

MINUTES OF A MEETING OF THE TEMPORARY COMMITTEE ON LEGISLATIVE FUNCTIONS OF THE ASSEMBLY OF THE 56TH SESSION OF THE NEVADA LEGISLATURE, January 18, 1971:

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The temporary Committee on Legislative Functions of the Assembly of the 56th Session of the Nevada Legislature, as appointed by the Secretary of State and consisting of Messrs. Lauri (chairman), Torvinen, Wilson, Roy Young, Schofield, Mello and Glaser, met in Room 222 of the Legislative Building, Carson City, Nevada, at approximately 12:30 p.m. on Monday, January 18, 1971. Present at the meeting were the committee members, Russell W. McDonald, Legislative Counsel, and Ann Rollins, reporter. Also present in the room were Messrs. Arthur Espinoza and Carl Martillaro and Jeffrey Ian Shaner, his attorneys.

Mr. Torvinen moved that only members of the committee be allowed to deliberate in discussions or make any comments to the committee or participate in discussions on the questions or motions, with the single exception of Russ McDonald, who would be allowed to answer questions or respond to other comments. Seconded by Mr. Roy Young and carried, with Messrs. Glaser, Mello and Schofield voting NO. Whereupon, the committee gave Messrs. Espinoza, Martillaro and Shaner permission to sit with the committee, subject to the motion previously adopted. During discussion on the motion, Mr. Mello went on record as objecting to the procedure of the committee on the grounds that the meeting of the committee should be an open meeting and that any member of the Assembly should be allowed to speak. Following the adoption of the motion, Mr. Espinoza's attorneys, Messrs. Martillaro and Shaner, requested that the record show that they objected to the prohibition against allowing Mr. Espinoza to speak and having Mr. Espinoza's counsel address the meeting.

Upon inquiry from the Chair, Mr. McDonald advised the committee that he had in his possession, issued by the Secretary of State, and delivered to him (Mr. McDonald) 39 certificates of members-elect of the Assembly. Mr. McDonald delivered those certificates to the Chairman. Continuing, Mr. McDonald stated that he also was in possession of a certificate of election of Mr. Espinoza, delivered to Mr. McDonald by the Secretary of State, together with a copy of a letter of resignation to the Governor of Mr. Arthur Espinoza, dated December 18, 1970, and a copy of a portion of the minutes of a meeting of the board of county commissioners of Clark County, Nevada, held December 21, 1970, the contents of which state the appointment of Mr. Espinoza as a member of the Nevada legislature. Mr. McDonald also stated that he had had, prior to the meeting of this committee, delivered to him by Mr. Mello an appointment certificate issued by Loretta Bowman, County Clerk of Clark County, Nevada, to Arthur Espinoza, dated December 21, 1970, indicating the appointment of Mr. Espinoza to the office of assemblyman, Assembly District No. 3, Clark County, Nevada. Mr. McDonald submitted the certificate of election, copies of the letter of resignation and county commissioners' minutes, and the certificate of appointment to the Chairman.

Mr. Roy Young moved that the 39 certificates of members-elect submitted by Mr. McDonald to the Chairman be accepted. The motion was withdrawn by Mr. Young at Mr. Torvinen's request.

Mr. Torvinen moved that the temporary Committee on Legislative Functions report that the following are duly elected and qualified members of the Assembly: Dr. Homer, Messrs. Jacobsen and Getto, Mrs. White, Messrs. Branch, May and Smalley, Mrs. Brookman, Messrs. Dreyer, Hilbrecht, Lowman, Olsen, Ronzone, Schofield, Wilson, Frank Young, Ashworth, Bryan, Glaser, Roy Young, Hafen, Swackhamer, Howard, Prince, Swallow, Dini, Miss Hawkins, Mr. Capurro, Mrs. Frazzini, Messrs. Fry, Kean, Lauri, Lingenfelter, McKissick, Poggione, Torvinen, Miss Foote, and Messrs. Mello and Valentine. The motion was seconded by Mr. Roy Young, whereupon Mr. Mello inquired why the motion was made excluding Mr. Espinoza.

Mr. Torvinen: This is an appointment certificate rather than an election certificate for Mr. Espinoza. It will be handled differently. I intend to make another motion concerning the appointment certificate.

And the motion carried.

Mr. Torvinen moved that the appointment certificate of Mr. Espinoza be set aside and that the committee request that Mr. Espinoza step aside at the swearing-in ceremony. Seconded by Mr. Roy Young.

