

Chapter 22

Election Contests and Disputes

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Research References

U.S. Const. art. I, § 5
1 Hinds §§ 634-755
6 Cannon §§ 90-189
Deschler Ch 9
Precedents (Smith) Ch 9
Manual §§ 701, 724, 853

§ 1. In General

Contests for seats in the House are governed by the Federal Contested Elections Act. 2 USC §§ 381-396. This statute, enacted in 1969, sets forth the procedure by which a defeated candidate may have a claim to a seat adjudicated by the House. The Act provides for the filing of notice of contest and other proceedings, for the taking of testimony of witnesses, and for a hearing by the Committee on House Administration on such depositions and other papers as have been filed with the Clerk. 2 USC §§ 381-396. Acting on committee reports, the House then disposes of the case by resolution. See § 4, *infra*.

The grounds for an election contest and the defenses available to the contestee, as well as the process of taking testimony and other procedures followed in determining the contest in committee, are treated elsewhere. See Precedents (Smith) Ch 9 §§ 14-38 for detailed summaries of every election contest from the 93d through 117th Congresses. For earlier election contests, see Deschler Ch 9 and Ch 9 Appendix, 1 Hinds §§ 756-844, 1 Hinds §§ 845-1135, and 6 Cannon §§ 121-189.

Notwithstanding the availability of the statutory election-contest procedures discussed herein, some election disputes have been presented directly to the House for consideration and committee investigation. See H. Rept.

99-58. An investigation of a challenged election has been initiated pursuant to:

- An action by the House in directly referring to the Committee on House Administration the question of a Member-elect's right to a seat. Deschler Ch 2 § 6.
- A protest filed by an elector of the district concerned. Deschler Ch 9 § 17.1.
- A petition filed by another person challenging the qualifications of a Member-elect. Deschler Ch 9 § 17.3.

The latter two procedures have rarely been invoked and they preceded the adoption of the modern contested election statute.

The right to a seat in the House also may be affected by House action on a proposition to expel, where a sitting Member's conduct is at issue. See ETHICS; COMMITTEE ON ETHICS.

§ 2. Jurisdiction and Powers

Generally

The Constitution authorizes each House to be the judge of the elections, returns, and qualifications of its Members. U.S. Const. art. I, § 5. Thus, the House is entitled to judge contested elections involving its seats, and is not bound by agreement of the parties or decisions of state tribunals. 6 Cannon §§ 90-92. The determination by the House as to the right to a seat is final, being considered a nonjusticiable political question. *Roudebush v. Hartke*, 405 U.S. 15 (1972).

Pursuant to the contested election statute, the House acquires jurisdiction of an election contest upon the filing of a notice of contest by a candidate. Deschler Ch 9 § 4.1; Precedents (Smith) Ch 9 § 8. Ordinarily, the papers relating to the contest are transmitted by the Clerk to the Committee on House Administration (the committee with jurisdiction over election contests under clause 1(k) of rule X). Such transmission is pursuant to the statute and needs no formal referral or other action by the House. 2 USC § 393(b); Deschler Ch 9 § 4. However, the House itself 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. Deschler Ch 2 § 6. The House also may summarily dismiss a contest by resolution. Deschler Ch 9 §§ 4.4, 4.5.

Where two persons claim the same seat from the same district, the House may refuse to permit either candidate to take the oath pending a determination of their rights by the House. Deschler Ch 9 § 4.3.

Election contests may be investigated by a special committee, by a subcommittee of the Committee on House Administration, or by *ad hoc* panels. Deschler Ch 9 §§ 5.2-5.4.

Recounts of Votes

To obtain an order from the House for a recount of votes in an election contest, the contestant should show that remedies to secure a recount under state law have been exhausted and that evidence and testimony have been taken in the matter. Deschler Ch 9 §§ 41.1, 41.3. Although the Committee on House Administration has authority to require a recount of votes for a contested seat in the House, the committee may decline to order such a recount where the highest court of the state has conducted a recount and where the contestant has not demonstrated that a recount would change the result of the election. Precedents (Smith) Ch 9 § 17.5.

§ 3. Parties

Under the controlling statute, “a candidate for election” to the House “in the last preceding election” is given the right to initiate a contest by filing the notice required by law. 2 USC § 382(a); Precedents (Smith) Ch 9 § 7. The statute defines “candidate” to mean one whose name was on the official ballot or who received write-in votes under certain conditions. 2 USC § 381(2). Thus, a candidate in the primary whose name was not on the ballot in the general election lacks the requisite standing to initiate a contest, and this was true even under the predecessor contested election statute. Deschler Ch 9 § 19.01; Precedents (Smith) Ch 9 § 7. Similarly, the House has dismissed a contest filed by one who was a candidate in a special election to fill a vacancy but was not a candidate in a succeeding run-off election. Precedents (Smith) Ch 9 § 16.7. A losing candidate in a primary election may be able to pursue a claim where it is shown that such individual qualified as a write-in candidate in the general election. Precedents (Smith) Ch 9 § 7.2.

A lack of standing of a contestant to initiate the contest is a defense that may be raised at the option of the contestee by motion. 2 USC § 383(b).

§ 4. Consideration and Disposition

Precedence and Privilege

Under article I, section 5 of the Constitution and rule IX, the consideration of a contested election case constitutes a question of privilege. 3 Hinds §§ 2579, 2580, 2626; Precedents (Smith) Ch 9 § 13. It takes precedence over the consideration of veto messages from the President (5 Hinds §§ 6641,

6642), special orders of business (3 Hinds § 2554), and business in order on Calendar Wednesday (8 Cannon § 2276).

