CONTESTED CONGRESSIONAL ELECTIONS

THE exclusive right of the House of Representatives to judge "the elections, returns and qualifications of its own members" is an interesting survival of an idea which has been discarded by the parent who originated it. The child, however, who inherited the idea still clings to it, possibly not so much because of any firm conviction of its value as because of a constitutional provision that cannot easily be brushed aside. Whatever may be the reasons for the retention of this parliamentary privilege, certainly the conditions which caused the original promulgation of the principle in England no longer prevail, either there or in the United States. As need hardly be explained, the control by the legislature of the election of its own members originated as a defense against executive encroachments. It was during the reign of Elizabeth that the Commons began strenuously to insist upon the right of judging the returns and qualifications of their own members; and it was during the reign of James I, in the famous "Bucks" election contest, that the final struggle occurred between Crown and Commons over this important subject. The Commons, of course, won, and, in the words of Hallam, "no attempt was ever afterward made to dispute their exclusive jurisdiction"[1] until they themselves disputed and, in 1868, practically surrendered it. This privilege of ultimately deciding their own elections the Commons seem to have claimed with a determination as strong as that displayed in the struggle for free speech and freedom from arrest, and it came to be regarded, to a degree perhaps disproportionate to its relative importance, as among the most inviolable of parliamentary privileges. But although England has outgrown the conviction, the United States apparently has not.

When representative institutions developed on this side of the Atlantic, the colonists naturally claimed for their assemblies the

[1] Hallam, Constitutional History of England (New York, 1847), p. 176.

same privileges which the House of Commons enjoyed. It may indeed be said that in this country the claim began with representative government, for when the famous Virginia assembly met in 1619, the House of Burgesses assumed jurisdiction over the contested election of one Captain Ward, to whom, as the record quaintly informs us,

> the Speaker tooke exception as at one that without any commission or authority had seated himselfe either upon the Companies, and then his plantation would not be lawful, or on Captain Martin's lande, and so he was but a limbe or member of him, and there could be but two Burgesses for all.[1]

Nor were the colonists of Massachusetts Bay slow to assume the same authority, for as early as March, 1635, we read in the records of that colony:

> It is ordered that when the deputies of several towns are met together before any General Court, it shall be lawful for them, or the major part of them, to hear and determine any difference that may arise about the election of any of their members.[2]

In nearly every state constitution[3] adopted prior to the meeting of the Federal Convention, the principle, as we should naturally expect, is clearly recognized; and in the Federal Convention itself, although the exact extent to which Congress might control the details of congressional elections was a matter of considerable debate, it seems not even to have been questioned that the House of Representatives should ultimately be the judge of the election of its own members.[4] The idea that the House should possess this important privilege was thus accepted as a matter of course and accepted with the original conception of its justification. To have allowed the courts, whose officers were directly or indirectly appointed by the

[1] Colonial Records of Virginia (Richmond, 1874), p. 11.

[2] Records of Massachusetts, vol. i, p. 142.

[3] The constitutions of Georgia and Virginia alone contain no specific recognition of the principle.

[4] The clause conferring this power was adopted "*nem. con.*" Elliot's Debates (Philadelphia, 1881), vol. v, p. 406.

crown, to decide contested elections in the colonial assemblies would have invited executive interference, and when the ex-colonists made the House of Representatives the judge of its own elections, they, with little doubt, did so in the spirit of the old fear. But in the United States, with an elected executive and a judiciary whose independence is guaranteed by life-appointment, the old danger of executive encroachment which justified the privilege in the reign of James I and in the American colonial period has vanished. To-day it is simply a contest between two parties for political influence and the rewards of office, or sometimes a contest between the majority in the House and a constituency of the minority party.

The present method of procedure in contested election cases in the House of Representatives is based upon the law of 1851 with subsequent amendments. The essential points, however, in the present system of procedure may be traced as far back as the law of 1798, the first general statute which Congress passed to regulate the trial of these cases. Since the early historical development of the procedure in cases of contested elections has already been sketched in a paper read before the American Social Science Association in 1869,[1] this part of the subject may be dismissed with a brief summary. The first Congress which met under the new constitution was not without its contested-election troubles and among the rules adopted was one providing for the appointment of a committee of elections,[2] historically one of the oldest standing committees of the House.

Contrary to present practice, the elections committee at first simply reported the evidence to the House, which, with a scrupulous, supersensitive regard for its constitutional duty as a judge, proceeded itself to "examine the evidence and vouchers," [3] but this supersensitiveness almost immediately evapor-

[1] H. L. Dawes, "Mode of Procedure in Cases of Contested Elections," *Journal of Social Science*, 1870, pp. 56–68.

[2] Annals of Congress, April 13, 1789, vol. i, p. 122. This first committee, however, was elected by ballot of the House.

