

DECLARING HERBERT R. O'CONNOR TO BE A DULY ELECTED SENATOR FROM THE STATE OF MARYLAND

MAY 13 (legislative day, MAY 10). 1948.—Ordered to be printed

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

REPORT

[To accompany S. Res. 234]

The Committee on Rules and Administration, to whom was referred the petition of D. John Markey, contesting the election of Herbert R. O'Connor as Senator from Maryland for the term beginning January 3, 1947, having considered the same, has adopted the report of its Subcommittee on Privileges and Elections as follows:

REPORT OF THE SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, TO THE COMMITTEE ON RULES AND ADMINISTRATION, RE MARKEY AGAINST O'CONNOR

Your Subcommittee on Privileges and Elections, to which have been referred the various petitions of D. John Markey, contesting the election on November 5, 1946, of Herbert R. O'Connor, for a seat in the United States Senate representing the State of Maryland, has had the matter under continuous consideration and respectfully reports as follows:

D. John Markey was the candidate for the above office on the Republican ticket and Herbert R. O'Connor, then Governor of the State of Maryland, was the candidate thereon on the Democratic ticket. The secretary of state of the State of Maryland certified to the United States Senate that of the 472,232 votes cast for United States Senator, D. John Markey (contestant) received 235,000 and Herbert R. O'Connor (incumbent) received 237,232.

Thereupon, Herbert R. O'Connor was administered the oath as a United States Senator from the State of Maryland on January 4, 1947, and is now serving in that capacity.

On November 30, 1946, contestant served formal notice on the incumbent of his intention to contest the reported election; a copy thereof was sent to the Secretary of the United States Senate. On December 10, 1946, contestant filed with the Special Committee to Investigate Campaign Expenditures (1946) his preliminary sworn petition alleging "that there were errors and irregularities in said election affecting the results which, if corrected, would show that petitioner received a majority of the votes cast." In view of the fact that "the laws of Maryland make no provision for a recount of votes cast in a general election for United States Senator," contestant requested "the Senate to employ its power and:

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authority for the purpose of effecting a fair and lawful recount of all ballots cast at said election."

Subsequently, on December 31, 1946, after the recount of votes cast on the voting machines in Baltimore City and Montgomery County (as hereinafter reported), contestant filed with the Secretary of the United States Senate his formal sworn petition, setting forth the general grounds of his contest and praying the United States "Senate to employ its full power and authority for the purpose of effecting a fair and lawful recount of all ballots cast at said election."

Said petition was referred to your Committee on Rules and Administration on January 6, 1947. A full text thereof appears in the appendix as exhibit 1.

Subsequently, on February 18, 1947, during the course of the test recount of five counties (as hereinafter reported) contestant filed a supplemental sworn petition with your Committee on Rules and Administration, praying that a fair and lawful recount of all paper ballots cast at said election throughout the State be ordered "forthwith."

Incumbent's only petition was thereafter filed with your Committee on Rules and Administration on April 10, 1947, "with respect to" contestant's petitions of December 31, 1946, and February 18, 1947. After referring to a prospective report of the subcommittee staff on the subject of irregularities observed during the recount, the petition continued:

"Your petitioner confidently expects that while such report may show technical noncompliance on the part of some officials with some of the provisions of the election laws, it will conclusively show that the contestant Markey did not suffer any prejudice thereby and that there was no fraud or intentional noncompliance on the part of such officials or anyone else in connection with this election."

Incumbent's petition closed with the prayer that, *inter alia*, "no further action be taken by this committee on the petition of the contestant Markey; that a State-wide recount be had of all ballots" until the committee completed its review of the ballots protested to date during the five-county recount (hereinafter reported)

Thereupon, April 15, 1947, contestant filed a supplemental unsworn petition by way of answer to incumbent's petition, and again urged the committee to proceed immediately with the recount of all of the remaining paper ballots cast in the State.

The consideration of this contest initially by the special committee and since January 18, 1947, by your subcommittee has resolved itself into four phases: First, the examination of all of the voting machines used in the State of Maryland and verification of the votes cast thereon; second, the conduct of a test recount of 5 counties using paper ballots; third, the conduct of the recount of the 17 remaining counties using paper ballots; and, fourth, the investigation of apparent irregularities for the purpose of determining the existence of fraud. Your subcommittee, therefore, has divided its report into four parts and will discuss each one under its respective heading.

