

CHAPTER 8

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Elections and Election Campaigns

A. APPORTIONMENT; VOTING DISTRICTS

§ 1. In General; Functions of Congress and the States

The compromise reached at the original Constitutional Convention and approved by the ratifying conventions in the 18th century provided for one House of the national legislature to equally represent the states and for the other House to equally represent the people of the several states.⁽¹⁾ While the drafters of the Constitution provided for a periodic enumeration of the national population to be used in computing representation in the House of Representatives,⁽²⁾ and provided

for both state and federal regulation over elections,⁽³⁾ the specific mechanism by which Representatives would be allocated to states and by which they would be elected by the people were not described in the Constitution. The procedures for determining the size of the House, allocating seats to states, and equally distributing the right to vote for Representatives have gained form through congressional and state practice, federal statute, and judicial interpretations of the Constitution.⁽⁴⁾

Due to the recent proliferation of judicial decisions and collateral materials on the general subject of equality of political representation, important terms relating to

1. See *Wesberry v Sanders*, 376 U.S. 1, 14 (1964) for a discussion of the "Great Compromise." The composition of the House is dictated by U.S. Const. art. I, §2, clause 1, and the composition of the Senate is dictated by U.S. Const., 17th amendment. For a general discussion of the intention of the drafters of the Constitution as to House apportionment and districting, see Hacker, *Congressional Districting*, Brookings Institution (Washington, rev. ed., 1964).
2. U.S. Const. art. I, §2, clause 3.

3. U.S. Const. art. I, §4, clause 1.
4. Collateral matters relating to districts are not described in this chapter. For example, the allowances the Representative may use within his district and his power to send franked material outside his district are discussed in Ch. 7, *supra*.
For coverage of elections and election procedures prior to 1936, see 1 Hinds' Precedents §§ 756 et seq. and 6 Cannon's Precedents §§ 121 et seq.

the subject have become ill-defined and interchangeable. Therefore, such terms as “apportionment,” “reapportionment,” “census,” “district,” and “districting,” are defined and used herein in their strict constitutional meaning.

The taking of the census is the first step in the process of effecting equal representation in the House of Representatives.⁽⁵⁾ The U.S. Constitution (art. I, §2, clause 3) provided for the allocation of Representatives among the states in accordance with an enumeration to be made of the national population every 10 years. The 14th amendment altered that clause in requiring the enumeration of all persons including former slaves, and in requiring reduction in a state’s allocation of seats for denial of voting rights.⁽⁶⁾ Congress has sole authority under the Constitution to direct the manner in which the enumeration or census shall be taken and compiled.⁽⁷⁾ Although the taking of the census and its uses have broadened in scope, its primary purpose remains to enumerate the people

5. Taking the census, see §2, *infra*.

6. See §2, *infra*.

7. U.S. Const. art. I, §2, clause 3 states that the enumeration shall be made in such manner as Congress shall direct.

as the basis for the equal allocation of Representatives in the House.

Apportionment is the method by which seats in the House are distributed among the states in accordance with the results of the decennial census.⁽⁸⁾ The term has been used interchangeably in recent years to refer to the districting within a state for the election of the allotted number of Representatives.⁽⁹⁾ The terms apportionment and reapportionment have also been used to refer to the allocation of state legislators and other nonfederal officials among state subdivisions; that area of the law is not germane to this discussion and must not be confused with apportionment and districting for the U.S. House of Representatives.

The function of apportioning the seats in the House is vested exclu-

8. The 14th amendment of the U.S. Constitution states: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”

9. References in U.S. constitutional provisions relating to the House of Representatives and election of Members thereof, and to the enumeration of the population of the various states, have to do with apportionment of Representatives among the states, and not within them. *Meeks v Avery*, 251 F Supp 245 (D. Kan. 1966).

sively in Congress,⁽¹⁰⁾ and neither states nor courts may direct greater or lesser representation than that allocated by an act of Congress.⁽¹¹⁾ Before seats in the House can be apportioned, the number of seats in the House must be set at a fixed number; this determination is within the province of Congress and has been directed by federal statute.⁽¹²⁾

10. Although the power of Congress to allocate seats to the states is not expressly stated in the Constitution, the power is logically implied from the congressional power to direct the taking of the census. *Prigg v Pennsylvania*, 41 U.S. (16 Peters) 619 (1842).
11. For states' claims to greater representation, see § 2, *infra*. A court cannot reduce the number of Representatives allotted to a state by Congress pursuant to statute. *Saunders v Wilkins*, 152 F2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870, rehearing denied, 329 U.S. 825 (1946).
12. "The power to district a state, in accordance with the Federal apportionment, is by this section [art. I, § 4, clause 1] conferred upon the state, subject to the control of Congress, whereas the power to fix or alter the number of Members of the House of Representatives of the United States is vested exclusively in the Federal Government . . . there is no doubt that a state cannot exercise the power to fix the size of the Federal House of Representatives, whether through its ordinary legislature, or its constitutional convention, or in

Under the Constitution, each state is entitled to at least one Representative.⁽¹³⁾ Since the first Congress, a specific mathematical method has been used in the allocation of the remaining seats in the House to the states.⁽⁴⁾ The first such method, devised by Thomas Jefferson, called for a predetermined ratio of inhabitants per Representative and a rejection of all remaining fractions. Under the second method, beginning about 1840, major fractions were accounted for by the assignment of an additional Representative.

The method of major fractions in use until 1940 employed a mathematical formula and a list of "priority values," based on the size of the population of each state, to allocate seats in the House. The priority list is also the principal feature of the present method of "equal proportions," which uses a different mathe-

any other way." H. REPT. NO. 51, Committee on Elections, 41st Cong. 2d Sess. (cited at 1 Hinds' Precedents § 318).

13. U.S. Const. art. I, § 2, clause 3.
14. See The Decennial Population Census and Congressional Apportionment, H. REPT. NO. 91-1314, 91st Cong. 2d Sess., Subcommittee on Census and Statistics, Committee on Post Office and Civil Service. See also Huntington, *Methods of Apportionment in Congress*, Government Printing Office (Washington, 1940).

mathematical formula to produce more evenly distributed apportionment than the major fractions method.⁽¹⁵⁾

Apportionment under the “equal proportions” method is complex. The problem is to allocate a finite number of seats (385, after each state has received one) among 50 states of widely varying population, where no seat can be shared between two states, and where the principal aim is to allot each seat to as nearly as practicable an equal number of constituents. The allotment is accomplished by dividing the population of each state by the geometric mean of successive numbers of Representatives ($n \times [n-1]$ where “n” is the number of the seat). For example, the population of state A is first divided by $2 \times (2-1)$ to establish its priority value for a second seat, then by $3 \times (3-1)$ to establish its priority value for a third seat, and so on. Priority val-

ues are computed for all the states, for successive numbers of seats, and then all the values are listed in descending order. If state A has a very large population, its claims for a second, third, and more seats will be listed ahead of the claim of state B for a second seat, if state B is sparsely populated. Thus the 385 seats are allotted to the states whose priority values are the first 385 on the priority list.⁽¹⁶⁾

If only one seat is allocated to a state under the method of equal proportions, the Representative is elected by and represents the total population of the state. If more than one Representative is allocated, the state must be divided into subdivisions which elect Representatives. Such subdivisions are called congressional districts, the formation of which is primarily a matter for the state government.⁽¹⁷⁾

15. For a technical comparison between the methods of major fractions and equal proportions in relation to apportionment, see *Shaw v Adkins*, 202 Ark. 856, 153 S.W.2d 415 (1941). The court discussed these and other contemporary formulas, such as the harmonic mean, smallest divisors, and greatest divisors, in order to choose the best method of apportioning state legislators. Federal experience was extensively discussed.

16. For a comprehensive discussion and examples of apportionment under the method of equal proportions, see *Guide to Congress*, p. 509, Congressional Quarterly Inc. (Wash., 1971).

17. Congress “apportions” Representatives among the states, while the states “district” by actually drawing congressional district lines. “Apportionment” in its technical sense refers solely to the process of allocating legislators among political subdivisions, while “districting” entails the

The function of the state in dividing itself into districts has been included within the label of "reapportionment." The decisions of the U.S. Supreme Court and of the federal courts since 1964 which have dealt with congressional representation and which have been termed "reapportionment" cases are in actuality decisions on the designation of congressional districts within a state and not on the apportionment of Representatives to states by Congress.⁽¹⁸⁾

Another term which the reader may encounter in this chapter is "at-large" elections.⁽¹⁹⁾ An at-large Representative was elected by and represented all the people of the state rather than a specific subdivision thereof. At-large elections and multi-member districts are

actual drafting of district lines. *Kilgarlin v Martin*, 252 F Supp 404 (D. Tex. 1966), reversed on other grounds, 386 U.S. 120, rehearing denied, 386 U.S. 999 (1967).

Congressional districting is a legislative matter for the several states. *Smiley v Holm*, 285 U.S. 355 (1932); *Carroll v Becker*, 285 U.S. 380 (1932); *Koenig v Flynn*, 285 U.S. 375 (1932).

18. For a discussion of those decisions, see § 3, *infra* (districting requirements) and § 4, *infra* (failure of states to redistrict).
19. See 2 USC § 2a(c) (superseded by 2 USC § 2c).

now prohibited by federal statute,⁽²⁰⁾ reflecting the prevailing view that such elections were not contemplated by the drafters of the Constitution.⁽¹⁾

Reapportionment and districting issues do not arise in relation to the elections of Delegates and Resident Commissioners, since the controlling constitutional provisions relate solely to Representatives of the states. Delegates and Resident Commissioners are created by statute, and each territory has been entitled to only one Delegate, elected by all the people of the territory.⁽²⁾

Collateral References

The Decennial Population Census and Congressional Apportionment, H. REPT. NO. 91-1314, 91st Cong. 2d Sess., Subcommittee on Census and Statistics, Committee on Post Office and Civil Service.

Hacker, *Congressional Districting*, Brookings Institution (Wash., rev. ed., 1964).

Keefe and Ogul, *The American Legislative Process: Congress and the States*, Prentice-Hall (1964).

20. See § 3, *infra*.

1. See *Norton v Campbell*, 359 F2d 608 (10th Cir.), cert. denied, 385 U.S. 839 (1966). See also Hacker, *Congressional Districting*, Brookings Institution (Washington, rev. ed., 1964).
2. For the nature of the office of Delegate and Resident Commissioner, see Ch. 7, *supra*.

Congressional Power Over Taking the Census

§ 1.1 The manner of taking the census is for Congress to decide.

On Jan. 8, 1941, the results of the 1940 census were laid before the House, accompanied by a Presidential message stating that all Indians had been included in the enumeration since they had become subject to federal taxation.⁽³⁾ The President's message read in part as follows:

The effect of this [enumeration of Indians] upon apportionment of Representatives, however, appears to be for determination by the Congress, as concluded in the Attorney General's opinion of November 28, 1940, to the Secretary of Commerce, a copy of which is annexed hereto.

No objection was made to the inclusion of Indians within the enumeration.

The opinion of the Attorney General referred to by the President stated that "what construction the Congress will now give to the phrase 'Indians not taxed' is a question for it to decide, and action taken by it with respect thereto will be final, subject only to review by the courts in proper cases brought before them."

3. 87 CONG. REC. 70, 77th Cong. 1st Sess. The 14th amendment excludes from the enumeration all Indians not taxed.

Pursuant to Congress' sub silentio ratification of the enumeration, Indians have been counted in the census since 1940.

Congressional Power to Allocate House Seats

§ 1.2 The House has determined that the constitutional provision requiring Congress to reapportion seats in the House to the states after the taking of the census is directory and not mandatory.⁽⁴⁾

On Apr. 8, 1926, the House determined by a yea and nay vote a question submitted to the House by Speaker Nicholas Longworth, of Ohio, pertaining to the constitutional privilege of a motion to consider reapportionment legislation.⁽⁵⁾ Preceding the vote on the question, there ensued a lengthy debate in the House on the nature of the requirement of the Constitution that Congress order a reapportionment of seats in the House to the states following each decennial census.⁽⁶⁾ By finding that the motion was not constitu-

4. For a prior elections committee report reaching the same conclusion, see 6 Cannon's Precedents § 54.

5. 67 CONG. REC. 7148, 7149, 69th Cong. 1st Sess.

6. *Id.* at pp. 7138-48. See § 2.4, *infra*, for more detailed discussion of this precedent.

tionally privileged, the House overruled prior precedents holding to the contrary and determined that the House could not be forced to consider reapportionment legislation.⁽⁷⁾

Congressional Power Districting

§ 1.3 Congress has constitutional authority to establish congressional districting requirements for the states and to compel compliance therewith.

On Jan. 9, 1951, the results of the 1950 census were transmitted to Congress, accompanied by a Presidential message recommending the enactment by Congress of congressional districting standards to correct wide variances in the size and composition of districts.⁽⁸⁾ The message cited Congress' power to preempt state regulation over the times, places, and manner of congressional elections in order to estab-

7. Congress thereafter provided for an automatic system of reapportionment. See the act of June 18, 1929, Ch. 28, §22, 46 Stat. 26, as amended, 2 USC §2a.

8. 98 CONG. REC. 114, 82d Cong. 1st Sess. Prior to 1929, Congress had enacted statutes regulating the size and composition of congressional districts (see §3.3, *infra*).

lish standards for congressional districting and to compel state compliance therewith.⁽⁹⁾

§ 2. Census and Apportionment; Numerical Allocation of Representatives

Article I, section 2, clause 3 of the U.S. Constitution requires that an enumeration of the people be made every 10 years in order that seats in the House may be apportioned among the states according to the number of persons counted in each state. As originally adopted, this provision made certain distinctions between free persons, slaves, and "Indians not taxed."⁽¹⁰⁾ The 14th amendment, ratified after the emancipation of slaves,⁽¹¹⁾ altered that provision

9. *Id.* Districting legislation was passed in later years (see §3.3, *infra*).

10. The original constitutional provision provided that three-fifths of the persons not freed be counted to compute a state's basis of representation. Enumeration was excluded, both in that provision and in the 14th amendment, for "Indians not taxed." Indians are now included in the enumeration since they are subject to federal taxation (see §2.3, *infra*).

11. The Emancipation Proclamation was issued on Jan. 1, 1863, and, although of no binding force, was sanctioned by the ratification of the 13th amendment in December of 1865.

by mandating the counting of the “whole number” of persons in each state and by directing that a denial of voting rights proportionately reduces a state’s basis of representation.

Congressional apportionment legislation adopted pursuant to these constitutional provisions allocates a certain number of seats in the House to each state, and also fixes the maximum numerical membership of the House.⁽¹²⁾

The census has been taken decennially since 1790,⁽¹³⁾ and has been administered since 1889 by the Bureau of the Census, a subdivision of the Department of Commerce.⁽¹⁴⁾ The data gathered

The 14th amendment was ratified in July of 1868.

12. For a historical analysis of the mathematical methods which have been used to apportion seats in the House based on census results, see §1, *supra*.
13. Under 41 USC §141, as amended by Pub. L. No. 94-521, 90 Stat. 2459, a mid-decade census is to be taken in 1985 and every 10 years thereafter, but information gained therein may not be used for apportionment or congressional districting.
14. For the establishment power, and duties of the Bureau of the Census and the Director of the Census, see 13 USCA §§1 et seq. For the scope of the census director’s authority and the constitutionality of Congress’ delegation of power to him, see the an-

through the census has been broadened to include information other than population statistics,⁽¹⁵⁾ since reports prepared by the Bureau of the Census aid the Congress in the informed performance of its legislative function.⁽¹⁶⁾

notations to title 13, USCA. For the reasonableness of criteria used by the Census Bureau in computing the population of respective states, see *Borough of Bethel Park v Stans*, 449 F2d 575 (3d Cir. 1971).

15. The Constitution does not prohibit the gathering of statistics other than those affecting population, *United States v Moriarty*, 106 F 886 (Cir. Ct. S.D. N.Y. 1901), and the fact that many personal questions may be asked in order to provide statistical reports on housing, labor, health, and welfare matters (see 13 USCA §§141-146) does not render census questions an unconstitutional invasion of a person’s right to privacy. *United States v Little*, 321 F Supp 388 (D. Del. 1971).
16. “While §2 [article I, clause 3] expressly provides for an enumeration of persons, Congress has repeatedly directed an enumeration not only of the freed persons in the states, but also those in the territories, and has required all persons over 18 years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court [Legal Tender Cases, 79 U.S. (12 Wall.) 457, 536 (1870)]; it is one of the methods whereby the national legislature exercises its in-

Proposals related to the census fall under the jurisdiction of the Committee on Post Office and Civil Service.⁽¹⁷⁾

Although the 14th amendment provides that when the right to vote in certain elections is denied to any male inhabitants of a state, the basis of representation shall be proportionately reduced,⁽¹⁸⁾ a

herent power to obtain the information necessary for intelligent legislative action." Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong. 2d Sess., p. 106.

17. Rule XI clause (16)(a), *House Rules and Manual* §711 (1973). The former Committee on the Census was consolidated into this committee by the Legislative Reorganization Act of 1946, 60 Stat. 812, Jan. 2, 1947.
18. Proportionate reduction of representation for denial of right to vote, under the 14th amendment, §2, refers to the right to vote as established by the laws and constitution of the state. *Lassiter v Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *McPherson v Blacker*, 146 U.S. 39 (1892); *Daly v Madison*, 378 Ill. 357, 38 N.E. 2d 160 (1941).

A collateral attack was made on the composition of the House, for alleged violation of the 14th amendment, in *Dennis v United States*, 171 F2d 986 (D.C. Cir. 1948), aff'd, 339 U.S. 162 (1950), where a defendant in a congressional contempt proceeding unsuccessfully claimed that committee action was invalid, one Member being an "interloper" rather

reduction in the representation of a state in the House for denial of voting rights has never been made.⁽¹⁹⁾ Unsuccessful attempts have been made by Members of the House⁽²⁰⁾ and by citizens to require that in taking the census the Census Bureau determine the number of disenfranchised persons in each state and make the reduction provided for in the 14th amendment.⁽¹⁾

than a Representative since his state was entitled to four instead of seven Representatives pursuant to the 14th amendment.

19. Congress has provided by statute that in case of apparent disenfranchisement by a particular state, certain steps be taken to regulate federal elections in such state. See 42 USCA §1971(e), and the discussion thereof in *South Carolina v Katzenbach*, 383 U.S. 301 (1966).
20. See §§ 2.7, 2.8, *infra*.

For an analysis of legislative attempts to enforce the 14th amendment, §2, since it was ratified, see Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93 (1961).

1. Some appellate courts have held that enforcement of the provision is within Congress' discretion and presents a nonjustifiable political question. *Saunders v Wilkins*, 152 F2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946); *Lampkin v Connor*, 239 F Supp 757 (D.D.C. 1965), aff'd, 360 F2d 505 (D.C. Cir. 1966).

Omission from a census form of a question relating to voter disenfran-

Results of the census are transmitted to Congress by the President, who is directed by law to compute the prospective allocation of Representatives to states pursuant to the mathematical method appointed by Congress.⁽²⁾ Since

chisement does not render the taking of a census unconstitutional notwithstanding the provisions of the 14th amendment. *United States v Sharrow*, 309 F2d 77 (2d Cir. 1962), cert. denied, 372 U.S. 949, rehearing denied 372 U.S. 982 (1963).

A New York resident had no standing to seek an injunction against the transmittal to the President by the Census Director of the 1970 census on grounds that the 14th amendment reduction had not been made, where the plaintiff failed to show that he had been injured thereby. *Sharrow v Brown*, 447 F2d 94 (2d Cir. 1971).

2. The power of Congress to direct how the enumeration shall be made and transmitted is derived from U. S. Const. art. I, §2, clause 3: "The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of 10 years, in such manner as they shall by law direct."

The transmission of the census results to Congress is provided for by 2 USC §2a.

Under the act of June 18, 1929, 46 Stat. 26, the President was required to ascertain the number of Representatives to which each state would be entitled under both the methods of equal proportions and of

1941, the method of "equal proportions" has been used to determine reapportionment questions.⁽³⁾

Until 1920, at the time of the 16th census, congressional reapportionment legislation was adopted based on each new enumeration.⁽⁴⁾ Following the 1920 census, however, no legislative action was taken, and Congress determined in 1926 that the constitutional provision providing for reapportionment following a census was directory rather than mandatory.⁽⁵⁾ In 1929, Congress enacted into law a procedure whereby apportionment following and based upon a census would automatically take effect if Congress chose not to act.⁽⁶⁾ Under

major fractions. For a description of those methods, see §1, *supra*.

3. See §2.6, *infra*.
4. Although art. I, §2, clause 3 directs that Representatives be apportioned among the states according to their respective numbers, and expressly authorizes Congress to provide for an enumeration every 10 years by law, the power to allocate seats in the House to the states after the enumeration is not expressly stated within the clause but has always been acted upon by Congress as "irresistibly flowing from the duty" directed by the Constitution. *Prigg v Pennsylvania*, 41 U.S. (16 Peters) 619 (1842).
5. See 1.2, *supra*.
6. Act of June 18, 1929, 46 Stat. 26.

this procedure, reapportionment is based on the method of equal proportions, and the Clerk of the House notifies state officials of the number of seats in the House to which the state is entitled.⁽⁷⁾

Reapportionment legislation has no privileged status under the Constitution and cannot interrupt the regular rules of proceeding of the House. Reapportionment legislation has been considered in the Committee of the Whole,⁽⁸⁾ and proposals on apportionment are within the jurisdiction of the Committee on the Judiciary.⁽⁹⁾

If a reapportionment of seats causes an increase or decrease in the number of seats to which a state is entitled, the state must redistrict itself into single-member districts consistent with constitutional requirements.⁽¹⁰⁾

Maximum numerical membership of the House was fixed at 435 by the act of 1911.⁽¹¹⁾ There was a

temporary increase to 437 Members between 1959 and 1963 when two new states were added,⁽¹²⁾ but the membership has returned to 435.

A state has no claim to seats additional to those allotted by Congress, and attempts by states to send to Congress more than its allotted number of Representatives have been unsuccessful.⁽¹³⁾

Collateral References

The Decennial Population Census and Congressional Apportionment, H. REPT. NO. 91-1314, 91st Cong. 2d Sess., Subcommittee on Census and Statistics, Committee on Post Office and Civil Service.

Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33 (1965).

Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93 (1961).

New Mexico should become states they should have one Representative each. Arizona and New Mexico became states in 1912; see the Presidential proclamation set out in 37 Stat. 1723.

7. 2 USC §2a (the act of 1929 as amended by the act of Apr. 25, 1940, 54 Stat. 162 and the act of Nov. 15, 1941, 55 Stat. 761).

8. See §2.5, *infra*.

9. Rule XI clause 14(b), *House Rules and Manual* §707 (1973).

10. See 2 USCA §§2a and 2c. For redistricting in general, see §3, *infra*.

11. The act of Aug. 8, 1911, 37 Stat. 13 provided, under the 13th census, for 433 Members, with the stipulation that if the Territories of Arizona and

12. Alaska and Hawaii were admitted as states and granted one Representative each. See 2 USCA §2a.

13. See 1 Hinds' Precedents §§314-319. For a discussion of the supremacy of congressional authority over allocation of seats in the House to the several states see 1, *supra*.

*Taking the Census***§ 2.1 When providing for the taking of the census and submission of results to Congress, Congress may also provide for the taking of other statistics.**⁽¹⁴⁾

On June 4, 1929, when the House was considering in the Committee of the Whole a bill dealing with the taking of the census and the submission of the results to Congress, Chairman Carl R. Chindblom, of Illinois, ruled that amendments to take additional statistics, such as to take a census of aliens,⁽¹⁵⁾ and to take a census of qualified voters whose right to vote has been denied or abridged,⁽¹⁶⁾ were germane.

§ 2.2 The President transmits to the Congress the results of the decennial census and the proposed reapportionment of Representatives among the states.

On Jan. 2, 1961,⁽¹⁷⁾ the President sent to the Congress a mes-

14. See generally 13 USC §§1 et seq.

15. 71 CONG. REC. 2338, 2339, 71st Cong. 1st Sess.

16. *Id.* at p. 2348.

17. 107 CONG. REC. 649, 87th Cong. 1st Sess., Jan. 12, 1961. See also 97 CONG. REC. 114, 82d Cong. 1st Sess., Jan. 9, 1951; and 87 CONG. REC. 70, 77th Cong. 1st Sess., Jan. 8, 1941.

sage relating to the census of 1960 and to a reapportionment of House seats:

To the Congress of the United States:

Pursuant to the provisions of section 22(a) of the act of June 18, 1929, as amended (2 U.S.C. 2a), I transmit herewith a statement prepared by the Director of the Census, Department of Commerce, showing (1) the whole number of persons in each State, as ascertained by the Eighteenth Decennial Census of the population, and (2) the number of representatives to which each State would be entitled under an apportionment of the existing number of representatives by the method of equal proportions.

DWIGHT D. EISENHOWER,
The White House,
January 10, 1961.

§ 2.3 Since 1940, all Indians have been included in the census enumeration, with the acquiescence of Congress, because they are subject to federal taxation.

On Jan. 8, 1941, the Presidential message transmitting the results of the 1940 census and the projected allocation of seats in the House to the states was laid before the House.⁽¹⁸⁾

The last paragraph of the President's message read as follows:

The Director of the Census has included all Indians in the tabulation of

18. 87 CONG. REC. 70, 77th Cong. 1st Sess.

total population since the Supreme Court has held that all Indians are now subject to Federal taxation (*Superintendent v Commissioner*, 295 U.S. 418). The effect of this upon apportionment of representatives, however, appears to be for determination by the Congress, as concluded in the Attorney General's opinion of November 28, 1940, to the Secretary of Commerce, a copy of which is annexed hereto.⁽¹⁾

The President's message was ordered referred and printed, and no challenge or objection was made to the inclusion of Indians within the enumeration.⁽²⁾

Consideration of Apportionment Legislation

§ 2.4 The House has determined that a motion to consider reapportionment legislation following the taking of a census is not privileged under the Constitution.

1. The U.S. Constitution, amendment 14, §2 provides that all persons be counted in the census except "Indians not taxed."

The Attorney General has stated that whatever "construction the Congress will now give to the phrase 'Indians not taxed' is a question for it to decide, and action taken by it with respect thereto will be final, subject only to review by the courts in proper cases brought before them." 87 CONG. REC. 71, 77th Cong. 1st Sess.

2. See also 97 CONG. REC. 114, 82d Cong. 1st Sess., Jan. 9, 1951 (Indians included in 1950 census).

On Apr. 8, 1926, Mr. Henry E. Barbour, of California, rose "to present a privileged question under the Constitution of the United States." The purpose of the motion was to discharge the Committee on the Census from further consideration of a bill for the apportionment of Representatives in Congress among the several states under the 14th census and to provide that the House proceed to the immediate consideration thereof. Mr. Bertrand H. Snell, of New York, made a point of order against the motion, contending that it was not privileged under House rules or procedures. He stated that there was "no mandatory provision in the Constitution itself which provides for immediate apportionments; and, furthermore, if we did grant there was such a provision, that there is no mandatory provision in the Constitution which provides that it shall be done contrary to the rules and procedure of the House."

Mr. Snell analyzed a long line of precedents which had held that motions to consider reapportionment legislation were privileged under the Constitution but stated that those decisions should be overruled, since the requirement in the Constitution that the House reapportion Representatives following a census was directory and not mandatory.⁽³⁾

3. 67 CONG. REC. 7138-48, 69th Cong. 1st Sess.

After lengthy discussion, Speaker Nicholas Longworth, of Ohio, stated that in his opinion the prior precedents, according constitutional privilege to reapportionment legislation, should be overruled. He declined to rule on the question, however, stating that the question should be submitted to the House. The House then voted that the consideration of the bill called up by Mr. Barbour's motion was not in order as a question of constitutional privilege.

§ 2.5 Bills pertaining to the apportionment of seats to the several states have been considered in the Committee of the Whole.⁽⁴⁾

Reference was also made to a report of the Committee on Elections No. 3, 68th Cong. 1st Sess., Mar. 29, 1924, indicating that a person could not claim a seat in the House that was not allotted to the state by the House where reapportionment following a census had not been made, since reapportionment following the taking of a census is a customary practice but not a constitutional requirement (see 6 Cannon's Precedents § 54).

4. 71 CONG. REC. 2258, 2259, 71st Cong. 1st Sess., June 3, 1929; 111 CONG. REC. 5080, 5084, 89th Cong. 1st Sess., Mar. 16, 1965; 87 CONG. REC. 1071-89, 77th Cong. 1st Sess., Feb. 17 1941; and 86 CONG. REC. 4373, 76th Cong. 3d Sess., Apr. 11, 1940.

Method of "Equal Proportions"

§ 2.6 In 1941, Congress determined that seats for Representatives should thereafter be allotted to the states under the method of "equal proportions."

Following the census of 1940, Congress determined, based on reports of the House Census Committee incorporating recommendations of prominent scientists, that seats for Representatives should thereafter be allotted to the states under the method of equal proportions.⁽⁵⁾ If Congress passes no reapportionment legislation following a census, the equal proportion method is automatically used and the Clerk notifies the state of the number of seats to which it is entitled in the House.⁽⁶⁾

See also 6 Cannon's Precedents §§ 51, 52.

5. Act of Nov. 15, 1941, 55 Stat. 761, codified as 2 USC § 2a. For detailed discussion of the mechanics of the method of equal proportions, see § 1, supra (summary).

In 1929, Congress provided that in submitting the results of the decennial census to Congress, the President should direct to be ascertained the number of Representatives to which each state would be entitled under both the method of major fractions and the method of equal proportions. Act of June 18, 1929, Ch. 28, § 22, 46 Stat. 26.

6. 2 USCA § 2a(b).

Reduction of Representation for Denial of Voting Rights

§ 2.7 To a bill dealing with the date for the periodic apportionment of Representatives in Congress, an amendment providing that, in submitting the statement to Congress and making the apportionment, the reduction provided in section 2 of the 14th Amendment to the Constitution shall be made, was held not germane.

On Apr. 11, 1940, the House was considering, in the Committee of the Whole, S. 2505 to amend the 1929 apportionment bill in

For House debate on H.R. 2665, on Feb. 17 and 18, 1941, to adopt the method of equal proportions for apportionment of Members to the states, see 87 CONG. REC. 1071-89, 1123-30, 77th Cong. 1st Sess. The method of equal proportions had been preferred by the National Academy of Sciences (at p. 1072), and extensive hearings were held by the Committee on the Census in 1940 on comparison between the various mathematical methods of reapportionment and the degree to which they produced equal representation in the House of Representatives.

By adoption of the equal proportions method retroactive to the 1940 census, the apportionment in 1941 caused the State of Arkansas to lose one seat and the State of Michigan to gain one seat.

order to change the date of subsequent apportionments. The change in date was considered necessary in light of the 20th amendment to the Constitution, which had changed the convening date of Congress and the Presidential inauguration day.⁽⁷⁾

Mr. John C. Schafer, of Wisconsin, offered an amendment directing that in submitting the census to Congress, the President reduce the basis of representation for states where required by the 14th amendment of the U.S. Constitution.⁽⁸⁾

Chairman Marvin Jones, of Texas, ruled that the amendment was not germane to the pending bill, since the bill dealt only with the mechanics of the apportionment and not with the census itself. He cited a past precedent where a similar amendment, providing for a proportionate reduction in the number of Representa-

7. 86 CONG. REC. 4373, 76th Cong. 3d Sess. The bill was passed and became law (act of Apr. 25, 1940, Ch. 152, §§ 1, 2, 54 Stat. 162); see 2 USC § 2a, as amended.

