The original documents are located in Box 37, folder "Personnel - Appointment of Congressmen to Another Office" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Notwithstanding any other provision of law, if a Member of Congress resigns to accept appointment to any other civil office under the authority of the United States, the compensation and emoluments available during the remainder of the time for which he was elected shall not exceed the level of compensation and emoluments which would have been available for service in such office at the beginning of the time for which he was elected.

(See Article I, Sec. 6, Clause 2 of the U. S. Constitution.)

8. Civil arrest or process

United States Senator while serving in official capacity is not exempt from service of civil process in District of Columbia under constitutional privilege from "arrest." Long v. Ansell, 1934, 69 F.2d 386, 63 App.D.C. 63, 94 A.L.R. 1466 affirmed 55 S.Ct. 21, 293 U.S. 76, 79 L.Ed. 208.

The privilege given by the last clause of this section does not protect from liability for libel based on the distribution by him of copies of the Congressional record containing a report of a defamatory speech made on the floor of the Senate. Id.

A member of Congress is entitled to exemption from service of process upon him, although it is not accompanied with the arrest of his person. Miner v. Markham, C.C.Wis.1886, 28 F. 387.

Defendant, who willfully failed to obey subpoena in supplementary proceedings, though a United States Representative, was guilty of civil contempt, and he would be fined $250 and would be sentenced to 30 days in jail, but he would be excused from imprisonment if he should appear for examination. James v. Powell, 1966, 274 N.Y.S.2d 192, 26 A.D.2d 295, affirmed 277 N.Y.S.2d 135, 18 N.Y.2d 931, 223 N.E.2d 562, motion granted 279 N.Y.S.2d 972, 19 N.Y.2d 813, 226 N.E.2d 705.

In view of provision giving to Senators and Representatives immunity from arrest, except in certain cases, during attendance at sessions and in going to and returning therefrom, member of Congress must respond to civil process and is liable for all consequences of disregarding civil process except that he cannot be subjected to arrest, and consequently there is no immunity from service of subpoena, since a subpoena is not an "arrest." Id.

Immunity under this clause giving to Senators and Representatives immunity from arrest, except in certain cases, during attendance at sessions and in going to and returning therefrom is immunity from civil arrest, and there is no exemption from civil process short of arrest. Id.

Congressman's immunity from arrest did not make him immune from service of summons based on claim that he had diverted certain payments to his wife to hinder, delay and defraud creditors. People on Complaint of James v. Powell, 1963, 243 N.Y.S.2d 555, 40 Misc.2d 593.

Immunity of Congressman from arrest does not render him immune from service of process. Id.

9. Status of Congressman

Count of indictment charging defendants with conspiracy to defraud United States by having defendant Congressman make speech in Congress was unconstitutional as applied to defendant Congressman because of this clause providing that for any speech or debate in either House, Senators and Representatives shall not be questioned in any other place, but this clause did not apply to defendants who were not members of Congress. U. S. v. Johnson, C.A. Md.1964, 337 F.2d 180, affirmed 86 S.Ct. 749, 383 U.S. 169, 15 L.Ed.2d 681, certiorari denied 87 S.Ct. 44, 134, 385 U.S. 846, 889, 17 L.Ed.2d 77, 117.

Constitutional privilege granted Senators and Representatives from arrest under this clause during their attendance at session of their respective houses did not apply to judgment debtor, a Congressman, against whom creditor sought order of arrest based on acts committed by debtor during period when Congress was not in session. James v. Powell, 1964, 250 N.Y.S.2d 635, 43 Misc.2d 314.

This provision applies to a delegate from a territory as well as a member from a state; he is entitled to a seat on the floor of the House as the representative of the people of the territory, elected with all the powers, rights, and privileges of a member from a state, except the power to vote, and with this exception he is a member of the House of Representatives, and entitled to the same constitutional privileges. Doty v. Strong, 1840, 1 Pinn. (Wis.) 84.

10. —— Determination

Judgment creditor of member of House of Representatives could not maintain quo warranto proceeding to determine right or title of member to office merely because of her status as judgment creditor who was unable to obtain arrest of member because of his congressional immunity. Application of James, D.C.N.Y. 1965, 241 F.Supp. 858.

