JUDGING QUALIFICATIONS AND ELECTIONS OF A LEGISLATOR-ELECT

CONSTITUTIONAL BASIS of LEGISLATIVE AUTHORITY

U. S. CONSTITUTION

Article 1, section 5, clause 1: “Each House shall be the judge of the Elections, Returns and Qualifications of its own Members.”

ALL STATE CONSTITUTIONS

Recognize each house of the legislature’s power to judge the qualifications and elections of its members-elect

Two separate, distinct inquires: Qualifications and the Election

QUALIFICATIONS

- Set by your constitution
  

- Not to be expanded by rule, statute or interpretive gloss
  

- Age, citizenship, residence are the three most common qualifications

- Some additional disqualifications: elector, registered voter, non-felon, incompatible other office, office or position of profit
  
  See, *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (NV, 2004);

- ALL must be constitutionally based; *Powell, supra*

AGE

- Normally by direct recitation 18, 21, 25, 30 years, etc.

  Query: Age at what point in time?

  At time assume the office
  At time of election – ?primary or general?
  At time of qualification for office

  Empirically proven

  CO = 25 for both; ?@ time of taking office? V, sec. 4
  LA = 18 for both; @ time of qualification III, sec. 4
  TN = 30 for Sen; 21 for House; immediately prior to election II, sec. 9 & 10
  VT = ?DOES Vermont have an age qualification?
CITIZENSHIP

- 14th amendment to U.S. constitution: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”
- Therefore, citizenship equates to residence

RESIDENCE

- Power to judge a Candidate’s Residence is Expressly Provided in the Constitution
- A Candidate may have more than one residence.
  - Which states interpret “residence” to equal domicile? To equal permanent residence
  - Either of these are matters of intent of the candidate & HARD to judge
- A Challenge to the Residence of a Candidate May be Considered by a Court Before the Election
- After the General Election, a Court has No Power to Judge that a Candidate is Not Qualified
  - A Challenge to the Residence of a Candidate May Not Be Considered by a Court after the Candidate Has Been Duly Seated by the Body, Except as Expressly Provided in the Constitution
- The Judgment of a Legislative Body May Differ from that of a Court

CO = 12 months next preceding election resided in district V, sec. 4
LA = 2 yr. resident of state; 1 yr. domiciled in dist. III, sec. 4
TN = 3 yr. resident of state; 1 yr. in locale II, sec. 9 & 10
VT = 2 yr. state, last 1 yr. in district II, sec. 15

SEPARATION OF POWERS

- Dual office holding/dual employment
  - Are these qualifications such that an exclusion could take place?
  
  The State constitutions enumerate, sometimes in much detail, three classes of official persons whom they interdict, in some form” or other, from legislative functions, namely, all persons exercising or possessing offices under the authority of the United States, and all persons connected with the executive or judicial department of the government of each particular State.

  See, Cushing, Luther J., Lex Parliamentaria Americana, Little, Brown, 1856; sec. 77, pg. 30.

CANDIDATE’S STATUS AS AN ELECTOR/REGISTERED VOTER

- Must a candidate be a registered voter?
  - At what point in time – @ qualification; @ election; @ taking the oath
 Status as convicted felon

State constitution must withhold right to run for office from a felon whose voting rights have been restored

See, LA const. art. I, sec. 10.1

ELECTIONS

 Judicial Authority Over Elections and Returns is Statutory

Each state’s law will control the judiciary’s jurisdiction in pre- OR post-election contests

Louisiana: Title 18, Chapter 9 Contests and Challenges; R.S. 18:1401 et seq.

 Each Legislative body is the SOLE judge of whether or not a candidate has been duly elected;

Even though statutes may grant this power to the judiciary pre-election

Post-election, the courts have NO role in judging qualifications.

_CF, Stephenson v. Woodward_, 182 S.W.3d 162 (Ky. 2005)

 Any judicial authority over elections and returns is statutory

 Judiciary may compel executive officials to carry out ministerial duties

 Judiciary may not compel election officials to change the vote count

 The judiciary may NOT fix irregularities in an election after a legislative body has taken up the matter

 Whether the judiciary may take evidence in contested cases may, or may not, be for the legislature to decide

See, Ohio contest procedures

 A legislative body may initiate a contest on its own motion at any time

 Judgement of a Legislative body may differ from that of the Judiciary:

In _Roudebush v. Hartke_, 405 U.S. 15 (1972), a case of contests or challenges properly raised concerning the election or selection of a U.S. Senator, the Supreme Court affirmed the constitutional authority for “an independent evaluation by the Senate” of the selection of those presenting themselves for membership.

PROCEDURAL ISSUES

Who may initiate a contest or objection to the qualifications and election of a Member-elect

Only Members

Are there substantive due process issues if this limitation is in place?

Or, above plus unsuccessful candidates

Or, above plus other elected officials

Or, above plus voters in the district
Standing top bring suit, in those jurisdictions which allow judicial intervention in the election process, would encompass the electors of the district, which would include the other classes of challengers. . . .


How is a contest or objection to the qualifications and election of a Member-elect initiated

Another Member-elect
   Through motion or resolution or raising an verbal objection
A third party
   Notice only, written communication or by petition

A much more common mode of instituting the inquiry, especially where it relates to the election or return rather than to any subsequent disqualification of a member, is by means of a petition, (sometimes, but improperly, denominated a remonstrance) of some party interested, either as an elector, or as claiming the seat in question. Where this mode is adopted, the investigation assumes the character of an adversary proceeding before a judicial tribunal. The petition should state the facts relied upon with such certainty as to give the sitting member reasonable notice of the grounds upon which his right is controverted; -to enable the assembly to judge whether the facts alleged are verified by the proof; - and, if proved, to determine whether they are sufficient to require the election to be set aside; and the petitioner ought not in general to be permitted, without the consent of the other party, to give evidence of any fact not substantially set forth in his petition.


Service requirements
Member-elects right to answer

When is a contest or objection to the qualifications and election of a Member-elect to be made
During prior term or on day of organization of the house
Contest or objection noticed or voiced before the administration of the oaths

What is the effect of a contest or objection to the qualifications and election on a Member-elect
No immediate effect – take oath with colleagues
Stand aside and take the oath later
   Provisional oath
   Oath “without prejudice”

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.”
* * *

On occasion [15 of 107 cases since 1933], 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. 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. 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 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.”


Generally, a senator with the proper credentials against whom a challenge had been filed would be seated "without prejudice." Under this arrangement, if a committee investigation later determined that for some reason the individual was not entitled to a seat, he could be "excluded" from the Senate by a simple majority vote, as opposed to having to be expelled, which required a two-thirds majority.

United States Senate Election, Expulsion, and Censure Cases, 1793-1990, Butler and Wolff, pg. xvii, Senate Doc. 103-33.

Objection, Investigation, Hearing, Report and Consideration

Procedural due process rights of the Member-elect and the objecting party

Adequate notice of a hearing, right to be heard by tribunal, right to be represented by counsel, right to compel testimony, right to confront witnesses

See, Connecticut House Rule 19 & HR 4; Illinois House Rule 86; Nebraska Senate Rule 10; Wyoming Joint Rule 15

Does the hearing have to be public to protect these rights?

Do not avoid these requirements and hand losing party a tailor-made litigation issue

Investigation

Gather facts, take testimony, consider arguments

See, Connecticut House Rule 19 & HR 4; Illinois House Rule 86; Mississippi SR 2; Nebraska Senate Rule 10; Wyoming Joint Rule 15.

Make a recommendation to the house

Should the options for recommendation be limited?

Declare seat vacant or declare election void or award seat to second place finisher or declare Member-elect qualified & duly elected

See, Illinois House Rule 86; Mississippi SR 2; Nebraska Senate Rule 10; TX Election Code; Wyoming Joint Rule 15

Committee

Standing or special

See, Connecticut House Rule 19 & HR 4; Illinois House Rule 86; Mississippi SR 2; Nebraska Senate Rule 10; TX Election Code; Wyoming Joint Rule 15

If special, make up

Number, partisan break-down

See, Connecticut House Rule 19; Illinois House Rule 86; Mississippi SR 2; Nebraska Senate Rule 10; Wyoming Joint Rule 15

Staff assistance
House staff or outside investigative counsel
Special Master – Texas Legislature
Appointed pursuant to statute
Controls and manages all discovery and depositions
See, Texas House Rule 1, sec. 16 and Texas Election Code, Title 14, Chapter 241

Scope of investigation
Set by motion or resolution
See, Mississippi SR 7; Wyoming Joint Rule 15
Determines the report to be made by the committee

Conduct of hearing
Public meeting – due process consideration
Any special oath required of committee members
Proceeding is quasi-judicial
Swearing of witnesses
Issuance of subpoenas
See, Connecticut House Rule 19; Illinois House Rule 86; Mississippi SR 2;
Nebraska Senate Rule 10; TX Election Code; Wyoming Joint Rule 15
Burden of proof
Should be on the person objecting
See, Mississippi SR 7; Wyoming Joint Rule 15
Should be affirmatively stated in the rules for the committee
Standard of proof
Preponderance of the evidence – See, Mississippi SR 7; Wyoming Joint Rule 15
Clear and convincing – See, Texas House documents
Should be affirmatively stated in the rules for the committee

Report of the committee findings
Majority and minority reports
See, Connecticut House Rule 19; Illinois House Rule 86; Nebraska Senate Rule 10; TX Election Code; Wyoming Joint Rule 15
Vote required in committee to adopt a recommendation
Should this ever be greater than a majority present and voting?

Committee recommendation
Promulgate the report in form of resolution

Consideration of the report by the house
Who argues for the report’s recommendations
Connecticut resolution authored by the Speaker and majority leader
Mississippi resolution authored by the chair of the special committee.
Speakers in opposition
Parliamentary motions available
Vote required to adopt the report
   Absent a constitutional provision or chamber rule
       Majority of those voting, a quorum being present
   See, Illinois House Rule 88 requiring majority of the members of the entire body
LIST OF AUTHORITIES

Cases


Bond v Floyd, 385 U.S. 116 (1966)


Stephenson v. Woodward, 182 S.W.3d 162 (Ky. 2005)

Constitutions

U.S. constitution, Article 1, section 5, clause 1.

U.S. constitution, 14th amendment, sec. 1, sentence 1.

LA const. art. I, sec. 10.1

Authorities

Cushing, Luther J., Lex Parliamentaria Americana, Little, Brown, 1856.


Butler and Wolff; United States Senate Election, Expulsion, and Censure Cases, 1793-1990, Senate Doc. 103-33.


RELATED DOCUMENTS

1. LA const. art. I, sec. 10.1
5. Arkansas Senate election contest 2008
6. Connecticut House Resolution 4 and House Rule 19
8. Mississippi Senate Resolutions 2 & 7.
9. Nebraska Senate Rules
10. Ohio contest procedures; digest
11. Texas Election Code, Title 14, Chapter 241
12. Wyoming Joint Rule 19 and
LA const. art. I, sec. 10.1:

Disqualification from Seeking or Holding an Elective Office or Appointment

(A) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or hold elective public office or appointment of honor, trust, or profit in this state:

(1) A person actually under an order of imprisonment for conviction of a felony.

(2) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government, or country having such authority to pardon in the place where the person was convicted and sentenced.

(B) Exception. The provisions of Paragraph (A) of this Section shall not prohibit a person convicted of a felony from qualifying as a candidate for elective public office or holding such elective public office or appointment of honor, trust, or profit if more than five years have elapsed since the completion of his original sentence for the conviction.

(C) The provisions of Paragraph (A) of this Section shall not prohibit a person from being employed by the state or a political subdivision.
LEGISLATION

The Legislature's Power To Judge the Qualifications of Its Members

I. THE CONSTITUTIONAL RULES AND THEIR HISTORICAL BACKGROUND

Because federal and state constitutions require members of the legislative branch of the government to meet certain qualifications, the legal existence of a legislative body is dependent upon compliance with those constitutional requirements. However, by express constitutional provisions, and by traditional legislative practice and usage, the legislature itself is deemed to be the final judge of the election and qualifications of its members. Section 5 of article I of the United States Constitution provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members ...." The constitutions of all the states contain provisions to this same effect. In keeping with the fundamental principle prohibiting judicial encroachment upon the functions of the legislature, judicial usurpation of legislative powers, and judicial interference with the exercise of legislative power, it is well settled that such a constitutional provision vests in the legislature the sole and exclusive power to judge the election and qualifications of its own members and deprives the courts of jurisdiction to determine these matters. This view is typically expressed in the following manner:

In view of this constitutional power vested in the Legislature, it is clear that this court has no jurisdiction to determine the qualifications of the plaintiff as State Senator. This is a matter which rests in the sole and exclusive juris-

1. SUTHERLAND, STATUTORY CONSTRUCTION § 404 (3d ed. Horack 1943). It should be noticed that the term "qualifications" as used in this immediate context denotes both the standards laid down as prerequisites to election to the legislature, and those requirements relating to serving in the body to which one has already been elected. For a discussion of the term, see Annot., 34 A.L.R.2d 155 (1954).
2. See Appendix infra for a listing of state constitutional provisions referring to legislative power to judge elections and qualifications.
6. See, e.g., English v. Bryant, 153 So. 2d 167 (Fla. 1963); Reif v. Barrett, 335 Ill. 104, 188 N.E. 889 (1933); Raney v. Stovall, 361 S.W.2d 518 (Ky. 1962); Dinan v. Swig, 223 Mass. 516, 112 N.E. 91 (1916); Brown v. Lamprey, 106 N.H. 121, 206 A.2d 493 (1965); Scott v. Thornton, 234 S.C. 19, 106 S.E.2d 446 (1959); Annot., 107 A.L.R. 205 (1937). The courts are held to be deprived of jurisdiction both prior and subsequent to legislative decision or action.
This power in the legislature has been characterized as a continuous one, running through the entire term and empowering the body to pass on the present qualifications of its members.8

The same principle also applies to the legislature’s right to control the conduct of its members, including its right to remove them. “From time immemorial it has been deemed the right of legislative bodies to expel members thought unfit.”9 The federal constitution’s expulsion clause, very similar to those found in most state constitutions,10 provides: “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”11 The decision of a legislature, acting in pursuance of such a provision, is conclusive and not subject to review or revision by the courts,12 even to the extent of determining whether notice and hearing were afforded the expelled member.13

The time honored concept of legislative prerogative in seating and expelling members was established in the constitutional law of England in the 16th century when the House of Commons decided that it, rather than the Lord Chancellor, should decide a membership controversy.14 As early as 1619, the Virginia Assembly, after questioning the qualifications of a representative, refused to seat him until he fulfilled certain conditions.15 The principle appears to have been well established in America in 1692, when the legislative bodies of Massachusetts and Virginia declared that they were the sole judges of the qualifications of their members.16 Following the pattern of the colonies, the present federal and state constitutional provisions were similarly

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9. Luce, Legislative Assemblies 275 (1924).
10. See Appendix infra.
12. See, e.g., French v. Senate, 146 Cal. 604, 80 Pac. 1031 (1905) (court will not review or revise even a most arbitrary or unfair decision); Hiss v. Bartlett, 69 Mass. (3 Gray) 468 (1855). “[T]here is no chance of appeal. The courts deem themselves powerless.” Luce, op. cit. supra note 9, at 288.
13. 1 Sutherland, op. cit. supra note 1, § 404.
14. Luce, op. cit. supra note 9, at 192. A committee appointed by the House reported “they had not thought it proper to inquire of the Chancellor what he had done, because they thought it prejudicial to the privilege of the House to have the same determined by others than such as were members thereof.”
16. Luce, op. cit. supra note 9, at 196-97. For a discussion of the occasional struggles between colonial assemblies and governors for the power to judge qualifications of legislators, see id. at 197-98.
framed. This vesting of exclusive jurisdiction in the legislature has been justified as a necessary concomitant to the body’s power of self-protection. As Judge Story explained:

It is obvious, that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members. . . . The only possible question on such a subject is, as to the body, in which such a power shall be lodged. If lodged in any other, than the legislative body itself, its independence, its purity . . . may be destroyed . . . . 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 own constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America.

In effect, these constitutional provisions empower the legislatures to say, “We are quite competent to decide these questions ourselves,” without the assistance, review or revision of the courts. The only apparent restraint upon this “remaining stronghold of legislative justice” is the responsibility of the representatives to their constituents.

II. THE EFFECT OF THE FEDERAL SYSTEM

A. State Courts

The American federal system complicates this matter to a certain degree. Of course, there is no such complication regarding the jurisdiction of state courts to review determinations of qualifications and elections by a state legislative body. In these matters, the state courts are uniformly held to be without appellate jurisdiction. It should be noted, however, that state courts have assumed jurisdiction in certain ancillary matters. For instance, courts have taken appellate jurisdiction in cases dealing with the appointment of ministerial officers concerned

18. See Hiss v. Bartlett, supra note 12. “We believe a state legislative body necessarily possesses this . . . inherent power of self-protection if the separation of powers doctrine is to have any real meaning on the state level. And self-protection goes to the process of qualifications as well as expulsion.” Bond v. Floyd, 251 F. Supp. 333, 341 (M.D. Ga. 1966).
23. See note 6 supra.
with election procedure.\textsuperscript{24} Also, state courts have compelled a canvassing board to issue a certificate of election to a candidate.\textsuperscript{25} This judicial action was held to be permissible because its sole purpose was to facilitate proving to the legislative body that the candidate had a prima facie right to a seat, rather than to admit the candidate to office.\textsuperscript{26} As might be expected, state courts are held to have no jurisdiction to determine the right of a party to hold a seat in the United States Congress.\textsuperscript{27}

\textbf{B. Federal Courts}

Likewise, it appears that article I, section 5 of the United States Constitution deprives federal courts of jurisdiction in these matters.\textsuperscript{28} In a habeas corpus case brought by an individual arrested for failure to appear as a witness in an election contest before the United States Senate, the United States Supreme Court acknowledged that the “Senate . . . [has] sole authority under the Constitution to judge of the elections, returns and qualifications of its members . . . .”\textsuperscript{29} The Court held that the exercise of this power involved the ascertainment of facts, the attendance of witnesses, and the examination of such witnesses, together with the power “to render a judgment which is beyond the authority of any other tribunal to review.”\textsuperscript{30} The warrant in this case was upheld, even though the Court, in a statement apparently contrary to traditional ideas as to the absoluteness of the legislature’s power in this regard,\textsuperscript{31} said: “[I]f judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law.”\textsuperscript{32}

The question of the jurisdiction of federal courts to review a state

\textsuperscript{24} See O’Ferrall v. Colby, 2 Minn. 180 (1858); Anderson v. Blackwell, 168 S.C. 137, 167 S.E. 30 (1933). See \textsc{sutherland}, \textit{op. cit. supra} note 1, at 104-05.

\textsuperscript{25} See People \textit{ex rel. Fuller v. Hilliard}, 29 Ill. 413 (1862); People \textit{ex rel. Sherwood v. State Canvassers}, 129 N.Y. 360, 29 N.E. 345 (1891).

\textsuperscript{26} People \textit{ex rel. Fuller v. Hilliard}, supra note 25.


\textsuperscript{28} See Barry v. United States, 279 U.S. 597 (1929); Keogh v. Horner, 8 F. Supp. 933 (S.D. Ill. 1934) (no jurisdiction to issue a writ of prohibition restraining governor from issuing a certificate of election).

\textsuperscript{29} Barry v. United States, \textit{supra} note 28, at 619.

\textsuperscript{30} Id. at 613.

\textsuperscript{31} “[T]he judicial department has no power to revise even the most arbitrary and unfair action of the legislative department . . . taken in pursuance of the power committed exclusively to that department by the Constitution. . . . The senate has power to adopt any procedure and to change it at any time and without notice.” \textit{French v. Senate}, \textit{supra} note 12, at 606, 608, 80 Pac. at 1032-33.

