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Josiah M. Daniel, III

LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948

*Josiah M. Daniel, III**

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* Partner, Vinson & Elkins, LLP, resident in its Dallas office (3700 Trammell Crow Center, 2001 Ross Ave., Dallas, Texas 75201). Bio: http://www.velaw.com/lawyers/lawyer_detail_fb.aspx?id=1632. A version of this paper was presented at the American Politics Conference, University of Oxford, January 7, 2011.

I. Historical Lawyering as a New Viewpoint on *LBJ v. Stevenson*

A. “Historical Lawyering”

This article explores the history, from the lawyers’ perspective, of a high-profile litigation of sixty years ago, the whirlwind of state and federal litigation that attended the 1948 runoff election battle between Congressman Lyndon B. Johnson and former Texas governor Coke Stevenson for the Texas Democratic Party nomination for the office of United States Senator. Johnson famously won this election by 87 votes out of almost a million cast (“Landslide Lyndon,” he almost immediately called himself) based on very tardy vote tallies reported from Precinct 13 in politically corrupt Jim Wells County in the Rio Grande Valley of Texas, a result that was ultimately sustained—by an “unusual stay” issued by a United States Supreme Court justice in favor of Johnson in an unnumbered proceeding styled *Lyndon B. Johnson v. Coke Stevenson*¹—at the end of three weeks of litigation between the two candidates. The litigation and is interesting as a key moment in LBJ’s rise to power, and perhaps even as a precursor to *Bush v. Gore*.² However, after working through the biographers’ accounts of the episode, I surmised that a legal historian or a lawyer might be able to obtain from a thorough study of the legal papers and the court proceedings, and from seeking to understand the work of the candidates’ lawyers, new or perhaps more nuanced understandings about the junction of politics and law that occurs when very close election tallies are challenged and the dispute is presented to courts for resolution.

Indeed as I examined the biographers’ footnotes, I began to surmise that the biographers had failed to understand or to fully appreciate some very interesting primary sources, namely the records of the multiple courts in which the Stevenson-Johnson legal battles were waged. Such records and related documents and materials are well familiar to lawyers and legal historians and are generally open and accessible, if not in clerks’ offices in courthouses, then in archives.³ Specifically, such sources include attorneys’ pleadings, motions, briefs, court orders, hearing transcripts, docket sheets, other clerk and court records,⁴ and, in the instance of significant trials

¹ In oral history interview, Joseph Rauh, one member of LBJ’s Washington legal corps, recalled later the “the unusual stay which ended the whole case and which made possible Lyndon Johnson’s future career.” Oral history interview by Paige Mulhollan with Joseph L. Rauh, Jr., Washington, D.C., July 30, 1969, at 4, LBJ Library available at http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/rauh_joseph_1969_0730.pdf (“Rauh Oral History”).

² In 2000 the New York Times noted: “as lawyers continue to wage the legal battles across Florida that will determine whether Gov. George Bush of Texas or Vice President Al Gore goes to the White House, the famous 1948 election has cropped up once again, as historians, reporters and Texas politicians here have traced some intriguing parallels between the two elections.” *Florida Vote Evokes Texas Squeaker*, NEW YORK TIMES, Nov. 19, 2000, at 29.

³ In the present instance, the federal trial court’s and the Fifth Circuit’s complete files are preserved in the Southwest Branch of the National Archives in Fort Worth (“NARA-SWB”); the U.S. Supreme Court’s file is in the National Archives in Washington, D.C. (“Nat’l Archives”); the Travis County District Court’s file is on microfilm in the Office of the District Clerk of Travis County, Texas in Austin, Texas (“Travis Cty. Dist. Clerk’ Off.”); and the Supreme Court of Texas’ file is in the Texas State Archives in Austin (“Tex. St. Archives”). Transcripts of the oral history interviews with certain of the lawyers are available at the Lyndon Baines Johnson Library (“LBJ Library”) and over the Internet.

⁴ Access to the lawyers’ “client files” would be additionally informative, but here, as usual, such records are not generally available. See Ad Hoc Committee on Access to Lawyers’ Files of the Organization of American Historians, REPORT (1994), available at www.h-net.org/n_law/access.htm. The Lyndon Baines Johnson Library in Austin contains interviews with many of his lawyers and two of Stevenson’s attorneys involved in the 1948 litigations. All the lawyers who worked these cases have died.

or notable figures such as LBJ, oral history interviews of participating attorneys. Such research materials exist for the litigation under study, presenting a useful opportunity to investigate the “lawyering” of this particular election dispute.

Over the past 60 years, usage of the term “lawyering” has skyrocketed in law practice, court decisions, and in legal studies, and a survey of the contemporary legal literature shows that the term is used as a commonplace and generally assumed not to need definition.⁵ For instance, the legal lexicographer Bryan A. Garner defines “lawyering” blandly and quite briefly as “a neutral term to describe *what they [lawyers] do*, and even as a term of praise in the collocation creative lawyering.”⁶ But what is it that lawyers really “do”? An American Bar Association task force has identified the “fundamental lawyering skills essential for competent representation” as “problem solving[,] legal analysis[,] legal research[,] factual investigation[,] communication[,] counseling[,] negotiation[, and] litigation . . .”⁷; and certainly lawyers do all of those things, but that laundry list of discrete skill sets does not capture the essence of lawyering. More usefully, in their law-school text, Stefan H. Krieger and Richard K. Neumann, Jr. describe the “craft” of lawyering: “A lawyer’s job is to *find a way*—to the extent possible—for the client to gain control over a situation.”⁸

Having not found a truly useful definition of “lawyering,” I have elsewhere attempted to formulate a definition that, taking a cue from Krieger and Neumann, is functional and result-oriented:

“Lawyering” is the work of a specially skilled, knowledgeable, or experienced person who, serving by mutual agreement as another person’s agent, invokes and manipulates, or advises about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the status quo for his or her principal.⁹

⁵ For examples of authors freely using the term but neglecting to define it, consider: JAMES C. FREUND, *LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE 1* (1979)(“here’s how you do it”); HELENE E. SCHWARTZ, *LAWYERING ix* (1976)(“[this book] is about the art of lawyering”); AUSTIN SERRAT AND STUART SCHEINGOLD, eds., *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY* (1998); STUART SCHEINGOLD, *CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA* (2001); Bryn Vaaler, *Bridging the Gap: Legal Opinions as an Introduction to Business Lawyering*, 61 UMKC L. REV. 23, 27 (1992).

⁶ BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE*, *Lawyer, lawyering* (1987) at 332 (emphasis).

⁷ AMERICAN BAR ASS’N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: *NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES 3* (1992).

⁸ STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* (2d ed., 2003), at 7. For an inferior formulation, see Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 25-26 (2005)(“Traditional lawyering . . . focuses on courtroom and client advocacy in an adversary system. . . . Where a lawyer advocates for a client, the lawyer’s duty is to *help the client win by creatively arguing that the client has complied with law or has a stronger case than the opposing party.*”)(emphasis added).

⁹ Josiah M. Daniel, III, *A Proposed Definition of the Term “Lawyering,”* 101 LAW LIBRARY J. 207, 215 (2009).

The lawyering of a dispute or transaction in an earlier time may therefore be referred to as “historical lawyering.” Historical lawyering is a nascent topic within the broad field of legal history.¹⁰

This paper proceeds from that perspective and seeks to contribute to that study by reviewing the fundamental legal papers and the efforts of the attorneys working for the opposing candidates in this significant post-election litigation at mid-twentieth century. Utilizing both the Krieger-Neumann generalization and my definition of lawyering, this paper seeks to assess the “job” each of the opposing teams of lawyers “did” in attempting to “caus[e] a desired change in, or preserve[e], the status quo of” the post-election situation for its candidate-client, during three hectic weeks in September and October 1948, by telling the story chronologically¹¹ and by investigating how the attorneys engaged by both sides, who were preeminent practitioners of their day in Texas, with an admixture of prominent Washington lawyers on LBJ’s team at the end, moved along the civil litigation path, cobbling together ad hoc strategies and tactics under pressure and in a highly compressed time frame, formulating legal theories and drafting pleadings to advance their objectives, selecting fora and judges (both state and federal), invoking—and often ignoring—applicable procedural rules, developing evidence and dealing with problems of proof or eschewing evidence altogether, seeking and obtaining from trial-court judges injunctive relief of various types, sometimes very late at night or very early in the morning, and, finally, maneuvering through appellate processes toward the desired “control of the situation” for the client.

This study correcting improving the biographers’ account of these three weeks of litigation between Johnson and Stevenson, this article shows how the candidates’ lawyers actually worked to preserve or to achieve electoral victory despite or in the face of the fraud that tainted the last votes. In the end, it was superior lawyering by the Johnson team that preserved his 87-vote electoral victory.

B. The Incomplete Accounts of Caro and Other Biographers

The 1948 Texas Democratic senatorial primary runoff election battle between Lyndon B. Johnson and Coke Stevenson was a significant political event that has been extensively chronicled. All the major biographies of LBJ tell the story, and some of the participants, such as LBJ’s campaign manager, John B. Connally, have published reminiscences about it,¹² while many others, particularly Johnson supporters, gave oral history interviews after LBJ left the White House. The most important biographies have been published in the past twenty years. The first is Robert Caro’s critical biography, *The Years Of Lyndon Johnson: Means Of Ascent* (1990),¹³ which is the second volume in his projected quartet and specifically focuses on the

¹⁰ See, e.g., WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH* (1999); MICHAEL H. HOEFELICH, ed., *SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING* (2008); Brian Dirck, *LINCOLN THE LAWYER* (2007); Felice Batlan, *The Ladies Health Protective Association: Lay Lawyers and Urban Cause Lawyering*, 41 *AKRON L. REV.* 701, 704-05 (2008).

¹¹ The form of my inquiry was inspired in part by a lecture I heard in 1975 in which Irving Younger recounted the story of the lawyering that began with an accident and led to the filing of a personal injury lawsuit that resulted to the Supreme Court’s *Erie RR. v. Tompkins* decision. See Irving Younger, *What Happened in Erie*, 56 *TEX. L. REV.* 1011, 1012 (1978).

¹² JOHN CONNALLY, WITH MICKEY HERKOWITZ, *IN HISTORY’S SHADOW: AN AMERICAN ODYSSEY* (1993).

¹³ ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* (1990).

1948 primary election and resulting litigation as emblematic of Johnson's character. The second is Robert J. Dallek's *Lone Star Rising* (1991),¹⁴ the first of his two-volume biography. Two others are helpful, Ronnie Dugger's 1982 biography of LBJ¹⁵ and James Reston, Jr.'s 1989 biography of Connally.¹⁶

That Johnson won the election by 87 votes as a result of very late ballots reported from the Counties of Jim Wells, Duval, and Zapata, counties dominated by political bosses in the Rio Grande Valley, by persons absent, ineligible, or deceased is well known, even the stuff of folklore.¹⁷ Caro argues that LBJ's campaign and his resulting election victory was a watershed event, not only for Johnson, who catapulted to political power in America as a result,¹⁸ but also for "the transformation of American politics in the middle of the twentieth century" which he describes as the triumph of the "new politics" that utilized electronics, technology, and the media over the "old politics" of a lone campaigner lacking modern electioneering tools.¹⁹ All the biographers and political historians tend to concur.

What was less well known, until Caro first described it, is the detailed story of the litigation between the two candidates over the certification of Johnson's nomination at the State Democratic Convention in Fort Worth on September 13, 1948. While Caro's book drew criticism from reviewers, and the Dallek biography was acclaimed "fairer,"²⁰ it is Caro who has provided the most factually detailed account not only of the politics and the campaign but also of the litigation cauldron in which that nomination was tested and from which, after three see-saw weeks, Johnson emerged victorious.²¹ Any attempt to understand *LBJ v. Stevenson* should begin with Caro's extended account, supplemented by Dallek and other biographers who offer some additional facts.

However, Caro is a journalist by training and veteran biographer by experience,²² Dallek is a political historian, Dugger is another journalist, and Reston is a novelist and journalist. It is not a diminution of their work to observe that each overlooked some primary and secondary sources pertinent to the history of the litigation,²³ misunderstood some elements and aspects of the legal proceedings, and generally failed to plow the ground as a legal historian or historically

¹⁴ ROBERT J. DALLEK, *LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES, 1908-1960* (1991). Another important biography is RANDALL J. WOODS, *LBJ: ARCHITECT OF AMERICAN AMBITION* (2006).

¹⁵ RONNIE DUGGER, *THE POLITICIAN: THE LIFE AND TIMES OF LYNDON JOHNSON: THE DRIVE FOR POWER, FROM THE FRONTIER TO MASTER OF THE SENATE* (1982).

¹⁶ JAMES RESTON, JR., *THE LONE STAR: THE LIFE OF JOHN CONNALLY* (1989).

¹⁷ NAT'L PUBLIC RADIO, *Weekend Saturday, Johnson's Senatorial Election in 1948*, (August 15, 1998)(the guest, columnist Sam Attlesee of the Dallas Morning News, remarked about Ballot Box 13, "somebody has it down there"). See also Kent Biffle's *Texana, Reliving the Scandal of Box 13*, *DALLAS MORNING NEWS* (Mar. 25, 1990) at 43A.

¹⁸ In January 1955, he became Majority Leader of the Senate; in January 1961, Vice President; and when President Kennedy was assassinated on November 22, 1963, President.

¹⁹ Accord DALLEK *supra* note 14 at 198, 207. See also PAUL K. CONKIN, *BIG DADDY FROM THE PEDERNALES: LYNDON B. JOHNSON* (1986) at 118 ("This close, contested, corrupt election proved the most important turning point in Johnson's political career.")

²⁰ Caro's Chapter 13 is entitled "The Stealing."

²¹ Caro's account covers his pages 322-84. In contrast, Dallek devotes only 11 pages to the litigation.

²² His first volume on LBJ is *THE YEARS OF LYNDON JOHNSON: PATH TO POWER* (1982). Before that, he wrote an acclaimed biography of Robert Moses, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

²³ For example, Caro did not find the published memoirs of the federal district judge. See note 110 *infra*.

mindful lawyer would have done.²⁴ This paper incorporates the lawyers' pleadings and briefs, the court documents, and the legal positions of the parties into as accurate as possible a description of the three weeks and analyzes the episode with particular reference to the ways the numerous lawyers went about their jobs in initiating and defending the resulting multiple, sometimes simultaneous, lawsuits and proceedings in a very short period of time, all with the goal of gaining control of the election for their respective clients.

C. LBJ's 87-Vote Margin of Victory

Texas was a one-party state in 1948; winning the Democratic Party primary was tantamount to winning the general election. The favored candidate was the popular former governor, 60-year old Coke Stevenson. LBJ was a 40-year old, six-term Congressman from a rural district in Central Texas; he had run for the Senate six years earlier, losing in a runoff election by a tiny margin to another governor, W. Lee ("Pappy") O'Daniel. He was bored in the House, did not file for reelection, and staked his political career on his candidacy for Senate, which he declared on May 12, 1948, only days before O'Daniel announced that he would not stand for reelection.

Johnson campaigned feverishly, even utilizing for the first time in American politics a helicopter to draw attention to his message and to campaign more speedily from town to town. Stevenson relied on his widespread popularity and did not actively campaign. In the original primary election on July 24th, Stevenson and Johnson finished first and second, respectively, with Stevenson leading by 71,460 out of 1.2 million votes cast in a field of 12 candidates.²⁵ For the necessary runoff election five weeks later, LBJ electioneered ceaselessly. He had raised and spent unprecedented amounts of cash from Texas and Eastern contributors in the initial primary and had enjoyed the support of Texas businessmen such as George and Herman Brown, the principals of the Texas-based contracting firm, Brown & Root; and during the runoff he continued to enjoy that support and to spend freely. Once again, Stevenson did not actively campaign.

