Ballot Battles

The History of Disputed Elections in the United States

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> He would like to have all the forms to be observed in the returns, but when he was satisfied that the form in reference to the return of a town was all the objection to it, and that the votes as stated were actually given as so stated, he would not vote merely for form's sake to deprive a town of its vote, let it make what difference it might to his own or any other party. He was satisfied in his own mind that the vote of Westfield was given as stated, and he should vote for acceptance of the Report.[43]

Likewise, another house member explicitly "urged acceptance of the report, notwithstanding, by doing so, the political character of the Governor elect was different from that of the majority of the members of the House."[44]

Not every Whig was willing to be so magnanimous. Three of the joint committee's thirteen members (including its chair) published a dissent, claiming that the state's constitution required rejection of returns that did not comply with the requirement that the attestation be under seal. More ominously, the Whig speaker of the house apparently was itching for a partisan fight. But on January 15 the senate voted 29–10 to defeat a motion that would have excluded the Westfield return contrary to the joint committee's report, and the next day the house voted overwhelmingly to accept the report.[45]

Based on the joint committee's complete calculations of all the returns, including Westfield's, Morton had the exact number of votes needed to make an outright majority: 51,034. In that sense, Morton won the election by a single vote, even though Everett had only 50,725 and there were a "scattering" of 307 other counted ballots. Had just one Morton voter cast a ballot for Everett instead, Morton would have lost his majority. It was excruciatingly ironic to Everett that his own brother had voted for Morton. This statewide election was truly one in which every single vote mattered, and his own brother's betrayal caused his defeat. Perhaps even worse, although such would seem hardly possible, Everett's own secretary of state failed to cast a ballot. At least, his brother's defection was based on contrary political convictions. The secretary of state, a fellow Whig, had no excuse; he had intended to vote in the afternoon but had run out of time.[46]

Everett himself supported the counting of the contested Westfield votes, and his leadership on this issue was instrumental in causing the Whigs as a party to accept his defeat. In his diary on January 13, he wrote:

> As the votes were unquestionably given in Westfield, and as Judge Morton has a majority of all the votes, I think it is decidedly best that this return should not be rejected, although its admission costs my election.[47]

Figure 3.3 Edward Everett, governor of Massachusetts in 1839, needed only one more vote to win another term, but he refused to prevail by invaliding votes for clerical defects. Portrait by Richard Morrell Staigg, in American Eloquence (vol. III, 1897).

Everett's biographer observes: "The fact stood out that above all else Judge Morton had received the larger number of votes."[48] This fact made it unpalatable to Everett to try to deprive Morton of his victory based on a technicality. Also relevant was the fact that Everett had served four terms, and thus it was time to give the other side a turn. Still, in the annals of American history there is not an equivalent example of a candidate in a major statewide election willing to forego a victory so tantalizingly within reach based on, first, such a narrow a margin and, second, such a readily available legal argument for invalidating disputed ballots.

The Broad Seal War: New Jersey, 1838, and Congress, 1839

Although handled very differently, the Pennsylvania election of 1838 and Massachusetts election of 1839 were symptoms of just how evenly matched and tenacious the electoral competition between Whigs and Democrats could be in this era. Other states were affected, and so too was Congress. In 1838 the election of New Jersey's entire congressional delegation became tangled in a vote-counting dispute, and the following year that dispute ensnared Congress.

Establishing which party controlled the US House of Representatives required determining which of the disputed representatives from New Jersey were entitled to take their seats. It was a vicious circle: the House could not act until the representatives from New Jersey were seated, but they could not be seated until the House acted. Chaos reigned, exposing a flaw in the constitutional design.

Once again, the conduct of a particular individual contributed significantly to the outcome of the conflict. Whereas Pennsylvania had avoided even worse calamity in its Buckshot War because of General Patterson, and while Edward Everett's magnanimity helped avert any crisis in Massachusetts, in Congress John Quincy Adams stepped forward to break the deadlock over New Jersey's delegation. Although Adams acted outside the bounds of strict procedural regularity and although his role could not be described as entirely nonpartisan, some sort of intervention was necessary, and his was undertaken in a statesmanlike spirit of assisting the nation to resolve the impasse.

Just as New Jersey in 1789 had given the House of Representatives its first ballot-counting dispute, now New Jersey triggered the House's most crippling vote-counting crisis. In 1838 New Jersey elected all six of its federal representatives at-large rather than by district, meaning that the entire state voted for each of them. The Whig candidate won one of these seats indisputably, but the outcome of the other five depended on the status of ballots from two towns in the state. In both instances, the town's election officials had failed to authenticate the town's election returns in the specific form required by state law. In one case, the town clerk failed to affix the necessary local seal; in the other, the town's election officials failed to certify and sign the returns properly. In essence, it was a repeat of the problem that afflicted New York's gubernatorial election of 1792: there were formal deficiencies in the officials' delivery of election returns, which risked the disenfranchisement of all voters from those localities, but which also might signal (at least in theory) a problem with the returns' reliability. Indeed, with respect to the returns from each of these New Jersey towns, the county clerk to whom the returns were sent refused to accept them on account of their deficiencies.[49]

Both county clerks were Whigs, and rejecting the returns from these two towns caused the Whig candidates to have a majority of counted ballots in these five disputed congressional seats, whereas accepting the returns would have caused the Democratic candidates to have a majority of votes. Democrats immediately and vehemently protested the partisanship of these two county clerks' decisions.

The partisanship continued at the state level. The state's governor, a Whig, certified the victory of the five Whig congressional candidates based on the

submissions from the two Whig county clerks. In doing so the governor affixed the "broad seal" of the state, thereby giving the controversy its name. (In contrast to the Buckshot War, the term Broad Seal War was entirely metaphorical.) Meanwhile, the secretary of state was a Democrat, and he submitted to Congress his own dueling certificate of the election, which included the returns from the two towns and thus declared the five Democratic candidates to be victorious.[50]

December 2, 1839, was the date for the new House of Representatives in the 26th Congress to convene—over a year after the New Jersey voters had cast their ballots. The five Whig claimants to the disputed New Jersey seats presented their Broad Seal certificates to the Clerk of the House, Hugh Garland. The five Democratic claimants likewise presented their competing certificates from the secretary of state. Everyone was aware that whichever set of claimants was seated, even if only provisionally, would likely determine which party would be able to elect a Speaker and appoint committee chairs and members. The only significant uncertainty was whether some Southern Democrats would break from their party if it took too much of a pro-Northern stance on issues relating to slavery and states' rights. The situation had the potential for the kind of "rival legislature" scenario that Pennsylvania had witnessed a few months earlier: two different bodies each purporting to be the majority of the US House of Representatives and thus a sufficient quorum to do business.[51]

