

SENATOR FROM OKLAHOMA

JANUARY 27, 1976.—Ordered to be printed

Mr. CANNON, from the Committee on Rules and Administration,  
submitted the following

REPORT

together with

MINORITY AND SUPPLEMENTAL VIEWS

[To accompany S. Res. 356]

INTRODUCTION

The Committee on Rules and Administration, to which was referred on January 14, 1975, the contested election for a seat in the United States Senate from the State of Oklahoma, having considered the same, finds itself unable to determine the outcome of that contest. The Committee is reporting an original resolution (S. Res. 356) to the Senate expressing its inability to make this determination, and requests that the Senate determine the outcome of the contested November 5, 1974, election or, if unable to do so, to declare that a vacancy exists in the office of Senator for the State of Oklahoma in order to enable a special election to be held in accordance with the laws of the State of Oklahoma. The committee recommends that the resolution be agreed to.

The motion passed by the Committee reporting this matter to the Senate is as follows:

Be it moved that:

The Committee on Rules and Administration of the Senate of the United States hereby finds and declares:

That Article I, Section 5, of the Constitution of the United States establishes the Senate of the United States as the Judge of Elections of its own Members;

That the Committee on Rules and Administration, in the exercise of such Constitutional responsibility, and pursuant to direction of the Senate of the United States, has reviewed

the contested election of November 5, 1974, for the office of United States Senator from the State of Oklahoma, has received and reviewed the results of an investigation by its staff, and has held hearings at which all interested parties were provided an opportunity to be heard;

That the evidence before the Committee conclusively demonstrates that at the said election of November 5, 1974, the election machines of Tulsa County, Oklahoma, were not in conformance with the laws of the State of Oklahoma, in that the candidates for United States Senator were listed after the candidates for State office in violation of 26 O.S., section 277 (c), the machines did not provide straight-party voting devices in violation of 26 O.S. section 274, and 545 of 640 machines had affixed prominent instructions as to use of straight-party voting devices, which devices were not available for use by the voters;

That experts and other witnesses who appeared before the Committee offered testimony as to the effects of these violations of the laws of the State of Oklahoma upon the results of the election for United States Senator, and further data regarding such effects were received by the staff during its investigation and hearings;

That the evidence offered on behalf of Petitioner, Ed Edmondson, is that the results of the election were in fact affected by the violations of the laws of the State of Oklahoma, and that were it not for the violations of law, there is a high probability that Ed Edmondson would have received sufficient votes in Tulsa County to win in the statewide election;

That the testimony offered on behalf of Senator Henry Bellmon disputes the witnesses for Ed Edmondson as to methodology and conclusions;

In view of the foregoing findings and declarations, the Committee on Rules and Administration reports to the Senate of the United States its inability to determine the outcome of the contested November 5, 1974, election for the office of United States Senator from the State of Oklahoma, and requests that the Senate of the United States exercise its Constitutional responsibility under Article I, Section 5, of the Constitution as the Judge of Elections of its own Members, to determine the outcome of the contested November 5, 1974, election for the office of United States Senator from the State of Oklahoma, and, if unable to so determine, to declare a vacancy exist in such office in order to enable a special election to be held in accordance with the laws of the State of Oklahoma governing Special Elections.

Thus, the Committee was unable to determine whether, but for the violations of election laws of the State of Oklahoma occurring in Tulsa County on November 5, 1974, Henry Bellmon or Ed Edmondson would have been elected to the office of United States Senator. The

Committee therefore presents this question for determination by the Senate, pursuant to Article I, Section 5 of the Constitution.

If the Senate is unable to make this determination, it should declare the seat to be vacant, in order that a special election may be held in accordance with the established laws of Oklahoma.

#### HISTORY OF CONTEST

In the election held in the State of Oklahoma on November 5, 1974, there were three candidates for the office of United States Senator: Ed Edmondson, the nominee of the Democratic party; Henry Bellmon, the nominee of the Republican party; and Paul Edward Trent, an independent not affiliated with a political party.

The results of the election were as follows:

|                    | Tulsa<br>County | Other 76<br>counties | Statewide |
|--------------------|-----------------|----------------------|-----------|
| Ed Edmondson.....  | 49, 775         | 337, 387             | 387, 162  |
| Henry Bellmon..... | 72, 145         | 318, 852             | 390, 997  |
| Paul E. Trent..... | 1, 798          | 11, 852              | 13, 650   |

Based on the above results, certified by the Oklahoma State Election Board, Henry Bellmon was declared the winner.

Mr. Edmondson challenged the results in Tulsa County, and filed a contest with the State Election Board under the laws of Oklahoma. The matter was initially heard by a State District Judge. Mr. Edmondson claimed that the election laws of Oklahoma had been violated in that (a) the voting machines used in Tulsa County listed the contest for United States Senator after fourteen (14) state contests, in violation of 26 Oklahoma Statutes Section 277 (c); (b) the said machines did not have devices for straight party voting, in violation of 26 Oklahoma States Section 274; and (c) that 545 of the 640 voting machines used in Tulsa County prominently displayed erroneous and misleading instructions as to straight party voting, which instructions could not be followed because of the absence of the straight party levers.

The statutes alleged by Mr. Edmondson to have been violated provided that:

Separate portions of the elective office panel in each voting machine shall be allocated as separate ballots in such manner as to classify separately National, State, county and local offices respectively in the order named. (26 O.S. 277(c))

And, with regard to the construction of a voting machine—

It must be so constructed as to permit straight party voting as well as mixed or split tickets, except that voting machines with a vertical columnar presentation of the individual candidates for office, if there are more than two (2) political parties on the ballot at a general election, shall not be programmed so as to permit straight party voting by the use of a single lever, button or other device. (26 O.S. 274)

The instructions on 545 of the 640 voting machines used in the election stated as follows:

PARTY VOTE INSTRUCTIONS

To Vote a Straight Ticket:

1. Raise lever at bottom of column until arrow on level points to desired party.
2. Return lever to original position.
3. If you wish, you may split your ticket by moving any key or keys to a different party candidate.
4. After all selections have been made—press VOTE button.

It is undisputed that there were no such levers on the machines.

The Oklahoma District Court sustained a demurrer by representatives of Senator Bellmon to the question of the placement of the senatorial race on the ballot, and refused to consider any evidence as to the effect of such ballot placement on the outcome of the election. The District Court further did not find that there was a violation of 26 O.S. Section 274, since a voter could vote a straight ballot in the absence of the straight party lever. The District Court upheld the legality of the election.

Mr. Edmondson then petitioned the Supreme Court of Oklahoma, which assumed jurisdiction over the matters involved. The Supreme Court did not conduct a *de novo* proceeding, but considered the decision of the District Court, the record before that court, such pleadings as were filed by the parties, and oral argument of counsel for the parties.

After consideration of the above, the Supreme Court of Oklahoma found (a) that the voting machines in Tulsa County "were not programmed so as to permit straight party voting as required by Section 274;" (b) assumed "arguendo, that a candidate for U.S. Senate is a candidate for a national office, and that the placement of the U.S. congressional candidates in Column 6, instead of Column 3, where the candidates for state office were placed conflicts with the mandatory provisions of Section 277 (c)," and (c) found that "since the machines were not programmed to permit straight party voting by using a single lever per column of the ballot, and, in fact, no such lever was on the machines, the contested instructions were clearly erroneous."

The Supreme Court further held that under Oklahoma law, the statutes involved were mandatory prior to elections, but only directory after elections. The cases cited by the Oklahoma Supreme Court did not involve election contests for national offices.