\textsuperscript{32} Barry v. United States, \textit{supra} note 28, at 620.
legislature's determination of the qualifications and elections of its members presents problem areas which are illuminated by several United States Supreme Court decisions. The first of these, *Taylor v. Beckham*,34 involved a legislative determination of the outcome of a contested gubernatorial election, such determination being placed in the hands of the General Assembly by the Kentucky state constitution.34 It was alleged that the Assembly's arbitrary and wrongful action deprived "plaintiffs in error of their offices without due process of law,"35 and deprived the people of Kentucky of "the right to choose their representatives, secured by the guarantee of the Federal Constitution of a republican form of government to every State."36 The Court, in upholding the Assembly's determination, decided that there was no denial of a right secured by the fourteenth amendment because a public office is not property as such.37 Furthermore, the Court held that the guarantee of a republican form of government to the states was the responsibility of the "political department" of the federal government.38 Therefore, this latter claim, based upon the "guaranty clause," was a nonjusticiable "political question." In *Snowden v. Hughes*,39 the Court rejected a claim that the State Primary Canvassing Board's wrongful and arbitrary refusal to certify correctly the results of a primary election constituted a denial of equal protection of the laws and an abridgement of the privileges and immunities of a citizen of the

33. 178 U.S. 548 (1900).
34. "Contested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law." Ky. Const. § 90.
35. Taylor v. Beckham, 178 U.S. at 573-74. It was contended that the General Assembly's administration of statutes enacted pursuant to the constitutional provision amounted to a deprivation of due process of law. Id. at 575.
36. Id. at 574. "The United States shall guarantee to every State in this Union a Republican Form of Government..." U.S. Const. art. IV, § 4. This clause is commonly called the guaranty clause.
37. Taylor v. Beckham, 178 U.S. at 575-77. See also Wilson v. North Carolina, 169 U.S. 586 (1898). In this case, the Court decided that suspension of a state official by the Governor pursuant to state constitution and laws did not give rise to a federal question even though the official had no opportunity to see the evidence against him, confront his accusers or cross-examine witnesses.
38. Taylor v. Beckham, 178 U.S. at 578-81. The Court relied on Luther v. Borden, 48 U.S. (7 How.) 1 (1849), in which it was held that Congress, not the courts, was to decide which government is the established one of a state, as well as the republican character of the state government. For a discussion and criticism of Luther v. Borden, and its progeny, see 1 Schwartz, Powers of Government 71-74 (1963). For a discussion of the "political question" doctrine, see notes 47-55 infra and accompanying text. The Taylor principle was re-affirmed by Cave v. Missouri, 246 U.S. 650 (1918) (per curiam). See also Walton v. House of Representatives, 285 U.S. 487 (1924) (federal courts as courts of equity are without jurisdiction over appointment and removal of state officers); Elder v. Colorado ex rel. Badgley, 204 U.S. 85 (1907) (contest over state office dependent upon mere construction of state law involves no federal question).
United States, as guaranteed by the fourteenth amendment. The Court said:

The protection extended . . . by the privileges and immunities clause . . . does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law . . . .

The right to become a candidate for state office . . . is a right or privilege of state citizenship . . . .

The Court then reaffirmed the conclusion of Taylor v. Beckham, and, in rejecting the contentions of a denial of equal protection, said:

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination . . . . Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights . . . . (Emphasis added.)

The Court concluded that there were no allegations in the complaint showing such “purposeful” discrimination.

Because of its enunciation and clarification of principles regarding the justiciability of claims involving state governmental organization and the political rights of state citizens, the momentous case of Baker v. Carr is of great importance in this area. In its discussion of the problem of “political questions,” the Court noted that a problem

42. “More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. . . . [W]e reaffirm . . . [that conclusion] now.” Id. at 7.
43. Id. at 8, 11.
44. The Court then added, “[I]t is not without significance that we . . . have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment.” Id. at 12. The dissenting opinion of Mr. Justice Douglas is also instructive. “[A] candidate . . . is not denied . . . equal protection . . . merely because he is the victim of unlawful administration of a state election law. . . . [A] denial of equal protection . . . requires an invidious, purposeful discrimination.” Id. at 18.
46. 369 U.S. 186 (1962).
47. The political question doctrine is built upon the separation of powers principle. In a case involving a “political question,” the “expressed view of the political department becomes a rule of decision for the court.” The case will not be “decided upon its merits as an independent question by the court.” Field, The Doctrine of Political
should be recognized as being "political," and hence nonjusticiable, only when it involves a problem of separation of powers — that is, "the relationship between the judiciary and the coordinate branches of the Federal Government" — or, when there is "a lack of judicially discoverable and manageable standards for resolving it." The majority opinion took pains to make clear that the lack of such "judicially discoverable and manageable standards" is the only reason that the Court might label a question involving state governmental arrangements a "political question." As one commentator points out:

It is simpler to say that the mere fact of involvement in state governmental arrangements is irrelevant to the political question doctrine and go on to the residual inquiries: whether the matter under consideration involves a possible conflict with other branches of the federal government, or whether appropriate judicial standards are lacking.

Furthermore, the Court said that guaranty clause claims have been held to be nonjusticiable political questions, simply because they involve elements which define a "political question," and not because of any relationship to matters of state governmental organization. The Court clearly implied that the guaranty clause will still be regarded as nonjusticiable because it is not "a repository of judicially manageable standards," but pointed out that a mere coupling of a valid federal


49. Id. at 217. It should be noted that, despite language in Mr. Justice Brennan's opinion indicating that the applicability of the "political question" doctrine is strictly limited to causes concerning the power of the federal judiciary as against the power of the President or Congress, a lack of judicially discoverable standards will stamp a question as "political" even if a state government is involved. This is indicated by his speaking of a possible lack of such standards as a factor to be considered in Baker v. Carr itself (equal protection clause applies to a claim of under-representation in the state legislature). Id. at 226. See McCloskey, supra note 45, at 60. For the Court's formulation of factors indicating the probability of a political question, see Baker v. Carr, 369 U.S. at 217.

50. "Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization." Id. at 229.

51. McCloskey, supra note 45, at 63.


53. "[T]he involvement in Guaranty Clause claims of the elements thought to define 'political questions'; and no other feature, which could render them nonjusticiable. . . . [S]uch claims are not held nonjusticiable because they touch matters of state governmental organization." Baker v. Carr, 369 U.S. at 229. The Court analyzed the prior guaranty clause cases, including Luther v. Borden, supra note 38, and Taylor v. Beckham, supra note 33. Baker v. Carr, 369 U.S. at 218-23.

54. Id. at 223. See id. at 218, 222, 227. One commentator has suggested that if the Court's logic is pressed, even this implication is clouded because the guaranty clause's standards "are not any more nebulous than those of the equal protection clause in this context." McCloskey, supra note 45, at 63. It has been argued that the courts should not hold that all issues raised under the guaranty clause are nonjusticiable, and
claim with a claim based upon the guaranty clause will not defeat the valid claim, unless it is "so enmeshed with those political question elements which render guaranty clause claims nonjusticiable as actually to present a political question itself." To emphasize further its constant assertion that claims are not nonjusticiable merely because they touch matters of state governmental organization, the Court cited Gomillion v. Lightfoot, a case in which the fifteenth amendment was used to strike down a redrafting of municipal boundaries which effectuated a discriminatory impairment of voting rights. Gomillion’s answer to an argument based upon the traditional view that the states enjoy unrestricted control over municipal boundaries was:

Legislative control of municipalities . . . lies within the scope of relevant limitations imposed by the United States Constitution . . . . The opposite conclusion . . . would sanction the achievement by a state of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions.

Speaking of the extent of federal court review of state action, the Court in Gomillion observed:

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

This examination of these important cases suggests several considerations regarding the jurisdiction of federal courts to review a state legislature’s determination of the qualifications and elections of its members. The mere unlawful denial by state authority of the right to state office is not a claim coming within federal court jurisdiction. It becomes such if, in addition to the denial to office, there is a claim of constitutional deprivation which is amenable to judicial correction, such as a denial of equal protection of the laws because of intentional or purposeful discrimination. A claim involving state governmental ar-


57. See Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1960).


59. Id. at 347.
rangements is not rendered nonjusticiable because of the "political question" doctrine; but if the matter involves a conflict with the other branches of the federal government, or if appropriate judicial standards are lacking, it is a "political question" and cannot be considered by the federal courts. Because claims under the guaranty clause involve the elements defining a "political question," the clause cannot be invoked to remedy a denial of right to membership in the state legislature.

C. A Case in Point

An important recent case, Bond v. Floyd, deals with the question under discussion. Having no direct guiding precedents, a three-man federal court addressed itself to the problem of federal jurisdiction over the refusal of the Georgia House of Representatives to seat a representative-elect because of his endorsement of a statement issued by a militant civil rights organization of which he was a member. The statement was strongly critical of United States foreign policy and offered support to persons unwilling to respond to the military draft. Endorsement of this position, along with similar personal views of Julian Bond, the representative-elect, was viewed by the House of Representatives as justification for disqualifying him from taking the oath to support the United States and Georgia constitutions. The offered theory was that the oath, required of state representatives by the federal and state constitutions, could not honestly be taken by

60. It appears that the scope of the political question doctrine was significantly narrowed by Baker v. Carr. See McCloskey, supra note 45, at 59, 61.
62. Three-judge district court jurisdiction was premised on 28 U.S.C. § 2281 (1964), primarily by a claim that the Georgia Constitution was unconstitutionally administered to the representative-elect. Bond v. Floyd, 251 F. Supp. at 335.
63. The organization was the Student Nonviolent Coordinating Committee. Julian Bond, the plaintiff in this action, was communications director of the organization.
64. The following are certain relevant portions of the statement: "We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in ... other countries ... and in the United States itself. ... Our work ... has taught us that the United States government has never guaranteed the freedom of oppressed citizens ... Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. ... We are in sympathy with, and support, the men ... who are unwilling to respond to a military draft. ..." Id. at 336-37.
65. Bond endorsed the statement in a taped interview with the press. He added that "as a second-class citizen of the United States" he did not think that he had an obligation to support the government's role in Viet Nam. He also told a reporter that he admired the courage of anyone who would burn his draft card. Id. at 337.
66. "[T]he Members of the several State Legislatures ... shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI. "Each senator and representative, before taking his seat, shall take the following oath, or affirmation, to wit: 'I will support the Constitution of this State and of the United States, and on
Bond because his expressions of belief were inconsistent with and repugnant to it. The Georgia constitution, as interpreted by state courts, vested the legislature with the sole and exclusive power to judge the election and qualifications of its members. The representative-elect brought an action in federal district court for declaratory and injunctive relief against officers and members of the state House of Representatives, primarily alleging that the House action deprived him of his right of free speech as guaranteed by the first amendment.

The court asserted that the vesting of "sole and exclusive" power in the Georgia House to judge the qualifications of its members does not deprive a federal court of jurisdiction when a denial of first amendment rights has been alleged. The House's exclusive power exists only insofar as it does not conflict with the Federal Constitution and must therefore give way to first amendment rights in view of the vertical application of those rights to the states through the due process clause of the Fourteenth Amendment.

all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State." GA. CONST. art. III, § 4.

67. Bond v. Floyd, 251 F. Supp. at 338. Petitions challenging the seating of Bond also contained contentions that Bond's statements gave aid and comfort to the enemies of the United States, violated 62 Stat. 622 (1948), as amended, 50 U.S.C. § 462 (1964) (Selective Service), and tended to bring discredit and disrespect on the House of Representatives. Id. at 337-38.

68. "Each House shall be the judge of the election, returns, and qualifications of its members . . ." GA. CONST. art. III, § 7.


71. Plaintiff also contended that article III, section 4 was unconstitutionally vague; that he was barred from membership because he was a Negro; that he was denied both procedural and substantive due process; that the House action constituted an ex post facto law and bill of attainder; that his constituents were deprived of a republican form of government; that there was a denial of equal protection of the law, and a denial of the right of Negroes to vote. Bond v. Floyd, 251 F. Supp. at 335. These contentions were disposed of summarily by the court. This note does not fully explore the validity of the various constitutional objections to the legislature's action but is confined to the question of the right of federal courts to review such action.

72. Id. at 338. "It could hardly be argued that the House could refuse to seat a member because of his race or for any other reason amounting to an invidious discrimination under the equal protection clause of the Fourteenth Amendment. . . . We think it follows that the court has jurisdiction over a denial of First Amendment rights by the state. . . ." Id. at 338.

73. Id. at 340. On the applicability of first amendment freedoms to the states, see De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925).
Feeling that it should practice "some restraint" when dealing with state "political questions" concerning individual offices,74 the court said that the House's exclusion of Bond would not conflict with his first amendment rights if he were not denied procedural and substantive due process of law.75 No denial of procedural due process of law was found, and the court concluded that there would be no denial of substantive due process if there was a "rational evidentiary basis" for the House's action.76 Branding the endorsed statement as "a call to action based on race,"77 the court concluded:

This call to action, and this is what we find to be a rational basis for the decision which denied Mr. Bond his seat, is that language which states that SNCC supports those men in this country who are unwilling to respond to a military draft . . . . [Bond's] statements and affirmation of the SNCC statement as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath . . . . This suffices as a rational basis . . . .

III. STATUTORY ALTERATION OF CONSTITUTIONAL QUALIFICATIONS

When a constitution lays down specific eligibility requirements for a particular constitutional office, such as that of legislator, the constitutional specification is generally considered to be exclusive.79 The legislature is viewed as having no power to require additional or different qualifications for the position. This general rule has been narrowed by some courts when the constitutional provisions in question are negatively worded.80 The negative wording has been regarded as providing a list of disqualifications, and not precluding the legislature from re-

74. Bond v. Floyd, 251 F. Supp. at 343. The court implied that this same restraint need not be shown when dealing with questions concerning "whole systems," such as malapportionment, or racial discrimination. Ibid.
75. Id. at 343.
76. The fulfilling of this "test" would insure that the act was not arbitrary. Id. at 344.
77. Ibid.
78. Id. at 344-45. The court insisted that the wisdom of the House's action was not in issue, and that the judgment of the court should not be substituted for that of the House. See note 127 infra and accompanying text for an explanation of the dissenting opinion of Judge Elbert P. Tuttle.
79. See, e.g., Whitney v. Bolin, 85 Ariz. 44, 330 P.2d 1003 (1958); Burroughs v. Lyles, 142 Tex. 704, 181 S.W.2d 570 (1944); Annot., 34 A.L.R.2d 155 (1954); COOLEY, CONSTITUTIONAL LIMITATIONS 139 (8th ed. Carrington 1927). It should be noted that the "qualifications" of concern here are those laid down as a prerequisite to election, as distinguished from those requirements relating to serving in a capacity to which one has already been elected. See notes 1 supra and 85 infra.
80. An example of negative wording is: "No Person shall be a Representative who shall not have attained to the Age of twenty-five years . . . ." U.S. CONST. art. I, § 2. An example of affirmative wording is: "The Representatives shall be citizens of the United States who have attained the age of twenty-one years . . . ." GA. CONST. art. III, § 6.
quiring additional qualifications for the office. Other courts have rejected the validity of this distinction and have held that even a negatively worded constitutional prescription of qualifications is exclusive. Finally, the legislature does not have the power to remove or dispense with an eligibility qualification or disqualification prescribed by the constitution. However, the significance of these interpretive rules is limited because, as will be pointed out, the legislature in judging the qualifications of its members may impose additional qualifications or waive those mentioned in the constitution. Therefore, the practical effect of these rules is to forbid formal, statutory alteration of constitutional qualifications.

IV. NON-STATUTORY ALTERATIONS OF CONSTITUTIONAL QUALIFICATIONS

May the legislative body, as a part of its discretionary judgment of qualifications, refuse to seat a representative-elect for reasons other than his failure to meet those qualifications expressly specified in the constitution? This question, the subject of some dispute in the United States, had its first prototype in the controversy surrounding John Wilkes in mid-eighteenth century England. Because Wilkes, a journalist and pamphleteer, incurred the displeasure of King George III and his followers, he was expelled from the House of Commons. His constituents returned him to the same office four consecutive times, but each time he was refused membership by the House. How-

83. See, e.g., Morgan v. Vance, 67 Ky. (4 Bush) 323 (1868) (involving office created by statute, but laying down principle applicable to constitutional office); Ferguson v. Wilcox, 119 Tex. 280, 28 S.W.2d 526 (1930).
84. See 1 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES 607-08 (2d ed. 1929).
85. The term "qualifications" as used in this present context denotes those requirements relating to serving in the body to which one has already been elected. See Annot., 34 A.L.R.2d 155 (1954).
86. The United States Constitution furnishes a typical example of such a specification. "No person shall be a Senator who shall not have attained to the Age of thirty years, and been nine years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3.
87. For accounts of the Wilkes episode, see BECK, THE VANISHING RIGHTS OF THE STATES (1926); 2 MAY, CONSTITUTIONAL HISTORY 26 (6th ed. 1887); Note, 33 Va. L. Rev. 322, 324 (1947).
88. Wilkes is reported to have goaded his constituents with this warning: "If ministers can once usurp the power of declaring who shall not be your representative, the next step is very easy . . . . It is that of telling you whom you shall send to Parliament . . . ." BECK, op. cit. supra note 87, at 37.
ever, Wilkes was the eventual victor, for in 1782 (thirteen years after the fourth rejection) the House of Commons voted to expunge from the records all resolutions of expulsion. Apparently, a limit to parliamentary power was established because Parliament acknowledged that it can not permanently deny a seat to a member who qualifies according to law.89 The framers of the federal constitution were aware of the Wilkes case,90 and were the recipients of a colonial heritage steeped in the idea that the legislature should be the judge of its members’ qualifications.91 However, the proceedings of the Constitutional Convention do not unequivocally answer whether there was an intention to give each House the unrestrained power to deny admittance.92 It is significant to note that the drafters, under the leadership of Madison, rejected a proposed provision that would have given Congress the discretion to impose property qualifications.93 In so doing, they also voted down a counter-proposal leaving Congress free to impose whatever qualifications it might choose.94 The expunging of these provisions from the proposed constitution would seem to infer that the delegates did not intend that Congress be free to place whatever qualifications it desired as a condition to membership.95 However, it should be noted that James Wilson of Pennsylvania opposed giving Congress the power to prescribe property qualifications because such an affirmative grant might be construed as constructively excluding a general Congres-

89. 24 Halsbury’s Laws of England 335 (Hailsham ed. 1937). It has been contended that no such principle was established by the Wilkes case, but that the only result was a grudging admission by the House of Commons that it ought to have admitted him. Gooch, Book Review, 13 Va. L. Rev. 670 (1927).

90. Wilkes was a hero in the colonies; Pennsylvania named an infant city in his honor (Wilkes-Barre), and South Carolina, through her legislature, contributed to his support. Beck, op. cit. supra note 87, at 34-35.

91. See note 15 supra and accompanying text. In regard to these pre-Constitutional Convention state constitutions, there appears to be no instance in which a colonial or state legislature undertook to exclude any member for lack of qualifications other than those required by such constitutions. Warren, op. cit. supra note 82, at 423 (1937).


93. “The legislature of the United States shall have authority to establish such uniform qualifications of the members of each House with regard to property as to the said Legislature shall deem expedient.” II Farrand, op. cit. supra note 92, at 173.

