

DISMISSING THE ELECTION CONTEST AGAINST ED CASE

JULY 15, 2003.—Referred to the House Calendar and ordered to be printed

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

R E P O R T

[To accompany H. Res. 317]

The Committee on House Administration, having had under consideration an original resolution, dismissing the election contest against Ed Case, report the same to the House with the recommendation that the resolution be agreed to.

COMMITTEE ACTION

On July 9, 2003, by voice vote, a quorum being present, the Committee agreed to a motion to report the resolution favorably to the House.

COMMITTEE OVERSIGHT FINDINGS

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

STATEMENT ON BUDGET AUTHORITY AND RELATED ITEMS

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

STATEMENT OF FACTS

On January 31, 2003, Steve Tataii (“contestant”) filed with the Clerk of the House of Representatives a Notice of Contest captioned “Steve Tataii—Contestant v. Ed Case—Contestee.” The document,

prepared by the contestant, was filed pursuant to the Federal Contested Elections Act (“FCEA”).¹

The chronology of events that culminated with the contestant filing his Notice of Contest is set forth below:

The Hawaii Democratic Party held its primary election for the Second Congressional District on September 21, 2002. The contestant was the only candidate to challenge the late Representative Patsy Mink in the Democratic primary. The final primary results showed Representative Mink with 67,246 votes (72.6% of the total vote), while the contestant received 14,178 votes (15.3%).

On September 27, 2002, the contestant filed an election contest with the Hawaii Supreme Court. Citing Section 11–117 of the Hawaii Revised Statutes,² the contestant asserted that Representative Mink’s poor health at the time of the primary election required her to voluntarily withdraw from the election or be disqualified by Hawaii election officials or Democratic Party officials, which would have resulted in the contestant becoming the Democratic nominee. The Hawaii Supreme Court concluded that “Section 11–117 * * * allows, but does not mandate, a candidate to withdraw from an election and allows, but does not mandate, the Chief Election Officer to seek a candidate’s disqualification. Section 11–117 * * * does not require a political party to seek a candidate’s disqualification.”³ Therefore, the Court ruled against the contestant, holding that he “failed to show mistakes or errors that could change the result of the contested primary election.”⁴

Representative Mink died on September 28, 2002. Pursuant to a proclamation issued by Hawaii’s chief election officer, Representative Mink’s name remained as the Democratic nominee on the ballot for the November 5, 2002 general election, where she received 56 percent of the votes cast. (The contestant did not mount a write-in campaign for the general election.)

A special election was then held on November 30, 2002 to determine who would serve the remainder of Representative Mink’s term in the 107th Congress. The contestant filed as a candidate for the special election, in which he received 28 votes (0.1% of the vote total). Ed Case won the special election with 23,576 votes (51%).

On January 4, 2003, the contestant was one of 44 candidates in a special election to determine who would hold the Second Congressional seat for the 108th Congress. The results of the special election released by the Hawaii Office of Elections showed that the

¹ 2 U.S.C. §§ 381–96.

²“(a) Any candidate may withdraw not later than 4:30 p.m. on the day immediately following the close of filing for any reason and may withdraw after the close of filing up to 4:30 p.m. on the twentieth day prior to an election for reasons of ill health. When a candidate withdraws for ill health, the candidate shall give notice in writing to the chief election officer if the candidate was seeking a congressional or state office, or the candidate shall give notice in writing to the county clerk if the candidate was seeking a county office. The notice shall be accompanied by a statement from a licensed physician indicating that such ill health may endanger the candidate’s life.

“(b) On receipt of the notice of death, withdrawal, or upon determination of disqualification, the chief election officer or the clerk shall inform the chairperson of the political party of which the person deceased, withdrawing, or disqualified was a candidate. When a candidate dies, withdraws, or is disqualified after the close of filing and the ballots have been printed, the chief election officer or the clerk may order the candidate’s name stricken from the ballot or order that a notice of the death, withdrawal, or disqualification be prominently posted at the appropriate polling places on election day.”

³*Tataii v. Yoshima*, No. 25353 (Haw. Oct. 3, 2002).

⁴*Id.* The contestant appealed this decision to the United States Supreme Court. On March 3, 2003, the U.S. Supreme Court denied the contestant’s petition for writ of certiorari. 123 S. Ct. 1363 (2003).

contestee (D) received 33,002 (43.2%) of the 76,328 votes cast, giving him a plurality of the total vote. The contestant received nine (9) votes (0.001%). The contestee was sworn in on January 7, 2003 as a Member of the House of Representatives based on the uncertified results of the special election.

