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Volume 1
Federal Perspective

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Volume contains a history of contested elections and recounts for federal offices in the United States, describes the various state contest and recount systems, identifies major problems and issues in the process, and makes specific recommendations for federal actions designed to improve contested election and recount procedures.

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INTRODUCTION BY THE NATIONAL CLEARINGHOUSE ON ELECTION ADMINISTRATION

A contested election is, strictly speaking, a formal challenge to the outcome of an election; a charge that something went seriously wrong in the electoral process. It would be comforting to think that contested elections are a rare exception in the United States and that such cases as may arise are resolved quickly and easily.

As a matter of fact, contested elections in federal races are the exception. Ninety-nine percent of all races for federal office are resolved firmly and finally on election day. The remaining one percent, unfortunately, have resulted in three contested presidential elections since the beginning of the Republic, over 500 contests for House seats during the same period, and about two dozen Senate races since the direct election of Senators in 1913. This works out in real numbers to about five House seats every two years, a little over one Senate seat every four years, and about one in every sixteen presidential elections.

Despite their relative infrequency, then, contested elections are not so rare as to be unheard of from Congress to Congress. But it would be wrong to conclude that their fairly steady occurance has resulted in anything like a standard, routine, and speedy way of resolving them. A number of cases in the past decade prove the contrary.

There are several reasons why it is hard to resolve contested elections. And it is surprising, given its importance and complexity, that the process of resolving them has attracted so little administrative, legal, or scholarly attention. This report is designed to fill the void by exploring how federal elections are contested and resolved under current state and federal laws and procedures.

In designing this project, we recognize at the outset that lawyers are inclined to view contested elections as essentially legal questions while politicians are likely to see them as being essentially political. In line with our mission as the National Clearinghouse on Election Administration our approach is to look at the contested election process (and, indeed, the entire election process) as a system and, hence, as an administrative problem. Our general concern is that the election system (or, more precisely, our 50 election systems) be able to tell us with reasonable certainty who won the election. This project is concerned specifically with the ability of the state election systems, when an outcome is challenged, to verify their own procedures and tabulations.

Adequate verification procedures may immediately answer the doubts of a challenger. Failing that, they are essential to whatever legal or political processes may follow. Ultimately, they are vital to public confidence in the American electoral system.

The objectives of this report, therefore, are:

- to describe the contested election and recount laws and procedures throughout the country with regard to federal offices
- to identify major problems and issues that impede the just and speedy resolution of challenges, and
- to recommend laws and procedures that will minimize the risk of contested elections and that will facilitate the just resolution of those that occur.

The report is in three volumes. Volumes I and II overlap in large part but are tailored respectively to federal and to state interests and perspectives. Volume III is a series of legal memoranda summarizing relevant state laws with appropriate code citations.

We would like to acknowledge and express our gratitude to the members of the Project Advisory Board whose guidance and periodic reviews were of immeasurable value to the contractor. Their work and devotion have added enormously to the thoroughness and practicality of the final products. They are:

Mr. Bernard J. Apol
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Ms. Joyce V. Diefenderfer
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The Honorable Allen J. Beermann
Secretary of State
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Mr. William Durley
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California

Mr. Thomas Downs
Attorney
Lansing, Michigan

We are grateful to the many state and federal officials and legislative staff whose time, interest, and cooperation led to the success of the effort.

Finally, we are naturally eager to know your reactions to these reports – whether they are helpful, whether they save you time and money, whether we can do more for you, and whether you need more copies. Please let us hear from you.

Gary Greenhalgh, Director

Bill Kimberling, Deputy Director

Gwenn Hofmann
Assistant to the Director

Charlotte Ott
Secretary/Administrative Assistant

AN ANALYSIS OF LAWS AND PROCEDURES

GOVERNING CONTESTED ELECTIONS AND RECOUNTS:

FINAL REPORT

VOLUME I: THE FEDERAL PERSPECTIVE

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Interpretations, opinions, and recommendations presented in this report are those of the authors, and do not necessarily represent the views of the Federal Election Commission.

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This project has involved the collection of large amounts of data from a variety of sources at the national, state, and local levels. We owe a great debt of gratitude to literally hundreds of individuals who supplied us with assistance and information, and whose services we could never repay. While we could not possibly name all of these individuals, there are some whose assistance we would like to explicitly acknowledge.

Our principal sources of data for the project were state laws and state election officials. Copies of laws, Attorney General opinions, and court opinions were, for the most part, obtained directly from the state. Copies of these materials were promptly provided to us by the offices of State Chief Election Officers or by State Attorneys General. Their willing and timely assistance made the legal analysis and development of the memoranda of law much less difficult than it otherwise would have been. All of the state chief election officers or their representatives were surveyed by mail and telephoned in order to obtain large amounts of information concerning actual practices of the states. Each of these officials gave us at least an hour and a half of valuable time, and many contributed three or four times that amount. Without their assistance, state-by-state analyses of procedures would not have been possible.

State and local officials in twelve states kindly permitted us to visit them and take a few days of their time for very in-depth analyses of procedures overall, and of the details of recent election recount and contest cases. Any insight that we may have been able to share in these volumes are largely attributable to these public servants who gave so much of their time, knowledge, and experiences. Our special thanks are owed to the chief election officers, their staffs, and numerous local officials of Alabama, Colorado, Illinois, Louisiana, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, Oklahoma, Rhode Island, and Texas.

We also obtained important insight, review of products, general guidance, and advice from a panel of election officials who generously gave of their time to serve on the project advisory board. This panel, composed of six individuals with extensive experience in the administration of elections and the conduct of recounts and contests, gave valuable assistance in directing us in the right direction

to begin with, and occasionally correcting our course as the project progressed. Members of the panel were:

Mr. Bernard J. Apol, Director of Elections, Office of the Secretary of State, Michigan
The Honorable Allen J. Beermann, Secretary of State, Nebraska
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We wish also to thank the staff of the National Clearinghouse on Election Administration for their guidance, assistance, and understanding. Mr. William C. Kimberling, the contract technical manager for this project, has lived with our work from the beginning, and spent many hours reviewing it and providing insightful and useful criticism. We are extremely grateful for his time, energies, assistance, and forbearance. Dr. Gary Greenhalgh, Director of the Clearinghouse, also provided encouragement, and was very helpful in facilitating the acquisition of materials from a number of federal agencies whose assistance we needed.

Finally, our thanks go to our student assistants, whose painstaking work provided much of the information used in these reports, and to the clerical staff of the Institute, without whose several hundred hours of diligent labor and many evenings and weekends spent at the office this report could never have been produced.

PREFACE

This volume is one of three produced in the project to conduct "An Analysis of Laws and Procedures Governing Contested Elections and Recounts." The principal intended audience includes election officials at the state and local level, including state chief election officers, board members, Attorneys General, legislators; local officials with election jurisdiction; members of Congress; candidates for public office; and students of elections.

The contested elections and recounts project generated a rather large amount of report materials which have been presented in three volumes:

Volume I: Recounts and Contests of Federal Elections

Volume II: Recounts, Contests, and the Administration of Elections at the State and Local Level

Volume III: State Memoranda of Law on Election Contests and Recounts

Volume I is oriented primarily toward the definition of recount and contest systems, and includes a discussion of major recount and contest problems involved in congressional elections within the last ten years. It includes some major recommendations for change in the administration of challenges to the outcome of federal elections which will be of interest to the Congress, candidates, and state election officials.

Volume II, contains the same system definition materials as Volume I, but focuses its findings, analyses, and recommendations on the election administration system as it is run by states and localities. As a result, it should be useful to anyone with interest in any form of election administration, contests and recounts. Much of this volume is organized to present state-by-state information on a wide variety of specific subjects related to who can contest the outcome of an election, under what circumstances, and how. The recommendation sections provide a definition of problems encountered by the states in the actual administration of recounts and contests, and contain analyses of problems in election administration as a whole.

Finally, Volume III, the memoranda of law, provides detailed digests of the laws on election recounts and contests in each of the states, the District of Columbia, and the United States as a whole. This volume will be of use for anyone with an interest in the laws of a specific state, or to someone looking for examples of how provisions

for individual system types may have been written in other states. For this latter purpose, the user might wish to refer to Volume II to identify states with features of interest, and then to turn to the memoranda for those states in Volume III.

Each volume is designed to stand alone--that is the reason for the overlap between Volumes I and II--and it is hoped that readers will find each single volume and the entire set useful in answering questions on the range of systems in use and the ways in which the states have addressed recount and contest problems.

Table of Contents

Table of Contents (continued)

Chapter I

INTRODUCTION

To the extent that anyone has paid attention to the administration of elections in the United States since the publication of the works of Joseph P. Harris in the 1930's, that attention has been focused on election system functions that are presumed to affect voting behavior or the opportunity to vote. This focus has led researchers to explore in quite some detail questions of districting, especially in the years immediately before and after the one-man, one-vote decisions of the 1960's. Voter registration and campaign finance issues have also received substantial attention. At the same time that a renewed interest developed in elections and the way they are run, relatively little attention has been paid to the methods by which the actual outcome of an election is determined and validated, or to the ways in which the apparent results of an election might be challenged and potentially overturned. This report deals with recounts and contests, the basic validation functions in the election process. It asks questions about such subjects as who can initiate contests and recounts; what officials or official bodies receive them, administer them, and determine their outcome; the probability of success of any given type of challenge to the outcome of an election; what the record of recounts and contests has been in practice; and what parts of the election system lead to recounts and contests that might have been prevented.

The general lack of interest in recounts and contests is surprising in light of the number of major elections in any given election year that are not easily resolved either in the original tabulation of the votes or through the normal recount process. While the incidence of challenges to the outcome of major elections may not have recently increased, there have occurred a few very important and highly notorious cases in which the entire system designed to ensure the timely production of a clear-cut election winner has failed miserably, sometimes in ways that have made it forever impossible to ascertain with any degree of certainty at all who really won. Admittedly, most of the cases that attracted the greatest attention have not involved failure of the recount and contest stage, but rather failure at some earlier point.

Congressional elections provide a good illustration of administrative problems that can leave election outcomes in doubt. As a general rule, the states do a certain amount of error checking in congressional races, typically providing

for recounts (although some states have denied themselves the authority to recount congressional races, claiming exclusive congressional authority). They frequently will not handle contests defined in terms of non-recount challenges to election outcomes. Each house of Congress, as the final judge of the elections, returns, and qualifications of its own members, then serves as the final arbiter of any remaining dispute concerning which of several candidates has the rightful title to the seat.

The number and severity of cases ultimately appealed to the Congress, and the length of time required by the Congress to resolve them, can be used as a rough measure of the extent to which the entire system is properly performing its job of ensuring the accurate and final certification of a winner. In 1977, as a result of the 1976 congressional elections and one 1977 special election, eight elections for seats in the House of Representatives were contested in the House. Of these eight cases filed in December and January, three were decided by the House Committee on Administration as late as October 15, 1977; one was, strictly speaking, never settled by the House because the resignation of the contestee rendered the contest moot; and the remaining four were decided in the late spring of 1977. In addition to these eight House contests, one House primary is known to have been rerun because of irregularities that rendered any other method of determining a winner impossible. Nor was 1976 atypical. The 1974 elections produced five major contests in the House of Representatives and two in the Senate. One of those Senate contests, Durkin v. Wyman, was not fully resolved until a full year after the original election, and resulted in the effective disenfranchisement of the citizens of the State of New Hampshire during that time.

Presidential elections have not been immune to recount and contest requests either. While the last presidential race to be challenged at the time of counting electoral votes was in 1876, challenges to the outcome in selected states are not uncommon. Most recently, challenges were mounted in 1976 to the results in four states, with recounts actually conducted in Oregon and Ohio.

In races for state and local office the magnitude of the problem is far greater than in congressional elections. While congressional recounts, and especially congressional contests, attract the greatest national attention, statewide races are frequently recounted or contested in the states, and elements of election administration under the exclusive control of the states are occasionally challenged in contests as well. Additionally, races in very small districts show an extraordinarily high incidence of recounts, since it appears

that the probability of recount in any given race increases as district size diminishes. States in which legislative districts are relatively small, for example, report that they expect to recount about 10% of all legislative general elections, and a somewhat higher percentage of primaries. Consequently, when we discussed contest and recount problems and the sources of those problems with state and local officials, the base of experience was really quite broad. Furthermore, while the kinds of problems caused by a challenge to the outcome of a congressional election or a statewide race may overshadow those caused by challenges to legislative or local ones, we found no reason to support a belief that such problems are different in kind, except of course in contests that are appealed to the Congress. Therefore, the experience of the states and localities in recounting their own races and in handling contests of them has proven very instructive in identifying areas where the system fails that would not have been identified through an analysis of recent federal office contests alone.

O The Importance of Validating Elections

The right to vote in a democracy is among the most precious of all individuals' rights. It is a mechanism which individuals can and do use to hold officeholders accountable even when other parts of the political process fail to produce accountability. For one's vote, when cast, to be translated into a true message to officeholders and candidates, that vote must be accurately counted, and if necessary, recounted at every stage of the election process. The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for one's vote to be diluted.

At a time when public opinion surveys show a growing political alienation in the United States and when recent voting statistics trace a declining turnout in elections, every effort should be made to ensure the integrity of the electoral process from the first act of registration down to the last act of certifying the final winners of elections. Integrity is particularly crucial at the tabulation stage because many elections in this nation occur in very competitive jurisdictions where very close election results are always possible. Voters and the media expect rapid and accurate tabulation of election returns whether the election contest is close or one-sided. But at present electoral systems rarely, if ever, can meet these demands in close elections. This problem is a result of election system weaknesses at a number of different points, and will require major legislative and administrative change.

The legal and procedural mechanisms for tabulating and recounting ballots in contested elections are important since these mechanisms may prevent or delay accurate counts and the ultimate certification of election winners. Voters may as a result be deprived of representation for several months, as in the 1974 New Hampshire Senate case. They may even be governed by a defeated officeholder for several months, as occurred after the Minnesota gubernatorial race in 1962. Voters have every reason to expect the person they elect to take office at the officially appointed time rather than after some laborious and time-consuming recount process. The legal and procedural mechanisms for tabulating and recounting ballots in contested federal elections take on further importance in view of the delicate constitutional and legal provisions governing election laws in the American federal system. Therefore, contested election and recount procedures have social, political, and legal significance.

Δ Social Significance

In the early days of our democracy, when many decisions about officeholders and issues were made in town meetings, the accuracy of a vote count could be easily witnessed by all present and any recount could be almost instantly completed. As our democracy grew and the franchise was extended from the few to the many, elaborate administrative and legal processes were developed to ensure the integrity of the vote count. Voters today place a lot of faith in the electoral system to yield as a winner the person who obtains the most votes. In close elections, voters and candidates alike want the tabulation system to work properly so that no one wins or loses an election because of failures in the election system.

Confidence in the election system is of great significance in this society, for if individuals cannot be assured of an accurate vote count they can have no faith in other parts of the political process. Social stability in this nation rests on confidence in the system to function correctly in every respect, including the vote tabulation process. As many states and localities move more and more toward deciding issues by referendum, the overall stability of the society will be enhanced by a vote counting system which ensures that the majority viewpoint always wins.

Δ Political Significance

The political significance of the contested election and recount process is threefold:

1) how the process is used may determine the actual outcome of an election;

2) ineffective employment of contested election and recount processes may make the determination of the election result a partisan political matter (e.g., the 1974 New Hampshire Senate contest); and,

3) because of the substantial cost of conducting recounts, the election process in the United States may not be as cost-effective as possible.

In close races the contested election and recount process will almost always produce a winner, even if that candidate was not truly the one preferred by a majority of the voters. The contest and recount process itself can bias the results depending on how the process is established legally and then administered procedurally. Losing candidates on the first count need assurance that they can contest an election and not have bias in the process prevent them from winning a recount.

In addition to potentially biasing the outcome, inefficient or unfair contested election recount processes may ultimately lead to determining the election results along the partisan lines of a legislative body--that is, the party that controls the chamber may declare its candidate the winner. Such a result is unfair both to voters and candidates. Resolving an election contest also takes up legislative committee time, and may tie up the floor deliberations for a long time. The U.S. Senate is particularly vulnerable to this problem since the rule allowing unlimited debate could paralyze the legislative process indefinitely.

It is a natural and obvious temptation for politicians to view election contests as purely political questions. (For the same reasons, lawyers tend to see them as essentially legal problems and systems analysts tend to see them as systemic problems.) Nor is it hard to see the charm that a purely partisan, political view has for the party that controls the chamber and will, hence, decide the outcome of the contest. But such political solutions offer only small, short-term advantages at substantial long term costs. The most obvious cost is that the opposition party will take the same advantage when they come to power. More important is the loss of public confidence in the integrity and honesty of the democratic process. But the greatest casualty is the right of the people in the jurisdiction affected to select their own representatives rather than having one selected for them.

Present legal and administrative mechanisms for election contests and recounts are also politically significant because of the costs involved in operating them. The nature

of election contests and recount processes and their frequency contribute to increasing the cost of elections as a whole. Reforming election contest and recount procedures may help make elections less expensive.

The high cost of contests and recounts also deters losing candidates from requesting recounts even when they should legitimately expect one. Losers must often post bonds to obtain recounts and are frequently held liable for all the costs of the recount if it does not change the election result. On the other hand, many observers fear that reforming contest and recount procedures may increase their frequency and hence their costs. If so, the consequences of the reforms need to be assessed and evaluated carefully before they are proposed.

In summary, the potential for the election contest and recount process to bias the outcome highlights the political importance of election contest and recount mechanisms. Furthermore, there is great potential for the election contest to become a partisan political matter with substantial political costs to all involved. And, finally, in monetary terms the present process is costly and may tend to deter losing candidates from contesting elections.

Δ Legal Significance

The legal significance of the contested election and recount process in the United States revolves around the question of whether the process is a legitimate federal concern.

Because the U.S. Constitution in Article I, Section 5, states that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members," contested elections and recounts have been of federal concern since the first Congress was elected. The Twelfth Amendment to the U.S. Constitution gives Congress the power to resolve disputes about Presidential elections (as was done in the 1876 election in which Rutherford B. Hayes was declared the winner over the popular vote choice Samuel J. Tilden). But because the U.S. Constitution also requires the states to prescribe "the times, places and manner of holding elections for Senators and Representatives," state laws define the legal and procedural framework under which election contests and recounts for federal elective offices are handled. Conflicts over which law, federal or state, shall apply to election contests and recounts have occurred in the past and almost certainly will in the future.

An additional legal complexity relating to federal elections involves the responsibility for bearing the high costs in-

volved in resolving such disputes. Should it be a federal government responsibility, be borne exclusively by the state government involved, or be the sole responsibility of the losing candidate? Present responsibility is ill-defined and needs legal clarification.

In summary, the legal significance of the election contest and recount process involves delicate constitutional questions as well as unclarified responsibilities for administrative costs.

O What a Recount and Contest System Should Do

As the above discussion suggests, there are many ways in which the apparently simple determination of an election winner can be delayed, clouded, or wholly subverted. Recounts and contests should serve as a check on system accuracy and fairness. This subsection is a discussion of the values which, in our opinion, ought to govern the design and operation of recount and contest systems, and which appear to be necessary to the proper operation of the election system as a whole. These broad values are:

- Speed;
- Determinacy;
- Fairness;
- Accuracy; and
- Efficiency.

Δ Speed

That the outcome of an election should be known within a reasonable period of time seems obvious, but the definition of "reasonable period of time" is not a trivial problem. In a very tight race, there must be time to recount the results in order to ensure the accuracy of the tabulation. This means that time must be set aside to:

1) handle the initiation of the recount process itself, however that is done locally;

2) set up the machinery for conducting the recount itself;

3) instruct workers who are to perform the actual recounts;

4) retabulate all ballots; and

5) recanvass returns and recertify results.

The amount of time actually required for this entire process depends very heavily upon the law and procedure governing the process in individual jurisdiction, and can range from less than a day in a state with an automatically triggered process and few paper ballots to several weeks in decentralized, candidate-initiated systems where large numbers of paper ballots are used.

The time required to complete contest proceedings after an election is more variable than for recounts. In particular, the vast majority of the states employ normal rules of civil procedure in contests taken to court, permitting structural appeals of every aspect of a trial, including pretrial and discovery motions. It is not at all uncommon for a contest of a primary election still to be pending at the time of the general election, especially in states that have adopted late primaries. Likewise, contests of general elections are sometimes unsettled at the time the newly-elected incumbent is supposed to have taken office.

That last point underpins the definition of reasonable speed. The election recount and contest system and the election system as a whole should be structured in such a way that the ultimate outcome of a primary election will be known by the time the nominated candidate would normally begin the election campaign. This definition of fair speed has the effect of defining as unfair virtually all late primary systems. Under the same rule, general election contests and recounts should certainly be settled before the newly-elected incumbent is to take the office, and preferably before decisions concerning housing, schools for children, and presession orientation programs must be made. In congressional elections, it is especially important that all state-level proceedings be completed by about a month after the general election in order to permit preparation of any possible appeals to the Congress itself, and to avoid the now common occurrence of parallel state and federal contest proceedings in the same election.

The review of laws, procedures, and actual cases conducted as part of this project indicates that many jurisdictions do not successfully determine election outcomes sufficiently rapidly. The failure to do so may be related to cumbersome or leisurely procedures, or to delays introduced deliberately by one of the parties. The process is slowest when courts are involved, and many recounts and contests do delay general election campaigns or the seating of winners. System characteristics that contribute to these failures are discussed in Chapter III.

Δ Determinacy

It seems obvious that recounts and contests should be determinate, i.e., that whatever decisions emerge should be final, and known by all actors to be final. Such a determinacy requires that all contestable issues be dealt with simultaneously as part of the same process instead of being raised sequentially by one party or another. In the case of congressional elections, it requires an end to the current confusion concerning the jurisdictions of state and federal courts, and the Congress.

In many states it is now virtually impossible to end a contest without exhausting the courts and bankrupting the parties. Issues raised in a recount may be appealed separately; losers in early rounds may subsequently raise issues that would have been more timely before the election (ballot form, candidate eligibility, etc.); and every ruling on a pretrial or trial motion may be appealed. This delaying strategy is wholly rational for the apparent winner, especially in congressional elections, since taking office usually establishes a prima facie right to it. The effect, however, is to make it difficult to know when the whole process is irrevocably final.

Δ Fairness

Fairness refers to the availability of different possible remedies to individual candidates or parties at interest. All parties should have equal access to the system, and no party should be able to play an obstructionist role that has the effect of denying another party an opportunity to prepare, present, and argue a case.

Fairness also requires that no presumption of having won be made until the outcome of any contest is known, i.e., apparently winning on the basis of an original tabulation that is subsequently challenged by legal means should not carry a presumption of title to the seat.

This criterion is related to the two preceding, and the problem of delays discussed above is certainly unfair to the party bringing the action. Delaying tactics become especially unfair when they have the effect of preventing discovery or suppressing evidence. In 1976, alone, two congressional contests were disrupted through this kind of delay. In one, the apparent winner was able to prevent discovery by playing simultaneous state and federal actions against each other. In the other, evidence was suppressed by means partly questionable and partly criminal. While

these cases are extreme, they are different from many others only in degree, not in kind.

Δ Accuracy

Accuracy is related to both fairness and determinacy, and requires simply that retabulations, recanvassing, recertifications, and contests are conducted with such high standards that their results are beyond question. Questions of accuracy are fairly straightforward in the case of recounts, although achieving it may not be as simple.

In contests, accuracy involves taking into account all available evidence and arriving at a decision that is correct under applicable law. This process is not as simple as it might at first appear, since the speed with which some contests must be settled makes the discovery process difficult at best. Evidence that might have had a bearing on the case frequently comes out after a contest has been settled.

In many states recounts fail to be accurate because they are not conducted on the same group of votes originally counted. This difference arises when ballots are lost or destroyed, machine totals erased, or selected ballots excluded from the recount for some other reason. Additionally, many jurisdictions repeat on recount many of the procedural steps that lead to errors in original tabulation, thereby casting doubt on recount accuracy.

Contests sometimes also fail to produce accurate outcomes, usually because relevant evidence is not considered. In the most common type of case, discovery opportunities are restricted by procedural delays or because contestants bear unreasonable pre-discovery burdens of proof.

Δ Efficiency

Elections, like all other public functions, should be well-run, but the concept of efficiency in recounts and contests requires simply that costs be minimized to the extent possible without affecting speed, fairness, or accuracy, and that the system be designed in such a way as to minimize the incidence of frivolous challenges to elections. Where efficiency is not entirely consistent with fairness, the system ought to lean toward fairness. In practice, however, the least efficient system types tend to be the least fair.

Δ Protect the Public Interest

For the most part, recount and contest systems use the adversary process to provide all parties at interest the tools

necessary to protect those interests. Unfortunately, the rules of civil procedure that normally apply assume that everyone with an interest has an opportunity to be represented in the process. Elections are unusual in that there is a paramount public interest which should take precedence over the claims of any candidate. The legal system provides no sure method of representing this interest. While the values proposed earlier were put in the context of fairness to candidates, they apply equally well to the protection of the public interest and the integrity of the election process as a whole.

In summary, analyses and conclusions that follow assume that the quality control functions of recounts and contests should determine with absolute finality the outcome of an election contest in time for the next step in the process (campaign or taking office) to take place. This determination of the outcome should be done in such a way that it is accurate, fair to all parties (including the public) and efficient in the sense that costs are minimized without impairing the ability of the system to serve its purposes.

○ Summary of Recommendations

This section presents a summary of major recommendations. The detailed recommendations and the documentation of the findings that led to them appear in the last chapters of Volumes I and II.

△ Recommendations for State Actions

The recommendations for the states concentrate on the development of laws, rules, and procedures designed to ensure that the election system itself fails less frequently, thereby reducing the incidence of contests and recounts. Detailed recommendations have also been made for the development of laws and procedures for the recount and contest systems. The major recommendations include:

- that formal, written procedures should be developed for every aspect of the election process;
- that all states mandate training for local election officials in order to ensure that procedures are understood;
- that the states which have not yet done so enact legislation to provide for congressional election recounts;
- that primary elections be scheduled sufficiently far in advance of general elections to make it pos-

sible to resolve challenges to the outcome of the primary in time to permit the general election campaign to proceed normally;

- that each state treat recounts as ministerial error checking functions to be initiated by election officials under conditions specified by law, and that state officials be empowered to correct errors on their own initiative;

- that the states streamline their contest proceedings to make it possible to contest elections quickly, fairly, with some degree of determinacy, within a reasonable period of time;

- that the states adopt contest procedures designed to reduce some of the excessive burden of proof now placed on contestants.

Δ Federal Action

Since federal elections are actually administered by the states, the largest volume of recommendations call for state action. A few very major issues have, however, arisen in congressional contests. The recommendations for federal action deal with ways of giving congressional candidates equal access to the federal contest system. The major recommendations are:

- that the Congress take action to define the jurisdiction of the states over contests for congressional office;

- that the Congress consider the enactment of federal standards specifically delegating to the states the authority to recount congressional races;

- that the Congress exercise its authority to regulate election dates and limit the minimum amount of time that can separate two congressional elections (primary, run-off, and general) to not less than eight weeks; and

- that the Congress act to make the scope of congressional office recounts uniform nationwide.

Chapter II

HISTORY OF CONTESTED ELECTIONS AND RECOUNTS

Contested elections and recounts have been prevalent in the American political system ever since the founding of the republic. At the presidential level major disputes took place in 1801 and 1825, with the House of Representatives actually choosing the President each time. After the 1801 dispute in which Thomas Jefferson and Aaron Burr had received an equal number of electoral votes, the Constitution was amended in 1804 to ensure a separate electoral vote for the offices of President and Vice President. In the 1825 dispute, none of the candidates garnered a majority of the electoral votes and the House of Representatives elected John Quincy Adams who had finished second to Andrew Jackson in the electoral vote. In both the 1801 and 1825 disputes the constitutional provisions for resolving contests over the presidency were used effectively by the Congress to select a President.

The other major dispute over the presidency took place in 1877 between Samuel Tilden, a Democrat, and Rutherford B. Hayes, a Republican. In the election of 1876 Tilden had won a majority of the popular vote, but both candidates were short of a majority in the electoral college because the 22 electoral votes of Florida, Louisiana, Oregon, and South Carolina were in dispute. Prior to that point no statute had been enacted to cover the handling of contests over the counting of electoral votes. Before the Civil War, custom and precedent were followed in the counting of electoral votes. In the post-Civil War period, custom and precedent were formalized into what became known as Rule 22, which gave each House the authority to reject disputed electoral votes. But in 1875 when the Democrats for the first time since the end of the Civil War won control of the House of Representatives, the Republican-controlled Senate repealed Rule 22 because of their fear that a Democrat-controlled House might reject enough Republican electoral votes to throw the choosing of the President in 1877 into the House. With each house controlled by the opposite political party, with the electoral vote of 1876 in dispute, and with the absence of any formal rule governing the electoral vote count, the conditions were ripe for some kind of compromise in order to permit the orderly selection of President. The Congress provided by statute for the appointment of an electoral commission to hear and resolve contests over disputed electoral votes. The commission, composed of five members of the Senate, five members of the House of Representatives, and five members of the Supreme

Court, was authorized to make a final resolution of disputes subject to a veto from both Houses of the Congress.

In the Hayes-Tilden case the commission resolved the electoral vote dispute each time in favor of Hayes, with the result that Hayes was elected President by the bare majority of one electoral vote.

Following on the Hayes-Tilden experience, Congress during the next decade debated how to resolve electoral vote disputes. Finally, in 1887 an Electoral Count Act was enacted. This act, which is still in effect today, delegates to each state the final authority to determine the legality of its choice of electors and requires a concurrent majority of both the Senate and the House to reject any electoral votes. The law also codified the existing procedures for counting electoral votes by the Congress.

○ Contested Elections for the Congress

When the Constitutional Convention of 1787 gave the Congress the power to count the electoral vote, it also conferred on each house of the Congress the authority to be the final "judge of the elections, returns, and qualifications of its own members." The proposal to give Congress control over questions involving its own membership was the subject of little debate at the Constitutional Convention because it was an accepted practice in English constitutional history. Beginning in the sixteenth century in Great Britain, the House of Commons asserted that it was the sole judge of the election returns of its members and successfully established that neither the King nor any court could overrule the decision of the Commons on election contests. As American colonial governments were established, provisions were written into their fundamental laws giving the colonial legislatures control over disputes involving their own membership. And when the colonies revolted in 1770's and established themselves as states, the evidence is that all but two states incorporated in their state constitutions a provision saying that the legislature shall be the sole judge of election returns of its own members. Thus the framers of the U.S. Constitution simply incorporated into their proposed document a practice already widespread in the states. The language of Article I, Section 5, of the U.S. Constitution, however, left open the question of how each house was to implement that authority.

△ The U.S. Senate

The constitutional procedures for selecting U.S. Senators by state legislatures were problematic and controversial almost

from the first days of the republic. The very first election contest brought before the Senate in 1793 resulted in the expulsion of Albert Gallatin of Pennsylvania on the charge that at the time of his election he had not been a citizen for nine years as required by the U.S. Constitution. According to a publication prepared for the Senate Rules and Administration Committee in 1972, 156 cases growing out of contested elections had come before the Senate as of that date.[1] The recent New Hampshire and Oklahoma cases bring the total to 158.

Before the direct election of Senators was begun in 1913, contested Senate elections were frequent, usually involving allegations about irregularities in how the legislatures selected Senators. In 1866 the Congress replaced an unregulated system for electing Senators with a law designed to reduce the frequency of election contests. The new law, however, did not have the desired effect, and, in fact, a requirement calling for a majority of the vote of both houses of the state legislature to elect a Senator seems to have increased the likelihood of deadlock. Eventually, abuses by state legislatures of their right to elect Senators became a contributory factor leading to the direct election of Senators. Since 1913, when all Senators began to be popularly elected, only about two dozen election contests have been brought to the Senate for resolution. These disputes have involved a wide variety of issues, from fraud to excessive campaign spending, miscounting of ballots, illegal voting, bribery, and moral turpitude. In almost all cases, the certified winner was seated. Only once a seated Senator was unseated, and three times including the 1974 New Hampshire contest the seat was declared vacant.

Despite the frequency of Senate contests, the Senate has never adopted any general rules and procedures for handling election cases because it is commonly believed that each dispute presents a unique case for adjudication. There are, however, certain precedents and general principles emerging from the 158 cases brought to the Senate. Beginning with the first election contest case, the Senate established the procedure of referring protests against the seating of members to a committee which was to investigate the dispute and make a recommendation to the full Senate for action. This has been the practice in most contest cases with the exception of some early cases involving the question of the power of state governors to fill vacancies where the full Senate has elected to decide the cases without any committee guidance. The Senate has made it a practice to accept

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[1] Senate Election, Expulsion and Censure Cases, Sen. Doc. No. 71, 87th Cong. 2nd Sess. (1962).

petitions from private citizens, private or public associations, organs of state government, as well as from a person claiming the seat in dispute. No date has been prescribed by which a petition must be filed, nor has any particular form been mandated for election contest petitions. Typically, the persons contesting a Senate election set forth as many grounds as possible for the challenge and present as much evidence as possible to support the petition referred to committee, which decides whether the challenge is of sufficient merit to warrant further investigation. If the committee decides that the petition deserves consideration, it investigates the case, holds hearings, calls witnesses, and even conducts recounts if necessary in an attempt to settle the claim. In essence, the committee does whatever it deems necessary to fulfill its obligation to report back to the full Senate on the contest. Finally, the committee makes a recommendation to the Senate, and then the Senate makes a final decision on the case.

Based upon a detailed study of all Senate contested election cases through the mid-fifties, one observer has concluded that a number of principles have emerged that the Senate will ordinarily observe in the hearing of election contest cases. They are:

1) The Senate is the sole judge of the elections of its own members, and will not delegate to another tribunal the constitutional duty of so judging. The determination of election contests in the first instance can be assigned to some other federal tribunal, but the final and decisive disposition of such contests must be made by the Senate itself.

2) While the Senate will not investigate the election of a returned member on vague and indefinite charges, it will investigate any Senatorial election if specific charges are made and if these are supported by reasonable corroborating evidence.

3) The Senate will not upset the returned result of an election on the basis of fraud, bribery or other irregularities unless they were sufficient to change the result of the election. If, however, the returned member has participated in such fraud or bribery, or has knowingly condoned the same, the Senate will unseat him even though the result of the election may not have been affected by such actions or activities.

4) The Senate interprets its control over the elections of its members to include control

over the nominating process. The Senate will therefore investigate the conduct of primary elections or nominating conventions as well as the administration of final elections. A returned member who is found to have participated in questionable activities in either a primary or a final election may be unseated because of such conduct.

5) A decision once made in an election contest should not be reversed later, on the application of the principle of res adjudicata; however, the Senate has plenary authority in all such contests and may reverse an earlier decision if it decides that this is necessary and just; this authority will be exercised with care.

6) While the Senate will not recognize or enforce qualifications for membership in the Senate established by State law, the Senate will investigate the qualifications of persons returned to the Senate to determine whether a person duly returned possesses the qualifications established by the Constitution of the United States.

7) The seating of a returned member is taken without prejudice to the right of the Senate to unseat him at a later date; if his right to sit is questioned at the time that he is sworn in, the Senate's authority to later unseat him will be specifically announced. However, because the authority of the Senate in these matters is plenary, it can be exercised even if the person's right to his seat was not questioned at the time of the administration of the oath.[1]

Δ The U.S. House of Representatives

Many elections to the U.S. House of Representatives have been contested in the more than 200 years of nationhood. As best we can determine, there have been 582 contests brought to the House for consideration--an average of about six per session. Figure II-1 presents the number of seats contested in the House of Representatives beginning with the 41st Congress (roughly the end of the Civil War). As can be seen, the numbers of cases contested in the House have been generally declining over time, although the experience of the last two or three Congresses may represent an upturn in contests.

