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SENATOR FROM NEW HAMPSHIRE

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HEARING

BEFORE THE

SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

OF THE

COMMITTEE ON

RULES AND ADMINISTRATION

UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON THE

PETITION OF JOHN A. DURKIN CONTESTING THE ELEC-
TION OF LOUIS C. WYMAN AS UNITED STATES SENATOR
FROM THE STATE OF NEW HAMPSHIRE

JANUARY 9, 1975



Printed for the use of the Committee on Rules and Administration
United States Senate

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DOCUMENTS

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REPORT

The following report was prepared by the committee on the subject of the proposed changes in the curriculum of the Department of Education, and is submitted to the Board of Education for their consideration.

The committee has had the honor to receive from the Board of Education a copy of the report of the Commission on the Structure of the Public Schools, dated June 1, 1918, and has carefully studied the same. The Commission's report is a most valuable contribution to the study of the public school system, and its recommendations are of the highest importance.

The committee has endeavored to bring into line the curriculum of the Department of Education with the recommendations of the Commission, and has proposed the following changes:

1. The elimination of the subject of Latin from the curriculum of the Department of Education, and its replacement by the subject of English.

2. The elimination of the subject of Greek from the curriculum of the Department of Education, and its replacement by the subject of History.

3. The elimination of the subject of French from the curriculum of the Department of Education, and its replacement by the subject of Science.

4. The elimination of the subject of German from the curriculum of the Department of Education, and its replacement by the subject of Art.

5. The elimination of the subject of Italian from the curriculum of the Department of Education, and its replacement by the subject of Music.

6. The elimination of the subject of Spanish from the curriculum of the Department of Education, and its replacement by the subject of Physical Education.

7. The elimination of the subject of Latin from the curriculum of the Department of Education, and its replacement by the subject of English.

8. The elimination of the subject of Greek from the curriculum of the Department of Education, and its replacement by the subject of History.

9. The elimination of the subject of French from the curriculum of the Department of Education, and its replacement by the subject of Science.

10. The elimination of the subject of German from the curriculum of the Department of Education, and its replacement by the subject of Art.

11. The elimination of the subject of Italian from the curriculum of the Department of Education, and its replacement by the subject of Music.

12. The elimination of the subject of Spanish from the curriculum of the Department of Education, and its replacement by the subject of Physical Education.

The committee believes that these changes are necessary and desirable, and that they will result in a more efficient and practical curriculum for the Department of Education.

SENATOR FROM NEW HAMPSHIRE

THURSDAY, JANUARY 9, 1975

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 10:33 a.m., in room 318, Russell Senate Office Building, Hon. Claiborne Pell (chairman), presiding.

Present: Senators Pell, Robert C. Byrd, and Griffin.

Full committee staff present: William McWhorter Cochrane, staff director; Chester H. Smith, chief counsel; Joseph E. O'Leary, professional staff member, minority; John P. Coder, professional staff member, Jack L. Sapp, professional staff member; and Raymond N. Nelson, professional staff member.

Subcommittee staff present: James H. Duffy, chief counsel; James F. Schoener, minority counsel; Mary G. Daly, secretary; and Charlotte Orton, secretarial assistant.

OPENING STATEMENT OF HON. CLAIBORNE PELL, CHAIRMAN, SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

Senator PELL. The subcommittee will come to order. This hearing has been called for the purpose of receiving testimony relative to the election of a U.S. Senator from the State of New Hampshire.

The initial recount of the ballots after the election of November 5, 1974, which resulted in an original declaration in favor of Mr. Wyman, resulted in a plurality of 10 votes for Mr. John Durkin. The State of New Hampshire then issued a certificate of election for Mr. Durkin, which is on file with the Office of the Secretary of the Senate.

Upon application by Representative Wyman, the New Hampshire Ballot Law Commission reviewed previous ballot rulings by the secretary of state of New Hampshire and reviewed certain disputed ballots. The ballot law commission then ruled that Representative Wyman received a plurality of two votes, and the State of New Hampshire issued a certificate of election to Representative Wyman. As a result of this, the Senate has in its possession two separate certificates of election for two separate individuals.

Under New Hampshire State law there is no appeal within New Hampshire from the decision of the Ballot Law Commission for congressional candidates. Consequently, Mr. Durkin, on December 30, 1974, filed a petition with this Subcommittee on Privileges and Elections, as well as with Senator Howard Cannon, chairman of the full parent Committee on Rules and Administration, and with the President of the Senate, Vice President Rockefeller.

Article I, section 4, of the U.S. Constitution provides that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof.

However, article I, section 5, of the U.S. Constitution provides that each House of the Congress shall be the final judge of the "elections, returns, and qualifications" of its Members.

In the New Hampshire election contest being considered this morning, this subcommittee has received no formal charges of fraud or of other corrupt practices. Rather, the issues as presented in the petition by Mr. Durkin involve only questions of whether ballots were properly counted.

The petitioner, Mr. Durkin, claims that the remedies available to the parties, pursuant to State law, have been exhausted and that it now devolves upon the Senate to make a final determination of the election under the constitutional powers of the Senate.

This subcommittee seeks clarification of the events which took place during the New Hampshire election. It is my hope that the parties to the controversy may come to an agreement or stipulation on the issues and ballots in dispute so that the subcommittee can focus on those precise matters in contest.

Before we hear the witnesses, I wish to emphasize that the purpose of this inquiry is to gather information that will be helpful to our parent committee and to the Senate in the Senate's fulfilling its constitutional responsibility to judge the "elections, returns, and qualifications" of its Members. In my view, that responsibility requires that the Senate determine to the best of its ability the wishes of the people of the State of New Hampshire as they were expressed in the ballots cast on election day, November 5, 1974.

And in doing this, I believe that we must not only be fair, but that the country must know that we are being fair and that we appear to be fair in every way that we possibly can.

Senator Griffin, do you have a statement that you wish to make?

**OPENING STATEMENT OF HON. ROBERT P. GRIFFIN, MEMBER,
SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS**

Senator GRIFFIN. Thank you, Mr. Chairman. While I don't wish to challenge or argue the point of the jurisdiction of this subcommittee to proceed this morning, I do want to indicate on the record that at least there could be some question about what is the appropriate role and function of the subcommittee and the full Committee on Rules and Administration during this hiatus period between the 93d Congress, which expired on January 3, and the yet-to-convene 94th Congress.

Now, I am familiar with the doctrine that the Senate is a continuing body, and there are precedents indicating that the jurisdiction of a committee continues until successor members are appointed.

On the other hand, I think we should take note in the record that the precedents of the Senate have indicated that a preceding Congress does not decide a contested election question affecting the next Congress.

Now, we may be in the 94th Congress at this time—we have not organized. It is somewhat presumptuous to assume which Members will be assigned to which committees. One of the members of the full committee was not reelected.

No decision has been made as to what the ratio between Republicans and Democrats will be on committees in the 94th Congress.

And so what I am suggesting is that the jurisdiction of the committee to take any definitive action that might prejudice the rights of either of the contesting parties at least ought to be raised.

Now, I don't question the right—or, indeed, the desirability—of this subcommittee proceeding with a fact-gathering function, as we are doing here this morning—holding a hearing, trying to lay the facts out, trying to be helpful to the new Senate when it convenes on January 14. I want to make that clear that I think that is an appropriate role that we can play.

I would only press this point if the subcommittee or the committee sought to take some action which might prejudice the rights of either party before this matter was actually referred to this committee by the Senate, which it has not been. Mr. Durkin's petition has been directed to the President of the Senate. It has not formally been referred to this committee. In past instances the Senate has established a special committee to consider such questions as this. In other instances the Senate has referred it to the standing committees, such as the Committee on Rules and Administration, with instructions to proceed in a particular way or to examine or investigate particular allegations.

Here we are assuming, or presuming, a role or a function which the Senate has not actually given to us.

I want to say further, Mr. Chairman, if I may, something about the significance of the record that we will be making in these hearings. Regardless of whether decisions are made or not made by the subcommittee or the full committee, I am sure that we realize that this record is likely to be if not the basis, at least a primary basis for whatever action the Senate may take as a whole on or about January 14.

Recognizing the importance of this hearing and the record, as one member of the subcommittee I wish to welcome testimony on any relevant questions that have arisen or may arise. I wish to stress that testimony with respect to several questions in particular would be most helpful.

First, I trust that we could agree, as lawyers at least, that there could be only one valid certificate of election outstanding at this time that has been duly issued by the proper authorities of New Hampshire, in accordance with the statutes and laws of that State.

I hope the witnesses will address themselves to the question: Which of these two contesting parties has the valid certificate of election?

Second, a question the Senate will have to decide is whether in this case the person with the valid certificate should be seated, conditionally or otherwise.

While it has not been uniformly followed, certainly it has generally been the custom that when a Senator-elect presents a valid certificate—valid on its face—the oath is administered and he is seated, even though his seating may be without prejudice to further proceedings or investigation concerning the regularity of the election.

This Senator is aware of only one case in which the Senate actually recounted the votes cast in an election for U.S. Senator. In that case, Herbert O'Connor, a Democrat, presented himself to the Republican-controlled Senate of the 80th Congress. He presented a certificate of election, valid on its face, but the right of O'Connor to be seated was

challenged on behalf of his Republican opponent, who charged irregularities in connection with the election, and called upon the Senate to recount the ballots.

Having presented a valid certificate, O'Connor, a Democrat, was seated by that Republican Senate in the 80th Congress, even though the Senate proceeded thereafter to refer the contest to the Rules Committee and conducted a recount of all the votes cast in the Maryland election.

I might note that the committee undertook in that case to recount the ballots because, as the committee report stated—and I quote—"The Maryland law made no provision for a recount."

And, third, Mr. Chairman, should the Senate look behind the certificate of election in this case, how and what about this election in New Hampshire should it review or recount? In his pleadings at least, as the chairman has recognized, Mr. Durkin does not make any allegation of fraud or illegality in connection with this New Hampshire election.

As I understand it, he contends only that the duly constituted officials of New Hampshire made certain errors of judgment. I take it that one of the very serious questions to be decided will be this, should the Senate, or a committee of the Senate, now undertake to substitute its judgment—and to what extent should it substitute its judgment—for that of the duly constituted authorities of the State of New Hampshire in a situation where no fraud or illegality is either shown or alleged and where the State laws do provide for a recount and where a full and complete recount was undertaken and provided and where that final recount actually confirmed, though by a smaller margin, the original canvass by which Mr. Wyman was earlier declared the winner?

Now, of course, it is beyond question that under the broad authority of section 5, article I, of the Constitution, to which the Chairman has alluded, the Senate has the power, even in this unprecedented case, to recount the ballots again itself, if the Senate wishes to do so. It is my impression, however, that that would be an unprecedented step for the Senate to take.

I think the committee would welcome from the witnesses any enlightenment as to precedent or as to the action, the extent of the action, which the Senate should take.

Now, I realize, of course, that in many areas of controversy the Senate has not always paid much attention to precedent. But as I reviewed the 164 cases summarized in the excellent document on the Senate election cases prepared under the direction of the Secretary of the Senate, I was impressed that in this area of election contests, perhaps because of the strong natural tendency or temptation to be partisan, Senators over the years have paid unusual deference to precedent. Exceptions can be found, but generally speaking the Senate has followed its established precedents, even in the tough cases involving strong political considerations.

I hope and believe the Senate will measure up to that standard of statesmanship in this case.

If, nevertheless, the Senate does proceed to a recount or a reexamination of this election, then this record of this hearing could be important

to provide a basis for determining exactly what should be recounted or reexamined.

Should we recount all 220,000 ballots cast in the New Hampshire election, as was done in Maryland—indeed, 472,000 ballots were recounted by the Senate following the 1946 election in Maryland.

If there is to be a recount or a reexamination of any less than all the ballots, then on what grounds and why?

And, finally, Mr. Chairman, I wish to pose one additional very important question, which I hope will be addressed by the witnesses in their testimony here today. I take it that the Senator who will ultimately be seated wants to represent the people of the State of New Hampshire on the basis of the votes of the people of New Hampshire, not on the basis of the votes of the Members of the U.S. Senate. If it should be determined that there is reasonable doubt as to whether it can be determined which of these contesting parties was actually elected, wouldn't it be better for all concerned—and particularly for the person who ultimately will represent New Hampshire as its Senator—if that doubt were finally resolved by the votes of the people of New Hampshire in a new election, rather than the votes of the Members of the U.S. Senate?

So with the focus on those particular questions, which I think are particularly pertinent, Mr. Chairman, I thank you for your indulgence.

Senator PELL. Thank you, Senator Griffin. Senator Byrd?

OPENING STATEMENT OF HON. ROBERT C. BYRD, MEMBER, SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS

Senator BYRD. Mr. Chairman, I had planned no opening statement. But I do wish to comment on a couple of things which have been said by the distinguished Senator from Michigan, Mr. Griffin.

Now, he raised the question of jurisdiction of this subcommittee to act prior to a referral by the Senate of any resolution with regard to this matter. And he also made some reference to the 94th Congress not having convened.

I see no problem with jurisdiction here. In the first place, under article I, section 5, of the Constitution, each House shall be the judge of the elections, returns and qualifications of its own Members. So the Senate has jurisdiction when any petition of contest arises in connection with a Senate race, as is the case here.

Now, second, the Senate is a continuing body, to which Mr. Griffin alluded in his opening remarks. It is the same Senate as the Senate that met in 1789 and it will always be the same Senate as long as this republican form of constitutional government exists. It always has two-thirds of its Members present.

The 93d Congress is not in recess, it is not in a period of adjournment—the 93d Congress died at 12 o'clock noon on January 3 of this year. We are in the 94th Congress now. The President of the United States, under the Constitution, could call this Congress back into session on any day if he saw fit, even prior to the date of the prospective convening of the Senate and House, to wit, January 14, 1975.

So this decision, if the Senate elects to look into this case—and does not elect to seat one or the other of the two contestants—this decision will be made, and these hearings are being conducted, by the 94th Congress. This subcommittee had its genesis a long time ago. The membership of the subcommittee has no bearing upon the jurisdiction of this subcommittee—whether or not the subcommittee may have lost a member has no bearing—that is entirely irrelevant. This is a legitimate subcommittee and it is proceeding in a legitimate manner to deal with a legitimate petition of contest.

What the Senate will do on January 14 is something else. It may reject the petition of contest and seat Mr. Wyman—period. It may seat Mr. Wyman without prejudice to Mr. Durkin. It could conceivably seat Mr. Durkin—period. It could conceivably seat Mr. Durkin without prejudice to Mr. Wyman. Whatever the Senate does, there is no higher court. The Senate may act arbitrarily if it wishes—but it will not. The Senate may declare the seat vacant—and in that case the electorate of the State of New Hampshire will render a new decision. The Senate may refer the matter to the committee for further consideration by formal resolution.

But in the meantime, this subcommittee, I think, has the responsibility to develop whatever facts it can develop which may be helpful to the Senate in its ultimate decision. And that is what the subcommittee is proceeding to do.

The Senator from Michigan is not alone in his desire that no definitive action be taken which might prejudice the rights of either of these men. I should think that each member of this subcommittee would feel just as strongly in that regard.

But we do have a duty here, and that is to develop the facts, as far as we can. On next Tuesday, January 14, the Senate may take action that would make of no necessity any further action by this subcommittee.

But in the meantime it is acting properly. And I hope that its actions will be helpful to the Senate in reaching its conclusion.

Now, one other comment I would have. And I say these things with the utmost respect for my friend from Michigan—I am his friend and he is mine—but I cannot allow the record to stand without some effort on my part to balance the record. My colleague has referred to this subcommittee, or the full committee, “substituting its judgment” for that of the voters of New Hampshire.

This subcommittee is not going to substitute its judgment for the judgment of the voters of New Hampshire. The Senate is not going to substitute its judgment for the judgment of the voters of New Hampshire.

The Senate has the power and authority under the Constitution, to judge the elections, returns and qualifications of its own Members. We are not making an effort to substitute our judgment here. We are confronted with a lawful petition of contest that has been submitted by one of the contestants. We have no alternative—the Senate has no alternative but to at least give some consideration to this petition of contest. And that is the spirit in which this subcommittee is approaching its duty—not substituting its judgment, but, if it may, and if the Senate requires the subcommittee and the full committee to do so, to

determine as best it can what the clear intent was of the New Hampshire electorate—not to substitute its judgment, but to determine the clear intent of the New Hampshire electorate.

Thank you, Mr. Chairman.

Senator PELL. Thank you, Senator Byrd. I would like to insert in the record at this point, if there is no objection, the certificate of election for Mr. Durkin, the rescission of Mr. Durkin's certificate, the certificate of election for Mr. Wyman, the certificate of appointment of Mr. Wyman to fill a vacancy in the U.S. Senate seat caused by the resignation of Senator Norris Cotton, Mr. Durkin's petition of contest and the Wyman response to the petition. They will all be inserted in the record at this point.



THE STATE OF NEW HAMPSHIRE

 Executive Department

To the President of the Senate of the United States:

This is to certify that on the fifth day of November,
nineteen hundred and seventy-four

JOHN A. DURKIN

Was duly chosen by the qualified electors of the State of New
Hampshire a Senator from said State to represent said State in the
Senate of the United States for the term of six years, beginning on
the third day of January, nineteen hundred and seventy-five.

Witness: His Excellency, our
Governor Meldrim Thomson, Jr.
and our Seal hereto affixed
at Concord this twenty-seventh
day of November, in the year
of our Lord nineteen hundred
and seventy-four.



Meldrim Thomson, Jr.
Governor

By the Governor, with
advice of the Council:

Robert F. Otis
Secretary of State

DEC 9 1974

State of New Hampshire
Secretary of StateROBERT L. STARK
SECRETARY OF STATEEDWARD C. KELLEY
DEPUTY SECRETARYCATHERINE C. HARDY
ADMINISTRATIVE ASSISTANTSTATE HOUSE
CONCORD

December 5, 1974

Honorable Francis R. Valeo
Secretary of the U. S. Senate
Washington, D. C. 20510

DEC - 9 1974

Dear Mr. Valeo:

Enclosed herewith is a resolution unanimously adopted by the Governor and Council on December 5, 1974, rescinding their previous action of November 27, 1974 whereby they certified John A. Durkin as the winner for the office of United States Senator by ten (10) votes.

Very truly yours,

A handwritten signature in cursive script that reads "Robert L. Stark".
Robert L. Stark
Secretary of StateCopy to: John A. Durkin
60 Lenz Street, Manchester, N. H.Louis C. Wyman
121 Shaw Street, Manchester, N. H.

State of New Hampshire

OFFICE OF SECRETARY OF STATE



I, ROBERT L. STARK, Secretary of State of the State of New Hampshire, do hereby certify that the following and hereto attached is a true copy of a Resolution unanimously adopted by the Governor and Council on December 5, 1974, on file in this office and held in my custody as Secretary of State.



In Testimony Whereof, I hereto set my hand and cause to be affixed the Seal of the State, at Concord, this ...5th..... day of December - A.D. 19 74..

.....*Robert L. Stark*.....
Secretary of State

RESOLUTION

WHEREAS, the Secretary of State is required by RSA 63:8 and 63:11 to present the figures on the election for office of the United States Senator to the Governor and Executive Council for certification, and;

WHEREAS, the Secretary of State on 5 December 1974 has advised the Governor and Executive Council that all votes cast for the office of United States Senator were not recounted, and;

WHEREAS, the Secretary of State has stated that no write-in votes in the balloting machines were tallied on the re-count, and;

WHEREAS, the Governor and Executive Council have received a notarized statement indicating write-in votes were cast and a notarized statement that write-in votes were counted in the official return of votes for one of the two candidates, and;

WHEREAS, the Secretary of State has notified the Governor and Executive Council on this date that these same votes were not tallied in the recount, and;

WHEREAS, on November 27, 1974 Governor and Council did pursuant to Statute certify by Resolution the count given to it by the Secretary of State, which Resolution reads as follows:

"Resolved that the official recount of the ballots cast in the election for United States Senator having been completed and showing the following results:

John A. Durkin	- 110,924
Louis C. Wyman	- 110,914
Carmen C. Chimento	- 1,513

It is resolved that under the provisions of RSA 63:8 and 63:11 the Governor and Council certify John A. Durkin of Manchester as the winner of said election, further stating that the Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 68."

WHEREAS, the text of said Resolution was not included in the certification forwarded to the United States Senate and to the senatorial candidates;

BE IT HEREBY RESOLVED that the Governor and Executive Council rescinds the certification of November 27, and instruct the Secretary of State to forthwith notify the United States Senate and the senatorial candidates of this action.

Mellin Hanson
Governor of New Hampshire

Lyle E. Herson
Lyle E. Herson
Executive Councilor

James H. Hayes
James H. Hayes
Executive Councilor

Robert E. Whalen
Robert E. Whalen
Executive Councilor

John F. Bridges
John F. Bridges
Executive Councilor

Bernard A. Streeter, Jr.
Bernard A. Streeter, Jr.
Executive Councilor

State of New Hampshire
Secretary of State

ROBERT L. STARK
SECRETARY OF STATE

EDWARD C. KELLEY
DEPUTY SECRETARY

CATHERINE C. HARDY
ADMINISTRATIVE ASSISTANT



STATE HOUSE
CONCORD

December 27, 1974

Hon. Francis R. Valeo
Secretary of the United States Senate
Washington, D. C.

Dear Mr. Valeo:

Enclosed please find a resolution passed by the Governor and Council December 27, 1974, relative to the election of Louis C. Wyman, United States Senator from New Hampshire.

Very truly yours,

Robert L. Stark
Secretary of State

State of New Hampshire

OFFICE OF SECRETARY OF STATE



I, ROBERT L. STARK, Secretary of State of the State of New Hampshire, do hereby certify that the following and hereto attached is a true copy of a Resolution and Certificate approved by Governor and Council at their meeting held December 27, 1974 and held in my custody as Secretary of State.



In Testimony Whereof, I hereto set my hand and cause to be affixed the Seal of the State, at Concord, this27th... day of ... December A.D. 19.....74

Robert L. Stark
Secretary of State

RESOLUTION

WHEREAS the State of New Hampshire conducted a biennial general election on November 5, 1974, and

WHEREAS the report of the Secretary of State of the return of the votes cast for United States Senator was duly laid before the Governor and Council on November 21, 1974 as Louis C. Wyman, Manchester, 110,716; John A. Durkin, Manchester, 110,361; and Carmen C. Chimento, Brookline, 1,327; whereupon the Governor and Council ". . .and authorized the Governor to issue election certificates in accordance with the (above) records," and formally declared "Louis C. Wyman, Manchester, having received the largest number of votes cast for United States Senator. . .elected. . .," and

WHEREAS formal documentation was not prepared forthwith by the Secretary of State due to the then ongoing official recount in said election, and

WHEREAS a formal request was made by legal counsel for John A. Durkin, Manchester, on November 6, 1974 for impounding all ballots and a formal request was made by the same parties on November 7, 1974 for an official recount by the Secretary of State, and

WHEREAS such an official recount was conducted by the Secretary of State on November 18, 1974 through November 26, 1974, and

WHEREAS upon completion of said official recount the Secretary of State on November 27, 1974 announced that the votes cast for the election of United States Senator were John A. Durkin, Manchester, 110,924; Louis C. Wyman, Manchester, 110,914; and Carmen C. Chimento, Brookline, 1,513; and thereupon the Secretary of State presented these totals to the Governor and Council for certification within an hour, and

WHEREAS the Governor and Council, acting prudently, on November 27, 1974 sought an informal opinion from the Attorney General of New Hampshire as to when final certification was appropriate and legal, having in mind that a further appellate proceeding still remained available to either Mr. Durkin or Mr. Wyman with the Ballot Law Commission, a State agency, and

WHEREAS the Attorney General advised the Governor and Council on November 27, 1974 that they should then certify Mr. John A. Durkin as the elected United States Senator at that point in time and on a further request from the Governor and Council the Attorney General stated in an informal opinion that the State Ballot Law Commission would certify direct to the United States Senate and to the participating candidates of any changes in the total votes cast when the Ballot Law Commission reviewed challenged ballots, and

WHEREAS the Governor and Council then requested the Attorney General to draw up a qualifying resolution providing for a conditional certification for John A. Durkin which was unanimously passed by the Governor and Council and which read, in part. . . "The Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 68," and

WHEREAS on November 27, 1974 counsel for Louis C. Wyman, Manchester, appealed the declaration of recount of the Secretary of State under RSA 68:4 II, and

WHEREAS during the ensuing dates between December 4, 1974 and December 23, 1974 the State Ballot Law Commission acted in consideration and review of the challenged ballots, and

WHEREAS on December 5, 1974 the Governor and Council first were made aware of two sworn affidavits alleging that the Secretary of State in conducting the official recount had failed to count write-in ballots on the voting machines in the town of Exeter, and

WHEREAS the Secretary of State, under questioning by the Governor and Council, admitted that he had not counted write-in ballots on the voting machines in the town of Exeter nor in the cities of Manchester, Nashua and Portsmouth based on his interpretation of a prior Ballot Law Commission ruling occurring during a previous election which now appears not to have been applicable in this particular election since it applied in multiple-choice elections and not in a "one-choice election," and

WHEREAS it was clearly apparent to the Governor and Council that all votes cast on November 5, 1974 were therefore not counted in the official recount by the Secretary of State thus creating inaccurate totals in the qualified certification of John A. Durkin, and

WHEREAS the Secretary of State, under questioning by the Governor and Council, was unable to offer any reason for his failure to advise the United States Senate nor the candidates of the qualified certification drawn by the Attorney General and unanimously passed by the Governor and Council on November 27, 1974 certifying John A. Durkin and which clearly indicated the awareness by the Governor and Council of the availability of a further appellate procedure through the Ballot Law Commission in the event of a request for a review of challenged ballots by either candidate, and

WHEREAS the Governor and Council felt strongly that until the challenged votes were reviewed by the State Ballot Law Commission and determinations made, and all appeal routes had been exhausted at the State level that certification by the highest executive authority in the State of New Hampshire, namely the Governor and Council, had been premature and inaccurate, and

WHEREAS the Governor and Council for these reasons then acted on December 5, 1974 to decertify the previous qualified certification of John A. Durkin, Manchester, and

WHEREAS the Ballot Law Commission has formally announced on December 24, 1974 that the following totals in the election of the United States Senator are final and accurate as in their best judgment reflecting the intent of each voter, and

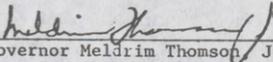
WHEREAS under the Constitution of New Hampshire, Part II, Article 62, the Governor and Council is responsible "For ordering and directing the affairs of the State, according to the laws of the land,"

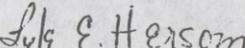
NOW THEREFORE the Governor and Council, acting as the highest executive authority in the State of New Hampshire concurs with the State Ballot Law Commission in the issuance of a Certificate of Changed Declaration and Accompanying Report of the New Hampshire Ballot Law Commission dated December 24, 1974 of the total vote cast as being Louis C. Wyman, Manchester, 110,926; John A. Durkin, Manchester, 110,924; Carmen C. Chimento, Brookline, 1,513; as being an accurate representation of the total votes cast for each candidate in the biennial election held on November 5, 1974 for the office of United States Senator, and

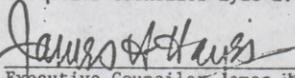
NOW THEREFORE the Governor and Council directs the Secretary of State, acting in the capacity of Secretary to the Executive Council (New Hampshire Constitution, Part II; Article 64) and as Clerk and Recording Officer of the New Hampshire State Ballot Law Commission (RSA 68:1) to make this Resolution part of the certification documents of Louis C. Wyman, Manchester, and

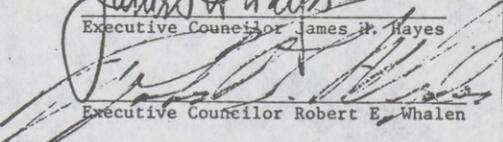
NOW THEREFORE the Governor and Council authorizes the Governor to declare Louis C. Wyman the elected United States Senator and to issue to him a certificate which will include the following paragraph:

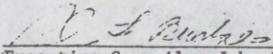
This certifies that the Governor and Executive Council having reviewed and accepted the findings of the New Hampshire Ballot Law Commission that at the biennial election held on November 5, 1974, Louis C. Wyman of Manchester received 110,926 votes; that John A. Durkin of Manchester received 110,924 votes; that Carmen C. Chimento of Brookline received 1,513 votes in the contest for United States Senator, hereby declare Louis C. Wyman elected and do authorize the Governor to issue to him a Certificate of Election reflecting the said certification of the Ballot Law Commission.

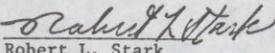

Governor Meldrim Thomson, Jr.


Executive Councilor Lyle E. Hersom


Executive Councilor James W. Hayes


Executive Councilor Robert E. Whalen


Executive Councilor John F. Bridges


Robert L. Stark
Secretary of State


Executive Councilor Bernard A. Greeter

THE STATE OF NEW HAMPSHIRE

Executive Department

To the President of the Senate of the United States:

This is to certify that on the fifth day of November, nineteen hundred and seventy-four

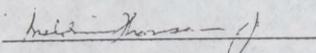
Louis C Wyman

Was duly chosen by the qualified electors of the State of New Hampshire a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the third day of January, nineteen hundred and seventy-five.

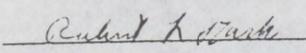
This certifies that the Governor and Executive Council having reviewed and accepted the findings of the New Hampshire Ballot Law Commission that at the biennial election held on November 5, 1974, Louis C. Wyman of Manchester received 110,926 votes; that John A. Durkin of Manchester received 110,924 votes; that Carmen C. Chimento of Brookline received 1,513 votes in the contest for United States Senator, hereby declare Louis C. Wyman elected and do authorize the Governor to issue to him a Certificate of Election reflecting the said certification of the Ballot Law Commission.



Witness: His Excellency, our Governor
and our Seal hereto affixed
at Concord this twenty-seventh
day of December, in the year
of our Lord nineteen hundred
and seventy-four


Governor

By the Governor, with
advice of the Council:


Secretary of State



MELDRIM THOMSON, JR.
GOVERNOR

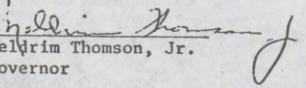
STATE OF NEW HAMPSHIRE
CONCORD 03301

Concord, New Hampshire
December 30, 1974

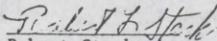
CERTIFICATE OF APPOINTMENT

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 New Hampshire, (Revised Statutes Annotated 63:3), I, Meldrim Thomson, Jr., the Governor of the State of New Hampshire, do hereby appoint Louis C. Wyman, as Senator from New Hampshire to represent New Hampshire in the Senate of the United States until the vacancy therein, caused by the resignation of Senator Norris Cotton, is filled by Louis C. Wyman's qualification and seating as Senator-Elect from the State of New Hampshire.


Meldrim Thomson, Jr.
Governor

Witness: His Excellency, our Governor Meldrim Thomson, Jr., and the seal of the State of New Hampshire affixed at Concord, New Hampshire, this 30st day of December, in the year of our Lord 1974.


Robert Stark
Secretary of State

TO THE HONORABLE NELSON A. ROCKEFELLER
VICE PRESIDENT OF THE UNITED STATES
AND PRESIDENT OF THE SENATE
THE CAPITOL
WASHINGTON, D. C. 20510

PETITION OF JOHN A. DURKIN

JOHN A. DURKIN, of Manchester, in the County of Hillsborough, and State of New Hampshire, respectfully petitions that the Senate of the United States exercise its Constitutional right under Article I, §5 of the United States Constitution to be "the judge of the elections, returns and qualifications of its own members" and review the election of November 5, 1974 for United States Senator from the State of New Hampshire. Your Petitioner asserts that he is entitled to be seated on January 14, 1975 as Senator from New Hampshire and states in support of his claim to such seat the following facts and circumstances.

1. At the New Hampshire biennial election of November 5, 1974, the candidates for the United States Senate were John A. Durkin (Democrat), Louis C. Wyman (Republican) and Carmen C. Chimento (American Party).

2. At the original canvass by the town, ward and other precinct election officials, the tally was declared on November 8, 1974 by the Secretary of State as follows:
 - Wyman: 110,716
 - Durkin: 110,361
 - Chimento: 1,327

3. In the manner and within the time authorized by the N. H. Revised Statutes Annotated 59:94, Durkin applied for "a recount of all the ballots cast and recorded for such office" and the recount was held between November 17 and November 26, 1974 with the following results:
 - Durkin: 110,924
 - Wyman: 110,914
 - Chimento: not counted.

4. Under authority of N. H. RSA 59:98 the Secretary of State declared Durkin "to have the greatest number of votes" and on November 27, 1974, under N. H. RSA 63:8, Governor and Council issued a certificate of election to John A. Durkin which was mailed by the New Hampshire authorities on November 27, 1974 to the Secretary of the United States Senate and received by the Senate on November 29, 1974. Said certificate is still on file with the Secretary of the Senate.

5. On November 29, 1974, Wyman, under N. H. RSA 68:4(II), appealed to the Ballot-Law Commission. On such appeal the statute directs the Commission to "consider and review all the rulings of the secretary of state on ballots protested during the recount." The reference in said statute to "ballots protested" is to the fact that during the recount by the secretary of state the secretary affixes to each ballot a memorandum of protest by either party of "the counting of or failure to count any ballot" (N. H. RSA 59:96).
6. The review of the Ballot-Law Commission commenced December 5 and after various recesses, concluded December 24, 1974. The results of said review were as follows:
- | | |
|-----------------|---------|
| Louis C. Wyman: | 110,926 |
| John A. Durkin: | 110,924 |
7. Under both New Hampshire common law and the New Hampshire statutes, the review contemplated by the Ballot-Law Commission is not final in a case involving election to a legislative office until after appeal to the legislative body involved. Petition of Dondero, 94 N. H. 236, 51 A2d 39; N. H. RSA 68:11,

8. New Hampshire statutory law provides that "there shall be an appeal to the Supreme Court from the decisions of the ballot-law commission" but that no such appeal may be taken "in cases of contested elections for the offices of United States senator, representative in congress, state senator or representative in view of the constitutional provisions vesting in both houses of congress and both houses of the general court [the N. H. legislature] exclusive jurisdiction over the elections and qualifications of their respective members." (see N. H. RSA 68:11)
9. Thus under New Hampshire law, no further proceedings can be had in New Hampshire to determine who has been chosen at the 1974 election to represent the state in the United States Senate.
10. Your petitioner hereby requests that the United States Senate, pursuant to the practice in such cases established (see Senate Election, Expulsion and Censure cases 1793 to 1972, Senate Document No. 92-7 pp. VII-VIII) re-examine the ballots heretofore ruled on by the state authorities, make such other and

independent investigation of the conduct and results of such November 5, 1974 election for United States Senator in New Hampshire as it deems appropriate, and conduct such hearings and receive such evidence as will establish the following:

- A. That the New Hampshire Ballot-Law Commission erred in overruling the Secretary of State and increasing Wyman's votes or decreasing Durkin's votes on at least forty (40) ballots.
- B. In addition, the Ballot-Law Commission erred in failing to count at least twenty (20) votes for Durkin which he was entitled to and erred in counting at least twenty (20) votes for Wyman he was not entitled to.
- C. In making the errors described in Paragraphs A and B, the Ballot-Law Commission
 - i) Ignored or failed properly to follow the established principle that wherever possible the intent of the voter should be determined from the ballot and surrounding circumstances.

- ii) Applied different standards in judging ballots for Durkin than were applied in judging ballots for Wyman.
- iii) Applied purely mechanistic and unlawful tests in counting certain ballots.
- iv) Allowed oral testimony to contradict the written record in violation of constitutional and statutory standards prescribed for casting and counting votes and ballots.
- v) Ignored a long-standing published and statutorily authorized rule which decreed that where a candidate's name was printed on a voting machine, write-in votes for such candidate should not be counted.
- vi) Despite evidence that write-in votes on voting machines could result in double voting under known circumstances, refused to test the few machines in question to determine if this had occurred.
- vii) Failed to follow its own published rules of procedure.

viii) Committed numerous other errors of law and fact in reviewing several hundred votes protested before the Secretary of State and presented to the Ballot-Law Commission by the parties.

11. All of the ballots in question have been marked, preserved and secured in the custody of the Ballot-Law Commission and are available to the Senate as are the voting machines involved with the illegally counted write-in votes.
12. A written transcript of the proceedings before the Ballot-Law Commission is partially completed and the balance will be completed in the near future.
13. The review of the ballots passed on by the Ballot-Law Commission can be accomplished in three or four days. Such review will clearly establish that John A. Durkin received the greatest number of votes for United States Senator at the November 5, 1974 election in New Hampshire and is entitled to be seated on January 14, 1975.

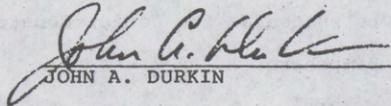
WHEREFORE your Petitioner, John A. Durkin, prays:

- A. That the Senate assume jurisdiction and control over the ballots and other evidences of the New Hampshire election for United States Senator of November 5, 1974, and issue such orders for the protection and security thereof as it deems appropriate.
- B. That the Senate conduct the review hereinabove requested in Paragraph 10 of this Petition, and make such other and further independent investigation of the conduct and results of such election of November 5, 1974 as it may deem appropriate for the purpose of making final determination of who is entitled to be seated as the Junior Senator from New Hampshire.
- C. That if possible, the review be conducted and the investigation be completed prior to January 14, 1974 so that the winner of said election may be seated and represent the State of New Hampshire fully and without reservation or conditional restriction in the 94th Congress.
- D. That if such final determination of the outcome of the November 5, 1974 election cannot be

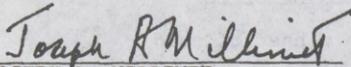
completed by the Senate prior to January 14, 1975, your Petitioner, John A. Durkin, be seated as United States Senator from New Hampshire under the authority of the certificate of election filed November 29, 1974 without prejudice to the outcome of such review and other investigation as the Senate may conduct pursuant to the request of this petition.

AND FOR SUCH OTHER AND FURTHER relief as, in the judgment of the United States Senate, may be appropriate under its Constitutional power and duty to judge the elections, returns and qualifications of its own members.

Respectfully submitted,

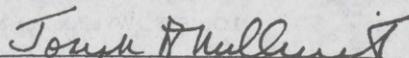

JOHN A. DURKIN

Dated at Manchester,
New Hampshire this
26th day of December,
1974.


JOSEPH A. MILLIMET,
His Attorney
1838 Elm Street
Manchester, New Hampshire

I, Joseph A. Millimet, attorney for John A. Durkin,
the within Petitioner, hereby certify that I have this day

mailed or delivered copies of the within Petition to Thomas D. Rath, Esq., counsel for the Ballot-Law Commission of New Hampshire and the Secretary of State of New Hampshire; Stanley M. Brown, Esq., counsel for Louis C. Wyman; David A. Brock, Esq., counsel for the Honorable Meldrim Thomson, Jr., Governor of the State of New Hampshire and the Executive Council of the State of New Hampshire; and George S. Pappagianis, Esq., Clerk of the Supreme Court of the State of New Hampshire; and Richard Leonard, Esq., Counsel for Carmen Chimento.


JOSEPH A. MILLIMET

Dated this 27th day of December, 1974.

TO THE HONORABLE NELSON A. ROCKEFELLER
VICE PRESIDENT OF THE UNITED STATES
AND PRESIDENT OF THE SENATE
THE CAPITOL
WASHINGTON, D.C. 20510

RESPONSE OF
LOUIS C. WYMAN, U.S. SENATOR ELECT (N.H.)
TO
PETITION OF JOHN A. DURKIN

LOUIS C. WYMAN, of Manchester, County of Hillsborough,
State of New Hampshire, being the United States Senator-Elect from New
Hampshire, elected by the people thereof, and certificated as such
Senator-Elect on December 27, 1974 by the Governor of New Hampshire
with the countersignature of the Secretary of State of New Hampshire, all
as duly appears of record in the office of the Secretary of the United
States Senate, respectfully responds to the Petition of John A. Durkin
and says:

1. Mr. Durkin's petition, by omission of significant facts and
what appears to be affirmative distortions of the records of valid State
election processes, misrepresents to this Honorable Senate both the fact
and the record, viz:

2. It is true that Durkin was the Democratic Party candidate
and that Wyman was the Republican Party candidate in a three-man election

Footnotes refer to Appendices filed herewith.

contest for the office of U.S. Senator at the New Hampshire Biennial Election of November 5, 1974, and that Wyman was declared the winner of that election, after the original canvass of local tallies, on November 8, 1974, Wyman's apparent margin then being 355 votes over Durkin.

3. Durkin thereafter promptly availed himself of State election processes to require a re-counting by the New Hampshire Secretary of State, of the ballots and of the votes. During the process of that recount, both Durkin and Wyman, in accordance with State statute and practice, preserved protests to certain precinct recounts, to certain precinct recount tallies, to the inclusion and exclusion from the recount and recount tallies of certain ballots, and to the Secretary of State's recount rulings on several thousand individual ballots, all as permitted, and as appears of record in the State proceedings, these protests being reserved, under the State procedure, for determination by the Ballot Law Commission of the State, should the apparent loser of the recount segment of State procedure exercise his right to seek such review and determination.¹

4. On November 27, at the conclusion of the recount segment of the State procedure, solely as the result of the Secretary of State's having counted seventeen (17) votes (12 for Durkin, 5 for Wyman) which appeared on what were subsequently shown to be 17 cancelled ballots² which should not have been counted at all, and the Secretary of State's

failure to include and count at all 5 write-in votes which were cast on voting machines (1 for Durkin, 4 for Wyman) which it was subsequently shown should have been included in the recount,³ Durkin appeared to be the apparent winner by 10 votes, although had the two corrections above referred to been made at the time, the contest would have appeared to have resulted in a tie.

5. On November 27, Wyman availed himself of the review by the Ballot Law Commission of the protests reserved on his behalf before the Secretary of State. In that review the 17 cancelled ballots were excluded from the count, the 5 machine write-in votes were in-
cluded in the count; the Secretary of State was found to have improperly counted 3 ballots for Durkin by clear error--mis-calls admitted to be such by Durkin's counsel.⁴ The result was that when the Ballot Law Commission addressed itself to its final statutory duty of reviewing the judgment calls of the Secretary of State on individual protested ballots, Wyman was the apparent winner by at least 3 votes. At the conclusion of the Ballot Law Commission review, Wyman was found, ruled, declared and certificated as the winner on the final State tally by a margin of 2 votes: Wyman 110,926 to Durkin 110,924.⁵

6. During the Ballot Law Commission review Durkin, as well as Wyman, presented such of his reserved protests as he desired for review and ruling, as the written record of its proceedings will reveal.

Both contestants were accorded full due process, both were represented by experienced legal counsel¹, in open hearings, attended by the press and by observers from the Privileges and Elections Sub-Committee of the U.S. Senate Committee on Rules and Administration. Many protests were not presented to the Ballot Law Commission, by both contestants, with reservation of rights to present those protests to the Senate.⁶ The Ballot Law Commission excluded from its consideration, on jurisdictional grounds, other protests with regard to which the contestants reserved their rights to proceed in other fora.⁷

7. On November 27, the same date on which Wyman had noticed his appeal to the Ballot Law Commission, Durkin, as the apparent recount winner by 10 votes, was certificated as the Senator-Elect under State procedures, upon resolution of the Governor and Council which resolution clearly indicated that this certification was subject to the result of the Ballot Law Commission review. That certification, by error, was forwarded to the U.S. Senate without the underlying resolution that clearly showed its conditional nature. Having that certification, although well knowing that the State processes for review of the election were not complete, Durkin undertook to obstruct and defeat the completion of the State election process, to the end that he might improperly persuade this Honorable Senate to seat him as Senator-Elect.

8. On December 4, the day the Ballot Law Commission hearings were to commence, Durkin filed Civil Action 74-359 in the Federal District Court for the District of New Hampshire against the Ballot Law Commission, seeking to enjoin that Commission from proceeding with its review and to declare its proceeding void. After each of the two preliminary hearings, the Federal District Court refused to prevent the Ballot Law Commission from proceeding. Finally, after a third hearing, and this before a three-judge Federal Court, that Court, on December 18, completely rejected Durkin's contentions, finding and ruling:

" We are satisfied that the statutory proceedings in progress before the Commission, like the Indiana recount in Roudebush, are an integral part of the New Hampshire electoral process and are 'within the ambit of the broad powers delegated to the States by Art. 1, §4' [of U.S. Constitution] Id. at 23. The fact that the Indiana recount procedure approved in that case was a one-tier administrative operation, and the New Hampshire procedure involves a recount followed, if a candidate desires, by a Commission review of the rulings of the Secretary of State on ballots disputed during the recount is a distinction without a difference. We are assured by responsible State officials, that the New Hampshire proceedings have been and will be accompanied by careful action to preserve all disputed ballots and related evidence so that the Senate, in exercising its final authority over whom to seat, can make 'an independent final judgment'. Id. at 25. We thus find no encroachment upon the Senate's powers and no occasion to enjoin or otherwise interfere with the proceedings before the Commission. "

9. In the same Federal District Court litigation Durkin had sought orders to prevent the Ballot Law Commission from changing the conditional certification of Durkin as Senator-Elect. The District Court,

on December 6, ordered that no change be made in retaliation because
Durkin had sought relief in Federal Court.⁸ Almost simultaneously with the
 entry of this order, however, the Governor and Council, having been
 advised by affiants that machine write-in votes which had been counted
 locally had not been included in the recount, (which fact the Secretary
 of State acknowledged to the Governor and Council) concluded that the
 recount segment of the State procedure had not, in fact, been completed,
 and that therefore Durkin's conditional certification had been premature.
 Consequently they duly rescinded the November 27 certification, so
 advising the Secretary of the U.S. Senate, as appears of record.¹⁰

Durkin promptly complained to the Federal District Court,
 made the Governor and Council defendants, and sought to have the
 District Court order the Governor and Council to re-issue the rescinded
 conditional certificate. This the District Court declined to do. This
 issue was pressed again to the three-judge Federal Court, which
 disposed of the issue, thusly:

" We turn next to plaintiff's request that we order the
 Governor and Council to re-issue to him the certificate
 that they later revoked. The certificate may have been
 prematurely issued since under the governing New Hamp-
 shire statute, RSA 59:98, a certificate is to be issued
 upon the Secretary of State's declaration following a
 recount 'unless the result is changed upon appeal to the
 Ballot Law Commission'. In any event, given our ruling
 that the proceedings of the Ballot Law Commission may
 continue, it would make little sense to order issuance of
 a certificate which can at most have meaning only after
 the Commission completes its work. * * * We decline
 therefore to order issuance of the certificate."

10. Upon this record, Mr. Wyman respectfully suggests that Durkin's partial recitations falsely implying that he has a currently effective certification as Senator-Elect (Petition, para. 4), and his complete failure to advise the Senate that his certification was rescinded, or that Wyman has the only currently effective certification which is based on the final State tally, or that the three-judge Federal Court convened at Durkin's request has ruled that his certification was premature and that the only meaningful certification would be the final certification issued at the conclusion of the Ballot Law Commission proceeding, and ¹¹ which has now been issued to Wyman, is a patent effort to confuse and mislead this Senate.

By basic and familiar rules of res judicata, Mr. Durkin is and should be held estopped and barred from asserting any right to be seated based upon his rescinded premature certification of November 27, and from further contesting the legal and constitutional validity of Mr. Wyman's certification. Durkin sought the intervention of the Federal Court on these issues, submitted them there, and the Federal Court has disposed of them. No appeal has been taken. This Honorable Senate should, Wyman respectfully submits, accept the Federal Court's decision and honor Mr. Wyman's certification.

11. Durkin, in his Petition to this Honorable Senate, specifically complains of the Ballot Law Commission's having refused to disenfranchise voters who voted by "write in" on voting machines, and

its decision to include such votes in arriving at the final State tally. This inclusion of machine write-in votes resulted in a net gain of 3 votes for Wyman.

Durkin omitted to advise the Senate that the counting of such votes has been reviewed and implicitly (not expressly) approved by the New Hampshire Supreme Court in two opinions rendered on December 16. .

12

In No. 7083, Wyman v. Durkin, commenting upon the Commission's action in tentatively counting such votes, the Court said: " The Commission is proceeding within its statutory jurisdiction..."

13

In No. 7089, Opinion of the Justices, the Court said:

" The enactment of RSA 59:25 (Voting Machines) made it possible for the voter to express his intention in ways additional to those specified in RSA 59:58 [the statutes relating to paper ballots]. By pulling a lever on a voting machine a citizen can register his choice of the names listed. Alternatively, he can write in his preference by lifting a panel.

The counsel for the ballot law commission in a companion case (Wyman v. Durkin, No. 7083) has suggested that this court should not express an opinion on write-in votes on voting machines since the ballot law commission has not completed its functions. We assume the ballot law commission is completely aware of the guiding principle expressed...as follows: ' Statutes regulating the form of ballots are generally regarded as directory rather than mandatory. (Citations omitted). They provide a convenient and uniform method for voting, but should not be applied to disenfranchise voters because of technical irregularities."

While the New Hampshire Supreme Court, at the request of the Commission's counsel, refrained from directly and explicitly approving or directing the inclusion of these votes in the tally, any fair reading of

these two opinions will make clear the Court's approval of the Commission's action. The Commission, at the conclusion of its review, confirmed its tentative ruling to include these votes as authorized by these New Hampshire Supreme Court opinions. Durkin's complaint in this regard should be rejected by the Honorable Senate, as an attempt by him to garner additional margin by disenfranchising three New Hampshire voters selectively.

12. As the above-referenced New Hampshire Supreme Court opinions relate, there was and still is pending (as of January 6, 1975) in the New Hampshire courts, litigation related to the election extraneous to and collateral to the Ballot Law Commission's proceeding to determine the final State tally and to certify the winner as shown by that final tally.

That litigation has at issue currently three contentions that Wyman claims, if proven to the satisfaction of the trial court, should warrant invalidation of this 1974 U.S. Senate election, even though Wyman has been certified as the winner. The three areas of contention are (1) widespread disregard of statutory requirements for the handling of absentee ballots in the City of Nashua, (2) uncertainty of the result in the City of Manchester because 12 new voting machines on which more than 2,000 voters attempted to vote were patently and admittedly malfunctioning, and (3) the counting and return of more than 1100 ballots and machine votes in excess of the number of voters shown by checklist check off to have been entitled to vote.

The legal questions as to whether on proof that these situations existed, the election may be invalidated and a run-off election mandated by State authority are presently pending, having been argued and submitted on January 3, 1975 before the New Hampshire Supreme Court, and the decision of that Court may well be rendered before the hearing before the Senate subcommittee.

In regard to these issues, Durkin sought to have the Federal Court enjoin the State Court proceedings, and to have the New Hampshire Supreme Court prohibit the proceedings. The New Hampshire Court declined to issue its writ of prohibition; the three-judge Federal Court refused to enjoin the proceedings, saying:

" Finally, we turn to plaintiff's request that we enjoin litigation in the New Hampshire courts commenced by Wyman. We decline to do so.³ We find nothing in the maintenance of state court proceedings which would subvert the clear and acknowledged function of the United States Senate to determine whom to seat. No impending state court action or practice has been called to our attention which would impede the independent determination of the outcome by the United States Senate. Whether the New Hampshire courts would exceed their constitutional authority were they to order a new election or to order other types of action are, at this time, purely hypothetical questions which cannot be decided apart from consideration of specific orders. Even if state courts were to intervene in the election process, the Senate would retain the power to ignore the results of a second election or of other action. Indeed, we are not prepared to rule that every conceivable state court action would necessarily be an unwanted intrusion upon the Senate's authority. The New Hampshire state courts have a first hand familiarity with New Hampshire election law. Moreover, the state courts are capable of interpreting the federal Constitution, and of observing its limitations upon state judicial authority.

" The door of the federal court remains open should it be demonstrated that state actions or practices are being pursued which deprive the Senate or any candidate of rights conferred by the federal Constitution. "

It is Senator-Elect Wyman's position publicly stated and consistently maintained, that regardless of the winner, with the margin of election being less than 100 votes, with the uncertainties referred to above, and recognizing the physical impossibility to manually count 200,000 ballots with complete accuracy or without inadvertent counting errors, a run-off election between the three candidates who were contestants in the 1974 Biennial Election should be mandated, so that the Senator to be seated can truly be accepted by the people and by the Senate as the Senator elected by the people of New Hampshire. If the New Hampshire Supreme Court rules, however, that under State law, no run-off election is possible, even if the election is invalidated, Senator-Elect Wyman proposes to seek leave to withdraw or dismiss that litigation, unless the State or other parties object and are prepared to conduct the litigation.

Having been certified as Senator-Elect by valid state proceedings which are not challenged as fraudulent and which have been approved as appropriate and constitutional state procedures by both State and Federal Courts, it is Mr. Wyman's position that he now has an obligation to the electors of New Hampshire to exercise his certification and seek to be seated as the Junior Senator, elected by the people

of New Hampshire, in the 94th Congress, if no run-off election is possible, as he has been advised is probably the case.

WHEREFORE, Senator-Elect Louis C. Wyman prays:

A. That the Senate dismiss John A. Durkin's petition, and accept the certification by the State of New Hampshire of Louis C. Wyman as the Senator-Elect from that State, elected by the people of New Hampshire.

B. That Senator-Elect Louis C. Wyman be seated as the Junior Senator from New Hampshire when the Honorable Senate convenes on January 14, 1975, without reservation or limitation, in the 94th Congress.

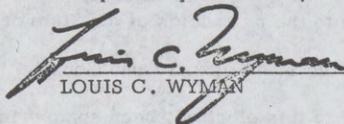
C. That should the Honorable Senate undertake to review and judge the election and return, as is its prerogative under Article 1, § 5 of the Constitution of the United States, that it give full faith and recognition to the procedures of the State of New Hampshire delegated to it by Article 1, § 4 of that same Constitution which have hitherto, with regard to this election, been approved in Durkin v. Ballot Law Commission, CA. 74-359, U.S. District Court, N.H., and which have resulted in the Certification of Louis C. Wyman as Senator-Elect.

D. If any review of ballots cast and counted is undertaken by the Honorable Senate which seeks to look behind the final State tally and certification by the Ballot Law Commission, in order that due process

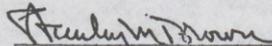
may be accorded not only to the Petitioner Durkin and Senator-Elect Wyman, but also to the electors of the State of New Hampshire, that all such ballots be recounted and reviewed, including a complete mechanical inspection of the voting machines from which thousands of votes were accepted into the tally without any investigation of the correctness of the machine counting mechanisms although it is now admitted that specific machines were malfunctioning. Senator-Elect Wyman respectfully suggests that sensibly the question of the accuracy of the machine count might appropriately be the first area of investigation if the election is to be reviewed by the Senate.

AND FOR SUCH OTHER AND FURTHER relief, as, in the judgment of the United States Senate, may be appropriate under its Constitutional power and duty to judge the elections, returns and qualifications of its own members.

Respectfully submitted,


 LOUIS C. WYMAN

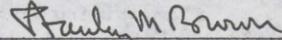
Dated at Manchester,
 New Hampshire this
 5th day of January,
 1975.



STANLEY M. BROWN,
 His Attorney
 67 Central Street
 Manchester, New Hampshire 03101
 Tel. 603 668-5860

Donald E. Santarelli of Washington, D.C., and
 Eugene Van Loan, III of Manchester, N.H.,
 OF COUNSEL

I, Stanley M. Brown, Attorney for Senator-Elect Louis C. Wyman, hereby certify that I have this day mailed or delivered copies of the within Response of Louis C. Wyman, U.S. Senator-Elect, to Petition of John A. Durkin, to Thomas D. Rath, Esquire, counsel for the Ballot Law Commission of New Hampshire and the Secretary of State of New Hampshire; Joseph A. Millimet, Esquire, counsel for John A. Durkin; David A. Brock, Esquire, counsel for the Honorable Meldrim Thomson, Jr., Governor of the State of New Hampshire and the Executive Council of the State of New Hampshire, and George S. Pappagianis, Esquire, Clerk of the Supreme Court of the State of New Hampshire; and Richard Leonard, Esquire, Counsel for Carmen Chimento.


STANLEY M. BROWN

Dated this 5th day of January, 1975.

WIGGIN · NOURIE · SUNDEEN · PINGREE & BIGG

Counsellors at Law

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 COUNSEL

November 27, 1974

Robert L. Stark, Secretary of State
 Clerk of the N. H. Ballot Law Commission
 State House
 Concord, New Hampshire 03301

Dear Mr. Stark: re: Wyman-Durkin Recount

I am writing to you in your capacity as Secretary of State and Clerk of the New Hampshire Ballot Law Commission.

I am the legal representative of Honorable Louis C. Wyman, presently United States Congressman, and candidate for the United States Senate.

Pursuant to RSA 68:4 (II), I am writing to you to hereby appeal from your declaration upon recount, that Mr. Wyman did not have the greatest number of votes.