On January 24, 2003, the contestant filed a complaint pursuant to state law with the Hawaii Supreme Court contesting the results of the special election. Under Hawaii law, the State chief election officer cannot certify the results of an election until any contests filed in State court relating to that election are resolved and the time for appealing the decisions has expired.⁵ Thus, the Hawaii Office of Elections had yet to certify the contestee as the winner of the Second Congressional District seat at the time that the contestant filed his Notice of Contest.⁶

STANDING

The first issue is whether the FCEA permits the contestant to file a Notice of Contest, i.e., whether the contestant has standing to bring such action as a contestant. To have standing under the FCEA, a contestant must have been a candidate for election to the House of Representatives in the last preceding election and claim a right to the contestee's seat.⁷

As to the first prong, the contestant's name was printed as a candidate for the Second Congressional District on the official ballot for the January 4, 2003 special election. And as to the second, the contestant claims a right to the contestee's seat and sets forth the reasons why he believes he should have been the Democratic nominee on the ballot for the November 2002 general election. It is unclear, however, whether a contestant may claim a right to a seat, and thus have standing, when the basis of his or her complaint relates to the conduct of a primary election, not the general election. Nevertheless, the Committee opts not to resolve whether the contestant has standing, instead choosing to dispose of this election contest on other grounds.

TIMING/NOTICE

The Notice of Contest appears to have been served upon Congressman Case and filed within the appropriate time strictures of the FCEA.⁸

⁵Haw. Rev. Stat. § 11-156.

⁶On May 22, 2003, the Hawaii Supreme Court dismissed the contestant's election contest challenging the results of the January 4, 2003 special election. *Tataii v. Yoshina*, No. 25599 (Haw. May 22, 2003). Mr. Case was certified as the winner of Hawaii's Second Congressional seat on May 23, 2003.

⁷U.S.C. § 382(a).

⁸The FCEA states that the filing of a Notice of Contest will be considered timely only if done "within *thirty days* after the result of such election shall have been declared by the officer or Board of Canvassers authorized by law to declare such result." *Id.* (emphasis added). As mentioned above in the Statement of Facts, when the contestant filed his Notice of Contest, the chief election officer for Hawaii had yet to officially certify the contestee as the winner of the seat for the Second Congressional District because the contestant's election contest filed pursuant to state law had not yet been resolved by the Hawaii Supreme Court. The question, therefore, has been raised whether this matter was ripe; i.e., whether Hawaii's chief election officer must have first certified the election result before the Committee could consider the contestant's Notice of Contest.

The Committee finds that an official certification issued pursuant to state law by a state's chief election official is not always necessary for an election result to be considered "declared" for purposes of the FCEA (although a certification will typically be the dispositive event triggering the FCEA's 30-day filing window). Rather, the Committee concludes that an election re-

RESPONSE BY MR. CASE

The contestee did not file a formal answer in response to the Notice of Contest. Nevertheless, the burden remains upon the contestant to provide credible allegations to the House sufficient to support a claim under the FCEA.⁹

BASIS OF CONTEST

In the Notice of Contest, the contestant asserts that former Representative Patsy Mink was not qualified to be a candidate for the Democratic Primary for the Second Congressional District of Hawaii due to her poor health at the time of the primary. According to the contestant, Section 11–117 of the Hawaii Revised Statutes¹⁰ required the state’s Chief Election Officer, Mr. Dwayne D. Yoshina, to deem Representative Mink as incapacitated and thus disqualify her as a primary candidate, a situation that would have left the contestant as the unopposed candidate for the Democratic nomination. The contestant contends therefore that he should have been declared the Democratic nominee by default, and that his status as the party’s nominee would have resulted in an inevitable victory in the general election because of “Hawaii’s traditional Democratic voting for this seat.” The contestant alleges that Mr. Yoshina’s failure to disqualify Representative Mink was part of “a self-serving set up * * * orchestrated by the incompetent and corrupt” party officials “to manufacture the two Special elections” so that candidates favored by such officials would have an advantage.

The contestant also asserts that the January 4, 2003 was “most likely rigged” by state party officials. He bases this claim on the fact that while he garnered 14,178 votes in the primary election, he received only nine (9) votes in the special election.

ANALYSIS

By its very terms, the FCEA does not contemplate considering Notices of Contest that are based on the conduct of primary elections. The statute defines “election” as “an official general or special election to choose a Representative in * * * Congress, but that term *does not include a primary election*, or a caucus or convention of a political party.”¹¹ Thus, as a general rule, general or special elections may be contested using the procedures set forth in the FCEA, while primary elections may not.

The locus of the contestant’s Notice of Contest centers not on the January 4, 2003 special election but on the conduct of the September 21, 2002 Democratic Primary. Though he alleges that the special election was rigged, he offers no proof of vote tampering, nor does he argue that he would have won the special election had there been no alleged vote rigging. Rather, the contestant’s claim to why he is entitled to the Second Congressional seat is based chiefly on his argument that Representative Mink should have been disqualified as a primary candidate, that he should have been

sult may be considered to have been “declared” where, as in the instant case, the House has sworn in a member based upon the uncertified results provided by the relevant state’s chief election officer.

⁹Id. § 385.

¹⁰See *supra* note 2.

¹¹2 U.S.C. § 381(1) (emphasis added).

declared the Democratic nominee by default, and that as the nominee, he would have been the inevitable general election winner.

Consequently, the Committee concludes that the basis for the contestant's Notice of Contest falls outside the scope of the FCEA. For this reason, the Committee holds that the contestant's arguments regarding the conduct of the Democratic Primary election in Hawaii do not constitute grounds sufficient to change the result of the election and, therefore, recommends that this election contest be dismissed.