The Supreme Court, upon consideration of the evidence before it as to the effect of the above violations on the outcome of the election, found that Mr. Edmondson had failed to establish by competent or sufficient evidence that these irregularities were sufficient to void the election or make it impossible to determine with mathematical certainty which candidate received the greater number of statewide votes and was entitled to a certificate of election (26 O.S. 395).

On January 9, 1975, Mr. Edmondson filed with the Senate a Petition and Complaint, based upon the violations of the laws of the State of Oklahoma, asking the Senate to accept jurisdiction over the contest

in accordance with Article I, Section 5, of the United States Constitution, which states that "Each House shall be the judge of the elections, returns and qualifications of its own Members."

On January 13, 1975, Senator Bellmon filed with the Senate a motion to dismiss the Edmondson Petition and Complaint, together with an Answer to said Petition and Complaint.

The Committee on Rules and Administration considered the petition, the motion and the answer, and, on January 13, 1975, unanimously agreed to a motion that the Chairman recommend to the Senate that Senator Bellmon be seated "without prejudice" to Mr. Edmondson's contest of the election. On January 14, 1975, Senator Bellmon was seated by the Senate "without prejudice" to the contest, and the matter was referred to the Committee on Rules and Administration. (Cong. Rec. S. 6, 94th Cong. 1st Sess.).

At that time, the Committee was deeply involved in the contested election for United States Senator in the State of New Hampshire. The New Hampshire contest was considered at length by the Committee and the Senate without either being able to conclude that contest, until both claimants to the New Hampshire Senate seat agreed that the seat should be declared vacant in order that a special election might be held. On July 30, 1975, the Senate declared the New Hampshire seat to be vacant, thereby enabling the people of New Hampshire to express their will in a new election.

The Committee then commenced consideration of the Oklahoma contest and authorized a staff investigation and hearings in Tulsa, Oklahoma. Opportunity was provided for both sides to present or offer witnesses and staff hearings were held on August 12, 13 and 14, and October 15 and 16, 1975. The full text of those hearings, as well as the summary reports prepared by majority and minority staff, are contained in the printed record prepared by the Committee.

Fourteen (14) witnesses appeared at the staff hearings in Tulsa, including the secretary, Republican member, and chief clerk of the Tulsa County Election Board, the outside contract programmer for the voting machines used in the election, the former chief clerk of the Tulsa County Election Board, precinct workers in Tulsa County, the Oklahoma State Election Board secretary and chief clerk, one of the Tulsa County Commissioners, a State Representative from Tulsa who had been Mr. Edmondson's Tulsa County coordinator, a State Senator who had been Tulsa County Democratic Chairman at the time of the 1974 election, the President Pro Tem of the Oklahoma State Senate, also from Tulsa County, and a businessman who had been an Edmondson campaign worker in 1974.

The staff report and exhibits prepared by James H. Duffy, then Chief Counsel for the Subcommittee on Privileges and Elections, and Richard D. Casad, an investigator whose services were made available to the Committee by the Permanent Subcommittee on Investigations, contain a complete summary and description of the staff investigation and hearings conducted in Tulsa.

Following receipt of the staff report, the Committee scheduled hearings on the Oklahoma contest, again inviting both sides to submit names of desired witnesses. Hearings were held before the Committee on November 17 and 18, and December 4, 1975. The witnesses appearing on behalf of the petitioner included Mr. Edmondson, Dr. Samuel

Kirkpatrick, Professor of Political Science and Director of the Bureau of Government Research at the University of Oklahoma, and Dr. Warren Miller, Director of the Center for Political Studies of the Institute for Social Research, University of Michigan. Witnesses called at the request of Senator Bellmon were Danny McDonald, Secretary of the Tulsa County Election Board, Harmon Moore, Chief Clerk of the Board, Dr. Howard Penniman, Professor of Government at Georgetown University, and Dr. Walter DeVries, President of DeVries and Associates, and part-time instructor at Duke University.

Drs. Kirkpatrick, Miller, and Penniman were non-partisan expert witnesses. Dr. DeVries stated that he was a registered Democrat who works in political campaigns at least predominantly for Republican candidates, and Messrs. McDonald and Moore stated that they were Democrats, each of whom claimed to have worked in the Edmondson campaign in 1974 (during non-office hours). However, both of the latter testified several times on behalf of Senator Bellmon.

Upon conclusion of the hearings on December 4, 1975, the Committee set December 8 as the date for final briefs. Briefs were filed on behalf of both parties, together with other legal memoranda, and are a part of the printed record.

On December 9, 1975, the Committee agreed that the Oklahoma contest would be considered at a meeting on December 12, 1975.

On December 12, the Committee voted on the question, "Shall the petition of contest be dismissed, and Senator Bellmon be certified for the full term of the election?" The proposal to dismiss was defeated by a rollcall vote (5 to 3) as follows:

## YEAS—3

Mr. Hatfield  
Mr. Hugh Scott  
Mr. Griffin

## NAYS—5

Mr. Pell  
Mr. Robert C. Byrd  
Mr. Williams<sup>1</sup>  
Mr. Clark  
Mr. Cannon

On December 15, the Committee took under consideration the motion set forth at the beginning of this report. (See p. 1.) Senator Hatfield offered an amendment that after the third paragraph of the proposal the remaining parts be stricken and substitute therefore the following language: "Therefore the Committee on Rules and Administration reports to the Senate of the United States its inability to agree whether the irregularities alleged by Mr. Edmondson had any effect on the outcome of the November 1974 election for United States Senator from Oklahoma." On a rollcall vote, Senator Hatfield's amendment was defeated (5 to 3).

## YEAS—3

Mr. Hatfield  
Mr. Hugh Scott<sup>1</sup>  
Mr. Griffin

## NAYS—5

Mr. Pell  
Mr. Robert C. Byrd  
Mr. Williams  
Mr. Clark  
Mr. Cannon

## ABSTENTION—1

Mr. Allen<sup>2</sup>

Senator Griffin then offered an amendment to the motion set forth at the beginning of this report that after the word "Oklahoma" in the last paragraph that a period be substituted in place of the comma and the remaining words be deleted. On a rollcall vote, Senator Griffin's amendment was defeated (5 to 3).

## YEAS—3

Mr. Hatfield  
Mr. Hugh Scott<sup>1</sup>  
Mr. Griffin

## NAYS—5

Mr. Pell  
Mr. Robert C. Byrd  
Mr. Williams  
Mr. Clark  
Mr. Cannon

## ABSTENTIONS—1

Mr. Allen<sup>2</sup>

A rollcall vote was taken on the proposal which is set forth at the beginning of this report and which was approved (5 to 3).

## YEAS—5

Mr. Pell  
Mr. Robert C. Byrd  
Mr. Williams  
Mr. Clark  
Mr. Cannon

## NAYS—3

Mr. Hatfield  
Mr. Hugh Scott<sup>1</sup>  
Mr. Griffin

## ABSTENTIONS—1

Mr. Allen<sup>2</sup>

## BACKGROUND

The investigations and hearings of the Committee and its staff have been conducted in an impartial manner with an opportunity for all interested parties to be heard and present a complete picture of the facts and law, as they affect both sides of the controversy, to the Committee.

The Committee and the parties are in full agreement that the election laws of the State of Oklahoma were violated in Tulsa County on November 5, 1974. While representatives of Senator Bellmon had argued to the District Court and the Supreme Court of Oklahoma that there had been no violations of law, the Supreme Court of Oklahoma specifically found certain irregularities to have occurred. The Committee agrees and finds that there were violations of Oklahoma election laws.

Specifically, the candidates for the United States Senate were listed on the machine ballots in Tulsa County after 14 state contests in violation of 26 O.S. Section 277(c) which required that they be listed in first place; the machines did not provide straight party voting levers, in violation of 26 O.S. 274; and 545 of the 640 machines used in Tulsa County had erroneous and misleading instructions.

