110TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
110–175

DISMISSING THE ELECTION CONTEST RELATING TO THE OFFICE OF REPRESENTATIVE FROM THE TWENTY-FIRST CONGRESSIONAL DISTRICT OF FLORIDA

JUNE 6, 2007.—Referred to the House Calendar and ordered to be printed

Mr. BRADY of Pennsylvania, from the Committee on House Administration, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H. Res. 459]

The Committee on House Administration, having had under consideration an original resolution dismissing the election contest relating to the office of Representative from the Twenty-first Congressional District of Florida, reports the same to the House with the recommendation that the resolution be agreed to.

DISMISSING THE ELECTION CONTEST IN THE TWENTY-FIRST CONGRESSIONAL DISTRICT OF FLORIDA

The Committee on House Administration, having had under consideration an original resolution dismissing the election contest against Lincoln Diaz-Balart, reports the same to the House with the recommendation that the resolution be agreed to.

COMMITTEE ACTION

On, May 8, 2007, 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 Rep-

resentatives, 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 3, 2007, Frank J. Gonzalez (Contestant) filed a Notice of Contest with the Clerk of the House of Representatives captioned "Frank J. Gonzalez, Contestant, v. Lincoln Diaz-Balart, Contestee pursuant to the Federal Contested Elections Act ("FECA").[1] Contestant was the Democratic nominee for the seat in the Twenty-First Congressional District of Florida on November 7, 2006. The other principal candidate for the Twenty-First Congressional District was incumbent Republican Lincoln Diaz-Balart (Contestee). On November 20, 2006, the Florida Elections Canvassing Commission certified the results: Contestee received 66,784 votes and Contestant received 45,522 votes. The Florida Secretary of State issued the Certificate of Election certifying Contestee as the winner of the Twenty-First Congressional District seat on November 22, 2006.

BASIS OF CONTEST

In the Notice of Contest, Contestant alleges that the official election results for the Twenty-First Congressional District of the State of Florida are incorrect because of irregularities associated with the electronic voting machines used in the election. Specifically, Contestant avers that the electronic voting machines used did not accurately record votes cast. In support of this argument, he asserts that the electronic voting machines produced unreliable and incorrect results based on a theory that these machines were hacked or had their data tabulations altered by electronic means. Contestant also alleges that an accurate recount of the votes could never be conducted because the electronic voting machines used in this election were not equipped with a verified voter paper audit trail. Further, Contestant contends the vote totals are unreliable based on his assertions that the Supervisor of Elections for Broward County failed to comply with certain testing and fielding requirements for electronic voting machines pursuant to Florida law.

STANDING

To have standing under the FCEA, a contestant must have been a candidate for election to the House of Representatives in the last preceding election and claim a right to Contestee's seat.[2] In the instant case, Contestant was the Democratic nominee and his name appeared as a candidate for the Twenty-First Congressional Dis-

[1] 2 U.S.C. Sec. 381–96.
[2] 2 U.S.C. Sec. 382(a).

trict on the official ballot for the November 7, 2006 election, satisfying the standing requirement.

TIMING/NOTICE

The Notice of Contest has been served upon the Contestee and filed with the Clerk of the House of Representatives on December 20, 2006.

RESPONSE BY CONTESTEE

On January 17, 2007, Contestee filed a Motion to Dismiss Contest of Election, in response to Contestant's notice contesting the results of the 2006 General Election for the Twenty-First Congressional District of the State of Florida. In his motion, Contestee seeks to have this election contest dismissed based upon Contestant's failure to timely file the Notice of Contest with the Clerk of the House of Representatives pursuant to the filing requirements under FCEA.

ANALYSIS

To survive a motion to dismiss, Contestant must proffer allegations that, if proven, would have altered the election outcome. In his Notice of Contest, Contestant presented the Committee on House Administration (Committee) with allegations that the electronic voting machines used in the election did not record votes accurately. In support of his assertions, Contestant relies on affidavits collected from voters in Precinct 151, Pasco County by John Russell who was a candidate for United States Representative for Florida's Fifth District. Like Contestant, John Russell also filed a Notice of Contest before this Committee where he maintains that the electronic voting machines used in his election recorded votes inaccurately. Contestant provides the Committee with results of Russell's own canvass and affidavit gathering process of the individuals who had cast ballots in precinct 151, which he believes revealed a discrepancy in the Election Day vote totals. Russell maintains that this discrepancy is evidence of inaccurate vote totals and sufficient to place in doubt the election results for Florida's Fifth Congressional District. Contestant contends that the evidence obtained by Russell also places his election results in doubt because electronic voting machines without a verified paper audit trail were also used in the Twenty-First District and, therefore, must have inaccurately recorded the votes.

Contestant's reliance on allegations of electronic voting machine error in another Congressional District is irrelevant and not persuasive. The precinct Contestant refers to is Pasco County Florida's 151 precinct and is located in Florida's Fifth Congressional District, not in Florida's Twenty-First District. Even if Contestant is able to prove the voting machines used in precinct 151 did not record votes accurately, it does not establish that the electronic voting machines used in Contestant's race are inherently unreliable and failed to record votes accurately.

