

MINUTES OF THE
TEMPORARY CREDENTIALS COMMITTEE
SIXTY-FIRST SESSION
NEVADA STATE LEGISLATURE

January 20, 1981

The continued hearing of the Senate Temporary Credentials Committee appointed for the contest of Peggy Cavnar as to the election of William Hernstadt was called to order by the Chairman, Senator Melvin D. Close, at 9:30 a.m. on Tuesday, January 20, 1981, in Room 213 of the Legislative Building, Carson City, Nevada. Exhibit A is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Melvin D. Close, Chairman
Senator Don Ashworth
Senator Jean Ford
Senator Lawrence E. Jacobsen

OTHERS PRESENT:

Peggy Cavnar
Attorney Larry Johns
William E. Hernstadt
Attorney I. R. Ashleman
Frank Daykin, Legislative Counsel

WITNESSES PRESENT:

George Ullom
Kathleen A. Misenor
Scott Doyle
Martin Trishman
Marianne Marhar

Continuing his testimony from January 19, 1981, Mr. Ullom stated that, pursuant to the request of the Committee, he had obtained the original affidavit book for precinct 91 from Las Vegas for examination by the Committee and Mrs. Cavnar.

Kathy Meisner of Clark County Date Processing testified as to the difference in the figures of the rerun of the ballots from the election. She stated that during the course of the rerun,

Senate Temporary Credentials Committee

January 20, 1981

they did partial printouts, and some of the reruns must have inadvertently gotten in with the copies that Mrs. Cavnar received. She explained that they could have been picked up off the table when they were being sorted. Ms. Meisner presented the committee with a copy of the official recount that was in the book, which was marked as Mr. Ullom's Exhibit 8, attached hereto and referred to herein as Minute's Exhibit B. The pages given to Mrs. Cavnar which indicated the difference between the computer runs was marked by Chairman Close as Mrs. Cavnar's Exhibit K, attached hereto and referred to herein as Minute's Exhibit C.

It was agreed by attorney Johns that by using the proper pages from the computer runs, Mrs. Cavnar's tabulations would equal the Election Board's tabulation of the votes.

During discussion on how and why cards are rejected during the counting of ballots, Mark Trishman, Clark County Data Processing, testified that each card that is read through the card reader is read twice and then compared electronically. If both sets of readouts do not compare, he stated, then the card is kicked out and goes into another separate pocket. He said that another way a card can be rejected and cannot be read in with the appropriate group of cards is that in going down through the card reader as the cards are fed in, the card may turn wrong and at that point in time, the operator will take that card out and again put it in at a later date. He stated that these are the two most common ways the cards are rejected or not read and may make a difference in the figures until the final run is completed.

Ms. Meisnor stated that in the final recount, Mrs. Cavnar received one more vote than the official summary reflects.

Mr. Larry Johns stated in his final statement that he felt it was clear that the hearing of this contest is appropriately with the Senate and referred the committee to NRS 293.407. He also referred to NRS 293.425 and 293.427.

In discussing what rules the committee is governed by in this proceeding and what the guidelines are, Mr. Johns referred the committee again to NRS 293.427(2). Mr. Johns stated that he knew of no court opinions which address the question of the standards that are to be applied by legislative bodies in governing the conduct and decision in an election proceeding. Mr. Johns referred the committee to Azizaki v. Fong, 461 P.2d, 221, which is attached hereto as Exhibit D, however, he stated that what the case provides is not in the Nevada Statute but does provide that the Supreme Court of the State of Hawaii has jurisdiction in matters such as this contest.

Senate Temporary Credentials Committee
January 20, 1981

In closing, Mrs. Cavnar stated that considering all of the irregularities in the election, she felt the committee should consider the possibility of the Senate proposing an extra Senate district and Senate seat in Senate District 3 at this time, making 8 seats instead of 7, and requesting that the Governor appoint her to fill the 8th seat.

Mr. Ashleman stated in his closing argument that Mrs. Cavnar had not met the burden of proof and she did not prove that if the irregularities of the election were corrected, it would have changed the outcome of the race.

Mr. Hernstadt, in his closing statement, stated that he did not feel the challenge was against him personally but was more a challenge of the entire election system and the Election Department. He stated the contest was without merit, should be dismissed and that he should be seated today.

Senator Close called a recess at this time until Mr. Daykin could be summoned for his further advice.

The hearing of the contest of Peggy Cavnar reconvened at 10:00 a.m.

Chairman Senator Close asked Mr. Daykin whether the Legislature at this point in time has the power to create another Senate district in Clark County for the purpose of appointing Mrs. Cavnar as a State Senator.

Mr. Daykin stated that the Legislature clearly has the power to change the number of seats in the Legislature. However, the effect of adding a seat in Clark County would be to create a vacancy which, under the constitution, he did not believe the Legislature has power to fill by election or appointment. He stated that the number of Senators could not be more than half nor less than one-third of the number of Assemblymen.

The next question posed to Mr. Daykin by Senator Close was whether or not the court is available (1) for the purpose of hearing this contest, and (2) is the court available for the purpose of obtaining subpoena power to obtain information.

Mr. Daykin replied that there were two separate issues. He stated the court is not available to determine this contest; and the constitution says that each house is the judge of the election of its members, which implies a prohibition against the courts and that the Supreme Court has so held. On the other hand, Mr. Daykin stated, a person who believes himself aggrieved by an election or the conduct of the election officials could, upon proper showing, get an extraordinary writ from the District Court or Supreme Court to obtain

Senate Temporary Credentials Committee
January 20, 1981

information in order to contest the election before the proper body. He stated that the court would not hear the contest but it might help the contestant by power of the writ to prepare for a hearing. He stated that while the Senate is in session, it has the power that each house does, therefore, there should be no need to apply to a court while the contest is being determined by the committee, since it can call for information which it needs.

Chairman Senator Close asked Mr. Daykin what the obligation of the Temporary Credentials Committee is to investigate the allegations of impropriety in regard to the election.

Mr. Daykin stated that the Committee's obligation is only to go as far as they think they need to go in order to decide the contest. He said the Committee is the sole judge of the contest and the sole judge of the extent of its own obligation.

Chairman Senator Close then asked Mr. Daykin to restate once again who had the burden of proof and to what extent a contestant must go to sustain that burden.

Mr. Daykin replied that the burden of proof is upon the contestant and quoted In the Matter of Joseph F. Lisa v. Board of Elections of the City of New York and Ivan C. Lafayette, 357 N.E.2d 1013, attached hereto as Exhibit E.

Chairman Senator Close stated that the Committee would decide if further investigation would be necessary after Mrs. Cavnar examined the balance of the information obtained from the Election Board.

The meeting was adjourned at 10:35 a.m.

The continued hearing of the Senate Temporary Credentials Committee was called to order by the Chairman, Senator Close at 3:25 p.m. on Tuesday, January 20, 1981, in Room 213 of the Legislative Building, Carson City, Nevada.

Mr. Johns stated that Mrs. Cavnar had reviewed the registration for precinct 91 and called Marianne Marhar to testify as to the validity of the signatures in the book.

Marianne Marhar stated that she is a licensed document examiner, had examined the signatures in precinct 91 and had found 12 signatures which she considered suspect. She listed the following names:

Senate Temporary Credentials Committee
January 20, 1981

John Savage, page 12; Daryl Spencer, page 16; Susan Peterson, page 10, line 30; Ruth Beckwith, page 1, line 13; Joseph Donovan, page 4, line 7; Alice Fears, page 4, line 23; George Garrison, page 5, line 14; Warren C. Gee, page 5, line 17; Jean B. Hope, page 6, line 23; Craig Lacey, page 7, line 30; Benita Lowry, page 8, line 17; Vern Savage, page 12, line 6.

