76TH CONGRESS } SENATE { REPORT
1st Session } { No. 281

RECOUNT AND INQUIRY IN UNITED STATES SENATORIAL ELECTION IN THE STATE OF INDIANA, HELD NOVEMBER 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

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 Vandenburgh 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 or 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:

[S. 1871, 76th Cong., 1st sess., Rept. No. 221]

[Omit the part in black brackets and insert the part printed in italic]

A BILL To prevent pernicious political activities

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives.

[SEC. 2. It shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for or not to vote for any candidate for the nomination of any party as its candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any primary or nominating convention held solely or in part for the purpose of selecting the candidate of such party for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives.]

SEC. [3] *2.* It shall be unlawful for any person employed in any administrative position by the United States, or by any department, independent agency, or other agency of the United States (including any corporation controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof), to use his official authority [or influence] for the purpose of interfering with, or [affecting the results of, any primary, political convention, or election] *affecting the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives*: *Provided,* That nothing herein shall be deemed to affect the right of any such person *to state his preference with respect to any such candidates or* to vote as he may choose.

[SEC. 4. It shall be unlawful for any person employed in an administrative position by any State or political subdivision thereof, or by any department, agency, or instrumentality of any State or any political subdivision thereof, whose compensation or any part thereof is paid from monies appropriated by the Congress or from any fund into which such moneys or any part thereof are placed, whether the payment of such compensation is made by the United States or by any department, independent agency, or other agency of the United States (including any corporation controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof), or is made by the State or political subdivision thereof, or by the department, agency, or instrumentality of the State or the political subdivision thereof by which such person is employed, to use his official authority or influence for the purpose of interfering with, or affecting the results of, any primary, political convention, or election: *Provided,* That nothing herein shall be deemed to affect the right of any person to vote as he may choose.]

SEC. [5] *3.* It shall be unlawful for any person, directly or indirectly, to promise any employment, position, work, compensation, or other benefit, provided for or made possible by any Act of Congress, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election.

SEC. [6] *4.* Except as may be required by the provisions of subsection (b), section [10] *9* of this Act, it shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any Act of Congress appropriating funds for *work relief or* relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election.

SEC. [7] *5.* It shall be unlawful for any person to solicit or be in any manner concerned in soliciting any assessment, subscription, or contribution for any political purpose whatever from any person *known by him to be* entitled to or receiving compensation, employment, or other benefits provided for or made possible by any Act of Congress appropriating funds for *work relief or* relief purposes.

SEC. [8] *6.* It shall be unlawful for any person to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment, or benefits provided for or made possible by any Act of Congress appropriating, or authorizing the appropriation of, funds for *work relief or* relief purposes, [for delivery] to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes.

SEC. 7. No part of any appropriation made by any Act, heretofore or hereafter enacted, making appropriations for work relief, relief, or otherwise to increase employment by providing loans and grants for public-works projects, shall be used for the purpose of, and no authority conferred by any such Act upon any person shall be exercised or administered for the purpose of, interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.

SEC. [9] *8.* Any person who violates any of the foregoing provisions of this Act shall be deemed guilty of a felony and upon conviction shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

SEC. [10] *9.* (a) It shall be unlawful for any person employed in any administrative or supervisory capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to use his official authority or influence for the purpose of interfering with an election or of affecting the results thereof. All such persons shall retain the right to vote as they please and to express privately their opinions on all political subjects, but they shall take no active part in political management or in political campaigns.

(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress shall be used to pay the compensation of such person.

SEC. [11] *10.* All provisions of this Act shall be in addition to, not in substitution for, any other sections of existing law or of this Act.

SEC. [12] *11.* If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Irregularities of election officials by failing to require affidavits of physical disability or illiteracy of those voters who asked for assistance at the polls is charged, but there is no allegation or claim that this irregularity renders void, or voidable, the election generally or specially. There is no allegation that connects Senator Van Nuys in any way with these irregularities.

A rule that has been followed by the Committee on Privileges and Elections respecting irregularities is well stated in the decision of *Bowers* v. *Smith* (111 Mo. 45, 20 S. W. 101), thus:

> If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial.