The runoff election was held on Saturday, August 28th. As was the custom, after the polls had closed and tallies had been made, the county election officials around the state telephoned their vote totals to the Texas Election Bureau, the unofficial tabulator sponsored by Texas newspapers. The results favored Stevenson on Election Night and for the next five days with the margin varying from 854 to 31.²⁶ But after noon on Friday, September 3rd, six days after the polls had closed, the very last votes, numbering 202, came in from Precinct 13 in Jim Wells County, with 201 for Johnson and only one for Stevenson, and that last surge provided

²⁴ According to his endnotes, except for the federal district court's trial transcript, Caro did not review the underlying lawsuits, appellate case papers, and the various courts' orders and decisions, relying instead on oral history interviews and newspaper accounts, in an attempt to understand the legal battle. He failed, for instance, to find the original mandamus proceeding in the initiated by LBJ's counsel, and he did not cite the pleadings and orders of the multiple cases in the archives and various courts' clerks' files.

²⁵ *Tabulation of Votes Cast for Each State Office Candidate in Democratic Primaries of 1948*, attachment to Vann M. Kennedy, Secretary, State Democratic Executive Committee, to Clerk, U.S. District Court, Sept. 20, 1948, undocketed letter in file of Stevenson v. Tyson, Case No. 1640, U.S. District Court, Northern District of Texas, NARA-SWB.

²⁶ CARO, *supra* note 13, at 312-16.

LBJ's ostensible margin of victory, 87 votes. Allegations of voting irregularities arose immediately.

Johnson's biographers have written, and his confidantes have stated in oral-history interviews,²⁷ that LBJ had learned a lesson from his extremely close defeat by Pappy O'Daniel in the senatorial primary race of 1941, a loss he believed to be due to the latter's employment of fraudulent, decisive votes at the last minute, after all of LBJ's votes had been reported.²⁸ In the days after September 3rd, each candidate accused the other of vote fraud, and one popular Texas historian writes that "Johnson's men had not *defrauded* Stevenson, but successfully *outfrauded* him."²⁹ Yet, while he alleged in radio broadcasts³⁰ and in his federal court pleadings that Stevenson was guilty of even greater vote fraud, LBJ's counsel never introduced any evidence of it in court or in public. In the federal district court hearing, Stevenson's lawyers did introduce specific evidence, testimonial and documentary, of vote fraud that Johnson's lawyers failed to rebut or even to cross-examine. In his biography of LBJ, Caro says simply that whatever Stevenson's allies may have been doing in Austin during those days immediately after the election, the candidate himself was relaxing back at this ranch³¹; and elsewhere Caro has at length attempted to negate the Johnson camp's allegation of fraud on the part of Stevenson.³²

In 1948, certain Texas counties in the Rio Grande Valley were still under the domination of local political machines.³³ In Duval County, the boss was George Parr, the "Duke of Duval," and his power extended to other counties in the Valley. Duval County initially reported 4,197 votes for LBJ and 40 for Stevenson, later increasing Johnson's total by 425 ballots. Parr had caused votes to be cast for every single poll tax receipt in the county, and he had no more capacity to add votes; but his ally Ed Lloyd, the political boss in Jim Wells County, could and did add more, including those last 202 votes on September 9th.³⁴ When he learned the news of the very tardy results from the boss-controlled Counties of Duval, Zapata, and Jim Wells, Stevenson was outraged, and he took immediate action.

Time was short for Stevenson. One thing that Caro notes, but fails to explain clearly, and that is critical to an appreciation of both sides' litigation tactics after the State Convention, is why the date of October 2nd was the critical deadline to achieve control of the nomination. The Texas primary election statutes created a very tight time frame. By law, when a primary election, then held on the next to last Saturday of July, did not produce a majority for one candidate, the runoff election was required to be exactly five weeks later, a date falling in the last

²⁷ Oral history interview of George R. Brown by David G. McComb, July 5, 1972, at 5, LBJ Library http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/brown_george_1969_0806.pdf.

²⁸ GEORGE NORRIS GREEN, *THE ESTABLISHMENT IN TEXAS POLITICS: THE PRIMITIVE YEARS, 1938-1957* (1979) at 36-37.

²⁹ T.R. FENRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* (1968) at 659 (emphasis original).

³⁰ CARO, *supra* note 13, at 319 & 333.

³¹ CARO, *supra* note 13, at 313.

³² Robert A. Caro, *My Search for Coke Stevenson*, *NEW YORK TIMES BOOK REVIEW* 1 (Feb. 3, 1991).

³³ EVAN ANDERS, *BOSS RULE IN SOUTH TEXAS: THE PROGRESSIVE ERA* (1982); J. GILBERTO QUESADA, *BORDER BOSS: MANUEL B. BRAVO AND ZAPATA COUNTY* (1999). See also DALLEK, *supra* note 14, at 329 ("an area notorious for boss rule, bloc voting, and doctored ballots").

³⁴ The encyclopedia of Texas history states: "The famous Box 13, which gave Johnson his eighty-seven-vote victory, was actually in Jim Wells County, but the manipulation of the returns was almost certainly directed by Parr." *HANDBOOK OF TEXAS, Duval County*, available at <http://www.tshaonline.org/handbook/online/articles/DD/hcd11.html>.

few days of August. The State Convention always followed two and a half weeks later. Upon certification of candidates by the State Convention, the Texas Secretary of State was then required by statute to prescribe to the 254 county clerks the forms of official ballots to be used in the general election on the first Tuesday of November. A Texas statute further required each county clerk to post publicly for 10 days the names of all the candidates to appear on the ballot at the general election and after that to provide absentee ballots to voters for the next 20 days.³⁵

In an affidavit submitted to the U.S. Supreme Court at the end of the three weeks, the Texas Secretary of State, Paul Brown,³⁶ explained the statutory time frame:

[The state statutes] mean that I should have in the hands of each of the 254 County Judges of the State of Texas, a sample ballot to contain the names of the nominees for each party *not later than October 2*. As a practical matter, in view of the fact that the means of communication with many of the 254 counties is limited to railroad or bus line, I must send out those blanks several days in advance of October 2 . . . Before sending out such blanks, I must have the proof prepared by the printer, proofread the same and the printing completed in advance of the time before the same are placed in the mail . . .³⁷

Thus, in the three weeks of litigation, all of the lawyers always had their eyes on October 2nd as the critical moment toward which they worked to secure the placement of their respective client's name on the general-election ballot in the slot for the Democratic Party candidate for U.S. Senator.

A lawyer himself,³⁸ Stevenson quickly put together teams to go to the Rio Grande Valley to investigate what had happened. First, he sent one team, headed by San Antonio attorney Pete Tijerina, to Duval County to interview residents. Many who were certified as having voted there informed Tijerina that they had not voted and that their county commissioner had picked up their poll tax receipts and voted them. However, no notary public in that county was willing to notarize the witnesses' statements. Soon Duval County Sheriff's deputies, including one carrying a submachine gun, stopped Tijerina and his team, spread-eagle searched them, and informed them that they had half an hour to depart the county, which they did.³⁹

Second, Stevenson asked three attorneys to investigate the matter in Jim Wells County: Callan Graham, a young lawyer in Junction with strong ties to Stevenson, and two San Antonio law partners, Kellis Dibrell and James Gardner, who were former FBI agents.⁴⁰ When they arrived in Alice, the county seat, on Tuesday, September 7th, they saw groups of unshaven men

³⁵ Tex. Penal Code sec. 206 (1948 version).

³⁶ The Texas Secretary of State was a party to the original mandamus proceeding in the Texas Supreme Court, but not to the proceedings in the U.S. Supreme Court. Caro misidentifies him as Ben Ramsey, who succeeded Brown as Secretary of State but not until the following year, 1949. CARO, *supra* note 13, at 338.

³⁷ *Affidavit of Paul H. Brown*, September 25, 1948, Ex. F to Johnson's Supp. Motion for Stay filed October 4, 1948, in *Johnson v. Stevenson*, unnumbered proceeding, U.S. Sup. Ct., Nat'l Archives.

³⁸ In addition to ranching, Stevenson practiced law for more than 50 years, continuing to practice into his seventies. *See, e.g.*, *Abilene Christian College v. Landers*, 371 S.W.2d 97 (Tex. Civ. App.—El Paso 1963) (the last reported case in which Stevenson, then age 75, appeared as counsel for a party).

³⁹ CARO, *supra* note 13, at 322-23.

⁴⁰ Dallek says Gardner went there at a later time, with Stevenson. DALLEK, *supra* note 14, at 332.

wearing pistols and carrying rifles along Main Street. The three were armed only with a book on election law,⁴¹ and they intended to inspect the election tally sheets and the voters' sign-in sheets, as Texas election law clearly provided any citizen may do.

The lists were in the possession of Tom Donald, the outgoing Chair of the county's Democratic Executive Committee and the cashier of Parr's Texas State Bank of Alice. In the bank office, the lawyers informed Donald that they were attorneys for Stevenson, cited the Texas statute that any citizen may inspect voting records, and asked to see the lists. Donald responded: "I know that. But you can't see them because they're locked up in that vault, and I'm not going to unlock the vault. That's why you can't."⁴² The lawyers concluded that the lists contained proof that the critical 202 votes had been added to LBJ's total after the polls had closed. From there the lawyers went to see "reform" members of the county's Democratic Party Executive Committee, one of whom had seen the subject tally list for Precinct 13 and had noticed that the last 202 names on the list were written in alphabetical order and in a different ink color, blue rather than black.⁴³

Third, with his teams of investigating lawyers stymied, Stevenson himself went to Jim Wells County, and he took an old friend, the legendary former Texas Ranger, Frank Hamer, who wore his sidearm during the trip.⁴⁴ In Alice they met up with Dibrell and Gardner at a hotel; and in a scene Caro characterizes as reminiscent of the Old West, the Stevenson party walked 200 yards down Main Street to the bank as various groups of armed men in their path gave way. Inside the bank, with one reporter also present, Stevenson cited the election law and demanded to see the list. Donald pulled the Precinct 13 tally sheet and voter list out of his desk, and Dibrell and Gardner studied them. When they began to scribble notes, Donald yanked the papers back.⁴⁵

But the two lawyers had had time to observe not only that the last 202 names were in a different color ink but also that the grand total figure on the tally sheet had been changed from 765 to 965 – a loop had been added to the 7 to make it a 9, representing 200 additional votes for LBJ. The attorneys then located several of the persons on the list who gave affidavits that they had not voted; and the lawyers also discovered that a number of the additional voters were deceased. Stevenson prepared his own affidavit recounting these findings and filed it with the County Clerk of Jim Wells County; and he petitioned the Jim Wells County Democratic Executive Committee to meet and certify a new, corrected county tally.⁴⁶

⁴¹ In 2000, at age 86, Graham remembered, "It was scary going into town that day. It's pretty funny now, but all I had was a law book." *Election Confusion, Texas Style: 1948 Primary Snared LBJ, Ex-Governor In Vote-Fraud Tangle*, DALLAS MORNING NEWS, Nov. 19, 2000 39A, 51A. Caro does not identify the book, CARO, *supra* note 13, at 323, but it must have been the then-recently issued pamphlet, GEORGE SERGEANT, *MANUAL OF ELECTION PROCEDURE COMPILED FOR THE TEXAS DEMOCRATIC STATE EXECUTIVE COMMITTEE* (1945).

⁴² Oral history interview of Callan Graham, Aug. 10, 1978, at 18, LBJ Library, (http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/graham_callan_1978_0810.pdf) ("Graham Oral History"). See CARO, *supra* note 13, at 324.

⁴³ CARO, *supra* note 13, at 323-24.

⁴⁴ Hamer had served as a Texas Ranger for three decades, was wounded 17 times, had killed 53 men, and was the officer who had tracked down and killed the outlaws Bonnie Parker and Clyde Barrow in Louisiana in 1934. In 1948 he was employed by Texas Oil Company. H. GORDON FROST AND JOHN H. JENKINS, "I'M FRANK HAMER": *THE LIFE OF A TEXAS PEACE OFFICER* (1968).

⁴⁵ CARO, *supra* note 13, at 328.

⁴⁶ *Id.* at 325, 327-330.

On September 9th, the county Committee adopted a resolution addressed to Vann Kennedy, the Secretary of the Texas Democratic Party Executive Committee. Signed by Harry Lee Adams, the new county chair and H.L. Poole, the secretary of the committee, the certificate of the Committee, which was later introduced into evidence at the September 21st hearing in federal district court,⁴⁷ recites that a meeting of a quorum of the committee had been held on September 8th “to consider . . . the complaint of Coke R. Stevenson as to fraud and irregularities in the voting in Election Precinct No. 13,” and that “evidence was heard” regarding the change in the returns for Precinct 13 from 765 for LBJ and 60 for Stevenson to 967 for the former and 61 for the latter. It further stated that the “Poll List, Voters List and the Returns” ought to be examined but such documents were in the possession of Donald who “has refused to surrender said returns to the present Chairman.” The certificate concluded that, because it is unable to determine the correct vote, “the State Democratic Executive Committee should investigate and determine the number of votes received by each candidate in Election Precinct No. 13.” The certificate ends with a certification of the County Clerk of Jim Wells County attesting that Adams is “the duly elected, qualified and acting Chairman” of the county committee.

There things stood, on the eve of litigation.

II. The Three Weeks of Litigation

A. LBJ’s Lawyers File Suit in the State Court System and Gain Initial Control

1. *Friday, September 10*

When Johnson learned of the September 8th meeting and of the Adams-Poole report to the State Executive Committee is unclear; but while Stevenson and his team were wrapping up their evidence gathering and other efforts, Johnson’s lawyers apparently learned on Friday, September 10th, that the new leadership of the Jim Wells County committee was preparing to meet again on Saturday, September 11th for the purpose of making a corrected return of votes to the State Executive Committee.⁴⁸ On that Friday, the last business day before the State Convention was to commence on Monday, Johnson filed the first lawsuit. In the petition, Johnson’s attorneys expressed their client’s concern that the Jim Wells County committee would in fact be meeting the next day for the purpose of changing the county’s certification of votes that had been made to the Secretary of the State Democratic Party.

The pleading reflects haste on the part of LBJ’s counsel. On September 10th, Alvin J. Wirtz, a former state senator and Johnson’s long-time personal lawyer and confidante who had played a significant role in the campaign, and his law partner, Everett L. Looney, filed the petition initiating the state court suit styled *Lyndon B. Johnson v. Coke R. Stevenson, et al.*⁴⁹ Named as defendants were Stevenson, Hamer, Dibrell, and nineteen members of the Jim Wells County Democratic Party Executive Committee, but not Tom Donald. The pleading is untitled

⁴⁷ Plaintiff’s Ex. 9, *Stevenson v. Tyson*, Case No. 1640, U.S. District Court, Northern District of Texas, at 1-2, NARA-SWB. Caro seems not to have overlooked this source.

⁴⁸ The AUSTIN AMERICAN-STATESMAN reported on Saturday, September 11th, that the Committee was going to meet again that day, so it is not surprising that Johnson’s lawyers learned of it the preceding day.

⁴⁹ Judges Civil Docket, District Court, Travis County, No. 81686, Travis Cty. Dist. Clerk’s Off.

but its jacket was labeled “Petition for Temporary Restraining Order.”⁵⁰ The line of the caption for designation of the county of suit was typed as a blank and filled in by hand at the last moment. Rather than in Jim Wells County, the site of the events and involved persons regarding Ballot Box 13, the Plaintiff’s attorneys filed the suit in Travis County, the county in which the state capital Austin is situated and the place LBJ was located at that time.

The Petition contains five paragraphs of allegations and a prayer. First, LBJ asserted that he “received a majority of the votes for nomination as a candidate for said office as the returns of said election were duly and legally canvassed by the County Executive Committees of the several counties wherein such election was held.” He then alleged that

the Defendants herein named have entered into a conspiracy and are acting together for the purpose of causing the Democratic Executive Committee of Jim Wells County to alter and change the returns from said County. . . . Stevenson, together with Defendants Dibrell and Hamer, have gone into Jim Wells County and, by threats and intimidation, have attempted to have the votes of one or more of the voting boxes in said County eliminated from the official canvass and official returns and to have new returns forwarded to the State Executive Committee, taking votes from Plaintiff in sufficient number to change the result of the election.⁵¹

Further allegations stated that Adams met with others at a private residence to plan how “to throw out and disregard the votes in Precinct No. 13 of said County on the ground of ‘fraud and irregularities,’” citing a statement said to have been made by Poole to the Houston Chronicle newspaper, and alleged that the committee had no authority to determine the charges of illegality or irregularity of votes in the election. If not restrained, the Defendants would “irreparably injure and damage Plaintiff and deprive him of his statutory rights.” Because Stevenson, Hamer, and Dibrell were seeking “by force and threats” to obtain the committee meeting, Johnson requested issuance of a temporary restraining order without notice, preventing the Defendants “from recanvassing . . . the returns” and from sending to the State Executive Committee any return different from the prior one.⁵² The pleading alleges no venue facts, and it cites none of the Texas Rules of Civil Procedure, which had been in effect since 1939 and included specific rules governing injunctive practice. Nor does the pleading cite any case law.

