From Inside the House: The Lurking Threat of Elections Being Overturned Within the Halls of Congress

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I. INTRODUCTION

In the wake of the 2020 Presidential election, seemingly endless ink has been spilled over the possibility of "stolen" elections. This modern trend,

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especially popular among conservatives,[1] has focused on "election integrity,"[2] particularly the prevention of fraudulent votes being inserted into counts to alter election results.[3] Although claims of shenanigans at the ballot box are not outrageous on their face,[4] no convincing evidence was ever procured of any fraud sufficient to swing any individual state, let alone the entire election.[5]

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[1] *See generally* Jon Greenberg, *Most Republicans Still Falsely Believe Trump's Stolen Election Claims. Here Are Some Reasons Why*, POYNTER (June 16, 2022), https://www.poynter.org/fact-checking/2022/70-percent-republicans-falsely-believe-stolen-election-trump/ [https://perma.cc/2LSG-L9XS]; Nicholas Riccardi, *Lawsuit Is Latest Evidence of Bogus 'Stolen Election' Claims*, ASSOCIATED PRESS (Feb. 17, 2023), https://apnews.com/article/politics-2022-midterm-elections-donald-trump-georgia [https://perma.cc/BE3E-7E8U]; Roy Morris Jr., *Was the Presidential Election Stolen?*, AM. HERITAGE (2021), https://www.americanheritage.com/was-presidential-election-stolen [https://perma.cc/6DFT-MTUG]; Sahil Kapur, *House Passes Bill to Prevent Stolen Elections, Despite Strong GOP Opposition*, NBC NEWS (Sept. 21, 2022), https://www.nbcnews.com/politics/congress/house-passes-bill-prevent-stolen-elections-strong-gop-opposition-rcna48587 [https://perma.cc/VFE9-7VAW]; *Rick Hasen on Election 2016: Rigged, Hacked or Stolen?*, UCI L. (Sept. 28, 2016), https://www.law.uci.edu/podcast/episode20.html [https://perma.cc/P3DX-L5QP].

[2] One example of this is True the Vote, a conservative Texas-based nonprofit that, among other things, took part in the production of "2000 Mules," a documentary investigating allegations of voter fraud in the 2020 U.S. Presidential Election. *See America's Confidence in Our Electoral Process*, TRUE THE VOTE, https://www.truethevote.org/about/ (2023 page on file with the *Ohio State Law Journal*) (framing the organization's mission as "election integrity"); *see also 2000 Mules*, IMDB, https://www.imdb.com/title/tt18924506/ [https://perma.cc/H9LV-7TP8].

[3] *See, e.g.*, 2000 MULES (D'Souza Media & Salem Media Group 2022) (using cellphone geo-tracking data to construct an argument that "mules" deposited mail-in ballots in drop boxes in an attempt to influence the 2020 Presidential election). The film has been the target of significant criticism and "debunking." *See Does '2000 Mules' Provide Evidence of Voter Fraud in the 2020 U.S. Presidential Election?*, REUTERS (May 27, 2022), https://www.reuters.com/article/factcheck-usa-mules/fact-check-does-2000-mules-provide-evidence-of-voter-fraud-in-the-2020-u-s-presidential-election-idUSL2N2XJ0OQ [https://perma.cc/3X9W-BTR8] (concluding that the main claims presented in the film did not have "any concrete evidence definitively showing proof of fraud").

[4] Such cheating has undoubtedly been seen in American elections, even in the fairly recent past. *See, e.g.*, EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 206–17 (2016) (concluding, with regard to Lyndon B. Johnson's victory in the 1948 Texas Senate election, that "[t]here can be no doubt that 'Landslide Lyndon's' 87-vote victory in the runoff was procured by fraudulent means").

[5] *See* Joseph Tanfani & Simon Lewis, *As Trump Pushes Baseless Fraud Claims, Republicans Pledge Tougher Voting Rules*, REUTERS (Dec. 21, 2020), https://www.reuters.com/article/us-usa-election-voting-rules-insight-idUSKBN28V1DN [https://perma.cc/AU9U-MUYV] ("State and federal judges—some appointed by Trump—have dismissed more than 50 lawsuits brought by Trump or his allies alleging election fraud and other irregularities."). *See generally* JOHN DANFORTH ET AL., LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION (July 2022) (on file with the *Ohio State Law Journal*) (debunking claims of fraud in six of the most contested states).

Despite the enduring popularity of such theories, even among elected officials and candidates for office,[6] they have been repeatedly debunked by scholars.[7] Government agencies such as the Cybersecurity & Infrastructure Security Agency (CISA) have since put tremendous efforts towards combatting the mis-, dis-, and mal-information around election security to convince the broader public of the undeniable truth that American elections are secure.[8]

While so much time and effort has been put into thinking and writing about the (im)possibility of modern elections being stolen at the ballot box, a relatively obscure, yet potentially more dangerous avenue for undermining the will of voters has remained largely ignored. Instead of looking at the start of the election process—voting—this risk comes at the end, within the halls of Congress itself. Such a possibility stems from the authority of each House of Congress to act as "Judge of the Elections, Returns and Qualifications of its own Members."[9] Although vague, this power effectively makes each house of Congress the final arbiter for all disputes as to who is entitled to a seat within their respective body.[10] Instances in which this power has been abused are far from fringe, baseless theories.[11]

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[6] *See* Kayleen Devlin & Jack Goodman, *Boebert to Lake: How Many 2020 Election Deniers Won Their Races?*, BBC (Nov. 10, 2022), https://www.bbc.com/news/world-us-canada-63568003 [https://perma.cc/B2M4-DWKG]; Daniel Dale, *How 2020 Election Deniers Did in Their 2022 Midterm Races*, CNN (Nov. 9, 2022), https://www.cnn.com/interactive/2022/11/politics/election-deniers-winners-losers-midterms-2022/ [https://perma.cc/7G9X-NUHQ]; *The Landscape of Election Denial in America*, REPLACING THE REFS, https://electiondeniers.org/ [https://perma.cc/B7PA-C54Q] (finding that there are 25 "election deniers" holding statewide office in 19 states as of March 2024).

[7] *See, e.g.*, DANFORTH ET AL., *supra* note 5; Andrew C. Eggers, Haritz Garro & Justin Grimmer, *No Evidence for Systematic Voter Fraud: A Guide to Statistical Claims About the 2020 Election*, 118 PROCEEDINGS NAT'L ACAD. SCIS. 1, 1 (2021); Wendy R. Weiser, Michael Waldman, Sean Morales-Doyle & Eliza Sweren-Becker, *The Myth of Voter Fraud*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud [https://perma.cc/34BN-EEYP].

[8] *See Election Security Rumor vs. Reality*, CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/rumorcontrol [https://perma.cc/SNX3-EAWT]; *Exhaustive Fact Check Finds Little Evidence of Voter Fraud, But 2020's 'Big Lie' Lives On*, PBS NEWS HOUR (Dec. 17, 2021), https://www.pbs.org/newshour/show/exhaustive-fact-check-finds-little-evidence-of-voter-fraud-but-2020s-big-lie-lives-on [https://perma.cc/24RG-7G7P]; Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, ASSOCIATED PRESS (June 28, 2022), https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d [https://perma.cc/XKD8-7W5K]; Adam Goldman & Zolan Kanno-Youngs, *F.B.I. Director Sees No Evidence of National Mail Voting Fraud Effort*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/24/us/politics/fbi-director-voter-fraud.html [https://perma.cc/U87A-68ZP].

[9] U.S. CONST. art. I, § 5, cl. 1.

[10] *See infra* Part II.

[11] *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 818 (2015) (noting that "it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision"); Michael Kruse,

This Note argues that the current set of contested elections procedures in the House of Representatives represent inadequate safeguards against abuse in our increasingly heated political environment and must be improved to protect principles of democratic government, particularly honoring the wishes of voters. While the framers and subsequent generations took seriously the threat of elections being subverted by bad actors,[12] the systems they put in place to handle the issue are inadequate for the problems faced today.[13] In fact, a review of the history of Constitutional, and statutory measures as well as House precedents reveals a history of abuse that could act as a playbook for those seeking to game the system.[14] As the norms that were so heavily relied upon to maintain order in our national politics erode further and further, settled laws and not merely vague expectations must be put in place to protect democratic principles.[15]

Part II will discuss the history of the elections power within the House. It will recount the reasoning behind locating it within the House and the extent of the power before summarizing a few contested elections cases which demonstrate some procedures historically utilized in such cases. Part III will focus on what is currently the most comprehensive attempt to proceduralize the contested elections process within Congress, the Federal Contested Elections Act (FCEA).[16] It will begin with the motivating purpose behind the act and proceed to an overview of what is included within the FCEA. Part IV will discuss issues that remain unresolved by our current framework of House contested elections regulations, with particular focus on the "Bloody Eighth" incident and what it reveals about the failures of FCEA and House contested elections procedures generally. Part V will discuss how these myriad issues could potentially be resolved, advocating primarily for the adoption of an arbitration approach, or, that failing, greater guarantees of procedural rights for participants. In addition, a brief section emphasizes the importance of the public in ensuring fairness in such proceedings with special attention to the role of the media and minimum reforms that could encourage greater public oversight. Finally, Part VI will briefly conclude.

The 'Stolen' Election that Poisoned American Politics. It Happened in 1984, POLITICO (Jan. 6, 2023), https://www.politico.com/news/magazine/2023/01/06/indiana-8th-1984-election-recount-00073924 [https://perma.cc/KY23-SJ78].

[12] *See* THE FEDERALIST NO. 59 (Alexander Hamilton) (defending the decision to give ultimate authority over federal elections to Congress for fear of "leav[ing] the existence of the Union" up to State legislatures).

[13] *See* Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359, 362 (2017).

[14] *See infra* Parts II, V.

[15] *See* Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1400 (2022) (stating that "law is one of our few tools for stemming norm erosion"); Manheim, *supra* note 13, at 361 (urging that Congress "replace the confused and inconsistent regime that currently governs these adjudications with a clearer and more sensible set of rules").

[16] Federal Contested Elections Act, 2 U.S.C. §§ 381–396 (1969).

