

## Case Changed History and Defined “Lawyering”

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July 26, 2012 – From 1937 until 1963, Lyndon Baines Johnson served as Congressman, Senator and Majority Leader and Vice President; and, upon the assassination of President John F. Kennedy, LBJ became the 35th President of the United States.

That rise to power would not have happened had he not won the Texas Democratic Party’s U.S. senatorial primary runoff election held Saturday,



*Congressman Lyndon Baines Johnson*

August 28, 1948; and because that election was sharply disputed, Johnson would not have won if he had not prevailed in the ensuing litigation.

Over three furious weeks in September 1948, the lawyers for LBJ and for former governor Coke Stevenson, his opponent, sought and obtained successive, trumping injunctions in state and federal courts until finally a U.S. Supreme Court justice ended the matter by entering an unusual stay that ensured Johnson’s victory.

Why study such litigation from the past? On one hand, the story is intrinsically interesting – with LBJ at the center—and on the other hand, this litigation provides a useful case study or illustration of “lawyering.” That makes this story, about which I have recently written at length [*LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*],<sup>31</sup> *The Review of Litigation* 1 (2012), particularly interesting].

### 1. A Brief History of this Litigation

Texas in 1948 was a one-party state. Winning the primary election was equivalent to electoral victory. Initially after the Saturday

runoff election, the Texas Election Bureau counted Stevenson the winner.

But the tally fluctuated in the following days, until, six days later, the final 202 votes arrived in Austin from Precinct 13 in politically corrupt Jim Wells County in the Rio Grande Valley, with 201 votes for Johnson and only one for Stevenson. That surge provided LBJ an 87-vote victory margin out of a million ballots cast. Stevenson was outraged, and litigation on multiple fronts followed.

While Robert Caro, Robert Dallek, Ronnie Dugger and the other LBJ biographers – non-lawyers all – have written about the ensuing litigation, none accurately explains it. Today it is clear that Johnson won because of



*Governor Coke R. Stevenson*

fraudulent votes, those last 202 ballots ostensibly on behalf of persons absent or deceased, whose names were written on the poll list in a different color ink and in alphabetical order.

Over the years, LBJ’s defenders have asserted that Stevenson was guilty of equal or greater vote fraud elsewhere, but the only votes ever tested in court were those last ones from the Rio Grande Valley—and through superior lawyering, LBJ’s attorneys managed nonetheless to sustain those votes at the end of the litigation.

Time was short: October 2 was the Secretary of State’s deadline to issue the official ballot for the November 2 general election. Thus, the lawyers had only three weeks to secure their respective client’s name on the ballot as Democratic candidate for Senator.

A lawyer himself, Stevenson knew what to do: he sent lawyers to the Valley to investigate and collect witness statements for challenging the >



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vote in the State Democratic Convention in Fort Worth to begin on September 13, and he asked the local party committee to change the vote tally.

Johnson learned of that; and in Austin, 200 miles away, on Friday night, September 10, the last business day before the Party's state convention, LBJ's lawyers filed a state court suit against Stevenson and the local committee. At 9:50 p.m., according to the file-marks on the papers, they obtained an ex parte temporary restraining order from State District Judge Roy Archer to prevent a recount of the Jim Wells County votes.

Stymied there, Stevenson's lawyers presented their evidence of vote fraud in the Valley at the convention in Fort Worth the following Monday, September 13,; but the Party's Executive Committee, in a dramatic midnight vote, approved the nomination of Johnson by 29 to 28.

Stevenson refused to accept defeat. Although Johnson had already resorted to state court, it was the litigation brought by Stevenson in the federal district court in Fort Worth that became the next scene of battle. Stevenson's lawyers managed to locate U.S. District Judge Whitfield Davidson outside the Northern District of Texas; at his sister's cabin on Caddo Lake, 200 miles from Fort Worth, at 6:25 a.m. on September 15, they obtained from the Judge a Temporary Restraining Order to stop the certification of LBJ as the victor.