Members of the committee reviewed the signatures with Ms. Marhar at this time. Chariman Close stated that some of the signatures appeared very similar while others appeared very different, and that this would be taken into consideration in making a decision on the contest.

Chairman Close stated that at this time the presentation of evidence had terminated and that the committee would reconvene on January 21, 1981 at 10:00 o'clock for a decision on the contest.

The meeting was adjourned at 4:00 p.m.

Respectfully submitted by:

Iris Parraguirre, Secretary

APPROVED BY:

Senator Melvin D. Close, Chariman

Date: _____

ATTENDANCE ROSTER FORM

COMMITTEE MEETINGS

SENATE COMMITTEE ON _____

DATE: 1-20-81

EXHIBIT A

PLEASE PRINT NAME	PLEASE PRINT ORGANIZATION & ADDRESS	PLEASE PRINT TELEPHONE
ROD JACKSON	KTNV-TV	
Ed VOGAN	RONALD - JOURNAL	
Arish White	AP	
Cynthia Glass		
Lance Frank	KTNV-TV	
J. R. Ashburn	Atty.	
Steve Ullom	Clark Co Electric Dept.	
Deborah	" " "	
Bill Curran	Clark County D. A. office	
SCOTT DOYLE	" " " " "	
Christy Tubman	Clark County Data Processing	
Kathy Martin	" " " "	
SAM CRUM	HOUSEHUSBAND OF ^{SARAH} PEZDY CRUM	
Manning Miller	Revis	
C. WOODYARD	L. V. SUN	
ROB MCCOY	KVBC-TV	
Bryce CHRISTENSEN	Joyce + Ass	
W. J. Jones	Secy - Concerned	- 8 -
John Whitcomb	intern - Verges	
Sigi Hays	legislative intern - Herstadt	
Laura Baskerville	UNR - intern	

Official Recount
in the Book

Ex 8

EXHIBIT B

101 COUNTRY CLUB 023

PAGE 1

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980

REGISTERED VOTERS - TOTAL 675

BALLOTS CAST - TOTAL 558

82.7% OF TURNOUT

U.S. PRESIDENT & VICE-PRESIDENT

ANDERSON & LUCEY	IND.	40	7.1%
CANTER & MCDALE	DEM.	103	19.9%
CLARK & KOCH	LIBT	7	1.3%
REAGAN & BUSH	REP.	391	71.7%
NONE OF THESE CANDTE,		4	.7%

UNITED STATES SENATOR

GRJACK, M.	DEM.	175	32.2%
HACKER, A.A.	LIBT	10	1.8%
LAXALI, P.	REP.	352	64.8%
NONE OF THESE CANDTE,		6	1.1%

REPRESENTATIVE IN CONGRESS

MANGUM, H.J.	LIBT	11	2.0%
SANTINI, J.	DEM.	365	68.0%
SAUNDERS, V.	REP.	139	25.9%
NONE OF THESE CANDTE,		22	4.1%

STATE SENATE, DISTRICT NO. 3

ASHVORTH, K.	DEM.	314	17.0%
BILLRAY, J.	DEM.	235	12.7%
CAVNAK, P.	REP.	285	15.4%
CORRETT, J.	LIBT	11	.6%
BERNSTADT, B.	DEM.	251	13.6%
LAMB, F.R.	DEM.	297	16.1%
LAMBERT, C.	REP.	80	4.3%
LEAL, J.	REP.	262	14.2%
OBRIEN, P.	LIBT	16	.9%
ONCILL, P.	LIBT	15	.8%
PONTON, M.	LIBT	22	1.2%
SMERS, A.	REP.	58	3.1%

STATE ASSEMBLY, DISTRICT NO. 13

FARRIS, W.A.	LIBT	20	4.2%
HAYES, R.W.	DEM.	299	62.7%
REAGAN, S.	REP.	158	33.1%

PUBLIC ADMINISTRATOR

HARRIS, A.I.	LIBT	61	13.1%
POLEACK, J.	REP.	180	38.6%
SHAFFER, J.	DEM.	225	48.3%

CONSTABLE, LAS VEGAS TOWNSHIP

BONAVENTURA, J.	DEM.	256	56.3%
JUNIKKA, E.	LIBT	21	4.6%
SANDERS, M.L.	REP.	178	39.1%

JUSTICE OF SUPREME COURT, SEAT A

FLANGAS, P.L.	N.P.	94	18.8%
MURRAY, J.	N.P.	366	73.1%
NONE OF THESE CANDTE,		41	8.2%

JUSTICE OF SUPREME COURT, SEAT E

GOLDMAN, P.S.	N.P.	353	67.8%
SPRINGER, C.E.	N.P.	157	30.1%
NONE OF THESE CANDTE,		11	2.1%

DISTRICT COURT JUDGE, DEPARTMENT NO. 9

HUFFAKER, S.L.	N.P.	304	58.9%
SHEARING, M.	N.P.	212	41.1%

REGENT, STATE UNIVERSITY, SUB-DISTRICT C

JONES, J.M.	N.P.	283	55.1%
KARAMANGS, G.	N.P.	231	44.9%

JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3

BAUCOM, V.	N.P.	97	21.7%
MCGROARTY, J.S.	N.P.	350	78.3%

JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4

BIXLER, J.M.	N.P.	265	59.7%
LODEWYCK, J.	N.P.	179	40.3%

JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5

SLEEPER, J.	N.P.	175	39.8%
WHITE JR., E.W.	N.P.	265	60.2%

QUESTION NO. 1

YES,	405	81.2%
NO,	94	18.8%

QUESTION NO. 2

YES,	144	29.0%
NO,	352	71.0%

QUESTION NO. 3

YES,	178	35.0%
NO,	331	65.0%

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980
& LH

QUESTION NO. 4

YES,	278	56.2%
NO,	217	43.8%

QUESTION NO. 5

YES,	196	39.4%
NO,	301	60.6%

QUESTION NO. 6

YES,	288	53.3%
NO,	252	46.7%

QUESTION NO. 7

YES,	241	48.7%
NO,	254	51.3%

QUESTION NO. 8

YES,	410	79.5%
NO,	106	20.5%

QUESTION NO. 9

YES,	322	63.9%
NO,	182	36.1%

WE, THE UNDERSIGNED, CERTIFY THAT
THE ABOVE RESULTS ARE TRUE AND VALID.

