

LAW OFFICES
BUCK & HARRIS
COMMERCIAL STANDARD BUILDING
FORT WORTH 2, TEXAS

January 20, 1950

RECEIVED

JAN 27 1950

SEN. CONNALLY

Mr. J. L. McAtee
334 Post Office Bldg
Houston 2, Texas.

*John. This takes care
of the court costs
Raymond*

Dear Mr. McAtee:

I enclose herewith my check in the amount of eight hundred (\$800.00) dollars in payment of your statement dated December 31, 1949 covering Court Reporting and Transcript, mileage and travel expense.

The check is payable to John Waide, Whit Waide, Mondshine and J. L. McAtee. We appreciate your fine services and cooperation.

Yours very truly,

Raymond E. Buck
Raymond E. Buck

REB/fr

encl

COPY

LAW OFFICES
BUCK & HARRIS
COMMERCIAL STANDARD BUILDING
FORT WORTH 2, TEXAS



Mr. John Connally
Senate Office Building
Washington 25, D.C.

September 23, 1948

Arnold, Fortas, and Porter
Washington, D. C.

Attention: Judge Thurman Arnold

My dear Thurman:

Enclosed I am handing you copy of transcript of part of the proceedings before Judge Davidson in the case of Stevenson vs. Johnson.

I am also enclosing copy of motion for stay of temporary injunction which we will present to Judge Hutcheson tomorrow, and also copy of Petition for Writ of Mandamus and Prohibition, which we have prepared but have not yet decided whether it will be necessary that it be presented.

This will give you a partial picture of the situation, and I will communicate with you after Judge Hutcheson acts.

Sincerely

Alvin J. Wirtz

October 19, 1948

Duval Primary Given Clean Bill Of Health by Jury

Caller-Times News Service

SAN DIEGO — Duval County's Aug. 28 primary election was given a clean bill of health by a district court grand jury here Monday.

In a verbal report to Dist. Judge L. Broeter, Jose Tovar, foreman of the grand jury, said that 20 witnesses had been examined during the course of the investigation begun Oct. 4, but that no evidence of irregularities of any sort had been discovered.

When he empanelled the grand jury at the opening of a four-week term of 79th District Court for Duval County Oct. 4, Judge Broeter specially instructed it to make a "thorough investigation" of the Aug. 28 primary.

The action of the grand jury apparently brought to an end a chain of events which began Sept. 15 when Coke R. Stevenson in federal court at Fort Worth questioned the Duval County vote total in the runoff election. His attorney, Dan Moody, said that the Duval County vote was "loaded" and called attention to the fact that Stevenson has been given only 40 votes to 4,622 for his senatorial opponent, Lyndon B. Johnson.

A one-day hearing was held here Sept. 28 by J. M. Burnett, special federal master in chancery appointed to investigate the election. The federal investigation was call-

ed off, however, when a justice of the U. S. Supreme Court intervened and ruled that the federal court was not the proper forum for an election contest suit.

Among witnesses questioned by the grand jury was Campbell King, chairman of the county executive committee. King was vacationing and could not be served with a subpoena to appear with his records at the federal inquiry.

In addition to Tovar the grand jury consisted of Clark King, Jesus Olivera, Jr., Dan Tobin, Jr., A. C. Farias, Diego Gonzalez, R. H. Hudgens, A. V. Barrera, Róy W. Medlin, E. Carrillo, Jr., Henry Norris and Harry Peck.

The grand jury returned four indictments before adjourning, two for murder, one for failure to stop and render aid following an accident and one for child desertion. The names of those indicted were withheld pending their arrest by Sheriff Dan U. Garcia and his deputies.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. HURVENSON,

PLAINTIFF,

VS.

TOM L. TYSON, VANN M. KENNEDY,
LYNDON B. JOHNSON, PAUL H. BROWN,
CLARENCE O. KRAFT, MELVIN FAULK,
AND SULLY MONTGOMERY,
DEFENDANTS.

CIVIL NO. 1640

AFFIDAVIT

I, J. Edward Johnson, being duly sworn, depose and say:

I am a resident of Brownwood in Brown County, Texas, a practicing attorney and a member of the State Bar of Texas and the Brownwood Bar. I appeared as attorney of record for the Defendant in the cause of A. E. Wilson vs. F. A. Landerhalk in the District Court of Brown County, Texas, in Cause No. 11,130 on the Docket of said Court, the same being a statutory contest of election between candidates for nomination for the office of County Judge of Brown County, Texas, at the Second Democratic Primary Election held in said county on the 28th day of August, 1948.

After a hearing before the Honorable R. B. Cross, Judge of the 52nd Judicial District of Texas, presiding at said trial, the said Court entered its order and judgment therein, a certified copy of which is hereto attached and marked Exhibit "A". As appears from said judgment the Court found and adjudicated that none of the official ballots cast in voting precinct #27, known as Brooksmith; that none of the official ballots cast in voting precinct #1, also known as Ward 1 of the City of Brownwood; that none of the official

ballots cast in voting precinct #29, known as Chapel Hill; that none of the official ballots cast in voting precinct #8, known as Bangs; that none of the official ballots cast in voting precinct #19, known as Woodland Heights; and that none of the official ballots cast in voting precinct #30, known as Winchell; were legal ballots, but that all ballots cast in all of said boxes at said Primary Election were illegal ballots and could not be counted.

As shown by certificate of Thomas H. Taylor, Chairman of the Brown County Democratic Executive Committee, hereto attached and marked Exhibit "B", said Executive Committee at its meeting on Wednesday afternoon, September 1, 1948, canvassed the returns of said Primary Election held on August 28, 1948 and did certify to the Chairman of the State Democratic Executive Committee the results of said Primary Election in the race for United States Senator from Texas to be that Lyndon B. Johnson received 2184 votes and Coke R. Stevenson received 3644 votes. In these returns were included the aforesaid six voting boxes in which all ballots were declared to be illegal in the election contest aforesaid and in which Lyndon B. Johnson received a total of 634 votes and Coke R. Stevenson received a total of 1102 votes. It is apparent, therefore, that if the votes, all of which were illegal in said six boxes, were eliminated the legal vote to be counted for each candidate would be 1550 for Lyndon B. Johnson and 2542 for Coke R. Stevenson, and the majority for Coke R. Stevenson in said County would be reduced to the extent of 468 votes. The foregoing tabulation, however, does not take into account 4 absentee ballots legally cast in the Chapel Hill box, of which 3 were for Stevenson and 1 for Johnson.

Although an appeal has been taken from the judgment rendered by the Court in said cause, there is no assignment and no contention that the Court was in error in holding that the aforesaid ballots cast in said boxes were all illegal ballots, but the appeal is predicated solely on the fact that

an amended petition raising the question as to the box in Ward 1 was filed 14 days after the certification of the result, and not within the 10 days prescribed by Statute for the filing of a contest.

SWORN to and subscribed before me, the undersigned authority, on this _____ day of September, A. D. 1948.

Notary Public in and for Tarrant
County, Texas.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON
PLAINTIFF,

VS.

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE O. KRAFT
MELVIN FAULK, and
SULLY MONTGOMERY,

DEFENDANTS.

CIVIL NO. 1640

DEFENDANT LYNDON B. JOHNSON'S
OPPOSITION TO GRANTING OF
TEMPORARY INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES LYNDON B. JOHNSON, one of the Defendants in the above cause, although no notice has been given to him to appear in connection with the show cause orders issued by this Honorable Court on September 15 and 16, respectively, since he is the real party at interest and the other defendants have no personal interest in the outcome of this hearing, subject to and without waiving his plea to the jurisdiction heretofore filed herein, and for the special purpose of resisting and objecting to the issuance of a temporary injunction herein, as prayed for in the Complaint and Amended Complaint herein; and in support hereof respectfully shows:

1.

As shown by this defendant's motion to dismiss heretofore filed herein, and which is made a part hereof, by reference, this Court is without jurisdiction of the course of action which is the subject matter of this suit.

2.

The Complaint shows upon its face that this Court has no jurisdiction of the persons or subject matter of this action.

3.

The Complaint fails to state a claim against any of the Defendants upon which relief can be granted.

4.

The Complainant has a plain and adequate remedy at law in that, even if any of his civil rights have been violated (which Defendant will deny in the proper forum), and even if he were entitled to sue in this Honorable Court for such alleged deprivation of his rights, at most Complainant might have a right to recover damages against those who have wronged him; and the Complaint shows upon its face that the person or persons who, he claims, have wronged him are not even parties to this suit; therefore, the Complaint affirmatively shows that Complainant is not entitled to a restraining order or preliminary injunction of any kind.

5.

Even if everything alleged by Complainant were true (which this Defendant will deny under oath in the proper forum), the Complainant has an additional adequate remedy at law, provided by the Statutes of Texas to institute an election contest in the State courts; and, if the decisions of the Texas Supreme Court are not, in Complainant's opinion, in keeping with the provisions of the United States Constitution, then Complainant has a right to prosecute his election contest to the Supreme Court of the United States; therefore, this Court has no jurisdiction and the Complaint should be dismissed.

6.

The complaint affirmatively shows upon its face that complainant has failed to exhaust his remedy of an election contest afforded him under the statutes of Texas, simply pleading as a conclusion, without alleging any facts in support thereof, that the Texas statutes which make provision for an election contest are ineffectual; and because the Supreme Court of the United States has held that where the State courts afford a remedy, such remedy must be exhausted before appealing to the United States courts even though there be some fancied claim of a deprivation of rights protected by the Constitution of the United States; therefore, upon the face of the complaint, it affirmatively appears that this action should be dismissed and complainant should be required to prosecute his remedy in the State courts, from which he can prosecute an appeal to the United States Supreme Court.

7.

So far as the application for a preliminary injunction is concerned, in an appeal to the Chancellor to exercise the sound discretion, which guides the determination of courts of equity, this Court, sitting as the Chancellor, will seek the avoidance of needless friction with State policies and restrain its actions because of "scrupulous regard for the rightful independence of the State governments" and for the smooth working of the Federal judiciary; and will, "in furthering the harmonious relation between State and Federal authority," refuse to interfere with the discharge of purely ministerial and statutory duties by State officers.

8.

Because it appears from Plaintiff's petitions, or is reasonably to be inferred therefrom, that under the laws and court decisions of the State of Texas, this Defendant has secured a certain definite standing and a valuable right which he is entitled to have protected by the courts and which complainant seeks to destroy by this suit; that this Defendant won the nomination of the Democratic Party of Texas for United States Senator; that the

election officials in the various counties in Texas made their returns, as required by law, to the State Democratic Executive Committee; that the returns were canvassed by that Committee, as required by law, and reported to the State Democratic Convention; that they were again canvassed on the night of September 14, 1948, by a committee headed by one of the State District Judges, who had been appointed by the complainant while he was Governor; that such committee reported to the convention that this Defendant had received a majority of the votes cast in the August 28th primary and its said report was adopted by the convention and a certificate issued by its officials, the Defendants Tyson and Kennedy, as required by law, each and all before any restraints were granted by this Honorable Court and the Defendants notified thereof; that said certificate of nomination^{was}/likewise transmitted by such officials to the Secretary of State, as required by law, and filed with that official, along with the nomination of other candidates of the Party for other State offices; and that the Secretary of State, the Defendant Paul H. Brown, was preparing to carry out his statutory duties and certify the name of this Defendant as a Democratic nominee for United States Senator when the second restraining order issued by this Honorable Court was served upon him. In this connection, this Defendant says that said Defendant Brown has already transmitted to the printer the names of all other State candidates of the Democratic Party, preparatory to certification of such names to the various county election members for printing on the ballot; that under the laws of Texas, the names of all nominees of the various parties must be in the hands of the county election officials in time for posting of the election notices, printing of the ballots, and etc. for absentee voting, which commences twenty (20) days prior to the General Election on November 2, 1948; that the Secretary of State has publicly and openly announced that it will be necessary for him to have the name of the Democratic candidate for United States Senator on or before September 27, 1948, in order to certify it to the various county election officials for inclusion on the ballot; that this Defendant, therefore, has

a vested and legal valuable right, entitled to be protected under the Constitution and laws of this State, to have his name appear as the Democratic nominee for United States Senator from Texas; and that the Democratic Party of Texas also has a valuable right to have a candidate upon the General Election ballot, which valuable rights the complainant seeks to defeat by this action in order to secure the election of himself or the candidate of the Republican Party, by reason of all of which there is no equity in Plaintiff's Bill, and therefore, this Honorable Court, in deference to the decisions of the Texas Supreme Court, and in observing the niceties and proprieties of a Chancellor, and in order to maintain the proper relationship between the State and Federal Governments, should dismiss this action, since otherwise this Defendant will suffer great and irreparable damage.

9.

The Complaint fails to state a claim upon which relief can be granted in that it wholly fails to comply with well-established legal requirements necessary to justify or support the extraordinary relief which he seeks. This Defendant says that in order to entitle Complainant to any injunctive relief that he must first set forth all the facts necessary to show the equities which he asserts; that he must present a case falling within some well-defined head of equity jurisprudence; that candor and frankness are essential and that material facts should neither be concealed nor misrepresented; that Plaintiff must come into court with clean hands and in the case and under the circumstances sought to be presented, Plaintiff must offer to do equity - whereas, the Complaint (both original and amended) contains mere conclusions of the pleader and nowhere make any clear or succinct statement of facts which would entitle him to the equitable relief prayed; that the Complaint, on its face, conceals and presents in a garbled way only a part of the facts; and otherwise shows an absence of frankness and candor. Among other things, the Complaint wholly fails to allege that a fair count of all the votes in all the counties in Texas, and throwing out all the illegal and

fraudulent votes credited to Complainant, would change the result of the election. Therefore, the Complaint is insufficient in equity to entitle Complainant to an injunction or to any other equitable or legal relief.

Therefore, the Complainant does not come into court with clean hands; and his Complaint is insufficient in that, even if his general allegations as to election irregularities in two counties were true (which this Defendant in no way admits and which he will expressly deny under oath in the proper form), it would not affect the result of the election; for the reason that in the proper form, if the occasion should arise, this Defendant could show that Complainant, himself, has been the beneficiary of frauds, illegal ballots and irregularities in various counties of Texas; and that Complainant knows of these frauds in his own behalf which have been widely publicized.

Among other things, this Defendant can show, in the proper form, that the Complainant received in one county in Texas 1102 illegal votes; and that this has been disclosed in a judicial proceeding in the courts of Texas in an election contest between two candidates for a local office; and that as a result of these irregularities, Complainant received more illegal votes in that one county than he claims this Defendant received in both Jim Wells and Zapata Counties, the only counties of which he complains; therefore, the result of the election would not be changed.

This Defendant can further show, in the proper form and at the proper time, that Complainant was the beneficiary of other illegal votes in various other Counties in Texas; and that in one county his own cousin, as Chairman of the Democratic County Executive Committee, made five different returns to the State Executive Committee, in violation of law, resulting in giving Complainant hundreds of illegal votes; and that in other counties in this State so-called "corrections" were sent in which resulted in giving to Complainant hundreds of illegal and fraudulent votes without which he would have been defeated more decisively than the returns to the State Democratic Executive

Committee indicate. This Defendant can show, in the proper form and at the proper time, that in one large county, which Complainant carried by more than two thousand votes, the Grand Jury has returned indictments for election irregularities and frauds, recommending at the same time further investigation by future grand juries; and reporting that these irregularities and frauds were constituted in part by transfer of voters from one precinct to another, votes by parties unknown, "tombstone votes" and votes by prostitutes who had left the city; and Complainant received practically all of said illegal votes; and that in other counties, the returns of the County Chairmen to the State Democratic Committee were erroneous in favor of Complainant so as to give him substantial numbers of illegal votes that were fraudulent in law.

This Defendant can show, in the proper form, if the occasion should ever arise, that a fair count of the legal votes in the various counties in Texas will disclose that Complainant was decisively defeated by this Defendant on August 28th.

Because of the facts alleged, and in order to determine which of the two candidates for the Democratic nomination for United States Senator at the Primary Election of August 28th, 1948, received a majority of the legal votes cast thereat, it would be necessary that a court of competent jurisdiction, with authority to open ballot boxes, hear evidence in respect to all matters of fraud and irregularity; and that this Court, for want of sufficient time and lack of authority to recount the votes, cannot determine such issue prior to the time within which the election officials must, as required by law and under severe penalties, perform their official and ministerial duties of placing this Defendant's name on the official ballot to be used in the forthcoming General Election. In this connection, Defendant would show that the Secretary of State has publicly and openly announced that it will be necessary for him to have the name of the Democratic Candidate for United States Senator on or before September 27, 1948, in order to certify it to the various county election officials in time for its inclusion on the official ballot to be voted in the General Election.

Therefore, in the exercise of its wise discretion and for all the reasons alleged in the foregoing paragraphs of this Motion and response to the show cause order, this Honorable Court should sustain such motions, dissolve the temporary restraining order, deny its continuation, refuse to issue the preliminary injunction prayed for for want of jurisdiction and for want of equity.

WHEREFORE, this Defendant prays this Honorable Court to refuse to continue in effect or to grant any other restraints or injunctive relief in Complainant's favor - this Defendant hereby expressly reserving all rights and privileges of answering on the merits of any cause of action or justiciable issue of which this Court may hold it has jurisdiction.

Lyndon B. Johnson, Defendant

Address _____

Address _____

Address _____

Address _____

Address _____

Address _____

Address _____

Address _____

ATTORNEYS FOR DEFENDANT, LYNDON B. JOHNSON

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,
PLAINTIFF,

VS

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE G. KRAFT
MELVIN FAULK, and
SULLY MONTGOMERY,

DEFENDANTS.

CIVIL NO. 1640

AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Coke R. Stevenson, who resides in Kimble County, Texas, plaintiff, complaining of Tom L. Tyson, who resides in Navarro County, Texas, Vann M. Kennedy, who resides in Nueces County, Texas, Lyndon B. Johnson, who resides in Blanco County, Texas, Paul H. Brown, who resides in Travis County, Texas, Clarence G. Kraft, Melvin Faulk and Sully Montgomery, all of whom reside in Tarrant County, Texas, and all of whom are hereafter referred to as defendants.

I.

The defendant Tom L. Tyson was elected Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, which is hereinafter referred to, and Vann M. Kennedy, defendant, was elected Secretary thereof; these defendants are sued individually and in their official capacities as officers of said Democratic State Convention.

The defendant Lyndon B. Johnson was a candidate in the Democratic Primary Election held on August 28, 1946, hereinafter referred to.

The defendant Paul H. Brown is Secretary of State of the State of Texas, and he is sued individually and as such officer.

The defendant Clarence O. Kraft is County Judge of Tarrant County, Texas, and, by virtue of such official position, is a member of the election board for Tarrant County, Texas; the defendant Melvin Faulk is County Clerk of Tarrant County, Texas, and, by virtue of such official position, is a member of the election board for Tarrant County, Texas; the defendant Sully Montgomery is Sheriff of Tarrant County, Texas, and, by virtue of such official position, is a member of the election board for Tarrant County, Texas. These last three are sued individually and in their official capacities in and for Tarrant County, Texas, and as the election board for Tarrant County, Texas.

There are 254 counties in Texas and in each of said counties there is a County Judge, a County Clerk and a Sheriff and in each of said counties said Judge, Clerk and Sheriff constitute the official election board for their respective county.

Said parties constituting the election boards of said counties are so numerous as to make it impractical to bring them all before the Court and, there being a common question of law and fact affecting the several rights and a common relief being sought herein, the said Clarence O. Kraft, Melvin Faulk and Sully Montgomery are sued as representatives of the County Judges, County Clerks and County Sheriffs of Texas and in their capacity as a board as representative of the other 253 election boards of the counties of Texas and the officials constituting such boards.

II.

The occasion for this amendment and the reason for bringing in the above named new parties arise out of the following facts:

Notwithstanding the original restraining order issued by this Honorable Court September 15, 1948, at 6:25 a. m., on or about 11:00 a. m. on said date of September 15, 1948, the defendants Tom L. Tyson and Vann M. Kennedy and Lyndon B. Johnson caused to be presented to the defendant Paul H. Brown, as Secretary of State, in the City of Austin, Texas, a purported certificate of nomination of Lyndon B. Johnson as the Democratic Party's candidate for the

office of United States Senator from Texas to the Congress of the United States, and the said Paul H. Brown is threatening to and will, unless restrained by this Honorable Court, certify to or report unto the County Judges, County Clerks, County Sheriffs and the 254 election boards in the counties of Texas, as set out above, that the said Lyndon B. Johnson is the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas to the Congress of the United States, and said election officials, that is, the County Judges, the County Clerks and the County Sheriffs and the election boards constituted by said county officials over Texas, will prepare official ballots for the election to be held November 2, 1948, in which the voters of the State of Texas will elect a Senator from the State of Texas to the Congress of the United States notwithstanding that plaintiff is the legal and only candidate selected by the legal voters in the Democratic primary held August 28, 1948 by the Democratic Party of Texas for the purpose of determining whether the plaintiff or the defendant Lyndon B. Johnson would be selected by the members of the Democratic Party of Texas as the candidate of the Democratic Party of Texas for the office of United States Senator from Texas as aforesaid.

The defendant Paul H. Brown has threatened to make said certification or report to the county election officials aforesaid immediately and will do so unless restrained by this Honorable Court. If said certification or report is made, said county officials will thereupon prepare official ballots to be used in the general election on November 2, 1948, with the name of the defendant Lyndon B. Johnson printed thereon as the candidate of the Democratic Party of Texas for the office of United States Senator as aforesaid, and will distribute said ballots to the various precincts in their respective counties and make same available to the voters in the general election to be held November 2, 1948, unless restrained by this Honorable Court.

That, if said certification or report is made by the defendant Paul H. Brown to said election boards and said ballots are printed with the name of Lyndon B. Johnson thereon, as set out above,

irreparable injury and damage will result to plaintiff before notice can be served and a hearing had thereon.

III.

The Democratic Party of Texas is a political party as defined by statutory laws of Texas and for many years has exercised its right to designate candidates for offices to be elected by the voters of Texas and in all the years in which a United States Senator from the State of Texas to the Congress of the United States was to be elected it has always designated a candidate thereof, and the primary election held by the Democratic Party of Texas August 28, 1948, referred to in the original complaint and in this amended original complaint, was a part of the process of nominating a candidate for said office which the Democratic Party of Texas must follow in order to have its candidate's name placed on the official ballot to be used in the general election on November 2, 1948.

Plaintiff is now and has been for a number of years a member of the Democratic Party of Texas and was a candidate at the first or original primary election held July 24, 1948, by the Democratic Party of Texas and together with the defendant Lyndon B. Johnson was elected to be a candidate in the run-off election held August 28, 1948, for final election by the members of the Democratic Party as the candidate of the Democratic Party for the office of United States Senator as aforesaid.

IV.

As a part of this amendment, plaintiff adopts and makes a part hereof as fully as if written herein all allegations contained in the original complaint filed in this cause on September 15, 1948, and the facts therein alleged still exist.