Section 6, Clause 2. Holding other offices

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 encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Notes of Decisions

Library references
Officers ⟸30.3.
United States ⟸12, 61.
C.J.S. Officers § 23.
C.J.S. United States §§ 18, 84.

1. Nature and scope of prohibition

The incompatibility is not limited to exercising an office and at the same time being a member of either house of Congress; but it equally extends to the case of holding—that is, having, keeping, possessing, or retaining—an office under such circumstances. Hammond v. Herrick, Cl. & H.El.Cas. 287–289.

2. Appointment during tenure

Where a person was elected and qualified as a United States senator for a term expiring in March, 1883 and in March, 1881, he resigned to accept the position of secretary to the interior, which office he soon thereafter resigned, after his second resignation the office of tariff commissioner was created by Act of Congress, and the attorney-general advised that this section of the Constitution disqualified him for appointment as commissioner. Appointment to Civil Office, 1882, 17 Op.Atty.Gen. 365.

The nomination and confirmation of a person who at the time is ineligible, for the office by force of this clause, cannot be made the basis of his appointment to such office after his ineligibility ceases. Appointment to Civil Office, 1883, 17 Op. Atty.Gen. 522.

A representative in Congress does not become a member of the House until he takes the oath of office as such representative; therefore, he may lawfully hold any office from his election until that time. 1874, 14 Op.Atty.Gen. 408.

One accepting and holding an office incompatible with that of representative in Congress is ineligible to the latter office. Bowen v. De Large, Smith Ell.Cas. 99.

3. Resignation and forfeiture of office

Where a person holding an office incompatible with that of senator is elected to the latter office, his resignation of the former before offering to assume the duties of the latter will remove any objection founded on this clause. Stanton v. Lane, Taft El.Cas. 205.

Continuing to execute the duties of an office under the United States after one is elected to Congress, but before he takes his seat, is not a disqualification; such office being resigned prior to the taking of the seat. Earle, Cl. & H.El. Cas. 314.

If one, after election to Congress, accepts a state office, and subsequently resigns the same before his term in Congress is to begin, he will not thereby be rendered incapable of holding his seat in Congress. Washburn v. Ripley, Cl. & H. El.Cas. 679–682.

The acceptance by any member of any office under the United States, after he has been elected to and taken his seat in Congress, operates as a forfeiture of his seat. Van Ness, Cl. & H.El.Cas. 122.

If the office to which a person is appointed does not in fact exist, such appointment will not render him ineligible to election as senator. Stanton v. Lane, Taft El.Cas. 205.

The formal resignation of an office held by a member-elect is not necessary if the duties of it have so far ceased as to have operated a virtual abolition of the office. Munford, Cl. & H.El.Cas. 316.

4. Service in armed forces

It would be a sound and reasonable policy for the Executive Department to refrain from commissioning or otherwise utilizing the services of Members of Congress in the armed forces, and the Congress by exemptions in the Selective Training and Service Act of 1940, 50 U. S.C.A.App. § 305 [now covered by 50 U. S.C.A.App. § 456], has recognized the soundness of this policy. 1943, 40 Op. Atty.Gen. Dec. 23.

Both the House and Senate, exercising their constitutional prerogative, have determined upon occasions in the past that service with the armed forces of the

Congressional Pay Appointment of Congressman to another position

THE WHITE HOUSE

WASHINGTON

December 18, 1974

MEMORANDUM FOR: PHILIP BUCHEN

FROM: WILLIAM E. TIMMONS

SUBJECT: Attorney General's Compensation

As you may know the Congress had to enact a special law at the time of Bill Saxbe's confirmation to satisfy the Constitutional requirements of a Member of Congress taking a federal post after raising the salary of that position.

There is some uncertainty about the Attorney General's emoluments in the future. One school of thought says it automatically is raised to $60,000 on January 2, 1975. Another has the provision applying only to a former Member. Still a third school argues that a new law must be enacted to raise the salary.