II. HISTORY OF THE CONTESTED ELECTIONS POWER

Article I, Section 5 of the Constitution states that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Member."[17] This power is multifaceted, granting each house of Congress the ability to judge the constitutional qualifications of members,[18] as well as the "right to examine witnesses and inspect papers,"[19] in pursuit of making a determination of the right of an individual to be seated.[20] In effect, each House of Congress "acts as a judicial tribunal" with concomitant authority.[21] Exercises of this authority are not able to be reviewed by courts as they represent nonjusticiable political questions.[22]

Precedent for allowing legislatures to act as the final judge for elections and qualifications of members already had significant historical backing by the time it was included in the Constitution.[23] In his Commentaries on the Constitution, Joseph Story set forth the basic arguments for locating such authority within the legislature itself.[24] First, the power must reside somewhere to prevent uncertainty and to assure duly elected members are seated.[25] And second, locating the power elsewhere would necessarily harm the independence of the legislature as its membership could be amended by that other body to ensure, or at least promote, compliance with that second body's will.[26] By placing the authority within each House of Congress, the power exists as a tool "to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its constituents."[27]

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[17] U.S. CONST. art. I, § 5, cl. 1.

[18] Although this power is fairly narrow in scope. *See* Powell v. McCormack, 395 U.S. 486, 550 (1969) ("[A]nalysis of the 'textual commitment' under Art. I, § 5, has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution." (internal citation omitted)).

[19] Kilbourn v. Thompson, 103 U.S. 168, 190 (1880).

[20] H.R. REP. NO. 92-1090, at 2 (1972).

[21] *See* Barry v. United States *ex rel*. Cunningham, 279 U.S. 597, 613, 616 (1929) (noting the authority of the Senate to issue a warrant of arrest to compel attendance of a witness).

[22] *See* Roudebush v. Hartke, 405 U.S. 15, 19 (1972) ("Which candidate is entitled to seated in the Senate is, to be sure, a nonjusticiable political question . . . .").

[23] *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 831 (Melville M. Bigelow ed., 5th ed. 1994) (noting that such authority has always been lodged in the legislative body by the uniform practice of England and America).

[24] *Id.* § 833.

[25] *Id.*

[26] *Id.*

[27] *Id.*; *see also* THE FEDERALIST NO. 59 (Alexander Hamilton) (saying in defense of the Elections Clause, "I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION").

A. *The First Contested Elections*

Despite the persistent ambiguities of the extent of the Elections Power,[28] significant progress has been made over the country's history towards clarifying its reach.[29] The first exercise of this power came almost immediately after the Constitution was ratified.[30] The members-elect from New Jersey, bearing official credentials from the state's governor, were sworn-in normally alongside their colleagues,[31] with two of the members taking part in the organizing votes that selected a Speaker and Clerk.[32] However, only a few weeks later, a letter appeared alleging that these members were illegally elected.[33] The House referred the matter to the Committee on Elections, instructing them to investigate the matter and report back to the whole body.[34] This initial report, concluding that it would be necessary for evidence to be collected to decide the matter, merely requested the authority to "receive such proofs and allegations as the petitioners shall judge proper . . . [and to] receive all proofs and allegations from persons who may be desirous to appear and be heard in opposition to the said petition."[35] That the Committee on Elections felt it necessary to request the authority to hear evidence shows immense confusion as to what authority was encompassed within the Elections Power. Action on the issue would hit another obstacle when the Committee on Elections decided that it would need to hear testimony, another power they were uncertain they possessed, to properly resolve the issue.[36]

Although the House apparently had little issue agreeing to the first request for authority to receive "proofs and allegations,"[37] granting of the authority to hear testimony was far more contentious.[38] In that debate, members expressed their concern for the suggestion from the Committee on Elections that a commission should be sent to New Jersey to take testimony, something viewed as unideal as it would deprive the House itself of hearing *viva voce* testimony[39] and threatened to set a potentially costly precedent should similar disputes occur

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[28] *See, e.g.*, Manheim, *supra* note 13, at 36–37.

[29] *See generally* 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 756–90 (1907).

[30] *See* H.R. JOURNAL, 1st Cong., 1st Sess. 23 (1826).

[31] *Id.* at 11.

[32] *See* 1 ANNALS OF CONG. 99–101 (1789) (Joseph Gales ed., 1834) (noting that Elias Boudinot and James Schureman arrived before the election of the Speaker and Clerk on April 1st, 1789).

[33] H.R. JOURNAL, 1st Cong., 1st Sess. 23 (1789).

[34] *Id.*

[35] 1 ANNALS OF CONG. 425 (1789) (Joseph Gales ed., 1834).

[36] *Id.* at 663.

[37] *Id.* at 425.

[38] *Id.* at 663–67 (showing that the issue of the competency of the Committee on Elections to take testimony was the only matter debated that day).

[39] *Viva voce*, literally meaning "live voice," is "oral rather than written testimony." *Viva voce*, BLACK'S LAW DICTIONARY (11th ed. 2019).

in states further from the then capital, New York.[40] A suggestion that witnesses be required to travel to the capital to deliver their testimony raised concerns of inequity, with the possibility of high travel costs again being of chief concern.[41] The alternative solution of utilizing state judges to hear the relevant testimony faced similarly harsh criticism for fear that they may be too close to the matter to adjudicate it fairly.[42] In the end, it was agreed that witnesses should travel to New York to present their evidence.[43]

The Committee on Elections utilized their newly confirmed authority to receive evidence, eventually reporting back to the House, but only with factual conclusions regarding how the certification of elections in New Jersey had occurred and notably omitting a recommended resolution.[44] These conclusions paint only a vague picture of what occurred, but suggest that the state's governor and a "privy council" he convened had ultimately decided by majority vote to certify the election of the members-elect who would go on to be sworn-in with the First Congress, despite the fact that one county had not yet sent its returns.[45] The entire House engaged in a heated debate over what to do in response, with calls to void some votes or even the entire election failing to persuade a majority of members.[46] Instead, most members coalesced around the view that there was not enough evidence to overturn the election, leading to the passage of a resolution affirming the election of the New Jersey representatives.[47]

This episode illustrates the extreme uncertainty of the early House when it came to resolving contested elections. Despite the presence of the members who had taken part in writing the Constitution,[48] no definitive view existed as to the precise meaning of the Elections Power.[49] Instead, the members proceeded

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[40] *Id.* at 664.

[41] 1 ANNALS OF CONG. 666 (1789) (Joseph Gales ed., 1834).

[42] FOLEY, *supra* note 4, at 38.

[43] *Id.*; 3 GORDON DENBOER, LUCY TRUMBULL BROWN & CHARLES D. HANGERMAN, THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at 106 (1989).

[44] H.R. JOURNAL, 1st Cong., 1st Sess. 83 (1789).

[45] *Id.* In reality, the failure of state law to provide a time or even a date by which the election must end caused some amount of partisan shenanigans. FOLEY, *supra* note 4, at 34–35. The Antifederalists on the privy council urged the governor to end the election once the council met, despite nearly half the state's counties having not sent their returns yet. *Id.* The governor refused and instead waited for the other counties. *Id.* at 35. However, knowing that a full statewide election was likely to result in their defeat, Essex county held its polls open for over two and a half months hoping to wrangle enough votes to overcome the presumed slant of the state's electorate. *Id.* The governor refused to wait for this singular county and certified the state's results without the Essex returns. *Id.*

[46] DENBOER, BROWN & HAGERMANN, *supra* note 43, at 170.

[47] H.R. JOURNAL, 1st Cong., 1st Sess. 95 (1789).

[48] James Madison among them. 1 ANNALS OF CONG. 667 (1789) (Joseph Gales ed., 1834).

[49] DENBOER, BROWN & HAGERMANN, *supra* note 43, at 174 (showing letters from multiple members expressing their uncertainty as to whether they had reached the right decision).

slowly and cautiously, fearing that a poorly reasoned decision could be disastrous precedent for the fledgling nation.[50]

In fact, the procedures followed by Congress established precedent that would be followed for at least the next forty years.[51] The process for organizing the House, beginning with credentialed members choosing a Speaker who administers the oath to other members, is still followed to this day.[52] Perhaps most consequentially for the purposes of this Note, the coincidence that the House did not consider the dispute until the members had already been sworn-in as facially valid created what Brian C. Kalt has termed as the "Oaths First process."[53] That process allows those with facially-valid credentials to swear in as members, leaving the disposition of any challenge until after the House has been organized.[54] This process would be followed, with only some slight deviations,[55] until the Broad Seal War, the first major House election crisis, came in 1839.[56]

Beyond the creation of Oaths First, the House's handling of this first contest provided a few other valuable precedents. First, it helped clarify what specific authorities were included within Art. I, Section 5's broad mandate to act as "Judge of the Elections, Returns and Qualifications of its own Members . . . ."[57] It had been definitively decided that the role of the Committee on Elections would be more than merely providing a summary of the facially apparent facts of a contest. Instead, the Committee on Elections would take a leading role in investigating the election. This investigative authority would augment the

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[50] FOLEY, *supra* note 4, at 37. Even Alexander Hamilton, despite partisan connection to the contestants, refused an offer to represent them in the proceedings, acknowledging the danger the situation presented to "commencement of the Government." DENBOER, BROWN & HAGERMANN, *supra* note 43, at 143.

[51] *See infra* Part II.B.

[52] *See Oath of Office*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Institution/Origins-Development/Oath-of-Office/ [https://perma.cc/26QU-P9EP]; 1 CHARLES W. JOHNSON, JOHN V. SULLIVAN & THOMAS J. WICKHAM, JR., PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 115-62, at 174 (2017).

[53] Brian C. Kalt, *Swearing in the Phoenix: Toward a More Sensible System for Seating Members of the House of Representatives at Organization*, 105 MARQ. L. REV. 1, 8–9 (2021).

[54] *Id.* at 8.

[55] Thomas Moore from Kentucky was challenged before taking the oaths due to a potential defect with his credentials, leading to Moore and the seat's other claimant, Robert Letcher, both withdrawing to leave the seat vacant. *See id.* at 13–14. Eventually, a new election was ordered and Letcher prevailed. *Id.* at 14.

[56] *Id.* at 16 (describing the crisis as "perhaps the messiest organization in the House's history"); FOLEY, *supra* note 4, at 92 (noting that the crisis showed "the US House of Representatives institutionally ill-equipped to handle a conflict of this kind"); *see infra* Part II.B.

