STATE OF CONNECTICUT
BEFORE THE HOUSE OF REPRESENTATIVES
COMMITTEE ON CONTESTED ELECTIONS

IN THE MATTER OF:	:	**JANUARY 30, 2019**
JIM FEEHAN, CONTESTANT,	:	
AND	:	
PHILIP L. YOUNG III, CONTESTEE.	:	

MEMORANDUM OF PHILIP L. YOUNG III REGARDING STANDARDS TO BE APPLIED BY THE HOUSE IN CONSIDERING THIS CONTESTED ELECTION

"[T]he Constitution of the State of Connecticut indicates that each House of the General Assembly shall be the final judge of the election returns and qualifications of its members. That is the Constitution. That is the highest law of our state within our state." J. House Proc., at 230 (Jan. 9, 1985) (remarks of Rep. Frankel). Pursuant to the House of Representatives' constitutional authority, this committee's first responsibility is to receive and consider evidence concerning the contested election for the 120th House District. It must then try to prepare a report and resolution for consideration by the House in support of the House's exercise of its constitutional duty to be "the final judge" of this contested election. Conn. Const. Article Third, § 7; House Rule 19.[1]

In exercising that responsibility, the House acts in a *judicial* capacity, the people of the State having reserved this judicial authority to the House in every version of our state's

[1] Until 1985, House Rule 19 required appointment of a three-person committee on contested elections, with two majority members and one minority member. When Democrats attained the majority in 1987, they amended House Rule 19 to require equal representation on such committees, and it has remained so through 2019.

Constitution since 1818. Before the creation of a separate judicial branch in 1818, the General Assembly held *all* the judicial power in Connecticut.

> In the preface to the first volume of the Connecticut Reports, Thomas Day summarized the state of the judiciary as it had evolved to that point, just before the adoption of the constitution of 1818. Day observed that "[i]n the origin of our government, the legislative body possessed and exercised the whole judicial power." Day, Preface to Connecticut Reports, 1 Conn. iii (1816); see *State* v. *Clemente*, 166 Conn. 501, 512-13, 353 A.2d 723 (1974); *see generally* Loomis & Calhoun, The Judicial and Civil History of Connecticut (1895).

Kinsella v. Jaekle, 192 Conn. 704, 714 (1984). Although the Constitution of 1818 created a separate and independent judiciary, the Constitution reserved certain judicial power to the General Assembly, most notably the power of impeachment and to judge the qualifications and elections of General Assembly members.

No statutes control – or could control – the House's consideration of the questions that must be examined here. Each elected House must adopt its own rules for consideration of contested elections. While the House has adopted by rule *Mason's Manual of Legislative Procedure* to govern its parliamentary practices, *Mason's* is silent on many of the issues that must be addressed, most notably what standards should be applied. *See Mason's* § 560.10. It merely emphasizes that the decision belongs to the House, not to the courts. "By constitutional provision, each house of the legislature is made *the judge* of the election, qualifications and returns of its members," and "each branch of a state legislature has the *sole and exclusive power* to judge the election and qualifications of its own members." *Mason's*, §§ 560.1-560.2 (emphases added); *see also* House Rule 19.

While this House has from time to established committees on contested elections, most recently in 1985, available research has not identified a thorough analysis of parliamentary records from those proceedings to guide the House's deliberations. By this memorandum, we set

out various principles that the Committee may wish to consider, based largely on parliamentary practice used to decide contested elections by other legislative bodies, most notably the U.S. House of Representatives.

The House's sole power to judge contested elections of its members is based on clear, unambiguous language in our constitution:

> The treasurer, secretary of the state, and comptroller shall canvass publicly the votes for senators and representatives . . . . The return of votes, and the result of the canvass, shall be submitted to the house of representatives and to the senate on the first day of the session of the general assembly. *Each house shall be the final judge of the election returns and qualifications of its own members.*

Conn. Const. art. third, § 7 (emphasis added). This language was not inadvertent or accidental. The United States Constitution, and the constitutions of nearly every state, have similar language. Annotation, *Jurisdiction of Courts to Determine Election or Qualifications of Members of Legislative Body, and Conclusiveness of Its Decision, As Affected by Constitutional or Statutory Provision Making Legislative Body the Judge of Election and Qualification of its Own Members*, 107 A.L.R. 205 ("The constitutions of most if not all, of the states contain provisions similar to Art. 1, § 5, of the Federal Constitution, to the effect that each house of the state legislature shall be the judge of the election and qualifications of its own members. And *it is well settled that such a provision vests the legislature with sole and exclusive power in this regard, and deprives the courts of jurisdiction of those matters.*") (originally published in 1937) (emphasis added). Insofar as the Constitution is our government's foundational document, with

authority provided to the three branches of government directly by the people, its commands and restrictions are binding on all state officials.[2]

This provision in article third, § 7 is based on the fundamental principle of separation of powers: if anyone but the members of a legislature can determine the qualifications and elections of its members, then the other branches of government could directly or indirectly control the membership of the legislative branch – the branch most directly representative of and most directly responsive to the people.

> "If [the power to judge elections is] lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger. No other body but itself can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights and sustain the free choice of its constituents." I J. STORY § 833, at 604-05.

Morgan v. United States, 801 F.2d 447, 450 (D.C. Cir. 1986) (Scalia, J.). *See also* The Federalist No. 51, at 318 (James Madison) (C. Rossiter ed., 1961) ("[I]t is evident that each department

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[2] "The constitution of the state, framed by a convention elected for that purpose and adopted by the people, embodies their *supreme original will*, in respect to the organization and perpetuation of a state government; the division and distribution of its powers; the officers by whom those powers are to be exercised; and the limitations necessary to restrain the action of each and all for the preservation of the rights, liberties and privileges of all; and is therefore the supreme and paramount law, to which the legislative, as well as every other branch of the government, and every officer in the performance of his duties, must conform. Whatever that supreme original will prescribes, the General Assembly, and every officer or citizen to whom the mandate is addressed, must do; and whatever it prohibits, the General Assembly, and every officer and citizen, must refrain from doing; and if either attempt to do that which is prescribed, in any other manner than that prescribed, or to do in any manner that which is prohibited, their action is repugnant to that supreme and paramount law, and invalid." *Opinion of the Judges of the Supreme Court as to Constitutionality of Soldiers' Voting Act*, 30 Conn. 591, 593-94 (1862) (emphasis in original).

should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.").

The Connecticut Supreme Court reaffirmed this principle in upholding the Superior Court's dismissal of the contestant's judicial challenge to this election. *See also State ex rel. Morris v. Bulkeley*, 61 Conn. 287, 372 (1892) ("The Superior Court cannot make the declaration which the Constitution says shall be made by the Assembly.").

In exercising its authority under article third, § 7, the House acts in a judicial capacity.

> As each house acts in these cases [of judging the election return and qualification of its members] *in a judicial character*, its decisions, *like the decisions of any other court of justice*, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty.

Morgan, 801 F.2d at 450 (quoting I Kent's Commentaries 248 (8th ed. 1854) (1st ed. N.Y. 1826) (emphasis added)). *See also Kinsella*, 192 Conn. at 717. The threshold issue confronting this committee – and the House – is what "known principles of law" are to be applied to judging this contested election.

Plainly the Committee's *process* has adhered to those known principles of law, specifically an open and fair process, with evidence offered and considered without unreasonable limitation. *See generally Mason's* § 560.10 ("A legislative body that is the sole judge of the election of its members, upon a contest respecting election of one of its members, may appoint a committee to take testimony and report the facts and the evidence to the body."). The committee has quite properly sought evidence from witnesses with direct and indirect knowledge, and those witnesses have been subject to full examination by any committee member who wishes to question them. The committee has also invited comment from the parties and no doubt will thoroughly consider any written submissions.

At this point, a brief comment about what happened at Bunnell High School on the day of

the election seems appropriate. Whatever else the evidence establishes, it plainly is the case (1) no *fraud* or other intentional misconduct took place in the election, (2) neither candidate had anything to do with any *mistake* in the administration of the election, directly or indirectly, and (3) the overwhelming majority of registered voters in this district—over 10,000 people—cast *valid* votes in this race at eight precincts, including at Bunnell High School. This may matter in determining what, if anything, to do next.[3]

In the absence of clear local authority on reasonable parliamentary procedures containing standards that might be used to consider the evidence—the "known principles of law" that the House should apply—it seems sensible to consider the standards adopted by the United States House of Representatives acting in cases of contested elections. The former parliamentarian of the U.S. House has reviewed the processes followed by the House through the years and assembled a multi-volume treatise reviewing established practices. That treatise, called *Deschler's Precedents*, is publicly available; the most relevant section is attached to this memorandum as Exhibit A.[4]

To be sure, under these precedents, the House has the authority to decide that a contested seat is vacant. "As to exclusion—or denial by the House of the right of a Member-elect to a seat—by majority vote, the House has the power to judge elections and to determine that no one was properly elected to a seat." *Id.* § 12, at 924. But that has been historically an exceedingly rare

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[3] "Fraud involves a deliberate attempt to manipulate the system unfairly, usually by candidates or their supporters. In contrast, mistake involves an unintentional disturbance or distortion of the election processes, usually caused by those administering the election." Huefner, *Remedying Election Wrongs*, 44 Harv. J. on Legis. 265, 271 (2007).

[4] H. Doc. 94-661, Deschler's Precedents: https://www.govinfo.gov/collection/precedents-of-the-house. The most relevant discussions are in Volume 2.

event, *ordered only one time since 1933*, in light of several controlling principles:

- "The administration of the oath to the contestee may establish his prima facie right to the seat." 2 *Deschler's Precedents.* § 35.1.[5] (Chapter 9, § 35 is attached as Exhibit A).
- "In ruling on election contests, House election committees have followed the general rule that violations by state poll and election officials of their functions under state statutes do not vitiate ballots or void elections, in the absence of fraud, since laws prescribing the duties of the officials are directory in nature." *Id.* § 7.6, at 881.
- "In order to set aside an election there must be not only proof of irregularities and errors, but, in addition thereto, *it must be shown that such irregularities or errors did affect the result.*" *Id.* § 7.7, at 882 (emphasis added).
- "A committee finding of evidence of irregularities in the conduct of an election will not provide a sufficient basis for overturning that election where there is no evidence connecting contestee with such irregularities." *Id.* § 12.2. "In *Miller v Cooper* . . . , a 1936 Ohio contest, the Committee on Elections found evidence of irregularities in the destruction of ballots, tabulations of votes cast, and in the method of conducting the election. However, there was no evidence whatsoever connecting the contestee therewith, and the committee recommended that he be seated." *Id.*
- "In an election contest, contestant has the burden of proof to establish his case, on the

[5] It should be noted that under Article Third, § 8 of the Connecticut Constitution, it was unnecessary for Rep. Young to have taken his oath on the first day of the 2019 session, because a legislator's term is two years "*and* until their successor is qualified." Article Third, § 10 (emphasis added). Regardless of taking the oath three weeks ago, by operation of the constitution Rep. Young would continue to serve the term to which he was last elected at the special election in early 2018 unless and until a new election led to a different result. *See State ex rel. Morris v. Bulkeley*, 61 Conn. 287, 376 (1892) (incumbent governor who did not run in 1890 election entitled to remain in office pending certification of the election by the General Assembly).

issues raised by the pleadings, by a fair preponderance of the evidence." *Id.* § 35.2. "It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus the burden of proof placed on the contestant is necessarily substantial." *Id.* § 35.7 (quoting California election contest *Tunno v. Veysey* (1971)).[6]

- "In the absence of a showing that the results of the election would be changed, lack of knowledge of registration laws and improper enforcement by officials charged with their administration are not such irregularities as will void the results of an election." *Id.* § 35.3.
- "Merely showing that some voters have been precluded from voting through errors of the election officials does not satisfy the contestant's burden of establishing his claim for the seat." *Id.* § 35.8. "In the 1971 California election contest of *Tunno v Veysey* (§ 64.1, infra), the contestant alleged that the election officials had wrongfully and illegally canceled the registration of approximately 10,000 voters. However, the contestant did not

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[6] Some states require a higher burden of proof, and one commentator has reasoned that a contestant should prove his claims by clear and convincing evidence.

> The most suitable test, however, and one presently employed in a number of states, is to require clear and convincing evidence of an election failure. A clear and convincing standard is appropriate because our election processes, though imperfect, have earned a strong presumption of correctness. To rebut this presumption, and thereby void or alter an official result, should require not just a fifty-one percent probability, but some higher confidence or likelihood that the official certification is not trustworthy. . . The clear and convincing test should be the standard for two discrete components of the contest: proof that some irregularity occurred in the election, and proof that this irregularity altered the outcome or at least rendered it uncertain.

Huefner, *Remedying Election Wrongs*, 44 Harv. J. on Legis. 265, 313 (2007).

> show how these potential voters would have voted, and the election committee, after expressing a hesitancy to invalidate an election under these circumstances, held that the contestant had not carried through on his burden of establishing his claim to the seat under the Federal Contested Elections Act [specifically, 2 USC §§382, 383][7] and the precedents of the House." *Id.*

This Committee should carefully consider *Tunno v. Veysey*, a contested election case considered by the U.S. House that has some obvious parallels to this case. *Tunno v. Veysey* was a 1971 contest involving the apparent mistaken disenfranchisement of 10,600 voters by elections officials. The committee report, H. Rep. 92-626 (1971), is reproduced in part in 2 *Deschler's Precedent's*, Chapter 9, § 64.1. (Exhibit B).

The contestee, Veysey, won the election by 1795 votes. The contestant, Tunno, asked the House to order a new election since 10,600 voters were improperly precluded from voting and the margin was far less than 10,600. The Committee reviewed several authorities counseling that a new election is an extreme remedy because of the impact on those who cast valid votes:

> We do not believe that the facts warrant the rejection of the entire poll of this township, nor does the law as practiced in almost every jurisdiction warrant such a result. *McCrary on Elections* [George McCrary, A Treatise on the American Law of Elections, Chicago, Callaghan & Co., 1897] section 488, says: The power to reject an entire poll is certainly a dangerous power, and, though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested-election case, it should be exercised only in an extreme case; that is to say, where it is impossible to ascertain with reasonable certainty the true vote.