[3] Ramsay *v.* Smith, first Congress; Clarke and Hall, Cases of Contested Elections, 1789–1834, pp. 23–37. There was published recently (1901, House Doc. 510, 56th

ated and the House was content to allow the committee to sift the evidence and report the facts.[1] For about nine years the House continued to decide contested elections with an irregular, shifting mode of procedure, but finally, in 1798, after several ineffectual attempts to devise a remedy[2] the first law establishing a general method of procedure was passed.[3] This law, however, expired in 1804, and for nearly half a century the House chose to proceed without the restriction of any general law and with little regard to precedent. Until 1834 when the first digest of cases was published, it was in fact quite impossible to know what the precedents were; it was a period without law, when each Congress in the determination of these cases did what seemed best in its own eyes. Frequent and protracted delays in the trial of cases were inevitable, for not until a Congress had met and an elections committee had been appointed could anything be done. There was no preliminary collection of evidence, such as is made to-day; and consequently the committee on elections had to spend weeks and months of valuable time upon work which might have been accomplished in the year or more intervening between the election and the meeting of the new Congress, not to mention the total loss of important testimony frequently caused by the delay. In the latter part of this period, in the twenty-sixth Congress, occurred the well known New Jersey case which caused such a bitter partisan conflict.[4] A member debating the bill of 1851 set

Congress, 2d Session) a digest, prepared by C. H. Rowell, of the cases from the first Congress to the fifty-sixth. This is a decided improvement upon the earlier compilations, which are of varying degrees of perfection or rather of imperfection. The earlier compilations include: Clarke and Hall, 1st–23d Congresses; Bartlett, 24th–38th, 2 Bartlett, 39th–41st; Smith, 42d–44th; Ellsworth, 45th, 46th; 2 Ellsworth, 47th; Mobley, 48th–50th; Rowell, 51st; Stofer, 52d.

[1] On the very next case, for example, the committee was instructed to report the facts; N. J. Members, 1st Congress, Clarke and Hall, Cases, 38–44.

[2] *E. g.*, 1791, 1796, 1797.

[3] 1 U. S. Statutes at Large, 537; 1798, chap. viii.

[4] "This is the first case in which the charge, now so common, that the majority of the committee were controlled in their determination by partisan considerations was solemnly and directly made by a minority of the committee in a report to the House." Rowell, Digest, 1789–1901, pp. 109–112. Although politically very important, this New Jersey case did not establish any very important precedents. *Cf.* McCrary, American Law of Elections, p. 236.

forth, probably with little exaggeration, the evils existing during these years:

> This thing of contesting the right to a seat upon this floor has become the greatest of all humbugs in this age of humbugs. A man comes here and claims that he is entitled to the seat of the person holding it under the proper authority of the state. The consequence is that, during a long nine months' session, the member retains his seat, but at the close of the session the House decides that he is not entitled to it and he is turned out, after having exercised the functions of an office to which he had not been entitled, and both the contestant and sitting member are paid full wages of members of Congress.[1]

Eventually in 1851, after fifty years of chaotic irregularity, Congress passed a law that again introduced some uniformity into the method of procedure, and which, with subsequent changes, still regulates the trial of contested elections in the House. The chief purpose of the law was to expedite the taking of testimony, and thus to make it possible that cases should be more speedily decided. To contest an election, the contestant must, within thirty days after the result of the election has been declared, serve notice upon the member whose seat he claims, specifying the "grounds upon which he relies in the contest;" within thirty days after receiving this notice, the returned member must file an answer admitting or denying the facts stated in the notice and likewise stating "specifically any other grounds upon which he rests the validity of his election." Thus within sixty days after an election, the issue was to be clearly drawn and the gathering of testimony was to commence. The act contained more or less detailed regulations as to the manner in which testimony should be taken: the third section, for example, provided that any federal, state or local judge, upon the request of either party to the contest, should subpœna witnesses; the seventh required the magistrate to have this testimony reduced to writing and to transmit it to the clerk of the House of Representatives. The testimony was to be confined to the matters stated in the notice and answer, and was all to be taken within sixty days after the service of the answer

[1] *Congressional Globe*, 31st Congress, 2d Session, vol. xxiii, p. 109.

by the contestee.[1] These regulations saved weeks of valuable time and introduced into the method of procedure at least a semblance of uniformity.

The rules laid down by the act of 1851 remained in force without change for about twenty-two years, when Mr. McCrary, of Iowa, the author of the well-known manual on the *Law of Elections*, at that time chairman of the committee on elections, secured the adoption of several amendments designed to improve the practical working of the law.[2] The sixty days allowed for taking testimony having been found too brief, the time was extended to ninety days,[3] and somewhat more definite and detailed provisions were made as to how the testimony should be taken.[4] The legislation of Congress regulating the expense of the contests is interesting and somewhat amusing. The Congress of 1873, after making in its sundry civil bill an appropriation of fifty thousand dollars for innocent "miscellaneous purposes" that evidently included the expenses of contestants and contestees, provided that after its own expiration Congress should no longer pay the expenses of election contests.[5] The next Congress, however, determined to be as generous to itself as other Congresses had been, simply disregarded this prohibition and proceeded as usual to pay the expenses of the parties, aggregating in some instances as much as three thousand dollars to each contestant and contestee.[6] Congress has since continued to make appropriations to parties involved in contested elections, with the restriction, as provided in the law of 1879, that such grants shall not exceed the amount

[1] 9 Statutes at Large, 568, 1851, chap. xi.

[2] There was little debate on these amendments either in the House or Senate. *Congressional Globe*, 42d Congress, 2d Session, part i, p. 396; part ii, p. 1161; 3d Session, part i, pp. 230, 306, 361, 495. 17 Statutes at Large, 408; 1873, chap. xxiv.