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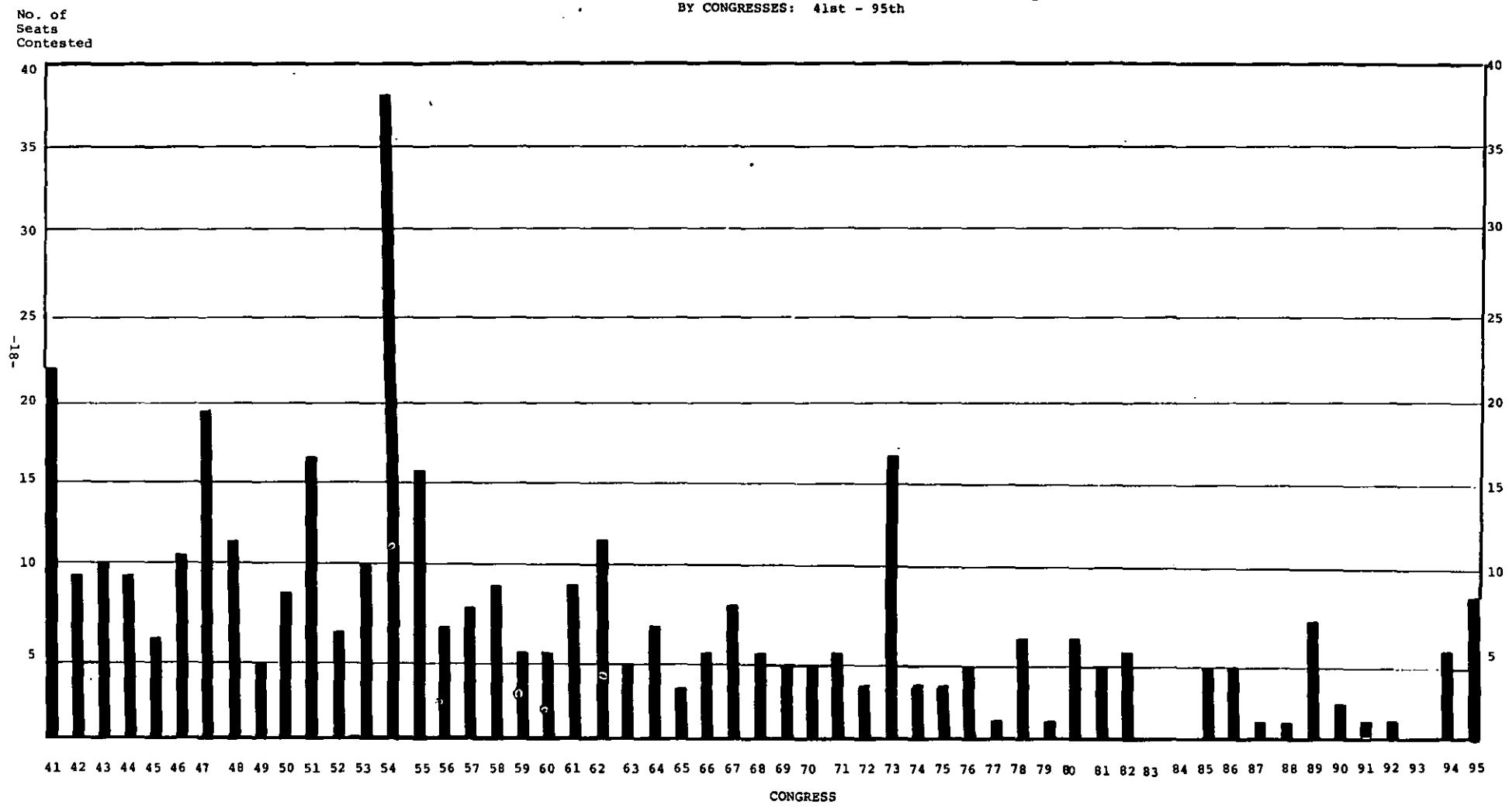
[1] John T. Dempsey, Control by Congress Over the Seating and Disciplining of Members, Ph.D. dissertation, University of Michigan, 1956, pp. 123-24.

Figure II-1

NUMBER OF SEATS CONTESTED IN THE U.S. HOUSE OF REPRESENTATIVES
BY CONGRESSES: 41st - 95th



Unlike the Senate, the House has made a number of attempts at establishing formal procedures for handling election contests. After about a decade of experience in trying to resolve election disputes using ad hoc procedures, the Congress in 1798 enacted its first law providing procedures to guide the House in handling election contests. The law, which was renewed by the next two Congresses, provided for a uniform mode of taking testimony and for compelling the attendance of witnesses by the House Committee on Elections. The law, however, lapsed in 1804 when the Senate failed to pass another renewal as the House had done. Not until 1851 did the Congress act again to establish procedures for deciding House election contests.

The period between 1804 and 1851, when no law existed to govern the handling of House election contests, has been characterized at best as "loose and unsatisfactory"[1] and at worst as a period of "chaotic irregularity" and partisanship.[2] According to one source during this period

> there was no uniformity in the conduct of election cases, either in the manner of assembling the evidence, conducting the hearings, or the principles controlling the result. Proofs were prepared, and evidence taken, generally in accordance with practice in the states wherein contests arose. In certain cases, affidavits were used, taken without notice or opportunity for cross-examination. In all instances, testimony was voluntary, since there was no way to enforce the attendance of witnesses or compel them to answer questions.[3]

The act of 1851 (2 U.S.C. 201-226), as amended, governed the disposition of contested elections in the House until replaced by the Federal Contested Election Act of 1969. The 1851 act provided that any person intending to contest a House seat must, within 30 days after the election result

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[1] Henry L. Dawes, "The Mode of Procedure in Cases of Contested Elections," Journal of Social Science, Vol. 2 (1870), p. 61.

[2] C. H. Rammelkamp, "Contested Congressional Elections," Political Science Quarterly, Vol. 20 (1905), p. 425.

[3] John T. Dempsey, Control by Congress Over the Seating and Disciplining of Members, Ph.D. dissertation, University of Michigan, 1956, p. 53.

is officially announced, give formal written notice of the contest to the person holding the certificate of election. The notice had to specify all the grounds on which the contest was based. The law also required that the notice of contest was to be replied to within 30 days, with the contestee admitting or denying the facts alleged in the notice and stating specifically the grounds on which he rested the validity of the election. The law further provided that testimony in the case must be taken within the next 90 days, with the contestant taking testimony during the first 40 days, the contestee taking testimony in the next 40 days, and the final 10 days being set aside for the taking of rebuttal testimony by the contestant. Any such testimony could be taken before any Federal judge, judge of any state court of record, before any mayor or recorder of any city or town, or before a notary public. Witnesses could be subpoenaed by either party to the contest, and any person subpoenaed who failed to appear was made liable to punishment by fine or imprisonment. Cross-examination of witnesses was permitted, and all testimony was required to be transcribed. A transcript of all testimony was required to be sent to the Clerk of the House of Representatives who was empowered to open the testimony in the presence of the contesting parties. The Clerk was then to transmit all material relevant to the contest to the House, which was then to refer it to the Committee on Elections.

The act of 1851 as originally written and later amended was silent about procedures once all the materials had been referred to the Committee on Elections. Rules adopted later prescribed the manner in which election contests were to be heard by the Committee on Elections and required that final reports in contested election cases be submitted to the House by the Committee no later than six months from the beginning of the Congress to which the contestee was elected. This latter rule in subsequent Congresses was held to be directory only, and not mandatory, since the Committee on Elections often did not receive all testimony in cases until after the six months deadline had passed.

Dissatisfaction with the slowness of the process under the amended legislation of 1851 led the Congress in 1969 to replace the old act with a new law (2 U.S.C. 381-396). In attempting to remedy some of the alleged defects in the old law, the new act provides that a contestee, instead of answering a notice of contest within 30 days, may have the option to file any of several defense motions. They are: 1) insufficiency of service of notice of contest, 2) lack of standing of contestant, 3) failure of notice of contest to state grounds sufficient to change result of election, and 4) failure of contestant to claim right to contestee's seat.

In addition, the new law provides that the contestee may file a motion for a more definite statement if the notice of contest is vague or ambiguous. The time period for the taking of depositions was also shortened from 90 days to 70 days. The 1969 law also codified some of the rules governing the hearings before the Committee on House Administration and provided for the reimbursement of reasonable expenses to the parties involved in the election contest. The new law like the old law does not require the Committee on House Administration to make a final report on a case within any specific time period. All House election contest cases since 1969 beginning with the Tunno v. Veysey case (all case citations appear in Appendix D) have been heard under the new law.

- The Courts and the History of Contested Elections and Recounts

Although losers of close elections often go to court in an attempt to win, the U.S. Supreme Court has consistently held that the question of title to a seat in the U.S. Congress is "a non-justiciable" question. The authority of each house of the Congress to decide contested election cases is final and not subject to review by the U.S. Supreme Court. State courts have also generally adopted the position that federal legislative elections are not contestable in state courts and that contestants must look to the appropriate house of the Congress for relief.

While holding that contests over federal legislative seats are "non-justiciable," the Court has been willing to decide procedural questions involving election contests for federal office. In Roudebush v. Hartke, the Court decided that the section of the U.S. Constitution making the Senate the judge of its own membership does not prohibit a state from conducting a recount of Senate election returns. The Court argued that when a statutory recount procedure is designed as a procedure to guard against irregularity and error in the tabulation of votes, it is an integral part of an electoral process and is therefore a legitimate exercise of state authority to regulate elections under Article I, Section 4, of the U.S. Constitution. Hence, the states clearly have the authority to provide for administrative recounts of federal elections.

Despite the fact that the Supreme Court decision in Roudebush v. Hartke can be interpreted to mean that state administrative recounts of federal legislative elections are permissible and that attempts to resolve election contests in state courts are probably fruitless, state courts and election agencies seem to be making decisions on requests for state

recounts of federal elections which are inconsistent with the majority position in Roudebush. Furthermore, a number of states do not statutorily provide for administrative recounts in general and/or primary elections for congressional office. In states that do provide for such recounts, they are only available in the context of contest proceedings. And to the degree that courts in those states adopt the position that they lack jurisdiction to hear contests over federal legislative elections, the opportunity to recount a federal election is effectively precluded.

The most recent case of this type is Pierce v. Pursell Michigan contest in which the state Attorney General ruled that Michigan statutes provide for recounts of only primary elections for federal legislative office. His opinion was upheld by state courts. A similar and more recent situation is the Young v. Mikva Illinois contest over the 10th Congressional seat. The Illinois Supreme Court held that state statutes did not provide for contesting elections to the office of Representative in Congress and, thus, that the recount provisions of the Illinois Election Code could not be used to recount the election between Young and Mikva.

Louisiana state courts, on the other hand, have assumed jurisdiction in an attempt to resolve election contests for two House seats in recent years. Following the 1974 election a contest over the 6th district House seat resulted in the ordering of a new election by the Louisiana Supreme Court. In that case a voting machine failed to register more votes than the difference in the final total vote in the district, thereby throwing the accuracy and determinacy of the final result into doubt. In 1976 the Louisiana courts accepted jurisdiction in the case of Moreau v. Tonry, a dispute over the Democratic nomination for the 1st district House seat. The highest court of Louisiana rejected Moreau's claim that widespread voting irregularities and fraud had deprived him of the nomination and found that Tonry was the legitimate nominee on the basis of the primary vote. Both Louisiana cases presented issues that other state courts probably would have said were not justiciable under their state laws. Consequently, with the highest courts of different states reading the Roudebush v. Hartke decision differently, congressional candidates in some states do have state recount and/or contest proceedings open to them, while in others the only way to get an election recounted is to file a contest with the appropriate house of the Congress.

In summary, this brief history shows that no way has yet been devised to resolve contests to the satisfaction of all parties without appeal to the Congress, and that the Congress cannot always be assured of the administrative propriety of the elections.

Chapter III

DESCRIPTION OF THE CONTESTED ELECTION AND RECOUNT SYSTEM

O Overview

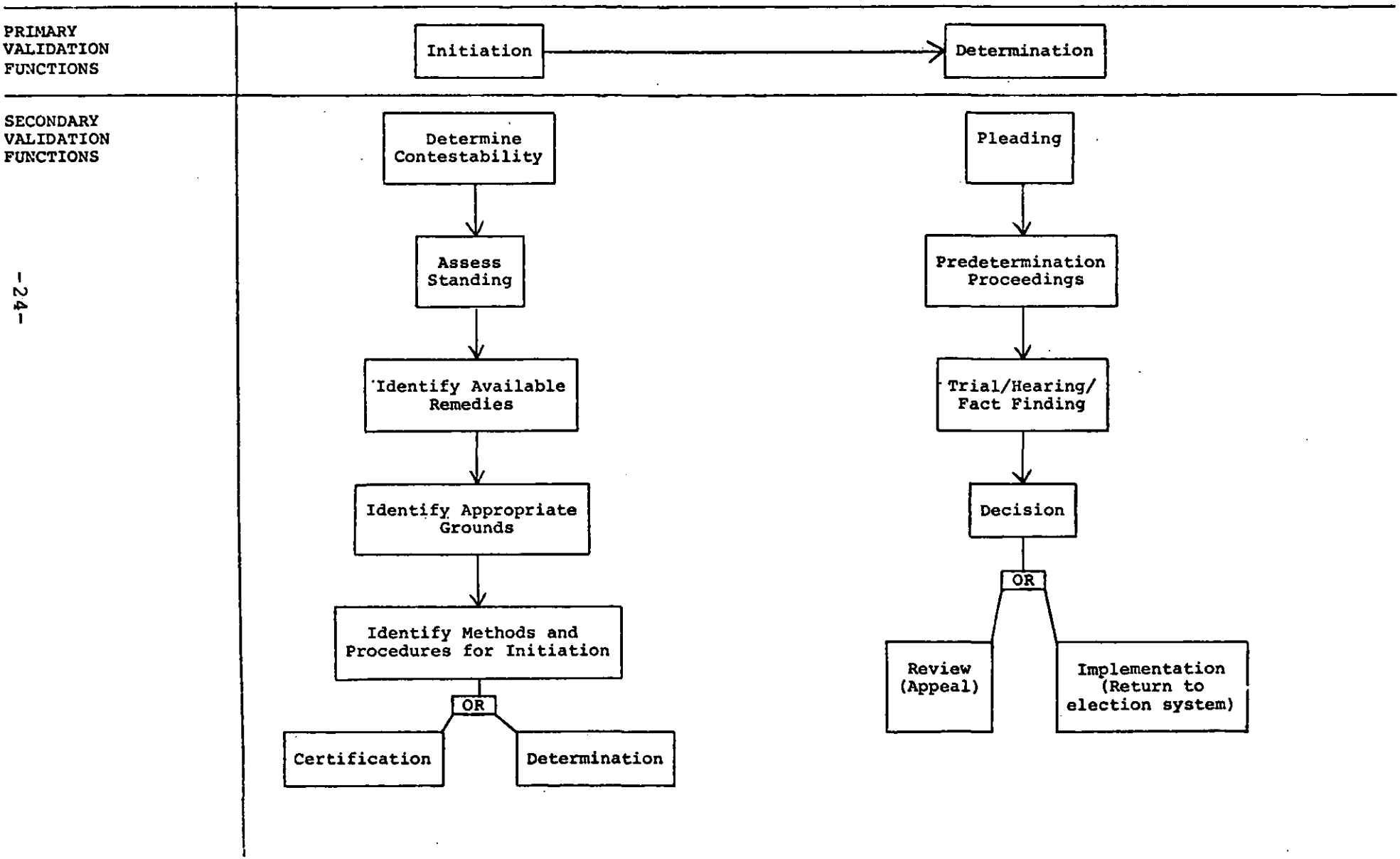
One important task of this project was to describe contests and recounts as they are conducted in practice in order to identify laws and procedures that appear to cause problems or lead to notorious contest cases. Conversely, we hoped to identify features of state systems that appear to prevent such problems. Describing systems in these terms can best be done functionally, i.e., by identifying just what it is that each system element is supposed to do (define functions) and how each element fits into the overall system. The early portions of this chapter describe the recount and contest system functions.

The functional analysis was used as the organizing concept for all project data collection, analysis, and reporting. Questionnaires used in surveys of the states and the memoranda of law were organized to describe the ways in which each state performs each function. Differences between the states were identified for each function based on a review of laws. Since we expected to be able to group states for further analysis according to the type of system they use, this preliminary functional analysis was an important activity performed jointly by the project staff and the advisory committee. The result was the functions presented in Figure III-1, and the typology of state recount system presented in this chapter.

The system typology was developed largely for convenience in presenting information. It was also expected that there would be systematic differences between the states in the performance of the contested election system, and that states would be typed according to the characteristics that best predicted performance. The advisory committee and the project staff agreed that the criterion that best distinguishes the states is the accessibility of recounts. Contest systems, while not identical, perform in very similar ways, and tend to the same problems. Recounts, viewed as a special case of contests, are another matter; the ease with which recounts are initiated appear to be a good indicator of the underlying, operating philosophy of the election system as a whole. At one extreme, recounts are viewed as routine checks on the accuracy of the original count, desirable in close races to ensure the accuracy of the outcome. At the other extreme, the accuracy of the original count is presumed, and a call for a recount necessarily implies an attack on the officials who conducted it.

Figure III-1

CONTESTED ELECTION AND RECOUNT SYSTEM



It was found that, in general, states with the least accessible recounts have the greatest contest and recount administration problems, the most localized and variable election procedures, and the least assurance of protecting the public interest. The section on system types describes the operation of each system and the record of the states in each group. More detailed information on each state is presented at the end of Volume II.

O Functional Model of the Contested Election/Recount System

Developing a functional model of the contested election and recount system requires considering the election system as a whole in order to determine just where this particular subsystem fits. Contests and recounts are treated as a normal error-checking and quality control function which is overarching and continuing with respect to the rest of the election process.

While both the laws and procedures governing contests and recounts vary widely from state to state, the process does share certain top-level uniform characteristics. Furthermore, both recounts and contests share the same overall structure, with recount, civil suit, contest before an administrative board, etc., all being different but related mechanisms by which the state or a candidate can attempt to obtain an official determination of the accuracy of the originally-reported returns. Figure III-1, "Contested Election and Recount System," identifies the functions involved in the validation of election outcomes. The relevant sections of this report are organized along the same lines.

As can be seen from the figure, only two primary functions were identified: (1) initiating some kind of challenge to the original returns; and (2) determining the outcome of the contest including the administration of an election recount.

Initiating a contest is a sequential process that must be followed in order to determine whether or not a contest or recount is possible, and if so, how to proceed. These steps are:

- Determine Contestability. Whoever wants to contest a particular election needs first to determine whether the election in question is contestable at all, and if so, how.

- Assess Standing. This step is straightforward, occasionally complex. Standing is sometimes accorded only to the losing candidate with the

highest number of votes, sometimes to any losing candidate, and sometimes to any elector. The particular race, and the jurisdiction in which it occurred, will determine the list of individuals with standing to request a recount or file an election contest.

- Identify Available Remedies. Someone contesting the outcome of an election may have several possible remedies available. These include a simple recount to check the accuracy of the results and to reverse the outcome if the results change. If the recount is not an appropriate remedy, other possibilities include the invalidation of the entire election to permit a rerun, the granting of the seat to someone other than the candidate with the certified largest total, or some other action such as suing under common law provisions like quo warranto. Again, the availability of individual remedies will depend on state and federal laws applicable to the particular race.

- Identify Appropriate Grounds. The possible grounds for contesting an election are fairly broad, and state laws vary widely concerning the major grounds that must be specified at the time a contest is filed. In many jurisdictions, for example, grounds are not required in filing for recount. In others, specific errors in tabulation or specific fraudulent actions must be alleged. In many jurisdictions, a close margin (with "close" being defined differently in different jurisdictions) constitutes sufficient grounds for a recount. Contests, on the other hand, always require some specific grounds, and the definition of what constitutes sufficient grounds for reversal of an election or the granting of other possible remedies varies widely.

- Identify Methods and Procedures for Initiation. This step involves learning the details of local procedures or House and Senate rules for initiating a contest or request for recount. It ranges from the identification of deadlines to the preparation of work in the appropriate format and on the appropriate forms, as well as such simple but important matters as determining where and how to file.

- Certification. If the contest action fails to survive any of the above tests, the original certification is normally affirmed.

- Determination. If the contest action survives all of the above procedural steps, it goes into the determination phase, including the administration of a recount (where appropriate) or appropriate judicial or administrative proceedings.

The determination phase of the recount and contest process begins only if all of the substantial procedural hurdles are successfully jumped. Regardless of the forum before which requests for recount or actual contest proceedings are heard, the process is functionally the same, and tends to resemble the normal judicial process for handling civil cases. In fact, in many states election contests are handled as cases in equity, or as special cases under rules of civil procedure. In a few jurisdictions, recounts must be requested through the courts in proceedings that are distinguishable from contests only in that the remedy sought is a retabulation of the votes. The determination process can be broken into the following major functions:

- Pleading. This is the point at which a case or request for recount is filed according to the procedures identified under the initiation phase. It may involve filing a simple request for recount with a county or town clerk or secretary of state; filing a civil suit in the appropriate court; filing notice of contest with some statutorily designated administrative body; or filing notice of contest and initial documentation with either house of Congress.

- Predetermination Proceedings. The format of these proceedings will vary widely from jurisdiction to jurisdiction, and case to case. They cover the filing and ruling on pretrial motions, where a trial is involved, and all other preliminaries that may fall between the original filing of the case and a trial or hearing. The principal element common to all cases in this stage will be discovery proceedings. In recount cases, discovery may or may not exist, depending on local rules covering grounds (e.g., if grounds must be stated and shown in order to obtain a recount, there will probably be discovery as part of the determination phase; otherwise, there probably will not).

- Fact-Finding. The fact-finding function is the point at which all relevant materials are formally presented in the appropriate forum. In the case of a recount it may be as simple as a review by an administrator to determine that the initiation process has been properly followed and that the facts warrant a decision, or it may be a formal hearing at which a case for recount is made. In contest cases, the fact finding stage is normally a civil trial, a similar quasi-judicial proceeding before an administrative body, or a staff investigation by a house or senate committee with election jurisdiction.

- Decision. Once the fact-finding is over, the forum with the ability to act must render a decision. This decision will be for or against the initiator--i.e., for a recount or for granting of relief to a contestant, or not. In either event, the decision is either appealed, or it is implemented by return to the appropriate stage in the election process.

- Review. This function is the appellate process. It may involve an administrative review of the decision of a hearing officer, or normal judicial appeals through the statutorily designated route. In some cases no possible review exists.

- Implementation. When the contest or request for recount has been heard and decided, and whatever review process is called into play has finished, an ultimate decision is ready for implementation. This implementation will take the form of a return to some point in the overall election system. A decision to recount involves the return to the tabulation function. A decision to either uphold or reverse the original certification outright requires a return to the certification function for action at that point. A decision to invalidate the election and start over requires that the entire process be rerun. In any event, at this point the case is out of the process by which the merits of a contest are decided and acted upon, and back into some point in the normal election system.

The rest of this chapter is devoted to a description of the contest process in the states, descriptions of recount systems and a discussion of how these systems perform at the state and local level. This information was used heavily

in the Volume II recommendations to the states. Volume I conclusions and recommendations, being aimed primarily at congressional contests, do not draw heavily on the materials of this chapter.

O The Contest Process in the States

Election contests are permitted by statute in at least some elections in all fifty states and the District of Columbia. In slightly more than half of the states any election, general or primary, may be contested. In the remainder of the states, contests are permitted over selected elections only. Typically, the elections which may not be contested at the state level in these states include federal legislative elections (usually the general election) and elections involving state or local propositions. Only rarely is the contest process uniform in any of the fifty states. The most common pattern is for contests over state legislative office to be decided by the appropriate house of the legislature, with other contests to be tried within the state judicial system. Hence, the office being contested and the election involved (general or primary) will often determine the availability of a contest forum at the state level and which contest process is to be used.

Δ Contests Over Federal Office

State statutes provide for the determination of election contests over all federal offices in 24 of the 50 states (see Table III-1). These states claim that they have the authority to handle contests over congressional offices, despite the fact that the preponderance of legal authority surveyed in this study would hold that the contest process, since it deals directly with the question of title to a seat in Congress, is an exclusive power of the individual houses of Congress under Article I, Section 5, of the U.S. Consitution. Although 24 states claim that they have jurisdiction over contests for all federal offices, in only a few of them has this claim ever been tested in recent years. Contests over U.S. Senate seats were heard by state courts after the 1974 general elections in New Hampshire and Oklahoma, while a general election contest over a U.S. House seat was tried in Louisiana state courts in 1974. Primary election contests over the nomination for U.S. House seats have been determined recently in Iowa (1974), Louisiana (1976), New Jersey (1976), and New York (1972).

In several other states, however, attempts to contest federal elections resulted in court decisions which invalidated state claims to jursidiction over all contests for federal office. State courts in California, Illinois, Michigan, and

Texas all have held recently that contests over federal legislative office are exclusively under the jurisdiction of the appropriate house of Congress and, thus, the states lack the authority to enact statutes defining processes for contesting federal legislative offices after general elections. The trend has been one of the state courts, when presented with a dispute over state jurisdiction, ruling that the states do not have jurisdiction over general election contests for federal legislative office. If state authority had been challenged in most of the 24 states claiming jurisdiction over all federal elections, undoubtedly only a small number of states would have been able to sustain this claim.

State claims of authority over primary election nomination contests for federal legislative office are easier to sustain than those involving jurisdiction over federal election contests for federal legislative office. Ordinarily, primary elections determine who shall be a party's nominee in the general election and not who shall hold title to a seat. Hence, a primary election contest involves a question of who is to be placed on the ballot and not who shall be certified as the ultimate winner of an office. In addition, primary elections have traditionally been regulated almost exclusively by the states under Article I, Section 4, of the U.S. Constitution. The Congress has only rarely assumed jurisdiction over contests for Senate or House seats growing out of primary elections. In 1970, for example, when presented with a Democratic primary election case from the 1st District of Colorado, the House Administration Committee dismissed it saying that it lacked jurisdiction to hear it because it involved a nomination and not the title to a House seat. Thus, it is no surprise, as Table III-1 reveals, that all but nine of the fifty states provide by statute for primary election contests over federal legislative offices.

As was indicated above in the history section of this report, in the Electoral Count Act of 1887, Congress delegated expressly to the states the authority to determine contests over the office of presidential elector. And, 41 states and the District of Columbia have enacted general or specific contest statutes applying to presidential elector contests. The nine states which do not permit state contests over presidential elector appear, for the most part, to have simply failed to provide for presidential elector contests through oversight.

Δ Initiation of the State Contest Process

All fifty states and the District of Columbia provide by statute for the process of initiating an election contest.

The statutes in varying degrees of specificity 1) define standing to initiate election contests, 2) enumerate the permissible grounds for contesting elections, 3) spell out the deadlines for filing contests, 4) prescribe the form which contests must take and mandate notice requirements, 5) indicate what, if any, requisite conditions must be met in filing a contest, and 6) prescribe the forum with which the contest is to be filed. As we discuss the initiation process below, it will be abundantly clear that the state statutes do not uniformly deal with any of these six topics. In the 24 states which claim authority to handle contests over all federal elections, these are the statutes which govern initiation of federal election contests.

▲ Standing

Standing to bring an election contest has traditionally been restricted to individuals who can rightfully claim that they have been injured in some way by the outcome of the election. In some states which narrowly define the parties interested in an election outcome, the statutes will say that only a defeated candidate has standing to initiate an election contest. And defeated candidates are only the ones who could reasonably lay claim to a nomination or an office if an election contest was successful. Hence, candidates who run third in a general or primary election race for a single-occupant office, or those who finish lower than the first runner-up in a race for a multi-occupant office would lack standing to initiate an election contest over the office in question. Quite a few states, however, are more liberal in defining who might be considered to be an injured party in an election contest. In some, all candidates, regardless of place of finish, are accorded standing, while in others, any elector may bring an election contest. Electors are generally defined as registered voters who voted in the election being contested. The trend has been in the direction of permitting any elector or a designated number of electors to initiate a contest so as to facilitate the possibility that elections on issues or propositions can be contested. In only five states (New York, Michigan, Rhode Island, Texas, and Wisconsin) do prosecutors have the authority to initiate election contests in their official capacity. And in only two others (Hawaii and South Dakota) do political parties have the standing to bring contests. No explicit attempt has been made to grant election officials the standing to initiate contests, because it is generally thought that election officials have standing as electors in the many states which accord standing to electors.

Standing provisions are generally uniform within almost all of the states. Although the states vary over which offices

may be contested in state proceedings, standing to contest tends to be the same no matter which office is to be contested. The most common deviation from this point occurs in some states where only a defeated candidate or any candidate may contest an election over a nomination or an office, while only any elector or a designated number of electors may bring a contest over an issue or proposition. In a few rare cases standing will vary for different offices because different statutes will have been written at different times to provide for election contests. A particular statute will then reveal the preferences of the state's lawmakers about standing at the time of the statute's passage, and those preferences may not be in accord with those of previous lawmakers.

After examining the standing to initiate election contest provisions of the fifty states and the District of Columbia, we conclude that the standing provisions are sufficiently liberal in almost two-thirds of the states in that any elector or a designated number of electors may bring an election contest over any of the contestable offices. In the other one-third of the states, provisions which grant standing only to defeated candidates or any candidate, standing is restrictive and thus may affect the availability of the contest system as a mechanism for validating elections.

▲ Grounds

Most of the states require that the grounds for bringing an election contest be specified during the initiation of an election contest. In the few states which do not require the alleging of any grounds, contestants, presumably, make it a practice to allege some grounds in order to have any likelihood of succeeding with the contest. Almost one-fourth of the states require that grounds be specified in initiating a contest, but have statutes which are silent as to which grounds may be employed. Hence, although any grounds appear to be permitted in these states, the absence of statutory guidance means that the forums hearing election contests have to rely on precedent and common sense in judging whether proper grounds have been alleged by a contestant. The failure of the statutes to enumerate permissible grounds for contesting elections may also have the consequence of encouraging contests based on frivolous grounds, for a contestant can never really know whether he or she has proper grounds for a contest until he or she tries them.

The statutes in about 31 states specify the grounds which may be employed in initiating election contests. Among the

grounds most frequently specified are: 1) allegations of error, 2) allegations of fraud, 3) allegations of malconduct by election officials, 4) ineligibility of the contestee, 5) illegal votes received, and 6) legal votes rejected. For the most part, offenses allegedly committed by a contestee like corrupt campaign practices or bribery are not permissible grounds for bringing an election contest. All of the most frequently specified grounds but one (ineligibility of the contestee) are directly related to the conduct of the election by election officials. Thus, the contest process largely becomes a way in which candidates or electors may hold election officials accountable for errors they make, whether they are willful or inadvertent. And, of course, this means that election officials as well as contestees must often be treated as adversaries by contestants when they initiate an election contest.

In the approximately 31 states which spell out the permissible grounds for bringing an election contest, it is a common pattern for whatever grounds are specified to be applicable to all elections which are defined as contestable by the state statutes. Only in a few states do the statutorily permitted grounds vary from office to office, or by type of election (primary vs. general). This situation typically occurs in states like Alabama, Illinois, Missouri, New Hampshire, New York, and Tennessee where two different statutes govern primary and general elections.

These approximately 31 states also vary in terms of the number of permissible grounds on which election contests can be based. Several states are very liberal and permit election contests to be brought on the basis of as many as six or seven different categories of grounds. These grounds will typically cover errors by election officials, fraudulent activities by election officials or candidates, and violations of election or corrupt practices laws by candidates. In short, almost anything improper, whether inadvertent or willful, can be the basis for bringing an election contest. At the other extreme are the states which restrict the number of grounds which can be the basis for election contests. If a state chooses to have only one or two grounds for bringing contests, it is highly likely that fraud by election officials or candidates is one of them. This ground is one of the hardest to allege successfully because of the evidence needed to sustain it. Hence, it becomes a ground that is rarely used.

Grounds, thus, can be factors affecting the availability of the contest process. If they are specified in the statutes and numerous, the forum in which a contest is initiated will have an ample number of ways to assume jurisdiction to hear

a contest. On the other hand, if the statutes are silent about permissible grounds, the forum in which a contest is brought has much greater freedom to find ways to avoid assuming jurisdiction in a election contest. In the absence of statutory authority to proceed, we are assuming that contest forums will not charge ahead on their own.

▲ Deadlines

State statutes, for the most part, set specific deadlines by which time a contest petition must be filed. The deadline will vary quite often by type of election and the office being contested. For example, it is quite typical for deadlines for primary election contests to be shorter than deadlines for general election contests. This is particularly the case in those states which hold primaries in September or October, leaving little time for the resolution of a contest before the November general election. The deadline for general election contests over state legislative seats are usually longer than they are for other offices because these contests cannot be heard by the legislature until it convenes, which is generally sometime in January following a November general election. For primary election contests, the deadlines for initiation range from less than one day after the election (Rhode Island) to as long as one year after the return date of the election (Montana). Typical primary deadlines are in the neighborhood of 10 to 15 days after the election, and only about 15 states have primary contest deadlines shorter than the typical deadline.

General election contest deadlines, which are customarily longer than those for primary election contests, range from two days after the completion of the official canvass (North Carolina) to as long as one year after the return date of the election in Montana. The most typical general election deadlines are somewhere in the range of 20 to 30 days after the election. About 15 states and the District of Columbia have deadlines for filing general election contests shorter than the deadline employed in the most typical states.

Altogether, about two-thirds of the states have both primary and general election contest deadlines which we feel are reasonable. They are neither too short nor too long, thus ensuring both that a potential contestant has enough time to get a case together and that a contestee can feel assured that no contest will be filed after he or she has assumed office. Reasonable contest deadlines permit the scheduling of a contest hearing before any contestee will have taken office.

▲ Form for Filing

Initiation of a contest proceeding in the fifty states generally occurs in a form laid down by statute. The two most common forms employed by the states are: 1) a written petition or notice of contest and 2) a sworn affidavit or verified petition. In only a few states is any other form of initiation permitted.

The written petition or notice of contest type of form is used to initiate some or all contests in about 37 states. Use of this type of form typically involves framing a petition or notice which states which election is being contested, what standing the contestant has to initiate the contest, what grounds the contestant alleges as a basis for the contest, what evidence the contestant has related to the grounds of the contest, and what relief the contestant seeks. A sworn affidavit or verified petition type of form will generally include the same information as a written petition or notice of contest type of form except that the evidence presented to support the alleged grounds for the contest must be sworn to under oath by the contestant and/or verified by others who have knowledge of the evidence. In essence, the pleadings appear to need to be stronger under the sworn affidavit or verified petition type of form than other the written petition or notice of contest type of form. The sworn affidavit or verified petition type of form is in use in about 22 of the states for the initiation of some or all election contests.

An appeal from a recount type of form is employed in five states for some or all contests. Under this type of form the contestant must either allege that irregularities which occurred in the original tabulation were not cleared up in the recount or that new irregularities took place in the recount when initiating the contest on appeal. These appeals usually take the form of the written petition described above and present the same items of information.

Initiation of an election contest also involves the giving of notice of the contest to the party whose election or nomination is being contested, to other interested or affected parties, and to election officials who were responsible for administering all aspects of the election in question. State statutes almost always specify very clearly whose responsibility it is to notify the contestee in an election contest. The statutes, however, tend to be vague on who is responsible for notifying other interested or affected parties and election officials. Because many election contests are initiated as suits before judicial bodies, the natural tendency has been to regard the con-

testee as the one whose interests are at stake and that no one beyond the contestee has any real interest in the outcome of the contest.