NAME _____

NAME _____

DIFF. BETWEEN COMPUTER RUNS

CAVNAK & HERNSTADT

101 COUNTRY CLUB 023

PAGE 1

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980

REGISTERED VOTERS - TOTAL	675	BALLOTS CAST - TOTAL	555	82.2% OF TURNOUT
U.S. PRESIDENT & VICE-PRESIDENT		CONSTABLE, LAS VEGAS TOWNSHIP		
ANDERSON & LUCEY	IND. 40 7.4%	BONAVENTURA, J.	DEM. 255 56.2%	
CARTER & MCNDALE	DEM. 103 19.0%	JUNIKKA, E.	LIBT 21 4.6%	
CLARK & KOCH	LIBT 7 1.3%	SANDERS, M.L.	REP. 178 39.2%	
REAGAN & BUSH	REP. 389 71.6%	JUSTICE OF SUPREME COURT, SEAT A		
NONE OF THESE CANDTE,	4 .7%	FLANGAS, P.L.	N.P. 94 18.8%	
UNITED STATES SENATOR		MURRAY, J.	N.P. 366 73.2%	
GOJACK, M.	DEM. 175 32.4%	NONE OF THESE CANDTE,		
HACKER, A.A.	LIBT 10 1.9%	40 8.0%		
LAXALT, P.	REP. 349 64.6%	JUSTICE OF SUPREME COURT, SEAT E		
NONE OF THESE CANDTE,	6 1.1%	GOLDMAN, P.S.	N.P. 353 68.0%	
REPRESENTATIVE IN CONGRSS		SPRINGER, C.E.	N.P. 155 29.9%	
MANGRUM, H.J.	LIBT 11 2.1%	NONE OF THESE CANDTE,		
SANTINI, J.	DEM. 364 68.0%	11 2.1%		
SAUNDERS, V.	REP. 138 25.0%	DISTRICT COURT JUDGE, DEPARTMENT NO. 9		
NONE OF THESE CANDTE,	22 4.1%	HUFFAKER, S.L.	N.P. 303 58.8%	
STATE SENATE, DISTRICT NO. 3		SHEARING, M.	N.P. 212 41.2%	
ASHWORTH, K.	DEM. 314 17.1%	REGENT, STATE UNIVERSITY, SUB-DISTRICT C		
BILBRAY, J.	DEM. 235 12.8%	JONES, J.M.	N.P. 281 54.9%	
CAVNAK, P.	REP. 284 15.4%	KARAMANCS, C.	N.P. 231 45.1%	
CORNETT, J.	LIBT 10 .5%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3		
HERNSTADT, B.	DEM. 250 13.6%	BAUCOM, V.	N.P. 97 21.8%	
LAMB, F.R.	DEM. 296 16.1%	MCGREARY, J.S.	N.P. 348 78.2%	
LAMBERT, C.	REP. 80 4.3%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4		
LEAR, J.	REP. 260 14.1%	BIXLER, J.M.	N.P. 263 59.5%	
GRIEN, P.	LIBT 16 .9%	LODEWYCK, J.	N.P. 179 40.5%	
ONEILL, P.	LIBT 15 .8%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5		
PONTON, M.	LIBT 22 1.2%	SLEEPER, J.	N.P. 174 39.7%	
SMOKE, A.	REP. 58 3.2%	WHITE JR., E.W.	N.P. 266 60.3%	
STATE ASSEMBLY, DISTRICT NO. 13		QUESTION NO. 1		
HARRIS, W.A.	LIBT 20 4.2%	YES,	402 81.0%	
HAYLS, K.W.	DEM. 298 62.7%	NO,	94 19.0%	
REAGAN, S.	REP. 157 33.1%	QUESTION NO. 2		
PUBLIC ADMINISTRATOR		YES,	143 29.0%	
HARRIS, M.J.	LIBT 60 12.9%	NO,	350 71.0%	
POLLACK, J.	REP. 180 38.8%	QUESTION NO. 3		
SHAFER, J.	DEM. 224 48.3%	YES,	177 35.0%	
		NO,	329 65.0%	

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980
& LH

QUESTION NO. 2			
YES,	103	24.1%	
NO,	325	75.9%	
QUESTION NO. 3			
YES,	139	31.8%	
NO,	298	68.2%	
QUESTION NO. 4			
YES,	226	52.6%	
NO,	204	47.4%	
QUESTION NO. 5			
YES,	153	35.3%	
NO,	281	64.7%	
QUESTION NO. 6			
YES,	175	38.2%	
NO,	283	61.8%	
QUESTION NO. 7			
YES,	217	50.8%	
NO,	210	49.2%	
QUESTION NO. 8			
YES,	343	77.6%	
NO,	99	22.4%	
QUESTION NO. 9			
YES,	319	71.7%	
NO,	126	28.3%	

WE, THE UNDERSIGNED, CERTIFY THAT
THE ABOVE RESULTS ARE TRUE AND VALID.

NAME _____

NAME _____

**DIFF. BETWEEN COMPUTER
RUNS
HERNSTADT**

115 DESERT HILLS 001

PAGE 1

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980

REGISTERED VOTERS - TOTAL				BALLOTS CAST - TOTAL				82.0% OF TURNOUT			
U.S. PRESIDENT & VICE-PRESIDENT				PUBLIC ADMINISTRATOR							
ANDERSON & LUCEY	IND.	38	8.2%	HARRIS, M.I.	LIBT	62	15.4%	PULLACK, J.	REP.	126	31.3%
CARTER & MONDALE	DEM.	154	33.2%	PULLACK, J.	REP.	126	31.3%	SHAFFER, J.	DEM.	214	53.2%
CLARK & KOCH	LIBT	4	.9%	CONSTABLE, LAS VEGAS TOWNSHIP							
REAGAN & RUSH	REP.	262	56.5%	BCNAVENTURA, J.	DEM.	236	59.7%	JUNIKKA, E.	LIBT	26	6.6%
NONE OF THESE CANDTE,		6	1.3%	SANDERS, M.L.	REP.	133	33.7%	JUSTICE OF SUPREME COURT, SEAT A			
UNITED STATES SENATOR				JUSTICE OF SUPREME COURT, SEAT A							
GOJACK, M.	DEM.	211	45.7%	FLANGAS, P.L.	N.P.	77	17.4%	MOWBRAY, J.	N.P.	320	72.4%
HACKER, A.A.	LIBT	3	1.7%	JUSTICE OF SUPREME COURT, SEAT E							
LAXALT, P.	REP.	239	51.7%	GOLDMAN, P.S.	N.P.	233	52.6%	SPRINGER, C.E.	N.P.	181	40.9%
NONE OF THESE CANDTE,		4	.9%	JUSTICE OF SUPREME COURT, SEAT E							
REPRESENTATIVE IN CONGRESS				JUSTICE OF SUPREME COURT, SEAT E							
MANGRUM, H.J.	LIBT	7	1.5%	NONE OF THESE CANDTE,		45	10.2%	DISTRICT COURT JUDGE, DEPARTMENT NO. 9			
SANIINI, J.	DEM.	331	71.0%	DISTRICT COURT JUDGE, DEPARTMENT NO. 9							
SAUNDERS, V.	REP.	103	22.1%	HUFFAKER, S.L.	N.P.	240	55.6%	STATE BOARD OF EDUCATION, SUB-DISTRICT D			
NONE OF THESE CANDTE,		25	5.4%	SHEARING, M.	N.P.	192	44.4%	TRUSTEE, CLARK COUNTY SCHOOL - DISTRICT A			
STATE SENATE, DISTRICT NO. 3				TRUSTEE, CLARK COUNTY SCHOOL - DISTRICT A							
ASHWORTH, K.	DEM.	268	16.6%	BUTLER, P.R.	N.P.	171	42.8%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3			
BILBRAY, J.	DEM.	250	15.5%	FOLST, S.	N.P.	229	57.3%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3			
CAVNAK, P.	REP.	221	13.7%	STATE BOARD OF EDUCATION, SUB-DISTRICT D							
CORNETT, J.	LIBT	11	.7%	KENNEY, J.	N.P.	350	100.0%	TRUSTEE, CLARK COUNTY SCHOOL - DISTRICT A			
HERNSTADT, H.	DEM.	256	15.8%	TRUSTEE, CLARK COUNTY SCHOOL - DISTRICT A							
LAMB, F.R.	DEM.	270	16.7%	BUTLER, P.R.	N.P.	171	42.8%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4			
LAMBERT, C.	REP.	43	2.7%	FOLST, S.	N.P.	229	57.3%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4			
LEAR, J.	REP.	169	10.5%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3							
OBRIEN, P.	LIBT	22	1.4%	BAUCCM, V.	N.P.	121	30.5%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4			
ONEILL, P.	LIBT	29	1.8%	MCGROARTY, J.S.	N.P.	276	69.5%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4			
PONTON, M.	LIBT	40	2.5%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3							
SMOKE, A.	REP.	37	2.3%	BIXLER, J.M.	N.P.	201	50.9%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4			
STATE ASSEMBLY, DISTRICT NO. 16				JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3							
HAM, J.	REP.	203	47.5%	LODEWYCK, J.	N.P.	194	49.1%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5			
HARMON, H.L.	DEM.	206	48.2%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3							
KING, C.	LIBT	18	4.2%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5							
COUNTY COMMISSION, DISTRICT A				JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5							
BROADBENT, R.N.	REP.	256	59.5%	SLEEPER, J.	N.P.	184	45.7%	QUESTION NO. 1			
PAPEN, A.A.	DEM.	174	40.5%	WHITE JR., E.W.	N.P.	219	54.3%	YES,			
								NO,			
								351 82.6%			
								74 17.4%			

