

deduction); §38.2 (voter intention as paramount concern in interpreting ballot); §39.4 (recount pursuant to state law, with House supervision).

## § 58. Eighty-sixth Congress, 1959-60

### § 58.1 Investigation of right of Dale Alford to a seat.

During the organization of the House of Representatives of the 86th Congress on Jan. 7, 1959, a single objection having been made to the oath being administered to the Member-elect, Dale Alford from the Fifth Congressional District of Arkansas, Mr. Alford was asked by the Speaker, under the precedents, to stand aside while the other Members and Delegates-elect were sworn. Thereupon the House agreed to House Resolution 1.<sup>(7)</sup> House Resolution 1 provided as follows:

*Resolved*, That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Arkansas, Mr. Dale Alford.

*Resolved*, That the question of the final right of Dale Alford to a seat in the 86th Congress be referred to the Committee on House Administration, when elected, and said committee shall have the power to send for persons and

papers and examine witnesses on oath in relation to the subject matter of this resolution.

The previous question was immediately ordered on the resolution, at which time Mr. Thomas P. O'Neill, Jr., of Massachusetts, propounded a parliamentary inquiry as to whether 40 minutes of debate would be permitted on the resolution, there having been no debate prior to the adoption of the previous question. Speaker Sam Rayburn, of Texas, replied that "under the precedents, the 40-minute rule does not apply before the adoption of the rules." The resolution was thereupon agreed to by voice vote and without further debate which authorized the Speaker to administer the oath to Mr. Alford, and which referred to the Committee on House Administration the question of the final right of Dale Alford to the seat. The committee was authorized to send for persons and papers and to examine witnesses under oath.

On Apr. 15, 1959, the committee adopted a motion making it mandatory for the committee to investigate the election, and requesting the federal authorities in possession of the ballots and other documents to release them to the committee. To facilitate the investigation, the Subcommittee on Elections traveled to Little Rock, Arkansas, to take physical cus-

7. 105 CONG. REC. 14, 86th Cong. 1st Sess.

tody of the ballots and other materials.

The subcommittee examined all ballots cast in the election, as a result of which 3,409 ballots were isolated as "questionable" and were sent to Washington, D.C., for examination by the full committee. Prior to consideration of the questionable ballots, the subcommittee considered the issue of the validity of write-in votes and determined that all ballots would be considered as valid where the name of the write-in candidate had been properly written in or placed on the ballot by sticker. (Mr. Alford had been elected as a "Democratic write-in candidate" over Brooks Hays, the nominee of the Democratic Party.) The subcommittee disregarded an uncertainty which existed in state law with respect to write-in votes in general elections, and decided that the will of the voters should not be invalidated by an uncertainty in state law. The committee noted that it had been the custom in Arkansas to accept write-in votes, that spaces had been provided on the ballots for write-in votes, and that the House of Representatives had always recognized the right of a voter to write in the name of his choice.

Regarding the use of stickers bearing Dale Alford's name in lieu

of the write-in vote, the subcommittee determined that an opinion of the state attorney general, issued on Oct. 30, 1958, to the effect that stickers are legal, was binding on the clerks and judges and that they were required to count the sticker votes. Neither Mr. Hays nor any voter had appealed from the opinion of the attorney general. The subcommittee further determined that it should not void ballots in those precincts where stickers were distributed at the polls, since the state did not have a law prohibiting such distribution and in view of the fact that the Arkansas Supreme Court had ruled in 1932 that ballots bearing stickers distributed at the polls were legal. The report cited the Massachusetts contest in the 66th Congress of *Tague v Fitzgerald* (6 Cannon's Precedents §96), in support of the proposition that the use of stickers in balloting should not void the ballots involved. The subcommittee unanimously recommended, however, that the Arkansas legislature should clarify the use of stickers and write-in voting in general.

The subcommittee investigation was conducted as a result of charges made by a single voter from the district, many of the charges made on the basis of

hearsay. The losing candidate, Brooks Hays, offered to assist in an investigation, although he did not file a contest under the statute governing contested elections (2 USC §§201 et seq.). The committee report<sup>(8)</sup> expressed its strong preference for contesting congressional elections by following the procedures outlined in the statute cited above.

As the result of the subcommittee investigation conducted in Arkansas, the subcommittee determined that the questionable ballots presented 16 distinct categories. The subcommittee considered separately the issues raised by each of the 16 categories.

(1) The subcommittee ruled that each of the 48 ballots which did not have stubs detached were invalid. Citing the Arkansas statute which required the voter to detach the stub from the ballot and to deposit it separately, the subcommittee cited a Kentucky case [*State Board of Election, Commissioners v Coleman* (1930), 235 Ky. 24, 295 S.W.2d 619] in which the court ruled that the "depositing of the ballot without first detaching the stub would destroy the constitutional requirement for secrecy of the ballot if such ballot is

counted, and such requirement is mandatory."

