

THE JUSTICIABILITY OF ELIGIBILITY: MAY COURTS DECIDE WHO CAN BE PRESIDENT?

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INTRODUCTION

The 2008 election cycle has been a busy one for legal disputes over the qualifications of presidential candidates, with federal cases having been filed to challenge both major candidates' eligibility under the "natural born Citizen" clause. These cases unquestionably present vital questions of constitutional law, touching on matters of self-evident national importance. It is doubtful, however, that they are justiciable in lower federal courts. Standing requirements and the political question doctrine make it unlikely that a federal court will reach the merits in cases of the type filed to date.

That does not mean that all hope is lost for those seeking to challenge the eligibility of John McCain, Barack Obama, or future presidential candidates. There are other avenues through which the issue might be adjudicated. The most plausible is an action in *state* court challenging an allegedly ineligible candidate's access to the ballot, which would not present the same justiciability obstacles. Though state-court challenges to a presidential candidate's eligibility raise concerns about consistency and political bias, the U.S. Supreme Court's appellate jurisdiction in such cases would provide a check against such abuses. In the event that a renegade state court wrongly disqualified a presidential candidate, or that there were an interstate conflict over a particular candidate's eligibility, the Court would have a vitally important role to play in resolving the issue. Another possibility is that Congress could decide the eligibility of a presidential candidate through its constitutionally assigned role in counting Electoral College votes. The existence of these two alternative means to adjudicate a presidential candidate's eligibility strengthens the arguments against the justiciability of the federal lawsuits filed to date.

I. FEDERAL LAWSUITS CHALLENGING PRESIDENTIAL ELIGIBILITY

Three cases have challenged McCain's eligibility on the ground that he is ineligible due to his birth in the Panama Canal Zone. The first case,

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Inland Empire Voters v. United States, was filed in the U.S. District Court for the Central District of California. The skeletal complaint alleged that McCain was ineligible to serve as President and sought declaratory relief, without providing any explanation of why the named plaintiffs had standing. Plaintiffs voluntarily dismissed that case in April 2008.

In the meantime, a second case, *Hollander v. McCain*, was filed in a New Hampshire federal district court. The plaintiff, Fred Hollander, is a registered Republican who alleged that he planned to vote in the 2008 election. Hollander claimed that the nomination of a candidate who was ineligible to serve under Article II of the Constitution “disenfranchised” him and other voters. He sought not only a declaration of McCain’s ineligibility, but also an injunction requiring that McCain withdraw his candidacy and that the Republican National Committee reassign McCain’s delegates to other candidates and nominate a qualified candidate. [The district court dismissed Hollander’s case](#), concluding that he presented only a “generalized interest” shared in common with other citizens that failed to satisfy the injury-in-fact requirement for standing under Article III.

The third federal case challenging McCain’s eligibility, *Robinson v. Bowen*, was filed in the U.S. District Court for the Northern District of California in August 2008. Plaintiff in that case, Markham Robinson, is the chairperson-elect of the American Independent Party (“AIP”) and a would-be elector in support of the AIP’s candidate, Alan Keyes. Robinson thus asserted that he had a more direct interest than an ordinary voter. In particular, the complaint alleged that Robinson’s status as a potential presidential elector and chairperson-elect of a competing party was sufficient to confer standing. The district court nevertheless [dismissed the case](#), concluding that Robinson lacked standing because he claimed no imminent and particularized injury. In addition, the court concluded that the Electoral College process provided an appropriate means by which to resolve disputes over a presidential candidate’s eligibility. Referring to the process by which members of Congress may raise objections to the counting of certain electoral votes, the court concluded that “[j]udicial review—if any—should occur only after the electoral and Congressional processes have run their course.”

Another case challenged Senator Obama’s eligibility to serve as president. The complaint in *Berg v. Obama* was filed in the U.S. District Court for the Eastern District of Pennsylvania shortly before the 2008 Democratic National Convention. It alleged that Obama does not satisfy the Constitution’s natural born citizen requirement because he was born in Kenya, not Hawaii as he claims. The complaint also claimed that, by virtue of Obama’s moving to Indonesia with his mother as a child, he lost his U.S. citizenship. Although the assertions in this complaint are extremely far-fetched, in the highly unlikely event that these allegations could be proven, they appear to present a strong argument against Obama’s eligibility.