WHEREFORE, plaintiff prays that the Court enlarge the restraining order heretofore made on September 15, 1948, herein, restraining the defendants Tom L. Tyson and Vann M. Kennedy, as Chairman and Secretary of the State Democratic Convention from issuing said certificate of nomination of Lyndon B. Johnson; and that the defendant Paul H. Brown be restrained from certifying or reporting to the County Judges, County Clerks, County Sheriffs and County

election boards of the State of Texas the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas; that the defendants Clarence O. Kraft, Melvin Faulk and Sully Montgomery in all of their official capacities, and all other County Judges, County Clerks, County Sheriffs and County election boards of the respective counties of Texas be restrained from preparing and distributing any official ballots for use in the general election to be held November 2, 1948, which contain the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas; that the court make said order returnable and set this action for hearing September 21, 1948, at 10:00 a. m. as originally ordered; and, that upon trial on the merits of this action that plaintiff have judgment permanently enjoining the issuance of a certificate of nomination of Lyndon B. Johnson, and, if one has been issued, then cancelling and annulling any such certification so made; and that the defendant Paul H. Brown and all other defendants herein named as election officials be permanently enjoined from preparing any official ballot for use in the general election November 2, 1948, carrying the name of the defendant Lyndon B. Johnson as the nominee of the Democratic Party of Texas for the office of United States Senator from the State of Texas; for judgment declaring plaintiff received the nomination of the Democratic Party of Texas for United States Senator; for all of which plaintiff demands judgment; and plaintiff prays for such other and further relief as under the facts and in law and in equity he may be justly entitled to receive.

T. R. JAMES
DAN MOODY
ALLEN B. CONNER
JOSH H. GROCE
(H. O. Renfree)

Attorneys for Plaintiff

Filed 17 day of September
1948 at 9:55 o'clock a.m.

THE STATE OF TEXAS |
COUNTY OF TARRANT |

BEFORE ME, the undersigned authority, on this day personally appeared Coke R. Stevenson, who, being by me first duly sworn, upon his oath deposes and says that he is the plaintiff named in the foregoing Amended Complaint; that he had read said Amended Complaint, and is familiar with the contents thereof and that the allegations of fact set forth in said Amended Complaint are true.

/s/ Coke R. Stevenson

Subscribed and sworn to before me this the 15th day of
September, 1948.

/s/ Annie Laurie Needham

Notary Public in and for
Tarrant County, Texas

SEAL

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,	)	
Plaintiff	)	
vs.	)	CIVIL NO. 1640
TOM L. TYSON, ET AL.,	)	
Defendants	)	

ENLARGED RESTRAINING ORDER

The Amended Original Complaint of Plaintiff having been presented and considered wherein the Plaintiff has brought in additional parties and is seeking an enlargement of the Original Restraining Order issued herein, and

IT APPEARING TO THE COURT that the relief should be granted, and

IT FURTHER APPEARING TO THE COURT that irreparable injury and damage will result to Plaintiff before notice can be served and a hearing had thereon because the Defendant Paul H. Brown is threatening to certify and report the nomination of the Defendant Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas to the Congress of the United States, and that upon receipt of such certification and report of nomination the Defendants County Judges, County Clerks, County Sheriffs and County Election Boards in the 254 counties of Texas will prepare and distribute official ballots to be used in the November 2, 1948, general election carrying the name of Defendant Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator unless a restraining order is issued immediately;

IT IS THEREFORE ORDERED that the Original Restraining Order be continued in full force and effect until the date set for its hearing, namely, September 21, 1948, at 10:00 A. M., and thereafter until said hearing is concluded, and that such restraining order be enlarged and the same is hereby enlarged to restrain the Defendant, Paul H. Brown from certifying or reporting to the Defendants Clarence O. Kraft, Melvin Faulk and Sully Montgomery, individually and as County Judge, County Clerk, County Sheriff of Tarrant County, and in their capacity as members of the Election Board for Tarrant County, Texas, and the other County Judges, County Clerks and County Sheriffs and County Election Boards in each of the Counties of Texas, that Lyndon B. Johnson is the candidate of the Democratic Party of Texas for the office of United States Senator for the State of Texas to the Congress of the United States; and the Defendants Clarence O. Kraft, Melvin Faulk, Sully Montgomery in their respective official capacity and as members of the Election Boards for Tarrant County, and all other County Judges, County Clerks, and County Sheriffs in their respective official capacity and as members of their respective County Election Boards are hereby restrained from preparing and distributing official ballots for use in the general election to be held November 2, 1948, carrying the name of Lyndon B. Johnson as the candidate of the Democratic Party of Texas for the office of United States Senator from the State of Texas to the Congress of the United States; the original restraining order as herein enlarged, and this restraining order shall remain in effect until September 21, 1948, at 10:00 A. M., at which time they are made returnable and shall then remain in

force until the conclusion of the hearing thereon, which hearing shall be held in the United States District Courtroom in the City of Fort Worth, Texas.

IT IS FURTHER ORDERED AND ADJUDGED that this Order shall become effective and operative upon the filing by the Plaintiff of the Statutory Undertaking in the sum of \$1,000.00, to be approved by the Clerk of the Court.

SIGNED this 16th day of September, 1948, 8:35 P.M.

/s/ T. Whitfield Davidson

United States District Judge

District Court of the United States

FOR THE

NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

CIVIL ACTION FILE NO. 1640

Coke R. Stevenson

Plaintiff

v.

Tom L. Tyson
Vann M. Kennedy and
Lyndon B. Johnson

Defendant s.

SUMMONS IN CIVIL ACTION

SUMMONS

To the above named Defendant : **Lyndon B. Johnson, Blanco County, Texas.**

You are hereby summoned and required to serve upon **W. E. Allen,**

Subscribed and sworn to before me, a

plaintiff's attorney, whose address is **614 First National Bank Bldg., Fort Worth, Texas,**

Special Agent in Charge

United States Marshal

MAVESHVIL'S FEES

an answer to the complaint which is herewith served upon you, within **20** days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEO. W. PARKER,

Clerk of Court.

By **Ruth Buckley**

Deputy Clerk.

Date: **September 15, 1948.**

[Seal of Court]

I hereby certify that within summons

ATTEST: **Sept. 15, 1948**
I hereby certify and return this on the
GEO. W. PARKER, CLERK,

By **Ruth Buckley, DEPUTY**

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT

NOTE.—This summons is returnable by the party to whom it is directed, before the Court or Judge of the Court, on or before the day of the return.

I hereby certify and return, that on the

day of

19

I received the within summons

Date: September 12, 1918.

[Seal of Court]

Deputy Clerk
B2
GEO. A. PARKER
Clerk of Court

be taken against you for the relief demanded in the complaint.

of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint, which is hereby served upon you, within 30 days after service.

MARSHAL'S FEES

Travel..... \$.....

United States Marshal.

Service.....

By.....

Deputy United States Marshal.

Subscribed and sworn to before me, a

this

day of

19

[SEAL] You are hereby summoned and required to serve upon

A. E. VITON

To the above named Defendant: GUYMON B. JOHNSON, Attorney General, Texas.

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

Defendant

No.
District Court of the United States
DISTRICT OF
Plaintiff

SUMMONS IN CIVIL ACTION

Returnable not later than
after service.

SUMMONS

Attorney for Plaintiff.

FPI-LK-9-19-46-150M-4260-60

CIVIL ACTION FILE NO. 1240

NORTH DIVISION

NORTHERN DISTRICT OF TEXAS

FOR THE

District Court of the United States

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE Northern DISTRICT OF TEXAS
Fort Worth DIVISION

COKE R. STEVENSON,
PLAINTIFF

VS.
TOM L. TYSON
VANN M. KENNEDY and
LYNDON B. JOHNSON

DEFENDANTS

CIVIL NO. 1640

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COKE R. STEVENSON, who resides in Kimble County, Texas, Plaintiff, complaining of Tom L. Tyson who resides in Navarro County, Texas, Vann M. Kennedy, who resides in Nueces County, Texas, and of Lyndon B. Johnson, who resides in Blanco County, Texas, all referred to as defendants herein.

I.

That Tom L. Tyson was elected Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, and Vann M. Kennedy was elected Secretary thereof.

II.

The rights and property involved in this action are nomination by the Democratic Party of Texas for the office of United States Senator from Texas for a term of six years beginning in January, 1949, and which nomination amounts to election to the office of United States Senator from Texas for said term. The emoluments of said office exceed in amount, and therefore the value of the rights in controversy exceed in amount, the sum of Three Thousand Dollars (\$3,000.00).

III

The rights asserted in this action, and which this action is brought to enforce and protect, and the right to invoke the jurisdiction of this Court to prevent the wrongs and threatened wrongs alleged, arise under Section 4 of Article I and the Seventeenth Amendment to the Constitution of the United States, and under Section 43, Chapter 3, Title 8, United States Code, 1946, and under Sections 51 and 52, Chapter 3, Title 18, United States Code, 1946, and under Sections 241 and 242, Title 18, United States Code, the Act of Congress of June 25, 1948; and jurisdiction of this Court of this action is provided by Section 1343, Title 28, United States Code, the Act of Congress of June 25, 1948.

IV

Heretofore, to-wit, on August 28, 1948, there was held in the State of Texas by the Democratic Party a general primary as provided in Article 3137, Revised Civil Statutes of Texas, 1925, for the purpose of making nomination of a candidate for the office of United States Senator from Texas for a term of six years beginning in January, 1949; that in said general primary election which was held on said date in each of the Counties of Texas, with the exception of Hansford County and Kinney County, plaintiff Coke R. Stevenson was a candidate for nomination by the Democratic Party for United States Senator from Texas for said term; and Lyndon B. Johnson, one of the defendants, was also a candidate for said nomination. Members of the Democratic party residing in Jim Wells County and in Zapata County voted in said primary, and the names of Coke R. Stevenson and Lyndon B. Johnson appeared on the official primary ballot in said counties as candidates for said nomination.

V

In Zapata County, Texas, there were on August 28, 1948, four regularly designated and established voting precincts. In precinct No. 1 of Zapata County, Texas, Coke R. Stevenson received 50 votes and Lyndon B. Johnson received 301 votes; in

precinct No. 2 of Zapata County, Texas, Coke R. Stevenson received 17 votes and Lyndon B. Johnson received 192 votes; in precinct No. 3 of Zapata County, Texas, Coke R. Stevenson received 59 votes and Lyndon B. Johnson received 91 votes; and in precinct No. 4 of Zapata County, Texas, Coke R. Stevenson received 5 votes and Lyndon B. Johnson received 39 votes. Pursuant to the provisions of Article 3127, Revised Civil Statutes of Texas, 1925, the Chairman of the County Democratic Executive Committee of Zapata County, Texas, certified to the Chairman of the State Democratic Executive Committee the vote in said county as between the two candidates for the nomination of the Democratic party for United States Senator from Texas and fraudently certified that Lyndon B. Johnson had received 669 votes, when in truth and in fact he had received only 623 votes; and said Chairman further fraudently certified that Coke R. Stevenson had received only 71 votes in said county in said primary election, when in truth and in fact he had received 131 votes.

VI

The Democratic primary election officials of Jim Wells County, Texas, after the polls had closed and all of the votes cast in precinct No. 13 of Jim Wells County, Texas, had been counted, first reported that Coke R. Stevenson had received in said precinct No. 13, 60 votes and that Lyndon B. Johnson had received 765 votes. Thereafter, and approximately five days after the polls had closed and the counting of all votes cast in said precinct No. 13 had been completed and the vote reported, the Democratic primary election officials of Jim Wells County, Texas, fraudulently changed the vote as between Coke R. Stevenson and Lyndon B. Johnson to show that Lyndon B. Johnson had received 967 votes and Coke R. Stevenson had received 61 votes in said election precinct No. 13. At the

time the polls were closed and the count of the votes in said election precinct No. 13 had been completed, only 841 votes had been cast in said precinct. In the few days following there were added to the list of persons voting in said precinct 200 additional names and 200 votes which had never been cast were fraudulently credited to Lyndon B. Johnson.

VII.

The former Chairman of the County Democratic Executive Committee of Jim Wells County, Texas, in certifying to the Chairman of the State Democratic Executive Committee the vote in Jim Wells County, Texas, for the Democratic nomination for United States Senator from Texas, fraudulently included in the returns so certified 201 or 202 more votes for Lyndon B. Johnson than he had in truth and in fact received and such additional votes credited to him in said certification were added as above alleged to the vote in precinct No. 13 of Jim Wells County, Texas.

VIII.

Under the provisions of Article 3137, Revised Civil Statutes of Texas, 1925, the State Democratic Executive Committee met on Monday, September 13, 1948, at Fort Worth, Texas, for the purpose of canvassing the returns from the various counties in Texas of the results of said primary election, and of the contest between plaintiff and defendant Lyndon B. Johnson for nomination by the Democratic party for United States Senator from Texas; and said Lyndon B. Johnson was given the benefit of said fraudulent returns from Zapata and Jim Wells Counties, Texas, and after said canvass was made the State Democratic Executive Committee reported the results to the State Convention of the Democratic party held in Fort Worth on September 14, 1948, and said defendants Chairman and Secretary will issue a certificate of nomination of Lyndon B. Johnson, unless the relief herein prayed for is granted. The number of votes fraudulently credited to Lyndon B. Johnson in the returns from Zapata and Jim Wells

Counties, Texas, were sufficient in number to change and did change the results of said primary election in the nomination of a candidate for United States Senator; and if said fraudulent votes so certified from said two counties are deducted from the total vote of the said Lyndon B. Johnson, the plaintiff Coke R. Stevenson would be shown entitled to and he would receive the certificate to nomination.

IX

Under the law of Texas, as declared by the Supreme Court of Texas (Ferguson vs. Huggins, 122 Tex. 95, 52 S. W. (2d) 904), the State Democratic Executive Committee's power does not include the power to recount the ballots or go behind the returns filed with it which appear regular upon their face. Under the law of Texas, as declared by the Supreme Court of Texas (Sterling vs. Ferguson, 122 Tex. 122, 53 S.W. (2d) 122), the certificate of nomination issued by the State Democratic Convention will give to Lyndon B. Johnson a standing and a right which will entitle him to have his name printed upon the official general election ballot, unless the certificate is set aside by a proper proceeding such as an election contest. The statutes of Texas make provision for an election contest but the provision so made is ineffective to contest a statewide primary election such as that held on August 28, 1948, because of the limited time between the date provided by statute for the issuance of the certificate of nomination and the date provided by law for the certification by the Secretary of State of the State of Texas to the officials of the various counties of the names to be printed on the official ballot for the ensuing general election; and the effect of the decisions of the Supreme Court of Texas on this question is such as to deprive a candidate in a statewide primary election of any means of effectively contesting such a statewide primary on grounds of fraud or otherwise,

X

The right asserted by plaintiff to an honest count and an honest certification of the results of said primary election in Zapata and Jim Wells Counties, Texas, and the right to have the

returns honestly reported to the State Democratic Executive Committee and its canvass of the returns based upon honest certification from the several counties of the State, are rights secured to plaintiff by the Constitution of the United States and the Acts of Congress cited in the jurisdictional allegations above. Unless this Court by peremptory order restrains the Chairman and Secretary of the State Democratic Convention pending a final hearing in this action, said officers of the State Democratic Convention will make said certificate of nomination of Lyndon B. Johnson.

XI.

Plaintiff has diligently investigated and caused to be investigated the matters alleged in this complaint, beginning immediately upon his first learning of possible fraud in said primary election in Zapata and Jim Wells Counties, Texas; that he learned the facts of fraud as herein alleged on September 10, 1948, and upon returning to Austin, Texas, on the morning of September 11, 1948, he arranged to have this petition prepared and filed. But he could not know that the State Democratic Executive Committee would certify the count in favor of Lyndon B. Johnson until it voted to do so late on the night of September 13, 1948. In this connection plaintiff shows that he has been delayed in determining the facts as herein alleged because his demands and the demands of his agents to inspect the records were consistently refused until on September 10, 1948, he was permitted to see the voting list in precinct No. 13 of Jim Wells County, Texas, but was not allowed even then to make a copy thereof.

XII.

The laws of Texas do not affore plaintiff a remedy to enforce his rights and there is no adequate remedy afforded to him by law. Plaintiff's rights can only be protected by restraining orders and injunction as prayed for in this complaint.

WHEREFORE, plaintiff prays that the Court make a peremptory order restraining the defendants Chairman and Secretary of the State Democratic Convention from issuing said certificate of nomination of Lyndon B. Johnson; that the Court make said order returnable and set this action for hearing at the earliest possible date; and that upon trial on the merits of this action, that plaintiff have judgment permanently enjoining the issuance of a certificate of nomination of Lyndon B. Johnson, and, if one has been issued, then cancelling and annulling any certifications so made; for judgment declaring plaintiff received said nomination for United States Senator; for all of which plaintiff demands judgment; and plaintiff prays for such other and further relief as under the facts and in law and in equity he may be justly entitled to receive.

T. R. James

W. E. Allen

C. C. Renfro

Dan Moody

Attorneys for Plaintiff.

THE STATE OF TEXAS
COUNTY OF TARRANT

BEFORE ME, the undersigned authority, on this day personally appeared Coke R. Stevenson, who, being by me first duly sworn, upon his oath, deposes and says that he is the plaintiff named in the foregoing complaint; that he had read said complaint and is familiar with the contents thereof and that the allegations of fact set forth in said complaint are true.

Coke R. Stevenson

Subscribed and sworn to before me this the 14th day of September, 1948.

(Seal)

Hazel Creighton
Notary Public in and for
Tarrant County, Texas.

Sep 15, 1948 at 6:25 A.M.
This petition being considered, it is ordered that Tom L. Tyson and Vann M Kennedy be restrained as prayed for pending a hearing hereon on Sept. 21, 1948 at 10 A.M. at Fort Worth, Texas, at which date this temporary order is made returnable.

T. WHITFIELD DAVIDSON
U. S. Dist. Judge.

Lyndon B. Johnson
Notary Public
Tarrant County, Texas

STATE OF TEXAS)
COUNTY OF TARRANT)

BEFORE ME, the undersigned authority, on this day personally appeared LYNDON B. JOHNSON, known to me to be the person whose name is subscribed to the foregoing pleading, who being by me duly sworn, states upon oath:

I have read the foregoing motion and the facts therein stated are true.

SWORN to and subscribed before me, this _____ day of September, A. D. 1948.

Notary Public in and for Tarrant County, Texas.

Jake Roberts
Dated 19th
April 1874

COUNTY OF TARRANT
STATE OF TEXAS

BEFORE ME, the undersigned authority, on this day personally ap-
peared LYNDON B. JOHNSON, known to me to be the person whose name is sub-
scribed to the foregoing pleading, who being by me duly sworn, states upon

oath:

I have read the foregoing motion and the facts therein stated are

true.

SWORN to and subscribed before me, this ____ day of September, A. D.

1874.

Notary Public in and for Tarrant
County, Texas.

PARKER, SMITH & RICE

ATTORNEYS AT LAW

NATIONAL BANK OF COMMERCE BUILDING

SAN ANTONIO 5, TEXAS

H. MAXWELL PARKER
WILLIAM ROBERT SMITH, JR.
GEORGE S. RICE

October 15, 1948

Mr. Everett L. Looney
c/o Looney & Clark
711 Brown Building
Austin, Texas

Re: Civil Action 1640, ND Texas,
Stevenson vs. Tyson, et al

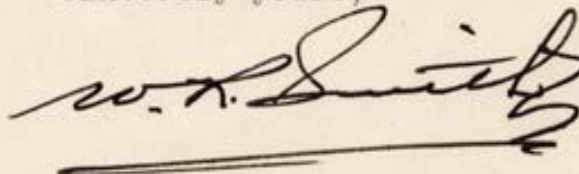
Dear Everett:

Responding to yours of October 14, you are advised that under date of October 5, Honorable T. Whitfield Davidson, United States District Judge, Northern District of Texas, directed a letter to me, saying in part:

"Your report was a lawyer-like paper. I believe, though, there should be a summary of the evidence filed, and I take it that you are sending that direct to Fort Worth."

The quoted part of the letter is the only part of same that bears upon the subject of your inquiry.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "W. R. Smith", with a horizontal line drawn underneath it.

WRS:ldp

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FOUR WOMEN DIVISION

COLE R. SEVERSON,
PLAINTIFF,

VS.

CIVIL NO. 1640

TOM L. TISON, VANN M. KENNEDY,
LYNDON B. JOHNSON, PAUL H. BROWN,
CLARENCE O. KRAFT, MELVIN PAULK,
AND GULLY MONTGOMERY,
DEFENDANTS.

AFFIDAVIT

I, J. Edward Johnson, being duly sworn, depose and say:

I am a resident of Brownwood in Brown County, Texas, a practicing attorney and a member of the State Bar of Texas and the Brownwood Bar. I appeared as attorney of record for the Defendant in the cause of A. E. Wilson vs. F. A. Landerhilk in the District Court of Brown County, Texas, in Cause No. 11,130 on the Docket of said Court, the same being a statutory contest of election between candidates for nomination for the office of County Judge of Brown County, Texas, at the Second Democratic Primary Election held in said county on the 28th day of August, 1948.

After a hearing before the Honorable R. B. Cross, Judge of the 52nd Judicial District of Texas, presiding at said trial, the said Court entered its order and judgment therein, a certified copy of which is hereto attached and marked Exhibit "A". As appears from said judgment the Court found and adjudicated that none of the official ballots cast in voting precinct #27, known as Brooksmith; that none of the official ballots cast in voting precinct #1, also known as Ward 1 of the City of Brownwood; that none of the official

ballots cast in voting precinct #29, known as Chapel Hill; that none of the official ballots cast in voting precinct #8, known as Bangs; that none of the official ballots cast in voting precinct #19, known as Woodland Heights; and that none of the official ballots cast in voting precinct #30, known as Winchell; were legal ballots, but that all ballots cast in all of said boxes at said Primary Election were illegal ballots and could not be counted.

As shown by certificate of Thomas H. Taylor, Chairman of the Brown County Democratic Executive Committee, hereto attached and marked Exhibit "B", said Executive Committee at its meeting on Wednesday afternoon, September 1, 1948, canvassed the returns of said Primary Election held on August 28, 1948 and did certify to the Chairman of the State Democratic Executive Committee the results of said Primary Election in the race for United States Senator from Texas to be that Lyndon B. Johnson received 2184 votes and Coke R. Stevenson received 3644 votes. In these returns were included the aforesaid six voting boxes in which all ballots were declared to be illegal in the election contest aforesaid and in which Lyndon B. Johnson received a total of 634 votes and Coke R. Stevenson received a total of 1102 votes. It is apparent, therefore, that if the votes, all of which were illegal in said six boxes, were eliminated the legal vote to be counted for each candidate would be 1550 for Lyndon B. Johnson and 2542 for Coke R. Stevenson, and the majority for Coke R. Stevenson in said County would be reduced to the extent of 468 votes. The foregoing tabulation, however, does not take into account 4 absentee ballots legally cast in the Chapel Hill box, of which 3 were for Stevenson and 1 for Johnson.

Although an appeal has been taken from the judgment rendered by the Court in said cause, there is no assignment and no contention that the Court was in error in holding that the aforesaid ballots cast in said boxes were all illegal ballots, but the appeal is predicated solely on the fact that

an amended petition raising the question as to the box in Ward 1 was filed
14 days after the certification of the result, and not within the 10 days
prescribed by Statute for the filing of a contest.