In this case, the Committee on Privileges and Elections again applied the rule and found that, because there was nothing alleged showing that these irregularities changed the result, and nothing alleged showing that the law specifically invalidated the election or the votes involved in the irregularities this committee did not seek to overthrow the expressed will of the voters for something that occurred without their fault.

For the reasons last expressed, the committee found no sufficient cause, based on the following general allegations, to recommend a recount:

That affidavits of challenges of voters were not mailed to such voters until after election day (affiant not stating whether the voters challenged were Democratic or Republican);

That voting booths were at times exposed to view from the outside;

That voting machines were opened up by election officials during the voting;

That 109 cards of voters were removed from their tills;

That mutilated ballots were counted;

That ballots having distinguishing marks were counted;

That Republican officials were intimidated by Democratic officials;

That Republican officials were assaulted by Democratic officials.

A precedent for such denial of the petition is the election contest of a Senator from Texas, to wit: *George E. B. Peddy, Contestant* v. *Earle B. Mayfield, Contestee* (Senate Committee Hearings, vol. 225, before the Committee on Privileges and Elections, and a select committee, Rept. No. 973, 68th Cong., 2d sess.), where there were involved many irregularities, discrepancies, and clear violations of law in connection with the casting of ballots, as well as acts of omission and commission in violation of express statutes, but the committee unanimously recommended that the contest be dismissed and the protests against the seating of Senator Mayfield be overruled, stating in part:

> Undoubtedly there were, particularly in the primary election, and in the general election as well, acts of omission and commission in violation of express statutes, and some of them doubtless were intended to unlawfully produce a desired result in the election, but the evidence from the beginning to the end of it does not show either a knowledge or a consent of Senator Mayfield in these matters, nor are they of a character or extent which in the judgment of your committee warrant either the sustaining of the contest or the protest against the seating of Senator Mayfield.

The various allegations regarding contributions and expenditures do not move the committee to recommend a recount or an investigation.

There is no allegation in the petition of violations of the Federal Corrupt Practices Act by Senator Van Nuys.

The petition contains a voluminous description of the Two Per Cent Club, alleged to have been organized for the purpose of circumventing the Corrupt Practices Acts of both the Federal and State Governments. It charges that—

> Huge sums of money were collected by this organization during and prior to the last campaign; this money was used by the Democratic State committee to pay the expenses of the senatorial election and the expenses of the election of State candidates. The only accounting that has ever been made of it is that included in the filed list of receipts and expenditures of the Indiana Democratic State Committee, which announces that certain amounts were received from the Hoosier Democratic Club. Where the Hoosier Democratic Club obtained this money is unknown.
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> * * * * * * *
>
> The fact that Indiana law-enforcement agencies, or Federal law-enforcement agencies in Indiana, have not investigated this condition is no argument against a senatorial investigation. In fact, the failure of local authorities and Federal authorities within the State to investigate only serves to emphasize the need for an investigation by some other agency (petition, pp. 283–284).

Assuming to be true the allegations respecting this and other similar clubs, the committee is of the opinion that thereby the election of Senator Van Nuys was not vitiated, and that the Congress need not enact any additional legislation applicable to the situation because the

Federal Corrupt Practices Act is adequate herein. Enforcement of that act is not a duty of the Senate. Investigation is not necessary because the allegations are voluminous, covering 65 legal cap pages, and are assumed, for the purpose of passing on the pleadings, to state facts.

The petition affirmatively alleges that Senator Van Nuys denounced the activities of the so-called Two Per Cent Club, saying:

> I might say that my own organization will be separate and distinct from the statehouse machine; that it will be financed independently of the Two Per Cent Club and that it will comply with the spirit and letter of both the State Corrupt Practices Act and the Federal act on the same subject. Even under other circumstances I could not have accepted aid from the Two Per Cent Club organization for the simple reason that I regard that organization as violative of both the Federal and State Corrupt Practices Act (petition, p. 302).

Other allegations in the petition show that he also publicly announced:

> I do not subscribe to the levying of assessments on appointees for campaign purposes.
>
> You will join me in the ambition to keep the Federal service in Indiana absolutely beyond criticism or reproach. Let it be understood that Civil Works Administration, Public Works Administration, and Civilian Conservation Corps workers are not to be solicited for campaign contributions under any circumstances (petition, p. 288).