Contestant also alleges that the intent of the voters and the vote tally could not be accurately discerned because the electronic voting machines used in the instant election were not equipped with a voter verified paper audit trail. Specifically, Contestant argues that

only with a voter verified paper audit trail: (1) could a voter determine whether the vote which he or she cast reflected the vote that was intended to be cast; and (2) could election results be validated. The fact that Contestant would have preferred that voters be given the benefit of a verified paper audit trail adds no weight to his claim.

In November 2006, numerous state and federal candidates were elected on electronic voting machines that were not equipped with a verified paper audit trail. For decades states have used mechanical and electronic voting equipment that does not provide for a paper audit trail. These systems have not been demonstrated to be inherently unreliable. States by law may choose to require a paper audit trail, but the mere absence of a paper trail is not a basis for setting aside an election. A contestant's musing about the vulnerability of a voting system to hacking or fraudulent manipulation does not form the basis for a cognizable claim to the office. Such claims are in essence no different than a claim that the ballots boxes could have been stuffed in an election that used paper ballots. A notice of contest must contain specific credible allegation(s) of misconduct or irregularity in the election in order to overcome the presumption of regularity.

Additionally, Contestant accuses the Supervisor of Elections for Broward County of failing to comply with Florida law relating to the testing and fielding for electronic voting machines. Contestant's allegation of misconduct and non-compliance by certain election officials is irrelevant unless it can be shown to have affected the outcome of the election. Contestant's personal lack of confidence in how the election was administered does not form the basis for a cognizable claim to the office. While Contestant may believe the Supervisor of Elections for Broward County did not perform certain voting machine testing, he failed to provide any information demonstrating that Broward County election officials violated any laws associated with machine testing, or that these alleged violations affected the outcome. Contestant's allegations are no more than unsupported speculation and his claims do not cast sufficient doubt on the results of the election to merit investigation. For the Committee to come to any other conclusion would be to remove the presumption of regularity that attaches to the state certification and would make all elections open to contest and investigation based on mere conjecture or speculation.

CONCLUSION

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

MINORITY VIEWS

While we agree with the majority that this election contest is wholly without merit, and should be dismissed without further delay, we submit these views because we believe that, in addition to the numerous substantive defects of this contest, its procedural failings are also fatal and sufficient to warrant dismissal on their own. Pursuant to the FCEA, a sufficient and timely Notice of Contest must be filed with the Clerk of the House and served upon Contestee before the Committee can proceed to review and make determinations regarding the allegations and grounds of an election contest. FCEA requires contestants to file their notice of contest with the Clerk of the House within 30 days of the election results having been declared. This rule allows members and their constituents to know the date beyond which the election can no longer be challenged.

Section 382(a) of the FCEA:

> (a) Filing of notice. Whoever, having been a candidate for election in the last preceding election and claiming a right to such office, intends to contest the election of a Member of the House of Representatives, shall, *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, file with the Clerk and serve upon the contestee written notice of his intention to contest such election. (emphasis added)

Under Florida law, the Florida Elections Canvassing Commission is the body authorized to declare all election results. On November 20, 2006, the Florida Canvassing Commission certified the results of the election for the Twenty-First Congressional District and declared Lincoln Diaz-Balart the winner, thereby triggering the 30-day time period for filing an election contest with the House of Representatives. Accordingly, anyone wishing to contest the results so declared was obligated to do so by filing a contest with the Clerk on or before December 20, 2006. Though Contestant's Notice of Contest and certificate of service is dated December 20, 2006, this is not the date it was filed.

The transaction log for the vendor that handles mail delivery for the House of Representatives reveals that the Notice of Contest was not received by the House until December 28, 2006. It was not received by, that is filed with, the Clerk until January 3, 2007. This is outside of the 30-day window the statute allows for filing. Simply mailing the contest within the 30-day period does not constitute filing, and is not sufficient to meet the statutorily imposed deadline.

While mailing does suffice for service of other kinds of pleading, it does not suffice for the initial filing of the contest. We believe the

proper interpretation of FCEA requires the document actually be in the possession of the Clerk within the prescribed period. Section 382 clearly distinguishes between filing and service—requiring that a notice of contest be filed with the Clerk within 30 days and served on Contestee within this time period. This distinction exists for a reason and is reiterated in Section 384 which allows mailing within the required period to suffice for other pleadings, but explicitly states that these modes of service are acceptable for pleadings other than the notice of contest:

> (a) Modes of service. Except for the notice of contest, every paper required to be served upon the attorney representing the party, or is not represented by an attorney or upon a party shall be made:
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> * * * * * * *
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> (3) by mailing it addressed to the person to be served at this residence or principal office. Service by mail is complete upon mailing.
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> (b) Filings of papers with clerk. All papers subsequent to the notice of contest required to be served upon the opposing party shall be filed with the Clerk either before service or within a reasonable time thereafter.

Obligating actually filing, as opposed to simply mailing, the notice of contest within 30 days allows all Members to know with certainty the date beyond which their elections can no longer be challenged. To allow contests filed after this date to be considered creates uncertainty for Members and extends the period in which they can be challenged. It also contradicts the plain language of the statute, and should not be permitted.

VERNON J. EHLERS.
DANIEL E. LUNGREN.
KEVIN MCCARTHY.

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