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George Santos, Lester Chang and Legislative Exclusion

While Santos may be off the hook currently, Chang's fate remains in the hands of the Assembly.

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Congress Member-elect George Santos from Long Island has become a household name, at least to those who follow politics and the law. As he just admitted, he lacks certain credentials he touted to the voters of New York's Third Congressional District during the recent campaign, and falsified significant biographical information about his past. All of which is to say that he is not who he said he was. As a result of his so-called "embellishments," and despite his mea culpa, there are people demanding that the House of Representatives not allow him to take his seat on January 3rd when the new Congress gavel into session. They will be disappointed.

In a somewhat analogous case, New York State Assembly Member-elect Lester Chang seems to be on track to make history as the first state legislator to not be seated when the legislature convenes on January 4th. His problem is not one of fakery. It's because he allegedly does not meet the residency qualification to serve in the Assembly. Specifically, he is required to have lived in Brooklyn for a year prior to his election this past November. A hearing on Chang's residency was held last week by the New York State Assembly's Judiciary Committee, and the full Assembly is slated to consider the matter in the new year.

I will discuss Santos first. In that Santos has admitted lying to the voters, can the House refuse to swear him in? The short answer is “no.” In order to serve as a Representative, the U.S. Constitution sets out three qualifications: A Member must be an inhabitant of their state (not the district) when elected, a citizen of the United States for seven years, and 25 years old. Santos meets all three qualifications. The seminal case barring the House from excluding members who were duly elected and satisfied the qualifications to serve involved New York Congress Member Adam Clayton Powell Jr. After the House refused to seat him in 1967, the Supreme Court, distinguishing exclusion from expulsion, held that inasmuch as he met the three qualifications, he must be seated.

Indeed, even if a state attempted to add a qualification that a Representative could not be a lying scoundrel or some such legal equivalent, this add-on requirement, if challenged, would be struck down. The [U.S. Supreme Court](#) made that clear when considering Arkansas’s attempt to impose term limits on House members, ruling that states cannot change the three qualifications provided in the Constitution. In fact, a state cannot even ban a felon from serving. The rule is so ironclad that voters are not permitted to “recall” a member of Congress when the procedure is otherwise permitted in a state. Partisans in New Jersey learned this the hard way when trying to recall Senator Robert Menendez, and the state [Supreme Court ruled](#) that the recall procedure was an improper modification of the congressional qualifications in the U.S. Constitution.

There you have it. Once George Santos is seated on January 3rd, he’s a member of Congress for two years. Only public pressure will persuade him to give up his seat before the next election. Of course, if investigations turn up criminal activity associated with Santos’s misrepresentations, he could be expelled by the House, but given the razor-thin margin enjoyed by the GOP, this appears unlikely.

Now let’s turn our attention to Mr. Chang. Unlike Santos, he is said to have failed to satisfy the qualifications required to serve in the state Assembly. The New York State Constitution provides, in pertinent part, that he had to live in the district for a full year prior to his election, or in a redistricting year (such as 2022) in the relevant county for that year. After Chang won his seat and allegations surfaced of his failure to comply with the residency requirement, the Speaker of the Assembly directed the chamber’s Judiciary Committee to ascertain whether Chang actually was qualified to serve. This was based upon the New York State Constitution’s provision that “Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members” Indeed, the Committee’s special counsel, hired for the purpose of conducting this inquiry, advised its members that the legislature had an “obligation” to conduct an “independent evaluation” of the qualifications of elected members before they are sworn in (though I have not found any other such inquiry by the Assembly or Senate, either subsequent to the adoption of New York’s modern constitution in 1938 or before).

Mr. Chang, represented by counsel, testified, and both he and the Committee’s counsel presented documentary evidence during the hearing. It remains to be seen how the Committee, and then the full Assembly, weighs the facts and applies the law on the issue.

A predicate question, however, is whether the Assembly has the authority to find that Chang was not qualified and refuse to seat him. The language of the New York Constitution cited above seems to allow it, but the legislature has delegated authority to challenge residency (and other qualifications of its members) to opposing candidates (and “citizen-objectors”) during the ballot access process, and to the New York Attorney General once an allegedly unqualified member takes their seat. In the first instance, the Election Law has a very detailed procedure to challenge a candidate’s bona fides, permitting a full-fledged adversarial proceeding and a judicial determination. (No such challenge to Chang’s residency was instituted.) And the Attorney General has the authority under the state’s Executive Law to institute a quo warranto proceeding in state Supreme Court, seeking to remove an unqualified public official (whether requested by the Assembly, any other citizen, or on its own motion). This proceeding would also allow for an adversarial process and a judicial determination.

Given the fact that Albany appears to have never excluded a duly-elected member (to be distinguished from “expelling” a member), assuming there is an adverse evaluation on residency, a referral to the Attorney General by the Assembly appears to be a more prudent course than refusing to seat Chang—especially because, as observed in 1971 by the U.S. District Court for the Southern District of New York in a case involving an improperly-elected Assembly member (*Lehner v. O’Rourke*, 339 F. Supp. 309 (SDNY 1971)), New York has “fail[ed] to spell out a procedure for determining a challenged election by the legislature.” Unlike other states and the federal government (see the [Federal Contested Elections Act](#)), New York law is still bereft of such procedures. Referring the matter to the AG would avoid extensive litigation as to whether the Assembly has divested itself of its constitutional authority to judge the qualifications of its members when it enacted the Election Law and Executive Law; it would also avoid the issue of whether the absence of “spelled-out” procedures had deprived Chang of his due process rights; and it would prevent a constitutional imbroglio if exclusion by the Assembly were followed by a court proceeding that rendered a ruling favorable to Chang.

One caveat to this suggestion. In that same *Lehner* case referred to above, the Court also observed that then-Attorney General Louis Lefkowitz said that his office had no authority to bring a quo warranto proceeding with respect to a legislator. No citation is given and the issue was not litigated. And there appears to be no Formal or Informal Opinion on the subject issued by the Office of the Attorney General. My inference is that the then-AG told this to the court because, simply, he did not wish to get involved. Thus, it appears that his pronouncement is not equivalent to precedent and would not be binding on the current Attorney General.

All of this is to say that the Assembly is in uncharted waters. Of course, if the Committee or the full chamber finds that Chang did indeed satisfy the prescribed residency requirement, all these legal issues can be saved for another day. In any event, while Santos may be off the hook currently, Chang’s fate remains in the hands of the Assembly.

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