[3] Construed by act of March 2, 1875, to mean ninety days from date when answer is served on contestant. 18 Statutes at Large, 338; chap. cix.

[4] Contestant was to take testimony during the first forty days and the returned member during the next forty; contestant might take testimony in rebuttal during the remaining ten days. It was also specifically provided that testimony might be taken in two or more places at the same time.

[5] 17 Statutes at Large, 490; 1873, chap. ccxxvi.

[6] 18 *ibid.* 389; 1875, chap. cxxx.

of two thousand dollars.[1] At one time Congress also directed that the name of a member whose seat was contested should not be placed upon the pay-roll until the contest was determined,[2] but this restriction remained in force but a short time.[3] Further changes, designed to expedite the consideration of cases, were made in 1887.[4] The existing law provided that the testimony must be in the hands of the clerk of the House before the meeting of Congress; the amendments of 1887 provided also for the printing of the evidence and filing of the briefs before the meeting of Congress, and thus effected a further saving of time.[5]

By several statutes and a long series of precedents the method of procedure in the trial of contested elections is thus pretty definitely fixed. Yet, as need hardly we stated, since the Constitution makes each House absolutely and exclusively the judge of its own elections, any House may at any time constitutionally disregard both law and precedent; and the most that can be said for the laws regulating the procedure is that they will not be disregarded "without good cause."[6] Both in earlier and in more recent years it has been repeatedly admitted in congressional debates and demonstrated in actual practice, that the House is absolutely free in this matter. A few examples may be given to illustrate what form the deviations from established law are likely to take. It has happened with some frequency, for instance, that the House has extended or limited the statutory time for the taking of testimony. In

[1] 20 Statutes at Large, 400; 1879, chap. clxxxii.

[2] Revised Statutes, 1878, sec. 38.

[3] 18 Statutes at Large, 389; 1875, chap. cxxx.

[4] 24 *ibid.* 445; 1887, chap. cccxviii.

[5] These amendments aroused but little debate. For report of committee, see *Congressional Record*, vol. xvii, part iv, p. 3517.

[6] Jones *v.* Shelly, 47th Congress, Rowell, Digest, 1789–1901, p. 395. A recent assertion of the exclusive jurisdiction of each House is found in the report of elections committee, no. 2, in the 57th Congress. *Congressional Record*, vol. xxxvi, p. 230. "We have no hesitation in saying that there is no statute which can fetter this House in the exercise of the high privilege and important duty devolved upon it by the constitutional declaration that 'each House shall be the judge of the elections, returns and qualifications of its own members.'"

the case of Page *v.* Pirce in the forty-ninth Congress, the notice and answer had been duly given, but the contestant had failed to take testimony within the prescribed ninety days, alleging a verbal agreement with the contestee "that testimony might be taken at any time before the beginning of the session of Congress." The contestee, denying the existence of the agreement, had refused to attend the hearings to cross-examine witnesses, but Congress directed that the time for taking testimony should be extended so that the case might be investigated.[1] In the fifty-seventh Congress, contrary to the argument of the contestee that the House had no right to disregard the statute, the time allowed for the taking of testimony was shortened in order that the case might be decided before the adjournment of Congress.[2] In the fifty-first Congress, by order of the House, the chairman of the elections committee appointed a sub-committee of five to proceed to Arkansas to investigate a contest.[3] Ordinarily, all cases of disputed elections and controversies regarding seats are referred to the elections committee, but in extraordinary cases special committees may be appointed, as was done in the recent Roberts case.[4] But after all, these departures from the statutory regulations are not numerous, and whatever may have been the tendencies in earlier years, at present only most urgent reasons seem to cause a deviation.

The vital problem in connection with contested elections in the House of Representatives relates, of course, to the question of partisanship in the decisions, and in the consideration of this problem the remarkable increase in the number of seats contested during the last half-century must be regarded as sig-

[1] Page *v.* Pirce, 49th Congress; Rowell, Digest, 1789–1901, pp. 419–421. *Cf.* the case of O'Hara *v.* Kitchin, 46th Congress, in which request to extend time was refused, *ibid.* pp. 348, 349.

[2] Wagner *v.* Butler, 57th Congress, *Congressional Record*, vol. xxxvi, pp. 230–245. See especially the remarks of Mr. Olmstead. Other cases in point are the following: McCabe *v.* Orth, 46th Congress, Rowell, Digest, 1789–1901, p. 342; Jones *v.* Shelly, 47th Congress, *ibid.* p. 394; Benoit *v.* Boatner (2d case), 54th Congress, *ibid.* pp. 526, 527.

[3] Clayton *v.* Breckenridge, 51st Congress, *ibid.* pp. 679–681.

