

Stevenson To Drop Election Contest

San Antonio, June 14 (AP).—
The attorney for Coke Stevenson
in his contest of Lyndon Johnson's
right to a seat in the U. S. Senate
says the contest will be dropped.

James F. Gardner made the an-
nouncement yesterday, declaring
that the Senate Election Commit-
tee would pigeonhole the plea be-
fore July 31. Johnson defeated
Stevenson by a narrow margin in
the election last year.

REPORT OF THE SUBCOMMITTEE ON PRIVILEGES
AND ELECTIONS, TO THE COMMITTEE ON RULES
AND ADMINISTRATION, RE TEXAS SECOND PRIMARY

Your Subcommittee on Privileges and Elections has the following matters before it with respect to the second or so-called "run-off" Democratic primary held August 28, 1948, for the selection of the Democratic nominee for a seat in the United States Senate representing the State of Texas:

1. A communication filed under date of October 18, 1948 by Honorable Coke R. Stevenson, the defeated candidate for the Democratic nomination for United States Senator from Texas in the "run-off" primary alleging election frauds and irregularities in certain counties in Texas.
2. A communication filed under date of October 25, 1948 by Honorable Lyndon B. Johnson, the successful candidate for the Democratic nomination for United States Senator from Texas in the "run-off" primary, alleging election frauds and irregularities in numerous counties throughout Texas.
3. A petition was filed on January 5, 1949 by a Texas "Citizens' Committee" ^{1/} requesting that no Democratic nominee for United States Senator ~~from Texas~~ be seated.

Your Subcommittee has had these matters under consideration and now respectfully reports as follows:

The Junior Senator from Texas, Honorable Lyndon B. Johnson ("Johnson") was elected a Senator for a full six year term in the November 1948 General Election, receiving 809,420 votes to his opponent's 389,190 votes. When the 81st Congress convened, Johnson presented his certificate of election from the State of Texas, took the oath of office and was thereupon seated.

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The "Citizens' Committee" called itself the "Citizens' Committee Against Political Fraud," P. O. Box 1271 - State Headquarters, San Antonio 6, Texas.

No charges with respect to the conduct of the General Election have been made either to the Senate or directly to the Senate Subcommittee on Privileges and Elections ("Sub-Committee").^{2/} There is, therefore, no contest pending before the Senate with respect to the General Election in which Johnson was the clear victor.

NATURE OF ALLEGATIONS

The petitions of the "Citizens' Committee" in substance charged that at the time of the run-off primary, and as a consequence of the manner in which it was conducted, the Republican form of Government guaranteed to the State of Texas by Article IV, Section 4, of the Constitution of the United States, was abridged and nullified. It was also charged, in effect, that an unnamed candidate or candidates engaged in "insurrection or rebellion against the (United States and gave) aid or comfort to the enemies thereof...." These charges are entirely unsupported and need not be considered further.

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CONDUCT OF THE PARTY PRIMARY IN TEXAS

Inasmuch as no charges have been made with respect to the

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Subcommittee of the Senate Committee on Rules and Administration.

conduct of the General Election but only with respect to the run-off primary, it is desirable briefly to describe the manner in which the laws of Texas require party primaries to be conducted and to indicate what actually transpired thereunder.

The laws of Texas governing party primary elections provide that the several County Executive Committees of a political party shall meet at stated times, shall canvass the returns as made by the election officials of the several voting precincts of the county, and shall certify the returns to the State Executive Committee of the party; that the State Executive Committee shall meet at a stated time, shall canvass the returns as certified by the County Executive Committees, and shall certify the result to the State Convention of the party for its approval or disapproval. This procedure was fully adhered to in the Primary Election.

On September 13, 1948 in Fort Worth, Texas, Stevenson appeared before the State Executive Committee and presented his charges of fraud and irregularities. The Committee heard the charges, determined the same in Johnson's favor and, pursuant to its statutory function, certified to the State Convention that Johnson had received a majority of the votes in the primary election.

The State Convention of the Democratic Party convened on September 14, 1948, the day following the meeting of the Executive Committee, received the Committee's report, and immediately referred it to the Convention's Committee on Party Nominations. The Committee on Party Nominations recommended to the Convention that Johnson's name be certified as the Democratic nominee for United States Senator. The Convention adopted the report of that committee, and declared Johnson to be the nominee of the Democratic Party of Texas as its candidate for the office of United States Senator from Texas. The party officers certified his name as such nominee to the Secretary of State of the State of Texas, for inclusion on the official ballot to be voted in the ensuing General Election, all in accordance with state law.

The laws of Texas further provide that the results of a party primary election may be contested by the losing candidate by suit in a

District Court, which, in Texas, is a court of general jurisdiction. In the case of a contest of a statewide race, the venue of the contest is fixed in any of the three District Courts of Travis County, the seat of the State Capitol. In such a suit the court has authority to impound and open ballot boxes, make a recanvass, reject all illegal votes, and ascertain and declare the result.

Stevenson did not pursue the remedy provided by State law.^{3/} Instead, he filed a suit in equity in a United States District Court in Fort Worth, Texas, seeking to enjoin the election officials of the State from placing Johnson's name on the official ballot to be voted in the General Election.

LITIGATION OVER NOMINATION

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1. An injunction to prevent officers of the Democratic Party in Texas from certifying the name of Johnson as Democratic nominee for United States Senator as a result of the primary election.

2. An injunction to prevent Johnson's name as such nominee from being placed on the official ballot for the general election to be held on November 2, 1948.

^{3/} As the winning candidate Johnson was unable to avail himself of this remedy, inasmuch as he had no standing to contest his own election.

^{4/} Tom L. Tyson was Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, and Vann M. Kennedy was Secretary of said Convention.

3. Cancellation of the certificate if already made.

4. A declaration that Stevenson was the true nominee.

Immediately following the presentation of the complaint, Judge Davidson forthwith endorsed thereon a temporary restraining order.

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Thereafter, Johnson filed a motion to dismiss the complaint for want of jurisdiction and, on September 21, 1948, a hearing on the application for a temporary injunction took place. On September 22, 1948, the temporary injunction was continued in effect.

On September 24, 1948, Johnson lodged an appeal before Honorable Joseph C. Hutcheson, Jr., Circuit Judge of the United States Court of Appeals, 5th Circuit, seeking an order "setting aside and staying the temporary injunction order issued by the Court below, pending the determination of this appeal." Judge Hutcheson denied the motion "without prejudice to the right to present the motion to the (full) Court."

On September 29, 1948, Johnson filed a motion for a stay of the temporary restraining order theretofore issued, which motion was addressed to the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States and Supervising Justice for the 5th Circuit. On the same day Justice Black issued an order providing "that the temporary injunction issued by the United States District Court for the Northern District of Texas (Fort Worth Division) on September 23, 1948, in the case entitled Coke R. Stevenson v. Lyndon B. Johnson, et al,

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Brown was Secretary of State of the State of Texas. Kraft, Faulk and Montgomery were County Judge, County Clerk and Sheriff, respectively, of Tarrant County, Texas. These last three individuals were added as defendants, inasmuch as they constituted the members of the Election Board of Tarrant County and were alleged to be properly representative of all the Election Board Members of the 253 other counties of the State.

Civil Number 1640, be and the same hereby is stayed and that the said temporary injunction is and shall be of no force and effect until further order of the Supreme Court." Thereafter, on October 2, 1948, Coke R. Stevenson filed a motion with the Supreme Court of the United States requesting that the order of Mr. Justice Black of September 29, 1948, be vacated. On October 5, 1948, the Supreme Court issued an order denying the above mentioned motion and dismissed the proceedings.

Meanwhile, the Court of Appeals for the 5th Circuit proceeded with a consideration on the merits of Johnson's appeal from the District Court's decision and, on October 7, 1948, in a unanimous decision, held that the District Court was without jurisdiction to consider the cause. It stated in part that:

"We are of opinion...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

"The order of injunction is set aside and the cause is remanded with direction to dismiss the petition."^{6/}

Subsequently, Stevenson filed a petition for certiorari with the Supreme Court of the United States. On January 31, 1949, such petition was denied.

ACTION BY SUB-COMMITTEE

Following the receipt of Stevenson's charges the Subcommittee sent investigators to Texas. No evidence has been disclosed which would support Stevenson's allegations.

No action has been taken on Johnson's allegations and, in view of the foregoing, no action is required.

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170 Fed. 2nd, 108, 111.

If we were to assume, contrary to precedent, that the Senate should properly inquire into the results of a nominating primary election conducted by a political party, and should set aside decisions of duly constituted party officials as authorized by State law, it is apparent that the defeated candidate himself, by not filing a contest in the State Courts of Texas and thus preserving the ballots cast in the primary, has frustrated the proper conduct of such an inquiry in the instant case. If, unknown to the Subcommittee, illegal votes were actually cast and improper returns actually made in the run-off primary in Texas, in order to determine whether such conduct had the effect of changing the result of the race between Johnson and Stevenson it would be necessary to eliminate all illegal votes and all votes improperly counted and returned for each candidate. It would be necessary, among other things, to examine the ballots and returns in those counties where Johnson claimed illegalities and irregularities resulting in large numbers of added votes for Stevenson. Therefore, in order for the Subcommittee to arrive at its own determination as to the results of the primary election, it would be necessary to have a full re-count of all the ballots and a check of all returns.

This might have been accomplished if the Subcommittee had impounded all ballot boxes and returns, as requested by Johnson. It might also have been accomplished by Court order if Stevenson had filed a contest in a Texas district court, as provided by State law. Johnson, being the officially certified party nominee, could not under Texas law invoke the jurisdiction and powers of the Court for the purpose of effecting a recount or impounding of the ballots. The Subcommittee is informed that all or virtually all of the ballots in the 254 counties of Texas have now been destroyed pursuant to the provisions of State law and a recount hence impossible.

CONCLUSIONS

After a study and consideration of the above matters the Subcommittee concludes:

1. There is no contest pending before the Senate with respect to the General Election in which Johnson was the victor.
2. No evidence has been disclosed which would support Stevenson's allegations.
3. That Lyndon B. Johnson was duly elected and seated as United States Senator from the State of Texas.

Therefore your Subcommittee on Privileges and Elections recommends the adoption of the following resolution:

"RESOLVED, That Lyndon B. Johnson is hereby declared to be a duly elected Senator of the United States from the State of Texas for the term of 6 years, commencing on the 3rd day of January 1949, and is entitled to be seated as such."

Respectfully submitted,

Francis J. Myers, Chairman

Guy M. Gillette

William F. Knowland

COPY

The attempt to have the Senate Committee investigate the Democratic Primary Election in Texas is motivated solely by a desire for publicity on the part of the losers and in the hope of making political capital.

The very close race brought fraud charges from both sides. The losing candidate, assisted by a major oil company Special Ranger, centered his charges and conducted a personal investigation of the votes in certain Valley counties. In four previous campaigns he had solicited and received these votes. Following this private investigation these charges were presented to and considered by

1. The State Democratic Executive Committee -- result Johnson certified.
2. The State Democratic Convention -- result Johnson certified.
3. Two District Court Grand Juries -- no fraud found, no charges brought.
4. F. B. I. -- No violations of Federal law developed.
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In Galveston County, a Stevenson County, 14 indicted for political fraud.

In Brown County, a Stevenson county, after final tabulation by Executive Committee and State Convention, Johnson received 466 more votes, net, due to Court throwing out ballots illegally counted.

Johnson asked for and welcomed any and all investigations, urged Senate Committee to impound and count all ballots, urged opponent to file contest in State Court and have all ballots recounted.

CARL MAYDEN, ARIZ., CHAIRMAN
THEODORE FRANCIS GREEN, R. I.
FRANCIS J. MYERS, PA.
JOHN C. STENNIS, MISS.
RUSSELL B. LONG, LA.
GUY M. GILLETTE, IOWA
LESTER C. HUNT, WYO.
GARRETT L. WITHERS, KY.
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WILLIAM F. KNOWLAND, CALIF.
HENRY CABOT LODGE, JR., MASS.
WILLIAM E. JENNER, IND.
IRVING M. IVES, N. Y.

PAUL R. EATON, CHIEF CLERK

United States Senate

COMMITTEE ON
RULES AND ADMINISTRATION

September 8, 1949

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

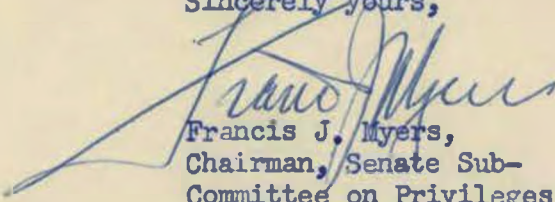
SEP 10 A.M.

Dear Senator Johnson:

I am enclosing herewith for your information and files a copy of a report of the Senate Subcommittee on Privileges and Elections to the Committee on Rules and Administration regarding charges with respect to the conduct of the August 28, 1948 "run-off" primary election for the Democratic nomination for United States Senator from Texas, made by Coke R. Stevenson, the defeated candidate in that Primary. This report, which, you will note, concludes that you were duly elected United States Senator from the State of Texas, has been unanimously adopted by the Committee on Rules and Administration.

In connection with the preparation of this report the Subcommittee's staff made an investigation of the charges and a careful study of all information and data which conceivably could be of significance in considering such charges. On the basis of that investigation and study the Subcommittee unanimously concluded that no basis whatsoever existed for contesting your election. On the contrary, only minor irregularities, common to every election, which would not possibly vitiate a state-wide primary and subsequent general election, were discovered. All of the evidence supports the conclusion that you had no knowledge of or were in any way connected or identified with, directly or indirectly, any of the matters with respect to which charges were made to the Subcommittee.

Sincerely yours,


Francis J. Myers,
Chairman, Senate Sub-
Committee on Privileges
and Elections

fjm/esk

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Robert Mar

Digitization Technician

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Following the receipt of Stevenson's charges the Subcommittee sent investigators to Texas. No evidence has been disclosed which would support Stevenson's allegations.

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Therefore your Subcommittee on Privileges and Elections recommends the adoption of the following resolution:

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Respectfully submitted,

Francis J. Myers, Chairman

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William F. Knowland

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DONALD G. COOK

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1200 EIGHTEENTH STREET, N. W.
WASHINGTON 6, D. C.
TELEPHONE EXECUTIVE 1228
CABLE ADDRESS "COBERG"

January 28, 1949

Senator Lyndon B. Johnson
Senate Office Building
Washington 25, D. C.

Re: Senate Election Contests Upon
Petition of Third Persons

Dear Lyndon:

Reference is made to my previous memorandum "Contested Senate Elections", and in particular its page 1 as to the abbreviations used hereafter, and pp. 9-10 as to the terms "Committee" and "Subcommittee".

The question discussed below is whether Senate election contests have been commenced and conducted upon petition of third persons as distinguished from contests either instituted by the opponent defeated in the Senate election, or from proceedings originating in the Senate itself. The great majority of Senate election contests fall into one of the two latter groups. But there are some cases which do not. There is, though, no case of a contest instituted solely by a defeated primary opponent. Nor has there been a closely analogous case. The nearest thing is the Overton case, discussed below.

Numerous cases in the "third person" group belong to the period before 1913 (enactment of the 17th Amendment), and originated with the state legislatures which chose the Senators according to Art. I, Sec. 3, Cl. 1 of the Constitution. There was apparently only one case, that of Stephenson (1911), WP 1114, where a formal joint resolution was adopted by the Wisconsin legislature asking the Senate to investigate the election and irregularities therein as well as in the primary. But it was quite common for a number of dissatisfied members of a state legislature to file a memorial with the Senate asking for an investigation and unseating of the Senator-

elect. Disregarding cases where the charges were considered insufficient to justify an investigation, there were five cases of this type.

In the Stockton case (1865), WP 322, a memorial of members of the New Jersey legislature led to an investigation and ultimately resulted in unseating the Senator-elect. The decisive question was whether the vote of Stockton himself could be properly counted.

In the Pomeroy and Caldwell case (1872), WP 426, a joint committee of the Kansas legislature investigated charges of bribery and corruption in the election, and sent a report to the U.S. Senate. The Senate took testimony, Caldwell resigned his seat before a vote was taken, the Committee Report stated that the charges against Pomeroy were not sustained, and no further action was taken.

A memorial of members of the state legislature was the basis for an investigation in the Ingalls case (1879), another Kansas case, WP 692. No further action was taken after testimony before the Committee since it found that, though there had been bribery, no decisive amount of votes had been switched thereby, and that Ingalls had had no knowledge thereof.

Similarly, in the Scott case (1899), WP 888, memorials of members of the West Virginia legislature (and others from private citizens) led to a lengthy legal discussion of alleged irregularities of the ballot in the state legislature.

Memorials from members of the Montana legislature, from the governor, and from private citizens, prompted, in the case of Clark (1899), WP 906, an investigation of charges of bribery. The Committee reported repeatedly that the charges (that the decisive votes in the state legislature had been obtained through illegal and corrupt practices), were justified. Clark resigned before the Senate took final action.

There were, moreover, two cases prior to 1913 where memorials of private citizens led to election contests. In the case of Grover (1877), WP 661, memorials from private citizens in Oregon demanded that Grover not be seated because of bribery. He was seated, however, and thereupon Grover himself moved for an investigation. On the basis

of the evidence taken the charges were held to be unsupported. While the Grover case is a weak precedent, the case of Smoot (1903), WP 928, is a rather strong one. Memorials by apparently only about 20 citizens of Utah led to one of the bitterest and longest Senate election contests, mainly on the basis of the charge that Smoot, a Mormon, advocated polygamy. A minority vote of little more than one-third saved Smoot from expulsion which had been recommended by the Committee.

Of the cases after enactment of the 17th Amendment, that of Steck v. Brookhart (1925), H 216, cannot be considered a precedent, although the Republican State Central Committee of Iowa filed a contest, H. 220-221, on the ground that Brookhart, successful in the Republican primary and in the general election, was not a member of the Republican party and had obtained the Republican nomination under false pretenses. The contest, however, was primarily by the defeated Democrat Steck who won the Senate seat in the contest. The Committee made it clear, H 228, that it considered the contest by the Republican state party only in connection with Steck's contest.

The famous LaFollette case (1917), H 49, one of the few genuine expulsion cases for reasons occurring subsequent to taking the seat, based on an allegedly seditious speech, was prompted by a memorial of the Minnesota Commission of Public Safety, H 50-51, composed of the governor and "eminent citizens" of that state, H 97. There were extended hearings and voluminous reports, briefs, and documentary evidence. Finally, the recommendation of the Committee to resolve that the speech did not justify any action by the Senate was adopted by the Senate, 57 Cong. Rec. 1527.

It would seem that the lengthy and highly controversial proceeding in the Langer case (1941; see previous memorandum, pp. 16-17), was brought about solely by protests of private citizens, 77th Cong., 2d Sess., Sen. Rept. 1010 (Pt. 1), p. 1, and (Pt. 2), p. 1, by "charges of various sorts from citizens of North Dakota", as then Senator Barkley put it, 87 Cong. Rec. 1.

Also the voluminous and somewhat confused case of the "Senators from Louisiana" (1932), i.e. Overton and Huey Long, H 654, belongs to this same group. The significance of the case is obscured by the fact that, for a long time,

Senator Connally, chairman of the Subcommittee, contended, H 674, that he had jurisdiction exclusively to investigate campaign expenditures, but not other irregularities, and that there was no election contest before the Committee. There had been numerous charges, however, and evidence as to these charges was actually taken. Finally, there was a formal notice of contest by a "Woman's Committee of Louisiana", and thereupon a formal proceeding was started. It suffices, for our purposes, to state that a comprehensive investigation was launched on the basis of charges by third persons. The most interesting thereof were those brought by the former Senator Broussard who intended to run for re-election and was defeated in the primary by Overton. Broussard filed comprehensive charges, H 658-660, alleging irregularities in the primary, but he never filed a formal contest and never claimed that he had been nominated, H 657-660, 667. Moreover, there were charges by an "Honest Election League", H 660-666, and many other papers were filed by private Louisiana citizens, H 655 (see also 73rd Cong., 2d Sess., Sen. Rept. 499), questioning the validity of the primary and of the election of Overton and particularly Long. The end of the whole proceeding was that the Committee, after taking voluminous evidence, considered all the charges as insufficient and recommended that the Senate take no further action. The Senate adopted a resolution to this effect, 78 Cong. Rec. 12015-12016.

There seem to be only two cases where a single private citizen filed a Senate contest, and both were abortive. In the Erickson case (1933), H 651, a federal judge in Montana, acting as a private citizen, filed a protest against the seating of Erickson as Senator because Erickson, formerly governor of Montana, resigned his governorship upon the death of a Senator from that state, and had himself appointed Senator by his successor, the former Lieutenant Governor. The letter from the federal judge, H 652, would indicate that he was a sort of crank; and Senator Wheeler contended that the letter writer intended to run for the Senate when leaving the bench. The letter was referred to the Committee, and an investigation authorized by resolution, H 652-653; but no further action was ever taken on the resolution.

In the case of Lowry v. Berry (1937), H 727, Lowry, a private citizen, filed charges against the character of the Senator-elect and petitioned that Berry not be seated. The Committee announced unanimously that the allegations were insufficient to warrant any Senate action.

In genuine contests the contestant has almost the position of a party in a lawsuit, and the proceeding before the Committee resembles litigation in a court. See, e.g., the case of Pritchard v. Bailey (1931), H 610. It is not the same in cases of the type dealt with in this memorandum. However, memorials and petitions from private persons or organizations have been received by the Senate and acted upon. And to some extent such third persons have been granted rights of a party in a proceeding, especially in more recent cases. The resolution in the LaFollette case, H 50, read:

"That the resolution of the Minnesota Commission of Public Safety petitioning the Senate * * * to institute proceedings looking to the expulsion * * * be, and the same hereby are, dismissed * * * ."

In the Long case, the petitioner Woman's Committee of Louisiana was advised that its allegations were insufficient, and invited to make its allegations more specific, H 654. Thereupon public hearings were conducted. Even the treatment of hopeless cases as those of Erickson, H 651, and Lowry v. Berry, H 727, suggests that the Senate is not inclined to disregard completely any "contest" even though it comes only from a single citizen, in no way connected with the Senate race.

The conclusion, particularly on the basis of the Smoot, LaFollette, Overton, Long and Langer cases, is therefore that there is some precedent for the statement that the Senate may take action (if justified by the merits of the case), in an election contest even though the proceeding is prompted by the petition of a person other than the defeated opponent in the general election.

Sincerely yours,



Donald C. Cook

DCC:mmw

COOK AND BERGER

and files

I am enclosing herewith for your information a copy of a report of the Senate Subcommittee on Privileges and Elections to the Committee on Rules and Administration regarding charges with respect to the conduct of the August 28, 1948 "run-off" primary election for the Democratic nomination for United States Senator from Texas, made by Coke R. Stevenson, the defeated candidate in that Primary. This report, which, you will note, concludes that you were duly elected United States Senator from the State of Texas, has been unanimously adopted by the Committee on Rules and Administration.

In connection with the preparation of this report the Subcommittee's staff made a thorough investigation of the charges and a most careful study of all information and data which conceivably could be of significance in considering such charges. On the basis of that investigation and study the Subcommittee unanimously concluded that no basis whatsoever existed for contesting your election. On the contrary, only minor irregularities, common to every election, which would not possibly vitiate a state-wide primary and subsequent general election, were discovered. All of the evidence supports the conclusion that you had no knowledge *of or* ~~were in any way connected or identified with, directly or~~ *indirectly* ~~or reason to believe that any election irregularities in~~ *any of* ~~fact occurred.~~ *the* Further, it is abundantly clear that the charges made were engendered solely by the heat of a vigorous political campaign.

(The 1948 irregularities)
with respect to
which charges were
made to the Subcommittee]

COOK AND BERGER
LAW OFFICES

RACUL BERGER
DONALD C. COOK

RING BUILDING
1200 EIGHTEENTH STREET, N. W.
WASHINGTON 6, D. C.
TELEPHONE EXECUTIVE 1226
CABLE ADDRESS "COBERG"

April 28, 1949

John Connally, Esq.
Room 231
Senate Office Building
Washington 25, D. C.

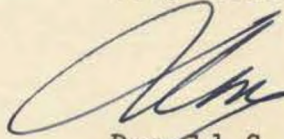
Dear John:

I am enclosing herewith an original and three (3) copies of a proposed letter to Turner Smith, which I believe you should seriously consider sending to him over the signature of Mr. Wertz.

I am also enclosing an original and three (3) copies of a revision of the Memorandum which you gave me last night. So that you will be able easily to determine the suggested changes which I have made in the Memorandum, I am also returning the Memorandum which you handed me as I have marked it up.

Please let me know if there is anything further that I can do.

Very sincerely,



Donald C. Cook

*P.S. To the matter in
footnote 2 of the memorandum
a matter of record with the
Committee.*
DCC:mmw
Encls
OK.

Processing Note:

1/29/2025

There are 4 copies of the following seven-page document. 3 of the 4 copies are carbon copies. These carbon copies have not been scanned.

Robert Mar

Digitization Technician

Turner Smith, Esq.
Counsel to Senate Sub-Committee on
Privileges and Elections
Committee on Rules and Administration
Senate Office Building
Washington 25, D. C.

Dear Sir:

In connection with your consideration of certain allegations which have been made to the Sub-Committee by persons resident in Texas regarding the so-called "run-off" primary held on August 28, 1948 for the purpose of selecting a Democratic nominee for United States Senator from the State of Texas, it has occurred to me that the following information, which may not have heretofore been called to your attention, should be submitted to you.

(1) In the general election for Senator in November, 1948 Lyndon B. Johnson ("Johnson") received a total of 807,266 votes to his opponent's 387,258 votes, or a majority of over 420,000 votes.

(2) At no time has the defeated candidate in the November, 1948 general election or anyone else advanced any charges with respect to the conduct of said general election.

(3) The Civil Statutes of the State of Texas deal with primary elections and party nomination contests in great detail. For your convenience and ready reference I am attaching hereto a tabulation of citations to pertinent provisions of said Civil Statutes.

