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Understanding the election scandal in North Carolina's 9th district

[Molly E. Reynolds](#) Friday, December 7, 2018

Editor's Note:

As a political and electoral scandal unfolds in the 9th congressional district of North Carolina, we asked our resident Congress expert, Molly Reynolds, to break down the issues and help us understand what the short- and long-term implications will be.

There is a political scandal brewing around the election in the 9th congressional district of North Carolina; can you explain briefly what is going on there?

The story has a lot of moving parts, but here are the basics: the 2018 general election in North Carolina's 9th district was a contest between Democrat Dan McCready and Republican Mark Harris; Harris had defeated the incumbent GOP holder of the seat, Robert Pittenger, in the primary. While Harris leads in the vote count by 905 votes, the North Carolina State Board of Elections has twice refused to certify the results of the race because of potential irregularities involving mail-in ballots. The allegations fall into several categories. Some voters claim that individuals came to their homes and collected their unsealed absentee ballots. Others allege that they received absentee ballots that they never requested. In addition, multiple individuals have come forward to claim that they were paid by a Republican political operative, Leslie McCrae Dowless, to collect absentee ballots from voters; under North Carolina law, it is, with limited exceptions, illegal to collect and return someone else's absentee ballot. (For more on the ins-and-outs of the controversy, I'd recommend some great reporting from local journalists on the episode.)

Experts and commentators are distinguishing what is happening in NC-09 as "election fraud" rather than "voter fraud." Can you explain the difference and what you think is the appropriate term?

I think this terminology question stems from the political valence taken on by the term “voter fraud” in recent years. Generally, and thanks in large part to the efforts of conservative activists, we now associate that term with purposeful actions committed by individual voters, like non-citizen voting, voting multiple times, or voting in a jurisdiction where one does not live. Indeed, the mandate of President Trump’s short-lived and controversial Presidential Advisory Commission on Election Integrity included identifying “those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.” What allegedly happened in North Carolina, however, is not primarily about voters casting ballots they were ineligible to cast. Rather, it appears to involve party-allied actors inhibiting voters’ ability to do so.

Is this a scandal that affects just the Democrat in the race, or is the Republican Party there affected as well?

The effects of the unfolding scandal could extend beyond just the ultimate outcome of the general election in the 9th district. Investigators are also looking into the results of the Republican primary, in which Harris beat Pittenger by just 828 votes but won 96 percent of the absentee vote in one key county. In addition, Dowless appears to have had ties to other Republican candidates in the 2018 election and the county at the center of the scandal has seen at least five separate elections investigations since 2010.

What are the options that the North Carolina State Board of Elections (NCSBE) has moving forward?

The NCSBE could reverse course and certify Harris as the winner. If they elect not to do so, there are, as political scientist Michael Bitzer has outlined, four criteria under which the Board could call a new election; of these, only one—the presence of “irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness”—does not require the presence of votes “sufficient in number to change the outcome of the election.” According to North Carolina law, if a new election is called by the Board, “all candidates who were listed on the official ballot in the original election” would appear on the ballot, making it, essentially, a re-do of the general election.

Do you think this will be resolved before the new Congress is sworn in in four weeks? If not, what options does the House of Representatives have moving forward?

Thanks to Article 1, Section 5 of the U.S. Constitution, the House of Representatives is the ultimate judge of the “elections, returns and qualifications” of its members. Historically, the House has been deferential to state election proceedings; under the House’s precedents, a certificate of election from an authorized state official “constitutes evidence of a prima facie right to a congressional seat in the House.” When a House seat has a certified winner, then, there is a substantial burden of proof on the loser to convince the House to reject that decision by a state.

If there is a challenge to be adjudicated, there are two basic ways it can arise. The primary approach in contemporary practice is for the losing candidate filing a contest under the Federal Contested Elections Act (FCEA) of 1969. Alternatively, the House may refer the question of a right to a seat to the Committee on House Administration for an investigation. Under both avenues, the Committee has a wide range of remedies available to it, including recommending that the results of the election be rejected and a new election be held. Comments from prominent House Democrats, including Minority Leader Nancy Pelosi, indicate that the party, which will control the House come January, have started to consider their options.

Is there precedent for situations like this? How have they resolved?

There’s a long tradition of contested election cases in the House. This report from the Congressional Research Service documents 107 such episodes between 1933 and 2009. In the majority of the cases, the contest was dismissed in favor of the person whose election was challenged. Historically, the House has been hesitant to declare a seat vacant. In a famous 1985 case involving Indiana’s 8th district, the Committee’s report described declaring a seat vacant as a “drastic action’ that it recommended against ‘in nearly every instance.’”

Finally, is this a bigger issue beyond NC’s 9th district? Is this something Americans should care more about and why?

Fundamentally, all Americans have a stake in ensuring that our elections are conducted fairly and that their ability to exercise their right to vote isn't impeded by fraudulent actors. Uncovering misconduct when it does happen requires high quality and transparent election data—two things that, as political scientist Jason Roberts points out here, are made available in North Carolina. To the extent that Americans are concerned about this kind of behavior in the future, it's in their interest to push for higher-quality election administration.

Research also suggests that voters who cast votes via absentee ballot are less confident that their vote will be counted as they intend; high-profile scandals involving absentee ballot fraud could undermine this confidence further. The episode could also have consequences for the availability of so-called “convenience voting” options going forward. Some states, like Georgia, have recently adopted policies that subject absentee ballots to increased scrutiny when they are returned—changes that advocates argue disproportionately disadvantage minority voters. For proponents of these restrictive policies, absentee ballot fraud—even if perpetrated not by voters themselves, but by party-aligned actors—could be used as justification for more widespread adoption of such measures.