94. Id. at 251; Warren, op. cit. supra note 82, at 419.

95. Alexander Hamilton wrote: “The qualifications of the persons who may choose or be chosen are defined and fixed by the Constitution and are unalterable by the legislature.” The Federalist No. 60, 384 (Sesquicentennial ed. 1938). See Note, 33 Va. L. Rev. 322, 329 (1947). An historian notes: “Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress . . . the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself . . . .” Warren, op. cit. supra note 82, at 421.
sional power to disqualify "odious and dangerous characters."\footnote{96}

The United States Congress and the state legislatures apparently have felt that the power to judge the qualifications of members includes the power to exclude for reasons other than a failure to fulfill constitutional requirements.\footnote{97} Analysis of seating disputes in the United States Congress\footnote{98} supports one commentator's conclusion:

[It is] sufficiently clear that the Senate and House have repeatedly held it to be proper that they should consider whether or not persons should be admitted... even though possessing all the qualifications prescribed by the Constitution for membership and presenting credentials in due form of their election.\footnote{99}

Two cases showing exclusion for matters other than a failure to meet constitutional qualifications are illustrative. In 1900, the House refused to seat Brigham H. Roberts of Utah on the ground that he was a polygamist.\footnote{100} In 1870, the House refused to allow B. F. Whittemore of South Carolina to take the oath and occupy his seat when he had been reelected after a previous expulsion on the charge of selling appointments to the military academies.\footnote{101} The traditional congressional rationale for the possession of this apparently unlimited power was succinctly expressed by Senator Walter F. George of Georgia:

There has always been a strong opinion that the prohibitions in the Constitution were exhaustive of the grounds on which the Senate would act in excluding a Senator. But I have never thought that that doctrine would be adhered to, because the occasion might arise when someone who was a moral leper and publicly and notoriously known to be such would come here and would say, "I have been elected by my State and here is my certificate and I want to sit here. If this body could not protect its integrity, if it could not preserve itself against that kind of member, then this body would have lost the power to preserve its very life."\footnote{102}

\footnote{96. 93 CONG. REc. 12 (1947) (debate on whether Senator Bilbo of Mississippi was disqualified). See WARREN, op. cit. supra note 83, at 422; Note, 33 VA. L. REV. 322, at 329 n.28 (1947).}
\footnote{97. "[T]hough neither House may formally impose qualifications additional to those in the Constitution, or waive those that are mentioned, they may, in practice, do either of these things... [T]here is no judicial means of overruling their action." 1 WILLOUGHBY, op. cit. supra note 84.}
\footnote{98. For a presentation of some of these seating disputes, see LUCE, LEGISLATIVE ASSEMBLIES 285 (1924); 1 WILLOUGHBY, op. cit. supra note 84, at 608; Note, 33 VA. L. REV. 322, 330 (1947).}
\footnote{99. 1 WILLOUGHBY, op. cit. supra note 84, at 610.}
\footnote{100. LUCE, op. cit. supra note 98, at 286-87; 1 WILLOUGHBY, op. cit. supra note 84, at 608. The House rejected a strenuous argument that Roberts, who possessed all constitutional qualifications, should be admitted and then, if deemed undesirable, expelled (expulsion requiring a two-thirds vote, U.S. CONST. art. I, § 5). LUCE, op. cit. supra note 78, at 608.}
\footnote{101. LUCE, op. cit. supra note 98, at 287.}
\footnote{102. 88 CONG. REc. 2390 (1942). In essence, this view makes the personal characteristics of each member an additional matter for the Congress to "judge." See POMEROY, CONSTITUTIONAL LAW 143 (Bennett ed. 1886).}
Of course, the same general approach applies to state legislatures. There appear to be no reported decisions holding that a legislative body is powerless to bar a member-elect for reasons other than a failure to meet constitutional requirements, and the cases often contain assertions such as this: “The authority to be ‘judge of the . . . qualifications of its own members,’ does not limit their power; they are judges in other respects, in all respects.” An illustrative case involves the expulsion of five Socialist members of the New York Assembly in 1920. Because the New York Constitution does not specifically give the legislature expulsory power, the assembly employed the provision specifying that each House was the judge of the qualifications of its members. A special committee of the Association of the Bar of the City of New York, headed by Charles E. Hughes, argued for the “absolute liberty of electors . . . to choose . . . any person, who is not made ineligible by the Constitution.” However, after a long controversy the Socialists were expelled.

Of course, the legislature’s power to judge qualifications is to be distinguished from its power to judge elections and to expel members. Obviously, this latter authority does not include the legislative imposition of personal qualifications as a prerequisite for being seated. In exercising the power to judge elections, the legislature merely determines the winner of the election in question, taking into account any irregularity or illegality involved. For instance, the United States Senate excluded from its membership Frank L. Smith of Illinois, and William S. Vare of Pennsylvania on the ground that their 1926 elections had been tinged with fraud because of excessive political donations and expenditures. The power of expulsion, on the other hand, often requiring more than a mere majority vote to be effective,
primarily concerns character and acts relating to the dignity of the body and the due performance of its functions. Logically speaking, it refers to an act of a legislator during his term of office which adversely affects the discipline, decorum, or functions of the legislature. Therefore, expulsion generally is not a determination as to lack of qualifications, but is a disciplinary device. As an example, in 1797 William Blount of Tennessee was expelled from the Senate for attempting, during his Senate term, to incite certain Indians to act against the best interests of the United States.

Policy arguments favoring an expansive interpretation of the legislature's power to judge the qualifications of its members center around the basic idea of that body's right of self-protection. The legislative body may exclude members for any reason in order "to preserve its very life." As one observer notes: "[T]he weight of common sense is with those who argue for plenary powers. Is it not absurd to suppose that an assembly may not exclude an idiot or a leper?" The judicial branch of government, as an expression of its confidence in the legislature, should not interfere with the legislature's unfettered exercise of discretion. The only restraint should come from the legislator's constituents, who theoretically will react adversely if they feel that legislative judging of qualifications has actually become unauthorized legislative creation of qualifications.

Proponents of a stricter construction of the constitutional provisions involved argue that the framers of those provisions did not intend that the legislature's judging of qualifications would leave it free to disqualify for reasons other than failure to meet constitutionally-enumerated qualifications.

110. See 1 WILLOUGHBY, op. cit. supra note 84, at 611.

111. See BECK, op. cit. supra note 87, at 51. "The power of expulsion . . . is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent and disorderly, or in the habit of using profane, obscene, and abusive language." Hiss v. Bartlett, supra note 103, at 473.

112. LUCE, op. cit. supra note 98, at 285.

113. "We believe a state legislative body necessarily possesses this same inherent power of self-protection if the separation of powers doctrine is to have any real meaning . . . . The qualifications . . . . of legislators in the Georgia Constitution are not all inclusive." Bond v. Floyd, 251 F. Supp. at 341-42.

114. See note 104 supra.

115. LUCE, op. cit. supra note 98, at 207.

116. Because of the unavailability of overruling of legislative action by courts of the same jurisdiction, a practical statement of the problem might be whether a legislative body ought to add personal qualifications for membership, and not whether it may add such qualifications. See 1 WILLOUGHBY, op. cit. supra note 84, at 608; Gooch, supra note 98, at 671. Of course, a different situation arises when a federal court reviews state legislative action. Bond v. Floyd, 251 F. Supp. at 340.

117. See POMEROY, op. cit. supra note 102, at 143.
In regard to the United States Constitution, a scholar asserts:

"The Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship, and race."

This assertion is strengthened by the fact that the power of expulsion, which may be utilized for reasons other than failure to fulfill constitutional qualifications, is functionally distinct from the power to judge qualifications, and generally requires more than a mere majority vote to be effective. Exclusion predicated upon the personal character or acts of the parties results from a failure to distinguish properly the two powers. However, the basic policy reasons for the position that the legislature's judging of the qualifications of its members must be confined to those qualifications enumerated in the constitution, revolve around the idea that the electorate has the untrammeled right to elect whom it pleases. Therefore, the legislative body cannot insist upon the right to disapprove elected members for a non-enumerated reason.

In speaking of the United States Congress, one proponent of this restrictive view says:

"To hold that 'qualifications' has a broader meaning, and invests the right in either House to determine whether the chosen representative of the State is in other respects fit to take his seat, would be a nullification of the right of the people in each state to select their representatives... It is preposterous to claim that the word 'qualifications' means intellectual or moral fitness, for if this were so, the States would simply nominate a representative in the Senate, and the Senate would pass upon his fitness..."

119. Warren, op. cit. supra note 82, at 421. "[T]he maxim expressio unius est exclusio alterius would seem to apply." Ibid. See notes 85 and 89 supra.
120. See Beek, op. cit. supra note 87, at 49-50. Beek also asserts that it required a constitutional amendment, U.S. Const. amend. XIV, § 3 ("No person shall be a Senator or Representative... who, having previously taken an oath, as a member of Congress... to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."), to invest the Senate with the right to exclude anyone, even though he had engaged in a war to destroy the United States. Id. at 52-53.
122. Beek, op. cit. supra note 87, at 49. "This clause said that each House shall be the 'judge'—not that each House should fix...—of the elections, returns and qualifications... To judge a qualification... is not to determine whether a man is intellectually of a certain capacity, or whether morally he is so deficient... that you do not care to have his companionship in the Senate. To judge... is merely to determine whether certain qualifications which have been theretofore made the legal standard of eligibility have been complied with." Beek, May it Please the Court 290-91 (McGuire ed. 1930).
The electorate should be the final judge of a candidate's fitness for office, and if the electorate's choice meets those standards enumerated by the constitution, this choice should be binding upon the legislature even though the representative-elect is a racist, socialist, or ne'er-do-well. Any vesting of uncontrollable authority is certainly unwise because it gives the legislature a source of tremendous power. This power "to go at large in a determination of whether Representative-Elect 'A' meets undefined, unknown or even constitutionally questionable standards shocks not only the judicial, but also the lay sense of justice." The ultimate control over the legislature by its constituents can not effectively prevent the legislature, in its exercise of this exclusionary power, from denying representation to certain segments of the populace.

This very question was of importance in Bond v. Floyd. The majority decided that "the qualifications and the disqualifications of legislators in the Georgia Constitution are not all inclusive." Therefore, the legislature could exclude Julian Bond from membership even though he fulfilled all constitutional qualifications. The dissent did not reach a federal constitutional question because of its belief that the legislature was not empowered to "find a lack of qualifications beyond those expressly provided for in the Constitution itself . . ."

V. CONCLUSION

The significance of this problem is underscored by the fact that it touches three basic relationships, each of great importance to our governmental system: the relationships of (1) the judiciary to the legislature, (2) the federal government to the state governments, (3) and the electorate to the legislatures. The competing interests in these relationships must be properly balanced. For instance, the legislature, in judging the qualifications of a representative-elect, must maintain a careful balance between its interest in excluding odious characters and the electorate's interest in being represented by the person it chooses. The federal judiciary must balance the right of state

123. In commenting on the attempt to exclude Senator Bilbo of Mississippi from the United States Senate, an observer noted: "No doubt Senator Bilbo's speeches are offensive to many, but the views he expresses are not original. His evident popularity with the people of Mississippi indicates that he to some extent voices their sentiments. He has a right to be their spokesman." Note, 33 Va. L. Rev. 322, 335 (1947).
125. For a criticism of the Supreme Court's placing all power in an analogous area in non-judicial hands, see 1 Schwartz, Powers of Government 73 (1963). Also, the effectiveness of "legislative justice" has been questioned. Note, 33 Va. L. Rev. 322, 333-34 (1947).
127. Id. at 352.
governments to maintain their own separation-of-powers concepts against the rights guaranteed to individual citizens by the federal constitution. And, the judiciary must not let its zeal for doing justice lead it into those “political” areas reserved by the constitutions for the other branches of government. Most importantly, all parties should recognize the fundamental purpose of the constitutional provisions enumerating qualifications for legislators: a representative legislature functioning in an orderly manner. It is to this end that all judging of qualifications should be directed.

APPENDIX

Sec. 560. Each House of a Legislature Is the Judge of the Election and Qualification of Its Members

1. By constitutional provision, each house of the legislature is made the sole and exclusive judge of the election, and qualifications of its members.
2. The exclusive power to judge the qualifications and elections of its members is fixed in each house and cannot by its own consent or by legislative action be vested in any other tribunal or office.
3. Under constitutional provisions that each house shall have the power to judge the qualifications and elections of its members, its determination is conclusive and not subject to review, even by the judiciary.
4. In reviewing the eligibility of a member, the body must comply with the relevant constitutional provisions and may not add a qualification not found in the constitution unless a statutory qualification is enacted pursuant to constitutional authority.
5. Each house of a state legislature is the sole judge of the election of its members; upon a contest respecting election of one of its members, the house may appoint a committee to take testimony and report the facts and the evidence to the body.
6. The right to assume the functions of a member, and to participate in the preliminary proceedings and organization, depends wholly and exclusively upon the election returns or certificate of elections.
7. The right of a member-elect to take the oath may be challenged. Such a challenge usually occurs at the time of the organization of a legislative body. Motions and debate are in order on the questions involved in a challenge, and other business may intervene by unanimous consent.
8. The preliminary steps, as well as any subsequent proceedings, of the state legislatures are more or less analogous to the corresponding proceedings of the House of Commons. According to practice, the members elected make their appearance at the time and place appointed and proceed to organize themselves as a legislative body, in the manner regulated by state constitutional provision, adopted rules, custom and traditions, and state statute.
9. The members of a house of a state legislature, having taken the oath necessary to qualify them to discharge the functions of members, are all precisely equal among themselves and have an equal right to participate in all the proceedings of the body, so long as their election is not set aside or until they cease to be members of the body.

See also Sec. 52, Equality of Members.

10. Notwithstanding a member's right to participate, practices in some of the states require a member to be recused from participating in a question involving the right of that member to a seat.
11. In view of the constitutional provision that each house shall be the judge of the qualifications; and election of its members, the courts are without authority to determine whether a legislator had the right to hold office. This right to judge the qualifications of its members includes the right to decide finally whether or not a member has become disqualified during a term of office; this decision is not subject to judicial review.
12. The judiciary will not entertain a proceeding to determine the rights of one who has been seated by a legislative body.
13. A member of a legislature cannot be removed from office under a general law relating to
the removal of "any officer." However, a member who holds a seat in the legislature and thereafter accepts an appointment to an incompatible office thereby subjects that seat to being declared vacant.

14. The authority of a house of a legislature to pass upon its membership is a continuing power, and the question of the election and qualification of members is never finally decided, in the sense that a decision is conclusive upon the house, until final adjournment. A member at any time may be seated or unseated upon the same facts.

15. A member excluded from office by a body may not be precluded from a seat after a subsequent election solely because of a prior violation of an election law, since to do so would create an additional qualification for office. Refusing to seat (excluding) an otherwise duly elected and qualified member based on the exercise of a right guaranteed to a person by the constitution has been subject to review by the judiciary.

Sec. 560: Cushing's Legislative Assemblies, Sec. 1240; Foster v. Harden (Miss., 1988); Hinesly v. Todd (Mo. App., 2014).

Sec. 560, Par. 1: State Constitutions: Ala. IV, 51; Alaska II, 12; Ariz. IV, Part II, 8; Ark. V, 11; Calif. IV, 5; Colo. V, 10; Conn. III, 7; Del. II, 8; Fla. III, 2; Ga. III, Sec. IV, 7; Hawaii III, 12; Idaho III, 9; Ill. IV, 6; Ind. IV, 10; Iowa III, 7; Kan. II, 8; Ky. 38; La. III, 7(a); Maine IV, Part III, 3; Md. III, 19; Mass. Part II, Ch. I, Sec. II, 4, Sec. III, 10, Sec. III, 10; Mich. IV, 16; Minn. IV, 6; Miss. IV, 38; Mo. III, 18; Mont. V, 10; Neb. III, 10; Nev. IV, 6; N.H. II, 22, 35; N.J. IV, Sec. IV, 2; N.M. IV, 7; N.Y. III, 9; N.C. II, 20; N.D. IV, 12; Ohio II, 6; Okla. V, 28, 30; Ore. IV, 11; Pa. II, 9; R.I. VI, 6; S.C. III, 11; S.D. III, 9; Tenn. II, 11; Texas III, 8; Utah VI, 10; Vt. II, 14, 19; Va. IV, 7; Wash. II, 8; W.Va. VI, 24; Wis. IV, 7; Wyo. III, 10; Young v. Boles (Ark., 1909); Allen v. Lelande (Calif., 1912); Mills v. Newell (Colo., 1902); Rainey v. Taylor (Ga., 1928); Burge v. Tibor (Idaho, 1964); Kansas v. Tomlinson (Kan., 1878); Harris v. Shanahan (Kan., 1963); Rogers v. Shanahan (Kan., 1976); Louisiana ex rel. O'Donnell v. Houston (La., 1888); Price v. Ashburn (Md., 1914); In re Opinion of the Justices (Mass., 1877); Attorney General v. 7th Senatorial Dist. Bd. (Mich., 1908); Minnesota ex rel. McKusick v. Peers (Minn., 1885); Montana ex rel. Boulaw v. Porter (Mont., 1919); Bingham v. Jewett (N.H., 1891); In re Sherrill (N.Y., 1907); Petition of Knowles (R.I., 1897); Corbett v. Naylor (R.I., 1904); Riddle v. Perry (Utah, 2002); Wyoming ex rel. Sullivan v. Schnitger (Wyo., 1908).


Sec. 560, Par. 3: Bond v. Floyd (U.S., 1966); Allen v. Lelande (Calif., 1912); Fuller v. Bowen (CA Ct App 3rd, 2012); Rainey v. Taylor (Ga., 1928); Reif v. Barrett (Ill., 1934); Auditor General v. Bd. of Supervisors (Mich., 1891); Heller v. Legislature of Nevada (Nev., 2004); Corbett v. Naylor (R.I., 1904).


Sec. 560, Par. 5: Cushing's Legislative Assemblies, Secs. 153, 165; New Jersey ex rel. Salmon v. Haynes (N.J., 1887).

Sec. 560, Par. 6: Cushing's Legislative Assemblies, Sec. 229.

Sec. 560, Par. 8: Cushing's Legislative Assemblies, Sec. 228.
Sec. 560, Par. 9: Cushing's Legislative Assemblies, Sec. 279.
Sec. 560, Par. 11: Fuller v. Bowen (CA Ct App 3rd, 2012); English v. Bryant (Fla., 1963); Raney v. Stovall (Ky., 1962); Cf. Stephenson v. Woodward (Ky., 2005).
Sec. 560, Par. 13: Kansas v. Gilmore (Kan., 1878); New Jersey v. Parkhurst (N.J., 1802).
Sec. 560, Par. 14: Kansas v. Gilmore (Kan., 1878); Montana ex rel. Boulware v. Porter (Mont., 1919).
Senate Procedures in Contested Elections

As it considered election cases over the years, the Senate developed a series of informal precedents to guide its actions. For example, if a senator-elect arrived with credentials that appeared valid on their face and were signed by the proper state authorities, that individual typically would be permitted to take his seat even if a challenge to the election had been filed with the Senate.

Generally, a senator with the proper credentials against whom a challenge had been filed would be seated "without prejudice." Under this arrangement, if a committee investigation later determined that for some reason the individual was not entitled to a seat, he could be "excluded" from the Senate by a simple majority vote, as opposed to having to be expelled, which required a two-thirds majority. On some occasions, the Senate excluded by majority vote a member who had originally been seated. At other times, the Senate voted to require a two-thirds vote to unseat the senator, but in those instances, not even a simple majority voted in favor of exclusion. In a few such instances, election cases hovered on the edge of becoming disciplinary cases when the body considered whether the allegations were serious enough to actually expel an individual or whether only exclusion was warranted. Examples included charges of election corruption and complaints about the actions of a member before he entered the Senate.

Opponents sometimes sought to block a senator's seating by filing allegations with the Senate that the member-elect had engaged in possible criminal or immoral behavior before being elected. Such charges often originated with political adversaries back in the state, and usually the Senate
did no more than refer the matter to a committee for a cursory investigation, on the theory that members should only be required to meet the three basic constitutional qualifications of age, residency, and citizenship.

The Senate did take seriously charges of bribery and corruption in a member's election. The investigations of such allegations sought not only to determine whether the transgressions occurred but also whether the senator knew about or participated in them, and whether enough votes were affected to change the outcome. If the Senate determined that the member was unaware of the bribery or if it affected only a small number of votes, the body usually permitted the individual to keep his seat.

Challengers sometimes contended that, if the winning candidate was ineligible for some reason, the runner-up should be declared the winner. As the Privileges and Elections Committee pointed out in an 1872 case, this was apparently true under English law, where the votes for an ineligible candidate were not counted and the candidate with the next highest number of votes was declared elected. The practice in the United States, however, was to declare such an election void, rather than to grant the seat to a competitor, and the Senate held consistently to this precedent.