The pleading was signed by Wirtz⁵³ and Looney. Attached are an affidavit and a jurat by LBJ. In the affidavit, he swore that he had determined, after his own telephone inquiry, that the resident judge of Jim Wells County was presently in another county, too distant to be reached for presentation of the petition. The last sentence declares “The best information affiant has been able to obtain is that the defendant Adams will at any moment, unless restrained, seek to make a

⁵⁰ Petition for Temporary Restraining Order, No. 81686, file-marked Sept. 10, 1948, 9:50 P.M., Travis Cty Dist. Clerk’s Off.

⁵¹ *Id.*, para. II.

⁵² *Id.*, para. “Prayer.”

⁵³ Caro states that “Looney’s name came first; Wirtz never put his name first on anything if he could help it.” CARO, *supra* note 13, at 335. But Wirtz’s name and signature as counsel for LBJ is clearly first not only on this state court petition but also on several of LBJ’s papers filed in the federal cases.

new tabulation and certification, for which affiant prays for injunction to prevent.”⁵⁴ In the jurat, Johnson swore that “I am the person named as Plaintiff I am familiar with the facts alleged in said petition, and the facts therein alleged are true.”⁵⁵ Caro found a “pattern” in the legal struggle from this opening volley to the final battle: Stevenson trying to open and LBJ trying to keep closed the record of voting in the three Rio Grande Valley counties.⁵⁶

Caro reports correctly that Looney presented the petition to Judge Roy C. Archer, one of the District Judges in Austin; but he does not mention that the Travis County Courthouse had been long closed when the papers were filed with the District Clerk at 9:50 P.M., according to the Clerk’s handwritten notation on the file-stamp.⁵⁷ No notice was provided to Stevenson or anyone else; the relevant rule of civil procedure provided that “No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.”⁵⁸ Archer signed the Temporary Restraining Order, which had been drafted by Johnson’s counsel, reciting that the county committee will, unless restrained, recanvass or recount the votes “contrary to the provisions of the statute,” which is not identified, and it refers to the meeting of the State Democratic Executive Committee that was to begin on Monday, September 10th in Fort Worth. The TRO enjoins the Defendants for a period not to exceed ten days unless extended for a like period. Finally, the TRO set the “application for temporary injunction”—by which must have been meant the Petition for TRO—for hearing at 10:00 A.M. on September 13th “in the District Courtroom” at the Courthouse in *Alice*, the county seat of Jim Wells County. Last, the TRO directed the Clerk to issue notice to the Defendants of the TRO and of the September 13th hearing conditioned on Plaintiff posting a bond, the amount of which Judge Archer hand-wrote as “\$500.00.” Johnson signed a bond as principal, and Wirtz and Looney signed as sureties. The TRO and the Bond are file-marked 9:55 P.M., five minutes after the petition was filed, so if a hearing was held, it was extremely abbreviated. The Clerk then sent telegrams notifying defendants of the TRO.⁵⁹

That is the end of the file in the District Clerk’s office in Travis County except for a notation at the foot of the official minutes of the District Court that “The original papers in this cause were transmitted to Jim Wells County, Texas, upon request of Plaintiff.” The Clerk retained photostatic copies. No motion to transfer venue was filed; the “request of Plaintiff” must have been oral, and apparently Plaintiff’s counsel took those original papers from the Travis County Courthouse and delivered, or somehow caused their delivery, during the weekend to the District Court in Jim Wells County, where the cause was assigned Case No. 8376 in the 79th District Court, because on Monday morning, September 13th, Judge Lorenz Broeter of that District Court commenced the temporary injunction hearing in Alice. That was about the same time the State Convention opened in Fort Worth. LBJ’s counsel had accomplished their job of obtaining control of the situation over that weekend, preventing any possible recount in Jim Wells County.

⁵⁴ *Id.*, Affidavit dated Sept. 10, 1948.

⁵⁵ *Id.*

⁵⁶ CARO, *supra* note 13, at 334.

⁵⁷ Petition for TRO, jacket, No. 81686, Travis Cty Dist. Clerk’s Off.

⁵⁸ TEX. R. CIV. P. 680.

⁵⁹ CARO, *supra* note 13, at 335.

2. *Monday, September 13, 10:00 A.M.-3:00 P.M.*

On Monday, September 13th, the State Democratic Convention convened in Fort Worth, and the hearing in Judge Broeter's court commenced at 10:00 A.M. on that same date in Alice. Caro reports that George Parr himself strode into the courtroom and sat at Johnson's table.⁶⁰ Stevenson appeared by his counsel Wilbur Matthews, Adams appeared in person and by counsel, Dibrell did not answer or appear, Poole and seven other members of the county committee appeared without counsel, and ten other members of the committee appeared in person and by counsel and filed an answer stating that they did not wish to contest the application for injunction.

At mid-afternoon, after hearing some evidence and the legal arguments of both sides, Judge Broeter granted Johnson's counsel's motion to nonsuit Stevenson, Hamer, and Dibrell and overruled Adams' defensive pleas. The Court concluded that the Jim Wells County defendants, if not restrained, would canvass or recount the votes

by illegally passing on questions of law and mixed questions of law and fact contrary to the provisions of statutes [not identified] and will certify to the State Executive Committee a result other than that determine by a legal canvass [by which] the will of the electorate will be defeated and plaintiff will be irreparably injured⁶¹

Judge Broeter immediately signed and the District Clerk entered the Judgment and Order Granting Temporary Injunction. Stevenson had been restrained for about 60 hours; but the local Executive Committee remained under injunction not to attempt to recount votes.

Back at the convention, although they hoped the Jim Wells Executive Committee would be freed of the TRO so that it could meet and quickly issue a new certification of the Precinct 13 tally, the Stevenson lawyers were ready with the evidence of vote fraud that they had obtained in the Valley. After the temporary injunction was issued, the canvassing subcommittee of the State Democratic Executive Committee completed counting the votes on an adding machine, and the total favored Johnson by the 87 votes. On behalf of LBJ, attorney Charles I. Francis of Houston, argued to the subcommittee chair, "For this or any other committee to refuse to accept the vote as now certified would be violating a court order [Judge Broeter's injunction]."⁶² Nonetheless, the subcommittee voted 4-3 in Stevenson's favor, recommending to the Executive Committee to exclude those last 202 votes from Jim Wells County.

⁶⁰ Id. at 342.

⁶¹ Judgment and Order Granting Temporary Injunction, Case No. 8376, 79th District Court of Jim Wells County, Texas, certified copy of which is in the federal District Court's file, NARA-SWB.

⁶² CARO, *supra* note 13, at 344.

3. *September 13, 7:00 P.M. to Midnight*

On September 13th, at 7:00 P.M. the Executive Committee began its meeting. Stevenson attorneys Clint C. Small of Austin and Josh Groce of San Antonio presented some of the affidavits that the Stephenson team had gathered in the Valley to demonstrate fraud. LBJ's attorneys Francis and John D. Cofer joined by the Jim Wells County political boss, Lloyd, contended that the proof had been procured by threats and intimidation. After great contention and high and low drama,⁶³ by a final vote of 29 to 28, the Executive Committee of the party disregarded the subcommittee's recommendation and approved the certification of the Johnson's nomination at around midnight. Technically, a final vote of all delegates to the Convention remained to be taken the next day, but the Executive Committee's action precipitated a latent split among the delegates, and "Dixiecrat" delegations from Dallas and Houston who favored Strom Thurmond for President—and who would have voted for Stevenson—marched out the next morning, September 14th, clearing the path for a lopsided vote approving Johnson's nomination by the Convention delegates who remained.

B. Stevenson's Lawyers Move the Post-Election Dispute to the Federal Court System and Acquire Control

1. *Tuesday and Wednesday, September 14 and 15*

Stevenson determined to challenge the result. When he made the decision is unclear. Caro says it was after the Executive Committee's midnight vote.⁶⁴ However, Stevenson's lawyers had presented a strong case to the committee that the Jim Wells County return was based on fraudulent votes, and that evidence was in hand.⁶⁵ Stevenson must have known well beforehand that the evidence would be also available for use in any litigation; and with the party's State Convention process now closed, the decision to challenge through the courts was natural and indeed was probably anticipated by both sides.⁶⁶ Johnson had been the first to resort to litigation in state court, and Johnson's counsel probably anticipated any further litigation would be waged in that court system, but it was the litigation brought by Stevenson in the federal district court in Fort Worth that became the primary focus in the battle over the succeeding weeks.

⁶³ For instance, Wirtz saved one vote for LBJ by taking a proxy from an Executive Committee member who collapsed from ptomaine poisoning before the stricken man was taken away. The decisive vote was cast by Charlie Gibson, who had been rushed to the Convention at the last minute in the Brown & Root airplane, and who had been dragged by LBJ supporters into the meeting to cast that vote. CARO, *supra* note 13, at 348; DALLEK, *supra* note 14, at 335.

⁶⁴ CARO, *supra* note 13, at 352.

⁶⁵ Robert Calvert, the Chair of the State Democratic Party and later Chief Justice of the Texas Supreme Court, recalled in his oral history interview: "The evidence that was produced before the committee that evening left me convinced absolutely and without the shadow of a doubt that somebody had added two hundred votes in Box 13 in Jim Wells County for Johnson that were not actually cast for him." Oral history interview of Robert Calvert, May 16, 1971, at 15, LBJ Library, (http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/calvert_robert_1971_0506.pdf).

⁶⁶ One Johnson lawyer had shouted to Stevenson "have your day in court. We'll meet you there." CARO, *supra* note 13, at 351.

Stevenson is remembered, memorably in Caro's telling, as "Mr. Texas," the rancher and former Governor from 1941 to 1947, but he was also a lawyer⁶⁷ and a former Member and Speaker of the House of Representatives and Lieutenant Governor. For counsel, Stevenson turned to someone he had known well for more than 20 years, former Governor Dan Moody of Austin.⁶⁸ Co-counsel with him during the trial court phase were Clint Small of Austin and Connie C. Renfro of Dallas, both of whom had been members of Moody's legislative team in the Legislature from 1927 to 1931, and T.R. James and W.E. Allen, law partners in Fort Worth. Within a few days, Groce and Allen B. Connor of Fort Worth formally joined the team.

Youngest ever to serve in the office, Moody had served two terms as Governor of Texas at the end of the twenties. Before that, as a District Attorney from 1923 to 1925, Moody had successfully prosecuted the Ku Klux Klan; and as Texas Attorney General from 1925-1927 he had exposed the corruption of Governor Miriam A. ("Ma") Ferguson, who had been elected in 1924 as a surrogate for her husband James E. ("Farmer Jim" or "Pa") Ferguson, who had been impeached and removed from the governorship and forever barred from office in 1917. As Governor, Moody was a classic New South "business-progressive,"⁶⁹ which brought him into conflict with Wirtz, who was Ferguson-allied state senator in those days. Declining to run for a third term as Governor, Moody engaged in litigation practice in Austin beginning in 1931,⁷⁰ acquiring an excellent reputation as a skilled and highly respected litigator and appellate advocate in both state and federal cases.⁷¹

Moreover, Moody had run as a conservative, anti-Roosevelt Democrat in the U.S. senatorial primary election of 1941, finishing third to O'Daniel and Johnson⁷²; in short, he was no friend of LBJ.⁷³ Perhaps most importantly, Moody was familiar with major election litigation and court precedents in Texas, beginning with the litigation in the 1920s over the ineligibility of Pa Ferguson to stand for any office in the State,⁷⁴ continuing through controversies following the

⁶⁷ Caro reports that on September 2nd, the fifth day after the election, Stevenson was at the Travis County Courthouse "performing legal work for a rancher who was his neighbor in Kemble County." CARO, *supra* note 13, at 316.

⁶⁸ Stevenson had served as a State Representative during Moody's second gubernatorial term. Moody may have become involved in this representation as early as the week Stevenson sent Graham, Dibrell, and Gardner to the Valley to investigate. Graham recalled: "Dan Moody and Clint Small . . . were sort of the top lawyers on our side. Kellis Dibrell, Jim Gardner and myself and some other young squirt lawyers around were doing the legwork, as usually happens. We were going down and making an investigation and calling the information back or bringing it back to them." Graham Oral History, *supra* note 39, at 14.

⁶⁹ See GEORGE BROWN TINDALL, *THE EMERGENCE OF THE NEW SOUTH, 1913-1945* (1967) at 224-233 (defining "business progressivism" as an attenuated form of the Progressive Movement in the New South that, during the 1920s, emphasized public services and efficiency in state government). Moody was a classic business progressive governor in the twenties.

⁷⁰ NORMAN D. BROWN, *HOOD, BONNET, AND LITTLE BROWN JUG: TEXAS POLITICS, 1921-1928* (1984); Handbook of Texas, *Daniel James Moody, Jr.*, available at <http://www.tsha.utexas.edu/handbook/online/articles/MM/fmo19.html>; Josiah M. Daniel, III, *Business Progressivism in Texas: the Administration of Governor Dan Moody, 1927-1931* (M.A. Thesis, Univ. of Texas at Austin, 1986).

⁷¹ Many reported decisions in *Southwestern Reporter* reflect his appearance as counsel over a legal career of three decades.

⁷² EVAN ANDERS, *supra* note 30.

⁷³ Moody had had also political differences with Wirtz going back to his four years as Governor in the late 1920s; Wirtz had been an ally of the Fergusons and had opposed Moody's business-progressive legislative program.

⁷⁴ *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924); *Ferguson v. Wilcox*, 119 Tex. 280, 28 S.W.2d 526 (1930).

defections of many Democrats from the Democratic fold when the party nominated Alfred E. Smith of New York for President in 1928,⁷⁵ and finally with the state Democratic Party's continuous efforts to disenfranchise African-American voters throughout the era of the twenties, thirties, and forties.⁷⁶

Moody served as chief counsel for Stevenson.⁷⁷ According to Caro, it was Moody who formulated Stevenson's legal theory—that Johnson had deprived Stevenson of civil rights by obtaining the election by fraud—and elected to litigate Stevenson's complaint in the federal court.⁷⁸ This might seem an anomalous claim to make on behalf of Stevenson, who was a white, conservative Texas Democrat and no friend of minorities.⁷⁹ However, Moody and Stevenson knew that while a federal claim could be litigated in a state court,⁸⁰ they faced two substantial problems that precluded resort to state court in Stevenson's circumstances.

First, the case law contained several Texas Supreme Court precedents that grew out of the serial efforts of Pa Ferguson to get back on the ballot or to run his wife as a surrogate during the twenties and thirties. Most important was *Sterling v. Ferguson*,⁸¹ a 1932 decision that both Johnson's and Stevenson's attorneys cited throughout the litigation. In that year, by a very close margin, Ma Ferguson, Moody's predecessor, won the runoff for Democratic nomination for Governor over the incumbent, and Moody's immediate gubernatorial successor, Ross Sterling. Sterling filed a state court suit to contest the election, "alleging that Mrs. Ferguson received many illegal votes," and he obtained a TRO. The next day, the Fergusons filed with the Texas Supreme Court an application for writ of mandamus seeking to compel the Secretary of State to place Mrs. Ferguson's name on the ballot. Before the Supreme Court could rule, the state court

⁷⁵ *Love v. Buckner*, 121 Tex. 369, 49 S.W.2d 425 (1932).

⁷⁶ See, generally, CHARLES L. ZELDEN, *THE BATTLE FOR THE BLACK BALLOT: SMITH V. ALLWRIGHT AND THE DEFEAT OF THE TEXAS ALL-WHITE PRIMARY* (2004) ("ZELDEN, BLACK BALLOT").

