

***Heller v. Legislature*, 120 Nev. Adv. Op. No. 51, 93 P.3d 746 (July 14, 2004)¹**

**CONSTITUTIONAL LAW –
SEPARATION OF POWERS – WRITS OF MANDAMUS**

Summary

On April 2, 2004, The Honorable Dean Heller, Secretary of State of the State of Nevada, sought an original petition for a writ of mandamus by the Nevada Supreme Court to compel the state Legislature (as a whole) to enforce separation of powers. The Secretary challenged whether state government employees' service in the state Legislature (dual service) violated the constitutional separation of powers doctrine and questioned whether local government employees' service in the Legislature also violated the separation of powers. The petition asked the court to: (1) find that service in the Legislature by "certain," unidentified state executive branch employees violated separation of powers; (2) direct the Legislature as a whole to enforce separation of powers; and (3) determine whether service in Legislature by local government employees violated the separation of powers. The Secretary relied upon a March 1, 2004 Attorney General opinion that concluded that the separation of powers "bars any employee serving in the executive branch...[from] serving simultaneously as a member of the Nevada State Legislature," but tolerates a local government employee's simultaneous service as a legislator.

On May 4, 2004, the Legislature filed an answer that listed numerous bars to mandamus relief; asserted the Secretary's only "judicial recourse is to bring an appropriate judicial action against the individual legislator...;" and concluded a legislator's service in state or local government employment did not violate the separation of powers. The Nevada Faculty Alliance, the American Civil Liberties Union of Nevada, various educational associations and a consortium led by the Las Vegas Police Protective Association, Metro, Inc. were permitted to file amici briefs. The amici all joined against the Secretary.

On May 20, 2004, the Secretary replied to the Legislature's answer, and partially altered the relief sought to request an interpretation by the court of Nevada Constitution, Article 3, Section 1(1) (separation of powers)², as it pertains to executive branch employees serving in the Legislature and for the court to order the Legislature to use that interpretation in its discretionary duty to judge the qualifications of its members under Article 4, Section 6.³ The relief sought would have applied on a prospective basis only beginning with the February 2005 start of the Legislature's 73d regular session.

After an en banc hearing, Nevada Supreme Court Chief Justice Miriam Shearing, and Justices Deborah Agosti, Robert Rose, Nancy Becker, A. William Maupin, Mark Gibbons, and Michael Douglas, in a *per curiam* opinion, denied the petition, holding that: (1) the Secretary of State did not have standing to seek mandamus relief; (2) the Secretary sued the wrong party at the wrong time in that each house of the Legislature has the right to judge member qualifications

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²Nev. Const., art.1, § 1. cl. 1. The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

³Nev. Const., art. 4, § 6. Power of houses to judge qualifications, elections and returns of members; selection of officers; rules of proceedings; punishment of members. Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.

without interference from the other house and the Legislature, as a whole, cannot be compelled or have legal authority to perform that duty and no concrete controversy yet existed for the court to resolve; (3) quo warranto⁴ was the proper mechanism to challenge title to a public office, not writ of mandamus, with each individual legislator named as quo warranto respondents; (4) the Legislature could not exempt its members from quo warranto suits; and (5) the separation of powers doctrine barred judicial review of state employees' service in the Legislature.

Issues and Disposition

Issues

- 1) Whether the Secretary of State had standing to seek exclusion of state government employees from serving in the Legislature (dual service);
- 2) Whether the Secretary had sued the correct party at the correct time;
- 3) Whether quo warranto, rather than writ of mandamus, was the proper mechanism to try title to public office;
- 4) Whether the Legislature could exempt its members from quo warranto suits;
- 5) Whether the separation of powers doctrine in the Nevada Constitution barred judicial review of state government employees' service in the Legislature; and
- 6) Whether the dual service issue could be subject to judicial review with respect to the qualifications for a legislator to serve in the executive branch.

