴¹⁹

Irrespective of growing public sentiment about the residency challenge, Durnil maintained that there were other tangible political benefits to pursuing the litigation. Durnil seemed convinced that facts uncovered during the trial left Bayh "wide open" to attack. Durnil pointed to his moving deduction as evidence that Bayh had "cheated" on his taxes. Durnil also argued that Bayh's admissions that he had never held a full-time job longer than 16 months and the fact that he drove a German-made BMW until he became a candidate for political office would prove embarrassing.⁴²⁰ According to Durnil, "it's his whole life living off his last name, his whole silver-spooned, elitist attitude about everything ... that eventually will catch up with him You put the whole story together with some of the information that came out of the trial, and you've got a whole package."⁴²¹ Mutz, however, openly sparred with Durnil over whether any of the information was particularly useful and expressed his desire to focus on other issues. "I'm sick and tired of having an issue like this overshadow all the important issues in this state," Mutz said. "I say, on with the campaign. We need to get this past us so we can get on with the issues of importance."⁴²²

When asked if the residency challenge caused Republicans to appear arrogant and out-of-touch, Durnil shot back: "The most arrogant thing is some elitist [Bayh] from St.

⁴¹⁹ South Bend Tribune, March 20, 1988.

⁴²⁰ Indianapolis News, March 15, 1988.

⁴²¹ Evansville Courier, March 16, 1988.

⁴²² Indianapolis News, March 15, 1988.

Alban's who doesn't think the Constitution applies to him."⁴²³ Durnil also repeated that the publicity for Bayh generated by the residency challenge was short-lived and geographically concentrated. He denied that it had been pursued because Bayh was the leader in contemporaneous public opinion polls.

On March 28, Judge O'Connor denied the state election board's motion to correct errors. O'Connor also denied McNamar's motion to have the court consider Bayh's passport application as "newly-discovered" evidence. O'Connor found that the evidence was "cumulative" and that "such evidence would probably not produce a different result upon retrial."⁴²⁴ O'Connor also ordered the clerk of the Shelby County Circuit Court to immediately prepare a transcript of the proceeding so that an expedited appeal could be taken. In spite of Mutz's opposition, Orr spokeswoman Dollyne Pettingill announced that, "the governor's position has not changed. He is interested in a final determination, one that cannot be challenged. And that must come from the state's highest court."⁴²⁵

In normal circumstances, cases from a trial court are appealed first to the Indiana Court of Appeals and, after a decision by that court, to the Indiana Supreme Court. The Indiana Supreme Court has a rule, however, under which it will allow a case to bypass that established procedure if the matter involves a question of substantial public importance.⁴²⁶

McNamar's colleague, Michael R. Franceschini, asserted that the necessary appeal

⁴²³ Jeffersonville Evening News, March 14, 1988.

⁴²⁴ Record of Proceedings, Volume II, p. 345.

⁴²⁵ Indianapolis Star, March 29, 1988.

⁴²⁶ Ind. Appellate Rule 56(A)(2007) (see <http://www.in.gov/judiciary/rules/appellate/index.html>).

documents could be prepared and filed for the Supreme Court's consideration within three weeks.

While the parties to the lawsuit prepared for their final skirmish before the Indiana Supreme Court, the political parties continued to posture for partisan advantage. Durnil and Livengood had a joint appearance before the Kiwanis Club of Indianapolis on Friday, March 18. Livengood created a stir by asserting that because the Republican Party was responsible for bringing the residency challenge, they, rather than Hoosier taxpayers, ought to be bearing the costs associated with it. By that point, over \$8,000 in public funds had been spent pursuing the litigation. McNamar's special representation of the election board had cost about \$4,000. In addition, another \$4,000 was necessary to pay the special chairman of the election board, Judge Puckett. Livengood argued that the issue was a "partisan" creation by those who supported Mutz's campaign for governor. Thus, the partisans who were responsible for it ought to pay for it.⁴²⁷

Durnil responded to Livengood by saying the Bayh case was "totally a government action." Alternatively, Durnil argued that Bayh should pay the costs since he was the one who had initiated the declaratory judgment action in the Marion County Superior Court. According to Durnil, the amount of money involved was unimportant. "That's a small amount of money," he said. "It doesn't make a difference."⁴²⁸ The Mutz campaign also responded. McDaniel said of Livengood, "He's a desperate guy. Everybody knows that if Evan Bayh would gain control of his party, John Livengood would probably be one of the first to go. He's not had a good record as a county chairman and he's not had a good record

⁴²⁷ Indianapolis News, March 18, 1988.

⁴²⁸ Ibid.

as a state chairman.”⁴²⁹ Livengood countered: “Republicans say the matter must be dragged out, must be appealed Maybe they’d feel differently if they had to pay for the appeal themselves.”⁴³⁰

On Tuesday, April 5, the transcript of the proceedings before Judge O’Connor was filed in the office of the joint clerk for the Supreme Court and Court of Appeals. McNamar requested that the case be allowed to bypass the Indiana Court of Appeals and be sent directly to the Indiana Supreme Court. Karl Mulvaney, the Supreme Court’s administrator, indicated that the Supreme Court would decide by the end of the week whether to transfer the case to it from the Court of Appeals.⁴³¹

On that same day, WTHR-TV of Indianapolis released the results of a statewide survey that it had conducted from March 5 through March 27 showing that Bayh had increased his lead over Mutz among likely voters: the gap now stood at 45.6 percent to 28 percent.⁴³² At a statewide gathering of local Republican Party officials, attendees knew intuitively that the intense coverage given to Bayh during the residency challenge had made a difference. Ralph Morgan of Washington, Indiana, said, “they (the Democrats) have got a million dollars of free publicity.” Karen E. Mitchell of Seymour countered, “I think we need to forget the free publicity and start concentrating on [Bayh’s] experience.” Betty Morgan, also of Washington, Indiana, agreed: “I think it should be proven that he is eligible ... then, I think we should put it all behind us and go forward.”⁴³³ While most Republican

⁴²⁹ Indianapolis Star, March 27, 1988.

⁴³⁰ Ibid.

⁴³¹ Indianapolis News, April 6, 1988.

⁴³² Ibid.

⁴³³ Jeffersonville Evening News, April 6, 1988.

leaders had been supportive of the challenge initially, they all wanted it to end so as not to obscure the more important issues of the campaign.

On Thursday, April 7, the Supreme Court granted the state election board's petition for an immediate transfer of the appeal to the Supreme Court from the Court of Appeals. The Supreme Court also issued an accelerated briefing schedule. Mulvaney suggested that if briefs were submitted by April 15, there existed a "reasonable chance" that the Supreme Court would be able to render a decision in advance of the May 3 primary.⁴³⁴ It was also announced that state election officials were printing primary ballots which included Bayh's name. The Supreme Court set the matter for oral argument to be conducted on Monday, April 25, at 10:30 a.m. Each side was granted thirty minutes to present its case and orally supplement the written arguments that would be filed.

On Monday, April 11, the state election board submitted its brief.⁴³⁵ In it, McNamar reiterated the board's position that the history surrounding the drafting of the Indiana constitution supported the interpretation that constitutional authors meant physical presence when they referred to "residence." In the alternative, even if continuous physical presence were not the standard, McNamar argued that Bayh had failed to satisfy his burden of showing that he possessed the requisite intent to maintain his residency in Indiana. McNamar pointed to Bayh's application for a passport (which McNamar also requested the Supreme Court to consider) as evidence that Bayh's actions were indicative of an intent to "reside" in Washington, D.C., at least for some portion of the constitutionally required five-year period.

⁴³⁴ Indianapolis News, April 8, 1988.

⁴³⁵ Record of Proceedings, Appellate Volume, 690-759.

On April 18, Krahulik filed Bayh's response brief, arguing that the state election board's insistence on physical presence was unsupported by any case law. He argued that the physical presence standard was also unworkable. "Over what period does one test to determine usual sleeping habits? Residence, under the board's theory, would fluctuate with each movement or at least on some kind of time basis. Would it be determined monthly, semi-annually, or every three years?"⁴³⁶ Further, Krahulik argued that many Indiana cases, as well as numerous decisions from other states, had found the concepts of residency and domicile to be intertwined. Domicile, he argued, was determined by one's intent. The evidence presented at trial conclusively established that Bayh never intended to live anywhere other than Indiana.

Lastly, Krahulik maintained that, if the Supreme Court reversed the trial court's decision, it would be replacing its judgment for that of the trial court, something no appellate court could appropriately do.⁴³⁷ This last argument well illustrated how much the ground had shifted in the debate. Remember that one of Bayh's principal concerns over having the matter first considered by the state election board was that in any subsequent judicial review of a board decision, the court would be required to give deference to the board's findings about his residency. Now the shoe was on the other foot. Not only had Bayh avoided the election board having made any findings about his residency, a trial court had made findings in his favor. For many of the same policy reasons that a court reviewing the findings of an administrative agency gives deference to them, a court in an appeal gives deference to the findings of the trial court. Indeed, the Supreme Court has a special rule that applied in the

⁴³⁶ Jeffersonville Evening News, April 19, 1988.

⁴³⁷ Record of Proceedings, Appellate Volume, 760-807.

Bayh residency case: “On appeal of claims tried by the court without a jury ... , the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.”⁴³⁸ It was now Bayh asserting that a reviewing court could not appropriately examine the facts de novo. “ we should be mindful of the well-settled and time-honored standards of review.”⁴³⁹ To do otherwise, according to Bayh, would be for the Supreme Court to re-weigh the evidence and substitute its own conclusions for those of the trier of fact.⁴⁴⁰

The Bayh residency case was now before the Indiana Supreme Court for the second time. Given that the Court had been unable to adhere to its announced timetable initially and then only cobbled together a decision that decided almost nothing, it was unclear what the result would be this time. But there were several aspects of the case that made it different the second time around.

