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

WASHINGTON
GOVERNMENT PRINTING OFFICE
1926

69TH CONGRESS } SENATE { REPORT
1st Session } { No. 498

SENATOR FROM IOWA

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.

State ex rel. *v.* Thornberg (97 N. W. 537, Ind.):

The question, then, is, Is the prima facie case made by the return and certificate of the canvassing board overcome by the evidence in the case? The board certified 400 votes for the appellee. The ballots voted and those disputed, protested, counted, and not counted, were preserved and delivered to the city clerk, who at the time was appellee. The package was placed in a vault, which was used jointly by appellee as city clerk and the city treasurer. each of whom had the combination to the vault and keys to the inside lock, and appellee since January 3, 1910, as treasurer, has had access to the vault, and it was possible for other persons to go into the vault. At the time of the recount the paper bag containing the ballots, talley sheets, and poll sheets and other papers were taken by appellee to the city of Portland, some 15 miles away, upon notice, and the bags there were opened by the recounting board in the court room, then resealed and taken by appelleee to Dunkirk, and other persons were in and about the room during the recount. There is evidence that the package which contained the ballots from the first ward was unsealed when brought to the city clerk's office, and that the officers required the inspector to seal it in their presence.

The papers were in the custody of the appellee as clerk until noon of January 3, 1910, and thereafter in the possession of his successor, who produced them on the trial, and testified that, so far as he knew, they were in the same condition as when he received them, and that, while he did not look at them daily, he kept track of them where they were daily, and that except on one occasion when the ballot packages were examined by one of the attorneys in the cause for appellant, when appellee was present, he had had possession of them, and they were not examined or tampered with by anyone else, so far as he knew. Exhibit 14 was a ballot package from the first ward, containing unvoted ballots and was kept with the other packages. This witness thinks it was unsealed when handed over to him. Appellee as custodian of the papers from the day of the election until January 3, 1910, testified that all papers were turned over to him sealed, except Exhibit 14, and that he had never tampered with them, and no one else had to his knowledge. The ballots voted were in packages or sacks marked "Exhibits 4, 5, and 6," being the ballots voted in the first, second, and third wards, respectively. These ballots were put in new packages, as were the seals from the old packages, and resealed by the commissioners for the recount in separate packages as to each ward. One of the election clerks testified that at one place on his tally sheet by mistake he made five vertical marks and one diagonal mark, that when five votes were represented by the five vertical marks and the diagonal mark and when five votes were counted, that the diagonal mark was used to tie the five vertical ones together, that his attention was called to it by the other clerk and instead of erasing it he announced that he could just tally anyhow; and that the other tally sheet showed five ballots. He was corroborated by the other clerk; the tally showed his corroboration of the fact in that it showed five votes counted for the six marks, and it is under this evidence that appellee claims one vote. By reason of the claim * * * that the package had been opened by unauthorized persons and the possibility that the ballots might have been hampered or tampered with appellee contends that the papers and ballots have not been preserved with such care that the ballots could have any force as evidence and that their value as evidence is thereby destroyed and the objection to their introduction is made on this ground, as to most of them which will be hereafter designated as the general objection, to avoid repetition. The objection seems to us to go rather to their weight than to their admissibility. What are claimed to be the original ballots are before us. In the absence of any specific evidence as to their having been tampered with we are bound to presume that they have been honestly preserved as they came from the hands of the inspector.

Tebbe *v.* Smith (29 L. R. A. 675, Calif.):

The first point urged is that the court erred in overruling contestee's objection to receiving the ballots in evidence. The evidence showed that the ballots and returns reached the county clerk through the proper channels. The sealing wax on some of the packages was broken when they were received from the express office. Other seals were broken in handling. The packages were placed on top of a large case in the clerk's office, and there remained, in the condition in which they had arrived, until the completion of the canvass by the supervisors, when they were put into three gunny sacks, each sack securely bound and sealed, and placed under the clerk's desk, where they remained until produced in court. * * *

So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestee, of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by the naked showing that it was possible for one to have molested them. The law can not guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one. When all this has been said, it remains to be added that the question is one of fact, to be determined in the first instance by the jury or trial judge.

State *v.* Creston (195 Iowa, 1372):

All of the above cases, which are cited and relied upon by appellants, involve election contests in which the question of the admissibility of the ballots in evidence because of improper preservation was the point in issue. The appellant did not, in the case at bar, offer evidence to show that the ballots were improperly preserved, or that they were tampered with after they were delivered by the judges to the proper officers, so as to render these inadmissible in evidence.

These cases answer the contention of incumbent regarding the absence of proof that the ballots were legally preserved.

A substantial compliance with the laws of Iowa has been shown in this, that the ballots were found in the custody of the various county auditors, the legal custodians of the ballots, and that out of the large number of Iowa precincts in only two do the county auditors show, in compliance with the stipulation of the parties, that there was any defect in the envelopes in which the ballots were contained. This showing makes a prima facie case, and no effort was made by incumbent to amend his pleading or to overturn this presumption.

Under the Iowa law it was not open to incumbent to suggest the existence of a mere possibility that the ballots were tampered with, but he would have been compelled to offer evidence showing that the ballots had been in actual point of fact tampered with. That he did not offer to do. (See Moss *v.* Hunt, 135 Pac. 282, supra.)

If the contention of the incumbent that the recount in the precincts to which he calls attention should be rejected and the official count accepted, because, as he alleges, there is a discrepancy between the number of votes forwarded to Washington and the official polls in these precincts, why should he not ask the committee to reject the recount in every precinct where this discrepancy appears?

There is attached hereto the result in 68 townships taken at random wherein there was a difference between the official polls and the number of ballots forwarded to Washington. In these precincts the incumbent gained an advantage of 275 votes by the recount. (See "Ex. E.")

The incumbent never asked that the committee should disregard the recount in these precincts and accept the official count.

There is also attached hereto an explanation which deals with stipulation No. 71, and explains the classes in which these votes for convenience were divided by the committee. It will be marked "Exhibit F."

Also there is attached hereto the statute of Iowa as it appears in the code of 1919, and under which the instructions to voters theretofore had been issued. (See "Ex. G.")

What follows is a summary of the vote according to the finding of the subcommittee, and which your committee adopts, which discloses that the contestant, Steck, has a plurality of 1,420 votes.

Your committee in reaching its conclusion examined the ballots set apart and segregated in classes, 1 to 16, inclusive, in accordance with the stipulation and agreement of contestant and incumbent, except these in class 1, which were conceded to be "No votes." (See Ex. H.)

In determining for whom the votes included under the remaining classes, 2 to 16, inclusive, should be counted, your committee sought to ascertain the true intent of the voters. In reaching this conclusion, it took into consideration every circumstance that might shed any possible light upon such intent. It disregarded all claims put forward to disfranchise the voter, either by a contention that certain marks were distinguishing marks, or that the voter had not complied technically with the provisions of the statute.

In any and all cases of doubt the advantage was given the incumbent, because he had the certificate of nomination.

For the convenience of Senators, there is hereinafter set out in condensed form the tabulation of the votes with explanations.

Attention is likewise called to the fact that in Iowa, in certain of the larger cities, voting is done by machine, and the votes so cast are hereinafter referred to as "machine votes," in contradistinction to those which were cast by hand, and are known as "paper ballots." Votes with reference to which at the recount no objection was raised are divided as follows:

Claimed votes, divided as follows

	Brookhart		Steck	
	Unchallenged	Challenged	Unchallenged	Challenged
Votes:				
Machine	122,930		125,756	
Straight	120,720		75,702	
Scratched	200,167	6,453	246,486	2,268
Total	443,817	6,453	447,944	2,268

Plurality of Steck in unchallenged ballots from report of counters, 4,127.

