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MEMO ON HISTORY OF CONTESTED ELECTIONS STATUTE AND ON RACE, INTIMIDATION
AND OTHER GROUNDS FOR VOIDING HOUSE ELECTIONS.

This memo is (1) a brief summary of the legislative history behind the enactment and use of Section 201 of Title 2, the statute permitting any person to contest the election of a United States Representative and (2) a discussion of race, intimidation, and other factors as grounds for voiding House elections.

An election contest statute substantially identical to Section 201 was enacted in 1798, and appears to be the first attempted regulation on this subject. Stats. 1798, ch.8, § 1. Two years later, the same statute was re-enacted to last another four years, Stats. 1800, ch.27, but after 1804 there appears to have been no statutory authority for election contests until similar legislation was once again enacted, this time as a permanent measure, in 1851. Stats. 1851, ch.11 § 1. The Committee on Elections which administered contests under the 1851 statute was merged into the House Committee on House Administration in 1946, Stats. 1946, ch 753, § 121, but in all other pertinent respects the 1851 statute and the present Section 201 are identical. In the limited time available it was not possible to discover any particular historical explanation for the enactment of an election contest statute, but in light of the early date of the first such statute it should be safe to assume that denial of the right to vote on the grounds of color was not the concern of this legislation. The administration of the statute, however, shows its most consistent use to have been in contesting elections which allegedly involved widespread racial and political intimidation.

The first reported decision of the Committee on Elections in an election contest involving violence and intimidation appears to be that in Whyte v. Harris, Fifth Session, 35th Congress, H.R. No. 538 (1858), in which the Committee relied entirely upon English precedents in recommending that the election in question be set aside and the seat vacated:

① 1858 ... (The election return) can not be considered the return of an election made by the legal voters of the Third Congressional district of Maryland. An election is the free choice by those who have the right to make it, and who desire and seek to make it, un-compelled, un-awed, and un-intimidated. [The proofs show that (in various wards),

in some to a much greater extent than others, but in all a most culpable extent, violence, tumult, riot and general lawlessness prevailed. That, as a consequence, the reception of illegal votes and the rejection of legal votes, the acts of disturbance and assault committed on peaceable citizens, and the intimidation of voters so predominated as to destroy all confidence in the election as being the expression of the free choice of the people of that Congressional district.

The committee are not unmindful of the magnitude of the question they present to the consideration of the House. On the one hand it involves the vacation, temporarily, of a seat in the House of Representatives; on the other, it requires an acquiescence in, if not approval of, a wanton and unjustifiable interference with the most sacred of all political rights of a free people.

The House did not adopt the Committee's recommendation that the contested seat be vacated in Whyte v. Harris, but it has since done so in a substantial number of election contests based upon the intimidation of voters. See, e.g., Sypher v. St. Martin, First Session, 41st Congress, H.R. No. 11 (1869); Benoit v. Boatner, First Session, 54th Congress, Journal p. 328, Record pp. 3035-3051 (1896).

For some time it was the Committee on Election's practice to refuse vacation of a contested seat where there existed no proof that the intimidation in question actually affected the overall election results, e.g., Harrison v. Davis, Second Session, 36th Congress, H.R. No. 60 (1861); but this view seems to have gradually disappeared as it became apparent that some types of intimidation could so affect the reliability of votes actually cast as to taint the entire election process. In Benoit v. Boatner, supra, for example, the Committee first rejected its prior position that no new election need be held so long as some votes were validly cast:

We therefore hold as a proposition of law, growing out of the principle laid down in Sypher v. St. Martin, as follows:

"If fraud, violence, and intimidation have been so extensive and general as to render it certain that there has been no free and fair expression by the great body of the electors, then the election must be set aside, notwithstanding the fact that in some of the precincts or parishes there was a peaceable and fair election."

By the same reasoning, an election was set aside in Myers v. Moffett, First Session, 41st Congress, H.R. No. 9 (1869) upon the Committee's finding that election officials in one of a Congressional district's wards had received over 200 votes known to be illegally cast. Declaring that "(i)n such cases not only State courts but legislatures and Congress have not hesitates to declare the whole poll void and of no effect," the Committee

went on to recommend the seating of the contestant candidate, and that recommendation was adopted. The rule that an unintimidated minority can support a contested election result was definitely disapproved in Richardson v. Rainey, Second Session, 45th Congress, H.R. No. 806 (1878), and in most contests decided thereafter the Committee has adhered to the common-sense principle that an election should be set aside when the corruption or intimidation in question casts serious doubt upon whether the same candidate would have been elected under normal conditions.

