trol of election machinery, casting of illegal election ballots, and destruction of legal election ballots.(12)

After determining that a two-thirds vote was necessary for expulsion,(13) the Senate voted not to expel Senator Langer.(14)

§ 8. Ballots; Recounts

The content, form, and disposition of ballots used in congressional elections are generally regulated by state law. The only federal requirement is that such ballots be written or printed, unless the state has authorized the use of voting machines.(15) Federal courts do not normally interfere with a state's prerogative to establish standards for ballots and voting machines.(16)

In judging election contests, the House must on occasion gain access to the ballots cast and determine whether they were properly included within or omitted from the official count taken by state authorities. House committees investigating contests, or investigating election irregularities or fraud, may be granted authority to impound or otherwise obtain ballots within the custody of state officials.(17)

In judging the validity of ballots, the House (or its committee) relies on state statutes regarding ballots and on state court opinions construing those laws. The general rule is that laws regulating the conduct of voters and the casting of votes are mandatory in nature and violations thereof invali-

12. 88 CONG. REC. 2077–81, 77th Cong. 2d Sess., Mar. 9, 1942.

13. *Id.* at p. 3064.

14. *Id.* at p. 3065. See §§ 6.3–6.5, supra, for instances in which election results were challenged for control of election machinery so as to deny voting rights.

15. 2 USC § 9.

16. See *Voorhes* v *Dempsey*, 231 F Supp 975 (D. Conn. 1964), aff'd, 379 U.S. 648 (state requirement of party lever on voting machines did not violate the 14th amendment where candidate listing and voter choice not impaired); *Voltaggio* v *Caputo*, 210 F Supp 237 (D. N.J. 1962), appeal dismissed, 371 U.S. 232 (statute directing manner of listing names on ballot not violative of the 14th amendment; prohibiting independent candidate from having slogan printed beneath name not violative of the U.S. Constitution); *Smith* v *Blackwell*, 115 F2d 186 (4th Cir. 1940) (federal court lacked power to set up election machinery by order or to require certain form of ballot); Peterson v Sears, 238 F Supp 12 (D. Iowa 1964) (federal court lacked jurisdiction to enjoin county auditors from unlocking voting machines).

17. See §§ 8.9, 8.10 for impoundment of ballot boxes and their contents.

date the ballots cast, particularly where the voter's intent cannot be clearly ascertained. Laws regulating the functions of election officials are directory in nature, and in the absence of fraud the officials' conduct will not vitiate ballots, even if they are subject to criminal sanction for the breach complained of.[18]

Under most state election laws, a losing candidate may request a recount of votes based on alleged irregularities and errors in the administration of the election or the official count. In seeking a remedy, the losing candidate should look first to the law of the state where the election was held.[19] State courts have held that where state law provides for a recount, the election process is not final until a recount has been conducted or time to request one has elapsed; therefore state courts may assume jurisdiction of controversies over recounts without violating article I, section 5, clause 1 of the Constitution, vesting final authority over elections and returns in the House or Senate.[20]

The House may order its own recount of the votes cast, without regard to state proceedings, under article I, section 5, clause 1 of the U.S. Constitution;[1] but it has not assumed authority to order a state or local elections board to undertake a recount,[2] although in some states the law may provide for a state-ordered recount to be supervised by a congressional committee.[3]

Collateral Reference

Bushel, State Control Over the Recount Process in Congressional Elections, 23 Syracuse L. Rev. 139 (1972).

Power of State to Conduct Ballot Recount

§ 8.1 The Senate seated a Senator-elect without prejudice to the outcome of a Supreme Court case where the Senator-elect was challenging

18. See § 8.11, infra.

19. Neither the due process clause of the Constitution nor the requirement that Representatives be chosen by the people guarantees a federal remedy for unintentional errors in the administration of an election, where a petitioner has failed to properly file for a fair and accurate state remedy which is available. *Powell* v *Power*, 436 F2d 84 (2d Cir. 1970).

20. See *Blackburn* v *Hall*, 115 Ga. App. 235, 154 S.E.2d 392 (1967) (cited at § 8.3, infra); *Wickersham* v *State Election Board*, 357 P.2d 421 (Okla. 1960).

