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The Federal Contested Election Act: Overview and Recent Contests in the House of Representatives

The Federal Contested Election Act (FCEA; 2 U.S.C. §§381-396), enacted in 1969, rests at the intersection of federal election law and policy, legislative procedure, and constitutional provisions regarding congressional authority over House elections and membership. FCEA contests rarely change election results, as doing so typically requires the House to overturn a state-certified election result.

The FCEA covers general election or subsequent runoff races for the U.S. House of Representatives (including elections for Delegate and Resident Commissioner). Pursuing a contest under the FCEA does not preclude a candidate from pursuing other options available under state law, through litigation, or by other methods prescribed by the House. Specifically, although an election contest may be initiated in other ways—for example, by a floor challenge to a Member's right to be sworn in—in modern practice, the FCEA is the primary method by which election contests come before the House. As such, other contest methods generally are not discussed here.

What is a Contested Election?

Generally, *contested elections* entail reexamining election conduct, such as ballot-counting or other election and voting procedures, after an election jurisdiction has finalized, or *certified*, the results. Contests are distinct from the *canvass* process used to verify election results and from *recounts*, *audits*, or other processes used to verify election accuracy, although investigations accompanying contests can involve recounts or audits.

Constitutional Framework

The Elections Clause of the U.S. Constitution empowers the states with the initial and principal authority to administer the "Times, Places and Manner" of congressional elections within their jurisdictions (Art. 1, § 4, cl. 1). At the same time, the Elections Clause provides Congress with overriding authority to "make or alter" such state laws. The Constitution further provides that each house of Congress has the express authority to be the final judge of the "Elections, Returns and Qualifications" of its Members (Art. I, § 5, cl. 1). Thus, congressional election recounts, audits, or other verifications are typically conducted at the state level, which sometimes involves state courts, and contests are presented to the House of Representatives, which serves as the final arbiter of such elections.

The Supreme Court has held that, in judging congressional elections, Congress's determination of the right to a seat is "a nonjusticiable political question," resulting in "an unconditional and final judgment" (*Roudebush v. Hartke*, 405 U.S. 15, 19 (1972)). The Court has also observed that in the context of election contests, each house of Congress "acts as a judicial tribunal" (*Barry v. United States*, 279 U.S. 597, 616 (1929)). Consistent with these Supreme Court rulings, the House, in considering contested elections, has at times accepted state counts, recounts, or other state determinations; at others it has conducted its own recounts and made its own determinations and findings.

Overview of the FCEA

Two key terms—contestant and contestee—are integral to understanding the FCEA. The *contestant* is the candidate who brings the complaint (2 U.S.C. §381(3)). The *contestee* is the responding candidate, typically the state-certified winner (2 U.S.C. §381(4)).

Contests must be filed with the Clerk of the House within 30 days after the relevant state election authority (e.g., the secretary of state or a canvassing board) has declared the results, and must "state with particularity the grounds" for contesting the election (2 U.S.C §382(b)). The FCEA specifies five permissible methods of service of process and requires that proof of service be made promptly to the Clerk of the House. (2 U.S.C §382(c)). The contestee has 30 days to respond, although failure to respond "shall not be deemed an admission of the truth" of the contest claims by the contestee (2 U.S.C. §385). Even before providing a written answer, a contestee could raise several defenses to the contest, for example, that the contestant lacks standing to bring a contest under the act (3 U.S.C. §383(b)).

Even where there is little question of the outcome, FCEA's procedural timelines typically preclude the House from disposing of contests for at least the first few months of a new Congress. More complicated contests, although rare, can require substantial time to take depositions, conduct investigations, or seek assistance from state authorities or legislative support agencies (e.g., the Government Accountability Office (GAO)) to conduct audits or recounts.

Simply objecting to the election results is insufficient for a successful FCEA claim. Rather, "the burden is upon contestant to prove that the election results entitle him to contestee's seat" (2 U.S.C. §385). Therefore, the contestant must demonstrate that, but for voting irregularities or acts of alleged fraud, the contestant would have prevailed. (See, e.g., *Pierce v. Pursell*, H.Rept. 95-245 (1977).) In addition, although the House has broad authority over its elections, a state-issued election certificate generally provides prima facie evidence of the regularity and results of an election to the House (*Deschler's Precedents of the United States House of Representatives*, H.Doc. 94-661, 94th Cong., 2nd sess., (Washington: GPO, 1994) vol. 2, ch. 8, §15).

House Rule X and the FCEA (2 U.S.C. §381(7)) assign the Committee on House Administration (CHA) jurisdiction over contests filed under the act. The CHA may establish task forces or subcommittees to assist it in its work.