The Whigs argued that their claimants should be seated solely by virtue of possessing the Broad Seal certificates, since they were appropriate and conventional in form and obviously superior (as a purely formal matter) to the unconventional and dubious certificates from the secretary of state. Garland, however, was a Democrat, having been appointed Clerk at the end of the previous Congress by the slimmest of margins, 106–104, in an intensely partisan vote.[52] As Garland called the roll to seat the representatives from each state, when he got to New Jersey he announced that he would skip it on account of the dispute, rather than seating either set of claimants even provisionally.[53]

"The [House] chamber erupted," as one account of the episode puts it.[54] Both sides attempted to control the situation, but with the status of the New Jersey seats unsettled neither side was able to surmount the parliamentary impasse. The Clerk took the position that no business could be done until there was a quorum, which could not occur until after he resumed calling the roll. But he would not resume calling the roll while there were objections to his doing so, and there were plenty of objections based on his handling of the disputed seats from New Jersey.

Garland disclaimed any partisan motives for his conduct. On the contrary, he asserted that leaving the seats vacant until completion of the roll call was the

best method to avoid any "party advantage."[55] Others, however, have accused Garland of being disingenuous in this respect. They argue that the nonpartisan position would have been for him to seat the Whig claimants according to the formal propriety of their certificates, and that his deviation from that course demonstrated his own partisanship.[56] While precedent concerning single seats arguably supported seating of the Whigs, the situation was itself unprecedented as never before had partisan control of the entire House turned on a Clerk's initial decision on whether or not to seat a member during the roll call.

On December 5, after three days of intransigence, John Quincy Adams, the former president and now a Whig member of Congress from Massachusetts, took the chair in an effort to obtain some order whereby the House could vote on various motions concerning the status of the New Jersey seats. Although there was no official parliamentary mechanism for this move, the Democrats acquiesced in order to avoid sheer anarchy. Still, there were some protests. The *Congresssional Globe* reports:

> Much confusion and noise being heard [when Adams took the chair,] and some hissing, Mr. THOMPSON of South Carolina said that he announced to galleries that if there was the slightest interruption to the business of the meeting he would call on the President for a military force to preserve order.[57]

(The president in 1839 was Martin Van Buren, a Democrat. Thompson, however, like Adams, was a Whig.) The next day, Adams continued to act as "Chairman *pro tempore*" of the meeting. Ignoring the Clerk's position that there was no quorum until he resumed calling the roll, Adams put to the entire body assembled the question of whether the five Whig claimants should be seated immediately. He was of the view that they should be and would rule from the chair to that effect unless and until overruled by the entire body. There was considerable uncertainty on whether any of the New Jersey claimants, Whig or Democrat, would be permitted to vote on these irregular procedural motions, which concerned the very question of their entitlement to be seated during the calling of the roll.

On December 10, there was a vote on whether to sustain Adams's decision as chair that the five Whig claimants would be permitted to participate in the vote on their right to take their seats. This vote was 108 to 114, meaning that "the decision of the chair was reversed."[58] As it turned out, for this particular vote four of the Whig claimants participated and also four of the Democratic claimants. Obviously, it could not be the case that both groups of four were entitled to participate, and yet such was the disarray that the House was then in. Over the next two days, there were several other extraordinarily close votes on procedural

skirmishes that proved inconclusive because of the participation of competing claimants. "Great disorder was now prevailing in the House."[59]

The situation came to a head late on December 11 after much "noise and confusion" and the belligerent disturbance of one member who threatened Adams and others with physical violence.[60] The House conclusively voted to deny all of the claimants the right to participate on whether they would be seated. The key vote was 118 to 122 on the question of the claimants' right to participate, with four Whig claimants voting in favor and three Democratic claimants against. Adams, as chair, declared that the decision must stand that the claimants could not participate. The House then voted to leave the New Jersey seats vacant until completion of the roll call.[61]

Two days later, after completion of the roll call, the Whigs attempted again to seat their claimants, at least provisionally until such time as the House ruled on the issue of the disputed election itself. This motion failed by a tie vote, 117–117. With the New Jersey seats still empty, the Democrats thought they

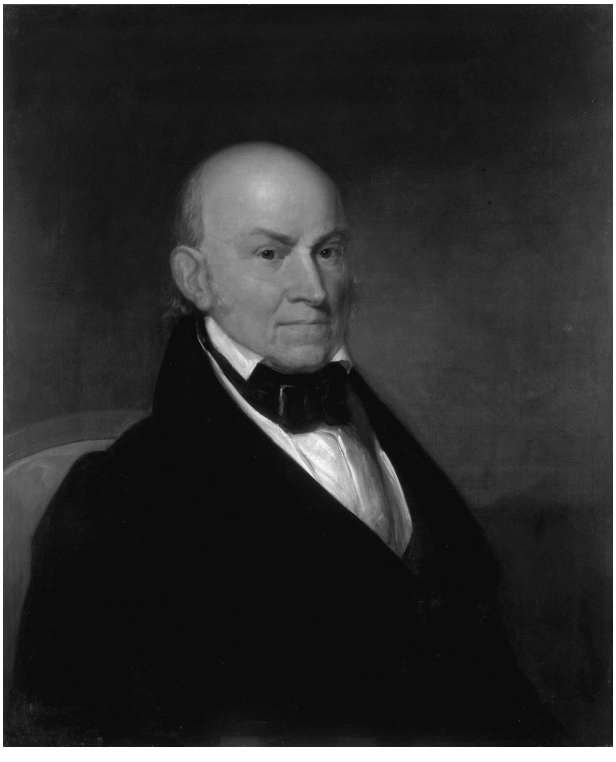

Figure 3.4 John Quincy Adams, serving in the House of Representatives after his presidency, asserted himself chair of the chamber to diffuse a crisis when the House was unable to elect a Speaker because of disputed elections. Portrait by Asher Brown Durand, N.Y. Historical Society.

had a chance to elect one of themselves Speaker, but their members from South Carolina refused to go along with the party's choice, John Jones. After much jockeying, the South Carolinians defected from their party and voted with the Whigs to elect a Virginian Whig, Robert Hunter, as Speaker.[62] Eventually, however, the House accepted the Democratic claimants to the disputed New Jersey seats, on the grounds that the returns from the two towns should not have been excluded.[63]

The significance of the Broad Seal War is that it shows the US House of Representatives institutionally ill-equipped to handle a conflict of this kind. The Whig-Democrat conflict within New Jersey had precipitated the problem, and the same Whig-Democrat competition left the House in paralysis. The House needed some sort of procedure to settle a dispute over specific seats that would determine which party was the majority in the chamber. Having a nonpartisan Clerk apply a clear and predetermined rule for the situation—for example, that claimants with certificates of election bearing the official seal of the state must be seated at least provisionally regardless of the merits of a challenge to the underlying circumstances upon which those certificates rest—would go a long way to enable the House to manage the situation.[64] But in 1839 the Clerk could not be trusted to be nonpartisan, and a clear rule had not been laid down with sufficient precision in advance.

