69TH CONGRESS
1st Session

SENATE

REPORT
No. 498

SENATOR FROM IOWA

REPORT

OF THE

COMMITTEE ON PRIVILEGES AND ELECTIONS

PURSUANT TO S. RES. 21

AUTHORIZING THE INVESTIGATION OF ALLEGED UNLAWFUL PRACTICES IN THE ELECTION OF A SENATOR FROM IOWA

TOGETHER WITH

MINORITY VIEWS

MARCH 27 (calendar day, MARCH 29), 1926.—Ordered to be printed

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Mr. CARAWAY, from the Committee on Privileges and Elections, submitted the following

REPORT

[Pursuant to S. Res. 21]

[References are to pages in printed hearings]

Your Committee on Privileges and Elections, empowered under Senate Resolution No. 21 to inquire into the contest of Daniel F. Steck, contestant, against Smith W. Brookhart, incumbent, as to which was duly elected and is entitled to a seat as Senator in the Senate of the United States from the State of Iowa, respectfully submits the following report:

After a full review and careful consideration of the pleadings, testimony, and exhibits therein presented, and after hearing the Hon. Smith W. Brookhart in his own behalf, the committee find and declare that the said Smith W. Brookhart was not elected a Senator from the State of Iowa in the general election held therefor in said State on the 4th day of November, 1924, and is not entitled, therefore, to a seat in the Senate of the United States as a Senator from said State, but that at said election the Hon. Daniel F. Steck was elected a Senator of the United States in said election and is entitled to a seat in the Senate as a Senator from said State.

In submitting this report, your committee bases its conclusion on the following facts:

I

(*a*) The complaint, or petition, of the said Daniel F. Steck alleges in substance that many ballots were cast for him and should have been so counted, but were, by the election officers, rejected for various reasons.

(*b*) That many votes cast for the said Steck were, in fact, counted for the said Smith W. Brookhart.

(*c*) That many votes that were illegal were counted for the said Smith W. Brookhart.

(*d*) That many votes cast by those not qualified to vote at said election were cast for the said Brookhart, and that the said Steck received a plurality of all the votes cast for Senator of the United States from the State of Iowa at said election.

II

To this petition, or complaint, the Hon. Smith W. Brookhart filed an answer, or response, and likewise pleadings, which might be considered as a cross-complaint, or petition, in which he denied each and every allegation of the petition of the contestant, except—

(*a*) The holding of said election; and

(*b*) His (Brookhart's) being awarded a certificate therefor.

On his own part he alleges irregularities, incompetent votes, and the counting for Steck of votes that should have been counted for himself, and alleges that he received a very much larger plurality than that which was, by the canvassing board, so certified.

III

Luther A. Brewer filed a contest, but took no further steps in this matter.

IV

The Republican State Central Committee of Iowa filed a petition, alleging, among other things:

(*a*) That the Hon. Smith W. Brookhart was not elected a Senator of the United States from the State of Iowa and was not entitled to a seat in the Senate of the United States as such Senator.

(*b*) That the said Smith W. Brookhart obtained his votes under a fraudulent representation that he was a Republican, when in fact he was not.

To this, many exhibits were annexed.

V

To this petition, the Hon. Smith W. Brookhart filed a denial and also a demurrer.

Under stipulation an agreement was entered into under which all the votes cast in said election were brought to Washington and recounted. (Record, p. 53–54.)

The form of the subpœna for the ballots appears in the stipulation found on page 57 of the record.

Afterwards, counsel for contestant and incumbent agreed to waive certain provisions of their stipulation as to the presence of representatives of each in the taking up of the ballots from the county auditors. (See affidavits of Parsons, Pendy, and Thayer, marked, respectively, "Ex. A," "Ex. B," "Ex. D.")

Contestant and incumbent likewise agreed as to the method to be pursued in the recounting of said ballots and how objections should be presented. (Record, p. 3.)