<sup>1</sup> Proxy.

<sup>2</sup> Senator Allen rescued himself from voting since he had been unable to attend the hearings. He advised that "unless my vote would be decisive on some of the issues presented, I feel that it would be the better practice for me to recuse myself on these votes."

The Oklahoma Supreme Court found that Mr. Edmondson had not provided "sufficient" or "competent" evidence to demonstrate that these violations of the law affected the outcome of the Senate contest. The Senate, however, is not bound by the Court's findings on the facts, both because the Senate is required to be the judge of the elections, returns, and qualifications of its own Members under Article I, Section 5 of the United States Constitution, and because in this contest substantial additional evidence was submitted to the Committee which was not available to the Court.

Thus, the Committee has not rejected the Court's findings, but has considered them, together with the evidence presented to it on behalf of Mr. Edmondson and Senator Bellmon. The Committee finds that the evidence before it is competent and sufficient to establish that the results of the election could well have been affected by the violations of Oklahoma law in Tulsa County, and it is unable to determine who would have won the election had the violations of law not occurred.

#### *New Evidence*

No substantial evidence was submitted to the Supreme Court of Oklahoma relating to the effect the illegal placement of the Senate race had upon that contest. Such evidence was presented to the Committee. The Supreme Court stated that there was no evidence to support Mr. Edmondson's argument that the erroneous instructions confused voters wanting to vote a straight ticket by leading them to move the selector tab opposite the party designator for the bottom Democratic candidate in each of the columns, resulting in votes only for Congressman Jones at the bottom of the ballot that were intended to be for Mr. Edmondson as well. The Committee has received evidence from Dr. Kirkpatrick and a Dr. William Fewell which supports this argument. Further, where the expert witness testimony before the Courts was based on data collected well *prior* to the 1974 elections, these experts presented additional evidence to the Committee based on 1974 election data, nationally as well as for Oklahoma. Finally, Drs. Kirkpatrick and Miller, the expert witnesses testifying on behalf of Mr. Edmondson, were unable to advise the Oklahoma Courts as to the extent of the effect of the violations of law on the Senate election contest. They were also unable to provide the Oklahoma Courts with current voter behavior data to document their testimony, since in November 1974 this data had not been available. However, based on their 1974 data, these witnesses stated to the Committee that, but for the violations of law, there was a high probability that Mr. Edmondson would have received sufficient votes in Tulsa County to win in the statewide election.

The following is a summary of additional new evidence which was presented to the Committee which had either not been available to the Oklahoma Courts, or which corrected previous testimony before the Oklahoma Courts which had apparently been erroneous:

1. Mr. Danny McDonald, secretary of the Tulsa County Election Board, had testified before the Oklahoma District Courts that the unlawful ballot placement had been directed by the Oklahoma State Election Board. However, subsequent testimony before the Committee

staff in Tulsa by the secretary and chief clerk of the Oklahoma State Election Board establishes that such directions were not given to the Tulsa County Election Board. The state board at that time did not have authority to direct a local board with respect to such matters, and in any event, did not attempt to do so. Mr. McDonald's testimony before the Oklahoma courts was thus erroneous in this respect, just as he had been mistaken as to the legality of the ballot placement itself.

2. There was substantial testimony and oral argument before the Oklahoma courts to the effect that all of the violations of law objected to by Mr. Edmondson were the result of actions by fellow Democrats, making reference primarily to Mr. McDonald, secretary of the Tulsa County Election Board. Although there was no evidence of anything but negligence on the part of the Election Board officials, the Committee staff did determine in its investigation, subsequent to the hearings before the Oklahoma courts, that Mr. Gene Gallagher, the contractor who actually programmed the Tulsa County voting machines, was the individual who made the actual determination to leave the straight party levers off the machines. Mr. Gallagher stated that he made this decision without consultation with Mr. McDonald or anyone else. There was no evidence presented to the Committee that Mr. Gallagher was anything other than negligent and mistaken as to the legal necessity to use straight party levers on the machines during the election. It was also determined by the Committee staff that Mr. Gallagher is a Republican.

3. Mr. Harold Sexton, former chief clerk of the Tulsa County Election Board, an expert witness on voting machine requirements in Tulsa County, presented testimony to the Committee staff that if he had still been in charge of preparing for elections on November 5, 1974, as chief clerk, and had not been engaged in new employment, he would have had the straight party levers placed on the Tulsa County machines, as required by Oklahoma law. The Committee staff investigation confirmed that Mr. Sexton had left his job with the Tulsa Election Board on July 1, 1974, at which time Mr. Harmon Moore, Jr., became chief clerk. Mr. Moore had no prior experience in programming voting machines, and the November 5, 1974 election was his first general election as chief clerk. Tulsa County Election Board secretary, Mr. McDonald, had less than two years experience at the time of the contested election, and this was his first general election.

4. The President Pro Tem of the Oklahoma State Senate, Gene Howard, presented testimony before the Committee staff that in his contested election in Tulsa County in 1966, it had been demonstrated that approximately 25 percent of the Democratic voters in the Tulsa precinct involved in the contest had attempted to vote a straight party ticket using the straight party lever which was then on the machines. He testified that in his situation there was a malfunction causing the failure of a straight party level to record votes cast in the race, along with the votes cast for other candidates in the same column. He stated further that voters apparently thought their votes had been recorded when they used the level, when in fact, the votes had not been recorded.

Senator Howard also affirmed statements he had made shortly following the election, that:

I think there is a strong possibility there will have to be a new election.

There were illegal procedures in such substantial numbers that they considerably exceed the difference between the candidates.

*The legislature has shown it prefers new elections instead of disenfranchising people because of irregularities.* (Hearings, Senator from Oklahoma, pp. 1201-1202)

5. Oklahoma State Senator Roger Randle, Tulsa County Democratic chairman at the time of the 1974 election, testified before the Committee staff that the campaign emphasis of the Tulsa County Democratic Party during the 1974 election was to get people to vote a straight Democratic ticket without individual candidate identification. He also testified that although the Tulsa County Democratic Party did not usually feel that a candidate should be supported simply because of his party affiliation, 1974 was an unusual election year and they found a genuine upsurge in the desires of many of the voters to vote a complete and straight Democratic ticket. As a result, the party made a choice to gear its strategy in advertising in Tulsa County to this approach. Consequently, the failure to provide the straight party levers, the Senator testified, "had a definite detrimental effect on the many voters who wished to do this, but who were confused by the layout of the voting machines."

6. Mr. Rodney Ray of Stillwater, Oklahoma, a businessman, presented to the committee affidavits of voters in Tulsa County which he had obtained while conducting a survey in two precincts in Tulsa County to determine what the voters' experience with the Tulsa machines had been. A copy of the survey form used by Mr. Ray, and a copy of the affidavits are attached as exhibits to the staff report which is a part of the record. This evidence had been submitted to the Oklahoma Supreme Court as an exhibit to a motion by Mr. Edmondson to reconsider its decision but had not been available to the Oklahoma District Court. Mr. Ray testified before the staff that in Precinct No. 7, which is one of the precincts he surveyed, there were 361 votes cast in the Senatorial race. He stated that during a door-to-door random canvass, a total of 62 voters were interviewed, of whom 16, or approximately 25 per cent submitted affidavits indicating confusion and difficulty in casting a straight party vote during the 1974 election.

Mr. Ray further stated that in Precinct No. 148, there were 240 votes cast in the Senatorial race. In that precinct, a total of 83 voters were interviewed in a random door-to-door canvass, and 8 voters, or approximately 9 percent of the voters interviewed, submitted sworn affidavits indicating confusion and difficulty in casting a straight party vote during the 1974 election.