8. The 14th amendment, §2, provides that where the right to vote is denied by a state, the basis of representation in the state shall be reduced in the proportion which the number of male citizens denied the vote shall bear to the whole number of such citizens in the state.

tives allotted to a state pursuant to the 14th amendment, was held not germane to reapportionment legislation.⁽⁹⁾

§ 2.8 To a civil rights bill, an amendment establishing a “Commission on Voting” to report the number of citizens in each state denied the right to vote and to calculate a new apportionment of Representatives on the basis of such findings, was ruled out as not germane.

On Feb. 4, 1964, while the House was considering title I of the Civil Rights Bill of 1963, an amendment was offered to establish a Commission on Voting to report the number of citizens in each state denied the right to vote and to calculate a new apportionment of Representatives on the basis of such findings.⁽¹⁰⁾

Chairman Eugene J. Keogh, of New York, ruled that the amendment was not germane, citing the precedent of July 19, 1956, wherein Chairman Aime J. Forand, of

9. See also 8 Cannon's Precedents §2996 for a ruling that, to a bill providing for reapportionment of Representatives in Congress, an amendment authorizing redistricting of states in accord with such apportionment was not germane.

10. 110 CONG. REC. 1899, 88th Cong. 2d Sess.

Rhode Island, held not germane a similar amendment to a similar bill.⁽¹¹⁾

§ 3. Districting Requirements; Duty of States

After Congress has allocated a certain number of Representatives to a state following a census,⁽¹²⁾ some method must be appointed by the state legislature for the election of such Representatives. The power of a state legislature under article I, section 4 of the U.S. Constitution, to divide the state into districts to elect and to be represented by Members of the House is unquestioned, although the way in which the state districts itself may be directed by federal statute or by court order. A state must redistrict itself to reflect changes in its allocated representation in the House as well as population shifts indicated by the census.⁽¹³⁾

11. For unsuccessful proposals to create a joint congressional committee to implement the 14th amendment of the U.S. Constitution by providing for reduction in representation for denial of voting rights, see S. 2709, 85th Cong. 1st Sess. (1957) and S. 1084, 86th Cong. 1st Sess. (1959).

12. See 2, *supra*.

13. See §1, *sup a*, for a discussion of the delineations of power between Con-

The first attempt by Congress to exercise its constitutional power over state districting under article I, section 4, providing for preemption of state law by federal law over election procedure, was undertaken in 1842, when Congress provided that states with more than one Representative should establish single-member districts of contiguous territory.⁽¹⁴⁾ The single-member districting requirement was eliminated in 1850⁽¹⁵⁾ but reinstated in 1862.⁽¹⁶⁾ In 1872, Congress added a requirement that districts be as equal in population as practicable⁽¹⁷⁾ and in 1901 a requirement was added that districts be compact as well as contiguous.⁽¹⁸⁾ The three requirements—of single-member districts, of con-

gress, the states, and the courts over the census, apportionment, and congressional districting.

See also, Schmeckebier, *Congressional Apportionment* (Washington, 1941); Celler, *Congressional Apportionment—Past, Present and Future*, 17 *Law and Contem. Prob.* 286 (1952); *Hearings on Congressional Districting* (H.R. 8953 and related proposals), subcommittee No. 5, House Committee on the Judiciary, 92d Cong. 1st Sess.

14. Act of June 25, 1842, 5 Stat. 491.
15. Act of May 23, 1850, 9 Stat. 428.
16. Act of July 14, 1862, 12 Stat. 572.
17. Act of Feb. 2, 1872, 17 Stat. 28.
18. Act of Jan. 16, 1901, 31 Stat. 733.

tiguity, and of compactness—were consolidated in the Reapportionment Act of 1911.⁽¹⁹⁾

Between 1842 and 1911 Congress did not enforce the statutory provisions mandating state districting requirements for congressional elections. In 1842, 1901, and 1910,⁽²⁰⁾ the House rejected challenges to rights to seats based on state noncompliance with the federal districting standards. There was, in addition, some question as to the power of the courts to enforce the requirements for congressional districts.⁽¹⁾

When the Apportionment Act of 1929,⁽²⁾ establishing a permanent procedure for apportionment of seats in the House, was enacted, none of the prior districting requirements were included therein. Following that legislative action, the Supreme Court in a 1932 case ruled the federal districting standards no longer operative.⁽³⁾

19. Act of Aug. 8, 1911, 37 Stat. 13.
20. 1 *Hinds' Precedents* §§310, 313; 6 *Cannon's Precedents* §43.
1. See the following language in *Oregon v Mitchell*, 400 U.S. 112, 121 (1970): "And in *Colgrove v. Green*, 328 U.S. 549 (1946), no Justice of this court doubted Congress' power [under article I, §4] to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting."
2. Act of June 18, 1929, 46 Stat. 26.
3. *Wood v Broom*, 287 U.S. 1 (1932). See also *Exon v Tiemann*, 279 F Supp 603 (D. Neb. 1967).

In 1946, when Illinois voters sued in federal court to enjoin the holding of a forthcoming congressional election, claiming constitutional and statutory violations of districting requirements, the Supreme Court affirmed the dismissal of the case because the statutory requirements had been superceded by the 1929 Reapportionment Act, and because the issue presented a nonjusticiable political question.⁽⁴⁾ The Court pointed to article I, section 4 of the Constitution as conferring “upon Congress exclusive authority to secure fair representation by the states in the popular House” and stated that if Congress failed in that respect, “the remedy ultimately lies with the people.”⁽⁵⁾

In 1964, the Supreme Court invalidated for the first time, in *Wesberry v Sanders*, a Georgia congressional districting statute which accorded some districts more than twice the population of others.⁽⁶⁾ The political-question doctrine of *Colgrove v Green*⁽⁷⁾

4. *Colgrove v Green*, 328 U.S. 549 (1946).

5. *Id.* at p. 554.

6. 376 U.S. 1 (1964). See also the companion case, *Wright v Rockefeller*, 376 U.S. 52 (1964) (failure to show racially discriminatory districting in New York).

7. 328 U.S. 549 (1946).

was overruled in reliance on the state apportionment case of *Baker v Carr*.⁽⁸⁾ The Court held in *Wesberry* that the command of article I, section 2 of the Constitution that Representatives be chosen by the people of the several states means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's.⁽⁹⁾ The Court did not establish specific requirements for congressional districts, stating that although it may not be possible to draw them with a mathematical precision, equal representation for equal numbers of people was the fundamental goal of redistricting.⁽¹⁰⁾

The Supreme Court decision in *Wesberry* impelled Congress to act

8. 369 U.S. 186 (1962).

9. 376 U.S. 1 at pp. 7, 8 (1964).

10. The court drew on the Constitutional and Ratifying Conventions to demonstrate that the purpose of the “Great Compromise” was to afford equal representation for equal numbers of people in the House of Representatives. *Id.* at pp. 13, 18.

By 1968, the majority of congressional district lines had been redrawn, with only nine states having a population deviation in excess of 10 percent from the state average, and 24 states having no deviation as large as five percent. McKay, Reapportionment: Success Story of the Warren Court, 67 Mich. L. Rev. 223, 229 (1968).

upon federal redistricting requirements, and in 1967 a bill was enacted into law requiring that districts be limited to a single member.⁽¹¹⁾ No other congressional requirements were established, although attempts were made to legislate allowable percentage variances of congressional districts.⁽¹²⁾

In 1969, the Supreme Court re-enforced the *Wesberry* opinion by invalidating congressional redistricting in Missouri, where districts were several percentage points above or below the mathematical ideal. The Court would allow only “the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which Justification is shown”⁽¹³⁾

and stated that economic, social, or political factors do not suffice for justification of variances.⁽¹⁴⁾ The Court added that districting could be based on eligible voter population rather than total population, if accurately and completely computed, and that population shifts over a 10-year period could be anticipated in redistricting but findings as to such shifts must be thoroughly documented and systematically applied statewide.⁽¹⁵⁾ In other decisions on congressional redistricting the Supreme Court has required a state showing of good faith effort to achieve precise mathematical equality among all districts,⁽¹⁶⁾ and has applied a test of practicability, under the particular circumstances of the state involved, in drawing districts.⁽¹⁷⁾

11. See § 3.3, *infra*.

The single-member district requirement of 2 USC §2c removed the prior command of 2 USC §2a(c) that elections be held at-large upon legislative failure to redistrict. *Preisler v Secretary of State*, 279 F Supp 952 (W.D. Mo. 1967), *aff'd*, 394 U.S. 526 (1969), rehearing denied, 395 U.S. 917 (1970).

12. See §3.3, *infra*. For other attempts to enact federal districting standards, and the procedure by which their consideration was governed, see §§3.43.7 *infra*.

13. *Kirkpatrick v Preisler*, 394 U.S. 526 (1969). See also the companion case, *Wells v Rockefeller*, 394 U.S. 542

(1969) (state must demonstrate good faith effort to achieve precise mathematical equality among congressional districts).

14. *Kirkpatrick v Preisler*, 394 U.S. 526 (1969).

15. *Id.* See also *Lucas v Rhodes*, 389 U.S. 212 (1967) (*per curiam*), where the court affirmed the finding of unconstitutionality applied to congressional redistricting in Ohio where unofficial but incomplete post-census population figures were taken into account.

16. *Wells v Rockefeller*, 394 U.S. 542 (1969) (New York State).

17. *Dinis v Volpe*, 264 F Supp 425 (D. Mass. 1967), *aff'd*, 389 U.S. 570 (1968) (*per curiam*).

The allowable population variance in percentage points for any district from the state average remains undefined. However, it has been held that a state plan providing for some districts with twice the population of others in the same state,⁽¹⁸⁾ or which vary 25 percent from the state population norm,⁽¹⁹⁾ is unconstitutional. A variance of 10 percent to 15 percent has been both accepted and rejected by the Court.⁽²⁰⁾

On the subject of “gerrymandering,” or the drawing of congressional district lines with the motivation or affect of benefiting an incumbent, political party or racial group,⁽¹⁾ the Supreme Court has stated that citi-

zens challenging a congressional redistricting act on the grounds of racial discrimination must show either racial motivation or actual districting along racial lines.⁽²⁾

Some disputes have arisen concerning the validity under state law of redistricting action taken by the states. Following the 1930 census, a series of cases arose in which the right of the Governor to veto a reapportionment bill was questioned. The U.S. Supreme Court ruled that the state function to redistrict itself for congressional elections was legislative in character and therefore subject to gubernatorial veto under the same terms as other state legislation.⁽³⁾

18. *Wesberry v Sanders*, 376 U.S. 1 (1964).

19. *Dinis v Volpe*, 389 U.S. 570 (1968) (per curiam).

20. See the dissenting opinion of Justice Harlan in *Rockefeller v Wells*, 389 U.S. 421 (1967) (per curiam), stating that the Court had left the lower courts and Congress without guidance for congressional redistricting. See also his dissenting opinions on the same subject in *Grills v Branigin*, 390 U.S. 932 (1968) (stay denied) and *Lucas v Rhodes*, 389 U.S. 212 (1967) (per curiam).

1. See *Guide to Congress*, pp. 502, 503, 505, 506, Congressional Quarterly Inc. (Washington 1971).

Districting requirements for special election to fill vacancy, § 9, *infra*.

2. *Wells v Rockefeller*, 376 U.S. 52 (1964). The Court has more pointedly addressed gerrymandering in districting for state and local elective officials. See, for example, *Gomillion v Lightfoot*, 364 U.S. 339 (1960).

See also Edwards, *The Gerrymander and “One Man, One Vote,”* 46 N.Y.U.L. Rev. 879 (1971).

3. See *Smiley v Holm*, 285 U.S. 355 (1932); *Koenig v Flynn*, 285 U.S. 375 (1932); *Carroll v Becker*, 285 U.S. 380 (1932).

In *Grills v Branigin*, 284 F Supp 176 (D. Ind. 1968), *aff’d*, 391 U.S. 364 (1969), a federal court held that only the state general assembly had the power to create congressional districts, an elections board lacking legislative power under the state and federal constitutions.

Congressional Standards for Districting

§ 3.1 In transmitting the 1950 census results to Congress, the President recommended the adoption by Congress of federal standards for congressional districting.

On Jan. 9, 1951, the President transmitted pursuant to statute the results of the 1950 census to Congress.⁽⁴⁾ Within his message on the census he included an appraisal of the wide discrepancies in congressional districting among the states and recommended that Congress re-establish former statutory requirements of compact, contiguous single-member districts with as nearly as practicable an equal number of inhabitants. The message also supported Congress' power, under article I, section 4 of the Constitution, to establish congressional districting requirements and to compel compliance therewith.⁽⁵⁾

4. 98 CONG. REC. 114, 82d Cong. 1st Sess.

5. Legislation in response to the President's message was introduced by Emanuel Celler, of New York, Chairman of the Committee on the Judiciary, in the 82d and subsequent Congresses but was not acted upon. See, e.g., H.R. 2648, 82d Cong. 1st Sess. (1951); H.R. 6156, 82d Cong. 2d Sess. (1952); H.R. 6428, 83d Cong.

§ 3.2 The Committee on the Judiciary has recommended in reports on districting legislation that Congress establish specific guidelines in the absence of judicial standards.

On several occasions since the Supreme Court's entry into the field of congressional districting,⁽⁶⁾ the Committee on the Judiciary, which has jurisdiction over congressional districting,⁽⁷⁾ has submitted reports on proposals to establish standards for congressional districting by the states. On those occasions, the committee has recommended that such guidelines be adopted due to the failure of the judiciary to prescribe definite standards.⁽⁸⁾

1st Sess. (1953); H.R. 8239, 84th Cong. 2d Sess. (1956).

6. See *Wesberry v Sanders*, 376 U.S. 1 (1964).

7. Rule XI clause 13(b), *House Rules and Manual* §707 (1973).

8. H. REPT. NO. 191, Committee on the Judiciary, 90th Cong. 1st Sess. (1967); H. REPT. NO. 486, Committee on the Judiciary, 92d Cong. 1st Sess. (1971); H. REPT. NO. 140, Committee on the Judiciary, 89th Cong. 1st Sess. (1965). Justice Harlan, in his dissenting opinion in *Rockefeller v Wells*, 389 U.S. 421 (1967) (per curiam), cited the latter report for the proposition that the Court had left both the lower courts and Congress without guidance in drawing congressional district lines.

§ 3.3 Except to require single-member congressional districts, Congress has declined since 1929 to set standards for congressional districting by the states.⁽⁹⁾

In 1967, Congress required that all states establish a number of districts equal to the number of Representatives to which each such state is so entitled, with one Representative to be elected from each such district.⁽¹⁰⁾

9. Congress has affirmed that it has the constitutional power to establish congressional districting requirements. See 111 CONG. REC. 5080, 89th Cong. 1st Sess., Mar. 16, 1965; 113 CONG. REC. 11064-71, 90th Cong. 1st Sess., Apr. 27, 1967.

Prior to 1929, Congress required that the states district themselves so as to produce compact, contiguous, and single-member congressional districts. See the act of Aug. 8, 1911, Ch. 5, §30, 37 Stat. 14. That act, which was formerly codified as 2 USC §3, expired by its own limitation upon the enactment of the Reapportionment Act of June 18, 1929, Ch. 28, 46 Stat. 21, as amended, 2 USC §2a. See *Wood v Broom*, 287 U.S. 1 (1932), where the Supreme Court held that the 1911 act had become inoperative upon the enactment of the 1929 act.

10. Pub. L. No. 90-196, 81 Stat. 581, Dec. 14, 1967 (2 USC §2c).

Districting legislation in the 90th Congress as originally proposed by the House Committee on the Judici-

The Congress has declined to set any other standards as to congressional redistricting by the states.⁽¹¹⁾

Consideration of Districting Legislation

§ 3.4 Legislation regulating congressional redistricting has been considered in the Committee of the Whole.⁽¹²⁾

§ 3.5 Legislative proposals setting standards for congress-

ary and as passed by the House provided not only for single-member districts but also for compactness and contiguity, and fixed a maximum percentage variance among districts. 113 CONG. REC. 11089, 90th Cong. 1st Sess., Apr. 27, 1967. The Senate desired a smaller and more immediate percentage variance, and never reached agreement with the House on the bill. 113 CONG. REC. 31712, 90th Cong. 1st Sess., Nov. 8, 1967.

11. See, for example, the legislative history of H.R. 5505, 89th Cong. 1st Sess. (1965), and H.R. 8953 and 10645, 92d Cong. 1st Sess. (1971); see also the announcement of the Chairman of the Committee on the Judiciary describing committee action taken on a redistricting bill, 117 CONG. REC. 28945, 28946, 92d Cong. 1st Sess., Aug. 2, 1971, and the committee's report, H. REPT. NO. 92-486, 92d Cong. 1st Sess. (1971).

12. 113 CONG. REC. 11071, 90th Cong. 1st Sess., Apr. 27, 1967; 111 CONG. REC. 5084, 89th Cong. 1st Sess., Mar. 16, 1965.

sional districting have been considered by the House pursuant to a special rule or order limiting amendment of the proposal.

On Mar. 16, 1965, Howard W. Smith, of Virginia, Chairman of the Committee on Rules, offered House Resolution 272, providing that H.R. 5505, on federal standards for congressional districting, be considered under limited power to amend.⁽¹³⁾ After some debate, a “modified closed rule” was adopted by the House.⁽¹⁴⁾

On Apr. 27, 1967, the House adopted House Resolution 442, providing for a “closed” rule on H.R. 2508, requiring the establishment of congressional districts of contiguous and compact territory, and for other purposes.⁽¹⁵⁾ Mr. B.F. Sisk, of California, a member of the Committee on Rules, explained that the closed rule was proposed because of the complicated provisions of the legislation and because of the urgency of passage, although closed rules were not normally considered for such legislation.⁽¹⁶⁾ Opposition to the closed rule was

13. 111 CONG. REC. 5080, 89th Cong. 1st Sess.

14. *Id.* at p. 5084.

15. 113 CONG. REC. 11071, 90th Cong. 1st Sess.

16. *Id.* at pp. 11064, 11065.

voiced by Mr. John Conyers, Jr., of Michigan, and Mr. Richard L. Ottinger, of New York, because of the serious constitutional and political issues raised by the bill.⁽¹⁷⁾

§ 3.6 To a joint resolution proposing a constitutional amendment relating to the election of the President and Vice President by popular vote rather than through the electoral college process, an amendment pertaining to standards for congressional districting was ruled not germane.⁽¹⁸⁾

On Sept. 18, 1969, the House was considering in the Committee of the Whole a joint resolution proposing an amendment to the Constitution providing for a popular vote rather than an electoral vote for the offices of President and Vice President.⁽¹⁹⁾

An amendment was offered by Mr. Thaddeus J. Dulski, of New York, requiring that the states establish compact and contiguous single-member districts for con-

17. *Id.* at pp. 11069, 11070.

18. An amendment providing for the re-districting of states has also been held not germane to a bill dealing with reapportionment. 71 CONG. REC. 2364, 2444, 2445, 71st Cong. 1st Sess., June 6, 1929.

19. 115 CONG. REC. 25966, 91st Cong. 1st Sess. (H.J. Res. 681).

gressional elections. Chairman Wilbur D. Mills, of Arkansas, ruled that the amendment was not germane to the joint resolution, since nothing in the resolution pertained to the apportionment or election of Representatives.⁽²⁰⁾

Unequal Representation in Primary

§ 3.7 The House refused to overturn an election in a state with a “county unit” primary election system, where less populous counties were entitled to a disproportionately large electoral vote for nominees.

On Apr. 27, 1948, the House adopted without debate House Resolution 553, dismissing the Georgia election contest of *Lowe v Davis*.⁽¹⁾

Parliamentarian's Note: The House in this case refused to invalidate the Georgia “county unit” system for primaries, requiring use of county electoral votes rather than popular votes for choosing nominees. Under the system each candidate was required to receive

20. *Id.* at pp. 25983, 25984.

1. 94 CONG. REC. 4902, 80th Cong. 2d Sess.

See also Ch. 9, *infra*, for election contests generally.

a majority of county unit votes for nomination, and unit votes were allotted in favor of less populous counties rather than strictly by population.⁽²⁾

§ 4. Failure of States to Redistrict

Congressional redistricting is a legislative function for the several states.⁽³⁾ The failure of a state in this regard may arise either through neglect to pass any new districting legislation after re-allocation of House seats or population changes reflected in the census, or through enactment of legislation which does not satisfy the requirements of the Constitution, federal statutes, or state law.⁽⁴⁾

Where a state's districting plan is defective, the remedy lies either with Congress or with the courts. Since Congress not only has the

2. See the elections committee report in the case, H. REPT. NO. 1823, 80th Cong. 2d Sess. (1948). The Supreme Court later invalidated the use of the “county unit” system. *Gray v Sanders*, 372 U.S. 368 (1963).

3. For discussion of state responsibility for congressional districting, see §§ 1, 3, *supra*.

4. For past and present congressional districting requirements, see § 3, *supra*.

power to enact federal standards for congressional districts,⁽⁵⁾ but also is the sole judge of the elections and returns of its Members,⁽⁶⁾ the House has the power to investigate the congressional districting plan of any state and to deny seats to Members from states which have drawn defective district lines or no district lines at all.⁽⁷⁾ There appears to be no doubt that Congress has the power to compel a state to redraw its congressional district lines in accordance with existing law.⁽⁸⁾ However, the House has declined on at least three occasions to deny seats to Members from states in violation of federal districting statutes.⁽⁹⁾

5. See U.S. Const. art. I, §4, clause 1. For the relationship of that clause to federal districting standards, see §3, *supra*.
6. U.S. Const. art. I, §5, clause 1.
7. However, a court finding that a particular state districting plan is invalid does not cast doubt upon the validity of elections in which Congressmen then serving have been elected, or upon their right to serve out terms for which elected. *Grills v Branigin*, 284 F Supp 176 (S.D. Ind. 1968), *aff'd*, 391 U.S. 364 (1969).
8. "And in *Colgrove v. Green*, 328 U.S. 549 (1946), no Justice of this court doubted Congress' power [under U.S. Const. art. I, §4] to rearrange the congressional districts according to population. . . ." *Oregon v Mitchell*, 400 U.S. 112, 121 (1970).
9. See 1 Hinds' Precedents §§310, 313; 6 Cannon's Precedents §43.

The federal courts and on some occasions the state courts have taken affirmative action to correct a failure of a state to redistrict.⁽¹⁰⁾ In 1966, the U.S. Supreme Court first allowed a federal district court to itself draw congressional district lines in a state where the existing districting legislation was unconstitutional.⁽¹¹⁾ On the subject of judicial interference with the traditionally legislative function of congressional districting, the Court has stated:

Legislative reapportionment is primarily a matter for legislative deter-

10. See Hearings on Congressional Districting (H.R. 8953 and related proposals), subcommittee No. 5, House Committee on the Judiciary, 92d Cong. 1st Sess., pp. 141-160.

Judicial intervention in the area of districting was forecast: "[T]hat the Constitution casts the right to equal representation in the House in terms of affirmative congressional power should not preclude judicial enforcement of the right in the absence of legislation. Such judicial action is commonplace in other areas." Lewis, *Legislative Apportionment in the Federal Courts*, 71 Harv. L. Rev. 1057, 1074 (1958).

Although the courts may review districting, they have no power over the allocation of seats by Congress to the states. See *Saunders v Wilkins*, 152 F2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870, *rehearing denied*, 329 U.S. 825 (1946).

11. *Maryland Citizens' Committee for Fair Congressional Districting v Tawes*, 253 F Supp 731 (D. Md. 1966), *aff'd sub nom, Alton v Tawes*, 384 U.S. 315 (1966).

mination and consideration and judicial relief becomes appropriate only when the legislature fails to reapportion according to Federal constitutional requisites in timely fashion after having had adequate opportunity to do so.⁽¹²⁾

Congressional attempts to restrict the power of the judiciary over congressional districting have not been successful.⁽¹³⁾

12. *Dinis v Volpe*, 264 F Supp 425 (D. Mass. 1967), aff'd, 389 U.S. 570 (1968) (per curiam).
13. On Nov. 8, 1967, the Senate considered a conference report on H.R. 2508, to require the establishment of compact and contiguous congressional districts, and for other purposes. A portion of the bill, as reported from conference, provided that no state could be required to redistrict prior to the 19th federal decennial census unless the results of a special federal census were available for use therein. See 113 CONG. REC. 31708, 90th Cong. 1st Sess. The language of the bill and its effect on the power of the courts to compel congressional districting by the states in accordance with the "one man-one vote" principle, was extensively debated as to its clarity and constitutionality. For challenges to the constitutionality of the provision, see pp. 31696-31702. For remarks in sup-

A federal court may retain jurisdiction of districting matters pending appropriate action by the state legislature.⁽¹⁴⁾ A federal court may postpone election processes to provide more time for redistricting,⁽¹⁵⁾ but has allowed elections to be held under invalid districting where there was no other alternative.⁽¹⁶⁾

On several occasions, state courts have ordered congressional districting plans into effect.⁽¹⁷⁾

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- port of its constitutionality, see pp. 31707, 31708. The Senate rejected the conference report (at p. 31712).
14. *Grills v Branigin*, 284 F Supp 176 (S.D. Ind. 1968), aff'd, 391 U.S. 364 (1969).
 15. See *Toombs v Fortson*, 241 F Supp 65 (N.D. Ga. 1965), aff'd, 384 U.S. 210 (1966) (per curiam); *Butterworth v Dempsey*, 237 F Supp 302 (D. Conn. 1965).
 16. *Skolonick v Illinois State Electoral Board*, 307 F Supp 698 (N.D. Ill. 1969). See also *Legislature v Reinecke*, 99 Cal. Rptr. 481, 492 P.2d 385 (1972).
 17. See *Legislature v Reinecke*, 99 Cal. Rptr. 481, 492 P.2d 385 (1972); *People ex rel. Scott v Kerner*, 33 Ill. 2d 460, 211 N.E.2d 736 (1965).

B. TIME, PLACE, AND REGULATION OF ELECTIONS

§ 5. In General; Federal and State Power

The U.S. Constitution delineates the respective areas of state and federal regulatory power over congressional elections in the following language:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators.⁽¹⁸⁾

This provision of the Constitution was adopted in order to furnish a flexible scheme of regulatory authority over congressional elections, to depend upon harmony and comity between the individual states and the Congress.⁽¹⁹⁾ The discretionary power

18. U.S. Const. art. I, § 4, clause 1. See generally *House Rules and Manual* §§ 42–44 (1973).

19. See the Federalist No. 59 (Hamilton): “It will not be alleged that an election law could have been framed and inserted in the Constitution which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there

vested in Congress to supersede election regulations made by the states has only been exercised where necessity required it to protect constitutional rights or to remedy substantial inconsistencies among congressional elections in the several states.⁽²⁰⁾

Although Congress has the absolute power, as affirmed by numerous decisions of the Supreme

were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the state legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations, which in ordinary cases and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose whenever extraordinary circumstances might render that interposition necessary to its safety.”

20. Congress has acted to unify the time of congressional elections, 2 USC §§ 1, 7, and the manner of balloting, 2 USC § 9.

For the general relationship of state power to congressional power over elections, see *Ex parte Siebold*, 100 U.S. 383 (1880).

Court, to fashion a complete code for congressional elections,⁽¹⁾ congressional regulation has been directed largely towards the failure of the states to ensure the regularity of elections under their own state laws and to the failure of the states to adequately protect the voting rights of all citizens entitled to vote.⁽²⁾ The actual mechanism of holding congressional elections is traditionally left by Congress to the province of the states. In judging the elections and returns of its Members, the House has usually deferred to state law on the procedure of elections,⁽³⁾ on

1. "It cannot be doubted that these comprehensive words [art. I, §4] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and candidates, and making a publication of election returns; in short, to enact numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v Holme*, 825 U.S. 355, 366 (1932).

Congress as judge of Members' qualifications, Ch. 7, *supra*.

2. See §6, *infra*. Congress has also legislated extensively in the field of campaign practices (see §§10 *et seq.*, *infra*).
3. See §7, *infra*.

recount remedies and the validity of ballots,⁽⁴⁾ and on the functions of state election officials.⁽⁵⁾

The Constitution not only grants the states power over election procedure, but also delegates to them the power to prescribe the qualifications for voters, who must possess those qualifications requisite to vote for the most numerous branch of the state legislature.⁽⁶⁾ However, variances among the states in regard to the qualifications of electors have been greatly diminished through constitutional amendment, through judicial decisions, and through federal legislation.⁽⁷⁾ The franchise has been extended to all citizens, male or female, regardless of color, race, creed, or wealth, who are at least 18 years of age. The right to vote in primaries which are an integral part of the election process, to register as voters, and to vote without discrimination, intimidation or threats, have been ensured by civil rights legislation spanning from 1870 to the present. The courts have taken an active role in voiding state statutes and practices which deny the

4. See §8, *infra*.

5. See §§7, 8, *infra*.

6. U.S. Const. art. I, §2, clause 1. See generally *House Rules and Manual* §§7, 8 (1973).

7. See generally §6, *infra*.

right to vote or prescribe unreasonable and discriminatory qualifications. Thus, although earlier judicial decisions suggested that Congress had no right to interfere with state regulation of state elections,⁽⁸⁾ Congress in the Voting Rights Acts of 1964 and 1965 enacted regulations applicable to elections for both state and federal officials.⁽⁹⁾ The Supreme Court later upheld Congress' power under the 14th and 15th amendments to the Constitution to act to protect voters from state interference in state elections.⁽¹⁰⁾

The ultimate validity of elections rests on determinations by the House and Senate as final judges of the elections and returns of their respective Members,⁽¹¹⁾ and the temporary denial of a state to a seat in the House or Senate is a necessary consequence of Congress' power to judge such elections.⁽¹²⁾ The House and the

Senate construe the effect of state and federal legislation on elections both through the election contest process⁽¹³⁾ and through independent investigations of the regularity and propriety of individual congressional elections.⁽¹⁴⁾

Although there is no constitutional provision for representation in the national legislature by territories of the United States or by the seat of government, Congress has by statute extended nonvoting representation in the House to those entities.⁽¹⁵⁾ Where popular elections are held in territories or in the seat of government, limited power is delegated by Congress to the governing bodies thereof to regulate the conduct of such elections. Election contests challenging the regularity of elections or of results may be instituted in regard to territorial elections as well as to congressional elections within the states.⁽¹⁶⁾

8. See *Lackey v United States*, 107 F 114 (6th Cir. 1901), cert. denied, 181 U.S. 621; *United States v Belvin*, 46 F 381 (Cir. Ct. Va. 1891); *Ex parte Perkins*, 29 F 900 (Cir. Ct. Ind. 1887).
9. Pub. L. No. 88-352, 78 Stat. 241 (1964); Pub. L. No. 89-110, 79 Stat. 437 (1965).
10. *South Carolina v Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v Morgan*, 384 U.S. 641 (1966).
11. U.S. Const. art. I, §5, clause 1.
12. See *Barry v United States ex rel. Cunningham*, 279 U.S. 597 (1929).

Jurisdiction of States

§ 5.1 The Senate delayed judging an election pending a de-

13. See §§ 5.4, 5.5, *infra*. See also Ch. 9, *infra*.
14. See § 14, *infra*, for committee investigations of elections, and Ch. 15, *infra*, for the investigative power of the House in general.
15. For Delegates and the Resident Commissioner, see Ch. 7, *supra*.
16. See § 5.5, *infra*.
Contested election statutes, procedures and cases, see Ch. 9, *infra*.

termination by the U.S. Supreme Court that a state could order an election recount without violating the Senate's sole authority as the judge of the elections and returns of its Members.

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."⁽¹⁷⁾

Parliamentarian'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.⁽¹⁸⁾

17. 117 CONG. REC. 6, 92d Cong. 1st Sess.