The petition, at page 318, alleges:

> Mr. Willis and the members of the Indiana Republican State Central Committee earnestly agree with the statements of United States Senator Frederick Van Nuys concerning this organization and earnestly hope that his threat made June 15, 1938, when he said:
>
> "* * * The Senate has an elections committee appointed by Vice President Garner, who is as clean as a hound's tooth. The committee personnel will be clean and it can function either before or after an election * * *" will be fulfilled.

The committee which is referred to above is not this committee, but another committee whose special function is the investigation of campaign expenditures.

Whereas that committee might have been actuated to investigate, during the performance of its functions, upon a showing of the character contained in this petition; nevertheless, this Committee on Privileges and Elections is not moved to a recount and investigation without a prima facie showing that the tendency thereof would be, either the unseating of the contestee, or the enactment of legislation.

The petition fails on both points. Therefore, the committee recommends that the following resolution be adopted by the Senate:

> *Resolved*, That the petition of Raymond E. Willis, and the Indiana Republican State Central Committee, for a recount and 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, be, and the same is, hereby dismissed.

WILLIAM H. KING, *Chairman*,
EDWARD R. BURKE,
WARREN R. AUSTIN.

WM. CLABAUGH & CO.,
Washington, D. C., April 4, 1939.

Hon. WARREN R. AUSTIN,
Committee on Privileges and Elections,
Washington, D. C.

DEAR SENATOR AUSTIN: Pursuant to your instructions to our Mr. Frank L. Mansuy, as outlined in your letter of March 27, 1939, to Senators William H. King and Edward R. Burke, regarding the petition for investigation and recount of the Indiana general election of 1938, we have tabulated and classified, according to instructions in said letter, the number of votes cast and counted for the Democratic ticket which are alleged, according to affidavits contained in the said petition, to have been improperly cast by reason of the causes set forth in the tabulation. The tabulation was confined solely to information obtained from affidavits contained in the petition.

In addition to specific allegations contained in the attached tabulation, exhibit A, other affidavits of a more general nature are summarized in the attached exhibit B.

The following classifications are not included in the tabulation, exhibit A, as no items were found to fall within those classifications: Mutilated, coerced by Works Progress Administration manipulation, by persons non compos, on names of non-voters (ineligible), under intimidation by sheriffs, induced by excessive prices for relief food paid by Works Progress Administration to merchant, in excess of total number of voters in precinct, resulting from tampering with the tally sheets, or miscounting.

There are attached hereto:

Summary of exhibit A.

Exhibit A. Votes cast and counted for the Democratic Party which are alleged, according to affidavits contained in petition to investigate the senatorial election, to have been improperly cast by reason of the causes set forth herein.

Exhibit B. Affidavits of a general nature alleging improper voting for the Democratic Party, as contained in petition to investigate the senatorial election.

Respectfully submitted.

WM. CLABAUGH & CO.,
By S. FRANK LEVY,
Certified Public Accountants.

SUMMARY OF EXHIBIT A, INDIANA GENERAL ELECTION OF 1938

Votes cast and counted for the Democratic Party which are alleged, according to affidavits contained in petition to investigate the senatorial election, to have been improperly cast by reason of the causes set forth herein

Allegation	Clay County	Lake County	Marion County	St. Josephs County	Sullivan County	Vanderburgh County	Vigo County	Total
Purchased with money	0	1	0	1	0	2	0	4
Marked for identification	0	0	0	0	0	0	40	40
Coerced by local relief manipulation	0	2	0	0	0	0	0	2
Cast by a clerk who had not complied with Indiana statute re illiteracy	0	0	0	0	0	1	0	1
Cast on names illegally registered	0	2	3	0	4	1	2	12
Repeated	0	0	0	1	0	4	2	7
On names of dead persons	0	0	0	0	0	2	0	2
Effected by tampering with voting machines	0	0	0	0	0	3	0	3
Voted upon a false residence, and in wrong precinct	0	5	19	0	5	8	4	41
On names of local voters who did not vote	0	0	5	0	0	1	0	6
Influenced by spying on ballot booth	0	0	2	0	0	0	0	2
Total	0	10	29	2	9	22	48	120