104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–852

DISMISSING THE ELECTION CONTEST AGAINST CHARLIE ROSE

SEPTEMBER 26, 1996.—Referred to the House Calendar and ordered to be printed

Mr. THOMAS, from the Committee on House Oversight, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany H. Res. 538]

The Committee on House Oversight, having had under consideration the resolution (H. Res. 538), dismissing the election contest against Charlie Rose, report the same to the House with the recommendation that the resolution be agreed to.

COMMITTEE ACTION

On October 25, 1995, by voice vote, a quorum being present, the Committee agreed to a motion to report the resolution favorably to the House.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee states that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

STATEMENT ON BUDGET AUTHORITY AND RELATED ITEMS

The resolution accompanying this report does not provide new budget authority, new spending authority, new credit authority, or an increase or decrease in revenues of tax expenditures and a statement under clause 2(l)(3)(B) or rule XI of the Rules of the

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House of Representatives and section 308(a)(1) of the Congressional Budget Act of 1974 is not required.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee states, with respect to the resolution, that the Director of the Congressional Budget Office did not submit a cost estimate and comparison under section 403 of the Congressional Budget Act of 1974.

OVERSIGHT FINDINGS OF COMMITTEE ON GOVERNMENT OPERATIONS

The Committee states, with respect to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, that the Committee on Government Reform and Operations did not submit findings or recommendations based on investigations under clause 4(c)(2) of rule X of the Rules of the House of Representatives.

TASK FORCE ON CONTESTED ELECTION

Pursuant to Rule 16(b) of the Rules of Procedure of the Committee on House Oversight, the Honorable Bill Thomas, Chairman of the Committee, established a Task Force on February 8, 1995, to examine the documentary record, to receive oral arguments, and to recommend to the Committee, the disposition of an election contest filed pursuant to the Federal Contested Election Act, 2 U.S.C. §§ 381–96 (1988), by Mr. Robert Anderson (contestant) against Mr. Charlie Rose (contestee).

STATEMENT OF FACTS

Introduction

This report relates to the election contest filed concerning the 1994 election for the House of Representatives seat for the Seventh District of North Carolina. As discussed below, this election contest arises under the United States Constitution, Article. V, § 1, and the Federal Contested Election Act. 2 U.S.C. §§ 381–96.

1994 election for the Seventh District of North Carolina

The principal candidates for the seat in the House of Representatives in the election for the Seventh Congressional District of North Carolina on November 8, 1994 were incumbent Democrat Charlie Rose and Republican challenger Robert Anderson. The official election returns showed Mr. Rose with a plurality of 3,821 votes, with Mr. Rose receiving 62,670 votes and Mr. Anderson 58,849 votes. The congressional election coincided with local elections, including a very competitive contest for sheriff.

Proceedings involving North Carolina agencies

Following the elections, on November 28, 1994, Mr. Anderson filed a consolidated election protest and complaint against Robeson County election officials with the North Carolina State Board of Elections ("SBE") on November 28, 1994 in accordance with North

Carolina state law.[1] The complaint alleged largely the same particular irregularities later included in his contest filed with the House of Representatives. The complaint requested, among other things, that the SBE refrain from certifying the election returns, that an investigation be conducted of alleged election irregularities and violations of election laws, and that a new election be ordered.

On November 29, 1994, the SBE held a hearing concerning the compliant and voted to delay certification of the election. After Mr. Anderson left the meeting, however, a previously-unintroduced attorney for Mr. Rose addressed the board urging that they reconsider their decision, arguing that the delay in certification would harm Mr. Rose's then-pending candidacy for the office of Minority Leader in the 104th Congress. Following this testimony and telephone calls from additional people connected with the state Democratic Party, the SBE then reversed its vote to delay certification.

Even before Anderson's filing, however, on November 18, 1994, the SBE had directed the North Carolina State Bureau of Investigation to conduct an investigation of Mr. Anderson's charges. Subsequently, the SBI dispatched investigators to Robeson County to conduct interviews and investigations and to review election materials. The SBI agent-in-charge then summarized his view of the evidence and forwarded the summary along the raw investigative materials to the District Attorney responsible for Robeson County, Luther Johnson Britt, III.[2] Mr. Britt then prepared a letter summarizing his view of the SBI materials for the SBE.[3]

Proceeding before the Committee on House Oversight

On December 28, 1994, Mr. Anderson filed a Election Contest (hereinafter "Anderson's Notice") with the Committee under jurisdiction granted by the U.S. Constitution[4] and the Federal Contested Election Act ("FCEA").[5] Subsequently, the Committee appointed a Task Force on February 8, 1995 to handle this contest consisting of three members: Hon. John Boehner, Hon. Vern Ehlers, and Hon. William Jefferson. Congressman Boehner was the Chairman of the Task Force. On February 8, 1995, Mr. Rose filed Contestee's Motion to Dismiss Contestant's Notice of Election Contest (hereinafter "Rose's Motion") and Memorandum of Congress-

[1] Mr. Anderson chose not to file a complaint with the Robeson County Board of Elections, alleging that such a protest would have been futile in that many of his complaints concerned allegedly improper actions by board members as well as ineffective or illegal board policies. While North Carolina regulations encourage filing of election complaints at the local level, the SBE also has authority to consider any allegations of election irregularities. *See* N.C. Gen. Stat. § 163–22; *see also In re Judicial by Republican Candidates for Election in Clay County* 264 S.E.2d 338 (N.C. Ct. App.), *cert. denied,* 267 S.E.2d 672 (N.C. 1980); *Sharpley* v. *Board of Elections,* 209 S.E.2d 513, 14–15 (N.C. Ct. App. 1974). The fact that the SBE opted to refer the matter to the North Carolina State Board of Investigation ("SBI") for inquiry demonstrates that neither agency believed Mr. Anderson had waived any rights to challenge the election.

[2] The SBI agent-in-charge allowed Mr. Britt to direct, in part, the scope of the investigation, especially the inquiry into allegations of bribery.

[3] It should be pointed out that Mr. Britt, an elected Democratic official, refused to meet with Mr. Anderson to discuss the allegations, although there was evidence that he discussed the case with staff for Mr. Rose.

[4] U.S. Const. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members * * *.").

[5] 2 U.S.C. §§ 381–96 (providing procedural framework in the House of Representatives for a candidate to contest the election of a Member of the House of Representatives).

man Charles G. Rose, III in Support of Motion to Dismiss Notice of Election Contest (hereinafter "Rose Memorandum").[6]

Hearings held by the Task Force

The Task Force held a hearing on June 9, 1995, in Lumberton, N.C. concerning Rose's Motion. As the moving party, Mr. Rose, through counsel, made the initial presentation in favor of dismissal. Mr. Rose's presentation featured several witnesses including District Attorney Britt. Mr. Anderson then presented his defense against Rose's Motion, including testimony by several witnesses including, poll workers, voters, a State Representative, and political scientists. Mr. Rose made a brief rebuttal presentation and Mr. Anderson concluded with additional argument and testimony. After each segment, the parties, their counsel, and their witnesses were questioned by the members of the Task Force. The Task Force chose to hold the hearing in Lumberton so that voters, election workers, and local officials would more easily be able to provide the Task Force with relevant information.

On August 3, 1995, the Task Force held another meeting to consider Rose's Motion. After debate by the Task Force, Rep. Ehlers made a motion to grant the Motion to Dismiss and to send a copy of the committee report to the Department of Justice with a request to investigate irregularities and potential violations of federal law. Rep. Jefferson made a motion to separate the matters. The motion to grant the Motion to Dismiss passed by a vote of 3–0. The motion of referral to the Department of Justice was approved by a vote of 2–1, with Rep. Jefferson dissenting.

Although no further action was required by the Task Force due to the granting of the Motion to Dismiss, the Committee issues this report to explain formally the reasons why Rose's Motion to Dismiss the Contest was granted.

ANDERSON'S ALLEGATIONS

Anderson's Notice focused almost entirely on allegations concerning Robeson County, North Carolina.[7] Outside of Robeson County, Mr. Anderson won the election by over 6400 votes. In Robeson County, however, Mr. Rose was declared the winner by over 10,000 votes. Mr. Anderson made numerous specific allegations concerning election irregularities and fraud arising in the county before, dur-

[6] After Anderson's Notice vested the Committee with jurisdiction, numerous additional pleadings were filed. They were:

On January 3, 1995, Mr. Anderson filed a Addendum of Election Contest concerning alleged improprieties related to financial contributions made by the Rose campaign;

On January 26, 1995, Mr. Anderson filed a Second Addendum to Election Contest concerning Mr. Rose's residency;

On March 2, 1995, Mr. Anderson filed Contestant's Response to Rose's Motion to Dismiss;

On May 2, 1995, Mr. Anderson filed Anderson's Response to the Britt Report;

On May 8, 1995, Mr. Rose filed Contestee's Reply to Contestant's Response to Rose Motion to Dismiss the Election Contest;

On June 6, 1995, Mr. Anderson filed Contestant's Response to Rose Reply to Contestant's Response to Rose's Motion to Dismiss * * *;

On June 19, July 6, July 7, July 24, July 28, August 3, and August 4, 1995, Mr. Anderson submitted additional information to the Committee;

On August 21, 1995, Mr. Anderson filed a Memorandum of Law in Support of Motion to Reconsider Election Contest; and

On August 30, 1995, Mr. Anderson filed an Addendum to Memorandum of Law in Support of Motion to Reconsider Election Contest.

[7] The 7th District encompasses all or part of eight counties of southeastern North Carolina: Bladen, Brunswick, Columbus, Cumberland, New Hanover, Onslow, Pender, and Robeson.

ing, and after the election. Mr. Anderson also relied heavily on the fact that, during 1994, an off-year election, Robeson County saw a vote increase of 12% while every other county in the district saw a vote falloff of at lease 23%. Indeed, the district-wide falloff was 35% from the turnout in the 1992 presidential election cycle.[8]

Anderson's most significant allegations were:

Inaccurate registration lists included many deceased voters and duplicate registrations and impostors apparently voted for registered voters;

Election day registrations were allowed;

People unable to identify themselves were allowed to vote;

Felons were allowed to vote;

Poll workers were harassed;

There were problems with ballot machines, ballot marking pens, and other election day difficulties;

Voting machines were preset not to read certain ballots;

The curbside voting process for disabled voters was abused;

Ballots were improperly remarked by election officials;

Voters suffered harassment, including intimidating demands that voters cast their ballot in a particular manner;

Opening of ballot boxes before the polls closed and failure to secure ballot boxes after the election;

Voters in public housing were told their rents might increase if they voted in a particular manner; and

Bribes were offered to voters with funds contributed by Rose and others to local "voter participation" groups.[9]

All of these allegations were made in the context of explaining the unusual vote surge in the Seventh District portion of Robeson County.

