

DISMISSING THE ELECTION CONTEST RELATING TO THE
OFFICE OF REPRESENTATIVE FROM THE TWENTY-
FOURTH CONGRESSIONAL DISTRICT OF FLORIDA

JUNE 6, 2007.—Referred to the House Calendar and ordered to be printed

Mr. BRADY of Pennsylvania, from the Committee on House
Administration, submitted the following

R E P O R T

[To accompany H. Res. 461]

The Committee on House Administration, having had under consideration an original resolution dismissing the election contest relating to the office of Representative from the Twenty-fourth Congressional District of Florida, report the same to the House with the recommendation that the resolution be agreed to.

DISMISSING THE ELECTION CONTEST IN THE TWENTY-FOURTH
CONGRESSIONAL DISTRICT OF FLORIDA

The Committee on House Administration, having had under consideration an original resolution dismissing the election contest against Tom Feeney, reports the same to the House with the recommendation that the resolution be agreed to.

COMMITTEE ACTION

On, May 8, 2007, by a voice vote, a quorum being present, the Committee agreed to a motion to report the resolution favorably to the House.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee states that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

STATEMENT ON BUDGET AUTHORITY AND RELATED ITEMS

The resolution does not provide new budget authority, new spending authority, new credit authority or an increase or decrease in revenues or tax expenditures. Thus, clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and the provisions of section 308(a)(1) of the Congressional Budget Act of 1974 are not applicable.

STATEMENT OF FACTS

On December 20, 2006, Clint Curtis (Contestant) filed a Notice of Contest with the Clerk of the House of Representatives pursuant to the Federal Contested Elections Act (FCEA).¹ Contestant ran as the nominee of the Democratic Party for the office of Representative to the United States Congress representing the Twenty-Fourth Congressional District of the State of Florida in November 7, 2006 election. The other principal candidate for the Twenty-Fourth Congressional District was incumbent Republican Tom Feeney (Contestee). On November 20, 2006, the Florida Elections Canvassing Commission² certified the results: Contestee received 123,795 votes and Contestant received 89,863 votes, a margin of 33,932 votes. In addition to the Notice of Contest, Contestant also filed an election contest with the Circuit Court of Leon County on November 30, 2006.

BASIS OF CONTEST

In his Notice of Contest, Contestant alleges that the official election results for the Twenty-Fourth Congressional District of the State of Florida are incorrect because of alleged irregularities associated with the electronic voting machines used in the election. Specifically, Contestant avers that the electronic voting machines did not record accurately the votes cast. In support of this argument, Contestant asserts that the electronic voting machines produced unreliable and incorrect results based on his belief that these machines were hacked and the software manipulated. Contestant further contends that an accurate count of the votes cast can never be discerned because the electronic voting machines used in this election were not equipped with a verified voter paper audit trail. Contestant also contends that the failure of local boards of election to put into place necessary procedural safeguards compromised the election results.

STANDING

To have standing under the FCEA, a contestant must have been a candidate for election to the House of Representatives in the last preceding election and claim a right to the contestee's seat.³ Contestant was the Democratic nominee and his name appeared as a candidate for the Twenty-Fourth Congressional District on the offi-

¹ 2 U.S.C. Sec. 381-96.

² Title IX, Electors and Elections (Chapters 97–109) § 102.111 (1) of the Florida Code provides that “The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each federal, state, and multicounty office.” The Canvassing Commission consists of the Governor and two members of the Cabinet selected by the Governor.

³ 2 U.S.C. Sec. 382(a).

cial ballot for the November 7, 2006 election, thereby satisfying the standing requirement.

TIMING/NOTICE

The Notice of Contest appears to have been served upon Congressman Feeney and filed within the prescribed time periods of the FCEA.

RESPONSE BY CONTESTEE

On January 19, 2007, Contestee filed a Motion to Dismiss Contest of Election in response to Contestant's Notice of Contest challenging the results of the 2006 General Election for the Twenty-Fourth Congressional District of the State of Florida. Contestee maintains that the contest against him should be dismissed because Contestant failed to claim a right to the office and support that claim with specific credible allegations of irregularities or fraud that if proven true would be sufficient to change the result of the election.

STANDARD FOR GRANTING MOTION TO DISMISS

The House of Representatives has the constitutionally vested power to judge its own elections.⁴ The FCEA sets forth procedures under which a Contestant may bring a contest to the House of Representatives. Under the FCEA, it is not sufficient for a Contestant merely to allege irregularities or fraud in an election. The Contestant must claim a right to the office.⁵ The contestant must support this claim with specific credible allegations of irregularity or fraud that if proven true, would entitle the contestant to the office.⁶ Unless a contestant credibly claims in his Notice of Contest a right to the office, the House of Representatives will dismiss the Contest.⁷

ANALYSIS

To survive a motion to dismiss, Contestant must proffer allegations that, if proven, would have altered the election outcome. In his Notice of Contest, Contestant presented the Committee on House Administration (Committee) with a series of alleged irregularities in the conduct of the election that he contends support his claim that he lost due to errors in the administration of the election. These irregularities fall into the following five categories:

1. Election Equipment
2. Polling Data
3. Election Administration Errors
4. Affidavit Progression
5. Software Source Code Disclosure

Although Contestant complains that the election was not well conducted, those charges fall well short of credibly suggesting that Contestant is entitled to the office. As discussed below, those claims, taken individually or collectively, provide no basis upon which the House of Representatives could conclude that the Contestant is entitled to the office. Contestant has not demonstrated

⁴ U.S.C.A Const. Art. 1, §

⁵ 2 U.S.C. Sec. 382.

⁶ See, e.g. *Pierce v. Pursell*, H. Rep. 95-245 (1977).