(2) The subcommittee ruled that the 415 ballots which had the name of a write-in candidate written in, or placed on the ballot by sticker, but which did not contain any mark in the box opposite the name, were valid. The report cited the contest of *Tague v Fitzgerald* (6 Cannon's Precedents §96) as the only case in which the Committee on House Elections had ever ruled on disputed ballots of this type. In that case the committee had ruled that a cross was not necessary to the validity of the ballots, stating (as quoted by the subcommittee in the instant case):

No other candidate for Congress was voted for on such ballots. In the absence of a provision expressly rendering such a ballot void in the (state) and in the absence of a reported state case on that point, the committee held that the intention of the voter to vote for (Tague) was manifest by affixing a sticker or writing a name, notwithstanding that the act had not been completed by the making of a cross thereafter.

The subcommittee cited several subsequent cases from courts of other states [*Rollyson v Summers County Court* (1932), 113 W. Va. 167, 167 S.E. 83; *Sawyer v Hart* (1916), 194 Mich. 399, 160 N.W. 572; *Burns v Rodman* (1955), 342

8. H. Rept. No. 1172 submitted Sept. 8, 1959, 105 CONG. REC. 18610, 18611, 86th Cong. 1st Sess.

Mich. 410, 70 N.W.2d 793] to substantiate the “general rule” that the intent of the voter can be ascertained and a vote is valid even though the voter fails to mark a cross in the square provided.

(3) The subcommittee ruled that 28 ballots which had the name of a write-in candidate written in, or placed on the ballot by sticker, and which had the box opposite the name of the other candidate marked were invalid, as such a ballot denoted in effect that the voter had voted twice for the same office.

(4) The subcommittee determined that 236 ballots which had the name of the write-in candidate written in and the box opposite checked rather than “Xed” were valid, as the intention of the voter was clear.

(5) The subcommittee ruled that 52 ballots upon which the wrong end of the sticker had been placed were invalid as if not voted at all for either candidate.

(6) The subcommittee considered 88 ballots on which the name of the write-in candidate was either written or placed by sticker in some place on the ballot other than on the write-in line. The subcommittee first determined that 37 ballots, on which the name of the write-in candidate had been

written or placed by sticker either in or partially in the congressional box, were valid, but that four ballots which had been voted by scratching or marking a line through the name of Brooks Hays and writing Alford’s name on the Hays line were invalid. Of the 47 ballots upon which the write-in name or sticker appeared outside the congressional box, 46 ballots were considered invalid.

(7) There were 1,097 ballots on which the name of the write-in candidate was misspelled or only the last name used. The subcommittee validated all ballots on which the surname had been properly spelled or nearly correctly spelled (1,035) but invalidated those on which the wrong *given* name was written or the surname too incorrectly spelled to show definite intent of the voter (62).

(8) There were 190 ballots apparently intended for the write-in candidate, but containing erasures or other markings. The subcommittee (a) validated 28 ballots apparently voted for the write-in candidate but with Hays’ name stricken through (such practice being in accordance with a prior law); (b) invalidated 73 ballots containing write-in votes but also marks in the Hays box which had then been scratched through or

erased; and (c) validated 89 votes where the ballots had additional information such as "5th District" written after the name or sticker.

(9) The subcommittee invalidated 357 ballots on which the box opposite the write-in line was marked by an "X" or check but contained nothing written in or placed on the write-in line. The National Bureau of Standards had reported to the subcommittee that there was "no evidence of any adhesive particles or torn fibers," thus no evidence of fraud.

(10) The subcommittee invalidated seven ballots upon which stickers had been placed over or partially over marks for the other candidate.

(11) The subcommittee validated two ballots on which the voter had written in the name of Brooks Hays, but had not marked an "X" in the box opposite his name. The subcommittee cited a Pennsylvania Supreme Court case (no Arkansas case being in point), which validated ballots similarly cast, the name of the person written in being identical to the name printed on the ballot. In that case, the court had distinguished between such ballots and ballots containing marks beside the printed name as well as write-in votes for the same candidate, which the court considered invalid as a dou-

ble vote. *James' Appeal* (1954), 377 Pa. 405, 105 A.2d 64.

(12) There were 584 ballots on which the voter had placed a checkmark rather than the "X" prescribed by law, opposite the name of Brooks Hays. As the subcommittee had done in category (4) above, regarding votes cast for the write-in candidate, it ruled these ballots valid, as the intention of the voter was clear.