SEEN to and subscribed before me, the undersigned authority, on this _____
day of September, A. D. 1948.

Notary Public in and for Tarrant
County, Texas.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON
PLAINTIFF,

VS.

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE O. KRAFT
MELVIN PAULK, and
SULLY MONTGOMERY

DEPENDANTS,

AND

V. E. STRIEGLER
FRANK SHELLEY, and
C. H. STEVENSON,

INTERVENORS.

CIVIL NO. 1640

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that we, Lyndon B. Johnson, and V. E. Striegler, Frank Shelley, and C. H. Stevenson, composing the Election Board of Blanco County, Texas, in its behalf, and on behalf of the other 253 County Election Boards in Texas, as Principals, and the others who signed as Surety, are held and firmly bound unto Coke R. Stevenson, Tom L. Tyson, Vann M. Kennedy, Paul H. Brown, Clarence O. Kraft, Melvin Paulk, and Sully Montgomery, in the full and just sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said Coke R. Stevenson, Tom L. Tyson, Vann M. Kennedy, Paul H. Brown, Clarence O. Kraft, Melvin Paulk, and Sully Montgomery, their successors, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Executed and dated this 23rd day of September, 1948.

Whereas, on September 22, 1948, in an Action pending in the United States District Court for the Northern District of Texas, Fort Worth Division, by Coke R. Stevenson as Plaintiff, and Tom L. Tyson, Vann M. Kennedy, Lyndon B. Johnson, Paul H. Brown, Clarence O. Kraft, Melvin Faulk, and Sully Montgomery as Defendants, and V. E. Striegler, Frank Shelley, and C. H. Stevenson as Intervenor, a Judgment granting a temporary injunction was rendered against the said Tom L. Tyson, Vann M. Kennedy, Lyndon B. Johnson, Paul H. Brown, Clarence O. Kraft, Melvin Faulk, and Sully Montgomery as Defendants, and V. E. Striegler, Frank Shelley, and C. H. Stevenson as Intervenor, and the said Lyndon B. Johnson, Defendant, and the Intervenor, above named, having filed a notice of appeal from such Judgment to the United States Circuit Court of Appeals for the Fifth Circuit;

Now, the condition of this obligation is such that if the said Lyndon B. Johnson, Defendant, and the Intervenor above named shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the Judgment affirmed, or such costs as the said Circuit Court of Appeals may award against the said Lyndon B. Johnson, Defendant, and the Intervenor above named. If the Judgment is modified, or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

LYNDON B. JOHNSON, DEFENDANT

V. E. STRIEGLER, County Judge,
Blanco County, Texas
FRANK SHELLEY, Sheriff, Blanco
County, Texas
C. H. STEVENSON, County Clerk,
Blanco County, Texas

By

Their Attorney of Record

PRINCIPALS

SURETIES

Filed and approved this 23rd day of September, 1948.

Clerk, United States District Court

RAYMOND E. BUCK
HARRY N. HARRIS
RAYMOND E. BUCK, JR.

LAW OFFICES
BUCK & HARRIS
COMMERCIAL STANDARD BUILDING
FORT WORTH 2, TEXAS

September 23, 1948

Mr. Everett Looney
c/o Looney & Clark
Attorneys at Law
Brown Building
Austin, Texas

Dear Mr. Looney:

Coke R. Stevenson v. Tom L. Tyson, et al.
Civil No. 1640

Enclosed herewith we hand you two copies of the transcript of all pleadings in the captioned case which are in addition to the three certified copies required to be filed with the Circuit Court.

One of these copies is for Mr. Johnson's counsel's own use, and the other is the clerk's own copy which we have withdrawn upon our personal guarantee that the same will be returned in good condition upon demand.

Will you please take pains to see that the clerk's copy is carefully preserved.

Yours very truly,

BUCK & HARRIS

By: *Raymond E. Buck*

HNH:vb

Enc.

TO: Mr. Looney
FROM: R. Dean Moorhead
RE: Stevenson v. Tyson, et al.

I take it that our objective remains that which we previously discussed, to-wit, an exposition of authority for the purpose of acquainting you with same as a predicate for your argument rather than the preparation of any formal brief. In making such an exposition, I shall not include the material included in Judge Allred's memorandum (which is quite complete), but shall merely refer to same.

I.

The Federal Courts as Courts of
Limited Jurisdiction

At the outset of any consideration of jurisdiction in the instant case, attention is properly paid to the elementary proposition that the federal courts are courts of special or limited jurisdiction which have no jurisdiction except that conferred by the constitution and laws of the United States. Contrariwise, such courts do not possess the inherent powers of courts existing by prescription or by common law. These propositions doubtless do not require citation of authority, but if you desire such citations you will find them on pages 4 and 5 of Judge Allred's memorandum.

Hence, even if it might be said that the power to hear an election contest is an inherent power normally possessed by a court, such statement would not hold true with respect to a federal court unless and until some statute or constitutional provision can be demonstrated which expressly, or by necessary implication, confers this power upon the federal courts.

II.

The Power to Hear Election Contests is not an Inherent Power

Moreover, the authorities are unanimous in holding that the power to hear election contests is not an inherent power even with respect to courts of general and unlimited jurisdiction. It is elementary that courts are inherently empowered only to act with respect to "judicial matters." An election contest presents a "political question" rather than a judicial matter. The importance of this distinction is well shown by past decisions in this State. Prior to 1891 the Texas Constitution did not expressly authorize the Texas courts to determine election contests. Notwithstanding this fact, the legislature passed statutes which purported to authorize the district courts to determine such contests. In Odell v. Wharton, 87 Tex. 173, the Supreme Court held these statutes unconstitutional as authorizing the courts to deal with political rather than judicial matters, and it was not until the Texas Constitution was amended in 1891 that the Texas courts were authorized to deal with such contests.

It is because of the fact that an election contest presents a political question rather than a judicial one that the courts have uniformly held that the power to hear such contests is not inherent, even in a court of unlimited jurisdiction, and have required authorization by the constitution or by statutes before any particular court can be said to have such power. The authorities cited on pages 1 to 4 of Judge Allred's memorandum present a summary of these holdings. In addition to those authorities, the following statement is made in 43 C. J. S. pp. 645-646:

"Election officers will not be enjoined from giving a certificate of election to the successful candidate, and the fact that there was fraud in the election sufficient to vitiate it, or that the election was held under a void statute, does not affect the operation of the rule. The right to hold office cannot be tried in a suit to enjoin certification of an election, the remedy being by quo warranto."

Only decisions of state courts are cited in support of the above. I have read them and they contain nothing other than the above principle which would appear to warrant citing them individually herein.

Thus, at the very beginning of any consideration of this matter we are confronted with a situation in which (a) because of its limited jurisdiction a federal court cannot hear this case unless some statute or constitutional provision authorizes it to do so, either expressly or by necessary implication, and (b) since the suit is couched in terms of an election contest, no court--federal or otherwise--could hear it in the absence of some such authorization.

III.

The Statutes Involved

The following two statutes would appear to be the only possible ones to which the plaintiff might point as sustaining jurisdiction over this type of case in this type of court:

8 U.S.C.A. sec. 43

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

If the plaintiff herein has in any way been injured, such injury, under his complaint, has resulted from acts committed by unnamed persons in Zapata and Jim Wells Counties. Even if we assume that such unnamed persons acted under color of a statute, etc. of this State, and even if we further assume that the right to be a candidate for nomination to the office of United States Senator is a privilege secured by the Constitution, nevertheless it appears patent that the above statute does not confer jurisdiction with respect to the parties defendant named in this suit. If the acts alleged by plaintiff actually did occur in Zapata and Jim Wells Counties, the foregoing statute perhaps would be sufficient to confer jurisdiction with respect to the persons alleged to have committed such acts. Certainly, however, the statute in no way confers such jurisdiction against defendants such as those named herein who are in no way connected with the acts which allegedly occurred in Zapata and Jim Wells Counties and who are not alleged to have participated in such acts.

28 U.S.C.A. sec. 1343

The first two subdivisions of this statute deal with actions for damages and, hence, can in no way be pertinent here. The third subdivision reads as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

'To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.'"

Here again, the observations made in the preceding portion of this discussion would appear pertinent. The statute permits an action to "redress the deprivation" of a right or privilege secured by the Constitution. Even if it be assumed that plaintiff has been deprived of such a right or privilege under color of a law, etc. of this State, a court would appear to have jurisdiction only of an action for redress directed at the person or persons who allegedly accomplished the deprivation. No such person or persons is made a party defendant herein.

The inapplicability of this statute is further illustrated by the decisions below.

Judge Allred's memorandum, on page 7 thereof, deals with the contention that Section 1344 of Title 28 by inference and necessary implication negatives jurisdiction over a case such as this.

IV.

Decisions

(a) Virtually all of the opinion in Keogh v. Horner, 8 F. Supp. 933, is set forth on pages 5 and 6 of Judge Allred's memorandum. Apart from the language in the case, I think it is important to note that there--as in the case at bar--the relief was sought against a party who did not accomplish whatever deprivation of right there was. The plaintiff claimed that the election of a Congressman was void because the legislature had failed to re-district the State in conformance with the mandate contained in the Federal Constitution. If the failure to re-district did deprive the plaintiff of a federal right, such deprivation occurred through an omission of the legislature. Yet the Governor--a person who was not a party to any deprivation and who had only a ministerial duty to perform--was the party defendant in the suit.

In the case at bar, Paul Brown has only a ministerial duty to perform and he was not a party to any alleged deprivation. These facts, together with the language of the case, appear to me to afford strong basis for arguing in support of your contentions.

(b) In Saunders v. Wilkins (CCA, 4th, 1945), another re-districting case was presented in connection with a Congressional race. The suit was a suit for damages, based upon 8 U.S.C.A. sec. 43, against the Secretary of State for failure to certify the name of the plaintiff for a place on the general election ballot. It was based upon allegations that Congress and the State Legislature had failed to re-district properly and, hence, that the Congressman from Virginia had to be chosen as Congressman-at-large rather than by districts, and

that the plaintiff should have been certified to run for such office. The Court held that no jurisdiction resided in the federal courts with respect to such an action, stating:

"We think that this contention presents a question political in its nature which must be determined by the legislative branch of the government and is not justiciable."

Nothing else in the opinion appears to be worth quoting.

(c) Anthony v. Burrow, 129 Fed. 783, was yet another re-districting case, decided by a Kansas Federal Circuit Court in 1904. The plaintiff brought the suit against the Kansas Secretary of State, Auditor and Attorney General, comprising a statutory election board, to enjoin them from certifying Charles Curtis as the Republican nominee for Congress and to direct the Secretary of State to certify the name of the opposing candidate. Observing that "the right to become the nominee of a political party for a public office, whether national or state, and as such nominee to receive the votes of the qualified electors voting to fill such office, is a purely political right as contradistinguished from a civil or property right," the Court held that it was without jurisdiction either to restrain the election board or to compel certification by the Secretary of State.

V.

No Court, Either State or Federal, Has Jurisdiction
over the Matters Involved Herein

The matter hereinafter set forth refers to the same question discussed on pages 6a and 6b of Judge Allred's memorandum. You will recall that the Judge was doubtful whether this material should be presented to the Court. I don't know all of the ins and outs of a policy decision such as this, but purely as a matter of law it seems to me

that the decisions hereunder are the strongest ones in your favor. The annotation in 107 A.L.R. 206 gives a host of decisions holding that when an election to Congress is involved, no court can hear an election contest with respect thereto and the legality of the election is a matter solely cognizable by the Congress.

You will note that the Keogh case expounds this proposition. In addition, note the following cases:

In Smith v. Polk, 19 N. E. (2d) 281 (Ohio, 1939), an election contest was brought under the regular Ohio statutes in connection with a Congressional office, with the allegations being that the votes certified from Pike County were tainted with fraud. The language of the Ohio statutes was sufficiently broad to permit a contest with respect to an office of Congressman, as well as a contest with respect to ordinary State offices. The Court held that, notwithstanding the language of the contest statutes, no contest could be entertained, since:

"When a member of Congress is elected in the various states the Congress has the right to decide not only his qualifications but also whether he has been legally and rightfully elected."

To the same effect is Burchell v. State Board, 68 S. W. (2d) 427 (Ky. 1934).

In Opinion Rendered to Governor, 12 Fla. 686, the Governor asked the Florida Supreme Court for an advisory opinion as to whether or not a certain person had legally been elected United States Senator. In response, the Court said that:

"The power of Congress in this respect being supreme and exclusive, the courts have no jurisdiction to determine the legality of an election of a member of Congress."

In State ex rel. McCue v. Blaisdell, 118 N. W. 141 (N. D.), it was contended that a primary law of North Dakota by which a certain person was nominated for the position of United States Senator contravened the Federal Constitution. In discussing this matter, the Court stated:

"Conceding, for the sake of argument, that the provisions of this primary law contravene the provisions of the Federal Constitution relating to the election of United States Senators, it by no means follows that this relator can raise the question, or that this court has jurisdiction to pass upon it. The Federal Constitution provides by Section 5, Article 1, that 'each house shall be the judge of the elections, returns and qualifications of its own members.' Manifestly, therefore, the question whether a Senator has been elected in the constitutional way is not a judicial question for the courts to determine, but rests entirely with the United States Senate. If this court should decide that the provisions of the statute in question are constitutional, such decision would in no manner be controlling, and the senate could say that a person elected by our legislature at the coming session was not legally elected, and could refuse him a seat. The question is a Federal one exclusively, and the tribunal to determine the same is designated in the Federal Constitution to be the United States Senate."

More than a dozen decisions to approximately this same effect are set forth in the annotation set forth above. In addition to the citations therein and to the cases summarized above, attention might also be directed to the decision of the United States Court of Appeals for the District of Columbia in Sevilla v. Elizalde, 112 F. (2d) 29, wherein the Court held that it had no jurisdiction to entertain a contest with respect to the qualifications of the delegate to Congress from the Philippines, since such jurisdiction was held exclusively by Congress.

VI.

This Proceeding is Moot

It is settled in this State that an election contest becomes moot, and that an injunction preserving the jurisdiction of the court over such contest falls, whenever the time is such that the case cannot be tried and settled in time to permit substantial compliance with the election statutes. Sterling v. Ferguson, 53 S. W. (2d) 753. In discussing this matter, the Court stated in the case last cited:

"So, in the very nature of things, an injunction, the effect of which is to prevent the certification of Mrs. Ferguson's name after the time arrives when it must be certified, in order to be posted and placed on the ballot as provided by law, not only does not preserve the subject-matter, but destroys the right of the certified nominee and grants no right of value to the contestant. Such an injunction no court has power to issue, except after final trial on the merits."

The federal courts quite naturally recognize the general principles relative to mootness, but no decision has been found in which they have recognized such principles in connection with an election contest--a fact which doubtless is attributable to the fact that no decision has been found wherein a federal court entertained an election contest. However, it would appear that the principle of mootness with respect to election contests should be as applicable to a federal court as to a state one. If this be true, attention might be paid to the recent decision of the Texas Supreme Court in Polk v. Davidson, 196 S. W. (2d) 632.

In the case last cited the general election was to occur on November 5 (this year it occurs on November 2). The name of Polk, the certified candidate, had already been posted for 10 days when

the election contest was filed, so the necessity for that 10 day period was removed. The trial of the contest started on September 21--the same day that this cause is being heard--and continued throughout the remainder of September and into October. On October 3, Polk sought original mandamus from the Supreme Court to compel the district court to dismiss the contest as moot. The Supreme Court granted such relief, observing that absentee voting had to start on October 16 and that the remaining time was necessary for the preparation and printing of the ballot. In the present case, absentee voting will start on October 13. In addition, the various county clerks throughout the State have to post the names to appear on the ballot for ten days before the ballots are printed. Even omitting the interval which, as a practical matter, will have to occur between posting and printing, October 3 is the deadline for the posting and hence the certifications must be in the hands of the clerks by October 2. The time interval here is even shorter than in the Polk case, and a State election rather than a county one is involved. Under the Polk case, it appears certain that if an election contest were initiated in the State courts, it would be declared moot. Upon a parity of reasoning, the present contest should also be held moot.

In the above summary I have only tried to hit the high spots, and I have omitted dozens of decisions which perhaps have some slight relevance and would be included in a brief on this question, but which could not be used in oral argument and which would require much exposition to make plain their relevance. I have done this both

because I understand you only want a general picture, rather than the minute details, and also because I understand that Luther Jones has prepared a detailed brief on the matter, with such briefs perhaps also being prepared by John Cofer and Judge Allred.

VII.

Decisions Which Possibly are Adverse

(a) The case of Chapman v. King, 154 F. (2d) 460, I assume, is the Georgia case about which I have heard discussion. It doesn't particularly perturb me. A negro sued the members of a County Democratic committee for damages under 8 U.S.C.A. sec. 43, alleging that he had been deprived of his right to vote in violation of his rights under the Federal Constitution, and particularly under the Fifteenth Amendment thereto. The Court gave him damages insofar as the deprivation affected his right to vote for Congressmen. In that case, the negro clearly had a right to vote under the Fifteenth Amendment. In this case, there is no right under that amendment, and, if any rights exist, they are rights under Sections 2, 4 and 19 of Article I of the Federal Constitution (pertaining to the election of Congressmen). In that case, it was the voter who was claiming that he had been denied a right. In this case it is the unsuccessful candidate. Possibly a disfranchised citizen, white or black, in Zapata or Jim Wells Counties might sue the election officials claiming to have been deprived of a right under Sections 2, 4 and 19 of Article I, or the Fifteenth Amendment in the case of the negro, and obtain damages. Such a situation would be far different from one in which the defeated candidate is

the plaintiff and persons who inflicted no injury upon him are the defendants. This distinction was alluded to and discussed by the Court in Anthony v. Burrow, supra, 129 Fed. 783. It will be recalled that in that case the defeated candidate was also attempting to take action against executive officers charged with a ministerial duty, rather than against those who allegedly injured him. In support of his contentions, he cited a decision such as the one under discussion in which a voter was awarded damages from those interfering with his right to vote, and he cited another decision such as the Classic case, infra, in which criminal penalties were inflicted upon one who wrongfully denied another the right to vote. The Court there pointed out that to say that a person may, under federal law, collect damages from the one who denied him the right to vote, and that the United States may, under federal law, punish the malefactor, is to state propositions which are quite different than to say that a federal court, at the behest of a defeated candidate, may enjoin a State official from performing a ministerial duty in connection with an election.

(b) Much of what is said above is also applicable to U. S. v. Classic, 61 S. Ct. 1031. There the Court held that the right to vote in a primary election conducted to select a Congressman is a right under the Federal Constitution, and that a deprivation of such right can be redressed by suit for damages. Presumably, if an alteration of ballots in Zapata or Jim Wells Counties could be shown, the case affords ample authority for the federal government to punish the persons accomplishing such alteration. However, it would appear to be an entirely different matter to say that the case is authority for the

proposition that there exists a federal right on the part of a candidate and that such right may be redressed by having a federal court recount the ballots and certify the victor. The redistricting cases would appear to be pertinent here. In all of those cases (except the Keogh case where the matter was not mentioned), the courts recognized that a voter wrongfully denied a vote could collect damages and that the courts could punish the wrongdoer, but the courts pointed out that the matter of attempting to redistrict a state is a matter which they have neither the power nor the facilities to perform. Similarly, in a case such as the present one, we can recognize the damage and the criminal cases, but such recognition by no means establishes the fact that the federal courts have either the power or the facilities to perform. Similarly, in a case such as the present one, we can recognize the damage and the criminal cases, but such recognition by no means establishes the fact that the federal courts have either the power or the facilities to canvass the votes.

Admittedly, the case establishes a federal right to vote in a primary for a Congressional office. Perhaps by necessary implication the case also establishes the fact that it is a federal right for a candidate at such a primary to have the votes fairly and honestly counted. However, if the latter is a right it would appear to be a right without means of redress other than through a suit for damages or by criminal action, for those are the only two means of redress which the Congress has provided. With the authority being to the effect that only the Houses of Congress may inquire into the legality of

Congressional elections, it would appear to be highly improbable that the "redress" referred to in 28 U.S.C.A. sec. 1343 is redress other than by damages or by criminal action.

(c) In Joyner v. Browning, 30 F. Supp. 512, the federal court granted an injunction against the governor to prevent his calling out the militia in connection with the election. The Court held that the right to vote in a primary election involving the office of United States Senator is a federal right, and that by virtue of the old 28 U.S.C.A. sec. 41(11)--one of the predecessors of the present section 1343--it possessed the right to prevent a threatened deprivation of this right by use of an injunction. This decision worries me more than any of the others. For example, it shoots holes in the theory, expressed above, that "redress" may include only damages or criminal action. My thoughts with reference to distinguishing the case from the situation at bar are these: (1) The suit was directly against the threatened malefactor--the very person who allegedly would accomplish the deprivation of right. The present suit is not. (2) The redress in that suit was preventive in nature, and, as the court clearly possessed jurisdiction to grant damages if an actual deprivation occurred, so might it well possess jurisdiction to use the remedy of injunction to prevent such a deprivation. In the instant case, the redress sought is an inquiry into the legality of the election--an inquiry exclusively within the power of the Houses of Congress. (3) In that case, the State officer was enjoined from doing an act which the Court held to be outside of his authority. In the case at bar, the State officer is being enjoined from the performance of a ministerial act which clearly is enjoined upon him by law.

MEMORANDUM BRIEF

Tyson or Kennedy, in appearing, in response to the show cause order should not make personal appearances and should not answer on the merits since they have not been served with process.

The facts alleged can probably better be recited in different language by those familiar with the facts. The attached is simply a suggested form which follows Form 213 Federal Procedural Forms by Holtzoff & Coxier.

It might be well to make a specific affidavit attached as Exhibit A by Tyson and Kennedy rather than to have them simply swear to the answer and motion as a whole.

A further memorandum will be forthcoming on the jurisdiction of the court in general.

Any special answer desired setting up that the particular defendant has no interest in the outcome of the case, and etc. can be added as a numbered paragraph but should be made expressly subject to the motion to dismiss on account of lack of jurisdiction.

The pleading must be filed in duplicate with the Federal District Court. Copies should be available for adverse counsel and delivered to them on Monday, if possible.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,

PLAINTIFF

VS

TOM L. TYSON
VANN M. KENNEDY and
LYNDON B. JOHNSON

DEFENDANTS

§

§

§

§

§

§

CIVIL NO. 1640

MOTION TO DISMISS AND ANSWER TO SHOW CAUSE ORDER,
SUBJECT TO MOTION TO DISMISS

MOTION TO DISMISS

Defendant Tom L. Tyson, who has personal notice of the show cause order issued by this Honorable Court on September 15, 1948, but who has not been served with any character of process, appearing only in response to the informal notice to him of the issuance of the temporary restraining order and the show cause order entered herein on September 15, 1948, moves the Court as follows:

I.