II. JUSTICIABILITY PROBLEMS WITH THE FEDERAL LAWSUITS

Under current case law, plaintiffs in the cases challenging the presidential candidates' eligibility probably lack standing. In fact, it is questionable whether *anyone* would have standing to challenge a presidential candidate's eligibility in federal court as an initial matter, due to the prudential limitations on standing. There is also a serious question about whether the suits should be deemed nonjusticiable under the political question doctrine.

The three requirements for Article III standing are well-established and easy to state, though often more difficult to apply. First, as described in *Lujan v. Defenders of Wildlife* and other cases, the plaintiff must show an "injury in fact." That requires that the injury be "concrete and particularized" as well as "real and immediate, not conjectural or hypothetical." There is no bright-line rule for ascertaining whether an injury is sufficiently imminent to satisfy the injury-in-fact prong, but the Court has said that an asserted right to have the government act in accordance with the law is not sufficient. In *Allen v. Wright*, for example, the Court held that parents of black schoolchildren lacked standing to challenge the IRS's failure adequately to enforce its prohibition on tax exemptions to racially discriminatory private schools, holding that the "stigmatic" injury that plaintiffs claimed was too abstract. Second, plaintiff must show causation, meaning that the injury is "fairly traceable to the defendant's allegedly unlawful conduct." Third, plaintiff must establish redressability, meaning that a court is likely to remedy the injury by a favorable court decision.

The injury-in-fact requirement is the most serious barrier to Article III standing in the presidential eligibility cases. To meet this requirement, plaintiffs must have a "personal stake" in the controversy that goes beyond that possessed by other members of the public. Thus, in *Schlesinger v. Reservists Committee to Stop the War*, the Court concluded that citizens lacked standing to enforce the constitutional prohibition on members of Congress serving in the executive branch. Such a "generalized interest of all citizens in constitutional governance" was insufficient. Under this precedent, the plaintiffs in *Inland Empire Voters*, *Hollander*, and *Berg* probably lack Article III standing.

The plaintiff in *Robinson*, a would-be elector for a minor party candidate, has a somewhat stronger claim of injury than the plaintiffs in the other cases. But while his interest may be somewhat stronger than that of other members of the public, such a plaintiff still has a serious Article III standing problem. The chances of the candidate winning any electors from any state—whether or not McCain is in the race—are exceedingly remote. On occasion, the Court has found an impediment to competition sufficient to establish standing. There is also a Seventh Circuit case, *Fulani v. Hogsett*, in which a minor-party presidential candidate was held to have standing to challenge the certification of *both* major parties' 1988 presidential candidates. In that case, however, the court found that the minor party candidate "could conceivably have won the Indiana election" if she obtained the relief sought. By contrast, Robinson's preferred candidate Alan Keyes is

exceedingly unlikely to win any electoral votes in California, even if McCain were disqualified. Robinson's claim of injury is thus too speculative and insufficiently imminent to satisfy Article III, as the district court correctly concluded.

Even if plaintiffs challenging the candidates' eligibility could meet the requirements of Article III, they would still have to satisfy the *prudential* requirements for standing. Courts generally describe these as "judicially self-imposed limits on the exercise of federal jurisdiction." While the precise boundaries of prudential standing remain nebulous, the Court in *Elk Grove Unified School District v. Newdow* defined it as encompassing three separate bars: (1) the general prohibition on raising another person's legal rights, sometimes referred to as "third-party standing," (2) the prohibition on the resolution of "generalized grievances" that should be addressed to the political branches, and (3) the prohibition on hearing the claims outside the "zone of interests" protected by federal law. What unifies these strands of prudential standing, the *Newdow* Court explained (quoting *Warth v. Seldin*), is a concern that "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."