First, the case now was in the form of a conventional appeal of a trial court’s decision, not the highly technical challenge to a trial court’s jurisdiction as it had been before. This could be seen in the names of the two cases themselves. Now the Supreme Court was being asked to decide a case with the straightforward name of State Election Board, Appellant (Defendant Below) v. Evan Bayh, Appellee (Plaintiff Below). While the current case had reached the high court without an intervening stop in the Court of Appeals, that was not at all unusual. The Court would be in its normal rhythm considering this appeal, unlike the earlier “writ” proceeding.

⁴³⁸ Ind. Trial Rule 52(A)(2007) (see http://www.in.gov/judiciary/rules/trial-proc/trial_proc.pdf).

⁴³⁹ Record of Proceedings, Appellate Volume, 763.

⁴⁴⁰ See, Hagemann v. City of Mount Vernon, 154 N.E.2d 33 (Ind., 1958); Trustees of Indiana University v. Williams, 251 N.E.2d 439 (Ind., 1969).

Second, perhaps because Judge Zore was no longer a party to the case or perhaps for some other reason, Justice DeBruler would be participating in the decision this time. This meant not only that at least one Democratic justice would have a say in the outcome, but also the Court would have the benefit of the counsel of its most experienced member.

Third, as just discussed, the standard or test that the Court would use to review the trial court's decision this time was quite clear – the Supreme Court would “not set aside the findings or judgment [of the trial court] unless clearly erroneous, and due regard [would] be given to the opportunity of the trial court to judge the credibility of the witnesses.” In contrast, in the earlier writ proceeding, the applicable Court rule dictated that, “original actions are viewed with disfavor and may not be used as substitutes for appeals.”⁴⁴¹

Fourth, in the intervening weeks since the Court had first confronted the case, the political situation had taken greater shape. For example, pre-primary finance reports were filed by both campaigns on April 22. Bayh maintained his record pace in money raised compared to any previous Democratic gubernatorial candidate in Indiana. By early April, Bayh had raised nearly \$1.1 million. Similarly, Mutz was benefiting from the traditional fundraising advantages that Indiana Republicans held over Democrats. He reported having raised a total of \$1.6 million. His campaign announced a total campaign budget goal of \$3.5 million. Despite Mutz's overall advantage, Bayh's report was quite encouraging for two reasons. First, he was receiving considerable financial support although, throughout the entire fundraising period, the status of his eligibility to even have his name on the ballot was in doubt. Secondly, while Mutz outpaced Bayh in money raised, he was also outpacing Bayh in money spent. During the reporting period, the Mutz campaign reported spending

⁴⁴¹ Orig. Act. R. 2(E), *ibid*.

\$217,466 while Bayh's campaign spent only \$64,143. Therefore, at the end of the period, Mutz enjoyed only a slight advantage in terms of cash-on-hand, \$965,000 for Mutz to \$874,000 for Bayh.⁴⁴² Bayh's ability to neutralize the inherent Republican fundraising advantage would prove increasingly important as the campaign progressed.

In addition, the residency dispute was proving to be disastrous for the Republicans and their candidate, Mutz, in the court of public opinion. On the very morning of oral argument in the Bayh case, the Indianapolis Star published the results of another statewide poll that it had commissioned. Those results confirmed that Bayh had lengthened his lead over Mutz among likely voters. Bayh had the support of 48 percent while Mutz was supported by 33 percent – a difference of 15 points. This was in contrast to the 10 percentage point lead he had enjoyed in early January. Not only was the size of Bayh's lead over Mutz increasing, but fewer Hoosiers remained undecided as Bayh was now receiving support from nearly one half of all of those polled. In January, Bayh led Mutz 38 percent to 28 percent with 34 percent undecided. By the end of April, only 19 percent of voters considered themselves undecided. The poll also indicated that Bayh's primary victory over Democratic primary rival, Stephen Daily, was virtually assured.

With respect to the residency challenge itself, the poll revealed that, for the most part, voters were reacting negatively. "Although 80 percent of those polled said the dispute would have no impact on their vote for governor, it's clear that Bayh has benefited from it. 'It did not play well,' poll director [Anthony M.] Casale said. 'It gave Bayh some support and hurt the Republicans.'"⁴⁴³ Specifically, over half of the 800 people surveyed said they had heard of or read about the residency challenge. Of those who said they were aware of it,

⁴⁴² Indianapolis News, April 22, 1988.

⁴⁴³ Indianapolis Star, April 25, 1988.

47 percent said that they believed it was an attempt to sabotage Bayh's candidacy and 15 percent said they were more likely to vote for Bayh because of the challenge. In the area where coverage was most saturated – the Indianapolis metropolitan area – Bayh led Mutz by 18 percentage points. He had *trailed* Mutz by 12 points in that same area in the Star's January poll.⁴⁴⁴

Republican political leaders explained that Bayh's 15 point lead had been driven by the "sympathy blip" created by the challenge to Bayh's residency. McDaniel, Mutz's campaign manager, said "that is why we wanted this (the challenge) over quickly, so it would be finished, the damage felt and we could get our message out." This statement constituted the first public admission by the Mutz campaign that the residency challenge had been a mistake that had caused damage. To date, the public's focus in the governor's race had been on Bayh. The Mutz message had gotten swallowed up by the relentless Republican attacks on residency.

Despite the poll numbers, Mutz remained publicly optimistic. "I can't imagine the average person has any idea what Evan's idea of the future is, or what his plans are or what he had done ... I know it may sound strange based on the numbers and the change in the numbers, but I am feeling better by the day." As well Mutz should. The end of the residency challenge was nearly in sight.

Perhaps the most ironic comments were made by Durnil. When asked to describe the strategy for a Mutz victory, Durnil explained that once Mutz "brings home the Republicans, recovers from the residency dispute and starts to get his message out through

⁴⁴⁴ Ibid.

television and direct mail, this race will close up real quick.”⁴⁴⁵ Durnil seemed to be acknowledging that the residence dispute that he, Durnil, had done so much to foster had backfired and had damaged Mutz’s candidacy.

On April 25, 1988, the oral argument before the Indiana Supreme Court lasted just over one hour. The state election board had its final opportunity to persuade a court that Bayh was not eligible. All five justices participated. Both McNamar and Bayh’s lawyer, John P. Price, were peppered with questions by members of the Court concerning their legal positions. McNamar repeated one final time the argument for a standard of physical presence. “To have any meaning at all, residency cannot be given some Lewis Carroll, Humpty Dumpty definition, when convenient.”⁴⁴⁶ McNamar also reviewed all of the “various addresses at which Bayh has lived since his birth in Terre Haute, and noted that Bayh did not own a home to which he could return.”⁴⁴⁷ Justice Dickson quizzed McNamar about his argument, that equated the residency requirements of candidates with those for voters. Dickson “suggested that stricter residency requirements are placed on voters because they are not exposed to scrutiny. A gubernatorial candidate is heavily scrutinized,” he said, “and the electorate may reject ‘carpetbaggers.’”⁴⁴⁸

Price took aim at McNamar’s historical argument regarding “physical presence” by noting that two participants in Indiana’s 1851 constitutional convention later became justices on the Indiana Supreme Court. That very same Supreme Court, when asked to rule

⁴⁴⁵ The Times of Northwest Indiana, April 25, 1988.

⁴⁴⁶ Louisville Courier-Journal, April 26, 1988.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

on its first case concerning residency, held that “a New Albany man who traveled in Europe for three years never lost his residency in Floyd County.”⁴⁴⁹ At the close of the argument, Chief Justice Shepard indicated that the Supreme Court would do its best to render a timely decision. “We are mindful of the urgency of the matter, and we will do our best to be prompt.”⁴⁵⁰ A spokeswoman for the court administrator’s office had been told to expect a decision no later than Thursday of that week.⁴⁵¹

⁴⁴⁹ Indianapolis Star, April 26, 1988.

⁴⁵⁰ Ibid.

⁴⁵¹ Louisville Courier-Journal, April 26, 1988.

Chapter Eight

THE DECISION

“The question is whether Secretary of State Evan Bayh presently meets our Constitution’s residency requirement for the office of Governor. We hold that he does.”

Opinion of the Indiana Supreme Court
April 28, 1988

Three days later, on Thursday, April 28, the Indiana Supreme Court issued its unanimous opinion upholding Judge O’Connor’s decision and declaring Bayh to be constitutionally qualified to serve as governor if elected.⁴⁵² In a ten-page opinion written by Chief Justice Shepard, the Supreme Court first complimented Governor Orr and Bayh himself for taking steps to ensure that questions surrounding Bayh’s eligibility were answered in a timely way. “This pre-empted the unseemly possibility of a later quo warranto action challenging Bayh’s residency should he become governor.”⁴⁵³ The Court then recounted the procedural steps taken before the state election board, the Marion Superior Court, and the Shelby County Circuit Court that caused the matter to be before the Court on an expedited appeal.

The Court acknowledged Judge O’Connor’s “extensive and careful” findings of fact and declared them to be “most helpful.” Recognizing that Judge O’Connor had found that “the ultimate facts were in favor of Bayh,” the Court next explained that its standard of review was narrow. Making the point about deference to the findings of the trial court

⁴⁵² State Election Board v. Evan Bayh, 521 N.E.2d 1313 (Ind., 1988), 1313-1318.

