



United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 105th CONGRESS, FIRST SESSION

Vol. 143

WASHINGTON, THURSDAY, SEPTEMBER 4, 1997

No. 115

Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

O God, You have prophesied through Isaiah, "You will keep him in perfect peace whose mind is stayed on You"—Isaiah 26:3; and promised through Jesus, "Peace I give to you, not as the world gives do I give to you. Let not your heart be troubled, neither let it be afraid."—John 14:27.

That is the quality of peace we need to do our work creatively today. Often the conflict and tension present in our lives threaten to rob us of a calm and restful mind and heart. It is so easy to catch the emotional virus of frustration and exasperation. Help us to remember that Your peace is a healing antidote to anxiety that can survive in any circumstance.

Provider of peace, give us the peace of a cleansed heart, a free and forgiving heart, a caring and compassionate heart. Right now, may Your deep peace flow into us, calming our impatience and flowing from us to others.

Especially, we pray for Your peace for the women and men of this Senate. May Your profound inner peace free them to think clearly and speak decisively while maintaining the bond of peace with one another. Through our Lord and Saviour. Amen.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The able majority leader, Senator LOTT of Mississippi, is recognized.

Mr. LOTT. Thank you very much, Mr. President.

THE CHAPLAIN'S PRAYER

Mr. LOTT. Mr. President, it is worth coming to the opening moments of the

Senate session each day just to hear the Chaplain's prayers. I wish to express, again, my sincere appreciation for the beauty and for the meaningfulness of those prayers. It gives us the right frame of mind to begin a day's work together for the American people.

SCHEDULE

Mr. LOTT. Mr. President, the Senate will immediately resume consideration of amendment No. 1077, offered by the Senator from Indiana, Senator COATS, who is here and prepared to go. This is an amendment, of course, to S. 1061, the Labor, HHS appropriations bill. It is hoped that an agreement can be reached this morning to conduct a vote on the Coats amendment by mid-morning, hopefully within the hour.

In addition, Members can anticipate additional votes on amendments currently pending to the Labor, HHS appropriations bill and other amendments expected to be offered to the bill throughout the day's session. I understand a couple of amendments have been offered and set aside. I know there are some other amendments pending. As always, Members will be notified of exactly what time the votes will be scheduled. We will work with all Members to make sure they have an opportunity to offer their amendments and debate them, and then, of course, we will have votes, if necessary.

I ask, again, that all Senators cooperate with our managers on both sides of the aisle. They are trying to move this very important legislation that means so much to our country. And, as is quite often the case when we return from a period back in our respective States, we have not gotten off to a fast start. We hope to complete this very important appropriations bill today. We do have some problems and some delays. I would like to address those just for a moment.

First, with regard to tomorrow, it is still my intent to have a cloture vote

in the morning. We have not set a time. It could be as early as 8:30 to accommodate Senators' schedules, on the cloture motion on the Food and Drug Administration reform bill. We need to get this bill done. It was reported out overwhelmingly from the committee, and it has broad bipartisan support. Unfortunately, this is even a cloture vote on the motion to proceed.

The Senator from Massachusetts, Senator KENNEDY, has objections to this FDA reform. I thought we had them worked out two or three times at the end of the session, before the August recess, and then it seemed to get away from us.

I hope we can get all the Senators to work together and work out agreements so we can move this very important legislation. It is very important to the health and general quality of life of all Americans. This is an agency that has been bureaucratic, it has been slow, it has not done its work where it should be doing its work, and it has tried to force itself into areas where it really doesn't belong. This is long overdue.

I, again, am interested in getting it done. But if we have to, we will have more than one vote or votes on cloture. We need to go ahead and complete this. I think, once we can get it to debate and vote, it will not take very long. If we can work out something, by the way, on the bill, before the time, then we would not have to have a cloture vote tomorrow. I would be glad to work with the leaders on the legislation, Democratic leaders, to decide on a time when it would be debated and when that would be scheduled, either later on this week, or Monday or Tuesday. We will work together on that.

CONTESTED LOUISIANA ELECTION

Mr. LOTT. Mr. President, the other issue I want to address is some of the problems we have today. When we have something brought to the Senate that

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



Printed on recycled paper containing 100% post consumer waste

S8765

we have to look into, and, in this case, I am referring to the election in Louisiana for the Senate last year, where allegations of fraud have been made, it is incumbent upon us to thoroughly check those allegations out. Unfortunately, the committee charged with jurisdiction in this area has not been able to work together in a bipartisan way to get it done and get the work completed. I want us to reach that point sooner, not later, and I have worked across the aisle to try to come up with a process to make that happen. I thought we had it worked out, again, the last week in July, and at the last minute that fell apart.

So, we have to do our job. I am not going to come to the floor of the Senate, look Senators in the eye, and the American people, and say, "We checked it out thoroughly, there is nothing here," or, "There is a real problem here," until all the work that needs to be done has been done. I can't do that.

Now we are being told, well, if you continue it, we are going to have delays and obstruction by the Democrats. What are they delaying and obstructing? The Labor, Health and Human Services appropriations bill, the Superfund reform. Here is a program, Superfund, that is really the laughingstock of America. You care about the environment? Who among us would not care that the program is not working. Lawyers have a grand time. They are making money. But we are not cleaning up hazardous sites. We are not cleaning up hazardous waste sites.

So the Committee on Environment and Public Works wants to meet today to mark up the Superfund bill, and I am being told, "Well, we are not going to let you meet; we are not going to let that committee meet, in a bipartisan way, and mark this bill up." And, therefore, I have no option but to say, OK, if you are going to do that, then we will go out this afternoon.

If objection is made to the Environment and Public Works Committee meeting this afternoon to mark up Superfund reform, which would clean up hazardous waste sites in my State and probably every State in America, if that is going to be blocked, then the Senate will go out at 2 o'clock, we will be out until 4 o'clock so the committee can meet and do its work, and we will tack that time onto tonight. We are not going to have this arrangement where the other side tries to dictate the schedule in committee meetings. We are not going to do that.

I have worked very hard to keep my word to the Senate and to the Senators. When I say we are going to meet and have votes, we try to do that. When we agree we are not going to meet and have votes, we try to honor that. We agreed we would be out in the third week in October for the Columbus Day period. I am going to keep my word on that. I tried to keep in mind the personal lives, and opportunities to have dinner with families and children.

I want to do that. But if we are going to start playing this game of threats and delays and obstruction and blocking of committee meetings and that sort of thing, then I have no option but to put the time on the back end.

So, I don't think that is necessary. We have had a good feeling here in the Senate for the last 2 months. We worked together in a bipartisan way, even when we disagreed. I think we can continue to do that, and I certainly will try to continue to keep my word and work with the Senators on this schedule. That is one of the reasons why we might have to vote early in the morning, because some Senators on both sides of the aisle want to leave. That is fine. We want to help them. But we also have work to do.

So, I just wanted to point out what is going on. I don't have any problem with doing it this way. I just want everybody to understand I am not doing it to cause confusion or delay. I have no option.

The Environment and Public Works Committee will meet today. We will continue to work on the Labor, HHS appropriations bill. I believe that we can and should get it completed today or tomorrow. But we will have success on this bill, and we will do it in a bipartisan way, and we will do it, hopefully, by the end of this week or the first of next week.

So I just wanted to advise Senators what the schedule looks like for today and in the morning. I will talk to my counterpart on the other side of the aisle. I will be glad to work with Senators on FDA reform and Superfund reform and on Labor, HHS, to see if we can find reasonable accommodation, and we will also continue to pursue an opportunity to recommend to the Senate what action, if any, or none, should be taken with regard to the Louisiana election.

Mr. DORGAN. Will the Senator yield for a question?

Mr. LOTT. I'd be glad to yield.

Mr. DORGAN. I listened with interest to the Senator from Mississippi, the majority leader. I think it is important to point out that there is no intention that I am aware of on this floor to interrupt the business of appropriations bills. The principal business in this month of September is to finish, and work hard on, the appropriations bills; by the end of September, have them down to the White House, so the President can sign them and avoid a continuing resolution. So we want to do that, and there is no objection that I am aware of, made by anyone, which would interrupt in any way the conduct of business on appropriations bills.

The Senator from Mississippi, the majority leader, knows there is great concern about the issue of a contested election in Louisiana, by which a Member of the Senate was seated without prejudice and an investigation was begun. The conduct of that investigation causes some significant concern

here in the Senate. It is not December, it is not January, February, March, or April; it is September, and we have a Member of the Senate who is still seated in this Senate, seeing activities of a committee on an investigation in which allegations of fraud were made. And I might say that the committee hired a couple of investigators, lawyers—a Republican and a Democrat—and the first report they gave to the committee was to say there is nothing there. But that was not enough.