⁷ *Anderson v. Rose*, H. Rep. 104-852 (1996).

to the Committee's satisfaction that this contest is anything more than a reflection of his general dissatisfaction with how the election was administered. Lacking from his contest is a credible claim that absent the alleged irregularities he would have won the election. Contestant's claims are built on shifting sands of speculation and conjecture and do not provide a basis for the Committee proceeding with an investigation.

Election equipment

While Contestant identifies several problems in the administration of the election that he contends may have contributed to an inaccurate and unreliable election result, he also maintains that a likely cause of his defeat was the electronic voting machines used in the Twenty-Fourth Congressional District. The voting machines used in this election to capture the votes cast employed one of two technologies: Direct Recording Equipment (DRE) and Optical Scan. In describing the DRE voting machines used in the election, Contestant maintains that these machines had an obvious unexplained bias toward Contestee in the way votes were recorded. The only evidence Contestant offers to support this claim is the historical voting patterns in the district. Contestant claims that he did not do as well as a hypothetical Democrat in the district would do. The very nature of this claim demonstrates how speculative it is. There are many possible explanations for the purported variance and there is no reason to believe that the DRE voting equipment accounted for the difference. Contestant's claims regarding the optical scan equipment are similarly deficient. Merely suggesting that voting equipment may be subject to tampering or is not inherently reliable is insufficient grounds for contesting an election.

Polling data

Contestant relies on polling data collected in October 2006, a month before the election, to show that the race at that point was within 2–3 percentage points. The fact that there was a poll a month before the election suggesting that Contestant was behind by a smaller margin than he eventually lost by is hardly evidence that Contestant won the election. Such evidence simply does not support a claim that Contestant is entitled to the office.

Election administration errors

Contestant alleges that election administrators failed to perform their duties properly and these failures affected the outcome of the election. The alleged errors fall into two categories: failure to implement safeguards and failure to follow required procedures. Contestant asserts that certain voting machines used in Volusia County, Florida, for the Twenty-Fourth Congressional District were not properly certified under Florida law. Even assuming that this allegation was true, Contestant has failed to show that the outcome of the election was affected by the failure to comply completely with the certification process. To maintain a contest it is not sufficient to simply assert, or even prove, that some state laws or processes were not followed. Contestant must credibly claim and support with specific allegations how the failure to comply affected the outcome of the election. Contestant's claim never amounts to more than conjecture and is insufficient to support an election contest.

Second, Contestant claims that certain pre-election procedures were not followed. Initially, he cites allegations by individuals and organizations detailing incidents of voter registration denials, missing or destroyed audit logs, and road blockages and detours preventing voters from getting to the polls. These allegations, even if proven true, do not justify overturning an election that the Contestee won by a margin of 33,932. Next, Contestant argues in the Notice of Contest that the integrity of certain ballots was compromised. In Volusia County, Contestant claims that he discovered discrepancies during a ballot inspection where certain seals on the ballot bags were either missing or did not match up with numbers on the ballot reconciliation forms. Again, Contestant has failed to show the number of ballots affected comes anywhere close to the margin by which he was defeated.

In addition to purported discrepancies with ballot bag seals, Contestant alleges discrepancies exist between the "Statement of Votes Cast" and the "All Voter Disk Data" provided by the Volusia County Supervisor of Elections. Contestant states that the statement of votes cast shows that 45,021 ballots were cast on Election Day, but the All Voter Disk Data reflects only 44,773 people voting at the polls on Election Day. While Contestant agrees that a 248 vote difference is rather small, he still believes that the fact that a discrepancy exists is an indication of greater problems in the administration of the election in Volusia County. We do not find that the claimed errors or misconduct, if proven true, would change the election outcome.

In reviewing actions by election administrators, it is well established that the Committee does not consider a mere claim of election official error sufficient to sustain a contest unless that error is of such magnitude that it likely affected the outcome of the election. "Our respect for the States and State election officials mandates that these 'assumptions of regularity' not be discarded based solely on a '[c]ontestant's bare allegations of irregularity,' election officials are presumed to have acted in accordance with State law, and errors will not be imputed without convincing evidence."⁸ While there may be some administrative errors that occurred on or before Election Day, the allegations cited by Contestant do not cast sufficient doubt on the election results to merit this Committee's further consideration.

Affidavit progression and vote flipping

Contestant also claims that the software used to record the votes contained malicious source code. Contestant believes that the electronic voting machines used in this election contained vote flipping software, hidden in the source code, to manipulate the election results in Contestee's favor. Because Contestant offers no factual basis for this claim, it must be dismissed. Contestant's claim can only generously be described as conjecture. Allowing contests to be brought on such claims would overthrow the presumption of regularity that attaches to the State elections process and would make every election open to contest.

⁸See *Anderson v. Rose*, H. Rep. No. 104-852 (1996) quoting *McCuen v. Dickey*, H. Rep. No. 103-109 at 6 (1993).

Software source code disclosure

Contestant suggests that proof of the alleged electronic voting machines manipulation can be proven by examining the software source code. The fact that an examination of the source code might reveal it contained malicious software does not relieve Contestant of his obligation to make a credible claim that it does. If it did, all elections would be open to challenge.

CONCLUSION

The Committee finds that Contestant has failed to make a credible and specific claim that he is entitled to the office. Contestant's claims amount to no more than raw conjecture and speculation unsupported by specific and credible allegations of irregularity sufficient to put into doubt the outcome of the election. None of the cited irregularities associated with the electronic machines or the administration of the Twenty-Fourth Congressional District election justify the Committee proceeding any further with an election contest. The Committee finds that Contestant failed to meet the required burden under the FCEA.