Id. § 64. Further, "'[i]gnorance, inadvertence, mistake, or even intentional wrong on the part of the local officers should not be permitted to disfranchise a district.' *Paine's Treatise on the Law*

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[7] The Federal Contested Elections Act, 2 U.S.C. §§ 381-396, provides for procedures in contested election cases but does not include substantive standards. The Connecticut General Assembly attempted to create a similar statutory process by means of Public Act 86-121, but it was vetoed by then-Governor O'Neill.

of Elections [Halbert Paine, *A Treatise on the Law of Elections*, Boston, Little, Brown & Co., 1890] section 497." *Id.* "Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond a reasonable doubt that there has been such a disregard of law or such fraud that it is impossible to determine what votes were lawful or unlawful, or to arrive at any result whatever, or whether a great body of voters have been prevented from exercising their rights by violence or intimidation." *Id.* "There is nothing which will justify the striking out of an entire division but an inability to decipher the returns or a showing that not a single legal vote was polled or that no election was legally held." *Id.* (quoting Halbert Paine, *A Treatise on the Law of Elections*, section 498).

The report in *Tunno* continued, "[i]t has long been held by all the judicial tribunals of the country, as well as by the decisions of Congress and the legislatures of the several States, that an entire poll should always be rejected for any one of the three following reasons: 1. Want of authority in the election board. 2. Fraud in conducting the election. 3. Such irregularities or misconduct as rendered the result uncertain." *Id.*

> As can be seen from the above mentioned cases the problem involved not so much the registration irregularities themselves but, rather, conceding the irregularities, the amount of and nature of the proof required of the contestant to substantiate his claim of a right to the seat in question. Where the proof offered by the contestant shows how those who were not permitted to vote would have voted and that they tendered a vote and were wrongfully rejected, the House has generally found that this is sufficient to warrant counting the votes as cast. Then if in counting these votes the contestant receives more votes than the contestee he gets the seat. This line of reasoning conforms with the earlier stated standard of preserving and correcting the return if it is at all possible, and with the concept that contestant bears the burden of proof in seeking to have certified returns rejected."

Id. § 64, at 1268. Absent such evidence showing that the contestant would be entitled to the seat, the committee recommended dismissal of the complaint, and the House agreed. *Id.* §64.1, at 1270.

As in *Tunno*, the contestant here has not offered *evidence* as to how any mistake *actually* affected the vote totals. Indeed, he concedes in his challenge that "[i]t is impossible to determine the identity or intent of the approximately 76 voters whose votes were improperly cast for the wrong district." (Election Challenge ¶ 20). Certainly, no voters have offered evidence in that respect. The contestant did not offer evidence at the hearings, subject to examination and cross-examination by the committee, of any statistical analysis of the vote totals. *See Deschler's Precedents* § 36.2 ("The returns of the election . . . and the certificate issued to [the contestee] are presumptive proof of the result of that election which will prevail unless rebutted by proper evidence.") (quoting *Osser v. Scott* (1951)). If the contestant now tries to submit proof not offered during the hearings, where the witnesses could have been examined and cross-examined, the effort should be declined. "The ordinary rules of evidence govern in election contests as in other cases; thus, the evidence must be relevant and confined to the point in issue. Evidence taken ex parte and not in conformity with the election contests statutes will not be considered." *Deschler's Precedents* § 34.

Another case which this Committee should consider is the 1985 challenge of *McCloskey and McIntyre* in the U.S. House, where the House considered a contested election on its own motion. The House considered an election where McCloskey was determined to have won by four votes out of more than 200,000 cast. Complaints were raised about irregularities in recounts. Although the committee recognized that the House had the authority to reject the returns and declare a seat vacant, the committee noted that the House of Representatives has been "very hesitant" to declare a seat vacant, preferring instead to "measure the wrong and correct the returns," when possible. "Because of the closeness in the election, it has been suggested that a special election should be called. But for this House to reject the results of last

November's election would be to reject the citizens who voted, and the individual they elected. In our democracy, the person with a majority of the votes wins, regardless of how slim that majority might be." *McCloskey and McIntyre*, H. Rept. 99-58, at 43 (1985). The committee reiterated the general principle that "[n]othing short of an impossibility of ascertaining for whom the majority of votes were given ought to vacate an election." *McCloskey and McIntyre*, H. Rept. 99-58, at 44 (1985) (citing McCrary, *A Treatise on The American Law of Elections*, R.B. Ogden, 1880, at 489). "Indeed, the committee in *McCloskey v. McIntyre* characterized setting aside an election and declaring a House seat vacant as a 'drastic action' that it recommended against 'in nearly every instance.'" *Id.* (quoted in Congressional Research Service, *Procedures for Contested Election Cases in the House of Representatives*, at 16 (Nov. 4, 2010)) (attached as Exhibit C).[8] *See also* Huefner, *Remedying Election Wrongs*, 44 Harv. J. on Legis. 265, 318 (2007) (noting that "holding a new election imposes huge costs [and] therefore should be the last resort" and should not be ordered where "the specific impact" of an election failure on the vote totals "was uncertain").

Although judicial precedents certainly are not *controlling* on this House—the "final judge" of the election returns of its members—they may or may not be persuasive. The

[8] "It appears that of the 107 contested election cases considered by the House since 1933, in at least three cases, the House ultimately seated the contestant, and in at least one case, the House ultimately refused to seat any individual, declaring a vacancy." Congressional Research Service, *Contested Election Cases in the House of Representatives: 1933 to 2009*, at 1-2 (Nov. 2, 2010). In the *only* case from 1933 to 2009 where no individual was seated and a vacancy ordered—the relief that the contestant seeks here—the decision followed two special elections that were entirely improper under state law (one due to lack of notice, the other due to the "election" taking the form of a mass meeting). *Id.* at 8-9.

Connecticut Supreme Court has noted that a new election ordered by a court is a drastic remedy because what it calls the "snapshot" of each election is unique:

> [T]hat snapshot can never be duplicated. The campaign, the resources available for it, the totality of the electors who voted in it, and their motivations, inevitably will be different a second time around. Thus, when a court orders a *new* election, it is really ordering a *different* election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated election day. Consequently, all of the electors who voted at the first, officially designated election -- 3057 electors in the present case -- have a powerful interest in the stability of that election because the ordering of a new and different election would result in *their* election day disfranchisement. The ordering of a new and different election in effect disfranchises all of those who voted at the first election because their validly cast votes no longer count, and the second election can never duplicate the complex combination of conditions under which they cast their ballots. All of these reasons strongly suggest that, although a court undoubtedly has the power to order a new election pursuant to § 9-328 and should do so if the statutory requirements have been met, the court should exercise caution and restraint in deciding whether to do so.

Bortner v. Town of Woodbridge, 250 Conn. 241, 255-56 (1999).[9] *See also Grogins v. City of Bridgeport*, 2001 Conn. Super. LEXIS 3521, at *1-3 (Dec. 4, 2001) (Thim, J.) (ordering new election only in precinct where single voting machine failed because "[t]he voting machine malfunction only affected those electors who voted at the Roosevelt School, that is, District 130-C. Votes were validly cast in District 130-A and 130-B and remain valid."); *In re 1984 General Election for Office of Council*, 203 N.J. Super. 563, 592 (1984) ("There are good reasons to

[9] The court in *Bauer v. Souto*, 277 Conn. 829, 843-44 (2006), did order a new citywide election for New Britain city council seats where there were multiple candidates, because anything less than a citywide election would encourage "bullet voting" for a single candidate and would not present the same set of incentives as a two-candidate race. Anything less than a citywide election "would involve a wholly different set of voting incentives than obtained in the first election, in which the voters, unaware of which candidate would finish where, did not have the same set of incentives to cast bullet votes. Because it is undisputed--and undisputable--that, if the new election were limited to district eleven, all of the other candidates would necessarily retain the votes that had been validly cast for them in the other thirteen districts, there would be very strong incentives for candidates to urge, and for voters to choose, bullet voting that could change the ultimate lineup of successful candidates, both by individual candidate and by party." *Id.* at 843-44. The same circumstances are not present here, and so *Bauer* is inapposite.

require (1) a setting aside of the election in the Sixth District only and (2) the holding of a new election in that District instead of simply eliminating its votes when counting the municipal totals. Only the election in the Sixth District was challenged. No irregularities have been shown to have occurred in any other Maple Shade district. If the entire municipal election is set aside, the time, effort, and expense of candidates, officials and voters who participated in 18 entirely bona fide district elections will have been wasted. The voters in those districts will be disenfranchised, at least temporarily, and be obliged to duplicate their voting arrangements, if they are able to do so. That would not be equitable.").

Those considerations are no less applicable here. Turnout in November 2018 was very high (62 percent), and over 10,000 people voted. If a new election is ordered district-wide, there is powerful evidence that most people who voted in November simply will not vote (setting aside those who voted in November and *cannot* vote in a special election). When Rep. Young was elected in a special election in February 2018, only about 18.5 percent of people voted. In effect, the votes of over 10,000 people who made arrangements to get to the polls and who properly voted in November 2018 would not be counted if a special election were ordered, through no fault of either the candidates or the voters themselves. Instead, if a new election is ordered—the third in one year for this seat—the race likely would be decided by a small fraction of those who voted in November. That is, no doubt, one reason why compelling a new election is a "drastic action." *McCloskey v. McIntyre*, H. Rept. 99-58, at 44.

The facts presented to the committee establish nothing more than an unintentional mistake by election officials, and the contestant did not establish with any certainty what the effect of that mistake might have been. On this record, the Committee should recommend that the House dismiss the complaint.

RESPECTFULLY SUBMITTED,

By *___/s/ William M. Bloss*_____

WILLIAM M. BLOSS
ALINOR C. STERLING
EMILY B. ROCK
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
TEL: (203) 336-4421
FAX: (203) 368-3244
bbloss@koskoff.com
asterling@koskoff.com
erock@koskoff.com

CERTIFICATION

This is to certify that a copy of the foregoing has been emailed, on this 30th day of January 2019, to the Clerk of the Committee and to:

Attorney Proloy Das
Murtha Cullina LLP
CityPlace One
185 Asylum Street
Hartford, CT 06103

/s/William M. Bloss
William M. Bloss

EXHIBIT A

boards, taken ex parte and prior to the initiation of the election contest in the House, are incompetent as evidence and will not be considered by the Committee on Elections.

In Hicks v Dondero (§ 53.1, infra), a 1945 contest, the contestant submitted two copies of transcripts of proceedings before the Wayne County, Michigan Canvassing Board, which were held prior to the initiation of his election contest in the House. The Committee on Elections ruled that such transcripts were entirely ex parse and incompetent as proof of any issues urged by contestant.

Testimony at State Inquiry

§ 34.4 A committee on elections stated that it was not bound by the actions of a state court in supervising a recount; but the committee denied contestant's motion to suppress testimony obtained at a state inquiry where the contestant had initiated the state recount procedure and would be estopped from offering rebuttal testimony as to the result of the recount.

In Kent v Coyle (§ 46.1, infra), proceedings took place as described above. A partial recount had been conducted by a state court pursuant to state law; but a committee on elections held that contestant had failed to sustain the burden of proof of fraud where a discrepancy between the official returns and the partial recount was inconclusive.

§ 35. Burden of Proof

Under the Federal Contested Elections Act, the burden is on contestant to prove that the election results entitled him to contestee's seat, even where the contestee fails to answer the notice of contest or otherwise defend as provided by such act,[6] and even in opposition to a motion to dismiss submitted by contestee in advance of submission of formal evidence.[7]

Administration of Oath as Prima Facie Evidence of Right to Seat

§ 35.1 The administration of the oath to the contestee may establish his prima facie right to the seat.

In the 1965 Mississippi election contest of Wheadon et al. v

6. 2 USC § 385.

7. See Tunno v Veysey, discussed in § 35.7, infra.

Abernethy et al. [The Five Mississippi Cases] (§ 61.2, infra), the committee report and comments by members of the committee, during debate on the resolution dismissing the contest, suggested that the Committee on Elections regarded the administration of the oath to the contestees as establishing their prima facie right to the seats.(8)

Standard of "Fair Preponderance of Evidence"

§ 35.2 In an election contest, contestant has the burden of proof to establish his case, on the issues raised by the pleadings, by a fair preponderance of the evidence.

In Scott v Eaton (§ 50.2, infra), a 1940 California contest, an elections committee summarily ruled that a contestant had not established by a fair preponderance of the evidence that contestee had violated a California statute or the Federal Corrupt Practices Act, or that any such violation directly or indirectly prevented contestant from receiving a majority of votes cast.(9)

Burden of Showing Results of Election Would Be Changed

§ 35.3 In the absence of a showing that the results of the election would be changed, lack of knowledge of registration laws and improper enforcement by officials charged with their administration are not such irregularities as will void the results of an election.

In Wilson v Granger (§ 54.5, infra), a 1948 Utah contest, the majority report of the Committee on House Administration acknowledged "widespread and numerous errors and irregularities in many parts of the district," but nevertheless upheld the 104 vote lead of the contestee because the correct result of the election was not affected by the irregularities shown. The House agreed to a resolution dismissing the contest.

§ 35.4 Where the contestant alleges that procedural requirements in an election have not been complied with,

8. See also the debate on H. Rept. No. 89-602 disposing of the election contest of Peterson v Gross (§ 61.3, infra), for more authority that the administration of the oath establishes a prima facie right to the seat, with resulting evidentiary burdens imposed on the contestant. 111 CONG. REC. 26499, 89th Cong. 1st Sess., Oct. 11, 1965.

9. As to the "fair preponderance" standard, see also Gormley v Goss, a 1934 Connecticut contest (§ 47.9, infra).

he has the burden of showing that, due to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved.

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, the Committee on Elections determined that contestant had proven certain irregularities relating to the failure of local officials in certain precincts to keep registration books and to comply with various administrative requirements imposed by state law, but dismissed the contest for failure of the contestant to bear the burden of showing fraud and irregularity by any election official whereby contestant was deprived of votes.