I am not going to go into what is going on in the committee. I don't think we need to have that discussion. But, you know, it is September. It's September, and we have a Member of the U.S. Senate who is still held in limbo, here, on this issue of investigation. I saw yesterday newspaper after newspaper after newspaper in Louisiana, the editorials and stories say, "There is nothing here. Let this go. Stop this investigation."

So, you know, the concern that some exhibit on the floor of the Senate about this issue is not without foundation. The Senator from Mississippi points out that he is concerned about delay. I don't think any of us want a delay.

Mr. LOTT. Mr. President, if I could reclaim my time to respond on that, I think everybody has indicated we want to continue to move the appropriations bills.

Mr. DORGAN. That's correct.

Mr. LOTT. But if an objection is heard today for the Environment and Public Works Committee to meet in session this afternoon and work on marking up a very important environmental bill to clean up hazardous waste sites, that interrupts the process of the appropriations bill. That committee should meet. In my opinion, it should have already met on this issue, and had votes and brought it to a conclusion. So, if an objection is heard to committees meeting, I have no option but to go out for a period of time to allow the committees to do their work. That's a very important part of our process here.

So the effect is that you are delaying the appropriations bill. But perhaps objection would not be heard, we wouldn't have to stop for 2 hours this afternoon so that a very important committee could meet. I have indicated to the Senator and to Senator DASCHLE that we hope that would not be necessary. But, you know, the effect is to delay the Labor, Health and Human Services appropriations bill.

With regard to the Louisiana election, yes, it is September. It need not be. This matter could have been concluded, completed, weeks or months ago, but from the beginning, the Democrats on the committee would not cooperate, would not work with us. They didn't actually—

Mr. DORGAN. Well—

Mr. LOTT. Wait, I have the floor and I will yield when you ask me to. I am on that committee, and all I ever said was find out what happened, was there

apparent fraud or not. As a matter of fact, investigators never went into Louisiana until July. Shortly thereafter, in something I have not seen in 25 years in Congress, the Democrats walked out of the committee's proceedings and said, "We won't participate."

In investigation after investigation over the years in the House and the Senate, I never saw the Republicans or Democrats, in any other instance, say, "We're not going to participate."

What happened after the investigators' being down there for like 2 weeks, the Justice Department withdrew the FBI agents. It couldn't come to a conclusion. The week before we went out, I talked with Senators on the Democratic side of the aisle, and we worked out an arrangement that I thought everybody was satisfied with for a special allocation of money to complete that work and in time to complete that work. At the last minute, it was jerked away.

What has happened is, I think Senator WARNER is going to make an announcement today, I believe, about a schedule he has in mind. There are several boxes of documents that have been turned over now to the committee as a result of the subpoena duces tecum to get evidence with regard to gaming interests and involvement in the election. By the way, I think they have every right to support a referendum. The only question is was it in any way used improperly or illegally. I don't know the answer to that.

Once those documents are reviewed, I understand the committee is going to meet, hear from the investigators, hear what the evidence is, if any, that they find in these documents and, at some point, the committee will proceed to action. I don't know exactly what date that would be.

It is not my intention to drag this out indefinitely. But I have to be able to come here and say to Members on both sides of the aisle, "We've done our work. Even though we haven't had co-operation, we have reached a conclusion as best we can, and here it is." I have told the Senators on both sides of the aisle over the past year and 3 months how we deal with you. I am not interested in causing undue delay or difficulty for any Senator here with or without prejudice. But I must be able, along with other Senators, to say that we did our work, we fulfilled our constitutional responsibility, and then make a recommendation. I will be glad to yield further if you like.

Mr. DORGAN. If the Senator will yield, he clearly should and will not be surprised at concern expressed now in September about this issue. Those concerns were registered in July and early August, and the Senator understands that we have a Senator from Louisiana whose election is still being contested, and it is now September. I just want to, if I might, just show you some of what is happening in Louisiana in the press:

"When will investigation end? Voters might not be happy with prolonged debate."

"Poll: State's voters believe Landrieu probe unnecessary."

"Enough's enough," an editorial in the Times-Picayune.

"Senate investigation will hurt Louisiana."

"No evidence of widespread fraud."

It is September, and there is no demonstration of any kind that I am aware of that any irregularities existed in that election that would in any way overturn the results of the election, and yet we still have what I think is a concerted effort by some to drag this out and drag it out and drag it out.

Mr. LOTT. Yes.

Mr. DORGAN. Frankly, a lot are not happy about that.

Mr. LOTT. Yes, there has been an effort that has caused it to be delayed and dragged out.

Mr. DORGAN. I understand who the Senator from Mississippi says is at fault. I only know it is September. The first two lawyers who were hired, a Democrat and Republican, testified in front of the committee that hired them and said there is nothing here. The majority leader said that is not satisfactory.

Mr. LOTT. In the areas they had looked into. There had been nothing done with regard to the gaming activities and the so-called life organization in New Orleans.

Mr. DORGAN. My point is, if he will allow me one more minute, my point is that I think it is unfair to the Senator from Louisiana. I think it is unfair to the people of Louisiana. This ought to get wrapped up.

Our point is this: There is no intention to interrupt the business of the Senate, which is now to pass these appropriations bills in the month of September. We have to do that. There is no one out here objecting to the work on those appropriations bill.

Mr. LOTT. But you are going to object to a committee meeting, which makes it necessary for the work of the Appropriations Committee to be interrupted.

Mr. DORGAN. As the Senator knows, the regular order of the Senate is to have no committee meetings when the Senate is in session.

Mr. LOTT. But it has been the common practice for committees to be able to meet. All I am saying to you is, work with us and we can bring this to conclusion. But I am also saying that if you start interrupting the business of the Senate or committees, it will not be without action in return. We need to work together. We need to do these things privately and communication in the type of way we have done over the last 2 months. But if you start playing games with committees meeting on important issues like Superfund and, let me tell you, fast track, it will have an effect. Every action produces a reaction.

So let's not start down that trail. Let's continue to work together as we

have, and we can complete our work on appropriations and on Superfund and on fast track and on ISTEA, and then return to our constituency.

Mr. DORGAN. If the Senator will yield for one more comment, the issue of delay applies especially and indelibly to the issue of the investigation in Louisiana, and delay, it seems to me, continued delay is unfair to Senator LANDRIEU and unfair to the people of Louisiana. It is not our intent to cause problems for the Senator from Mississippi in the scheduling of the Senate. I understand it is not easy to be involved in running this place. So it is not our intention to cause those kinds of problems. That is especially why—

Mr. LOTT. Let me just say, it is not easy, but it is a great pleasure. I'm enjoying it a lot.

Mr. DORGAN. You actually act like you are enjoying it. We have done a lot. This has been a pretty productive year, but at least a good number on our side say with respect to delay, one of the delays that occurs now in the Senate is the delay on this investigation and the end of the investigation, and the investigation has found nothing on the issue of this contested Senate election. We hope that we will get beyond that and get on with the business and not have that hanging over the head of Senator LANDRIEU or the people of Louisiana.

So our point is this: Let's continue with the Senate business. Let's pass these appropriations bills, get them to the President, get them signed. That is the regular order. Let's also resolve this issue with the Louisiana election. It is now September. It is not March or April or July. It is September, and it is long past the time when that should have been resolved.

Mr. LOTT. Mr. President, I ask unanimous consent, at the end of my remarks, to have printed in the RECORD the history of this type of investigation, these type of allegations and the length of time they have gone on.

The PRESIDING OFFICER (Mr. BROWNBACK). Without objection, it is so ordered.

(See exhibit 1.)

Mr. LOTT. Mr. President, as a matter of fact, most of them, many of them, have gone on for weeks and months, including some Senators who serve here in the Senate right now, and they proceeded in the normal way. It is not my intention to delay this investigation and this conclusion. It is my intention to make sure that we have investigated all of the alleged fraud and abuses of election laws and illegal acts. When we have done that, I will press aggressively for a conclusion. But until that is done, with the cooperation of the Democrats, it will not end.

I yield the floor, Mr. President.

EXHIBIT 1

CONTESTED ELECTION CASES

(Prepared by the Office of Senate Legal Counsel, December 1996)

I. INTRODUCTION

The Constitution provides that "Each House shall be the Judge of the Elections,

Returns, and Qualifications of its own Members. . . .¹ The Senate has always been "jealous of [this] constitutional right."² Courts have consistently recognized that congressional actions in this area present nonjusticiable political questions beyond judicial review.³ In *Reed et al. v. The County Comm'rs of Delaware County, Penn.*, the Supreme Court acknowledged that the Senate is the final judge of the elections of its members and held: "[The Senate] is the judge of the elections, returns and qualifications of its members. . . . It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department."⁴

II. SENATE REFUSAL TO SEAT STATE-CERTIFIED CANDIDATES

The Senate has been called upon to judge approximately 100 contested election cases. On only nine occasions, however, has the Senate denied a seat to the candidate whose election had been certified by the state.⁵ Several of these cases involve fact patterns that are unlikely to be at issue in modern disputes. They are not examined in this memorandum.⁶ Five cases, however, involve allegations that are more likely to be at issue in modern contested election cases: challenges to the accuracy of the ballot count, and challenged based on claims that the election results were tainted by fraud and corruption.

