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# Procedures for Contested Election Cases in the House of Representatives

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October 18, 2016

**Congressional Research Service**
7-....
www.crs.gov
RL33780

**CRS REPORT**
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 House elections 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 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. Before answering a notice, the contestee may make a motion to the Committee on House Administration 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 contestant, who must overcome the presumption of the regularity of an election, and its results, evidenced by the certificate of election presented by the contestee. The FCEA's contested election procedure is directed at the question of who won the most votes and is "duly elected." It is not the proper vehicle to challenge the *qualifications or eligibility* of a Member-elect. Indeed, an election contest brought under the FCEA challenging a Member-elect's qualifications would likely be subject to a motion to dismiss based on the failure of the contestant "to state grounds sufficient to change result of election," or a failure of contestant "to claim a right to contestee's seat." In the FCEA's 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 they wish to put on the record. The FCEA specifies that 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 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.

Under 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. Specifically, the committee may recommend—and the House may approve by a simple majority vote—to affirm the right of the contestee to the seat, to seat the contestant, or to find that neither is entitled to be 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 its 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, superseding authority within 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,[3] 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.[4]

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."[5] 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."[6] 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

[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] Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007); William and Mary School of Law, ELECTION LAW MANUAL Ch. 9, "Election Contests." (http://www.electionlawissues.org/Resources/Election-Law-Manual.aspx)(website viewed on date of this writing). For a general overview of procedures, see Garber and Frank, *Contested Elections and Recounts, A Summary of State Procedures for Resolving Disputed Federal Elections*, published by the National Clearinghouse on Election Administration, Federal Election Commission (1990).

[4] 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.

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

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

> independence, its purity and even its existence and action may be destroyed, or put into imminent danger.[7]

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."[8] 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."[9]

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.[10] 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.[11] 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,[12] 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."[13]

## 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*:

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

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

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

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

[11] 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."

[12] It appears that in the 107 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)).

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

> 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 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.[14]

The FCEA, codified at 2 U.S.C. Sections 381-396, governs contests for the seats in the House of Representatives that are initiated by a candidate in the challenged election.[15] 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.[16]

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.[17]

# 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.[18] The contestant must be a candidate whose name was on the official ballot or who was a bona fide write-in candidate.[19]

## 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

[14] 2 *Deschler's*, Ch. 9, §4, at 344.

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

[16] 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.

[17] 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."

[18] 2 U.S.C. §382(a).

[19] *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.[20] 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.[21] 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.[22]

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."[23]

# 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. Sections 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.[24] In the 113th Congress, the Committee on House Administration found that a tax-exempt organization did not meet the definition of a contestant under the FCEA and therefore, was not authorized to file a contest.[25]

## 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.[26]

## 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

[20] 2 *Deschler's*, at Ch. 9, §17.

[21] 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.

[22] 2 *Deschler's*, at Ch. 9, §17, at 383.

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

[24] 2 U.S.C. §381(3), (4).

[25] The House Administration Committee, in "Dismissing the Election Contest Relating to the Office of Representative from the Ninth Congressional District of Tennessee," stated: "Under the requirements of the FCEA, to be a valid Contestant the contesting party must be an individual. The notice of contest in this case was filed by Project Hurt, an organization claiming to be a registered 501(c)(3) not for profit organization. Accordingly, Project Hurt does not meet the definition of Contestant under the FCEA and is not authorized to file a contest." H.Rept. 113-132 (2013).

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

Canvassers authorized by law to make such a declaration. Written notice must be filed with the Clerk of the House and be served upon the contestee, that is, the Member-elect or Member certified as the winner of the election.[27]

## 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.[28] 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."[29]

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.[30] 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.[31] 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

[27] *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.

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

[29] *Id.*, at Ch. 33, §3, at 635.

[30] In election contests considered by the House between 1933-2011, Members-elect have been asked to "step aside" in at least 15 instances.

[31] 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.

