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Chapter 23
Election of Members

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Research References

U.S. Const. art. I, § 5, cl. 1
1 Hinds §§ 277–633
6 Cannon §§ 38–89
Deschler Ch 8

§ 1. In General

Generally

Although Congress has enacted extensive legislation to protect the right to vote and to secure the process against fraud, bribery, and illegal conduct, the actual mechanism for conducting and holding congressional elections has been left largely to the States. Deschler Ch 8 §§ 5, 7. However, under article I, section 5, clause 1 of the Constitution, 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. Deschler Ch 8 § 5. Therefore, 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 refuse to administer the oath to a Member-elect. Deschler Ch 8 § 7; see Deschler Ch 8 for complete treatment of elections and election campaigns.

Apportionment and Reapportionment

Since the admission of Alaska and Hawaii to statehood, the total membership of the House has remained fixed by statute at 435 seats. *Manual* § 227. By law, these 435 seats are automatically apportioned among the States according to each decennial census. 2 USC § 2a.

Under this law, a statistical model known as the ''method of equal proportions'' is used to determine the number of Representatives to which each State is entitled. Although other methods for apportioning House seats may be permitted, the equal proportions method chosen by Congress has been

upheld under the Constitution and was plainly intended to reach as close as practicable the goal of ''one person, one vote.'' *Massachusetts* v. *Mosbacher*, 785 F. Supp. 230 (D. Mass. 1992), *rev'd* on other grounds *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992). The courts also have recently upheld under Federal law and the Constitution a counting methodology used by the Census Bureau in a decennial census. This method, known as ''imputation,'' was held to be different than ''sampling,'' a method prohibited under section 195 of title 13, United States Code. *Utah* v. *Evans*, 536 U.S. 452 (2002). The method of apportioning the seats in the House is vested exclusively in Congress, and neither States nor courts may direct greater or lesser representation than that allocated by statute. Deschler Ch 8 § 1. The States create their own congressional districts, which must be redrawn after reapportionment so that each district is as equally populated as practicable. *Manual* § 229.

Section 2a of title 2, United States Code, mandates the manner in which a State must conduct an election after any apportionment but before the State is redistricted. Section 2a addresses an election where the number of Representatives has not changed, has increased, or has decreased. The authority under section 2a(c) of title 2 for a State to retain an at-large seat pending its redistricting should be read in light of section 2c of title 2, which requires all States entitled to more than one seat to elect representatives only from single-Member districts. *Manual* § 227.

Reapportionment proposals have been considered in the House, but have no privileged status under the Constitution and cannot interrupt the regular proceedings of the House. Deschler Ch 8 § 2. Reapportionment legislation also has been considered in the Committee of the Whole. Deschler Ch 8 § 2.5. Under rule X clause 1(k), proposals relating to apportionment are within the jurisdiction of the Committee on the Judiciary.

§ 2. Campaign Practices

The power of Congress to regulate the election process extends to the regulation of campaign practices. Deschler Ch 8 § 10. The Federal Election Campaign Act established a new and comprehensive code for campaign practices and expenditures, and contains provisions for investigations and enforcement. 2 USC § 431.

The Federal Election Commission is the agency empowered with primary jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act. *Federal Election Comm'n* v. *American Intern. Demographic Services, Inc.*, 629 F. Supp. 317 (E.D. Va. 1986). However, the House itself has the power to judge elections and to

determine whether a candidate was improperly elected to a seat. If violations of the election campaign statutes are so extensive as to render an election void, the House may deny the right to a seat. Deschler Ch 8 § 12.

Under rule X clause 1(i), the Committee on House Administration has jurisdiction over measures relating to the election of the President, Vice President, or Members of Congress and over measures relating to the raising, reporting, or use of campaign contributions for House candidates. Investigations of specific elections or election practices usually are undertaken by that committee. See, *e.g.*, 105–2, H. Res. 355, Feb. 12, 1998, p 453. Investigations of Members' elections may be conducted under the statutory election-contest procedures or offered on the floor of the House as questions of privilege. *Manual* § 701; see ELECTION CONTESTS AND DISPUTES. Formerly, investigations were undertaken by select committees created to review election campaigns and proceedings, which were created by privileged resolution reported from the Committee on Rules. Deschler Ch 15 § 1.3. Under the modern practice, investigations are undertaken by the Committee on House Administration.

