109TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
109–57

DISMISSING THE ELECTION CONTEST IN THE SIXTH CONGRESSIONAL DISTRICT OF TENNESSEE

APRIL 27, 2005.—Referred to the House Calendar and ordered to be printed

Mr. NEY, from the Committee on House Administration, submitted the following

R E P O R T

[To accompany H. Res. 239]

The Committee on House Administration, having had under consideration an original resolution, dismissing the election contest in the Sixth Congressional District of Tennessee, report the same to the House with the recommendation that the resolution be agreed to.

COMMITTEE ACTION

On February 9, 2005, 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 3(c)(1) of rule XIII 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)(I) 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 does not provide new budget authority, new spending authority, new credit authority, or an increase or decrease in revenues or tax expenditures. Thus, clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and the provisions of section 308(a)(I) of the Congressional Budget Act of 1974 are not applicable.

39–006

STATEMENT OF FACTS

On December 28, 2004, J. Patrick Lyons ("Contestant") filed with the Clerk of the House of Representatives a Notice of Contest captioned "*J. Patrick Lyons, Contestant,* v. *Bart J. Gordon, Contestee.*" The document, prepared by the Contestant, was filed pursuant to the Federal Contested Elections Act ("FCEA").[1]

The Contestant ran as an Independent for the seat in the Sixth Congressional District of Tennessee on November 2, 2004. The other principal candidates for the Sixth Congressional District seat were incumbent Democrat Bart Gordon ("Contestee"), Republican challenger Nick Demas, and Independent challenger Norman R. Saliba. The results released by the Tennessee Secretary of State showed that the Contestee received 167,448 votes; Mr. Demas, 87,523 votes; the Contestant, 3,869; and Mr. Saliba, 1,802. The Tennessee Secretary of State certified the Contestee as the winner of the Sixth Congressional District seat on December 7, 2004.

BASIS OF CONTEST

In the Notice of Contest, the Contestant alleges that Representative Gordon should be disqualified from serving as a Member of the House of Representatives for violating several different provisions of the Constitution of the United States. The substance of the notice is virtually identical to a Notice of Contest filed against the Contestee by the Contestant following the 2002 election—a challenge that was dismissed by the House on July 15, 2003.[2]

At the outset of the notice, the Contestant flatly states:

> This Election Contest *IS NOT* based on alleged *fraud, wrongdoing, and/or irregularities* with respect to the conduct of said November 2, 2004 General Election nor, does Contestant challenge the accuracy of the vote totals certified by the Tennessee Secretary of State on *7 December 2004,* certifying the *Contestee—Bart Gordon,* the winner of the Sixth U.S. Congressional District seat.[3]

Rather, the Contestant premises his contest on a convoluted argument that an incumbent member of Congress is required by the Constitution—specifically, Article I, section 6, clause 2[4] and section 1 of the 20th Amendment[5]—resign his or her seat prior to seeking re-election to that seat. Thus, according to the Contestant, the Contestee's failure to resign his seat prior to running for re-election made him ineligible to be a candidate for the Sixth District seat.[6]

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[1] 2 U.S.C. §§ 381–96.

[2] H. Res. 318, 108th Cong. (2003); *see* H. Rept. 108–208. The Contestant also brought a case in federal district court in Tennessee challenging the qualifications of the Contestee, in which he set forth the same arguments as he did in his previous election contest. On May 29, 2003, the district court dismissed with prejudice the Contestant's case. *Lyons* v. *Thompson,* No. 3:02–1004 (M.D. Tenn. May 29, 2003).

[3] Emphases in the original.

[4] "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

[5] "The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin."