This appeal is from all rulings made by you as Secretary of State, on ballots protested during the recount, and on all rulings related thereto, including but not limited to your rulings denying my protests and my requests as follows:

(1) to send for and examine an additional box from Gorham, allegedly containing additional ballots, and to recount once more those ballots presently in your possession from the Town of Gorham;

(2) to once again recount the ballots from the Town of Bedford and determine the cause for an alleged change in the number of recounted ballots from said Town;

(3) to once again recount the ballots from the Town of Claremont, Ward 2, and determine the cause for an alleged change in the number of recounted ballots from said Ward 2 in the Town of Claremont;

The reason why the Secretary of State counts cancelled ballots in the recount segment of the New Hampshire procedure, although recognizing that they may be erroneously included, is this:

To demonstrate that such ballots were replaced by new ballots given to the voters who "spoil" ballots requires taking evidence--the testimony of the election officials who marked the ballots "cancelled", "void", "invalid", etc. The Secretary of State takes no evidence; he merely "reads" the ballot, records the protest, and leaves the proof for the Ballot Law Commission procedure which follows.

The proof of the fact is before the Ballot Law Commission--and was in this case. See BLC Transcript e.g., December 5, 1974; December 6, 1974, Vol. II; and December 23, 1974, pp. 51 - 54.

The Ballot Law Commission record (e.g., December 6, 1974, Vol. I, pp. 2-21, 40 -54, 59 - 65; December 20, 1974, pp. 6 - 100; and December 23, 1974, pp. 36 - 46) to this machine write-in problem. See also the N. H. Supreme Court opinions which are marked Appendix 12 and 13.

Essentially what happened here is that an old BLC regulation of 1958 published in 1962, but not brought to the attention of the voters in any way, provided that if a candidate's name was on the voting machine ballot, a write-in for the same candidate was to be not counted.

When promulgated it was thought necessary to prevent double voting for a single candidate. Such double voting would be possible in a multiple choice race (Vote for 3, etc.), but in fact, in a vote for 1 race--such as the U. S. Senate race, no such double voting is mechanically possible; hence, upon that fact being proven, and the application of the regulation to this race being challenged, the regulation was not applied, since to do so would disenfranchise the write-in voters.

Appendix 4

The admission of these three "mis-calls"--the only clear errors made by the Secretary of State in reading several thousand ballots--being clear errors favoring Durkin, appears in the BLC Transcript: December 10, 1974, pp. 118-120 (Allentown); December 17, 1974, pp. 86-90 (Woodstock); and December 19, 1974, pp. 112-113 (Danville).

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

RE:

APPEAL OF HON. LOUIS C. WYMAN. *

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DECEMBER 24, 1974

The above-entitled matter came on for hearing before the New Hampshire Ballot Law Commission at The State House, Concord, New Hampshire, on Tuesday, December 24, 1974, commencing at 10:00 a.m.

Present:New Hampshire Ballot Law Commission Members:

Ronald L. Snow, Esq., Chairman
Warren B. Rudman, Esq.
Roger J. Crowley, Jr.

For the Ballot Law Commission:

Thomas D. Rath, Esq.
Assistant Attorney General

JORDAN & CONNELLY, INC.
CERTIFIED SHORTHAND REPORTERS
POST OFFICE BOX 303
EXETER, NEW HAMPSHIRE 03833
(603) 772-4053

For Hon. Louis C. Wyman:

McLane, Graf, Greene & Brown by
Stanley M. Brown, Esq.

For John A. Durkin, Esq.:

Devine, Millimet, Stahl & Branch by
Joseph A. Millimet, Esq.

Stenotype Reporter:

James M. Connelly, C.S.R.

CHAIRMAN SNOW: The New Hampshire Ballot Law Commission began hearings in the above-entitled matter on December 4, 1974, at 11:00 a.m. The final testimony and rulings of the Commission concluded on December 23, 1974, at approximately 4:00 p.m.

During the hearings 414 exhibits were received and marked by the Commission and have been preserved as evidence in this case. Additionally, testimony under oath was taken of several witnesses who were subject to cross-examination by opposing parties and questioning in some instances by the Commission. All of this testimony has been taken by stenographic record which will be transcribed as a permanent record of this hearing along with the exhibits which will be preserved until both sides are satisfied that they are no longer needed.

At the conclusion of the recount by the Secretary of State and his staff, the Secretary certified the count as follows:

Durkin	--	110,924 votes
Wyman	--	110,914 votes
Chimento	--	1,513 votes

During the recount representative of Mr. Chimento protested several rulings of the Secretary of State. The

Commission considered those rulings during the course of the hearings and sustained the Secretary of State in all cases. We, therefore, find no change in the original recount total for Mr. Chimento.

At the beginning of this hearing the Commission pointed out to counsel for Wyman and Durkin the statutory philosophy the Commission believed it should follow together with case law citations and specific statutory authority for this review. The two specific New Hampshire Statutes that we referred to early in the proceedings and several times thereafter were N.H. R.S.A. 59:96 and 68:4 II.

Simply stated, it was the Commission's philosophy that its responsibility was to review ballots protested either for having been counted or not counted by the Secretary of State during the recount and that in pursuing the objective we should attempt to determine the voter's intent if possible and honor that intent even where some violation of the technical form of voting was evident.

For example, although a ballot clearly states on the face of it that the voter should mark the box opposite the name of his choice with an "X," this Commission has observed literally hundreds of deviations from that

apparently simple instruction, including but not limited to checkmarks, straight lines, diagonal lines, circles around the box, marks to the left, right and top of the box, complete blackening of the box, lines through a series of boxes and combinations in a myriad of fashions in all of the above. This Commission has attempted with admitted difficulty in many cases to interpret the voter's intent and where possible allow votes to count for the candidates of choice unless the ballot was so confusing that the Commission reached the conclusion that it could not determine the voter's intent.

We are quick to point out that in these decisions in many instances we had to be subjective and we resorted to magnifying glasses, lights and a considerable amount of eye strain for hours on end in arriving at these conclusions, and we also point out that in many cases these decisions were not unanimous on our part.

In point of fact, at one time or another throughout with respect each Commissioner found himself in a minority position with respect to the other two Commissioners as ballots were considered and voted upon. Rightly or wrongly we determined from the outset and consistently followed the practice of considering each ballot as a

separate state of facts depending on each ballot to determine voter intent rather than resorting to an arbitrary rule which we would attempt to apply to dispose of these questions. We note with interest decisions rendered by the New Hampshire Supreme Court during the pendency of this hearing, but after our original statement of legal philosophy was set forth for counsel. In its advisory opinion to the Governor and Council dated December 16, 1974, the Court stated in part as follows:

"In this State the statutes afford a citizen several ways to express his preference by ballot. R.S.A. 59:58; R.S.A. 59:25 (Supp. 1973). Whichever mode is selected by the voter, his expressed intention is crucial. Barr v. Stevens, 79 N.H. 192, 193, 106 A. 483 (1919); Murchie v. Clifford, 76 N.H. 99, 102, 79 A. 901, 902 (1911). Strict compliance with the technical form of a vote must yield to recognition of the voter's indication of intention. Keene v. Gerry's Cash Market, Inc., 113 N.H. 165, 168, 304 A.2d 873, 875 (1973); Nickerson v. Aimo, 110 N.H. 348, 351, 266 A.2d 828, 830 (1970); see Opinion of the Justices, (Nov. 4, 1974)."

The Court also stated in the same opinion:

"Statutes regulating the form of ballots are generally regarded as directory rather than mandatory They provide a convenient and uniform method for voting, but should not be applied to disenfranchise voters because of technical irregularities."

Similarly, the Supreme Court in its decision of December 16, 1974, Wyman v. Durkin, No. 7083 (12/16/74) stated in part as follows:

"The Chairman of the Ballot Law Commission has expressed its awareness of the principle that the legally expressed choice of the voters shall be controlling."

Almost daily memoranda of actions taken by the Committee prepared by the Chairman at the end of each day for use by the Commission summarize all actions taken by the Commission which changed rulings originally made by the Secretary of State at the recount.

It is appropriate, however, to comment briefly on the Commission's ruling which allow write-in votes from voting machines in the Town of Exeter and the City of Nashua. This decision was made despite a published regulation of the New Hampshire Ballot Law Commission in effect since 1962 which stated that a write-in vote in a voting machine for a candidate whose name was printed on the ballot would not be counted. The Commission ruled as it did in allowing write-in votes in the Senate race from voting machines to be counted for three reasons:

First, we were convinced upon the evidence that it was impossible in the Senate contest for a voter to in

effect obtain two votes for the same candidate by using the write-in method of voting and then also being able to vote in the normal voting machine fashion. The rule above-referred to was apparently promulgated to avoid the possibility of double voting in situations where a multiple vote option was available on the ballot which we understand continues to offer the possibility of double voting.

Secondly, we were convinced upon the evidence that voters in Exeter and Nashua were not advised of the fact that if they voted for a candidate whose name was printed on the ballot in the Senate race in the write-in slot that it would not be counted.

Thirdly, the overriding legal philosophy as expressed in the Supreme Court decisions above-cited as well as the older New Hampshire cases referred to on the record that we should not disenfranchise a legitimate vote where it was clearly expressed.

All of the above suggests that the rules and regulations of the Ballot Law Commission first published in 1962 are in need of careful review and revision to reflect the current state of facts as applied to the current voting machines in use in the towns and cities of

New Hampshire, but in this hearing we knowingly disregarded Rule 2d of the Rules of the Commission as it applied to the Wyman-Durkin contest in Exeter and Nashua for the reasons above stated.

The original transcript of the hearings, although not yet transcribed in complete and final form, will obviously be the best evidence of the actions taken by this Commission on protested ballots throughout the hearing, but the Commissioners' notes and memoranda which are believed to be accurate with respect to count indicate that at the close of the evidence and after all rulings requested had been made by the Commission the count was as follows:

Wyman -- 110,926 votes

Durkin -- 110,924 votes

Chimento -- 1,513 votes

THEREFORE, we, the New Hampshire Ballot Law Commission, pursuant to New Hampshire R.S.A. 68:4 II hereby issue this Certificate of Changed Declaration from the Declaration of the Secretary of State at the conclusion of the recount and declare the final vote for each candidate as above stated. We direct the New Hampshire Secretary of State to forward a copy of this Certificate

of Changed Declaration to the parties to this appeal, to His Excellency the Governor and the Honorable Council for the State of New Hampshire and to the United States Senate. We issue this Certificate of Changed Declaration mindful of the additional legal recourse to either or both of the parties as set forth in Section II of R.S.A. 68:4, and mindful of the United States Senate's authority with respect to the seating of its membership as set forth in the Constitution of the United States.

Dated this 24th day of December, 1974, at Concord,
New Hampshire.

NEW HAMPSHIRE BALLOT LAW COMMISSION

Warren B. Rudman, Attorney
General

Roger J. Crowley, Jr.

Ronald L. Snow, Chairman"

Let me add, finally, Appendix A to this report is a copy of all of the memorandum of the Commission, on a daily basis, which summarized all of the rulings on changed ballots.

COMMISSIONER RUDMAN: Mr. Chairman, I noted several very minor typographical errors, which we will sign this

report, then we will furnish the parties with the corrections.

(The three Commissioners thereupon signed the report.)

CHAIRMAN SNOW: Mr. Crowley, do you have any statements?

COMMISSIONER CROWLEY: Yes, Mr. Chairman. First I would like to thank Mr. Tom Rath who has been counsel to the Commission during these proceedings, and who has done a very fine job, outstanding job, and I would like to say to the Attorney General, that his efforts here should be recognized. Second, Mr. Chairman, I would like to compliment you on the way you have conducted this hearing and, also, to pay my thanks to Attorney General Rudman who has been most helpful and I, personally, feel that the rulings of this Commission have been fair, equitable, and haven't considered, in any way, the vested interest of either candidate.

COMMISSIONER RUDMAN: Mr. Chairman, I personally pay tribute to you. I think the people of the State of New Hampshire owe you, a private citizen, a great debt of gratitude for doing a superb job. I think when the report is viewed, including appendices, the people of the State

will see that this Commission has really been well led, and I am sure I join Captain Crowley in saying that to you. I also say that we reluctantly, but I think it has to be said in view of some of the statements of the recent past, that I have known Roger Crowley and Ronald Snow for some years, and I think I know myself, and I want to assure the people of this State, for myself and for my two brother members of this Commission, that our personal integrity, to us individually, and collectively, is worth a great deal more than any Senate seat, anywhere, to anyone. I want that on the record.

CHAIRMAN SNOW: Any comments from either of the parties? Anything that needs to be said?

MATTHIAS REYNOLDS: I just thought, Mr. Chairman, I would introduce myself. I am Matthias Reynolds, I am here representing Mr. Millimet and Mr. Durkin, and I have no comment.

CHAIRMAN SNOW: There being no further business before this Commission, this hearing is closed.

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

 RE: *
 *
 APPEAL OF HON. LOUIS C. WYMAN. *
 *

C E R T I F I C A T E

I, JAMES M. CONNELLY, a Certified Shorthand Reporter and Notary Public of the State of New Hampshire, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the hearing of the Ballot Law Commission taken at the place and on the date hereinbefore set forth.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the hearing in which this transcript was taken; and further that I am not a relative nor employee of any attorney or counsel employed in this hearing, nor am I financially interested in the hearing.

James M. Connelly
 JAMES M. CONNELLY, C.S.R.

Examples of the reservation of rights by both parties appear in the BLC record with regard to ballots in virtually every voting precinct. See for examples, Transcript: December 17, 1974, pp. 4, 12, 13, 15, 16, 17 and 20; December 19, 1974, pp. 24, 31, 49 and 51.

APPENDIX 7

BALLOT LAW COMMISSION'S RULINGS

(On Appellant's Opening Statement)

(Ballot Law Commission's Transcript pp. 11 -

December 5, 1974)

CHAIRMAN SNOW: I will address myself to that subject now, sir.

MR. MILLIMET: All right.

CHAIRMAN SNOW: There have been substantial numbers of statements in the last two days about what it was this Commission was going to do and what it wasn't going to do. I find that hard to understand, since the Commission hasn't made any rules, up to now, as to what it was going to do and not do, and entertain and not entertain. I would like to attempt to add some clarity to that, with respect to my understanding of the proposed issues, of the appellant's case at least, as it has been outlined to us, and my personal--and I will ask the members of the Commission, because we have not discussed this, secretly or otherwise, but I spent a considerable amount of hours during the middle of the night attempting to understand for myself our mandate under the statute. And, the statute certainly is clear about how it was applied to the proposed six areas of inquiry outlined for us carefully and clearly in an opening statement yesterday. For the benefit of both parties, I would like to express my personal view as to those issues that are within the scope of the statute, as I understand it, and

that, at least at the present time, seem to me to be outside of the scope of the inquiry, as I understand it, and I will be happy to have my fellow Commissioners comment on each of these as they go down the list. I then, at the end of this statement, with respect to these six, would propose the procedure as the original initial procedure for this inquiry this morning. The first proposed area of inquiry had to do with, quote, "void," close quote, ballots which have been protested and, theoretically, are back here sealed in boxes, in special envelopes. I understand that this may require testimony, in addition to analysis of ballots, and that was the reason, quite frankly, that, in the proposed rules, as sent to both parties, there was some reference and provision made to possible testimony from people, in addition to looking at pieces of paper. It was not an attempt, or an indication, that we were going to go outside of the strict interpretation of the statute which in my opinion, must require the examination of two statutes, RSA 68:4, II, which says that the Commission will consider and review all the rulings of the Secretary of State on ballots protested during the recount, and the other section, which I also cited for both parties in the

memorandum is 59:96, which says that a protest can be the protest of a counted ballot or the protest of a ballot that was not counted. That is what we understand, or at least what I understand, to be the mandate under the statute of the review of this Commission. I, therefore, feel that, under Item 1, void ballots protested, that is a proper scope for review by this Commission, and I propose that to be the first area of inquiry, as we try to get the ballots that are specifically under that category, if we can get them before the group.

MR. MILLIMET: Excuse me, Mr. Chairman, do I understand, in conjunction with that issue, you are going to receive extraneous evidence?

CHAIRMAN SNOW: I don't know, at this point.

MR. MILLIMET: All I would like to say is, in the interest of getting something done, and not sitting around twiddling our thumbs, if you are going to do that, then I feel I am deeply prejudiced, because we have not had an opportunity to investigate, as the opposition has, these affidavits and people whose names are involved. We don't have any certificates, we don't have any depositions, and that is the real prejudice to us, if you go ahead on that basis.

CHAIRMAN SNOW: My instincts, Mr. Millimet, are to take those issues as they come up.

MR. MILLIMET: All right, sir.

CHAIRMAN SNOW: Okay. The second has to do with, quote, "write-in votes," close quote, specifically from the Town of Exeter that were protested as not counted. Now, regardless of the order in which that is taken---

MR. MILLIMET: Excuse me; could I be excused for a moment; I have a call from the Federal Court.

CHAIRMAN SNOW: All right. We will recess for five minutes.

(Hearing recessed.)

CHAIRMAN SNOW: As I was saying when the phone rang with respect to the issue of quote, "write-in votes," close quote, that issue, it is my personal belief, that may be within the scope, since they were protested as not counted at the time, although we will probably require evidence on that issue. I am not saying it is going to be taken up at the first item, but my instincts are that that is within the scope of inquiry.

MR. MILLIMET: When you say, there will need to be evidence, are you referring to whether or not they were protested?

CHAIRMAN SNOW: Yes, sir.

MR. MILLIMET: Thank you.

CHAIRMAN SNOW: Let me say to Mr. Brown, on that issue, that, in answer to his request for a ruling, of yesterday, that, after discussing this with the Commissioners we requested the State Police to take control of the sheets of paper in Exeter, and they have been delivered here, and they are under guard with the rest of the ballots. I have not seen them, but I assume they are back there.

MR. MILLIMET: We have not seen them, and request to do so before they are dealt with.

CHAIRMAN SNOW: You will all have an opportunity. I just didn't want them to disappear, Mr. Millimet, or get lost, or whatever.

MR. BROWN: May I interrupt for a moment. Does the Commission have in mind taking any action to be sure that any other similar tapes are not accidentally lost somewhere? My understanding is, and I have been talking with two mechanics who know this stuff, that there are probably tapes in every machine.

CHAIRMAN SNOW: I am about to get to that.

MR. BROWN: I think the Senate might appreciate

being sure they are still there.

CHAIRMAN SNOW: With respect to, so-called, write-in votes in voting machines in the other towns and cities, I have attempted to contact, through the Secretary of State's office and the Attorney General's office, the city clerks of the towns in question to have them, in the first instance, take control of all of these documents so that if it is the desire of this Commission--and we have not discussed this, and we are going to discuss it right now--we will also have all those picked up by the State Police, and delivered to the vault.

MR. BROWN: Mr. Chairman, our protest was only on Exeter. But, it does seem to me, I think I indicated in my opening, if the Commission concurs that those votes have not been counted, and if there are votes in the other areas, I think both candidates interest require that, at least, the evidence be preserved, and I would have no objection to the Commission reviewing all of the tapes, if there is no objection on the other side.

CHAIRMAN SNOW: Do you concur in that request?

MR. MILLIMET: I don't want any of them touched at all. I think the law is perfectly clear, that this Commission had the power to make the rule that it did

make, that they are not to be counted, under Section 27, they made the rule and I think it is completely beyond the concept of due process of law for that rule to be changed. Therefore--and, since they were not protested, as far as I know, in Exeter or anywhere else, I don't think they are before this Commission.

CHAIRMAN SNOW: That is an issue of fact. I am not ruling on the issue of fact.

MR. MILLIMET: Mr. Brown admitted that he didn't protest them anywhere else.

MR. BROWN: Our only protest was Exeter, Mr. Chairman.

CHAIRMAN SNOW: Okay. I personally believe, fellow Commissioners, that the voting machine records of all of the cities in the State of New Hampshire, regardless of what are done with them by this Commission or anyone else, ought to be frozen, and ought to be put under security. Does anyone disagree with that?

COMMISSIONER RUDMAN: I don't disagree, Mr. Chairman. I would only add, that I say that without prejudicing any future vote of mine as to whether they ought to be considered--but I think they ought to be secured.

MR. MILLIMET: I have no objection to them being

secured, but I think they should be secured in the machines.

CHAIRMAN SNOW: I don't, at this point, have enough personal knowledge to what the best way, with respect to these machines, of securing them, is. But, I will attempt to discuss that with the Attorney General's office and get some more information, and we will make an actual ruling on that as soon as possible. It occurred to me that, regardless of whether they are counted or considered, or not considered, the evidence, if it is not preserved, is going to be of very little value to anyone. Now, with respect to absentee votes in the City of Nashua, which was the third issue discussed, my personal belief is that is probably outside of the scope of inquiry of this Commission, and I have, although I am willing to listen to argument on that issue, and subject to it being overruled by the other members of this Commission who have as much of a vote on any of these things as I do, I believe that Section 68:4, in the final paragraph, provides the relief of any party, when it says that nothing contained in this paragraph shall be construed to bar any person from recourse to the Superior Court on other questions within the jurisdiction of such Court, relating to the

legality or regularity of biennial elections, or the results thereof. My personal belief is that that statute is not within the province of this Commission, unless it was a ballot protested and ruled on by the Secretary of State. So that everyone understands my position, I would be happy to have Mr. Rudman express his, and then Mr. Crowley express his, on that issue.

COMMISSIONER RUDMAN: I concur with the Chairman. I would also add that I concur for an additional reason. I can't give you the citation, but I am pretty sure that the election laws do contain a limitation as to when absentee votes can be challenged, and I think that would reflect on what this Commission might do. It certainly might not reflect on what a Superior Court might do.

MR. BROWN: I believe I am correct that on the record during the Secretary of State's checking of the machines, that we did, for Mr. Wyman, protest all of the absentee ballots in Nashua Ward 4. Now, it was the result of our investigation of that situation that we found the flagrant violations, and that they did not--they were not confined to one ward. I understand the, I trust, tentative result that the Chairman has just announced. When we get to that point in my presentation,

if I may, I would like an opportunity to make an offer of proof, because I believe we have credible evidence that in Ward 4, where we do have a protest on the absentee ballots, at least two ballots were returned for a single person, that single person not having signed either one of them, and one other voter, we believe we have the evidence on, was allowed to vote twice, once at the polls and once by absentee, and if that evidence is there, then I think that our protest of that ward, on the absentee, which is what we protested, that that brings it fairly within the purview of this Ballot Law Commission. The balance of it, I recognize the problem, and that is why, I guess, we have lawyers. We may be in the Superior Court with regard to other aspects of it.

CHAIRMAN SNOW: Obviously, I don't mean to preclude anybody from attempting to convince us on any issue with respect to the statute, and we will rule on each of them as we get to them. I am only attempting to outline, in a preliminary way, my feelings after having spent a substantial amount of time reading some law. Mr. Crowley do you wish to express yourself? I didn't get to you on the absentee situation in Nashua.

COMMISSIONER CROWLEY: Yes I do. I generally concur with

the Chairman, subject to the following: as the only non-lawyer on the Commission, and at the risk of being redundant, I want to quote part of Chapter 68.4, or column 4, subparagraph 1, and that states, "the Ballot Law Commission shall forthwith meet, here and decide such appeal and shall, on such appeal, consider and review all the rulings of the Secretary of State on ballots protested during the recount." Section 2 of that section says, "the jurisdiction vested in the Commission under this paragraph shall be exclusive; but nothing contained in this paragraph shall be construed to bar any person from recourse to the Superior Court on other questions, within the jurisdiction of such Court, relating to the legality or regularity of biennial elections or the results thereof." Therefore, it is clear, at least to me, that the jurisdiction of the Ballot Law Commission is limited to rulings of the Secretary of State on ballots protested during the recount. Further, it appears to me that unless the matter is presented by counsel for Congressman Wyman, within the context of a ruling of the Secretary of State, the Ballot Law Commission has no apparent jurisdiction, and that the appellant, or plaintiff in this case, has recourse to another remedy, namely

the Superior Court. So, unless those 14 points that are brought up fall within that particular context, this Commission has no jurisdiction.

CHAIRMAN SNOW: Okay. The other issue was the man^{T.S.} voting ~~on~~ the machine question, and the request that we consider the discrepancies, if that is the proper word, between one count and another count. I have the same initial reaction to this issue as I do to the absentee issue in Nashua, namely that it may not be within the scope of this Commission. Obviously, we will have to consider the specific factual questions as they, or legal arguments, as they are presented, but on the surface, to me, this appears to be outside of the scope of this inquiry and rather within the scope of the second half of the statute which Mr. Crowley has just cited.

COMMISSIONER RUDMAN: I concur, at this time, with your statement, Mr. Chairman.

CHAIRMAN SNOW: Did you wish to add anything further, Roger?

COMMISSIONER CROWLEY: No.

MR. BROWN: May I just interject, again, that we specifically protested the vote on the first of the machines, the one where the vote changed by 100 on a

machine that supposedly doesn't change. Now, we have a specific protest of the votes recorded on that single machine. I think that may stand differently than the other 12, and, again, I don't concur with the preliminary ruling, but I understand the basis of it.

COMMISSIONER RUDMAN: For my information, I was not there, of course, was a protest made, or were protests made, as you traveled around the State looking at these machines, in some formal way, as they were done up here in the Council chamber?

MR. BROWN: I was not on that trip either, but I understand from Governor Gregg and Attorney Bigg that that was the procedure that was used on the trip. But, I think I am also correct that there were at least two protests that were made on the trip, the one at Exeter and the one on this single machine in Ward 11.

CHAIRMAN SNOW: We will get at these issues.

MR. MILLIMET: I assume there is a record on it.

CHAIRMAN SNOW: We will find out, I assume. Now, the fifth one was to review all counts in four specific towns or cities, Gorham, Gilford, Bedford, Somersworth Ward 1. I have, personally, some difficulty with this request also, because of the scope of the statute. It may

be that the Gorham situation will stand apart, or it may not, as an issue. It is, as I understand the claim, at least, it is that there may be some ballots that were not counted that they asked the Secretary of State to check into, and that there was an adverse ruling to that request, and that the request now is for us to get the so-called Constitutional Convention ballots here and open the boxes and see if there are additional ballots that were cast. It may be that that issue will stand different but, as I said in the original memorandum, I don't believe we have the authority to conduct a recount of any particular city, unless there was a specific protest at the time, and the record will speak for itself when we get to those issues. Again, that is a preliminary feeling on the law on that issue.

MR. BROWN: With regard to each of the precincts that are specified in Mr. Bigg's letter of advice of the areas of the appeal, a protest was made, addressed to the entire precinct, and that includes these four towns. Now, if the Commission comes to the conclusion that a precinct challenge, that is challenging of the entire precinct, is improper, or does not preserve the protest to the Ballot Law Commission level, I suspect

that, for the purpose of future recounts, it might be desirable to have that become known to all parties, because this was done both by Mr. Millimet and by us on the town basis.

MR. MILLIMET: My recollection is contrary to Mr. Brown's. I recall of no protest recorded by Mr. Bigg in any of those towns, but I assume, again, the record will show whether there was one recorded.

CHAIRMAN SNOW: The last issue, we have almost made it through, at least the preliminary remarks, this morning, has to do with, as I understand it, all of the, quote, "official protests of ballots," close quote, which are back behind us in the vault and, quite frankly, that is what we would like to get to. In my opinion, that is exactly what the statute provides, and all of those are clearly within the scope of what we are here to do. Now, it is obvious that some of the issues that I have just discussed fall within, or may fall within, number 6-- there may be specific issues that counsel have highlighted to bring to our attention out of the mass of protests which do exist but, clearly, number 6, in my view, is what we are here to do.

COMMISSIONER RUDMAN: I concur.

COMMISSIONER CROWLEY: I concur.

CHAIRMAN SNOW: Okay. Now then, I would like to move to the first issue, since it is the appellant's case that is being presented, I would ask Mr. Brown which town, or which precinct, he would like to start with, and see if we have it ready to bring out. I would propose that I have the sealed box put on the table in front of us so it is in the view of everyone. I have been provided with a deadly weapon to open the box. I propose to take the envelope, as I understand it, I don't know how this was done, which is inside of the box with the protested ballots and put it on the table, open it, spread them out, and let counsel for both sides view each, and make their comments on the record. Let me say, at this time, if Mr. Chimento's attorney is here--is he here? I guess he is not here. I was going to say he could come look at them too, because he protested that we were not going to let him, yesterday. So, for the record, let me say, if Mr. Chimento's attorney wants to look at any of the ballots, he may, that were protested, and, add a comment for the record. We have no objection. Is that correct?

COMMISSIONER RUDMAN: That is correct.

COMMISSIONER CROWLEY: Right.

OPENING

If it please the Commission:

Attorney Dort Bigg, who has been co-counsel with me for Mr. Wyman, will be unable to be here this week, but hopes to participate later. Attorney Eugene Van Loan will join me this afternoon and will participate throughout so far as we know. Attorney David DePuy of my office will participate throughout, except for this afternoon. Attorney Richard Upton will participate as necessary from time to time. We do not presently anticipate any other counsel of record before the Commission. I will be responsible, as lead counsel, for Congressman Wyman's presentation, and notices brought to my attention at 40 Stark Street, Manchester, will be sufficient as notice to Mr. Wyman.

In Mr. Wyman's appeal of November 27, in the fourth introductory paragraph, the Commission will note that we have preserved our right to have reviewed here all of the Secretary of State's rulings, and we did not limit our appeal to the 14 specific matters thereafter set forth. For example, all absentee ballots were under protest by both candidates; we do not waive that protest. Mr. Wyman's representatives protested rulings concerning the voting machine inspection, and we waive none of those protests.

On the other hand, after Mr. Durkin's representatives challenged Mr. Stark's rulings that check marks would be recognized as valid votes, we similarly protested those ballots--perhaps 30,000 or so ballots. We do not

plan to pursue that challenge in our affirmative case; if we may reserve the right to rely on it in the event our opponent later sees fit to rely on it. In other words, if Mr. Dunkin's representatives end up waiving this position, we shall do likewise; but if they keep this issue alive, we wish to keep our protest also alive. We do not rely on this position affirmatively because we believe it is unsound on the law; but if we are wrong on the law on this point, Mr. Wyman would gain several thousand votes, so we cannot waive our protest.

We propose, if it please the Commission, to seek redress on six different points, the first four of which will require the taking of evidence--Part A of Rule 5--the last two probably not requiring any evidence but merely review by the Commission--Part B of Rule 5. I will briefly outline our expected proof in the order in which we are prepared to go forward.

1. Void Ballots counted for Durkin

We will offer evidence that the Secretary of State counted as votes for Mr. Durkin at least 10 and more probably 17 ballots that were marked "Spoiled" by the moderator under RSA 59:57. Our evidence will be that the voters concerned were given new ballots as the statute provides and hence these spoiled ballots were improperly credited to Mr. Durkin. As the Commission knows, Mr. Stark is not charged with determining whether such markings are under Section 57 or are prohibited under Section 68; that decision is for this Commission on the evidence.

2. Write in votes for Wyman on voting machines, not counted

We will offer proof that in the town of Exeter at least 3 voters voted for Mr. Wyman by write-in on the voting machines. Although requested to observe and rule upon these valid votes, Mr. Stark declined to do so, and the votes were therefore not counted at all. How many additional Wyman votes were not counted because in the machines in other cities we do not know. Mr. Stark's action was in conformity with a regulation of this Commission, which we contend is erroneous, and must be rescinded to permit the recount of all the votes to be completed.

RSA 59:59 gives the voters the unqualified right to vote by write-in and provides "such votes shall be counted". So also does RSA 59:69-b. Our appeal here is based on Mr. Stark's "failure to count" these ballots, as required by RSA 59:96.

Because of the Secretary of State's failure to recount "all of the ballots cast and recorded" as required by RSA 59:94, we contend that his certifying Mr. Durkin as the winner of the recount was premature and improper and that the certificate of the Governor and Council addressed to the United States Senate was similarly premature and improper, and should be recalled and rescinded.

I request a ruling by this Honorable Commission forthwith, as to whether or not this Commission will, as a part of this proceeding, issue such orders as are necessary to require the Secretary of State to complete the recount, by obtaining the write-in tapes and ruling on the write-in votes recorded thereon.

The reason for this request is that if the Commission declines to afford us that relief, we may be required to take recourse to the Superior Court, as provided by RSA 68:4,II, and/or to apply to the Governor and Council for relief, and if that is the Commission's ruling we wish to do so immediately.

3. The absentee voter ballots in the City of Nashua (295 for Wyman and 480 for Durkin) should be declared invalid and void, because of widespread violation of RSA 60:4, 6, 8, and 8e.

We will offer evidence that the City Clerk's office in Nashua delivered to campaign workers of Mr. Durkin many absentee ballots--many more than the 10 vote differential between these two candidates--in direct violation of Section 4 of the statute which requires that those ballots be delivered only to the voter--the language is mandatory, that if an application is received, and the city clerk finds that the person is on the checklist, he "shall" "deliver or mail to such person" the ballot, envelope and affidavit. This violation of ballot security is so flagrant that we believe Judkins v. Hill, 50 N.H. 140, requires that all absentee ballots in the city be rejected, or the election itself be declared invalid.

Our evidence will include testimony that absentee ballots were handled improperly, depriving some voters of their right to vote and possibly permitting some to vote twice, that one was delivered late, that ballot security was thereafter violated, and of other improprieties.

While we will present the Nashua situation in detail, we do not wish to be misunderstood; we believe similar improprieties occurred elsewhere of a similar nature, and if it please this Commission, will offer proof of similar mishandling of absentee ballots in other areas. Our evidence will be that Nashua was not alone, but our evidence will also be that the Nashua situation alone warrants the relief we seek.

4. The Manchester machine vote on 13 machines should be declared invalid and void--because of malfunctioning of, or meddling with, these particular machines.

Machine 1626 in Ward 11 we ask be completely rechecked and checked, this time for malfunction. This is the machine on which 100 additional votes were read for Mr. Durkin by Mr. Stark's recount. We will offer documentary evidence which indicates a probable malfunction of that machine affecting this and other contests.

There are 12 additional machines in Manchester which we ask be thoroughly rechecked for malfunctioning or improper handling. There is a net total variance on these 12 machines between the protective counters and the public counters of 1,008 votes. On 10 machines the public counters recorded more votes than the protective counters show; on two the public counters show less.

If these machines were not malfunctioning, these variances indicate at least flagrant disregard for this Commission's mandatory regulations providing for ballot security where machines are used; they cast doubt on the accuracy of the votes recorded; they may indicate further improprieties.

We request the right to have an expert of our own choosing participate in testing these machines, and urge the Commission on its own initiative to fully investigate why these variances arose. Judkins v. Hill has application here as well.

5. We request that this Commission completely review all of the ballots, used and unused, together with the other relevant election documents, of Gorham, Bedford, Gilford and Somersworth Ward 1, unless we can be afforded an opportunity to review certain of these documents to satisfy ourselves that less than a full review is necessary that justice be done.

What is involved here is that responsible election officials and voters, in each of these precincts, are insistent to us that their original counts were valid and that counting errors occurred during the recount. Logically, this may actually be true. We therefore, because of special circumstances in each of these four precincts, wish a further review.

In Gorham, for example, if we may have the sealed box of constitutional question ballots opened, the contents inventoried, and all ballots in that box (Con-Con ballots) counted, that may resolve the doubts without further review.

In Bedford, if we were afforded an opportunity to check for some tally markings on the ballots, and they are found, further review of Bedford might be waived. Similar situations affect Gilford and Somersworth Ward 1.

6. Finally, we have several hundred protested ballot rulings--particular ballots with regard to which we differ with Mr. Stark's and Mr. Kelley's rulings, and we ask that this Commission review those particular ballots and correct the errors, if they are errors.

When we get to this aspect of the case, we will be prepared to go through those ballots in whatever order the Commission sees fit.

While many of our challenges were defensive, that is, taken for the purpose of preserving countervailing evidence when our opponents made particular protests, there are well over 100 ballots on which reasonable men might properly differ in determining what the voter's intention was, and whether the ballot was or was not a valid vote. We believe that many more than 10 were erroneously credited to Mr. Durkin in this group, and will ask the Commission to so find and rule.

As to time--I estimate that two days will suffice for our evidence on void ballots; one day for the Exeter write-in; 2 days for the Nashua absentee ballot situation; 1 day for the Manchester machine vote situation; 1 day for the four individual towns, and 1 day for the review of other challenged

ballots--a total of 8 days. This does not include any allowance for time examining the voting machines. We are willing to work Saturdays. We will attempt to shorten up our presentation if possible. We have no objections to night sessions.

In order to be ready to start evidence I would request that the protested ballots from Salem, Claremont Ward 2, Moultonboro, Hampton, Atkinson, and North Hampton be made available.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

John A. Durkin

v.

Ronald L. Snow, Roger J.
Crowley, Jr., and Warren B.
Rudman, The Ballot Law
Commission of New Hampshire

Civil Action No. 74-359

S. DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
FILED

DEC 5 1974

Annell S. Perry
CLERK

O R D E R

1. Although the petition does not specifically request the convening of a Three-Judge Court, it is clear that the plaintiff seeks an interlocutory and permanent injunction restraining the action of the members of the New Hampshire Ballot Law Commission because it is claimed that the State statute authorizing such Commission is unconstitutional. New Hampshire Revised Statutes Annotated, Chapter 68. I rule that a substantial constitutional question is involved and have requested the convening of a Three-Judge Court. 28 U.S.C. §§ 2281 and 2284.

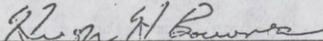
2. I find, based on the pleadings, affidavits, and documents filed, and the statements made by counsel at the hearing held on December 4, 1974, that irreparable damage will not result if a temporary restraining order is not granted and the motion for a temporary restraining order is, therefore, denied.

3. I interpret the remarks of Attorney General Rudman, made at the conclusion of the hearing, to mean that there may be an attempt by either the Ballot Law Commission or the Governor and Council to change or rescind the certification already

issued to Mr. Durkin prior to the determination of the Ballot Law Commission of the validity of the Secretary of State's recount or any order of this court because of the action taken by Mr. Durkin in initiating this proceeding. Such change in certification would be a clear abridgment of Mr. Durkin's constitutional right to seek redress in the Federal Court.

It is therefore ordered that there be no change in Mr. Durkin's certification until the constitutionality of the Ballot Law Commission's power is decided and/or the final determination of the Ballot Law Commission of the validity of the recount is made.

SO ORDERED.


United States District Judge

December 4, 1974

cc: Stanley M. Brown, Esq.
Joseph A. Millimet, Esq.
Thomas D. Rath, Esq.

Appendix 8A

IN THE UNITED STATES DISTRICT COURT RECD DEC 11 AM
FOR THE DISTRICT OF NEW HAMPSHIRE

John A. Durkin)
v.) Civil Action No. 74-359
Ronald L. Snow, Roger J.)
Crowley, Jr., and Warren B.)
Rudman, The Ballot Law)
Commission of New Hampshire)

ORDER

The first part of the motion is that the temporary restraining order be granted because of irreparable damage.

I would like to explain something that counsel knows. The spectators may not know it. And that is, before a single Judge sitting on behalf of a Three-Judge Court can grant a temporary restraining order, he must find that the person seeking it will suffer irreparable harm, and he must also find that there is a probability of success in the main case on the merits. I cannot make those findings in this case.

I point out that The Ballot Law Commission has not yet decided the outcome of this hotly contested election, if it has the power to do so.

And, in the second place, I point out that, as all counsel have agreed, the Senate can act on its own, regardless of the action taken by the Governor and the Council and regardless of any determination that may be made, rightly or wrongly, by The Ballot Law Commission. The question of the eventual outcome of the election, if one of the losing parties so desires, will be up to the United States Senate under the Constitution.

I also would like to point out that, in my opinion, there is a very serious and substantial question relative to the constitutionality of The Ballot Law Commission's power to act and the statute authorizing it. I don't know how that question is going to be decided, and I frankly would not like to have to decide it today. I do know this, however, that if I issued a temporary restraining order at this time, and it turned out that my judgment as to the constitutional issue was in error, that there would be, in my opinion, needless delay. So that, because of those factors, that portion of the plaintiff's motion asking that The Ballot Law Commission be temporarily restrained is denied.

I point out, however, that a Three-Judge Court may decide differently after they have had the advantage of the briefs and arguments by counsel.

I have already granted that portion of the motion amending the complaint to include as defendants the Governor and Council and the Secretary of State.

The motion also asks that the Court enforce its order prohibiting change in Mr. Durkin's certification against the Governor and Council. I point out in connection with that request, or that portion of the motion, two things:

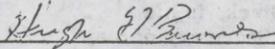
First of all, the Governor and Council have already acted. In my opinion there is not nearly sufficient evidence to convince me that I should even attempt to invoke the contempt powers of this court, and I do not intend to do so. And I do not suggest that the Governor and Council in any way acted in bad faith or as an attempt to punish Mr. Durkin for his exercise of his right to go to the Federal Court for an alleged deprivation of his constitutional rights. I also

point out that that portion of the motion may be considered again by the Three-Judge Court after it has met, and that portion of the motion is, therefore, denied.

Paragraph 4 of the motion asks that an immediate hearing be held so that the Court can issue such orders as will be necessary to implement its ruling. The immediate hearing has been held, and we have been here on that hearing since two o'clock this afternoon, so that portion of the motion has, in effect, been granted.

Paragraph 5 also requests such other relief be granted as the Court deems just and equitable. The Court considers it just and equitable that nothing further be done on the status of the record at this time until the Three-Judge Court has met.

SO ORDERED.


 United States District Judge

December 6, 1974

cc: Honorable Levin H. Campbell
 Honorable Edward T. Gignoux
 Stanley M. Brown, Esq.
 Joseph A. Millimet, Esq.
 Thomas D. Rath, Esq.
 David A. Brock, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

John A. Durkin,

Plaintiff

v.

Ronald L. Snow,

Roger J. Crowley, Jr., and

Warren B. Rudman, The

Ballot Law Commission

of New Hampshire,

Defendants,

and

Meldrim Thomson, Jr., in his
capacity as Governor of the
State of New Hampshire;

Robert L. Stark, in his
capacity as Secretary of State
of New Hampshire;

James H. Hayes,

Lyle E. Hersom,

John F. Bridges,

Bernard A. Streeter, Jr., and

Robert E. Whalen,

in their capacity as Executive

Council of the State of

New Hampshire

Defendants,

and

Louis C. Wyman,

Intervenor

CIVIL ACTION
No. 74-359

Before CAMPBELL, Circuit Judge,
GIGNOUX and BOWNES, District Judges.

OPINION

This three-judge district court was convened upon the petition of one of the candidates, John A. Durkin, following an exceedingly close and currently disputed election held November 5, 1974, for the office of United States Senator from the State of New Hampshire.

Louis C. Wyman, an opponent of Mr. Durkin, has been permitted to intervene here. Initially, Mr. Wyman was officially declared the winner by a plurality of 355 votes. Mr. Durkin^{per se} applied for a recount pursuant to N. H. R. S. A. 59:94. After the recount, the New Hampshire Secretary of State declared Durkin the winner by 10 votes, and on the same day the Governor and Secretary of State signed a certificate of election which was issued to Durkin with the approval of the Executive Council.

R. S. A. 59:98. In accordance with R. S. A. 68:4(II), Wyman appealed to the State Ballot Law Commission (the "Commission") on November 29, 1974. On December 4, 1974, Durkin applied to the federal district court for a temporary restraining order against the Commission on the ground that its proceedings and statutory authorization unconstitutionally usurp the exclusive jurisdiction of the United States Senate over contested Senate elections under Article I, Section 5 of the United States Constitution. The district court refused to grant this relief but did grant the request that steps be undertaken to convene

1.

Article I, § 5 provides: "Each House shall be the judge of the Elections, Returns and Qualifications of its own members"

a three-judge court, and ordered no change in Durkin's certification until the constitutionality of the Commission's power was determined and the Commission's proceedings completed. Almost simultaneously with the issuance of this order, however, the Governor and Executive Council purported to rescind the certificate issued to Durkin. Proceedings by the Commission have since been in progress. Under R. S. A. 68:4(II), the Commission is to "consider and review all the rulings of the secretary of state on ballots protested during the recount."

After this court was convened, briefs were submitted on behalf of the two candidates as well as the Commission and the Governor and Council, and several hearings held, one before the single district judge for the purpose of establishing a factual record, and most recently before the full court for the purpose of receiving oral argument on the legal issues. This court is in agreement with and affirms and adopts all actions heretofore taken by the single judge.

On his original and amended pleadings, Durkin seeks essentially three forms of relief: ^① to enjoin Commission proceedings and declare them void; ^② to order the Governor and Council to issue a new certificate of election to Durkin to replace the rescinded one; and ^③ to enjoin the prosecution of proceedings recently commenced by Wyman in the New Hampshire Superior and Supreme Courts raising various aspects of the election and recount proceedings.

We are unable to agree with Durkin that the proceedings before the Commission are unconstitutional. In Roudebush v. Hartke, 405

U. S. 15, 23 (1972), the Supreme Court held that Indiana's recount procedures did not interfere with the Senate's ultimate authority.

The Court said:

"It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. But a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment."

We are satisfied that the statutory proceedings in progress before the Commission, like the Indiana recount in Roudebush, are an integral part of the New Hampshire electoral process and are "within the ambit of the broad powers delegated to the States by Art. I, § 4."² Id. at 23. The fact that the Indiana recount procedure approved in that case was a one-tier administrative operation, and the New Hampshire procedure involves a recount followed, if a candidate desires, by a Commission review of the rulings of the Secretary of State on ballots disputed during the recount is a distinction without a difference. We are assured by responsible state officials that the New Hampshire proceedings have been and will be accompanied by careful action to preserve all disputed ballots and related evidence so that the Senate, in exercising its final authority over whom to seat, can make "an independent final judgment." Id. at 25. We thus find no encroachment upon the Senate's powers and no occasion to enjoin or otherwise interfere with the proceedings before the Commission.

2.

Article 1, § 4 provides in part:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

We turn next to plaintiff's request that we order the Governor and Council to reissue to him the certificate that they later revoked. The certificate may have been prematurely issued since under the governing New Hampshire statute, R. S. A. 59:98, a certificate is to be issued upon the Secretary of State's declaration following a recount "unless the result is changed upon appeal to the ballot-law commission." In any event, given our ruling that the proceedings of the Ballot Law Commission may continue, it would make little sense to order issuance of a certificate which can at most have meaning only after the Commission completes its work. The most compelling reason to order reissuance would have been a finding of deliberate disobedience to the order of the single district judge. However, without altogether discounting the possibility, we cannot say that the Governor and Council acted in awareness and defiance of such order. We decline therefore to order issuance of the certificate.

Finally, we turn to plaintiff's request that we enjoin litigation in the New Hampshire courts commenced by Wyman. We decline to do so. We find nothing in the maintenance of state court proceedings which would subvert the clear and acknowledged function of the United

3.

Because, for reasons stated in text, an injunction against state court proceedings would be an unwarranted exercise of our discretion, we need not decide whether the anti-injunction statute 28 U. S. C. § 2283, separately prohibits such relief. See Mitchum v. Foster, 407 U. S. 225 (1972). While jurisdiction is asserted here as in Roudebush, under 28 U. S. C. § 1343(3) and pursuant to a claim under 42 U. S. C. § 1983, the Supreme Court has not expressly discussed, and it is not altogether clear, to what extent a candidate may assert the protection of the civil rights statute in these circumstances.

States Senate to determine whom to seat. No impending state court action or practice has been called to our attention which would impede the independent determination of the outcome by the United States Senate. Whether the New Hampshire courts would exceed their constitutional authority were they to order a new election or to order other types of action are, at this time, purely hypothetical questions which cannot be decided apart from consideration of specific orders. Even if state courts were to intervene in the election process, the Senate would retain the power to ignore the results of a second election or of other action. Indeed, we are not prepared to rule that every conceivable state court action would necessarily be an unwanted intrusion upon the Senate's authority. The New Hampshire state courts have a first hand familiarity with New Hampshire election law. Moreover, the state courts are capable of interpreting the federal Constitution, and of observing its limitations upon state judicial authority.

The door of the federal court remains open should it be demonstrated that state actions or practices are being pursued which deprive the Senate or any candidate of rights conferred by the federal Constitution.

The complaint is dismissed without prejudice.

By the Court:


Clerk.

Dated: December 18, 1974

Executive Council Chambers
Concord, N.H.
Dec. 5, 1974

#65

The Governor and Council assembled in special meeting at 8 40 A.M., all members being present.

The Governor and Council, on motion of Councilor Hayes, seconded by Councilor Whalen, on a roll call vote, unanimously adopted the following resolution at 8:50 A. M.

RESOLUTION

WHEREAS the Secretary of State is required by RSA 63:8 and 63:11 to present the figures on the election for office of the United States Senator to the Governor and Executive Council for certification, and;

WHEREAS, the Secretary of State on 5 December 1974 has advised the Governor and Executive Council that all votes cast for the office of United States Senator were not recounted, and

WHEREAS, the Secretary of State has stated that no write-in votes in the balloting machines were tallied on the re-count, and;

WHEREAS, the Governor and Executive Council have received a notarized statement indicating write-in votes were cast and a notarized statement that write-in votes were counted in the official return of votes for one of the two candidates, and;

WHEREAS, the Secretary of State has notified the Governor and Executive Council on this date that these same votes were not tallied in the recount, and

WHEREAS, on November 27, 1974 Governor and Council did pursuant to Statute certify by Resolution the count given to it by the Secretary of State, which Resolution reads as follows:

"Resolved that the official recount of the ballots cast in the election for United States Senator having been completed and showing the following results:

John A. Durkin	110,924
Louis C. Wyman	110,914
Carmen C. Chimento	1 513

It is resolved that under the provisions of RSA 63:8 and 63:11 the Governor and Council certify John A. Durkin of Manchester as the winner of said election, further stating that the Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 68."

WHEREAS, the text of said Resolution was not included in the certification forwarded to the United States Senate and to the senatorial candidates:

BE IT HEREBY RESOLVED that the Governor and Executive Council rescinds the certification of November 27, and instruct the Secretary of State to forthwith notify the United States Senate and the senatorial candidates of this action.

s/s Meldrim Thomson, Jr.
Governor of New Hampshire

s/s Lyle E. Hersom
Lyle E. Hersom
Executive Councilor

s/s James H. Hayes
James H. Hayes
Executive Councilor

s/s Robert E. Whalen
Robert E. Whalen
Executive Councilor

s/s John F. Bridges
John F. Bridges
Executive Councilor

s/s Bernard A. Streeter, Jr.
Bernard A. Streeter, Jr.
Executive Councilor

The following two notarized statements were made a part of the record.

I John E. Gilmore, Selectman of Exeter, N.H., hereby personally certify that 3 write in votes were counted and recorded for Louis C. Wyman for U. S. Senate in the election Tues., Nov. 5, 1974. held at Exeter, N.H.

s/s John E Gilmore

State of New Hampshire
County of Rockingham

Dec. 3, 1974

Personally appeared John E. Gilmore before me and took oath to the above statement.

s/s Charles K. Thayer

Charles K. Thayer

Notary Public

My Commission Expires April 1978

I, Harry B. Thayer III, do hereby certify that I voted by the write-in box and not with the candidate's lever on a voting machine in Exeter, N.H. Nov. 5, 1974, for Louis C. Wyman for U. S. Senate.

s/s Harry B. Thayer III

State of New Hampshire
County of Rockingham

Dec. 3, 1974

Personally appeared Harry B Thayer III before me and took oath to the above statement.

s/s John E. Gilmore JP

John E. Gilmore

Justice of the Peace

The Honorable Board then adjourned.

State of New Hampshire

OFFICE OF SECRETARY OF STATE



I, ROBERT L. STARK, Secretary of State of the State of New Hampshire, do hereby certify that the following and hereto attached is a true copy of a Resolution and Certificate approved by Governor and Council at their meeting held December 27, 1974 and held in my custody as Secretary of State.

In Testimony Whereof, I hereto set my hand and
 cause to be affixed the Seal of the State, at
 Concord, this 27th ... day of ... December
 A.D. 19.74...

..... *Robert L. Stark*
 Secretary of State

RESOLUTION

WHEREAS the State of New Hampshire conducted a biennial general election on November 5, 1974, and

WHEREAS the report of the Secretary of State of the return of the votes cast for United States Senator was duly laid before the Governor and Council on November 21, 1974 as Louis C. Wyman, Manchester, 110,716; John A. Durkin, Manchester, 110,361; and Carmen C. Chimento, Brookline, 1,327; whereupon the Governor and Council ". . .and authorized the Governor to issue election certificates in accordance with the (above) records," and formally declared "Louis C. Wyman, Manchester, having received the largest number of votes cast for United States Senator. . .elected. . .," and

WHEREAS formal documentation was not prepared forthwith by the Secretary of State due to the then ongoing official recount in said election, and

WHEREAS a formal request was made by legal counsel for John A. Durkin, Manchester, on November 6, 1974 for impounding all ballots and a formal request was made by the same parties on November 7, 1974 for an official recount by the Secretary of State, and

WHEREAS such an official recount was conducted by the Secretary of State on November 18, 1974 through November 26, 1974, and

WHEREAS upon completion of said official recount the Secretary of State on November 27, 1974 announced that the votes cast for the election of United States Senator were John A. Durkin, Manchester, 110,924; Louis C. Wyman, Manchester, 110,914; and Carmen C. Chimento, Brookline, 1,513; and thereupon the Secretary of State presented these totals to the Governor and Council for certification within an hour, and

WHEREAS the Governor and Council, acting prudently, on November 27, 1974 sought an informal opinion from the Attorney General of New Hampshire as to when final certification was appropriate and legal, having in mind that a further appellate proceeding still remained available to either Mr. Durkin or Mr. Wyman with the Ballot Law Commission, a State agency, and

WHEREAS the Attorney General advised the Governor and Council on November 27, 1974 that they should then certify Mr. John A. Durkin as the elected United States Senator at that point in time and on a further request from the Governor and Council the Attorney General stated in an informal opinion that the State Ballot Law Commission would certify direct to the United States Senate and to the participating candidates of any changes in the total votes cast when the Ballot Law Commission reviewed challenged ballots, and

WHEREAS the Governor and Council then requested the Attorney General to draw up a qualifying resolution providing for a conditional certification for John A. Durkin which was unanimously passed by the Governor and Council and which read, in part. . . "The Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 68," and

WHEREAS on November 27, 1974 counsel for Louis C. Wyman, Manchester, appealed the declaration of recount of the Secretary of State under RSA 68:4 II, and

WHEREAS during the ensuing dates between December 4, 1974 and December 23, 1974 the State Ballot Law Commission acted in consideration and review of the challenged ballots, and

WHEREAS on December 5, 1974 the Governor and Council first were made aware of two sworn affidavits alleging that the Secretary of State in conducting the official recount had failed to count write-in ballots on the voting machines in the town of Exeter, and

WHEREAS the Secretary of State, under questioning by the Governor and Council, admitted that he had not counted write-in ballots on the voting machines in the town of Exeter nor in the cities of Manchester, Nashua and Portsmouth based on his interpretation of a prior Ballot Law Commission ruling occurring during a previous election which now appears not to have been applicable in this particular election since it applied in multiple-choice elections and not in a "one-choice election," and

WHEREAS it was clearly apparent to the Governor and Council that all votes cast on November 5, 1974 were therefore not counted in the official recount by the Secretary of State thus creating inaccurate totals in the qualified certification of John A. Durkin, and

WHEREAS the Secretary of State, under questioning by the Governor and Council, was unable to offer any reason for his failure to advise the United States Senate nor the candidates of the qualified certification drawn by the Attorney General and unanimously passed by the Governor and Council on November 27, 1974 certifying John A. Durkin and which clearly indicated the awareness by the Governor and Council of the availability of a further appellate procedure through the Ballot Law Commission in the event of a request for a review of challenged ballots by either candidate, and

WHEREAS the Governor and Council felt strongly that until the challenged votes were reviewed by the State Ballot Law Commission and determinations made, and all appeal routes had been exhausted at the State level that certification by the highest executive authority in the State of New Hampshire, namely the Governor and Council, had been premature and inaccurate, and

WHEREAS the Governor and Council for these reasons then acted on December 5, 1974 to decertify the previous qualified certification of John A. Durkin, Manchester, and

WHEREAS the Ballot Law Commission has formally announced on December 24, 1974 that the following totals in the election of the United States Senator are final and accurate as in their best judgment reflecting the intent of each voter, and

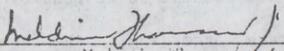
WHEREAS under the Constitution of New Hampshire, Part II, Article 62, the Governor and Council is responsible "For ordering and directing the affairs of the State, according to the laws of the land,"

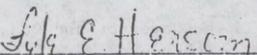
NOW THEREFORE the Governor and Council, acting as the highest executive authority in the State of New Hampshire concurs with the State Ballot Law Commission in the issuance of a Certificate of Changed Declaration and Accompanying Report of the New Hampshire Ballot Law Commission dated December 24, 1974 of the total vote cast as being Louis C. Wyman, Manchester, 110,926; John A. Durkin, Manchester, 110,924; Carmen C. Chimento, Brookline, 1,513; as being an accurate representation of the total votes cast for each candidate in the biennial election held on November 5, 1974 for the office of United States Senator, and

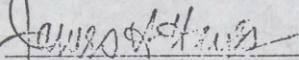
NOW THEREFORE the Governor and Council directs the Secretary of State, acting in the capacity of Secretary to the Executive Council (New Hampshire Constitution, Part II, Article 64) and as Clerk and Recording Officer of the New Hampshire State Ballot Law Commission (RSA 68:1) to make this Resolution part of the certification documents of Louis C. Wyman, Manchester, and

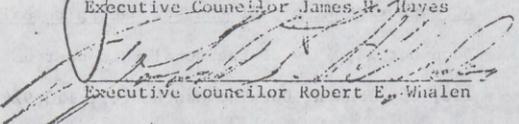
NOW THEREFORE the Governor and Council authorizes the Governor to declare Louis C. Wyman the elected United States Senator and to issue to him a certificate which will include the following paragraph:

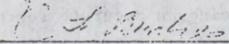
This certifies that the Governor and Executive Council having reviewed and accepted the findings of the New Hampshire Ballot Law Commission that at the biennial election held on November 5, 1974, Louis C. Wyman of Manchester received 110,925 votes; that John A. Durkin of Manchester received 110,224 votes; that Carmen C. Chimento of Brookline received 1,513 votes in the contest for United States Senator, hereby declare Louis C. Wyman elected, and do authorize the Governor to issue to him a Certificate of Election reflecting the said certification of the Ballot Law Commission.

