APPOINTMENT OF PIERRE SALINGER AS A UNITED STATES SENATOR FROM THE STATE OF CALIFORNIA

HEARING

BEFORE THE

SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

OF THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

EIGHTY-EIGHTH CONGRESS

SECOND SESSION

ON THE

APPOINTMENT OF PIERRE SALINGER AS A U.S. SENATOR FROM THE STATE OF CALIFORNIA

AUGUST 10, 1964

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CONTENTS

EXHIBITS

APPOINTMENT OF PIERRE SALINGER AS A U.S. SENATOR FROM THE STATE OF CALIFORNIA

MONDAY, AUGUST 10, 1964

U.S. SENATE,
SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS
OF THE COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 301, Old Senate Office Building, Senator Claiborne Pell (chairman) presiding.

Present: Senators Pell, Hayden, and Curtis.

Also present, from the Subcommittee on Privileges and Elections: James H. Duffy, chief counsel; Burkett Van Kirk, minority counsel; George E. Pazianos, special assistant to Senator Pell; and Mary G. Daly, secretary.

In addition, the staff of the Committee on Rules and Administration was represented by: Gordon F. Harrison, staff directors; Hugh Q. Alexander, chief counsel; Walter L. Mote, professional staff member; and John P. Coder, professional staff member.

Senator PELL. This meeting of the Privileges and Elections Subcommittee will come to order.

We are meeting here to consider the question of seating the Senator from California.

Pierre Salinger was seated as a U.S. Senator, without prejudice, on August 5, 1964. The Senate, however, has referred his credentials to this committee for study of his qualifications with instructions to report back to the Senate thereon by August 13, 1964.

The Constitution of the United States provides in article I, section 3, clause 3, that——

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

And in article I, section 5, clause 1, that—

> Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members * * *

Rule XXV of the Standing Rules of the Senate confers jurisdiction upon the Committee on Rules and Administration and its Subcommittee on Privileges and Elections over all matters pertaining to—

1. The election of the President, Vice President, and Members of the Senate;
2. Corrupt practices;
3. Contested elections;
4. Credentials and qualifications;
5. Federal elections generally; and
6. Presidential succession.

Acting under its vested authority and pursuant to the instructions of the Senate, the subcommittee is meeting to hear testimony and to receive statements pertaining to the seating of Pierre Salinger.

I ask unanimous consent to incorporate in the record at this point a certificate of appointment signed by the Governor of the State of California, and the action taken by the U.S. Senate on August 5, 1964.

Senator CURTIS. By action, you are referring to the Mansfield motion?

Senator PELL. Exactly.

Senator CURTIS. Yes. All right.

(The documents referred to are as follows:)

EXHIBIT 1. CERTIFICATE OF APPOINTMENT OF PIERRE SALINGER AS A U.S. SENATOR FROM THE STATE OF CALIFORNIA

EXECUTIVE DEPARTMENT, STATE OF CALIFORNIA

CERTIFICATE OF APPOINTMENT

To the President of the Senate of the United States:

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of California, I, Edmund G. Brown, the governor of said State, do hereby appoint Pierre Emil George Salinger, a Senator from said State to represent said State in the Senate of the United States until the vacancy therein, caused by the death of Clair Engle, is filled by election as provided by law.

Witness: His excellency our governor, and our seal hereto affixed at Sacramento, California, this fourth day of August, in the year of our Lord, 1964.

By the governor:

EDMUND G. BROWN,
Governor of the State of California.

[SEAL]

FRANK M. JORDAN,
Secretary of State.

WALTER C. STUTLER,
Assistant Secretary of State.

EXHIBIT 2. ORDER OF THE SENATE OF AUGUST 5, 1964, RE APPOINTMENT OF PIERRE SALINGER

IN THE SENATE OF THE UNITED STATES:

Ordered, That the oath be administered to Mr. Salinger without prejudice, and that the credentials be referred to the Committee on Rules and Administration with instructions to consider all matters pertaining to the said appointment and to report back not later than August 13.

(Agreed to, 59 to 29.)

Senator PELL. Our first witness today will be Mr. George Murphy, who has been kind enough to come from California, with his counsel, and they will proceed as they will.

Following that, Mr. Stanley Mosk, as the attorney general of California, will speak. And each side shall have the opportunity to rebut the other afterward.

Senator CURTIS. Mr. Chairman, may I ask this? I ask unanimous consent that Mr. Murphy's full statement may be printed, and then he will make a brief oral statement.

Senator PELL. Right. The full statement of Mr. Murphy will be printed in the record as if read, and he may make an oral statement.

Would you mind being sworn in?

Mr. MURPHY. No, indeed.

Senator PELL. Will you raise your right hand? Do you solemnly swear that the testimony you are about to give in the matter before

this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MURPHY. I do.

(The statement referred to is as follows:)

STATEMENT OF GEORGE MURPHY, REPUBLICAN NOMINEE FOR THE OFFICE OF U.S. SENATOR FROM THE STATE OF CALIFORNIA

Mr. Chairman, members of the subcommittee, my name is George Murphy. I reside at 807 Rodeo Drive, Beverly Hills, Calif.

Under the circumstances of this hearing, I should perhaps add that I have been owner, resident, and inhabitant at that address and since 1935 I have been continuously—and am today—an inhabitant and resident of California, a taxpayer of California, and an elector of California.

For more than two decades I have been active in State and National politics within the Republican Party, and currently I am honored to be the Republican nominee for the office of U.S. Senator from California. I am the only nominee for that office eligible to vote in the election for that office.

Mr. Chairman, I am grateful to you and the members of the subcommittee for the opportunity to appear before you this morning, and I am deeply aware of the importance of the issue which I am here to discuss.

From the inception of our Republic, our Federal system has been one of the glories of the civilized world—and we have no stronger bulwark of that Federal system than the Senate of the United States.

It is because our Federal system is so sound and so right that the United States stands today as the symbol for all who believe in the government of laws, and not of men. Yet today there are signs, too numerous in the land, that the rule of law is considered by some to be subject to exception. With all the earnestness I can command, I urge you: Do not make the Senate of the United States—of all places on earth—a place of exception to the rule of law.

It is not necessary for me to remind this subcommittee of the awesome prestige which this great deliberative body enjoys throughout the world. Indeed, it is a great man and from another country, perhaps the greatest statesman of our time, who exemplifies the respect which the world holds for the U.S. Congress. I refer to Sir Winston Churchill, and I can never forget that day after Christmas in 1941, 3 weeks after Pearl Harbor, when Prime Minister Churchill stood before the Congress of the United States. At this proud moment in his life, the great Englishman turned to the President of the Senate and reminded him that his mother had been an American. "I like to think, sir," he said, "that if my mother had been an Englishwoman and my father an American, instead of the other way around, I might have got here on my own."

Mr. Chairman, Mr. Churchill well understood that it is the Constitution of the United States which determines how one can get here, and one can get here no other way.

You know better than I the evaluation which the authors of our Constitution placed upon the Senate and the privilege of membership in it. The debates on the qualifications of a Senator lasted not hours but days, and virtually every word of article I, section 3, was tested and savored before it was ultimately accepted or revised.

In the Continental Congress there had been cases where a well-connected resident of one State found it expedient and possible to represent a different State. And those wise men of the Constitutional Convention intended that in the new Republic this would never happen again.

Either the law gave Governor Brown the power to appoint a nonelector of California or it did not. If it did not, then the purported appointed was a nullity and in that case there is no appointee before you for consideration no more than if you or I had attempted to make that appointment.

We are here today to state to you the reason why the purported appointment of Pierre Salinger is illegal and invalid on its face. We are here to ask the Senate of the United States to reject that purported appointment as a legal nullity.

Let me make it clear I am not here to debate Pierre Salinger's qualifications, personal, residential, or otherwise. The people can judge those in November. At the moment I don't know where he lives. I don't know of what State, if any, he is a resident; of what State, if any, he is an inhabitant. I don't even know where he has his laundry delivered—maybe it's the Fairmont Hotel in San Francisco, maybe it's the Mark Hopkins, maybe it's his home at 917 Lakeview Drive, Falls, Church, Va. Maybe, for all I know, he left it in Saigon.

What I do know is that Mr. Salinger is not an elector of California, and a purported appointment of a nonelector is no appointment at all.

Let me summarize the reasons why the purported appointment of Pierre Salinger nullity.

Under the Constitution of the United States, there are only three ways a person can become a U.S. Senator, and these are clearly prescribed in the 17th amendment. There are no other ways by which a person can become a U.S. Senator.

The first is by election by the people of the State. This is the normal general election, like that which will be held in California in November.

The only other two ways involve a vacancy in office. The 17th amendment provides that such vacancy may be filled in two alternative ways:

(1) The executive authority of the State may issue writs of election;

(2) The legislature of the State may empower the executive thereof to make temporary appointment.

Let me make this crystal clear. The Governor of the State has no inherent power to appoint a Senator. He has only such power of appointment as the legislature may have given him pursuant to the 17th amendment.

The California Legislature, in its wisdom, chose to give to the Governor the power to appoint an elector of the State of California, as defined by the constitution of California. It did not give him the power to appoint a nonelector. Therefore, the Governor had no power to appoint Pierre Salinger, and the purported act of appointment was a wishful gesture totally without legal reality.

If, on the other hand, as Governor Brown contends, the legislative act empowering him to appoint an elector was invalid, then the Governor had no power to make any appointment at all. If you strike down the power to appoint an elector there is simply nothing left.

It has been argued that the section empowering the Governor to appoint an elector (sec. 25001 of the California Election Code) is invalid because it tends to enlarge the qualifications of a Senator. But section 25001 does not deal with the qualifications of a Senator; it deals with one method of choosing him.

If he is an elector, he can be appointed by the Governor. If he is an inhabitant, but not an elector, he can be chosen in a special election.

Governor Brown had a clear constitutional and legislative alternative: If he preferred an inhabitant who was not an elector, he could have issued a writ of election. Instead, in his haste and in his arrogance, he chose to "brush aside" the law. (As one friendly reporter predicted he would do, the day Clair Engle died.) He chose to put the rule of one man above the rule of law, and he chose as his target the Senate of the United States.

Mr. Chairman, the California Legislature was not required to give to the Governor any power of appointment at all. The 17th amendment is permissive, not mandatory. The legislature had the choice of withholding all power or of giving the Governor that degree of power which they considered wise and prudent.

The language they chose was no accident or mistake. It permits the Governor to appoint a person who has been a resident of California for at least a year. It withholds power to appoint anyone who has resided in California for less than a year.

Let us consider what section 25001 was all about. What is its true purpose and significance? Simply and clearly it involves the problem of the traveling opportunist—the wandering adventurer as he was called in the constitutional debates. It foresees the ghoulish case of a man who would cross State lines when a Senator is mortally ill or has died, cross State lines in such tragic circumstances to seek the vacant office, or the office soon to be vacant.

If such a man should aspire to the high office of Senator, the California Legislature wanted him to face the people at the polls. They trusted the people more than they trusted any single man, any Governor, present or future.

It is one thing if the people in their collective wisdom prefer to choose a new resident, even a traveling opportunist. It is quite another thing to entrust such a choice to the naked power of one man. That could present too great a temptation, and the legislature therefore deliberately withheld from any Governor the personal power to make such an appointment on his own.

Section 25001 was written before the day of the jetplane, but the principle was the same in 1913, in the days of the slow train. Thus the legislature protected the State and the people of California, then and now, against a political raid when a Senator dies. They prevented the possibility that a Governor, in such situation, could telephone a crony in any State of the Union. He could telephone that friend and say, "Charlie, hop a jet for San Francisco, register at a hotel and I will appoint you U.S. Senator in the morning."

Mr. Chairman, this is exactly what the Brown-Mosk interpretation of the statute means, for if they were right, then any Governor could do exactly this. And many Californians, Mr. Chairman, can see a striking parallel between the case of Charlie and the case before you now.

Let me finally emphasize how outlandish the Brown-Mosk position really is. They would argue that the Federal Constitution renders invalid section 25001, which gives the Governor the power to appoint an elector. They are wrong in this, but even if they were right, it could not help their case. For in order to make the appointment valid, Brown and Mosk must then assert that the legislature really intended to pass an utterly different statute, a statute giving to the Governor the power to appoint any inhabitant, possibly a Charlie. Mr. Chairman, it is one thing to claim that a law is invalid; it is quite another thing to assert that the legislature intended to write an opposite law.

One does not have to be a lawyer to understand that neither a Governor nor a State attorney general, who claims a statute is constitutionally invalid, can then on his own authority write a new and opposite statute on the legislature's behalf.

Mr. Chairman, this sort of thing is the inevitable result with those who place the rule of a man above the rule of law.

On that point, let me mention a most revealing footnote. When the rumored appointment was first publicly challenged by the secretary of state and by me and many others, the Governor announced he would not act until he had received an opinion from the attorney general. That opinion, such as it is, was issued on August 4. But gentlemen, the day before that opinion was issued, the day of Clair Engle's funeral, the Brown-Salinger jetplane to Washington had already been chartered and invitations for the celebration ride to Washington, D.C., has been issued. And Governor Brown had already announced the forthcoming joint press conference at which he would introduce Mr. Salinger as his appointee. I have heard of such a cynical approach to the law by high officials in certain other countries; I hope it will not be condoned in California.

The law of California adopted by the California Legislature pursuant to the 17th amendment empowers the Governor to appoint an elector of California. Mr. Salinger is not an elector of California. Unless and until Governor Brown does appoint an elector of California, no actual appointment of U.S. Senator from California has been made.

That is the law of the matter. That is the ethical heart of the matter. With profound respect and sincerity, I urge the Senate to reject the purported appointment for the legal nullity it is. Thank you.

TESTIMONY OF GEORGE MURPHY, REPUBLICAN NOMINEE FOR THE OFFICE OF U.S. SENATOR FROM THE STATE OF CALIFORNIA; ACCOMPANIED BY ROBERT H. FINCH, COUNSEL

Mr. MURPHY. I would like to thank the committee for hearing me here.

I would like to state there has not been a question of the authority of the committee to determine the qualifications for membership in the Senate. The matter in question today goes beyond that, and has to do with the application of California law.

It is our position that the Governor of the State of California brushed aside certain aspects of California law in making the appointment. And we have asked that an opinion of the Supreme Court of the State of California be handed down in this matter.

The law is very clear. It says that the Governor may appoint an elector to fulfill the unexpired term caused by the unfortunate death of Senator Engle. The man who is appointed is not an elector of the State of California, and, therefore, we take the position that the entire action should be nullified and the Governor's decision should be vacated before the matter is brought to the attention of the U.S. Senate; that the matter was in error from the very beginning. And we hope that it would have been handled in that manner.

36-546—64——2

That is simply our position. There is no other position. It has nothing to do with the qualifications, the abilities, or personality of the Senator. It is merely a question of California law as it applies, and the powers given to the Governor by the legislature to make this appointment.

Senator CURTIS. Mr. Chairman—for the record, what is your address, Mr. Murphy?

Mr. MURPHY. 807 North Rodeo Drive, Beverly Hills, Calif.

