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.

report (H. Rept. No. 1521)[15] from the Committee on Elections No. 3 on Aug. 13, 1937, which was referred to the House Calendar and ordered printed.

Mr. Charles W. Tobey, of New Hampshire, subsequently made a point of order against acceptance of the report by the House, in that it violated § 47 of Rule XI, which required the several elections committees of the House to make final reports to the House in all contested election cases not later than six months from the first day of the first regular session of the Congress to which the contestee was elected. (The six-month reporting requirement was changed in the 92d Congress to a direction to report "at such time as the committee considers practicable in that Congress to which contestee was elected." Rule XI clause 25, *House Rules and Manual* § 733 [1971]. This requirement was omitted from the rules in the 94th Congress.)

Mr. Gerald J. Boileau, of Wisconsin, concurred with Mr. Tobey, contending, that after the six months' period expired, the Committee on Elections lost its privilege of calling up such resolution. Mr. Arthur H. Greenwood, of Indiana, replied that the Constitution and the House rules give the House the power to decide the question of its own membership, which power would be denied should the rule be construed as mandatory. Mr. John J. O'Connor, of New York, pointed out that an elections committee which for any reason failed to report within six months could successfully deprive the House of the opportunity to decide the elections of its Members, were the rule to be construed as mandatory. Mr. Kerr argued that the federal statutes governing contested election cases give each party much longer than six months to gather evidence and present it to the House.

The Speaker,[16] in overruling the point of order, stated:[17]

> The Chair thinks it proper in the construction of this issue not only to take into consideration the verbiage of this rule but also a provision of the Constitution of the United States which has been cited in this argument. Section 5 of article I of the Constitution, in part, provides that each House shall be the judge of the elections, returns, and qualifications of its own Members.
>
> The Chair is of the opinion that although the terms of the rule are in the language read by the Chair and as argued by the gentleman from New Hampshire, yet, nevertheless, the

15. 81 CONG. REC. 8842, 8878, 75th Cong. 1st Sess.; H. Jour. 859, 862.

16. William B. Bankhead (Ala.).

17. 81 CONG. REC: 8845, 8846, 75th Cong. 1st Sess.

Chair must look at all the facts in the case in order to reach a decision as to what was the fair intention of the House of Representatives in the adoption of this rule. The Chair refers briefly to the various steps that are authorized under the statute in order to give the contestant and the contestee an opportunity to take evidence, to give proper notice one to the other of the procedures of the case, and to present it finally for the determination of the House of Representatives. The Chair finds on examination that under [former] sections 201, 202, 203, and 223 [now §§ 382, 383, 386, 391(a), and 393] of title II, United States Code, the contestee and the contestant are allowed no more than 6 months in which to present the evidence in the case to the House for its consideration. So that if they used, as they apparently did in this case, the time that was allowed to them by the statute . . . it would have been physically impossible as a matter of time, for the House to have had the case presented to it at all for its consideration. In this case, according to the letter filed by the Clerk of the House with the Speaker, which may be found in House Document 305, Seventy-fifth Congress, the issue was filed on July 21, 1937, and immediately referred to the Committee on Elections No. 3, and it appears to the Chair that the Committee on Elections has not been dilatory in this matter, but, upon the contrary, has exercised great diligence and dispatch in reaching its conclusion with reference to the issues involved. So that the Chair is under the impression that a fair construction of this rule, taken in connection with the constitutional rights of the contestant and the contestee, taken in connection with the fact that both parties to the issue were entitled to use more than 6 months in the preparation of their case, and, taking into consideration the fact that these issues were only presented to the committee on July 21, that a fair construction of the rule under all of the circumstances in this case would indicate that the provisions of this rule properly construed are not strictly mandatory, but directory. Otherwise, the Chair is of opinion that the contestant, or even the contestee, might be deprived not only of his constitutional privilege but under the terms of the statute in such case made and provided it would be made impossible for the issue to be properly presented to the House of Representatives for its determination.

There is one other matter that the Chair feels justified in taking into consideration in an interpretation of the rule under discussion.

It will be remembered that the rule in question was adopted in 1924, at which time Congress ordinarily did not assemble until more than 1 year had expired after the election of Members, and under that situation the 6-month rule would be within the realm of reason and give a fair opportunity to both parties to the contest to comply with its provisions and the provisions of the statutory law. Since its adoption, however, the so-called "lame duck" amendment to the Constitution has been ratified, under the provisions of which the Congress meets in regular session within 2 months after the Members are elected. The Chair is of the opinion that if this status had existed at the time the rule was adopted, that its harsh and impossible terms would never have been agreed to as a perma-

nent rule of the House of Representatives.