Mr. Ray further stated that combining the results of the two precincts surveyed, 24 voters out of the total 145 voters interviewed, or 16.5 percent, had submitted sworn affidavits certifying to their confusion and difficulty in voting in the 1974 election because of the misleading instructions on the machines.

7. A Dr. William F. Fewell of Tulsa, Oklahoma, submitted an affidavit to the Committee on November 27, 1975, evidencing voter confusion during the 1974 election. He stated that he had voted for the bottom Democratic candidates in each column "as I understand you should do to vote a straight party ticket." "I voted straight Democratic by moving the bottom levers in each column."

8. The conclusions of both of the expert witnesses testifying on behalf of Mr. Edmondson before the Committee, as well as a substantial portion of the data upon which they based their conclusions, were substantially different than that presented by the same witnesses to the Oklahoma courts. Both expert witnesses had conducted additional research following the Oklahoma court hearings which allowed them to use relevant voting data from the 1974 elections, including information on the effect of the unlawful ballot placement, information relating to the actual ballots used in the election, and other significant data not available to them in testifying before the Oklahoma courts. The results of their additional studies allowed each of these expert witnesses to conclude before the Committee that, but for the violations, there was a high probability that Mr. Edmondson would have won the election. Lacking the updated 1974 data and additional input from the 1974 survey, these witnesses had not been able to reach such a definitive conclusion before the Oklahoma courts as to the effect of the violations.

9. Dr. Kirkpatrick, in testifying before the Committee, presented new data not available to the Oklahoma courts, that persons voting on the "Amarillo" machines (the 95 machines without the erroneous instructions in Tulsa County) definitely gave Mr. Edmondson a higher percentage of the vote than he received in the precincts using machines with confusing instructions (the Tulsa machines). Furthermore, Dr. Kirkpatrick's data presented to the Committee showed that on a percentage basis, more people using machines with the erroneous and misleading instructions voted for the bottom line Democrats than was the case where there were no such instructions. Dr. Kirkpatrick testified that this data led to the conclusion that Democratic voters were confused by the instructions, and tried to vote a straight party ticket by voting for the bottom line Democrats. It was further stated that selected precinct results and absentee ballot results did not alter the conclusions, based on percentage comparisons.

10. It was further disclosed on December 4, 1975, to the Committee, that Mr. Lance Tarrance, the only witness offered as an expert to the Oklahoma courts by Senator Bellmon's counsel, had neglected to advise the courts that he and his company had received \$14,254.01 in April and May of 1974 for work on the Bellmon campaign. While it was recognized at the time of the hearings before the Oklahoma courts that Mr. Tarrance was a partisan Republican, the courts were not advised that Mr. Tarrance was employed by the Bellmon organization during the campaign itself.

11. There was no evidence presented, and no one was apparently aware during the Oklahoma court proceedings, of additional data obtained by the Committee staff, showing, in the words of the staff report, that "The official certificates of votes for the 315 precincts in Tulsa County contain a multiplicity of errors, either human or ma-

chine, which cast doubt upon the procedures employed and the maintenance of the controls required to insure proper elections." (Hearings, Senator from Oklahoma, pp. 491-494). No explanation was ever provided to the Committee for the vast majority of these particular errors.

The Committee considered all of the above new evidence, which had not been available to the Oklahoma courts, as well as the evidence which had been a part of the record before the courts. Representatives of Senator Bellmon have argued that these matters were all before or available to the Oklahoma courts, a position which the Committee finds difficult to accept. This is particularly the case with the testimony of Drs. Kirkpatrick and Miller. Both of these experts had testified during the court proceedings, but each was limited to pre-1974 data at that time. Their testimony before the Committee included 1974 election data, which was not available to them or to the courts during the judicial proceedings in Oklahoma.

#### *Expert Testimony*

Dr. Samuel A. Kirkpatrick, Professor of Political Science and Director of the Bureau of Government Research at the University of Oklahoma, testified as a qualified expert on Oklahoma elections, voting behavior, and voting patterns, that, *"without the irregularities associated with voting machines in the November 1974 election, there is a high probability that Ed Edmondson would have received sufficient votes in Tulsa County to win in the State-wide election."*

Dr. Kirkpatrick's qualifications included a Ph. D. with a major in Political Science and a minor in Statistics from Penn State. He is president of the Southwestern Political Science Association and has been in charge of the NBC forecasting systems in the State of Oklahoma since 1970 and served as election night analyst as well for the ABC affiliate in Tulsa County.

Dr. Kirkpatrick's testimony before the Committee on November 18, 1975, was based in part on his previous testimony before the trial court in Tulsa, Oklahoma, and a more extensive affidavit presented to the Oklahoma Supreme Court. Significantly, however, Dr. Kirkpatrick's testimony before the Committee was also based on additional subsequent research conducted since December of 1974 which was not available to the Oklahoma Supreme Court.

Dr. Kirkpatrick's presentation to the Committee was divided into three essential parts. First, Dr. Kirkpatrick conducted a review of scholarly findings about the impact of ballot and voting machine arrangements on the pattern of electoral outcomes and concluded as follows:

All of this research strongly suggests that the absence of party voting devices and levers in Tulsa County in 1974 increases the amount of ticket splitting in a disproportionate way, so as to cast serious doubt on the mathematical certainty of the senatorial race outcome. In addition, it is most likely that the Democratic senatorial candidate's votes were most negatively affected since party arrangements are more particularly influential for Democrats, weak partisans, low motivated voters, and those of lower educational and socio-economic positions.

Next, Dr. Kirkpatrick testified as to the results of his research with regard to Oklahoma party deviations and ticket-splitting as they related to ballot characteristics in Oklahoma. He stated to the Committee that the results of this research also—

definitely cast serious doubt on the mathematical certainty of the senatorial outcome, and they strongly suggest that conditions of machine or ballot uniformity statewide would favor Mr. Edmondson and have at least made the outcome a toss-up.

As indicated above, Dr. Kirkpatrick's conclusions before the Committee had the benefit of 1974 research which showed, among other things, that Tulsa County ticket-splitting in 1974 was substantially greater than it had ever been in Tulsa County or in the rest of the state in any previous year in over four and a half decades. The amount of ticket splitting in Tulsa County in 1974 was 14.3 percent higher than the mean ticket splitting in the county from 1930 to 1966.

Dr. Kirkpatrick's statement and testimony related to the effects of the violations of Oklahoma law on the Tulsa County machines, compounded by the misleading instructions. He noted that in the last two elections where Governor and Senator were together on the ballot in Tulsa County, 1962 and 1966, and the Senate candidate preceded the gubernatorial candidate on the machine, the Democratic candidates for Senate received some 6,000 and 9,000 more votes respectively, than the Democratic candidates for Governor. In the 1974 results with Governor preceding the Senate race on the machine ballot for the first and only time, the Democratic candidate for Governor received 10,000 more votes than the Democratic candidate for Senator.

Dr. Kirkpatrick further stated with respect to roll-off or ballot fatigue and the effects of the erroneous instructions on the Tulsa County machines, that,

In addition to the effects of the absence of party levers on split ticket voting, there is evidence of voter confusion in this case resulting from (1) the general absence of levers which are normally present, or (2) the presence of additionally confusing instructions about how to use the non-existent levers in all but 46 of the 315 Tulsa County precincts.

Dr. Kirkpatrick offered additional data, not available when he testified before the Oklahoma court, that Edmondson ran 0.7 percent better in the precincts using the "Amarillo" machines than he ran in the remaining precincts where there were erroneous and confusing instructions on the machines. Dr. Kirkpatrick did not limit his review to just the Senate, or Senate and Governor races, but reviewed all ballot results as to ballot fatigue and rolloff, as well as confusing instructions in the absence of straight party levers.