A. Inaccurate ballot counts

1. Steck v. Brookhart (1926)

The case of *Steck v. Brookhart* is the only occasion on which the Senate has overturned the result of a state-certified election and seated the contestant. Every other time that the Senate has overturned the results of a state-certified election, it has simply declared the seat vacant and left the state to decide how it should be filled.⁷ In 1926, however, the Senate voted to unseat Republican Smith Brookhart from Iowa and replace him with his general election opponent, Democrat Daniel Steck.

Brookhart was certified the winner of the November 1924 Iowa Senate election after a state recount showed that he had gained a plurality of less than 800 votes out of the more than 900,000 ballots cast in a four-way race. In January 1925, his opponent Steck filed with the Senate a challenge to Brookhart's seating based on alleged irregularities in the vote count. In an unusual twist, the Iowa Republican State Central Committee, angered by Brookhart's failure to endorse the Coolidge presidential ticket, also challenged his election on the ground that Brookhart was not, as he had represented himself to be, a member of the Republican Party. The Senate allowed Brookhart to take his seat at the beginning of the 69th Congress in March 1925 and referred the challenges to the Committee on Privileges and Elections. Beginning in the summer of 1925, the Committee conducted an investigation of Brookhart's election, which included a recount in Washington, D.C. of each of the ballots cast. In March 1926, the Committee reported to the Senate that Steck had received a plurality of 1,420 votes and recommended that Brookhart be unseated and replaced by Steck. Much of the seven-day Senate debate concerned the applicability of Iowa election law to the vote count. The Committee majority took the position that the Senate was not constrained by Iowa law.⁸ On April 12, 1926, the Senate, in a vote that crossed party lines and did not include Brookhart, voted by a margin of 45 to 41 to unseat Brookhart and replace him with Steck.

2. Durkin v. Wyman (1974-75)

In the 1975 contested election case of *Durkin v. Wyman*, the Senate, rather than declare the winner as it had done in *Steck v. Brookhart*, simply found the seat vacant. The initial count of the November 1974 New Hampshire Senate election showed Republican Louis Wyman ahead of Democrat John Durkin by 355 votes out of more than 200,000 cast. A subsequent state recount determined that Durkin had won the election by ten votes, and on November 27, 1974 the governor issued Durkin a "conditional" certificate of election. Wyman challenged the certification before the New Hampshire State Ballot Law Commission, which ruled on December 24, 1974 that Wyman had won the election by two votes. On December 27, 1974, the governor rescinded Durkin's "conditional" credentials and certified Wyman the victor. That same day, Durkin filed a petition with the Senate contesting Wyman's credentials. The matter was referred to the Rules Committee's Subcommittee on Privileges and Elections. The Subcommittee began its investigation, which included a day of hearings during sine die adjournment, before the 94th Congress convened. The Subcommittee refused to make a recommendation and passed the case onto the full Committee, which divided evenly on the matter. The full Committee then referred the case to the full Senate without a recommendation.

When it convened in January 1975, the Senate would neither seat Wyman nor declare the seat vacant. Instead, the Senate referred the matter to the Rules Committee again. After much debate, the Committee decided upon carefully crafted procedures to recount the approximately 3,500 disputed ballots. But despite spending more than 200 hours on the matter, the Committee could not agree upon whom should be seated. Eventually, the Committee reported the matter to the Senate without a recommendation. Beginning in June 1975, the Senate debated the case for six weeks. Six cloture votes could not cut off the Republican-led filibuster. The Senate was at an impasse. The case was resolved only when Durkin and Wyman agreed in late July 1975 to support a new election. The day after the candidates reached their compromise, the Senate voted 71 to 21 to declare the seat vacant. That action paved the way for a September 1975 election, which Durkin won decisively.

B. Corrupt elections

1. William Lorimer (1910-12)

On three occasions the Senate has determined that an election was so tainted with corruption that its results were invalid. Each time, the Senate declared the seat vacant. The first occurred in 1912 when the Senate voted to overturn the certified election of William Lorimer of Illinois. The Illinois legislature elected Lorimer to the Senate, where he took his seat in 1909. In May 1910, Lorimer asked the Senate to investigate allegations by the press that he had gained his seat through bribery. In December 1910, the Committee on Privileges and Elections reported to the Senate its determination that Lorimer's election was valid. The Committee majority argued for the application of a standard that had been established by precedent: the Senate would invalidate an election on the basis of corrupt practices only if the Senator knew of or sanctioned the corrupt activities or if those activities had changed the outcome of the election.⁹ In March 1911, the Senate declared the election valid.

Repeated press reports of bribery in Lorimer's election forced the Senate to continue to probe the allegations, however, and in June 1911, the Senate created a special committee to conduct a second investiga-

tion. The second investigation took almost a year and involved the testimony of 180 witnesses. In May 1912, the special committee finally reported to the Senate that it could find no evidence linking Lorimer to the alleged corruption.¹⁰ A minority report, however, cited evidence that seven Illinois legislators had been bribed to vote for Lorimer.¹¹ Moreover, the minority believed that there was significant evidence linking Lorimer to the bribes.¹² The minority argued that the evidence was sufficient for the Senate to rule that the election was invalid. In July 1912, following a public outcry and an extensive Senate debate, the full Senate sided with the minority and voted 55 to 28 to declare Lorimer's election invalid and his seat vacant. In a special election following Lorimer's ouster, Lawrence Y. Sherman was elected to fill the seat.

2. Frank L. Smith (1926-28)

The other two instances in which the Senate declared an election invalid because of corruption arose out of the work of a Special Committee that was created in May 1926 to investigate allegations of the corrupt use of campaign expenditures in primary elections in Pennsylvania and Illinois. Eventually, the scope of the Special Committee's investigation expanded to include allegations of corrupt practices in the November general election too. In both cases the Senate departed from its normal procedure and refused to seat the Senator-elect pending the outcome of its investigation. This departure from practice is probably best explained by the fact that an ongoing investigation had already uncovered substantial evidence of fraud and corruption by the time each of these Senators-elect presented his credentials to the Senate.

Despite the negative publicity from the investigation of his primary victory, Frank L. Smith won the November 1926 Illinois general election. The Special Committee continued its investigation and on January 17, 1928 reported to the Senate its recommendation that Smith not be seated. The committee concluded that Smith's election was tainted with fraud and corruption because he had received campaign contributions from public service corporations in Illinois while he was chairman of the state agency that regulated them. The Senate agreed and on January 19, 1928 voted 61 to 23 to deny Smith a seat. Smith resigned from office on February 9, 1928. Otis F. Glenn was elected to fill the vacancy, and took his seat December 3, 1928.

3. William S. Vare (1926-29)

William S. Vare, the Republican nominee for the Senate from Pennsylvania, also won the November 1926 general election despite the negative publicity surrounding the Special Committee's investigation of his primary win. His opponent in the general election, Democrat William B. Wilson, filed a petition challenging Vare's credentials, alleging corruption by Vare's supporters in the general election. Wilson's allegations included "padded registration lists, 'phantom' voters who were actually dead or imaginary, criminal misuse of campaign funds, and voter intimidation."¹³ The Committee on Privileges and Elections conducted an investigation of Vare's general election campaign that supplemented the Special Committee's investigation into his primary victory. On February 22, 1929, the Special Committee, after an almost three-year probe, reported to the Senate its unanimous recommendation that Vare should not be seated because of the evidence of corruption it had uncovered, including thousands of instances of fraudulent registration. On December 5, 1929, the Committee on Privileges and Elections reported to the Senate its contrary determination that Vare's election was lawful. After a

*Footnotes at end of report.

day of debate, the Senate voted on December 6, 1929, by a margin of 66 to 15, that William Wilson had not been elected, and, by a margin of 58 to 22, that Vare should be denied a seat. On December 12, 1929, Joseph R. Grundy took Vare's seat by appointment.