I. THE EXAMINATION OF ALL OF THE VOTING MACHINES USED IN THE STATE OF MARYLAND AND VERIFICATION OF THE VOTES CAST THEREON

Contestant's petition of December 10, 1946, referred to a decision of the Board of Supervisors of Elections of Baltimore City to clear the machines on December 16, 1946, and stressed the necessity for an immediate investigation and verification of the figures shown thereon before the board's proposed action might be consummated.

The special committee, having first ascertained that the laws of the State of Maryland did not, in fact, provide for a recount as desired by contestant, forthwith dispatched investigators to make a verification check of all voting machines used in that election in the State of Maryland. Voting by machine is confined to Baltimore City and Montgomery County, where approximately 47 percent of the entire vote of the State is cast.

The voting-machine tabulations, comprising 943 machines, representing 28 wards and 471 precincts located in Baltimore City as well as 148 voting machines in Montgomery County, which were used in the 1946 contested election, were checked by the committee investigators in the presence of representatives of contestant and incumbent and an official of the board of supervisors of elections.

The verification check commenced on December 13, 1946, and completed on December 19, 1946, disclosed 8 discrepancies involving 416 votes in Baltimore City, and 1 discrepancy involving 10 votes in Montgomery County. The 9 discrepancies erroneously accredited incumbent with a total of 426 votes, which, when corrected, reduced his purported majority at that time from 2,232 to 1,806.

None of these errors, however, were found to have occurred on machines which had been carelessly sealed or involved circumstances from which the inference of fraud might be drawn.

II. THE CONDUCT OF A TEST RECOUNT OF FIVE COUNTIES USING PAPER BALLOTS

At its meeting on December 31, 1946, the special committee ordered contestant to furnish an affidavit containing a list of five counties in the State of Maryland using paper ballots, wherein it was alleged that the greatest number of irregularities and discrepancies occurred, in the order of their importance. The sworn list supplied by contestant on January 9, 1947, listed the following counties in the order named: (1) Anne Arundel, (2) Prince Georges, (3) Baltimore, (4) St. Marys, and (5) Howard. Thereafter, at the request of counsel for the parties, your subcommittee authorized the substitution of Cecil County for Baltimore County.

The committee planned to recount all of the ballots in each of those counties for the purpose of testing the truth or falsity of the charges made by the contestant; and, if in the opinion of the committee, the changes, if any, in the committee's recount from the totals previously reported, substantially reduced the lead of incumbent, a State-wide recount would be considered. On the other hand, if no substantial change resulted, a further recount in other counties would be abandoned.

In furtherance of these plans, counsel for contestant and incumbent, together with committee representatives, met in Washington and agreed upon general procedure for the conduct of the recount.

Before the commencement of the five-county recount, and, in anticipation of the expiration of the special committee on January 31, 1947, and, in consequence of contestant's petition of December 31, 1946, having been referred to the Committee on Rules and Administration in accordance with the provisions of the Legislative Reorganization Act, the special committee transferred its files in this contest to the Committee on Rules and Administration, which, in turn, assigned them to this Subcommittee on Privileges and Elections. The special committee's report on its activities in connection with this subject appears in the appendix as exhibit 2.

Your subcommittee thereupon reviewed and concurred in the actions of the special committee with reference to its decision to proceed with the five-county recount.

Your subcommittee, fully realizing the seriousness and implications of a recount of this character and finding only meager precedent as a guide, of necessity gave considerable thought to its organization and procedure in an effort to provide every possible security for the integrity of the undertaking, and in order to meet the requirements of accuracy and impartiality. The recount was organized and conducted within the framework of the stipulation of the parties themselves, the full text of which appears in the appendix as exhibit 3.

A. CHALLENGERS' REVIEW OF BALLOTS

The five-county recount, comprising 28,048 and 31,291 reported votes for contestant and incumbent, respectively, commenced on January 21, 1947. All stages, including challengers, counsel, and subcommittee reviews, were concluded on May 28, 1947.

This phase of the review took place in the post office at Annapolis, Md. (for Anne Arundel County ballots), the courthouse at Upper Marlboro (for Prince Georges County ballots), while, St. Marys, Howard, and Cecil County ballots were challenged and reviewed by counsel for the parties in the post office at Baltimore, Md. The subcommittee review of these ballots was held in the Senate Office Building, Washington, D. C.

