Advisory Opinions on State Law

§ 5.13 An elections committee may accept the opinion of a state attorney general as to the effect of state laws for disputing an election.

In the 1957 Iowa contested election of Carter v LeCompte (§ 57.1, infra), the election committee expressly rejected the ruling in Swanson v Harrington (§ 50.4, infra), a 1940 Iowa election contest in which the contestant had been required to show, by seeking recourse to the highest state court, that the Iowa election laws did not permit him a recount. This time, however, the committee adopted the view of the Iowa attorney general, as expressed in a letter to the Governor and secretary of state, that the laws of Iowa contained no provision for contesting a House seat.

§ 5.14 An advisory opinion by a state supreme court that ballots from certain precincts should be discounted for failure of election officials to perform duties made mandatory by state law may be accepted as binding by an elections committee of the House.

In Brewster v Utterback (§ 47.2, infra), a 1933 Maine contest, contestant alleged the fraudulent or negligent failure. of election officials to perform their duties as required by state law. He claimed that election officials had neglected to provide voting booths in certain precincts, that in another precinct more ballots had been cast than there were voters, and that in yet another precinct officials had illegally permitted and assisted unqualified voters to cast ballots.

The Committee on Elections assumed the validity of the state supreme court opinion to the effect that certain ballots should be discounted for failure of election officials to perform duties required by state law.

§ 6. The Clerk; Transmittal of Papers

Under the modern practice, all papers filed with the Clerk pursuant to the Federal Contested Elections Act are to be promptly transmitted by him to the Committee on House Administration.[20] By long-standing practice, testimony taken by deposition in an election contest is transmitted to the Clerk.[21]

Under the prior contested elections statute, the Clerk trans-

20. 2 USC § 393(b).

21. 1 Hinds' Precedents §§ 703, 705.

mitted the original notice of contest, answer, and testimony directly to the committee (pursuant to 2 USC § 223), but other special motions and papers filed with the Clerk by either party were forwarded to the Speaker for reference by him to the committee, as reflected in the precedents which follow.

Items Transmitted by Clerk to Speaker

§ 6.1 Prior to 1969, among the documents that were communicated to the Speaker for reference to an elections committee was a communication to the Clerk from a contestee raising the question as to whether contestant was barred from proceeding further because of a failure to comply with some provision of the Federal Contested Elections Act.

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, the contestee sought to bar contestant from further proceeding under the statute because of a failure to forward certain testimony to the Clerk within the time required by law. The contestee's letter to this effect was transmitted to the Speaker for referral.

§ 6.2 In the event that certificates of election are submitted by both parties to a contest, they are included with the communication from the Clerk to the Speaker.

In the 1934 Kemp, Sanders investigation (§ 47.14, infra), the Clerk transmitted a certificate of election of Mrs. Bolivar E. Kemp, Sr., signed by the Governor of Louisiana and attested by the secretary of the State of Louisiana, along with a certificate of election of J. Y. Sanders, which certificate was prepared by the "Citizens' Election Committee of the Sixth Congressional District." Ultimately, the House determined that neither party had been validly elected.

§ 6.3 Among the papers which prior to 1969 the Clerk transmitted to the Speaker for reference to an elections committee was a contestant's application for extension of time for taking testimony.

In the 1943 Illinois election contest of Moreland v Schuetz (§ 52.3, infra), the Speaker laid before the House a letter from the Clerk conveying a request by the contestant for an extension of time because the time and facilities of the responsible election officials were

then being totally consumed in preparation for local elections. By resolution, the House extended the time for taking testimony by 65 days.

§ 6.4 The Clerk's letter transmitting a contest has been ordered printed by the Speaker to include copies of the contestant's notice of the contest, contestee's answer thereto, contestee's two motions to dismiss the contest, and contestant's memorandum in explanation of his failure to take testimony within the time prescribed by law and of his discontinuance of further action in the matter.

In the 1951 Missouri contested election case of Karst v Curtis (§ 56.2, infra), the contestant brought the contest on the advice of his county party committee, based on allegations of improper tallying of ballots in a local election held simultaneously with his own. When the recount failed to disclose the discrepancies, the contestant notified the House of his decision to discontinue action, which the Speaker ordered printed as a House document and referred to the Committee on House Administration along with the other documents received by the Clerk. The other documents included: (1) contestant's notice of contest; (2) contestee's answer; (3) contestee's motion to dismiss for failure of contestant to take testimony within 40 days after service of answer; (4) a memorandum from contestant explaining his failure to take testimony during the 40 days; and (5) contestee's renewed motion to dismiss for failure of contestant to take testimony during the 90-day statutory period.

§ 6.5 A communication from the Clerk transmitting a memorial challenging the right of a Member-elect to a seat was referred to a committee on elections but not printed as a House document

In the 1933 investigation of the citizenship qualifications of a Member-elect from Pennsylvania, In re Ellenbogen (§ 47.5, infra), the Clerk transmitted to the Speaker a letter containing a memorial and accompanying papers filed by Harry A. Estep, a former Member, challenging the citizenship qualifications of the Member-elect. The communication and accompanying papers were referred to the Committee on Elections, but not ordered printed.

§ 6.6 In his letter of transmittal to the Speaker rel-

ative to an election contest, the Clerk may point out that he does not regard the contestant as competent to bring the contest under the statutes governing such proceedings.