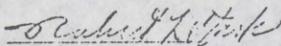

Governor Meldrim Thompson, Jr.

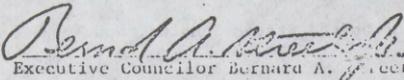

Executive Councilor Lyle E. Hersom


Executive Councilor James H. Hayes


Executive Councilor Robert E. Whalen


Executive Councilor John F. Bridges


Robert L. Stark
Secretary of State


Executive Councilor Bernard A. Greeter

THE STATE OF NEW HAMPSHIRE

Executive Department

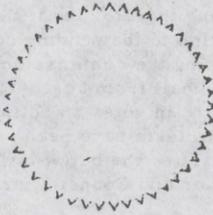
To the President of the Senate of the United States:

This is to certify that on the fifth day of November, nineteen hundred and seventy-four

LOUIS C. WYMAN

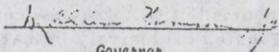
was duly chosen by the qualified electors of the State of New Hampshire a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the third day of January, nineteen hundred and seventy-five.

This certifies that the Governor and Executive Council having reviewed and accepted the findings of the New Hampshire Ballot Law Commission that at the biennial election held on November 5, 1974, Louis C. Wyman of Manchester received 110,926 votes; that John A. Durbin of Manchester received 110,924 votes; that Carmen C. Chimento of Brockline received 1,513 votes in the contest for United States Senator, hereby declare Louis C. Wyman elected and do authorize the Governor to issue to him a Certificate of Election reflecting the said certification of the Ballot Law Commission.

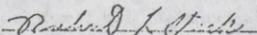


Witness: His Excellency, our Governor

and our Seal hereto affixed at Concord this twenty-seventh day of December, in the year of our Lord nineteen hundred and seventy-four


Governor

By the Governor, with
advice of the Council:


Secretary of State

NOTICE: This opinion is subject to formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire, 03301, of any typographical or other formal errors, in order that corrections may be made before the opinion goes to press.

Original
No. 7083

Louis C. Wyman v. John A. Durkin & a.

December 16, 1974

Stanley M. Brown, Donald R. Bryant, Michael F. Farrell, and James H. Schulte (Mr. Bryant and Mr. Brown orally) for the plaintiff.

Devine, Millimet, Stahl & Branch, and John T. Broderick, Jr. (Mr. Broderick orally) for the defendant, John A. Durkin.

David A. Brock by brief and orally for the defendants Governor and Council and Secretary of State.

Thomas D. Rath, assistant attorney general, orally for the defendants Ballot Law Commission.

PER CURIAM. This petition brought by the plaintiff Wyman, the Republican candidate for the office of United States Senator at the November 5, 1974 election, against the defendant Durkin, the Democratic candidate for the same office, seeks a writ of certiorari directed to the State ballot law commission requiring it to certify the circumstances of the adoption by it of a certain rule or rules with respect to write-in votes on voting machines and other matters relating thereto; and if the rule is found by the commission to have no application to the pending contest the petition seeks a writ of prohibition, prohibiting the commission, the secretary of state, and the Governor and Council from certifying any winner in the contested election until all write-in votes on voting machines have been canvassed and counted, and any protests have been ruled upon by the commission. The petition joins as parties the ballot law commission, the secretary of state, and the Governor and Council "for jurisdictional purposes only."

The defendant in support of his answer and motion to dismiss contends that jurisdiction to review contested elections to the United States Senate is vested exclusively in that body under Article 1, section 5 of the United States Constitution, and that for this and other reasons the plaintiff's petition should be dismissed.

Following the election of November 5, 1974, at which the returns showed the plaintiff to be the successful candidate, a recount was conducted by the secretary of state at the defendant's request, and the defendant was thereafter certified as the successful candidate (RSA 63:7, 8), subject to

appeal to the ballot law commission as provided by RSA 59:98. Thereafter, the plaintiff appealed to the ballot law commission (RSA 68:4 II), and the Governor and Council acted to rescind the Durkin certificate as premature. Hearings before the ballot law commission were in progress when the plaintiff's petition was filed in this court on December 9, 1974.

The plaintiff complains of a regulation relative to voting machines adopted by the commission in 1962 (RSA 59:27), providing in substance that a write-in vote appearing upon a voting machine ballot bearing the printed name of a candidate shall not be counted for him "for the same office". The plaintiff contends that the regulation should have no application to the pending contest, and if so applied would be invalid because in violation of the State and Federal Constitutions. It appears from the affidavit of the chairman of the commission filed in the case, that the plaintiff's contention that the regulation should not apply to this contest has been tentatively accepted by the commission to the extent that certain write-in votes on voting machines have been counted by the commission, subject to reconsideration by it at the close of its hearings currently in progress. In the light of this affidavit, the plaintiff at oral argument has waived his prayer for a writ of certiorari.

A writ of prohibition is an extraordinary writ issued to prevent the exercise of jurisdiction not granted, and is to be used with caution and forbearance. Manchester Education Ass'n v. Superior Court, 109 N.H. 513, 257 A.2d 11 (1969). The chairman of the ballot law commission has expressed its awareness of the principle that the legally expressed choice of the voters shall be controlling. Murchie v. Clifford, 76 N.H. 99, 79 A. 901 (1911); Nickerson v. Aimo, 110 N.H. 348, 351, 266 A.2d 828, 830 (1970); Opinion of the Justices, No. 7050 (November 4, 1974). Counsel for the Governor and Council and secretary of state has assured the court that no certificate of election will issue before the commission has completed its functions.

In these circumstances and upon the record before us, we are of the opinion that no writ of prohibition may appropriately be issued. The commission is proceeding within its statutory jurisdiction, and we will not presume that the defendant constitutional officers will take further action before the commission has carried out its legal responsibilities. Opinion of the Justices, No. 7089 (December 16, 1974). Accordingly, the order is

Writ of prohibition denied; petition dismissed.

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Request of Governor and Council
No. 7089

Opinion of the Justices

December 16, 1974

The following resolution was adopted by the Governor and Council December 10, 1974, and filed with the supreme court on the same day:

"Whereas, Meldrim Thomson, Jr., in his capacity as Governor, and James H. Hayes, Lyle E. Hersom, John F. Bridges, Bernard A. Streeter, Jr. and Robert E. Whalen in their capacity as Executive Councilors of the State of New Hampshire and Robert L. Stark in his capacity as Secretary of State are parties for jurisdictional purposes in the Matter of Louis C. Wyman vs. John A. Durkin, now pending before the Honorable Supreme Court of the State of New Hampshire; and

"Whereas, the Governor, Executive Council and Secretary of State have determined that a solemn occasion exists upon which important questions of law have arisen; and

"Whereas, the Governor, Executive Council and Secretary of State have certain questions as to the nature and extent of their powers and responsibilities with regard to performance of their official duties under the Constitution and laws of the State of New Hampshire in connection with ascertainment of election results;

"Now, therefore, be it resolved by the Governor, Executive Council and Secretary of State, that the Justices of the Supreme Court be respectfully requested to give their opinion upon the following questions:

"1. Should write-in votes cast on voting machines in "one-choice" election contests, either those reported by local officials or those not so reported, be counted:

"(a) By the Secretary of State before he declares the results of the vote under RSA 59:98?

"(b) By the Ballot Law Commission before it declares the result of the vote under RSA 68:4 II?

"(c) By the Governor and Executive Council before it ascertains the results of said elections under RSA 63:7 and RSA 63:8?

"2. If the answer to the question in 1. is in the affirmative and it is found by the Secretary of State, or the Ballot Law Commission, that all such write-in votes are not available to be counted, and that it is therefore impossible for either the Ballot Law Commission, the Secretary of State or the Governor and Executive Council to declare a true and complete count of the actual vote, does the Governor and Executive Council under the provisions of RSA 63:9, or otherwise, have authority to cause precepts for

another election to issue, if -

"(a) there is an actual tie, or

"(b) there is a virtual tie in terms of reliable statistical data."

The following answer is returned:

To His Excellency the Governor and the Honorable Council:

In the resolution you pose the questions whether write-in votes cast on voting machines in "one-choice" election contests should be counted by the secretary of state pursuant to RSA 59:98, by the ballot law commission according to RSA 68:4 II and by the Governor and the Executive Council under RSA 63:7, 8. The right of citizens to vote is guaranteed by both the Federal and State Constitutions. U.S. CONST. art. 1, sec. 2; Amend. XVII, N.H. CONST. pt. I, art. 11; State v. Sullivan, 101 N.H. 429, 430, 146 A.2d 1 (1958). A ballot is a mechanism for expressing the voter's preference, thereby giving vitality to the right to vote. See In re Manchester Town Election, 115 Vt. 230, 231, 55 A.2d 612, 613 (1947). In this State the statutes afford a citizen several ways to express his preference by ballot. RSA 59:58; RSA 59:25 (Supp. 1973). Whichever mode is selected by the voter, his expressed intention is crucial. Barr v. Stevens, 79 N.H. 192, 193, 106 A. 483 (1919); Murchie v. Clifford, 76 N.H. 99, 102, 79 A. 901, 902 (1911). Strict compliance with the technical form of a vote must yield to recognition of the voter's indication of intention. Keene v. Gerry's Cash Market, Inc., 113 N.H. 165, 168, 304 A.2d 873, 875 (1973); Nickerson v. Aimo, 110 N.H. 348, 351, 266 A.2d 828, 830 (1970); see Opinion of the Justices, (Nov. 4, 1974).

The enactment of RSA 59:25 (Voting Machines) made it possible for the voter to express his intention in ways additional to those specified in RSA 59:58. By pulling a lever on a voting machine a citizen can register his choice of the names listed. Alternatively, he can write in his preference by lifting a panel.

The counsel for the ballot law commission in a companion case (Wyman v. Durkin, No. 7083) has suggested that this court should not express an opinion on write-in votes on voting machines since the ballot law commission has not completed its functions. We assume the ballot law commission is completely aware of the guiding principle expressed in Keene v. Gerry's Cash Market, Inc., 113 N.H. 165, 168, 304 A.2d 873, 875 (1973) as follows: "Statutes regulating the form of ballots are generally regarded as directory rather than mandatory. Annot., 165 A.L.R. 1263, 1264 (1946); 3 McQuillin, Municipal Corporations sec. 12.14, at 109-10 (3d ed. rev. 1963). They provide a convenient and

uniform method for voting, but should not be applied to disenfranchise voters because of technical irregularities. Opinion of the Justices, 107 Me. 514, 516, 517, 78 A. 656, 657 (1910)." Accordingly we deem it inappropriate to give an advisory opinion to the Governor and Council on question number 1. Opinion of the Court, 58 N.H. 621 (1879); Opinion of the Justices, 53 N.H. 640, 641 (1873); Bell v. Pike, 53 N.H. 473, 474 (1873); see Opinion of the Justices, 152 Me. 212, 216, 142 A.2d 532, 534 (1956).

In light of what was said under question number 1, we consider only that part of question number 2 which relates to an actual tie under RSA 63:9. That statute reads as follows: "Tie Vote. If two or more persons, at any election of representatives in congress, shall, in any district, receive the largest and an equal number of votes, so that no choice is made, the governor, with advice of the council, shall cause precepts to be issued to the selectmen of the several towns within such district for another election, requiring them to warn meetings to be holden at the time specified in such precepts for the choice of a representative." In the case of such an actual tie, and only in that instance, does the statute empower the Governor and Council to call for a new election. Such power is consistent with a State's authority to prescribe "the times, places and manner of holding elections for Senators and representatives. . ." U.S. CONST. art. 1, sec. 4; Roudebush v. Hartke, 405 U.S. 15, 24 (1971); Smiley v. Holm, 285 U.S. 355, 366 (1932). The term "virtual tie", however, has not been defined in your resolution nor do we find it defined by any statute. It is a phrase of ambivalent content without known parameters. The statute confers on the Governor and Council no authority to call a special election except in the case of an actual tie as specified by RSA 63:9.

Frank R. Kenison

Laurence I. Duncan

Edward J. Lampron

William A. Grimes

Robert F. Griffith

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT

SEPTEMBER TERM, 1974

No. E-1451

Louis C. Wyman

vs.

John A. Durkin, Robert L. Stark,
and Carmen C. ChimentoPLAINTIFF'S MOTION TO TRANSFER QUESTION OF LAWIN ADVANCE OF TRIAL

NOW COMES Louis C. Wyman, the plaintiff in the above entitled action, and moves:

That this Honorable Court forthwith transfer to the Supreme Court of New Hampshire, in advance of trial, the following question of law:

If proof is adduced sufficient to satisfy this Court of the probability either that (1) more illegal absentee votes were recorded and returned from the City of Nashua than the two votes which constitutes plaintiff's plurality as determined in the final State tally declared by the Ballot Law Commission on December 24, 1974, or (2) that more votes than that plurality were probably incorrectly recorded or omitted on the voting machines in Manchester referred to in the petition, or (3) that more illegal votes than that plurality were probably included in the statewide count and returns as shown by comparison of the checklists and ballots tallied; does this Court, or the Supreme Court, or any State agency, have the authority to order a run-off election for the office of United States Senator, or any

election for that office prior to the Biennial Election of November, 1976?

And the plaintiff further moves that the requirements of Rule 72 be waived, and that the matter be transferred upon original papers, including the Court's order upon the above motion, plaintiff's Memorandum in support thereof, and such additional memoranda as may be submitted in this Court by any party, and on any other documents authorized to be submitted in the Supreme Court by that Court.

Respectfully submitted,
 LOUIS C. WYMAN,
 By His Attorneys,

Stanley M. Brown
 Dort S. Bigg
 R. David DePuy
 Eugene M. VanLoan, III

By: Stanley M. Brown
 Stanley M. Brown

December 26, 1974

I hereby certify that I mailed a copy of the within Motion to John A. Durkin and to his counsel, Joseph A. Millimet, to Carmen C. Chimento and to his counsel Richard Leonard, and to Robert L. Stark, Secretary of State.

Stanley M. Brown

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT

SEPTEMBER TERM, 1974

No. E-1451

Louis C. Wyman

vs.

John A. Durkin, Robert L. Stark,
and Carmen C. Chimento

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO TRANSFER QUESTION OF LAW
IN ADVANCE OF TRIAL

1. Since this Court's assumption of jurisdiction of this proceeding on December 16 (Douglas, P. J.), the posture of the matter has been changed by subsequent events and the decisions of the Supreme Court of New Hampshire and a three-judge Federal District Court referred in this Court's December 23 memorandum (Douglas, P. J.). Additionally the Ballot Law Commission, on December 24, completed its review of the rulings of the Secretary of State on ballots protested during the recount, determined that plaintiff Wyman had the greatest number of votes (110,926 to 110,924) and has issued its Certificate of Changed Declaration to plaintiff, declaring him the Senator-elect by the final State tally.

2. During, and as a result of the concluding of the Ballot Law Commission proceedings, certain of the prayers for relief from this Court have become moot:

(A) There is no necessity or occasion for this Court to act on plaintiff's prayer to exclude from the final tally the

Nashua absentee votes alleged to have illegal votes included therein, which would increase plaintiff's plurality by 185 votes (as requested in paragraph 5 of the prayer of the original petition), or to hear the parties with regard to similar situations in Seabrook, and in Somersworth, or with regard to the situation in Amherst (paragraph 7 of First Motion to Amend Petition and paragraph 1 of Second Motion to Amend Petition), since the only result of such exclusions and corrections, if warranted and undertaken, would be to increase plaintiff's plurality of votes.

(B) There is no necessity or occasion for the Court to extend discovery remedies to secure and preserve evidence for possible use in the U.S. Senate with regard to voting machine write-in votes (First Amendment to Petition) or with regard to Manchester malfunctioning voting machines (Paragraphs 3-5, original Petition), nor with regard to variations between checklist and ballots cast (Second Amendment to Petition). Such of this evidence as still exists has now been secured and is being preserved by the Ballot Law Commission, as a result of plaintiff's requests to that Commission, and the voting machines are being held sealed.

3. There remain at issue, however, three situations upon the basis of any one, or all of which, plaintiff has prayed for the relief of having this Court declare the November 5, 1974 Biennial Election invalid insofar as it relates to the office of United States Senator, and that a Special Election for this office be required forthwith (Prayer 4, original Petition). These three allegedly invalidating situations are as follow:

(A) The Nashua absentee voting irregularities referred to above, and originally declared upon (Paragraphs 6-9 of original Petition). As evidence that this is not a frivolous claim, plaintiff attaches hereto as Exhibits 1 and 2 for identification , photocopies of articles published in the Nashua Telegraph of November 26 and 27, 1974, and offers, on trial, to prove the facts related therein, and the further detailed facts alleged in Paragraph 7 of the Petition.

(B) The variation between voters checked off as voting on local checklists and the total ballots returned and counted (Second Amendment to Petition), has been calculated from data compiled by the Attorney General's office, and the Secretary of State. A summary of this variation by counties is attached as Exhibit 3 for identification, and plaintiff offers to prove the substantial accuracy of this tabulation.

It may be noted that there apparently were 20 more voters checked off in Cheshire County than ballots returned,

and similarly that in Hillsborough County, 149 more voters were checked off as voting than the ballots or votes, returned. This is the opposite of the situation in Judkins v. Hill, 50 N.H. 140, where the normal situation of ballots exceeding checklists by very small margins is tolerated.

(C) The allegations concerning Manchester voting machine malfunctions are demonstrated by the charts attached hereto as Exhibits 4 and 5 for identification, and the testimony of Thomas Huhn before the Ballot Law Commission contained at pages 24 through 30 of Volume I of December 7, 1974, attached as Exhibit 6 for identification.

Exhibit 4 for identification details the disparity between the protective counters and public counters on twelve specific Manchester voting machines found during the recount, the range of variation being as high as 707 supposed voters on a single machine. For the significance of such variations, see Huhn, Exhibit 6 for identification at p. 28.

Huhn suggested to the Ballot Law Commission (p. 26) that reference to the checklists should be made in connection with such variations, since, obviously, if the checklist confirmed one counter, the other might be considered either malfunctioning or improperly set.

Exhibit 5 for identification aligns the checklist indications

of voters entering the machines to vote in Manchester with both protective and public counters of the persons whose votes were registered. This Exhibit is presented on a ward basis because no individual machine checklist is maintained as such. Having in mind that Hillsborough County checklists (including Manchester) show 149 more voters checked off than ballots (including machine votes) returned, the Manchester situation, plaintiff believes, is disturbing.

The Court will note that only in Wards 6 and 9 is there any close alignment of voters voting by the checklists and voters voting by the machine counters, and even in these two wards the variations are in excess of the two-vote margin between Wyman and Durkin declared in the final State tally.

While the argument will undoubtedly be made that malfunctioning protective and public counters do not necessarily mean that the counters in individual races were similarly malfunctioning, it is illogical to suppose, if the entire ballot of a voter is unrecorded, that some part of the vote may have survived.

Plaintiff suggests that these exhibits, plus Huhn's testimony, cast grave doubt on the accuracy of the machine recording of votes cast in Manchester, and offers to prove the substantial accuracy of the proposed exhibits, on trial of the issue. To go further, and open the machines for inspection and possible

discovery of the reason for the apparent malfunctioning might well impair the reliability of any such evidence in further anticipated proceedings before the U.S. Senate. The machines, and the evidence are, however, presumably secured against tampering.

4. It is the position of plaintiff Wyman that although he has now been certified as the Senator-elect in the final State tally by the Ballot Law Commission, that a two-vote margin of victory in an election in which the above-related irregularities and inaccuracies of a magnitude greater than his plurality occurred, renders the actual election result uncertain and a virtual tie, and that therefore an early run-off election between the contenders in the 1974 Biennial Election is desirable, so that the actual choice of the voters may be ascertained with reasonable certainty. This Petition was instituted to achieve that purpose.

5. If, in spite of satisfactory proof of the facts outlined in the offers of proof in paragraph 3, the relief of a run-off election cannot be granted by this Court or by the Supreme Court of New Hampshire or by any State authority, plaintiff would request leave to withdraw this petition, without prejudice, reserving his rights to press the same issues, if in the best interests of this State, before the U.S. Senate.

6. Plaintiff has been advised by counsel that the right to a run-off election ordered by State authority may have expired upon the conclusion of the review by the Ballot Law Commission, no tie resulting (see

RSA 63:2 and 63:9-13), and that, should this Court or the Supreme Court of New Hampshire invalidate the November 5, 1974 election, a vacancy would probably result upon the retirement of Senator Cotton and/or upon the convening of the new U.S. Senate on January 14, 1975, to be filled by appointment by the Governor until the next general election in November, 1976 (RSA 63:3, 63:1), with the result that the citizens of this State would not be represented by a junior Senator elected by them for two years. He has further been advised that Lacaze v. Johnson, _____ Louisiana _____, No. 55,601 (Nov. 27, 1974) while persuasive that the State Courts may invalidate a U.S. Senate election, is not authority for the proposition that a State may order a run-off election in a U.S. Senate contest, in the absence of a State run-off statute, since the run-off election ordered in the Lacaze case was for the U.S. House of Representatives.

7. As a result of the above advice of counsel, plaintiff respectfully prays that the Court certify the question to the Supreme Court of New Hampshire, whether a run-off election can be ordered, if the 1974 Biennial Election for U.S. Senator is invalidated; and should that Court rule that a run-off election is not permissible under the circumstances, that plaintiff be granted leave to withdraw the petition without prejudice to his rights to assert the same facts seeking the same or similar relief in other forums.

Respectfully submitted,

LOUIS C. WYMAN

By His Attorneys
Stanley M. Brown
Dort S. Bigg
R. David DePuy
Eugene M. VanLoan, III

By: Stanley M. Brown
Stanley M. Brown

December 26, 1974

I hereby certify that I mailed a copy of the within Memorandum to John A. Durkin and to his counsel, Joseph A. Millimet; to Carmen C. Chimento and to his counsel, Richard Leonard, and to Robert L. Stark, Secretary of State, on this date.

Stanley M. Brown

Candidates Distributing A

Nashua and Hudson Clerks Intend to Halt This Practice

By CLAUDETTE DUROCHER

Distribution of absentee ballots by candidates for political office is an old tradition in Nashua but City Clerk Lionel Guilbert thinks the time has come to end the practice before it leads to abuse.

Coincidentally, Hudson Town Clerk John P. Lawrence has been thinking in the same vein. And both Guilbert and Lawrence have been eyeing the same election law to end what they find is a questionable practice. They intend to institute the reform in future city and town elections.

What they want to end is the practice of allowing candidates or their workers to distribute absentee ballots.

Guilbert said the practice dates back many years.

"I know candidates or their representatives have been allowed to distribute absentee ballots in Nashua for years. It was a practice which was well established before I became a city clerk.

"The more I've seen of it as city clerk, though, the less I like it. I came to the conclusion during the last election that it should end permanently. I've been reviewing the election laws and I think they give me the authority to halt the practice."

Lawrence who is relatively new to the job of town clerk, said workers for candidates have been allowed to distribute absentee ballots in Hudson.

"There is a potential for abuse and from what I've been able to observe in the past two elections I think the time has come to put an end to the practice. I just don't think it's right."

Discusses Curb

Guilbert, in discussing his thoughts on clamping down on the distribution of absentee ballots, said he was not pointing to any particular candidate or party.

"I don't want to accuse anyone or anything. All I'm interested in is stopping something before it gets out of hand," Guilbert said. "I just don't care to see candidates, or their workers, distributing absentee ballots because I think in some cases they can use the occasion to exert influence during the voting process to promote a particular candidacy.

"And," Guilbert continued, "I don't want to deprive anyone from the opportunity of voting by absentee ballot. All I want is to make sure that voting by absentee ballot is done fairly and properly."

The problem has been, he said, that candidates or their workers come to his office and pick up stacks of application blanks for absentee ballots.

They take these applications to nursing homes, hospitals, public housing for the elderly or anywhere else there may be voters unable to come to the polls because of physical dis-

ability or because they will be out-of-town on election day.

The candidates return the signed applications to the city clerk's office at City Hall where they are checked out. The city clerk's office then gives the candidates the proper number of absentee ballots to distribute to the applicants.

After the voters mark the ballots, they can return them to the city clerk's office by mail or through an intermediary. Again, candidates or their workers sometime serve as intermediaries to return the sealed ballots to the city clerk.

At the next election, no candidate or anyone working in a campaign, will be allowed to handle absentee ballots.

"They'll still be allowed to take out and distribute application blanks and return these to the city clerk's office," Guilbert said.

"But after that my office will do the actual distribution of the absentee ballots to the applicants either through the mail or by hand-carrying them to the applicants, depending on the time available."

Guilbert said he believes he has the authority to prevent candidates or workers from distributing ballots under a section of the election laws which states in part:

"When an application for an official absent voting ballot is received by the clerk of a city or town, whether on the form supplied by the secretary of state, or by written statement or oral request containing the information required.... said clerk shall check the same forthwith and ascertain if the person is on the check-list of the town or city. If such person is found to be on such check-list said clerk shall, without delay, deliver or mail to such person the papers (ballot and envelopes)"

Studies Law

Lawrence said he has been looking at this same section of the law and believes it clearly

points out that only the city town clerk shall distribute the ballots.

Allowing candidates to distribute the ballots, Guilbert said, may constitute a form of campaigning which is not permitted at the polls.

"Suppose you are a student and can't come to the polls election day," Guilbert said. "Candidate X sees to it that you get an application for absentee ballot and he delivers the ballot to you."

"It's pretty hard for you when you get to that candidate's name, not to be grateful and obliged to vote for him, especially if the candidate happens to wait around while you mark your ballot."

"In the case of voters with poor eyesight," Guilbert said, "the candidate may even request to help out mark a ballot. There again, it's almost a foregone conclusion the voter in such a situation will feel obliged to give the candidate's name check-off."

"I don't think a candidate or his representative should in any way handle absentee ballots or should be around when voters are marking them.

"If a person needs assistance, he should ask for assistance of a relative or a neutral third party."

There is always a possibility, Lawrence noted, that bogus signatures are used by someone involved in a campaign in order to take advantage of absentee ballot for a particular candidate.

"A person may be a person whose name appears on the check lists but who does not vote on election day because they have been moved out of the community or have died.

"By arranging to have someone sign an application form and also sign the certificate form used with the absentee ballot, this is

Absentee Ballots Questioned

ballot could be misused to a particular candidate's advantage.

"I think this type of misuse can be avoided by having only the town or city clerk handle the actual issuance of all absentee ballots."

Speaking of absentee voting in general, Guilbert said he sometimes wonders if people realize that by law the only persons allowed to use this method of voting are those unable to go to the polls because of physical disability or because they will be away from the city on election day.

Voters using absentee ballots must sign a form stating under which condition they are voting by absentee ballot. The form is signed under penalty of perjury.

"The reason I wonder if people are aware of this is that we've had cases where the voters turn up at the polls to hand over their absentee ballot to the moderators. If they can get to the polls, they have no reason for voting by absentee ballot."

Too Many Issued

And, Guilbert also wonders if the number of absentee ballots issued for residents of Sullivan Terrace may be a bit high.

"I am sure that there are elderly residents there who can't come to the polls on election day," he said. "But on the whole the residents of Sullivan Terrace are mobile and many should be able to vote at the polls. I don't think absentee ballots should be used merely to avoid a bit of inconvenience."

The use of absentee ballots requires much cross-checking by his office, Guilbert said.

There is a lot of paper work to processing this type of ballot. Even envelopes and applications blanks used for absentee balloting must be kept on file in case questions of validity develop after election day. Absentee ballots should be used for only the reasons permitted by state law.

The application deadline for communities using voting machines is 11 a.m. on election day. All absentee ballots must be returned no later than noon of election day.

Lawrence said state law does not seem to provide a clear-cut application deadline for towns.

The law states, however, that absentee ballots may be

returned to town clerks on election day until such time as the polls close.

Lawrence said he is considering imposing a 5 p.m. application deadline for absentee ballots on the day before election day.

"There is a lot of work required to cross-check application signatures and addresses," he said. "Absentee ballots are available way ahead of an election and there is plenty of time to attend to voting without waiting to the very last minute to ask for such a ballot."

"I think ballots may still continue to be returned on election day but I think application for their issuance should cease as of 5 p.m. the eve of the election."

Hudson will use absentee ballots for the first time in a local election in the March town election. Nashua's next election will be the city election in November, 1975. The city permits absentee balloting for its local elections.

About 75 absentee ballots were cast in Hudson in the Nov. 5 election and some 800 in Nashua.

Absentee Ballots Proposal Triggers Many Complaints

By CLAUDETTE DUROCHER

City Clerk Lionel Guilbert said he knew he'd be showered with complaints once he announced he wanted to shut off candidates from handling absentee ballots.

"I expected candidates and regular campaign workers would object and they have," he said.

But Guilbert remains unconvinced that the old practice of allowing candidates to physically handle and distribute absentee ballots in the city should be allowed to continue.

"What I propose will not deprive anyone from using an absentee ballot," he said.

"And it will not make it more difficult to get an absentee ballot."

But it will give this office better control over the distribution of absentee ballots to eliminate the possibility of fraud.

Guilbert revealed his decision to change procedures in the handling of absentee ballots in a Telegraph article yesterday.

The phone calls from political campaign workers and others, he said, started coming shortly after the article appeared.

Mayor Dennis J. Sullivan told the Board of Aldermen last night he too had received phone calls from persons who object to the changes proposed by Guilbert.

He said those close to the election process are aware of potential dangers but perhaps a major departure in

procedures should be fully discussed by all those involved to determine the full extent of its ramifications.

Guilbert said some of the older residents fear they will be deprived from voting by absentee ballots if candidates or their agents are not allowed to distribute the ballots.

But Guilbert said this is not the case. Candidates would still be allowed to go around to institutions to sign up applicants for absentee ballots.

However, the candidates would no longer be allowed to receive ballots and to take them to the applicants. The ballots, instead, would be mailed from the city clerk's office directly to the applicant, or if time is lacking, the ballots would be hand-delivered.

Hudson Town Clerk John P. Lawrence has also said that he too plans at the next town meeting to implement the same type of reform in the handling of absentee ballots.

"Our ward workers should be proud and pleased that the recount of the machine votes in Nashua yesterday showed no deviation from the count originally reported," Guilbert said. "We go to great lengths to see that the machine count is correct but in allowing just anybody to physically handle the paper absentee ballots we kind of relinquish control over the integrity of that section of the vote."

"I'm only advocating stricter controls on the actual handling of the ballots to

make sure that this form of voting is not abused," he said.

Both he and Lawrence said there is a possibility for abuse in having candidates both solicit applications for absentee ballots and then also distributing the ballots and returning the marked ballots to their office.

Guilbert added that having a candidate deliver the ballots and retrieve them amounts to a subtle form of campaigning, especially if a candidate were to wait around while the ballot is being marked.

The Nashua city clerk said he has one complaint still to be settled involving the use of an absentee ballot in the Nov. 5 election.

The case involves an elderly voter who appeared at the polls in Ward 8 but was turned away because an absentee ballot had already been cast in his name.

This voter's son maintains that his father did not vote by absentee ballot.

Guilbert said over the years he has received similar complaints. But in the other cases, he said, a comparison of the various signatures required for absentee ballot forms showed that the elderly voter had simply forgotten he had used an absentee ballot.

In the present case, he said, he has not been able to examine signatures because all absentee ballots and forms were impounded for the Durkin-Wyman recount.

Once the ballots are released by the secretary of state's office, Guilbert said, he plans to match signatures to see if the Ward 8 voter has a valid complaint.

"So far we've never had a bad situation develop because of the absentee ballots," Guilbert said. "The Ward 8 case is an example of something which I am trying to prevent altogether in future elections. I think the way the absentee ballots have been handled in the past has been lax in terms of security control and the procedure I recommend to correct it will not prevent anyone from getting an absentee ballot or make it any harder to get a ballot."

EXHIBIT NO. 22 FOR IDENTIFICATION

Telegraph 12/20/74

EXHIBIT NO. 3 FOR IDENTIFICATION

	<u>Voters Checked Off On Checklist (Including Absentee Voters)</u>	<u>Total Ballots Tallied (Including Absentee Ballots)</u>
Belknap	11,669	11,687
Carroll	7,739	7,792
Cheshire	15,328	15,308
Coos	10,747	10,811
Grafton	16,743	16,861
Hillsborough	71,614	71,465
Merrimack	27,542	27,557
Rockingham	43,387	43,856
Strafford	20,424	20,824
Sullivan	9,235	9,424
	<hr/>	<hr/>
	234,428	235,585
	Total Ballots Tallied	235,585
	Voters Checked Off On Checklist	234,428
		<hr/>
	Difference	1,157

Amount by which Total Ballots Tallied exceeds voters checked off
on checklists:

1,157

EXHIBIT NO. 4 FOR IDENTIFICATION

MANCHESTER VOTING MACHINES

Vard No.	Voting Machine No.	Protective Counter		Actual Difference	Public Counter	Difference Between Public Counter and Protective Counter
		Opening Count	Closing Count			
10	1620	238	410	172	218	+ 46
10	1623	86	313	227	243	+ 16
11	1633	89	224	135	183	+ 48
4	1562	121	301	180	59	-121
7	1591	59	300	241	239	- 2
7	1595	209	299	90	199	+109
1	1532	153	299	146	311	+165
1	1533	286	549	263	970	+707
2	1537	177	466	289	290	+ 1
6	1581	209	478	269	273	+ 4
12	1640	305	538	233	267	+ 34
12	1645	170	427	257	258	+ 1

Amount by which
public counter exceeds
actual difference: 1003

Protective counter supposedly is permanent record of every time machine is operated, and hence records total votes on the machine during life of machine, reducing to 000 after each 999 votes.

Public counter is counting device required to be set at 000 at beginning of use in each election; its total at the end of voting period supposedly is total votes cast on that machine in particular election.

The public counter total should be identical with difference between opening and closing figures on protective counter. Variances mean either malfunction, improper public setting, or meddling with machines.

EXHIBIT NO. 5 FOR IDENTIFICATIONMANCHESTER 1974 BIENNIAL ELECTION

<u>Ward</u>	<u>Number of Persons Checked Off Checklist (Not including absentees)</u>	<u>Number of Persons Recorded on Public Counters</u>	<u>Number of Persons Recorde On Protective Counters</u>
1	2968	3702	2830
2	2585	2668	2667
3	1877	1894	1894
4	2026	1992	2113
5	1691	1764	1764
6	2599	2604	2600
7	2038	2130	2023
8	2309	2237	2237
9	2351	2337	2337
10	2338	2501	2439
11	1874	1878	1830
12	<u>2557</u>	<u>2567</u>	<u>2532</u>
TOTAL	26,213	28,274	27,266

1 Original
No. 7092

2

3

JOHN A. DURKIN

4

5

v.

6

HILLSBOROUGH COUNTY SUPERIOR COURT

7

8

December 20, 1974

9

10 Devine, Millimet, Stahl & Branch (Mr. Joseph A. Millimet orally)
11 for the plaintiff.

12

13 McLane, Graf, Greene & Brown (Mr. Stanley M. Brown orally) for
14 Louis C. Wyman, intervenor.

14

15 PER CURIAM. In this petition for writ of prohibition, the issue is
16 whether the superior court has jurisdiction to determine if in the elec-
17 tion for United States Senator illegal absentee ballots were counted,
18 whether voting machine malfunctions and whether certain other irregulari-
19 ties exist, and in the event thereof either to order the exclusion of
20 certain votes from being counted or to declare the election invalid and
21 order a new election.

22

The matter arises out of the contest for the 1974 election for the
23 United States Senate between John A. Durkin and Louis C. Wyman. Plaintiff
24 Durkin after a recount conducted pursuant to RSA 59:94-98 was declared to
25 have the greatest number of votes by 10 and a certificate of election was
26 issued to him by the Governor and Council on November 27, 1974, pursuant
27 to RSA 63:8. Thereafter Louis C. Wyman appealed to the ballot law
28 commission pursuant to RSA 68:4 II. On December 5, 1974, the Governor

29

1 and Council then voted to decertify the plaintiff. While proceedings
2 before the ballot law commission were in progress, Wyman filed in the
3 Superior Court for Hillsborough County a petition alleging certain
4 irregularities and voting machine malfunctioning and seeking to exclude
5 alleged illegal votes or to invalidate the 1974 biennial election for
6 United States Senator. Plaintiff Durkin moved to dismiss for lack of
7 jurisdiction since article I, section 5, of the Constitution of the
8 United States vests exclusive jurisdiction in the Senate of the United
9 States to judge "the elections, returns and qualification of its own
10 members". The superior court assumed jurisdiction on December 16, 1974,
11 and on the same day plaintiff filed this petition. In the proceeding
12 before the ballot law commission, which has not been completed, interim
13 rulings which are subject to reconsideration indicate candidate Wyman to
14 be in the lead by five (5) votes as of December 19, 1974.

15 There has been substantial litigation in this senatorial contest.
16 Wyman v. Durkin, No. 7083 (N.H. Dec. 16, 1974); Opinion of the Justices,
17 No. 7089 (N.H. Dec. 16, 1974); Durkin v. Snow, No. 74-359 (D.N.H. (three-
18 judge court) Dec. 18, 1974). Prohibition is an extraordinary remedy which
19 is within the discretion of the court but which should be exercised "only
20 when the right to relief is clear." Hillsborough v. Superior Court,
21 109 N.H. 333, 334, 251 A.2d 325, 326 (1969). Without passing on the
22 merits of the jurisdictional contentions of the parties, we hold that a
23 writ of prohibition should not issue in this case. Manchester Education
24 Association v. Superior Court, 109 N.H. 513, 257 A.2d 23 (1969); Wyman v.
25 Durkin, No. 7083 (N.H. Dec. 16, 1974). We particularly note that nothing
26 in the denial of this petition without prejudice is to be construed as a
27 holding by this court that the superior court has authority and jurisdic-
28 tion to order a new election.

29 Petition denied without prejudice.

**STATEMENT OF HON. THOMAS J. McINTYRE, A U.S. SENATOR FROM
THE STATE OF NEW HAMPSHIRE (INTRODUCING MR. DURKIN)**

Senator McINTYRE. With the kind permission of the subcommittee, I would like to introduce Hon. John A. Durkin. Mr. Durkin, as you know, was the Democratic candidate for the office of U.S. Senator from New Hampshire, and is the petitioner in these proceedings. He is also my friend, and I want you to know that I campaigned for him and with him. And I sincerely hope that he will be declared the firm and final winner after this "longest election night" in New Hampshire history, and will join me to represent New Hampshire in the Senate of the United States.

But I also want you, Mr. Chairman and members of the subcommittee, to know this—I am not here today in behalf of John Durkin. I am here in behalf of the people of New Hampshire. They have now waited more than 2 months for the will that they expressed on November 5, 1974, to be recognized and confirmed.

The people of my State deserve a final, definitive, and impartial decision, a decision that accurately reflects the judgment they made on election day. Under the law, as it existed on election day, November 5, 1974, only one institution can make that determination now, Mr. Chairman, for the Constitution, New Hampshire law, and ample historical precedent make it clear that the Senate is the ultimate judge of the election and qualification of its members.

Senator PELL. I would now ask to come forward John A. Durkin, candidate for the U.S. Senate. I think our colleague, Senator McIntyre, is with him.

In view of the seriousness of these occasions, we are going to swear in all the witnesses. And so I would ask Mr. Durkin and any other of his colleagues who will speak for him, if they will stand and be sworn in.

Do you solemnly swear that the testimony you are about to give to this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

[All respond "I do."]

Senar PELL. Excuse me, it has been called to my attention that the record should show who stood. Senator McIntyre, Mr. Durkin—and would you introduce—

Mr. DOWNS. Attorney Tom Downs.

Senator PELL. And Mr. Downs stood and took the oath. And, Senator McIntyre, I understand you may introduce Mr. Durkin.

So I am here for one reason only—to appeal to you, to the full committee and to the Senate itself to determine what the voters indeed expressed on election day, 1974. Though a full count, a recount, and a ballot review have not clearly revealed the voters' verdict, we all know that verdict is there. For in an election where more than 222,000 votes were cast, the statistical chance for an absolute tie is so remote it virtually defies consideration.

Surely, close elections are nothing new. And just as surely they have been resolved—no matter how narrow the margin between victory and defeat.

In the 1960 Presidential election, more than 68 million Americans cast their ballots—and John F. Kennedy received 34,227,096 votes and

Richard M. Nixon 34,108,546. That election was decided by a margin of only seventeen-hundredths of 1 percent.

The 1968 Presidential election was almost as close, with Richard Nixon's victory edge a scant seven-tenths of 1 percent.

And then the year that I came to the Senate of the United States, 1962, was the year that Senator George McGovern won election in South Dakota by the hairbreadth margin of twenty-three hundredths of 1 percent.

So, Mr. Chairman and members of the subcommittee, we have had close elections before—many close elections. But somehow a winner was indeed determined.

The same is true in this case. All that is required here, Mr. Chairman and members of the subcommittee, is a fair, final and impartial reading of the will of the New Hampshire electorate. If this is done, if those disputed ballots are examined with scrupulous care, then the elusive verdict of November 5, 1974, will reveal itself. This is all John Durkin asks. This is all I ask. This is all New Hampshire asks.

Thank you, Mr. Chairman, and I present to you, Mr. John Durkin. Senator PELL. Thank you, Senator McIntyre, Mr. Durkin?

STATEMENT OF JOHN A. DURKIN, CONTESTANT FOR A NEW HAMPSHIRE SENATE SEAT, ACCOMPANIED BY THOMAS DOWNS

Mr. DURKIN. Thank you, Senator McIntyre, Senator Pell, Senator Byrd, Senator Griffin. I am happy to be here, even though it was a long journey. I think we now have the indoor record for the longest election night in history.

I would like to state at the outset that I am not here as a 38-year-old brown-eyed Democrat asking a democratically controlled Senate to give me any special consideration. I am here representing the people of New Hampshire. And I ask that I not be given, nor will I accept, any special consideration. But I also ask that I not be penalized because I am a Democrat.

Under New Hampshire law—I must stress that—under New Hampshire law and the U.S. Constitution, I am here representing the people of New Hampshire, the 110,000 that voted for me, the 110,000 that voted against me and the 200-odd thousand that chose to protest by not voting at all that day.

This is the only body, under the U.S. Constitution and the law of the State of New Hampshire, that can answer the serious question that we have and the real issue that we have presented or attempted to frame in that position.

At the outset, let me state that I would like to narrow the controversy, narrow the issues and to facilitate and make easier the tough job that you have before you, I publicly offer to stand aside on January 14 without prejudice—and I challenge my opponent also to stand aside—so the Senate can review the ballots in question and not be bothered with the question of who should be seated on the 14th.

Furthermore, in an effort to narrow the scope, I would like to stipulate that there are basically 400 ballots in question.

As Senator Pell so vividly demonstrated, you have two certificates. There is a bridge between those two certificates. The first certificate,

issued to John Durkin, was based on a physical recounting or physical retabulation of approximately 222,000 votes, including the machines.

The second certificate of Congressman Wyman is based on a review of 400 ballots.

The bridge between those certificates is 400 ballots or so that were reviewed by the Ballot Law Commission. Of those, I am willing to stipulate today that 50 or so, less than 50, are in any serious dispute.

And I offer to the subcommittee my assistant, Mr. Meara, who is intimately familiar with the ballots, as much so as is possible under New Hampshire law and practice. I offer him to assist the committee in finding those ballots, taking them out of the envelopes, under the watchful eye of whoever you—do it in a fishbowl, and I would recommend doing it in a goldfish bowl—to facilitate and narrow the issues you have before you.

I would like to stress again that we are on a constitutional trolley. We can't get off. It would have been much easier on my family, it would have been much easier on my supporters, it would have been much easier on myself—and I presume it would have been much easier on Congressman Wyman if we could have had a new election some weeks ago. We would have hopefully a final and clearcut decision.

But, as I say, under New Hampshire law and the Constitution, the people of New Hampshire—and actually the people of this country—are looking to you to decide which certificate is the valid certificate. They are looking to you to decide who won the November 5 election in 1974 for the Senate seat, the junior Senate seat in the State of New Hampshire.

I am not going to read the brief. I will try to paraphrase the brief or the statement this morning.

Just on January 5, last Friday, the New Hampshire Supreme Court reaffirmed a longstanding position that the courts do not traditionally involve themselves in legislative contests or legislative election contests, be it State or Federal. It is the most recent utterance of the New Hampshire Supreme Court, and it is their opinion, as it is the petitioner's, that this issue is properly before you, and the two certificates give you jurisdiction, if there were any question of jurisdiction.

Scope. Senator Griffin has pointed out there is no allegation of fraud, there is no allegation of fraud by election officials. Senator McIntyre and I—and I think everybody in the State of New Hampshire—are proud of the people of New Hampshire, that there was no election fraud, especially what has happened in the last 18 months. And I know I speak for Senator McIntyre and myself and the people of New Hampshire.

I submit the most reasonable means for the U.S. Senate to decide which certificate should be honored is to review the ballots ruled upon on the ballot law commission. In this manner the conflict between certificates can be resolved promptly on the basis of the ballots themselves. And I think that is essential.

Both of these certificates exist because of a tabulation of ballots. I think the Senate should concern itself first with a review of the 400 ballots that led to the second certificate. The ballots—it is sort of like poker, you turn them over and read the cards—the cards, like the ballots, speak for themselves.

In this manner a junior Senator from New Hampshire can be seated promptly, thereby giving the State full representation, thereby giving the forces in this body that want to start fighting unemployment, fighting inflation, and get this country moving economically again, can get started on it just as soon as possible.

And you can seat the person who comes up short on the ballots—seat the person who comes up ahead, rather, on the ballots, without prejudicing the claims of anyone else to go into alleged irregularities.

And I am willing to stipulate now that if you look at those ballots, and Louis Wyman comes out one vote ahead, I will get the next plane back to Manchester and resume practicing law in Manchester. If John Durkin comes out one vote ahead, I think it is your constitutional obligation to seat John Durkin without prejudice to any claims that Congressman Wyman may bring regarding alleged irregularities.

But I submit that if I am seated by one vote, that the allegations of irregularities will disappear faster than the snow earlier this week.

Under New Hampshire law, court decisions, custom of long standing, the primary consideration is the intent of the voter, where intent can be determined. And there is a presumption that the person who came out to vote actually intends to vote.

And under New Hampshire law—and I believe it is the law in Rhode Island and I believe it is the law in West Virginia—a ballot should be counted unless it is impossible to ascertain intent. It is my understanding in Michigan, it is a very strict construction by statute.

This principle of the intent is not only fundamental to the law of New Hampshire—I think it is fundamental to the Democratic Party, which is indicated by the urge to provide for post-card registration, to make it easier for more people to vote. And I think this procedure, this intent, to enfranchise as many people as possible should run all through this proceeding—and certainly it runs through New Hampshire law.

What I have attached to this morning's statement are several exhibits. They are Xerox copies of ballots. We think the ballots speak for themselves, and we have tried to reduce Xerox copies of the ballots. Needless to say—and no offense to the Xerox Corp.—something is lost in translation or transposition. We picked ones that we think establish a prima facie case that Senator-designate [sic] Wyman's certificate is invalid, in that the count cannot be sustained.

Just for the record—I would like to, with permission of the chairman, to indicate on the blowup New Hampshire ballot what has been considered a vote in the State of New Hampshire by court case and tradition, if it is all right with you, sir.

Senator PELL. Go ahead.

Mr. DURKIN. Under New Hampshire law, even though the law of New Hampshire says you shall put an X in the square or in the circle, the interpretations of ballots have been such to give rise, to give credit to the intent.

A mark such as this, outside the straight ticket—

Senator PELL. Can that bright light be turned off in back? We can't see.

Mr. DURKIN. An X mark such as this has been considered a straight Democratic ballot or a straight Republican ballot, if it is in that column.

A small, a very small X here has also been considered a straight Democratic or straight Republican—or a straight ballot.

Senator PELL. You mean a small X next to "Democratic" would be a straight ballot.

Mr. DURKIN. Yes, a small X virtually anywhere in this square, be it the Republican square or the Democratic square. A small fat check mark in this area has been considered a straight-ticket vote. A what we call the big X, where a person comes in and marks an X through the entire column has been considered a straight ballot for that party—in this case the Democratic Party.

No offense to the Republican Party, it is just closer to reach the Democratic Party. [Laughter.]

Senator PELL. Why don't you use the American Party? [Laughter.]

Mr. DURKIN. Also counted as a ballot for at least the offices in question—in some cases a straight ticket—is a medium size X, such as that. Also two X's have been considered a straight ballot.

Also check marks—as I said, a small check mark. And we stipulate that a large check mark through the entire column should be considered a straight vote as well.

Now, in the exhibits—and, pardon me, I don't have the actual number, but I will refer to it more specifically—we have four ballots that were not counted by the ballot law commission. And you have got to picture the day—it was the 5th of November, it was a cold rainy day in the north country in New Hampshire—people don't go out on days like that to cast nullities.

There are several ballots—one in Burling, ward 3, and one in Stewartstown, tucked up under the Canadian border, Canadian-Vermont border. X's in this part of the column, X's here in the bottom—the only mark on the ballot. And we submit to you that any reasonable interpretation of the voter intent would indicate that that was the only blank spot—and that should be considered a straight Democratic or a straight Republican ballot, such as the case may be.

I just offer that to give the committee evidence of what has been counted as ballots or what should be counted—this last one has not been counted, we submit that it should be when it is the only mark on the ballot, because people don't come out on cold rainy days to cast nullities.

Senator PELL. How does it work if you want to vote for one man on one ticket and all the others—how would you mark that?

Mr. DURKIN. Wel, we have, as you see—excuse me?

Senator PELL. If you wanted to vote for one man, Wyman, and all the other Democrats, how would you do that?

Mr. DURKIN. The traditional way is he would put the X in the square to the right of Congressman Wyman's name, and then he would vote by X, or it could be by check, for the rest.

Under New Hampshire law, although it is contrary—I think it is the minority holding—I think it is different in West Virginia—the space where they would put, say, an X aside of Louie's name, and then an X in the straight party column—the majority of cases—and we don't have any of these in question before us today—but the majority rule is—and I think the better reasoned cases are—to hold that this is a general intent, but it is overruled by the specific intent to vote for a particular person.

We are not here to talk about the Ballot Law Commission. I have made some rather strong statements about the Ballot Law Commission at home—I am not backing away from those statements—but I am not going to take up your time with repeating those statements, unless there are questions directed at me.

I think the ballots—and we have offered a dozen or so here—I think the ballots, like the cards, speak for themselves and impeach the rulings of the Ballot Law Commission, and almost compel this subcommittee to look at the 400 ballots in question.

The attached exhibits—and we are talking about page 4—the attached exhibits A-1, A-2, and A-3 are Xerox copies of three ballots; two of which—A-1 and A-3—the Ballot Law Commission counted for Wyman, one of which was counted for neither. An examination of these ballots demonstrates inconsistent rulings by the Ballot Law Commission. A-1 was correctly ruled by the Secretary of State to be a double vote, because there was an X in both the Wyman and Chimento squares.

The Ballot Law Commission erroneously ruled that this was a Wyman vote by finding the Chimento mark a crossout. And I ask you to look at the first one, marked 247W—it is a ballot from Keene, Ward 5. That was counted as a vote for Congressman Wyman.

A-2 is a clear vote for the petitioner—there are no other marks in the Senate column. Yet it was not counted for Durkin. A-3 was a clear cross-out and a clear obliteration of the X in the Wyman column, yet that was counted for Wyman.

The second set, B-1 and B-2, were counted blank, as no votes. But B-3 was counted for Wyman.

The Ballot Law Commission obviously used the slight marks in the Wyman squares in B-1, and B-2—and you can see there, again I would like to assure the committee or the subcommittee that the ballots themselves are much more eloquent than I am.

The Ballot Law Commission uses the slight marks in the Wyman squares in B-1 and B-2 to declare those ballots blank, as a double vote—even though there were good X's in the Durkin square.

And B-3, which is very similar, the Ballot Law Commission counted the check for Wyman but ignored the slight mark in the Durkin—I think a clearcut inconsistency in ruling.

Exhibit C—the C exhibits. Page 6. I hope I am not proceeding too rapidly. I thought someone asked me to slow down.

Senator PELL. No.

Mr. DURKIN. Excuse me. The next set, the C ballots, for the most part I will pass over them, with your indulgence, inasmuch as we think they are an integral part of the case—but that is essentially what I diagramed on the blown-up ballot.

You can see the first five were counted as votes and the last four, with what we call the small X—that would be exhibit C-6. Stewartstown, as I say, is up on the Vermont and Canadian border—it was pretty cold that day, I don't think people come out intended not to vote. Same way with Burling, Ward 3—it is in the heart of the north country. Exhibit C-8 Somersworth—again the only mark on the ballot. And Farmington, which is fairly close to Somersworth, the only mark on the ballot—and to count those as no votes disenfranchises four voters, we think contrary to accepted law, custom and practice in New Hampshire and the great majority of the States.

Exhibits D-1 through D-3 show additional inconsistencies. As you see, the first one, D-1, town of Merrimac, a check mark was counted. D-2 with a big X in the Republican column, in addition to a small X in the Thompson square, was counted for Wyman. But ballot D-3, with a check in the Leonard square and a big check in the Democratic column—and the end of that check slices right through the Durkin square—was not counted for Durkin.

Exhibit E is a clear example of the intent of the voter to cancel the name of Louis C. Wyman, yet it was counted as a Wyman vote—and you can see the person very clearly put a line through Louie Wyman's name. And yet that was counted for Wyman.

I submit that it is very difficult for any other form of obliteration—that is as complete as possible, unless possibly the person had a secretary that had Snow-Pak or something in her purse and wanted to completely obliterate it.

Exhibit F—there is a faint slash mark in both the Republican and Democratic circles, yet there is a clear check mark for every office, including the ballot square for Durkin. The intent and expression of the voter I think is crystal clear, that they intended to vote for the petitioner, but it was not counted as a Durkin vote.

Gentlemen, I think we are all involved in a constitutional—

Senator BYRD. Mr. Chairman, may I ask a question here?

Senator PELL. Certainly.

Senator BYRD. Mr. Durkin, the various exhibits that you have presented to the committee here, are we to assume that these are included in the 50 more or less that you say you would be contend to stipulate, or are they included beyond that, in the 400?

Mr. DURKIN. Senator, it is my opinion or belief that they are in the 50. I don't think—I can't speak for Louie—but I don't think that there is any serious dispute in any more than 50 of those ballots of the 400 or so that were reviewed by the ballot law commission.

And there is another 900 or so that counsel didn't even bother to argue before the ballot law commission, and the protest was preserved, I suppose, as a defense mechanism more than anything else.

Senator BYRD. In the case of each exhibit, are we to assume that there is only the one ballot of that kind, or may we assume that in some instances the exhibit that is shown is merely an example—and there are two, three, four, or more ballots of similar make-up?

Mr. DURKIN. Right. Senator, I would be less than candid if I did not say that we picked the two categories attached to this statement—the ones that were most compelling on their face and ones that also appeared, were able to be reproduced by Xerox equipment.

So there are some other series that are equally compelling, but there are erasures or obliterated votes and they cannot be reflected adequately on a Xerox or any machine, for that matter.

And so these are, for the most part, examples. I hesitate to say—I think the four with the little X's. I think that is it, as far as the four X's—the little X's in the bottom.

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

RE: APPEAL OF HON. LOUIS C. WYMAN

The ballot to which this document is affixed was protested
by Wyman *is counted Blank*
The Secretary of State (~~allowed~~) (disallowed) the ballot.