It was salutary that a figure of such stature as John Quincy Adams, the only ex-president to serve in the House, was available and willing to step into the breach. Adams, moreover, despite being a Whig, conducted himself as provisional chair of the House without undue bias in favor of his own party, sustaining the key preliminary motions he put to a vote of the House, even though they went against the Whigs.[65] As impressive as his own personal conduct may have been, however, it would have been better for the House to have adopted institutional procedures and rules that were fair to both sides of the dispute and did not depend on the personal virtues of any particular individual—and especially did not depend on the personality of whoever stepped forward to take control of an anarchic situation.

The Triumph of Judicial Intervention: *Bashford v. Barstow,* 1856

The convulsive electoral competition between Democrats and Whigs in the late 1830s cried out for some new institution to arbitrate the vote-counting conflicts this competition precipitated. The first sign that a state supreme court could constructively play that role occurred in 1837, when Maine faced a potentially

in favor.[24] Kansas then went on to hold another convention, resulting in a Free State constitution, and afterward regular elections under that constitution.[25]

Governor Walker's repudiation of the fraud in October 1857 was thus a decisive step toward bringing a measure of peace to Kansas. It is ironic, and perhaps symbolic of the circumstances that prevailed in the territory, that his heroic move was to defy a court decree. Normally, a chief executive's defiance of a court order, particularly one concerning the counting of ballots, is cause for alarm. It certainly was the opposite of heroism when Governor Barstow of Wisconsin, in an effort to cling to power based on fraudulent returns, contemplated defiance of the Wisconsin Supreme Court in *Bashford v. Barstow*. The heroism of 1856 in Wisconsin belonged to the court, not the governor. But in Kansas the following year it was the opposite, a sign that the rule of law really had not yet fully taken hold in the territory. Walker's lawlessness in disobeying the court order was a necessary step to move Kansas closer to the point where regular government under a democratic constitution could prevail. Although Kansas was starting to achieve that orderly status by the end of the decade, its turmoil in the 1850s was propelling the nation to the all-encompassing Civil War.

Democracy During the Civil War

Constitutional republicanism, the idea of popular sovereignty controlled by and exercised through constitutional law, undoubtedly suffered severely as a result of the Civil War. Secession itself was, of course, the ultimate breach of the federal constitutional order, and to preserve the Union Lincoln imprisoned war critics and suspended the writ of habeas corpus.[26] But although fundamental constitutional freedoms were denied due to the exigencies of war, the prevailing impression has been that in the North democracy itself endured the Civil War. The great belief, in other words, is that free elections persisted throughout the war, at least on the Union side, and that the military did not undermine the authentic choices of the Union electorate. Lincoln was on the side of democracy, not dictatorship; that is what the nation has wanted to believe of its most beloved president.

There has been notable scholarly dissent to this national mythology. Focusing on the 1862 congressional elections, in which the Republican Party lost 23 House seats because of Lincoln's unpopularity at that point in the war—while the Democrats made "huge gains"[27]—several distinguished historians have maintained that military coercion at the polls in Border States prevented Democrats from taking over control of the House. If the Union Army had not subverted free elections in this way, the argument goes, congressional hostility

to Lincoln's war efforts, including his Emancipation Proclamation, might have changed the course of the war significantly, perhaps causing the Union to seek peace terms with the Confederacy that would have permitted slavery to continue.[28]

Writing a century after the election in question, for example, University of Wisconsin historian William Hesseltine bluntly declared: "In 1862 it was the army-controlled votes of the Border States that overcame Democratic victories in the Northern states and enabled the Republicans to retain control over the House of Representatives."[29] More recently, Cornell historian Richard Bensel has expanded upon the point. Relying upon the reports of several contested congressional seats arising from the 1862 election, Bensel depicts the horrifically disenfranchising tactics employed by some Union Army officers and their state militia allies at polling places in Missouri and Kentucky.[30] Would-be voters suspected of disloyalty to the Union cause were not permitted to vote, and in some instances no voter was permitted to cast a ballot for candidates deemed sympathetic to the Confederacy.[31] Summing up the evidence, Bensel concluded: "Military intervention at the polls may very well have made a difference in the outcome of the war."[32]

The disputed congressional elections that Bensel described, however, tell a different story when examined from another perspective. There is no doubt about the egregiously improper disenfranchising practices that occurred at the polls, which Bensel detailed extensively. But whether this military interference with the ballot box affected the outcome of enough congressional seats to keep the House in Republican hands is another matter, more complicated and ultimately more momentous.

The Democrats of course wanted to take control of the House. In fact, after their strong showing in the 1862 elections, they organized a scheme to do so. Because the new Congress would not convene until December 7, 1863, they had plenty of time to work up their plan, which centered on the outgoing Clerk of the House, Emerson Etheridge, who had the responsibility to declare the properly credentialed members of the new House at the start of the session.[33]

The Republicans had installed Etheridge, a Tennessee politician, as Clerk in 1861 because at the time he was thoroughly pro-Union.[34] In fact, it was the Republicans who, fearful of losing control of the House after the 1862 elections, gave the Clerk unusually broad powers to determine who would be entitled to take seats at the very beginning of the new session. The lesson these Republicans apparently learned from the Broad Seal War (discussed in the previous chapter) was not to constrain the Clerk, but rather to expand his exclusionary powers.