§ 35.5 A contestant who alleges that voters had been registered who did not reside in the precincts where registered must present such evidence of these irregularities as to leave no doubt of their existence.

In the 1951 Pennsylvania contested election case of Osser v Scott (§ 56.5, infra), the contestant's testimony enumerated instances where registrants had given fictitious residence addresses, and indicated that as to such registrants contestant had filed some 2,000 "strike-off petitions." The committee, however, found that no evidence had been presented to show that any of the illegal registrants had voted for the contestee. Thus, the committee concluded that the contestant had not presented sufficient evidence to impeach the returns.

§ 35.6 An elections committee will recommend dismissal of a contest where there is no evidence that the election was so tainted with the misconduct of election officers that the true result cannot be determined.

In the 1951 Pennsylvania contested election case of Osser v Scott (§ 56.5, infra), the contestant contended, as stated in the report, that he was unable to have "honest-to-goodness Democrats file for minority inspector [poll watchers]" and that the Republican Party "will register persons as Democrats in order to file them for minority inspector and to complete the election board." However, the committee recommended dismissal, which the House subsequently agreed to, because no evidence was presented to show "that the election was so tainted with fraud, or with the misconduct of the election officers, that the true result cannot be determined."

§ 35.7 The requirement that the contestant in a contested election case make a claim to the seat carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone, could seat the contestant.

Under the new contested election statute, contestant has the burden of resisting contestee's motion to dismiss, prior to the submission of evidence and testimony, by presenting sufficient evidence that the election result would be different or that contestant is entitled to the seat. Thus, in the 1971 California election contest of Tunno v Veysey (§ 64.1, infra), the committee report recommended dismissal of the contest where the contestant merely alleged that election officials had wrongfully and illegally canceled the votes of 10,000 potential voters, without any evidence as to how these potential voters would have voted.

The committee report noted the following burden of presenting evidence:

> Under the new law then the present contestant, and any future contestant, when challenged by motion to dismiss, must have presented, in the first instance, sufficient allegations and evidence to justify his claim to the seat in order to overcome the motion to dismiss.

The report continued:

> The major flaw in the contestant's case is that he fails to carry forward with his claim to the seat as required by the precedents of the House of Representatives and the Federal Contested Elections Act. A bare claim to the seat as the contestant makes in his notice of contest without substantiating evidence ignores the impact of this requirement and any contest based on this coupled with a request for the seat to be declared vacant must under the precedents fail. The requirement that the contestant make a claim to the seat is not a hollow one. It is rather the very substance of any contest. Such a requirement carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone could seat the contestant.
>
> That the contestant in the present case fails to do this is quite clear. If all of his allegations were found to be correct he would still not be entitled to the seat. It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus the burden of proof placed on the contestant is necessarily substantial.

The House agreed to a resolution dismissing the contest.[10]

10. This was the first election contest arising under the present Federal

Burden of Establishing Claim to Seat

§ 35.8 Merely showing that some voters have been precluded from voting through errors of the election officials does not satisfy the contestant's burden of establishing his claim for the seat.

In the 1971 California election contest of Tunno v Veysey (§ 64.1, infra), the contestant alleged that the election officials had wrongfully and illegally canceled the registration of approximately 10,000 voters. However, the contestant did not show how these potential voters would have voted, and the election committee, after expressing a hesitancy to invalidate an election under these circumstances, held that the contestant had not carried through on his burden of establishing his claim to the seat under the Federal Contested Elections Act [specifically, 2 USC §§ 382, 383] and the precedents of the House.

Allegations of Improper Expenditures

§ 35.9 A contestant has the burden of proof with respect to his allegations of improper campaign expenditures by contestee.

In Lovette v Reece (§ 47.11, infra), a 1934 Tennessee contest, the committee found that contestant's allegations of improper campaign expenditures by contestee were based on hearsay evidence related to other elections, and that the contestant had failed to sustain his burden of proof.

Evidence Not Compelling Examination of Ballots

§ 35.10 To entitle a contestant in an election case to an examination of the ballots, he must establish (a) that some fraud, mistake or error has been practiced or committed whereby the result of the election was incorrect, and a recount would produce a result contrary to the official returns; and (b) that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them.

In O'Connor v Disney (§ 46.3, infra), a 1932 Oklahoma contest, a committee on elections refused to conduct a partial recount where contestant had failed to sustain the burden of proving fraud or irregularities sufficient to change

Contested Elections Act, 2 USC §§ 381 et seq.

the result of the election, and of proving such proper custody of ballots as to reasonably prevent tampering with them.

§ 36. Presumptions

Official Returns as Presumptively Correct

§ 36.1 A contestant in an election contest must overcome the prima facie evidence of the correctness of the election as established by the official returns.

In the 1934 Illinois election contest of Weber v Simpson (§ 47.16, infra), after the contestant examined the tally sheets in all of the 516 precincts of the district and found discrepancies in 128 of the precincts, he requested that the elections committee order a recount based on the discrepancies shown. The committee denied this request, finding no evidence of irregularities, intimidation, or fraud in the casting of ballots, concluding that "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee."

§ 36.2 The burden is on the contestant to present sufficient evidence to rebut the presumption that official returns are proof of the result of an election.

In the 1951 Pennsylvania contested election of Osser v Scott (§ 56.5, infra), the committee granted the contestant full opportunity for presenting testimony and hearing arguments of counsel supporting his claim, but still concluded that the contestant had not sustained his contention, stating:

> The returns of the election . . . and the certificate issued to [the contestee] are presumptive proof of the result of that election which will prevail unless rebutted by proper evidence.

The House then agreed to a resolution that the contestee was duly elected and entitled to his seat.

Similarly, in O'Connor v Disney (§ 46.3, infra), the Committee on Elections applied the principle that the burden of coming forward with evidence to meet or resist the presumption of irregularity rests with the contestant, and found that contestant had failed to overcome the presumption of correctness of official returns.

§ 36.3 Election returns prepared by election officials regularly appointed under the laws of the state where the election was held are presumed to be correct until

EXHIBIT B

of contest does not state grounds sufficient to change the result of the general election. Contestant, an unsuccessful candidate in the Democratic primary, was not a candidate for the Fifth Congressional District seat in the general election and does not claim any right to the seat. There are a number of recent precedents from 1941 to 1967 involving contests brought by persons who were not candidates in the general election indicating that the House of Representatives regards such persons as lacking standing to bring an election contest under the statute. [Citing Miller v Kirwan (§ 51, supra); McEvoy v Peterson (§ 52.2, supra); Woodward v O'Brien (§ 54.6, supra); Lowe v Davis (§ 56.3); Frankenberry v Ottinger (§ 61.1, supra); and Five Mississippi Cases of 1965 (§ 61.2, supra).]

The committee ultimately concluded:

> The committee, after careful consideration of the notice of contest, the oral arguments, and the brief filed by contestant, concludes that contestant Wyman C. Lowe, not being a candidate in the general election, has no standing to bring a contest under the contested election law and that he has failed to state sufficient grounds to change the result of said election. It is recommended that House Resolution 364 be adopted dismissing the contested election case.

The House agreed to House Resolution 364,[6] which provided:[7]

> *Resolved,* That the election contest of Wyman C. Lowe, contestant against Fletcher Thompson, contestee, Fifth Congressional District of the State of Georgia, be dismissed.

A motion to reconsider was laid on the table.

Note: Syllabi for Lowe v Thompson may be found herein at § 19.1 (contestants as candidates in general election).

§ 64. Ninety-second Congress, 1971–72

§ 64.1 Tunno v Veysey

On Nov. 9, 1971, Mr. Watkins W. Abbitt, of Virginia, from the Committee on House Administration, submitted the committee report, House Report No. 626, on the contested election case of David A. Tunno v Victor V. Veysey from the 38th Congressional District of California. Mr. Veysey was certified on Dec. 17, 1970, by the secretary of the State of California as elected to the office of U.S. Representative in Congress from the district at the general election held on Nov. 3, 1970. The credentials of Mr. Veysey were presented to the House of Representatives and he appeared, took the oath of office, and was seated without objection, on Jan. 21, 1971.[8]

6. 115 CONG. REC. 10041, 91st Cong. 1st Sess., Apr. 23, 1969.
7. *Id.* at p. 10040.
8. 117 CONG. REC. 13, 92d Cong. 1st Sess.

The official canvass of the district showed that a total number of 173,163 votes were cast in the congressional election in the district. Of this total number of votes cast, Mr. Veysey received 87,479 votes and Mr. Tunno, the contestant, received 85,684 votes. Mr. Veysey's majority consisted then of 1,795 votes.

The contestant served notice of contest on the contestee by mail on Dec. 14, 1970. At the same time a notice of intent to contest was filed by the contestant's representative with the Clerk of the House for delivery to the Committee on House Administration.

While the contestant claimed the seat as required by 2 USC §§382 and 383,[9] in his notice of contest, the relief sought by the contestant, as set forth in his notice, was that the seat be declared vacant. The notice stated:

> Contestant requests the House of Representatives of the United States, 92d Congress, first session, declare a vacancy in the office of Member of the House of Representatives, U.S., 38th Congressional District, State of California, and direct the proper executive authority of the State of California to issue a writ of election ordering a new election to fill said vacancy of said office of Member, House of Representatives of the United States, 38th Congressional District, State of California.

The contestant claimed that the affidavits of registration of some 11,137 voters in Riverside County, California, had been wrongfully and illegally canceled, depriving approximately 10,600 qualified voters of the right to vote. The notice stated: [10]

> 1. On or about August 15, 1970, the elections supervisor, Riverside County, State of California (hereinafter referred to as "supervisor") wrongfully and illegally canceled the affidavits of registration of approximately 11,137 voters of Riverside County, State of California. As a result of said illegal and wrongful cancellation of said affidavits of registration, approximately 10,616 qualified voters of Riverside County, State of California, were precluded from voting at said last preceding general election for Member of the U.S. House of Representatives from the 38th district.

From facts set out in the committee report, it appeared that local California election officials may have misinterpreted a state election statute, a mistake which may have disenfranchised approximately 10,600 voters. There were no facts indicating how many, if any, of these voters would have voted, had they not been disenfranchised, nor was

9. Pub. L. No. 91–138, §§3, 4; 83 Stat. 284 (Dec. 5, 1969). This was the first case arising under the Federal Contested Elections Act of 1969.

10. H. Rept. No. 92–626, submitted Nov. 9, 1971.

there any indication, of course, of how they would have voted. The report declared:

> On Tuesday, May 11, 1971, the Subcommittee on Elections met to hear arguments on the motion to dismiss the contest submitted by the contestee, Victor V. Veysey. Opening statements and rebuttal statements were given by the attorney for the contestant, Mr. Robert J. Timlin and the attorney for the contestee, James H. Kreiger. The contestant, Mr. David Tunno, and the contestee, Congressman Victor V. Veysey, also submitted statements.
>
> The new Federal Contested Election Act, Public Law 91–138, 83 Stat. 284, provides in section 4(b)(3) this defense to the contestee, "Failure of notice of contest to state grounds sufficient to change result of election." This defense was raised by the present contestee by way of a motion to dismiss. This provision was included in the new act because it has been the experience of Congress that exhaustive hearings and investigations have, in the past, been conducted only to find that if the contestant had been required at the outset to make proper allegations with sufficient supportive evidence that could most readily have been garnered at the time of the election such further investigation would have been unnecessary and unwarranted.
>
> Under the new law then the present contestant, and any future contestant, when challenged by motion to dismiss, must have presented, in the first instance, sufficient allegations and evidence to justify his claim to the seat in order to overcome the motion to dismiss.
>
> The major problem raised is, on the basis of the contestant's allegations and evidence, are a sufficient number of potential votes in actual contention to warrant the committee granting the relief sought and declaring the seat vacant and calling for a new election? This may be restated as, what standards has the House of Representatives applied in contests wherein declaring a vacancy was either contemplated or actually done where registration irregularities were alleged.
>
> With regard to the problem, the contested election case of Carney v. Smith [6 Cannon's Precedents 911 in the 63d Congress considered a request that the seat be declared vacant and in response to the request set forth the following standards as a criteria for taking such action.
>
> We do not believe that a committee of this House, looking for the truth to determine who in fact was elected by the voters, should, on account of this irregularity, disfranchise the electors of this township. No question is made but that the ballots cast in this precinct were cast by legal voters and in good faith. Nor is it claimed that the contestee received a single vote more than was intended to be cast for him, or that the contestant lost a single vote. We do not believe that the facts warrant the rejection of the entire poll of this township, nor does the law as practiced in almost every jurisdiction warrant such a result. *McCrary on Elections* [George McCrary, *A Treatise on the American Law of Elections*, Chicago, Callaghan & Co., 1897] section 488, says:
>
> > The power to reject an entire poll is certainly a dangerous power, and, though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested-election

case, it should be exercised only in an extreme case; that is to say, where it is impossible to ascertain with reasonable certainty the true vote.

Paine's Treatise on the Law of Elections [Halbert Paine, *A Treatise on the Law of Elections,* Boston, Little, Brown & Co., 1890] section 497, says:

> Ignorance, inadvertence, mistake, or even intentional wrong on the part of the local officers should not be permitted to disfranchise a district.

Section 498 says:

> The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result.
>
> The departure from the mode prescribed will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result and has not been occasioned by the agency of a party seeking to derive a benefit from them.
>
> Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond a reasonable doubt that there has been such a disregard of law or such fraud that it is impossible to determine what votes were lawful or unlawful, or to arrive at any result whatever, or whether a great body of voters have been prevented from exercising their rights by violence or intimidation. (Case of *Daley* v. *Petroff,* 10 Philadelphia Rep., 289.)
>
> There is nothing which will justify the striking out of an entire division but an inability to decipher the returns or a showing that not a single legal vote was polled or that no election was legally held. (In *Chadwick* v. *Melvin, Bright's Election Cases,* 489.)
>
> Nothing short of an impossibility of ascertaining for whom the majority of votes were given ought to vacate an election, especially if by such decision the people must, on account of their distant and dispersed situation, necessarily go unrepresented for a long period of time. [McCrary, *A Treatise on the Law of Elections,* 489.]