When the subcommittee met to hear argument of counsel, by request of counsel representing the contestant and incumbent, further delay was granted in order that the attorneys might go over the ballots contested, and if possible agree with reference to a part of them at least, and to subdivide the others into classes. The subcommittee accordingly adjourned from time to time from December 4 to January 6 (R. pp. 190–191), at which latter date it was ascertained that the attorneys representing the contestant and the incumbent had reduced the number of votes against which they wished to urge challenges, as is shown by the following statements:

	Brookhart	Steck
Agreement of attorneys as to challenged votes:		
Conceded as good votes	14	1,163
Conceded as no votes	115	35
Not considered	42	7
Submitted to committee	6,282	1,063
Total	6,453	2,268
Result after attorneys' agreement—Agreed and challenged votes:		
Agreed by counters	443,817	447,944
Agreed by attorneys	14	1,163
Total	443,831	449,107
Steck plurality		5,276
Challenged votes after attorneys' agreement	6,282	1,063
Rulings of committee as to remaining challenged votes following attorneys' tabulation:		
Ruled as no votes—		
II	13	1
V (stipulations 71, 80, 84, 95, 136, 148, 161, and 199)	1,344	
VI	3	
VII	1	
XVI	3	
Total	1,364	1
Votes ruled good by committee:		
Classification No.—		
2	42	13
4	276	62
5 (conceded by contestant's attorney)	2,490	
6	1,755	149
7	37	27
8	21	1
9	90	
10	4	
11	22	222
12	37	57
13	16	362
14	24	14
15	97	155
16	7	
	4,918	1,062
I to XVI, inclusive:		
No votes	1,364	1
Good votes	4,918	1,062
Total	6,282	1,063

It will now be observed that the number of votes claimed by the incumbent and challenged by the contestant were 6,282 and those claimed by the contestant and challenged by the incumbent were 1,063.

Under class 5 there were 3,834 ballots originally contested. Of these 2,490 were challenged on the ground that Senator Brookhart had obtained these votes under a misrepresentation that he was a Republican. This challenge was abandoned by counsel for contestant, as appears on pages 239 and 240 of the record.

This, then, finally reduced the contested votes upon which the committee was required to pass to 2,729 claimed by Brookhart and contested by Steck, and 1,063 claimed by Steck and contested by Brookhart.

Your committee examined these ballots, which had been subdivided for convenience by the attorneys into 16 classes and many subdivisions, as will be seen by the stipulations appearing in the hearings. However, it was conceded by contestant and incumbent that those ballots segregated under class 1 were no votes; that is,

that they could not be counted for either the contestant or the incumbent. This will be observed to have included 115 which at one time had been claimed for Brookhart, but the claim abandoned, and 35 which had been claimed by Steck, but the claim abandoned.

It will be observed that class 3 was likewise disposed of by stipulation, it being conceded by representatives of the contestant and the incumbent that these votes were good and that the challenge made by each, respectively, should be disallowed.

It is here also called to the attention of the Senate that 2,490 votes which appear under class 5 were conceded to be votes which should be counted for the incumbent, and they were so awarded to him.

Your committee also examined with care the ballots contained in the various classes as divided by the representatives of the contestant and the incumbent, and awarded each ballot to the one for whom it believed the voter intended to cast it. The committee arrived at a decision on each ballot without any reference whatever to the result it would have upon the fortunes of contestant or incumbent. It did not examine or consider the totals until every ballot had been disposed of under the rules adopted; that is, to determine the intent of the voter, without invoking any technical rule, and waiving every irregularity, seeking only to give effect to the voter's intent.

The result will appear, then, from the following table:

Result of good votes after ruling by committee

	Brookhart	Steck
Agreed good votes (supervisors and attorneys)	443,831	449,107
Votes ruled good by committee	4,918	1,062
Total	448,749	450,169
Steck plurality		1,420

Permit your committee, in conclusion, to call attention to this circumstance, that some confusion may arise in view of the fact that the new Code for Iowa became effective about 10 days prior to the election of November 4, 1924. Whether it was intended that the law of Iowa be changed with reference to the manner of voting and counting the ballots is solely a question of opinion. It was a recodification of the laws of Iowa, and whether it was intended to state the law as it had theretofore been codified, or to change its provisions, is not clear. It is clear, however, that the same instructions as to the manner of holding an election, the marking of the ballots, and counting of the ballots, which had prevailed under the Code of 1919, were furnished to the election officers and followed in holding the election in 1924. Therefore it seemed unimportant, in arriving at the intent of the voter to seek to settle the question as to whether there was any substantial change in the election law under the Code of 1924.

The law in force previous to the recodification is attached to this report, marked "Exhibit G."

In passing, let the committee emphasize the fact that no question was ever raised and no suggestion was ever offered that there was any issue to be determined by the committee other than that of determin-

ing which of the two, the contestant or the incumbent, had received a plurality of the votes cast in the election of 1924. Any of the other issues later suggested were raised only after the results had been ascertained, and for purposes which need no comment.

In view of the foregoing, your committee, having found that the contestant, Daniel F. Steck, received a plurality of all the votes cast for United States Senator in the State of Iowa at the election held on November 4, 1924, and that the incumbent, the Hon. Smith W. Brookhart, did not receive a majority of the votes cast at said election, it therefore recommends that the Senate shall declare that the Hon. Smith W. Brookhart was not elected a Senator from the State of Iowa at the election held on November 4, 1924, and is not entitled to a seat as a Senator from said State, but that the Hon. Daniel F. Steck did receive a plurality of the votes cast for United States Senator from said State at the said election, and is entitled to a seat as a Senator from said State.

EXHIBIT A

STATE OF IOWA,
Polk County, ss:

J. M. Parsons, being first duly sworn, deposes and says that he is the attorney originally employed by Daniel F. Steck in the contest in the matter of Steck *v.* Brookhart for seat in the United States Senate from the State of Iowa.

That the facts set forth in Exhibit A, attached hereto, and by reference made a part hereof, being a copy of letter written to the Hon. Richard P. Ernst, are true; that the affiant has personal knowledge of such facts, and knows them to be true.

J. M. PARSONS.

Subscribed and sworn to before me this 3d day of February, 1926.

PAUL HEWITT,
Notary Public in and for Polk County, Iowa.

EXHIBIT B

STATE OF IOWA,
Polk County, ss:

John W. Pendy, being sworn, deposes and says, that he was the supervisor appointed in behalf of Mr. Steck to assist in the canvass of the votes at Washington, D. C., in the matter of Steck *v.* Brookhart, a contest for a seat in the United States Senate from Iowa.

That he heard the letter, a copy of which is hereto attached, marked "Exhibit A," dictated by J. M. Parsons; that he has personal knowledge of all the facts therein contained, and that they are true.

JOHN W. PENDY.

Subscribed and sworn to before me this 3d day of February, 1926.

CARL HEWITT,
Notary Public in and for Polk County, Iowa.

EXHIBIT C

UNITED STATES OF AMERICA,
District of Columbia.

