Chapter CLVIII.[1]

INCOMPATIBLE OFFICES.

60. The examination of 1916 as to incompatibility of commissions in the Army with Membership in the House.

Conclusion of the Judiciary Committee that acceptance of commission in the National Guard by a Member vacates his seat.

Action on part of the House not essential to relinquishment of seat through acceptance of incompatible office, but deemed necessary as a matter of public convenience.

Discussion as to what constitutes "public office."

On June 7, 1916,[2] Mr. James R. Mann, of Illinois, offered the following resolution, which was agreed to by the House:

Resolved, That in order to determine the status of certain Members of this House, with reference to whether there is any disqualification of such Members by reason of such Members holding commission in the National Guard of the various States, the Judiciary Committee is hereby directed to investigate such question and to report its conclusion thereon at such early date as may be convenient to such committee.

In explaining the purpose of the resolution, Mr. Mann said:

There are several Members of the House who hold commissions in the National Guard of the various States. There was no question in reference to that before the enactment of the recent Army reorganization bill. Under that act, there is pay that goes to the officers, and several Members have asked me in reference to their status, whether they could still remain members of the National Guard and of the House. I have a resolution asking the Committee on the Judiciary to make an investigation of the subject so that they may have their standing known.

On June 29 Mr. Edwin Yates Webb, of North Carolina, from that committee, submitted a report [3] in accordance with the resolution of instructions.

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[1] Supplementary to Chapter XVI.

[2] First session Sixty-fourth Congress, Record, p. 9324; Journal, p. 773.

[3] House Report No. 885.

After quoting section 6, Article I, of the Constitution, and referring to the act of June 3, 1916, making provision for the national defense, the report thus analyzes the question submitted:

The practical question submitted to the committee by the resolution, therefore, is, Does a Representative in Congress cease to be such a Representative upon his acceptance of a commission in the National Guard under the provisions of the act of Congress mentioned?

As to whether a commission in the National Guard may be considered to be an "office" within the meaning of the Constitution, the report says:

In United States *v.* Hartwell (6 Wall., 385), the Supreme Court of the United States said that the term "public office" embodies the ideas of tenure, duration, emoluments, and duties, and that the duties are continuing and permanent, not occasional and temporary.

Accepting this as a correct definition, we must, then, look to the act of Congress above referred to and determine whether a commissioned officer in the National Guard, under the provisions of the said act, is an officer of the United States.

Section 58 of the act mentioned provides that—

"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years, organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years."

Section 60 provides that the organization of the National Guard shall be the same as that which shall be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War, and authorizes the President to prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia, in order to secure a force which, when combined, shall form complete higher tactical units.

Section 64 authorizes the President to assign the National Guard of the several States and Territories to divisions, brigades, and other tactical units, and to detail officers either from the National Guard or the Regular Army to command such units.

Section 65 provides that—

"The President may detail one officer of the Regular Army as Chief of Staff, and one officer of the Regular Army or of the National Guard as assistant to the Chief of Staff of any division of the National Guard in the service of the United States as a National Guard organization."

Section 67 provides as follows:

"A sum of money shall hereafter be appropriated annually, to be paid out of any money in the Treasury not otherwise appropriated, for the support of the National Guard, including the expense of providing arms, ordnance stores, quartermaster stores and camp equipage, and all other military supplies for issue to the National Guard, and such other expenses pertaining to said guard as are now or may hereafter be authorized by law."

Section 69 provides that enlistment contracts shall be for a period of six years.

Section 70 provides that enlisted men in the National Guard shall enter into enlistment contracts, such contracts to contain an obligation to defend the Constitution of the United States, and to take an oath to the same effect.

Section 72 provides that enlisted men may be discharged from service in the National Guard in such form as shall be prescribed for the Regular Army, and in time of peace discharges may be given prior to the expiration of terms of enlistment under such regulations as the President may prescribe.

Section 74 provides that persons hereafter commissioned as officers in the National Guard shall not be recognized as such unless they shall have taken and subscribed to the oath of office prescribed by the act.

Section 75 provides that—

"The provisions of this act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such

qualifications for commission shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both."

Section 76 provides a method of filling vacancies in commissioned officers in the National Guard, and that the same shall be filled by the President as far as practicable by the appointment of persons similarly taken from said guard and in the manner prescribed by law for filling similar vacancies occurring in the volunteer forces.

Section 92 further provides that each company, troop, battery, and detachment in the National Guard shall assemble for drill and instruction, including indoor target practice, not less than 48 times each year, and in addition thereto shall participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least 15 days in training each year, including target practice, unless such company, troop, battery, or detachment shall have been excused from participation in any part thereof by the Secretary of War.

Section 93 gives the Secretary of War the right to have the National Guard inspected, both the enlisted men and the commissioned officers, with a view to ascertaining both the equipment and qualifications.

Section 94 provides that the President of the United States shall authorize the Secretary of War to call out for drill, target practice, and military exercises all or any part of the National Guard of any of the States, Territories, or the District of Columbia. If further provides that officers and enlisted men of the National Guard while so engaged shall be entitled to the same pay, subsistence, and traveling expenses as that of officers and enlisted men of the United States Army.