Mr. Torvinen: It is the understanding, and we all have knowledge of the fact, that an election contest has been filed concerning Mr. Espinoza's seat, that the election contest is filed in legal and due form to our knowledge, that the contest by law will be presented to us by the Secretary of State, that the law allows a contestant to challenge an election by contest and Mr. Smith has done so concerning Mr. Espinoza, that because the law allows for election contests, although I will have to admit that it is an imperfect law, that Mr. Smith ought to have the right to have his election contest heard in an impartial manner by the Assembly. With a view of his having the right of having his contest heard, I have made my motion setting aside the appointment certificate of Mr. Espinoza and for that reason only. Unfortunately, the constitution of the State of Nevada, Article 4, Section 6, reads as follows:

Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.

The second part causes a legal problem. We have had legal advise--the Republican leadership--that having once seated Mr. Espinoza, our hearing an election challenge may be without two-thirds support of the house and we would be spinning our wheels. To accomplish the ends we seek to accomplish, which is only one--that is to allow Mr. Smith to present his challenge and Mr. Espinoza to present his case in opposition to the challenge in as fair, open and honest a way as possible--we ask him to step aside, and for no other reason, because once having been seated, it would then allow, under some precedent in the State of Nevada, the courts to step in and say because we revoked his election certificate which the contest law talks about, it would then be a meaningless thing, because revoking the election certificate after somebody is sworn in as a member of the legislature wouldn't have any effect, would have no value. The true thing, then, is he has been accepted, stood and sworn in. It has been said in past election contests that the contestee has been seated and then withdrew, but there was no threat or challenge of a court action in that case. I must take notice of the fact that there has been wide discussion of the threat or challenge of a court action involving the legislature in Hal Smith's contest.

Mr. Mello: I would like to object to the motion. I would like to go by the constitution also. I feel it is the duty of this committee to seat Mr. Espinoza. Mr. Espinoza had a certificate of election. Then he resigned. The county commissioners could have appointed anyone to fill that seat. It did not have to be Mr. Espinoza. He put his seat up for grabs when he did this. But he was appointed by the county commissioners. First of all, though, if you talk about his certificate, which I have seen, of election, as far as I know the county clerk had made the count and found that Mr. Espinoza had won his election, but because of the so-called malfunctioning machine--no one in this room can say it was malfunctioning--he decided to resign. Then he was appointed. According to Mason's Manual we do have the right to unseat any one of our members and the courts cannot interfere in our action. I personally cannot see the logic to Mr. Torvinen's motion other than the fact that he has 21 votes. It seems to me to be a power play against Mr. Espinoza. I feel that if the courts should decide that Hal Smith is to be the man that was elected by the people of Henderson and we accepted Mr. Espinoza, which I think we should, he would resign. But we are not giving him the opportunity to resign. We don't know. You are assuming that if the courts say that Hal Smith won the election that because of a two-thirds vote then we can't unseat Mr. Espinoza. Is that correct?

Mr. Torvinen: Yes.

Mr. Mello: I see no grounds for this motion whatsoever. I think it is our duty to accept the appointment when it is covered right in "filling vacancies" in article 4, section 12,

of the state constitution. If we are going to abide by the constitution, then I think we should. I see no precedent whatsoever. This will be a precedent. We have a case in 1935 where an assemblyman was seated and then unseated through absentee ballots. As you say, he resigned. I think we as a committee should give Mr. Espinoza the right to resign if the courts decided that he did not win the election. All I hear is the Republicans have the facts. I think the facts should be brought right here to this committee. We are the ones to decide, not the Republican Party. I have seen no evidence whatsoever for Hal. Smith to be seated through the courts. None whatsoever.

Mr. Torvinen: I don't know what the courts have to do with this.

Mr. Mello: The courts have been thrown in because of a two-thirds vote!

Mr. Torvinen: I hope we can stay away from the courts!

Mr. Glaser: Roy, if your resolution carried and was followed through, what would be the mechanics then?

Mr. Torvinen: (Started to reply but was interrupted.)

Mr. Mello: I would like to see the evidence--the reason why you do not want to seat Mr. Espinoza. I have heard that you thought it should be thrown into the court's hands.

Mr. Torvinen: That is not it at all.

Mr. Mello: I would like to know exactly what you are trying to get at.

Mr. Lauri: It is a matter of knowledge that a contest be filed with the Secretary of State. It is the function of this committee to determine the qualification of its members according to the constitution. In order that the Assembly get all the facts it is necessary that we take this course.

Mr. Mello: I ask an opinion from our legal advisor on this.

Mr. McDonald: I'll buy Mr. Torvinen's statement concerning expulsion, but assuming the legislature that enacted the election code had authority under that provision of the constitution to establish a procedure, I think the statute, as cumbersome and indefinite as it is, at least it was the intention of the enactors to establish a procedure which would say that within two days after organization, of a contest being filed, the Secretary of State is mandated to file such documents with the house in which the contest is directed. Without looking at it, it seems to me to infer at least to seat him, because it goes on to say that after a hearing of a contest if the

house's decision is to unseat him, the certificate of election or appointment would be void and the house itself then issues, without any further direction, a certificate without any further qualification at that point. As far as any observations, which might be pedestrian, concerning the vote required to expell, you have to draw the distinction, unsupported by any authority, that "is this in fact an expulsion?". I think this is the thrust of the argument. Or do you read the constitution differently to say that this is not an expulsion and therefore the rules of the house as they might exist would apply at the time of the contest hearing.