On March 3, 1863, at the close of the previous lame-duck session, when they were still in power, the Republicans enacted a statute that in its entirety provided:

> That before the first meeting of the next Congress, and of every subsequent Congress, the clerk of the next preceding House of Representatives shall make a roll of the representatives elect, and place thereon the names of all persons *and of such persons only*, whose credentials show that they were regularly elected in accordance with the laws of their states respectively, or the laws of the United States.[35]

The key language of this short statute was the italicized clause, which gave the clerk the authority to keep off the roll any claimant whose credentials he deemed improper. The Republicans thought that Etheridge could use this power to prevent from being seated Democrats or their allies, primarily from Border States, whom the Republicans considered disloyal—candidates who, in their view, were not entitled to have been elected in the first place. (Republicans also accused Confederate sympathizers in Border States of coercion at polling places under their, rather than loyalist, control.) If Republicans could knock out enough of their opponents through Etheridge's use of this new statute, then retaining their control of the House would be assured.[36]

Between March and December of 1863, however, Etheridge apparently had switched his allegiance from the Republicans to the Democrats. He soured on Lincoln's policies, including the Emancipation Proclamation (even though it exempted Border States like Tennessee). Consequently, he let it be known to the leader of the House Democrats, Samuel S. Cox of Ohio, that he would be willing to use his power as Clerk to their advantage, and not in favor of the Republicans. Etheridge ultimately identified for exclusion sixteen credentialed claimants whom the Republicans desperately wanted seated: five from Maryland (the state's entire delegation), six from Missouri (two-thirds of that state's delegation), one from Oregon (the state's sole representative), one from Kansas (another sole seat), and three from West Virginia (that new state's whole delegation). Etheridge was willing to be selective in his use of this power; he did not exclude three representatives from Missouri who were aligned with the Democrats. He also indicated that he would seat three representatives from Louisiana who also were on the Democratic side and whose seating the Republicans strenuously opposed. Heading into the December 7 opening of the House session, Democrats were cautiously confident that Etheridge's calculations were enough for them to prevail.[37]

Republicans, conversely, were increasingly anxious as December 7 approached. They considered ways that they might now prevent Etheridge's use of the credential-recognition power that they had given him. One option would be to have their most senior member, Elihu Washburne of Illinois, assert authority over the House for the purposes of correcting the Clerk's roll as necessary. Republicans called this option the "John Quincy Adams precedent,"[38]

learning another lesson from the Broad Seal War (although Washburne's assertion of himself as chair of the House arguably would have been specifically partisan, in order that Republicans would prevail, whereas Adams had acted more neutrally to break the logjam in 1839).

Another option, which Republicans seriously considered with President Lincoln's active involvement, was to forcibly remove Etheridge from the floor of the House, so that they could seat the sixteen members whom he was prepared to exclude. Lincoln "was not inclined to rely exclusively upon moral force," his trusted advisers Nicolay and Hay wrote in their monumental biography of him.[39] Citing Nicolay's diary from the eve of the December 7 opening session, they quote Lincoln as saying: "If Mr. Etheridge undertakes revolutionary proceedings, let him be carried out on a chip, and let our men organize the House."[40] The distinguished historian David Donald, in his prizewinning biography of Lincoln, adds that Lincoln "promised to have a troop of soldiers ready to assist."[41] That Lincoln was prepared to use military force upon the US Capitol to maintain Republican control of the House when it met to organize itself on December 7, 1863, is not generally well known. Nonetheless, Lincoln's willingness to have the military interfere with the internal workings of Congress was much more significant—and dangerous to democracy—than the military interference at particular polling places, as problematic as that also was.[42]

Ultimately, however, this contingency along with the rest of the Republican strategizing proved unnecessary, because Etheridge and the Democrats had miscalculated. When December 7 finally arrived, Etheridge attempted to carry out the plan. He did exclude the sixteen claimants that the Republicans wanted seated, and he did seat the Louisiana claimants that the Republicans wanted excluded. But after he did so, the Republicans immediately moved to add the sixteen claimants to the rolls, and they succeeded based on a vote of the members—and only the members—whom Etheridge had recognized. Etheridge is to be credited for allowing a vote on the Republican resolution. The Democrats had hoped that he would rule it out of order altogether—a decision that might well have provoked Lincoln's planned show of force.[43] But when the Democrats asked for this ruling, Etheridge instead announced that his opinion was that the resolution was "in order, as being pertinent to the organization of the House."[44] Etheridge's handling of the matter indicates that he may not have moved all the way to the side of the Democrats, and certainly not as far as the Democrats had hoped—or needed.

The vote was 94–74 in favor of the Republicans.[45] At the moment when Democrats were relying on the power of the Clerk to keep dubious Republicans off the roll, they could not muster a majority of the House. This fact shows that military interference at the polls is not what kept the Democrats from gaining control of the House. The Democrats had their chance to organize the House

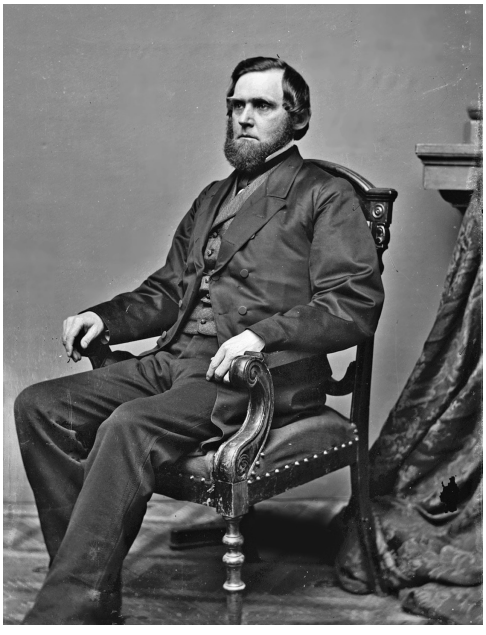

Figure 4.2 Emerson Etheridge, Clerk of the House of Representatives, rejected the election certificates of pro-Lincoln candidates whose victories in 1862 the Democrats disputed, but the undisputed members overruled Etheridge and thus foiled the Democrats' efforts to take control of the House. Library of Congress.

based on a vote that excluded Republicans they believed had won as a result of military improprieties. Yet even with this crucial vote on their terms, the Democrats could not prevail; instead, there still was "a majority of twenty for the Government."[46]

Afterward, moreover, the Democrats could have attempted to unseat enough Republicans through the mechanism of contested elections. They did file three such contests, and indeed it is those contest proceedings that provide the evidence of the military coercion at the polls that the historian Bensel described. But the Democrats did not file nearly enough contests to put control of the House potentially in play.[47]

Subsequently contesting only three of the sixteen initially excluded seats on grounds of military misconduct was no way for the Democrats to attempt to show that this military misbehavior deprived them of a controlling majority in the House. They did add one additional contest of a Kentucky member whom Etheridge had seated.[48] But even assuming that four members who were part of the Republican majority won their seats because of military interference with the elections, that number was hardly enough to affect the balance of power in the House. To be sure, there may have been other, uncontested seats affected by

military improprieties. But the cardinal rule of disputed elections is that unless a defeated candidate formally puts to the test a claim that the defeat was wrongful, there is no way to evaluate the merits of that claim. Democrats undoubtedly had the opportunity to claim that their candidates were wrongly defeated because of military misconduct; they did so in four instances. That they did not do so in more must be taken as skepticism of the broader allegation that they were deprived of a majority in the House because of that military misconduct.