I, Philip W. Turner, under oath, make the following statement with reference to the certificate of the auditors under which the ballots, other than the machine ballots, were transmitted to the Senate in the contest of Daniel F. Steck *v.* Smith W. Brookhart.

There appeared, according to the statement of the county auditors, to have been two lots of votes that reached the auditor from the precinct in an unsealed package, and only two. One came from Madison County, Center Township, and had to do with the votes cast in the First Ward of Winterset. This is evidenced by a card as follows:

"This sack was unsealed when delivered by the election board, first ward, city of Winterset." Signed Ellison Green, county auditor.

In this case the official count was accepted by both sides.

The next one came from Emmet County, Estherville Township, second ward, city of Estherville. I find it bears this notation, "Estherville, Iowa." These ballots were found loose in the sack, signed J. J. Klopp, county auditor. In this sack were found 20 less ballots than the names on the poll books indicated.

Later 10 more votes were found, and on objection by the supervisor representing Senator Brookhart, were not counted, though, if counted, they would have given Steck a greater number of votes, and he lost by the exclusion.

PHILIP W. TURNER.

Sworn to and subscribed before me this 6th day of March, 1926.

[SEAL.] CHARLES F. PACE,
Notary Public, United States Senate, Washington, D. C.

My commission expires March 15, 1926.

EXHIBIT D

UNITED STATES OF AMERICA,
District of Columbia:

I, Edwin P. Thayer, on oath, state that the stipulation that the contestant and the contestee should have a representative present when the county auditor should mail these ballots from the respective counties in Iowa, was, by the attorneys J. G. Mitchell, counsel for the incumbent, Smith W. Brookhart, and J. M. Parsons, counsel for the contestant, Daniel F. Steck, waived, it being agreed that the auditors should deliver the packages to the United States Post Office in their respective counties and that they should be transmitted by mail to the Senate.

That the condition in which they reached Washington and were delivered to me was known by the representative of the contestant and the representative of the contestee and no question was raised or suggestion made that there was anything irregular with reference to these ballots by either parties.

I have read the affidavit of Mr. J. M. Parsons with reference to the agreement to waive the presence of a representative of the contestant and a representative of the contestee when the auditor should deliver these ballots to the post office and it correctly states the agreement.

Since reading my answers made before the committee, I am afraid that they do not clearly convey what actually were the facts, and this affidavit is made in order to clarify what actually happened.

The reason that I know of the agreement by the attorneys with reference to waiving the presence of any representative of the contestant and the contestee when the votes were received from the auditors is that when this matter was called to my attention the attorneys representing the contestant and the contestee said they had entered into an agreement and waived the presence of a representative of the contestant and the contestee when the vote was taken. I made an inquiry about this because I hadn't received a subpœna, and they told me this agreement had been entered into.

EDWIN P. THAYER,
Supervisor.

Sworn to and subscribed before me this 6th day of March, 1926.

CHARLES F. PACE,
Notary Public, United States Senate.

My commission expired March 15, 1926.

EXHIBIT E

Sixty-eight miscellaneous precincts taken at random from which ballots came in sealed sacks

County and precinct	County auditor's official count		Recount						
	Steck	Brookhart	Protested ballots, Steck	Conceded ballots, Steck	Protested ballots, Brookhart	Conceded ballots, Brookhart	"No votes"	Grand total	Number of names on poll lists
Adair:									
Orient	176	217	-------	177	-------	215	35	427	433
Walnut	68	149	-------	68	-------	149	24	241	248
Adams:									
Colony	90	140	-------	90	-------	140	22	252	256
Nodaway	197	216	-------	198	-------	214	34	446	454
Appanoose:									
Johns	137	232	-------	140	-------	235	50	425	437
Vermillion	128	156	-------	127	-------	154	27	308	311
Audubon:									
Hamlin	107	151	-------	106	-------	152	18	276	278
Viola	54	163	-------	58	-------	170	13	241	245
Black Hawk:									
East Waterloo	438	236	2	435	2	236	49	724	730
Waterloo—									
First precinct, first ward	318	100	6	311	3	181	52	554	555
Fourth precinct, third ward	311	243	-------	314	1	252	48	615	634
Bremer:									
Fredrika	127	78	-------	128	-------	75	35	238	240
Sumner	345	411	-------	343	9	398	127	877	894
Buchanan:									
Fairbanks	312	160	-------	312	-------	159	42	513	519
Newton	119	120	-------	118	-------	119	13	250	255
Buena Vista:									
Elk	17	129	-------	17	-------	128	9	154	156
Rembrandt	28	137	-------	28	-------	139	27	194	197
Butler:									
Albion	274	240	-------	272	1	252	65	589	594
Monroe	93	272	1	92	5	271	53	422	429
Cass:									
Atlantic No. 3	677	194	-------	693	-------	180	36	909	911
Cass	186	250	-------	190	1	248	39	478	485
Cedar:									
Center	303	124	-------	305	4	120	30	459	461
Springfield	131	367	2	130	19	342	48	541	556
Tipton	358	76	-------	358	4	75	22	459	455
Cerro Gordo: Grant	66	191	-------	64	5	186	9	264	268
Cherokee:									
Afton	49	105	-------	48	1	103	12	164	171
Cherokee, first ward	518	381	4	512	9	370	52	947	936
Chickasaw:									
Chickasaw	264	281	-------	260	2	269	37	568	581
Richland	91	163	-------	96	-------	160	13	269	277
Utica	233	157	3	232	1	156	27	419	427
Clarke:									
Franklin	63	144	2	69	5	144	13	233	236
Troy	231	429	-------	233	14	413	56	716	719
Clayton:									
Garnarillo	118	177	2	118	3	176	38	337	339
Read	33	149	1	34	1	149	20	205	208
Clinton: Third precinct, first ward	610	538	2	457	9	688	58	1,214	1,224
Delaware: Delaware	248	115	-------	241	6	117	23	387	399
Emmet: Estherville, first ward	194	408	-------	191	6	401	66	664	685
Fayette: Scott	60	130	-------	60	2	128	23	213	230
Fremont:									
Monroe	236	99	1	239	1	97	12	350	363
Ross	289	68	-------	287	-------	67	11	365	383
Grundy: Palermo	675	395	1	678	8	380	89	1,156	1,120
Guthrie: Thompson	195	344	2	191	6	336	37	572	582
Henry:									
Jefferson	208	267	1	207	5	262	25	500	511
Salem	265	175	1	269	4	165	32	471	482

Sixty-eight miscellaneous precincts taken at random from which ballots came in sealed sacks—Continued