⁴⁵³ Ibid., 1314.

discussed above, the Court’s opinion declared, “We will neither reweigh the evidence nor reassess the credibility of the witnesses and will not set aside the fact-finding of the trial court unless it is clearly erroneous.” Thus, the primary task of the Court’s review was to “interpret the Indiana Constitution’s residency requirement for the office of Governor.”⁴⁵⁴

As it focused on the specific language contained in Article 5, Section 7, the Court admitted that the framers left “little to discern their intention about the meaning of the phrase ‘resident of the State.’” The Court pointed out that both the Northwest Ordinance of 1787 and the first Indiana Constitution had durational residency requirements for governors. However, the first constitution required the citizen to “have resided in the State five years” before election. At the 1850 constitutional convention, an effort had been made to eliminate residency language altogether, but it failed. But the Court noted that the earlier requirement to “reside in” the state had been changed to require that the individual be a “resident of.” “It could reasonably be concluded that by ... adopting ‘resident of’ instead of ‘resided in’ language, the 1851 Constitution embraced a pure domicile theory.” The Court also noted that two other states had found residency provisions to require continual physical presence, but found those were distinguishable from the Bayh case because they both required gubernatorial candidates to be both a citizen of the state and a resident of the state. If physical presence were not required, then the language requiring citizenship and residence would be “mere surplusage.” Indiana was different in that one is required to be a “citizen of the United States” and “a resident of the state.” “We therefore have no reason to conclude from the constitutional language that residency requires continual physical presence.”⁴⁵⁵

⁴⁵⁴ *Ibid.*, 1315.

⁴⁵⁵ *Ibid.*, 1316.

With that important threshold inquiry established, the Court then turned its attention to examining residency as domicile. Noting that residency requirements in democratic societies are meant to ensure that the candidates are sufficiently acquainted with the state and that the voters have the opportunity to scrutinize the candidates, the Court found that the concept of domicile satisfied these purposes. The Court found that domicile meant “the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning.” Domicile could be established in any one of three ways: by birth, by choice, or by operation of law. Once domicile is established, however, it is presumed to continue. “A change of domicile requires an actual moving with an intent to go to a given place and remain there.” The Court further declared that “a person who leaves his place of residence temporarily, but with the intention of returning, has not lost his original residence.”⁴⁵⁶ Since the trial court had appropriately applied the law and had found that Bayh did not intend to abandon his Indiana domicile and establish a new, permanent residence elsewhere, the Supreme Court affirmed the trial court’s ruling.

Bayh was pleased. “I’m probably the only candidate ever to run for state office in the state of Indiana who has had a court of law rule that I am a Hoosier.”⁴⁵⁷ He noted that “all six judges involved in the case – five of whom are Republican – had upheld his right to run and serve as governor.”⁴⁵⁸ Bayh also echoed the recurrent theme that his time away from Indiana had never been a legitimate criticism of his candidacy. Rather, his campaign

⁴⁵⁶ Ibid., 1317.

⁴⁵⁷ Indianapolis News, April 29, 1988.

⁴⁵⁸ Indianapolis Star, April 29, 1988.

intended to point out “‘the need to have a breath of fresh air’ in Indiana government and that the residency fight is ‘symptomatic’ of the incumbent’s self-serving attitude.”⁴⁵⁹

Mutz’s reaction was understated. “All the court decided today was that Evan Bayh meets the minimum requirements to be governor of Indiana. The question now is which of us meets the requirements of the people of Indiana for the next governor of Indiana.”⁴⁶⁰ Mutz conceded that the controversy had given Bayh exposure that he would not have otherwise received, but he believed that any support Bayh had received on that basis would dissipate quickly. Mutz’s campaign manager, Michael D. McDaniel, refused to second-guess the strategy employed by Republicans in pursuing the residency challenge, but admitted that he would not want to repeat it. “What do you think I am, a glutton for punishment and pain?”⁴⁶¹

Governor Orr expressed satisfaction that the issue had been conclusively resolved. “‘There can be no challenge to his right and privilege to govern the state, and there would always be that question mark’ if the Supreme Court had not ruled.”⁴⁶² Durnil claimed that he was glad the matter was over because “Evan Bayh has had this to hide behind.” Durnil acknowledged, however, that “we have built the wall to allow him to hide behind.” He expressed confidence that the issue would not create backlash against Mutz or the Republicans, arguing that “this is not the kind of issue that moves voters.”⁴⁶³ He observed that his only regret was that the state election board had deferred its decision-making to the

⁴⁵⁹ Louisville Courier-Journal, April 29, 1988.

⁴⁶⁰ Indianapolis Star, April 29, 1988.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Louisville Courier-Journal, April 29, 1988.

trial court. According to Durnil, “the board could have found different facts in the case, thus presenting a different case on appeal to the Supreme Court.”⁴⁶⁴ He maintained that he personally had not been hurt by the issue although, admittedly, he had been identified as Bayh’s chief antagonist. “My role the last 20 years has been to be the point man,” Durnil said. As a campaign manager and state chairman, he said he would “match my record with anybody.”⁴⁶⁵

As might be imagined, the editorial commentary was varied. The Indianapolis Star characterized the Republicans’ residency challenge as “testy,” but dismissed the notion that it would ultimately affect the outcome of the race itself. “Some political pundits predict that contesting Bayh’s eligibility will boomerang on the Republicans. That hardly seems likely. Once the residency challenge was made, voters were entitled to have any question of constitutionality laid to rest.”⁴⁶⁶ The Fort Wayne Journal-Gazette was not so charitable. Calling the debate “an unfortunate charade,” the paper opined that “the sad thing is that the debate proved such a distraction. Often the views of the leading candidates got lost in the shuffle, as leaders of both parties argued over Bayh’s residency. In the end, it probably hurt the Republicans, who raised the question in the first place. Now, it’s up to the voters to decide Bayh’s qualifications to be governor – which is precisely the way it should have been all along.”⁴⁶⁷

The South Bend Tribune echoed these sentiments. “Durnil, who has seemed obsessed by the Bayh issue, reacted with a characteristic lack of grace. Maybe the opinion

⁴⁶⁴ Indianapolis News, April 29, 1988.

⁴⁶⁵ Ibid.

⁴⁶⁶ Indianapolis Star, April 30, 1988.

⁴⁶⁷ Fort Wayne Journal-Gazette, April 30, 1988.

was not unanimous to begin with, he grumbled. The justices can react to that as they choose. The chairman added that now Bayh will be forced to discuss the issues. That is something all of us could have been doing all along, had it not been for the Great Durnil Panic Ploy The impression formed by millions of Hoosiers, however, is that Durnil not only shot himself in the foot, but showed the governor how to do it too.’⁴⁶⁸

As to the Supreme Court, its decision did it credit. It had decided the case extremely rapidly – prior to primary election day – and had clearly and unambiguously resolved the issue of Bayh’s eligibility. Indeed, the Court made explicit not only that Bayh was eligible to run, but also that if elected, his ability to take office was beyond challenge. The Court seemed to go out of its way to compliment Governor Orr, not only for seeking a prompt resolution of the issue of Bayh’s eligibility but also for “appoint[ing] an independent chairman to take [the Governor’s] place on the Board for the purpose of investigating the validity of Bayh’s declaration of candidacy.” As we have seen, Puckett was far from independent of Orr, taking his instructions on allowing the trial court to consider the matter first and on appealing the trial court’s decision. But the Supreme Court also complimented Bayh for seeking prompt resolution of the issue and was not in any way backhanded in declaring from the very outset of its decision that “Secretary of State Evan Bayh presently meets our Constitution’s residency requirement for the office of Governor.”⁴⁶⁹

The fact that the other four justices – DeBruler, Givan, Pivarnik and Dickson – all joined without comment the 2,900 word decision penned by Shepard was impressive. Recall that in the writ proceeding, four justices issued three separate statements. While it is

⁴⁶⁸ South Bend Tribune, May 1, 1988.

⁴⁶⁹ State Election Board v. Evan Bayh, 521 N.E.2d 1313 (Ind. 1988), 1314.

by no means unusual for the Court to speak with one voice, the ability of the five to find total consensus on a matter of such visibility and importance reflected well upon it.

It is interesting to reflect on whether the relatively new merit-selecting process for choosing and retaining justices played a role in the Court's decision. Certainly, it could be argued that it would have been inconceivable for a Court with four Republican justices to have voted against the professed position of their state party chairman if they themselves faced re-election. On the other hand, by the time the Court decided the case, public opinion on the issue so clearly favored Bayh that a decision against him would in all likelihood have been against the best interests of the Republican party.

But the merit-selection system clearly did permit the members of the Court to consider the merits of the legal issues presented to it without having to consider in any way whether there would be personal political consequences. The ability of the justices to be fair and impartial in this way is an impressive feature of the Indiana judicial system. Indeed, when Bayh pointed out that, of the six judges who had passed favorably on his case, five were Republican, he made a positive statement not only about the strength of his position on the issue but on the fairness and impartiality of Indiana judges.

On Tuesday, May 3, 1988, Evan Bayh won the Democratic nomination for governor with a resounding primary victory. Bayh captured 493,198 votes (82 percent) to Daily's 66,242 votes (12 percent). O'Bannon garnered 34,360 votes (6 percent). In accepting his party's nomination, Bayh called for an "open state government" that could only be brought about by "new leadership."⁴⁷⁰ "I'm very gratified," said Bayh. "The Democratic Party is

⁴⁷⁰ Evansville Press, May 4, 1988.

united, and I'm convinced that in the fall, independents and Republicans will join us in opening up state government and providing new leadership as we enter the '90's."⁴⁷¹

In the aftermath of the legal failure to have Bayh declared ineligible, the Mutz campaign immediately started broadcasting a television commercial which compared the voluminous experience Mutz possessed in government to the "one-page resume" offered to Hoosier voters by Bayh. The commercial highlighted Mutz's governmental experience as a long-time state legislator and as lieutenant governor in contrast to Bayh's 15 months as secretary of state. "Quite a difference," the commercial concluded.⁴⁷² The Mutz campaign spent \$350,000 statewide during a run of about ten days surrounding the primary election. While effective in contrasting the two candidates' resumes, the commercial in that particular form never aired again. Not surprisingly, the public did not find the argument persuasive.