1. See § 8.5, infra.

2. See § 8.7, infra.

3. See § 8.8, infra.

the constitutional power of his representative state to conduct a recount of the ballots cast.

On Jan. 21, 1971, the Senate ordered "that the oath may be administered to Mr. Hartke, of Indiana, without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." (4)

Parlimentarian's Note: Senator Vance Hartke was challenging the request of his opposing candidate that the state order a recount of the votes cast. Senator Hartke claimed that the recount was barred by article I, section 5 of the Constitution, delegating to the Senate the sole power to judge the elections and returns of its Members. The Supreme Court later held that the constitutional provision did not prohibit a state recount, it being mere speculation to assume that such a procedure would impair the Senate's ability to make an independent final judgment.(5)

State Proceedings as Affecting House Action

§ 8.2 The House rejected a challenge to the returns for a Member-elect where state law appointed a state ballot commission as final adjudicator.

On Jan. 5, 1937, Mr. John J. O'Connor, of New York, arose to object to the administration of the oath to Arthur B. Jenks, Member-elect from New Hampshire. Mr. O'Connor stated that the certificate of election of Mr. Jenks "may be impeached by certain facts which tend to show that he has not received a plurality of the votes duly cast in that congressional district." (6)

Mr. Bertrand H. Snell, of New York, arose to state that Mr. Jenks had the right to be sworn in since he had a duly authenticated certificate and since the laws of New Hampshire provided that a ballot commission was the final adjudicator in regard to the objection presented.(7) The House then adopted a resolution permitting

4. 117 CONG. REC. 6, 92d Cong. 1st Sess.

5. *Roudebush* v *Harthe,* 405 U.S. 15 (1972). The Supreme Court cited the action of the Senate in seating Senator Hartke, without prejudice to the outcome of the court case, as a basis for declaring the controversy not moot.

6. 81 CONG. REC. 12, 13, 75th Cong. 1st Sess.

7. *Id.*

Mr. Jenks to take the oath of office:

> *Resolved,* That the gentleman from New Hampshire be now permitted to take the oath of office.

§ 8.3 A special committee to investigate campaign expenditures recommended by divided vote to the succeeding Congress that a certified Member-elect not be seated pending determination of the contest, based upon a preliminary state court determination that not all split-ticket ballots had been counted.

On Jan. 3, 1967, after the adjournment *sine die* of the 89th Congress, a special committee established in the 89th Congress to investigate campaign expenditures filed a report on campaign expenditures with the House (H. Rept. No. 89–2348), recommending to the next Congress by a divided vote that a certified Member-elect from Georgia, Benjamin B. Blackburn, not be seated pending the initiation of an elections contest to resolve the matter. The committee so recommended because of a preliminary state court determination in Georgia that some split-ticket ballots had not been counted.[8]

On Jan. 10, 1967, at the convening of the 90th Congress, Mr. Blackburn's right to be sworn was challenged. The House authorized him to be sworn but referred the question of his final right to a seat to the Committee on House Administration.[9]

§ 8.4 The Committee on House Administration expressly rejected a requirement that a contestant show that he had no remedy under the law of his state as determined by recourse to the highest state court.

On Apr. 22, 1958, the Committee on House Administration submitted its report in the election contest of *Carter* v *LeCompte* (Iowa); the committee had ruled that where a contestant seeking a recount had served copies of his notice of contest on state election officials but had been advised by the state attorney general that state laws contained no provision for contesting a House seat, the

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8. H. REPT. NO. 2348, 89th Cong. 2d Sess.

For the final court decision, see *Blackburn* v *Hall,* 115 Ga. App. 235, 154 S.E.2d 392 (1967). It is customary practice for special elections committees to pass their findings on recent elections to the next Congress for use in elections contest determinations (see § 14, infra).