[57] U.S. CONST. art. I, § 5, cl. 1.

Committee's quasi-judicial role, presiding over and considering evidence submitted by each party.[58]

Although notably absent in this first contested election, another important precedent would be established by another of the House's earliest contested elections. This case would come out of Delaware, where state law prescribed an accepted form for ballots, leading to the rejection of enough ballots to swing the election.[59] Here, the Committee on Elections would break out of its previous passivity by providing a conclusion of their own with how to dispose of the contest.[60] In addition, a minority view was provided, putting into official record the reasoning and conclusions of those in opposition.[61]

These precedents evidenced some of the values that remain crucial in successful and orderly resolution of contested elections. First, the establishment of clear, reliable procedures gives each party fair notice of how they might expect the contest to proceed.[62] Second, Congress attempted to make the process a transparent one, conducting the business of the investigation via reports that were subsequently entered into Congressional record.[63] Third, the House seems to have demonstrated a commitment to nonpartisanship, with the New Jersey contest resulting in a near unanimous vote to sustain the election despite

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[58] Upon inspection, this authority, while accurately described as a "judicial tribunal," is more akin to those found in inquisitorial system, as opposed to the more commonly seen adversarial system. Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMPAR. L. REV. 63, 67 n.19 ("The term 'inquisitorial' thus signifies that the court performs the task of inquiring.").

[59] 1 HINDS, *supra* note 29, § 758.

[60] *Id.*

[61] *Id.* The use of the minority report as a kind of legislative equivalent to a judicial dissent would become deeply rooted in the contested elections process and persists to the modern day. *See, e.g.*, SAMUEL SCOTT MARSHALL, BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-14, at 1 (1866); WAYNE L. HAYS & ANTHONY CAVALCANTE, CONTEST FOR A SEAT IN THE HOUSE OF REPRESENTATIVES FROM THE SIXTH CONGRESSIONAL DISTRICT OF THE STATE OF MICHIGAN, H.R. REP. NO. 81-1735, pt. 2, at 1 (1950); DISSENTING VIEWS FILED BY REPRESENTATIVES FRENZEL ET AL., RELATING TO ELECTION OF A REPRESENTATIVE FROM THE EIGHTH CONGRESSIONAL DISTRICT OF INDIANA, H.R. REP. NO. 99-58, at 45 (1985). Even from this small sampling, one sees the lack of consistency in how the House handles contested elections. The naming conventions of each report differ significantly as does the designation of the minority reports. For Baldwin, an entirely separate report was filed. *See* BALDWIN VS. TROWBRIDGE, H.R. REP. NO. 39-13, at 1 (1866). The second report cited, a contest in the Sixth Congressional District of Michigan between George D. Stevens and William M. Blackney, treats the minority report as a "Part 2." *See* H.R. REP. NO. 81-1735, pt. 2, at 1. Finally, the report from the "Bloody Eighth" pertaining to McCloskey and McIntyre simply includes the minority views, termed as "dissenting views," within the main report with only a small heading to distinguish between the two. *See* H.R. REP. NO. 99-58, at 45.

[62] PRINCIPLES OF THE L. OF ELECTION ADMIN.: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 201 cmt. b. (AM. L. INST. 2019).

[63] *Id.* § 202 cmt. a.

uncertainty from the members as to whether they had taken the right course of action.[64] By grounding their initial process in principles central to proper election administration, the First Congress set a strong groundwork to be built upon. However, despite this promising start, little work was done between these first contested elections and the first contested election crisis the body faced.

B. *The First Great Crisis*

The conflict that would eventually become known as the Broad Seal War grew out of the New Jersey House elections of 1838.[65] New Jersey found itself once again at the forefront of House politics against the backdrop of increasing political division between Democrats and Whigs, a division exasperated by the potential for Whigs to gain control of the House for the first time should they fare well in New Jersey.[66] Of particular concern was election of the Speaker of the House, a matter that was totally up in the air between the contested seats and lack of cohesion among the parties.[67] These seats were selected at-large, meaning the entire state electorate voted on each contest, but were nonetheless incredibly close.[68]

The officially certified results, declared by the state's Whig governor, showed a complete Whig victory.[69] This occurred because of the exclusion of two towns in which Democrats had won a significant majority.[70] These towns' returns were denied by a Whig county clerk for failure of local election officials to properly certify and sign the returns.[71] Despite Democratic cries of foul play, the Whig candidates were given official writs of election from the governor, with the accompanying "broad seal" of New Jersey, and set off for Washington.[72] Democrats, however, refused to acquiesce so easily as the Democratic Secretary of State issued his own writs to the five Democrats who claimed victory.[73]

When the new Congress convened, both sets of candidates presented their credentials to the Clerk of the House, a man named Hugh Garland who had been

[64] FOLEY, *supra* note 4, at 39–40 (describing the ultimate vote as having only one dissenter, despite evidence that some members were "unsettled" as to the correct decision even in the following days).

[65] JEFFERY A. JENKINS & CHARLES STEWART III, FIGHTING FOR THE SPEAKERSHIP: THE HOUSE AND THE RISE OF PARTY GOVERNMENT 110–11 (2013).

[66] *Id.* at 110.

[67] *Id.* at 114.

[68] *Id.* at 110–11 ("The House candidate who received the most votes statewide, Peter D. Vroom (D), outpolled the last-place finisher, John B. Ayerigg (W), by only 197 votes.").

[69] *Id.* at 111.

[70] *Id.*

[71] JENKINS & STEWART, *supra* note 65, at 111.

[72] *Id.*

[73] *Id.* The number of Democrats is only five as one of the seats was indisputably won by a Whig candidate. The secretary of state issued a writ to the winning Whig as well. *Id.*

appointed a year earlier by a very narrow Democratic majority.[74] Faced with two sets of candidates claiming a right to the New Jersey seats, Garland chose to break from the Oaths First precedent and instead announced that he would skip those members, allowing the organized House to sort it out later.[75] "[P]rotracted and vicious" debate followed as Whigs claimed that precedent should be followed while Democrats backed their partisan colleague.[76]

Having failed to follow the precedent that did exist, the House was forced into cobbling together new procedures to resolve the crisis.[77] The eventual solution began with the appointment of John Quincy Adams as "chairman," a position that had no statutory or precedential basis.[78] From this position, Adams put forth the proposition that the Whigs should be seated and planned to do so from his new position unless overruled by the entire House, which he was.[79] More heated debate eventually led to a vote following Garland's original plan to skip the seats and complete the roll call.[80] The initial gridlock now behind them, the House elected a Whig Speaker after significant debate and the defection of a few Democratic representatives.[81] With the ultimate prize secured, Whig opposition relented and the House concluded that the county clerk had improperly excluded the Democratic-favored returns, resulting in the seating of the five Democratic candidates.[82]

Despite the existence of precedents that could have been employed, when push came to shove, procedures fell to the wayside. Only through the intervention of a uniquely authoritative figure, former President John Quincey Adams, was any progress made at all.[83] By failing to follow the precedent, the

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[74] *Id.* at 113.

[75] *Id.* at 114.

[76] *Id.*

[77] JENKINS & STEWART, *supra* note 65, at 115.

[78] FOLEY, *supra* note 4, at 90.

[79] *Id.* As Foley notes, this vote acutely evidenced the chaos of the crisis as four of the contestants from each side, Whigs and Democrats, took part in the vote. This would later be rectified by a subsequent vote definitively denying any of the claimants a right to take part in subsequent votes, although, interestingly, four of the Whigs and three of the Democrats took part in that vote as well. *Id.* at 90–91.

[80] JENKINS & STEWART, *supra* note 65, at 115.

[81] FOLEY, *supra* note 4, at 91.

[82] JENKINS & STEWART, *supra* note 65, at 128; *see also* RICHARD P. MCCORMICK, THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY 1664–1911, at 119 (1953). It appears that this sudden conclusion may have been influenced by the thorough investigation conducted by the Committee on Elections, but that of the New Jersey legislature and not the House. JENKINS & STEWART, *supra* note 65, at 128. That Whig-dominated committee investigated claims of fraud in the same areas as the House elections swung, eventually concluding that the Democratic state candidates had won. *Id.*

[83] As Foley details, this approach, reliance on a "charismatic savior," is not unique to the Broad Seal War. FOLEY, *supra* note 4, at 163–69. A similar situation played out in Maine in 1879 where Joshua Chamberlain, hero of the Battle of Gettysburg and former state governor, guided the state through an incredibly tense contest for the state legislature that seemed certain to come to violence. *Id.* at 164. Just as Adams before him, Chamberlain

House fell into many of the pitfalls common to deciding contested elections.[84] Knowledge of what the result would be should the votes be excluded or included made it impossible to remove partisan leanings. While this would not normally have been enough to elevate the situation into the crisis it became, the coincidence of this close election with a time of acute partisan conflict exasperated the situation and made normal adjudication an impossibility.

III. THE FEDERAL CONTESTED ELECTIONS ACT

Enacted in 1969, the Federal Contested Elections Act (FCEA)[85] standardizes procedures for election contests.[86] Introduced by Rep. Watkins Abbitt (D) of Virginia, the FCEA was modeled upon the Federal Rules of Civil Procedure, reflecting its goal of providing "efficient, expeditious processing of the cases and a full opportunity for both parties to be heard."[87] While significant progress was made in laying out a reliable procedural framework, the FCEA was never intended to provide substantive guidance for disposition of cases.[88]

A challenge begins when a losing candidate claiming a right to the seat of a member files a written notice of contest with the Clerk of the House within thirty days of the state certification of the election results.[89] That same written notice must also be served upon the contestee.[90] Once served, the contestee has thirty days to answer the notice, either admitting or denying the claims and setting forth any defenses they plan to rely upon.[91] One sees here a process that is roughly analogous to the service process in a civil action.[92]

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eschewed partisanship in favor of fair procedures, heroically maintaining order until the state courts resolved the contest. *Id.* at 167–68. One particularly colorful episode involved partisans storming his office, threatening to assassinate Chamberlain, yet leaving chastised after Chamberlain "opened his shirt and, pointing to his Civil War scars, said that they should do to him what the South had failed to do, but he was not going to let them take Maine's government by violence." *Id.* at 167. While successful on these two occasions, it may be better to rely on proper procedure rather than the gravitas of a singular figure, just in case all the former Presidents and war heroes are out of town or without sufficient scarring to humble would-be insurrectionists.