⁴⁷¹ Indianapolis Star, May 4, 1988.

⁴⁷² Indianapolis News, May 5, 1988.

CONCLUSION

On Tuesday, November 8, 1988, Democrat Evan Bayh was elected governor of Indiana defeating Republican John Mutz. Bayh garnered 1,138,574 votes to Mutz's 1,002,207, a margin of 53 percent to 47 percent.⁴⁷³ While Bayh's 136,000 vote plurality out of approximately 2.1 million total votes cast may appear narrow, it was a significant victory, particularly when viewed in the context of the other Indiana statewide results. Vice President George H. W. Bush, along with his Hoosier vice-presidential running mate, Senator Dan Quayle, carried Indiana by nearly 440,000 votes over his Democratic opponent, Massachusetts Governor Michael Dukakis – a margin of 60 percent to 40 percent. The differential between the margins of victory enjoyed by Republican George Bush and Democrat Evan Bayh was nearly 575,000 votes. That is to say, well over a quarter of a million Hoosiers voted for Republican George Bush for president and Democrat Evan Bayh for governor.

In addition, U.S. Senator Richard Lugar was re-elected to a third term, capturing 68 percent of the vote against Democrat Jack Wickes. Even more remarkable and historic is the 900,000 vote differential between the margins of victory of Lugar and Bayh. In excess of 400,000 voters cast their ballot for Republican Richard Lugar for senator then switched tickets and voted for Democrat Evan Bayh for governor. Almost one out of every five voters who cast ballots in 1988 voted for both Lugar and Bayh. To this day, that level of ticket-splitting remains unprecedented.

The Republicans also handily won all other statewide races. Incumbent Republican Attorney General Linley Pearson easily defeated John Rumble and incumbent Republican

⁴⁷³ Election Report of the State of Indiana, Office of the Indiana Secretary of State, 1988.

State Superintendent of Public Instruction H. Dean Evans was elected over Mary Petterson. By most benchmarks, 1988 was an incredibly successful year for almost all Republican statewide candidates in Indiana. Yet, in the midst of this Republican success, Bayh, and his running mate Frank O'Bannon, also won comfortably.

The 1988 gubernatorial campaign was hard fought. At the time, it was the most expensive political effort in Indiana history with each candidate raising over \$4 million in furtherance of his campaign. Some observers regarded it as “the nastiest campaign for governor they’d ever seen.”⁴⁷⁴ While many factors were involved in Bayh’s victory, it is impossible to ignore the role that the gubernatorial residency challenge played in the election’s outcome.

As previously noted, the enormous profile it granted Bayh throughout the first four months of 1988 was invaluable. Durnil routinely dismissed as unimportant the notoriety that the case afforded Bayh, arguing that he already enjoyed a high level of name recognition. As a result of his success in the 1986 secretary of state’s race and because of his well-known father, it is true that Bayh possessed an unusually high degree of statewide name recognition, particularly for someone so early in his public life. But the near daily attention given to the residency challenge by the press over this four-month period assisted Bayh far beyond an increased awareness of his last name. In many respects, it helped shape a new Indiana political personality.

It offered Bayh repeated opportunities to emphasize two themes that were central to his candidacy: that after twenty uninterrupted years of one-party control of the governor’s office it was time for a change; and that the Republicans had become so entrenched that they

⁴⁷⁴ Stoner, *Legacy of a Governor*, 136.

were willing to go to any lengths to maintain control, including denying Bayh even the chance to run. It allowed Bayh the opportunity to become, in effect, a political martyr, the victim of a legal attack brought by those who would rather see politicians select Indiana's next governor instead of the voters themselves. As O'Bannon declared during the campaign, "... it is fair to say, I believe, that the Republican leadership of this state is getting complacent. There is not a freshness in the air. New ideas are not usually welcome. There is a lack of energy to tackle the challenges that must be met. Too many Republicans have come to think that vast areas of this state are their own personal property. They feel that what is good for them is what is good for the State of Indiana, and that is simply not so."⁴⁷⁵

Beyond the thematic consistency it provided, the publicity surrounding the residency challenge enabled Bayh to emerge from the long political shadow cast by his father. During this period, Evan Bayh truly "came of age" and began to be seen as an individual possessed with his own "political persona" and his own set of priorities. Those who previously may have recognized only the "Bayh" political name were now able to separate father from son – Evan from Birch. Consequently, Republicans were unable to take advantage of any lingering disenchantment that some voters might have felt toward Birch Bayh. More particularly, Republicans were not able to re-run the successful political campaign they had waged against the father in 1980. The public had, for an extended period of time, witnessed Evan Bayh, standing on his own, absorbing and responding to the enormous pressure of a concerted political and legal challenge by his opponents.

In addition, the public opinion polling conducted during the residency challenge (particularly by non-partisan sponsors) confirms that Bayh was able to expand upon his early campaign lead. Since no other substantive issues were subject to vigorous debate so

⁴⁷⁵ *Ibid.*, 114.

early in the election season, the shifts in voting preference were due largely to the residency challenge. The table below shows these shifts as they occurred during the course of the litigation:

| Date of Poll | Source | Bayh | Mutz | Undecided |
|---------------------|------------------------|-------------|-------------|------------------|
| January 10, 1988 | Indianapolis Star | 38% | 28% | 34% |
| April 5, 1988 | WTHR-TV (Indianapolis) | 46% | 28% | 26% |
| April 25, 1988 | Indianapolis Star | 48% | 33% | 19% |

From January, 1988 to primary election day, Bayh’s lead over Mutz increased by 5 percentage points – not an insignificant change, given that it came at a time when most people were not focused on elections or campaigns for public office. Just as important is the fact that the number of undecided voters decreased by 15 percentage points – from 34 to 19 percent. Of those undecided voters who were making up their minds during this period, they chose Bayh over Mutz at a rate of 2 to 1.

In addition, both the February poll commissioned by Livengood and the April poll by the Indianapolis Star confirmed voters’ negative reaction to the Republican efforts to have Bayh disqualified. The February poll suggested that over one-third of all voters would look less favorably on the Republicans if Bayh were declared ineligible to run. The Indianapolis Star poll conducted in April revealed that over half of all voters surveyed had heard of the residency challenge and, of that number, 47 percent believed it to be a political attempt by Republicans to “sabotage” Bayh’s candidacy. A total of 15 percent of all of those polled said they were more likely to vote for Bayh because of the residency challenge. If it can be said that 15 percent of the electorate eventually made its gubernatorial choice on the basis that Republicans had attempted to keep Bayh off the ballot, his election might very well be defined accordingly.

The residency challenge was not solely responsible for Evan Bayh's election. That conclusion overreaches. Like any race for governor in any particular election year, more was involved. But to suggest, as did some Republicans, that voters completely forgot the residency challenge by November, or that it played little, if any, role in the election would be an equally uninformed point of view. As the polling data confirm, there is no question that people were aware of the effort and, for the most part, reacted unfavorably. It did inexorably alter public perception, particularly with respect to the partisan motivations behind challenging Bayh's residency. This lingering perception could not have served the Republicans well as they entered the decisive period of the fall campaign. And the result validates this conclusion. As Jack Colwell predicted in March of 1988, "if the final decision is to be made by voters rather than judges, Bayh is being helped by this. In other words, Republicans, having gone the court-challenge route, had better win there or face the prospect of Bayh being even stronger in a vote challenge."⁴⁷⁶

Throughout and after the residency challenge, Bayh never lost his advantage. In fact, the question repeatedly asked during the summer and fall of 1988 was not who was ahead, but how wide was Bayh's lead? Certainly, there are circumstances that could have altered the eventual outcome. The fact is, however, once the residency litigation was resolved, Bayh possessed the upper hand for the duration of the campaign. The announcement of Dan Quayle as George Bush's running mate in August was as close as the Republicans would come to an outcome-altering event. While Quayle's presence on the national ticket provided Indiana Republicans an enormous boost of confidence and

⁴⁷⁶ South Bend Tribune, March 20, 1988.

optimism, even that was not enough to deny the Bayh-O'Bannon ticket its place in Indiana political history.

Thus, the question must be asked – if the residency challenge proved instrumental to Bayh's victory, why did the Republicans pursue it in the first place? More acutely, why was it pursued to the bitter end? Why was the issue allowed to consume nearly four months of the campaign in light of the ever-growing perception that the public was reacting negatively? Explaining it away as a terrible miscalculation is too simple. It does not give the Republican Party enough credit. Miscalculations were not part of their playbook. The primary actors – Mutz, Durnil, Orr – were all political veterans. They did not blindly follow a flawed course of action without an appreciable sensitivity to all of the possible political consequences. How, then, should it be understood?

Republicans (particularly, Mutz) recognized the unique position the party faced in the 1988 election – twenty years of uninterrupted control of the governor's office combined with a challenge by an attractive and articulate opponent promising change. In accordance with normal political rhythms, "change" would be an undeniably natural predisposition among the electorate. This was the political context in which the decisions by Republicans concerning Bayh's residency were made. Given that context, it is not difficult to understand why many of them were attracted to any argument that might alter that political environment. Although Republicans repeatedly emphasized that Mutz was their "most experienced gubernatorial candidate ever," some were fearful that 1988 might be the type of political year when that argument would not matter. In fact, Bayh's candidacy was particularly appealing because it offered a public inclined toward change a shift in direction

that was safe and reassuring. And in their efforts to address Bayh's appeal, Republicans made several critical errors.