Section 103 gives to the President of the United States the power to order a court-martial of any enlisted man or commissioned officer in time of peace, and without previously having said organization called to the regular service of the United States.

Sections 109 and 110 provide that commissioned officers of the National Guard shall receive certain compensations under regulations prescribed by the Secretary of War, and further provide as follows, in section 110:

"All amounts appropriated for the purpose of this and the last preceding section shall be disbursed and accounted for by the officers and agents of the Quartermaster Corps of the Army, and all disbursements under the foregoing provisions of this section shall be made as soon as practicable after the thirty-first day of December, and the thirtieth day of June of each year upon pay rolls prepared and authenticated in the manner to be prescribed by the Secretary of War."

Considering the accepted definition of the term "public offices" in connection with these provisions of the national defense act, the report decides:

From the foregoing provisions it is apparent that a commissioned officer in the National Guard clearly meets the definition in United States *v.* Hartwell of an officer of the United States; that is, that his office embraces the idea of tenure, duration, emoluments, and duties, and that his duties are continuing and permanent, not occasional and temporary. As such commissioned officer serves under an act of Congress, he takes an oath that he will obey the orders of the President of the United States (see sec. 73, act June 3, 1916), and will act under such rules and regulations as may be prescribed by the President and Secretary of War, perform the duties prescribed by the President and Secretary of War, and will be entitled to receive such compensation from the Federal Government for his services as may be prescribed and appropriated by Congress.

Having thus determined the status of an office in the National Guard, the committee then take up the question as to the incompatibility of such office with that of a seat in the House.

The report states the question as follows:

The only question, then, to be considered is, whether as an officer he is disqualified to fill a seat in the House of Representatives of the Congress of the United States.

From the earliest time it has been recognized as a plain principle of public policy that "where two offices are incompatible they can not be held by the same person." Incompatibility exists where the nature and duties of the two offices are such as to render it improper, from consideration

of the public policy, for one incumbent to fill both, the rule being that the acceptance of the second office vacates the first. From the further discussion of the duties and requirements of the two offices under consideration it will clearly appear that they are incompatible. The question here presented, however, is not to be determined by any general rule of public policy as promulgated by the courts and dependent upon a finding of incompatibility; but rests upon the plain prohibition contained in the clause of the Constitution already quoted.

The report then goes on to cite the cases of John P. Van Ness, in the Seventh Congress; Edward D. Baker, in the Twenty-ninth Congress; Frank P. Blair, in the Thirty-eighth Congress; and quotes at length the report of the Committee on the Judiciary on the subject in the Fifty-fifth Congress.

Applying the principles discussed in these cases, the committee conclude:

No line can be drawn between the large and the small office. The Constitution prohibits a Member of Congress from holding "any office under the United States while a Member of either House." If a Member should hold any office under the United States, the prohibition of the Constitution at once intervenes and declares that he shall not "be a Member of either House."

It follows that the seats of those Members of the House of Representatives who shall accept commissions in the National Guard of the various States under the act of Congress of June 3, 1916, will at once become vacant. The only action necessary would be to declare such vacancy by resolution as a matter of convenience and to aid the Speaker and others in discharging their public duties. It would not change the legal effect of accepting such an office in the National Guard.

The committee, therefore, reports in answer to the resolution that any Member of the House holding a commission in the National Guard under the provisions of the act of Congress of June 3, 1916, would at once be disqualified from acting as a Member of the House.

61. The examination of 1916 as to incompatibility of commissions in the Army with Membership in the House, continued.

Instance wherein appropriations were made for salaries of Members withheld during absence in military service.

Passage by the House of resolution authorizing payments of salaries of Members accepting commissions in the Army.

The report of the committee was not acted on by the House, but on February 28, 1919,[1] during consideration of the deficiency appropriation bill, Mr. Mann offered an amendment providing for payment of salary and clerk hire of Members who had accepted such commissions in the military service.

The amendment was agreed to, and Mr. Finis J. Garrett, of Tennessee, said:

The amendment proposed by the gentleman from Illinois has been agreed to. As a matter of fact, those gentlemen who left the House of Representatives and accepted commissions in the Army, under all the holdings of the past as reported by the Committee on the Judiciary following an investigation of precedents made in order by a resolution offered by the gentleman from Illinois calling upon them for a report, forfeited their seats as Members of the House of Representatives. I say those who accepted commissions. Those who went as privates, of course, occupied a different status.

Now, there is not any doubt about that. There is not any doubt in the mind of any gentleman here. Here, unfortunately, is what, because of our unwillingness to engage in an ungracious act, we are doing: We are providing an entirely different plane for men who left the House of Representatives and went into the Army from those who left other departments of the Government and went into the Army. I have no doubt, so far as I am personally concerned, of the

[1] Third session Sixty-fifth Congress, Record, p. 4623.

correctness of the report made by the Committee on the Judiciary. I have no doubt that they were correct under the precedents; I have no doubt they were right under the reasoning. I did not make the point of order. It would have been an ungracious thing to do; it would have been an exceedingly objectionable thing to do to the membership of the House, and yet this opportunity having arisen to express myself, I wish to take advantage of it to say that I did not approve of the amendment.

Mr. Richard Wayne Parker, of New Jersey, added:

The House ought to understand the last decision that was had with reference to this matter of Army service of Members of Congress and their pay.