9. 113 CONG. REC. 14, 27, 90th Cong. 1st Sess.

contestant need not seek recourse to the highest state court to demonstrate that no remedy was available under state law.(10)

In so ruling, the committee expressly overruled a report of Committee on Elections No. 3 in the 76th Congress, which found that the House or its elections committee will only order a recount when the contestant has shown that he has attempted recourse to the highest court of that state to obtain a recount under state procedures.(11)

Congressional Recount

§ 8.5 Where a standing committee was authorized to investigate the right of two contestants to a seat, the committee ordered a recount of the ballots under its general investigatory power, rather than under the applicable election contest statute.

On Jan. 3, 1961,(12) the House adopted a resolution providing that the question of the right of either of two contestants from Indiana, J. Edward Roush and George O. Chambers, to a seat be referred to the Committee on House Administration, and that until that committee had reported, neither the Member-elect nor the contestee could take the oath of office.

During its investigation, the Committee on House Administration conducted a recount of all the ballots cast in the election. This was done under its general power to investigate, not under the election contest statutes.(13)

When the House confirmed the right of Mr. Roush to the seat, pursuant to the report of the committee, the House adopted a privileged resolution providing for expenditures from the contingent fund to pay compensation and certain expenses to Mr. Roush and to the contestant. Neither was reimbursed for expenses pursuant to the election contest statutes since the recount had been ordered by

10. H. REPT. NO. 1626, 104 CONG. REC. 6939, 85th Cong. 2d Sess.

11. H. REPT. NO. 1722, 86 CONG. REC. 2689, 76th Cong. 3d Sess., Mar. 11, 1940. The Committee on Elections No. 3, however, did acknowledge that it had the discretion to order a recount without reference to state proceedings, and proceeded to consider the contestant's evidence of an informal recount which he had conducted to determine whether the committee would be justified in ordering a recount.

12. 107 CONG. REC. 23, 24, 87th Cong. 1st Sess.

13. See H. Res. 339, 107 CONG. REC. 10160, 87th Cong. 1st Sess., June 13, 1961.

the Committee on House Administration under its investigative power.(14)

Congressional Power Over State Recount

§ 8.6 By resolution the House denied a joint application, by both parties to an election dispute, petitioning the House to order the state elections board to conduct a recount.

On Feb. 25, 1943,(15) the House adopted House Resolution 137, denying a joint application for an order of a recount in a disputed election case. The resolution was offered in order to establish a "precedent for all time that jurisdiction of an alleged contested election case cannot be conferred on the House or one of its committees by any joint agreement of parties to an alleged election contest unofficially or otherwise submitted."

The resolution read as follows:

> *Resolved,* That the joint application for order of recount of John B. Sullivan, contestant, against Louis E. Miller, contestee, Eleventh District of Missouri, be not granted.

§ 8.7 An elections committee reported that there were no precedents whereby the House had ordered a state or local board of elections to take a recount.

On Feb. 25, 1943, the Committee on Elections No. 3 submitted a report on a resolution denying a joint application for a recount in the contested case of *Sullivan* v *Miller,* Eleventh District of Missouri. In its report, the committee stated that it had found no precedents wherein the House had ordered a state or local board of elections to take a recount.(16)

§ 8.8 A recount of votes cast in an election for a House seat was conducted by bipartisan teams and supervised by representatives of a special House committee.

On Aug. 12, 1958,(17) the House agreed to House Resolution 676, relative to the contested election case of *Oliver* v *Hale,* First Congressional District of Maine:

> *Resolved,* That Robert Hale was duly elected as Representative from the First Congressional District of the

14. See H. Res. 340, 107 CONG. REC. 10160 (June 13, 1961) and 10391 (June 14, 1961), 87th Cong. 1st Sess.

15. 89 CONG. REC. 1324, 78th Cong. 1st Sess.

16. H. REPT. NO. 180, 89 CONG. REC. 1353, 78th Cong. 1st Sess. For the text of the resolution, see § 8.6, supra.

17. 104 CONG. REC. 17119, 85th Cong. 2d Sess.

State of Maine in the 85th Congress and is entitled to his seat.

The resolution, which was reported from the Committee on House Administration, was accompanied by House Report No. 2482. The committee advised in the report that a special committee on elections had traveled to Maine to conduct a recount of ballots pursuant to a Maine state statute which provided for a recount to be conducted by bipartisan teams and to be supervised by representatives of a special House elections committee.