Legislative Procedure and the FCEA

While election contests are pending, the House may provisionally seat the contestee. In rare instances, the House has directed that a seat remain vacant pending the outcome of an investigation (Charles W. Johnson, John V. Sullivan, Thomas J. Wickham, Jr., *Precedents of the United States House of Representatives*, Svol. 1, H.Doc. 115-62, 115th Cong., 1st sess. (Washington: GPO, 2018), ch. 2, §§, 2.0, 2.3, pp. 174, 177-178).

Resolutions disposing of election contests are privileged for consideration under House rules and debate on such a resolution is under the Hour Rule, with extensions of time permitted by unanimous consent. Such resolutions might resolve the case in various ways, including dismissing the contest; declaring one of the parties entitled to the seat; or directing the returns from the election be rejected, that the seat be declared vacant, and that a new election be held. If not a sitting Member, the contestant in an election contest may be permitted on the floor during the consideration of the case in the House but must abide by the rules of proper decorum. Such an individual may not participate in debate. A sitting Member may debate, may insert remarks in the Record, and may vote on the resolution disposing of the contest (Charles W. Johnson, John V. Sullivan, Thomas J. Wickham, Jr., *House Practice, A Guide to the Rules, Precedents and Procedures of the House* (Washington: GPO, 2017), ch. 22, §6, p. 495).

Selected Contests Brought Under the FCEA

House candidates who lose an election according to state-certified results rarely prevail under the FCEA. As discussed above, the burden of proof is on the contestant to show entitlement to the seat, and contestants fail to overcome motions to dismiss in most contests. Selected examples of prominent and recent contests appear below.

Most recent contests: During the 117th Congress, two FCEA contests were filed. In the Iowa 2nd District open seat race, candidate Rita Hart contested the election of certified winner Mariannette Miller-Meeks. After CHA consideration, Ms. Hart eventually withdrew the contest. In the Illinois 14th District, challenger Jim Oberweis contested the certified victory of Representative Lauren Underwood. The House dismissed the contest after the CHA determined, in part, that the vote margin in question would not affect the outcome of the election (H.Res. 379; see also H.Rept. 117-28).

Before the 117th Congress, the House had not considered FCEA contests since the 113th Congress. At that time, the House dismissed contests to 2012 election results in California (H.Res. 278), Tennessee (H.Res. 277), and Texas (H.Res. 127).

Jennings-Buchanan: 110th Congress. The FCEA contest to the 2006 Florida 13th District race focused on "undervotes" (ballots without a marked choice in the congressional race) and voting equipment in Sarasota County. Ms. Jennings contested the state-certified results of the open-seat race. The House seated Mr. Buchanan while considering the contest. A CHA Task Force directed GAO to investigate whether voting machine malfunctions had affected the election outcome. In February 2008, the House confirmed Florida's certification of Representative Buchanan's victory and dismissed the contest (H.Res. 989; see also H.Rept. 110-528, 110th Cong.).

Dornan-Sanchez: 105th Congress. Then-Representative Robert Dornan filed an FCEA contest to Representative-elect Loretta Sanchez's certified victory in the 46th District of California in 1996. The House seated Ms. Sanchez while considering the contest. A CHA Task Force determined that more than 700 votes had been improperly cast in the election, but that the number was insufficient to change the election results. Congressional consideration of the contest, which paralleled state and federal investigations, lasted until February 1998. The House dismissed the contest (H.Res. 355; see also H.Rept. 105-416, 105th Cong.).

Non-FCEA Contests and Other Disputes

Since Congress enacted the FCEA in 1969, this method appears to be the most common for contesting House election results. There are, however, other options, separate from the FCEA, to bring contests within the House (in addition to litigation or state processes). In particular, a Member-elect may challenge the right of another to be sworn in, usually when the House convenes for a new Congress. The most prominent such example in recent history concerned the 1984 election in Indiana's 8th District. This contest, between candidates McCloskey and McIntyre, was perhaps the most contentious in modern House history. The Indiana Secretary of State certified Mr. McIntyre as Representative-elect after a recount reversed incumbent McCloskey's 72-vote election-day lead. Neither candidate was sworn in, pending an investigation of the contest. A CHA Task Force found various inconsistencies in state election practices and ordered a GAO-administered recount that yielded a four-vote victory for Mr. McCloskey. The House seated Representative McCloskey and dismissed the contest in May 1985 (H.Res. 146; see also H.Rept. 99-58, 99th Cong.).

Even high-profile election disputes do not necessarily result in contests that the House considers. For example, after an investigation of absentee ballot practices in North Carolina in 2018, the State Board of Elections ordered a new election for the 9th District House seat. The CHA noted that it was monitoring developments in the case. However, no FCEA contest was filed.

R. Sam Garrett, Specialist in American National Government
L. Paige Whitaker, Legislative Attorney
Christopher M. Davis, Analyst on Congress and the Legislative Process

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