(4) Under Texas law, as you will observe by referring to the various provisions of the Civil Statutes cited in the attached tabulation, the canvassing of votes and the ultimate selection of a Party nominee for United States Senator is determined in the following manner:

The respective County Executive Committees are convened to receive the election returns from the precinct election judges, to canvass the results and to forward the tabulated statements of votes to the Chairman of the State Executive Committee.

The State Executive Committee canvasses the returns as certified by the various County chairmen and prepares a tabulated statement showing the number of votes received by each candidate in each County. The tabulation is presented to the State Committee for its approval or disapproval, and, if approved, for certification by the Chairman thereof. The State Chairman thereafter presents the tabulated statement to the Chairman of the State Convention, duly convened, for the approval or disapproval of the Convention. Upon approval by the Convention it declares the candidate who received a majority of all votes cast to be the nominee of the Party, and the Chairman and the Secretary of the State Convention certify the nominee to the Secretary of State for the State of Texas. The Secretary of State in turn certifies the nominee to the various election officials as the party candidate for Senator and his name is placed on the official ballot for use in the general election.

(5) Under established Party procedures, as well as under the Civil Statutes of Texas, Party nomination contests are conducted in the following manner:

Under the established Party procedures contenders for Party nominations are accorded the right to appear before and be heard by the State Executive Committee as well as the Committee on Party Nominations of the State Convention. Further, debate on the Convention floor is also permitted.

In addition to the foregoing, provision is made under applicable Texas statutes for contests before the State District Courts, which are courts of general jurisdiction. In a contest of a statewide election, venue is laid in any of the three District Courts of Travis County, the seat of the State capitol. Further, in cases

"where fraud or illegality is charged, if such charges of fraud or illegality be supported by some evidence, or by affidavit of reputable persons, and the ends of justice seem to require it, the Court shall have authority to unseal and reopen the ballot boxes to determine controverted issues, and the Court may recount, or under its direction cause to be recounted, the ballots cast in any or all precincts of the county to determine the true result of such election." (50 Texas Stat. (Supp.) 3148 (3149)).

An appeal from the decision of the District Court may be taken, by either party to the contest, to the Court of Civil Appeals for the particular Supreme Judicial district, "which appeal shall be advanced upon the docket of said Court and shall have precedence over all other cases."

Court review of the declaration of the State Convention may be had only by the defeated candidate for the party nomination.

Thus any disappointed prospective nominee, for cause shown that he is aggrieved, has a complete remedy in the State courts. Thus complete protection is afforded against any arbitrary use of power by Party officials.

(6) Stevenson, the defeated candidate for the nomination in the run-off primary, and Johnson both presented charges of election irregularities to, and were fully heard by a Sub-Committee of the State Executive Committee as well as by the full State Executive Committee. The State Executive Committee decided the controversy in Johnson's favor.

(7) Stevenson was accorded the right to appear before the Committee on Party Nominations of the State Convention but he declined to do so. The Committee on Party Nominations reported to the State Convention that Johnson had received a majority of the votes and should be declared the Party nominee.

(8) The State Convention, in open assembly, received the results of the canvass of the State Executive Committee and the report of its Committee on Party Nominations. It found that Johnson had received a majority of the votes cast and declared him to be the duly elected Party nominee.

(9) The Chairman and Secretary of the State Convention certified Johnson to the Secretary of State as the duly elected Party nominee for United States Senator and his name was accordingly placed on the ballot.

(10) As noted above the State law of Texas provides for a Party nomination contest by a defeated candidate and vests exclusive jurisdiction to decide the same in the State District Courts, with provision for an expeditious appeal to the Courts of Civil Appeals. The decision is final and conclusive. Further, on allegations of fraud or illegality made in a contest, the District Courts may open the ballot boxes and recount the ballots.

(11) If no contest is filed the laws of Texas provide that all ballots shall be destroyed sixty (60) days after the primary election.

(12) Stevenson failed to contest the primary election under Texas law, although repeatedly challenged to do so by Johnson. Johnson was precluded by law from initiating a contest inasmuch as he was the victorious candidate.

(13) Instead of filing a contest in the State Courts Stevenson sought an injunction from a Federal District Court. A temporary injunction was first granted by the District Court but subsequently dissolved on order of the Circuit Court of Appeals. Stevenson's petition for certiorari was denied by the Supreme Court.

(14) As a result of Stevenson's failure to contest the primary under State law, and Johnson's inability to do so, the ballots have been destroyed and no recount is now possible.

(15) The charges of fraud made by Stevenson to the State Executive Committee were repeated by him in various public statements. As a result thereof, Grand Jury investigations were held in the three Texas counties in which Johnson had received substantial majorities and which were the principal subject of Stevenson's charges of fraud.

(16) No fraud was found by any Grand Jury. One reported an unusual amount of personal opinions and political animosities; the second commended the election officials on the fairness with which the election was conducted; and the third found that the overwhelming evidence showed that the election was conducted legally, fairly and impartially and that the election officials were diligent in their duties.

(17) By refusing to contest the run-off primary under State law, Stevenson made it impossible to preserve the ballots, thus making a complete recount impossible. A careful examination of the Senate's precedents indicates that in circumstances such as here presented, even if a contest were to be instituted, a complete recount of all the votes cast would be necessary to any decision. Consequently, Stevenson is in the position of seeking to raise an issue before your Sub-Committee after having permitted the destruction of the data indispensable to a determination of the suggested issue.

This letter is not intended to be a brief; nor is it intended to be argumentative in character. As I have indicated at the outset, the purpose of this letter is merely to acquaint you with some relevant and purely factual matters which may not heretofore have been called to your attention.

Very truly yours,

CITATIONS TO THE CIVIL STATUTES OF THE
STATE OF TEXAS
(ALL CITATIONS ARE TO CHAPTER XIII - NOMINATIONS -
UNLESS OTHERWISE INDICATED)

<u>Nature of Article</u>	<u>Article No.</u>
Senatorial Contests governed by law regulating contests for State officers.....	3067 (Chap. 9)
State laws apply to Senatorial primaries.....	3088 (Chap.12)
Nomination at primary.....	3090 (Chap.12)
All State election laws apply to Senatorial primaries.....	3091 (Chap.12)
Second primary.....	3094 (Chap.12)
Conduct of Election.....	3095 (Chap.12)
Officers of primary.....	3104 (3089)
Political party may prescribe qualifications of members.....	3107
Primary committee.....	3115 (3103)
County executive committees.....	3118 (3107-9)
Time for returns by judge in party primary elections.....	3123 (3121)
Returns of election.....	3124 (3122)
Canvass of result.....	3125 (3123-25)*
Tabulated statement.....	3127 (3126-7)
Boxes and ballots returned.....	3128 (3129)*
Objections to nomination; jurisdiction of district court; procedure.....	3130 (3131)*
Place for State convention.....	3136 (3137)
State committee to canvass.....	3137 (3138)

<u>Nature of Article</u>	<u>Article No.</u>
State convention to canvass.....	3138 (3139)
State convention.....	3139 (3140)
Mandamus.....	3142 (3143)
Powers of district court where fraud or illegality charged.....	3148 (3149)*
District court to certify findings; filing record in appellate court.....	3150 (3151-2)*
By district court.....	3152 (3154-57)*
Appeal from district court.....	3153 (3158)

* Reference to cumulative supplement.

Processing Note:

1/29/2025

There are 2 copies of the following thirty-six-page document. Only one copy has been scanned.

Robert Mar

Digitization Technician

REPORT OF
THE SENATE SUBCOMMITTEE ON
PRIVILEGES AND ELECTIONS
TO THE
COMMITTEE ON RULES AND ADMINISTRATION
RE TEXAS SECOND PRIMARY

June 21, 1949

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CITATIONS TO THE CIVIL STATUTES OF THE
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Appeal from district court.....	3153 (3158)

* Reference to cumulative supplement.

REPORT OF THE SUBCOMMITTEE ON PRIVILEGES
AND ELECTIONS. TO THE COMMITTEE ON RULES
AND ADMINISTRATION. RE TEXAS SECOND PRIMARY

Introduction

Your Subcommittee on Privileges and Elections has the following matters before it with respect to the second or so-called "run-off" Democratic primary held August 28, 1948, for the selection of the Democratic nominee for a seat in the United States Senate representing the State of Texas:

1. A petition filed on January 5, 1949 by a Texas "Citizens' Committee"^{1/} requesting that no Democratic nominee for United States Senator [from Texas] be seated.

2. A communication filed under date of October 18, 1948 by Honorable Coke R. Stevenson ("Stevenson"), the defeated candidate for the Democratic nomination for United States Senator from Texas in the run-off primary, alleging election frauds and irregularities in certain counties in Texas.

3. A communication filed under date of October 25, 1948 by Honorable Lyndon B. Johnson ("Johnson"), the successful candidate for the Democratic nomination for United States Senator from Texas in the run-off primary, alleging election frauds and irregularities in numerous counties throughout Texas.

Your Subcommittee has had these matters under consideration and now respectfully reports as follows:

The Junior Senator from Texas, Honorable Lyndon B. Johnson was elected a Senator for a full six-year term in the November 1948 General Election, receiving 809,420

^{1/} The "Citizens' Committee" called itself the "Citizens' Committee Against Political Fraud," P. O. Box 1271 - State Headquarters, San Antonio 6, Texas.

votes to his opponent's 389,190 votes. When the 81st Congress convened, Johnson presented his certificate of election from the State of Texas, took the oath of office and was thereupon seated.

It will be observed from the foregoing that the only matters pending are charges made with respect to the "run-off" primary. No charges with respect to the conduct of the General Election have been made either to the Senate or directly to the Senate Subcommittee on Privileges and Elections ("Sub-Committee").^{2/} There is, therefore, no contest pending before the Senate with respect to the General Election in which Johnson was the victor.

NATURE OF ALLEGATIONS

The petitions of the "Citizens' Committee" alleged, in substance, that at the time of the run-off primary, and as a consequence of the manner in which it was conducted, the Republican form of Government guaranteed to the State of Texas by Article IV, Section 4, of the Constitution of the United States, was abridged and nullified. It was also alleged, in effect, that an unnamed candidate or candidates engaged in "insurrection or rebellion against the (United States and gave) aid or comfort to the enemies thereof. . ." These allegations were entirely unsupported.

In his communication forwarded to the Subcommittee under date of October 18, 1948, Stevenson charged generally that various election frauds and other irregularities had occurred in the run-off primary in certain counties in Texas. Stevenson requested the Committee to investigate. An investigation was made.

^{2/} Subcommittee of the Senate Committee on Rules and Administration.

Johnson, the successful candidate for the Democratic nomination in the run-off primary, charged generally, in his communication filed with the Subcommittee under date of October 25, 1948, that various election frauds and irregularities had taken place in the run-off primary in numerous counties throughout Texas. Johnson requested that all the ballots cast in the run-off primary in all the counties of Texas be impounded by the Subcommittee so that in the event a complete recount of said ballots was deemed necessary and ordered, they would be available for that purpose. Johnson's charges were not investigated and his request was not acceded to.

CONDUCT OF THE PARTY PRIMARY IN TEXAS

Inasmuch as no charges have been made with respect to the conduct of the General Election but only with respect to the run-off primary, it is desirable briefly to describe the manner in which the laws of Texas require party primaries to be conducted and to indicate what actually transpired thereunder.

The Civil Statutes of the State of Texas provide that a political party desiring to nominate a candidate for United States Senator shall nominate or select such candidate for United States Senator at a general primary election to be held throughout the State.^{3/} The statutes also provide that:

"No person shall be declared the nominee for any political party for United States Senator unless he has * * * received a majority of all the votes cast at said primary for all the candidates for that party for United States Senator. If at the first primary election no candidate receives a majority of the vote * * * the State Executive Committee or State Chairman thereof shall call a second primary election for the purpose of determining the choice of the party as between

^{3/} 50 Civil Statutes of the State of Texas Art. 3090. (Hereinafter cited as "Texas Stat.")

the two candidates receiving the largest number of votes at the first primary election."^{4/}

The first Democratic primary was duly held but none of the candidates for the nomination received a majority of the votes cast. The two candidates receiving the largest number of votes were Johnson and Stevenson. Accordingly, pursuant to the requirements of the Texas law, as set forth above, a second or run-off primary was held at which the voting was restricted to a choice between Johnson and Stevenson.

Under Texas law the canvassing of the votes and the ultimate selection of the party nominee is determined in the following manner.

The respective County Executive Committees^{5/} are convened to receive the election returns from the precinct election judges,^{6/} to canvass the results^{7/} and to forward the tabulated statements of votes to the Chairman of the State Executive Committee.^{8/}

The State Executive Committee^{9/} canvasses the returns as certified by the various County chairmen and prepares a tabulated statement showing the number of votes received by each candidate in each County. The tabulation

^{4/} 50 Texas Stat. 3094.

^{5/} A County Executive Committee is composed of "a county chairman, and one member from each election precinct in such county * * *." 50 Texas Stat. 3118.

^{6/} 50 Texas Stat. 3124 (3122).

^{7/} 50 Texas Stat. 3125 (3123-5).

^{8/} 50 Texas Stat. 3127 (3126-7).

^{9/} The State Executive Committee consists of a Chairman, Vice-Chairman and sixty-two members, two from each senatorial district of the State. 50 Texas Stat. 3139 (3140).

is presented to the State Committee for its approval or disapproval, and, if approved, for certification by the Chairman thereof.^{10/} The State Chairman thereafter presents the tabulated statement to the Chairman of the State Convention duly convened, for the approval or disapproval of the Convention.^{11/} Upon approval by the Convention it has the duty to

"declare ☒ the candidate who received a majority of all votes cast for such office the nominee of the party for such office"

and the Chairman and the Secretary of the State Convention certify the nominee to the Secretary of State for the State of Texas.^{12/} The Secretary of State in turn certifies the nominee to the various election officials as the party candidate for Senator and his name is placed on the official ballot for use in the general election. This procedure was fully adhered to in connection with the run-off primary.

It is thus seen that elaborate and detailed statutory provisions, including provision of extensive machinery to ensure the correctness of the tabulation of votes, not only govern the conduct of the primary, but also fix the powers and duties of party officials. It is important to note that the State Convention has both the power and the duty to canvass the returns and declare who shall be the party nominee. The name of no person may appear on an election ballot unless he is declared by the State Convention to be the party nominee and certified as such to the Secretary of State.

But while the powers of the party with respect to the selection of nominees are indeed great, the rights of

^{10/} 50 Texas Stat. 3137 (3138).

^{11/} Ibid.

^{12/} 50 Texas Stat. 3138 (3139).

prospective nominees are appropriately safeguarded both by established party procedures and by statutory provision for contests.

Under established party procedures contenders for party nominations are accorded the right to appear before and be heard by the State Executive Committee as well as the Committee on Party Nominations of the State Convention. Further, debate on the Convention floor is also permitted.

In addition to the foregoing, under applicable Texas statutes, provision is made for contests by defeated candidates before the State District Courts. ^{13/} In cases

"where fraud or illegality is charged, if such charges of fraud or illegality be supported by some evidence, or by affidavit of reputable persons, and the ends of justice seem to require it, the Court shall have authority to unseal and re-open the ballot boxes to determine controverted issues, and the Court may recount, or under its direction cause to be recounted, the ballots cast in any or all precincts of the county to determine the true result of such election." ^{14/}

An appeal from the decision of the District Court may be taken, by either party to the contest, to the Court of Civil Appeals for the particular Supreme Judicial district, "which appeal shall be advanced upon the docket of said Court and shall have precedence over all other cases." ^{15/}

It is thus seen that any disappointed prospective nominee, for cause shown that he is aggrieved, has a complete remedy in the State courts. Thus complete protection is

^{13/} 50 Texas Stat. (Sup.) 3130 (3131) provides that "The District Court shall have original and exclusive jurisdiction of all contests for nominations growing out of primary elections. Any candidate desiring to contest the declared result of any primary election in which he was a candidate shall file his suit in the District Court."

^{14/} 50 Texas Stat. (Sup.) 3148 (3149).

^{15/} 50 Texas Stat. (Sup.) 3153 (3158).

afforded against any arbitrary use of power by party officials.

Having examined State party and statutory machinery with respect to party primaries, we will now give attention to what actually transpired thereunder.

The run-off primary early developed into a close contest, and during its course various allegations were publicly made by both candidates to the general effect that irregularities in the primary had been widespread.

After the ballots had been cast the County Executive Committees were duly convened, received the returns from the precinct election judges, canvassed the results and forwarded them to the Chairman of the State Executive Committee. Both the State Executive Committee and the State Convention were assembled in Fort Worth, Texas. The former received the tabulations from the County Executive Committees and prepared to make a preliminary canvass thereof through a duly appointed and properly authorized Subcommittee.

On September 13, 1948 both Johnson and Stevenson were heard by the Subcommittee of the State Executive Committee and also by the full Committee. The public charges and countercharges then became a matter of record before and the official business of the party officials.

Stevenson's charges were principally concerned with the fact that Johnson had received large majorities in a limited number of counties. Johnson, for his part, charged widespread irregularities throughout the state, including numerous specified counties, of which Stevenson was the beneficiary.

Both candidates were represented by counsel, and the full facts as known to the parties were presented in

detail, argued at length and considered fully.

After the hearings of the parties the full State Executive Committee decided the issues in Johnson's favor, completed the canvass of the votes, found that Johnson had received a majority thereof, and determined him to be the duly elected nominee of the Democratic party. Accordingly, it certified Johnson to the State Convention as the nominee of the Democratic Party for United States Senator from Texas.

The State Convention of the Democratic Party convened on September 14, 1948, the day following the meeting of the Executive Committee, received the Committee's report and immediately referred it to the Convention's Committee on Party Nominations. In view of the contest before the State Executive Committee, Stevenson was invited to appear before and be heard by the Convention's thirty-one man Committee on Party Nominations. He declined to do so.

The Committee on Party Nominations reported to the State Convention that Johnson had received a majority of the votes cast and should be certified as the party nominee. The State Convention received the report in open assembly, approved the same and declared Johnson to be the duly elected nominee of the Democratic party as its candidate for the office of United States Senator. Thereupon the Chairman and Secretary of the State Convention certified his name as such nominee to the Secretary of State of the State of Texas for inclusion on the official ballot to be voted in the ensuing General Election, all in accordance with the laws of Texas.

As we have previously noted, only the unsuccessful candidate for the party nomination has the right to

contest the nomination of his successful opponent before the appropriate State District Court, which, in Texas, is a court of general jurisdiction. We have also seen that where fraud or illegality is charged in such a suit, the Court has authority to impound and open ballot boxes, recount the ballots, reject all illegal votes, and ascertain and declare the true results of the election.

The defeated candidate, as we have seen, contested the nomination before the State Executive Committee where, as already noted, he was unsuccessful. Further, as we have also seen, he did not exercise the right accorded to him to appear before the Committee on Party Nominations of the State Convention. Further, he refrained from filing a suit in the State District Court to obtain a judicial determination. Had he done so he could have had a decision from a court with full power to deal with, and make a final and binding disposition of, the controversy.

Johnson, on the other hand, as the successful candidate, had no standing to obtain a judicial determination of the issues. Unable to originate a contest he was similarly precluded from having the ballot boxes throughout the State impounded.

Further, the State primary laws provide that ballot boxes after being used in primary elections shall be returned with the ballots cast to the county clerk, and unless there is a contest for a nomination, they shall be unlocked and the contents destroyed at the expiration of sixty days after such primary election, provided, that the District judge by an order may defer the destruction of the contents of such ballot boxes for a period of not exceeding twelve (12) months after such primary election.^{16/}

^{16/} 50 Texas Stat. (Sup.) 3128 (3129).

Stevenson took no steps under State law to contest the nomination of Johnson and hence no steps to have the ballot boxes impounded as provided thereunder. Consequently, pursuant to the requirements of Texas law, virtually all the ballots cast in the primary have long since been destroyed.

Instead of pursuing the remedy which he had available under Texas law, Stevenson filed a suit in equity in a United States District Court at Fort Worth, Texas, seeking to enjoin the election officials of the State from placing Johnson's name on the official ballot to be voted in the General Election.

LITIGATION IN FEDERAL COURTS OVER NOMINATION

The above referred to suit by Stevenson was commenced on September 15, 1948 in the District Court of the United States for the Northern District of Texas (Fort Worth Division) against Johnson and Tom L. Tyson and Vann M. Kennedy.^{17/} Stevenson charged in substance that numerous election irregularities and illegalities had occurred and as a result thereof he was deprived of the Democratic nomination. He asked the Court for the followings:

1. An injunction to prevent officers of the Democratic Party in Texas from certifying the name of Johnson as Democratic nominee for United States Senator as a result of the primary election.
2. An injunction to prevent Johnson's name as such nominee from being placed on the official ballot for the general election to be held on November 2, 1948.
3. Cancellation of the certificate if already made.
4. A declaration that Stevenson was the true

^{17/} Tom L. Tyson was Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, and Vann M. Kennedy was Secretary of said Convention.

nominee.

Immediately following the presentation of the complaint, Judge Davidson forthwith endorsed thereon a temporary restraining order.

On September 7, 1948, Stevenson amended his original complaint and added as defendants Paul E. Brown, Clarence O. Kraft, Melvin Faulk, and Sully Montgomery.^{18/} Upon the filing of the amended complaint an amended enlarged temporary restraining order was also issued. The restraining order was made returnable on September 21, 1948 at Fort Worth, Texas.

Thereafter, Johnson filed a motion to dismiss the complaint for want of jurisdiction and, on September 21, 1948, a hearing on the application for a temporary injunction took place. On September 22, 1948, the temporary injunction was continued in effect.

On September 24, 1948, Johnson lodged an appeal before Honorable Joseph C. Hutcheson, Jr., Circuit Judge of the United States Court of Appeals, 5th Circuit, seeking an order "setting aside and staying the temporary injunction order issued by the Court below, pending the determination of this appeal." Judge Hutcheson denied the motion "without prejudice to the right to present the motion to the (full) Court."

On September 29, 1948, Johnson filed a motion for a stay of the temporary restraining order theretofore issued, which motion was addressed to the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States and Supervising Justice for the 5th Circuit. On the same day

^{18/} Brown was Secretary of State of the State of Texas. Kraft, Faulk and Montgomery were County Judge, County Clerk and Sheriff, respectively, of Tarrant County, Texas. These last three individuals were added as defendants, inasmuch as they constituted the members of the Election Board of Tarrant County and were alleged to be properly representative of all the Election Board Members of the 253 other counties of the State.

Justice Black issued an order providing "that the temporary injunction issued by the United States District Court for the Northern District of Texas (Fort Worth Division) on September 23, 1948, in the case entitled Coke R. Stevenson v. Lyndon B. Johnson, et al, Civil Number 1640, be and the same hereby is stayed and that the said temporary injunction is and shall be of no force and effect until further order of the Supreme Court." Thereafter, on October 2, 1948, Coke R. Stevenson filed a motion with the Supreme Court of the United States requesting that the order of Mr. Justice Black of September 29, 1948, be vacated. On October 5, 1948, the Supreme Court issued an order denying the above-mentioned motion and dismissed the proceedings.

Meanwhile, the Court of Appeals for the 5th Circuit proceeded with a consideration on the merits of Johnson's appeal from the District Court's decision and, on October 7, 1948, in a unanimous decision, held that the District Court was without jurisdiction to consider the cause. It stated in part that:

"We are of opinion . . . 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 . . .

"The order of injunction is set aside and the cause is remanded with direction to dismiss the petition."^{19/}

Subsequently, Stevenson filed a petition for certiorari with the Supreme Court of the United States. On January 31, 1949, such petition was denied.^{20/}

Thus the litigation in the Federal Courts was decided in Johnson's favor.

^{19/} Stevenson v. Johnson, et al., 170 F. (2d) 108, 111.

^{20/} 17 L.W. 3227.

NATURE AND EXTENT OF THE SENATE'S POWERS AND CIRCUMSTANCES
UNDER WHICH THEY ARE EXERCISED

Having summarised the history as well as the significant considerations affecting the controversy, there remains for consideration the question of what action in the premises, if any, is now called for. In this connection and at the outset, it will be useful briefly to summarise the nature and extent of the Senate's powers and the circumstances under which, in the past, so far as here relevant, they have been exercised.

The Constitution of the United States provides that:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members " * * * ^{21/}

With respect to the qualifications of Senators, the Constitution provides that:

" No Person shall be a Senator who shall not have attained to the Age of thirty years, and been nine years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen. ^{22/}

The Federal Convention refused to establish qualifications for members other than those set forth above. It also refused to give Congress power to establish qualifications. In view of these facts it has been seriously contended that the Senate, under Article I, Section 5, Clause 1 of the Constitution, is restricted to a determination of whether a Senator has the qualifications required by

^{21/} Constitution, Art. I, Sec. 5, Clause 1. The exact words of this provision were agreed upon in the Federal Convention without debate on August 10, 1787. Madison, Debates in the Federal Convention of 1787 (Int. Ed. 1920) 378.

^{22/} Constitution, Art. I, Section 3, Clause 3.

Article I, Section 3, Clause 3. Thus Warren has said: ^{23/}

"Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age citizenship and residence."

This position is given some support by Hamilton's exposition of the Constitution in the Federalist, wherein he stated: ^{24/}

"[The] authority [of the national government] would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon another occasion, are defined and fixed in the Constitution, and are unalterable by the legislature."

It is unnecessary to do more than advert to the constitutional question, however, because in a long line of cases the Senate has repeatedly considered matters in Senate contests not concerned with either age, citizenship or residence. ^{25/}

We will proceed therefore on the assumption for present purposes that the Senate has power to inquire fully into the "elections" " " " of its own members," unfettered by Article I, Section 3, Clause 3.

Another question as to the Senate's power is

^{23/} Warren, The Making of the Constitution 1928. See also Warren 420-421, 423-425; 33 Va. L.R. 328, 329; 324-326.

^{24/} The Federalist, No. LX (By Hamilton).