Understood in this way, prudential standing presents formidable difficulties for these plaintiffs and, indeed, for anyone seeking to challenge a presidential candidates' qualifications in federal court. The "generalized grievance" component of prudential standing is especially germane to the eligibility cases. This requirement partly overlaps with the injury-in-fact requirement of Article III, but it sweeps even more broadly. The interest in not having a president who is eligible to serve is quintessentially "generalized," since it is shared with every other American citizen. The *Warth-Newdow* language suggests that federal courts should be especially reluctant to find standing in cases asserting a "structural" constitutional violation—like the prohibition on members of Congress serving in the executive branch or the requirement that a president be a natural born citizen—as opposed to the violation of individual rights. As Dean Erwin Chemerinsky stated, such a broad reading of the generalized grievance requirement for prudential standing would "read these clauses out of the Constitution," at least in terms of their enforceability through federal court lawsuits.

This is not to say that prudential standing is lacking in all cases alleging structural violations. There are some cases in which a plaintiff would have a stronger claim to standing. That is particularly true of cases in which the interests of incumbent elected officials conflict with the interests of voters generally, and federal judicial intervention is necessary to correct self-entrenching conduct. An example is *Reynolds v. Sims* and the "one person, one vote" line of cases or, more recently, partisan gerrymandering cases such as *Vieth v. Jubelirer*. Of course, these cases (unlike the eligibility cases) can at least be framed as involving individual rights to equal treatment. Moreover, there is an identifiable group of voters whose collective interests

are negatively affected by the challenged action. The same is not true in a challenge to a presidential candidate's eligibility.

Even if a court found a political party or its candidate to have some more pressing interest than the ordinary citizen, the question of institutional competence remains. Are federal courts the best institution, or at least an appropriate institution, to resolve this sort of dispute? If the answer to this question is no, then prudential standing would arguably bar not only *minor* parties and their candidates, but also *major* parties and their candidates. If Obama were to file a federal lawsuit challenging McCain's eligibility, there would be a much stronger claim of injury than in a case brought by the AIP or its candidate. Obama could plausibly claim that he is suffering an injury that satisfies Article III through the diminution in his own chances to win Electoral College votes and, therefore, to become president. The more difficult obstacle for Obama would be *prudential* standing. The same would hold true in the extremely improbable event that McCain's running mate, Governor Sarah Palin, were to file a federal lawsuit challenging his eligibility (either before or after the presidential election). It is at least open to question whether courts are institutionally competent to address this dispute, which does not clearly involve the protection of individual rights or self-entrenching conduct by elected officials. If they are not, then it is quite possible that *no one* would satisfy the prudential standing requirements.

I do not mean to overstate the argument against prudential standing, especially since the doctrine necessarily requires some discretionary judgments on the part of federal courts. The Court has not definitively precluded standing in cases that allege structural constitutional violations rather than violation of individual constitutional rights. Nor has it ruled on whether federal courts are institutionally competent to adjudicate the eligibility of a presidential candidate. But to decide this question, a federal court would have to consider whether there are other institutions better suited to resolve the question. I suspect that most federal judges would be strongly disinclined to take on the question of a presidential candidate's eligibility if there were some other way of resolving the question. That would be especially true once the major parties' chose their presumptive nominees through the primary and caucus processes. Citizens participating in this process, after all, have access to information regarding the circumstances of the candidates' birth. For a federal court to repudiate citizens' choices of their preferred candidates would surely be seen as an arrogation of political power, to which *Bush v. Gore* would pale in comparison. It is hard to imagine that many judges would be willing to go out on such a limb.

This suggests another potential bar to the justiciability of a case challenging the eligibility of a political candidate: the political question doctrine.

Under the political question doctrine, certain categories of cases—such as those alleging a violation of the Republican Guarantee Clause—are not justiciable in federal courts. This doctrine stems from the separation of powers, the idea being that the Constitution impliedly entrusts certain decisions to one or both of the political branches. The modern formulation of the test,

articulated in *Baker v. Carr*, looks in part to whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” This is not exactly the same as saying that another institution is more competent to address the matter, but it is similar. A plaintiff seeking to challenge a presidential candidate’s qualifications would need to overcome the objection that this matter is textually committed to another branch.