At any rate, it's your problem now. Attached is copy of Act and the committee report.

Public Law 93-178
93rd Congress, H. R. 11710
December 10, 1973

An Act

87 STAT. 697

To insure that the compensation and other emoluments attached to the Office of Attorney General are those which were in effect on January 1, 1969.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the compensation and other emoluments attached to the Office of Attorney General shall be those which were in effect on January 1, 1969, notwithstanding the provisions of the salary recommendations for 1969 increases transmitted to the Congress on January 15, 1969, and notwithstanding any other provision of law, or provision which has the force and effect of law, which is enacted or becomes effective during the period from noon, January 3, 1969, through noon, January 2, 1975.

Office of the Attorney General. Compensation and other emoluments. 83 Stat. 863. 5 USC 5312 and note.

SEC. 2. (a) Any person aggrieved by an action of the Attorney General may bring a civil action in the appropriate district court to contest the constitutionality of the appointment and continuance in office of the Attorney General on the ground that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution. The United States district courts shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office.

USC prec. title 1.

(b) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court.

62 Stat. 968; 74 Stat. 201.

(c) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

Approved December 10, 1973.

LEGISLATIVE HISTORY:

CONGRESSIONAL RECORD, Vol. 119 (1973):
Dec. 3, considered and passed House.
Dec. 6, considered and passed Senate, amended.
Dec. 7, House concurred in Senate amendment.

GPO 99-139

Calendar No. 474

93D CONGRESS
1st Session

SENATE

REPORT
No. 93-499

COMPENSATION OF THE OFFICE OF ATTORNEY GENERAL OF THE UNITED STATES

NOVEMBER 13, 1973.—Ordered to be printed

Mr. MCGEE, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To accompany S. 2673]

The Committee on Post Office and Civil Service, to which was referred the bill (S. 2673) to insure that the compensation and other emoluments attached to the office of Attorney General are those which were in effect on January 1, 1969, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 2673 is to reduce the salary of the Office of Attorney General to its pre-January 15, 1969 level of $35,000 per annum. The legislation was introduced at the request of the Administration. It is the judgment of the Attorney General that S. 2673 must become law before the nomination of Senator Saxbe can be submitted to the Senate.

On January 3, 1969, when Senator Saxbe began his term of office, the salary of the Office of Attorney General was $35,000. Later in 1969, under PL 92-206, the salary of the Office of Attorney General was increased to $60,000.

Article I, Section 6, Clause 2 of the Constitution provides that:

> 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; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This measure achieves its purpose by reducing the Attorney General's salary to that amount authorized by law on January 3, 1969,

when he took office. The Committee has no desire or intention to resolve any constitutional issue regarding Senator Saxbe's appointment as Attorney General of the United States. Such issues are not within the jurisdiction of the Senate Committee on Post Office and Civil Service.

STATEMENT

The Acting Attorney General of the United States, Robert H. Bork, stated in his testimony before the Committee on November 13, 1973, that his initial view of the Constitutional injunction cited above was that it would not be unconstitutional for nomination and Senate consideration to move forward in the absence of the remedy provided by this bill. The Constitution, he pointed out, speaks of a Senator or Representative being *appointed;* and nomination and consideration in the Senate would, on the face of it, appear to be steps which precede actual appointment. The Acting Attorney General stated, however, that legal research conducted by his office shows that history does not bear out his initial view; and that should Senator Saxbe be appointed and should Judiciary Committee consideration proceed prior to the elimination of the Constitutional impediment with regard to salary, the legality of his appointment could later be challenged in the courts.

Accordingly, upon the advice of the Acting Attorney General and upon the basis of a specific written request of the President of the United States, the Chairman of the Committee and the ranking Republican Member agreed to hold a hearing and to consider the bill. Having heard the testimony of the Acting Attorney General as to the necessity for this Committee's taking initial action, and having considered the measure, the Members of the Committee unanimously agreed to the bill reducing the salary of the Attorney General.