[84] *See infra* Part IV.

[85] 2 U.S.C. §§ 381–396.

[86] Morgan v. United States, 801 F.2d 445, 450 (D.C. Cir. 1986) (noting that the FCEA "establishes certain procedures . . . by which an election contest with respect to a seat in the House of Representatives shall be conducted").

[87] STAFF OF H. COMM. ON H. ADMIN., 112TH CONG., A HISTORY OF THE COMMITTEE ON HOUSE ADMINISTRATION 1947–2012, at 115–16 (Comm. Print 2012).

[88] *Id.* at 116.

[89] 2 U.S.C. § 382.

[90] *Id.*

[91] *Id.* § 383.

[92] *Compare* 2 U.S.C. § 383, *with* FED. R. CIV. P. 4(c). However, a failure to respond is not considered an admission of the truth of the contestant's claims, meaning there is no "default judgment" to be had. 2 U.S.C. § 385.

The procedural similarities to civil proceedings continue, with provisions allowing for depositions compelled by subpoena,[93] the creation of a record upon which the case is heard,[94] filing of documents,[95] and instructions on how to compute time.[96] Beyond that, the last provisions of the FCEA direct that the death of a contestant ends the case,[97] and that "reasonable expenses" may be reimbursed to any party taking part in a contested election case.[98]

That is the entirety of the FCEA. In two measly paragraphs, one can recite in full the primary framework constraining the handling of contested elections cases within the House of Representatives. Except, the House is not even required to follow these procedures![99]

Compared to the procedural rights seen in civil proceedings, those set forth in the FCEA are surprisingly slim. Perhaps most notable among these is the lack of discovery, something that is integral to the civil process.[100] Similarly missing in the FCEA is the right to provide live testimony, a particularly strange omission as its value had previously been seen as paramount by the first Congress when resolving the contest of the New Jersey seats.[101] In addition, the FCEA does nothing to codify non-statutory rights present within civil proceedings, particularly constitutional procedural due process rights.[102] While one may initially assume that such rights would be protected by judicial review, they are functionally non-existent, unless compelled by statute, as the court has routinely found claims for review of procedural aspects of Congressional contested election cases as nonjusticiable political questions.[103]

Such meager provisions show the failure of the House to achieve its goal of determining contests "under modern procedures which would provide efficient, expeditious processing of the cases and a full opportunity for both parties to be

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[93] 2 U.S.C. § 386–91.

[94] *Id.* § 392.

[95] *Id.* § 393.

[96] *Id.* § 394.

[97] *Id.* § 395.

[98] *Id.* § 396.

[99] *See infra* Part IV. The exact problem that had led to the Broad Seal War, abandonment of precedent in favor of an ad hoc process, would again rear its ugly head in the "Bloody Eighth," showing the failure of the FCEA to remedy even the known problems of contested elections. *See supra* Part II; *see also infra* Part IV.

[100] FED. R. CIV. P. 26–34.

[101] *See supra* Part II.A.

[102] *Compare* FED. R. CIV. P. 5.1(a) (codifying constitutional challenges to a statute for parties that file pleadings, motions, or other documents), *and* FED. R. CIV. P. 38(a) (preserving the right of trial by jury under the Seventh Amendment for civil actions), *with* 2 U.S.C. § 382(a) (requiring only notice to contestee when challenging an election).

[103] *See, e.g.*, Reed v. Cnty. Comm'rs of Delaware Cnty., 277 U.S. 376, 388 (1928) (holding that the Senate was "fully empowered and may determine [contested election procedures] without the aid of the House of Representatives or the Executive or Judicial Department").

heard."[104] The process set forward fails to meet the "modern" standard it was intended to embody when signed into law in 1969.[105] These failures are particularly egregious considering the stated goal of the FCEA to bring the procedures utilized in contested elections "into closer conformity with the Federal Rules of Civil Procedure."[106]

With only this minimal framework in place, there is little constraining Congress should it want to decide a contested election against the will of the voters. Although the Court has ruled that Congress may not simply exclude otherwise duly elected members,[107] so long as some amount of controversy can be stirred up regarding the result of the election, Congress can act unrestrained to choose the outcome it so desires. As the matter is nonjusticiable, the only court capable of passing meaningful judgment is the court of public opinion.[108] Instead of resolving the process for good, the FCEA provided only superficial advances, leaving the door open for future conniving. It was not long before its weaknesses were exposed.

IV. FAILURES OF CURRENT SYSTEM

Many of the failures of the current system came to the fore during "the Bloody Eighth,"[109] a contested election that would reveal the post-FCEA world as plagued by many of the same issues faced before the Act's passage. With its entire procedural framework nonmandatory, the Democratic majority simply ignored the FCEA as it steamrolled the Republican candidate in pursuit of a slightly more secure hold upon power within the House.[110]

This crisis grew out of the 1984 election for Indiana's Eighth District.[111] The contest pitted Frank McCloskey, the incumbent Democrat, against Rick McIntyre, two-term Republican state representative.[112] Despite already possessing a majority in the House without the seat, Democratic leadership felt

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[104] STAFF OF H. COMM. ON H. ADMIN., *supra* note 87, at 115–16.

[105] *See* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1304 (1975) (noting in relation to government action that "due process may require a trial type-hearing on a claim of eligibility when the consequences of a refusal are serious" (citing Willner v. Comm. on Character & Fitness, 373 U.S. 96 (1963))). If the composition of the US House of Representatives is not serious, what is?

[106] STAFF OF H. COMM. ON H. ADMIN., *supra* note 87, at 115.

[107] Powell v. McCormack, 395 U.S. 486, 522 (1969).

[108] *See* Roudebush v. Hartke, 405 U.S. 15, 19 (1972); DENBOER, BROWN & HAGERMANN, *supra* note 43, at 162–64.

[109] Kalt, *supra* note 53, at 57.

[110] Roberta Herzberg, *McCloskey versus McIntyre: Implications of Contested Elections in a Federal Democracy*, 16 PUBLIUS: J. FEDERALISM 93, 93–96 (1986).

[111] LEON PANETTA, RELATING TO ELECTION OF A REPRESENTATIVE FROM THE EIGHTH CONGRESSIONAL DISTRICT OF INDIANA, H.R. REP. NO. 99-58, at 4 (1985).

[112] *See* Herzberg, *supra* note 110, at 93.

compelled to push for the extra vote out of fear of potential defectors.[113] These defectors, conservative Democrats known as "Boll Weevils," were courted by Republicans in the build up to the 1984 election,[114] and seemed capable of defecting in the wake of a failed intra-party challenge to the eventual Speaker, Tip O'Neill.[115]

The initial returns of the race were incredibly close, showing a mere 72-vote lead for McCloskey on the night of the election.[116] However, various issues were found with the initial count, including arithmetic and punch-card related tabulation errors, alongside problems with proper procedure being followed to secure ballots.[117] Corrected returns submitted by a few counties in the days immediately after the election resulted in a 111-vote swing in favor of McIntyre, eliminating McCloskey's lead and instead putting McIntyre up by a mere 39 votes.[118] As McCloskey tried, and failed, to receive a mandamus order from a U.S. District Court, the Indiana secretary of state certified McIntyre as the winner by a 34-vote margin, a figure reached after yet another recount had altered the totals.[119]

Democrats challenged McIntyre's right to the seat before swearing in, ignoring Oaths First once again and requiring that he step aside and leave the seat vacant until an investigation could be conducted.[120] More shockingly, instead of proceeding via the procedures set forth by the fairly recent FCEA, the House sent the matter to the Committee on House Administration directly,[121]

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[113] *See* Jane Perlez, *Disgusted Liberal Plans to Retire*, N.Y. TIMES (Jan. 26, 1984) (noting, with regard to the previous Congress that "[t]he Speaker was initially afraid the Boll Weevils would bolt and that he wouldn't have a majority to support his speakership"); FOLEY, *supra* note 4, at 258.

[114] Steven V. Roberts, *Congress; Republicans Cultivating Swing Votes*, N.Y. TIMES (Sept. 17, 1984).

[115] Mary McGrory, *Despite Appearances, Tip Won*, WASH. POST (Dec. 4, 1984), https://www.washingtonpost.com/archive/politics/1984/12/04/despite-appearances-tip-won/8840300a-1885-4f4f-924f-74313d22f835/ [https://perma.cc/5EJW-FQTT]; *see also* Perlez, *supra* note 113.

[116] DISSENTING VIEWS FILED BY REPRESENTATIVES FRENZEL ET AL., RELATING TO ELECTION OF A REPRESENTATIVE FROM THE EIGHTH CONGRESSIONAL DISTRICT OF INDIANA, H.R. REP. NO. 99-58, at 4 (1985).

[117] *Id.* at 5–6.

[118] *Id.* at 5–6.

[119] *Id.* at 6.

[120] Margaret Shapiro & Dan Balz, *House Democrats Refuse to Seat GOP Lawmaker*, WASH. POST (Jan. 4, 1985), https://www.washingtonpost.com/archive/politics/1985/01/04/house-democrats-refuse-to-seat-gop-lawmaker [https://perma.cc/AHD8-CTDE].