Each side quickly assembled a dozen and more volunteer lawyers, including the ablest lawyers in the state. For Stevenson, chief strategist and trial counsel was former Texas governor Dan Moody; and for LBJ, former governor and former federal district judge Jimmy Allred took the lead with former state senator and LBJ confidante Alvin Wirtz as strategist. Only one could win the election, and the lawyering of both sides was of the highest order.

To be in federal court, Stevenson needed a federal question. Moody formulated a complaint on the novel theory that the civil rights of the candidate, Stevenson, had been violated by the fraudulent

ballots. Ironically, Stevenson and Moody, who had worked over several decades in a futile effort to perpetuate the All-White Primary in Texas, resorted to pleading a civil rights case, while LBJ, the New Deal veteran and more liberal candidate, and his legal team were compelled to take a states' rights stance, seeking to get out of federal court.

In the trial conducted September 21-22, Judge Davidson heard a dozen witnesses for Stevenson, but Johnson's counsel, insisting that jurisdiction was lacking, introduced no evidence. The Court granted a preliminary injunction against Johnson and the Secretary of State, and it ordered special masters to go to the Valley to gather evidence about the ballots and to report back before October 2.

In desperation at this point, LBJ added to his team the Washington lawyer Abe Fortas, who happened to be in Dallas taking depositions. Fortas improvised an on-the-spot strategy of seeking a stay from the Fifth Circuit, which was out of session, with expectation that it would be denied, so that he could then rush a stay motion directly to the Supreme Court Justice responsible for the Fifth Circuit, Hugo Black.

In a remarkable feat, LBJ's Washington lawyers bluffed the Supreme Court Clerk into file-marking their stay motion, despite the absence of papers from the courts below; and a few days later, after an in-chambers hearing on September 29, Justice Black issued his unusual stay order — bearing no case number — that terminated the masters' efforts to unlock the challenged ballot boxes in the Valley. Free of Judge Davidson's injunction, the Secretary of State then promulgated the statewide ballot with LBJ on it as Democratic nominee for U.S. Senate.

And the rest is history.

### **2. The Meaning of "Lawyering"**

The term "lawyering" has enjoyed a meteoric rise in usage over the past half century. From a few references in early 20th century law review literature and its initial appearance in a >



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federal court case in 1966, the gerund or participle “lawyering” simply zoomed into the vocabulary of lawyers, judges, and legal scholars.

I searched long for a meaningful definition. Everyone seemed to know what it means, but no one had put a meaningful definition down on paper. For instance, in his *Dictionary of Modern Legal Usage*, the legal lexicographer Brian Garner defines “lawyering” as “a neutral term to describe what [lawyers] do.” For me, there is nothing neutral about *lawyering*; that definition failed to capture the essence of what lawyers “do.”

So before writing the history of *LBJ v. Stevenson*, I crafted my own definition, one that is result-oriented and based on the relationship of agent and principal: “Lawyering” is the work of a lawyer who, serving his or her client, “invokes and manipulates, or advises about, the dispute-resolving or transaction-effectuating processes of the legal system *for the purpose of solving a problem or causing a desired change in, or preserving, the status quo for his or her principal.*”

After hearing me speak on the lawyering in *LBJ v. Stevenson*, a law professor asked, “What am I supposed to tell my students? That it is OK to ignore procedural rules? To bluff court clerks into filing papers they really shouldn’t? To call out judges at odd times and out-of-district places in order to get ex parte injunctions?”

My response was, and is, that the essence of “lawyering” is the accomplishment of a desirable *result for the client*. Lawyering to obtain a result for a client is necessarily improvisational and ad hoc in nature, although it of course occurs within the boundaries of a legal system amply provisioned with rules to promote the presentation of cases on their merits. LBJ’s team “out-lawyered” his opponent’s counsel; and what mattered most for Lyndon Johnson in September 1948 was that his lawyers obtained his *desired objective*.

What a study of *LBJ v. Stevenson* demonstrates is that, when exceptional lawyering is required to win or to settle critical litigation or to consummate or to unwind a significant transaction, it really matters who each party chooses as its counsel.

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