The giving of notice to the contestee is most often the responsibility of the contestant. This is the case in about half of the fifty states. When notice is the responsibility of the contestant, the forum receiving the contest petition generally requires some tangible evidence that notice has been served before the forum will consider the petition completely filed in all respects. An acknowledgement of service signed by the contestee or his/her representative is generally regarded as the best evidence of service. In the other half of the states, a notice of the contest is served at the order of an official employed by the forum with whom the contest has been filed. Typically, this person will be a court or election official. After an election contest is filed, this official is to see that the contestee is notified that a contest is pending and of any legal requirements which the contestee must meet in order to protect his/her interests. In only two states could we find no provisions requiring the giving of notice to contestees (Alaska in all elections, and Rhode Island in general elections only).

As we indicated above, the state statutes are often vague as to responsibility for notifying other interested or affected parties and election officials about an election contest. The most comprehensive statutes indicate that all other candidates for the office being contested are to be notified as well as officials who are involved in such election functions as tabulation and certification. The contestant may be required to give notice to these parties and officials, or in some cases, a court or election official will be called upon to notify these people. In the numerous situations where the statutes are vague about notification of other parties and election officials, the statutes often give blanket authority to the forum hearing the contest to require the attendance of other candidates and election officials. Thus, if the forum decided that their presence is necessary for the hearing of the contest, the forum will handle the necessary notices.

▲ Requisite Conditions

When filing an election contest in 22 states, a contestant must provide some type of security as a requisite condition. In the other states and the District of Columbia, a security deposit is not a requisite condition for initiating an election contest. Where security is required, it is to cover the expected costs of trying the election contest. Typically, the security may take the form of a cash deposit, a bond, or surety. In some cases, the statutes will specify

the dollar amount of the security or a dollar limit for it. In a number of states, the forum hearing the contest is given discretion to determine the amount of the security deposit.

To the extent that the states requiring a security deposit as a requisite condition for filing an election contest specify that the deposit should cover all contest costs, they are establishing a barrier to the initiation of election contests. This barrier can become rather large in the situations in which the election to be contested took place statewide or in a congressional district. A contestant would need to feel very confident of his/her case before risking a large amount of money in a contest over an election which took place in a large jurisdiction. Thus, the availability of an election contest process to validate an election outcome is restricted by statutes which require a security deposit as a requisite condition for filing an election contest.

▲ Forum for Filing

The forum for initiating an election contest varies across the fifty states, and even within states depending upon the election being contested. In only thirteen of the states and the District of Columbia is the same forum employed for the filing of contests over all elections which are contestable under state statutes. In the other 37 states, the election being contested will determine which forum is the appropriate one for the filing of the contest. The most confusing situations occur in four Southern states (Alabama, Mississippi, South Carolina, and Tennessee) where as many as four different [types of] forums are prescribed for the initiation of election contests.

The most common pattern in the states is for election contests to be filed with some local judicial body. This is the case for some or all contests in 42 states. Typically, the local judicial body will be a county-level court such as a Circuit, District, Superior, Chancery, or Common Pleas Court. And in practice the filing will be with the clerk of that court. State level judicial bodies are the forum for filing some contests in ten states. In these states, a state judicial body has been empowered to hear contests over some offices which are elected statewide or district-wide. In only Hawaii, New Hampshire, and Washington may election contests over local offices or propositions be filed with state level judicial bodies.

State and local election officials and/or boards serve as the forum for filing some or all election contests in 16

states. In three of these states, the forum is the same for all contestable offices (state level in Maine; local level in California and Oklahoma). In the other 12 states the pattern is one in which some or all contests over statewide or district-wide offices will be filed with a state election official or board, with contests over local offices being filed with a local election official or board or with a local judicial body. Only in three states (Delaware, Pennsylvania, and Vermont) are some contests filed with a state non-election official.

The state legislature is the forum for filing election contests over state legislative seats in 23 states. This is the case because the constitutions of these states have made each legislative chamber the judge of the election returns of its members. In 13 states the legislature is the forum for filing contests involving elections to some or all state executive offices. In all 13 contests over the governorship are filed with the legislature. In practice the filing is with an official of the legislature such as the Secretary of the Senate or the Clerk of the House.

Primary election contests in four states (Alabama, Mississippi, South Carolina, and Tennessee) are filed with the party committee responsible for running the primary. Except in Tennessee where all filings are with the state party committee, local level contests are initiated with a local party committee while statewide or district-wide contests over nominations are brought before the state party committee.

Although some states have chosen to prescribe that election contests over different offices be filed in different forums, this requirement, while confusing to some, does not appear to be a barrier to the initiation of election contests. These states have generally written their laws to ensure that an election contest will be filed with a forum that can efficiently handle all aspects of the contest. In particular, this means that contests over statewide or district-wide office are brought to a forum whose jurisdiction is statewide. States which require that all contests be filed with a local election official or judicial body have structured a situation where a contest over the nomination or election to a statewide or district-wide office must be pursued in a multiplicity of local jurisdictions at the same time. Such a contest system can serve as a very effective barrier to the bringing of a successful statewide or district-wide contest. As best we can determine on the basis of our research, such a contest system exists in about two-thirds of the states.

△ Determination in the State Contest Process

The process for determination of election contests is spelled out in varying degrees of detail in the statutes of the fifty states and the District of Columbia. Typically, the statutes will: 1) delineate the forums for the trial of election contests, 2) indicate what kind of procedures are to be used by the forums when they try the contests, 3) outline the ways in which costs are to be assessed at the conclusion of the contest trial, and 4) spell out the types of relief which the contest forums may grant to either the contestant or the contestee. In our discussion below we will show how these determination provisions vary across and even within the states. These provisions, of course, will be applicable to contests over federal elections in those states which claim jurisdiction over such election contests.

▲ Forum for Hearing

The forum designated to try an election contest will most often be the forum with whom the election contest was initiated. Contests over state legislative and/or executive offices are usually the exception to this generalization, with those contests being heard by a forum different than the one prescribed for the filing of a contest. In those contests the filing typically will be with an election official or administrative officer of the legislature, who then delivers all the materials related to the contest to the forum for hearing (usually one or both houses of the legislature) after it convenes.

As was the case with the forum for initiating an election contest, it is atypical for a state to designate the same forum for hearing all election contests. Only 13 of the states and the District of Columbia use one type of forum for the trial of contests. Alabama, Mississippi, and South Carolina appear to have the most complex systems, with four different types of forums being involved in the hearing of contests depending upon which election or office is being contested.

The prevalent pattern in the states is for most election contests to be tried by a local judicial body. This is the case in 26 states. Generally this forum will be a county level court such as a Circuit, District, Superior, Chancery, or Common Pleas Court.[/] State level judicial bodies are the forum for hearing some contests in 13 states, with only Hawaii and New Hampshire placing principal reliance on a state court for trying most contests.

State and local election officials and/or boards are the forum for trying some or all election contests in nine

states. In only one of these states (Maine) is the forum the same for hearing all contests. In four of these states the structure is one in which statewide or district-wide contests are heard by a state official or board, while contests over local offices are heard by a local election official or board. In the other four states a state or local election official or board tries only primary contests or contests over outcomes in races for presidential elector.

The state legislature has been designated frequently as the forum for hearing general election contests over some or all state executive offices and seats in the legislature. Fifteen of the states provide that contests over the office of Governor are to be tried by the legislature, with nine of these also having all state executive offices contested before the legislature. Contests over state legislative seats are tried by the appropriate chamber of the legislature in 34 states, under state constitutional provisions making each house the judge of the election returns of its members.

Primary election contests are tried by state or local party committees in only four states. In Tennessee all contests are heard by the state executive committee of the appropriate political party, while in Alabama, Mississippi, and South Carolina local contests are determined by the appropriate local executive committee and statewide or district-wide contests are tried by the appropriate state executive committee.

As we indicated above, only 12 states and the District of Columbia employ the same type of forum for determining all election contests. No matter what election or office is being contested, all contests will be tried in the same type of forum. In only two of the 13 jurisdictions using a single type of forum are all contests actually heard by the same forum. In the District of Columbia it is the U.S. Court of Appeals, and in Maine the Commission on Governmental Ethics and Election Practices. The process is more decentralized in the 11 other states using the single type of forum for hearing election contests. In these states all contests are heard by local judicial bodies which tend to be located at the county level. Which local judicial body will hear a contest is determined by the place in which the contestable grounds took place or by the residence of the contestant or contestee. Of these 11 single type of forum states, only Indiana, Oklahoma, and Utah have a system under which contests have to be tried in every jurisdiction in which election irregularities took place. All the other single type of forum states have statutes which provide for the handling of statewide or district-wide contests before one forum.

For all practical purposes, another 10 states tend to use a single type of forum for trying elections which are contestable under state law. The major exception in these states is that state legislative contests are to be determined by the appropriate house of the legislature. As was true in the jurisdictions which employ a single type forum for all contests, the predominant pattern in these 10 states is for contests to be heard at the local level by a judicial body. Only Hawaii and New Hampshire have a process where all contests but those over state legislative seats are tried by a state judicial body. The other eight have statutes, for the most part, which provide that statewide or district-wide election contests are to be heard by a single local forum. Only New York and Wyoming have contest systems which call for contests to be tried in every jurisdiction in which election irregularities took place.

The other 28 states employ two or more different [types of] forums for determining election contests. This situation means that the election--primary or general--and/or the office will determine which forum will come into play in the trying of contests. When different [types of] forums get involved in hearing contests, it is much more likely that procedures, rules of evidence, and perhaps even outcomes will vary for similar cases. In some states the statutes actually call for different procedures to be used in different types of contests. In others non-uniformity in procedures occurs because too many different [types of] forums are used. States which provide for the use of different [types of] forums are also making it more difficult for contests to be expeditiously heard, for most forums in multi-forum states probably will have little prior experience in the trying of election contest cases. States, on the other hand, which use single forum types of systems are much more likely to have cases heard by judges or officials with previous contest experience.

▲ Procedures

The actual procedures employed in the determination of contested election cases varies tremendously across the fifty states and the District of Columbia. In a number of states a recount or exhaustion of other remedies serves as a requisite condition for the trying of contests. In others no requisite conditions are called for by the statutes. Priority is given election contests by statute or custom in many states, while in others no priority is given to election cases. Procedures also vary in the states as to whether contestees or defendants in election contests are required to file an answer to a notice of contest or a contest petition. In some states the procedures provide for

various forms of discovery during the determination of the contest, while in others no forms of discovery are permitted. Jury trials are required or permitted in some states, whereas in others all judicial contests are heard by a judge or a panel of judges. In a few states the forum determining the contest may appoint a special master to hear testimony on the case and make recommendations to the forum, which the forum can use in deciding the case.

▲ Cost Assessment

Provisions for assessing costs in election contest cases also vary considerably across the fifty states and the District of Columbia. In a large number of states all costs are assessed against the contestant. In some of them payment of these costs will be guaranteed because the contestant was required to make some form of security deposit in order to initiate the contest. In others the forum determining the contest will at the conclusion of the contest enter an order requiring the payment of costs by the contestant. It is fairly common for security deposits to be refunded or for costs not to be assessed against the contestant if the contestant is successful in the contest.

Another common pattern is for the contestee to be held responsible for the costs of the contest if he or she loses the contest. Since contestees rarely have to make security deposits, the practice if a contestee loses a contest is for the forum determining the contest to enter a judgment against the contestee for the costs of the contest.

In a few states explicit provisions exist under which some level of government--state or local--is responsible for paying the contest costs no matter who wins the contest. In others state or local governments end up paying for the contest if the contestant prevails because of errors or fraud on the part of election officials. In either of these situations, the level of government which ends up actually paying the contest costs will generally be one where the forum hearing the contest is located.

▲ Relief Available

Provisions on the relief available from contest forums also differ across the fifty states and the District of Columbia. The most common forms of relief available are confirmation or reversal of the election in question. Some states have also given the forums determining election contests the power to nullify the original election. In some of them the forum has no power to order a new election and vacancies in an office are filled by whatever statutory provisions exist

for the filling of vacancies. In others the forum which has the power to nullify an election also has the power to order a new election.

It is common for limited types of relief to be also available in most of the states. Recounts are quite often a specific type of relief which will be requested and granted. In a few situations, particularly those involving contests over federal legislative offices, the only relief which a state contest forum may grant will be in the nature of fact-finding for ultimate use by the appropriate house of Congress.

Finally, a few states provide for assessment of damages against the contest loser as a particular form of relief which may be requested and granted.

△ Review in the State Contest Process

The process for review of election contest decisions, where available, is outlined with varying degrees of specificity in the statutes of the fifty states and the District of Columbia. The statutes generally will: 1) define the availability of the review process and who has standing to ask for a review of a previous election contest decision; 2) enumerate the permissible grounds for requesting a review; 3) spell out the deadlines for petitioning for a review; and, 4) prescribe the proper forum from which a review may be sought. In the discussion below, we will show how the review process varies across the states. In those states which claim jurisdiction over contests for federal office, these review processes govern such election contests.

▲ Availability and Standing

Review of previous election contest decisions is permitted by statute for some or all elections in 46 of the states. Only four states (Hawaii, New Hampshire, Vermont, and Virginia) and the District of Columbia preclude the opportunity to have a previous election contest decision reviewed. In Hawaii, New Hampshire, and the District of Columbia, no review is practicable since the contest itself would have been determined by the highest court in the jurisdiction. Vermont and Virginia have chosen to make lower court decisions non-reviewable in election contest cases.

In addition to the five jurisdictions which permit no review of election contests, another eight states allow a review of a previous contest decision only in restricted circumstances. The most common pattern in these eight states is for review to be forbidden except in cases involving the office of state legislator. Thus, review of contests is either not permitted

or severely restricted in about one-fourth of the states.

In general, election contests which were originally determined by a state legislative body or by the highest court of a state will not be reviewable. On the other hand, it is a common pattern for contest decisions made by local judicial bodies and by local or state election officials to be subject to review. The overall picture, then, is one in which decisions made by local judicial bodies, local election officials, or state election officials are reviewable in about three-fourths of the states.

Standing to request a review of an election contest decision has traditionally been restricted to individuals who can reasonably claim that they have been harmed in some way by the contest decision. Hence, how a state originally defines standing to initiate an election contest will limit who can ask for a review of the contest decision. The states which tend to limit standing to initiate an election contest to defeated candidates only restrict standing to ask for a review of an election contest decision to the direct loser of the contest (i.e., the original contestant or contestee). The states which more broadly define standing to initiate an original contest to include any candidate or elector have also adopted a more liberal view of standing to request a review of a contest decision. In those states any candidate or elector which is an interested party in the original contest has standing to petition for a review. Overall, about 25 of the states have these liberal provisions for standing to initiate the review process, while about 13 states have adopted the more narrow view of standing. The remaining 13 jurisdictions are those which forbid or restrict the availability of a review process.

▲ Grounds

Most of the state statutes are very vague as to what constitutes grounds for asking for a review of an election contest decision. Where there is some mention in the law of grounds, the grounds are most likely to be the same as in other civil cases. In only a few states are questions of law or fact enumerated as the grounds for petitioning for a review of a contest.

Given the absence of statutory guidance on the grounds for requesting a review of an election contest, it is up to the petitioner to determine the proper grounds to use in attempting to obtain a review of the original contest decision. Previous election contest cases which have been reviewed will often become the source of possible grounds to allege. Just as the petitioner is left with a great deal of discretion in choosing grounds for review, the forum charged with

the responsibility of granting review will need to use precedent in deciding whether or not to permit a review of the previous decision. To the extent that the statutes and/or precedent do not give much guidance on the grounds for review to the reviewing forum, the forum will probably shy away from granting review and adopt a position of judicial restraint.

▲ Deadlines

As was the case with grounds for review, the state statutes are also vague about the deadlines for petitioning for a review of an election contest decision. In a number of states where review is permitted, the statutes are silent about deadlines or will say that the deadline in election contest cases is the same as in other civil cases. Where the statutes are specific about a deadline for requesting a review, the most common deadline will be some number of days after the entry of judgment in the original contest. Most of the states which set a specific deadline in the statutes have deadlines in the range of ten to thirty days after the entry of judgment. Only a few states have deadlines which are either very short (immediately after entry of judgment) or very long (90 days).

▲ Forum

The forum for review of an election contest varies across the fifty states. In most states where review is permitted, the forum with which the petition for review is filed is either an intermediate level appeals court or the state court of final jurisdiction. If review is permitted of a previous contest decision involving a state legislative office, the appropriate chamber of the state legislature is usually the forum authorized to review the previous decision. In contests involving offices other than state legislature, the pattern in most states is for the same type of forum to handle all petitions for review of contest decision.

O State Recount Systems

As discussed in the overview of this chapter, modal or generic types of state contested election/recount systems were identified based on the review of the literature, legal materials, and procedural data collected from the states. It was initially expected that the form of the process itself would vary from state to state in important ways, and that states could be grouped into modal types according to the form of the local process. The general form of the contested election and recount system described in the previous section does, however, in fact hold generally, with state by state

differences being defined largely by degrees of access to the initiation process. Contest systems are all essentially similar, so states were grouped on the degree to which they provide access to the recount process.

In defining the recount system types it was discovered that a number of major differences exists between states, and between offices within the individual states. For example, not all offices in all states are subject to a recount at all, with Congressional elections being the most notable exception. The persons and groups having standing to initiate recounts also varies widely--from a state or local official who simply orders a recount when certain conditions exist to losing candidates to individual citizens. Available remedies also vary, but in this section recounts are the only remedy of interest. Fifteen states still require the filing of papers that allege or show that certain types of irregularities occurred in voting or tabulation that had the effect of causing an incorrect certification of the winner. Finally, the methods and procedures employed in initiating recounts varied widely.

In determining the outcome of a recount, three basic models were found. In many states, a recount is automatically triggered by a close margin, and the determination function simply involves conducting a recount itself and reviewing the original certification if it is determined it should be changed. In other states, recounts are virtually automatic on candidate demand, and the same rule applies. In the fifteen states that still require grounds for recount other than closeness of race, the proceedings tend to follow normal judicial procedures even if they are handled by an administrative body.

While the system is essentially the same for other offices in most states, such is not uniformly the case. States are grouped on the following four characteristics:

- Whether the official with the authority to order a recount must do so when certain specified conditions are met (mandatory vs. discretionary);
- Who can initiate (election official only, candidate, or elector);
- Who pays (public, initiating candidate or group, or losing candidate or group); and,
- Whether a recount must cover the entire district in question, or whether it can be selective with or without an opportunity for cross filing by an opposition candidate.

These characteristics describe the ease with which a recount can be obtained and the underlying assumptions about the purpose of the recount. At one extreme the recount is simply a way of ensuring the accuracy of the original count, and it is done at official initiative and public expense. A similar type provides recounts at public expense in close races on candidate demand.

More restrictive systems operate on the assumption that the original returns are correct, and that candidates challenging them are probably raising frivolous issues on the off-chance that some error will be discovered on recount. These systems usually treat the whole process as a game played by the candidate and the officials with stakes (fees or deposits), elements of chance (surviving procedural hurdles), and risk (very poor odds for the challenger).

We have already discussed our conception of what elections, contests, and recounts should accomplish. While restrictive access itself is insufficient evidence that the system fails to fulfill its obligations to the public, the association between recount system restrictions and failures to use recounts as a quality control device is very strong.

A brief description of five basic system types follows. The states that fall in each type of federal elections are shown in Table III-2. Detailed system descriptions and discussions of recent experience appear in subsequent chapters.

Type 1 Recount Systems are those in which recounts are mandatory, full or partial, at public expense and initiated by candidate or elector. Only two states have this system. The Secretary of State (Massachusetts) or the State Board of Elections (Rhode Island) will conduct a recount of part or all of a congressional district or the state on the demand of any candidates, or, in the case of referenda, on petition of groups of electors on a candidate's petition for recount. Recounts are conducted quickly and at public expense. In many instances, a recount would extend only to a recanvass of machines, or only to an examination of absentee ballots. In Rhode Island, the board of elections counts all absentee ballots centrally, and will normally defer the original validation and tabulation of all paper ballots if the unofficial machine totals are closed in order to avoid having to count them twice. In such a case, the original tabulation is conducted with representatives of all parties present and operating under the rules applicable to recounts, with opportunities to challenge individual ballots and have them segregated. Appeals of administrative rules are to the courts.

TABLE III-2

STATE SYSTEM TYPES FOR RECOUNTS IN FEDERAL ELECTIONS*

	Description of type	States
1.	Mandatory, full, or partial recount, at public expense, initiated by candidate or elector.	Massachusetts, Rhode Island
2.	Mandatory recount, if difference in vote between candidates is less than a certain figure, at public expense, initiated by election official, candidate or elector.	Alaska, Arizona, Colorado, Connecticut, D.C., Florida, Georgia, Maine, Michigan, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Utah, Vermont, Washington, Wisconsin, Wyoming
3.	Mandatory, full or partial recount, at candidate expense, initiated by candidate.	California, District of Columbia, Idaho, Indiana, Nevada, New Jersey, New Mexico, Kentucky, Oklahoma, Pennsylvania, Texas, Virginia, West Virginia
4.	Discretionary, full or partial recount, at candidate expense, initiated by candidate.	Alabama, Arkansas, Delaware, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Tennessee
5.	Discretionary, full or partial recount, at public expense, initiated by candidate.	Mississippi, New York, North Carolina

* These system types do not apply to elections for U.S. House of Representatives in states without statutory authority to recount those races.

Type 2 Recount Systems are very much like Type 1 above, but are distinguishable by the feature that recounts are automatically ordered if the outcome of the race is within a specified margin. The vote figure used to automatically trigger a recount varies from state to state both in terms of the percentage margin, and the base on which it is computed.

The responsibility for conducting recounts in this group also varies across states, and is sometimes vested at the state level and sometimes at the local level.

Type 3 Recount Systems conduct recounts on candidate demand. All regular election recounts in this group are initiated by candidates, with referenda recounts being either unavailable, initiated by petition of a specified number of electors, or on demand of the organized group responsible for placing the question on the ballot. Expenses are borne by the initiator, except that most of these states provide for state payment of recount expenses in the event that the outcome of the election is reversed on recount. In some states, the loser of the recount is assessed costs. In most cases, the initiator must post a cash bond before the recount begins. The candidate's liability may be fixed in absolute amount by statute, or it may extend to full cost of the recount. California is unique in this group by requiring that candidates post in case the estimated cost of conducting the recount for each day at the beginning of that day's proceedings. The initiator can halt the proceedings by simply failing to pay for the next day. Recounts may be conducted by state or local administrative officials, or by courts.

Type 4 Recount Systems empower the appropriate recount official to determine whether or not a recount will be held. Depending on the state, that official may be a state or local administrative official, a judge, or, in primaries, a party official or committee. Candidates must file for a recount, alleging some kind of error in tabulation or misconduct by polling officials. In some of these states misconduct on the part of opposition candidates can also be cited as grounds for obtaining a recount. Payment is as in Type 3 above. A recount, once ordered, may include the entire district, or may be selective with or without an opportunity for the opposition candidate to cross-file.

Type 5 Recount Systems, found in three states, have procedures much like those in Type 4 except that recounts are borne at public expense. The distinguishing characteristic of these last two types is that the official with the authority to order a recount can exercise substantial discretion in determining whether or not to do so, and in determining what constitutes adequate showing of apparent error or misconduct.

The following sections provide detailed descriptions of the system types.

Δ Type 1: Mandatory, Full or Partial Recount, at Public Expense, Initiated by Candidate or Elector

This system type, including only the states of Massachusetts and Rhode Island, provides for publicly funded recounts of any election upon the request of any candidate or group of electors having standing to file for recount. (In Massachusetts statewide races are excepted from this rule, and the difference between the apparent winner and the candidate requesting a recount must not exceed one half of one percent of the total vote cast. For statewide races, therefore, Massachusetts fits in system type 2, described below, but it fits here for all other purposes.)

Massachusetts and Rhode Island provide the most liberal access to their recount systems, and operate them least formally. Rhode Island provides mandatory recounts upon the request of any losing candidate in all races, and Massachusetts makes the same provisions (except as noted above) for any candidate who can obtain a sufficient number of petition signatures. The Massachusetts petition must bear the following number of signatures: 1) in towns under 2500 persons, 10 from each ward; 2) in towns or cities greater than 2500, 10 from each precinct in which recount is sought; in Boston, 50 from each ward; and in statewide races, 250 from each of four counties.

While the law governing recounts and contests in both states is fairly specific, both Massachusetts and Rhode Island are distinguished by the degree of informality in the whole process. Action is frequently taken on the basis of verbal request, although a formal written request may eventually be required for the record. Ground rules are worked out for each recount between the appropriate recounting authority, the candidates, and their representatives. Normally, every effort is made to accommodate the wishes of candidates for special schedules, ground rules, procedures, etc., within the constraints of general agreement among all concerned and the necessity to comply with the state laws.

Beyond these generalizations, there are some unique features to each of these two states. Since there are only two in this type, they will be considered separately.

▲ Massachusetts. Recount petitions are submitted to the municipal clerks by the sixth day following a primary or the tenth day following a general election. Petitions for statewide recounts are submitted to local boards of regis-

Table III-3

Type of Trigger Used to Initiate
Mandatory Triggered Recounts by State

Percentage of Total Vote	Percentage of Winner's Vote	Raw Vote	Sliding Scale
Alaska	Colorado	Arizona	District of Columbia
Arizona	North Dakota	Connecticut	Maine
Connecticut	Wyoming	Michigan	Nebraska
Florida		Utah	South Dakota
Georgia			
Montana			
New Hampshire			
Ohio			
Oregon			
South Carolina			
Vermont			
Washington			
Wisconsin			

Table III-4

Standing to Initiate Mandatory
Triggered Recounts by State

Election Official with No Waiver Permitted	Election Official with Waiver	Candiates or Electors
Arizona	Connecticut	Alaska
Colorado	Florida	District of Columbia
Michigan	Nebraska	Georgia
Oregon	South Carolina	Maine
Washington		Montana
Wyoming		New Hampshire
		North Dakota
		Ohio
		South Dakota
		Utah
		Vermont
		Wisconsin

trars for verification of petition signatures, and then forwarded to the secretary of state. Recounts are conducted by municipal clerks operating on their own authority in local races, or on the order of the commonwealth secretary in statewide races. Recounts are conducted publicly, and issues are confined to questions raised in the original recount petition. In addition to a simple retabulation of the vote, witnesses may be called and questioned. Therefore, the recount is almost automatically the first step in any contest action whether the accuracy of the count itself is in question. In practice, recount proceedings are suspended at any point at which the candidates can agree that the outcome has been determined.

▲ Rhode Island. Petitions are filed with the State Board of Elections, which conducts all recounts of races other than city and town elections. Unlike Massachusetts, Rhode Island does not require any statement of grounds, and the scope of issues raised in a recount is virtually unlimited. As in Massachusetts, the distinction between a recount and an administrative contest is not great, and the route to either is through the recount request. The statutorily-mandated procedure would have local races originally tabulated at the city or town level, and recounted on order of the state board. In practice, however, the State Board of Elections attempts to determine if there will be a recount based on tight machine totals shortly after the polls close on election night. If it appears that any losing candidate will file for a recount, the state board will defer the original tabulation of absentee ballots until the candidates and their representatives can be present. Then the original tabulation is run under rules for recount.

△ Type 2: Mandatory Full Recount at Public Expense, Triggered If Vote Difference is Close.

By far the most prevalent recount system in use in the fifty states and the District of Columbia is mandatory recounts at the expense of state and/or local governments if the difference in votes between candidates is less than a certain figure. As of January 1, 1978, this system is in use in 21 states and the District of Columbia.

This mandatory system (sometimes labeled the "automatic" recount) originated in Colorado in the early 1960's as a method by which election officials could recheck the original vote count and original canvass to ensure that the proper person had been nominated or elected. Since then the system in various forms has diffused to 20 other states.

In all states using this type of system a statutory figure determines whether or not a full recount shall be conducted

at public expense. The actual triggering figure varies across the 20 states employing this recount type. In some states the difference in votes between the winning and losing candidates must be less than a certain percentage of the total vote cast, while others require the difference to be less than a certain percentage of the vote cast for the leading candidate (see Table III-3). A few states specify that the triggering difference must be less than an absolute number of votes. Some others vary the triggering percentage or vote figure depending upon how many total votes were cast in the election, with the triggering percentage decreasing as the size of the electorate increases. Differences in turnout between primary and general elections are usually compensated for by having the triggering percentage for primaries higher than for general elections.

Although most states with mandatory recounts have devised comprehensive systems, several state systems do not cover all elections. For example, in Michigan the mandatory provisions apply only to statewide elections decided by 2,000 votes or less. So in 1976, the losing candidate in the 2nd Congressional District race was not entitled to a recount even though he wanted one, while if the U.S. Senate election had been decided by 2,000 votes or less, the loser would have "automatically" received statewide recount. Primary elections are also not necessarily covered. In New Hampshire, for example, primary election recounts are solely conditioned by a security deposit to cover recount costs, while general election races decided by one percent of the vote or less are recounted at public expense. Triggering margins may also differ depending upon the race recounted.

▲ Standing and Grounds to Initiate Recount Process

Under this type of mandatory recount system, standing is granted either to election officials, candidates, or electors to initiate the recount process. Several states require either a local or a state election official to commence the recount process by informing other election officials and affected candidates that the difference in vote is close enough that a recount is warranted. This decision is usually made on the basis of preliminary county or state canvasses of the vote. In some states, the recount may be waived by losing candidates, while in others a recount is to be held even if no losing candidate desires a recount (see Table III-4). Officials in states with no candidate waiver provision argue that the public's interest in obtaining an accurate election result outweighs any particular candidate's interest in the election and suggest that such a provision increases the public's confidence in the election system.

The other major approach to initiating a mandatory triggered recount requires that candidates and/or electors formally request a recount. Electors are sometimes given standing under this approach to ensure that close referenda elections can be recounted. In these states, the election official will not order a recount unless it is requested. Typically, to start the recount process a losing candidate or the requisite number of electors file a petition with either a state or local election official indicating that they have reason to believe that the election was close enough to meet the statutory trigger requirements, and thus [they] request a full recount to be conducted at public expense. The election official receiving the petition then verifies whether the election result meets the trigger requirements. If it does, a recount is ordered; if not, the official notifies the petitioner that the election fell beyond the trigger margin, and that a recount cannot be conducted at public expense. The official then usually informs the petitioner of other recount options available in the state.

In some states employing this candidate and/or elector demand approach, the petitioner must also claim to believe that a recount will change the election result or that sufficient mistakes or fraud took place in the conduct of the election to alter the outcome. Even though the petitioner may statutorily be required to make these allegations in the recount request, there is no evidence that election officials use these allegations or conduct any type of investigation in determining whether or not a recount should be conducted at public expense. Generally, they simply check to see that the vote margin is close enough to order the free recount, and are not empowered to judge the validity of the allegations in granting the request.

▲ Deadlines in the Initiation of the Recount

Because almost all mandatory recounts must be conducted prior to the issuance of any certificates of nomination or election, the initiation of the recount process is governed by strict time deadlines. In the states where the election official starts the process, the statutes usually require the official to order the recount as soon as it is clear that the race was close enough and no later than the day set aside for the official canvass of the vote. In practice, election officials generally order a recount as soon as they know one is warranted so as not to unduly delay the official certification of the election outcome. In states where candidates or electors initiate the process, the law spells out the actual deadlines for filing the petition. The specified period for filing is relatively short, with no state permitting a recount request to be filed beyond 10

days from the date of the canvass. Primary election deadlines are sometimes shorter than those for general elections since in many states nominees must be certified promptly in order to allow sufficient time to print the ballots and to mail absentee ballots for a general election.

▲ Notice to Parties

In most mandatory-triggered recount system states, the election official ordering the recount is responsible for notifying other officials and all parties interested in the election race that a recount is to be held. The contents of the notice usually include the reason, time and place for the recount, some basic ground rules, and the number of representatives each party is permitted at the recount. In the states permitting a waiver of the recount, the notice to the losing candidate also advises him of this provision and indicates how the waiver may be exercised, usually by signing an enclosed affidavit. Notices of recounts are generally sent by registered mail a certain number of days prior to the recount as specified by statute.

▲ Ordering and Supervision of the Recount

Under the mandatory triggered recount system, a state or local election official orders the recount, except in three states (Arizona, North Dakota, and Vermont) where a court is the forum charged with ordering recounts. The power to order a recount customarily extends to setting a date for the recount and deadlines for its completion. In general, under this system type the local election official ordering a recount of a county or lower level office is also empowered to supervise and conduct the recount. The powers of state election officials over district (multi-county) and state level recounts, however, vary tremendously in the 22 jurisdictions employing this system type.

The most common practice finds the state election official with exclusive authority to order the recount; canvass the recounted returns; and to certify the winner of the recount (see Table III-5), but leaves the supervision and the actual conduct of the recount to the discretion of local election officials. Some of these states have expanded the state election officials' role in the recount process to permit the issuance of rules, regulations, and procedures for recounts. This power has been afforded to state officials to ensure uniform procedures and standards in recounting each ballot in a single election. The states which have given this regulating power to a state election official have generally experienced restrained use of the power; officials have tended only to issue procedural guidelines

Table III-5

State Election Official/Board Role
in the Statewide Recount Process

Order Recounts	Promulgate Rules and Regulations	Supervise Recounts	Conduct Recounts	Canvass Recounts	Certification/ Recertification
Alaska	Alaska	Alaska	Alaska	Alaska	Alaska
Colorado	Arizona	Arizona*	Arizona*	Colorado	Arizona
Conn.	Colorado	D.C.	D.C.	Conn.	Colorado
D.C.	Conn.	Maine	Maine	D.C.	Conn.
Florida	D.C.	Mich.	N.H.	Florida	D.C.
Georgia	Georgia	N.H.		Georgia	Florida
Maine	Maine	Oregon		Maine	Georgia
Mich.	Mich.	Utah		Mich.	Maine
Montana	Nebr.			Montana	Mich.
Nebr.	N.Y.			Nebr.	Montana
N.H.	Ohio			N.H.	Nebr.
Ohio	Oregon			Ohio	N.H.
Oregon	Utah			Oregon	N. Dak.
S.C.	Wash.			S.C.	Ohio
S. Dak.				S. Dak.	Oregon
Utah				Utah	S.C.
Wash.				Vermont	S. Dak.
Wyo.				Wash.	Utah
				Wisc.	Vermont
				Wyoming	Wash.
					Wisc.
					Wyoming

*Applies only to recounts in jurisdictions employing electronic vote tabulating equipment.

which restate the law, and occasionally offer procedures not presently covered by the statutes. Some states, however, like Michigan and Oregon, distribute procedural guidelines which outline step-by-step procedures to be employed by local authorities when conducting recounts.

State election officials in a few of the states using this system type are authorized to supervise the conduct of recounts ordered by that official. In practice, representatives of the state official's office may thus be present at all recount sites, ready to render interpretations of election law and to help resolve difficulties. In all cases where a state official is authorized to supervise recounts, the official also has the power to issue rules, regulations, and procedures for recounts. Hence, representatives of the official issuing the rules and regulations can serve as interpreters of what the recount rules and regulations mean at the recount sites.

Finally, state election officials in an even smaller number of states employing this system, have direct control over all or part of the actual conduct of the recount. Nothing peculiar to this system type, however, required these four states to opt for a state-conducted recount system. Alaska has a centralized system of election administration for both state and federal elections, and the provision for state conducted recounts is consonant with the rest of the Alaska election system. Arizona, on the other hand, generally has a decentralized system of election administration, but has authorized the Secretary of State's office to recount punch card ballots on a computer furnished and programmed by that office. Because all but one county in Arizona use punch card ballots in county, state, and federal elections, in practice this provision gives the Secretary of State the power to supervise and direct the conduct of recounts in virtually all precincts. In Maine and New Hampshire, however, because all local election responsibilities are vested in the towns and municipalities, the canvassing of all county, state, and federal elections is done at the state level. Presumably because it would be too cumbersome to have recounts conducted in each town or municipality, these two states have chosen to centralize the conduct of recounts. The District of Columbia also fits into this category since the chief local election official is administratively equivalent to a chief state election official.