BACKGROUND

The Committee was initially reluctant to involve itself in Senate procedures involving the appointment of an Attorney General of the United States, because, very clearly, recommendations to the Senate with regard to its advice and consent on this appointment fall within the purview of the Senate Judiciary Committee and no other.

The Committee's action is based upon the Acting Attorney General's testimony and the statement of the President of the United States contained in his letter of November 8, 1973, to the Chairman: "Constitutional precedents beginning with President Washington indicate that the nomination of an individual not then eligible may be improper and that any subsequent appointment based on such nomination might be null and void."

ADDITIONAL VIEWS

Following are additional views of Senator Quentin N. Burdick:

In joining with the Committee in approving this legislation to reduce the salary of the proposed nominee for Attorney General, I want to indicate that I reserve my right to make a *further* judgment on the constitutionality of this legislation.

QUENTIN N. BURDICK.

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THE PRESIDENT'S RECOMMENDATION

Following is a letter from the President of the United States to the Chairman of the Committee specifically requesting that S. 2673 be acted upon favorably prior to his nomination of Senator Saxbe to be Attorney General.

THE WHITE HOUSE,
Washington, November 8, 1973.

Hon. GALE W. McGEE,
Chairman, Committee on Post Office and Civil Service, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I wish to inform you of my intention to nominate Senator William B. Saxbe of Ohio to be Attorney General of the United States, immediately upon enactment of remedial legislation that would eliminate a Constitutional impediment to Senator Saxbe's appointment.

Without this legislation, doubt would exist concerning Senator Saxbe's eligibility because Article I, section 6, clause 2 of the Constitution provides:

"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 Senator Saxbe's term of service in the United States Senate the annual salary of the Office of Attorney General was increased from $35,000 to $60,000.

On November 5, 1973, Acting Attorney General Robert H. Bork submitted legislation which would remove the Constitutional impediment to Senator Saxbe's appointment by reducing the compensation and other emoluments attached to the Office of Attorney General to those in effect before Senator Saxbe began his Senate term.

This solution has historical support. In 1909, similar legislation was enacted at the request of President Taft to reduce the salary of the Office of the Secretary of State so that Senator Philander C. Knox would be eligible for appointment, the compensation and other emoluments of that Office having been increased during the Senate term which Knox was then serving. After enactment of remedial legislation, Senator Knox was nominated, and confirmed by the Senate.

Constitutional precedents beginning with President Washington indicate that the nomination of an individual not then eligible may be improper and that any subsequent appointment based on such nomination might be null and void.

On February 28, 1793, President Washington withdrew the nomination of William Patterson of New Jersey to be Associate Justice of the Supreme Court on the ground that Mr. Patterson "was a member of the Senate when the law creating that Office was passed, and that the time for which he was elected is not yet expired. I think it my duty therefore, to decree that I deem the nomination to have been nulled by the Constitution."

This position has been consistently followed by the Attorney General of the United States in opinions in 1883 by Attorney General Brewster and in 1895 by Acting Attorney General Conrad.

I strongly urge that corrective legislation be enacted as soon as possible. I will submit the nomination of Senator Saxbe immediately upon passage of such legislation so that the Senate may proceed with the confirmation process.

Sincerely,

RICHARD NIXON.

Attorney Gen-
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AGENCY VIEWS

Following is a letter from the Acting Attorney General of the United States, requesting that S. 2673 be introduced, and acted upon affirmatively; and the statement of the Acting Attorney General at the Committee hearing November 13, 1973, providing the results of the research conducted by the Attorney General's office into the historical precedents for this measure.

DEPARTMENT OF JUSTICE.

STATEMENT OF ROBERT H. BORK, ACTING ATTORNEY GENERAL, BEFORE THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE, U.S. SENATE, CONCERNING S. 2673, RELATING TO THE SALARY OF THE ATTORNEY GENERAL, NOVEMBER 13, 1973

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to appear to give the Department of Justice views on S. 2673, relating to the salary of the Attorney General.