For the convenience of the Senate the instructions given to the supervisors, as they appear on page 2 of the hearings are here embodied in full. It will be borne in mind that this was at the meeting

of the subcommittee held on the 20th day of July, 1925, and that there were present the attorneys representing respectively the contestant and the incumbent. The following occurred at that meeting:

Mr. THAYER. Mr. Chairman, the counters who have been engaged in this case are now assembled. As acting chairman of the committee, you will administer the oath to them. The form of the oath is the first matter in the line of procedure. The second is headed "Influence of attorneys," and is as follows:

"During the process of the count no counsel should speak to the counters in regard to the count until the work sheet is finished."

That is this sheet. I will explain that procedure when we get downstairs. This continues:

"When this is done any suggestion should be made to the assistant supervisors."

Mr. Cook and Mr. Pendy.

"Since the counters are sworn officers the same as jurymen, counsel will have no right to influence them.

"3. PROCEDURE OF COUNSEL

"When the work sheet is finished, should any of the counsel disagree, they then call the assistant supervisors.

"If they agree, then that becomes the work sheet that goes to the tabulator.

"If the assistant supervisors disagree, they should then call the chief supervisor.

"His decision is final and the work sheet then goes to the tabulator."

The attorneys still have a right to take exceptions, and ballots objected to will be segregated and put in a locked mail sack. This proceeds:

"4. WORK-SHEET PROCEDURE

"Teams, when agreeing, pass report to the judges for O. K."

These two supervisors.

"Then on to the chief supervisor."

That makes three O. K.'s, so we will know the report is correct.

"Upon his O. K. then to the tabulator.

"When teams disagree, appeal to the judges"—

Which means in this instance the supervisors.

"If the supervisors agree, pass work sheet to the chief supervisor.

"Or upon his decision, which is final, pass work sheet to the tabulator."

Of course, all kinds of questions may be asked as the work proceeds, but that is the general outline of the procedure.

If there is anything that is not clear, I would be glad indeed to answer a question regarding it.

Mr. MITCHELL. I have just this suggestion: If the Marion County situation is to be disposed of, and any of the ballots are disputed, just what record are we to make of that, in view of the fact that it is desired that they go back?

Mr. THAYER. In that case they do not need them until about October, consequently we will be through long before they need them. You could leave that particular case to the subcommittee, or the committee itself, so far as that is concerned, and let them decide as to that particular county.

Mr. MITCHELL. It might be that photographs could be taken and some agreement could be reached.

Senator ERNST. They will not go back as long as the attorneys think they should not go. We would rather have them delayed than to have any question.

Mr. PARSONS. May I ask Mr. Mitchell if he has any specific objection to the Marion County ballots outside of what would naturally arise as to any other ballots?

Mr. MITCHELL. I know of none, but you see in Marion County there are two contests.

Mr. PARSONS. I understand that.

Mr. MITCHELL. But we can probably agree as to the conditions and make a record and submit it.

Senator ERNST. If that is entirely satisfactory to both sides, it is agreeable to the committee.

We have here about 30 or 40 counters ready to start to work, and some of the gentlemen who are familiar with the facts seem to think it will not take as long

to make the count as it did in the Texas case. I had thought it would take longer because the ballots are so largely in excess of the number cast in Texas in number. How many are there in this case?

Mr. THAYER. As near as we can estimate, about 740,000 to 760,000; somewhere along there.

Senator ERNST. How many were there in the Texas contest?

Mr. THAYER. There were 340,000; but there were more complications arising in that contest. This is just a straight count.

Senator ERNST. I take it that all of you want the count expedited just as much as possible. Is not that the desire?

Mr. MITCHELL. Yes, Senator.

Mr. PARSONS. Certainly.

Senator ERNST. That is our desire also, and when the present force has been thoroughly broken in, if it is found they are not proceeding fast enough, we will add to the number of counters.

While it is hard to look so far forward, as we near the end of the count, I will communicate with counsel and try to have you agree upon the hearing, so as not to interfere with your court duties. I will try to do that just as soon as it appears that the end of the count is in sight.

Mr. PARSONS. My thought in coming down at this time is this, that certain questions will arise with regard to different ballots, but they will all classify themselves into about half a dozen lists, not more than that. I thought that we would stay here at least until most of the questions had arisen, so that arrangements could be made to take our exceptions to all of that class of ballots.

Senator ERNST. You can advise your supervisors as to what objections you would want them to make, and counsel on the other side can take a similar course.

Mr. PARSONS. Yes, that is true.