Disposition

1. No. The Secretary of State lacked standing to seek mandamus relief regarding the dual service issue. Although not addressed by either the Legislature or the Secretary, the court reached the issue of standing because it affected their original jurisdiction. A mandamus writ must be denied if the petitioner cannot demonstrate a direct and substantial interest in the legal matter asserted, *i.e.*, the petitioner will gain no direct benefit from its issuance, or suffer no direct detriment if denied.
The Secretary's only explicit constitutional duties were to keep a true record of official acts of the Legislature and executive branch and administer the election process. The Secretary only had standing to seek enforcement of state election laws. The present matter did not render the Secretary unable to discharge his official duties without the writ relief. The Secretary had no discernible beneficial interest from the ouster or exclusion of state employees serving in the Legislature, nor was it within the scope of the Secretary's administration of the election process.
2. No. The Secretary sued the wrong party at the wrong time. Under the Nevada Constitution, the authority to determine members' qualifications rested with each House, rather than the Legislature as a whole. Neither House may interfere with the seating of the other's members. Thus, the Legislature, as a whole, had no legal authority to perform the act the Secretary sought to compel. Further, until executive branch employees were actually elected and seated in the 73d Legislature, there was no concrete controversy for the court to resolve and the matter was not yet ripe for review.
3. Yes. Quo warranto was the proper mechanism to try title to public office. Mandamus was ill-suited to determine whether a person unlawfully holds public office because, unlike quo warranto, the officeholder need not be made a party and no legal officer of the state need authorize the action. This was in contradiction to Nevada Revised Statutes

⁴Heller v. Legislature, 93 P.3d 746, 751 (Nev. 2004) (citing 74 C.J.S. QUO WARRANTO § 1, at 96 (2002) (An ancient common law writ and remedy to determine the right to the use or exercise of a franchise or office)).

(NRS) 35.040 and 35.060, that provide that the Attorney General may sue in quo warranto and the person allegedly holding the office unlawfully must be named as a defendant.

4. No. The Legislature could not exempt its members from quo warranto actions. The court's powers to issue writs of mandamus, certiorari, prohibitions, quo warranto, and habeas corpus are derived from the Nevada Constitution, Article 6, §4. The Legislature's 1971 statutory modification to NRS 35.010⁵ to exempt its members from quo warranto actions held invalid because a legislature cannot restrict a court's original jurisdiction to issue writ relief, or to substantially impair or practically defeat the exercise of the court's constitutional powers.
5. Yes. The Nevada Constitution's separation-of-powers doctrine barred judicial review of a state executive branch employee's service in the Legislature. Separation of powers "is probably the most important single principle of government declaring and guaranteeing the liberties of the people."⁶ Nevada Constitution Article 4, §6, expressly reserved to the Senate and Assembly the rights to extend, withhold, and withdraw membership status. A constitutional provision that the Legislature "shall judge" the qualifications, returns, and elections of its own members insulated a legislator's qualifications to hold office from judicial review. The only areas in which a court could act with respect to qualifications, elections, and returns of legislators was where the legislature had: (1) devised a role for the courts by statute, such as deciding election contests; (2) infringed upon personal constitutional rights; or (3) imposed extra-constitutional qualifications on the legislator.
6. Yes. The dual service issue may be raised as a separation-of-powers challenge to legislators working in the executive branch. Although a court could not review a state employee's qualifications to sit as a legislator, a court could review a legislator's employment in the executive branch. This was because no state constitutional provision gave the executive branch exclusive authority to judge its employees' qualifications. Challenges to executive branch employees invested with sovereign powers and occupying public offices were within quo warranto's exclusive reach. Declaratory relief, coupled with injunctive relief, could be sought against other executive branch employees. The attorney general, or someone with a "legally protected interest," such as a person seeking the executive branch position held by the legislator, had the clearest standing to bring quo warranto or declaratory relief actions. Individual legislators would need to be named as either quo warranto respondents or declaratory relief defendants.

Commentary

State of the Law before *Heller*:

Before the case, the Nevada Supreme Court had not directly addressed judicial intrusion

⁵ Nev. Rev. Stat. 35.010 Action in name of State against public officer, association or usurper of public office or franchise. A civil action may be brought in the name of the State:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, except the office of assemblyman or state senator, or a franchise, within this state, or an officer in a corporation created by the authority of this state.
2. Against a public officer, civil or military, *except the office of Assemblyman or State Senator*, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.
3. Against an association of persons who act as a corporation within this state without being legally incorporated. [Emphasis added.]

[1911 CPA § 714; RL § 5656; NCL § 9203]—(NRS A 1971, 660)

⁶*Heller*, 93 P.3d at 753 (*citing* Galloway v. Truesdell, 422 P.2d 237, 241 (Nev. 1967)).

upon the right of the Legislature to judge its members qualifications.⁷ In previous dictum, the court recognized that constitutional provisions similar to Nevada Constitution Article 4, §6 “deprive the courts of jurisdiction to decide election contests for state legislative offices.”⁸ Nor had the court addressed the validity of the Legislature’s 1971 amendment to NRS 35.010(1), exempting legislature members from quo warranto actions.