⁷⁷ Although he signed the Complaint last of the four attorneys of record for Stevenson, he opened and closed in the hearing in the District Court, and he alone signed the appellate papers and alone appeared and argued in Justice Black's chambers.

⁷⁸ CARO, *supra* note 13, at 352.

⁷⁹ As Governor in 1943, Stevenson approved and signed the following odious resolution of the State Legislature:

That the Forty-eighth Legislature of the State of Texas go on record as declaring the following to be the public policy of this State:

1. All persons of the Caucasian Race within the jurisdiction of this State are entitled to the full and equal accommodations, advantages, facilities, and privileges of all public places of business or amusement, subject only to the conditions and limitations established by law, and rules and regulations applicable alike to all persons of the Caucasian Race.

2. Whoever denies to any person the full advantages * * * except for good cause applicable alike to all persons of the Caucasian Race * * * shall be considered as violating the good neighbor policy of our State.

Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824, 826 (Tex.Civ.App.—San Antonio, 1944). Dallek states flatly that Stevenson was a racist who had denounced the U.S. Supreme Court's *Smith v. Allwright* decision that had finally put an end to the all-white primary in Texas in 1944. DALLEK, *supra* note 14, at 316. Caro says that, while Stevenson may have been a segregationist, LBJ at that time had his own dismal record of voting against civil rights legislation. Caro, *My Search for Coke Stevenson*, *supra* note 29, at 1.

⁸⁰ For example, in 1944, certain legislation that Stevenson as Governor had approved was challenged in state court on grounds including the 14th Amendment of the U.S. Constitution. *James v. Gulf Ins. Co.*, 179 S.W.2d 397 (Tex.Civ.App.—Austin 1944). In his later petition for certiorari to the U.S. Supreme Court, Moody acknowledged that Stevenson could have gone to state court.

⁸¹ *Sterling v. Ferguson*, 122 Tex. 122, 53 S.W.2d 753 (1932).

dissolved the TRO, and Sterling appealed to the Court of Civil Appeals, which immediately certified the question to the Supreme Court.

The *Sterling* Court consolidated the two cases and reviewed the multiple Texas statutes governing the timing and conduct of party primary elections, which required issuance of the official form of ballot at least 30 days before the general election day. The Court concluded that, while the courts of the state do have jurisdiction to entertain election contest suits,

[t]he nominee of a political party who holds a certificate to that effect such as Mrs. Ferguson holds, gives that nominee *a certain definite standing*, and endows him, or her, with *a valuable right*, which may be enforced. . . . [T]he holder of a certificate such as that held by Mrs. Ferguson is entitled to have his, or her, name printed on the official election ballot until the certificate is set aside by a proper proceeding, such as an election contest; *provided that a contest filed in due time*. . . . [The statutes governing the time for issuance of the official ballot by the Secretary of State] mean that *such an election contest becomes moot*, and the issue no longer justiciable *when the time comes that a final judgment* adjudging the validity or invalidity of the election certificate *cannot be heard in time for the certificate of the Secretary of State to reach the county clerks* . . . in time for at least substantial performance of the duties prescribed by law *When that time arrives the contest case is moot and should be dismissed.*⁸²

The upshot was that the time period for election contests was extremely short; that was the result of the imperatives of the statutes governing primary and general elections that the Legislature had adopted over several decades. Because there was no time for Sterling to prove his allegations, the Supreme Court held that it was obliged to issue the requested mandamus to the Secretary of State.

Thus, under *Sterling*, not only did Johnson, as the holder of the nomination certificate from the State Convention, hold the benefit of “a certain definite standing and . . . a valuable right,” but there was only about three weeks within which to try to overcome that standing and that right through litigation in a state trial court, failing which the litigation would become moot. A mandamus action in the Supreme Court would be a remedy available to the certified candidate, not to the challenger.

Under Texas venue rules, the state courts in Austin would have been a proper state court venue. But Wirtz and Looney had already demonstrated their ability to secure favorable orders in the state court in Austin by obtaining the late-night TRO on September 10; and Judge Broeter in Alice, who was under the control or strong influence of Parr, had enlarged the TRO into a temporary injunction on September 13th after that case was transferred to his court. Indeed all of the state courts in the Valley were under the control of political bosses loyal to LBJ.⁸³ As Graham recalled: “it was useless to file a suit of any kind in Jim Wells County. Everybody’s against you there. It would be a farce to do that. We didn’t have much option but to go into

⁸² Id. at 135-37, 140 (emphasis added).

⁸³ ANDERS, *supra* note 30.

federal court. . . .”⁸⁴ Nor was there time for a statewide recount.⁸⁵ So Moody had to find a way to place the litigation in federal court.

At that time, federal civil practice had just undergone important changes. Only three months earlier Congress had revised and re-codified all statutes pertaining to the federal judiciary in Title 28 of the United States Code. The Federal Rules of Civil Procedure, which had been in effect for ten years but were still widely referred to among Texas lawyers as “the New Rules,”⁸⁶ required only “notice pleading” under Rule 8(a) with more specificity required for allegations of fraud under Rule 9(b); and the demurrer, formerly the source of much pretrial wrangling in federal practice, had been abolished in favor of the motion to dismiss under Rule 12, whether for lack of jurisdiction under subdivision (b)(1) or for failure to state a claim under subdivision (b)(6). Moreover, the Federal Rules clearly provided for injunctive and other equitable relief and for the appointment of special masters. But, then as now, federal district court jurisdiction is limited and depends on either diversity of citizenship—obviously lacking here—or else a federal question or other specific statutory authorization. Moody therefore had to formulate a *federal* claim, which he imaginatively did: that Stevenson, as *candidate* had been deprived of his civil rights.

Moody’s experience in civil rights voting litigation went back to the U.S. Supreme Court’s 1927 decision *Nixon v. Herndon*. That decision originated as a suit for damages by L. A. Nixon, an African-American dentist, against two El Paso election judges who had denied Nixon the right to vote in the 1924 primary election based upon the state’s 1923 white primary law. When the federal District Court dismissed that case, a writ of error was taken directly to the U.S. Supreme Court. The defendants’ El Paso lawyers then dropped out of the case; and when the scheduled oral argument was held in Washington on January 4, 1927, no one appeared to argue against Dr. Nixon’s NAACP-retained attorneys. Moody happened to be present in the Supreme Court that very day, ready to argue, as outgoing Attorney General, the next-scheduled case on behalf of the State of Texas. According to Nixon’s lead counsel, El Paso lawyer Fred C. Knollenberg, at the conclusion of the *Nixon v. Herndon* argument, Moody requested permission to file a post-submission brief in behalf of the State, and the Court granted the request.⁸⁷

Two weeks later Moody was sworn in as Governor, and the writing and filing of the brief for the State fell to the new Attorney General, Claude Pollard. Whether Moody participated in the drafting of the *Nixon v. Herndon* brief is unknown, but certainly he had learned about the issues and the legal principles involved, the attitude of the Supreme Court Justices, and the likelihood of the white primary law being held unconstitutional. Pollard’s brief argued that “political questions are not within the province of the judiciary.” The Supreme Court’s opinion, authored by Justice Oliver Wendell Holmes two months later, disposed of that argument as a “play upon words”; the recoverability of private damages caused by political action had been settled “for over two hundred years.” The Court invalidated the white primary statute as a “direct

⁸⁴ Graham Oral History, *supra* note 39, at 36.

⁸⁵ *Id.* at 40 (“You can’t possibly have a recount in that period of time.”)

⁸⁶ Neil N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79 (2006), The author began practice in 1978 in a law firm whose senior partners had begun their careers in the thirties and who, even in the seventies, referred to the Federal Rules as “the New Rules.”

⁸⁷ CONREY BRYSON, DR. LAWRENCE A. NIXON AND THE WHITE PRIMARY (1974).

and obvious infringement of the 14th.” Justice Holmes observed that there was no difference between denying the right to vote at a general election and denying the vote at the primary election that, ipso facto, determines the result at a general election. The white primary law discriminated against blacks “by the distinction of color alone,” and “color cannot be made the basis of a statutory classification affecting the right” to vote.⁸⁸

Later that year, Moody, now Governor, called a Special Session of the Legislature to enact new legislation to preserve the white primary in an altered form. As adopted, the new statute provided that “Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party.” The Democratic Party immediately adopted a resolution that “All white Democrats who are qualified voters under the Constitutions and laws of Texas . . . and none other, be allowed to participate in the primary elections.”⁸⁹ The NAACP then sponsored Dr. Nixon’s second effort to invalidate the All White Primary, and Moody must have been familiar with the defensive arguments of the Democratic Party there that the party was “private in nature” and that there was no state action involved within the meaning of the Fourteenth Amendment. In the resulting 1932 Supreme Court decision *Nixon v. Condon*,⁹⁰ Justice Benjamin Cardozo voided that new version of the white primary in 1932 on the ground that the state law unconstitutionally delegated to the State Executive Committee a power to unlawfully discriminate against black voters.

Moody must have been aware, finally, of the next iteration of the white primary, which was a resolution, adopted immediately after *Condon*, by the entire State Democratic Convention to the same effect as the prior Executive Committee resolution, excluding African-Americans. This version lasted until the Supreme Court invalidated the Texas all-white primary a third time in the 1944 cases *Smith v. Allwright*,⁹¹ holding the white primary system was indeed a violation of black voting rights pursuant to the 15th Amendment. That decision ended the All White Primary once and for all. It was also a decision then-Governor Stevenson had publicly denounced as a “monstrous threat to our peace and security.”⁹²

It is unknown whether Moody had been a delegate to the Convention, but certainly he was in Fort Worth at the time, and he met immediately with Stevenson and other lawyers who volunteered to represent him. According to Caro, Moody proposed that Stevenson “sue under the federal court’s [sic] statute because he had been denied a civil right: the right to have the votes in the primary counted honestly.”⁹³ Caro says that Stevenson called and awoke Groce in the early morning hours of Tuesday, September 14th and asked him to turn his convention report into a pleading.⁹⁴ The lawyers must have worked diligently through the day of September 14th

⁸⁸ *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁸⁹ ZELDEN, *BLACK BALLOT*, *supra* note 76, at 57. See also DARLENE CLARK HINE, *BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS* (2003).

⁹⁰ *Nixon v. Condon*, 286 U.S. 81 (1932).

⁹¹ *Smith v. Allwright*, 321 U.S. 649 (1944).

⁹² Stevenson quoted in DALLEK, *supra* note 14, at 316.

⁹³ CARO, *supra* note 13, at 352. Caro says that Stevenson had declared in an affidavit that while in Alice at the bank, “Stevenson advised [Donald] that I was being deprived of my rights under federal law,” so perhaps Stevenson had been mulling a theory that LBJ had violated his civil rights by the election fraud. In any event, Moody, Stevenson’s chief counsel, had substantial familiarity with voting rights litigation and precedents.

⁹⁴ CARO, *supra* note 13, at 352-53.

and into that night to complete Stevenson’s “Original Complaint,” which named two defendants, Tom L. Tyson, Chairman of the State Convention, and Vann Kennedy, the Secretary of the State Democratic Party. It averred that “[t]he rights and property involved in this action are nomination by the Democratic Party of Texas for the office of United States Senator from Texas” with emoluments of office of a value exceeding \$3,000, and it sought to restrain the defendants from certifying the nomination to the Texas Secretary of State.

In a succinct averment, the Complaint’s Paragraph III alleged that subject matter jurisdiction obtained under the civil rights jurisdictional statute, 28 U.S.C. § 1343, on four grounds:

The rights asserted in this action . . . and the right to invoke the jurisdiction of this Court to prevent the wrongs and threatened wrongs alleged, arise under [i] Section 4 of Article I and [ii] the Seventeenth Amendment to the Constitution of the United States, and [iii] under Section 43, Chapter 3, Title 8, United States Code, 1946, and [iv] under Sections 51 and 52, Chapter 3, title 18, United States Code, 1948, and under Sections 241 and 242, Title 18, United States Code, the Act of Congress of June 25, 1948; and jurisdiction of this Court of this action is [therefore] provided by Section 1343, Title 28, United States Code⁹⁵

Later, in Stevenson’s Fifth Circuit and U.S. Supreme Court papers, Moody and the Stevenson legal team elaborated their theory that the federal court had subject matter jurisdiction, but in the District Court they never cited or argued any case law supporting those disparate jurisdictional allegations. It was a broad effort to justify jurisdiction for a complaint in the nature of civil rights.

Paragraph III may be appraised as a “short and plain statement of the jurisdiction”; it simply recites the legal citations for several strands of law claimed to be applicable. First, § 4 of Article I of the Constitution simply provides that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”⁹⁶; there was no case law support for the idea that § 4 could be a source of a constitutional right that would support a cause of action to overturn a party nomination of a candidate for either house of Congress. Second, the idea for alleging a violation of the 17th Amendment probably came from *Smith v. Allwright*; in that opinion, the High Court mentioned that Smith, the black voter who had been denied a vote in the Texas primary in 1942 and was represented by Thurgood Marshall, had alleged a violation of that amendment; but the decision did not adjudicate the allegation or even indicate whether it had any relevance. Later, in the appellate papers, Moody never even cited the Seventeenth Amendment.

Third, the citation to Section 43 of Title 8 of the U.S. Code, the code section at that time containing the Civil Rights Act,⁹⁷ was probably the strongest jurisdictional hook—except that a *white* candidate was invoking a statute historically invoked to vindicate the civil rights of minorities. For that proposition, no reported case at that time could be found. Fourth, the references in the jurisdictional paragraph to four sections of Title 18, the federal criminal code,

⁹⁵ Original Complaint, para. III.

⁹⁶ U.S. Const. art. I, § 4.

⁹⁷ Now codified as 42 U.S.C. § 1983.

may seem odd since this was plainly a civil action; however, in 1941 the Supreme Court in *U.S. v. Classic*⁹⁸ had reversed the dismissal of a federal indictment under the cited sections of Title 18 for fraud of Louisiana election officials in manipulating the outcome of a primary election. Moody knew of the *Classic* case because he cited and discussed it later in his appellate briefs.

The last clause of Paragraph III of the Complaint alleged jurisdiction to subsist under § 1343 of the Judicial Code. That is the statute that creates jurisdiction in the district courts for civil rights-based actions. The congressional recodification of Title 28 earlier that year had consolidated three sections of former Title 28, substituted the phrase “civil action” for “suit” in order to conform to the usages of the Federal Rules, and made “numerous changes . . . in arrangement and phraseology.”⁹⁹ Later, in the Court of Appeals and the Supreme Court, Moody would also cite 28 U.S.C. § 1331, the federal question statute; although § 1343 required no allegation of jurisdictional amount,¹⁰⁰ § 1331 did, and that may be why Moody alleged in the Complaint an amount in controversy exceeding the statutory minimum of \$3,000. One other section of Title 28, § 1344, provided jurisdiction for “election disputes,” including election disputes for the office of United States Senator, but only where the deprivation of the vote was “on account of race.”¹⁰¹

The succeeding paragraphs of the Complaint averred in some detail that the vote count was fraudulently in favor of Johnson by 105 votes in Zapata County and by 202 votes in Jim Wells County. In Paragraph IX, Moody laid out Stevenson’s theory most clearly:

The right asserted by plaintiff to an honest count and an honest certification of the results of said primary election in Zapata and Jim Wells Counties, Texas, and the right to have the returns honestly reported to the State Democratic Executive Committee and its canvass of the returns based upon honest certification from the several counties of the state, are rights secured to plaintiff by the Constitution of the United States and Acts of Congress cited in the jurisdictional allegations above.

As for the relief requested,¹⁰² Moody plead for a “peremptory order restraining” the Chairman of the Convention and Secretary of the State Democratic Party from certifying the nomination of Johnson and that, upon trial on the merits, judgment be entered permanently enjoining the issuance of a certificate of nomination of Johnson and further, without citing the declaratory judgment statute, “declaring plaintiff received said nomination.”¹⁰³

The Original Complaint was typed with blanks for the names of the specific federal judicial district of Texas and division and for the name of the Chairman of the Democratic State Convention. The latter blank was handwritten in as Tom Tyson.¹⁰⁴ The district was filled in by

⁹⁸ 313 U.S. 299 (1941).