18. *Roudebush v Hartke*, 405 U.S. 15 (1972). The Supreme Court cited the

§ 5.2 A Member who had been defeated in a primary election inserted in the Record a state court opinion that the court lacked jurisdiction to pass upon that Member's allegations of election irregularities since the House had exclusive jurisdiction to decide such questions and to declare the rightful nominee.

On Sept. 23, 1970,⁽¹⁹⁾ Mr. Byron G. Rogers, of Colorado, addressed the House in order to insert in the Record a recent opinion of the supreme court of Colorado, holding that the court had no jurisdiction to consider Mr. Rogers' allegations of election irregularities in a primary election where he had been defeated, and that the House had

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.

Generally, where state law provides a remedy for maladministration of an election, the state may retain jurisdiction over election results until the remedial process has been completed, although the House or Senate may make its own independent judgment (see for example §§8.1–8.4, *infra*, and the cases cited therein). For an occasion where a state court ruled to the contrary, see § 5.2, *infra*.

19. 116 CONG. REC. 33320, 91st Cong. 2d Sess.

exclusive jurisdiction to decide such questions.

Parliamentarian's Note: The matter was later investigated by the Committee on House Administration, which did not report to the House thereon. The latter committee found that while there were irregularities in the election, there was no practical way of ascertaining whether they would have changed the result of the primary election.⁽²⁰⁾

§ 5.3 To a bill vesting in federal courts jurisdiction over certain voting rights actions, amendments prohibiting preemption of jurisdiction of the state courts over elections in general were held to be germane.

On June 17, 1957, the House was considering H.R. 6127, a civil rights measure. The bill provided that jurisdiction should be vested in federal district courts over certain civil actions for protection of voting rights. An amendment was offered to prohibit preemption of jurisdiction of the state courts over elections. Chairman Aime J. Forand, of Rhode Island, held that

20. The opinion inserted by Mr. Rogers was later officially reported as *Rogers v Barnes*, 172 Colo. 550, 474 P.2d 610 (1970). Compare *Roudebush v Hartke*, 405 U.S. 15 (1972), cited at § 5.1, supra.

the amendment was germane, since it was offered to sections of the bill that have to do with voting, and therefore with elections.⁽¹⁾

House Construction of State Election Statutes

§ 5.4 In judging the elections of its Members, the House may construe the language of the applicable state election laws and determine the effect of any violations thereof on such an election.⁽²⁾

§ 5.5 Where a territorial act passed by Congress required the Governor of the territory to deliver the certificate of election to the Delegate but allowed the territorial legislature power over election laws, a statute of the territory requiring the secretary thereof to declare and certify election results was found controlling in an election contest.⁽³⁾

1. 103 CONG. REC. 9394, 9395, 85th Cong. 1st Sess.

2. See 78 CONG. REC. 8921, 73d Cong. 2d Sess., May 25, 1934. For detailed analysis, see § 7.1, infra, and the precedents referred to therein.

3. Unlike the states, which have power under U.S. Const. art. I, § 4, clause 1 to regulate elections by law, any power of territories and of the seat of

On May 21, 1936, the Committee on Elections No. 2 submitted House Resolution 521 in the contested election case of *McCandless v King* for the seat of the Delegate from the territory of Hawaii.⁽⁴⁾ The proposed resolution declared Mr. Samuel Wilder King to be duly elected as Delegate. The report analyzed the Hawaiian Organic Act, passed by Congress, to determine whether the contest had been filed within the proper time. The act required the territorial Governor to deliver a certificate of election to the Delegate, but also provided that the election be conducted in conformity with the general laws of the territory and permitted its legislature to amend the election laws.

The committee found that a law of the Hawaiian territorial legislature which required the secretary of the territory to declare and certify election results was controlling as to the question of whether the contestant had filed notice of contest within the time required by law.⁽⁵⁾

government over elections must be delegated by congressional enactment.

4. 80 CONG. REC. 7765, 74th Cong. 2d Sess. The House passed the resolution, without debate, on June 2, 1936, 80 CONG. REC. 8705, 74th Cong. 2d Sess.
5. H. REPT. NO. 2736, Committee on Elections No. 2, 74th Cong. 2d Sess.

State Action Denying Voting Rights

§ 5.6 Where the right of an entire state delegation to take the oath was challenged by a citizens group which claimed systematic denial of voting rights and which held citizen elections, the House affirmed the right of the original delegation to the seats in question.

On Jan. 4, 1965, objection was made to the administration of the oath to the entire delegation of Members-elect from Mississippi. The House then adopted a resolution (H. Res. 1) authorizing those Members-elect to be sworn in.⁽⁶⁾

The challenge to the administration of the oath to the Members from Mississippi was based on the constitutional argument that systematic denial of Negro voting rights throughout the state invalidated the entire election. The citizens group challenging the election had held its own election to choose five representatives.

A formal election contest was instituted but was dismissed by the House on Sept. 17, 1965.⁽⁷⁾

6. 111 CONG. REC. 18-20, 89th Cong. 1st Sess.
7. 111 CONG. REC. 24291, 89th Cong. 1st Sess. For other materials on the challenge, see pp. 18691 (July 29,

§ 5.7 The House refused to overturn an election in a state with a “county unit” primary election system, under which less populous counties were entitled to a disproportionately larger electoral vote than other counties in the same state.

On Apr. 27, 1948, the House adopted without debate House Resolution 553, dismissing the Georgia election contest of *Lowe v Davis*.⁽⁸⁾

Parliamentarian’s Note: The House thereby refused to invalidate the Georgia “county unit” system for primaries, requiring use of county electoral votes rather than popular votes for choosing nominees. Under that system each candidate was required to receive a majority of county unit votes for nomination, and unit votes were allotted to less populous counties rather than strictly on the basis of population.⁽⁹⁾

1965), 22364 (Aug. 31, 1965), 24263–92 (Sept. 17, 1965).

8. 94 CONG. REC. 4902, 80th Cong. 2d Sess.
9. See the elections committee report in the case, H. REPT. NO. 1823, 80th Cong. 2d Sess. The Supreme Court later invalidated the use of the “county unit” system. *Gray v Sanders*, 372 U.S. 368 (1963).

§ 6. Elector Qualifications; Registration

The original Constitution and Bill of Rights left the determination of qualifications required of electors to vote for Members of the House entirely up to the states.⁽¹⁰⁾ At the time of the adoption of the Constitution, qualifications based on status, such as property ownership, were a widespread prerequisite to the exercise of voting rights. Since that time, the power of the states to prescribe the qualifications of electors for Representatives and for Senators⁽¹¹⁾ has been severely proscribed by constitutional amendments extending the franchise to U.S. citizens without regard to such matters as race, color, or sex,⁽¹²⁾ and by federal legislation protecting the integrity of the congressional electoral process.⁽¹³⁾

10. U.S. Const. art. I, §2, clause 1. See also *House Rules and Manual* §§6, 7 (1973).
11. The 17th amendment altered the Constitution in directing the election of Senators by the people of the state, rather than by the state legislatures.
12. See the 15th amendment (race, color, previous condition of servitude); the 19th amendment (sex); the 24th amendment (poll tax); the 26th amendment (age).
13. For a summary of such legislation, see Constitution of the United States

The first step in the voting process for electors is voting registration. Although registration is primarily regulated by the states, congressional authority to preempt state regulation extends to the registration process.⁽¹⁴⁾ Civil rights legislation enacted by Congress has provided for federal registrars and other procedures to insure that citizens qualified under the Constitution are not denied voting participation by rejection of registration applications on an arbitrary or discriminatory basis.⁽¹⁵⁾ In judging election contests, the House or Senate may have occasion to construe state laws regulating registration and the effect of violations thereof.⁽¹⁶⁾

The states may prescribe reasonable qualifications for voting in

of America: Analysis and Interpretation, S. Doc. No. 92-82, 108-111, 92d Cong. 2d Sess. (comments to U.S. Const. art. I, §4, clause 1).

14. See *United States v Louisiana*, 225 F Supp 353 (D. La. 1963), aff'd, 380 U.S. 145; *Katzenbach v Original Knights of Ku Klux Klan*, 250 F Supp 330 (D. La. 1965).
15. See, for example, 42 USC §1971 (a) (2), (e). See also *South Carolina v Katzenbach*, 383 U.S. 301 (1966), construing registration provisions of the Voting Rights Act of 1965. For early federal court approval of federal registrars, see *In re Sundry Citizens*, 23 F Cas. 13 (Ohio 1878).
16. See §§6.1, 6.2, *infra*.

congressional elections as long as the requirements do not contravene constitutional provisions or conflict with preemptive federal legislation enacted pursuant to law.⁽¹⁷⁾ Residency requirements, absence of a previous criminal record, and an objective requirement of good citizenship are examples of allowable voter qualifications.⁽¹⁸⁾

The first voter qualification which was prohibited from consideration by the states was race,

17. See *Harman v Forssenius*, 380 U.S. 528 (1965); *Davis v Schnell*, 81 F Supp 872 (D. Ala. 1949), aff'd, 336 U.S. 933.

Although the Constitution itself does not confer federal voting rights on any person or class of persons, *Kuffman v Osser*, 321 F Supp 327 (D. Pa. 1971), the electors do not owe their right to vote to a state law prescribing qualifications for the most numerous branch of their own legislature in any sense which makes the exercise of the right depend exclusively on the state law. *Ex parte Yarbrough*, 110 U.S. 663 (1884); *United States v Mosley*, 238 U.S. 883 (1915).

18. *Lassiter v Northampton County Board of Elections*, 360 U.S. 45 (1959).

In relation to Presidential elections, Congress abolished state durational residency requirements and provided for absentee balloting. See *United States v Arizona*, 400 U.S. 112 (1970).

color, or previous condition of servitude; the 15th amendment provided not only that the right of citizens to vote should not be denied on those grounds but also granted Congress the power to enforce the amendment by appropriate legislation. Race as a substantive qualification in elections and primaries,⁽¹⁹⁾ as well as procedural requirements which effectively handicap the exercise of the franchise on account of race, were barred.⁽²⁰⁾

Under the 15th amendment, Congress may legislate to protect the suffrage in all elections, both state and federal, against state interference based on race, color, or previous condition of servitude,⁽¹⁾

19. The same test to determine discrimination or abridgement of right to vote as applied in a general election should be applied to a primary election, and a resolution of a political party limiting membership to white citizens where membership in a political party was an essential qualification was an unconstitutional provision. *Smith v Allwright*, 321 U.S. 649 (1944), rehearing denied, 322 U.S. 769. For Congress' authority over primaries, see §7, *infra*.
20. See *Wayne v Wilson*, 307 U.S. 268 (1939).
 1. See *James v Bowman*, 190 U.S. 127 (1903); *United States v Reese*, 92 U.S. 214 (1876); *Larche v Hannah*, 177 F Supp 816 (D. La. 1959), reversed on other grounds, 263 U.S.

and under the 14th amendment Congress may act to prevent state interference with any citizen's voting rights.⁽²⁾ Under article I, section 4, clause 1 of the Constitution, Congress can legislate against private as well as state interference but only in relation to federal elections.⁽³⁾

Congress has enacted a number of statutes, dating from 1870 to the present, providing a variety of remedies against interference with voting rights.⁽⁴⁾ Some of those statutes have provided for federal officials to actively supervise congressional elections in the

420, rehearing denied, 364 U.S. 855; *South Carolina v Katzenbach*, 383 U.S. 301 (1939).

2. *Katzenbach v Morgan*, 384 U.S. 641 (1966); *Oregon v Mitchell*, 400 U.S. 112 (1970).
3. See *Ex parte Siebold*, 100 U.S. 371 (1880); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States v Classic*, 313 U.S. 299 (1941).
4. For early legislation, see Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca, 1947). Later acts were the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; Voting Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; Civil Rights Act of 1970, Pub. L. No. 91-285, 84 Stat. 314.

states and directed suspension of otherwise permissible voting tests, such as literacy requirements,⁽⁵⁾ which are designed and administered so as to deny voting rights in a discriminatory way.⁽⁶⁾

On occasion, titles to seats in the House have been challenged for reason of denial of voting rights, either through a systematic state pattern⁽⁷⁾ or through private action by either the candidate or party officials.⁽⁸⁾ On many such occasions, challenges and contests have been dismissed or denied due to the difficulty in obtaining substantial evidence of

5. For permissible literacy requirements, see *Lassiter v Northampton County Board of Elections*, 360 U.S. 45 (1959); *Trudeau v Barnes*, 65 F2d 563 (5th Cir. 1933), cert. denied, 290 U.S. 659.

6. For construction of federal legislation suspending literacy tests, see *Katzenbach v Morgan*, 384 U.S. 641 (1966); *South Carolina v Katzenbach*, 383 U.S. 301 (1966); *Gaston County v United States*, 395 U.S. 285 (1969). See also *Davis v Schnell*, 81 F Supp 872 (D. Ala. 1949), aff'd, 336 U.S. 933; *Louisiana v United States*, 380 U.S. 145 (1965).

A "grandfather clause" exemption from an educational qualification prescribed by a state constitution is unconstitutional. *Guinn v United States*, 238 U.S. 347 (1915); *Myers v Anderson*, 238 U.S. 368 (1915).

7. See §§ 5.6, 5.7, supra.

8. See §§ 6.3, 6.5. infra.

actual abridgment of voting rights or of a connection between the challenged Member and the alleged abridgment.

Other state-ordered voter qualifications have been removed by way of amendment of the federal Constitution. The right to vote regardless of sex was established in 1919 with the adoption of the 19th amendment. The right of all citizens to vote without paying a poll tax was affirmed through the adoption of the 24th amendment, following the passage by the House but not by the Senate of a bill in the 80th Congress to make unlawful a poll tax in any federal election.⁽⁹⁾

The right of citizens to vote has been set by the 26th amendment of the Constitution at 18 years of age or older. Prior to the adoption of this amendment, Congress had amended the Voting Rights Act in 1970 to authorize 18-year-olds to vote in all elections, both state and federal.⁽¹⁰⁾ The Supreme Court held that although Congress did have authority under the Constitution to fix the age of voters in federal elections,⁽¹¹⁾ Con-

9. See § 6.7, infra.

10. See Pub. L. No. 91-285, 84 Stat. 314.

11. One Justice was of the opinion that power was conferred on Congress by U.S. Const. art. I, § 4, clause 1, and four Justices were of the opinion

gress had no power to fix an age requirement for voting in state elections.⁽¹²⁾

Voter Registration

§ 6.1 Violations of a state's registration and election laws prohibiting transportation of voters to places of registration, providing qualifications for registrars, confining registration to certain hours, and requiring detailed registration lists were held not to affect the results of an election, and therefore did not nullify the election.

On June 19, 1948, the House adopted without debate House Resolution 692, dismissing an election contest:

Resolved, That the election contest of David J. Wilson, contestant, against Walter K. Granger, contestee, First Congressional District of Utah, be dis-

that power was conferred on Congress by the enforcement clause of the 14th amendment, §5. *United States v Arizona*, 400 U.S. 112 (1970), rehearing denied, 401 U.S. 903.

12. The Court held that the 10th amendment to the Constitution reserved to the states the power to establish voter age qualifications in state and local elections. *Oregon v Mitchell*, 400 U.S. 112 (1970).

missed and that the said Walter K. Granger is entitled to his seat as a Representative of said district and State.⁽¹³⁾

The resolution was adopted pursuant to a report of the Committee on House Administration recommending the contest be dismissed; the committee had determined that violations of Utah's registration laws applicable to congressional elections did not affect the election results and did not require the voiding of the election.⁽¹⁴⁾ The registration laws in issue prohibited transportation of voters to places of registration, required qualifications of registrars, confined registration to particular hours, and mandated detailed registration lists.

§ 6.2 To provide a basis for the rejection of votes allegedly given by illegal registrants, challenge must have been made at the time of registration.

On Mar. 19, 1952, the House adopted without debate House Resolution 580, affirming the right of a Member-elect to his seat:

Resolved, That Ernest Greenwood was duly elected as Representative

13. 94 CONG. REC. 9184, 80th Cong. 2d Sess.
14. H. REPT. NO. 2418, submitted June 17, 1948, 94 CONG. REC. 8964, 80th Cong. 2d Sess.

from the First Congressional District of New York to the Eighty-second Congress and is entitled to his seat.⁽¹⁵⁾

The resolution was adopted pursuant to a report of the Committee on House Administration submitted on the same day. The committee had ruled that votes claimed to have been given by illegal and fictitious registrants in congressional elections must have been challenged at the time of registration. Where the contestant files petitions to annul the votes of such registrants, he must show that he took testimony from those registrants and that they voted for his opponent.⁽¹⁶⁾

Challenges to Seats for Denial of Voting Rights

§ 6.3 Where the House by resolution has authorized the Committee on House Administration to investigate the question of the final right of a Member to his seat, the committee will not consider charges against party officials that they conspired to nullify the will of the voters, where there is no evidence to connect the Member to such conspiracy.

15. 98 CONG. REC. 2517, 82d Cong. 2d Sess.

16. H. REPT. No. 1599, 98 CONG. REC. 2545, 82d Cong. 2d Sess.

On Sept. 8, 1959, the Committee on House Administration submitted a report of an investigation of the final right of a Member to his seat.⁽¹⁷⁾ The report stated in part that the committee had refused to consider charges against Arkansas party officials that they had conspired to nullify the will of the voters, where no evidence was tendered to connect the challenged Member, Mr. Dale Alford, with any such conspiracy.

§ 6.4 Where the right of an entire state delegation to take the oath was challenged by reason of systematic denial of voting rights, the challenge was treated as a contested election case and later dismissed by the House.

On Jan. 4, 1965, the convening day of the 89th Congress, a challenge was made to the administration of the oath to all the Members-elect from Mississippi. Those Members-elect stepped aside as the oath was administered to the other Members.⁽¹⁸⁾ The House then authorized the Members-elect from Mississippi to be sworn in after Mr. Carl Albert, of Okla-

17. H. REPT. No. 1172, 105 CONG. REC. 18610, 86th Cong. 1st Sess. The House adopted H. Res. 380, affirming the right to a seat of Mr. Alford (Ark.), *id.* at p. 18611.

18. 111 CONG. REC. 18, 19, 89th Cong.

homa, stated that “Any question involving the validity of the regularity of the election of the Members in question is one which should be dealt with under the laws governing contested elections.”⁽¹⁹⁾

Election contest proceedings were then instituted,⁽²⁰⁾ and the House later dismissed the contest.⁽¹⁾

§ 6.5 Exclusion proceedings were sought in the 80th Congress against a Senator-elect charged with conspiracy to prevent voters from participating in sensational elections.⁽²⁾

19. *Id.* at pp. 19, 20.

20. See 111 CONG. REC. 24263–92, 89th Cong. 1st Sess., Sept. 17, 1965; 111 CONG. REC. 22364, 89th Cong. 1st Sess., Aug. 31, 1965; and 111 CONG. REC. 18691, 89th Cong. 1st Sess., July 29, 1965.

1. One of the sitting Members whose seat was being contested voted on the resolution dismissing the contest and then withdrew his vote and was recorded as present. He stated that he felt he had the privilege of voting on the resolution since in hearings before the elections committee it was agreed that the election contest was an attack upon the seats of the State of Mississippi rather than against the individual Members-elect. 111 CONG. REC. 24292, 89th Cong. 1st Sess., Sept. 17, 1965.
2. See §7.8, *infra*, for Senate expulsion proceedings in relation to a can-

On Jan. 4, 1947, at the convening of the 80th Congress, the right of Senator-elect Theodore G. Bilbo, of Mississippi, to be sworn in and to take a seat in the Senate was challenged by the presentation of Senate Resolution 1, which read:

Whereas the Special Committee To Investigate Senatorial Campaign Expenditures, 1946, has conducted an investigation into the senatorial election in Mississippi in 1946, which investigation indicates that Theodore G. Bilbo may be guilty of violating the Constitution of the United States, the statutes of the United States, and his oath of office as a Senator of the United States in that he is alleged to have conspired to prevent citizens of the United States from exercising their constitutional rights to participate in the said election; and that he is alleged to have committed violations of Public Law 252, Seventy-sixth Congress, commonly known as the Hatch Act; and

Whereas the Special Committee To Investigate the National Defense Program has completed an inquiry into certain transactions between Theodore G. Bilbo and various war contractors and has found officially that the said Bilbo, “in return for the aid he had given certain war contractors and others before Federal departments, solicited and received political contributions, accepted personal compensation, gifts, and services, and solicited and accepted substantial amounts of money

didate’s illegal control of election machinery and destruction of opposing ballots.

for a personal charity administered solely by him" . . . and "that by these transactions Senator Bilbo misused his high office and violated certain Federal statutes"; and

Whereas the evidence adduced before the said committees indicates that the credentials for a seat in the Senate presented by the said Theodore G. Bilbo are tainted with fraud and corruption; and that the seating of the said Bilbo would be contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuation of free Government and the preservation of our constitutional liberties; Now, therefore, be it

Resolved, That the claim of the said Theodore G. Bilbo to a seat in the United States Senate is hereby referred to the Committee on Rules and Administration with instructions to grant such further hearing to the said Theodore G. Bilbo on the matters adduced before the Special Committee To Investigate Senatorial Campaign Expenditures, 1946, and the Special Committee To Investigate the National Defense Program and to take such further evidence as shall be proper in the premises, and to report to the Senate at the earliest possible date; that until the coming in of the report of said committee, and until the final action of the Senate thereon, the said Theodore G. Bilbo be, and he is hereby, denied a seat in the United States Senate.⁽³⁾

After debate, the Senate laid on the table the resolution and the question as to whether the Senator-elect was to be sworn in,

3. 93 CONG. REC. 7, 8, 80th Cong. 1st Sess., Jan. 3, 1947.

without prejudice to his rights, since he had recently undergone an operation and required further medical care. Senator-elect Bilbo later died in the first session of the 80th Congress, before any further consideration of his right to be sworn in.⁽⁴⁾

Poll Tax Requirements

§ 6.6 Members of the House were advised that an individual who threatened to contest the elections of Members from states having poll taxes had no legal standing to contest such elections.

On Feb. 14, 1945, Hatton W. Sumners, of Texas, Chairman of the Committee on the Judiciary, addressed the House in relation to the claim of a private citizen that he could contest the elections of 71 Members of the House of Representatives: Mr. Sumners inserted in the Record a letter he had written to one such Member, advising him that the citizen referred to had no standing to bring such election contests Mr. Sumners advised Members to ignore the claim of the citizen.⁽⁵⁾

4. 93 CONG. REC. 109, 80th Cong. 1st Sess., Jan. 4, 1947. For the announcement of Nov. 17, 1947, concerning Theodore G. Bilbo's death, see 93 CONG. REC. 10569, 80th Cong. 1st Sess.

5. 91 CONG. REC. 1083, 1084, 79th Cong. 1st Sess.

§ 6.7 The House under suspension of the rules passed a bill making unlawful a requirement for the payment of a poll tax as a prerequisite to voting in a primary or other election for national officers, despite objections to its constitutionality.

On July 21, 1947, the House passed H.R. 29, rendering unlawful a state poll tax as a prerequisite to voting in a primary or other election for national officers.⁽⁶⁾ The bill was passed by the House under suspension of the rules despite a point of order that the bill violated the U.S. Constitution, especially article I, section 2, which authorizes the states, not Congress, to set the qualifications of electors for Representatives. Speaker Joseph W. Martin, of Massachusetts, overruled the point of order on the grounds that the Chair does not pass on the constitutionality of proposed legislation.

The Senate rejected the bill, but a constitutional amendment with the same purpose was later ratified (see § 6.8, *infra*).

§ 6.8 While the Committee on House Administration has ju-

For election contests initiated by petition of citizens, see Ch. 9, *infra*.

6. 93 CONG. REC. 9552, 80th Cong. 1st Sess. For debate on the bill, see pp. 9522-52.

risdiction over legislation relating to poll tax requirements for federal elections, the Committee on the Judiciary has jurisdiction over proposals to amend the Constitution relative to federal election requirements.

On July 26, 1949,⁽⁷⁾ Speaker Sam Rayburn, of Texas, submitted to the House the question as to the engrossment and third reading of H.R. 3199, the anti-poll tax bill. Mr. Robert Hale, of Maine, arose to offer a motion to recommit the bill to the Committee on House Administration with directions that it report the legislation back to the House in the form of a joint resolution amending the Constitution to make payment of poll taxes—as a qualification for voting—illegal. The Speaker ruled that the language carried in the motion to recommit was not germane to the bill since a constitutional amendment would lie within the jurisdiction of the Committee on the Judiciary and not the Committee on House Administration.

§ 6.9 In the 87th Congress, a Senate joint resolution proposing a national monument was amended in the Senate

7. 95 CONG. REC. 10247, 81st Cong. 1st Sess.

by striking all after the resolving clause and inserting provisions of a constitutional amendment abolishing the poll tax.⁽⁸⁾

On Mar. 27, 1962, the Senate was considering Senate Joint Resolution 29, providing for the establishment of a national monument. An amendment was offered to strike out all after the resolving clause of the resolution and to insert the provisions of a constitutional amendment abolishing the poll tax in the states. The Vice President ruled that the joint resolution could be so amended; he also ruled that only a majority vote was required for the adoption of a substitute, although a two-thirds vote was required on the adoption of the resolution as amended.⁽⁹⁾

The House passed the measure under a motion to suspend the rules on Aug. 27, 1962.⁽¹⁰⁾

8. The Anti-Poll Tax Amendment was ratified by 38 states and became effective Jan. 23, 1964. 110 CONG. REC. 1077, 88th Cong. 2d Sess. (see U.S. Const., 24th amendment).

9. 108 CONG. REC. 5086, 87th Cong. 2d Sess. (Vice President Johnson [Tex.]). The Senate proceeded to pass the amended resolution by a two-thirds vote.

For the entire Senate debate on the amendment and the method by which it was being offered, see pp. 5072-105.

10. 108 CONG. REC. 17670, 87th Cong. 2d Sess.

Residency Requirements

§ 6.10 An elections committee invalidated votes cast by workers who were only temporarily in an election district, but found that those votes, though disregarded, would not affect the outcome of the election.

On Mar. 11, 1940, Elections Committee No. 3 submitted Report No. 1722 in an elections case, recommending that the seated Member, Mr. Harrington, be declared entitled to his seat:

Resolved, That Albert F. Swanson is not entitled to a seat in the House of Representatives in the Seventy-sixth Congress from the Ninth Congressional District of Iowa.

Resolved, That Vincent F. Harrington is entitled to a seat in the House of Representatives in the Seventy-sixth Congress from the Ninth Congressional District of Iowa.⁽¹¹⁾

The resolution was agreed to, the committee having determined that, although certain votes cast by workers temporarily present in the election district were invalid, the rejection of those votes would not change the result of the election.

§ 6.11 A contestant who alleges that certain voters in an

11. 86 CONG. REC. 2662, 76th Cong. 3d Sess. (H. Res. 419).

election did not reside in the precincts where registered must present evidence of the claimed irregularities sufficient to overcome the presumption that the election officials properly performed their duties.

On Mar. 19, 1952, the House adopted without debate House Resolution 580, affirming the right of a Member-elect to a seat:

Resolved, That Ernest Greenwood was duly elected as Representative from the First Congressional District of New York to the Eighty-second Congress and is entitled to his seat.⁽¹²⁾

The resolution was adopted pursuant to a report of the Committee on House Administration submitted on the same day. The committee found that votes claimed to have been given by illegal registrants, not residing in the precincts where registered, must have been challenged at the time they registered or voted. The committee also invoked the general rule that the contestant must produce evidence in such cases, through testimony and documents, proving the fact of nonresidence in the county for the statutory period of time, to overcome the presumption that election officials properly perform their duties.⁽¹³⁾

12. 98 CONG. REC. 2517, 82d Cong. 2d Sess.

13. H. REPT. NO. 1599 (98 CONG. REC. 2545, 82d Cong. 2d Sess.). The com-

Federal Protection of Voting Rights

§ 6.12 In the 89th Congress, the President delivered a special message on voting rights to a joint session and submitted to Congress proposed legislation which was enacted into law as the Voting Rights Act of 1965.

On Mar. 15, 1965, the House and Senate met in joint session, pursuant to House Concurrent Resolution 117, to hear an address by the President of the United States.⁽¹⁴⁾ The President's message was directed to denial of voting rights on racial grounds and urged the passage of federal civil rights legislation to protect those rights.⁽¹⁵⁾

The legislation suggested by the President led to the passage by Congress of the Voting Rights Act of 1965, the bill being signed by the President at the Capitol on

mittee had also found that a local court opinion was controlling as to when residence commenced to run, in the absence of challenge to a registrant at the time of registration or voting.

14. 111 CONG. REC. 5058, 89th Cong. 1st Sess.

15. *Id.* at pp. 5058-63. The President submitted a legislative proposal for voting rights legislation which became H.R. 6400.

Aug. 6, 1965.⁽¹⁶⁾ In 1966, the act was upheld as constitutional by the U.S. Supreme Court.⁽¹⁷⁾

§ 7. Time and Place; Procedure

Article I, section 4, clause 1 of the Constitution vests in the states the power to prescribe the times, places, and manner of holding elections for Senators and Representatives but allows Congress preemptive authority to su-

16. On Aug. 6, 1965, the Senate stood in recess in order to receive the President of the United States. When the Senate reassembled, there was ordered to be printed in the *Congressional Record* the proceedings conducted at noon on the same day, when the President had delivered a message in the Rotunda of the Capitol and then retired to the President's Room in the Capitol in order to sign into law the Voting Rights Act of 1965. 111 CONG. REC. 19649, 19650, 89th Cong. 1st Sess. For the Voting Rights Act of 1965, see Pub. L. No. 89-110, 79 Stat. 437. For codification see 42 USC §§1971 et seq.

17. In upholding the validity of the 1965 Voting Rights Act in *Katzenbach v Morgan*, 384 U.S. 641 (1966), the Supreme Court cited congressional materials in finding a rational basis for the act. See 111 CONG. REC. 10676, 10680 (May 20, 1965), 15671 (July 9, 1965), 89th Cong. 1st Sess.

persede or change any such state regulation.⁽¹⁸⁾ Although Congress has enacted extensive legislation to protect the right to vote and to secure the process against fraud, bribery and illegal conduct,⁽¹⁹⁾ the actual mechanism for conducting congressional elections has been left largely to the states. And in judging the elections of their Members, the House and the Senate defer in great part to state law regarding elections and to state court opinions construing such election laws.⁽²⁰⁾

The place where elections shall be held is for the states to determine, qualified only by the requirement that Representatives must be chosen in congressional districts which comply with statutory and constitutional requirements.⁽¹⁾

Poll facilities and functions of state officials at polling places are a matter of state regulation, but the House and Senate must often

18. See *United States v Mumford*, 16 F 223 (Cir. Ct. Va. 1883). For a general discussion of the delineation of power over the regulation of elections, see § 5, supra.

19. For legislation protecting the right to vote, see § 6, supra. See §§ 10-14, infra, as to federal regulation of campaign practices.

20. See § 7.1, infra.

1. For districting requirements, see §§ 3, 4, supra.

examine such state laws in order to determine the validity of the elections of their respective Members.⁽²⁾ Unintentional maladministration of elections and erroneous conduct by state election officials at the polls do not usually invalidate elections;⁽³⁾ but where the conduct of election officials or of candidates and their agents constitutes fraud or illegal control of election machinery, the House or Senate may void an election and exclude a Member-elect, or expel a Member charged with such conduct.⁽⁴⁾ And Congress has the power not only to enact laws providing for the enforcement of state provisions ensuring election regularity,⁽⁵⁾ but also to establish

2. See U.S. Const. art. I, §5, clause 1, vesting in the House and the Senate the exclusive authority to judge the elections and returns of their Members.

3. See §§ 7.6, 7.7, *infra*.

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).