[4] *Ibid.* pp. 582–596.

nificant. Roughly speaking, three times as many seats have been contested during the last fifty years as were contested during the preceding sixty-five years. The following table, showing the number of disputed seats in each House since the organization of the government, will be found instructive.[1]

Congress	Seats Contested	Congress	Seats Contested
1, 1789–1791	5	30, 1847–1849	2
2, 1791–1793	2	31, 1849–1851	6
3, 1793–1795	5	32, 1851–1853	1
4, 1795–1797	6	33, 1853–1855	1
5, 1797–1799	1	34, 1855–1857	9
6, 1799–1801	0	35, 1857–1859	7
7, 1801–1803	3	36, 1859–1861	7
8, 1803–1805	4	37, 1861–1863	21
9, 1805–1807	2	38, 1863–1865	22
10, 1807–1809	3	39, 1865–1867	8
11, 1809–1811	2	40, 1867–1869	17
12, 1811–1813	1	41, 1869–1871	29
13, 1813–1815	6	42, 1871–1873	19
14, 1815–1817	4	43, 1873–1875	11
15, 1817–1819	3	44, 1875–1877	10
16, 1819–1821	2	45, 1877–1879	7
17, 1821–1823	3	46, 1879–1881	12
18, 1823–1825	4	47, 1881–1883	20
19, 1825–1827	3	48, 1883–1885	14
20, 1827–1829	0	49, 1885–1887	10
21, 1829–1831	4	50, 1887–1889	8
22, 1831–1833	2	51, 1889–1891	17
23, 1833–1835	2	52, 1891–1893	6
24, 1835–1837	1	53, 1893–1895	10
25, 1837–1839	3	54, 1895–1897	38
26, 1839–1841	6	55, 1897–1899	16
27, 1841–1843	2	56, 1899–1901	9
28, 1843–1845	24[2]	57, 1901–1903	10
29, 1845–1847	5	58, 1903–	12

[1] Comparison of this table with the number of contests reported in Rowell's Digest will show some divergence. This is occasioned by the fact that Rowell reports cases, while this table represents the number of seats contested. Usually the two agree; but in Rowell a second attack upon the same seat in the same Congress figures as a second case, while a contest for a number of seats may appear as a single case.

[2] The large number of seats contested in the 28th Congress was exceptional; these were really not contests in the ordinary sense of the term. Congress had passed a law calling for the election of representatives by districts, but the states of New Hampshire, Georgia, Mississippi and Missouri had failed to obey the law, and the question therefore came up whether their representatives should be admitted. This question accounts for 22 of the 24 disputed seats. It is to be noted that the members elected by those states were not excluded.

It will be observed that prior to 1855 no Congress (excepting the twenty-eighth, in which most of the cases were not contests in the ordinary sense of the term) had more than six cases; in two Congresses there were no contests whatever, and the occasions when only one or two seats were contested were frequent.[1] Since 1855, however, no Congress has had less than six, and one has had more than six times six. The average number of cases for each Congress prior to 1855 was about 3.54; since then the average has been 13.92, nearly four times as great. The progressive increase is made equally clear by a different comparison, by the fact that there have been more cases in the past thirty-five years than in the preceding eighty years.[2]

This large increase in the number of cases threatened to make serious inroads upon the time of the House, and the elections committee, with the thousands of pages of written testimony[3] that had to be read, the oral arguments of the contesting parties that had to be heard, not to mention its own deliberations, found itself overburdened. Unless changes in the procedure of the House itself were made to expedite the consideration of the increasingly large number of cases, it would be manifestly absurd even to pretend to make a fair examination of the merits of the contests. An early and natural expedient was to increase the size of the committee.[4] In 1869, when an unusually large number of cases threatened to add to the burden under which the elections committee was already staggering, the House authorized the chairman of the committee to appoint sub-committees of three members

[1] *E. g.*, five Congresses in which there was only case; eight in which there were only two.

[2] 1789–1869, 209 contests; 1869–1904, 258 contests.

[3] In 30 of the 38 cases that arose in the 54th Congress there were 15,627 pages of printed testimony. *Congressional Record*, vol. xxviii, part 1, pp. 7, 209.

[4] From the 1st to the 22d Congresses, inclusive, with the exception of the 21st, the committee contained seven members; from the 23d to the 42d, inclusive, with the exception of the 41st, nine members; in the 43d and 45th, eleven members; in the 44th, twelve members; from the 46th to the 53d, inclusive, fifteen members; from the 54th Congress to the present, three committees of nine members each.

each, whose report should be made directly to the House.[1] The practical effect of this expedient was, of course, to turn the one committee of fifteen into five separate committees, so that contests were practically decided by small committees of only three members. The speed of the committee may thus have been multiplied by five, but it may be doubted whether the previous standard of justice and fairness in the trial of cases was maintained. The succeeding Congress, with a small number of cases on its hands, abandoned this expedient; and for about a quarter of a century, although on several occasions there were numerous contests, the House managed to get along with its one committee of nine to fifteen members. When, however, in the fifty-fourth Congress over thirty cases loomed up for consideration, something again had to be done to relieve the pressure on the committee; and accordingly, upon the motion of Mr. Cannon, of Illinois, instead of one committee, three were appointed,[2] an arrangement which has since been retained, although the number of contests has not again approached the high-water mark of 1895–1897.