Upon review the Ballot Law Commission (~~sustains~~) (overrules)
the decision of the Secretary of State.

no count / vote Wyman

NEW HAMPSHIRE BALLOT LAW COMMISSION

By Ronald P. Bruce
12/1/24

AMERICAN PARTY
HOMER PAPERS

CARMEN C. CHIMENTO, Bookkeeper



DEMOCRATIC

RICHARD W. LEONARD, Nabua

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HELEN L. HEISS, New Ipswich

JEAN R. WALLIN, Nabua

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KATHERINE M. J. ANSA, Keene

RICHARD P. PELQUIN, Keene

GEORGE W. SCHUYER, Keene

PETER S. EPIEFS, Keene

JAMES S. MEATH, Hamsville

STUART V. NIMS, Keene

KATHLEEN M. D. VIEAU, Jeffrey

DAVID A. BARRITT, Keene

DARBELE J. ALI HUB, Keene

JAMES G. SMART, Keene

DOROTHY J. LABAR, Keene



REPUBLICAN

MELDRIM THOMSON, JR., Orford

LOUIS C. WYMAN, Manchester

JAMES C. CLEVELAND, New London

BERNARD A. STREETER, JR., Nabua

KENNETH P. COLDY, Keene

HAROLD F. DREW, Keene

ANDREA A. SCRANTON, Keene

GEORGE W. SCHUYER, Keene

EDWARD J. O'BRIEN, Keene

WARREN G. ALLEN, Charlestown

EVELYN S. CHAKALOS, Keene

PHYLLIS J. PARKER, Keene

DAVID A. BARRITT, Keene

HAROLD F. DREW, Keene

For Governor
Vote for any ONE

For United States Senator
Vote for any ONE

For Representative in Congress
Vote for any ONE

For Councilor
Vote for any ONE

For State Senator
Vote for any ONE

For Representatives to the
General Court
Vote for any TWO

For Sheriff
Vote for any ONE

For County Clerkenay
Vote for any ONE

For County Treasurer
Vote for any ONE

For Register of Deeds
Vote for any ONE

For Register of Probate
Vote for any ONE

For County Commissioner
Vote for any ONE

For Supervisor of the Check-List
Vote for any ONE

For Moderator
Vote for any ONE

For Ward Clerk
Vote for any ONE

Keene W-5

TOWN

1 COUNTED FOR *Blond*

PROTESTED BY *Wiggin*

 <p>REPUBLICAN</p>	 <p>DEMOCRATIC</p>	<p>AMERICAN PARTY NON-PARTIS</p> <p>CARMEN C. CHIMENTO, Headline</p>
<p>For Governor Vote for any ONE <input checked="" type="checkbox"/></p> <p>For United States Senator Vote for any ONE <input type="checkbox"/></p> <p>For Representative in Congress Vote for any ONE <input type="checkbox"/></p> <p>For County Judge Vote for any ONE <input checked="" type="checkbox"/></p> <p>For State Senator Vote for any ONE <input checked="" type="checkbox"/></p> <p>For Representatives to the General Court Vote for any TWO <input checked="" type="checkbox"/></p> <p>For Sheriff Vote for any ONE <input checked="" type="checkbox"/></p> <p>For County Attorney Vote for any ONE <input checked="" type="checkbox"/></p> <p>For County Treasurer Vote for any ONE <input type="checkbox"/></p> <p>For Register of Probate Vote for any ONE <input type="checkbox"/></p> <p>For County Commissioner Vote for any ONE <input type="checkbox"/></p> <p>For Supervisor of the Check-list Vote for any ONE <input checked="" type="checkbox"/></p> <p>For Notary Vote for any ONE <input type="checkbox"/></p> <p>For Ward Clerk Vote for any ONE <input type="checkbox"/></p>	<p>RICHARD W. LEONARD, Italian <input type="checkbox"/></p> <p>JOHN A. DURBIN, Mar. Ill. <input checked="" type="checkbox"/></p> <p>HELEN L. BLESS, New Ipsw. Ch. <input type="checkbox"/></p> <p>JEAN B. WALLIN, N. Mass. <input type="checkbox"/></p> <p>CLESSION J. HIGANBELL, I. Conn. <input type="checkbox"/></p> <p>KATHERINE M. HANNA, I. Conn. <input type="checkbox"/></p> <p>RICHARD P. PELOQUIN, Keene <input type="checkbox"/></p> <p>GEORGE W. SCHINER, Keene <input checked="" type="checkbox"/></p> <p>PETER S. ESPIES, Keene <input type="checkbox"/></p> <p>JAMES S. MEATH, Harroville <input type="checkbox"/></p> <p>STUART V. NIMS, Keene <input type="checkbox"/></p> <p>KATHLEEN M. DAVILLU, affray <input type="checkbox"/></p> <p>DAVID A. BARRETT, Keene <input type="checkbox"/></p> <p>DARRELE J. AUTIER, Keene <input type="checkbox"/></p> <p>JAMES G. SMART, Keene <input type="checkbox"/></p> <p>DOUGLBY J. LABAR, Keene <input type="checkbox"/></p>	<p>AMERICAN PARTY NON-PARTIS</p> <p>CARMEN C. CHIMENTO, Headline</p>
<p>MEADRIM THOMSON, Jr., Offord <input checked="" type="checkbox"/></p> <p>LOUIS C. WYMAN, N. Mass. <input type="checkbox"/></p> <p>JAMES C. CLEVELAND, N. & London <input type="checkbox"/></p> <p>BERNARD A. STREETER, Jr., N. Mass. <input checked="" type="checkbox"/></p> <p>KENNETH P. COLBY, Keene <input checked="" type="checkbox"/></p> <p>HAROLD F. DREW, Keene <input checked="" type="checkbox"/></p> <p>ANDREA A. SCRANTON, Keene <input type="checkbox"/></p> <p>GEORGE W. SCHINER, Keene <input checked="" type="checkbox"/></p> <p>EDWARD J. O'BRIEN, Keene <input type="checkbox"/></p> <p>WARREN G. ALLEN, Chesterfield <input type="checkbox"/></p> <p>EVELYN S. CHAKALOS, Keene <input type="checkbox"/></p> <p>PHYLLIS J. PARKER, Keene <input type="checkbox"/></p> <p>DAVID A. BARRETT, Keene <input type="checkbox"/></p> <p>HAROLD F. DREW, Keene <input checked="" type="checkbox"/></p>	<p>16 TOWN</p> <p>136 TOWN</p> <p>D TOWN</p>	<p>COUNTED FOR</p> <p>PROTESTED BY</p>

AMERICAN PARTY
HONK PAPERS

GARMEN C. CHIMENTO, Brookfield



DEMOCRATIC

<input type="checkbox"/>	RICHARD W. LEON III, Nehas
<input type="checkbox"/>	JOHN A. DURKIN, Inchester
<input type="checkbox"/>	NORMAN E. D'AMICO JR., Manchester
<input type="checkbox"/>	EDWARD CASSIDY, Manchester
<input type="checkbox"/>	WALTER F. HEALY, Manchester
<input type="checkbox"/>	BEATRICE V. BOURQUELL, Hooksett
<input type="checkbox"/>	ROBERT A. DIONNI, Hooksett
<input type="checkbox"/>	DORIS J. RILEY, Hooksett
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<input type="checkbox"/>	VINCENT J. NARDI II, Concord
<input type="checkbox"/>	RAYMOND C. CUMBERG, Loudon
<input type="checkbox"/>	KATHLEEN M. ROY ZIAY, Concord
<input type="checkbox"/>	CAROL E. INGRAHAM, Concord
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<input checked="" type="checkbox"/>	PHILIP A. LAFOND, Hooksett
<input type="checkbox"/>	RICHARD D. RILEY, Hooksett



REPUBLICAN

<input checked="" type="checkbox"/>	MELDRIM THOMSON, JR., Orford
<input checked="" type="checkbox"/>	LOUIS C. WYMAN, Manchester
<input checked="" type="checkbox"/>	DAVID A. BANKS, Chechester
<input checked="" type="checkbox"/>	LOUIS D'ALLESANDRO, Manchester
<input type="checkbox"/>	RICHARD F. FERDINANDO, Manchester
<input checked="" type="checkbox"/>	LAURENT J. BOUCHER, Hooksett
<input checked="" type="checkbox"/>	JUDITH ANN HESS, Hooksett
<input checked="" type="checkbox"/>	EDITH S. RICE, Hooksett
<input checked="" type="checkbox"/>	RONALD DANA DANIELS, JR., Hopkinton
<input checked="" type="checkbox"/>	RICHARD A. HAMPE, Hopkinton
<input checked="" type="checkbox"/>	RICHARD D. HANSON, Bow
<input checked="" type="checkbox"/>	KATHLEEN M. ROY GUAY, Concord
<input checked="" type="checkbox"/>	CAROL E. INGRAHAM, Concord
<input checked="" type="checkbox"/>	PETER J. SPAULDING, Bow, Concord
<input type="checkbox"/>	CHARLES E. FOSTER, Hooksett
<input checked="" type="checkbox"/>	RICHARD D. RILEY, Hooksett

For Governor	<input checked="" type="checkbox"/>
For United States Senator	<input checked="" type="checkbox"/>
For Representative in Congress	<input checked="" type="checkbox"/>
For Councilor	<input type="checkbox"/>
For State Auditor	<input type="checkbox"/>
For Representative to the General Court	<input type="checkbox"/>
For Sheriff	<input checked="" type="checkbox"/>
For County Attorney	<input checked="" type="checkbox"/>
For County Treasurer	<input checked="" type="checkbox"/>
For Register of Deeds	<input checked="" type="checkbox"/>
For Registrar of Probate	<input checked="" type="checkbox"/>
For County Commissioner	<input checked="" type="checkbox"/>
For Supervisor of the Check-list	<input type="checkbox"/>
For Moderator	<input checked="" type="checkbox"/>

f. J. Doherty
TOWN

COUNTED FOR *W. J. Doherty*

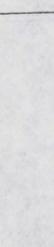
PROTESTED BY *W. J. Doherty*

B. The Ballot Law Commission was inconsistent in its rulings on the following three ballots.

Ballots B1 and B2 were counted blank, but B3 was counted for Wyman.

An examination of these ballots shows clear inconsistency.

The Ballot Law Commission used the slight marks in the Wyman squares in B1 and B2 to declare those ballots blank as a double vote, even though there were good x's in the Durkin squares. In B3, the Ballot Law Commission counted a check mark for Wyman, even though there was a mark in the Durkin square.

<p>For Governor Vote for any ONE</p> <p>For United States Senator Vote for any ONE</p> <p>For Representative to Congress Vote for any ONE</p> <p>For Councilor Vote for any ONE</p> <p>For State Senator Vote for any ONE</p> <p>For Representatives to the General Court Vote for any TWO</p> <p>For Sheriff Vote for any ONE</p> <p>For County Attorney Vote for any ONE</p> <p>For County Treasurer Vote for any ONE</p> <p>For Register of Deeds Vote for any ONE</p> <p>For Register of Probate Vote for any ONE</p> <p>For County Commissioner Vote for any ONE</p> <p>For Supervisors of the Check-list Vote for any THREE</p> <p>For Moderator Vote for any ONE</p>	<p>REPUBLICAN</p>  <p>MELDREIM THOMSON, JR., Oxford <input checked="" type="checkbox"/></p> <p>LOUIS C. WYMAN, Manchester <input checked="" type="checkbox"/></p> <p>JAMES C. CLEVELAND, New London <input checked="" type="checkbox"/></p> <p>LYLE E. HERRON, Northumberland <input checked="" type="checkbox"/></p> <p>LAURIER LAMONTAGNE, Berlin <input type="checkbox"/></p> <p>EMILE A. MARTINEAU, Berlin <input type="checkbox"/></p> <p>PIERRE J. MORIN, Berlin <input type="checkbox"/></p> <p>JOHN D. MORTON, SR., Berlin <input type="checkbox"/></p> <p>WARREN A. BARTLETT, Lancaster <input type="checkbox"/></p> <p>A. GLADYS MACLEAN, Lancaster <input type="checkbox"/></p> <p>RENE BERGERON, Berlin <input type="checkbox"/></p>	<p>DEMOCRATIC</p>  <p>RICHARD W. LEONARD, Nashua <input type="checkbox"/></p> <p>JOHN A. DURKIN, Manchester <input checked="" type="checkbox"/></p> <p>EILEEN L. BLISS, New Ipswich <input type="checkbox"/></p> <p>ROMEO J. THIERIAULT, Berlin <input checked="" type="checkbox"/></p> <p>LAURIER LAMONTAGNE, Berlin <input checked="" type="checkbox"/></p> <p>REBECCA A. GAGNON, Berlin <input checked="" type="checkbox"/></p> <p>RICHARD L. PULLIN, Berlin <input checked="" type="checkbox"/></p> <p>EMILE A. MARTINEAU, Berlin <input checked="" type="checkbox"/></p> <p>PIERRE J. MORIN, Berlin <input checked="" type="checkbox"/></p> <p>JOHN D. MORTON, SR., Berlin <input checked="" type="checkbox"/></p> <p>WARREN A. BARTLETT, Lancaster <input checked="" type="checkbox"/></p> <p>A. GLADYS MACLEAN, Lancaster <input checked="" type="checkbox"/></p> <p>RENE BERGERON, Berlin <input checked="" type="checkbox"/></p> <p>ROLAND CAQUETTE, Berlin <input type="checkbox"/></p> <p>EMILE HANSEN, Berlin <input checked="" type="checkbox"/></p> <p>ADRIEN J. THIERIAULT, Berlin <input checked="" type="checkbox"/></p> <p>RENE DUMOULIN, Berlin <input checked="" type="checkbox"/></p> <p>OSCAR J. CARRIER, Berlin <input type="checkbox"/></p>	<p>AMERICAN PARTY NOM. PARRIS</p> <p>CARMEN C. CHIMENTO, Brookline <input type="checkbox"/></p>
<p>Counted for _____</p> <p>TOWN <i>Berlin 48</i></p> <p>Protected by <i>nm</i></p> <p>Protected by <i>W. Berlin</i></p>			



REPUBLICAN

For Governor Vote for any ONE	<input checked="" type="checkbox"/>	MELDEIR THOMPSON, Jr., Oxford
For United States Senator Vote for any ONE	<input checked="" type="checkbox"/>	LOUIS C. WYMAN, Manchester
For Representative to Congress Vote for any ONE	<input checked="" type="checkbox"/>	JAMES C. CLEVELAND, New London
For Councilor Vote for any ONE	<input checked="" type="checkbox"/>	BERNARD A. STEETER, Jr., Nahua
For State Senator Vote for any ONE	<input checked="" type="checkbox"/>	C. R. TROWBRIDGE, Dublin
For Representative to the Legislature Vote for any ONE	<input type="checkbox"/>	ARMAS W. HILLBACK, Bodge
For Sheriff Vote for any ONE	<input checked="" type="checkbox"/>	GEORGE W. SCINYVER, Keene
For County Attorney Vote for any ONE	<input type="checkbox"/>	EDWARD J. O'BRIEN, Keene
For County Treasurer Vote for any ONE	<input checked="" type="checkbox"/>	WARREN G. ALLEN, Chesterfield
For Register of Deeds Vote for any ONE	<input type="checkbox"/>	EVELYN S. CHAKALOS, Keene
For Register of Probate Vote for any ONE	<input checked="" type="checkbox"/>	PHYLLIS J. PARKER, Keene
For County Commissioner Vote for any ONE	<input type="checkbox"/>	HAROLD E. SAVAGE, Bodge
For Supervisor of the School-district Vote for any ONE	<input type="checkbox"/>	JOAN R. O'NEIL, Bodge
For Moderator Vote for any ONE	<input type="checkbox"/>	DAVID M. TOWER, Bodge



DEMOCRATIC

For Governor Vote for any ONE	<input type="checkbox"/>	RICHARD W. LEONARD, N. Sha
For United States Senator Vote for any ONE	<input checked="" type="checkbox"/>	JOHN A. DUBKIN, Manchester
For Representative to Congress Vote for any ONE	<input type="checkbox"/>	HELEN L. BLISS, New Ipswich
For Councilor Vote for any ONE	<input type="checkbox"/>	JEAN R. WALLIN, Nahua
For State Senator Vote for any ONE	<input type="checkbox"/>	C. R. TROWBRIDGE, Dublin
For Representative to the Legislature Vote for any ONE	<input type="checkbox"/>	GEORGE W. SCINYVER, Keene
For Sheriff Vote for any ONE	<input type="checkbox"/>	PETER S. BISHES, Keene
For County Attorney Vote for any ONE	<input type="checkbox"/>	JAMES S. MEATH, Haverhill
For County Treasurer Vote for any ONE	<input type="checkbox"/>	STUART V. NIMS, Keene
For Register of Deeds Vote for any ONE	<input type="checkbox"/>	KATHLEEN M. DAVIEAU, Jr, Troy
For Register of Probate Vote for any ONE	<input checked="" type="checkbox"/>	ROBERT L. BONNER, Swanton
For County Commissioner Vote for any ONE	<input type="checkbox"/>	
For Supervisor of the School-district Vote for any ONE	<input type="checkbox"/>	
For Moderator Vote for any ONE	<input type="checkbox"/>	

AMERICAN PARTY
Vote, Papers

CARMEN C. CHIMENTO, Brookline

1 COUNTED FOR Keene
TOWN Keene

PROTECTED BY Wagoner

Reuter

C. The Ballot Law Commission counted certain ballots with clear x's and didn't count others with x's even though the voters' intent was clear on all such ballots.

Following are 9 xerox copies of ballots being Ballot Exhibits C1 through C9. The first five, C1 through C5, were counted as votes and four equally clear ballots C6 through C9 were not counted.

Exhibit C1 shows the extent to which the Ballot Law Commission went to enfranchise a voter if there were only one mark on the ballot.

C2 is a clear small x in the Democratic column and was properly counted as a straight Democratic vote.

C3 was properly counted for Durkin.

C4 and C5 -- the "big X's" were properly counted for Durkin.

C6, 7, 8, and 9 were erroneously not counted for Durkin. If the "small x" of C2 and the "big X" of C5 were counted, then, the medium-size "x" of C6, 7, 8, and 9 should be counted.

Failure to count as votes these four "x" marks disenfranchises four voters as the "x" mark was the only mark on each ballot.

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

RE: APPEAL OF HON. LOUIS C. WYMAN

The ballot to which this document is affixed was protested
by W yman

The Secretary of State ~~(allowed)~~ ^{cancelled - no vote} (disallowed) the ballot.

Upon review the Ballot Law Commission (~~sustains~~) (overrules)
the decision of the Secretary of State.

we count 1 vote W yman

NEW HAMPSHIRE BALLOT LAW COMMISSION

By Ronald P. Luce

12/8/24

	DEMOCRATIC	AMERICAN PARTY NOM. PAPERS
For Governor Vote for any ONE	<input type="checkbox"/> MELDREM THOMSON, JR., Oxford	<input type="checkbox"/> RICHARD W. LEON, Midd., Nashua
For United States Senator Vote for any ONE	<input type="checkbox"/> LOUIS C. WYMAN, Manchester	<input type="checkbox"/> JOHN A. DURKIN, Manchester
For Representative in Congress Vote for any ONE	<input type="checkbox"/> DAVID A. BARKS, Chichester	<input type="checkbox"/> NORMAN E. D'AMORE, Manchester
For Councilor Vote for any ONE	<input type="checkbox"/> EYEL E. HERSON, Northumberland	<input type="checkbox"/> ROMEO J. THERIAULT, Berlin
For State Senator Vote for any ONE	<input type="checkbox"/> EDITH B. GARDNER, Gilford	<input type="checkbox"/> JOSEPH KASPER, JR., Lewiston
For Representatives to the General Court Vote for any TWO	<input type="checkbox"/> RODERICK ALLEN, Brookfield	
For Sheriff Vote for any ONE	<input type="checkbox"/> ARTHUR W. FULLAM, Ouilpée	
For County Attorney Vote for any ONE	<input type="checkbox"/> GRANT A. FLOYD, Southwick	<input type="checkbox"/> ELIZABETH H. GREENE, Conway
For County Treasurer Vote for any ONE	<input type="checkbox"/> FREDERIC L. COX, Ouilpée	
For Register of Deeds Vote for any ONE	<input type="checkbox"/> G. COLBY WEBER, Freedom	
For Register of Probate Vote for any ONE	<input type="checkbox"/> PERCY A. BLAKE, Madison	
For County Commissioners Vote for any THREE	<input type="checkbox"/> RUTH C. ECKHOFF, Ouilpée	
For Supervisor of the Check-list Vote for any ONE	<input type="checkbox"/> E. MORTON LEAVITT, Ouilpée	<input type="checkbox"/> DONALD M. ERBER, Conway
For Moderator Vote for any ONE	<input type="checkbox"/> MILBURN F. ROBERTS, Conway	<input type="checkbox"/> SHIRLEY E. GANNON, Brookfield
	<input type="checkbox"/> GORDON O. THAYER, Tiltonboro	
	<input type="checkbox"/> LUCY B. SHIBERLICH, Brookfield	
	<input type="checkbox"/> EARL B. BROWN, Brookfield	



TOWN Brookfield
 COUNTED FOR W. W. Ross
 PROTESTED BY S. J. [Signature]

	 REPUBLICAN	 DEMOCRATIC	AMERICAN PARTY <small>1904-1908</small>	
For Governor Vote for any ONE	<input type="checkbox"/> MELDREM THOMSON, JR., Oxford	<input type="checkbox"/> RICHARD W. LEONARD, Nashua	<input type="checkbox"/>	
For United States Senator Vote for any ONE	<input type="checkbox"/> LOUIS C. WYMAN, Manchester	<input type="checkbox"/> JOHN A. DURKIN, Manchester	<input type="checkbox"/>	
For Representatives in Congress Vote for any ONE	<input type="checkbox"/> JAMES C. CLEVELAND, New London	<input type="checkbox"/> HELEN L. BLISS, New Ipswich	<input type="checkbox"/>	
For Councillor Vote for any ONE	<input type="checkbox"/> LYLE E. HERSON, Northumberland	<input type="checkbox"/> ROMEO J. THEBAULT, B-ella	<input type="checkbox"/>	
For Mayor Vote for any ONE	<input type="checkbox"/> LAURIER LAMONTAGNE, Berlin	<input type="checkbox"/> LAURIER LAMONTAGNE, Berlin	<input type="checkbox"/>	
For Representatives to the General Court Vote for any TWO	<input type="checkbox"/> BENNET CLAGG, Northumberland	<input type="checkbox"/> BENNET CLAGG, Northumberland	<input type="checkbox"/>	
For Sheriff Vote for any ONE	<input type="checkbox"/> ROGER L. HUNT, Stratford	<input type="checkbox"/> ROGER L. HUNT, Stratford	<input type="checkbox"/>	
For County Clerk Vote for any ONE	<input type="checkbox"/> EMILE A. MARTINEAU, Berlin	<input type="checkbox"/> EMILE A. MARTINEAU, Berlin	<input type="checkbox"/>	
For County Treasurer Vote for any ONE	<input type="checkbox"/> PIERRE J. MORIN, Berlin	<input type="checkbox"/> PIERRE J. MORIN, Berlin	<input type="checkbox"/>	
For Register of Deeds Vote for any ONE	<input type="checkbox"/> JOHN D. MORTON, Sr., Berlin	<input type="checkbox"/> JOHN D. MORTON, Sr., Berlin	<input type="checkbox"/>	
For Register of Probates Vote for any ONE	<input type="checkbox"/> WARREN A. BARTLETT, Lancaster	<input type="checkbox"/> WARREN A. BARTLETT, Lancaster	<input type="checkbox"/>	
For County Commissioner Vote for any ONE	<input type="checkbox"/> A. GLADYS MACLEAN, Lancaster	<input type="checkbox"/> A. GLADYS MACLEAN, Lancaster	<input type="checkbox"/>	
For Supervisory of the Check-Kit Vote for any ONE	<input type="checkbox"/> THOMAS E. CORRIGAN, Lancaster	<input type="checkbox"/> THOMAS E. CORRIGAN, Lancaster	<input type="checkbox"/>	
For Moderator Vote for any ONE	<input type="checkbox"/> HELEN C. ANDERSON, Northumberland	<input type="checkbox"/> HELEN C. ANDERSON, Northumberland	<input type="checkbox"/>	
	<input type="checkbox"/> LYLE E. HERSON, Northumberland	<input type="checkbox"/> LYLE E. HERSON, Northumberland	<input type="checkbox"/>	
TOWN <i>Northumberland</i>				
COUNTED FOR <i>Wasson</i>				
PROTESTED BY <i>Wasson</i>				

NORTHUMBERLAND

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

RE: APPEAL OF HON. LOUIS C. WYMAN

The ballot to which this document is affixed was protested
by Dunkin counted out for none
The Secretary of State (~~allowed~~) (~~disallowed~~) the ballot.

Upon review the Ballot Law Commission (~~sustains~~) (overrules)
the decision of the Secretary of State.

no count i vote for Dunkin

NEW HAMPSHIRE BALLOT LAW COMMISSION

By Ronald P. [Signature]
12/17/74

AMERICAN PARTY
NON-PARTISAN

CARMEN C. CHIMENTO, Brookline

DEMOCRATIC

RICHARD W. LEONARD, Nashua	<input type="checkbox"/>
JOHN A. DURKIN, Manchester	<input type="checkbox"/>
NORMAN B. D'AMICO, Manchester	<input type="checkbox"/>
ROBERT O. NICHOLS, Hopkinton	<input type="checkbox"/>
JOSEPH KASPEL, S.L. Incola	<input type="checkbox"/>
CLARENCE B. BARTLETT, Epsom	<input type="checkbox"/>
RUSSELL D. MORGAN, SR., Concord	<input type="checkbox"/>
VINCENT J. NARDI, Concord	<input type="checkbox"/>
RAYMOND C. CLIPMINK, Londonderry	<input type="checkbox"/>
KATHLEEN M. ROY GUAY, Concord	<input type="checkbox"/>
CAROL E. INGRAHAM, Concord	<input type="checkbox"/>
RICHARD GEWEHL, D. Doughton	<input type="checkbox"/>
ARNOLD L. WELLS, Pittsfield	<input type="checkbox"/>
ADELAID E. PELLISSIER, Pittsfield	<input type="checkbox"/>

REPUBLICAN

MEDRIM THOMPSON, JR., Orford	<input type="checkbox"/>
LOUIS C. WYMAN, Manchester	<input type="checkbox"/>
DAVID A. BANKS, Chickadee	<input type="checkbox"/>
JAMES H. HAYES, Concord	<input type="checkbox"/>
EDITH B. GARDNER, Gilford	<input type="checkbox"/>
KENARD F. AYLES, Pittsfield	<input checked="" type="checkbox"/>
CLARENCE B. BARTLETT, Epsom	<input type="checkbox"/>
RONALD DANA DANIELS, JR., Hopkinton	<input type="checkbox"/>
RICHARD A. HAMPE, Hopkinton	<input type="checkbox"/>
RICHARD D. HANSON, Bow	<input type="checkbox"/>
KATHLEEN M. ROY GUAY, Concord	<input type="checkbox"/>
CAROL E. INGRAHAM, Concord	<input type="checkbox"/>
PETER J. SPALDING, Bradford	<input type="checkbox"/>
ADELAID E. PELLISSIER, Pittsfield	<input type="checkbox"/>

For Governor Vote for any ONE	<input type="checkbox"/>
For United States Senator Vote for any ONE	<input type="checkbox"/>
For Representative in Congress Vote for any ONE	<input type="checkbox"/>
For State Senator Vote for any ONE	<input type="checkbox"/>
For State Senator Vote for any ONE	<input type="checkbox"/>
For Representatives to the General Court Vote for any TWO	<input type="checkbox"/>
For Sheriff Vote for any ONE	<input type="checkbox"/>
For County Attorney Vote for any ONE	<input type="checkbox"/>
For County Treasurer Vote for any ONE	<input type="checkbox"/>
For Register of Deeds Vote for any ONE	<input type="checkbox"/>
For Register of Probate Vote for any ONE	<input type="checkbox"/>
For County Commissioner Vote for any ONE	<input type="checkbox"/>
For Supervisor of the Check-list Vote for any ONE	<input type="checkbox"/>
For Moderator Vote for any ONE	<input type="checkbox"/>

Pittsfield
TOWN

COUNTED FOR none

PROTESTED BY None

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

RE: APPEAL OF HON. LOUIS C. WYMAN

The ballot to which this document is affixed was protested
by Durkin

The Secretary of State ~~(allowed)~~ ^{counted none} (disallowed) the ballot.

Upon review the Ballot Law Commission ~~(sustains)~~ (overrules)
the decision of the Secretary of State.

we count 1 vote Durkin

NEW HAMPSHIRE BALLOT LAW COMMISSION

By Ronald S. Swane
12/19/71

	 REPUBLICAN <small>FOR ANY ONE</small>		 DEMOCRATIC <small>FOR ANY ONE</small>		AMERICAN PARTY <small>NOVA PAPERS</small>	
For Governor Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For United States Senator Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Representative to Congress Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Councillor Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For State Senator Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Representatives to the General Court Vote for any TWO	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Sheriff Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For County Attorney Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For County Treasurer Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Register of Deeds Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For County Commissioner Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Supervisor of the Check-list Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Moderator Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	MEDDUM THOMPSON, JR., Oxford	JOHN A. DURIEN, Manchester	RICHARD W. LEONARD, Viduan	JOHN A. DURIEN, Manchester	CARMEN C. CHIMENTO, Brookline	
	LOUIS C. WYMAN, Manchester	JAMES C. CLEVELAND, New London	HELEN L. BLISS, New Ipswich			
	JAMES C. CLEVELAND, New London	LYLE E. HERSON, Northumberland	ROSIE J. O'BRIEN, Berlin			
	LAURIE LAUGHTON, Berlin	LAURIE LAUGHTON, Berlin	LAURIE LAUGHTON, Berlin			
	HAROLD W. BURNS, Whitefield	HAROLD W. BURNS, Whitefield	DWIGHT E. MERRILL, Jefferson			
	MABEL L. RICHARDSON, Randolph	MABEL L. RICHARDSON, Randolph	MABEL L. RICHARDSON, Randolph			
	EMILE A. MARTINEAU, Berlin	EMILE A. MARTINEAU, Berlin	EMILE A. MARTINEAU, Berlin			
	PIERRE J. MORIN, Berlin	PIERRE J. MORIN, Berlin	PIERRE J. MORIN, Berlin			
	JOHN D. MORTON, SR., Berlin	JOHN D. MORTON, SR., Berlin	JOHN D. MORTON, SR., Berlin			
	WARREN A. BARTLETT, Lancaster	WARREN A. BARTLETT, Lancaster	WARREN A. BARTLETT, Lancaster			
	A. GLADYS MACLEAN, Lancaster	A. GLADYS MACLEAN, Lancaster	A. GLADYS MACLEAN, Lancaster			
	RENE BERGERON, Berlin	RENE BERGERON, Berlin	RENE BERGERON, Berlin			
	FLORA C. DAY, Milan	FLORA C. DAY, Milan				
	RONALD HAWKINS, Milan	RONALD HAWKINS, Milan				

TOWN
 Milan
 COUNTED FOR Blank

PROTESTED BY Dusk

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

RE: APPEAL OF HON. LOUIS C. WYMAN

The ballot to which this document is affixed was protested
by Durkin.

The Secretary of State (~~allowed~~) (disallowed) the ballot.

Upon review the Ballot Law Commission (~~reaffirms~~) (overrules)
the decision of the Secretary of State.

we count 1 vote Durkin

NEW HAMPSHIRE BALLOT LAW COMMISSION

By Ronald [Signature]
12/19/24

1111
TOWNSHIP

COUNTED FOR _____

PROTESTED BY CI. nuel

DEMOCRATIC	
<input type="checkbox"/>	RICHARD W. LEONARD, Nashua
<input type="checkbox"/>	JOHN A. DURKIN, Manchester
<input type="checkbox"/>	NORMAN E. D'AMOUR, Manchester
<input type="checkbox"/>	ROBERT F. O'NEIL, Salem
<input type="checkbox"/>	BILEEN FOLEY, Portsmouth
<input type="checkbox"/>	GUY CHICHESTER, Rye
<input type="checkbox"/>	EDWARD J. GONZALEZ, Derry
<input type="checkbox"/>	EDWARD J. HOWARD, Exeter
<input type="checkbox"/>	JOHN C. DRISCOLL, Portsmouth

REPUBLICAN	
<input type="checkbox"/>	MELDRIM THOMPSON, JR., Oxford
<input type="checkbox"/>	LOUIS C. WYMAN, Manchester
<input type="checkbox"/>	DAVID A. BANKS, Chichester
<input type="checkbox"/>	LEON G. YEATON, Dover
<input type="checkbox"/>	FRANK TONIS, Rye
<input type="checkbox"/>	MELISSA A. APPEL, Rye
<input type="checkbox"/>	ELIZABETH A. GREENE, Rye
<input type="checkbox"/>	RICHARD S. LOCKHART, New Castle
<input type="checkbox"/>	GEORGE SAMFSON, Brentwood
<input type="checkbox"/>	CARLETON ELDREDGE, Stratham
<input type="checkbox"/>	WINSTON H. LOTHROP, Exeter
<input type="checkbox"/>	EDITH E. HOLLAND, Exeter
<input type="checkbox"/>	EDWARD J. HOWARD, Exeter
<input type="checkbox"/>	C. CECIL DAMIE, Portsmouth
<input type="checkbox"/>	ROBERT S. BARBER, Rye
<input type="checkbox"/>	DOUGLAS R. GRAY, Rye

<input type="checkbox"/>	For Governor Vote for any ONE
<input type="checkbox"/>	For United States Senator Vote for any ONE
<input type="checkbox"/>	For Representative in Congress Vote for any ONE
<input type="checkbox"/>	For Councilor Vote for any ONE
<input type="checkbox"/>	For State Senator Vote for any ONE
<input type="checkbox"/>	For Representatives to the General Court Vote for any THREE
<input type="checkbox"/>	For Sheriff Vote for any ONE
<input type="checkbox"/>	For County Attorney Vote for any ONE
<input type="checkbox"/>	For County Treasurer Vote for any ONE
<input type="checkbox"/>	For Register of Deeds Vote for any ONE
<input type="checkbox"/>	For Register of Probate Vote for any ONE
<input type="checkbox"/>	For Commissioner of the Superior Court Vote for any ONE
<input type="checkbox"/>	For Supervisor of the Check-list Vote for any ONE
<input type="checkbox"/>	For Moderator Vote for any ONE

AI

CARMEN C. CHIMENTO, Brookline

INDEPENDENT
LOCAL PARTIES

JOAN T. FORD, Salem

COUNTED FOR _____

PROTESTED BY _____

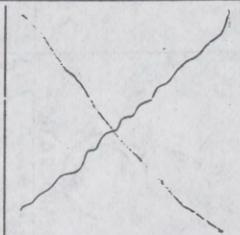
AMERICAN PARTY
NON-PAPERS

CARMEN C. CHIMENTO, Bookliner



DEMOCRATIC

- RICHARD W. LEONARD, No. 148
- JOHN A. DURKIN, Member
- HELEN L. BLISS, New Ipswich
- ROMEO J. THERIAULT, Bell
- LAURIE LAMONTAGNE, Berlin
- BURNHAM A. JUDD, Peabody
- PAUL L. FIERCK, Seawardon
- MARGUERITE H. WISWELL, Colbrook
- EMILE A. MARTINEAU, Bell
- PIERRE J. MORIN, Berlin
- JOHN D. MORTON, SR., Bell
- WARREN A. BARTLETT, Lanesier
- A. GLADYS MACLEAN, Lanesier



REPUBLICAN

- HELDRIH THOMSON, JR., Oxford
- LOUIS C. WYMAN, Member
- JAMES C. CLEVELAND, New London
- LYLE E. HESOM, Northumberland
- LAURIE LAMONTAGNE, Berlin
- HARRY F. HIGGINS, Peabody
- BURNHAM A. JUDD, Peabody
- MARGUERITE H. WISWELL, Colbrook
- EMILE A. MARTINEAU, Berlin
- PIERRE J. MORIN, Berlin
- JOHN D. MORTON, SR., Berlin
- WARREN A. BARTLETT, Lanesier
- A. GLADYS MACLEAN, Lanesier
- NORMAN S. BRUNGOT, Colbrook
- NORMA H. BURNS, Seawardon

- For Governor
Vote for any ONE
- For United States Senator
Vote for any ONE
- For Representative in Congress
Vote for any ONE
- For County Treasurer
Vote for any ONE
- For State Senator
Vote for any ONE
- For Representatives to the
General Court
Vote for any THREE
- For Sheriff
Vote for any ONE
- For County Attorney
Vote for any ONE
- For County Treasurer
Vote for any ONE
- For Register of Deeds
Vote for any ONE
- For Registrar of Probate
Vote for any ONE
- For County Commissioner
Vote for any ONE
- For Supervisor of the Check-list
Vote for any ONE

Staudstern
TOWN

COUNTED FOR Bland

PHOTOSTED BY Dunk

REPUBLICAN		DEMOCRATIC	
For Governor Vote for any ONE	<input type="checkbox"/>	RICHARD W. LEONARD, Hoboken	<input type="checkbox"/>
For United States Senator Vote for any ONE	<input type="checkbox"/>	JOHN A. DURKIN, Manchester	<input type="checkbox"/>
For Representative in Congress Vote for any ONE	<input type="checkbox"/>	HELEN L. BISS, New Ipswich	<input type="checkbox"/>
For Councillor Vote for any ONE	<input type="checkbox"/>	ROMEO J. THERIAULT, Berlin	<input type="checkbox"/>
For State Senator Vote for any THREE	<input type="checkbox"/>	LAURIER LAMONTAGNE, Berlin	<input type="checkbox"/>
For Representatives to the General Court Vote for any TWO	<input type="checkbox"/>	JAMES B. COONEY, Berlin	<input type="checkbox"/>
For Sheriff Vote for any ONE	<input type="checkbox"/>	GEORGE E. LEBLANC, Berlin	<input type="checkbox"/>
For County Attorney Vote for any ONE	<input type="checkbox"/>	EMILE A. MARTINEAU, Berlin	<input type="checkbox"/>
For County Treasurer Vote for any ONE	<input type="checkbox"/>	PIERRE J. MORIN, Berlin	<input type="checkbox"/>
For Register of Deeds Vote for any ONE	<input type="checkbox"/>	JOHN D. MORTON, SR., Berlin	<input type="checkbox"/>
For Register of Probate Vote for any ONE	<input type="checkbox"/>	WARREN A. BARTLETT, Lancaster	<input type="checkbox"/>
For County Commissioner Vote for any ONE	<input type="checkbox"/>	A. GLADYS McLEAN, Lancaster	<input type="checkbox"/>
For Supervisors of the Check-list Vote for any THREE	<input type="checkbox"/>	RENE BERGON, Berlin	<input type="checkbox"/>
For Moderator	<input type="checkbox"/>	LOUIS E. DELONGE, Berlin	<input type="checkbox"/>
	<input type="checkbox"/>	EDWARD E. HUDSONY, Berlin	<input type="checkbox"/>

AMERICAN PARTY
HOLD PAPERS

CARMEN C. CHIMENTO, Brookline



X

Berlin W-3

TOWN

1. COUNTED FOR Island

PROTESTED BY Dunkin

 REPUBLICAN		 DEMOCRATIC		AMERICAN PARTY <small>1964 Platform</small>	
<input type="checkbox"/> For Governor <small>Vote for any ONE</small>	<input type="checkbox"/> MELDRETH THOMPSON, JR., Oxford	<input type="checkbox"/> RICHARD W. LEON, JR., Durham	<input type="checkbox"/> CARMEN C. CHIMENTO, Brockton	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For United States Senator <small>Vote for any ONE</small>	<input type="checkbox"/> LOUIS C. WYMAN, Manchester	<input type="checkbox"/> JOHN A. DURKIN, Manchester	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For Representative in Congress <small>Vote for any ONE</small>	<input type="checkbox"/> DAVID A. BANKS, Cokkner	<input type="checkbox"/> NORMAN E. DYMO, JR., Manchester	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For Councilor <small>Vote for any ONE</small>	<input type="checkbox"/> JAMES H. HAYES, Concord	<input type="checkbox"/> ROBERT O. NICHOLS, Hopkinton	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For State Senator <small>Vote for any ONE</small>	<input type="checkbox"/> EDITH B. GARDNER, Gilford	<input type="checkbox"/> JOSEPH KASPER, SR., J. locale	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For Representatives to the General Court <small>Vote for any THREE</small>	<input type="checkbox"/> ETHEL M. CANNEY, Farmington	<input type="checkbox"/> HAROLD T. FOLEY, Farmington	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For Sheriff <small>Vote for any ONE</small>	<input type="checkbox"/> WILFRIED B. OSGOOD, Farmington	<input type="checkbox"/> RAMON MARTINEAU, Farmington	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For County Attorney <small>Vote for any ONE</small>	<input type="checkbox"/> JAMES H. FARSHLEY, New Durham	<input type="checkbox"/> STELLE G. PLACK, Farmington	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For County Treasurer <small>Vote for any ONE</small>	<input type="checkbox"/> HAROLD B. KNIGHT, Durham	<input type="checkbox"/> ANDREW L. ROUCHARD, Dover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For Registrar of Deeds <small>Vote for any ONE</small>	<input type="checkbox"/> T. CASEY MOHER, Durham	<input type="checkbox"/> HAMILTON E. KEARIS, JR., Dover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For Registrar of Probate <small>Vote for any ONE</small>	<input type="checkbox"/> LEO CORRIER, Rochester	<input type="checkbox"/> LEO CORRIER, Rochester	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> For County Commissioners <small>Vote for any THREE</small>	<input type="checkbox"/> MARGORIE E. HOLMES, Dover	<input type="checkbox"/> LAURA D. CARRY, Dover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> MARGARET WALDRON OGDEN, Dover	<input type="checkbox"/> MARGARET WALDRON OGDEN, Dover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> NEIL H. ROBINSON, Dover	<input type="checkbox"/> ANDREW E. COURTEAU, SR., Dover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> RICHARD L. SMITH, Rochester	<input type="checkbox"/> PAUL J. DUMONT, Rochester	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> GEORGE A. YOUNG, Rochester	<input type="checkbox"/> JOHN L. FLANNAGAN, Dover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> STELLE G. PLACK, Farmington	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Farmington
TOP

COUNTED FOR *Blank*

PROTESTED BY *Durham*

D. The following three ballots are additional examples of inconsistent rulings.

The following three ballots, being Exhibits D1 through D3, show additional inconsistencies.

Check marks are accepted as showing the intent of the voter, as well as x's. See ballot D1 as example of a counted check mark.

A ballot, D2, with a big X in the Republican column in addition to a small x in the Thomson square was counted for Wyman.

But ballot D3, with an equally clear big check in the Democratic column and a small check in the Leonard square was not counted for Durkin.

REPUBLICAN		DEMOCRATIC	
For Governor Vote for any ONE	MELDREH THOMSON, JR., Oxford	<input type="checkbox"/>	RICHARD W. LEONARD, No. 108
For United States Senator Vote for any ONE	LOUIS C. WYMAN, Manchester	<input type="checkbox"/>	JOHN A. DUKEN, Manchester
For Representative in Congress Vote for any ONE	DAVID A. BANKS, Clarksville	<input type="checkbox"/>	NORMAN E. D'AMOURA, Manchester
For Councillor Vote for any ONE	BENARD A. STREETER, JR., Nashua	<input type="checkbox"/>	JEAN B. WALLIN, Nashua
For State's Solicitor Vote for any ONE	ROBERT F. MONIER, Goffstown	<input type="checkbox"/>	J. WILCOX BROWN, Dunbarton
	MINNIE F. CARSWELL, Merrimack	<input type="checkbox"/>	MINNIE F. CARSWELL, Merrimack
	KONALD E. GEIGER, Merrimack	<input type="checkbox"/>	DONALD B. DWYER, Merrimack
For Representatives to the General Court Vote for any FIVE	GUY R. GRANGER, JR., Merrimack	<input type="checkbox"/>	JANIS R. LINT, Merrimack
	ELAINE T. LYONS, Merrimack	<input type="checkbox"/>	ANTHONY J. PELLEGRINO, Merrimack
	DAVID E. PICEERING, Merrimack	<input type="checkbox"/>	MARGUERITE M. NYAN, Merrimack
	LAWRENCE J. SHEA, Manchester	<input type="checkbox"/>	LAWRENCE J. SHEA, Manchester
For Sheriff Vote for any ONE	EDWARD P. MORAN, JR., Nashua	<input type="checkbox"/>	RAYMOND A. CLOUTIER, Goffstown
For County Attorney Vote for any ONE	GUY R. GRANGER, JR., Merrimack	<input type="checkbox"/>	ROBERT F. KIEFF, Manchester
For County Registrar Vote for any ONE	JOSEPH G. MALTAIN, Manchester	<input type="checkbox"/>	JOSEPH G. MALTAIN, Manchester
For Register of Deeds Vote for any ONE	C. EDWARD BOURASSA, Manchester	<input type="checkbox"/>	C. EDWARD BOURASSA, Manchester
For Register of Probate Vote for any ONE	EDWARD J. LOBACKE, Ferrisburgh	<input type="checkbox"/>	ROSARIO RIGGIARDI, Milford
For County Commissioner Vote for any ONE	EDNA G. TURNER, Merrimack	<input type="checkbox"/>	JOHN E. LYONS, Merrimack

AMERICAN PARTY
NOM. PAPERS

CARMEN C. CHIMENTO, Brookline



Merrimack
TOWN

COUNTED FOR *Dunbar*

PROTECTED BY *W. G. ...*

NEW HAMPSHIRE BALLOT LAW COMMISSION

HEARING

RE: APPEAL OF HON. LOUIS C. WYMAN

The ballot to which this document is affixed was protested
by Wyman.

The Secretary of State (~~allowed~~) (disallowed) the ballot.

Upon review the Ballot Law Commission (~~sustains~~) (overrules)
the decision of the Secretary of State.

we count a vote for Wyman

NEW HAMPSHIRE BALLOT LAW COMMISSION

By Ronald Brown

12/19/74

Count
 TOWN
 /
 COUNTED FOR Blond
 PROTECTED BY R. Neal
AN



DEMOCRATIC

- RICHARD W. LEONARD, Norwich
- JOHN A. DURKIN, Manchester
- NORMAN E. D'AMORE, Manchester
- ROBERT E. O'NEIL, Salem
- EILEEN FOLEY, Portsmouth
- GUY CHICHESTER, N.Y.
- EDWARD J. GONT, Br. Dury
- EDWARD J. HOW, Br. Dury
- JOHN C. DRISCOLL, Portsmouth

INDEPENDENT

NOM. PAPERS
 JOAN T. FORD, Salem



REPUBLICAN

- MELDRIM THOMSON, JR., Oxford
- LOUIS C. WYMAN, Manchester
- DAVID A. BANKS, Chichester
- LEON G. YEATON, Dover
- FRANK TONIS, N.Y.
- MELISS A. APPEL, N.Y.
- ELIZABETH A. GREENE, N.Y.
- RICHARD S. LOCKHART, New Castle
- GEORGE SAMPSON, Brentwood
- CARLETON ELDREDGE, Stratham
- WINSTON H. LOTHROP, Essex
- EDITH E. HOLLAND, Essex
- EDWARD J. HOWARD, Essex
- C. CRAIG DAHLE, Portsmouth
- ROBERT S. BARBER, N.Y.
- DOUGLAS R. GRAY, N.Y.

- For Governor
Vote for any ONE
- For United States Senator
Vote for any ONE
- For Representative in Congress
Vote for any ONE
- For Councilor
Vote for any ONE
- For State Senator
Vote for any ONE
- For Representatives to the
General Court
Vote for any THREE
- For Sheriff
Vote for any ONE
- For County Assessor
Vote for any ONE
- For County Treasurer
Vote for any ONE
- For Register of Deeds
Vote for any ONE
- For Register of Probate
Vote for any ONE
- For County Commissioner
Vote for any ONE
- For Supervisor of the Check-list
Vote for any ONE
- For Moderator
Vote for any ONE

/ COUNTED FOR None
 PROTECTED BY 4711011

	 REPUBLICAN	 DEMOCRATIC	AMERICAN PARTY <small>NO. 1 PAPER</small>	INDEPENDENT <small>NO. 1 PAPER</small>
For Governor Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For United States Senator Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
For Representative in Congress Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Councillor Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For State Senator Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Representatives to the General Court Vote for any SIX	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Sheriff Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For County Attorney Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For County Treasurer Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Registrar of Deeds Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For Register of Probate Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
For County Commissioner Vote for any ONE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	MELBREM THOMSON, JR., Oxford LOUIS C. WYMAN, Manchester JAMES C. CLEVELAND, New London LOUIS D'ALESSANDRO, Manchester G. PHILIP RODGERS, Hudson SUSAN E. BAIRD, Hudson ROBERT W. HILL, Hudson GILBERT C. NOBLE, Hudson REICH L. PARKER, Hudson STANLEY N. SEABER, SR., Hudson LEONARD A. SMITH, Hudson LAWRENCE J. SHEA, Manchester EDWARD P. MORAN, JR., Nahant GUY H. GRANGER, JR., Merrimack JOSEPH G. MALTAIN, Manchester C. EDWARD BOURASSA, Manchester EDWARD J. EDMACK, Ferrisburgh	RICHARD W. LEONARD, N. Ashm HELEN E. BEISS, New Ipswich EDWARD CASIDY, March 2nd THOMAS J. CLAVAU, Houlton GEORGE H. BAKER, SR., H. Ashm JOHN M. BENDAR, Hudson GENE E. GRAVELL, Hudson NORMAN E. LEFVEL, H. Ashm ANDREW J. POLAK, Hudson JOHN P. QUIGLEY, Hudson LAWRENCE J. SHEA, Manchester RAYMOND A. GROUTIN, Hudson ROBERT F. KERR, Manchester JOSEPH G. MALTAIN, Merrimack C. EDWARD BOURASSA, M. Ashm ROGARD RICCARDI, Merrimack GEORGE H. BAKER, SR., H. Ashm LAKE M. MUNDAY, Hudson	GARMEN C. CHIMENTO, Brookline	STANLEY ALLUKONIS, Hudson

Hudson
TOWN

COUNTED FOR 243

PROTECTED BY W. W. W.

E. The Ballot Law Commission erred in counting the following ballot for Wyman.

Exhibit E is a clear example of the intent of the voter to cancel the name of Louis C. Wyman, yet it was counted as a Wyman vote.

 REPUBLICAN		 DEMOCRATIC	
For Governor Vote for any ONE	<input checked="" type="checkbox"/>	RICHARD W. LEONARD, 7 th Dist.	<input type="checkbox"/>
For United States Senator Vote for any ONE	<input checked="" type="checkbox"/>	JOHN A. DURBIN, Manchester	<input type="checkbox"/>
For Representative in Congress Vote for any ONE	<input checked="" type="checkbox"/>	NORMAN E. D'AMOURS, Manchester	<input type="checkbox"/>
For Councilor Vote for any ONE	<input checked="" type="checkbox"/>	EDWARD CASSIDY, Manchester	<input type="checkbox"/>
For School Director Vote for any ONE	<input checked="" type="checkbox"/>	PAUL E. PROVOST, Manchester	<input type="checkbox"/>
For Representatives to the General Court Vote for any FOUR	<input checked="" type="checkbox"/>	JOHN A. BURKE, Manchester	<input type="checkbox"/>
For Sheriff Vote for any ONE	<input checked="" type="checkbox"/>	TIMOTHY K. O'CONNOR, Manchester	<input type="checkbox"/>
For County Attorney Vote for any ONE	<input checked="" type="checkbox"/>	ROSIE C. VACIONI, Manchester	<input type="checkbox"/>
For County Treasurer Vote for any ONE	<input checked="" type="checkbox"/>	LOUIS J. ZIANKA, Manchester	<input type="checkbox"/>
For Registrar of Deeds Vote for any ONE	<input checked="" type="checkbox"/>	LAWRENCE J. SHEA, Manchester	<input type="checkbox"/>
For Registrar of Probate Vote for any ONE	<input checked="" type="checkbox"/>	RAYMOND A. CLOUTIER, Doverton	<input type="checkbox"/>
For County Commissioner Vote for any ONE	<input checked="" type="checkbox"/>	ROBERT F. KEENE, Manchester	<input type="checkbox"/>
For Moderator Vote for any ONE	<input checked="" type="checkbox"/>	JOSEPH G. MALTAIS, Manchester	<input type="checkbox"/>
For Ward Clerk	<input checked="" type="checkbox"/>	C. EDWARD BOURASSA, Manchester	<input type="checkbox"/>
		GERARD J. DIGRACK, Manchester	<input type="checkbox"/>
		WAYNE A. AMSDEN, Manchester	<input type="checkbox"/>
		HARRIET B. ZIANKA, Manchester	<input type="checkbox"/>

AMERICAN PARTY
ROM, PAPERS

CARMEN C. CHIMENTO, Brookline

Man. 49
TOWN

COUNTED FOR W. W. W. W. W.

PROTECTED BY Rustan

F. The following ballot shows a clear intent to vote for Durkin.

The following ballot, Exhibit F, has a faint slash in both the Republican and Democratic circles. Yet there is clear check mark for every office including the ballot square for Durkin.

The intent and expression of the voter is clearly a vote for Durkin.



REPUBLICAN

For Governor Vote for any ONE	<input type="checkbox"/>
For United States Senator Vote for any ONE	<input type="checkbox"/>
For Representative in Congress Vote for any ONE	<input type="checkbox"/>
For Councilor Vote for any ONE	<input checked="" type="checkbox"/>
For State Senator Vote for any ONE	<input type="checkbox"/>
For Representatives to the General Court Vote for any TWO	<input checked="" type="checkbox"/>
For Sheriff Vote for any ONE	<input type="checkbox"/>
For County Attorney Vote for any ONE	<input checked="" type="checkbox"/>
For County Treasurer Vote for any ONE	<input checked="" type="checkbox"/>
For Register of Deeds Vote for any ONE	<input checked="" type="checkbox"/>
For Register of Probate Vote for any ONE	<input type="checkbox"/>
For County Commissioner Vote for any ONE	<input type="checkbox"/>
For Supervisor of the Check-list Vote for any ONE	<input type="checkbox"/>
For Auditor Vote for any ONE	<input type="checkbox"/>



DEMOCRATIC

RICHARD W. LEONARDI, Italian	<input checked="" type="checkbox"/>
JOHN A. DURKIN, Manchester	<input checked="" type="checkbox"/>
NORMAN E. D'AMOURS, Touchette	<input checked="" type="checkbox"/>
ROBERT E. O'NEIL, Selma	<input type="checkbox"/>
ROBERT F. PRESTON, Isle aux Pins Newmarket	<input checked="" type="checkbox"/>
PATRICIA JENNINGS BIA NOBETTA, Newmarket	<input type="checkbox"/>
JOHN TWARDUS, Newmarket	<input checked="" type="checkbox"/>
EDWARD J. GONTEL, Dory	<input type="checkbox"/>
EDWARD J. HOWARD, Essex	<input checked="" type="checkbox"/>
RALPH E. SOUTHWICK, St. Johns	<input checked="" type="checkbox"/>
PATRICIA M. FICTEAU, Newmarket	<input checked="" type="checkbox"/>
RONALD LEMBURK, Newmarket	<input checked="" type="checkbox"/>

AMERICAN PARTY
ROMA PAPERS

CARMEN C. CHIMENTO, Brookline

INDEPENDENT
ROMA PAPERS

JOHN T. FORD, Salem

JOHN H. O'BRIEN, Raymond

Newmarket
TOWN

COUNTED FOR *meat*

PROTESTED BY *Newbery*

CONCLUSION

The petition of John A. Durkin reflects the inescapable fact that the people of New Hampshire under New Hampshire law and the U.S. Constitution have only the U.S. Senate to look to to determine once and for all who was elected as the Junior Senator from New Hampshire on November 5, 1974. The U.S. Senate and only the U.S. Senate has jurisdiction to resolve this controversy. This controversy is much more important than John A. Durkin, Louis C. Wyman, or C. Carmen Chimento. We are but bit players on a far ranging constitutional stage.

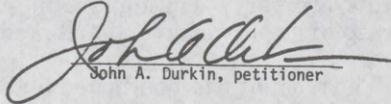
Petitioner seeks only a fair and objective review of the 400 ballots ruled upon by the Ballot Law Commission.

Petitioner neither requests nor will he accept special consideration because he is a Democrat. However, petitioner requests that he not be penalized because he is a Democrat.

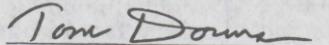
I believe an objective review of the ballots ruled upon by the Ballot Law Commission will clearly indicate that the election certificate of John A. Durkin is the only valid certificate and the one which should be honored by this body.

It is further respectfully urged that you commence the review of the ballots as soon as reasonably possible, as only the ballots themselves can resolve this controversy once and for all.

RESPECTFULLY SUBMITTED,


John A. Durkin, petitioner

Dated: January 8, 1975


Tom Downs
603 Capital Savings and Loan Bldg.
Lansing, Michigan
Attorney for John A. Durkin

Senator BYRD. You have indicated that you have selected certain ballots which in your judgment made the best case for you to present as samples. Are there, in your judgment, among the 50 or among the 400—first the 50—which you would stipulate—second, the 400, plus or minus—I guess it is a plus—which were reviewed by the ballot law commission—are there those which, if you were Mr. Wyman, you would be presenting at this time as the best samples of what would make the best case for you which you understandably may have not presented here?

Mr. DURKIN. Senator, to the best of my knowledge—we have looked at those ballots from every conceivable angle for so long, I think we are quite familiar with them. Our best estimate is that there are 20 probable votes for Durkin, along the lines of what we showed here. There is one probable vote for Congressman Wyman. There are nine—for want of a better term—maybes for Durkin and seven maybes, if you will, for Wyman, in those 50 ballots that we are talking about.