▲ Conduct of the Recount

In the 22 jurisdictions using the mandatory-triggered recount system type, full rather than selective recounts are usually conducted. For cases in which an election official initiates

a recount, the statutes require a full recount at public expense, since only a full recount can validate the accuracy of the original election results. Most states requiring a candidate or elector to request a recount at public expense provide that such recounts shall be of all election precincts. In the few states under this system type permitting selective recounts, those requested at public expense are customarily complete recounts. For example, the 1974 recount of the general election for Alaska Governor was complete even though the law permitted a selective recount.

Abandonment of a recount, once it has started, is not ordinarily permitted under this system type. In those states prohibiting waiver of a triggered recount, the recount must be complete, with appropriate canvassing of the recounted returns, and corrections made to the official records of the election. States permitting waivers of recounts insist that the waiver be exercised before the recounts begin. If not waived by that time, the recount proceeds as in non-waiver states. Where a candidate or elector must initiate a recount, the state statutes are hazy about whether abandonment is permitted or not. In practice, few recount petitioners are likely to be interested in abandonment since their recount expenses are minimized because the recount is at public expense.

Recounts conducted in mandatory-triggered system type states are customarily held in a central site in each county, except in those states in which a state official conducts the recounts. There, the most common practice is for the recount to be held at one site in the state capitol.

Regular employees of the office authorized to conduct a recount are customarily employed to do the actual recount. Where no regular election staff exists or is unavailable, the election official is empowered to hire extra employees to do the recount. Typically, the official will hire people who worked at the polls on election day and are thus already familiar with the ballot tabulation procedures. Consequently, few of these states provide either by statute or custom, for any special training or orientation on recount or tabulation procedures prior to the recount. Because of the decentralization of the process in almost all of the states using this system type, the actual procedures employed in recounts in the same states vary among jurisdictions. Except in those cases in which the state conducts or has representatives supervising the recount, the final authority on procedures and resolution of disputes over ballot validity is a local election official.

A number of the states which have gone over to using the mandatory-triggered recount system are attempting to make

the recount process primarily administrative rather than judicial. While ensuring that parties involved in the recount may have representatives or watchers present during recounts, election officials viewing themselves as protectors of the public's interest in fair elections have tried to run the recounts as careful and painstaking retabulations of the original election results with attorneys representing candidates permitted only a minimum amount of involvement in the process. These election administrators see the contest process rather than the recount process as the proper place for the resolution of disputes between the candidates. Hence, recounts under this system type commonly limit ballot challenges to those which could be exercised at the original count; do not generally deal with the legality of votes not counted or the illegality of votes counted; and severely restrict the opportunity to make exhibits or to make a record of the proceeding for future use in an election contest proceeding. Rightly or wrongly, these election administrators believe that such activities impede the conduct of an administrative recount and attempt to minimize their occurrence.

▲ Canvass and Certification of Recount Results

Once the votes are recounted under this system type, the official or board responsible for the conduct of the recount canvasses the vote for the election in question. The recanvassed election returns then become the official returns of the election replacing any previously canvassed returns. When the recounted election involves a local (county or lesser) office or proposition, the official or board responsible for the certification of elections then certifies the winning candidate or position on a proposition. If the recounted election involves a district (multi-county) or statewide office or proposition, the canvassing authority then transmits the recount results for its jurisdiction to a state election official or board for final canvassing. The state official or board then canvasses the returns. They become the official state returns replacing any previous returns. If appropriate, the state official or board then issues a certificate of election to the recount winner.

In the states conducting recounts after the original election results have been certified, no post-recount certification is necessary if the original winner is confirmed by the recount. If, on the other hand, the recount reverses the original results, the election official or board voids the original certificate of election and issues one to the recount winner. Because the voiding of one certificate of election and issuance of another has sometimes led to contests over the validity of the respective certificates,

the trend in these states has been to require the conduct of triggered recounts prior to the issuance of any certificates of election. Thus, only one certificate of election is ever issued for each election, ensuring that none of the parties involved in the recount has a legal head start over others making a claim to the same office in a contest.

▲ Payment of Recount Costs

Under the mandatory-triggered system type, all recount expenses incurred by state and/or local election officials are paid for out of the public treasury. Parties to the recount, as in all other system types, are responsible for paying their own legal and personal expenses associated with a recount. The major expenses which must be paid for by the public include: 1) wages of recount officials and their assistants; 2) computer rental or time; and 3) postage, telephone, and telegraph charges related to the recount.

Extra direct costs to the public are often minimized under this system type because the actual recount is ordinarily conducted under the supervision of officials already on the public payroll and by regular paid employees of the election official or board. In effect, the officials and employees are diverted from their regular tasks to perform the recount and must catch up with their normal work after the recount at no additional public expense. When temporary employees must be hired or regular employees paid overtime to work on a recount, extra costs begin to accrue. Computer rental or time is often also provided for in regular budgets and not treated as extra costs associated with a recount. Where central data processing facilities provide services to all departments, it is virtually impossible for election officials to ascertain what the additional computer-related recount expenses might be. Even minor expenses like postage, telephone, and telegraph charges are not customarily regarded as an extra expense because they are usually paid out of regular budget categories and not carefully accounted for.

Most of the states employing this system type expect the local governments (usually the counties) to pay the extra direct costs of the recount as well as the expenses buried among regular salaries and budgets for other expenses (see Table III-6). In these states, the legislatures have mandated a recount system without providing the extra funds necessary to pay for its implementation requiring special supplemental appropriations from the legislature if recount costs are too great to be absorbed by the election office, as was the case in Vermont in the 1976 recount for Lieutenant Governor. Five states provide for state payment of

Table III-6

Level of Government Responsible for
Paying Recount Expenses Under Mandatory
Triggered Recount Systems in Type 2 States

State Pays All	State Pays State Exp., County Pays County Exp.	County Pays All*	Town Pays All
Alaska	Arizona	Colorado	Connecticut
District of Columbia	Ohio	Florida	
Maine	Oregon	Georgia	
New Hampshire	Utah	Michigan	
	Vermont	Montana	
	Washington**	Nebraska	
		North Dakota	
		South Carolina	
		South Dakota	
		Wisconsin	
		Wyoming	

*In these states, the state government pays any costs which state officials incur while ordering or supervising recounts. These costs are usually minimal compared to the expenses the county governments must pay.

**The Counties pay all recount expenses in even-year elections when county offices are filled, while the state government pays for recounts in odd-year elections when only state offices are up for election.

mandatory recount expenses when the race involves a state office, otherwise counties are responsible for paying the expenses of county office recounts. The three states where mandatory recounts are conducted at the state level pay for them from the state treasury.

▲ Review of Recounts

Because recounts conducted under the mandatory triggered system type are generally regarded as administrative recounts, most of the states employing this type do not provide for any explicit review of recounts (see Table III-7). To obtain a review of a recount in these states, a losing party must undertake a contest proceeding against the recount winner. Of the seven states providing for recount reviews by statute under this system type five provide for judicial review of the recount, while two provide for review by an administrative tribunal. Hence, under this system type the losing party in a recount must either accept the recount results as certified or undertake the arduous and expensive route of contesting the election. Because grounds for a contest must be alleged to obtain the recount review and because in many cases few specific grounds can be demonstrated, very few recounts are ever reviewed through the contest process. In effect, once a recount is completed and the winner is certified, the election result is finally settled under this system type.

▲ Type 3: Mandatory Full or Selective Recount at Candidate Expense, Initiated by Candidate

This system type provides a mandatory recount if a candidate requests it and is willing to pay expenses. Presently in use in twelve states, it allows no discretion to administrators or judges as to whether a recount should be held. The philosophy behind this rule is that any candidate willing to pay for a recount ought to have the right to have it conducted because no public funds need be spent in providing the recount. Typically, other candidates may also join in the recount request if they are willing to share in paying the recount expenses. And, quite often, if the recount overturns the original election result, the candidates requesting the recount are not held liable for costs.

Unlike the mandatory triggered system type discussed above, recounts under this type may be selective, with different candidates having recounts conducted in different election districts. If a selective recount overturns the original election result, the states using this system type generally permit the losing candidate to file for a recount in the unrecounted election districts or require that the recount

Table III-7

Type of Recount Review Available
Under Mandatory Triggered Recount
Systems in Type 2 States

None*	Administrative	Judicial
Arizona	Maine	Alaska
Colorado	New Hampshire	Florida
Connecticut		South Carolina
D.C.		South Dakota
Georgia		Wisconsin
Michigan		
Montana		
Nebraska		
North Dakota		
Ohio		
Oregon		
Utah		
Vermont		
Washington		
Wyoming		

* In these states, a review of a recount is customarily obtained only by filing a contest action.

be extended to a full recount at public expense. The customary intent is to prevent elections from being overturned by partial recounts. Hence, under this system type, candidates carefully choose the election districts they want recounted to maximize the probability that the recount will overturn or preserve the election result and minimize the cost to candidates if the original election result ends up being confirmed.

In comparison to system types I and II, type III lessens the availability of recounts because of its requirement that candidates pay for recount expenses unless the original result is reversed. Particularly in large or populous states like California, Indiana, New Jersey, Pennsylvania, Texas, and Virginia, the requirement that candidates must pay for recount costs may inhibit recount requests in statewide races. Even in a smaller state such as Oklahoma, the costs of a statewide recount became a factor in 1974 when Ed Edmondson was deciding whether or not to seek a recount in his U.S. Senatorial race against Henry Bellmon. Instead of requesting an administrative recount, Edmondson contested the election only because the cost of coincidentally pursuing a recount and contest was too high. This system type gives an obvious advantage to candidates either who are wealthy in their own right or who can obtain the backing of major interest groups.

▲ Standing and Grounds to Initiate Recounts

Candidates and often electors have standing under this system type to petition for recounts. Only rarely may an election official order a recount without a request from a candidate or an elector.

The recount process typically begins with a losing candidate or some number of electors filing a petition with either a state or local election official indicating that they would like to have a full or selective recount. In several states, the recount request is filed with a local judicial body rather than an election official (see Table III-8). In seven of the twelve states using this type, a losing candidate for statewide or district office cannot request a statewide or district recount directly from a state official, but must file a recount petition with as many local (county and city) election officials or judicial bodies as exist in the state or district if a full recount of the election race is desired. Consequently, full statewide or district recounts are a rarity in these seven states because of the requirement for local filing of recount requests.

Table III-8

Type of Forum Available for Filing Recount Reqests
For Statewide or District Recounts in Type 3 States

State Election Official	Local Election Official	Local Judicial Body
Idaho	California	Indiana
Nevada	West Virginia	Kentucky
New Mexico		New Jersey
Oklahoma		Pennsylvania
Texas		Virginia

When filing a recount petition, a petitioner must specify whether the recount is to be full or selective. If selective the request must specify which precincts or election districts are to be recounted. In addition, the requestor typically must make a deposit to cover the costs of the recount. Generally, the state statutes specify an amount per election district which must be deposited. In several cases, election officials or judicial bodies are authorized to estimate the likely recount costs and to require a deposit to cover the estimated costs. Only one state (Virginia) of the 12 falling under this type does not require any deposit, but costs are later assessed against the petitioner if the original result is not overturned.

In addition to specifying the intended scope of the recount and making a security deposit, a petitioner sometimes must also allege grounds. The usual allegations involve error on the part of election officials, and they must be documented. In some states the petitioner may also allege fraud or misconduct on the part of election officials. The requirement that grounds be alleged is really an empty one in these states since recount requests are granted if they are in the proper form and timely filed. Election officials in these states generally believe that any losing candidates should be granted recounts if they are willing to pay the costs.

▲ Deadlines in the Initiation of the Recount

Because all recounts under this system type must be initiated by a candidate or some number of electors, strict deadlines for recount requests are set by statute. A recount petition filed after the deadline will be denied.

In these twelve states the deadlines for filing recount petitions are usually a certain number of days after the completion of the official canvass or the certification of the election results. In practice, this period varies from two to 20 days in general elections. In primary elections the period is usually the same number of days or fewer. Several of these states start the deadline count on election day rather than on the day of the final canvass or certification. In those states the deadline varies from about three to 15 days after the election.

Under this system type, the need to meet short deadlines can affect the availability of a recount remedy if the petitioner needs to raise a large security deposit or must allege some grounds to comply with a state's statutes. In addition, any candidate who desires a selective recount must quickly decide which election districts to have recounted, and hence may not make the best decision on where to have a recount conducted. In the seven states (see Table III-8) where statewide or district recounts must be initiated at the local level, a short time deadline may make it nearly impossible to file for a recount in every county. While short deadlines may ensure that election winners will be determined quickly, they may not permit losers in close elections to avail themselves fully of the recount remedy.

▲ Notice to Parties

In most states using this mandatory system type, a local election official is usually responsible for notifying all parties interested in an election race that a recount is to be held. In one state--Idaho--a state official notifies parties, while in two others the recount petitioner must notify the other parties. Only in West Virginia is there no requirement that the parties to a recount be notified.

The notice customarily includes the reason for a recount, times and places, ground rules, and how many representatives each party may have. Notices are generally served in person or sent by registered mail. The statutes often provide firm deadlines by which notice must be given so as to allow other parties sufficient time to cross-file a recount in election districts not specified in the original petition.

▲ Ordering and Supervising the Recount

Under this type of mandatory recount system, recounts are ordered most often by local election officials or judicial bodies. In four of the states (Idaho, Nevada, New Mexico, and Oklahoma), statewide or district recounts are ordered by a state official or board (see Table III-9). A recount order typically indicates the date for starting the recount and the deadline for its completion. If the recount is to be selective, the order will name the election districts to be recounted and sometimes specify the sequence in which the districts are to be recounted. The order may also include some other ground rules for the conduct of the recount, particularly those governing the access of candidates and their representatives to the proceedings. Supervision of recounts is the responsibility of local election officials or judicial bodies in all states but one. In Oklahoma, the one exception, the State Election Board has for a number of years on the basis of a court decision assumed responsibility for supervising all statewide and district recounts. In the case at issue, a recount had been held in a multi-county race for a District Court judgeship. After the recount results were reported to the State Election Board, the Board was advised that the recount had been improperly conducted in one of the counties. Upon investigation of this claim, the Board ordered the recount to be conducted again in that county. The loser of the final recount then went to court arguing that the Board exceeded its power in going behind the originally recounted returns to investigate the claim of recount irregularities. The court upheld the Board's action and since then the Board has exercised supervisory powers over all multi-county recounts in order to ensure that recounts do not have to be conducted again because of errors by local election officials.

State election officials play a very small role in the recount processes of the 12 states employing this system type. Consequently, it is highly unlikely that a statewide or district recount will be conducted on the basis of uniform procedures. While local election officials may in a few states receive guidance in a recount order or from promulgated rules and regulations on how to conduct a recount, in most of these states the local election official or judicial body is left with a great deal of discretion in supervising recounts. And, without really intending to do any harm to any candidate's interests, too many supervisors can lead to legal interpretations and procedural rulings which can vary across a state in any one recount.

▲ Conduct of the Recount

In these 12 states selective rather than full recounts are customarily conducted. A selective recount is less expensive

Table III-9

State Election Official/Board Role
In the Statewide Recount Process in Type 3 States

Order Recounts	Promulgate Rules and Regulations	Supervise Recount	Conduct Recounts	Canvass Recounts	Certification/ Recertification
Idaho	Nevada	Okla.		California	California
Nevada	N.M.			Idaho	Idaho
N.M.	Okla.			Indiana	Indiana
Oklahoma				Kentucky	Kentucky
				Nevada	Nevada
				New Mexico	New Mexico
				Oklahoma	Oklahoma
					Virginia

to obtain than a full recount, and not as many local officials or boards must be dealt with when petitioning for a selective recount as when the request is for a full one.

Recounts can be drawn out over a fairly long period of time, for if a selective recount for one candidate reverses the election outcome, either the other candidates are given time to request recounts in additional election districts or the state law requires a full recount at public expense. In essence, the first selective recount may either quickly satisfy the recount petitioner that he or she has really lost the election, or it may be only the first step in a multi-step recount process.

Abandonment of a recount, once it has begun, is generally allowed. Since the losing candidates and their backers are responsible for recount costs, the advocates of this system type argue that those who are paying for the recount should be able to halt it at any time and have any deposit above actual costs refunded. Typically, abandonment occurs during a recount when a losing candidate finds that he or she is not gaining a sufficient number of votes to overturn the election or is not finding enough irregularities to form the basis to file a contest. If a recount is abandoned before the completion of a selective or a full recount, the original election results will not be changed in the official canvassing reports.

Recounts are usually held in a central site in each county. None of these states permits recounts to be conducted by state level officials at state capital sites, as is the practice in several states using system types I and II. In local jurisdictions where lever voting machines are used at the polls, recounts will typically be conducted at two central sites, the voting machine warehouse and the local election officials' office.

Practice varies on recount procedures. In the states where the recount process is under the supervision of local election officials, the practice tends to be easier to identify and general procedures appear to be similar. Where recounts are under the jurisdiction of local judicial body, existing practice is harder to identify and when identified appears to vary widely at the discretion of the judicial body.

Where recounts are conducted under the supervision of local election officials rather than judicial bodies, the official customarily uses the regular employees of the election office to do the actual recounting. Where there is no regular election staff or they are unavailable for recount duty, the election official has the authority to hire extra employees to recount. Generally, the people who do the

actual recounting are experienced in vote tabulation because they are election office employees or because they have previously worked at the polls. These states have not felt any real need to provide for the training of recounters. Whatever training is necessary is customarily done by the local election official or by the most experienced of the recounters.

Where local judicial bodies are responsible for the conduct of recounts, the practice is to involve election officials in the actual recount as much as possible. In effect, the local election employees become employees of the local judicial body to do the recount. Again, little or no training is necessary because the people appointed to do the recounting are experienced at vote tabulation.

Procedures for resolving disputes in the vote retabulation process vary under this system type. A common practice is to break the recount team up into boards composed of an equal number of representatives from each political party in general elections or from each contending candidate in primaries. A neutral third party (e.g. election official) resolves disputes over voter intent on paper ballots. Decisions of these boards generally may be appealed to the official or body supervising the recount. Where recount boards are not used, disputes are usually taken directly to the local election official or judicial body for resolution.

Candidates and/or their representatives are customarily allowed to observe the recount process and to make notes on possible irregularities in the original ballot tabulation. In some of the states using this system type, candidates or their representatives are allowed to challenge ballots as they are tabulated or to make exhibits of ballots they intend to challenge on appeal or in contest proceedings. The recount may be the only opportunity for contending candidates to gather evidence about the ballots before getting into a contest. The degree to which candidates and their representatives are allowed to gather evidence varies across the local jurisdictions and is quite often conditioned by the attitudes of the local official or judicial body. Election officials who feel that a recount request attacks the credibility of their conduct of elections are not likely to be very open to much candidate access to the ballots during the recount. At the same time, election officials may feel friendly to one candidate and hostile to another and use their control over access to the recount to help one and hinder the other. Because the rights of candidates and their representatives are often vaguely defined, situations may occur where a candidate will be treated differently across jurisdictions, with the result that candidates may end up feeling that they have not received a fair shake.

▲ Canvass and Certification of Recount Results

After the recounts, the local election official or judicial body ordering the recount completes the first canvass of the results. Because most recounts occur after the original official canvass of the votes and the official certification of the election outcome, the election officials or judicial body supervising a recount are faced with a problem of error correction. A few states, such as Kentucky, Texas, and West Virginia, do permit some type of recount of the returns before the official canvass or certification, but in so doing they do not usually preclude the possibility of conducting a post-certification recount as part of a contest proceeding. Pre-certification recount results, even if they are selective, replace the original returns and are incorporated in the original canvass and certification, thus requiring error correction in the unofficial returns only.

Error correction of the official canvass or certification is one of the stickiest problems faced by election officials or judicial bodies when only a selective recount has been conducted. Simply stated, they feel uneasy about only correcting the returns from the election districts which have been selectively recounted because of candidate requests, and not being able to correct the returns from other election districts.

The states have taken several approaches to dealing with this problem. Several simply prohibit the election official from correcting already-canvassed official returns based upon a selective recount, and simply see the selective recount as a tool to be used to gather evidence to contest an election. Some require a full recount before the official canvass or certification may be corrected. Idaho has a particularly novel statute prohibiting error-correction based on selective recounts, and requires the state attorney general to order a full recount at public expense if the selective recount results projected to all election districts suggest that the election outcome might be reversed.

In some states where the public interest theory of elections is downplayed, local election officials or judicial bodies are authorized to correct official returns and original certifications on the basis of a selective recount. Here the argument is that the parties to an election dispute have ample opportunity to file and cross-file in precincts they judge to be most favorable to each of them. When the selective recount is over, the returns are corrected and recanvassed, and a new election winner certified if the election outcome is reversed. By failing to call for a recount in the other precincts, the parties forfeit the opportunity

to have those returns corrected even if there had been errors in them. The election dispute is viewed as between the parties only.

If recanvassing of the official election returns is permitted, it generally occurs in one of two ways. Where a local judicial body has ordered the recount, the tribunal is authorized to order election officials to correct returns and certifications on the basis of the recount. Where a local election official has ordered the recount, that official may correct the returns and certification without any outside direction. If the recounted election involves a district (multi-county) or statewide office or proposition, the local election official or judicial body then transmits the recount results for its jurisdiction to a state election official or board for final recanvassing of the election.

If the recanvassed returns indicate that the original election outcome is confirmed, no post-recount certification is necessary. On the other hand, if the recount reverses the election outcome, the election official or board voids the original certificate of election and issues one to the winner of the recount. With the issuance of a second certificate of election, the stage is often set for an election contest to determine which party has the "valid" certificate of election.

▲ Payment of Recount Costs

All recount expenses are to be paid by the parties requesting the recount. The only exception to this rule is that most of these twelve states provide for the refund or assumption of the costs if the recount overturns the original election outcome.

Even though the candidate or individuals requesting the recount are responsible for paying the recount costs, the actual method of cost-assessment used by the states does vary. The most common method of cost-assessment requires the parties requesting a recount to deposit cash, security, or a bond to cover the recount costs at some time prior to the beginning of the recount (see Table III-10). In the states which require a deposit, it is fairly typical for the state's statutes to specify a dollar figure which must be deposited for each precinct or county to be recounted. When a deposit is required but the amount is unspecified in the statutes, the common practice is for the election official to estimate the expected recount costs and to order a deposit of that amount before a recount may proceed. Only in Virginia may a recount occur without some prior security deposit. There the judicial body supervising the recount is empowered to assess costs against the recount petitioner if the election outcome is not reversed.

Table III-10

Method of Cost Assessment for Paying
Recount Expenses Under System Type 3

Cost Assessment Discretionary	Deposit Required by Statute	Amount Required by Statute	Deposit Estimated by Election Off.	Deposit Refunded on Reversal
Virginia	California Idaho Indiana Kentucky Nevada New Jersey New Mexico Oklahoma Pennsylvania Texas West Virginia	Idaho ($100 per precinct) Indiana ($10 per precinct)* New Jersey ($25 per election district) New Mexico ($50 per precinct) Oklahoma ($500 per county) Pennsylvania ($50 cash or $100 bond per precinct) Texas ($10 per precinct)** West Virginia ($300 per county)	California Kentucky Nevada	California Idaho Nevada New Jersey New Mexico Oklahoma Pennsylvania Texas West Virginia

* Minimum of $100 per recount

** Minimum of $50 per recount

Either the election official or judicial body conducting recounts under this system type must, of necessity, take great care to keep accurate records of the recount expenses. This information is particularly needed if the state requires the referral of any deposited money in excess of actual expenses or the payment of excess costs by the petitioners above and beyond any deposit. Several states now specify by statute or regulation the actual categories of expenses for which recount petitioners are liable. Nevada, for example, delineates by category what local election officials may and may not count as recount costs so as to prevent disputes between election officials and recount petitioners over what costs the petitioners should pay. Under this system type, recount expenses seem to be kept to a minimum because of the requirement that careful and accurate records be kept of all recount costs.

In the states permitting refunds of deposits or assumption of recount expenses by the taxpayers if the election outcome is reversed, the most common practice is for the local jurisdiction (usually counties) to pay costs whether the recount was for a state or a local office. Only a few of the states require that the state government pay for the recount costs in situations where statewide elections have been overturned.

▲ Review of Recounts

Under this system type a review of a recount is permitted by statute in only half of the states (see Table III-11). Review by a judicial body is the most common type available, although one state--Oklahoma--does provide for review by am administrative body. As was the case in system type 2, the only review of a recount available in the other half of the states is through a contest action. Judicial review of recounts through contest action, however, are fairly rare because contest statutes usually require grounds beyond closeness of the votes, and because of the high costs of contest proceedings.

Table III-11

Type of Recount Review Available
Under System Type 3

None*	Administrative	Judicial
California	Oklahoma	Idaho
Indiana		Kentucky
Nevada		New Jersey
Texas		New Mexico
Virginia		Pennsylvania
West Virginia		

* In these states, a review of a recount is customarily obtained only by filing a contest action

Δ Type 4: Discretionary Full or Selective Recount at Candidate Expense, Initiated by Candidate

This system requires the candidate to request a recount and pay expenses. In addition, the decision as to whether a recount shall be conducted is discretionary and made by the forum from which a candidate requests a recount. This system is presently in use in twelve states. Typically, a candidate must allege some kind of error or irregularity. Other candidates may also join in the recount request if they are willing to share in the paying of recount expenses. The basic philosophy behind this system type is that the original tabulation of the election returns is presumed correct unless some candidate or interested party can allege sufficient error to have the election tabulation reexamined.

Recounts are generally available only as part of a contest proceeding. Consequently, a recount petitioner must convince a judicial body that a recount is warranted. A recount, then, becomes one of a number of possible requests that a petitioner will make of the court. Recounts typically will be selective, with each candidate attempting to either overturn a sufficient number of votes to change or preserve the original results. Different candidates may have recounts conducted in different election districts at the same time. It is quite possible for election outcomes to be changed on the basis of a selective recount, a situation impossible under the three previous system types. Candidates choose carefully the election district they want recounted to maximize the probability that the recount will overturn or preserve the election.

In contrast to the previous three types, this type lessens the availability of recounts because it requires candidates to allege sufficient grounds. The requirement that candidates pay for the recount also tends to lessen the availability of recounts. In requiring grounds to obtain a recount, the time period in which a recount can be filed can become a factor in determining whether it can be successful. In the states where the period of time for filing a contest petition requesting a recount is relatively short, it is difficult for a candidate wishing a recount to accrue sufficient evidence to convince the court that a recount is warranted. Overall, access to financial and legal resources is very important for a candidate that has neither wealth nor the ability to obtain good legal advice is probably going to be disadvantaged.

▲ Standing and Grounds to Initiate Recount

Candidates and, sometimes, electors have standing to petition for a recount, but election officials do not. To the

extent that electors are allowed to petition for recounts, it is common that this opportunity is restricted to elections involving propositions.

To start the recount process, a losing candidate or a number of electors typically files a petition with either a state or local judicial body indicating that they would like to have a full or selective recount conducted. In several states using this system type, the recount request is filed with either a state or a local election official, the state party committee, or the state legislature depending upon the election (see Table III-12). In only three of the twelve states can a losing candidate for statewide or district office request a general election recount directly from a state election official or state judicial body. If the recount is requested for a primary election, the candidate wishing a recount can go to a state election official, state court, or state party committee in only four out of the twelve states. More often, a recount petition must be filed with each local (county and city) election official or judicial body. Consequently, full statewide or district recounts are a rarity.

When filing a recount petition a petitioner must allege grounds. The usual allegations involve error on the part of election officials and must be documented. Typically, the petitioner may also allege fraud or misconduct on the part of election officials and document it. In none of these twelve states is closeness of the vote sufficient grounds for obtaining a recount.

In contrast to the previous system type, the requestor does not necessarily need to make a security deposit to cover the costs of the recount. In some states the question of whether a security deposit is necessary is left to the discretion of the forum with which the recount request is filed. In several other states the petitioner is not required to deposit any security at all. Instead the practice is that costs of any recount are assessed after it has been conducted.

▲ Deadlines in the Initiation of the Recount

Strict time deadlines for making a recount request are set by statute. A recount petition filed after the deadline will be denied.

The deadlines for filing recount petitions are usually a certain number of days after the completion of the official canvass or the certification of the election results. In practice, this period varies from seven days to forty days in general elections. In primary elections, the period is

usually the same number of days or fewer. Several of these states start the deadline count on election day rather than on the day of the final canvass or certification. In those states the period for filing a recount petition tends to be shorter than in the states using the day of the final canvass or certification as the deadline.

Short deadlines can particularly affect the availability of a recount remedy since the petitioner must allege some grounds to comply with the state statute in order to obtain a recount. In addition, any candidate desiring a selective recount must quickly decide which election districts to have recounted and hence may not make the best decisions. In the states (see Table III-12) where statewide or district recounts must be initiated at the local level, a short deadline may make it nearly impossible to file for a recount in every local jurisdiction. While short deadlines may work to insure that election winners will be determined quickly, they may prevent losers in close elections from availing themselves fully of a recount remedy.

▲ Notice to Parties

In about half the states using this particular system type, the petitioner is responsible for notifying all parties interested in an election race that a recount has been requested. In several other states an election official or a court clerk must notify the other parties. Only in Maryland is there no requirement that the parties to a recount request be notified.

The notice customarily includes the grounds for requesting a recount and the time and place for a hearing on the recount request. These notices are generally served in person or sent by registered mail. State statutes often provide firm deadlines by which the notice must be given to allow other parties sufficient time to answer for a recount in or cross-file.

▲ Ordering and Supervising the Recount

A hearing will be held by the forum with which the recount petition was filed to determine whether a recount shall be held. At the hearing the petitioner will attempt to show that the grounds alleged in the petition are sufficient. Representatives of the other parties to the recount petition are typically allowed to rebut any allegation made by the recount petitioner. Motions may also be filed at the hearing requesting discovery of evidence and requesting the testimony of appropriate election officials or witnesses. The forum at that time may decide whether or not a recount is warrant-

Table III-12

Type of Forum Available for Filing Recount Requests for Statewide or District Recounts in Type 4 States

State Election Official	Local Election Official	State Judicial Body	Local Judicial Body	State Party Committee
Iowa[1]	Iowa[2]	Hawaii	Arkansas	Alabama[2]
Kansas[2]	Maryland[2]	Missouri[1]	Delaware	Tennessee[2]
			Illinois[2]	
			Louisiana	
			Maryland[1]	
			Minnesota	
			Missouri[2]	
			Tennessee[1]	

State Legislature

Alabama[3]
Illinois[3]
Kansas[3]

[1] General elections only.
[2] Primary elections only.
[3] General elections for state office only.

ed and if so, so order it, or choose to continue the hearing until further evidence has been brought in on the contest. Eventually, the forum must decide whether a recount is to be ordered. If not, the petitioner may generally appeal.

If a recount is ordered, the forum will notify the appropriate election officials. The order will name the election districts to be recounted and sometimes specify the sequence in which the districts are to be recounted. It will indicate the date for starting the recount and the deadline for its completion. The order may also include some ground rules for the conduct of the recount, particularly those governing the access of the candidates and their representatives to the proceedings. In some cases, the order may specify the procedures to be used in conducting the recount.

Supervision of recounts is typically the responsibility of the forum ordering them. In the states where either a state or local judicial body has ordered the recount, the judicial body will retain jurisdiction over the recount in order to settle any disputes.

As presented in Table III-13, neither state election officials nor a state judicial body play a very large role in the recount processes of the twelve states employing this discretionary system type. Consequently, it is highly unlikely that statewide or district recounts will be conducted with uniform procedures.

▲ Conduct of the Recount

Selective rather than full recounts are customarily conducted. Because recount requests often must be filed with local officials or judicial bodies and because of the expense involved in conducting a recount, this system type is more suitable for selective than full recounts. The practice is to attempt to obtain a recount in election districts or jurisdictions most likely to yield favorable results to one's candidacy, and not to seek recounts in areas that are likely to be friendly to any opposing candidate.

Because of this system's discretionary nature, it is highly likely that recounts may be drawn out over a fairly long period of time. If a recount conducted at the request of one candidate reverses the election outcome, the other candidates are usually afforded time to petition for recounts in other election districts of the jurisdiction being recounted, and any appeal taken from the original recounts may include requests for recounting of additional precincts if the court to which the appeal is taken grants a hearing.

Table III-13

State Election Official/Board or
Judicial Body Role in the Statewide
or District Recount Process in Type 4 Recounts

Order Recount	Rules and Regulations	Supervise Recount	Conduct Recount
Hawaii	Hawaii	Hawaii	Iowa[1]
Iowa[1]	Iowa[1]	Iowa[1]	Kansas[2]
Kansas[2]	Kansas[2]	Kansas[2]	
Missouri[1]	Missouri[1]	Missouri[1]	

Canvass Recount	Certification/ Recertification
Hawaii	Arkansas
Iowa[1]	Delaware
Kansas[2]	Hawaii
Missouri[1]	Illinois[2]
	Iowa
	Kansas[2]
	Louisiana
	Maryland
	Minnesota
	Missouri
	Tennessee[1]

[1] General elections only.
[2] Primary elections only.

The only guarantee that recounts will come to an end is if the judicial body ordering the recounts makes both parties agree beforehand on the election districts to be recounted and then not permit any further recount requests.

Abandonment of a recount is generally permitted under this system type. Because petitioners and their backers are responsible for recount costs, the pattern is for recounts to be abandoned if the petitioner is not picking up a sufficient number of votes to overturn the election or is not finding enough election irregularities to support a contest. A financial incentive operates under either of these conditions for petitioners to abandon recounts, for it will reduce the amount of money to be paid at the end.

Recounts are held in a central site in each county. Typically, a local election official will be ordered to have paper ballots retabulated, lever voting machine totals recanvassed, or to have punchcard ballots recounted. The local election officials are responsibile for recruiting individuals to serve as recounters and for the training of those recounters. As a recount proceeds, the officials are to keep track of any disputed ballots and to keep a record of the proceedings for a submission to the forum that has ordered the recount. Once the recount is completed, the record and all disputed ballots and questions are submitted to the forum ordering the recount. The forum will then decide on all disputes, giving ample opportunity to representatives for all candidates to argue then.

As is indicated in Table III-13, several states give judicial bodies the authority to conduct a recount themselves. In those cases, local election officials are ordered to bring ballots, tabulations sheets and any other relevant election materials to the court so that the court can conduct the recount. The judicial body itself will provide for hiring people to assist in the recount, designate the procedures to be used in the recount, and generally attempt to resolve disputes over ballots as they arise in the process of recounting. In one very famous case conducted under this system type, the Minnesota Supreme Court ended up in 1963 finally resolving as best it could all disputes about the intent of voters as they cast paper ballots in the 1962 race for governor.

Because recounts are generally conducted as part of a contest process, the parties to dispute are given wide latitude in making ballot exhibits and challenging ballots. The recount is essentially a fact finding stage in a judicial proceeding and therefore both parties know that they must raise every issue, because appeals from the original contest proceeding do not generally allow for additional fact finding.

These recounts tend to be time consuming because of the many opportunities for making exhibits and for challenging ballots and because of the time that it takes to resolve disputes over each ballot that is challenged. In statewide or district level recounts, there are many opportunities for inconsistencies in rulings that are made on ballot challenges and, therefore, it is highly likely that a number of ballots will be carried forward on appeal process.

Since actual practice in the conduct of recounts varies quite dramatically under this system type, it is highly likely that little uniformity will exist in the way recount decisions will be made. All in all, the procedures used in recounts under this system type are likely to be idiosyncratic to the state, to the county sometimes, and certainly to the election that is being recounted.