Impounded ballots and all relevant election data were checked and received from respective supervisors of elections in the presence of respective counsel and subcommittee investigators with careful observations being made and recorded of their condition and storage. They were then transported to the designated recounting station under escort of subcommittee investigators, where they were later checked by the recount units.

The recount unit consisted of a table staffed by two challengers, paid by the subcommittee, who were appointed by and represented incumbent and contestant, respectively. The number of recount units varied depending on the availability of working space and qualified personnel. Unit supervision was provided by a subcommittee investigator and the over-all supervisor was a chief investigator designated by the subcommittee.

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The challengers were carefully instructed in the procedure determined in advance by, and in pursuance of, the stipulation mutually agreed upon by both parties. Instruction was progressively altered or augmented as experience and expediency dictated and the various tabulation forms especially prepared for this recount were also modified from time to time in the interest of efficiency.

Before ballot boxes were opened they were carefully checked for the condition of their seals and any apparent irregularities. All relevant records and data were similarly checked and compared. Both challengers and their respective counsel were requested to make observations which were noted by a subcommittee investigator and tabulated.

The ballot boxes were then opened and the ballots recounted and carefully tabulated, precinct by precinct. After each ballot was unfolded and reviewed, it was placed in the appropriate one of the five boxes conveniently located on the recount unit table and labeled: (1) "Conceded to Markey", (2) "Conceded to O'Connor", (3) "Protested by Markey", (4) "Protested by O'Connor", and (5) "Not Voted Senatorially".

When a ballot was conceded to either contestant or incumbent, a stroke mark was made upon a tally sheet kept by each challenger. The ballots, on the validity of which both challengers did not agree without reservation, were "protested" by placing a circle in red indelible pencil around the item on the ballot which clouded its validity. At the conclusion of the count of each precinct, all ballots in the above-named boxes were checked to verify each challenger's tally record.

The challengers and counsel, in protesting or conceding ballots, endeavored to follow the Maryland election laws and the rulings thereunder. However, many ballots were protested because of the divergence of opinion concerning the interpretation and applicability of the law in relation to the various markings on the ballots.

The supervising subcommittee investigator recorded each precinct's count on the record provided therefor, with both challengers initialing all entries. The conceded ballots were replaced and locked in their respective ballot boxes, while protested ballots were cataloged and packaged, locked and secured under subcommittee guards. At the conclusion of the challenger review, 12,990 ballots remained protested and required counsel review.

B. COUNSEL REVIEW OF 12,990 PROTESTED BALLOTS

The 12,990 remaining protested ballots from the 5 counties were next reviewed by counsel for contestant and incumbent with definite instructions to reduce the number of protested ballots to a minimum in order to facilitate the task of the subcommittee in the final review. The subcommittee had granted counsel the privilege of participating in the recount for the sole purpose of encouraging the reduction of the number of protested ballots as much as possible by general agreement of parties.

This screening took place in the Baltimore and Anne Arundel post offices under the close surveillance and supervision of subcommittee investigators and guards, and ran concurrently, whenever the counsel for incumbent and contestant could meet, with the initial screening conducted by the challengers.

The procedures followed during counsel review and the tabulation forms used were quite similar to those employed in the challenger review. The ballots previously protested were reviewed singly, precinct by precinct. They were either conceded to one of the parties or protested when counsel could not agree on their validity. The intense, yet commendable loyalty of counsel to the cause of their respective clients, coupled with their natural affinity to disagreement on the correct legal interpretation of the laws applying to the ballots in question, understandably delayed the ultimate conclusion of this review.

On April 24, 1947, counsel, after conceding 6,366 of the 12,990 ballots previously protested by the challengers, completed their review of the ballots in the 5-county recount.

C. SUBCOMMITTEE REVIEW OF 6,624 PROTESTED BALLOTS

The remaining 6,624 protested ballots were separated by subcommittee investigators into categories, depending on the grounds for the respective protests. Each of the categorized ballots was again inspected by counsel and an agreement was reached that each ballot was correctly classified and tabulated in preparation for final subcommittee review.

Counsel, at the request of the subcommittee, submitted detailed briefs on the interpretation and application of the laws of Maryland, and consequent rulings, in their relation to the categories of protests. Subsequently, the subcommittee