The Constitution of the United States provides that no person holding any office under the United States shall be a Member of either House during the continuance of that office. During the Spanish-American War several Members of this House went into the war, which was a very temporary affair, as officers of volunteers, and a resolution was offered, which went before the Committee on the Judiciary, inquiring whether they had forfeited their seats. There had been a good deal of contradictory practice in the House of Representatives before that time, during the Civil War, and no one had ever actually been turned out of the House. The provision of the Constitution is different from that of the statute in England. In England, if any member of Parliament accepts any office under the Crown, the statute declares his seat vacant and forfeited, and that a writ of election shall immediately issue. Our Constitution does not say that the seat is forfeited forever. It simply says that no one holding office under the United States shall be a Member of either House during the continuance of his office. When this matter came before the Committee on the Judiciary, then presided over by Mr. Henderson, a resolution was reported by the majority of the committee that each of these Members, of whom Gen. Wheeler was one, had forfeited his seat. I filed a minority report, to protect these officers, suggesting that the Constitution recognized the necessity sometimes of using Members of Congress for temporary employment. The United States had sent Senators over as commissioners to Europe in order to negotiate peace and had sent Mr. Dingley to Canada as commissioner to negotiate a treaty. And while I acknowledged and believed that during the continuance of such office under the United States, such temporary office, the man was not in Congress and could not draw his pay or emoluments here, yet I insisted that if no notice was taken by Congress or by the States of the fact that the vacancy existed, the membership was only suspended and the Member could come back to his seat again.

This matter never came to decision on the merits. When the resolution was moved in the House, a veteran of the Civil War, Mr. Lacey, of Iowa, raised the question of consideration, and the House refused to consider the fact that these Members had left for this temporary service. At the same time it was ruled by the Speaker, Mr. Reed then being Speaker, that he would sign no warrants for pay while they were away as officers of the Army, and while their offices continued they received Army pay, but no payment was made to any Member of Congress who went into the Army of his salary as Member during his absence. Those who returned retook their seats after discharge from the Army, and went on with their duties and received their salary as Members here, as some of the present Members already have done.

Subsequently,[1] Mr. Mann moved to suspend the rules and pass the following:

Resolved, That the Sergeant at Arms and Clerk of the House of Representatives are hereby authorized and directed to immediately pay all arrears of salary and clerk allowance to Members of the House of Representatives of the Sixty-fifth Congress who have not received their monthly salary and allowance owing to their absence from the House while in the military service of the United States during the war: *Provided,* That there shall be deducted from such amounts for salary, respectively, any money received by any of the above-named as compensation for service in the Army during the present emergency, and the affidavits of the above-named persons shall be accepted as proof as to whether or not any such payment has been received by them.

The motion was agreed to.

[1] Journal, p. ———; Record, p. 5077.

62. Resolution to investigate compatibility of office of Representative with other offices held by Member, is privileged.

In 1921 the House questioned the constitutional right of a Member to accept a commission in the United States Army.

A committee receiving instructions from the House to make an investigation, made no report thereon.

On August 2, 1921,[1] Mr. Simeon D. Fess, of Ohio, asked unanimous consent that leave of absence be granted Mr. R. G. Fitzgerald, of Ohio, holding a commission in the Reserve Corps of the United States Army, in order to permit him to comply with orders to report for camp duty.

The request being submitted to the House, Mr. Thomas L. Blanton, of Texas, objected.

Thereupon Mr. Finis J. Garrett, of Texas, proposed to offer a pertinent resolution, when on motion of Mr. Frank W. Mondell, of Wyoming, the House adjourned.

On August 4,[2] Mr. Garrett presented, as privileged, the following resolution, which was unanimously agreed to:

Resolved, That the Committee on the Judiciary be instructed to ascertain and report to the House whether any Member of the House is at present holding a commission as an officer in the service of the Army of the United States; and if so, whether the holding of such commission vacates the seat of the Member holding the same.

The Committee on the Judiciary made no report thereon.

63. A member of either House is eligible to appointment to any office not forbidden him by law, the duties of which are not incompatible with those of a Member.

The question as to whether a Member may be appointed to the Board of Managers of the Soldiers' Home and become local manager of one of the Homes, is a matter for the decision of Congress itself.

There is no constitutional objection to the election of a Member to the Board of Managers of the Soldiers' Home, although in the opinion of the Attorney General such election appears contrary to public policy.

Under other circumstances than those involving the control of the Congress over a position established and filled by itself, the holding of a visitorial and an administrative office by the same person would be regarded as legally incompatible.

On November 15, 1907,[3] (26:457), in response to a letter of inquiry addressed to the President by Mr. Nathan W. Hale, of Tennessee the Attorney General[4] rendered the following opinion:

The questions presented by Representative Hale are as follows:

Whether or not, under the law and under the construction of the law, a man who is a Member of Congress or a United States Senator is eligible to be appointed to any other Federal office at the

[1] First session Sixty-seventh Congress, Record, p. 4563.

[2] Record, p. 4657; Journal, p. 405.

[3] 26 Opinions of Attorneys General, p. 457.

[4] Attorney General Charles J. Bonaparte.

same time? If so, to what kind of office can he be appointed? For instance, can be a man be a Member of Congress and be appointed at the same time as a member of the Board of Managers of the Soldiers' Home, and become local manager of one of the Homes?