Powell v. McCormack is the political question case that presents the closest analogy to the presidential eligibility issue. In that case, the Court held that the House of Representatives’ decision to exclude a congressman who undisputedly met the qualifications set forth in Article I of the Constitution did *not* present a political question. The power to exclude a qualified representative did not belong to Congress. *Powell* suggests, however, that a dispute over whether a member of Congress really did meet the constitutional qualifications would be a nonjusticiable political question. Suppose, for example, there were a controversy over whether a newly elected congresswoman were really twenty five years old, as the Constitution requires. Such a dispute would probably present a political question because the Constitution confers on the House, not the federal courts, the power to judge whether its members meet the qualifications for service. If the same reasoning applies to *presidential* eligibility, then the determination whether McCain, Obama, or any other presidential candidate meets the constitutional requirements would be a nonjusticiable political question.

Should the same reasoning apply to disputes over presidential qualifications? This depends on a question that I have so far avoided: whether there is some mechanism other than a lawsuit commenced in federal court for resolving the dispute. This question is vital to both the prudential standing and political question inquiries. For prudential standing, as stated in *Warth* and *Newdow*, the availability of an alternative mechanism is critical in assessing whether there are “other governmental institutions may be more competent to address the question[.]” The political question doctrine, as stated in *Baker*, similarly turns in part on whether the Constitution commits the matter to “a coordinate political department.” Although these are not the same tests, both of them depend in part on the alternative means by which a party may adjudicate a presidential candidates’ satisfaction of the constitutional requirements—the question to which I now turn.

III. ALTERNATIVE MEANS OF ADJUDICATING PRESIDENTIAL ELIGIBILITY

There are two plausible alternative means by which a party may challenge the eligibility of a presidential candidate. The first is through a state-court action filed under state election laws, seeking to prevent the election of an ineligible candidate. Conceivably, a party could file such an action either before or after an election, depending on what state law allows. The second possibility is that a member of Congress could challenge the eligibility of a presidential candidate as part of the process by which Congress counts the Electoral College votes. Both of these present, at least in some respects,

more satisfactory ways of resolving disputes over presidential eligibility than actions brought in federal court.

Although the possibility for state-court litigation of a presidential candidate's eligibility may seem counterintuitive, there is a good reason for believing that this sort of dispute belongs in state court. Article II, Section 1 of the Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." In litigation surrounding the 2000 election, Bush's legal team argued that the Florida Supreme Court violated this provision by failing to follow the Florida *legislature's* instructions on post-election proceedings. Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* accepted this argument, concluding that the state supreme court's construction of certain provisions of state election law went beyond the bounds of proper statutory interpretation. Yet none of the Justices disputed that state courts may hear cases alleging violations of state election statutes or that state courts generally possess the power to interpret and enforce those laws.

State-court litigation might proceed as a lawsuit seeking to keep a presidential candidate off the primary or general election ballot, on the ground that he or she does not satisfy the requisite qualifications. There exists some recent precedent for this type of case. In 2004, supporters of presidential candidate John Kerry brought a number of state-court actions seeking to deny Ralph Nader access to state ballots. In *In re Nomination Papers of Nader*, for example, registered voters in Pennsylvania filed suit in state court, seeking to have the names of independent candidate Nader and his running mate Peter Camejo excluded from the ballot. As in several other states, the objectors challenged the petition signatures submitted by the Nader-Camejo campaign. In addition, the Pennsylvania objectors argued that Nader and Camejo were not qualified to appear on the general election ballot by virtue of the state's "sore loser" law, which prohibited candidates from running in a general election after running in state primaries. Although the Pennsylvania Supreme Court found that its statute did not in fact justify the exclusion of Nader and Camejo from the ballot, there was no doubt as to the state court's ability to entertain a challenge to a presidential candidate's qualifications in the course of determining whether to deny that candidate access to the state ballot.

It is conceivable that a comparable state-court lawsuit could be filed, in Pennsylvania or another swing state, to challenge a presidential candidate's *constitutional* qualifications to serve. There is no requirement that a plaintiff in a state-court lawsuit meet the Article III or prudential requirements for standing. Further, the federal political question doctrine does not bar state-court litigation seeking to exclude a presidential candidate from the ballot on the ground that he or she is ineligible. It is also conceivable that a state-court case challenging a presidential candidate's eligibility could be brought *after* an election. State law might allow a post-election contest of primary or general election results on the ground that the candidate who gained the most votes does not meet the qualifications for office. A losing presidential

candidate could bring a contest petition in state court, seeking an order invalidating the election results if state law allows such a remedy.