Survey of Other Jurisdictions

The Nevada Supreme Court relied heavily upon constitutional jurisprudence in other jurisdictions to reach its conclusion in *Heller* that the separation-of-powers barrier cannot be breached to oust a member of the Legislature, for any reason, including dual service.⁹ The court reiterated the finding of the Minnesota Supreme Court that: “[t]here are good reasons for the widespread acceptance of the principle...” [against judicial intrusion into legislature’s right to judge the elections, returns, and qualifications for office] so as to preserve the independence, purity and free choice of the legislature’s own constituents.¹⁰

The Nevada Supreme Court also looked to California, Oregon, and Utah in support of its position that judicial review of the dual service issue is barred by the separation-of-powers doctrine.¹¹ The court distinguished a California Court of Appeals case that stated the separation-of-powers proviso meant that a person may not simultaneously hold positions in different departments of the government.¹² The Nevada Supreme Court pointed to an express finding by the appellate court that the dual service issue was beyond its reach and quo warranto was the proper proceeding to directly test the title to all public offices, not writ of mandamus.

The court also noted the U.S. Supreme Court has held that Congress is the sole judge of whether an elected official meets the qualifications enumerated in the Constitution, except when Congress imposes extra-constitutional requirements, such as a resolution barring an individual

⁷*Heller*, 93 P.3d at 755 (citing *Mengelkamp v. List*, 501 P.2d 1032 (Nev. 1972) (denying writ relief. Judicial intervention not warranted because under-age candidates for Legislature statutorily ineligible to run for office)).

⁸ *Laxalt v. Cannon*, 397 P.2d 466, 467-68 (Nev. 1964).

⁹ *Heller*, 93 P.3d at 754-755, citing *Foster v. Harden*, 536 So.2d 905, 906 (Miss.1988) (refusing to consider an election contest which questioned whether a state senator satisfied a residency requirement, because “[e]ach legislative body is the sole judge of the elections, returns, and qualifications of its own members, and its action in admitting or expelling a member is not reviewable in the courts” (internal quotation marks omitted)); *State v. Banks*, 454 S.W.2d 498, 500-01 (Mo.1970) (declining to consider a quo warranto action to oust a state legislator, and stating that no authority existed to contradict the principle that a legislature’s power to judge its members’ qualifications is exclusive); *Lessard v. Snell*, 155 Or. 293, 63 P.2d 893, 894 (Or. 1937) (barring secretary of state from declaring senator’s seat vacant, and stating, “We apprehend there is no case in the books--certainly none has been cited--where any court has ever ousted a member of a Legislature or directed such co-ordinate branch of the government to accept any person as one of its members.”). *But cf.* *State ex rel. Stratton v. Roswell Schools*, 111 N.M. 495, 806 P.2d 1085, 1095 (N.M.Ct.App.1991) (concluding, without recognizing the New Mexico Constitution’s qualifications clause, that a school teacher and a school administrator were not barred by separation of powers from being legislators).

¹⁰ *Heller*, 93 P.3d at 754-55, citing *Scheibel v. Pavlak*, 292 N.W.2d 843, 847 (Minn. 1979).

¹¹ *See California War Veteran’s for Justice v. Hayden*, 222 Cal. Rptr. 512 (Cal. Ct. App. 1986) (“unequivocally clear” that suit to disqualify assemblyman was barred by California Constitution directives that “each house shall judge the qualifications and elections of its members.”) (quoting Cal. Const., art. IV, § 5); *Lessard v. Snell*, 63 P.2d 893, 894 (Or. 1937) (It would be wholly foreign to our constitutional systems of government for the executive or judicial department to determine a matter expressly reserved for the Legislature); *State v. Evans*, 735 P.2d 29 (Utah 1987) (relying on Utah Constitution provisions that each house shall judge the election and qualifications of its members and noting other state courts interpreted analogous constitutional provisions as barring judicial intervention into legislatures’ decisions to seat defendants).

¹² *Elliott v. Van Delinder*, 247 P. 523, 524 (Cal. Ct. App. 1926).

representative from resuming their congressional seat because of alleged travel and salary payment irregularities.¹³

On the subject of the proper mechanism to challenge the title to a public office, the court stated that most states recognized quo warranto not only as an adequate remedy to challenge a person's right to hold public office, but it was the exclusive remedy.¹⁴ The court particularly noted the Pennsylvania Supreme Court's rationale for quo warranto's exclusiveness based on the facts that public officers should not have their authority questioned incidentally in litigation between other parties, nor should they have to defend their authority unless they are made a party to the proceeding and the proper legal officer of the state had determined the question raised is serious and deserved judicial consideration.¹⁵

Thus, the court's decision to deny a writ of mandamus seeking to oust or exclude executive branch employees from serving in the legislature under dual service as being barred by the separation-of-powers doctrine appears consistent with federal and state jurisdictions that addressed this fundamental constitutional issue. Likewise, the court's conclusion quo warranto is the proper mechanism to determine the right to the use or exercise of a franchise or office rests upon a solid foundation and is consistent with other jurisdictions.