In the period after adoption of direct popular election, the Senate faced unfamiliar types of election challenges that required different approaches, and the body gradually developed new standards for handling such cases. For example, the Senate did not wish to step in where legal action in the federal or state courts was appropriate, and it seldom took very seriously the claims of a contestant who had failed to follow these avenues of redress. Similarly, when a losing candidate demanded a recount of ballots, the Senate preferred to become involved only if the state law made no provision for such a recount. Still, in some cases the Senate felt impelled to act, and the sealed ballot boxes were shipped to Washington where staff members, carefully observed by representatives of both candidates, scrutinized the ballots and election records for possible irregularities.
Committee Procedures

Until the mid-19th century, the Senate referred contested election cases to committees specially appointed for the purpose. Then from the 1850s to the 1870s, the Judiciary Committee reviewed such cases. Faced with the overwhelming volume of complicated election cases during Reconstruction, the Senate in March 1871 created a Committee on Privileges and Elections, apparently to relieve the burden on the Judiciary Committee. The Committee on Privileges and Elections handled most contested elections until after World War II.

Beginning in the 1920s and continuing until the 1950s, the Senate often expressed its concern about the way campaigns were financed by establishing a special committee to review campaign expenditures in a particular election year. Occasionally, these special committees supplemented the work of the Committee on Privileges and Elections by reviewing the financial aspects of disputed elections. Although the Senate usually only reviewed cases formally brought before it by the filing of an election contest or charges of campaign irregularities from the state, the special campaign expenditure committees had authority to look into matters they learned about through such informal means as newspaper articles.

In 1947, when the Legislative Reorganization Act consolidated Senate committees and jurisdictions, Privileges and Elections ceased to be a separate committee and became a subcommittee under the Committee on Rules and Administration. While the Senate abolished that subcommittee in 1977, the full Rules Committee continues to be responsible for contested election cases.


Return to Contested Elections
Procedures for Contested Election Cases in the House of Representatives

Updated October 18, 2016
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. 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 I, Section 4, clause 1 (which also provides a residual, superseding authority within Congress to alter such regulations concerning congressional elections). 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.

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.”

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.” 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

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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.


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.


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.\(^7\)

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.


\(^11\) 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)).

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

\[^{14}\] Deschler’s, Ch. 9, §4, at 344.

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


\[^{17}\] 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).

adoption of a resolution instructing that the question of the right to the seat be referred to the committee. 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. 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.

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.”

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. 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.

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.

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

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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.
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.

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. 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.”

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. 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.

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

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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 election 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.”

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.

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.

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.”

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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 definite statement before interposing an answer.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{42}

\textbf{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.\textsuperscript{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

\textsuperscript{36} 2 U.S.C. §383(a).
\textsuperscript{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.”
\textsuperscript{38} 2 U.S.C. §383(b).
\textsuperscript{39} See Tunno v. Veysey, H.Rept. 92-626, supra.
\textsuperscript{40} 2 U.S.C. §383(c).
\textsuperscript{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.
\textsuperscript{42} 2 U.S.C. §385.
\textsuperscript{43} 2 U.S.C. §386.
issuing by judges or clerks of the federal, state, and local courts of record. 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.

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. 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. 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.

Filing of Pleadings, Motions, Depository, 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. 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.

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.

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.” 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

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47 2 U.S.C. §389(b).
50 2 U.S.C. §392(a),(b),(c).
51 2 U.S.C. §392(d),(e),(f).
been different and the contestant would have prevailed.\textsuperscript{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.”\textsuperscript{54} The contested elections statute specifically requires the contestant to have a legitimate claim of “a right to such office,”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{59} It is possible, although unusual, that

\textsuperscript{54} 2 Deschler’s, supra at Ch. 9, §9, p. 362.
\textsuperscript{55} 2 U.S.C. §382(a).
\textsuperscript{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.), Rowl’s Digest of Contested Election Cases, 220-221 (1901); Lowry v. White (50th Cong.), Rowl’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, 101\textsuperscript{st} Cong., 2d Sess. 701 (1992). For a general discussion of qualifications of Members, see CRS Report R41946, Qualifications of Members of Congress.
\textsuperscript{57} U.S. Const., art. I, §2, cl. 4.
\textsuperscript{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.
\textsuperscript{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
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. 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.

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. 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.” 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.

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.”

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.


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.

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.” 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). 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. 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. 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.

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.

**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

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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 FCFA 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 (FCFA) over final right to the seat.”
69 1 Deschler’s supra at Ch. 2, §6, at 132.
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).
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. 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. 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.

Motions adopted in the committee may direct an examination and recount of disputed ballots. 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.

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. 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.” The committee task force then set out procedures and

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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.


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.


77 H.REPT. 99-58, supra, at 12.

operating rules for canvassing votes and examining and counting ballots. 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. 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.

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 determine 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 or may conduct their own recount, if permitted, which may then become the basis of a stipulation upon which the House may act. 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. 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. A party to a contested election case who would claim that the state recount of the

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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).
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.
ballots was in error would have the burden of proof to establish such error before the committee would order a recount.\textsuperscript{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.\textsuperscript{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.\textsuperscript{88} The committee, after voting for a recount, may reconsider its action and determine that such a recount is not necessary.\textsuperscript{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;
- 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.\textsuperscript{90}

\textsuperscript{86} Roy v. Jenks, H.REPT. 75-1521 (1937).
\textsuperscript{87} Moreland v. Schuetz, supra; Peterson v. Gross, H.REPT. 89-1127 (1965).
\textsuperscript{88} Swanson v. Harrington, supra.
\textsuperscript{89} McAndrews v. Britten, H.REPT. 73-1298 (1934).
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 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


\(^92\) 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, 64\(^\text{th}\) 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, 64\(^\text{th}\) 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.

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

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).
104 Id.
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. A resolution disposing of a contested election case is privileged and can be called up at any time for consideration by the House. 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.

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. 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.

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.

Author Information

L. Paige Whitaker
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Acknowledgments

Former CRS legislative attorney Jack Maskell co-authored this report.

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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.
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RE: Willis v. Crumbly election contest proceedings

The following is the final report by the Senate State Agencies and Governmental Affairs committee in regard to the Willis v. Crumbly election contest hearing. By a vote of four (4) to three (3), the committee has recommended Option 3 under the election contest procedures to the full Senate as a benchmark for final action.

Option 3 reads as follows:

(3) If the evidence indicates fraud or irregularities that existed with regard to the June 13, 2006, runoff election did not rise to a level that influenced the results of the election and the respondent was duly elected to the Senate seat in question, the committee shall recommend the respondent maintain his or her current position in the Senate.

Please see the following pages for committee opinions and individual remarks from members of the committee. This concludes committee activity on this issue. The next step will be to bring the committee recommendation to the full Senate for final action at a date to be determined.

Respectfully submitted,

[Signature]

Senator Steve Faris  
Chairman  
State Agencies and Governmental Affairs Committee
Willis v. Crumbly
Election Contest – Committee Report

Senate State Agencies and Governmental Affairs Committee

Chair, Senator Steve Faris
Vice Chair, Senator Gilbert Baker
Senator Ed Wilkinson
Senator Shawn Womack
Senator Randy Laverty
Senator Bobby Glover
Senator Bill Pritchard

April 18, 2008
COMMITTEE REPORT FROM THE STATE AGENCIES AND GOVERNMENTAL AFFAIRS COMMITTEE OF THE ARKANSAS SENATE
Willis vs. Crumbly Election Contest Hearing

On the 25th day of March, 2008, the State Agencies and Governmental Affairs Committee of the Arkansas Senate convened in the Old Supreme Courtroom of the Arkansas State Capitol for the purpose of hearing the election contest between former Representative Arnell Willis and Senator Jack Crumbly for the runoff election of the 2006 Democrat Party Primary in Senate District 16. Senator Jack Crumbly, a member of the committee, was ineligible to participate with the committee due to his status as a party to the case.

The committee was chaired by Senator Steve Faris and included Senators Gilbert Baker, Bobby Glover, Randy Laverty, Bill Pritchard, Ed Wilkinson, and Shawn A. Womack. After two full days of hearings, the testimony concluded, both sides rested their cases, and the committee closed its hearing. The committee has provided for a full transcript of the proceedings for reference and all witnesses involved were duly sworn in prior to testimony.

Pursuant to the rules adopted by the committee for the purpose of this hearing, the committee had four options from which to choose, based on their determination of the facts of the case. Those options were as follows:

FINAL DETERMINATION BY SENATE

At the conclusion of the hearing, the State Agencies and Governmental Affairs committee shall deliberate in a manner consistent with the powers granted to the Senate under the Arkansas Constitution and then issue a written recommendation to the full Senate regarding the resolution of the election contest. The committee shall make one (1) of four (4) recommendations:

(1) If the evidence indicates fraud or irregularities influenced the results of the June 13, 2006, runoff election and the fraud or irregularities rose to a level that would have changed the outcome of the election, the committee shall recommend the respondent be expelled from the Senate seat in question and the petitioner be placed in the Senate seat in question;

(2) If the evidence indicates fraud or irregularities influenced the results of the June 13, 2006 runoff election to the extent that it is impossible to determine the true winner of the Senate race, the committee shall recommend the respondent be expelled from the Senate seat in question and the Senate seat be declared vacant;

(3) If the evidence indicates fraud or irregularities that existed with regard to the June 13, 2006, runoff election did not rise to a level that influenced the results of election and the respondent was duly elected to the Senate seat in question, the committee shall recommend the respondent maintain his or her current position in the Senate; or
(4) If the evidence indicates no fraud or irregularities existed with regard to the June 13, 2006, runoff election and the respondent was duly elected to the Senate seat in question, the committee shall recommend the respondent maintain his or her current position in the Senate.

After several days of deliberation in which the committee examined the evidence, reviewed the testimony, and evaluated the law, a conclusion was reached that resulted in a split recommendation to the full Senate. Options number 1 and 4 were eliminated from further consideration because the clear weight of the evidence was inconsistent with the results required for either of these options. Options 2 and 3 were unanimously determined to be the scope of further deliberation from which any ultimate decision would come. Three members of the committee voted to recommend option 2, four members of committee voted to recommend option 3. Attached to this report is the opinion in support of each position. The majority opinion, supporting option 3, was authored by Chairman Faris and joined by Senators Baker, Laverty, and Wilkinson. The minority opinion, supporting option 2, was authored by Senator Womack, and joined by Senators Glover and Pritchard.

The following items were agreed to unanimously by the committee.

a. Fraud and irregularities, which were flagrant in nature, did exist in the election process;
b. There is no evidence that Senator Jack Crumbly personally committed any of the fraudulent or irregular activity in the election process;
c. It is the request of the committee that the United States District Attorney for the Eastern District of Arkansas conduct a full investigation of the fraudulent and irregular activities in this election process and a full review of the evidence before this committee; and
d. It is the request of the committee that the appropriate state agencies, including, but not limited to, the Arkansas State Police and the Arkansas Election Commission, to the fullest extent of their authority, review the fraudulent and irregular activities in this election process and conduct monitoring and oversight of all elections in St. Francis County until such time as they are convinced that all procedures required by law are being followed by election officials as it pertains to conducting the elections, handling the ballots, and counting votes;

This report concludes the action of the State Agencies and Governmental Affairs Committee of the Arkansas Senate as it pertains to the election contest In RE: Willis vs. Crumbly.
Opinion in support of option 3:
Written by Chairman Steve Faris and joined by Senators Gilbert Baker, Randy Laverty, and Ed Wilkinson

Option 3 states as follows:

(3) If the evidence indicates fraud or irregularities that existed with regard to the June 13, 2006, runoff election did not rise to a level that influenced the results of election and the respondent was duly elected to the Senate seat in question, the committee shall recommend the respondent maintain his or her current position in the Senate.

Four members of the committee voted in support of option 3. It was clear from the facts and evidence before the committee a very large degree of fraud and irregularities did in fact occur during the course of the election in question. There is no dispute some votes cast in this election were cast in either a manner not conforming to the requirements of law or were the subject of forgery.

The responsibility this issue has placed upon us as committee members is one we have approached with the highest degree of seriousness and scrutiny. With this in mind, it is our opinion the evidence, albeit compelling, did not rise to the level of influencing the outcome of the election to the point of absolute or comfortable certainty as to changing the outcome as certified by the Secretary of State.

Therefore, although there are inconsistencies in the number of ballots and stubs existing for both the absentee and the early voting boxes, we believe these inconsistencies do not rise to the level of which we can discount these votes. To overturn the outcome of the election, to discount votes of electors, and to recommend the removal of a duly sworn Senator from office are issues of extremely serious consequence which, in our opinion, require a very high standard of proof. With this in mind, we have concluded such a standard of proof has not been met to the degree of certainty for us to make such an assumption.

However, the evidence and testimony presented during our hearing shows a blatant and flagrant disregard for the democratic process of election as guaranteed by the Constitution and laws of our State and Nation. Such disregard by election officials cannot be tolerated and overlooked without the total compromising of the electoral process and the sacred right of every citizen to vote.

Furthermore, it is our opinion the evidence and testimony presented during our hearing unveils a chilling and alarming pattern of disregard for state election laws in a cavalier and irresponsible manner. Each election official responsible should be held fully accountable for their actions in the proper judicial forum. Until such accountability is seriously and aggressively pursued, there is little doubt these type situations will not only continue but will in all likelihood worsen.
Opinion in support of option 2:
Written by Senator Shawn A. Womack and joined by Senators Bobby Glover and Bill Pritchard

Option 2 states as follows:

(2) If the evidence indicates fraud or irregularities influenced the results of the June 13, 2006 runoff election to the extent that it is impossible to determine the true winner of the Senate race, the committee shall recommend the respondent be expelled from the Senate seat in question and the Senate seat be declared vacant;

Three members of the committee voted in support of option 2. The official results of the election were certified with Crumbly defeating Willis by 68 votes. We believe that based on the evidence before us, there is proof in the evidence submitted of at least 69 absentee votes that were not cast in accordance with the statutory requirements for the absentee voting process. Pursuant to the holding in Womack vs. Foster, 340 Ark.124, 149,8 S.W.3d 854, the standard for judging votes cast by absentee ballot is a standard of strict compliance with the statutory requirements as they pertain to the application for the absentee ballot and the ballot itself. Therefore, it is our opinion that those 69 ballots must be thrown out.

In addition to the absentee ballots that were improperly cast, we believe there were at least 18 votes that included some element of forgery for which there was no contrary evidence or suitable explanation provided by the attorney for the respondent. Both the counts of at least 69 ballots in non-compliance with the statute and at least 18 absentee votes containing some element of forgery were determined by viewing the evidence in a light most favorable to the respondent. The actual count for both is likely higher. If we stopped at that point and did not consider any other evidence, it is our opinion that there are a sufficient number of votes in question to make it impossible to determine the true winner of the Senate race as is the declared standard adopted by the committee in option 2.

In our opinion, it is a legitimate function to consider additional items in evidence beyond the proof established with regard to the absentee ballots discussed previously. There was evidence presented by the attorney for the petitioner indicating a discrepancy in at least 781 other instances pertaining to ballots and stubs. Within this count are the following:

- Early ballots cast exceeding the number officially accounted for by 99 ballots
- Early ballots cast exceeding early voting stubs by 511 ballots
- 72 stubs for early voting that were in three separate sequences, rubber banded together and laid flat inside the stub box (The standard procedure was for the poll worker to fold the stub several times and push it through a small opening in the top of the box)
- 97 stubs for absentee ballots in excess of the number of absentee ballots
- 2 absentee ballots that were properly cast for the petitioner and placed in a properly filled out envelope and then removed and placed in a blank envelope and not counted
These discrepancies were presented without being significantly contested by the attorney for the respondent. These discrepancies are great cause for concern for the democratic process and add to the legitimacy of the point argued by the attorney for the petitioner that the vote was manipulated by the “stuffing” of extra ballots into the boxes or removal of unfavorable ballots from the boxes.

We take our responsibility as members of this committee very seriously. We do not take lightly the consequences of our decision to recommend option 2, which if accepted by the full Senate, would result in the removal of our colleague from office. This decision is made more difficult by the fact that we don’t believe that Senator Crumbly personally contributed to the wrong doing. However, it is our view that the weight of the evidence was extremely significant to the point that the only conclusion that we can make is that the fraud and irregularities committed in this election did in fact rise to a level that it made the true outcome of the election impossible to determine. For these reasons we recommend to the full Senate that option 2 be followed, that the respondent be expelled from the Senate seat in question, and that the seat be declared vacant.
Each Senator was given the opportunity to prepare individual remarks for inclusion in the record if they so desired.

The following pages contain statements from Chairman Faris and Senators Glover, Baker, Womack, and Pritchard.
FINAL COMMENTS REGARDING THE
WILLIS VS. CRUMBLY ELECTION CONTEST

Nothing I have been involved in as a member of the Arkansas General Assembly has been more difficult than this task. As these proceedings end, I would like to offer my thanks and gratitude to the members of the State Agencies and Governmental Affairs Committee for the many hours of thoughtful debate and deliberation that brought us to this decision.

As a final note, I must again emphasize the need for a full and complete investigation of the electoral process in St. Francis County. Though it is beyond the scope of our authority, it is imperative the proper authorities weigh in heavily to ensure the people of this area have a clean, above board, and lawful electoral process in the future.

As a former chairman of a county election commission, there is not a doubt in my mind there was blatant and flagrant disregard for the law as applied to various aspects of the electoral process. Actions such as these are criminal in nature and cannot, nor should not, be ignored or overlooked.

Any and all election officials responsible for this situation must be held accountable for their actions. This includes, but is not limited to, the Chairman of the Election Commission and the County Clerk. The root of this problem lies with the individuals who have compromised their duties in a lax and irresponsible manner, with obvious disregard for the law.

Finally, it is difficult to understand how the Prosecuting Attorney can justify not recusing himself as attorney for the election commission in light of the obvious conflict of interest with his primary responsibilities as a prosecutor in this situation. Though not under the purview of our authority, his unwillingness to recuse reflects an unwillingness to cooperate and has to make it difficult to confidently provide a fair and unbiased environment in the proper judicial and investigatory arenas.
To sum it up, if this situation is not addressed quickly and seriously with all available resources, hearings like this may sadly become commonplace as “bad actors” take bolder and bolder steps to circumvent and unduly influence the electoral process.

Senator Steve Faris
Chairman
State Agencies and Governmental Affairs Committee
STATEMENT OF SENATOR BOBBY L. GLOVER
April 16, 2008

As a member of the Senate State Agencies and Governmental Affairs Committee, an awesome and very important responsibility has fallen on my shoulders regarding the Willis vs. Crumbly election contest held in St. Francis County, Arkansas, in 2006.

I have always taken the position throughout the election contest hearing to be objective as to the testimony, the evidence, and reviewing the laws governing the election process, including the conduct, duties, and responsibilities of those holding election positions and any possible violations of any law or laws pertaining to paid campaign workers and/or volunteers.

Upon the conclusion of the election contest hearing, I made it very clear that the credibility of the Arkansas State Senate is at stake in the eyes of our constituents and the citizens of Arkansas.

After hearing undisputed testimony and taking into consideration the evidence presented and, moreover, the lack of evidence that was either missing or destroyed, I have come to the conclusion that the state senate seat election held in St. Francis County between Willis and Crumbly was undoubtedly one of the most corrupted elections ever held in the state of Arkansas.

Following are my specific reasons for making such a statement:

A paid campaign worker for Crumbly stated under oath that she personally handled between 250 to 275 absentee ballots in this election. Furthermore, this worker is known as the "absentee ballot queen" in Forrest City, which is the county seat of St. Francis County. Under Arkansas law, a bearer is only allowed to handle 2 absentee applications and ballots per election.

In carefully examining the absentee applicants and ballots that would not qualify, including forged ballots, a handwriting expert, Dawn Reed, testified under oath that Louise Fields, a paid campaign worker for Crumbly, had made at least 75 entries on
absentee ballot applications and related election records. She pointed out that the same 3 people wrote numerous entries on the documents, which included the name of Louise Fields. Ms. Reed further testified that, in many instances, she could identify at least 40 forged applications and had questions about approximately 250 absentee applications as to their legitimacy.