Senator CURTIS. How long have you lived there?

Mr. MURPHY. I have lived there about 15 years. I have lived in the city of Beverly Hills now for over 25 years.

Senator CURTIS. And you are the nominee of the Republican Party for the office of U.S. Senator in the coming election in November?

Mr. MURPHY. I am; yes, sir.

Senator CURTIS. Mr. Chairman, I have nothing further. He has made his statement. It is in the record. I will have some questions for the lawyers.

Senator PELL. Senator Hayden?

Senator HAYDEN. I have no questions.

Senator PELL. Mr. Duffy?

Mr. DUFFY. No; I have no questions.

Senator PELL. Thank you very much. I think Mr. Finch probably has—I am sorry, Mr. Scribner.

Mr. FINCH. I am Robert Finch, of Los Angeles, attorney in California, Mr. Murphy's personal counsel. Mr. Fred Scribner, the counsel for the Republican National Committee, will join with me in the argument with regard to the formal legal questions involved.

Senator PELL. Mr. Scribner, would you like to sit up at the table?

Mr. SCRIBNER. Did I understand that I would go on after the attorney general?

Senator PELL. As you wish.

You have no more statement to make at this point?

Mr. FINCH. Not at this point, sir.

Senator PELL. Then Mr. Murphy is excused.

Mr. MURPHY. Thank you very much, gentlemen. It has been a great honor.

Senator PELL. Now, we will ask Mr. Mosk if he will come up and make his statement. Mr. Mosk, you are the attorney general of California?

Mr. MOSK. Yes.

Senator PELL. Would you be willing to take this oath? Do you solemnly swear that the testimony you are about to give in the matter now pending before the subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MOSK. I do.

Senator Pell. Would you identify yourself?

TESTIMONY OF STANLEY MOSK, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Mr. MOSK. My name is Stanley Mosk, attorney general of the State of California, 430 Roxbury Drive, Beverly Hills, Calif.

First of all, Senator Pell, Senator Curtis, Senator Hayden, I am not going to discuss any of the political implications of the appointment.

I think that should be reserved for the political arena. Although I might say I think a pretty good political case could be made for the Governor of the State appointing the nominee of the majority party of the State to fill a vacancy. I am concerned, as the chief legal officer of the State of California, solely with whether the appointment is valid and legal under the Constitution of the United States and the laws of the State of California.

Prior to the time the Governor made his appointment, he asked us for an opinion on whether the Governor can appoint a person to fill a vacancy, and whether he can appoint a person who is not an elector of the State of California at the time of the appointment. Under date of August 4, 1964, we rendered an opinion to the Governor, which was affirmative in both respects. I have given to your committee counsel a copy of our opinion on that subject.

Senator PELL. Would you like this opinion included in the record?

Mr. MOSK. Yes, Mr. Chairman; I would like to have that included in the record.

Senator PELL. It will be inserted at this point.

(The opinion referred to is as follows:)

EXHIBIT 3. OPINION OF THE ATTORNEY GENERAL OF CALIFORNIA RE APPOINTMENT BY THE GOVERNOR TO FILL VACANCY IN THE OFFICE OF U.S. SENATOR

OFFICE OF THE ATTORNEY GENERAL, STATE OF CALIFORNIA

STANLEY MOSK, ATTORNEY GENERAL

64/226—AUGUST 4, 1964

OPINION OF STANLEY MOSK, ATTORNEY GENERAL; CHARLES A. BARRETT, ASSISTANT ATTORNEY GENERAL; JAMES GANULIN, DEPUTY ATTORNEY GENERAL

THE HONORABLE EDMUND G. BROWN, GOVERNOR OF THE STATE OF CALIFORNIA, has requested an opinion on the following questions:

1. Can the Governor appoint a person to fill a vacancy in the office of United States Senator caused by the death of the incumbent?

2. Can the Governor appoint, to the office of United States Senator, a person who possesses the qualifications for the office established by Article I, Section 3, Clause 3, of the United States Constitution even though the appointee is not an elector of the State of California at the time of the appointment?

The conclusions are:

1. The Governor may fill a vacancy in the office of United States Senator by appointment.

2. In filling a vacancy in the office of United States Senator, the Governor may appoint a person who possesses the qualifications established by Article I, Section 3, Clause 3, of the United States Constitution even though that person is not an elector of the State of California at the time of the appointment.

ANALYSIS

The untimely death of the Honorable Clair Engle has given rise to a question concerning the method of filling a vacancy in the office of United States Senator.

The Seventeenth Amendment of the United States Constitution provides in part as follows:

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct."

Acting pursuant thereto, the California Legislature has enacted Elections Code Section 25001 which provides as follows:

"If a vacancy occurs in the representation of this State in the Senate of the United States, the Governor may appoint and commission an elector of this State, who possesses the qualifications for the office, to fill the vacancy until his successor is elected and qualifies and is admitted to his seat by the United

States Senate. However, whenever a vacancy occurs within a term fixed by law to expire on the third day of January following the next general election, the person so appointed shall hold office for the remainder of the unexpired term unless such vacancy is filled at a special election held prior to such general election, in which case the person elected at such special election shall hold office for the remainder of the unexpired term. An election to fill a vacancy in the term of a United States Senator shall be held at the general election next succeeding the occurrence of the vacancy or at any special election."

Thus, the Governor may appoint a person to fill a vacancy in the office of United States Senator.

Turning to the second question, Article I, Section 3, Clause 3, of the United States Constitution provides as follows:

"No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

It is well settled that the qualifications established by the United States Constitution for the offices of United States Senator and Representative in Congress are exclusive and a state cannot, by constitutional or statutory provisions, add to or enlarge upon those qualifications. *State* v. *Crane*, 197 P. 2d 864, 867–874 (Wyo. 1948), and cases cited therein.

Section 25001 of the Elections Code purports to restrict the appointment to "* * * an elector of this State * * *". Under Elections Code Section 20, an elector is a person who qualifies under Section 1 of Article II of the State Constitution which sets forth a residency requirement of one year.

Thus, the question is presented as so whether Section 25001 of the Elections Code, insofar as it requires an appointee to be an elector, has established an additional qualification for the office of United States Senator.

In *State* v. *Crane*, 197 P. 2d 864 (Wyo. 1948), a provision of the Wyoming Constitution, disallowing the Governor from being eligible to any other office during the term for which he was elected, was held to amount to an additional qualification for the office of United States Senator and therefore could not prevent the Governor from becoming a United States Senator since the provisions dealing with the qualifications for the Senate and House of Representatives set forth in the United States Constitution were controlling. In the *Crane* case, the Court stated:

"The case of State ex rel. Eaton v. Schmahl, Secretary of State, 140 Minn. 219, 167 N.W. 481, decided in 1918 dealt with a provision of the Minnesota Constitution prohibiting any person who had been convicted of a felony from holding a public office. Proceedings were brought to restrain the Secretary of State of Minnesota from placing the name of a candidate, one Peterson, for the United States Senate on the primary election ballot on the ground that 'since the filing of his affidavit as such candidate he was convicted of a felony in the federal court, sitting in this state, and is now under sentence by the judgment of that court to imprisonment for a term of years.' The court dismissed the proceedings, asserting that the position of Senator is a federal office created by the United States Constitution and that a state is without authority to enlarge or modify the qualifications for United States Senator prescribed by the National Constitution and also that the provisions of the Minnesota Constitution on the right to hold public office could have no application to the Office of United States Senator. Said the Court: 'Peterson is not disqualified under the provisions of the federal Constitution.' " 197 P. 2d at 870.

In *Riley* v. *Cordell*, 194 P. 2d 857 (Okla. 1948), it was held that the United States constitutional clause with respect to qualifications for the Senate or House was exclusive and provisions of an Oklahoma statute barring judges from becoming elected or appointed as a candidate for any office other than a judicial office could not prevent a judge from becoming a candidate for nomination for United States Senator. Other cases holding to the same effect are: *Wettengel* v. *Zimmerman*, 24 N.W. 2d 504 (Wis. 1948); *State ex. rel. Handley* v. *Superior Court of Marion County*, 151 N.E. 2d 508 (Ind. 1958); *Opinion of the Judges*, 116 N.W. 2d 233 (S.D. 1958); *State* v. *Crawford*, 10 So. 118 (Fla. 1891).

Certainly the pertinent portion of Section 25001 of the California Elections Code requires something more of the appointee than being thirty years of age, nine years a citizen of the United States, and being an inhabitant of the state. United States Constitution, Article I, Section 3, Clause 3. To the extent that it requires him to be an elector; i.e., a resident of the state for one year, it is enlarging upon the United States constitutional qualifications for office and is invalid.

An argument might be presented that the Governor can not appoint a person who is not an elector because the United States constitutional provision as to inhabitancy only refers to the individual's being an inhabitant "* * * when elected." However, this argument is not correct because the United States Constitution as originally enacted did not provide for the election of a United States Senator by popular vote of the people, but only provided that they be "* * * chosen by the Legislature * * *." The adoption of the Seventeenth Amendment to the United States Constitution for the first time provided for the popular election of United States Senators. Therefore, the use of the word "elected" as used in Article I, Section 3, Clause 3, of the United States Constitution, should be held to include the broader meaning of selected or chosen. To the same effect is the recent California State Supreme Court case of *Barrett* v. *Hite*, 61 A.C. 83, 85–86 (1964), where the Court held that the word "elected" should be construed to include the broader meaning of selected or chosen.

Though statutes are presumed constitutional, the presumption of validity is not conclusively binding on the courts. *McKay Jewelers, Inc.* v. *Bowron*, 19 Cal. 2d 595, 603 (1942). Thus, in a case such as this, where a portion of the statute is clearly contrary to the provisions of the United States Constitution, that portion must be declared invalid.

The portion of Section 25001 of the Elections Code authorizing the Governor to appoint a person who possesses the qualifications for the office to the United States Senate is valid as clearly authorized by the provisions of the Seventeenth Amendment to the Constitution of the United States. This part of the section can stand alone and remain in force since it can be separated from the invalid part of the section; namely, the elector requirement, since it constitutes a completely operative expression of the legislative intent. *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 555 (1946); 11 Cal. Jur. 2d Constitutional Law, Sec. 87, p. 424.

It is important to note also that the provisions of the United States Constitution, Article I, Section 5, Clause 1, read in part as follows: "Each House shall be the judge of the elections, returns and qualifications of its own members, * * *."

Thus, the ultimate decision as to whether or not a particular person shall be seated in the United States Senate belongs to the Senate itself. Therefore, assuming a person has the requisite qualifications set forth in the United States Constitution, the question of whether his election or appointment is valid under a purported restriction set forth in a State statute or State Constitution is left solely to the United States Senate. *State* v. *Crawford*, 10 So. 118 (Fla. 1891); Cf., *In re McGee*, 36 Cal. 2d 592 (1951).

For the foregoing reasons, we conclude that the Governor may fill a vacancy in the office of United States Senator by appointment and may appoint a person who possesses the qualifications established by Article I, Section 3, Clause 3, of the United States Constitution even though that person is not an elector of the State of California at the time of the appointment.

Mr. MOSK. I also have, for the benefit of the committee, a certified copy, the copy being certified by the clerk of the Supreme Court of California, of the order of the Supreme Court of California, placing the name of Pierre Salinger on the ballot.

A challenge was made to his right to be on the ballot at the primary election, on some of the same grounds that are being urged in this challenge to his right to be seated as a Senator. So I have for the committee a certified copy of the order of the Supreme Court certifying his right to be on the primary ballot. And I would like to have that included in the record.

Senator PELL. What is the date of that?

Mr. MOSK. This is a dated March 27, 1964.

Senator PELL. Fine. In other words, that was prior to the primary?

Mr. MOSK. Yes; prior to the primaries.

Senator PELL. You wish that inserted in the record?

Mr. MOSK. Yes. I would like to have this inserted in the record.

Senator CURTIS. No objection.

Senator PELL. Without objection.

(The document referred to is as follows:)

EXHIBIT 4. ORDER OF THE SUPREME COURT OF CALIFORNIA PLACING THE NAME OF PIERRE SALINGER ON THE CERTIFIED LIST OF CANDIDATES FOR THE CALIFORNIA PRIMARY ELECTION OF JUNE 2, 1964

[Filed March 27, 1964. William I. Sullivan, Clerk]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

S.F. 21659

PIERRE E. G. SALINGER, PETITIONER v. CHARLES A. ROGERS, AS REGISTRAR OF VOTERS OF THE CITY AND COUNTY OF SAN FRANCISCO AND FRANK M. JORDAN, AS SECRETARY OF STATE, RESPONDENTS

BY THE COURT

It appearing that petitioner has filed with the respondent Registrar his declaration of candidacy for the office of United States Senator and that he has substantially complied with the requirements of section 6401 and other pertinent sections of the Elections Code, and that respondent Registrar has forwarded to respondent Secretary of State petitioner's declaration of candidacy duly certified as required by section 6401, and it further appearing that respondent Secretary of State has rejected and returned the declaration of candidacy, the respondent Registrar is hereby directed to again transmit petitioner's declaration of candidacy together with filing fee and certified list of sponsors to respondent Secretary of State, and upon receipt of same respondent Secretary of State is hereby directed to place petitioner's name on the certified list of candidates who are eligible to be voted for at the direct primary election to be held on June 2, 1964.

This order is final forthwith.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 7th day of August A.D. 1964.

[SEAL] WILLIAM I. SULLIVAN, *Clerk*.

Mr. MOSK. The basic issue, it seems to me, is whether or not any State has the right to add qualifications to those set forth in the Constitution of the United States in article I, section 3, clause 3. That section, as we well know now—if we had not reviewed it before—prescribes the three qualifications for a U.S. Senator, that is, that he must be 30 years of age, that he must be a citizen for at least 9 years, and that he must be an inhabitant of the State when chosen.

Now, the question, then, is may any State narrow the use of that word "inhabitant" to limit the qualification to something else—in this instance, an elector.

We have done considerable research, some of which is included in this memorandum we submitted to the Governor, and I have yet to find a single case anywhere, in any State in the Union, that permits any State to add qualifications to those set forth in the Constitution of the United States.

For example, in *Riley* v. *Cordell*, an Oklahoma case, cited in 194 Pacific 2d 857, the State had a statute prohibiting justices of the supreme court of the State from being candidates for another office for the term for which they were elected. The Supreme Court of Oklahoma said:

> The petitioner contends that the provisions of article I, section 3 of the Constitution of the United States prescribing the qualifications of U.S. Senators are exclusive, and that a State may not add to or take away from such qualifications. The attorney general, as attorney for the respondents, concedes this argument, and we think properly so.

That was the holding of the court.

You will find that same ruling in *State* v. *Howell*, 104 Washington 99, 175 Pacific Reporter, 569, and an Arizona case, with which I am sure

Senator Hayden is familiar, *Stockton* v. *McFarland*, 56 Arizona 138, 106 Pacific 2d, 328.