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980
8 LH

QUESTION NO. 4		
YES,	359	51.1%
NO,	344	48.9%

QUESTION NO. 5		
YES,	254	35.6%
NO,	459	64.4%

QUESTION NO. 6		
YES,	317	41.5%
NO,	447	58.5%

QUESTION NO. 7		
YES,	346	48.6%
NO,	366	51.4%

QUESTION NO. 8		
YES,	576	78.9%
NO,	154	21.1%

QUESTION NO. 9		
YES,	515	71.1%
NO,	209	28.9%

WE, THE UNDERSIGNED, CERTIFY THAT
THE ABOVE RESULTS ARE TRUE AND VALID.

NAME _____

NAME _____

PAGES GIVEN TO
CAVARNAR EX K

DIFF. BETWEEN COMPUTER
RUNS

EXHIBIT C

112-COUNTRY CLUB 033

CAVARNAR & HERNSTADT

PAGE 1

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980

REGISTERED VOTERS - TOTAL		989		BALLOTS CAST - TOTAL		774		78.3% OF TURNOUT	
U.S. PRESIDENT & VICE-PRESIDENT				CONSTABLE, LAS VEGAS TOWNSHIP					
ANDERSON & LUCEY	IND.	51	6.7%	BONAVENTURA, J.	DEM.	357	55.4%		
CARTER & MONDALE	DEM.	175	22.9%	JUNIKKA, E.	LIBT	24	3.7%		
CLARK & KOCH	LIBT	11	1.4%	SANDERS, M.I.	REP.	263	40.8%		
REAGAN & DUSH	REP.	514	67.4%	JUSTICE OF SUPREME COURT, SEAT A					
NONE OF THESE CANDTE,		12	1.6%	FLANGAS, P.L.	N.P.	124	17.4%		
UNITED STATES SENATOR				MOWBRAY, J.					
GOJACK, M.	DEM.	312	41.4%	NONE OF THESE CANDTE,					
HACKER, A.A.	LIBT	5	.7%						
LAXALT, P.	REP.	420	56.8%	JUSTICE OF SUPREME COURT, SEAT E					
NONE OF THESE CANDTE,		9	1.2%	GOLDMAN, P.S.	N.P.	438	60.9%		
REPRESENTATIVE IN CONGRESS				SPRINGER, C.E.					
MANGRUM, H.J.	LIBT	22	2.9%	NONE OF THESE CANDTE,					
SAMINI, J.	DEM.	505	67.2%						
SAUNDERS, V.	REP.	197	26.2%	DISTRICT COURT JUDGE, DEPARTMENT NO. 9					
NONE OF THESE CANDTE,		27	3.6%	HUFFAKER, S.L.	N.P.	430	59.3%		
STATE SENATE, DISTRICT NO. 3				SHEARING, M.					
ASHGORTH, K.	DEM.	437	16.7%						
BILBRAY, J.	DEM.	375	14.5%	REGENT, STATE UNIVERSITY, SUB-DISTRICT C					
CAVARNAR, P.	REP.	399	15.3%	JONES, J.M.	N.P.	378	52.4%		
COPNETT, J.	LIBT	16	.6%	KARAMANIS, C.	N.P.	344	47.6%		
HERNSTADT, B.	DEM.	296	15.1%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3					
LAMB, F.P.	DEM.	433	16.6%	BAUCOM, V.	N.P.	163	25.6%		
LAMBERT, C.	REP.	80	3.1%	MCGROARTY, J.S.	N.P.	473	74.4%		
LEAR, J.	REP.	325	12.6%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4					
ORRIN, P.	LIBT	23	.9%	BIXLER, J.M.	N.P.	421	65.6%		
ONTELL, P.	LIBT	32	1.2%	LODEWYCK, J.	N.P.	221	34.4%		
POGTON, M.	LIBT	32	1.2%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5					
SMOKE, A.	REP.	64	2.4%	SLEEPER, J.	N.P.	260	41.4%		
STATE ASSEMBLY, DISTRICT NO. 13				WHITE JR., E.W.					
HARRIS, W.A.	LIBT	29	4.4%						
HAYES, K.W.	DEM.	410	61.9%	QUESTION NO. 1					
RLAGAN, S.	REP.	223	33.7%	YES,					
PUBLIC ADMINISTRATOR				NO,					
HARRIS, M.I.	LIBT	80	12.3%	585 81.9%					
POLLACK, J.	REP.	279	43.1%	129 18.1%					
SPAHER, J.	DEM.	289	44.6%	QUESTION NO. 2					
				YES,					
				NO,					
				179 25.2%					
				532 74.8%					
				QUESTION NO. 3					
				YES,					
				NO,					
				226 31.4%					
				493 68.6%					

orig

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980

REGISTERED VOTERS - TOTAL	573	BALLOTS CAST - TOTAL	471	82.2% OF TURNOUT
U.S. PRESIDENT & VICE-PRESIDENT		PUBLIC ADMINISTRATOR		
ANDERSON & LUCY	IND. 38 8.2%	HARRIS, M.I.	LIBT 62 15.4%	
CARTER & MONDALE	DEM. 155 33.3%	POLLACK, J.	REP. 126 31.3%	
CLARK & KOCH	LIBT 4 .9%	SHAFFER, J.	DEM. 215 53.3%	
REAGAN & RUSH	REP. 262 56.3%	CONSTABLE, LAS VEGAS TOWNSHIP		
NONE OF THESE CANDTE,	6 1.3%	BONAVENTURA, J.	DEM. 237 59.8%	
UNITED STATES SENATOR		JUNIKKA, E.	LIBT 26 6.6%	
GOJACK, M.	DEM. 211 45.6%	SANDERS, M.L.	REP. 133 33.6%	
HACKER, A.A.	LIBT 8 1.7%	JUSTICE OF SUPREME COURT, SEAT A		
LAXALI, P.	REP. 249 51.8%	FLANGAS, P.L.	N.P. 77 17.4%	
NONE OF THESE CANDTE,	4 .9%	MUWBRAY, J.	N.P. 321 72.5%	
REPRESENTATIVE IN CONGRESS		NONE OF THESE CANDTE,	45 10.2%	
MANGUM, H.J.	LIBT 7 1.5%	JUSTICE OF SUPREME COURT, SEAT E		
SANTINI, J.	DEM. 232 71.1%	GOLDMAN, P.S.	N.P. 233 52.5%	
SAUNDERS, V.	REP. 103 22.1%	SPRINGER, C.E.	N.P. 182 41.0%	
NONE OF THESE CANDTE,	25 5.4%	NONE OF THESE CANDTE,	29 6.5%	
STATE SENATE, DISTRICT NO. 3		DISTRICT COURT JUDGE, DEPARTMENT NO. 9		
ASHWORTH, K.	DEM. 269 16.6%	HUEEAKER, S.L.	N.P. 241 55.7%	
BILBRAY, J.	DEM. 251 15.5%	SHEARING, M.	N.P. 192 44.3%	
CAVNAK, P.	REP. 221 13.7%	STATE BOARD OF EDUCATION, SUE-DISTRICT D		
CORNETT, J.	LIBT 11 .7%	KENNEY, J.	N.P. 351 100.0%	
HERNSTADT, B.	DEM. 257 15.9%	TRUSTEE, CLARK COUNTY SCHOOL - DISTRICT A		
LAMB, F.P.	DEM. 279 16.7%	BUTLER, P.R.	N.P. 172 42.9%	
LAMBERT, C.	REP. 43 2.7%	FOLST, S.	N.P. 229 57.1%	
LEAR, J.	REP. 169 10.4%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3		
O'BRIEN, P.	LIBT 22 1.4%	BAUCCM, V.	N.P. 121 30.4%	
ONEILL, P.	LIBT 29 1.8%	MCGRODARY, J.S.	N.P. 277 69.6%	
PENTON, M.	LIBT 40 2.5%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4		
SHOKE, A.	REP. 37 2.3%	BIXLER, J.M.	N.P. 201 50.9%	
STATE ASSEMBLY, DISTRICT NO. 16		LODEWYCK, J.	N.P. 194 49.1%	
HAM, J.	REP. 203 47.4%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5		
HARMON, H.L.	DEM. 207 48.4%	SLEEPER, J.	N.P. 185 45.8%	
KING, C.	LIBT 18 4.2%	WHITE JR., E.W.	N.P. 219 54.2%	
COUNTY COMMISSION, DISTRICT A		QUESTION NO. 1		
BROADBENT, R.N.	REP. 256 59.4%	YES,	352 82.6%	
HAFEN, A.A.	DEM. 175 40.6%	NO,	74 17.4%	