⁹⁹ H.R. 3214 Report, 80th Cong., 1st Sess. (April 25, 1947), reprinted in Roy M. Mersky and Jacobstein at A121.

¹⁰⁰ Id. at A114.

¹⁰¹ Id. at A1121.

¹⁰² Id., para. XII.

¹⁰³ The federal declaratory judgment act was in effect, but Moody failed to mention it.

¹⁰⁴ The election of Tom Tyson as the Chair of the Convention followed the certification of LBJ as the candidate. Calvert Oral History at 20. By that time, Stevenson’s supporters had departed the Convention, so the Stevenson lawyers apparently had to find out afterward who had been elected to that position.

hand as “Northern,” and the division was written in as “Dallas” but that was then marked out and “Fort Worth” was inserted, perhaps reflecting that while the cause of action was being formulated and reduced to writing, the choice of forum and the judge within the chosen forum was still being discussed among Stevenson’s counsel. The pleadings do not explain why, or even allege that, the Northern District is a proper venue. Perhaps it was because everyone on Stevenson’s team was already in Fort Worth. Perhaps Stevenson’s counsel feared that a federal court in the Western District of Texas, which includes Austin, might have been more deferential to Texas state courts in matters of Texas election law. Or perhaps the lawyers had a particular judge in mind, and he happened to be resident in the Northern District.

Caro says that Stevenson and all his lawyers met in his Fort Worth hotel room to consider their choices of District Judges in the Northern District and “[t]here seemed no good choice.”¹⁰⁵ However, from the distance of six decades, it appears an easy decision. There were only three judges serving the District. The first was Chief Judge William Hurley Atwood, assigned to the Dallas Division. Atwood was a Republican who had served as U.S. Attorney for the District for 15 years, in 1922 had been the Republican candidate for Governor, and in 1923 had been appointed to the federal District Court bench by President Warren G. Harding.¹⁰⁶ Atwell was progressive in his pre-bench years,¹⁰⁷ but later became known for consistently ruling against NAACP suits to desegregate Dallas public schools.¹⁰⁸ He was known as a cantankerous and unpredictable jurist.¹⁰⁹ The second Northern District judge was Joe B. Dooley, a strong Democrat only very recently appointed by President Truman and resident in Amarillo, 385 miles away. That left T. Whitfield Davidson, a 72 year old judge who had responsibility for the Fort Worth Division of the Northern District of Texas.

Davidson was also well known to Moody.¹¹⁰ Davidson had served as Lieutenant Governor of Texas from 1923-1925, President of the Texas Bar Association in 1927, and General Counsel for The Praetorians, a Dallas based insurance company, from 1927 to 1936. Davidson was active in Democratic politics, and in 1936, President Franklin D. Roosevelt appointed Davidson as a District Judge for the Northern District of Texas. Davidson was author

¹⁰⁵ CARO, *supra* note 13, at 353.

¹⁰⁶ DARWIN PAYNE, *BIG D: TRIUMPHS AND TROUBLES OF AN AMERICAN SUPERCITY IN THE 20TH CENTURY* (1984) at 71; DARWIN PAYNE, *AS OLD AS DALLAS ITSELF: A HISTORY OF THE LAWYERS OF DALLAS, THE DALLAS BAR ASSOCIATIONS, AND THE CITY THEY HELPED BUILD* (1999).

¹⁰⁷ Atwell provided office space to Dallas’ first woman lawyer. DARWIN PAYNE, *AS OLD AS DALLAS ITSELF*, *supra* note 106, at 126.

¹⁰⁸ DARWIN PAYNE, *BIG D*, *supra* note 106, at 294-95; DARWIN PAYNE, *AS OLD AS DALLAS ITSELF*, *supra* note 106, at 94.

¹⁰⁹ A prominent Dallas lawyer, Jack Hauer, recalled that, when he began to practice law in 1948 in Dallas, Judge Atwell “loved a lawyer who put on his case quickly and stopped,” demanded to be addressed as “The Court,” and unpredictably terrorized all who practiced before him. Hauer added, “Atwell began his life ahead of his time and finished behind them.” JACK HAUER, *FINEST KIND! A MEMORABLE HALF CENTURY OF DALLAS LAWYERS (PLUS A FEW FROM OUT-OF-TOWN)* (1992), at 175-204.

¹¹⁰ T. WHITFIELD DAVIDSON, *THE MEMOIRS OF T. WHITFIELD DAVIDSON* (1972) at 103 (“DAVIDSON MEMOIRS”) (“Governor Moody, Stevenson’s counsel, and I had been very close.”) Moody had once reversed a Davidson decision. See *La Fon v. Grimes*, 86 F.2d 809 (5th Cir. 1936).

of a law book entitled *Davidson's Simplified Law*.¹¹¹ Caro says simply that Davidson “was known for his independence.”¹¹²

Stevenson and Davidson knew each other, but it is unclear how well. Both had been active in the dozen-year effort of elite lawyers to “incorporate” the Texas Bar Association that culminated in the Stevenson-co-sponsored State Bar Act of 1939.¹¹³ Archival research has found one set of correspondence between the two. On September 13, 1943, under the letterhead of his federal court, Judge Davidson wrote a three and half page, single-spaced letter to one of the Regents of the University of Texas complaining of “un-American teaching” at that university, and on the same date Davidson forwarded a copy of that letter to Stevenson, then the sitting Governor, under a short cover letter saying “I know you are interested in the matters I mention in this letter.”¹¹⁴ Stevenson sent a letter of thanks to Davidson a week later, concluding that “I know your conception of our organic structure of government.”¹¹⁵

Davidson was also well acquainted with LBJ and his legal team. In open court on September 21, the Judge stated:

Gentlemen, if this case is not tried right, it will not be for the want of able counsel. To say nothing of men like Governor Moody, Mr. C[ro]oker and others of numerous counsel, I might especially mention my friend John Cofer [who served as] my parliamentarian . . . in the State Senate of Texas.¹¹⁶

The Judge also mentioned his relationship with James V. Allred, who had served as Texas Attorney General from 1931 to 1935 and Governor from 1935 to 1939,¹¹⁷ and he remarked that as a lawyer he had represented Lady Bird Johnson’s father for years.

Most importantly for Stevenson, Davidson was more interested in the equities of the claim than in the subject matter jurisdiction of his court. In his privately published memoirs, not cited by Caro, Davidson recalled that as a sitting judge he followed “a proposition of constitutional law, which though not expressly named in any provisions under the Bill of Rights, is fundamental: There shall be no wrong without a remedy.”¹¹⁸ Stevenson’s counsel clearly picked the most favorable judge for this case.

On September 14th, there was however, one problem: Davidson was absent from the District, vacationing at his sister’s cabin at Caddo Lake, the large natural lake in far East Texas

¹¹¹ T. WHITFIELD DAVIDSON, *DAVIDSON’S SIMPLIFIED LAW* (1938).

¹¹² CARO *supra* note 13 at 353. One biographer of Hugo Black demeans Davidson as “Tiddy Winks” Davidson. BRUCE ALLEN MURPHY, *FORTAS : THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (1988).

¹¹³ Josiah M. Daniel, III, *Creating the State Bar of Texas, 1923-1940*, 45 TEX. BAR J. 454-59 (1982).

¹¹⁴ T.W. Davidson to Coke Stevenson, Sept. 13, 1943, Coke Stevenson Papers, Box 147, Tex. St. Archives.

¹¹⁵ Coke Stevenson to T. Whitfield Davidson, Sept. 1943, Coke Stevenson Papers, Box 147, Tex. St. Archives.

¹¹⁶ Transcript of Hearing, Sept. 21, 1948. Davidson also acknowledged that he had been close to Allred and his family. DAVIDSON MEMOIRS, *supra* note 110, at 103.

¹¹⁷ Allred had also served, upon appointment by President Roosevelt, as federal district judge in the Southern District of Texas from 1939 to 1942, at which point he had resigned to run in the same 1942 Democratic Senatorial Primary with Pappy O’Daniel, LBJ, and Moody, finishing behind all of them. In 1951 President Truman reappointed him to the Southern District bench.

¹¹⁸ DAVIDSON MEMOIRS, *supra* note 110, at 103.

more than 200 miles from Fort Worth. In the very early hours of September 15th, Renfro drove to Caddo Lake to present the Original Petition, which had been signed by all four of Stevenson's lawyers, to Davidson and to request issuance of a TRO. Over coffee at his breakfast table at 6:25 A.M., Davidson signed the TRO and set a temporary injunction hearing for September 21. As Davidson recounted in his memoirs, he considered this "a case of vital interest."¹¹⁹ In his own hand, the Judge wrote at the foot of the Complaint:

September 15, 1948 at 6:25 A.M.

This petition being considered, it is ordered that Tom L. Tyson and Vann M. Kennedy be restrained as prayed for pending a hearing hereon on Sept. 21, 1948 at 10 a.m. at Fort Worth, Texas, at which date this temporary order is made returnable.

T. Whitfield Davidson
U.S. Dist. Judge¹²⁰

Renfro apparently drove straight back to Fort Worth to file the papers and the order because the Clerk's docket sheet begins on September 15th with the notation "Filing Original Complaint and Entering Restraining Order" on that date, and the Clerk endorsed the time of filing on the complaint as 1:00 P.M.

Two days later Moody filed an Amended Original Complaint averring that, notwithstanding the 6:25 A.M. TRO, at 11:00 A.M. on September 15, Tyson, Kennedy, and Johnson had presented a certificate of nomination, reflecting LBJ as the Democratic Party candidate, to Paul H. Brown, the Texas Secretary of State¹²¹ in Austin. Filed on September 17th at 9:55 A.M., with Stevenson's verification, the amended pleading requested an enlargement of the TRO to cover those individuals, plus the three members of the Election Board of Tarrant County as representatives of a class of all 254 counties' election officials. Although he had had two days to reflect on his pleading, Moody added no further averments to elaborate the theory that Stevenson's civil rights had been violated and that he had a federal claim that created federal court subject matter jurisdiction; he did not have to, since the judge had already accepted the case. Judge Davidson granted the Enlarged Temporary Restraining Order immediately, according to the Clerk's file-mark, setting a bond at \$1,000, which Stevenson instantly posted with Travelers Indemnity Company as his surety.¹²² Service of process was effected quickly, with Connally accepting service on behalf of LBJ on the second day, September 16th.¹²³ At this juncture, Stevenson's counsel had accomplished their job, in Krieger-Newmann terms, of "gain[ing] control over the situation" for their client.

For his defense, LBJ quickly called together eleven Texas attorneys who had been associated with him before or during the campaign and had been generally opposed to Stevenson over the years. His initial counsel of record were Wirtz of Austin; James E. Allred, the former

¹¹⁹ Id. at 101

¹²⁰ Order endorsed at foot of Original Petition at 8, Case No. 1640.

¹²¹ Caro made a factual error on his page 338 when he misidentifies Ben Ramsey as the Texas Secretary of State. Paul Brown was the Secretary of State in 1948, and Beauford Jester appointed Ramsey as Secretary of State in 1949.

¹²² Bond dated Sept. 16, 1948, Case No. 1640.

¹²³ Summons in a Civil Action addressed to Lyndon B. Johnson and Return on Service of Writ, Case No. 1640.

Governor of Texas and former federal judge; John H. Crooker of Houston; Raymond E. Buck of Fort Worth; and B. Dudley Tarleton and Luther E. Jones, Jr. of Corpus Christi. Soon he also added John D. Cofer of Austin, Looney, and Dallas Scarbrough of Abilene. Representing allied defendants and clearly part of the overall LBJ team were Cecil Burney of Corpus Christi, Danny Harris who was Buck's law partner in Fort Worth, and A.W. Moursund of LBJ's hometown of Johnson City. Jones recalled later that Allred functioned as "sort of the leader" of this "fairly large group of lawyers who went up there [Fort Worth] to help him" in the early round of the litigation.¹²⁴

2. *Thursday, September 16*

Overlooked by Caro and misunderstood by Dallek,¹²⁵ there was also an attempt by Johnson's counsel, one day after Judge Davidson had signed the TRO, to reacquire control through the state court system by launching an original mandamus proceeding in the Texas Supreme Court styled *Lyndon B. Johnson v. Paul H. Brown and Coke Stevenson*.¹²⁶ On September 16th, at 11:18 A.M.,¹²⁷ Wirtz, Looney, Allred, and Cofer filed a motion in the State's highest civil court requesting leave to file a petition for writ of mandamus to compel the Secretary of State to issue an official ballot with LBJ's name on it. Apologizing for "hasty preparation and filing of such petition,"¹²⁸ Johnson's counsel cited only one case, *Sterling v. Ferguson*,¹²⁹ in support of the request to file a petition for mandamus against Paul H. Brown, the Texas Secretary of State.

At 3:00 P.M. that same day, Price Daniel, the Attorney General of Texas, and his assistant Joe R. Greenhill, filed a carefully worded affidavit by Brown in which he declared "he will, under the present record of this office duly certify to the various County Judges in Texas the name of Lyndon B. Johnson as Democratic candidate for United States Senator in Texas, and that he has never stated that he would not so certify . . . and that the only way that he could be prevented from so doing would be a proper action in a proper court restraining him from so doing."¹³⁰ Although, Stevenson's lawyers had not had an opportunity to file anything in opposition, only 45 minutes later, the Clerk notated on the docket that the motion was overruled "because the respondent . . . Secretary of State, has notified the Court in writing that he has not refused and has no intention to refuse to perform the acts which the petition for mandamus seeks to compel him to perform."¹³¹ Johnson's ability to prevail in the state court system was again demonstrated; although LBJ's lawyers did not receive a writ of mandamus or other order or action of the Supreme Court, they obtained its near-equivalent, a sworn statement of the

¹²⁴ Oral history interview of Luther E. Jones, Jr., June 13, 1969, at 24, LBJ Library (http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/jones_luther_1969_0613.pdf) ("Jones Oral History").

¹²⁵ Dallek mistook this original proceeding, which was filed in the State's highest civil court, for an "appeal" of the federal court's injunction, which could only be appealed through the federal appellate system. See DALLEK, *supra* note 14, at 337.

¹²⁶ *Johnson v. Brown*, Case No. A-1901, Texas Supreme Court, Texas Supreme Court Records, Tex. St. Archive. See *Johnson v. Brown*, 147 Tex. 104, 213 S.W.2d 529 (1948).

¹²⁷ The Supreme Court's docket sheet lists the exact time of the filing of each document in the case.

¹²⁸ Argument in Support of Motion for Leave to File Petition for Mandamus, *Johnson v. Brown*, No. A-1901, Supreme Court of Texas, Records of the Supreme Court in the Texas State Archives.

¹²⁹ See n. 64 *supra*.

¹³⁰ Affidavit of Paul H. Brown, Case No. A-1901, Tex. St. Archives.

¹³¹ Docket, No. A-1901.

Secretary of State that he would certify Johnson's nomination unless "a proper court restrain[ed] him from so doing." So the focus returned to the federal court system.

3. *Tuesday and Wednesday, September 21 and 22*

All of the Defendants were summonsed, and at 10:45 A.M. on September 21st Johnson, Kennedy, and Tyson filed their motions to dismiss for want of jurisdiction.¹³² Although failing to refer to Federal Rule of Civil Procedure 12(b)(1) in his "plea to the jurisdiction," Johnson's counsel argued for dismissal for lack of subject matter jurisdiction. The "New Rules" were only ten years old, and Judge Davidson's memoir recalls LBJ's counsel pleading a "demurrer to Stevenson's complaint . . . taking also the nature of a motion to dismiss in that there was no cause of action" and "making contention that it should be a contest before the United States Senate on the final results."¹³³ Specifically, Johnson plead in 22 multifarious paragraphs that the District Court is "wholly without jurisdiction" because the relief "can be obtained only as a result of a contest of the Primary Election . . . and this Court has no jurisdiction to try, hear or determine an election contest."¹³⁴ That the litigation was really, in essence, an "election contest" for which federal jurisdiction was absent, was the Johnson lawyers' steadfast theme to the end; they must have believed it strongly because they made little preparation to present evidence for Johnson.