In support of these allegations, Mr. Anderson provided numerous affidavits, witness statements, statistical breakdowns, campaign materials, newspaper stories, correspondence, maps, audiotapes, his complaint filed with state authorities, documents related to the finances of local political organizations, registration and ballot information, minutes of meetings of state and local governmental bodies, and other materials.

At the Lumberton hearing, Mr. Anderson presented witnesses who testified under oath concerning alleged irregularities. These witnesses included political scientists who discussed the unusual vote turnout in Robeson County, poll workers described harassment of voters and poll workers, voters who described alleged irregularities, and an elected official and one other witness who disputed charges that Mr. Anderson's contest was based on racial animus.

Additionally, Mr. Anderson also argued that Mr. Rose was not a resident of the Seventh Congressional District at the time of the election, and thus was ineligible to be elected under North Carolina law. He specifically alleged that, under North Carolina law, Mr. Rose's residence had legally changed to Virginia in that his living quarters, correspondence, tax and voting records, and other actions

[8] The declines in turnout ranged from a low of 23% to a high of 38% in the counties in the Seventh District other than Robeson.

[9] The allegations concerning bribery and financial contributions involved organizations operating in counties other than Robeson County.

reflected his decision and intention to end his North Carolina residency. Mr. Anderson also referred to divorce proceedings in which a Virginia court allegedly concluded that Mr. Rose was a resident of Virginia.[10]

ROSE'S PRE-ANSWER DEFENSES

The Task Force considered Mr. Rose's pre-answer defense in the form of a "Motion to Dismiss" which demanded dismissal on the grounds that Anderson's Notice failed to state sufficient grounds to change the result of the election.[11] This defense is one of the four statutory defenses allowed by the FCEA which a contestee may raise before filing an answer.[12]

Mr. Rose alleged that the evidence provided along with the Notice of Contest to prove the allegations was insufficient to survive a Motion to Dismiss. Mr. Rose claimed that the Notice of Contest had failed to provide "in the first instance, sufficient supportive allegations and evidence to justify his claim to the seat." Rose Memorandum at 8 (quoting H. Rep. 626, 92nd Cong., 1st Sess., *Tunno* v. *Veysey*, at 3 (1971)) (Rose's emphasis). Mr. Rose stated that the Notice of Contest provided "no competent evidence" and charged that the allegations were based upon "rumor and speculation[.]" Rose Memorandum at 9, 10.

As an alternative ground for dismissal, Mr. Rose asserted that the Committee should respect North Carolina law and election procedure by dismissing the Notice of Contest because Mr. Anderson allegedly opted to forego state remedies.

Mr. Rose also stated that he had been and intended to remain a North Carolina resident.

STANDARD FOR JUDGING A MOTION TO DISMISS BASED ON A LACK OF EVIDENCE

The same standard for judging a Motion to Dismiss which was intended at the time of passage of the FCEA was applied to this contest: a contestant must make credible allegations of irregularities of fraud which, if subsequently proven true, would likely change the outcome of the election. The credibility element of the test allows for consideration of evidence confirming or refuting allegations of election errors or fraud, if such evidence is available. The standard also recognizes, however that the proof of election irregularities or fraud may not be obtainable by a contestant who has not had access to discovery. Nor does the test penalize contestants

[10] Mr. Anderson has continued to seek a ruling concerning Mr. Rose's residency. He has sought to unseal court records concerning Mr. Rose's divorce which are maintained by a Virginia court. He has also attempted to obtain an administrative hearing in Cumberland County, North Carolina, concerning the status of Mr. Rose' residency. While the Task Force has authority to consider evidence of a candidate's residency in judging a contest, this Task Force opted, in its lawful discretion, not to interfere with a determination of Mr. Rose's residency by North Carolina authorities. Independent of his rights before the Task Force, Mr. Anderson has had and has utilized his rights before state regulatory and judicial authorities concerning this issue.

[11] Although the FCEA does not specifically provide that a pre-answer motion may be styled in the form of a "Motion to Dismiss", contestees have frequently used this section of the Act as a demurrer device. *See* 2 U.S.c. § 383(b) (1988).

[12] The four pre-answer defenses 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.
(4) Failure of contestant to claim right to contestee's seat.
Id.

who cannot fully support their credible allegations because the proof of their claims is in the hands or minds of those who have committed the errors or violations at issue.[13]

A key word in this test is "credible." A Task Force should not allow a losing candidate to contest an election based on general, or disproven claims of fraud or irregularities. A contestant must provide specific, credible allegations which either invalidate sufficient ballots to affect the result of the election or would show the validity of the vote count to be seriously suspect because certain precincts were contaminated by fraud or other improper influences. In judging whether a particular allegation is credible, a Task Force should consider not only the contestant's view and any supporting evidence, but any countervailing arguments and evidence available from the contestee or other sources. Thus the standard balances the need of the House to allow for meanginful discovery while recognizing that mere notice pleading is insufficient in the face of credible contrary evidence.

Republicans have consistently rejected the Democrat position that the contestant must be able to provide specific preliminary proof of his or her case at the time of the filing of the notice of contest in order to survive a Motion to Dismiss.[14] The Democrat standard incorrectly elevated the Motion to Dismiss stage to an insurmountable barrier to election contestants.

Thus, to be allowed discovery, a contestant must make, at a minimum, credible allegations which show either that:

(1) more ballots were improperly cast than the margin of victory; or

(2) because of contaminating factors such as bribery, harassment of voters, corruption of officials, etc., in certain precinct(s), the credibility of the vote total is irreparably damaged.

If a contestant is eventually successful in establishing convincing evidence of irregularities or fraud, the Committee could order remedies, including proportional deduction of improper ballots,[15] exclu-

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[13] The standard also recognizes the fact that contestants may not have had sufficient time to review election materials such as registration lists, poll sheets, absentee ballot forms, etc. which might form the basis of allegations of irregularities by the deadline for filing a contest. This problem in some cases might be due to the unavailability of the materials, or their sheer volume.

[14] *See, e.g.,* H. Rep. 244, 95th Cong., 1st Sess., *Young* v. *Mikva* (1977). This standard was advocated by Democrats filing motions to dismiss in 1995. *See* Contestee (Rose's) Motion to Dismiss Contestant's Notice of Election Contest, at 10 (filed Feb. 8, 1995); Contestee Gejdenson's Motion to Dismiss the Election Contest, at 5 (filed Feb. 3, 1995).

[15] This remedy may be necessary where establishing a true vote count may be impossible because it cannot be determined for whom improper ballots had been cast without violating the voters' rights to a secret ballot. Even if a voter waived this right, it still might be difficult to prove for whom illegal ballots were cast because testimony by voters whose ballots are disputed might not have been credible while in other situations, the illegal ballot may not have been cast by any actual voter. The House's precedents allow for deletion of improper ballots by proportional deduction. This "general rule . . . in the House for deduction of illegal votes where it is impossible to determine for which candidate they were counted" requires reducing the total vote count in affected precincts in proportion to the percentage of votes received by each candidate in each precinct to eliminate the improper ballots from the vote count. *See* H. Rep. 513, 87th Cong, 1st Sess., *Roush or Chambers,* at 56 (1961); *see also* Deschler's Precedents § 57 (H. Rep. 2482, 85th Cong., 1st Sess., *Oliver* v. *Hale* (1958)), § 56.4 (H. Rep. 1599, 82nd Cong., 2nd Sess., *Macy* v. *Greenwood* (1952)); Ch. 9 App. Deschler's Precedents § 5.4 at 828 (H. Rep. 1450, 69th Cong., 1st Sess., *Bailey* v. *Walters* (1926)), § 4.2 (H. Rep. 224, 68th Cong., 1st Sess., *Chandler* v. *Bloom* (1924)), § 3.6 at 770–71 (H. Rep. 1101, 67th Cong., 4th Sess., *Paul* v. *Harrison* (1922)), § 2.7 at 744–45 (H. Rep. 1325, 66th Cong., 3d Sess., *Farr* v. *McLane* (1921)), § 1.4 at 681 (H. Rep. 839, 65th Cong., 3rd Sess., *Wickersham* v. *Sulzer* (1919)), at § 2.6 at 734 (H. Rep. 1319, 66th Cong., 1st Sess., *Wickersham* v. *Sulzer and Grigsby* (1919)); Chester H. Rowell, A Historical

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sion of contaminated precincts,[16] or ordering a new election.[17] Whether any remedy would be appropriate depends on whether the allegations are proven and how critical they were to the apparent victory.

Statutory construction, legislative history, and House precedent

The language of the Motion to Dismiss in the FCEA and the statute's legislative history clearly indicate that the legislation was meant to install a procedural framework without changing substantive precedent of the House. The House had normally reviewed the pleadings and available evidence to determine whether there were sufficient grounds to allow further investigation. As a comparison with the federal civil procedure rules, therefore, the House utilized a standard blending of Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

The FCEA statute allowing a Motion to Dismiss itself was designed and modeled after Rule 12(b)(6) of the Federal Rules of Civil Procedure which govern actions in federal court. This rule allows a defendant to have a case dismissed before discovery if the lawsuit could not state a legal claim even if every factual allegation and inference were true: the claimant is not required to provide convincing evidence in the form of documents and/or affidavits. The legislative history indicates the FCEA's supporters believed the language establishing the Motion to Dismiss was mean to give the defending party a procedural right similar to the demurrer, the common law equivalent of Rule 12(b)(6). Since the FCEA was only a procedural reform, it did not alter the ability of the Committee to consider available evidence in deciding whether a contest deserved further consideration. There is no indication from the statute or the legislative history, however, that the Motion to Dismiss device in the FCEA was meant to result in a trial on the merits.

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and Legal Digest of all the Contested Election Cases of the House of Representatives from the First to the Fifty-Sixth Congress (1901), at 368 (47th Cong., *Bisbee* v. *Finley* (1881)), at 318 (44th Cong., *Platt* v. *Goode* (1875)), at 305 (44th Cong., *Finley* v. *Walls* (1875)).