^{25/} Further, there are no cases in which either State or Federal courts have interfered with the exercise of the Congressional power under Article I, Sec. 5, Clause 1. State Courts have expressly refused to do so. Election of United States Senator, 12 Fla. 686, 688-689 (1869); State of Florida vs. Crawford, 28 Fla. 441, 479-480 (1891); Sutherland vs. Miller, 79 W. Va. 796, 808 (1917). In Barry vs. United States ex rel. Cunningham, 29 U.S. 597 (1929), the Supreme Court expressly stated that the Senate, though a legislative body, has a judicial power under Article I, Section 5, Clause 1.

apparent at the threshold of our inquiry, namely, is a primary an "election" within the meaning of Article I, Sec. 5, Clause 1?

It will be remembered that Article I, Section 3, Clause 1 of the Constitution, prior to the XVII Amendment, governed the election of Senators and provided that:

"The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof * * *."

The XVII amendment, effective May 31, 1913, superseded this provision by providing that

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof * * *."

It was not until after 1913, therefore, that Senators were elected directly by the people and hence not until that time that primaries came to have particular significance in this connection.

It is nevertheless interesting to note, however, that prior to 1913 the Senate held that a state primary (Wisconsin) for the nomination of candidates for election to a State legislature, even though provided for by State statute, was not part of the election for United States Senator because the duty of election was vested solely in the legislature. Hence irregularities in a primary could not affect the validity of the election of a Senator by the State legislature.^{26/}

In 1921, eight years after the effectiveness of the XVII Amendment, Justice McReynolds (speaking in this respect for himself and three other Justices) in *Newberry vs. United States*,^{27/} a case concerning the *Newberry*

^{26/} The case of *Stephenson, Webb and Pierce*, Compilation of Senate Election Cases (1913), Senate Doc. No. 1036, 62nd Cong. 3d Session.

^{27/} 256 U.S. 232, 250 (1921).

Senate contest, stated that primaries

"are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified elections. * * * the two things are radically different."

More recent cases appear to have abandoned this general view,^{28/} although none of them is concerned with any of the aspects of Senate contests.

Since 1913 the Senate has dealt, from time to time, with various charges regarding primaries. In *Chilton v. Sutherland*^{29/} allegations with regard to a West Virginia primary and the ensuing general election were made by the defeated candidate Chilton. The allegations with respect to the primary were investigated in connection with the investigation of the general election. In *Ford v. Newberry*^{30/} the Senate conducted a recount of all the ballots cast in the Michigan general election and also investigated various aspects of the primary. As noted above, however, Justice McReynolds and three other Justices concluded that primaries were "in no sense elections for an office." In *Paddy v. Mayfield*^{31/} (Texas); *Stock v. Brookhart*^{32/} (Iowa), and *Johnson v. Scholl*^{33/} (Minnesota) various aspects of primaries were considered but only in connection with an investigation of the respective general elections. Thus it seems to have

^{28/} *Nixon vs. Harndon*, 273 U.S. 536, 541 (1927); *Nixon vs. Condon*, 286 U.S. 73 (1932); *Smith vs. Allwright*, 321 U.S. 649 (1944), expressly overruling *Gracey vs. Townsend*, 295 U.S. 45 (1935). See also *United States v. Classic*, 313 U.S. 299, 313-320 (1941), and *Rice vs. Elmore*, 165 F. (2d) 387 (C.C.A. 4th, 1947), *Certiorari denied*, 333 U.S. 375 (1948).

^{29/} Hays, *Compilation of Senate Election Cases, 1913-1940*, Senate Doc. 147, 76 Congress, 3d Session, 44. (Cited hereafter as "Hays.").

^{30/} Hays, 99.

^{31/} Hays, 200.

^{32/} Hays, 216.

^{33/} Hays, 256.

been the practice of the Senate to inquire into primaries only in connection with contests involving the general election.

In the Smith^{34/} case (Illinois) and the Vare^{35/} case (Pennsylvania), however, the Senate was concerned almost exclusively with primary matters, and it has been stated that:

"One of the most significant features of the work of this select Committee [i.e. the investigating committee] and of the Senate's action upon its reports in the Smith and Vare cases is the Senate's practical acceptance of that view that the primary is a part of the election."^{36/}

But as the case of Heflin v. Bankhead^{37/} (Alabama) clearly shows, the Senate did not decide in the Smith and Vare cases that it would regard all aspects of primaries as being within its cognizance and appropriate for decision. In this case Bankhead was the Democratic nominee who defeated Heflin in the general election by some 50,000 votes. Heflin contested the election on various grounds relating both to the Democratic primary and the general election, including particularly that he had

"been defrauded of the right to run in the regular Democratic primary held in the State of Alabama on the 12th day of August 1930 * * *."^{38/}

Heflin's contention as to the illegality of the primary, in the words of the Committee:

"[Gray] out of the fact that a resolution of the State Democratic Committee, calling the primary, fixed as one of the qualifications for candidates a test of party loyalty in the preceding election

^{34/} Hays, 289 (Decided in 1928).

^{35/} Hays, 318 (Decided in 1929).

^{36/} Haynes, The Senate of the United States (1938), V. 1, p. 150, n. 2.

^{37/} Hays, 470 .

^{38/} Hays, 472 .

but did not fix this test for voters in that primary. * * * It is admitted that * * * the Committee had the power to fix the qualifications for candidates * * * but it is contended that these qualifications became automatically the qualifications for voters and that the attempt to fix qualifications for voters differing from those fixed for candidates was beyond the power of the Committee and resulted in invalidating the whole primary."39/

In considering Heflin's contention the Committee stated:

"It may be well to direct attention at this point to the fact that whatever the powers of Congress, since the adoption of the seventeenth amendment, may be to regulate primaries in which nominations for the United States Senate are made, that there is no Congressional legislation attempting to exercise this power at this time.

"No intention has been shown by any Federal legislation, since the original corrupt practices act was declared invalid in the Newberry case, to exercise jurisdiction over state primaries. The legality of the Alabama primary in question must, therefore, be determined in the light of the Alabama statutes and general principles of law as declared in judicial decisions."40/

In this connection it will be recalled that Stevenson failed to avail himself of the clear remedy which he had under Texas law to contest the nomination of Johnson.

The role of the Senate in connection with a primary is stated in Heflin v. Bankhead^{41/} as follows:

"We have not deemed it a matter of sufficient importance to present the argument made by Heflin for the reason that the action of the electorate of Alabama in the general election eliminates from consideration the question of the legality of the primary.

"In our opinion the legality of the primary is not a proper matter for the consideration of the Senate of the United States. If it were * * * the action of the people in the general election has foreclosed consideration of it. For the fraud and corruption of the successful candidate in the election the Senate may go into the primary, as was done in Smith's case and Vane's case. Here the alleged infirmity is in the action of the party committee, not in Bankhead.

Thus while the Senate cannot be judicially restrained from examining into any and every aspect of the

39/ Hays, 476. The minority views of the Subcommittee were approved by a majority of the full Committee and accepted by the Senate by a vote of 64 to 18.

40/ Hays, 478.

41/ Hays, 481.

conduct of a primary election if it determines to do so, the rule governing its function in connection with primaries, consistent both with the constitutional source of its power and with its precedents of over 160 years, is that it will investigate and take appropriate action in connection with a primary election only when it is affirmatively shown that the nomination was secured by the fraud and corruption of the successful candidate.

The foregoing view is not only consistent with the Senate's precedents, but is also consistent with applicable judicial decisions.^{42/} As pointed out by the Senate in Heflin v. Bankhead^{43/}

"In Johnson v. Bosland (103 Minn. 147) the court said:

"The Contestee's name went on the official ballot under order of the court and the sanction of the law, and the authorities do not support the suggestion that the election may be overturned and electors disfranchised long after the election is past and the result thereof acted upon by those interested for irregularities, or even fraud, in nominating conventions or primary nominating elections.

"Contests for nominations as party candidates for public office must be settled before the general election, and when not, those whose names go upon the official ballots as the regular nominees are entitled to all benefits therefrom whether they, perchance, could have been in contest proceedings ousted of the right or not. The question recently came before the Supreme Court of Wisconsin, and was there determined in harmony with this view. (State v. Bunnell, 110 N.W. 177; State v. Goff, 129 Wis. 668, 109 N.W. 638, L.R.A., N.S. 916 * * *)."

"The basic principle upon which the foregoing authorities are grounded, and which is patently and fundamentally sound, is that the will of the people must prevail and cannot be set aside by reason of technical objections relating to the way the candidates name got on the ticket." * * *"

Having thus ascertained the rule to be applied we now turn to its application to the case before us.

^{42/} It is, of course, likely that the formulation of the Senate's precedents were influenced by the principles evolved by the courts in either resolving or refusing to take jurisdiction in election controversies, coming before them.

^{43/} Hays, 430.

ACTION BY SUBCOMMITTEE

As heretofore noted, subsequent to the victory of Johnson in the General Election, the "Citizens' Committee" forwarded a petition to us the printed portion of which is as follows:

- "1. Under the provisions of Article 1, of Amendments to the Constitution of the United States, we, the undersigned, citizens of the State of Texas, do humbly petition the members of the United States Senate to investigate and publicly divulge the actions and policies of the candidates for nomination for United States Senator in the Democratic Run-Off Primary Election in Texas held on 28 August, 1948, in which election the guarantee to the citizens of this state of a free and unmolested form of government, as set out in Section 4, of Article IV, of the Constitution of the United States, was abridged and nullified in this State, and,
- "2. We, the undersigned, citizens of the State of Texas, do further humbly petition, under Section 3, of Article XIV, of the Constitution of the United States, that no Democratic nominee for United States Senator be seated until and after the investigation petitioned above shall be complete."

Article IV, Section 4 of the Constitution, referred to in paragraph (1) of the Petition as the basis for the requested investigation, provides that:

"The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Looking to the substance of the allegations in paragraph (1) of the Petition, we find the petitioners charging, in effect, that at the time of the run-off primary, and as a consequence of the manner in which it

was conducted, the Republican Form of Government in the State of Texas was "abridged and nullified", and, possibly, that the State of Texas needed Federal protection against domestic violence. No evidence of any kind in support of these sweeping allegations has ever been submitted to us.

But in any event, and at the outset, important and obvious questions as to whether the Petition sets forth any grounds on which any relief could be granted are presented. Does the Constitutional guarantee to a State of a Republican Form of Government embrace any aspects of a primary election for United States Senator conducted under the laws of a State which apart from the events in such primary is conceded to have a "Republican Form of Government"? Can Federal action be taken under this Article at the request of private citizens in the face of the Constitutional requirement of an "Application of the Legislature, or of the Executive (when the Legislature cannot be convened)"? We think the answers are clearly in the negative. But whatever the answers may be, unsupported allegations to the effect that the State of Texas did not, at the time of the primary, have a Republican Form of Government (and possibly that Federal action was necessary to protect against domestic violence) are not entitled to serious consideration. As stated in another case:

"The State of Texas [was and] is in full possession of its faculties as a member of the Union, and its legislature, executive and judicial departments [were and] are peacefully operating by the orderly and settled method prescribed by its fundamental law." AA/

AA/ Taylor v. Beckham, 178 U. S. 578, 579 (1899).

Article XIV (Amendment), Section 3 of the Constitution, referred to in paragraph (2) of the Petition as the basis for not seating any Democratic nominee for United States Senator until the completion of the investigation requested in paragraph (1), provides, in material part, that:

"No person shall be a Senator * * * in Congress * * *, who, having previously taken an oath, as a member of Congress, * * * to support the Constitution of the United States, ^{45/} shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof * * *."

An allegation to the effect that any candidate in the run-off primary engaged in "insurrection or rebellion against the United States" or gave aid or comfort to the enemies thereof * * *" surpasses the credence of the Subcommittee. This allegation is also not entitled to serious consideration.

Accordingly, the petitions need not be considered further.

Following the receipt of the defeated candidate's charges the Subcommittee sent investigators to Texas. No evidence has been disclosed which would either support his allegations or personally connect any candidate with any election fraud or irregularities.

The material before the Committee consists of an exceptionally large amount of personal opinion, rumor, speculation and hearsay. Some carelessness on the part of election officials was noted, but nothing of a character such as could possibly vitiate the results of a state-wide primary and subsequent general election.

^{45/} Johnson as a former member of the House of Representatives of the United States has previously taken such an oath; Stevenson has not.

In this connection it is noted that the Senate, in *Bankhead v. Heflin*, quoted with approval from various judicial decisions, as follows: ^{46/}

"In *Whipley v. McKune* (12 Calif. 352, 362) the court said:

"Indeed, as the returns are prima facie evidence of the fact they impart, and as the returned candidate * * * especially after being commissioned * * * is prima facie entitled to the office, the contestant must show that the election was not only conducted irregularly, but that in consequence of irregularities the declared result was different from what it would have otherwise been."

"In *Farrington v. Turner* (55 Mich. 27, 18 N.W. 544) the Court said:

"The principle, as I understand to have been established by this Court, and also by the great weight of authority, is that an election is not to be set aside and declared void because of an irregularity which does not affect the result, that the wills of electors, plainly expressed in the form prescribed by law, can not be defeated by the negligence, mistake, or fraud of the officers appointed to register the result of an election."

"In *Wood v. Sykes* (61 Miss. 649, 662), the Court said:

"The cardinal rules controlling such cases are these: Where the charge is fraud the burden is always upon the contestant to show both fraud and injury to himself in the conduct of the canvass, and that in truth and in fact he received the greatest number of legal votes. Until he has approved (sic) proved both of these he can never recover. Unless he has received a majority of the legal votes he has no right to bring a suit, and he can complain of no sort of irregularity or fraud save when he affirmatively shows that he was thereby damaged * * *. But always his obligation is to prove that he was really elected by a plurality or majority of legal votes. Unless by the whole proof he has done so, his case must be dismissed or decided against him * * *."

"In order to set aside an election there must be not only proof of irregularities and errors, but, in addition thereto, it must be shown that such irregularities or errors did affect the result * * *. Unless it be affirmatively shown that they did affect the result, they are to be disregarded, and the result of the election stands."

Assuming for present purposes that irregularities had taken place in the run-off primary, could such irregularities affect the result of the election as declared by duly empowered Texas officials adhering to the requirements of Texas law?

If we were to assume, contrary to precedent, that the Senate should properly inquire into the results of a nominating primary election conducted by a political party, and should set aside decisions of duly constituted party officials as authorized by State law, it is apparent that the defeated candidate himself, by not filing a contest in the State Courts of Texas and thus preserving the ballots cast in the primary, has frustrated the proper conduct of such an inquiry in the instant case. If, unknown to the Subcommittee, illegal votes were actually cast and improper returns actually made in the run-off primary in Texas, in order to determine whether such conduct had the effect of changing the result of the race between Johnson and Stevenson it would be necessary to eliminate all illegal votes and all votes improperly counted and returned for each candidate. It would be necessary, among other things, to examine the ballots and returns in those counties where Johnson claimed illegalities and irregularities resulting in large numbers of added votes for Stevenson. Therefore, in order for the Subcommittee to arrive at its own determination as to the results of the primary election, it would be necessary to have a full re-count of all the ballots and a check of all returns.

This might have been accomplished if the Subcommittee had impounded all ballot boxes and returns, as requested by Johnson. It might also have been accomplished by Court order if Stevenson had filed a contest in a Texas district court, as provided by State law. Johnson, being the officially certified party nominee, could not under Texas law invoke the jurisdiction and powers of the Court for the purpose of effecting a re-count or impounding of the ballots. The Subcommittee is informed that all or virtually all of the ballots in the 254 counties of Texas have now been destroyed pursuant to the provisions of State law and a re-count hence impossible.

No action has been taken on Johnson's allegations and, in view of the foregoing, no action is required.

SUMMARY

1. The Junior Senator from Texas, Honorable Lyndon B. Johnson ("Johnson") was elected a Senator from the State of Texas in the November 1948 General Election receiving 809,420 votes to his opponent's 389,190 votes.
2. No charges of any kind with respect to the conduct of the General Election have been made. There is, therefore, no contest with respect to the General Election in which Johnson was the victor.
3. When the Senate convened in January 1949, Johnson presented his certificate of election from the State of Texas and was thereupon seated.
4. Subsequent to the run-off primary election in Texas, in which Johnson was found by the State Executive Committee, the Committee on Party Nominations of the State Democratic Convention and finally by the State Democratic Convention to have received a majority of the votes cast and hence declared to be the Democratic nominee, both the Honorable Coke Stevenson ("Stevenson"), the defeated candidate in the run-off primary, and Johnson, made various charges of irregularities in said run-off primary.
5. Subsequent to Johnson's victory in the General Election a group of petitions were filed by an organization calling itself a "Citizens' Committee Against Political Fraud".
6. The allegations of the Citizens' Committee, while not entirely clear, appear in substance to be that as a

result of the conduct of the run-off primary, the State of Texas was deprived of a Republican Form of Government within the meaning of Article IV, Section 4 of the Constitution of the United States, and that it needed Federal intervention to protect against domestic violence, as provided by the same Article. It asked an investigation on those grounds. It also asked, on the basis of Article XIV, Section 3, of the Constitution, which provides in substance that no person shall be a Senator if having taken an oath to support the Constitution shall engage in insurrection or rebellion against the United States or give aid or comfort to its enemies, that no Democratic nominee be seated until after the completion of the requested investigation.

7. Stevenson charged generally that various election frauds and other irregularities had occurred in the run-off primary in certain counties in Texas. He asked for an investigation which was held.
8. Johnson, the successful candidate for the Democratic nomination in the run-off primary, charged that various election frauds and other irregularities had taken place in the run-off primary in numerous counties throughout Texas. He requested that all the ballot boxes throughout the State be impounded so that in the event a complete recount of the ballots was deemed necessary and was ordered they would be available for that purpose. Johnson's charges were not investigated and his request to impound the ballots was not granted.
9. Under Texas law the County Executive Committees canvass the returns and forward the results to the State Executive

Committee. The State Executive Committee thereupon canvasses the returns and submits its results to the State Convention for its approval or disapproval. Under Texas law the State Convention has the power and the duty to determine the candidate receiving a majority of the votes, to declare him to be the party nominee, and to certify him to the Secretary of State for appearance on the ballot as the party candidate.

10. Stevenson and Johnson presented their respective charges to and were heard by a Subcommittee of the State Executive Committee as well as the full State Executive Committee. The issues were decided in Johnson's favor.
11. Stevenson was accorded the right to appear before the Committee on Party Nominations of the State Convention but he declined to do so. The Committee on Party Nominations reported to the State Convention that Johnson had received a majority of the votes and should be declared the party nominee.
12. The State Convention, in open assembly, received the results of the canvass of the State Executive Committee and the report of its Committee on Party nominations. It found that Johnson had received a majority of the votes cast and declared him to be the duly elected party nominee.
13. The Chairman and Secretary of the State Convention certified Johnson to the Secretary of State as the duly elected party nominee for United States Senator and his name was accordingly placed on the ballot.

14. The State law of Texas provides for a party nomination contest by a defeated candidate and vests exclusive jurisdiction to decide the same in the State District Courts, with provision for an expeditious appeal to the Courts of Civil Appeals. The decision is final and conclusive.
15. On allegations of fraud or illegality made in a contest the District Courts may impound and open all ballot boxes, recount the ballots, reject all illegal ballots and ascertain and declare the true results of the election.
16. If there is no contest filed, the laws of Texas provide that all ballots shall be destroyed sixty (60) days after the primary election.
17. Stevenson failed to contest the primary election in the State Courts under Texas law. Johnson was precluded by law from initiating a contest inasmuch as he was the victorious candidate.
18. Instead of filing a contest in the State Courts Stevenson sought an injunction from a Federal District Court. A temporary injunction was first granted by the District Court but subsequently dissolved on order of the Circuit Court of Appeals. Stevenson's petition for certiorari was denied by the Supreme Court.
19. As a result of the defeated candidate's failure to contest the results of the primary under State law, and Johnson's inability to do so, the ballots have been destroyed and no recount is now possible.

20. The charges made by Stevenson to the State Executive Committee were repeated by him in various public statements. As a result thereof, Grand Jury investigations were held in three Texas counties which had been the subject of the charges.
21. No fraud was found by any Grand Jury. One reported an unusual amount of personal opinions and political animosities; the second commended the election officials on the fairness with which the election was conducted and the third found that the overwhelming evidence showed that the election was conducted legally, fairly and impartially and that the election officials were diligent in their duties.
22. The precedents of the Senate show that whatever is the nature and scope of its powers regarding State primary elections, absent fraud or corruption on the part of the successful candidate, it has respected the rights of the States and has left the determination of the legality of State primaries to be made under State law. As the Senate stated in *Heflin v. Bankhead* (Hays, Compilation of Senate Election Cases, 481):

"In our opinion the legality of the primary is not a proper matter for the consideration of the United States Senate. If it were * * * the action of the people in the general election has foreclosed consideration of it."
23. The solicitude of Congress for the political rights of the States is further evidenced by the fact that Congress has refused to extend the Federal Corrupt Practices Act to party primaries. The definition of "election" in that Act is as follows:

"The term 'election' includes a general or special election, but does not include a primary election or convention of a political party."

Thus party primaries and political conventions have been entirely excluded from its scope.

24. In a contested election the contestant has the burden of showing that he received a plurality or majority of the legal votes. In *Heflin v. Bankhead*, supra, the Senate quoted with approval from other election contest cases as follows:

"* * * the contestant must show not only that the election was conducted irregularly but that in consequence of irregularities the declared result was different from what it would have otherwise been."

and

"Where the charge is fraud the burden is always upon the contestant to show both fraud and * * * that in truth and in fact he received the greatest number of legal votes. * * * But always his obligation is to prove that he was really elected by a plurality or majority of legal votes. Unless by the whole proof he has done so, his case must be dismissed or decided against him. * * *"

25. By failing to contest the run-off primary election under State law, Stevenson made it impossible to preserve the ballots, thus making a recount and compliance with the Senate's precedents similarly impossible.
26. The allegations of the "Citizens' Committee" are entirely unsupported and need not be further considered.
27. No evidence has been disclosed which would support Stevenson's allegations or personally connect any candidate with any fraud or irregularities.

CONCLUSIONS

After a study and consideration of the above matters the Subcommittee concludes:

1. There is no contest pending before the Senate with respect to the General Election in which Johnson was the victor.

2. No evidence has been disclosed which would establish Stevenson's allegations.

3. That Lyndon B. Johnson was duly elected and seated as United States Senator from the State of Texas.

Therefore your Subcommittee on Privileges and Elections recommends the adoption of the following resolution:

"Resolved, That Lyndon B. Johnson is hereby declared to be a duly elected Senator of the United States from the State of Texas for the term of 6 years, commencing on the 3rd day of January 1949, and is entitled to be seated as such."

Respectfully submitted,

Francis J. Myers, Chairman

Guy M. Gillette

William F. Knowland

MEMORANDUM

WITH RESPECT TO THE

TEXAS

SECOND OR "RUN-OFF" PRIMARY

MARCH 28, 1949.

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MEMORANDUM WITH RESPECT TO THE
TEXAS SECOND OR "RUN-OFF" PRIMARY

INTRODUCTION

The Junior Senator from Texas, Honorable Lyndon B. Johnson ("Johnson"), was elected a Senator for a full six year term in the November 1948 General Election, receiving 798,561 votes to his opponent's 385,366 votes, a majority of over 413,000 votes. When the 81st Congress convened Johnson presented his credentials, took the oath of office and was thereupon seated.

No charges with respect to the conduct of the General Election have been made to the Senate Subcommittee on Privileges and Elections ^{1/} ("Subcommittee"). Various charges of irregularities have been made, however, with respect to the conduct of the second or "run-off" primary in which Johnson defeated his opponent, Honorable Coke Stevenson ("Stevenson"), by a close margin for the Democratic nomination. These charges, referred to in some detail below, were first made, immediately after the holding of the run-off primary, continued intermittently for some time, and were pending before the Subcommittee when Johnson took oath of office.

^{1/} A Subcommittee of the Senate Committee on Rules and Administration.

In view of the spirited character of the campaign for the nomination, the ardor of the contestant's supporters, and the closeness of the ultimate vote, it was to be expected that acute partisanship would become evident and allegations of irregularities be made. This expectation was not disappointed.

It will be observed from the foregoing that the Subcommittee does not have pending before it allegations respecting the Texas Senatorial election made by a defeated candidate in that election but, rather, charges made by or on behalf of the unsuccessful contender for the Democratic nomination in the second or "run-off" primary. Such being the case it will be helpful, at the outset to examine into the nature of the Texas Primary Election Laws and to observe the compliance therewith in the run-off primary.

Texas Primary Election Laws

The Civil Statutes of the State of Texas provide that a political party desiring to nominate a candidate for United States Senator shall nominate or select such candidate for United States Senator at a general primary election to be held throughout the State.^{2/} The statutes also provide that:

^{2/} 50 Civil Statutes of the State of Texas Art. 3090. (Hereinafter cited as "Texas Stat.")

"No person shall be declared the nominee for any political party for United States Senator unless he has * * * received a majority of all the votes cast at said primary for all the candidates for that party for United States Senator. If at the first primary election no candidate receives a majority of the vote * * * the State Executive Committee or State Chairman thereof shall call a second primary election for the purpose of determining the choice of the party as between the two candidates receiving the largest number of votes at the first primary election." 3/ (Underlining supplied throughout).

The first Democratic primary was duly held but none of the candidates for the nomination received a majority of the votes cast. The two candidates receiving the largest number of votes were Johnson and Stevenson. Accordingly, pursuant to the requirements of Texas law, as set forth above, a second or run-off primary was held at which the voting was restricted to a choice between Johnson and Stevenson.

Under Texas law the canvassing of the votes and selection of the party nominee is determined in the following manner.

The respective County Executive Committees ^{4/} are convened to receive the election returns from the precinct election judges, ^{5/} to canvass the results ^{6/} and to forward the

3/ 50 Texas Stat. 3094.