Dr. Kirkpatrick testified that roll-off, as an empirical fact, was well established for Oklahoma. He stated that since the 1920's, the average percentage spread of vote totals for the top and bottom offices of the ballot have been approximately 15 percent. Dr. Kirkpatrick testified that his evidence *"strongly suggests that a disproportionately large number of voters were effectively disenfranchised by the presence of confusing instructions, that such voters were attempting to cast*

straight party votes and that Mr. Edmondson was disproportionately and negatively affected by it."

Although Dr. Kirkpatrick had been unable to state the effect of the violation of law upon the outcome of the election before the Oklahoma courts, his conclusion before the Committee, based upon 1974 data was positive and convincing:

In conclusion, the cumulative thread of empirical evidence about irregularities in this election casts serious doubt on the mathematical determinacy of the outcome. While there are always difficulties in precisely isolating cause and effect in the social and political world, an attempt has been made to employ the best of our social science capabilities in reaching a judgment. These capabilities are firmly rooted in past research and in comparative scientific method which encourages the use of geographic, precinct, and temporal comparisons, as well as common sense about possible effects.

The data in this case indicate that a number of processes are at work and that they are attributable to voting machine irregularities at odds considerably better than even, that the absence of party levers disproportionately heightened split-ticket voting so as to cast serious doubt on the outcome, which was considerably more abnormal than other outcomes when such devices were used, and that voters' confusion resulting from the absence of such devices influenced patterns of voting that represent a substantial departure from more normal voters fatigue affects and which produced results likely to be different from instances where such confusion was not present.

*Based on the above, I have concluded that without the irregularities associated with voting machines in the November 1974 election, there is a high probability that Ed Edmondson would have received sufficient votes in Tulsa County to win in the statewide election."*

Dr. Warren E. Miller, a qualified expert on voting patterns and the behavior of citizen participation in national elections, and the Director of the Center for Political Studies of the Institute for Social Research at the University of Michigan, testified before the Committee that in his opinion, it was "most likely that Mr. Edmondson would have indeed won had these irregularities not occurred." Dr. Miller has been a national election analyst for ABC since 1966 and theretofore had done similar work for both CBS and NBC.

Dr. Miller's expert testimony and opinion before the Committee were based on national surveys of voters following national elections. The underlying data supportive of Dr. Miller's opinion included data from the 1974 elections, based upon interviews with 935 voters residing in 292 electoral jurisdictions. Dr. Miller had previously presented testimony before the Oklahoma courts that it was indeterminate as to how the election would have come out had the violations of law not occurred. This prior testimony, however, was based only on 1956 data compiled and analyzed by Dr. Miller and did not have the benefit of the significantly updated and different 1974 survey data. Both the 1956 and the 1974 surveys which formed the underlying data upon which

Dr. Miller based his opinion before the Committee included two precincts in Tulsa County, Oklahoma.

Dr. Miller's testimony before the courts in Oklahoma focused almost entirely on the significance of the presence or absence of a single party lever on the Tulsa County voting machines. Dr. Miller concluded from the 1956 study alone that the presence or absence of a single lever made a very conservative 12 per cent difference in the frequency with which straight party votes were actually cast. Dr. Miller emphasized that the 1956 study was confined to a comparison of the single party lever as against all other varieties, whereas the 1974 study had a different base for evaluation, and permitted him to examine one additional feature relevant to the contest—the location of the Senatorial election contest on the ballot.

Although, on the basis of the 1956 study Dr. Miller concluded that there would be a 12 per cent difference in the frequency with which straight party votes would be cast, he had also concluded before the Oklahoma courts that the 1956 data showed there was no difference in the way in which Democrats and Republicans responded to the absence or presence of the party lever; i.e., the absence or presence of the party lever appeared to have had the same impact on both parties. However, based on the 1974 study, which included (a) January 1974 registration figures for Democrats and Republicans in Tulsa County where the Democratic registration outnumbered the Republican registration by approximately 119,000 to 81,000, (b) the fact that approximately 61.7 per cent of those registered actually cast votes in November of 1974—127,000 out of 205,000, and (c) assuming that the Democrats and Republicans turned out in reasonably similar rates, with 73,500 Democrats voting versus 50,050 Republicans, Dr. Miller showed there was a substantially larger impact of the absence of the party lever on the 23,450 more registered Democrats. Since the conservative 12 per cent increase in straight ticket voting among 50,000 Republican votes would have constituted an increase of 6,000 more straight-ticket Republican votes and the 12 percent increase among 73,000 potential Democratic supporters would have produced an additional 8,800 straight Democratic votes, the Democratic candidates who were disadvantaged because of ticket splitting would have picked up an additional 2,800 votes. The gain of 2,800 votes for the Democratic candidates as a result of the above would be at the expense of a Republican loss of 2,800 votes, for a resultant shift of about 5,600 votes favoring the Democratic candidate. This net shift is substantially larger than the 3,835 vote margin by which Mr. Edmondson lost to Senator Bellmon in the certified results of the Oklahoma contest.

It is apparent from the evidence that the *minimum* number of voters who would have to shift in order to overturn the election results was 1,918, rather than the 2,800 referred to above. Dr. Miller's testimony also shows that, assuming a differential of 8.5 per cent in the degree of turnout between Republican and Democrats; i.e., if only 60.1 percent of the 119,167 registered Democrats voted while 68.5 percent of the 81,117 Republicans voted, this would have resulted in the 1,918 shifting votes needed to overturn the election.

It is further significant that the 1974 survey determined by post-election interviews that 55 per cent of all voting Democrats voted



a straight party ticket where machines or paper ballots provided for a single party choice, but only 41 per cent voted a Democratic straight ticket where votes had to be cast for each race separately, as was the case in Tulsa County. This produced a 14 per cent spread, which would have further enhanced Mr. Edmondson if the straight party levers had been on the Tulsa machines as required by statute.

As previously noted, the 1974 study contained additional data relating to the placement of the Senate race on the Tulsa ballot. Across the nation at large in 1974, the tendency to vote a straight party ticket was substantially greater when the Senate race occupied the advantageous position in the first place in the upper left-hand corner of the ballot. The 1974 data showed that when the Senate race was in first place in the upper left-hand corner of the ballot only 31 per cent of the voters split their tickets. However, when the Senate race was moved to a less prominent place on the ballot, the proportion of ticket splitting increased sharply and averaged 51 per cent—a 20 per cent increase in ticket splitting as a result of the Senate race not being in the lead position on the ballot. The 1974 data further showed that this difference was accentuated when there was not a party lever available for a single party choice. The data showed that among voters who had to make a choice for each race, because of the absence of a party lever, only 11 per cent split their ballots when the Senate contest was most advantageously placed, but 48 per cent split their ballots when the Senate race was located in the interior of the ballot. Thus, the overall 20 per cent increase in ticket splitting associated with an interior location for the Senate race went up to a 37 per cent increase where a party lever was not available.

Dr. Miller was of the opinion that if the Tulsa ballot had been headed by the Senate race, as required by the Oklahoma law “—the proportion of split tickets cast in the absence of a party lever; would have been much smaller than it was, and all of the decrease in ticket splitting or increase in straight-ticket voting would have accrued to the benefit of the Democratic candidate.”

Dr. Miller summarized his testimony as follows:

To summarize the relevant evidence from our study, the pattern of votes cast by Democratic party identifiers was sharply influenced by the presence or absence of the party lever. Moreover, the presence or absence of the party lever compounded the impact of the placement of the senatorial race within the ballot. Given the particular configuration of the Tulsa voting machines, it is reasonable to conclude that the Democratic candidate for the United States Senate was disadvantaged both by the absence of the party lever which forced a race-by-race decision on the part of the voter and by the location of the Senate race among lesser state offices.