In *Danielson* v. *Fitzsimmons*, a Minnesota case, 44 Northwest Reporter, 2d, 484, the Minnesota State Constitution provided—and this is remarkably similar to the current situation—provided:

> Every person who by the provisions of this article shall be entitled to vote at any election shall be eligible to any office who now is or hereafter shall be elected by the people in the district wherein he shall have resided 30 days previous to such election.

In other words, under the Minnesota Constitution, a person was entitled to hold office only if he was eligible to be a voter.

A woman by the name of Grace Carlson had been convicted of a felony. She sought the nomination of the Socialist Workers Party for Congress, and the Secretary of State refused to certify her for a position on the ballot because she had this felony conviction. The court said:

> The qualifications of those who aspire to hold this office are prescribed by the U.S. Constitution and the State may not enlarge or modify such qualifications. The provisions of U.S. Constitution, article I, section 4, permitting the States to regulate the time, place, and manner of holding elections for Members of Congress do not permit the State to add qualifications for such office not contained in the U.S. Constitution. All authorities so far as we have been able to find are in accord.

The best case I have been able to find on this situation, one that reviews every authority from the days of our Founding Fathers down to date, is *State* v. *Crane*, a Wyoming case, cited in 197 Pacific 2d 864. That case involved Lester Hunt, who was Governor of Wyoming. There was a prohibition against a Governor taking any other office for the term for which he was elected. The Governor then sought to run for the U.S. Senate, and someone attempted to bar him from the ballot.

The court reviewed all the cases at great length. I am going to read a couple of quotations from this case, because they are very revealing. They go all the way back to the Federalist Papers.

At the time the Constitution was being considered, James Madison discussed this very point. And in the Federalist Papers he said:

> The qualifications of the persons who may choose or be chosen—

notice the word "chosen" and not "elected"—

> has been remarked upon on other occasions are defined and fixed in the Constitution and are unalterable by the legislature.

There is James Madison in the Federalist Papers.

Here again, Justice Storey, one of our great constitutional Justices of the U.S. Supreme Court, has this to say on this subject:

> The truth is that the States can exercise no powers whatsoever which exclusively spring out of the existence of the National Government, which the Constitution does not delegate to them. They have just as much right and no more to prescribe new qualifications for a representative as they have for a President.

In other words, the Constitution of the United States gives the qualifications for office of only three offices—the President of the United States, U.S. Senators, U.S. Congressmen. And no State has any right to add to or detract from the constitutional qualifications for those three offices. They have a complete right to regulate any other office as they see fit.

Quoting still further from the *State* v. *Crane* case, it cites "Burdick on Constitutional Law" as follows:

> It is clearly the intention of the Constitution that all persons not disqualified by the terms of that instrument, to wit, the Constitution should be eligible to the Federal office of Representative.

And, of course, in this instance, we merely change the word "Representative" to "Senator."

Situation after situation heard by the U.S. Senate and the House of Representatives of the United States are discussed the *Crane* case—some of them quite significant.

Here, again, Senator Foote, of Vermont, at the time, in 1856, when there was a challenge to an Illinois Senator named Trumbull, who had been a judge, and was chosen as Senator contrary to the provisions of the constitution of the State of Illinois, Senator Foote said:

> A State either by legislative enactment or by provision of its organic law has nothing to do with defining the tenture of office, the duties, powers, or jurisdiction of office or the qualifications for office of any Federal officer whose functions are all created, regulated, and controlled by the Federal Government.

An interesting case cited here involved Senator McCarthy. Senator McCarthy was a judge in Wisconsin. The Wisconsin constitution, section 10, article 7, provided that

> Each of the judges of the supreme and circuit courts shall hold no office of public trust except a judicial office during the term for which they are respectively elected.

Nevertheless, then Judge Joseph McCarthy sought nomination as the Republican candidate for the Senate in the State of Wisconsin. He was challenged in court. And the Wisconsin Supreme Court held as follows:

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

And then it went on to hold that:

> Neither by a constitutional provision nor regulative enactment can the State of Wisconsin prescribe qualifications of a candidate for nomination for the office of U.S. Senator in addition to those prescribed by the Constitution of the United States.

I think perhaps I have belabored that point. I am certain that any constitutional lawyer would have to concede that no State has any right whatever to add to or detract from the provisions in the Constitution of the United States regarding the qualifications of a Member of the U.S. Senate.

Now, let's pass on to the next question that may arise, and that is the interpretation of the 17th amendment to the Constitution.

As you are well familiar, the 17th amendment to the Constitution provides that:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies provided that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by the election as the legislature may direct.

Now, I point out to you members of the committee that there is nothing in the 17th amendment relating to the subject of qualifications for office. This merely authorizes the States to set forth the mechanics and the procedure for making a senatorial appointment. It doesn't

mention the word "qualifications" of a Senator, either directly or by inference. And in no manner does it suggest any intention to modify the uniform qualifications which were previously written into the Constitution.

Now, what do we mean by mechanics and procedure? I think we mean such things as the legislature could place mechanical limitations on the appointment, such as the time in which the Governor may make an appointment. He could make—they could possibly say that he could not make an appointment for 1 week after the vacancy occurs or for 1 month. They could provide, for example, that the Governor must make the appointment during a congressional session, and not during a congressional recess, and so on. Those kind of mechanical and procedural matters were permitted to be made by the States through the 17th amendment.

In the case of *State* v. *Frear*, 142 Wisconsin 320, 125 Northwestern 961, there was a requirement that a candidate, if nominated, must sign an affidavit or a form stating that if elected he will serve. The court there held that this was not an added qualification. In other words, this, once again, was mechanical or procedural. That is, the guarantee that a candidate would serve. And in no way did it add to or detract from the qualifications for office.

To that same effect is the *Riley* v. *Cordell* case, the Oklahoma case, which I previously cited.

California adopted section 25001 of its elections code, pursuant to the power given to it under the 17th amendment to the Constitution. It seems to me very clear then that the use of the word "elector" in 25001 was an inadvertence, or an unfortunate, but certainly an invalid use of that term.

Senator PELL. That will be inserted in the record at this point.

(The document referred to is as follows:)

EXHIBIT 5

SECTION 25001 OF THE ELECTIONS CODE OF THE STATE OF CALIFORNIA

Section 25001.—If a vacancy occurs in the representation of this State in the Senate of the United States, the Governor may appoint and commission an elector of this State, who possesses the qualifications for the office, to fill the vacancy until his successor is elected and qualifies and is admitted to his seat by the United States Senate. However, whenever a vacancy occurs within a term fixed by law to expire on the third day of January following the next general election, the person so appointed shall hold office for the remainder of the unexpired term unless such vacancy is filled at a special election held prior to such general election, in which case the person elected at such special election shall hold office for the remainder of the unexpired term. An election to fill a vacancy in the term of a United States Senator shall be held at the general election next succeeding the occurrence of the vacancy or at any special election.

Mr. MOSK. Now, it seems clear that the State of California has no power to limit the term "inhabitant" as set forth in the Constitution of the United States, to read "elector" which is certainly a much more constricted term. And I doubt that any constitutional argument could be made to the contrary—that is, that the State does have power to limit the qualifications set forth in the U.S. Constitution.

Then a question may arise, and indeed has arisen in some of the cases now pending, whether if that word is stricken the section can remain in full force and effect. Is the section severable? Or if you strike the word "elector," change the word "elector," does the whole

36-546—64——3

section necessarily fall? It seems to me clear under California law that it does not.

In the case of *Danskin* v. *San Diego School District*, 28 California 2d 536, the court there stated that the legislature didn't have to pass a civic center act making school buildings available for meetings, but having done so the legislature could not impose an unconstitutional provision requiring authorities to determine that users were not subversive.

In other words, in California, our legislature passed an act providing that school buildings could be made available for meetings, but that school boards had an obligation to establish that those using the buildings were not subversive. The court struck down that provision regarding the requirement that the school district people determine that the users were not subversive. But the court very clearly said then that the invalidity of that antisubversive requirement did not invalidate the act as a whole. The purpose of the act was to provide the use of school buildings to portions of the citizenry.

Similarly, in *People* v. *Lewis*, 13 California 2d, 280, page 284, 89 Pacific 2d 388, the Supreme Court of California said—this is a quote:

> It is a general rule, supported by an unbroken line of decisions, that a provision in or a part of an act may be unconstitutional and beyond the power of the legislature to enact, and still the whole act may not be void, The accepted doctrine in such cases is that the constitutional portions of the statute may stand alone and remain in force if they can be separated from the portions which are void. The unconstitutional provisions will not vitiate the whole act unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions.

Now, in 11 Cal. Jur. 2d, sections 88 and 89, it is pointed out that the purpose of the act as a whole, and the intention of the legislature, is to be determined by the general purposes of the law. To that same extent, see *Hale* v. *McGenighan*, 114 California 112, 45 Pacific 1049, also *Childs Estate*, 18 California 2d, 115 Pacific 2d 432. And there is an annotation on that subject in 136 ALR 333.

In this instance, the general purpose of the law is very clearly to establish a method pursuant to the 17th amendment of the Constitution of the United States by which the Governor may fill a vacancy in the Senate.

Obviously, it is to the advantage of the State, and, therefore, the purpose of the legislature was, to assure that California will have two Senators, and that the Governor is empowered to make an appointment. The invalid portion, the limitation to an elector, cannot vitiate the legislative intent to have a Senate seat filled by appointment by the Governor.

Now, we also have—I have many other cases, gentlemen, that I could cite on the subject of the power of the State—the lack of power by a State to add to or detract from the qualifications of a Senator. But you will find that many precedents in your own Senate history—precedents from Hinds and Cannons, with which I am sure you gentlemen are thoroughly familiar.

In volume 1 of Hinds and Cannons, page 381, there is reference to the election of William McCreery, back in 1807. There, the House was inclined to the view that the States cannot have the right to prescribe qualifications. There the Maryland constitution required 12 months of residence in the State. The committee reported that

the Maryland law was unconstitutional, and they, therefore, seated McCreery as a Member of the Congress of the United States.

Back in 1856 there was the question of seating a Mr. Trumbull from Illinois, to which I have already made reference. This is cited in Hinds and Cannons, page 384. And page 388 of Hinds and Cannons, you will find reference to the seating of a man named Peters, in which the committee reported to the Congress of the United States that the State may not superadd qualifications.

Senator PELL. Excuse me for interrupting. Are these from precedents of Hinds and Cannon?

Mr. MOSK. Yes.

Senator PELL. Could we not insert them in the record at this point?

Mr. MOSK. Yes, sir.

Senator PELL. And, also, there is another memorandum here from the attorney general. Would you like to have that inserted?

Mr. MOSK. Yes, sir.

Senator PELL. Without objection.

(The documents referred to are as follow:)

EXHIBIT 6

RESEARCH BY ATTORNEY GENERAL STANLEY MOSK RE OPINION ON APPOINTMENT OF PIERRE SALINGER TO U.S. SENATE, AUGUST 4, 1964

PRECEDENTS FROM HINDS AND CANNONS

Volume I, p. 381

In 1807 the election of William McCreery was questioned. The House "inclined manifestly to the view" that the states did not have the right to prescribe qualifications but avoided an explicit declaration to that effect. The Maryland Constitution required 12 months of residence in the state. The committee reported that the Maryland law was unconstitutional and they did not try to ascertain whether or not McCreery met the Maryland requirements (pp. 381–382). The majority of the committee argued that the states could not reserve a power to add to the qualifications of representatives of the Congress. Although the House did not wish to decide the states rights question and struck a phase which read that McCreery "being duly qualified agreeably to the Constitution of the United States, is entitled to his seat in this House," nevertheless seated McCreery under the resolution that "William McCreery is entitled to his seat in this House."

Page 384

In 1856 the House decided that a provision of the Illinois Constitution stating that judges were not eligible for Federal elective office and providing that all votes for such persons would be void, was not determinative. The committee concluded that it was a fair presumption that when the Constitution prescribed the three qualifications for representatives, it meant to exclude all others. For otherwise it would prevent the choice by the people of a representative. One of the representatives was seated, the other had been elected to the Senate and his challenger was held not entitled to the seat as the votes cast for the judge were not void. (*Turney* v. *Marshall; Fouke* v. *Trumbull.*)

Page 387

The same constitutional provision was interpreted in the Senate and Mr. Trumbull was declared entitled to his seat.

The House affirmed the view in 1884 that only the Constitution sets the qualifications for representatives.

Page 388

The committee reports stated (*Wood* v. *Peters*) that the states may not superadd qualifications. That "they have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States." Peters was seated and his title confirmed unanimously.

Page 426

The Senate in 1809 held that a Mr. Griswold, of Illinois, appointed by the Ohio Governor to fill a vacancy, was qualified. He was appointed during the Senate's recess in May; he then moved into Ohio and had resided there since September. The executive certifying that Griswold was a citizen of the States, it was recommended that he be seated. The Senate seated Griswold.

In 1926 the seating of Senator Nye, of North Dakota, was questioned. Under the North Dakota statute, there was no specific mention that the Governor had the authority to fill a vacancy. The committee reporting to the Senate considered that the North Dakota statute was insufficient because it did not provide for temporary appointments. By a vote of 41 to 39, Senator Nye was held entitled to his seat (Congressional Record, January 7–12, 1926). At page 1681 of the Congressional Record, the minority report stated that the Governor had the authority to appoint a senator. General discussion in the debate indicated that a senator is considered a Federal officer.

EXHIBIT 7

MEMORANDUM OF ATTORNEY GENERAL STANLEY MOSK RE APPOINTMENT OF PIERRE SALINGER TO U.S. SENATE

Other cases which could have been included in our opinion but which were not:

In *Keough* v. *Horner*, 8 Fed. Supp. 933 (1934), District Court Illinois, it was held that the power of each house of congress to judge the qualifications and legality of the election of their members is supreme and that the federal courts have no authority to judge the manner in which such members were elected or to interfere with the Governor in issuing election certificates.

McLeod v. *Kelly*, 7 N.W. 2d 240 (Mich. 1942) stands for the proposition that mandamus will not issue without a clear legal duty, and that it would not issue therefor to compel the Board of Canvasers to declare an election void on the ground of election irregularities, since the House, and not the Board, have the duty to determine the result of the election. (For this we may read: "validity of the appointment.")

Danielson v. *Fitzsimmons*, 44 N.W. 2d 484 (Minn. 1950) held that Minnesota Constitution, Art. VII, Sec. 7, providing that every person who is entitled to vote is eligible to any elective office, could not rule as against the Federal Constitution that the office of Representative is a federal office, and that the qualifications are prescribed by the U.S. Constitution and may not be modified by the state. Thus a conviction for a felony was not a bar despite the state law making a felon ineligible to elective office.

Shub v. *Simpson*, 76 A. 2d 332, 40 (Md. 1950) held that the refusal to file a nonsubversive affidavit did not disqualify one from being placed on the ballot for federal office. The requirement of the Maryland Constitution did not apply to such persons because no qualifications could be added to those required in the U.S. Constitution and if a person is disqualified, it is for the Congress to determine.