GENERAL ELECTIONS
CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 04, 1980

REGISTERED VOTERS - TOTAL	989	BALLOTS CAST - TOTAL	778	78.7% OF TURNOUT
U.S. PRESIDENT & VICE-PRESIDENT		CONSTABLE, LAS VEGAS TOWNSHIP		
ANDERSON & LUCEY	IND. 51 6.6%	BONAVENTURA, J.	DEM. 360 55.6%	
CARTER & MONDALE	DEM. 177 23.1%	JUNIKKA, E.	LIBT 24 3.7%	
CLARK & KUOH	LIBT 11 1.4%	SANDERS, M.L.	REP. 264 40.7%	
REAGAN & RUSH	REP. 515 67.1%	JUSTICE OF SUPREME COURT, SEAT A		
NONE OF THESE CANDTE,	13 1.7%	FLANGAS, P.L.	N.P. 127 17.8%	
UNITED STATES SENATOR		MOKBRAY, J.	N.P. 497 69.5%	
GOJACK, M.	DEM. 313 41.3%	NONE OF THESE CANDTE,	91 12.7%	
HACKER, A.A.	LIBT 5 .7%	JUSTICE OF SUPREME COURT, SEAT E		
LAXALT, P.	REP. 430 56.8%	GOLDMAN, P.S.	N.P. 441 61.1%	
NONE OF THESE CANDTE,	9 1.2%	SPRINGER, C.E.	N.P. 248 34.3%	
REPRESENTATIVE IN CONGRESS		NONE OF THESE CANDTE,	33 4.6%	
MANGRUM, H.J.	LIBT 22 2.9%	DISTRICT COURT JUDGE, DEPARTMENT NO. 9		
SANTINI, J.	DEM. 507 67.2%	PUFFAKER, S.L.	N.P. 432 59.3%	
SAUNDERS, V.	REP. 199 26.4%	SHEARING, M.	N.P. 296 40.7%	
NONE OF THESE CANDTE,	27 3.6%	REGENT, STATE UNIVERSITY, SUB-DISTRICT C		
STATE SENATE, DISTRICT NO. 3		JONES, J.M.	N.P. 380 52.3%	
ASHKERTH, K.	DEM. 438 16.7%	KARAMANOS, C.	N.P. 346 47.7%	
BILLERAY, J.	DEM. 380 14.5%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 3		
CAVNAK, P.	REP. 401 15.3%	BAUCOM, V.	N.P. 164 25.7%	
CORNETT, J.	LIBT 16 .6%	MCGREARY, J.S.	N.P. 475 74.3%	
HERNSTADT, B.	DEM. 409 15.2%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 4		
LAMB, F.P.	DEM. 433 16.5%	BIXLER, J.M.	N.P. 422 65.5%	
LAMPERT, C.	REP. 80 3.0%	LODEKYCK, J.	N.P. 222 34.5%	
LEAR, J.	REP. 327 12.4%	JUSTICE OF THE PEACE, LAS VEGAS TWP - DEPT 5		
GRIEN, P.	LIBT 23 .9%	SLEEPER, J.	N.P. 263 41.6%	
ONEILL, P.	LIBT 33 1.3%	WHITE JR., E.W.	N.P. 369 58.4%	
PONTON, M.	LIBT 33 1.3%	QUESTION NO. 1		
SUKE, A.	REP. 64 2.4%	YES,	589 82.0%	
STATE ASSEMBLY, DISTRICT NO. 1-3		NO,	129 18.0%	
HARRIS, W.A.	LIBT 29 4.4%	QUESTION NO. 2		
HAYES, R.W.	DEM. 410 61.7%	YES,	181 25.3%	
REAGAN, S.	REP. 226 34.0%	NO,	534 74.7%	
PUBLIC ADMINISTRATOR		QUESTION NO. 3		
HARRIS, M.I.	LIBT 82 12.6%	YES,	229 31.7%	
POLLACK, J.	REP. 280 43.0%	NO,	494 68.3%	
SHAFER, J.	DEM. 289 44.4%			

AKIZAKI v. FONG

Hawaii 221

Cite as 461 P.2d 221

3. States ⇨30

Under State Constitution, function of House of Representatives in judging elections of its members extends only to ascertaining whether parties have properly invoked jurisdiction of competent court to judge contest. HRS §§ 12-101 to 12-105; Const. art. 2, § 7.

4. Elections ⇨296

Where courts are final arbiter, an election contest involving candidates to House of Representatives is not mooted by seating of one of contestants before final judicial determination. HRS §§ 12-101 to 12-105; Const. art. 2, § 7.

5. Constitutional Law ⇨68(3)

Election contest case involving candidates to House of Representatives does not present nonjusticiable political question.

6. Elections ⇨298(3)

Where 19 ballots invalid because post-marked too late were commingled with valid ballots and counted, and margin between two contestants was two votes, it could not be determined which of two candidates won contested seat, and new election should be held. HRS § 12-103.

Syllabus by the Court

1. The fundamental interest to be protected in election contest cases is that of the voters affected.

2. Where nineteen invalid ballots were commingled with valid ballots and counted, where it can not be determined for whom the invalid ballots were cast, and where the margin between the two contestants is two votes, it can not be determined which of the two won the contested seat, and a new election should be held, pursuant to HRS § 12-103.

3. Where an apparent conflict between Article II, Sec. 7 and Article III, Sec. 13 of the Hawaii Constitution raised the question of whether the House of Representatives or the courts should be the

George Y. AKIZAKI and David C. McClung

v.

Sam L. FONG, Jr. and Edward E. Johnston and Thomas P. Gill as Lieutenant Governor of the State of Hawaii.

No. 4864.

Supreme Court of Hawaii.

Nov. 11, 1969.

Contest of election decided by two votes which losing candidate for House of Representatives proved that of ballots cited, at least 19 were invalid. The First Circuit Court, Tom Okino, J., discarded absentee ballots, among which were invalid ones, and on basis of tabulation counted out such ballots, declared candidate to be winner of election. Opposing candidate appealed. The Supreme Court, Ardson, C. J., held that under State Constitution, the courts were final arbiter in election disputes involving candidates to House of Representatives, and that in light of facts that 19 invalid ballots had been commingled with valid ballots and counted, and margin between contestants was two votes, it could not be determined which contestant won contested seat and election was required.