Senator BYRD. Mr. Chairman, I did not mean to begin asking questions out of line. I want to proceed in accordance with whatever rule the chairman wishes to follow here. I merely wanted to interject those questions at that point.

Senator PELL. Anybody should feel free to interject whenever they wish, but my idea, my thought, was to let the witness present his testimony—then, following the 10-minute rule, we could ask questions if we wished, then move on to Congressman Wyman, then move on from him to the ballot law commission. Then I was going to hold off on some of my questions to the two claimants, until they could both be up here together and we could ask the same question of them both.

So I was going to limit my questions in the first round.

Mr. DURKIN. Do I have your permission to proceed, sir?

Senator PELL. Yes; proceed.

Mr. DURKIN. I would like to point out also—a couple of things I think are very, very important, I think the committee should have a grasp of. And we have distributed a chronology of events this morning as well.

The recount was conducted by Secretary of State Stark. Secretary of State Stark was appointed, elected, by the Republican legislature, he conducted a very fair recount, he is an honorable man—he conducted a fair recount, he didn't do us any favors, nor do we seek any favors, nor do we expect any.

But I would like to point out clearly for the record—we won that recount fairly and squarely—and a certificate, one of those certificates you held up earlier in your hand, Senator, was a result of that recount. And my opponent would like to convince you that this was a continuous proceeding and the secretary of state did not count all the ballots. But I submit that that is mainly argument.

Two other points now that we raised in the petition—the writeins on machines. I am not going to sit before you today and argue that you shouldn't count or the Ballot Law Commission should not have counted writeins on the machines, because I think, consistent with the philosophy that you enfranchise just as many people as possible, should obtain here as well.

However, I think the Ballot Law Commission was remiss in that they only had five writeins and they refused our request to test those

particular machines in question, where those writeins were recorded, to make sure—there is testimony in the record that does not pertain to that question. And I think the Ballot Law Commission was remiss in not physically testing the machine in Nashua and the two or three machines at most in Exeter, to make sure—because the AVM machine, if not properly adapted, you could conceivably have three votes. You could have a vote in block 32, a writein, you could have a vote in block 2, and then if the machine was not properly set up, you could also have a vote on the lever. Conceivably you could have three votes on a particular machine. There is no evidence that there was three votes, but I think the Ballot Law Commission was remiss in not testing the particular machines.

We are not going to push the—and ask you to throw out those writeins. But I would like to point out also that the security of the rolls in Exeter, I don't think was as tight as it should have been.

And I think taking into consideration that the Ballot Law Commission had issued a rule going back to 1958, when Congressman Wyman was on the Ballot Law Commission, saying that in a general election, writein votes would not be counted if your name was on the machine—I think there is an added possibility that the officials programming those machines might not have looked twice, because they were familiar with the rule that you did not count writeins. I just offer that as background for the subcommittee. We are not urging you to disenfranchise those people who chose, for what reason, for one reason or another, to vote by writing in when they could have voted on the machine.

Senator GRIFFIN. Mr. Durkin, before you go onto another point, I think your recognition of the importance of machine voting is appropriate—and you have criticized the Ballot Law Commission for not taking certain action with regard to votes cast on certain voting machines.

It is not a fact that there are a number of other questions that the Ballot Law Commission did not address itself to relating to voting machines; questions in some instances where voting machines were not operating properly; where it appeared that more votes were cast on the voting machine than were indicated that people voted—things of that kind?

I am not familiar with all the details, but it is my understanding that questions of that nature have been raised. While I recognize that the laws of Louisiana are not the laws of New Hampshire, we might just note in passing that earlier this week in Louisiana there was a new runoff election for a Member of the House of Representatives. This runoff was called because only one voting machine was malfunctioning in a particular precinct, where the tally on that voting machine could make a difference in the outcome of the election.

I guess I am raising this by way of questioning your suggestion that we look at only some 50 ballots. We will have to develop the evidence, but I think you are aware of the fact that there are a lot of questions about the malfunction of various voting machines in various wards and towns in the State, is that not a fact?

Mr. DURKIN. No; Senator

Senator GRIFFIN. Not a fact?

Mr. DURKIN. I will be glad to explain it.

Senator GRIFFIN. All right, I would like to hear it.

Mr. DURKIN. Fine. Let me state at the outset, Senator, that there is absolutely no correlation between the situation in the Lacaze race in Louisiana and—

Senator GRIFFIN. I am just saying that in Louisiana one machine was malfunctioning and a whole new election was required.

Now, here, I understand, there are a lot of questions about voting machines, whether they functioned properly, that you haven't even brought before the committee.

Mr. DURKIN. Well, Senator, if you will permit, I will answer your question. You have raised the prospect—you were the one that brought up the situation in Louisiana, so I think I must lay that to rest. There is absolutely no correlation between the situation with the Lacaze malfunctioning machine—in that case, a candidate counter malfunctioned.

There are allegations—and I will be glad to submit to the subcommittee a copy of the reserve case that went up before the New Hampshire Supreme Court last week—and it is the one that the New Hampshire Supreme Court indicated that the New Hampshire courts traditionally did not take jurisdiction.

In that reserve case—and I would be also happy to provide you with a copy of the transcript of the city clerk of the city of Nashua—and I believe that pretty well covers the allegations of irregularities that have been offered by Congressman Wyman. That in itself poses an interesting situation, where we have Congressman Wyman claiming the election was invalid in New Hampshire, but yet he is here asking you to seat him on the basis of a certificate which grew out of his alleged invalid election. An interesting point of law, a twist of law.

But let me address the Manchester machines first. The Manchester machines are new machines. They are the R. F. Shoup machines, and in that reserve case you will see the affidavit of the attorney who interviewed Dr. Shoup in Pennsylvania in preparation for the superior court case in New Hampshire.

And we will be happy to provide you with a breakdown of the voting results in the Governor-Senate-congressional races in the city of Manchester on all the machines, and you will see that the candidate counters—there was no malfunction in the candidate counters.

You had two problems in Manchester. The protective counters on some of the machines malfunctioned. They are not connected to the candidate counter, nor are they connected to the public counter. It is a completely isolated counting mechanism—and there is no evidence whatsoever, other than the pure unadulterated speculation of the Wyman forces, that the candidate counters malfunctioned. I think a review of the results in those three races in the top of the ticket will show that.

Secondly—if you want I will proceed—there is another aspect of the Manchester machines. More people were checked off the checklist in Manchester than actually voted. This was only the third time that Manchester residents had voted by that particular machine. And what happened—and we can provide affidavits, if you would like—is that some people forgot and didn't realize that after they either pulled the straight lever or the various levers that there was another lever down in the lower left-hand corner that had to be pushed down. Many people thought that it was the type machine where you opened the curtain and it registered your vote.

And inasmuch as I carried Manchester, I think if any votes—I probably suffered more than my opponent—of any votes that were not registered, because people didn't complete the process in Manchester.

With respect to the checklists—we will be glad to submit—but a review of the situation wherein there are more votes cast than voters checked off the checklist, I think arise out of the fact that some of the supervisors of the checklist were talking and gabbing and not checking off voters. And I submit that happens in most every election.

And I think a review of the record will show that that happened more so in predominantly Republican communities, and so if anyone was benefited, again my opponent benefited, if there was. But I point out, Senator, you, in your opening statement proudly noted that there was no evidence of allegation of fraud. And in light of there was no allegation of fraud, I think the ballots speak for themselves and cannot be impeached—or should not be impeached—by a collateral activity such as a checklist.

With respect to the absentee voters in Nashua, Congressman Wyman has made much of the fact that the absentee voters, the ballots were not handled in what he feels the proper manner in the city of Nashua. And you have the testimony before you of Lionel Gilbert, the city clerk of Nashua, under oath, the Superior Court of New Hampshire, being cross-examined—and I think you will see that there were no irregularities warranting any change in the city of Nashua.

I submit for the record that the procedure of handling absentee ballots in New Hampshire could be tightening up. I also submit that, generally speaking, the Democrats, rather than the Republicans, take a beating in the absentee ballots. I would be glad to stipulate further, if it please the subcommittee, to disregard all the absentee ballots and throw out all the absentee ballots in the State of New Hampshire.

Senator BYRD. Mr. Chairman, for my own edification, where are we in our round of questioning? Has the witness completed his statement and are we interjecting questions or is Mr. Griffin on his 15 minutes?

Senator PELL. No, no. Mr. Durkin is presenting his original testimony, and as a courtesy, if any of us feel compelled to offer questions while doing so—we should interrupt, this was an interpolation.

Why don't we leave Mr. Durkin to finish and resolve not to interrupt him until he is through?

Senator BYRD. Mr. Chairman, I don't think that is necessarily the best procedure. There are times when I think there must be an interruption made at the precise point the witness states something. I can't write shorthand. I can't follow him in making notes as fast as he is speaking.

Senator PELL. Let's proceed the way we have.

Senator BYRD. Then I have a question of him.

Senator PELL. OK.

Senator BYRD. All right; but the reason I ask my question as to whether or not Senator Griffin was in his time turn, I didn't want to ask the question if he was. If he is not, then I would like to—

Senator PELL. No; time hasn't started yet.

Senator BYRD. All right, Mr. Durkin, you have covered several areas in your response to Senator Griffin. He asked a question about voting machines, but you first said something to the effect that the ballot

committee refused to consider certain—or refused to test or examine certain voting machines, if I recall; am I correct?

Mr. DURKIN. Yes, sir.

Senator BYRD. All right, I have a few questions on that point. One, does that area of balloting fall within the area to which you would stipulate? In other words, are those particular voting machine ballots included in the 50 ballots to which you would stipulate?

My second question—if that is not the case, are they included in the 400 ballots which were reviewed by the ballot commission?

And a third question. You say that the ballot commission should have examined certain machines. Did you protest, did you enter a timely protest with respect to those very machines at the time the secretary of state was conducting the recount?

Mr. DURKIN. Let me answer your first two questions.

Senator BYRD. May I have the answer to the last one first, because it may wipe away the need for the first two?

Mr. DURKIN. Senator, I am not sure—and there was quite a bit of controversy at the ballot law commission whether the Wyman forces had protested, or made a timely protest of the write-in situation in Exeter.

Senator BYRD. You are referring to write-ins, I am talking about the machines which you said should have been reexamined because of malfunctioning.

Mr. DURKIN. Well, I think I can clear it up. You see, the machines that we are talking about—as far as write-ins on the machines, that is the first area. There were only write-ins in the town of Exeter and the city of Nashua.

There was some question whether the Wyman forces had protested the write-ins on the machines in the city of Exeter. And that was resolved by the ballot law commission, that they had made a timely protest.

My recollection of what happened is, we were over in the town hall in Exeter and someone mentioned there are write-ins on the machines and someone says, well, we don't count them anyway. And neither of us made a timely protest. But that is immaterial, I think, for this point, because we are not asking you to throw out those write-ins.

And so I am not sure whether they are in your 50, Senator, or in the 400, because we would stipulate that you could count those 4 votes—there is a 3-vote differential, that Congressman Wyman picks up 3 votes.

We are willing to stipulate that the ballot law commission was correct in giving those votes to Wyman, but sloppy in their procedure in not checking the machine to make sure that you couldn't write in and flip the lever at the same time, seeing there are only five write-ins in the whole State on machines.

Senator BYRD. You earlier made a statement which precipitated Senator Griffin's question. You said that the ballot law commission refused to examine certain machines for possible malfunction—I am sure I haven't stated it as precisely as you did—but my question is this.

What was the rationale behind the ballot commission's refusal to examine those machines for malfunctioning? Was that rationale based on the possibility that you had not entered a timely protest during the recount with respect to the malfunctioning of those machines?

Mr. DURKIN. I do not think so, Senator Byrd, but I think I would not mislead you.

The ballot commission could answer better their rationale. I think we made a timely protest, but I would not want to state so with certainty.

Senator BYRD. Thank you, Mr. Chairman.

Senator PELL. Please proceed.

Mr. DURKIN. Thank you, Mr. Chairman.

I just have a couple of items. I do not know whether you have opened up a bag of cats with your questioning. I have two points I have to make on the checklist issue.

There are approximately 235,000 total ballots cast, you know, paper ballots, and machine, and absentees.

There are approximately 234,000 check marks. In New Hampshire, they check off.

Senator GRIFFIN. So there is a discrepancy of some 1,100—actually 1,157—where, on the face of it, it appears that there were 1,157 more ballots than there were people who voted; is that correct?

Mr. DURKIN. 21,000 people cast votes in the U.S. Senate race, so the possibility of a defect in the checklist I do not think pertains to the Senate race in that there were more checks than there were votes in the Senate race by approximately 3,000, so I think it resolves from another angle any concern that you might have.

Senator GRIFFIN. Did the ballot commission go into this question of the discrepancies overall, and in particular go to the towns where the checklist tally did not correspond with the number of ballots that were there?

Mr. DURKIN. No; well, you see, you have a strange situation.

The attorney general, under the powers of the New Hampshire law can, on his own motion, look into almost anything you have in an election, and as a corollary to the recount, but the secretary of state, the attorney general's office subpoenaed the checklist and tried to count the checklist during the recount.

Senator GRIFFIN. Is it not a fact that the ballot law commission declared it did not have jurisdiction to go into that since appeals could be made to courts, or to the Senate?

Mr. DURKIN. I believe they did, but what I am trying to do is set the stage for you, and have the attorney general, who proceeds under one section of chapter VII, the powers and duty of the attorney general generating information.

Then he sits as a member of the ballot law commission. I believe the ballot law commission refused to pursue the question of the checklist because it was not within their statutory authority which is the rule upon ballots protested before the secretary of state during the recount.

Senator GRIFFIN. These checklists in New Hampshire I take it are something similar to what we would call a registration list in Michigan. You would have a list of the people who are listed and eligible to vote, and as they come in, they are checked off.

If we end up with a situation where there are more ballots than there were people who presented themselves, or were checked off, of course, the explanation that you offered is a logical explanation, and that is maybe people who have had the responsibility to check them off did not do so.

Of course, there is another explanation, that is in some areas ballot boxes could have been stuffed so there were more ballots.

Mr. DURKIN. You yourself, pointed out, Senator, in commenting on the fact there was no fraud in the New Hampshire election, that would be fraud, and I think we have stipulated that both sides have stipulated there is absolutely no fraud in New Hampshire, and we are very, very proud of that fact.

Senator GRIFFIN. The point is that the question could be a substantive question, and was not really decided by the ballot law commission, as I understand it. They did not regard that they had jurisdiction, is that correct?

Mr. DURKIN. That is my understanding.

Senator GRIFFIN. Thank you. Why not go ahead with your presentation?

Mr. DURKIN. Maybe in further attempting to narrow the scope and present a review I would be happy, as I said earlier, to stand aside.

The two certificates you have are based upon a review of the ballots, and I think you should count those ballots, those 40 ballots, and if as I said earlier, if it comes only out to one there is no point in going back to Manchester.

Senator BYRD. Mr. Durkin has made reference to 40 ballots.

Mr. DURKIN. Excuse me, for the record there are approximately 400 ballots, a little less than 400 ballots reviewed by the ballot law commission.

Of those, there are less than 50 that are in serious dispute, and so if I may, if I could call those 50, 400 in one pot, and 50 on this side.

Senator PELL. The 50 is included in the 400?

Mr. DURKIN. Yes, sir; but the 50 will make or break the case, and I am willing to rest that if you review those 50 ballots or if you choose the 400, I want to stipulate those 50, and Louis Wyman comes out one vote ahead, I will get the next plane back to New Hampshire and practice law.

Senator PELL. But you would be equally agreeable to stipulating to the 400?

Mr. DURKIN. If John Durkin comes out 400 ahead, I think he should be seated without prejudice to the claims of Congressman Wyman, without looking into the absenteeism voter situation and the machine, and I think a review of that transcript, I realize it is part of another proceeding, but I think the transcript pretty well lays to rest those irregularities, but I would be willing to abide by that process if the subcommittee and the Senate, in its wisdom, so feels it appropriate.

Looking at the many notes here, one other category that we mentioned in the petition are the voids.

I think we lost a net of seven votes on the void ballots.

The testimony came in, and the officials said they had voided the ballot, and handed a person another ballot.

We are not pursuing that and asking you to overturn that decision. I think the Ballot Law Commission was mistaken. I think they set a bad precedent when they allow testimony to come in and be admitted in an effort to impeach the ballots, because if you reduce that to the absurd, and we had a person who would come in and state that they wanted to vote for me but they could not read and they were embarrassed to ask the election official, and they voted their ballot, voided their ballot and put it in blank.

You open a bag of cats up when you start testimony to impeach the four corners of the ballot, but I bring this up only because we mention it in the petition.

We are not pursuing it, but I offer it for the general information of the subcommittee.

Senator GRIFFIN. Mr. Durkin, that would change the position you took and presented in your petition filed with the Senate committee, would it not?

Mr. DURKIN. That is why I brought it up, to further narrow it, Senator.

As I say, I think the proper approach is to enfranchise. You should be liberal in enfranchising people, but strictly not attempt to disenfranchise, and I do not think any doubt should be thrown out unless the moderator or the law official strictly follows the law.

You should be very, very strict before you allow a ballot to be voided.

Senator GRIFFIN. By the same token you do not contend, of course, that any one voter should have two votes counted?

Mr. DURKIN. Of course not, one man, one vote, sir.

Senator GRIFFIN. And in this particular situation, just so that the record can be clear, as I understand it, there were 17 ballots in various areas which had been marked "voided," and the Ballot Law Commission took testimony from the local election officials, and the evidence came forward that what happened was that the voter attempted to vote, and the Ballot Law Commission said that under those circumstances obviously you do not count both ballots, because the first ballot happened to show a vote for Durkin or Wyman. Is that not essentially what the situation was?

Mr. DURKIN. Somewhat. I think the New Hampshire law says it shall be marked canceled.

The case law has expanded that a bit, signed by the moderator, and put with the unused ballots.

Traditionally, if it is with the case ballots it is common, but you have a situation in Salem, I offer as a contrast to your observation, Senator.

In Salem, the number of ballots sent to the town of Salem by the Secretary of State, the number of ballots cast, the number of ballots returned, and the number of people that checked off came out right on the button, and yet, four ballots were voided.

Theoretically, if there had been people voting twice, there should have been a discrepancy of four. There was not.

I only offer that by way of background for the committee. I think they set a dangerous precedent when they allow testimony to impeach the use of the ballot.

I think the intent of the voter is encompassed in the four corners of the ballot that can be reasonably obtained, which is the real question before you and before the Senate itself.

I think unless there are more questions, I pretty well have wrapped it up in somewhat rambling fashion, but I want to thank the subcommittee for giving me this opportunity.

As I said earlier, this controversy is much more important than John Durkin or Louie Wyman. This is a constitutional dilemma. We have seen over the past 2 years that the constitutional legal processes take time, but they do produce an adequate result, and I think we and

the people of New Hampshire are looking to you, and I am just a bearer, and just a bit player on the constitutional stage.

I am the bearer of this petition. They have a problem, and only you can solve it.

I thank you very much.

Senator PELL. Thank you, Mr. Durkin.

I have a couple of questions. In fact, they can either be answered yes or no, and I will defer my further questions until you come back with Mr. Wyman, and we can ask them together.

Am I correct in saying that during the recount all candidates for election to the Senate were given the full opportunity to examine, challenge, or make copies of exhibits pertaining to the challenged ballots?

Mr. DURKIN. Yes, sir.

Senator PELL. At this point, there are many thousands of protested ballots, is that not correct?

Mr. DURKIN. Excuse me, Senator.

Senator PELL. There are many thousands of ballots protested at this time.

Mr. DURKIN. There were 32,000, but most of those were, you know, just for the lawyers who wanted to look like they were doing something important.

Senator PELL. Thank you.

Following the recount, when the secretary of state declared Mr. Durkin to be the winner by 10 votes, Mr. Wyman filed an appeal with the ballot law commission; is that correct?

Mr. DURKIN. Yes; I believe he filed it on the 27th.

Senator PELL. Is it correct that the parties and their counsel agreed by preserving their rights not to submit all protested ballots to the ballot law commission, but just a limited number which were in dispute?

Mr. DURKIN. Yes, sir.

Senator PELL. And was that number about 414?

Mr. DURKIN. Yes, but let me explain.

I think there are 414 envelopes, that is, in manila envelopes. Inside the envelopes there might be 3 or 4 ballots, but there is less than 400 paper ballots that we are talking about, even though there might be 414 envelopes.

Senator PELL. Thank you. I would defer my questions until later on this afternoon when you will be back with Mr. Wyman.

Senator Griffin and Senator Byrd, any questions now, or would you like to defer?

Senator Griffin?

Senator GRIFFIN. Thank you, Mr. Chairman.

Mr. Chairman, will we be able to go around again?

Senator PELL. Oh, yes.

Senator GRIFFIN. Thank you.

Senator BYRD. Mr. Chairman, if the Senator will yield at this point—

Senator GRIFFIN. I yield.

Senator BYRD. It would seem to me, and I do not attempt to impose my views on the committee, or on the chairman, but I would be perfectly willing to have Senator Griffin proceed and not be cut off at

the end of 10 minutes, until he has developed his full line of questioning, because only in that way, it seems to me, can we lay into the record the facts that ought to be laid in.

If he wants to go 20 minutes, or if he wants to go 25 minutes, that is fine with me.

Senator PELL. As long as it is agreeable with Senator Byrd, it is fine with me, too.

Senator GRIFFIN. I do appreciate that. I think it is an appropriate way to proceed, and if at any point either of my colleagues wants to interrupt and ask questions, they are welcome to do so.

Mr. Durkin, you indicated that you would be willing to stand aside and not take the oath.

Do you do that because you recognize that you do not have a valid certificate of election from the State of New Hampshire?

Mr. DURKIN. No, sir, I think the certificate issued to John Durkin, on its face, is a valid certificate.

I am just offering to stand aside to facilitate the organizational work of the Senate on Tuesday, and so this controversy can be resolved equitably and promptly.

Senator GRIFFIN. You are a lawyer, as I understand it.

Mr. DURKIN. Yes. I challenge—and I do not want to call my opponent—but I challenge Congressman Wyman to do that. I guess we are both, Senator, alleged, at this point.

Senator GRIFFIN. In addition to being candidate for the Senate you are a lawyer, right?

Mr. DURKIN. Yes.

Senator GRIFFIN. Do you dispute the fact that under the law of New Hampshire, 59 :98, if I am citing it correctly, that a certificate of election cannot be valid until an appeal to the ballot law commission has been decided?

Mr. DURKIN. No, sir.

Senator GRIFFIN. Do you follow that statement?

Mr. DURKIN. No, I think; Senator, you have to realize the New Hampshire Election Code is like one of the two Elliott poems. There is something in there for everyone.

The law is in a sorry state of disrepair, and I think the people in New Hampshire realize, as Michigan has done, not so long ago, after the Soapy Williams recount, I gather reformed the election code.

Ours will be done, I think, this year, but there are many inconsistent provisions tacked on, like the New England house. There is another rule, or subsection, or chapter added, so there is almost anything in there that you wish.

Senator GRIFFIN. I would like to read the record, Mr. Chairman, this particular section of the New Hampshire statute. It reads as follows:

If, in case of a recount of such votes, it shall appear that a person was elected other than the person declared elected upon the canvass of returns from the clerks of the towns and wards the Secretary of State shall declare the results found by him and the person so declared by him to have the greatest number of votes, unless the result is changed upon appeal to the Ballot Law Commission, shall be entitled to receive a certificate to such declaration.

Mr. Chairman, earlier you put into the record the certificate which was issued to Mr. Durkin.

I would like to ask whether or not an accompanying resolution adopted by the Governor and the council was also inserted in the rec-

ord? That accompanying resolution, the underlying resolution which authorized the issuance of that certificate to Mr. Durkin included reference to that statutory provision as follows:

It is resolved that under the provisions of RSA 63.8 and 63.11, the Governor and Council certify John A. Durkin of Manchester as the winner of such election
* * *

And further stating that:

The Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 868.

This is a proper and appropriate recitation of the facts, is it not? Senator PELL. It was inserted in the record.

Senator GRIFFIN. I appreciate that.

Mr. DURKIN. I am sorry, sir; I was not following your every word.

Senator GRIFFIN. I am only stating and reading from the resolution.

Mr. DURKIN. That is the record of the secretary of state.

Senator GRIFFIN. No; this was the resolution adopted by the Governor and council. This was on November 27, 1974, authorizing the issuance of your certificate.

Mr. DURKIN. I have no objection to admitting that.

Senator PELL. It has already been inserted in the record.

Mr. DURKIN. No objection, whatsoever.

Senator GRIFFIN. Is it true that on December 5 the same Governor and the council issued your certificate subject to the ballot commission appeal, then rescinded your certificate, and so notified the secretary of state and the secretary of the senate?

Mr. DURKIN. I think the record shows in the various court proceedings that Congressman Wyman called Governor Thompson in St. Louis at the Republican Governors' Conference while we were in Federal court, and asked Governor Thompson for his intervention.

At 7:30 the next morning Congressman Wyman's son presented three affidavits regarding write-ins to Governor Thompson, and hastily called the Governor's council meeting in the early morning on December 5.

The obvious intent was to beat the Federal court which was in the process of issuing an injunction to the Governor's council.

The press stated on the record under oath, a member of the press at the Federal court hearing, that the Governor and the council, and one of the councilmen was aware that the Federal court had acted, had not been served with the decision.

Senator GRIFFIN. Mr. Durkin, I do not quarrel with your explanation. It is perfectly proper to have it in the record.

You did not answer my question. Is it not a fact that on December 5, 1974, that the same Governor and council issued your certificate subject to the appeal by the Ballot Law Commission, then rescinded your certificate and so notified the secretary of the senate?

Mr. DURKIN. Well, they purportedly rescinded.

Senator GRIFFIN. You do not recognize they did, is that the point?

Mr. DURKIN. Yes, sir.

Senator GRIFFIN. Mr. Chairman, is that resolution of rescission dated December 5 in the record?

Senator PELL. It is in the record.

Senator GRIFFIN. I thank the Chairman.

Mr. DURKIN. Could I just, by way of explanation, Senator, offer one comment?

Your citation of 59:98 I think I think has to be read in connection with chapter 63, which deals more particularly with elections to the U.S. Congress, and there is some question whether the council had any authority to change a certificate until the ballot law commission had issued its certificate of changed declaration.

The law is less than clear on that score.

Senator GRIFFIN. Mr. Durkin, if you did not recognize the decision by the Governor and the council, why did you call upon the Federal court to have that decision canceled, and request a new certificate issued?

Did you not institute a case in the Federal court, and that was one of the reasons?

Mr. DURKIN. Under the rationale of the act, that is the Roudebush controversy, we felt there was room between the Senator Cannon and Senator Hartke Supreme Court case, and proceeded to challenge the authority of the ballot commission to engage in election contests contrary to our interpretation of article 1, section V.

We asked for a temporary restraining order, and that is based on a serious Constitution question.

The district judge in New Hampshire did not see that it would cause any irreparable harm, but he attempted to enjoin the Governor and the council any way. He felt there was a substantial Federal question, and convened a three judge panel.

I am sorry to report, while it was a distinguished three-judge panel, they did not have our same clear vision of the law, and they ruled against us quite conclusively.

Senator GRIFFIN. I was going to bring that out, Mr. Durkin.

If I may, I would like to refer to the decision of that three-judge Federal court which decided this case brought by Mr. Durkin, and referring in particular to that part of its opinion where the court says this:

On his original pleadings Durkin seeks essentially three forms of relief; to enjoin the Commission proceedings, that is the Ballot Law Commission, and declare them void, to order the Governor and the Council to issue a new certificate of election to Durkin to replace the rescinded one, and to enjoin the prosecution of proceedings recently commenced by Wyman in the New Hampshire Superior Court and Supreme Court raises various aspects of the proceeding.

On another point, the three-judge Federal court said in this opinion a part that is particularly pertinent:

"We are satisfied that the statutory proceedings in progress before the Commission * * *" that is the Ballot Law Commission, " * * * are an integral part of the New Hampshire electoral process."

At another point they say:

We turn next to plaintiff's request that we order the Governor and the Council to reissue to him a certificate that they later revoked. The certificate may have been prematurely issued, since under the governing New Hampshire statute, RSA 59:98 * * *

Which parenthetically, I might say, is the section I read to you earlier:

* * * a certificate is to be issued upon the Secretary of State's declaration following a recount, unless the result is changed upon appeal to the Ballot Law Commission.

At another point the court says:

It would make little sense to order issuance of a certificate which can at most have meaning only after the Commission gets its work * * *

The Commission here being the Ballot Law Commission.

Mr. Chairman, this is a rather brief opinion, an opinion written by the New Hampshire Supreme Court, I think which was earlier inserted in the record.

I suggest this opinion should be made a part of this record also.

Senator PELL. Without objection it will be inserted at this point.

[The opinion referred to follows:]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

John A. Durkin,

Plaintiff

v.

Ronald L. Snow,

Roger J. Crowley, Jr., and

Warren B. Rudman, The

Ballot Law Commission

of New Hampshire,

Defendants,

and

Meldrim Thomson, Jr., in his

capacity as Governor of the

State of New Hampshire;

Robert L. Stark, in his

capacity as Secretary of State

of New Hampshire;

James H. Hayes,

Lyle E. Hersom,

John F. Bridges,

Bernard A. Streeter, Jr., and

Robert E. Whalen,

in their capacity as Executive

Council of the State of

New Hampshire

Defendants,

and

Louis C. Wyman,

Intervenor

CIVIL ACTION
No. 74-359

Before CAMPBELL, Circuit Judge,
GIGNOUX and BOWNES, District Judges.

OPINION

This three-judge district court was convened upon the petition of one of the candidates, John A. Durkin, following an exceedingly close and currently disputed election held November 5, 1974, for the office of United States Senator from the State of New Hampshire.

Louis C. Wyman, an opponent of Mr. Durkin, has been permitted to intervene here. Initially, Mr. Wyman was officially declared the winner by a plurality of 355 votes. Mr. Durkin applied for a recount pursuant to N. H. R. S. A. 59:94. After the recount, the New Hampshire Secretary of State declared Durkin the winner by 10 votes, and on the same day the Governor and Secretary of State signed a certificate of election which was issued to Durkin with the approval of the Executive Council. R. S. A. 59:98. In accordance with R. S. A. 68:4(II), Wyman appealed to the State Ballot Law Commission (the "Comission") on November 29, 1974. On December 4, 1974, Durkin applied to the federal district court for a temporary restraining order against the Commission on the ground that its proceedings and statutory authorization unconstitutionally usurp the exclusive jurisdiction of the United States Senate over contested Senate elections under Article I, Section 5 of the United States Constitution.¹ The district court refused to grant this relief but did grant the request that steps be undertaken to convene

1.

Article I, § 5 provides: "Each House shall be the judge of the Elections, Returns and Qualifications of its own members"

a three-judge court, and ordered no change in Durkin's certification until the constitutionality of the Commission's power was determined and the Commission's proceedings completed. Almost simultaneously with the issuance of this order, however, the Governor and Executive Council purported to rescind the certificate issued to Durkin. Proceedings by the Commission have since been in progress. Under R. S. A. 68:4(II), the Commission is to "consider and review all the rulings of the secretary of state on ballots protested during the recount."

After this court was convened, briefs were submitted on behalf of the two candidates as well as the Commission and the Governor and Council, and several hearings held, one before the single district judge for the purpose of establishing a factual record, and most recently before the full court for the purpose of receiving oral argument on the legal issues. This court is in agreement with and affirms and adopts all actions heretofore taken by the single judge.

On his original and amended pleadings, Durkin seeks essentially three forms of relief: to enjoin Commission proceedings and declare them void; to order the Governor and Council to issue a new certificate of election to Durkin to replace the rescinded one; and to enjoin the prosecution of proceedings recently commenced by Wyman in the New Hampshire Superior and Supreme Courts raising various aspects of the election and recount proceedings.

We are unable to agree with Durkin that the proceedings before the Commission are unconstitutional. In Roudebush v. Hartke, 405

U. S. 15, 23 (1972), the Supreme Court held that Indiana's recount procedures did not interfere with the Senate's ultimate authority.

The Court said:

"It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. But a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment."

We are satisfied that the statutory proceedings in progress before the Commission, like the Indiana recount in Roudebush, are an integral part of the New Hampshire electoral process and are "within the ambit of the broad powers delegated to the States by Art. I, § 4."² Id. at 23. The fact that the Indiana recount procedure approved in that case was a one-tier administrative operation, and the New Hampshire procedure involves a recount followed, if a candidate desires, by a Commission review of the rulings of the Secretary of State on ballots disputed during the recount is a distinction without a difference. We are assured by responsible state officials that the New Hampshire proceedings have been and will be accompanied by careful action to preserve all disputed ballots and related evidence so that the Senate, in exercising its final authority over whom to seat, can make "an independent final judgment." Id. at 25. We thus find no encroachment upon the Senate's powers and no occasion to enjoin or otherwise interfere with the proceedings before the Commission.

2.

Article 1, § 4 provides in part:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

We turn next to plaintiff's request that we order, the Governor and Council to reissue to him the certificate that they later revoked. The certificate may have been prematurely issued since under the governing New Hampshire statute, R. S. A. 59:98, a certificate is to be issued upon the Secretary of State's declaration following a recount "unless the result is changed upon appeal to the ballot-law commission." In any event, given our ruling that the proceedings of the Ballot Law Commission may continue, it would make little sense to order issuance of a certificate which can at most have meaning only after the Commission completes its work. The most compelling reason to order reissuance would have been a finding of deliberate disobedience to the order of the single district judge. However, without altogether discounting the possibility, we cannot say that the Governor and Council acted in awareness and defiance of such order. We decline therefore to order issuance of the certificate.

Finally, we turn to plaintiff's request that we enjoin litigation in the New Hampshire courts commenced by Wyman. We decline to do so. We find nothing in the maintenance of state court proceedings which would subvert the clear and acknowledged function of the United

3.

Because, for reasons stated in text, an injunction against state court proceedings would be an unwarranted exercise of our discretion, we need not decide whether the anti-injunction statute 28 U.S.C. § 2283, separately prohibits such relief. See Mitchum v. Foster, 407 U.S. 225 (1972). While jurisdiction is asserted here as in Roudebush, under 28 U.S.C. § 1343(3) and pursuant to a claim under 42 U.S.C. § 1983, the Supreme Court has not expressly discussed, and it is not altogether clear, to what extent a candidate may assert the protection of the civil rights statute in these circumstances.

States Senate to determine whom to seat. No impending state court action or practice has been called to our attention which would impede the independent determination of the outcome by the United States Senate. Whether the New Hampshire courts would exceed their constitutional authority were they to order a new election or to order other types of action are, at this time, purely hypothetical questions which cannot be decided apart from consideration of specific orders. Even if state courts were to intervene in the election process, the Senate would retain the power to ignore the results of a second election or of other action. Indeed, we are not prepared to rule that every conceivable state court action would necessarily be an unwanted intrusion upon the Senate's authority. The New Hampshire state courts have a first hand familiarity with New Hampshire election law. Moreover, the state courts are capable of interpreting the federal Constitution, and of observing its limitations upon state judicial authority.

The door of the federal court remains open should it be demonstrated that state actions or practices are being pursued which deprive the Senate or any candidate of rights conferred by the federal Constitution.

The complaint is dismissed without prejudice.

By the Court:

A handwritten signature in cursive script, likely belonging to the Clerk of the Court, positioned above the printed title "Clerk."

Clerk.

Dated: December 18, 1974

Mr. DURKIN. Senator, may I make one comment?

Senator PELL. Yes.

Mr. DURKIN. I think after the Federal court found the ballot commission constitutional, the rest of the decision naturally followed.

The question of whether the certificate was premature or not was not really before the court, and at best, I say again here, at best it is dicta, and that issue was really never argued, never briefed, and never argued in the Federal court, so I do not think that can in any way be construed for the position that the certificate was premature.

Senator GRIFFIN. Even though I did not really expect a different response from you, I would think that the record that has been made here of a certificate conditioned upon the appeal to the ballot law commission, the proceedings having been taken to the ballot law commission, a different result arrived at, and the original certificate having been expressly rescinded by the Governor and the council which issued the original certificate. And you, Mr. Durkin, having gone into Federal court and raising this question, and the court having decided that the proceedings were proper, and that the rescinded certificate should not be reissued. Certainly, it seems to me to be in order to have asked you whether or not you offered to stand aside because you, yourself, recognize that you do not have a valid certificate from the State of New Hampshire.

Mr. DURKIN. No, sir, I think I have a valid certificate.

I think that that decision, it says the ballot law commission was constitutional. It did not say they were infallible. That is the problem we have, and that is the case presented here today.

I think that is your decision that I cannot make. It is the Senate's decision which one of those certificates is the valid one.

Senator GRIFFIN. I have only one or two more questions at this stage, at least.

I understand, putting legalism aside, we will be arguing about those, I am sure, as to whether or not a new election can be held, I understand that some kind of a statewide poll has recently been taken in New Hampshire testing the views of the voters as to whether or not they think a new election should be held, is that correct?

Are you familiar with the results of that poll?

Mr. DURKIN. Yes; it is a loose term calling it a poll though, Senator.

Senator GRIFFIN. I see.

Mr. DURKIN. It was conducted by one of our local newspapers, and I think in that we should not give it any significant consideration.

Senator PELL. Which newspaper?

Mr. DURKIN. The Manchester Daily Reader and the Sunday News. I think there are 1,800 people in favor of a new election, and 200 against it, and we inquired to see how many of the people who are in favor of a new election that used franked envelopes, and we could not find out.

Senator PELL. Senator Griffin?

Senator GRIFFIN. Aside from what the opinion of the voters of New Hampshire may be at the moment, were you correctly quoted in the Washington Star on December 31, when you filed a petition of complaint when it was reported that you said you, "would be happy with the new election if the Senate ruled that a tie exists."

I am just asking a question; yes or no. You were correctly quoted there; were you not?

Mr. DURKIN. I assume so. I do not know what article you are referring to, but let me state for the record that all along I have been in favor of a special runoff election. The trouble is it cannot be negotiated. There is only one, and it has to be a natural tie.

Senator GRIFFIN. I understand. There is a question of whether it can be held. I recognize that.

I was just trying to establish what your views and public statements had been.

Mr. DURKIN. I think, Senator, I have to give more than a yes or no, as that would be an incomplete answer.

I have been in favor, all along, of a runoff. I think I would win a runoff election easily.

My opponent made some rather intemperate remarks, insulting the people of New Hampshire, particularly on the seacoast, since he has referred to those who had lived in the State less than 10 years as second-class citizens.

I can win a runoff easily and cheaper. We have spent more in this proceeding than I spent in the contested primary, and it is approaching more than we spent in the general election.

It will be easier on my stomach, but what is convenient for the parties I think we have seen over the last 2 years, that we have to let the constitutional legal processes take their normal course, no matter how hard it is on the participants.

My personal preferences are irrelevant to the predicament. I think we are on a constitutional trolley car. We cannot get off until the Senate gives us an answer, and if there is a tie, New Hampshire has had a law on the books since 1840 saying that there will be a runoff between the two.

In the event there is a tie, the Senate decides there is a tie, I think only the Senate could decide that, because under the ballot law commission statute it contemplates an appeal to this body.

Senator GRIFFIN. But if it were legally possible you would not have any objection?

Mr. DURKIN. No, but I think first the people of New Hampshire have a right to have the November 5 election decided once and for all.

Once that has been done, we can proceed.

Senator GRIFFIN. You see, it is possible that the Senate, in reviewing this election, could conceivably determine that it was a tie, a most unlikely finding, I admit, or it might conceivably determine there are a number of ballots and questions as to which reasonable people cannot really make a definitive judgment as to whether voters indicated an intention, or what that intention was. The Senate could conceivably declare the seat vacant to which you aspire. In such event, if it were legal, and a procedure were available in the State of New Hampshire to have a new election I assume all we are trying to establish in accordance with your public statements, you would have no objection to that? And even though the paper that took the poll does not seem to be in high repute here in the hearing room, I do not think you would quarrel that a large majority of people in New Hampshire would feel that would be an appropriate way to decide this very "difficult" question.

Mr. DURKIN. I think it is somewhat analogous to an impeachment. When it was first discussed in the polls most people were opposed to impeachment, but there is an analogy.

We have the long constitutional legal process, and I think as time goes on more people realize that the election cannot be, and they would like the final results of the November 5 election before they start dealing with hypotheticals.

Senator GRIFFIN. I can understand that.

Mr. DURKIN. Can I add one more thing here?

With all due deference to this subcommittee and the U.S. Senate, I think I want to be as humble as possible, but I think if the Senate would get off its hands and say we cannot decide, we would be approaching a copout, and I think the whole country would be upset with that.

You are stuck. I am stuck. Louie is stuck in many respects with a constitutional dilemma.

I think you first have to reaffirm the one man, one vote in the long-standing American principle.

I think we have to decide the November 5 election. After all, as I say, some other reporters asked me yesterday if I had a crystal ball on February 11 when I announced, what would I change?

My answer to them was, in effect, that I would have proposed that if election was closer to one-quarter of 1 percent, there could be no recount, all deference to Tom Downs, but no recount. There would be an automatic runoff. It would be easier on everyone, but that is not the situation we have.

We have to operate under the law as of November 5, 1974.

Senator GRIFFIN. You challenged Mr. Wyman to stand aside, and I do not know what he is going to respond to when he gets before the committee.

I am going to put him on the spot. What if he responds that he will stand aside and not take the oath, if you will agree to a new election?

Mr. DURKIN. Senator, I do not know how to make it more clear.

Senator GRIFFIN. It would be fine with you if it is legally possible?

Mr. DURKIN. John Durkin cannot agree. I think we disenfranchise every citizen in the State of New Hampshire if we have a brokered decision for November 5. We disenfranchise everybody. Louie and I can sit down and negotiate.

Senator GRIFFIN. Are we going to enfranchise him and let the voters of New Hampshire decide the question?

Mr. DURKIN. The voters of New Hampshire follow the Constitution and New Hampshire law. That provides that this body make the decision.

If Louie and I can negotiate a tie, then we could negotiate the thing further. I think the long-term negotiated elections are something that you and I and the entire Senate do not want to get into.

Senator GRIFFIN. I do not want to press you further, but I wish you would think about that more.

Mr. Chairman, I will reserve any additional questions, realizing I have taken too much time.

Senator PELL. Senator Byrd?

Senator BYRD. Mr. Durkin, boiled down to its bare essentials, what is the basis on which you present your petition of contest?

Is it based solely on the fact that you now hold a certificate of election, or is it based on the fact that in your judgment the ballot commission erred in its review of the protested ballots which were recounted by the secretary prior thereto?

Mr. DURKIN. Well, both, Senator, in that our certificate is valid, and that there would be no second certificate had the ballot commission not ruled erroneously, and inconsistently.

I do not know how to separate them in my own mind. They are almost inextricably entwined.

Maybe we have been with this thing for so long we are all getting punchy. I think it is on both grounds, really, or they cannot be segregated.

Senator BYRD. Do you think that you are really basing your petition on the fact that you hold what you consider to be a valid certificate of election?

You could present a petition of contest without any certificate whatsoever.

Mr. DURKIN. Oh, yes, sir, but I think we have a much stronger case based on the fact that there was a valid certificate of election issued.

Senator BYRD. That is debatable.

Mr. DURKIN. Right.

Senator BYRD. It seems to me, and I wonder if you agree with me, that the true basis of your petition to this body is really not the fact that you hold in your hand a certificate of election—which you consider the valid certificate—but instead the true basis is the action of the ballot commission which, in your judgment, erred in changing the vote which was established by the recount.

Mr. DURKIN. Well, sir, again I suppose there is a question whether there is a valid certificate, but I think there is no question that the certificate was issued.

The first certificate to me was issued, and I remember Governor Thompson's words as he read the statute imposed a positive duty, chapter 63, imposed a positive duty. It was a nondiscretionary act on the behalf of the Governor and the council once the results were presented by the secretary of state.

They are inextricably entwined in my mind, inasmuch as I do not see how there could be a second certificate.

I think the action of the Governor and the council is invalid, the purported decision is invalid under any set of circumstances.

There would not have been a second certificate, and there would not be the two-certificate problem that is so graphically demonstrated by the chairman at the opening if the ballot law commission had not made serious errors of fact.

Senator BYRD. That is what I say. You are really challenging the validity of Mr. Wyman's certificate. You are not basing your petition of contest on what you consider to be a valid certificate of election held by you.

I must confess that the argument does not persuade me very much—the argument that you hold in your hand—a certificate of election, which in your judgment is valid. That is debatable, and it does not influence my thinking very strongly in this case.

I am very willing to concede that, if you feel as you have stated, that the ballot commission erred in its judgment with respect to the 400 ballots that were reviewed by the commission, you have a legitimate basis on which to petition this body for a rendering of its judgment.

I think I should state that for the record at this point, and I have so stated.

Now, I am referring to your petition, and I shall ask some questions based on my review of your petition.

The pages here are not numbered. On the fourth page of that petition you state as follows:

Your petitioner hereby requests that the United States Senate conduct such hearings, and receive such evidence as will establish the following:

Then I go to paragraph B, which says:

The Ballot Law Commission erred in failing to count at least 20 votes for Durkin when he was entitled to, and erred in counting at least 20 votes for Wyman which he was not entitled to.

Are those ballots included in the 50 to which you have entered a stipulation?

Mr. DURKIN. Yes, sir, that 40 is sort of expanded to 50, but it is the same group of ballots, sir.

Senator BYRD. Do you have your petition in front of you, and are you following me when I am reading B?

Mr. DURKIN. Yes, sir.

Senator BYRD. Now in C you state as follows:

In making the errors described in Paragraphs A and B, the Ballot Commission ignored or failed properly to follow the established principle wherever possible the intent of the voters should be determined from the ballot and surrounding circumstances.

Going over to subparagraph (5) on the next page, you make this statement:

Ignored a long standing published and statutorily authorized rule which decreed where a candidate's name was written on a voting machine write-in votes for such candidates should not be counted.

Are you being consistent? On the one hand you say the commission should have abided by the longstanding and published statutory rule that where there is a voting machine then if there is a write-in vote that should not be counted, whereas on the preceding page you are saying that the ballot commission ignored the established principle that the intent of the voter is what really should count.

Mr. DURKIN. Yes, sir. And what I think I tried to do here was—

Senator BYRD. Pardon me, but what I am interested in, is, to which of those paragraphs do you now subscribe?

Mr. DURKIN. As I said in my opening statement, we waive that position on V. We waive that I just offered it.

Senator Byrd. Why did you not waive it in your petition? Why did you raise it in your petition?

Mr. Durkin. I suppose if we did not put it in we could not have raised it here.

I suppose we put it in as a defense mechanism.

Senator BYRD. May I, with all respect to the witness, say that I am interested in your reaction to my question.

On the next page you say :

The ballot commission applied mechanistic and unlawful tests in counting certain ballots.

What do you mean by that phraseology, "mechanistic and unlawful tests"?

Mr. DURKIN. Senator, they had before them at various times, two flashlights, a magnifying glass, and even came up with a textile cutter magnifying glass, and they would concentrate on the square and ignore the rest of the ballot.

I think what we are saying is they got lost in their flashlights and magnifying glasses, and missed the real intent of the voter.

We think that is an improper test, and the ballot should be looked at in its four corners without magnifying glasses and flashlights.

Senator BYRD. You are not saying the use of a magnifying glass—which this subcommittee may also have to resort to—would be unlawful, are you?

Mr. DURKIN. Well, to the extent that it distorts the ability to discern the intent of the voter it is unlawful to the extent it does not follow the precept that the intent of the voter is going to be reasonably ascertained, which is primary.

Senator BYRD. I will not argue with you on this point, but it seems to me that it might not necessarily distort the ability to discern the intent of the voter. It may aid the ballot commission in determining what the true intent of the voter was.

Unless you have better evidence than you have presented, I cannot find fault with the ballot commission for having used a magnifying glass to determine what, in its judgment, was the intent of the voter, but I understand that that is what you are referring to in that statement?

Mr. DURKIN. Yes, sir.

Senator BYRD. Now, in the next paragraph you use this phraseology: "Allowed oral testimony to contradict the written record."

You referred earlier in your statement to that, and you explained why you would question that.

Why do you use the word "constitutional," and also the words "statutory standard" in that statement? You say allowed "oral testimony to contradict the written record in violation of constitutional and statutory standards."

What constitutional standards do you have in mind?

Mr. DURKIN. To be honest with you, it seemed to make sense when it was composed.

I think we are referring there, Senator, in a very general broad way as indicated at the opening that it was creating problems to allow oral testimony to impeach the written documents and the ballot itself, and we just phrased that as widely and as loosely as possible.

Senator BYRD. But you cannot support your contention that constitutional standards were violated therein and thereby?

Mr. DURKIN. Well, there are a lot of cases in some jurisdictions that the statute is very, very precise as to what is counted, and it is printed on the ballot, you know, put an "X" in the square of the circle and this vote will not be counted, and as stated earlier, the New Hampshire law, although the statutory law says the "X" shall be in the box or in the circle, the long line of cases has ignored that for all intents and

purposes so there are a line of cases in some jurisdictions, or practice, that they do not allow oral testimony to impeach the ballot.

Senator BYRD. What "statutory" standards specifically were violated in the allowing of oral testimony?

Mr. DURKIN. None in the State of New Hampshire, but again in drafting the petition as broadly as we could, in some ways it is like the blind man feeling the elephant. We do not know what we are up against, and we do not know whether this party, this body would follow New Hampshire law or the majority rule, the minority rule, or what have you, and we tried to phrase it as broadly as possible.

Senator BYRD. At the bottom of the page you say, "failed to follow its own published rules of procedure."

What published rules of procedure did the ballot commission fail to follow?

Mr. DURKIN. One was the longstanding rule regarding counting of write-in votes on machines in general elections when the name of the candidate was also on the machine.

Senator BYRD. You are not complaining about that here, though?

Mr. DURKIN. No.

Senator BYRD. All right, did it fail to follow any other published rules of procedure?

Mr. DURKIN. Well, there was a problem in the initial meeting. There was a question whether the memorandum which grew out of the unpublicized meeting of December 27 had violated the right-to-know law of the State of New Hampshire, and the Administrative Procedures Act, inasmuch as they had set down in that memorandum on rules for the conduct of particular hearings, and that is one of the reasons that we resorted to Federal court, because it appeared from that memorandum, which were rules in a different format really that they were going to go far afield and beyond the statutory authority as set forth in chapter 68.

Senator BYRD. What did the Federal court reason on this point?

Mr. DURKIN. Well, two things. The Federal court ruled they were constitutional, but I think after that, after the ruling, or after going to the Federal court, the ballot commission, with the exception of looking at the constitutional question, stayed within the confines of chapter 68.

Senator BYRD. Are you saying here, then, that indeed, the ballot law commission did not fail to follow its own published rules of procedure setting aside the one published rule which you now do not complain of?

Mr. DURKIN. I think that is a fair statement.

I do not think we suffered from any lack of procedural due process after that—well, we never received formal notice as required by the statute, but I do not think after we went to Federal court and sort of got their attention, I do not think we suffered procedurally in the hands of the ballot commission.

Senator BYRD. Very well. I am simply trying to narrow as much as I can the area to which this subcommittee should give attention.

What about the third party in this contest? If there were a new election in New Hampshire, I take it that the runoff would be only between the two major candidates, or would it be among the three of you?

Mr. DURKIN. Well, if the existing law, chapter 63 of the runoff for congressional seat were followed it would be between the top two.

Now, there is talk of legislation back home. I have not seen it, but it is my understanding that that legislation would provide for all three candidates, and then I heard that former Governor Powell said there should be a new primary, and he is suggesting there be a new primary.

Under existing law it would be just the two, Louie and me, and Lord knows what will come out of that.

Senator BYRD. Well, was the third party present at the review by the ballot commission of the 400 ballots?

Mr. DURKIN. Yes, he participated, his representatives participated during the recount for a while, and had checkers, and his rights were preserved there.

He also had the opportunity to appear before the ballot law commission. His representative was in the superior court proceeding that transferred the case. He was given the opportunity to be there if he so desired.

Senator BYRD. I take it that none of the 400 ballots which were recounted, and which this subcommittee may, in its judgment, and in the judgment of the Senate, ultimately recount would be expected to count one way or the other for the third candidate.

In other words, all of the 400 ballots are strictly protested ballots, and whatever decision is rendered, if rendered in connection with each ballot, would count for either you or Mr. Wyman.

Mr. DURKIN. Well, there could be a situation, Senator, where the vote for the third party candidate, Mr. Chimento, to nullify a vote for either Wyman or Durkin in that it could be ruled as a dual vote.

That is the only area that I think the third party candidate would add. I do not really think it would affect his vote total, but it might affect the vote total depending on our interpretation.

Senator BYRD. Mr. Wyman, in his response, stated with reference to three ballots, that they were cast for you by clear error, and that these miscalls were admitted to be such by Durkin's counsel.

Do you agree with that statement?

Mr. DURKIN. Essentially so. I am not sure of the number, but there were some that God knows how they ended up in the envelope.

Senator BYRD. I am talking about the three ballots that were counted for you by miscall.

Mr. Wyman's statement says your counsel admitted that this was a clear error.

Do you agree? Does your counsel agree?

Mr. DURKIN. Senator, I cannot state with any certainty, but I can state that there were some when they came out of the envelopes during the proceeding before the ballot law commission they were stamped, you know, there was absolutely no question. I know that there were several that were clear Wyman votes, and I think there might have been one that was mine.

Senator BYRD. I am looking at page 3 of Mr. Wyman's response, paragraph 5, if you have it there.

I am trying to determine whether this subcommittee should concern itself with those 3 ballots, and 17 counted ballots that were excluded from the count.

The five machine write-in votes were included in the count. The Secretary of State counted three ballots for Durkin by error. Miscalls were conceded as such by Durkin's counsel.

Do yo agree with that statement?

Mr. DURKIN. No, sir, except I question the context—excuse me, item 4, I do not know if the implication there was a continuous procedure, but in actuality there was a tie, and that the secretary of state somehow made an error.

There is a distinct break in the secretary of state's recount announcement of the vote, went to the council, and then Congressman Wyman appealed to the ballot law commission.

I only recall paragraph 4. I agreed there was three. I have no knowledge that there was not, but I question the flow of paragraph 4.

Senator BYRD. Well, does your counsel agree that the three ballots for Durkin by clear errors were miscalls?

Mr. DURKIN. Miscalls? He is not here. The ballot law commission is now suing IBM on an antitrust action, but I will stipulate that is the case.

Senator BYRD. Mr. Chairman, I have no further questions at this time.

Senator PELL. Thank you, Mr. Durkin.

I think we should recess now for luncheon, and reconvene at 2 o'clock, and meet here when Mr. Wyman will be present.

[Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

[The subcommittee reconvened at 2:03 p.m., Senator Pell, chairman, presiding.]

Senator PELL. The subcommittee will come to order. We now welcome here Representative Wyman, you were a duly appointed Senator for several days, and your colleagues. If you would rise and take the oath—and anybody who would testify with you would do so also.

Do yo solemnly swear that the testimony that you are about to give to this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

[Response "I do."]

Senator PELL. Would you identify the other gentlemen who stood up, please?

Mr. BROWN. Attorney Stanley M. Brown of Manchester, N.H., Mr. Chairman.

Senator PELL. Thank you. It is my understanding that you have been courteous enough in connection with the ballot law commission's wish to return to New Hampshire, to give your opening statement and then to step to one side so they can make their presentation and then come back; is that correct?

Mr. WYMAN. If that is satisfying to you, sir.

Senator PELL. It is and it is very courteous of you to the ballot law commission, and I thank you very much.

STATEMENT OF LOUIS C. WYMAN, CONTESTANT FOR A NEW HAMPSHIRE U.S. SENATE SEAT

Mr. WYMAN. Mr. Chairman and members of the committee, I appreciate this opportunity to say a word in my own behalf and in behalf of due process and the sovereign rights of all 50 States, from Alaska and Hawaii to Rhode Island. I will be very brief and I will ask my New Hampshire counsel, Attorney Stanley M. Brown of Manchester, N.H., a former member of the board of governors of the American Bar

Association, to present to you the more formal aspects of the answer to the Durkin petition which has been filed with the committee.

All I seek is fairness and justice in this proceeding—a continuation of the due process which has begun in the State of New Hampshire and has now reached this Senate in which every State has two votes I have the utmost confidence in the integrity and honor of the U.S. Senate and of each Member thereof. I believe that when the facts of the present situation are fully understood that your decision should and will be to honor the certificate of my election, even though the majority of my victory was only two votes, a certificate as U.S. Senator, presented to and on file with the Senate.

I believe it is important to stress the fact that this certificate results from a record of due process of law that would be virtually impossible to improve upon. The New Hampshire recount was tested throughout by repeated court proceedings and judicial decisions at both State and Federal levels. This has even extended to the convening of a special three-judge Federal court to rule upon Mr. Durkin's request to reinstate a certificate of election erroneously issued to him, which the court, consisting, I believe, of two members of the Democratic Party and one Republican, unanimously denied, indicating in its decision that it could not say that the certificate was not prematurely issued since the recount was not then completed.