Article I, Section 6, Clause 2 of the Constitution provides that:

"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; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

As you know, the President has announced his intention to nominate Senator William B. Saxbe to be Attorney General of the United States. The salary applicable to the office of Attorney General under existing law is $60,000 because of a recommendation for salary increases submitted to the Congress pursuant to Public Law 90-206 on January 15, 1969. The salary for the office of Attorney General at the time Senator Saxbe began his term of office on January 3, 1969, was $35,000, set at that figure by Public Law 89-554, passed on September 6, 1966. S. 2673 is designed to remove the question of the impact of the quoted constitutional provision on the nomination of Senator Saxbe to be Attorney General of the United States.

There are two precedents for the proposed action. First, Lot M. Morrill was appointed to serve as Secretary of the Treasury in 1876 after having been elected to the Senate in 1871. Cabinet officers' salaries had been raised in 1873 from $8,000 to $10,000 and returned in 1874 to $8,000. Senator Morrill's nomination was nevertheless confirmed by the Senate.

Second, a measure with the same purpose as the bill under consideration today was passed by the Congress in 1909 in order to permit the nomination of Senator Philander Knox to be Secretary of State.

Senator Knox had been elected in 1905 for a term expiring on March 3, 1911. In 1907 the compensation of the Secretary of State had been increased from $8,000 to $12,000. An unofficial opinion of Assistant Attorney General Russell commenting on the bill which reduced the compensation of the Secretary of State to $8,000 states that the purpose of the constitutional provision was "to destroy the expectation a Representative or Senator might have that he would enjoy the newly created office or newly created emoluments." 43 Cong. Rec. 2403, February 15, 1909. After passage of the remedial legislation, Senator Knox was nominated and confirmed as Secretary of State.

The purpose of the constitutional provision is clearly met if the salary of an office is lowered after having been raised during the Senator's or Representative's term of office. The Senators and Representatives know that, because of the constitutional provision, they cannot be appointed to an office with a higher salary than was provided at the beginning of their current term of office, so the expectation of a higher salary cannot influence their votes on legislation to raise salaries of Federal officers.

S. 2673 should remove any constitutional question which may be raised concerning the appointment of Senator Saxbe to be Attorney General of the United States. I urge its early consideration by this Committee and prompt enactment by the Senate in order to facilitate consideration of Senator Saxbe.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 5, 1973.

PRESIDENT PRO TEMPORE,
U.S. Senate,
Washington, D.C.

DEAR MR. PRESIDENT PRO TEMPORE: Enclosed for your consideration and appropriate reference is a legislative proposal to provide that the compensation and other emoluments attached to the Office of Attorney General are those which were in effect on January 1, 1969.

Article I, Section 6, Clause 2 of the Constitution provides: "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; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

When Senator William B. Saxbe of Ohio began his term of service in the United States Senate on January 3, 1969, the salary for the Office of Attorney General was established by P.L. 89-554 (80 Stat. 460, September 6, 1966) at $35,000. On January 15, 1969, the President transmitted to the Congress pursuant to P.L. 90-206 (81 Stat. 642, December 16, 1967) a recommendation increasing the annual salary for the Office of Attorney General to $60,000.

The accompanying legislation is designed to remove the question concerning the impact of Article I, Section 6, Clause 2 on the President's nomination of Senator William B. Saxbe to be Attorney General of the United States.

I urge prompt consideration and enactment of this legislation.

The Office of Management and Budget has advised that enactment of this proposal is in accord with the Program of the President.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

O

THE WHITE HOUSE

WASHINGTON

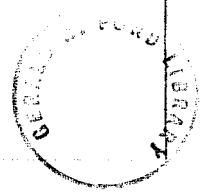
December 18, 1974

To: Bill Timmons

From: Phil Buchen P.W.B.

Attached is a copy of a memorandum previously sent to Jack Marsh by Phil Areeda. By all means, we should support the new bill that will repeal P. L. 93-178.

Attachments



December 13, 1974

MEMORANDUM FOR: JACK MARSH

FROM: PHIL AREEDA

SUBJECT: SALARY OF ATTORNEY GENERAL

When Saxbe was made Attorney General, the Congress enacted P. L. 93-178 reducing the compensation of that office in order to comply with Article I, Section 6 of the Constitution. That Section precludes the appointment of a Senator to an office whose salary was increased during the period for which that Senator was elected.

Saxbe's Senatorial term would have ended this year. And, as you know, there will soon be a new Attorney General.

Accordingly, it is appropriate to repeal P. L. 93-178 and to provide that the Attorney General's compensation should be the same as that of other Cabinet members. A draft bill is attached for that purpose. Perhaps this is a matter on which Congress could act routinely and expeditiously before it adjourns.

I have coordinated this matter with Silberman, Ebner and Walker. They all agree. I have not consulted anyone else. Phil Buchen also agrees.

Attachment

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(Note.—Fill in all blank lines except those provided for the date and number of bill.)

IN THE SENATE OF THE UNITED STATES

Mr. _____

introduced the following bill; which was read twice and referred to the Committee on

A BILL

Compensation and other emoluments attached to the Office of the Attorney General.

(Insert title of bill here)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the Act entitled "An Act To insure that the compensation and other emoluments attached to the Office of the Attorney General are those which were in effect on January 1, 1969" (Public Law 93-178; 87 Stat. 697), is repealed effective as of January 3, 1975, and the compensation and other emoluments attached to the Office of the Attorney General shall, on and after that date, be those that now or hereafter attach to offices and positions at level I of the Executive Schedule (5 U.S.C. 5312).

Personnel —
Appointment of
Congressman to
another Office

THE WHITE HOUSE

WASHINGTON

December 18, 1974

MEMORANDUM FOR: PHILIP BUCHEN

FROM: WILLIAM E. TIMMONS

SUBJECT: Attorney General's Compensation

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93rd Congress, H. R. 11710
December 10, 1973

An Act

87 STAT. 697

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Office of the Attorney Gensral. Compensation and other emoluments. 83 Stat. 863. 5 USC 5312 and note.

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(b) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court.

62 Stat. 968; 74 Stat. 201.

(c) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

Approved December 10, 1973.

LEGISLATIVE HISTORY:

CONGRESSIONAL RECORD, Vol. 119 (1973):
Dec. 3, considered and passed House.
Dec. 6, considered and passed Senate, amended.
Dec. 7, House concurred in Senate amendment.

GPO 99-139

Calendar No. 474

93D CONGRESS } SENATE { REPORT
1st Session } { No. 93-499

COMPENSATION OF THE OFFICE OF ATTORNEY GENERAL OF THE UNITED STATES

NOVEMBER 13, 1973.—Ordered to be printed

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[To accompany S. 2673]

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STATEMENT

The Acting Attorney General of the United States, Robert H. Bork, stated in his testimony before the Committee on November 13, 1973, that his initial view of the Constitutional injunction cited above was that it would not be unconstitutional for nomination and Senate consideration to move forward in the absence of the remedy provided by this bill. The Constitution, he pointed out, speaks of a Senator or Representative being *appointed;* and nomination and consideration in the Senate would, on the face of it, appear to be steps which precede actual appointment. The Acting Attorney General stated, however, that legal research conducted by his office shows that history does not bear out his initial view; and that should Senator Saxbe be appointed and should Judiciary Committee consideration proceed prior to the elimination of the Constitutional impediment with regard to salary, the legality of his appointment could later be challenged in the courts.

Accordingly, upon the advice of the Acting Attorney General and upon the basis of a specific written request of the President of the United States, the Chairman of the Committee and the ranking Republican Member agreed to hold a hearing and to consider the bill. Having heard the testimony of the Acting Attorney General as to the necessity for this Committee's taking initial action, and having considered the measure, the Members of the Committee unanimously agreed to the bill reducing the salary of the Attorney General.

BACKGROUND

The Committee was initially reluctant to involve itself in Senate procedures involving the appointment of an Attorney General of the United States, because, very clearly, recommendations to the Senate with regard to its advice and consent on this appointment fall within the purview of the Senate Judiciary Committee and no other.

The Committee's action is based upon the Acting Attorney General's testimony and the statement of the President of the United States contained in his letter of November 8, 1973, to the Chairman: "Constitutional precedents beginning with President Washington indicate that the nomination of an individual not then eligible may be improper and that any subsequent appointment based on such nomination might be null and void."