There are obvious reasons why such post-election challenges would be undesirable. As Rick Hasen has argued in *Beyond the Margin of Litigation*, pre-election litigation is generally preferable to post-election litigation. It is generally better to resolve disputes before an election, allowing problems to be avoided in advance rather than putting courts in the difficult position of cleaning up the mess afterwards. This is particularly true in the context of a challenge to a presidential candidate's qualifications. In the event that a candidate is deemed ineligible, the party could still put up a substitute.

Of course, it is up to states—and, in particular, to state legislatures—to define the rights and remedies available in cases where a presidential candidate is alleged to be ineligible. There is certainly no constitutional *requirement* that the state provide either a pre-election remedy (such as denial of ballot access) or a post-election remedy (like an order invalidating election results) for such disputes. But there remains no constitutional *bar* to such state-law remedies. In fact, such remedies would seem to fall squarely within what Article II contemplates in leaving it to state legislatures to define the manner by which presidential electors are appointed.

A downside of such lawsuits is that they could lead to mischief and inconsistency in the state courts. That is particularly true where members of one party or another dominate a state's highest court. For example, a majority of Florida's judges were appointed by Democratic Governor Lawton Chiles, and Ohio's supreme court currently is dominated by elected Republican justices. Suppose that a group of Florida voters brought a state-court action seeking to exclude McCain's name from that state's ballot on the ground that he is ineligible to serve. Alternatively, suppose that Ohio voters brought a state lawsuit attempting to knock Obama off the Ohio ballot, alleging that he is ineligible. Suppose further that the state supreme court in either state actually grants the relief requested, excluding the challenged candidate from the ballot on the ground that he is not a natural born citizen. Notwithstanding Article II's language conferring authority on state legislatures to appoint electors, the prospect of a renegade state court excluding a presidential candidate who is, in fact, qualified is enough to give one pause. It is also possible that state courts in different states could reach conflicting decisions on whether a challenged presidential candidate satisfies the eligibility requirements in Article II.

Fortunately, there would be an avenue for federal judicial review of such cases. Because the state court's decision would rest on *federal law*—in this case Article II's specification of the requirements to serve as president—the U.S. Supreme Court could hear the case on a petition for writ of certiorari. This is true even if the original state-court action would *not* have been justiciable in federal court. In *ASARCO v. Kadish*, for example, the Court held that defendants who lost in state court could obtain U.S. Supreme Court review of federal issues decided against them, even though the original plaintiffs would *not* have had standing to bring the action in a federal court. The Court held that defendants had standing to seek Supreme Court review

on the theory that they had suffered an “injury” by virtue of the adverse state-court judgment against them. For similar reasons, if a candidate were removed from the Florida ballot as part of a state-court action, on the ground that he was constitutionally ineligible to serve as president, that candidate would presumably have standing to seek U.S. Supreme Court review—even if the original plaintiffs (the voters who sought to remove his name from the ballot) would not have had standing to sue in federal court as an initial matter. The prospect of U.S. Supreme Court review provides some assurance against a renegade state court rejecting a candidate who is eligible to be president, and against the possibility of two or more state courts reaching different conclusions on the same presidential candidate’s eligibility.

There is still a potential objection to Supreme Court review of a state-court decision excluding or disqualifying a presidential candidate. A court may find that such a case presents a nonjusticiable political question because it is entrusted to another branch of the federal government. To evaluate this question, it is necessary to consider the other plausible option for adjudicating a presidential candidate’s qualifications: Congress making this determination during the process of counting Electoral College votes.

As I described in [a previous *First Impressions* commentary](#), the process for counting Electoral College votes is a product of both constitutional and statutory law. The constitutional requirements are set forth in Article II, section 1, as modified by the Twelfth and Twentieth Amendments. In brief, the Constitution provides that the presidential electors, appointed as prescribed by the state legislature, are to meet in their respective states. The Electoral Count Act of 1887 sets the date for their meeting forty-one days after Election Day. The electors then send their votes to “the seat of the government of the United States,” where “the votes shall then be counted.” The person who gains a majority of the electoral votes is elected president. The Electoral Count Act allows states to make objections in writing, if signed by at least one Senator and one member of the House. This act also includes the so-called “safe harbor” date: If state law provides for a final determination of controversies concerning the appointment of electors, and if such determination is made at least six days before the date fixed for the meeting of electors in the states (i.e., 35 days after Election Day, the “safe harbor date”), then Congress is required by statute to respect the state’s decision.