Senator ERNST. I think that would be very helpful all around.

Mr. PARSONS. I think so.

Senator ERNST. Mr. Brown, I suppose that appeals to you also?

Mr. BROWN. That appeals to me, Mr. Chairman.

Senator ERNST. If I can be of any service to you in any way, I will be glad to have you call on me.

Mr. PARSONS. It so happens that our code went into effect two weeks before this election was held, so that there are not any intervening acts of the legislature which will have to be laid before the committee.

Senator ERNST. I suppose that we can get all the laws and the code from the library. The main thing is for the lawyers on both sides to indicate what they want segregated.

Mr. PARSONS. I brought down with me several copies of the Official Register. We publish in our State semiannually what is called the "Official Register." That sets out the vote in detail and by precinct. It is printed. If any more are needed, Mr. Mitchell and I can send them back. They are State publications. The whole vote is tabulated.

Senator ERNST. Suppose you leave that here.

Mr. PARSONS. I gave one to Colonel Thayer this morning.

Senator ERNST. Colonel Thayer, you had better preserve that.

Mr. PARSONS. That has the vote of every precinct in the State for Senator, and, of course, for President.

Senator ERNST. You can check up the count to a certain extent with that?

Mr. PARSONS. Absolutely. You have the absolute official count right there, printed.

Mr. THAYER. Then we have it forwarded by the several county auditors.

Senator ERNST. Over their signatures?

Mr. THAYER. Oh, yes; the returns from each county, including the machine count.

Now, if there are no further questions, I suggest that we go downstairs and that the chairman administer the oath to the counters.

(The subcommittee thereupon proceeded to the counting room in the Senate Office Building, where the acting chairman administered to the counters the following oath:)

"You and each of you do solemnly swear that you will conduct the recount of ballots in the Iowa senatorial contest arising out of the election of November 4, 1924, to the best of your ability and will honestly and faithfully examine the ballots and other election paraphernalia submitted to you and make true and accurate returns in entire accordance with the facts as they appear to you on the ballots and other paraphernalia. So help you God."

The committee reserved its decision with reference to the demurrer and heard testimony and examined exhibits offered by the Republican State Central Committee of Iowa.

It likewise heard testimony and examined exhibits in the contest of Hon. Daniel F. Steck.

It also heard the statement of the incumbent, the Hon. Smith W. Brookhart.

The testimony heard and exhibits offered by the Republican State Central Committee of Iowa are important only as they may aid in disclosing the intent of certain voters and furnish an explanation as to marks on certain ballots. These will be referred to hereafter.

Under the stipulations of contestant and incumbent with reference to the recounting of the ballots about which they agreed, and the segregation of those ballots about which there was disagreement, there will be later a more extended discussion.

Under the stipulations referred to above, all the ballots were recounted. As to those about which an agreement could not be reached by the supervisors, counsel for the contestant, J. M. Parsons, and counsel for the incumbent, J. G. Mitchell, asked the subcommittee to grant a continuance so that they might further examine the ballots and, if possible, reduce the number of the contested ballots to the fewest number possible.

To facilitate and oblige counsel in this matter, the subcommittee adjourned on the 4th day of December, 1925, to the 6th day of January, 1926, at which latter date the subcommittee learned that the number of votes conceded contestant was 449,107, and that the number of votes claimed by him, but contested by the incumbent, was 1,063; that the number of votes conceded to the incumbent was 443,831, and that there were claimed by the incumbent and contested by the contestant 6,268 votes.

These contested ballots by stipulations appearing in the record were divided into groups from 1 to 16, inclusive. It was agreed, however, that all the votes appearing under class 1, were "No votes;" that is, that these votes had not been cast for either contestant or incumbent. (Record, pp. 198–205.)

Upon the 6th day of January, 1926, pursuant to call, the subcommittee met, and contestant, through his counsel, J. M. Parsons and William F. Zumbrunn, and the incumbent, by his counsel, J. G. Mitchell, and the brother of the incumbent, Thomas Brookhart, appeared.

This meeting was to hear the argument of counsel, at which meeting the tabulations and stipulations were presented, and counsel were heard.

For convenience we herein copy pages 191 and 192 of record.