Where the 1956 data suggests that the magnitude of the disadvantage depended on the relative balance of the party identifiers in the electorate, the 1974 data indicates that the Republican partisans were not affected by the presence or absence of the party lever and the Democratic candidate, therefore, bore the full brunt of the vote loss which might be attributed to the physical arrangement and the mechanical provisions for the voting in Tulsa County.

It is important to note that Dr. Miller's testimony and conclusions as to the effect of ticket splitting and the 12 percent and 14 percent figures relating to the 1956 and 1974 studies do not include a roll-off factor of 1,400 votes from the Gubernatorial to the Senatorial vote. This additional factor should be considered cumulatively to Dr. Miller's other conclusions.

Dr. Miller concluded that with respect to the impact of the presence or absence of the straight party lever alone, somewhere between 4,000 and 20,000 votes might have switched. With respect to the illegal placement of the Senate race on the ballot, Dr. Miller concluded that this alone would have a net impact of 9,380 votes. Finally, with respect to the two elements of voter participation and turnout, Dr. Miller concluded that between 2,500 and 3,900 votes might have been added to the Edmondson total. Taking all of the above elements into consideration, Dr. Miller was of the opinion that based on the 1974 survey data and his over 20 years of experience in electoral research, it was “most likely that Mr. Edmondson would have indeed won had these irregularities not occurred.”

The Committee received the testimony of two witnesses presented on behalf of Senator Henry Bellmon, both of who offered only a critique or rebuttal testimony to the testimony of Drs. Miller and Kirkpatrick. Neither of the two experts presented on behalf of Senator Bellmon had conducted any surveys or extended research on Oklahoma or Tulsa County elections to support their testimony.

Unlike the expert testimony presented on behalf of Mr. Edmondson, the testimony of these individuals was not directed to the veracity or accuracy of the Tulsa County election results in 1974, but to various aspects of the testimony of Mr. Edmondson's witnesses.

Dr. Howard R. Penniman, Professor of Government at Georgetown University, devoted a significant portion of his testimony before the Committee to a critical review of the texts cited by Dr. Kirkpatrick, and an attack on the figures used by Drs. Miller and Kirkpatrick, based on their research. Dr. Penniman acknowledged, however, that he had not conducted any research of his own on the subject. The Committee noted that portions of Dr. Penniman's testimony were contradictory and, in some instances, contained particular errors. For example, one part of his critique of Drs. Miller and Kirkpatrick's presentations was based on a theory of party registrations with Republicans and Independents registering as Democrats. However, during questioning from the Committee, Dr. Penniman stated that his theory was not borne out by the comparative results or returns in primary or general elections.

Another such example was reflected in the error contained at the end of his prepared statement to the Committee where Dr. Penniman stated that “the percentage point difference between the highest and lowest Republican candidates in Oklahoma County was 34 percentage points, very considerably higher than in Tulsa or the rest of the State.” The evidence before the Committee shows that Senator Bellmon's total in Tulsa County was 72,145 votes while Mr. Mizer (the candidate for Congress) received only 38,923 votes in Tulsa County. Thus, Mr. Mizer received only 54 percent of the votes received by Bellmon, or Bellmon received 185 percent of the votes received by Mizer. These facts do not support the 34 percent figure presented by Dr. Penniman. In fact, the actual figures indicate much more ticket splitting in Tulsa County than

in Oklahoma County where there were correct instructions and party levers on the machines.

A further example is contained in Dr. Penniman's statement before the Committee that the voting machines in Tulsa County had been used with the same straight-party lever instructions on 16 prior occasions without any confusion on the part of the voter. During questioning, however, Dr. Penniman did agree that it was not possible for a voter to follow the instructions for straight party voting, and acknowledged that he had no real knowledge of the existence or absence of confusion in prior elections. Dr. Penniman's conclusion that there was no confusion is not supported by the evidence which shows there were numerous instances of actual voter confusion at the polls in Tulsa County during the election in 1974.

Dr. Penniman concluded his prepared testimony before the Committee by stating that it was his belief that there was "no reason to doubt the validity of the outcome, as reported in November 1974." However, during questioning by the Committee Dr. Penniman acknowledged that the machines used in Tulsa County encouraged and made it easier for the voter to split his ticket absent the straight levers required by law. *He further acknowledged that it was possible the several voting irregularities, when combined, might have made a difference in the Senate election results.*

Dr. Walter DeVries, President of DeVries and Associates and an Associate Professor at Duke University, appeared before the Committee on behalf of Mr. Bellmon to comment on the earlier testimony of Drs. Kirkpatrick, Miller, and Penniman. Dr. DeVries has devoted the majority of his time to work in political campaigns, mainly for Republican candidates.

The essence of Dr. DeVries' testimony was a discussion of his national findings on ticket-splitting and his conclusion that, based on these findings, he was unable to find any evidence to support the conclusion presented to the Committee by Drs. Kirkpatrick and Miller. He acknowledged that he had not done any research with respect to Oklahoma or Tulsa County, and offered no evidence or conclusions as to the effects of the erroneous instructions, the absence of straight party levers, or the illegal ballot placement upon the voters of Tulsa County who desired to vote a straight Democratic party ticket.

The Committee recognized the import of Dr. DeVries' testimony, that a split-ticket voter would not have a problem voting on the Tulsa voting machines. A key question, however, which this witness did not address himself to, is what trouble would a Democratic straight ticket voter have had with the same machines, absent straight party levers required by statute?

The evidence and logic show the answer to be that the more actions a voter must take on a machine, the more likely he is to split his ticket—whether deliberately or through confusion. This was recognized by Dr. Penniman. As identified by Drs. Miller and Kirkpatrick, and further acknowledged by Dr. Penniman, the evidence showed there is a class of Democratic voters who vote a straight lever whenever given a chance to do so. In Tulsa, this was supported by State Senator Gene Howard who reported that some 25 percent of the voters in one of his precincts vote as straight lever Democrats.

The Committee has found the evidence presented to it by Drs. Kirkpatrick and Miller to be competent and sufficient to cast serious doubt upon the efficacy of the election results and the ability to determine with "mathematical certainty" who won. (26 O.S. 395) Inspection and attempted use of the prototype machines brought before the Committee from Tulsa reinforces the conclusion that the outcome of the election for United States Senator could well have been affected by the violations of law.

#### *Additional Evidence*

The expert testimony on the effect of the violations of law upon the voters, and through the voters, upon the outcome of the election, was buttressed by the evidence received by the staff at the investigatory hearings in Tulsa. Both testimony and affidavits received by the staff evidenced a voter confusion caused by the absence of straight party voting levers and the erroneous and misleading instructions.

Mrs. Irene Perkins, a precinct worker (inspector) at the November 5, 1974 election, testified as to the confusion among voters at her precinct. She stated that some voters asked her how to vote a straight ticket, since the machine was not set up for that type of voting, and "the board was so loaded they thought if they had a straight ticket, they could just hit one button and that would be it." She stated, however, that when asked by those voters about straight ticket voting, she advised them how to move the various selectors to vote for candidates of one party.

Mrs. Rosalie Parker, a precinct inspector in Tulsa County on November 5, 1974, offered the following statement to the Committee:

"I have been an inspector in Precinct 5 for about six years. There are quite a few old people in our precinct, and they like to vote a straight party and are used to voting straight party. Most of them in our precinct are Democrats. On November 5th, they could not vote straight party as they were used to voting, and it was quite confusing."