[121] DISSENTING VIEWS FILED BY REPRESENTATIVES FRENZEL ET AL., RELATING TO ELECTION OF A REPRESENTATIVE FROM THE EIGHTH CONGRESSIONAL DISTRICT OF INDIANA, H.R. REP. NO. 99-58 at 2–3 (1985). Interestingly, even the report notes that the House initiating investigation on its own, as opposed to after a challenge has been brought by a losing candidate, was an extremely unusual step, although not totally unprecedented, having occurred only four times in the prior fifty years. *Id.* at 3.

where a three-member task force was appointed.[122] That task force was made up of two Democrats, Representatives Leon Panetta of California and William Clay of Missouri, along with Republican William M. Thomas of California.[123]

Before beginning their investigation, the task force set forth an organizational memo, including a statement of principles and operating rules that should be followed.[124] The second of these rules indicated that, despite the challenge not being brought under the FCEA, the task force would attempt to resolve issues in accordance with that framework, but only "to the extent that the orderly and timely consideration of issues can be handled . . . ."[125] In addition, the task force set forth the principle that it was not their "role to judge Indiana Election law."[126] Among the rules, the task force resolved to "complete and adopt an assessment of the vote in each country [sic]" which they would use "as a basis for the decision as to which ballots will not be recounted by the Task Force."[127]

The most important issue the task force had to confront was how to deal with absentee ballots that did not conform with state law.[128] According to state law, such ballots could not be counted.[129] However, at least five out of fifteen counties in the district had counted nonconforming ballots and had done so in such a way that they were intermingled with conforming ballots and thereby unable to be removed.[130] Resolving to "treat like ballots the same,"[131] the task force concluded that they could not simply apply a strict interpretation of state law against the nonconforming ballots of the other counties and dove deeper to decide how to handle each separate type of nonconforming ballot.[132] These differing nonconforming ballots, alike in that they all had some defect related to notarization or witness-confirmation, differed as to whether they had been sent to precincts on election day.[133] Unlike the intermingled ballots, the nonconforming ballots that had been sent to precincts here had been caught before counting.[134] As some precincts had mistakenly counted these ballots, those that had not been previously counted were now counted in furtherance of the resolution to "treat like ballots the same."[135]

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[122] *Id.* at 12.
[123] *Id.*
[124] *Id.* at 14.
[125] *Id.*
[126] *Id.*
[127] DISSENTING VIEWS FILED BY REPRESENTATIVES FRENZEL ET AL., *supra* note 121, at 15.
[128] FOLEY, *supra* note 4, at 260.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 261.
[133] *Id.*
[134] FOLEY, *supra* note 4, at 261.
[135] *Id.* at 261–62.

This left only a subset of ballots that were nonconforming, but had not been sent to precincts.[136] Despite being substantially similar in their defects, these ballots were distinguished by the majority, who refused to count them.[137] The majority report justifies this decision by stating that they were respecting the decisions of county clerks.[138] In reality, by the point this decision was being made, all the other ballots had been counted and McCloskey held a four-vote lead.[139] Fearing that this last batch of ballots may lean more towards McIntyre,[140] the Democrats on the task force denied them, guaranteeing the seat for their partisan colleague.[141]

Despite coming after the FCEA, the Bloody Eighth contest saw many of the same problems that plagued contested elections before the Act's attempted standardization. These failures were manifest from the start as, despite the existence of the FCEA, the Democrats of the 99th Congress chose to bypass it when the chips were down.[142] With an alternative route available, the FCEA was shown to be totally toothless, unable to bind the House in just the situation it was designed to resolve. Nonetheless, there is some evidence that the mere existence of the FCEA may have had some chilling effect as the task force felt it necessary to indicate that they would operate under its auspices.[143]

Untethered from procedural limitations, the Committee compounded its problems by counting as they went. With the count continuing in the background as they made each ruling, the Committee was always aware of the state of the recount. This awareness created the potential for exactly the situation that played out, one party stopping the count as soon as they could guarantee victory.

Finally, the very makeup of the Committee and subsequent taskforce paved the way for partisan meddling. Made up of dedicated political partisans, each of these bodies had obvious interest in the outcome of the contest and the power to act on that interest should it be politically feasible.

V. SOLUTIONS

With the FCEA having failed to prevent a majority party from taking for itself an extra seat, new processes must be set forward to prevent such undemocratic results in the future. The root of this issue stems, as the historical evidence has shown,[144] from the lack of restraint upon a majority party's ability

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[136] *Id.* at 262.

[137] LEON PANETTA, RELATING TO ELECTION OF A REPRESENTATIVE FROM THE EIGHTH CONGRESSIONAL DISTRICT OF INDIANA, H.R. REP. NO. 99-58, at 37 (1985).

[138] *Id.*

[139] FOLEY, *supra* note 4, at 263.

[140] *Id.* at 261.

[141] *Id.* at 263.

[142] DISSENTING VIEWS FILED BY REPRESENTATIVES FRENZEL ET AL., *supra* note 121, at 49.

[143] H.R. REP. NO. 99-58, at 14.

[144] *See supra* Parts II.B, IV.

to ignore justice when the benefits outweigh the drawbacks. For the Whigs in the Broad Seal War and Democrats in the Bloody Eighth, securing greater representation meant the immediate benefit of securing control of the House.[145] The price for this control, some public backlash,[146] and the risk of eroding norms,[147] was minor and otherwise far away.[148]

With gain at hand and cost so far away, the choice which otherwise seems so difficult to make, as evidenced by the relative rarity with which seats have been "stolen," becomes at least possible if not necessarily easy. Worryingly, these costs may be decreasing due to factors common to modern politics, particularly increasing polarization.[149] With voters increasingly seeing the opposing party as not only wrong,[150] but potentially malevolent,[151] and falling willingness to vote for candidates of the opposition party,[152] the cost of bad behavior falls. Whereas a politician in less polarized times could reasonably fear being ousted by a candidate of the opposing party should they step out of line, the prevalence of "safe" seats severely undermines this consideration.[153] The

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[145] *See supra* Part II.B.

[146] *See, e.g.*, Julian E. Zelizer, *A 1985 Recount Is Suddenly Relevant Again*, ATLANTIC (Nov. 12, 2018), https://www.theatlantic.com/ideas/archive/2018/11/florida-recounts-message-matters/575614/ [https://perma.cc/JV9F-N69V] (stating that, with regard to public perception of the Bloody Eighth, Democrats "didn't understand that Republicans had succeeded in convincing the public that something was amiss—that, perhaps, the very legitimacy of the Democratic majority was suspect" and citing to the handling of the contest as a potential cause for the stunning Republican takeover of the House in 1994).

[147] FOLEY, *supra* note 4, at 267 (noting the possibility for the erosion of norms, but acknowledging that Republicans passed up engaging in similar behavior when given the chance during the 1994 election for Connecticut's Second Congressional District).

[148] *See* Zelizer, *supra* note 146 (stating that Democrats failed to "anticipate how the Bloody Eighth would embolden Republicans" and lead to a party consensus view led by Newt Gingrich that would eventually lead to Republicans taking control of the House in 1994).

[149] Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/Q54X-G2BR].

[150] PEW RSCH. CTR., AS PARTISAN HOSTILITY GROWS, SIGNS OF FRUSTRATION WITH THE TWO-PARTY SYSTEM 6 (Aug. 2022), https://www.pewresearch.org/wp-content/uploads/sites/20/2022/08/PP_2022.09.08_partisan-hostility_REPORT.pdf [https://perma.cc/9LEH-S65X].

[151] *See generally* Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCI. 533 (2020).

[152] *Id.* at 535.

[153] Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, BRENNAN CTR. FOR JUST. (Aug. 11, 2022), https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [https://perma.cc/X6FH-SH45]; Susan Davis, *U.S. House Loses More 'Swing' in 2022*, NPR (May 29, 2022), https://www.npr.org/2022/05/29/1100980188/u-s-house-loses-more-swing-in-2022 [https://perma.cc/S5YS-LA3H].

rise of intra-party challenges does prevent a possible check on this trend,[154] but with "safe" seats often being among the most polarized districts,[155] the chance of a more moderate, norm-following challenger prevailing seems unlikely.

Some solutions, including the first that will be discussed in depth here, may sidestep these considerations entirely by "removing" the power of deciding from the hands of members and instead placing it elsewhere. Absent such a solution, the falling costs of unjust contested election resolutions must be counteracted to improve, or at least maintain, the balance that has so far done a passable job of preventing partisan shenanigans when deciding contested elections. This could be imposed through Congress itself engaging in some amount of hand-tying, judicial intervention to accomplish the same, or greater scrutiny from civic society to hold bad actors accountable for their misdeeds.

Among the various potential solutions, the first considered is putting in place an arbitration process. This process would best be accomplished by empowering parties to agree upon neutral arbiters and braced by a sufficiently coercive fallback mechanism to incentivize both parties to cooperate for fear of a worse outcome. Beyond this fairly extreme measure, either Congress or the Court could improve the process by guaranteeing greater procedural rights to participants.

A. *Arbitration*

The removal of final authority from Congress represents the best solution for the issue at hand, but also the trickiest to implement and least likely to be agreeable to parties who may want another tool in their toolbox should the need arise.

1. *Empowering Parties to Agree Upon Neutral Arbiters*

When casting about for a body in which to vest such powers, perhaps the most natural destination is the Supreme Court. The Court has, until recently,[156] existed in popular conception as the least political of the three branches of our national government,[157] set above the squabbling of elected officials by

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[154] Li & Leaverton, *supra* note 153.

[155] *Competitive Districts*, LEAGUE OF WOMEN VOTERS OF MONT., https://my.lwv.org/montana/competitive-districts [https://perma.cc/D382-TGVR].

[156] *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/42R2-QDU5].

[157] *See* PEW RSCH. CTR., PUBLIC'S VIEWS OF SUPREME COURT TURNED MORE NEGATIVE BEFORE NEWS OF BREYER'S RETIREMENT 5 (Feb. 2022), https://www.pewresearch.org/wp-content/uploads/sites/20/2022/02/PP_2022.02.02_views-of-SCOTUS_REPORT.pdf [https://perma.cc/V6UB-V924]. This modern view differs greatly from both reality and historical conceptions of the Court as a political beast. *See* Joshua Zeitz, *The Supreme Court Has Never Been Apolitical*, POLITICO (Apr. 3, 2022),

principles such as lifetime appointment and norms of judicial impartiality.[158] Indeed, when reviewing the qualities of the Court, one finds much to like: a body of legal experts, well-equipped to interpret election statutes when deciding upon the validity of ballots, and sufficiently removed from the two-party system so as not to have immediately identifiable loyalties to one candidate over another.