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS,
Washington, D. C., Wednesday, January 6, 1926.

The subcommittee met, pursuant to call, at 10 o'clock a. m. in the room of the Committee on Privileges and Elections, Capitol Building, Hon. Richard P. Ernst, chairman, presiding.

Present: Senators Ernst (chairman), Watson, Caraway, and George.

Present also: Mr. J. G. Mitchell, representing Senator Smith W. Brookhart; Mr. J. M. Parsons and Mr. W. F. Zumbrunn, representing Mr. Daniel F. Steck, the contestant.

The CHAIRMAN. Gentlemen, we are ready to proceed.

Mr. PARSONS. I will make up the record here, Mr. Chairman, so far as we are concerned, about the same as if this were a law suit. I will first make a brief statement.

Colonel Thayer was appointed as supervisor of this contest, and as such he went to Iowa and checked over the machine vote, which is about 25 per cent of the vote of the State. The machine votes could not very well be transported to Washington. He then brought in the balance of the ballots. There were, in round numbers, about a million votes in the State of Iowa. There was no way of determining the number without counting the names on the poll lists. During the summer the ballots, as distinguished from the poll lists, were counted here by a number of counters, I do not know how many, and each side had at all times a supervisor representing it. Mr. John W. Pendy, of my firm, represented Mr. Steck as supervisor during the entire recount here, and Lewis Cook, Mr. Brookhart's campaign manager in Iowa, represented Mr. Brookhart for some time.

Senator CARAWAY. There is no contention about the count, is there?

The CHAIRMAN. No.

Mr. PARSONS. I do not know of any. I have not heard any question raised.

Senator CARAWAY. I was under the impression that there was none.

The CHAIRMAN. There is none that I have heard of.

Mr. PARSONS. Mr. Brookhart's private secretary, Mr. Roy Rankin, represented him a short time, and following that Thomas Brookhart, a brother of Senator Brookhart, represented the Senator.

There were between eight and nine thousand contested votes after the count was completed. Mr. Mitchell and I have been through those, with the exception of these two supervisors, and have undertaken to classify them so that they could be more easily passed on by the Senate, and those are covered in stipulations. Every ballot is covered in some way or other by a stipulation, but from the stipulations alone you will not be able to determine how all of the ballots should be counted.

I will now ask Mr. Turner to take the stand.

Mr. MITCHELL. Before you go any further, Mr. Parsons, I would like to suggest that there are the same objections, as I understand it, incorporated in the record of the contest as were the basis of the complaint in the protest brought by the central committee against Senator Brookhart. There is a demurrer filed in that case, and, so far as I am advised, there has been no ruling on that demurrer. I would like to suggest this, very respectfully, that if we could have a ruling on that demurrer it would dispose of the same questions raised in the Steck-Brookhart contest, and perhaps shorten our record, and take up less of the time of the committee.

Senator CARAWAY. May I ask you a question, Mr. Mitchell?

Mr. MITCHELL. Certainly.

Senator CARAWAY. As I understood it, the question you gentlemen wish to present to us to-day during your argument is as to whether certain ballots should be counted at all, and if so, for what condidate. I am absolutely certain that is all the committee is very seriously interested in, although I am not speaking for anybody but myself.

Mr. MITCHELL. Just as an illustration, which will answer your question, objection has been raised in these stipulations to a number of straight ballots and, as I understand it, the basis of that objection is exactly the same basis that was offered in the committee case.

Senator CARAWAY. Do I understand you to contend, then, that they were obtained by misrepresentation?

Mr. MITCHELL. That is the charge.

Senator CARAWAY. Do you think that question arises in disposing of these ballots?

Mr. MITCHELL. That question has been raised by the contestant in this case. That is why I am suggesting it here. If I apprehend the situation correctly, the same action which would be taken in the State central committee's contest would apply in this case, on that particular question.

The CHAIRMAN. We think you should go right along with the case, and we will reserve all questions for final determination. We are ready now to have you continue.

Mr. PARSONS. In the absence of Mr. Thayer, I will ask Mr. Turner to take the witness stand.

TESTIMONY OF PHILIP W. TURNER

(The witness was sworn by the chairman.)