Mr. Torvinen: I forgot to say in my opening remarks, if Hal Smith fails to meet his burden to the members of the legislature, I think that is an individual thing with each person or vote. I for one, and as far as I know, everybody I have talked to, all rights and privileges would be retroactive to Mr. Espinoza to the day we were sworn in. We are not trying to penalize him in any way. Secondly, one of the main purposes of taking the actions I am suggesting in my motion is to keep this thing out of the courts. We don't want to go to court. The constitution says we judge the election of our own members. We ought to do it. The courts should be discouraged from getting mixed up in it. We have a separation of powers. The courts invade too often. That is one reason for doing this, because there is no court precedent in Nevada, as Mr. McDonald said, concerning whether after election it is expulsion or something else. We don't know. We would rather not give the court a chance to put its nose in our business.

Mr. Torvinen (continuing): The procedure I will now outline is the procedure which was outlined to Mr. Hilbrecht and would have been outlined to counsel for Mr. Espinoza had they asked, after Saturday (when the procedure had been agreed upon at a meeting among party leadership), merely to try to establish a procedure to hear the election contest. The procedure, which was outlined at the caucus this morning, is as follows: A special committee of seven members, after the Secretary of State delivers the papers to the Speaker, will be appointed, consisting of seven members, four Republicans and three Democrats. The Democrat members have been selected by the minority leader and the names submitted to the Speaker already. The committee will have authority to summons and place witnesses under oath. The committee will have, hopefully, if the Senate agrees, the money to hire one or two certified court reporters who will transcribe every procedure and testimony daily. Daily transcripts will be available to counsel. Affidavits on file with the Secretary of State will be delivered to the Speaker, who will give them to the investigating committee. What the committee will do with those or what weight they will give them remains to be seen. We are talking about committee procedural rules. The committee will probably go to Las Vegas, where the machine is, and test the machine in the company of the contestant, the contestee and counsel, with experts, if possible, to be present. They will take testimony from the election

board of that precinct and whatever else is relevant. We may take testimony somewhere else other than Las Vegas. We think that the committee, the seven-man committee, should take all the testimony. No other testimony should be taken by way of factfinding procedures outside the seven-man committee, merely to make an orderly way of proceeding. That the committee then make a findings of fact when they have completed taking testimony and submit findings of fact, together with a transcript of proceedings, to the Speaker, who will then resolve the (Assembly) to a committee of the whole to accept the report and findings of fact of the factfinding committee.. At that time, the resolve to committee of the whole will limit the scope to the question of the election contest and the house will not accept any new evidence. Counsel for each will be given limited but adequate time to argue. We will proceed under the assumption that Mr. Smith has the burden of proving his case and allow his counsel to open and close. Then we will have, assuming someone will make a motion on the basis of the evidence, to adopt the report of the committee of the whole. That motion will then be debated. Then there will be the procedural matter of the report being submitted to the Assembly and the Assembly voting on the report. The last two steps would be procedural.

Mr. Espinoza: I have served in the Nevada legislature for many sessions. I have attended various committee hearings. At this point, with all the evidence you have before you, I am a duly elected member of the state legislature, as you are. There is no evidence before you that would indicate otherwise. I feel I am not receiving a hearing. The intent of an election contest is to permit a hearing before the body. I think I am being prejudged. I think I won the election properly. I think you are prematurely judging on lack of any evidence. I have a certificate that looks exactly like yours. In addition, I have another certificate of appointment. I don't see any possible way you can deny me my seat. When you do that, somebody be prepared to carry me out of there, because I am not going to walk out.

Mr. Mello: I read in the papers where Mr. Espinoza resigned and mentioned the fact that he was already prejudged by the lower house. You came back and said he didn't have any faith and confidence in his fellow legislators. If we accept his appointment, then you do not have faith in our fellow legislators, if it is proven by this special committee that Mr. Smith won the election, that the two-thirds vote will not unseat Mr. Espinoza.

Mr. Torvinen: The question was fair and difficult. I can start by saying that I have not prejudged the case in any way. In my mind the question turns on the voting machine. If the voting machine shows no evidence of not counting votes, or if the voting machine shows something else--and I have no idea how a voting machine works--these are the merits of the case, and we shouldn't be discussing them here.

Mr. Mello: I think they are pertinent to what we are talking about.