In addition to the various court decisions, including the New Hampshire supreme court, all of which are more fully documented in my formal answer, United States Senate observers, and always the media, were present in New Hampshire throughout the recount and I am confident will also attest to you its complete fairness and due process of law.

New Hampshire has a two-stage recount procedure—stage one by the secretary of state, and stage two by the State ballot law commission, charged by State law with reviewing protested rulings of the secretary of state upon individual ballots. The commission is comprised of outstanding New Hampshire citizens, presently two Republicans and one Democrat. Its chairman is a prominent attorney in Concord, N.H., whom, incidentally, I had never personally met before the current case. The second member, Mr. Rudman, is the State attorney general and currently president of the National Association of Attorneys General of the United States. The third member is a retired Navy captain who was the Democratic nominee for Governor of New Hampshire in two preceding elections and titular head of the Democratic Party in the State of New Hampshire. The final decision of the New Hampshire Ballot Law Commission that Wyman had received a majority of the votes cast for U.S. Senator in New Hampshire at the November 5 election was unanimous, as were all court decisions handed down during the process of the New Hampshire recount.

Originally, I was certified as the winner of the election by some 355 votes. Mr. Durkin requested a recount. When stage one of the recount by the secretary of state appeared to have been completed, the Governor and council of New Hampshire were told by the secretary of state that the recount indicated Mr. Durkin had received a majority of 10 votes. Whereupon, the Governor and council passed a resolution authorizing the issuance of a certificate of election to Mr. Durkin, subject to Wyman's right of appeal to the State ballot law commission for stage two of the recount, as provided by law. This certificate was

forwarded to the Secretary of the Senate the same day that my appeal was filed with the State ballot law commission. The ballot law commission proceedings were scheduled to begin on December 5, 1974, the day Durkin filed suit in the Federal district court to prevent them.

Approximately a week later, it was learned that the secretary of state had failed to count write-in votes on the machines used in four communities in the State of New Hampshire. That was potentially in excess of some 30,000 votes. When the Governor and council were informed of this by the secretary of state they revoked the earlier certificate of election, out of no animus toward Mr. Durkin, but for the simple reason that the secretary hadn't counted all the ballots and the recount was then incomplete. A copy of the formal resolution of revocation was filed with the Secretary of the Senate on December 5.

Mr. Durkin had appealed to the Federal court, requesting that it order this revoked certificate reinstated. Extensive argument was held on this request in the Federal court in the presence of the U.S. Senate observers. And as I have previously indicated, the request was unanimously denied by three Federal judges.

Subsequently, the New Hampshire Ballot Law Commission, after at least 2 weeks of hearings and review of individual ballots on a ballot-by-ballot basis, in some instances with the aid of magnifying glasses and reflected lights, in some instances taking as long as 30 minutes on a single ballot in examination, finally determined that Wyman had received a majority of the votes cast and certified Wyman as Senator-elect, as provided by law. Thus, a unanimous decision was rendered in Wyman's favor, once, twice—and, in fact, four times.

Thereupon, the receipt of the formal notice of this certification, the Governor and council issued a certificate of election to me as Senator-elect from New Hampshire, which certificate of election is the only outstanding certificate of election from the State of New Hampshire presently before the U.S. Senate.

At no time in the course of the proceedings in New Hampshire did Wyman charge either partisanship, collusion, conspiracy, or fraud. As a matter of fact, Mr. Durkin's petition to this honorable Senate was carefully worded to avoid any charge or any complaint of either conspiracy or fraud.

The thrust of the Durkin petition is simply a demand that the U.S. Senate re-recount the New Hampshire recount and substitute judgment value decisions on nearly a quarter of a million individual ballots for the judgment value decisions made by the duly authorized officials of the State of New Hampshire in a proceeding attended at all times by both Mr. Durkin and his counsel and always under the vigilant eyes of the media—and, as Mr. Durkin has said here this morning, with procedural due process. I have asked—and I do request respectfully—that should the Senate undertake to re-recount the New Hampshire recount, that it do so in its entirety rather than to merely review the particular ballots protested or requested by Mr. Durkin. As will appear in my formal answer and its exhibits—particularly the list in exhibit 1—totaling some 109 pages, there were some 14 areas of ballot review that I requested the New Hampshire Ballot Law Commission to recount, as well as certain others which were requested of the New Hampshire superior court to review. These included certain absentee ballots and apparent voting machine malfunctions.

These requests of the New Hampshire Ballot Law Commission were denied by it on the basis that this was beyond its jurisdiction and everything was for the U.S. Senate rather than for the New Hampshire Ballot Law Commission, under its narrow statutory authority to merely go over the protested rulings of the secretary of state of New Hampshire. And this denial was urged and supported by counsel for Mr. Durkin.

The superior court aspect of my request in terms of absentee ballots became moot with the final decision of the ballot law commission that I had a majority, inasmuch as it made no difference whether the majority was 2 votes or 19 votes or 194 votes, for reasons obvious.

If this honorable Senate is to undertake to re-count the New Hampshire recount, in fairness and justice it should examine—it must examine—these areas of protested ballots, precinct counts, and tally sheets in my behalf as well as those requested by Mr. Durkin, again for obvious reasons, since the totals to be involved—the total count—would be materially affected by its determination. I would add substantially to my numerical majority from such a review.

It is my sincere conviction that under the Roudebush decision and by settled precedent, this honorable Senate should honor a State certification of election issued upon such a record of manifest due process of law, confirmed by both Federal and State courts and Senate observers. Were it to undertake to re-count a State recount, which by Roudebush is clearly within the province of the several sovereign States, it would open the door to requests for similar re-counts in future contested elections, when without any complaints of fraud or collusion or conspiracy creates a prospect of questionable value and certain burden.

If it should be your decision to undertake to re-count the New Hampshire recount, I respectfully ask that my New Hampshire certificate of election be honored to the extent that I be seated without prejudice in the interim.

The State of New Hampshire is surely entitled to this and to have the services of a Senator and a staff for the time involved in investigation and recount.

In the interests of fairness, I have consistently requested a run-off election. I said in the very beginning of the recount that if it turned out that I won, and we didn't know the answer to that until the last minute of the last day before the Ballot Law Commission, by less than a hundred votes, that I would seek, if there was any way possible, to have a runoff election. I sought this in the State courts and I have exhausted my remedies in the States courts in this respect.

I was consistently opposed in this by Mr. Durkin. My feeling is that the margin of two votes is less than a mandate and I would like to have a runoff, if one can be arranged, I certainly feel that in the situation that now exists with an on-going re-count in prospect instead of a vacancy, with the citizen caseload that Senator Cotton left, with the certificate of election that I have and my own pending caseload that I am at least entitled to be seated during the interim without prejudice, so that a staff can be here and attend to the problems and concerns of the people of New Hampshire.

If it should be the will of this honorable Senate to declare a runoff between myself and Mr. Durkin, I want it to be expressly clear that I would welcome this, but that I again feel very deeply that I have a right on the basis of the only certificated Senator-elect to be seated without prejudice in the interim unless State law should require Senate declaration of a vacancy, in which event seating without prejudice would be inapplicable.

Whatever the Senate's ultimate decision may be, I am confident that it will be rendered by you gentlemen with fairness and objectivity, aware that your decision could set a political precedent that would haunt all statewide elections to this body henceforth. In effect, the Senate in the 93d Congress, under the 25th amendment, has already elected a President and a Vice President of the whole United States. The issue here before this Senate of the 94th Congress is whether due process in the sovereign State of New Hampshire will be overridden?

In these United States every citizen's vote is important. This case illustrates this perhaps better than any that has been before this body in prior years. I cannot believe that the U.S. Senate would disenfranchise the majority of the sovereign State of New Hampshire or thenceforth from the sovereign State of Rhode Island or West Virginia or Michigan or any of the 50 States of the Union. Should this be done, voters will say "My vote didn't count after all," if Senators from thousands of miles removed, can reinterpret the intention of a quarter of a million voters in New Hampshire. Certainly, the honorable men of the U.S. Senate cannot render a wiser judgment of due process than the honorable judges and commissioners of New Hampshire—men of great reputation and integrity—who agonized over every legally challenged ballot, as the record proves.

I respectfully request that you honor New Hampshire's certificate of election to me as its U.S. Senator. Failing that decision by you, then return the ultimate decision to the people of New Hampshire.

Senator PELL. Thank you very much indeed, Mr. Wyman, for your statement. And, if we can, we will move on to the ballot law commission and return to you shortly.

Will the ballot law commission come forth?

Gentlemen, would you raise your right hand—and do you solemnly swear that the testimony you are about to give to this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

[Response "I do."]

Senator PELL. And would you identify yourselves for the record?

Mr. SNOW. For the record, Mr. Chairman, I am Ronald Snow, chairman of the ballot law commission of New Hampshire.

Mr. RUDMAN. My name is Warren Rudman, Mr. Chairman. I am attorney general of the State of New Hampshire.

Mr. RATH. My name is Assistant Attorney General Thomas D. Rath and I represent the ballot law commission. I am here today to read a statement for Mr. Crowley, a member of the commission.

Senator PELL. Proceed as you will.

STATEMENT OF RONALD L. SNOW, CHAIRMAN OF THE NEW HAMPSHIRE BALLOT LAW COMMISSION; WARREN L. RUDMAN, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE AND MEMBER OF THE BALLOT LAW COMMISSION; AND THOMAS D. RATH, ASSISTANT ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE (IN BEHALF OF ROGER CROWLEY, MINORITY MEMBER OF THE NEW HAMPSHIRE BALLOT LAW COMMISSION)

Mr. SNOW. Mr. Chairman and members of this committee, my name is Ronald Snow, Chairman of the New Hampshire Ballot Law Commission. I appear before this committee today not as a supported of the position of either candidate, but rather, Mr. Chairman, in answer to your cordial invitation, for the purpose of placing before you some facts about our recent ballot law commission hearing with the fond hope that these facts may be of some value in your deliberations.

My comments, therefore, will be directed to four questions.

The first is a legal definition of the New Hampshire Ballot Law Commission.

The second is a brief description of its membership.

The third is a discussion of the issues which were considered and ruled on by the commission in this case.

And, finally, a listing of issues which the commission deliberately did not consider and rule upon and the reasons therefor.

The first point concerns itself with what is the ballot law commission. In that regard, Mr. Chairman, there are four statutes under New Hampshire law to which the commission would draw this committee's attention. I have cited them completely in the prepared statement which has previously been submitted to the committee. But, in part, the first statute, which is New Hampshire RSA chapter 68, states that the attorney general shall sit as a member of the ballot law commission by virtue of his position as attorney general, and that there shall be two other members appointed by the Governor with the advice and consent of the council for terms of 4 years.

And, finally, not more than two commissioners shall be of the same political party.

The second statute, which is of some significance, is RSA chapter 68:4 II, which defines, we believe, the scope of the inquiry by the ballot law commission. Again, it states in part that on an appeal to the ballot law commission, it shall consider and review all the rulings of the Secretary of State on ballots protested during the recount.

The third statute which again is of some significance is New Hampshire chapter 59:96, which defines, we believe, what are protested ballots. It indicates that a candidate or his attorney have the right to protest either the counting of or the failure to count any ballot.

And, finally, chapter 68:11, which discusses the appeal from decisions of the ballot law commission, states in its critical part there shall be no appeal in races considering the U.S. Senate, recognizing the ultimate authority of this body to decide its own membership.

We believe it is significant to note that during the proceedings before the ballot law commission and while they were in process, a three-judge Federal panel sitting in the U.S. District Court, District of New Hampshire, found that the New Hampshire Ballot Law Commission

did not encroach upon the Senate's powers to be the final judge of its own membership, and was therefore constitutional.

That citation is pointed out for your body in the prepared statement.

The second issue which I would like to comment on briefly is the membership of this commission.

Attorney General Warren Rudman, who was appointed to that position by former Governor Walter Peterson, sits as a member of the commission.

Roger J. Crowley, Jr., who would be here today, Mr. Chairman, but is in the Mary Hitchcock Hospital after recent surgery, is currently director of the Governor's Commission on Crime and Delinquency, a registered Democrat, a former candidate for the office of governor of the State of New Hampshire and is the most recent appointee to the commission, that being in the summer of 1974.

The chairman of the commission is a registered Republican who was appointed as chairman of the commission in the summer of 1972 by then Governor Peterson.

Attorney General Rudman and Commissioner Crowley are both well known and highly respected citizens of our State. The chairman of our commission, by contrast, is by far the least prominent of the three commissioners and for the last 14 years has primarily concerned himself with being a trial attorney in the city of Concord, and has not really been active in any political activity for either party.

In point of fact, Mr. Chairman, as was pointed out just a moment ago by Mr. Wyman, prior to the beginning of the ballot law commission hearings, I never met or spoke with that gentleman. I have not to this day met Governor Meldrim Thomson, Jr., the current Governor of the State of New Hampshire, and I have a law partner who ran as an independent candidate against both Governor Thomson and Roger Crowley, Jr., for the office of governor a few years ago.

All of this is relevant only to emphasize that the suggestion that the three current ballot law commissioners, because of identity of interests, could have conspired to favor either candidate in their deliberations, because of party loyalty or otherwise, in my opinion is absurd on its face and unsupportable in fact.

The third point that I would like to make, Mr. Chairman, are the issues that the ballot law commission considered and ruled upon.

At the end of the recount by the secretary of state, his staff, the count stood as follows:

Durkin 110,924 votes; Wyman 110,914 votes.

At the end of the ballot law commission hearings, the count stood as follows:

Wyman 110,926 votes; Durkin 110,924 votes.

The net result of the ballot law commission hearings therefore was an increase of 12 net votes allowed for Wyman and no change in the Durkin count.

Before arriving at its conclusions, however, the ballot law commission had to rule on all of the protested ballots during the recount procedure. No count was attempted of the total ballots which were processed before us, but I would estimate that it was in excess of 3,500 votes.

Of all the ballots considered by the ballot law commission, however, the secretary of state's decision were overruled in only approximately 80 specific cases.

The ballot law commission in ruling on protested ballots attempted to follow the principle which it discussed with the parties on the first day of the hearings, namely, to attempt to interpret the intent of the voter and, wherever possible, to allow that intent to prevail, even where technical ballot law rules had been violated by the voter. Many votes, for example, were ultimately counted by the ballot law commission for both candidates where the voter expressed his choice by some means other than putting an X within the square or circle as prescribed by the ballot.

The New Hampshire Supreme Court in two decisions, rendered while the ballot law commission hearings were in process, substantiated, we believe, that our philosophy of approach, from a legal standpoint, was correct.

The New Hampshire Supreme Court stated in part—and I quote:

In this State the statutes afford a citizen several ways to express his preference by ballot. Whichever mode is selected by the voter, his expressed intention is crucial. * * * Strict compliance with the technical form of a vote must yield to recognition of the voter's indication of intention.

And again they stated in another decision at the same time—and I quote:

The chairman of the ballot law commission has expressed its awareness of the principle that the legally expressed choice of the voters shall be controlling.

The ballots overruling the secretary of state's original decisions by the ballot law commission, we believe, in retrospect, break down roughly into four categories:

First, a category which can be described generally as purely an attempt to determine the intent of the voter by examination of all aspects of the ballot. In this category—again after the fact—we find that 15 Durkin protests were in effect upheld and 21 Wyman protests were in effect upheld by the ballot law commission.

The second category of protested ballots in which the secretary of state was overruled were ballots which have previously been referred to today as the so-called large X. This was the situation where a large X, as was pointed out in the exhibit this morning, was marked covering the entire slate of candidates, or at least that portion of the slate encompassing the election, candidates, in question. These ballots were allowed by the commission for whichever candidate the X marked, so long as there were no countervailing marks on the ballot, which tended to confuse the intent of the voter in our minds.

In this category protests by Durkin were upheld in 11 cases, and Wyman protests were upheld in 6 cases.

We believe it is significant, Mr. Chairman, to point out that the ballot law commission in considering the protested ballots took each precinct one at a time, opened the sealed box, removed an envelope which contained the protested ballots, considered all of those protested ballots before moving on to the next sealed box, which in turn was opened as the previous one. In other words, the ballot law commission had no way of knowing at any time during these proceedings the total number of protested ballots that it was going to consider or what general category of protest they fell into. The above first two categories

of protested ballots were in all respects the most controversial which were considered, in our minds, and yet, as can be seen by the results, the net gain or loss of either candidate after all of these both groups were considered was exactly one vote.

The third category of protested ballots included only four ballots—again in retrospect—but were ballots in which there appeared to be clear error on the part of the secretary of state's staff in marking the protested slips. One ballot was a clear Democratic straight-ticket ballot, no other marks, which indicated it had been counted for neither candidate. The other three ballots appeared to be similarly clear ballots, properly voted for Wyman, which had been either counted for Durkin or counted blank. Counsel for both parties, we believe, acknowledged that these were clear unexplained errors.

The fourth and final category consisted of 18 ballots marked spoiled, canceled or with some other designation suggesting that they had been replaced at the voting booth by the voting officials with a new ballot for the voter. In all cases, the secretary of state had counted these ballots for whichever candidate they appeared to indicate. The ballot law commission listened to oral testimony with respect to these ballots by the voting officials from each precinct involved to confirm that they had in fact issued new ballots to the voters and that these were truly spoiled ballots which should be considered canceled by the ballot law commission. In this category 12 Wyman protests were upheld and 6 Durkin protests were upheld. Resulting, of course, in 12 previously Durkin votes being counted no vote and 6 previously counted Wyman votes being counted no vote.

In addition to the above paper ballots considered in which the Secretary of State was overruled, three write-in votes from the voting machines in Exeter were allowed and two write-in votes from the city of Nashua on voting machines were allowed. These votes were allowed after the voting officials of the respective towns testified that there was no way in which double voting could take place in the U.S. Senate race, that the write-in vote was in the proper column to indicate the voter's intent in the U.S. Senate race, and that a previously published rule of the ballot law commission in 1962 indicating that write-in votes for candidates whose names were printed on the ballot would in effect not be counted had never been published or explained to the voters of the town, and finally that there were no indications of this rule in the respective voting machine booths themselves. Four of these ballots turned out to be Wyman votes and one a Durkin vote. All other voting machines in the State of New Hampshire were canvassed by the attorney general's office with representatives of both parties present, and no other write-in votes for either candidate were found anywhere in voting machines.

The final point that I would like to discuss are the issues that the New Hampshire Ballot Law Commission refused to consider and rule upon.

The commission consistently refused during this hearing to consider and rule upon issues which can be broadly considered as "voting irregularities." We did this basically for two reasons. The first, and the most important, was that there was no specific statutory authority which, in our opinion, allowed us to do it in the enabling statute. Second, the same statutory section which prescribed our authority,

we thought specifically gave the parties a proper recourse for voting irregularities within the New Hampshire Superior Court. Or, failing that, before this body, the U.S. Senate.

Now, obviously, in the last few days, as has been pointed out, the New Hampshire Supreme Court has spoken on this issue and indicated that no New Hampshire court could take jurisdiction of these voting irregularities.

Some of these issues, upon which we denied counsel's motions to consider, were a refusal to open and count an absentee vote from the town of Amherst, which had not been deposited with the regular ballots at the time of the original count. It was significant to the commission in refusing to open and count this ballot that the outside envelope had previously been opened when it arrived before our commission.

We refused to consider and review claimed irregularities in the absentee voting in Nashua.

We refused to consider and rule on claimed voting irregularities on the voting machines in Manchester.

We refused a request to recount all ballots in the towns of Lancaster, Meredith, and Merrimack.

We refused to review a claimed irregularity in the absentee checklist in the town of Seabrook.

We refused the request to recount all ballots in the town of Salem.

We refused to recount ballots and check tally sheets in Conway. The same with respect to absentee votes in Meredith, absentee votes in Littleton, and a Ward 8 absentee ballot in the city of Manchester.

In conclusion, Mr. Chairman, New Hampshire law, we believe, provides for three possible sources of review in a contested election. The first review is by the secretary of state and his staff at a complete recount of all ballots which are accumulated from the various precincts for that purpose. At that recount all parties in interest have an opportunity to protest the rulings on the counting or failure to count any ballot.

Next, an appeal to the ballot law commission is provided, but that review is limited to a consideration of protested ballots.

Finally, the statute provides that other problems related to the election, but not within the jurisdiction of the ballot law commission, can in some elections be considered by the New Hampshire courts. As I have just pointed out, the New Hampshire Supreme Court has just ruled, however, that the New Hampshire courts have no jurisdiction to consider these issues in this Senate race.

At the conclusion of the ballot law commission hearing on December 24, 1974, the first and second avenues of review of this election had been completed in compliance with New Hampshire law. And, in my opinion, absent a showing of prejudice, partiality or fraud, for this body to review and alter that finding would be to embark on a dangerous precedent. Once you begin to substitute the judgment of the U.S. Senate for the judgement of the New Hampshire voting officials on ballots considered by them, one is led, I believe, to the inescapable conclusion that all 223,363 ballots cast for Wyman, Durkin, or Chimento will have to be reviewed in order to guarantee that the same standards have been applied to the consideration of this election.

For example, hundreds, maybe even thousands of ballots originally protested by the parties were marked as exhibits by the ballot law commission, but not ruled upon, stipulated by the parties, with their rights preserved, to press their objections at some other time. Because of previous rulings we had already made on ballots that had come before.

If you change votes involving any of these issues, in my opinion you automatically trigger a review of these other ballots which have not been considered.

Absent some showing of fraud or gross irregularity or some specific statutory language to the contrary, a two-vote margin by a successful candidate is just as accurate a reflection of the election as a 20-vote margin, a 200-vote margin or a 2,000-vote margin, for that same candidate.

Notwithstanding the above, the third area of possible review by an appellate stands in my view on an entirely different basis. The question of the merit of the arguments that there were voting machine irregularities, for example, and the effects of these facts, if substantiated, on the outcome of this election, have never been considered by the secretary of state, the ballot law commission, or ruled upon by New Hampshire courts. Whether the U.S. Senate wishes to hear evidence on these issues is obviously for this body to decide. But, in my view, the resolution of the question of possible voting irregularities and their effect on the election, if any, should be the prime consideration by this committee.

It goes without saying that in an election this close, any malfunction or unexplained discrepancy in voting machines or the handling of absentee ballots or anything else would make the determination of the true winner difficult, if not impossible, to decide, since the vote or voter affected by the error could not be traced.

Mr. Chairman, members of this committee, I hope that this background will be of some value to this committee and I should be happy to answer any questions at this time or at any other time in the future which this committee or any other Member of the Senate may have concerning the actions of our commission.

Thank you.

Senator PELL. Thank you. Before going on, maybe we can hear from all three members of the panel.

Attorney General Rudman, would you proceed?

Mr. RUDMAN. Thank you very much, Mr. Chairman, members of the subcommittee, I want to thank you for your invitation and for the privilege of appearing before you today.

My name is Warren Rudman, I am the attorney general of the State of New Hampshire. I was appointed to that position by former Gov. Walter Peterson in 1970 and reappointed to a full 5-year term by that same Governor in 1971. My current term of office expires on January 16, 1976.

I am in somewhat of a unique position before you today in that, because of my office, I have been simultaneously responsible for the enforcement of the election laws under RSA 7:12, representing the Governor and executive council as well as all agencies within the

State government, and also sitting as a member of the ballot law commission, as is required by RSA 68 :1.

In discharging my responsibilities under RSA 7:12, I organized an election day task force which monitored the conduct of the election and responded to complaints and questions posed during election day. The volume of such complaints and questions was light, and, specifically, neither of the principals here nor their representatives ever contacted me while the polls were open.

Shortly after midnight on November 6, 1974, as the returns from across the State gradually revealed the closeness of this contest, Mr. Durkin—I believe it was Mr. Durkin, although it could have been one of his staff members at that late hour, I believe it was Mr. Durkin—called me at my home to request that all ballots be secured, since a recount would in all likelihood be necessary. It was my view, confirmed after a telephone conference with Assistant Attorney General Thomas D. Rath, that our statutes mandated such a securing. That morning, at approximately 10 a.m., the New Hampshire State police began to collect all ballots from throughout the State. These were brought to Concord to a secure area of the statehouse, where they were kept under a 24-hour-a-day guard.

During the recount, my staff counted the number of persons who were checked off the checklists as voting and also the number of unused ballots returning to the secretary of state. And I might depart from my prepared text here to say that I did that, because it was quite apparent to me that with the closeness of this election, it would be most valuable to courts or to this body at some date to know whether or not there was fraud in his election. And had we not done this, by counting ballots, unused ballots and checklists, then we would not have known that today. And that is why it was done.

We also observed the checking of all tallies from voting machine precincts.

While we found almost inevitable human error to be widespread, nowhere did we find any evidence of fraud or misconduct.

Mindful of the possible conflict between my role as attorney general and as a ballot law commissioner, at the outset of the hearings before the ballot law commission, I delegated and made part of the record of those commission proceedings all of my powers under Revised Statutes Annotated 7:12 to David H. Souter, the deputy attorney general of the State of New Hampshire. Additionally, when it became necessary for the Governor and council to be represented before the U.S. District Court for the District of New Hampshire for its role in the certification process, I advised the Governor and the executive council that my office could not represent them, and made the suggestion, which was adopted, that the Governor and the council retain special outside counsel. I feel, therefore, that I was able to sit on the ballot law commission, make the difficult decisions, without any fear of conflict or appearance of conflict.

Much has been said and will be said here about the ballot law commission and its proceedings. This committee has the complete transcript of those hearings. It is quite bulky, but it bears reading. Speaking for myself, however, I take special notice of the fact that the ballot law commission process has been strenuously tested and challenged by these candidates in the State and Federal courts. No court has enjoined, interfered with or even criticized the ballot law commission.

Indeed, the courts have been unanimous in their opinion that, as the New Hampshire Supreme Court said, the ballot law commission's actions had not been shown to have:

* * * exceeded its powers under the statute, or failed to conscientiously afford all candidates a fair opportunity to be fully heard in a manner consistent with due process.

I know that my brother commissioners, as well as I, have striven to remain aloof from partisan concerns. It is most unfortunate that some, who were not even present during all of our deliberations, have sought to impugn the integrity and fairness of those deliberations and the men making them. I regret these hasty charges and choose to attribute them to the terrific pressures of a most stressful situation. Their surest and most certain refutation is to be found in the record of the ballot law commission, which is both fair and honorable, and one to which I am proud to lend my name.

I recognize that the choices that are faced by this subcommittee and, ultimately, by the U.S. Senate, are hard ones. In my view, as a lawyer and as attorney general, the State processes have been exhausted and a winner determined. In a strictly legal sense, he should be seated. As a pragmatist, I am aware that others may differ with the conclusions of the ballot law commission. I also recognize that the U.S. Senate has the full, absolute, and plenary power to rule over the qualifications of its Members. I would only point out to this subcommittee that should the Senate opt for a decision other than that arrived at by the election processes of the State of New Hampshire, that decision would always be susceptible to challenge from some quarters as the product of a partisan political body. I personally would totally reject such a view, believing most sincerely that the U.S. Senate would act only in a fair and nonpartisan manner.

To avoid any possibility of challenge, I urge this subcommittee to at least consider the good faith alternative pending, I believe today, before the New Hampshire General Court. This alternative simply provides that the people shall decide who sits as their next Senator. In this time of widespread citizen distrust of their governmental processes, this very simple plan would work to remove all doubt from this senatorial election by returning the choice to those to whom the seat in fact belongs, the people of the State of New Hampshire.

Senator PELL. Thank you very much. Would you proceed, sir?

Mr. RATH. Mr. Chairman, Senator Byrd, and Senator Griffin, as I noted earlier, I am reading the statement of Roger J. Crowley, who is hospitalized and could not be here today.

My name is Roger J. Crowley, Jr. I am director of the Governor's Commission on Crime and Delinquency for the State of New Hampshire. I am also a member of the State's ballot law commission, having been appointed to that position in August of 1974.

I am also a lifelong Democrat and was on two occasions the Democratic candidate for Governor of my State (i.e., 1970 and 1972).

I am also a retired naval officer. On retirement from the Navy in 1962, I became director of the New Hampshire Aeronautics Commission and served in that capacity for approximately 5 years.

In 1967, I was appointed commissioner of the New Hampshire Department of Resources and Economic Development and served in this capacity for approximately 3 years.

Until December of 1974, I had never seen a marked ballot except my own. Moreover, I had no knowledge of the ballot law commission's functions, authority or responsibility until I was appointed as a member of said commission in August of last year.

I have known Attorney General Warren Rudman for some 12 years on a personal and official basis. During that period I have come to respect Mr. Rudman for his integrity and ability. I first met Attorney Ronald Snow in September of this year. I have found him to be a person of integrity and outstanding ability.

In November of 1974, I was scheduled to enter the Mary Hitchcock Hospital at Hanover, N.H., for vascular surgery. I postponed that operation until this week in order to serve on the ballot law commission. Let me make crystal clear at this time that no State official or other person either directly or indirectly attempted to persuade me to delay my operation. A few personal friends had commented that if I did not serve on the commission during a critical period, it might appear that I had taken the easy way out of a difficult situation.

The functions of the ballot law commission were conducted under R.S.A. 68:4, Laws of the State of New Hampshire. Decisions of the ballot law commission were confined to rulings made by the secretary of state during the recount and protested by a candidate.

Alleged irregularities in certain voting machines in Manchester and absentee ballots in Nashua were not considered by the commission on the basis that the commission's authority by statute is limited to decisions made by the secretary of state during a recount and only when such decisions are protested by a candidate.

Mr. Durkin protested 21 absentee ballots (exhibit 230-W) in the town of Meredith of which 16 were recorded for Wyman and 5 for Durkin. After hearing testimony on this issue the commission decided to sustain the decision of the secretary of state.

Mr. Durkin also protested two votes in the Salem tally sheet. The commission met in executive session to consider the Durkin protest but found that the protested ballots could not be isolated for recount. Accordingly, the ruling of the secretary of state was sustained.

On several occasions during the proceedings where contested ballots were being ruled on, there were split votes, so that on different occasions each member of the ballot law commission found himself in a minority position. In each of these instances it was extremely difficult to interpret the intent of the voter.

Finally I would state that the rulings of the ballot law commission were based on each member's judgment, and were completely impartial as to the final outcome.

As the sole Democrat on the ballot law commission, I would like to acknowledge the fairness, integrity and outstanding ability of the Republican commission members, viz., Chairman Ronald Snow and Attorney General Warren Rudman. Both Attorney Snow and Attorney General Rudman extended every consideration and courtesy to me throughout the entire proceeding. The entire proceeding, in my opinion, was eminently fair and conducted in an efficient and orderly manner.

At this time I am about to undergo vascular surgery at the Mary Hitchcock Hospital in Hanover, N.H. During the period I am hospitalized I am willing to provide additional information or depositions to the committee. By the end of January, I should be physically able to appear before the committee if you so desire.

In conclusion I should like to state the significant question of voting irregularities and the small margin of victory may well warrant the need for a new election.

Senator PELL. Well, thank you very much indeed, gentlemen.

In connection, Mr. Snow, with the composition of the ballot law commission, are there any customs in New Hampshire as to what sort of people should be appointed to it? What have been the precedents in this regard? Because I can't help but note, in this case, that the two members—not you, the chairman, the two members—are in paid appointed positions, paid positions appointed by the Governor.

I was wondering if that was normal.

Mr. SNOW. Based on my reflections on the records of the secretary of state, Mr. Chairman, there has been no set precedent throughout the years, it has varied completely; for I would say most of the last 30 or 40 years, the ballot law commission has been primarily two lawyers in the State of New Hampshire, one a Democrat, one a Re-

publican, in addition to whomever the attorney general happened to be at that time.

Senator PELL. Is Captain Crowley a lawyer?

Mr. SNOW. No, he is not.

Senator PELL. So, in other words, there is no Democratic lawyer on the Commission?

Mr. SNOW. That is correct.

Senator PELL. Now, from the viewpoint of disqualification, if one of the commissioners was himself or had a close relative employed by or very close to one of the participants in the election, should that individual disqualify himself or not?

Mr. SNOW. There is a statute which covers that, which is in the statutes that have been provided to you, the blue book. It provides that the chairman petitions the New Hampshire Supreme Court, who then appoint a member of whatever party is being replaced. And we have done that on occasion since I have been chairman of this commission on other hearings.

Senator PELL. What are your views as to what would be the grounds for disqualification, for an individual to ask to be disqualified?

Mr. SNOW. Well, obviously, if any of the parties petitioned for a disqualification, I would assume that that would have to be taken into consideration. A member of the family being considered in some ward election, or a very close friend or associate, I would assume—the same kinds of criteria, Mr. Chairman, which would govern good ordinary procedure in any other board in which you are asked to sit part time.

Senator PELL. How many of the ballot law decisions, the commission decisions, were 3 to 0, 2 to 1? Were they generally 3 to 0 or what percentage?

Mr. SNOW. Most of the decisions were unanimous, Mr. Chairman. I have not counted the 2-to-1 votes. I have heard reference from the record that it was on the order of 12 or 15, but I have not personally reread the entire transcript at this time.

Senator PELL. As you mentioned, you operated in a goldfish bowl atmosphere with the press there, but I understand there was a closed door session prior to operating. What was the purpose of that closed door session?

Mr. SNOW. That session was referred to by some members of the New Hampshire press, Mr. Chairman, as a secret meeting. What in fact it was was an attempt on the part of the commissioners to find out whether the hearings would ever get started. We were having difficulty getting the parties together to agree to a starting date. We merely met as a commission and decided on what date we would start and published a set of procedural rules which were within an hour of that meeting sent to both sides—that was the entire extent of that meeting.

Senator PELL. Was a transcript kept of that meeting?

Mr. SNOW. There are no transcripts kept of any meetings of the commission, Mr. Chairman.

Senator PELL. You mentioned that 3,500 ballots were considered by your commission. Would you spell out for me a little more what were those 3,500 ballots?

Mr. SNOW. What I said, Mr. Chairman, is that there were 3,500 ballots processed through us, and what I mean by that is, within each

box—let me take an example, the city of Laconia would be a good one, several wards. Each ward was in a separate sealed box. Within the top of the box would be an envelope in which the so-called protested ballots were contained.

I believe if you were to count all of the ballots within all of those envelopes, you would have approximately 3,000 to 3,500 documents. We were not asked to rule on all of those, because counsel for each side sitting at the same table would say, I do not wish to have you rule on this at this time, reserving my rights to have a ruling at a later time, if I so choose. That is what I meant, Mr. Chairman.

Senator PELL. I noticed, too, that you refused to hear, consider, certain categories of ballots that were protested. We may wish to emulate your example, if we have to go into this.

What were the grounds of your refusal?

Mr. SNOW. Very simply, the one status in question which defines our scope, says that we shall hear and decide on all ballots protested at the recount, period. I read that and my fellow commissioners agreed that that did not include nonprotested irregularities, which then we were asked to rule upon.

Senator PELL. If the Senate decided to follow the same terms of reference that you did in your inquiry, would that be correct, in your view?

Mr. SNOW. That depends, Mr. Chairman, on which street the Senate wishes to walk in terms of what it is going to do, in my opinion.

Senator PELL. We don't know yet, we are coming to the crossroads and we really do not know what direction we are going down.

Mr. SNOW. I agree with the chairman's statement that you are at a crossroads, because from a personal standpoint that is the way I view it. If you take the road which says we wish, in effect, to review the whole situation, then I think it is perfectly proper—in fact, it is maybe mandated that you do go into the question of irregularities, if the candidates pursue that objection.

We did not have that right under the law, as we read it. But if this body is to take the position that it is at this point, if you will, a super appeals court, a court of last appeal, then, in my opinion, the issues which were factual, as in any other trial court, should be given their due and should be considered as precluded from review, unless, as in any other appeal court, there is gross irregularity or fraud, which is not being suggested in this case.

Senator PELL. Did the ballot law commission attempt to determine the intent of the voter by taking the ballot on its face, or did you use any other means to determine the intent of the voter?

Mr. SNOW. If I understand the question, Mr. Chairman, in terms of what you are asking, we primarily looked at each ballot as a separate and new state of facts, because there were obviously no identical ballots—there were some that were very close—but we did, in retrospect, in terms of trying to analyze for this committee and put together this statement, I arbitrarily said there were four different kinds of issues.

But we did, I think, Mr. Chairman, attempt to look at each ballot, all of the marks on each ballot, and look for intent based on that.

Senator PELL. Were you here when Mr. Durkin made his presentation and then walked us through his exhibits?

Mr. SNOW. I have been here throughout the proceedings, Mr. Chairman.

Senator PELL. Do you have any comments with regard to those exhibits he cited, because reading them myself, without a magnifying glass, but I must say with the help of glasses, it does seem that he had some very valid points there.

Mr. SNOW. Mr. Chairman, my opinion, based on my looking in New Hampshire at some of the photocopies, which I understand you have been provided—I have not seen Mr. Durkin's exhibits, I have not been provided with a copy of his statement—but my opinion is that any attempt to make anything out of what you have before you, if they are the same documents that I looked at, would be meaningless, because the Xerox copy just plain does not come through in any way, the way the original ballots were, as you will see them, when you get them, if you ask for them.

And I would strongly urge you not to make any conclusions about what we did based on Xerox copies or, in my opinion, you will be wasting a lot of your valuable time.

Senator PELL. I should have said that the secretary of state is here, Mr. Robert L. Stark, and would like to introduce his copy of the minutes of certain meetings of the Governor and his council, for the record.

I, Robert L. Stark, Secretary of State of the State of New Hampshire, and Secretary to the Governor and Executive Council, do hereby certify that the attached are true copies of those pages of minutes of the meetings of November 21, 1974, November 27, 1974, December 5, 1974, and December 27, 1974.



Robert L. Stark
Robert L. Stark
Secretary of State

January 6, 1975

The Governor and Council, on motion of Councilor Hayes, seconded by Councilor Whelan, accepted the report submitted by the Secretary of State of the return of votes cast at the biennial election on November 5, 1974 for United States Senator; for Representatives in Congress - First and Second Districts; and for State Senators, as submitted; and authorized the Governor to issue election certificates in accordance with the following records; and approved the move to table the report of the Secretary of State of the return of votes cast at the biennial election on November 5, 1974 for the proposed amendments to the Constitution until the date has passed for recount applications, which is November 30, 1974.

The Secretary of State laid before the Governor and the Council the return of votes cast at the biennial election on November 5, 1974 in the several towns and wards of the State for United States Senator, Members of Congress from the First and Second Districts, and State Senators, as follows:

For United States Senator:

Louis C. Wyman, Manchester	110,715
John A. Durkin, Manchester	110,351
Carmen C. Chimento, Brookline	1,327

and Louis C. Wyman, having received the largest number of votes cast for United States Senator, was declared elected.

For Representative in Congress:

First District

David A. Banks, Chichester	53,610
Norman E. D'Amours, Manchester	50,360

Second District

James C. Cleveland, New London	69,052
Helen L. Bliss, New Ipswich	36,453

and Norman E. D'Amours, First District, and James C. Cleveland, Second District, having received the largest number of votes cast in their respective districts, were declared elected.

The Honorable Board found that the following candidates for State Senators had received the largest number of votes and were duly declared elected Senators from their respective districts:

District No. 1	Laurier Lemontagne, Berlin
2	Andrew W. Poulsen, Littleton
3	Stephen W. Smith, Plymouth
4	Edith B. Gardner, Gilford
5	David Hammond Bradley, Hanover
6	Louis E. Bergeron, Rochester
7	Alf E. Jacobson, New London
8	James A. Saggiotes, Newport
9	Robert E. Nonier, Goffstown

Executive Council Chambers
 Concord, New Hampshire
 November 27, 1974

#54

The Governor and Council convened at 10:00 A.M., all members being present.

The Governor and Council, on motion of Councilor Hayes, seconded by Councilor Whalen, unanimously approved the following:

The Secretary of State laid the following Resolution before the Governor and Council:

Resolved that the official recount of the ballots cast in the election for United States Senator having been completed and showing the following results:

John A. Durkin - 110,924
 Louis C. Wyman - 110,914
 Carmen C. Chimento - 1,513

It is resolved that under the provisions of RSA 63:8 and 63:11 the Governor and Council certify John A. Durkin of Manchester as the winner of said election, further stating that the Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 68.

The Governor and Council, on motion of Councilor Whalen, seconded by Councilor Hayes, voted to deny a recount on Constitutional Question #1, Are you in favor of amending the constitution to remove the restriction against the Legislative granting pensions for more than one year at a time? As petitioned by Representative Catherine Lamy and supported by the State Employees Association.

This denial is under authority of RSA 59:101 and an informal opinion of the Attorney General.

The Governor and Council, on motion of Councilor Hayes, seconded by Councilor Whalen, ordered the Secretary of State, under authority of RSA 59:101 to recount Constitutional Questions #2 - Are you in favor of amending the Constitution to prohibit denial or abridgment of equal rights by the state on account of race, creed, color, sex or national origin? And Question #4, are you in favor of amending the constitution to permit the legislative to provide alternate methods of taking the oath of office by senators and representatives when oaths cannot be readily taken before the Governor and Council? As requested in a petition submitted by Representative John M. Bednar, of Hudson and in accordance with an informal opinion of the Attorney General.

Minutes of the Governor and Council meeting held November 7, 1974, page 62F which reads "nine persons to Boston, Mass., November 15-16, expense \$105.00, travel by two state cars" was amended to read "five persons to Boston, Mass., November 15-16, expense \$90.00, travel by two state cars."

Executive Council Chambers
Concord, N.H.
Dec. 5 1974

#65

The Governor and Council assembled in special meeting at 8:40 A.M., all members being present.

The Governor and Council, on motion of Councilor Hayes, seconded by Councilor Whalen, on a roll call vote unanimously adopted the following resolution at 8:50 A. M.

RESOLUTION

WHEREAS the Secretary of State is required by RSA 63:8 and 63:11 to present the figures on the election for office of the United States Senator to the Governor and Executive Council for certification, and:

WHEREAS, the Secretary of State on 5 December 1974 has advised the Governor and Executive Council that all votes cast for the office of United States Senator were not recounted, and

WHEREAS, the Secretary of State has stated that no write-in votes in the balloting machines were tallied on the re-count, and;

WHEREAS, the Governor and Executive Council have received a notarized statement indicating write-in votes were cast and a notarized statement that write-in votes were counted in the official return of votes for one of the two candidates, and;

WHEREAS, the Secretary of State has notified the Governor and Executive Council on this date that these same votes were not tallied in the recount, and

WHEREAS, on November 27, 1974 Governor and Council did pursuant to Statute certify by Resolution the count given to it by the Secretary of State, which Resolution reads as follows:

"Resolved that the official recount of the ballots cast in the election for United States Senator having been completed and showing the following results:

John A. Durkin	110,924
Louis C. Wyman	110,914
Carmen C. Chimento	1,513

It is resolved that under the provisions of RSA 63:8 and 63:11 the Governor and Council certify John A. Durkin of Manchester as the winner of said election further stating that the Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 68."

55 Page A

WHEREAS the text of said Resolution was not included in the certification forwarded to the United States Senate and to the senatorial candidates:

BE IT HEREBY RESOLVED that the Governor and Executive Council rescinds the certification of November 27 and instruct the Secretary of State to forthwith notify the United States Senate and the senatorial candidates of this action.

s/s Meldrim Thomson, Jr.
Governor of New Hampshire

s/s Lyle E. Herson
Lyle E. Herson
Executive Councilor

s/s James H. Hayes
James H. Hayes
Executive Councilor

s/s Robert E. Whalen
Robert E. Whalen
Executive Councilor

s/s John F. Bridges
John F. Bridges
Executive Councilor

s/s Bernard A. Streeter, Jr.
Bernard A. Streeter, Jr.
Executive Councilor

The following two notarized statements were made a part of the record.

I, John E. Gilmore, Selectman of Exeter, N.H., hereby personally certify that 3 write in votes were counted and recorded for Louis C. Wyman for U. S. Senate in the election Tues., Nov. 5, 1974 held at Exeter, N.H.

s/s John E. Gilmore

State of New Hampshire
 County of Rockingham

Dec. 3, 1974

Personally appeared John E. Gilmore before me and took oath to the above statement.

s/s Charles K. Thayer

Charles K. Thayer

Notary Public

My Commission Expires April 1978

I, Harry B. Thayer III, do hereby certify that I voted by the write-in box and not with the candidate's lever on a voting machine in Exeter, N.H. Nov. 5, 1974, for Louis C. Wyman for U. S. Senate.

s/s Harry B. Thayer III

State of New Hampshire
 County of Rockingham

Dec. 3, 1974

Personally appeared Harry B Thayer III before me and took oath to the above statement.

s/s John E. Gilmore JP

John E. Gilmore

Justice of the Peace

The Honorable Board then adjourned.

RESOLUTION

WHEREAS the State of New Hampshire conducted a biennial general election on November 5, 1974, and

WHEREAS the report of the Secretary of State of the return of the votes cast for United States Senator was duly laid before the Governor and Council on November 21, 1974 as Louis C. Wyman, Manchester, 110,716; John A. Durkin, Manchester, 110,361; and Carmen C. Chimento, Brookline, 1,327; whereupon the Governor and Council ". . .and authorized the Governor to issue election certificates in accordance with the (above) records," and formally declared "Louis C. Wyman, Manchester, having received the largest number of votes cast for United States Senator. . .elected. . .," and

WHEREAS formal documentation was not prepared forthwith by the Secretary of State due to the then ongoing official recount in said election, and

WHEREAS a formal request was made by legal counsel for John A. Durkin, Manchester, on November 6, 1974 for impounding all ballots and a formal request was made by the same parties on November 7, 1974 for an official recount by the Secretary of State, and

WHEREAS such an official recount was conducted by the Secretary of State on November 18, 1974 through November 26, 1974, and

WHEREAS upon completion of said official recount the Secretary of State on November 27, 1974 announced that the votes cast for the election of United States Senator were John A. Durkin, Manchester, 110,924; Louis C. Wyman, Manchester, 110,914; and Carmen C. Chimento, Brookline, 1,513; and thereupon the Secretary of State presented these totals to the Governor and Council for certification within an hour, and

WHEREAS the Governor and Council, acting prudently, on November-27, 1974, sought an informal opinion from the Attorney General of New Hampshire as to when final certification was appropriate and legal, having in mind that a further appellate proceeding still remained available to either Mr. Durkin or Mr. Wyman with the Ballot Law Commission, a State agency, and

WHEREAS the Attorney General advised the Governor and Council on November 27, 1974 that they should then certify Mr. John A. Durkin as the elected United States Senator at that point in time and on a further request from the Governor and Council the Attorney General stated in an informal opinion that the State Ballot Law Commission would certify direct to the United States Senate and to the participating candidates of any changes in the total votes cast when the Ballot Law Commission reviewed challenged ballots, and

WHEREAS the Governor and Council then requested the Attorney General to draw up a qualifying resolution providing for a conditional certification for John A. Durkin which was unanimously passed by the Governor and Council and which read, in part. . ."The Governor and Council make this certification aware of the rights of appeal to the State Ballot Law Commission contained in RSA 68," and

WHEREAS on November 27, 1974 counsel for Louis C. Wyman, Manchester, appealed the declaration of recount of the Secretary of State under RSA 68:4 1), and

WHEREAS during the ensuing dates between December 4, 1974 and December 23, 1974 the State Ballot Law Commission acted in consideration and review of the challenged ballots, and

WHEREAS on December 5, 1974 the Governor and Council first were made aware of two sworn affidavits alleging that the Secretary of State in conducting the official recount had failed to count write-in ballots on the voting machines in the town of Exeter, and

WHEREAS the Secretary of State, under questioning by the Governor and Council, admitted that he had not counted write-in ballots on the voting machines in the town of Exeter nor in the cities of Manchester, Nashua and Portsmouth based on his interpretation of a prior Ballot Law Commission ruling occurring during a previous election which now appears not to have been applicable in this particular election since it applied in multiple-choice elections and not in a "one-choice election," and

WHEREAS it was clearly apparent to the Governor and Council that all votes cast on November 5, 1974 were therefore not counted in the official recount by the Secretary of State thus creating inaccurate totals in the qualified certification of John A. Durkin, and

WHEREAS the Secretary of State, under questioning by the Governor and Council, was unable to offer any reason for his failure to advise the United States Senate nor the candidates of the qualified certification drawn by the Attorney General and unanimously passed by the Governor and Council on November 27, 1974 certifying John A. Durkin and which clearly indicated the awareness by the Governor and Council of the availability of a further appellate procedure through the Ballot Law Commission in the event of a request for a review of challenged ballots by either candidate, and

WHEREAS the Governor and Council ~~felt strongly that until the challenged~~ votes were reviewed by the State Ballot Law Commission and determinations made, and all appeal routes had been exhausted at the State level that certification by the highest executive authority in the State of New Hampshire, namely the Governor and Council, had been premature and inaccurate, and

WHEREAS the Governor and Council for these reasons then acted on December 5, 1974 to decertify the previous qualified certification of John A. Durkin, Manchester, and

WHEREAS the Ballot Law Commission has formally announced on December 24, 1974 that the following totals in the election of the United States Senator are final and accurate as in their best judgment reflecting the intent of each voter, and

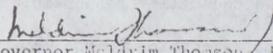
WHEREAS under the Constitution of New Hampshire, Part II, Article 62, the Governor and Council is responsible "For ordering and directing the affairs of the State, according to the laws of the land,"

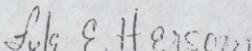
NOW THEREFORE the Governor and Council, acting as the highest executive authority in the State of New Hampshire concurs with the State Ballot Law Commission in the issuance of a Certificate of Changed Declaration and Accompanying Report of the New Hampshire Ballot Law Commission dated December 24, 1974 of the total vote cast as being Louis C. Wyman, Manchester, 110,926; John A. Durkin, Manchester, 110,924; Carmen C. Chimento, Brookline, 1,513; as being an accurate representation of the total votes cast for each candidate in the biennial election held on November 5, 1974 for the office of United States Senator, and

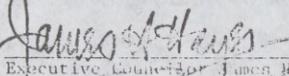
NOW THEREFORE the Governor and Council directs the Secretary of State, acting in the capacity of Secretary to the Executive Council (New Hampshire Constitution, Part II, Article 64) and as Clerk and Recording Officer of the New Hampshire State Ballot Law Commission (RSA 68:1) to make this Resolution part of the certification documents of Louis C. Wyman, Manchester, and

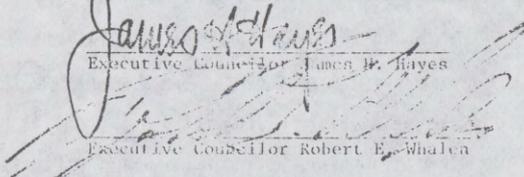
NOW THEREFORE the Governor and Council authorizes the Governor to declare Louis C. Wyman the elected United States Senator and to issue to him a certificate which will include the following paragraph:

This certifies that the Governor and Executive Council having reviewed and accepted the findings of the New Hampshire Ballot Law Commission that at the biennial election held on November 5, 1974, Louis C. Wyman of Manchester received 110,926 votes; that John A. Durkin of Manchester received 110,924 votes; that Carmen C. Chimento of Brookline received 1,513 votes in the contest for United States Senator, hereby declares Louis C. Wyman elected and by authorizing the Governor to issue to him a Certificate of Election reflecting the said certification of the Ballot Law Commission.

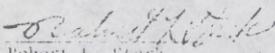

Governor Meldrim Thomson, Jr.

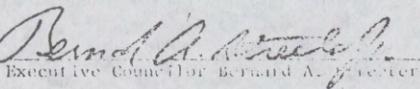

Executive Councilor Lyle E. Hersom


Executive Councilor James H. Hayes


Executive Councilor Robert E. Whalen


Executive Councilor John F. Bridges


Robert L. Stark
Secretary of State


Executive Councilor Bernard A. Greener

THE STATE OF NEW HAMPSHIRE

Executive Department

To the President of the Senate of the United States:

This is to certify that on the fifth day of November,
nineteen hundred and seventy-four

LOUIS C. WYMAN

Was duly chosen by the qualified electors of the State of New Hampshire a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the third day of January, nineteen hundred and seventy-five.

This certifies that the Governor and Executive Council having reviewed and accepted the findings of the New Hampshire Ballot Law Commission that at the biennial election held on November 5, 1974, Louis C. Wyman of Manchester received 110,926 votes; that John A. Durkin of Manchester received 110,924 votes; that Carmen C. Chinnato of Brookfield received 1,512 votes in the contest for United States Senator, hereby declare Louis C. Wyman elected and do authorize the Governor to issue to him a Certificate of Election reflecting the said certification of the Ballot Law Commission.

Witness: His Excellency, our
Governor

and our Seal hereto affixed
at Concord this twenty-seventh
day of December, in the year
of our Lord nineteen hundred
and seventy-four



John A. Durkin
Governor

By the Governor, with
advice of the Council:

Richard L. Haskins
Secretary of State

Senator FELL. Senator Griffin?

Senator GRIFFIN. Chairman Snow, what procedure was followed in permitting or allowing Xerox copies of ballots to be made?

Mr. SNOW. At the request of both sides, at termination at the end of our proceedings, Senator Griffin, the candidates, or their representatives, I understand, went with a representative of the secretary of state and the attorney general to the depository where the original ballots are being kept under lock and key, and made Xerox copies of whatever they wanted, and then went away with those Xerox copies. And, as I understand it, both sides got the same set of whatever they agreed they wanted to have copied.

I have no personal knowledge of what those are, because we were not there. This was after the termination of our hearing.

Senator GRIFFIN. I was impressed by the procedure followed by the ballot law commission, that you went into the protested ballots one precinct or ballot box at a time without knowing how many protested ballots there would be, and so on. I can't recall where that testimony appears in your statement.

With all of the parties having Xeroxed some large undetermined number of ballots up there, the Senate committee wouldn't quite be in the same position—that is my own observation.

I take it that counsel for both sides are busily examining those Xerox copies and trying to figure out all sorts of arguments and things, which, of course, they are entitled to do.

I notice that the ballot law commission, on page 13, "D. We refused a request to recount all ballots in the towns of Lancaster, Meredith, and Merrimack."

I don't quite quite understand why.

Mr. SNOW. Why the request or why the refusal?

Senator GRIFFIN. Why the refusal?

Mr. SNOW. These ballots had already been recounted by the secretary of state. These had not—they had not been recounted. The request was that the complaining party thought there was an error between the tally sheet count and what had been reported by the secretary of state. And after the fact, they are asking us to go count all the ballots, not to determine who voted for whom, but how many total ballots there were.

In our opinion this would have been a recount of the previous recount, which we were not entitled to do.

Senator GRIFFIN. Here, again, you concluded that your statutory authority did not permit you to do that?

Mr. SNOW. That is correct.

Senator GRIFFIN. That is not to say someone else should not review the question of irregularities in a situation like that?

Mr. SNOW. Our decision was based exclusively, Senator Griffin, on our understanding of what our statutory authority was. In point of fact, one of the parties was suggesting we should not be doing it throughout and the other party was suggesting we should.

Senator GRIFFIN. May I ask which party was making which suggestion?

Mr. SNOW. Mr. Wyman's position was that these issues should all be gone into. Mr. Durkin's attorney took the position we were already going outside of the scope of our authority in allowing oral testimony,

which we did on the questions of spoiled ballots and on allowing counting of write-in ballots from voting machine, which we did do.

Senator GRIFFIN. Except for the so-called closed meeting to which reference was made at the outset where the commission determined whether it was going to proceed or how it was going to proceed, were all other proceedings of the ballot law commission open to the public, to the press?

Mr. SNOW. The answer to your question is simply yes.

Let me make, if I may, one comment about the whole issue of closed meetings. The claim was this was a violation of New Hampshire rights to notice. That issue was waived at the hearing, I understand before the three-judge panel. I think it is important that be made.

Let me also say one of the exceptions to the rights to know, in New Hampshire, is an emergency meeting, and that is what I indicated it was in order to merely get the procedural ground rules going.

Senator GRIFFIN. And throughout the proceedings held by the ballot law commission, were there representatives of the Senate Privileges Elections Subcommittee observing?

Mr. SNOW. They were there for all periods of time that they were in New Hampshire and at our suggestion and invitation, they sat directly behind us, Senator Griffin, so that if they chose to stand and watch us over our shoulders as they did many afternoons while we considered tough ballots, we were very happy to have them do so and we discussed them with them, at the same time, and let them see them so that they could see at all times what we were faced with, if you will.

Senator GRIFFIN. Thank you, Mr. Chairman.

Senator PELL. Thank you.

Senator Byrd.

Senator BYRD. Mr. SNOW, I compliment you and the Commission on what appears on the face of the record to have been a fair and objective approach to the problem.

As you indicated in your statement—for which I also want to compliment you—

Mr. SNOW. Thank you, sir.

Senator BYRD (continuing). Reading from the bottom of page 6:

However, before arriving at its conclusions, the Ballot Law Commission had to rule on all of the protested ballots during the recount procedure. No count was attempted of these total ballots during the Ballot Law Commission hearing, but it can reasonably be estimated to be in excess of 3,500 in number.

When it was all boiled down, how many ballots did you actually review?