Does Congress possess the power to adjudicate a dispute over a presidential candidate’s qualifications through this vote-counting process? The answer is not completely clear. On one hand, there is historical precedent for Congress exercising its power not to count electoral votes. In 1873, three of Georgia’s electoral votes cast for Horace Greeley, who died after the November election but before the date the Electoral College met, were not counted. The Senate voted to count those votes while the House voted not to do so and, due to the nonconcurrence of the two chambers, the Greeley votes were not counted under a joint rule. In the event that there is a dispute over a president-elect’s qualifications to serve, it is conceivable that an objection could be made by at least one Senator and one member of the House, which Congress would then have to rule upon. On the other hand,

the process of counting the state electors' votes is, arguably, purely ministerial. This is especially true for states that comply with the safe harbor deadline. As a matter of federal statutory law, those states are entitled to have their electoral votes counted, where controversies are resolved by the safe harbor date.

Of course, Congress could simply refuse to comply with the safe harbor statute. Suppose, for example, that Colorado is the pivotal state in 2008, that it completes its post-election dispute resolution proceedings by the safe harbor date, and that it timely transmits its list of votes for McCain. Suppose further that Congress refuses to count those votes on the ground that McCain is ineligible and instead counts a competing slate sent by Obama's electors, in plain violation of the federal safe harbor statute. What then? Would McCain have any legal recourse?

A candidate in these circumstances would almost surely have Article III standing, as the party most directly injured by Congress's failure to abide by federal law. The candidate would also have prudential standing, given that he would have suffered a particularized rather than a generalized injury, through its refusal to count the electoral votes to which he was arguably entitled. The big problem is the political question doctrine. The court might deem the question of how to count electoral votes as being entrusted to Congress's unreviewable discretion, and therefore non-justiciable. It is very difficult to predict whether a federal court would intervene in such a nightmare scenario, particularly given the slipperiness of the political question doctrine. The Twentieth Amendment adds to the confusion. It provides that "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." Unfortunately, it does not explicitly say who is to make the determination whether a president elect has "failed to qualify," and there is little scholarship on the subject. Vasan Kesavan's article *Is the Electoral Count Act Unconstitutional?* argues that the Constitution's structure "suggests that neither the President nor Congress makes these determinations." It is anyone's guess, however, whether the Supreme Court would agree or whether it would deem this a nonjusticiable political question.

The uncertainty over Congress's power vis-à-vis the federal courts in this sphere magnifies the importance of state courts being open to those challenging a presidential candidate's qualifications. There is little doubt that state legislatures have the power to define a process to adjudicate a presidential candidate's qualifications, either through a denial of ballot access or through some type of post-election proceeding. Given the legal uncertainty regarding Congress's authority not to count the electoral votes of a candidate it believes ineligible, state-court litigation seems like the most appealing path for the resolution of such a dispute, with the possibility of review in the U.S. Supreme Court. Neither standing nor the political question doctrine should serve as a barrier to such review.

CONCLUSION

The current federal lawsuits challenging the presidential candidates' eligibility to serve as president are not justiciable, and it is questionable whether any justiciable case could be brought in federal court as an initial matter. Fortunately, there are alternative means to adjudicate this matter that are consistent with the U.S. Constitution. The most promising is a pre-election state-court lawsuit seeking to keep an allegedly unqualified candidate off the ballot. In the event that a renegade state court rejects a candidate who is, in fact, eligible or that two or more state courts reach conflicting conclusions on a candidate's eligibility, U.S. Supreme Court review should be available as a backstop. This avenue seems less fraught with peril than congressional resolution of the matter, given Congress' dubious legal authority to not count electoral votes of a candidate it believes ineligible. Those who seek to challenge a presidential candidate's eligibility would thus be well-advised to dust off their state election codes and head to state court.