Odegard v. *Olson*, 119 N.W. 2d 717 (Minn. 1963) stated that while states may regulate the conduct of elections, each house of the congress is the sole judge of election returns and qualifications of its members exclusive of any other authority, including the courts.

Other cases to the same effect as above include:

In re Youngdale, 44 N.W. 2d 459 (Minn. 1950). (State courts have no jurisdiction over elections of representatives to Congress. Congress is its own judge of election returns.)

Matter of Executive Communication, 12 Fla. 688 (1869). (Statute, allowing inquiry into illegal practices concerning the election of a U.S. Senator insofar as it purports to authorize judicial inquiry into the regularity of an election of a Senator intrudes on the exclusive authority of the U.S. Senate.)

Burchell v. *State Board of Election Commissioners*, 68 S.W. 2d 427 (Ky. 1934). (State court has no jurisdiction to determine the right of a Representative to a seat or to judge whether he has been elected.)

Also, *Smith* v. *Polk*, 17 N.W. 2d 281 (Ohio 1939); *In re Williams Contest*, 270 N.W. 586 (Minn. 1936); *Opinion of the Judges*, 116 N.W. 2d 233 (S.D. 1962).

Collection of cases: Anno. 107, A.L.R. 205.

Mr. MOSK. I will just conclude by pointing out one other precedent. You will find this in Hinds and Cannons, page 426. In 1809 a man named Griswold was appointed by the Governor of Ohio to fill a

vacancy. Mr. Griswold was a citizen of Illinois, didn't live in Ohio, and as far as I have been able to determine never was in Ohio. But the Governor of Ohio appointed this Illinois resident to serve as Senator from Ohio. He was appointed during a recess, in May. He moved into Ohio in September. And his seat was challenged and the challenge was denied and Griswold was seated as a Senator from the State of Ohio.

Senator CURTIS. What was the date of that?

Mr. MOSK. 1809.

Senator PELL. This is a case cited by a publication we put out last year, Stanley Griswold of Ohio.

Mr. MOSK. Yes. I am not familiar with that publication. But undoubtedly it is the same case, Senator.

Senator PELL. It appears at page 5 of the pamphlet we wrote.

Mr. MOSK. One final point. Even if it should be held, although I cannot conceive of this situation, that section 25001 of the Elections Code of California were to fail, there still is precedent for a Governor, without any authority whatever in his State law, to fill a vacancy. This was done in the case of Senator Gerald Nye, of North Dakota, in 1926. The seating of Senator Nye was questioned because under North Dakota statutes there was no specific authority for the Governor to fill a Senate vacancy. The Governor of the State did appoint Senator Nye. His seat was challenged. Senator Nye nevertheless was seated.

So I think for all of these, and other reasons which I could state at greater length, there is ample authority for this subcommittee to recommend the permanent seating of Senator Salinger.

Senator PELL. Thank you very much, Mr. Mosk.

Senator Curtis, do you have any questions?

Senator CURTIS. Yes. Mr. Attorney General, are you authorized to supply our record with certain facts about Mr. Salinger?

Mr. MOSK. I have no information about the facts, Senator, other than what I have learned casually, as you probably have.

Senator CURTIS. You stated that the Governor asked you if he could appoint a nonelector; is that correct?

Mr. MOSK. That is correct. The precise question is stated forth in our opinion.

Senator CURTIS. Is it your statement that Mr. Salinger is not an elector?

Mr. MOSK. I don't know that as a fact. I have been given to understand that. But I cannot certify to that under oath.

Senator CURTIS. Do you know where—of what place he is a resident?

Mr. MOSK. He is now a resident of the State of California.

Senator CURTIS. What is his address?

Mr. MOSK. I can't tell you that. I don't know.

Senator PELL. Excuse me. Would you want inserted in the record at this point what he considers his address?

Senator CURTIS. Yes. If someone is authorized to speak for him. And I would also like to have the date on which he claims to establish a residency, or become an inhabitant of California.

Mr. MOSK. I assume this would be sometime prior to his filing for the nomination in the Democratic primary. The Democratic primary was held on June 2. The filing date closed, as I recall, about the

third week in March. I am sure Mr. Murphy would know that date better than I. March 20, I am told.

Senator CURTIS. Was this an oral request for an opinion?

Mr. MOSK. Yes; I have since learned that it was an oral request.

Senator CURTIS. Then the Governor did not submit a request in writing?

Mr. MOSK. No. The Governor orally asked us the two questions which we have repeated in the first page of our opinion.

Senator CURTIS. And your opinion has been printed in the record?

Mr. MOSK. Yes; it has.

Senator CURTIS. Would you mind explaining the letter of the Governor?

Mr. MOSK. I have ascertained there was no letter from the Governor, merely an oral request.

Senator Curtis. I certainly do not want to inconvenience anybody. But I would like to have in the record what Mr. Salinger says is his residence, and when he says be became a resident of California.

Mr. MOSK. I am informed that his present address is 66 Cleary Court, San Francisco. I cannot state that of my own knowledge, however. I have been told that.

Senator CURTIS. And you do not know whether or not—when he claims he established a residence in California?

Mr. MOSK. I do not. I think perhaps I ought to clarify the function of the attorney general. It is merely to render legal opinions when asked a legal question. Frequently the questions asked of us assume facts. We make no effort to ascertain whether the facts are valid or not. We don't think that is our function.

Senator PELL. One thought here. Do you have a copy of the supreme court's ruling that put him on the ballot?

Mr. MOSK. I have already introduced that into the record.

Senator CURTIS. Does that recite when he claims to have established a residency?

Mr. MOSK. It does not. It is merely the order of the court. It recites no facts.

Senator CURTIS. Do the pleadings recite that?

Mr. MOSK. I would assume some of the pleadings do. I am sure they do. Pleadings certainly by those opposing placing his name on the ballot would make that assertion.

Senator CURTIS. Well, I wonder—and I am perfectly willing to have this submitted so we can have it before we close this hearing. I certainly do not want to subject him to any long cross-examination, but I would like to know where his residence is now, when he claims to have established a residence in California, and where that residence has been maintained since that time.

Senator PELL. Senator Curtis, would it be of help if we asked Senator Salinger to come in and give us that information himself?

Senator CURTIS. Yes, I will go ahead with some other matters.

Senator PELL. All right. We will call him down and ask him.

Senator CURTIS. Now——

Mr. MOSK. I might say, Senator, I do know that Mr. Salinger is a native Californian, born in California, educated in California, went to school in San Francisco, University of San Francisco, that he worked there most of his adult life.

Senator CURTIS. Now, as a lawyer, you know that someone could live for 75 years as an inhabitant of a place, be an elector, have all the

qualifications to perform any action, and could change that overnight. Isn't that true?

Mr. MOSK. That is correct.

Senator CURTIS. So while that may be a set of facts that is very proper for him to submit to the people in the way of argument, it doesn't go to the point of where—of what State an individual is an inhabitant, does it?

Mr. MOSK. That is correct.

Senator CURTIS. Now, the court order placing Mr. Salinger's name on the ballot, that refers to the election or the running for the office, and not the appointment; is that correct?

Mr. MOSK. Yes.

Senator CURTIS. Was there an opinion issued?

Mr. MOSK. No. I have given you all that the court rendered.

Senator CURTIS. Now, the 17th amendment provides for direct election of Senators for full terms. It also provides for the executive authority of the State to issue writs of election to fill vacancies. And then it has an additional provision that provides for appointments, does it not?

Mr. MOSK. Yes; that is correct—in section 2.

Senator CURTIS. The power to appoint, at least since the adoption of the 17th amendment, which became effective back in 1913, the constitutional provision then has been included in these words:

Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Do you agree that that is the constitutional authority for appointments?

Mr. MOSK. That is correct.

Senator CURTIS. What was the date of the act of the California Legislature which was prescribed in the code 25001?

Mr. MOSK. It was subsequent to the adoption of the 17th amendment. There was an earlier version in what we formerly called the political code, adopted in 1913, amended in 1939, again in 1947, and codified in the elections code in 1955.

Senator CURTIS. As a matter of fact, didn't it follow the adoption of the 17th amendment?

Mr. MOSK. It did.

Senator CURTIS. And was intended to carry out the provisions of that part of the 17th amendment relating to appointments?

Mr. MOSK. It was.

Senator CURTIS. Now, you mentioned an Oklahoma case. What was the statute involved in that case? What statute were they construing?

Mr. MOSK. The statute there was one prohibiting justices of the State supreme court from being candidates for another office for the term for which they were elected.

Senator CURTIS. And that statute was a prohibition against judges in regard to all other offices, State and National; is that correct?

Mr. MOSK. That is correct.

Senator CURTIS. It was a negative prohibition. Of course, I guess a prohibition would be negative. It was a prohibition against judges running for other offices.

Mr. MOSK. That is correct.

Senator CURTIS. It was not a statute written to implement the proviso of the 17th amendment, was it?

Mr. MOSK. No; not specifically.

Senator CURTIS. Mr. Mosk, you referred to a Wyoming case. What was that statute about?

Mr. MOSK. It is a case I have here, Senator. That involved section 2, article IV of the constitution of the State of Wyoming, which involved pretty much the same thing—provided that no person shall be eligible to the office of Governor unless he be a citizen of the United States and a qualified elector of the State who has attained the age of 30 years, and who has resided 5 years within the State, nor shall be eligible to any other office during the term for which he was elected. And it was that last clause that was involved here, because——

Senator CURTIS. What year was that?

Mr. MOSK. This case was decided in 1948. It involved Governor Hunt, who was a candidate for the U.S. Senate.

Senator CURTIS. Yes. It was not a statute implementing the proviso of the 17th amendment to the Federal Constitution?

Mr. MOSK. It was not.

Senator CURTIS. Now, you mentioned an Arizona case. Will you tell me what statute was involved there?

Mr. MOSK. That involved a similar situation, involving Senator McFarland, who before that was, as I understand it, a judge, and who sought election as a U.S. Senator.

Senator CURTIS. And there, again, it was not a statute that was enacted to implement the proviso of the 17th amendment to the Federal Constitution.

Mr. MOSK. It was not.

Senator CURTIS. How about the Minnesota case?

Mr. MOSK. The Minnesota case was not, either. That involved the Minnesota constitution, which limited those eligible to public office to those who are entitled to vote at an election, which is a situation not dissimilar to the one we are involved with here.

Senator CURTIS. It pertained to all offices, did it not?

Mr. MOSK. That is correct.

Senator CURTIS. So it was not a specific attempt of the legislature to implement the proviso of the 17th amendment to the Federal Constitution?

Mr. MOSK. You are right.

Senator CURTIS. And you mentioned a *Freer* case, from Wisconsin, What statute was involved there?

Mr. MOSK. That involved a Wisconsin statute requiring all candidates for all offices to declare if elected they would serve. And it was held to be invalid as applied—correction—it was held to be valid, even though applied to a Federal election, because it was not an additional qualification to public office.

Senator CURTIS. Now, you made reference to an Ohio case. I do not recall whether it was a court case, or from the published precedents of the Senate and House.

Mr. MOSK. Yes. That is the *Griswold* case.

Senator CURTIS. That is back in 1809?

Mr. MOSK. That is correct.

Senator CURTIS. And the 17th amendment became effective much later than that?

Mr. MOSK. Yes. But I think it ought to be pointed out, Senator, that in 1809 we did not have popular election of Senators. So when we are talking about choosing Senators back in 1809 we were not talking about their being elected by the public. We were talking about them being chosen, chosen, true, by the legislature and not by the Governor. But it was still an appointment rather than an election.

Senator CURTIS. And the appointment that you referred to there, in this Ohio case, was one made by the legislature?

Mr. MOSK. No. That was an appointment by the Governor, to fill a vacancy. Page 426 of Hinds and Cannon.

Senator CURTIS. But so far as you know, there is no court application there?

Mr. MOSK. So far as I know, there is not.

Senator CURTIS. Do you have any——

Mr. MOSK. I cited that as Senate precedent.

Senator CURTIS. Do you have any court case decision involving an interpretation of the proviso of the 17th amendment?

Mr. MOSK. No; I have none directly involving the 17th amendment. As far as we have been able to determine, there are none.

Senator CURTIS. Is the matter being litigated in California?

Mr. MOSK. If you mean have lawsuits been filed, the answer is "Yes." No court has accepted jurisdiction, however. Well, I must qualify that by saying that the superior court, which is our trial court, of course hears every matter. But the supreme court hears matters only which it determines to hear, much like the U.S. Supreme Court.

Senator CURTIS. Is there an action pending in the Supreme Court of California?

Mr. MOSK. A petition for a writ has been filed. The court has not granted the writ up to this point.

Senator CURTIS. I am interested in the time element involved. How soon could the court accept jurisdiction if it chose to hear a case?

Mr. MOSK. It could do so immediately, if it chose to do so.

Senator CURTIS. And soon thereafter could they make a decision? I am not referring to the length of time they would want to take it under advisement, or write an opinion. But as far as the law is concerned, when could they make a decision?

Mr. MOSK. Well, they could make it rapidly, as in the situation involving Senator Salinger's effort to get on the ballot at the primary. There was a challenge made to his right to be on the ballot. Various writs were filed with the supreme court. They granted the petitions and ordered the litigants to submit briefs within a matter of days, as I recall—we had about 3 days to file our response to the writs—to the petitions for writs. This required our office to work day and night to get this out in time and into the court's hands, as I recall, our brief was filed one day and the court announced its conclusions the very next day. So they obviously were meeting quickly, because of the mechanical problems involved there—a closing filing date, and after a certain date it is impossible for the secretary of state to print ballots in time for the primary election. Now, where there isn't that—this is an unusual situation there, and where there is not a mechanical problem or arbitrary date fixed by statute, the court is less likely to act with haste.

Senator CURTIS. You received notice this recent case was filed in the Supreme Court of California?

Mr. MOSK. Yes. As a matter of fact, I rode up on the plane with Mr. Murphy's counsel, and he served me on the airplane flying from Los Angeles to San Francisco.

Senator CURTIS. Have you prepared an answer of any kind?

Mr. MOSK. We are preparing an answer. I believe it will be filed today.

Senator CURTIS. Who else are made parties?

Mr. MOSK. Well, I am not a party, Senator. Governor Brown and Senator Salinger are the two defendants.

Senator CURTIS. In other words, your appearance or the appearance for your office, is in behalf of Governor Brown?

Mr. MOSK. That is correct. Under the constitution of California, I am legal counsel for all the constitutional officers.

Senator CURTIS. Do you know who is representing Mr. Salinger?

Mr. MOSK. I do not. And I do not know as a fact whether he has been served, since he hasn't been in the State of California since his appointment—since his seating by the Senate.

Senator PELL. His seating without prejudice.

Mr. MOSK. Seating without prejudice; that is correct.

Senator CURTIS. That is what I was coming to. You are familiar with, in general, what the Senate has done here, of seating him without prejudice?

Mr. MOSK. Yes. I read the Congressional Record for that day.

Senator CURTIS. And I think the accepted understanding of that is that he may proceed to act, vote on measures, be assigned to committees, take part, and have full authority as a Senator while this matter is being determined. Is that your understanding?