C. Recent challenges

Since 1992, three Senate elections have been contested, but in none of these cases has the election result been overturned. In 1992, two petitions were filed asking the Senate to seat Senator-elect Coverdell conditionally pending the resolution of legal complaints concerning his election. One petition, filed by four Georgia citizens, asked that Senator-elect Coverdell be seated conditionally pending the resolution of a federal lawsuit brought by the four petitioners and Public Citizens, Inc. challenging the constitutionality of a Georgia law requiring a run-off between the top two candidates where no single candidate has won a majority in the general election. The second petition, filed by three Georgia citizens, asked the Senate to seat Senator-elect Coverdell conditionally until the Federal Election Commission ("FEC") had an opportunity to investigate a complaint filed by the Democratic Senate Campaign Committee ("DSCC") charging that the National Republican Senatorial Committee ("NRSC") had exceeded campaign spending limits during the Georgia run-off election. Senator Coverdell was sworn in with accompanying language noting that he was being seated "without prejudice" to the Senate's right to consider the petitions before it.¹⁴ Public Citizen's lawsuit challenging the constitutionality of the 1992 run-off election was dismissed by a federal district court in March 1993. The district court's decision was upheld on appeal in June 1993. In April 1995, the FEC concluded that it could not reach a verdict with respect to the charge that the NRSC had overspent during the run-off election.¹⁵ The Rules Committee took no official action on the petitions.

Also in 1992, several petitions contesting the election of Senator Packwood were filed by Oregon voters. These petitions, later consolidated, argued that Senator Packwood had lied to the voters regarding his mistreatment of women and had thereby "defrauded" the electorate. The petitions asked that the election result be set aside. Like Senator Coverdell, Senator Packwood was seated without prejudice to the Senate's right to review the petitions.¹⁶ By a vote of 16-0, the Rules Committee dismissed the petitions against Senator Packwood in May 1993. While the Committee did not formally report to the Senate, the Chairman advised the Senate of the Committee's decision not to proceed further with the inquiry and the Senate took no action.¹⁷

Finally, in 1994 California Senatorial candidate Michael Huffington filed a petition contesting the election of Senator Dianne Feinstein. In his petition, Huffington argued that some of the votes cast for Senator Feinstein were invalid and that he had won a majority of the valid ballots cast. Senator Feinstein was sworn in "without prejudice" to the Senate's right to consider the petitions before it.¹⁸ Huffington withdrew his petition before the Rules Committee could report to the Senate.¹⁹

III. SENATE PROCEDURES IN CONTESTED ELECTION CASES

Unlike the House of Representatives, whose election contests are governed in part by codified procedures,²⁰ "[t]he Senate has never perfected specific rules for challenging the right of a claimant to serve."²¹ Rather, Senate "practice has been to consider and act upon each case on its own merits, although some general principles have evolved

from the precedents established."²² A discussion of those general principles is set forth below.

A. Beginning the election contest

Senate election contests are most frequently begun with the filing of a petition by the losing candidate, addressed to the Senate, protesting the seating of the contestee and asserting a right to the seat in question. However, there is no requirement that the protest be made by a losing candidate. Petitions have also been filed by interested voters in the state,²³ and in *Steck v. Brookhart*, discussed above in section II, a protest was filed not only by the unsuccessful Democratic candidate, but by the state's Republican committee as well, which maintained that the certified winner of the election was not a proper party member.²⁴ Although no rule exists, recent practice has been to file the petition with the President of the Senate.²⁵ On other occasions, the petition has been sent to various members of the Senate majority and minority leadership.²⁶ Petitions of contest are not the only means available for instituting an election contest. A member may offer a resolution calling for an investigation of an election.²⁷ In addition, the Committee on Rules and Administration has asserted its right to investigate an election contest upon its own motion.²⁸ Recent Senate practice has been to refrain from investigating a contested election until the state has conducted its own review or recount, where such state remedies were available.²⁹

B. Senate action upon filing of petition

1. The Decision to Seat

If a petition of contest is filed in advance of the presentation of credentials and swearing-in of senators-elect on the opening day of a new Congress,³⁰ the Senate must decide whether to seat the certified senator-elect pending resolution of the election contest. The practice of the Senate has generally been to treat a state certification that appears proper on its face³¹ as *prima facie* evidence that the member-elect is entitled to a Senate seat, and to seat him pending determining of his right to office:

"[T]he orderly and constitutional method of procedure in regard to administering the oath to newly elected Senators [is] that when any gentleman brings with him or presents a credential consisting of the certificate of his due election from the executive of his State he is entitled to be sworn in, and that all questions relating to his qualification should be postponed and acted upon by the Senate afterwards."³²

Although this has been the usual Senate practice, the Senate retains its discretion to look behind such credentials and to refuse to seat a member-elect until it completes its adjudication of the election contest. For example, in the 1927 contest of *Wilson v. Vare* for a Pennsylvania Senate seat, discussed above in section II, the Senate asked the certified senator-elect, William Vare, to step aside. The Senate refused to seat Vare until a special committee, previously formed to investigate excessive expenditures and corrupt practices in the 1926 senatorial campaigns in Pennsylvania and Illinois, had completed its investigation and made its final report.³³ This exercise of power was upheld in a case arising out of the Vare investigation, *Barry v. U.S. ex rel. Cunningham*,³⁴ in which the Supreme Court held that the Senate had the discretion to decide whether to accept Vare's credentials and administer him the oath, pending adjudication of the election contest.³⁵

The Senate most recently refused to seat a member-elect presenting state credentials in the 1975 election contest between John

Durkin and Louis Wyman for a New Hampshire Senate seat, also discussed above in Section II. A certificate of election had been issued to Durkin, but, after a recount, the certificate was rescinded and reissued to Wyman. At the swearing-in of new members-elect, both Wyman and Durkin were asked to stand aside,³⁶ and the certificates were referred to the Committee on Rules and Administration.³⁷ After neither the Rules Committee nor the full Senate was able to resolve the dispute, the seat was ultimately declared vacant.³⁸

The more common practice in recent years has been to seat the certified member-elect against whom a petition of contest has been filed, but to administer the oath of office to him "without prejudice."³⁹ The effect of administering the oath without prejudice is, it has been said, "a two-sided proposition—without prejudice to the Senator and without prejudice to the Senate in the exercise of its right."⁴⁰ The "right" of the Senate is its right, by majority vote, to later unseat the member or affirm his membership after the issues respecting his right to the seat are resolved.⁴¹ The most recent explanation of this practice came from then Majority Leader Dole at the beginning of the 104th Congress in connection with administering the oath to Senator-elect Feinstein, whose election had been challenged by her opponent. It was Senator Dole's view that the phrase "without prejudice" had no effect upon the rights of the Senator to act as a Senator, or the rights of the Senate to act as the judge of the Senator's election:

"The oath that will be administered to Senator Feinstein, just as the oath that will be administered to all other Senators-elect, will be without prejudice to the Senate's constitutional power to be the judge of the election of its members. . . . [T]he making of this statement [that the oath is administered "without prejudice"] prior to the swearing in of a challenge[d] Senator-elect serves the purpose of acknowledging formally that the Senate has received an election petition and that it will review the petition in accordance with its customary procedures."—141 Cong. Rec. S4 (daily ed. Jan. 4, 1995).⁴²

2. Reference to committee

The petition of contest and other papers that have been filed relating to an election contest are referred to the Committee on Rules and Administration for investigation and recommendations.⁴³ The committee has jurisdiction over "[c]redentials and qualifications of Members of the Senate [and] contested elections."⁴⁴ Under the rules of the Senate, standing committees continue in existence and maintain their power during the recesses and adjournments of the Senate.⁴⁵ The committee, on the basis of this rule and the Senate precedents that underlie it, has asserted its power to continue investigations without interruption during periods of adjournment.⁴⁶ The committee has also begun investigations of election contests in advance of the convening of the Congress to which the member-elect was elected.⁴⁷

C. Committee practice and procedure

1. Pleadings before the committee

In most election cases, the protest takes the form of a petition and complaint, similar to that in a lawsuit, describing in varying detail the grounds upon which the challenge is based. The contestee files a response, typically in the form of an answer or an answer combined with a motion to dismiss. The parties may submit follow-up replies, and in some cases the contestant, either on his own or upon the request of the committee, may file one or more amended complaints. In addition to formal pleadings, the parties may

submit various legal memoranda on issues relevant to the investigation, for example, on questions concerning the scope and applicability of the state's election laws.⁴⁸

2. Committee hearings

Committee hearings may be held not only in Washington, but also at the site of the election.⁴⁹ The parties and their counsel are generally permitted an active role in these hearings. Either the contestants or their counsel typically make opening statements,⁵⁰ and counsel may be permitted to make subsequent legal arguments and otherwise present their client's positions during the hearings.⁵¹ The parties may be permitted to call witnesses,⁵² and counsel may be given the right to question and cross-examine witnesses themselves.⁵³ As might be expected given the politically charged nature of the issues that may arise in these disputes, hearings may be lengthy, particularly if a recount is conducted. For example, the Rules Committee held 46 sessions and 698 rollcall votes in its attempt to resolve the *Durkin v. Wyman* contest.⁵⁴