If there has been a fair vote and an honest count, the election is not to be declared void because the force conducting it were not duly chosen or sworn or qualified. [6 Cannon's Precedents § 91.]

In the contested election case of *Reid* v. *Julian* [2 Hinds' Precedents §§ 881, 882], 41st Congress the committee in its report, House Report 116 stated that:

> It has long been held by all the judicial tribunals of the country, as well as by the decisions of Congress and the legislatures of the several States, that an entire poll should always be rejected for any one of the three following reasons:
>
> 1. Want of authority in the election board.
>
> 2. Fraud in conducting the election.
>
> 3. Such irregularities or misconduct as rendered the result uncertain. [2 Hinds' Precedents § 881].

In the Michigan election case of *Beakes* v. *Bacon* in the 65th Congress [6 Cannon's Precedents § 144], the same standards were reiterated.

Because the contestant's allegations and the relief he seeks fall under No. 3, "Such irregularities or misconduct as render the result uncertain," it is necessary to survey those instances in contested election cases wherein "such

irregularities or misconduct . . ." involved registration procedures. Consideration of the above-mentioned cases will, of necessity, involve an ancillary problem, the problem of the potential voter, because the House in its consideration of irregularities and misconduct has traditionally dealt not only with such irregularities and misconduct in a vacuum but also with their effect on the election, the effect of the irregularities on the potential voter, and the amount of proof necessary to overcome the regular election returns as a result of such irregularities.

It should be noted as a preface to the contests involving registration procedures that in these the contestant had made an attempt to show with a great deal of specificity how those who were disfranchised by the irregularities in registration would have voted had they been given the opportunity and that, in general, the contests revolved around this point rather than around the mere fact of irregularity or misconduct on the part of the registration officials. The fact that the contestant in the present case makes absolutely no attempt to make such a showing as to how those who were disfranchised by being stricken from the registration lists would have voted had they been given the opportunity thus removes his case somewhat from the scope of the precedents. The problem lies basically in the fact that the contestant does not carry forward his claim to the seat.

One contest which concerns itself with almost the same issues that are involved in the present contest is *Wilson* v. *McLaurin* [2 Hinds' Precedents § 1075] which arose out of an election in South Carolina for a seat in the 54th Congress. In the *Wilson* case the committee found that a South Carolina registration law needlessly disfranchised a significant number of otherwise qualified voters. The problems that the committee was then confronted with were (1) should the seat be declared vacant because of irregularities and (2) how to treat the potential vote of these individuals who should have been allowed to vote. In the following passage which is taken from the committee report, House Report 1566, 54th Congress first sess., particular attention should be paid to the manner in which the contestant attempted to prove that his claim to the seat was justified and the standards which the committee adopted in regard to such offers of proof.

> A majority of this committee has reached the conclusion that the voters of the district now in consideration, who were qualified under the constitution of South Carolina and who were rejected under color of the enforcement of the registration law, are entitled to be heard in this contest.
>
> In this conclusion no violence is done to the doctrine that "where the proper authorities of a State have given a construction to their own statutes that construction will be followed by the Federal authorities." While the supreme court of South Carolina has not passed decisively upon the statute in question the people themselves, the highest authority in that State have decreed its disappearance from the statute book.
>
> From this standpoint we look for the course to be followed. Shall the election be set aside and the seat in question vacated? Under the authorities we think not.
>
> Beyond doubt the usual formalities of an election were for the most part observed. No substantial miscount of

votes actually cast is alleged. There are no charges of violence or intimidation seriously affecting the result which have been verified. If fraud be alleged, under sanction of legislative enactment, it was a general fraud and the returns are in general unchallenged for correctness. The votes actually cast are not in controversy; the votes not cast are the ones presented for computation.

[McCrary], *Treatise on the American Law of Elections,* in section 483, says—

"The election is only to be set aside when it is impossible from any evidence within reach to ascertain the true result—when neither from the returns, nor from other proof, nor from all together can the truth be determined."

The same authority quotes the following (sec. 489):

"Nothing short of the impossibility of ascertaining for whom the majority of votes were given ought to vacate an election."

It is a matter of serious import and precedent to introduce into an election the count of a large disfranchised class. But if the principle is good as to 4 or 40 or 400 it should certainly be no less available for a large number; or, briefly, the number is immaterial if capable of correct computation.

In the case of *Waddill* v. *Wise,* [2 Hinds' Precedents § 1026] reported by the Committee on Elections to the House in the 51st Congress, the doctrine is discussed, the authority is collated, and the opinion adopted by the House expressed in these words (p. 224):

"If the fraudulent exclusion of votes would, if successful, secure to the party of the wrongdoer a temporary seat in Congress, and the only penalty for detection in the wrong would be merely a new election, giving another chance for the exercise of similar tactics, such practices would be at a great premium and an election indefinitely prevented. But if where such acts are done the votes are counted upon clear proof aliunde the wrong is at once corrected in this House and no encouragement is given to such dangerous and disgraceful methods."

In following this opinion the testimony is presented for scrutiny.

A careful examination has been made of a record which covers 683 closely printed pages. The contestant claims to be allowed the votes of several thousand alleged voters, whose names are given, but whose qualifications rest upon varying testimony. These names of voters appear in lists executed in most of the election precincts on the day of the election, signed by the parties or by authorization, and (with few exceptions) are appended to a form of petition, which is as follows:

"To the Honorable Senate and House of Representatives of the United States in Congress assembled:

"The petition of the subscribers, citizens of the State of South Carolina, respectfully sheweth:

"That your petitioners are over the age of twenty-one (21) years and male residents of the county of _____, and the voting precinct of _____, in the county and State aforesaid, and are legally qualified to register and vote.

"That on this the sixth day of November eighteen hundred and ninety four, they did present themselves at said voting precinct in order to vote for Member of Congress, and that they were denied the right to vote.

"That your petitioners have made every reasonable effort to become qualified to vote according to the registration law of this State, but have been denied an equal chance and the same opportunity to register as are accorded to others of their fellow-citizens.

"Your petitioners desired and intended to vote for Joshua E. Wilson for Member of Congress.

"Wherefore your petitioners pray that you investigate the facts herein stated and the practical workings of the registration and election laws of this State and devise some means to secure to us the free exercise of the rights guaranteed to us by the constitution of this State and the laws and Constitution of the United States, and your petitioners will ever pray, etc., etc."

These petitions are not usually verified by affidavit, but are generally supplemented by testimony of those who had them in charge, with such explanations and corroborations as the witnesses could give.

It is considered by a majority of this committee that these lists are not per se evidence in the pending contest. They are declarations, important parts of which should be proven in accordance with usual legal forms. It is not impossible so to do, and consequently we think it is necessary for reaching trustworthy results.

Under the authority of *Vallandigham* v. *Campbell* (1 Bartlett, p. 31) these declarations might serve a use beyond a mere list for verification. For it was there held—

"The law is settled that the declaration of a voter as to how he voted or intended to vote, made at the time, is competent testimony on the point."

We propose to compute the ballots of those who were entitled to cast them, and there is ample support in a line of authorities and precedents. A few only are selected.

Delano v. *Morgan* (2 Bartlett, 170), *Hogan* v. *Pile* (20 Bartlett, 285), *Niblack* v. *Walls* (Forty-second Congress, 104, January, 1873), *Bell* v. *Snyder* (Smith's Rep., 251), are uniformly for—

"the rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote shall be counted."

In *Bisbee, Jr.* v. *Finley* [2 Hinds' Precedents §§ 977–981], it was stated—

"as a question of law we do not understand it to be controverted that a vote offered by an elector and illegally rejected should be counted as if cast."

In *Waddill* v. *Wise* (supra) the same doctrine was elaborately discussed and a further step taken by holding—

"That the ability to reach the window and actually tender the ticket to the judges is not essential in all cases to constitute a good offer to vote."

Referring to the evidence given in connection with the lists in this record it seems proper to adopt some general principles as a standard for the examination, and the following have been used as suitable and in accord with the precedents quoted:

First. The evidence should establish that the persons named in the lists as excluded voters were voters according to the requisites of the constitution of South Carolina.

Second. The proof should show that said persons were present at or near the Congressional voting place of their respective precincts, for the purpose of voting and would have voted but for unlawful rejection or obstruction.

Third. That said excluded voters would have voted for the contestant.

Another election contest which involved irregularities in the application of a registration law resulting in the disfranchisement of a number of otherwise qualified voters was *Buchanan* v. *Manning* [2 Hinds' Precedents § 972] in the 47th Congress. In this contest the

evidence of a disqualification of potential voters was somewhat stronger than in the present case because it appears that the registrars unlawfully refused to register "many electors." In regard to such action by the registrars, its effect on the election, and the efforts which are necessary for a potential voter to undertake in order that his vote may be counted the committee investigating the matter held:

> It appears in the evidence that very many electors in the various counties of this district were deprived of the right of voting because they were not registered. The registry law of Mississippi provides the manner in which registration shall be made. An unlawful refusal on the part of the registration officers to register a qualified elector is a good ground for contest; but in order to make it available the proof should clearly show the name of the elector who offered to register; that he was a duly qualified voter, and the reason why the officer refused to register him, and, under the statutes of the United States, if he offered to perform all that was necessary to be done by him to register, and was refused, and afterwards presented himself at the proper voting place and offered to vote and again offered to perform everything required of him under the law, and his vote was still refused, it would be the duty of the House to see to it that he is not deprived of his right to participate in the choice of his officers. Unfortunately, in this case the proof falls far short of that which is required to enable the House to apply the proper remedy. That there were many instances in which the officers of the registration arbitrarily refused to do their duty is apparent. That many electors were deprived of their right to vote in consequence of this action is also apparent; but in going through the testimony in this case the number thus refused registration and refused the right to vote if added to contestant's vote would not elect him. Neither is it shown sufficiently for whom the nonregistered voters would have voted had they been allowed that right.

As can be seen from the above mentioned cases the problem involved not so much the registration irregularities themselves but, rather, conceding the irregularities, the amount of and nature of the proof required of the contestant to substantiate his claim of a right to the seat in question. Where the proof offered by the contestant shows how those who were not permitted to vote would have voted and that they tendered a vote and were wrongfully rejected, the House has generally found that this is sufficient to warrant counting the votes as cast. Then if in counting these votes the contestant receives more votes than the contestee he gets the seat. This line of reasoning conforms with the earlier stated standard of preserving and correcting the return if it is at all possible, and with the concept that contestant bears the burden of proof in seeking to have certified returns rejected.

The House of Representatives has rather consistently been hesitant in declaring a seat vacant preferring rather to measure the wrong and correct the returns, if this is at all possible.

This preference for protecting the initial returns and correcting them if the evidence shows that they are incorrect is amply illustrated in the contests wherein fraud has been proven, and in contests involving possible rejection of returns. In fact in the index to *Hinds and Cannon* under Election of Rep-

resentatives, section 376 is entitled "Returns, Purging of.—Not To Be Rejected If Corrections May Be Made" and section 377 is entitled "Returns, Purging of.—Not To Be Rejected Even for Fraud If Correction May Be Made." Under these two headings are three full pages of citations.

Considering the above precedents along with the statement from the committee report in the election contest of *Gormley* v. *Goss* [§ 47.9, supra], House Report No. 893, 73d Congress, second session wherein it was held that:

> . . . your committee has been guided by the following postulates deemed established by law and the rules and precedents of the House of Representatives:
>
> 1. The official returns are prima facie evidence of the regularity and correctness of official action.
>
> 2. That election officials are presumed to have performed their duties loyally and honestly.
>
> 3. The burden of coming forward with evidence to meet or resist these presumptions rests with the contestants. It is clear that the contestant in this case has failed to meet these presumptions and requirements.
>
> The major flaw in the contestant's case is that he fails to carry forward with his claim to the seat as required by the precedents of the House of Representatives and the Federal Contested Election Act. A bare claim to the seat as the contestant makes in his notice of contest without substantiating evidence ignores the impact of this requirement and any contest based on this coupled with a request for the seat to be declared vacant must under the precedents fail. The requirement that the contestant make a claim to the seat is not a hollow one. It is rather the very substance of any contest. Such a requirement carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone could seat the contestant.
>
> That the contestant in the present case fails to do this is quite clear. If all of his allegations were found to be correct he would still not be entitled to the seat. It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus the burden of proof placed on the contestant is necessarily substantial.
>
> In this case the contestant has not met this burden of proof. He makes no substantial offer to show any of the following elements, much less all of them which are necessary to his case: (1) that those whose names were stricken from the registration list were, at the time of the election, qualified resident voters of the 38th Congressional District of California; (2) that those whose names were so stricken offered to vote; and (3) that a sufficient number to change the result offered to vote and were denied by election officials because their names had been stricken from the registration lists would have voted for the contestant had they not been so denied. Had all of the criteria been met then it would have been incumbent upon the committee to pass, in the first instance, on the actions of the registrars in Riverside County and then on the validity of the evidence offered, but such is not the ease here.
>
> The type of relief that the contestant seeks is not a proper one. The contestant is limited, as was noted above, to claiming the seat in question and offering proof to substantiate that claim. Declaring a vacancy in the seat is one of the options

available to the House of Representatives and is generally exercised when the House decides that the contestant, while he has failed to justify his claim to the seat, has succeeded in so impeaching the returns that the House believes that the only alternative available to determine the will of the electorate is to hold a new election.

The committee also takes note of the time factor involved in the contest. It appears from the record available to the committee that the contestant had, at the very minimum, three months notice in advance of the election of the actions here protested of the registrars. It would seem that if the contestant had any reservations about such actions the proper forum in which to test such reservations would have been the California courts. In election matters the courts have generally been inclined to expedite the case and we feel certain that such would have been the case in California had the contestant chosen to so act. From the record it appears rather that the contestant decided to take his chances and we feel constrained to abide by that decision.

On Nov. 9, 1971, Mr. Abbitt, by direction of the Committee on House Administration, called up House Resolution 507 (accompanying H. Rept. No. 92–626) which provided:

H. RES. 507

Resolved, That the election contest of David A. Tunno, contestant, against Victor V. Veysey, contestee, Thirty-eighth Congressional District of the State of California, be dismissed.