How shall we explain the increasingly large number of contested elections in the House of Representatives? It the first place, it must be recognized that there exist circumstances, which not only extenuate but justify an increase. Other things being equal, we ought to expect more contested elections in a House of three hundred and ninety members than in a House of sixty-five members. Furthermore, some allowance must be made for the abnormal conditions created in the South by civil war conditions, which in more than one instance led to contests involving all the seats from a state.[3] Such cases can scarcely be classified as ordinary party contests for seats. Nevertheless, all due allowance being made for such and other natural causes, the increase still remains abnormally large. A larger number of voters and a larger number of congressmen may explain a proportionate increase in the number of cases, but they

[1] *Congressional Globe*, 41st Congress, 2d Session, part ii, pp. 1108, 1268, 1439, 1440.

[2] *Congressional Record*, vol. xxviii, part i, p. 202.

[3] *E. g.*, Tennessee in 1869 and Georgia in 1871.

do not explain the more than proportionate increase. In the period prior to 1855 the total number of contests was about two per cent of the total membership of the House, while during the last fifty years the contests were over four and one-half per cent of the membership.[1] The exceptional cases in more recent years which have been due to the "abnormal conditions" created by the war are counterbalanced by equally exceptional cases in the earlier period. For example, the digests of those earlier years include among the number of contests cases occasioned by the acceptance of another office by a member of the House; nor must the twenty-two exceptional cases of the twenty-eighth Congress be forgotten.

The question has frequently been asked whether this rather large increase in the number of contested seats is not due in great measure to the partisan character of the decisions. The existence of an element of partisanship in the decisions scarcely needs proof. The question is simply one of the extent of this partisanship and the possibility of lessening, if not of eradicating it, under some other system of adjudication. On the whole, it is surprising, not that there has been so much partisan unfairness in the trial of contested House elections, but that the partisanship has been no greater. The House, a partisan body, whose members are frequently swayed by violent party passions, inevitably, on occasions, will make partisanship and not justice the basis of its decisions on this as well as on other questions. To make possible some estimate of the extent to which the House allows itself to be influenced by party considerations, the following table has been prepared, attempting to show how far decisions since the Civil war have been in favor of the majority, and how far in favor of the minority.[2]

[1] These percentages are reckoned on the basis of the membership as fixed by the census apportionment. For the earlier period the exact percentage was 1.96 and for the later period, 4.6.

[2] The party affiliations of the persons concerned in these contests have been determined by the use of the Biographical Congressional Directory, 1774–1903 (Doc. 458, 57th Congress, 2d Session) and, where that has failed, of the Congressional Directories. The last column marked "difficult to classify" includes for the most part cases in which the House took no action. It seemed unwise to attempt to enumerate these as decisions in favor of the majority or minority, although in some instances the failure to act amounted practically to a decision. In the 47th Congress, it should be noted, the Republicans had only a plurality.

Congress	Party in Majority	Decision for Majority	Decision for Minority	Seat Declared Vacant	Difficult to Classify
39, 1865–1867	Rep.	5	1	.....	2
40, 1867–1869	Rep.	9	2	3	3
41, 1869–1871	Rep.	13	4	8	4
42, 1871–1873	Rep.	5	12	1	1
43, 1873–1875	Rep.	6	3	.....	2
44, 1875–1877	Dem.	6	3	1	
45, 1877–1879	Dem.	5	.....	.....	2
46, 1879–1881	Dem.	3	5	.....	4
47, 1881–1883	Rep.	7	5	1	7
48, 1883–1885	Dem.	10	2	.....	2
49, 1885–1887	Dem.	1	2	1	6
50, 1887–1889	Dem.	5	2	.....	1
51, 1889–1891	Rep.	8	4	1	4
52, 1891–1893	Dem.	3	1	.....	2
53, 1893–1895	Dem.	6	.....	.....	4
54, 1895–1897	Rep.	10	25	2	1
55, 1897–1899	Rep.	6	8	.....	2
56, 1899–1901	Rep.	4	1	.....	4
57, 1901–1903	Rep.	4	3	1	2
58, 1903–	Rep.	4	4	.....	4
		120	88	19	57

It will be noted that the results of this statistical study apparently do not bear out the charges of extreme partisanship made against the present system. Out of a total number of contests amounting to two hundred eighty-four, less than one-half of the decisions were unqualifiedly in favor of the majority. If we leave out of account for the moment the seventy-six cases in the last two columns, only thirty-two decisions more were rendered in favor of the majority than of the minority, a fact apparently showing a certain degree of self-restraint. If an attempt were made to take some account of the figures in the last two columns, it is not believed that the general result would be materially changed, for although most of the cases in which the seat was declared vacant were virtual decisions in favor of the majority, at least more than half of the cases listed as "difficult to classify," including mostly those in which the House took no action, resulted advantageously to the minority.

Does the table then prove the charge of extreme partisanship unjustifiable? An affirmative answer cannot be given, for undoubtedly the table hides a considerable portion of the par-

tisanship involved in the decisions. It must be remembered that, under a system which allows contestants to draw upon the government for their expenses, members of the majority party are encouraged to contest upon grounds frequently so slight as to make an adverse decision inevitable, and that a decision for the minority usually means no more than that a member of the minority, already returned to the House, is permitted to retain his seat. Possibly a truer test of the amount of partisanship in the decisions would be found in the number of times the majority has actually deprived itself of seats, as compared with the number of times it has compelled members of the minority to vacate their seats. Measured by this criterion, the decisions would seem to justify some of the most emphatic charges of partisanship. Although the majority may frequently refuse to give a seat to a contestant of its own party, it very rarely asks a member of its own party to give up a seat. In the period of thirty-nine years covered by the statistics just given, the majority deprived itself of seats only nine times, while it deprived the minority of seats eighty-two times.