4/ A County Executive Committee is composed of "a county chairman, and one member from each election precinct in such county * * *," 50 Texas Stat. 3118.

5/ 50 Texas Stat. 3124. (3122).

6/ 50 Texas Stat. 3125 (3123-5).

the tabulated statements of votes to the Chairman of the State Executive Committee.^{7/}

The State Executive Committee^{8/} canvasses the returns as certified by the various County chairmen and prepares a tabulated statement showing the number of votes received by each candidate in each County. The tabulation is presented to the State Committee for its approval or disapproval, and, if approved, for certification by the Chairman thereof.^{9/} The State Chairman thereafter presents the tabulated statement to the Chairman of the State Convention, duly convened, for the approval or disapproval of the Convention.^{10/} Upon approval by the Convention it

"declare as the candidate who received a majority of all votes cast for such office the nominee of the party for such office"

and the Chairman and the Secretary of the State Convention certify the nominee to the Secretary of State for the State of Texas.^{11/} The Secretary of State in turn certifies the nominee to the various election officials as the party candidate for Senator and his name is placed on the official ballot for use in the general election.

^{7/} 50 Texas Stat. 3127 (3126-7).

^{8/} The State Executive Committee consists of a Chairman, Vice Chairman and sixty two members, two from each senatorial district of the State. 50 Texas Stat. 3139 (3140).

^{9/} 50 Texas Stat. 3137 (3138).

^{10/} Ibid.

^{11/} 50 Texas Stat. 3138 (3139).

It is thus seen that elaborate and detailed statutory provisions, including provision of extensive machinery to ensure the correctness of the tabulation of votes, not only govern the conduct of the primary, but also fix the powers and duties of party officials. It is important to note that the State Convention has both the power and the duty to canvass the returns and declare the party nominee. The name of no person may appear on an election ballot unless he is declared by the State Convention to be the party nominee and certified as such to the Secretary of State.

But while the powers of the party with respect to the selection of nominees are indeed great the rights of prospective nominees are appropriately safeguarded by statutory provision for contests.

Party Nomination Contests Under Texas Law

Under the applicable Texas statutes provision is made both for contests before the State Executive Committee and, upon allegations of fraud or illegality, before the State District Courts. ^{12/} Provision is made for expeditious hearings both before the State Executive Committee and the District Courts. An appeal from the decision of the District Court

^{12/} 50 Texas Stat. (Sup.) 3146 (3147), 3148 (3149).

^{13/} 50 Texas Stat. (Sup.) 3130 (3131).

may be taken, by either party to the contest, to the Court of Civil Appeals for the particular Supreme Judicial district, "which appeal shall be advanced upon the docket of said Court and shall have precedence over all other cases."^{14/}

In cases where fraud or illegality is charged the District Court has the authority:

"to unseal and reopen the ballot boxes to determine controverted issues, and the Court may recount, or under its direction cause to be recounted, the ballots cast in any or all precincts of the county to determine the true result of such election * * *."^{15/}

As might be expected, although it is nonetheless important to note, court review of the declaration of the State Executive Committee may be had only by the defeated candidate^{16/} for the party nomination.

It is thus seen that any disappointed prospective nominee, for cause shown that he is aggrieved, has a complete and expeditious remedy in the State courts. Thus complete protection is afforded against any arbitrary use of power by party officials.

^{14/} 50 Texas Stat. (Sup.) 3153 (3158).

^{15/} 50 Texas Stat. (Sup.) 3148 (3149).

^{16/} "The District Court shall have original and exclusive jurisdiction of all contests for nominations growing out of primary elections. Any candidate desiring to contest the declared result of any primary election in which he was a candidate, shall file his suit in the District Court * * *." 50 Texas Stat. 3130 (3131). (The jurisdiction of the State Executive Committee is exhausted when it presents the results of its canvass to the State Committee.) See 50 Texas Stat. (Sup.) 3148 (3140).

Having examined State statutory machinery with respect to party primaries we will now give attention to what transpired thereunder in the run-off primary between Johnson and Stevenson.

The Johnson-Stevenson Run-Off Primary

The run-off primary early developed into a hard fought and extremely close contest. As soon as it became apparent that the victor would be determined by a narrow margin, various allegations were made to the general effect that there were numerous and widespread irregularities in the primary.

Both aspirants for the nomination apparently entered into the spirit of the occasion and there emerged a picturesquely diversified sequence of events. Each aspirant claimed victory for himself and defeat for his opponent; charges and countercharges were quickly made and as readily refuted. Meanwhile the newspapers joined in the clamor, weaving titillating tapestries from the aspirant's charges, accounts of hurried meetings held, investigators dispatched, and law suits instituted - with more to come in the next edition.

But the shadow was in no way a true reflection of the substance. The party officials did not lose sight of the serious character of their responsibilities and they carefully set about to perform their statutory duties and to determine

and declare the party's successful nominee for high office from a great State.

As provided by statute the County Executive Committees were duly convened, received the returns from the precinct election judges, canvassed the results and forwarded them to the Chairman of the State Executive Committee. Both the State Executive Committee and the State Convention were assembled. The former received the tabulations from the County Executive Committees and prepared to make a preliminary canvass thereof through a duly appointed and properly authorized Subcommittee.

Both Johnson and Stevenson were heard by both the Subcommittee of the State Executive Committee and the full Committee, and the public charges and countercharges then became a matter of record before and the official business of the party officials charged by law to consider and decide.

Stevenson's charges were principally concerned with the fact that Johnson had received large majorities in four South Texas counties, namely, Duval, Jim Wells, Starr and Zapata counties. Johnson for his part charged widespread irregularities, of which Stevenson was the beneficiary, throughout the state, mentioning alleged irregularities particularly in Brown, Dallas, Harris, Galveston, Eastland, Wharton, Chambers and Clay Counties. These alleged irregularities will be commented upon further in their appropriate place below.

Both candidates were represented by able and distinguished counsel and the full facts as known to the parties, were presented in detail, argued at length and considered fully.

After a full and fair hearing of the parties and careful consideration both the Subcommittee and the full State Executive Committee, on the basis of the canvass of the voting as it was charged by law to do, found that candidate Johnson was the duly elected nominee of the Democratic party and that his name should accordingly be certified as such to the State Convention.

Meanwhile the State Convention had been assembled to receive the results of the canvass by the State Executive Committee. The Chairman of the State Convention received the results of the canvass by the State Executive Committee and presented the same to the State Convention in open assembly. After considerable debate the Convention declared Johnson to be the duly elected nominee of the Democratic party for United States Senator. Thereupon the Chairman and Secretary of the State Convention certified Johnson to the Secretary of State of the State of Texas as the party's nominee as aforesaid.

As we have previously noted the unsuccessful candidate for the party nomination, or contestee, has the right

to contest the nomination of his successful opponent both before the State Executive Committee and, de novo before the appropriate State District Court. We have also seen that where fraud or illegality is charged the District Court has the authority to reopen the ballot boxes and recount the ballots to determine the true results of the election.

Stevenson exercised his right to contest the nomination before the State Executive Committee where, as already noted, he was unsuccessful. But he failed, however, to file a suit in the District Court and obtain a judicial determination. Had he done so he could have had a prompt determination by a court with full power to deal with, and make a final and binding disposition of, the controversy,

Johnson, on the other hand, as the successful candidate had no standing (since he was not a contestee within the meaning of the applicable statute) to obtain a judicial determination of the issues raised, either by himself or by Stevenson, before the State Executive Committee. Unable to originate a contest he was similarly precluded from having the ballot boxes throughout the State impounded.

Further, the State primary laws provide that ballot boxes after being used in primary elections shall be returned with the ballots cast to the county clerk and unless

there is a contest for a nomination, they shall be unlocked and the contents destroyed at the expiration of sixty days after such primary election, provided, that the District judge by an order may defer the destruction of the contents of such ballot boxes for a period of not exceeding (12) months after such primary election.

Stevenson took no steps under State law to contest the nomination of Johnson and hence no steps to have the ballot boxes impounded as provided thereunder. Consequently virtually all the ballots cast in the primary have long since been destroyed pursuant to the requirements of Texas law and the only kind of a recount which could in any sense be significant, namely, a state-wide recount, has been rendered impossible.

Instead of pursuing the clear remedy which he had available under applicable state law governing contests over a party nomination Stevenson elected to file suit in a Federal District Court.

The scene now shifts to both the court room of Federal District Judge, the Honorable T. Whitfield Davidson, and to the Subcommittee on Privileges and Elections, Committee on Rules and Administration, United States Senate, where various events were simultaneously transpiring. These events will be considered, in the order named, below.

Litigation in the Federal Courts

On September 15, 1948 Stevenson filed a suit in the District Court for the Northern District of Texas, Judge T. Whitfield Davidson presiding, against Johnson and others to enjoin the certification by the officers of the Democratic party in Texas of Johnson as the Democratic nominee for United States Senator; to prevent Johnson's name from being placed on the official General Election ballots; for a cancellation of the certificate if made; and a declaration that Stevenson was the true nominee.^{17/} Other defendants included the party officers charged with the duty of certifying, the Secretary of State to whom the certificate was addressed (and who prepared the form of ballot) and an election board claimed to be properly representative of all board members in all counties.

A temporary restraining order was granted and a hearing set for a temporary injunction. At the hearing Johnson moved to dismiss on various grounds, including that the court lacked jurisdiction to nullify a certificate of nomination duly made under the laws of Texas. Johnson also filed under oath a statement taking issue with Stevenson's factual allegations and proposed to show at a proper time

^{17/} A statement of facts is contained in Johnson, et al. v. Stevenson, 170 F.(2d) 108 (Oct. 7, 1948).

and in a proper forum that illegal votes were counted for Stevenson in numbers larger than any number Stevenson had alleged were counted for Johnson. The motion to dismiss was overruled and the court, without making specific findings of fact, granted a temporary injunction on September 22, 1948.

Johnson forthwith took an appeal to the United States Court of Appeals for the Fifth Circuit. Because it was not possible to obtain a prompt hearing and decision necessary in view of the imminency of the printing of the ballots, Johnson appealed to Supreme Court Justice Black, Supervising Justice for the Fifth Circuit, who directed that the injunction be dissolved.

The appeal from the decision of the District Court was heard in ordinary course and the Circuit Court ordered the injunction set aside and the cause remanded to the District Court with direction to dismiss Stevenson's petition.^{18/}

Stevenson filed a petition for certiorari with the Supreme Court which was denied on January 31, 1949.^{19/}

Meanwhile, of course, Johnson had been duly elected in the General Election and had taken his seat in the United States Senate.

^{18/} Id.

^{19/} 17 L.W. 3227.

Complaints Lodged with the Subcommittee
by both Johnson and Stevenson

From time to time, commencing almost immediately following public announcement of the voting results in the various counties indicating that Johnson had received a majority of the votes for Democratic nominee for United States Senator, various letters, telegrams and petitions from Stevenson and his supporters were received by the Subcommittee claiming, in their material part, that false election returns were made in four counties in Texas in the run-off primary; namely, Duval, Jim Wells, Starr and Zapata counties. The Subcommittee was urged to make an immediate investigation. The Subcommittee authorized a preliminary investigation of the charges.

Johnson also lodged various complaints with the Subcommittee. While Stevenson had confined his complaints almost exclusively to alleged irregularities in four counties, Johnson charged widespread election irregularities throughout the state. In a sworn statement he specifically charged that numerous illegal votes were cast in Brown, Galveston and Clay Counties, that returns from Dallas County were several times amended (at least twice without basis of law or fact), each time increasing the vote of Stevenson, and that changes were made in the returns from Eastland, Wharton, Chambers and

many other counties after the polls were closed. Johnson represented to the Subcommittee that a determination could not be made which would reflect the true results of the primary by a recounting of the votes in a few boxes only, but that a recount should embrace all ballots cast in all counties in Texas in which the primary was held. Accordingly, Johnson requested the Subcommittee to impound all of the ballot boxes in all of the Counties of Texas.

On the basis of the foregoing charges by both Stevenson and Johnson the Subcommittee impounded the boxes in certain of the above mentioned Counties but not in all as Johnson had requested.

We are advised that the charges with respect to irregularities in Duval, Jim Wells, Starr and Zapata Counties were also publicly made within the State of Texas by Stevenson. We are also advised that the Department of Justice received various complaints with respect to the conduct of the primary. We will now turn our attention to these matters.

Grand Jury Investigations in Texas

As noted above the charges made by Stevenson to the Subcommittee were made before the Texas State Executive Committee as well as before the State Convention. Both candidates were represented by counsel and accorded full and fair

hearings. As heretofore noted both the State Executive Committee and the State Convention found Johnson to have received a majority of the votes cast and hence to be the successful party nominee. The charges there made were also publicly made in statements issued by or on behalf of Stevenson. As a result thereof, and at various dates subsequent to the run-off, Grand Juries were convened in Duval, Jim Wells and Zapata Counties for the purpose of investigating the conduct of the run-off in said counties.

Extensive investigations were made, many witnesses were called (all of whom occupied positions entitling their testimony to weight and credit) and voluminous testimony was taken. No fraud was found by any of the Grand Juries and no indictments were returned.

On the contrary, we are advised that one Grand Jury specifically found that there had been no fraud in the primary, another Grand Jury commended the election officials on the fairness with which the election was conducted, and still another Grand Jury found that the overwhelming evidence showed that the election was conducted legally, fairly and impartially, and that the election officials were diligent and zealous in their duties.

Investigation by the Department of Justice

As heretofore noted, the Department of Justice also received various complaints with respect to the conduct of the

election all of which were investigated. We have communicated with the Department for the purpose of ascertaining the nature of the investigation and results thereof. The Department advised that as the agency charged with the enforcement of Federal laws it investigated all complaints received with a view to determining whether any Federal laws were violated. All complainants were interviewed and all data obtained were carefully analysed, both by the appropriate United States Attorneys and in the Department in Washington. No basis was found warranting the taking of any prosecutive action.

Having summarized the history as well as the significant considerations affecting the controversy, there remains for consideration the question of what action in the premises, if any, is called for. In this connection and at the outset, it will be useful briefly to summarize the nature and extent of the Senate's powers and the circumstances under which, so far as here relevant, in the past, they have been exercised.

Nature and Extent of the Senate's
Powers and Circumstances Under Which
they are Exercised

The Constitution of the United States provides
that:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members " * * ." 20/

With respect to the qualifications of Senators, the Constitution provides that:

"No Person shall be a Senator who shall not have attained to the Age of thirty years, and been nine years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." 21/

The Federal Convention refused to establish qualifications for members other than those set forth above. It also refused to give Congress power to establish qualifications. In view of these facts it has been seriously contented that the Senate, under Article I, Section 5, Clause 1 of the Constitution, is restricted to a determination of whether a Senator has the qualifications required by Article I, Section 3, Clause 3.

22/
Thus Warren has said:

"Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship and residence."

20/ Constitution, Art. I, Sec. 5, Clause 1. The exact words of this provision were agreed upon in the Federal Convention without debate on August 10, 1787. Madison, Debates in the Federal Convention of 1787 (Int. Ed. 1920) 378.

21/ Constitution, Art. I, Section 3, Clause 3.

22/ Warren, The Making of the Constitution (1928). See also Warren 420-421, 423-425; 33 Va. L.R. 328, 329; 324-326.

This position is given some support by Hamilton's exposition of the Constitution in the Federalist, wherein he stated:^{23/}

"[The] authority [of the national government] would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon another occasion, are defined and fixed in the Constitution, and are unalterable by the legislature."

It is unnecessary to do more than advert to the constitutional question, however, because in a long line of cases the Senate has repeatedly considered matters in Senate contests not concerned with either age, citizenship or residence.^{24/}

We will proceed therefore on the assumption that the Senate has power to inquire fully into the "elections * * * of its own members", unfettered by Article I, Section 3, Clause 3.

Another question as to the Senate's power is apparent at the threshold of our inquiry, namely, is a primary an "election" within the meaning of Article I, Sec. 5, Clause 1?

^{23/} The Federalist, No. LX (By Hamilton).

^{24/} Further, there are no cases in which either State or Federal courts have interfered with the exercise of the Congressional power under Article I, Sec. 5, Clause 1. State Courts have expressly refused to do so. Election of United States Senator, 12 Fla. 686, 688-689 (1869); State of Florida vs. Crawford, 28 Fla. 441, 479-480 (1891); Sutherland vs. Miller, 79 W. Va. 796, 808 (1917). In Barry vs. United States ex rel. Cunningham, 29 U.S. 597 (1929), the Supreme Court expressly stated that the Senate, though a legislative body, has a judicial power under Article I, Section 5, Clause 1.

It will be remembered that Article I, Section 3, Clause 1 of the Constitution, prior to the XVII Amendment, governed the election of Senators and provided that:

"The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof * * *."

The XVIIth amendment, effective May 31, 1913, superseded this provision by providing that

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof * * *."

It was not until after 1913, therefore, that Senators were elected directly by the people and hence not until that time that primaries came to have particular significance in this connection.

It is nevertheless interesting to note, however, that prior to 1913 the Senate held that a state primary (Wisconsin) for the nomination of candidates for election to a State legislature, even though provided for by State statute was not part of the election for United States Senator because the duty of election was vested solely in the legislature. Hence irregularities in a primary could not affect the validity of the election of a Senator by the State legislature.^{25/}

^{25/} The case of Stephenson, Webb and Pierce, Compilation of Senate Election Cases (1913), Senate Doc. No. 1036, 62nd Cong. 3d Session.

In 1921, eight years after the effectiveness of the XVII Amendment, Justice McReynolds (speaking in this respect for himself and three other Justices) in Newberry vs. United States, ^{26/} a case concerning the Newberry Senate contest, stated that primaries

"are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified elections. " " " the two things are radically different."

More recent cases appear to have abandoned this general view, ^{27/} although none of them is concerned with any of the aspects of Senate contests.

Since 1913 the Senate has dealt, from time to time, with various charges regarding primaries. In Chilton v. Sutherland ^{28/} allegations with regard to a West Virginia primary and the ensuing general election were made by the defeated candidate Chilton. The allegations with respect to the primary were investigated in connection with the investigation of the general election. In Ford v. Newberry ^{29/}

^{26/} 256 U.S. 232, 250 (1921).

^{27/} Nixon vs. Herndon, 273 U.S. 536, 541 (1927); Nixon vs. Gordon, 286 U.S. 73 (1932); Smith vs. Allwright, 321 U.S. 649 (1944), expressly overruling Gray v. Townsend, 295 U.S. 43 (1935). See also United States v. Classic, 313 U.S. 299, 313-320 (1941), and Rice vs. Elmore, 165 F.(2d) 387 (C.C.A. 4th, 1947), Certiorari denied, 333 U.S. 875 (1948).

^{28/} Hays, Compilation of Senate Election Cases, 1913-1940, Senate Doc. 147, 76 Congress, 3d Session, 44. (Cited hereafter as "Hays".)

^{29/} Hays, 99.

the Senate conducted a recount of all the ballots cast in the Michigan general election and, also investigated various aspects of the primary. As noted above, however, Justice McReynolds and three other Justices concluded that primaries were "in no sense elections for an office". In Paddy v. Mayfield ^{30/} (Texas); Stack v. Brookhart ^{31/} (Iowa), and Johnson v. Schell ^{32/} (Minnesota) various aspects of primaries were considered but only in connection with an investigation of the respective general elections. Thus it seems to have been the practice of the Senate to inquire into primaries only in connection with contests involving the general election.

In the Smith ^{33/} case (Illinois) and the Vare ^{34/} case (Pennsylvania), however, the Senate was concerned almost exclusively with primary matters, and it has been stated that:

^{30/} Hays, 200.

^{31/} Hays, 216.

^{32/} Hays, 256.

^{33/} Hays, 289 (Decided in 1928).

^{34/} Hays, 318 (Decided in 1929).

"One of the most significant features of the work of this select Committee i.e. the investigating committee/ and of the Senate's action upon its reports in the Smith and Vare cases is the Senate's practical acceptance of that view that the primary is a part of the election." 35/

But as the case of Heflin v. Bankhead 36/ (Alabama) clearly shows the Senate did not decide in the Smith and Vare cases that it would regard all aspects of primaries as being within its cognizance and appropriate for decision. In this case Bankhead was the Democratic nominee who defeated Heflin in the general election by some 50,000 votes. Heflin contested the election on various grounds relating both to the Democratic primary and the general election, including particularly that he had

"been defrauded of the right to run in the regular Democratic primary held in the State of Alabama on the 12th day of August 1930 * * *." 37/

Heflin's contention as to the illegality of the primary, in the words of the Committee:

35/ Haynes, The Senate of the United States (1938), V. 1, p. 150, n. 2.

36/ Hays, 470.

37/ Hays, 472.

"[Groom] out of the fact that a resolution of the State Democratic Committee, calling the primary, fixed as one of the qualifications for candidates a test of party loyalty in the preceding election but did not fix this test for voters in that primary. * * * It is admitted that * * * the Committee had the power to fix the qualifications for candidates * * * but it is contended that these qualifications became automatically the qualifications for voters and that the attempt to fix qualifications for voters differing from those fixed for candidates was beyond the power of the Committee and resulting in invalidating the whole primary." 38/

In considering Heflin's contention the Committee stated:

"It may be well to direct attention at this point to the fact that whatever the powers of Congress, since the adoption of the seventeenth amendment, may be to regulate primaries in which nominations for the United States Senate are made, that there is no Congressional legislation attempting to exercise this power at this time.

"No intention has been shown by any Federal legislation, since the original corrupt practices act was declared invalid in the Newberry case, to exercise jurisdiction over state primaries. The legality of the Alabama primary in question must, therefore, be determined in the light of the Alabama statutes and general principles of law as declared in judicial decisions." 39/

In this connection it will be recalled that Stevenson failed to avail himself of the clear remedy which he had under Texas law to contest the nomination of

38/ Hays, 476. The minority views of the Subcommittee were approved by a majority of the full Committee and accepted by the Senate by a vote of 64 to 18.

39/ Hays, 478.

Johnson by the State Democratic Committee.

In considering a related question in Heflin v.

Bankhead the Committee stated:

"It is to be noted that no effort of any character was made by the contestant after the nomination of Mr. Bankhead to prevent his name being certified by the party authorities as the party candidate for United States Senator, nor was there any effort made by him to prevent the proper authorities of the State of Alabama from placing Mr. Bankhead's name on the ticket to be voted in the general election as the Democratic candidate for United States Senator."

40/

As already noted Stevenson refused to avail himself of the clear remedy under State law which he was repeatedly challenged to do by Johnson. Instead he sought to obtain an injunction in Federal court, a procedure which well established and equally well known cases showed was doomed to inevitable failure.

We are of course unaware of the considerations which led Stevenson, who is an experienced lawyer and who was represented by some of the most outstanding figures of the Texas Bar, to follow this course. Two facts are, however, apparent. If he had filed a contest in a Texas state court all of the ballot boxes throughout the state could have been impounded and a recount, now precluded, would then have been possible. Further, if Stevenson had been able to obtain an injunction in a Federal court and keep it in force for a very few days, the date for printing the ballots to be used

in the general election would have passed and neither Johnson's name nor the name of any other Democratic nominee would have appeared on the ballot, ^{41/} even though the injunction were subsequently dissolved. In fact, as we have already seen, only a Paul Revere ride to the Supreme Court by Johnson prevented this from transpiring.

The role of the Senate in connection with a primary is stated in Heflin v. Bankhead as follows:

"We have not deemed it a matter of sufficient importance to present the argument made by Heflin for the reason that the action of the electorate of Alabama in the general election eliminates from consideration the question of the legality of the primary.

"In our opinion the legality of the primary is not a proper matter for the consideration of the Senate of the United States. If it were " " the action of the people in the general election has foreclosed consideration of it. For the fraud and corruption of the successful candidate in the election the Senate may go into the primary, as was done in Smith's case and Vare's case. Here the alleged infirmity is in the action of the party committee, not in Bankhead."

Thus while the Senate cannot be judicially restrained from examining into any and every aspect of the conduct of a primary election if it determines to do so, we believe the true rule governing its function in connection

^{41/} In the general election Stevenson supported the Republican candidate in opposition to Johnson.

with primaries, consistent both with the constitutional source of its power and with its precedents of over 160 years, to be that it will investigate and take appropriate action in connection with a primary election only when it is affirmatively shown that the nomination was secured by the fraud and corruption of the successful candidate.

The foregoing view is not only consistent with the Senate's precedents, but is also consistent with applicable judicial decisions.^{42/} As pointed out by the Senate in Hafflin v. Bankhead^{43/}

"In Johnson v. Dosland (103 Minn. 147) the court said:

"The Contestee's name went on the official ballot under order of the court and the sanction of the law, and the authorities do not support the suggestion that the election may be overturned and electors disfranchised long after the election is past and the result thereof asked upon by those interested for irregularities, or even fraud, in nomination conventions or primary nominating elections.

"Contests for nominations as party candidates for public office must be settled before the general election, and when not, those whose names go upon the official ballots as the regular nominees are entitled to all benefits therefrom whether they, perchance, could have been in contest proceedings ousted of the right or not. The question recently came before the Supreme Court of Wisconsin, and was there determined in harmony with this view. (State v. Bunnell, 110 N.W. 177; State v. Coff, 129 Wis. 668, 109 N.W. 638, 9 L.R.A., N.S. 916 * * *).

^{42/} It is, of course, likely that the formulation of the Senate's precedents were influenced by the principles evolved by the courts in either resolving or refusing to take jurisdiction in election controversies, coming before them.

^{43/} Hays, 480.

"The basic principle upon which the foregoing authorities are grounded, and which is patently and fundamentally sound, is that the will of the people must prevail and cannot be set aside by reason of technical objections relating to the way the candidates name get on the ticket " " "."

Having thus ascertained the rule to be applied we now turn to its application to the case before us.

The Johnson-Stevenson Controversy

Stevenson has charged in substance that by illegal and fraudulent means votes were cast and counted for Johnson, and election returns changed, particularly in Duval, Jim Wells, Starr and Zapata Counties, thereby resulting in the nomination of Johnson.