Mr. SNOW. I do not have an absolute count. It has been referred to several times today as something in the order of 400, Senator Byrd. I cannot quibble with that. I think that probably is a very fair statement.

Senator BYRD. Those 400 being ballots independent of those numbered in the 3,500 or were they included in that 3,500?

Mr. SNOW. That is included in that number.

Senator BYRD. That is included in that number. Then approximately 3,500 ballots went through your hands, but you singled out approximately 400 for decisions by the Commission, is that right?

Mr. SNOW. The answer is "Yes", and the reason we did, those are the ones that counsel for each side presented us with after reviewing them beforehand themselves.

Our procedure was that each box was brought out and put on the table in front of the two attorneys who sat facing us. We would open the box, take out the envelope, hand it to the attorneys first. They would open it up, divide the protest according to who protested what in two piles. Then review at their leisure those they wished to now have us review. We would do that, mark those as a separate exhibit, put them in a separate envelope and say "We have considered these, this is exhibit 135," or whatever it is, have it marked for identification.

Those that they said, "We do not now wish to have you read these, we will reserve our rights for future date," we would put in a second envelope, the next succeeding number in most cases, and mark it number 136-W or D, and have it marked for identification.

Senator BYRD. So as to the approximately 3,100 ballots, neither contestant asked that any one of those be reviewed by your commission?

Mr. SNOW. That is correct, Senator Byrd. In most cases the issue that they wished to have presented or the issue that they were preserving already had been decided by a previous decision of the Commission, and so they said based on what you have already done, we will reserve our right on these.

An example of that would be check marks or red ink, or defacing of the ballot, extraneous markings on some of the ballots. The big X question. These kinds of things.

If we had already made a decision and they did not think it was a new issue, in many instances they did not ask us to rule again, but said they would merely reserve their rights, because another body might have a different standing, and that might then become relevant.

Senator BYRD. So that insofar as the 400 ballots were concerned, those were the only ballots with respect to which one or both sides requested or felt that you should review?

Mr. SNOW. That is correct, sir.

Senator BYRD. In other words, you did not toss out one here and one there to which an objection was raised by either side?

I am talking about the 3,100 now. None of the 3,100 consisted of ballots which the Commission said regardless of what you said, Mr. Wyman or Mr. Durkin, we do not think we ought to go into that.

Mr. SNOW. Clearly not. The answer to that question is, "No."

Senator BYRD. This would involve, I am sure, a very detailed examination of the votes perhaps, or at least a portion of those 400, but can you give a simplistic answer as to how you came out with 12 additional votes over the recount—none of which went for Mr. Durkin, but all of which went for Mr. Wyman?

Mr. SNOW. The answer to the question in its simplest form is we did not. What I said in my statement, Senator Byrd, was that the net result of the recount was an increase of 12 net votes for Mr. Wyman. That net 12 came about in the following fashion. If my recollection does not desert me at this time, he had a net over Mr. Durkin of three write-in votes not previously counted off the voting machines. He had a net of six over Mr. Durkin on the question of the spoiled ballots which had been previously counted and were subtracted.

There were, in addition to that, a net of one of the first two categories of the big X's and so-called erasures and things of this nature, so that that is where the 12 came from.

Senator BYRD. You started with 110,924 votes for Durkin and 110,914 votes for Mr. Wyman, which totaled 221,838 votes. You did not review the 221,838 votes. You only reviewed approximately 400 ballots.

Would you indicate your methodology of arithmetic in that you could not count the whole, not review the whole, but only a certain portion, and end up with Mr. Wyman 110,926, Mr. Durkin 110,924?

Mr. SNOW. Simple answer would not be simple to arrive at.

A simple way for me to answer the question is to refer you to the decision of the ballot law commission decision dated December 24, 1974, which had appended to it my daily notes which were transcribed and dictated at the end of each day in which I attempted to summarize the changed votes for that day and the basis of it. And that is an appendix to that decision.

If you do not have one I can certainly make one available to you.

It went up and down is the simple answer, day after day. It got to zero, one candidate was ahead, another candidate was another day, and it just went on day after day and ultimately ended up there. But it went all over the lot throughout the entire hearings.

Senator BYRD. In other words, you started out with 221,838 votes, you separated 400 votes and decided that these are the 400 we need to review—

Mr. SNOW. No, sir.

Senator BYRD [continuing]. Which would leave, let's say, 221,438, and then add to each side as we go along? This is not the approach you took?

Mr. SNOW. No, sir. As I said in my statement, what we did is take each box from each precinct, one at a time, 299 precincts, State of New Hampshire, and went through every single one of them, every box, every vote potentially could have come before us had it been protested. We knew not beforehand how many were going to be found in each one of those boxes.

I broke open the seal and I took out the first town from the first county. Within that envelope there might have been 60, 70, 100 protested ballots. We processed all of them. I believe there were, as I say, 3-4,000 of those probably. But each attorney, representing each candidate, then decided which they wanted to have us consider at that time. They made the decision, not us, sir.

Senator PELL. I do not understand one thing. How do you mean you opened up the envelope and then found the protested ballots. You mean the protests were made at the actual time of the voting?

Mr. SNOW. At the time of the recount, sir, before the secretary of State.

Senator PELL. I expect the secretary of state's recount—

Mr. SNOW. Yes, sir.

Senator PELL. Then they were all put back in the envelopes afterward?

Mr. SNOW. No; what they did, they separated at the time of the recount from all of the ballots those ballots from each town that were being specifically protested. Each one of those got a little pink slip stapled to it by the secretary of state which he marked. For example,

ballot counted for Wyman, protested by Durkin, counted "no vote." And whenever that pink slip was on there, we knew it was a protested ballot. They were all then put in a separate envelope and marked "Protested ballot" and sealed.

Senator GRIFFIN. Mr. Chairman.

When you say they were all put in, this is confusing.

Mr. SNOW. All of the protested ballots.

Senator GRIFFIN. Protested only?

Mr. SNOW. Yes, sir, pink slips.

Senator GRIFFIN. Put in an envelope?

Mr. SNOW. Yes, sir, and sealed and marked "Protested ballots." That envelope was then deposited on top of the other remaining ballots for each box and the box was sealed. So that we had to open physically each box which might have had 10,000 ballots in it, remove the ballots with a few hundred or whatever protested ballots, open it, let the candidates' attorneys decide which of those they now wanted us to review.

Senator PELL. Thank you.

Senator BYRD. On page 12, you set forth a number of counsels motions that were denied. May I ask in each instance, beginning with A, was your refusal based on a failure to lodge timely protest by either of the parties?

Mr. SNOW. In addition to the jurisdictional question you mean? Because clearly all of these we felt were outside our jurisdiction, but in almost all of the instances—there were some of these that had been protested at the time of the recount.

Senator BYRD. But you refused, you declined, you denied the motion on the basis in each of these that it was beyond the jurisdiction of your commission?

Mr. SNOW. Yes, sir.

Senator BYRD. Regardless of whether the protest had been registered?

Mr. SNOW. I believe that is correct.

Senator BYRD. In due time?

Mr. SNOW. That is correct, yes. Because only in one instance—in two instances were there actually protests launched at the time of the recount and those were the absentee votes in Nashua and the voting irregularities in Manchester, I believe.

The record would be the best evidence of that and the full transcript is before you. I believe all of the others were issues that came up during the course of our hearing.

Senator BYRD. So only with respect to B and C were timely protests made?

Mr. SNOW. That is my recollection, Senator, without having the record before me.

Senator BYRD. But even in those two instances, you declined to review the recount because of the jurisdictional question?

Are you having trouble hearing me?

Mr. SNOW. I am getting side noises sometimes.

Senator GRIFFIN. Did you say B and C?

Senator BYRD. I said B and C.

Is it your recollection that both sides accepted your decision with respect to the declination to allow—or to review the 10 requests?

Mr. SNOW. Well, I am not sure how to answer the question as to whether they accepted it. They immediately proceeded to the New

Hampshire Superior Court on some of these. I did not participate in those hearings, so I do not know how many were protested there, Senator. But I know many of these were raised on the theory that we had declined jurisdiction and they therefore were proceeding to the superior court and asked the court to take jurisdiction over these issues and decide them.

Senator BYRD. Do you agree with Mr. Rudman, the attorney general that the conclusion of the commission may in good faith be questioned by Mr. Durkin?

Mr. SNOW. If the question is whether I believe that a dissatisfied or losing party has a right to question the validity of a judgment of any person, the answer is yes, sir.

Senator BYRD. I can understand your feeling that the results of the review by the commissioner were based on conscientious good faith, objective, impartial decisions. But Mr. Durkin is questioning the results of your review.

Mr. SNOW. Mr. Durkin is questioning my integrity, sir.

Senator BYRD. Well, I am not concerned about that. That is irrelevant so far as I am concerned.

I do not question your integrity.

But is Mr. Durkin questioning the decision of the commission?

In other words, is he saying the commission was in error in some of its judgments on some of the ballots?

Mr. SNOW. That is what he is pleading, and I agree that is what his pleading say, yes, sir.

Senator BYRD. And do you feel that that is a conclusion which a reasonable man could reach?

Mr. SNOW. I believe, as I said earlier, that any party before any adjudicatory party or quasi-adjudicatory party has a right to question issues of fact with which he disagrees, yes, sir.

Senator BYRD. That is not quite the answer to my question.

Mr. SNOW. I do not believe, Senator—

Senator BYRD. Would you say that as a reasonable man, the judgment could be questioned?

Mr. SNOW. I believe—yes, certainly.

Senator BYRD. You believe in it, I know you believe in it. But is it reasonable for me or John Doe, as a reasonable man, if he feels that there is justification, as Mr. Durkin demonstrated that he did, and which you perhaps in some instances would be able to refute, but he demonstrated that there were certain inconsistencies in the way that the commission ruled on various ballots. Now, that being the case, could not a reasonable man come to the conclusion that the commission erred in its judgment—

Mr. SNOW. I do not agree—

Senator BYRD [continuing]. That the commission indeed was not consistent, that therefore the 400 ballots that were reviewed by the commission should be subject to rereview?

Mr. SNOW. I do not agree with the premise which was the basis of your question, which is that the commission proceeded in approaching these in any inconsistent way.

I do not believe that has been demonstrated by anything that I have seen here today.

Senator BYRD. But that is not my premise. I am not saying you did or you did not. But I am saying that for the sake of argument, if Mr.

Durkin is correct that there was inconsistency—and here is where I think we need to find out whether or not there was inconsistency, you maintain there was not and you may be right, but if there was inconsistency in truth, then there would be legitimate reason to say that the conclusion was not the right conclusion, that the commission erred, and that the conclusion should be reviewed. That would not be an unreasonable position to take?

Mr. SNOW. Certainly not. Certainly not. And I believe the question anticipates the answer.

What you are saying, I believe, sir, is if error can be shown by a reviewing body, that decision should be changed and I certainly would agree with that.

Senator BYRD. Mr. Chairman, I have no further questions at this time.

Senator PELL. Thank you.

Mr. SNOW, who presently has got custody or control of all of the ballots, machines, and other election material; where are they and are they secured?

Mr. SNOW. The answer to the first part of your question is that all of the ballots which were marked as exhibits are locked in the police headquarters, Evansville, and are secure. The ballots not marked in evidence but which we believe might be pertinent to this are locked in the National Guard armory, and they are secured in a separate vault.

Senator PELL. In other words, 400 are with the State police, the 3,000 are—

Mr. SNOW. The 220,000.

Senator PELL. 3,000 are with the 220,000?

Mr. SNOW. That is correct.

Senator PELL. In other words, the pink slip ones to which neither side took exception blended in with all the others and where are they again?

Mr. SNOW. State Police, Crime Laboratory, Evansville, walk-in vault.

Senator PELL. Where are the machines?

Mr. SNOW. The machines are locked in wherever and whatever town they had come from. There are only four cities or towns in New Hampshire—Exeter, Portsmouth, Nashua, and Manchester. They are secured in whatever place they are usually secured in. The counters have not been changed. We have instructed the voting officials to keep them in the same fashion they were in at the time of the recount.

Senator PELL. And would you give us your reason, as an expert in this field now, for the difficulties encountered in determining the intent of the voters in counting the votes? Was it paper ballot system you used?

Mr. SNOW. The really tough problem we were asked to rule on were those in which there was a clear X, for example, in the Durkin box and a marking of some kind in the Wyman box. Question then became was there an attempt at an erasure? First start out on one side and go to the other? Or was there an attempt to cross over the top of an X that had been put in the wrong box and the man changed his mind?

These kinds of decisions. Was it really a pencil that was too sharp and left a very strong deep hole in the paper, but left very little marking on it? What was he trying to do? It is those kinds of decisions.

And the ones with large X's and the ones that were spoiled were the easier ones. Those become an application of what we thought the law was to the facts as we saw them. The others were much more subjective.

Senator PELL. Is there any ground for doubt in your opinion relative to which candidate is entitled to seek the Senate?

Mr. SNOW. Not at this point, sir.

Senator PELL. No doubt in your mind at all?

Mr. SNOW. Absent as I said in my statement the consideration by this august body of the question of voting irregularities which we did not consider. But in terms of the things we did, although as Senator Byrd has pointed out honest men might differ as to how to approach it, and how they would rule if they were sitting in our place, I believe we followed the statutory procedure to its end.

Senator PELL. Were there any bona fide allegations of fraud or other violation of law involving this election to your knowledge?

Mr. SNOW. None that I am aware of.

Senator PELL. Mr. Rudman?

Mr. RUDMAN. None whatsoever, Senator.

Senator PELL. Thank you.

Senator GRIFFIN. May I?

Chairman Snow, focusing on the 10 categories that Senator Byrd referred to, beginning on page 12 and going over to 13, the situation where the ballot law commission refused for one reason or another to recount or review. I ask this question of you, I suppose the chairman has appropriately recognized you are an expert witness, even though some of these matters as you have said were not before your commission, but Senator Byrd referred to categories B and C. I am not quite sure what the point was there.

On these other categories, is there not reason for the Senate, if it is to review this election at all, to look into some or all of these categories and can you be specific and elaborate in that regard?

Mr. SNOW. Well, my position, as I have stated, Senator—

Senator GRIFFIN. I know you did, but it seems to have gotten lost up here somehow and I think you ought to restate it.

Mr. SNOW. You have to excuse me. I am used to telling the judge one time and if I try again, he usually tells me to sit down.

With respect to the absentee vote in the town of Amherst, this was one ballot only.

Senator GRIFFIN. I see.

Mr. SNOW. And the ballot was delivered by the town clerk of Amherst after calling up the secretary of state and telling him that through clerical error, this absentee ballot should have been counted, but through some clerical error, the voter's name had been left off the check list and he presented it to us and we were asked to count it. We did not.

We did not open it, as a matter of fact. It is sealed in an envelope and has exhibit number on it and we have never looked at it. So I have no idea as to which voter, if any, which candidate, if any, that was for.

With respect to the claimed irregularities in the city of Nashua, the claim there was that there were gross irregularities in the processing of absentee votes in the city of Nashua.

With respect to the voting machines in Manchester, the claim was that there was a discrepancy between the public counter and the protective counter which exceeded 1,000 in number.

Senator GRIFFIN. If I may interrupt you, the point I would like to get at is your ballot law commission did not rule on these matters, but is that any reason that this Senate committee should not look at these matters?

Did the parties waive their rights?

Mr. SNOW. Negative. And in my opinion, the answer to your question is the fact that we did not rule on them has no bearing on what your body does in any way.

Senator GRIFFIN. I get the impression that we are only considering or maybe only considering reviewing what you did.

I think it needs to be emphasized what the role was you played, and what is the status of those things which you did not review.

Mr. SNOW. As I pointed out, they have not been ruled on by either the secretary of state, the ballot law commission, or any New Hampshire agency or court. And to answer your question further, no one has waived any of their legal rights with respect to any of those legal issues.

Senator GRIFFIN. As I understand it, the New Hampshire Supreme Court with respect to these matters ruled that the Senate was the appropriate place for review; is that correct?

Mr. SNOW. That is correct. That is the most recent ruling of the supreme court, which is about 4 days old.

Senator GRIFFIN. Supreme court?

Mr. SNOW. State of New Hampshire.

Senator BYRD. Mr. Chairman.

Senator PELL. Senator Byrd.

Senator BYRD. Did the New Hampshire court rule that, that the Senate was the appropriate place for review?

Mr. SNOW. I have a copy of the decision.

Senator GRIFFIN. I am not an authority on that.

Senator BYRD. Just the word "appropriate" is the word to which my question is pointing.

Senator GRIFFIN. If we understand each other, and I think we do now, I just want to make it clear that these other questions that are enumerated here on pages 12 and 13 were not looked into by the ballot law commission. Clearly we have to look at it independently to determine if the Senate, if we go into it at all, would go into those questions. The fact that the ballot law commission didn't, would not necessarily foreclose or preclude parties from so requesting.

Senator BYRD. I agree with the Senator. This is a decision that the committee would make. But we are not to infer from the court's decision that the Senate has a responsibility to go into those other areas.

Senator GRIFFIN. Well, I think we agree, the Senate has the power and authority, which is very broad under the Constitution, to do nothing, to review at all, or to review any part of it.

Mr. SNOW. The answer to your question, sir, is the decision is of January 6, 1975, *Wyman v. Durkin*, and on page 2 of that decision the supreme court says in part, and I quote:

The Senate of the United States, under article 1, section 5, of the Constitution of the United States, like our own Senate, under part 2, article 35, of the New Hampshire Constitution, is vested with the power to judge the election and

qualification of its own members, including the complaints which are the subject matter of these proceedings, were to take jurisdiction over these claimed irregularities, Manchester voting machines and Nashua absentee vote discrepancies.

Senator GRIFFIN. I think the point needs to be made and emphasized that if there were timely questions raised concerning alleged irregularities which were brought to the attention of the ballot law commission but if the ballot law commission declined to rule on, not because they did not think they were of substance but because they didn't think they had the statutory jurisdiction to do that, and if the person—and I take it in some instance it is one side and others it is the other side—has gone to the Supreme Court of New Hampshire and the Supreme Court of New Hampshire has not seen fit to review those alleged irregularities on the grounds that Senate is the appropriate forum, it seems to me we have a responsibility to look closely at the claim there; otherwise we are leaving the person raising the question with no place to go at all. That is the point I want to make. I do not think I need to pursue it further.

Senator BYRD. Would the Senator yield?

Senator GRIFFIN. Yes.

Senator BYRD. If I should accept that premise without question, which I would not, is it not correct, Mr. Snow, that the Senate would only be looking at those areas involved in paragraphs B and C? In that those were the only two areas with respect to which timely protests were entered?

Mr. SNOW. That, sir, depends, it seems to me, again, on which road the Senate chooses and this committee—

Senator BYRD. No, I am taking your own testimony. You said earlier in regard to this list of 10 areas, the commission refused to decline to go into them because, in all of them, there was a jurisdictional question; in the cases of B and C, their timely protest had been entered, but you declined to look at those because of jurisdictional questions.

Mr. SNOW. We had two burdens which complaining party had to meet, you are correct, timely protest plus jurisdictional. With respect to the two you have just mentioned, there was protest with jurisdictional problem, that is correct.

Senator BYRD. Mr. Chairman, may I follow up on those two areas just with this one question?

Senator PELL. Right. Before doing so, let's insert in the record the supreme court rulings of the dispute.

Senator BYRD. Very well.

Senator PELL. Without objection, so ordered.

[Supreme court rulings follow.]

1 Original
2 No. 7083

3 LOUIS C. WYMAN

4
5 v.

6 JOHN A. DURKIN & a.

7
8 December 16, 1974

9 Stanley M. Brown, Donald R. Bryant, Michael F. Farrell, and James
10 H. Schulte (Mr. Bryant and Mr. Brown orally) for the plaintiff.

11
12 Devine, Millimet, Stahl & Branch, and John T. Broderick, Jr.
13 (Mr. Broderick orally) for the defendant, John A. Durkin.

14 David A. Brock by brief and orally for the defendants Governor and
15 Council and Secretary of State.

16 Thomas D. Rath, assistant attorney general,^{orally} for the defendants
17 Ballot Law Commission.
18

19 PER CURIAM. This petition brought by the plaintiff Wyman, the
20 Republican candidate for the office of United States Senator at the
21 November 5, 1974 election, against the defendant Durkin, the Democratic
22 candidate for the same office, seeks a writ of certiorari directed to
23 the State ballot law commission requiring it to certify the circumstances
24 of the adoption by it of a certain rule or rules with respect to write-in
25 votes on voting machines and other matters relating thereto; and if
26 the rule is found by the commission to have no application to the
27 pending contest the petition seeks a writ of prohibition, prohibiting
28 the commission, the secretary of state, and the Governor and Council
29

1 from certifying any winner in the contested election until all write-in
2 votes on voting machines have been canvassed and counted, and any protests
3 have been ruled upon by the commission. The petition joins as parties
4 the ballot law commission, the secretary of state, and the Governor and
5 Council "for jurisdictional purposes only."

6 The defendant in support of his answer and motion to dismiss contends
7 that jurisdiction to review contested elections to the United States
8 Senate is vested exclusively in that body under Article 1, section 5 of
9 the United States Constitution, and that for this and other reasons the
10 plaintiff's petition should be dismissed.

11 Following the election of November 5, 1974, at which the returns
12 showed the plaintiff to be the successful candidate, a recount was con-
13 ducted by the secretary of state at the defendant's request, and the
14 defendant was thereafter certified as the successful candidate (RSA 63:7,
15 8), subject to appeal to the ballot law commission as provided by RSA
16 59:98. Thereafter, the plaintiff appealed to the ballot law commission
17 (RSA 68:4 II), and the Governor and Council acted to rescind the Durkin
18 certificate as premature. Hearings before the ballot law commission were
19 in progress when the plaintiff's petition was filed in this court on
20 December 9, 1974.

21 The plaintiff complains of a regulation relative to voting machines
22 adopted by the commission in 1962 (RSA 59:27), providing in substance that
23 a write-in vote appearing upon a voting machine ballot bearing the printed
24 name of a candidate shall not be counted for him "for the same office".
25 The plaintiff contends that the regulation should have no application to
26 the pending contest, and if so applied would be invalid because in
27 violation of the State and Federal Constitutions. It appears from the
28 affidavit of the chairman of the commission filed in the case, that the
29

1 plaintiff's contention that the regulation should not apply to this
2 contest has been tentatively accepted by the commission to the extent
3 that certain write-in votes on voting machines have been counted by
4 the commission, subject to reconsideration by it at the close of its
5 hearings currently in progress. In the light of this affidavit,
6 the plaintiff at oral argument has waived his prayer for a writ of
7 certiorari.

8 A writ of prohibition is an extraordinary writ issued to prevent
9 the exercise of jurisdiction not granted, and is to be used with caution
10 and forbearance. Manchester Education Ass'n v. Superior Court, 109 N.H.
11 513, 257 A.2d 11 (1969). The chairman of the ballot law commission has
12 expressed its awareness of the principle that the legally expressed
13 choice of the voters shall be controlling. Murchie v. Clifford, 76 N.H.
14 99, 79 A. 901 (1911); Nickerson v. Aimo, 110 N.H. 348, 351, 266 A.2d 828,
15 830 (1970); Opinion of the Justices, No. 7050 (November 4, 1974). Counsel
16 for the Governor and Council and secretary of state has assured the court
17 that no certificate of election will issue before the commission has com-
18 pleted its functions.

19 In these circumstances and upon the record before us, we are of the
20 opinion that no writ of prohibition may appropriately be issued. The
21 commission is proceeding within its statutory jurisdiction, and we will
22 not presume that the defendant constitutional officers will take further
23 action before the commission has carried out its legal responsibilities.
24 Opinion of the Justices, No. 7089 (December 16, 1974). Accordingly, the/
order is

25 Writ of prohibition denied; petition dismissed.
26
27
28
29

To His Excellency the Governor and the Honorable Council:

In the resolution you pose the questions whether written votes cast on voting machines in "one-choice" election contests should be counted by the secretary of state pursuant to RSA 59:98, by the ballot law commission according to RSA 68:4 II and by the Governor and the Executive Council under RSA 63:7, 8. The right of citizens to vote is guaranteed by both the Federal and State Constitutions. U.S. CONST. art. 1, § 2; Amend. XVII; N.H. CONST. pt. I, art. 11; State v. Sullivan, 101 N.H. 429, 430, 146 A.2d 1 (1958). A ballot is a mechanism for expressing the voter's preference, thereby giving vitality to the right to vote. See In re Manchester Town Election, 115 Vt. 230, 231, 55 A.2d 612, 613 (1947). In this State the statutes afford a citizen several ways to express his preference by ballot. RSA 59:58; RSA 59:25 (Supp. 1973). Whichever mode is selected by the voter, his expressed intention is crucial. Barr v. Stevens, 79 N.H. 192, 193, 106 A. 483 (1919); Murchie v. Clifford, 76 N.H. 99, 102, 79 A. 901, 902 (1911). Strict compliance with the technical form of a vote must yield to recognition of the voter's indication of intention. Keene v. Gerry's Cash Market, Inc., 113 N.H. 165, 168, 304 A.2d 873, 875 (1973); Nickerson v. Aimo, 110 N.H. 348, 351, 266 A.2d 828, 830 (1970); see Opinion of the Justices, (Nov. 4, 1974).

The enactment of RSA 59:25 (Voting Machines) made it possible for the voter to express his intention in ways additional to those specified in RSA 59:58. By pulling a lever on a voting

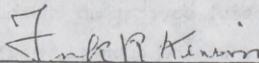
machine a citizen can register his choice of the names listed. Alternatively, he can write in his preference by lifting a panel.

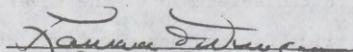
The counsel for the ballot law commission in a companion case (Wyman v. Durkin, No. 7083) has suggested that this court should not express an opinion on write-in votes on voting machines since the ballot law commission has not completed its functions. We assume the ballot law commission is completely aware of the guiding principle expressed in Keene v. Gerry's Cash Market, Inc., 113 N.H. 165, 168, 304 A.2d 873, 875 (1973) as follows: "Statutes regulating the form of ballots are generally regarded as directory rather than mandatory. Annot., 165 A.L.R. 1263, 1264 (1946); 3 McQuillin, Municipal Corporations § 12.14, at 109-10 (3d ed. rev. 1963). They provide a convenient and uniform method for voting, but should not be applied to disenfranchise voters because of technical irregularities. Opinion of the Justices, 107 Me. 514, 516, 517, 78 A. 656, 657 (1910)." Accordingly we deem it inappropriate to give an advisory opinion to the Governor and Council on question number 1. Opinion of the Court, 58 N.H. 621 (1879); Opinion of the Justices, 53 N.H. 640, 641 (1873); Bell v. Pike, 53 N.H. 473, 474 (1873); see Opinion of the Justices, 152 Me. 212, 216, 142 A.2d 532, 534 (1956).

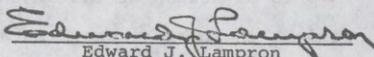
In light of what was said under question number 1, we consider only that part of question number 2 which relates to an actual tie under RSA 63:9. That statute reads as follows: "Tie Vote. If two or more persons, at any election of representatives in congress, shall, in any district, receive the largest and an equal number of votes, so that no choice is made, the governor, with advice of the council, shall cause precepts to be issued to the selectmen of the several towns within such district for another election, requiring them to warn meetings to be holden at the time specified in such precepts for the choice of a representative." In the case of such an actual tie, and only in that instance, does the statute empower the Governor and Council to call for a new election. Such power is consistent with a State's authority to prescribe "the times, places and manner of holding elections for Senators and representatives.

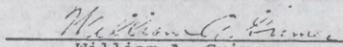
. . ." U.S. CONST. art. 1, § 4; Roudebush v. Hartke, 405 U.S. 15, 24 (1971); Smiley v. Holm, 285 U.S. 355, 366 (1932). The term "virtual tie", however, has not been defined in your resolution nor do we find it defined by any statute. It is a phrase of ambivalent

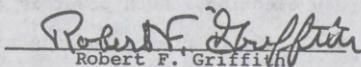
content without known parameters. The statute confers on the Governor and Council no authority to call a special election except in the case of an actual tie as specified by RSA 63:9.


Frank R. Kenison


Laurence I. Duncan


Edward J. Lampron


William A. Grimes


Robert F. Griffith

December 16, 1974

1 Original
No. 7092

2

3

JOHN A. DURKIN

4

5

v.

6

HILLSBOROUGH COUNTY SUPERIOR COURT

7

8

December 20, 1974

9

10 Devine, Millimet, Stahl & Branch (Mr. Joseph A. Millimet orally
11 for the plaintiff.

12

13 McLane, Graf, Greene & Brown (Mr. Stanley M. Brown orally) for
14 Louis C. Wyman, intervenor.

15

16 PER CURIAM. In this petition for writ of prohibition, the issue is
17 whether the superior court has jurisdiction to determine if in the elec-
18 tion for United States Senator illegal absentee ballots were counted,
19 whether voting machine malfunctions and whether certain other irregulari-
20 ties exist, and in the event thereof either to order the exclusion of
21 certain votes from being counted or to declare the election invalid and
22 order a new election.

23

24 The matter arises out of the contest for the 1974 election for the
25 United States Senate between John A. Durkin and Louis C. Wyman. Plaintiff
26 Durkin after a recount conducted pursuant to RSA 59:94-98 was declared to
27 have the greatest number of votes by 10 and a certificate of election was
28 issued to him by the Governor and Council on November 27, 1974, pursuant
29 to RSA 63:8. Thereafter Louis C. Wyman appealed to the ballot law
30 commission pursuant to RSA 68:4 II. On December 5, 1974, the Governor

31

1 and Council then voted to decertify the plaintiff. While proceedings
2 before the ballot law commission were in progress, Wyman filed in the
3 Superior Court for Hillsborough County a petition alleging certain
4 irregularities and voting machine malfunctioning and seeking to exclude
5 alleged illegal votes or to invalidate the 1974 biennial election for
6 United States Senator. Plaintiff Durkin moved to dismiss for lack of
7 jurisdiction since article I, section 5, of the Constitution of the
8 United States vests exclusive jurisdiction in the Senate of the United
9 States to judge "the elections, returns and qualification of its own
10 members". The superior court assumed jurisdiction on December 16, 1974,
11 and on the same day plaintiff filed this petition. In the proceeding
12 before the ballot law commission, which has not been complete, interim
13 rulings which are subject to reconsideration indicate candidate Wyman to
14 be in the lead by five (5) votes as of December 19, 1974.

15 There has been substantial litigation in this senatorial contest.
16 Wyman v. Durkin, No. 7083 (N.H. Dec. 16, 1974); Opinion of the Justices,
17 No. 7089 (N.H. Dec. 16, 1974); Durkin v. Snow, No. 74-359 (D.N.H. (three-
18 judge court) Dec. 18, 1974). Prohibition is an extraordinary remedy which
19 is within the discretion of the court but which should be exercised "only
20 when the right to relief is clear." Hillsborough v. Superior Court,
21 109 N.H. 333, 334, 251 A.2d 325, 326 (1969). Without passing on the
22 merits of the jurisdictional contentions of the parties, we hold that a
23 writ of prohibition should not issue in this case. Manchester Education
24 Association v. Superior Court, 109 N.H. 513, 257 A.2d 22 (1969); Wyman v.
25 Durkin, No. 7083 (N.H. Dec. 16, 1974). We particularly note that nothing
26 in the denial of this petition without prejudice is to be construed as a
27 holding by this court that the superior court has authority and jurisdic-
28 tion to order a new election.

29 Petition denied without prejudice.

1 Hillsborough
2 No. 7112

3 LOUIS C. WYMAN

4 v.

5 JOHN A. DURKIN
6 ROBERT L. STARK, SECRETARY OF STATE
7 CARMEN CHIMENTO

8 January 6, 1975

9 Stanley M. Brown, Dort S. Bigg, Eugene M. Van Loan III and David
10 R. DePuy (Mr. Brown orally) for the plaintiff.

11 Devine, Millimet, Stahl & Branch and Matthias J. Reynolds and
12 William S. Gannon (Mr. Joseph A. Millimet by brief and orally) for
13 John A. Durkin.

14
15 Thomas D. Rath, assistant attorney general, orally, for Robert
16 L. Stark, Secretary of State.

17 Richard W. Leonard, by brief and orally, for Carmen Chimento.
18

19 PER CURIAM. This transfer arises out of the same case which was
20 the subject matter of the petition for writ of prohibition in Durkin v.
21 Hillsborough County Superior Court, 114 N.H. (No. 7092, decided
22 December 20, 1974). The Superior Court (Bois, J.) has transferred
23 without ruling seven questions, the first of which is as follows:

24 "Does the Superior Court have jurisdiction either through RSA 68:4 II;
25 other jurisdictional statutes or through precedent, to invalidate an
26 election for United States Senator?"

27 The several States may regulate the conduct of senatorial elections
28 and may provide procedures necessary to guard against irregularity and
29

1 error in the tabulation of votes and against fraud and corrupt practices.
2 U.S. CONST. art. I, § 4; Smiley v. Holm, 285 U.S. 355 (1931). They may
3 provide procedures for a recount so long as they do not impair or frus-
4 trate the Senate's ability to make an independent judgment. Roudebush
5 v. Hartke, 405 U.S. 15 (1972).

6 The proceedings before the ballot law commission are an integral
7 part of this State's elections laws under U.S. CONST. art. I, § 4.
8 Roudebush v. Hartke, 405 U.S. 15 (1972); Durkin v. Snow, No. 74-359
9 (D.N.H. (three-judge court) Dec. 18, 1974). On the record before us
10 and the arguments of counsel, there is no indication that the ballot
11 law commission has exceeded its powers under the statute (RSA ch. 68),
12 or failed to conscientiously afford all candidates a fair opportunity
13 to be fully heard in a manner consistent with due process. The ballot
14 law commission has ordered a certificate of election to be issued to
15 Candidate Wyman from which order Candidate Durkin has filed an appeal
16 to the Senate of the United States. RSA 68:11.

17 The Senate of the United States under article I, section 5 of
18 the Constitution of the United States, like our own Senate under part II,
19 article 35 of the New Hampshire constitution, is vested with the power
20 to judge the election and qualifications of its own members including
21 the complaints which are the subject matter of these proceedings.
22 Barry v. United States, 279 U.S. 597 (1928); Petition of Dondero, 94
23 N.H. 236, 51 A.2d 39 (1947); RSA 68:11; RSA ch. 67.

24 The petition in Hillsborough County Superior Court bases its
25 jurisdictional claim upon the last section of RSA 68:4 II. That section
26 after vesting exclusive jurisdiction in the ballot law commission states
27 that "nothing contained in this paragraph shall be construed to bar
28 any person from recourse to the superior court on other questions,
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1 within the jurisdiction of such court, relating to the legality or
2 regularity of biennial elections or the results thereof." However
3 this language relates only to matters which are "within the jurisdic-
4 tion of such court." Certain statutes give the courts jurisdiction
5 in elections matters, e.g., RSA 64:6 and RSA 68:11. The latter
6 statute however specifically excludes cases of "contested elections
7 for the offices of United States senator, representatives in congress,
8 state senator or representative to the general court in view of the
9 constitutional provisions vesting in both houses of congress and both
10 houses of the general court exclusive jurisdiction over the elections
11 and qualifications of their respective members."

12 Traditionally our courts have not taken jurisdiction over disputes
13 involving elections to legislative bodies either state or federal.
14 RSA ch. 67. We find no statutory authority under RSA 68:4 II or any
15 other jurisdictional statute or any binding precedent which gives the
16 superior court jurisdiction to invalidate an election to the Senate
17 of the United States.

18 The answer to question 1 is therefore "No" and it is unnecessary
19 to answer the remaining questions transferred.

20 Remanded.

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Senator BYRD. Who protested in the case of B and who protested in the case of C?

Mr. SNOW. For the record, B being the claimed irregularities of absentee voting in Nashua, protest was a Wyman protest.

With respect to C, the claimed voting irregularities, voting machines in the city of Manchester, initially the protest was a Wyman protest.

My recollection, again the record would be the best evidence, Senator, is during the recount there was a request by the Durkin forces for testing of some of these voting machines with respect to the question of irregularity.

I suppose both parties did some protesting on that issue.

Senator BYRD. Very well.

Mr. Chairman, again I want to compliment Mr. Snow and Mr. Rudman—and Mr. Crowley in absentia—for what appears to have been a very conscientious approach to a most difficult job.

Mr. SNOW. Thank you, sir.

Mr. RUDMAN. Thank you very much.

Senator BYRD. Also I thank and commend them for the testimony here today.

Senator PELL. Thank you very much. Thank you for your kindness.

Mr. SNOW. May we be excused?

Senator PELL. You are excused.

Mr. SNOW. Thank you.

Senator BYRD. Will we have, Mr. Chairman, the opportunity to have further contacts with these three commissioners in the event the need arises?

Senator PELL. We will, but we will have to bring them back from New Hampshire. They are catching a plane.

Mr. RUDMAN. We will be available to come back, Senator, I am sure all of us will. But we would like to leave this evening if we could.

Senator PELL. Right.

Will you be leaving any representative down here at all?

Mr. RUDMAN. No, sir.

Mr. SNOW. No.

Mr. RUDMAN. Not that we do not like the city, sir, but we do have some things to do.

Senator PELL. Mr. Wyman, if you would come forward now.

STATEMENT OF LOUIS C. WYMAN—Continued

Senator PELL. Thank you very much, Mr. Wyman, for your willingness to step to one side.

We just had finished hearing your testimony.

I have some questions, but I will reserve those until both you and Mr. Durkin are together at the witness table.

Senator Griffin, you may have some questions for Mr. Wyman.

Senator GRIFFIN. I would like to focus attention on matters Senator Byrd and I were just discussing, these various matters referred to on pages 12 and 13 of Chairman Snow's statement.

Mr. WYMAN. I do not have the statement, Senator.

I have it now.

Senator GRIFFIN. I am addressing this question either to you, Mr. Wyman, or your counsel.

As I understand, Senator Byrd's point, with respect to B and C, timely protests were filed, but some questions were raised, a question was raised apparently with regard to the rest, whether or not any right of review—here, I guess, or anywhere—has been reserved on these other enumerated matters, questions, which the Ballot Law Commission did not review.

Mr. WYMAN. With your permission, Senator, I would like to have Attorney Brown respond to that, because he reserved it.

Mr. BROWN. Senator Griffin, the appendix No. 1 to Senator-elect Wyman's response is a written documentation.

Senator GIFFIN. Appendix No. 1 attached to the Wyman response?

Mr. BROWN. Yes; is the document that records the protests made on his behalf when the recount segment of the State procedures other than the precise challenge of the ruling on particular ballots which were evidenced by the little red slips physically attached to the ballots.

Going to the list you invite to our attention, G, for example, on that list, is not our protest; that is Mr. Durkin's request for a precinct recount.

You will notice in our appendix 1 that we had 14 precinct protests. Mr. Durkin had two, Conway and Salem. All of those precinct protests were actually made during the recount, but there is no written record of them, because the only written record that the Secretary made was the little pink slip on each individual ballot being protested. The general protests were made in the presence of counsel for both sides. I do not think there was any real argument between my brother Millimet, not here now but who was with me there—I agreed, he had his precinct protests. I think he agreed we had ours. But the Ballot Law Commission, and I think properly, took the position that it did not have the authority to go into that area.

And I say, and I suggest this to the august Senate, that if you are going to go into it to review of the election return, that sensibly you should recount those precincts, because the rights to have them recounted were preserved.

Similarly, both Mr. Millimet and myself had actually protests. Mine were Lancaster, Meredith, and Merrimack in which we lost a total of eight votes, eight Wayman votes, we say merely on the mathematics of the tally sheet.

The last item that the Ballot Law Commission ruled upon was Mr. Millimet's similar protest of a tally in the town of Salem in which he claimed that we got two votes to which we were not entitled. When you are dealing with a contest decided by a margin of two, these small matters, one vote in Lancaster, one vote in Merrimack, six votes in Meredith, he says two in Salem, they all assume greater importance. But the rights were preserved. I think they are here. And it seems to me if the Senate is going to go back of the certification resulting from the Ballot Law Commission's work, that you do get yourselves involved in those specific areas.

Senator GRIFFIN. Now, Mr. Chairman, of the subcommittee, this letter referred to by the attorney dated November 27 attached to the Wyman response, I take it all attachments are made part of the record along with the response? And if not, I think it would be—

Senator PELL. My understanding is these were automatically included in the record. If not, so be it.

Senator BYRD. Together with—if I may be pardoned for the interruption, the exhibits that were included in Mr. Durkin's presentation.

Senator PELL. Correct. All appendices and exhibits will be part of the record.

Mr. BROWN. Mr. Chairman, I do not have any affirmative prepared message. I will attempt to answer any questions. I was at the recount; I know the procedure. I was at the Ballot Law Commission; I do know that procedure.

One thing that Senator Byrd brought up I would like to—I may be able to be helpful on, there are three issues still alive if the Senate accepts the spinoff the State supreme court invites you to accept in the area of irregularities.

Senator BYRD. The supreme court did not invite us to do that.

Mr. BROWN. That may be so.

Senator BYRD. To use your words.

Mr. BROWN. Well, the supreme court at least recognized, as New Hampshire courts have throughout and as both parties have throughout, that the Senate does have the ultimate problem of judging the situation. And as I read Mr. Durkin's petition, he similarly asked you to go beyond the Ballot Law Commission and there are three areas that I say are of sufficient concern so that if due process is going to be afforded the voters of my State, I say you should concern yourself with these three areas.

One of them is the massive disregard of specific statutory regulations of absentee voters' votes, ballots, in the city of Manchester. And in that connection, we did submit in superior court and I have copies here, I can submit them again if you are interested, we have affidavit evidence indicating voting down there as a result of overenthusiastic campaign workers for the Democrats as it turned out. We have an affidavit of one lady who tells us that she was given three ballots for herself and for her two sisters. One of her sisters is on her death bed in a nursing home. But she knew that her sister would want a straight Democrat ballot, and so she voted her sister.

All right. We have another one, and this is also affidavit, a gentleman who came in and voted on machine and, lo and behold, he also voted by absentee ballot and he said he never filled out any application, never had any ballot. But there is one there and it was counted.

Now, we are talking about an election contest with a margin of two. There are two double votes. I think, on Durkin's total.

Now, we have said in New Hampshire that we have no standing to merely try to increase Mr. Wyman's lead by proving 17 victories. We have some evidence that there are at least 17. But take another, that is just one situation, there are 12 voting machines in the city of Manchester, new machines, which malfunctioned. I say it, one of our exhibits to the transfer document taken to the State supreme court last week gives you the machine number, gives you the variation between the two counters that are on there for the protection of the public that are supposed to read the same.

One of them, the variation is 707 votes. Now, I heard Mr. Durkin this morning say that these poor people in Manchester went in there, were checked off, did not know enough to pull the big lever? That is a lot of nonsense. Those machines were malfunctioning.

And in those wards where there are malfunctioning machines, in four of those wards there are more people checked off than there are voters recorded as having voted.

Now that I think, 145 votes, as I mentioned, and I think you ought to look and find out whether in fact there was a malfunction of that magnitude, because if it turns out when we open those machines up for the next election that they were malfunctioning, Mr. Wyman is sitting down there as U.S. Senator, you people and he, and we are going to look like a bunch of awful dupes.

That is why I say the first thing, the sensible thing to do is to put to rest whether or not those malfunctioning machines malfunctioned, the recording of votes in this race.

There is an affidavit Mr. Durkin's people brought in the superior court a week ago by attorney by the name of Gammon, who said he had talked to the manufacturer of the machines, Mr. Shelp. And Mr. Shelp said all 12 of those machines were not malfunctioning; only 11 of them were. And he says by his affidavit that Shelp tells him he knows what it was, a ratchet here, spring here, that type of thing.

Nobody has looked at those machines yet and nobody is going to kid me until I have seen them that the entire ballot is unrecorded, but that some votes in some races nevertheless survived. Because I do not believe it. I do not think you folks believe it.

Senator BYRD. Mr. Chairman, could I ask a question?

The witness says that it would be the sensible thing to do this or to do that or to do something else. He has a right to his opinion.

Do you accept the decision of the ballot law commission?

Mr. BROWN. Yes, sir.

Senator BYRD. The decision of the ballot law commission was that instead of Mr. Durkin's having been elected by a majority of 10 votes, Mr. Wyman is in truth elected by a majority of 2 votes. Do you accept that?

Mr. BROWN. Yes, sir.

Senator BYRD. That statement?

Mr. BROWN. Yes, sir. Because I know—

Senator BYRD. Just answer. The answer is "yes"?

Mr. BROWN. Surely. Surely.

Senator BYRD. Very well. Then why should this committee or the Senate feel it incumbent upon it to go back and check all of the machines to determine whether or not they malfunctioned when, as a matter of fact, the Commission did not do that and it explained its reasons, which in the viewpoint of some of us at least were just and good reasons.

If Mr. Wyman has won on the basis of the Commission's decision—which did not include an examination of the machines—why is it the only "sensible" approach for this body to go back and check the functioning of those machines?

Mr. BROWN. Senator Byrd, I think people up in the hills of New Hampshire are about the same as the people down in the hills of West Virginia.

Now, we know up there that there were 12 machines malfunctioning. This is not a figment of my imagination. We know they were malfunctioning. And when we have an election decided by 2 votes

and nobody has looked at those machines to see whether the apparent nonrecording of 145 votes was an actual nonrecording or not, we do not feel very happy about it.

If you seat Mr. Wyman and do not do any investigation at all, in other words accept the ballot law commission's review of the legal ballots that were returned, you stop there, then Mr. Wyman properly is seated and sits here under a cloud I think.

Senator BYRD. Well, if you know, as you say you do, that the machine is malfunctioning, how do you know that the malfunctioning of those machines, if examined, would not show that Mr. Durkin had gained votes rather than Mr. Wyman?

Mr. BROWN. We are not going to be able to tell that, Senator.

Senator BYRD. All right, you are not going to be able to tell that, but you are willing to accept the commission's decision that Mr. Wyman has won on the basis of that commission's study of certain ballots without its having gone back and studied the malfunctioning of the machines?

Mr. WYMAN. May I just, Senator, respond, just in one sense, I think I understand the thrust of your question. The commission could not look at the machines. It told Mr. Brown, as my counsel, and derivatively myself, we have no jurisdiction to do this. We filed the only other thing that we could do, which was a request to the superior court under RSA 68-4 and asked them to do it. And strong objection was filed against our request by Mr. Durkin. In fact, they sought every way they could to stop us from even going to the court.

Eventually that question was, again over protest, certified to our highest court, the Supreme Court, and the answer was that if this sort of thing is to be done, it cannot be, it may not be done by us; it may not be done by the ballot law commission. It may be done if at all only by the U.S. Senate.

Senator BYRD. That does not answer my point.

Mr. WYMAN. I am trying to do this.

Senator BYRD. I understand what you are saying, as to the reason why—

Mr. WYMAN. I have consistently taken the position that I felt that something less than 100 votes was less than a mandate.

Senator BYRD. What is a "mandate"? Where does one draw the line?

Mr. WYMAN. I do not know, sir.

Senator BYRD. When does a majority become a mandate?

Mr. WYMAN. I do not know. It certainly is a majority and under the law, two votes is a majority. But the point is, should this honorable Senate undertake to review only the 400 votes, and come out with a different conclusion than the Ballot Law Commission of New Hampshire has come out with, which is just testified before you, I say 4 votes or 8 votes or 10 votes, the evidence is clear that the probability is that a larger number of votes on the other side may not have been considered by anyone or any agency for lack of jurisdiction and the only agency under our law that can do this is you, gentlemen.

Senator BYRD. Well, with all due respect, Mr. Wyman, I think that both you—and I say this with the utmost respect and you do not intend to obfuscate this question, but that is the result of your thrust; perhaps I do not make myself clear.

I understand why the ballot law commission did not go back and examine the machines. They explained that that was beyond their jurisdiction.

What I am trying is this, you have a block of votes that are some 400 in number; originally, Mr. Durkin was the winner by 10 votes, as a result of the recount.

Now, the commission has taken 400 ballots, and after reviewing those 400 ballots, it has transposed a majority of 10 on this side into a majority of 2 on this side.

Now, the commission did not go back and study the malfunctioning of the machines—the alleged malfunctioning of the machines—and for good reason. But on the basis of this block of votes, it was able to reach a decision which came out in the end with a difference of 12 votes.

Now, if within that block of 400 votes there lies this difference from 10 on the one hand as a majority, to 2 on the other hand as a majority, why is not the true decision that we are trying to reach encompassed in that block of 400 votes?

Mr. BROWN. May I answer you, Senator?

Senator BYRD. Yes.

Mr. BROWN. No. 1, the movement from plus 10 to 2 on the other side, you certainly would not insist that the spoiled ballots be kept in. The first thing done was to take ballots not counted out. There go 6 for his 10.

You then put in the write-in ballots that were not in there at all, and here goes three more.

Then you have the four clear erroneous calls. You certainly are not going to perpetuate them, count them.

And Mr. Wyman is ahead by three or four votes, and then the report of the judgment calls, went on for 2 weeks, did nothing less than reduce his margin down to two. That is what is involved. But it is not just 400 ballots.

Senator BYRD. Well, but you are overlooking the possibility of this subcommittee taking these three votes or those four votes, or those few votes thrown out and voided, and reversing the judgment or taking a different view from that taken by the commission.

Mr. BROWN. I am absolutely satisfied, Senator Byrd, that on those three you gentlemen will do the same as the ballot law committee.

That does not impress me as being a viable possibility.

Senator BYRD. Did they not inure to the benefit of Mr. Wyman?

Mr. BROWN. Senator—

Senator BYRD. Did they not inure to the benefit of Mr. Wyman?

Mr. BROWN. No, sir.

Senator BYRD. The three votes?

Are we talking about the three votes, Mr. Wyman, that were machine—

Mr. BROWN. Machine write-ins?

Senator BYRD. Machine write-in.

Mr. WYMAN. Yes; there was a net of three.

Senator BYRD. How were they finally counted?

Mr. WYMAN. They were counted because they had not been noticed before, which—

Senator BYRD. But to whom did they finally——

Mr. WYMAN. Net of three in my favor.

Senator BYRD. Good. Fine.

Mr. BROWN. For a total of five, a net of three.

Senator BYRD. So your attorney says he knows this subcommittee would reach the same conclusion. Well and good; he should have no complaint there.

Mr. BROWN. I have no complaint. I am not concerned about that.

Those paper ballots have been recovered. They are amongst the exhibits and you will see them, and they are there.

You are not going to disenfranchise those votes any more than people up in New Hampshire. I do not think you are going to say, knowing there are 17 or 18 spoiled ballots in there meaning double counting, I do not believe you are going to put them back in. I do not believe it.

Senator BYRD. I do not think we will.

Mr. BROWN. All I am suggesting, Senator——

Senator BYRD. If these were included in the 400, I would suggest if we look at the 400 we might come to the same conclusion the commission did.

Mr. BROWN. The situation, Mr. Snow averted to it, I would like to be sure you gentlemen understand it, talking to big X, and that is one area that Mr. Durkin suggested perhaps you gentlemen might make different rulings than were made in New Hampshire. If you go into the big X, not within the 400 but within the 3,400, I have some more big X's, if you change the rule on me.

Now, similarly, in every one of these——

Senator GRIFFIN. Can I ask you at that point? I do not think that the significance of that is perhaps—you ought to elaborate what you mean by that.

Mr. BROWN. When we started to rolling the ballots over for ballot law commission, Mr. Millimet sitting here and I sitting here, the protested ballots are brought out, I take mine, he takes his. We look them over, then at——

Senator GRIFFIN. Mr. Millimet was the attorney for Mr. Durkin?

Mr. BROWN. Yes, sir, Mr. Durkin's attorney and myself.

We look them over and we decide which ones we are going to present for ruling by the ballot law commission and which ones we are going to reserve for the Senate. And what happened, once we got a ruling in a particular category, if I had another one that I felt the ballot law commission would rule the same way on, I did not present the second one, or the third or fourth or fifth. Once I knew which way they were going to rule, I held the rest back in order to expedite the proceeding. And so did my brother Millimet.

Senator GRIFFIN. Are your rights, however, preserved with respect to those ballots?

Mr. BROWN. Yes, sir, on the record you will see in virtually every instance and repeated, that the balance of these are not being presented for ruling at this time without waiving the rights to present them later.

Now, that is the situation throughout. And Mr. Durkin is in the same situation. If there are changes made, there will be other ballots of his that he will—his counsel will want to bring up out of the 3,400.

Because you change any part of this, it is not 400; it is 3,400 ballots that are involved. And we have very poor xeroxes but xeroxes of all. And I know where I can go and pick up more votes than Mr. Wyman (sic).

I can select 50 ballots out of that 3,400 and increase his lead by 100. Depends on which ones you are going to grab.

Senator BYRD. Are you continuing?

Senator GRIFFIN. I will yield. Thank you.

Senator BYRD. Mr. Wyman, up to this point, holds a winning hand. He wins by two.

Mr. BROWN. Oakland beat Miami by two.

Senator BYRD. I am not talking about Oakland and Miami.

Mr. Wyman holds a winning hand?

Mr. BROWN. At this point.

Senator BYRD. Now, Mr. Durkin is willing to have the Senate reexamine that winning hand and cast his lot on the decision reached in a review thereof.

Why should you not be likewise willing?

Mr. BROWN. In the Senate-elect Wyman's response, Senator, the last paragraph, our position is still exactly what is said there. If you agree to go in there at all, in fairness, under due process, justice, to the candidates and to the voters, you cannot do less than count them all.

Let me just point this out, if I may. I would be willing to guarantee that no human being can count 100,000 pieces of paper within an accuracy of 100. And there are 200,000 pieces of paper that have to be counted and were counted here.

There undoubtedly are counting errors underlying this recount result.

In addition to the uncertainty of the malfunctioning of the machine.

Now, if you are going to go into it at all, do not take merely the tip of the iceberg. You do justice; you go back and recount them all, I think.

I do not see there is any way that you can come up with an answer that you would be satisfied with any better than any answer we now have.

Senator BYRD. Well, Mr. Chairman, it seems to me that the State of New Hampshire, through the statutes that have been enacted by its legislative body, has for some good reason felt that the appellate body, the ballot law commission, should only review such ballots as, with respect to which, a timely protest had been entered. That decision by the legislative body of New Hampshire must have been based upon a reasonable and well thought out rationale. That commission has, for the statutory reasons, stated, segregated out approximately 400 ballots, and has reviewed those ballots. And in its good judgment has changed the vote from a majority of 10 for Mr. Durkin to a majority of 2 for Mr. Wyman.

Now, it would seem to me that if we follow the argument of the learned lawyer who presents this viewpoint, that if the Senate is going to go back into this thing, it ought to begin de novo and start all over again.

Mr. BROWN. That is essentially what I said, Senator.

Senator BYRD. It seems to me that that is not a reasonable argument here.

Had it been, it would seem to me that the legislature in the State of New Hampshire, in setting forth the statutory limitations beyond which the ballot law commission could not go, would not have established those limitations.

Now, second, if indeed the Senate were to go back and study the 200-plus thousand ballots, the results might be to the benefit of Mr. Durkin by a lopsided majority, or they might be to the benefit of Mr. Wyman by a lopsided majority.

So the distinguished counsel, it appears to me, is not willing to take a look at that small bloc of votes which carry within themselves the victory for one or the other of these two men, and defeat for one or the other.

The commission ruled in the favor of the attorney's client. I cannot understand why the attorney is not willing to let the chips rise or fall on the basis, in the event that the Senate decides to review this, on the basis of a review of what is a winning hand for his client.

Mr. BROWN. May I respond briefly, Senator?

Apparently I have not been able to explain so you now understand what our procedure before the ballot law commission was.

Senator BYRD. That is my fault you are not able to do that.

Mr. BROWN. I am sure it is my inadequacy.

But it is not 400; it is 3,400.

Now, if you were talking in terms of a 3,400 protested ballot—because that is what—my 1,400 vote, that is where my winning hand was, 1,400 not 400.

Now, if you are talking about that, I would suppose that logically, logically the Senate might say we will review only the ballot law commission segment of it because Mr. Durkin apparently was quite happy with the 10-vote margin coming away from the secretary of state.

I still think that you are leaving built-in counting error behind you.

Now, I am perfectly content to have my client be the U.S. Senator. He is entitled to it. He is entitled to be seated. But I am also willing, and so is he, to find out for sure, by whatever sensible means can be devised, whether in fact he was the choice of the electorate.

If it turns out he was not, he does not want to be down here under false colors and I do not want him down here under false colors.

I want the voters in the State of New Hampshire to have another shot at this, and have them decide which of these gentlemen they want.

We have been trying to get Mr. Durkin to proceed toward that ever since we got into this, and he has resisted all of the way.

Senator BYRD. So if I understand you, instead of 200,000 ballots, we are now talking about 3,500 ballots?

Mr. BROWN. I have not changed my position as to what you gentlemen should do if you are going to do it right. But if you do not want to do it right, the next level at which sensibly it might be looked at, I think, is on the total protested ballots on which rights have been reviewed.

Senator BYRD. To wit, 3,500?

Mr. BROWN. Approximately.