First, they lacked consensus regarding the risk management applicable to the residency challenge. If a challenge was to be made, how should it be pursued? Once started, what was the possibility of getting out if political losses started to mount? There appeared to be little agreement among Republicans on these important strategic questions. This incongruity contributed to the perception that Mutz lacked any control over the matter. Similar to the incident regarding Rob Bowen (who, embarrassingly, was informed by a reporter how his own name would appear on the 1986 election ballot), there were times when Mutz appeared unable to exert control over developments that were consuming his campaign. In contrast, Bayh exercised complete control over his campaign's legal and political strategies and responses. At all times, he remained good-humored, but determined. No surrogate ever spoke for him. He accepted responsibility over the tactical decisions made. His calm demeanor in the face of inordinate confusion no doubt reassured Hoosiers that he possessed a level of maturity belied by his age.

This Republican discord may very well have been an important reason why the residency challenge spun out of control. To this day, the question of who was making final decisions for Republicans (both legally and politically) remains unclear. Was it Governor Orr, who convened the state election board and ordered the investigation of Bayh? Was it Durnil, the state party chair, who, throughout, was the most outspoken proponent of challenging Bayh's eligibility? Was it Mutz, who, as the party's gubernatorial nominee, had the most at stake?

For his part, concerns over issues of constitutionalism appear to have genuinely troubled Governor Orr. Having served as governor for eight years, Orr appreciated better than anyone the burden that would haunt Bayh, if elected, with unresolved questions surrounding his eligibility to serve. Admittedly, Orr was not oblivious to the political benefit that would result from having Bayh disqualified. Bayh was by far the strongest Democratic opponent to Mutz. Again, as Jack Colwell observed, “Bayh poses a real threat to continued Republican control of the Statehouse. No other Democrat would have much of a chance If Bayh can’t run, it wouldn’t matter how much sympathy there was among voters.”⁴⁷⁷ But Orr’s primary motivation seemed to be avoiding the possibility of compromising a governor’s authority.

To his credit, Orr took affirmative steps to modify the more overtly partisan aspects of the state election board process. In addition, Orr agreed with Judge Puckett’s decision to suspend the state election board’s investigation of Bayh and allow the matter to be decided by the Shelby County Circuit Court. Likewise, Orr’s insistence that Judge O’Connor’s verdict be appealed to the Indiana Supreme Court appeared motivated more by Orr’s desire for finality of judgment than any interest he may have had in clinging to already desperate partisan political hopes. More cynical observers (and those more critical of Governor Orr) could argue with all of these observations. Without question, Orr possessed a partisan preference in the campaign. But Orr’s actions appeared measured and prudent and, primarily, motivated by a concern for a governor’s authority under the constitution.

Obviously, the same cannot be said for Durnil. Then again, as the state party chair, Durnil had a job to do – that is, to elect Republican candidates. And as he repeatedly boasted, Durnil had proven capable of doing just that, with aplomb, over the course of the

⁴⁷⁷ *Ibid.*

preceding eight years. He prided himself that he had been mentored by the Indiana Republican political icon, L. Keith Bulen. Somewhere, however, Durnil had lost his way. Durnil had surrendered the noble conviction of political victory by honorable means to the notion of winning elections at any cost, even at risk of substantial negative political reverberation. Bayh's astonishing victory in the 1986 secretary of state's race had tarnished Durnil's veneer of invincibility. With a prize as cherished as the governor's office at stake, to lose in successive cycles to the same person was unthinkable.

Colwell characterized Durnil's relentless pursuit of the residency challenge this way: "[Bayh] proved to be a superb candidate in beating the powerful Indiana Republican organization in the secretary of state's race in 1986. And he appears to have the potential to take advantage of a time-for-a-change feeling in Indiana and again smite Goliath. Goliath doesn't like being smited once and can't stand the thought of it happening twice."⁴⁷⁸ Durnil responded to the political pressures of 1988 in a way that his questionable conduct in 1986 had presaged. Several contemporaneous press accounts concluded that Durnil was "obsessed" with Bayh. They were not mistaken. Defeating Bayh became Durnil's sole focus. Over time, this obsession substantially impaired his judgment.

In his defense, much of Durnil's doggedness was no doubt the result of his reliance upon his lawyers' advice. When his lawyers opined that the case against Bayh was winnable, Durnil was certainly not predisposed to question that legal recommendation. Yet, from the beginning, a "favorable" outcome was largely dependent on control over forum. Durnil understood and appreciated this. To the extent that it was imperative for the state election board to make the initial decision, Durnil's unalterable insistence in that regard can

⁴⁷⁸ Ibid.

be better understood. Once the Indiana Supreme Court, in its March 2 order, allowed both forums to proceed simultaneously, Durnil had obtained his wish – the state election board was now free to proceed to determine Bayh’s eligibility without fear of court injunction.

At a minimum, a ruling by the state election board likely would have precluded any decision being rendered by Judge O’Connor. If an initial determination had already been made, it is unlikely that the trial before Judge O’Connor would have occurred. O’Connor could have justifiably dismissed Bayh’s pending lawsuit and allowed the board’s administrative determination to be appealed through normal avenues of judicial review. It must be re-emphasized that Durnil’s only publicly expressed regret throughout the entire Bayh residency challenge was that the state election board had deferred decision making to a court of law.

As a purely pragmatic political matter, Durnil was focused on winning a legal victory. If Bayh was thrown off the ballot, Durnil was convinced that Mutz would win in the fall. However, the question became: at what price was that course of action justifiable? The issue caused some people to begin to openly challenge Durnil’s judgment. As time wore on, Durnil’s strategy was criticized as being shortsighted – that is, Durnil’s plan might “win the battle, but lose the war.” Republicans began to fear that the backlash would be so overwhelming that O’Bannon would be the only beneficiary of the Bayh residency challenge. In a final twist of irony, Republicans lost both – the battle and the war.

Had Durnil’s strategy been carried out, Bayh’s name would probably not have appeared on the November ballot. No doubt, an election between Mutz and O’Bannon would have been close. O’Bannon would have been afforded full benefit of the argument that Mutz (and his surrogates) had used the legal system for political advantage. However,

given the margins of Republican political victories in every other statewide race that year, Democratic success in the governor's race would certainly not have been guaranteed. In fact, despite the enormous political turmoil that would have ensued from Bayh being declared ineligible, it is entirely possible that Mutz would have won the governor's race.

The Republican leader placed in the strangest and most uncomfortable position was John Mutz himself. It remains unclear what role Mutz played in the decisions surrounding how the residency challenge was handled. Other than Bayh, Mutz had the most at stake. As Governor Orr's eight-year partner in government, the two shared a cooperative working relationship, both governmentally and politically, and they communicated frequently.⁴⁷⁹

That having been said, some Mutz partisans advised Mutz that he needed to publicly "break" from Orr because of the overwhelming "time for a change" mood among the electorate. "According to his campaign manager, Mike McDaniel, 'Mutz said, I'll have none of that. [Orr's] been too good to us.'"⁴⁸⁰ Orr and Mutz discussed the possible consequences of the course of action that Orr was setting in motion. Yet, at many critical junctures, Mutz appeared to be unable to convince the governor of the adverse political consequences that some of Orr's decisions were having on Mutz's own campaign.

⁴⁷⁹ Nevertheless, State House observers with long memories recall the role John Mutz, as a member of the State Senate, played in putting Bob Orr, then lieutenant governor, in an extremely awkward position during the 1973 session of the legislature. The Senate was considering then-Governor Otis R. Bowen's property tax reform plan that had been the centerpiece issue of the Republican gubernatorial campaign during the previous year. The Bowen-Orr administration had no higher priority. Yet when it came to a vote on final passage of the bills on April 6, 1973, Senator Mutz voted "no." Without a sufficient number of "yes" votes, Lt. Gov. Orr, as the president and presiding officer of the Senate, unilaterally recessed the Senate in the middle of the vote to give Governor Bowen time to try to convince Mutz and other Republicans to support his tax reform package. Never before had the Senate been put in recess in the middle of a vote and the Democrats strenuously protested Orr's action. Ultimately, Governor Bowen did persuade enough senators to change their votes to permit his tax package to pass. But Senator Mutz was not among them. See *Indiana Senate Journal* (1973) 932, 1031-1033, 1040, 1299 (Roll Call No. 464), and 1337 (Roll Call No. 577).

⁴⁸⁰ Stoner, *Legacy of a Governor*, 134.

