

## Analysis

### Acknowledge the consequences of the court's decision

By Kenneth J. Ashman

A provocative question for lawyers is raised in the film, "All the President's Men," during a conversation between Carl Bernstein, the Washington Post reporter, and Donald Segretti, a member the committee to re-elect President Richard M. Nixon. Segretti says:

"Let me ask you something, Carl. What would you have done if you were just getting out of the Army, been away from the real world for four years, didn't know what kind of law you wanted to practice and then one day you got a call from an old friend asking you to go to work for the president of the United States?"

Most lawyers would jump at the opportunity to work for the president, but if one had designs on running for mayor of Chicago, the offer should be declined, for, according to the appellate court's decision relating to Rahm Emanuel, acceptance of the position would leave one unqualified to serve as mayor.

In *Maksym, et al. v. The Board of Election Commissioners*, No. 2010 COEL 020 (Jan. 24, 2011, 1st Division), the appellate court, in a 2-1 split, held that, due to Emanuel's absence from the city to serve as chief of staff to President Barack Obama, he did not "reside in" the city for one year prior to the scheduled Feb. 22, 2011, mayoral election, rendering him "unqualified" to serve.

For those disinclined to read the briefs, case law, the

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appellate court decision and Supreme Court submissions, this column will summarize the parties' legal positions before concluding that the majority erred in its decision.

At the outset, it is important to recognize the consequences of the appellate court's decision. If that decision stands, then Obama would be "unqualified" to hold the position of mayor of Chicago if he returned to Chicago less than one year prior to a mayoral election — something that must strike everyone as a bit odd. Is this really the result that the Illinois legislature intended?

There are two statutes at play: one concerns the qualifications to be a voter (under the election code) and the other concerns the qualifications to be a candidate (under the municipal code). Each statute has two subsections that are relevant and at issue — all of which use the term, "resident," or "reside in."

To qualify as a voter, or "elector," under Section 3-1 of the election code, one who has "resided in" the election district for 30 days prior to an election, and is a U.S. citizen at least 18 years old, qualifies to vote in that election. 10 ILCS 5/3-1.

Section 3-2 of the election code explains that "[a] permanent abode is necessary to constitute a residence" under Section 3-1, but "[n]o elector ... shall be deemed to have lost his or her residence ... by reason of his or her absence on business of the United States, or of this State." 10 ILCS 5/3-2.

To qualify as a candidate, under Section 3.1-10-5(a) of the municipal code, one must first qualify as a "voter" under Section 3-1 of the election code, and also have "resided in"

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the municipality for one year prior to the election at issue. 65 ILCS 5/3.1-10-5(a).

In 2007, the legislature added a provision to the municipal code to provide that the time a member of the military resides outside of a municipality shall be counted toward the one-year residency requirement, if the person was a resident of the municipality immediately prior to active duty and, immediately upon discharge, again becomes a resident of that municipality. 65 ILCS 5/3.1-10-5(d).

The appellate court majority held that the term "residency" or "reside in" in the voter context under the election code should be interpreted differently than such terms in the candidate context under the municipal code. According to the majority, one who temporarily leaves home with intent to return is still a resident for voting purposes, but not for candidacy purposes.

The majority justified its decision on three grounds.

First, the majority held that the purpose of the residency requirement in the candidate context is to ensure that candidates actually reside in the municipality from which they seek election.

The decision upon which the majority based its conclusion was issued in 1901, which the majority acknowledged was non-binding. In the 110 years since, technology has permitted those who live temporarily elsewhere to maintain a firm handle on local events, thereby satisfying the majority's stated purpose for the requirement.

Second, the majority held that an Illinois Supreme Court case, *Smith v. People ex rel. Frisbie*, 44 Ill. 16 (1867), that permitted a judge to remain in office despite the fact that he had temporarily moved out of the Illinois prior to his appointment to the bench was distin-

guishable and non-binding.

The majority held that the *Smith* case involved a presumption and standard of proof that was not at issue in the Emanuel situation, and that it seemed more likely to involve the concept of "domicile" rather than "residency." But in so doing the majority ignored the more salient point adopted by the Supreme Court — that one does not lose one's residency by a temporary absence as long as an intent to return exists.

Finally, the majority held that the military exception to the one-year residency requirement for candidates supports the notion that a candidate must "actually live" in the municipality for a solid year prior to an election, since the exception "assumes" that a loss of residency occurs when a member of the military is stationed elsewhere.

The majority's decision is flawed. It makes little sense to conclude that a voter retains residency status despite a temporary absence, but a candidate does not. The majority's opinion leads to absurd results and offers no guidance on how to interpret the decision. Must a candidate not leave the municipality at all for a solid year — no visiting mother in Florida over Christmas?

As difficult as it might be to ascertain one's intent, it is far more difficult to ascertain when one's "temporary" absence results in a loss of residency.

Potential candidates will need to hug their homes in fear for a year prior to an election, lest they be accused of residing elsewhere by their temporary absence, despite an intent to return.

The Supreme Court should reverse the appellate court and permit Emanuel to remain on the ballot — not on the basis of political considerations but on a fair and just reading of the law.