The contestee and the contestant having each more than 6 months under the statutes to present their case, the Chair is of opinion that under all of the circumstances the fair and reasonable and just interpretation of this rule justifies him in overruling the point of order, and the Chair does overrule the point of order.

Mr. Bertrand H. Snell, of New York, appealed from the decision of the Chair, whereupon Mr. Sam Rayburn, of Texas, moved to lay the appeal on the table, which motion was agreed to by a roll call vote of 286 yeas to 69 nays.

On Aug. 19, 1937, Mr. Kerr called up as privileged House Resolution 309,[18] which provided:

Resolved, That Arthur B. Jenks is not entitled to a seat in the House of Representatives in the Seventy-fifth Congress from the First Congressional District of the State of New Hampshire.

Resolved, That Alphonse Roy is entitled to a seat in the House of Representatives in the Seventy-fifth Congress from the First Congressional District of the State of New Hampshire.

House Report No. 1521 accompanied House Resolution 309. The views of the majority as presented in this report were repeated verbatim in the final committee report (H. Rept. No. 2255). Mr. Kerr obtained unanimous consent that general debate be extended for two and one-half hours, to be equally divided and controlled by himself and Mr. Charles L. Gifford, of Massachusetts, who had submitted the minority views which accompanied the committee report. Under Mr. Kerr's request, the previous question was to be considered as ordered at the conclusion of the general debate. At the conclusion of such debate, Mr. James M. Wilcox, of Florida, offered the following motion[19] to recommit House Resolution 309 to the Committee on Elections No. 3 with instructions:

. . . [T]hat this resolution be recommitted to the committee; that the committee be and hereby is authorized, empowered, and directed to take or cause to be taken the testimony of the 458 Newton residents shown by the town election records to have voted there in person on November 3, 1936, and such further testimony as the committee may consider relevant to better enable it to determine the issue raised by this case; and that the committee be authorized to expend such sums in its investigation as it may deem necessary, and report its findings and recommendations to this House at the next session of Congress.

The motion to recommit was agreed to by a roll call vote of 231 to 129.

18. 81 CONG. REC. 9356, 75th Cong. 1st Sess.; H. Jour. 893.

19. 81 CONG. REC. 9374, 75th Cong. 1st Sess.; H. Jour. 893.

On Aug. 20, 1937, Mr. William B. Cravens, of Arkansas, asked unanimous consent for the immediate consideration by the House of House Resolution 329:[20]

> *Resolved,* That the expenses of conducting the investigation authorized by the House in the contested-election case of ROY versus Jenks, incurred by the Committee on Elections No. 3, acting as a whole or by subcommittee, not to exceed $5,000, including the expenditures for the employment of experts, clerical, stenographic, and other assistants, shall be paid out of the contingent fund of the House on vouchers authorized by such committee or by any subcommittee thereof, conducting such investigation or any part thereof, signed by the chairman of the committee and approved by the Committee on Accounts.
>
> Sec. 2. *Provided,* That the committee shall during hearings in the District of Columbia use the committee stenographers of the House.

Mr. Lindsay C. Warren, of North Carolina, reserving the right to object, stated that this resolution should properly come from the Committee on Accounts. But, observing that the amount was reasonable and that the resolution was for the purpose of carrying out the mandate of the House to conduct an additional investigation, he withdrew his objection. Whereupon, the resolution was agreed to by voice vote and without further debate.

On Aug. 21, 1937, the final day of the first session of the 75th Congress, Mr. John C. Nichols, of Oklahoma, asked unanimous consent for the immediate consideration of House Resolution 339,[1] which stated as follows:

> *Resolved,* That the Committee on Elections No. 3, as a whole or by subcommittee, is authorized, pursuant to order of the House, August 18, 1937, to sit and act during the recesses of the Seventy-fifth Congress, in the District of Columbia or elsewhere, and to hold such hearings as the committee may determine in connection with the contested-election case of *Roy* v. *Jenks.* For the purpose of this resolution, the committee may require the attendance of such witnesses and the production of such books, papers, and documents, by subpena or otherwise, and to take such testimony as it deems necessary. Subpenas shall be issued under the signature of the Speaker of the House of Representatives or the chairman of said committee, and shall be served by any person designated by them or either of them. The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee or any subcommittee thereof, willfully makes default, or who, having appeared, refuses to answer any questions pertinent to the matter herein authorized, shall be held to the pen-

20. 81 CONG. REC. 9501, 75th Cong. 1st Sess.; H. Jour. 914.

