
RECOUNT AND INQUIRY IN UNITED STATES SENATORIAL
ELECTION IN THE STATE OF INDIANA, HELD NOVEM-
BER 8, 1938

APRIL 13, 1939.—Ordered to be printed

Mr. KING (for himself, Mr. BURKE, and Mr. AUSTIN), from the
Committee on Privileges and Elections, submitted the following

REPORT

[To accompany S. Res. 123]

The Committee on Privileges and Elections, having fully considered the petition for a recount, and an inquiry, in the senatorial election in the State of Indiana, held November 8, 1938, in which Hon. Frederick Van Nuys was elected a United States Senator from the State of Indiana, report that said petition ought to be dismissed.

This petition was brought by Raymond E. Willis, defeated Republican candidate for United States Senator in said election, and was joined in by the Indiana Republican State Central Committee. It bears date March 13, 1939, was laid before the Senate by the Vice President, President of the United States Senate, and was referred to this committee on March 13, 1939 (Congressional Record, p. 3686).

Senator Van Nuys presented his returns and took the oath of office as a Senator on the 3d day of January 1939 (Congressional Record, p. 5), and was occupying his seat in the Senate at the time said petition was laid down.

No right of the petitioners is diminished by the fact of occupancy above set forth (*Barry v. U. S. ex rel. Cunningham*, 279 U. S. 597, at 614).

The Senate, in judging of elections under article I, section 5, of the Constitution, providing that each House shall be the judge of the elections, returns, and qualifications of its own Members, acts as a judicial tribunal (*Barry v. U. S. ex rel. Cunningham*, 279 U. S. 597, 616, 1929).

The petition of recount and inquiry is analogous to a petition in equity, and ought to state facts adequate to show ground for the relief sought.

The petition in this case is defective in substance for the purpose of causing the Senate to exercise its judicial power.

The petition does not allege—

That Senator Van Nuys is in any wise unfit for the service;

That Senator Van Nuys was connected with any of the alleged fraud, bribery, excessive expenditures, coercion, intimidation, or irregularities of election officials.

Assuming as fact all of the statements made, of their own knowledge, by affiants, regarding votes cast and counted for the Democratic Party, and claimed to have been void for various causes, they total only 120 votes.

Assuming as fact the estimates set forth in allegations of a general nature charging improper voting, irregularities by election officials, and other offenses, the aggregate is less than enough to change the effect of the election, to wit: 4,217 votes.

The petition alleges (p. VII), that in the election—

Senator Van Nuys received total votes.....	788, 386
Raymond E. Willis received total votes.....	783, 189

Showing a majority for Senator Van Nuys of.....	5, 197
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Following the report of the subcommittee to the Committee on Privileges and Elections, a motion was made that the petitioners be informed of the decision of the committee that the petition was insufficient, and be tendered an opportunity to present additional evidence within a reasonable time before the dismissal of the petition. This motion was not agreed to and the committee thereupon unanimously voted to recommend to the Senate that it dismiss the petition.

A precedent for such action is the Bursum-Bratton election contest, in which, upon a review of the affidavits and photographs submitted, the committee was of the opinion that the pleadings filed by the contestant failed to show sufficient cause to justify the committee in taking steps to recount the ballots; that by giving the contestant credit for everything claimed, the contestee still had a substantial majority, and that all other matters set forth in the contest were of such character that a recount of the ballots would have no bearing whatsoever, and that there remained no other questions to be determined. (See Senate Reports, vol. B, II, 69th Cong., 1st sess., Rept. No. 724.)

Another precedent for such action is John R. Neal, contestant, versus Tom Stewart, contestee (76th Cong., 1st sess., S. Rept. No. 242.)

Mr. Logan, from the Committee on Privileges and Elections, submitted the following report to accompany S. Res. 115:

We, your Committee on Privileges and Elections, beg leave to report that we have given careful consideration to the petition and supplemental petition filed by the contestant in the above-captioned proceedings, and have concluded that the petition and supplemental petition should be dismissed, and that no further consideration should be given to the contest. Therefore we recommend that the following resolution be adopted by the Senate:

Resolved, That the contest of John R. Neal against Tom Stewart, Senator from the State of Tennessee, be, and the same is hereby, dismissed."

The resolution was agreed to (Cong. Rec., p. 5027).

The character of the charges in the general allegations is not of a kind to move the committee to recommend an investigation with a view to determining, either the existence of a conspiracy to deprive voters of their rights, or to show that the entire general election was corrupt, and therefore, voidable, or that the will of the people was balked respecting the final determination. (See exhibit A, which is

an analysis, classification, and tabulation made by Wm. Clabaugh & Co., certified public accountants, of the information contained in the affidavits attached to the petition.)