(13) The subcommittee validated 42 of the 43 ballots on which the voters had placed some mark other than an "X" or check in the square opposite Brooks Hays' name, as the intention of the voter was clear.

(14) 175 ballots contained erasures or other markings which apparently had been counted for Brooks Hays. The subcommittee found that all of these ballots should be invalidated, either on the grounds of potential fraud (erasures of the write-in name and "X"s marked for Brooks Hays, or "X"s for Hays in different form from the other "X"s on the ballot), or due to irregular markings on ballots and failure of voters to avail themselves of new ballots under the "spoiled ballot" provisions of state law.

(15) 74 ballots either were not marked for either candidate, or contained names of persons other

than the write-in candidate. The subcommittee invalidated each of these ballots, as the persons written in had not declared themselves to be write-in candidates within 48 hours before opening of the polls, as required by state law.

(16) The subcommittee invalidated seven ballots which had previously been voided.

(17) Finally, the subcommittee invalidated three ballots where a voter had placed a mark across the entire congressional box, or had torn the top off a ballot, or had torn Mr. Hays' name from the marked ballot.

The subcommittee investigated certain other phases of the campaign and election. It found nothing irregular regarding expenditures by the write-in candidate. It condemned the use of an unsigned pre-election circular by an individual who had distributed information in Mr. Alford's behalf, apparently without the candidate's knowledge. The subcommittee ruled, however, that the mere existence of an irregularity in any campaign should not be attributed to a particular candidate where he did not participate therein.

The subcommittee refused to consider charges against officials of the Democratic party that they conspired to nullify the will of voters in the Democratic primary,

there being no evidence to substantiate the involvement of Mr. Alford in a conspiracy. By the terms of House Resolution 1, the committee was limited in the scope of its investigation to the question of the final right of Dale Alford to his seat in Congress.

The subcommittee disregarded charges that the write-in candidate had represented himself to be a "Democratic" candidate in order to deceive voters. The ballot itself showed that Mr. Hays was the nominated party candidate and that Mr. Alford was a Democrat running as a write-in candidate, his name not being printed thereon.

The subcommittee finally considered and recapitulated alleged errors in tally sheets of various precincts. Thereupon, the final count showed that of the 3,408 questionable ballots, 937 were invalid and not counted. Of the remaining validated ballots, Mr. Alford was credited with 1,843 and Mr. Hays with 628. Dale Alford's final plurality, therefore, was 1,498, having received 30,247 votes to 28,749 for Brooks Hays.

On Sept. 8, 1959, Mr. Ashmore called up as privileged House Resolution 380.<sup>(9)</sup> Following remarks by the Chairman of the Com-

9. 105 CONG. REC. 18610, 18611, 86th Cong. 1st Sess.

mittee on House Administration and by its ranking minority member, the resolution was agreed to on a division vote—ayes 245, noes 5. Thereby, Dale Alford was held entitled to his seat in the 86th Congress. House Resolution 380 provided as follows:

Whereas the Committee on House Administration has concluded its investigation of the election of November 4, 1958, in the Fifth Congressional District of Arkansas pursuant to House Resolution 1; and

Whereas such investigation reveals no cause to question the right of Dale Alford to his seat in the Eighty-sixth Congress; Therefore be it

*Resolved*, That Dale Alford was duly elected a Representative to the Eighty-sixth Congress from the Fifth Congressional District of Arkansas, and is entitled to a seat therein.

*Note:* Syllabi for the proceedings involving Mr. Alford may be found herein at § 5.9 (actions by election committee to preserve evidence); § 13.2 (candidate's participation in irregularities); §§ 17.1, 17.4 (alternatives to filing election contests); §§ 37.9–37.17 (validity of ballots); § 38.5 (state law as related to voter intention).

### § 58.2 Mahoney v Smith

Mr. Robert T. Ashmore, of South Carolina, submitted the unanimous report of the Committee on House Administration in the contested election case of

Mahoney v Smith, Sixth Congressional District of Kansas, on Mar. 21, 1960.<sup>(10)</sup> The contest had come to the House on June 30, 1959, on which date the Speaker had referred to the committee a communication from the Clerk transmitting the required papers and testimony.<sup>(11)</sup> Prior to June 30, 1959, the Clerk had transmitted on May 6, 1959, contestee's motion to dismiss the contest,<sup>(12)</sup> accompanied by contestant's objection thereto and on June 2, 1959, contestant's motion that the House direct the impounding and preservation of all ballots.<sup>(13)</sup> These communications had been referred by the Speaker on those dates to the Committee on House Administration, and had been ordered printed to include the motions of the parties.