[16] Mr. Anderson argued that all of the votes from certain precincts be disallowed, as has occurred when the Committee has concluded that the extent of the illegal ballots so distorted certain precincts that the proper remedy was to not count any ballots from the contaminated areas. *See, e.g.* Ch. 9 App. Deschler's Precedents § 7.4 at 877 (H. Rep. 1901 Part 2, 71st Cong., 2d Sess., *Hill* v. *Palmisano* (1930)), § 5.4 at 820 (H. Rep. 1450, 69th Cong., 1st Sess, *Bailey* v. *Walters* (1926)), § 4.2 at 784 (H. Rep. 224, 68th Cong., 1st Sess., *Chandler* v. *Bloom* (1924)); *id.* § 3.6 at 770 (H. Rep. 1101, 67th Cong., 4th Sess., *Paul* v. *Harrison* (1922)), § 2.7 at 744 (H. Rep. 1325, 66th Cong., 3d Sess., *Farr* v. *McLane* (1921)), § 2.4 at 717 (H. Rep. 961, 66th Cong., 2d Sess., *Salts or Major* (1920)), at § 2.1 at 696 (H. Rep. 375, 66th Cong., 1st Sess., *Tague* v. *Fitzgerald* (1919) (Citing *Gill* v. *Dyer,* 63rd Cong., *Gill* v. *Catlin,* 62nd Cong., *Connell* v. *Howell,* 58th Cong., *Horton* v. *Butler,* 57th Cong., *Wagner* v. *Butler,* 57th Cong., and *Easton* v. *Scott,* 14th Cong.)).

This remedy should be utilized only in extreme circumstances.

Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond a reasonable doubt that there has been a disregard of law or such fraud that it is impossible to determine what votes were lawful or unlawful, or to arrive at any result whatever, or whether a great body of voters have been prevented from exercising their rights violence or intimidation.

H. Rep. 626, 92nd Cong., 1st Sess., *Tunno* v. *Veysey* (1971) at 4 (internal citation deleted).

[17] An entirely new election is proper if the contamination of votes makes the winner of the election virtually impossible to determine. "Declaring a vacancy in the seat is one of the options available to the House of Representatives and is generally exercised when the House decides that the contestant, while he has failed to justify his claim to the seat, has succeeded in so impeaching the returns that the House believes that the only alternative available to determine the will of the electorate is to hold a new election." H. Rep. 626, 92nd Cong., 1st Sess., *Tunno* v. *Veysey* at 11 (internal citations omitted); *see also* Deschler's Precedents Ch. 9 § 49.1 at 509 (H. Rep. 2255, 83rd Cong., 3d Sess., *Roy* v. *Jenks* (1938)), § 47.14 at 495 (H. Rep. 334. 73rd Cong., 2nd Sess., *Kemp, Sanders Investigation* (1934)).

The Act's legislative history proves that the Act was not designed to alter the substantive grounds which a contestant must prove to overturn the certified results of a congressional election, a burden which has been and remains extremely high. Rather, as noted by then Chairman, Subcommittee on Elections, Democrat Rep. Abbitt:

> * * * [T]his bill does not set out any substantive grounds for upsetting an election such as fraud or other irregularities. It is strictly limited to prescribing a procedural framework for the prosecution, defense and disposition of contested-election cases patterned upon the Federal rules of civil procedure used for more than 20 years in our U.S. district courts.

115 part 22 Cong. Rec. 30510 (1969). Rep. Kyl echoed these sentiments: "The procedures [the Act] contains for pleadings, taking testimony and briefing a case are patterned roughly after the Federal Rules of Civil Procedure." *Id.* This conclusion was also reflected in the House report on the Act:

> The purpose of these changes is to bring the procedure into closer conformity with the Federal Rules of Civil Procedure upon which the contested election procedures prescribed in H.R. 14195 are based . . . Historical experience with the existing law has demonstrated its inadequacies, among which are the following: . . . There is no procedure for challenging the legal sufficiency of the notice of contest by a motion in the nature of a demurrer.

H. Rep. 569, Federal Contested Election Act, 91st Cong., 1st Sess., at 3 (1969).[18]

The reasons why the Committee has and should demand more than mere allegations, as a court would require at summary judgment, are more complex. Normally a claim in federal or state court would be dismissed on summary judgment only after the party against whom dismissal was sought had an opportunity to gather evidence through the discovery process. However, under the FCEA, for a contestant to reach such discovery, he or she must first surmount the Motion to Dismiss hurdle. In order to keep frivolous cases from reaching discovery, the Committee standard incorporates the component of credibility into the review of a contestant's allegations similar to the standard a judge would utilize in reviewing the evidence at issue in a Rule 56 motion for summary judgment.[19] Thus, because of the peculiarities of the contested elec-

[18] *See also id.* at 4 ("the bill is patterned upon the Federal Rules of Civil Procedure used for more than 20 years in the Federal Courts."); 115 part 22 Cong. Rec. 30510 (1969) (remarks of Rep. Kyl) (remarking on need for procedure similar to demurrer). In affording a contestee the opportunity to present a "failure to state a claim" defense before serving an answer, the FCEA mirrors Rule 12(b)(6) which allows a defendant to assert "failure to state a claim upon which relief can be granted[.]" This similarity is not surprising because the language and structure of 2 U.S.C. § 83 are copied directly from Rule 12 of the federal rules. For purposes of a Rule 12(b)(6) motion, all well-pleaded allegations are presumed true, all doubts and inferences are resolved in the pleader's favor, and the pleading is viewed in the light most favorable to the pleader. *See, e.g., Albright* v. *Oliver,* 114 S. Ct. 807, 810 (1994); *Markowitz* v. *Northeast Land Co.,* 906 F.2d 100, 103, (3d Cir. 1990).

[19] Also, the federal rules provide that a judge may deny or continue a motion for summary judgment if the party facing the motion certifies that certain evidence is not obtainable. Fed. R. Civ. P. 56(f). Of course, normally by this stage in litigation a party would have an opportunity to take discovery. In the contested election context, where discovery comes after the Motion to

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tion process and the important concern that only substantive challenges be permitted discovery, the proper standard is a blend of Rules 12(b)(6) and 56.

In comparison, when evidence was reviewed under the standard used by Democrats for the FCEA Motion to Dismiss, such consideration amounted to a trial on the merits. Using this summary judgment standard when the contestant had not been allowed discovery effectively made winning contests virtually impossible.

Consistent with the Republican position since the enactment of the FCEA

In every case under the FCEA where a contestant made credible allegations of election irregularities or fraud which could have affected the result of the election, Republicans have urged use of this standard. For example, in the 1977 case of *Paul* v. *Gammage*, the Republicans noted:

> [T]he only burden cast upon the contestant is to "state" with particularity the grounds of his contest, not to "prove" them. * * * It would be the grossest of discretion to deprive a contestant of the opportunity to present evidence in support of his claim for the only reason that he failed to plead his case with particularity.
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> * * * Our statute is new. Early precedents will set the tone for disposition of later cases. It is essential, therefore, that the misapplication of the burden in deciding Motions to Dismiss be corrected now.

H. Rep. 243, 95th Cong., 1st Sess., at 7, 9 (dissenting views).

Similarly, in *Young* v. *Mikva*, a dissenting Republican recommended that a "motion to dismiss a contest will be granted unless the contestant has made allegations sufficient to justify the committee's conclusion that grounds have been presented which if proven would change the result of the election." H. Rep. 244, 95th Cong., 1st Sess., at 9 (1977) (minority views of Rep. Dave Stockman). The same standard was proposed by Republicans in the case of *Wilson* v. *Leach* in 1980: "if the contestant has stated grounds sufficient to change the results of the election, the Committee must deny the motion to dismiss and proceed with the case. The contestant does not have to prove those allegations beyond a reasonable doubt to quash the motion." H. Rep. 784, 96th Cong., 2d Sess., at 5 (minority views). Republicans also dissented against the dismissal of the cases of *Hendon* v. *Clarke* in 1983 and *Hansen* v. *Stallings* in 1985 where persuasive allegations of irregular vote counting were pled properly. H. Rep. 453, 98th Cong., 1st Sess. at 9 (dissenting views); H. Rep. 290, 99th Cong., 1st Sess., at 10 (minority views).

The Republicans consistently rejected the Democrat standard which shifted the burden of proof to the contestant at the Motion to Dismiss stage, even before the contestant had an opportunity for discovery. They remarked in *Paul* v. *Gammage*:

Dismiss, recognition that evidence may be beyond the grasp of a contestant is even more appropriate.

> The panel concluded that the mere filing of a motion to dismiss casts upon the respondent the burden of proving his case at the time the motion is heard.
>
> Such a unique shifting of the burden not only reverses completely the established burden cast upon the moving party in the analogous situation of a motion for summary judgment, but is particularly inappropriate under our contested election statute.

H. Rep. 243, 95th Cong., 1st Sess., at 8 (dissenting views).

The reason why such burden-shifting is inappropriate was explained in Republican views filed in *Young* v. *Mikva* in 1977. Since irregularities and fraudulent activity may be difficult to uncover through private investigation (especially in cases where those committing the mistakes or violations are in control of the probative evidence and information), contestees need access to the FCEA's discovery mechanisms to uncover the evidence supporting credible allegations of irregularities or fraud:

> The contestant should be allowed the opportunity to have access to the material he needs to present his case either through action of the courts or this committee pursuant to the Federal Contested Election Act. To do otherwise renders the Procedures of the Federal Contested Election Act a mockery and establishes a veritable "Catch 22" precedent.

H. Rep. 244, 95th Cong., 1st Sess., at 9 (1977) (minority views of Rep. Dave Stockman).

Republicans have been unwavering in their advocacy of this standard for judging a Motion to Dismiss. Thus, in the case of *Saunders* v. *Kelly* in 1977, where a Republican winner was challenged by a defeated Democratic candidate, the separate views of the minority Republicans rejected the Democrat position that Saunders' contest should be dismissed because she failed to provide documentary proof of her allegations. H. Rep. 242, 95th Cong., 1st Sess., at 5 (separate views).

Of course, on numerous occasions where the allegations made in a contest were either vague, improbable on their face, or insufficient even if true to place the election result in doubt, Republications have supported dismissals. In *Pierce* v. *Pursell*, the Republicans noted:

> In the instant case, Mr. Pierce is unable to allege any specific irregularities justifying the conclusion that the result of the election was in error * * *
>
> The present case is to be distinguished from *Young* v. *Mikva* where specific ballot errors in an amount sufficient to change the result of the election were affirmatively alleged by the contestant.