Similarly, as the Republican Party's gubernatorial standard-bearer, Mutz possessed at least some authority over Durnil, the state party chair. To conclude otherwise would be to suggest that Mutz was politically impotent. It is possible, perhaps, that Mutz and Durnil did not share a close personal relationship. Yet that conclusion would be at odds with the public record, given that it had been Durnil who, early on, declared his unconditional support for Mutz for governor in the face of a significant potential primary challenge from Hudnut. Similarly, Durnil had to have realized that his continued service as the state party chair was dependent on two things: Mutz's election and Mutz's continued support. However, communication between the Mutz campaign and the state Republican Party was strained throughout the campaign. Oftentimes, the statements issued were not well-coordinated and, at times, appeared contradictory. As Douglas Davidoff, political reporter for the Indianapolis News confirmed, the relationship between Mutz and Durnil deteriorated as the residency controversy dragged on.⁴⁸¹

There is no question that Mutz initially supported the effort to challenge Bayh's eligibility. While Mutz attempted to refrain from direct involvement, his decision in January 1988 to release five years of income tax returns was irrefutably designed to force Bayh's hand as a lead-up to the legal challenge, particularly as it related to what was thought to be critical evidence – Bayh's 1983 and 1984 state income tax returns. Traub commented that, throughout January and February, most Republicans supported a challenge to Bayh's residency – Mutz included. But, by late February and into March, 1988, Mutz and his advisors became increasingly concerned over the way the challenge was evolving. At first, the objections were privately raised. Then, with a greater sense of urgency, the objections

⁴⁸¹ Indianapolis News, March 16, 1988.

became public. By the time that there was full public commentary on the wisdom of Durnil's residency strategy, it was too late. Organizational Republicans were too enmeshed in the challenge to cut their political losses and move on.

By March 14 (the date of Judge O'Connor's decision), Mutz's patience was finally exhausted. He publicly acknowledged, with insistence that all parties should "get on with the campaign." While he reluctantly conceded the appropriateness of pursuing a finality of legal judgment, he also admitted that Republican efforts to keep Bayh off the ballot had backfired. Mutz wanted the residency challenge over with as soon as possible. By late March, he expressed his displeasure that an appeal was being pursued. He complained that he had not been consulted with respect to that decision. Mutz, in effect, was conceding that the challenge to Bayh's residency had significantly affected his campaign and, in an ironic twist, it made him look "inexperienced."

In the final analysis, Mutz's attempt to "have it both ways" was a crucial error. On the one hand, he appreciated the political advantage of having Bayh declared ineligible. Mutz did not want Evan Bayh as an opponent in the fall. After all, Bayh was the only potential opponent that he trailed in the polls. At the same time, Mutz wanted to avoid the perception that he was unwilling to take on all comers. Perhaps he was convinced that, as long as Durnil and Governor Orr took the public lead on the issue, he could distance himself from any negative political repercussions. However, Mutz's attempt to straddle the fence impaired his credibility whenever he spoke on the issue. He would have been better served to make a decision, one way or the other, and remain steadfast to it.

Second, beyond this lack of consensus, the Republicans also underestimated Evan Bayh. They underestimated his judgment – his intuitively deft responses to all levels of

political attack. They underestimated his shrewd appreciation for the political and legal positioning that played such a pivotal role in the way the public perceived what was occurring and why. And they underestimated his persuasiveness – the ability to convince Hoosier voters that he was a victim of a political attack promoted by partisans whose primary motivation was political power and control.

In the end, Republicans deluded themselves into believing their own political rhetoric – that Bayh was too young and inexperienced to be governor. They thought he was incapable of withstanding the cauldron of a coordinated political firestorm. They thought he would be unable to control the more aggressive elements within his own party, particularly his primary opponents. They thought that his fundraising would suffer and considerably diminish. They were convinced he would make mistakes. And, as will be discussed later, in the final analysis, they had become convinced that they would prevail in their effort to have Bayh declared ineligible.

It was Frank O'Bannon, Bayh's running mate, who would best articulate the Republicans' dilemma. In an interview on the eve of the 1988 election with Indianapolis Star reporter Joe Gelarden, O'Bannon admitted that there had been a time when O'Bannon himself "underestimated Bayh's political abilities, but [he] had come to know how good Bayh really was. 'Once we joined our campaigns, I knew the Republicans would underestimate him, too,' [O'Bannon] said."⁴⁸² In that regard, Wayne Townsend and former Indiana Governor Matthew Welsh must be given credit for recognizing Bayh's enormous potential early on, although many others believed Bayh had yet to "pay his dues." They saw something in Bayh that the Republicans failed to fully recognize.

⁴⁸² Stoner, Legacy of a Governor, 137.

At his announcement for governor in November of 1987, Mutz was already captive of this institutional underestimation. Mutz characterized Bayh as superficial. Mutz cautioned voters that “Indiana cannot afford to let image makers decide its choice for chief executive. The times do not permit it. The ever-escalating demands of a changing world allow no substitute for a proven record of experience and leadership.” Mutz went on to assert, “I am not interested in slick campaign commercials.”⁴⁸³ Republicans dismissed Bayh as an intellectual lightweight whose previous electoral success had been attributable more to Madison Avenue advertising than to substance.

With respect to these observations, Mutz was not alone. Durnil and Republican leadership, including Governor Orr, underestimated Bayh as well. They feared him politically, but for the wrong reasons. They feared his poise and his charisma. They complained that he was so young that he lacked a public record that could be analyzed and attacked. What they should have feared was the depth of his intelligence – his ability to respond decisively as events and situations evolved. What they should have feared was his discipline, in both legal and political judgment.

Again, as Stoner observed, “ultimately, the contrast between Mutz and Bayh was not favorable [to Mutz]. While lacking Mutz’s experience in state government, Bayh seemed to have a confidence and a natural ease to him He railed against twenty years of Republican rule but did it in a way that did not annoy or put off Hoosiers. Bayh also successfully ‘stole’ the right flank from Republicans, consistently hitting on his plans to lower state spending, cut taxes and be a ‘true fiscal conservative.’”⁴⁸⁴ On this point,

⁴⁸³ Indianapolis Star, November 8, 1987.

⁴⁸⁴ Stoner, Legacy of a Governor, 135.

Stoner's analysis is particularly astute. As early as November, 1987, Bayh had already decided that his campaign would not follow the predictable course of attacking Mutz on issues of Republican weakness. Rather, Bayh insisted that his campaign make a full frontal assault on those issues perceived as areas of greatest Republican strength – taxes and job creation.

Third, by having his residency challenged, Bayh was able to use the lawsuit to successfully negate the criticism that he was “inexperienced.” Instead, Bayh went on the offensive and turned the “experience” argument on its head. Rather than shy away from it, Bayh made it a centerpiece of his campaign. On his gubernatorial announcement day, Bayh thundered away at the so-called Republican “experience”: “During the last eight years, those who now come before us touting their ‘experience’ have given Hoosier taxpayers the two largest tax increases in the history of our state. They have raised state spending in real terms by 38%. They have dramatically increased the number of state employees. During this same period of ‘experienced leadership,’ we have seen virtually every criteria of evaluation of our education system decline, per capita income of the average Hoosier has eroded [and], by their own admission, the condition of our roads and bridges and highways has reached a critical point.”⁴⁸⁵ To underscore the authenticity of sentiment behind these ideas, it should be noted that Bayh had no campaign speechwriter. These were political arguments that were his, and his alone.

Fourth, the Republicans never anticipated that Bayh and O'Bannon would join forces as a ticket, presenting a unified political party, collectively pursuing a single goal – Democratic victory in November. For the same reasons that they underestimated Bayh,

⁴⁸⁵ Indianapolis Star, November 13, 1987.

Republicans did not believe that O'Bannon possessed the self-assurance and courage to subjugate his own immediate political fortunes for the collective good. In this regard, Republicans underestimated Frank O'Bannon as well. Without specific intention, O'Bannon foreshadowed the best argument for the potential of this joint effort in his May, 1987 gubernatorial announcement speech: "We must show the ability to lead in a new, creative way, and we must have a candidate who can unite the Democratic Party."⁴⁸⁶

In the end, the Republican effort to have Bayh declared ineligible unified Democrats to an even higher degree. All Democrats, even skeptical ones, eventually acknowledged that the residency challenge was an admission of Republican weakness, not strength. It also accelerated the "healing process" among O'Bannon loyalists who may have been initially disgruntled by O'Bannon's decision to abandon his gubernatorial campaign, arguing that given the age differential, "it was Frank's turn." Unlike most political marriages, the Bayh/O'Bannon ticket was immediately called upon to "circle the wagons" and join together in a united fight for political survival to overcome an intense assault by their political opponents.

Bayh's willingness to do whatever was necessary to ensure O'Bannon's nomination for governor, if the courts ruled against Bayh, went a long way toward confirming Bayh's commitment to O'Bannon. If Bayh had been declared ineligible, the Bayh/O'Bannon team would have become the O'Bannon team, with the Bayh camp doing all that it could to ensure O'Bannon the party's nomination and a victory in the November general election. As awkward as it was to have O'Bannon's name appear on the primary ballot for governor, the fact that Bayh wholeheartedly supported the effort to ensure O'Bannon's ascendancy if the Republican residency challenge would prove successful, convinced skeptical Democrats

⁴⁸⁶ Corydon Democrat, May 17, 1987.

that Bayh and O'Bannon were committed to the same end – one of them would be the next governor of Indiana.

Fifth, Republicans discounted most of the more obvious political downsides that could occur as a result of the residency challenge because they assumed that they would win. Certain of victory, Durnil trusted that Republicans would be vindicated eventually in the eyes of the public. Durnil was prepared to accept, in the short term, an initial and reasonably predictable negative reaction by the public because, in the end, the challenge would be seen by the public as having been justified on constitutional grounds, once it was established that Bayh was, in fact, ineligible.

Durnil obviously preferred that a challenge against Bayh be initiated by Democrats. After all, in the two most recent cases where durational residency requirements for governor had been litigated (Missouri and South Carolina), challenges had come from within the candidate's own political party – a Republican primary challenger sued Republican Kit Bond in Missouri, and a “friendly” lawsuit instituted by the state Democratic chair had begun the litigation against Democrat Charles “Pug” Ravenel in South Carolina. A Bayh residency challenge brought by Democrats, whether “friendly” or otherwise, would have been in many ways a political victory for Republicans, irrespective of the legal outcome.