3. Committee recount procedures

In many cases, the nature of the protest is such that the committee will not engage in a recount. In some cases, no recount will be requested by the contestant. For example, in the 1975 *Edmondson v. Bellmon* contest, the challenger's sole complaint was that the voting machines in one county had been programmed in violation of Oklahoma law.⁵⁵ In other cases, the committee may decide to make its recommendations exclusively on the basis of the pleadings and other evidence introduced by the parties, and reject any full-scale investigation or recount.⁵⁶ The committee may also refuse to conduct a recount because of the contestant's failure to exhaust available state recount procedures.⁵⁷ The decision to conduct a recount is generally made by the formal adoption of a resolution by the committee;⁵⁸ the resolution may authorize a recount on less than a statewide basis, limited to selected counties in the state or to a particular group of protested ballots.⁵⁹

The first step of a recount is to secure immediate possession of all election records bearing on the contest. Most Senate recounts have been conducted in Washington.⁶⁰ Committee staff members, often together with the Sergeant at Arms, may be sent to the state to seal all voting machines and to bring back paper ballots, tally sheets, ballot stubs, and other election records.⁶¹ In some cases, committee subpoenas have been issued to the responsible state election officials to obtain these records.⁶² Stringent security precautions have been observed in transporting these materials to Washington and in storing them during the recount. For example, in the *Durkin v. Wyman* contest, ballots were kept in a locked room in the basement of the Russell Office Building with Capitol Police officers on guard around the clock; two padlocks were placed on the door, with a different key given to the ranking majority and minority members of the committee.⁶³

Often extensive field investigations may be necessary at various stages of the recount process. Voting machines may need to be inspected to verify that the machines accurately recorded the votes cast and that the total votes recorded on the machines corresponds with the number of voters listed on the pollbooks.⁶⁴ Registration records may need to be examined and compared with the pollbooks to ensure that only legally authorized voters are included in the count.⁶⁵ In many election cases, charges of a wide variety of election irregularities will be at issue, such as illegal assistance or corruption of voters, tampering with ballot boxes or voter machines, violation of the secrecy of the bal-

lot, and fraudulently altered ballots. Investigation of such questions may require a significant commitment of committee manpower. For example, in investigating charges of violations of New Mexico voters' constitutional right to a secret ballot in *Hurley v. Chavez*, committee investigators interviewed and obtained signed and witnessed statements from thousands of voters throughout the state. A number of Spanish-speaking investigators were engaged by the committee to aid in this effort.⁶⁶

4. Committee report and recommendations

Upon the completion of its investigation and any recount, the committee submits to the Senate a report, together with an accompanying resolution, recommending a final disposition of the election contest. The report may also contain minority views.⁶⁷ There are several courses of action that the committee may recommend to the Senate. The committee may recommend that the petition of contest be dismissed. Dismissals of contests are commonly based on the ground that the allegations of the petition are too general to justify committee investigation.⁶⁸ or that even if the allegations are accepted as true, they would be insufficient to affect the result of the election.⁶⁹ Alternatively, based upon its investigation, the committee may recommend that a certain candidate has received a majority of the valid votes and should be declared the winner.⁷⁰ Finally, the committee may conclude that no winner can be determined, and recommend that the election be set aside and the seat declared vacant so that a special election can be held.

However, in the two most recent Senate contested election cases in which the full Senate has acted, both occurring during the 94th Congress, the committee was unable to agree upon recommendations for final disposition of the contests. As noted in the *Durkin v. Wyman* contest, the inability of the committee to resolve the numerous issues on which it was evenly divided prevented it from reaching agreement on a final recommendation; the committee was able only to report a resolution seeking Senate determination of the issues upon which the committee had deadlocked.⁷² In the *Edmondson v. Bellmon* contest the committee found that the Oklahoma election laws had been violated and that those violations could have affected the results of the election, but it was unable to determine who would have won the election had the violations of law not occurred. The committee reported a resolution requesting that the Senate determine the outcome of the election.⁷³ A minority report, which charged that the majority report was partisan, recommended that the challenge be dismissed. After four days of debate, the Senate voted 47 to 46 to table the majority's resolution. By voice vote the Senate then declared that the state-certified victor should keep his seat.

D. Standard of review

The contestant in an election has the burden of proof to establish, by a preponderance of evidence,⁷⁴ the allegations raised in his petition. Sufficient evidence must be offered to overcome the presumption that the official returns are prima facie evidence of the regularity and correctness of the election⁷⁵ and that election officials have properly performed their legal duties.⁷⁶ Not only must the contestant overcome these presumptions of regularity, but he must affirmatively establish that the irregularities complained of would affect the result of the election.⁷⁷ In addition to these general standards, common to all election contests, the committee will often adopt detailed evidentiary presumptions to govern its consideration of the factual issues that may be raised in a particular contest.⁷⁸

E. Application of State election laws

The Senate has generally attempted to observe state election laws in resolving election contests. However, as the final judge of its elections, the Senate is not bound by state election laws, and has exercised its power to disregard those laws, especially in instances where their technical application would invalidate the will of the voters.⁷⁹ As Senator Cannon stated about the Senate's investigation of the *Durkin v. Wyman* contest, "The U.S. Senate, as the final judge or arbiter of elections, returns, and qualifications of its Members, is not bound by the statutes and case law of a State, although the committee has consistently given weight to the New Hampshire law consistent with the attempt to determine the intent of the voter."⁸⁰ In determining whether to give effect to state election laws, a distinction is often drawn between "directory" and "mandatory" provisions of state law. "Mandatory" provisions affecting the right of suffrage itself have been more strictly followed than "directory" provisions, such as those governing ministerial functions of state election officials and technical requirements concerning the manner of marking ballots.

F. Senate disposition

Election contests are generally disposed of, following floor consideration and debate, pursuant to Senate resolution. A resolution from the committee disposing of a contested election case is highly privileged; it does not have to lie over a day and has precedence over most unfinished business or motions.⁸¹ The parties to the election contest, including bona fide claimants and senators-elect who have not been permitted to take the oath of office, are usually granted floor privileges during the debate on the election contest;⁸² occasionally, they have even been granted the privilege of addressing the Senate to present their case.⁸³

The Senate may adopt a resolution dismissing the complaint; such resolutions are frequently adopted by unanimous consent with little or no floor debate.⁸⁴ If a senator-elect who has previously been sworn in is determined by the Senate to be entitled to the seat, the resolution will declare that he was duly elected for a six-year term as of the date he received the oath.⁸⁵ Where the contestant is declared the winner and the incumbent is unseated, or if no one had earlier been sworn in, upon adoption of the resolution, the prevailing party has been immediately given the oath of office and seated.⁸⁶ In most instances, where the Senate has determined that the state-certified victor should not be seated, it has declared the seat vacant.⁸⁷

G. Reimbursement of election contest expenses

The Senate has by resolution authorized the payment of expenses incurred by the parties in contested election cases.⁸⁸ Reimbursement is not automatic, however, and the Senate has refused to authorize payment of expenses even in instances where the committee recommended such payment.⁸⁹ Most of these resolutions authorizing reimbursement specify the amount of the payments, typically less than the actual expenses incurred by the parties during the contest. In the *Durkin v. Wyman* contest, however, the resolution authorized payments out of the contingent fund of the Senate to reimburse both *Durkin* and *Wyman* in an amount to be determined by the committee.⁹⁰

DURATION OF CONTESTED ELECTION CASES

Investigations

Edmondson v. Bellmon, Oklahoma, 1975 election: 18 months; investigation delayed 9 months during New Hampshire case.

Hurley v. Chavez, New Mexico, 1952 election: 15 months; fraud investigation.

Tydings v. Butler, Maryland, 1950 election: 8 months; campaign finance and slander investigation.

Sweeney v. Kilgore, West Virginia, 1948 election: 18 months; fraud investigation.

Hook v. Ferguson, Michigan, 1948 election: 9 months; fraud investigation.

Long and Overton, Louisiana, 1932 election: 20 months; fraud investigation by special committee.

Heflin v. Bankhead, Alabama, 1930 election: 17 months; fraud investigation.

Smith, Illinois, 1926 election: 20 months; campaign finance and bribery investigation by special committee.

Wilson v. Vare, Pennsylvania, 1926 election: 3½ years; fraud and campaign finance investigation by special committee.

Peddy v. Mayfield, Texas, 1992 election: Over 2 years; fraud investigation and recount.

Ford v. Newberry, Michigan, 1918 election: 3½ years; fraud and campaign finance investigation.