To dismiss this action as to this defendant on the ground that it is wholly moot as to plaintiff and this defendant by reason of the following:

As shown by the complaint, this defendant was joined as a party hereto because of his service as Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948,

which convention was required by law to canvass the returns certified by the County Chairmen of the various counties in Texas and issue to the successful candidate a certificate of nomination by certifying same to the Secretary of State of the State of Texas. At said convention, the State Democratic Party performed its statutory duties and adjourned at _____ .M. on September _____, 1948. Prior to adjournment, this defendant executed a certificate of nomination of Honorable Lyndon B. Johnson as the Democratic candidate and nominee of such party and said convention to the office of United States Senator and certified the said Lyndon B. Johnson as such candidate to the Secretary of State as required by law, along with the other candidates named by such party at such convention for all other State offices; and at the same time the Secretary of said convention, the defendant, Vann M. Kennedy, joined in such certificate and transmitted same to the Secretary of State by delivering same for transmission to the Secretary of State. Said certificate was so filed, as this defendant is informed, with the Secretary of State at 11:29 A.M., on September 15, 1948.

This defendant did not know of the action of this Honorable Court in issuing the restraining order at 6:25 A.M. on the morning of September 15, 1948, until in the afternoon of September 15, 1948, about 4 o'clock, when he reached his home in Corsicana, Navarro County, Texas, when he was informed of such action. In any event, this defendant had already completed his official and statutory actions in connection with the issuance of such certificate and as Chairman of the Democratic State Convention long before the issuance of the temporary restraining order by this Honorable Court. This cause is, therefore, moot so far as plaintiff and this defendant are concerned and no relief can be granted against this defendant.

II.

To dismiss the action because the complaint fails to state
a claim against defendant upon which relief can be granted.

TOM L. TYSON, Defendant

By-_____
Attorney for Defendant

Address of Defendant's Attorney

THE STATE OF TEXAS

COUNTY OF

BEFORE ME, the undersigned authority, on this day personally
appeared TOM L. TYSON, who being by me first duly sworn states upon
oath: I am one of the defendants in the above cause and have read over
the foregoing pleading; I am familiar with the facts alleged therein
and same are true.

Sworn to and subscribed before me this _____ day of September,
A. D. 1948.

Notary Public in and for _____
County, Texas.

MEMORANDUM ON JURISDICTION

Plaintiff's prayer is for a peremptory order restraining the defendants Tyson, Kennedy, Brown and County Officials from issuing said certificate or certifying said Lyndon B. Johnson as a candidate; and that upon trial on the merits plaintiff have judgment permanently enjoining the issuance of a certificate of nomination and, if one has been issued, cancelling and annulling any certifications so made; for judgment declaring plaintiff received said nomination for United States Senator, and etc.

This action is, therefore, an election contest.

The United States District Court has no jurisdiction over an election contest. The general rule is stated in 29 C.J.S. 247, pp. 355-58, as follows:

"Sec. 247. STATUTORY REMEDIES

- a. In general
- b. Exclusiveness of remedy

a. In General

Under statutes providing for election contests, the right, as well as the procedure to be followed, is purely statutory, and strict compliance with the statute is necessary. The statutes are to be construed to effect the intention of the legislature.

Under constitutional or statutory provisions in most, if not all, jurisdictions provision has been made for the contest of elections. It is only under these provisions that the right to contest an election exists; and one seeking relief under the statute must bring himself strictly within the terms. The procedure is purely statutory, and the statute must be strictly followed. . . .

The proceeding being purely statutory, the courts are limited in their investigation to such subjects as are specified in the statutes. The remedy is not to be extended to include cases not within the language of the statute, and the right to contest is not to be inferred from doubtful provisions." (underscoring supplied)

And again from 29 C.J.S. 248 pp. 359-360, as follows:

"Sec. 248. REMEDY IN EQUITY

Courts of equity have no inherent power to try election contests.

It is a general rule that courts of equity have no inherent power to try contested elections, notwithstanding fraud on the part of the election officers; and it has been said that they have never exercised such power except in cases where it has been conferred by express enactment or by necessary implication therefrom; but this latter statement seems a little too broad, for numerous exceptions to the rule have been recognized. Thus it has been held that equity will assume original jurisdiction over an election contest where the constitutional rights of a citizen are sought to be invaded by an attempt to make an unconstitutional or inapplicable law operative through the means of a popular election, or where the election relates solely to some local question as for instance a local option election, especially where fraud in the election is the controlling question to be determined, or the creation of a local bonded indebtedness, or elections to determine the location of a county seat; although it has been held on the other hand that a court of equity has no jurisdiction either in a direct or a collateral proceeding to hear and determine the validity of a county seat election. Again it has been held with strong reason that equity will assume original jurisdiction where the state seeks to enjoin a conspiracy to pervert an election by the corruption of the ballot box. It has also been held that, where the legality of an election or whether a person holds an office rightfully arises incidentally in the course of a suit in which equity has jurisdiction, that court will inquire into and decide it as it would any other question in the case, although it has been said that the decision is only for the purpose of the suit, and does not settle the right to an office or vacate it if the party is in actual possession. The mere facts that a right or liability arises out of an election and that the legality of an election is involved are no objection to the jurisdiction of equity." (underscoring supplied)

Again, as to jurisdiction, we quote from 29 C.J.S. 252, pp. 364-366, as follows:

"Sec. 252. JURISDICTION

The determination of election contests is judicial only when and to the extent authorized by the statute; and the constitutional and statutory provisions in the various jurisdictions determine what tribunal shall entertain the proceedings, and only such tribunal may do so.

As stated supra Sec. 247, election contests are purely statutory, and the courts have no inherent power to determine election contests, the determination of such contests being a judicial function only when and to the extent that the determination is authorized by statute. Constitutional or statutory provisions in the various jurisdictions determine what court shall entertain the proceedings, and only the court or board authorized by the statute has jurisdiction to hear an election contest, and then only to the extent authorized." (underscoring supplied)

Again, we quote from 18 Am. Jur., Sec. 272, pp. 359-360:

"Sec. 272. ACTION IN EQUITY. - It is a firmly established general rule that the jurisdiction of courts exercising general equity powers does not include election contests, unless it is so provided expressly or impliedly by organic or statute laws. The reason for this exclusion is that the questions involved are political and that the right to public office is not considered as constituting property in such sense as will warrant the intervention of equity to protect it. As a consequence, it has been almost uniformly held that the title to a public office and the right to exercise its functions cannot be determined in an action for an injunction. Accordingly, a court of equity will not restrain officers on whom devolves the duty of declaring the result of an election from performing their duty, or enjoin the issuance of a certificate of nomination to a successful contestant in a primary election contest. Likewise, where one of two claimants to an office has received a certificate of election constituting prima facie evidence of his right to the office in controversy, an injunction will not be issued to restrain him from exercising the duties of the office because of any defect in his election." (underscoring supplied)

Again, from 18 Am. Jur., Sec. 275, p. 361:

"Sec. 275. NATURE. - An election contest is not an action at law or a suit in equity, but is a purely statutory proceeding unknown to the common law. . . . " (underscoring supplied)

Again, from 18 Am. Jur. Sec. 284, p. 365:

"Sec. 284. GENERALLY. - Jurisdiction to hear and determine election contests is dependent upon, and regulated by, statutory provision. . . . " (underscoring supplied)

And, from 18 Am. Jur. Sec. 285, pp. 365-366:

"Sec. 285. COURTS. - The general rule is firmly established that the judicial department of the government

has no right to interfere with or attempt to control a citizen in the exercise of political rights unless jurisdiction is conferred by constitutional or statutory provision. The hearing of an election contest is the exercise of a political, as distinguished from a judicial, power, and in some jurisdictions statutes attempting to impose this function upon courts have been held unconstitutional. Many state Constitutions authorize the legislature to confer upon the judiciary jurisdiction to hear and determine election contests, but it has been held that constitutional authority to confer such power upon a court does not authorize the legislature to empower a judge to hear and determine election contests in vacation. The scope of the court's jurisdiction in an election contest should be determined from the statute under which it assumes to act. . . . (underscoring supplied)

Then, from 54 Am. Jur., Sec. 10,, p. 671:

"Sec. 10. CHARACTER OF JURISDICTION; LIMITED. - The Federal courts are created courts of common law and equity. They do not possess, however, the powers inherent in courts existing by prescription or by common law. Although they are not foreign courts, they are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts. The Federal courts are not courts of general jurisdiction, but are courts of special or limited jurisdiction, in the sense that they have no jurisdiction except that conferred by the Constitution and laws of the United States. Certain prescribed elements or conditions, discussed at length hereinafter, are necessary to their jurisdiction. Where these are wanting, the court cannot proceed, even with the consent of the parties. . . . " (underscoring supplied)

Federal Courts are courts of limited jurisdiction.

We quote from Cyclopaedia of Federal Procedure, Vol. 1, Sec. 62, pp. 115-116, as follows:

"Sec. 62. FEDERAL COURTS AS OF "LIMITED" JURISDICTION.

In view of what has been said in preceding sections, there can be no question but that the lower federal courts are all courts of "limited" jurisdiction. The jurisdiction of all federal courts is limited to that which is specially conferred on them, and they are not possessed of the powers inherent in courts existing by prescription or by the common law. . . . " (underscoring supplied)

No statute can be cited which gives to the Federal courts the authority to try election contests or to issue injunctions in election matters.

Indeed, the contrary will be shown hereafter.

That the court does not have jurisdiction is conclusive from the case of Keogh v. Horner (1934 D.C. Ill.), 8 Fed. Supp. 933. In that case a writ of prohibition or injunction was requested against Governor Horner of Illinois to restrain him from issuing certificates of election to those who were ostensibly elected to Congress. It was claimed that the election was illegal and void because of the failure of the Illinois General Assembly to redistrict the State in compliance with the United States statute. The Court says:

"No cases are cited by petitioner, and after a diligent search of the cases and textbooks, I am unable to find any authority, which, by any stretch of the imagination, holds or tends to hold that a District Court has any authority to grant the relief sought. The general rule with reference to the jurisdiction of federal courts has been oftentimes stated as being of limited jurisdiction and without power to exercise any jurisdiction except that which is expressly, or necessarily by implication, conferred by Congress. Such courts are creatures of Congress, provided for by the Constitution, and necessarily depend upon statutory enactment for jurisdiction. There is no such authority to be found in any enactment of Congress. Foster's Federal Procedure, volume 3, page 2250, states: 'No District Court of the United States has the power to issue a writ of prohibition except when necessary for the exercise of its jurisdiction in some matter previously before it.' Other text-writers announce the same or similar rule.

Some state authorities are called to my attention in which courts have allowed the writ directed to those exercising a judicial or quasi judicial function, and it seems that petitioner relies upon these meager authorities. The fallacy of this position is twofold: First, in such cases the courts were not of limited jurisdiction such as is this court; and, second, respondent, in performing the act which is sought to be prohibited, in my opinion, acts purely in a ministerial capacity and not one which is judicial or quasi judicial in its character. . . .

It would seem to me the Governor has no discretion except to issue the certificate of election or commission to those entitled thereto as is provided in the foregoing section. To hold that the Governor acts in a judicial capacity would do violence, not only to the plain language of the statute just quoted, but would confer upon him the right to conduct and settle contests concerning members of Congress, when that power is expressly conferred upon

the respective Houses of Congress by the Constitution of the United States. If the Governor, acting judicially, can determine those elected as members of Congress are to be denied a certificate of election on account of the character of the districts from which they were elected, or because of the failure of the General Assembly to re-district the state, it would be just as reasonable to conclude that he has the authority and duty to determine any other question concerning the legality of their election, such as the qualifications provided by the Constitution, violation of the Federal Corrupt Practices Act, or any of the other questions which are so often raised in the House of Representatives in election contests. Such a construction, of course, would be ridiculous. If the Governor refused or was prohibited from issuing such certificates of election and the situation was presented to the House of Representatives, I do not doubt but what the House would have the right to seat the members elected without any certificate just as it could refuse to seat the members with a certificate, if it chose to do so. In other words, the power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme. The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found, controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected, or to interfere with the Governor in furnishing them a certificate or commission as to what the canvass shows with reference to their election.

The court has no jurisdiction to issue the writ prayed for, and the petition is herewith dismissed." (underscoring supplied)

The foregoing case is quoted with approval and followed by the United States Court of Appeals in Sevilla v. Elisalde, 112 F. (2) 30, 38, involving the right of the court to inquire into the qualifications of the resident commissioner of the commonwealth of the Philippine Islands to the United States. The Court says, page 32:

"Courts have no jurisdiction to decide political questions."

~~It is~~ Exclusive jurisdiction to try election contests involving United States senator or congressman.

It is extremely doubtful whether any court has jurisdiction to try an election contest involving a United States senator. Indeed, the weight of authority if not all authority is to the effect that the United States Senate and the National House of Representatives alone have jurisdiction to try election contests involving those offices.

Article I, Section 5 of the Constitution of the United States provides that "each House shall be the judge of the elections, returns, and qualifications of its own members." In 107 A.L.R. 206, the following statement is made:

"It is well settled that this provision constitutes each House of Congress the sole and exclusive judge of the election and qualifications of its own members and deprives the courts of jurisdiction to determine these matters."

This authority cites Barry v. United States, 279 U.S. 597, 73 L. Ed. 867, 49 S. Ct. 452, and Keogh v. Horner, 8 Fed. Supp. 933. Numerous other cases from Florida, Kentucky, Michigan, Minnesota, New Hampshire, New York, North Dakota, Oregon and West Virginia are cited.

Likewise, in 54 Am. Jur. Sec. 17, page 534, the following statement is made:

"Sec. 17. DETERMINATION OF ELECTION AND QUALIFICATION OF MEMBERS. - While the Constitution prescribes certain requirements as to age, citizenship, and residence, in order to be eligible to be seated as a member of Congress, Article I, Sec. 5 thereof, providing that 'each House shall be the judge of the elections, returns, and qualifications of its own members,' constitutes each house of Congress the sole and exclusive judge of the election and qualifications of its own members and deprives the courts of jurisdiction to determine those matters. It is within the discretion of the Senate whether to seat one who presents himself claiming rights of membership, pending an investigation of and adjudication upon the validity of his election. Whether a Senator or a Representative has been elected in the constitutional way is not a judicial question for the courts to determine, but is a matter resting entirely with the Senate or the House of Representatives as the case may be. . . ." (underscoring supplied)

While the Texas statute, Article 3147, gives a right to contest for "State office" and presumptively this would afford a statutory right of contest, yet there is some doubt as to the validity of the State procedure in view of the provision of the United States Constitution cited above and the decisions thereunder. Moreover, it has been held by the Galveston Court of Federal Appeals in Lane v. McLemore, 169 S.W. 1073, that a congressman at large was not a State officer; and that the office of congressman is not a "State office". Likewise, in State ex rel Carroll v. Becker, (Mo.) 45 S.W. (2) 533-36, a member of Congress was held not to be a State officer but a United States officer. So, the provision for contest of the State office in the State statute could very easily be construed as not authorizing a contest for the office of United States Senator.

Conclusive of the point that the United States District Court does not have jurisdiction of this suit, it is the provision of 28 U.S.C. 1344 (28 U.S.C.A. 41) (15), reading as follows:

"Sec. 1344. ELECTION DISPUTES

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, wherein it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States." (underscoring supplied)

From the foregoing, it will be observed that jurisdiction in election disputes is expressly denied to the United States courts in the case of a United States Senator. Further, that the jurisdiction granted is confined to those cases where the sole question arises out of the denial of the right to vote on account of race, color or previous condition of servitude.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,
PLAINTIFF,

VS.

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE O. KRAFT
MELVIN FAULK, and
SULLY MONTGOMERY,
DEFENDANTS,
V.E. STREIGLER
FRANK SHELLEY
C.H. STEVENSON,
INTERVENERS.

CIVIL NO. 1640

ORDER OVERRULING DEFENDANT LYNDON B.
JOHNSON'S MOTION TO DISMISS FOR WANT
OF JURISDICTION

On the 21st day of September, come on for hearing the above entitled and numbered cause, and came Lyndon B. Johnson appearing in person and by attorneys for the sole purpose of urging his Motion to Dismiss for Want of Jurisdiction, and the court having heard argument of counsel on such Motion and having considered same, is of opinion that it should be and it is hereby accordingly overruled; to which ruling the defendant Lyndon B. Johnson then and there in open court excepted.

Done this _____ day of September, 1948, at
_____ o'clock ____ M., in open court.

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,
PLAINTIFF,

VS.

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE O. KRAFT
MELVIN FAULK, and
SULLY MONTGOMERY,
DEFENDANTS,
V.E. STREIGLER
FRANK SHELLEY
C.H. STEVENSON,
INTERVIEWERS.

CIVIL NO. 1640

ORDER OVERRULING DEFENDANT LYNDON B.
JOHNSON'S MOTION TO DISMISS FOR WANT
OF JURISDICTION

On the 21st day of September, come on for hearing the above entitled and numbered cause, and came Lyndon B. Johnson appearing in person and by attorneys for the sole purpose of urging his Motion to Dismiss for Want of Jurisdiction, and the court having heard argument of counsel on such Motion and having considered same, is of opinion that it should be and it is hereby accordingly overruled; to which ruling the defendant Lyndon B. Johnson then and there in open court excepted.

Done this _____ day of September, 1948, at
_____ o'clock ____ M., in open court.

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,
PLAINTIFF,
VS.

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE O. KRAFT
MELVIN PAULK, and
SULLY MONTGOMERY,
DEFENDANTS,
V.E. STREIGLER
FRANK SHELLEY
C.W. STEVENSON,
INTERVENERS.

CIVIL NO. 1640

ORDER OVERRULING DEFENDANT LYNDON B.
JOHNSON'S MOTION TO DISMISS FOR WANT
OF JURISDICTION

On the 21st day of September, came on for hearing the above entitled and numbered cause, and came Lyndon B. Johnson appearing in person and by attorneys for the sole purpose of urging his Motion to Dismiss for Want of Jurisdiction, and the court having heard argument of counsel on such Motion and having considered same, is of opinion that it should be and it is hereby accordingly overruled; to which ruling the defendant Lyndon B. Johnson then and there in open court excepted.

Done this _____ day of September, 1943, at
_____ o'clock ____ M., in open court.

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,
Plaintiff,

VS.

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE O. KRAFT
MELVIN FAULK, and
SULLY MONTGOMERY,
Defendants,
V. E. STREIGLER
FRANK SHELLEY
C. H. STEVENSON,
Interveners.

CIVIL NO. 1640

ORDER OVERRULING INTERVENERS'
MOTION TO DISMISS FOR WANT
OF JURISDICTION

On the 21st day of September, came on for hearing the above entitled and numbered cause, and came V. E. Streigler, Frank Shelley, and C. H. Stevenson, appearing in person and by attorneys for the sole purpose of urging their Motion to Dismiss for Want of Jurisdiction, and the court having heard argument of counsel on such Motion and having considered same, is of opinion that it should be and it is hereby accordingly overruled; to which action and ruling Interveners then and there in open court duly excepted.

Done this _____ day of September, 1948, at _____
o'clock ____ M., in open court.

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,
Plaintiff,

VS.

TOM L. TYSON
VANN M. KENNEDY
LYNDON B. JOHNSON
PAUL H. BROWN
CLARENCE O. KRAFT
MELVIN FAULK, and
GULLY MONTGOMERY,
Defendants,
V. E. STREIGLER
FRANK SHELLEY
C. H. STEVENSON,
Interveners.

CIVIL NO. 1640

ORDER OVERRULING INTERVENERS'
MOTION TO DISMISS FOR WANT
OF JURISDICTION

On the 21st day of September, came on for hearing the above entitled and numbered cause, and came V. E. Streigler, Frank Shelley, and C. H. Stevenson, appearing in person and by attorneys for the sole purpose of urging their Motion to Dismiss for Want of Jurisdiction, and the court having heard argument of counsel on such Motion and having considered same, is of opinion that it should be and it is hereby accordingly overruled; to which action and ruling Interveners then and there in open court duly excepted.

Done this _____ day of September, 1948, at _____
o'clock ____ M., in open court.

United States District Judge

COPY

June 15, 1949

Dear Senator:

I am attaching a copy of a newspaper clipping which I think you will find interesting.

I think someone should pay very careful attention to two different phases of the matter referred to in this clipping, the first being whether or not the Federal Court subpoena issued in the civil action brought against Salas could be attacked on the grounds of jurisdiction. The second thing that should be carefully looked into by someone there would be the jurisdiction of the Federal District Court vs. the State District Court in the issuance of their respective subpoenas.

Sincerely

John Connally

Senator A. J. Wirtz
Brown Building
Austin, Texas

jbc dj
johnson-court pleadings
give back to john

TO THE HONORABLE R. D. WRIGHT,
Judge of the 49th Judicial District of Texas.

WHEREAS, certain charges and insinuations have appeared in the newspapers of this state and country, charging that some kind of fraud was committed in Zapata County in connection with the run-off primary of August 28, 1948, and

WHEREAS, it was intimated in said newspaper articles that the charges were based mostly upon testimony given by certain individuals from Zapata County, and one in particular from Webb County, and

WHEREAS, it was the desire of the Grand Jury for Zapata County, under its sworn duty and obligation to investigate all criminal matters in the County, to investigate the true facts concerning said purported charges:

NOW, THEREFORE, the undersigned citizens of Zapata County, constituting the duly sworn and empanelled Grand Jury of the 49th Judicial District Court for Zapata County, February Term, A. D. 1949, respectfully report to Your Honor that a thorough, comprehensive and impartial investigation was conducted by said Grand Jury seeking to determine whether or not any fraud or violations of the Penal Code were committed by anyone in Zapata County in connection with the run-off primary of August 28, 1948. In this connection, thirteen witnesses were summoned to testify, and did testify, before said Grand Jury, including all the witnesses who were named in said newspaper articles as having appeared to testify from Zapata County and one from Webb County, before a Federal Court in connection with the charges of fraud allegedly committed in Zapata County. Also called to testify before us were those county officials and the officers of election of Zapata County, who had any part whatsoever with the conduct of the run-off primary election of August 28, 1948.

The evidence adduced before said Grand Jury showed that there was no fraud in said election and no violations of the Penal Code; on the contrary, the overwhelming evidence and testimony showed that

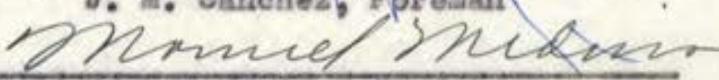
the election was conducted legally, fairly and impartially, and that the officers of election and the officials of Zapata County were exceedingly diligent and zealous in their duties, and that a fair and orderly election was held in Zapata County on said date of August 28, 1948

A complete transcript of the testimony of all witnesses appearing before the Grand Jury was recorded and has been made a part of the files of the Grand Jury for Zapata County.