A primary objection being made to the 1964 election results in question is that Negro voters were systematically denied or discouraged from exercising their rights to register and/or vote in Mississippi. Reference to the records of House of Representatives election contests indicates that such discrimination has many times been the ground for contest, and in a good number of such contests the seat in question has been vacated. A fair number of the reported Committee opinions take the position that the election result should be overturned if, and only if, the votes which were proven to have been denied would have defeated the contestee if cast. See, e.g., Threet v. Clarke, First Session, 51st Congress, H.R.No. 363 (1890) (contestee remained seated), and Wise v. Young, Second Session, 55th Congress, H.R. No. 772 (1898) (contestant seated). Where the general impropriety or calculated discriminatory nature of registration and election procedures is widespread, however, the Committee on Elections has not hesitated to vacate the seat in question without regard to the votes actually cast. See, e.g., Bisbee v. Finley, Second Session, 47th Congress, H.R. No. 1066 (1883) (incomplete and incorrect registration records kept); Langston v. Venable, First Session, 51st Congress, H.R. No. 2462, (1890), (segregated voting lines with result that polls closed before larger Negro population all had opportunity to vote); Moore v. Funston, Second Session, 53rd Congress, H.R. No. 1164, (1894) (improper challenges to Negro voters and fraud in counting allots); and Martin v. Lockhart, First Session, 54th Congress, H.R.No.2002 (1896) (attempts by election officials to cause Negro voters to make mistakes invalidating their ballots). In its recommendation that an election be set aside in McGinnis v. Alderson, First Session, 51st Congress, H.R. No. 2806, the Committee on Elections set forth a list of acts of official misconduct not at all dissimilar to those complained of in 1964:

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Much of the evidence in this case is directed to the misconduct of supervisors of registration and of district registering officers. Other portions of the evidence are directed to the misinterpretation of the law by managers of election. The misconduct of registering officers consisted in unlawfully striking from books large numbers of duly registered voters, in refusing or neglecting to restore the names ordered to be restored by county commissioners, in keeping their offices closed on days of registration, in unreasonably delaying applicants, in unlawfully requiring colored applicants to prove their places of residence by white witnesses known to the registering officers, in unlawfully refusing or neglecting to make transfers on due application, in furnishing unequal facilities for registration, as between their party friends and party opponents, and in fraudulently registering persons not qualified.

Managers of election unlawfully refused to receive the ballots of colored Republican voters who were duly registered, and whose names were on the registry books in the hands of the managers, because they did not present their registration certificates. They also refused to accept such certificates as proof of the right to vote of voters whose names had been unlawfully stricken from the rolls.

They also refused to accept the tendered votes of Republicans who were marked as having moved within the precinct in which they were registered. In many instances this removal had not, in fact, taken place, and when it had it did not disqualify the voter, under the law, from voting. . .

The committee are clearly of opinion that voters complying with all other requirements of the law can not be disfranchised by the neglect of the public officials to furnish them opportunity to register.

The foregoing are but a few of many instances in which the statutory predecessor to Section 201 has been employed by the House of Representatives to investigate and set aside a contested election on the ground that Negro voters were denied the opportunity to register and vote. An important additional case is the 1882 contest by the Mississippi Negro Republican John R. Lynch to unseat J.R.Chalmers, his white opponent, who was certified as the winner by the Redeemer white state government. (Congressional Record, 47th Congress, First Session, 1882). Lynch successfully unseated Chalmers by a 125-71 vote of the House. The House invalidated some provisions of the Mississippi election law, accepted many of the figures of the Federal super-

visors in place of those of the state government, looked to the population statistics and in general seemed to take appropriate action to obtain an accurate expression of all the people of the district.

It has been indicated that a second ground for contest will be that only those candidates elected on the "Freedom Ballot" are entitled to seats as Representatives. It is interesting to note that the Committee on Elections has on various occasions come to the conclusion that Negroes were denied the vote by comparing those votes cast in the election in question with those cast in some recent election where no discrimination was alleged. See, e.g., Smalls v. Tillman, First Session, 47th Congress, H.R.No. 1525 (1882) and Bisbee v. Finley, Second Session, 47th Congress, H.R. No. 1065 (1883).

The question also arises whether an election contest can be initiated under Section 201 by someone other than the defeated candidate. The statute itself says "whenever any person intends to contest an election," and this language appears to have been literally interpreted ~~as~~ allowing a contest by interested citizens in Sundry Citizens v. Sergeant, First Session, 19th Congress (1828). This question relates to the interesting problem of what status the contestee and contestant should occupy during the period of the election contest. Contestants have been known to voluntarily vacate their seats upon discovering that the contest of their election was well founded, see Bonyng v. Shafroth, Second Session, 58th Congress, Record pp. 1986, 1988 (1904), but there is apparently no requirement that a contestee relinquish his position pending the contest's outcome and the United States Attorney General has ruled him to be endowed with all rights, powers and privileges given other members of the House. 21 Ops.U.S.Att .Gen. 342 (1896). By resolution adopted on July 5, 1861, however, the House extended to contestants the "privilege of the floor during such contest, with the right to speak with regard to their respective cases"; this privilege is now found in Rule XXXII of the House of Representatives.

The writer regrets that more time has not been available for his research in this matter, but the above should at least indicate that respectable authority exists for the 1964 election protest now on file.