I would like to point out that the official results of the election that was certified gave Crumblly 68 votes over Willis. Thus, the number of absentee votes that were found to be forged would far exceed the 68 votes giving Crumblly the win.

Although these facts alone are enough to make it impossible to determine the true winner of the Senate race, unfortunately, there is much more evidence to consider.

There were 103 absentee votes that undeniably did not meet the statutory requirements, including the forged absentee ballots. In addition, the evidence showed that:

1) 99 early voting ballots were missing;
2) 511 early voting stubs were missing;
3) 72 stubs for early voting were found in 3 separate sequences, rubber banded together laying flat inside of a stub box; and
4) There were 97 more absentee stubs than ballots, and 2 absentee ballots were found in an unmarked envelope in the county clerk's office that had not been counted.

A poll worker, B.J. Griffith, testified she found a box of early voting ballots in a shabby cardboard box. A ballot stub box was found in a janitor's closet between the wet box and the brooms. Griffith also testified she was one of three who hand counted the ballots and that they found 178 missing early voting ballots when compared against the certified election results.
Taking all of these totals into consideration, now you have over 900 questionable ballots that places the Willis vs. Crumbly election in jeopardy to the extent that there is absolutely no way, under any circumstances, that a legal election was held in this matter because of the blatant and proven disregard of election laws.

As a result of outright fraud and illegal irregularities, I have joined with Senator Shawn Womack and Senator Bill Pritchard in their opinion that the evidence is clear that fraud and irregularities influenced the results of the June 13, 2006, run-off election. Further, to the extent that it would be impossible to determine the true winner of the Senate race, I recommend that the respondent be expelled from the Senate seat in question and such seat be declared vacant. This same recommendation would stand if Mr. Willis were in the seat instead of Mr. Crumbly, under the same circumstances.

I also want to point out that, apparently, all the corrupt practices involved in this election were conducted (1) in the courthouse by Mr. Frederick Freeman, serving as St. Francis County Election Commissioner Chairman, and (2) a voting precinct at a church in Forrest City which allowed unregistered voters to cast a ballot.

It should be noted that, in my opinion, this cloud of dishonest behavior by no means implicates the law-abiding citizens of Forrest City and St. Francis County, who deserve much better. For that reason, steps must be swiftly taken to end these unethical practices in elections.

In conclusion, I have always considered myself being a friend of Mr. Crumbly and Mr. Willis equally. While I do not see any handprints of Mr. Crumbly on the election documents or evidence that was present, I truly believe that, without a doubt, both paid and unpaid supporters of Mr. Crumbly showed that they would stop at nothing to have their candidate elected as State Senator. Further, I would like to reiterate that, in order for the state Senate to remove the cloud that is hovering over it as a result of these fraudulent election practices and maintain the credibility that is incumbent upon us, I
feel it is necessary to support the expulsion of Mr. Crumbly as a State Senator and to ask the governor to call a special election to fill the empty seat.

Sincerely,

[Signature]

Senator Bobby L. Glover

BLG/slfl
April 16, 2008

The Senate State Agencies Committee was given a very difficult and serious task. We were charged with trying to determine the accuracy of an election that occurred almost two years ago.

As we listened to sworn testimony and reviewed various documents and facts, it was obvious that there were many problems and discrepancies throughout the voting process. Activities of those charged with oversight of the election process raised multiple concerns. Hopefully, improvements of oversight and implementation for future elections will occur as a result of the hearings that have been held.

In my opinion, the evidence presented did not verify fraud to a level that I could definitely determine that the election outcome should be invalidated.

Respectfully Submitted,

[Signature]

Senator Gilbert Baker, Vice-Chairman, State Agencies Committee
April 17, 2008

To Members of the Arkansas Senate
In RE: The Willis vs. Crumbly Election Contest

Dear Colleagues:

It is with a somber attitude that I write today to advise you of my position in the Willis vs. Crumbly matter. As a point of full disclosure, I entered the House of Representatives as a freshman member in 1999 with then Representative Arnell Willis and served two terms with him in the House. I have served for seventeen months in the Senate with Senator Jack Crumbly since voting to seat him as a member in November of 2006. In fact, I advocated to many of you that he be seated, as a matter of process, based on the best information about the then certified election that was available to us at the time. I have come to know both men to be honest and capable legislators.

As a member of the Senate State Agencies and Governmental Affairs Committee, I have taken my charge to be a fair arbiter of the facts in this case very seriously. Through the course of these proceedings I have made every effort to completely disregard any relationship I may have enjoyed with either party, as well as any information that may have been in the public domain but outside the scope of evidence presented. My focus was on the evidence presented by the parties, the credibility of the evidence and witnesses involved, and the degree to which the opposing party contested the evidence presented.

In preparation for this hearing, a list of four options was adopted by the committee and presented to the parties so that all involved were fully aware of the possible outcomes as they related to the findings of fact. With that information at hand, the committee members, the parties, and the attorneys for the parties knew the standards that would be used and the thresholds that had to be met for each possible outcome.
It should be noted that although this is a multi-county Senate district, all evidence in this hearing was limited in its scope to St. Francis County, the home county of Senator Crumbly. It should also be noted that this case comes to the committee nearly two years after the election in question because both parties failed to properly raise the issue of jurisdiction in the court proceedings until after the second remand from the Supreme Court on other issues, thereby causing this delay.

Upon hearing all witnesses and accepting all evidence, the public hearing closed and the committee met extensively in deliberations to weigh the evidence, make our findings of fact, and apply the law in accordance with our findings and the adopted standards. It quickly became clear that the threshold for finding in favor of option 1 had not been met by Mr. Willis. Option 1 would have required sufficient proof that any fraud or irregularities that did exist rose to the level of actually changing the outcome of the election in favor of Mr. Willis. That standard simply was not met by Mr. Willis and frankly would have been nearly impossible to meet given the secret ballot provisions that exist for voters. Similarly, in light of the overwhelming evidence indicating both fraud and irregularities in this election, option 4 was not seriously considered.

Our opinion in support of option 2 cites the evidence upon which we relied in concluding that the outcome of the election was indeterminable. The certified vote total declared Senator Crumbly the winner by 68 votes. It is my opinion that at a bare minimum there is proof of 69 absentee ballots or associated applications which failed to meet the standard as clearly set out in the statute. This number is concluded by giving all benefit of the doubt to the arguments of Senator Crumbly. The actual number is likely significantly higher.

It is important at this point to differentiate between absentee ballots and other ballots. Any ballot cast at a polling place or at an early voting site, is done in the presence of trained poll workers and under the supervision of the election commission or clerk of the county. The process is routine, open, and public so that the opportunity for fraud or manipulation of the ballot or the stub in greatly diminished. An absentee ballot on the other hand is voted outside of the presence of any trained worker or neutral observer thereby increasing the opportunity for fraud or manipulation of either the application for the ballot or the ballot itself. The unwitnessed and unguarded absentee ballot is held to a higher standard in the law, as it should be, to reduce the risk of behavior that would jeopardize free, fair, and open elections.

This higher standard is laid out in specific terms in the statutory provisions passed by the legislature and is confirmed in the holding in the Womack (no relation) case that is cited in our opinion. In the Womack case, the Arkansas Supreme Court recognized the higher standard that the legislature applied to absentee ballots and ruled the proper measure to use in determining the validity of an absentee ballot or an application therefore is a standard of strict
compliance with the statutory requirements. Any absentee ballot or application which is not completed in strict compliance with those higher standards must be disregarded and not counted in the election.

In addition to the absentee ballots that should be disregarded for not being properly cast, there are at least 18 absentee ballots that the evidence shows contained some element of forgery and should be thrown out as well. Again, the 18 is figured by viewing the evidence in a light most favorable to Senator Crumbly. In this category, we made an assumption that all potential forged absentee ballots that were contested by Senator Crumbly were in fact not forged. In light of the credibility of the evidence and testimony presented on both sides as to this point of forgery, it is likely that the number actually does exceed 18.

Combined, these two categories provide for at least 87 votes from St. Francis County that should be disregarded. This exceeds the overall margin of the election. Given the secret ballot nature of our elections in Arkansas following the changes that removed the identifying numbers from the ballots a few years ago, it is not possible to determine for which candidate the invalid votes were cast even though we can identify the voters in these two categories.

In addition to these 87 invalid absentee votes, there are 779 instances laid out in our opinion that have a problem relating to the reconciliation of ballots and stubs and evidence of two absentee votes properly cast for Mr. Willis, which were removed from the properly filled out envelope and placed in a blank envelope and not counted. As an accounting function and as a verification function, the number of ballots cast should match the number of stubs presented. The very purpose of this reconciliation is to be a safeguard against the manipulation of elections by those who would either stuff extra votes into a ballot box in favor of a candidate or remove votes from a ballot box to harm a candidate. This type of manipulation in favor of Senator Crumbly and to the detriment of Mr. Willis has been alleged in this case and is supported by credible evidence.

Mr. Willis presented evidence indicating the lack of reconciliation between stubs and ballots as laid out in our opinion and that evidence was not seriously contested by Senator Crumbly. Furthermore, Mr. Willis makes a strong case that there was both motive and opportunity on the part of the Chairman of the Election Commission, a supporter of Senator Crumbly, to engage in this type of manipulation.

With the 779 unreconciled ballots and stubs, the two improperly discarded absentee votes and the 87 invalid absentee votes, there are 868 instances of problematic votes cast in this election; 800 more than Senator Crumbly’s declared margin of victory. With the bulk of the weight of my decision given to the absentee problems, I concur that these other issues are valid for
consideration as well. Therefore, I find that as a matter of fact, the true winner of the Senate race cannot be conclusively determined. When I apply the law to this finding of fact and consider the standards adopted for these proceedings, I am left with no choice but to recommend option 2 be adopted by the full Senate, Senator Crumbly be expelled from the Senate, and the Senate seat be declared vacant.

I do not take this recommendation lightly in the first place, but regrettably this action is even more difficult because I do not believe there is any proof before us that Senator Crumbly committed, encouraged, or condoned, any of the fraudulent and irregular activities that occurred, although he was the ultimate beneficiary. Senator Crumbly is a victim in this case from the standpoint that his reputation has been called into question and damaged and the legitimacy of his status as a Senator is in doubt. Mr. Willis is also a victim in this case because although there is a strong possibility that he may have been the actual winner of the election, his charge that it was stolen from him, while appearing credible, cannot be proven conclusively.

The most unfortunate victims however are the citizens of District 16 and the State of Arkansas. The thousands of voters who properly cast there ballots in favor of the candidate of their choice have had this election stolen from them to the point that, regardless of which candidate they supported, their legitimate actions of participating in democracy are in doubt because of the illegitimate actions of others. If the bad actors in this case are left free to act again, what does that do to future elections in this county, in this district, or in a statewide election? How can we as citizens and voters have confidence that our votes count and are properly counted when there are those among us, some in a position of trust, that put all of these things in doubt?

There have long been anecdotal indications of a culture of corruption in the election processes in this part of the state. The facts before us in this case certainly do nothing to dispel those indications. By allowing the absentee ballots to be cast the way they were, by not properly reconciling the ballots to the stubs and making a proper accounting of the actual votes cast in this election, and by failing to cooperate and follow up with any serious investigation in this case, the elected and appointed officials involved in this process have miserably failed to serve the very voters that they are sworn to serve. We cannot be certain if the problem in this case is fraud or incompetence or both, but clearly the problem is deep and systematic within St. Francis County.

Respectfully submitted,

Shawn A. Womack
State Senator
The Courts refusal to hear this matter in a timely fashion has put this body in an extremely difficult position. We should have been deciding this issue some 18 months ago, before Jack Crumbly was seated as a member of the 86th General Assembly, but that was not our choice and the timing does not change the facts.

Our charge was to determine was there fraud or irregularities in the election and if yes, to what extent did these actions affect the outcome of the election.

After two days of sworn testimony (during which I took 40 pages of notes), many hours of committee deliberation, and many more hours of debating with myself, I have reached the following conclusions based on the facts without regard to personal feelings or personalities:

There was evidence of many substantial instances of fraud and irregularities which included forgery, double voting, improper and illegal actions by election officials, mishandling of absentee ballots, failure to reconcile ballots to stubs, and ballots not being properly secured.

No one disputes these facts. The respondent gave no convincing testimony to dispute these allegations and, in fact, agreed that many of the ballots should not have been counted. It has been argued that we do not know if these “Bad Ballots” were cast for Crumbly or Willis. If we did know, then we could adjust the totals accordingly and determine the winner. Since we do not know for whom these ballots were voted, I must concur with the minority opinion that “it is impossible to determine the true winner in this race”.

I believe that Jack Crumbly was as shocked as the rest of us as to the magnitude and the volume of these wrong doings. There was no evidence presented that Jack Crumbly was guilty of any wrong doing. But our charge was not to find him guilty or innocent, but rather to determine if the election was legitimate. We now know that it was not.

If Jack Crumbly were to resign and call for a new and fair election, I believe the voters would reward him for this honorable and courageous action by electing him to the Senate.
It is a difficult and painful decision for me and my fellow Senators to remove a colleague from office but the charge to us is clear. (Option #2) "If the evidence indicates fraud or irregularities influenced the results of the June 13, 2006 run-off election to the extent that it is impossible to determine the true winner of the Senate race, the committee shall recommend the respondent be expelled from the Senate seat in question and the Senate seat be declared vacant."

After studying all the facts, careful deliberation, and praying for guidance, I must recommend Option #2 to the full Senate.

Respectfully submitted,

Bill Pritchard
Senate District 35
Resolved by this House:

1. That the committee on contested elections, appointed pursuant to Rule 19 of the House Rules, report to the clerk of the House, on or before the close of business on February 4, 2019; that the Speaker of the House appoint the chairperson of the committee; that the chairperson of the committee have the power to compel the attendance and testimony of witnesses by subpoena, require the production of any necessary records, books, papers or other documents, and to administer oaths to witnesses before the committee; and that the joint committee on legislative management provide to the committee on contested elections such staff and facilities, including administrative personnel, supplies and equipment, that the committee on contested elections may require to discharge its duties.
Rules of the Connecticut House

19. At the opening of each session a committee on contested elections, consisting of four members, at least two of whom shall be members of the minority party in the House, shall be appointed by the speaker to take into consideration all contested elections of the members of the House and to report the facts, with their opinion thereon in a manner that may be directed by House resolution.
Illinois

House Rule 83. Election Contests and Qualifications Challenges.
(a) An election contest places in issue only the validity of the results of an election of a member to the House in a representative district. An election contest may result only in a determination of which candidate in that election was properly elected to the House and shall be seated.
(b) A qualifications challenge places in issue only the qualifications of an incumbent member of the House under the Constitution, or the legality of an appointment of a person as a member of the House to fill a vacancy. A qualifications challenge may result only in a determination of whether a member of the House is properly seated.
(c) Election contests and qualifications challenges shall be brought and conducted as provided in these Rules.
(d) If an election contest or qualifications challenge is filed with the Clerk, the Speaker shall create an Election Contest or Qualifications Challenge Committee, as the case may be, within 3 legislative days by filing a notice with the Clerk. The creation of any committee under this Rule shall be governed by Rule 10. The election contest or qualifications challenge shall be automatically referred to the Election Contest or Qualifications Challenge Committee, as the case may be. For purposes of this Article, the term “committee” means only the Election Contest or Qualifications Challenge Committees created under this Rule. This subsection may not be suspended.
(e) The committee may adopt rules to govern election contests and qualifications challenges, but those committee rules must be consistent with these Rules, must be filed with the Clerk, and must be made available to all parties and to the public. Any committee rule shall be subject to amendment, suspension, or repeal by House resolution.

House Rule 84. Initiating Election Contests.
(a) Election contests may be brought only by a registered voter of the representative district or by a member of the House.
(b) Election contests may be brought only by the procedures and within the time limits established by the Election Code. Notice of intention to contest shall be served on the person certified as elected to the House from the representative district within the time limits established by the Election Code. The requirements of this subsection apply to a member of the House appointed to fill a vacancy the same as if that member had been elected to the House.
(c) Within 10 days after the convening of the House in January following the general election contested, each contestant shall file with the Clerk a petition of election contest and shall serve the petition on the incumbent member of the House from the representative district. A petition of election contest shall allege the contestant’s qualifications to bring the contest and to serve as a member of the House, that he or she believes that a mistake or fraud has been committed in specified precincts in the counting, return, or canvass of the votes, or that there was some other specified irregularity in the conduct of the election in specified precincts. A petition of election contest shall contain a prayer specifying the relief requested and the precincts in which a recount or other inquiry is desired. A petition of election contest shall be verified by affidavit swearing to the truth of the allegations or based upon information and belief, and shall be accompanied by proof of service on all respondents.
(d) A notice of intent to contest may not be amended to cure a defect under the statutory requirements. A petition of election contest, if filed and served after the notice of intention to contest, may not raise points not expressed in the notice.

(e) The incumbent member of the House from the representative district is a necessary party to the initiation of an election contest.

House Rule 85. Initiating Qualifications Challenges.

(a) Qualifications challenges may be brought only by a registered voter of the representative district of the representative challenged or by a member of the House.

(b) Qualifications challenges must be brought within 90 days after the day the challenged member takes his or her oath of office as a member of the House, or within 90 days after the day the petitioner first learns of the information on which the challenge is based, whichever occurs later.

(c) A qualifications challenge shall be brought by filing a petition of qualifications challenge with the Clerk, and by serving a copy of the petition on the respondent member of the House. The petition must be accompanied by proof of personal service upon the respondent member and must be verified by affidavit swearing to the truth of the allegations or based upon information and belief. A petition of qualifications challenge shall set forth the grounds on which the respondent member is alleged to be constitutionally unqualified, or on which his or her appointment to the House is claimed to be legally improper, the qualifications of the petitioner to bring the challenge, and a prayer for relief.

House Rule 86. Contests and Challenges; Due Process.

(a) Election contests and challenges shall be heard and determined as expeditiously as possible under adversary procedures wherein each party to the proceedings has a reasonable opportunity to present his or her claim, to present any defense and arguments, and to respond to those of his or her opponents. All parties may be represented by counsel.

(b) Election contests and qualifications challenges shall be heard and determined in accordance with the applicable provisions of the Election Code and other Illinois statutes, the Illinois Constitution, and the United States Constitution. Judicial decisions that bear on a point of law in a contest or challenge shall be admissible in the arguments of the parties and the deliberations and decisions of the committee. Judicial decisions applicable to a point of law or to a fact situation to the committee shall be given weight as precedent.

(c) In addition to notice of meetings required under these Rules, the committee and any subcommittee shall give notice to all parties reasonably in advance of each meeting or other proceeding. The committee shall also give notice of all rules, timetables, or deadlines adopted by the committee. Notice under this subsection shall be in writing and shall be given either personally with receipt, or by certified mail (return receipt requested) addressed to the party at his or her place of residence, and to his or her attorney of record at the attorney’s office if so requested by the party.


(a) All proceedings of the committee and any subcommittees concerning election contests and qualifications challenges shall be transcribed by a certified court reporter. Copies of the transcript shall be made available to the members of the committee and to the parties.

(b) The committee may dismiss an election contest or qualifications challenge, or may determine to proceed to a recount or other inquiry. The committee may limit the issues to be determined in a contest or challenge, except that when a recount is conducted in an election
contest, any precinct timely requested by any party to be recounted shall be recounted by the committee.
(c) In conducting inquiries, investigations, and recounts in election contests and qualifications challenges, the committee has the power to send for and compel the attendance of witnesses and the production of books, papers, ballots, documents, and records by subpoena signed by the Chairperson of the committee as provided by law and subject to Rule 4(c)(9). In conducting proceedings in election contests and qualifications challenges, the Chairperson of the committee and the Chairperson of any subcommittee may administer oaths to witnesses, as provided by law, and for this purpose a subcommittee is deemed to be a committee of the House.
(d) The committee may issue commissions by its Chairperson to any officer authorized to take depositions of any necessary witnesses as may be permitted by law. In recounting the ballots in any election contest, however, no person other than a member of the committee shall handle any ballots, tally sheets, or other election materials without consent of the committee or subcommittee. The responsibility for the actual recounting of ballots may not be delegated.
(e) The committee shall maintain an accurate and complete record of proceedings in every election contest and qualifications challenge. That record shall include all notices and pleadings, the transcripts and roll call votes, all reports and dissents, and all documents that were admitted into the proceeding. The committee shall file the record with the Clerk of the House upon the adoption of its final report. The record shall then be available for examination in the Clerk’s office.
(f) With the approval of the Speaker, the committee may employ clerks, stenographers, court reporters, professional staff, and messengers.