County and precinct	County auditor's official count		Recount						
	Steck	Brookhart	Protested ballots, Steck	Conceded ballots, Steck	Protested ballots, Brookhart	Conceded ballots, Brookhart	"No votes"	Grand total	Number of names on poll lists
Humboldt:									
Deledal	57	286	1	62	24	286	74	447	453
Rutland	70	150		71	4	154	20	249	264
Jasper: Newton, fourth ward	692	328	3	681	11	326	30	1,051	1,077
Jones: Oxford	449	129	6	437	1	128	33	605	614
Keokuk: Adams	227	198		228		198	13	439	457
Lee:									
Jackson	552	327	9	545	7	321	92	974	992
West Point	353	151	2	356		150	61	569	584
Linn:									
Rapids—									
First	518	338	1	518	1	337	35	892	906
Twenty-first	1,123	159	1	1,119	4	158	15	1,297	1,310
Lucas: Olnitz	16	196	1	18	3	192	19	233	244
Madison: South	149	274	2	148	14	262	56	482	492
Monona: Mapleton	289	224	1	289	4	216	51	561	573
Monroe: Union	378	225	2	379	1	227	61	670	716
O'Brien: Summit	208	355		213	5	343	79	640	661
Osceola: Fairview	59	146	1	58		147	26	232	233
Page: Clarinda, first ward	340	114		334	5	113	27	479	480
Pottawattamie:									
Layton	352	260	3	345	10	247	45	651	665
Council Bluffs, third precinct, fifth ward	355	501	10	354	24	456	125	969	984
Kane	385	476	16	479	18	435	156	1,104	1,080
Sioux: Lincoln	168	417		158	9	405	56	628	645
Tama: Salt Creek	325	117	3	320	4	115	55	497	516
Wapello: Center, first precinct, first ward	474	423	9	457	6	467	51	990	1,004
Winneshiek: Decorah, fifth ward	164	110		161	4	106	23	294	311
Worth: Northwood	322	409		331	3	399	61	794	809
Total	17,665	15,590	102	17,556	299	15,559	2,835	36,353	36,944

N. B.—Sixty-eight precincts above shown—all ballots came in sealed sacks. Official count gave in these counties an aggregate plurality of 2,075 for Steck. Recount, counting protested ballots as good votes, gives an aggregate plurality of 1,800 for Steck. In recount there appeared 591 ballots less than the number called for on poll books.

EXHIBIT F

Stipulation No. 71 and the following shown in the stipulations as the same as No. 71, viz, Nos. 80, 84, 95, 136, 148, 161, and 199 cover 1,347 ballots and are under class 5, attorneys' tabulation, were divided into two major classes and were those in which the voter voted only for candidates whose names appeared in the Republican column on the ticket or where the voter voted a split ticket. These two classes were subdivided each into two classes, one where the voter marked a cross in the square before some candidate for every office to be voted for except that for United States Senator or where he failed to put cross in the square before a candidate for United States Senator but did put crosses in the squares before some of the candidates for other offices.

Crosses only appearing in Republican column:	
Practically all squares having crosses except that for United States Senator	587
Only a few squares having crosses and none for United States Senator	274
Having no cross in circle or in senatorial square	1
Cross on split ticket:	
Practically all squares having crosses except that for United States Senator	301
Only a few squares having crosses and none for United States Senator	181
Total	1,344

EXHIBIT G

SEC. 447. Marking the ballot: Upon retiring to the voting booth the voter shall mark his ballot. He may place a cross, if he desires, in the circle at the head of one ticket on the ballot, and the voter may place a cross in the square opposite the name of any candidate for whom he desires to vote, whether he has put a cross in the circle or not.

If the voter does not wish to vote for all of the candidates of his party to an office where more than one candidate is to be elected, the cross in the circle at the top of his ticket shall not apply to said office, but the voter must mark crosses in the squares opposite the names of the candidates for whom he intends to vote. The voter may also insert in writing in the proper place the name of any person for whom he desires to vote, making a cross opposite thereto. The writing of such name without making a cross opposite thereto, or the making of a cross in a square opposite a blank without writing a name therein, shall not affect the validity of the vote. (C. 97/1119; S. 13/1119; 38 G. A. ch. 86/7.)

SEC. 448. How counted: When a circle is marked the ballot shall be counted for all of the candidates upon the ticket beneath said circle, except those offices for which some candidate has been voted for by marking a square. A cross placed in a square shall be counted for the candidate before whose name the square is so marked.

When a square in front of any candidate has been marked, a mark in the circle shall not count for any candidate for that particular office. When more candidates than the number to be elected to the same office are voted for by marking the squares opposite their names the vote shall not be counted for any candidate for that office. If less than the whole number of candidates to be elected are voted for by marking the squares opposite their names, the vote shall be counted only for those marked in the square, and the mark in the circle shall not apply. If for any reason it is impossible to determine the voter's choice for any office, his ballot shall not be counted for such office, but a mark in the circle of any ticket on the ballot shall not be held to make it impossible to determine the voter's choice. Any ballot marked by the voter in any other manner than as authorized in this chapter, and so that such mark may be used for the purpose of identifying such ballot, shall be rejected. (C. 97/1120; S. 13/1120:38 G. A. ch. 86/8.)

Attorney's Tabulation No. 1.—Summary of stipulations

[Numerals in parentheses refer to stipulations]

No votes conceded:	
Steck—	
(1)	5
(2)	3
(38)	1
(40)	6
(75)	2
(82)	18
Brookhart—	
(1)	48
(2)	5
(51)	12
(52)	1
(76)	2
(82)	9
(105)	2
(120)	1
(151)	20
(157)	1
(192)	5
(203)	1
(208)	6
(211)	2

No votes claimed:	
Steck—	
(3)	8
(26)	1
(27)	4
(37)	1
Brookhart—	
(7)	7
(8)	1
(53)	10
(59)	1
(97)	1
(98)	24
(100)	10
(106)	1
Votes conceded to—	
Steck—	
(16)	3
(32)	1
(39)	22
(43)	1
(50)	1
(63)	1

Attorney's Tabulation No. 1.—Summary of stipulations—Continued

[Numerals in parentheses refer to stipulations]

Notes conceded to—Continued.	
Steck—Continued.	
(72)	1
(73)	1
(74)	1
(170)	5
(184)	1
(189)	4
(193)	1
(207)	11
(218)	1, 109
Brookhart—	
(16)	1
(39)	1
(87)	1
(101)	2
(103)	1
(132)	1
(144)	1
(146)	2
(150)	1
(166)	1
(200)	2
Votes in Progressive column:	
Steck—	
(4)	6
(5)	47
(11)	1
(12)	1
(13)	1
(14)	2
(94)	3
(194)	1
Brookhart—	
(6)	5
(9)	1
(99)	4
(107)	2
(110)	2
(111)	2
(113)	[1] 6
(114)	1
(116)	35
(118)	205
(119)	1
(155)	11
(156)	1
Cross in circle or square: Cross before blank:	
Steck (218)	[1] 1,109
Brookhart—	
(55)	1
(56)	1
(60)	4
(61)	2
(70)	1, 282
(71)	1, 281
(80)	22
(81)	1, 108
(83)	1
(84)	1
(86)	1
Cross in circle or square: Cross before blank—Continued.	
Brookhart—Continued.	
(89)	7
(90)	11
(91)	15
(92)	2
(93)	5
(95)	1
(115)	1
(130)	1
(134)	5
(136)	1
(139)	1
(152)	1
(160)	1
(161)	35
(162)	14
(168)	1
(174)	7
(177)	1
(179)	4
(181)	3
(198)	3
(199)	3
(201)	7
Steck—	
(15)	6
(36)	38
(44)	99
(47)	3
(209)	2
(210)	1
(58)	3
(65)	3
(79)	1
(88)	3
(117)	14
(137)	2
(138)	1
(172)	12
(173)	126
(178)	2
(180)	1
(190)	1, 163
(191)	376
(191–a)	16
(195)	21
(196)	12
(199)	2
Cross in two circles, not in both Republican and Democratic:	
Steck—	
(34)	10
(35)	12
(185)	1
(215)	4
Brookhart—	
(57)	6
(78)	1
(108)	1
(133)	30

[1] Various initials.

Included in concessions (3).