However, as has already been demonstrated, locating the power in the Court is legally impossible[159] and, further, likely to upset the delicate balance kept by the separation of powers. The legal impossibility of the matter stems from the long-settled precedent that decisions of which candidate is entitled to a seat in Congress represent nonjusticiable political questions.[160] Leaving aside the possibility that the Court is already an increasingly political institution,[161] allowing the court final say on membership of a coequal branch would greatly upset our system of checks and balances.[162]

Although the Court is out of contention, the qualities it embodied should not be forgotten. Despite the prevalence of lawyers in the body,[163] Congressional members are *certainly* not experts in resolving conflict,[164] nor interpreting

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https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482 [https://perma.cc/6GY5-K7RW] ("From the nation's founding through the mid-20th century, there was no expectation that justices remain aloof from partisan politics. Men . . . moved fluidly between Congress, statehouses and the Supreme Court."). Although Alexander Hamilton saw the judiciary as "from the nature of its function . . . the least dangerous to the political rights of the Constitution." THE FEDERALIST No. 78 (Alexander Hamilton).

[158] Lauren Cahn, *Why Do Supreme Court Justices Serve for Life?*, READER'S DIGEST (Mar. 1, 2022), https://www.rd.com/article/why-do-supreme-court-justices-serve-for-life/ [https://perma.cc/5XBK-BH5G] (quoting Burt Neuborne, a law professor and founding Legal Director of the Brennan Center for Justice as saying that "The framers believed it important to separate the legislative, executive, and judicial powers of government, and they believed it was particularly important to create a judiciary that would be independent of popular opinion").

[159] Barring an amendment to the Constitution.

[160] Roudebush v. Hartke, 405 U.S. 15, 19 (1972).

[161] PRINCIPLES OF THE L. OF ELECTION ADMIN.: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 205, cmt. a (AM. L. INST. 2019) (noting that "even ostensibly nonpartisan institutions of government, like courts, are increasingly portrayed in the media and thus perceived by some members of the public to be susceptible to partisan bias (whether intentional or not) in their decisions").

[162] *See* Story, *supra* note 23; THE FEDERALIST NO. 51 (James Madison) ("It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices.").

[163] Adam Bonica, *Why Are There So Many Lawyers in Congress?*, 45 LEGIS. STUD. Q. 253, 255 n.2, 256 (2020) (showing that, from the 1st to 115th Congresses, 62% of House seats and 71% of Senate seats were held by lawyers and showing that the percentage of legislators with a background in law in Congress is far greater than in comparable nations).

[164] *See, e.g.*, Emma Petty Addams & Jennifer Walker Thomas, *Is Congress Resolving Conflict, or Escalating it for Political Profit?*, DESERETNEWS (Mar. 15, 2021), https://www.deseret.com/opinion/2021/3/15/22328119/hr-1-voting-rights-for-the-people-

statutes.[165] Finally, as seen earlier, their interest in the outcome of election contests can be astronomically high,[166] with control over the body representing not just the ability to enact one's legislative agenda, but also to hire more staff,[167] secure more prestigious and publicly noticeable assignments,[168] engage in oversight of the administrative state,[169] and, as recently seen, better hold the media's spotlight.[170]

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act-congress-conflict-compromise-partisanship [https://perma.cc/37DJ-U7ZF]; Burgess Everett & Eleanor Mueller, *Bank Failures Revive Bitter Senate Democratic Infighting*, POLITICO (Mar. 14, 2023), https://www.politico.com/news/2023/03/14/svb-senate-democrat-infighting-00087097 [https://perma.cc/3XLN-BM8V]; Clare Foran, Melanie Zanona, Haley Talbot, Kristin Wilson & Annie Grayer, *McCarthy Will Not Run for Speaker Again After House Votes to Oust Him*, CNN (Oct. 3, 2023), https://www.cnn.com/2023/10/03/politics/mccarthy-gaetz-vote-motion-to-vacate/index.html [https://perma.cc/8C3Y-RTXC].

[165] As a start, it is widely acknowledged that it is Congressional staffers and not members who do the vast majority of drafting. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 906 (2013). Although these staffers indicated significant knowledge of canons of statutory interpretation and indicated that they affected how legal rules were drafted, there were significant gaps in knowledge. *Id.* at 906–07 (noting that "there were a host of canons that our respondents told us that they do not use, either because they were unaware that the courts relied on them or despite known judicial reliance").

[166] *See supra* Parts II.B, IV.

[167] *See, e.g.*, *Committee Funding for the 116th Congress: Hearing Before the Committee on House Admin.*, 116th Cong. 29 (2019) (statement of Elijah E. Cummings, Chairmain, H. Comm. on Oversight and Reform) (stating that funding for his Committee was sufficient for twenty-five staffers, with fifteen allocated to the majority and ten to the minority).

[168] This is perhaps most important for committee appointments and particularly appointments to chairpersonships which are controlled by the majority party. JACOB R. STRAUS, CONG. RSCH. SERV., RL33313, CONGRESSIONAL MEMBERSHIP AND APPOINTMENT AUTHORITY TO ADVISORY COMMISSIONS, BOARDS, AND GROUPS 2–3 (2023).

[169] Congressional oversight of the administrative state includes things such as the power to investigate, acting as "the eyes and the voice" of the people. Trump v. Mazars USA, LLP, 591 U.S. 848, 865 (2020). This power is viewed as necessary as without it Congress "cannot legislate wisely or effectively in the absence of information." McGrain v. Daugherty, 273 U.S. 135, 175 (1927). Wielding such authority, the party in power is better able to generate evidence supporting their political positions and pressure agencies to enforce laws in line with the preferences of the majority. *See ArtI.S8.C18.7.1 Overview of Congress's Investigation and Oversight Powers*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C18-7-1/ALDE_00013657/ (on file with the *Ohio State Law Journal*).

[170] *See, e.g.*, BENNIE G. THOMPSON ET AL., SELECT COMM. TO INVESTIGATE THE JAN. 6th ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663 (2022). The investigation of the attempted January 6th insurrection garnered significant media attention, including a peak of twenty million live viewers across eleven cable networks. Ted Johnson, *January 6th Committee Hearing Draws 17.7 Million Viewers, A Falloff from June's Primetime Session*, DEADLINE (July 22, 2022), https://deadline.com/2022/07/january-6th-

However, the location of the power within Congress is not all bad. As previously seen, it has long been thought that such authority is necessary for a legislature to maintain its independence.[171] Combining these considerations, a solution comes forth: the power of deciding contested elections should remain within Congress, but out of the hands of members.

Deciding elections via this "arbitration" approach is by no means unprecedented and has been argued for in the past in various contexts.[172] Historical usage of such procedures can be found in both the state and federal level. The most effective state example comes from Minnesota's 1962 gubernatorial election.[173] There, a very tight race led to a series of challenges that eventually put the matter before a panel of three judges that representatives of each side agreed to.[174] This panel of one Democratic-appointee, one Republican-appointee, and a Democratic-appointee who had been later elevated to a higher appointment by a Republican left both sides assured as to the fairness of the decision.[175]

At the federal level, a similar approach was employed to resolve the Tilden-Hayes election.[176] There, a fifteen-member panel was created to resolve the dispute, with ten members of Congress (split evenly along partisan lines) alongside five Supreme Court justices, two leaning Democratic and two Republican who then worked together to pick the last member.[177] Here, however, unlike in Minnesota, the "neutral" member was suspected of, and ultimately seemed to decide based upon, partisan leanings.[178]

Setting forth a requirement for the two parties to come together to reach an agreement on who will serve as arbiter provides the greatest possibility of a truly neutral, expert party adjudicating the conflict. While the arbitration approach is

committee-hearing-draws-17-7-million-a-falloff-from-last-primetime-session-1235075449/ [https://perma.cc/9NAZ-T83T].

[171] *See supra* Part II.

[172] *See, e.g.*, PRINCIPLES OF THE L. OF ELECTION ADMIN.: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 304 (AM. L. INST. 2019) (proposing a "Presidential Election Court" made up of three judges appointed by the Chief Justice of the state supreme court in which a Presidential election dispute occurs); Rebecca Green, *Arbitrating Ballot Battles?*, 104 KY. L.J. 699, 703 (2015); Edward B. Foley, *Electoral Dispute Resolution: The Need for a New Sub-Specialty*, 27 OHIO ST. J. ON DISP. RESOL. 281, 281 (2012); FOLEY, *supra* note 4 at 249–51.

[173] Iric Nathanson, *The Minnesota Gubernatorial Election Recount of 1962*, MINNPOST (Nov. 7, 2022), https://www.minnpost.com/mnopedia/2022/11/the-minnesota-gubernatorial-election-recount-of-1962/ [https://perma.cc/HZN5-X2Z8].

[174] Zac Farber, *Politics of the Past: The Razor-Thin Election of 1962*, MINN. LAW. (Dec. 7, 2016), https://minnlawyer.com/2016/12/07/politics-of-the-past-the-razer-thin-election-of-1962/ [https://perma.cc/NU65-ZFZL].

[175] Green, *supra* note 172, at 710–12.

[176] Lina Mann, *The Election of 1876*, WHITE HOUSE HIST. ASS'N (Apr. 22, 2021), https://www.whitehousehistory.org/the-election-of-1876 [https://perma.cc/KL62-F937].

[177] FOLEY, *supra* note 4, at 130–31.

[178] *Id.* at 132, 138–39.

imperfect, it represents the finest solution to the problems inherent in deciding contested Congressional elections. By placing power outside the immediate unilateral control of either party, partisan bias is most effectively neutralized.

2. *The Necessity of a Fallback Mechanism*

However, merely asking the two sides to come to an agreement on adjudicators is not enough. There must also be an underlying mechanism in the event that the parties are unable to reach an agreement. In deciding upon this mechanism, the lessons of the Ohio Redistricting Commission should be heeded.[179]

The Commission came into existence with overwhelming bipartisan support in 2015.[180] In an attempt to combat rampant gerrymandering,[181] the plan set forth a slate of reforms, expanding the Commission to guarantee greater representation of the minority party,[182] diversifying membership requirements to potentially include more than just elected officials,[183] tightening rules on allowable districts, and putting in place incentives for cooperation.[184] This last point was, for our purposes, most importantly accomplished through a rule that made maps approved without the support of at least two members of each party remain in place for only four years.[185] In contrast, a map with sufficient bipartisan support would last until the next redistricting cycle a decade later.[186] At the time, it was thought that fear of electoral uncertainty would lead the otherwise controlling majority to compromise, reasoning that, in what had

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[179] *See* League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379, 406–08 (Ohio 2022) (finding beyond a reasonable doubt that the Ohio Redistricting Commission, despite being established as a bipartisan initiative, did not even attempt to draw a district plan that complied with the rules set forth in the Ohio constitution).