Mr. WYMAN. Senator, if you look at exhibit I, you will find 12 places that were precinct objections by us, and some of those precincts that are involved include several thousand ballots in each.

We asked the ballot law commission, because of reasons assigned, to re-count the counts out of those precincts. Those are a part of what, if this Senate is to undertake a re-count of the New Hampshire recount, should be included as well as the 3,500 ballots to which Mr. Brown has just made reference.

Senator BYRD. It was my understanding when Mr. Snow was before the committee that they began with approximately 3,500 ballots.

Mr. BROWN. Those are the individually protested ballots, Senator, you are correct.

Senator BYRD. And they narrowed these down to 400.

Mr. BROWN. No, sir.

Senator BYRD. Approximately 400?

Mr. BROWN. No, sir.

Counsel presented for ruling there only about 400. The ballot law commission had no jurisdiction to prevent us. This was our tactical decision as we were going along, and we preserved our right, both sides.

Senator BYRD. Very well. Then counsel presented for rulings by the commission 400 ballots?

Mr. BROWN. Roughly.

Senator BYRD. Now, why should counsel ask the U.S. Senate to take a look at 3,500 ballots when counsel itself was willing on both sides to agree to the commission examining only 400?

Mr. BROWN. When the Senate starts going over those ballots again, when the first decision is made, I then determine which of my 1,400 I am going to present. And it may not be the same 200 that I had in that 400; it may be some other.

That is the thing that I have not been able to get to your understanding, Senator.

Senator BYRD. I am afraid you will not be able to penetrate.

Mr. BROWN. I will stop trying.

Senator BYRD. To penetrate to that degree.

Mr. WYMAN. There is another thing. I realize some of the aspects of the recount are technical. One of the reasons why counsel were confined to separating out the 400 out of the 3,500 and letting the rest go, except preserving their right to protest to this body, was because the ballot law commission said no, we will not recount the precinct objections.

If that is to be done, they ruled, you will have to get it from higher authority. We are here, if this is to be undertaken, very respectfully asking you as higher authority. And the only higher authority available to us.

If you are going to recount these 400 ballots in an effort to see who had a numerical majority, we ask you to rerecount these other ballots also. And we have reserved our rights on them.

Senator BYRD. Well, Mr. Chairman, I do not want to belabor the point. I think perhaps I need not say anything further; the committee will have to make the decision.

Senator GRIFFIN. May I follow along with a question bearing on the reasoning my colleague from West Virginia gave?

As I understand it, he takes the position and suggests that because the Legislature of New Hampshire gave the ballot law commission only certain limited jurisdiction, that it must have made a wise deci-

sion. I cannot quite recall the words that he used. And I guess what he is saying is that therefore a question outside the area of the ballot law commission jurisdiction is not to be reviewed?

Senator BYRD. No; I am not saying that.

I am simply saying this, and I am not attempting to refute the argument of the counsel; I am simply trying to understand it, and to understand the rationale behind it.

As I understand, he is taking the viewpoint that if the Senate is going to review this, it should not confine itself to the 400 ballots that were reviewed by the commission.

He goes from step to step, saying if you are going to review it, do not stop there; go all the way, 200,000.

If you are not going all the way, at least go 3,500.

Now, I am simply saying that the Legislature of New Hampshire must have had some good reason for placing limitations on the ballot law commission for its review of a recount. I do not know what that rationale was. But it seems to me like that if that rationale was good enough for the Legislature of New Hampshire, it should be good enough for the Senate.

Mr. BROWN. May I respond to the suggestion, Senator?

We have the problem, of course, that the election is in November and your legislative body comes in January, so does ours at the State level. So we have a time factor.

What we try to do, we tried to get a quick recount. Recount, you know, runs from 9 o'clock in the morning until 11 o'clock at night every day. It was not a 10 to 5.

In order to get through that phase of it and at the end of that you should be able to tell, if you are reasonably a bright politician, what your chances are if you go the rest of the way, either you go or you do not go.

Senator BYRD. Well—

Mr. BROWN. But having in mind that the legislative bodies which have the ultimate authority are going to be seating people in January, it is a shortcut procedure in order to get through the administrative end and leave the rest of it up to the—in this instance, the U.S. Senate which has plenary authority over the areas that were not given to the ballot law commission, in order to get ballot law commission through and done sometime this summer.

Senator GRIFFIN. I cannot help but wonder, I might say, if, which is not the case, the allegation or concern about these voting machines in Manchester were not just that they malfunction with deviation of votes of 700, but suppose there was some fraud suspected in connection with the malfunction, that too would be outside the jurisdiction of the ballot law commission.

Mr. BROWN. Yes.

Senator BYRD. Except that was not alleged.

Senator GRIFFIN. Pardon?

Senator BYRD. Except that was not alleged.

Senator GRIFFIN. I am not saying it would be. But under the logic, the argument, apparently, would we say that we would not look into it? And if we were going to look into the allegations of near relations of error or mistakes of judgment, in one area of the election, why are we not going to look into the consequence of the malfunc-

tion of voting machines in another area which ballot law commission did not take a look at?

Mr. BROWN. That is my view. If it is going to be opened up at all, it seems in fairness, if everybody, including the voters, perhaps the whole thing should be redone.

Senator BYRD. There are no allegations of fraud in this.

Senator GRIFFIN. I know that.

Mr. BROWN. No.

Senator GRIFFIN. I am testing the reason in your logic being applied.

Senator BYRD. May I respectfully say I do not think the Senator has adequately tested it.

The legislature did not say that allegations of fraud lay beyond the pale of responsibility or jurisdiction of anybody.

Mr. BROWN. I think the Supreme Court in the most recent decision, if you review that entire State court action, has indicated that while the State courts can investigate, authorize the collection of evidence and that type of thing, even if there were fraud at the State level, the election could not be invalidated. We would get the evidence preserved for you, gentleman, then—

Senator GRIFFIN. I think we had better get the opinion and read it to us, because it is right on the point if that is the case.

Mr. BROWN. It is the same opinion just received in evidence.

Senator GRIFFIN. It seems to be very crucial right here right now.

Mr. BROWN. Well, it is here, perhaps we have to have the complete pleadings, but we can make available to your staff counsel. But I think you will find that that is precisely what happened. The supreme court did not prevent the superior court to entertain—when we asked the final question, does the State court have authority to validate the election, the answer was no. The ultimate judge is the U.S. Senate. So what I think my courts were telling us, telling you gentlemen as well, was they are willing to be helpful, the judicial process will be available to get, preserve evidence for your consideration; but it is our view that these questions are for the Senate. And there is no machinery in the State of New Hampshire to allow these things to be handled locally at all. That is the situation we have.

Senator GRIFFIN. That is something like the Maryland case to which I referred before.

Mr. BROWN. I think so.

Senator GRIFFIN. And the State of Maryland had no procedure whatever under its statutes for recounting. Senate proceeded to recount all the ballots of that particular election in 1946.

Mr. BROWN. We had a House contest out of New Hampshire my office was involved in, so was Mr. Wyman. He was representing the Republican, we were representing the Democrat, and we recounted twice in New Hampshire.

And the House of Representatives counted the whole thing over again three times down there; they could not get away from a tie. That was in the Roy Jenks dispute, 1938, perhaps 1937-38.

We have on occasion had a double recount in New Hampshire but not this time.

Senator BYRD. Mr. Chairman, if there were allegations of fraud, I could understand why the counsel would not only act, but he would

urge and expect the Senate to go into those additional areas. But there are no allegations of fraud.

As long as there have been no allegations of fraud with respect to those voting machines and so on—

Mr. BROWN. No, they are merely new machines, Senator. And I think on the record we have thus far, there were two machine experts who testified before the ballot law commission, one of them approaching this area generally, not these particular machines, but they suggest there probably was malfunctioning in the sense of non-recording votes; whether it is so I do not know.

Senator BYRD. The petitioner, however, does not ask the Senate to do this.

Mr. BROWN. Sir?

Senator BYRD. The petitioner does not ask the Senate to do this, to go back and—

Mr. BROWN. I think, Senator Byrd, at the bottom of the page is paragraph 10. He requests that you reexamine the ballots hitherto ruled on by the State authorities, make such other independent investigation of the conduct and results of the election as the Senate deems appropriate.

Now, I think, after the comma, starting "make such other," I think he is asking you to go outside of the ballot law commission proceedings. And I do not know what else there is to go look at these three areas of irregularity and uncertainty of which we did preserve rights and we did—

Senator BYRD. Are you referring to his petition?

Mr. BROWN. To Mr. Durkin's petition, my copy does not have any pagination, but in his paragraph 10, at the bottom of the page on which that paragraph starts, he asks you to do two things.

Senator BYRD. But that petition was dated when? What was the date of the petition? December 27.

Today, in his appearance before this subcommittee, he amends that petition in that respect by saying he would be willing for this subcommittee to take a look only at a block of approximately 50 ballots, or beyond that the block of 400 ballots. He is not pressing this subcommittee to take a look at the machines.

Now, if the Senate is going to take a look at this at all, it seems to me it is going to take a look at it on the basis of the petition of contest.

The person who is filing the petition of contest has not raised any question about the malfunction of machines. He makes his case on two premises; one, that he holds a valid certificate of election. In my judgment that is irrelevant here.

It can be debated—the various ins and outs of that.

Second, he questions the judgment of the ballot law commission with respect to the conclusions arrived at in a review of 400 ballots.

Now, there is the question that is raised. Why should we go hither, thither, and yon, examining every little thing, go back and take 200,000 ballots, examine all of the machines, see if they are functioning properly or not, when that question is not raised by the person who brings this petition of contest to the Senate?

He questions not the good faith of the commission, but he questions its accuracy.

It seems to me, then, that the Senate, if it is required to do anything, is merely required to make its judgment as to whether or not the con-

clusion of that commission, which is being challenged as being inaccurate, is indeed accurate with respect to the 400 ballots.

Mr. BROWN. Senator, if the only person whose rights involved here were Mr. Durkin, then I think I would agree with you, sir. Because he should be able, if his rights and his alone are involved, he should be able to say, "Look at the 50 ballots on which I may win."

That is not the situation. Mr. Wyman's rights and the rights of the voters of the State of New Hampshire are involved.

Now, it is not a group of 50 votes—I can handpick 50 votes or 400 votes and come up with any answer I want.

Your pardon, sir, it is to determine what the voters of the State of New Hampshire—all those who voted in this election, what their choice were, and you cannot in my judgment fairly reach and solve that problem by taking any selected few that somebody says will allow me to win.

Senator GRIFFIN. Are you saying due process is a right that other people have in addition to Mr. Durkin?

Mr. BROWN. I have been led to believe that is so.

Senator GRIFFIN. Including Mr. Wyman?

Mr. BROWN. I hope so.

Senator GRIFFIN. In your petition in response, did you ask for the committee to look at these matters?

Mr. BROWN. My final paragraph says: "If you are going to go back of certification at all, that is precisely what you must do."

It is on page 12, going over to 13 in my response.

Senator GRIFFIN. Thank you, sir.

Senator BYRD. Mr. Chairman, it is a matter for the Senate to decide as to what is due process in this instance. And counsel certainly has a right to state what his opinion is of due process, and what is required in order to render due process. He has done so. And I do not see any point in discussing the matter further.

Mr. WYMAN. Mr. Chairman, may I just make one observation?

Senator PELL. Yes.

Mr. WYMAN. In response to Senator Byrd's comment.

The irony of the situation, apropos of the Senator's comment, is that Mr. Durkin is asking the Senate to review what has already been ruled on, but he does not want the Senate to review what no one has yet ruled on, which we were unable to have ruled upon except the Senate and to which we have reserved protest.

Senator PELL. I understand.

Senator BYRD. Mr. Chairman, in view of the fact Mr. Wyman has made this comment, I think it calls for further comment from me.

Mr. Durkin is not bringing a petition to the Senate of the United States saying, "Take a look at the whole 200,000. Recount the whole 200,000. I question the recount of the whole 200,000 ballots."

He merely has today only questioned one block of votes. And if the determination with respect to that one block of votes is that Mr. Wyman wins, then Mr. Durkin will be satisfied.

It seems to me that if we are going to resolve the question, if we are asked to get into it, we ought to take a look only at that area to which the accuser points and says the inaccuracies are here, the wrong was done here. I was robbed of my seat here, in this group.

Mr. WYMAN. Senator, if we had been allowed to, we could have increased our majority in New Hampshire substantially, substantially.

We were not allowed to. The only place we can do this or have consideration of this is before the U.S. Senate by decision of our New Hampshire Supreme Court.

Senator BYRD. Well, I would say counsel should have raised that question when he was going through the 3,500 ballots.

Mr. BROWN. Beg your pardon, sir, I did.

Senator BYRD. In agreeing to the 400 that would be reviewed.

Mr. BROWN. I beg your pardon, Senator. But I did raise these questions before the ballot law commission and my opening statement, and the Commission rulings on it, are one of the appendixes to Mr. Wyman's response. And I think if you have the time to read it before getting to your final decisions, you will find that both Mr. Millimet, who was Mr. Durkin's attorney, and I preserved all of our rights, made a fair record so that you can see what we did and what we did not do.

Senator BYRD. You reserved your rights with respect to a block of 30,000 votes also.

Mr. BROWN. No; the 30-odd thousand is a total of both Mr. Durkin's protests and Mr. Wyman's.

Senator BYRD. But I say you reserved your rights in regard to that?

Mr. BROWN. Yes, that is right.

Senator PELL. I would like to ask Mr. Wyman maybe a subjective question, but if you were to let your fate ride on the outcome of this 400 votes when counted by the ballot law commission, why do you have problems about letting that result be reexamined?

Mr. WYMAN. Senator, simply because the position before the ballot law commission was terminated in terms of our alternative sources of relief, once they determined I had a majority. I would be able to do it, and had the law permitted it, I would have asked the ballot law commission add for Wyman at least 17 and perhaps 185 absentee votes.

I would also have requested recount other precinct areas where we were satisfied we could add substantial votes, so we would have had a more substantial majority. In fact, so much so that no re-counting of the 400 ballots could possibly end up in a majority for Durkin. The situation here involves no complaint of fraud. I have seen no complaint of collusion or conspiracy. Under these circumstances, what Mr. Durkin apparently is seeking to do here is simply at his own option to narrow the Senate investigation and ask them only to recount the ballots that he wants to recount, and disregard Wyman's right to increase his majority by recounting Wyman's protests.

Senator PELL. Thank you for your response.

What I would like to do now would be to ask Mr. Durkin if he would come forward, then we have some questions we would like to ask—sorry.

Senator GRIFFIN. I have one question which I indicated I would earlier, and I forgot to ask it; that is, Mr. Wyman, in view of the fact that Mr. Durkin made an offer to step aside when the Senate convened, I said earlier I was going to ask you what your response would be, would you step aside if he were to agree to a new election?

Mr. WYMAN. Senator, Mr. Durkin does not have a certificate of election. I do.

Senator Cotton is gone.

I think at the very least, on a record as manifest of due process as the one that is before this Senate, that at the very least, I am entitled to be seated without prejudice, so there can be at least a staff around to serve the people of New Hampshire during the interim. Should it be the will of the body to have runoff election between the time of the 14th and that day and declare a vacancy I would of course yield of necessity to an appointee.

I have consistently, ever since the beginning—and on this there is no question on the record—said that I wanted a runoff election. I have sought to have Mr. Durkin agree to a runoff election. Mr. Durkin made the statement this morning that he did not feel that the parties could in some way negotiate something in derogation of the right of the Senate. At a time when the ballot law commission was at zero, at a tie, I suggested that we waive further protests. Had that been done, then, the automatic provisions of State law in the State of New Hampshire would have taken effect and the Governor and council would have issued their precept confirmed by a subsequent supreme court decision for a runoff election. Durkin would not do this.

It is only of a vintage currently perhaps today, that he says now if I will step aside, give up my certificate, give up the right of the sovereign State of New Hampshire to have a certificate honored that has been issued on due process, that he will stand aside. All I can say to that is I do not think I should be required to stand aside. I do want a runoff election and I offered to have it even though I have won this election.

Senator GRIFFIN. I thank you for your response.

Senator PELL. Thank you very much.

Will Mr. Durkin come forward.

Mr. Wyman, stay where you are, please.

Senator BYRD. While we are waiting, Mr. Chairman, may I ask this question of Mr. Wyman: How can there be a runoff unless the Senate declares the seat to be vacant?

Mr. WYMAN. There cannot, I do not believe.

There is under consideration, as you know—and I have endorsed it—legislation in New Hampshire Legislature I am informed currently, as of 20 minutes ago, that the rules have been suspended in the New Hampshire Senate and that they are now debating the passing of a runoff election statute. And I strongly would like to have that available for the consideration of this body if they should determine, if you should determine to take that course of action.

Senator BYRD. But that would be only in the event of a vacancy, would that not be?

Mr. BROWN. I think that is the way it was drafted, gentlemen.

Senator BYRD. Then you are saying, Mr. Lyman, you would prefer the Senate, in order that the electorate of New Hampshire be given an opportunity to give you more than a two-vote majority, you would prefer that in the event a New Hampshire statute is enacted into law that you would prefer that the Senate declare the seat vacant rather than seat you on the basis of a two-vote majority?

Mr. WYMAN. I have made that position clear, Senator. I feel that the fairest way in this kind of a margin situation is to put the question back to the people.

Senator BYRD. Suppose after a new election you have a three-vote majority?

Mr. WYMAN. As I say, I would expect that some day a decision will be made somewhere at a legislative level that a certain percentage automatically causes a runoff election.

Senator PELL. I have several questions that really take a yes or no answer, but I want to lay a record if I can here, gentlemen.

First, addressing this, I guess, to the order in which the witnesses appeared this morning, Mr. Durkin, were there only 400 ballots approximately submitted to the ballot law commission for review?

INTERROGATION OF MR. DURKIN AND MR. WYMAN BY THE SUBCOMMITTEE MEMBERS

Mr. DURKIN. Yes, sir.

Senator PELL. Is that correct, Mr. Wyman?

Mr. BROWN. I think that is approximately correct.

Senator PELL. Thank you.

Is the actual number of ballots in dispute less than 50, Mr. Durkin?

Mr. DURKIN. To my way of believing, yes, sir.

Senator PELL. Mr. Wyman.

Mr. WYMAN. No.

Senator PELL. Would you approximate a number?

Mr. BROWN. If there is going to be any review of the judgment calls, it seems to me in fairness both sides—Mr. Durkin's counsel is not here, I think he would agree with me, must be in position to call forward any of the ballots we have under protest from the 3,300 to 3,400 in number.

Mr. DURKIN. Mr. Chairman, may I make just a comment on that, inasmuch as I have been represented by two attorneys in this proceeding?

Senator PELL. Right.

Mr. DURKIN. I think it taxes one's imagination to think that if there are any ballots that would change the outcome of such a close race, that they be left in an envelope and not be reviewed by the ballot law commission.

Senator PELL. Since the Senate is the only body which can review the ballot law commission's ruling, do you think the Senate should perform this function before a certificate of election is duly recognized?

Mr. DURKIN. Yes, sir.

Senator PELL. Mr. Wyman?

Mr. BROWN. I do not believe so in the posture of this case, Senator. And I say that because there is no claim of fraud, corruption, connivance. And you have heard our State elections people. I will leave it up to you; I think we have a ballot certification of Mr. Wyman I think should be recognized, and let the investigation, if you gentlemen feel you should go into it, proceed thereafter.

Senator PELL. Are you through?

Mr. BROWN. Yes.

Senator PELL. Would the parties stipulate that the candidate with the most votes following review by the Senate of the 400 protested ballots before the ballot law commission should be seated, but without prejudice to other issues?

Mr. Durkin.

Mr. DURKIN. Yes, Mr. Chairman. I believe, as I said this morning, that I am willing to rise or fall on the review of those 400 or 50 ballots, whatever decided. And if I lose by one, I go back to Manchester. If I win by one, be seated without prejudice to any claims of irregularities Congressman Wyman or anyone else wants to bring. And that way I think everything to date, as has been brought out here extremely well, on the question, has been on the basis of ballots.

I think someone should be seated on the basis of ballots, thereby New Hampshire gets the representation it deserves, and the other questions, I think this is the wisdom expressed by Mr. Brown when he said the machinery was set, so we could review ballots, get someone seated; if there is any other questions, the Senate can look into it.

I do not think New Hampshire should not have representation on the basis of unfounded allegations or irregularities.

Senator PELL. What you are saying is if you found you lost in that recount, you would give up your other rights and go back to New Hampshire?

Mr. DURKIN. Yes, that is it for me. I would go back to practicing law and see what the future holds in the courtroom.

Senator PELL. Let me ask the same question, if I may, of Mr. Wyman.

Mr. WYMAN. No.

Mr. BROWN. Not on the basis which you asked the question, Senator Pell.

You are still going back to this magic 400 Mr. Durkin thinks he can win on. And I cannot stipulate or agree that any determination be made on a permanent or temporary basis on such an inadequate review if you are going to go into the area at all.

Senator PELL. So your answer basically would be "No," then?

Mr. BROWN. Yes.

Senator PELL. If it is no, should not the certificate of election issued based on the ballot law commission ruling be considered invalid, too?

Mr. BROWN. There is no basis on which this subcommittee can act, assuming an invalidity of the ballot law commission proceedings.

Mr. Durkin's petition is not evidence. It is merely a petition to group having authority asking for relief. And up to right now, the ballot law commission result is well founded, well supported by fact and record. And there is no basis for anybody to suggest there is any invalidity.

Senator PELL. As you see, the subcommittee is faced with a very tough choice as to what its recommendations should be to the full committee and the Senate, whatever action the Senate cares to take.

And we can go down several paths. If we go down the path of counting ballots, then we want to narrow it as much as we could.

If we did decide on that path, what stipulation would you make? Here I address this question to Mr. Wyman, what would be the smallest number that would meet with your approval to be recounted?

Mr. WYMAN. The reservations, Mr. Chairman, that have been made in the ballots that are in the boxes and envelopes, to their presentation to this body, and that comes to approximately 3,500 plus the list of precinct objections that are listed in appendix I.

I wonder if I might say in terms of these rules, as I have read their excellent publication in terms of historical precedence seated without prejudice, I know of no case where a person who presented a certificate of election by whatever margin who had no charge of fraud, no charge of anything against that certificate, was not seated without prejudice.

Senator PELL. I appreciate your comment on that and I will have that researched.

I do not know if your statement is correct.

Mr. WYMAN. I think it is, sir.

Senator PELL. I will research it. Probably is.

How many ballots would that total number add up to?

I have read through your reply very carefully, but I could not figure out the number of votes because it did not show.

Mr. BROWN. It is less than 10,000 and I will ask Mr. Van Moon this evening to get an accurate count and submit it to the committee.

Senator PELL. It will be less than 10,000?

Mr. BROWN. Yes, I am quite sure.

Senator PELL. You are talking about less than 10,000. Mr. Durkin is talking about less than 400.

Mr. BROWN. If the subcommittee accepted our view, Mr. Durkin also has two communities which involve perhaps 3,000 additional ballots and I am sure if Mr. Millimet were here, he would want to go that road, he would want you to take a look at Conway and Bedford, Salem.

Mr. DURKIN. May I say, I speak for John Durkin and not some absent attorney.

Senator PELL. Right.

So we leave it that way then, it would be the difference between 400 and 10,000 approximately.

Mr. WYMAN. I think that is right.

Mr. DURKIN. Mr. Chairman, may I comment just briefly?

Senator PELL. Certainly.

Mr. DURKIN. I think there is a point that should be made. Again, it was alluded to in the questioning, the protests on the tallies that are contained in Mr. Wyman's exhibit 1; I believe the record will show, there are no formal protests made during the recount except on two tally sheets they were made by the Durkin forces on the tally sheet at Conway and tally sheet I believe at Salem. So there is a strong reason to believe that they waived those protests by not making them timely at these recount stages.

Mr. BROWN. Senator Pell, may I just respond to that?

Senator PELL. Certainly.

Mr. BROWN. You will find in the ballot law commission record the testimony of Attorney Souter, who was the author of that letter, and you also find in the testimony of Secretary of State Stark and the testimony of those two gentlemen I think will satisfy you all that Mr. Durkin is in error in protest, and if the protests were recognized by the secretary of state—it is a matter of record and I rely upon the record.

Senator PELL. If we do proceed with the counting of ballots, the subcommittee or the full committee, or whatever special committee the Senate designates, or the whole 100 Senators could be given that responsibility for arriving at what those ballots say. But when it comes

to physical counting, I would like to see some not politically elected body do the counting, reporting a fact to us.

We may not move in that direction, but if such a procedure were agreeable to my colleagues in the Senate, could you see yourself each appointing an individual and that person agreeing to an inbetween man who would do the counting.

Mr. BROWN. Yes.

Mr. WYMAN. Mechanical details, of course.

Senator PELL. Not too mechanical.

Mr. WYMAN. The answer is "Yes."

Senator PELL. Mr. Durkin.

Mr. DURKIN. Well, just having come through a three-man commission, I have got to have—

Senator PELL. You would have one and one-half?

Mr. DURKIN. I am in no position to object, Senator, if that is the wisdom of this subcommittee. It is surely not my first choice. And I cannot really articulate a reason. It is intuitive as much as anything.

Senator PELL. Right.

Senator GRIFFIN. I will pass.

Senator PELL. Senator Byrd.

Senator BYRD. Mr. Wyman, do you have faith in the ballot law commission of New Hampshire?

Mr. WYMAN. Do I have what?

Senator BYRD. Do you have implicit faith in the ballot law commission of New Hampshire?

Mr. WYMAN. Of course. Yes, sir.

Senator BYRD. May I ask your attorney if he has the same faith?

Mr. BROWN. Yes, sir; this is not the first recount I have been in. They do an excellent job, and the procedure we have, subject to human limitations, is excellent.

Mr. WYMAN. Many years ago I served as a member of that ballot law commission for 8 years.

Senator BYRD. Mr. Durkin, how about you?

Mr. DURKIN. Senator, I am trying to understand what you mean by "faith in the ballot law commission."

Senator BYRD. Well, perhaps I can best ask the question like this, you have indicated your willingness to let the chips rise or fall where they may, and your fortunes rise or fall on the basis of a review by the Senate of the 400 ballots that were involved in the block reviewed by the commission.

Mr. Wyman would not be so happy with that approach nor would his attorney.

It would seem to me if all parties have absolute faith in the integrity and honesty and objectivity and impartiality of the commission, and if they likewise wish to lodge that kind of faith in this committee, it would not be such a problem as it appears to be here.

Mr. DURKIN. I have no reservation of this committee—

Senator BYRD. On the other hand, Mr. Wyman and his attorney do not want the committee to rely on the 400; yet the block of votes—at least one reasonable man could arrive at a conclusion that Mr. Wyman and/or his attorney do not trust the faith of that commission; or, on the other hand, they do not trust this committee.

Mr. DURKIN. I have complete confidence, complete faith in the subcommittee and the U.S. Senate.

I do not have much faith in the ballot law commission, Senator. I think our exhibits this morning—

Senator BYRD. But in any event, you are willing to rest your case on the review by the Senate of that block for votes that was examined by the ballot law commission?

Mr. DURKIN. Yes, sir.

Senator BYRD. Which was not in your favor?

Mr. DURKIN. May I?

Senator BYRD. The review by that commission did not come out in your favor.

Mr. DURKIN. I think I must have answered the wrong question.

Pardon. I thought I was answering the question that I have complete faith in this subcommittee and complete faith in this subcommittee and complete faith in the U.S. Senate.

I think the fact I am here today and that I am petitioning the Senate is indicative of the fact that I do not have faith in the ballot law commission's determination.

I am still not sure I answered your question either.

Senator BYRD. All right.

Mr. WYMAN. You realize, of course, we wanted the ballot law commission to look into quite a bit more than it felt it could.

Mr. BROWN. May I add one thing more? You gentlemen, or some group in the Senate, end up, even if we end up being restricted to the 400, I am going to win your recount of your 400. I will win by a larger number.

The ballot law commission did not accept some of my very persuasive arguments on those. I would expect to get them from you.

Senator PELL. Would you be willing to come down?

Mr. BROWN. No; I do not want Senator Byrd playing poker, but I want the full hand.

Senator BYRD. Let the record show that Senator Byrd does not want to play poker.

Mr. BROWN. I am sorry, sir.

Senator BYRD. Senator Byrd is going to be as impartial and objective as he knows how to be.

Mr. BROWN. I am sure you are.

Senator BYRD. And he intends to take a look at this if this is the judgment of the Senate, and Senator Byrd intends to let the chips fall where they may.

If Mr. Wyman goes to the Senate, so be it. As a member of this committee it is my duty not to be partisan, and not to be partial, but to do the very best I can to determine what the clear intent of the voters was in New Hampshire.

Mr. BROWN. We intend to be as helpful as we can, Senator, but I must object when the suggested procedures that you suggest are not, in my judgment, sufficient to give full faith and credit to the State of New Hampshire or to determine the actual intent of our voters.

Under the Constitution, our Senator is elected by our voters. That is what the requirement is and that is what the problem is, finding out what the decision is.

Senator BYRD. You have a perfect right to present your view here, but you have no right to infer from the questions that I asked that

the cards are stacked against you or that I am going to play cards as implied in your statement.

Mr. BROWN. Senator Byrd, I apologize for my remark. It was said in jest.

I was talking and you were talking earlier, and I guess I used the words I wanted my full hand.

Senator BYRD. I think I used that same term, too.

Mr. BROWN. It was not in any manner intended to reflect upon your integrity, sir. I have no question about your integrity whatsoever.

Mr. WYMAN. Mr. Chairman, I have served with Senator Byrd. We have been on conference committees in years past. I know his competence and integrity.

I made, as a first statement, the first part of the statement I made here that I have the utmost confidence in the integrity and honesty of the Senate, and each Member thereof, and when you said just a moment ago, Mr. Wyman, are you willing to go down that road? And I said no, I said it respectfully and with no reflection upon the subcommittee whatever, but simply because the confines of the road were too narrow.

The road that the Ballot Law Commission of New Hampshire took was extremely confined because it could not look at anything more.

I am satisfied if you look at something more that we will be able to increase our majority. We would have increased the majority had the ballot law commission been able to look at something more.

Senator GRIFFIN. Mr. Chairman, I would like to ask Mr. Durkin a question.

If you had complete confidence in the Senate as you said you did, then why are you willing to have the Senate review the questions that Mr. Wyman wants reviewed?

Mr. DURKIN. Well, I think there are several problems, Senator.

Let me say once again there is a bridge. Every decision made so far has been based upon ballots. There are machine ballots. The commission decided in their wisdom not to review the machines, even though they are ballots. All decisions have been made on ballots. There were 222 ballots by Secretary of State Stark, roughly 400 ballots by the ballot law commission.

I wanted to ride my fortunes on a review of those ballots, and I think someone should be seated on the review of those 400 ballots.

If I lose, I am not going to waste your time with any irregularities. If I win, I think I should be seated without prejudice to the rights of Congressman Wyman and the others to pursue those irregularities, and I submit to you in all candor that it is my impression that if I am seated by one vote, that those irregularities, those allegations of the irregularities, will disappear.

One other point with respect to the confidence in the ballot law commission. I am not sure what is in our record now or out of the record now, but I think the record should show that the Democratic member of the ballot law commission's son was employed on Congressman Wyman's staff during the month of October 1974.

We raised that publicly in New Hampshire.

Second, the secretary of state is the clerk of the ballot law commission. He conducted the recount, and his son is in whatever the legal

entity is, the law firm at least, according to the Yellow Pages, the law firm of Wyman & Beane.

I think those things should be set forth on the record. Those are some of the reasons I am a little shakey in everything less than complete confidence in the ballot law commission.

Mr. BROWN. May I respond?

Captain Crowley and Mr. Stark both made this information known, inquired whether Mr. Durkin had any complaint or any reservation about their ability to act impartially, and through his counsel he said he had no such reservations.

Senator GRIFFIN. When was this done?

Mr. BROWN. It is on the record so far as Mr. Stark was concerned. It was before we started the recount.

Senator PELL. Where is it on the record?

Mr. BROWN. With regard to Captain Crowley.

Senator PELL. No, no, with regard to Mr. Stark.

Mr. BROWN. With regard to Mr. Stark, it is not on the written record.

Senator PELL. I thought you just told me it was on the record.

Mr. BROWN. So far as Captain Crowley is concerned, it is on the ballot law commission record.

Senator PELL. Ballot—what?

Mr. BROWN. The ballot law commission's record of the ballot law commission's proceedings.

With regard to Mr. Stark, Mr. Durkin made it known to the press that he had reservations about Mr. Stark and when we came in for the sitdown, getting the recount started, Mr. Stark put it right on top of the table and said—

This is the situation: My son is a lawyer. I have no interest in his earnings. I do not stay in touch with him. He is working in a firm which has Mr. Wyman's name on it, but Mr. Wyman has no financial interest in that firm at all, has had no interest for 8 years.

All of this was made known on the record, and Mr. Durkin made no complaint.

Senator GRIFFIN. Before the complaint was commenced, is that correct?

Mr. BROWN. Before the recount, the matter of Mr. Stark came up, and before the ballot law commission was even started, the matter of Captain Crowley came up.

Senator GRIFFIN. It was not too clear to me who Mr. Stark was when the name was mentioned, but he is the secretary of state?

Mr. BROWN. The secretary of state is Robert L. Stark.

Senator GRIFFIN. Declared after the first stage of the recount that Mr. Durkin has won by 10 votes.

Mr. BROWN. He is the man who claimed the 10-vote margin in favor of Mr. Durkin.

Mr. WYMAN. Mr. Chairman, the conference to which Mr. Brown has just referred, I also attended. It was around the Governor's and the council chamber table—or should I say in the council chambers in the statehouse in Concord, N.H.

This was attended by Mr. Durkin and by his counsel and by the press.

Mr. Stark offered not to sit, offered not to conduct a recount if they had any objection to his being there, and after having disclosed the fact that his son was associated with my former partner.

Senator GRIFFIN. Mr. Chairman, I do have a further question of Mr. Durkin.

It has been mentioned that there is a bill pending before the New Hampshire Legislature which would provide for a special election between February 24 and 28, in the event the Senate declared the seat vacant, providing that the Governor could not appoint any of the three candidates during the interim, and which would mean that Mr. Wyman, of course, if that were to be given effect and put into effect, would not be able to be seated during that period.

I understand he supports the bill pending before the legislature, which would give the people of New Hampshire, or is designed to give the people of New Hampshire the opportunity to decide this question.

Do you support the bill, Mr. Durkin?

Mr. DURKIN. Sir, I have not read the bill, and my general comments with respect to it is that I think, as I stated earlier today, that the people of New Hampshire have a right to have elections on November 5 decided once and for all, and finally, on the basis of the laws that were in effect on November 5, 1974, in accordance, as they mentioned, with the Constitution.

I notice from accounts in the paper that your office also supports that bill in New Hampshire, so I gather it has extraterritorial support as well.

Senator GRIFFIN. You do not indicate that you support it.

Do you oppose it?

Mr. DURKIN. Well, we have been faced with so many real problems here and real situations, we have not spent much time concerning ourselves with the bill back home.

I neither support it nor oppose it, for the main reason I do not know if the bill is even drafted yet.

I find my opponent has just handed me a copy of it.

Mr. BROWN. I would have brought down one for you if I had known you did not have one.

Mr. DURKIN. Thank you.

I guess we are getting far afield, but I think as I have said before, there are several things that intertwine, not necessarily in a special election between the 18th—or I should say the 14th and 18th, or what have you, of February.

There cannot be a final decision until this party either rejects this decision or acts upon it, but until there is a final determination I think the people of New Hampshire are owed a final determination for November 5 in accord with the rules in effect.

I think I will do extremely well in a runoff for the reasons enunciated this morning. I did fairly well with the visibility, barely reaching 60 percent on November 5. The visibility is 60 percent.

Now, I submit it is in the 90's. Since that election night, Congressman Wyman has insulted certain people on the seacoast. He has insulted the people of the city of Manchester, claiming George Meany had some stranglehold on the people of Claremont and since then he has been harassing senior citizens in an effort to find out how they voted.

I think the practice is questionable at best, and since then, since I have chosen to move to Manchester and it is my adopted home, that I have less than first-class citizenship and by doing so he has insulted all the people who have moved into New Hampshire in the last 10 years. And that is a considerable number of voters in the State of New Hampshire.

In a runoff, that is an issue. Under the rules we have to operate under the Constitution, and I want the chips to fall where they may.

Senator GRIFFIN. I want to say in response to one remark concerning names here, I do not know what the people of New Hampshire have said. I confess I am interested in the possibility that the people of New Hampshire could have the opportunity to make this very, very difficult decision so that we could make sure that whoever is seated would be the choice of the people of New Hampshire.

I do not know, of course, whether that special legislation will become law. I understand from some staff report that the State senate this afternoon has suspended its rules and is proceeding to consider and probably will pass the bill in the senate today.

When or if it will then pass the State house of representatives, I do not know, but I think it is appropriate at least for this committee and the senate to take note of the fact that there is that possibility that the machinery may be available to go the route of a special election.

It would be desirable, of course, if the route is available, that both candidates would willingly agree to such an election.

I take it that Mr. Wyman would agree, and it is not clear what your position would be at the moment.

Mr. DURKIN. Senator, generally back home we do not roll up our trousers until we get to the creek.

Second, I do not think we can negotiate something that disenfranchises the 110,000 who voted against me, the 100,000 who did not vote at all.

That is a chilling prospect in this country, and I have to shy away from any appearance of a negotiated deal, a negotiated election.

That disturbs me. I cannot take part in that, and agree to that.

Let me raise another point. There seems to be some thrust from the ballot law commission's presentations and my opponent's presentations that there is some sort of disenfranchisement going on if we follow the U.S. Constitution, and let the Senate decide this as part of our Constitution.

It is not the case of the Senator from Michigan or Idaho or any particular place usurping the function of the voters.

This is our constitutional system. It is one of the strengths and bulwarks of our system, and I cannot consider disenfranchising anyone. It is the beauty of our system, if we let it work.

Senator PELL. Mr. Wyman?

Mr. WYMAN. Thank you, Mr. Chairman.

Please understand that I believe I am entitled to be seated, that I have the credentials on due process and the certificate of the State of New Hampshire should be honored.

I have also indicated explicitly that I favor a runoff election, and I have done everything that I can to set into motion the option to be available to this honorable senate for that if the senate do declare the seat vacant and put it back to the people of New Hampshire; but I

think in all fairness to the remarks of the gentleman that I must inform the chairman and members of the subcommittee that Senator McIntyre called at least three senators in the State senate and asked them to vote against this measure; and I cannot believe that was without the knowledge of the gentleman beside me.

Mr. BROWN. I just add one other thing, Mr. Chairman.

I know a little something about New Hampshire politics, not Washington politics.

Let me say that I am a member of the legislature up there. If Mr. Durkin wanted actually a special election, all he has to do is to call up Mr. Spiro in the house and Mr. Downing in the senate and just tell them, fellows, it is all right with me to pass that thing, and it would be enacted either today or tomorrow, and this weasel talk that he can lick Louis, he says he can murder him in the press in a new election, he does not stand for reelection; and that is the actual fact, and that is the reason he does not want the special legislation enacted.

Senator BYRD. May I say to both parties that this is a responsibility that I am sure no one on this committee asked for.

What the judgment of the Senate will be remains to be seen. If it is the judgment of the Senate that this subcommittee should further consider this matter, I want to say in the presence of both parties that as a Democrat leader, I would like to have seen the people of New Hampshire send to the Senate a Democrat. That is not casting any aspersions on Mr. Wyman.

I have always had a very high regard for Mr. Wyman. But as a member of this subcommittee and as a Member of the Senate, if the duty is incumbent upon this body to make a decision, it will not be my desire or intention to be partisan.

Let me say that I shall attempt, in every way I know how, to be as impartial and as objective and as fair as I can be, because otherwise I think I would cast a reflection on myself and, even more than that, a reflection on the Senate.

Now, I think that both parties have submitted good evidence today. I do not think Senators are going to be persuaded one way or the other by things that may have been said in the heat of personal feeling here today.

If we have to take a look at this, we are going to try to be objective.

My sole interest today, and my sole objective, has been to attempt to narrow as much as I felt we could, the area we should examine and review in the event it becomes our lot to do that.

Mr. BROWN. May I ask a point of information, Mr. Chairman?

Senator PELL. Yes.

Mr. BROWN. I have not been able to persuade Senator Byrd of the propriety of my suggestion that the 400 is not the right number, you know, if you are going to shortcut.

Would it be inappropriate if I brought you, Mr. Chairman, or Senator Byrd, or all three of you, a note pointing out precisely what I am talking about, and show you a couple of ballots we did not present because of prior rules?

Senator PELL. You are free to send it. You are free to do that but it may not arrive in the mails until after the subcommittee has acted.

Senator BYRD. May I say to the gentleman that I am open to persuasion that a larger block of votes should be examined.

My questions would rightly indicate, I think, that at this point it would seem to me that the appropriate area to examine would be the bloc of 400 votes.

Mr. WYMAN. Of course, Senator, you understand that on the basis of the precedents established and lacking any allegation of fraud or impropriety, it is my position that re-counting State votes by the U.S. Senate is something that should not be undertaken lightly.

If there was a challenge on the basis of fraud or ballot stuffing or anything else to invoke any precedent the situation would be different but never before in the history of the U.S. Senate have they ever recounted a State recount or a part thereof when a complaint before them did not charge fraud.

Senator BYRD. I guess we are going round and round here.

I have not sought to convey the idea that I feel that there should be a re-recount of a recount.

As I see it, the area of votes that is in question, that has been challenged as having been inaccurately counted—and which, up to this point, is in your favor—would be the only block of votes that the Senate ought to concern itself with, if it is going to concern itself at all.

Mr. WYMAN. The only trouble with that is you have two fields before you, with the counting of only some of the votes, of determinations made in New Hampshire. This is a re-recount.

Senator PELL. Any other statements or questions?

Well, this will conclude this hearing. I regret to say we have another petition and complaint for another U.S. election, and that is from Oklahoma.

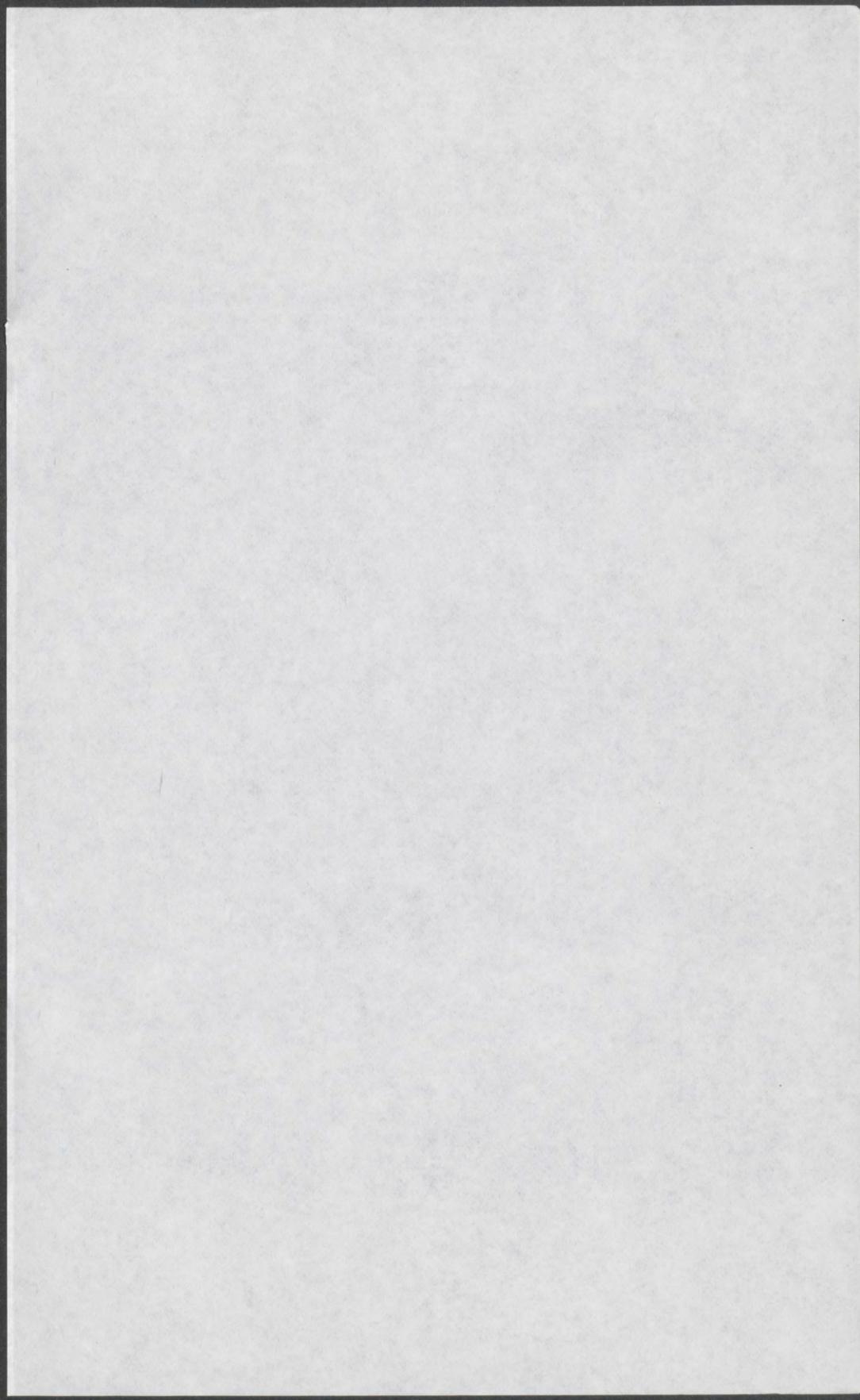
So the subcommittee is seized with another problem as well.

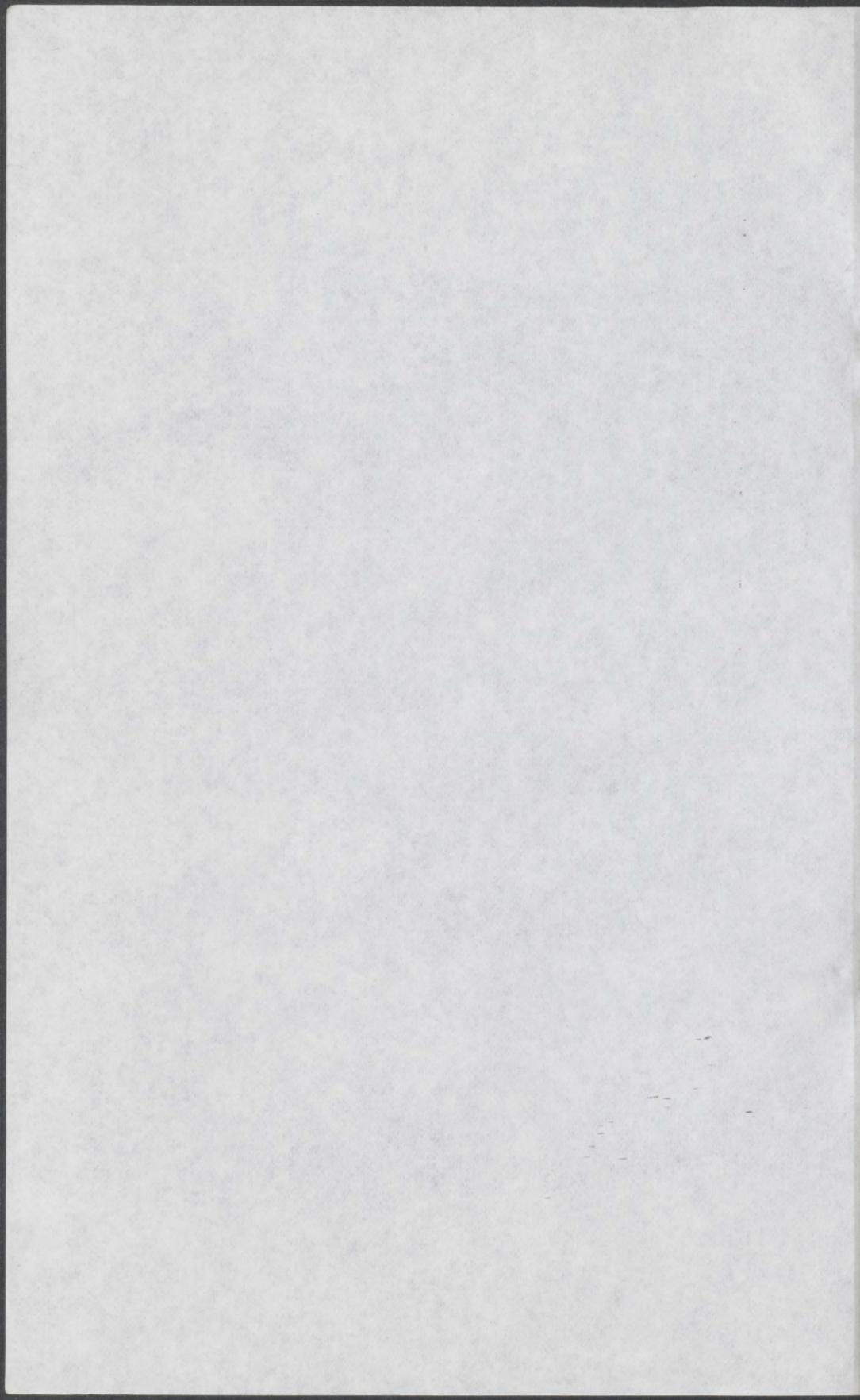
We will leave the record open for submission of any further documents or information or records, and the subcommittee will go into executive session at 6 o'clock in room 301.

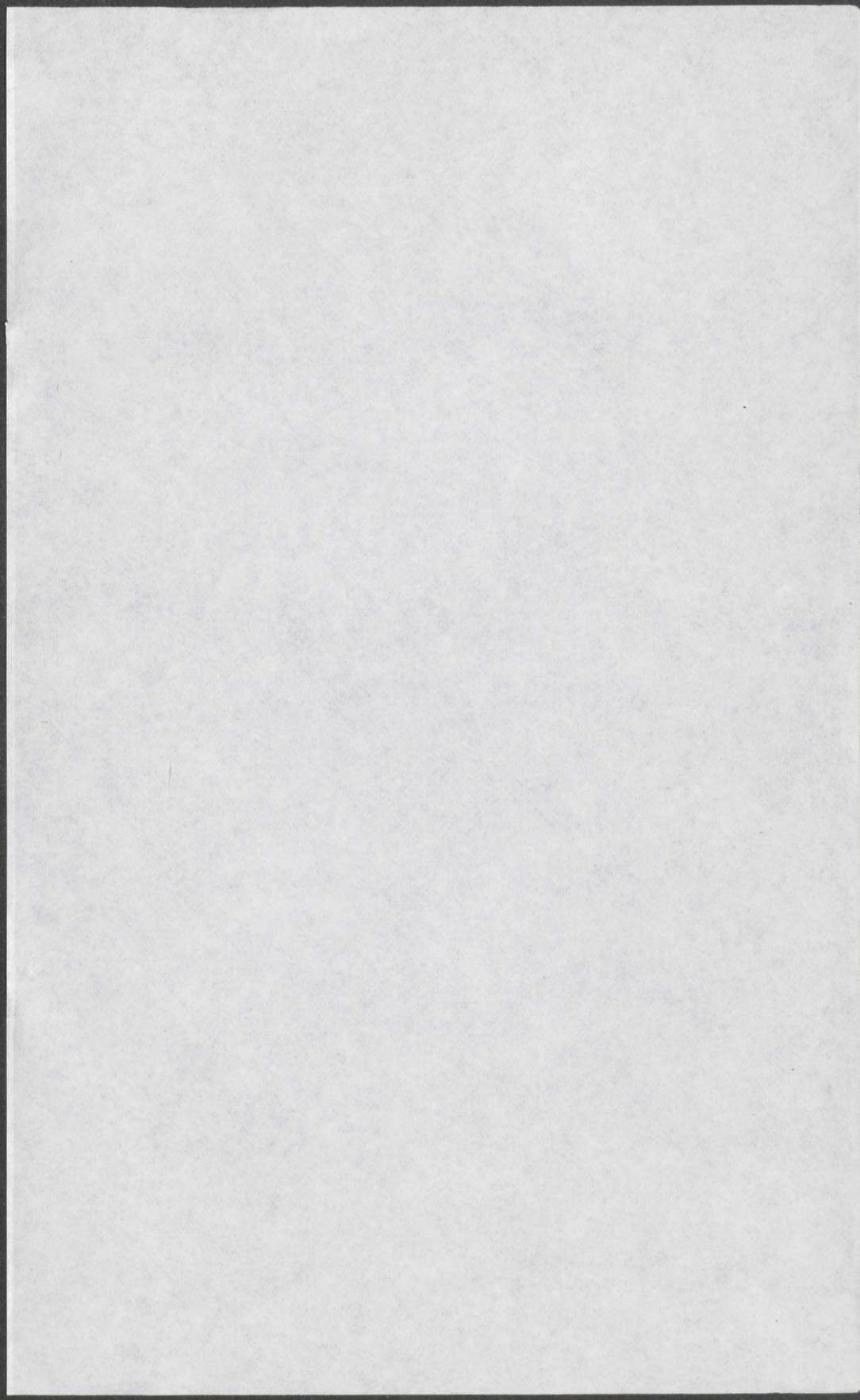
This meeting is adjourned.

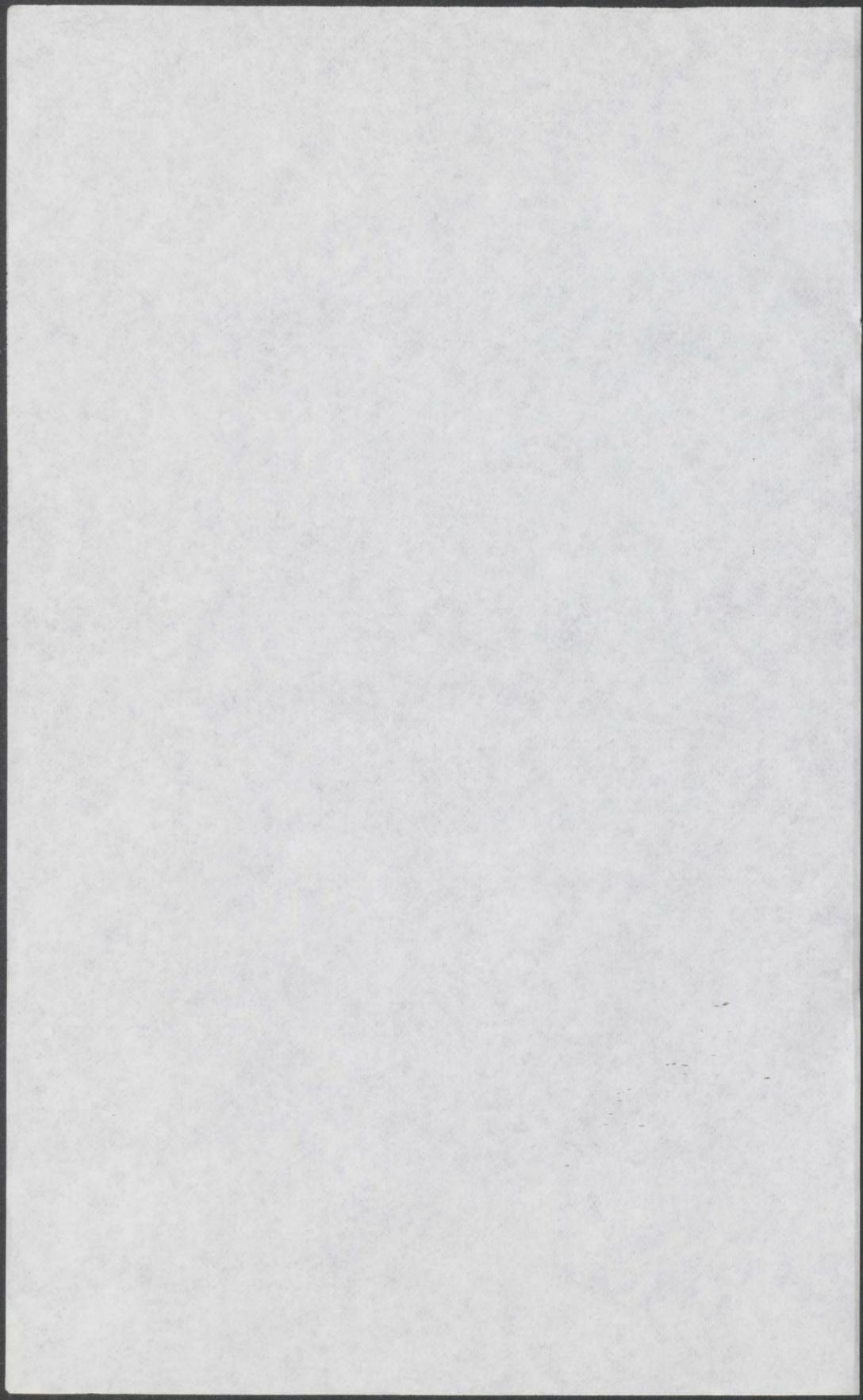
[Whereupon, at 5:20 p.m., the subcommittee was adjourned].















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