4. See § 7.8, *infra*.

5. See *In re Coy*, 127 U.S. 731 (1888); *United States v Gale*, 109 U.S. 65 (1883); *Ex parte Clarke*, 100 U.S. 399

federal systems for the supervision of voting and election registration procedures.⁽⁶⁾

The states may set general requirements for the placing of a candidate's name on the ballot where such requirements do not amount to qualifications in addition to those prescribed by the Constitution for Senators and Representatives.⁽⁷⁾

Primaries to nominate candidates for congressional election are regulated by state law, and both the House and Senate construe individual state statutes to determine whether a Member-elect is entitled to his seat where allegedly not nominated in compliance with state law.⁽⁸⁾

The authority of Congress to supersede state election laws ex-

(1880); *Ex parte Siebold*, 100 U.S. 371 (1880).

6. See *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880).

For a summary of recent federal voting rights legislation establishing supervisory federal election officials, see § 6, *supra*.

7. A state may, for example, require a filing fee for a candidate. *Fowler v Adams*, 315 F Supp 592 (D. Fla. 1970), appeal dismissed, 400 U.S. 986. For the qualifications of Members-elect to the House and Senate, and the lack of state power to add to those requirements, see Ch. 7, *supra*.

8. See §§ 7.3–7.5, *infra*.

tends to primaries, since they are an integral part of the election process.⁽⁹⁾

State Authority to Prescribe Election Regulations

§ 7.1 Congress, in judging the elections of its Members, will follow state law as to the time, place and manner of holding elections, in the absence of a controlling federal law.⁽¹⁰⁾

On Jan. 20, 1934, a committee on elections submitted House Resolution 231 and Report 334, declaring null and void an election and denying the seat to either of two contestants, one with a certificate of election from the governor and one with a certificate of election from a citizens' committee.

The resolution read as follows:

Resolved, That there was no valid election for Representative in the House of Representatives of the Seventy-third Congress from the Sixth

9. See *United States v Classic*, 313 U.S. 299 (1941); *United States v Wurzbach*, 280 U.S. 396 (1930). Authority to the contrary, *Newberry v United States*, 256 U.S. 232 (1921), was overruled by the decisions above.
10. For state authority generally, see U.S. Const. art. I, §4, clause 1, discussed in §5, *supra*.

Congressional District of the State of Louisiana on the 5th day of December, or the 27th day of December 1933, and that neither Mrs. Bolivar E. Kemp nor J. Y. Sanders, Jr., is entitled to a seat therein; and be it further

Resolved, That the Speaker communicate to the Governor of the State of Louisiana that there is a vacancy in the representation of the State in the Sixth Congressional District thereof.⁽¹¹⁾

The committee had determined (see Report 334), after examining the relevant state law, that: the election to fill the vacancy, held pursuant to the governor's proclamation, was invalid because held prior to expiration of the preliminary time period required by state law; although the election was invalid, a party committee could not itself nominate a candidate and hold an election to choose him as a Representative to Congress.

After debate,⁽¹²⁾ the House adopted the resolution declaring the election null and void.⁽¹³⁾

Primary Nominations

§ 7.2 On the recommendation of a committee, the House re-

11. 78 CONG. REC. 1035, 73d Cong. 2d Sess. On Jan. 3, 1934, the House had denied the right to be sworn to either contestant and had referred the matter to the Elections Committee. 78 CONG. REC. 11, 12, 73d Cong. 2d Sess.
12. 78 CONG. REC. 1108-11, 73d Cong. 2d Sess., Jan. 22, 1934; 78 CONG. REC. 1510-21, 73d Cong. 2d Sess., Jan. 29 1934.
13. 78 CONG. REC. 1521, 73d Cong. 2d Sess., Jan. 29, 1934.

fused to deprive a properly nominated Member of his seat for irregularity in the nomination of his opponent.

On June 14, 1967, the Committee on House Administration submitted Report No. 365 to accompany House Resolution 541, denying the petition of a citizen that the seat of Mr. Fletcher Thompson, of Georgia, be vacated, based upon the nomination of his opponent in alleged contradiction of state law.⁽¹⁴⁾

The House considered the resolution on July 11, 1967. Mr. Robert T. Ashmore, of South Carolina, summarized the background of the election contest and urged the adoption of the resolution, since no precedent existed for depriving a seated Member of his seat for the irregular or illegal nomination of his opponent. Mr. Charles E. Goodell, of New York, stated that a Georgia court had dismissed a petition urging that Mr. Thompson's opponent be enjoined from entering the race because of his allegedly illegal nomination.⁽¹⁵⁾

The House then agreed to the resolution dismissing the election contest and denying the petition.⁽¹⁶⁾

14. 113 CONG. REC. 15848, 90th Cong. 1st Sess.

15. 113 CONG. REC. 18290, 18291, 90th Cong. 1st Sess.

16. *Id.* at p. 18291.

§ 7.3 Where state law requires the nomination of candidates by direct primary elections called by party committees, but permits such committees to themselves nominate candidates where the party has no nominee for any position named in the call of the committee, the nomination of a candidate by a committee which had not first called a primary election is invalid.

On Jan. 20, 1934, a committee on elections submitted a report and resolution recommending that the House declare an election null and void, because the regular election had been held at an improper time and because the contestant had been elected and certified by a party committee in contravention of Louisiana law.⁽¹⁷⁾ The House adopted the resolution on Jan. 29, 1934, thereby determining that the nomination of a candidate by a party committee which had not first called a primary election was invalid, state law requiring nomination of party candidates in direct primary elections, but allowing committees to themselves nominate candidates where the party "shall have no nominee . . . for any position

17. 78 CONG. REC. 1035, 73d Cong. 2d Sess. (H. Res. 231 and H. REPT. NO. 334).

named in the call of the committee.”

The resolution read as follows:

Resolved, That there was no valid election for Representative in the House of Representatives of the Seventy-third Congress from the Sixth Congressional District of the State of Louisiana on the 5th day of December, or the 27th day of December 1933, and that neither Mrs. Bolivar E. Kemp nor J. Y. Sanders, Jr., is entitled to a seat therein; and be it further

Resolved, That the Speaker communicate to the Governor of the State of Louisiana that there is a vacancy in the representation of that State in the Sixth Congressional District thereof.⁽¹⁸⁾

§ 7.4 The House refused to overturn an election in a state with a “county unit” primary election system, where less populous counties were entitled to a disproportionately large electoral vote for nominees.

On Apr. 27, 1948, the House adopted without debate House Resolution 553, dismissing the Georgia election contest of *Lowe v Davis*:

Resolved, That the election contest of Wyman C. Lowe, contestee, against James C. Davis, contestee, Fifth Con-

18. 78 CONG. REC. 1521, 73d Cong. 2d Sess. For debate on the resolution, see 78 CONG. REC. 1108–11, Jan. 22, 1934; 78 CONG. REC. 1510–21, Jan. 29, 1934.

gressional District of Georgia, be dismissed and that the said James C. Davis is entitled to his seat as a Representative of said District and State.⁽¹⁹⁾

Parliamentarian’s Note: The House thereby refused to invalidate the Georgia “county unit” system for primaries, requiring use of county electoral votes rather than popular votes for choosing nominees. Under the system each candidate was required to receive a majority of county unit votes for nomination, and unit votes were allotted in favor of less populous counties rather than strictly by population.⁽²⁰⁾

§ 7.5 Where a Senator was elected to a full six-year term by a “write-in” vote, following the death of his predecessor at a time too late for a new nominating primary, he announced his resignation to permit nomination of a candidate in a regular primary election in which he would be a candidate.

On Mar. 6, 1956,⁽¹⁾ Senator James Strom Thurmond, of South

19. 94 CONG. REC. 4902, 80th Cong. 2d Sess.

20. See the elections committee report in the case, H. REPT. NO. 1823, 80th Cong. 2d Sess. The Supreme Court later invalidated the use of the “county unit” system. *Gray v Sanders*, 372 U.S. 368 (1963).

1. 102 CONG. REC. 3991, 84th Cong. 2d Sess.

Carolina, inserted in the Record an announcement he had made in his home state on the subject of his resignation from the Senate. He had been elected by a "write-in" vote at a general election held two months after the death of his predecessor in the Senate. He had pledged to the people of his state that he would resign after election to the Senate by a write-in vote to permit the nomination of a Senator in a regular primary election. Mr. Thurmond announced his candidacy for the unexpired term created by the vacancy.

Conduct of Poll Officials

§ 7.6 Statutory functions of election and poll officials are directory in nature, and errors in election administration at the polls, absent fraud, do not normally invalidate ballots or elections.

In ruling on election contests, House election committees have followed the general rule that violations by state poll and election officials of their functions under state statutes do not vitiate ballots or void elections, in the absence of fraud, since laws prescribing the duties of the officials are directory in nature.⁽²⁾ Commit-

2. Laws directing the manner in which ballots are to be marked are manda-

tees have determined that failure to provide at the polls proper instruments to mark ballots do not invalidate ballots;⁽³⁾ that failure of precinct or poll clerks to initial ballots is not a crucial error;⁽⁴⁾ that distribution of stickers at polling places to be used on ballots is allowable, where state law is uncertain as to sticker votes but the state executive and judiciary permit their use;⁽⁵⁾ and that violation of state laws regarding poll procedure and disposition of absentee ballots, envelopes and applications is not fatal to the validity of the absentee ballots.⁽⁶⁾

Voting Facilities

§ 7.7 The Senate refused to void an election where in various counties no voting booths were provided, where there were no officials present to aid incapacitated voters, and where question-

tory and noncompliance therewith may invalidate ballots (see §8.11, *infra*).

3. Report No. 513, submitted June 13, 1961, 87th Cong. 1st Sess.; see 107 CONG. REC. 10186.
4. *Id.*
5. Report No. 1172, submitted Sept. 8, 1959, 86th Cong. 1st Sess.; see 105 CONG. REC. 18610.
6. Report No. 2482, submitted Aug. 6, 1958, 85th Cong. 2d Sess.; see 104 CONG. REC. 16481.

able ballots were destroyed by court order.⁽⁷⁾

On Mar. 23, 1954, the Senate rejected the following resolution, reported from the Subcommittee on Privileges and Elections of the Committee on Rules and Administration:

Resolved, That it is the judgment of the Senate in the November 4, 1952, general election, in and for the State of New Mexico, no person was elected as a Member of the Senate from that state, and that a vacancy exists in the representation of that state in the Senate.

The Secretary of the Senate is directed to submit a copy of this resolution to the Governor of the State of New Mexico.⁽⁸⁾

The resolution was predicated on the failure of New Mexico election authorities to provide voting secrecy by providing booths in all counties, the absence of officials to help blind and incapacitated persons in voting, and the destruction of ballots by court order.⁽⁹⁾

In urging the rejection of the resolution, Senator Walter F.

7. For House decisions on the validity of ballots, see § 8.11, *infra*.

8. 100 CONG. REC. 3732, 3733, 83d Cong. 2d Sess.

9. For debate on the resolution and remarks describing the errors and irregularities in the New Mexico election, see 100 CONG. REC. 3696-732, 83d Cong. 2d Sess.

George, of Georgia, cited the rule laid down by the Senate in judging past elections of its Members:

It will be noted that, according to this statement of the rule, the irregularity or error does not of itself create a situation where it must be shown that the result was not affected. In order to set aside an election there must be not only proof of irregularities and errors, but, in addition thereto, it must be shown that such irregularities or errors did affect the result.⁽¹⁰⁾

Illegal Control of Election Machinery

§ 7.8 In the 77th Congress, the Senate failed to expel, by the necessary two-thirds vote, a Senator whose election had been challenged on various grounds, including his alleged illegal control of election procedure.

On Jan. 3, 1941, at the convening of the 77th Congress, Mr. William Langer, of North Dakota, took the oath of office, despite charges from the citizens of the state recommending that he be denied a congressional seat because of campaign fraud and of conduct involving moral turpitude.⁽¹¹⁾

The petition against Mr. Langer alleged, among other charges, con-

10. *Id.* at p. 3731.

11. 87 CONG. REC. 3, 4, 77th Cong. 1st Sess.

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⁾

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

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-

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,

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).

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

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⁾

Parliamentarian'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⁾

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

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

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⁾

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

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

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 appli-

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.

cable 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

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.

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.

§ 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

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 subpoena 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 resolu-

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).

tion 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-

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

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.

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-

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

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.)

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-

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*.

signs directly to the Speaker, the Speaker may be given authority by the House to notify the state Governor of the vacancy.⁽¹⁷⁾ Although a resigning Member may specify that his resignation take effect in the future,⁽¹⁸⁾ there is doubt as to the validity or effectiveness of a resignation which does not specify its effective date.⁽¹⁹⁾

If a Governor does not recognize the existence of a vacancy, such as in the case of a presumed death not susceptible of proof, the House itself may declare the seat vacant, as it does where independent House action creates a vacancy by expulsion or exclusion of a Member.⁽²⁰⁾

Once the vacancy is declared, the state Governor has a mandatory and not merely a directory duty to call for a special election.⁽¹⁾

17. See §9.2, *infra*.

18. See §9.3, *infra*.

19. *Id.*

20. See §9.2, *infra* (Speaker notifies state of vacancy) and §9.5, *infra* (presumed death, House declaration of vacancy).

1. See *Jackson v Ogilvie*, 426 F2d 1333 (7th Cir. 1970), cert. denied, 400 U.S. 833; *In re Congressional Election*, 15 R.I. 624, 9 A.224 (1887); *In re the Representation Vacancy*, 15 R.I. 621, 9 A.222 (1887). *Contra*, *People ex rel. Fitzgerald v Voorhis*, 222

The time, place, and manner of special elections are regulated in much the same way as in general elections; in the absence of federal regulation, state law governs the proceedings.⁽²⁾ And Congress is the sole judge of the elections and returns of Members-elect to fill vacancies, whose certificates must be transmitted to the House and must show the Member-elect regularly elected in accordance with federal and state law.⁽³⁾

Although the time for general elections is regulated by federal statute,⁽⁴⁾ the states appoint the time of special elections to fill vacancies.⁽⁵⁾ The state in holding a special election must comply with constitutional and statutory requirements applicable to all federal elections, such as those mandating full voting rights and properly drawn congressional districts.⁽⁶⁾

N. Y. 494 119 N.E. 106 (1918) (state court, would not interfere with executive discretion to call special election).

2. See §9.7, *infra*.

3. For materials on Congress as judge of elections to fill vacancies, see §§9.7, 9.8, *infra*. For the certificates of election of Members-elect to fill vacancies, see §§9.11–9.13, *infra*.

4. See 2 USC §7.

5. See 2 USC §8.

6. For protection of voting rights, see §6, *supra*. For districting requirements, see §§3, 4, *supra*.

Notification of Vacancy**§ 9.1 Under normal practice, Members notify the Speaker by letter of their resignation after first submitting their resignations to the Governor of their state.**

On Sept. 12, 1968,⁽⁷⁾ the Speaker⁽⁸⁾ laid before the House a communication from Mr. Charles Goodell, of New York, which read as follows:

HOUSE OF REPRESENTATIVES,
Washington, D.C.,
September 11, 1968.

Hon. JOHN W. McCORMACK,
Speaker of the House of Representatives,
Washington, D.C.

In cases where congressional district lines were redrawn after the general election but before a special election, the decisions have been in conflict as to whether the special election should be held in the old district or the newly drawn district. See *People ex rel. Fitzgerald v Voorhis*, 222 N.Y. 494, 119 N.E. 106 (1918) (election to be held in new district rather than district at time of original election); *contra, Sloan v Donoghue*, 20 Cal. 2d 607, 127 P.2d 607, 127 P.2d 922 (1942). See also 1 Hinds' Precedents §§ 311, 312, 327.

7. 114 CONG. REC. 26541, 90th Cong. 2d Sess. For further illustrations see 108 CONG. REC. 7, 87th Cong. 2d Sess., Jan. 10, 1962; and 89 CONG. REC. 7779, 78th Cong. 1st Sess., Sept. 23, 1943.
8. John W. McCormack (Mass.).

DEAR MR. SPEAKER: I have today submitted my resignation as United States Representative from the 38th District of the State of New York to the Governor of New York. This resignation is effective at the close of business on September 9, 1968.

The years I have spent in the House of Representatives have been memorable ones. I will not soon forget the many wonderful friendships I made during these years. The opportunity to serve with you and the many outstanding members of the House of Representatives has been most rewarding.

I look forward to working with you and your colleagues in another capacity as we continue to pursue constructive and positive solutions to the critical problems of the times.

With warm personal regards, I am,

Very truly yours,

CHARLES E. GOODELL.

§ 9.2 Where a Member resigns by direct communication to the Speaker only, the House authorizes the Speaker to notify the Governor of the State in order to effectuate the resignation and create a vacancy.⁽⁹⁾

On July 12, 1957, after a Member from Pennsylvania had re-

9. Where the House itself creates a vacancy, as by its ruling in an election case or otherwise, the Speaker is directed to notify the state executive of the vacancy (see §§ 9.5, 9.7, *infra*). But a Member's resignation is only effective when transmitted to the Governor, and not to the House.

signed directly to the House,⁽¹⁰⁾ Speaker Sam Rayburn, of Texas, was authorized by the House (by unanimous consent) to notify the Governor of Pennsylvania of the vacancy as follows:

His Excellency GEORGE M. LEADER,
Governor of Pennsylvania,
Harrisburg, Pa.

SIR: Honorable Samuel K. McConnell, Jr. on Friday July 12, 1957, submitted his resignation as a Representative in the Congress of the United States from the Thirteenth District of Pennsylvania, effective September 1, 1957, and pursuant to the order of the House of Representatives on Friday, July 12, 1957, I have been directed to so inform you.

Very truly yours,
SAM RAYBURN.

Resignations Effective in the Future

§ 9.3 Resigning Members have on occasion made their resignations effective on a future date and on one occasion the effective date followed the anticipated date of a special election to fill the vacancy which would be cre-

10. 103 CONG. REC. 11536, 85th Cong. 1st Sess. See also 75 CONG. REC. 2969, 72d Cong. 1st Sess., Jan. 29, 1932; 90 CONG. REC. 8450, 78th Cong. 2d Sess., Nov. 27, 1944; 106 CONG. REC. 16535, 86th Cong. 2d Sess., Aug. 16, 1960 (during adjournment, previous authority granted).

ated; but a resignation to become effective when a special election may be held or a successor elected, without specifying an effective date certain, is invalid and does not create a vacancy.

On Oct. 2, 1963,⁽¹¹⁾ W. Homer Thornberry notified Speaker John W. McCormack, of Massachusetts, of his resignation as a Representative from Texas, the resignation to become effective Dec. 20, 1963. Mr. Thornberry delayed the effective date of his resignation because of the press of business in the House and because a special election, for another purpose, had previously been scheduled for Dec. 9 in Texas; that date was therefore considered an opportune time to conduct a special election for Mr. Thornberry's seat. James J. Pickle, of Texas, was elected to fill the seat in the Dec. 9 special election and took the oath as a Member on Dec. 21, 1963.

On Dec. 1, 1944,⁽¹²⁾ in the 78th Congress, second session, Dave E. Satterfield notified Speaker Sam Rayburn, of Texas, of his resignation as a Representative from Virginia, "to become effective as soon as my successor can be elected."

11. 109 CONG. REC. 18583, 88th Cong. 1st Sess.

12. 90 CONG. REC. 8689, 78th Cong. 2d Sess.

Mr. Satterfield had already been re-elected in November to a House seat in the 79th Congress. No special election was called in Virginia and Mr. Satterfield took his seat as a Representative from Virginia to the 79th Congress. On Jan. 29, 1945, Mr. Satterfield resigned from the House, effective on Feb. 15, 1945.

On Jan. 18, 1965 (see §9.4, *infra*), Albert W. Watson notified Speaker John W. McCormack, of Massachusetts, of his resignation as a Representative from South Carolina, to be effective "upon such date as the Governor may set for a special election to fill the vacancy." The Governor of South Carolina declined to take any action on the conditional resignation and no special election was called. On Jan. 28, 1965, Mr. Watson notified the Speaker of his resignation as a Representative to take effect immediately.

On Sept. 26, 1956,⁽¹³⁾ Senator Marion Price Daniel (who had begun his six-year term in 1953) resigned his seat in the Senate from the State of Texas, to become effective Jan. 15, 1957, "or at such earlier date as my successor has been elected and qualified." Sen-

13. 103 CONG. REC. 3, 85th Cong. 1st Sess., Jan. 3, 1957 (letter of resignation laid before the Senate at convening of 85th Congress).

ator Daniel's letter of resignation to the Governor of Texas stated that "although the date of the election . . . is a matter within your discretion, please permit me to express the hope that it will be held in time for my successor to take office not later than January 3." The Governor of Texas did not call a special election, since no vacancy could be created by the qualified resignation until Jan. 15, 1957, in the 85th Congress first session. Senator William A. Blakley was appointed to fill the vacancy created on Jan. 15 and took his seat in the Senate on Jan. 17.

Parliamentarian's Note: For a discussion in the Senate in the 58th Congress on the impropriety of a resignation to take effect on a future unspecified date, see 2 Hinds' Precedents §1229. The view was expressed on that occasion (involving a contested election case) that any resignation to take effect in the future, whether or not an effective date was specified, only constituted notice of the intention to resign, since the resigning Member could withdraw his resignation before it took effect. See, for example, the resignation of a Member to take effect on a future specified date cited at 6 Cannon's Precedents §231; the Member withdrew his resignation

after it had been received by the State Governor but before its effective date.

The precedents of the House have established that a resignation may be made effective on a future date (see 2 Hinds' Precedents §§1220–1227), but as the precedents above indicate, a resignation which does not specify a date certain on which it becomes effective is invalid and does not create a vacancy. And in view of the possibility of the withdrawal of a resignation which is not yet effective, a special election to fill the seat should be withheld until the effective date of the resignation.

State Duty to Call Special Election

§ 9.4 Where a Member resigned, his resignation to be effective on the date of an election to fill the vacancy, and the Governor failed to call a special election, the Member immediately resigned from the House.

On Jan. 18, 1965,⁽¹⁴⁾ Speaker John W. McCormack, of Massachusetts, laid before the House a letter from Mr. Albert W. Watson, of South Carolina, advising the

14. 111 CONG. REC. 805, 806, 89th Cong. 1st Sess.

Speaker of his resignation to the Governor of his state, such resignation to be effective upon such date as the governor may set for a special election to fill the vacancy.

On Jan. 28, 1965,⁽¹⁵⁾ the Speaker laid before the House a communication from Mr. Watson stating that it appeared that the Governor of South Carolina intended to take no affirmative action on his provisional resignation or to call a special election to fill the vacancy that would be created. Mr. Watson therefore immediately resigned his seat as a Representative, to the Governor with notice to the Speaker.⁽¹⁶⁾

§ 9.5 Where a Member-elect disappeared between the issuance of his certificate of election and the convening of the Congress, and the Governor took no action, the House declared the seat va-

15. 111 CONG. REC. 1452, 89th Cong. 1st Sess.

16. When a vacancy in a congressional seat is created, the state Governor has an affirmative duty under U.S. Const. art. I, §2, clause 4 to call a special election to fill the vacancy. See *Jackson v Ogilvie*, 426 F2d 1333 (7th Cir. 1970), cert. denied, 400 U.S. 833.

Under 2 USC §8, the state legislature may prescribe the time for a special election to fill a congressional vacancy.

cant and notified the Governor thereof.

On Jan. 3, 1973, at the convening of the 93d Congress, Speaker Carl Albert, of Oklahoma, laid before the House communications from the Clerk advising him of the disappearance of an aircraft carrying two Representatives-elect to the House, N.J. Begich, of Alaska, and Hale Boggs, of Louisiana.⁽¹⁷⁾ The Clerk's communication stated that, for one of those Members-elect, the Governor of the state had declared the congressional seat vacant, pursuant to a presumptive death verdict and a certificate of presumptive death.

As to the other Member-elect, Mr. Boggs, the Clerk advised the Speaker that the attorney general of Louisiana had informed him that no action had been taken by the Governor and no action was contemplated to change the status of Mr. Boggs or to change the status of the certificate of election for Mr. Boggs filed with the Clerk.

The House then adopted House Resolution 1, declaring the seat of Mr. Boggs to be vacant and notifying the Governor of Louisiana of the existence of the vacancy.⁽¹⁸⁾

§ 9.6 After a vacancy was created by the death of a Rep-

17. 119 CONG. REC. 15, 16, 93d Cong. 1st Sess.

18. *Id.*

representative, the state Governor proclaimed the winner of the special primary election to be duly elected to the House without holding a general election, since the primary winner was the only qualified candidate for the general election.

On Oct. 18, 1965,⁽¹⁹⁾ Mr. Edwin W. Edwards took the oath of office to fill a vacancy from the State of Louisiana. On Oct. 15, 1965, the Governor of Louisiana had proclaimed Mr. Edwards duly elected to the House of Representatives, without holding a general election, since Mr. Edwards had won the special Democratic primary election and no other candidates had qualified to stand for office in the general election to fill the vacancy.

Application of State Law as to Special Elections

§ 9.7 Congress in judging the elections of Members to fill vacancies follows state law regulating the time and procedure for such elections, in the absence of federal regulation.⁽²⁰⁾

19. 111 CONG. REC. 27171, 89th Cong. 1st Sess.

20. See U.S. Const. art. I, §4, clause 1 and 2 USC §8.

On Jan. 20, 1934, a Committee on Elections submitted House Resolution 231 and House Report No. 334, declaring null and void an election to fill a vacancy and denying the seat to either of the two contestants, one with a certificate of election from the Governor and one with a certificate of election from a citizens' committee.⁽¹⁾

The committee (see H. Rept. No. 334) had determined, after examining the relevant state law, that: The election to fill the vacancy, held pursuant to the governor's proclamation, was invalid because held prior to expiration of the period required by state law to precede the election; and although the election was invalid, a party committee could not itself nominate a candidate and hold an election to choose him as a Representative.⁽²⁾ The House adopted the resolution declaring the election null and void:

Resolved, That there was no valid election for Representative in the

1. 78 CONG. REC. 1035, 73d Cong. 2d Sess. On Jan. 3, 1934, the House had denied the right to be sworn to either contestant and had referred the matter to the Elections Committee. 78 CONG. REC. 11, 12, 73d Cong. 2d Sess.
2. See 78 CONG. REC. 1108-11, 73d Cong. 2d Sess., Jan. 22, 1934 and 78 CONG. REC. 1510-21, 73d Cong. 2d Sess., Jan. 29, 1934.

House of Representatives of the Seventy-third Congress from the Sixth Congressional District of the State of Louisiana on the 5th day of December, or the 27th day of December 1933, and that neither Mrs. Bolivar E. Kemp nor J. Y. Sanders, Jr., is entitled to a seat therein; and be it further

Resolved, That the Speaker communicate to the Governor of the State of Louisiana that there is a vacancy in the representation of that State in the Sixth Congressional District thereof.⁽³⁾

§ 9.8 Where a state court issued a preliminary injunction against the issuance of a certificate to a Member-elect to fill a vacancy and the Speaker declined to administer him the oath, without the certificate and without unanimous consent of the House, the House authorized that he be sworn and referred to committee the question as to his final right to a seat.

On May 24, 1972, the House authorized the Speaker to administer the oath to Member-elect William S. Conover II, to fill a vacancy in a congressional seat from Pennsylvania.⁽⁴⁾ House Resolution 986, authorizing the administration of the oath, provided that Mr.

3. 78 CONG. REC. 1521, 73d Cong. 2d Sess., Jan. 29, 1934.
4. H. Res. 986, 118 CONG. REC. 18654, 92d Cong. 2d Sess.

Conover's final right to a seat be referred to the Committee on House Administration, since a citizens' group had obtained a state court preliminary injunction prohibiting the state Governor from issuing a certificate of election to Mr. Conover:

Whereas the Honorable James G. Fulton, Representative from the Twenty-seventh District of Pennsylvania, died on the 5th day of October 1971;

Whereas Governor Milton Shapp, duly elected Governor of the Commonwealth of Pennsylvania, ordered a special election for the purpose of filling the seat vacated by the death of the Honorable James G. Fulton;

Whereas said special election was held on the 25th day of April 1972;

Whereas the laws of Pennsylvania provide that any candidate may challenge the results of said election within twenty days of the election;

Whereas twenty days have expired and neither Douglas Walgren, Democratic candidate in that special election, nor Willard Holt, Constitution candidate in said special election, have filed suit in any court challenging said election;

Whereas the Bureau of Elections, Allegheny County, has forwarded the official certified vote to the Secretary of the Commonwealth of Pennsylvania, according to the laws of the Commonwealth of Pennsylvania, showing that William S. Conover II received twenty-eight thousand six hundred and forty-seven votes; Douglas Walgren received twenty-five thousand nine hundred and fifty-six votes; and Willard Holt received one thousand five hundred and seventeen votes;

Whereas a citizens' group has instituted a suit against Milton Shapp, Governor of the Commonwealth of Pennsylvania, and C. Delores Tucker, Secretary of the Commonwealth of Pennsylvania, and did on May 11, 1972, obtain in the Commonwealth Court of Pennsylvania a preliminary injunction restraining Milton Shapp, Governor of the Commonwealth of Pennsylvania, from issuing a certificate of election based on the aforementioned results of the special election held April 25, 1972;

Whereas legal proceedings emanating from this suit may result in protracted litigation thereby depriving the Twenty-seventh Congressional District of Pennsylvania of representation in the House of Representatives for an indefinite period; and

Whereas under article I, section 5 of the Constitution of the United States the House of Representatives is the judge of the elections, returns and qualifications of its own Members: Therefore be it

Resolved, That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Pennsylvania, Mr. William S. Conover II; and be it further

Resolved, That the question of the final right of William S. Conover II to a seat in the Ninety-second Congress be referred to the Committee on House Administration, and said committee shall have the power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution.

Parliamentarian's Note: Mr. Conover had originally appeared to take the oath of office shortly

after the special election to fill the vacancy was held on Apr. 25, 1972, but Speaker Carl Albert, of Oklahoma, declined to administer the oath due to the preliminary injunction and the likelihood of an objection being raised to Mr. Conover's taking the oath without a certificate of election.

Proposals to Fill Vacancies by Appointment

§ 9.9 Proposals to amend the Constitution to provide for filling vacancies in the House by appointment have been rejected.⁽⁵⁾

Re-election of Representative to Succeed Himself

§ 9.10 A Member who resigns or who is excluded from the House may be re-elected in a special election to succeed himself in the same Congress.

On Nov. 20, 1944,⁽⁶⁾ Mr. James Domengeaux appeared to take the oath of office. He was elected to fill a vacancy created when he had resigned his congressional

seat from the State of Louisiana in the same Congress.

Parliamentarian's Note: Mr. Domengeaux resigned to enter the armed forces and after approximately 90 days was discharged because of physical disability.

On May 1, 1967,⁽⁷⁾ Speaker John W. McCormack, of Massachusetts, laid before the House a letter from the Clerk, advising receipt of a certificate showing the special election of Mr. Adam C. Powell, of New York, to fill a vacancy created when the House, on Mar. 1, 1967, adopted a resolution excluding Mr. Powell from membership and declaring his seat vacant. In response to a parliamentary inquiry, the Speaker indicated that if Mr. Powell appeared to take the oath and was again challenged, the House would have to determine, at that time, what action it should take.

On June 16, 1965,⁽⁸⁾ Mr. Albert W. Watson, of South Carolina, elected in a special election to fill the vacancy created when he himself resigned from the House, was administered the oath of office. He had originally been elected as a Democrat, resigned from the House, and was re-elected to the House as a Republican.⁽⁹⁾

5. See, e.g., 106 CONG. REC. 1715, 1747, 1748, 86th Cong. 2d Sess., Feb. 2, 1960 (S.J. Res. 39).

6. 90 CONG. REC. 8201, 78th Cong. 2d Sess.