See In re Plunkett (§ 53.2, infra), a 1945 dispute, in which the Clerk expressed his belief that an individual who was attempting to contest the election of 79 Members from various states had not been a party to any of the elections and was therefore incompetent to initiate such a contest.

§ 6.7 In his letter of transmittal to the Speaker, the Clerk may point out that neither party had taken testimony during the time prescribed by law and that the contest appears to have abated.

In Roberts v Douglas (§ 54.4, infra), a 1947 California contest, the Clerk's letter, together with copies of the contestant's notice of contest and contestee's motion to dismiss and a letter from her attorney in support thereof, were referred by the Speaker to the Committee on House Administration. The Clerk's letter noted that testimony had not been timely taken and that the contest appeared to have abated. The House subsequently agreed to dismiss the contest on a voice vote and without debate.

§ 6.8 The Clerk may include the contestee's answer, though filed for information only, in a letter transmitted to the Speaker stating the Clerk's opinion that the contest has abated.

In Browner v Cunningham, a 1949 Iowa contested election case (§ 55.1, infra), the contestee's answer was transmitted by the Clerk to the Speaker along with the Clerk's letter relating that no testimony had been received and the opinion of the Clerk that the contest had abated.

§ 6.9 Where the Clerk receives an application for an extension of time for taking testimony, he communicates that fact to the Speaker together with accompanying papers, which the Speaker then refers to an appropriate committee.

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, an application for an extension of time for taking testimony, although filed before the contest had been formally presented to the House, was communicated by the Clerk to the Speaker together

with accompanying papers, which the Speaker referred to a committee and ordered printed.

§ 6.10 In communicating with the Speaker relative to an apparent election contest and papers pertaining thereto, the Clerk may rely on "unofficial knowledge." And the Speaker may refer such communication and accompanying papers to a committee on elections.

In Reese v Ellzey (§ 47.13, infra), a 1934 Mississippi contest, the Speaker laid before the House a letter from the Clerk transmitting his "unofficial knowledge" of the contest, together with contestant's letter of withdrawal therefrom. The Clerk's letter and accompanying papers were referred to a committee on elections and ordered printed.

§ 6.11 The Clerk's letter transmitting a notice of contest to the Speaker may disclose that the contestee has not filed a brief in support of his position within the time prescribed by law.

In the 1947 Georgia election contest of Mankin v Davis (§ 54.2, infra), the Clerk's letter, which the Speaker ordered printed as a House document, stated that the contestant had complied with the requirements to forward his brief to the contestee and file notice within 30 days, but that the contestee had not submitted his brief in answer within the requisite time.

§ 6.12 In the Clerk's letter of transmittal, he may include the information that contestant has not forwarded testimony to his office in the manner prescribed by law.

In Hicks v Dondero (§ 53.1, infra), a 1945 Michigan contest, the Clerk's letter of transmittal to the House related that he had received packets of material which had not been addressed to the Clerk, or prepared in the manner required by law. The Clerk's letter further stated that since the proper statutory procedure had not been followed, he was transmitting all of the material received to the House for its disposition.

Production of Documents Under Subpena

§ 6.13 The Clerk has refused to comply with a subpena duces tecum served upon him by a contestant's notary public requesting production of documents filed by the contestee.

In the 1934 Illinois contested election case of Weber v Simpson

(§ 47.16, infra), the contestant's notary public served a subpena duces tecum upon the Clerk, who refused to comply with it without permission of the House. The subpena requested production of documents filed by the contestee in the dispute. The subpena and accompanying papers were referred to the Committee on the Judiciary and ordered printed. The 73d Congress did not authorize the Clerk to respond to the subpena.

§ 7. The Courts

Although the House is the final judge of the elections of its Members, candidates are frequently subjected to actions in state and federal courts for violations of laws regulating campaign practices, an area which Congress has largely left to the states. Beyond the scope of this chapter are injunctions against the issuance of election certificates[22] and suits by individuals such as those arising from violations of the 1965 Voting Rights Act, 42 USC §§ 1971 et seq., and court-ordered congressional redistricting.[1]

This section takes up precedents involving (1) the necessity to appeal to state courts before the election to cure pre-election irregularities;[2] (2) the acceptance of advisory opinions from state courts on the laws of that state;[3] and (3) the binding effect of local court determinations.[4]

The House has stated that local magistrates lack authority to break open ballot boxes.[5]

Appeal to State Court Regarding Pre-election Irregularities

§ 7.1 A contestant must exhaust state law remedies by protesting pre-election irregularities to the state board of election, with appeal to the state courts, prior to the election, in order to overturn the results of that election on the basis of the pre-election irregularity.

22. See Ch. 8 § 16.4, supra, for discussion of an instance wherein a state court had issued a preliminary injunction against the issuance of a certificate to a Member-elect, and the House referred the question of his right to be seated to a committee.

1. See *Wesberry* v *Sanders,* 376 U.S. 1 (1963) and kindred cases such as *Gray* v *Sanders,* 372 U.S. 368 (1963) which invalidated the use of the "county unit" system of selecting party candidates. Generally, see Ch. 8, supra.

2. § 7.1, infra.

3. § 7.3, infra.

4. § 7.4, infra.

5. § 7.7, infra. The jurisdiction of the courts over the election of Members is more fully discussed in Ch. 8, supra.