▲ Canvass and Certification of Recount Results

After the race in question has been recounted, the local election official ordered to conduct the recount completes a first canvass. The official then reports the results of this canvass to the forum which ordered the recount. If the recount involves a race in a jurisdiction larger than a single county, the forum is then responsible for doing a second canvass of the results reported from all local jurisdictions. The forum then orders the appropriate canvassing body to correct the official returns and, if the returns indicate a reversal of the original election outcome, the forum will order the canvassing authority to issue a new certificate of election.

If the forum which ordered the recount actually conducts the recount itself, it then goes ahead and does the complete canvass of the recounted race. It will then order the appropriate canvassing authority to correct the original returns and if the original election result has been reversed, it will order the canvassing authority to issue a new certificate of election.

Since recounts conducted under this system type are likely to be post-certification recounts, it is possible that two contending certificates of election will be issued. This may set the stage on appeal for a contest over the validity of each certificate, in the case of congressional elections, may leave it up to the appropriate house of the Congress to determine which certificate is valid.

▲ Payment of Recount Costs

All recount expenses are to be paid by the parties involved in the recount. There appears to be no statutory authority

for the public to pay for recounts if they overturn the original election outcome.

The actual methods of cost-assessment used by these twelve states vary. In several of them, the recount petitioner is required to make a security deposit as a requisite condition to receiving a recount. These monies cover the cost of conducting the recount. Whenever the actual costs of the recount are less than the amount deposited, a refund of the difference is given to the petitioner. In other states, no security deposit is required when a recount petition is filed. Instead, the forum ordering the recount assesses costs at the end of the proceeding. The forum may assess costs in one of several ways. If the recount petitioner does not overturn the election result, all costs will be assessed against that petitioner. If the recount overturns the original election results, costs may be assessed against the loser of the recount. And, in some other cases, the forum ordering the recount may simply decide to divide the costs among the parties involved in the recount proceeding and to make an appropriate assessment against each.

Since the parties to the recount proceedings are responsible for paying costs great care is exercised to keep accurate records of the recount expenses. This information is needed particularly if the state requires the refund of any deposited money in excess of actual expenses or the payment of excess costs by the petitioners above and beyond any deposits. All parties are responsible for paying their own legal expenses.

▲ Review of Recounts

A judicial review of the recount is permitted in all but three of the states (Hawaii, Iowa, and Missouri). A review of a recount in those three states is not available because they have a system in which a high state authority, for example a state supreme court, is the forum with which recounts are initiated.

△ Type 5: Discretionary Full or Partial Recount at Public Expense, Initiated by Candidate

Presently in use in three states (Mississippi, New York, and North Carolina), this type gives full discretion to election administrators or judicial bodies to decide whether a recount should be held. Advocates of this system argue that if candidates can convince an administrator or a judge that a recount is warranted, they should not be barred from obtaining it because they do not have adequate financial resources. Hence, the provision under this system type is

for the public to pay for non-frivolous recounts. Other candidates involved in the election being contested may also join in the recount request to protect their interests.

Recounts may be selective, with different candidates having recounts conducted in different election districts at the same time. If a selective recount overturns the original election results, the states generally permit the losing candidate to file in the unrecounted election districts. As under the previous two system types, candidates in these three states have an incentive to choose carefully the election districts they want recounted so as to maximize the probability that the recount will overturn or preserve the election results (depending on the candidate's position before the recount).

In comparison to the other system types discussed below, this one tends to restrict the availability of recounts because of its requirement that candidates allege sufficient grounds for conducting a recount at public expense. In effect, the recount petitioner must not only show that enough errors have occurred in the election process to warrant a recount, but also must show that those errors are sufficient to change the outcome of the election. Hence, a more substantial showing must be made by a petitioner than under system type four. The cost of a recount becomes a factor in the minds of the administrators or judges granting a recount rather than in the minds of the candidates who would be requesting a recount.

▲ Standing and Grounds to Initiate Recounts

Candidates generally have standing to petition for recounts, and in New York, electors also have standing. Election officials do not, although in New York the state attorney general is empowered to request a recount of the votes on his own initiative as part of the filing of a contest petition.

To start the recount process, a losing candidate will typically file a petition with either a local election official or judicial body. In both Mississippi and North Carolina, the recount request is filed with a local election body. In New York, it is filed with a local judicial body. In none of these states can a losing candidate for statewide or district office request a statewide or district recount directly from a state election official or a state judicial body. Instead, a petition must be filed with each local (county) election official or judicial body. Thus, full statewide or district recounts are a rarity in these three states. Losing candidates are much more likely to petition for selective recounts.

When filing a recount petition a petitioner must specify the grounds for requesting the recount. The usual allegations involve error, fraud or misconduct on the part of election officials. Whatever allegations are made must be documented. In addition to alleging the grounds for a recount, the petitioner must specify whether the recount is to be full or selective. If selective, the request must specify which precincts or election districts are to be recounted.

▲ Deadlines in the Initiation of the Recount

In two of the three states strict time deadlines for recount requests are set by statute. A recount petition filed after that deadline will be denied. In Mississippi, whose statutes lack provisions for primary and general election recounts and contests, there appears to be no deadline. The deadline, in North Carolina and New York are at two extremes. North Carolina has a very short deadline, requiring that recount requests be submitted by the second day following the canvass by the county board of elections. New York, on the other hand, permits recount petitions to be filed any time within thirty days following the election. Hence, in North Carolina losing candidates have very little time to put together a reasonable case, while in New York the period of thirty days should provide an ample opportunity to array the necessary evidence. Not surprisingly, recounts appear to be more common in New York than in North Carolina.

▲ Notice to Parties

No common pattern exists for giving notice to parties. In North Carolina it is the responsibility of the petitioner to notify the parties; in New York notice is to be given at the discretion of the court; and, in Mississippi there appears to be no statutory requirement that the parties to a recount be notified. As was true in the other system types, the notice customarily includes the allegations as to why a recount should be held and indicates the time and place for a hearing. Recount notices are generally served in person or sent by registered mail. When notice is given, it generally specifies the time period to answer the petition.

▲ Ordering and Supervision of the Recount

Under this recount system type, recount petitions are heard by the local forum with which they have been filed. In Mississippi a decision as to whether a recount shall be conducted is made by the county election commission in general elections, or the appropriate party executive committee in primary elections. In North Carolina the decision is made by the county board of elections, while in New York it is made by a local judicial body. In both Mississippi

and North Carolina the decision to grant a recount request will be made by the body to conduct the recount. But in New York the decision is made by a body which orders local election officials to actually conduct the recount.

If a recount petition is granted, the order typically indicates the date for starting the recount and a deadline for its completion. If the recount is selective, the order will name the election districts to be recounted and sometimes specify the sequence in which they are to be recounted. The order may also include some other ground rules for the conduct of the recount, particularly those governing the access of candidates and their representatives to the proceedings.

Supervision of recounts is always the responsibility of either local election officials or a local judicial body. In none of the three states does a state election official have any supervisory responsibility for the conduct of recounts. Local election officials are responsible for hiring and training the people who will conduct the recount. The procedures used are up to the discretion of the local election officials, although in New York the local judicial body may dictate the procedures. In statewide or district recounts, different procedures may be used and different rulings made in different election jurisdictions.

▲ Conduct of the Recount

Selective rather than full recounts are customary because of the requirement that recount petitions be filed at the local level. Recounts can be drawn out over a fairly long period of time because of the need to file in so many jurisdictions. Only in North Carolina is the recount system structured so as to provide for a relatively short period of recounting.

Although abandonment of a recount, once it has begun, is generally allowed under this system type, it is rare, for a candidate has little or no monetary incentive. Since the public is paying for a recount, the only large costs associated with a recount are those involving the payment of legal fees. On the other hand, it is not at all clear whether an election official or a judicial body can order the abandonment of a recount if the petitioners are not gaining.

Recounts held in a central site in each county. In those local jurisdictions where lever voting machines are used at the polls, recounts will typically be conducted at the voting machine warehouse as well as the local election office. The procedures to be used in conducting the recount

will be determined by the local election officials or a local judicial body. And, as would be expected, the procedures vary within any given state.

▲ Canvass and Certification of Recount Results

Provisions for canvass of recount returns vary across the three states. In Mississippi the local election commission will recanvass the recount and, in the case of statewide or district recounts, submit that recanvass report to the state canvassing authority. The state canvassing authority will recanvass recounted returns coming from the local jurisdictions and correct the original canvass for the office in question. In New York the local election body conducting the recount will canvass the returns and submit the canvassed results to the judicial body which has ordered the recount. In the case of statewide or district elections, the judicial body will then submit the recanvassed returns to the state election authority. In North Carolina, because recounts must be conducted prior to the final canvass of returns by local election officials, there is no need for a recanvass. The procedure is simply to make corrections in the returns and incorporate those corrections into the final canvass.

In Misssissippi and New York the new canvass may reveal that the election outcome has been changed and thus, a new certificate of election must be issued. In North Carolina, since no certificates of election have been issued prior to the holding of the recount, the recount winner will always be the candidate certified in the first instance.

▲ Payment of Recount Costs

Under this system type, all recount expenses are to be paid by the public. In New York and North Carolina the actual costs are paid by the counties. In Mississippi the county pays for local recounts, while the state is responsible for the costs of statewide recounts. To the extent that it is possible, the election officials in these three states attempt to use regular employees of the local election boards to conduct the recounts to minimize costs that the public will pay.

▲ Review of Recounts

A review of a recount appears to be possible in all three of these states. In Mississippi and New York that review is available from a state judicial body. North Carolina appeals are taken to the State Board of Elections.

Chapter IV

CONTESTS OF CONGRESSIONAL RACES

Since all federal elections are administered by states and localities operating under laws and regulations that are made primarily at the state level, they are usually run in very much the same manner as state and local elections. The general procedural findings and recommendations applicable to the conduct of recounts and contests and to the administration of elections in general appear in Volume II, and are not repeated here. This section is devoted to a presentation of contest problems peculiar to congressional elections.

Contesting a congressional election places the contestant in a peculiar position. The election being contested was conducted under state laws and procedures, and, for the most part, contests are based on allegations of failures by election officials or citizens to observe those laws. Congressional election contests are different from other contests, however, because the individual houses are the constitutionally-designated judges of the right of any candidate to take and retain a seat. Thus, while the problems may have arisen at the state and local level, and while some of the system validation functions may be carried on under state jurisdiction, many contests may ultimately be carried to the United States Senate or to the House of Representatives.

While many cases ultimately reach a house of Congress, they typically raise only a small set of important issues. Three recent and particularly interesting cases are used in this chapter to illustrate the kinds of problems that normally arise, and the procedures employed by the states and the Congress to resolve them. An important overall conclusion is that the combination of state and federal procedures now used normally has the effect of denying contestants a fair opportunity to press their claims. Additionally, while the outcome of a contest in the Congress is necessarily determinate, problems of jurisdiction, time constraints, the heavy burden of proof borne by contestants, and a lack of detailed, published procedures for contestants to follow frequently cast doubt on the fairness, accuracy, and efficiency of the decision-making process. The three cases used for illustrative purposes are: (1) Durkin v. Wyman, arising from the New Hampshire Senate race in 1974; (2) Moreau v. Tonry, arising from a Louisiana House race in 1976; and Paul v. Gammage, arising from a Texas House race in 1976.

Durkin v. Wyman was a rare case among those carried to the Congress: its primary issues dealt almost wholly with

tabulation procedures and the determination of the actual count. As such, most of the problems raised by this notoriously difficult case are in the realm of state recount and contest procedures. Since the state-level recount issues are discussed in quite some detail in Volume II, we will not deal with them here. The New Hampshire case, does, however, present another set of issues peculiar to congressional contests, notably the roles of partisanship and the Senate rules in delaying the final resolution of the contest. The remarks on this case in the following section represent selected conclusions about the case. For an excellent chronology and comprehensive summary of the issues, see Tibbetts (1976).[1]

Two House contests--Moreau v. Tonry and Paul v. Gammage--arising from the 1976 elections present very neatly the set of issues that are potentially present in any congressional contest, and which provide empirical evidence of potential failures in the contest system. These issues, presented in some detail below, fall under three broad headings:

- Congressional contest jurisdiction. The jurisdiction of the states to handle contests for congressional office is hotly debated. Some states have assumed such jurisdiction, arguing that the logic of Roudebush v. Hartke is extendable to contests so long as the right and ability of the Congress to make the ultimate decision is not prejudiced. Other states have taken the position that the hearing of such contests is an exclusive congressional power. Texas has recently fallen into this latter group, and a Texas Supreme Court decision in a contest involving candidates Paul and Gammage illustrates some problems associated with a gap in available remedies.

- Reliance upon candidates to police elections. Many jurisdictions allow candidates or parties to nominate poll watchers on the assumption that representatives of different interests will keep each other honest. However, another 1976 case, Moreau v. Tonry, illustrates some of the failures which can occur in such a system. The section entitled "Adversaries at the Polls" analyzes some of the systemic failures which allowed fraud to occur.

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[1] Donn Tibbetts. The Closest Senate Race in U.S. History. Manchester, N.H.: Donn Tibbetts and J. W. Cummings Enterprises Inc., 1976.

- Time constraints and the heavy burden of proof placed on contestants. Moreau v. Tonry also serves to illustrate problems that can be caused by the extraordinarily heavy burden of proof placed on contestants, and by the very short time frame within which contests must be settled. Related to this issue is a host of subissues ranging from appropriate discovery proceedings to other aspects of the jurisdiction question raised above. The section below entitled "Time and the Burden of Proof" discusses issues illustrated in the Louisiana First Congressional District contest.

The two cases discussed here are particularly good for these purposes, since the issues raised in them are universal, and the circumstances surrounding them are not specific to any individual state system. The same problems could arise in virtually any state in the union. Many of the recommendations in the following section are based upon these cases and others raising similar issues, and other cases are used as part of the discussion of the recommendations.

Durkin v. Wyman: The Indeterminate Election

On July 30, 1975, the United States Senate, after six months of debate, argument, partisan wrangling, and filibuster, finally agreed to return a Senate race to the State of New Hampshire to be rerun. It had all begun as a fairly straightforward, if stormy, recount and contest following normal New Hampshire procedures, but a series of procedural errors in that state had rendered the determination of the actual vote count virtually impossible. While New Hampshire did certify Wyman as the winner, the Senate was persuaded to reject that certification. In the month that followed that rejection, the Senate Committee on Rules and Administration, which has elections jurisdiction, struggled with the development of procedures for handling this particular case, and ultimately even had to develop procedures for reviewing and counting paper ballots.

The Rules Committee, having had to design its procedures while handling an active case, found itself unable to settle some thirty-five related issues, and referred these issues to the full Senate for resolution. Most of these issues were procedural, i.e., they dealt with questions of whether the Committee should grant petitions to recount selected towns in New Hampshire, and if so, under what rules. The fight that had been carried out in committee was simply transferred to the Senate floor, where a filibuster imposed further delays. The basic partisan issue revolved around

the fact that a member of the minority party had been originally certified by the state, and the accusation was made that the majority were simply attempting to seat one of their own. The difficulties associated with this charge were greatly exacerbated by the fact that seating Durkin would have increased the majority held by the Democrats past one of the thresholds used to determine the partisan composition of committees. Consequently, much more was at stake than just one seat.

The extended debate over rules and the partisan nature of that debate are the two issues of interest for these purposes, and they will be dealt with in reverse order. Legislative deliberations are by their very nature partisan. Members of Congress are almost always elected from a political party, and the organization of the two houses is very much along party lines. Additionally, the partisan issues raised in this case did not begin when it reached the Congress, but were very much in evidence in the prior state proceedings. While it is easy to say that settling an election contest on partisan grounds is improper--and we believe it is--it is unrealistic to expect that partisanship will not creep into the deliberations when the rules, the evidence, and the issues are all very much in doubt. Therefore, while it is fairly easy to condemn a number of specific actions committed in the handling of this case, there is no obvious direct solution to their prevention in the future.

The procedural issues raised by a lack of rules, on the other hand, are amenable to solution. It seems an obvious point that the development of rules for the handling of cases in general will be extremely difficult when there is an active, hotly contested case. The House has a Contested Election Act and committee rules which explicitly define the framework within which contests are handled. (The issue of whether these rules are always followed is a separate one considered in the next section.) The Senate clearly needs a set of rules of its own, whether they be written in the form of statute or Senate rules. These rules, more than anything else, are the key to preventing the recurrence of extreme embarrassments like the New Hampshire case.

Δ Jurisdictional Problems: A Case Study

Synopsis: Paul v. Gammage

The 1976 general election in the 22nd Congressional district of Texas was close. An unofficial tally gave Democrat Robert Gammage a 94 vote margin over Ron Paul, the Republican incumbent. Paul requested and received a recount of the entire district, which contains parts of four counties. (Texas law

makes recounts readily available in close elections for candidates who are able to pay the cost if they should fail to reverse the results.) The recount increased Gammage's margin to 268 votes, or 50.07 percent of the total. The biggest change occurred in Brazoria County where officials discovered that 156 votes for Ron Paul had been counted twice.

Paul then contested the election in the Texas courts and in Congress. His case was based upon the allegation of numerous illegal votes and vote count irregularities. In some instances Paul's representatives disagreed with recount officials over whether certain ballots should be counted. Other potentially illegal votes were identified by mailing first class, "do-not-forward" letters to the registered addresses of persons who had voted in the election. The Paul forces concentrated their mailings in precincts which had gone heavily to Gammage, so they counted undeliverable letters as illegal votes for Gammage. They further alleged that in some Gammage precincts there were more votes counted than there were people voting. By this method they claimed to have identified at least 500 illegal votes, a total sufficient to alter the outcome of the election if they had gone to Gammage.

Paul's lawyers adopted a sequential strategy. They would pursue the case in the state courts under Texas law and would then move to the U.S. House of Representatives where the final determination would be made. Therefore, they filed an election contest in State District Court of Harris County, Texas, immediately after Gammage was certified the winner on November 22. They began scheduling and taking depositions in order to establish that enough illegal votes had been cast for Bob Gammage to change the result of the election.

The Paul forces were unable to complete their attack as planned. After being seated in Congress on January 4, 1977, Gammage filed a motion in state court to dismiss the Texas contest for lack of jurisdiction. On January 17, Judge John R. Compton denied this motion, whereupon Gammage applied to the Texas Supreme Court for a writ of mandamus. That Court denied the motion on January 25. During both cases Paul's lawyers were stayed from taking depositions. When the second stay was lifted, the trial court ordered Gammage to appear on February 12 for deposition. Gammage again appealed to the Texas Supreme Court and this time he was successful. On March 2, 1977, the Supreme Court of Texas ruled that the state did not have jurisdiction. Paul would have to take his case to the U.S. House of Representatives.

Federal law requires the filing of a "Notice of Contest" within 30 days of the state's official declaration of the election result. Therefore, Paul had filed in the U.S. House on December 19, 1976. The three member panel assigned to hear the case held open hearings on February 23, 1977. Paul's attorneys asked the panel to stay all proceedings until the Texas case was settled and to grant an additional 30 days for taking depositions. Gammage's lawyer asserted that Paul was on a "fishing expedition" and asked for dismissal. On March 9, one week after the Texas Supreme Court decision, the panel voted 2-1 to grant Gammage's motion and dismiss the case for lack of evidence. Congressman Wiggins (R, Calif.) objected strenuously that requiring the contestant to bear the burden of proof on a motion to dismiss violated the House's own procedures. Nevertheless, the House Administration committee and, subsequently, the House of Representatives, passed the motion to dismiss, thus closing the case.

▲ Analysis: The Potential Impact of Jurisdictional Problems

The Paul-Gammage contest illustrates the importance of this unresolved question in the contesting of Congressional elections. While it is clear that Congress has the final determination of its own membership, it is not clear whether the states may also exercise jurisdiction. Where the issue is not settled the ambiguity can place a heavy burden on a contestant.

The Paul forces had some reasons to believe that Texas would take jurisdiction. In Roudebush v. Hartke the U.S. Supreme Court had sanctioned a statutory recount by a state so long as it did not interfere with the final determination of the election by Congress. A district court in Louisiana had taken jurisdiction in a recent Congressional contest (LaCaze v. Moore) and the decision was upheld by the Louisiana Supreme Court. Finally, the Texas law granting jurisdiction of election contests to district courts specifically mentioned federal offices.

However, in the 5-4 decision in Paul v. Gammage the Texas Supreme Court ruled that the state did not have jurisdiction. The Court was careful to distinguish Paul from Roudebush. The latter case involved only Indiana's statutory recount, which "did not constitute a 'court proceeding.'" On the other hand, Paul had already had his recount in Texas and was seeking to wage "an all-out election contest. . . for the determination of "to whom the office belongs.'" For such a contest to be conducted by the state courts would, according to the court, violate Article I, Section 5, of the

United States Constitution. Furthermore, according to the majority opinion, Paul was not without recourse. He had already filed a contest with the U.S. House of Representatives under the Federal Contested Election Act, and action on that case was pending at the time of the Texas Supreme Court decision.

While the Texas decision did not deprive Paul of a legal remedy, the practical effect was damaging to his cause in Washington. According to an attorney for Paul, the contestant was relying upon local officials acting under the authority of state law to take depositions. Because of Gammage's challenges to the jurisdiction of the state, discovery was stayed from December 31 through January 12, January 17 through January 25, and February 9 through the Texas Supreme Court decision of March 2, prohibiting further action under state law. The effect of these stays was compounded by the necessity of rescheduling depositions (with a week's notice) after each stay was lifted. In this way the jurisdictional dispute severely handicapped Paul's ability to gather evidence on the substantive issue.

Of course, Paul's attorney could have proceeded with discovery under the Federal Contested Election Act from the beginning, and in retrospect it appears that their sequential strategy was a mistake. Yet it was not an unreasonable mistake. This case illustrates the danger in not having such matters as state jurisdiction clearly defined in advance. If the outcome of a contest is determined by procedural errors, the public's interest in contests as mechanisms for ensuring accurate election results is not well-served.

The present ambiguity may be resolved in a number of ways. It is possible that the U.S. Supreme Court will decide the issue in some future case, but the Court refused to hear the Paul-Gammage case. Furthermore, there may be few test cases in the future because the precedents established thus far give a contestant fairly strong incentives to take his case directly to Congress. At a minimum, jurisdictional battles take substantial resources and, given the severe time constraints and heavy burden of proof which a contestant faces, it is doubtful that many contestants will be able to absorb the extra cost without detracting from their substantive cases. To the extent that the Paul-Gammage precedent is predictive, Congress will not allow contestants to start over at the federal level after losing at the state level, even if the case was decided on the basis of jurisdiction. Finally, a contestant has no assurance that a successful contest through state procedures would improve chances of a favorable outcome in Congress.

These incentives might produce a resolution of the jurisdictional issue in fact, if not in law. As far as Congressional elections are concerned one might expect contestants to seek post-election remedies at the state level in the following circumstances:

(1) in recounts provided by statute; and

(2) in contests where there is a precedent of state court jurisdiction.

Other cases would probably go straight to the Congress.

However, this resolution might not be very stable, since it provides very different treatment for contesting parties in different states, whereas Congress might seek some uniformity in the process. Second, the distinction between recounts and contests is neither well-defined nor uniform across the states. A ministerial recount certainly includes a counting again, but does it also involve questions of ballot validity, voter eligibility, etc? At present, state laws governing recounts vary widely, and Roudebush may not be a very precise guide in many cases.

Finally, it is conceivable that Congress will clarify the situation. For example, a resolution might set forth how Congress views state contest procedures in general or, perhaps, procedures of a certain type completed by a certain deadline. If the policy were clear that Congress would not wait on or consider the results of state rulings, contestants would have fair warning that they should bring their cases directly to Washington. On the other hand, Congress might prefer to let the states settle their Congressional election contests if possible. Under such a system Congress would still make the final decision but would rely upon the results of state procedures as long as they met certain standards for speed and fairness. Indeed, if such criteria were made explicit many states might be encouraged to improve their own procedures.

The question of how the state jurisdiction problem should be solved involves a number of administrative, political, and constitutional issues. Yet it is clear that some resolution is necessary. The contest of an election is difficult in any forum, but is is unnecessarily difficult if the choice of forums is part of the contest. Recommendations for possible ways to eliminate jurisdictional ambiguities appear in the recommendation section of this report.

- Systemic Failures to Prevent or Remedy Fraud

The Moreau v. Tonry contest provides a useful case for analysis. In most instances it is impossible for the analyst to

separate the mechanics of the process from the merits of the case. The contestant almost always loses, but the result may simply reflect good election administration. In the absence of an independent measure of the facts, it is very difficult to evaluate the substantive outcome of a contest. However, in this case Moreau lost the original contest, and we now have strong evidence that his allegations were substantially correct. With as much assurance as one is likely to have in this sort of analysis we can now label the original outcome as erroneous, i.e., it is not consistent with the facts as we now understand them. (The label does not imply that the principals erred in their handling of the case under the circumstances which prevailed at that time.) Thus we have a unique opportunity to investigate the systemic causes of fraud and of the original contest decision.

Δ Synopsis: Moreau v. Tonry

The only 1976 congressional election dispute which resulted in the ouster of the original winner was the Moreau-Tonry contest. On October 2, 1976, Richard A. Tonry had apparently defeated James A. Moreau in the second Democratic primary of Louisiana's First Congressional District. The margin was slim, 184 votes out of a total of 97,394, but Moreau's complaint was fraud, not counting error. (All Louisiana precincts use machines, and all machines are canvassed twice as part of the regular election process.) On October 2, Moreau brought suit contesting the election under state law. The first two trial judges were recused, but the third judge, Melvin A. Shortess, ruled in favor of Tonry. Although there was evidence of fraudulent votes, Shortess concluded that Moreau had not carried the heavy burden of proof placed upon him by Louisiana law and precedent. The Court of Appeals overruled and nullified the election. However, the Louisiana Supreme Court reversed the Court of Appeals and reinstated Shortess' decision dismissing the suit. Moreau's appeal to the federal courts was unsuccessful, and on November 2, Tonry won the general election. Although both actions were fought by Moreau's attorneys, Tonry was certified by the State of Louisiana on November 21, and sworn in as a member of Congress on January 4.

While still pursuing his state remedies Moreau had, on December 2, sent a memorial to the Clerk of the U.S. House of Representatives challenging Tonry's right to the seat. A three-member panel chaired by Rep. Mendel Davis of South Carolina was appointed to hear the matter. Meanwhile, federal and local officials were pursuing criminal investigations, and beginning on December 15, a number of poll commissioners from St. Bernard Parish were indicted for vote fraud. Tonry charged that the investigation was one-sided and that the District and U.S. Attorneys were encouraging

plea bargains in an effort to develop information harmful to him. On February 15, the House panel ruled against Tonry's motion to dismiss the case and subsequently decided to make an independent investigation.

On April 21, in a new Louisiana trial Judge Shortess ruled:

> The evidence clearly and convincingly shows that a minimum of 229 fraudulent votes were cast in favor of Tonry and 25 illegal votes were cast for Moreau. Tonry's margin of victory was only 184 and had the fraud and ill practice not been perpetrated upon the court last October, Moreau would have shown that he was entitled to the relief he sought . . . .
>
> The language of Article 1, Section 5, of the U.S. Constitution makes Congress the sole judge of the qualifications of its members. Congress must now decide.[1]

On May 3, the House panel received the report from its investigators and on May 4, Tonry resigned. In a new election Tonry ran again in the Democratic primary and Moreau, abandoned by some of his former supporters, ran in the Republican primary. Both men lost.

Δ Analysis: Adversaries at the Polls

Most electoral systems rely at some point on representatives of opposing sides to keep each other honest. This approach has merit because partisans may provide a relatively inexpensive source of labor and because their inclusion in the process makes them partially responsible for the outcome. If one side fails to check on the other, it risks punishment in the election results. Unfortunately, the voters are also punished if fraud or error occurs. They have an interest in seeing their will accurately reflected in the election results. It is therefore important to evaluate the system of mutual checks by adversaries in light of this public interest. The Moreau-Tonry case provides a classic example of a breakdown in the adversary process at the polling place. It illustrates two problems: (1) opposing candidates are frequently not represented in all precincts, and (2) even the presence of a titular representative does not necessarily guarantee the honest administration of elections.

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[1] Moreau v. Tonry, No. 29-542 (La.25thJud.Dist., April 21, 1977) at 16-17.

Like most states, Louisiana has a system whereby each major candidate or party has an opportunity to name some of the commissioners or supervisors at each precinct. (Obviously, it would be impossible to accomodate representatives of all candidates in a primary.) However, candidates have not always taken advantage of their opportunities. It is often difficult to find supporters in each precinct who are willing to put in long hours on election day for little or no pay. The problem is compounded when an area is dominated by a particular party or faction. In St. Bernard Parish neither Tonry nor Moreau nominated commissioners or employed poll watchers. Therefore, the precincts were largely manned by a group of "regulars" who hired on for almost every election. Many officials have encouraged such repetitive service because it increased expertise at the polls and decreased training costs. In this case it is not surprising that many of the regular commissioners turned out to be supporters of Sheriff Rowley, the leader of the dominant faction in St. Bernard Parish. Rowley publicly backed Tonry in the primary.

The picture which emerges is certainly not one of opposing partisans jealously guarding their candidates' (and the public's) interest at the polls. Rather, it is one of friends and acquaintances most of whom live and work together year after year and who generally support the same party or faction. Although honesty frequently prevails without external checks, it seems reasonable to believe that the odds of fraud would be greater in the second situation than in the first. In several St. Bernard precincts where there were no supporters of Moreau various election commissioners were casually ringing up votes for Tonry throughout the election day.

However, in the precinct which appeared to have the greatest number of fraudulent votes, there was a reported Moreau supporter among the commissioners. This fact weighed heavily with Judge Shortess in the first ruling on the case.

> It is inconceivable that he [John Merrill Nunez, the Moreau supporter] would have kept his peace if the other commissioners at that poll rang the bell 178 times or even one time.[1]

Yet if we are to believe the subsequent testimony of the commissioners in federal court, that is approximately what Nunez did. When upon returning from the bathroom he discovered another commissioner casting fraudulent votes for Tonry, he took that commissioner's suggestion and rang up some votes

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[1] Moreau v. Tonry, No. 29-542 (La.25thJud.Dist., April 21, 1977) at 1578.

for Moreau. Nunez testified that later in the day the Clerk of the Court and his uncle, State Senator Sammy Nunez, came by the poll and he told them what had happened. According to Nunez his uncle got mad and walked out and the Clerk of Court told him to stop ringing the bell. Nevertheless, around 125 fraudulent votes were counted for Tonry and 20-25 (Nunez's contribution) for Moreau.

It is, of course, impossible for an outside investigator to know precisely what Merrill Nunez did or why he did it. Some participants in the Moreau-Tonry contest have suggested that Nunez did not really support Moreau, that he simply belonged to a political family which was opposed to the Rowley organization. Several supporters of Moreau have suggested that Nunez was a decoy set up by the other commissioners to establish wrong-doing on both sides in case of an investigation. It is also possible to paint a scenario in which Nunez, not knowing what to do and being subject to considerable peer pressure, simply took what seemed to be a handy way out. In any case, it is reasonably clear that the adversary process did not function in this situation.

Yet one may ask, so what? The problem occurred in a primary, not a general election contested by two organized parties, and St. Bernard Parish is hardly typical of the rest of the country. However, primaries are an important part of the electoral process, and many tow-party states have areas which are dominated by one party or a faction of one party. The present example does not establish the existence of problems elsewhere; it merely suggests the potential of problems. (It would be useful to discover the percentage of precincts in primaries and in general elections which operate without officials or poll watchers from opposing sides.)

What can be done? Where representatives of the opposing candidates cannot be relied upon to guarantee the integrity of the process, one might consider having at least one representative of the public at each poll. Several observers in Louisiana suggested the establishment of a statewide examination and certification process for poll commissioners. One problem with this approach is that many local election officials cannot attract all of the poll workers they would like for election day, much less induce them to attend training sessions and take examinations. Potential solutions for this problem include higher pay for the select cadre of certified poll officials and/or the use of public employees to staff the polls. Such people might be assigned to work in jurisdictions other than the ones in which they reside. Louisiana advocates of this general approach are quick to admit that such proposals would require more money and centralization and therefore would probably encounter considerable resist-

ance. Yet at a minimum these ideas provide a reasonable basis for further discussion.

Δ Analysis: Time and the Burden of Proof

In many states contests of elections to other than legislative offices are handled in the courts under something quite similar to normal civil procedure. The principal way in which these states provide for the special nature of election contests is through precedence on the docket. Yet given certain values, it would appear that precedence is not sufficient compensation for the severe time constraints under which election contests are frequently held.

The values involved here are fairness to the parties and the public's interest in an accurate result. If time pressures affected both parties equally, we might consider them a necessary inconvenience to be endured in the interest of a speedy conclusion. However, the contestee does not have to prove a case; the contestant does. In a complex situation it often takes considerable time to build a case. Therefore, the rapid termination of a trial may place a severe handicap on the party bearing the burden of proof.

Of course, it is always dangerous to generalize from a single case; election contests are fairly rare and their outcomes may be subject to many purely local influences. Louisiana's First Congressional District is unusual in several ways. It has long been a one-party district in a one-party state. There is ample evidence that at least parts of the district have experienced some novel election practices as well as an interesting variant of intra-party competition. The strength of the faction associated with the late Leander Perez, Sr. is legendary. Yet, in this case such idiosyncracies appear to have had more to do with the occurrence of fraud than with the handling of the contest.

Other local factors which could affect the outcome of a contest include the evidence, the advocates, and the judge. Elusive evidence, inept lawyers, or a biased and/or incompetent judge could produce a faulty decision regardless of the merits of the case or the adequacy of the contest procedures. Therefore, it is important to consider these possibilities.

Moreau v. Tonry was unusual in that the basic evidence of fraud was available from the time the polls closed. Like most states, Louisiana requires a signature at the time of registration and another signature at the time of voting. (Because registration closes before the day of the election it is impossible to forge both signatures at the same time.)

The poll commissioners who cast fraudulent votes were apparently so casual about their activities that they made only belated efforts to cover themselves in the poll books. According to his subsequent testimony, the commissioner entertained himself throughout the day by alternately shooting basketball, watching television, and ringing up votes for Tonry. It was only when his father warned him late in the day that he began to make up names and scribble them in the books. He apparently had a hard time keeping the books in balance with the totals on the machine. Others were not so careless, but they left a trail which included forged signatures of the same name, and signatures of fictitious people or people who were neither registrants nor residents of the district. These records were later used in federal court to win indictments against many of the poll commissioners.

The lawyers for the contestant had access to this evidence and they obviously knew, or quickly figured out, what to do with it. The runoff primary had been held on Saturday, October 2. On Monday, Moreau's attorneys filed a discovery motion to secure the voting records. Although the defendant appealed to the Fourth Circuit Court and the Supreme Court of Louisiana, the plaintiff gained access to the records for a 72-hour inspection in the office of the clerk of the court. Working around the clock the Moreau forces identified over 600 discrepancies in the books of four wards in St. Bernard Parish. On Wednesday they filed suite in the District Court to contest the election and on the same day they notified the U.S. Attorney Gerald Gallinghouse of their findings. Gallinghouse seized the records for his own grand jury investigation but made them available to the parties during the election contest.

Another important actor in this contest proceeding was the District Court train judge, Melvin Shortess. Given the scarcity of election contests in any single jurisdiction, one could not normally expect to have a judge with any experience in such matters. Indeed, had the contest procedures followed the statute precisely, the case would have been heard by a local judge with no known background in election contests. However, the defendant objected to the first and then a second local judge. Upon appeal, the Louisiana Supreme Court appointed Judge Shortess from Baton Rouge to hear the case. Judge Shortess had presided over LaCaze v. Moore in 1974. He had later collaborated with Judge Charles G. Douglas of Durkin v. Wyman, in an article in the Journal of the American Bar Association on the jurisdiction of the state courts in federal election contests.[1]

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[1] Shortess, Melvin A., and Charles G. Douglas III, 1976. "The Courts and Federal Elections." Journal for the American Bar Association, 62 (April): 451-455.