Reversed.

Abe, J., dissented.

Elections ⇨269

Fundamental interest to be protected in election contest cases is that of voters affected.

Elections ⇨30

Constitutional provision that contested elections shall be determined by court of competent jurisdiction in such manner as may be provided by law prevails over provision that each house of legislature shall be judge of elections, returns and quali-

4. Where the courts are the final arbiter, an election contest is not mooted by the seating of one of the contestants before final judicial determination.

Herbert Y. C. Choy, Honolulu (Fong, Miho, Choy & Robinson, Honolulu, of counsel), for defendants-appellants.

Frank D. Padgett and Walter H. Ikeda, Honolulu (Padgett, Greeley, Marumoto & Akinaka, Honolulu, of counsel), for plaintiffs-appellees.

Morton King and Thomas M. Pico, Jr., Deputy Attys. Gen., Honolulu (Bertram T. Kanbara, Atty. Gen., Honolulu, on the brief) for defendant-appellee.

Before RICHARDSON, C. J., LEVINSON and ABE, JJ., HAWKINS, Circuit Judge, for MARUMOTO, J., disqualified, and KING, Circuit Judge, for KOBAYASHI, J., disqualified.

RICHARDSON, Chief Justice.

In the November 1968 election to select six representatives in the House of Representatives from the Fifteenth Representative District, five candidates were clearly elected without contest. The present case involves a controversy over the sixth seat.

In the final tabulation of the votes, the Republican candidate, Fong, received two more votes than did the Democratic candidate, Akizaki. Akizaki contested the election in the court below, and proved that of the ballots counted, at least nineteen were clearly invalid. These were absentee ballots which, because of late postmarks, failed to meet the requirements of HRS § 14-8.¹ HRS § 14-8 provides that an absentee ballot received not later than noon on the sixth day following a general election may be counted, but only if it is postmarked not later than the day before the election. Due

to a mistake on the part of the election officials, nineteen ballots postmarked too late to be opened and counted were nevertheless opened and counted. In the process they were commingled with valid absentee ballots so that it could not later be determined for whom the invalid ballots had been cast. Since the number of invalid ballots greatly exceeds the margin of victory, it is obvious that their presence could have affected the result. The court below resolved this problem by discarding 174 absentee ballots, among which were the nineteen invalid ones. On the basis of a tabulation without these 174 ballots, the court declared Akizaki to have been the winner of the election. From this determination Fong appeals to this Court.

Subsequent to the decision of the court below and pursuant to the recommendation of its credentials committee, the House seated Akizaki. On the basis of the House's action, Akizaki claims that the controversy has been finally determined; that the case has been mooted; and that this Court should not rule upon the question, or should simply affirm the judgment of the court below. Fong claims that discarding so many valid absentee ballots is an unwarranted disenfranchisement of many absentee voters whose votes were validly cast. He also claims that because jurisdiction over election contest cases is granted to the court by the Constitution of the State of Hawaii, Article II, Sec. 7,² this Court may properly review the decision of the court below to reach an appropriate result, notwithstanding the action of the House.

[1] The fundamental interest to be protected here is that of the people of the Fifteenth Representative District in choosing whomever they please to represent them in the House of Representatives. The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by

democratic form of government. Implicit in that right is the right to have one's vote count and the right to have as nearly perfect an election proceeding as can be provided. The result we reach must be consistent with these principles.

[2] Before deciding the substantive issues raised in this appeal, we must determine the basic underlying constitutional question presented. Counsel for appellees have urged that, since the House has now seated Akizaki, this Court may not and should not further consider this election contest. This claim is based upon their reading of Article III, Sec. 13 of the Hawaii Constitution, which says, in part, that "[e]ach house shall be the judge of the elections, returns and qualifications of its own members." Appellants, however, argue that the controlling provision is Article II, Sec. 7 of the same document, which states that "[c]ontested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law." We must resolve the apparent conflict between these two provisions before proceeding further. Simply stated, the question is: Should the courts or should the legislative body be the final arbiter of the dispute in the event of an election contest involving a legislative seat? We hold that the courts are required by the Hawaii Constitution to be the forum and the final arbiter in such disputes.

At the outset, it is important to note that the legislature has enacted HRS §§ 12-101 to 12-105 to implement Article II, Sec. 7 of the Constitution. These sections provide that suit may be brought in the circuit court to contest an election; that the court, after hearing the case, should determine the winner of the election if possible; and that if, because of a mistake on the part of the election officials, the court cannot ascertain the correct result, it should invalidate the election and a new election should be held.

read in context, along with the other provisions of the Constitution, including Article II, Sec. 7. In this regard, it is helpful to note the analysis of a similar problem by the United States Supreme Court in *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). The United States Constitution includes language identical with that found in Article III, Sec. 13 of the Hawaii Constitution, that "[e]ach house shall be the judge of the elections, returns and qualifications of its own members." In *Powell*, the United States Supreme Court considered the problems raised by this language in regard to judging *qualifications*. The Court held that Congress was empowered to judge only the qualifications "expressly prescribed" in the Constitution itself, *Powell, supra* at 522 and 548, 84 S.Ct. 1944, and not more general qualifications, or qualifications extrinsic to the Constitution. In other words, the Congress' judicial power with respect to qualifications extended only to investigation and determination of whether the specific membership requirements set out in the Constitution had been met.

[3] Similarly, we hold that under the Hawaii Constitution the House's function in judging the *elections* of its members extends only to ascertaining whether the Constitution has been complied with; that is, whether the parties have properly invoked the jurisdiction of a competent court to judge the contest under Article II, Sec. 7 and the statutory implementation of that provision.

This interpretation of the Constitution is clearly the correct reading, as well as the most consistent with protection of the electorate. For the framers of our Constitution to have entrusted the final determination of such controversies to the legislative body would have been unwise. It would have provided a dangerously effective method of perpetuating the existing majority in

ing to note that the House vote seating Mr. Akizaki was divided strictly along party lines.

The point is that the Constitution recognizes that the courts alone are the sort of neutral and disinterested body which ought to consider and to decide election contests.

We note that the legislature has apparently concurred in this recognition by enacting detailed procedures for resolution of these disputes by the judiciary in HRS §§ 12-101 to 12-105. To say, therefore, that a house of the legislature could undertake a binding and independent resolution of an election contest would be inconsistent with the legislature's own statutory action, as well as contrary to the requirements of our Constitution.

Moreover, we note in this case that it was the demonstrated intent of the House to give great weight and deference to the decision of the judiciary. We rely for this proposition upon the intent expressed in the reports of the credentials committee. In its first report, dated January 15, 1969, and titled "Special Com. Rep. No. 1," at p. 3, that committee deferred action on the matter of seating one of the candidates pending the decision of the circuit court. In its second report, dated February 24, 1969, and titled "Special Com. Rep. No. 2," rendered after the decision of the circuit court but before this Court had heard the appeal, the committee recommended the seating of Mr. Akizaki, but again expressed its deference to the decision of the circuit court and noted that it could not appropriately make a decision that might later be in conflict with the resolution of the appeal by this Court.³

Appellee Akizaki nevertheless argues that the questions presented are moot; and that

3. "Any recommendation by your Committee at this time that is contingent upon the possible decision of the State Supreme Court is conjectural and clearly without the scope of inquiry and task of your Committee * * * Special Com.

even if they are not moot, they are non-justiciable because the controversy is basically a political question. In light of our reading of the effect of Article II, Sec. 1 and Article III, Sec. 13 of the Constitution, however, these contentions are unavailing.

[4] Clearly the case cannot be made moot by the seating of one of the candidates by the House during the judicial determination of the contest. Such a reading of the Constitution would emasculate both the constitutional mandate of Article II, Sec. 1 and the statutory provisions that provide for judicial resolution of election contests. We think such an interpretation cannot have been intended by the framers of our Constitution.