[180] OHIO REDISTRICTING COMM'N, https://www.redistricting.ohio.gov/ (on file with the *Ohio State Law Journal*); *Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Bipartisan_Redistricting_Commission_Amendment,_Issue_1_(2015) [https://perma.cc/6A8G-MY4Q] (showing that the Issue passed with over 70% of the vote).

[181] Jim Siegel, *Ohio Legislators in Both Parties Want New Congressional-Redistricting Method*, COLUMBUS DISPATCH (Oct. 9, 2015), https://www.dispatch.com/story/news/politics/2015/10/09/ohio-legislators-in-both-parties/23578783007/ [https://perma.cc/VJ29-CFKA].

[182] OHIO CONST. art. XI, § 1(a); *see also* Michael Li & Eric Petry, *Redistricting Reform Wins Big in Ohio*, BRENNAN CTR. FOR JUST. (Nov. 5, 2015), https://www.brennancenter.org/our-work/analysis-opinion/redistricting-reform-wins-big-ohio [https://perma.cc/EMP8-36VG].

[183] OHIO CONST. art. XI, §§ 1(a)(4)–(7); *see also* Li & Petry, *supra* note 182.

[184] OHIO CONST. art. XI, §§ 3–6; *see also* Li & Petry, *supra* note 182; *Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015)*, *supra* note 180.

[185] OHIO CONST. art. XI, § 8(C)(1).

[186] *Id.* art. XI, § 8(B).

historically been a purple state, no party could guarantee holding control four years into the future.[187] Rather than risk giving the opposition a chance to make the maps for six years should they take control, a majority party would instead compromise on an initially marginally worse map to avoid the risk of a totally gerrymandered map being imposed on them in the near future.[188]

Instead, the system broke down when put into action, resulting in a slew of suits,[189] and calls for new reform after only one cycle.[190] Many critics have pointed to the lack of a proper fallback option as being the primary cause.[191] Whereas other state's redistricting schemes explicitly called upon another institution to implement a map should the normal processes fail to put forward a satisfactory version, no such solution exists in Ohio.[192] Instead, the Republican controlled Commission chose to "run out the clock,"[193] simply refusing to comply with statutory requirements until federal courts felt compelled to step in and approve "a map that does not fully comply with other aspects of the Ohio Constitution."[194] Invoking *Purcell v. Gonzalez*,[195] a decision that primarily stands for the principle that "federal courts ordinarily should not enjoin a state's

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[187] Li & Petry, *supra* note 182.

[188] *Id.*

[189] *See, e.g.*, League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379, 379 (Ohio 2022); Gonidakis v. LaRose, 599 F. Supp. 3d 642, 642 (S.D. Ohio 2022).

[190] Andrew J. Tobias, *Gov. Mike DeWine Served on Redistricting Commission that Violated Ohio Constitution. Now He Wants to Ban Politicians from the Process*, CLEVELAND.COM (Feb. 17, 2023), https://www.cleveland.com/news/2023/02/gov-mike-dewine-served-on-redistricting-commission-that-violated-ohio-constitution-now-he-wants-to-ban-politicians-from-the-process.html [https://perma.cc/US3A-KY6U] (showing support from Ohio's Republican Governor to reform the redistricting system).

[191] *See, e.g.*, Susan Tebben, *Redistricting: One Year Later, Ohio a Unique, Flawed Case*, OHIO CAP. J. (Sept. 2, 2022), https://ohiocapitaljournal.com/2022/09/02/redistricting-one-year-later-ohio-a-unique-flawed-case/ [https://perma.cc/84AT-AW84]; Tierney Sneed, *A Fair Maps Success Story or 'Multi-Layered Stages of Dante's Hell'? Where Redistricting Commissions Worked—and Didn't Work—This Cycle*, CNN (June 18, 2022), https://www.cnn.com/2022/06/18/politics/redistricting-commission-takeaways-success/index.html [https://perma.cc/AJ9S-K34D] (quoting Brennan Center senior counsel for Democracy, Michael Li, as saying that "Ohio's reforms were designed for the assumption that Ohio was a battleground state, and it just isn't anymore . . . . And now Republicans are like, 'Well, we'll pass a map. It's only good for four years, and then we'll redraw the map in four years. We don't have a problem with that'").

[192] Sneed, *supra* note 191; *see, e.g.*, MD. CONST. art. III, § 5 (directing the state's governor to create a plan that becomes law if the state General Assembly fails to pass a map within 45 days); VA. CONST. art. II, §§ 6-A(f)–(g) (directing the Supreme Court of Virginia to establish districts should the General Assembly fail to adopt them by established deadline).

[193] Daniel Nichanian, *In Ohio's Redistricting Redo, a New Justice and a New Speaker Will Steer the Ship*, BOLTS (Jan. 12, 2023), https://boltsmag.org/ohio-redistricting-supreme-court-appointment/ [https://perma.cc/T383-S8VJ].

[194] Gonidakis v. LaRose, 599 F. Supp. 3d 642, 666, 676 (S.D. Ohio 2022).

[195] Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

election laws in the period close to an election,"[196] the Southern District of Ohio decided it was compelled to intervene, lest Ohio "not have an election at all."[197] The remedy set forth by the court was the imposition of a map that was "in direct contravention of the 2015 redistricting amendments."[198]

What the redistricting debacle in Ohio shows is the necessity of a coercive fallback option. While some incentive did exist to compromise in the form of maps that would stay in place longer, that benefit was far lower than the potential benefit of seats gained through more strongly gerrymandered maps. In a different system, such as those seen in Maryland and Virginia,[199] partisans of the majority party would have had no avenue through which to pursue this gain. Instead of running out the clock and getting a favorable map, they would have run straight into a deadline and had a map imposed upon them. It was the lack of this final piece of uncertainty, a third party standing in the wings ready to step in to impose their own solution should the process stall, that led to the failure of Ohio's Redistricting Commission.

For deciding contested elections, that means there must be a method for selecting an impartial arbitrator should the two sides prove unable to reach an agreement. Although it is a bit out of sorts in a legal world so heavily concerned with notions of notice, uncertainty is particularly beneficial in such a setting. By making the ultimate decision uncertain, each side has significant incentive to compromise, following the old saying: "better the devil you know than the devil you don't." Whoever fulfills this role should be as disinterested as possible from the proceedings and partisan bias, as otherwise one party could be incentivized to wait out the clock, safe in the knowledge that a friendly political partisan will ultimately decide in their favor.

Now recognizing that a backstop must be in place, the nature of the backstop itself must be decided. The Supreme Court again comes to mind as the most obvious option. The Court still boasts the same benefits as before, but now stands on potentially solid ground regarding questions of justiciability and sits far more restrained in their influence over a coequal branch than had they adjudicated the matter themselves. In addition, the reasoning of locating the power to decide contested elections within the legislature, the body's self-interest in maintaining its independence, should serve as further incentive to reach compromise lest they leave the decision up to outsiders.

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[196] Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (mem.) (Kavanaugh, J., concurring).

[197] *Gonidakis*, 599 F. Supp. 3d at 667 ("This case thus presents the rare moment when the logic underpinning *Purcell* actually calls for intervention. Why? Because without judicial relief in some form, the evidence indicates that Ohio may not have an election *at all*—and certainly not one compliant with state election laws and deadlines. Unlike the typical *Purcell* case, we are not being asked to enjoin an existing state law in a manner that would disrupt an otherwise functional election. Instead, we're asked to ensure an election happens in the first place. And we're asked to intervene at the last possible moment consistent with state law." (footnote omitted)).

[198] *Id.* at 679 (Marbley, C.J., concurring in part and dissenting from the remedy).

[199] *See supra* note 192 and accompanying text.

The increasingly political Court[200] may, however, fail to meet the standards of unpredictability and lack of partisan bias that are needed to ensure maximum effectiveness in this situation. But no other obvious candidate comes to mind. The other two branches are even worse on these measures. Trying to keep this decisionmaker a federal actor potentially leads one to the military, an avowedly unpolitical and thoroughly trusted institution in American life, but that violates countless sacred maxims of democratic governance, most notably civilian supremacy over the military.[201] Maybe the name of a citizen could be drawn at random, like a political version of the draft for one unlucky soul.[202] This undoubtedly leaves the outcome uncertain, but fails on other important considerations, such as guaranteeing any knowledge whatsoever of the stakes of such a decision or potential candidates to act as the ultimate adjudicator. With all other options failing, the Supreme Court stands alone.[203]

If concerns of Court bias are too great to ensure their service as a viable fallback, further uncertainty can be artificially added. Instead of all Justices deciding the matter together, some smaller subset could be randomly selected to make the selection. Even this procedure could tend towards one party or another given the composition of the Court at that time, but would require that one of the parties be prepared to "roll the dice" and risk losing. In the face of such unbearable uncertainty, finding a mutually agreeable adjudicator should appear the far better option. Although such an unorthodox remedy may seem extreme, it should be implemented to ensure compliance in a political climate in which "nuclear" options are more feasible than ever before.[204]

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[200] *See, e.g.*, Matthew Levendusky et al., *Has the Supreme Court Become Just Another Political Branch? Public Perceptions of Court Approval and Legitimacy in a Post-*Dobbs *World*, 10 SCI. ADVANCES 1 (2024), https://www.science.org/doi/10.1126/sciadv.adk9590 (on file with the *Ohio State Law Journal*).

[201] *See generally* KATHLEEN J. MCINNIS, CONG. RSCH. SERV., IF11566, CONGRESS, CIVILIAN CONTROL OF THE MILITARY, AND NONPARTISANSHIP (2020).

[202] *Cf. Return to the Draft*, SELECTIVE SERV. SYS., https://www.usa.gov/selective-service [https://perma.cc/YXG5-KFJ9].

[203] The potential of ordering an entirely new election may come to mind, but this is severely disfavored by current jurisprudence. *See* North Carolina v. Covington, 581 U.S. 486, 488–89 (2017) (vacating a District Court's remedial order for special elections after improper racial gerrymandering was found in North Carolina's districting scheme). The *Covington* court recited principles of equity and concluded that the District Court had not adequately weighed each side when reaching its decision to order special elections. *Id.* Upon remand, the Middle District of North Carolina concluded that "a special election would significantly interfere with the ordinary processes of state government" and was therefore an inappropriate remedy. Covington v. North Carolina, 270 F. Supp. 3d 881, 899 (M.D.N.C. 2017).