The resolution dismissing the contest was agreed to by the House and a motion to reconsider was laid on the table.(11)

Note: Syllabi for Tunno v Veysey may be found herein at §35.7 (burden of showing results of election would be changed); §35.8 (burden of establishing claim to seat); §42.11 (disposal by resolution declaring seat vacant).

11. 117 CONG. REC. 40017, 92d Cong. 1st Sess.

EXHIBIT C

Procedures for Contested Election Cases in the House of Representatives

Jack Maskell
Legislative Attorney

L. Paige Whitaker
Legislative Attorney

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Prepared for Members and Committees of Congress

Summary

Under the U.S. Constitution, each House of Congress has the express authority to be the judge of the "elections and returns" of its own Members (Article I, Section 5, clause 1). Although initial challenges and recounts for the House are conducted at the state level, under the state's authority to administer federal elections (Article I, Section 4, cl. 1), continuing contests may be presented to the House, which, as the final arbiter, may make a conclusive determination of a claim to the seat.

In modern practice, the primary way for an election challenge to be heard by the House is by a candidate-initiated contest under the Federal Contested Elections Act, (FCEA, codified at 2 U.S.C. §§ 381-396). Under the FCEA, the candidate challenging an election (the "contestant"), must file a notice of an intention to contest within 30 days of state certification of the election results, stating "with particularity" the grounds for contesting the election. The contestee then has 30 days after service of the notice to answer, admitting or denying the allegations, and setting forth any affirmative defenses. The contestee may, before answering a notice, make a motion to the committee for a "more definite statement," pointing out the "defects" and the "details desired." If this motion is granted by the committee, the contestant would have 10 days to comply. Under the FCEA, the "burden of proof" is on the party challenging the election, and the contestant must overcome the presumption of the regularity of an election, and its results, evidenced by the certificate of election presented by the contestee. In this adversarial proceeding, either party may take sworn depositions, seek subpoenas for the attendance of witnesses and production of documents, and file briefs to include any material as an appendix that they wish to put on the record before the committee. In accordance with the FCEA, the actual election contest "case" is heard by the committee, "on the papers, depositions and exhibits" filed by the parties, which "shall constitute the record of the case."

On less frequent occasions, the House may refer the question of the right to a House seat to the Committee on House Administration for it to investigate and report to the full House for disposition. In lieu of a record created by opposing parties, the committee may conduct its own investigation, take depositions, and issue subpoenas for witnesses and documents. Jurisdiction may be obtained in this manner from a challenge to the taking of the oath of office by a Member-elect, when the question of the final right to the seat is referred to the committee. In the past, committees investigating such questions have employed several investigative procedures, including impounding election records and ballots, conducting a recount, performing a physical examination of disputed ballots and registration documents, and interviewing and examining various election personnel in the state and locality.

In election cases under Committee on House Administration jurisdiction by way of either procedure, the committee will generally issue a report and file a resolution concerning the disposition of the case, to be approved by the full House. The committee may recommend, and the House may approve by a simple majority vote, a decision affirming the right of the contestee to the seat, may seat the contestant, or find that neither party is entitled to be finally seated and declare a vacancy.

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Introduction

Background

The U.S. Constitution provides at Article I, Section 5, clause 1, that each House of Congress shall be the judge of the "elections, returns and qualifications" of their own Members.[1] Under the federal system, primary authority over the procedures and the administration of elections to Congress within the several states is given expressly to the states in the "Times, Places, and Manner" clause of the Constitution, Article 1, Section 4, clause 1 (which also provides a residual, superceding authority within the Congress to alter such regulations concerning congressional elections).[2] Election recounts or challenges to congressional election results are thus initially conducted at the state level, including in the state courts, under the states' constitutional authority to administer federal elections, and are presented to the House of Representatives as the final judge of such elections.[3]

Under these constitutional provisions and practice, the House essentially is the final arbiter of the elections of its own Members. As noted by the House Committee on Administration, once the final returns in any election have been ascertained, the ultimate "determination of the right of an individual to a seat in the House of Representatives is in the sole and exclusive jurisdiction of the House of Representatives under article I, section 5 of the Constitution of the United States."[4] A noted 19th century expert on parliamentary and legislative assemblies, Luther Sterns Cushing, explained that the final and exclusive right to determine membership in a democratically elected legislature "is so essential to the free election and independent existence of a legislative assembly, that it may be regarded as a necessary incident to every body of that description, which emanates directly from the people."[5] In his historic work, *Commentaries on the Constitution*, Justice Joseph Story analyzed the placing of the power and final authority to determine membership within each House of Congress:

> It is obvious that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty as to who were legitimately chosen members, and any intruder or usurper might claim a seat, and thus trample upon the rights and privileges and liberties of the people.... If lodged in any other, than the legislative body itself, its independence, its purity and even its existence and action may be destroyed, or put into imminent danger.[6]

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[1] Each House may judge the constitutional "qualifications" of its Members (age, citizenship, and inhabitancy in the state from which elected) and, in election challenges, may determine if the Member is "duly elected." *See* Powell v. McCormack, 395 U.S. 486, 550 (1969).

[2] Congress generally allows the states to govern congressional election procedures within their own jurisdictions, but has by law designated the date on which House elections are to be held and has required that all votes for Representatives be by written or printed ballot or by voting machine. 2 U.S.C. §§ 7, 9.

[3] House committees hearing election contests have recommended dismissal, on occasion, for failure of contestant to "exhaust his state remedies first," in the case of certain pre-election procedural irregularities, Huber v. Ayres, 2 *Deschler's Precedents of the United States House of Representatives* [hereinafter *Deschler's*], Ch. 9, § 7.1, at 358, and in the case of recounts of ballots, Carter v. LeCompte, 2 *Deschler's*, Ch. 9, §§ 7.2, 57.1, finding that candidate has exhausted remedies if no state recount allowed for congressional elections.

[4] In re William S. Conover, II, H.Rept. 92-1090 (1972), at 2.

[5] Cushing, *Law and Practice of Legislative Assemblies*, at 54-55 (1856).

[6] Story, *Commentaries on the Constitution*, Volume II, § 831, at 294-295.

In *Roudebush v. Hartke*, the U.S. Supreme Court held that under this provision of the Constitution, the final determination of the right to a seat in Congress in an elections case is not reviewable by the courts because it is "a non-justiciable political question," and that each House of Congress in judging the elections of its own Members has the right under the Constitution to make "an unconditional and final judgment."[7] Earlier, the Supreme Court had also found that each House of Congress under Article I, Section 5, clause 1, "acts as a judicial tribunal" with many of the powers inherent in the court system in rendering in such cases "a judgment which is beyond the authority of any other tribunal to review."[8]

Under the constitutional authority over the elections and returns of its own Members, the House in its consideration of a challenged election may accept a state count or recount or other such determination, or conduct its own recount and make its own determinations and findings.[9] While the House has broad authority in this area, there is an institutional deference to, and a "presumption of the regularity" of state election proceedings, results and certifications. An election certificate from the authorized state official, generally referred to as the "credentials" presented by a Member-elect, therefore, is deemed to be prima facie evidence of the regularity and results of an election to the House.[10] The consequences of this presumption of regularity would generally result in the swearing in of a Member-elect presenting such credentials to the House at the beginning of a new Congress, even in the face of a filed contest or challenge,[11] and would create a "substantial" burden of proof on the contestant to persuade the House to take action that, in substance, would amount to "rejecting the certified returns of a state and calling into doubt the entire electoral process."[12]

House Jurisdiction

There are two general avenues by which the House obtains jurisdiction over an election that is challenged or contested. In modern practice, the Federal Contested Elections Act of 1969 (FCEA) is the primary method by which a congressional election is contested in the House of Representatives. This contest is triggered by a losing candidate filing a notice under the provisions of the FCEA. In addition, the House has in the past, upon a challenge to the seating of a Member-elect, referred the question of the right to a seat in the House to the committee of jurisdiction (now the Committee on House Administration) for the committee to investigate and to report to the House for disposition. As explained in *Deschler's Precedents*:

> The House acquires jurisdiction of an election contest upon the filing of a notice of contest. Normally the papers relating to an election contest are transmitted by the Clerk to the Committee on House Administration, pursuant to 2 USC § 393(b), without a formal referral

[7] Roudebush v. Hartke, 405 U.S. 15, 19 (1972).

[8] Barry v. United States ex rel. Cunningham, 279 U.S. 597, 613, 616 (1929).

[9] Roudebush v. Hartke, *supra*, at 25-26.

[10] 2 *Deschler's*, Ch.8, § 15, at 305: "Once Congress meets, the certificate constitutes evidence of a prima facie right to a congressional seat in the House."

[11] It appears that in the 103 contested election cases considered by the House since 1933, on the first day of the new Congress the House failed to seat, even provisionally, only two Members-elect who had presented valid credentials (*see* Roush or Chambers, 107 Cong. Rec. 24 (January 3, 1961); McCloskey and McIntyre, 131 Cong. Rec. 380, 381-388 (January 3, 1985)).

[12] Tunno v. Veysey, H.Rept. 92-626, citing Gormley v. Goss, H.Rept. 73-893. *See* 2 *Deschler's*, Ch. 9, § 64, at 637-638.

> or other action by the House. However, the House may initiate an election investigation if a Member-elect's right to take the oath is challenged by another Member, by referring the question to the committee.[13]

The FCEA, codified at 2 U.S.C. §§ 381-396, governs contests for the seats in the House of Representatives that are initiated by a candidate in the challenged election.[14] The FCEA essentially sets forth and details the procedures by which a defeated candidate may contest a seat in the House of Representatives. The contest under the FCEA is heard by the Committee on House Administration upon the record provided and established by the parties to the contest. After the contest is heard by the committee, the committee reports the results. After discussion and debate, the whole House can dispose of the case by privileged resolution by a simple majority vote.[15]

On less frequent occasions in modern practice, a referral by the House to the Committee on House Administration of the question of the right to a congressional seat has been made after a challenge by one Member-elect to the taking of the oath of office by another Member-elect. In such a circumstance, the Committee on House Administration may investigate the matter itself or may rely substantially on the evidence and materials provided by the interested parties/candidates following similar procedures as in the statutory Federal Contested Elections Act.[16]

Who May Challenge the Right to a Seat in the House

Federal Contested Elections Act (FCEA)

In a contested election brought under the statutory procedures of the FCEA, only losing candidates have standing to initiate a contest by filing a notice of intent to contest a House election. The statute provides expressly that only "a candidate for election in the last preceding election and claiming a right to such office" of Representative in Congress may contest a House seat.[17] The contestant must be a candidate whose name was on the official ballot or who was a bona fide write-in candidate.[18]

House-Initiated Challenges and Contests

In recent years, the Committee on House Administration has, on infrequent occasions, obtained jurisdiction of an election contest by virtue of a challenge by one Member-elect to the taking of the oath of office of another Member-elect on the first day of a new Congress, and the subsequent

[13] 2 *Deschler's*, Ch. 9, § 4, at 344.

[14] The Senate does not have codified provisions for its contested-election procedures.

[15] Brown and Johnson, *House Practice, A Guide to the Rules, Precedents and Procedures of the House*, 108th Cong. (2003) [hereinafter Brown and Johnson], at Ch. 22, §§ 4-6, at 477-479.

[16] In the matter of Dale Alford, H.Rept. 86-1172 (1959), 2 *Deschler's*, at Ch. 9, § 17.4 at 385: "The committee report strongly recommended that in such cases proceedings be under the provisions of the contested elections statute."

[17] 2 U.S.C. §382(a).

[18] *Federal Contested Elections Act*, H.Rept. 91-569 (1969), at 4.

adoption of a resolution instructing that the question of the right to the seat be referred to the committee.[19] In addition to a House-initiated referral in this manner, it has also been noted that it is possible that a petition from an elector of the congressional district in question, or from any other person, might also be referred by the Speaker or the House to the committee for investigation.[20] According to *Deschler's*, there are thus four ways for a challenge to be brought before the House:

> (1) an election contest initiated by a defeated candidate and instituted in accordance with law [the FCEA]; (2) a protest filed by an elector of the district concerned; (3) a protest filed by any other person; and (4) a motion of a Member of the House.[21]

Although these other methods of obtaining jurisdiction, other than by means of a filing under the statute, have been employed on occasion, the Committee on House Administration, in one instance of a referral of a petition, noted "a strong preference" for "determining disputed elections by following the procedures under the contested election statute."[22]

Challenges Under the Federal Contested Elections Act (FCEA)

The current Federal Contested Elections Act (FCEA), enacted in 1969 and codified at 2 U.S.C. §§ 381-396, sets forth procedures for contesting a seat in the House. In modern practice, it is the primary method for a losing candidate to challenge the results of a House election. The FCEA defines "contestant" as an individual who contests the election of a Member of the House of Representatives under the statute, and defines "contestee" as a Member of the House of Representatives whose election is contested under the statute.[23]

Standing To Initiate a Contest Under the FCEA

In accordance with the FCEA, only a losing candidate in a general election for a seat in the House of Representatives may contest a seat.[24]

Filing of Notice

The FCEA provides that a losing candidate shall file a notice of intention to contest an election within 30 days after the election result is declared by the appropriate state officer or Board of Canvassers authorized by law to make such a declaration. Written notice must be filed with the

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[19] 2 *Deschler's*, at Ch. 9, § 17.

[20] 2 *Deschler's*, at Ch. 9, § 17, at 383-385. *See also* matter of Dale Alford, 105 Cong. Rec. 14 (January 7, 1959); 2 *Deschler's*, Ch. 9, § 17.1; and Lowe v. Thompson, 2 *Deschler's*, Ch. 9, at § 17.5.

[21] 2 *Deschler's*, at Ch. 9, § 17, at 383.

[22] Matter of Dale Alford, H.Rept. 1172, 86th Congress (1959), and 2 *Deschler's*, Ch. 9, § 17.1 at 384, § 17.4 at 385, and § 58 at 586.

[23] 2 U.S.C. § 381(3), (4).