Recounts

Durkin v. Wyman, New Hampshire, 1975 election: 9 months.

Markey v. O'Connor, Maryland, 1946 election: 16 months.

Steck v. Brookhart, Iowa, 1924 election: 15 months.

Note—dates measured from date of election.

Case	Any Committee Action Taken During Sine Die Adjournment of Congress?	State Certified Candidate Seated?
Steck v. Brookhart	Yes	Yes
Durkin v. Wyman	Yes	No
William Lorimer	Yes	Yes
Frank L. Smith	Yes	No
Wilson v. Vare	Yes	No

FOOTNOTES

¹ U.S. Const. art. I, §5, cl. 1.
² *Ford v. Newberry*, S. Rep. No. 277, pt. 1, 67th Cong. 1st Sess. 9 (1921).

³ *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972).

⁴ 277 U.S. 376, 388 (1928).

⁵ See generally *United States Senate Election, Expulsion and Censure Cases 1793-1990*, S. Doc. No. 33, 103d Cong., 1st Sess. (1995) (hereafter "Senate Election Cases"). This publication, compiled by the Senate Historian's Office, contains a brief description of all Senate election, expulsion, and censure cases during the period 1793 to 1990.

⁶ Two involve the unseating of Senators who were found ineligible under the Constitutional requirement that a Senator be a U.S. citizen for nine years; see *Senate Election Cases* at 3 (Albert Gallatin, 1793-94) and 54 (James Shields, 1849); and two others involve challenges to the method to elect U.S. Senators used by state legislatures prior to the 1913 ratification of the Seventeenth Amendment, *id.* at 74 (James Harlan, 1855-57) and 127 (John Stockton, 1865-66).

⁷ *Id.* at 424 (*John A. Durkin v. Louis C. Wyman*, 1974-75); *id.* at 333 (Frank L. Smith, 1926-28); *id.* 328 (*William B. Wilson v. William S. Vare*, 1926-29); *id.* at 283 (William Lorimer, 1910-12); *id.* at 129 (John P. Stockton, 1865-66); *id.* at 76 (James Harlan, 1855-57); *id.* at 55 (James Shields, 1849); *id.* at 4 (Albert Gallatin, 1793-94).

⁸ The Senate has maintained consistently the majority's position. See *infra* at 26, 27.

⁹ S. Rep. No. 942, pt. 1, 61st Cong., 3d Sess. 2 (1910).
¹⁰ S. Rep. No. 769, 62d Cong., 2d Sess. 91 (1912).

¹¹ *Id.* at 100-14.

¹² See *id.* at 101 (noting that one of the bribed legislators had successfully blackmailed Lorimer to obtain employment, and that an "innocent [man] would indignantly have refused to have anything else to do with such a blackmailer.")

¹³ *Senate Election Cases* at 325.

¹⁴ 139 Cong. Rec. S4-S7 (daily ed. Jan. 5, 1993). As discussed below, see discussion *infra* at 17, such qualifying language probably has no legal effect.

¹⁵ However, the FEC found that Senator Coverdell's 1992 campaign committee had accepted \$66,000 in improper contributions from 95 people. The FEC fined the committee \$32,000 and directed it to return the improper contributions.

¹⁶ 139 Cong. Rec. S4-S7 (daily ed. Jan. 5, 1993).

¹⁷ See 139 Cong. Rec. S6294 (daily ed. May 21, 1993) (statement of Senator Ford).

¹⁸ 141 Cong. Rec. S4 (daily ed. Jan. 4, 1995).

¹⁹ Michael Doyle, *Huffington Concedes Nov. 8 Senate Race*, The Fresno Bee, Feb. 8, 1995, at A3.

²⁰ The Federal Contested Election Act of 1969, 2 U.S.C. §§381-396 (1994). Prior to 1969, House election contests were governed by the provisions of the Contested Elections Act, 2 U.S.C. §§201-226 (repealed), which derived from the Act of Feb. 19, 1851, ch. 11, 9 Stat. 568.

²¹ *Senate Election, Expulsion and Censure Cases from 1793 to 1972*, S. Doc. No. 7, 92d Cong., 1st Sess. vii (1972).

²² *Id.*

²³ See *William Langer*, S. Rep. No. 1010, 77th Cong., 2d Sess. 1 (1942). Following the 1992 election, five groups of Oregon voters filed petitions with the Senate contesting the election of Senator Robert Packwood, charging that he had engaged in election fraud by lying during the campaign about his treatment of women.

²⁴ *Steck v. Brookhart*, S. Rep. No. 498, 69th Cong., 1st Sess. 2 (1926).

²⁵ See, e.g., *In the Matter of the United States Seat from California in the 104th Congress of the United States* (1994) (petition filed by Michael Huffington contesting the election of Senator Dianne Feinstein); *Petition to Deny Seating to, or Seat Conditionally, Senator Bob Packwood* (1992) (filed by Oregon voter Keith Skelton); *Petition by Certain Voters and Citizens of the State of Oregon* (1992) (also contesting the election of Senator Packwood).

²⁶ *Petition Challenging the Election of Paul Coverdell* (1993) (filed by three Georgia citizens).

²⁷ Investigations of improper campaign expenditures and corrupt practices have often been instituted in this manner. See, e.g., *Frank L. Smith, Senate Election Cases*, *supra* note 5, at 330-33; *Wilson v. Vare*, *id.* 323-29.

²⁸ See *Hurley v. Chavez*, S. Rep. No. 1081, 83d Cong., 2d Sess. 2 (1954).

²⁹ See S. Rep. No. 597, 94th Cong., 2d Sess. 8 (1976) (*Edmondson v. Bellmon*); S. Rep. No. 156, part 2, 94th Cong., 1st Sess. 3-6 (1975) (*Durkin v. Wyman*); *Senate Election Cases* at 419 (*Roudebush v. Hartke*, 1970-72); *id.* at 399 (*Hurley v. Chavez*, 1952-54). See also S. Rep. No. 802, 81st Cong., 1st Sess. 9 (1949) (*Sweeney v. Kilgore*) (where contestant had withdrawn his request for a recount by the state, the Subcommittee did not conduct a recount in keeping "with the policy of the subcommittee to conduct no recount in any State wherein the laws of that State provide for a recount by candidates for United States Senator."). But see *Senate Election Cases* at 391-93 (*Tydings v. Butler*, 1950-51) (no effort to pursue state remedies where Senate was conducting a hearing and investigation into allegations of campaign irregularities, including slander and smear tactics). Following the 1994 general election, Michael Huffington contested the election of Senator-elect Dianne Feinstein in the Senate without first seeking a recount in California. Huffington later withdrew his Senate petition before the Rules Committee could report to the Senate. See Susan Yoachim, *Huffington Concedes, Drops Voter Challenge*, S.F. Chron., Feb. 8, 1995, at A3; Michael Doyle, *Huffington Concedes Nov. 8 Senate Race*, The Fresno Bee, Feb. 8, 1995, at A3.

³⁰ There is no such requirement; petitions are frequently filed after the contestee has been seated. See, e.g., *Hook v. Ferguson* (1949), *Senate Election Cases*, *supra* note 5, at 386.

³¹ The Senate has adopted forms of suggested certificates of election and appointment of senators. See Rule 2.3, Standing Rules of the Senate, S. Doc. 8, 104th Cong., 1st Sess. 2 (1994). Credentials should be signed by the governor and attested by the secretary of state of the state in which the election was held.

³² 37 Cong. Rec. 1 (1903) (statement of Sen. Hoar). See also *Riddick's Senate Procedure*, S. Doc. No. 28, 101st Cong., 2d Sess. 704 (Alan S. Frumin ed., rev. ed. 1992) ("Under orderly procedure, a Senator-elect, upon presentation of credentials, should be sworn in, and all matters touching his qualifications should be determined thereafter."); *Senate Election Cases*, *supra* note 5, at xviii.

³³ 60 Cong. Rec. 4, 337-38 (1927). As discussed above in Section II, the certified senator-elect from Illinois, Frank L. Smith, was also asked to step aside, based upon similar indications for fraud and corruption discovered by the special committee. See *Senate Election Cases*, *supra* note 5, at 333. The Senate has also refused to seat members-elect presenting credentials in a number of cases predating the adoption of the Seventeenth Amendment in 1913. In many of these cases, the credentials were invalid for reasons either apparent on their face or otherwise within the knowledge of the Senate, for example, because a governor was attempting to make an appointment

to fill a vacancy which had not been filled by the legislature while it was in session. E.g., *Matthew Quay* (1899), *id.* at 261-62; *Henry W. Corbett* (1897), *id.* at 253-55; *Lee Mantle* (1893), *id.* at 243-45. A number of cases involved instances where more than one candidate presented credentials for a seat. E.g., *Lucas v. Faulkner* (1887), *id.* at 230-31; *Reynolds v. Hamilton* (1870), *id.* at 164-65; *Stanton v. Lane* (1861), *id.* at 92-94. Many occurred during the Civil War when there was concern about seating senators disloyal to the Union cause or senators representing states in a state of rebellion. E.g., *Fishback, Baxter and Snow* (1864), *id.* at 117-20; *Cutler Smith and Hahn* (1864), *id.* at 121-23; *Segar and Underwood* (1865), *id.* at 124-26.