Mr. MOSK. Yes. That is what I understand from reading the Congressional Record of that date.

Senator CURTIS. And your answer is going to be filed today. If Mr. Salinger accepts jurisdiction, and immediately files an answer, there is no legal bar to the Supreme Court of California, if they choose to issue the writ, proceeding very promptly to make a decision; is that correct?

Mr. MOSK. That is right, Senator. But let me state, in answering it that way, that I would be surprised if the highest court of the State of California would act in view of the unbroken line of cases holding that the Senate is the sole judge of its own membership, and that no State court has jurisdiction to determine the seating of a Senator of the United States.

Senator CURTIS. Did you see——

Senator PELL. May I interrupt here? I think the record should show that seating without prejudice does not refer to any action the Supreme Court of California chooses to take or not take.

Mr. MOSK. Yes, I stated that without—I did not mean that answer to be made in reliance upon the action taken by the Senate in this case without prejudice. But even if no action has been taken, and even if Senator Salinger had not been seated, I would still be very much surprised if any State court were to try to exercise jurisdiction over the qualifications of a U.S. Senator, either elected or appointed.

Senator CURTIS. Well, you would not go so far as to suggest that the Supreme Court of California would not face up to the issue as to whether or not a statute of the State of California was in contravention of the Constitution, would you?

Mr. MOSK. I would be surprised if the Supreme Court of California, or any court in California, were to assume jurisdiction in a case involving the right of the Senate to seat an individual—whether or not he has been seated previously.

Senator CURTIS. Do you have a procedure seeking a declaratory judgment in California?

Mr. MOSK. Yes; we do.

Senator CURTIS. Is it your opinion that if a citizen of California would seek a declaratory judgment as to whether or not the California statute, 25001, is constitutional or not, they would not hear the matter?

Mr. MOSK. It is my opinion, Senator, that this is the forum to determine whether Senator Salinger should be seated, and not a State court.

Senator CURTIS. Now, did you see the certificate that Governor Brown filed making the appointment?

Mr. MOSK. I did not.

Senator CURTIS. Referring to the first two lines after the salutation, I read: "This is to certify, pursuant to the power vested in me by the Constitution of the United States, and the laws of California"—then it goes ahead and makes the appointment of Mr. Salinger. Would you say that this appointment was made pursuant to the laws of the State of California?

Mr. MOSK. Yes; I do.

Senator CURTIS. Is it your contention that this statute, 25001, is not a part of the laws of California?

Mr. MOSK. It is my opinion this section 25001 authorizes the Governor of the State of California to appoint a Senator in the event of a vacancy.

Senator CURTIS. And that is the section that requires him to appoint an elector?

Mr. MOSK. Yes. I think the limitation that the appointment must be that of an elector is invalid, but that the section as a whole authorizes the Governor to make an appointment.

Senator CURTIS. Have you any court decisions that you could give the committee dealing with the subject of separability of a part of the statute holding the constitution and the other part valid?

Mr. MOSK. Yes; I did cite those cases—not with reference to this in particular, but to separability of statutes generally. I cited the *Danskin* case in California, the *People* v. *Lewis* case, a whole section in 11 Cal. Jur. 2d, sections 88 and 89, the *Hale* v. *McGhenigan* case, *Childs Estate* case.

Senator CURTIS. Now, have you examined those statutes recently? The statutes involved in these interpretations?

Mr. MOSK. I have the *Danksin* and the *Lewis* cases.

Senator CURTIS. What were the main provisions of that statute?

Mr. MOSK. Well, I recited that in regard to the *Danskin* case. That was the Civil Center Act of California. In this act, the legislature provided that school buildings shall be available for public meetings. But it also provided that the governing body of the school district must ascertain that those using the schools are not subversive. The supreme court said that this was an unconstitutional limitation, but that the basic purpose of the act was to make the school buildings available for meetings, and that that basic purpose was not disturbed

by the fact that there was an unconstitutional limitation contained therein.

Senator CURTIS. Was there more than one section to that act—was there more than one section?

Mr. MOSK. I do not recall, specifically.

Senator CURTIS. It is your contention, then, that section 25001 is valid or invalid?

Mr. MOSK. It is my belief that section 25001 is valid except insofar as it attempts to use the word "elector." This was an inadvertent and invalid limitation of the Governor's appointive power.

Senator CURTIS. Have you any decision that you can call to our attention where a court has held a part of a sentence of a statute a nullity and the balance of the sentence valid?

Mr. MOSK. I am sure that is the situation in some of these cases, but I cannot specifically point them out to you at the moment. But the law in California is very clear that you have to examine the general purpose of the statute in order to ascertain whether the statute is valid, even though some part of it may be unconstitutional. It seems clear to me that the general purpose of 25001 is to establish the mechanics by which the State of California regains its two Senators in the event of a vacancy. Certainly it was not a statute enacted for the benefit of electors. It was a statute enacted for the benefit of the State of California, to make certain that it is represented in the Senate by two Senators at all times.

Senator CURTIS. That is all I have for the moment. One more question. You are familiar with the fact of the practice in Federal legislation of providing—of often inserting a section in a bill expressing the intent of the Congress that if one section of the bill falls because of conflict with the Constitution, that it is the intent of the Congress that the other part, the remaining sections, shall be valid?

Mr. MOSK. That is correct.

Senator CURTIS. Is that practice followed in California?

Mr. MOSK. It has been followed in recent years. But in older statutes and sections of our various codes, this was not done. And yet cases from very earliest times in California discuss the subject of severability of statutes and retaining their validity even though they may contain invalid portions.

Senator CURTIS. I think that is all.

Senator PELL. Mr. Duffy, do you have any questions?

Mr. DUFFY. No, Mr. Chairman; I have no questions.

Senator PELL. All right. Thank you, Mr. Mosk. We will now hear from Senator Salinger.

Senator Salinger, would you be kind enough to raise your right hand? Do you solemnly swear that the testimony you are about to give in the matter now pending before this subcommittee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Senator SALINGER. I do.

Senator PELL. Will you give us your present address and the date that this became your address?

TESTIMONY OF HON. PIERRE SALINGER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator SALINGER. My present address is 66 Cleary Court, San Francisco, Calif. I acquired that address on approximately June 9,

1964. However, I had another residence in California prior to that time.

Senator PELL. Should that be part of the record? What was your address?

Senator SALINGER. I established residence at the Fairmont Hotel, San Francisco, Calif., March 20, 1964, and maintained that residence during the primary campaign.

Senator CURTIS. What was your residence prior to March 20, 1964?

Senator SALINGER. I had a residence at 917 Lakeview Drive, Falls Church, Va.

Senator CURTIS. And on that date, you chose to establish a residence in California?

Senator SALINGER. That is correct.

Senator CURTIS. Have you filed any Federal tax returns since you have gone to California?

Senator SALINGER. I have.

Senator CURTIS. And can you tell us about that?

Senator SALINGER. Yes. They were filed with the District Director of Internal Revenue, at San Francisco, Calif.

Senator CURTIS. What was the date of that?

Senator SALINGER. I couldn't tell you precisely, Senator. It was filed approximately April 15. Just about the final date of closing—whatever the final date for filing Federal returns is.

Senator CURTIS. And that was while you were a resident of——

Senator SALINGER. Resident of California.

Senator CURTIS. In other words, after you went to California you filed your income tax return?

Senator SALINGER. That is correct, Senator.

Senator CURTIS. Now, when was the last tax return that you filed for purposes of State or local taxes in Virginia?

Senator SALINGER. In Virginia? Yes, I filed my 1963 State income tax in the State of Virginia.

Senator CURTIS. About when?

Senator SALINGER. Approximately the same—I believe it was the same day I filed my Federal tax.

Senator CURTIS. And was that a resident or nonresident return?

Senator SALINGER. I was a resident of the State of Virginia in the year 1963.

Senator CURTIS. Do they have a current payment act in Virginia, or do you file for 1963 in the year 1964?

Senator SALINGER. You file for 1963 in the year 1964.

Senator CURTIS. Do you remember what month is was?

Senator SALINGER. That I filed? Yes, sir; I filed the same day I filed my Federal income tax. Approximately April 15, 1964.

Senator CURTIS. I see. Do you file an income tax in Virginia for a part of a year, or do you know, in such cases?

Senator SALINGER. I believe that in the year 1959, which is the first year I lived in Virginia, that I filed a partial income tax for part of that year; yes, sir.

Senator CURTIS. But it is your understanding of the law that is not a decision you have to make until the next year?

Senator SALINGER. That is correct.

Senator CURTIS. For any earnings you may have while you were a resident of Virginia in 1964?

Senator SALINGER. That is correct.

Senator CURTIS. For what purpose did you establish a residence in California?

Senator SALINGER. Well, I was returning to my native State, and I also became a candidate for public office in that State.

Senator CURTIS. When did you become a candidate?

Senator SALINGER. March 20, 1964.

Senator CURTIS. The same day?

Senator SALINGER. That is correct.

Senator CURTIS. What time did you arrive in California?

Senator SALINGER. Oh, I believe it was around 4 o'clock in the morning.

Senator CURTIS. Where did you go?

Senator SALINGER. I went to the Fairmont Hotel.

Senator CURTIS. About what time of day did you file for office?

Senator SALINGER. About 5 o'clock in the afternoon.

Senator CURTIS. That is all.

Senator PELL. Thank you very much, Senator Salinger. You are excused.

Senator SALINGER. Thank you.

Senator PELL. We will now hear Mr. Scribner.

Will you take the oath, please? Do you solemnly swear that the testimony you are about to give in the matter now pending before this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SCRIBNER. I do.

TESTIMONY OF FRED C. SCRIBNER, JR., ATTORNEY, WASHINGTON, D.C.

Mr. SCRIBNER. Mr. Chairman, members of the committee, my name is Fred C. Scribner, Jr. I am a resident of Portland, Maine; I am at the present time serving as the general counsel of the Republican National Committee. I at one time served as counsel for the Treasury Department of the United States. In 1962 and 1963 I was president of the Constitutional Commission of the State of Maine. I am a member of the bar of the District of Columbia, as well as of Maine and Massachusetts. I have submitted to you a memorandum of law prepared by me and Mr. Finch, counsel for Mr. Murphy, who has testified.

Senator CURTIS. Would you like to have that printed in its entirety?

Mr. SCRIBNER. I would like to have that printed in its entirety at this place in the record.

Senator PELL. It will be so done.

(The document referred to is as follows:)

EXHIBIT 8

MEMORANDUM BY FRED C. SCRIBNER, JR., AND ROBERT H. FINCH RE VALIDITY OF APPOINTMENT OF PIERRE SALINGER TO FILL A VACANCY IN THE U.S. SENATE AND SENATE ACTION THEREON

To the Members of the Subcommittee on Privileges and Elections of the Rules Committee of the U.S. Senate:

I. STATEMENT OF FACTS

On August 4, 1964, Gov. Edmund G. Brown purported to appoint Pierre Salinger to the U.S. Senate to fill a vacancy created by the untimely death of Senator Clair Engle, and a purported commission evidencing such appointment

was issued. On August 5, 1964, the Senate of the United States temporarily seated Salinger "without prejudice" and referred the certificate of appointment to the Rules Committee "for consideration of all matters raised pertaining to the appointment."

Salinger is not an "elector" of the State of California since he was not a resident of the State for 1 year next preceding the day of his appointment, nor was he a resident of the county within the State in which he claims his vote 90 days prior to the date of his appointment, nor was he a resident in any election precinct of the State for 54 days prior to his appointment—all of which requirements must be met under the California constitution and statutes.

Mr. George Murphy, Republican nominee for the U.S. Senate, petitioned the Superior Court of the State of California on August 5, 1964, and thereafter filed on August 7, 1964, with the Supreme Court for the State of California a petition for writ of mandate requesting that the court direct Governor Brown to vacate the purported appointment of Salinger to the Senate.

II. ISSUE PRESENTED

Has the California Legislature under its grant from article XVII of the U.S. Constitution empowered the Governor to appoint an individual who is not an "Elector" of California to fill a vacancy in the office of U.S. Senator from California.

III. ARGUMENT

Under the U.S. Constitution, and the statutes of California, the Governor's appointment was patently unlawful.

Pierre Salinger should not be seated as U.S. Senator, from California, because he does not possess the qualifications which the Legislature of California specified in authorizing the Governor of California to make temporary appointments to the U.S. Senate and; therefore, Salinger is not entitled to a certificate of appointment.

A

The California Legislature authorized the Governor to appoint only electors to Senate vacancies.

The basic authorization for filling of vacancies occurring in the representation of a State in the U.S. Senate is found in the 17th amendment of the Federal Constitution: This amendment provides in part as follows:

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Pursuant to the above-quoted authorization, the Legislature of California enacted section 25.001 of the California Elections Code, which provides as follows:

"If a vacancy occurs in the representation of this State in the Senate of the United States, the Governor may appoint and commission an elector of this State who possesses the qualifications for the office, to fill the vacancy until his successor is elected and qualifies and is admitted to his seat by the U.S. Senate. However, whenever a vacancy occurs within a term fixed by law to expire on the third day of January following the next general election, the person so appointed shall hold office for the remainder of the unexpired term unless such vacancy is filled at a special election held prior to such general election, in which case the person elected at such special election shall hold office for the remainder of the unexpired term. An election to fill a vacancy in the term of a U.S. Senator shall be held at the general election next succeeding the occurrence of the vacancy or at any special election."

B. Pierre Salinger is not a California elector.

One must be a resident of the State of California for 1 year to be an elector within the meaning of the term as used in section 25.001.

The attorney general of California in an opinion issued earlier this month, dated August 4, 1964, a copy of the same having been published in the Congressional Record, volume 110, page 17419, made the following statement clarifying the 1-year residential requirement.

"Certainly the pertinent portion of section 25.001 of the California Elections Code requires something more of the appointee than being 30 years of age, 9 years a citizen of the United States, and being an inhabitant of the State. U.S. Constitution, article I, section 3, clause 3. To the extent that it requires him

to be an elector; i.e., a resident of the State for 1 year, it is enlarging upon the U.S. constitutional qualifications for office and is invalid."

Pierre Salinger not having been a resident of California for 1 year was not at the time of his appointment and is not now an elector.

It has been contended that since California has statutory provisions allowing individuals who reside in the State for at least 54 days, but less than 1 year, to vote for presidential electors, but not for other officials, and since Pierre Salinger might become a resident of California for 54 days, and therefrom might vote for presidential electors, he is an "elector" within the meaning of that term as used in section 25.001. It is clear, however, both from the attorney general's opinion cited above, and from the statutory language creating the limited right to vote for presidential electors, that one given this limited right is not an elector under the law of California.

The 1958 addition to the California constitution, article II, section 1½, provides:

"The legislature may extend to persons who have resided in this State for at least 54 days but less than 1 year the right to vote for presidential electors, but for no other office; provided, that such persons were either qualified electors in another State prior to their removal to this State or would have been eligible to vote in such other State had they remained there until the presidential election in that State, and; provided further, that such persons would be qualified electors under section 1 hereof except that they have not resided in this State for 1 year."