Johnson, for his part, has made similar charges as to illegal and fraudulent votes cast and counted for Stevenson, particularly in Brown, Dallas, Harris, Galveston, Eastland, Wharton, Chambers and Clay Counties.

Stevenson requested the Senate Subcommittee to impound the ballots in the counties named by him. This was done by the Subcommittee.

Johnson requested the Subcommittee to impound the ballots throughout the entire State of Texas so that a complete

recount might be had. ^{44/} The Subcommittee refused Johnson's request, however, and impounded only the boxes from a selected number of counties.

Thus at the present time the Subcommittee has in its possession the ballots cast in only a few of the 254 counties in Texas. It is thus apparent that a complete recount is not now possible.

As previously noted, Stevenson failed to file a contest in the Texas state courts, thus preventing impounding of the boxes under state law.

In this connection it is noted that the Senate, in Bankhead v. Heflin, quoted with approval from various judicial decisions, as follows: ^{45/}

"In Whitley v. McKune (12 Calif. 352, 362) the court said:

"Indeed, as the returns are prima facie evidence of the fact they impart, and as the returned candidate * * * especially after being commissioned * * * is prima facie entitled to the office, the contestant must show that the election was not only conducted irregularly, but that in consequence of irregularities the declared result was different from what it would have otherwise been."

^{44/} As a matter of interest, and bearing on the question of the feasibility of impounding all the ballots and conducting a complete recount on a statewide basis in Texas, it is pointed out that in the case of Paddy v. Mayfield, a Texas case, the Senate Sergeant at Arms gathered all the ballots in Texas and they were recounted before a Senate Subcommittee. Hays, 200.

^{45/} Hays, 490.

"In Farrington v. Turner (55 Mich. 27, 18 N.W. 544) the Court said:

"The principle, as I understand to have been established by this Court, and also by the great weight of authority, is that an election is not to be set aside and declared void because of an irregularity which does not affect the result, that the wills of electors, plainly expressed in the form prescribed by law, can not be defeated by the negligence, mistake, or fraud of the officers appointed to register the result of an election."

"In Wood v. Sykes (61 Miss. 649, 662), the Court said:

"The cardinal rules controlling such cases are these: Where the charge is fraud the burden is always upon the contestant to show both fraud and injury to himself in the conduct of the canvass, and that in truth and in fact he received the greatest number of legal votes. Until he has approved (sic) /proved/ both of these he can never recover. Unless he has received a majority of the legal votes he has no right to bring a suit, and he can complain of no sort of irregularity or fraud save when he affirmatively shows that he was thereby damaged * * *. But always his obligation is to prove that he was really elected by a plurality or majority of legal votes. Unless by the whole proof he has done so, his case must be dismissed or decided against him * * *."

"In order to set aside an election there must be not only proof of irregularities and errors, but, in addition thereto, it must be shown that such irregularities or errors did affect the result * * *. Unless it be affirmatively shown that they did affect the result, they are to be disregarded, and the result of the election stands."

Did the irregularities, assuming them to be true as alleged, affect the result as declared by the Texas officials pursuant to the requirements of Texas law? ^{46/} It is now too late to determine this question because while Johnson charged irregularities and fraud generally throughout the State, the ballots were never impounded and consequently no recount is now feasible.

Finally, the Subcommittee has carefully examined all of the data before it and while it is not entirely clear that either candidate has been charged with personal fraud or corruption, the record has been examined from that point of view. In any event, no such evidence appears in the record. In no sense can it be said that either candidate was personally associated with any irregularities or wrongful acts.

Conclusion and Recommendation

Accordingly, our conclusion and recommendation is that Johnson was duly elected a Senator from the State of Texas in the election of November 4, 1948, and is entitled to his seat.

^{46/} No charge has been made that there was any fraud or irregularity in the procedure followed by the State Executive Committee and the State Convention in declaring that Johnson was duly the elected Democratic nominee. The charge by Stevenson is in substance that a fraud was practiced on said Committee and Convention. The Committee and Convention, as previously noted, heard all the charges and held otherwise.

"ART. 3067. United States senator

"If the nomination of any candidate for United States Senator be contested, the same shall be conducted under the provisions of the law regulating contests before party election committees or the courts for State officers."

"ART. 1022. State laws apply

"Every law regulating or in any manner governing elections or the holding of primaries in this State shall be held to apply to each election or nomination of a candidate for a United States Senator so long as they are not in conflict with the Constitution of the United States or of any law or statute enacted by the Congress of the United States regulating the election of United States Senators or the provisions of this law. The returns from any election held for United States Senator shall be made, the result ascertained and declared, a certificate of election issued, as provided for the election of representatives in Congress, by this title."

ART. 1090. Nomination at Primary

"Each party desiring to nominate a candidate for United States Senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidate at a general primary election to be held throughout the State on the fourth Saturday in July next preceding such election for United States Senator."

PART. 3091. All laws apply

"At each primary election held in this State for the nomination of a candidate for United States Senator, each provision of the laws of this State which has for its object the protection of the ballot and the safeguarding of the public against fraudulent voting, illegal methods, undue influence, corrupt practices, and in fact each restriction of whatever kind or character as applied to any election held in this State whether general, special or primary shall be held to apply to a primary election held for or when a candidate for United States Senator is to be nominated when not in conflict with the provisions of this law. When the law with reference to holding senatorial primaries is silent, the election officers in securing supplies, in conducting the election and in making returns and in canvassing the votes shall in every particular follow the methods provided by law covering primary elections or general elections held for the purpose of nominating or electing State, district, county, and precinct officers."

"ART. 3094. Second primary

"No person shall be declared the nominee of any political party for United States Senator unless he has complied with every requirement of this law and all laws applicable thereto and has received a majority of all the votes cast at said primary election for all the candidates for that party for United States Senator. If at the first primary election no candidate receives a majority of the vote polled by his party for all the candidates for United States Senator before said party, the State Executive Committee or State chairman thereof shall call a second primary election for the purpose of determining the choice of the party as between the two candidates receiving the largest number of votes at the first primary election. Said second primary shall be held on the fourth Saturday in August, immediately after the first primary is held. At such second primary, only the two candidates in each party receiving the highest votes shall be voted upon."

"ART. 3091. General of election

"At each primary held for the nomination of a candidate for United States Senator, the election shall be conducted by the duly appointed and constituted election officers of the several polling places and voting precincts throughout the State who shall be paid as provided by law for holding elections in other cases. No person shall vote for any candidate for the nomination for United States Senator who does not belong to the same political party with which the voter affiliates and when any voter attempts to vote for any person as a candidate for the nomination for United States Senator, and is challenged he shall, before being permitted to vote, make an affidavit that he is a bona fide member of said party and if he voted in the preceding general election held for the election of State officials, he voted for the nominees of the party whose ticket he desires to vote. Upon making such affidavit he shall be permitted to vote."

"ART. 3104. (3089) Officers of primary

"All the precinct primary elections of a party shall be conducted by a presiding judge, to be appointed by a chairman of the county executive committee of the party, with the assistance and approval of at least a majority of the members of the county executive committee. Such presiding judge shall select an associate judge and two clerks to assist in conducting the election; two supervisors may be chosen by any one-fourth of the party candidates, who, with the judges and clerks, shall take the oath required of such officers in general elections. Two additional clerks may be appointed, but only when, in the opinion of the presiding judge, there will be more than one hundred votes polled at the primary election in the precinct."

"ART. 3107. Political party may prescribe qualifications of members.

"Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

ART. III. (3103) Primary committee

"Subject to the approval of the committee, the County Chairman shall appoint a subcommittee of five (5) members to be known as the primary committee, of which he shall be ex-officio chairman. This subcommittee shall meet on the fourth Monday in June and make up the official ballot for such general primary in such county, in accordance with the certificates of the State and District Chairman and the request filed with the County Chairman, and place the names of the candidates for nomination for State, district, county and precinct offices thereon in the order determined by the county executive committee as herein provided."

"ART. 3118. (3107-9) County executive committees

"There shall be for each political party required by this law to hold primary elections for nomination of its candidates, a county executive committee, to be composed of a county chairman, and one member from each election precinct in such county; the committeeman from such election precinct shall be chairman of his election precinct, and the said county chairman shall be elected on the general primary election day; the county chairman by the qualified voters of the whole county, and the precinct chairman by the qualified voters of their respective election precincts. Said county and precinct chairman shall assume the duties of their respective offices on Saturday following the run-off primary immediately after the committee has declared the results of the run-off primary election. Said county chairman shall be ex-officio a member of the executive committee of all districts of which his county is a part, and the district committee thus formed shall elect its own chairman. Any vacancy in the office of chairman, county or precinct, or any member of such committee shall be filled by a majority vote of said executive committee. The list of election precinct chairmen and the county chairmen so elected, shall be certified by the county convention to the county clerk, along with the other nominees of said party. If there are no requests filed for candidates for county and precinct chairman, a blank space shall be left on the ticket beneath the designation of such position."

"ART. 3123. (3121) Time for returns by judge in party
primary elections

"The presiding judges of party primary elections in all of the election precincts of this State shall, within seventy-two hours after the closing of the polls in said party primary election, make returns to the Chairman of the County Executive Committee of their respective Counties of the ballot boxes containing the ballots voted, locked and sealed, tally sheets, poll lists, return sheets, ballots mutilated and defaced, and ballots not voted, for which said County Chairman shall account to the Executive Committee of the county. The County Chairman shall, within forty-eight hours after the votes have been canvassed by the County Executive Committee as provided in Article 3124, Revised Civil Statutes of 1925 as amended by Chapter 273, Acts of the Regular Session of the Forty-first Legislature, mail to the State Chairman of their respective parties, complete returns as to the results of said party primary elections as to the several State offices."

"ART. 3124 (3122) Returns of election

"Immediately upon the completion of the counting of the ballots, the precinct election judges shall prepare and make out triplicate returns of the same showing: (1) The total number of votes polled at such box; (2) The total number of votes cast at such box for each candidate, and the total number of votes polled at such box for or against any proposition voted upon. Such returns shall be signed and certified as correct by the judges and clerks of the election precinct. One copy of said returns shall be sealed up in an envelope and delivered by one of the precinct judges of election to the chairman of the county executive committee within twenty-four hours after the ballots shall have been counted; one copy of said returns shall be placed in one of the ballot boxes together with the ballots voted and shall be locked and sealed therein; the remaining copy of said returns shall be retained by the presiding judge of election for a period of twelve months succeeding the date of election. The chairman of the county executive committee shall, upon receiving returns from each election precinct in the county, order the members of the county executive committee to convene at the county seat of the county on the next succeeding day; provided, however, that if the returns of all precincts are not received by the county chairman before the first Friday succeeding the day of the primary election, the county executive committee shall meet on the first Saturday succeeding the day of the primary election, and the returns in the hands of the county chairman shall be opened by the executive committee in executive session and shall be canvassed by them. The county attorney shall upon the relation of the county chairman immediately institute mandamus proceedings in the proper court to compel the delinquent returning officers to make proper returns as required by law, and it shall be the duty of the county chairman to notify the county attorney of the delinquency of the election officers immediately after the meeting of the county executive committee on the first Saturday next succeeding the day of the primary election."

SUPPLEMENT

"ART. 3125. (3123-25) Canvass of result

"At the meeting of the county executive committee, provided for in Article 3124, returns from the election precincts of the county shall be canvassed by the committee. Within the meaning of this Act, such canvass shall include an actual checking and comparison of the voting lists with the tally lists and return sheets, and a mere tabulation of votes shown by the return sheets shall not be deemed a compliance with this provision. All discovered errors in the returns shall be corrected before the results of the election are certified, and upon the sworn statement of any candidate filed with the committee before the actual printing of the official ballot, setting out alleged errors in the primary election returns as certified by the county executive committee, the said committee shall be reconvened for the investigation and consideration of such alleged errors, (sic), which provision is hereby declared to be mandatory and may be enforced by writ of mandamus. The said committee shall have the power to exclude any vote that is prima facie illegal, but any vote involving a question of law, or mixed question of law and fact shall not be determined by the committee. When the votes have been canvassed in accordance with the foregoing provisions and the result thereof declared by the committee, the chairman of the executive committee shall make a list of the candidates for county and precinct offices who received the necessary vote to nominate and shall certify the same and deliver it to the county clerk of the county. At the meeting of the executive committee after the first primary, if a majority of the votes be required to nominate for county and precinct offices, and in any case no candidate received a majority of the votes, the county executive committee shall determine the two candidates who received the highest number of votes cast for all candidates for the particular office and order their names printed on the ballot for the second primary."

"ART. 3127. (3126-7) Tabulated statement

"The chairman of the executive committee in each county shall, as soon as the vote in the primary election has been counted and canvassed, as provided in this chapter, prepare a tabulated statement of the votes cast in his county for each candidate for each nomination for a State, district, county or precinct office, and of that cast for county chairman, as shown by the canvass made by the county executive committee, and shall immediately mail such statement as to a state or district office, in a sealed envelope by registered letter, to the chairman of the state executive committee, who shall present the same to the state executive committee, as herein provided. The state executive committee shall meet at the seat of government not later than the second Saturday following the day of the first primary election and shall canvass the returns for all state and district offices. In the event any candidate for a district office received in the first primary the necessary vote to nominate, the state executive committee shall certify the name of such candidate to the county clerks of the proper district to be printed upon the official ballot for the general election as a candidate of the party for said office. In the event no candidate for a particular state or district office received the necessary vote to nominate at the first primary, the state executive committee shall upon canvassing the returns, determine the two candidates who received the largest number of votes cast for all candidates for the particular state or district office and shall order that the names of those candidates be printed upon the official ballot for the second primary election."

SUPPLEMENT

"ART. 3128. (3129) Boxes and ballots returned

"Ballot boxes after being used in primary elections, shall be returned with the ballots cast as they were deposited therein by the election judges, locked and sealed, to the county clerk, and unless there be a contest for a nomination in which fraud or illegality is charged, they shall be unlocked and unsealed by the county clerk and their contents destroyed by the county clerk and the county judge without examination of any ballot, at the expiration of sixty (60) days after such primary election. Provided, that the district judge, upon his own motion or upon the request of the county or district attorney, may, by an order entered on the minutes of the district Court, defer the destruction of the contents of such ballot boxes for a period not exceeding twelve (12) months after such primary election."

SUPPLEMENT

"ART. 3130. (3131) Objections to nomination; jurisdiction of district court; procedure"

"The District Court shall have original and exclusive jurisdiction of all contests for nominations growing out of primary elections. Any candidate desiring to contest the declared result of any primary election in which he was a candidate, shall file his suit in the District Court within ten (10) days from the date of declaring the result by the executive committee, and process shall be served upon the opposite party as in other civil suits, except that the return day thereof shall be fixed by the District Judge. However, upon the filing of any such suit, the contestant shall forthwith deliver, or cause to be delivered, a true copy of his petition or complaint to the opposite party. The filing of the suit shall be immediately called to the attention of the District Judge by the Clerk of said Court. If the District Court be then in session, the Judge thereof shall set the said contest for trial at a date not more than ten (10) days from the date of the filing of said contest. If the District Court be not in session at said time, the Judge thereof shall order a special term of said Court to be convened not later than ten (10) days from the filing of such contest for the hearing of same, and in either case, the said contest shall have precedence over all other matters. The contestee shall file his answer within five (5) days from the filing of such suit, but either party, or both, shall have the right to amend before announcing ready for trial and set up additional causes of action or matters of defense, as the case may be. Any further changes in the pleadings shall be within the sound discretion of the Court. In the trial of such cause, the trial judge shall have wide discretion as to matters of pleading, procedure and admissibility of evidence, the purpose of this article being to subserve the ends of justice, rather than strict compliance with technical rules of pleading, procedure, and evidence. The District Court shall have the exclusive power to determine the regularity of the election in the county or any precinct, and the legality or illegality of any ballot involving a question of law, or mixed question of law and fact. When the issues involved in such contest have been adjudicated, the District Court shall cause its decision to be certified to the county clerk of the county."

"ART. 3136. (3137) Place for State convention

"At the meeting of the State Executive Committee held on the second Monday in June preceding each general primary election, the said Committee shall decide upon and publish the place where the State convention of the party shall be held on the first Tuesday after the third Monday after the fourth Saturday in August, A.D. 1928."

"ART. 3137. (3138) State committee to canvass

"On the third Monday after the fourth Saturday in July 1928, and every two years thereafter the State executive committee shall meet at a place selected at the meeting held on the second Monday in June preceding, and shall open and canvass the returns of the primary elections held on the fourth Saturday in July as to candidates for State offices, as certified by various county chairmen, 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. If such returns show that for any State office no candidate received a majority of all the votes cast for all candidates for such office, such committee shall prepare a list of the two candidates receiving the highest vote for each office for which no candidate received a majority of votes cast at such primary for such office and shall certify same to the county chairmen of the several counties to be placed upon the official ballot as candidates for office at the second primary election to be held on the fourth Saturday in August thereafter. On the third Monday after the fourth Saturday in August 1928, 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 (sic) the returns of the second primary election held to nominate candidates for State offices as certified by the various county chairman (sic) 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."

"ART. VIII. (3139) State convention to canvass

"The State convention shall 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, and shall declare the candidates for each State office who has received a majority of votes cast for all candidates for such office in the first primary election, if any candidate receives a majority of all the votes cast for all the candidates for such office at said primary election, and if no candidate received such majority, then it shall declare the candidate who received a majority of all votes cast for such office at the second primary election, the nominee of the party for such office; and the chairman and the secretary of the State convention shall forthwith certify all such nominations to the Secretary of State."

"ART. VIII. (3149) State Convention

"All party State conventions to announce a platform of principles and announce nominations for Governor and State offices shall, except as otherwise provided, meet at such places as may be determined by the parties respectively on the Tuesday after the second Monday after the fourth Saturday in August, 1936, and every two years thereafter, and they shall remain in session from day to day until all nominations are announced and the work of the convention is finished. Said convention shall elect a chairman and a vice-chairman of the executive committee, one of whom shall be a man and the other a woman, and sixty-two members thereof, two from each senatorial district of the State, one of whom shall be a woman and the other a man, the members of said committee to be those who shall be recommended by the delegates representing the counties composing the senatorial districts respectively, each county voting its convention strength, each of whom shall hold said office until his successor is elected; and, in case of a vacancy, majority of the members of said committee shall fill the same by electing some eligible person thereto, but such person shall be of the same sex as vacating member."

PART. 3142. (3143) Mandamus

"Any executive committee or committeeman or primary officer, or other person herein charged with any duty relative to the holding of the primary election, or the canvassing, determination or declaration of the result thereof, may be compelled by mandamus to perform the same in accordance with the provisions of this title."

SUPPLEMENT

"ART. 3146. (3147) Contest of Officers

"Except for a place on party tickets for public elective offices, all contests within a political party shall be decided by the State, District, or County Executive Committee, as the nature of the office may require, each such Committee to retain all such powers and authority now conferred by law. "

SUPPLEMENT

"ART. 3148. (3149) Contest before executive committee

"The complaining candidate, if he desires to file a contest with the executive committee, shall, within five (5) days after the result has been declared by the committee or convention, cause a notice to be served on the chairman or some member of the executive committee, in which he shall state specifically the ground of his contest; and said hearing shall be set at a date not exceeding ten (10) days from the filing of said contest; and he shall also serve or cause to be served on the opposing candidate a copy of such notice, at least five (5) days prior to the date set for hearing by the committee; provided, however, that such notice may be served upon the agent or attorney of such opposing candidate, or may be served by leaving the same with some person over the age of sixteen (16) years at the usual place of residence or business of such opposing candidate, or his last address. If special charges of fraud or illegality in the conduct of the election, or in the manner of holding the convention, or in the manner of making nominations, are made, and not otherwise, the chairman, or, in case he fails or refuses, any member of the committee, shall within twenty (20) days after the primary election, or the convention, convene the executive committee, who shall then examine the charges, hear evidence and decide in favor of the party who in their opinion was nominated in the primary election, or in the convention; provided, that, before any advantage can be taken of the disregard or violation of any directory provision of the law, it must appear that, but for such disregard or violation, the result would have been different."

SUPPLEMENT

"ART. 3148. (3149) Powers of district court where
fraud or illegality charged

"In addition to the powers and authority granted to the District Courts by Article 3130, as amended by this Act, where fraud or illegality is charged, if such charges of fraud or illegality be supported by some evidence, or by affidavit of reputable persons, and the ends of justice seem to require it, the Court shall have authority to unseal and reopen the ballot boxes to determine controverted issues, and the Court may recount, or under its direction cause to be recounted, the ballots cast in any or all precincts of the county to determine the true result of such election. In all such cases in which a reopening of ballot boxes is ordered, the Court shall exercise all due diligence to preserve the secrecy of the ballots, and upon completion of such recount, the said ballot boxes with their original contents shall be resealed and redelivered to the county clerk."

SUPPLEMENT

"ART. 3150. (3151-2) District court to certify
findings; filing record in appellate court

"When the District Court shall have decided the contest, unless notice of appeal to the Court of Civil Appeals be given and an appeal bond filed within five (5) days, the said Court shall certify its findings to the officers charged with the duty of providing the official ballot for the ensuing election for observance in the preparation of the ballot for that particular party. The trial Court shall further fix a time within which the record in the trial Court shall be filed in the appellate Court, and make all such other orders in the cause as in his discretion may be necessary and expedient in order to expedite such appeal."

SUPPLEMENT

"ART. 3152. (3154-57) By district court

"In State, district, county, precinct, or municipal offices, the certificate of nomination issued by the president or chairman of the nominating convention or chairman of the county executive committee shall be subject to review, upon allegations of fraud or illegality, by the District Court of the county in which the contestee resides, or the Judge of said Court in vacation, or in any county in which contestee was candidate for office; provided, that such allegations are filed in said Court within ten (10) days after the issuance of said certificate; and when said allegations are so filed, or the appeal from the decision of the executive committee is perfected, the Judge of the District Court shall set same down for hearing, either in term time or vacation, at the earliest practicable time, not to exceed ten (10) days; and a copy of said grounds of contest, together with the notice of the date set for hearing shall be prepared and issued by the District Clerk and be served upon the contestee five (5) days before the hearing by said Court or Judge, and the parties to said contest shall have the right to summon witnesses; provided, however, that service upon the contestee of a copy of said grounds of said contest, together with the notice of the date set for hearing, may be had by service upon the agent or attorney of such person, or by leaving the same with some person over the age of sixteen (16) years at the usual place of residence or business of the contestee, or his last address. The said Court or Judge shall determine said contest at the earliest time practicable. A certified copy of the judgment of said Court or Judge shall be transmitted by the clerk thereof to the officers charged with the duty of providing the official ballot, and the name of the candidate in whose favor said judgment shall be rendered shall be printed in the official ballot for the general election.

"For good cause shown, supported by affidavit of either party, the trial of said contest may be postponed one time for not exceeding five (5) days."

SUPPLEMENT

"ART. 3153. (3158) Appeal from district court

"In all contests for party nominations filed in the District Courts under authority of this Act, either party thereto may appeal to the Court of Civil Appeals for that particular Supreme Judicial district, which appeal shall be advanced upon the docket of said Court and shall have precedence over all other cases. Provided, that no appeal in such cases shall be dismissed as moot merely because of possible interference with the printing of the official ballot, unless the appellant has been guilty of negligence in perfecting and prosecuting such appeal, (but such appellate Court shall retain jurisdiction of such appeal) and expeditiously dispose of same."

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REPORT CONCERNING PROTESTS OF TEXAS'

PRIMARY ELECTION OF 1948

Honorable Lyndon B. Johnson was elected United States Senator from Texas in the General Election of 1948, and on presenting his certificate of election at the convening of the 81st Congress, took the oath of office and assumed his seat in the United States Senate for a full six year term. He received 807,266 votes to 387,258 votes for his opponent in the General Election, a majority of more than two to one. No contest of such election has been presented and no question has been raised with respect to the conduct and regularity of the election.

The only matter before the Committee concerning Senator Johnson relates to the Second Primary election of the Democratic Party held in Texas on August 26, 1948, in which Johnson defeated his opponent, former Governor Coke Stevenson, by a narrow margin. Stevenson charged irregularities in counting and returning votes in five counties of South Texas, claiming that, as a result thereof, he was wrongfully deprived of several hundred votes. Johnson claimed that he was wrongfully deprived of several thousand votes as the result of irregularities in a large number of other counties. The Committee fully investigated the charges made by Stevenson and impounded the ballots in the five counties named by him, with the

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exception of one county where they had been destroyed.^{1/} No investigation was made by the Committee of the charges presented by Johnson, and his request that all ballots, particularly those in a number of named counties, be impounded, was not complied with.

The laws of Texas governing party primary elections provide that the several County Executive Committees of the political party shall meet at stated times, shall canvass the returns as made by the election officials of the several voting precincts of the county, and certify the returns to the State Executive Committee of the party; that the State Executive Committee shall meet at a stated time, shall canvass the returns as certified by the County Executive Committees, and shall certify the result to the State Convention of the party for its approval or disapproval. Stevenson appeared before the State Executive Committee and presented his charges. The Committee heard all the charges, and pursuant to its statutory function and duty certified to the State Convention that Johnson had received a majority of the votes in the Primary Election. The State Convention of the Democratic Party convened on the day following the meeting of the Executive Committee, received its report, and referred it to the convention's Committee on Party Nominations. The Convention adopted

^{1/} No particular significance is to be given to the destruction of the ballots (done by a long-employed court house janitor), as such occurred in other counties and was for the purpose of making the ballot boxes available for the ensuing General Election, and was not an unusual occurrence.

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the report of that committee, and declared Johnson to be the nominee of the Democratic Party of Texas as its candidate for the office of United States Senator from Texas. The party officers certified his name, as such nominee, to the Secretary of State of the State of Texas, for inclusion on the official ballot to be voted in the ensuing General Election, all in accordance with state law.