Most pertinently, Johnson's dismissal motion pointed out that the Complaint did not allege a deprivation of "rights, privileges or immunities secured by the Constitution and laws thereunder." His counsel also included requests to dismiss for failure to state a claim and for improper venue. The motion concluded with an extremely long paragraph that asserted Johnson's "vested legal right" to the nomination and that characterized Stevenson's citation of *Sterling v. Ferguson* as essentially an admission that Johnson was "entitle[d] . . . to have his name printed upon the official General Election ballot, unless the certificate is set aside by a proper proceeding such as an election contest." Johnson signed a jurat that "the facts therein stated are true."¹³⁵ The other defendants' and intervenors' motions to dismiss are of similar tenor. Separately Johnson's counsel also filed his verified Opposition to Granting of Temporary Injunction that not only objected to the relief requested by Stevenson but further alleged that Johnson could show in unnamed counties that Stevenson had received many votes "by parties unknown, 'tombstone votes' and votes by prostitutes who had left the city."¹³⁶ Also filed on that date was the Motion to Intervene as Defendants by the County Judge, Sheriff, and County Clerk of LBJ's home county, Blanco County, constituting the Election Board of that county, represented by Looney and Moursund, alleging that the members of the Tarrant County Election Board were inadequate representatives of a class because those Tarrant County officials had not answered and did not intend to defend the complaint.¹³⁷

¹³² Defendant Lyndon B. Johnson's Motion to Dismiss for Want of Jurisdiction, Case No. 1640, NARA-SWB.

¹³³ DAVIDSON MEMOIRS, *supra* note 110, at 101-02.

¹³⁴ Defendant Lyndon B. Johnson's Motion to Dismiss for Want of Jurisdiction, filed Sept. 21, 1948, Civil Action No. 1640, NARA-SWB.

¹³⁵ Defendant Lyndon B. Johnson's Motion to Dismiss for Want of Jurisdiction, filed Sept. 21, 1948, Civil Action No. 1640, NARA-SWB.

¹³⁶ Opposition to Granting of Temporary Injunction, Case No. 1640.

¹³⁷ Motion to Intervene as Defendants, Case No. 1640.

On September 21st and 22nd, Davidson conducted the temporary injunction hearing in his courtroom in the federal courthouse in Fort Worth. At first, the court stated that it would hear the evidence before ruling on the dismissal motions, but after lengthy arguments by Johnson's counsel, he relented. After arguments on those motions, Judge Davidson spoke at length about the ancient concept of equity and concluded:

There is a maze of decisions here growing out of the 15th Amendment, most of which bear in mind and have in mind the rights of a man to vote. In our mind if there was no statute on the books, this man [Stevenson] would still have an equitable hearing in this court. He comes to a United States Court complaining that he has been deprived of a right which was a valuable right and which was leading to an election, to the United States Senate. Therefore, there is involved a Federal right that he wants to adjudicate in the United States Court, and it is admitted by both parties that the right to determine that nomination exists no where, if not in this court. Under the circumstances, we are going to have to overrule the motion.¹³⁸

LBJ's counsel knew immediately they had lost not only their motions to dismiss but also the temporary injunction hearing.¹³⁹

But there the evidentiary portion of the hearing was still to come. Recognizing that they were going to have to scramble to seek appellate relief, Johnson's attorney Allred requested immediate entry of written orders overruling the motions to dismiss of Johnson and of the Blanco County Election Board, Looney's client of record; and Allred orally withdrew Johnson's written opposition to a temporary injunction and moved the court to pretermitt the taking of evidence and to rule based solely on the sworn complaint because "the passing of time is just as effective in behalf of the complainant as would be a preliminary or temporary injunction." Groce responded coolly, "We would like to introduce our evidence." Davidson ruled: "I think we will hear the evidence."¹⁴⁰

After lunch on the second day, September 22nd, 13 witnesses testified for Stevenson. Graham recalled later that "It was substantially the same evidence, exactly the same" as had been presented to the Executive Committee.¹⁴¹ Allred invoked the rule of witness exclusion from the courtroom, which the court granted. When Dibrell and Gardner did not rise to depart the courtroom, Allred renewed that motion specifically as to them. But Judge Davidson overruled it, stating "members of the Bar are entitled to every consideration." Throughout the afternoon Allred objected to testimony fairly frequently, primarily on the ground of hearsay, almost all of which Judge Davidson overruled.¹⁴² H.L. Adams was the first witness, and Gardner and witnesses from Alice testified to facts showing clearly that Ballot Box 13 had been stuffed.¹⁴³ Johnson's counsel put into evidence an affidavit by one of Stevenson's affiants retracting his

¹³⁸ Partial Transcript, Sept. 21, at 6-7.

¹³⁹ Caro at 356.

¹⁴⁰ Partial transcript of hearing, Sept. 21, 1948, at 1-4.

¹⁴¹ Graham Oral History, *supra* note 39, at 37.

¹⁴² Transcript, Case No. 1640.

¹⁴³ For example, one witness testified that the County Clerk had provided 200 fewer blank ballots for Precinct 13 in Jim Wells County than the tally reflected.

prior affidavit testimony and a copy of Judge Broeter’s injunction, but no live testimony or other exhibits.

In his memoirs, Judge Davidson recalled that after hearing the evidence, he concluded that “the Senate was not a remedy for an alleged fraud committed in the primary.”¹⁴⁴ He wrote:

Several witnesses were heard bearing upon the election centering on Box 13. . . . It was apparent to me that a full set of facts should be before the Court before [I] finally ruled. I therefore appointed commissioners [special masters] to go to Jim Wells County and take depositions covering the points raised by the pleading and the evidence that had been produced in the preliminary trial. To await such action I issued a temporary injunction that things remain in status quo until the commissioners proceeded to take the testimony and that it should be done with all dispatch.¹⁴⁵

Judge Davidson announced that he was granting the temporary injunction and would appoint two special masters,¹⁴⁶ and he asked the lawyers for both sides to collaborate on the form of the written order and on the designation of persons to be appointed as masters.

At the very end of the hearing, Allred implored the court to enter an order that could be immediately appealed and he referred to “a statute [that] gives the right to appeal on an order granting a temporary injunction.”¹⁴⁷ Moody pointed out that the statute, probably referring to the interlocutory appeal statute, was “discretionary with the court”; but when Allred grumbled “We have some rights,” Moody graciously agreed on the record to “do everything I can to facilitate getting up their record” or cooperating on a stipulation on the facts so that an immediate appeal could be taken. Judge Davidson accepted that concession and indicated that he would grant a severance of the order so as to facilitate an appeal.¹⁴⁸

That same day, September 23rd, Davidson signed the order overruling the motions to dismiss and he signed the preliminary injunction order, which had been approved as to form by both sides, and held:

There was evidence of fraud in the official returns from certain election officials in Jim Wells, Zapata, and possibly other counties in the State Democratic Executive Committee, without which there would have been a change in the official certification by the Officers of the State Convention as to who was the Democratic nominee for the Office of United States Senator and that an injunction is necessary to preserve the subject matter of the litigation pending trial on the

¹⁴⁴ Id. at 103.

¹⁴⁵ DAVIDSON MEMOIRS, *supra* 110, at 104.

¹⁴⁶ See Fed. R. Civ. P. 53; Kaufman, Masters in Federal Courts: Rule 53, 58 Colum. L. Rev. 452; James S. DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 N.Y.U. L. Rev. 800 n. 7 (1991)(“A vivid example of the traditional use of special masters is [Stevenson v. LBJ]”).

¹⁴⁷ Transcript at 75.

¹⁴⁸ Id. at 76-77.

merits and to prevent the deprivation of rights guaranteed by the Constitution and Laws of the United States.¹⁴⁹

A separate order pursuant to Federal Rule of Civil Procedure 53 appointed two special masters to go to the Rio Grande Valley. To one of these positions, Judge Davidson appointed W.R. Smith, Jr. of San Antonio, whom he delegated to go to Jim Wells County to hold hearings, examine poll lists, voter lists, tally sheets, and returns and all other facts pertinent to the returns from Precinct 13.¹⁵⁰ Smith was a former United States Attorney for the Western District of Texas who had secured two convictions of George Parr for tax evasions and probation violation. Judge Davidson appointed Smith's former deputy J.M. Burnett as the other master, to go to Duval and Zapata Counties for the same purposes. The Special Masters were directed to report to the Court "on or before October 2nd, 1948." Stevenson's legal team had sustained the control of the election situation initially obtained when Judge Davidson granted the TRO a week earlier. LBJ's counsel were dismayed and despondent.

But Davidson also gave Johnson something of great value: the opportunity to immediately appeal. Had he not severed the injunctive order, Johnson's counsel would have had to seek a permissive interlocutory appeal under 28 U.S.C. § 1292, which requires consent both of the trial court and of the appellate court and would have required more work and more time, or else Johnson would have had to move the appellate court to permit the filing of mandamus proceeding against Judge Davidson, which was a slow and cumbersome procedure, particularly with the Fifth Circuit not in session.

4. *Friday, September 24*

Caro details the conference of LBJ's numerous counsel after the hearing on September 21st to decide how to proceed, and he reports that those lawyers meeting in a Fort Worth conference room were gridlocked.¹⁵¹ Separately, Allred, Crooker, Cofer, and Looney tried to draft pleadings, but no one could determine how to obtain quick relief via an appeal.¹⁵² The Fifth Circuit and the Supreme Court were both out of session, each not scheduled to reconvene until October 4. After hours of unresolved debating of the lawyers, Caro writes, LBJ took command himself and called for Abe Fortas.¹⁵³ However, it was Wirtz who recommended Fortas and made the telephone call.¹⁵⁴ Dallek reports that the entire Arnold, Fortas & Porter law firm had previously contributed money to LBJ's campaign¹⁵⁵ and that Fortas' law partners Paul Porter and Thurman Arnold, along with former Attorney General Francis Biddle, had advised Wirtz on September 18th about a theoretical possibility of bypassing the Court of Appeals for the

¹⁴⁹ Order Granting Temporary Injunction, September 23, 1948, NARA-SWB.

¹⁵⁰ Order Appointing Special Masters,

¹⁵¹ CARO, *supra* note 13, at 368.

¹⁵² Jones Oral History, *supra* note 124; CARO, *supra* note 13, at 365, 368-69.

¹⁵³ *Id.*

¹⁵⁴ Transcript, Abe Fortas oral history interview, Aug. 14, 1969, at 4, LBJ Library, available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/fortasa/fortas01.pdf>; BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988) at 90 ("MURPHY").

¹⁵⁵ DALLEK, *supra* note 14, at 308-09.

Supreme Court. In any event, after some phone calls Fortas was located; conveniently he was in Dallas, only 30 miles away.¹⁵⁶

Fortas himself wrote and spoke later of these events, and both his principal biographers address it. After he had arrived and had been briefed, Fortas asked the “acres and acres of lawyers” to focus on the question “What’s the law on this?” After an hour, with no answer forthcoming, Fortas said “We had better get it on up to the Supreme Court; [Justice Hugo] Black will handle it expeditiously.”¹⁵⁷ He gathered the papers, took Johnson’s secretary Mary Rather into another room, and dictated a one page outline of the argument and the strategy, namely to take an appeal to the Fifth Circuit with the expectation of an emergency stay motion being there refused—and then immediately to present the same motion to Justice Black.¹⁵⁸ Black was the Justice assigned to handle matters coming out of the Fifth Circuit when the Supreme Court was out of session.¹⁵⁹

On September 22nd at 6:25 P.M., the Johnson team filed with the District Clerk two Notices of Appeal, one for Johnson, represented by Allred, Crooker, Buck, Tarleton, and Jones, and one for the Blanco County group, represented by Moursund and Looney. The notices were filed early, actually a day before the U.S. District Clerk’s entry of the temporary injunction that contained the severance provision, so Johnson’s counsel were clearly in a rush. The question then arose for LBJ’s team as to which Fifth Circuit judge the lawyers should select for presentation of Johnson’s stay motion.

At that time, there were six judges of this Court of Appeals, which covered the federal judicial districts of Texas and four other Southern states. The Chief Judge was a Texan, Joseph C. Hutcheson, Jr., resident in Houston¹⁶⁰; the other five resided in Louisiana, Mississippi, Alabama, and Florida. When he had been a federal district judge previously in Houston, Hutcheson had consistently ruled against civil rights voting lawsuits. He was a jurist whose judicial philosophy “emphasized the need for economic, social, and political stability”¹⁶¹; and he was the author of a book on constitutional and other law and a book about Robert E. Lee.¹⁶² Tommy Corcoran and others of Johnson’s Washington lawyers analyzed the Fifth Circuit’s multiple judges and concluded that Hutcheson’s record augured well for Fortas’ strategy, which contemplated a quick denial by any judge of the Court of Appeals so that papers could be immediately then filed with the Supreme Court. With the Fifth Circuit out of session, Hutcheson was physically located in Houston at that time.

¹⁵⁶ One source reports that LBJ telephoned Stanley Marcus, founder of the Neiman-Marcus Department Stores, and asked “Do you know where in hell I can put my hands on Abe Fortas?” Marcus replied, “He’s right here.” MURPHY, *supra* note 154, at 90. Fortas was in Dallas participating in depositions in an antitrust case.

¹⁵⁷ Fortas Oral History Interview; MURPHY, *supra* note 154, at 91.

¹⁵⁸ CARO, *supra* note 13, at 372.

¹⁵⁹ HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891-1981 (1984) at 58 (“COUCH”).

¹⁶⁰ Hutcheson had served as District Judge in the Southern District of Texas from 1918 until his appointment to the Fifth Circuit in 1931. For a thorough history of that court and Hutcheson’s tenure there, see CHARLES L. ZELDEN, JUSTICE LIES IN THE DISTRICT: THE U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, 1902-1960 (ZELDEN, JUSTICE LIES”).

¹⁶¹ *Id.* at 201-02, 79.

¹⁶² See JOSEPH C. HUTCHESON, JR., LAW AS LIBERATOR: THE PRINCIPLE OF DEMOCRACY IN AMERICA, THE SPIRIT OF ITS LAWS (1937); WE MARCH BUT WE REMEMBER (1941). A list Hutcheson’s complete writings may be found at 38 Tex. L. Rev. 140 (1959). See also 35 ABA J. 546 (1949). ZELDEN, JUSTICE LIES, *supra* note 160, at 80-88.

Johnson's team had requested the expedited preparation of the transcript of the hearing and of the rest of the trial court's record for the appeal, and the court reporters and the District Clerk complied. On Thursday or Friday, September 23rd or 24th, one of Johnson's counsel, Luther Jones, flew to New Orleans in the Brown & Root plane,¹⁶³ paid the \$25 filing fee on behalf of Johnson, and filed the Motion for Stay of Temporary Injunction with the Clerk of the Court. The Clerk of Court docketed the appeal as Case No. 12,529. The Court set oral argument for Friday, September 24th. The Clerk's docket sheet reflects formal appearances for LBJ by Allred, Crocker, Looney, Tarleton, Cofer, and Buck, and for Stevenson by Moody, Renfro, Groce, and James. The motion argued that "there is no provision of the Constitution or the laws of the United States which give the Federal District Courts the power to enjoin the certification of a person as the nominee of a political party for the office of the United States Senator."¹⁶⁴

The Clerk's records do not identify the members of LBJ's and Stevenson's legal teams who made the oral arguments on the request for a stay to Hutcheson in Houston, apparently running for several hours,¹⁶⁵ but in an oral history interview, Crocker recalled that he presented the matter for Johnson.¹⁶⁶ Moody likely argued for Stevenson. After hearing counsel's arguments in chambers and then deliberating on the matter for about five more hours,¹⁶⁷ Hutcheson issued a five page ruling. As the Fifth Circuit's official history puts it, "Because of his conservatism, Hutcheson did not feel that he had greater authority than any other circuit judge, or that he could enlarge the power of the office."¹⁶⁸ Sitting alone, with the Court out of session, he ruled that he was powerless to do anything but to set the matter for hearing on the next regularly scheduled court day, October 4th.¹⁶⁹ His decision summarized the jurisdictional issue being appealed and then assessed and dismissed the legal authorities cited to him by Johnson's lawyers, namely, Federal Rule of Civil Procedure 62(g), 28 U.S.C. § 377, which is the All-Writs Statute, and 28 U.S.C. § 227, which was then the section number of the interlocutory appeal statute. Judge Hutcheson therefore denied the motion, but without prejudice. The decision reflects that he found that he simply lacked power to stay the lower court's order.