H. Rep. 245, 95th Cong., 1st Sess., at 4 (supplemental views).

In conclusion, the standard for judging a Motion to Dismiss under the FCEA which applied in this case is consistent with the language of the statute, the FCEA's legislative history, analogy to court practice, the House's precedents, and common sense. Just as importantly, it will bolster the integrity of our electoral system by

allowing illegal and improper acts to be publicized and deterred, and by ensuring that elections are decided by the voters, not by election officials.

ANDERSON'S ALLEGATIONS DID NOT MEET THIS STANDARD

Introduction

Although they spotlighted serious and potentially criminal violations of election laws, Mr. Anderson's allegations did not meet the required standard to survive the Motion to Dismiss. While on their face they bring into question the validity of more specific ballots than the margin of victory, once available evidence was considered, the number of votes potentially affected by credible allegations is far below than requisite 3,821 ballots. Furthermore, while Mr. Anderson does provide credible allegations of corrupting factors which support a contamination theory of a changed result, the sporadic nature of the problems indicates that discovery would not uncover sufficient evidence to justify discounting of any particular precinct.

The SBI report[20]

As discussed below, the Committee is generally willing to defer to state electoral rules and investigations. It is clear, however, that while the SBI thoroughly investigated many of the allegations raised by Anderson, it failed to take several important investigatory steps. These gaps cast serious doubt on the conclusiveness of the report. For instance, although allegations of bribery were confirmed, the SBI accepted the District Attorney's recommendation not to take polygraphs of any of the alleged perpetrators. Nor did the SBI attempt to question the officers of the "community groups" Mr. Anderson alleged were involved in the vote buying or examine their financial records. Also, Mr. Anderson alleged that voting machines were pre-set to ignore votes cast in his favor. The SBI chose not to question the sole source of this allegation.[21] Additionally, the SBI largely ignored the claims by numerous voters and poll workers that election officials were improperly advising and assisting voters to vote "straight Democrat" tickets. The SBI report, therefore, is not a definitive document on Anderson's allegations.[22]

Bribery

Mr. Anderson alleged widespread bribery of voters with funds donated by Mr. Rose and others to three community groups. In support of his charges, Mr. Anderson provided the statements of several voters who were either allegedly offered or witnessed bribes.[23] The SBI confirmed isolated allegations of bribery. The investigators, however, did not uncover evidence indicating widespread bribery, and no poll worker or election official provided any testimony

[20] Asserting a North Carolina state statute, the SBI refused to turn over physical control of their investigatory materials or allowed them to be copied. Consultants and staff for the Task Force and its members, however, did review the material over several days. The officer-in-charge and counsel for the SBI also responded to questions posed by consultants and staff.

[21] Consultants to the Task Force spoke to the source, the former Robeson County sheriff, who refused to confirm this allegation.

[22] The SBI report is also incomplete in that several individuals who provided affidavits or statements to Mr. Anderson refused to speak to SBI agents.

[23] It is not clear whether the bribes were said to be offered for a vote in the Anderson-Rose contest, the sheriff's race, or both.

involving specific instances of bribery.[24] As mentioned above, the status of the community organizations and the propriety of the contributions for "get-out-the-vote" activities are unclear.[25]

Nonetheless, the bribery charges are insufficiently credible to bolster the contest to survive the Motion to Dismiss. As noted above, in order to contribute to overcoming the burden a contestant faces on a Motion to Dismiss, any particular allegation must be specific and credible. In this case, Mr. Anderson has provided specific, credible allegations involving bribery which concern only a very small number of voters. His allegations of a wider scope, involving financial contributions, do not contain any specific allegations showing how the financial contributions resulted in bribes. It is not impossible that Mr. Anderson's scenario is true, but his theory is not nearly detailed enough to meet the requisite credibility standard.[26]

Harassment of voters

Affidavits and witness statements provided by Mr. Anderson, some of which were confirmed by the SBI, detail a number of alleged incidents suggesting that voters were harassed at certain polling stations. This harassment included election officials urging voters to vote "straight Democratic" tickets and showing voters how to vote these tickets without being requested to do so, Democratic poll workers improperly having access to voting areas to campaign for their candidates, and intoxicated and extremely aggressive individuals interrupting the polling process.[27]

It is obviously impossible to calculate how many votes, if any, were affected by this improperly partisan atmosphere at the polling stations. For these allegations to warrant discounting the results of any precinct, the Task Force would have to conclude that during discovery, Mr. Anderson might uncover evidence to meet the following standard:

> Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond a reasonable doubt that there has been a disregard of law or such fraud that it is impossible to determine what votes were lawful or unlawful, or to arrive at any result whatever, or whether a great body of voters have been

[24] Of the persons alleged to have been handing out cash at the polls, several claimed to have been paying people who were hauling voters to vote.

[25] Mr. Rose contributed $5,600 to the Minority Vote Drive Committee ("MVDC"), $3,000 to the Columbus County Civic League ("CCCL"), and $5,000 to the South Lumberton Improvement Association. Documents provided by Mr. Anderson indicate that the MVDC is not registered with any regulatory authority and operates from a P.O. box. Additionally, documents provided by Mr. Anderson show the CCCL has been cited repeatedly by state election authorities for violations of financial disclosure requirements.

[26] The seriousness of the allegations and the specific accusations of several of Mr. Anderson's witnesses, however, do warrant referral of this issue to the Department of Justice. That the Task Force believes that the bribery allegations are insufficient to meet the standards required by the FCEA does not mean that illegal conduct did not occur. Unlike the Task Force, the Department of Justice need not consider the margin of victory in examining charges of bribery and other alleged violations of federal law. *"See, e.g.,"* 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 594, 597, 1341, 1952; 42 U.S.C. §§ 1973gg–10(1), 1973i(c).

[27] Mr. Anderson and supporting witnesses also alleged Republican poll workers and voters were harassed outside the polling areas by Democratic poll workers and by local Democratic elected officials such as sheriffs and town managers. While District Attorney Britt dismissed these charges as "best described as aggressive campaigning[,]" the number and violence of these threats demonstrate another feature of a flawed election process in Robeson County.

> prevented from exercising their rights by violence or intimidation.

H. Rep. 626, 92nd Cong., 1st Sess., *Tunno* v. *Veysey* (1971) at 4 (citations omitted). The Task Force was entitled (and indeed required) to consider the evidence available concerning this issue. The witness statements gathered by the SBI indicate that the harassment of voters was more isolated or merely suggestive than widespread or intimidating. The general tone of the comments concerning harassment indicated that improper campaigning outside the polling area was the main problem, rather than intimidation of voters inside the polls.

Improper voters

Mr. Anderson made a number of allegations suggesting that votes were cast by unqualified voters or by impostors. These accusations included: (1) dead voters "voting"; (2) unregistered persons voting; (3) multiple votes being cast in the name of a single voter; (4) persons unable to identify themselves being allowed to vote; (5) felons improperly being allowed to vote; and (6) the curbside voting process for disabled voters being used to cast fraudulent votes. While Mr. Anderson made numerous specific allegations in support of these charges, the SBI report and other available evidence makes clear the conclusion that these events did not occur on a scale large enough to affect the election and thus warrant the denial of the Motion to Dismiss.

For instance, the SBI confirmed, either through handwriting analysis or personal affirmation, virtually every curbside ballot and found that Mr. Anderson's allegations that the curbside process was utilized to stuff ballots were unsupported.[28] Furthermore, the SBI concluded that while inmates were allowed to register, no ineligible felon cast a ballot. Additionally, the SBI found no evidence that ballots were cast in the name of deceased voters. The allegations that numerous persons were allowed to register on election day and vote at certain precincts were based on vague rumors and the addition of several names to precinct registration lists. The SBI found no evidence suggesting that voters other than those confirmed as eligible by the local board of elections were added to the rolls at these precincts. Likewise, while there was evidence that some voters could not provide personal information matching the registration lists, the confusion most often appeared to be due to voters having similar names or registration lists being inaccurate.[29]

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[28] The Task Force recognizes that the number of voters utilizing the curbside voting process in Robeson County was unusually high in comparison with the rest of the district.

[29] The fact that many of these issues did not affect the result of the election does not alter the Task Force's conclusion that the election process in Robeson County is highly flawed. Just as one example, the registration lists do contain numerous double registrations and deceased voters. The Board of Elections' response to Mr. Anderson's allegations suggested more concern for partisan politics than for the integrity of the election process. For instance, when questioned about Mr. Anderson's allegations, one member of the Robeson County Board of Elections rejected the claims, stating that the board was following an unspecified "new agenda" in light of the 1994 election returns. That the board would turn a blind eye to voter fraud is partisan politics at its worst. The member went on to claim that Mr. Anderson's allegations were an attempt to create an apartheid system such as in South Africa, a charge of racism which African-American witnesses for Mr. Anderson forcefully rebuked at the June 9, 1995 hearing. The election official also later criticized proposals to check voters' identification, claiming that poll workers could determine by sight who was eligible and ineligible to vote.

The SBI did confirm several instances where voters appeared at the polls only to find that ballots had already been cast in their name. While this unexplained phenomenon again highlights the inadequacies of the election process in Robeson County, the small numbers involved do not suggest discovery might uncover massive numbers of additional impostor voters.

Other alleged irregularities

Mr. Anderson made a number of additional accusations concerning pre-election, election day, and post-election matters, none of which cast doubt on the result of the election, even taken in their entirety. The SBI did confirm that a handful of voters were accidentally given ballots with the 8th Congressional District race included, instead of the Anderson-Rose contest. A number of additional events raised by Anderson concerning particular ballots or voters turned out to be true but had little or no effect on the validity of any ballots.[30]

Other allegations can be discounted in light of evidence and testimony collected by the SBI.[31] Still additional allegations were either so generalized or distantly related to the casting of ballots that meaningful evaluation was not possible.[32]

The unexplained surge in turnout in Robeson County

The most difficult aspect of Mr. Anderson's contest lies in the unexplained voter surge in the portion of Robeson County which lies in the Seventh Congressional District. As described above, while turnout in the off-year election of 1994 throughout the district, the state, and the nation was down significantly from 1992, the turnout in the crucial part of Robeson County was up 12.6%. Mr. Rose and a political scientist who testified on his behalf have argued that the turnout was the result of a racially-charged and hotly-contested sheriff's election in Robeson County. The portion of Robeson County in the Eighth Congressional District saw a vote falloff of 18.5%, however. Had turnout in Robeson County been uniform, Mr. Rose's overall margin would have been less than 1000 votes. Had

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[30] These matters included: (1) Deceased voters remaining on registration lists when no votes were cast in their names; (2) Voters being registered multiple times when no multiple votes were cast; (3) Ballots using the term "Democratic" instead of "Democrat"; (4) Duplicate absentee ballots being circulated with safeguards against multiple voting when ballots were distributed without the name of a candidate for another office; and (5) Ballots being reinked by election officials in the presence of many observers, including a SBI agent. Mr. Rose's argument, however, that Mr. Anderson was required to file actions in state court concerning irregularities arising before the election is applicable only to those matters known by Mr. Anderson sufficiently in advance of the election to allow a protest. *See* H.Rep. 453, 98th Cong., 1st Sess., *Hendon* v. *Clarke,* at 5–6 (1983); L. Deschler, Deschler's Precedents of the House of Representatives, Ch. 9, §§ 7.1, 56.1 (discussing H. Rep. 906, 82nd Cong., 1st sess., *Huber* v. *Ayres* (1951)).