Since the illegal actions were blatant, the evidence easily available, and the principals experienced, it does not appear that the failure of the original contest proceeding can be blamed upon unusually elusive evidence or below average officers of the court. On the basis of available evidence it would appear that, if anything, the case is unusual in the availability of evidence and the experience and competence of the lawyers and judges. How then can one account for the erroneous decision? An alternative explanation rests upon time pressure and the burden of proof.

▲ Early Maneuvers

The second primary was held on October 2, one month before the general election. The events which had to be pressed into this brief interim included discovery, the trial, appeals, numerous other legal maneuvers, the printing of election material, and the preparation of voting machines, and whatever campaigning the Democratic nominee might be able to do. Numerous events during the trial indicated that at least some of the participants were aware of time pressures.

The most obvious time constraint was the impending general elections. On October 7, Moreau's attorneys filed suit with U.S. District Court Judge Fred Cassibry requesting the postponement of the general election in the First Congressional District until Moreau had exhausted his state remedies. Cassibry dismissed the suit for lack of evidence.

A more immediate deadline was imposed by the Louisiana law that absentee ballots be available twenty days before the general elections, in this case on October 13. Since the trial began on October 12, the need for haste was apparent. A few days earlier, the Louisiana Supreme Court had dissolved a restraining order by District Judge August Nobile which prevented Tonry;s name from appearing on the ballot pending a hearing of Moreau's suit. According to reports in the New Orleans press, the Tonry forces believed that the candidate who was designated the winner at the time of the absentee ballot deadline would, for all practical purposes have won the court battle.

Consequently, Tonry was concerned about the widely reputed political connection between Judge Nobile and the Perez faction, which supported Moreau. (In addition, Nobile had been opposed for reelection by Tonry's law partner.) Therefore, Tonry asked for a change of venue from Nobile's 25th District Court or a new judge. Judge Nobile refused, but the Fourth Circuit Court ordered a hearing to determine whether Nobile should be recused. Judge Eugene Leon began the recusal hearing, but in the absence of an objection from Moreau, Judge Nobile decided to step down.

By that time almost six and one-half hours of testimony had been heard by Nobile. However, the day was still October 12, and, mindful of the October 13 deadline, Judge Leon decided to continue the trial without rehearing the earlier testimony. Tonry's attorneys objected; the Louisiana Supreme Court also relieved the most immediate time pressure by staying absentee balloting for the general election until further notice. The trial resumed on October 14, with Judge Shortess presiding.

▲ The Trial

At the trial Moreau pursued two avenues of possible relief. His first choice was to have the Court subtract the fraudulent votes from Tonry's total. Since Tonry had won by only 184 votes and an investigation of the St. Bernard books by employees of the Plaquemines Parish Commission Council had found 616 more votes on the voting machines than signatures in the registration books, this action would have made Moreau the Democratic nominee. Moreau's alternate plea was to have the primary election annulled. The Court rejected the second alternative. Citing Dowling v. Orleans Parish Democratic Committee, Judge Shortess ruled that where illegal votes could be separated from legal votes it was the duty of the court to subtract the illegal votes and declare a winner. (In contrast, he had ordered a new election in LaCaze v. Moore, a case based upon machine error in which it was impossible to determine the final result.)

This approach places a much heavier burden of proof upon the contestant than other approaches. He must show not only that there were enough illegal votes to alter the outcome but also that enough of them were cast for his opponent.

Although the point was moot in this case because the illegal votes did not represent actual people, in Louisiana one cannot require a voter to reveal his vote even in contest proceedings.

Thus, Moreau was required to show that more than 184 illegal votes were cast for Tonry. His lawyers contended that the commissioners in charge of the precincts where the discrepancies had occurred were members of the Rowley faction. Since Sheriff Rowley supported Tonry, the discrepancies must be due to vote fraud in favor of Tonry. The opposing lawyers argued that the court would not accept the findings of the Plaquemines employees concerning the excess of votes over registrants because Plaquemines Parish was dominated by the Perez faction, which supported Moreau.

At the time of the trial it had not been established that some of the commissioners had actually committed fraud.

Gibson Tucker, an attorney for Moreau, stated that he had wanted to put each commissioner on the stand and take him through the poll book discrepancies name by name. By continually confronting the commissioners with evidence inconsistent with their stories he had hoped to get at the truth or at least to discredit their testimonies that they had no knowledge of fraud.

This strategy was only partially successful. A few commissioners took the fifth amendment and because this was a civil case, Judge Shortess made the inference that their testimony would have been unfavorable to them. However, three of the commissioners from Ward 4, Precinct 2, where the most serious charges were made, were unavailable to testify. One commissioner did testify that he knew of no wrongdoing and that the fifth commissioner, Merrill Nunez, was a supporter of Moreau. Nunez was not called to the stand and Judge Shortess concluded that his presence at the poll would have precluded any fraud. Other commissioners testified that there was no fraud at their polls.

The Moreau strategy for attacking the testimony would have required a very lengthy trial, and at 2:00 p.m. on October 15, the second day of the trial in which Judge Shortess presided, the Court ordered the plaintiff to conclude his case in two hours. As a result, Moreau's attorneys had to rely in part on aggregate figures such as 616 more votes on the machines than in the registration books. (The discrepancies between the machine totals and the poll books were minor.) This evidence suggested that something was wrong but it did not directly incriminate the commissioners who testified. There was no time to find and question the commissioners who did not show up for the trial. Being unable to shake the testimony of the commissioners that there had been no fraud, the contestant certainly could not go on to determine who had been the beneficiary of the fraud. Thus, the case rested in large measure upon the identification of illegal votes and the argument that the votes must have been cast for Tonry because the commissioners were supporters of the Rowley faction.

In his ruling, Judge Shortess stated:

> I must go back to the test as set forth in Dowling: Can these alleged illegal ballots be identified? The answer is no because the only extrinsic circumstance introduced is that the commissioners are or were aligned in the Rowley camp. You must first start with the legal presumption that the commissioners are presumed to do their duty. Taking that presumption and adding to it the Dowling rationale that the use of circumstantial evidence must be so

> strong that it excludes every other reasonable hypothesis compels this court to rule that plaintiff has failed in his burden of proof.[1]

Louisiana's Fourth Circuit Court of Appeals overruled and annulled the election. In a unanimous opinion the nine judges agreed "no inference can be made that these illegal vostes were cast for Tonry." However, their reading of the evidence produced a finding of at least 315 illegal, although unidentifiable votes, which "when considered in the light of the proven incidents of fraud and forgery, cannot be included in the vote total."[2]

"As the Supreme Court stated in Dowling and Lewis, where the illegalities are of such a serious nature as to deprive the voters of the free expression of their will, the election will be set aside and nullified."[3]

The decision was rendered on October 21, twelve days before the general election. At least one of the judges recognized the severe time problems involved. "However, having reached the conclusion that the result of the election should be annulled, I find, and I suppose that the majority of this court has some difficulty, that because of the time frame involved in this particular election process, there is insufficient time to order that a new primary election be held for the nomination of the Democratic candidate. . . . There is ample authority for this court to have declared that the issue before it was moot, because no effective remedy can be offered at this late date by way of a judicial declaration ordering a new election."[4]

The issue was appealed to the Louisiana Supreme Court on the same day, with argument beginning at 9:30 p.m. At 11:00 a.m. on the following day, October 22, the Supreme Court issued a 5-2 decision overruling the Court of Appeals and reinstating the decision of Judge Shortess.[5] Moreau appealed to the federal courts, but he was unsuccessful. Tonry won the general election and was seated in Congress.

▲ Conclusion

Although the action in the federal courts and in the U.S. House of Representatives is interesting in its own right, our focus is upon the Louisiana contest system. On February

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1 Moreau v. Tonry, (October, 1976), supra at 1587.
2 Moreau v. Tonry, No. 8222 (La.Ct.App.4thCir., October 21, 1976) at 8.
3 Id., at 9.
4 Id. (Boutall, J., concurring), at 3.
5 Moreau v. Tonry, No. 58791 (La.Sup.Ct., April 21, 1977).

15, after a number of poll commissioners had pleaded guilty to vote fraud in federal court, Moreau filed suit in Judge Shortess' court seeking to annul the decision of October 15. Shortess took jurisdiction and ruled in favor of Moreau. His written reasons for judgment provide a post-mortem analysis of the earlier procedure.

> "Has Moreau shown that this court's judgment of October 15, 1976, was obtained through fraud and ill practice? The clear, conclusive and convincing proof rings out with a resounding--Yes, he has done so. Alcide Hernandez has now admitted that he lied in the October proceeding. William J. McKenna deceived the court last October. The Sheriff's office reported that commissioners Schenk, LeBlanc and McCardle were outside the State of Louisiana and could not be served with subpeonas to testify last October. In fact, these gentlemen were not out of state or even out of town. They were present and available to testify. Whether they testified or plead the Fifth Amendment is really of no matter. In either event, the court would have known that something was awry in Ward 4, Precinct 2 and would not have placed so much weight upon McKenna's assertion that everything was "on the up and up" in that precinct. Add to this perjury and deceit, the conspiracy between lawyers and other unnamed members of Tonry's defense staff which culminated in Gary Dragon's appearance to plead the Fifth Amendment for commissioners who had not retained him, and one begins to sense the massive scheme which was employed to prevent this court from arriving at the truth.
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> "In an election contest suit, the contestot must overcome a most difficult burden, because an election may be upset only if the one contesting it can show that, 'But for irregularities or fraud, he would have been nominated. . . .' R.R. 18:364(B). Throughout the proceedings last October, this court, the Fourth Circuit Court of Appeal, and the Supreme Court all found that, 'No inference can be made that these illegal votes were cast for Tonry.' That inference has now been completely destroyed and shattered. The true facts are now in the record and the bell has tolled. But for the irregularities and fraud, Moreau would have been nominated in the second Democratic primary on October 2, 1976. The evidence clearly and convincingly shows that a minimun of 229 fraudulent votes were cast in favor of Tonry and 25 illegal votes were cast for Moreau. Tonry's margin of victory was only 184 and had the fraud and ill

> practice not been perpetrated upon the court last October, Moreau would have shown that he was entitled to the relief that he sought."[1]

Judge Shortess was undoubtably correct in stating that the decision would have been different if the perjury and deceit had not occurred. However, he was accounting for a particular outcome and we are focusing upon systemic characteristics. It is not reasonable to assume that people who commit vote fraud also will try to avoid testimony or will commit perjury in order to protect themselves? If one can expect massive fraud and perjury to occur together, how can one design a system to correct such abuses?

A possible answer is provided by the U.S. Attorney's separate investigation. Having time and resources, Gallinghouse developed strong cases against the commissioners themselves for conspiracy to deprive citizens of their civil rights. Armed with indictments and stiff penalties he plea bargained with the commissioners to get confessions. Thus, he was able to establish not only that illegal votes were cast but for whom they were cast. Tonry alleged that the investigation and plea bargaining were very selective, but the U.S. Attorney General investigated the matter and concluded that Gallinghouse was doing an excellent job. In obtaining the indictments, the U.S. Attorney's office made significant use of the same raw evidence which Moreau's attorneys had tried to present in the original contest.

It is, of course, impossible to reconstruct the original contest proceeding under different circumstances. Yet it is reasonable to hypothesize that in the absence of severe time pressures the results would have been different. There would have been more time to locate all the commissioners or to establish the fact that they were deliberately avoiding testimony. The court could also have carefully compared the testimony of the commissioners with the evidence in the poll books. Finally, if the date of the general election had not been so near, the option of annulling the primary might have been a more viable alternative.

However, identifying the time constraints as a problem is not the same thing as discovering a solution. It is impossible to allot in advance precisely the right amount of time for a contest; some plaintiffs would undoubtedly go on forever if they had the resources. Furthermore, there are many disadvantages to lengthy proceedings. Not only are they costly, but they also must distract the original winner

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[1] Moreau v. Tonry, (April, 1977) supra at 15.

from his tasks as a nominee or an office holder. In addition, the cost feature would probably raise another equity problem. If time constraints produce a one-sided disadvantage for the contestant, a lengthy contest would probably create a one-sided disadvantage for the party with the fewest resources.

In spite of these difficulties some remedies would appear to be promising. One of these would be to reverse the apparent trend toward shorter intervals between elections (primaries and general elections, first and second primaries). It is true that candidates have complained of lengthy campaigns, and some observers have feared that the increased cost of long campaigns would make candidates more dependent upon their financial backers. There is also the possibility that longer intervals between elections would cause voters to lose interest. These are worthy concerns, but they must be balanced by some thought for the administration of elections. It takes time to prepare for elections and time to correct errors and abuses. We cannot identify an ideal interval, but we can suggest that post-election remedies will be less effective as the interval approaches the minimum necessary for normal election preparation without a contest.

Judge Shortess has suggested that the initial proceeding in a contest of a primary election should be an evidentiary hearing designed to separate serious from frivolous cases. This hearing would be accompanied by a right of immediate appeal. If the courts decided that there was sufficient evidence, they could postpone the election to leave time for a trial. Special procedures would have to be developed for federal elections.

Another remedial step would be to speed up the contest process by the avoidance of delays. As noted in Chapter 4, a definitive settlement of the jurisdictional question in Congressional elections would allow a more efficient use of the time available for contests. In addition, where normal judicial procedure is used, many other delays are available, and given the effect of time constraints, the defendant has every incentive to use them as much as possible. When the Moreau v. Tonry trial began, the parties had already been through structural appeals to the Louisiana Supreme Court three times on different writs brought by the defense. (This figure does not include the procedures involved in the removal of the first two trial judges.) In normal judicial procedure the ability to raise and appeal many different issues may delay the conclusion of the original case. In election contests and the conclusion frequently cannot be delayed, so time taken on other issues is, in effect, subtracted from the time available for the contestant's case. It is instructive here that lawyers on both sides of Moreau

v. Tonry agree that there are too many opportunities for delay in Louisiana contest procedures.

We recommend that policy-makers streamline contest procedures to apportion the scarce commodity of time as fairly as possible.

Chapter V

RECOMMENDATIONS

O Recommendations for State Action

Volume II contains a detailed development of recommendations for the states. In general, all contests and recounts arise from some failure elsewhere in the election system. The recommendations for the states concentrate on the development of laws, rules, and procedures which are designed to ensure that the election system itself fails less frequently, thereby reducing the incidence of contests and recounts. Additional recommendations deal with the procedures for conducting both recounts and contests, but these are considered secondary for the most part. Of course, recommending the reduction of recounts does not imply that a recount or a request for one is evidence of failure in the system. Quite the contrary is true. A recount is a simple ministerial function to ensure the accuracy of the original tabulation. When large numbers of votes are to be counted, it can be expected that some error will occur in tabulation or in canvassing. If a race is very close, it is equally reasonable to expect that a check will need to be made to determine if the expected error is sufficient to alter the outcome. Contests, on the other hand, do constitute evidence of real system failure (or allegations that there was one), and election procedures should be designed to minimize the need for them.

△ Procedures Definition

Most state and local election agencies have no formal procedures for the conduct of elections as a whole or for recounts in particular. Most of the errors found in recounts deal with inconsistent tabulation criteria. Especially troublesome is the determination of the intent of voters who marked paper ballots. Formal, written procedures should exist for every aspect of the election process; those procedures should be developed at the state level; and some kind of state-operated monitoring system should be developed and implemented in order to ensure that procedural mandates are in fact observed.

△ Training

In most jurisdictions there is no formal training of election officials at the local level. In particular, precinct-level workers almost never receive training. While the vast majority of individuals who give their time to assist in the operation of elections are well meaning and capable, they are trained only in very general terms. This lack of training, combined with the lack of specific procedures for doing any particular job, necessarily implies a lack of uniformity in the ways in which officials will assess the eligibility of voters who

present themselves at the polling place, run the election itself, count ballots and machine totals, and tabulate and certify the results. This problem is exacerbated by the fact that these employees generally work only once or twice in each election year, and that there is high turnover among them.

A similar problem exists for local election boards, clerks, etc., even though their tenure and experience tends to reduce the magnitude of problems somewhat. It is recommended that all states mandate training for local election officials; that this training cover the election laws, regulations, mandated procedures, and good practice; and that some system be designed and implemented in each state to ensure that every person involved in the administration of an election receive such training.

Unfortunately, mandatory training will not guarantee that local officials will be able to recruit enough people to undergo the training programs. In many cases the financial rewards for the prospective poll worker may simply not be enough to offset the added burden of participating in a training program. Some states now have fairly specific training requirements, and some local officials in these states have been forced to choose between enforcing the training requirements and manning the polls.

One possible solution to this problem would be to make the rewards for trained poll workers sufficiently great to attract an adequate number of people. Of course, this option would increase the costs of elections in many jurisdictions. A compromise approach would be to establish different pay scales for workers with different qualifications and to insure that every polling place had at least one well-qualified person in a supervisory capacity.

Δ Recounts and Federal Elections

Under Roudebush v. Hartke, it is clear that states have the constitutional authority to recount congressional races. However, not all states have enacted statutes to provide for such recounts. The 1976 congressional elections produced one contest to the House of Representatives because the State of Michigan could not provide a simple recount in a very close race. It is recommended that the states which have not yet done so enact legislation to provide for congressional election recounts in races sufficiently close to cast doubt on the true outcome. Ideally, such recounts would be conducted under the same rules that apply to other major offices in the state.

Δ Election Scheduling

As discussed in Chapter IV, the scheduling of elections can

itself be a major element in contests. When sufficient time is not allowed between a primary and a general election, it is frequently impossible to settle even the most trivial contest before the next election. It is recommended that primary elections be scheduled sufficiently far in advance of general elections: (1) to allow adequate time for the operation of the individual state's normal recount and contest procedures, the time frame for which varies radically from state to state; (2) to provide time for any runoff that might be required; and (3) to provide campaigning time. While it is difficult to generalize about all states, it is clear that no state has a sufficiently rapid set of procedures for recounting elections to schedule a primary later than two months before the next expected election. States with relatively slow contest procedures need even more time.

△ Expediting Recounts and Contests

This recommendation is closely tied to the one preceding. Because of time and resource constraints and the need for reasonable speed in settling disputes, each state should design a recount and contest system to expedite proceedings to the extent possible, while still permitting adequate time for discovery proceedings and case preparation. Volume 2 contains detailed discussion on this point and a presentation of alternative methods for accomplishing the purpose, but in general we favor the system Type 1 described in Chapter III of this volume. It is recommended that recounts be treated as a ministerial error-checking function; that they be initiated on the basis of margin by a designated election official; and that they otherwise be available either on candidate demand or as a discovery proceeding incident to a contest. It is further recommended that special rules of procedure be adopted for election contests to minimize the ability of the defendant to delay the proceedings through the sequential appeal of pre-trial motions or the filing of parallel litigation in different courts. One method for accomplishing this purpose is to shorten the appellate procedure by designating the highest-level appeals court in each state as the appropriate court of original jurisdiction for contests of elections for House of Representative and for statewide offices.

○ Recommendations for Federal Action

Since federal elections are actually administered by the states, the recommendations for state action apply to them as well. In fact, all contests carried to the Congress have arisen as a result of failures in the state systems. Because the Congress deals only with contests carried from the states, the number of issues with which it must deal is substantially narrower than those faced at the state level. These issues are, however, extremely important to the proper operation of

a contest system. Our recommendations raise constitutional questions about the ability of the Congress to regulate the process and to delegate to the states certain of its power. The next subsection, which precedes the recommendations themselves, discusses these questions.

△ Constitutional Law and Emergent Federal and State Roles in Congressional Election Disputes

The authority allocated to the Congress and the states to regulate the electoral process for congressional elections and to determine the outcome of those elections through post-election recount and contest procedures is assigned by Article I, § 4 and § 5 of the U. S. Constitution. Article I, § 4 empowers the states to regulate federal legislative elections, subject, however, to the superseding power of the Congress to alter state regulations other than those designating the places for election of senators. This enabling authority of the states to adopt a congressional election code is constrained not only by the congressional authority to alter state regulations for federal elections, but by the exclusive authority vested in each house of Congress by Article I, § 5 to judge the elections, returns and qualifications of its members.

The mandatory and potential roles of the states and the Congress in the process for determination of the ultimate victor in a congressional election are dependent on both the opportunities, as well as the constraints, provided by the Constitution.

State action is dependent upon (1) the range of permissible state activity allowed under Article I, § 4; (2) the manner and extent to which a state is willing to exercise the Article I, § 4 authority; (3) the degree of acquiescence in state action by Congress by not adopting superseding regulations; and (4) the limits on state activity dictated by the Article I, § 5 requirement that each house judge the elections and returns of its members.

Congressional action, on the other hand, is limited by (1) the scope of activity each house of Congress alone can undertake under Article I, § 5 in judging election outcomes; (2) the range of permissible discretionary congressional activity allowed under Article I, § 5, and under other Constitutional provisions which facilitate the judging process; (3) the manner in which Congress is willing to exercise the discretionary power under Article I, § 5; and (4) the degree of necessary cooperation by entities external to the Congress (such as the states).

The state role in providing remedies for the validation of election outcomes was specified in Roudebush v. Hartke, a

1970 U.S. Supreme Court decision regarding the authority of a state to conduct a recount in a senatorial election. The court in Roudebush confirmed the range of permissible state action under Article I, § 4 to regulate the conduct of congressional elections recognized in an earlier decision.[1] In Smiley v. Holm, the court had said:

> It cannot be doubted that these comprehensive words [Article I, § 4] embrace authority to provide a complete code for congressional elections, not only as to times and places, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publishing election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[2]

In the Indiana election considered in Roudebush, the losing candidate petitioned for a recount, which under Indiana statutory law had to be granted by the appropriate state court. A three-member administrative recount commission was appointed by the court pursuant to the statutory procedure to recount the vote in designated precincts in the affected county. The recount process involved making new and independent determinations as to which ballots should be counted, and the recount results superseded previous returns. The court in Roudebush observed that the state had found the recount to be a necessary procedure to guard against "irregularity and error" in the tabulation of the votes. The court determined that the pre-recount election results were not final, despite the issuance of a certificate of election to the leading candidate, because a recount supersedes the initial count under Indiana law. The recount procedure was "an integral part of the Indiana electoral process" and was "within the ambit" of the state's Article I, § 4 powers.[3]

The court recognized that the state process of verifying the accuracy of the election results under Article I, § 4 was not totally separate from the Senate's Article I, § 5 judging power. The Article I, § 5 power was not violated, however:

> [A] recount can be said to "usurp" the Senate's function only if it frustrates the Senate's ability to make an independent final judgment. A recount does not prevent the Senate from independently

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[1] Roudebush v. Hartke, 402 U.S. 15 (1972).

[2] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[3] Roudebush v. Hartke, supra at 23-26.

evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount.[1]

The Roudebush decision provides the following criteria in determining the scope of minimum permissible state action after consideration of both § 4 and 5 of Article I:

1. The state may adopt a complete code for congressional elections, including procedure and safeguards necessary to enforce the fundamental right involved.

2. A recount remedy which permits the original results to be superseded is an integral part of a state's election code and is an appropriate exercise of Article I, § 4 powers.

3. A recount does not usurp the Article I, § 5 function of each house of Congress unless it frustrates the ability of the house to make an independent final judgment.

The principles enunciated in Roudebush extend logically to validate any state post-balloting remedy designed to verify an election outcome. State contest, as well as recount, remedies, whether administered judicially or administratively, are intended to safeguard the right to vote and protect the integrity of the election process, authorize supersession of the initial results, and do not frustrate the ability of each house of Congress to make an independent final judgment, unless for some reason necessary evidence may be destroyed. Nevertheless, state courts have ignored or constricted the implication of Roudebush and have prohibited a state contest action in a congressional election on the grounds it is an impermissible infringement of the exclusive authority vested in Congress by Article I, § 5.[2] It is clear, however, that permissible state action includes at least a recount remedy in congressional elections.[3]

Many states, by statutory silence, express statutory prohibition or state court interpretation, do not provide for a

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[1]Id., at 25-26.

[2]See, e.g., Gammage v. Compton 548 S.W.2d 1 (Tex.Sup.Ct. 1977), cert. denied sub nom. Paul v. Gammage, 97 S.Ct. 2676 (1977); Young v. Mikva, ___ Ill.2d ___, 363 N.E.2d 851 (1977).

[3]Roudebush v. Hartke, supra at 25-26.

recount remedy for congressional elections.[1] There is no right to a state-administered recount in the absence of state statutory authorization; consequently, the opportunity for recount endorsed by Roudebush is meaningless without a specific state statutory recount procedure applicable to congressional elections.

Congress has acquiesced in both state recount and contest actions.[2] In fact, before a contestant in a contest before the U.S. House of Representatives can obtain a House-ordered recount, he must have exhausted available state recount remedies.[3] Both houses of Congress have the authority to conduct independent recounts regardless of prior state recount actions.[4]

The role of each house of Congress in congressional elections is to be "the judge of the elections, returns and qualifications of its own members."[5] This power conferred by the Constitution has been characterized as being judicial rather than legislative in nature.[6] Each house has the "sole authority" to exercise this judicial power to determine the outcome of the elections of its members.[7] This exclusive authority, according to the Roudebush case, means at least the retention of ability of each house to make an "independent final judgment" in an election contest.[8]

The power to judge its members' elections includes the ancillary power to investigate disputed elections. The Supreme Court affirmed the existence of this investigatory power in Reed v. County Commissioners:

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[1]See Volume III, State Memoranda of Law on Election Contests and Recounts.

[2]See e.g., Moreau v. Tonry, H.R. Rep. of Special Ad Hoc Panel of the Comm. on House Admin., 95th Cong., 1st Sess., June 2, 1977; Durkin v. Wyman, S. Rep. No. 156, 94th Cong., 1st Sess. (1975).

[3]Swanson v. Harrington, H.R. Rep. No. 1722, 76th Cong., 1st Sess. (1940).

[4]See, e.g., Durkin v. Wyman, supra.

[5]U.S. Const. art. 1, § 5.

[6]Barry v. U.S. ex rel. Cunningham, 279 U.S. 597, 613 (1929).

[7]Id., 279 U.S. at 619.

[8]Roudebush v. Hartke, supra at 25.

> That [judicial] power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections.[1]

The power to investigate may be delegated to a committee consisting of members of the house or may be exercised by the house itself.[2] In the House of Representatives the Committee on House Administration has jurisdiction over the investigation of contested elections.[3] A subcommittee or ad hoc panel of that committee is assigned the responsibility of factfinding in any election contest.[4] In the Senate the Committee on Rules and Administration investigates contested election cases, although any such case may be referred to a subcommittee for factfinding and reporting of recommendations.[5] The final decision, after recommendation by the appropriate standing committee, is made by each house itself.[6]

Congress is not limited to the committee structure of each house for an investigation essential to the performance of one of its constitutional functions. In Buckley v. Valeo, a 1976 Supreme Court decision regarding, inter alia, the constitutionality of the Federal Election Commission as originally constituted, the court clarified the authority of Congress to employ means other than the committee system to conduct investigations.[7] The eight-member Federal Election Commission initially was composed of two non-voting ex officio members (the Secretary of the Senate and the Clerk of the House of Representatives), two members appointed by the Senate, two appointed by the House of Representatives, and two appointed by the President. The six appointed, voting members of the Commission were subject to confirmation by the Congress. The duties of the Commission included enforcement of the provisions of the Federal Election Campaign Act of 1971.

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[1]Reed v. County Commissioners, 277 U.S. 376, 388 (1928).

[2]Barry v. U.S. ex rel. Cunningham, supra at 613.

[3]U.S. House of Representatives, 95th Cong., 1st Sess., Rules of the House of Representatives, Rule X(i)(11) (1977).

[4]See H.R. Rep. Nos. 242-245, 95th Cong., 1st Sess. (1977).

[5]U.S. Senate, 95th Cong., 1st sess., Standing Rules of the U.S. Senate, Rule 25.1 p(1)(D) (1977); see Hurley v. Chavez, S. Rep. No. 1081, pt. 1 at 1, 83d Cong., 2d Sess. (1954).

[6]U.S. Const. art I, § 5.

[7]Buckley v. Valeo, 424 U.S. 1 (1976).

The Supreme Court, in finding the statutory appointment procedure an unconstitutional circumvention of the President's authority to appoint "officers of the United States", provided guidance on the extent to which Congress can employ instrumentalities other than congressional committees to conduct investigations:

> Insofar as the powers confided in the [Federal Election] Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to its own committees, there can be no question that the Commission as presently constituted may exercise them.[1]
>
> They [the Federal Election Commissioners] may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."[2]

The Buckley case recognized the power of Congress to conduct investigations through instrumentalities other than committees and to appoint the membership of the investigating body without violating the appointment power of the President.[3]

Since the Congress can create non-committee investigative bodies to aid it in the performance of its legislative functions, by analogical extension it should be able to use investigative and factfinding entities and procedures designated by the Congress or one of its houses to facilitate its performance of a judicial function, that of judging the elections of its members. Even without reliance on the Buckley decision, the authority of Article I, § 5, coupled with Congress' implementation authority under the "necessary and proper clause", should permit the employment of reasonable alternative investigative approaches in contested election cases, but only if the final independent judgment of the judging

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[1] Id., at 138-139.

[2] Id., at 140.

[3] Id., see also U.S. v. Fitzpatrick, 96 F.Supp. 491, 493 (D.C.D.C.), where the district court said: "The power of the Congress to conduct investigations by and through its committees, or otherwise, is one essential to the performance of the legislative function and certain other functions that are committed to it by the Constitution."

house is facilitated rather than frustrated.[1]

The Congress can establish an independent commission to investigate a contested election dispute and report directly to the appropriate house of Congress. This conclusion is the strictest, most limited interpretation of Buckley v. Valeo; however, the Congress has adopted a number of alternative strategies under the "necessary and proper clause" to implement other powers. The Congress has used the states (specifically the state courts) to conduct naturalization proceedings pursuant to Congress' exclusive authority to establish a uniform system of naturalization.[2] Congress has also adopted state criminal laws for application in federal enclaves located within the boundaries of a state.[3] Thus, Congress has by direct delegation of power and responsibility designated state instrumentalities to participate in the performance of federal functions and has assimilated state law into federal law.

Through its power to adopt necessary and proper laws for the execution of other constitutional power, Congress may assign the states initial responsibility for investigation and resolution of congressional election disputes or may assimilate state contested election laws into federal law or congressional rules. In either event, recourse to state recount and contested election remedies could be made a condition precedent to pursuit of further relief before Congress; the contestant, in effect, would be required first to exhaust available state remedies. The state procedures, however, must not frustrate the ability of the affected house of Congress to render an independent, final judgment.

The use of federal courts to assist in the investigative phase of a congressional contest proceeding has been proposed many times.[4] It is not clear whether the investigative authority could be delegated to the "inferior courts" in the federal system, the so-called Article III courts.[5] Although the inferior courts, such as the district courts and courts of appeal, are dependent upon Congress for their creation and assignment of jurisdiction, it has been held by the Supreme Court that an Article III court's opinion cannot be subject to

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[1]Buckley v. Valeo, supra at 138-140; U.S. Const. art. I, §§ 4, 5, and 8, cl. 18; Roudebush v. Hartke, supra at 25.

[2]U.S. Const. art. I, § 8, cl. 4; Holmgren v. U.S., 217 U.S. 509 (1910).

[3]U.S. v. Sharpnack, 355 U.S. 286 (1958).

[4]Barnett, Contested Elections in Recent Years, 54 Political Science Quarterly 187 (1939).

[5]U.S. Const. art. III, § 1.

revision or control by a legislative or executive officer.[1] Finality of judgment is considered an essential attribute of federal judicial power, which is the reason why federal courts decline to render advisory opinions.[2] Legislative courts, which are created by Congress under its Article I authority, can be vested with non-judicial functions of a legislative or advisory nature; their judgments can be deprived of finality.[3] A legislative court, therefore, could be required to conduct an investigation of a congressional election contest and report its findings and recommendations to Congress, if it did not frustrate the ability of Congress to make a final independent judgment.[4]

In summary, each house of Congress under Article I, § 5 is the sole authority to judge the outcome of the elections of its members. This authority requires each house to render a final independent judgment in an election contest. The investigatory power of the Congress permits the use of instrumentalities and procedures other than the congressional committee system to investigate election contests and report recommendations for the final independent judgment by the affected house. Congress can employ an independent commission or legislative court for factfinding and advisory recommendations. It may also require a federal election contestant to exhaust available state recount or contest remedies before initiating and pursuing a contest remedy before Congress.

Δ Jurisdiction Over Congressional Contests

In order to reduce the incidence of frivolous contests to the Congress while improving the ability of the contest process to produce a fast, equitable treatment of legitimate contests, it is recommended that the Congress take action to define the jurisdiction of states over contests for congressional office. Three possible solutions to the problem are discussed below.

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[1] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S., 113-114 (1948).

[2] See discussion, Congressional Research Service, The Constitution of the United States of America--Analysis and Interpretation, 649-650, 598-599 (L. Jayson sup.ed. 1973), U.S. Senate Doc. 92-82.

[3] Ex parte Bakelite Corp., 279 U.S. 438 (1929); Gordon v. U.S., 69 U.S. 561 (1864).

[4] Roudebush v. Hartke, supra at 25.

▲ Delegation to the States

Under this option the Congress, or each house, would declare its intent by statute that the logic of the Roudebush decision be extended to contests for congressional office, and that the states assume jurisdiction over such contests with the understanding that they could not preclude subsequent congressional review of the results. If this option is adopted, the Congress should insist on the total exhaustion of state-level remedies before reviewing the case, although it could impose stringent time limits for state review in order to ensure speedy resolution. This option could involve the use of state procedures as they exist for other offices, explicit authority for states to enact special procedures, or authority for states to act under guidelines imposed by the Congress.

▲ A Congressional Fact-finder

Under this option the Congress would establish a bipartisan group of non-members whose function it would be to serve as fact finders in all contests brought to the Congress. Such a body could act for the entire Congress, or separate ones could be established for each house. This fact-finder or group of fact-finders should investigate contests according to rules established by each house, summarize the facts of the cases, and make a recommendation to the appropriate committees.

▲ A Mixed System

The third option is to combine the previous two arrangements. In such a case, the state process would be viewed as a preliminary screening device which would have the effect of settling many contests, but a congressionally-designated, professional fact-finder would still be used to investigate those that come to the Congress, make a recommendation to the appropriate committee, and perform other services to the Congress to minimize the burden on committee members and staff now caused by the high volume of congressional contests. (It should be noted that the House of Representatives used a modification of this model with its special ad hoc investigative committees in the 1977 session, except that committee members were used as fact-finders.) This mixed option would function well only if incentives were provided to both candidates and the states to move rapidly and with a certain amount of procedural and substantive uniformity.

△ Election Dates

As discussed in the state recommendations, the tendency toward very late primaries, while it has many advantages, makes the resolution of any serious election contest before the next election campaign must begin virtually impossible. It is

recommended that the Congress exercise its authority to regulate election dates by imposing guidelines on the states concerning the latest acceptable time for federal primaries. No two elections (primary, runoff, and general) should occur within the same eight-week period, except for special elections held as a result of a contest in which a regular election result was invalidated.

Δ Accessibility

The accessibility of recounts to candidates to federal office varies widely from state to state. It was recommended elsewhere that all states that have not yet done so make routine recounts available in congressional races. It is recommended here that the Congress consider the enactment of federal standards specifically delegating such authority to the states and requiring that they exercise it. Alternatively, the Congress might provide explicitly for discovery and full recounts in cases in which no such remedy is available at the state level, and the closeness of the originally-reported outcome warrants it.

Δ Uniformity of Recount Scope

The scope of available recounts and recanvasses in federal offices varies widely from state to state, thereby denying candidates in the more restrictive states an opportunity for a simple review of the entire record of the election. Two problems are posed by these differences: (a) the scope of available evidence in discovery proceedings is restricted, and (b) a recount which determines entitlement to a set may be conducted on some limited subset of the original election. It is recommended that the Congress act to make the scope of congressional office recounts uniform nationwide with respect to the following: (a) the recanvass of machine totals; (b) the recount of all paper ballots, including absentees; (c) the reassessment of qualifications and eligibility of voters whose ballots were cast; and, (d) policy concerning reexamination of ballots invalidated during the original tabulation.