However, absent a challenge from within the Democratic Party itself, Republicans also believed that Bayh could ultimately be forced to initiate his own lawsuit because of the perception that he needed to “clear title” in his run for the governor's office. Many political commentators agreed with this view. Because resolution of the “residency issue” appeared to be fundamental to Bayh's own candidacy, many believed that he was the one who was obligated to resolve the question. The fact that Bayh refrained from filing a lawsuit until it

was ultimately necessary to protect his own political interests against actions already initiated by Republicans is further proof of how much the Republicans underestimated his level of political discipline.

Admittedly, there did exist some cases from other states which supported the argument that durational residency language required continued “physical presence.” If that standard were applied in this case, Bayh was ineligible. However, given the Indiana Supreme Court’s decision in Evrard, it was more likely that “residency as domicile” would be the standard applied. Even so, apparently convinced by his lawyers that there was evidence sufficient to show that Bayh had abandoned his domicile in Indiana and established it elsewhere, Durnil was determined to pursue it to its logical extreme.

The lawyers advising Durnil were not the same lawyers who carried the public burden once the litigation ensued. Much like John Mutz, the lawyers advising the Republican Party appeared desirous of having it both ways. While they were quite willing to counsel Republican leadership on legal strategy, they were reluctant to publicly represent their position once the matter got to court. Perhaps they feared that any public profile contrary to the interests of an individual who could be the next governor of Indiana was not prudent. To his credit, Daniel F. Evans, Jr., did enter his personal appearance on behalf of Durnil once Bayh’s lawsuit was filed. He was successful in having Durnil dismissed as a defendant. However, at no time on any court documents did Evans identify his legal association or in any way indicate that he was, in fact, a profiled partner in a prominent Indianapolis law firm.

Durnil repeatedly assured Republican activists that Evans and his colleagues at the law firm did the bulk of the legal research necessary to advise him regarding Republican

legal options. Ironically, after his two terms as governor, Bayh accepted employment with the very same law firm – a law firm which had devoted countless hours and enormous legal expertise to prevent Bayh from running for governor in the first place. In this respect, McNamar, the lawyer hired by the state election board, should be given some latitude. He is not the one who developed the legal strategy. He was simply hired, at public expense, to put a public face on it.

Although the Republicans initiated their own “lawsuit,” they were convinced that the public would eventually see the challenge as completely justifiable. With the state election board as forum, a decision declaring Bayh ineligible was highly likely. With that decision being subject to multiple layers of judicial review, Bayh would have been afforded his “day in court.” And because the scope of judicial review would be confined and narrow, the state election board’s decision would be upheld. Bayh would be declared ineligible and a fall campaign would proceed between O’Bannon and Mutz.

Bayh responded to the state election board investigation with a declaratory judgment action of his own. Republicans were comforted, no doubt, by the Indiana Supreme Court’s March 2 decision that prevented the trial court from restraining the election board in any way. This decision forced Bayh to compromise. He agreed not to challenge the Shelby County venue and he voluntarily abandoned his request for a jury trial in an effort to secure an earlier bench trial date. These compromises assured Republican leadership that the case would be solely decided by a Republican judge. In addition, Republicans had the comfort of knowing that any decision of a Republican trial court judge would be reviewable on appeal by the Indiana Supreme Court, consisting of four Republicans (two of whom had been appointed by Governor Orr) and only one Democrat. Durnil’s confidence in the outcome,

therefore, was not misguided. He was not a risk-taker. He knew what he was doing, calculated the odds, and made political decisions accordingly. He preferred the state election board route, but became convinced that the probability of success in a court of law was still quite high, given the circumstances.

Yet when Judge O'Connor issued his decision, Republicans were dealt a significant setback. They should not have been surprised. As early as February 1, in the memo prepared by Bayh's panel of legal experts, it was clear that "residency as domicile" was quite likely to be the applicable standard in defining the constitutional concept of "residency." How that standard would be applied to the facts remained an unknown. But it should have been accepted that, in all likelihood, in order to win, Republicans would be required to do more than try to poke holes in evidence that Bayh produced. They needed proof that he clearly and unequivocally intended to abandon his domicile in Indiana and establish it elsewhere. When that did not occur, the Indiana political world was turned upside down. As WTHR-TV later summarized: "In court, Bayh won a clear cut [legal] victory. The residency challenge allowed Evan Bayh to dominate the earned media for months, exploiting the issue of fairness against John Mutz. It also deprived Mutz [of] the potent line of attack Bayh observed, 'Maybe in the way I handled it, by not losing my cool, by trying to remain steady and calm, reassured some people.'"⁴⁸⁷

Republicans also underestimated the independence of the third branch of government – the judiciary. While Durnil may have been justified in believing that he could exert partisan control over a decision by the state election board, any thought that Republican trial and appellate court judges could be relied upon to "do the right thing" was

⁴⁸⁷ Television documentary, "The Making of a Governor," WTHR-TV, January 9, 1989.

uninformed. To the extent that Durnil possessed such a belief, this revealed a woefully antiquated understanding of how seriously judges take their responsibility and how protective they are of the integrity of the judiciary.

To be sure, Shelby County Circuit Court Judge Charles O'Connor is a Republican. When he sits on the bench, however, he does not view legal issues from a partisan perspective. The people of Indiana are well served because of public servants like Judge O'Connor who, once elected, leave their partisan stripes at home. Profiles in courage rarely come without a price. Despite his well-established reputation for fairness and sound judgment, Judge O'Connor has been often overlooked for promotion within the federal judicial system by Republican-controlled panels. In extremely partisan circles, Judge O'Connor is still regarded as "the Republican judge who let Evan Bayh run for governor." Despite significant systemic reforms, partisan memory is long in Indiana. Judge O'Connor may be the only true "victim" of the Bayh residency challenge.

The integrity and independence of the judiciary can also be said to have been sustained by the late Judge James Puckett. In his private sanctuary, Judge Puckett was a loyal Republican. He would not have been selected by Governor Orr for the role he was asked to play if that were not the case. But, for Puckett, rule of law trumped partisan considerations. In the Bayh case, he recommended that the state election board suspend its investigation and defer to the Shelby County Circuit Court because it was legally appropriate, it made sense, and it was in the public's best interest. While he was, no doubt, relieved that his patron, Governor Orr, agreed with his decision, Judge Puckett may have ultimately possessed the courage to make that decision irrespective of the governor's

opinion. At an extremely tenuous time in our state’s political history, the tempered wisdom of Judge Puckett served Indiana citizens well.

The same must ultimately be said about our Indiana Supreme Court. While the court may have stumbled in its initial consideration of the election board versus trial court jurisdiction issue and was largely protected from political pressure by the retention vote system, the fact that, despite its partisan make-up, it unanimously affirmed Judge O’Connor’s trial court findings should be recognized by the public as our judicial branch of government elevating legal principle over political pressure and expectation.

As a final observation, Republicans fundamentally underestimated the public. Whether plausible or not, Republicans believed that the average voter would not accept Bayh’s explanation how he satisfied the required five year residency period prior to election day. Republicans assumed that the “residency as domicile” standard would be viewed as some type of contorted legal “hocus-pocus” that amounted to nothing more than an effort to change the rules for Bayh.

To the contrary, Republicans believed that their own explanation would be more persuasive. Every other candidate for governor in the history of our state had been required to satisfy Indiana’s durational constitutional residency requirement. Why not Bayh? Or, as Mutz would later describe, “do you want somebody making decisions for you who has only been here for 22 months and who really has not lived here even the five years that the Indiana constitution says the guy is supposed to.”⁴⁸⁸

Republicans were convinced the public would understand that the Indiana constitution requires a candidate to have lived here for five years, and Evan Bayh had not

⁴⁸⁸ Ibid.

physically lived here for five years. For Mutz campaign manager Mike McDaniel, the residency challenge was entirely legitimate. “... Evan Bayh had clearly not lived in Indiana,” McDaniel said. ‘There is no question about that. He grew up in D.C., he really had, and we had plenty of evidence that he had not really lived in Indiana.’”⁴⁸⁹

Many prominent Indiana Republicans were convinced of the same notion – Bayh did not satisfy the constitutional residency requirement because Bayh had lived most of his life outside the state of Indiana. To this day, some Republicans bristle at the suggestion that the Bayh case was rightfully decided. Republicans can be often overheard to grumble that “residency” after the Bayh case does not mean anything anymore. To these partisans, Bayh grew up in Washington, D.C. He spent most of his life outside of Indiana, including attending law school at the University of Virginia, as well as working for a Washington, D.C., law firm. They believed he returned to Indiana for the sole purpose of trading on his father’s famous name and running for political office. For them, the antiquated language of Indiana’s constitution provided a bona fide (if not, intoxicating) reason to challenge Bayh’s eligibility to even be on the ballot.

Yet, in truth, this argument is not really a legal argument at all. Rather, it is simply a different version of the familiar political refrain leveled against any so-called “carpetbagger.” In their desire to ensure political control, many Republicans confused what may have been an effective “political” argument against an alleged “carpetbagger” (particularly when combined with the legitimate political criticism about Bayh’s level of experience) with a highly technical constitutional argument about Bayh’s “residency.” Years later, McDaniel, Mutz’s campaign manager, confirmed this assessment. “In

⁴⁸⁹ Stoner, *Legacy of a Governor*, 129.

retrospect now, there is no question in my mind that we would have been better off if we had played the ‘carpetbagger’ issue during the campaign as opposed to acting like the big guys who want to keep the new young guy out of the race,” McDaniel said. “Clearly it spilled over onto the campaign. That is all water over the dam now, but it had an effect.”⁴⁹⁰

In this regard, to most ordinary Hoosier voters, the Republican argument was simply not credible. How could anyone with a straight face argue that Birch Bayh’s son was not a Hoosier? Whether Democrat or Republican, Birch Bayh friend or foe, you had to acknowledge that Birch Bayh was Hoosier to the core. How could his son not be? On top of that, Senator Birch Bayh’s father, Birch Bayh, Sr. (Evan Bayh’s grandfather) had officiated seven times in the Indiana state high school basketball tournament final game. As Jack Colwell observed, “you just can’t have much more Hoosier heritage than that.”⁴⁹¹ And most people believed that, if for some reason Evan Bayh was determined to not be a Hoosier, it had to be the result of some hyper-technical reason that might make sense to politicians, but not to the public.