1. 81 CONG. REC. 9627, 75th Cong. 1st Sess.; H. Jour. 932.

alties provided by sections 102, 103, and 104 of the Revised Statutes of the United States, as amended (U.S.C., title 2, secs. 192, 193, and 194.)

Mr. Nichols then advised that the purpose of this resolution was to modify the authority embodied in the motion to recommit, adopted previously, so as to permit either the whole committee or a subcommittee thereof, to conduct the investigation in Newton, New Hampshire. This resolution further provided for administration of oaths and issuance of subpenas. The resolution was thereupon agreed to.

On Apr. 28, 1938, Mr. Kerr submitted the majority report from the Committee on Elections No. 3.[(2)] In that report the majority of the committee stated that they had found no evidence as a result of the investigation in Newton, New Hampshire, which changed their opinion (incorporated in H. Rept. No. 1521 which accompanied H. Res. 309). House Report No. 2255 and House Resolution 482 which it accompanied were based on three findings of fact by the majority: first, the original official returns from the Nov. 3, 1936, election having given Mr. Roy 51,370 votes and Mr. Jenks 51,920 votes, Mr. Roy on Nov. 9 applied to the secretary of state of New Hampshire for a recount, pursuant to state law making it mandatory upon that official to conduct a recount upon request of either candidate. At the recount Nov. 24, at which both parties were represented, discrepancies were found in 114 of 129 voting precincts, resulting in a net loss of 241 votes to Mr. Jenks and in a net gain of 309 to Mr. Roy, and thus a tie vote of 51,690 votes to each candidate.

Second, upon declaration of the tie vote, both candidates immediately appealed to the ballot-law commission for final determination. At the hearing of Dec. 2 and 3, both parties stipulated that they would only contest 108 ballots at the recount of the secretary of state, and thus the commission accepted the recount of all other ballots. The commission found that Mr. Roy had received 51,695 votes and Mr. Jenks 51,678 votes, giving Mr. Roy a majority of 17 votes. Thereupon Mr. Roy requested a certificate of election from the secretary of state, and Mr. Jenks notified the Governor and state council that he had obtained proof of a 34- or 36-vote discrepancy, in his favor in the town of Newton, New Hampshire, and requested that, pending in-

2. H. Rept. No. 2255, 83 CONG. REC. 5957, 5960, 75th Cong. 3d Sess.; H. Jour. 422.

vestigation, the election certificate be withheld. Mr. Jenks had not cited this discrepancy at the first recount or hearing, but it was considered by the committee as one of the discrepancies found in 114 of the 129 precincts upon the first recount.

Third, the state ballot-law commission granted Mr. Jenk's petition for a rehearing on Dec. 16–18, 1936, to examine the discrepancies between the election officers return and the recount of ballots in the Newton precinct. Without deciding the matter, the commission on Dec. 19 ordered a recount of the total vote, and found, pursuant thereto, that Mr. Roy had gained 7 votes, increasing his majority to 24 votes. Then, for the first time, the commission held that there were 34 votes missing in the Newton precinct box, all of which had been cast for Mr. Jenks, thereby making him the winner by 10 votes. The secretary of state thereupon issued an election certificate to Mr. Jenks. The majority declared that the issue to be decided was whether the tally sheets and check lists of the Newton precinct were to be considered the best evidence as to the number of votes cast, or whether the ballots themselves, which the committee, upon extensive testimony of the town officials responsible for preserving the ballots, had found to be preserved according to law without a "scintilla" of direct evidence to the contrary, were to be considered the best evidence. The committee placed the burden of proof upon the contestee Mr. Jenks to establish that "there were 34 votes cast for him in the Newton precinct ballot box, which were not given to him in either recount, and that these ballots by fraud or mistake were removed from this ballot box at some time before a recount of same by the Secretary of State."

Following a recitation in the report of testimony of each of the officials responsible for safeguarding the ballots in question, the committee "declined to accept the tally sheets and the check lists as the best evidence as to how many votes were cast for the contestant and the contestee in Newton precinct."