State Senator Roger Randle, Tulsa County Democratic Party Chairman at the time of the election, testified:

"1974 was an unusual election year and we found a genuine upsurge in the desires of many voters to vote a complete Democratic ticket. The failure of the voting machines to be programmed for this option had a definite detrimental effect on the many voters who wished to do this but who were confused by the layout of the voting machines."

Testimony and a series of voter affidavits were received from Rodney Ray, a former campaign worker for Edmondson. Immediately following the election, Mr. Ray conducted a survey in two Tulsa precincts which had machines with the erroneous/confusing instructions. In one precinct where 361 votes were cast in the Senate race, 62 voters were interviewed, and 16 submitted affidavits indicating confusion and difficulty in casting a straight party vote. In the other precinct, 240 votes were cast in the Senate race, 83 voters were interviewed, and affidavits indicating confusion and difficulty in casting a straight party vote were given by 8 voters. Mr. Ray is not a professional

pollster, but he did submit his survey forms, and explain the methods and protections of fairness built into the survey. The results of his survey show a minimum of 15 per cent voter confusion.

Among the affidavits submitted by Mr. Ray, there are the following comments:

Beulah C. Ingram: "When I went to vote I wanted to vote a straight Democratic ticket. I was told by the clerk that I couldn't do so this time. This was confusing and took more time."

Ezra Alexander: "When I went in to vote I wanted to vote a straight Democratic ticket but there was no lever. I waited in line for about 15 minutes, it took me about five minutes to vote and I did not complete voting. I only got about halfway through the ballot. I was confused because of the voting procedures, and I would like a straight party lever. It would be much easier to understand."

Ruth Bundy: "The voting process was more confusing this year than ever before \* \* \* This year was the biggest mess-up, you couldn't tell what was going on."

K. D. Argrow: "It was my intention, when I went to vote on November 5th, to vote a straight Democratic ticket. The machine I voted on had instructions on how to vote a straight ticket, and I read these instructions. Because of the form of the ballot and the inability to vote a straight ticket with one lever, I was very confused."

Thelma Graham: "The way the machine was set up was confusing to me because I always try to vote a straight ticket."

Charlotte Andrews: "It was my intention to vote a straight party Democrat ticket in this election. I was confused because of the ballot, and the instructions and I am not sure that I completed voting in all races."

Harry R. Jones: "I can't say I remember I voted for Ed Edmondson or Jim Jones for sure because of the confusion I found in the whole voting ballot. I figured on voting a straight ticket, but I honestly can't say for sure how my vote went."

Clorice Weathers: "When I went in to vote I wanted to vote a straight party ticket. I voted a straight Democratic ticket by pulling one time on the Democratic lever. It took me less than one minute to vote. I do not remember voting in the races, individually, for congressman or senator. I voted straight party democratic."

Finally, the following was in the affidavit of Kathrine Stearns, a precinct inspector:

Many of the voters were disappointed and confused when they found out they could not vote a straight ticket. Many people asked for help and the voting process was slowed down a lot for the working people when they came in to vote.

Some were simply disgusted because of the confusion and did not vote in all races. Despite my repeated advice, many

people simply refused to complete the ballot. I saw a Mrs. Carney leave the poll because of the long lines, I do not believe she returned. One man came in and just pushed the vote button; he did not move the levers.

Even though I was very familiar with the sample ballot when I went in to vote, I was a bit confused by the structure of the ballot.

These impressions of voter confusion confirm the testimony of the expert witnesses as to the fact that the violations of the voting laws affected the voters and the outcome of the vote.

Based upon all the evidence before the Committee, it is not possible to determine with any degree of certainty who would have won the election if the violations had not taken place.

#### APPLICABLE LAW AND PRECEDENTS

The Constitution of the United States, in Article I, Section 4, mandates that the State legislatures shall prescribe the "times, places and manner" of holding elections for Congressional offices. This delegation to the State legislatures cannot be redelegated to the State executive or judicial branches. The "manner" of elections has been held by the United States Supreme Court to include: "\* \* \* a complete code for Congressional elections . . . in relation to notices, registrations, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns \* \* \*"*Smiley v. Holm*, 285 U.S. 355, at 366 (1932).

The Legislature of the State of Oklahoma exercised this authority by enacting, inter alia, 26 O.S. Sections 274 and 277 (c). While these same statutes also govern elections to state and local offices in Oklahoma, this does not change or abrogate the fact that the Legislature's authority to determine the location of candidates for national office on the ballot, and the use of straight party levers in voting for national candidates, flows directly from the Constitution of the United States.

It is the position of counsel for Mr. Edmondson that the violations of these statutes in Tulsa County necessarily resulted in the voiding of all votes in the Senate contest in Tulsa County. The argument that these violations in Tulsa County in and of themselves should void the election, or at least the votes in Tulsa County, is not without merit. (See, Memorandum in Support of Petition and Complaint of Ed Edmondson, submitted on November 17, 1975). The Committee, however, has not found it necessary to apply such a void *ab initio* rule.

Similarly, the Committee has not attempted to reach the question of whether these particular statutes may be considered as mandatory before an election, but only directory after an election, as was held by the Oklahoma Supreme Court. The Committee notes, however, that an election statute is generally considered mandatory both before and after an election if it affects the voter's franchise, and if a violation of the statute results in a change in the outcome of the contest. It is also significant that the violations of the Oklahoma statutes

here involved, 26 O.S. Sections 274 and 277 (c), are criminal acts and constitute a felony, as declared by 26 O.S. 294:

It shall be unlawful for any person \*\*\*

(1) to fail, refuse, or neglect to discharge any duty imposed upon him, either individually or in any official capacity, by any provision of the laws of this state relating to voting machines \*\*\*

Any person violating any provision of this act shall be guilty of a felony \*\*\*

Further, the Committee is aware of the *per se* rules recently used by Federal Courts to void elections which have violated the equal protection rights of the voters. (See Hearings, Senator from Oklahoma, pp 680-714). This procedure is not being applied to this contest.

The Committee feels that it need not adopt such seemingly rigid legal precepts in this contest because, as already stated, it finds that there is competent and sufficient evidence to show the violations of law could well have affected the outcome of the Senate contest. The evidence also shows that were it not for the violation of law there is a high probability that Mr. Edmondson would have received sufficient votes in Tulsa County to win in the statewide election.

The Committee is thus faced with a contest where there were clear violations of the Oklahoma election laws, and where the evidence shows that such violations did affect the result of the election. Under these circumstances, the Senate must act pursuant to its jurisdiction as provided by Article I, Section 5, of the Constitution, as the judge of elections of its members. The jurisdiction and authority granted to the Senate by our Founding Fathers must be exercised, as it has been in the past, with restraint and in an equitable manner. Each contest must be considered on its own merits, with a deference to past precedent of the Senate, reflected in the general rule that "In order to set aside an election there must be not only proof of irregularities or errors, but, in addition thereto, it must be shown that such irregularities or errors did affect the result." (Statement of Senator George in *Hurley v. Chavez*, referring to rule established in *Heflin v. Bankhead*; 93d Congress, 2d Session: Congressional Record Vol. 100, p. 3731.)