The laws of Texas further provide that the results of a party primary election may be contested by the losing candidate by suit in a District Court, which, in Texas, is a court of general jurisdiction. In the case of a contest of a statewide race, the venue of the contest is fixed in any of the three District Courts of Travis County, the seat of the State Capitol. In such a suit the court has authority to impound and open ballot boxes, make a re-canvass, reject all illegal votes, and ascertain and declare the result. Stevenson did not pursue the remedy plainly provided by State law and frequently resorted to in other instances. Instead, he selected a United States District Court in Fort Worth, Texas, in which to file a suit in equity seeking to enjoin the election officials of the State from placing Johnson's name on the official ballot to be voted in the General Election. Both the Court of Appeals of the Fifth Circuit and the Supreme Court held that the District Court was without jurisdiction, and by direction of the Court of Appeals

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the suit was dismissed.^{2/}

Having presented his contest and having obtained an adverse decision from the State Executive Committee and the State Convention of his party, and having declined to present his case to a court of competent jurisdiction, Stevenson then submitted his case to the electorate by appeals to the voters to vote in the General Election for Johnson's opponent, the nominee of the opposition party. Having again lost, he now asks the Senate to conduct an investigation of the party primary election in Texas to the limited extent of the conduct of the election in the five South Texas Counties.

If it be assumed, contrary to precedent, that the Senate should properly inquire into the results of a nominating primary election conducted by a political party, and should set aside decisions of duly constituted party officials as authorized by State law, it must be obvious that Stevenson himself has frustrated the proper conduct of such an inquiry in the instant case. If

^{2/} The Presiding Judge of one of the District Courts of Travis County had been appointed to the Bench by Stevenson when Governor. Both Stevenson and Johnson resided in the Western District of Texas. The U. S. District Judge of that district was available, as was a Judge of the Northern District and two of the Southern District, and all more easily accessible than the one from whom the injunction was obtained. The latter, according to press reports, signed the temporary restraining order during the early morning hours, on his farm near the Louisiana border. These facts are not mentioned for the purpose of indicating a pre-conceived opinion of the Judge, but to indicate the evaluation of the merits of the case by Stevenson and his attorneys, all of whom were able lawyers and prominent members of the State Bar.

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illegal votes were cast and improper returns made in the Primary Election in Texas, in order to determine whether such had the effect of changing the result of the race between Johnson and Stevenson it would be necessary to eliminate all illegal votes and all votes improperly counted and returned for each candidate. It would be necessary, among other things, to go into the ballots and returns in those counties where Johnson claimed illegalities and irregularities resulting in added votes for Stevenson.^{3/} Therefore, in order to arrive at a correct determination of the results of the election, it would be necessary to have a full re-count of all the ballots and a check of all returns. This might have been accomplished if the Committee had impounded all ballot boxes and returns, as requested by Johnson or by Court order if Stevenson had filed a contest in a district court of Travis County, as provided by State law. Johnson being the winning candidate could not invoke the jurisdiction and powers of the Court for the purpose of effecting a recount or impounding of the ballots. Practically all of the ballots in all the 254 counties of Texas, have now been destroyed pursuant to the provisions of State law.

^{3/} Johnson claimed that a contest in a local race in one county resulted in a court decree establishing that some _____ illegal votes were cast and counted in that county, of which Stevenson obtained a majority of _____ of such illegal votes. In another county, in which Stevenson received a majority of two to one, a Grand Jury investigation disclosed that there were some 2000 illegal votes, cast in the names of prostitutes who had been run out of the county and in the names of deceased persons taken from tombstones. It was also charged that illegalities and irregularities in many other counties resulted in giving Stevenson several thousand more votes than were legally cast for him.

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In justice to all parties, it should be stated that the charges presented by Stevenson were fully investigated by agents of this Committee. They secured written statements from the witnesses to whom they were referred by Stevenson's attorneys. Much of the data secured was either violently partisan in character, rumor, speculation or pure hearsay. The charges have been investigated by Grand Juries in the three counties principally complained about by Stevenson. If the charges were true it would follow that the criminal laws were violated and indictments would have been returned. No indictments were returned by any of the Grand Juries. On the contrary, their reports showed, in substance, that the election in those counties was conducted legally, fairly and impartially and that the election officials were diligent in the performance of their duties. The charges, if true, would also have indicated a violation of Federal law. The Department of Justice, through the FBI, has investigated the charges. Had evidence existed to establish the truth of the charges it would have been presented to a Federal Grand Jury, and, if sufficient, indictments would have been returned. Therefore, on the basis of the above, as well as on the basis of a consideration of the data before it, this Committee concludes that there has been a failure to make out a prima facie case of fraud or other illegality, and that further investigation is not warranted. But even if we were warranted in holding that the charges brought

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by Stevenson deserve further investigation, such would be fruitless unless we could ascertain whether and to what extent Stevenson himself was the beneficiary of fraud and irregularity, and what the result would have been if all votes illegally or irregularly cast and returned for each candidate were eliminated.

That further proceedings are not justified is conclusively established by Senate precedent. In the very recent case of Heflin vs. Bankhead involving alleged irregularities and illegalities in the conduct of a party primary, the following principles were affirmed:

"We have not deemed it a matter of sufficient importance to present (the argument made by Heflin) for the reason that the action of the electorate of Alabama in the general election eliminates from consideration the question of the legality of the primary.

"In our opinion the legality of the primary is not a proper matter for the consideration of the Senate of the United States. If it were * * * the action of the people in the general election has foreclosed consideration of it. For the fraud and corruption of the successful candidate in the election the Senate may go into the primary, as was done in Smith's case and Vare's case. Here the alleged infirmity is in the action of the party committee, not in Bankhead."

See report of Heflin vs. Bankhead, (Hays 481). It has been asserted on good authority, and strenuously argued, that the Senate is authorized to determine the only Constitutional qualifications of its members (i.e. age, citizenship and residence) and that the electorate determines their mental, moral and other qualifications. See Warren, "The Making of the Constitution"; The Federalist (Hamilton) LX: On this theory the Senate has inquired into the actual election only, and refused to inquire into party nomination, whether by Primary Election or otherwise. See The Case of Stephenson, Senate Doc. 1036, 62nd Congress; Newberry vs. United States, 256 U. S. 232. In cases where it did make inquiries into the conduct of party nominations, such as the Smith and Vare cases, it did so only for the purpose of determining whether the elected candidate was himself guilty of fraud or corruption in obtaining party nomination. This position is strongly reaffirmed in the more recent case of Heflin vs. Bankhead (Hays. 470).

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That precedent is particularly controlling here. The electorate of Texas in the General Election overwhelmingly "eliminate(d) from consideration the question of the legality of the Primary."^{5/} There is no evidence that Johnson had any connection with or knowledge of any irregularities in the Primary Election. Nor do any of the protests on file with the Committee contain any factual allegations tending to connect him in any manner with the conduct of the Primary Election.

It is recommended that the protests be dismissed and that no further proceedings be taken in respect thereof.

^{5/} Johnson received the largest majority of any of the thirty-two Senators who took their seats at the convening of the 81st Congress. This vote was given him by the electorate of Texas, notwithstanding that his opponent in the Primary had made an issue of the charges now before the Committee and had endorsed Johnson's opponent in the General Election, the nominee of the opposition party.

CONTESTED SENATE ELECTIONS

Sources of Information

I.

(a) While there is no compilation concerning Senate precedents, comparable to Hinds' and Canon's Precedents, the material concerning contested Senate elections has been assembled (though not very well indexed). Complete collections of all (about 130) contested Senate election cases from 1789 through 1940 (end of the 76th Congress) are available. They are the following compilations:

(1) Clarke and Hall, Cases of Contested Elections in Congress (1834), covering the period from 1789 to 1834.

(2) Bartlett, Cases of Contested Elections in Congress (1865), covering the period from 1834 through 1865, 38th Cong., 2d. Sess., House Misc. Doc. No. 57.

(3) George S. Taft, Compilation of Senate Election Cases (1885), 49th Cong., 1st Sess., Sen. Misc. Doc. No. 47.

(4) Furber, Compilation of Senate Election Cases (1893), 52nd Cong., 2d Sess., Sen. Misc. Doc. No. 67.

(5) Buck, Compilation of Senate Election Cases (1903), 58th Cong., Spec. Sess., Sen. Doc. No. 11.

(6) Webb and Pierce, Compilation of Senate Election Cases (1913), 62nd Cong., 3d Sess., Sen. Doc. No. 1036 (hereinafter quoted as "WP").

(7) Hays, Compilation of Senate Election Cases from 1913 to 1940 (1940), 76th Cong., 3d Sess., Sen. Doc. No. 147 (hereinafter quoted as "H").

(1) and (2) contain election cases of both Houses, while (3) through (7) deal exclusively with Senate cases.

(3), (4), (5) and (6) are strictly cumulative; each of them contains all cases passed upon up to the time of the publication. (1), (2) and (7) are not cumulative.

(3) through (6) are not only cumulative, but also identical with each other as to cases reported in two or more of them; obviously, the same plates were used for such cases. Their reports are, however, not identical with those in (1) and (2) with regard to cases reported in (1) and (2).

None of the reports is complete. There is, in general, a short headnote or kind of syllabus, followed by (sometimes quite comprehensive) excerpts from the material. This material consists mainly of Senate Reports, of proceedings and debates as recorded in the Congressional Globe or Congressional Record, and, in a very few cases, of printed hearings. (It would seem that there are many unprinted hearings available in the Senate Library; see e.g., reference in Blackball, *infra*, 234, n. 92.)

No compilation has yet been published concerning contested election cases since 1941 (apparently 2 (including the Langer) cases in the 77th, one case in the 78th, and 4 cases in the 80th Congress, among them the Bilbo case and Markey vs. O'Connor).

Consequently, (3), (4), and (5) may be completely disregarded. The main source for research as to cases between 1789 and 1940 are (6) and (7). As to cases between 1789 and 1865, it might be advisable to check with (1) or (2) in important instances. But none of the cases prior to 1865 is

important for the purposes of this memorandum. Where the details in (6) and (7) do not suffice, resort must be taken to the Congressional Record, etc., For the sake of convenience, references in this memorandum have been made exclusively to WP or H wherever this is sufficient. Research as to cases since 1941 must be undertaken individually.

(b) Discussions of contested Senate elections by legal writers have been extremely rare. There may be altogether 25 of them. Most of them are highly partisan. A considerable portion of them dealt with one or the other aspect of the sensational Newberry, (Frank L.) Smith, and Vare cases. The only valuable objective contributions to our problems seem to be: 1 Haynes, The Senate of the United States (1938), 119-199 (hereinafter quoted as "Haynes"); and Note, Senate Blackball, 29 Geo. L. J. 215 (1940), by Frank E. Hays, the compiler of H, which article is based mainly on the headnotes in H. (hereinafter quoted as "Blackball"). Of some usefulness among the partisan publications are: Beck, The Vanishing Rights of the States, (1926); Beck was counsel for and a protegee of Vare; see also Blackball 226, n. 58; Monsen, The Right of the Senate to Exclude a Senator-Elect, 4 Notre Dame Lawyer 3 (1938); McGuire, The Right of the Senate to Exclude and Expel a Senator, 15 Geo. L. J. 382 (1927), both articles also in favor of Smith and Vare; Ervin, Henry Ford vs. Truman H. Newberry; a Study in American Politics, Legislation and Justice (1935), a belated, voluminous defense for Newberry; Note, The Rights of Congress to Exclude its Members, 33 Va. L. R. 322 (1947), prompted by the Bilbo case and in Bilbo's favor. While all these publications were strictly in favor of the Senator whose election was contested, Wickersham, The Right of the Senate to Determine the Qualifications of its Members (1927), 70th Cong., 1st Sess., Sen. Doc. No. 4, is an attack against

beck's booklet, and against Vare.

II.

Constitutional History.

There seems to be nothing in the history of the initial words of Art. 1, sec. 5, cl. 1 of the Constitution (hereinafter quoted as "1/5/1") that could shed light on our problem. The exact words of this provision

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, * * *"

(art. 6, sec. 4 of the then draft) were agreed upon in the Federal Convention without debate on August 10, 1787. Madison, Debates in the Federal Convention of 1787 (Int. Ed. 1920) 378. This fact in connection with other action of the Federal Convention, refusing to establish qualifications for its members (other than those in art. 1, sec. 3, cl. 3 of the Constitution) or to give Congress power to establish qualifications, has been used as the basis for the following statement by Warren, The Making of the Constitution (1928) 421:

"Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship and residence."

See also 33 Va. L. R. 328-329. Two further reasons have been adduced for this conclusion:

(1) The Convention acted in this respect in concurrence with Madison's views as to abuses of regulations of qualifications in the British Parliament, referring to the famous election case of John Wilkes. Warren 420-421; Beck 29-41, 45; 33 Va. L. R. 324-326. Contra: Wickersham 8-17.

(2) The wording of 1/5/1 did not originate with the Federal Convention. It had a long history in state constitutions, being traceable to William Penn's Charter to Pennsylvania of 1701. Thus, state constitutions contained numerous qualifications of members of the legislature (resident, age, religion, property, etc.) and it was with reference to such qualifications that the legislatures were authorized to judge their members. Thus, the Federal Convention accepted a provision the meaning and scope of which was well-known. Warren 423-424.

In support of the theory of a restrictive construction of 1/5/1 reference has also been made to a few passages in The Federalist, primarily to one in No. LX (by Hamilton):

"[The] authority [of the national government] would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution, and are unalterable by the legislature."

However, the relevancy of this excerpt, taken from a chapter dealing rather with what is now article 1, section 4, clause 1 of the Constitution may well be doubted. Even weaker are references to a few more items of historico-legal material, appearing frequently in Senate debates and mentioned by Monsen, 4-5, 8, 10, whose legal reasoning is rather poor.

It may be noted that, as far as our problem is concerned, Jefferson's Manual of Parliamentary Practice contains no clue. Its Section IV contains merely the text of 1/5/1.

III

The Courts.

Even if the above outlined argument as to the limited meaning of 1/5/1 should be correct, and prohibit the exclusion of a Senator in a particular case, he would have no remedy in the courts if he is excluded nonetheless. There is not a single case in which the courts tried to interfere with the exercise of the Congressional power under 1/5/1. State courts have expressly refused it. Election of United States Senator, 12 Fla. 686, 688-689 (1869); State of Florida vs. Crawford, 28 Fla. 441, 479-480 (1891); Sutherland vs. Miller, 79 W. Va. 796, 808 (1917). Barry vs. United States ex rel. Cunningham, 279 U.S. 597 (1929), stated expressly (at 613) that the Senate, though being a legislative body, has a judicial power under 1/5/1. The Barry case dealt only with an incident of the Vare case, by holding that the Senate could force a reluctant witness to appear before it. The dictum (at 620) that:

"if judicial interference can be successfully invoked, it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law"

refers obviously to the procedural question involved in the case, and not to the Senate contest itself, and is, therefore, no basis for the argument that the Supreme Court might possibly interfere with Senate action in an election contest. And, for all practical purposes, no authority needs to be cited for the statement that the Supreme Court of 1949 will be even much more reluctant to undo Congressional action than the Supreme Court of 1929. The opinion of the court (announced only by three Justices, though) in

Colegrove vs. Green, 328 U.S. 549, 553 (1946), refusing to interfere with the system of congressional districts within the State of Illinois, assumed that the power (of the House of Representatives) under 1/5/1 has a broad scope. The opinion said:

"Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof."

There can be no doubt either that the power of the Senate under 1/5/1 would not be impaired, by a court, because of the fact that a contest concerns exclusively a primary. The Supreme Court would not consider a controversy justiciable for this reason. It is true that the opinion of Justice McReynolds (speaking in this respect for himself and three other Justices) in Newberry vs. United States, 256 U.S. 232, 250 (1921), a case concerning the Newberry Senate contest, stated that primaries

"are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. " " " the two things are radically different."

This view has certainly been abandoned in subsequent cases. Nixon vs. Herndon, 273 U.S. 536, 541 (1927), Nixon vs. Condon, 286 U.S. 73 (1932), Smith vs. Allwright, 321 U.S. 649 (1944), expressly overruling Grovey vs. Townsend, 295 U.S. 45 (1935), considering primaries as part of elections subject to federal control. See also United States vs. Classic, 313 U.S. 299, 313-320 (1941), and Rice vs. Elmore, 165 F. (2d) 387 (C.C.A. 4th, 1947), certiorari denied, 333 U.S. 875 (1948).

IV.

Necessity of Examination of Cases.

From the foregoing, the conclusion seems inescapable that the only useful approach to problems of Senate election contests is the examination of contests as acted upon in prior instances by the Senate.

Not all cases are of the same importance in general, and for the present purposes in particular. Their precedential value also greatly depends on the grounds on which the election contest was based. Stressing the difficulties of any classification, Haynes 126, n. 2, said:

"From a somewhat careful study of the abstracts and debates, the writer concludes that the ground upon which most of these contests were based might be roughly grouped as follows: (a) mere technicality, 16; (b) fraud, bribery, or corruption in the election, 14; (c) serious irregularities, other than fraud, bribery, or corruption, 17; (d) Reconstruction tangles, 17; (e) alleged crimes or misdemeanors not directly connected with the election, 6; (f) interpretation of 'qualifications,' 7; (g) right of Governor to fill vacancy by appointment, 23; (h) autocratic or illegal action by the presiding officer."

V.

Procedure in General.

The Senate has never perfected specific rules for challenging the right of a claimant to serve. Blackball 215.

As to the usual origin and procedure in contest cases, the introduction to H, VII-VIII, says the following:

"[The] practice of viewing each case affecting claims to membership on its individual merits has resulted in a variety of means by which the cases are originated. The Senate-elect to a seat in the Senate generally appears with his credentials. On some occasions, when these credentials are presented, some Senator will submit a motion that the credentials be referred to the Committee on Privileges and Elections, and that, pending report, he be denied the privilege of taking the oath of office. Upon adoption of such a motion, the Senator-elect steps aside and the Senate seat is vacant for the time being. * * *

"On other occasions, the Senator-elect is permitted to take the oath of office and this is now regarded and followed as the proper procedure, but thereafter inquiry as to his election is undertaken by the Senate. Resolutions calling for such investigations may be offered by any Senator. * * *

"The usual origin of such cases, however, is by petition. The contestant may file such a petition, protesting the seating of the contestee, and asserting his own right to the seat in question. It is not required to be filed prior to the swearing-in of the contestee, and no rights are lost if filed afterwards. In some cases, petitions have been signed and filed by others than the contestant, simply protesting against the seating of the contestee, without asserting any claim in behalf of the defeated candidate. * * *

"A petition of contest is addressed to the United States Senate, and may be laid before the Senate by the presiding officer or formally presented by some Senator. There is no prescribed form of such a petition. It is somewhat analogous to a complaint filed in a lawsuit. * * * The petition is usually referred to the Committee on Privileges and Elections, but if it involves primarily the question of the excessive use of money in the campaign, it may first be referred to a Special Committee on Investigation of Senatorial Campaign Expenditures. In at least two cases [i.e., Smith and Varg], investigations were started by a special committee prior to the general election and resulted eventually in the Senators-elect involved therein not being seated.

"In any event, if the committee * * * decides that there is ground for belief that an election has been tainted with fraud, or if there are other reasons why the * * * candidate should not be seated * * * it submits such report to the Senate for action thereon * * *. The investigating committee has authority to secure the ballots or other papers pertinent to the case by means of subpoena, and it may summon or compel the attendance of witnesses."

(For more than 80 years Senate election contest cases were handled by a special committee or the Committee on the Judiciary. A standing Committee on Privileges, to deal with such cases, was created in 1871. Haynes 122-123. Since the 80th Congress, these cases are under the jurisdiction of the Committee on Rules and Administration in accordance with Rule XIV (a)(c)(1)(D) of the Standing Rules of the Senate as amended by section 102 of the Legislative Reorganization Act of 1946, 60 Stat. 820. They are actually handled by a Subcommittee on Privileges and Elections.)

The Supreme Court has expressly stated that it is a matter of discretion for the Senate whether or not, pending an exclusion proceeding, the Senator should be seated. Barry vs. United States, ex rel. Cunningham, 279 U. S. 597, 614, also 615, n. * (1929). The same case held (at 615-616) that there was no merit in the contention that a state was deprived of equal suffrage by refusal to seat a Senator-elect. The opinion further stated (at 619);

"The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority."

As stated before, it has become the practice that a Senator-elect is seated pending investigation. Precautions are taken now to prevent the contention that a two-thirds majority (under article 1, section 5, clause 2 of the Constitution) would be necessary to "expel" the Senator. Thus, Senator Langer

"was permitted to take the oath without prejudice, and subject to parliamentary ruling that only a majority of the Senate would be required to pass on the qualifications of the Senator-elect." 87 Cong. Rec. 1-2.

However, this practice was not without exceptions; in the Smith, Vare and Bilbo cases the Senators-elect had to "stand aside." See also Haynes, 123-124, 144-147.

Although a two-thirds vote is required for expulsion (as distinguished from exclusion), e.g., Snoot case, WP 928, 985-986, see also Haynes 177-178, there have been at least six cases in which a Senator was seated, but "expelled by simple majority. This was done by the expedient of "vacating" his seat because of the invalidity of the election, as shown by investigation. Haynes 175 n. 2; see cases in H 217, n. 2; Blackball 226, n. 59. (Moreover, a rather weakly founded attempt was made by the majority report in the Langer case to construe article 1, section 5, clause 2 of the Constitution very strictly and to limit the possibility of expulsion (and the necessity of a two-thirds majority) to the case of disorderly conduct of the Senator while a member of the Senate. 77th Cong., 2d Sess., Sen. Rep. No. 1010, (Part 1), pp. 5-13)

VI.

Scope of Power under 1/5/1.

On the basis of a strict construction of the words of 1/5/1, and of parliamentary and constitutional history, an argument has been made to the effect that the power under 1/5/1 is restricted to the examination of the qualifications under article 1, section 3, clause 3, of the Constitution and, in a purely formal way, of the credentials of the Senator-elect (see II of this memorandum); and that neither the Senate nor, for that matter, a state law may prescribe additional qualifications. This argument was, for instance, strongly advanced by counsel for Smith and Vare, for the proposition that it was none of the business of the Senate to look into

campaign expenditures. The question of "May the Senate add to the qualifications of a Senator?" has been discussed on hundreds of pages in innumerable varieties throughout the history of Senate election contests. It has been aired in almost all of the more famous cases, e.g., almost one hundred years ago, extensively in the Trumbull case, WP 228, Cong. Gl., 34th Cong., 1st Sess., Pt. 1, pp. 547-552, and during the last twenty-two years most notably in the Gould, Smith, Vane, Langer and Bilbo cases, and has been dealt with by each legal writer listed in I(b) of this memorandum. Although no other pertinent question has received nearly as much attention as the one of "qualifications", it is beyond the purpose of this memorandum to go into details of this problem. And there is also a very practical reason for not doing it. It is a matter of experience, clearly shown by the records, that a Senate majority, intending to exclude or expel a member, never has hesitated to start such proceedings, even though it might amount to "adding qualifications." Senator Taft is among the staunchest defenders of the restrictive construction. In the Langer case, Taft stood on the same side of the fence as the late Senator Overton, and they agreed cordially about this point. 88th Cong. Rec. 2858-2862. However, when the Bilbo case came up, Overton and Taft found themselves on different sides of the controversy. 93rd Cong. Rec. 11-14. Overton, profusely quoting from Taft, tried in vain to persuade Taft to apply the theory to the case before the Senate. Taft did not deny his theoretical view (at p. 14):

"I agree with the Senator, but there are those who take the other position, and the ultimate determination of the case will depend upon the votes of people who take that position."

VII.

Power under 1/5/1 as Exercised.

(a) There have been strongly worded statements as to the wide scope of the Senate's power under 1/5/1. In 1828, the question was before the Senate whether a Senator should be seated who had cast the decisive vote in the State Legislature for himself. Bateman case, WP 176. Although, under the circumstances and under the state law, the Committee and the Senate concluded that he was entitled to his seat, the Committee expressly stated (at 177) that its members

"cannot permit themselves to entertain a doubt [as to] the right of the Senate to look behind the commission granted by the governor."

The majority report in Ford v. Newberry, H 99, (though recommending the seating of Newberry) contains the following passages (at 110):

"The Senate is jealous of its constitutional right to be 'the judge of the elections, returns, and qualifications of its own Members.'"

"No man, however qualified, can be admitted to a seat in the Senate who has not been legally elected in the State which he seeks to represent, and no man, on the other hand, however great his electoral majority may have been, can be either admitted or continued as a Member of the Senate whose conduct, either during the primary or general election, or subsequent thereto, is such as to show him unworthy to assume the high office to which, by virtue of his election, he has been chosen."

"The interest of the State which he seeks to represent, and the welfare of the Nation alike, demand that each Senator shall be one concerning whom there is no proven charge of disloyalty, dishonesty, or of conduct which would reasonably make his presence in the United States Senate a menace to the country, either because of the example which his conduct has produced or because it is reasonable to assume from established facts that he is unworthy of that trust and confidence which of necessity must be reposed in every Member of the United States Senate."

The views of the Senate are also indicated by the formulation of resolutions. When Smith was excluded, Sen. Res. 112, 70th Cong., 1st Sess., 69 Cong. Rec. 1718, used the following words:

"Resolved. That the acceptance and expenditure of the various sums of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith; * * *

(b) It is a fair statement to say that the practice of the Senate has not recognised any limitation of its power under 1/5/1. And with very few and unimportant exceptions (e.g., the Turnie case, WP 719, where the Senate refused to investigate whether the seating of members of the electing state legislature had been proper; but there was no allegation of fraud), the Senate proceeded to investigate everything it considered important for the question of seating a Senator-elect.

(c) The Senate investigated the (indeed questionable) sanity of a Senator (but considered him sane). Hiles case, WP 216-217. It investigated the loyalty of Senators. In one instance the investigation committee found the Senator disloyal (but the Senate voted against expulsion). Stark case, WP 284. In another case, the Senator was unseated. Thomas case, WP 333. The Senate investigated thoroughly the character and the religious and social beliefs of a Mormon in the Smoot case. The Committee recommended his expulsion and there was almost a two-thirds majority in favor of it. WP 928, 931-934, 986. See also Haynes 176-178.