C. LBJ's Lawyers Reacquire Control With a Supreme Court Justice's Stay

1. *Monday and Tuesday, September 27 and 28*

Back in Washington, with Judge Hutcheson having denied Johnson's stay motion, Fortas was joined by his partners Thurman Arnold and Paul Porter—plus "thirty-five other lawyers" including New Deal veterans such as Tommy Corcoran, Ben Cohen, and James H. Rauh.¹⁷⁰ The

¹⁶³ Jones Oral History, *supra* note 124, at 27.

¹⁶⁴ Motion to Stay Temporary Injunction, Case No. 12,529, U.S. Court of Appeals for the Fifth Circuit, NARA-SWB.

¹⁶⁵ There is no transcript of the hearing, and Hutcheson's order reflects only that counsel for both Johnson and Stevenson were present.

¹⁶⁶ Oral history interview – Crocker.

¹⁶⁷ CARO, *supra* note 13, at 372.

¹⁶⁸ COUCH, *supra* note 159, at 75.

¹⁶⁹ Jerome I. Chapman, Expediting Equitable Relief in the Courts of Appeals, 53 CORNELL L.Q. 12 (1967).

¹⁷⁰ See also oral history interview of Rauh, at 3 ("there were a lot of real good lawyers over there [at Arnold, Porter & Fortas]. They didn't need any more, but Tom's idea of how you handle a case like this was to get a million good lawyers and then something would come out of it. . . . So I went over and we worked all afternoon, all night, on the case.").

Supreme Court was out of session, not scheduled to convene until Monday, October 4th,¹⁷¹ two days after the Texas-law deadline of October 2nd. According to Caro, the day after Judge Hutcheson ruled, Saturday, September 25th, Corcoran and the three partners of Arnold, Fortas & Porter telephoned Johnson's request for a stay to Justice Hugo Black at his home in Alexandria, Virginia; and Black set a hearing for Tuesday, September 28th. Black's biographer says that on Sunday the 26th, Black's law clerk told Arnold he would hear the case on the 28th, and Moody agreed to fly up for it.¹⁷²

Dallek has a slightly different version: that Arnold and Porter hand delivered the Motion for Stay on behalf of Johnson to the Clerk of the Supreme Court. The deputy clerk protested that he could not accept it for filing because no appeal had been docketed through the Fifth Circuit, but Arnold tossed the motion on the desk, stated that he was "effecting a lodgment," departed, and waited to see what happened.¹⁷³ The accounts may be reconcilable because the Clerk's office was not open on the weekend, so the Motion was clearly not "lodged" there until the Monday, but telephone conversations about it could easily have occurred on Saturday and Sunday. The Clerk's file contains a letter from him to Justice Black dated Monday, September 27th, stating that he is enclosing "for your preliminary examination the motion for stay in the case of Johnson v. Stevenson." The letter adds that "Both Mr. Arnold, representing the petitioner, and Mr. Moody, representing the respondent, have no preference as to the time for the presentation of this application," and asks the Justice to advise of his desired time.¹⁷⁴

The Motion for Stay that was "lodged" is highly unusual in that it, while it bears the Clerk's file-mark of September 27th, it was never assigned any case or proceeding number. The motion was not accompanied by any record on appeal because that record was back at the Fifth Circuit Clerk's office. In its 21 pages, this well drafted legal motion reviews the course of proceedings to date in full detail with the pertinent underlying documents attached as Exhibits A-F. It argues in six fairly succinct points that the trial court lacked jurisdiction because the dispute is, in essence, an "election contest under the laws of the State of Texas," that Federal Courts have no jurisdiction to adjudicate the validity of certifications of the authorized officers of the State Democratic Party, that Johnson held a vested right to be certified as the nominee of the Democratic Party, that 28 U.S.C. § 1344 deprives Federal Courts of such jurisdiction, that the cause of action "does not arise under the laws of the United States and does not involve property or civil rights protected by the laws of the United States but relates only to political rights," and that the subject matter lies solely within the jurisdiction of the United States Senate. The Motion also relies prominently on *Sterling v. Ferguson*. Finally, the Motion pleads that a stay "will in no way prejudice plaintiff's rights if on final determination, it is held that the Federal Courts have jurisdiction to determine whether . . . Johnson's name should appear on the official ballot."

In 1948, there was no such federal procedure as "lodgment" in the appellate rules, the Supreme Court rules, or the Federal Rules of Civil Procedure. Dallek states that Arnold was recalling an obscure device in common law pleading he had heard in law school. Research reveals that until 1938, there had been a "lodgment" rule in federal practice and it did pertain, in a way, to appeals, namely, Equity Rule 75. That rule provided that when an appellant wishes to

¹⁷¹ 17 U.S.L.W. 3073.

¹⁷² ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994) at 374 ("NEWMAN").

¹⁷³ DALLEK, *supra* note 14, at 339.

¹⁷⁴ E.P. Cullinan to Hugo L. Black, Sept. 27, 1948, Records of the U.S. Sup. Ct., Nat'l Archives.

designate trial-court evidence for the record on appeal, she should “lodge” the evidence with the clerk and give notice of that “lodgment” to the appellee.¹⁷⁵ However, the designation of a portion of the appellate record in a lower court is a far different thing than authorizing the filing in the nation’s highest court of a stay motion without a notice of appeal or other process having been transmitted up from the Clerk of a Court of Appeals. Moreover, the Equity Rules had been abrogated by the Federal Rules for a decade. In the *Johnson* case, Arnold was improvising, and he succeeded in bluffing the clerk into filing the motion by deploying a legalistic word that must have had some resonance in the mind of the clerk. Without at least a clerk-file-marked paper in hand, it is doubtful that Justice Black would have acted.

Johnson’s motion asserts that, if the trial court has jurisdiction, it can later restrain the issuance of a certificate of election to Johnson or restrain the counting of votes for Johnson, or it can by publishing its declaration give notice to the public that Johnson is not a legal candidate and, finally, may restrain Johnson from taking a seat in the Senate. The Motion concludes by asserting that, without a stay, the name of no Democratic nominee would appear on the general election ballot and that only a stay would assure “the right of the people of Texas to vote on official ballots prepared and distributed according to law.” The prayer requested issuance of an order staying the temporary injunction of Judge Davidson and staying all further proceedings in that court until further order of the Supreme Court. The pleading was signed by Wirtz, Allred, Arnold, Fortas, and Cox, with the names of eight other Texas lawyers for LBJ listed below the signature block. Black set a hearing for Tuesday, September 28th.

Meanwhile, on Monday, the 27th, the two Special Masters commenced hearings in borrowed courtrooms in the state courthouses in Jim Wells and Duval Counties. Many subpoenas were issued, but the majority of the witnesses had gone to Mexico or could not be found. Those who did appear and testify, such as the chairman of Precinct 13, gave incredible answers about losing the poll lists and tally sheets while the car was parked at a bar. Finally in Jim Wells County, Special Master Smith called for all the ballot boxes of the county to be brought into the courtroom. Johnson’s counsel, Looney and Tarleton, protested vociferously, but on the second day Smith ordered all the boxes open. Since a number of them were padlocked, he hired a locksmith.¹⁷⁶

At the same time on that Tuesday, September 28th, Justice Black conducted a hearing at the Supreme Court. There is no official record of the proceeding, and accounts of the hearing are sparse and varying. One writer says, without any back-up, that Black “hear[d] lengthy arguments in open court.”¹⁷⁷ But all other sources agree that the hearing was held in the Justice’s chambers. For LBJ were six attorneys, Fortas, Arnold, Porter, Hugh Cox, Wirtz, and Allred; Moody alone appeared for Stevenson. Apparently one newspaper reporter was present.¹⁷⁸ In 1999, Dan Moody’s son, Dan Moody, Jr., then a retired Austin lawyer, told the author in a telephone interview that he remembered his father recalling that when he arrived at Justice Black’s chambers, the numerous lawyers for Johnson were already there; that after the other side had

¹⁷⁵ See, e.g., *Saul v. Saul*, 104 F.2d 245, 248 (D.C. Cir. 1939). See also Equity Rule 75, quoted in *Kelly v. U.S.*, 300 U.S. 50, n.1 (1937).

¹⁷⁶ Graham Oral History.

¹⁷⁷ CHAPMAN, *supra* note 169, at 12.

¹⁷⁸ Marshall McNeil, *How Fortas Gave LBJ His Start*, WASH. DAILY NEWS, Aug. 3, 1965. McNeil reported in this article 18 years later that he had been present at the hearing.

completed their argument without mentioning what Moody, Jr. called “the states’ rights angle,” Black said to them suggestively, “Have you considered this?”; and Johnson’s lawyers then took a recess and came back to make that very argument.¹⁷⁹ The widow of Wirtz recalled later: “I remember one phase of [the hearing]. Dan Moody . . . said that some town in the Valley where all the votes went for Lyndon just couldn’t be right, there had to be fraud. And I remember my husband told the Judge that Governor Moody evidently had forgotten that when he ran for governor he got every vote in that town, just as Lyndon had gotten them.” Black’s biographer reports that Fortas focused on jurisdiction and Moody on fraud¹⁸⁰ and the Civil Rights Act, which of course was his real argument as the basis for invoking federal court jurisdiction in the first place.

Black asked sharp questions, having researched the case law with his son Hugo, Jr., a third-year law student who happened to be home at the time. The biographer states:

When Black indicated that he wanted counsel to address the Court’s power to interfere with the electoral process, Moody felt that Black was suggesting what Fortas should assert and that he “had no chance to win after that.” But Black, privately having little doubt that Johnson stole the election, was trying to give Moody a lifeline, however flimsy. He did not take it while Fortas subtly shifted his argument. The federal judge had overstepped his domain, Fortas concluded. Texas laws gave Johnson an “irrevocably and incontestably vested” right to be on the ballot. The whole case was “a political controversy, neither more or less.”¹⁸¹

After lunch, Black announced his decision to grant the motion, explaining that he could find no statute authorizing a federal judge to act in such a state election and that Stevenson had recourse to a forum other than the federal court because the Senate is the judge of its own members’ qualifications.¹⁸²

Johnson’s counsel rushed to telephone the news to the courthouse in Alice, and the proceedings before the Special Masters came to a halt. A written order remained to be prepared, and Moody stayed over to approve it as to form, and the next day, Wednesday the 29th, Black entered the written order granting the stay. The Order is terse:

ORDERED that the temporary injunction issued by the United States District Court for the Northern District of Texas, Fort Worth Division . . . be and the same hereby is stayed, and that the said temporary injunction is and shall be of no force or effect, until further order of the Supreme Court.

Later Fortas would say “There really was no question about the merits of the case. The injunction was improvidently entered; that is, the federal judge enjoining the state election under these circumstances was just plain wrong.”¹⁸³ But Joe Rauh always thought that Corcoran had

¹⁷⁹ Author’s telephone interview of Dan Moody, Jr., May 25, 1999. Moody, Jr. had completed college and law school in September 1948.

¹⁸⁰ Transcript, Mrs. Alvin Wirtz oral history interview, February 22, 1970, at 6, LBJ Library, available at http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/wirtz_mrs_1970_0222.pdf.

¹⁸¹ NEWMAN, *supra* note 171, at 375.

¹⁸² *Id.*

¹⁸³ LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990) at 200.

spoken with Black before the hearing, according to one of Fortas' biographers.¹⁸⁴ In his autobiography, William O. Douglas speculated that Black might have decided, with vote fraud alleged by both parties, that he would assist the more congenial candidate, LBJ.¹⁸⁵ Other speculations include Truman, Attorney General Tom Clark, or Sam Rayburn contacting Black, but the Justice's biographer doubts it. LBJ did throw an 80th birthday party for Black at the White House in 1966, and toasted him: "If it weren't for Mr. Justice Black at one time, we might well be having this party. But one thing I know for sure, we wouldn't be having it here."¹⁸⁶

Upon entry of the written stay order, telegrams began to fly. The Clerk of the Supreme Court sent a telegram to Judge Davidson, advising of the stay. Judge Davidson sent telegrams to his Special Masters to cease work. In his memoirs, Judge Davidson recalled the last day of hearings in the Valley:

There was some confusion in the testimony involving the care of the election boxes. Some of them were locked with padlocks, some of them had padlocks with the keys left in the locks, some of them were kept with one custodian and some with another. Box 13 or a box purporting to be Box 13 was hidden in the Clerk's office behind other records under the orders of the County Clerk to await further information after the conflict between the first report and the later one. Several of the subpoenas which were issued were returned *non est*.

About this time in the commissioner's proceeding, he [the special master] paused and read a telegram from the trial court that had appointed him commissioner, the telegram reading as follows:

Honorable W R Smith
Care of County Judge
Alice Texas

The Court is advised that Justice Black today signed an order in case of Johnson versus Stevenson which provides Quote The temporary injunction issued by the United States District Court for the Northern District of Texas Fort Worth Division, on September 23rd 1948 in case entitled Coke R Stevenson versus Lyndon B Johnson et al Civil No. 1640 be and the same is hereby stayed and that the said temporary injunction is and shall be of no force and effect until further order of the Supreme Court end Quote Take no further action under order of this Court in said cause.¹⁸⁷

Judge Davidson also observed in his memoirs, "There were a number of witnesses present [before the Special Masters] who had [been] sworn later to be used," and went on to state somewhat cryptically: "The trial court's [i.e., Davidson's] temporary order stayed all proceeding until we received the reports of the commissioners when we would then be able to proceed with

¹⁸⁴ Id. at 202.

¹⁸⁵ Id.

¹⁸⁶ Quoted in NEWMAN, *supra* note 171, at 375-76.

¹⁸⁷ DAVIDSON MEMOIRS, *supra* note 110, at 104-05.

the trial of the case on the merits.”¹⁸⁸ First of all, it was Hugo Black’s order, not “the trial court’s” temporary order, that stayed all proceedings in the U.S. District Court, and there never was a substantive report made by the special masters. Moreover, there was never a “trial . . . on the merits” because a week later the Fifth Circuit reversed Davidson and ordered dismissal of the action. The final sentence of Judge Davidson’s memoir about this episode is thus entirely correct: “The effect of Judge Black’s decision was thus to the effect that Stevenson had no right in law to maintain his case.”¹⁸⁹

2. *October 2 to January 31*

Although LBJ had prevailed at the highest level prior to the October 2nd deadline, thus assuring the placement of his name as Democratic candidate on the ballot, the litigation continued, albeit in a wind-down mode. Quickly Johnson’s counsel moved both in the U.S. Supreme Court and in the Texas Supreme Court to attempt to consolidate the victory provided by Justice Black.

The proceeding in the Texas Supreme Court had lain dormant since September 17th. Johnson’s Texas lawyers returned to the Texas Supreme Court on Tuesday, September 28th, at 7:00 P.M. with a Motion for Leave to Refile Original Petition for Mandamus and to File Supplemental Petition for Writ of Mandamus and Prohibition, seeking to ensure that the Secretary of State would place LBJ’s name on the Ballot. Since Justice Black had orally granted his stay shortly after lunch that day, this filing about four or so hours later with the Texas Supreme Court appears to be a spur of the moment effort by LBJ’s legal team to protect against Stevenson switching course to try to seek recourse in the state court system. Court clerks’ offices usually close at or before 5:00 P.M., so as with the first lawsuit in Judge Archer’s court, Johnson’s counsel must have asked a favor. The next day the Clerk set that motion for submission on Thursday, September 30th, at 9:00 A.M. At 8:45 A.M. on September 30th, Greenhill, the Executive Assistant Attorney General of Texas, filed the Answer of Brown. While Stevenson never filed a response, Moody must have raced back from Washington because he did appear to participate in the oral argument that day. At 11:59 A.M. that day, the Court entered its per curiam opinion, *Johnson v. Brown*.¹⁹⁰ In view of the speed with which it was issued, only three hours after the commencement of the oral argument, it must have been partially drafted by one of the judges or a law clerk prior to the hearing. In the decision, which was officially reported, the Court denied the relief and denied Johnson’s counsel’s request to keep the file open just in case something happened.