Mr. PARSONS. Mr. Turner, were you the official tabulator of the Steck-Brookhart contest?

Mr. TURNER. Yes.

Mr. PARSONS. And you acted under Colonel Thayer?

Mr. TURNER. Yes.

RÉSUMÉ

The testimony and exhibits offered by the Republican State Central Committee of Iowa were found relevant and competent only to explain, or tend to explain, certain marks, more particularly arrows, which appeared on certain ballots, and the large number of votes of those registered as Republicans who seemed not to have voted for incumbent, Smith W. Brookhart. These, in substance, were as follows:

(A) The Republican State central committee on the 3d day of October, 1924, passed a resolution declaring that there was no Republican candidate for the office of United States Senator from Iowa to be voted for in the general election, held on the 4th day of November, 1924, in the State of Iowa. (Record, p. 108.)

(B) This resolution, together with an interview given out by the chairman of said committee, received wide publicity, especially in Republican newspapers scattered throughout the State. (Record, p. 111.)

(C) Certain Republican papers very bitterly assailed Smith W. Brookhart, particularly for his Emmettsburg speech, in which he sought to differentiate his position from that of the Republican candidate for the Presidency, Mr. Coolidge. (Record, p. 118.) Twenty Republicans had openly advocated the election of the contestant, Steck. (Record, pp. 120–124.)

(E) No member of the Republican State central committee voted for Brookhart. (Record, pp. 182–183.)

That many papers printed sample ballots, with an arrow pointing to square before name in which cross was to be made.

After the record had been made and the argument of counsel for contestant heard, counsel for incumbent sought to inject the question as to whether certain ballots had been received from the auditors in unsealed packages, and urged the subcommittee to reject the recount in 67 precincts and accept the official certificate, because, as he alleged, these ballots had reached the committee in unsealed packages.

This question, the subcommittee thought, and the full committee thinks, was one that should have been raised at the time the ballots were received in Washington and before they were recounted; if not at that time, then when the tabulations were prepared, and these ballots should have been segregated among others for decision by the subcommittee. (Record, pp. 191–192.)

It possibly serves no useful purpose to discuss these suggestions, inasmuch as this does not seem to be determinative of this controversy, but your committee wishes to call attention to the facts.

According to the stipulations under which the ballots were subpœnaed, any irregularity in the manner of transmission and the preserving of the ballots was to be certified on the package by the county auditors.

According to these certificates only two packages were transmitted or received by them in unsealed packages. These refer to two precincts. (See affidavits of Turner and Thayer, attached hereto, marked, respectively, "Ex. C" and "Ex. D.")

All the ballots reached Washington in locked mail pouches, which were conceded by the incumbent not to have been tampered with from the time they were taken from the auditors until they were opened and recounted in Washington, and of course not thereafter. So that instead of 62 packages having been transmitted or received by an auditor in unsealed packages, only 2 were so transmitted or received.

It is true that some reached Washington in packages the seals to which had been loosened or broken, but evidently and conclusively this occurred in transporting in the mails. It is contended, however, by counsel for incumbent, that even this condition raised a presumption that they might have been tampered with, or could have been tampered with, and, therefore, that they could not be received.

Inasmuch as the law of Iowa required the election officials to seal and transmit all the ballots, poll books, and tally sheets to the county auditors, and required that the county auditors should keep and preserve them after they were received, it seemed to your committee that this presumption would rebut and overcome the presumption suggested by counsel for incumbent.

The committee also calls attention to the denial in the response of incumbent to all acts of irregularity and fraud set up in the petition of contestant. Therefore, any facts relied upon by incumbent would have to be affirmatively shown.

No evidence was offered to support the suggestion of the incumbent. No acts of fraud were alleged or proved, or were sought to be proved. No witness was introduced to establish such an issue, nor were any pretended to be available.

In fact, counsel for incumbent admitted that he knew of no acts or circumstances, other than the unsealed packages, to sustain such a presumption.

Obviously no burden rested upon the contestant to refute the suggestion of counsel for incumbent. This view is sustained by not only the courts of Iowa, but by those of most of the jurisdictions of the United States.