(d) Among the most frequent and important investigations have been those concerning corrupt practices, in particular bribery, in connection with the election (or primary). E.g., (for bribery), Clark case, WP 906; Lorimer case, WP 1002, 1026. In this respect, however, the Senate has made two important restrictions. The majority report in the Payne case, WP 700-705-706, stated that:

"[in order] to deprive a sitting member of the Senate of his seat, the Senate must be satisfied by legal evidence that he was personally guilty of bribery, or that he was personally connected with the bribery or the corrupt use of money to procure his election, or that he had personal knowledge of such corrupt use of money and personally sanctioned or encouraged such use thereof to insure his election. * * *

"[if not personally guilty] then the Senate must be satisfied by legal evidence that a sufficient number of the members of the legislature were bribed * * * to secure the votes * * *, and that without the votes thus corruptly obtained the sitting member would not have been declared elected."

These principles have been consistently observed in investigations since, and also applied to the popular elections since the 17th Amendment.

(e) Excessive campaign expenditures were the main object of investigation in the most famous cases of the last forty years: Stephenson case, WP 1114; Ford v. Newberry, H 99, see also Haynes 137-144; Smith case, H 289; Vane case, H 318.

(f) One important question as to which, however, no reliable precedent is available, is whether the Senate may exclude a Senator-elect because of "moral turpitude" completely unconnected with his membership in the Senate or with the election, primary, etc. But this much may be said; the Senate investigated cases of that type, though none of the cases ended in exclusion, and none brought a decision as to the controversial issue.

No conclusive action was taken in the Roach case, WP 809, where the Senator was charged with the offense of criminal embezzlement.

In the Gould case, H 276, there was the charge that the Senator, fourteen years prior to the election, had paid an enormous bribe to Canadian public officers in order to obtain certain action. An investigation was ordered. However, a unanimous report, finding that the matter had been free from fraud, etc., and that Gould was a man of good character, recommended dismissal of the charge. The Senator, however, did not indicate its stand as to the basic legal problem. See also Blackhall 239.

The same basic question was the center of the hotly debated Langer case which took a considerable portion of the time of the 77th Congress and of the Committee. There was a rich assortment of criminal offenses and acts of turpitude, extending over many years, committed by Langer, and in several instances rather freely admitted. However, they had no connection with the election to the United States Senate. They had been committed by Langer either as a private person, or as a lawyer, or as a state officer (including Governor). The majority report, signed by thirteen members of the Committee out of sixteen, stated that the Senate had plenary power to go into the question of moral turpitude prior to the election, and recommended a resolution to the effect that Langer was not entitled to his seat. 77th Cong., 2d Sess., Sen. Rep. 1010, (Pt. 1), pp. 18-22, 76. However, after endless debates on the floor, and quite as a surprise, the resolution against Langer was defeated by a 52:30 vote. (There seems to be no other comparable case of such a discrepancy between a substantial majority of the Committee and a substantial majority of the Senate. The closest thing is the Stark case, WP 284. In general, discrepancies, if any, between Committee and the full Senate are characterized by very narrow margins.) But, again, there

was no conclusive indication as to the solution of the theoretical problem, though the viewpoints of both sides were stated again and again.

(g) The Senate has gone so far as to violate the principle of res adjudicata in the Lorimer case, 1026, although it adhered in general to it. See list of cases at Haynes 133, n. 1.

And the Senate has not hesitated to disregard deliberately pertinent state law (as to the count of ballots) when it thought that the intention of the voters was not in harmony with the result of the count according to such state law. Stack vs. Brookhart, N 216.

VIII.

Primeries.

As a general rule, there can be no doubt that the Senate claims and exercises the power to look into primaries in election contests. Although this question could not be squarely before the Senate prior to the 17th Amendment, there were several cases even before 1913 which indicated the trend.

The Senate did not hesitate to look into the election of a Senator by the state legislature if the alleged irregularities were such that they were decisive for the election. Thus, in the Clark case, WP 906, in 1900, the Committee submitted a report that Clark had obtained the decisive majority votes in the state legislature by illegal and corrupt practices. Pp. 907-913. Clark resigned thereupon. (He was re-elected, though, in 1901, and served a full term. Haynes 130-131.)

Buying up the decisive votes in the state legislature, was also the basic charge in the Lorimer cases, WP 1002, 1026. This shows that the Senate did not content itself with an examination of the formal regularity of the election by the state legislature, but also investigated the whole state proceeding in its antecedent stages.

There were at least two cases prior to 1913, which are even closer precedents. In 1886, in the Payne case, WP 700, bribery was alleged, but a substantial majority of the Committee and the Senate considered the evidence as insufficient. The election in the state legislature had been agreed upon, for all practical purposes, in a caucus of the Democratic Party commanding a substantial majority in both state houses. A majority report (at 711-712) said in this respect:

"We have, in our conclusions, made no distinction between the use of fraud, corruption, or bribery in a caucus vote or in the legislative vote, for a Senator. Although a caucus, or what proceeds in it, has no constitutional or legal relation to the election of a Senator, yet, by the habit of political parties, the stage of determination as to who is to be elected Senator, and the influences, proper or improper, that produce that determination, is that which proceeds and is concluded in the caucus. So far as the question of personal delinquency or turpitude is concerned, no moral distinction should be taken between corrupt proceedings in caucus and those in the legislature."

There was even one case where primaries were directly involved. In the Stephenson case, WP 1114, see Haynes 135-137, the charges of corruption were mainly founded on excessive expenditures in the Wisconsin primaries (more than \$100,000 in 1908). The majority report and the Senate (by a slim majority) thought that the charges had not been sustained. The majority report stated (WP 1126-1127) that the primary (for nomination of candidates for election in the state legislature), though provided for by state statute, was not part of the election for United States Senator because the duty of

election is solely vested in the legislature; and that the primary could not affect the validity of the election by the legislature. A report by a substantial minority, however, referring to bribery cases, stated (WP 1138-1139):

"If the primary choice was secured by corrupt methods and practices, would not the vote in the legislature secured thereby be corrupt, however innocent the member casting it? * * *

"When candidates for the legislature announce that they will vote for the choice of the primary for Senator, then to buy or corrupt the primary is to buy the member of the legislature; * * * and if the Senate can go outside of the proceedings of the legislature and investigate corruption in preventing men from being candidates for the Senate before the legislature, then it can certainly investigate methods and proceedings in the primary."

A considerable number of cases after 1913, discussed below in the order of time, dealt with incidents of primaries. Invariably, the Senate and the Committee investigated charges regarding primaries and (except for some arguments in the Bankhead case, infra) no serious doubt was expressed as to the propriety of such an investigation, except, of course, by the contestees.

In the case of Chilton v. Sutherland, H 44, there were allegations with regard to the general election and with regard to the primary. The former were not substantiated so that the only charge actually investigated was that Sutherland had spent, in the primaries, an amount exceeding the statutory maximum permitted. The excess, however, was only \$51.63 and the Committee found, mainly by construing the state statute, that, under the statute, Sutherland could not be ejected from the office. The report added, however, a general warning not to violate such statutes.

In the case of Ford v. Newberry, H 99, the painstaking recount of votes, cast in the general election, reduced the plurality of Newberry, but did not eliminate it. (No recount of the primary vote had been asked for.) Thereafter, the charge that was pressed, substantiated, and, after the next following general election, caused Newberry's resignation, was the excessive amount of campaign expenditures for Newberry's nomination in the primaries. Also the majority report (though exonerating Newberry because the majority assumed that he had been ignorant of the amount expended, and because nothing had been spent for illegal purposes) dwelt on the excessive amount (at least \$195,000) of the expenditures. H 108-110. It stated with regard to the conceded amount of the expenditures:

"The amount * * * was large-- too large-- * * *"

"It is * * * a larger sum than ought to have been expended."

"Your committee condemns the use of such a large sum of money in any primary campaign * * *."

The minority report (H 113, et seq.) was, of course, even more critical. The above-quoted dicta from the majority report, concerning excessive expenditures, have been used as precedent, in particular in the Smith and Yare cases. It was in the debates in the Newberry case that Senator Borah stated (62 Cong. Rec. 989) that:

"the primary is a part of the election process, and the improper use of money in the primary has the same effect in invalidating the election as the use of money in the election proper."

There were various charges with regard to the primaries in the Mayfield case, H 200, such as conspiracy with the Ku Klux Klan, excessive expenditures, intimidation, etc. The contestant also complained that the Texas statute provided for a loyalty test. The Committee found unanimously, however, that there was no sufficient evidence to support the charges, and that the loyalty test did not vitiate the primaries. The report was unanimously

agreed to without debate. The recount of votes concerned only the general election. No recount as to the primaries had been demanded.

The case of Stack v. Brookhart, H 216, centered around, and was decided by, the recounting of the votes. There was also an allegation, however, by the Republican State Central Committee, that Brookhart's name had come on the Republican ticket by fraud. H 220-221. No action, however, was taken in this respect.

In Johnson v. Schall, H 256, it was one of the original charges that there had been excessive expenditures in the primary. However, no testimony was offered to substantiate this allegation. H. 263.

The giant cases of Smith and Vare, H 289 and 318, see also Haynes 144 154, were prompted by, debated with regard to, and decided on the basis of, excessive expenditures in the Republican primaries in Illinois and Pennsylvania (An unspecified, but obviously small portion of the expenditures in the Smith case concerned the general election.) There were, in the initial stages, endless discussions as to the propriety of the investigation of primaries. The main arguments advanced against it were the reasoning of Justice McReynolds in the Newberry case, and the lack of regulation of the primaries by federal statute. See for a summary: Beck 72-84. But the Senate started its investigation, by a special committee, immediately (in the Vare case one day) after the primaries, several months before the general elections in which the Republicans won rather easily. The cases are remarkable not only because of the amount involved (between \$500,000 and \$2,000,000 for one candidate for nominee and his state ticket), but also because of the promptness of starting the investigation, and because of the sanctions applied: both Smith and Vare had to "stand aside". As to both, the final decision of the Senate was that they were not entitled to be seated. Haynes 150, n. 2,

stated:

"One of the most significant features of the work of this select committee and of the Senate's action upon its reports in the Smith and Vare cases is the Senate's practical acceptance of that view that the primary is a part of the election."

No recount was asked for in the Smith case, and no recount of the primary in the Vare case.

After Vare was denied his seat, Governor Fisher of Pennsylvania, elected on a rival Republican ticket (successful for Governor, but unsuccessful for the incumbent Senator George W. Pepper) promptly appointed Grundy Senator who had contributed \$400,000 to the expenditures for this ticket. In the Grundy case, H 467, Grundy was seated, after some debate, but a resolution, asking for investigation, was sent to the Committee. The Committee made a short report, dealing with formal points only, and concluding that Grundy was legally appointed. The Senate took no further action.

While the propriety of the Senate's investigation of incidents of primaries was not considered a question of doubt any more in the final stages of the Smith and Vare cases, this problem came again (and, it would seem, unnecessarily) into the foreground, in 1931 and 1932, in the case of Heflin vs. Bankhead, H 470. An overwhelming majority decided the case (correctly) in favor of Bankhead. Irregularities in the general election (in which Heflin, running as an "independent Jeffersonian" Democrat against the regular party nominee, was defeated) constituted the main issue of the case. Numerous irregularities were found, but on both sides, and not changing the result (conclusion of majority report, H 503-504). But there was also an issue regarding the primary. (No recount of the primary was asked for, though.) Under state primary election law, a political party

could prescribe qualifications for primary candidates. And the Democratic party provided for a loyalty test. Since Heflin had supported Hoover in the 1928 election, he could not compete in the primary. His contention was that this fact deprived him of success in the primary and the general election.

The minority report (a report of a majority of the investigating sub-committee, the full Committee, however, accepting the views of the minority of the sub-committee), siding with Heflin, considered the primaries invalid because of the loyalty test. H 563-565. The majority view, however, did not rely solely on the propriety of such a loyalty test, but stressed the point that the Senate did not have the right to investigate incidents of primaries. The lack of Congressional legislation as to primaries was emphasized H 477. It was stated (H 481):

"We have not deemed it a matter of sufficient importance to present the argument made by Heflin that the loyalty test was not authorized by the state statute at length in this report, for the reason that the action of the electorate of Alabama in the general election eliminates from consideration the question of the legality of the primary.

"In our opinion the legality of the primary is not a proper matter for the consideration of the Senate of the United States. If it were, under the facts in this case, the action of the people in the general election has foreclosed consideration of it. For the fraud and corruption of the successful candidate in the election the Senate may go into the primary, as was done in Smith's case and Vare's case. Here the alleged infirmity is in the action of the party committee, not in Mr. Bankhead."

Even stronger was the argument of the late Senator Pittman in the debate (75 Cong. Rec. 9122) who expressly relied on the authority of the McReynolds opinion in the Nawberry case. He denied the right of the Senate to find out who the nominee was. It is true that the above-quoted passage from the report, supporting Bankhead, and also Pittman in his speech, expressly stated that, as had been done in the Smith and Vare cases, fraud and corruption in the primary

might be investigated. But there is no doubt that the views expressed would narrow the scope of possible investigation of primaries by the Senate.

The Bilbo case fills most of the first 100 pages of the Congressional Record for the 80th Congress. (A kind of compromise was finally reached that the question of whether Bilbo should be seated was to be kept in suspense until his state of health would allow him to come back to Washington. 93 Cong. Rec. 104. He never came back.) The charges against Bilbo were violations of the Hatch Act, and intimidation of colored voters in the primary. E.g., 93 Cong. Rec. 21. The Congressional debate centered around the question of whether the Senate ought to seat Bilbo or to have him "stand aside. While various legal questions were discussed at length in the debates, there was apparently no denial of the right of the Senate to investigate such primary incidents. Nor was this point raised by Bilbo's (legalistic) apologist in 33 Va. L. R. 322.

Among many allegations in the original complaint in Markey v. O'Connor, the reason Maryland case, was also one of excessive primary expenditures. 80th Cong., 2d Sess., Sen. Rep. No. 1264, p. 20, Exh. 1, par. 9. But this charge was vague and general and was apparently not substantiated. The report contains no indication that there was an investigation in this respect. No recount of the primary was asked for in this case.

Thus, there has been no instance, thus far, in which the recount of primary ballots was demanded or made. Considering, however, the plenary powers assumed by the Senate in election contests in general, and the great variety of primary incidents that have been actually investigated, there can be practically no doubt that the Senate would order a recount of primary ballots if material for the seating of a Senator-elect.

IX.

RECOUNT OF VOTES.

With respect to the question of recount of votes, reference is made to the very informal summary submitted previously. Therefore, only a few lines shall be devoted to additional remarks.

The reports in the cases of Ford v. Hawberry, Steak v. Brookhart, Vare, and Heflin v. Bankhead, contain many details as to the method, and tables as to the results, of the recount. So does the report in the case of Marker v. O'Connor. In the Mayfield case, however, only summaries are given.

In all cases, except Marker v. O'Connor, the recount was made exclusively in Washington, D.C.

In all cases, except the Vare case, the recount covered all available ballots. Vare's opponent, Wilson, had challenged the ballots of six counties only (among them those where Philadelphia and Pittsburgh are situated), while Vare, in turn, alleged irregularities in favor of Wilson in 30 more counties. The ballots of the six counties were recounted (and only the decisive ones of Philadelphia and Pittsburgh were discussed in detail). Nothing was done with regard to the 30 counties since the majority report (not objected to by the minority report as to this point) concluded that Vare (whose official plurality in the general election had amounted to 173,507) retained a plurality of 19,049, even if every unfavorable circumstance was considered. See H 431-433, 465.

In Marker v. O'Connor, the contestant raised many issues. 80th Cong., 2d Sess., Sen. Rep. No. 1284, Exh. 1. But his main desire was the recount of the votes in the general election. The official vote was 237,232 for O'Connor, and 235,000 for the contestant. As to the other alleged irregularities,

Markey, in effect, withdrew his contest as to everything, except for alleged irregularities in Prince Georges County and in two Baltimore wards. The evidence adduced was found insufficient to support the charges. Sen. Rep., pp. 13-17. With regard to an often-stated principle (which, however, has yet to be applied by the Senate to a case), the report (p. 16) said:

"Proof that fraud and illegal voting involved substantially every precinct in the county would, of course, require a complete disregard of the election in the county in its entirety. There is, however, no such evidence in the record to sustain any such theory."

The recount was made in three stages, the idea being that the next step might not be taken if O'Connor's plurality would not be affected in the prior stage. However, his plurality was reduced in the first and second stages. Therefore, the recount was total. The first stage was the checking of the voting machines. Sen. Rep., pp. 2-3. This investigation was made on the spot and reduced O'Connor's plurality by 426 votes. The next stage was a test recount of five (important) counties using paper ballots. Sen. Rep., pp. 3-11. This reduced O'Connor's plurality to 1,028. The recount in these five counties was made on the spot. The procedure was partly regulated by a stipulation between counsel under which only ballots, challenged by one or the other side, were to be reviewed by the sub-committee in Washington. Sen. Rep., Exh. 3, pp. 24-25. There were 6,624 challenged ballots in the second, and 28,612 in the third stage. The third stage covered the remaining 17 counties, using paper ballots. Sen. Rep., pp. 11-13. This recount was made in Baltimore. The final result was that O'Connor had a plurality of 1,624 votes. This led to the unanimous conclusion (p. 17) that O'Connor should be declared lawfully elected Senator. The Senate adopted unanimously Senate Res. 234, 80th Cong., 2d. Sess., to this effect. 93 Cong. Rec. 6314.

X.

Political Character of Senate Decision.

Despite the numerous and lengthy Senate debates about points of law in connection with contested elections, it is clear that, in doubtful cases, the decisions have been guided strongly by political reasoning and party affiliation. Cases like Stack v. Brookhart, decided by a non-partisan vote, are rare exceptions. (And, of course, the Stack case may easily be explained even from a partisan viewpoint, since the whole contest originated from the enmity between the conservative party regulars and the nominee on the Republican ticket.)

Of 382 contests submitted to the House of Representatives up to the 59th Congress, it happened only in three cases that persons not of the dominant party obtained seats. Alexander, *History and Procedure of the House of Representatives* (1916), 324, as quoted in Haynes 126, n. 1. In many Senate cases the decisive majority of votes consisted only of members of one party. Thus, in the Newberry case, the votes for seating him were exclusively those of his party, and he felt compelled to resign before the next following Congress convened, when seven of his backers were defeated over the issue of "Newberryism". Haynes 142-143; Blackball 220-221.

Some instances of partisan approach have been mentioned in this memo-randum: e.g., the different reaction to the same problem by Senator Taft in the Langer case on one hand, and the Bilbo case on the other hand; the reliance of the majority in Heflin v. Bankhead on the opinion of Justice McReynolds in the Newberry case.

Blackball 240 said:

"The principal distinction between the decision of a court and one of the Senate, in which the latter functions as a 'jury', lies in the fact that the reasoning behind the 'decision' may often be obscure. * * * but, as we have seen, [the report which may be considered analogous to a court opinion] is not binding upon the Senate, the final decision often being colored by political considerations rather than precedent."

From Lyndon B. Johnson
For Immediate Release

October 25, 1948

Honorable C. Wayland Brooks, Chairman
Committee on Rules and Administration
United States Senate
Washington, D. C.

Attention: Mr. Nelson Derenian, Chief Counsel
Sub-Committee on Privileges and Elections

Dear Senator Brooks :

I understand that a request has been made of your Committee to take action through the appropriate sub-committee to investigate matters connected with the Second Primary Election of the Democratic Party held in Texas on August 28, 1948, and particularly as pertains to the selection of a Democratic nominee for United States Senator. Press reports indicate that the sub-committee, or its attorney or investigators, is contemplating impounding ballot boxes used in connection with such election in several Texas counties.

I do not know what charges have been made or what basis the Committee has for acting to impound ballot boxes in any particular county, but if any of the ballot boxes are impounded in any of the counties, I respectfully request that all ballot boxes in all counties be impounded.

In connection with my request, I want to point out that there has been a judicial determination by a Texas court, in connection with a contest involving the nomination of a local official, that in said Primary 1736 illegal votes were cast in Brown County, out of which my opponent received a lead of 466 votes; that the County Chairman of Dallas County, a kinsman of my opponent, amended his returns from that County some four or five times, each time increasing the vote of my opponent in that county, and that at least two of those certificates were without basis in law or fact; that in Harris County election officials refused to count absentee ballots cast by perhaps 100 legally qualified voters, a majority of which I allege to have been cast for me; that a Grand Jury investigation in Galveston County is reported to have disclosed that there were approximately 2,000 illegal votes cast in that county, in the names of persons who did not reside in the county and in the names of deceased persons, the names being obtained from tombstones; that changes were made in the returns from Eastland, Wharton, Chambers and many other counties after the polls were closed; and that an election contest in Clay County discloses that a number of illegal votes were cast in that county.

more

Lyndon B. Johnson
Page 2

From the foregoing, it is obvious that a determination cannot be made which will correctly reflect the result of the Primary Election by a recounting of the votes in a few boxes only, but in the event of a recount it must be comprehensive enough to embrace all ballots cast in all of the 252 counties where the Primary Election was held.

Upon being informed on last Saturday, the 23rd instant, that your Committee contemplated impounding the ballot boxes in only two or three counties of Texas, I called Donald Cook, Esquire, in Washington, and asked him to present a request of the above nature in my name. I understand from him today that perhaps it is necessary that detailed facts be furnished you, under oath, in order to warrant you in taking the requested action, and for that reason I am writing you this letter, the facts of which are being verified, as noted below.

Very truly yours,

Lyndon B. Johnson

Sworn to and subscribed before me by the said Lyndon B. Johnson this ____ day of October, 1948.

Notary Public, Travis County, Texas.

Hebbronville, Texas

Received this date from Fernando
Ximenez, County Clerk of Jim
Hogg County Texas returns of
the Primary Election held Aug.
28, 1948 directed to Chmn. of
County Executive Committee of
the Dem. Party of Jim Hogg
Co., Hebbronville, Texas.

Such records had been left
in the custody of Mr. Ximenez
by Hamell M. Campbell,
Co. Chmn.

A. R. Bremer
Chief Investigator
Sub. Comm. on P & C.
U. S. Senate.

Hebbronville, Texas

Received this date from Fernando Jimenez, County Clerk of Jim Hogg County, Texas, returns of the Primary Election held August 28, 1948, directed to Chairman of County Executive Committee of the Democratic Party of Jim Hogg Co., Hebbronville, Texas.

Such records had been left in the custody of Mr. Jimenez by Howell McCampbell, Co. Chairman.

A. R. Broer, Chief Investigator
Sub Committee on Privileges and Elections
United States Senate

COPY

Hebbronville, Texas

Received this date from Fernando Ximenez, County
Clark of Jim Hogg County, Texas, returns of the Primary
Election held August 28, 1948, directed to Chairman of
County Executive Committee of the Democratic Party of
Jim Hogg Co., Hebbronville, Texas.

Such records had been left in the custody of Mr.
Ximenez by Howell McCampbell, Co. Chairman.

A. R. Broer, Chief Investigator
Sub Committee on Privileges and Elections
United States Senate

COPY

Hebbronville, Texas

Received this date from Fernando Ximenes, County
Clark of Jim Hogg County, Texas, returns of the Primary
Election held August 28, 1948, directed to Chairman of
County Executive Committee of the Democratic Party of
Jim Hogg Co., Hebbronville, Texas.

Such records had been left in the custody of Mr.
Ximenes by Howell McCampbell, Co. Chairman.

A. R. Broer, Chief Investigator
Sub Committee on Privileges and Elections
United States Senate

 **COPY** 4728

REPORT CONCERNING PROTESTS OF TEXAS'

PRIMARY ELECTION OF 1948

Honorable Lyndon B. Johnson was elected United States Senator from Texas in the General Election of 1948, and on presenting his certificate of election at the convening of the 81st Congress, he took the oath of office and assumed his seat in the United States Senate for a full six year term. He received 807,266 votes to 387,258 votes for his opponent in the General Election, a majority of more than two to one. No contest of such election has been presented and no question has been raised with respect to the conduct and regularity of the election.

The only matter before the Committee concerning Senator Johnson relates to the Second Primary election of the Democratic Party held in Texas on August 28, 1948, in which Johnson defeated his opponent, former Governor Coke Stevenson, by a narrow margin. Stevenson charged irregularities in counting and returning votes in five counties of South Texas, claiming that, as a result thereof, he was wrongfully deprived of several hundred votes. Johnson claimed that he was wrongfully deprived of several thousand votes as the result of irregularities in a large number

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of other counties. The Committee fully investigated the charges made by Stevenson and impounded the ballots in the five counties named by him, with the exception of one county where they had been destroyed.^{1/}

No investigation was made by the Committee of the charges presented by Johnson, and his request that all ballots, particularly those in a number of named counties, be impounded, was not complied with.

The laws of Texas governing party primary elections provide that the several County Executive Committees of the political party shall meet at stated times, shall canvass the returns as made by the election officials of the several voting precincts of the county, and certify the returns to the State Executive Committee of the party; that the State Executive Committee shall meet at a stated time, shall canvass the returns as certified by the County Executive Committees, and shall certify the result to the State Convention of the party for its approval or disapproval. Stevenson appeared before the State Executive Committee and presented his charges. The Committee heard all the charges, and pursuant to its statutory function and duty certified to the State Convention that Johnson had received a majority of the votes in the Primary Election. The State Convention of

^{Particular}
^(law by the Legislature and not State Convention)
^{1/} No significance is to be given to the destruction of the ballots, as such occurred in other counties and was for the purpose of making the ballot boxes available for holding the General Election, and was not in violation of law.

