



April 16, 2007

To: Journalists

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Re: U.S. House Task Force Meets Tomorrow on FL-13; Precedents Indicate House Can and Should Investigate and Remedy Sarasota Situation

On Tuesday, a task force of the House Administration Committee will convene to investigate what went wrong in the congressional election in Sarasota County, Florida, last November. Paperless touch-screen voting machines failed to record the choices of more than 18,000 voters in that election and almost certainly changed the election's outcome.

This memo highlights key congressional and legal precedents that make it clear that the House has the authority to investigate the Sarasota undervote and to remedy the situation as it sees fit, including vacating the FL-13 seat until a new election is held, irrespective of whether a decision is eventually rendered by courts in Florida. Lawsuits contesting the election are moving slowly through Florida's justice system and have not yet come to trial. More than five months after the midterm elections, Florida voters still lack confidence that they are represented by someone they actually elected. This delay is unacceptable. Congress has a responsibility to act now to determine what went wrong in Sarasota and to remedy the situation.

The process beginning with tomorrow's initial task force meeting, under the chairmanship of Representative Charlie Gonzalez (D-Tex.), presents an opportunity for Congress to bring about such an outcome.

Congress Has the Authority to Investigate and Remedy the FL-13 Election Now, Regardless of What Happens in the Florida Courts

Article I, section 5 of the Constitution states that each house shall be the judge of its own elections, returns, and Member qualifications. Section 4 further permits Congress to make laws to alter state regulations concerning elections. This means the House and Senate may act as they wish regarding contested elections, even if their wishes are contrary to decisions of state legislatures or courts, or to agreements reached between the contestants.¹ Court cases, most recently in 1972, have held that House decisions of contested elections, even if perceived as political in nature, cannot be brought to the courts on appeal. While election recounts or challenges to congressional election results may initially be conducted at the state level, including in the state courts, under the states' constitutional authority to administer federal elections, they do not have to be. Either way, the House of Representatives is the final judge of such elections.

¹ Each house may judge the constitutional "qualifications" of its members (age, citizenship, and inhabitancy in the state from which elected) and, in elections challenges, may determine if the Member is "duly elected. See *Powell v. McCormack*, 395 U.S. 456, 550 (1969).

Under these constitutional provisions and practice, the House is the *final* arbiter of the elections of its own Members. As noted by the House Committee on Administration, once the final returns in any election have been ascertained, the ultimate “determination of the right of an individual to a seat in the House of Representatives is in the *sole and exclusive jurisdiction* of the House of Representatives under article I, section 5 of the Constitution of the United States.”² Indeed, in just the last century, the House has used this authority to consider more than 100 contested election outcomes affecting its membership.

In *Roudebush v. Hartke*, the U.S. Supreme Court held that under Article I, Section 5, the final determination of the right to a seat in Congress in an elections case is not reviewable by the courts because it is “a non-justiciable political question,” and that each House of Congress in judging the elections of its own Members has the right under the Constitution to make “an unconditional and final judgment.”³ The Supreme Court also held that each House of Congress under Article I, Section 5, clause 1, “acts as a judicial tribunal” with many of the powers inherent in the court system in rendering in such cases “a judgment which is beyond the authority of any other tribunal to review.”⁴

Moreover, there is precedent for the House Committee on Administration to move forward with its investigation while state proceedings are simultaneously under way. In the 95th Congress, for example, while the Supreme Court of Illinois was still considering the appeal of a lower court’s dismissal of a contest against Representative Abner Mikva (D-Ill.), the House Administration Committee held hearings on the contest and resolved the issue. See *Young v. Mikva*, H.Rep. No. 95-244 (1977). And in the 104th Congress, the House Administration Committee investigated and resolved a contest against Representative Charlie Rose (D-N.C.), although a state action was still pending. (See *Anderson v. Rose*, H.R. Rep. No. 104-852) (1996).

Decisions of the U.S. House Take Precedence over State Law or State Court Decisions

Under its constitutional authority over the elections and returns of its own Members, the House in its consideration of a challenged election may accept a state count or recount or other such determination, or conduct its *own* recount and make its *own* determinations and findings. The House has *broad* authority in this area.⁵

Deference to state findings or determinations is not binding, and is solely at the discretion of the House. The Committee on House Administration is not bound to follow state law or state court decisions concerning the procedures of a House election, though such laws or decisions may be used to help aid the committee in its determination of a House contested election. Generally, the Committee and the House “seek to follow state law” and state court decisions in resolving House election contests, but in certain instances, this has not been the case, particularly

² Id.