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."[32]

## 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."[33] 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.[34]

## 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."[35]

## 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

[32] *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.*

[33] Gormley v. Goss, H.REPT. 73-893 (1934).

[34] 2 U.S.C. §382(b).

[35] 2 U.S.C. §382(c).

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.[36]

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.[37] 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.[38] 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.[39]

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.[40] 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.[41] 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."[42]

## 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.[43] 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

[36] 2 U.S.C. §383(a).

[37] 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."

[38] 2 U.S.C. §383(b).

[39] *See* Tunno v. Veysey, H.REPT. 92-626, *supra*.

[40] 2 U.S.C. §383(c).

[41] 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.

[42] 2 U.S.C. §385.

[43] 2 U.S.C. §386.

issued by judges or clerks of the federal, state, and local courts of record.[44] 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.[45]

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.[46] 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.[47] 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.[48]

## 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.[49] 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.[50]

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.[51]

## 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."[52] 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

[44] 2 U.S.C. §388.

[45] 2 U.S.C. §390.

[46] 2 U.S.C. §389(a).

[47] 2 U.S.C. §389(b).

[48] 2 U.S.C. §396.

[49] 2 U.S.C. §393.

[50] 2 U.S.C. §392(a),(b),(c).

[51] 2 U.S.C. §392(d),(e),(f).

[52] 2 U.S.C. §385.

been different and the contestant would have prevailed.[53] 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.

A contested election procedure under the FCEA is directed at the question of who won the most votes and is "duly elected." It is not the proper vehicle to challenge the qualifications or eligibility of a Member-elect. As noted in *Deschler's Precedents*: "A challenge to seating a Member-elect may also be based on his failure to meet the constitutional requirements of citizenship, residence, or age for the office, and in that context is treated as a matter of 'exclusion' and not as a contested election."[54] The contested elections statute specifically requires the contestant to have a legitimate claim of "a right to such office,"[55] which could not be the case for a contestant who has *not* actually received the most votes in the election. Under the so-called "American Rule" followed in the House (and the Senate), no claim to a right to the office could be made by one who is the second-place finisher, even if the winner of the election is ultimately found not to be qualified to be seated.[56] If a challenge is properly brought before the House to the qualifications of a Member-elect, and such Member-elect is actually found to lack the constitutional qualifications to office, then a "vacancy" is declared in the seat and a new election must be called by the governor of the state.[57] An election contest brought under the FCEA to challenge a Member-elect's "qualifications" would most likely be subject to a motion to dismiss based on the failure of the contestant "to state grounds sufficient to change result of election," or a failure of contestant "to claim a right to contestee's seat."[58]

# 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.[59] It is possible, although unusual, that

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

[54] 2 *Deschler's*, *supra* at Ch. 9, §9, p. 362.

[55] 2 U.S.C. §382(a).

[56] 2 *Deschler's*, *supra* at Ch. 7, §9, at 96; *see* discussion of "American Rule" versus "English Rule," in Smith v. Brown (40th Cong.), *Rowell's Digest of Contested Election Cases*, 220-221 (1901); Lowry v. White (50th Cong.), *Rowell's Digest, supra* at 426-427; 1 *Hinds' Precedents of the House of Representatives*, at §424, p. 403. In the Senate, *see* Riddick and Fruman, *Riddick's Senate Procedure, Precedents and Practice,* S. Doc. No. 101-28, 101st Cong., 2d Sess. 701 (1992). For a general discussion of qualifications of Members, *see* CRS Report R41946, *Qualifications of Members of Congress*, by (name redacted)

[57] U.S. Const., art. I, §2, cl. 4.

[58] 2 U.S.C. §383(b)(3) and (4). The House Administration Committee, in "Dismissing the Election Contest Against Bart Gordon," stated: "The Committee finds that, as a general matter challenges to the qualifications of a Member-elect to serve in the Congress fall outside the purview of the FCEA, which was designed to consider allegations relating to the actual conduct of an election." H.Rept. 108-208, at 4.

