designated as a House document). The 72d Congress did not authorize the Clerk to respond to the subpena duces tecum.

The contest was transmitted to the Seventy-third Congress on Jan. 16, 1934, on which date the Speaker[1] laid before the House a letter[2] from the Clerk. The communication was referred to the Committee on Elections No. 3 and ordered printed (not designated as a House document).

At the general election held Nov. 8, 1932, contestee (Mr. Simpson) had received 101,671 votes to 100,449 votes for contestant and to 45,067 votes for Mr. Church, a plurality of 1,222 votes for contestee. Contestant thereafter examined the tally sheets in all of the 516 precincts comprising the 10th Congressional District, and found discrepancies in 128 precincts which reduced contestee Simpson's plurality to 920 votes.

Contestant requested that the committee order a recount of all ballots cast, based on the mistakes shown to have existed in 128 precincts. The committee denied this request, finding no evidence of irregularities, intimidation or fraud in the casting of ballots. The committee concluded that "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee." House Resolution 374[3] was submitted on May 4, 1934, by Mr. Kerr with the report, and was referred to the House Calendar. As recommended by the committee, the resolution—

> *Resolved,* That Charles H. Weber is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Tenth Congressional District of the State of Illinois; and further
>
> *Resolved,* That James Simpson, Jr. is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Tenth Congressional District of the State of Illinois.

The resolution was not called up during the 73d Congress.

Note: Syllabi for Weber v Simpson may be found herein at § 6.13 (items transmitted by Clerk); § 30.1 (Clerk's refusal to respond to subpena); §§ 36.1, 36.7 (official returns as presumptively correct); § 44.7 (burden of proving recount would change election result); § 42.20 (House failure to take action on reported resolutions).

§ 48. Seventy-fourth Congress, 1935–36

§ 48.1 Lanzetta v Marcantonio

1. Henry T. Rainey (Ill.).
2. 78 CONG. REC. 760, 761, 73d Cong. 2d Sess.; H. Jour. 64.
3. 78 CONG. REC. 8085, 8122, 73d Cong. 2d Sess.; H. Jour. 489.

On June 19, 1936 (Calendar Day, June 20, 1936), Mr. Milton H. West, of Texas, submitted the unanimous report[4] from the Committee on Elections No. 1 in the contested election case brought by James J. Lanzetta against Vito Marcantonio from the 20th Congressional District of New York. The contestee, Marcantonio, had received a majority of 246 votes from the official tabulation of votes cast in the election held Nov. 6, 1934. Contestant had filed notice of his intention to contest on Dec. 31, 1934, with timely answer by contestee. More than 4,000 pages of testimony and exhibits were taken, but the testimony of contestant was not taken until after the expiration of the 90-day period prescribed by 2 USC § 203 (running from the time contestee's answer was filed).

On Jan. 6, 1936, the Speaker had laid before the House a letter from the Clerk of the House[5] transmitting information that the notice of contest and reply thereto had been filed with his office and that the Clerk would forward to the Committee on Elections the testimony adduced on behalf of contestee within the time prescribed by law. No testimony had at that time been received on behalf of contestant. The Speaker referred the Clerk's communication to the Committee on Elections No. 1, and ordered it printed as a House document. The Clerk then permitted each party 30 days to file his brief with his office, pursuant to 2 USC § 223. The Clerk did not order printed that portion of the testimony taken after the expiration of the time required by law and received by the Clerk after referral of his letter. The Committee on Elections No. 1, however, having found some justification for delay, considered all testimony, it being made available to the committee by the Clerk pursuant to 2 USC § 223.

Contestant charged the violations by contestee "of nearly all of the election laws including intimidation of voters, violation of the Corrupt Practices Act, illegal and excessive expenditure of money, failure to account for various contributions, inciting and leading riots," and other infractions. However, the committee found that none of the charges were sufficiently proven to warrant a committee recommendation that they be sustained. The committee concluded that it could not properly

4. H. Rept. No. 3084, 80 CONG. REC. 10615, 74th Cong. 2d Sess.; H. Jour. 689.

5. H. Doc. No. 383, 80 CONG. REC. 98, 74th Cong. 2d Sess.; H. Jour. 24.

decide the contest without causing further testimony to be taken, and that further testimony could not be taken due to the approach of adjournment *sine die* of the 74th Congress, second session.

As the result of certain irregularities on the part of contestee and his attorneys during the taking of testimony and refusals to testify or ignoring of subpenas by witnesses, the committee recommended—

> . . . [T]hat the present election laws be amended and some authority empowered to require witnesses to obey process and give their testimony.
>
> The committee feels that by the action of the contestee's attorneys and associates it has been denied the opportunity under the existing law to properly inquire into the fraud and corruption which was charged in this election.

The committee called the attention of the House to actions of contestee's attorneys and witnesses as follows:

(1) The attorneys for each side agreed to waive the requirement that witnesses sign testimony, and that stenographer transcripts would be sufficient; contestee's attorneys later refused to accept the agreed testimony (unsigned by witnesses), which necessitated further subpenas to witnesses, some of whom refused to respond or could not be found.