7. 113 CONG. REC. 11298, 90th Cong. 1st Sess.

8. 111 CONG. REC. 13774, 89th Cong. 1st Sess.

9. See also §7.5, *supra*, where a Senator elected by a "write-in" vote re-

Certificate of Election to Fill Vacancy

§ 9.11 The Clerk notifies the Speaker when he receives certificates of elections to fill vacancies in the House.

On Jan. 3, 1956,⁽¹⁰⁾ the Speaker laid before the House a communication from the Clerk stating as follows:

A certificate of election in due form of law for the Honorable John D. Dingell as a Representative-elect to the Eighty-fourth Congress from the Fifteenth Congressional District of the State of Michigan, to fill the vacancy caused by the death of his father, the late Honorable John D. Dingell, has been received from the secretary of state of Michigan, and is on file in this office.

§ 9.12 Members-elect to fill vacancies may be sworn by

signed to permit a regular primary election and announced his candidacy therein.

10. 102 CONG. REC. 5, 84th Cong. 2d Sess. See also 104 CONG. REC. 5, 85th Cong. 2d Sess., Jan. 7, 1958; 112 CONG. REC. 6, 89th Cong. 2d Sess., Jan. 10, 1966 (certificates for Members to fill vacancies are not laid before the House until after the roll call, on the convening day of the second session); 114 CONG. REC. 25508, 90th Cong. 2d Sess., Sept. 4, 1968; 115 CONG. REC. 26056, 26057, 91st Cong. 1st Sess., Sept. 18, 1969 (Governor of state, having named appointee to fill vacancy, appeared on Senate floor to witness taking of oath by appointee).

unanimous consent where their certificates of elections have not arrived and their elections are not contested.⁽¹¹⁾

§ 9.13 A Member-elect elected to fill a vacancy was sworn in, although his certificate was objected to on the ground that it stated he was "duly elected as Congressman," instead of "Representative in Congress."⁽¹²⁾

On June 2, 1930,⁽¹³⁾ Mr. Robert H. Clancy, of Michigan, arose to object to the validity of the certificate of election of Thomas L.

11. 115 CONG. REC. 28487, 91st Cong. 1st Sess., Oct. 3, 1969 (sworn in as Member prior to vote on military procurement authorization for 1970); 111 CONG. REC. 27171, 89th Cong. 1st Sess., Oct. 18, 1965 (only candidate for the vacancy); 111 CONG. REC. 13774, 89th Cong. 1st Sess., June 16, 1965 (re-election of Member who resigned); 100 CONG. REC. 13282, 83d Cong. 2d Sess., Aug. 4, 1954 (Delegate-elect); 90 CONG. REC. 8194, 78th Cong. 2d Sess., Nov. 16, 1944.
12. Although no special form for the certificate of a Representative-elect is required by federal law, the certificate of a Member-elect to fill a vacancy should identify the vacancy and term he is filling. See, in general, § 15, *infra*.
13. 72 CONG. REC. 9891, 9892, 71st Cong. 2d Sess.

Blanton, Member-elect from Texas, to fill a vacancy. Mr. Clancy's objection was based on the description in the credentials of Mr. Blanton as "Congressman," instead of as "Representative in Congress."

Mr. John N. Garner, of Texas, arose to state that Mr. Clancy's objection was frivolous, since the certificate clearly stated that Mr. Blanton was elected from the 17th District of Texas, and to succeed Mr. Robert Q. Lee, who all the Members of the House knew represented the 17th District in the House. Mr. Clancy responded that the Clerk of the House had notified the authorities in Texas a number of times that they should not designate the office as "Congressman," but as "Representative in Congress," and that the precedents of the House mandated that the credentials must be in order and must correctly describe the office.

The House then voted on the question and directed that the Speaker administer the oath to the challenged Member-elect.

Appointees to Fill Vacancies in Senate

§ 9.14 An appointee to fill a vacancy in the Senate declined to serve, whereupon his certificate of appointment was

returned to the state Governor.

On June 21, 1956,⁽¹⁴⁾ there was laid before the Senate two communications from Governor Chandler of Kentucky, one appointing Senator-elect Joseph Leary to fill a vacancy, and one asking the return of the certificate of appointment, since Mr. Leary had declined to serve. The Senate ordered the return of the certificate:

Ordered, That in view of the declination of Joseph J. Leary of the appointment by the Governor of Kentucky as Senator from that State to fill the vacancy caused by the death of the late Senator Alben W. Barkley, the certificate of appointment of Mr. Leary be returned by the Secretary of the Senate to the Governor, in compliance with his request.

§ 9.15 Where a candidate was simultaneously elected as a Senator and as Vice President, he was administered the oath as Senator and then immediately resigned from the Senate; this resignation was followed by the administration of the oath to an appointee to fill the vacancy that had been created.

On Jan. 3, 1961,⁽¹⁵⁾ Senator-elect Lyndon B. Johnson, of

14. 102 CONG. REC. 10769, 84th Cong. 2d Sess.

15. 107 CONG. REC. 6, 7, 87th Cong. 1st Sess.

Texas, was administered the oath, after which he submitted his resignation from the Senate due to his election as Vice President of the United States.

Following his resignation, there were laid before the Senate a letter and telegram from the Governor of Texas appointing Mr. William A. Blakley to fill the vacancy created by Mr. Johnson's resignation. After the receipt of the communications, Mr. Blakley, who was present, was administered the oath.

§ 9.16 The Speaker laid before the House a letter of resignation from a Member who had been appointed to the Senate to fill the vacancy caused by the resignation of a Senator

whose term of office was about to expire.

On Dec. 31, 1970, the Speaker laid before the House the resignation of Mr. William V. Roth, Jr., of Delaware. Mr. Roth had been appointed by the Governor to fill a vacant senatorial seat and was administered the oath in the Senate on Jan. 2, 1971, although the term of office for the seat was to expire a day later on Jan. 3, 1971.⁽¹⁶⁾

Parliamentarian's Note: Mr. Roth had been elected as a Senator from Delaware, his term to begin Jan. 3, 1971; the appointment to fill the vacancy in the 91st Congress had the effect of increasing his seniority in the 92d Congress.

C. CAMPAIGN PRACTICES

§ 10. Regulation and Enforcement

The U.S. Constitution grants each House of Congress the power, under article I, section 5, to judge the elections and returns of its own Members. It also grants to Congress, under article I, sec-

tion 4, the power to make or alter regulations for the time, place, and manner of holding elections.⁽¹⁷⁾

The Supreme Court has affirmed that the power of Congress to make regulations for holding elections extends to every phase of the election process, including campaign practices:

^{16.} 116 CONG. REC. 44516, 91st Cong. 2d Sess.

^{17.} For the constitutional provisions and comments thereon, see *House Rules and Manual* §§ 42-44, 46-51 (1973).

It cannot be doubted that these comprehensive words [U.S. Const. art. I, §4, clause 1] embraces authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and candidates, and making a publication of election returns; in short, to enact numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.⁽¹⁸⁾

Until 1972, campaign practices in congressional elections were governed by the Corrupt Practices Act of 1925, as amended; the Federal Election Campaign Act of 1971 repealed the Corrupt Practices Act and established a new and comprehensive code for campaign practices and expenditures with provisions for investigations and enforcement.⁽¹⁹⁾ The act required reports on campaign contributions and expenditures to be

filed with the Clerk by candidates for election to the House and designated the Clerk as “supervisory officer” of the act in relation to House elections with duties as to investigations, enforcement, and referral to prosecutors of violations of the act. Because of the Clerk’s role under the election statutes, a variety of civil actions have been brought against him in his official capacity, and the Clerk has been authorized to obtain counsel when necessary in relation to his statutory functions. The Federal Election Campaign Act Amendments of 1974 imposed new limitations on campaign contributions and expenditures, modified reporting requirements under the act, provided for public financing of Presidential nominating conventions and primary elections, and created a new Federal Election Commission to investigate and enforce compliance with the act, to render advisory opinions and to promulgate rules and regulations under the act. Under the 1974 amendments, the commission was composed of the Clerk of the House and Secretary of the Senate, as ex officio members without voting rights, and six members, two to be appointed by the Speaker upon the recommendations of the Majority and Minority Leaders of the House,

18. *Smiley v Holme*, 285 U.S. 355, 366 (1932).

Congressional authority over election regulation and practices extends to the primary process. See *United States v Classic*, 313 U.S. 299 (1941), *United States v Wurzbach*, 280 U.S. 396 (1930).

19. Pub. L. No. 92-225, 86 Stat. 3, Feb. 7, 1972. See §§ 10.6-10.8, *infra*, for instances of civil actions brought against the Clerk.

two to be appointed by the President pro tempore upon the recommendations of the Majority and Minority Leaders of the Senate, and two to be appointed by the President; all nominees were subject to confirmation by both Houses of Congress.⁽²⁰⁾

On Jan. 30, 1976, the U.S. Supreme Court handed down a decision in the case of *Buckley v Valeo*,⁽²¹⁾ in which the constitutionality of the Federal Election Campaign Act Amendments was challenged on several grounds. The Court ruled that certain of the spending limitations imposed by the act violated the first amendment to the Constitution; the Court also found that the Federal Election Commission was prohibited from exercising all of the administrative and enforcement powers granted to it by the act, since the authority of the Speaker and the President pro tempore to appoint two members each to the commission violated U.S. Con-

stitution, article II, section 2, clause 2, vesting in the President the power to nominate and to appoint, with the advice and consent of the Senate, officers of the United States. To remedy the constitutional infirmities of the 1974 act and to effect further modifications in the Election Campaign Act, the Congress passed and the President signed into law the Federal Election Campaign Act Amendments of 1976; that act provided that all six members of the Federal Election Commission be appointed by the President with the advice and consent of the Senate.⁽²²⁾ The 1976 amendments also provided a new procedure, not contained in the 1974 act, for the House to consider as a privileged matter a report of the appropriate House committee on a resolution disapproving certain regulations proposed by the commission on reporting requirements for candidates for election to the House; the 1974 act had made such regulations subject to a single-House veto but did not specify any procedure for House consideration of disapproval resolutions.⁽²³⁾

20. Pub. L. No. 93-443, 88 Stat. 1263, Oct. 15, 1974. See §10.11, *infra*, for the procedure of the House in receiving and confirming the nominations to the commission in 1975.

21. 424 U.S. 1 (1976); as indicated in the note to §10.11, *infra*, the decision of the Court as to the powers of the commission was stayed for a time certain to allow Congress to consider and act on the matter.

22. Pub. L. No. 94-283, 90 Stat. 475, May 11, 1976.

23. See §10.12, *infra*, for a discussion of congressional disapproval of commission regulations under the Election Campaign Act, as amended.

The functions of the Clerk under the 1974 and 1976 amendments to the Federal Election Campaign Act of 1971 differ from his functions both under the original act and under the Federal Corrupt Practices Act.

Under the Federal Corrupt Practices Act, candidates for the House were required to report to the Clerk, as were political committees which fell within the terms of the act, even if such committees existed to support senatorial or Presidential candidates.⁽²⁴⁾ Similarly, any person making expenditures greater than \$50, other than by contribution to a political committee, had to file a statement disclosing the particulars with the Clerk, if such expenditures influenced the election of candidates in two or more states.⁽²⁵⁾

Under the Federal Election Campaign Act of 1971, which designated the Clerk a "supervisory officer" with respect to House elections, the definition of committees supporting candidates was broadened, with the result that most of the intrastate and district committees previously reporting at the state level under the Federal Corrupt Practices Act had to file timely reports with the Clerk.⁽²⁶⁾

24. Pub. L. No. 506, Ch. 368, title III § 305, Feb. 28, 1925.

25. *Id.*, § 306.

26. Pub. L. No. 92-225, 86 Stat. 3, § 304(a), Feb. 7, 1972.

Moreover, all committees falling within the definition had to file a statement of organization and register with the Clerk.⁽²⁷⁾ The Clerk had jurisdiction over amendments to or withdrawals of registrations. Finally, the definition of an election was expanded to include primaries and runoff elections.⁽²⁸⁾

In addition to the reports which committees and candidates were required to file at specified time intervals, the Clerk received reports of independent expenditures. Among other duties and functions of the Clerk were the following: to prescribe reporting and registration forms together with separate schedules, particularly for the reporting of committee debts and obligations; to make reports and registrations available for public inspection; to preserve all documents for a five-year period from the date of receipt; to conduct audits and field investigations; to receive complaints and to report any apparent violations of the act to the appropriate law enforcement authorities; and to prescribe rules and regulations for the performance of these duties.⁽¹⁾

Under the 1974 amendments, signed Oct. 15, 1974, many functions of the Clerk were trans-

27. *Id.*, § 303(a).

28. *Id.*, § 301(a).

1. *Id.*, § 308.

ferred to the newly established Federal Election Commission. Although reports of House candidates and committees were still to be filed initially with the Clerk, independent expenditure reports were now required to be filed with the commission. The Clerk was required to cooperate with the commission in carrying out its duties under the act and to furnish such services and facilities as might be required. Any complaints filed with, or apparent violations found by, the Clerk were to be referred to the Federal Election Commission,⁽²⁾ which had primary jurisdiction with respect to civil enforcement of the law. The Clerk continued to review registrations and reports filed so as to determine their completeness and accuracy, although responsibility for audits and field investigations was shifted to the staff of the Federal Election Commission.

Under the 1976 amendments, all complaints of possible violations are to be submitted directly to the Federal Election Commission, rather than the former practice whereby the Clerk referred apparent violations of the act to the commission.⁽³⁾

2. Pub. L. No. 93-443, 88 Stat. 1263, §314(a)(1)(B), Oct. 15, 1974.

3. Pub. L. No. 94-283, 90 Stat. 475 at 483, §313, May 11, 1976.

Other public laws bear on campaign practices, such as those prohibiting bribery and other unlawful acts.⁽⁴⁾

The use by an incumbent Member of his statutory allowances, in relation to campaigns, has been the subject of much discussion and litigation.⁽⁵⁾ In the 93d Congress, a public law was enacted to clarify the use of the congressional frank, to prohibit the franking of campaign mail, and to limit the jurisdiction of courts to the review of decisions of a Special

4. See, for example, the following criminal statutes: 18 USC §599 (prohibits candidate from promising employment); 18 USC §602 (solicitation or receipt of political contributions from federal employees); 18 USC §603 (solicitation of political contributions in federal building); 18 USC §611 (solicitation of contributions from federal contractors); 18 USC §608 (limitation on expenditure of personal funds); 18 USC §610 (no contributions from corporations or labor unions); Pub. L. No. 92-225, §§301-311 (failing to file campaign fund reports).

5. For the allowances of a Member and their use, see Ch. 7, *supra*. For a compilation of court cases on the alleged use of the frank for campaign purposes, see Report of the Joint Committee on Congressional Operations Identifying Court Proceedings and Actions of Vital Interest to the Congress, Final Report for the 92d Congress, Dec. 1972.

Commission on Mailing Standards, which commission has power to investigate the use of the frank, whether related to campaign mail or to other types of mail.⁽⁶⁾

The Committee on House Administration has general jurisdiction over election practices and their regulation and obtained jurisdiction over campaign contributions in the 94th Congress.⁽⁷⁾ The committee investigates contested elections and practices occurring in specific campaigns.⁽⁸⁾

The Committee on Standards of Official Conduct, created in the 90th Congress, has jurisdiction over financial disclosure requirements and, until the 94th Congress, over the regulation of campaign contributions.⁽⁹⁾

The states may also enact corrupt practices acts, and the Fed-

6. Pub. L. No. 93-191, 87 Stat. 737, Dec. 18, 1973.

The act provides that the computed cost of franking shall not be considered as a campaign expenditure or contribution for the purpose of statutory limitations thereon. 87 Stat. 741.

7. *House Rules and Manual* §693 (1973). The committee was created by the Legislative Reorganization Act of 1947 and absorbed the former Committee on Election of President, Vice President, and Representatives in Congress.

8. For select committees on campaign expenditures, see § 14, *infra*.

9. See § 10.5, *infra*.

eral Election Campaign Act provides for reports to be filed with proper state officials, for each congressional candidate.⁽¹⁰⁾

Campaign Funding

§ 10.1 In the 90th Congress, the rules of the House were amended to provide regulations governing the use and expenditure of campaign funds.

On Apr. 3, 1968,⁽¹¹⁾ the House agreed to House Resolution 1099, amending the rules of the House to establish, as new Rule XLIII, a Code of Conduct for Members, and for other purposes. Clauses 6 and 7 of the new rule related to campaign funds and contributions:

6. A Member of the House of Representatives shall keep his campaign funds separate from his personal funds. He shall convert no campaign funds to personal use in excess of reimbursement for legitimate and verifiable prior campaign expenditures. He shall expend no funds from his campaign account not attributable to bona fide campaign purposes.

7. A Member of the House of Representatives shall treat as campaign

10. Pub. L. No. 92-225, § 309.

The House or its committee has taken state corrupt practices acts into account in judging election contests; see § 11, *infra*.

11. 114 CONG. REC. 8802, 90th Cong. 2d Sess.

contributions all proceeds from testimonial dinners or other fund raising events if the sponsors of such affairs do not give clear notice in advance to the donors or participants that the proceeds are intended for other purposes.⁽¹²⁾

Committee Jurisdiction

§ 10.2 Where a Presidential legislative proposal amending the federal election laws included a title on income tax deductions for political contributions, that title was deleted in order that the Committee on House Administration could consider the bulk of the proposal and the Committee on Ways and Means could consider the tax proposal as a separate proposition.

On May 26, 1966,⁽¹³⁾ a Presidential communication, executive communication 2433, proposing a comprehensive amendment of the federal election laws, was referred to the Committee on House Ad-

12. The resolution also provided for a financial disclosure requirement, in Rule XLIV, not applicable to campaign receipts. See *House Rules and Manual* §940 (1973). Disclosure of campaign receipts and expenses are required under the Federal Election Campaign Act.

13. 112 CONG. REC. 11686, 11687, 89th Cong. 2d Sess.

ministration. The proposal included amendments not only to the Federal Corrupt Practices Act but also to the Internal Revenue Code.

Parliamentarian's Note: It was agreed by House leaders that while most of the proposal fell within the jurisdiction of the Committee on House Administration, title VII of the bill, pertaining to income tax deductions for political contributions, was clearly within the jurisdiction of the Committee on Ways and Means. It was agreed that the latter committee would consider title VII as a separate proposition and that the Committee on House Administration would delete that title from the proposal before introducing the bill on the floor of the House.

§ 10.3 In the 74th Congress, bills relating to election offenses and providing penalties therefor came within the jurisdiction of the Committee on the Judiciary and not the (former) Committee on Election of President, Vice President, and Representatives in Congress.

On Feb. 19, 1936,⁽¹⁴⁾ Mr. Thomas Fletcher Brooks, of Ohio, addressed the House in order to ask

14. 80 CONG. REC. 2360, 74th Cong. 2d Sess.

unanimous consent that a bill relating to offenses in elections and providing penalties therefore, which was formerly referred to the Committee on Election of President, Vice President, and Representatives in Congress, be rereferred to the Committee on the Judiciary. Mr. Fletcher stated that he had talked with the chairmen of both committees. There was no objection to the request.⁽¹⁵⁾

§ 10.4 The Committee on the Judiciary and not the Committee on Military Affairs had jurisdiction of bills to repeal the provisions of the War Disputes Act relating to political contributions by labor organizations.

On May 11, 1944,⁽¹⁶⁾ Mr. Andrew J. May, of Kentucky, who had introduced a bill to repeal provisions of the War Disputes Act relating to political contributions by labor organizations, addressed the House in relation to the committee jurisdiction of the

15. The former Committee on Election of President, Vice President, and Representatives in Congress was absorbed by the Committee on House Administration, created by the Legislative Reorganization Act of 1947. See *House Rules and Manual* § 694 (1973).

16. 90 CONG. REC. 4323, 78th Cong. 2d Sess.

bill. The bill had originally been referred to the House Committee on Military Affairs, but Mr. May obtained unanimous consent that the bill be rereferred to the Committee on the Judiciary.

§ 10.5 In the 91st Congress, the House rules were amended to confer on the Committee on Standards of Official Conduct jurisdiction over the raising, reporting, and use of campaign contributions for House candidates.

On July 8, 1970,⁽¹⁷⁾ the Committee on Rules reported House Resolution 1031, amending the rules of the House in relation to the jurisdiction of the Committee on Standards of Official Conduct over campaign contributions. The resolution, as passed by the House, conferred on that committee jurisdiction over the raising, reporting, and use of campaign contributions for candidates for the House. The committee was also given jurisdiction to investigate such matters and to report findings to the House.

17. 116 CONG. REC. 23136-41, 91st Cong. 2d Sess.

This jurisdiction was transferred to the Committee on House Administration in the 94th Congress (H. Res. 5, Jan. 14, 1975).

Clerk's Role Under Election Campaign Act

§ 10.6 A class action was brought against the Clerk claiming that he had failed to comply with the Federal Election Campaign Act of 1971 and challenging the price of copies of reports filed thereunder.

On May 2, 1972, Speaker Carl Albert, of Oklahoma, laid before the House a communication from the Clerk, advising the House that he had been named as defendant in a court action instituted by Common Cause, seeking: (1) a declaratory judgment that the Clerk had failed to comply with the provisions of the Federal Election Campaign Act of 1971; and (2) a restraining order to prohibit the Clerk from continuing a price increase for copies of reports filed under the act and from prohibiting the plaintiff from using its own duplicating equipment.⁽¹⁸⁾

18. 118 CONG. REC. 15311, 92d Cong. 2d Sess.

For the court opinion in the suit against the Clerk, see *Common Cause v Jennings*, Civil Action 842-72 (D.C. Cir. 1972). The U.S. District Court entered a restraining order precluding any increase in the copying cost of 10 cents per page. (The Committee on House Administration had ordered the Clerk to raise the

§ 10.7 An action was brought in which the plaintiff alleged that the Clerk of the House and the Secretary of the Senate had failed to take action against the practice known as "earmarking" political campaign contributions in violation of the Federal Election Campaign Act of 1971.

In an action brought by Common Cause against the Clerk of the House and the Secretary of the Senate,⁽¹⁹⁾ the plaintiffs alleged that the defendants "unlawfully" refused "to take action against certain practices that insulate candidates from associating with their actual contributors." The plaintiffs characterized the practice of "earmarking" as one in which, instead of giving directly to the candidate, the contributor gives his money to an intermediary political committee which supports a number of candidates, with the informal but clearcut agreement that the intermediary committee will pass the gift on to the candidate named by the original donor.

The plaintiffs asserted that this practice violated the Federal Elec-

price to \$1 per page.) The District Court action was affirmed by the U.S. Court of Appeals for the District of Columbia without opinion on Dec. 21, 1973.

19. See *Common Cause v Jennings*, (D.D.C. No. 2379-72).

tion Campaign Act, section 310, which stated “No person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another person.”

The District Court denied the defendant’s motion to dismiss on Mar. 20, 1973. The parties, on May 13, 1974, stipulated that the case be dismissed without prejudice and that all designated, earmarked contributions should be reported as such under section 304 together with the details of the earmarking.

Clerk Authorized to Obtain Counsel

§ 10.8 The Speaker laid before the House a communication from the Clerk, informing the House of the receipt of replies from the Department of Justice and the United States Attorney for the District of Columbia in which they agreed to furnish representation for the Clerk in a civil action relating to the enforcement of certain election campaign statutes unless a “divergence of interest” should develop between the positions of the Clerk and the Justice Department.

On Mar. 15, 1972,⁽²⁰⁾ Speaker Carl Albert, of Oklahoma, laid before the House various communications from the Clerk of the House relative to a case later to become known as *Nader v Kleindienst*. This case was a class action based on the Federal Corrupt Practices Act. The plaintiffs sought enforcement of the act, or the appointment of special prosecutors, and the termination of the alleged Justice Department policy to only prosecute under the act if so requested by the Clerk of the House or Secretary of the Senate.

Parliamentarian’s Note: On May 3, 1972, the Clerk received a letter from the Justice Department stating that a “divergence of interest” had developed between the positions of the Clerk and the Justice Department and requesting the Clerk to obtain other counsel. On May 3, the House adopted House Resolution 955, authorizing the Clerk to obtain other counsel in cases brought against him relating to the Corrupt Practices Act and the Federal Election Campaign Act.⁽²¹⁾ (A similar resolution

20. 118 CONG. REC. 8470, 92d Cong. 2d Sess.

21. For the communication from the Clerk advising the House of the original summons, see 118 CONG. REC. 5024, 92d Cong. 2d Sess., Feb. 22, 1972.

adopted in the 93d Congress, House Resolution 92, Jan. 6, 1973, was later made permanent law by Public Law No. 93-145, 87 Stat. 527.)

The United States District Court for the District of Columbia dismissed the complaint as to the Clerk of the House and Secretary of the Senate.⁽²²⁾

Suit Testing Applicability of Campaign Act

§ 10.9 The Speaker laid before the House a communication from the Clerk, advising that he had been served with a summons and complaint in a civil action pending in a federal court relating to the applicability of the Federal Election Campaign Act of 1971 to a political advertisement prepared by the American Civil Liberties Union.

On Oct. 5, 1972,⁽²³⁾ Speaker Carl Albert, of Oklahoma, laid before the House a communication from the Clerk of the House relative to *American Civil Liberties Union v Jennings*.

In the case, the Clerk, among others, was named in a challenge

22. See *Nader v Kleindienst*, 375 F Supp 1138 (D.D.C. 1972), aff'd, 497 F2d 676.

23. 118 CONG. REC. 34040, 92d Cong. 2d Sess.

to the constitutionality of the Federal Election Campaign Act of 1971. The case arose from the refusal of a newspaper to print an allegedly "political" advertisement prepared by the ACLU, where the advertisement contained the name of a Congressman. The U.S. District Court ruled that the statutory language in question did apply to the activities of the ACLU, but "only to committees soliciting contributions or making expenditures" for candidates.⁽¹⁾

Clerk Authorized to Investigate Violations

§ 10.10 The House agreed to a privileged resolution, reported from the Committee on Rules, establishing a special committee to investigate and report on campaign expenditures and practices by candidates for the House, and authorizing the special committee and the Clerk of the House to jointly investigate alleged violations of

1. See 366 F Supp 1041 (D.D.C. 1972j). See also *United States v The National Committee for Impeachment*, 469 F2d 1135 (2d Cir. Oct. 30, 1972), wherein it was held that an organization printing an advertisement was not a "political committee" required to file statements and reports under the Federal Election Campaign Act of 1971.

the Federal Election Campaign Act of 1971.

On Mar. 15, 1973,⁽²⁾ Mr. Richard Bolling, of Missouri, called up, by direction of the Committee on Rules, House Resolution 279 as privileged. The resolution created a special or select committee to investigate campaign expenditures.

The resolution authorized joint investigations by the select committee and by the Clerk of the House, in order to permit the Clerk to take advantage of the select committee's subpoena power in carrying out his duties under the Federal Election Campaign Act of 1971:

. . . (8) The Clerk of the House of Representatives is authorized and directed when carrying out assigned responsibilities under the Federal Election Campaign Act of 1971 that prior to taking enforcement action thereunder, to initiate a request for consultation with and advice from the committee, whenever, at his discretion, election campaign matters arise that are included within sections (1) through (6) above and may affect the interests of the House of Representatives.

(9) The committee is authorized and directed to consult with, advise, and act in a timely manner upon specific requests of the Clerk of the House of Representatives either when he is so acting on his own motion or upon a

written complaint made to the Clerk of the House under oath setting forth allegations of fact under the Federal Campaign Act of 1971. The committee, or a duly authorized subcommittee thereof, when acting upon the requests of the Clerk shall consult with him, shall act jointly with him, and shall jointly investigate such charges as though it were acting on its own motion, unless, after a hearing upon such complaint, the committee, or a duly authorized subcommittee thereof, may be either in executive or in public sessions, but hearings before the committee when acting jointly shall be public and all order and decisions and advice given to the Clerk of the House of Representatives by the committee or a duly authorized subcommittee thereof shall be public.

For the purpose of this resolution, the committee, or any duly authorized subcommittee thereof, is authorized to hold such public hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods during the period from March 1, 1973 through June 6, 1973, of the Ninety-third Congress, to employ such attorneys, experts, clerical, and other assistants, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to administer such oaths, and to take such testimony as it deems advisable. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by such chairman, and may be served by any person designated by any such chairman or member.

(10) The committee is authorized and directed, when acting on its own

2. 119 CONG. REC. 7957, 7958, 93d Cong. 1st Sess.

motion or upon a complaint made to the committee, to report promptly any and all violations of any Federal or State statutes in connection with the matters and things mentioned herein to the Attorney General of the United States in order that he may take such official action as may be proper. The committee or a duly authorized subcommittee thereof is authorized and directed when acting upon the specific request of the Clerk of the House to render advice promptly in order to give the Clerk of the House of Representatives the prior benefits of its advice and in order that he may then take such official action under the Federal Election Campaign Act of 1971 as the Clerk of the House of Representatives deems to be proper.⁽³⁾

Parliamentarian's Note: This was the last occasion on which a select committee to investigate campaign expenditures was established. The Committee on House Administration, with jurisdiction over campaign practices, also was given jurisdiction over campaign contributions in the 94th Congress (H. Res. 5, 94th Congress). And in the 94th Congress, all standing committees, including the Committee on House Administration,

3. See also H. Res. 131, 93d Cong. 1st Sess., extending the Special Committee to Investigate Campaign Expenditures created in the 92d Congress, to enable it to assist the Clerk of the House in investigating new allegations of violations of federal election laws.

were given the power to issue subpoenas whether or not the House was in session (H. Res. 988, 93d Congress, effective Jan. 3, 1975).

Federal Election Commission, Composition

§ 10.11 Under the Federal Election Campaign Act Amendments of 1974, establishing a Federal Election Commission, both the House and Senate were required to confirm the nominations of six members of the commission, two to be appointed by the Speaker on the recommendations of the Majority and Minority Leaders of the House, two to be appointed by the President pro tempore of the Senate on the recommendations of the Majority and Minority Leaders of the Senate, and two to be appointed by the President.

On Jan. 29, 1975,⁽⁴⁾ Speaker Carl Albert, of Oklahoma, laid before the House a communication from the Majority Leader Thomas P. O'Neill, Jr., of Massachusetts, and a communication from Minority Leader John J. Rhodes, of Arizona, each recommending a nominee for appointment by the Speak-

4. 121 CONG. REC. 1680, 94th Cong. 1st Sess.

er to serve as members of the Federal Election Commission; the recommendations were submitted pursuant to section 301(B) of Public Law No. 93-433, Federal Election Campaign Act Amendments of 1974, creating the commission and providing for two appointments by the Speaker upon recommendations of the Majority and Minority Leaders of the House, two appointments by the President pro tempore upon recommendations of the Majority and Minority Leaders of the Senate, and two appointments by the President. The Speaker referred the communications to the Committee on House Administration, which had considered and reported the public law in question. On Mar. 6, 1975,⁽⁵⁾ the Speaker laid before the House a communication from the Secretary of the Senate transmitting the recommendations of the Majority Leader of the Senate, Mike Mansfield, of Montana, and the Minority Leader of the Senate, Hugh Scott, of Pennsylvania, for appointments to the Federal Election Commission by the President pro tempore of the Senate. The communication was referred to the Committee on House Administration. And on Mar. 10, 1975,⁽⁶⁾

5. 121 CONG. REC. 5537, 5538, 94th Cong. 1st Sess.