[24] *See* 2 U.S.C. 382(a).

Clerk of the House and be served upon the contestee, that is, the Member-elect or Member certified as the winner of the election.[25]

Swearing In of Member-Elect Whose Election Is Contested Under the FCEA

Once a notice of an election contest is filed by a losing candidate with the Clerk of the House, and notice served upon the contestee, the House of Representatives and the appropriate committee (now the Committee on House Administration) formally obtain jurisdiction over the matter. For the House to be able to finally "judge" the election of one of its Members whose election has been contested under the FCEA, there need not be any further action or motions presented to or adopted by the House on the first day of Congress with regard to the election, or concerning the Member-elect whose seat is being challenged. With the filing of an election contest, the Committee on House Administration may later hear the matter, recommend a particular action or resolution to the House, and the House may, by a simple majority vote, determine finally who has the right to the seat in question, regardless of whether or not the Member-elect had been sworn in on the first day of the new Congress.[26] As stated by Parliamentarians to the House of Representatives, Brown and Johnson, "[t]he seating of a Member-elect does not prejudice a contest pending under the Federal Contested Elections Act (FCEA) over final right to the seat."[27]

On occasion, the House has asked certain Members-elect to "step aside" or remain seated when the oath of office is given collectively to the other Members-elect.[28] If an election contest has been filed, and the Member-elect whose election is being contested is asked to "step aside," then that Member-elect may, after the other Members-elect have taken the oath of office, merely be administered the oath with no further direction, instruction, or comment by the House.[29] In at least one instance, another Member-elect has made a parliamentary inquiry of the Speaker concerning the swearing in of a Member-elect whose election has been contested under the

[25] *See id. But see* McLean v. Bowman (62nd Cong., 1912), 6 *Cannon's Precedents* § 98 (finding that the contested elections statute, in effect prior to the FCEA, limiting the time within which notice of contest of election may be served, "is merely directory and may be disregarded for cause"). For example, in Tataii v. Abercrombie (H.Rept. 111-68), the Committee on House Administration found that the certificates of election were signed by the state's chief election officer on November 24, 2008, and therefore, in order to be timely pursuant to Section 382(a) of the FCEA, the contestant would have had to file a notice of contest by December 24, 2008. The contestant filed a notice of contest on January 16, 2009. However, due to an elections contest filed by the contestant in the state supreme court, the certificate of election was not delivered by the state to the U.S. House of Representatives until December 16, 2008, when the court made a final determination. Noting that the FCEA expressly provides that a notice of contest must be filed within 30 days of elections results being declared, the committee announced that the contestant's notice of contest was untimely. Nonetheless, acknowledging that the contestant may have received inaccurate advice on timely filing, the committee decided to evaluate the contestant's claims on the merits.

[26] Brown and Johnson, *supra*, Ch. 22, §§ 4-6, at 477-479; Ch. 33, § 3, at 635, and Ch. 58, § 28.

[27] *Id.*, at Ch. 33, § 3, at 635.

[28] Of the 107 election contests considered by the House since 1933, it appears that Members-elect have been asked to "step aside" in 15 instances. *See* CRS Report 98-194, *Contested Election Cases in the House of Representatives: 1933 to 2009*, by L. Paige Whitaker.

[29] In 11 of the 15 cases where a Member-elect has been asked to "step aside," it appears that an election contest under the FCEA had been filed, and the resolution offered to swear in the challenged Member-elect merely provided that the Member-elect "be now permitted" to take the oath of office, with no specific reference to final determination of the right to the seat nor any express reference to a filed election contest. *See* CRS Report 98-194, *Contested Election Cases in the House of Representatives: 1933 to 2009*.

statute, to clarify that the swearing in of such Member-elect is without prejudice to the House's authority to resolve the election contest, and to finally determine who was "duly elected."[30]

Significance of Certified Election Results

In the 1934 contested elections case of *Gormley v. Goss*, the House Elections Committee declared that the official election returns are prima facie evidence of the "regularity and correctness of official action," that election officials are presumed to have performed their duties loyally and honestly, and that the burden of coming forward with evidence to meet or resist these presumptions rests with the contestant."[31] In other words, the certification of election returns by the appropriate governor or secretary of state is generally accepted by the House.

Contents and Form of Notice

The FCEA requires that the notice of intention to contest "shall state with particularity the grounds upon which contestant contests the election," and shall state that an answer to the notice must be served upon the contestant within 30 days after service of the notice. In addition, the notice of intention to contest must be signed by the contestant and verified by oath or affirmation.[32]

Proof of Service

The FCEA provides that service of the notice of intention to contest shall be made by one of the following methods: (1) personal delivery of copy to contestee, (2) leaving a copy at contestee's house with a "person of discretion" of at least 16 years old, (3) leaving a copy at contestee's principal office or place of business with a person in charge, (4) delivering a copy to an agent authorized to receive such notice, or (5) mailing a copy by registered or certified mail addressed to contestee at contestee's residence or principal office or place of business. Service by mail is considered complete upon the mailing of the notice of intention to contest. Proof of service by a person is achieved upon the verified return of the person servicing such notice setting forth the time and manner of the service; proof of service via registered or certified mail is achieved by the return post office receipt. Proof of service is required to be made to the Clerk of the House of Representatives "promptly and in any event within the time during which the contestee must answer the notice of contest." The FCEA further provides that failure to make proof of service, however, "does not affect the validity of the service."[33]

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[30] *See* Morgan M. Moulder, 107 Cong. Rec. 12 (January 3, 1961)(in response to a parliamentary inquiry as to whether adoption of the resolution to administer the oath of office to the challenged Member-elect would "preclude and foreclose any further contest of these elections before the Committee on House Administration," the Speaker stated that the "gentleman would have all rights he would have under the law"). *Id.*

[31] Gormley v. Goss, H.Rept. 73-893 (1934).

[32] 2 U.S.C. § 382(b).

[33] 2 U.S.C. § 382(c).

Response of Contestee

Within 30 days after receiving service of a notice of intention to contest, in accordance with the FCEA, the contestee must serve upon the contestant a written answer to the notice of contest admitting or denying the averments contained in the notice. The answer must set forth affirmatively any defenses in law or in fact on which the contestee relies and shall be signed and verified by the contestee by oath or affirmation.[34]

The contestee also has the option of making certain defenses by motion prior to his or her answer to the contestant. The FCEA expressly provides that any such motion would alter the time for serving an answer on the contestant.[35] At the option of the contestee, the following defenses may be made by motion, served upon the contestant prior to the contestee's answer: (1) insufficiency of service of notice of contest, (2) lack of standing of contestant, (3) failure of notice of contestant to state grounds sufficient to change the result of election, and (4) failure of contestant to claim right to contestee's seat.[36] Upon such a motion to dismiss, the burden of proof is on the contestant to present sufficient evidence that he or she is entitled to the House seat in question. The purpose of a motion to dismiss is to require the contestant, at the outset of the contest, to present sufficient evidence of a prima facie case, prior to the formal submission of testimony, so that the committee can determine whether to conduct exhaustive hearings and investigations.[37]

If the notice of contest is so vague or ambiguous that the contestee "cannot reasonably be required to frame a responsive answer," the FCEA also provides that the contestee may move for a more definitive statement before interposing an answer.[38] Such a motion must specify the defects of the notice and note the details required. If the committee grants the motion for a more definite statement and if the contestant does not comply with the order of the committee within 10 days after notice of such order, the committee may dismiss the case or make such other order as it deems appropriate.[39] The FCEA expressly states that the failure of a contestee to answer the notice of contest or otherwise defend shall not be deemed to be an admission of truth of the averments contained in the notice of contest. Notwithstanding such failure, "the burden is upon contestant to prove that the election results entitle him to contestee's seat."[40]

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[34] 2 U.S.C. § 383(a).

[35] Section 383(d) provides: "Service of a motion permitted under this section alters the time for serving the answer as follows, unless a different time is fixed by order of the Committee: If the Committee denies the motion or postpones its disposition until the hearing on the merits, the answer shall be served within ten days after notice of such action. If the Committee grants a motion for a more definite statement the answer shall be served within ten days after service of the more definite statement."

[36] 2 U.S.C. § 383(b).

[37] *See* Tunno v. Veysey, H.Rept. 92-626, *supra*.

[38] 2 U.S.C. § 383(c).

[39] 2 U.S.C. § 383(d). For comparison, note that in Senate contested election cases, the contestant may be asked by the Senate Rules and Administration Committee to file a supplemental petition setting forth any specific charges of fraud or irregularities if the petition to contest is too general or ambiguous, *see* Bursum v. Bratton and Wilson v. Ware, S.Rept. 71-447 at 1 (1930). The Senate contestee may also request that the contestant file a bill of particulars or a statement of specific amendments, *see* Hurley v. Chavez, S.Rept. 83-1081 at 284 (1954), and may file a denial or demurrer, as well as a petition for dismissal of the contest.

[40] 2 U.S.C. § 385.

Taking of Depositions and Reimbursement of Fees

The FCEA allows for the contestant and the contestee to take testimony by deposition of any person for the purpose of discovery and for use as evidence in the contested election proceeding.[41] The total time permitted for the taking of testimony is 70 days. Upon application by any party, a subpoena for attendance at a deposition and for the production of documents shall be issued by judges or clerks of the federal, state, and local courts of record.[42] For witnesses who willfully fail to appear or testify, a fine of $100 to $1,000 or imprisonment for 1 to 12 months may be imposed.[43]

Each judge or clerk who issues a subpoena or takes a deposition shall be entitled to receive from the party for whom the service was performed such fees as are allowed for similar services in the U.S. district courts.[44] Witnesses who are deposed shall be entitled to receive, from the party for whom the witness appeared, the same fees and travel allowances paid to witnesses subpoenaed to appear before House committees.[45] From applicable House accounts, the committee may reimburse any party for reasonable expenses of the case, including reasonable attorneys fees, upon application by such party accompanied by an expense accounting and other supporting documentation.[46]

Filing of Pleadings, Motions, Depositions, Appendices, and Briefs; Record of Case of Election Contest

The FCEA requires all pleadings, motions, depositions, appendices, briefs, and other papers to be filed with the Clerk of the House, and copies of such documents may also be mailed by registered or certified mail to the Clerk.[47] The record of the contested election case shall be composed of the papers, depositions, and exhibits filed with the Clerk of the House. Both the contestant and the contestee are required to print, as an appendix to his or her brief, those portions of the record that he or she wishes the committee to consider in order to decide the case.[48]

The contestant has 45 days, after the time for both parties to take testimony has expired, in which to serve on the contestee his or her printed brief of the facts and authorities relied on for the grounds of the case. The contestee then has 30 days, from the time he or she is served with contestant's brief, in which to serve on the contestant a brief of the relied upon facts and authorities. After service of contestee's brief, the contestant has 10 days to serve a reply brief upon the contestee.[49]

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[41] 2 U.S.C. § 386.

[42] 2 U.S.C. § 388.

[43] 2 U.S.C. § 390.

[44] 2 U.S.C. § 389(a).

[45] 2 U.S.C. § 389(b).

[46] 2 U.S.C. § 396.

[47] 2 U.S.C. § 393.

[48] 2 U.S.C. § 392(a),(b),(c).

[49] 2 U.S.C. § 392(d),(e),(f).

Burden of Proof

Under the FCEA, the party challenging the election, the contestant, has the burden of proving that "the election results entitle him to contestee's seat."[50] As an election certificate from the authorized state official is deemed to be prima facie evidence of the regularity and results of an election to the House, it is a presumption that generally allows for the swearing in of a Member-elect holding such certificate, and is a presumption that must be rebutted by a contestant to "change the result" of the election as certified by the state. In other words, the contestant must show that but for the voting irregularities or acts of fraud, the results of the election would have been different and the contestant would have prevailed.[51] Since enactment of the FCEA, most House contested election cases have been dismissed due to failure by the contestant to sustain the burden of proof necessary to overcome a motion to dismiss.[52]

Challenges In the House Other than Under the Federal Contested Elections Act

Procedures To Bring Matter Before Committee

As noted earlier, although in modern practice the Federal Contested Elections Act is the primary and (according to the Committee on House Administration) the preferred procedure to challenge an election in the House of Representatives, the committee of jurisdiction—now the Committee on House Administration—may obtain jurisdiction of an election challenge by way of a referral to the committee by the House upon a challenge by any Member or Member-elect of the House to the taking of the oath of office by another Member-elect.[53] It is possible, although unusual, that jurisdiction may be obtained by the committee because of a "protest" or petition filed by an elector of the district in question, or by any other person.[54] Although these procedures for the committee to obtain jurisdiction over an election challenge are not common, it appears that in the 103 contested election cases considered in the House since 1933, election challenges have come before the committee of jurisdiction in the House by means other than the statutory provisions of the contested elections statute on a total of at least six occasions.[55]

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[50] 2 U.S.C. § 385.

[51] *See, e.g.*, Pierce v. Pursell, H.Rept. 95-245 (1977).

[52] *See generally* CRS Report 98-194, *Contested Election Cases in the House of Representatives: 1933 to 2009*, *supra*.

[53] 2 *Deschler's*, Ch. 9, § 4, at 344: "[T]he House may initiate an election investigation if a Member-elect's right to take the oath is challenged by another Member, by referring the question to the committee."

[54] 2 *Deschler's*, Ch. 9, § 17, at 383. Two instances have been cited for the committee obtaining jurisdiction in this manner, in 1959 concerning Member-elect Dale Alford (2 *Deschler's*, Ch. 9, §§ 17.1, 17.4, 58.1) where, based on a petition from a single voter, a Member-elect objected to the taking of the oath by Alford, and the House, seating Alford, referred the question of his *final* right to the committee; and in 1967 in Lowe v. Thompson, where the losing candidate did not file under the statute, and the committee considered, but then denied the petition brought by a primary candidate. 2 *Deschler's*, Ch. 9, § 17.5, § 62.1, at 624-625. In another instance, a petition challenging the *qualifications* of a Member-elect (but not whether a Member-elect was "duly elected," and thus not an elections contest), was transmitted "to the Speaker, who in turn laid it before the House and referred it to the Committee on Elections." In re Ellenbogen, 1933, 2 *Deschler's*, Ch. 9, §§ 17.3, 47.5.