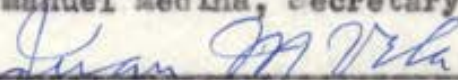
Respectfully submitted,



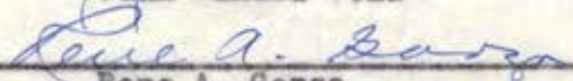
J. M. Sanchez, Foreman



Manuel Medina, Secretary



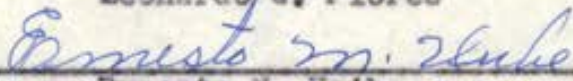
Juan Manuel Vela



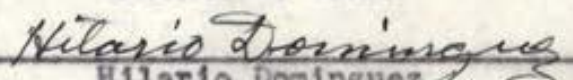
Rene A. Garza



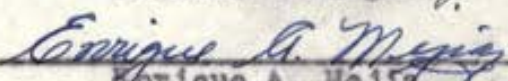
Leonardo G. Flores



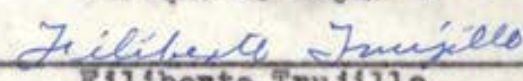
Ernesto M. Uribe



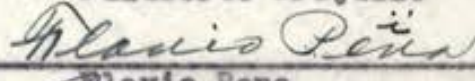
Hilario Dominguez



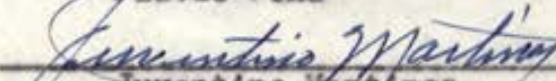
Enrique A. Mejia



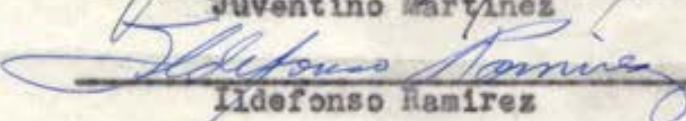
Filiberto Trujillo



Flavio Pena



Juventino Martinez



Idefonso Ramirez

For Mr Johnson
from the Fintas

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12529

LYNDON B. JOHNSON, V. E. STREIGLER,
FRANK SHELLEY and C. H. STEVENSON,

Appellants,

v.

COKE R. STEVENSON,

Appellee.

Appeal from the District Court of the United
States for the Northern District of Texas.

October 7th, 1948.

Before HUTCHESON, SIBLEY and McCORD,
Circuit Judges.

SIBLEY, Circuit Judge: On September 15, 1948, Appellee, Stevenson filed this suit in the district court against Appellant Johnson and others to stop by injunction the certifying by the officers of the Democratic Party in Texas of the name of Johnson as the nominee of that party for United States Senator as a result of a Democratic primary election; to prevent his name as such being placed on the official ballots for the general election to be held November 2, 1948; and for a cancellation of such certification if made; and a declaration that Stevenson is the true nominee. The other defendants are the party officers who are charged with the duty of certifying; the Secretary of State to whom the certificate is addressed and who prepares the form of ballot; and the members of the election board of Tarrant County, who are alleged to be proper representatives of all the board members in the 253 other counties of the state who are too numerous to be brought before

the Court. A restraining order was at once granted and a hearing set for a temporary injunction. At the hearing Johnson filed a motion to dismiss on various grounds, including these: that the relief sought is in essence a contest of the primary election and the Court has no jurisdiction to hear and determine such election contest; that the Court has no jurisdiction to determine the right and title to the Democratic nomination for United States Senator, and that such jurisdiction is expressly denied by 28 U. S. C., Sec. 1344; that no deprivation of a right or privilege secured by the Constitution or laws of the United States is alleged, but only of a right to a party nomination under the election laws of the State of Texas, as to which there is no jurisdiction in the federal district court; and that there is no jurisdiction in equity to nullify a certificate of nomination duly made under the laws of Texas in favor of Johnson, who is a person qualified to hold the office, in order to substitute another as nominee. Johnson also filed under oath what he calls an opposition to the temporary injunction which takes issue with some of the factual allegations of the petition and proposes at a proper time and in a proper forum to show illegal votes in larger numbers which were counted for Stevenson than those Stevenson claims were fraudulently counted for Johnson. The other defendants filed motions to dismiss as to them and answers, but none of these has any real interest in the result or is charged with any personal misconduct, and they need not be further noticed. The motions to dismiss were overruled. Evidence was introduced by both Stevenson and Johnson tending to support their contentions of **Fact**. The Court made no specific findings of fact, but held generally that the facts were with the plaintiff and granted a temporary injunction on September 22, 1948 "for the reason that there was evidence of fraud in the official returns from certain election officials in Jim Wells, Zapata, and possibly other counties, to the State Democratic Executive Committee, without which there would have been a change in the official certification by the officers of the State Convention as to who was the Democratic nominee for the office of

United States Senator." The injunction forbids the certifying and reporting to the election boards of all the counties that Johnson is the Democratic nominee, and forbids the boards to prepare and distribute ballots carrying Johnson's name for use in the election. The Appeal is from the grant of this temporary injunction.

We are of the opinion that whatever may be the truth as to the fraudulent returns from certain precincts in the named counties, and whatever may be the truth as to illegal votes elsewhere which are claimed as more than an offset, the subject matter is not one to be taken cognizance of by the district court for the exercise of equitable relief. The object to be attained is precisely that of a contest of an election, the evidence so far heard is all appropriate to such a contest, as is that proposed to be taken by one or more masters which the record shows are to be appointed to go to all of the counties in which illegal returns or voting has been or may by amendment be alleged to have occurred. The Texas Statutes afford machinery for such a contest as part of their provision for both party nominations and final elections. It is urged that there is not time to review a statewide primary by such a contest before the general election comes on. But if there were no provision at all for contesting the result of a primary it would not give a district court jurisdiction which it lacks. The Constitution, Art. I, Sec. 5, after all makes each House of Congress the final judge of the qualifications, elections, and returns of their respective members; and if a State, as Texas has done, makes nominations by a primary to be a part of its election machinery, and if, as is alleged here, Democratic nomination insures election, no reason occurs to us why this constitutionally provided judgment of the election should not reach back to the nomination; and we judicially know that such Congressional investigations have included primaries.

The jurisdiction of the district court is limited to those cases within Art. III, Sec. 2 of the Constitution over which an Act of Congress has given it jurisdiction. The petition refers us to Sec. 1343 of Title 28 of the United States Code as recently

revised and enacted, entitled "Civil Rights", and to Sec. 43 of Title 8 of the Code in the chapter on Civil Rights entitled "Civil Action for Deprivation of Rights." Both sections use equivalent language, that of Sec. 43, being: "Every person who under color of any statute, ordinance, regulation, custom or usage of any State or Territory subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The redress here chosen is a suit in equity. The right claimed is the Democratic nomination as United States Senator in a primary held under the laws of Texas, which is alleged to be a right of property exceeding \$3,000 in value because Democratic nomination insures final election and the emoluments of the office far exceed that sum or value. We may assume without deciding that this nomination is the equivalent of election, and that the right to the election is really in controversy. We then face Sec. 1344 of Title 28 entitled "Election Disputes", which does give the district court jurisdiction over such disputes if the sole question arises out of the denial of the right to vote on account of race, color or previous condition of servitude, and limits the jurisdiction to the determination of the right to vote. No such question is raised in this case; but if it were, the section expressly excludes disputes concerning the office of "elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a State legislature." This is a dispute about the office of United States Senator. In this section there is a manifest purpose to keep the judicial department from intervening, even by the usually available law writ of quo warranto, in the election of these high functionaries in the executive and legislative departments. According to the common law there was no right at all to contest in a court any public election, because they belong to the political branch of the government and are beyond the control of judicial

power, and the only remedy in the nature of an election contest was a quo warranto or an information in that nature. 29 C. J. S., Elections, Sec. 246. This explains the words in Sec. 1344 "to recover possession of any office", which would be the object of a quo warranto. The aim of the section is to enable the district court to interfere in elections only to the limited extent it prescribes and to exclude it altogether from interfering with the election of a Senator or with the constitutional right of the Senate to judge of his election in all its steps or stages.

But if Sec. 1344 has no application because a party nomination is not an office, and if Sec. 1343 is to be applied, we get no further. Its words, as set forth in Sec. 43 of Title 8, were before the Supreme Court in GILES v. HARRIS, 189 U. S. 475, which was a case concerning the right of Negroes to register for voting in Alabama, which was brought by the excluded voters themselves. Their standing to complain under this statute had just previously been established, as it has been recently confirmed by SMITH v. ALWRIGHT, 321 U. S. 649 in the Supreme Court, and by CHAPMAN v. KING, 154 F. 2d 460, in this Court. But Justice Holmes for the Court said, p. 486: "It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of Sec. 1979 (now Section 43 of Title 8) does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief . . . The words allow a suit in equity only when it is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. Green vs. Mills, 69 Fed. 853, 30 L. R. A. 90." To GREEN v. MILLS may be added a host of authorities: 18 Am. Jur., Elections, Sec. 272; 30 C. J. S., Equity, Sec. 66 and cases cited. BLACKMAN v. STONE, 17 F. Supp. 102, by three judges, contains a review of the federal cases. TURMAN v. DUCKWORTH, 68 F. Supp. 744, is also a recent case by three judges. Appeals in both cases were dismissed in the Supreme Court.

But Stevenzon does not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it. He is here claiming a political nomination by a primary under the laws of Texas. As was remarked in UNITED STATES v. GRADWELL, 243 U. S. 476, 488, 489 in applying the similar provisions of the Criminal Statute then Sec. 19 of the Criminal Code (now Sec. 241 of Title 18) to a nominating primary, there is no applicable provision of the federal Constitution or statutes which secures the rights of a candidate for nomination; and the distinction between the personal right of the voter and the general right of a candidate to a pure final election was made in UNITED STATES v. BATHGATE, 246 U. S. 220, 226, 227. We have found no case holding that one claiming a nomination in a primary held under state law, though it be a part of the state election machinery, has ~~any~~ any right secured by the laws of the United States. We have here no question ~~of~~ of votes excluded contrary to the Constitution, but only of frauds and illegalities under the Texas law. The persons alleged to have perpetrated the frauds are not even parties. We are of opinion, both on the words of Sec. 1343 of Title 28 and under the broad policy indicated in Sec. 1344, that there is here no case for interference by a federal court of equity in a senatorial primary; that the injunction ought not to have been granted; and that the motion to dismiss ought now to be sustained. We can order dismissal on this interlocutory appeal. SMITH v. VULCAN IRON WORKS, 165 U. S. 518, and cases following it.

The order of injunction is set aside and the cause is remanded with direction to dismiss the petition.

REVERSED WITH DIRECTION.

IN THE
Supreme Court of the United States

COKE R. STEVENSON, *Petitioner,*

v.

LYNDON B. JOHNSON, ET AL., *Respondents.*

**BRIEF FOR RESPONDENTS IN OPPOSITION TO PETI-
TION FOR WRIT OF CERTIORARI.**

JOHN H. CROOKER,
Houston, Texas.

JOHN D. COFER,
Austin, Texas.

JAMES V. ALLRED,
Houston, Texas.

THURMAN ARNOLD,
Washington, D. C.

ABE FORTAS,
Washington, D. C.

ALVIN J. WIRTZ,
Austin, Texas.

Attorneys for Respondents.

EVERETT L. LOONEY,
Austin, Texas.

A. W. MOURSUND, JR.,
Johnson City, Texas.

Attorneys for Intervener Respondents.

INDEX.

	Page
STATEMENT	1
REASONS FOR DENYING PETITION	2
ARGUMENT	2
CONCLUSION	12

AUTHORITIES.

CASES.

Ashwander v. Tennessee Valley Authority, 297 U. S. 288	2
Anthony v. Burrow, 129 Fed. 783	10
Barker Painting Co. v. Local 734 BPDP, 281 U. S. 462.	2
Blackman v. Stone, 17 F. Supp. 102	10
Burt v. City of New York, 156 F. (2d) 791.	10
Giles v. Harris, 189 U. S. 475.	10
Hague v. Congress of Industrial Organizations, 307 U. S. 496	10
Lane v. Wilson, 307 U. S. 268	10
George Moore Ice Cream Co. v. Rose, 289 U. S. 373.	2
Picking v. Pa. R. Co., 151 F. (2d) 240	10
Saunders v. Wilkins, 152 F. (2d) 235, cert. den. 328 U. S. 870	10
Smith v. Vulean Iron Works, 165 U. S. 518.	11
Turman v. Duckworth, 68 F. Supp. 744.	10
U. S. v. Bathgate, 246 U. S. 220.	9
U. S. v. Classic, 313 U. S. 299	5, 9
U. S. v. Gradwell, 243 U. S. 476	5
U. S. v. Mosley, 238 U. S. 383.	9
U. S. v. Saylor, 322 U. S. 385	5, 9

STATUTES.

U. S. C., Title 2, Section 7	2
R. S. of Texas, 1925, Articles 2930, as amended, and 3086	2
R. S. of Texas, 1925, Articles 3026-3035.	2
Section 1344, Title 28, U. S. C. (revised)	4, 7
Section 1, Title 2, U. S. C.	7

	Page
Section 1343, Title 28, U. S. C.	8
Section 43, Title 8, U. S. C.	8, 10, 11, 12
Title 18, Secs. 251 and 252, U. S. C.	9, 10

MISCELLANEOUS.

14 Amer. Jur. (Courts), Section 49, Page 277.....	2
18 Amer. Jur. pp. 359-60, Sec. 272.....	4
29 C. J. S. pp. 355-358, Sec. 247.....	4
Constitution—	
Article I, Section 4	5, 9
Article I, Section 5	6, 7
Article III, Section 2	4, 5

IN THE

Supreme Court of the United States

No. 466.

COKE R. STEVENSON, *Petitioner*,

v.

LYNDON B. JOHNSON, ET AL., *Respondents*.**BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully submit this brief in opposition to the petition for writ of certiorari and in reply to the brief for petitioner.

Statement of the Case.

The case is fairly stated in the opinion of the Court of Appeals, and that statement is adopted with the following additions (R. 45-50). None of the election officials who are alleged to have committed or participated in the alleged fraud were parties to the suit. There are no allegations that Johnson or the other respondents were parties to, participated in, or were cognizant of any fraud, as alleged. There are no allegations of conspiracy (See Complaint, R. 1, and Amended Complaint, R. 7).

Reasons for Denying the Petition.

The petition should be denied and writ of certiorari refused for the following reasons:

1. The questions presented are moot. They call on this Court for an opinion on abstract propositions only.
2. The case was correctly decided by the Court of Appeals.
3. Petitioner is not entitled to have the cause remanded in order to amend in an attempt to state a cause of action for damages.

ARGUMENT.

Point One.

The Questions Presented Are Moot. They Call on This Court for an Opinion on Abstract Propositions Only.

Authorities and Argument.

The General Election was held in Texas on November 2, 1948, under the provisions of Federal law¹ and the provisions of the statutes of Texas.² The time for canvassing the vote, making returns of the election and issuance of certificate of the election has expired.³ Respondent Lyndon B. Johnson was duly elected. The issues raised in the present case relate solely to the primary election. Not only is that election completed, but the general election has been held and completed. Accordingly, this case presents no issues which can or should be subject to the processes of equity. It is the province of the Court to decide real controversies, not to discuss or give opinions on abstract propositions.⁴

¹ U. S. C., Title 2, Section 7.

² R. S. of Texas, 1925, Articles 2930, as amended, and 3086.

³ R. S. of Texas, 1925, Articles 3026-3035.

⁴ *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288; *Barker Painting Co. v. Local 734, B. P. D. P.*, 281 U. S. 462; *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373; 14 Am. Jur. (Courts), Section 49, Page 277.

None of the relief sought by petitioner would be effective if the judgment of the Court of Appeals is set aside. The relief sought upon trial on the merits was that plaintiff have judgment (1) permanently enjoining the issuance of a certificate of nomination of Johnson, and if one had been issued, then cancelling and annulling such certification so made; (2) that the defendant Brown, Secretary of State, and all other defendants named as election officials be permanently enjoined from preparing any official ballot for use in the General Election on November 2, 1948, carrying the name of the defendant Lyndon B. Johnson as the nominee of the Democratic Party of Texas for the office of United States Senator from the State of Texas; and (3) for judgment declaring plaintiff received the nomination of the Democratic Party of Texas for United States Senator.

It is obvious that the only effective relief which the Court could have granted to petitioner, if the Court had jurisdiction and authority to grant any relief, would have been to prevent the name of Johnson from being printed on the official ballot at the General Election to be held on November 2, 1948. It is remotely possible—although we deny it—that the Court might have had power also to declare petitioner to be the Democratic nominee and require that his name appear on the official ballot as such nominee. While it may be argued that nomination by the Democratic Party is equivalent to election, such argument is premised on the name of the nominee appearing on the official ballot. Election is determined by votes cast in the General Election, and it cannot with any show of reason be argued that a nominee whose name is not printed on the official ballot is assured of election.

Point Two.

The Case Was Correctly Decided by the Court of Appeals.

Authorities and Argument.

District Courts of the United States have no jurisdiction over election contests.

The jurisdiction of the district courts is limited to those cases within Article III, Section 2 of the Constitution over which an Act of Congress has given them jurisdiction. The only Act of Congress which it may be argued confers jurisdiction on United States District Courts over an election contest appears as Section 1344, Title 28, U. S. C. (revised), headnoted "*Election disputes.*" This section confers jurisdiction on the district courts "of any civil action to recover possession of any office" and specifically exempts the office of United States Senator. By a "civil action to recover possession of any office" it was evidently the intent of Congress to limit the action to a *quo warranto* proceeding, which is the only proceeding, absent statutory authority, for testing the right to public office. Courts of general jurisdiction have no power, either in law or equity, to try election contests unless expressly authorized to do so by constitutional or statutory provisions.⁵

The fact that Congress found it necessary to enact Section 1344 of Title 28, U. S. C. (revised) in order to confer jurisdiction on the District Courts over the limited type of election disputes therein enumerated conclusively establishes that it did not intend that other and general statutes should have the effect of conferring jurisdiction on the District Courts of all election disputes involving alleged denial

⁵ 29 C. J. S. pp. 355-358, Sec. 247, 18 Am. Jur. pp. 359-60, Sec. 272. The reason for the rule is that courts have universally recognized that the conduct of elections constitutes an exercise of a political function of the Government to which judicial authority does not extend unless specially conferred.

of any and all rights guaranteed the citizens by the Constitution and laws of the United States.

If it be conceded that the Congress has the power under Article I, Section 4, and Article III, Section 2 of the Constitution to confer jurisdiction on the District Courts to hear and determine election contests, the question recurs, whether Congress has exercised that power. The history of congressional legislation on the subject has been reviewed fully by this Court in *United States v. Gradwell*, 243 U. S. 476, wherein it is demonstrated that Congress did provide for the regulation and supervision of elections in the Enforcement Acts of 1870 and 1871, which were repealed in 1893, the basis of the repeal being the report of a Congressional Committee that such matters were better left to the states. Petitioner, in effect, concedes that the District Court has no jurisdiction over election contests, by resorting to a labored argument that this is not an election contest.

The Court of Appeals correctly decided that the suit was essentially and in fact an election contest. Petitioner argues that this is not an election contest because the character of proof necessary to the granting of the relief sought would also be appropriate in the trial of a criminal case.⁶ Such argument is begging the question. In order to sustain a criminal prosecution, it would only be necessary to show that one fraudulent vote was cast or counted; or, in a proper case, to show that there was a conspiracy to make fraudulent returns or to bribe voters. In order for a court to give petitioner the only effective relief sought here, it would be necessary for the Court to ascertain first whether there were fraudulent votes cast and returned, and, if so, whether they had the effect of changing the result. It would be appropriate for the defendant in such action to show, as respondents proposed to show, and in fact did show, that there were more illegal votes cast, counted and

⁶ Citing *U. S. v. Classic*, 313 U. S. 299, and *U. S. v. Saylor*, 322 U. S. 385.

returned for petitioner than those alleged to have been returned for respondent Johnson.⁷

Evidence of illegal votes in certain boxes did not entitle petitioner to the relief sought unless all of the evidence showed that but for such votes the result would have been different. If the face of the returns had showed a majority of 100,000 votes for Johnson, certainly it could not be said that because 308 votes counted for him were fraudulently returned, petitioner would be entitled to the relief he sought.

The relief sought is exactly the relief sought in an election contest, and the type of relief that can be granted only in an election contest. Likewise, the evidence necessary to determine whether petitioner was entitled to the relief sought is exactly the evidence necessary to the determination of an election contest. The necessary evidence means all legally admissible evidence tendered by both parties in respect to illegal voting, and this would be admissible and appropriate in no other action than an election contest.

The Constitution and laws of the United States deny to District Courts jurisdiction of a suit involving the title to the office of United States Senator. Article I, Section 5 of the Constitution specifically provides that "each House shall be the judge of the Elections, Returns, and Qualifications of its own members . . ." It is evident that the Con-

⁷ By his pleadings, Johnson alleged that he was prepared to show and would show at a proper time and in a proper forum that more illegal votes were cast, counted and returned for petitioner than those alleged to have been so returned for respondent Johnson (R. 36-37). The statement appearing in the petition (p. 4) that the "statement of facts brought up on the appeal discloses that the material allegations of the complaint and amendments were sustained by the testimony before the trial court" is not true. Petitioner alleged that there were 308 votes illegally returned for respondent Johnson in two counties. The evidence to sustain such allegations was slight, if indeed it were admissible or of any probate force in a trial on the merits. Respondents introduced evidence to show that a trial before a court of competent jurisdiction in a contest for a local office resulted in a judicial ascertainment that 1736 illegal votes had been cast in one county, out of which petitioner Stevenson had received 468 votes more than respondent Johnson.

gress considered this provision of the Constitution as conferring exclusive jurisdiction on its two Houses and for that reason denied District Courts jurisdiction of actions involving the office of United States Senator and Representative in or delegate to Congress.

The brief for Petitioner grounds his right on the Seventeenth Amendment to the Constitution, providing for the election of Senators, and on Article I, Section 4 of the Constitution, providing that the times, places and manner of holding elections for Senators shall be prescribed in each state by the legislature thereof but that the Congress may at any time by law make or alter such regulations, and on Section 1 of Title 2, United States Code, 1946, providing that a United States Senator shall be elected by the people of the State. In the complaint it is alleged that "the rights and property involved in this action are nomination by the Democratic Party of Texas for the office of United States Senator from Texas for a term of six years, beginning in January, 1949, and which nomination amounts to election to the office of United States Senator from Texas for said term."

Petitioner is in the unenviable position where he must blow hot and blow cold. As a basis for his claimed right, he relies on the provisions of the Constitution and laws of the United States providing for the election of United States Senators by vote of the people. To bring himself within the provisions of those sections of the Constitution and statutes, he must argue that the contest involves an election. But when confronted with the fundamental principle that courts are without jurisdiction to determine election contests unless clothed therewith by statutory or constitutional provisions and when confronted with the provisions of Article I, Section 5 of the Constitution and Section 1344 of Title 28 of the Code, which specifically deny jurisdiction to the Federal Courts, petitioner must take the opposite position and contend that the controversy is not over an election but over a Party nomination.

Petitioner has wholly failed to allege any facts sufficient to state a cause of action within the jurisdiction of the District Court. Petitioner relies, as he must, on Title 28, Section 1343, U. S. C., the pertinent parts of which are:

“The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:”

* * *

“(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”

It will be noted that jurisdiction is conferred on the District Courts only of a “civil action authorized by law.” Petitioner then points to the only law which can be found to authorize any such action, being Title 8, Section 43, U. S. C., reading:

“Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

It will be noted that petitioner does not sue the “person” who allegedly subjected the party injured to the deprivation of any rights allegedly secured by the Constitution and laws.