[59] 2 *Deschler's*, Ch. 9, §4, at 344: "[T]he House may initiate an election investigation if a Member-elect's right to take (continued...)

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.[60] Although these procedures for the committee to obtain jurisdiction over an election challenge are not common, it appears that in the 107 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.[61]

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.[62] 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."[63] 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.[64]

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

(...continued)

the oath is challenged by another Member, by referring the question to the committee."

[60] 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.

[61] 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); 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.

[62] 2 U.S.C. §26 (Roll of Representatives-elect).

[63] 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.

[64] Brown and Johnson, *supra* at Ch. 33, §3, at 634; *Deschler's supra* at Ch. 2, §6.

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."[65]

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."[66] 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).[67] 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 in only two instances.[68] 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.[69] 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.[70]

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.[71]

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

[66] 1 *Deschler's supra* at Ch. 2, §6, at 131.

[67] 1 *Deschler's, supra* at Ch. 2, §6, at 131-132.

[68] *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. 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."

[69] 1 *Deschler's supra* at Ch. 2, §6, at 132.

[70] *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).

[71] *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).

## 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.[72] The committee then may proceed to conduct an investigation and to hold hearings, not only in Washington, DC, 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 committee has determined to have won the election, or the committee could recommend the seating of no candidate, thus declaring a vacancy.

In the past, at an early state of the contested election proceedings, the committee has 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.[73] 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.[74]

Motions adopted in the committee may direct an examination and recount of disputed ballots.[75] 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.[76]

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

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[72] 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.

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

[74] *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).

[75] *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.

[76] *Roush v. Chambers*, H.REPT. 87-513, *supra*, at 7.

Republican to investigate the election.[77] 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."[78] The committee task force then set out procedures and operating rules for canvassing votes and examining and counting ballots.[79] 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.[80] 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 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.[81]

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 a state recount,[82] or may conduct their own recount, if permitted, which may then become the basis of a stipulation upon which the House may act.[83] 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

[77] H.REPT. 99-58, *supra*, at 12.

[78] H.REPT. 99-58, *supra*, at 12-13, 14-15.

[79] H.REPT. 99-58, *supra*, at 15-32.

[80] H.REPT. 99-58, *supra*, at 16, 22-26.

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

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

[83] Sullivan v. Miller, H.REPT. 78-180 (1943).

initiated.[84] 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.[85] 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.[86] 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
- make him or her the winner.[87]

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.[88] The committee, after voting for a recount, may reconsider its action and determine that such a recount is not necessary.[89]

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;

[84] Stevens v. Blackney, H.REPT. 81-1735 (1950).

[85] 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.

[86] Roy v. Jenks, H.REPT. 75-1521 (1937).

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

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

[89] McAndrews v. Britten, H.REPT. 73-1298 (1934).

- 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.[90]

# 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).[91] 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.[92] 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.[93] 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.[94]

In short, the House has the final say over House contested election cases.[95]

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.[96] For example, in a 1902 House contested election case, the House Elections

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[90] *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).

[91] U.S. CONST., Art. I, §4, cl. 1.

[92] 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).

[93] *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).

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

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

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

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.[97] Thus, the Committee 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,"[98] 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.[99] 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."[100] 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."[101]

# 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.[102]

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."[103] Indeed, the committee in *McCloskey and McIntyre*

[97] 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.

[98] McCloskey and McIntyre, H.REPT. 99-58, *supra*, at 23.

[99] *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).

[100] McCloskey and McIntyre, H.REPT. 99-58, *supra*, at 24.

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

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

[103] 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).

characterized setting aside an election and declaring a House seat vacant as a "drastic action" that it recommended against "in nearly every instance."[104]

# 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.[105] A resolution disposing of a contested election case is privileged and can be called up at any time for consideration by the House.[106] 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.[107]

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.[108] 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.[109]

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.[110]

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[104] *Id.*

[105] 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.

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

[107] 2 *Deschler's*, Ch. 9, §42.5, at 445.

[108] *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).

[109] *Id.* at §42.7.

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