To aid in a correct understanding of the problem, the testimony of members of Congress themselves will be useful, provided we exclude that class of testimony which consists only of party criminations and recriminations. The evils of the present system have frequently been exposed by the men who have had practical experience in the determination of disputed House elections. The late Henry L. Dawes, with a long experience as chairman of the elections committee, writing when there could have been no occasion for party prejudice, thus characterizes the partisan nature of the decisions:

> All traces of a judicial character in these proceedings are fast fading away, and the precedents are losing all sanction. Each case is coming to be a mere partisan struggle. At the dictates of party majorities, the committee must fight, not follow the law and the evidence; and he will best meet the expectations of his appointment who can put upon the record the best reasons for the course thus pursued. This tendency is so manifest to those in a position to observe that it has ceased to be questioned and is now but little resisted. There is no tyranny like that of majorities, and efforts in the past to resist them and to hold the

judgments of a committee of elections up above the dirty pool of party politics have encountered such bitter and unsparing denunciation and such rebuke for treason to party fealty that they are not likely often to be repeated.[1]

From a man eight years at the head of the elections committee such words seem eloquent testimony to the evils of the system; they seem the wail of a chairman whose hands were tied behind his back by party dictation. Of course Mr. Dawes had in mind the conditions existing at the time when he wrote, and since 1869 the conditions have undoubtedly improved, but hardly less emphatic is the official opinion of two recent elections committees. In formal reports to both the fifty-third and fifty-fourth Congresses, the committee, using identical language, expressed the conviction that

> A most casual inspection of the workings of the present system of deciding election contests will show that it barely maintains the form of a judicial inquiry and that it is thoroughly tainted with the grossest partisanship. . . . When it is alleged that members of a minority do not generally contest seats, a striking tribute is paid to the partisanship of the present system.[2]

It is particularly to be noticed that these opinions were not partisan denunciations made in the heat of a debate, but deliberate convictions uttered under circumstances that add greatly to their force. They are in the nature of frank confessions of wrong-doing—an ex-Republican chairman confessing to a scientific society, a Republican committee twice officially confessing to a Republican Congress.

Certain proceedings in recent Congresses further suggest the

[1] *Journal of Social Science*, 1870, p. 64.

[2] Report from Elections Committee no. 3, Mr. McCall, chairman. House Report no. 2234, 54th Congress, 1st Session. This is in great part a quotation from a similar report in the preceding Congress. Mr. McCall has not changed his mind since that report was made, for he writes, August 5, 1904: "*My Dear Sir:* I beg to acknowledge the receipt of your favor of the 30th *ult.*, asking me whether the characterization, in a report of a committee of which I was chairman in the 54th Congress, concerning election cases still holds good. I think it does. I do not mean to say, by any means, that all cases are decided in a partisan way, but I think it is very rare that a close election case is decided upon judicial grounds."

difficulty of maintaining a strictly fair judicial procedure in the consideration of the cases. In the fifty-first Congress, for example, whenever a certain case came up for decision, the members of the minority, with persistent regularity, arose and left the House to break the quorum.[1] Even if it be granted that the merits of the case justified extreme measures, it is hardly compatible with a dignified judicial procedure that the minority of the judges should run away to prevent the court from making a decision. Likewise in an earlier Congress, the forty-seventh, the minority resorted to filibustering tactics in order to prevent a decision on a contested election, and the majority had to amend the rules to make a decision possible.[2] When, in the fifty-fourth Congress, the present arrangement of three committees was proposed on behalf of the majority and was opposed by the minority, the objections advanced were plainly mere pretexts; as, for example, when members of the minority protested against the extravagance of paying three committee clerks instead of one.[3] The real reason for the opposition was, with little doubt, partisan. The purpose of the proposed change was to expedite the consideration of cases. Under the old arrangement of one committee, the numerous contests of that Congress could not possibly be disposed of with any semblance of judicial fairness before the end of the Congress; and failure to act would be of decided advantage to the contestees, most of whom of course belonged to the minority. The longer the delay, the longer would the sitting members remain in the House, and if the delay were only long enough some might never be removed. Nor would one, on the other hand, care to maintain that only a conscientious, unadulterated yearning for justice prompted the Republican majority to advocate the multiplication of election committees. The desire for justice was probably re-enforced by the opportunity to seat Republican contestants.[4]

[1] In the case of Miller *v.* Elliot, S. C.

[2] *Congressional Record*, vol. xiii, part 5, pp. 4304–4329.

[3] *Ibid.* vol. xxviii, part 1, p. 208.

[4] A reference to the table, however, will show that most of the cases were finally decided in favor of the minority.

In the failure to be strictly just in the decision of contested elections, it may in general be assumed that one party has been as guilty as the other. As Mr. Cannon remarked in a recent Congress, in which his own party had a large majority: "I apprehend, if there have been abuses touching election cases, that honors are easy." [1] The Republicans, having been in power longer, have had more opportunity to be guilty of "abuses"; but a reference to the table on a previous page will demonstrate that the Democrats have made proportional misuse of their more limited opportunities.