Petitioner then proceeds to claim that the “rights, privileges, or immunities secured by the Constitution and laws,” of which he is alleged to have been deprived, were secured to him by the Seventeenth Amendment to the Constitution

and Article I, Section 4 of the Constitution. These provisions of the Constitution and all relevant statutes that we have been able to find simply secure to the qualified electors the right to choose their United States Senator by popular vote. None of them attempts to deal with the right of any citizen to become the candidate of a political party for the office of United States Senator, nor to prescribe how such political party shall select its candidates. The cases so strongly relied upon by petitioner⁸ each dealt with the right of the people “to choose a representative in Congress” (Petitioner’s brief, p. 14). This Court, in the *Gradwell case*, *supra*, unanimously rejected the contention that the provisions of the Constitution and statutes relied upon by petitioner conferred any rights on a candidate for office. In that case a primary election was involved. In the later case of *U. S. v. Bathgate*, 246 U. S. 220, such contention respecting a General Election was again rejected. This Court did not consider the right of the candidate in the *Classic case*, although such question was considered by the lower court in dismissing the indictment. In its jurisdictional statement to this Court, the Government said:

“It was alleged that these defendants conspired to injure, oppress, threaten and intimidate citizens of the United States in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, i. e., (1) the right of registered voters who cast their ballots at this primary election to vote and to have their votes counted as cast for the candidate of their choice, and (2) the right of certain candidates at this primary election to have all votes cast for them counted as cast. The Government in this case is not seeking to sustain the application of Sections 51 and 52 [i.e. Sections 251 and 252, Title 18, United States Code] to the rights of candidates at primary elections. Consequently it is not challenging the ruling of the District Court [sustaining demurrer to the indictment] insofar as it applies to the second object of the conspiracy . . .”

⁸ *U. S. v. Classic*, 313 U. S. 299, *U. S. v. Saylor*, 322 U. S. 385, and *U. S. v. Mosley*, 238 U. S. 383.

Thus, the principles enunciated in the *Gradwell* and *Bathgate* cases as establishing the rights of a candidate for office were in no manner overruled or modified by the decision in the *Classic* case. That principle was adhered to by this Court, in effect, by denying certiorari (328 U. S. 870) in *Saunders v. Wilkins*, 152 F. (2) 235.

It is true that this Court was then considering sections of the Criminal Code (Title 18, Sections 251 and 252, U. S. C.), but the rights there protected are no different from those protected by the provisions of Section 43 of Title 8 of the Code.⁹

Petitioner's cause, therefore, must fail on both grounds—first, that the Code gives him a cause of action only against the person who deprived him of his right and did him the injury, and, second, because the right asserted is not one guaranteed to him under the Constitution and laws of the United States.

If petitioner's argument be followed to its logical conclusion and if petitioner be sustained in his contentions, the United States District Courts could be called upon to exercise their equitable powers in behalf of any candidate in any election, general or primary, for any office, from Constable to United States Senator. It would only be necessary for a defeated candidate to allege that votes had been fraudulently counted so as to deprive voters of rights guaranteed under the Fifteenth Amendment to the Constitution. Federal courts would be continually called upon to use their equitable powers "to achieve or frustrate a political result." This Court, speaking through Mr. Justice Holmes, refused to be drawn into such a situation when it said: "The traditional limits of a proceeding in equity have not embraced a remedy for political wrongs."¹⁰

⁹ *Hague v. Congress of Industrial Organizations*, 307 U. S. 496, *Burt v. City of New York*, 156 F. (2) 791, *Picking v. Pa. R. Co.*, 151 F. (2) 240.

¹⁰ *Giles v. Harris*, 189 U. S. 475. See also *Lane v. Wilson*, 307 U. S. 268, *Anthony v. Burrow*, 129 Fed. 783, *Turman v. Duckworth*, 68 F. Supp. 744, and *Blackman v. Stone*, 17 F. Supp. 102.

Point Three.

Petition is Not Entitled to Have the Cause remanded in Order to Amend in an Attempt to State a Cause of Action for Damages.

Authorities and Argument.

Petitioner refers to no authority, rule or precedent entitling him to a remand of a cause where no cause of action is alleged in the complaint. The Court of Appeals properly ordered dismissal under authority of the case cited in its opinion¹¹ and the many other cases of like effect decided by this Court. Petitioner contents himself by stating that "it seems obvious that petitioner would have a right to amend and ask for damages on the basis of the facts alleged in the complaint" (petitioner's brief, page 47).

The facts alleged in the complaint are wholly insufficient to state a cause for damages. Petitioner now asserts that he has a right to maintain an action for damages under Section 43, Title 8, U. S. C. As heretofore pointed out, this statute provides only for redress against the person who "subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." If it be assumed that petitioner, as a candidate for office, was deprived of any such rights, nevertheless, his cause of action would be against the persons who were guilty of depriving him thereof. There is no allegation in the petition that any of the defendants named therein were guilty of depriving petitioner of any of his rights. It is alleged that fraud was committed in Jim Wells and Zapata Counties. The election officials in those counties who could have committed any of the overt acts alleged are not parties to the cause of action. It is not alleged that any of the other parties to the suit, including respondent Johnson, had any knowledge

¹¹ *Smith v. Vulcan Iron Works*, 165 U. S. 518.

of the alleged fraud, and no conspiracy is alleged. Only the defendant Tom L. Tyson, Chairman of the State Democratic Convention (who resides in Navarro County, Texas) and the defendants composing the Election Board of Tarrant County are residents within the territorial jurisdiction of the District Court for the Northern District of Texas, where the case was filed. Tyson did not take office until after the alleged fraud occurred, and both he and the Tarrant County Election Board performed only ministerial duties. Jim Wells and Zapata Counties, where the election officials reside, are in the territorial jurisdiction of the District Court for the Southern District of Texas, and the other defendants are alleged to reside within the territorial jurisdiction of the District Court for the Western District of Texas.

CONCLUSION.

From the foregoing, it is obvious that petitioner's only object in asking for certiorari and the only purpose which he hopes to gain thereby is to have this Court render an advisory opinion on an abstract question, namely, whether petitioner, as a candidate for the Democratic nomination for United States Senator from Texas, had rights, as such, which are guaranteed to him under the Constitution and laws of the United States, for deprivation of which he could maintain a suit for damages under the provisions of Section 43, Title 8, of the U. S. Code. This Court would be

proceeding contrary to all precedent if it granted certiorari on the issues presented in the petition.

WHEREFORE, respondents respectfully submit that the petition for certiorari should be denied.

JOHN H. CROOKER,
Houston, Texas.

JOHN D. COFER,
Austin, Texas.

JAMES V. ALLRED,
Houston, Texas.

THURMAN ARNOLD,
Washington, D. C.

ABE FORTAS,
Washington, D. C.

ALVIN J. WIRTZ,
Austin, Texas.

Attorneys for Respondents.

EVERETT L. LOONEY,
Austin, Texas.

A. W. MOURSUND, JR.,
Johnson City, Texas.

Attorneys for Intervener Respondents.

Copies of this brief have been sent to each of the attorneys for petitioner.

Opinion delivered by Mr. Chief Justice Gureton.

This suit is before us on motion for leave to file a petition for mandamus. Because of the importance of the matter involved, we set the motion down for hearing and notified the parties respondent, all of whom appeared and answered, both by written pleadings and oral arguments.

The petition for mandamus is presented by Mrs. Miriam A. Ferguson against the Chairman and Secretary and the members of the State Democratic Executive Committee. Mrs. Jane Y. McCallum, Secretary of State, in her official capacity, and Governor R. S. Sterling, in his private capacity as a candidate, were made parties respondent by the pleadings because of their relationship to the subject matter of the suit. The relator alleges in her petition that she and the respondent R. S. Sterling, together with others, were candidates before the democratic state primary election held on July 24, 1932, for the nomination of that party of its candidate for the office of governor; that at this first primary she and the respondent Sterling received the highest number of votes cast, and by reason thereof became the contending candidates at the second state democratic primary held on the 27th of August, 1932. She states that at the second primary she received approximately 4,000 more votes than her opponent, and that this fact will be shown by the statutory returns made by the county chairmen to the State Democratic Executive Committee. The purpose of this suit is to obtain the issuance of a writ of mandamus to require the State Democratic Executive Committee to canvass the returns, tabulate the votes, and certify the same to the State Convention which meets on September 13, 1932, as provided by statute. The prayer of the petition, in so far as necessary to be considered, is as follows:

WHEREFORE, your Relator respectfully prays that this Honorable Court will make its peremptory order forthwith, commanding the Respondent Committee - its president, its secretary and each member thereof, that it will meet in the City of Lubbock on Monday the 12th day of September, 1932, and that it shall then open and canvass the returns of the second primary election of August 27, 1932, held to nominate candidate for state offices, as certified by the various county chairmen to the state chairman, and shall prepare a tabulated statement, showing the number of votes received by each candidate for Governor, in each county, and that when prepared, such statement shall be approved by the

respondent committee and certified by its chairman, and further that such tabulated statement shall be by its chairman presented to the chairman of the State Convention immediately after its temporary organization on September 13, 1932.

"That in the canvassing of said returns and in the preparation of the tabulated statement showing the number of votes received by each candidate for Governor, the defendant committee will take into consideration only such matters as are certified in the said returns by the various county chairmen and will not take into consideration, or be governed to any extent whatever, by any matters or things, whether of irregularity, fraud or other illegality or things whatsoever, not shown in said returns, as certified by the said various county chairmen."

That portion of the statute here involved reads:

"Art. 3137. **** On the second Monday after the fourth Saturday in August, 1926, and every two years thereafter, the State executive committee shall meet at the place selected for the meeting of the State convention and shall open and canvass the returns of the second primary election held to nominate candidates for State offices as certified by the various county chairman (chairmen) to the State chairman, and shall prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the State committee and certified by its chairman. At this meeting the State committee shall also prepare a complete list of the delegates elected to the State conventions from each county, as certified to the State chairman by each county chairman. The State chairman shall present said tabulated statement and said list of delegates to the chairman of the State convention immediately after its temporary organization on the following day, for its approval or disapproval."

1. It will be noted from the above statute that it is the duty of the State Executive Committee to open and canvass the returns of the primary election "as certified by the various county chairmen to the State chairman"; that the Committee is also to prepare "a tabulated statement showing the number of votes received by each such candidate in each county." The Chairman of the State Executive Committee is to present this tabulated statement to the Chairman of the State Convention immediately after its organization.

By Article 3138 of the statutes it is made the duty of the State Convention "to canvass the vote cast in the entire State for each candidate

for each State office, as shown by the statement thereof presented to it by the State Committee." The Article also provides that the convention shall declare the candidates who have received the majority of votes cast, etc., the nominees of the party for the offices involved. This Article also makes it the duty of the Chairman and Secretary of the State Convention forthwith to certify such nominations to the Secretary of State.

In neither of the Articles to which we have referred is the subject of contesting a primary election mentioned. This, however, is cared for by other Articles of the Statutes.

Article 3148 provides that a contest may be filed with a party executive committee in a certain manner within five days after the result of the primary election has been declared by the Committee or by the Convention.

Articles 3146 and 3147 relate to and govern the same subject.

Article 3149 provides for the opening of ballot boxes on a statutory contest.

Articles 3151, 3152, and 3153 provide for the contests of primary elections through the courts of the State.

Article 3146, previously mentioned, expressly relates to contests of primary elections based on charges of fraud or illegality in the method of conducting the elections. These contests, as previously stated, are to be instituted in the manner provided by Article 3148, within a designated number of days after the result of the primary election has been declared by the Committee or Convention.

2. It is obvious, we think, from these statutes, which we have but briefly referred to in this opinion, but which we have examined carefully, that the duties of the State Executive Committee are those of a canvassing board.

It is well settled by the authorities that, aside from their quasi judicial power to determine the genuineness of election returns, the functions and duties of the canvassing board are ministerial. They derive their powers from the Constitution or Statutes, and have no other powers, functions, or duties than those named. 20 Corpus Juris, p. 200, sec. 254.

Corpus Juris further states the rule:

"It is a common error for a canvassing board to over-estimate its powers. Where there is no question as to the

genuineness of the returns or that all the returns are before them, the powers and duties of canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained. They have no power to go behind the returns and ascertain the qualifications of the voters or otherwise inquire into the regularity of the election. Fraud, bribery, violence or other matters affecting the regularity of the election are to be passed on by the proper tribunal and not by the board of canvassers. The canvassers are not authorized to determine the legality or illegality of the votes cast at the election; to decide upon the official title of the election officers; to entertain a contest of the election; to determine the constitutionality of a statute; to inquire into the validity of the certificates of nomination of candidates, to pass upon the eligibility of a candidate to office, to decide whether there are any vacancies in any offices, to determine what was done at an election in a previous year, or to reverse an act of their predecessors." 20 Corpus Juris, p. 200, sec. 255.

Again, the same authority in part declares:

"It is settled beyond controversy that canvassers cannot go behind the returns. The returns provided for by law are the sole and exclusive evidence from which a canvassing board or official can ascertain and declare the result. The canvassers are not authorized to examine or consider papers or documents which are transmitted to them with the returns, or as returns, but which under the statutes do not constitute part of the returns. Neither are they at liberty to receive and consider extrinsic evidence, unless the official returns are destroyed before they are canvassed, in which case secondary evidence of their contents may be received."

3. The authorities likewise hold that, in the absence of a statute conferring it, a board of canvassers has neither express nor implied power to recount the ballots. 20 Corpus Juris, p. 203, sec. 259.

We have previously adverted to the fact that a board of canvassers have the power to determine the genuineness of election returns. 20 Corpus Juris, p. 201, sec. 256, states the rule illustrative of this power as follows:

"Canvassers have the quasi judicial power to determine whether the papers transmitted to them are genuine election returns signed by the proper officers. Thus, where what purports to be two or more returns from the same election district are received, the canvassing board must necessarily determine from the face of the papers which one shall be regarded as the true and genuine return; but there is no room for the exercise of such discretionary power where there is before the canvassing board or official only one document which purports to be the certified abstract or return required by law. The canvassers are not required to receive or treat as a return any paper which does not appear on its face to be such a return. If a paper purporting to be a return is obviously false or a forgery the canvassers should disregard it; but if it is doubtful they must include it in the count. It is the duty of the canvassers to receive and count all returns sent to them which are not obviously spurious, however false and fraudulent they may be in fact. Where the returns are in due form and are properly authenticated and hence are valid on their face, they cannot be rejected by the canvassers. The canvassers must decide what are the returns from the face of the papers or documents submitted to them as returns; they are not to institute any inquiries as to their authenticity."

Since the State Democratic Executive Committee is obviously a canvassing board, these elementary rules of law are applicable to it in the performance of its statutory duties. It does not follow, however, from what we have said that we should permit the petition for mandamus to be filed, or that a mandamus should issue against the Committee. The respondent State Democratic Executive Committee in its sworn answer has denied all the allegations of the petition which could be construed in effect as charges that the Committee would not canvass the returns in accordance with the statute and the rules of law which arise therefrom. After a general denial, the Committee in its answer states:

"4. For further answer, respondents allege that they and each of them, acting individually and acting collectively as members of the said State committee, intend in good faith to meet at Lubbock on the date prescribed by law, to wit, September 12, 1932, and in said meeting duly assembled to then proceed under the authority of and in compliance with the terms of R.C.S., article 3137, and in the manner prescribed by the laws of this State, to open and canvass the returns of the second primary election of the Democratic party held on August 27, 1932, to nominate candidates for State offices, including that of governor, as certified by the various county chairmen to the State chairman, and to prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the said State committee, and certified by its chairman W. O. Huggins, and shall be presented to the Chairman of the State Democratic Convention immediately after its organization on the following day. Further, in performing the above described acts and duties, these respondents shall act as prescribed by law, impartially, conscientiously and legally, uninfluenced by any threats, attempts to intimidate, or by any threatened court actions, made by the partisans or either of the candidates for nomination of the Democratic party for governor or by anyone else.

"5. That none of these respondents has heretofore expressed any intention to not canvass the returns of the said election impartially and in accordance with the laws of this State, and that none of them has committed any act in violation of the election laws of this State, or has indicated in any way that he is preparing to violate such election laws. In this connection there is no basis in fact or in law for the making of the charges against these respondents which are contained in the petition of the relator, and the said allegations are untrue."

It is thus seen that the respondents have not refused, or indicated any purpose to refuse or fail, to follow the statute governing them in the canvass of the primary election returns, and to do the very things which the relator asks that they be required to do by mandamus. On the contrary, the answer of the Committee shows a bona fide purpose and intention to comply with the statute.

4. The rule is an elementary one that a writ of mandamus will not lie to compel the performance of an act which the respondent shows a

willingness to perform without coercion. 38 Corpus Juris, p. 554, sec. 244 People v. Dunne, 258 Ill., 441, 101 N. E., 560, 45 L.R.A. (N.S.) 500; Double v. McQueen, 96 Mich., 39, 55 N. W., 564; State v. Nash, 134 Minn., 73, 158 N. W., 730; Bailey v. Garvin, 280 Fed., 677; Reynolds v. Egan, 123 La., 114, 48 So., 764; St. Louis & S. F. R. Co. v. Messenger, 26 Okla., 590, 110 Pac., 893; State v. Sunset Tel. & Tel. Co., 30 Wash., 676, 71 Pac. 198.

The case of People v. Dunne, just cited, appears to be precisely in point. The action was one for mandamus against a statutory board whose duty it was to canvass the result of an election. The points made in briefs and argued by counsel for the relators were that the duties of the State Canvassing Board were purely ministerial; that a writ of mandamus might issue against the governor, who was a member of the canvassing board, to compel the performance of such duties; that the State Canvassing Board had no right to look back of the abstracts of votes and the certificates of the county canvassing boards, but should have accepted them and declared the result accordingly. That the State Canvassing Board is a permanent body, and the act sought to be held void was one which did not require a reassembling of the Board. The brief of the Attorney General, who appeared for the State Canvassing Board, made the following points, namely: That the State Canvassing Board can act only upon certified statements of the county canvassers, and had no authority to procure corrected returns or go behind the returns or receive testimony either to sustain or invalidate them; that the duties of the Canvassing Board were purely ministerial, and that mandamus would lie to compel the Board to issue a certificate to the person having the greatest number of votes as shown by the returns; that while a writ of mandamus could not issue to control the head of an executive department in the discharge of a duty involving judgment and discretion, yet the writ could issue where the duty was merely ministerial. In discussing the case the Supreme Court of the State of Illinois held that the writ of mandamus could only issue to compel a party to act when it was his duty to act without it; that the writ would not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion, the court in part said:

"It will therefore be seen that there is entire agreement between the counsel for the relators and the attorney general, representing the defendants, concerning the questions of law involved; and, there being no controversy or difference of opinion between them respecting the law and the duty of the state canvassing board, there does not seem to be any necessity for calling into exercise the power of the court to coerce the defendants to do what they admit to be their duty under the law. The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty which one charged with the duty has refused to perform. The writ can only be issued to compel a party to act when it was his duty to act without it. It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none. People ex rel. McKee v. Gilmer, 10 Ill., 242, Ottawa v. People, 48 Ill., 233; People ex rel. Peoria & R. I. R. Co. v. Cline, 63 Ill, 394. If it is the duty of the defendants to do the acts sought to be coerced by the writ, such acts would not be any more valid or legal if done under the command of the court. The office of the writ is to compel action by the unwilling. There must be a refusal to perform the act; and, if a personal right is involved, a refusal must follow a demand. The writ will not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion. People ex rel. National Cigar Co. v. Dulaney, 96 Ill., 503." (Italics ours).

Fear is expressed in the petition that the State Democratic Executive Committee might be intimidated by extrinsic forces, or that their deliberations might be interfered with through an injunction issued by some district judge. We do not think the allegations made sufficient to warrant the issuance of the writ of mandamus against the Committee. The Committee in its answer expressly declares that in canvassing the returns it "shall act as prescribed by law, impartially, conscientiously and legally, uninfluenced by any threats, attempts to intimidate, or by any threatened court actions made by the partisans of either of the candidates for nomination of the Democratic Party for Governor, or by anyone else." (Italics ours)

The petition for mandamus attempts to make the State Democratic Convention, its president, secretary, and each and all the delegates and members thereof, participating and to participate, parties respondent, and contains a prayer asking for a peremptory order of this Court directing the State Democratic Convention, its president, secretary, and each and all of its delegates and members, to canvass the returns of the primary election and make statutory certificates, etc.

The State Democratic Convention thus far has no existence, has not been served, has not appeared, and is plainly not a party to this proceeding. Its president and secretary have not been elected, and the names of its delegates are not shown in the petition. None of these are parties to this proceeding, and none appeared at the argument.

Since it is apparent that the respondents, members of the State Democratic Executive Committee, have not breached any statutory duty due to the relator, and have shown clearly that they do not intend to do so, it is obvious that were we to permit the filing of a petition for mandamus, we would necessarily refuse to grant the writ. This being the state of the record, and after appearance by all parties involved and full argument, we deem it our duty to overrule the motion for leave to file, and it is accordingly overruled.



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

July 31, 1948

Hon. R. E. Schneider, Jr.
County Attorney
Live Oak County
George West, Texas

Opinion No. V-643

Re: Qualification of
voters; duties of
and advice to elec-
tion officers.

Dear Sir:

We refer to your letter in which you submit
the following questions:

"1. What are the requirements for
qualification to vote in the elections in
Texas concerning the ability to read and/or
write the English language? Speak and/or
understand the same?

"2. Are the Election Judges required
to assist in marking the ballot if requested
to do so for a potential voter between the
ages of twenty-one and sixty in good physi-
cal condition and not blind?

"3. Are the Election Judges required
to mark the ballot, if so requested, of a
potential voter between the ages of twenty-
one and sixty in good physical condition and
not blind if the only reason he or she is un-
able to mark his or her own ballot is his or
her illiteracy?

"4. In whom in Texas is the authority
vested to order and/or advise the Election
Judges as to how they shall conduct their
boxes and/or whom they shall challenge as to
his or her right to vote and to whom they
shall deny a ballot?"

The only limitation of the qualification of
voters in Texas is contained in Section 1 of Article VI
of the State Constitution which does not disqualify per-
sons who are not able to read, write, speak and under-
stand the English language. Sections 2 and 3 of Arti-
cle VI provide that every person subject to none of the

disqualifications stated in said section 1 who shall have attained the age of 21 years, who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election and the last six months within the district or county in which such person offers to vote, shall be deemed a qualified voter; provided that any voter who is subject to pay a poll tax shall have paid the same before the first day of February next preceding such election.

In Ramsey v. Wilhelm, 52 S. W. (2d) 757 (error refused), the Court said:

"The Constitution itself defines the qualifications of a legal voter, and the legislature is without power to restrict or extend these requirements."

There is no law which requires that a voter shall be able to read, write, speak or understand the English language. We answer your first question accordingly.

Article 3010, Vernon's Civil Statutes provides for aid to voters by election officers. It reads:

"Not more than one person at the same time shall be permitted to occupy any one compartment, voting booth or place prepared for a voter, nor shall any assistance be given a voter in preparing his ballot, except when a voter is unable to prepare the same himself because of some bodily infirmity, such as renders him physically unable to write or is over sixty years of age and is unable to read and write, in which case two judges of such election shall assist him, they having been first sworn that they will not suggest, by word or sign or gesture, how such voter shall vote; and they will confine their assistance to answering his questions, to naming candidates, and the political parties to which they belong, and that they will prepare his ballot as such voter himself shall direct; provided that the voter must in every case explain in the English language how he wishes to vote, and no judge of the election shall use any other than the English language in aiding the voter, or in performing

any duty as such judge of the election. Where any assistance is rendered in preparing a ballot other than as herein allowed, the ballot shall not be counted, but shall be void for all purposes. If the election be a general election, the judges who assist such voters shall be of different political parties, if there be such judges present, and if the election be a primary election one or more supervisors may be present when the assistance herein permitted is being given, but each supervisor must remain silent except in cases of irregularity or violation of the law."