The official abstract showed that contestee had received a plurality of 233 votes, 43,782 to 43,549 for contestant in the election held Nov. 4, 1958. Contestant alleged voting irregularities in four election precincts and irregular casting of within-state absen-

10. H. Rept. No. 1409, 106 CONG. REC. 6195, 86th Cong. 2d Sess.

11. H. Doc. No. 190, 105 CONG. REC. 12330, 12331, 86th Cong. 1st Sess.

12. H. Doc. No. 129, 105 CONG. REC. 7530, 86th Cong. 1st Sess.

13. H. Doc. No. 167, 105 CONG. REC. 9571, 86th Cong. 1st Sess.

tee ballots in a certain county which he contended should void the total votes in those precincts, resulting in a 56-vote plurality for contestant. Specifically contestant alleged that an election official had incorrectly marked and counted ballots and that in certain precincts the number of votes cast was greater than the number of voters listed as having voted.

The committee first considered the actions taken by its Subcommittee on Elections regarding contestee's motion to dismiss. The committee concurred in the subcommittee's denial of the motion "for the reason that it was impossible at that early date to evaluate the merits of the case or rule on the testimony. There was no evidence actually then before the committee because the testimony adduced under the contest statute had not yet been printed or transmitted by the Clerk to the committee." The subcommittee did, however, act upon contestant's motion for preservation of the ballots by notifying state officials to preserve ballots despite state law which required their destruction six months after the election. The committee found, however, that certain county clerks had not been officially notified of the pending contest and had destroyed ballots prior to filing of contestant's motion.

The committee ruled that contestant had not proven fraud or irregularities on the part of any election official from the evidence produced nor had he proven that the votes in the election were greater than the number of listed voters. Finally, the committee ruled, with respect to the "within-state absentee ballots," that the witnesses adduced in contestant's behalf were prohibited by state law from being present at the counting of the votes and had no standing to contest the ballot counting.

On Mar. 24, 1960, Mr. Ashmore called up as privileged House Resolution 482 which was agreed to by the House without debate and by voice vote.<sup>(14)</sup> Thereby the contestee was held entitled to his seat. House Resolution 482 provided as follows:

*Resolved*, That Wint Smith was duly elected as Representative from the Sixth Congressional District of the State of Kansas in the Eighty-Sixth Congress and is entitled to his seat.

*Note:* Syllabi for *Mahoney v Smith* may be found herein at §5.8 (actions by election committee to preserve evidence); §25.6 (motion to dismiss as premature).

### § 58.3 Myers v Springer

On Apr. 30, 1959, the Speaker laid before the House and referred

14. 106 CONG. REC. 6523, 86th Cong. 2d Sess.

to the Committee on House Administration a letter from the Clerk transmitting a communication from Carlton H. Myers which complained about the conduct of the election held Nov. 4, 1958, for Representative from the 22d Congressional District of Illinois. In that communication, Mr. Myers, the defeated Democratic candidate, claimed that his opponent had appointed the editor and owner of a local paper, which paper later supported his opponent and refused Mr. Myers coverage, to a position as acting postmaster, in violation of the Federal Corrupt Practices Act. Mr. Myers also alleged attempts of bribery and coercion against him by representatives of the opposing political party. The Clerk's letter was ordered printed to include the notice of contest copy, which had been filed with that office.<sup>(15)</sup>

There was no record in the proceedings of the 86th Congress to indicate that contestant complied with the requirements of the laws regulating contested election cases (2 USC §§201 et seq.), and no record that the Committee on House Administration had taken action in this contest.

*Note:* Syllabi for *Myers v Springer* may be found herein at

15. H. Doc. No. 123, 105 CONG. REC. 7242, 7265, 86th Cong. 1st Sess.

§18.1 (compliance with statutory requisites).

## § 59. Eighty-seventh Congress, 1961-62

### § 59.1 Roush or Chambers

In 1961, the House conducted an investigation of the question of the right of J. Edward Roush or George O. Chambers, from the Fifth Congressional District of Indiana, to a seat in the 87th Congress, although the case was not one that had been brought pursuant to the contested election statute.

On the organization of the House of Representatives of the 87th Congress on Jan. 3, 1961, Mr. Clifford Davis, of Tennessee, objected to the oath being administered to the Member-elect, George O. Chambers, from the Fifth Congressional District of Indiana, who was then asked by the Chair, under the precedents, to stand aside while other Members-elect and the Resident Commissioner-elect were sworn.

Mr. Davis then submitted the following resolution:<sup>(16)</sup>

*Resolved,* That the question of the right of J. Edward Roush or George O.

16. 107 CONG. REC. 23-25, 87th Cong. 1st Sess.