A more detailed examination of the contests themselves confirms this point. In the lead case from Missouri, which served as a precedent for the others, the Democrats did not even ask that their candidate be seated, only that the Republican be unseated.[49] In the Kentucky case, Democrats as well as Republicans ultimately concluded that the evidence of military impropriety was not widespread enough to undermine the Unionist candidate's large margin of victory in that particular district.[50] And in another of the contested cases from Missouri, the contestant was more pro-Government than the certified winner he was seeking to replace.[51] In short, while military misconduct at the polls was deplorable—as Henry Dawes, the Republican chair of the House Elections Committee emphatically and passionately declared at the time[52]—the available evidence does not sustain the claim that this military misconduct enabled Republicans to steal the House from the Democrats at that vital juncture of the Civil War.

What remains more disturbing is that some Republican leaders, including Lincoln himself, were prepared to use military force if Etheridge's rulings had deprived them of control over the chamber. Whether or not Etheridge was justified in his exclusion of the sixteen claimants, there needs to be some designated officer at the opening of the session to declare the initial roll of the House so that the body can begin to organize itself. It would be best if that officer could be impartial between the two main parties competing for control of the chamber. But in 1863 the Republicans had no basis for arguing that Etheridge's purported allegiance with the Democrats was justification for ousting him with military force. The Republicans, after all, had installed him as Clerk and given him the exact power he was exercising. That an individual official, originally believed to be trustworthy, is no longer trusted is not adequate justification for forcible ejection of that official by military means. Instead, if the Republicans had lost the crucial vote on December 7—and the sixteen had remained off the rolls, and the Democrats had proceeded to elect a Speaker and organize the House under their control—then the lawful and appropriate response of Republicans, including Lincoln, would have been to use the available procedures in the House for petitioning that their claimants be seated. If the Democrats had then been partisan in wrongly keeping out members who on the merits should have been seated, that would have generated a severe crisis—perhaps even justifying

extraordinary measures at that point, given the exigencies of war, but not before. As Dawes himself said, Lincoln and the Republicans would have been justified in using military force only "to assert the freedom of elections" and "not to secure the election of particular men."[53] If Lincoln instead had insisted on Republican control of the House, regardless of what the certified returns provided, and regardless of what an honest assessment of all disputed seats would show, that insistence would have been worthy of condemnation.

Fortunately, however, this circumstance did not come to pass. December 7, 1863 came and went without any kind of coup d'etat, and the Republicans retained control of the House pursuant to the procedures established in advance for recognizing elected members. Their legitimate control continued as proceedings on specific contested seats worked their way through the system, with none of those contests affecting that legitimate control. Thus in this crucial respect, American-style representative democracy as it had come to be developed by the mid-nineteenth century was not subverted in the 1862 congressional elections, notwithstanding the military improprieties that occurred at some of the polls that year.[54]

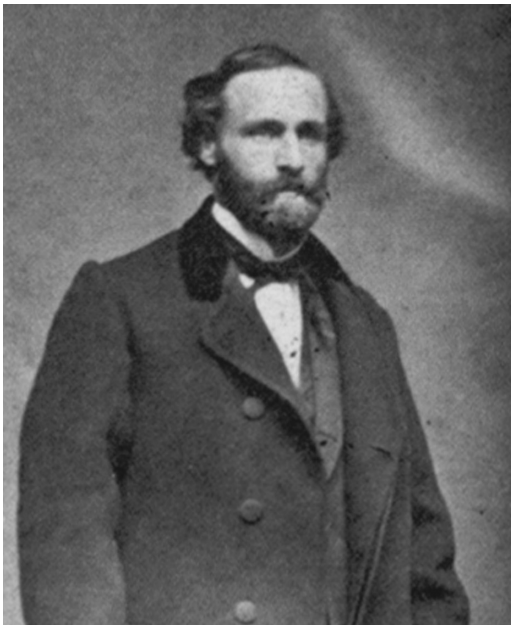

Figure 4.3 Henry Dawes, chair of the House Elections Committee, deplored the efforts of fellow Republicans to secure a partisan advantage during the Civil War from military presence at the polls. Library of Congress.

The Bloody Eighth showed how vitriolic a vote-counting dispute could become when the national parties saw the battle as significant. Indeed, some of the key players involved in *Bush v. Gore* cut their proverbial teeth in the Bloody Eighth episode. Likewise, the 1994 Alabama chief justice election served as a model of how the federal judiciary could repudiate a state-court ruling perceived as antithetical to the proper operation of democracy.

For anyone wishing to understand how *Bush v. Gore* emerged from antecedents in the eighties and nineties, it pays to take a closer look at both the Bloody Eighth and the 1994 election for Alabama's chief justice. It is worth noting also that problems with absentee ballots provided the fodder for each of these two major conflagrations. Along with Miami's mayoral election of 1997, for which a Florida appeals court nullified all of the absentee ballots because of rampant fraud, these episodes signaled that absentee ballots are a particularly vulnerable component of the voting process.[7] Based on the track record of the eighties and nineties, one would predict that in the early part of the twentieth-first century absentee ballots would continue to provide an attractive target of opportunity for any candidate wishing to challenge a close election result. Absentee ballots indeed threatened to become a major focal point of the disputed presidential election in 2000, until the Gore campaign for political reasons abandoned its willingness to challenge procedurally deficient absentee ballots. But the prediction would prove true in 2008, in Minnesota's disputed US Senate election, where litigation over absentee ballots became the main event.