³⁴ 279 U.S. 597 (1929).

³⁵ *Id.* at 614-15.

³⁶ 121 Cong. Rec. 4-5 (1975).

³⁷ 121 Cong. Rec. 1495 (1975).

³⁸ 121 Cong. Rec. 25960-61 (1975). See generally, D. Tibbetts, *The Closest U.S. Senate Race in History* (1976).

³⁹ See, e.g., 141 Cong. Rec. S4 (daily ed. Jan. 4, 1995) (Senator-elect Feinstein); 139 Cong. Rec. S4-S7 (daily ed. Jan. 5, 1993) (Senators-elect Coverdell and Packwood); 121 Cong. Rec. 8 (1975) (Senator-elect Bellmon); 117 Cong. Rec. 6 (1971) (Senator-elect Hartke); 110 Cong. Rec. 18120 (1964) (Senator-elect Salinger) (appointee); 97 Cong. Rec. 3 (1951) (Senator-elect Butler).

⁴⁰ 87 Cong. Rec. 3 (1941) (statement of Senator Barkley on the seating of Senator-elect Langer).

⁴¹ See 87 Cong. Rec. 4 (1941) (ruling of the presiding officer that "[i]f this agreement is entered into, only a majority of the Senate will be required to pass on the qualifications of the Senator-elect").

⁴² Democratic Leader Senator Daschle added his concurrence to Senator Dole's remarks. *Id.* In 1993 Senators Coverdell and Packwood took the oath of office while challenges to their election were pending. At that time, Senator Dole, as Republican Leader, stated his view that "the phrase 'without prejudice' used today is of course meaningless, in its effect upon any subsequent Senate action." 139 Cong. Rec. S7 (daily ed. Jan. 4, 1993).

⁴³ See, e.g., 121 Cong. Rec. 8 (1975) (referral of petition of contest and reply in *Edmondson v. Bellmon* contest). Election contests were often initially heard by the Subcommittee on Privileges and Elections of the Rules Committee; that subcommittee was disbanded in 1977. Election contests during the period 1871-1946 were referred to the Committee on Privileges and Elections; prior to 1871, such disputes were usually referred to special committees or to the Committee on the Judiciary. In this section of this memorandum, the term "committee" will be used generally to refer to the Rules Committee and its predecessor committees.

⁴⁴ Rule 25.1(n)(1)(4), Standing Rules of the Senate, S. Doc. No. 104-8, *supra* note 31, at 30 (1944).

⁴⁵ Rule 26.1, Standing Rules of the Senate, S. Doc. No. 104-8, *supra* note 31, at 36.

⁴⁶ See 121 Cong. Rec. 1472 (1975) (statement of Sen. Allen); *Senate Election, Expulsion and Censure Cases From 1909-1960*, S. Doc. No. 71, 87th Cong., 2d Sess. viii (1962).

⁴⁷ See *Durkin v. Wyman*, S. Rep. No. 94-156, part 2, *supra* note 29, at 5-6.

⁴⁸ See, e.g., *Senator from Oklahoma: Hearings Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 94th Cong., 1st Sess. 221-464 (1975) (hereinafter "*Edmondson v. Bellmon Hearings*") (collecting together pleadings and memoranda of contestants).

⁴⁹ For example, in the *Edmondson v. Bellmon* contest, committee staff members held hearings in Oklahoma, which were followed with hearings before the committee in Washington. S. Rep. No. 94-597, *supra* note 29, at 5-6 (1976).

⁵⁰ See, e.g., *Edmondson v. Bellmon Hearings*, *supra* note 48, at 11-47; *Senator from New Hampshire: Hearings Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 93d Cong., 2d Sess. 136-205 (1975) (hereafter "*Durkin v. Wyman Subcommittee Hearings*"); *Steck v. Brookhart*, S. Rep. No. 69-498, *supra* note 24, at 5.

⁵¹ See *Durkin v. Wyman*, S. Rep. No. 94-156, part 1, *supra* note 29, at 2; *Senator from New Mexico: Hearings Before Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 83d Cong., 1st Sess. 159-82 (1953) (hereafter "*Hurley v. Chavez Hearings*") (argument of counsel on motion of dismissal).

⁵² See *Edmondson v. Bellmon Hearings*, *supra* note 48, at 49-50.

⁵³ See *Steck v. Brookhart*, S. Rep. No. 69-498, *supra* note 24, at 6-7; *Johnson v. Schall*, S. Rep. No. 1021, 69th Cong., 1st Sess. 3-8 (1926).

⁵⁴ S. Rep. No. 94-156, part 1, *supra* note 29, at 2. This was in addition to hearings held by the Subcommittee on Privileges and Elections. See *Durkin v. Wyman Subcommittee Hearings*, *supra* note 50.

⁵⁵ S. Rep. No. 94-597, *supra* note 29, at 3-5.

⁵⁶ See *Willis v. Van Nuys*, S. Rep. No. 281, 76th Cong., 1st Sess. 8 (1939) (rejecting recount because of the absence of a prima facie showing that it might result in unseating of the contestee); *Bursum v. Bratton*, S. Rep. No. 724, 69th Cong., 1st Sess. 7-10 (1926) (recount unjustified because no preliminary evidence was offered tending to cast doubt upon the accuracy of the official returns).

⁵⁷ See *Sweeney v. Kilgore*, S. Rep. No. 81-802, *supra* note 29, at 9.

⁵⁸ See, e.g., *Hurley v. Chavez*, S. Rep. No. 83-1081, *supra* note 28, at 265.

⁵⁹ For example, in the *Durkin v. Wyman* contest, the committee ordered a recount of the approximately 3,500 ballots that had been before the state ballot law commission. S. Rep. No. 94-156, part 2, *supra* note 29, at 8. The committee may also begin with a limited recount to determine if there are sufficient grounds for a wider investigation and state-wide recount. See *O'Connor v. Markey*, S. Rep. No. 1284, 80th Cong., 2d Sess. 3, 11-12 (1948) (preliminary five-county recount subsequently widened to state-wide recount in light of trend reducing incumbent's lead).

⁶⁰ An alternative approach is to count the ballots at locations in the state, and only bring to Washington those ballots remaining in dispute for committee review. See *O'Connor v. Markey*, S. Rep. No. 80-1284, *supra* note 59, at 3.

⁶¹ See *Durkin v. Wyman*, S. Rep. No. 94-156, part 1, *supra* note 29, at 4; *Heflin v. Bankhead*, S. Rep. No. 568, 72d Cong., 1st Sess. 36 (1932); *Peddy v. Mayfield*, S. Rep. No. 973, 68th Cong., 2d Sess. 3 (1925).

⁶² See *Hurley v. Chavez*, S. Rep. No. 83-1081, *supra* note 28, at 75; *Steck v. Brookhart*, S. Rep. No. 69-498, *supra* note 24, at 2.

⁶³ D. Tibbetts, *supra* note 38, at 60.

⁶⁴ See *Durkin v. Wyman*, S. Rep. No. 94-156, part 1, *supra* note 29, at 35; *Hurley v. Chavez*, S. Rep. No. 83-1081, *supra* note 28, at 276.

⁶⁵ *Hurley v. Chavez*, *id.* at 55.

⁶⁶ *Id.* at 16. In the *Sweeney v. Kilgore* contest, 22 investigators hired by the committee spent a total of 7,006 man-days over a period of 18 months conducting field investigations. S. Rep. No. 81-802, *supra* note 29, at 6.

⁶⁷ See *Edmondson v. Bellman*, S. Rep. No. 94-597, *supra* note 29, at 27-50; *Steck v. Brookhart*, S. Rep. No. 69-498, *supra* note 24, at 23-33.

⁶⁸ See *Pritchard v. Bailey*, S. Rep. No. 1151, 72d Cong., 2d Sess. 1 (1933); *Hoidale v. Schall*, S. Rep. No. 1066, 72d Cong., 2d Sess. 6 (1933).

⁶⁹ See *Willis v. Van Nuys*, S. Rep. No. 76-281, *supra* note 56, at 2; *Heflin v. Bankhead*, S. Rep. No. 72-568, *supra* note 61, at 20-21.