The Senate is not bound by the decision of the Oklahoma Supreme Court. The Constitution delegates the authority to judge the election of its members to the Senate, and not to the Supreme Court of the United States or any of the sovereign states. The precedents demonstrate that the Senate does take into consideration the decisions of State courts affecting election contests, giving such deference to the opinions as is warranted by the circumstances, but the Senate is not and cannot be bound by State court decisions. *Ray v. McMillen*, Case No. 77 of *Senate Election, Expulsion and Censure Cases*, Sen. Doc. No. 92-7. In the contest in *Ray v. McMillen*, Senator Allen G. Thurman of Ohio clearly enunciated this proposition during the floor debate:

There is one conclusive answer to all that has been said about the decisions of the Supreme Court of Louisiana; and that is that the question before us is to be decided by this Senate and by this Senate alone, and that the decision of no court, not

even if it were the Supreme Court of the United States, has even the force of a precedent on a question like this. The Constitution makes the Senate the sole judge of the elections, returns, and qualifications of its members. It cannot, therefore, be bound by the decision of any other tribunal or any other body of men. (Cong. Rec., 44th Cong., 1st sess., vol. 4, pt. 1, p. 910).

The decision of the Oklahoma Supreme Court does not bind the Senate, nor has the Committee simply rejected it out of hand.

The Committee has found, as did the Oklahoma Supreme Court, that there were violations of the Oklahoma election laws. The Committee has further found, based upon competent and sufficient evidence presented on behalf of Mr. Edmondson which was not before the courts of Oklahoma, that there is evidence to show these violations affected the outcome of the contest for United States Senator.

The Committee has further found that the statutes violated were substantive in nature, affecting the franchise, and were not ministerial functions, the omission of which would have no effect on the vote. There are technical election statutes, involving a variety of functions for election officials, which have no direct effect on the rights of voters. These might include the size and structure of voting booths, the distance from a polling place where campaigning may take place, the actual place designated for voting, the matter of public notice, the use of voting machines and/or paper ballots, handling of ballots by inspectors or judges, locking of the ballot box, production of the list of registered voters, and many others. Such statutes, without more, do not affect the vote, and as such they might well be considered as directory after an election.

Examples of the above can be found in the contest of *Heflin v. Bankhead* (Case No. 138, *Senate Election, Expulsion and Censure Cases*, Sen. Doc. No. 92-7). The Bankhead contest involved an election in 1930 for Senator from the State of Alabama. The basic issue before the Senate was the validity of the qualification to run in the Democratic primary. The petitioner, Heflin, was the incumbent in the Senate, but had been denied the opportunity to run in the primary. He thereafter ran in the general election and was defeated by Bankhead by 50,016 out of some 250,000 votes cast. Following his loss in the general election, Heflin sought relief in the Senate, asking that he be declared the duly elected Senator. The Senate held the primary process was valid. Heflin also challenged the election based on a series of alleged irregularities, discrepancies, and violations of Alabama election laws. One of the alleged irregularities was that persons voted who were not on the registration lists; however, no evidence was submitted to show that such persons voting were not qualified voters. Other charges included that the ballots were not numbered as required by law; certain ballots were numbered in pencil rather than in ink, as required by statute; and that some ballot boxes were not properly sealed. The Senate found that there was no evidence that these violations affected the outcome of the election. The violations were merely infractions of directory provisions of the State law, and there was no evidence of such a disregard of law as to affect the election. In *Bankhead*, as distinguished from this contest, the violations of law

were of a directory or ministerial nature and, as again distinguished from this contest " \* \* \* none of the alleged irregularities, discrepancies, and violations of law, nor all of them together, either did or ought to change the result." (Sen. Doc. No. 92-7, p. 130).

The election laws which were violated in Tulsa County on November 5, 1974, were substantive laws, the violation of which is a felony, and substantial evidence has been presented that these violations did affect the voters and the final vote. Improper placement of a race on the ballot, failure to provide straight party levers, and the use of erroneous and misleading instructions are of such a nature that they would all, singly or cumulatively, affect the voters and the vote.

Representatives of Senator Bellmon have argued that placement did not make a difference, noting that the Senate race in 1972 was in the same physical position (column) on the machines. In 1972, however, the Senate race was preceded only by the Presidential election contest, and not by any state races. This was in conformance with the statute on placement. In 1974, the Senate race followed fourteen (14) state races, contrary to the law of the State of Oklahoma.

The Committee notes that since election machines were first introduced in Tulsa County, the race for United States Senator has always preceded *all* state races. The testimony of Drs. Kirkpatrick and Miller is that the illegal placement resulted in a loss of votes for Edmondson. The testimony of Drs. Penniman and De Vries did not rebut or dispute the evidence on the effect of the unlawful placement on the Senate race.

The absence of the straight party levers from the machines, compounded by the erroneous and misleading instructions on 545 of the 640 machines used in Tulsa County, clearly affected the voters and the resulting vote. The Committee recognizes that the use of straight party voting levers is a question for the states and is aware of disputes in state legislatures, including Oklahoma, as to whether straight party levers should be used. These disputes go to the very heart of the franchise, since each side recognizes that the presence or absence of such levers does affect the vote. The legislature of Oklahoma chose to use straight party levers, and it cannot reasonably be denied that the absence of such levers in Tulsa County violated the statute and affected the election for the Senate.

Dr. Kirkpatrick, who is most familiar with Oklahoma voting, stated that it made a difference in the outcome of the race, and that but for the violations, there was a high probability Mr. Edmondson would have won. Dr. Miller agreed, basing his testimony on national studies which included two precincts in Tulsa. Dr. Penniman acknowledged the violations could have had an effect on the outcome.

The evidence before the Committee, which included an opportunity to inspect the machines in question, leaves little doubt but that there was an effect on the voters and the vote for Senator.

Finally, with respect to a point raised by counsel to Senator Bellmon, the Committee is not convinced that Mr. Edmondson has waived any of his rights. This argument is based on Mr. Edmondson's having been advised by his campaign coordinator in Tulsa County on the Thursday or Friday prior to the election that straight party levers were not on the machines. Mr. Edmondson, who had never seen a

Tulsa machine, was also advised at that time that a request had been made to Tulsa County election officials that correct instructions on voting a straight ticket be provided in each voting booth. This was not done. Thus, Mr. Edmondson's limited knowledge was prejudiced by his understanding that there would be corrective action taken, and by the absence of any knowledge of the compounding effect of erroneous and misleading instructions and the unlawful ballot placement. Furthermore, there does not appear to be any way that Mr. Edmondson could waive the rights of Democratic voters in Tulsa County to vote in accordance with the statutes of Oklahoma, as guaranteed by the Constitution of the United States, Article I, Section 4, and the equal protection clause of the 5th and 14th Amendments.

Did the violations of Oklahoma law and erroneous instructions, considered cumulatively, affect the outcome of the Oklahoma Senate race? Based on all of the evidence before it, the Committee is persuaded that they could well have had such an effect. The Oklahoma statute provides for a new election if "it is impossible to determine with mathematical certainty" the candidate who won the election (26 O.S. Section 395). Based on all of the evidence presented to the Committee, the Committee is not able to determine with any degree of certainty the winner in the Oklahoma contest for United States Senator.

#### CONCLUSION

The Committee has found that there were violations of the election laws of the State of Oklahoma, and has received new evidence submitted on behalf of Mr. Edmondson which demonstrates that these violations affected the outcome of the contest for United States Senator. The Committee has been unable to determine the winner of that contest because of the violations of the election statutes.

Under these circumstances, the Committee, by motion passed on a vote of 5 to 3 with one member recusing himself is reporting to the Senate its inability to determine whether Mr. Edmondson or Mr. Bellmon won the disputed election and is entitled to be seated as the Senator from Oklahoma.

The Committee requests that the Senate exercise its constitutional responsibility under Article I, Section 5, of the Constitution, to determine the outcome of the election of November 5, 1974. If the Senate is unable to make such a determination, then the Senate should declare a vacancy to exist in the contested seat. A resolution declaring a vacancy will enable the State of Oklahoma to call a special election to fill such vacancy, pursuant to 26 O.S., Section 548, and in conformance with the election laws of the State of Oklahoma.