[55] In five instances, the House referred the matter to the committee by resolution: Sanders v. Kemp, 78 Cong. Rec. 12 (January 3, 1934) (nullifying results of improper special elections); Dale Alford, 105 Cong. Rec. 14 (January 7, 1959); (continued...)

A member-elect to a new Congress whose proper "credentials" (the formal election certificate from the appropriate state executive authority) have been transmitted to the Clerk of the House is placed by the Clerk on the role of the Representatives-elect.[56] A Member-elect is not a Member of Congress, however, until he or she takes the oath of office and is seated by the House. Any single Member-elect, on the first day of the new Congress and before the Members-elect are to be sworn (that is, at the time when the Speaker asks the Members-elect to rise to take the oath of office), may object to the taking of the oath of office by another Member-elect based upon the objecting Member-elect's own "responsibility as a Member-elect" and/or upon "facts and statements" that the Member-elect "considers reliable."[57] The Member-elect about whom the objection is made is generally then asked to stand aside, step aside, or to remain seated, while the other Members-elect rise to be collectively administered the oath of office.[58]

Because the possession of proper "credentials" by a Member-elect to the House is considered prima facie evidence of one's right to the seat, and provides a presumption of the regularity of the returns of that election, the possession of the election certificate generally results in the taking of the oath of office by the Member-elect, even in the face of a challenge by another Member-elect and a request to initially "step aside" while the other Members-elect are sworn. As noted by the Committee on House Administration, it is only in "the most extraordinary of circumstances" that a Member-elect holding a certificate of election would be denied the opportunity to take the oath of office on the first day of the new Congress, that is, where "irregularities and inconsistencies in the state process are so manifest that the result is not entitled to deference."[59]

There are, it should be noted, however, three different procedures that could possibly be followed with regard to one Member-elect challenging the taking of the oath of office by another Member-elect: First, the House could agree to a resolution to seat the Member at that time, and to determine then both "his prima facie as well as final right to the seat."[60] Second, with regard to a Member-elect who presents valid credentials and is qualified to be a Member, a resolution may be offered to seat the Member-elect provisionally or conditionally (even though those words are not expressly used) based on his or her prima facie right to the seat, by resolving to seat the Member-elect but to refer the question of the *final* disposition of his or her entitlement to the seat to the appropriate committee of jurisdiction (now the Committee on House Administration).[61] Since 1933, it appears that an explicit provisional seating of a Member-elect, with express referral by the House of the question of the final right to a seat to the committee of jurisdiction, has occurred

(...continued)

Mackay v. Blackburn, 113 Cong. Rec. 14, 27 (January 10, 1967); Roush or Chambers, 107 Cong. Rec. 24 (January 3, 1961); McCloskey and McIntyre, 131 Cong. Rec. 380, 381-388 (January 3, 1985). In one other case, in 1967, in the elections investigation of Lowe v. Thompson, the losing candidate did not file under the statute, but the committee directly considered, and then dismissed on the merits, the petition brought by a primary candidate. 2 *Deschler's*, Ch. 9, § 62.1, at 624-625.

[56] 2 U.S.C. § 26 (Roll of Representatives-elect).

[57] 1 *Deschler's*, Ch. 2, § 6, at 130 and Ch. 2, § 6.2, at 133-134; Brown and Johnson, Ch. 33, § 3, at 634-635: "The fact that the challenging party has not himself been sworn is no bar to his right to invoke this procedure," citing 1 *Hinds* § 141. *See also* 1 *Deschler's*, *supra* at Ch. 2, § 5, at 117.

[58] Brown and Johnson, *supra* at Ch. 33, § 3, at 634; *Deschler's supra* at Ch. 2, § 6. It appears, in relation to election challenges and contests, that Members-elect have been asked to step aside in 15 instances since 1933. *See generally*, CRS Report 98-194, *Contested Election Cases in the House of Representatives: 1933 to 2009*, by L. Paige Whitaker.

[59] McCloskey and McIntyre, H.Rept. 99-58 (1985), at 3.

[60] 1 *Deschler's supra* at Ch. 2, § 6, at 131.

[61] 1 *Deschler's*, *supra* at Ch. 2, § 6, at 131-132.

in only two instances.[62] Third, the resolution may refer both the prima facie right to the seat, as well as the final right to the seat, to the committee without authorizing the swearing in (and seating) of anyone.[63] As noted, it would be under only the most exceptional circumstances for the House to refuse to seat, even provisionally, a Member holding valid election credentials from the state, and it appears that this third option has happened since 1933 only two times on the first day of the new Congress, and once during the Congress concerning a special election.[64]

If the House decides to propose a resolution not to seat, or to seat a Member-elect provisionally, and to refer the question of the initial and/or final right to a seat to the committee to investigate, the House resolution is then put to a vote. In the case of the adoption of a resolution not to seat anyone, the adoption would effectively nullify a certificate of election that was previously issued by the executive authority of the state. In either case, the adoption of the House resolution referring the matter to the committee places the responsibility on the committee to determine the results of the challenged election and report them back to the full House.[65]

Investigative Procedures by the Committee on House Administration When Directed by the House To Investigate an Election

The House resolution by its own terms is referred to the committee and becomes a matter within the jurisdiction of the committee. Once the committee is organized in the new Congress, a motion to investigate may be made and, depending on the nature of the dispute, may include express authority to conduct a recount of the ballots, if deemed necessary or advisable.[66] The committee then may proceed to conduct an investigation and to hold hearings, not only in Washington, D.C., but also in the congressional district of the election contest site, at which the contestant and contestee, as well as other pertinent parties, may be called to testify. After the completion of its investigation, the committee may file a report and offer to the House for its consideration and vote a privileged resolution recommending generally the seating of a certain candidate whom the

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[62] *See* Dale Alford, 105 Cong. Rec. 14 (January 7, 1959); and Mackay v. Blackburn, 113 Cong. Rec. 14, 27 (January 10, 1967). In most of the 15 cases where a Member-elect has been asked to "step aside," it appears that an election contest under the FCEA *has* been filed, and the resolution offered to swear in the challenged Member-elect merely provided that the Member-elect "be now permitted" to take the oath of office, with no specific reference to final determination of the right to the seat nor any express reference to a filed election contest. *See generally*, CRS Report 98-194, *Contested Election Cases in the House of Representatives: 1933 to 2009*, *supra*. As stated by Brown and Johnson, *supra* at Ch. 33, § 3, at 635: "The seating of a Member-elect does not prejudice a contest pending under the Federal Contested Elections Act (FCEA) over final right to the seat."

[63] 1 *Deschler's supra* at Ch. 2, § 6, at 132.

[64] *See* Sanders v. Kemp, 78 Cong. Rec. 12 (January 3, 1934)(concerning results of apparently improper special elections); Roush or Chambers, 107 Cong. Rec. 24 (January 3, 1961); and McCloskey and McIntyre, 131 Cong. Rec. 380-388 (January 3, 1985).

[65] *See, e.g.*, McCloskey and McIntyre, H.Rept. 99-58 (1985) at 1-4; Roush or Chambers, H.Rept. 87-513 (1961) at 3-4. In McCloskey and McIntyre, the House adopted H.Res. 1, refusing to seat either candidate and referring the case to the Committee on House Administration to investigate and report back to the House on the question of who was duly elected. H.Res. 1, 99th Cong. 1st Sess., 131 Cong. Rec. 381 (January 3, 1985).

[66] An example of such a motion to investigate reads as follows:

That the Committee on House Administration, pursuant to House Resolution 1, adopted on January 3, 1961, investigate the election of November 8, 1960, in the Fifth District of Indiana to determine whether J. Edward Roush or George O. Chambers was duly elected, and the said investigation, including a recount of the ballots, if found advisable in the judgment of the committee, be completed at the earliest possible time. H.Rept. 87-513, *supra*, at 5.

committee has determined to have won the election, or the committee could recommend the seating of no candidate, thus declaring a vacancy.

The committee has in the past, at an early stage of the contested election proceedings, examined and analyzed pertinent sections of the state election laws relevant to matters that may be in dispute, including state laws and regulations on voting procedures, counting of ballots, and recounts. If necessary, the committee may move to impound records, ballots, tally sheets, ballot stubs, poll books, ballot boxes, voting machines or other electronic voting systems, and irregular or defective paper and absentee ballots, although the committee may be satisfied with the security state or local officials have provided and may merely request state, local, or county auditors to retain and preserve ballots and other papers in an election contest case.[67] Where state law requires destruction of ballots after an election, the committee may notify the state election officials to preserve the ballots despite the state law. The committee, with its counsel and the General Accounting Office (GAO) (now the Government Accountability Office) auditors, may choose go to the site of an election contest case and take custody of the ballots, voting machines, and electronic voting systems, as well as other related materials to investigate the contested election.[68]

Motions adopted in the committee may direct an examination and recount of disputed ballots.[69] The committee may direct counsel and GAO auditors to aid state officials in the examination and recount of ballots. The committee may also meet in executive session within the District of Columbia, or in the congressional district, to do such things as establish criteria for classifying ballots to be examined and recounted by GAO auditors under the supervision of the committee.[70]

In *McCloskey and McIntyre* in the 99th Congress, the Chairman of the House Administration Committee appointed a three-member Task Force composed of two Democrats and one Republican to investigate the election.[71] The task force initially took the steps necessary to secure all of the ballots by requesting by telegram that all county clerks protect and keep safe for six months "... all originals and copies of books, records, correspondence, memoranda, papers, and documents ..." pertaining to the contested general election "...including but not limited to all ballots, certifications, poll books and tally sheets...."[72] The committee task force then set out procedures and operating rules for canvassing votes and examining and counting ballots.[73] The committee noted that while it sought to follow the state election statutes regarding the counting of ballots, it was not bound to follow state law, because the final power of judging the whole question of returns and elections must reside in the House of Representatives, whose objective, over and above following mere technicalities of state or local regulation, is to determine the will of the electorate.[74] In addition to the examination of ballots, the committee aided by GAO auditors may, and has in the past, examined other related documents such as (1) voters' poll list; (2) absentee applications and absentee ballot envelopes; (3) precinct tally sheets; (4) precinct

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[67] *See* McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 12-13.

[68] *McCloskey and McIntyre*, H.Rept. 99-58, *supra*, at 12-43. 2 *Deschler's*, Ch. 9, §§ 5.7, 5.8, 5.9, at 350-351 (1977).

[69] *McCloskey and McIntyre*, H.Rept. 99-58, *supra*, at 12-17; 2 *Deschler's* Ch. 9, § 5.10 at 351, noting *Oliver v. Hale*, H.Rept. 85-2482 (1958), concerning the power of the committee to examine and recount ballots in a House contested election case.

[70] *Roush v. Chambers*, H.Rept. 87-513, *supra*, at 7.

[71] H.Rept. 99-58, *supra*, at 12.

[72] H.Rept. 99-58, *supra*, at 12-13, 14-15.

[73] H.Rept. 99-58, *supra*, at 15-32.

[74] H.Rept. 99-58, *supra*, at 16, 22-26.

certificates and memoranda of votes cast; (5) precinct registration certificates of error; (6) precinct registered voters affidavits of change of name; (7) precinct affidavits, challenges and counter-challenges; and (8) unopened absentee ballots and applications which were rejected.[75]

In sum, the Committee on House Administration, pursuant to the House's constitutional authority under Article I, Section 5, clause 1, has broad power and authority to conduct an examination of an election, election procedures, and ballots in a contested election case, and to establish uniform standards and guidelines for the counting of ballots to determination voters' intentions. This authority is independent of and not related to any proceedings under the FCEA. An investigation by the committee, referred to the committee by the House, could take several different procedural routes, depending on the circumstances of the case and the matters before it. The committee, within its discretion, could decide not to conduct any investigation of its own and to proceed based on the pleadings, arguments, and evidence introduced by counsel or the parties. The committee could conduct a preliminary investigation or a limited recount to determine whether there are sufficient grounds to warrant a full-scale investigation and/or recount. In addition, if warranted, the committee could order a full-scale investigation, including a recount, an examination of alleged vote fraud in the balloting process, or an inquiry into other matters brought before it to resolve the underlying questions and issues presented in the challenge.

Ordering a Recount of Ballots Under FCEA and Otherwise

The parties to an election contest case may, by stipulation, agree to the conduct a state recount, [76] or may conduct their own recount, if permitted, which may then become the basis of a stipulation upon which the House may act.[77] However, a contestant on his or her own accord generally may not conduct a recount without the supervision of the committee after an election contest has been initiated.[78] A motion for a recount in an FCEA-initiated election contest may be granted by the committee if there is sufficient evidence to raise at least a presumption of fraud or irregularity. A recount would not necessarily be ordered by the committee on the mere assertion of fraud or irregularity.[79] A party to a contested election case who would claim that the state recount of the ballots was in error would have the burden of proof to establish such error before the committee would order a recount.[80] The burden would be on the contestant to prove to the committee that a recount would

- show substantial fraud and irregularity,
- change the result of the election, and

[75] Roush or Chambers, H.Rept. 87-513, *supra*, at 10-11.

[76] Moreland v. Schuetz, H.Rept. 78-1158 (1943). *See generally*, 2 *Deschler's*, Ch. 9, §§ 39-41, at 437-444.

[77] Sullivan v. Miller, H.Rept. 78-180 (1943).

[78] Stevens v. Blackney, H.Rept. 81-1735 (1950).

[79] Swanson v. Harrington, H.Rept. 76-1722 (1940); *see also* Stevens v. Blackney, *supra*, in which the committee and House declined to order a recount because the contestant offered no evidence to indicate that the official returns were invalid.

[80] Roy v. Jenks, H.Rept. 75-1521 (1937).