The Bloody Eighth

In the 1984 election for Indiana's eighth congressional district, Frank McCloskey was a one-term incumbent Democrat in a seat previously held by Republicans. McCloskey was vulnerable in a year that would be very good for Republicans, with Ronald Reagan on his way to a monumental reelection landslide over Walter Mondale. McCloskey's Republican challenger was Rick McIntyre, a two-term state representative.[8]

Initial returns showed McCloskey leading by 190 votes, then dropping in early December to just 72.[9] Amidst calls for a recount, it emerged that Gibson County had submitted erroneous initial returns to the secretary of state, Republican Ed Simcox, and that corrected returns would put McIntyre ahead by 34 votes.[10] Once Gibson County corrected this error, Simcox certified McIntyre the winner of the election even though fourteen other counties in the district had not yet completed their own recounting of ballots. The Democrats had tried to get a federal judge to order Simcox to certify McCloskey the winner before

he received Gibson County's amended return, but the federal judge had refused to intervene.[11]

McCloskey then went to the US House of Representatives in an effort to block McIntyre from assuming office. On January 3, 1985, as other Representatives took their seats in the new Congress, the House voted along straight-party lines, 238 to 177, to keep the Indiana Eighth vacant while its Administration Committee examined the election.[12] Meanwhile, on February 4, the fourteen other counties finally finished their recounts, with McIntyre's margin of victory expanding to 418 votes.[13]

The House Administration Committee had a dozen Democrats and only seven Republicans. It created a three-member task force to investigate the vote count in the Indiana Eighth. The task force had two Democrats, Leon Panetta of California and Bill Clay of Missouri. The one Republican was Bill Thomas, also of California, indeed from a district adjacent to Panetta's.[14] Panetta, the task force's chair, would later become Bill Clinton's chief of staff and then CIA director and secretary of defense in the Obama Administration. But Panetta had started his political career as a Republican, working in the Nixon administration.[15] In 1985, still fairly junior among Democrats in the House, he had the chance to prove his loyalty (and usefulness) to his new party by winning this battle for the Democrats.

The fight involved virtually every type of ballot-counting problem conceivable, including the same type of hanging chads on punch-card ballots that would become the focal point of the 2000 presidential election. But the main issue that made the Bloody Eighth so combative, provoking apoplectic fury among Republicans, was the task force's treatment of absentee ballots that had not been properly notarized or witnessed according to Indiana law. This same issue would feature prominently a quarter-century later in Minnesota's disputed US Senate election of 2008.

The problem was that although Indiana law strictly maintained that nonconforming ballots were ineligible to be counted, at least five of the fifteen counties in the congressional districts had failed to comply with the law and wrongfully counted absentee ballots that lacked the required notarization or witnessing. County clerks had sent these ballots to local precincts in violation of a state-law requirement that these ballots be retained at the county's offices, so that they would *not* be counted at local precincts.[16] Nonetheless, they had been sent and counted there, and now they were irretrievably commingled with all other counted ballots, so that it was physically impossible for the task force to uncount them.

The task force's challenge was how to handle absentee ballots that were equally nonconforming as the ones improperly counted (equally lacking the requisite notarization or witnessing) but thus far had been excluded from the

count in compliance with state law. All three members of the task force accepted the general principle that it should "treat like ballots the same."[17]When Thomas, the Republican, stated, "I think we have to handle like ballots in a similar way," Panetta replied, "Well, I would not disagree with that."[18] In *Bush v. Gore*, the US Supreme Court would recognize this principle as an element of equal protection, guaranteed by the federal Constitution. But in the eighties the task force saw it more as a value to respect rather than a requirement to obey.

The task force's difficulties were compounded by the fact that there were two types of equally nonconforming absentee ballots that had not yet been counted. One type had also been sent to the local precincts in violation of state law, but had been caught there to prevent the further violation of being counted. The other type had been retained by the county clerks, never sent to the local precincts, in full compliance with state law.[19]

The task force grappled with the problem at its meeting on April 10, 1985. By that point, the task force's recount of the entire district was nearing completion, and McCloskey (the Democrat) had pulled even with McIntyre (the Republican). Over Thomas's objection, the task force had decided to deviate from Indiana's strict ballot-counting rules to deal with another discrepancy that emerged. With respect to ballots cast in polling places on Election Day, state law required their disqualification unless they contained the initials of two poll workers, one from each party, as well as the precinct number penciled on the ballot. Many counties refused to enforce these strict requirements on the ground that doing so would disenfranchise innocent voters, since the failure to comply with these rules was poll worker error. (There was no allegation that fraud had caused the noncompliance with these requirements.) But other counties had complied, causing some 5,000 otherwise valid ballots to be disqualified solely on this basis, many of them coming from predominantly African American precincts.[20] The task force had decided to count all of these irregular ballots, to maintain equivalence with those already counted elsewhere in disobedience to state law. Thomas, the Republican member of the task force, had proposed that ballots lacking all three required elements—the two sets of initials and the precinct number—remain uncounted on the ground that these ballots lacked any indicia of reliability. But the two Democrats on the task force let them all in, and as a result McIntyre's 418-vote lead had entirely evaporated.

Now, on April 10, it was time to confront what to do about the nonconforming absentee ballots, which—in contrast to those cast in polling places—were thought generally to favor Republicans. The topic prompted an extended discussion between Panetta and Thomas, with Clay (the other Democrat) remaining silent. Panetta and Thomas were able to agree that the first type of nonconforming absentee ballots, those that had been sent to the local precincts but had remained uncounted, should be counted in accordance with the principle of treating "like

ballots" alike. As Thomas put it, "those nonnotarized absentee ballots that were sent to the precinct and opened and already counted has to be, I think, the standard that we apply to those other nonnotarized ballots that were sent to the precinct, because you cannot count some and not others that are in the same category."[21] Panetta concurred: "We will count all of the absentee ballots that went to the precinct" pursuant to the task force's "basic approach"—"because they are like ballots."[22]

But Panetta and Thomas struggled over how to handle the second type of nonconforming absentee ballots, those that had never been sent to the precincts at all. At the April 10 meeting, Panetta repeatedly expressed the view, albeit somewhat tentatively, that these ballots might deserve different treatment simply because they had been retained by the county clerks. Early in the discussion, Panetta posited: "There could be a distinction drawn between like ballots and unlike ballots in the sense that the ones that were retained by the county clerk as unnotarized were never reviewed, never looked at, basically set aside, never referred back to a precinct at all, so that in essence they were treated very differently from the ones that actually went back to the precinct then and were evaluated along with other ballots in some instances." As the discussion progressed, Panetta's position became firmer:

> It seems to me, that we can draw a distinction based on those within the precinct level, and the question then becomes, can you then say that the ones that are back in the County then ought not to be counted? My view is that they ought not to be counted because the county clerks basically made their judgment at that time, set those aside.[23]