Accusations revolving around election day matters which should be considered as insignificant include: (1) Republicans not being allowed carbon sheets; (2) Polling places being improperly set up; (3) The non-posting of one absentee voter list; (4) Problems with voting pens; and (5) One election official leaving a voting site.

[31] These allegations include: (1) The failure of election officials to accept registrations collected by local Republican workers; (2) Handling of tabulating machines during polling; (3) Absentee ballots being counted late; (4) Delays in votes being tallied; (5) The failure of election officials to check voting machine tapes; (6) One error in the canvass in another race; and (7) Failure to safeguard voting materials.

[32] These allegations included: (1) Voters being allowed to register after the registration cutoff; (2) Voters registered at P.O. boxes; (3) Illegal immigrants voting; (4) A gunshot being fired at an Anderson supporter's home; (5) A witness hearing a person tell a public housing resident rents would increase if Mr. Anderson won the election; and (6) An election official allegedly reporting one different precinct result to Mr. Anderson than the official totals indicated.

turnout in Robeson County matched the district as a whole, Mr. Anderson would have won the election.[33]

Mr. Rose's explanations for the turnout are not persuasive. He and his witnesses argued that the increases in registration and in turnout by Native American voters were due to interest in the sheriff's race in Robeson County.[34] Mr. Anderson and his academic witnesses, however, have discredited this theory by controlling for the levels of Native American population.[35] The argument made by Mr. Rose's political scientist that the disparity can be attributed to the closely-contested nature of the Rose-Anderson election is also without merit. The election in the Eight District also featured a tight struggle between a long-time Democrat incumbent and a Republican challenger, and the margin of victory (52%–48%) and the vote turnout (119,985 votes) were remarkably similar to the Seventh District race.

Nonetheless, a statistical analogy cannot be the basis of a contest. House precedent is clear that election returns are presumed to be correct and that errors rebutting this presumption must be proven, not assumed. H. Rep. 763, 94th Cong., 1st Sess., *Ziebarth* v. *Smith,* at 15 (1975); H. Rep. 1278, 73d Cong., 1st Sess., *Chandler* v. *Burnham,* at 3 (1934). These general rules are equally applicable to statistical accusations such as unusual turnout levels. H. Rep. 763, 94th Cong., 1st Sess., *Ziebarth,* at 16. Clearly the presence of unusual vote levels should heighten the scrutiny paid to events or trends which might explain the vote. Nonetheless, as the credibility of this statistical accusation depends on the credibility of the allegations made to explain the statistics, the unusual turnout cannot be the bootstraps by which Mr. Anderson's contest survives a Motion to Dismiss.

STANDARD FOR JUDGING A MOTION TO DISMISS BASED UPON DEFERENCE TO STATE PROCEEDINGS

Mr. Rose also sought dismissal of Anderson's Notice based on Mr. Anderson's alleged decision to forego state law remedies. Congress has repeatedly held that it will follow either state laws or decisions of state courts unless the laws or decisions are unsound. H. Rep. 202, 63d Cong., 2d Sess., *Carney* v. *Smith,* at 2586 (1914); *see also* 6 Clarence Cannon, *"Cannon's Precedents of the House of Representatives of the United States"* Ch. 162 §§ 91, 92 (1935) (quoted in H. Rep. 760, 94th Cong., 1st Sess., *Kyros* v. *Emery,* at 6 (1975)). This determination was upheld by the Supreme Court in a case involving a Senate election, *Roudebush* v. *Hartke,* 405 U.S. 15 (1972), and has been made by numerous state courts, including the Supreme Court of North Carolina. See H. Rep. 760, 94th Cong., 1st

[33] These comments assume that the candidates' vote percentages would have remained constant. The possibility exists, of course, that the unusual additional ballots cast were even more heavily weighted for Mr. Rose than the general returns in the Seventh District portion of Robeson County.

[34] As noted by Mr. Anderson, the figures for registration and turnout rates are of dubious accuracy because the registration lists are tainted by multiple registrations and decreased persons remaining on the rolls. Robeson County election officials have apparently failed to correct the large number of erroneous registrations.

[35] They have shown that precincts in the Seventh District with nearly identical percentages of Native Americans as matching Eighth District precincts had much higher vote turnouts. Of these eight pairs, the Seventh District precinct featured higher turnout in all but one instance, and six of the eight precincts had turnouts at least 10% higher. As noted, the overall difference in turnout between the seventh and Eighth District portions of the county was 31%.

Sess., *Kyros* v. *Emery,* at 8 (citing cases) (1975); *Britt* v. *Board of Comm'rs,* 90 S.E. 1005, 1007 (N.C. 1916). This deference to sound decisions applies to statutes, rulings concerning particular issues of ballot interpretation, and to the final determination of the winner of an election if reversed by rulings on disputed ballots. See, e.g., 2 Lewis Deschler, *"Deschler's Precedent",* Ch. 9 §§ 57.3, 591. (1978) (discussing *Oliver* v. *Hale,* H. Rep. 2482, 85th Cong., 1st Sess. (1958), and *Roush* or *Chambers,* H. Rep. 513, 87th Cong., 1st Sess. (1961)).

Although the House's constitutional responsibility to fairly judge the elections and returns of members is not limited by state law or state judicial decision, Mr. Rose correctly pointed out that the House has traditionally treated with respect state election laws and related legal process.[36] In general, deference to state law and procedures is a fair, just, and appropriate procedure for the House.

It appears to the Committee that Mr. Anderson did indeed seek state relief by his filing of his state complaint a month before the Notice of Contest was submitted. As discussed above, the state Board of Elections certified Mr. Rose's election only under very unusual circumstances. Moreover, the board left open the question of reconsidering the matter once the SBI had completed its investigation. As that investigation was not completed until long after the deadline for filing a contest under the FCEA, Mr. Anderson properly chose to proceed along two tracks.

Once the SBI report was completed and arrangements made for the Task Force to review its contents, staff and consultants to the Task Force reviewed the material. In large part, the Committee's decision in this matter has indeed been guided by the actions and conclusions of the SBI on particular matters raised by Mr. Anderson. Although neither the SBI or the SBE nor any state court has issued a formal review of the results of the election at this time, it is clear that North Carolina authorities are not likely to alter the result of the election. As the Committee has relied generally on the state investigation, has not conducted any independent investigation (except for the field hearing), and has not disturbed the conclusions that Mr. Rose won the election, the Committee indeed has upheld state proceedings.[37]

CONCLUSION

For the reasons discussed above, the Committee therefore concludes that this contest should be dismissed.

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[36] It is clear that this House tradition was grossly breached in the handling of the McCloskey-McIntyre contest. *See* H. Rep. 58, 99th Cong., 1st Sess., *McCloskey* v. *McIntyre,* at 45–58 (1985) (dissenting views).

[37] At the same time, however, as noted above, the House has the authority to arrive at its own conclusions on any particular issue affecting the validity of a ballot or return. The SBI report in some respects was clearly flawed or unreliable and the Committee disagrees with these flawed conclusions, even though these issues are not significant enough to deny the Motion to Dismiss.

SUPPLEMENTAL VIEWS

This election contest was initiated by Robert C. Anderson, pursuant to the Federal Contested Election Act of 1969 ("FCEA" or "the Act"), 2 U.S.C. § 381 et seq., to challenge the election of Congressman Charles G. Rose, III to represent the 7th U.S. Congressional District for the State of North Carolina. It is the last of such contests to be resolved by the Committee arising out of the November 1994 Congressional elections, all of which were brought by disappointed Republican candidates. Although this contest has now been dismissed by the Committee based on the pre-answer motion filed by Congressman Rose last February under § 383(b) of the Act, the dismissal of the Notice of Contest in this case, as in a number of other cases this year did not come until many months had passed and tens of thousands of dollars had been spent on field hearings and other proceedings conducted by the Majority over our objection. To a significant extent, we attribute the unnecessary delay, the unwarranted expense to the taxpayers, and the considerable cost to the efficient working of the House that accompanied this year's election contests to the fact that this Committee is under the control of a new Republican Majority, and that new Majority has struggled (at times for plainly partisan purposes) in interpreting and applying the provisions of the FCEA. Our purpose in submitting these supplemental views is to explain where the Republican Majority went wrong in interpreting the FCEA and permitting unnecessary and wasteful proceedings, with the hope that the Committee can avoid a repetition of the same mistakes in the future.

1. OVERVIEW OF THE COMMITTEE'S PROCEEDINGS

The Committee's dismissal of the Anderson contest is both proper and inescapable. Mr. Anderson lost the November 1994 election for the North Carolina 7th District to Congressman Rose by over 3,800 votes. He filed a Notice of Contest with the Clerk of the House which included a long laundry list of allegations, principally directed at elections officials in Robeson County, one of the eight counties included in whole or part in the North Carolina 7th. Those allegations ranged from claims that tables in certain polling places were not arranged in precisely the manner specified by State law to vague and unsubstantiated charges of bribery of thousands of voters. None of Anderson's allegations were supported by "substantial preliminary proof" of the type of Committee for the past 25 years has required a contestant to submit at the time the Notice is filed.

Moreover, even before submitting his laundry list of allegations to the House, Anderson submitted that same list to North Carolina State elections officials, who in turn asked the State Bureau of Investigation ("SBI") to determine whether there was any merit to

Anderson's allegation. In early April 1995, shortly after this Committee established a three-member Task Force to consider Anderson's Notice of Contest, the District Attorney in Lumberton, North Carolina, Luther Britt, issued a 20-page report on the SBI's extensive investigation of over 80 potential witnesses and hundreds of documents relating to Anderson's allegations. District Attorney Britt's report concluded: "Based upon the thorough investigation conducted by the State Bureau of Investigation, there is no evidence to support the allegations of elections fraud and wrongdoing by the Robeson County Board of Elections' officials.