House Rule 88. Adoption of Reports in Contests and Challenges.
(a) All final decisions of the committee regarding an election contest or qualification challenge shall be approved by a majority of the members appointed to the committee and reported in writing to the House. Reports shall include a specific recommendation to the House as to the disposition of the contest or challenge. Final reports following full inquiry on the merits of a contest or challenge shall contain findings of fact and, when necessary, conclusions of law.
(b) Any member of the committee may file a dissent from a report of the committee, a minority report, or a special concurrence with the majority report or with any minority report.
(c) A subcommittee shall report to the committee in writing in the same form as required for the committee report. Subcommittee members may file dissents, reports, and special concurrences.
(d) Reports shall not be adopted by the committee or a subcommittee until a hearing has been held thereon, with notice to all parties and a reasonable opportunity to examine and respond to a proposed majority report.
(e) Reports of the committee shall be filed with the Clerk, reproduced, and placed on the members’ desks, along with any dissents, minority reports, or special concurrences, in the same manner as provided for bills under Rule 39. The report shall be listed on the calendar under the heading “Report of Election Contest” or “Report of Qualifications Challenge”. The report shall be carried on the Daily Calendar for 2 legislative days before any action by the House.
(f) The House shall adopt the majority report or a minority report in an election contest or
qualifications challenge or shall refuse to adopt any report filed and re-refer the contest or challenge to the committee for further proceedings or for a modified report. A report that has the effect of unseating an incumbent member of the House shall be adopted only by the affirmative vote of 60 members elected.

(g) Each party to a contest or challenge shall file with the Clerk of the committee within 10 days after the filing of the final report a detailed statement of attorney’s fees and expenses incurred by that party in connection with the case. The committee shall make recommendations to the House concerning reimbursement of attorney’s fees and the expenses of the parties. The recommendation shall not exceed a sum that is reasonable, just, and proper.
MISSISSIPPI LEGISLATURE

REGULAR SESSION 2016

By: Senator(s) Burton

To: Rules

SENATE RESOLUTION NO. 2

A RESOLUTION TO ESTABLISH THE PROCEDURES TO BE FOLLOWED IN THE ELECTION CONTEST FOR MISSISSIPPI SENATE DISTRICT 37 FILED WITH THE SECRETARY OF THE SENATE BY MELANIE SOJOURNER.

WHEREAS, on December 4, 2015, the Secretary of State certified the election of Bob M. Dearing to Senate District 37 for the 2016-2019 term of office; and

WHEREAS, on December 2, 2015, Melanie Sojourner filed with the Secretary of the Senate a Petition to Contest the Election for Mississippi State Senate District 37 and an Answer to said Petition was filed by Bob M. Dearing thereafter; and

WHEREAS, Section 38, Mississippi Constitution of 1890, provides that each house of the Legislature "...shall judge of the qualification, return and election of its own members"; and

WHEREAS, the Senate has adopted no rule establishing procedures to govern election contests of Senate seats, and the Mississippi Legislature has adopted no statutes governing the specific procedures involved in handling the contest of an election other than Sections 23-15-955 and 23-15-957; and
WHEREAS, Section 23-15-955 provides that the legislative resolution of election contests involving Senate and House of Representative seats "...shall be conducted in accordance with procedures and precedents established by the House of Representatives or the Senate as the case may be. Such procedures and precedents may be found in the Journals of the House of Representatives and of the State Senate and/or in the published Rules of the House of Representatives and of the State Senate"; and

WHEREAS, the Senate has the authority to establish procedures for the handling of election contests pursuant to Section 38, Mississippi Constitution of 1890, and Section 23-15-955:

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE STATE OF MISSISSIPPI, That effective upon the adoption of this resolution, the procedure for resolving the contest of the election in Senate District 37 shall be as follows:

1. The Lieutenant Governor shall appoint a special committee to investigate the election contest and make recommendations to the Senate regarding the resolution of the contest. The special committee shall be composed of one (1) member of the Senate from each congressional district and one (1) member of the Senate appointed from the state at large. The Lieutenant Governor shall designate one (1) of the members to serve as Chairman. As soon as practicable, the committee shall meet upon the call of the Chairman to review the election contest.
(2) (a) The special committee may allow either party to the election contest to obtain discovery regarding any matter, not privileged, which is relevant to the particular grounds stated in the election contest or any response thereto.

(b) If discovery is allowed, all forms of discovery shall be completed within time limits set by the special committee.

(3) The special committee shall meet as soon as practicable after the adoption of this resolution. The resolution of the election contest shall be a matter of the highest priority for the Senate, and any conflicts in scheduling meetings of the special committee shall be resolved in favor of expediting the committee's work on the election contest. The special committee shall have the power to investigate all facts concerning the election or qualifications of any member or contestant, but shall not place itself in the position of investigating matters not alleged in the election contest or any response thereto. It also shall have the power to issue subpoenas and compel the attendance of witnesses and the production of such documents or papers as may be required as provided for in Section 23-15-957, and to issue notices of deposition by stenographic means for this purpose. It shall also have the power to hear any motion filed by either party and to issue rulings on any such motion.

(4) The committee shall conclude its deliberations, file a report of its findings with the Secretary of the Senate, and
report a resolution containing its recommendations to resolve the
election contest by not later than Monday, January 18, 2016,
unless the special committee determines, by a majority vote, that
circumstances require an extension of the reporting deadline to a
later date. Dissenting members of the special committee may file
a minority report with the Secretary of the Senate by not later
than the date the special committee files the report of its
findings. The resolution, once reported to the Senate, shall be
subject to amendment and shall be adopted by a majority vote of
those present and voting. The resolution adopted by the Senate
may contain the following remedies:

(a) The permanent seating of the person who was
certified;

(b) The permanent seating of the petitioner in the
election contest;

(c) A declaration that the office of Senator for the
district as vacant;

(d) An order requiring a new election for the district
or for certain precincts in the district, as appropriate; or

(e) Any other remedy including those that are available
to the courts in cases involving an election contest.

(5) If a party to the election contest is permanently
seated, the person shall receive the regular compensation and
expenses of a member of the Senate and be entitled to all rights
and privileges of the office of Senator, including, but not
ST: Establish a procedure for election contest involving State Senate District 37.

limited to, seniority, retroactive to the beginning of the session.
A RESOLUTION TO ADOPT A REMEDY TO THE ELECTION CONTEST FOR MISSISSIPPI SENATE DISTRICT 37 OF THE MISSISSIPPI STATE SENATE.

WHEREAS, on December 4, 2015, the Secretary of State certified the election of Bob M. Dearing to Senate District 37 for the 2016-2019 term of office; and

WHEREAS, on December 2, 2015, Melanie Sojourner filed with the Secretary of the Senate a Petition to Contest the Election for Mississippi State Senate District 37 and an Answer to said Petition was filed by Bob M. Dearing on December 11, 2015; and

WHEREAS, Section 38, Mississippi Constitution of 1890, provides that each house of the Legislature "...shall judge of the qualifications, return and election of its own members"; and

WHEREAS, Section 23-15-955 provides that the legislative resolution of election contests involving Senate and House of Representatives seats "...shall be conducted in accordance with procedures and precedents established by the House of Representatives or the Senate, as the case may be. Such procedures and precedents may be found in the Journals of the
House of Representatives and of the State Senate and/or in the published Rules of the House of Representatives and of the State Senate"; and

WHEREAS, on January 5, 2016, the Senate adopted Senate Resolution No. 2 which established a special committee and charged it with the duty of investigating and proposing to the Senate a remedy to the election contest for District 37 in the form of a resolution; and

WHEREAS, on January 5, 2016, pursuant to Senate Resolution No. 2, the Lieutenant Governor appointed Senators Burton (Chairman), Parks, Frazier, Doty and Fillingane to serve on the Special Committee to Investigate the Election Contest for Senate District 37 of the Mississippi Senate; and

WHEREAS, on January 6, 2016, the Special Committee met, organized and scheduled hearings on the election contest for Senate District 37 to begin on January 13, 2016; and

WHEREAS, the Special Committee conducted public hearings on the election contest from Wednesday, January 13, 2016, through Friday, January 15, 2016, and began its deliberations immediately thereafter; and

WHEREAS, the parties to the election contest were ably represented by counsel who presented facts and legal arguments to the Special Committee; and

WHEREAS, the Special Committee assumed its responsibility as fact finders and not as members of partisan parties, and the
Special Committee heard testimony and conducted its deliberations accordingly; and

WHEREAS, the Special Committee adopted the standard of "preponderance of the evidence" for weighing the testimony presented to it. Under this standard, the Petitioner Melanie Sojourner had the burden of presenting evidence which is of greater weight or more convincing than the evidence which is offered by the Respondent Senator-elect Bob Dearing; and

WHEREAS, prior to hearing testimony, the Special Committee heard four (4) Motions to Quash Subpoenas and Subpoenas Duces Tecum which were ruled to be moot due to subsequent complaints. After the Special Committee ruled on these motions, numerous witnesses were subpoenaed to testify at the hearing and these witnesses were examined by counsel and the members of the Special Committee. Numerous objections to the presentation of certain evidence and to the form of questions were made by both counsel for Respondent and Petitioner which were either sustained or overruled by the chairman in order to hear all relevant evidence in an effort to be totally fair to each party, with the exception of obvious hearsay which was not allowed; and

WHEREAS, the Special Committee to Investigate the Election Contest for Senate District 37 of the Mississippi Senate has concluded its hearing into the election contest and has filed a report with the Secretary of the Senate as required by Senate Resolution No. 2, 2016 Regular Session, that contains the relevant
facts of the contest, Mississippi law that is involved in the
election contest, the findings of the committee and the
recommendations of the committee; and

WHEREAS, the Special Committee has endeavored to render a
fair and impartial decision in this matter. The committee
recognizes the seriousness of the allegations in the petition of
Melanie Sojourner and also recognizes the importance of the
franchise and the duty not to disenfranchise voters without
sufficient cause. The Mississippi Supreme Court has stated that
"[t]he people who are electors should not be deprived of the
benefit of their votes, because those whose duty it was to hold
the election, were ignorant, incompetent, or wilfully failed in
some particulars to do their duty. Nor should the successful
candidate lose his office because of the misconduct of these
officials, if he is free from complicity with them and has not
gained the office by reason of such misbehavior." The committee
concluded in its report by majority vote, that (a) the Petitioner
did not present a preponderance of evidence that the Absentee
Voting Practices in Adams County would have changed the outcome of
the election of Senator-elect Bob Dearing, and that (b) the
Petitioner did not present a preponderance of evidence that Poll
Managers and Election Officials in Bude Precinct in Franklin
County provided unlawful assistance to voters which would have
changed the outcome of the election of Senator-elect Bob Dearing:
NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE STATE OF MISSISSIPPI, That because it should not overturn the will of the electorate in the Senate District 37 General Election, the Senate finds that the Honorable Bob M. Dearing is duly qualified and shall be permanently seated as a member of the Senate.

BE IT FURTHER RESOLVED, That Senator Dearing shall receive the regular compensation and expenses of a member of the Senate and be entitled to all rights and privileges of the office of Senator, including, but not limited to, seniority, retroactive to the beginning of the 2016 Regular Session.
Nebraska
Senate Rule 10, Election Contests and Qualifications Challenges

Section 1. Election Contests and Qualifications Challenges.
(a) An election contest shall place in issue only the validity of the results of an election of a member to the Unicameral Legislature. An election contest shall only determine which candidate was properly elected to the Legislature and shall be seated.
(b) A qualifications challenge shall place in issue only the qualifications of a person elected as a member of the Legislature under the Constitution. A qualifications challenge shall only determine whether a person elected to the Legislature is qualified to hold or retain the seat.
(c) Election contests and qualifications challenges shall be brought and conducted as provided in these rules.
(d) Each election contest and qualifications challenge filed with the Clerk shall be referred by the Clerk to the Reference Committee, who in turn shall refer the matter to a specially created committee to consider such contest or challenge. The committee shall consist of an odd number of members, shall have a minimum of five members and shall consist of members appointed by the Executive Board. The chairperson of such committee shall be appointed by the Executive Board.
(e) The special committee may adopt rules to govern election contests and qualifications challenges, provided that such committee rules must be consistent with these rules, must be filed with the Clerk within twenty-four hours of adoption, and must be made available to all parties and to the public.

Sec. 2. Initiating Election Contests.
(a) Election contests may be brought only by an unsuccessful candidate.
(b) Election contests may be brought only by the procedures and within the time limits established by the Nebraska statutes. Notice of intention to contest shall be served on the person certified as elected to the Legislature from the representative district within the time limits established by law.
(c) Within forty days following the general election contested, each contestant shall file with the Clerk of the Legislature a petition of election contest and shall serve such petition on the purported winner. A petition of election contest shall allege the contestant's qualifications to bring the contest and to serve as a member of the Legislature, that he/she alleges that a mistake, violation of election laws, or fraud was committed in specified precincts in the counting, return, or canvass of the votes, or that some other specified irregularity occurred in the conduct of the election in specified precincts. A petition of election contest shall contain a prayer specifying the relief requested and the precincts in which a recount or other inquiry is desired. A petition of election contest shall be verified by affidavit swearing to the belief that the allegations are true, and shall be accompanied by proof of service on all respondents.
(d) A petition of contest may not be amended to cure a defect under the statutory requirements. A petition of election contest, if filed and served subsequent to the notice of intention to contest, may not raise points not expressed in the notice.

Sec. 3. Initiating Qualifications Challenges.
(a) Qualifications challenges may be brought only by an unsuccessful candidate.
(b) Qualifications challenges must be brought within forty days following the general election contested.
(c) A qualifications challenge shall be brought by filing a petition of qualifications challenge with the Clerk, and by serving a copy of the petition on the purported winner. The petition must be accompanied by proof of personal service upon the respondent member and must be verified by affidavit swearing to the truth of the allegations or based upon information and belief. A petition of qualifications challenge shall set forth the grounds on which the respondent member is alleged to be constitutionally unqualified, the qualifications of the petitioner to bring the challenge, and a prayer for relief.

Sec. 4. Contests and Challenges - Due Process.
(a) Election contests and qualifications challenges shall be heard and determined as expeditiously as possible under adversary procedures wherein each party to the proceedings has a reasonable opportunity to present his claim, any defense and arguments, and to respond to those of his opponents. All parties may be represented by counsel.
(b) Election contests and qualifications challenges shall be heard and determined in accordance with the applicable provisions of the Nebraska statutes, the Nebraska Constitution, and the United States Constitution. Judicial decisions which bear on a point of law in a contest or challenge shall be admissible in the arguments of
the parties and the deliberations and decisions of the committee. Judicial decisions applicable to a point of law or to a fact situation to the committee shall be given weight as precedent.

(c) The committee shall give notice of all rules, timetables, or deadlines adopted by the committee. Notice under this subsection shall be in writing and shall be given either personally with receipt, or by certified mail (return receipt requested) addressed to the party at his or her place of residence and to his or her attorney of record at his or her office if so requested by the party.

Sec. 5. Committee Proceedings and Powers in Contests and Challenges.

(a) All proceedings of the committee concerning election contests and qualifications challenges may be recorded and transcribed. Copies of the transcript shall be made available to the members of the committee and to the parties.

(b) The committee may dismiss an election contest or qualifications challenge, or may determine to proceed to a recount or other inquiry. The committee may limit the issues to be determined in a contest or challenge, except that where a recount is conducted in an election contest, any precinct timely requested by any party to be recounted shall be recounted by the committee.

(c) In conducting inquiries, investigations and recounts in election contests and qualifications challenges, the committee shall have the power to compel the attendance of witnesses and the production of books, papers, ballots, documents and records, by subpoena signed by the chairperson of the committee as provided by Rule 3, Section 21. In conducting proceedings in election contests and qualifications challenges, the committee may utilize the legislative powers to gather information as provided by Rule 3, Section 21.

(d) The committee may allow any person authorized to take depositions of any necessary witnesses, as may be permitted by law. In recounting the ballots in any election contest, however, no person other than a member of the committee or officer of the Legislature shall handle any ballots, tally sheets, or other election materials without the consent of the committee. The responsibility for the actual recounting of ballots may not be delegated.

(e) The committee shall maintain a record of proceedings in every election contest and qualifications challenge. Such record shall include all notices and pleadings, roll call votes, all reports and dissents, and all documents which were admitted into the proceeding. The committee shall file the record with the Clerk of the Legislature upon the adoption of its final report. The record shall then be available for examination in the Clerk's office.

(f) With the approval of the Executive Board, the committee may employ staff assistants to include clerks, court reporters, professional staff, and other personnel as deemed necessary.

Sec. 6. Adoption of Reports in Contests and Challenges.

(a) All final decisions of the committee regarding an election contest or qualification challenge shall be reported in writing to the Legislature, and approved by a majority of the members of the committee. Reports shall include a specific recommendation to the Legislature as to the disposition of the contest or challenge.

(b) Any member of the committee may file a dissent from a report of the committee, a minority report, or a special concurrence with the majority report or with any minority report printed and placed on the members' desks, along with any dissents, minority reports, or special concurrences. The report shall be listed on the agenda under the heading "Report of Election Contest" or "Report of Qualifications Challenge." The report as filed with the Clerk, shall not be considered for two legislative days prior to any consideration by the Legislature.

(d) The Legislature shall adopt the majority report or a minority report in an election contest or qualifications challenge or shall refuse to adopt any report filed and rerefer the contest or challenge to the committee for further proceedings or for a modified report. Reports as filed by the committee are not amendable. If the Legislature fails to adopt a report, the matter shall automatically be rereferred to committee for further consideration.

(e) Each party to a contest or challenge may file with the Clerk of the Legislature within 15 days of the filing of the final report a detailed statement of attorney's fees and expenses incurred by said party in connection with the case. The committee shall make recommendations to the Legislature concerning reimbursement of attorney's fees and the expenses of the parties. Such recommendation shall not exceed a sum that is reasonable, just, and proper.
Senator’s or Representative’s election may be contested by filing a petition with the appropriate court within 15 days after the election results are ascertained and announced. The petition must:

1. set forth the grounds for the election contest,
2. be signed by the losing candidate or by at least 25 persons who voted for the office being contested,
3. be verified by the oath of the losing candidate or at least two of the petitioners,
4. be accompanied by a surety bond in a sum sufficient to pay all costs of the contest.

The person who files the petition is known as the “contestor.” The court causes a copy of the petition to be served upon the Senator or Representative whose election is being contested, and the Senator or Representative has ten days after receiving the petition to answer it.

The court holds a trial of the contest at which evidence is taken. The trial proceeds much as an ordinary civil trial and is heard expeditiously by the court without a jury. In order to prevail, the contestor must prove by clear and convincing evidence:

1. that one or more election irregularities occurred,
2. that the irregularity or irregularities affected enough votes to change or make uncertain the result of the election.

When the election of someone other than a Senator or Representative is at issue, the court pronounces judgment at the conclusion of the trial. However, when a Senator’s or Representative’s election is contested, the court does not pronounce judgment because each House of the General Assembly has exclusive power to judge the election, returns, and qualifications of its members. (The only limitation on the Senate and House in resolving a contest is that they cannot declare a person to be ineligible under the Ohio Constitution.)