Thomas, conversely, hardened his view in the opposite direction over the course of the deliberations. Initially, he stated his openness to the distinction that Panetta was proposing, based on the possibility that ballots kept by the county clerk (after being disqualified) might have been kept in a less secure condition than those sent to the precincts:

> I think the question is, were the ballots that were retained by the county clerks as being nonnotarized under Indiana law, were they treated differently or not exactly the same as those that were out in the precinct. If they were not, then I think we can honor those in the precinct without honoring those in the clerk's office.[24]

Later on, however, Thomas emphasized the flip side of the same coin: if the county clerks kept the nonconforming ballots in equally secure conditions as those in the precincts, then both groups should be counted equally along with

the nonconforming ballots already counted in the precincts. He called it "the most perverted thing I can think of" to reject absentee ballots kept by the county clerk if "they were treated exactly like" the ballots sent to the precincts in terms of "identical security." As long as the security conditions "are identical," Thomas repeatedly asserted, "I don't see how we can't count them."[25]

The hardening of the positions on both sides in the course of the deliberations may have reflected the increasing awareness, on the part of both Panetta and Thomas, that this second category of nonconforming absentee ballots might well determine the result of the entire race. In any event, the two sides agreed to defer final consideration of how to handle the category until they received further factual information from the counties on the key point, at least for Thomas, concerning the security conditions for these ballots retained by the county clerks. Panetta was careful to announce that, for him, this additional information might not matter: "It may very well be that despite [these additional] statements, I think there is a difference just by virtue of the fact that some are forwarded to the precinct, and the others are retained."[26] But Panetta was willing to go along with the collection of "additional evidence from the clerks" to see if it would shed any light on "how [these ballots] were treated."[27]

The task force next met on April 18. Meanwhile, with the recount virtually complete except for a final decision on what to do with the nonconforming absentee ballots kept at the clerk's offices, McCloskey had finally managed to eke ahead of McIntyre by a mere three votes. A fourth would later be added to his infinitesimal lead, making it the closest House race of the century.[28]

At the April 18 meeting, the task force heard a report on the additional evidence they had requested the previous week. They learned that several counties in fact had kept the disqualified absentee ballots completely secure. Even so, Panetta announced that he would adhere to his previously stated view that these ballots were in a "different class" from nonconforming ballots sent to the precincts simply because "they were kept at the county clerk's level" and thus "were never counted by anyone—the county clerk or anybody else—nor attempted to be counted by anyone because they basically abided by Indiana law by essentially voiding those ballots."[29] Clay, the other Democrat, said it had been wrong for the task force to count even those nonconforming absentee ballots sent to the precincts (although Clay had not stated that position at the April 10 meeting). Clay did not want to "compound the error" by now counting the nonconforming ballots retained by the clerks.[30]

Once Thomas saw that both Democrats were definitely against counting this batch of absentee ballots—there were 32 of them, more than enough to make a difference in the outcome of the election—he became furious.[31] "I cannot believe this," he exclaimed, directly accusing Panetta of "hypocrisy."[32]Thomas thought it was particularly two-faced that Panetta "didn't care about Indiana

law" when considering the nonconforming ballots cast at polling places, but now that absentee ballots were at issue "what I hear piously stated is that we had better talk about upholding the Indiana law." Thomas thought it "ironic," too, that the previous week Panetta was willing "to count those ballots that sent to the precincts," but now, even though the task force had learned that the ones retained by the clerks were kept securely—"so we know they are not tainted, we know they have not been contaminated"—Panetta refused to treat them the same. Furthermore, Thomas blasted, Panetta was taking this position although the retained ballots were no more nonconforming under Indiana law than the ones sent to the precincts (in fact less so, since they were supposed to be retained there, rather than sent to the precincts). Thomas repeated his charge: "To hide behind Indiana law saying they held them at the courthouse and therefore we don't count them is the absolute height of hypocrisy and I am surprised that the gentleman from California is willing to go that far in terms of being inconsistent under his own rules."[33]

Panetta retorted by saying that Thomas himself was inconsistent in his newfound eagerness to "trash Indiana law" by counting "the unnotarized, unwitnessed absentee ballots that were retained by the clerks," when previously Thomas had insisted upon compliance with Indiana law to "eliminate about 4,800 to 5,000 ballots" cast at polling places because they "had no initials [or] precinct numbers."[34] Panetta further defended his own distinction between the two groups of nonconforming absentee ballots, depending on whether they were sent to the precincts or retained by the clerk: "There is no question in my mind that these ballots were isolated by the clerks because they were not to be counted" and thus "are very different from the other ballots that we counted," which had been "forwarded to the precincts" and needed to be treated the same as equally nonconforming ballots already counted at the precincts: "We made the decision where those ballots were forwarded to the precinct they would all be counted" and so "there is a legitimate basis on which to make the decision that those retained by the county clerks ought not to be counted."[35]

Thomas, however, would not back down. He parried Panetta's charge that he was at least equally inconsistent, and riposted that Panetta was changing the rules just because McCloskey had pulled ahead:

> My argument is don't hide behind Indiana law at this date. My gosh, the rules you shoved down my throat didn't give much credence to Indiana law at the time. And now you are arguing that Indiana law will protect you from having some votes count that may change the outcome that you feel you already know.

Lest anyone miss his point, Thomas repeated that he was entitled to rely on Panetta's own rules once they had been made: "Yes, you crammed those rules down [my] throat by a straight partisan vote, but once we are under those rules let's at least try to be consistent under those rules and not game play the rules for one or the other's advantage."[36]

Thomas and Panetta continued to exchange heated words. But it did not change the result. Later in the proceeding, Thomas said he had felt as if he had been "raped" by the majority of the task force—a comment that drew considerable media attention.[37] Thomas defended the charge: "I use that word purposefully, because rapists try to conquer and dominate and humiliate their victims."[38]

Thomas, however, was hardly alone among Republicans in the vehemence with which he expressed his ire. In their official Minority statement accompanying the House Administration Committee's ratification of the task force, the Republicans on the committee echoed Thomas's basic accusation: "If McCloskey had been behind at that time, the Minority is confident that the Majority would have opened and counted those votes in hopes of reviving their candidate."[39] In their conclusion, the Republicans captured the essence of their