Sections 750 et seq. of the elections code set forth detailed provisions permitting,

"A person who has been a resident of this State for at least 54 days but less than 1 year prior to the date of the general election at which presidential electors are to be selected * * * to vote for presidential electors at that election, but for no other offices, * * *"

Section 751, elections code.

"These sections, as well as section 20, all were adopted in 1961 as part of Stats. 1961, chapter 23; and inasmuch as section 20 defining "elector" states only it means a person who qualified under section 1 of article II of the constitution, and does not also refer to one qualified to vote for a presidential elector under section 1½ of that article, there is no room for interpreting the legislative intent as including within the term "elector" one who may be or become entitled to vote in the presidential general election as a "new resident."

Accordingly, because said section 1½ does not purport or attempt to define the term "elector" at all—indeed its very language assumes that one entitled to vote thereunder is not an elector—and because section 20, adopted after said section 1½ was added to the constitution, is limited expressly to a person qualified under section 1, article II of the constitution, respondent Salinger is not an elector under the provisions of section 25.001 of the elections code even if entitled to vote for the presidential electors in the general election on November 3.

C. The California legislature in authorizing its Governor to make temporary appointments to the U.S. Senate was authorized to place limitations on the manner in which such authority should be exercised by the Governor.

The 17th amendment could have given authority to the chief executives of the respective States to fill Senate vacancies. It does not so provide. In lieu thereof it provides that "the legislature of any State may empower" an executive to fill a vacancy. If the legislature elects not to give authority to the Governor to fill a vacancy then any vacancy occurring in the representation of that State in the Senate must remain unfilled until the State has acted to fill it by an election. In other words, the legislature of each State can decide whether or not it wants to have Senate vacancies filled by appointment.

The absolute power of the legislature to decide whether or not vacancy-filling authority shall be enacted, includes the lesser power to determine the manner in which the Governor shall act to fill the vacancy. The Legislature of California, acting within its authority and having limited its Governor's power to fill vacancies in the U.S. Senate, the Governor of California has no authority to act on Senate appointments except to fill Senate vacancies by the appointment of "an elector of the State who possesses the qualifications of the office.

Mr. Salinger is not "an elector" of California; Governor Brown did not act within the authority given to him by the legislature; Governor Brown's appointment of Salinger was the appointment of an individual who does not mee the test of the California law and therefore the appointment is without effect.

In the instant case, the Senate is not considering the constitutional provisions covering an election to the U.S. Senate. The question here is not whether a State legislature may add to the qualifications which one seeking to take office as an elected U.S. Senator must possess. Here we are dealing with the qualifications which must be possessed by one who seeks to serve in the U.S. Senate by virtue

of an appointment. The State legislature, authorized as it is by the Constitution to act or not to act in this area, is authorized to place limits upon the appointing power of the Governor.

D. If it is held that the Legislature of California had no authority under the Federal Constitution to limit, in any manner, the power of the Governor to fill a vacancy then the California legislation authorizing the filling of vacancies is unconstitutional and void and the Governor is without authority to fill vacancies.

If section 25.001 is void then the only authority given the Governor of California to fill Senate vacancies becomes void and of no effect and, therefore, the Governor is without authority to make temporary appointments to the U.S. Senate and the seat formerly held by Senator Engle must remain vacant until an election has been held in California.

E. The alleged invalid portion of the California statute is not severable.

The attorney general of California, in the opinion cited previously in this memorandum, would hold that the California legislation was void insofar as it limited the Governor's right to make an appointment to that of appointing an "elector," but the attorney general sought to save the legislation by holding that the unconstitutional portion thereof could be severed from the rest of the statute and that having removed the restrictive provision the statute could stand without limitation, and give the Governor authority to act.

It is submitted that the California legislation now being discussed is not severable. If the words "elector of this State" are eliminated from the first sentence of section 25.001, the sentence becomes meaningless. It contains no authority for the Governor to appoint anyone. If the specification that the appointee must be an "elector" is invalid, this invalidity affects the entire sentence and any attempt to give partial effect to such sentence without the limiting clause would bring a result not conceivably intended by the legislative body.

IV. THIS COMMITTEE AND THE SENATE SHOULD TAKE NO ACTION UNTIL THE CALIFORNIA SUPREME COURT HAS RENDERED ITS DECISION

All of the above makes clear that a very precise and fundamental point of statutory interpretation involving the 17th amendment to the U.S. Constitution as well as the constitution and statutes of the State of California is here involved. This question has been properly submitted to the Supreme Court of the State of California. The officers of that court have indicated that a decision would be forthcoming on or before the 12th of August. The Rules Committee of the U.S. Senate has been requested to return to that body with its recommendation on the permanent seating of Pierre Salinger on or before August 13. As the highest lawmaking body in the land, we would hope that the U.S. Senate would not totally ignore the legal implications of a decision forthcoming from California's highest tribunal. It is notewrothy that both Governor Brown and Mr. Salinger have accepted personal service in the supreme court hearing and thus submitted themselves to the jurisdiction of the court.

It cannot be argued that the Senate, the people of California, or indeed Mr. Pierre Salinger himself is prejudiced by maintaining the status quo. He is able to participate in the proceedings of the Senate and to vote on the matters before it. He is afforded an office, staff, and all of the other prerogatives of a U.S. Senator.

In the face of this situation, it would be incompatible with the high standards of this body for the Senate to use its undisputed power and arbitrarily remove from the courts the opportunity to settle a question which may in the future involve the Governors and legislatures in any or every one of our 50 States and possible opponents of every Senator now in office.

Gentlemen, consider the implications of this matter in connection with the traditional division of powers at the Federal and State levels. In this instance, the chief executive of California arbitrarily determined that an act of his own legislature was unconstitutional and refused to abide by it as written. It is no long step from this to realize that if the Senate of the United States shields this gubernatorial usurpation, it establishes the far-ranging proposition that the Chief Executive—be he President or Governor—may pick and choose what laws he will abide by and enforce, depending upon his own views of their constitutionality and without first obtaining any judicial decision.

To provide a specific example of a Governor honoring his oath of office and abiding by the directed will of the State legislature, we should like to point out that Gov. Mark Hatfield, a Republican, upon the death of Senator Neuberger, a Democrat, found himself with a State law which required that a person appointed to the U.S. Senate by the Governor of Oregon must be of the same political party as his predecessor. Unhappy as Governor Hatfield may have been, he nonetheless

followed the law and appointed a Democrat to succeed Senator Neuberger. He honored his oath of office.

V. CONCLUSION

This hearing involves only the question whether the Governor acted validly in exercising the right of appointment granted by the State legislature under authority of the Federal Constitution amemdment. No issue is here presented as to the qualifications of Pierre Salinger for the office of U.S. Senator.

We submit the legislature properly limited the class from which the Governor might choose appointees without going to the people; and if that limitation was not valid there is nothing in the legislation to indicate that the Governor could appoint anyone, otherwise qualified for the office, who had just moved in from somewhere else, as was the case here.

The right to decide whether some such person should represent the people of this State in the Senate, is with the people under the 17th amendment except only where a Governor properly appoints pursuant to legislative authority. This was not done here.

Respectfully submitted.

FRED C. SCRIBNER, Jr., Esq.

WASHINGTON, D.C.

ROBERT H. FINCH, Esq.

LOS ANGELES, CALIF.

AUGUST 10, 1964.

Mr. SCRIBNER. I will not try to cover this in full detail. The matter which I feel that this committee should examine is a narrow one.

Contrary to the statement of the attorney general of California, this is not the same question which appeared before the court there on an examination of whether or not Mr. Salinger was qualified to be on the ballot to run as a candidate for the U.S. Senate in California, because the question of the qualifications which must be possessed by one who has been elected are those set forth in the Constitution. We do not claim that a State legislature can add thereto. And those qualifications speak as of the date of the election. So that a decision in March as to what qualifications Mr. Salinger might have in November is quite different than the question that the attorney general had put to him by the Governor, or that the Governor had facing him this month in making an immediate appointment. Further than that, the cases which the attorney general cited, as I think was brought out in the colloquy with Senator Curtis, are not cases in point in this situation.

We are not considering here one who has a certificate of election from the State and who presents it to the Senate and asks to be seated. We are concerned here with a man who has a certificate of appointment, and the question is did the Governor of the State of California have authority to issue the certificate which he presented to the Senate.

We are agreed—that is, the attorney general and those representing the side for which I speak—that authority to fill vacancies must be derived from the Constitution. And in fact before the adoption of the 17th amendment, the Constitution allowed a Governor to appoint—it was a constitutional provision, direct. There had to be no intervention of any action by a State legislature. But when the 17th amendment was adopted——

Senator CURTIS. One thing. The Constitution—you mean the Federal Constitution?

Mr. SCRIBNER. The Federal Constitution; yes, sir—prior to the adoption of the 17th amendment, allowed appointment by a Governor, and it was so provided in the Constitution. There was no require-

ment that the authorization had to flow from legislation adopted by the legislature of a State.

However, we start here as the source of power with the 17th amendment of the Constitution of the United States. That says that the legislature of any State "may empower the executive thereof to make temporary appointments." So it is necessary then to determine whether or not California did in fact provide the legislation which was required. We find that section 25001 was adopted.

Now, then, this is the only authority that exists in the law of California. The first sentence of that section reads:

> If a vacancy occurs in a representation of this State in the Senate of the United States, the Governor may appoint and commission an elector of this State who possesses the qualifications for the office, to fill the vacancy until his successor is elected and qualifies and is admitted to the seat by the U.S. Senate.

Now, Mr. Salinger has generously appeared here and made the record clear as to his residence. The fact that he did not become a resident of California or claimed residence in California until March makes it highly clear he has not been a resident for 1 year.

The attorney general's opinion, which is part of this record, as well as the various references in the California constitution and the California statutes, make it very clear that to be an elector in California you must be a resident there for 1 year.

I think it is obvious that this is the reason that the Governor asked the attorney general for an opinion. This is the reason that litigation is now pending in California. There is no dispute on those facts. It is the reason also that all of us are confronted with this sentence which I read from section 25001. That sentence gives the Governor only authority to appoint an elector.

The attorney general has said that term was a matter of inadvertence. And I of course defer to him as the chief law officer of California. But I have been informed by California counsel that the original statute allowing a Governor to fill vacancies and to appoint an elector was passed in California after the adoption of the 17th amendment but before the adoption of the amendment to the Constitution giving the right to vote to women.

I think there is no question that there was a very deliberate purpose in California in the enactment of this statute, and in using the word "elector" rather than "inhabitant." By the use of the word "elector" they limited that at that time to those who could then vote, and at the time that this was adopted, women were not entitled to vote.

The question here is basically not the qualifications of Pierre Salinger. The question here is the authority possessed by the Governor of the State of California. The attorney general has issued a ruling that the attempt of the California Legislature to limit the power of the Governor is ineffective. I do not agree with that position.

Obviously the Legislature of California could decide not to give the Governor any authority to fill vacancies. I know of no decision by any court which says that a Governor has the authority under the 17th amendment without action by the State legislature.

Since the State legislature has the basic and fundamental authority given to it by the Constitution to decide whether or not the Governor shall fill vacancies, it has the lesser power, encompassed by the greater, to determine how that authority shall be exercised, what area shall be open to the Governor in making his appointment. The legislature in proceeding under the authority granted by the Constitution said, yes,

the Governor has authority to fill vacancies but only by appointing an elector, one who is an elector within the definition of the word as used in section 25001. Under the California constitution, as the word "elector" is used, you must be a resident of California for 1 year. And I think that, as I have said, there is the authority, and the authority was granted to the California Legislature, and use was made of the authority.

Pierre Salinger is not an elector. Therefore the Governor could not appoint him. The Governor's act is a nullity. The certificate presented to the Senate is a nullity. However, the attorney general in his ruling bothered, quite properly, by this limitation has stated that in his opinion this limitation was unconstitutional, and that it can be eliminated from the statute; that this is a situation where the law of servability should apply.

I know of no case which would be relevant in this situation where the doctrine of severability has been applied to eliminate from one sentence pertinent and essential words of that sentence and to allow other words to be read in place thereof. The customary situation of severability is where there are several clauses, or at least several sentences in the legislation in question.

Let us read this first sentence, leaving out the words which the attorney general says are severable, and what do we have?

> If a vacancy occurs in representation of this State in the Senate of the United States, the Governor may appoint and commission who possesses the qualifications for the office.

The sentence is meaningless. You have to not only eliminate some words—you have to read in the word "inhabitants" or "citizen" or "a person." You have to, in other words, remake legislation. You are authorized under the doctrine of severability to remake legislation if it is clear that the legislature would have intended, had its attention been called to the situation, to have used other language, and not to have used the more restrictive language.

We submit here for the reasons given that the Legislature of California would not have been willing to use less restrictive language.

We have cited in our brief several California cases. As is so frequently the case where you have a good deal of litigation, there are cases on both sides of a question—even in one jurisdiction. And I want to call attention only to one California case. That is the case of *Marsh* v. *Supervisors*, 111 California 368. In this case, there was a primary election act limited in operation and effect to two counties in the State. The court said that limiting it to two counties would make it unconsitutional—that it would have to be statewide. The argument was made that they should strike out the limiting portion and keep the rest of the legislation, which means that it would be applicable to all of California. The court refused to do this. It said:

> If we should do so, we would be imposing upon the whole State a law which it is clear the legislature intended to apply in only two counties, and which would not have otherwise been passed. This we cannot do.

So that if a limitation on the right to appointment is in this law, then the sentence where it is contained, if the attorney general is right, is unconstitutional. The sentence goes out of the statute, and there is no authority of any kind in California for a Governor to make an appointment to fill a vacancy.

In other words, either the Governor had no right to appoint Mr. Salinger because Mr. Salinger is not an elector, and the legislature was authorized and properly limited the Governor's right to appointing an elector, or that legislation adopted in California is unconstitutional, it is wiped from the books, and therefore there is no authority to make an appointment. In either event, Mr. Salinger should not be seated.

Mr. Salinger's case, further than that, in my opinion, should not be passed upon finally by this committee or the Senate until the Supreme Court of California has had an opportunity, at least for a few days, to act on the case which is presented before it.

Now, before I get to that, I have one other point. The only situation that I know of which is relevant to the facts we have here is the case of Senator Nye, of North Dakota, the question of whether or not a Governor will have authority to make an appointment if there was no legislation in the State authorizing him to do so.

I would like, if it is proper, to have inserted in the record at this point the statement concerning the *Nye* case which appears at page 117 of Senate Document 71 of the 87th Congress, 2d session, which is "Senate Election, Expulsion, and Censure Cases."

Senator PELL. Without objection, it will appear.

(The material referred to is as follows:)

EXHIBIT 9

[Excerpt from "Senate Elections, Expulsion, and Censure Cases" (S. Doc. 17, 87th Cong.)]