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the Democratic Party convened on the day following the meeting of the Executive Committee, received its report, ~~which was~~^{it} referred to the convention's Committee on Party Nominations. The Convention adopted the report of that committee, and declared Johnson to be the nominee of the Democratic Party of Texas as its candidate for the office of United States Senator from Texas. The party officers certified his name, as such nominee, to the Secretary of State of the State of Texas, for inclusion on the official ballot to be voted in the ensuing General Election, all in accordance with state law.

The laws of Texas further provide that the results of a party primary election may be contested by the losing candidate by suit in a District Court, which, in Texas, is a court of general jurisdiction. In the case of a contest of a statewide race, the venue of the contest is fixed in any of the three District Courts of Travis County, the seat of the State Capital. In such a suit the court has authority to impound and open ballot boxes, make a recanvass, reject all illegal votes, and ascertain and declare the result. Stevenson did not pursue the remedy plainly provided by State law and frequently resorted to in other instances. Instead, he selected a United States District Court in Fort Worth, Texas, in which to

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file a suit in equity seeking to enjoin the election officials of the State from placing Johnson's name on the official ballot to be voted in the General Election. Both the Supreme Court and Court of Appeals of the Fifth Circuit ^{and} held that the District Court was without jurisdiction, and by direction of the Court of Appeals the suit was dismissed. ^{2/}

Having presented his contest and having obtained an adverse decision from the State Executive Committee and the State Convention of his party, and having declined to present his case to a court of competent jurisdiction, Stevenson then submitted his case to the electorate by appeals to the voters to vote in the General Election for Johnson's opponent, the nominee of the opposition party. Having again lost, he now asks the Senate to conduct an investigation of the party primary election in Texas to the limited extent of the conduct of the election in the five South Texas Counties.

^{2/} The Presiding Judge of one of the District Courts of Travis County had been appointed to the Bench by Stevenson when Governor. Both Stevenson and Johnson resided in the Western District of Texas. The U. S. District Judge of that district was available, as was a Judge of the Northern District and two of the Southern District, and all more easily accessible than the one from whom the injunction was obtained. The latter, according to press reports, signed the temporary restraining order during the early morning hours, on his farm near the Louisiana border. These facts are not mentioned for the purpose of indicating a pre-conceived opinion of the Judge, but to indicate the evaluation of the merits of the case by Stevenson and his attorneys, all of whom were able lawyers and prominent members of the State Bar.

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If it be assumed, contrary to precedent, that the Senate should properly inquire into the results of a nominating primary election conducted by a political party, and should set aside decisions of duly constituted party officials as authorized by State law, it must be obvious *Stevenson himself has frustrated the proper conduct of such an* that such inquiry ~~would be~~ *ineffectual* in the instant case. If illegal votes were cast and improper returns made in the Primary Election in Texas, in order to determine whether such had the effect of changing the result of the race between Johnson and Stevenson it would be necessary to eliminate all illegal votes and all votes improperly counted and returned for each candidate. *Among other things,* It would be necessary *to go into the ballots and* returns in those counties where Johnson claimed illegalities and irregularities resulting in added votes for Stevenson. ^{3/} [As a matter of fact, the margin of votes between the two candidates was so slight ~~as~~ that the result might be affected by honest mistakes and clerical errors.] Therefore, in order to arrive at a correct determination of the results of the election, it would be necessary to have a full re-count of all the ballots and ^{a of} ~~to check~~ all returns. This might have been accomplished if

- 3/ Johnson claimed that a contest in a local race in one county resulted in a court decree establishing that some _____ illegal votes were cast and counted in that county, of which Stevenson obtained a majority of _____ of such illegal votes. In another county, in which Stevenson received a majority of two to one, a Grand Jury investigation disclosed that there were some 2000 illegal votes, ~~represented by~~ prostitutes who had been run out of the county and names taken from tombstones.

It was also charged that illegality and irregularities in many other counties resulted in giving Stevenson several thousand more votes than were legally cast for him.

Cast in the names of

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or by Court order if Stevenson had filed a Contest in a district Court of Travis County, as provided by State law. Johnson being the winning candidate could not invoke the jurisdiction of the Committee had acted promptly to impound all ballot boxes and returns, as requested by Johnson. Practically all of these ^{ballots} in all the 254 counties of Texas, have now been destroyed pursuant to the provisions of State law.

In justice to all parties, it should be stated that the charges presented by Stevenson were fully investigated by agents of this Committee.

They secured written statements from the witnesses to whom they were referred by Stevenson's attorneys. ^{Much of the data secured was either violently perjured in character, or was} They have made written reports of

their findings. The charges have been investigated by Grand Juries in ^{Practically all counties about by Stevenson} three of the counties involved. If the charges were true it would follow

that the criminal laws were violated and indictments ^{would have been} should be returned.

No indictments were returned by any of the Grand Juries. ^{On the contrary} Their reports showed, in substance, that the election ^{in those counties} was conducted legally, fairly and

impartially and that the election officials were diligent in the performance of their duties. The charges ^{(if true) also have} would indicate a violation of Federal Law.

The Department of Justice, through the FBI, has investigated the charges,

~~and we are confident that~~ Had evidence existed to establish the truth of

the charges it would have been presented to a Federal Grand Jury, and,

if sufficient, ^{on the basis of the} an indictment would have been returned. Therefore, ^{above} the Committee is justified in stating that an examination of all factual specifications and evidence presented to the Committee fail to make out a prima

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other facie case of fraud or *even* illegalities. But, if we were warranted in holding

that the charges brought by Stevenson deserve further investigation,

such would be fruitless unless we could ascertain whether, *and to what extent* Stevenson *himself*

was the beneficiary of fraud and irregularity, and what the result would *have been*

~~be~~ if all votes illegally or irregularly cast and returned for each candidate were eliminated.

It is traditional that the Senate will not inquire into a party nomination except to determine whether an elected member of the Senate was guilty of such conduct in securing the nomination as to render him unfit for a seat in the United States Senate. ^{4/} Not only is there no evidence that Johnson had any connection with or guilty knowledge of the alleged irregularities, but the record contains no factual allegations tending to connect him in any manner with the conduct of the Primary Election in the five South Texas counties involved.

It is recommended that the protests be dismissed and that no further proceedings be taken in respect thereof.

^{only}
4/ It has been asserted on good authority, and strenuously argued, that the Senate is authorized to determine the Constitutional qualifications of its members (i.e. age, citizenship and residence) and that the electorate determines their mental, moral and other qualifications. See Warren, "The Making of the Constitution"; The Federalist

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(Hamilton) LX: On this theory the Senate inquired into the actual election only, and refused to inquire into party nomination, whether by Primary Election or otherwise. See The Case of Stephenson, Senate Doc. 1036, 62nd Congress; Newberry vs. United States, 256 U. S. 232. In cases where it did make inquiries into the conduct of party nominations, such as the Smith and Vare cases, it did so only for the purpose of determining whether the elected candidate was himself guilty of fraud or corruption in obtaining party nomination, as made clear in the case of Heflin vs. Bankhead (Hays, 470).

*This petition is
strongly reaffirmed
in the more
recent*

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UNITED STATES SENATE
Committee On
Rules and Administration

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

Dear Senator Johnson:

I am enclosing herewith for your information and files a copy of a report of the Senate Subcommittee on Privileges and Elections to the Committee on Rules and Administration regarding charges with respect to the conduct of the August 28, 1948 "run-off" primary election for the Democratic nomination for United States Senator from Texas, made by Coke R. Stevenson, the defeated candidate in that Primary. This report, which, you will note, concludes that you were duly elected United States Senator from the State of Texas, has been unanimously adopted by the Committee on Rules and Administration.

In connection with the preparation of this report the Subcommittee's staff made an investigation of the charges and a careful study of all information and data which conceivably could be of significance in considering such charges. On the basis of that investigation and study the Subcommittee unanimously concluded that no basis whatsoever existed for contesting your election. On the contrary, only minor irregularities, common to every election, which would not possibly vitiate a state-wide primary and subsequent general election, were discovered. All of the evidence supports the conclusion that you had no knowledge of or were in any way connected or identified with, directly or indirectly, any of the matters with respect to which charges were made to the Subcommittee.

Sincerely yours,

/s/ Francis J. Myers

Francis J. Myers,
Chairman, Senate Sub-
Committee on Privileges
and Elections

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REPORT OF THE SUBCOMMITTEE ON PRIVILEGES
AND ELECTIONS. TO THE COMMITTEE ON RULES
AND ADMINISTRATION. RE TEXAS SECOND PRIMARY

Your Subcommittee on Privileges and Elections has the following matters before it with respect to the second or so-called "run-off" Democratic primary held August 28, 1948, for the selection of the Democratic nominee for a seat in the United States Senate representing the State of Texas:

1. A communication filed under date of October 18, 1948 by Honorable Coke R. Stevenson, the defeated candidate for the Democratic nomination for United States Senator from Texas in the "run-off" primary alleging election frauds and irregularities in certain counties in Texas.
2. A communication filed under date of October 25, 1948 by Honorable Lyndon B. Johnson, the successful candidate for the Democratic nomination for United States Senator from Texas in the "run-off" primary, alleging election frauds and irregularities in numerous counties throughout Texas.
3. A petition was filed on January 5, 1949 by a Texas "Citizens' Committee"^{1/} requesting that no Democratic nominee for United States Senator from Texas be seated.

Your Subcommittee has had these matters under consideration and now respectfully reports as follows:

The Junior Senator from Texas, Honorable Lyndon B. Johnson ("Johnson") was elected a Senator for a full six year term in the November 1948 General Election, receiving 809,420 votes to his opponent's 389,190 votes. When the 81st Congress convened, Johnson presented his certificate of election from the State of Texas, took the oath of office and was thereupon seated.

^{1/} The "Citizens' Committee" called itself the "Citizens' Committee Against Political Fraud", P. O. Box 1271 - State Headquarters, San Antonio 6, Texas.

No charges with respect to the conduct of the General Election have been made either to the Senate or directly to the Senate Subcommittee on Privileges and Elections ("Sub-Committee").^{2/} There is, therefore, no contest pending before the Senate with respect to the General Election in which Johnson was the victor.

NATURE OF ALLEGATIONS

The petitions of the "Citizens' Committee" in substance charged that at the time of the run-off primary, and as a consequence of the manner in which it was conducted, the Republican form of Government guaranteed to the State of Texas by Article IV, Section 4, of the Constitution of the United States, was abridged and nullified. It was also charged, in effect, that an unnamed candidate or candidates engaged in "insurrection or rebellion against the (United States and gave) aid or comfort to the enemies thereof...." These charges are entirely unsupported and need not be considered further.

Under date of October 18, 1948, Stevenson forwarded a communication to the Subcommittee in which he charged generally that various election frauds and other irregularities had occurred in certain counties in Texas. Stevenson requested the Committee to investigate these charges.

Under date of October 25, 1948 Johnson, the successful candidate for the Democratic nomination in the run-off primary, filed a communication with the Subcommittee in which he charged generally that various election frauds and irregularities had taken place in numerous counties throughout Texas. Johnson requested that all the ballots cast in the run-off primary in all the counties of Texas be impounded by the Subcommittee so that in the event a complete recount of said ballots was deemed necessary and ordered, they would be available for that purpose. Johnson's charges were not investigated and his request was not acceded to.

CONDUCT OF THE PARTY PRIMARY IN TEXAS

Inasmuch as no charges have been made with respect to the

^{2/}

Subcommittee of the Senate Committee on Rules and Administration.

conduct of the General Election but only with respect to the run-off primary, it is desirable briefly to describe the manner in which the laws of Texas require party primaries to be conducted and to indicate what actually transpired thereunder.

The laws of Texas governing party primary elections provide that the several County Executive Committees of a political party shall meet at stated times, shall canvass the returns as made by the election officials of the several voting precincts of the county, and shall certify the returns to the State Executive Committee of the party; that the State Executive Committee shall meet at a stated time, shall canvass the returns as certified by the County Executive Committees, and shall certify the result to the State Convention of the party for its approval or disapproval. This procedure was fully adhered to in the Primary Election.

On September 13, 1948 in Fort Worth, Texas, Stevenson appeared before the State Executive Committee and presented his charges of fraud and irregularities. The Committee heard the charges, determined the same in Johnson's favor and, pursuant to its statutory function, certified to the State Convention that Johnson had received a majority of the votes in the primary election.

The State Convention of the Democratic Party convened on September 14, 1948, the day following the meeting of the Executive Committee, received the Committee's report, and immediately referred it to the Convention's Committee on Party Nominations. The Committee on Party Nominations recommended to the Convention that Johnson's name be certified as the Democratic nominee for United States Senator. The Convention adopted the report of that committee, and declared Johnson to be the nominee of the Democratic Party of Texas as its candidate for the office of United States Senator from Texas. The party officers certified his name as such nominee to the Secretary of State of the State of Texas, for inclusion on the official ballot to be voted in the ensuing General Election, all in accordance with state law.

The laws of Texas further provide that the results of a party primary election may be contested by the losing candidate by suit in a

District Court, which, in Texas, is a court of general jurisdiction. In the case of a contest of a statewide race, the venue of the contest is fixed in any of the three District Courts of Travis County, the seat of the State Capitol. In such a suit the court has authority to impound and open ballot boxes, make a recanvass, reject all illegal votes, and ascertain and declare the result.

Stevenson did not pursue the remedy provided by State law.^{3/} Instead, he filed a suit in equity in a United States District Court in Fort Worth, Texas, seeking to enjoin the election officials of the State from placing Johnson's name on the official ballot to be voted in the General Election.

LITIGATION OVER NOMINATION

The above referred to suit by Stevenson was commenced on September 15, 1948 in the District Court of the United States for the Northern District of Texas (Fort Worth Division) against Johnson and Tom L. Tyson and Vann M. Kennedy.^{4/} Stevenson charged in substance that numerous election irregularities and illegalities had occurred and as a result thereof he was deprived of the Democratic nomination. He asked the Court for the following:

1. An injunction to prevent officers of the Democratic Party in Texas from certifying the name of Johnson as Democratic nominee for United States Senator as a result of the primary election.

2. An injunction to prevent Johnson's name as such nominee from being placed on the official ballot for the general election to be held on November 2, 1948.

^{3/} As the winning candidate Johnson was unable to avail himself of this remedy, inasmuch as he had no standing to contest his own election.

^{4/} Tom L. Tyson was Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, and Vann M. Kennedy was Secretary of said Convention.

3. Cancellation of the certificate if already made.

4. A declaration that Stevenson was the true nominee.

Immediately following the presentation of the complaint, Judge Davidson forthwith endorsed thereon a temporary restraining order.

On September 17, 1948, Stevenson amended his original complaint and added as defendants Paul H. Brown, Clarence O. Kraft, Melvin Faulk, and Sully Montgomery.^{5/} Upon the filing of the amended complaint an amended enlarged temporary restraining order was also issued. The restraining order was made returnable on September 21, 1948 at Fort Worth, Texas.

Thereafter, Johnson filed a motion to dismiss the complaint for want of jurisdiction and, on September 21, 1948, a hearing on the application for a temporary injunction took place. On September 22, 1948, the temporary injunction was continued in effect.

On September 24, 1948, Johnson lodged an appeal before Honorable Joseph C. Hutcheson, Jr., Circuit Judge of the United States Court of Appeals, 5th Circuit, seeking an order "setting aside and staying the temporary injunction order issued by the Court below, pending the determination of this appeal." Judge Hutcheson denied the motion "without prejudice to the right to present the motion to the (full) Court."

On September 29, 1948, Johnson filed a motion for a stay of the temporary restraining order theretofore issued, which motion was addressed to the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States and Supervising Justice for the 5th Circuit. On the same day Justice Black issued an order providing "that the temporary injunction issued by the United States District Court for the Northern District of Texas (Fort Worth Division) on September 23, 1948, in the case entitled Coke R. Stevenson v. Lyndon B. Johnson, et al., Civil Number

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Brown was Secretary of State of the State of Texas. Kraft, Faulk and Montgomery were County Judge, County Clerk and Sheriff, respectively, of Tarrant County, Texas. These last three individuals were added as defendants, inasmuch as they constituted the members of the Election Board of Tarrant County and were alleged to be properly representative of all the Election Board Members of the 253 other counties of the State.

1640, be and the same hereby is stayed and that the said temporary injunction is and shall be of no force and effect until further order of the Supreme Court." Thereafter, on October 2, 1948, Coke R. Stevenson filed a motion with the Supreme Court of the United States requesting that the order of Mr. Justice Black of September 29, 1948, be vacated. On October 5, 1948, the Supreme Court issued an order denying the above mentioned motion and dismissed the proceedings.

Meanwhile, the Court of Appeals for the 5th Circuit proceeded with a consideration on the merits of Johnson's appeal from the District Court's decision and, on October 7, 1948, in a unanimous decision, held that the District Court was without jurisdiction to consider the cause. It stated in part that:

"We are of opinion... 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"

"The order of injunction is set aside and the cause is remanded with direction to dismiss the petition."^{6/}

Subsequently, Stevenson filed a petition for certiorari with the Supreme Court of the United States. On January 31, 1949, such petition was denied.

ACTION BY SUB-COMMITTEE

Following the receipt of Stevenson's charges the Subcommittee sent investigators to Texas. No evidence has been disclosed which would support Stevenson's allegations.

No action has been taken on Johnson's allegations and, in view of the foregoing, no action is required.

^{6/} 170 Fed. 2nd, 108, 111.

If we were to assume, contrary to precedent, that the Senate should properly inquire into the results of a nominating primary election conducted by a political party, and should set aside decisions of duly constituted party officials as authorized by State law, it is apparent that the defeated candidate himself, by not filing a contest in the State Courts of Texas and thus preserving the ballots cast in the primary, has made impossible the proper conduct of such an inquiry in the instant case. If, unknown to the Subcommittee, illegal votes were actually cast and improper returns actually made in the run-off primary in Texas, in order to determine whether such conduct had the effect of changing the result of the race between Johnson and Stevenson it would be necessary to eliminate all illegal votes and all votes improperly counted and returned for each candidate. It would be necessary, among other things, to examine the ballots and returns in those counties where Johnson claimed illegalities and irregularities resulting in large numbers of added votes for Stevenson. Therefore, in order for the Subcommittee to arrive at its own determination as to the results of the primary election, it would be necessary to have a full re-count of all the ballots and a check of all returns.

This might have been accomplished if the Subcommittee had impounded all ballot boxes and returns, as requested by Johnson. It might also have been accomplished by Court order if Stevenson had filed a contest in a Texas district court, as provided by State law. Johnson, being the officially certified party nominee, could not under Texas law invoke the jurisdiction and powers of the Court for the purpose of effecting a recount or impounding of the ballots. The Subcommittee is informed that all or virtually all of the ballots in the 254 counties of Texas have now been destroyed pursuant to the provisions of State law and a recount hence impossible.

CONCLUSIONS

After a study and consideration of the above matters the Subcommittee concludes:

1. There is no contest pending before the Senate with respect to the General Election in which Johnson was the victor.
2. No evidence has been disclosed which would support Stevenson's allegations.
3. That Lyndon B. Johnson was duly elected and seated as United States Senator from the State of Texas.

Therefore your Subcommittee on Privileges and Elections recommends the adoption of the following resolution:

"RESOLVED, That Lyndon B. Johnson is hereby declared to be duly elected Senator of the United States from the State of Texas for the term of 6 years, commencing on the 3rd day of January 1949, and is entitled to be seated as such."

Respectfully submitted,

Francis J. Myers, Chairman

Guy M. Gillette

William F. Knowland

REPORT OF THE SUBCOMMITTEE ON PRIVILEGES
AND ELECTIONS, TO THE COMMITTEE ON RULES
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The "Citizens' Committee" called itself the "Citizens' Committee Against Political Fraud," P. O. Box 1271 - State Headquarters, San Antonio 6, Texas.

Election Contests

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NATURE OF ALLEGATIONS

The petitions of the "Citizens' Committee" in substance charged that at the time of the run-off primary, and as a consequence of the manner in which it was conducted, the Republican form of Government guaranteed to the State of Texas by Article IV, Section 4, of the Constitution of the United States, was abridged and nullified. It was also charged, in effect, that an unnamed candidate or candidates engaged in "insurrection or rebellion against the (United States and gave) aid or comfort to the enemies thereof...." These charges are entirely unsupported and need not be considered further.

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2. An injunction to prevent Johnson's name as such nominee from being placed on the official ballot for the general election to be held on November 2, 1948.

^{3/} As the winning candidate Johnson was unable to avail himself of this remedy, inasmuch as he had no standing to contest his own election.

^{4/} Tom L. Tyson was Chairman of the Democratic State Convention held at Fort Worth, Texas, on September 14, 1948, and Vann M. Kennedy was Secretary of said Convention.

3. Cancellation of the certificate if already made.

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Immediately following the presentation of the complaint, Judge Davidson forthwith endorsed thereon a temporary restraining order.

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Thereafter, Johnson filed a motion to dismiss the complaint for want of jurisdiction and, on September 21, 1948, a hearing on the application for a temporary injunction took place. On September 22, 1948, the temporary injunction was continued in effect.

On September 24, 1948, Johnson lodged an appeal before Honorable Joseph C. Hutcheson, Jr., Circuit Judge of the United States Court of Appeals, 5th Circuit, seeking an order "setting aside and staying the temporary injunction order issued by the Court below, pending the determination of this appeal." Judge Hutcheson denied the motion "without prejudice to the right to present the motion to the (full) Court."

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^{5/}

Brown was Secretary of State of the State of Texas. Kraft, Faulk and Montgomery were County Judge, County Clerk and Sheriff, respectively, of Tarrant County, Texas. These last three individuals were added as defendants, inasmuch as they constituted the members of the Election Board of Tarrant County and were alleged to be properly representative of all the Election Board Members of the 253 other counties of the State.

Civil Number 1640, be and the same hereby is stayed and that the said temporary injunction is and shall be of no force and effect until further order of the Supreme Court." Thereafter, on October 2, 1948, Coke R. Stevenson filed a motion with the Supreme Court of the United States requesting that the order of Mr. Justice Black of September 29, 1948, be vacated. On October 5, 1948, the Supreme Court issued an order denying the above mentioned motion and dismissed the proceedings.

Meanwhile, the Court of Appeals for the 5th Circuit proceeded with a consideration on the merits of Johnson's appeal from the District Court's decision and, on October 7, 1948, in a unanimous decision, held that the District Court was without jurisdiction to consider the cause. It stated in part that:

"We are of opinion...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

"The order of injunction is set aside and the cause is remanded with direction to dismiss the petition."^{6/}

Subsequently, Stevenson filed a petition for certiorari with the Supreme Court of the United States. On January 31, 1949, such petition was denied.

ACTION BY SUB-COMMITTEE

Following the receipt of Stevenson's charges the Subcommittee sent investigators to Texas. No evidence has been disclosed which would support Stevenson's allegations.

No action has been taken on Johnson's allegations and, in view of the foregoing, no action is required.

^{6/}

170 Fed. 2nd, 108, 111.

If we were to assume, contrary to precedent, that the Senate should properly inquire into the results of a nominating primary election conducted by a political party, and should set aside decisions of duly constituted party officials as authorized by State law, it is apparent that the defeated candidate himself, by not filing a contest in the State Courts of Texas and thus preserving the ballots cast in the primary, has frustrated the proper conduct of such an inquiry in the instant case. If, unknown to the Subcommittee, illegal votes were actually cast and improper returns actually made in the run-off primary in Texas, in order to determine whether such conduct had the effect of changing the result of the race between Johnson and Stevenson it would be necessary to eliminate all illegal votes and all votes improperly counted and returned for each candidate. It would be necessary, among other things, to examine the ballots and returns in those counties where Johnson claimed illegalities and irregularities resulting in large numbers of added votes for Stevenson. Therefore, in order for the Subcommittee to arrive at its own determination as to the results of the primary election, it would be necessary to have a full re-count of all the ballots and a check of all returns.

This might have been accomplished if the Subcommittee had impounded all ballot boxes and returns, as requested by Johnson. It might also have been accomplished by Court order if Stevenson had filed a contest in a Texas district court, as provided by State law. Johnson, being the officially certified party nominee, could not under Texas law invoke the jurisdiction and powers of the Court for the purpose of effecting a recount or impounding of the ballots. The Subcommittee is informed that all or virtually all of the ballots in the 254 counties of Texas have now been destroyed pursuant to the provisions of State law and a recount hence impossible.

CONCLUSIONS

After a study and consideration of the above matters the Subcommittee concludes:

1. There is no contest pending before the Senate with respect to the General Election in which Johnson was the victor.
2. No evidence has been disclosed which would support Stevenson's allegations.
3. That Lyndon B. Johnson was duly elected and seated as United States Senator from the State of Texas.

Therefore your Subcommittee on Privileges and Elections recommends the adoption of the following resolution:

"RESOLVED, That Lyndon B. Johnson is hereby declared to be a duly elected Senator of the United States from the State of Texas for the term of 6 years, commencing on the 3rd day of January 1949, and is entitled to be seated as such."

Respectfully submitted, _____

Francis J. Myers, Chairman

Guy M. Gillette

William F. Knowland

I am enclosing herewith for your information a copy of a report of the Senate Subcommittee on Privileges and Elections to the Committee on Rules and Administration regarding charges with respect to the conduct of the August 28, 1948 "run-off" primary election for the Democratic nomination for United States Senator from Texas, made by Coke R. Stevenson, the defeated candidate in that Primary. This report, which, you will note, concludes that you were duly elected United States Senator from the State of Texas, has been unanimously adopted by the Committee on Rules and Administration.

In connection with the preparation of this report the Subcommittee's staff made a thorough investigation of the charges and a most careful study of all information and data which conceivably could be of significance in considering such charges. On the basis of that investigation and study the Subcommittee unanimously concluded that no basis whatsoever existed for contesting your election. On the contrary, only minor irregularities, common to every election, which would not possibly vitiate a state-wide primary and subsequent general election, were discovered. All of the evidence supports the conclusion that you had no knowledge or reason to believe that any election irregularities in fact occurred. Further, it is abundantly clear that the charges made were engendered solely by the heat of a vigorous political campaign.

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