The first question may be answered in the affirmative. A member of either House of Congress may be appointed to any other office not forbidden to him by law, and the duties of which are not incompatible with those of a Member of Congress. It would not be advisable to state any particular office which a Member of Congress might fill, and this does not seem to be necessary, as Representative Hale mentions a specific office, namely that of a member of the Board of Managers of the Soldiers' Homes, who should be the local manager of one of the Homes.

The law providing the method of selection of the Managers of the National Home for Disabled Volunteers, which title includes the several institutions in the various parts of the United States known as "National Soldiers' Homes" is contained in section 4826 of the Revised Statutes and provides that they shall be elected from time to time, as vacancies occur, by joint resolution of Congress." The selection of these officers being thus entirely vested in the Congress, the determination whether a member of Congress may be elected is wholly a matter for the decision of the Congress itself, unless there should appear to be some constitutional provision bearing upon the subject. As the members of the Board of Managers receive no compensation as such and as the positions were created by act of March 21, 1866, it does not appear that the matter comes within the second clause of the sixth section of article 1 of the Constitution.

Nor are such managers "Federal officers" who are prohibited by the Constitution from being members of Congress. Moreover, the intent of the Congress is shown by the fact that the act of March 21, 1866, creating this office, which contained the provision that the nine elective managers should "not be members of Congress," was amended by the act of March 12, 1867 (15 Stat., 1), striking out the restriction above quoted.

While, as has been said, the question is held to be one for Congressional determination, it may be pointed out that the institution in question is a creature of the Congress, so that a member elected a manager of the National Home for Disabled Volunteers would become, as a member of the governing body, an officer (in his capacity of manager, as aforesaid) by his own appointment, subject to removal by himself, whose powers are conferred and whose duties are prescribed by himself, and who himself supervises his own management. He, in one capacity, determines the amount which, in another capacity, he may expend, and he supervises his own expenditures; so that he would be in the incompatible position of both visitor and an officer whose acts are the subject of inquiry; but however incompatible, it is clearly within the province of the Congress to make the appointment, to continue or to discontinue it and I therefore answer that there is no constitutional obstacle to the election of a Member of Congress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to the principles of sound public policy and, under other circumstances than those which thus involve the entire control of the Congress over a position established and filled by itself, the holding of a visitorial and an administrative office by the same person would be regarded as legally incompatible.

64. Discussion of eligibility of Members of the Senate to civil offices created during their terms of office.

Discussion of incompatibility of office within the meaning of the Constitution.

In 1922 the Senate questioned the constitutional right of a Member to sit upon a commission created during the period of his Membership.

Service upon a commission the members of which receive no compensation and the function of which is limited as to time and restricted to a single object is not incompatible with service in the Senate.

Instance wherein the Senate disregarded the recommendation of the committee in confirming presidential appointments.

On February 24, 1922,[1] the Senate agreed to the following resolution submitted by Mr. Thomas J. Walsh, of Montana:

Resolved, That the Committee on the Judiciary be, and it hereby is, directed to inquire into and report to the Senate, not later than Tuesday next (Feb. 28, 1922), touching the eligibility of Hon. Reed Smoot and Hon. Theodore E. Burton to membership on the commission created by the act of Congress approved February 9, 1922, entitled "An act to create a commission authorized to refund or convert obligations of foreign Governments held by the United States of America, and for other purposes," reference being made to section 6 of Article I of the Constitution of the United States, as follows:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time."

During debate on the resolution, Mr. Walsh said:[2]

On July 13,1898, President McKinley appointed Senator Cullom, Senator Morgan, Representative Hitt, and Messrs. Dole and Frear as commissioners to recommend legislation concerning the Hawaiian Islands under the joint resolution of July 7, 1898. The matter of the eligibility of Senators Cullom and Morgan and Representative Hitt to serve upon this commission was, by resolution of the Senate, referred for consideration to the Judiciary Committee of the Senate. In that situation of affairs the House also took note of the question, and a report of Mr. Henderson was submitted to the House in support of his contention that there was no constitutional objection to the appointment of Members of Congress upon that commission.

No report was made from the Judiciary Committee of the Senate. It is recorded, however, that Senator Hoar, upon whose motion the reference was made, made a very able and exhaustive speech contending that the gentlemen named, being Members of one or the other House of Congress, were ineligible. The speech evidently made a very deep impression upon his colleagues. The Senate refused to confirm these nominations, and the inference is irresistible that they were persuaded by the discussion which took place. Speaker Henderson, however, took the other view; and the discussion to which I now direct the attention of the Senate is, I take it, as strong an argument as could be made upon the other side. The Speaker here points out that inasmuch as the members of this commission had no duties to perform except to investigate and report to the Congress, without any power to carry out any law or to enact any law or to construe any law, they were not officers within the meaning of the Constitution.

The majority report of the Committee on the Judiciary, submitted on April 11, 1922,[3] reached the conclusion that Mr. Smoot and Mr. Burton were ineligible to appointment on the commission.