CASE OF GERALD P. NYE OF NORTH DAKOTA

[Citations: S. Jour., 69th Cong., 1st sess., pp. 2, 55, 69, 79, 80, 81, 83, 86; Cong. Rec., vol. 67, pp. 376, 904, 1408, 1615–1634, 1681–1700, 1749–1754, 1814–1840, 1884–1893; S. Rept. No. 3 and S. Res. 104, 69th Cong., 1st sess.; Cannon's Precedents, vol. VI, § 173; S. Doc. No. 147, 76th Cong., 3d sess., p. 265]

Statement of the Case: Senator Edwin F. Ladd of North Dakota, who was elected for the term beginning March 4, 1921, died June 22, 1925. On November 14, 1925, the Governor of North Dakota appointed Gerald P. Nye to the vacancy until it could be filled by a special election called for June 30, 1926.

Prior to the adoption of the 17th amendment (effective May 31, 1913), providing for the direct election of Senators, art. I, § 3, cl. 2 of the Constitution of the United States gave the Governor direct authority to fill such a vacancy, as follows: "and if vacancies happen * * * during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies." This was changed by clause 2 of the 17th amendment which provided:

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct."

The Constitution of North Dakota, adopted in 1889, empowers the Governor to fill vacancies in office when no other mode is provided by the constitution or law. The State legislature adopted a statute in 1917 authorizing the Governor to fill all vacancies in State offices, with certain exceptions, by appointment. No reference was made to the office of United States Senator or to the 17th amendment. This statute was an amendment and reenactment of an early Territorial law.

This case presented the single legal question as to whether the Governor of North Dakota was clothed with authority from the State legislature to make a temporary appointment until the people filled the vacancy by special election.

Decision of the Senate: The majority of the Committee on Privileges and Elections adopted the view (S. Rept. No. 3, 69th Cong., 1st sess.) that the 17th amendment contemplated the necessity of affirmative legislation on the part of State legislatures before the State executive could make a valid temporary appointment to the Senate and that in enacting the statute of 1917 it was not the

intention of the North Dakota Legislature to confer upon the State executive the necessary appointive power.

Mr. Stephens, in writing the minority opinion, adopted the view that it was unnecessary for the legislature in granting authority to the Governor to make temporary appointments, to refer in any way to the 17th amendment.

The most controversial point at issue during the ensuing debate before the Senate, which lasted 5 days, was whether a United States Senator should be considered as a State or Federal officer. Mr. Shipstead closed the debate by citing the Blount impeachment case in 1799 (p. 3) to sustain the contention that a Senator is not an officer of the United States within the meaning of the Constitution.

On January 12, 1926, the Senate seated Mr. Nye by a vote of 41 to 39, and 15 not voting. Thus the Senate supported the views expressed in the minority report.

Mr. SCRIBNER. I would like to point out that the majority of this committee, acting in that situation, held that the Governor had no authority. A minority opinion was filed holding that the Governor did have authority. It was a controversial question in which there was a long and extended debate in the Senate of the United States, the question turning in large measure on whether or not a U.S. Senator was an officer of the United States within the meaning of the Constitution, or whether he was a State officer. I think it is interesting to note that Senator Nye was seated by a vote of 41 to 39, with 15 Senators not voting.

Senator PELL. I think the record should show that does not mean they were present and could not make up their mind. It just means they were probably not around.

Mr. SCRIBNER. Well, I am not sure about that, Senator. I am only reading from the report, which does not explain whether they were present and indecisive or not available. In any event, the one situation which we have which turns on the particular facts of the legislation of that State, and those facts, I do not believe, are particularly helpful in this situation. I would like to urge that the question of severability or nonseverability is a most difficult legal question.

Senator CURTIS. Before we leave the North Dakota case, I read here, page 118:

> The constitution of North Dakota adopted in 1888 empowers the Governor to fill vacancies in office when no other mode is provided by the constitution or law.

So they did have some authority. They were not relying upon a statute that it was contended was invalid.

Mr. SCRIBNER. I believe, Senator, that the difficulty was that the authorization was to fill State office. And the whole debate turned on whether or not this was broad enough to include a U.S. Senator—was this a State office or wasn't it a State office?

Senator CURTIS. Thank you.

Mr. SCRIBNER. I have been told by Mr. Finch that there is reason to believe that the Supreme Court of California will take jurisdiction of this matter. It is, I think, of significance that both Mr. Salinger and Governor Brown have accepted service in the action which is now pending in court, so that they are properly before the court. With the assurance that there will be prompt action, we urge that this committee give itself the benefit of such decision as the Supreme Court of California may hand down in this particular case.

I believe the attorney general will agree with me—and there may be some legislation in California which would produce a different result—but I believe that legislation, properly adopted by the legislature and signed by the Governor, is deemed to be constitutional

until held otherwise by a court having jurisdiction; that an opinion by counsel, although it be an attorney general, does not wipe the legislation from the books or render it, by virture of that opinion, unconstitutional. It requires a decision by a court having jurisdiction in the matter.

And so, in summary, we believe that the Senate should not seat Pierre Salinger for the reason that he does not possess the qualifications—residency qualifications—which the Legislature of California quite properly wrote into California legislation; that if they did not act properly, then there is no legislation in California authorizing the Governor to make an appointment, and he should not be seated for that reason.

But in any event, in view of the difficult question of severability here, in view of the closeness of the issue, the fact that the authority can be found which will give weight on both sides, that this committee should have the benefit of the decision which will be made in the very near future by the Supreme Court of California on this very difficult question, which calls for a construction of the California constitution and California statutes.

I was interested to note that Senator Kuchel particularly, and others in the debate on this matter in the Senate, indicated that they, of course, would like to have the benefit of a judicial opinion from California, and that such opinion would be of weight with them in arriving at a final decision in this matter.

Thank you very much.

Senator PELL. I have one question.

Is it your view that a State can add to the qualifications that are set forth by the Constitution for appointment or election to the Senate?

Mr. SCRIBNER. It is my view that a State cannot add to the qualifications in the case of an election—in the case of where one is running for office. I am interested that the section of the Constitution which sets forth those qualifications, as to the question of being an inhabitant, seems to limit that to elections. There are not the decisions on the question of appointment which make the constitutional question clear here. However, that is not the case which is before us. This is not a question of the qualifications of Pierre Salinger. This is a question of the authority of the Governor of California—he has no authority unless the legislature has acted. The legislature has acted and said, "You can appoint an elector; no one else." We say that that was a proper limitation on his power, just as they could have said, "You have got to make it in 10 days" or "You cannot make it for 20 days" or "You will have to post a notice for 5 days" or what have you. Further than that, if they did not have the right to limit it to elector, then the legislation is unconstitutional, and there is no authority in California to fill vacancies by appointment.

Senator PELL. Why, in your view, is a man who can vote for President not an elector? I don't follow that.

Mr. SCRIBNER. Because the word "elector" as used here is clearly a word of art in the California constitution and California law. We have only to go to the attorney general's opinion, where he specifically states that the term "elector" as used in section 25001 can only be satisfied by someone who has been a resident of California for a year.

And while I do not accept all of his opinion, I will accept that part of it.

Senator PELL. Senator Curtis?

Senator CURTIS. We do appreciate having you here to assist the committee in this, as well as we appreciate very much the presence of Attorney General Mosk. Now, I might call to your attention a very recent situation—by recent, it is within the last 10 years. Senator Joseph McCarthy, according to the records of the Senate, died on May 2, 1957. There was no appointment made by the Governor. The State of Wisconsin had not proceeded to implement the proviso of the 17th amendment with legislation. So the Governor of Wisconsin caused writs of the election to be issued, and a special election was held on August 27, 1957, at which time Senator Proxmire was elected. Do you have any comment on that with reference to the case before us?

Mr. SCRIBNER. I do not. And I do not know the facts of that other than what the Senator has just stated in the record this morning.

Senator CURTIS. We do not have a case directly in point that has been litigated in the courts, but I think very properly the Senate can give attention to the pattern of procedure that has been followed, just as we can give attention to the opinions that might be expressed in various rules and precedents.

Mr. Neuberger, a Senator, died while holding office within the last few years. The Oregon Revised Statutes 236.100 provide this:

> Whenever a vacancy occurs in any partisan elective office in this State and is to be filled by appointment, including the office of the U.S. Senator, no person shall be eligible for such appointment unless he is affiliated, as determined by the appropriate entry on his official election registration card, with the same political party as that by which the elected precedessor in such office was designated on the election ballot.

That pattern was followed with respect to Oregon. The then Governor of Oregon was a Republican. He appointed a Democrat, in accordance with their State statute. The appointee's certificate was received by the Senate, and he was seated. It is true that there was no contest made over it. But would you say that that type of act falls in the category of the power of the Governor as to whom he can appoint rather than to add an additional qualification to the office of the U.S. Senator?

Mr. SCRIBNER. Yes, sir; I would. As a matter of fact, it seems to me that the Oregon situation is a very excellent parallel here. There was a limitation written in. And as the Senator has pointed out, the Governor of Oregon elected to follow that. There was no challenge made. It was not debated. And, of course, it was not litigated.

I think it does emphasize the fact, however, that there the Governor felt the responsibility to follow the mandate of the people as expressed by their legislature. And that certainly there must be in the State of California those who are electors that have been resident for a year or more who would be qualified to serve, and Governor Brown could have, had he so elected, followed the mandate of the Legislature of California and obeyed the directive contained in the legislation by appointing an elector.

Senator CURTIS. In other words, while it is conceded that a State cannot add to the qualifications of Federal officers, Presidents, Representatives in Congress, and Senators, the States do, under the 17th amendment, have authority to regulate, empower, and limit

the actions of their own Governor. Is that correct? Is that the issue involved here?

Mr. SCRIBNER. That is the issue involved here, exactly.

Senator CURTIS. In other words, it might be stated that the apparent intent of the 17th amendment was that they did not change the original provision of the Constitution, that all you had to do was be an inhabitant, if the people were going to decide. But if the State wanted to have a temporary appointment there, the legislature would be the one that would lay down the guidelines, grant the power and authority for the Governor to appoint. Is that correct?

Mr. SCRIBNER. That is correct. I think it is significant, Senator, that with the 17th amendment there was a change in the Federal Constitution. Prior to that time, the chief executive of the State was given the authority. But there was thereafter a change. And with the change it was written into the Constitution that the legislature had to empower the executive. I do not believe that that was just intended to be a sort of a nullity, that they just had no discretion. Otherwise, why give them that power within the Constitution if they did not have it before.

Senator CURTIS. In other words, prior to the 17th amendment the people had no direct voice in choosing a U.S. Senator; is that correct?

Mr. SCRIBNER. That is correct.

Senator CURTIS. The country chose to change that matter and give the election of Senators directly to the people, so far as the election is concerned.

Mr. SCRIBNER. Yes, sir.

Senator CURTIS. And they went further and said, and I read:

Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

In other words, it is a restricted and limited authority of the Governor, to wit, to act according to State law. Is that right?

Mr. SCRIBNER. That is my interpretation; yes, sir.

Senator CURTIS. And for the basis of the record, I might read from article I, section 3, of the Constitution that portion relating to the appointment of vacancies prior to the 17th amendment. I read from the Senate manual, and this portion is shown in heavy brackets, which is the method they use to carry forward sections that are no longer binding.

And if vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

That was a direct grant of authority to the Governors, was it not?

Mr. SCRIBNER. Yes, sir.

Senator CURTIS. And no provision was attached that action should be in conformity with the law that the legislature passed.

Mr. SCRIBNER. The legislature had no part prior to the 17th amendment in the question of appointments to fill vacancies.

Senator CURTIS. And in your written statement you develop, in addition to your oral statement, your position that if any part of a sentence of section 25001 of the statute of California is invalid, the whole sentence is invalid; is that correct?

Mr. SCRIBNER. Well, I think it was a little more limited. We develop the position that the provision limiting to electors was an essential part of that sentence, and that if it is invalid, the whole sentence is invalid because it becomes meaningless.

Senator CURTIS. This committee will have to make its report to the full Senate, so I want to revert to something that was said on the Senate floor, as a matter of clarity, when the matter was before the Senate a few days ago. At that time mention was made of the fact that California permitted nonelectors to vote for President under certain circumstances. Does that have any relevancy in the case of the appointment of Mr. Salinger to the Senate?

Mr. SCRIBNER. Well, I know the argument was made that if he were there 54 days, he might be able to vote for presidential electors, and that he perhaps became an elector. But as I said earlier, I think the opinion of the attorney general of California has clearly answered that, and that there are also authorities in the memorandum which I have submitted which make it entirely clear that the word "elector" as used in 25001 is a word of art, and refers to a provision of the constitution which says that to be an elector you must be a resident for at least a year.

Senator CURTIS. Do you have anything further you wish to submit?

Mr. SCRIBNER. If the committee would permit, Mr. Finch, who is an attorney from Los Angeles, would like to just add briefly in reference to the pending litigation in California, and the State of service.

Senator PELL. Would you give us your name and address?

Mr. FINCH. Robert Finch. I was not sworn.

Senator PELL. Will you raise your right hand? Do you solemnly swear that the testimony you will give before this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FINCH. I do.

STATEMENT OF ROBERT H. FINCH, ATTORNEY, LOS ANGELES, CALIF.

Mr. FINCH. Just for the sake of clearing the record, I want to state that Senator Salinger designated Mr. Joseph Cerrell, of Los Angeles, as agent to accept service, and he was served on Friday with the petition for writ, which was filed Friday with the California Supreme Court. I want to be very precise on this point.

Mr. Crabtree, then acting as the clerk of the supreme court, assured counsel that in view of the pending matter to be returned by the Rules Committee to the Senate on the 13th, that the supreme court "would act on the matter before that time." I only wanted to point that out, so that there would not be any question about the precise posture of the matter before the supreme court.

Senator CURTIS. You are a practicing attorney in California for some time?

Mr. FINCH. Fourteen years, Senator.

Senator CURTIS. Do you know of any legal bar to a delay of the Supreme Court of California from proceeding rather promptly with this if they chose?

Mr. FINCH. No. Even if it is limited to whether or not they are taking jurisdiction—I should think that that fact would be significant insofar as the Senate is concerned.

Senator PELL. Do either of you gentlemen question the actual power of the Senate to be the exclusive judge of the election and qualifications of the Senator?

Mr. FINCH. Not at all.

Senator PELL. Also, do either of you two gentlemen question the power of the Senate to be the sole judge of the credentials of an appointee to the Senate who has presented himself with a certificate to the Senate, bearing a certificate of appointment?

Mr. SCRIBNER. I do not know if you could answer that question quite as categorically. I suppose that if the Supreme Court of California, for example, held that the certificate was null and void and directed the Governor to call it back again, that the Senate could disregard that, and having had a document presented to it, could still accept it. I suppose that the Senate, perhaps, could even act on the document presented to it, even though information came to it that the document was falsely prepared. I doubt very much if either one of those situations would develop. But I think that probably the power of the Senate, which is certainly supreme here, entitles it, if it wishes to shut its eyes as to facts as to the type of certificate, or the lack of completeness of a certificate. It probably has the right to do so.