If evils are conceded to in the present system, the question of a remedy naturally arises. The solution which England has made of the problem is frequently pointed to us as an object lesson for the United States. We inherited the evil from England, why not also copy from her the remedy? The manner in which England has solved the problem is well known and need not be described in detail. After long endurance of evils transcending those existing in the House of Representatives—for things had come to such a pass in England that ministers resigned upon an adverse vote in a contested election case—Parliament has handed over this important function to the courts. Contested elections are tried before two justices of the king's bench division of the high court of justice.[2] The judges send a formal notice of their decision to the speaker; and although the House may nominally disregard the recommendation of the court, the notice from the judges is really "final to all intents and purposes." This system, established by the reform of 1868, has justified itself.[3] Some defects have

[1] *Congressional Record*, vol. xxviii, part 1, p. 203.

[2] 31 and 32 Vict., chap. 125.

[3] Mr. James Bryce writes, August 10, 1904, regarding the practical working of this law: "Dear Sir: On the whole the act of 1868, which transferred jurisdiction in election cases from committees of the House of Commons to the judicial bench has worked well; there is at any rate no demand for a return to the old system. The decisions of the judges have not always been consistent and sometimes have been generally thought to be mistaken; sometimes they are too technical in annulling an election for some small breach of the law, sometimes they fail to annul it where there has been extensive corruption the specific instances of which it has been hard to prove. But under the old system, things were on the whole worse, decisions more uncertain, and sometimes affected by party spirit or believed to be." See also Porritt, Election Petition Trials in England, *Green Bag*, vol. ix, p. 231.

been found in the law, but they relate rather to minor details than to the general principle. The procedure provided for in the law of 1868 has been criticized on three grounds: (1) "the delay in the proceedings and protraction of the trial"; (2) "inevitable expense to parties irrespective of results"; (3) "inadequacy of existing arrangements to secure for the successful party the costs actually awarded."[1] In 1897 Parliament appointed a select committee to investigate the evils complained of and in the following year a report was brought in.[2] The committee recommended that the number of judges on the rota for the trial of election petitions should be increased and that several other changes should be made for the purpose of expediting the trials and reducing the expense connected with them; but it is noteworthy that the report embodied no suggestion of any fundamental change in the system.

It is worth while noting that under the English system the number of contested election cases is much smaller than under the American. In the ten years, 1894–1903, the House of Commons had only seventeen cases,[3] while our House in the same period had at least eighty-five cases on its hands, five times as many. It is true that elections are not so frequent in Great Britain as in America, but the membership of the British House is so much larger that the numerical comparison is not an unfair one. Is the advantage which Great Britain enjoys to be ascribed to a higher standard of political morality or to a better system and more stringent laws? A partial explanation is doubtless to be found in the different way in which the two countries deal with the matter of costs. While our government, on the assumption that the just determination of a contest is a public rather than a private advantage, pays the costs,[4] in Eng-

[1] British Blue Books, Report from the Select Committee on Election Petitions, 1898, vol. ix.

[2] *Ibid.* See also Parliamentary Debates, vol. xliv, p. 580; vol. lv, p. 623. A preliminary report was made in 1897, British Blue Books, Report from the Select Committee on Election Petitions, 1897, vol. xiii. The recommendations of the committee, contained in the final report of 1898, were not enacted into law.

[3] This figure was obtained by counting the reports made by the judges to the speaker, as found in the Parliamentary Debates.

[4] To the extent of $2,000.

land the expense of the trial falls upon the unsuccessful party, as in any other suit at law. This regulation tends to keep down the number of cases in England, for, with the danger of being asked to pay the costs of the trial staring him in the face, a candidate will not contest a seat except upon good grounds. Furthermore, the whole subject of the trial of contested parliamentary elections must be viewed in the light of the much more stringent laws against bribery and corruption existing in England.

Why not apply the English method in the United States? The objections are several, the first and strongest being the familiar constitutional obstacle. The duty of judging its own elections, imposed upon the House by the federal constitution, cannot be delegated; and even if the House should succeed in evading this technical difficulty, it is doubtful whether the courts themselves, in view of past decisions, would consent to undertake a function which they might choose to regard as political rather than judicial. Without an amendment of the constitution it is obvious that the courts in this country cannot be made the final arbiters in contested congressional elections. The additional difficulty that each House is itself absolutely free and untrammelled in this matter has already been dwelt upon. Remains there nothing, then, which may be done within the constitutional provisions as they are?