Mr. Torvinen: The thrust of my argument in favor of the motion is that a majority vote is what the constitution and statute contemplates for seating a member, and in order to preserve what the constitution contemplates as a majority vote to seat members, in order to carry out the true intent of the constitution and statutes, this is the action to take. It has nothing to do with faith or reliance on other people, in order to go forward in such a manner as to substantially follow the dictates of the constitution and the law.

Mr. Mello: What brought this about was the fact that it looked to me like a prejudgment verdict that Mr. Smith was going to be seated over Mr. Espinoza. When I feel in my thoughts that it was in very poor taste to assign Hal Smith to committees. It looks to me like he has already been seated. Now you only need to go through the formalities of a 21 to 18 vote.

Mr. Lauri: You mentioned the fact of what you read in the paper. I am a former member of the press. The person who wrote that down here (Carson City) came in too late to hear all of our proposals, and drew only her conclusions and that was the way it was written.

Mr. Schofield: I would like to go on record that this body seat Mr. Espinoza for the following reasons: (1) He has credentials that are valid from Clark County, from the county clerk, stating that he is appointed a delegate to this body. I feel that he should be appointed the same as--I ask Mr. McDonald was Senator Lee Walker seated?

Mr. McDonald: To the best of my knowledge. I met with the Senate credentials committee an hour ago and his credentials of appointment were submitted and accepted. Their report was delivered to the Senate and I assume it was adopted.

Mr. Schofield: Were his credentials similar to Mr. Espinoza's, from the same county clerk?

Mr. McDonald: Yes.

Mr. Schofield: Even though there is not a contest in the Senate in Mr. Walker's case, Mr. Espinoza has been appointed with the same credentials. I would like it a matter of record that I believe this legislative body can examine this and investigate it after Mr. Espinoza is seated if they choose to do so, if they choose to challenge the credentials he has from our county clerk.

Mr. Roy Young again seconded Mr. Torvinen's motion. Mr. Torvinen amended his motion to read that the appointment certificate of Mr. Espinoza be set aside and that the committee request that

Mr. Espinoza step aside at the swearing-in ceremony, pending a hearing of the election contest and final determination of the election contest. Seconded by Mr. Roy Young and carried, with Messrs. Schofield, Glaser and Mello voting NO.

Mr. Torvinen: It is my personal feeling that we proceed with all haste to decide this matter in an honest and fair way, and as quickly as possible.

Mr. Mello: I hope it will be fair and honest. At this meeting today, I wonder!

Mr. Lauri: I think the minority leader agreeing to this indicates--

Mr. Torvinen: He only agreed that the procedure of the election contest committee seemed to him to be a fair procedure.

Mr. McDonald requested direction as to the contents of the report of the committee to the Assembly. And after discussion and direction to Mr. McDonald, the meeting was recessed while a draft was prepared.

At 2:11 p.m. the committee reconvened in Mr. McDonald's office, and after Mr. McDonald had read the proposed draft to members of the committee, Mr. Torvinen moved that the committee adopt the report as read. Seconded by Mr. Wilson and carried, with Messrs. Schofield Glaser and Mello voting NO.

The text of the adopted report follows:

Mr. Secretary of State:

Your temporary Committee on Legislative Functions has had the credentials of the respective Assemblymen-elect under consideration, and begs leave to report that the following persons have been and are fully elected and qualified members of the Assembly of the 56th Session of the Legislature of the State of Nevada:

Dr. Homer, Messrs. Jacobsen and Getto, Mrs. White, Messrs. Branch, May and Smalley, Mrs. Brookman, Messrs. Dreyer, Hilbrecht, Lowman, Olsen, Ronzone, Schofield, Wilson, Frank Young, Ashworth, Bryan, Glaser, Roy Young, Hafen, Swackhamer, Howard, Prince, Swallow, Dini, Miss Hawkins, Mr. Capurro, Mrs. Frazzini, Messrs. Fry, Kean, Lauri, Lingenfelter, McKissick, Poggione, Torvinen, Miss Foote, and Messrs. Mello and Valentine.

Your temporary Committee on Legislative Functions has also examined and considered the credentials of appointment of Mr. Arthur Espinoza but, having knowledge that a statement of contest and other documents pertaining

to Mr. Espinoza's seat have been filed with the Secretary of State, refused to accept such credentials and recommends that Mr. Espinoza step aside and not take the oath of office when it is administered to other members-elect and that the house when organized and in receipt of the statement of contest and other documents then proceed expeditiously to hear and decide the contest by such rules as it shall prescribe. The action of your temporary committee concerning Mr. Espinoza's seat was adopted by an affirmative vote of Messrs. Lauri, Torvinen, Wilson and Roy Young, Messrs. Schofield, Mello and Glaser recording negative votes.

/s/ Nick Lauri, Chairman

There being no further business, the meeting was adjourned.

Chairman

Reporter