See Ferguson *v.* Henry, 64 N. W. 292 (Iowa):

> At the trial in the district court the contestant put in evidence ballots as returned to the auditor from the different voting precincts, under rulings of the court, and the ballots so counted gave to the contestant a majority over the incumbent of 18 votes, which the court held to be a prima facie case contestant. The incumbent then put witnesses on the stand who, against objections, were permitted to testify that certain of such ballots shown them were not as they were voted or counted by the judges of election. Contestants insisted that it was error to admit the testimony, for the reason that no such issue was made by the pleading. We think that there was no error in the ruling of the district court in this respect. The issues were such that contestant assumed the burden of showing that he had received a greater number of votes than the incumbent, and to do that he put in evidence the ballots now in question, with others, which gave him a majority. The ballots thus in evidence were valuable, as such, because of their identity as those cast at the election. The proof that they came through the channels and from the custodian provided by law for their preservation and keeping gave to them such a prima facie character. It was then the right of the incumbent to discredit this evidence.

We also now invite attention to the case of Murphy *v.* Lentz (108 N. W. L. G. 532, Iowa):

Neither the ballots nor their receptacles bore any evidence of having been tampered with save possible the defective ballots from Stapleton Township. The envelope containing these could not be found readily during the trial before the court of contest, but immediately after the adjournment was discovered on the shelf by one of the judges who had been invited by the auditor to assist him. The envelope containing them was not sealed when found and the flap at the side was half torn off. Whether the envelope was sealed when received does not appear. Two of the ballots contained therein were counted for contestant, none for appellee; but whether the result was affected thereby is not disclosed by the record. In view of admission that packages had not been tampered with when received at the auditor's office, and our finding that they had been properly kept thereafter, we are not inclined to say that, because of the defect in the envelope alone these ballots were not preserved as required. The envelope might have been carelessly sealed, and, when dried, opened, and might have been torn in handling. At any rate the inference to be drawn from the fact that it was not in the condition exacted by the statue was overcome by this evidence of their court. See Martin *v.* Miles (Neb.) 58 N. W. 732. The evidence as a whole is insufficient to sustain a reasonable suspicion that the ballots may have been tampered with.

That the law of Iowa is in line with the interpretation by the supreme courts in their respective jurisdictions is evidenced by the opinion in Ogg *v.* Glover (83 Pac. 1039, Kans.):

Ballots transmitted to this court unsealed as a part of the evidence in an election contest do not lose their probative effect from being temporarily intrusted by the clerk to the possession of the attorneys of one of the parties. No presumption that an attorney made any change in them arises from the fact that he had an opportunity to do so.

Similar is the opinion in the case of Moss *v.* Hunt (135 Pac. 282, Okla.):

Where the certificate of returns has not been executed by the officers of an election precinct, as prescribed by section 3084, Revised Laws 1910, and where the ballots have not been kept by the precinct officers and preserved for delivery to the counting election board in the manner prescribed by the statute, and such ballots have been so exposed as to afford an opportunity and a reasonable probability of their having been changed or tampered with, parol evidence of the judges of the election of such precinct as to the results of the election in that precinct, as shown by the tally sheets at the close of the counts of ballots, and parol evidence of bystanders as to the result declared by the election inspectors, or shown by a statement made by him at the close of the count, is admissible.

So we find the law in Tebbs *v.* Smith (108 Calif. 101):

Election contest—Burden of proof as to ballots, when shifts: When a substantial compliance with the statute in respect to the preservation of ballots has been shown, the burden of proof shifts to the contestee to establish that, notwithstanding such compliance, the ballots had in fact been tampered with, or that they had been exposed under such circumstances that a violation of them might have taken place. This proof is not made by a naked showing that it was possible for one to have molested them.

Question of fact: Whether ballots which are offered in evidence in an election contest have been kept in substantial compliance with the law and remain so unchanged that they should be received in evidence by the jury or trial judge, it is a question of fact, the finding upon which the appellate court will not disturb, unless the evidence does not warrant it.

It is a fair inference, fortified by Iowa legal adjudications, to assume that the envelopes were crushed and cracked in transmission to Washington, but, as heretofore stated, aside from these facts, the law presumes that Mr. Steck made a case showing legal preservation of the ballots when the record shows that the ballots were found in the custody of the proper Iowa officers.