WISH-TV reporter Jim Shella, who covered the residency challenge in its entirety, echoed that sentiment. Shella observed that the residency challenge was “a colossal mistake. What came out of that was this message that they [the Republicans] were afraid of Evan Bayh. They tried to make the argument that Birch Bayh’s son is not a Hoosier. The public said, first of all, that you cannot tell me that Birch Bayh’s son is not a Hoosier, and

⁴⁹⁰ Ibid., 130.

⁴⁹¹ South Bend Tribune, March 20, 1988.

second of all, why are you so afraid to run against him anyway? I think they may have lost that race then and there.”⁴⁹²

Stoner asserts that, “to most insiders, the residency challenge looked and smelled like fear on the part of the Republicans. To ‘Joe and Martha Hoosier,’ it just looked ridiculous that anyone would even try to argue that Birch Bayh’s son was not a Hoosier.”⁴⁹³ Yet as Stoner also observes, “[Republican] concern bubbled over, it seems, in a strange and ultimately harmful effort to try and deny Bayh even the chance to run. After months of bad-mouthing Bayh as an alleged ‘carpetbagger’ returning to Indiana for political opportunity, Durnil and other Republicans began to question whether Bayh met the state’s constitutional requirement to hold office for governor From the start, it was an odd effort, but one most Republicans were absolutely determined to pursue.”⁴⁹⁴

An odd effort, indeed. Yet, an oddity that helped shape the course of Indiana’s political history for an entire generation. Just as Birch Bayh’s final re-election to the U.S. Senate in 1974 closed one chapter of Indiana political history, his son’s election as governor in 1988 ushered in a new era when Indiana Democrats throughout the 1990’s re-asserted electoral competitiveness in nearly all levels of government.

In 1986, Bayh’s victory in the secretary of state’s race helped Indiana Democrats establish a 6 to 4 majority in the partisan make-up of Indiana’s congressional delegation. Between 1986 and 1990, the Democratic majority in the Indiana congressional delegation further expanded to 8-2.

⁴⁹² Stoner, Legacy of a Governor, 130.

⁴⁹³ Ibid., 129.

⁴⁹⁴ Ibid., 128-129.

Following Bayh's 1988 election as governor, and for the first time in our state's history, the two major political parties were evenly split at 50 Republicans and 50 Democrats in the 100-member Indiana House of Representatives. In one of his final acts as secretary of state, Bayh helped forge a unique power-sharing compromise between Republicans and Democrats in which the two parties would alternatively exert daily control over the legislative body under the leadership of Co-Speakers of the House: Republican Paul S. Mannweiler and Democrat Michael K. Phillips.

In the years following Bayh's 1988 election as governor, the Indiana Democratic Party enjoyed election victories in other races that it had not experienced in twenty years. In 1990, Democrats obtained a majority in the Indiana House of Representatives after fourteen consecutive years of minority status. Bayh himself was re-elected to a second term as governor in 1992 by a record-setting margin, capturing 63 percent of the vote. Bayh's partner in government, Lieutenant Governor Frank O'Bannon, was thereafter twice elected governor. Between Bayh and O'Bannon, this sixteen-year period represented the longest consecutive period that Democrats have held the governor's office since five different Democrats held the office from December 1843 until January 1861.⁴⁹⁵

During this same Bayh-O'Bannon sixteen-year period, Democrats enjoyed notable victories in several other statewide contests. Indiana Democrats elected two African-Americans to statewide office: in 1990, Dwayne Brown was elected Clerk of the State Supreme and Appellate Courts and, in 1992, Pamela Fanning Carter was elected Indiana's first female, as well as first African-American, Attorney General. During the Bayh years as governor, other Bayh-supported Democrats launched prominent careers. In 1990, Bayh aide

⁴⁹⁵ Linda C. Gugin and James E. St. Clair, eds., The Governors of Indiana (Indianapolis: Indiana Historical Society Press, 2006), 16.

Jeffrey Modisett was elected Marion County Prosecutor – the first Democrat to be elected to that office since 1974. Thereafter, Modisett went on to be elected Indiana Attorney General in 1996. One of Bayh’s closest friends and his former chief-of-staff, Bart Peterson, was elected mayor of Indianapolis in 1999, ending thirty-two uninterrupted years of Republican occupancy of that office. To this day, Mayor Peterson enjoys an unlimited political future. Joseph J. Andrew, one of the Indiana Democratic Party chairs under Bayh, went on to become the chairperson of the Democratic National Committee in 1999. All of these success stories were, in no small measure, attributable to the groundwork laid by the 1988 Bayh gubernatorial victory.

Evan Bayh might very well have been elected governor in November of 1988 even if no attempt had been made to keep him off the ballot. However, any honest reflection on the gubernatorial campaign of 1988 requires an examination of the residency challenge and the role that it played. Hardly an election season passes without some controversy surfacing concerning a candidate’s residency which, inevitably, encourages a revisiting of the Bayh case. In the 2003 New Albany city elections, a candidate for city council was alleged to live outside the city’s limits. He explained that he owned property both inside and outside the city’s limits and that he “divides his time between two homes.” The precedent established in the Bayh case was immediately referenced when contemporaneous newspaper accounts reported on the controversy.⁴⁹⁶

In 2004, a candidate for the state legislature from Vigo County, Jeffrey M. Lee, sought and won the Republican primary nomination but, subsequently, attempted to withdraw his candidacy claiming he was no longer a “resident” of the district where he

⁴⁹⁶ Louisville Courier-Journal, March 31, 2003.

originally filed. His opponents maintained that Lee had not changed his residence and that he, therefore, remained a bona fide candidate in that district. The trial court, citing the precedent established in State Election Board v. Bayh, insisted that the evidence showed that Lee never abandoned his residency in Vigo County. Because the court found evidence sufficient to show that Lee continued to reside in the applicable House district, he was initially restrained from withdrawing his candidacy. The Republican Party was temporarily prohibited from conducting a caucus to replace him as the duly nominated candidate in the November election.⁴⁹⁷

The “residency” of Indiana governors remains, to this day, an extremely sensitive issue. In 2005, when it was announced that Governor Mitchell E. “Mitch” Daniels intended to build a home for his family in Hamilton County, Indiana, because the official governor’s residence on North Meridian Street in Indianapolis was in need of repair, serious objections were raised, including reference to the constitutional obligation for governors to reside “at the seat of government,” pursuant to Article 6, Section 5 of the Indiana Constitution. At the time, Daniels claimed to be unaware of the requirement and indicated that he would have his lawyer research the question. Daniels said, “all I can tell you is I’m going to be in full compliance with the constitution, whatever it means. If it means the residence must be in Marion County, then, by gosh, mine will be.” When he was asked about the possibility of alternative interpretations, to a plain reading of the applicable constitutional provision, Daniels replied, “Well, I don’t know. There’s been a lot of ambiguity about residences, as I

⁴⁹⁷ Nunc Pro Tunc Findings of Fact, Conclusions of Law and Temporary Restraining Order, Record of Proceedings, Indiana State Democratic Central Committee and Dora Mae Abel v. Jeffrey M. Lee, et al., Cause No. 84D03-0409-MI-9204, Office of the Clerk of the Vigo County Superior Court, September 28, 2004.

recall.”⁴⁹⁸ Daniels ended the speculation, however, when he announced that he was proceeding with his family’s desire to build a new home in Hamilton County. The Indianapolis Star reported that “once it’s completed, Daniels ... will divide [his] time between that home and the governor’s official residence at 4750 N. Meridian Street, in Indianapolis”⁴⁹⁹

These examples are smaller iterations of the much larger conflict which took center stage in 1988. But they are its logical progeny. It is unassailable that Bayh’s election in 1988 altered Indiana’s political landscape in significant ways. Evan Bayh, a two-term Indiana governor, is now a two-term United States Senator from Indiana. He is widely regarded as possessing what it takes to be seriously considered for the presidency or the vice presidency of the United States of America. As Clifford L. Staten opines: “contemplating Bayh’s possible candidacy for president, Brian Vargus, noted Indiana pollster, observed that: ‘The gubernatorial years for Evan Bayh will probably be regarded as a chapter in a much larger volume The chapter is going to be less significant than the chapters of the rest of his career, which I expect to be very distinguished.’”⁵⁰⁰ Because of his potential, Bayh’s election as governor in 1988 may very well play a role in American political history. Only time will tell. If his election as governor launched a political career that might one day find him serving as vice president, or perhaps even president, then the effort by Republicans in 1988 to have Bayh legally disqualified from seeking office in 1988 will be judged with even sharper scrutiny. For now, and for all of the foregoing reasons, the careful review and

⁴⁹⁸ Indianapolis Star, February 12, 2005.

⁴⁹⁹ Ibid., November 2, 2006.

⁵⁰⁰ Gugin and James E. St. Clair, eds., The Governors of Indiana, 382.

consideration of the events which helped shape the Indiana 1988 election season are justifiable and worthy of our collective reflection.

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