Reports and Resolutions

The House generally disposes of election contests by acting on a simple resolution, which under the modern practice is reported from the Committee on House Administration. *Manual* § 724. A resolution typically is used to dispose of the case even where dismissal has been stipulated by the parties. Deschler Ch 9 § 52.5.

Under clause 5 of rule XIII, committee reports relating to the right of Members to their seats are privileged and are so reported from the floor. *Manual* § 853. Resolutions disposing of an election contest also are questions of privilege and may be called up at any time. Precedents (Smith) Ch 9 § 26.1. However, unreported resolutions are subject to the notice requirement of rule IX. *Manual* § 701; Deschler Ch 9 §§ 42.3, 42.4.

The resolution may:

- Declare one of the parties entitled to the seat. Deschler Ch 9 §§ 42.2, 62.2.
- Declare one of the parties not competent to bring the contest. Deschler Ch 8 § 13.1.
- Declare that neither party should be seated pending a committee investigation. Deschler Ch 9 § 42.15; Precedents (Smith) Ch 9 § 20.1.
- Declare the seat vacant. Deschler Ch 9 §§ 42.11, 42.12.
- Dispose of the contest upon expiration of a specified day. *Manual* § 701.
- Dismiss the contest. See § 5, *infra*.
- Provide for payment or reimbursement from the applicable accounts of the House for costs incurred in the contest or its investigation. Deschler Ch 8 § 13.4; Deschler Ch 9 §§ 45.1-45.6; see also 2 USC § 396 (permitting the committee to allow any party reimbursement for reasonable expenses in the case).

An election contest may become moot due to the withdrawal of the contest by the contestant. Precedents (Smith) Ch 9 § 13.1. In such cases, the Committee on House Administration typically files a report on the contest (*e.g.*, Precedents (Smith) Ch 9 § 15.2) but is not required to do so (*e.g.*, Precedents (Smith) Ch 9 § 38.1).

§ 5. — Dismissal

A motion to dismiss will lie under the Federal Contested Elections Act to permit the contestee to interpose certain defenses to the contestant's claim or notice of contest. 2 USC § 383(b). Such a motion may be acted on by the House pursuant to a privileged resolution reported from the Committee on House Administration. *Manual* §§ 850, 853.

Under this statute, the burden of proof is on the contestant to present sufficient evidence, even before the formal submission of testimony, to overcome the motion to dismiss. Deschler Ch 9 § 35.7; Precedents (Smith) Ch 9 § 11. A motion to dismiss will lie where the contestant has not adduced evidence or forwarded testimony in the manner prescribed by law or has failed to demonstrate that there is some documentable basis for the allegations. Deschler Ch 9 §§ 25.1-25.5. Under the statute, the contestant has the burden of proving sufficient evidence to show that the result of the election would be changed or that the House should conduct a complete recount. Precedents (Smith) Ch 9 §§ 16.2, 20.3. Evidence that the contestant received more votes than the contestee in a *prior* election is insufficient. Precedents (Smith) Ch 9 § 16.7. Merely suggesting the probability of error in the tabulation of votes, without offering evidence of a change in the election result, is likewise insufficient. Precedents (Smith) Ch 9 § 16.2. Where the number of illegal votes shown by clear and convincing evidence to have been cast in an election is less than the total margin of victory of the contestee, the House may adopt the recommendation of the Committee on House Administration dismissing the election contest. Precedents (Smith) Ch 9 § 26.1.

§ 6. — Debate and Voting; Amendment

Generally

Resolutions disposing of election contests have been determined by voice vote and without debate. Deschler Ch 9 § 42.5. Normally, however, debate on the resolution is under the hour rule, with extensions of time permitted by unanimous consent. The debate may be divided among certain Members, with the previous question considered as ordered at the conclusion thereof. Deschler Ch 9 §§ 42.9, 59.1. The Member supporting the recommendation of the committee in the contest is entitled to close debate. Deschler Ch 9 § 42.8.

The resolution may be subject to a demand for a division of the question if its form permits (Deschler Ch 9 § 42.14) and to a motion to recommit (Deschler Ch 9 § 42.16). The resolution is not subject to amendment unless the Member controlling the time for debate yields for that purpose or the previous question is voted down. Deschler Ch 9 § 42.17. If the manager of the resolution yields for an amendment, the floor is lost to the proponent of the amendment. Deschler-Brown Ch 29 § 30.8. Where the previous question is ordered on both the resolution of dismissal and on the preamble, the preamble is not separately voted on or amended unless part of a motion to recommit. Precedents (Smith) Ch 9 § 26.1.

Participation by the Parties

If not a sitting Member, the contestant in an election contest may be permitted on the floor under clause 2 of rule IV during the consideration of the case in the House but must abide by the rules of proper decorum. *Manual* § 622; Deschler Ch 4 § 4.5; Deschler Ch 9 § 42.6. Furthermore, such contestant is not allowed to participate in the debate absent an order of the House. 1 Hinds §§ 662, 666.

If a sitting Member, a contestee may participate in debate on the resolution disposing of the contest and insert remarks in the *Congressional Record*. Deschler Ch 9 §§ 42.6, 42.7; Precedents (Smith) Ch 9 § 26.1. Such contestee also may vote on the resolution. Precedents (Smith) Ch 9 § 20.3.