[6] According to the Contestant, each current incumbent Member who served in the previous Congress similarly violated the Constitution by not resigning before running for re-election, and

The Contestant further contends that the Contestee, who is an inactive member of the Tennessee Bar, is violating the separation of powers principle enshrined in the Constitution by remaining a judicial officer of the Courts of Tennessee while serving as a member of the federal legislature. The Contestant thus believes these alleged constitutional breaches qualify the Contestee as an insurrectionist who is violating his sworn duty under Article VI, clause 3[7] to support the Constitution. Therefore, the Contestant argues that the Contestee is constitutionally forbidden from holding federal office by section 3 of the 14th Amendment, which states: "No person shall be a Senator or Representative in Congress, * * * who, having previously taken an oath, as a member of Congress, * * * to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same * * *"

STANDING

To have standing under the FCEA, a Contestant must have been a candidate for election to the House of Representatives in the last preceding election and claim a right to the Contestee's seat.[8] In the instant case, the Contestant's name was printed as a candidate for the Sixth Congressional District on the official ballot for the November 2, 2004 election. Thus, the first prong of the two-part test is met.

As to the second prong, the Contestant asserts in his Notice of Contest that as "the only 'duly qualified' candidate having filed an Election Contest, [I] must be recognized as entitled to the seat—and, be seated immediately." As in his previous contest, the Contestant fails to explain the logical connection between the Contestee's alleged ineligibility to serve in the House of Representatives and the Contestant's entitlement to the Contestee's congressional seat.[9] However, the Committee opts to resolve this election contest on other grounds.[10]

TIMING/NOTICE

The Notice of Contest appears to have been served upon Congressman Gordon and filed within the appropriate time structures of the FCEA.

RESPONSE BY MR. GORDON

The Contestee did not file a formal answer in response to the Notice of Contest. Nevertheless, the burden remains upon the Con-

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thus the Contestant requested that "each such Member should voluntarily disqualify himself/herself from any participation in this Election Contest."

[7] "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution * * * "

[8] 2. U.S.C. § 382(a).

[9] According to House precedent, if a Member-elect is found to be disqualified, a losing congressional candidate is not entitled to the seat. See U.S. Const., Parliamentarian's Notes § 13, House Rules and Manual, H.R. Doc. 107–284 (2003).

[10] The Committee considers the Contestant's claim that he has a right to the Sixth Congressional seat in Tennessee to be completely without merit. The Contestant finished a distant third in the final vote totals, trailing the Contestee by over 163,000 votes and the Republican challenger by over 83,000 votes. Even if we were to assume the Contestee was ineligible to serve in Congress, the Contestant has put forth no reasons why he would be more entitled to the seat than the second-place finisher. Therefore, the Contestant does not appear to be in a position to claim a right to Tennessee's Sixth Congressional seat.

testant to provide credible allegations to the House sufficient to support a claim under the FCEA.[11]

ANALYSIS

Since the Contestant's arguments are the same as those he advanced in his contest of the 2002 election, the same analysis used to dispose of that matter is applicable here. To restate what the Committee stated then, the Committee will proceed to consider a Notice of Contest only if the notice states grounds sufficient to change the result of an election. In other words, a Contestant must allege irregularities, fraud, or wrongdoing with respect to the conduct of an election that, if proven, would likely overturn the original election outcome. Otherwise, the Committee will recommend dismissal of the contest.

In his Notice, the Contestant specifically states that his contest "is not based on alleged fraud, wrongdoing, and/or irregularities," and that he does not "challenge the accuracy of the vote totals certified by the Tennessee Secretary of State." Instead, the Contestant relies exclusively on his contention that the Contestee was not qualified either to run for Tennessee's Sixth Congressional seat or to serve in the Congress if elected.

The Committee finds that, as a general matter, challenges to the qualifications of a member-elect to serve in the Congress fall outside the purview of the FCEA, which was designed to consider allegations relating to the actual conduct of an election. Nothing in the Contestant's Notice of Contest persuades the Committee to re-consider this longstanding interpretation of the FCEA. Consequently, the Committee concludes that the Contestant's arguments regarding the Contestee's qualifications to serve in Congress do not constitute grounds sufficient to change the result of the election and, therefore, recommends that this election contest be dismissed.

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[11] Id. § 385.