Congressional Impoundment of Ballots

§ 8.9 A resolution providing for the procurement of ballot boxes, election returns, and election record books in an investigation of a contested election case is presented as privileged.

On Jan. 7, 1930,[18] Mr. Willis G. Sears, of Nebraska, offered as privileged House Resolution 113, by direction of the Committee on Elections No. 3. The resolution related to the subpena of witnesses and the procurement of ballot boxes, election returns, and election record books in a committee investigation of a contested election case. After a Member arose to object to the privileged status of the resolution, Speaker Nicholas Longworth, of Ohio, ruled that the resolution was a privileged matter.[19] The resolution read as follows:

Resolved, That Jack R. Burke, county clerk, or one of his deputies, Perry Robertson, county judge, or one of his deputies, and Lamar Seeligson, district attorney, all of Bexar County, State of Texas, are hereby ordered to appear before Elections Committee No. 3, of the House of Representatives as required then and there to testify before said committee in the contested-election case of Harry M. Wurzbach, contestant, versus Augustus McCloskey, contestee, now pending before said committee for investigation and report; and that said county clerk or his deputy, said county judge or his deputy, and said district attorney bring with them all the election returns they and each of them have in their custody, control, or/and possession, returned in the said county of Bexar, Tex., at the general election held on November 6, 1928, and that said county clerk also bring with him the election record book for the said county of Bexar, Tex., showing the record of returns made in the congressional election for the fourteenth congressional district of Texas, for the said general election held on

18. 72 CONG. REC. 1187, 71st Cong. 2d Sess.

19. See also 3 Hinds' Precedents § 2586, where a resolution offered from the floor providing for an investigation of the election of a Member was held to be privileged.

November 6, 1928, and to that end that the proper subpoenas be issued to the Sergeant at Arms of this House commanding him to summon all of said witnesses, and that said county clerk, said county judge, and said district attorney to appear with said election returns, as witnesses in said case, and said county clerk with said election record book; and that the expense of said witnesses and all other expenses under this resolution shall be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons or papers as it may find necessary for the proper determination of said controversy.

§ 8.10 Committees of the House and Senate investigating elections may be authorized to impound and to examine the content of ballot boxes following congressional elections.[20]

On several occasions, congressional committees have been authorized to impound ballot boxes containing ballots cast in congressional elections, either to resolve election contests or to investigate charges of election irregularities.

On Jan. 19, 1931, for example, the Senate authorized by resolution a special investigatory committee to impound and to examine the contents of ballot boxes. The committee was investigating alleged violations of the Corrupt Practices Act.[1]

Again, during the 86th Congress, a subcommittee on elections of the Committee on House Administration traveled to an Arkansas congressional district, where a seat was being contested (Mr. Dale Alford was the certified Member). Its purpose was to take physical custody of ballots and other materials and to isolate questionable ballots for further consideration. A federal court impounded the ballots for the use of the committee.[2]

Validity of Ballots

§ 8.11 Absent fraud, violations of directory state laws gov-

20. Similarly, a state law vesting custody of ballots in a state official cannot prevail against a grand jury investigation of violations of federal election statutes. *In re Massey*, 45 F 629 (D. Ark. 1890).

1. S. Res. 403, 74 CONG. REC. 2569, 71st Cong. 3d Sess. For the establishment of the committee and its powers, see 72 CONG. REC. 6828, 6829, 71st Cong. 2d Sess., Apr. 10, 1930.

2. See the remarks at 105 CONG. REC. 18610, 18611, 86th Cong. 1st Sess., Sept. 8, 1959. The investigation was undertaken pursuant to H. Res. 1, 86th Cong. 1st Sess.