The committee report stated, at page 8, as follows:

> . . . This official return was only prima facie evidence of its correctness. This has been overcome by a mandatory recount of the Newton ballots together with all other ballots cast for Congress, which recounts disclosed that the contention of the contestee (Jenks) that he received 34 votes in Newton was not correct since the ballots cast . . . were preserved as required by law and their integrity unimpeached.

The committee accepted the recount of the Newton ballots as the best evidence of the number of votes cast, decided that Mr. Jenks was entitled to four votes from a recount of 61 other ballots, and declared Mr. Roy elected by a majority of 20 votes.

Mr. Charles L. Gifford, of Massachusetts, submitted the minority report (H. Rept. No. 2255, part 2) on May 5, 1938, the minority of the elections committee having been granted, by unanimous consent on Apr. 28, one week to file minority views. The minority declared the crucial issue to be the number of ballots cast in Newton, and found the number to be 458, the original number as shown by the official town returns and as substantiated by the additional investigation conducted by the committee as ordered by the House. They sought to substantiate this number: (1) by evidence that 720 ballots were originally sent to Newton as required by statute, but only 686 used and unused ballots were found after the recount, a loss of 34 ballots; (2) by testimony of bipartisan town election officials that 458 voters had entered the polls and been checked on the tally sheets, and their ballots had been counted and recorded on check lists; and (3) by the official recount record, which showed a constant discrepancy between the ballot box and poll lists of 34 votes, and showed that each Republican candidate had lost 34 votes by the recount, while no Democrat had lost a single vote.

The minority claimed that the ballot box, alleged to be the best evidence, had been successfully impeached during the committee investigation in Newton, where 436 voters had appeared before the committee. The minority report relied on the sworn testimony of the voters themselves and of other witnesses, including testimony to the effect that the ballots in question had not been kept in safe custody before the recount, and that the ballots had been left unguarded during the recount.

The minority therefore considered that it had been conclusively established that 458 voters did in fact enter the polls on election day and cast ballots. "Since only 424 of these ballots have ever been found since the official returns in Newton were compiled—a loss of 34 used ballots—no recount of the 424 ballots can either legally or on a basis of morality or justice be used to impeach or change the original returns on the basis of which Mr. Jenks, the contestee, is clearly entitled to his seat in this Congress." Joining Mr. Gifford in the minority report were Mr.

James W. Wadsworth, of New York, and Mr. Charles A. Wolverton, of New Jersey.

House Resolution 482 was called up as privileged[3] on June 9, 1938, and general debate thereon limited to three hours, equally divided between Mr. Kerr and Mr. Gifford by unanimous consent. During the course of the debate, Mr. John J. Nichols, of Oklahoma, called the attention of the House to the presence of the contestant, Mr. Roy, in the gallery, and was ruled out of order by the Speaker pro tempore. Mr. Jenks, the seated contestee, took the floor, though he "had not intended to," to plead that the House take "the sworn testimony of 458 people in the State of New Hampshire."[4] The three hours of debate were consumed and the previous question ordered pursuant to the unanimous consent request.

Mr. Snell demanded a division of the two propositions in the resolution. The yeas and nays were ordered, and on the first resolve clause the House voted that Mr. Jenks was not entitled to a seat, 214 yeas to 122 nays. On the second resolve clause, the House voted 227 to 109 that Mr. Roy was entitled to a seat in the House of Representatives in the 75th Congress from the First Congressional District of New Hampshire.

Note: Syllabi for Roy v Jenks may be found herein at § 36.9 (correctness of talley sheets); § 37.2 (ballots as best evidence); § 40.3 (burden of showing fraud, irregularity or mistake); § 41.2 (recounts permitted by state law); § 42.6 (participation of parties and debate on resolution disposing of contests); § 42.9 (extension of time for debate on resolution disposing of contests); § 42.14 (demand for division on resolution disposing of contests); § 42.15 (resolutions admitting neither candidate to a seat); §§ 43.5, 43.6 (timeliness of committee report); § 43.7 (minority reports); § 45.2 (payments from contingent fund).

§ 49.2 Rutherford v Taylor

On June 30, 1937, the Clerk of the House transmitted to the Speaker a letter[5] concerning the contested election of J. Will Taylor, Second Congressional District of Tennessee, in the 75th Congress. The letter recited that on Dec. 4, 1936, Calvin Rutherford had served notice on Mr. Taylor, the returned Member, of his pur-

3. 83 CONG. REC. 8642, 75th Cong. 3d Sess.; H. Jour. 641.

4. 83 CONG. REC. 8650, 75th Cong. 3d Sess.