The Senate or House then proceeds to resolve the contest. If a Senate or House district is larger than a county, the appropriate court to hear an election contest arising with respect to the district is the Ohio Supreme Court. If a Senate or House district consists of one county or is smaller than a county, the appropriate court to hear an election contest is the court of common pleas of the county in which the contest arose.
ELECTION CODE

TITLE 14. ELECTION CONTESTS

SUBTITLE C. CONTESTS IN OTHER TRIBUNALS

CHAPTER 241. CONTEST FOR STATE SENATOR OR REPRESENTATIVE

Sec. 241.001. APPLICABILITY OF CHAPTER. This chapter applies to a contest of a general or special election for the office of state senator or state representative.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.002. PARTIES. The provisions of this title relating to who may be or is required to be a party in an election contest in the district court apply to a contest under this chapter.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

The following section was amended by the 86th Legislature. Pending publication of the current statutes, see S.B. 902, 86th Legislature, Regular Session, for amendments affecting the following section.

Sec. 241.003. PETITION. (a) The contestant must state the grounds for the contest in a petition in the same manner as a petition in an election contest in the district court.

(b) The contestant must file the petition with the secretary of state not later than the seventh day after the date the official result of the contested election is determined. The contestant must deliver a copy of the petition to the contestee by the same deadline.

(c) The contestant may not file the petition with the secretary of state or deliver the copy to the contestee before the day after the date of the contested election.

(d) Section 1.006 does not apply to this section.


Sec. 241.004. ANSWER. (a) The contestee must reply to the contestant's petition in an answer in the same manner as an answer to a
petition in an election contest in the district court.

(b) The contestee must file the answer with the secretary of state not later than the seventh day after the date the contestee receives the copy of the petition. The contestee must deliver a copy of the answer to the contestant by the same deadline.

(c) Section 1.006 does not apply to this section.


Sec. 241.005. METHOD OF DELIVERING CONTEST PAPERS TO PARTIES. (a) The copies of the petition and answer must be delivered to the parties by:

(1) personal delivery; or

(2) registered or certified mail, return receipt requested.

(b) Any adult resident of the state may perform the personal delivery. If the party to whom delivery is intended cannot be found in the party's county of residence, the delivery may be completed by leaving the document at the party's usual place of abode or business with a person who is 16 years of age or older.

(c) Personal delivery of a copy of an answer is sufficient if it is delivered to the contestant's attorney of record or left at the attorney's regular office with a person who is 16 years of age or older.

(d) A copy of a petition delivered by mail must be marked for restricted delivery to the addressee only. The delivery is sufficient if the copy is mailed to the contestee's regular residence or business address.

(e) If the contestant's petition states an address to which the copy of the answer is to be delivered, a copy delivered by mail must be mailed to that address. Otherwise, delivery of a copy of an answer by mail is sufficient if the copy is mailed to the contestant at the contestant's regular residence or business address or to the contestant's attorney of record at the attorney's regular business address.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.006. DELIVERY OF CONTEST PAPERS TO PRESIDING OFFICER. (a) On receipt of a petition or answer, the secretary of state shall enter the date of filing on the document. If the document is filed by mail, the secretary shall attach to the document the envelope in which it was mailed.

(b) The secretary of state shall deliver a petition to the president of the senate or the speaker of the house of representatives, as
appropriate, as soon as possible but not later than the day after the date
the petition is received. The secretary shall deliver an answer to the
appropriate presiding officer as soon as possible but not later than the
day after the date of its receipt.

(c) The secretary of state shall deliver with the petition the
secretary's certified statement of the total votes cast for each candidate
for the office as shown by the final canvass. If the final canvass has not
been completed, the statement shall be delivered as soon as practicable
thereafter.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts
1993, 73rd Leg., ch. 759, Sec. 8, eff. Sept. 1, 1993.

Sec. 241.0061. SECURITY FOR COSTS. (a) Not later than the third day
after the date the contestee's answer is received by the presiding officer
of the house having jurisdiction, the contestant must file with the
secretary of the senate or chief clerk of the house of representatives, as
appropriate:

(1) a cost bond payable to the appropriate house and to the
contestee in the amount of $5,000, having sufficient sureties approved by
the presiding officer, and conditioned that the contestant will pay all
costs of the contest assessed against the contestant;
(2) a cash deposit in lieu of bond; or
(3) an affidavit of inability to pay costs.

(b) Security for costs must be filed under Subsection (a), and an
affidavit of inability to pay costs may be contested, in the manner
generally applicable to a civil suit in the district court, subject to any
changes imposed by the master or by rules of the house having jurisdiction.

Added by Acts 1993, 73rd Leg., ch. 759, Sec. 9, eff. Sept. 1, 1993.

Sec. 241.007. RUNOFF DELAYED. (a) If a special election for which a
runoff is necessary according to the official result is contested, the
secretary of state shall promptly notify the governor in writing of the
contest when the canvass is completed or the petition is received,
whichever is later.

(b) The governor shall delay ordering the runoff pending the outcome
of the contest.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.
Sec. 241.008. PRESIDING OFFICER AS PARTY. If the presiding officer of the house having jurisdiction is a party to a contest, the house shall elect one of its members to perform the duties of the presiding officer with respect to the contest. The chair of the house's committee on administration shall perform those duties until the substitute is elected.


Sec. 241.009. MASTER OF DISCOVERY. (a) As soon as practicable after receiving the contestee's answer, the presiding officer of the house having jurisdiction shall appoint a master of discovery to supervise discovery proceedings and the taking of depositions, to issue any necessary process, to receive and report evidence, and to perform any other duties assigned by the presiding officer or by the committee to which the contest is referred.

(b) The master must be a member of the house in which the contest is pending.

(c) The presiding officer or the committee may limit the master's authority in the same manner as a civil court in appointing a master in chancery.

(d) The master acts under the direction of the presiding officer before the case is referred to a committee and acts under the direction of the committee after the referral.

(e) The master's rulings are subject to review by the committee to which the contest is referred unless otherwise provided by rules of the house.


Sec. 241.0091. FRIVOLOUS PETITION. (a) The master may on the master's own motion, or shall on the motion of the committee, determine whether the contestant's petition is frivolous or otherwise does not state the grounds necessary to maintain the contest.

(b) After making a determination under Subsection (a), the master shall promptly deliver to the committee a report stating the findings. The report to the committee may include any recommendation the master considers appropriate.
Sec. 241.010. DISCOVERY AND DEPOSITIONS. (a) Any party to a contest may conduct discovery and take depositions under the procedures applicable to a civil suit in the district court, subject to changes in those procedures or limitations imposed by the master or by rules of the house in which the contest is pending.

(b) Each party is responsible for the initial payment of the party's costs of discovery and taking depositions, but the costs may be assessed as provided by Section 241.025.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.011. REFERRAL OF CONTEST TO COMMITTEE; HEARING BY COMMITTEE. (a) As soon as practicable after receiving the contestee's answer, the presiding officer of the house in which the contest is pending shall refer the contest to a special committee, a standing committee, or a committee of the whole, as provided by rules of the house.

(b) The committee shall promptly set a time and place for hearing the contest. After notice to the parties, the committee shall investigate the issues raised by the contest, hearing all legal evidence presented by the parties, except as provided by Subsection (c).

(c) The committee may refuse to hear testimony or other evidence presented in person by the parties if the master determines under Section 241.0091 that the contestant's petition is frivolous or otherwise groundless.


Sec. 241.012. HEARING PROCEDURE. The procedure for the committee hearing of an election contest shall be prescribed by rules of the house in which the contest is pending.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.013. EVIDENCE. Except as otherwise provided by house rules, the rules of evidence generally applicable to a civil suit in the district court apply to the hearing of an election contest.
Sec. 241.014. ATTENDANCE OF WITNESSES. (a) The committee to which an election contest is referred has the same authority as other legislative committees to compel attendance of witnesses and production of evidence without the necessity for an express authorization by resolution, rule, or other action of the house creating the committee.

(b) The law generally applicable to the issuance and service of process in legislative committee hearings applies to the hearing of a contest.

(c) A summoned witness is entitled to payment for travel and subsistence expenses in accordance with the laws applicable to in-state travel for state employees.

(d) Each party is responsible for the initial payment of the costs for service of process and attendance of witnesses at the party's request, but the costs may be assessed as provided by Section 241.025.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.015. COMMITTEE REPORT. (a) Except as provided by Section 241.019, as soon as practicable after completing its hearing on a contest, the committee shall make a written report of its findings of fact and conclusions of law with respect to the contest to the house in which the contest is pending. The report may include any recommendation the committee considers appropriate.

(b) The committee shall accompany its report with all the papers in the contest and the evidence presented to the committee.

(c) The committee chair shall file the report with the secretary of the senate or the chief clerk of the house of representatives, as appropriate.


Sec. 241.016. MINORITY REPORT. Any member of the committee dissenting from the views of the majority may file a minority report.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.
Sec. 241.017. WITHDRAWAL OF CONTEST.  (a)  A contestant may withdraw 
the election contest at any time before the filing of the committee report 
by filing with the committee chair and the presiding officer of the house a 
written statement of withdrawal signed by the contestant or the 
contestant's attorney.

(b) On withdrawal of the contest, the contest is dismissed and the 
presiding officer shall have the statement of withdrawal read into the 
journal of the appropriate house.

(c) Costs of the contest following a withdrawal may be assessed as 
provided by Section 241.025.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.  Amended by Acts 
1997, 75th Leg., ch. 864, Sec. 235, eff. Sept. 1, 1997.

Sec. 241.018. DISPOSITION OF CONTEST BY HOUSE.  (a)  Except as 
provided by Section 241.019, the house in which a contest is pending shall 
dispose of the contest as provided by this section.

(b) As soon as practicable after the committee report on the contest 
is filed, the house shall set a date for consideration of the report.

(c) The house shall take action on the contest as prescribed by 
Section 221.012.

(d) A contestee may not vote on any matter involving the contest.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.019. DISPOSITION OF CONTEST BY COMMITTEE.  The committee to 
which a contest of a special election is referred shall take action on the 
contest as prescribed by Section 221.012 if:

(1) no candidate received a majority of the votes according to 
the official result of the election;

(2) the legislature is not in session on the date the 
contestant's petition is filed with the secretary of state, or, if it is in 
session, the session will end before the 25th day after the date the 
petition is filed;

(3) no session of the legislature is scheduled to begin within 30 
days after the date the petition is filed;  and

(4) the legislature is not in session on the date the committee 
completes its hearing, and no session is scheduled to begin within 30 days 
after that date.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.
Sec. 241.020. NEW ELECTION ORDERED IF CONTESTED ELECTION VOID. In an election contest in which the election is declared void, the house or committee, as appropriate, shall include in its judgment an order directing the governor to order a new election.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.021. DELIVERY OF CERTIFIED COPIES OF JUDGMENT. (a) After the judgment in a contest is rendered, the secretary of the senate or the chief clerk of the house of representatives, as appropriate, shall promptly deliver a certified copy of the judgment to the secretary of state.

(b) If another election is necessary under the judgment, the secretary of the senate or chief clerk of the house of representatives shall promptly deliver a certified copy of the judgment to the governor.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.022. PROCEDURES FOR NEW ELECTION GENERALLY. (a) If the contested election is declared void, the new election shall be held in the same manner as the contested election, except as otherwise provided by this chapter.

(b) Section 232.050 applies to the ballot form for the new election.

(c) Section 232.043 applies to write-in voting in the new election.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.023. ACCELERATED ELECTION SCHEDULE. If another election is necessary under the judgment in an election contest, the applicable time intervals for conducting a special election for state senator or state representative apply if the judgment is rendered:

(1) during a regular legislative session; or

(2) within 60 days before the date a legislative session is convened.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.024. CANDIDATES IN NEW ELECTION. (a) The candidates in a new election ordered in an election contest in which the election is declared void under this chapter are determined in accordance with the
applicable provisions of Chapter 232, Subchapter B, prescribing the candidates in a new election ordered by a court.

(b) In a new election in which replacement candidates are permitted on the ballot, the governor shall set the filing deadlines that are set by the district court in a new election ordered by a court.

(c) The governor shall set the deadline for withdrawal from a new election.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

Sec. 241.025. COSTS OF CONTEST. (a) Subject to Section 221.013(a), the house considering an election contest may assess the costs of the contest against any one or more of the parties, except that costs may not be assessed against a contestee who prevails in the contest.

(b) In a contest covered by Section 241.019, the committee determines how the costs are to be assessed.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.
REPORT AND FINDINGS OF THE MASTER

SUMMARY

1. Contestant Hefflin has failed to establish by clear and convincing evidence that the outcome of the contested election, as shown by the final canvass indicating Contestee Vo as the winner, was not the true outcome of the election. Accordingly, Contestant Hefflin's contest should be dismissed.

2. It is the master's finding that Contestee Vo's vote margin was reduced from 33 votes to 16 votes. There remain 4 votes that may be retrieved and opened and 1 voter who may be compelled to testify. However, even if all of those votes were in favor of the Contestant, Contestee Vo would still have a margin of victory of not less than 10 votes.

3. Contestant has produced no evidence of any intentional voter fraud which affected the final vote tally to his detriment. Contestant's challenge to the vast bulk of the votes in question is based on technical, and apparently unintentional, violations of election law.

4. There is evidence that several voters in District 149 were fraudulently transferred into District 137 in late 2003 or early 2004. The voters, primarily Nigerian Americans, all had their

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1 Although the Select Committee may order the ballots to be opened or the voters to be compelled to testify, such action is not necessary, because the additional ballots cannot eliminate the margin of Contestee Vo's victory.

2 In this report, the term "illegal vote" means a vote that, under a provision of the Election Code, should not have been counted in the election tally. As used in this report, the term does not mean and does not carry with it any criminal connotation. No evidence was presented that any illegal vote was made with knowledge of illegality or intent to violate election law.
IN THE MATTER OF ELECTION CONTEST, DISTRICT 48
GENERAL ELECTION OF NOVEMBER 2, 2010

DAN NEIL, §
CONTESTANT §
v. §
DONNA HOWARD, §
CONTESTEE §

§
HOUSE OF REPRESENTATIVES
§
OF THE
§
STATE OF TEXAS

MASTER'S REPORT—CONCLUSIONS OF LAW AND FINDINGS OF FACT

I. SUMMARY

1. Contestant Neil has failed to establish by clear and convincing evidence that the outcome of the contested election, as shown by the final canvass indicating Contestee Howard as the winner, was not the true outcome of the election. Accordingly, Contestant Neil's contest should be dismissed.

2. The Master finds that Contestee Howard's vote margin should be reduced from 12 votes to 4 votes.

3. Contestant has produced no evidence of any intentional voter fraud that affected the final vote tally to his detriment. Contestant's challenge to all of the votes in question is based on technical, and apparently unintentional, violations of election law.

II. BACKGROUND

A. HISTORY OF THE CONTEST

This contest arises from the November 2, 2010, general election. The initial canvass of votes for the District 48 race conducted on November 22, 2010, indicated the following result:

<table>
<thead>
<tr>
<th></th>
<th>Howard (D)</th>
<th>Neil (R)</th>
<th>Easton (L)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>25,026</td>
<td>25,010</td>
<td>1,518</td>
</tr>
</tbody>
</table>

A recount of the votes in the race was conducted on December 2, 2010, and provided this final result:

<table>
<thead>
<tr>
<th></th>
<th>Howard (D)</th>
<th>Neil (R)</th>
<th>Easton (L)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>25,023</td>
<td>25,011</td>
<td>1,519</td>
</tr>
</tbody>
</table>
Wyoming
Joint Rule 15, Election Contests

15-1(a) Upon receipt of notice of election contest and supporting documents from the secretary of state pursuant to W.S. 22-17-112, the presiding officer of the Senate if the contest is for the office of state Senator, or the presiding officer of the house if the contest is for the office of state representative, shall, as soon as possible, appoint a special committee to hear the contest. A special committee in the Senate shall consist of five (5) members and a special committee in the house shall consist of nine (9) members. Committee appointments shall be apportioned as nearly as possible to reflect the percentage of the elected members of the majority and minority parties of the appropriate house. The presiding officer of the appropriate house shall also appoint a chairman of the committee.

(b) (1) The appointed committee shall hear the election contest as expeditiously as possible.
(2) Each party to the proceedings may be represented by counsel and shall be afforded reasonable opportunity to be heard and to present oral argument. In accordance with W.S. 22-17-111, any party may, under procedures applicable to a civil action, take the deposition of any witness at any time after service of notice of intent to contest pursuant to W.S. 22-17-110. For purposes of this rule, "party" means any contestant and any person who is certified as elected by the state canvassing board whose election is being contested.
(3) The burden of proof is on the contestant to prove at least one (1) of the grounds specified under W.S. 22-17-101(a) by a preponderance of the evidence. If the contest is based upon grounds specified under W.S. 22-17-101(a)(iv) or (v), the contestant also has the burden of proving that any irregularities shown were of such a nature that, if not for the irregularities or for any illegal votes counted for the person declared elected, that person would not have been elected.
(4) In proceedings before the committee, irrelevant, immaterial or unduly repetitious evidence shall be excluded and no recommendation shall be made unless supported by the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. A party may conduct cross-examinations required for a full and true disclosure of the facts and a party is entitled to confront all opposing witnesses.

(c) (1) All proceedings of the committee concerning election contests shall be electronically recorded. The committee shall provide all parties advance notice of each meeting, hearing or other proceeding of the committee concerning the election contest.
(2) The chairman of the committee shall have the power to administer oaths and to compel the attendance of witnesses and the production of documents relevant to the contest, as authorized by W.S. 28-1-107 through 28-1-112. Any testimony made at any committee hearing or before the appropriate house which purports to establish matters of fact shall be made under oath.

(d) Not later than the fourth legislative day following the date the committee was appointed, the committee shall report its findings and final recommendation to the appropriate house. The final recommendation of the committee shall be to either sustain or reject the election contest.

(e) (1) As soon as practicable but not later than the second legislative day following receipt of the committee report pursuant to subsection (d) of this rule, the appropriate house shall consider the committee findings and final recommendation. Only a motion to sustain or reject the election contest shall be in order. The motion is debatable.
(2) Debate on the motion to sustain or reject the election contest shall be limited as follows:
(A) No member may speak more than twice on the motion; and
(B) No member shall occupy the floor more than five (5) minutes each time that he speaks; and
(C) There shall be no extensions of time under this rule.
(3) Once deliberations begin on a motion to sustain or reject the election contest, the house or Senate, as applicable, shall not adjourn until the contest is decided.
(4) If a quorum to transact business is present, a majority of the members of the appropriate house who are present may sustain or reject the election contest.

(f) Following a determination under subsection (e) of this rule, the presiding officer of the house or of the Senate, as applicable, shall inform the governor and the secretary of state of the decision.
(g) A decision of either house under this rule is final and shall not be subject to appeal.

(h) If the election contest is rejected by the applicable house, the individual whose election was contested shall, for purposes of salary, per diem and mileage, be treated as if the contest had not been initiated.
FIRST DAY – AFTERNOON SESSION
JANUARY 11, 2011
APPOINTMENT OF COMMITTEE TO HEAR
ELECTION CONTEST
Speaker Buchanan acknowledged receipt of a notice of Election Contest and supporting documents from
the Secretary of State relating to the election of the Representative from House District 45. Pursuant to
Joint Rule 15 of the temporary rules of the 61st legislature, Speaker Buchanan appointed the following
Representatives as a special committee to hear the contest and appointed Representative Illoway to
serve as chairman:
Barbuto, Byrd, Campbell, Illoway, Jaggi, Kroeker, Lubnau, Petersen and Stubson.

Note: Electronic recordings of the Select Committee's hearings on the election contest for House District
45, together with all pleadings and documentary evidence presented to the Select Committee, are on
file in the Legislative Service Office.

FOURTH DAY – AFTERNOON SESSION
JANUARY 14, 2011
REPORT OF THE SPECIAL COMMITTEE
ON ELECTION CONTEST
Your Special Committee appointed to hear the election contest for House District 45 respectfully reports
back to the House as follows: Based upon the findings set out in Attachment "A", it is the
recommendation of the Special Committee that the election contest for House District 45 be rejected
and that Matthias Greene be determined qualified to serve as the Representative for House District 45.

AYES: Campbell, Jaggi, Kroeker, Lubnau, Petersen, Stubson.
NAYS: Barbuto, Byrd, Illoway. Representative Illoway, Chairman.