Effect of *Heller* on Current Law

Any attempt to exclude or oust an executive branch employee from the legislature through a judicial proceeding is barred by the separation of powers.¹⁶ But, the dual service issue may be raised as a separation-of-powers challenge to legislators working in the executive branch. Dual service challenges to legislators also employed by the executive branch of state government may be brought in district court by the attorney general as a quo warranto action, or as a request for declaratory relief by a person demonstrating a direct and substantial interest in the legal right asserted.¹⁷

A quo warranto action or request for declaratory relief must name the individual legislators as respondents or defendants in order to protect the interests of the officeholder and all parties involved.¹⁸ The Legislature's attempt to exempt its members from quo warranto actions fails. The Legislature cannot restrict the original jurisdiction of the court to issue writ relief by substantially impairing the constitutional powers of the court or defeat their exercise.¹⁹ NRS 35.010 must be must be conformed to delete the impermissible language.

Unanswered Questions

The court stated the judiciary has the power to review a legislator's employment in the executive branch because there is no constitutional provision exclusively reserving such review to the executive branch.²⁰ Nevada has 42 seats in the Assembly and 21 seats in the Senate. With a large number of current candidates for Assembly and Senate who are also employed by state or

¹³ *Powell v. McCormack*, 395 U.S. 486 (1969).

¹⁴ *Heller*, 93 P.3d at 751, citing 65 Am. Jur. 2d, QUO WARRANTO, §§ 8-10 (2001); e.g., *Ex parte Sierra Club*, 674 So.2d 54, 57 (Ala.1995); *Nicolopoulos v. City of Lawndale*, 111 Cal.Rptr.2d 420, 422 (Cal. 2001); *Breslin v. Warren*, 359 N.E.2d 1113, 1114 (Ill. 1977); *Layle v. Schnipke*, 186 N.W.2d 559, 560 (Mich. 1971); *Delgado v. Sunderland*, 767 N.E.2d 662, 665 (N.Y. 2002); *State v. Tapp*, 380 P.2d 260, 267 (Okla.1963); *McCracken v. Bissett*, 203 A.2d 481, 481 (Pa. 1964); *Lewis v. Drake*, 641 S.W.2d 392, 394 (Tex.App.1982).

¹⁵ *Heller*, 93 P. 3d at 755, citing *In re Bd. of School Directors of Carroll Township.*, 180 A.2d 16, 17 (Pa. 1962).

¹⁶ *Id.*, at 757.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 752.

²⁰ *Id.* at 757.

local governments, such as educators, analysts, or administrators, the potential impact on the Legislature could be enormous if these actions are successful. Given the meager amount a Nevada legislator is paid, the costs of defending against such actions could have a chilling effect on getting otherwise qualified candidates or incumbents to run for office--even those with positive records and years of experience serving in the Legislature.

The court did not reach the specific question as to whether such dual service as a legislator employed in the executive branch actually violates the separation-of-powers doctrine.²¹ The court did state such a challenge might well be suited for quo warranto or declaratory relief action.²² The court did not answer the question whether legislators employed by local government agencies could be challenged.

Conclusion

The Nevada Constitution bars the judiciary from intruding upon the Senate and Assembly's right to judge their members qualifications under the separation-of-powers doctrine.²³ While constitutionally barred from reviewing a state employee's qualification to sit as a legislator, the judiciary has the jurisdiction to review a legislator's employment in the executive branch.²⁴

The Legislature's statutory attempt to exempt its members from quo warranto actions fails.²⁵ All challenges to dual service after *Heller* must be raised as quo warranto proceedings by the attorney general for any executive branch employee invested with sovereign powers or as requests for declaratory and injunctive relief for other executive branch employees by a person with a "legally protectable interest," such as a person seeking the executive branch position held by the legislator.²⁶

The lack of standing, suing the wrong party, and the constitutional bar against judicial review of the qualifications of persons to sit as legislators all support the court's denial of the Secretary's petition for writ of mandamus.²⁷

²¹ *Id.*

²² *Id.*

²³ *Id.* at 756-57.

²⁴ *Id.* at 757.

²⁵ *Id.* at 752.

²⁶ *Id.* at 757.

²⁷ *Id.*