³ *Roudebush v. Harke*, 4015 U.S. 15, 19 (1972).

⁴ *Supra*, at 25-26.

⁵ *Huber v. Ayres*, 2 *Deschler’s Precedents of The United States House of Representatives*[hereinafter *Deschler’s*] Ch.8, § 15, at 305: “Once Congress meets, the certificate constitutes evidence of a prima facie right to a congressional seat in the House.”

with regard to the validity of the ballots that have been declared invalid for failure to follow certain “technicalities” required by state law but where the intentions of voters are clear.⁶

For example, in a 1902 House contested election case, the House Elections Committee refused to reject ballots merely because they had not been marked according to the technical requirements of a state election law. The Committee ruled that it would accept those ballots where the intention of the voter was clear, regardless of a state election statute that required that ballots had to be marked strictly within the designated space.⁷ ***Thus, the Committee on House Administration has noted that “in addition to the fact that the House is not legally bound to follow state law, there are instances where it is in fact bound by justice and equity to deviate from it,”⁸ such as to ensure that “the will of the voters should not be invalidated” by mere technicalities of state law or regulation in instances where voters’ “obvious intent” may be discerned.⁹*** In addition, the Committee has noted that the “House has chosen overwhelmingly in election cases throughout its history not to penalize voters for errors and mistakes of election officials.”¹⁰ That is, in the absence of fraud, and where the honest intent of the voters may be determined, “the House has counted votes ... rather than denying the franchise to any individual due to malfeasance of election officials.”¹¹

People For the American Way Foundation has affidavits from over 100 Sarasota voters who have maintained that on Election Day the voting machines used in Florida’s 13th congressional district did not accurately register their votes. The precedent is clear that when voters’ intent has not been followed, the House must act such as to ensure that “the will of the voters should not be invalidated.”¹² If the House finds that voting machine flaws and/or election administration errors invalidated the will of Sarasota voters, it is empowered to remedy this situation by determining who, if anyone, should fill the contested seat.

The Duty and Precedent to Act Expeditiously

The 1984 Indiana congressional race contest is a case squarely on point, demonstrating the House’s precedent of acting on such contests expeditiously, before the voters are prejudiced by too much time passing in a two-year congressional term. Initial returns from the November 1984 election showed that Democrat Frank McCloskey had won the House seat in the eighth congressional district of Indiana by 72 votes. After corrections to the returns, the count showed that his opponent, Republican Richard McIntyre, had won by 34 votes. On December 13, 1984 the Secretary of State of Indiana certified that McIntyre had won. A subsequent recount supervised by the state courts, and completed by January 22, 1985, showed that McIntyre had

⁶ See McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 22-26.

⁷ Moss v. Rhea, H.Rept. 5-625 (1902), 2 *Hinds*’, § 1121, at 695-696. See also Sessinghaus v. Frost, H.Rept. 57-1959 (1883), 2 *Hinds*’, § 976, at 316; McKenzie v. Braxton, H.Rept. 42-4 (1872), 1 *Hinds*’, § 639, at 850; and Lee v. Rainey, H.Rept. 44-578 (1876), 1 *Hinds*’, § 641, at 853.

⁸ McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 23.

⁹ *Id.*, citing In re Dale Alford, 2 *Deschler*’s, Ch. 9, § 38.5, and Kyros v. Emery, 94th Cong. (1975), H.Rept. 94-760, at 5.

¹⁰ McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 24.

¹¹ *Id.*, citing McKenzie v. Braxton, 42nd Cong. 2nd Sess. (1872), 1 *Hinds*’ § 639, at 850.

¹² *Id.* citing In re Dale Alford 2 *Deschler*’s, Ch. 9, § 38.5, and Kyros v. Emery, 94th Cong. (1975), H.Rept. 94-760, at 5.

won by 418 votes. Before this recount could be completed, however, the House of Representatives assembled.