Senator PELL. Would you disagree with the view that the Senate is not shutting its eyes, but with its eyes open is the sole judge of whom it seats and the sole judge of any person's credentials?

Mr. SCRIBNER. Insofar as being the sole judge of whom it seats involves being the sole judge of credentials as an incident thereto, I would agree.

Senator PELL. Thank you. Mr. Harrison, do you have any questions?

Mr. HARRISON. For the sake of the record, Mr. Scribner, I would like to clarify your interpretation of the severability of California code section 25001. As I understand your testimony, you take the position that the provision relating to an elector is an essential part of the whole sentence, so that, if deleted, the sentence would be without meaning. Now, I would like to read to you, if I may, the pertinent similar statute in the State of New Hampshire, which is Revised Statute Annotated, 1955, 63.3:

> In case of a vacancy in the office of U.S. Senator, the Governor may fill the same by appointment until the next general election, when said vacancy shall be filled.

Now, Mr. Scribner, do you see anything invalid in that statute from the constitutional point of view?

Mr. SCRIBNER. The New Hampshire statute just read to me?

Mr. HARRISON. Yes.

Mr. SCRIBNER. Do you have the language there so I can look at it?

(Copy of New Hampshire statute handed to witness.)

Mr. SCRIBNER. Offhand, I see nothing wrong with that sentence.

Mr. HARRISON. Now, Mr. Scribner, I want to be very fair in this next question. I am going to read the pertinent portion of section 25001 of the California elections code, but I am going to delete certain words from that statute so it will read as follows:

> If a vacancy occurs in the representation of this State in the Senate of the United States, the Governor may appoint to fill the vacancy until his successor is elected and qualifies and is admitted to his seat by the U.S. Senate.

Do you find such a statute invalid?

Mr. SCRIBNER. No; I would not think that would be invalid.

Mr. HARRISON. Well, I have simply deleted the words from the code "and commission an elector of this State, who possesses the qualifications for the office." Now, would it be possible, in view of what you just said, that it could be construed that the words "and commission an elector of this State" were invalid, therefore a nullity; and that the words "who possesses the qualifications for the office" are impliedly in any appointive power anyway, so that the statute could stand on its constitutional merits?

Mr. SCRIBNER. Well, of course, what you are saying is if they had written the statute differently, it probably would be constitutonal. You want to take out not only the words which the attorney general feels would be in violation of any rights, but other words, which clearly would not be in violation of any rights, that nobody has claimed would be in violation of any other rights. And this is the very question on severability—whether or not you have the right to take out only the words which perhaps would be unconstitutional, or to take out several other words so as to get a different sense.

Further than that, in the question of severability, you also have to consider the question of whether or not, if the attention of the legislature was called to this, they would have been willing to have enacted a broader provision than the one which they did enact. Based upon the history of this statute I do not think there is any evidence in California that the legislature would have intended to have enacted a broader statute than they did. New Hampshire had some language, and it perhaps would have been well if California had followed New Hampshire. But in many things California has not been following New Hampshire.

Mr. HARRISON. The principal point that I tried to make is that the important words in the statute are the words "may appoint."

Senator PELL. At this point I would like, without objection, to have in the record a memorandum prepared by the American Law Division of the Library of Congress concerning section 25001 that says—the most significant paragraph to my mind is where it says:

> The California courts have consistently held that a law which is unconstitutional in part only is not to be held wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as to reasonably lead to the conclusion that the law would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional.

(The document referred to is as follows:)

EXHIBIT 10

MEMORANDUM FROM THE AMERICAN LAW DIVISION, LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, RE EFFECT OF SUPPOSED INVALIDITY OF SECTION 25001 OF THE CALIFORNIA ELECTIONS CODE [1]

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., August 10, 1964.

To: Senate Subcommittee on Privileges and Elections (Attention: Mr. Duffy).
From: American Law Division.
Subject: Effect of supposed invalidity of section 25001, California Elections Code.

In reference to your request for a statement on the charge that section 25001 of the California Elections Code is invalid because it requires the appointment of an

[1] The attached has been prepared for the personal use of the Member requesting it in conformance with his directions and is not intended to represent the opinion of the author or the Legislative Reference Service.

elector of California to fill a vacancy in the U.S. Senate, and consequently the Governor has no power to appoint, the following is suggested for your consideration:

"As for the charge that section 25001 of the California Elections Code is invalid and thus the Governor of California had no authority to appoint Senator Salinger, this is wholly without merit.

The California courts have consistently held that a law which is unconstitutional in part only is not to be held wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as to reasonably lead to the conclusion that the law would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional (see *In Re Phillips Estate*, 203 Cal. 106, 263 P. 1017, 1020 (1928): *Ex parte Frazer*, 54 Cal. 94; *People* v. *Perry*, 79 Cal. 105, 21 P. 423; *People* v. *McFadden*, 81 Cal. 496, 22 P. 851; *McGowan* v. *McDonald*, 111 Cal. 65, 43 P. 418; *People* v. *Hill*, 7 Cal. 103; *People* v. *Burbank*, 12 Cal. 393; *Niells* v. *Sargent*, 36 Cal. 382; *Ex parte Gerino*, 143 Cal. 412, 77 P. 166; *In re Bell*, 19 Cal. 2d 488, 122 P. 2d 22). Such invalid provisions will not vitiate the whole act unless it would be impossible to maintain it without them (see above, supra). The scope of the interpretation is indicated in *People* v. *McCaughan*, 49 Cal. 2d 409, 317 P. 2d 974, 979 (1957), where the court excised several qualifying words from one sentence of a misdemeanor statute and held the remainder constitutional. Consequently, the fact that section 25001 contains the added qualification of "elector" does not vitiate the rest of the statute relating to the Governor's authority to fill vacancies from the State in the U.S. Senate by appointment.

Furthermore even assuming that the charge were correct, the authority of the Governor would not be abrogated for "the general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer de facto, notwithstanding there was want of power to appoint in the person who professed to do so * * *" (43 American Jurisprudence, "Public Officers," sec. 481, p. 233). The Governor of California is granted general authority under article 5, section 8 of the California constitution to fill vacancies in any office where no mode is provided by the constitution or law for filling such vacancy. The authority to appoint would exist even though section 25001 were completely invalid.

However, since the Senate is the final judge of the qualifications of its Members, it makes the ultimate determination on qualification, as the cases have held, despite the validity or invalidity of State statutes (see, for instance, the case of Senator Turnbull of Illinois, 34th Cong., 1st sess., and Senator Faulkner of West Virginia, 50th Cong., 1st sess.). And, a judgment by the Senate, although acting as a judicial body (see *Barry* v. *U.S. ex rel. Cunningham*, 279 U.S. 597 (1929)) does not ex post facto invalidate a State qualifications statute. That function rests with the judiciary.

ROBERT L. TIENKEN, *Legislative Attorney.*

Mr. SCRIBNER. May I comment, Senator? I certainly do not disagree with that. This is the very reason that we would urge that this committee give the California court the benefit of ruling on this, because this is the very question, which is a legal and judicial question, which it seems to me the Senate would like to know—whether this is a sentence which can be dealt with under the law of severability or not. It it can be, then the Senate would have the comfort of that decision from California.

Senator PELL. I appreciate your wishing us to have this more comfortable feeling. We will take your views into consideration.

Mr. SCRIBNER. Thank you very much.

Senator CURTIS. May I just say—I do not want to belabor the point about what would happen if they took out—if the courts would strike down part of that first sentence of section 25001 of the California code. But, as pointed out by Mr. Scribner, if they did that they would not even have a sentence. They would have to strike out further words even to conform to the simple rule of sentence structure, because you would leave the words "who possesses the

qualifications for the office" and certainly that is not an unconstitutional provision. You would have a sentence that reads:

> If a vacancy occurs in the representation of this State in the Senate of the United States, the Governor may appoint who possesses the qualifications for the office to fill the vacancy until his successor is elected and qualifies and is admitted to his seat by the U.S. Senate.

It seems that that is an essential part of that.

Senator PELL. Any more witnesses, or is there anything in particular that you wish to add, Mr. Mosk?

Mr. MOSK. I may just add a word if I may, Mr. Chairman.

Senator PELL. All right.

TESTIMONY OF STANLEY MOSK, ATTORNEY GENERAL, STATE OF CALIFORNIA—Resumed

Mr. MOSK. I do not want to pursue this a great deal further. But if I may point out—in "Senate Election, Expulsion and Censure Cases from 1789 to 1960," beginning at page 157, there is an appendix indicating the State laws.

I have hurriedly gone through all of the State laws. I do not guarantee that I have not missed one, but I find in none of them any phrase or term describing persons eligible for appointment in any terms other than those set forth in article I of the Constitution of the United States. For example, Alaska uses the term "qualified person"; Nevada, "some qualified person"; Michigan, "some suitable person"; Ohio, "some suitable person." In each case there is an implication that being qualified or suitable embraces the three qualifications described in article I. No State other than California attempts to limit any of the provisions of article I—California having done it by changing the word "inhabitant" to read "elector."

Now, it seems to me that if we are to say there is a different standard for a U.S. Senator who is appointed rather than a Senator who is elected, we would have an anomalous situation. We would have one Senator from California who is an inhabitant, as described in the Constitution, and another who has some other qualifications. And if the State is permitted to change the word "inhabitant" to read "elector" in case of an appointment, then it would also be empowered, would it not, to change the words "9 years a citizen" to read "an alien," for example, and if it is permitted to change the term "inhabitant" to read "elector" and "citizen" to read "alien" can it not change the 30-year requirement to permit a 20-year-old to serve in the Senate? So that——

Senator PELL. I would like to interpolate——

Mr. MOSK. In the case of an appointment only.

Senator PELL. I had a relative, W. C. C. Claiborne, who served in Congress for one and a half years before he was 25, and he was not challenged. In order for it to be questioned, it has to be challenged.

Mr. MOSK. What I am saying, Senator, is that if we are going to say because one Senator is appointed his qualifications may be different than a Senator who is elected, this would apply not only to the word "inhabitant" but it must apply to the other two qualifications; to wit, citizenship and age. And I do not think that the Senate would be very happy with the situation in which a Senator was appointed who was an alien, or a Senator was appointed who was a

minor. Therefore, I do not think that we can state that it was the intention of the Founding Fathers of our country, or of those who adopted amendments to the Constitution, that they intended there should be different qualifications for an appointed Senator than an elected Senator.

Senator CURTIS. Now, may I ask this? You would not contend in the case of Oregon the fact that the legislature, in order to make the will of the people supreme, said the new Senator would have to be of the same political party, that that is not comparable to an act of the Legislature of Oregon stating that the U.S. Senator could be an alien, or that he would not have to be 30 years of age or anything of that sort, do you? You do not contend that those are comparable?

Mr. MOSK. Yes; I do. I think you are changing the qualifications, either by addition or subtraction. I do not think any State has that right, Senator, with regard to elected or appointed Senators.

Senator CURTIS. Isn't it a matter of the Governor still having to meet the Federal qualifications, and these limitations on his authority to carry that out?

Mr. MOSK. I don't follow you.

Senator CURTIS. Well, the fact that the California Legislature said he must be an elector—that does not give the Governor authority to appoint an alien, does it?

Mr. MOSK. No. The Constitution provides three qualifications—that he be an inhabitant, be 30 years of age, and be a citizen for 9 years. If you are saying, Senator, that the Legislature of California can change one of those provisions, then why do you pick out that one as distinguished from the other two?

Senator CURTIS. I am not suggesting that at all. I am suggesting that for the temporary appointment the Governor can make such appointment as the legislature has authorized him to make. And if that authorization is in question, it is up to some court to knock it down.

Mr. MOSK. I suggest to you, Senator, that this body is the final judge of its membership, and not a State court.

Senator CURTIS. I think that is correct. We are, however, charged with following the law. It is not a grant of power that is intended to be used capriciously or arbitrarily or contrary to the Constitution or the laws. But the final authority on that interpretation is, as you say—and it is not disputed by any of the parties here—the Senate itself. May I ask you—do you base any of Mr. Salinger's right to be seated on the fact that he may be eligible to vote for President this fall, even though he is not an elector?

Mr. MOSK. That is a relatively new section of our statutes—the provision to vote in Federal elections has not been interpreted. And I am unwilling to concede that one who is eligible to vote for President is not an elector. But I am not relying in this presentation on that point.

Senator CURTIS. And that was done by a constitutional provision, was it not?

Mr. MOSK. Yes, sir.

Senator CURTIS. Its purpose was to give persons who did not meet the statutory—the constitutional qualifications of electors in the State the right to use qualifications from some other State to vote for President; is that right?

Mr. MOSK. Well, that is part of it. But the basic part, of course, is that one has been in California for a minimum of 54 days prior to the general election.

Senator CURTIS (reading):

Provided, That such persons were either qualified electors in another State prior to moving to this State or would have been eligible to vote in such other State.

Mr. MOSK. That last clause, of course, eliminates the requirement that they have been actual and bona fide voters in another State. They merely are required to have been eligible to be voters. But they do not have to prove that they voted.

Senator CURTIS. Well, you were present here when Mr. Salinger testified. Do you now contend he is or he is not an elector in the State of California?

Mr. MOSK. Well, I am not prepared to state whether he is an elector. It is my opinion that he is a qualified Member of the U.S. Senate today.

Senator CURTIS. But you have no opinion on whether or not he is an elector?

Mr. MOSK. No; that is a question of fact I am not prepared——

Senator PELL. You two gentlemen are lawyers; I am not. But a man who can vote for President, in my mind, is an elector.

Mr. MOSK. I think that is immaterial, though, Senator. I think two different people may disagree on whether he is or is not an elector. But, in my opinion, that is completely irrelevant because the limitation of the State of California to electors being eligible for appointment by the Governor is an invalid limitation. And in checking the statutes of the other 49 States, I find none of them which contains any limitations upon the three basic qualifications set forth in article I of the Constitution of the United States. California seems to be the only one that fell into that error.

Senator CURTIS. I believe you said that the request of the Governor for an opinion is in writing, and, if the time element would permit, you would supply it?

Mr. MOSK. Yes. I am not certain of that. But that is the general procedure. And since we have two questions phrased at the start of our opinion, I would assume, Senator, those are the two precise questions which were asked of us, and in that form. That is, generally, the situation.

Senator CURTIS. I am referring to the request for an opinion at the time of the appointment. It has nothing to do with filing for office.

Mr. MOSK. That is what I am referring to. Our opinion at its very beginning states that the Governor has asked us the following two questions, and the questions are stated. And then we proceed to answer them.

Senator PELL. All right. Would both of you gentlemen, and you, Mr. Scribner, come back here about 3 o'clock in order to check the transcript and correct grammatical errors and such, if there were any. I am sure there were very few. Did you have anything further in the way of rebuttal?

Mr. SCRIBNER. No, sir. I admire your patience, and thank you.

Senator PELL. All right. This ends the hearings of the subcommittee. The subcommittee will meet in executive session at 9:30 tomorrow morning.

(Whereupon, at 11:50 a.m., the subcommittee was recessed, to reconvene at 9:30 a.m., Tuesday, August 11, 1964.

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