

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<sup>(7)</sup> 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

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

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<sup>(8)</sup> from the Committee on Elections No. 1 to accompany House Resolution 534,<sup>(9)</sup> 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-

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

9. H. Jour. 684.

representatives of the Seventy-sixth Congress from the Third Congressional District of the State of Tennessee.

The report stated that the committee had dismissed the contest and noted that:

[T]he contestant had failed to take the evidence, as he was required to do by law; and there was no evidence before the committee of the matters charged in his notice of contest, and no briefs filed, as provided by law. The contestant was notified to appear in person but did not do so. For these laches the committee dismissed the contest and recommended the adoption of House Resolution 534.

House Resolution 534 was referred to the House Calendar on June 18, 1940, the same day that the above report (H. Rept. No. 2609) was submitted. The House did not take any action on the resolution during the 76th Congress.

*Note:* Syllabi for *Neal v Kefauver* may be found herein at §5.5 (committee power to dismiss contest); §16.1 (laches); §25.3 (failure to produce evidence); §42.19 (failure to take action on reported resolutions).

### § 50.2 *Scott v Eaton*

On Mar. 14, 1940, Mr. Joseph A. Gavagan, of New York, submitted the unanimous report<sup>(10)</sup> of

10. H. Rept. No. 1783, 86 CONG. REC. 2915, 2916, 76th Cong. 3d Sess.; H. Jour. 246.

the Committee on Elections No. 2 in the contested election case brought by Byron N. Scott against Thomas M. Eaton in the 18th Congressional District of California. On Jan. 3, 1940, the first day of the third session of the 76th Congress, the Clerk of the House transmitted to the Speaker the papers and original testimony to accompany his letter,<sup>(11)</sup> which were laid before the House and referred by the Speaker on that day to the Committee on Elections No. 2, and the Clerk's letter ordered printed as a House document. The official tabulation of votes showed that contestee Eaton had received 52,216 votes to 51,874 votes for contestant, a majority of 342 votes. Contestant filed notice of contest on Dec. 24, 1938 (contesting the Nov. 8, 1938, election), with timely answer by contestee.

The committee considered only three issues raised by the pleadings:

(1) Whether contestee violated the California Corrupt Practices Act;

(2) Whether contestee violated the Federal Corrupt Practices Act;

(3) Whether any such violation directly or indirectly prevented contestant from receiving a majority of the votes cast.

11. H. Doc. No. 539, 86 CONG. REC. 6, 76th Cong. 3d Sess.; H. Jour. 51.

Without specifically setting forth the evidence and testimony as to any of the above issues, the committee reported that contestant had not sustained his burden of proof, which was to establish by "a fair preponderance of evidence the issues raised by the pleadings."

The committee report recommended adoption of House Resolution 427,<sup>(12)</sup> which was called up as privileged by Mr. Gavagan and agreed to by voice vote and without debate on Mar. 29, 1940. The resolution—

*Resolved*, That Byron N. Scott was not elected a Member from the Eighteenth Congressional District of the State of California to the House of Representatives at the general election held November 8, 1938; and

*Resolved*, That Thomas M. Eaton was elected a Member from the Eighteenth Congressional District of the State of California to the House of Representatives at the general election held on November 8, 1938.

*Note:* Syllabi for Scott v Eaton may be found herein at §35.2 (standard of "fair preponderance of evidence").

### § 50.3 Smith v Polk

On Mar. 15, 1939, the Speaker laid before the House a communication<sup>(13)</sup> from the Clerk of the

12. 86 CONG. REC. 3696, 76th Cong. 3d Sess., H. Jour. 290.

13. H. Doc. No. 207, 84 CONG. REC. 2761, 2762, 76th Cong. 1st Sess.; H. Jour. 341.

House informing the House that he had, on Mar. 4, 1939, received a letter from the contestant, Emory F. Smith, withdrawing the contest which he had instituted under the contested election statutes against the seated Member from the Sixth Congressional District of Ohio, James G. Polk. Contestant's letter asked that the contest be dismissed by the House. The communication, together with the accompanying papers, was referred to the Committee on Elections No. 3, and ordered printed as a House document.

Contestant's letter to the Clerk related that contestee had been certified as elected by 799 votes, but that contestant had filed a petition in the Supreme Court of Ohio under sections 4785-166 to 4785-174 of the General Code of Ohio alleging that he had received the greater number of valid votes in the whole district (fraudulent votes having been cast for contestee in a certain county), and asking the court to cancel the certificate of election of contestee and to issue a certificate to him. Contestee's demurrer to this petition was sustained upon the grounds that the provisions of the Ohio code under which the petition had been filed were invalid as in contravention of article I, section 5 of the Constitution of the

United States which prescribed that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Contestant claimed that depositions in support of his contentions were not filed with the House for the reason that he was awaiting the decision of the Ohio Supreme Court on the demurrer, which decision was made on Feb. 8, 1939. After that date, contestant decided that he would withdraw and dismiss his notice of contest due to the expense of obtaining evidence and to the difficulty in obtaining a favorable determination from an elections committee, the majority of which represented members from another political party.

On Apr. 10, 1939, Mr. Albert Thomas, of Texas, submitted the unanimous report<sup>(14)</sup> from the Committee on Elections No. 3 which recited that fact that contestant had withdrawn the contest and which recommended the following resolution:

*Resolved*, That the Honorable James G. Polk was duly elected as Representative from the Sixth Congressional District of the State of Ohio to the Seventy-sixth Congress and is entitled to his seat.