6. 121 CONG. REC. 5870, 94th Cong. 1st Sess.

the Speaker laid before the House two messages from President Gerald R. Ford nominating two persons for his appointments to the commission; the messages were referred to the Committee on House Administration.

On Mar. 19, 1975,⁽⁷⁾ Mr. Wayne L. Hays, of Ohio, called up by direction of the Committee on House Administration House Resolution 314, confirming the six nominations for appointment to the commission, and asked unanimous consent for the immediate consideration of the resolution (the resolution had no privileged status under the rules of the House). The House agreed to consider the resolution and after debate agreed thereto, voting separately on each nominee since a demand had been made for a division of the question. The Senate later confirmed all six nominees and the Speaker, the President pro tempore of the Senate, and the President made their various appointments.

Parliamentarian's Note: The Federal Election Campaign Act Amendments of 1976, enacted May 11, 1976, as Public Law No. 94-283, deleted from the Federal Election Campaign Act the provisions for appointments to the com-

7. 121 CONG. REC. 7344-54, 94th Cong. 1st Sess.

mission by the Speaker and President pro tempore and joint House-Senate confirmation of all nominees, and provided instead for six members to be appointed by the President with the advice and consent of the Senate (with the Clerk of the House and Secretary of the Senate to serve ex officio without voting rights, as in the 1974 amendments). The United States Supreme Court had held, in the case of *Buckley v Valeo*, 424 U.S. 1 (1976) (decided Jan. 30, 1976), that the Federal Election Commission could not exercise the full range of administrative and enforcement powers granted to it in the 1976 amendments, since the method of selecting members of the commission provided in the 1976 act violated the "Appointment Clause" of the Constitution, vesting in the President the sole power to appoint, with the advice and consent of the Senate, officers of the United States (U.S. Const. art. II, §2, clause 2). The Supreme Court had stayed that portion of its ruling for 50 days in order to avoid interrupting enforcement of the Election Campaign Act while the Congress considered whether remedial legislation was necessary (see H. Rept. No. 94-917, Mar. 17, 1976, 94th Cong. 2d Sess., a report by the Committee on House Administration on H.R. 12406, the

House counterpart to S. 3065 which was enacted as the Federal Election Campaign Act Amendments of 1976).

***Federal Election Commission,
Congressional Disapproval of
Regulations***

§ 10.12 The Federal Election Campaign Act, as amended, allows the House or the Senate, whichever is appropriate, to disapprove certain regulations proposed by the Federal Election Commission dealing with campaign reports and statements required of candidates for the House or Senate, and allows both Houses to disapprove reports and statements required of Presidential candidates.

The Federal Election Campaign Act Amendments of 1974, Public Law No. 93-443, section 209, amended the act to require the Federal Election Commission to transmit to the House or Senate, whichever is appropriate, proposed regulations dealing with reporting requirements for candidates for the House in question. Such regulations may be promulgated by the commission if the House or Senate, as the case may be, does not disapprove such regulations within 30 legislative days.

In the case of proposed regulations dealing with reporting requirements for Presidential candidates, both the House and the Senate may disapprove.

On Oct. 22, 1975,⁽⁸⁾ Mr. John Young, of Texas, called up by direction of the Committee on Rules House Resolution 800, providing for the consideration in the House of House Resolution 780, reported from the Committee on House Administration and disapproving a regulation proposed by the Federal Election Commission; a special order from the Committee on Rules was necessary since the Federal Election Campaign Act Amendments of 1974 did not provide a privileged procedure for considering such disapproval resolutions in the House. The House adopted the special order and then adopted the disapproval resolution. (The disapproval resolution had previously failed of passage under suspension of the rules on Oct. 20.)

The Federal Election Campaign Act Amendments of 1976, Public Law No. 94-283, section 110(b), amended the act to provide that whenever a committee of the House reports a disapproval resolution provided for by the act, "it is at any time thereafter in order

(even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to." The 1976 law also redefined a "rule or regulation" which could be disapproved as a "provision or series of interrelated provisions stating a single separable rule of law."

§ 11. Campaign Practices and Contested Elections

[Note: For specific election contests, see chapter 9, *infra*.]

In judging contested elections, the Committee on House Administration or its subcommittee on elections, and then the House, take into account alleged violations of federal or state election campaign laws and the effect of such violations on the outcome of the election. Such statutes are not binding on the House in exercising its function of judging the elections of its Members, since the Constitution gives the House the sole power to so judge.⁽⁹⁾

8. 121 CONG. REC. 33662, 33663, 94th Cong. 1st Sess.

9. See *House Rules and Manual* §§ 47-50 (comments to U.S. Const. art. I, § 5, clause 1) (1973).

The House generally does not unseat a Member for alleged campaign irregularities if he possesses a proper certificate of election and where it has been found in an election contest that any violations of the applicable statute were unintentional and not fraudulent.⁽¹⁰⁾ Thus, failure to file timely and accurate expenditure reports with the Clerk of the House does not necessarily deprive a contestee of his seat, and the Committee on House Administration will consider evidence of mitigating circumstances and of negligence as opposed to fraud.⁽¹¹⁾

The House has generally considered the election contest as the proper procedure by which a losing candidate can challenge the election of the nominee for alleged campaign improprieties.⁽¹²⁾ However, violations of the Corrupt Practices Act could also be litigated in civil court proceedings in a proper case.⁽¹³⁾

In presenting an election contest based on campaign irregular-

ities before a House committee, the contestant has the burden of proof to establish by a fair preponderance of the evidence that (1) the contestee had violated a state or federal campaign practices statute, and (2) that any such alleged violations directly or indirectly prevented the contestant from receiving a majority of the votes cast.⁽¹⁴⁾

Negligence in Reporting Campaign Expenditures

§ 11.1 An elections committee has found that negligence on the part of a candidate in preparing expenditure accounts to be filed with the Clerk should not deprive him of his seat in the House, absent fraud, where he received a substantial majority of the votes cast.

For example, on Jan. 31, 1944,⁽¹⁵⁾ an elections committee

10. See § 11.1, *infra*.

11. See § 11.5, *infra*.

12. See Ch. 9, *infra*. See § 12, *infra*, for expulsion, exclusion and censure in relation to campaign practices.

Congressional committees have investigated allegations of improper or illegal campaign activities (see §§ 13, 14, *infra*).

13. See Pub. L. No. 92-225, § 308(d)(1).

14. H. REPT. NO. 1783, to accompany H. Res. 427, reported Mar. 14, 1940, 86 CONG. REC. 2915, 2916, 76th Cong. 3d Sess., in the *Scott v Eaton* contest for the 18th Congressional District of California.

15. 90 CONG. REC. 962, 78th Cong. 2d Sess. See also 90 CONG. REC. 3252, 3253, 78th Cong. 2d Sess., Mar. 29, 1944, where the Committee on Elections No. 1 recommended that an

reported (H. Rept. No. 1032) in the contested election case of *Thill v McMurray*, for the Fifth Congressional District of Wisconsin. The committee recommended that the contestee be declared entitled to the seat despite irregularities in reporting expenditures to the Clerk. The committee found that the contestee had received a substantial majority of the votes for his seat and should not be deprived of his seat for negligent and not fraudulent preparation of expenditure accounts by himself and his attorney. The committee did admonish the contestee in its report for signing under oath an expenditure statement without being familiar with its contents and irregularities.⁽¹⁶⁾

The House agreed without debate to a resolution (H. Res. 426) dismissing the contest.⁽¹⁷⁾

election contest be dismissed where the contestee had failed to correctly file reports under the Corrupt Practices Act, but where such reporting was merely negligent and not purposeful. The House adopted H. Res. 490, dismissing the contest.

16. See also the report of an elections committee in the case of *Schafer v Wasielewski*, Fourth Congressional District of Wisconsin, where expenditure accounts were negligently prepared. The report stated that the "committee does not condone such negligence." 90 CONG. REC. 3252, 3253, 78th Cong. 2d Sess., Mar. 29, 1944 (report printed in the Record).
17. 90 CONG. REC. 933, 78th Cong. 2d Sess., Jan. 31, 1944.

Distribution of Campaign Literature

§ 11.2 A pre-election irregularity, such as unauthorized distribution of campaign literature, will not be attributed to a particular candidate where he did not participate therein.

On Sept. 8, 1959,⁽¹⁸⁾ the House agreed to House Resolution 380, reported by the Committee on House Administration and called up by Mr. Robert T. Ashmore, of South Carolina; the resolution declared Mr. T. Dale Alford entitled to a seat from the Fifth Congressional District of Arkansas following an investigation by the committee (H. Rept. No. 1172). The committee found that although campaign literature had been improperly distributed during the election, such distribution was not authorized by or participated in by Mr. Alford.⁽¹⁹⁾

18. 105 CONG. REC. 18610, 18611, 86th Cong. 1st Sess.

19. For a description of the pre-election irregularities investigated by the Committee on House Administration, pursuant to the recommendation of the Select Committee on Campaign Expenditures of the 85th Congress, see the remarks of Mr. Thomas P. O'Neill, Jr. (Mass.) at 105 CONG. REC. 3432-34, 86th Cong. 1st Sess., Mar. 5, 1959.

§ 11.3 An elections committee found no evidence that contestee financed extra editions of a magazine which supported his candidacy.

On Mar. 19, 1952,⁽²⁰⁾ an elections committee reported (H. Rept. No. 1599) in the contested election case of *Macy v Greenwood* for the First Congressional District of New York. The committee found no evidence that the contestee financed extra editions of a magazine which had supported his candidacy, and recommended that the contestee be declared entitled to the seat.

The House adopted House Resolution 580 declaring the contestee entitled to his seat.⁽¹⁾

Expenditures by Political Committees and Volunteers

§ 11.4 An elections committee may consider evidence to determine whether certain expenditures were made by a "voluntary" committee or "personal" campaign committee, as defined by state law.

On Mar. 29, 1944,⁽²⁾ the House agreed to House Resolution 490,

20. 98 CONG. REC. 2545, 82d Cong. 2d Sess.

1. 98 CONG. REC. 2517, 82d Cong. 2d Sess.

2. 90 CONG. REC. 3252, 3253, 78th Cong. 2d Sess.

dismissing the contested election case of *Schafer v Wasielewski* for the Fourth Congressional District of Wisconsin, pursuant to the report of the Committee on Elections No. 1. The report recommended such dismissal on the ground that although the contestee's expense reports disclosed expenditures in excess of amounts permitted by law, certain of those expenses were not campaign expenses attributable to the candidate himself under Wisconsin state law. The report, which was printed in the Record, stated in part as follows:

The Wisconsin statutes limit to \$875 the amount of money that can be spent by a candidate for Congress in the general election. The Wisconsin statutes, however, place no limitation upon receipts and expenditures of individuals or groups that might voluntarily interest themselves in behalf of a candidate.

Thaddeus F. Wasielewski filed with the Clerk of the House of Representatives on November 5, 1942, a statement, as required by Federal law, showing receipts of \$1,689 and total expenditures of \$1,172.

On December 17, 1942, contestant filed notice of contest of the election of Thaddeus F. Wasielewski in which he pointed out that the sum set forth in the statement filed by Thaddeus F. Wasielewski with the Clerk of the House of Representatives was in excess of expenditures permitted under Wisconsin law and the Federal Corrupt Practices Act, and that Thaddeus F.

Wasielewski was, therefore, in violation of the statutes of the State of Wisconsin and of the Federal statutes.

On its face, the statement of receipts and expenditures filed by contestee with the Clerk of the House of Representatives violates the laws of Wisconsin and the Federal Corrupt Practices Act. The direct evidence, however, indicates that the contributions listed were paid to the Wasielewski for Congress Club and the expenditures made by that organization, which was shown to be a voluntary committee rather than a personal campaign committee as defined by the laws of Wisconsin.

...

Under all the circumstances, the committee is of the opinion that Mr. Wasielewski, who received a substantial plurality of votes, approximately 17,000, in the general election of November 3, 1942, over Mr. Schafer, his nearest opponent, should not be denied his seat in the House of Representatives on account of the errors made in the statement filed by Mr. Wasielewski with the Clerk of the House of Representatives.

Effect of Mitigating Circumstances

§ 11.5 Mitigating circumstances may be taken into account by a committee on elections in determining whether to recommend to the House that a seated Member or Delegate be unseated for failure to comply with the Corrupt Practices Act which requires filing

with the Clerk complete and itemized accounts of expenditures.

On May 21, 1936,⁽³⁾ the Committee on Elections recommended in its report (H. Rept. No. 2736) on the contested election case of *McCandless v King* (for the seat of Delegate from Hawaii) that the contestee, Samuel Wilder King, be declared entitled to the seat, notwithstanding a failure to file accounts of expenditures as required by law.

The committee stated in its report that it had found certain mitigating circumstances to be present in the case. The report stated that such circumstances could include evidence of personal character, lack of experience as a candidate for public office, and the nature of the expenditures.

The committee also found that although the contestee had failed to comply with the Corrupt Practices Act, which required reporting within 30 days of the election to the Clerk of the House a complete and itemized account of expenditures, there were circumstances in mitigation of such failure.

The committee found that the contestee had, within the 30 days, communicated certain itemized

3. 80 CONG. REC. 7765, 74th Cong. 2d Sess.

expenditures to the Clerk and indicated his intention once in Washington to complete and file the required forms.

On June 2, 1936, the House declared the contestee entitled to his seat.⁽⁴⁾

§ 12. Expulsion, Exclusion, and Censure

[Note: For full discussion of censure and expulsion, see chapter 12, *infra*.]

Under article I, section 5, clause 2 of the United States Constitution, the House may punish its Members and may expel a Member by a vote of two-thirds.

In the 90th Congress, the Senate censured a Member in part for improper use and conversion of campaign funds.⁽⁵⁾ And the Committee on House Administration recommended in a report in the 74th Congress that a Member or Delegate could be censured for failure to comply with the Corrupt Practices Act.⁽⁶⁾ However, the House and the Senate have generally held that a Member may not be expelled for conduct committed prior to his election.⁽⁷⁾

4. 80 CONG. REC. 8705, 74th Cong. 2d Sess. (H. Res. 521).

5. See § 12.3, *infra*.

6. See § 12.4, *infra*.

7. See 2 Hinds' Precedents §§ 1284–1289; 6 Cannon's Precedents §§ 56, 238.

As to exclusion—or denial by the House of the right of a Member-elect to a seat—by majority vote, the House has the power to judge elections and to determine that no one was properly elected to a seat. If violations of the election campaign statutes are so extensive or election returns so uncertain as to render an election void, the House may deny the right to a seat.⁽⁸⁾

Expulsion

§ 12.1 In the 77th Congress, the Senate failed to expel, such expulsion requiring a two-thirds vote, a Senator whose qualifications had been challenged by reason of election fraud and of conduct involving moral turpitude.

On Jan. 3, 1941, at the convening of the 77th Congress, Mr. William Langer, of North Dakota, took the oath of office, despite charges from the citizens of his state recommending he be denied a congressional seat because of campaign fraud and past conduct involving moral turpitude.⁽⁹⁾

For discussion of the House as judge of qualifications for seats, see Ch. 7, *supra*.

8. See Parliamentarian's note in § 12.2, *infra*.

9. 87 CONG. REC. 3, 4, 77th Cong. 1st Sess.

The petition against Senator Langer charged: control of election machinery; casting of illegal election ballots; destruction of legal election ballots; fraudulent campaign advertising; conspiracy to avoid federal law; perjury; bribery; fraud; promises of political favors.⁽¹⁰⁾

After determining that a two-thirds vote was necessary for expulsion, the Senate failed to expel Senator Langer.⁽¹¹⁾

Exclusion

§ 12.2 A Senator-elect, whom Members of the Senate sought to exclude from the 80th Congress for corrupt campaign practices and past abuse of congressional office, died while his qualifications for a seat were still undetermined.

On Jan. 4, 1947, at the convening of the 80th Congress, the credentials of Senator-elect Theodore G. Bilbo, of Mississippi, were laid on the table and never taken up again due to his intervening death.⁽¹²⁾

10. 88 CONG. REC. 2077-80, 77th Cong. 2d Sess., Mar. 9, 1942.

11. 88 CONG. REC. 3064, 77th Cong. 2d Sess., Mar. 27, 1942.

12. 93 CONG. REC. 109, 80th Cong. 1st Sess. For the announcement of Nov. 17, 1947, concerning Theodore G.

The right to be sworn of Senator-elect Bilbo had been challenged through Senate Resolution 1, which read in part:

Whereas the Special Committee To Investigate Senatorial Campaign Expenditures, 1946, has conducted an investigation into the senatorial election in Mississippi in 1946, which investigation indicates that Theodore G. Bilbo may be guilty of violating the Constitution of the United States, the statutes of the United States, and his oath of office as a Senator of the United States in that he is alleged to have conspired to prevent citizens of the United States from exercising their constitutional rights to participate in the said election; and that he is alleged to have committed violations of Public Law 252, Seventy-sixth Congress, commonly known as the Hatch Act; and

Whereas the Special Committee To Investigate the National Defense Program has completed an inquiry into certain transactions between Theodore G. Bilbo and various war contractors and has found officially that the said Bilbo, "in return for the aid he had given certain war contractors and others before Federal departments, solicited and received political contributions, accepted personal compensation, gifts, and services, and solicited and accepted substantial amounts of money for a personal charity administered solely by him" . . . and . . . "that by these transactions Senator Bilbo misused his high office and violated certain Federal statutes"; and

Whereas the evidence adduced before the said committees indicates that

Bilbo's death, see 93 CONG. REC. 10569, 80th Cong. 1st Sess.

the credentials for a seat in the Senate presented by the said Theodore G. Bilbo are tainted with fraud and corruption; and that the seating of the said Bilbo would be contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuation of free Government and the preservation of our constitutional liberties. . . .⁽¹³⁾

Parliamentarian's Note: The Supreme Court has held, in the case of *Powell v. McCormack*, 395 U.S. 486 (1969), that a Member-elect of the House could not be excluded, by a majority vote, other than for failure to meet the express constitutional qualifications for the office. But since the House or Senate is the judge of elections and returns under the U.S. Constitution (art. I, §5, clause 1), and has the power to regulate elections (art. I, §4, clause 1), the House or Senate may determine by majority vote that a candidate was not validly elected.

Censure

§ 12.3 The Senate Select Committee on Standards and Conduct reported a resolution censuring a Senator, in the 90th Congress, for his personal use of campaign contributions.

On Apr. 27, 1967, Senator John Stennis, of Mississippi, Chairman

13. 93 CONG. REC. 7, 8, 80th Cong. 1st Sess., Jan. 3, 1947.

of the Senate Select Committee on Standards of Official Conduct, reported Senate Resolution 112, censuring Senator Thomas J. Dodd, of Connecticut, for having engaged in a course of conduct over five years of exercising his power and influence as a Senator to obtain and to use for personal benefit funds obtained from the public through political testimonials and political campaigns.⁽¹⁴⁾

The resolution, which was laid before the Senate on June 13, 1967,⁽¹⁵⁾ accompanied by Senate Report No. 193, read as follows:

Resolved, That it is the judgment of the Senate that the Senator from Connecticut, Thomas J. Dodd, for having engaged in a course of conduct over a period of five years from 1961 to 1965 of exercising the influence and power of his office as a United States Senator, as shown by the conclusions in the investigations by the Select Committee on Standards and Conduct,

(a) to obtain, and use for his personal benefit, funds from the public through political testimonials and a political campaign, and

(b) to request and accept reimbursements for expenses from both

14. 113 CONG. REC. 10977, 90th Cong. 1st Sess.

15. 113 CONG. REC. 15663, 90th Cong. 1st Sess. (resolution laid before the Senate). For discussion thereof, see 113 CONG. REC. 15663, 15735, 15773, 15998, 16104, 16269, 16348, 16560, 16976, 16978, 17005, 90th Cong. 1st Sess., June 13-23, 1967.

the Senate and private organizations for the same travel,

deserves the censure of the Senate; and he is so censured for his conduct, which is contrary to accepted morals, derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and disrepute.

On June 23, 1967, the Senate adopted the first portion of the resolution of censure relating to the use of political funds by Senator Dodd for private purposes:⁽¹⁶⁾

Resolved, (A) That it is the judgment of the Senate that the Senator from Connecticut, Thomas J. Dodd, for having engaged in a course of conduct over a period of five years from 1961 to 1965 of exercising the influence and power of his office as a United States Senator, as shown by the conclusions in the investigation by the Select Committee on Standards and Conduct, to obtain, and use for his personal benefit, funds from the public through political testimonials and a political campaign, deserves the censure of the Senate; and he is so censured for his conduct, which is contrary to accepted morals, derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and disrepute.

The Senate then proceeded to consider and agree to the remainder of the resolution, censuring Senator Dodd for improper use and solicitation of travel funds.

16. 113 CONG. REC. 17011, 90th Cong. 1st Sess.

§ 12.4 A committee on elections recommended that a contestee would be subject to censure by the House but not to forfeiture of his seat where there were mitigating circumstances involved in his violation of the Corrupt Practices Act.

On May 21, 1936,⁽¹⁷⁾ a committee on elections reported in the election contest case of *McCandless v King*, for the seat of Delegate from Hawaii. In its report, House Report No. 2736, the committee concluded that there were mitigating circumstances in the contestee's failure to fully comply with the reporting requirements of the Corrupt Practices Act. The committee recommended that Mr. Samuel Wilder King be declared entitled to the seat but stated in its report that Mr. King could be subject to censure by the House.

On June 2, 1936, the House adopted House Resolution 521, declaring the contestee, Mr. King, entitled to the seat.⁽¹⁸⁾

§ 13. Investigations by Standing Committees

Investigations of specific elections or election practices are usu-

17. 80 CONG. REC. 7765, 74th Cong. 2d Sess.

18. 80 CONG. REC. 8705, 74th Cong. 2d Sess.

ally undertaken by the Committee on House Administration.⁽¹⁹⁾ Such investigations have been undertaken pursuant to the statutory election contest procedures or under the general investigatory power conferred by the House.⁽²⁰⁾

The House may by resolution authorize the Committee on House Administration to investigate the right of a Member-elect to his seat,⁽¹⁾ where his right is impeached by charges and allegations of improper campaign conduct and of election irregularities.

Investigations have also been undertaken by select committees created to review election campaigns and proceedings. In recent Congresses, a select committee to investigate campaign expenditures has been created at the end of one Congress to investigate pending elections and to report findings to the succeeding Congress.⁽²⁾

19. See §13.4, *infra*. Investigations conducted under the election contest statutes, see generally Ch. 9, *infra*.

20. See also §13.2, *infra*, where the House authorized the committee to investigate elections where contests had not been formally presented.

1. See §§13.2–13.4, *infra*.

Challenging the right to be sworn and referring the right to a committee for investigation, see Ch. 2, *supra*.

2. See §14, *infra*.

The Committee on Standards of Official Conduct has some jurisdiction over the investigation of campaign contributions.⁽³⁾

Necessary Parties

§ 13.1 The House dismissed an election contest because the individual filing the notice was not a candidate for the House, although a Member objected that the House in such a case had power to refer the matter to a standing or a special committee in order to investigate charges.

On Jan. 19, 1965,⁽⁴⁾ a resolution was under consideration declaring an individual incompetent to bring a contest for a seat in the House, since the individual filing notice was not a candidate for the

A select committee to investigate campaign expenditures has recommended to the succeeding Congress that the right of a Member-elect to his seat be reserved for decision and investigated (see §13.5, *infra*).

Committees, their jurisdiction, powers and procedures, see Ch. 17, *infra*.

3. See §13.6, *infra*.

4. 111 CONG. REC. 951–57, 89th Cong. 1st Sess.

House and was not a proper party to bring the contest:

H. RES. 126

Whereas James R. Frankenberry, a resident of the city of Bronxville, New York, in the Twenty-Fifth Congressional District thereof, has served notice of contest upon Richard L. Ottinger, the returned Member of the House from said district, of his purpose to contest the election of Richard L. Ottinger; and

Whereas it does not appear that said James R. Frankenberry was a candidate for election to the House of Representatives from the Twenty-Fifth Congressional District of the State of New York, at the election held November 3, 1964: Therefore be it

Resolved, That the House of Representatives does not regard the said James R. Frankenberry as a person competent to bring a contest for a seat in the House and his notice of contest, served upon the sitting Member, Richard L. Ottinger, is hereby dismissed.

Mr. Carl Albert, of Oklahoma, spoke in favor of the resolution:

MR. ALBERT: Mr. Speaker, I yield myself such time as I might consume.

Mr. Speaker, the purpose of this resolution is to dismiss a contest brought against the gentleman from New York [Mr. Ottinger]. The notice of contest was given by letter dated December 19, 1964, by Mr. James R. Frankenberry, of 40 Woodland Avenue, Bronxville, N.Y. Mr. Frankenberry attempts to initiate this contest under the provisions of Revised Statutes 105 to 130, as amended, 2 United States Code 201-226 inclusive.

Mr. Speaker, the House is the exclusive judge of the election, returns, and qualifications of its Members under article I, section 5, of the Constitution of the United States.

The application of the statutes in question is justifiable by the House and by the House alone—*In re Voorhis*, 296 Federal Report 673.

Mr. Speaker, under the law and under the precedents, Mr. Frankenberry is not a proper party to contest the election of the gentleman from New York [Mr. Ottinger]. He is not a proper contestant within the applicable statutes, because he would not be able, if he were successful, to establish his right to a seat in the House. The contest involving Locke Miller and the gentleman from Ohio, Mr. Michael Kirwan, in 1941, is directly in point, as reported in the Congressional Record, volume 87, part 1, page 101. . . .

Mr. Speaker, the issue in the case brought by Locke Miller and the notice filed by Mr. Frankenberry are identical except that in the former case Locke Miller had been a candidate for the disputed office in the primary. The statutes under which this proceeding is initiated do not provide, and there is no case on record that we have been able to find to the contrary, that a person not a party to an election contest is eligible to challenge an election under these statutes.

Clearly under the precedent to which I have made reference, Mr. Frankenberry is not a contestant for a seat in the House, and his contest should be dismissed.

Therefore, Mr. Speaker, I urge adoption of the resolution.

Mr. Charles E. Goodell, of New York, arose to object to the resolution, stating:

. . . [T]he Corrupt Practices Act provides specifically for the taking of depositions and testimony which can be submitted to the House Committee on Administration. . . .

I would hope, therefore, that the House will defeat this resolution and that the matter will then go to the House Administration Committee for proper and deliberate action where the facts may be presented and where we may consider whether the Member should actually in this case be seated permanently.

There are many precedents with reference to the campaign contributions and excessive expenditures where the House has denied a Member a seat. Certainly, whatever our party, we must recognize in this kind of a situation that the reputation and dignity of the U.S. House of Representatives is involved. We should see to it that a full and complete hearing is held.

Mr. James C. Cleveland, of New Hampshire, addressed the House, following the conclusion of Mr. Goodell's remarks, citing many precedents to the effect that any person could challenge the election of a Member and that such challenge should be referred to the Committee on House Administration, to consider the facts and to determine whether the Member should finally be seated.

The House adopted the resolution.

House Authorization for Committee Investigations

§ 13.2 The Committee on House Administration was

authorized by the House to conduct an investigation during adjournments or recesses of election contests which had not been formally presented to the House.

On July 25, 1947,⁽⁵⁾ the Committee on House Administration was given investigatory authority in relation to certain election-contest cases in the 80th Congress which had not yet been formally presented to the House:

COMMITTEE ON HOUSE ADMINISTRATION—CONTESTED ELECTIONS

MR. [RALPH A.] GAMBLE [of New York]: Mr. Speaker, by direction of the Committee on House Administration, I offer a privileged resolution (H. Res. 337) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That notwithstanding any adjournment or recess of the Eightieth Congress, testimony and papers received by the Clerk of the House in any contested-election case shall be transmitted by the Clerk to the Speaker for reference to the Committee on House Administration in the same manner as though such adjournment or recess had not occurred: *Provided*, That any such testimony and papers referred by the Speaker shall be printed as House documents of the next succeeding session of the Congress.

The resolution was agreed to. . . .

5. 93 CONG. REC. 10210, 80th Cong. 1st Sess.

COMMITTEE ON HOUSE ADMINISTRATION—CONTESTED-ELECTION CASES

MR. GAMBLE: Mr. Speaker, by direction of the Committee on House Administration, I offer a privileged resolution (H. Res. 338) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That notwithstanding any adjournments or recesses of the first session of the Eightieth Congress, the Committee on House Administration is authorized to continue its investigations in the contested-election cases of Mankin against Davis, Lowe against Davis, and Wilson against Granger. For the purpose of making such investigations the committee, or any subcommittee thereof, is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

The resolution was agreed to. . . .

COMMITTEE ON HOUSE ADMINISTRATION—CONTESTED-ELECTION CASES

MR. [KARL M.] LECOMPTE [of Iowa]: Mr. Speaker, I offer a privileged resolution (H. Res. 339) to implement the resolution just passed and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the expenses of the investigations to be conducted pursuant to House Resolution 338, by the Committee on House Administration, acting as a whole or by subcommittee, not to exceed \$5,000, including expenditures for the employment of investigators, attorneys, and clerical, stenographic, and other assistants, shall be paid out of the contingent fund of the House on vouchers authorized by such committee or subcommittee, signed by the chairman of such committee, or subcommittee, and approved by the Committee on House Administration.

The resolution was agreed to.

Parliamentarian's Note: Under Rule XI, clause 2(m) as amended effective Jan. 3, 1975 (H. Res. 988, 93d Cong. 2d Sess.), all standing committees of the House now have the power to issue subpoenas whether the House is in session, has recessed, or has adjourned.

§ 13.3 A resolution providing for the subpoena of witnesses and the procurement of ballot boxes and election records, in an investigation of a contested election case, is presented as a matter of privilege.

On Jan. 7, 1930,⁽⁶⁾ House Resolution 113 was offered as privi-

6. 72 CONG. REC. 1187, 71st Cong. 2d Sess. See also 3 Hinds' Precedents § 2586, where a resolution providing for an investigation of the election of

leged. The resolution related to the subpoena 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, as follows:

THE SPEAKER: The question is on agreeing to the resolution.

MR. [WILLIAM H.] STAFFORD [of Wisconsin]: Mr. Speaker, I reserve a point of order on the resolution. I do not think it is privileged.

MR. [WILLIS G.] SEARS [of Nebraska]: Mr. Speaker, I move the adoption of the resolution.

MR. [BERTRAND H.] SNELL [of New York]: I would like to ask the gentleman a question about the resolution. Is this the usual form or the usual action that the Committees on Elections take to get people before them? I supposed there was just a general form for subpoenaing witnesses and that was all that was necessary. I have never known of a resolution of just this character.

THE SPEAKER: As the Chair caught the reading of the resolution, it not only provides for the presence of witnesses, but also provides for bringing before them the ballot boxes, and so forth. The Chair thinks it would be necessary to have such a resolution to bring that about.

a Member was ruled a question of privilege.

MR. [CASSIUS C.] DOWELL [of Iowa]: The resolution, Mr. Speaker, is certainly in order.

THE SPEAKER: The Chair thinks it is a privileged matter.

MR. SNELL: I suspect it is a privileged matter, coming from a Committee on Elections, but what I had in mind was whether this was the usual form under which we proceed in such cases.

THE SPEAKER: The Chair can not recall an immediate precedent, but the Chair would think this is the proper way to cover the appearance of witnesses under the circumstances set forth.

§ 13.4 Where the Committee on House Administration was authorized to investigate the right of two contestants to a seat and ordered a recount of the ballots under its general investigatory power, final compensation to the contestants was paid out of the contingent fund, since the recount was not undertaken under the election contest statutes.