[204] *See, e.g.*, Zachary B. Wolf, *What to Know About the Senate's Nuclear Option*, CNN (Jan. 11, 2022), https://www.cnn.com/2022/01/10/politics/nuclear-option-senate-filibuster/index.html [https://perma.cc/DL9J-X83N]; Alex Seitz-Wald, *The Nuclear Option: What It Is and Why It Matters*, NBC NEWS (Apr. 6, 2017), https://www.nbcnews.com/politics/congress/nuclear-option-what-it-why-it-matters-n742076 [https://perma.cc/6GNP-8ANE].

B. *Congressionally Mandated Due Process*

A less extreme, but still potentially effective option within the Congressional wheelhouse is expanding upon the procedural rights set forth by the FCEA. The substance of these rights could easily be drawn from existing procedures in other analogous settings, such as those held by parties in a civil action. The most obvious of these is the imposition of a more robust and complete discovery process that could allow parties greater ability to get at the truth of a matter.[205] Falling under a conception of a decision based upon the record,[206] Congress could put in place a mechanism to prevent the Committee from knowing the "live count" to prevent any temptation of outcome-based decision making as seen in the Bloody Eighth.[207] In addition, statutory prescription for Due Process rights that exist in civil proceedings yet are absent in Congressional contested elections cases due to justiciability concerns could serve as further guarantee of a just process.[208]

Perhaps most importantly, these rights must be guaranteed in all contested elections cases and act as a mandatory rather than just a potential process. These guarantees shut the door on situations such as that seen in the Bloody Eighth, where Democrats gamed the process to avoid employing the existing procedural framework so recently enacted via the FCEA.[209] While that case truly broke down upon substantial and not process grounds, it nonetheless shows the extent of abuse possible within the current system. While no egregious injustices have been perpetrated because of this gap thus far, as the saying goes, "an ounce of prevention is worth a pound of cure."

Any expansion of procedural rights grants a few important gains for achieving a better contested elections process. First, the expansion of rights guarantees a minimum floor of participation that is currently missing. While an existing framework does exist via the FCEA, that process is not currently guaranteed, nor is it sufficient to meet modern conceptions of procedural justice.[210] While a more just process does not necessarily result in more just

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[205] Borrowing the Federal Rules of Civil Procedure, with minor tweaks, would appear to be the easiest solution. *See supra* note 96 and accompanying text.

[206] *See* Friendly, *supra* note 105; *see also infra* note 210 and accompanying text.

[207] *See supra* Part IV.

[208] *See supra* notes 100–103 and accompanying text.

[209] *See supra* Part IV.

[210] *See, e.g.*, Friendly, *supra* note 105, at 1279–95 (setting forth a list of ten procedures due process requires). Comparing Judge Friendly's list to the procedures guaranteed for contested elections, one finds many deficiencies. While many of the procedures from the list are present (notice, opportunity to present reasons against the proposed action, opportunity to present evidence, right to know opposing evidence, requirement for tribunal recordkeeping, and the requirement for the tribunal to prepare written findings and reasons), others are missing. *Id.* at 1280–87, 1291–92. There is no guarantee to call witnesses, nor to cross-examine any adverse witnesses that may be allowed. *Id.* at 1282–87. As no framework is set forth for the basis of contested elections decisions, there is similarly no guarantee of a decision based only upon the evidence presented. *Id.* Although counsel has typically been

outcomes in every case, it does grant those facing injustice greater ability to make their case, if not to the tribunal they stand before, then to the broader public who holds ultimate authority in our democratic system.

Second, expanding procedural rights could provide normative gains. This comes about via a few avenues. The initial passage of such a rights package sends a message about the importance of fair and just resolution of election contests.[211] Further, explicitly bringing the process in line with that of a civil proceeding could bring with it many of the expectations of justice and impartiality associated with that system.[212]

Although these gains are less of a guarantee than those offered by complete removal of the power from Congressional hands, they nonetheless raise the cost of bad behavior and thereby work in favor of ensuring more just outcomes.

C. *Judicially Mandated Due Process*

Outside of the halls of Congress, courts could also step in to guarantee an expansion of procedural rights in contested elections cases. This would require courts to differentiate the nonjusticiable political question presented by determination of who is entitled to office versus the procedural issues in need of bolstering via Due Process protections.[213] The Court has already shown some willingness to step in on questions pertaining to seating of Congressional members, but not yet to guarantee procedural Due Process rights.[214]

Expansion of procedural rights via this avenue would have many of the same positive effects as if done by Congress itself. Just like in that scenario, the floor for procedural justice is raised, providing more space for a candidate facing injustice to "make a scene" and garner public support.

Normative value could still be gained, albeit in a slightly different manner. Instead of the self-policing potential that could come about from Congressional adoption, judicial adoption puts Congress on notice that they are being watched. The potential for court intervention represents a serious risk for potential wrongdoers, as stepping on the rights of an adversary could garner judicial chiding and thereby the threat of a negative public spotlight being cast upon

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allowed, there is no statutory guarantee of such a right. *Id.* at 1287–91. Perhaps most fundamentally, the tribunal is not unbiased as it is necessarily made up of political partisans. *Id.* at 1279–80.

[211] *See* BRIAN ALEXANDER, A SOCIAL THEORY OF CONGRESS: LEGISLATIVE NORMS IN THE TWENTY-FIRST CENTURY 17–37 (2021) (arguing from an explicitly constructivist perspective for the value of norm-setting as a continuing means of regulating congressional behavior).

[212] *See generally* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

[213] *See supra* note 192 and accompanying text.

[214] *See* Powell v. McCormack, 395 U.S. 486, 547 (1969) (finding that the Senate had improperly excluded a duly elected member without a proper justification of violation of standing requirements provided by the Constitution).

them. Fearing this, members would have a significant incentive to allow a fair process to play out, even if their ultimate intention is to undermine it on substantive grounds.

D. *Public Pressure*

The last solution proffered here is also the least exact, but still retains potential to be effective. As mentioned in the two preceding solutions, the ultimate benefit of greater procedure towards achieving just outcomes stems largely from the threat of public backlash. While greater procedures give a party more space to make a compelling and convincing case to a public audience, they are useless without an ability to reach that audience. In this regard, media coverage of such proceedings is crucial to connect the process to the public who may ultimately hold bad actors accountable.

Recent political events have shown the ways in which more complete and robust media coverage of political process can draw public attention. This was perhaps most effectively done by the United States House Select Committee on the January 6 Attack which drew in a viewership rivalling even popular NFL matchups in size.[215] While contested elections cases may not be able to offer similar drama to that seen in the January 6 Hearings, there is further evidence that the public is interested in even typically mundane actions of Congress so long as the stakes are properly laid out and coverage is well-produced.[216]

While much of the onus in elevating media coverage lies with media companies, Congress can help them achieve a more palatable product for consumers in the interest of drawing greater public attention. The coverage of the election for Speaker of the House that ultimately saw Kevin McCarthy prevail after fifteen votes demonstrates this.[217] Instead of the usual coverage of C-SPAN focusing merely on the dais, coverage of the votes for Speaker utilized a greater variety of cameras and angles, providing a new and more complete

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[215] *Compare* John Koblin, *At Least 20 Million Watched Jan. 6 Hearing*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/live/2022/06/09/us/jan-6-hearings [https://perma.cc/Q3VM-RCNP], *with* Brad Adgate, *The Audience Disparity of NFL Games and Everything Else Widens*, FORBES (Jan. 12, 2023), https://www.forbes.com/sites/bradadgate/2023/01/12/the-audience-disparity-of-nfl-games-and-everything-else-widens/?sh=5cea11a113a6 [https://perma.cc/Z28P-3EMX] (stating that NFL games "accounted for 94 of the 100 most watched telecasts" in 2022 with an average viewership of 16.7 million).

[216] Sarah Krouse, *The House Speaker Drama Has One Winner: C-SPAN*, WALL ST. J. (Jan. 6, 2023), https://www.wsj.com/articles/the-house-speaker-drama-has-one-winner-c-span-11673017215 [https://perma.cc/KXQ3-DDER].

[217] Barbara Sprunt & Susan Davis, *Kevin McCarthy Is Elected House Speaker After 15 Votes and Days of Negotiations*, NPR (Jan. 7, 2023), https://www.npr.org/2023/01/06/1147470516/kevin-mccarthy-speaker-of-the-house [https://perma.cc/X4KU-W8KV].

view of the process.[218] The promise of this approach was evident to broadcasters as well with C-SPAN's director of editorial operations saying, "Those visuals are really speaking to viewers . . . . It's helping to tell the story of this speaker election. Now, imagine if we were able to do that when there's a major piece of legislation. I think that it would be far more engaging for the American people . . . ."[219] While contested elections play out more in the Committee on House Administration's meeting room rather than on the House floor, a more professional, publicly appealing coverage could be similarly allowed to increase public engagement and hold parties accountable.

VI. CONCLUSION

The current set of contested elections procedures in the House of Representatives is inadequate to safeguard against abuse in our increasingly heated political environment and must be improved to protect principles of democratic government, particularly honoring the wishes of voters. From particularly confused and cobbled together beginnings, the processes utilized to decide such contests have been significantly improved over time. Despite this, there remains far too much room to abuse or even completely avoid the procedures put in place to guarantee a fair process. Instead of merely relying upon norms to safeguard our democracy, action must be taken to put in place further protections against injustice. Along the way, the numerous historical episodes of contested elections at all levels of government offer significant insight into the most effective methods to ensure justice. With many potential avenues forward, there is ample opportunity for progress, whether wholesale or incremental. American democracy is under greater threat today than possibly any other time in its history. To preserve and protect that democracy and its institutions, our elections, that vital connection between the people and their government, must be unassailable.

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[218] Camila DeChalus, *With the House in Chaos, C-SPAN Shows Footage Americans Don't Usually See*, MATZAV.COM (Jan. 5, 2023), https://matzav.com/with-the-house-in-chaos-c-span-shows-footage-americans-dont-usually-see/ [https://perma.cc/87YQ-JLR4].

[219] *Id.*