For another occasion where the Committee on House Administration recounted ballots under its investigatory power, see § 8.5, supra.

erning the conduct of election officials as to ballots are not sufficient to invalidate ballots, but laws regulating the conduct of voters as to ballots must be substantially complied with, as the latter are mandatory.[3]

Elections committees of the House examining allegedly invalid ballots have determined, often in reliance on state court opinions, that those state laws regulating the conduct of election officials in relation to ballots are merely directory in nature, violations thereof not constituting sufficient grounds to invalidate ballots. Laws governing the conduct of voters in marking and handling ballots are on the other hand mandatory in nature, and substantial violations operate to void the respective ballots.[4]

The following laws have been ruled as directory in nature and not sufficient to invalidate ballots: a requirement that certain instruments be made available to mark ballots;[5] a law regarding poll procedure and disposition of absentee ballots, envelopes, and applications;[6] a law requiring initials of precinct or poll clerks on ballots;[7] a law prohibiting sticker votes and write-in votes where the state customarily accepted such votes and the state attorney general had opined that their use was legal.[8]

The following laws have been regarded as mandatory, with violations thereof voiding ballots: a law containing provisions declar-

3. The only federal statute on the form of ballots is 2 USC § 9, requiring a written or printed ballot unless voting machines have been authorized by state law.

4. A state law requiring alternation of names on ballots and publication and display of ballots for a certain period prior to an election has been considered mandatory where invoked prior to the election. Committee on House Administration, report submitted Aug. 21, 1951, 97 CONG. REC. 10494, 82d Cong. 1st Sess.

5. Committee on House Administration, report submitted June 13, 1961, 107 CONG. REC. 10186, 87th Cong. 1st Sess. (law not made mandatory by fact that election officials were subject to criminal sanctions for violation thereof).

6. Committee on House Administration, report submitted Aug. 6, 1958, 104 CONG. REC. 16481, 85th Cong. 2d Sess.

7. Committee on House Administration, report submitted June 13, 1961, 107 CONG. REC. 10186, 87th Cong. 1st Sess. (adoption of state court opinion).

8. Committee on House Administration, report submitted Sept. 8, 1959, 105 CONG. REC. 18610, 86th Cong. 1st Sess. (where a subcommittee had unanimously recommended that the state clarify the use of stickers and write-in voting in its election laws).

ing an act of an election official essential to the validity of an election;[9] a law requiring the county clerk's seal and initials on absentee ballots;[10] a law requiring voter compliance with absentee voting laws;[11] and a law requiring that a ballot be invalidated if the voter's choice could not be ascertained for any reason.[12]

§ 9. Elections to Fill Vacancies

Article I, section 2, clause 4 of the Constitution provides that upon the creation of a vacancy in the House, the executive authority of the state shall issue a writ of election to fill the vacancy. A vacancy in the Senate may be filled either by a writ of election or by state executive appointment under the 17th amendment.[13]

Whether a vacancy arises by death, resignation, declination, or action of the House,[14] the vacancy must be officially declared, either by the state executive or by the House, in order that a special election may be held. Usually state authorities take cognizance of the vacancy without the requirement of notice by the House, and normally the state executive declares the vacancy to exist, particularly in cases of death, declination, or resignation.[5]

If a Member resigns directly to the state Governor, as is the customary practice, the House is thereafter notified and the House need take no action.[16] If he re-

9. Committee on Elections No. 3, report submitted Feb. 15, 1944, 90 CONG. REC. 1675, 78th Cong. 2d Sess.

10. Committee on House Administration, report submitted June 13, 1961, 107 CONG. REC. 10186, 87th Cong. 1st Sess. (adoption of state court opinion).

11. Report submitted Aug. 6, 1958, 104 CONG. REC. 16481, 85th Cong. 2d Sess. (listing nine types of mandatory absentee voting laws). The report concluded that where absentee ballots should be rejected due to improper envelopes and applications, the method of proportionate deduction could be used to equitably deduct votes from the totals of the respective candidates.

12. Report submitted Aug. 6, 1958, 104 CONG. REC. 16481, 85th Cong. 2d Sess. (adoption of state court opinion.)

13. For Senate appointments, see §§ 9.149.16, infra.

Proposals to amend the Constitution to allow the appointment of Representatives to fill temporary vacancies have been rejected. See § 9.9, infra.

14. For the ways in which vacancies may be created, see *House Rules and Manual* §§ 18–24 (comments to U.S. Const. art. I, § 2, clause 4) (1973).

15. See *House Rules and Manual* §§ 18, 19 (1973).

16. See § 9.1, infra.