The following statement of fact is given in the report:

On February 9, 1922, the President approved the bill, theretofore passed by Congress, providing for the appointment of a commission authorized, subject to the approval of the President, to refund, convert, and extend the obligations due to the United States from foreign governments, arising out of loans made to them during the war and other transactions incident thereto, amounting to approximately $11,000,000,000. By the terms of the act, a copy of which is appended hereto, the commission is to consist of five members, including the Secretary of the Treasury, the other four of whom are to be nominated by the President and confirmed by the Senate. Pursuant to that law, the President, on February 21, 1922, transmitted to the Senate a communication advising it that he had nominated as members of the commission Hon. Charles E. Hughes, Hon. Herbert C. Hoover, Hon. Reed Smoot, and Hon. Theodore E. Burton. At the time of the passage of the act Mr. Smoot was a Member of the Senate and Mr. Burton a Member of the House of Representatives.

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[1] Second session Sixty-seventh Congress, Record, p. 2996.

[2] Record, p. 2990.

[3] Senate Report No. 563, Record, p. 5257

Pending action on those nominations by the Senate, it directed the Committee on the Judiciary to inquire into the eligibility of the gentlemen last named for the positions for which they were thus nominated.

The purpose of the constitutional provision involved is thus discussed by the majority:

There was a dual purpose in the provision under review, first, to remove the temptation from Members to multiply offices to which they might be appointed, either to their honor or their profit, and, second, and perhaps more important, as viewed by the fathers, to deprive the Executive, with whom was to rest the power of appointment, of the opportunity to constrain Members of Congress to conform to his desires concerning legislation by holding out to them the hope of appointment to offices which they were to create or render more attractive by an increase of salary. In other words, to remove, in part at least, the corrupting power of the patronage of the Executive. However fanciful such a danger may seem to us, it was notorious in their day that the King of Great Britain, or at least his ministers, often secured from Parliament legislation favored by them by a liberal distribution of offices, pensions, peerages, and even of cold cash.

As to whether the positions on the commission in question come within the inhibitions of the Constitution, the majority say:

Ignoring the adjudications of the courts as to what is or what is not technically an "office," many of them irreconcilable and hinging upon particular statutes, let us try to solve the question before us by the application of fundamental rules. Is the term "office," as ordinarily used, broad enough to include the positions in question; and if it is, are they such positions as the framers of the Constitution intended should fall under the ban of the language they used?

Undeniably a member of the Funding Commission holds an office under the dictionary definition, but if there were any doubt about it, or if the term is sometimes used in a more narrow sense, and it is essential to inquire whether in the case before us it is to be given the narrower significance, attention may, yea, by a rule both ancient and universal, must be paid to the mischief which the law was to guard against and the purpose which was to be subserved in its enactment and such a construction must be given to the language assumed to be of doubtful import as will effectuate and not defeat the purpose of the authors of the statute.

The positions under consideration being easily within the meaning of the word "office" as it is popularly understood and being undeniably of the character the framers of the Constitution intended should not be open to Members of Congress in the creation of which they participated, however faultily they may have expressed that intention, it must be held that such Members are ineligible under the Constitution.

In support of this position the majority further point out:

The conclusion that the positions in question fall under the operation of section 6 of Article I of the Constitution is enforced by a consideration of other provisions of the Constitution in which the words "office" and "officer" are used. The President is by it to nominate and by and with the advice and consent of the Senate to "appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." Obviously Congress was of the opinion in enacting the law in question that the members of the commission are officers of the United States, for it is therein expressly provided that they should be nominated by the President and confirmed by the Senate, a circumstance which affords cogent proof of the fact that, as the term is popularly understood the members of the commission hold "office."

The majority also find authority for this interpretation in other provisions of the Constitution as follows:

By another provision of the Constitution no "person holding an office of trust or profit under the United States shall be appointed an elector" of President and Vice President. It was

this clause that was under consideration in In re Corliss, in which the Supreme Court of Rhode Island held that a member of the Centennial Exposition Commission holds an office under the United States. This provision likewise had its origin in a widespread apprehension that under the system being devised the Executive, in whom was reposed an enormous patronage, would use it to further his own purpose and ambitions. The electors it was assumed would be at liberty to exercise some independent judgment, and it was feared that an appointee of the President, eligible for reelection, would or might be constrained by a sense of interest or of gratitude to vote for him or at his direction or in conformity with his desires.

Let any Senator inquire of himself whether the framers of the Constitution intended that a citizen appointed to the high place occupied by members of the Funding Commission should, notwithstanding the ties which bind him to the Executive, be eligible as an elector of President and Vice President.

Still another provision of the Constitution is to the effect that "all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Are the members of the commission exempt from impeachment for bribery or other dereliction in connection with the discharge of their duties? If so, how can they be removed? The President may, of course, remove them, having the power to appoint. But is Congress powerless in the premises? Is it true that the Constitution makers reserved to Congress the right to remove by impeachment every petty officer of the United States, but surrendered it in the case of these high functionaries?

It is required by Article VI of the Constitution that all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support the Constitution. Is it conceivable that the authors of our fundamental law prescribed that a town constable or a poundmaster should take the oath, but that such important public servants as those under consideration should be exempt from that requirement?

Another particularly pertinent provision of the Constitution deserves notice, namely, that which prescribes that "No title of nobility shall be granted by the United States; and no persons holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign State." Comment is unnecessary.