On January 3, by a party-line vote, the House declined to seat McIntyre and appointed a Task Force of the House Administration Committee to investigate the election. Note that this occurred *before* state proceedings were complete. The Task Force decided to conduct its own recount and to employ its own rules rather than those of Indiana state election law. The Chairman of the House Administration Committee appointed a three-member Task Force composed of two Democrats and one Republican to investigate the election.¹³ The Task Force initially took the steps necessary to secure all of the ballots by requesting by telegram that all county clerks protect and keep safe for six months “all originals and copies of books, records, correspondence, memoranda, papers, and documents” pertaining to the contested general election “including but not limited to all ballots, certifications, poll books and tally sheets.”¹⁴ The Committee task force then set out procedures and operating rules for canvassing votes and examining and counting ballots.¹⁵ ***The Committee noted that while it sought to follow state election statutes regarding the counting of ballots, it was not bound to follow state law, because the final power of judging the whole question of returns and elections must reside in the House of Representatives, whose objective, over and above following mere technicalities of state or local regulation, is to determine the will of the electorate.***¹⁶ Its report, issued April 29, 1985, concluded that McCloskey had won by four votes out of the more than 230,000 votes cast.¹⁷ On May 1, 1985, again by a party-line vote, the House seated McCloskey.

Thus, in the McCloskey-McIntyre race, less than 25 years ago, the House diligently worked to resolve a contested election before four months of the congressional term expired, regardless of the state activities that were ongoing. The House formed a Task Force almost three weeks before the last recount was completed by the state.

In Sarasota, by contrast, the state proceedings are dragging on at a dangerously slow pace. Though a court case was diligently filed immediately after the election, the trial court has not even allowed discovery on the voting technology to proceed, and the appellate court has taken over three months to consider just the discovery issues, which remain unresolved for the foreseeable future. Meanwhile, the state, county, and corporate defendants have done everything within their power to slow the proceedings down, including apparently withholding relevant documents in discovery – documents which indicate very serious problems with the voting machines – problems which defendants knew about months before the election. It is now over three months since Congress provisionally seated the purported winner of the 13th district race – over one-eighth of a congressional term.

Further delay is unacceptable. The House Administration Committee has a responsibility to take action.

¹³ McCloskey and McIntyre, H.Rept. 99-58, *supra*, at 12-43. 2 Deschler’s, Ch. 9, §§ 5.7, 5.8, 5.9, at 350-351 (1977).

¹⁴ H.Rept. 99-58, *supra*, at 12-13, 14-15.

¹⁵ H.Rept. 99-58, *supra*, at 15-32.

¹⁶ H.Rept. 99-58, *supra*, at 16, 22-26.

¹⁷ H.R. REP. NO. 58, 99th Cong., 1st Sess. 2 (1985).

Conclusion

In sum, the Committee on House Administration, pursuant to the House's Constitutional authority under Article I, Section 5, Clause 1, has broad power and authority to conduct an examination of an election, election procedures, and ballots in a contested election case, to establish uniform standards and guidelines for the counting of ballots to determine voters' intentions, and to determine who should be seated.¹⁸ That authority is not dependent on any state proceedings, particularly where, as here, the state proceedings are not moving diligently forward or resolving the issues that the House must answer. The House not only has the power, but the duty, to conduct whatever investigation it deems necessary to resolve this issue as expeditiously as possible. Even at its quickest pace, it is unlikely this matter will be resolved by the House even by the late date of May 1, as the 1984 Indiana contest was. Tomorrow's convening of the FL-13 task force is a positive step forward that may yet offer Sarasota County voters a chance to be represented by someone they know they elected.

¹⁸ An investigation by the Committee, referred to the Committee by the House, could take several different procedural routes, depending on the circumstances of the case and the matters before it. The Committee, within its discretion, could decide not to conduct any investigation of its own and to proceed based on the pleadings, arguments, and evidence introduced by counsel or the parties. The Committee could conduct a preliminary investigation or a limited recount to determine whether there are sufficient grounds to warrant a full-scale investigation and/or recount. In addition, if warranted, the Committee could order a full-scale investigation, including a recount, an examination of alleged voter fraud in the balloting process, or an inquiry into other matters brought before it to resolve the underlying questions and issues presented in the challenge. CRS Report- Procedures for Contested Election Cases in the House of Representatives. January 2007.