(2) Contestee's law partner, the campaign fund treasurer, refused to testify on the ground that time for taking testimony had expired, despite substantiated charges that contestee had not reported certain contributions.

House Resolution 560[(6)] was called up by Mr. West at the time he submitted the report from the Committee on Elections No. 1, and was agreed to without debate and by voice vote on June 19, 1936 (Calendar Day, June 20, 1936), the final day of the second session of the 74th Congress. House Resolution 560 provided as follows:

> *Resolved*, That James J. Lanzetta is not entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Twentieth Congressional District of the State of New York; and be it further
>
> *Resolved*, That Vito Marcantonio is entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Twentieth Congressional District of the State of New York

Prior to the adoption of the above resolution, Mr. James P. Buchanan, of Texas, had, on June 19, 1936 (Calendar Day, June 20, 1936), asked unanimous consent for the immediate consideration of House Joint Resolution 641[(7)]

6. 80 CONG. REC. 10615, 74th Cong. 2d Sess.; H. Jour. 690.

7. 80 CONG. REC. 10253, 74th Cong. 2d Sess.; H. Jour. 653.

which he introduced at that time from the floor and sent to the Clerk's desk, and which made "appropriations for the payment of expenses incurred in the election contest for a seat in the House of Representatives from the Twentieth Congressional District of the State of New York" as follows:

> *Resolved*, etc., That the following sums, respectively, are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for payment to the contestant and the contestee for expenses incurred in the contested-election case of Lanzetta against Marcantonio, Twentieth Congressional District of the State of New York, as audited and recommended by the Committee on Elections No. 1 of the House of Representatives, namely:
>
> To James J. Lanzetta, contestant, $2,000.
>
> To Vito Marcantonio, contestee, $1,739.83.
>
> The foregoing sums to be disbursed by the Clerk of the House of Representatives.

The joint resolution was passed without debate and by voice vote, passed by the Senate on the same day, and approved as Public Resolution No. 122.

Note: Syllabi for Lanzetta v Marcantonio may be found herein at §§ 27.7, 27.9 (extensions of time for taking testimony); § 28.1 (unsigned transcript of deposition by witness); § 30.2 (noncompliance with subpena); § 45.3 (payments from Treasury authorized by joint resolution).

§ 48.2 McCandless v King

On May 21, 1936, Mr. Joseph A. Gavagan, of New York, submitted the report [8] from the Committee on Elections No. 2 in a contested election case brought by Lincoln L. McCandless against Samuel W. King, Hawaii Territory. According to the official tabulation of votes, contestee (Mr. King) received 31,487 votes and contestant (Mr. McCandless) received 29,630, a majority of 1,857 for contestee. Contestant served and filed notice of contest on Dec. 15, 1934, with timely answer by contestee. The Clerk of the House transmitted the original testimony, papers, and documents to the Speaker on Jan. 6, 1936,[9] on which date the contested election case was referred to the committee. These documents accompanied the Clerk's letter, which the Speaker laid before the House and ordered printed.

The committee dismissed contestant's contentions of intimidation and coercion of voters by contestee, having found no com-

8. H. Rept. No. 2736, 80 CONG. REG. 7765, 74th Cong. 2d Sess.; H. Jour. 482.

9. H. Doc. No. 384, 80 CONG. REG. 98, 99, 74th Cong. 2d Sess.; H. Jour. 24.

petent evidence of such actions on the record.

The contestee moved to dismiss the contest as not having been timely commenced, i.e., "notice of contest not filed within 30 days after the result of the election (has) been determined by the officer or board of canvassers authorized by law to determine the same," as required by 2 USC § 201.

On Nov. 10, 1934, the Governor of the Territory of Hawaii issued a certificate of election to contestee; on Nov. 17, 1934, the Secretary of the Territory canvassed the vote and made a certification thereon. Section 85 of the Hawaiian Organic Act provided, regarding election of a Delegate to the U.S. House of Representatives:

> . . . [T]he conduct of the election shall be in conformity to the general laws of the Territory; that the person receiving the greatest number of votes shall be declared by the Governor duly elected, and a certificate shall be given accordingly.

The general elections laws of the Territory of Hawaii in effect at the time of the election provided that the secretary of the territory declare and certify election results. For this reason, the committee reported that the certificate issued by the Governor was without legal effect, that the proper certification was that issued by the secretary, that the contestant had therefore filed notice of contest (on Dec. 15, 1934) within the 30 days required by 2 USC § 201, and denied the contestee's motion to dismiss.