Attorney's Tabulation No. 1.—Summary of stipulations—Continued

[Numerals in parentheses refer to stipulations,]

Cross before printed and written name:	
Steck—	
(214)	1
Brookhart—	
(175)	7
(176)	2
(202)	12
Sample ballots:	
Steck—	
(96)	4
(104)	2
(109)	78
(112)	1
(154)	5
Brookhart—	
(145)	4
Arrows:	
Steck—	
(17)	204
(19)	4
(23)	2
(24)	7
(28)	1
(122)	3
(216)	1
Brookhart—	
(123)	18
(142)	4
Distinctive marks:	
Steck—	
(18)	38
(20)	1
(22)	11
(25)	4
(62)	2
(213)	2
Brookhart—	
(66)	2
(85)	1
(102)	1
(124)	1
(131)	2
(143)	2
(147)	1
(148)	4
(197)	9
(204)	13
Names stricken:	
Steck—	
(21)	15
(28–a)	199
(29)	40
(30)	31
(31)	20
Names stricken—Continued.	
Steck—Continued.	
(42)	16
(45)	14
(69)	3
(125)	8
(186)	1
(205)	2
(217)	13
Brookhart—	
(67)	1
(126)	13
(128)	1
(164)	1
Erasures, obliterations, and irregular markings:	
Steck—	
(46)	6
(48)	4
(64)	2
(186)	1
(206)	1
Brookhart—	
(140)	1
(141)	1
(158)	3
(159)	6
(163)	1
(165)	1
(167)	4
(169)	1
(182)	4
(183)	1
(206)	1
Miscellaneous marks:	
Steck—	
(33)	23
(41)	87
(49)	11
(187)	10
(212)	24
Brookhart—	
(54)	6
(77)	13
(121)	1
(149)	28
(153)	46
(188)	3
Unclassified and reserved—	
(10)	[1] 1
(68)	[2] 1
(127)	[3] 2
(129)	[4] 1
(135)	[5] 4
(171)	[6] 1

[1] "Brotherhood."
[2] X in Republican circle; Brookhart name stricken.
[3] X in Republican circle; Brookhart name stricken (see ballots).
[4] X in Democratic circle and Brookhart square and Steck square; name Steck stricken.
[5] X in Democratic; also X in Republican Progressive circle.
[6] Similar to (135).

I. No votes; conceded by both parties:
Steck 35
Brookhart 115
II. No votes; claimed as no votes:
Steck 14
Brookhart 55
III. Conceded votes to parties under whose names they appear:
Steck 1,163
Brookhart 14
IV. Votes appearing for parties under whose names they appear in column entitled "Progressive":
Steck 62
Brookhart 276
V. Votes for incumbent challenged generally on the ground that no × appears before his name in Republican column:
Brookhart 3,834
VI. Votes where × appears before ——— for Senator in Progressive column but where candidate has received vote in another column:
Steck 149
Brookhart 1,758
VII. Votes where × appears in 2 circles at head of tickets but not in both Republican and Democratic:
Steck 27
Brookhart 38
VIII. Votes where × appears before printed and written name:
Steck 1
Brookhart 21
IX. Votes having name "Brookhart" written, but no initials:
Steck 90
X. Votes upon sample ballots, marked "official":
Brookhart 4
XI. Ballots having arrows drawn:
Steck 222
Brookhart 22
XII. Ballots having claimed distinguishing marks:
Steck 58
Brookhart 36
XIII. Ballots having names stricken:
Steck 362
Brookhart 16
XIV. Ballots having erasures, obliterations, and irregular marks:
Steck 14
Brookhart 24
XV. Ballots having miscellaneous marks:
Steck 155
Brookhart 97
XVI. Ballots reserved and unclassified 10

N. B.—The summary hereon is for purposes of convenience only, and in no manner commits either party to the classifications made as legally descriptive of the ballots involved.

MINORITY VIEWS

[Submitted by Mr. Stephens]

This is a contest for membership in the United States Senate from the State of Iowa arising out of the election held on November 4, 1924. There were four candidates for the Senate: Senator Smith W. Brookhart, Hon. Daniel F. Steck, Hon. Luther A. Brewer, and the Hon. Mr. Eickleberg. The State canvassing board found that Senator Brookhart had received a plurality of the votes cast; and a certificate of election was issued to him. He was commissioned by the governor of the State; he appeared in the Senate, took the oath of office, and is now occupying a seat in the Senate. Three complaints or notices of contest were filed against Senator Brookhart: By Mr. Brewer, who received only 862 votes; by the Republican State Central Committee of Iowa, filed by Hon. V. B. Burnquist, the chairman of the committee; and by Mr. Steck.

The contest filed by Mr. Brewer was not followed up and no evidence was offered in support of it.

The contest filed by the Republican Party in Iowa was presented by Mr. Burnquist and other counsel; a large volume of evidence was offered; vicious assaults upon the Republicanism of Senator Brookhart were made; and much evidence was taken in regard to that contest.

In the matter of the contest by Mr. Steck, a recount of the ballots cast in the election was ordered. This recount was made by certain persons acting under the authority of and for the Committee on Privileges and Elections. It appears that in the State of Iowa they have two systems of voting—one, the machine vote, the other the Australian ballot.

There were many stipulations and agreements entered into by the attorneys representing the parties with reference to the handling and counting of the ballots. Some of these will be referred to hereafter.

The ballots cast in 22 counties were counted in the counties where they were cast. Ballots coming from the remaining 67 counties were counted here.

After a careful consideration of all the testimony that is set out in the hearings, the law relating to the subject, and the argument of counsel, it appears to me that Senator Brookhart is entitled to retain a seat in the Senate. I shall discuss these propositions:

1. So far as it appears in the record, there is no evidence that the ballots brought to Washington to be counted by the agents of the committee were preserved in the way and manner required by law so as to make them admissible as evidence in this matter.

2. A recount of all the ballots cast in the election has not been made.

3. On a proper recount of the ballots presented to the committee, Senator Brookhart received more votes than did Mr. Steck.

I

NO EVIDENCE THAT BALLOTS WERE SAFELY KEPT AS THE LAW REQUIRED

Under the law of the State it is required that, after a count of the ballots, the judges of the election shall string the ballots counted upon a single piece of flexible wire, unite the ends of such wire in a firm knot, seal the knot in such a manner that it can not be untied without breaking the seal, inclose the ballots so strung in an envelope, securely seal such envelope, and at once return all the ballots to the county auditor, from whom they were received, who shall carefully preserve them for six months.

There is no evidence in the record to show that this statute was complied with, either by the judges of the election or by the county auditors. In fact, there is some evidence to show that the law was not complied with.

Several hundred thousand ballots were sent to the Committee on Privileges and Elections, at Washington, but there is no evidence in the record to show that any of these ballots are the identical ballots cast at the election. The burden of proof, of course, is upon the contestant to show that the law was complied with and that the ballots were safely kept. Unless such proof is made, the committee has no right to consider such ballots, but the official returns should be accepted. The presumption of law is that the judges of election in each of the precincts correctly counted the votes and made a correct return. This is only a presumption, but it stands until overthrown by proof showing the incorrectness of the returns made by the judges of election. If there are ballots missing, there is no way to determine whether the original count was correct or incorrect.

There were certain agreements entered into by the parties to this contest with reference to the transmission of ballots to Washington. These agreements are printed in the record and referred to as "Stipulations for subpoena of ballots."