Viewed from a perspective of simple common sense, the above makes clear that this Committee could have and should have dismissed Anderson's Notice of Contest shortly after it was filed, or at the very latest shortly after Congressman Rose submitted his pre-answer Motion under § 383(b) of the FCEA and the Committee received District Attorney Britt's report on the results of the State investigation. It further is all too clear to us why that common sense result did not occur in this case; just as we have no doubt about why the new Majority allowed other disappointed Republican candidates to maintain election contests for months and assisted them by holding field hearings designed to help build steam for their next election campaigns. Our principal reason for submitting these supplemental views, however, is not to comment on the motives for the Majority's actions but instead to decry the method used by the Majority to accomplish its purpose—a method that threatens to disrupt the electoral process and this House in the future and to undermine the consistent precedents that have been followed since enactment of the FCEA 25 years ago.

Specifically, we are most concerned by the Majority's refusal to endorse and abide by the legal standard that has been accepted and used to decide pre-answer motions to dismiss in every FCEA election contest that has been filed and resolved prior to this year. That legal standard fixes the threshold burden that a disappointed candidate must meet before he or she is permitted to commence discovery and invoke other procedures under the FCEA. For 25 years, Democratic and Republican members of the Committee together have read the FCEA as fixing that threshold burden at an appropriately high level-analogous to the burden that a plaintiff in a federal civil action must carry in responding to a motion for summary judgment under Federal Rule of Civil Procedure 56. This year, the new Republican Majority has vacillated in its articulation of the legal standard that governs pre-answer motions under the FCEA, at time acknowledging that the standard is analogous to a Rule 56 standard in a civil action, and at other times suggesting that it is analogous to the very different standard used to review motions filed in civil actions under Federal Rule of Civil Procedure 12(b)(6). That vacillation has encouraged disappointed candidates like Anderson and has been used by the Majority to justify field hearings and other delays before reaching the inevitable outcome of dismissal.

In the end, it is unclear where the legal standard adopted by the Majority falls on the spectrum between Rule 12(b)(6) and Rule 56. The Majority most recently has stated that, to survive a pre-answer motion, a contestant must make "credible allegations" of

irregularities or fraud which, if subsequently proven true, would likely change the outcome of the election. As we discuss below, although it is far from clear what the Majority means by the term "credible allegations" in this context, it does not appear to be the same standard that has been accepted on a bipartisan basis and that has served the Committee well in FCEA cases since 1969. Instead, as we further discuss below, the Majority's current formulation of its legal standard for resolving pre-answer motions appears to be the product of confusion and misunderstanding among the Majority and on their misreading of a handful of highly partisan dissenting statements by certain Republican members in earlier FCEA proceedings. Finally, we discuss why the facts and proceedings in this case make clear that the traditional legal standard established and used in every FCEA case prior to this year must be restored and followed in order to preserve an appropriate respect for the electoral process and to avoid unnecessary delay and expense in future proceedings under the Act.

2. THE ESTABLISHED LEGAL STANDARD FOR RESOLVING PRE-ANSWER MOTIONS UNDER THE FCEA

Section 383(b) of the FCEA authorizes a contestee to raise certain specified defenses at the outset of an election contest, before the contestee is required to submit an Answer to the contestant's Notice of Contest. This pre-answer motion, often referred to as a motion to dismiss, is intended to permit the contestee and the Committee to take a hard look at the contestant's Notice of Contest to determine whether there is good reason for the Committee and the parties to spend additional time and resources questioning an election result that in most cases already has been certified by the State in which the election was held. Among the defenses that a contestee may raise in a pre-answer motion, for example, is the "[f]ailure of [the] notice of contest to state grounds sufficient to change the result of this election." 2 U.S.C. § 383(b)(3).

The meaning and purpose of this section of the FCEA were discussed in the very first contest brought under the Act, in the case of *Tunno* v. *Veysey,* H. Rep. No. 92–626 (1971), in a unanimous, bipartisan decision that was issued by many of the same members of the House who had just recently sponsored the Act. In *Tunno* v. *Veysey,* the Committee explained the proper application of Section 383(b) of the Act as follows:

> This provision was included in the new act because it has been the experience of Congress that exhaustive hearings and investigations have, in the past, been conducted only to find that if the contestant had been required at the outset to make proper allegations *with sufficient supportive evidence* that could most readily have been garnered at the time of the election such further investigation would have been unnecessary and unwarranted.
>
> Under the new law then the present contestant, and any future contestant, when challenged by a motion to dismiss, must have presented, in the first instance, sufficient allegations *and evidence* to justify his claim to the seat in order to overcome a motion to dismiss.

Tuno v. *Veysey,* H. Rep. No. 92–626 at 3 (emphasis added).

The above discussion from *Tunno* v. *Veysey* has been quoted and cited with approval again and again in unanimous bipartisan Committee decisions ruling on pre-answer motions to dismiss. Based on *Tunno* v. *Veysey* as well as the language of the Act itself, House precedents over the past 25 years have established a clear legal standard governing motions to dismiss that embodies two basic rules: (1) once a motion to dismiss is filed, the contestant bears the burden of demonstrating to the Committee that there is good reason for permitting the election contest to go forward; and (2) in order to meet that burden, a contestant must supply evidentiary support for the allegations in the Notice of Contest—"[a]llegations without substantiating evidence are insufficient to meet the requirement of the burden of proof as against a motion to dismiss." *Wilson* v. *Hinshaw,* H. Rep. No. 94–764 (1975); accord, e.g., *Ziebarth* v. *Smith,* H. Rep. No. 94–763 (1975); *Pierce* v. *Pursell,* H. Rep. No. 95–245 (1977); *Archer* v. *Packard,* H. Rep. No. 98–452 (1983); *McCuen* v. *Dickey,* H. Rep. No. 103–09 (1993).

It is important to note that, while there was a Democratic Majority throughout the 25-year period during which the above legal standard was established and followed, the standard was applied in a completely evenhanded fashion. Indeed, each of the precedents cited in the preceding paragraph—including *Tunno* v. *Veysey*—involved a Democratic contestant who was challenging a seated Republican member. In each case, the Democratic Majority applied the legal standard set forth above and dismissed the Notice of Contest. In each case, the Republican members of the Committee unanimously joined in the decision. Over the 25 years following enactment of the FCEA, Republican members dissented from only a handful of decisions on motions to dismiss election contests brought under the Act, and all of those contests involved Republican contestants who sought to challenge Democratic members. As we will discuss in the next section, even those scattered and clearly partisan Republican dissents do not provide any rational basis for departing from precedent and changing the established legal standard.

It also is important to note that the legal standard to which the Committee adhered for the 25 years prior to this year does not impose an unfair or insurmountable burden on the contestant. The Committee consistently has emphasized that "a contestant is not required to prove his entire case in order to overcome a motion to dismiss." *Archer* v. *Packard,* H. Rep. No. 98–452 at 3 (1983); accord, e.g., *Perkins* v. *Byron,* H. Rep. No 96–78 at 3 (1979); *Rayner* v. *Stewart,* H. Rep. No. 96–316 at 3–4 (1979); *Thorsness* v. *Daschle,* H. Rep. No. 96–785 at 3 (1980). Instead, "a contestant must submit sufficient documentary or other evidence," including affidavits that indicate what testimony could be expected from witnesses if called or what documentary evidence could be produced pursuant to subpoena. Id. Unless the allegations in the Notice of Contest are based solely on speculation or surmise, a contestant should be able to produce at least some evidence—i.e., some "substantial preliminary proof," even if not the type that might be admissible at a hearing—to support those allegations.

This legal standard is designed to operate in a manner closely analogous to the standard used by federal courts in ruling on summary judgment motions filed by defendants under Rule 56 to test whether the plaintiff has an adequate factual basis for pursuing a federal complaint. A motion may be filed under Rule 56 "at any time" after a civil complaint has been filed. Fed. R. Civ. P. 56(b). Once a defendant files such a motion and calls into question the plaintiff's ability to support the allegations in the complaint, the burden is placed on the plaintiff (*i.e.* the party that would ultimately bear the burden of proof if the case were to proceed to trial) to come forward with evidence to support its allegations. The plaintiff is not required to "produce evidence in a form that would be admissible at trial," but it is required "to go beyond the pleadings" by producing affidavits or other documentary evidence which "designates 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 324 (1986)(quoting Fed. R. Civ. P. 56(c)). In short, a plaintiff cannot "resist a properly made motion" under Rule 56 "by reference only to its pleadings" and its own allegations; it must produce or demonstrate the existence of evidence that will support its claims. Id. at 325.

The *Celotex* decision cited above was one of three decisions issued by the United States Supreme Court in 1986 that clarified the appropriate placement of the burden and legal standard in the contest of a Rule 56 motion. See also *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *Anderson* v. *Liberty Lobby,* 477 U.S. 242 (1986). Prior to 1986, some lower federal courts had been confused and believed that Rule 56 would unfairly disadvantage plaintiffs unless it were read to place the burden on the moving party-defendant of "negating the [plaintiff's] claim." *Celotex*, 477 U.S. at 323. In many respects, the legal standard proposed by the new Republican Majority of this Committee, which will be discussed further in the next section, appears to suffer from this same type of confusion. As the Supreme Court explained in its 1986 trilogy of decisions on the subject, Rule 56's intended purpose "to isolate and dispose of factually unsupported claims" can be met only if the party that will ultimately bear the burden of proof also is required in responding to the motion to bear the burden of demonstrating that it has at least some substantial "evidentiary materials" other than "the mere pleadings themselves" to support its allegations. *Celotex,* 477 U.S. at 323–25.[1]

[1] Rule 56, of course, permits federal courts to defer ruling on a summary judgment motion, if the party opposing the motion submits an affidavit attesting under oath "that he cannot for reasons stated present by affidavit facts essential to justify his opposition." Fed. R. Civ. P. 56(f). This mechanism provides federal courts with latitude to avoid any unfairness that might result from granting summary judgment where a party can demonstrate valid reasons why it cannot meet its normal burden under Rule 56 but nonetheless will be able to carry its burden of proof at trial.