In Carter v. White, 161 S. W. (2d) 525 the Court of Civil Appeals had the question of assistance to voters by election officers under consideration and said:

"A summary of the assistance as found by the court is as follows: Five of the eleven asked for information as to how to vote a 'straight ticket' or a 'straight Democratic ticket,' and were told generally how to do it, two of whom inquired if the others should be marked out and were told yes. One voter was unable to find the President's name on the ticket and asked how he might vote for him, which was explained to him. One was afraid he might mutilate his ballot and asked what constituted a mutilated ballot, which was explained to him. One sought information as to how to vote for or against constitutional amendments, which was explained. Another explained she had never voted at a Presidential Election, and asked for general information, and engaged in a general discussion of how to do so. One asked if the ballot is marked part way down if it would destroy the whole ballot, and was told it would not, and was shown where the independent and socialist and other candidates were on the ballot. Another stated he had never voted and asked for a general explanation of the ballot, which was done. All conversations were with and all explanations were made by election officials after which each voter then retired to the place provided for marking ballots and marked and voted the ballot according to his own wishes and intentions.

"Plaintiff takes the position these matters constituted illegal assistance under the law and rendered each and all the eleven ballots void. None of the voters are within any exception of the statute authorizing assistance.

"We think it clear from the provisions of Art. 3010, R. C. S. 1925, and other provisions hereafter noticed, assistance or aid means assistance or aid in the marking of the ballot, and does not extend to and include general instructions and advice, such as given the voters here, which do not and cannot become injurious to contestant. If advice or instruction is such as would amount to assistance in marking the names of candidates on the ballot and resultant injury to contestant, then it would become illegal and render the ballot void. It cannot be presumed the Legislature intended to apply unreasonable and senseless rules in situations like this, and the courts will indulge none such.

"That assistance and aid refers to the marking of the ballot is made plain by the provisions of Arts. 3008, 3012, R.C.S. 1925, and article 2942a, Vernon's Ann. Civ. St."

In Lee v. Whitehead, 182 S. W. (2d) 744 the Court of Civil Appeals said:

"With reference to the ballots cast by Mrs. Joe Katzur and Mrs. Albert Volkmann, which the trial judge rejected because of his findings that those voters were assisted in preparing their ballots by election officials through the use of languages other than English, to-wit; Polish and German, respectively, the trial judge found that in both cases the voters were so assisted by election officials, that the English language was not used in either case, but that Polish was used in the case of Mrs. Katzur and German in the case of Mrs. Volkmann. The testimony fully supported these findings, which we adopt. As distinguished from the case of irregularities in absentee voting, the statute (Art. 3010) expressly provides that where language other than

English is used in explaining and/or assisting voters in casting their ballots, such ballots 'shall not be counted, but shall be void for all purposes.'"

To the same effect is *Huff v. Duffield*, 251 S. W. 298. There assistance was given to Mexicans who could not understand English. They were told how to vote Democratic, Republican, or Socialist; how to vote for Peddy for Sheriff, and that Teller was running for constable. The Court held all such votes illegal. The Court said, concerning the law:

"... it is mandatory in stating the only circumstance under which assistance shall be given those who are physically unable to prepare a ballot and those over a certain age. . . . They are the only ones who can be assisted, and that assistance can only be given when requested in English. . . Whether a wise law or not, it is the law and must be enforced."

The general rule is stated in 29 C. J. S. 294 that inability to read or write is ground for assistance in some jurisdictions; but in jurisdictions where physical disability is the only ground for assisting voters, illiteracy does not entitle a voter to assistance. To the same effect is 18 Am. Jur. 328. Article 3010 V.C.S. provides for assistance to a person who is over sixty and is unable to read and write. The natural implication therefore is that persons under 60 not physically handicapped may not be assisted even though they are illiterate. The Court stated in *Clark v. White*, *supra*:

"We think the primary and chief purpose in making illegal assistance in the marking of a ballot is to prevent fraud and the substitution of the will of some other for that of the voter."

In other words, the illiterate person would not be able to tell whether the person assisting him was voting as he directed or not. That Court distinguished between explaining a ballot and the actual marking thereof. For the illiterate person, the person assisting would have to participate in the actual marking of the ballot. This the Legislature has not permitted.

In view of the foregoing your questions 2 and 3 are answered in the negative.

Other than the procedural statutes relating to primary and general elections, we have found no law which authorizes any officer to order or advise election judges concerning their duties in conducting an election.

SUMMARY

There is no requirement in the laws of Texas that a person who offers to vote shall be able to read, write, speak or understand the English language. Election judges are not required or permitted to mark or assist in marking the ballot of a person between the ages of 21 and 60 years, though such person be unable to mark his ballot because of illiteracy or because such person cannot read or write the English language.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By

W. T. Williams

W. T. Williams
Assistant

WTW:wb

APPROVED:

Rice Daniel

ATTORNEY GENERAL

The Supreme Court
and the Chief Law Officers
of the State say the question
is moot after the general election.
It gets "mooted" every day.

In the general election, only the
right of the voter to have his
vote counted, is material.



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS

PRICE DANIEL,
ATTORNEY GENERAL

November 18, 1948

Hon. J. G. Anderson
County Attorney
Freestone County
Fairfield, Texas

Opinion No. V-719

Re: Election of County At-
torney who obtained his
license to practice law
after the primary and
before the general
election.

Dear Sir:

Your letter states that Mr. Elmer McVey was a candidate for the office of County Attorney in the July primary election. At that time he was not a licensed attorney. No protest as to his eligibility was raised. He nevertheless received the nomination. Subsequent to the primary and before the general election in November, he became duly licensed. He was elected at the November general election. Article 332 V. C. S. provides that no person who is not a licensed attorney shall be eligible to the office of County Attorney. You request an opinion as to whether McVey was legally nominated and elected in view of that statute, and whether he may legally assume the office.

Section 21, Article V of the Constitution reads, in part:

"A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of two years. . . ."

Article 332, V. C. S. provides that "no person who is not a duly licensed attorney at law shall be eligible to the office of district or county attorney."

Mr. McVey was ineligible at the time his name was placed on the primary ballot. He thereafter became a duly licensed attorney at law. On November 2, 1948, after having been licensed, he received more votes for county attorney in the general election on that date than were

cast for any other person for that office.

In *Cunningham v. McDermett*, 277 S. W. 218 (error refused), Cunningham defeated McDermett in the primary. In the general election Cunningham received 75 votes and McDermett received 97 write-in votes. Twenty-five of McDermett's voters had voted in the primary. It was contended that McDermett could not take the benefit of said 25 voters. The Court said:

"Appellant claims that on account of the provisions of article 3166, R. S. McDermett would have been disqualified from having his name placed on the official ballot as the candidate of any party or as an independent or nonpartisan candidate, and with his position in this matter we must agree (*Westerman v. Mims*, 111 Tex. 29, 227 S. W. 178); yet we think there is a material difference between a person's right to have his name placed upon the official ballot and his right to an office to which a majority of the voters have seen fit to elect him by writing his name on the ballot. . . ."

". . . Therefore, we must disagree with appellant on his proposition that, because McDermett had theretofore participated in the Democratic primary, and had filed a contest before the county Democratic executive committee, he was legally disqualified to be elected to the office of county and district clerk."

In Opinion No. O-2632-A by a former Attorney General, it was held, in accordance with the Supreme Court decision in *Allen v. Fisher*, 118 Tex. 38, 9 S. W. (2d) 731, that where an ineligible candidate received the largest number of votes, the second high candidate was not the nominee. The latest case to that effect is *Ramsey v. Dunlop* (1947) ____ Tex. ____, 205 S. W. (2d) 979.

In view of the foregoing we are of the opinion that Mr. McVey, having obtained his license as an attorney at law before the general election, if he received more votes of the qualified voters voting at the election than were cast for any other person for county attorney, the

question of ineligibility at the date of the primary is unimportant and moot. Having been duly licensed, he is eligible to enter the office of County Attorney.

SUMMARY

Where a candidate for county attorney was a duly licensed attorney at law when he received more votes for the office than were cast for any other person at the general election, the fact that such candidate was not an attorney when he was nominated in the primary election is immaterial. Having become duly licensed, he is eligible to assume the office.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

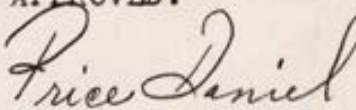


By

W. T. Williams
Assistant

WTW:wb

APPROVED:


PRICE DANIEL
ATTORNEY GENERAL

January 6, 1949

Dear Nick:

The brief you filed yesterday was another job well done. I just hope the Court does as well as my lawyers have.

Sincerely

Lyndon B. Johnson

wj:ga
Supreme Court case
???
Honorable L. A. Nikolovic
Arnold, Fortas and Porter
1200 Eighteenth Street, N. W.
Washington, 6, D. C.

Wick
of 4 1/2
4, and 19
2 1/2 1/2

JAN 6 A.M.

ARNOLD, FORTAS & PORTER
1200 EIGHTEENTH STREET, N. W.
WASHINGTON 6, D. C.

TELEPHONE
EXECUTIVE 7300

THURMAN ARNOLD
ABE FORTAS
PAUL A. PORTER
WALTON HAMILTON
MILTON V. FREEMAN
NORMAN DIAMOND
REED MILLER
L.A. NIKOLORIC

January 5, 1949

Honorable Lyndon B. Johnson
United States Senate
Washington, D. C.

Dear Senator Johnson:

We filed the enclosed today in order
to make Texas safe for democracy.

Best regards.

Sincerely,

L.A.

L. A. Nikoloric

Enclosure

MIRIAM A. FERGUSON v. W. O. HUGGINS ET AL, 122 Texas 95, 52 S.W.
(2) 904. Decided September 10, 1932.

Opinion delivered by Mr. Chief Justice Cureton.

This suit is before us on motion for leave to file a petition for mandamus. Because of the importance of the matter involved, we set the motion down for hearing and notified the parties respondent, all of whom appeared and answered, both by written pleadings and oral arguments.

The petition for mandamus is presented by Mrs. Miriam A. Ferguson against the Chairman and Secretary and the members of the State Democratic Executive Committee. Mrs. Jane Y. McCallum, Secretary of State, in her official capacity, and Governor R. S. Sterling, in his private capacity as a candidate, were made parties respondent by the pleadings because of their relationship to the subject matter of the suit. The relator alleges in her petition that she and the respondent R. S. Sterling, together with others, were candidates before the democratic state primary election held on July 24, 1932, for the nomination of that party of its candidate for the office of governor; that at this first primary she and the respondent Sterling received the highest number of votes cast, and by reason thereof became the contending candidates at the second state democratic primary held on the 27th of August, 1932. She states that at the second primary she received approximately 4,000 more votes than her opponent, and that this fact will be shown by the statutory returns made by the county chairmen to the State Democratic Executive Committee. The purpose of this suit is to obtain the issuance of a writ of mandamus to require the State Democratic Executive Committee to canvass the returns, tabulate the votes, and certify the same to the State Convention which meets on September 13, 1932, as provided by statute. The prayer of the petition, in so far as necessary to be considered, is as follows:

"WHEREFORE, your Relator respectfully prays that this Honorable Court will make its peremptory order forthwith, commanding the Respondent Committee - its president, its secretary and each member thereof, that it will meet in the City of Lubbock on Monday the 12th day of September, 1932, and that it shall then open and canvass the returns of the second primary election of August 27, 1932, held to nominate candidates for state offices, as certified by the various county chairmen to the state chairman, and shall prepare a tabulated statement, showing the number of votes received by each candidate for Governor, in each county, and that when prepared, such statement shall be approved by the

respondent committee and certified by its chairman, and further that such tabulated statement shall be by its chairman presented to the chairman of the State Convention immediately after its temporary organization on September 13, 1932.

"That in the canvassing of said returns and in the preparation of the tabulated statement showing the number of votes received by each candidate for Governor, the defendant committee will take into consideration only such matters as are certified in the said returns by the various county chairmen and will not take into consideration, or be governed to any extent whatever, by any matters or things, whether of irregularity, fraud or other illegality or things whatsoever, not shown in said returns, as certified by the said various county chairmen."

That portion of the statute here involved reads:

"Art. 3137. * * * * On the second Monday after the fourth Saturday in August, 1926, and every two years thereafter, the State executive committee shall meet at the place selected for the meeting of the State convention and shall open and canvass the returns of the second primary election held to nominate candidates for State offices as certified by the various county chairman (chairmen) to the State chairman, and shall prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the State committee and certified by its chairman. At this meeting the State committee shall also prepare a complete list of the delegates elected to the State conventions from each county, as certified to the State chairman by each county chairman. The State chairman shall present said tabulated statement and said list of delegates to the chairman of the State convention immediately after its temporary organization on the following day, for its approval or disapproval."

1. It will be noted from the above statute that it is the duty of the State Executive Committee to open and canvass the returns of the primary election "as certified by the various county chairmen to the State chairman"; that the Committee is also to prepare "a tabulated statement showing the number of votes received by each such candidate in each county." The Chairman of the State Executive Committee is to present this tabulated statement to the Chairman of the State Convention immediately after its organization.

By Article 3138 of the statutes it is made the duty of the State Convention "to canvass the vote cast in the entire State for each candidate

for each State office, as shown by the statement thereof presented to it by the State Committee." The Article also provides that the convention shall declare the candidates who have received the majority of votes cast, etc., the nominees of the party for the offices involved. This Article also makes it the duty of the Chairman and Secretary of the State Convention forthwith to certify such nominations to the Secretary of State.

In neither of the Articles to which we have referred is the subject of contesting a primary election mentioned. This, however, is cared for by other Articles of the Statutes.

Article 3148 provides that a contest may be filed with a party executive committee in a certain manner within five days after the result of the primary election has been declared by the Committee or by the Convention.

Articles 3146 and 3147 relate to and govern the same subject.

Article 3149 provides for the opening of ballot boxes on a statutory contest.

Articles 3151, 3152, and 3153 provide for the contests of primary elections through the courts of the State.

Article 3146, previously mentioned, expressly relates to contests of primary elections based on charges of fraud or illegality in the method of conducting the elections. These contests, as previously stated, are to be instituted in the manner provided by Article 3148, within a designated number of days after the result of the primary election has been declared by the Committee or Convention.

2. It is obvious, we think, from these statutes, which we have but briefly referred to in this opinion, but which we have examined carefully, that the duties of the State Executive Committee are those of a canvassing board.

It is well settled by the authorities that, aside from their quasi judicial power to determine the genuineness of election returns, the functions and duties of the canvassing board are ministerial. They derive their powers from the Constitution or Statutes, and have no other powers, functions, or duties than those named. 20 Corpus Juris, p. 200, sec. 254.

Corpus Juris further states the rule:

"It is a common error for a canvassing board to over-estimate its powers. Where there is no question as to the

genuineness of the returns or that all the returns are before them, the powers and duties of canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained. They have no power to go behind the returns and ascertain the qualifications of the voters or otherwise inquire into the regularity of the election. Fraud, bribery, violence or other matters affecting the regularity of the election are to be passed on by the proper tribunal and not by the board of canvassers. The canvassers are not authorized to determine the legality or illegality of the votes cast at the election; to decide upon the official title of the election officers; to entertain a contest of the election; to determine the constitutionality of a statute; to inquire into the validity of the certificates of nomination of candidates, to pass upon the eligibility of a candidate to office, to decide whether there are any vacancies in any offices, to determine what was done at an election in a previous year, or to reverse an act of their predecessors." 20 Corpus Juris, p. 200, sec. 255.

Again, the same authority in part declares:

"It is settled beyond controversy that canvassers cannot go behind the returns. The returns provided for by law are the sole and exclusive evidence from which a canvassing board or official can ascertain and declare the result. The canvassers are not authorized to examine or consider papers or documents which are transmitted to them with the returns, or as returns, but which under the statutes do not constitute part of the returns. Neither are they at liberty to receive and consider extrinsic evidence, unless the official returns are destroyed before they are canvassed, in which case secondary evidence of their contents may be received."

3. The authorities likewise hold that, in the absence of a statute conferring it, a board of canvassers has neither express nor implied power to recount the ballots. 20 Corpus Juris, p. 203, sec. 259.

We have previously adverted to the fact that a board of canvassers have the power to determine the genuineness of election returns. 20 Corpus Juris, p. 201, sec. 256, states the rule illustrative of this power as follows:

"Canvassers have the quasi judicial power to determine whether the papers transmitted to them are genuine election returns signed by the proper officers. Thus, where what purports to be two or more returns from the same election district are received, the canvassing board must necessarily determine from the face of the papers which one shall be regarded as the true and genuine return; but there is no room for the exercise of such discretionary power where there is before the canvassing board or official only one document which purports to be the certified abstract or return required by law. The canvassers are not required to receive or treat as a return any paper which does not appear on its face to be such a return. If a paper purporting to be a return is obviously false or a forgery the canvassers should disregard it; but if it is doubtful they must include it in the count. It is the duty of the canvassers to receive and count all returns sent to them which are not obviously spurious, however false and fraudulent they may be in fact. Where the returns are in due form and are properly authenticated and hence are valid on their face, they cannot be rejected by the canvassers. The canvassers must decide what are the returns from the face of the papers or documents submitted to them as returns; they are not to institute any inquiries as to their authenticity."

Since the State Democratic Executive Committee is obviously a canvassing board, these elementary rules of law are applicable to it in the performance of its statutory duties. It does not follow, however, from what we have said that we should permit the petition for mandamus to be filed, or that a mandamus should issue against the Committee. The respondent State Democratic Executive Committee in its sworn answer has denied all the allegations of the petition which could be construed in effect as charges that the Committee would not canvass the returns in accordance with the statute and the rules of law which arise therefrom. After a general denial, the Committee in its answer states:

"4. For further answer, respondents allege that they and each of them, acting individually and acting collectively as members of the said State committee, intend in good faith to meet at Lubbock on the date prescribed by law, to wit, September 12, 1932, and in said meeting duly assembled to then proceed under the authority of and in compliance with the terms of R.C.S., article 3137, and in the manner prescribed by the laws of this State, to open and canvass the returns of the second primary election of the Democratic party held on August 27, 1932, to nominate candidates for State offices, including that of governor, as certified by the various county chairmen to the State chairman, and to prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the said State committee, and certified by its chairman, W. O. Huggins, and shall be presented to the Chairman of the State Democratic Convention immediately after its organization on the following day. Further, in performing the above described acts and duties, these respondents shall act as prescribed by law, impartially, conscientiously and legally, uninfluenced by any threats, attempts to intimidate, or by any threatened court actions, made by the partisans of either of the candidates for nomination of the Democratic party for governor or by anyone else.

"5. That none of these respondents has heretofore expressed any intention to not canvass the returns of the said election impartially and in accordance with the laws of this State, and that none of them has committed any act in violation of the election laws of this State, or has indicated in any way that he is preparing to violate such election laws. In this connection there is no basis in fact or in law for the making of the charges against these respondents which are contained in the petition of the relator, and the said allegations are untrue."

It is thus seen that the respondents havenot refused, or indicated any purpose to refuse or fail, to follow the statute governing them in the canvass of the primary election returns, and to do the very things which the relator asks that they be required to do by mandamus. On the contrary, the answer of the Committee shows a bona fide purpose and intention to comply with the statute.

4. The rule is an elementary one that a writ of mandamus will not lie to compel the performance of an act which the respondent shows a

willingness to perform without coercion. 38 Corpus Juris, p. 554, sec. 24; People v. Dunne, 258 Ill., 441, 101 N. E., 560, 45 L.R.A. (N.S.) 500; Double v. McQueen, 96 Mich., 39, 55 N. W., 564; State v. Nash, 134 Minn., 73, 158 N. W., 730; Bailey v. Garvin, 280 Fed., 677; Reynolds v. Egan, 123 La., 114, 48 So., 764; St. Louis & S. F. R. Co. v. Messenger, 26 Okla., 590, 110 Pac., 893; State v. Sunset Tel. & Tel. Co., 30 Wash., 676, 71 Pac., 198.

The case of People v. Dunne, just cited, appears to be precisely in point. The action was one for mandamus against a statutory board whose duty it was to canvass the result of an election. The points made in briefs and argued by counsel for the relators were that the duties of the State Canvassing Board were purely ministerial; that a writ of mandamus might issue against the governor, who was a member of the canvassing board, to compel the performance of such duties; that the State Canvassing Board had no right to look back of the abstracts of votes and the certificates of the county canvassing boards, but should have accepted them and declared the result accordingly. That the State Canvassing Board is a permanent body, and the act sought to be held void was one which did not require a reassembling of the Board. The brief of the Attorney General, who appeared for the State Canvassing Board, made the following points, namely: That the State Canvassing Board can act only upon certified statements of the county canvassers, and had no authority to procure corrected returns or go behind the returns or receive testimony either to sustain or invalidate them; that the duties of the Canvassing Board were purely ministerial, and that mandamus would lie to compel the Board to issue a certificate to the person having the greatest number of votes as shown by the returns; that while a writ of mandamus could not issue to control the head of an executive department in the discharge of a duty involving judgment and discretion, yet the writ could issue where the duty was merely ministerial. In discussing the case the Supreme Court of the State of Illinois held that the writ of mandamus could only issue to compel a party to act when it was his duty to act without it; that the writ would not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion, the court in part said:

"It will therefore be seen that there is entire agreement between the counsel for the relators and the attorney general, representing the defendants, concerning the questions of law involved; and, there being no controversy or difference of opinion between them respecting the law and the duty of the state canvassing board, there does not seem to be any necessity for calling into exercise the power of the court to coerce the defendants to do what they admit to be their duty under the law. The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty which one charged with the duty has refused to perform. The writ can only be issued to compel a party to act when it was his duty to act without it. It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none. *People ex rel. McKee v. Gilmer*, 10 Ill., 242; *Ottawa v. People*, 48 Ill., 233; *People ex rel. Peoria & R. I. R. Co. v. Cline*, 63 Ill., 394. If it is the duty of the defendants to do the acts sought to be coerced by the writ, such acts would not be any more valid or legal if done under the command of the court. The office of the writ is to compel action by the unwilling. There must be a refusal to perform the act; and, if a personal right is involved, a refusal must follow a demand. The writ will not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion. *People ex rel. National Cigar Co. v. Dulaney*, 96 Ill., 503." (Italics ours).

Fear is expressed in the petition that the State Democratic Executive Committee might be intimidated by extrinsic forces, or that their deliberations might be interfered with through an injunction issued by some district judge. We do not think the allegations made sufficient to warrant the issuance of the writ of mandamus against the Committee. The Committee in its answer expressly declares that in canvassing the returns it "shall act as prescribed by law, impartially, conscientiously and legally, uninfluenced by any threats, attempts to intimidate, or by any threatened court actions made by the partisans of either of the candidates for nomination of the Democratic Party for Governor, or by anyone else." (Italics ours)

The petition for mandamus attempts to make the State Democratic Convention, its president, secretary, and each and all the delegates and members thereof, participating and to participate, parties respondent, and contains a prayer asking for a peremptory order of this Court directing the State Democratic Convention, its president, secretary, and each and all of its delegates and members, to canvass the returns of the primary election and make statutory certificates, etc.