[5] We think the case does not present a non-justiciable political question. The issue is expressly committed to the courts in the Constitution. The standards are set out in the statutes written by the legislature and are judicially discoverable and manageable. No lack of respect for a coordinate branch of government is presented since the Constitution requires the courts to act when their jurisdiction is properly invoked. In fact, the House has expressed deference to the judgment of the courts at every step of the proceedings.

[6] It remains to be decided whether the result reached by the court below is correct. We hold that it was not, and that a new election should have been ordered. Because of the commingling of the valid and invalid absentee ballots, there is no way to determine what the actual result of the election was, and who should therefore be declared the winner. In such a situation, HRS § 12-103 directs the courts to invalidate the election.⁴

rect result cannot be ascertained because of a mistake or fraud on the part of the election inspectors; * * * If the judgment should be that the election was invalid, a certified copy thereof shall be filed with the governor, * * *

The trial court's approach was plausible; but to excise the entire absentee vote contained in the 174 ballots excluded by the court, in order to eliminate the nineteen ballots known to be invalid, inflicts too harsh a result on those absentee voters whose votes were validly cast.

Pursuant to HRS § 12-105, this Court may, in election contest cases, enter any judgment the circuit court would have been authorized to enter. Our judgment is, as provided in HRS § 12-103, that the election was invalid for the reason that a correct result cannot be ascertained because of the mistake we have noted on the part of the election officials in opening the late-post-marked envelopes and commingling those ballots with ballots validly cast. Therefore, in accordance with HRS § 12-103, and in order to protect the right of the people of the Fifteenth Representative District to choose their representatives, we invalidate the election as between Fong and Akizaki. As set out in HRS § 12-103, a certified copy of our judgment shall be filed with the governor, so that he may call a new election as between Fong and Akizaki as provided by the statute.

Reversed.

ABE, Justice (dissenting).

The majority of the court holds that there is a conflict between Article II, § 7, and Article III § 13.

Article II, § 7 reads: "Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law." The pertinent portion of Article III, § 13 reads: "Each house shall be the judge of the elections, returns and qualifications of its own members * * *."

The majority court says: "We must resolve the apparent conflict between these

two provisions before proceeding further. Simply stated, the question is: Should the courts or should the legislative body be the final arbiter of the dispute in the event of an election contest involving a legislative seat? We hold that the courts are required by the Hawaii Constitution to be the forum and the final arbiter in such disputes."

It appears to me that the decision of the majority is in direct conflict with the concept of the American form of government where it is deemed that the three branches of government, that is, the executive, the legislative and the judiciary are independent and co-equal. This concept is recognized in the United States Constitution as well as the Constitution of the State of Hawaii wherein, respectively, the executive power¹ is vested in the President of the United States of America and the Governor of the State of Hawaii; the legislative power² is vested in the Congress of the United States and the legislature of the State of Hawaii; and the judicial power³ is vested in the United States Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish, and in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish.

Thus, if there is a conflict to be resolved, it would appear to me that under the concept of independence and equality of the various branches of the government it must be deemed that Article III, § 13, which states that "Each house shall be the judge of the elections, returns and qualifications of its own members", should prevail over Article II, § 7.

Further, I believe a study of the minutes of the Constitutional Convention indicates that this was the intent of the delegates to the Constitutional Convention.⁴

1. Art. II, U.S.Const. and Art. IV, Hawaii Const.

2. Art. I, U.S.Const. and Art. III, Hawaii Const.

4. Proceedings of the Constitutional Convention of Hawaii, 1950, Vol. II (Committee of the Whole Debates) p. 190:

ASHFORD: May I ask a question of the chairman of the committee in

However, for the determination of this case, I believe that it is not necessary for this court to decide whether there is a conflict between the two sections of the Constitution.

for the judging of elections, would the chairman of the committee feel that this is desirable to say, 'Notwithstanding any other provision of the Constitution?'

HEEN: I believe what the delegate just stated refers to some provision in the article on suffrage and elections which provides for contested elections by a court of competent jurisdiction. Mr. Chairman, I must state that that provision there gave the Committee on Style some concern and maybe that provision should be eliminated altogether. But, if it is going to be there, remain there, then the suggestion made by Delegate Ashford I think is in order. 'Notwithstanding any other provision in this Constitution, each house shall be the judge of elections and returns and qualifications of its own members.'

CHAIRMAN: With the understanding that the Style Committee will reconcile any difference, will that be satisfactory to Delegate Ashford?

ASHFORD: Yes. In my opinion perhaps the exception—two exceptions should be written into the article on suffrage and elections, that is, with the exception of any constitutional convention or the legislature.

BRYAN: The last time that this question came up, I pointed out that it may not have been exactly pertinent. This covers cases where there is no contest. Judges of elections in the other case, covered under the article on suffrage and elections, there would have to be a contest before it could be determined.

CHAIRMAN: This only applies to the legislature; it does not apply to the executive officers of government that may be elected. Any further discussion? If not, the Chair will put the question.

ROBERTS: I'm not quite clear as to the disposition you are making of this. In Committee Proposal No. 8 on suffrage and elections, there is a sentence which reads, 'Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law.' Unless you are going to make some exception in

The House of Representatives by its dependant action has declared plain Akizaki to be one of the six duly elected representatives from the Fifteenth District and no action by this court in

bers of the legislature, those two sections are in conflict. I think that the Committee on Style should be directed by this committee to resolve the conflict in some specific way, either change the article on suffrage and elections or make some provision in the present article with regard to that.

CHAIRMAN: This language is a common provision, that each house shall be the judge of the election returns and qualifications of its members. The section to which you have reference has to do with the contested election, which is a very different problem.

ROBERTS: Well, there may be a contest of election in connection with the legislature.

CHAIRMAN: Then the legislature is the sole judge.

ROBERTS: Well, unless you construe Section 5 to apply only to those areas other than the legislature and the constitutional convention elections otherwise there is a conflict.

CORBETT: I don't see how you can make the legislature judge in a contested election of its own members. It seems to me that the point in putting that section in suffrage and elections was to have a body entirely objective in its approach to the problem. You have a group of people sitting in judgment on each other, and it is going to make a very difficult situation. In a contested election where there are facts to go on, it is quite a different story.

CHAIRMAN: That's a provision contained in our constitutional history from its very beginning. Whether or not a person is qualified to sit in the legislature each house determines; it's a political question with which the courts cannot interfere.

Are you ready for the question? Are those in favor signify by saying 'Aye' Contrary. Carried.

TAVARES: I now move that in the sense of this Convention that the conflict in the article on suffrage and elections should be controlled insofar as inconsistent with the sections just adopted by this section.

CHAIRMAN: Is there a second?

C. RICE: I second the motion.

CHAIRMAN: You heard the motion.

AKIZAKI v. FONG

Cite as 461 P.2d 221

Hawaii 227

case can undo what has been done by the House of Representatives.

The House of Representatives in the proper exercise of this constitutional power by a majority vote of its members declared plaintiff Akizaki one of the six duly elected members from the Fifteenth Representative District and seated him. I cannot agree with the majority that this provision merely gives the House of Representatives power "to ascertaining whether the Constitution has been complied with; that is, whether the parties have properly invoked the jurisdiction of a competent court to judge the contest under Art. II, Sec. 7 * * *"

Courts in other jurisdictions have so interpreted similar provisions in other constitutions. *Phillips v. Ericson*, 248 Minn. 452, 80 N.W.2d 513 (1957); *Beatty v. Myrick*, 218 Ga. 629, 129 S.E.2d 764 (1963); *Daley v. Morial*, 205 So.2d 213 (Ct. of Appeal La.1967).