A Member's resignation during an investigation effectively terminates the investigation, because the Committee on House Administration has no further jurisdiction in the matter thereafter. 95–1, May 4, 1977, p 13391.

Under rule XIII clause 5, a resolution reported from the Committee on House Administration relative to the right of a Member to his seat is considered as privileged. Deschler Ch 8 § 13.5.

§ 3. Certificates of Election

Certificates of election are issued by each State after congressional elections have been conducted and the results tabulated. The certificates, also termed ''credentials,'' are sent to the Clerk of the House for use in composing the Clerk's roll. Although the certificate is not essential to the administration of the oath, any Member or Member-elect has the right to object thereto, by delivering a challenge either to the validity of the election or to the validity of the certificate itself. Deschler Ch 8 § 15. For a discussion of challenging the administration of the oath, see OATHS.

The House (and not the Speaker or other official) determines whether a Member may be sworn in after an election certificate has been challenged. If a challenge has been directed 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. Deschler Ch 8 § 17.1. However, if a certificate is challenged through an election contest or by an 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 often is followed where a certificate is on file in order not to deprive a State of representation in the House because of protracted proceedings. Deschler Ch 8 § 16.4. Another procedural option that may be pursued by the House is to declare that neither candidate be sworn and that the question of *prima facie* and final right to the seat be referred to committee. *Manual* § 204.

A circumstance which may require the nullification of a certificate is the intervening death or disappearance of the Member-elect named therein. Deschler Ch 2 §§ 4.8, 4.9.

The House does not always require a certificate in seating a Member-elect. If he appears without a certificate but his election is uncontested and unquestioned, the House may authorize him to be sworn by unanimous consent. *Manual* § 204. A photographic copy of the original certificate has been accepted without invoking the unanimous-consent procedure. 106–1, June 8, 1999, p 3773. In some cases where a certificate is delayed, the State represented will deliver informal communications to the House attesting to the validity of the election of the Member-elect. The House may accept such communications by unanimous consent in the absence of a certificate. Deschler Ch 2 § 3.3. Even where a Member-elect arrives without a certificate and his election is disputed, the House may by resolution authorize him to be sworn. Deschler Ch 8 § 17.2.

§ 4. Resignations; Deaths; Filling Vacancies

A Member properly submits his resignation to an official designated by State law and simply informs the House of his doing so, the latter communication being satisfactory evidence of the resignation. *Manual* § 19; 1 Hinds § 567.

Where a vacancy arises in the House by death, resignation, declination, or action of the House, the vacancy must be officially declared in order that a special election may be held. Usually, the State executive declares the vacancy to exist, particularly in cases of death, declination, or resignation. Deschler Ch 8 § 9. The State executive then issues a writ of election to fill the vacancy. U.S. Const. art. I, § 2, cl. 4. 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 initiate the action to have the seat declared vacant. Deschler Ch 8 § 9.5. Such a declaration is proper where independent House action has created a vacancy by expulsion or exclusion of a Member. Deschler Ch 8 § 9. In such cases, the House, by privileged resolution, directs the Speaker to notify the State executive. *Manual* § 22.

The State executive also is notified where the Member purports to resign directly to the Speaker, rather than to the Governor of his State as is customary.

Under rule XX clause 5, in the case of the death of a Member, the Speaker may lay before the House such documentation from Federal, State, or local officials as he deems pertinent.

A resolution declaring a seat vacant is used where a Member-elect is unable to take the oath or to resign due to an incapacitating illness. *Manual* § 22. In one instance, a letter to the Speaker from the attending physician was inserted in the *Congressional Record* to document the physical condition of the Member-elect. The letter stated that she was in a coma and would be unable to take the oath. *Manual* § 205. The House, by declaring the seat vacant by majority vote, was in effect judging a constitutional qualification of the Member; that is, the requirement that she take the the oath. The resolution was not tantamount to an expulsion, which requires a two-thirds vote to adopt.

The House recently adopted a resolution expressing the sense of the House that each State should examine its existing statutes, practices, and procedures governing special elections so that, in the event of a catastrophe, vacancies in the House may be filled in a timely fashion. 107–2, H. Res. 559, Oct. 2, 2002, p ____.