The general charge of conspiracy was alleged rather vaguely and doubtfully, thus:

On page 6:

Whether it was in fact a conspiracy may well be considered from the acts and events that transpired in Vandenburg County on election day 1938 and prior thereto.

On page 7:

At this point this is merely a theory. Further comment, however, will be made later on in this report.

All that was alleged on this subject there, and thereafter, has been considered, and the committee is not convinced that the evidence shows a conspiracy.

The charge is not made that Senator Van Nuys remotely conspired.

In the contest in connection with the election of a United States Senator from the State of Minnesota, 1924, between Magnus Johnson and Thomas D. Schall, the report of the Committee on Privileges and Elections unanimously recommended that the contest be dismissed, and that the protest against the seating of Thomas D. Schall be overruled. It was held, at page 10 thereof, that—

The testimony does not support the allegation that contestee conspired with A. N. Jacobs and Frank Corneaby to expend a sum of money in excess of \$50,000 or any sum in securing the election of contestee.

(See S. Repts., vol. B, II, 69th Cong., 1st sess., Rept. No. 102.)

Looking at this charge of conspiracy with regard to the incidental powers of Congress under article I, section 8, clause 18, to make all laws necessary to carry into execution the other powers vested in Congress, the committee considered that the Senate might properly be interested to investigate a general charge of conspiracy if it were necessary for the purpose of enacting statutes to protect the citizen therefrom in the free exercise of the right to vote. But such legislation is not necessary.

Title 8 of the United States Code, section 47, deals with conspiracies of this nature, and a part of subsection 3 thereof provides:

* * * if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; * * *

the party injured may have an action for damages against any of the conspirators.

Section 49 of the same title provides for institution of criminal prosecutions against all persons violating any of the provisions of chapter 3 of title 18, and that chapter makes conspiracy of the nature here under consideration a criminal offense, entailing a large fine and imprisonment of not more than 10 years, together with ineligibility "to any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

The validity of these statutes was sustained, and their effectiveness demonstrated in *Ex parte Yarbrough* (110 U. S. 651); *Logan v. United States* (144 U. S. 263, 293); *United States v. Mosley* (238 U. S. 383); *United States v. Aczel* (219 Fed. 917).

The last case cited arose, and was tried, in the State of Indiana.

With respect to these statutes relating to conspiracy, as well as the other statutes of both the State of Indiana and the United States, vaguely charged to have been, or possibly to have been, violated, the Senate should not attempt to exercise prosecutory powers. In the absence of probability that the result of the election would be changed, or new legislation enacted, by virtue of investigation, the Senate ought to leave such matters of law enforcement to the department of government to which they belong. This doctrine has been recognized by the committee before.

In the *Schall case* (supra), at page 9, the committee reported:

The Senate is a judge of the election and qualification of its Members and a judgment of a court under the provisions of the Minnesota law referred to would not be binding upon the Senate, but it would have great weight. It should not be expected that the Senate act as a substitute for a district court of that State.

Constitutional restraints on the Senate are regarded by the Committee such as to exclude prosecutory action under this petition. That the power to judge and the power to legislate have such limitations in such petitions, is implied in *Barry v. ex rel. Cunningham* (279 U. S. 597, at 613).

Mr. Justice Sutherland, delivering the opinion of the Court sustaining the power of the Senate to issue a warrant of arrest in an investigation relating to the election in 1926 of William S. Vare for United States Senator from Pennsylvania, held:

Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own Members (art. I, sec. 5, cl. 1). * * * When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so determine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit. In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, *subject only to the restraints imposed by or found in the implications of the Constitution.* [Italics supplied.] We cannot assume, in advance of Cunningham's interrogation at the bar of the Senate, that these restraints will not faithfully be observed.

A substantial part of the complaint and supporting affidavits deals—either directly or by hearsay—with the alleged abuse of relief, jobs, food, and favoritism, to coerce, intimidate, or purchase votes.

Assuming the maximum number of such votes as appear in the affidavits we find not enough of them to change the result.

Considering these acts, however, with reference to the duty to legislate, this committee does not need to investigate this type of alleged misconduct. It is already convinced of the existence of such misconduct, moving it to enact, if possible, legislation to prevent repetition of it, and to protect persons on relief in the freedom and sanctity of their voting rights.

This committee has already reported to the Senate the following bill:

