

ing which count would be accepted by the House, that of the contestant's notary public or that of the bipartisan officials who first conducted the count. It was suggested that the alternative of having the House conduct a third count would not be effective because the inviolability of the ballots would then have been destroyed. Ultimately, the House sustained the committee by agreeing to a resolution seating the contestee.<sup>(11)</sup>

### § 30. Subpenas

The attendance of witnesses may be compelled by subpoena in the manner provided by the Federal Contested Elections Act.<sup>(12)</sup> Subpenas for compelling attend-

**11.** Under the 1969 Contested Elections Act, the question whether the ballots are "papers" that must be produced is not resolved. While only judges, or their clerks whether federal, state or county, may now issue subpenas under 2 USC § 388(a), they may command the person to whom it is directed to bring "books, papers, documents, or other tangible things" designated in the subpoena under § 388(e). Ballots are not specifically mentioned. However, the subsection further provides that the committee before the time specified in the subpoena may "quash or modify the subpoena if it is unreasonable or oppressive. . . ." (See also § 39.3, *infra*.)

**12.** 2 USC § 386(e).

ance at a deposition must be issued by a judge or clerk of a federal district court or court of record of the state or county where the place of examination is located.<sup>(13)</sup>

The time, method, and proof of service is prescribed under the act, as is the form of the subpoena.<sup>(14)</sup>

A witness may be required to attend an examination only in certain counties or within 40 miles of the place of service.<sup>(15)</sup>

#### *Clerk's Refusal to Respond to Subpena*

**§ 30.1** The settled rule that the Clerk will not give up House documents without authorization from the House has been followed by the Clerk in refusing to respond to a subpoena served by contestant in an election contest for purposes of obtaining documents filed by contestee in a contested election case.

In the 1934 Illinois election case of *Weber v Simpson* (§47.16, *infra*), the contestant's notary public served a subpoena duces tecum upon the Clerk requesting

**13.** 2 USC § 388(a).

**14.** 2 USC § 388 (b), (d).

**15.** 2 USC § 388(c).

production of documents filed by the contestee in compliance with the Corrupt Practices Act. The Clerk transmitted the subpoena, along with his reply refusing to comply with it, to the Speaker, who referred it to the Committee on the Judiciary. The 73d Congress did not authorize the Clerk to respond to the subpoena.<sup>(16)</sup>

### *Noncompliance With Subpena*

**§ 30.2 Although the election contest statute authorized the use of subpoenas, there were instances of refusals to testify as well as ignoring of subpoenas by witnesses; for this reason, a House elections committee recommended that the laws be amended and some practical procedure be adopted by which witnesses could be required to obey process and give testimony.**

See *Lanzetta v Marcantonio* (§ 48.1, *infra*), a 1936 New York contest, wherein various witnesses refused to testify or could not be found or failed to obey the sub-

<sup>16</sup>. See 3 Hinds' Precedents § 2663.

pena or refused to sign testimony which might have been incriminating; it also appeared that contestee's law partner, the campaign fund treasurer, refused to testify. The law now provides for fine or imprisonment for non-compliance.<sup>(17)</sup>

### **§ 31. Affidavits**

Under the Federal Contested Elections Act, the testimony of a witness may be presented in the form of an affidavit. The act provides that by written stipulation of the parties, the testimony of any witness may be filed in the form of an affidavit; or the parties may agree as to what a particular witness would testify to if his deposition were taken. Such affidavits or stipulations are to be filed within the time prescribed by the act.<sup>(18)</sup>

<sup>17</sup>. Under the present statute, 2 USC § 390, noncompliance is a misdemeanor punishable by a fine of not more than \$1,000 nor less than \$100, or imprisonment for not less than one month nor more than 12 months.

<sup>18</sup>. 2 USC § 387(c).