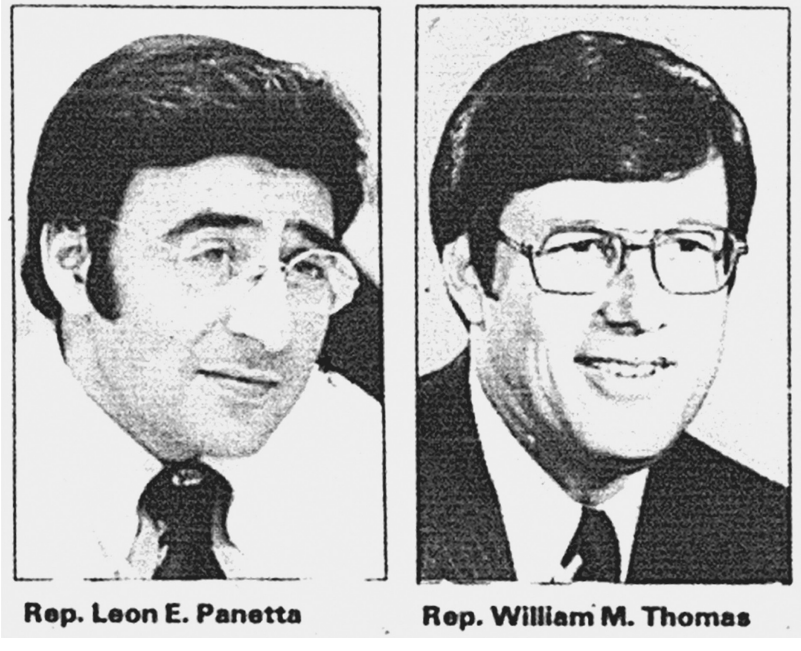

Figure 10.1 On May 5, 1985, the *Los Angeles Times* ran a story featuring the two congressmen from California dueling over the Bloody Eighth on behalf of their respective parties; accompanying the story were these photos supplied by their congressional offices.

complaint: "The Majority's total disregard of fair play magnifies the abuses of partisanship and rends the basic fabric of the House."[40]

As the matter moved to the House floor, Republicans escalated their rhetoric. Newt Gingrich condemned the "lesson in thug rule."[41] Dick Cheney proclaimed, "it's time to go to war."[42] Republicans attempted to bring the House to a halt, calling for a new election of the kind that occurred to resolve the 1974 New Hampshire Senate election.[43] But Republicans lacked the power of the filibuster in the House, and on May 1, 1985, the Democrats prevailed in voting to seat McCloskey. The Republicans walked out in protest, and they kept their rancor with them for decades, into the twenty-first century.[44]

Republicans also tried to overturn the outcome in federal court, raising equal protection and due process claims of the kind that they would present again in *Bush v. Gore*. But the federal judiciary ruled the claims nonjusticiable on the ground that under the Constitution the House, like the Senate, held final authority to judge the election of its own members. Then-judge (and soon-to-be Justice) Antonin Scalia wrote the lead opinion, declaring it "difficult to imagine a clearer case" of the court's "lack [of] jurisdiction to proceed."[45] The Republicans were left only with their sense that Democrats did not play fair and that there was no tribunal from which they could receive an impartial adjudication of the ballot-counting dispute. Investigative reporting later would show that McIntyre indeed would have prevailed by at least nine votes if the 32 disputed absentee ballots had been counted.[46]

Ultimately it matters little whether Panetta or Thomas had the better view on the disposition of the ballots, to count them or not. Rather, the crucial point is one of procedure and perception. Because the task force had two Democrats and one Republican, and because the key ruling was a 2–1 partisan split, Democrats could not refute the charge that they were manipulating the ballot-counting rules midstream to achieve the desired result. Of course, the Bloody Eighth was hardly the first instance of this kind of 2–1 partisan split by an authoritative ballot-counting body. In 1876, the Florida Canvassing Board had done exactly the same, with far greater repercussions.

But the Bloody Eighth earned its appellation—although no actual blood was shed—because ethical expectations had risen in the century since Hayes-Tilden. Although one of the Florida canvassers had confessed to "straining the rules" to "favor" his "own party," that sin was not one that congressional Democrats were willing to acknowledge in their handling of this Indiana election. The morality of ballot-counting had come to insist that the party in power treat the other party as it would insist on being treated if the roles were reversed. Perhaps this ethical injunction was nothing more than the ancient Golden Rule applied to the particular context, but it was a requirement now considered essential to the proper functioning of two-party competition in an electoral democracy. And it

was a requirement that Republicans believed that Democrats had breached in this instance.

In his memoirs Leon Panetta devotes less than a page to the Bloody Eighth episode, but in that short space he attempts to defend his conduct. He glosses over some key details—as, for example, when he asserts that "Thomas had agreed to the rules and process for the recount," despite the fact that Thomas clearly dissented on key rulings. Panetta also frames the crux of his defense in terms of an assertion that he acted consistently with the Golden Rule: "Republicans would have done the same if one of theirs had won by four votes."[47] Since he does not elaborate, it is unclear exactly what Panetta means. He could be claiming that Republicans would have been just as self-serving in manipulating the recount process to their own advantage if they had been in the position to do so. But that seems the weaker reading of his sentence. Instead, in context it appears that Panetta claims that it was perfectly fair to act as he did, because both parties would consider the task force's conduct appropriate for whichever party happened to be in control of ballot-counting in similar circumstances.

Whether or not Panetta advances a normatively sound understanding of the Golden Rule, the record shows that he is factually inaccurate in his characterization of how Republicans would behave if given the opportunity in similar circumstances. Ten years later, after the Gingrich revolution of 1994 put the Republicans in control of the House, Connecticut had an exceptionally close race for its Second congressional district. Republicans could have used this Connecticut election as payback for the Bloody Eighth. But they chose not to, exercising laudable self-restraint. Bill Thomas was on the task force for this election, and he was determined not to do unto Democrats what they had done unto Republicans a decade earlier. When the House Republicans awarded the Democratic candidate the Connecticut seat, the winning Democrat acknowledged that he had been treated more fairly than had his Republican candidate in the Bloody Eighth episode.[48]

The 1994 Alabama Chief Justice Election

Absentee ballots were also the centerpiece of the most doctrinally significant disputed election of the era between *Reynolds v. Sims* and *Bush v. Gore*. This statewide election was neither for governor nor US senator, but instead for chief justice on the Alabama Supreme Court. Regardless of whether or not judges should be elected, the symbolism of a vote-counting dispute in an election for chief justice is acutely poignant. The office of chief justice is the highest embodiment in a state of its commitment to the rule of law and the fairness of the legal system. If counting the ballots in a chief justice election is corrupt, then what hope is there