The parts of these stipulations that are applicable to the question now being discussed are as follows:

In the first stipulation there is found this language:

> (13) That there shall be subpoenaed and transmitted to the Sergeant at Arms of the Senate of the United States all paper ballots from each and every precinct of the State of Iowa where such ballots were employed in their original packages as are now in the possession of the several county auditors, together with all registration books, poll books, tally sheets, and other books and documents of every kind and character whatsoever used or employed in connection with the general election held on the 4th day of November, A. D. 1924, aforesaid.

In the second stipulation, made some time after the other, there is found this language:

> STIPULATION FOR SUBPOENA OF BALLOTS
>
> In the Senate of the United States. In the matter of the contest of Daniel F. Steck against the seating of Smith W. Brookhart in the United States Senate as Senator from Iowa
>
> *To the Senate of the United States:*
>
> It is hereby stipulated and agreed by and between the parties to the above-entitled contest as follows:
>
> 1. That the Sergeant at Arms of the Senate of the United States shall forthwith address a subpœna to each and all county auditors of each and every county

of the State of Iowa, a list of which said counties, with the county seats thereof, the said county seats being the official residences of the said county auditors, is hereby attached, marked "Exhibit A," and made a part hereof.

2. That the said subpœna shall provide:

a. That the said county auditors and each of them are commanded to transmit unto the said Sergeant at Arms all of the following books, papers, and documents in their custody used in their respective counties and in each and every precinct thereof in connection with and for the purposes of the general election held in the said State of Iowa on the 4th day of November, A. D. 1924, viz, all registration books, poll books, official canvass books, tally-sheet books, and other books of every kind or character; all paper ballots and their envelopes or other containers; all absentee ballots, together with affidavits made by persons casting their votes by means of such absentee ballots; and all other papers and documents of every kind and character and their envelopes or other containers.

b. That the said county auditors, so long as the said books, papers, and documents remain in their possession, shall take full charge and custody and restrain and prevent any and all persons from in any manner interfering or tampering therewith except as is hereinafter specifically provided.

c. That immediately prior to the transmission of the said books, papers, and documents the envelopes and containers thereof shall be examined by the county auditor in the presence of a representative of each of the contesting parties, who shall be designated for that duty by their respective counsel for the said parties, and the said examiners and county auditor shall sign their names on each and every envelope or container, which shall be sealed in such manner that they may not be tampered with or opened except by authority of the Committee on Privileges and Elections of the United States Senate without evidence of such tampering or opening appearing thereon. Should there appear any evidence of opening or tampering with any original package prior to the said examination by said county auditor and examiners, notation of the character thereof shall be made upon the envelope or container by the said county auditor and examiners, or either of them.

d. That the said books, papers, and documents shall immediately upon their certification as provided in the immediately preceding paragraph (*c*), be securely packed in substantial cases, the said cases and each of them to be certified in manner and form, so far as applicable, as provided for individual envelopes and containers, and thereupon forwarded by express to the said Sergeant at Arms at the city of Washington, D. C.

Dated this 30th day of March, A. D. 1925.

DAN F. STECK,
By J. M. PARSONS,
Of Counsel.

SMITH W. BROOKHART,
By J. G. MITCHELL,
Of Counsel.

It will be noted that under this stipulation, it was required that immediately prior to the transmission of the books, ballots, etc., the envelopes and containers thereof should be examined by the county auditor in the presence of a representative of each of the contesting parties. This was not done, according to the statement of Colonel Thayer, who was the chief supervisor appointed to make the recount. According to his statement, what was done is that a subpœna was issued to the various county auditors, commanding that the books, ballots, etc., be mailed by him to Washington. No representative of either party ever saw these documents or the envelopes and containers before they were mailed.

It was stated in the committee that Senator Brookhart, through his attorney, agreed that these subpœnas might be issued and the ballots be brought to Washington in the way that they were brought. There was no written agreement to this effect, so far as the record shows, but, if such an agreement was reached, it went only to this extent; that the presence of a representative when the ballots were

prepared for transmission was waived. I do not understand that it is even contended that there was any waiver made by Brookhart or his attorney so far as the duty of the county auditor, with reference to the preservation of ballots and statement by him with reference thereto, was concerned. There is nothing in the record that contains a statement from a single one of the 99 county auditors as to his method of handling the ballots in order to safely preserve them, nor is there any notation "on each and every envelope or container" that was forwarded to Washington.

It is my view that the burden of proof is on the contestant to show that the ballots, when they reached here, were in the same condition as they were in when the judges of election 'delivered them to the county auditors. This is not a technical objection. It is based upon the statute referred to with reference to the duty of the county auditor in preserving ballots, upon the stipulations agreed upon by the parties, and upon well-known principles of law.

Unless the contestant meets this burden, the official count made by the returning officers, upon which a certificate of election was given to Brookhart, must stand. The certificate of election gives him a prima facie right to a seat in the Senate, and that prima facie right can be overturned only upon positive proof that he did not receive a plurality of the votes.

It is apparent from the face of the record that the law was not complied with in many instances. Two county auditors made a notation on the bags containing the ballots to the effect that they were unsealed at the time they prepared them for mail. Sixty-seven bags of ballots came to Washington unsealed. There were 1,068 precincts in which there was a discrepancy between the number of names on the polling list and the number of ballots found in the boxes when they were counted here. In one precinct, there were 198 missing ballots; in another precinct there were 20 ballots missing. Later, a batch of ballots were sent from that precinct to the committee, thus showing conclusively that the ballots at that precinct had not been kept together and safely preserved as required by statute. These instances of discrepancies and shortages of ballots are referred to, in this connection, only to show that the law was not complied with with reference to the preservation of ballots.

In these circumstances, it can not be said that the contestant has met the burden the law places upon him to prove that the ballots were kept as required by statute and that they are the identical ballots cast at the election. Because of the failure to make such proof, a recount of the ballots should not have been made.

The recount having been made, it should not be allowed to affect the result in the absence of such proof. Neither the presumption that the judges of the election and the canvassing board made correct returns, nor the prima facie right that Brookhart has to the seat, which rests on the fact that he has been certified as elected and commissioned a Senator, can be overturned in the face of the failure of contestant to offer the proof referred to.

II

A RECOUNT OF ALL THE BALLOTS CAST AT THE ELECTION HAS NOT BEEN MADE

When in a contest of this character a recount of ballots is ordered, it is proper that all ballots cast at the election should be produced and counted. Unless this is done, the result of the recount should not be considered, except, of course, where the missing ballots are so few in number as not to affect the final result.

In the absence of enough ballots to materially change the result of a recount, such recount should be rejected and the official returns should be allowed to stand as showing who is entitled to the seat.

The committee employed several persons to assist in making a count of the ballots. A tabular statement of the votes case in the election was prepared by these persons. In one column were placed the number of ballots cast in the election; in another, the number of the names of persons who voted in each county.

The table was prepared with great care by persons skilled in such work. It was considered by the committee to be accurate. I am taking it for granted that it is correct in all its figures.

From that table, it appears that there is a shortage of about 3,300 ballots. In other words, there are 3,300 more names on the polling lists, which lists are supposed to give the names of the persons who actually voted, than there were ballots counted.

The number of names on the list and the number of ballots in the box, at each precinct, should correspond. There should be a name for each ballot and a ballot for each name.

What became of the missing ballots? For whom were they voted? Would the counting of such ballots affect the result reached by the majority of the committee?