On Monday, October 4th, Johnson’s counsel filed with the entire U.S. Supreme Court a Supplemental Motion for Stay, requesting that Justice Black’s stay be enlarged to stay not only the temporary injunction but also “all further proceedings in that court.”¹⁹¹ At the same time, Moody filed with the Court a Motion to Vacate Stay Order and to Dismiss Proceedings. On Tuesday, October 5th, by 8-0 vote in conference, with Justice Murphy not present, the High

¹⁸⁸ Id. at 105.

¹⁸⁹ Id.

¹⁹⁰ *Johnson v. Brown*, 147 Tex. 104, 213 S.W.2d 529 (Tex. 1948)

¹⁹¹ Supplemental Motion for Stay, *Johnson v. Stevenson*, unnumbered case, Records of the U.S. Sup. Ct., Nat’l Archives.

Court denied the supplemental motion for stay by LBJ and, at the same time, Stevenson's motion to vacate and dismiss.¹⁹²

Meanwhile, the Fifth Circuit appeal had been docketed on Friday, September 24th, and within a few days after Justice Black's stay, the battle resumed there. Judge Hutcheson had set the appeal for October 4, and both the Appellants' Brief and the Appellee's Brief are file-marked that date. The docket sheet in the case reflects "argument and submission" before Judges Hutcheson, Sibley, and McCord. Allred, Jones, and Crooker flew to Atlanta in the Brown & Root airplane and appeared for Johnson, with Crooker making the argument that day.¹⁹³ Johnson's Fifth Circuit brief, listing his same ten lawyers and submitted jointly with the Blanco County group, argued that jurisdiction was absent, noting that there was no case in point, and asserting that there is no constitutional "right to have the election fairly conducted" and that there is no cognizable claim under the Civil Rights Act for a state-law "election contest." In the Appellee's Brief, Moody and his three co-counsel from the trial court made for the first time in full their argument to the contrary, citing all of the U.S. Supreme Court decisions that had voided the All White Primary time and again: *Nixon v. Herndon*, *Nixon v. Condon*, and *Smith v. Allwright*.

In the decision, Judge Hutcheson wrote for the panel, agreeing with Johnson and pointing Johnson to the Senate for relief:

We are of opinion that whatever may be the truth as to the fraudulent returns from certain precincts in the named counties, and whatever may be the truth as to illegal votes elsewhere which are claimed as more than an offset, the subject matter is not one to be taken cognizance of by the district court for the exercise of equitable relief. The object to be attained is precisely that of a contest of an election, the evidence so far heard is all appropriate to such a contest, as is that proposed to be taken by one or more masters which the record shows are to be appointed to go to all of the counties in which illegal returns or voting has been or may by amendment be alleged to have occurred. The Texas Statutes afford machinery for such a contest as part of their provision for both party nominations and final elections. It is urged that there is not time to review a statewide primary by such a contest before the general election comes on. But if there were no provision at all for contesting the result of a primary, it would not give a district court jurisdiction which it lacks. The Constitution, Art. I, Sec. 5, after all makes each House of Congress the final judge of the qualifications, elections, and returns of their respective members; and if a State, as Texas has done, makes nominations by a primary to be a part of its election machinery, and if, as is alleged here, Democratic nomination insures election, no reason occurs to us why this constitutionally provided judgment of the election should not reach back to the

¹⁹² JOURNAL OF PROCEEDINGS, October 5, 1948 at 5, Records of U.S. Sup. Ct., Nat'l Archives. See also U.S. Sup. Ct., 17 U.S.L.W. 3097 (Oct. 5, 1948).

¹⁹³ Statement [in lieu of oral history interview) Furnished to Dr. Joe B. Frantz By John H. Crooker, Houston, Texas, Aug. 18, 1970, at 2, LBJ Library, available at http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/crooker_john_1970_0818.pdf; Jones Oral History, *supra* note 124, at 27.

nomination; and we judicially know that such Congressional investigations have included primaries.¹⁹⁴

On November 1st, Moody sought to overturn the Fifth Circuit's decision, filing a petition on behalf of Stevenson seeking writ of certiorari which, unlike LBJ's stay motion of a month earlier, did receive from the clerk a Supreme Court docket number, Case No. 466.¹⁹⁵ As he prepared the petition, Moody may have noticed that on October 21st, only two weeks after the Fifth Circuit ruled, in their dissent in a case named *MacDougall v. Green*, Justice Douglas and two other justices cited approvingly the very Fifth Circuit decision from which Moody was seeking certiorari:

Federal courts should be most hesitant to use the injunction in state elections. . . . If federal courts undertook the role of superintendence, disruption of the whole electoral process might result, and the elective system that is vital to our government might be paralyzed. Cf. *Johnson v. Stevenson*, 170 F.2d 108.¹⁹⁶

On January 31, 1949 the Supreme Court denied Moody's certiorari petition.¹⁹⁷

Stevenson was taxed with the costs of court. On December 14, 1948, even before the Supreme Court had ruled on the cert petition, Groce wrote the Clerk of the District Court in Fort Worth requesting the bill of costs in Case No. 1640.¹⁹⁸ On April 12, 1949, the Clerk issued its Bill of Costs in the amount of \$4,951.49, the bulk of which was the fees of court reporters and special masters, but also included the \$20 paid to C.W. Perkins of Alice, Texas, the locksmith who was opening the locked ballot boxes for Smith in the Alice courtroom on September 28th when the hearing was stayed by Justice Black.¹⁹⁹

III. *LBJ v. Stevenson* and Lawyering for Control of the Outcome of Disputed Elections

The reported decision *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), cert. denied 336 U.S. 904 (1949), has had negligible impact on American jurisprudence. The U.S. Supreme Court itself has cited it only once, in a per curiam opinion two years later, as a curious "cf." following the statement "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."²⁰⁰ It has been cited only four times by the Fifth Circuit, most recently in 1985,²⁰¹ twice by Texas state appellate courts,²⁰² and by all other federal courts a total

¹⁹⁴ *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), cert. denied 336 U.S. 904 (1949).

¹⁹⁵ Petition for Writ of Certiorari, *Stevenson v. Johnson*, Case No. 466, Nov. 1, 1948, Records of the U.S. Sup. Ct., Nat'l Archives. See also *Summary*, 17 U.S.L.W. 3193 (1948).

¹⁹⁶ *MacDougall v. Green*, 335 U.S. 281, 290 (1948) (Douglas, J.)

¹⁹⁷ MINUTES OF THE SUPREME COURT OF THE U.S., No. 466, Jan. 31, 1949. See also JOURNAL OF PROCEEDINGS, U.S. Sup. Ct., 17 U.S.L.W. 3227.

¹⁹⁸ Eskridge & Groce to Clerk of the U.S. District Court, Dec. 14, 1948, NARA SWB.

¹⁹⁹ Bill of Costs, Case No. 1640, Office of the Clerk of the U.S. District Court, Apr. 12, 1949, NARA-SWB.

²⁰⁰ *South v. Peters*, 339 U.S. 276, 277 (1950).

²⁰¹ *Hubbard v. Ammerman*, 465 F.2d 1169 (5th Cir. 1972); *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979); *Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985).

²⁰² *State ex rel. Kimmons v. Azle*, 588 S.W.2d 666 (Tex. Civ. App.—Fort Worth 1979); *Frias v. Bd. Of Trustees*, 584 S.W.2d 944, 949 (Tex. Civ. App.—El Paso 1979).

of 13 times.²⁰³ The lawyering of the two teams did not produce any jurisprudential landmark. The significance for LBJ, however, was enormous; but for the legal victory, he would not have become U.S. Senator and then Vice President and President. As Graham stated to the Dallas Morning News in 2000, “If we had won it for Governor Stevenson, there’s no doubt it would have changed the course of our nation’s history.”²⁰⁴

Because this set of litigations was so consequential in its political effect, it has left a fairly full record not only of court documents but also lawyers’ oral history interviews that enables this study of lawyering in election litigation. To be sure, an election lawsuit is not typical civil litigation. The proceedings occur in a tightly limited time frame—just three weeks here—and the forms of relief or remedies the parties seek are injunctive and equitable, rather than legal or monetary, in nature. The lawyers who participate in election lawsuits typically work without payment for their services. Here, LBJ paid no attorneys’ fees but sent telegrams on October 1st to each of his lawyers stating, “You are a great lawyer and a devoted friend. Signed, Lyndon B. Johnson,” and he gave three of his Texas lawyers inscribed wristwatches.²⁰⁵ Moreover, unlike in normal civil litigation, compromise and settlement is never an option. Finally, this assessment is based on a single set of legal proceedings for control of a high office, and it was conducted by elite, white, male lawyers of the late 1940s, such as Wirtz, Allred, Moody, and Fortas. The lawyering of this particular election contest may or may not be representative of election litigation and litigators generally. A broad and comparative history of the lawyering of election disputes, large and small, remains to be written.

But the story of *LBJ v. Stevenson* does provide several insights about the craft of lawyering as it was conducted for control of this election outcome. In fine, the history of the lawyers’ efforts in 1948 illustrates the Krieger-Neumann axiom about the essence of the craft of lawyering, as each group of lawyers sought to achieve its client’s objective by “gain[ing] control of the situation—to the extent possible,” including by ignoring applicable procedural rules at key moments and by filing their pleadings in those specific courts (state and federal) and before those particular judges most likely to grant the desired injunctive relief. By closely studying the *LBJ v. Stevenson* pleadings, hearings, and court papers with reference to immediately preceding events affecting the clients, it is possible to see a specific pattern in each side’s lawyering.

First, the process began when each client consulted his lawyers about a significant problem, and his lawyers devised a solution; in each instance, it was to obtain injunctive relief from a court in order to acquire control of the outcome of the disputed election.

For the second step, the attorneys made a strategic choice of court system, either state or federal. It is tempting, from reading the biographers’ accounts, to assume that, in order to do their job of seeking to acquire control of the situation for their clients, the lawyers simply picked the particular trial-court judge they wanted and then approached that judge and obtained the desired injunctive relief. It is true that each judge to whom the parties respectively turned during

²⁰³ A Westlaw check shows that it was never cited in any reported decision associated with *Bush v. Gore* litigation.

²⁰⁴ *Election Confusion, Texas Style: 1948 Primary Snared LBJ, Ex-Governor In Vote-Fraud Tangle*, DALLAS MORNING NEWS, Nov. 19, 2000 39A, 51A.

²⁰⁵ Rauh Oral History, *supra* note 1, at 4; Oral history interview of Raymond Buck, May 27, 1969, at 11, LBJ Library, available at http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/buck_raymond_1969_0527.pdf.

the three weeks were highly receptive to the respective plaintiffs' requests. But the process of lawyering here was more complex and more nuanced. The lawyers first chose the court system, next crafted a legal theory to justify seeking relief in that system, and then searched for the best judge. This subtlety is demonstrated, first, in the caption of Johnson's petition for TRO to the state court, in which the county and court district number were typed as blanks and then at the last moment filled in by hand, and, second, in the caption of Stevenson's federal-court complaint, in which the judicial district and divisions were typed with blanks and then written in by hand, and with the Division being written in, marked out, and then filled in with a different division.

So the third step was for the lawyers to formulate a legal theory to justify entry into the desired court system and the injunctive relief in favor of the candidate-client desired to be granted by the selected forum, and they drafted a pleading to articulate the rationale. For LBJ, the lawyers' theory was the consistently reiterated argument that a precedent of Texas' highest civil court precluded any court looking beyond the election reports of the political party. For Stevenson, Moody and the legal team engaged in more creative lawyering to formulate the theory that jurisdiction lay in the federal district court; and in fact the federal civil action brought by Stevenson against Johnson is the first time in American jurisprudence that a *candidate*, as opposed to a voter, attempted to utilize the Civil Rights Act to challenge fraudulent ballots as a violation of the candidate's civil rights. In 1948 there was no precedent for the claim.²⁰⁶

Fourth, the lawyers *then* selected a specific judge within the chosen court system, filed and presented the pleading to the judge, who accepted the legal rationale and granted the desired injunctive relief, on no, or extremely short, notice to the other side and at abnormal times of night or day or of court terms. This pattern obtained in respect of each of the three injunctive orders obtained: LBJ's September 10th late-Friday-night TRO from the state court in Austin, Stevenson's September 15th crack-of-dawn TRO from the federal district judge vacationing far outside his district, and Johnson's stay order from Justice Black that was entered at a time the Supreme Court was out of session.

In connection with the legal positions each team of lawyers staked out for its client, deep ironies permeate this story and illustrate one aspect or characteristic of a successful candidate. On one hand, focusing on Stevenson and his lawyers, it is ironic that white, "states rights" politicians and lawyers who had participated in efforts over two decades to maintain the All White Primary in Texas as an alleged "private and voluntary association" supposedly isolated from any "state action," resorted, in his time of desperation and with the goal of putting a "states' rights" conservative into the U.S. Senate, to federal civil rights law and the U.S. Supreme Court precedents that, over that same twenty years, had sequentially voided all the various iterations of Texas' All White Primary as violative of federal constitutional rights and civil rights law in order to justify the injunctive relief they sought. Stevenson's lawyers had no choice; LBJ's counsel had dominance in the state courts, and there was no other way to justify a resort to *federal* court

²⁰⁶ Subsequently some case law has acknowledged that such a claim may lie under that Act. See, generally, Annot., *Actionability, under 42 USCS § 1983, of Claim Arising Out of Maladministration of Election*, 66 A.L.R. FED. 750 (1984).

to right the wrong Stevenson averred in the fraudulent votes from the Rio Grande Valley. Chief counsel Dan Moody and the rest of Stevenson's team were excellent lawyers, and they did what was necessary to accomplish the client's goal: they disregarded their own political positions and histories and crafted a litigation position that they calculated to have the best chance of success, alleging that candidate Stevenson, a white conservative, had been deprived of civil rights. And Stevenson willingly authorized them to do so.

On the other hand, viewing LBJ and his counsel from this distance, it is also ironic that, in order to put a politician into the United States Senate, which became his stepping stone to the presidency, a presidency known for producing substantial advances in voting and civil rights law, chief Texas counsel Alvin Wirtz and chief Washington counsel Abe Fortas and Paul Porter, who were well known liberal New Deal veterans, resorted to a states-rights legal posture in order to defeat Stevenson's federal civil-rights cause of action and to get Johnson out of federal court by obtaining from Justice Black, another New Dealer, the critical stay of Stevenson's federal-court injunction and, ultimately, the dismissal by the Fifth Circuit of Stevenson's civil rights suit.²⁰⁷

Those ironies highlight the superb lawyering of this dispute. If Krieger and Neumann are correct that "a lawyer's job is to find a way—to the extent possible—for the client to gain control over a situation," then it mattered crucially who each party was able to engage as his lawyers and what ability each demonstrated to "find a way" to achieve the client's objective. In *LBJ v. Stevenson*, the "way" that was found by each side's counsel to take control was, sometimes in disregard the lawyer's personal politics, to take whatever steps were necessary—including ignoring procedural rules—in order to place the matter before a specific judge—regardless how late or how early in the day—most likely to grant the injunctive relief desired. Both sides displayed this ability and this boldness on separate occasions, with Wirtz and Looney calling Judge Archer to the courthouse in nighttime hours to grant the first TRO on September 10th; with Moody and Renfro able to call on Judge Davidson in pre-dawn hours to grant a more powerful federal-court TRO on September 15th; and, finally and most importantly, with Fortas, Arnold, and Porter able to call on Justice Black, when the Supreme Court was not in session, to grant the stay on September 28th that ended the matter by giving Johnson final "control over the situation" in the runoff election of 1948.

In short, it takes very able and determined lawyering, such as LBJ's counsel provided, in order to win the litigation that sometimes accompanies and determines the outcome of very close elections.

²⁰⁷ While he only mentions that there was post-election litigation in a single paragraph, biographer Woods does note this irony inherent in Black's stay. WOODS, *supra* note 14, at 217.