5. H. Doc. No. 282, 81 CONG. REC. 6630, 6643, 75th Cong. 1st Sess.; H. Jour. 675, 682.

pose to contest the election of said Mr. Taylor, and that Mr. Taylor did, on Dec. 21, 1936, answer the notice of contest served upon him. The letter further recited that contestant had begun taking testimony on Jan. 27, 1937, again on Jan. 29, and finally on Apr. 27, 1937, but that no further testimony had been adduced, despite contestee's requests that contestant complete his case within the 90 days permitted by 2 USC § 203. Contestee claimed that he was entitled to reimbursement for legal expenses as permitted by 2 USC § 226.

Contestant claimed in his notice of contest (1) that certain election boards had willfully refused to place his name on official ballots; (2) that contestee had procured such conduct by the election officials; and (3) that contestee had, during the primary election of Aug. 6, 1936, purchased tax receipts of voters in order to influence their vote in November. Contestee's demurrer and answer specifically denied each allegation of the notice of contest and further demonstrated that, even where contestant's claim that his name had been left off ballots in four counties substantiated, and had contestant received all the votes in those counties, contestee would nevertheless have won the election by a majority of 11,566. The final total showed that contestee had received 40,527 votes; his opponent, Mr. O'Conner, 39,080 votes, and Mr. Rutherford, 220 votes.

The Clerk's letter, which contained copies of the notice and answer, as well as transcripts of all testimony, advised that the contest had abated. This letter was referred by the Speaker to the Committee on Elections No. 1 on June 30, 1937, and ordered printed with accompanying papers as a House document (H. Doc. No. 282).

Note: Syllabi for Rutherford v Taylor may be found herein at § 43.11 (effect of contestant's withdrawal or abandonment of contest); § 45.6 (reimbursement request where contest has abated).

§ 49.3 Williams v Maas

On Mar. 30, 1937, the Clerk of the House wrote a letter[6] to the Speaker concerning the contested election case brought by Howard Y. Williams against Melvin J. Maas in the Fourth Congressional District of Minnesota. The letter stated that during the time allowed by law for the taking of testimony, the Clerk had received a

6. H. Doc. No. 182, 81 CONG. REC. 2901, 75th Cong. 1st Sess.; H. Jour. 341.

statement from the contestant, Mr. Williams, dated Feb. 27, 1937, withdrawing the contest and asking that it be dismissed. The notice of withdrawal was referred to the Committee on Elections No. 1 on Mar. 30, 1937, and ordered printed by the Speaker as part of the Clerk's letter.

There is no record that the House took further action in this contest, or that the Committee on Elections No. 1 reported thereon.

Note: Syllabi for Williams v Maas may be found herein at § 33.4 (manner of withdrawal from contests).

§ 50. Seventy-sixth Congress, 1939–40

§ 50.1 Neal v Kefauver

On Mar. 1, 1940, the Clerk of the House transmitted to the Speaker a communication[7] explaining that his office had unofficial knowledge of a contested election having been initiated as a result of the special election held Sept. 13, 1939, to fill the vacancy in the Third Congressional District of Tennessee. On Oct. 19, 1939, John R. Neal had served notice on the returned Member of his purpose to contest the election of Estes Kefauver (returned Member). Mr. Kefauver sent a communication to the Clerk on Feb. 23, 1940, asking that the contest be dismissed and setting forth the reasons therefor. The Clerk's communication related that no testimony in behalf of either party had been filed with his office, and that the time prescribed by the law governing contested election cases for submitting such testimony had expired.

The communication from the Clerk and Mr. Kefauver's motion to dismiss the contest, contained therein, were received by the Speaker and laid before the House on Mar. 1, 1940, and referred on that date to the Committee on Elections No. 1, and ordered printed as a House document.

Mr. Charles J. Bell, of Missouri, submitted the unanimous report[8] from the Committee on Elections No. 1 to accompany House Resolution 534,[9] which—

> *Resolved,* That John R. Neal is not entitled to a seat in the House of Representatives of the Seventy-sixth Congress from the Third Congressional District of Tennessee.
>
> *Resolved,* That Estes Kefauver is entitled to a seat in the House of Rep-

7. H. Doc. No. 645, 85 CONG. REC. 2202, 76th Cong. 2d Sess.; H. Jour. 207.

8. H. Rept. No. 2609, 85 CONG. REC. 8535, 8563, 76th Cong. 2d Sess.; H. Jour. 684.

9. H. Jour. 684.