Δ Development of Senate Contested Elections Procedures

In Durkin v. Wyman the Senate demonstrated that it has no formal procedures under which it conducts election contests. While the volume of contests in the Senate is admittedly low, fairness to potential contestants, the public, and the Senate itself dictates that rules be established for the resolution of contested Senate elections. The Senate should develop a contested election act or comparable rules under which all contests will be handled.

Any set of rules adopted by the Senate should deal with the issues discussed elsewhere in these recommendations, and

provide for each step in the initiation and determination phases of a recount. Since the Senate is the ultimate authority in such contests, there is obviously no need to provide for review. In order to prevent a recurrence of the problems that arose in the New Hampshire case, special attention should be paid to defining the circumstances under which the Senate would decide that the evidence presented to it makes the case impossible to resolve. One possible definition of this point would be the inability of a majority of the appropriate committee to reach agreement within a reasonable period of time as to vote totals and how they should be interpreted.

Δ Adherence to Published Procedures

The houses of Congress, being the ultimate authorities in election contests, are subject to no external checks to ensure that they in fact follow their own rules and statutorily-defined procedures. While it is not desirable to make the Congress subject to such checks, it is desirable that each house scrupulously adhere to its contested election legislation and related rules. The House of Representatives, in particular, appears to apply rules different from those published in the House Contested Election Act by requiring that contestants have the results of discovery in order to reach that stage of the contest process at which discovery is permissible. While the desire of the House to dispense with cases that appear to have no substantive merit is quite understandable, the appropriate way to deal with any perceived problem of frivolous cases is to change the rules rather than ignore them. It is recommended that both houses adopt the rules under which they wish to operate, and that they adhere strictly to those rules.

APPENDIX A

THE LAW ON ELECTION CONTESTS AND RECOUNTS IN FEDERAL OFFICE ELECTIONS

THE LAW ON ELECTION CONTESTS AND RECOUNTS IN FEDERAL OFFICE ELECTIONS

I. INTRODUCTION

A. Scope of Memorandum

This memorandum encompasses the law relating to election contests and recounts of elections for the offices of United States Senator, United States Representative, and Presidential Elector. Certain related subjects are, however, outside the scope of this study. First, questions presented to the separate houses of Congress concerning the qualifications of the members of the body will not be discussed. This issue is not strictly related to contesting the election of an individual member, although in some instances an election contest may be based on the lack of qualifications of a member-elect. Second, a question sometimes adjudicated by Congress, whether a presidential elector may be compelled to vote for the presidential candidate who received a plurality of the votes in the general election, is more a question of regulation of the electoral college and not one concerning the election of the individual elector. Nevertheless, both of these issues will be briefly discussed in this introduction to the memorandum.

B. Qualifications of Congressmen

The Constitution grants the separate houses of Congress authority to judge the "Elections, Returns and Qualifications of its own members . . . " [1]. It is the authority to judge the elections and returns of the members of Congress that is the major focus of this memorandum; however, judging the qualifications of members may be a threshold consideration.

An integral part of the qualifications question is the distinction that may be drawn between exclusion of a member-elect and the expulsion of a sitting member. Exclusion may be accomplished by either house of Congress by a simple majority vote of a quorum of the members, but a member may be expelled only upon the concurrence of two-thirds of the members [2]. The Supreme Court has interpreted the provision of the first clause of Article I, § 5, of the Constitution, relating to qualifications of members of Congress, to mean that each house may judge only those qualifications enumerated in the Constitution in determining if a person is qualified to serve in Congress [3]. The constitutional qualifications

include only minimum age, residency and citizenship requirements [4].

The Supreme Court in the Powell case was confronted with a situation in which the House had voted by a two-thirds vote to "exclude" a member-elect who had not been duly sworn by the House but had been asked to step aside during swearing-in ceremonies of the 90th Congress, thus creating "provisional membership" [5]. The Speaker of the House then appointed a Select Committee to investigate Mr. Powell's eligibility to serve in Congress [6]. The grounds of the investigation were certain illegal activities in which Powell was alleged to have engaged in while serving as a Representative in prior Congresses. The Select Committee, after hearings on the matter, concluded that Powell met all the constitutional qualifications and recommended that he be seated as a member of the 90th Congress, but also censured and fined $40,000 for the improper activities while serving in previous Congresses [7]. An amended resolution, calling for Powell's exclusion and a declaration of the vacancy of the seat, was voted upon by the House and passed by a margin of 307 to 116, a margin greater than the two-thirds majority required to expel a sitting member under the second clause of Article I, § 5 of the Constitution [8]. In answering a parliamentary inquiry concerning the vote needed to carry the resolution for "exclusion," the Speaker of the House ruled that a simple majority would suffice [9].

In answering the defendant's arguments that, since a two-thirds vote was mustered, the action taken by the House was tantamount to an expulsion, the Court held itself unable to speculate that the House would have voted to expel Powell had it been presented with that precise question. Since the Speaker had ruled that the vote conducted was one to exclude, the Court could not make a determination of the outcome as if Powell had been seated and expulsion proceedings had then been brought against him [10].

In determining that the House of Representative had unconstitutionally deprived Powell his seat in Congress, the Court considered and rejected arguments that the judiciary lacked subject matter jurisdiction over the dispute [11], and that the case presented a nonjusticiable political question based on the separation of powers of the branches of the Federal government [12]. The Court clearly established that the power to interpret the Constitution was vested in the judicial system, with the Supreme Court acting as the "ultimate interpreter of the Constitution" [13].

The Powell case narrowly construed thus stands for the propositions that: (1) Congress does not have discretionary authority to add to the qualifications enumerated in the Constitution [14]; (2) Congress may not by a majority vote, deny membership to any person whose election is not contested and who meets the constitutional qualifications [15]; and, (3) the courts may exercise their inherent authority to interpret the Constitution and to make determinations that a coordinate branch of the federal government has exceeded its constitutional authority [16]. The House of Representatives has acquiesced in the Court's interpretation of the Constitution and has declined to adjudicate a challenge to a House seat based upon alleged political "dirty tricks" where there was no connection between the violations and the results of the election. The House declined to decide the right to the seat on the basis of unfitness for office based on alleged criminal activity, for so to do would violate the clear mandate of Powell v. McCormack by adding additional qualifications to the holding of the office. In so holding, the the House expressly repudiated several House and Senate precedents based on the notion that mere violations of corrupt practice laws could constitute grounds for exclusion even in the absence of a showing that the violations affected the outcome of the election [17].

The court system's role in a controversy of the nature of the Powell case extends, however, only to those cases which may be decided on the basis of an interpretation of the Constitution [18]. This is an important qualification since it is clear that the courts may not substitute their judgment for that of the Congress when dealing with factual matters, the determination of which are constitutionally reserved to the legislative branch, rather than constitutional interpretation. Included in the category of generally non-justiciable political questions are Congress' power to act as the final judge of the elections and returns of its members, discussed infra, and the final judgment whether an individual meets the constitutionally provided qualifications for membership to Congress [19].

C. The Faithless Elector

A recurrent question in presidential elections is whether a person elected to the post of presidential elector may be required, either by political party mandate or imposition of a pledge, or by congressional action in counting the electoral vote pursuant to its constitutional duty, to vote for the officially declared candidate of the elector's political party. The constitutionality of political party requirements that

candidates for presidential elector, prior to being placed on the official ballot, sign a pledge to vote for the party's official candidate should the party prevail in the popular vote of the general election,has been upheld by the United States Supreme Court. The Court, however, declined to rule on the enforceability of the pledge. Although the Twelfth Amendment does not specifically allow the requirement of a pledge, neither does it disallow the practice. When weighed against the policy that political parties be allowed to protect the integrity of their political philosophies, the right to require pledges of candidates is not constitutionally proscribed [20].

When the electoral vote is being counted by the joint session of Congress, as provided by law, the vote of any elector may be protested in writing by a petition signed by at least one Senator and one Representative. After receiving any objections concerning the electoral vote, the houses of Congress separate to consider the question presented. Both houses must concur before rejecting any vote "regularly given" [21]. Congress has recently construed its duty to count all regular electoral votes as precluding the rejection of any vote for the sole reason that an individual elector may be characterized as a faithless elector. Both houses rejected the contention, raised by Senator Edmund Muskie and Congressman James O'Hara in the 1969 presidential elector count, that a vote by an elector not in support of the political party's official candidate is a vote not regularly given as required by the Constitution [22]. Thus, as one commentator has noted, "only custom binds an elector to any pledge he may have made to his party or to the voters" [23].

II. GENERAL CONSIDERATIONS--CONGRESSIONAL ELECTIONS

The tension between two constitutional provisions provides the background before which all Congressional election contests are decided. State legislatures are given the authority to prescribe the "Time, Places and Manner of holding Elections for Senators and Representatives," subject to Congress' authority to alter any such state regulations except those dealing with the places in which Senators are chosen [24]. The Supreme Court of the United States has interpreted this clause to mean the states are endowed with broad authority, subject to Congress' prerogative, to establish any regulations deemed necessary or appropriate to provide a comprehensive Congressional election code and "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved" [25].

More recently, the Court has held that this authority to prescribe a comprehensive procedural code for Congressional elections extends at least as far as a judicially ordered recount proceeding conducted by a panel with authority to make an independent decision concerning which ballots are to be counted and for whom they are to be tallied [26]. The Court characterized the statutory recount proceeding as one procedure necessary to guard against irregularity and error in the tabulation of election returns and therefore an "integral part of the Indiana electoral process" [27]. A commentator, writing prior to the decision in Roudebush, arrived at a similar conclusion, urging the constitutionality of recount provisions "which are an integral part of the initial counting of the ballots" [28]. The Court in Roudebush recognized that the constitutional powers granted to the states to prescribe the manner of congressional elections overlaps to a certain extent the powers granted to the separate houses of Congress to judge the elections and returns of their members. Viewing the situation pragmatically, the Court held that Congress may choose to accept or reject the results of the recount or even those of the initial tabulation, or either house may choose to conduct its own recount. Therefore, the recount proceeding may not be said to usurp the authority of Congress in judging the elections of its members [29].

A logical extension of the question resolved in Roudebush was left unanswered by the Court: may states provide a method by which to contest the final outcome of a Congressional election on grounds such as vote fraud, corrupt campaign practices, or lack of constitutional qualifications on the part of the winning candidate? It appears clear that as the sole judge of its members' elections, Congress has exclusive authority to decide such contest actions.

The holding in Roudebush, limited by its facts to situations involving recounts, may support, however, the argument that state contest proceedings may be conducted if the appropriate house of Congress is given the opportunity to make the final and conclusive judgment concerning the matter. A contest action would seem to fall into the category of a procedure to safeguard against fraud or corrupt practices in the electoral process of the state. Therefore, to be within the ambit of the Court's test, the contest action would merely have to be an "integral part" of the electoral process [30]. Despite the apparent plausibility of this argument, state and Federal courts have generally held that courts have no jurisdiction to pass on the merits of a Congressional election contest involving a general election [31].

In two instances, courts have accepted the logic of the argument that the functional equivalent of an election contest was not precluded by Article I, § 5. In Durkin v. Snow [32], the Federal district court refused to enjoin the meeting of the New Hampshire Ballot Law Commission in which the commission was going to rule on the validity of those ballots contested at the statutory recount proceedings allowed by the New Hampshire election code [33]. The New Hampshire election code provides the opportunity for all candidates for office to request a recount of the ballots. Either party may register a protest concerning the proper tabulation of any ballot as tallied at the recount proceeding. Any protest overruled at the initial recount may be appealed to the Ballot Law Commission, which has authority to determine for whom the disputed ballots were legally cast. The court found this system to be within the purview of the test established in Roudebush that is, whether the "recount" provisions are an integral part of the electoral process and are designed to protect the integrity of the electoral process [34]. Passing upon the merits of disputed ballots and rendering a "final" decision thereon may be construed as judging the returns of an election, thus lending support to the conclusion that a court-administered contest action, as opposed to the administrative procedures involved in Durkin v. Snow, that is provided to protect the integrity of a state's electoral processes may be within the ambit of Article I, § 4 powers reserved to the states.

The second case involved a state supreme court's decision that certain election irregularities, such as improper ballot placement and the use of voting machines that did not provide single-lever straight party voting, did not vitiate the result of the 1974 Oklahoma election for Senator nor render void the votes cast in the district experiencing the irregularities, because the proponent did not carry his burden of proof in showing that the outcome of the election could not be determined with mathematical certainty [35]. The action was originally brought to compel the issuance of the proper certification of election for the Senate office by the state election board. Thus, the case had definite election contest attributes, with both parties seeking a final judicial determination of the right to the certificate of election. Relief was granted by the court in finding that Mr. Bellmon was entitled to certification as originally issued [36]. Despite the nature of the case, no party to the suit contended that the court's jurisdiction over the case was precluded by Article I, § 5.

The question of judicial intervention into the electoral process also arises in the context of primary elections for Congressional offices. The Supreme Court has held that

where the primary election for Congressional officers is an integral part of the state procedures for the election of Representatives and Senators, the word "elections" in the Constitution encompasses the primary election as well as the general election [37]. The integrity of primary as well as general elections must be guarded. The decision in U.S. v. Classic was the basis for the Wisconsin supreme court's adoption of the view that the separate houses of Congress are vested with authority to finally determine the outcome of primary elections as well as general elections. Thus, the court denied jurisdiction of a dispute concerning the eligibility of Joseph McCarthy to run for the Senate [38]. The same view was expressly adopted in Colorado more recently. The state court, discussing Classic, held that, given the Constitution's grant of authority to states to regulate primary elections contained in Article I, § 4, it follows as a logical corollary that Article I, § 5 applies with equal force to primary elections. The court denied jurisdiction to hear the election contest [39]. The reasoning in Roudebush would also apply with equal force to primary elections, allowing those measures that are integrally related with the electoral process to be determined, initially but nonexclusively, on the state level.

III. HOUSE OF REPRESENTATIVES PROCEDURES

A. Procedural Aspects

Since 1851 there have been several different statutorily prescribed methods of initiating an election contest before the House of Representatives. The Federal Contested Elections Act was passed in 1969 to alleviate some perceived difficulties in the prior law [40]. This statute [41] provides any candidate for election to the House of Representatives the means by which to initiate a contest proceeding [42]. The prior statutory contest provisions allowed "any person" to contest the election for representative [43], however, the House had rarely granted standing to electors or elector groups and the legislative history of the present law makes it clear that one motivation for the amendments of 1969 was to ensure that only candidates could utilize the statutory provisions [44]. The statutory provisions apply specifically only to general elections [45], but the House has accepted and acted on contested primary elections [46].

There are, however, means by which persons other than the defeated candidate may bring into question the results of an election. An elector of the district or any other person may file with the House a protest or memorial concerning any member's election, and a member of the House may make

a motion questioning the election. Neither of these methods was affected by the passage of the Federal Contested Elections Act [47].

The statutory provisions of the Federal Contested Elections Act merely provide the means by which to initiate a contest action and do not prescribe any substantive law concerning the grounds for contest, the evidentiary burden placed on the parties, or the pleading requirements. The existing substantive law, as it has been shaped by the extensive precedents of the House, was left intact. Many different grounds for contest actions have been urged by unsuccessful candidates and other persons over the years, including inter alia allegations of violations of state election or corrupt practice laws, fraud, legally unqualified candidates, and other electoral irregularities such as the casting of a number of ballots in excess of the number of persons shown as voting. The House has also been petitioned frequently to render the final decision concerning the appropriate resolution of disputed paper ballots [48]. It is clear from the statutory provisions and from House precedent that the allegations of the complaint must be sufficient, if proven, to change the results of the election [49]. There are two grounds frequently alleged that the House has refused to recognize as sufficient bases, without some additional showing, upon which to predicate a House inquiry: the mere closeness of an election and the absence of a state recount procedure [50].

The Constitution makes it clear that the house in which the seat is contested is the appropriate forum for a contest action [51]. In the case of a representative's seat, a contest is initiated by filing a petition with the Clerk of the House [52]. The cause of action is referred to the Committee on House Administration pursuant to the House rules [53], and then the action is generally referred to a subcommittee or, as in present practice beginning with the 95th Congress, to an ad hoc panel composed of three members of the Committee appointed by the Chairman [54]. The ad hoc panel is appointed to act as a fact-finder and reports its findings, after holding hearings, to the full Committee. The panel's resolution adopted at the conclusion of the hearings is transmitted to the Committee on House Administration [55]. The full committee then may adopt or reject the panel's resolution after conducting any proceedings deemed necessary to make the proper decision and report thereon to the House [56]. The House may then debate the resolutions presented to it by the Committee on House Administration with the vote of the entire body acting as the final decision on the matter [57].

The statutes require that an election contest is to be initiated within thirty days after the results of the election have been declared by the officer or board of canvassers authorized by state law to perform such a function. The petition is filed with the Clerk of the House of Representatives, and a notice of intention to contest the election is served upon the contestee [58]. The notice to the contestee must state with particularity the alleged grounds for the contest and must also inform the contestee of the thirty-day period granted in which to answer the petition [59]. The notice is to be served in a manner which conforms generally to the requirements of the Federal Rules of Civil Procedure [60]. The answer, with either an admission or denial of the averments of the complaint, is served upon the contestant within thirty days after service of the complaint. Any defenses must be raised affirmatively in the answer [61]. House precedents make it clear, however, that the statutory limitations are not of absolute binding force, but rather are merely directory in nature [62]. Thus, the House has considered the merits of petitions filed with the Clerk of the House after the statutory period has expired [63] and in instances in which the petition was filed before the election results had been certified by the appropriate state authority [64].

A contestee may interpose several defenses by way of motion before filing the required responsive pleading. The contestee may allege the service of notice of the contest was insufficient, the contestant lacks the required standing, the notice failed to allege grounds sufficient to change the results of the election, or the failure of the contestant to claim title to the contested seat [65].

The pleading requirements of contest actions brought before the House are severe. The Federal Contested Elections Act provides that the notice of contest served upon the contestee must "state with particularity the grounds upon which contestant contests the election" [66]. The contestee must then answer the notice within thirty days or defend by motion prior to answering the complaint [67]. The 1969 contest statute specifically provides the contestee with a means by which to compel a more definite statement of the grounds of the contest in the event the complaint is vague or ambiguous. The contestee, however, must point out any defects in the notice and state the details necessary to frame a responsive pleading [68]. The legislative history reflects the concern of Congress in establishing a coherent system of procedure in contest actions by patterning the procedural framework after the Federal Rules of Civil Procedure [69].

The House precedents clearly have established the substance of the statutory requirement of pleading with "particularity." The election contest action involving Victor Veysey and David Tunno, arising out of the November 3, 1970, general election, was the first action to be heard by the House under the revised Federal Contested Election Act. Tunno was contesting the seat on the grounds of massive voter disfranchisement due to the improper cancellation of eleven thousand voter registrations. The House allowed Veysey to defend the suit by interposing a "motion to dismiss" based on the failure of the notice to allege grounds sufficient to change the results of the election. In this context the motion to dismiss is acted upon before the contestee is required to file an answer to the charge. According to the committee report, allowing the contestee to raise such a motion conserves valuable Congressional resources, because in the past extensive hearings and investigations had been conducted "only to find that if the contestant had been required at the outset to make proper allegations with proper supportive evidence that could most readily have been garnered at the time of the election, such further investigation would have been unnecessary and unwarranted" [70]. In resolving to dismiss the action, the Committee on House Administration made clear that the allegations of the contestant's petition were insufficient to change the result of the election even though proven [71]. The Committee on House Administration has held the contestant to the burden of presenting substantiating evidence, such as the number of votes counted in excess of those cast and the number of votes expected to be changed thereby, tending to show error or fraud of sufficient magnitude to change the results of an election in order to overcome the contestee's motion to dismiss [72].

The House was presented with eight election contest actions in the 95th Congress, and in all of those which were reported by the Committee on House Administration, insufficiency of the contestant's pleading was cited as the reason for dismissal [73]. In one of these cases, the committee report stated the necessity of pleading with particularity:

> The significant point one can glean from the law, its legislative history and the cases is that in order to get by the motion to dismiss the challenger must not only show fraud, error, or some kind of wrongdoing, but he must further show, with supportive evidence, that the result of the election, absent that, would have changed. Mr. Paul's pleadings are certainly in proper form and he does allege instances of irregular and perhaps even illegal voting. However, Mr. Paul has failed to demonstrate that any or all of this would change the result of the election [74].

The Committee also reaffirmed the efficacy of three presumptions attached to the official returns of an election: the returns represent prima facie evidence of the regularity and correctness of the returns; election officials are presumed honest; and the burden of overcoming these presumptions rests with the contestant [75]. The majority opinion of the Committee concluded:

> This case should be dismissed because Contestant Paul failed to sustain his allegations with evidence sufficient to overcome the motion to dismiss. In conclusion, therefore, this decision is not based on any technical or procedural defect but on a solid substantive defect pursuant to the controlling law and consistent with the cases and House precedent [76].

The Committee rested its resolutions for dismissal of three other contest actions on very similar bases [77], and the full House voted to accept all four resolutions as presented by the Committee [78].

A dissent to the Committee report in Paul v. Gammage and again to the adoption of the Committee's resolution by the House questioned the appropriateness of requiring the contestant to overcome a motion to dismiss by essentially having to prove his case in the pleading stages of a contest proceeding. The dissenting members of the Committee urged the motion to dismiss be denied, first, urging the denial of the motion to dismiss since Paul's complaint was well pleaded and "substantial issues of fact remain unresolved," and second, recommending to allow Paul an enlarged time in which to take depositions due to the parties' engagement in seeking state court remedies [79].

In light of the legislative history urging closer conformity with the rules of civil procedure in adjudicating election contests, it may be argued persuasively that by forcing the contestant to come forward with evidence concerning specific irregularities before the contestee has answered the initial complaint, the Committee has rendered nugatory the particularly liberal discovery provisions of the Federal Contested Elections Act, infra, which provide that a contestant may take testimony "within thirty days after service of the answer, or, if no answer is served . . . within thirty days after the time for answer has expired" [80]. Indeed, this was the major topic of the House debates concerning the resolutions reported out by the Committee on House Administration dealing with the contested election cases of the 95th Congress [81].

The dissent in these cases is perhaps suggesting there is a limit to the extent to which Congress may go in establishing the procedures by which election contests are heard and decided. Implicit in Powell v. McComack, supra, is the notion that Congress may not deny constitutionally protected rights to members or persons aspiring to be members of that body. Included in this panoply of rights vested in each individual is the right to be accorded due process of law [82]. Thus, there is some minimum level at which a house of Congress must provide a fair opportunity to be heard by an election contestant or a point at which a dismissal on the merits must be preceded by an adequate opportunity to present meaningful evidence. However, this minimum level is currently undefined since there has been no adjudication of the matter and the fundamental nature of due process is one of flexibility. The protection to be afforded is dependent on the time, place and circumstances of a particular situation [83]. Due process requires consideration of the private interest affected by the official action, the risk of an erroneous deprivation of due process pursuant to the present procedures and the value of additional procedural safeguards, the government's interest in the function involved and the fiscal and administrative burdens imposed by other procedures [84]. Congress' actions in election contest cases may be open to scrutiny on these grounds, based on the considerations in Powell and the magnitude of the interests involved.

In the event the Committee does not dismiss a complaint pursuant to a motion to dismiss by the contestee, either party may take the testimony of any person, both for discovery purposes and for evidentiary purposes. Such testimony must be taken by deposition upon oral testimony pursuant to the provisions of the Federal Contested Elections Act [85]. Any relevant matter may be inquired into, subject to the general rules concerning privileged testimony. The scope of inquiry is necessarily broad and is quite similar to the Federal Rules of Civil Procedure [86]. As noted above, the contestant may take testimony within thirty days of service of the contestee's answer, or within thirty days after the expiration of the time for answering if no answer is filed. The contestee is then allowed thirty days after the contestant's time for taking testimony has expired in which to gather evidence and made discovery. If the contestee takes testimony, the contestant is allowed an additional ten days in which to take rebuttal evidence [87].

Any party intending to take the deposition of any person must give two days' notice to the opposing party stating the time and place at which the deposition will be taken [88]. Subpoenas may be issued by any Federal district court or state or county court of record and may be utilized to compel

the production of documents as well as persons, subject to the Committee's authority to quash, upon timely application, any unreasonably burdensome subpoena [89]. The act also provides penalties for the willful disobedience of any subpoena [90].

The fact-finding process is delegated to an ad hoc panel (the method utilized during the 95th Congress) or to the Subcommittee on Elections (prior practice). The ad hoc panel hears the evidence presented by the parties in open session [91]. The procedures of the Committee and any subcommittees thereof are governed by the general rules of the House given the applicability of such rules [92]. Any hearings held before the Committee or subcommittee must be publicized at least one week before the commencement of such proceedings [93]. The questioning of witnesses before any panel or subcommittee is allowed only after recognition by the chairman. Such questioning of witnesses may extend for a period of only five minutes per member until all members have had the opportunity to question the witnesses. Recognition of members is to be in a ratio equivalent to the ratio of majority to minority members on the panel [94]. The hearing on the merits may proceed only after the parties have filed their briefs with the Clerk of the House, who must submit them to the Committee; the contestant must file his brief within forty-five days after the time for the completion of discovery proceedings, while the contestee's brief must be filed within thirty days after service of the contestant's brief, with the contestant allowed ten days in which to submit a reply brief [95].

It is clear from the House precedents that the contestant at any time may terminate the proceedings by formal action or by inaction [96]. If the action is prosecuted to a conclusion in the Committee, a resolution will be adopted by that body and presented to the entire membership of the House for debate and a vote. Thus, the House is the ultimate arbiter of the elections of its members [97].

It is apparent from the discussion above concerning the sufficiency of the pleadings that the contestant bears a very heavy initial burden of proof. The seat of the contestee is further protected by the precedents recognizing certain presumptions of regularity of election returns and that the certificate of election is prima facie evidence of the right to hold office [98]. Also, the contestee may not lose his seat upon a failure to defend a contest action; the contestant still must prove the election returns are in some way incorrect and that he is rightfully entitled to the contestee's seat [99]. The Committee has held the contestant to the general civil burden of proof, that is, he

must prove the case by a fair preponderance of the evidence, if the stringent pleading requirements have been met [100].

Only those papers, depositions and exhibits filed with the Clerk of the House may be considered as evidence in election contest cases heard by the Committee on House Administration, with such testimony and evidence constituting the record in the case. As noted above, the parties must submit briefs of the facts and points of law to be considered by the Committee [101].

B. Scope of Relief

Congress has plenary authority to judge the elections of its members [102] and has utilized that authority to grant successful contestants varied forms of relief. The most regularly requested and regularly denied relief is that the Committee conduct an independent appraisal of the ballots, either the total number of ballots cast in an election or only that portion of the ballots affected by an alleged fraud, illegality, or irregularity. Although no specific authority exists for the House or the Committee on House Administration to conduct a recount of any sort, the House has considered it within the ambit of its powers to conduct a recount if deemed necessary [103].

Before a contestant may secure a recount conducted by the House, all similar state remedies must have been exhausted [104]. In addition, the initial burden of overcoming the presumptions of regularity of the returns must be overcome by the contestant [105]. Although a party must generally exhaust any state recount remedies before petitioning the House, it is established precedent that the lack of a state recount procedure does not automatically vest the contestant with the right to have the House or Committee conduct a recount. There must be some proper showing of irregularity sufficient to change the result of the election [106].

The results of a state recount proceeding and subsequent certification of election based on such results are not binding upon the House in its determination, however. If the Committee deems an independent appraisal of the ballots necessary and appropriate to resolve the issues raised by the pleadings of the contestant, it may take whatever steps are necessary to safeguard the ballots and ensure the proper recount of the votes challenged [107]. The independent appraisal of the ballots by the Committee is to be guided by state law, but given the power of the House to make the final determination of returns the Committee has held that a determination of voter intent will override any technicalities imposed on the

voting franchise by state law [108]. As noted above, the actual fact-finding is conducted at the subcommittee or panel level with the report of that body generally being accepted by the full Committee on House Administration and adopted as the resolution which is reported out to the full House of Representatives [109]. The House is free to accept or reject the resolution concerning the election contest; conceivably the entire body could vote to conduct its own hearings or vote to recommit the measure to the Committee [110]. In any event, it is the vote before the full House that determines the outcome of the contest action.

Although the precedents are few, the House may reverse the outcome of an election if the facts so warrant [111]. The House has on occasion been petitioned to nullify an entire election, generally on the basis of widespread irregularities that may have influenced the outcome of the election. The House, however, has been reluctant to exercise its inherent power to nullify an election: "[t]he power to reject an entire poll is certainly a dangerous power [and] should be exercised only in an extreme case; that is to say, where it is impossible to ascertain with reasonable certainty the true vote" [112].

The greatest number of election cases brought before the House have been confirmed for reasons ranging from failure to prosecute the action to insufficiency of the pleadings [113].

As noted above, the House's power to rule on the election of its members is plenary and its decisions are final. No judicial body is vested with the power to review the substantive decisions of the House in election cases.

IV. SENATE PROCEDURES

A. Procedural Aspects

The Senate is constitutionally empowered to be the judge of the returns, elections, and qualifications of its members and is subject to the same restraints on that authority as is the House of Representatives, as discussed above [114]. However, as the majority report in a recently decided election contest case emphasized, the authority so granted must be exercised "with restraint and in an equitable manner" [115]. The procedures utilized by the Senate in scheduling and hearing election contest cases have not been codified or made the subject of any written rules, but are enforced on an *ad hoc* basis. This approach, it is felt by the Senate, best serves

the interests of all parties to any contest action, since there is the potential for great diversity in the facts and circumstances surrounding each case [116].

In addition to its authority to rule on election contest cases, the Senate in the past has determined the qualifications of those members of the Senate appointed by a state executive authority to fill a vacancy in the state's representation created by resignation or death [117]. Although these cases historically constitute a large portion of the cases concerning the qualifications and elections of the Senate's members, discussion of these cases is outside the scope of this memorandum. There will be discussed, however, several cases which do not fit neatly into the category of "election contest," but should be considered for their precedential value.

The Senate clearly has the constitutional authority to judge the "elections" of its members, but the question has arisen whether this power extends to the nomination of Senate candidates by primary election. The Senate has investigated alleged primary election violations, apparently considering the primary as merely the initial phase of the electoral process [118].

As noted above, the Senate has never reduced to writing any rules concerning election contests; thus, there has been no restriction placed upon standing to initiate an election contest. The usual course is for the defeated candidate to question the election or credentials of the person shown by the returns to have been elected [119]. The Senate has also investigated, pursuant to resolutions presented by sitting members of the body, several elections and primaries, with such investigations centering on alleged corrupt campaign practices and excessive spending [120]. As noted above in connection with House procedures, these questions are now precluded by the decision in Powell v. McCormack, supra.

In several cases, private citizens have been granted standing to protest, by way of memorial filed with the Senate, the election or appointment of a Senator [121]. The Senate also has granted standing to a political party state central committee to raise the issue whether the elected candidate had become a bona fide candidate of that party [122]. The Senate has even investigated alleged misconduct of a member at the instance of the member himself [123]. This latter case did not involve an election contest action, but may be utilized as precedent for initiating an election contest and the method of petitioning the Senate.

The grounds for contesting an election most commonly alleged are irregularities based upon violations of or noncompliance with state election laws. However, there is a wide variety of grounds upon which contestants have relied in prosecuting election contests. For instance, in one recent case, the issue before the Senate was the determination of the voters' intent as manifested on ballots marked in a manner not in strict compliance with the election laws. Although such irregularities do not generally render the vote void, candidates may challenge an incorrectly marked ballot as not reflecting voter intent [124]. In another contest case, the contestant alleged and proved violations of the Oklahoma election laws concerning ballot placement and the absence of a single-level straight party voting system on voting machines in one of the two most populous counties of the state. In addition, other irregularities in voter instructions in the voting machines were alleged [125]. In another contest action, the petition before the Senate alleged widespread violations of the ballot secrecy provisions of the state election code as well as violations by poll workers concerning voter assistance rules and rules governing ballot-marking equipment [126]. A similar case was presented in a Michigan senatorial election [127].

In the Bellmon, Chavez, and Ferguson cases, the Senate ultimately held the irregularities insufficient to overturn the elections. In Ferguson, the subcommittee, acting as fact-finder, held "faulty and inadequate procedure" insufficient, in the absence of fraudulent intent, to overturn the results of the election. The Senate upheld the findings without objection [128]. Similar views were expressed by the respective minority committee members in Bellmon and Chavez and again were accepted by votes of the Senate [129]. Only in the New Hampshire case has the Senate not adhered to this principle, largely because the task of making a judicial determination of the validity of 3,500 challenged ballots became highly partisan. Thus, the Committee on Rules and Administration, after great delay, reported a resolution to the Senate stating that it had not reached a conclusion in the case and that the full Senate should consider the issues not resolved by the Committee [130]. The Senate was also unable to resolve the issues of the case in its role as the final arbiter of the challenged ballots, and, after extensive debates from June 12, 1975, to July 21, 1975, voted to table the matter indefinitely after the parties themselves stipulated to a new election to decide the case [131].

A second common allegation is that the elected candidate has engaged in fraudulent activities or has attempted to corrupt the electoral process through the use of force, intimidation, or money [132]. In each of these cases, the

Senate voted to dismiss the contest complaints upon the advice of the Committee on Privileges and Election or the Committee on Rules and Administration. This course was apparently adopted due to the insufficiency of the proof of the contestant. In one instance, however, alleged fraudulent conduct by the individual elected to the Senate was proven by the contestant, who was thereupon seated and the incumbent ousted [133].

Several election contests have been predicated on alleged excessive campaign expenditures, which may be considered a subcategory of fraudulent and corrupt activities. These contests are often based on primary election expenditures [134], but may relate to general elections also [135]. An election contest also has been predicated on the lack of the constitutional age qualification of the winning candidate [136]. In this case, the Senate held Mr. Holt entitled to the seat because he did not present himself for swearing in until after his thirtieth birthday [137].

The Senate never has adopted specific rules governing contest actions. A petition to contest an election may be filed in the Senate whereupon a resolution may be adopted to make an inquiry into the matter. The Committee on Rules and Administration is vested with the authority to hear all petitions and memorials concerning contested elections and corrupt practices [138]. The matter may be referred further to the Subcommittee on Privileges and Elections [139]. The Committee or Subcommittee acts as the fact-finder and must report back to the Senate its conclusions and findings [140]. The Senate is the ultimate decision-maker pursuant to its constitutional mandate to judge the returns and elections of its members [141].

As noted above, there are no strict procedures governing the method by which a contest is initiated. The petition customarily sets forth the alleged grounds for the contest, but the time in which the petition must be filed is not established. In some instances, the petition has been filed after the winning candidate has been sworn in and in other instances before such time [142].

The petition need not be accompanied by any payment of bond or security for costs. The contestee may interpose motions to dismiss [143] or may answer by way of general denial. It is clear that no formal pleading requirements are imposed on the parties [144], but the Committee may recommend to the Senate to dismiss for insufficiency of the complaint [145], including the lack of allegations sufficient to change the outcome of the election [146].

The Senate may delegate to the appropriate standing committee the task of investigating the issues raised by an election contest, with the committee or subcommittee empowered to appropriate funds and to subpoena and compel the attendance of witnesses [147]. In addition, the United States Supreme Court has ruled that the Senate has the inherent power to enforce its own orders when investigating a contested election [148].