It is possible that a count of the missing ballots would overcome the lead claimed by the committee for Steck and cause the committee to concede that Brookhart received a plurality of the votes. The number of missing ballots is more than twice as large as the plurality claimed by the committee for Steck.

If Steck's plurality is only 76, as Senator George contends, it might very easily be overcome if the missing ballots were counted. In this state of the matter, the prima facie right that Brookhart has to the seat must prevail.

When the subcommittee made its report to the full committee, holding that Steck had received a plurality of the votes cast, it developed that the committee had failed to take into consideration the fact that at a large number of precincts there was a discrepancy between the number of names on the polling lists and the number of ballots found in the bags sent to the committee.

This was called to the attention of the committee, but the committee did not take any action with reference to having the tabulators go into the matter and prepare a statement in regard to this phase of the question.

Senator Howell, of Nebraska, wrote a letter to Mr. Philip W. Turner, who had prepared the tables for the committee, asking for

certain information. Mr. Turner had then, and still has, charge of the ballots. He wrote Senator Howell two letters, as follows:

MARCH 23, 1926.

Hon. R. B. HOWELL,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: Complying with the requests contained in your letter of March 22, I give below the information desired:

1. The number of precincts in Iowa in which machines were used in the 1924 election were 585.

2. The official votes in the above precincts gave Steck 128,865 and Brookhart 123,779. These ballots were divided as shown below:

	Steck	Brookhart
Machine votes	125,617	122,017
Paper ballots	3,248	1,762
Total	128,865	123,779

The recount by supervisors shows:

	Steck	Brookhart
Machine votes	125,756	122,930
Paper votes conceded	3,252	1,760
Paper votes protested	19	29
Total	129,027	124,719

3. The official vote in these precincts using paper ballots only of which there were 1,068 instead of 1,056, is shown below:

Steck	207,784
Brookhart	201,626

In this connection you will perhaps wish to know the number of protested ballots coming from these precincts in the recount, for which reason I show them:

Steck	1,409
Brookhart	4,054

Very respectfully,

PHILIP W. TURNER.

MARCH 23, 1926.

Hon. R. B. HOWELL,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: In connection with the Steck-Brookhart controversy, beg to advise that in 789 precincts where the ballots recounted conformed in number to the number of names shown on the poll list, were as follows:

Steck: Official returns, 110,171. Recount, 110,494 conceded and 840 protested.

Brookhart: Official returns, 122,232. Recount, 120,561 conceded and 2,370 protested.

Very respectfully,

PHILIP TURNER.

Taking these figures prepared by Mr. Turner, it appears that Brookhart has a substantial plurality.

Grand total based upon foregoing figures

	Steck	Brookhart
Recount by supervisors of machines plus paper ballots in certain counties where machines were used	129,027	124,719
Official count in 1,068 precincts where ballots are missing	207,784	201,626
Recount in 789 precincts where number of ballots checked with number of voters	111,334	122,931
Total	448,145	449,276
		448,145
Brookhart plurality		1,131

It will be observed that in reaching this result there have been included the 1,344 votes that the majority refused to count, and that Senator George and myself held should be counted for Brookhart.

But, if it should be granted that the majority is right in saying that there were found 1,344 ballots that should not be counted for Brookhart, that still leaves a plurality for him.

It must be remembered that in this calculation the recount is rejected and the official count taken in 1,068 precincts where there was a discrepancy between the polling list and the number of ballots found. The 1,344 rejected ballots came not only from those precincts but also from the 789 precincts where there was no discrepancy between the polling list and the number of ballots.

There is nothing in the record to show how many of the 1,344 ballots came from each of these two classes of precincts. As the record does not disclose the number of such ballots as came from the 789 precincts, it is but fair to take the rule of averages. If this is done, it appears that about 500 should be deducted. This would leave Brookhart a plurality of more than 600. So, whether the 1,344 ballots are counted for Brookhart or not, he has a plurality.

III

ON A PROPER RECOUNT OF ALL THE BALLOTS PRESENTED TO THE COMMITTEE SENATOR BROOKHART RECEIVED MORE VOTES THAN MR. STECK

The following sections from the Code of Iowa which was in effect at the date of the election, are cited:

811. *How to mark a straight ticket.*—If the names of all the candidates for whom a voter desires to vote appear upon the same ticket, and he desires to vote for all candidates whose names appear upon such ticket, he may do so in any one of the following ways:

1. He may place a cross in the circle at the top of such ticket without making a cross in any squares beneath said circle.

2. He may place a cross in the square opposite the name of each such candidate without making any cross in the circle at the top of such ticket.

3. He may place a cross in the circle at the top of such ticket and also a cross in any or all of the squares beneath said circle.

812. *Voting part of ticket only.*—If the names of all the candidates for whom the voter desires to vote appear upon a single ticket but he does not desire to vote for all the candidates whose names appear thereon, he shall place a cross in the

square opposite the name of each such candidate for whom he desires to vote without making any cross in the circle at the top of such ticket.

814. *How to mark a mixed ticket.*—If the names of all the candidates for whom a voter desires to vote do not appear upon the same ticket, he may indicate the candidates of his choice by marking his ballot in any one of the following ways:

1. He may place a cross in the circle at the top of a ticket on which the names of some of the candidates for whom he desires to vote appear and also a cross in the square opposite the name of each other candidate of his choice, whose name appears upon some ticket other than the one in which he has marked the circle at the top.

2. He may place a cross in the square opposite the name of each candidate for whom he desires to vote without placing any cross in any circle.

815. *Counting ballots.*—The ballots shall be counted according to the markings thereon, respectively, as provided in the six preceding sections, and not otherwise. If, for any reason, it is impossible to determine from a ballot, as marked, the choice of the voter for any office, such ballot shall not be counted for such office. When there is a conflict between the cross in the circle of one ticket and the cross in the square of another ticket on the ballot, the cross in the square shall be held to control, and the cross in the circle in such case shall not apply as to that office. Any ballot marked in any other manner than as authorized in the six preceding sections, and in such manner as to show that the voter employed such mark for the purpose of identifying his ballot, shall be rejected.

Section 811 of the Code of Iowa (1924) provides that a voter may mark a "straight ticket" in either of three ways. There were 1,344 ballots marked in the third way provided by the statute. Brookhart claims that they should be counted for him.

The majority of the committee hold that these ballots should not be counted, and did not count them for either candidate. This refusal was, in my judgment, arbitrary, unfair, and in the face of the law that should govern in this matter.

The committee absolutely ignored the law of Iowa. It proceeds upon the theory that the law of a State, with reference to voting for Senator, has no validity and should not be considered when a contest is filed and a recount is ordered. In this matter the committee proceeded as if the State of Iowa had no laws whatsoever upon the subject of voting.

It seems to be the idea of the majority that because the Constitution of the United States provides that "Each House shall be the judge of elections, returns, and qualifications of its own Members," the Senate is justified in ignoring the law of the State and in determining how a ballot shall be counted without any regard to the law. This is a substitution of mere rules of the Senate for the substantive law of a sovereign State.

Section 4, clause 1, of the United States Constitution reads:

> The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress has not attempted to exercise the power granted under this clause. The committee proposes to do by rule what the Congress has not done by legislative act.

It is contended by the majority that the "rule of the intention of the voter" should be followed. Grant that, but how is "the intention of the voter" to be determined? It is my opinion that the intention of the voter must be found by an examination of his ballot, viewed in the light of the law of the State informing the voter how to mark his ballot.