In conclusion the majority declare:

The places for which Senator Smoot and Representative Burton have been nominated are offices within the meaning of section 6 of Article I, and they are ineligible thereto.

Minority views submitted by Mr. Knute Nelson, of Minnesota, thus state the question under consideration:

The committee is required to answer a pure question of constitutional law, namely: Are Senator Reed Smooth and Representative Theodore E. Burton, eligible under the Constitution, to receive appointments as members of the World War Foreign Debt Commission, a commission created by the act of February 9, 1922; the act having been passed while these nominees of the President were Members of Congress, and during the time for which they were respectively elected?

The minority dissent from the interpretation of the majority in the following words:

Unquestionaly it is not only our right but our duty carefully to consider the known object which the makers of our Constitution had in view when particular provisions were debated and adopted; but respect for our fundamental law will not long survive if, in order to reach what may now be regarded as a desirable end and one which we may believe that the framers of the Constitution would have desired to reach had they been able to conceive the present development of organized society, we refuse to accept the true meaning of the words and phrases actually employed.

The minority has referred to this phase of the subject because it is earnestly and ably contended that to appoint a Senator or a Representative to any position of honor, distinction, or profit would be attended by the same evils that were anticipated and provided against by our forefathers when

they forbade the appointment of a Member of either House to a civil office under the authority of the United States created during the time for which he was elected.

The fundamental difference between the majority and the minority of the committee relates to the rule of construction which should be adopted. We may not differ upon literal definitions, but, nevertheless, lying deeper than the words which we may use to describe the guides which we follow, there is a radical divergence in thought.

The majority of the committee, while they would not admit the suggestion, are in fact, applying the rule which a distinguished President of the United States once stated in this very plain, blunt way—we are not attempting to quote him literally, but the substance of his declaration was that the Constitution at any given time means what the needs of the people at that time require that it shall mean. There are a great many statesmen of high degree and lawyers of great attainments who if they are not willing to avow this canon of construction act in accordance with its standards.

It is not difficult to understand the attitude of men who feel that it would promote the public interest if Members of Congress were ineligible for appointment to any office, position, place, or employment which they helped to create; first, because in rare instance the possibility of appointment might present a temptation that would influence their votes or, second, because the opportunity for such an appointment might give to the Executive an undue influence respecting the legislative act.

The minority of the committee do not deny that there is a possibility of such a result, but they can not accept the conclusion that because there is such a possibility we are justified in rewriting this clause of our Constitution, ignoring the distinction between the words "office," "position," "place," and "employment," and having so rewritten it, in testing the eligibility of Senator Smoot and Representative Burton, not by anything that those who have adopted the Constitution declared but by words and phrases not found in that instrument, but which according to the view of the majority ought to have been incorporated in it. The minority are strongly in favor of a literal construction of the Constitution, but they can not concur in the obvious effort to amend that instrument through interpretation.

In summing up the proposition, the minority are of the opinion that—

Senator Reed Smooth and Representative Theodore E. Burton are eligible for appointment as members of the World War Foreign Debt Commission.

In response to a request from the Senate, the President transmitted to the Senate the following opinion of the Attorney General:

WASHINGTON, D. C., *March 8, 1922.*

MY DEAR MR. PRESIDENT: I have the honor to acknowledge your request for my opinion as to whether the appointment of Senator Smooth and Representative Burton to the World War Foreign Debt Commission is invalid under Article I, section 6, of the Constitution.

Were this a case of first impression, I should have serious doubt as to what reply I should make. The language of the Constitution is so broad and comprehensive that it can not be denied that the commissioners in question, in a general sense, hold a "civil office under the authority of the United States," and as this commission was created by the Congress at a time when the two commissioners were Members of that body, the application of the section of the Constitution does present a serious and debatable question.

This department has already expressed an opinion on the subject, for, in an opinion rendered by my predecessor, Attorney General Griggs (Op. Atty. Gen., vol. 22, p. 183), specific reference is made to the fact that Senator Morgan was, with the approval of the Executive, appointed a member of the fur seal arbitration, although, while a Senator, he aided in creating that "civil office."

I have failed to find any judicial interpretation of the section of the Constitution now under consideration, and, in the absence of such finally authoritative interpretation, great weight must be attached to the practical construction put upon the Constitution from the beginning of the Government. In such practical construction a distinction has always been made between special employment on the one hand and offices on the other, and between offices—using that term in a

general sense—which serve only a temporary purpose, and those which have duration and permanency. From the very beginning of the Government Members of the Senate and the House have, from time to time, been asked to render services for the Government upon commissions of various kinds, and it has never been decided that such temporary employment for a special purpose and to serve an immediate exigency constituted a "civil office" within the meaning of the constitutional provision above referred to.

The opinion then cites various court decisions defining the word "office" and continues:

Applying this distinction between an "office" and a temporary trust to the act of Congress, which created the World War Foreign Debt Commission, I would say that for several reasons it excludes the application of the word "office" as above defined.

The commissioners receive no compensation.

Their tenure of office is limited in time and is restricted to a single object.

Therefore the opinion finds the positions not incompatible:

Having in mind the debates in the Constitutional Convention, it seems clear that the purpose of Article I, section 6, was to prevent Members of Congress from creating offices which thereupon they would seek to fill by resigning their positions in Congress. Thus the fundamental idea was the incompatibility of the new offices thus created with their existing office as Members of Congress. This reason is plainly inapplicable to the present legislation, for, when Senator Smooth and Representative Burton act on this debt commission, they are not exercising duties which are in compatible with their duties as Members of Congress, but, on the contrary, their duties as commissioners are, in a sense, an auxiliary to their work as Congressmen, and moreover an auxiliary to all the Members of Congress in any further consideration that that body may feel obliged to give to this matter of adjusting these foreign obligations.

The opinion accordingly concludes:

An impracticable and unreasonable construction of any clause of the Constitution ought to be avoided, and, as no judicial authority can be cited which forbids the views herein expressed, and as the practical construction by the Government from its very beginning and long acquiesced in has given some sanction to the views above expressed, I have less hesitation in advising you that in my judgment the appointment of Senator Smoot and Representative Burton does not offend Article I, section 6, of the Constitution.

Respectfully,

H. M. DAUGHERTY, *Attorney General.*

The PRESIDENT,
The White House, Washington, D. C.

On the same day on which the report was received the Senate, in executive session, confirmed the appointment of Mr. Smoot and Mr. Burton, yeas 47, nays 25.

65. Acceptance of an office the duties of which are incompatible with those of a Member of the House of Representatives automatically vacates the seat in the House.

While the Constitution does not prohibit a Member from holding any State office, the duties of a Member of the House and of the governor of a State are absolutely inconsistent and may not be simultaneously discharged by the same person.

The resignation of a Member, whether presented to the governor of the State or to the Speaker of the House, becomes immediately effective and may not be withdrawn.

Acceptance of the resignation of a Member of the House is unnecessary and the refusal of a governor to accept a resignation can not operate to continue membership in the House.

A Member having been inaugurated governor of his State was declared to have vacated his seat in the House coincident with his taking the oath as governor.

On January 15, 1909,[1] Mr. John W. Gaines, of Tennessee, rose to a question of the privilege of the House and offered the following resolution:

Whereas George L. Lilley, a citizen of the State of Connecticut, was duly elected and qualified a Member of the House of Representatives, Sixtieth Congress, from said State; and

Whereas the said George L. Lilley was thereafter, in November, nineteen hundred and eight, elected, and on January sixth, nineteen hundred and nine, duly qualified and entered upon his duties as governor of the said State: Therefore be it

Resolved, That his name be stricken from the roll and his seat in this House be, and is hereby, declared vacant.

Mr. Sereno E. Payne, of New York, moved that the resolution be referred to the Committee on the Judiciary, and asked, as a parliamentary inquiry, if the motion to refer was debatable.

The Speaker[2] said:

Such a motion is debatable, in narrow limits, as shown in the precedents that have been made from time to time.

Under the narrow limits of the language of the precedents, debate would not include any discussion of the merits of the proposition, but a discussion of the desirability of referring the resolution.

Thereupon, Mr. Champ Clark, of Missouri, raised the point of order that Mr. Gaines, having submitted a resolution, was entitled to the floor and Mr. Payne had not been recognized to make a motion.

The Speaker held:

The precedents are substantially uniform, where a Member arises in his place and presents a resolution; after the resolution is presented the gentleman must have a second recognition, and between the two recognitions, a motion having intervened after the introduction of the resolution, the gentleman making the motion pending should be entitled to recognition.

The question being taken, the motion was agreed to and the resolution was referred to the Committee on the Judiciary.

The report of the special committee, submitted by Mr. John J. Jenkins, of Wisconsin, January 20, 1909,[3] gives the following statement of facts:

The committee finds as facts that George L. Lilley was elected a Member of this House from the State of Connecticut to the Sixtieth Congress.

That the name of George L. Lilley was placed on the roll of Members-elect of the Sixtieth Congress.

That George L. Lilley performed more or less duties as a Member of this House during the first session of the Sixtieth Congress.

That George L. Lilley has not been in attendance at any time during the second session of the Sixtieth Congress.

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[1] Second session Sixtieth Congress, Record, p. 951.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] House Report No. 1882.

That on the 11th day of December, 1908, George L. Lilley tendered his resignation as Member of this House to Rollin S. Woodruff, governor of the State of Connecticut, to take effect January 5, 1909, and that Governor Woodruff declined to accept the resignation.

That George L. Lilley did not withdraw his resignation as a Member of this House.

That George L. Lilley was elected governor of the State of Connecticut and took the oath of office as governor of that State on January 6, 1909; and that ever since he took the oath of office he has been performing the duties of the office of governor of the State of Connecticut and has remained at the executive office at Hartford, Conn.

That on December 22, 1908, he drew his check for his stationery in full.

That on the 1st day of January, 1909, he drew his clerk hire in full for the month of December.

That George L. Lilley drew his salary as a Member of the House of Representatives up to and including the 4th day of December, 1908.

That on the 22d day of December, 1908, George L. Lilley made application by letter for a remittance of the mileage for the second session of the Sixtieth Congress.

The report also quotes the following letter explaining Mr. Lilley's position:

STATE OF CONNECTICUT, EXECUTIVE DEPARTMENT,
Hartford, January 18, 1909.