The FCEA provides the Committee with similar discretion. Section 383(d) of the Act specifically states that the Committee may "postpone[ ] its disposition" of a pre-answer motion. See *Ziebarth* v. *Smith*, H. Rep. No. 94–763 at 7 (1975). Such postponements, however, should not even be considered unless a contestant can identify specific reasons why he cannot now produce evidence, even in a preliminary form, to support his allegations but nonetheless can demonstrate that such evidence exists and can be produced at a hearing. Absent such a showing, a contestant should not be permitted to use the discovery procedures in the Act to engage in a "fishing expedition" in the hope of finding evidence to support otherwise baseless allegations. The contestant in the instant case has not even attempted to make such a showing, and in any event the deferral of a pre-answer motion does not alter the standard to be used in ultimately ruling on the motion. See *Ziebarth*, H. Rep. No. 94–763 at 16.

Finally, it is worth noting that the legal standard established by House precedent and adhered to by the Committee in ruling on motions to dismiss for 25 years is supported by sound policy considerations. As the decision in *Tunno* v. *Veysey* recognized,

> It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus, the burden of proof placed upon a contestant is necessarily substantial.

H. Rep. No. 92–626 at 10 (1971). For this reason, as we previously have recognized, "[w]ritten into the woof and warp of the Act are assumptions of regularity that must be overcome by a Contestant, i.e., the regularity of the returns and the regularity of the actions by election officials." *Young* v. *Mikva,* H. Rep. No. 94–759 at 4 (1975). Our respect for the States and State election officials mandates that these "assumptions of regularity" not be discarded based solely on a "[c]ontestant's bare allegations of irregularity," election officials are presumed to have acted in accordance with State law, and errors will not be imputed without convincing evidence." *McCuen* v. *Dickey*, H. Rep. No. 103–109 at 6 (1993).

An appropriately rigorous legal standard for ruling on motions to dismiss also is essential to protecting the efficient operations of the Committee and the House as a whole. Following the rationale first set fort in *Tunno* v. *Veysey*, we have observed that, absent "a mechanism to enable the House and the Committee to quickly identify and dispose of those cases which are lacking in substance," we "might, as experience has shown, spend many hours in fruitless, full-scale investigations that consume time which might otherwise be devoted to the legislative and representative process." *Ziebarth* v. *Smith*, H. Rep. No. 94–763 at 6 (1975). We further have observed that imposing on a contestant the burden of supporting his allegations with preliminary proof at the outset of an election contest is necessary "to justify the committee in requiring a duly certified member to expend time and resources necessarily involved in preparation of a defense to such charges." *Mack* v. *Stokes*, H. Rep. No. 94–762 at 2 (1975).

Any lowering or dilution of the legal standard used to resolve motions to dismiss could open the floodgates to a torrent of election contests that would have extremely damaging results on both the electoral process and the functioning of the House. Particularly if they perceive that members of the Majority party in the House may be willing to use election contests brought under the FCEA to press for partisan advantage, disappointed candidates from the Majority party will be eager to pursue election contests. At worst, a disappointed candidate may think he will be given a public forum and some apparent legitimacy for claims that he wants to assert against the candidate who just defeated him at the polls, in many cases with the hope that he may gain an advantage in mounting a future campaign for the seat. For 25 years, the Democratic Majority stood against those floodgates, by maintaining a consistent and appropriately high legal standard for resolving pre-answer mo-

tions to dismiss under the FCEA and by applying that standard in an evenhanded, nonpartisan manner. Out of proper respect for the electoral process and State election officials, and to avoid any further unnecessary disruption of the legislative and representative processes of the House and its members, whatever party is in the Majority in the future should do the same.

3. THE REPUBLICAN MAJORITY'S CONFUSION AND VACILLATION THIS YEAR ON THE PROPER LEGAL STANDARD

The position taken by the new Republican Majority on the proper legal standard for resolving motions to dismiss has been anything but consistent. At the initial Committee meeting held to appoint Task Forces to consider the four election contests filed this year, the Chairman of the Committee gave assurances that the new Majority would follow the precedents that had been established during the precious 25 years under the FCEA. The Chairman expressly disavowed any intent to depart from those precedents. See Transcript of Committee Meeting of Feb. 8, 1995, at 19–22.

Despite those assurances, the standard articulated and relied upon by the New Majority changed repeatedly during the proceedings for this and other election contests in 1995. In a memorandum distributed several weeks after the Committee meeting, the Republican Majority stated that, in their view, a contestant in election contest brought under the Act "need not * * * provide sufficient evidence" to overcome the "presumption of regularity" that attaches to the certification of an election by State election officials. Instead, the Majority opined that a contestant merely "must allege sufficient facts which could at a later stage, if supported by appropriate evidence, overcome the presumption." See March 13, 1995 Memorandum at 3. To return to the analogy to the Federal Rules of Civil Procedure discussed above, the Majority appeared to be advocating a legal standard analogous to that used by federal courts in ruling on motions under Rule 12(b)(6), rather than Rule 56. A motion under Rule 12(b)(6) is not intended to challenge the factual basis for a plaintiff's allegations, but instead is designed solely to challenge the legal sufficiency of a plaintiff's claims assuming that all of the plaintiff's allegations are true. Thus, in contrast with the legal standard established in *Tunno* v. *Veysey* and every FCEA case that has followed it, a Rule 12(b)(6) standard is not designed to identify and weed out cases that lack "sufficient supportive evidence" to warrant further investigation. *Tunno* v. *Veysey*, H. Rep. No. 92–626 at 3.

When we in the Minority, through Mr. Jefferson, the Democratic member on the Task Force, sought clarification of the statement in the Majority's memorandum, the Majority's position became even more perplexing. In response to a question from Mr. Jefferson, a representative of the Majority stated his view that the governing legal standard under the FCEA "is analogous, although not exactly the same, analogous to a summary judgment motion-type situation, in the Federal Court venue," which is controlled by Federal Rule of Civil Procedure 56. He went on, however, to describe his understanding of that standard by stating: "I believe the appropriate standard is in fact to allege facts, not necessarily to provide proof

at the pleading stage." See Transcript of March 15, 1995 Task Force Meeting at 7–12.

When Mr. Jefferson, who is an attorney, pointed out that the Majority's representative had begun by identifying the appropriate standard as "analogous to a summary judgment motion-type situation" but concluded by describing a very different Rule 12(b)(6)-type standard, Mr. Boehner, the Republican Chairman of the Task Force, stepped in to attempt to clarify the Majority's position. Mr. Boehner stated his understanding of the FCEA as follows:

> Mr. Jefferson, in looking at the Federal Contested Elections Act, it states pretty clearly that someone who is going to allege to have been treated unfairly must supply sufficient information * * *. We would argue that the contestant simply should have sufficient evidence to allege the facts that are subject to later proof.

Id. at 14. To his credit, Mr. Boehner read the FCEA on this occasion accurately and consistent with *Tunno* v. *Veysey* and the precedents that followed it. However, our satisfaction with this statement of the governing standard by the Majority did not last long.

The Majority offered another rendition of the governing legal standard in a memorandum dated March 22, 1995. That memorandum began its discussion of the governing legal standard with the somewhat puzzling statement that a "pre-answer motion in the FCEA structure is analogous in some ways to a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or a summary judgment motion under Fed. R. Civ. P. 56" Id. at 4. This statement is akin to describing an animal as "analogous in some ways" to a mouse or an elephant; it ignores the significant differences between the two "analogous" standards and obscures the fact that one of those two very different standards in a appropriate analogy and the other most certainly is not. Having thus confused the issue at the outset, the Majority went on the advocate the adoption of a new legal standard for pre-answer motions in FCEA cases that would be virtually indistinguishable from the federal court standard set forth in Rule 12(b)(6). Id. at 4–5 (indicating that the Task Force should "accept all of [the contestant's] allegations as true" for purposes of considering the motion).

Several weeks after releasing their March 22 memorandum, the Majority provided a separate memorandum to the Speaker and the Minority Leader of the House, in which yet a new and somewhat different version of the governing legal standard was proposed:

> The standard for analyzing a pre-answer motion to dismiss is as follows: the contestant must make credible allegations of irregularities and/or fraud which, if subsequently proven true, would likely change the outcome of the election. The contestee bears the burden of showing either that the allegations are so vague or unlikely that no proof is possible or that the result would not be in doubt even if the allegations were true.

See May 8, 1995 Memorandum. This formulation of the Majority's proposed standard appeared to move away from the pure Rule 12(b)(6)-type standard earlier advocated in the Majority's previous

memorandum, in that it suggested that a contestant's allegations need be accepted as true only if they are deemed "credible." At the same time, it expressly placed on the contestee the burden of showing that the contestants' allegations are not credible, in direct conflict with the legal standard established in *Tunno* v. *Veysey* and subsequent House precedents.

The Majority's final attempt a articulating a legal standard by which to judge a contestee's motion to dismiss came in a memorandum recommending that the Task Force in this case dismiss Anderson's Notice of Contest. That memorandum retained the statement from the Majority's May 8 memorandum that "a contestant must make credible allegations of irregularities of fraud." See August 3, 1995 at 1. It did not, however, retain the earlier statement placing on the contestee the burden of demonstrating that allegations in the Notice of Contest are not credible. Instead, it simply ducked the question of who bears the burden of production and/or persuasion by stating: "In judging whether a particular allegation is credible, a Task Force should consider not only the contestant's view and any supporting evidence, but any countervailing arguments and evidence available from the contestee or other sources." Id. at 2.

We are compelled to make several observations about the Majority's conspicuous efforts to twist and contort the established legal standard governing FCEA pre-answer motions to keep alive these particular Republican election contests for as long as those contests served the Majority's partisan interests.

First, even setting aside the winding path that the Majority followed to arrive at its final formulation of a proposed legal standard, it is far from clear how that standard could be implemented in practice. Although it is possible to imagine allegations that are so incredible on their face that they could be dismissed without reference to any evidence, most allegations (including one or two of Anderson's allegations in this case) are not inherently credible or not credible. What ordinarily makes an allegation credible is proof—either in the form of admissible evidence of the type presented at a hearing, or preliminary evidence such as affidavits that establish the existence or likely existence of such admissible evidence. If a contestant lacks any form of substantial proof or evidence, then his allegations by necessity are based on speculation and surmise, and his Notice of Contest is nothing more than a request to conduct a "fishing expedition" in the hope of finding evidence to support that speculation. Thus, the only rational and useful construction of the Majority's "credible allegations" formulation is one that would require contestants to produce some form of evidence in support of their allegations, thereby rendering it one and the same with the standard established in *Tunno* v. *Veysey* and the House precedents that followed that decision.