Attachment A
Issue:
It appeared to the special committee that the dispositive issue in this contest was:
Did Representative Matthias Greene ("Greene") have residency in House District 45 for one year prior to
the date of the election on November 2, 2010, in accordance with the Wyoming Constitution, and
Wyoming Statute §22-5-102?

Findings of Fact:
1. Mark Voorhees, Rachel Lynn, Seth Carson, Craig Rothwell and Debra Formento, all residents of
Wyoming House District 45, filed a notice to contest election on the 4th day of December, 2010,
pursuant to Wyoming Statutes §22-17-101, W.S. §22-17-102 and §22-17-110.
2. Discovery was conducted pursuant to Joint Rule 15 of the Rules of the Wyoming Legislature.
3. On January 11, 2011, the Speaker of the House empanelled a special committee to take testimony
and hear the arguments of the parties with respect to the election contest.
4. Former Representative Seth Carson ("Carson") spoke on behalf of the contestants.
5. The facts in this matter are basically undisputed. A timeline is attached to this report as Exhibit 1.

7. In March and April of 2009, Greene searched for a loft apartment in downtown Laramie. He expressed a desire to live in downtown Laramie because he likes the urban atmosphere, and he was within walking distance of the local restaurants and bars.

8. In April of 2009, Greene was notified that he was going to be deployed with the National Guard to Afghanistan to command a med-evac unit. At that time, he stopped his search for a downtown loft.

9. Greene acquired a mini-storage unit in House District 45 in May of 2009. He chose the location of the mini-storage based on the part of town it was located in and because of its convenience and it's ownership by a veteran who gave military discounts. Greene testified he always intended to move back to House District 45, but did not select the location of the mini-storage with any intention at that time of running for election in House District 45, although the mini-storage was located in House District 45.

10. On May 25, 2009, Greene placed all his worldly possessions, including his bed, his dresser, most of his civilian clothing, weight set and his kitchen utensils in mini-storage unit owned by Snowy Range Storage, Inc., located at 1491 Industry Drive, Laramie, Wyoming, and within the boundary of House District 45.

11. Greene's lease expired on the apartment at 611 Mitchell, Unit #2, Laramie, Wyoming on May 25, 2009. At that time, all his contact with House District 13 ended. He had no property in House District 13, no intent to return to House District 13, and no mailing address in House District 13.

12. On May 27th, 2009, Greene was sent to Canada to train for two and one-half weeks.

13. After the two and one-half weeks of training, Greene returned to Cheyenne for one night, where he spent the evening in the Comfort Inn in Cheyenne.

14. After his one night stay in Cheyenne, Greene was sent to Camp Guernsey for an additional 10 days of training for his deployment.

15. For the month of July 2009, Greene was trained in high-altitude helicopter flying in Colorado.


17. On August 5, 2009, Greene's unit was dispatched to Ft. Sill, Oklahoma for additional training.

18. On September 17, 2009, Greene was deployed to Afghanistan.

19. On September 18, 2009, Greene arrived in Afghanistan, and his primary residence was Forward Operating Base Solerno.

20. In November 2009, after reading a newspaper article in the Laramie Boomerang about Carson, Greene began to consider running for the position of House District 45.

21. Greene began contact with the Wyoming Secretary of State's office in December of 2009, from Forward Operating Base Solerno, to confirm his residency was in House District 45. Several phone calls and emails were exchanged regarding residency.

22. On February 19, 2010, Mr. Greene received electronic correspondence from the Wyoming Secretary of State's office, stating that according to the Wyoming Statewide Voter Registration System, Mr. Greene was still a registered voter of House District 13 and that being the case, the Wyoming Secretary of State's office would not approve an application of nomination for Wyoming House District 45.

23. On April 5, 2010, Mr. Greene completed the necessary forms to change his voter registration address from 611 Mitchell, Laramie, Wyoming, to 1207 Boswell Drive, Laramie, Wyoming.

24. On April 5, 2010, Greene changed his address in the statewide voter registration system to 1207 Boswell Drive, the home of Matthew Brian Leibovitz and Teresa Elizabeth Thompson. This change of address to House District 45 was for the purpose of voting in a special election – the first election held in the district since Greene's deployment.

25. On May 27, 2010, Greene filed for office, and provided the address of 1207 Boswell as his address in House District 45.

27. On June 24, 2010, Greene spent the night at the home of his friend Matt Leibovitz, at 1207 N. Boswell in Laramie, Wyoming.
30. On June 27, 2010, Greene returned to the Leibovitz house, and stayed there until he moved into his loft apartment in downtown Laramie on July 2, 2010, at the address of 115 E. Grand Ave., Laramie, Wyoming within the boundaries of House District 45.
31. On November 2, 2010, Greene was the top vote getter in the general election for House District 45.

OPINION
The requirement of residency is a constitutional prerequisite for serving in the legislature of the State of Wyoming. The Wyoming Constitution provides that no person shall serve in the legislature who is not a citizen "of this state and who has not, for at least twelve months next preceding his election resided within the county or district in which he was elected."

Wyoming Constitution Art. 3 Sec. 2. Section 22-5-102 of our statutes codifies the constitutional requirement by noting that "For the purpose of meeting the residency requirements of the Wyoming constitution, a person shall not be a candidate for the state legislature from a legislative district unless he has been a resident of that legislative district for at least one (1) year next preceding the election." Wyo. Stat. Ann. § 22-5-102(a).

The Special Committee's obligation is to determine whether Representative Matthias Greene meets these constitutional requirements.

While the consideration of these issues takes place in the context of a political body, the members of the Committee have embarked on this endeavor with a clear recognition of their oath to support, obey and defend the Constitution of the State of Wyoming.

It is noteworthy that the Wyoming Constitution makes special provision for the residency of those serving the United States in our military. Specifically, the Constitution notes that "No elector shall be deemed to have lost his residence in the state, by reason of his absence . . . in the military or naval service of the United States." Wyoming Constitution Art. 6 Sec. 7.

The facts underlying this contest are not significantly in dispute. In May, 2009 Matthias Greene was living at 611 Mitchell, Laramie, Wyoming, a residence located in House District 13. Representative Greene's lease on Mitchell property terminated in late May 2009. Some time before the lease termination Representative Greene had decided to move to downtown Laramie which is located in House District 45. Prior to entering an agreement for a new apartment, Representative Greene learned of his imminent deployment to Afghanistan as part of the Wyoming National Guard. As a result, Representative Greene stored his goods in a storage unit located in House District 45, ceased his search for an apartment in downtown Laramie and began training for his ultimate deployment to Afghanistan.

As of the end of May, 2009, Representative Greene removed all his belongings from House District 13. He ceased receiving mail in the district. From that point on he had no right or entitlement to occupy any structure within the district.

The reasons behind Representative Greene's decision to cease his apartment search are significant. Representative Greene had received orders to deploy to Afghanistan. The Wyoming Constitution
mandates that Representative Greene did not lose his residency in the State of Wyoming. Instead, his military service ensured that his residency was protected. As a result, we know that Representative Greene was a resident of either House District 13 or House District 45.

When examining this question the role of intent is significant. It is undisputed that Representative Greene intended to live in House District 45 and intended to return to House District 45 after his deployment. It is also undisputed that he formed that intent prior to his deployment. Objector contends that intent is not dispositive. The Committee agrees. Intent alone is not sufficient to build a basis for residency. However, intent must play a role in a review of the totality of the circumstances when determining the residency of a member.

Objector contends that Representative Greene remained a resident of House District 13 from May, 2009 until he returned to the country in June, 2010. Such an assertion defies both the law and common sense. After May 2009 Representative Greene had no connection whatsoever to House District 13. He testified that he did not intend to ever return to House District 13. The lease on 611 Mitchell had expired. Representative Greene removed all of his personal property from House District 13. He had no right to access or occupy any structure whatsoever within House District 13. To suggest that he remained a resident of House District 13 despite the lack of any remaining nexus to the District is to open possibilities of residency that eviscerate the principles embodied in our Constitution.

Applying these same principles to Representative Greene's contacts with House District 45 reveals a very different picture. Representative Greene's intent to live in House District 45 was accompanied by material and substantial acts. Representative Greene actively engaged in a search for housing prior to his deployment. He moved his personal belongings to the district. He took out a lease on a storage unit in the district. While the contacts with House District 45 are anticipatory, they are overwhelming in light of the lack of contacts with House District 13.

The very first election in Albany County following his departure from House District 13 occurred in May of 2010. Representative Greene voted absentee from Afghanistan in that election and voted as resident of House District 45. When Representative Greene returned from his deployment in June, 2010 he immediately returned to House District 45 and leased an apartment. When reviewing all the circumstances of this election contest, we see a continuity of conduct that weighs overwhelmingly in favor of a finding that Representative Greene was a resident of House District 45 beginning in late May or early June of 2009. This was more than one (1) year prior to the election of November, 2010. Representative Greene is qualified constitutionally to serve in the legislature of the State of Wyoming.

The fact of Representative Greene's popular election deserves some note. While no majority can undermine application of the Constitution, it is of significance that the people of House District 45 chose Mathias Greene as their representative and did so in light of broad publication of the facts outlined above. When there are two applicable interpretations of a provision within the Wyoming Constitution and one application undermines the will of the people while one supports the will of the people, that which recognizes the power of the voters should be sustained.

The contestant has relied heavily upon the opinion of the Attorney General dated November 1, 2010. The Committee finds that opinion to be unpersuasive. The Attorney General relied primarily on the definition of "Residence" as that term is defined in Wyo. Stat. § 22-1-102(a)(xxx). That definition refers to a place of actual habitation. However, that term is not used to define a person's eligibility for election. Instead, the legislature chose a different word "resident" to
describe the eligibility requirement. It is inappropriate to take the definition of a word not utilized within a statute to rewrite the statute and insert requirements not required by statute. In addition, even if we were to rely upon the definition of "Residence" instead of the terms actually utilized in the statute, it speaks clearly of an "intention of returning". There was absolutely no evidence that Representative Greene intended to return to House District 13. As a result, the very definition that the Attorney General employs undermines the contestant's claims.

Joint Rule 15-1 (b)(3) provides: "The burden of proof is on the contestant to prove at least one of the grounds specified under W.S. 22-17-1010(a) by a preponderance of the evidence." The uncontradicted testimony of Representative Greene was that he intended to live in House District 45. The contestants offered no additional proof countering the intent of Greene to live in the district. As a result, the contestant failed to meet his burden of proof, and the complaint must be rejected. It is clear that absent the issuance of military orders, Representative Matthias Greene would have been physically present within House District 45.

The Wyoming Constitution recognizes the special circumstances of this case where a person in service of their nation, leaves their home to serve. It is clear that in those circumstances an interested citizen should not be punished for their service, but should be treated as a continuing resident of this state. The majority of the special committee find that Matthias Greene intended to and in fact was a resident of House District 45 for more than one year prior to the election.

As a consequence the committee FINDS that the Contest of Election filed by Mark Vorhes, Rachel Lynn, Seth Carson, Craig Rothwell and Debra Formento should be REJECTED.

DISSENTING OPINION
The only question here is whether the facts demonstrate that Mr. Greene met the residency requirements for serving in the state legislature as outlined in Wyo. Const., art 3, § 2 and Wyo. Stat. Ann. § 22-5-102(a). A candidate is not qualified to run, "unless he has been a resident of that legislative district for at least (1) year next preceding his election." Wyo. Stat. Ann. § 22-5-102(a). The legislature has defined residence in Wyo. Stat. § 22-1-102(a)(xxx). Under this provision of the statute, residence, for purposes of this case, is defined as: "Residence" is the place of a person’s actual habitation. The construction of this term shall be governed by the following rules:
(A) Residence is the place where a person has a current habitation and to which, whenever he is absent, he has the intention of returning;
(B) A person shall not gain or lose residence merely by reason of his presence or absence while:....
(IV) Stationed at or residing on a military reservation or installation ....

The sections omitted from the quotation above, include absences related to such things as educational study or other public service purposes. Thus, the same definition of residence governs all absences from home and military service is not in a separate category.

The Attorney General issued an informal opinion of the definition of "residence" for purposes of serving in the legislature on November 1, 2010. The basic conclusion of the Attorney General is that the residency statute is unambiguous and in order to establish residency, a potential candidate must have an "actual habitation" to meet the residency requirement. The Attorney General Opinion, which is attached to this Report for the convenience of the body as Exhibit 2, concludes "actual habitation" as
applied to the definition of "residence" "means "a person's dwelling or home which he actually occupied."

The opinion, then, walks through the steps to apply the statute to facts similar to those in this contested case. Having determined that "the touchstone" of the definition is "actual habitation," the next step is to apply the provisions governing absence from a residence: "Then, if, for whatever the reason, a person is absent from that place for any period of time then the question becomes, ..., whether person possessed the subjective intent to return to his place of residence—i.e., a person's place of actual habitation." The Opinion then cites the example of a student who leaves for college, but has a home in Laramie County. The home in Laramie County remains the residence "as long as the person has the intent to return to that home. " The Opinion, then reaches the key conclusion relevant to this decision:

Since the statute defines "residence" as "actual habitation," if a person temporarily leaves the state with the intent to return but to a different location within the state, his "residence," for purposes of qualification as a member of the Legislature, must be the place he last actually physically resided. If not, then "residence" would not mean "actual habitation" and the statute's **plain and unambiguous meaning would be negated.** AG Opinion at 5.

Thus, under the AG Opinion, Mr. Greene, at the time his active military service resumed on or about May 27, 2009, needed to be a resident with an "actual habitation" in House District 45 and the intent to return to that residence. At the time he left for training in Canada, he had no "current habitation" in House District 45. The Attorney General Opinion does not allow Mr. Greene to declare a residency in House District 45.

Mr. Greene's interpretation of the statute is not supported by the plain language of the statute and as a result, should not be adopted by this body as our interpretation of the law. In essence, we are sitting as a court interpreting the statute and should be bound by the same strict interpretation of plain language as a court. This House should no more ignore the intent of the legislature, as represented in the words of the statute, than a court would. In fact, Mr. Greene provided no legal analysis in support of his statutory construction.

Some members of the committee questioned the analysis of the AG Opinion. It is not necessary to wholly agree with the AG's analysis, although it follows traditional rules of statutory construction.

Essentially, as we understood it, Mr. Greene's interpretation of the statute at Section 102(a)(xxx)(A) ignores the "current habitation" language and suggests Mr. Greene can rely solely on his "intent" to return to House District 45. This interpretation also disregards the overriding language of the definition that residence depends on "actual habitation." Finally, it ignores the provision that when absent, a person "shall not gain or lose statute first requires establishment of residence at time of departure, and then, an establishment of intent to return.

A basic rule of statutory construction, familiar to all the attorneys in this House is that a statute will not be interpreted to render any language superfluous. Under Mr. Greene's approach, "current habitation" has no application. Mr. Greene's interpretation ignores this most basic method for construing our laws. It would be extremely ironic for this body to ignore statutory rules of construction designed to show deference to the will of the legislature and ensure the courts do not exceed their authority and rewrite the laws rather than interpret them. This House, like a court, has no authority to in effect, rewrite the statute through this case.
The difficulty here is that Mr. Greene appears to have had no "current habitation" when he left Laramie for his military training. It is undisputed, however, his last address at the time of his departure for training was in House District 13. Either this address was his "current habitation" for purposes of the statute, as suggested by the AG's opinion, or he had no "current habitation." Either way we cannot revise the statute to fit the facts of Mr. Greene's unique circumstances. Mr. Greene made the choice to relinquish his residence, not find a new one, and place his possessions in storage—rather than in a residence. While it may seem harsh to suggest Mr. Greene had to maintain a home in Laramie during his deployment to meet the residency requirement for running for office, it is the result demanded by the statute.

Mr. Greene's interpretation would allow any potential candidate to leave the state for whatever purpose—education, military, temporary federal appointment—and return to any legislative district and argue an intent to return to establish residency. For example, assume someone moved to Washington, DC for a couple of years to work for one of our Congressional leaders and to save money, did not maintain a Wyoming physical residence, but always planned to return home one day to run for office. Under the interpretation proposed by Mr. Greene, such an individual could come back and run anywhere in the county they left and perhaps, anywhere in the state.

This result is bad for public policy and would lead to chaos in our elections. We cannot, as a body, authorize an interpretation that has the potential to cause all sorts of mischief in our electoral process.

Note: Exhibit 1 and Exhibit 2 referenced in Attachment "A" are on file in the Legislative Service Office.

FIFTH DAY – AFTERNOON SESSION
JANUARY 17, 2011
DEBATE AND FINAL ACTION ON ELECTION CONTEST
Representative Illoway moved adoption of the report of the Select Committee on Election Contest to reject the Election Contest relating to House District 45 and thereby determine that Matthias Greene is qualified to serve as the Representative for House District 45.

Pursuant to Joint Rule 15, Speaker Buchanan opened the motion for debate.
Note: An electronic recording of the debate on the motion is on file in the Legislative Service Office.

Following debate, Speaker Buchanan announced the motion is to reject the Election Contest relating to the election of Matthias Greene in House District 45. He explained that an aye vote is a vote to reject the Election Contest and to determine that Matthias Greene is qualified to serve as the Representative for House District 45. A no vote is a vote to sustain the Election Contest and to determine that Matthias Greene is not qualified to serve as the Representative for House District 45. Pursuant to Joint Rule 15, the vote required is a majority of the members present.

ROLL CALL
Ayes: Representative(s) Berger, Blikre, Bonner, Brechtel, Brown, Burkhart, Campbell, Cannady, Childers, Davison, Edmonds, Eklund, Gay, Greear, Harshman, Harvey, Hunt, Jaggi, Kasperik, Kroeker, Krone, Lockhart, Loucks, Lubnau, Madden, McKim, McOmie, Miller, Moniz, Nicholas, B., Patton, Peasley, Pedersen, Petersen, Petroff, Quarberg, Semlek, Shepperson, Stubson, Teeters, Vranish and Wallis
Nays: Representative(s) Barbuto, Blake, Botten, Byrd, Buchanan, Connolly, Craft, Esquibel, K., Freeman, Gingery, Illoway, Roscoe, Steward, Throne, Zwonitzer Dn. and Zwonitzer Dv.

Excused: Representative (s) Goggles and Greene

Ayes 42 Nays 16 Excused 2 Absent 0 Conflicts 0

Speaker Buchanan announced that a majority had voted to reject the Election Contest relating to the election of Matthias Greene in House District 45. It is therefore the determination of the House of Representatives that Matthias Greene is qualified to serve as the Representative for House District 45. Speaker Buchanan stated that pursuant to Joint Rule 15 the action of the House will be reported to the Governor and the Secretary of State.

Speaker Buchanan requested the following explanation of his vote be entered in the Journal:

"Pursuant to HR 13-6, I would like to explain my vote on the Election Contest. First, a bona fide analysis of the contest should not involve one's military service, although it is certainly an admirable trait and I honor that service. However, as a veteran myself, I feel consideration of this factor has no place in my decision, aside from military status allowing maintenance of residence while absent.

Second, a bona fide analysis of the contest should not involve one's political party. Although I am not a member of the contestant's party, I feel that the integrity of our constitution, our laws and our legislature rises above status, affiliation and personal feelings.

Third, a bona fide analysis of the contest should not involve the personalities involved. I have no doubt that the man sworn in to this body is more than worthy of the task and I recognize that there have been warranted criticisms of his predecessor.

Fourth, although I certainly respect the votes of all cast in that election, the will of the people cannot stand alone without the force of law behind it unless we wish to re-define our republic and our democracy.

My vote and my decision was based solely on the facts as presented by the committee and the law, as I understand it, applied to those facts.

My analysis is such that I believe an actual residence or habitation had to be established in House District 45, and then in absence, the individual has the intention of returning. I have no doubt in my mind that there was intent to return, but I could not come to find in my own mind that there was ever a residence established, per statute, in House District 45. The individual certainly maintained his Wyoming residency while deployed, but was not in my analysis a resident under the Election Code in House District 45.

This was my analysis, and I voted my honest and sincere belief, with out regard to irrelevant matters and without judging an opinion or vote contrary to mine."