On Jan. 3, 1961,⁽⁷⁾ the House adopted House Resolution 1, offered by Mr. Clifford Davis, of Tennessee, providing that the question of the right of either of the two contestants for a seat from Indiana (J. Edward Roush

7. 107 CONG. REC. 23-25, 87th Cong. 1st Sess.

and George O. Chambers) be referred to the Committee on House Administration, and providing that until that committee had reported, neither 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, under its general power to investigate rather than under the election contest statutes.⁽⁸⁾

On June 13, 1961, the House confirmed the right of Mr. Roush to the seat, pursuant to the report of the committee (H. Res. 339). The House adopted a privileged resolution, House Resolution 340, providing for expenditures from the contingent fund to pay the salary and certain expenses to the duly elected Member and the payment of certain expenses incurred by the contestant. They were not reimbursed for expenses pursuant to the election contest statutes since the recount had been ordered by the Committee on House Administration under its investigative power.⁽⁹⁾

Election Investigation Resolutions as Privileged

§ 13.5 A resolution from the Committee on House Admin-

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

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

istration affirming the right of a Member to his seat, after investigation of alleged fraud and dishonesty in his election, is reported and considered as privileged.

On Sept. 8, 1959,⁽¹⁰⁾ Mr. Robert T. Ashmore, of South Carolina, reported as privileged House Resolution 380 from the Committee on House Administration, relating to the right of a Member to his seat. The House adopted the resolution:

Whereas the Committee on House Administration has concluded its investigation of the election of November 4, 1958, in the Fifth Congressional District of Arkansas pursuant to House Resolution 1; and

Whereas such investigation reveals no cause to question the right of Dale Alford to his seat in the Eighty-sixth Congress; Therefore be it

Resolved, That Dale Alford was duly elected a Representative to the Eighty-sixth Congress from the Fifth Congressional District of Arkansas, and is entitled to a seat therein.

Parliamentarian's Note: The Select Committee to Investigate Campaign Expenditures, of the 85th Congress, had recommended, after investigating the elections in the fall of 1958, that Member-elect Alford not be seated pending an investigation of election irregularities. He was administered

10. 105 CONG. REC. 18610, 18611, 86th Cong. 1st Sess.

the oath, but his final right to a seat was referred for investigation to the Committee on House Administration, which investigated allegations of fraud and dishonesty in the conduction of the congressional election for the Fifth Congressional District of Arkansas.⁽¹¹⁾

Investigations of Campaign Contributions

§ 13.6 In the 91st Congress, the House rules were amended to confer upon the Committee on Standards of Official Conduct jurisdiction over the raising, reporting, and use of campaign contributions for House candidates, and jurisdiction over investigation of such matters.

On July 8, 1970,⁽¹²⁾ William M. Colmer, of Mississippi, Chairman of the Committee on Rules called up House Resolution 1031, amending the rules of the House in relation to the jurisdiction of the Committee on Standards of Official Conduct over campaign

11. See the remarks of Mr. Thomas P. O'Neill, Jr. (Mass.) on the Alford-Hays election at 105 CONG. REC. 3432-34, 86th Cong. 1st Sess., Mar. 5, 1959.

12. 116 CONG. REC. 23138-41, 91st Cong. 2d Sess.

contributions. The House passed the resolution, to confer upon that committee jurisdiction over the raising, reporting, and use of campaign contributions for candidates for the House. The committee was also given jurisdiction to investigate such matters and to report findings to the House.

Parliamentarian's Note: In the 94th Congress, legislative jurisdiction over campaign contributions was given to the Committee on House Administration (H. Res. 5, Jan. 14, 1975).

Senate Investigation Into Election of House Member

§ 13.7 A Senate resolution providing for an investigation into charges of election corruption involving a Member of the House was placed on the Senate Calendar and referred, on motion, to the Committee on Rules and Administration.

On Mar. 8, 1960,⁽¹³⁾ the Clerk of the Senate read Senate Resolution 285, offered by Senator John J. Williams, of Delaware. The resolution provided in part:

Resolved, That the Committee on Rules and Administration, or any duly authorized subcommittee thereof, is

13. 106 CONG. REC. 4899, 4900, 86th Cong. 2d Sess.

authorized and directed under sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, and in accordance with its jurisdictions specified by rule XXV of the Standing Rules of the Senate, to examine, investigate, and make a complete study of the charges, with a view to determining the truth or falsity thereof, which have recently appeared in the public press that certain persons have sought, through corruptly offering various favors, privileges, and other inducements (including large sums of money), to induce certain individuals to lend their political support to one political party rather than to another, or to become candidates of one political party rather than of another, and that the offers made by such persons have in fact corruptly induced certain of such individuals to change their political affiliations or to lend their political support to one political party rather than to another. . . .

Remarks were made concerning the unusual course being pursued by the Senate in inquiring into the activities of a Member of the House:

MR. [EVERETT M.] DIRKSEN [of Illinois]: Mr. President, normally, of course, one branch of Congress does not take account of the activities and behavior of a Member of the other branch on the theory that each House, of course, is the judge of the qualifications, behavior and conduct of its own Members. But I think it must be said, in fairness to the resolution proposed by the Senator from Delaware, that it is a fact that these reports which are given wide currency and so freely ven-

tilated in the press in all sections of the country become something of a reflection on the entire Congress as an institution.

Neither body in that sense escapes culpability in the eyes of the public when these charges are not refuted and when they are not rebutted. I believe that somehow, by some action, we should get to the very bottom of this subject. . . .

But certainly these reflections should not be permitted to continue without some action, without some answer, somewhere in the whole legislative establishment. Accordingly, recognizing the reluctance of one body to look into the affairs of its own Members, perhaps this is the only remedy which we have in order to sift the truth of these charges.

The resolution was directed towards an investigation of charges made by a columnist concerning alleged bribery and a candidate for public office, Mr. Adam C. Powell, of New York, a Member of the House of Representatives. Debate ensued on the resolution. Mr. Williams stated that he had called up the resolution for immediate consideration because he wished the entire Senate to vote upon it and not to have it referred to committee. Objection was made to its immediate consideration, and the resolution went over until the next day.

The resolution was again debated on Mar. 11, 1960,⁽¹⁴⁾ and on

14. 106 CONG. REC. 5261-63, 86th Cong. 2d Sess.

May 4, 1960, when it was on motion referred to the Senate Committee on Rules and Administration.⁽¹⁵⁾

§ 14. Investigations by Select Committees

In recent Congresses (until the 93d Congress), a select committee to investigate campaign expenditures had been created by one Congress to study and review certain pending matters and to forward its findings to the next Congress for appropriate action and use.⁽¹⁶⁾ Such findings have been used by the Committee on House Administration in judging and investigating election contests and the validity of certain elections.⁽¹⁷⁾ In the 93d Congress, the House granted the Committee on House Administration subpoena power to

15. 106 CONG. REC. 9403-07, 86th Cong. 2d Sess.

16. See §§ 14.1-14.3, *infra*, for creation and funding of such select committees.

Select committees, their creation, powers and procedures, see Ch. 17, *infra*.

Investigations and inquiries generally, see Ch. 15, *infra*.

17. See §§ 14.4 et seq., *infra*. For a discussion of the jurisdictional overlap between the select committee and the Committee on House Administration, see § 14.6, *infra*.

conduct investigations into election contests and practices, thereby enabling the committee to assume the functions and duties of the select committee,⁽¹⁸⁾ and effective Jan. 3, 1975, the Committee on House Administration as well as all other standing committees was given subpoena power, under Rule XI, clause 2(m), whether or not the House is in session.

The former Select Committee on Standards of Official Conduct had authority to investigate improper conduct by Members, including campaign activities.⁽¹⁹⁾

The Senate has established select committees to investigate improper campaign activities.⁽²⁰⁾

Creation of Select Committee to Investigate Campaign Expenditures

§ 14.1 In the 91st Congress, the House agreed to a privileged resolution, reported by the Committee on Rules, estab-

18. See H. Res. 737, 93d Cong. 2d Sess.

19. See § 14.9, *infra*.

The Senate Select Committee on Standards of Official Conduct recommended the censure of a Senator, who was then censured by the Senate, for improper use and conversion of campaign funds, in the 90th Congress (see § 12.3, *supra*).

20. See §§ 14.10-14.12, *infra*.

lishing a select committee to investigate and report on campaign expenditures and practices by candidates for the House.

On Aug. 4, 1970,⁽¹⁾ Mr. Thomas P. O'Neill, Jr., of Massachusetts, called up and the House adopted the following resolution, reported as privileged by the Committee on Rules:

H. RES. 1062

Resolved, That a special committee of five Members be appointed by the

1. 116 CONG. REC. 27125, 27126, 91st Cong. 2d Sess. As indicated by the note to § 10.10, supra, the creation of such a select committee is no longer necessary.

For similar select committees created by resolution, see H. Res. 929, 89th Cong. 2d Sess., Aug. 11, 1966, and H. Res. 1239, 90th Cong. 2d Sess., Aug. 1, 1968.

See also H. Res. 131, 93d Cong. 1st Sess., Jan. 15, 1973, continuing and funding a special committee on campaign expenditures. The resolution extended the special committee created in the 92d Congress, in order to enable it to assist the Clerk in investigating new allegations of violations of federal election laws.

H. Res. 279, 93d Cong. 1st Sess., authorized joint investigations by the select committee and the Clerk, so that the subpoena power of the committee could be used by the Clerk in carrying out his functions under the Federal Elections Campaign Act of 1971.

Speaker of the House of Representatives to investigate and report to the House not later than January 11, 1971, with respect to the following matters:

(1) The extent and nature of expenditures made by all candidates for the House of Representatives in connection with their campaign for nomination and election to such office.

(2) The amount subscribed, contributed, or expended, and the value of services rendered, and facilities made available (including personal services, use of advertising space, radio and television time, office space, moving picture films, and automobile and any other transportation facilities) by any individual, individuals, or group of individuals, committee, partnership, corporation, or labor union, to or on behalf of each such candidate in connection with any such campaign or for the purpose of influencing the votes cast or to be cast at any convention or election held in 1970 to which a candidate for the House of Representatives is to be nominated or elected.

(3) The use of any other means or influence (including the promise or use of patronage) for the purpose of aiding or influencing the nomination or election of any such candidates.

(4) The amounts, if any, raised, contributed, and expended by any individual, individuals, or group of individuals, committee, partnership, corporation, or labor union, including any political committee thereof, in connection with any such election, and the amounts received by any political committee from any corporation, labor union, individual, individuals, or group of individuals, committee, or partnership.

(5) The violations, if any, of the following statutes of the United States:

(a) The Federal Corrupt Practices Act.

(b) The Act of August 2, 1939, as amended, relating to pernicious political activities, commonly referred to as the Hatch Act.

(c) The provisions of section 304, chapter 120, Public Law 101, Eightieth Congress, first session, referred to as the Labor-Management Relations Act, 1947.

(d) Any statute or legislative Act of the United States or of the State within which a candidate is seeking nomination or reelection to the House of Representatives, the violation of which Federal or State statute, or statutes, would affect the qualification of a Member of the House of Representatives within the meaning of article I, section 5, of the Constitution of the United States.

(6) Such other matters relating to the election of Members of the House of Representatives in 1970, and the campaigns of candidates in connection therewith, as the committee deems to be of public interest, and which, in its opinion, will aid the House of Representatives in enacting remedial legislation, or in deciding contests that may be instituted involving the right to a seat in the House of Representatives.

(7) The committee is authorized to act upon its own motion and upon such information as in its judgment may be reasonable or reliable. Upon complaint being made to the committee under oath, by any person, candidate or political committee, setting forth allegations as to facts which, under this resolution, it would be the duty of said

committee to investigate, the committee shall investigate such charges as fully as though it were acting upon its own motion, unless, after a hearing upon such complaint, the committee shall find that the allegations in such complaint are immaterial or untrue. All hearings before the committee, and before any duly authorized subcommittee thereof, shall be public, and all orders and decisions of the committee, and of any such subcommittee, shall be public.

For the purpose of this resolution, the committee or any duly authorized subcommittee thereof, is authorized to hold such public hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Ninety-first Congress, to employ such attorneys, experts, clerical, and other assistants, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to administer such oaths, and to take such testimony as it deems advisable. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by such chairman, and may be served by any person designated by any such chairman or member.

(8) The committee is authorized and directed to report promptly any and all violations of any Federal or State statutes in connection with the matters and things mentioned herein to the Attorney General of the United States in order that he may take such official action as may be proper.

(9) Every person who, having been summoned as a witness by authority of said committee or any subcommittee

thereof, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties prescribed by law.

That said committee is authorized and directed to file interim reports whenever in the judgment of the majority of the committee, or of the subcommittee conducting portions of said investigation, the public interest will be best served by the filing of said interim reports, and in no event shall the final report of said committee be filed later than January 11, 1971, as hereinabove provided.

§ 14.2 A resolution creating a special committee to investigate and report on campaign expenditures of all Members is called up as privileged.

On Aug. 10, 1966, there was reported by the Committee on Rules House Resolution 929, authorizing the Speaker to appoint a special committee to investigate and report on campaign expenditures of candidates for the House of Representatives. The resolution was called up as privileged on Aug. 11 and agreed to by the House.⁽²⁾

Similarly, on Aug. 1, 1968,⁽³⁾ the Committee on Rules offered House Resolution 1239 authorizing the

2. 112 CONG. REC. 18775, 19080, 19081, 89th Cong. 2d Sess.

3. 114 CONG. REC. 24770, 24771, 90th Cong. 2d Sess.

Speaker to appoint a special committee to investigate and report on campaign expenditures of candidates for the House. The resolution was called up as privileged and was agreed to. On Aug. 2, 1968, Speaker John W. McCormack, of Massachusetts, appointed members to the special committee pursuant to the resolution.⁽⁴⁾

§ 14.3 Funds for a special committee to investigate campaign expenditures are authorized by House resolution and paid from the contingent fund.

On Aug. 2, 1968,⁽⁵⁾ the House passed a resolution authorizing the payment of expenses for an investigation to be conducted by the special committee to investigate campaign expenditures, established by House Resolution 1239. The resolution provided for payment from the contingent fund for staff members and for other expenditures of the committee.

Since the resolution was not reported from the Committee on

4. 114 CONG. REC. 25064, 90th Cong. 2d Sess.

The Committee on Rules reports as privileged a report on a resolution creating a select committee. See, for example, 108 CONG. REC. 16000, 87th Cong. 2d Sess., Aug. 9, 1962. Generally, see Ch. 17. *infra*.

5. 114 CONG. REC. 25065, 90th Cong. 2d Sess.

House Administration, the resolution was not called up as privileged:

MR. [SAMUEL N.] FRIEDEL [of Maryland]: Mr. Speaker, I ask unanimous consent for the immediate consideration of House Resolution 1281.

The Clerk read the resolution, as follows:

H. RES. 1281

Resolved, That the expenses of conducting the investigation authorized by H. Res. 1239, Ninetieth Congress, incurred by the Special Committee To Investigate Campaign Expenditures, 1968, acting as a whole or by subcommittee, not to exceed \$50,000, including expenditures for employment of experts, special counsel, and clerical, stenographic, and other assistants, shall be paid out of the contingent fund of the House on vouchers authorized by said committee, signed by the chairman of the committee, and approved by the Committee on House Administration.

Sec. 2. The official stenographers to committees may be used at all hearings held in the District of Columbia if not otherwise engaged.

THE SPEAKER: ⁽⁶⁾ Is there objection to the request of the gentleman from Maryland?

There was no objection.

The resolution was agreed to.

A motion to reconsider was laid on the table.

Use of Select Committee Findings to Judge Elections

§ 14.4 The findings of a special committee to investigate

6. John W. McCormack (Mass.).

campaign expenditures, established by the House in the preceding Congress, may be transmitted to the Committee on House Administration and used where applicable by parties to election contests.⁽⁷⁾

§ 14.5 A special committee to study campaign expenditures of the Members in the preceding Congress has recommended that the Committee on House Administration investigate and report to the House by a certain date.⁽⁸⁾

§ 14.6 Where the Select Committee to Investigate Campaign Expenditures of the

7. See H. REPT. NO. 1599 and H. Res. 580 in the contested election case of *Macy v Greenwood*, First Congressional District of New York, reported Mar. 19, 1952. 98 CONG. REC. 2545, 82d Cong. 2d Sess.

For a resolution adopted in the 93d Congress granting the Committee on House Administration subpoena power in conducting investigations, thereby enabling it to assume the functions of the select committee, see H. Res. 737, 93d Cong. 2d Sess.

8. See H. REPT. NO. 2482 and H. Res. 676 in the election contest of *Oliver v Hale*, for the First Congressional District of Maine, reported Aug. 6, 1958, 104 CONG. REC. 16481, 85th Cong. 2d Sess.

89th Congress investigated the election of a Member-elect and recommended that his right to his seat be reserved for decision, he was sworn in, but his final right to a seat was referred to the Committee on House Administration.

On Jan. 10, 1967,⁽⁹⁾ the House passed a resolution authorizing the administration of the oath to Member-elect Benjamin B. Blackburn, of Georgia, but directing that his final right to a seat be referred to the Committee on House Administration. The determination of his right to a seat was reserved for later decision pursuant to the recommendation of the Select Committee to Investigate Campaign Expenditures appointed in the 89th Congress.⁽¹⁰⁾

The right of Mr. Blackburn to his seat was then treated as a contested election case, and the Committee on House Administration recommended that Mr. Blackburn be declared entitled to his seat after the investigation.⁽¹¹⁾

On July 11, 1967,⁽¹²⁾ the House adopted House Resolution 542, re-

ported by the committee, affirming the right of Mr. Blackburn to his seat. The resolution was offered by Mr. Robert T. Ashmore, of South Carolina. He discussed the basis for the investigation, including the dispute concerning the accuracy of computers used to count the ballots.

Mr. Charles E. Goodell, of New York, remarked in debate on the function of the Select Committee on Campaign Expenditures and the conflict in jurisdiction between that committee and the Subcommittee on Elections of the Committee on House Administration.

MR. GOODELL: Mr. Speaker, I also join in the committee decision in this instance to dismiss the contest brought by Mr. Mackay against the incumbent contestee, the gentleman from Georgia [Mr. Blackburn]. It should be emphasized that at this stage Mr. Mackay has requested the withdrawal of his contest, so there is really no issue left to argue about.

I think there is one point, however, that should be made in this debate which affects all of us in the possibility of election contests in our own districts in the future. We must move to clarify the whole procedure of election contests in the interim between the election date and the opening of a new Congress. In that period the jurisdiction lies to a degree in the Special Committee on Campaign Expenditures. As a practical matter, the ultimate decision for investigating and deter-

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

10. See H. REPT. NO. 2348, 89th Cong. 2d Sess., Jan. 3, 1967.

11. 113 CONG. REC. 15848, 15849, 90th Cong. 1st Sess., June 14, 1967.

12. 113 CONG. REC. 18291, 18292, 90th Cong. 1st Sess.

mining election contests rests with the new Congress and with the Subcommittee on Elections of the Committee on House Administration. We have had in the past confusion in election contest cases. The contester in some instances has felt he had complied with the law by giving notice of contest to the Special Committee on Campaign Expenditures and failed to give notice under the law to the Clerk of the House and the Subcommittee on Elections of the Committee on House Administration.

In addition, Mr. Speaker, it seems unnecessary that we have two such subcommittees operating with overlapping jurisdiction.

We have moved to a degree to provide that the membership of the Special Committee on Campaign Expenditures will be the same as the membership of the House Subcommittee on Elections.

Perhaps this would be a solution. In any event I believe this Congress should move to try to eliminate the overlapping and confusion that exists in the present law between the jurisdictions of these two committees. It caused some difficulty in this instance. The Special Committee on Campaign Expenditures spent considerable time debating its proper jurisdiction, and the special committee ultimately, by a divided vote, recommended that the gentleman from Georgia [Mr. Blackburn] not be seated on opening day. There was considerable difference of opinion as to the proper jurisdiction of the Elections Subcommittee as distinguished from the Campaign Expenditures Special Committee in this situation.

Mr. Speaker, I would hope that we could move to eliminate any possibility of this type of confusion in the future.

§ 14.7 Both candidates for a congressional seat filed petitions with the special campaign expenditures committee of the preceding Congress, which committee investigated only one petition filed therewith.

On June 13, 1961,⁽¹³⁾ the Committee on House Administration reported on the Roush-Chambers election contest for the Fifth Congressional District of Indiana. As indicated by the report (H. Rept. No. 513) and by the debate in the House on House Resolution 339, on June 14, 1961, declaring Mr. J. Edward Roush entitled to the seat, both candidates had filed petitions with the special campaign expenditures committee created in the 86th Congress. The dispute was resolved in favor of Mr. Roush, although the committee had prepared findings on and had investigated only one of the petitions filed therewith.⁽¹⁴⁾

§ 14.8 The Committee on House Administration took

13. 107 CONG. REC. 10186, 87th Cong. 1st Sess.
14. For debate on the resolution, see 107 CONG. REC. 10377-91, 87th Cong. 1st Sess. For minority views criticizing the action of the special committee and the action of the Committee on House Administration, see *id.* at p. 10381.

“judicial notice” of complaints filed with a special committee to investigate campaign expenditures of the preceding Congress, although the special committee had failed to make recommendations thereon.

On Apr. 22, 1958,⁽¹⁵⁾ the Committee on House Administration reported on the contested election case of *Carter v LeCompte* for the Fourth Congressional District of Iowa, and recommended that the contestee be declared entitled to his seat. In its report, House Report No. 1626, the committee took judicial notice of complaints filed by the contestant with the special committee to investigate campaign expenditures which had been created and appointed in the 84th Congress. The special committee had not taken any action on those complaints.

On June 17, 1958, the House debated and adopted House Resolution 533 declaring the contestee entitled to the seat.⁽¹⁶⁾

Former Select Committee on Standards and Conduct

§ 14.9 In the 89th Congress, the House established a Select

15. 104 CONG. REC. 6939, 85th Cong. 2d Sess.

16. 104 CONG. REC. 11512-17, 85th Cong. 2d Sess.

Committee on Standards and Conduct, with authority to investigate allegations of improper conduct by Members.

On Oct. 19, 1966,⁽¹⁷⁾ a resolution establishing a Select Committee on Standards and Conduct, offered by the Committee on Rules, was called up as privileged (H. Res. 1013). The function of the proposed committee was to investigate allegations of improper conduct by Members, to recommend disciplinary action to the House, and to transmit recommendations as to any necessary legislation. The House passed the resolution, as amended, on the same day.⁽¹⁸⁾

Senate Select Committee on Campaign Practices

§ 14.10 A special Senate committee established in the 71st

17. 112 CONG. REC. 27713-29, 89th Cong. 2d Sess.

18. Expenditures by the Select Committee on Standards and Conduct were authorized to be paid out of the contingent fund of the House. 112 CONG. REC. 27730, 89th Cong. 2d Sess., Oct. 19, 1966. The Speaker [John W. McCormack (Mass.)] announced his appointments to the select committee on Oct. 20, 1966, 112 CONG. REC. 28112, 89th Cong. 2d Sess.

A standing Committee on Standards of Official Conduct, with jurisdiction over campaign contributions, was established in the 90th Congress (see Ch. 17, *infra*).

Congress to investigate campaign practices and violations of the Corrupt Practices Act held extensive hearings and proposed legislation intended to remedy certain defects in the act.

On Apr. 10, 1930, the Senate passed Senate Resolution 215, establishing a special committee to investigate the elections of 1930, with respect to campaign expenditures, election primaries, election contests, campaign practices, and alleged violations of the Federal Corrupt Practices Act of 1925.

The committee conducted extensive hearings and submitted reports on the effectiveness of the act⁽¹⁹⁾ and on alleged violations thereof.⁽²⁰⁾

§ 14.11 The Vice President was authorized to appoint a special committee for an investigation of alleged attempts to improperly influence the Senate through campaign contributions.

On Feb. 22, 1956,⁽¹⁾ the Senate adopted Senate Resolution 219,

19. S. REPT. NO. 20, 72d Cong. 1st Sess., submitted pursuant to S. Res. 215, printed in 75 CONG. REC. 977-79, 72d Cong. 1st Sess., Dec. 21, 1931.

20. S. REPT. NO. 24, pursuant to S. Res. 403, 72d Cong. 1st Sess., Dec. 21, 1931.

1. 102 CONG. REC. 3116, 84th Cong. 2d Sess.

authorizing an investigation by a special committee of lobbying activities. (The Senate had previously authorized an investigation into an alleged effort to influence a Senator, by contributing to his campaign, in relation to the natural gas bill, S. 1853.) In his veto message on the gas bill, President Eisenhower stated that accumulated evidence of questionable activities in relation to the bill indicated a substantial threat to the integrity of the governmental process.

Senate Resolution 219, as agreed to, provided in part:

Resolved, That there is hereby established a special committee which is authorized and directed to investigate the subject of attempts to influence improperly or illegally the Senate or any Member thereof, or any candidate therefor, or any officer or employee of the executive branch of the Government, through campaign contributions, political activities, lobbying, or any and all other activities or practices. . . .

. . . The special committee shall consist of 8 members to be appointed by the Vice President. . . .

. . . The special committee shall report to the Senate by January 31, 1957, and shall include in its report specific recommendations (1) to improve and modernize the Federal election laws; (2) to improve and strengthen the Federal Corrupt Practices Act, the Hatch Act, and the Federal Regulation of Lobbying Act, and related laws; and (3) to insure appropriate ad-

ministrative action in connection with all persons, organizations, associations, or corporations believed to be guilty of wrongdoing punishable by law.

§ 14.12 In the 84th Congress, the Senate by resolution created a select committee to investigate an attempt by a campaign contributor to influence the vote of a Senator.

On Feb. 7, 1956,⁽²⁾ there was laid before the Senate a resolution (S. Res. 205) establishing a select committee to investigate allegedly improper attempts through political contributions to influence the

vote of a Senator. The Senate adopted the resolution:

Resolved, That there is hereby established a select committee to investigate the circumstances involving an alleged improper attempt through political contributions to influence the vote of the junior Senator from South Dakota [Mr. Case] in connection with the Senate's consideration of the bill S. 1853, the natural gas bill.

Parliamentarian's Note: During the consideration of S. 1853, the gas bill, Senator Francis H. Case announced that an attempt had been made to influence his vote on the measure by tendering him a campaign contribution.

D. CERTIFICATES OF ELECTION

§ 15. In General; Form

After congressional elections have been conducted and results tabulated, the official returns are transmitted to the state executive, or other official designated to re-

ceive them under state law, for the issuance of a certificate of election.⁽³⁾ These certificates, also termed "credentials," are sent to the Clerk of the House for initial use in composing the Clerk's roll before the convening of Congress.

2. 102 CONG. REC. 2167, 84th Cong. 2d Sess.

3. The subject of this division is the issuance and form of election certificates, substantive grounds for challenge to their validity, and the practice of the House in determining whether a Member-elect may be sworn on the strength of his certificate.

On occasion, challenges to the validity of an election or to the satis-

faction of qualifications (see §§ 16.6, 16.7, *infra*) or to other matters are stated as challenges to the credentials. Such challenges are treated elsewhere; see Ch. 2, *supra* (enrolling Members and administering the oath), Ch. 7, *supra* (qualifications of Members), and Ch. 9, *infra* (election contests).

Once Congress meets, the certificate constitutes evidence of a prima facie right to a congressional seat in the House.⁽⁴⁾

The certificate is neither binding on the House nor essential to the administration of the oath, since the House is the sole and final judge of the elections and returns of its Members.⁽⁵⁾ Any Member or Member-elect has the right to object to the administration of the oath to another by delivering a challenge either to the validity of the election or to the validity of the certificate itself.⁽⁶⁾

The certificate must show that the Representative-elect was regularly elected in accordance with the laws of his state or the laws of the United States.⁽⁷⁾ Most state

4. The term "certificate of election" has been preferred herein to "credentials" since reference is to a specific document and not to qualifications in general.

For the procedure of presenting credentials, the status of Members-elect, and the functions of House officers at or before the convening of Congress, see Ch. 2, *supra*.

5. U.S. Const. art. I, §5, clause 1. Many Members-elect have been sworn in absent a certificate of election (see §15.5, *infra*).
6. For the form of challenges, and the procedure by which they are made, see Ch. 2, *supra*.
7. 2 USC §26. See also 2 USC §34 (referring to "credentials in due form of law").

laws provide for the Governor to issue the certificate under the seal of the state, although some provide for the secretary of state to perform the function,⁽⁸⁾ and some require the concurrent action of another body, such as an executive council.⁽⁹⁾ A citizens' group or party committee has no authority to issue a certificate based on an election conducted by them, even if the regular election was conducted in violation of state or federal law.⁽¹⁰⁾

The state Governor, or other official charged with the function, has an affirmative duty to issue and deliver the credentials and cannot reject the official results.⁽¹¹⁾ Where no regular election is held, there being only one qualified candidate, the Governor may proclaim him duly elected and thereafter issue a certificate of election.⁽¹²⁾

A Member may be enrolled and even sworn by action of the House even though a state court has enjoined the issuance of a certificate

8. See §§15.2, 15.7, *infra*

9. See §17.5, *infra*.

10. See §15.1, *infra*.

11. See §15.3, *infra*. See also 1 Hinds' Precedents §553 (administration of oath ordered by House, where Governor declined to issue credentials for a Member-elect whose election was unquestioned).

12. See §15.4, *infra*.

by the state executive.⁽¹³⁾ Indeed, it is doubtful whether state courts have jurisdiction to enjoin the issuance of a certificate, most courts holding they do not since Congress is the sole judge of elections and returns.⁽¹⁴⁾

The certificate is sent, usually by certified mail, directly to the Clerk of the House, who retains it for a period of four years.⁽¹⁵⁾ The certificate is not in contemporary practice carried to the House by the Member-elect. At the convening of Congress, the Clerk states that credentials have been received showing that the persons named therein were elected in accordance with state and federal law.⁽¹⁶⁾

Although the form of the certificate is not specified by law, it normally contains the following elements: signatures of both the Governor and the secretary of state;

13. See §§ 16.3, 16.4, *infra*.

14. See § 15.2, *infra*.

15. The certificates are retained for four years because those of the Resident Commissioner are effective for that period (see § 15.6, *infra*). Subsequently they are delivered to the National Archives.

16. See, *i.e.*, 117 CONG. REC. 9, 92d Cong. 1st Sess., Jan. 21, 1971.

For the Clerk's preliminary review of the certificate, see Ch. 2, *supra*. The Clerk has declined to enroll some Members-elect because their certificates were irregular.

stamp of the great seal of the state; specification of the term to which the Member-elect was chosen; and attestation to the validity of the election.⁽¹⁷⁾

Issuance of Certificate by State Executive

§ 15.1 A citizens' group has no authority to issue certificates of election.⁽¹⁸⁾

17. A further element of some credentials may be the attestation to the death of a Member, where the credentials are for a Member-elect to fill an unexpired term in such a case (see 1 Hinds' Precedents § 568).

When the fact of a Member's death does not appear from his successor's credentials, the House has inquired into the status of the seat (see 2 Hinds' Precedents §§ 1208, 1209).

18. Although by federal statute certificates of Senators-elect must be issued by the Governor under the state seal and countersigned by the secretary of state (2 USCA §§ 1a and 1b), the certificate of a Representative-elect must show only that he was elected in accordance with state or federal law. 2 USCA § 26.

State statutes provide for the Governor, or in some cases, the secretary of state, to issue the certificate for a Representative-elect.

In the 73d Congress⁽¹⁹⁾ and in the 89th Congress⁽²⁰⁾ the House determined that a citizens' group could neither call an election of its own nor issue a certificate of election to a person allegedly chosen as Representative-elect in such an election.