Contestant's third point of contention cited excessive campaign expenditures and contestee's failure to comply with the Corrupt Practices Act by filing with the Clerk of the House the required forms setting forth his campaign expenditures. The committee found that contestee had, within the 30-day period imposed by the act, written a letter to the Clerk of the House itemizing expenditures totaling $2,473.90 and stating that he would file the required forms upon arrival in Washington. The committee suggested that censure of contestee for his one-year delay in filing the forms might be in order; but the committee did not regard such delay as a sufficient basis for forfeiture of his seat, in the light of all the circumstances. Contestee's incomplete knowledge of the election laws and procedures, and the fact that the Clerk of the House had not mailed the required forms to contestee in Hawaii, were factors considered by the committee. The report then stated—

> . . . Furthermore, when analyzed, the contestee's statement shows no im-

proper or excessive expenditure. Your committee believes, therefore, that a strict interpretation of the requirements of law, under the circumstances of this case, might result in a wrong and injustice to the contestee and cloud a distinguished and honorable career. Considering that the contestee's failure to comply with the requirements of law in no way affected the rights of the contestant, your committee recommends that the issues raised by the contestant's third contention be dismissed.

Mr. Gavagan called up as privileged House Resolution 521 [10] on June 2, 1936, which incorporated the language recommended in the committee report as follows:

Resolved, That Lincoln Loy McCandless was not elected a Delegate from the Territory of Hawaii to the House of Representatives at the general election held November 6, 1934; and

Resolved, That Samuel Wilder King was elected a Delegate from the Territory of Hawaii to the House of Representatives at the general election held on November 6, 1934, and is entitled to his seat.

The previous question was ordered without debate, and the resolution was agreed to by voice vote.

Note: Syllabi for McCandless v King may be found herein at §§ 10.2, 10.5 (Corrupt Practices Act); § 20.4 (notice of contest filed late).

10. 80 CONG. REC. 8705, 74th Cong. 2d Sess.: H. Jour. 538.

§ 48.3 Miller v Cooper

On Mar. 5, 1936, Mr. John H. Kerr, of North Carolina, submitted the unanimous committee report [11] in the contested election case brought by Locke Miller against John G. Cooper, 19th Congressional District of Ohio.

According to the official tabulation of votes as certified by the Governor of Ohio, contestant had received 52,023 votes (27,335 of those votes having come from Mahoning County, one of three counties in the congressional district); whereas contestee had received a total of 56,200 votes (29,512 from Mahoning County); thus leaving a plurality of 4,177 votes for contestee in the district. Contestant filed timely notice of contest, with proper answer by contestee.

On Jan. 6, 1936, the Speaker laid before the House a letter from the Clerk of the House [12] transmitting the information that notice of contest and reply thereto had been filed with his office, and transmitting therewith "original testimony, papers, and documents relating thereto." The Speaker referred the Clerk's letter to the Committee on Elections No. 3 on

11. H. Rept. No. 2131, 80 CONG. REC. 3337, 74th Cong. 2d Sess.; H. Jour. 215.

12. H. Doc. No. 385, 80 CONG. REC. 99.

Jan. 6, 1936, and ordered the letter printed as a House document.

Contestant alleged that certain irregularities and frauds had occurred in Mahoning County, but not in the other two counties of the district. The committee, after considering all referred testimony and hearing arguments of counsel, found—

> . . . [S]ome irregularities, from the evidence, in respect to the destruction of the ballots, tabulations of the votes cast, and the method of conducting the election in Mahoning County, still, there was no evidence whatsoever connecting the contestee with these acts. And even if the committee should disregard entirely the election in Mahoning County and cast these ballots out, still it would not affect enough votes to change the result of this election; for the reason that in the other two counties in which the voting was not impeached, the contestee received a majority of 2,000 votes (though the unimpeached votes were not a majority of all votes cast in the district).

The committee recommended the adoption of the following resolution:

> *Resolved,* That Locke Miller is not entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Nineteenth District of the State of Ohio.
>
> *Resolved,* That John G. Cooper is entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Nineteenth District of the State of Ohio.

On Mar. 13, 1936, Mr. Kerr called up as privileged House Resolution 438[13] which embodied the language recommended by the committee in its report. The previous question was immediately ordered without debate, and House Resolution 438 thereupon agreed to by voice vote. Mr. Cooper was thereby held entitled to his seat.

Note: Syllabi for Miller v Cooper may be found herein at § 12.2 (balloting irregularities); § 39.5 (significance of number of disputed ballots).

§ 49. Seventy-fifth Congress, 1937–38

§ 49.1 Roy v Jenks

In the contested election case of Roy v Jenks in the First Congressional District of New Hampshire the Clerk of the House transmitted the testimony, papers, and documents to the Speaker on July 21, 1937,[14] on which date the contested election was referred to the committee. These documents accompanied the Clerk's letter, which the Speaker laid before the House and ordered printed.

Mr. John H. Kerr, of North Carolina, submitted the privileged

13. 80 CONG. REC. 3740, 74th Cong. 2d Sess.; H. Jour. 236.

14. H. Doc. No. 305, 81 CONG. REC. 7339, 7352, 75th Cong. 1st Sess.; H. Jour. 756.