Second, contrary to the suggestion in a number of the Majority's memoranda, a standard of the type proposed by the Majority this year has no precedent in the highly partisan dissenting statements of Republican members in *Paul* v. *Gammage,* H. Rep. No. 95–243 (1977) and certain other election contests from the late 1970s and early 1980s—all of which involved Republican contestants. In *Paul* v. *Gammage,* both the Democratic Majority and the Republican dissent were in agreement that the appropriate standard for judging

a pre-answer motion under the FCEA was analogous to the standard used by federal courts to resolve summary judgment motions under Rule 56. Indeed, the Republican dissent in *Paul* v. *Gammage* specifically described the governing standard as follows: "The nearest analogy in Federal civil practice is a Rule 56 Motion for Summary Judgment." H. Rep. No. 95–243 at 8. That Republican dissent, however, misunderstood the proper operation of Rule 56 and assumed that under the rule "the moving party must carry the burden of supporting his motion" by showing that the plaintiffs claim was without merit. Id. But, as discussed in the preceding section, the Supreme Court in its 1986 trilogy of decisions on the subject rejected that misreading of Rule 56: Where a defendant files a Rule 56 motion "pointing out * * * that there is an absence of evidence to support the [plaintiffs case]," the plaintiff bears the burden of producing at least preliminary evidence "showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324–25, accord *Matsushita Electric,* 475 U.S. at 585–87, *Anderson,* 477 U.S. at 247–52.

Finally, the vacillation and partisan approach of the Majority with respect to the appropriate legal standard governing contestee's motion to dismiss the Anderson contest has contributed greatly to the delay and has detracted significantly from the fairness of the proceedings. In his motion for reconsideration of the Task Force's recommendation that his Notice of Contest be dismissed, Anderson has pointed to some of the conflicting statements made by the Majority (summarized above) and has suggested that he has been forced to attempt to hit a moving target. At times, the Majority has indicated that all Anderson need do to survive the pre-answer motion was to hurl strongly-worded allegations, whether supported or not; in the end, Anderson's Notice of Contest was dismissed largely because there simply was no evidence whatsoever to support the allegations that Anderson had made. Had the Majority adhered to its initial commitment to follow the 25 years of unbroken precedents beginning with *Tunno* v. *Veysey,* Anderson would have known exactly what to expect from the outset, and his Notice of Contest could have been dismissed many months and tens of thousands of dollars ago.

4. THE EFFECT ON THIS CASE OF THE MAJORITY'S APPROACH TO THE APPROPRIATE LEGAL STANDARD

The Anderson election contest, which the Majority finally agreed to dismiss, provides a clear illustration of the unnecessary delay and other negative consequences that would result from a dilution of the legal standard established in *Tunno* v. *Veysey* and consistently followed prior to this year. As we indicated at the outset, Anderson has set forth a laundry list of unsupported allegations of various supposed irregularities in the election process, making it impractical to discuss each of them one-by-one. We instead will focus here solely on Anderson's most serious allegation—his allegation of widespread "bribery" of voters—to provide an example of how the Majority's approach to this case is completely at odds with the FCEA and sound public policy.

In his Notice of Contest, Anderson baldly alleged that unidentified "poll workers" had offered "bribes to voters," in violation of fed-

eral criminal law. See notice of Contest ¶ 25 B. This allegation on its face, although shocking, as Anderson undoubtedly intended it to be, is neither inherently credible or incredible. We would agree that it should be investigated vigorously if there were any evidence or good reason to believe it true.

Anderson submitted to the Committee two written statements in support of his bribery allegation. The first, attributed to a man referred to as "William (Big-Foot) Hunt," stated in pertinent part:

> I personally observed four poll workers greeting people on the outside (Maynor poll workers). They were known to be cupping their hands and pressing $5 or $10.00 bills into people's hand, usually $10.00 dollars were given to blacks. * * * I know of 2 black people that personally told me they were paid cash to vote for "Glenn the Man." They are from Fairmont.

The second statement was signed by two persons, Ethel Revels and Clyde Cox, and states in its entirety:

> On November 8 at 8 o'clock a.m. Clyde Cox and Ethel Revels went to Orrum to vote. When we got to Orrum to vote and park a colored man came up to us—said if we vote for Glenn Maynor they would pay us $5.00 a vote.

What is most striking about these two "supporting" statements is that neither one says anything whatsoever about alleged bribery in connection with the Congressional election between Mr. Anderson and Congressman Rose. Instead, each statement appears to allege improprieties with respect to the race for Robeson County Sheriff, in which one of the candidates was Glenn Maynor. As District Attorney Britt reported, the North Carolina SBI thoroughly investigated these allegations and statements. Mr. Hunt, the person to whom Anderson attributed the first statement, refused to make any statement to the SBI, and so the statement attributed to him could not be confirmed. The SBI also interviewed the two people who signed the second statement as well as the man whom they alleged had offered them $5.00 to vote for Mr. Maynor for sheriff. Based on those interviews, and their observation of the individuals involved, the SBI agents concluded that the allegations in the second statement also "could not be substantiated."

In an effort to expand his allegations of bribery of voters beyond three persons, Anderson next filed with the House an Addendum to his Notice of Contest which alleged that Congressman Rose's campaign had contributed $5,600 and $3,000 to two local "get-out-the-vote" organizations. Anderson's Addendum further alleged that each of those two organizations had failed to submit some required documentation to the State Board of Elections. Based solely on these factual allegations, which were never themselves adequately supported, Anderson alleged, "[u]pon information and belief," that these two organizations must have operated as "shell" organizations for the purchase of votes." Anderson took this preposterously strained and unsupported allegation a step further by arguing to the Task Force that, because Congressman Rose's campaign allegedly contributed a total of $8,600 to the organizations in question, and because two persons had made an unsubstantiated allegation

that a "colored man" had offered them $5.00 to vote for a candidate in the local sheriff's race, the Task Force should find that Congressman Rose's campaign had "bribed" 1,720 voters in the November 1994 Congressional election. See Contestant's Response to Motion to Dismiss Election Contest at 21.

These "bribery" allegations are as worthless and half-baked as any that have ever been advanced in any election contest with which we are familiar. To accept such allegations, one would need to be willing to infer that: (1) because two people alleged that they were offered $5.00 to vote in a County sheriff's election, votes in the Congressional election involving that County were routinely being bought and sold for $5.00; and (2) every dollar of any contribution made to an organization that allegedly failed to file a required report with the State Board of Elections must have been used to bribe voters. In a federal civil action, we are confident that such dubious allegations and inferences not only would be dismissed on summary judgment under Rule 56, but also likely would be subject to sanctions under other federal rules and statutes. It is equally clear that they would be rejected quickly on a pre-answer motion under the standard established in *Tunno* v. *Veysey* and followed for 25 years prior to this year.[2]

Nevertheless, because the Republican Majority was in the process of rethinking what legal standard applied, the Republican members of the Task Force refused initially to grant contestee's motion to dismiss Anderson's bribery and other similarly vague and supported allegations. Instead, the Task Force insisted over our objection on holding a field hearing in Lumberton, North Carolina, at taxpayers' expense, to look further into Anderson's allegations. This field hearing was used to full partisan advantage, with Anderson announcing during the hearing his intent to run again for the seat in the North Carolina 7th District in 1996 and attaching the Task Force's announcement of the hearing to his fund-raising solicitations. During the Lumberton hearing, Anderson repeated his allegations of bribery and projected for the assembled crowd revised estimates of the thousands of votes that he surmised must have been "bought" for $5.00 a piece—all without providing any evidence of bribery affecting even a single vote in the Congressional election. When asked whether he had evidence to support his bribery allegations, Anderson candidly responded that he had filed his Notice of Contest to obtain the subpoena power available in discovery under the FCEA so that he could look for evidence of bribery. This is precisely the type of "fishing expedition" that the Act (and the standard adopted in *Tunno* v.*Veysey*) was intended to prevent.

Even after the field hearing, the Majority members of the Task Force refused to take action on contestee's motion to dismiss Anderson's Notice of Contest. They instead summoned two members of the North Carolina SBI to Washington to present and explain the SBI's investigative report. Over a period of three days, the SBI officials were required to respond to questions and criticism from

[2] Indeed, even the dissenting and supplemental statements filed by Republican members of the Committee in several cases in the late 1970s and early 1980s expressly recognized that "an allegation of fraud or mistake on the basis of information and belief alone is insufficient as a matter of law." *Pierce* v. *Pursell,* H. Rep. No. 95–245 at 4 (1977) (Republican Supplemental Views).

the Majority staff and consultants on issues such as why the SBI did not administer polygraph tests to the two persons who alleged they had been offered $5.00 and the one person who allegedly made that offer in connection with the County sheriff's race. This was perhaps the epitome of a lack of federal respect for State election processes. Not only did the Task Force Majority hold in doubt the State-certified election results in the North Carolina 7th District for many months, but its staff, which had never interviewed any of the relevant witnesses, second-guessed two experienced law enforcement officers on whether it was necessary to use a polygraph in investigating a single incident of alleged bribery in a County sheriff's race.

In the end, much belatedly, the Majority finally agreed to recommend dismissal of Anderson's Notice of Contest. It did so based on a written recommendation, which concluded:

> One couple has alleged that they were offered bribes [in connection with the County sheriff's race]. A combination of this one specific allegation, general allegations of widespread bribery [made solely by Anderson], and the Rose campaign's payments to certain "community groups" is not sufficient to conclude that discovery would uncover bribery so severe that it could cause a changed result in the election.

See August 3, 1995 Memorandum 3. All of this, of course, was known to the Committee shortly after Anderson filed his Notice of Contest and Addendum. It did not require a field hearing, tens of thousands of taxpayer dollars, months of time and distraction for the Committee and Congressman Rose, or a review of the SBI investigative file to know that Anderson's unsupported allegations were inadequate to sustain the contestant's burden under the FCEA. Had the Republican Majority applied the established legal standard from *Tunno* v. *Veysey* in an even-handed and nonpartisan manner, as the Democratic Majority did for the prior 25 years, this contest could have been dismissed many months ago.

We can only hope that the new Majority will profit from this experience and that the House, its individual members, and, most importantly, the voters and taxpayers of the United States will be spared any future repetition of the type of costly and potentially destructive process that occurred in connection with this election contest. In future proceedings under the FCEA, the Committee should adhere steadfastly to the standard adopted in *Tunno* v. *Veysey* and avoid the temptation to use such proceedings to seek partisan advantage.

VIC FAZIO.
STENY HOYER.
ED PASTOR.
SAM GEJDENSON.
WILLIAM J. JEFFERSON.

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