⁷⁰ E.g., *Sweeney v. Kilgore*, S. Rep. No. 81-802, *supra* note 29, at 18; *Hook v. Ferguson*, S. Rep. No. 801, 81st Cong., 1st Sess. 1 (1949); *O'Connor v. Markey*, S. Rep. No. 80-1284, *supra* note 59, at 17; *Steck v. Brookhart*, S. Rep. No. 69-498, *supra* note 24, at 15; *Bursum v. Bratton*, S. Rep. No. 69-724, *supra* note 56, at 10.

⁷¹ See *Hurley v. Chavez*, S. Rep. No. 83-1081, *supra* note 28, at 5. The Senate rejected the committee's recommendation and permitted Chavez to retain his seat.

⁷² S. Rep. No. 94-156, part 1, *supra* note 29, at 1.

⁷³ S. Rep. No. 94-597, *supra* note 29, at 1-2.

⁷⁴ Although the standard has not been expressly stated by the committee in these terms, this would appear to be the most accurate characterization of the burden of proof that the committee has applied in election contests. See, e.g., *Wilson v. Vare*, S. Rep. No. 47, 71st Cong., 2d Sess. 2 (1929) ("it must be found, not beyond a reasonable doubt, perhaps, but it must be the conviction of reasonable men, at least, that the proof sustained the charges").

⁷⁵ *Pritchard v. Bailey*, S. Rep. No. 72-1151, *supra* note 68, at 1.

⁷⁶ *O'Connor v. Markey*, S. Rep. No. 80-1284, *supra* note 59, at 14; *Wilson v. Vare*, S. Rep. No. 71-47, *supra* note 74, at 5 (1927); *Sweeney v. Kilgore*, S. Rep. No. 81-802, *supra* note 29, at 7.

⁷⁷ *Id.* at 18; *Edmondson v. Bellman*, S. Rep. No. 94-597, *supra* note 29, at 22; *Heflin v. Bankhead*, S. Rep. No. 72-568, *supra* note 61, at 21; *Senate Election Cases*, *supra* note 5, at 384 (In *Sweeney v. Kilgore*, the committee found that fraudulent ballots did not effect the outcome of the election; therefore, the committee recommended that the state-certified victor retain his seat.).

⁷⁸ For example, in the *Hurley v. Chavez* contest, the committee adopted a number of evidentiary presumptions to govern its recount. Two examples are illustrative. The recount rules provided that, absent direct or circumstantial proof to the contrary, any erasure marks on a ballot would be treated as made by the voter and the ballot would be thrown out. On the other hand, where a ballot had been mutilated or had its secret number exposed, absent proof to the

contrary, someone other than the voter would be deemed responsible and the vote would be counted. S. Rep. No. 83-1081, *supra* note 28, at 268.

⁷⁹ Likewise, the Senate is not bound by the decisions of state courts or the results of state recount proceedings, though such state determinations are often accorded "great weight." *Johnson v. Schall*, S. Rep. No. 69-1021, *supra* note 53, at 9. For additional references, see *supra* note 29.

⁸⁰ 121 Cong. Rec. 18620 (1975).

⁸¹ See 84 Cong. Rec. 3611 (1939) (statement of Sen. George); 76 Cong. Rec. 3544 (1933) (statement of President pro tempore). See also *Riddich's Senate Procedure*, *supra* note 32, at 706.

⁸² *Id.* at 560. In the *Durkin v. Wyman* contest, both parties, together with their counsel, were permitted to sit in the rear of the Senate chamber during the debate. See D. Tibbetts, *supra* note 38, at 123. *Durkin*, by unanimous consent, was given the privilege of the floor. 121 Cong. Rec. 1472 (1975). No such motion was required for Wyman, as he already had floor privileges as an ex-senator.

⁸³ See S. Res. 2, 70th Cong., 1st Sess., 69 Cong. Rec. 338 (1927) (according William Vare "the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate"). There were even early instances when counsel for the parties were permitted to address the Senate. See 17 Annals of Cong. 187-207 (1808) (statement of Francis Scott Key); *id.* at 207-234 (statement of R.G. Harper).

⁸⁴ See, e.g., S. Res. 123, 76th Cong., 1st Sess., 84 Cong. Rec. 4183 (1929) (*Willis v. Van Nuys*); S. Res. 115, 76th Cong., 1st Sess., 84 Cong. Rec. 3611-12 (1929) (*Neal v. Steward*); S. Res. 343, 72d Cong., 2d Sess., 76 Cong. Rec. 3544-45 (1933) (*Hoidale v. Schall*).

⁸⁵ See S. Res. 142, 81st Cong., 1st Sess., 95 Cong. Rec. 10321 (1949) (*Sweeney v. Kilgore*); S. Res. 141, 81st Cong., 1st Sess., 95 Cong. Rec. 10321 (1949) (*Hook v. Ferguson*); S. Res. 234, 80th Cong., 2d Sess., 94 Cong. Rec. 6160 (1948) (*O'Connor v. Kilgore*).

⁸⁶ See S. Res. 194, 69th Cong., 1st Sess., 67 Cong. Rec. 7301 (1926) (*Steck v. Brookhart*).

⁸⁷ See, e.g., *Senate Election Cases*, *supra* note 5, at 333 (Frank L. Smith, 1926-28); *id.* at 328 (*William B. Wilson v. William S. Vare*, 1926-29); *id.* at 283 (*William Lorimer*, 1910-12). But see *id.* at 314 (*Daniel F. Steck v. Smith W. Brookhart*, 1925-26).

⁸⁸ See e.g., S. Res. 346, 72d Cong., 2d Sess., 76 Cong. Rec. 5008 (1933); S. Res. 256, 69th Cong., 1st Sess., 67 Cong. Rec. 12633 (1926); S. Res. 211 & 212, 69th Cong., 1st Sess., 67 Cong. Rec. 10563-64 (1926); S. Res. (unnumbered), 47th Cong., 1st Sess., 13 Cong. Rec. 2047 (1922); S. Res. (unnumbered), 46th Cong., 3d Sess., 11 Cong. Rec. 1911-12 (1991).

⁸⁹ See 79 Cong. Rec. 14449-50 (1935) (declining payment of attorney's fees for contestant and memorialists in *Henry v. Holt* election contest).

⁹⁰ S. Res. 247, 94th Cong., 1st Sess., 121 Cong. Rec. 39861 (1975).

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 1998

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of S. 1061, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1061) making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 1998, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Gregg amendment No. 1070, to prohibit the use of funds for national testing in reading and mathematics, with certain exceptions.

Coats/Gregg amendment No. 1071 (to Amendment No. 1070), to prohibit the devel-

opment, planning, implementation, or administration of any national testing program in reading or mathematics unless the program is specifically authorized by Federal statute.

Specter amendment No. 1069, to express the sense of the Senate that the Attorney General has abused her discretion by failing to appoint an independent counsel on campaign finance matters and that the Attorney General should proceed to appoint such an independent counsel immediately.

Coats/Nickles amendment No. 1077, to prohibit the use of funds for research that utilizes human fetal tissue, cells, or organs that are obtained from a living or dead embryo or fetus during or after an induced abortion.

AMENDMENT NO. 1077

The PRESIDING OFFICER. Amendment No. 1077 is now pending.

Mr. COATS addressed the Chair.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. COATS. Mr. President, we will be resuming discussion of the amendment I offered last evening. I don't intend to repeat all that I said last evening. I do know there are a few other Senators who wish to speak on this amendment, and, hopefully, we can accomplish that in a reasonable time and then move to a vote.

It is not my intention to utilize this amendment as a means of delaying a vote on the larger appropriations bill or specifically on the amendment that we adopted last evening, increasing funding for Parkinson's research, an amendment I supported and worked together with Senator WELLSTONE and others on this effort. I was pleased the Senate adopted my amendment related to the whole area of medical research so that we can commission a study which would give us, before the next appropriations and authorization cycle, a better idea of how we can direct research funds to achieve the greatest good for the greatest number.

There are allocations currently made on the basis of who has the best lobbying effort and perhaps who has the best champion in the Congress. While I don't in any way mean to impugn the motives of anyone here who is putting their heart and soul into providing support for research on a disease that affects them or that they believe is important and critical, I do think that in the interest of the widespread number of diseases that are currently under research at NIH and other places and the Federal funds that are used for that research, having a better understanding of where we can best apply those dollars to achieve the breakthroughs that can prevent the suffering and, hopefully, provide the cures for a number of these diseases is the direction we ought to go. We adopted that amendment last evening, and I am pleased the Senate supported that.

This particular amendment is designed to address a specific issue that relates to the utilization of human fetal tissue in research in a number of neurological disease areas. There is a broader question of whether we ought to utilize human fetal tissue and put restrictions on how that is sustained as