On the same day, Mr. Thomas called up House Resolution 156<sup>(15)</sup>

14. H. Rept. No. 392, 84 CONG. REC. 4040, 76th Cong. 1st Sess.; H. Jour. 437.

15. *Id.*

which incorporated the language recommended in the report. The resolution was agreed to by the House without debate and by voice vote. Contestee was thereby held entitled to his seat.

*Note:* Syllabi for *Smith v Polk* may be found herein at §§ 33.5, 33.6 (manner of withdrawal from contests); § 43.10 (effect of contestant's withdrawal or abandonment of contest).

#### § 50.4 Swanson v Harrington

On Mar. 11, 1940, Mr. Albert Thomas, of Texas, submitted the report<sup>(16)</sup> of the Committee on Elections No. 3 in the contested election case of Albert F. Swanson against Vincent F. Harrington in the Ninth Congressional District of Iowa. The Clerk of the House had, on Jan. 3, 1940, the opening day of the third session, transmitted to the Speaker pro tempore the papers, documents, and testimony, which were referred to the Committee on Elections No. 3 on that day by the Speaker, with the Clerk's letter.<sup>(17)</sup>

The official tabulation of returns as certified by the state canvassing board showed that the

16. H. Rept. No. 1722, 86 CONG. REC. 2689, 76th Cong. 3d Sess.; H. Jour. 233.

17. H. Doc. No. 540, 86 CONG. REC. 6, 76th Cong. 3d Sess.; H. Jour. 51.

contestee, Mr. Harrington, had received 46,705 votes and that contestant, Mr. Swanson, had received 46,366 votes, resulting in a majority of 339 votes for Mr. Harrington.

Contestant served notice of contest on Dec. 24, 1938, alleging, in 52 counts, misconduct, fraud, and illegality. Contestee's answer of Jan. 23, 1939, was in the form of a 52-count general denial.

Contestant's first claim, that 70 of the 528 votes cast in a certain precinct were illegal as they were cast by Works Progress Administration workers only temporarily in the district, was upheld; the committee ruled, however, that such votes if disregarded would not affect the outcome of the election in the whole district.

Contestant also claimed that the House should require a recount of the total vote, citing an informal recount he had taken in connection with a state recount for a local sheriff's office which allegedly indicated that contestant would be shown to have a plurality of five votes. The committee found that contestant had not exhausted his remedy of obtaining a recount through the state courts, as permitted by the Iowa code, prior to appealing to the committee to itself order a recount. The committee rejected contest-

ant's argument that he had been precluded from invoking state court aid as the state courts had not construed the relevant state election contest laws as they applied to House seats. Contestant, the committee reasoned, should not be permitted to substitute his own construction of state law for that of the state courts. The committee found that contestant had not exhausted state court remedies while acknowledging, at the same time, the power of the House committee to order a recount in its discretion without reference to state proceedings.

In relation to contestant's second claim, the committee determined the central issue to be whether the contestant could show, by a preponderance of the evidence, that an application for a recount was justified due to fraud or irregularity. The committee cited several precedents to establish that an application for a recount must be founded upon proof sufficient to raise at least a presumption of irregularity or fraud, and that a recount will not be ordered upon the mere suggestion of possible error.

The committee report considered the fundamental issue to be decided:

. . . [W]hether or not contestant has borne the burden of showing that, due

to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved. The committee is of the opinion that contestant has failed to carry this burden.

The report cited *Bailey v Walters* (6 Cannon's Precedents §166) in affirmation of the proposition that "the House will not erect itself nor will it erect its committees as mere boards of recount."

The committee found that contestant had not shown fraud or irregularity sufficient to compel a recount. The committee considered and rejected the informal recount taken by contestant in Woodbury County in connection with an official local election recount taken thereby which the candidates of the opposing political party had increased, rather than decreased, their vote totals.

Mr. Thomas called up House Resolution 419<sup>(18)</sup> as privileged on Mar. 11, 1940, the same day the committee submitted its report. Without debate and by voice vote, the House agreed to the resolution recommended in the committee report that—

*Resolved*, That Albert F. Swanson is not entitled to a seat in the House of Representatives in the Seventy-sixth

18. 86 CONG. REC. 2662, 76th Cong. 3d Sess.; H. Jour. 230.

Congress from the Ninth Congressional District of Iowa.

*Resolved*, That Vincent F. Harrington is entitled to a seat in the House of Representatives in the Seventy-sixth Congress from the Ninth Congressional District of Iowa.

*Note*: Syllabi for *Swanson v Harrington* may be found herein at §12.3 (balloting irregularities); §13.4 (failure to exhaust state remedy); §40.1 (justification for recount of ballots); §41.1 (exhaustion of state remedies).

## § 51. Seventy-seventh Congress, 1941-42

### § 51.1 *Miller v Kirwan*

On Jan. 10, 1941, John W. McCormack, of Massachusetts, the Majority Leader, called up as privileged the following resolution (H. Res. 54):<sup>(19)</sup>

Whereas Locke Miller, a resident of the city of Youngstown, Ohio, in the Nineteenth Congressional District thereof, has served notice of contest upon Michael J. Kirwan, the returned Member of the House from said district of his purpose to contest the election of said Michael J. Kirwan; and

Whereas it does not appear that said Locke Miller was a candidate for election to the House of Representatives

19. 87 CONG. REC. 101, 77th Cong. 1st Sess.; H. Jour. 55.