In seeking an answer to this question, it will be of interest and value to note the suggestions of reform that have recently come from the House itself. It has been twice proposed, first in the fifty-third and again in the succeeding Congress, that the duty of determining who are the *prima facie* members of the House should be turned over to the federal courts. Such legislation would virtually make the federal judges the returning officers, in place of the governors or other returning officers existing in the several states. The committee recommended that the duty of issuing the certificates of election be taken away from the political officials of the states, "who have no special qualifications to decide judicial questions" and be conferred upon judicial tribunals.[1] This would, of course, involve

[1] House Report, no. 1669, part 1, 53d Congress, 3d Session; no. 2234, 54th Congress, 1st Session.

no immediate change except in the method of determining who should be the members of the House for the purpose of its organization; but it was further proposed to accord to this preliminary judicial decision a strong moral and considerable practical influence upon the final decision of the House, by providing that the pleadings in the courts should "be substantially the notice of contest and answer thereto," and "that the same evidence shall be taken and used in the courts and in the ultimate contest in the House." The effect intended by such a regulation is obvious. The House would have to base its decision upon "precisely the same record that was passed upon by the courts;" and "while its power to reverse any decision made by the courts would be unquestioned, its members would hesitate to make a purely partisan decision and reverse a finding already made by a judicial tribunal."[1] But the bill met with vigorous opposition from the Democratic minority, who objected to it on grounds of both constitutionality and expediency. By quoting English precedents, the minority endeavored to demonstrate that to make the federal courts the judges even of the *prima facie* right to a seat would be an unconstitutional delegation of a power and duty conferred upon the House. They claimed that the bill violated the rights of the states; that it threatened the destruction of one of the boasted and fundamental principles of our government, the independence of the respective departments; and they feared that the measure would have a tendency to strengthen "the growing feeling of distrust" of the federal judiciary among the masses of the people.[2] These were the reasons publicly avowed by the minority to explain its opposition to the proposed reform; but again we cannot refrain from recalling a fact which must have appealed to the members of the minority, although they scarcely mentioned it. Most of the federal judges were Republicans, and since these hold life-appointments, the power

[1] Of course such a law could exist only so long as the House chose to obey it; but if such a system once became firmly established, it probably would not be easily changed or disregarded. However, the courts might refuse to bear this burden on the grounds previously noted.

[2] House Report, no. 1669, part 2, 53d Congress, 3d Session, vol. i.

of deciding contested House elections was likely to remain in the hands of that party for an indefinite period. The chance of getting control of the House was of course greater than that of controlling the courts. The minority's fear of the judiciary, which was natural and perhaps not groundless, illustrates how partisan considerations constantly stand in the way of reform. The Republican majority on its part was evidently apathetic, for notwithstanding the two successive recommendations from its committees nothing was done.

It has also been proposed to impose a special oath upon members of the election committees to decide cases "according to the law and evidence, with the understanding that ordinarily their verdict would settle the case"[1]—a mild reform that would presumably do little to change the present practice.

Thus far, then, all plans to change the system of deciding contested elections in the House of Representatives have not only failed, but have been received with general indifference and apathy. A "constitutional" prejudice is not easily shaken off. It should be added that some members, whose opinions undoubtedly deserve great respect, while admitting the existence of abuses believe that the present system is on the whole the best. Mr. James R. Mann, who is at present chairman of one of the election committees and has had several terms of experience in the House, is "inclined to believe," for example, "that the present method of settling contested election cases is the only practical method which can be adopted," and he questions whether the "ratio of justice" would be greater under any other system.[2] It must be admitted that noticeable par-

[1] Representative McCall, in a letter dated August 5, 1904. See also *Congressional Record*, vol. xxviii, p. 217.

[2] He writes further, under date of August 12, 1904: "I believe I can say confidently that during the four terms that I have been in Congress no Democrat has been unseated because he was a Democrat, the majority of the House during that entire time being Republican. My own judgment is that as a rule partisanship will have less effect upon the members of the legislative than it would have upon the members of the judiciary if the same questions were presented before the bench. . . . A contested election case is necessarily a somewhat summary proceeding. It cannot await the slow process of legal procedure in court even if it could be fairly determined there."

tisanship in the decisions appears just at present to be relatively infrequent. Under normal conditions, cases may continue to be decided, on the whole, equitably. The hundred and fifteen years of precedents and the recent publication of these precedents in a convenient digest tend constantly to counteract arbitrary procedure and injustice. But the tide of partisanship may rise again; and when some flagrant departure from justice, perhaps in a close contest involving the control of the House, draws attention to the evils lurking in the system, public interest will again be aroused.

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DIRECT LEGISLATION

AND ITS PROSPECTS IN THE UNITED STATES

IN the course of his inaugural address to the legislature of Massachusetts in January, Governor Douglas, the newly-elected Democratic governor of an admittedly Republican state, made certain suggestions for legislation which are of national interest. He stated it to be his opinion that Massachusetts industries are suffering from the present protective tariff, and he urged the legislature to appoint a commission to consider the effect of the tariff upon the prosperity of the commonwealth. He then suggested that the commission "should consider the advisability of a referendum vote on one or more of its conclusions, the primary object of such vote being to obtain an expression of opinion from the people for the information and guidance of our representatives in the Congress." The widespread sympathy which greeted this proposition demonstrated how deeply the sentiment in favor of a more active participation by the people in law making has manifested itself in the United States.

It is now ten years since the demand first began to be heard, from various parts of the nation, that a voter's franchise should not be confined to making a selection among candidates for public office, but should also include an opportunity to pass judgment upon questions of legislative policy and to approve or veto legislative enactments by voting for or against their confirmation. This desire for the so-called initiative and referendum is due in part to descriptions of the successful government of Switzerland by direct legislation, in part to a growing distrust of our representative system of government, as illustrated by our state legislatures and city councils, and in part to the labor unions. The workingmen have seen that if laws are to be enacted by the submission of measures to the voters at the polls, their organizations will give them opportunities for