Now, the House of Representatives having acted in accordance with the authority granted to it by our Constitution, I believe it is improper, to say the least, for this court, by its decision in this case, to attempt to undo what the House of Representatives has done. I disagree with the majority court and I believe its decision definitely shows not only utter disrespect but lack of confidence in a coordinate branch of our government.

I do not say the matter of the election has become moot as contended by defendant Lieutenant Governor Gill. However, that issue once having been determined by the House of Representatives by seating Akizaki, this suit should not be used as a vehicle to unseat Akizaki and nullify the act of the House of Representatives. Of course, defendant Fong in a proper action may question the action of the House of Representatives in seating plaintiff Akizaki as one of the representatives from the Fifteenth Representative District, if such action of the House of Representatives denied him his rights under the Constitutions of the United States and the State

of Hawaii under *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1968).

I believe that the decision of the majority court is setting a very dangerous precedent and will bring about disharmony, if not out-and-out animosity, between the legislative and judiciary branches of government.

Also, how is this Court or any other court of Hawaii to enforce the decision of this court? Under the decision, how is plaintiff Akizaki to be denied his seat in the House of Representatives? Is the House of Representatives to be compelled to expell plaintiff Akizaki?

It should be noted that the House of Representatives was not a party to this suit. In effect, this decision, if enforceable, would nullify the action of the House of Representatives. Now assuming the proposition of the majority court that the constitutional power of the House of Representatives to judge elections and returns of its own members was limited to determine "whether the parties have properly invoked the jurisdiction of a competent court to judge the contest" is correct, can it not be argued that the House of Representatives in seating Akizaki had based its action on the judgment of the First Circuit Court? Therefore, though in the light of the majority decision the seating was founded on an erroneous decision of a trial court; was not the seating based on constitutional authority? Then, is the action of the House of Representatives subject to a collateral attack? That is, can this court by this appeal undo or nullify the act of the House of Representatives?

All these confusions would be eliminated if this appeal is denied on the grounds that the House of Representatives has acted in connection with this matter and defendant Fong's relief would be through the institution of a proper suit to question the act of the House of Representatives.

This I would like to see . . .

LISA v. BD. OF ELEC. OF CITY OF N. Y. N. Y. 1013
Cite as 357 N.E.2d 1013

Robert A. Lifson, Huntington, for John J. Flanagan and others, respondents.

Howard E. Pachman, County Atty., for Board of Elections, respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

The record discloses that there were 1,617 signatures on the designating petition; 1,500 were required under the statute. It was stipulated at Special Term that 75 signatures were invalid. We conclude that another 134 signatures must be invalidated for omission or error with respect to the election or assembly district of subscribing witnesses (*Matter of Rutter v. Coveney*, 38 N.Y.2d 993, 384 N.Y.S.2d 437, 348 N.E.2d 313; cf. *Matter of Berry v. Dodd*, 38 N.Y.2d 995, 384 N.Y.S.2d 438, 348 N.E.2d 914). There accordingly were insufficient signatures to validate the petition. We neither reach nor consider the other issues tendered (see *Matter of White v. McNab*, 40 N.Y.2d 912, 389 N.Y.S.2d 359, 357 N.E.2d 1014, decided herewith).

BREITEL, C. J., and JASEN, GABRIEL-LI, JONES, WACHTLER, FUCHSBERG and COOKE, JJ., concur.

Order affirmed, without costs, in a memorandum.



40 N.Y.2d 911

In the Matter of Joseph F.
LISA, Appellant,

v.

BOARD OF ELECTIONS OF the CITY
OF NEW YORK, and Ivan C.
Lafayette, Respondents.

Court of Appeals of New York.

Oct. 27, 1976.

In an election contest, a new election was directed by the Supreme Court, Queens

County, Mario J. Cariello, J., but the Supreme Court, Appellate Division, reversed, denied the application and dismissed the proceeding, 387 N.Y.S.2d 876. On further appeal, the Court of Appeals held that petitioner had the burden of proving that alleged voting irregularities were of such nature as to establish probability that the result of the election would be changed by a shift in, or invalidation of, questioned votes, i. e., of showing causal connection between alleged incidents of campaign fraud and outcome of election. The burden was not sustained by mere showing of irregularities or showing that the election was mathematically close.

Order of Appellate Division affirmed.

Elections ⇐ 154(10)

Petitioner had burden of proving that alleged voting irregularities were of such nature as to establish probability that result of election would be changed by shift in, or invalidation of, questioned votes, i. e., of showing causal connection between alleged incidents of campaign fraud and outcome of election, and burden was not sustained by mere showing of irregularities or showing that election was mathematically close. Election Law § 330, subd. 2.

Sol R. Dunkin, New York City, for appellant.

Paul H. Asofsky, New York City, for Ivan C. Lafayette, respondent.

MEMORANDUM.

Even if we were to assume that the campaign practices complained of constituted frauds or irregularities within subdivision 2 of section 330 of the Election Law, petitioner failed to sustain his burden of proving a causal connection between the alleged incidents of campaign fraud and the outcome of the primary election in question.

As to the 179 invalid or suspect votes found by Special Term, petitioner did not

meet the burden of proving that the irregularities were of such a nature as to establish the probability that the result of the election would be changed by a shift in, or an invalidation of, the questioned votes. That burden is not sustained by a mere showing that the election was mathematically close (see *Matter of Stevenson v. Power*, 27 N.Y.2d 152, 314 N.Y.S.2d 705, 263 N.E.2d 225; *Matter of De Martini v. Power*, 27 N.Y.2d 149, 314 N.Y.S.2d 609, 262 N.E.2d 857).

We neither reach nor decide any other issue.

The order of the Appellate Division should be affirmed, without costs.

BREITEL, C. J., and JASEN, GABRIELLI, JONES, WACHTLER and COOKE, JJ., concur in memorandum.

FUCHSBERG, J., taking no part.

Order affirmed.



40 N.Y.2d 912

In the Matter of Margaret M.
WHITE, Respondent,

v.

Everett F. McNAB et al., Constituting
the Board of Elections of the County
of Suffolk, et al., Respondents,

and

Paul E. Harenberg, Appellant.

Court of Appeals of New York.

Oct. 27, 1976.

The Supreme Court, Suffolk County, granted petition to validate designating petition, and appeal was taken. The Supreme Court, Appellate Division, 387 N.Y.S.2d 692, reversed and invalidated petition, and appeal was taken. The Court of Appeals held

that error on part of subscribing witness with respect to election district required elimination of 45 signatures from designating petition and that additional 200 signatures had to be eliminated because of undated and uninitialed alterations, and that, accordingly, insufficient signatures remained to validate petition.

Order of Appellate Division affirmed.

Elections ← 144

Error on part of subscribing witness with respect to his election district required elimination of 45 signatures from independent nominating petition designating candidate for public office in general election, and additional 200 signatures had to be eliminated because of undated and uninitialed alterations concerning number of signatures witnessed and errors in assembly and election districts despite fact that such alterations resulted in manifestation of correct information, and, accordingly, insufficient signatures remained to validate petition.

E. Thomas Boyle, St. James, for appellant.

Nicholas Vincent Campasano, Freeport, for petitioner-respondent.

Howard E. Pachman, County Atty., for Board of Elections, respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

The designating petition contained 1,925 signatures; 1,349 were required to validate. The deletion of 468 signatures at Special Term is not challenged on appeal. We conclude that another 45 must be stricken for error on the part of a subscribing witness with respect to his election district (cf. *Matter of Rutler v. Coveney*, 38 N.Y.2d 993, 348 N.E.2d 913, 384 N.Y.S.2d 437). From the record supplemented by representations on oral argument we have also concluded that an additional 200 signatures must be elimi-