§ 15.2 A state executive official has issued a certificate of election notwithstanding an injunction against such issuance by the state judiciary.⁽¹⁾

On Jan. 3, 1949, the Clerk advised the House that he had placed on the roll the name of Member-elect John C. Davies, from New York, although the

19. 78 CONG. REC. 1521, 73d Cong. 2d Sess., Jan. 29, 1934 (H. Res. 231 and H. Rept. No. 334, Committee on Elections).

20. 111 CONG. REC. 24292, 89th Cong. 1st Sess., Sept. 17, 1965 (dismissal of election contest).

1. Since Congress is the judge of elections and returns, most courts have refused to enjoin or prohibit the issuance of a certificate. See *Keogh v Horner*, 8 F Supp 933 (D. Ill. 1934); *Odegard v Olson*, 264 Minn. 439, 119 N.W. 2d 717 (1963); *Burchell v State Board of Election Commissioners*, 252 Ky. 823, 68 S.W. 2d 427 (1934). *Contra*, *People ex ref. Brown v Board of Suprs. of Suffolk County*, 216 N.Y. 732, 110 N.E. 776 (1915) (see also § 16.4, *infra*).

Clerk had been advised that a state court had issued an order restraining the secretary of state from issuing the certificate.⁽²⁾

§ 15.3 A state Governor, pursuant to the finding of a state court issued a certificate to a contestee based on an official canvass of votes.

On Aug. 12, 1958,⁽³⁾ Mr. Robert Hale, of Maine, was declared entitled to the seat for the First Congressional District in his state, the Governor having issued a certificate of election to him based on a state court finding and on an official canvass of votes.⁽⁴⁾

§ 15.4 In one instance, a Member was sworn without a certificate of election but pursuant to a proclamation by the state Governor that he was duly elected to fill a vacancy.

2. 95 CONG. REC. 8, 81st Cong. 1st Sess. See also § 16.4, *infra*, wherein the House adopted a resolution authorizing the administration of the oath to a Member-elect, a citizens' group having obtained a state court injunction against the issuance of a certificate by the state Governor.

3. 104 CONG. REC. 17119, 85th Cong. 2d Sess.

4. See also H. REPT. NO. 2482, 85th Cong. 2d Sess., Committee on House Administration, to accompany H. Res. 676, relating to the election contest of *Oliver v Hale* for the First Congressional District of Maine.

On Oct. 18, 1965,⁽⁵⁾ the oath was administered to Mr. Edwin W. Edwards, of Louisiana, to fill a vacancy in a congressional seat from his state. His certificate of election had not been sent to the Clerk, but a proclamation from the state Governor declaring Mr. Edwards to be duly elected to fill a vacancy was transmitted to the Clerk's office. No general election had been held since Mr. Edwards had won the Democratic primary election and was the only qualified candidate to stand for general election to fill the vacancy.

Effect of Delay in Arrival of Certificate

§ 15.5 The oath is administered by unanimous consent to Members-elect whose certificates of elections have not arrived, there being no contest or question as to the validity of their elections.⁽⁶⁾

5. 111 CONG. REC. 27171, 89th Cong. 1st Sess.
6. 115 CONG. REC. 17622, 91st Cong. 1st Sess., June 27, 1969; 115 CONG. REC. 11209, 91st Cong. 1st Sess., May 5, 1969; 115 CONG. REC. 8129, 91st Cong. 1st Sess., Apr. 1, 1969; 114 CONG. REC. 4441, 90th Cong. 2d Sess., Feb. 28, 1968; 113 CONG. REC. 36514, 90th Cong. 1st Sess., Dec. 14, 1967; 105 CONG. REC. 9571, 86th Cong. 1st Sess., June 2, 1959; 105 CONG. REC. 3600, 86th Cong. 1st

Certificates of Delegates and Resident Commissioner

§ 15.6 Certificates of election for Delegates to the House, effective for two years, and for the Resident Commissioner, effective for four years, are transmitted to the House.⁽⁷⁾

At the convening of the 93d Congress, the Clerk addressed the House, after the call of the roll, to state that certificates of election had been received for the Delegates from Guam, the Virgin Islands, and the District of Columbia, and for the Resident Commissioner of Puerto Rico, the latter for a term of four years.⁽⁸⁾

Sess., Mar. 9, 1959; 104 CONG. REC. 10164, 85th Cong. 2d Sess., June 4, 1958; 104 CONG. REC. 1072, 85th Cong. 2d Sess., Jan. 27, 1958; 104 CONG. REC. 669, 85th Cong. 2d Sess., Jan. 20, 1958; 102 CONG. REC. 2383, 84th Cong. 2d Sess., Feb. 8, 1956; 97 CONG. REC. 11481, 82d Cong. 1st Sess., Sept. 17, 1951; 97 CONG. REC. 9316, 82d Cong. 1st Sess., Aug. 1, 1951; 92 CONG. REC. 1852, 79th Cong. 2d Sess., Mar. 4, 1946.

7. In former practice, the Resident Commissioner was appointed rather than elected, and his certificate of appointment was transmitted to the House by the President of the United States. 80 CONG. REC. 2053, 74th Cong. 2d Sess., Feb. 14, 1936. See also 90 CONG. REC. 7102, 78th Cong. 2d Sess., Aug. 18, 1944.
8. 119 CONG. REC. 11-15, 93d Cong. 1st Sess., Jan. 3, 1973.

§ 15.7 Where a territorial act passed by Congress required the Governor to declare the election result and to deliver the certificate to the Delegate but allowed the territorial legislature power over election laws, a territory law requiring the secretary thereof to declare and certify election results was held controlling in an election contest.

On May 21, 1936, a committee on elections submitted House Resolution 521 and Report 2736 in the contested election case of *McCardless v King* for the seat of Delegate from the territory of Hawaii.⁽⁹⁾

The proposed resolution declared Mr. Samuel Wilder King to be duly elected as Delegate. The report also construed the Hawaiian Organic Act, passed by Congress, to determine whether contest had been filed within the 30 days required by law. The act required the territorial Governor to declare elected and to deliver a certificate of election to the Delegate, but also provided that the election be conducted in con-

9. 80 CONG. REC. 7765, 74th Cong. 2d Sess. The House passed the resolution, without debate, on June 2, 1936, 80 CONG. REC. 8705, 74th Cong. 2d Sess.

formity with the general laws of the territory and permitted the territory legislature to amend the election laws.

The committee held that a law of the Hawaiian territorial legislature which required the secretary of the territory to declare and certify election results was controlling as to the question as to whether the contestant had filed notice of contest within the time required by law.⁽¹⁰⁾

Senate Certificates

§ 15.8 At the convening of Congress, the Vice President announces the receipt of certificates of election for Senators-elect, indicates whether they are regular in form, and causes them to be printed in the Record.

On Jan. 21, 1971, the convening date of the Senate in the 92d Congress,⁽¹¹⁾ Vice President Spiro T. Agnew announced as follows:

The Chair lays before the Senate the credentials of 33 Senators elected for 6-year terms beginning January 3, 1971.

All certificates, the Chair is advised, are in the form suggested by the Senate, except the ones from Pennsylvania

10. H. REPT. NO. 2736, Committee on Elections No. 2, 74th Cong. 2d Sess.

11. 117 CONG. REC. 3, 92d Cong. 1st Sess.

and Massachusetts which use the word "Commonwealth" instead of "State," and five others in various State forms.

If there be no objection, the reading of the 28 certificates in the form recommended by the Senate will be waived and they will be printed in full in the Record.

No objection was heard and the certificates were printed in full in the *Congressional Record*.⁽¹²⁾

§ 15.9 On one occasion, the Senate ordered the return to a state of a certificate of appointment to fill a vacancy in that body on receipt of a telegraphic request from the Governor, who advised the Senate that the appointee had declined to serve.

On June 21, 1956,⁽¹³⁾ acting President pro tempore William R. Laird 3d, of West Virginia, laid before the Senate two communications from the Governor of Kentucky, one certifying the appointment of a Senator-elect to fill a vacancy, and one to request the return of the certificate, since the appointee had declined to serve. The Senate ordered the certificate returned to the Governor.

12. 117 CONG. REC. 3-5, 92d Cong. 1st Sess. 2 USC §§ 1a and 1b require a certain form for Senate certificates.

13. 102 CONG. REC. 10769, 84th Cong. 2d Sess.

§ 16. Grounds for Challenge

Before Members-elect rise together to be administered the oath of office at the convening of Congress, any Member-elect may object to the right of a colleague to be sworn in. Similarly, the right to be sworn of a Member-elect who is elected to fill a vacancy during a Congress may be objected to.⁽¹⁴⁾ Most challenges are made to the validity of an election, or to the procedure followed therein, or to the qualifications of the Member-elect. However, a challenge may be directed specifically against the certificate of election itself by reason of formal defects or of impeachment by other facts or documents.⁽¹⁵⁾

Since certificates are prepared in accordance with a customary format⁽¹⁶⁾ and in accordance with state law,⁽¹⁷⁾ defects in form and improper terminology constitute grounds for challenge to a certificate of election. However, if the House is satisfied that a certifi-

14. For the procedure of challenging the right to be sworn, see Ch. 2, supra.

15. Some challenges which are in fact objections to the election or qualifications of a Member-elect are stated as objections to his certificate (see §§ 16.6, 16.7, infra).

16. See § 16.1, infra.

17. See 2 USC § 26.

cate clearly indicates when and where a Member-elect was chosen, and for what term and district, he will be seated.⁽¹⁸⁾

A more substantial ground for challenge is the claim that the certificate was issued in violation of state law. For example, objection may be made to a certificate issued before the expiration of an interim period mandated by state law, or issued in disregard of official results.⁽¹⁹⁾

On occasion, citizens' groups or candidates have obtained state court injunctions prohibiting the issuance of a certificate to a certain candidate for reason of election irregularities. Some courts have held, however, that they have no jurisdiction to entertain such suits because they infringe upon the absolute congressional power to judge elections and returns.⁽²⁰⁾

Certificates may also be challenged by evidence of other papers

18. See § 16.1, *infra*.

19. See § 16.2, *infra*.

20. See § 16.3, *infra*. See, for an occasion where a "citizens' certificate" was received, § 16.5, *infra*.

The House has received certificates additional to those allotted to a state, issued by the state executive, where the state claimed representation additional to that apportioned to it by Congress; such certificates have been rejected (see 1 Hinds' Precedents §§ 314-319).

and findings of fact. Official transcripts contradicting the certified result of the vote may impeach a certificate. On one occasion, a congressional investigatory committee of a Congress discovered election irregularities of such magnitude as to impeach the certificate of a Member-elect to the next Congress.⁽¹⁾

Form

§ 16.1 In one instance, the certificate of a Member-elect was objected to on the ground that the certificate stated he was "duly elected as Congressman," instead of "Representative in Congress."

On June 2, 1930,⁽²⁾ Mr. Robert H. Clancy, of Michigan, arose to object to the validity of the certificate of election of Thomas L. Blanton, Member-elect from Texas, to fill a vacancy. Mr. Clancy's objection was based on the description in the credentials of Mr. Blanton as "Congressman,"

1. See § 16.2, *infra*.

Findings of fact by investigatory election committees in one Congress are delivered to the next Congress for use in election contests and challenges to seats (see § 14, *supra*).

2. 72 CONG. REC. 9891, 9892, 71st Cong. 2d Sess.

instead of as “Representative in Congress.”

Mr. John N. Garner, of Texas, arose to state that Mr. Clancy’s objection was frivolous, since the certificate clearly stated that Mr. Blanton was elected from the 17th District of Texas, and to succeed Mr. Robert Q. Lee, who all the Members of the House knew represented the 17th District in the House. Mr. Clancy responded that the Clerk of the House had notified the authorities in Texas a number of times that they should not designate the office as “Congressman,” but as “Representative in Congress,” and that the precedents of the House mandated that the credentials must be in order and must correctly describe the office.

The House then voted on the question and directed that the Speaker administer the oath to the challenged Member-elect.⁽³⁾

Impeachment by Other Evidence

§ 16.2 Where a candidate’s certificate of election was contradicted by other papers of state and county officials and by fact findings of a special campaign expenditures committee, the House declared

3. *Id.* at p. 9892.

that neither candidate was to be sworn and that the question be referred to the Committee on House Administration for a determination.

On Jan. 3, 1961,⁽⁴⁾ the House adopted a resolution referring to an elections committee the right of Mr. George O. Chambers, of Indiana, who appeared with a certificate of election, and Mr. J. Edward Roush, of Indiana, a contestant, to the congressional seat from the Fifth Congressional District of that state.⁽⁵⁾ The House took such action after it appeared that the certificate of election had been impeached by: certificates of error filed by county officials on the counting and judging of ballots; a transcript from the secretary of state of Indiana declaring the contestant duly elected and not the Member-elect with the certificate of election; and findings of fact by a special campaign expenditures committee, which had held hearings on Dec. 16, 1960.⁽⁶⁾

4. 107 CONG. REC. 23, 24, 87th Cong. 1st Sess.

5. See H. REPT. NO. 513, 87th Cong. 1st Sess., Committee on House Administration, relating to the contested election and the validity of the certificate of election.

6. See the remarks of Mr. Ray R. Madden (Ind.) on Feb. 17, 1961, 107 CONG. REC. 2295–97, 87th Cong. 1st Sess. Mr. Madden also stated that

Impeachment by Court Order

§ 16.3 The Clerk placed the name of a Member-elect on the roll where a certificate of election in due form had been filed, although the Clerk had been advised that a state court had issued a writ restraining the secretary of state from issuing such certificate.⁽⁷⁾

the first certificate issued to Mr. Chambers was illegal because it had been signed seven days after the election, instead of 10 days, as mandated by state statute, and that the second certificate issued to Mr. Chambers was illegal because it ignored the certification transcript of the secretary of state.

For additional debate on the action taken by the House in the Roush-Chambers contest, on the validity and force of the certificate of election, see 107 CONG. REC. 10377-91, 87th Cong. 1st Sess., June 14, 1961 (debate on H. Res. 339, declaring Mr. Roush duly elected to the 87th Congress).

7. Since the Congress is the judge of elections and returns, most courts have refused jurisdiction to prohibit the issuance of a certificate. See *Keogh v Horner*, 8 F Supp 933 (D. Ill. 1934); *Odegard v Olson*, 264 Minn. 439, 119 N.W. 2d 717 (1963); *Burchell v State Board of Election Commissioners*, 252 Ky. 823, 68 S. W. 2d 427 (1934). *Contra*, *People ex rel. Brown v Board of Suprs. of Suffolk County*, 216 N.Y. 732, 110 N.E. 776 (1915).

On Jan. 3, 1949,⁽⁸⁾ at the convening of the 81st Congress, the Clerk addressed the House as follows:

A certificate of election is on file in the Clerk's office, showing the election of John C. Davies as a Representative-elect to the Eighty-first Congress from the Thirty-fifth Congressional District of the State of New York.

Several communications have been received from the executive deputy secretary of state for the State of New York informing the Clerk that a case is pending before the supreme court, Albany County, N.Y., and that the said secretary of state is restrained from certifying the election of a Representative from this congressional district. However, in view of the fact that a certificate of election in due form has been filed with the Clerk by John C. Davies, the Clerk has therefore placed his name on the roll.

§ 16.4 Where a state court issued a preliminary injunction against the issuance of a certificate to a Member-elect to fill a vacancy and the Speaker declined to administer him the oath, the House authorized that he be sworn but that his final right to a seat be referred to committee.

On May 24, 1972, the House authorized the Speaker to admin-

⁸. 95 CONG. REC. 8, 81st Cong. 1st Sess.

ister the oath to Member-elect William S. Conover II, to fill a vacancy in a congressional seat from Pennsylvania. The authorizing resolution provided that Mr. Conover's final right to a seat be referred to the Committee on House Administration, since a citizens' group had obtained a state court preliminary injunction prohibiting the state governor from issuing a certificate of election to Mr. Conover.⁹

Parliamentarian's Note: Mr. Conover had originally appeared to take the oath of office shortly after the special election to fill the vacancy was held on Apr. 25, 1972, but the oath was not administered since it was apparent that unanimous consent would not be granted due to the issuance of the preliminary injunction in the state court.

Impeachment by "Citizens' Certificate"

§ 16.5 Where two persons claimed the same seat in the House, one with a certificate

9. H. Res. 986, 118 CONG. REC. 18654, 92d Cong. 2d Sess. The text of the resolution explained that Mr. Conover was being sworn so as not to deprive the State of Pennsylvania of representation in the House pending "protracted litigation" for an "indefinite period."

signed by the Governor of the state and the other with a certificate from a citizens' elections committee, the House refused to permit either to take the oath of office and referred the question of their prima facie as well as final right to the seat to a committee on elections.

On Jan. 3, 1934,¹⁰ Speaker Henry T. Rainey, of Illinois, laid before the House the following communication from the Clerk:

I transmit herewith a certificate of election of Mrs. Bolivar E. Kemp, Sr., to fill the vacancy caused by the death of Hon. Bolivar E. Kemp, from the Sixth Congressional District of the State of Louisiana, received by this office, signed by the Governor of Louisiana, attested by the seal and by the secretary of state of the State of Louisiana.

I also transmit herewith a communication from the Citizens' Election Committee of the Sixth Congressional District of the State of Louisiana in the form of a certificate of election of Hon. J.Y. Sanders, Jr., to fill the vacancy caused by the death of Hon. Bolivar E. Kemp, from the Sixth Congressional District of the State of Louisiana.

The House then passed a resolution referring the prima facie as well as the final right of Mrs. Kemp and of Mr. Sanders to a committee on elections, and de-

10. 78 CONG. REC. 11, 12, 73d Cong. 2d Sess.

cided that neither contestant should be sworn until the committee had made its report.⁽¹¹⁾

On Jan. 29, 1934, the House passed a resolution declaring the election null and void as to both contestants, since the Governor's certificate was issued pursuant to an invalid election, and the citizens' group certificate was invalid per se.⁽¹²⁾

Impeachment by Collateral Matters

§ 16.6 In the 88th Congress, a challenge to the qualifications of an appointee to the Senate was stated as a challenge to the validity of his certificate of appointment.

On Aug. 5, 1964, Senator Everett McKinley Dirksen, of Illinois,

11. *Id.* at p. 12.

12. 78 CONG. REC. 1521, 73d Cong. 2d Sess. (see H. Res. 231 and H. Rept. No. 334 of the Committee on Elections, submitted Jan. 20, 1934, 78 CONG. REC. 1035).

See also 111 CONG. REC. 18-20 (Jan. 4, 1965), 18691 (July 29, 1965), 22364 (Aug. 21, 1965), 24263-92 (Sept. 17, 1965), 89th Cong. 1st Sess., for an instance where a citizens' group issued a certificate of election on the basis that the regular election was void because of denial of voting rights. The Members-elect with the Governor's certificates were held entitled to their seats.

challenged the validity of the certificate of appointment of Senator-elect Pierre Salinger, on the ground that Mr. Salinger did not meet the requirement of the California statute that an appointee to the Senate must be a resident for one year before the day of election.⁽¹³⁾ Mr. Salinger was permitted to take the oath by the Senate but his credentials were referred to the Committee on Rules and Administration with instructions to report back to the Senate by a specified date.⁽¹⁴⁾

The Senate later affirmed by resolution Mr. Salinger's entitlement to a seat in the Senate.⁽¹⁵⁾

§ 16.7 In one instance, an objection based on the failure of a candidate to receive a plurality of votes was stated as a challenge to the validity of the certificate of election.

On Jan. 5, 1937,⁽¹⁶⁾ Mr. John J. O'Connor, of New York, arose to state an objection to the administration of the oath to Arthur B. Jenks, Member-elect from New Hampshire. Mr. O'Connor stated

13. 110 CONG. REC. 18107, 88th Cong. 2d Sess.

14. *Id.* at p. 18120.

15. 110 CONG. REC. 19396, 19422, 88th Cong. 2d Sess., Aug. 13, 1964.

16. 81 CONG. REC. 12, 13, 75th Cong. 1st Sess.

that “despite the fact that a certificate of his election has been filed with the Speaker, it 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.”

Mr. Bertrand H. Snell, of New York, arose and stated:

The Rules and precedents of the House provide that every man who is duly qualified shall take the oath of office at the beginning of the Congress. Our rules provide that qualification is shown by a duly authenticated certificate from the Governor of the State. The gentleman from New Hampshire, Mr. Jenks, has such a certificate and it has been filed with the Clerk of the House.

The laws of the State of New Hampshire provide that a ballot commission is the final adjudicator in regard to these matters.

The House then authorized the administration of the oath to Mr. Jenks.⁽¹⁷⁾

§ 17. Procedure in Determining Validity; Effect

Once a challenge has been made to the administration of the oath to a Member-elect, based on the validity of his certificate, the Speaker requests him to stand

17. *Id.* at p. 13.

aside as the oath is administered to the other Members en masse. Thereafter the House may either finish the organizational business or may immediately proceed to determine whether the challenged Member-elect may be sworn on the strength of his certificate.⁽¹⁸⁾

In determining whether a certificate of election is valid or whether it entitles a Member-elect to a seat in the House, the House does not bind itself to rigid criteria. The House is the sole judge of the elections and returns of its Members, and the certificate, prepared and relayed by state officials, is only prima facie proof of entitlement to a seat.⁽¹⁹⁾

The House and not the Speaker or other official determines whether a Member may be sworn in, and whether a Member may take the oath with final right to the seat.⁽²⁰⁾ If a challenge has been di-

18. See Ch. 2, *supra*, for the procedure of oath administration and challenges to the right to be sworn. For the procedure governing the House at convening, both before and after the adoption of House rules, see Ch. 1, *supra*.

19. U.S. Const. art. I, § 5, clause 1. For judicial construction of Congress' power over elections and returns, see USCA Notes to U.S. Const. art. I, § 5, clause 1.

20. See § 17.1, *infra* (Speaker submitted the question to the House for deter-

rected to a mere irregularity in the form of the certificate, the House will ordinarily seat the Member-elect and declare him finally entitled to the seat.⁽¹⁾

If however a certificate is challenged by the institution of an election contest or by the allegation of election irregularities, the House may authorize the Member-elect to be sworn but provide that his final right to the seat be referred to committee. That procedure is often followed where a certificate is on file in order not to deprive a state of representation in the House resulting from protracted proceedings.⁽²⁾ Of course, an election may be separately contested under the procedure set forth in 2 USC §§ 381 et seq. without recourse to a challenge on the floor of the right of a Member-elect to take the oath.

A circumstance which may require the nullification of a certifi-

mination and declined to himself rule).

1. See §17.1, *infra*. See also §17.6, *infra* (where the Senate corrected an irregularity in the date for beginning a term by resolution).
2. See §16.4, *supra*. The Committee on House Administration has jurisdiction under House rules over credentials, *House Rules and Manual* §693 (1973), and the matter is often referred to an elections subcommittee of the Committee on House Administration.

cate is the intervening death or disappearance of the Member-elect named therein. Normally the state executive will declare the seat vacant in such a situation. On one occasion where a Member-elect had disappeared and was presumed dead but the state executive refused to nullify the certificate, the House itself declared the seat vacant.⁽³⁾

The House does not always require a certificate in order to determine final right to a seat. Where a Member-elect appears without a certificate but his election is uncontested and unquestioned, the House will authorize him to be sworn in by unanimous consent.⁽⁴⁾ In some cases where a certificate is delayed, the state of representation will deliver informal communications to the House attesting to the validity of the election of the Member-elect; the House places reliance on such communications in the absence of a certificate.⁽⁵⁾ Even where a Member-elect arrives without a certificate and his election is disputed, the House may authorize him to be sworn in, although a resolution rather than unanimous consent may be necessary to order such action.⁽⁶⁾

3. See §17.4, *in ra*.

4. See §15.5, *supra* (oath administration where certificate delayed).

5. See §17.5, *indra*.

6. See §17.2, *infra* (pending election contest).

*Jurisdiction of House***§ 17.1 When objection is made to the irregularity of a certificate, the question is a matter for the House to determine under the U.S. Constitution.**

On June 2, 1930, when an objection was made to the formal regularity of a certificate of election, Speaker Nicholas Longworth, of Ohio, declined to assume the responsibility of refusing administration of the oath to the Member-elect, but submitted the matter to the House, since section 5 of article I of the Constitution makes the House the judge of the elections, returns, and qualifications of its Members.⁽⁷⁾

§ 17.2 In one instance, the House by resolution authorized the Speaker to administer the oath to a Member-elect whose election was in dispute and who did not possess a certificate of election.

7. 72 CONG. REC. 9891, 9892, 71st Cong. 2d Sess., June 2, 1930. The House affirmed the right of the Member-elect to his seat. The objection to the form of the certificate was based on the fact that the certificate stated that the Member-elect was duly elected as "Congressman" instead of "Representative in Congress" (see § 16.1, supra).

On Mar. 9, 1933, the convening day of the 73d Congress, a resolution was offered to authorize the Speaker to administer the oath to John G. Utterback, of Maine, a Member-elect who appeared without credentials and whose election was being contested under the election contest statutes.⁽⁸⁰⁾ The House adopted the resolution, despite an objection of Mr. Bertrand H. Snell, of New York, that the right to take the oath should be referred to the elections committee, since "one of the first requisites for any Member of this House to receive the oath of office is a certificate in legal and due form from the sovereign State from which he comes."

*Nullification of Certificate***§ 17.3 House adoption of a resolution, authorizing a committee investigation of the right of either of two candidates to a seat and declaring that pending investigation neither candidate shall be sworn, has the effect of**

8. H. Res. 5, 77 CONG. REC. 71, 72, 73d Cong. 1st Sess. Where Members-elect appear without credentials and there is no contest or question as to their elections, the House normally authorizes the administration of the oath by unanimous consent (see § 15.5, supra).

nullifying a certificate of election issued to one of the candidates by the state Governor.

On Jan. 3, 1961,⁽⁹⁾ the House adopted House Resolution No. 1, referring the question of the right of two contestants to a seat from the Fifth Congressional District of Indiana to the Committee on House Administration. The resolution declared that until the committee shall have reported, neither contestant should have the right to be sworn. One of the contestants, George O. Chambers, had a certificate of election from the Governor of the State of Indiana. By adopting the resolution, the House nullified the certificate of election of Mr. Chambers pending the House investigation.

The other contestant to the election, J. Edward Roush, who had not been issued a certificate of election, was finally declared entitled to the seat by the House on June 14, 1961.⁽¹⁰⁾

§ 17.4 Where a Member-elect disappeared between the issuance of his certificate of election and the convening of Congress, and the state executive

9. 107 CONG. REC. 23, 24, 87th Cong. 1st Sess.

10. H. Res. 339, 107 CONG. REC. 10391, 87th Cong. 1st Sess.

utive took no action in relation to the certificate, the House, after receiving a report from the Clerk setting forth the circumstances surrounding the disappearance, declared the seat vacant by resolution.

On Jan. 3, 1973, at the convening of the 93d Congress, Speaker Carl Albert, of Oklahoma, laid before the House communications from the Clerk advising him of the disappearance of an aircraft carrying two Representatives-elect to the House.⁽¹¹⁾ The Clerk's communication stated that for one of those Members-elect, the Governor of the state had declared the congressional seat vacant, pursuant to a presumptive death jury verdict and a certificate of presumptive death.

As to the other Member-elect, Hale Boggs, of Louisiana, the Clerk advised the Speaker that the attorney general of Louisiana had informed him that no action had been taken by the Governor and no action was contemplated to change the status of Mr. Boggs or to change the status of the certificate of election for Mr. Boggs filed with the Clerk.

The House then adopted a resolution (H. Res. 1) declaring the

11. 119 CONG. REC. 15, 93d Cong. 1st Sess.

seat of Mr. Boggs to be vacant and notifying the Governor of Louisiana of the existence of the vacancy.⁽¹²⁾

Reliance on State Communications Absent Certificate

§ 17.5 In authorizing the administration of the oath to Members-elect who appear without credentials, the House may rely upon communications from state executive officials attesting to the validity of the election and results.

On Mar. 9, 1933,⁽¹³⁾ the House authorized the Speaker to administer the oath to Member-elect John G. Utterback, of Maine, whose certificate of election had not yet arrived. Although his election was being contested, he was sworn on the basis of a letter from the Governor stating that although Mr. Utterback had apparently received a majority of the votes cast in the district, the Governor lacked authority to issue credentials due to the terms of a state law which required the concurrent action of the Governor

12. *Id.*

13. 77 CONG. REC. 71, 72, 73d Cong. 1st Sess.

and executive counsel before an election certificate could be issued.

Similarly, on Mar. 19, 1964,⁽¹⁴⁾ the House permitted a Member-elect to be sworn, although her certificate of election had not arrived, after the Clerk advised the House of the receipt of a communication from the secretary of state declaring that unofficial returns indicated the Member-elect was duly elected and that there was no indication of any election contest or dispute.

On Nov. 27, 1963,⁽¹⁵⁾ the House permitted a Member-elect filling a vacancy to be sworn, although a certificate of election had not arrived, after the Speaker laid before the House a telegram from the secretary of state, stating that the Member-elect had been duly elected according to returns received in the secretary's office.

On Oct. 30, 1963,⁽¹⁶⁾ a Member-elect to fill a vacancy was administered the oath in the absence of the certificate of election, pursuant to a telegram from the state Governor stating that the Member-elect was duly elected according to unofficial returns.

On Nov. 15, 1937,⁽¹⁷⁾ the House authorized the administration of

14. 110 CONG. REC. 5730, 88th Cong. 2d Sess.

15. 109 CONG. REC. 22838, 88th Cong. 1st Sess.

16. 109 CONG. REC. 20612, 88th Cong. 1st Sess.

17. 82 CONG. REC. 9, 75th Cong. 2d Sess.

the oath to three Members-elect to fill vacancies from the State of New York, where the Clerk submitted to the House a telegram from the attorney general of the state indicating the election of those Members-elect.

On Oct. 18, 1965,⁽¹⁸⁾ Mr. Edwin W. Edwards, elected to fill a vacancy in a congressional seat from Louisiana, was sworn in although his certificate of election had not arrived. The secretary of state of Louisiana had transmitted to the Clerk a copy of a proclamation of the Governor of Louisiana declaring Mr. Edwards to be duly elected to the House to fill the vacancy, although a general election had not been held; the proclamation was issued because Mr. Edwards had won the Democratic primary election and was the only qualified candidate for the general election to fill the vacancy.

Correction of Date for Beginning of Term (Senate)

§ 17.6 The Senate passed a resolution fixing the date a Senator was sworn, in compliance with federal statute, as the beginning of his term, notwithstanding an earlier date stated in his certificate of election.

^{18.} 111 CONG. REC. 27171, 89th Cong. 1st Sess.

On Apr. 29, 1957,⁽¹⁹⁾ the Senate passed the following resolution (S. Res. 129):

Whereas the certificate of election of Ralph W. Yarborough, chosen a Senator on April 2, 1957, during the present session of the 85th Congress, by the qualified electors of the State of Texas to fill the vacancy in the term ending at noon on the 3d day of January 1959, caused by the resignation of Honorable Price Daniel, states that he was "duly chosen . . . to represent said State in the Senate of the United States for an unexpired term beginning on the 19th day of April 1957, and expiring on the 3d day of January, 1959"; and

Whereas under title 2, section 36, of the United States Code (49 Stat. 23), and precedents of the Senate based thereon, salaries of Senators elected during a session to succeed appointees shall commence on the day they qualify; and

Whereas the said Ralph W. Yarborough has this day duly qualified by taking, in the open Senate, as provided by Rule II, the oath required by the Constitution and prescribed by law, and has subscribed to the same; Therefore, be it

Resolved, That the term of the service of the said Ralph W. Yarborough shall be deemed to have commenced on this the 29th day of April 1957.

^{19.} 103 CONG. REC. 6060, 85th Cong. 1st Sess.

Salaries of Members elected for unexpired terms begin on the date of election (2 USC § 37).