MY DEAR SIR: I have the honor to acknowledge receipt of your favor of January 15, with inclosed copy of resolution introduced by John W. Gaines.

Replying to your letter, I beg to say that on December 11, 1908, I tendered my resignation as Congressman to Governor Rollin S. Woodruff. The matter was referred by Governor Woodruff to the attorney-general, whose opinion it was that the statute was mandatory, and that if the resignation was accepted a special election to fill the vacancy must be held. It seemed to the governor and to the attorney-general that the large expense entailed was a conclusive reason why my resignation should not be accepted. The governor, therefore, declined to accept my resignation.

I felt that the precedent laid down by my predecessor was obligatory upon me as govenor, particularly in view of the fact that after deducting the time necessary for a special election there would be but about one month for a new Member to serve. I inclose a copy of Governor Woodruff's letter. My belief is that the people of Connecticut uphold Governor Woodruff's decision.

With sincere regards, I am, very truly, yours,

GEO. L. LILLEY.

Hon. JOHN J. JENKINS,
House of Representatives, Washington, D. C.

As to methods of resigning from the House the report says:

The Constitution is silent as to how a Member can dissever his membership. The Constitution anticipates that a vacancy may occur:

"When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies. (Clause 4, sec. 2, art 1.)"

The Constitution does not prohibit a Member from holding any state office.

The Constitution does provide—

That no person holding any office under the United States shall be a member of either House during his continuance in office. (Part of clause 2, sec. 6, art. 1.)

"Each House shall be the judge of the elections, returns, and qualifications of its own members. (Part of sec. 5, art. 1.)

"Each House may * * * punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. (Subdivision 2, sec. 5, art 1.)"

In voluntary withdrawals from membership in the House of Representatives, the practice has not been uniform:

The retiring Member has resigned on the floor of the House. The retiring Member has notified the Speaker in writing and in turn the Speaker of the House has notified the governor of the State. Then again the retiring Member has resigned to his governor and the governor in turn has notified the Speaker, and then again the House was not informed of the vacancy until the new Member appeared with his credentials, but in all cases the act of the retiring Member has been positive to the extent of showing that he had ceased to be a Member of the House of Representatives as far as he was concerned.

By the statute of the State of Connecticut the governor may accept the resignation of any officer whose successor, in case of a vacancy in office, he has power to nominate or appoint; but there is no statute in the State of Connecticut authorizing the governor of that State to accept the resignation of a Member of Congress.

On the question as to whether a resignation is revocable the report decides:

There is no question but what if a Member of the House of Representatives tenders his resignation, no matter whether it be to the governor of the State or to the Speaker of the House, he becomes ipso facto no longer a Member, and therefore it is impossible for a Member having tendered his resignation to withdraw same.

Unless the House of Representatives exercises its power and expels a Member, it rests entirely with the Member as to whether or not he continues his membership. After he has declared in no uncertain terms to the governor of his State or to the Speaker of the House that he has resigned, there is nothing that can be done by the Member or by the officer to whom the resignation was tendered that will tend to continue the membership. The presentation of the resignation is all sufficient. It is self-acting. No formal acceptance is necessary to make it effective. The refusal of a governor to accept a resignation of a Member of Congress can not possibly continue the membership and certainly it is within the power of the House to declare what effect the presentation of the resignation had upon the membership.

The incompatibility of offices is thus commented upon:

It is a universally recognized principle of the common law that the same person should not undertake to perform inconsistent and incompatible duties, and that when a person while occupying one position accepts another incompatible with the first he, ipso facto, absolutely vacates the first office and his title thereto is terminated without any further act or proceeding. This incompatibility operating to vacate the first office exists where the nature and duties of the second office are such as to render it improper, from considerations of public policy, for one person to retain both. There is an absolute inconsistency in the functions of the two offices, Member of Congress and governor of the State of Connecticut.

Accordingly, the report concludes:

There can be but little question but what George L. Lilley resigned his membership in this House and that it became effective on the 5th day of January, 1909, and that being true, it logically follows that he ceased to be a Member at that time; but inasmuch as it seems so clear that George L. Lilley ceased to be a Member of the House of Representatives upon his acceptance of the office of governor of the State of Connecticut, and the question of time is so very brief, that it may be well to hold that his seat was vacant January 6, 1909.

The committee is of the opinion that if said George L. Lilley had not resigned on the 5th day of January, 1909, by entering upon the duties of the office of governor of the State of Connecticut, he ceased to be a Member of the House of Representatives of the United States on the 6th day of January, 1909.

The committee therefore recommended as a substitute for the House resolution the following resolution:

"Resolved, That the seat in this House of George L. Lilley as a Representative from the State of Connecticut was vacated on the 6th day of January, 1909.

"That the Clerk of this House be, and he is hereby, directed to remove the name of George L. Lilley from the roll of Members of this House."

Mr. Richard Wayne Parker, of New Jersey, and Mr. John A. Sterling, of Illinois, while concurring in the resolution recommended by the committee, submitted separate views holding that the House was authorized to decide when a resignation should take effect and it was therefore unnecessary to determine whether the office of governor is incompatible with that of Representative in Congress.

The substitute resolution recommended by the committee was agreed to [1] without debate or division.

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[1] Record, p. 1164, Journal, p. 184.