The State Democratic Convention thus far has no existence, has not been served, has not appeared, and is plainly not a party to this proceeding. Its president and secretary have not been elected, and the names of its delegates are not shown in the petition. None of these are parties to this proceeding, and none appeared at the argument.

Since it is apparent that the respondents, members of the State Democratic Executive Committee, have not breached any statutory duty due to the relator, and have shown clearly that they do not intend to do so, it is obvious that were we to permit the filing of a petition for mandamus, we would necessarily refuse to grant the writ. This being the state of the record, and after appearance by all parties involved and full argument, we deem it our duty to overrule the motion for leave to file, and it is accordingly overruled.

Processing Note:

1/17/2025

There are 7 total copies of the following 8-page document. The first copy has been scanned in its entirety. Two of the remaining copies each contain handwritten text. Both inscriptions are located on the back of page 8. These two pages have been scanned. All other pages of the remaining copies do not contain unique information and have not been scanned.

Robert Mar

Digitization Technician

Opinion delivered by Mr. Chief Justice Cureton.

This suit is before us on motion for leave to file a petition for mandamus. Because of the importance of the matter involved, we set the motion down for hearing and notified the parties respondent, all of whom appeared and answered, both by written pleadings and oral arguments.

The petition for mandamus is presented by Mrs. Miriam A. Ferguson against the Chairman and Secretary and the members of the State Democratic Executive Committee. Mrs. Jane Y. McCallum, Secretary of State, in her official capacity, and Governor R. S. Sterling, in his private capacity as a candidate, were made parties respondent by the pleadings because of their relationship to the subject matter of the suit. The relator alleges in her petition that she and the respondent R. S. Sterling, together with others, were candidates before the democratic state primary election held on July 24, 1932, for the nomination of that party of its candidate for the office of governor; that at this first primary she and the respondent Sterling received the highest number of votes cast, and by reason thereof became the contending candidates at the second state democratic primary held on the 27th of August, 1932. She states that at the second primary she received approximately 4,000 more votes than her opponent, and that this fact will be shown by the statutory returns made by the county chairmen to the State Democratic Executive Committee. The purpose of this suit is to obtain the issuance of a writ of mandamus to require the State Democratic Executive Committee to canvass the returns, tabulate the votes, and certify the same to the State Convention which meets on September 13, 1932, as provided by statute. The prayer of the petition, in so far as necessary to be considered, is as follows:

WHEREFORE, your Relator respectfully prays that this Honorable Court will make its peremptory order forthwith, commanding the Respondent Committee - its president, its secretary and each member thereof, that it will meet in the City of Lubbock on Monday the 12th day of September, 1932, and that it shall then open and canvass the returns of the second primary election of August 27, 1932, held to nominate candidate for state offices, as certified by the various county chairmen to the state chairman, and shall prepare a tabulated statement, showing the number of votes received by each candidate for Governor, in each county, and that when prepared, such statement shall be approved by the

respondent committee and certified by its chairman, and further that such tabulated statement shall be by its chairman presented to the chairman of the State Convention immediately after its temporary organization on September 13, 1932.

"That in the canvassing of said returns and in the preparation of the tabulated statement showing the number of votes received by each candidate for Governor, the defendant committee will take into consideration only such matters as are certified in the said returns by the various county chairmen and will not take into consideration, or be governed to any extent whatever, by any matters or things, whether of irregularity, fraud or other illegality or things whatsoever, not shown in said returns, as certified by the said various county chairmen."

That portion of the statute here involved reads:

"Art. 3137. **** On the second Monday after the fourth Saturday in August, 1926, and every two years thereafter, the State executive committee shall meet at the place selected for the meeting of the State convention and shall open and canvass the returns of the second primary election held to nominate candidates for State offices as certified by the various county chairman (chairmen) to the State chairman, and shall prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the State committee and certified by its chairman. At this meeting the State committee shall also prepare a complete list of the delegates elected to the State conventions from each county, as certified to the State chairman by each county chairman. The State chairman shall present said tabulated statement and said list of delegates to the chairman of the State convention immediately after its temporary organization on the following day, for its approval or disapproval."

1. It will be noted from the above statute that it is the duty of the State Executive Committee to open and canvass the returns of the primary election "as certified by the various county chairmen to the State chairman"; that the Committee is also to prepare "a tabulated statement showing the number of votes received by each such candidate in each county." The Chairman of the State Executive Committee is to present this tabulated statement to the Chairman of the State Convention immediately after its organization.

By Article 3138 of the statutes it is made the duty of the State Convention "to canvass the vote cast in the entire State for each candidate

for each State office, as shown by the statement thereof presented to it by the State Committee." The Article also provides that the convention shall declare the candidates who have received the majority of votes cast, etc., the nominees of the party for the offices involved. This Article also makes it the duty of the Chairman and Secretary of the State Convention forthwith to certify such nominations to the Secretary of State.

In neither of the Articles to which we have referred is the subject of contesting a primary election mentioned. This, however, is cared for by other Articles of the Statutes.

Article 3148 provides that a contest may be filed with a party executive committee in a certain manner within five days after the result of the primary election has been declared by the Committee or by the Convention.

Articles 3146 and 3147 relate to and govern the same subject.

Article 3149 provides for the opening of ballot boxes on a statutory contest.

Articles 3151, 3152, and 3153 provide for the contests of primary elections through the courts of the State.

Article 3146, previously mentioned, expressly relates to contests of primary elections based on charges of fraud or illegality in the method of conducting the elections. These contests, as previously stated, are to be instituted in the manner provided by Article 3148, within a designated number of days after the result of the primary election has been declared by the Committee or Convention.

2. It is obvious, we think, from these statutes, which we have but briefly referred to in this opinion, but which we have examined carefully, that the duties of the State Executive Committee are those of a canvassing board.

It is well settled by the authorities that, aside from their quasi judicial power to determine the genuineness of election returns, the functions and duties of the canvassing board are ministerial. They derive their powers from the Constitution or Statutes, and have no other powers, functions, or duties than those named. 20 Corpus Juris, p. 200, sec. 254.

Corpus Juris further states the rule:

"It is a common error for a canvassing board to over-estimate its powers. Where there is no question as to the

genuineness of the returns or that all the returns are before them, the powers and duties of canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained. They have no power to go behind the returns and ascertain the qualifications of the voters or otherwise inquire into the regularity of the election. Fraud, bribery, violence or other matters affecting the regularity of the election are to be passed on by the proper tribunal and not by the board of canvassers. The canvassers are not authorized to determine the legality or illegality of the votes cast at the election; to decide upon the official title of the election officers; to entertain a contest of the election; to determine the constitutionality of a statute; to inquire into the validity of the certificates of nomination of candidates, to pass upon the eligibility of a candidate to office, to decide whether there are any vacancies in any offices, to determine what was done at an election in a previous year, or to reverse an act of their predecessors." 20 Corpus Juris, p. 200, sec. 255.

Again, the same authority in part declares:

"It is settled beyond controversy that canvassers cannot go behind the returns. The returns provided for by law are the sole and exclusive evidence from which a canvassing board or official can ascertain and declare the result. The canvassers are not authorized to examine or consider papers or documents which are transmitted to them with the returns, or as returns, but which under the statutes do not constitute part of the returns. Neither are they at liberty to receive and consider extrinsic evidence, unless the official returns are destroyed before they are canvassed, in which case secondary evidence of their contents may be received."

3. The authorities likewise hold that, in the absence of a statute conferring it, a board of canvassers has neither express nor implied power to recount the ballots. 20 Corpus Juris, p. 203, sec. 259.

We have previously adverted to the fact that a board of canvassers have the power to determine the genuineness of election returns. 20 Corpus Juris, p. 201, sec. 256, states the rule illustrative of this power as follows:

"Canvassers have the quasi judicial power to determine whether the papers transmitted to them are genuine election returns signed by the proper officers. Thus, where what purports to be two or more returns from the same election district are received, the canvassing board must necessarily determine from the face of the papers which one shall be regarded as the true and genuine return; but there is no room for the exercise of such discretionary power where there is before the canvassing board or official only one document which purports to be the certified abstract or return required by law. The canvassers are not required to receive or treat as a return any paper which does not appear on its face to be such a return. If a paper purporting to be a return is obviously false or a forgery the canvassers should disregard it; but if it is doubtful they must include it in the count. It is the duty of the canvassers to receive and count all returns sent to them which are not obviously spurious, however false and fraudulent they may be in fact. Where the returns are in due form and are properly authenticated and hence are valid on their face, they cannot be rejected by the canvassers. The canvassers must decide what are the returns from the face of the papers or documents submitted to them as returns; they are not to institute any inquiries as to their authenticity."

Since the State Democratic Executive Committee is obviously a canvassing board, these elementary rules of law are applicable to it in the performance of its statutory duties. It does not follow, however, from what we have said that we should permit the petition for mandamus to be filed, or that a mandamus should issue against the Committee. The respondent State Democratic Executive Committee in its sworn answer has denied all the allegations of the petition which could be construed in effect as charges that the Committee would not canvass the returns in accordance with the statute and the rules of law which arise therefrom. After a general denial, the Committee in its answer states:

"4. For further answer, respondents allege that they and each of them, acting individually and acting collectively as members of the said State committee, intend in good faith to meet at Lubbock on the date prescribed by law, to wit, September 12, 1932, and in said meeting duly assembled to then proceed under the authority of and in compliance with the terms of R.C.S., article 3137, and in the manner prescribed by the laws of this State, to open and canvass the returns of the second primary election of the Democratic party held on August 27, 1932, to nominate candidates for State offices, including that of governor, as certified by the various county chairmen to the State chairman, and to prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the said State committee, and certified by its chairman W. O. Huggins, and shall be presented to the Chairman of the State Democratic Convention immediately after its organization on the following day. Further, in performing the above described acts and duties, these respondents shall act as prescribed by law, impartially, conscientiously and legally, uninfluenced by any threats, attempts to intimidate, or by any threatened court actions, made by the partisans or either of the candidates for nomination of the Democratic party for governor or by anyone else.

"5. That none of these respondents has heretofore expressed any intention to not canvass the returns of the said election impartially and in accordance with the laws of this State, and that none of them has committed any act in violation of the election laws of this State, or has indicated in any way that he is preparing to violate such election laws. In this connection there is no basis in fact or in law for the making of the charges against these respondents which are contained in the petition of the relator, and the said allegations are untrue."

It is thus seen that the respondents have not refused, or indicated any purpose to refuse or fail, to follow the statute governing them in the canvass of the primary election returns, and to do the very things which the relator asks that they be required to do by mandamus. On the contrary, the answer of the Committee shows a bona fide purpose and intention to comply with the statute.

4. The rule is an elementary one that a writ of mandamus will not lie to compel the performance of an act which the respondent shows a

willingness to perform without coercion. 38 Corpus Juris, p. 554, sec. 24; People v. Dunne, 258 Ill., 441, 101 N. E., 560, 45 L.R.A. (N.S.) 500; Double v. McQueen, 96 Mich., 39, 55 N. W., 564; State v. Nash, 134 Minn., 73, 158 N. W., 730; Bailey v. Garvin, 280 Fed., 677; Reynolds v. Egan, 123 La., 114, 48 So., 764; St. Louis & S. F. R. Co. v. Messenger, 26 Okla., 590, 110 Pac., 893; State v. Sunset Tel. & Tel. Co., 30 Wash., 676, 71 Pac. 198.

The case of People v. Dunne, just cited, appears to be precisely in point. The action was one for mandamus against a statutory board whose duty it was to canvass the result of an election. The points made in briefs and argued by counsel for the relators were that the duties of the State Canvassing Board were purely ministerial; that a writ of mandamus might issue against the governor, who was a member of the canvassing board, to compel the performance of such duties; that the State Canvassing Board had no right to look back of the abstracts of votes and the certificates of the county canvassing boards, but should have accepted them and declared the result accordingly. That the State Canvassing Board is a permanent body, and the act sought to be held void was one which did not require a reassembling of the Board. The brief of the Attorney General, who appeared for the State Canvassing Board, made the following points, namely: That the State Canvassing Board can act only upon certified statements of the county canvassers, and had no authority to procure corrected returns or go behind the returns or receive testimony either to sustain or invalidate them; that the duties of the Canvassing Board were purely ministerial, and that mandamus would lie to compel the Board to issue a certificate to the person having the greatest number of votes as shown by the returns; that while a writ of mandamus could not issue to control the head of an executive department in the discharge of a duty involving judgment and discretion, yet the writ could issue where the duty was merely ministerial. In discussing the case the Supreme Court of the State of Illinois held that the writ of mandamus could only issue to compel a party to act when it was his duty to act without it; that the writ would not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion, the court in part said:

"It will therefore be seen that there is entire agreement between the counsel for the relators and the attorney general, representing the defendants, concerning the questions of law involved; and, there being no controversy or difference of opinion between them respecting the law and the duty of the state canvassing board, there does not seem to be any necessity for calling into exercise the power of the court to coerce the defendants to do what they admit to be their duty under the law. The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty which one charged with the duty has refused to perform. The writ can only be issued to compel a party to act when it was his duty to act without it. It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none. People ex rel. McKee v. Gilmer, 10 Ill., 242, Ottawa v. People, 48 Ill., 233; People ex rel. Peoria & R. I. R. Co. v. Cline, 63 Ill., 394. If it is the duty of the defendants to do the acts sought to be coerced by the writ, such acts would not be any more valid or legal if done under the command of the court. The office of the writ is to compel action by the unwilling. There must be a refusal to perform the act; and, if a personal right is involved, a refusal must follow a demand. The writ will not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion. People ex rel. National Cigar Co. v. Dulaney, 96 Ill., 503." (Italics ours).

Fear is expressed in the petition that the State Democratic Executive Committee might be intimidated by extrinsic forces, or that their deliberations might be interfered with through an injunction issued by some district judge. We do not think the allegations made sufficient to warrant the issuance of the writ of mandamus against the Committee. The Committee in its answer expressly declares that in canvassing the returns it "shall act as prescribed by law, impartially, conscientiously and legally, uninfluenced by any threats, attempts to intimidate, or by any threatened court actions made by the partisans of either of the candidates for nomination of the Democratic Party for Governor, or by anyone else." (Italics ours)

The petition for mandamus attempts to make the State Democratic Convention, its president, secretary, and each and all the delegates and members thereof, participating and to participate, parties respondent, and contains a prayer asking for a peremptory order of this Court directing the State Democratic Convention, its president, secretary, and each and all of its delegates and members, to canvass the returns of the primary election and make statutory certificates, etc.

The State Democratic Convention thus far has no existence, has not been served, has not appeared, and is plainly not a party to this proceeding. Its president and secretary have not been elected, and the names of its delegates are not shown in the petition. None of these are parties to this proceeding, and none appeared at the argument.

Since it is apparent that the respondents, members of the State Democratic Executive Committee, have not breached any statutory duty due to the relator, and have shown clearly that they do not intend to do so, it is obvious that were we to permit the filing of a petition for mandamus, we would necessarily refuse to grant the writ. This being the state of the record, and after appearance by all parties involved and full argument, we deem it our duty to overrule the motion for leave to file, and it is accordingly overruled.

This convention derives its powers from the Constitution and statutes of Texas and has no powers, functions or duties other than those named. It has no power to challenge or upbraid the qualification of voters or investigate the regularity of ~~the~~ election or the votes ^{officially} certified as genuine ~~and valid~~ by a valid Certificate duly executed by the Chairman of a County Democratic Committee. Nor is this convention authorized to consider a proposed contest of matters affecting the regularity of the election in any precinct or county. This convention has neither the express or implied power to recount the ballots ^{or create inquiries as to their validity} but must receive and count all returns sent to it in due form, properly authenticated and valid on their face.

Since it is apparent that the respondents, members of the State
Declarative Committee, have not breached any statutory duty
due to the referee, and have shown clearly that they do not intend to do
so, it is obvious that there is no basis for the filing of a petition for
writ, we would necessarily refuse to grant the writ. This being the
state of the record, and after argument by all parties involved and
full argument, we deem it our duty to overrule the motion for leave to
file, and it is accordingly overruled.

24 = out 31
2 = star
5 = doubtful

10

MEMORANDUM BRIEF

Tyson or Kennedy, in appearing, in response to the show cause order should not make personal appearances and should not answer on the merits since they have not been served with process.

The facts alleged can probably better be recited in different language by those familiar with the facts. The attached is simply a suggested form which follows Form 213 Federal Procedural Forms by Holtzoff & Cozier.

It might be well to make a specific affidavit attached as Exhibit A by Tyson and Kennedy rather than to have them simply swear to the answer and motion as a whole.

A further memorandum will be forthcoming on the jurisdiction of the court in general.

Any special answer desired setting up that the particular defendant has no interest in the outcome of the case, and etc. can be added as a numbered paragraph but should be made expressly subject to the motion to dismiss on account of lack of jurisdiction.

The pleading must be filed in duplicate with the Federal District Court. Copies should be available for adverse counsel and delivered to them on Monday, if possible.

which convention was required by law to canvass the returns certified by the County Chairmen of the various counties in Texas and issue to the successful candidate a certificate of nomination by certifying same to the Secretary of State of the State of Texas. At said convention, the State Democratic Party performed its statutory duties and adjourned at _____ .M. on September _____, 1948. Prior to adjournment, this defendant executed a certificate of nomination of Honorable Lyndon B. Johnson as the Democratic candidate and nominee of such party and said convention to the office of United States Senator and certified the said Lyndon B. Johnson as such candidate to the Secretary of State as required by law, along with the other candidates named by such party at such convention for all other State offices; and at the same time the Secretary of said convention, the defendant, Vann M. Kennedy, joined in such certificate and transmitted same to the Secretary of State by delivering same for transmission to the Secretary of State. Said certificate was so filed, as this defendant is informed, with the Secretary of State at 11:29 A.M., on September 15, 1948.

This defendant did not know of the action of this Honorable Court in issuing the restraining order at 6:25 A.M. on the morning of September 15, 1948, until in the afternoon of September 15, 1948, about 4 o'clock, when he reached his home in Corsicana, Navarro County, Texas, when he was informed of such action. In any event, this defendant had already completed his official and statutory actions in connection with the issuance of such certificate and as Chairman of the Democratic State Convention long before the issuance of the temporary restraining order by this Honorable Court. This cause is, therefore, moot so far as plaintiff and this defendant are concerned and no relief can be granted against this defendant.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COKE R. STEVENSON,

PLAINTIFF

VS

TOM L. TYSON
VANN M. KENNEDY and
LYNDON B. JOHNSON

DEFENDANTS

CIVIL NO. 1640

MOTION TO DISMISS AND ANSWER TO SHOW CAUSE ORDER,
SUBJECT TO MOTION TO DISMISS

MOTION TO DISMISS

Defendant Tom L. Tyson, who has personal notice of the show cause order issued by this Honorable Court on September 15, 1948, but who has not been served with any character of process, appearing only in response to the informal notice to him of the issuance of the temporary restraining order and the show cause order entered herein on September 15, 1948, moves the Court as follows:

I.

To dismiss this action as to this defendant on the ground that it is wholly moot as to plaintiff and this defendant by reason of the following:

As shown by the complaint, this defendant was joined as a party hereto because of his service as Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948,

II.

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

TOM L. TYSON, Defendant

By-_____
Attorney for Defendant

Address of Defendant's Attorney

THE STATE OF TEXAS
COUNTY OF

BEFORE ME, the undersigned authority, on this day personally appeared TOM L. TYSON, who being by me first duly sworn states upon oath: I am one of the defendants in the above cause and have read over the foregoing pleading; I am familiar with the facts alleged therein and same are true.

Sworn to and subscribed before me this _____ day of September,
A. D. 1948.

Notary Public in and for _____
County, Texas.

Processing Note:

1/17/2025

There are 5 total copies of the following 2-page document. The first copy has been scanned in its entirety. The remaining copies do not contain any unique information and have not been scanned.

Robert Mar

Digitization Technician

TO THE HONORABLE R. D. WRIGHT,
Judge of the 49th Judicial District of Texas.

WHEREAS, certain charges and insinuations have appeared in the newspapers of this state and country, charging that some kind of fraud was committed in Zapata County in connection with the run-off primary of August 28, 1948, and

WHEREAS, it was intimated in said newspaper articles that the charges were based mostly upon testimony given by certain individuals from Zapata County, and one in particular from Webb County, and

WHEREAS, it was the desire of the Grand Jury for Zapata County, under its sworn duty and obligation to investigate all criminal matters in the County, to investigate the true facts concerning said purported charges:

NOW, THEREFORE, the undersigned citizens of Zapata County, under its sworn duty and obligation to investigate all criminal matters in the County, to investigate the true facts concerning said purported charges:

NOW, THEREFORE, the undersigned citizens of Zapata County, constituting the duly sworn and empanelled Grand Jury of the 49th Judicial District Court for Zapata County, February Term, A. D. 1949, respectfully report to Your Honor that a thorough, comprehensive and impartial investigation was conducted by said Grand Jury seeking to determine whether or not any fraud or violations of the Penal Code were committed by anyone in Zapata County in connection with the run-off primary of August 28, 1948. In this connection, thirteen witnesses were summoned to testify, and did testify, before said Grand Jury, including all the witnesses who were named in said newspaper articles as having appeared to testify from Zapata County and one from Webb County, before a Federal Court in connection with the charges of fraud allegedly committed in Zapata County. Also called

to testify before us were those county officials and the officers of election of Zapata County, who had any part whatsoever with the conduct of the run-off primary election of August 28, 1948.

The evidence adduced before said Grand Jury showed that there was no fraud in said election and no violations of the Penal Code; on the contrary, the overwhelming evidence and testimony showed that the election was conducted legally, fairly and impartially, and that the officers of election and the officials of Zapata County were exceedingly diligent and zealous in their duties, and that a fair and orderly election was held in Zapata County on said date of August 28, 1948.

A complete transcript of the testimony of all witnesses appearing before the Grand Jury was recorded and has been made a part of the files of the Grand Jury for Zapata County.

Respectfully submitted,

(SGD.) J. M. SANCHEZ

J. M. Sanchez, Foreman

(SGD.) MANUEL MEDINA

Manuel Medina, Secretary

(SGD.) JUAN MANUEL VELA

Juan Manuel Vela

(SGD.) FLAVIO PENA

Flavio Pena

(SGD.) RENE A. GARZA

Rene A. Garza

(SGD.) JUVENTINO MARTINEZ

Juventino Martinez

(SGD.) LEONARDO G. FLORES

Leonardo G. Flores

(SGD.) ILDEFONSO RAMIREZ

Ildefonso Ramirez

(SGD.) ERNESTO M. URIBE

Ernesto M. Uribe

(SGD.) HILARIO DOMINGUEZ

Hilario Dominguez

(SGD.) ENRIQUE A. MEJIA

Enrique A. Mejia

(SGD.) FILIBERTO TRUJILLO

Filiberto Trujillo