The majority do not agree to this opinion, and proceed to reach a conclusion without regard to the law aliende the ballot.

The true rule of law is that if the intention of the voter is manifest from what appears on the face of his ballot, in the light of the law under which it was cast, it must be counted for the candidate for whom it appears to have been cast.

No evidence is permissible to explain a ballot which is unambiguous on its face. Ballots that are ambiguous may be explained by extrinsic evidence.

It will likely be admitted by each member of the majority that under the law of Iowa, these 1,344 votes should be counted for Brookhart. But they are not counted for him because of disaffection in the Republican Party in Iowa and cordial dislike of Brookhart by many members of that party.

So, the majority decided that it had a right to take into consideration this condition and to refuse to count a ballot for Brookhart, which under the law of Iowa he was entitled to have counted for him.

No voter of any of these ballots had testified as to his intention. The majority entered into the broad field of surmise and speculation, and in the face of the law, declared that the voter, although he marked his ballot under the provisions of the law and thus cast a vote for Brookhart, did not intend to do so.

Text writers on "Elections" and cases almost without number support the contention that is made with reference to the legal propositions advanced here. It is not deemed necessary to cite them. Indeed, it is to be doubted whether there can be found any respectable authority to the contrary.

It was stated by the majority in the consideration of the matter in the committee that many of these 1,344 ballots are what is called a "mixed ballot." That does not prevent those from being counted for Brookhart. Sections 812, 814, and 815 of the Iowa Code settle this in his favor.

It is only by holding that a State has no right to pass any law on the subject of voting for a Senator, or if it does enact any such law it shall not be given consideration by the Senate, that the 1,344 votes can be denied Brookhart. Being unable to agree to any such doctrine and being unwilling to disfranchise a voter of Iowa who has followed the law of his State in marking his ballot, I contend that a grave injustice will be done, not only to Brookhart, but to the voters themselves, and that a precedent will be established that may rise up in later times to haunt us and produce a harmful and disastrous effect upon many States to the end that such States may be denied rights given under the Constitution of the United States.

The majority report finds a plurality of 1,420 in favor of Mr. Steck. Let us analyze this plurality.

In the first place, Senator George subtracts from it 1,344 straight Republican ballots, which all admit were cast, according to the Iowa law, for Brookhart, but this law is repealed, uprooted, and destroyed in the name of "intention of the voter" by the majority of this committee. The people of Iowa are denied the right to make their own election laws, and instead is substituted the arbitrary opinion of Senators. They refuse even to consider the intention of the voter in the light of the law or that the law could have anything to do with

forming his intention. Such a rule is unheard of in the Senate or in any court in the world.

After subtracting these straight ballots, the plurality for Mr. Steck is reduced to 76. On the committee's tabulation sheet "there were 49 of these ballots not agreed upon by the attorneys, 25 of these not having been found." If the writer's memory is not at fault, Senator Caraway's report from the subcommittee to the full committee contained this language, "There were 49 ballots, 7 claimed for Steck and 42 for Brookhart, though not conceded." These ballots have not been counted in this result, although they were duly counted and recorded in the tabulation, and the 35 difference would reduce Mr. Steck's apparent plurality to 41.

In order to get this plurality of 41, reference is had to the official tabulation of the committee, where it is shown that in the "first ward of Winterset (Madison County) the auditor's figures are taken as auditor's memorandum, shows ballots were received by him in unsealed sack, and that there were 748 ballots received here out of 946 as shown by the poll book." Although there were only 748 ballots in this precinct, the committee has taken the official count and given Brookhart 289 and Steck 563, there being 94 no votes, or ballots that did not vote on the office of Senator. We think it is the law and that that the committee acted properly in taking the official count in Madison County, where said 198 votes were missing. Without this precinct Mr. Steck would have no plurality. The only way he could get this precinct was by taking the official count.

However, this same rule should apply to every other precinct in the State in a similar condition. The work sheet for this precinct is found at the bottom of page 248 in the hearings. While this rule was adopted in this precinct for Mr. Steck, it is denied to Senator Brookhart in three other precincts.

On page 248, the work sheet of Guthrie County, Bear Grove Township precinct, shows that there were only 236 ballots found in the recount with a poll list of 256. Senator Brookhart is entitled to the official count in this precinct the same as was given to Mr. Steck in the Madison County precinct.

Again, on page 248 it is shown that there were 20 less ballots found than the number of names on the poll book in Emmet County, Estherville Township, second ward of Estherville. Later a package of 34 ballots was found in another place with a purported auditor's note saying they belonged to this precinct, but that would make an excess, and the same rule should apply in this precinct as did in Madison County in Winterset.

Again, at the bottom of page 250 is shown Wapello County, Center Township, ninth precinct, city of Ottumwa, where the chief supervisor finds only 602 ballots out of 624 on the poll list, thus making a shortage of 22 ballots in this precinct. The same rule should apply as in Madison County.

If the same rule is followed in these three precincts as was followed in Madison County, Senator Brookhart would gain 142 votes and the 41 plurality for Mr. Steck is overturned to 101 plurality for Senator Brookhart.

In addition to this, in Lee County, Jackson Township, second precinct, there is an excess of 12 ballots found in the bag, more than the names on the poll list. The same rule should apply in this

case, and that would add 17 more to the plurality of Senator Brookhart, making his total plurality 118 votes. This is found at the top of page 250 of the hearings.

All of these precincts were challenged. Mr. Steck's challenge was sustained in Madison County, but Senator Brookhart's challenges were all overruled in these four counties, notwithstanding that the same reason for sustaining them existed.

In answer to this it was said that there are 1,068 precincts in the 1,857 paper ballot precincts where there is a discrepancy (usually less ballots than number of voters). At random a few of these precincts were tabulated and resulted in a loss to Senator Brookhart if the official count were taken in these few precincts selected at random. Hence it was said that the challenges should be disregarded in the three specific cases before mentioned. After the report of the subcommittee was made, the tabulation referred to as having been made at Senator Howell's request was made for all of the 1,068 precincts, and they increase Senator Brookhart's plurality, by taking the official count, to 1,131. This is in fact the plurality to which he is entitled, less a reduction of 80 in class 1 and a few other scattered challenges that were sustained.

The committee did not follow the same rule in all cases. At the Winterset precinct, where there were missing ballots, the official count was accepted. At other precincts, where there were missing ballots, a recount was made. It happens that under each rule adopted by the committee Brookhart lost votes. A rule loses its validity and weight unless it is followed in all instances.

In addition to what has just been mentioned, there were 67 precincts where the bags of ballots were unsealed. The majority refused to take this into consideration and refused to accept the official count. There were several hundred ballots challenged on the ground that they had distinguishing marks upon them, some of which are known as "arrow ballots." Under the law these ballots were not to be counted, yet the committee did count them, thus making a considerable change in Steck's favor.

Reviewing the whole matter, it appears:

1. That if no recount should be had, on the face of the returns Brookhart has a plurality.

2. That if a recount should be had in the machine counties and in the precincts where the ballots corresponded with the names on the polling lists, Brookhart has a plurality, irrespective of the 1,344 votes that the committee refused to count for him.

3. That on a proper count of the legal ballots before the committee, in the light of the law of Iowa, Brookhart has a plurality.

Therefore, it is respectfully submitted that he should be declared to be entitled to a seat in the United States Senate as a Senator from the State of Iowa.

H. D. STEPHENS.