- make him or her the winner.[81]
- Moreover, a contestant arguably should exhaust state remedies in obtaining a recount under state election laws or through the state courts before requesting the committee to conduct such a recount. Although the committee has the power to undertake a recount outside of state recount proceedings when it deems it necessary, it may wait until the contestant has exhausted state remedies including state court actions.[82] The committee, after voting for a recount, may reconsider its action and determine that such a recount is not necessary.[83]
- Should the committee decide that a recount, limited or districtwide, is necessary, a set of stipulations is generally agreed upon by counsel for the parties subject to the approval of the committee, and the committee may issue a set of rules that would govern the recount. Stipulations made by the parties or a motion or House resolution stipulating certain ground rules could include, inter alia, such matters as
- controlling House precedents;
- controlling statutory and/or constitutional provisions relating to recounts, ballots; conduct of election, etc.;
- disputes over qualifications of voters;
- scope of recount;
- procedure by which committee counsel, auditors, or staff are to examine ballots, ballot boxes, tally sheets, and records and other pertinent documents and materials;
- procedure for counting ballots;
- decision on presence of press during counting;
- designation of election (counting) judges;
- comparison of registration books and poll books,
- counting of spoiled and mutilated ballots;
- determination of fraud and any irregularities;
- criteria for proper marking of ballots to determine clear intention of the voter; and
- allowing counsel to file objections and evidence at any stage of the recount proceedings.[84]

[81] Moreland v. Schuetz, *supra;* Peterson v. Gross, H.Rept. 89-1127 (1965).

[82] Swanson v. Harrington, *supra*.

[83] McAndrews v. Britten, H.Rept. 73-1298 (1934).

[84] *See* McCloskey and McIntyre, H.Rept. 99-58, *supra* at 27-30 (1985), and Roush v. Chambers, H.Rept. 87-513, *supra*, at 21-22 (1961).

Application of State Law and State Court Decisions to Committee Actions

Under the U.S. Constitution, there is a division of authority with respect to elections to federal office, whereby the states have significant administrative authority over the *procedures* of federal elections, that is, authority over the "Times, Places and Manner" of federal elections (unless Congress designates otherwise).[85] Article I, Section 5, Clause 1 of the Constitution expressly provides, however, that each House of Congress is the judge of the elections of its own Members, and thus the House has sole and exclusive jurisdiction to make an unconditional and final judgment determining the right to a seat in the House.[86] In light of such power, the committee is not bound to follow state law or state court decisions concerning the procedures of a House election, and may make its own determinations independently. Although state court decisions and state laws are not binding on the committee, they may be used to aid the committee in its determination of a House contested election case when they are consistent with the committee's notions of justice and equity.[87] In 1917 the Committee on Elections explained:

> Your committee maintains that the authority of the House of Representatives to judge of the elections and qualifications of its members is infinite. Since the formation of the Government the House has often signified its willingness to abide by the construction given by the State court, in good faith, to its statutes. But the decisions of a State court are not necessarily conclusive on the House, and will only guide and control it when such decisions commend themselves to its favorable consideration.[88]

In short, the House has the final say over House contested election cases.[89]

Generally, the committee and the House "seek[ ] to follow state law" and state court decisions in resolving House election contests, but in certain instances, this has not been the case, particularly with regard to the validity of the ballots where the intentions of the voters are clear but that have been declared invalid for failure to follow certain "technicalities" required by state law for marking ballots.[90] For example, in a 1902 House contested election case, the House Elections Committee refused to reject ballots merely because they had not been marked according to the technical requirements of a state election law. The committee ruled that it would accept those ballots where the intention of the voter was clear, regardless of a state election statute that required that ballots had to be marked strictly within the designated space.[91] Thus, the Committee

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[85] U.S. CONST., Art. I, § 4, cl. 1.

[86] Each House of Congress has the "sole authority under the Constitution to judge of the elections, returns and qualifications of its members," and "to render a judgment which is beyond the authority of any other tribunal to review," Barry v. Cunningham, *supra* at 613, 616, and to make "an unconditional and final judgment," Roudebush v. Hartke, 405 U.S. 15, 19 (1972).

[87] *See* McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 22-26, citing Brown v. Hicks, 64th Cong., 1917, at 6 *Cannon's*, § 143, at 261; McKenzie v. Braxton, H.Rept. 42-4 (1872), 1 *Hinds'*, § 639, at 850; and Carney v. Smith, 1914, 6 *Cannon's*, § 91, at 146.

[88] Brown v. Hicks, 64th Cong., 1917, at 6 *Cannon's*, § 143, at 261.

[89] In re William S. Conover, II, H.Rept. 92-1090, *supra*, at 2.

[90] *See* McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 22-26.

[91] Moss v. Rhea, H.Rept. 5-625 (1902), 2 *Hinds'*, § 1121, at 695-696. *See also* Sessinghaus v. Frost, H.Rept. 57-1959 (1883), 2 *Hinds'*, § 976, at 316; McKenzie v. Braxton, H.Rept. 42-4 (1872), 1 *Hinds'*, § 639, at 850; and Lee v. Rainey, H.Rept. 44-578 (1876), 1 *Hinds'*, § 641, at 853.

on House Administration has noted that "in addition to the fact that the House is not legally bound to follow state law, there are instances where it is in fact bound by justice and equity to deviate from it,"[92] such as to ensure that "the will of the voters should not be invalidated" by mere technicalities of state law or regulation in instances where voters' "obvious intent" may be discerned.[93] In addition, the committee has noted that the "House has chosen overwhelmingly in election cases throughout its history not to penalize voters for errors and mistakes on election officials."[94] That is, in the absence of fraud, and where the honest intent of the voters' may be determined, "the House has counted votes ... rather than denying the franchise to any individual due to malfeasance of election officials."[95]

Remedies Available to the Committee on House Administration Under the FCEA and Otherwise

In the course of its investigation, the Committee on House Administration has a number of remedies available, including

- a recommendation of dismissal upon a motion to dismiss by the contestee,
- a recommendation on the seating of a certain candidate on the grounds that he or she received a majority of the valid votes cast,
- a recommendation to seek a recount and to investigate any fraud or irregularities in the voting process in various precincts,
- a recommendation to order the seating of a certain candidate after the committee has conducted a recount and investigation, and
- a recommendation that the returns from the election be rejected and that the seat be declared vacant and a new election be held.[96]
- However, in the 1985 case of *McCloskey and McIntyre*, the committee noted that the House of Representatives has been "very hesitant" to declare a seat vacant, preferring instead to "measure the wrong and correct the returns," when possible. The committee reiterated the general principle that, "[n]othing short of an impossibility of ascertaining for whom the majority of votes were given ought to vacate an election, especially if by such decision the people must ... necessarily go unrepresented for a long period of time."[97] Indeed, the committee in *McCloskey and McIntyre* characterized setting aside an election and declaring a

[92] McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 23.

[93] *Id.*, citing In re Dale Alford, 2 *Deschler's*, Ch. 9, § 38.5, and Kyros v. Emery, 94th Cong. (1975), H.Rept. 94-760, at 5.

[94] McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 24.

[95] *Id.*, citing McKenzie v. Braxton, 42nd Cong. 2nd Sess. (1872), 1 *Hinds'* § 639, at 850.

[96] *See* Wilson v. McLaurin, H.Rept. 54-566 (1896). *See also* Tunno v. Veysey, H.Rept. 92-626 (1971).

[97] McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 44, citing McCrary, G.W., *A Treatise on The American Law of Elections*, R.B. Ogden, 1880, at 489.

House seat vacant as a "drastic action" that it recommended against "in nearly every instance."[98]

Disposition of Contested Election Cases in the House of Representatives

If a contested election case is not resolved by motion, such as a motion to dismiss by the contestee, or by other prior committee proceedings, it is generally disposed of pursuant to a House resolution following consideration and debate on the House floor.[99] A resolution disposing of a contested election case is privileged and can be called up at any time for consideration by the House.[100] The resolution, along with the committee report on a House contested election case, may be called up as privileged and be agreed to by voice vote and without debate.[101]

In some cases, the parties to an election contest have been permitted to be present during the debate, although the parties generally have not participated.[102] In a situation where the contestee is a Member, he or she may be permitted to participate in the debate on the House resolution disposing of the contest.[103]

After floor consideration and debate, the adoption by the House of a resolution disposing of an election contest, whether by declaring that one of the parties is entitled to a seat in the House or by declaring a vacancy with appropriate notice to the governor of the state, essentially ends the contested election case. With respect to the former, the prevailing party is administered the oath of office and seated in the House.[104]

Executive Summary

Under the express provisions of the U.S. Constitution, each House of Congress is the final judge of the "elections and returns" of its own Members. Article I, Section 5, clause 1. Typically, election recounts or challenges to congressional election results are initially conducted at the state level, including in the state courts, under the states' authority to administer federal elections (Article I, Section 4, clause 1), and are presented to the House of Representatives as the final judge of such elections. As noted by the Supreme Court, the House or Senate may accept a state count or recount, or other such determination, or conduct its own recount and make its own determinations, Roudebush v. Hartke, 405 U.S. 15, 26-27 (1972), although there is an institutional deference to, and a presumption of the regularity of state election proceedings, results and certifications.

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[98] *Id.*

[99] 2 *Deschler's*, Ch. 9, 42, at 444-450. *See also* Deschler and Brown, *Procedure In The U.S. House of Representatives*, [hereinafter *Deschler and Brown*] Ch. 9, §§ 3 and 4, App. B.

[100] *Deschler and Brown*, *supra*, at § 4.1, at 76.

[101] 2 *Deschler's*, Ch. 9, § 42.5, at 445.

[102] *Id.*, § 42.6 at 446. Parties were permitted to insert remarks in the *Congressional Record* supporting their positions. III Cong. Rec. 24285, 24286, 89th Cong., 1st Sess. (Sept. 17, 1965).

[103] *Id.* at § 42.7.

[104] *See Kunz v. Granata*, *Deschler's*, Ch. 9, § 42.7 at 446.

There are two possible avenues by which an election may be challenged or contested in the House. In modern practice, the primary method for contesting a congressional election in the House is for a losing candidate in the election to initiate a contest by filing a "notice of contest" under the provisions of the Federal Contested Election Act of 1969 (FCEA), as amended, which is then heard by the Committee on House Administration upon the record provided by the parties to the contest. Secondly, the House may refer the question of the right (either the prima facie right and/or the final right) to a seat in the House to the proper committee of jurisdiction (now the Committee on House Administration) for the committee to investigate and to report to the House for disposition.

With reference to a candidate-initiated contest under the FCEA, the candidate challenging the results of that election (the "contestant") must, within 30 days after the result of the election was certified by the state, file a written notice of an intention to contest the election with the Clerk of the House and provide a copy of the notice to the "contestee" (that is, the Member-elect or Member certified as the winner of the election). 2 U.S.C. § 382. This notice must state "with particularity" the grounds for contesting the election. 2 U.S.C. § 382(b). The contestee then has 30 days after such service to answer the notice, admitting or denying the allegations and averments in the notice, and setting forth any affirmative defenses, including the "failure of notice of contest to state grounds sufficient to change the result of the election." 2 U.S.C. § 383(a) and (b). If the original notice of contest is vague or too general, the contestee may make a motion to the Committee on House Administration for a "more definite statement" before answering, pointing out the "defects" and the "details desired"; if the motion is granted by the committee, the contestant would have 10 days to obey the order, or the committee may dismiss the contest or "make such order as it deems just." 2 U.S.C. § 383(c).

Under the FCEA, the "burden of proof" is on the party challenging the election; that is, "the burden is upon contestant to prove that the election results entitle him to contestee's seat." 2 U.S.C. § 385. An election certificate from the authorized state official is deemed to be prima facie evidence of the regularity and results of an election to the House—a presumption that generally allows the swearing in of a Member-elect holding such certificate, and a presumption that must be rebutted by a contestant to "change the result" of that election as certified by the state.

In this adversarial proceeding under the FCEA, either party may take sworn depositions for the purpose of discovery within the time frames provided, and may seek subpoenas for the attendance of witnesses and production of documents. 2 U.S.C. §§ 386-391. Under the statutory provisions of the FCEA, the actual election contest "case" is heard by the committee "on the papers, depositions and exhibits" filed by the parties, which "shall constitute the record of the case," including the briefs filed by either party. 2 U.S.C. § 392. The briefs may contain an appendix of any portion of the record which the party "desires the committee to consider." 2 U.S.C. § 392(b). The decision of the committee is made upon this record.

Concerning an election contest that is directed to the Committee on House Administration by the House, the committee may, in lieu of a record created by the opposing parties (such as under the FCEA), conduct its own investigation, take depositions, and issue subpoenas for the appearance of witnesses and the production of documents. In recent years, the committee has on infrequent occasions obtained jurisdiction of an election contest in this manner by virtue of a challenge by a Member-elect to the taking of the oath of office of another Member-elect on the first day of a new Congress, prior to time all the Members-elect rise to take the oath of office, and the subsequent adoption of a resolution provisionally seating the Member-elect and directing that the question of the final right to the seat be referred to the committee. The committees that have investigated

contested elections in the past under these conditions have employed a number of different investigative procedures and devices, including an impoundment of the election records, ballots, tally sheets and poll books; conducting a recount and re-canvass of the ballots and returns; a physical examination of disputed ballots; an examination of registration documents; and interviews and formal examinations of various election officials, administrators, watchers, and parties.

The committee may then issue a report and file a resolution concerning the disposition of the case, to be approved by the full House. The committee may recommend, and the House may approve by a simple majority vote, a decision affirming the right of the contestee to the seat, may seat the contestant, or may find that neither party is entitled to be finally seated and declare a vacancy.

It should be noted that each House of Congress is expressly entitled to adopt its own rules for proceeding, under Article I, Section 5, cl. 2 of the U.S. Constitution, and even when such procedural rules are adopted by way of statute under the House's rule making authority, the House may change such procedural rules by resolution, and adopt and apply others. Similarly, although various legislative precedent is extremely important in an ordered, democratic institution, such precedent followed by, for example, committees in the past, are not necessarily binding in a legal sense upon a later committee of the House, as long as the committee is acting within the scope of its authority.

Author Contact Information

Jack Maskell
Legislative Attorney
jmaskell@crs.loc.gov, 7-6972

L. Paige Whitaker
Legislative Attorney
lwhitaker@crs.loc.gov, 7-5477