Investigations of elections have been conducted both by the Senate of its own initiative [149] and pursuant to a defeated candidate's petition [150]. The Committee conducting such an investigation typically is vested with broadly based authority to use any measures necessary to arrive at the proper conclusion, but that is not an unlimited power [151]. In addition, if the Committee feels the facts do not warrant the type of investigation requested by the contestant, if may deny such an inquiry [152].

As a part of its inquiry, the Committee or Subcommittee may undertake a recount of the ballots. This task may involve a de novo determination of the validity and proper tally of challenged ballots [153] or a mere physical retally of the ballots as originally cast and counted. This may involve only a partial recount [154] or a recount of all the votes cast in an entire state [155].

The Senate or Committee proceedings ideally are not adversary proceedings, but merely proceedings to determine the true results of an election based on objective facts [156]. The proceedings before the Senate are, however, judicial in nature and the Supreme Court has recognized the Senate's authority to make a judicial determination of the outcome of an election [157]. The proceedings generally may be terminated by the contestant at any time [158] and by the Senate upon a motion to dismiss if sufficient grounds for continuing are not discovered [159]. However, there is a precedent in which the Committee proceeded to make a determination in a case in which the contestant sought a dismissal before the decision of the Committee had been rendered. The contestee had been killed in the midst of the proceedings, and the Committee offered its resolution to the Senate after the contestee's counsel submitted the answer posthumously. The Committee exonerated the contestee of the allegations of campaign improprieties raised by the contestant. The Senate thereafter adopted the Committee position [160].

The petition of the contestant of a Senate seat is not subject to the same stringent pleading requirements imposed upon those persons contesting a seat in the House of Representatives, but the petition must still present a prima facie

case tending to cast doubt on the election returns as presented to the Senate [161]. The burden of proving the claims advanced naturally lies with the proponent or contestant, as pointed out in the Senate debates in the Bellmon case [162]. The proof may be adduced in any manner approved by the Senate committee, which has generally accorded wide latitude in receiving evidence. Thus, the Committee has been presented with the oral and written testimony of experts on voter behavior and preferences [163], and oral and written testimony of voters concerning for whom they voted [164]. In addition, the Committee has recounted the ballots of an entire election [165] and has even sent investigatory teams to the site of the election for extended periods of time [166].

B. Scope of Relief

The Senate and its Committee on Rules and Administration may generally grant any relief that is appropriate in order to resolve an election contest case. Thus, the Committee has conducted recounts where such action was considered necessary [167]. After concluding a recount, the Senate may vote either to confirm the election results as presented by the official returns [168] or to overturn the prima facie returns and seat the contestant. This result appears to have been reached only once in an election contest case since the ratification of the Seventeenth Amendment providing for the direct election of Senators [169]. A final possibility is that the Senate may nullify the election for one reason or another. The most recent case in which this happened was Durkin v. Wyman, in which neither the Committee nor the Senate could determine the outcome of the election due to the closeness of the race and the number of disputed ballots. The parties agreed to hold a new election (which Durkin eventually won) [170], and the Senate voted to table the contest indefinitely [171]. The Senate has also voted to deny the certified winner his seat and at the same time to deny the contestant the right to take the seat, thus creating a vacancy in the representation of the state [172].

C. A Case Study

A study of the most recently decided election contest case before the Senate--Edmonson v. Bellmon--illuminates the philosophy of the Senate in regard to its duty as the judge of the elections and returns of its members. The majority of the Committee on Rules and Administration viewed the evidence presented to the Committee as equivocal at best regarding the actual mathematical outcome of the election and thus recommended that the Senate determine the outcome of the election on the basis of the voluminous evidence presented

or return the election to the voters of Oklahoma in order not to disfranchise voters of the state [173]. The majority of the Committee came to that decision based largely on the conflicting evidence of the expert witnesses presented by both sides and the acknowledged irregularities of the election [174]. The majority report relies, to some extent, upon the pertinent state statutory authority governing the conduct of state and Federal elections because these are the laws the Supreme Court of Oklahoma found to have been violated. However, the majority concluded that the Senate was not bound by the court decision rendered by the highest state court [175] in the contest proceeding. This proposition rests upon the constitutional authority of Congress to judge the elections of its members [176]. This philosophy was echoed by Senators Cannon and Pell in the debates on the Bellmon question [177].

The minority of the same committee urged the Senate to seat the incumbent Bellmon since the evidence on which the majority relied was not, in the minority's opinion, sufficiently accurate or competent to warrant overturning the decision of the Oklahoma Supreme Court [178]. The minority cited the similarity of the instant case to the case of Hurley v. Chavez, supra, particularly in that no fraud on the part of Mr. Bellmon or his agents was either alleged or shown [179]. The minority also relied on the presumption of regularity surrounding the issuance of the credentials by the state authority [180].

The debates in the Bellmon case lasted only three days, culminating in a motion introduced by Mr. Hatfield to table Senate Resolution 356; the motion to table was carried by the Senate 47-46, with seven Senators not voting [181]. Senator Cannon, the chairman of the Committee and the leading spokesman for the majority of the Committee, then moved that Mr. Bellmon be seated unconditionally [182]. It appears, then, the majority of those Senators voting on the election contest issue in the Bellmon case believed certification by the appropriate state authority to be the major consideration in judging the qualifications of Senators, at least when accompanied by the subsequent confirmation of the state supreme court in an election contest action. Edmondson v. Bellmon, therefore, became another precedent against overturning an election except on the strongest evidence of the impossibility of determining the winner of the seat.

V. PRESIDENTIAL ELECTORS

The legislature of each state is given the constitutional authority to prescribe the manner in which presidential electors are chosen or appointed [183], subject to Congress' power to legislate concerning the day on which the

election is held (now the first Tuesday after the first Monday in November in years evenly divisible by four) [184]. Congress has also prescribed the manner of transmitting the results of the states' electoral counts to the President of the Senate [185]. The electors meet at the place designated by state law on the first Monday after the second Wednesday in December following the election to cast their votes [186], certified copies of which are sent to the President of the Senate, the Secretary of State, the Administrator of General Services, and the Federal district court judge of the district in which the electors have met [187].

The authority vested in the state legislatures to establish the manner in which electors are chosen, however, is plenary and may not be abridged by Congress. Thus, many different modes of choice have been utilized by the states throughout the years, including appointment by the state legislature, election by district balloting, and by general election. All of these methods were specifically sanctioned by the United States Supreme Court when confronted with the contention that the state legislature could not adopt a district election scheme [188].

Congress has also enacted legislation dealing with the contingency that the vote for presidential elector is contested on the state level, whether it be for fraud or mistake in the vote count, ineligibility of a candidate, or for any other reason. The Federal statute dictates that any state legislation prescribing rules for contesting the office of presidential elector must have been enacted prior to the day for "appointment" of the electors, that is, the first Tuesday after the first Monday in November. Moreover, any contest action being prosecuted must have resulted in a final determination of the rights of the opposing parties at least six days prior to the day on which the electors are to meet, if the decision is to have any force. If these conditions are met, any state procedure, whether judicial in nature or otherwise, is deemed final and conclusive and will govern in the count of votes cast in the Electoral College for the offices of President and Vice-President [189].

The manner of counting the votes in Congress is also provided by statute. Congress meets on the sixth day of January succeeding the appointment of electors to open and canvass the certified votes for President sent to the President of the Senate by the various state executive authorities responsible for the proper certification. The President of the Senate opens the returns and reads the results aloud, while four previously appointed tellers record the vote as declared. The declared result may be challenged

by the filing of a written petition, signed by at least one member of each of the houses of Congress. The houses then separate to consider the merits of any challenges [190].

Congress may be presented with several types of electoral vote difficulties or irregularities specifically mentioned by the statute: (1) Congress is presented with one certificate of election to which a challenge has been made; or (2) Congress may have received more than one set of certificates which are alleged to be authentic, and (a) there has been a final state determination of the question under 3 U.S.C. § 5; (b) there have been final state determinations made under 3 U.S.C § 5, but there is a dispute over which is the proper state authority to make the determination; or (c) there has been no state determination made of the final outcome pursuant to 3 U.S.C. § 5 [191]. In case (1), no vote "regularly given" may be rejected by Congress, but by concurrent vote both houses may reject the vote as not regularly given [192]. In case (2)(a), the Congress may count only those votes regularly given by the electors appointed pursuant to the uncontested final determination. If there is a challenge to the authority of a body making a final determination under 3 U.S.C § 5, as in (2)(b), only votes regularly given which are supported by the state authority found by a concurrent vote of Congress to be the body properly making the decision may be counted. In the case of (2)(c), a concurrent vote of the Congress is required to determine which votes were cast by electors lawfully elected in accordance with state law. In the event the houses do not concur, the return certified by the executive of the state is controlling [193].

The statutory procedures outlined above were enacted in their basic form in 1887 [194]. Prior to their enactment the counting of electoral votes by Congress was controlled either by a Joint Rule of Congress or, as in 1877, by no formal procedure. In the Presidential race between Samuel Tilden and Rutherford B. Hayes, Tilden enjoyed a small advantage in the popular vote count, but neither candidate could present enough electoral votes to Congress to win because twenty-two electoral votes, those of Florida, Louisiana, Oregon and South Carolina, were subject to challenge [195]. The contested votes were ultimately decided by the Electoral Commission, a panel consisting of five senators, five representatives and five Supreme Court justices, who split along partisan political lines and answered the legal questions in favor of Hayes. The central legal issue in the case was whether Congress possessed authority to look beyond the popular returns certified by the appropriate canvassing

authority and duly certified by the state executive. The Commission ruled in each case that the certificates, if validly returned by the legal canvassing authority, were conclusive and challenges to the efficacy and legality of the popular vote could not be maintained. In the case of the Oregon challenge the Commission ruled that the governor had no authority to change the results as certified to him by the state canvassing authority [196]. The Electoral Count Act of 1887, as amended, does not explicitly answer the questions presented by the Hayes-Tilden electoral vote count, although Congress has the inherent authority to enact legislation to provide a final resolution of electoral vote contests by looking into the facts of a particular popular presidential election [197].

FOOTNOTES

1. U.S. Const. art. I, § 5.
2. U.S. Const. art. I, § 5.
3. Powell v. McCormack, 395 U.S. 486 (1969).
4. U.S. Const. art. I, §§ 2, 3.
5. 113 Cong. Rec. 26-27.
6. Id.
7. H.R. Rep. No. 27, 90th Cong., 1st Sess., 31-33 (1967).
8. 113 Cong. Rec. 5037-38.
9. Id. at 5020.
10. Powell v. McCormack, supra at 508.
11. Id. at 512-16.
12. Id. at 516-49.
13. Id. at 549.
14. Id. at 547.
15. Id. at 548.
16. Id. at 549.
17. Wilson v. Hinshaw, H.R. Rep. No. 761, 94th Cong., 1st Sess. 5 (1975).
18. Id. at 548.
19. Powell v. McCormack, supra at 553 (Justice Douglas, concurring); see generally, Note, Legislative Exclusion: Julian Bond and Adam Clayton Powell, 35 U. Chi. L. Rev. 151 (1967).
20. Ray v. Blair, 343 U.S. 214 (1952).
21. 3 U.S.C. § 15.
22. 115 Cong. Rec. 170-71 (1969) (House of Representatives vote on Muskie-O'Hara petition concerning the electoral vote of North Carolina); 115 Cong. Rec. 246 (1969) (Senate vote on Muskie-O'Hara petition). The House defeated adoption of the petition by a vote of 170 to 228, with 32 not voting and 4 members-elect not sworn. The Senate likewise defeated the petition by a vote of 33 to 58, with 9 senators not voting. See 115 Cong. Rec. 146-70, 196-246 (1969) for the extensive debates in both houses of Congress concerning the question.
23. R. Claude, The Supreme Court and the Electoral Process, John Hopkins Press (1970) 237.
24. U.S. Const. art. I, § 4.
25. Smiley v. Holm, 285 U.S. 355, 366 (1932).
26. Roudebush v. Hartke, 405 U.S. 15 (1972).
27. Id. at 25.
28. Comment, Congressional Election Contests and Recount Proceedings: A Critical Difference, 72 Dick. L.R. 433, 446 (1968) (hereinafter Dickinson L.R.).
29. Roudebush v. Hartke, supra at 25-26.
30. Roudebush v. Hartke, supra at 25.

31. See, e.g., Keogh v. Horner, 8 F.Supp. 933 (S.D. Ill. 1934); Odegard v. Olson, 264 Minn. 439, 119 N.W.2d 717 (1963); Reed v. County Commissioners of Delaware County, 21 F.2d 144 (E.D. Pa. 1927), aff'd 21 F.2d 1018 (3rd Cir.); Laxalt v. Cannon, 80 Nev. 588, 397 P.2d 466 (1964); Manion v. Holzman, 379 F.2d 843 (7th Cir. 1967); LaCaze v. Johnson, 305 So.2d 140 (Ct. App. 1st Cir. 1974); Wyman v. Durkin, 115 N.H. 1, 330 A.2d 778 (1975); Gammage v. Compton, 548 S.W.2d 1, cert. denied sub. nom. Paul v. Gammage, 97 S.Ct. 2676 (1977); see also Dickinson L.R. 433.
32. 403 F.Supp. 18 (D.N.H. 1974).
33. New Hampshire Revised Statutes Annotated 59:94.
34. Durkin v. Snow, supra at 19.
35. Edmonson v. State ex rel. Phelps, 533 P.2d 604 (Sup. Ct. Okl. 1974).
36. Id. at 607-08, 621.
37. United States v. Classic, 313 U.S. 299, 318.
38. State ex rel. Wetlengel v. Zimmerman, 249 Wis. 237, 24 N.W.2d 504 (1946).
39. Rogers v. Barnes, 172 Colo. 550, 474 P.2d 610 (1970).
40. S. Rep. No. 546, 91st Cong., 1st Sess. (1969), reprinted in (1969) U.S. Code Cong. and Ad. News 1456.
41. 2 U.S.C. § 381 et seq.
42. 2 U.S.C. § 382.
43. 2 U.S.C. § 201 (repealed 1969); but see Congressional Research Service, American Law Division, House Contested Election Cases: March 1933 to 1975, 58-59, 72 (1976), (hereinafter cited House Contested Election Cases).
44. H.R. Rept. No. 569, 91st Cong., 1st Sess. 3-4 (1969).
45. 2 U.S.C. § 381(a).
46. See e.g., 123 Cong. Rec. E441 (daily ed. Jan. 31, 1977) (remarks of Mr. Thompson); Special Ad Hoc Panel of the Committee on House Administration, 95th Cong., 1st Sess., Report on Second Democratic Primary Election held on Oct. 2, 1976 (Comm. Print 1977), concerning the contested primary election for Representative for the seat for the First Congressional District of Louisiana.
47. H.R. Rept. No. 569, 91st Cong., 1st Sess. 2 (1969).
48. For a compendium of recent House election precedents, see House Contested Election Cases: March 1933 to 1975, supra; for older election precedents see generally 1,2A. Hinds, Precedents of the House of Representatives (1907) and 66. Cannon Precedents of the House of Representatives (1935).
49. 2 U.S.C. § 383(b); see, e.g., Galvin v. O'Connell, 61st Congress (1910), 66. Cannon Precedents of the House of Representatives § 126, Ziebarth v. Smith, H.R. Rep. No. 763, 94th Cong., 1st Sess. 7 (1975).

50. Ziebarth v. Smith, supra at 6 and cases cited.
51. U.S. Const. art. I, § 5.
52. 2 U.S.C. § 382(a).
53. House of Representatives, 93d Cong., 2d Sess., Manual and Rules of the House of Representatives, 94th Congress, Rule X (i)(11)(1974).
54. 123 Cong. Rec. E441 (daily ed. Jan. 31, 1977), remarks of Rep. Thompson.
55. See H.R. Rep. Nos. 242-45, 95th Cong., 1st Sess. (1977).
56. See H.R. Rep. Nos. 242-45, supra.
57. See 123 Cong. Rec. H4183-90 (daily ed. May 9, 1977).
58. 2 U.S.C. § 382(a).
59. 2 U.S.C. § 382(b).
60. 2 U.S.C. § 382(c).
61. 2 U.S.C. § 383.
62. McLean v. Bowman, 62d Congress (1912), 6C. Cannon Precedents of the House of Representatives § 98.
63. Galvin v. O'Connell, supra.
64. Tunno v. Veysey, H.R. Rep. No. 626, 92d Cong., 1st Sess. (1971).
65. 2 U.S.C. § 383(b).
66. 2 U.S.C. § 382(b).
67. 2 U.S.C. § 383(a), (b).
68. 2 U.S.C. § 383(c).
69. H.R. Rep. No. 569, supra.
70. Tunno v. Veysey, supra at 3.
71. Id. at 10.
72. Ziebarth v. Smith, supra at 10, 14.
73. 123 Cong. Rec. H4183-92 (daily ed. May 9, 1977) (debate and votes on H. Res. Nos. 525-28).
74. Paul v. Gammage, H.R. Rep. No. 243, 95th Cong., 1st Sess. (1977).
75. Id. at 4; Gormley v. Goss, H.R. Rep. No. 893, 73d Cong., 2d Sess. (1934).
76. Paul v. Gammage, supra at 5.
77. See H.R. Rep. Nos. 242, 244-45, supra.
78. 123 Cong. Rec. H4183-92 (daily ed. May 9, 1977).
79. Paul v. Gammage, supra at 8.
80. 2 U.S.C. § 386(c)(1).
81. 123 Cong. Rec. H4183-92 (daily ed. May 9, 1977).
82. U.S. Const. amends. 5,14.
83. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893,903 (1976).
84. Id. at 338, 96 S. Ct. at 904.
85. 2 U.S.C. § 386(a).
86. 2 U.S.C. § 386(b).
87. 2 U.S.C. § 386(c).
88. 2 U.S.C. § 387.
89. 2 U.S.C. § 388.
90. 2 U.S.C. § 390.
91. Rules of Procedure of the Committee on House Administration, Rule No. 3 (published at 123 Cong. Rec. H642) (daily ed. Jan. 31, 1977).

92. Id., Rule No. 1.
93. Id., Rule No. 8.
94. Id.
95. 2 U.S.C. § 392.
96. Kyros v. Emery, H.R. Rep. No. 760, 94th Cong. 1st Sess. (1975) and House Contested Election Cases: March 1933 to 1975, supra at 3, 26 for summaries of cases terminated by official action of the contestant, and at 2, 6, and 25 for summaries of cases abated by lack of prosecution; see also Special Ad Hoc Panel of the Committee on House Administration, 95th Cong., 1st Sess., Report on Second Democratic Primary Election in Louisiana held on Oct. 2, 1976 (Comm. Print 1977).
97. See, e.g., 123 Cong. Rec. H4183-92 (daily ed. May 9, 1977).
98. See, e.g., Gormley v. Goss, supra.
99. 2 U.S.C. § 385.
100. Gormley v. Goss, supra.
101. 2 U.S.C. § 392.
102. U.S. Const art. I. § 5.
103. Roush v. Chambers, H.R. Rep. No. 513, 87th Cong., 1st Sess. (1961); Moreland v. Scharetz, H.R. Rep. No. 1158, 78th Cong., 1st Sess., (1944).
104. Swanson v. Harrington, H.R. Rep. No. 1722, 76th Cong., 1st Sess. (1940).
105. Id. at 3.
106. Pierce v. Pursell, H.R. Rep. No. 245, 95th Cong., 1st Sess. (1977); Peterson v. Gross, H.R. Rep. No. 1127, 89th Cong., 1st Sess. (1965).
107. See Kyros v. Emery, supra at 3.
108. Id. at 5.
109. See H.R. Rep. Nos. 525-28, supra.
110. See e.g., 123 Cong. Rec. H4187 (daily ed. May 9, 1977).
111. Roush v. Chambers, supra; Roy v. Jenks, H.R. Rep. Nos. 1521, 2255, 75th Cong., 1st and 2d Sess. (1937-38).
112. Tunno v. Veysey, supra at 4.
113. See e.g., H.R. Rep. Nos. 525-28, supra; see generally 1. 2. and 6 Hinds and Cannon Precedents of the House of Representatives.
114. U.S. Const. art. I, § 5.
115. Edmondson v. Bellmon, S. Rep. No. 597, 94th Cong., 2d Sess. (1976).
116. Subcomm. on Privileges and Elections, Senate Election, Expulsion and Censure Cases from 1789 to 1960, S. Doc. No. 71, 87th Cong., 2d Sess. (hereinafter cited as Election Cases) (1962) VII; Edmondson v. Bellmon, supra at 22.
117. See, e.g., Joseph R. Grundy, Election Cases 127.
118. Peddy v. Mayfield, Election Cases 112; see Wilson v. Vare, Election Cases 119.

119. See, e.g., Durkin v. Wyman, S. Rep. No. 156, 94th Cong., 1st Sess. (1975); Edmondson v. Bellmon, supra; Heflin v. Bankhead, Election Cases 128.
120. See, Wilson v. Vare, supra; Frank L. Smith, Election Cases 122.
121. Hatfield v. Holt, Election Cases 134; see; Huey P. Long and John Overton, Election Cases 131; Neal v. Stewart, Election Cases 137 (defeated primary candidate contesting the general election outcome based on alleged excessive campaign expenditures); see also, John E. Erickson, Election Cases 133.
122. Steck v. Brookhart, Election Cases 116.
123. Burton K. Wheeler, Election Cases 113 (although this did not involve an election contest action).
124. Durkin v. Wyman, supra.
125. Edmondson v. Bellmon, supra.
126. Hurley v. Chavez, S. Rep. No. 1081, pt. 1, 83d Cong., 2d Sess. (1954).
127. Hook v. Ferguson, Election Cases 146.
128. Id. at 147.
129. Edmondson v. Bellmon, supra at 27; Hurley v. Chavez, supra pt. 2, at 1.
130. Durkin v. Wyman, supra pt. 1, at 1.
131. 121 Cong. Rec. S14310 (daily ed. July 30, 1975).
132. Sweeney v. Kilgore, Election Cases 145; Wilson v. Vare, Election Cases 119; Chilton v. Sutherland, Election Cases 109.
133. Steck v. Brookhart, Election Cases 116.
134. Wilson v. Vare, Election Cases 119; Ford v. Newberry, Election Cases 110.
135. Neal v. Stewart, Election Cases 141.
136. Hatfield v. Holt, Election Cases 134.
137. Id.
138. Election Cases VII-VIII; Senate Manual, S. Doc. No. 1, 94th Cong., 1st Sess. Standing Rule 25.1 p(1)(D).
139. See Hurley v. Chavez, supra, pt. 1 at 1.
140. See 122 Cong. Rec. S2659 (daily ed. March 2, 1976) (remarks of Mr. Pell).
141. U.S. Const. art. I, § 5.
142. Election Cases, VIII.
143. Chavez v. Cutting, Election Cases 133; Pritchard v. Bailey, Election Cases 130.
144. Taft and Ferguson, Election Cases 148.
145. Hoidale v. Schall, Election Cases 130; Pritchard v. Bailey, Election Cases 130.
146. Willis v. Van Nuys, Election Cases 138; Heflin v. Bankhead, Election Cases 128.
147. 2 U.S.C. § 190(b).
148. Reed v. County Commissioners, 277 U.S. 376 (1928).
149. Wilson v. Vare, Election Cases 119; Frank L. Smith, Election Cases 122.

150. Hurley v. Chavez, supra; Steck v. Brookhart, Election Cases 116.
151. Hurley v. Chavez, supra pt. 2 (minority report).
152. Peddy v. Mayfield, Election Cases 112.
153. Durkin v. Wyman, supra.
154. Hurley v. Chavez, supra.
155. O'Conor v. Markey, Election Cases 144.
156. Hurley v. Chavez, supra pt. 2, at 1.
157. Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929).
158. See Taft and Ferguson, Election Cases 148.
159. Pritchard v. Bailey, Election Cases 130.
160. Chavez v. Cutting, Election Cases 133.
161. Willis v. Van Nuys, Election Cases 138; Bursum v. Bratton, Election Cases 114.
162. 122 Cong. Rec. S2643, 2661 (daily ed. March 2, 1976) (remarks of Mr. Hatfield).
163. Edmondson v. Bellmon, supra.
164. Hurley v. Chavez, supra pt. 1 (majority report).
165. O'Conor v. Markey, Election Cases 145.
166. Hurley v. Chavez, supra; Edmondson v. Bellmon, supra.
167. O'Conor v. Markey, Election Cases 144; Hurley v. Chavez, supra.
168. See, e.g., Edmondson v. Bellmon, supra; Hurley v. Chavez, supra.
169. Steck v. Brookhart, Election Cases 116.
170. 31 Cong. Quarterly Almanac 702.
171. 121 Cong. Rec. S14310 (daily ed. July 30, 1975).
172. Wilson v. Vare, Election Cases 119, 121.
173. Edmondson v. Bellmon, S. Rep. No. 597, 94th Cong., 2d Sess. 1(1976).
174. Id. at 2.
175. Edmondson v. State ex rel. Phelps, supra.
176. Edmondson v. Bellmon, supra at 22-23.
177. 122 Cong. Rec. S2641, 2660 (daily ed. March 2, 1976).
178. Edmondson v. Bellmon, supra at 27.
179. Id.
180. Id. at 50.
181. 122 Cong. Rec. S2918-19 (daily ed. March 4, 1976).
182. Id. at 2919.
183. U.S. Const. art. 2, § 1.
184. 3 U.S.C. § 1.
185. U.S. Const. amend. 12; 3 U.S.C. § 6.
186. 3 U.S.C. § 7.
187. 3 U.S.C. § 11.
188. McPherson v. Blacker, 146 U.S. 1 (1892).
189. 3 U.S.C. § 5.
190. 3 U.S.C. § 15.
191. 3 U.S.C. § 15.
192. Id.; see 115 Cong. Rec. 146-70, 196-246 (1969) for Congressional debates on the subject of "regularly given" votes in the context of the faithless elector, discussed supra, I.C.

193. 3 U.S.C. § 15. This discussion is merely an outline of the statutory provisions. It has been noted that the statutory scheme has many pitfalls and may not work properly when put to the test of a closely contested Presidential election in which the electoral vote of the states involved is sufficient to change the outcome of the election. For instance, the time period in which any final state determination must be made may be too short to allow a proper and definitive determination of the state results. Other instances are also cited in which serious difficulties may arise. L. Wroth, Election Contests and the Electoral Vote, 65 Dick. L. Rev. 321, 335-53 (1961). See Manual and Rules of the House of Representatives, 94th Congress, H.R. Doc. No. 416, 93d Cong., 2d Sess., and Senate Manual 1975, S. Doc. No. 1, 94th Cong., 1st Sess., for authority for appropriate committees to consider matters relating to the "election of the President, Vice President; . . . contested elections; . . . and Federal elections generally."

194. Act of Jan. 14, 1887.

195. R. Claude, The Supreme Court and the Electoral Process, supra 229.

196. L. Wroth, Election Contests and the Electoral Vote, 65 Dick. L. Rev. 321, 331-333.

197. Id. at 350.

APPENDIX B

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APPENDIX C

CONTEST CASE CITATIONS

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Contest Case Citations

1. Barry v. U.S. ex rel. Cunningham, 279 U.S. 597, (1929).

2. Buckley v. Valeo, 424 U.S. 1 (1976).

3. Chicago and S. Air Lines v. Waterman S.S. Corp., 333 U.S. 113 (1948).

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APPENDIX D

GENERAL PROCEDURES GOVERNING PARLIAMENTARY ELECTIONS IN CANADA

HISTORY AND SUMMARIZATION OF PROCEDURES FOR CONTESTS OF ELECTION TO THE HOUSE OF COMMONS, CANADA

GENERAL PROCEDURES GOVERNING PARLIAMENTARY ELECTIONS IN CANADA

Members of the House of Commons in Canada are elected in federal general elections, which occur at least once every five years, but may take place more frequently. Customarily, if the government in power is in a majority, the elections occur once each four years.

A federal general election not mandated by the five-year provision is either initiated by a vote of the House of Commons expressing a lack of confidence in the Prime Minister, or by the Prime Minister deciding to call a new election. For a new election, the Prime Minister calls upon the Governor General, who has the authority to dissolve Parliament and call a new election. In each of the provinces, the Premier does the same with the Lieutenant-Governor, who has the same power as Governor General in provincial elections. The Governor General or Lieutenant-Governor issues a writ in the name of Her Majesty calling the election, and the process begins.

Canadian elections are run by a board consisting of the Chief Electoral Officer in Ottawa and Returning Officers, or heads of the election for each constituency or riding. The Chief Electoral Officer is independent, nominated by the House of Commons, and subject to removal only for cause.

The actual election work is commenced immediately after the last election, because of the possibility of "snap elections," or elections in quick succession. As a result, much of the required work is far along when an election is called.

Between the 49th and 44th days preceding the election, enumerators go door-to-door to compile voter lists, which are then posted locally in order to give voters the opportunity to correct any errors.

Nominations close twenty-one days prior to the election. Most candidates are chosen by party nominating conventions, but any person meeting the qualifications for office (which do not include residency in the constituency that a candidate wishes to contest) may file for nomination, with a petition signed by twenty-five electors of the constituency who endorse his candidacy. A deposit of two hundred dollars is also filed, to be returned if the candidate wins or gets at least one-half the votes of the winning candidate.

The Returning Officer appoints a Deputy Returning Officer and a poll clerk to staff each polling station.

Advance polls are set up nine and seven days prior to the election so that voters who, for any reason, feel that they will be unable to vote on election day will not be disenfranchised.

After the polling stations close on election day the ballots are counted by the Deputy Returning Officer and the poll clerk, while witnessed by the candidates, their agents, party scrutineers, or, failing the above, by at least two electors. This count is immediately transmitted to the constituency Returning Officer, and made public as an unofficial count.

The ballot boxes are also returned to the Returning Officer, who holds them in his custody for the official count, which is not made sooner than seven days following the election. Armed service votes are added in at this point.

The official results are proclaimed by each Returning Officer in communicating the results to the Chief Electoral Officer, who then validates them through publication in the Official Gazette.

Because of their official capacities, the Chief Electoral Officer and his deputy, judges, and chief returning officers may not vote in parliamentary elections. Chief returning officers, in the event of tie votes, cast the deciding ballots.

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HISTORY AND SUMMARIZATION OF PROCEDURES FOR CONTESTS OF ELECTION TO THE HOUSE OF COMMONS, CANADA

Although it has been amended and its original legislative intent all but vanished for many years, the controverted Election Act of 1874 remains the basis for determination of contests of election to Canada's House of Commons.

As Canada's Confederation of 1867 established general assemblies in each province, some form of recourse for contesting elections to these bodies was needed. Provinces set up non-uniform procedures for dealing with these housekeeping matters. The province of Canada established a general committee on elections, appointed by the Speaker, and confirmed by the full house to hear election contests. The provinces of Nova Scotia and New Brunswick sent their contests to a select committee. All legislative proceedings in contest matters followed court procedure, with witnesses testifying under oath, and counsel representing the parties involved. Partisanship was rampant in such proceedings. The provinces of Manitoba and British Columbia referred their legislative election contests to the courts, to be handled in the same manner as all other election contests.

As the provinces were forced to choose systems, so was the Dominion's House of Commons. In 1867 the House of Commons selected the system relied on by the provinces of Ontario and Quebec, settling cases in the body's election committee. Reports indicate that the choice of this system was based not on merit, but rather on the thought that most were familiar with the system. Partisan majorities of the House soon made it clear that, aside from the system being expensive, time-consuming, and inefficient, it was simply not equitable.

In the first two parliaments, seventy-six election contest petitions were brought before the House. Eighteen of these petitions resulted in the confirmation of election of the Member, six were withdrawn, fifty-one were either discharged or neglected, and one Member was actually unseated.

By 1872, the provinces of New Brunswick and Ontario abandoned legislative adjudication of contests, and switched to trial by judge.

In 1873, as a result of a power play by Sir John A. Macdonald, who wanted to keep control of contested election trials, the House of Commons passed an act to assign election petitions to courts of the provinces in certain instances. Election

petitions would be assigned to courts of only those provinces whose lieutenant governors, with the consent of the executive council, approved it. In other cases, barristers of ten years' standing were appointed judges ad hoc.

Still, there were questions raised about the authority of the Dominion to impose upon provincial prerogatives in such matters, so in 1874, the ruling Liberals repealed the 1873 laws, and established the respective provincial supreme courts as election courts. This was the Controverted Election Act of 1874. It provided for contests to be heard and determined by a single judge, who would report his decision to the House of Commons. The judge was also authorized to make specific reports on corrupt practices, if it felt the facts so warranted, for the consideration of the House. In three special reports brought before the House soon after passage of the Controverted Election Act, only one was even referred to committee. To date, no parliamentary action has been taken on any special reports.

Under provisions of the act, election petitions were to be laid before the court within thirty days after publication of returns in the Canada Gazette. This deadline requirement meant that the ruling party was able to draw out the exposure of its opponents to election petitions by delaying the gazetting of returns. A security deposit of one thousand dollars was also required to initiate an election petition.

Withdrawal of petitions under the act could only be with leave of the court. Any types of withdrawal because of improper bargaining was to be reported to the Speaker of the House. This provision attempted to prevent "saw-offs" or indiscriminate filing of petitions, for the sake of protecting a party's interests. With the illegal saw-offs, deals were struck to drop charges on both sides to avoid costs and embarrassment.

Contest action was not rendered moot in the event a Member resigned his position, or assumed a different post; in fact the law made it clear that a Member was barred from resigning if a petition had been entered against him. Trials of election petitions could not go on while Parliament was in session.

An election could be set aside if an offense were proven to have been committed by anyone acting on behalf of a candidate, with or without his knowledge and/or consent. It became customary for a trial to be stopped after just one instance of any illegal practice was proven, so as to lessen any potential parliamentary embarrassment.

Any elector was permitted to file a petition, irregardless of residence in the constituency in which he filed. The member of Parliament was then required to disprove the petition at his own expense. Costs averaged approximately $3,500 to the winner, with the loser assessed heavy costs in addition.

After enactment, the years 1875-1878 saw a great change in results of election petitions. First, petitions were filed against sixty-five Members (over one-third of the membership of the House). Of these, only two were discharged, and the court upheld the right of fourteen Members to their seats. Still, forty-nine Members were actually unseated through contest petitions.

In 1876, because of the lack of follow-through prosecution by the House, an amendment was enacted to allow twenty-five voters petition for an investigation of corruption if the evidence existed, and no protest of the election had been filed. The House of Commons could provide for a judicial commission to investigate. In 1879, the first petition under these provisions was brought before the House, which buried it permanently in committee. An amendment to the amendment quickly passed requiring a deposit of $1,000 as a requisite for such petitions in the future.

By 1891, it was customary for the trial of election petitions to be divided into two questions: first, the right of the petitioner to submit the petition, and, second, the actual merits of the petition. This, of course, greatly increased the length and expense of trials.

In 1891, with saw-offs becoming so prevalent that over eighty election petitions were filed, reforms were again instituted. Changes were made in the deadline procedure, and two judges now sat on an election petition trial, rather than one. The law was also changed so that no longer was a candidate responsible for the actions of an individual of which he had no knowledge, or gave no consent.

In 1900, recognizing the plague of electoral corruption, the House passed an order-in-council providing for a judicial investigation. The commission made no report. In 1906 a motion for a general investigation failed.

By 1906, saw-offs had been refined to the point whereby counsel for the parties would go before the court and say that they did not have the evidence to proceed, and the court would then dismiss the petition. A six month limit on petitions was imposed, however, to prevent neglect of petitions for an inordinate amount of time.

1914 saw an agreement among Members that it was time to institute new reforms. In 1915 a draft bill of the select committee investigating the situation passed, ensuring prompt trials, and making the parties set forth particulars in their petitions. Expedition was also helped by dropping consideration of the right of the petitioner to file.

Canada's Chief Electoral Officer was empowered to recommend prosecution in cases where circumstances seemed to dictate that it was necessary. This move came in 1929.

Since 1891, election petitions have declined considerably to the point where they are considered a rarity today.

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