ADDITIONAL VIEWS

Following are additional views of Senator Quentin N. Burdick:

In joining with the Committee in approving this legislation to reduce the salary of the proposed nominee for Attorney General, I want to indicate that I reserve my right to make a *further* judgment on the constitutionality of this legislation.

QUENTIN N. BURDICK.

THE PRESIDENT'S RECOMMENDATION

Following is a letter from the President of the United States to the Chairman of the Committee specifically requesting that S. 2673 be acted upon favorably prior to his nomination of Senator Saxbe to be Attorney General.

THE WHITE HOUSE,
Washington, November 8, 1973.

Hon. GALE W. MCGEE,
Chairman, Committee on Post Office and Civil Service, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I wish to inform you of my intention to nominate Senator William B. Saxbe of Ohio to be Attorney General of the United States, immediately upon enactment of remedial legislation that would eliminate a Constitutional impediment to Senator Saxbe's appointment.

Without this legislation, doubt would exist concerning Senator Saxbe's eligibility because Article I, section 6, clause 2 of the Constitution provides:

"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 Senator Saxbe's term of service in the United States Senate the annual salary of the Office of Attorney General was increased from $35,000 to $60,000.

On November 5, 1973, Acting Attorney General Robert H. Bork submitted legislation which would remove the Constitutional impediment to Senator Saxbe's appointment by reducing the compensation and other emoluments attached to the Office of Attorney General to those in effect before Senator Saxbe began his Senate term.

This solution has historical support. In 1909, similar legislation was enacted at the request of President Taft to reduce the salary of the Office of the Secretary of State so that Senator Philander C. Knox would be eligible for appointment, the compensation and other emoluments of that Office having been increased during the Senate term which Knox was then serving. After enactment of remedial legislation, Senator Knox was nominated, and confirmed by the Senate.

Constitutional precedents beginning with President Washington indicate that the nomination of an individual not then eligible may be improper and that any subsequent appointment based on such nomination might be null and void.

On February 28, 1793, President Washington withdrew the nomination of William Patterson of New Jersey to be Associate Justice of the Supreme Court on the ground that Mr. Patterson "was a member of the Senate when the law creating that Office was passed, and that the time for which he was elected is not yet expired. I think it my duty therefore, to decree that I deem the nomination to have been nulled by the Constitution."

This position has been consistently followed by the Attorney General of the United States in opinions in 1883 by Attorney General Brewster and in 1895 by Acting Attorney General Conrad.

I strongly urge that corrective legislation be enacted as soon as possible. I will submit the nomination of Senator Saxbe immediately upon passage of such legislation so that the Senate may proceed with the confirmation process.

Sincerely,

RICHARD NIXON.

Attorney Gen-
orney General
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HARD NIXON.

AGENCY VIEWS

Following is a letter from the Acting Attorney General of the United States, requesting that S. 2673 be introduced, and acted upon affirmatively; and the statement of the Acting Attorney General at the Committee hearing November 13, 1973, providing the results of the research conducted by the Attorney General's office into the historical precedents for this measure.

DEPARTMENT OF JUSTICE.

STATEMENT OF ROBERT H. BORK, ACTING ATTORNEY GENERAL, BEFORE THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE, U.S. SENATE, CONCERNING S. 2673, RELATING TO THE SALARY OF THE ATTORNEY GENERAL, NOVEMBER 13, 1973

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to appear to give the Department of Justice views on S. 2673, relating to the salary of the Attorney General.

Article I, Section 6, Clause 2 of the Constitution provides that:

"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; and no Person holding any Office under the United States. shall be a Member of either House during his Continuance in Office."

As you know, the President has announced his intention to nominate Senator William B. Saxbe to be Attorney General of the United States. The salary applicable to the office of Attorney General under existing law is $60,000 because of a recommendation for salary increases submitted to the Congress pursuant to Public Law 90–206 on January 15, 1969. The salary for the office of Attorney General at the time Senator Saxbe began his term of office on January 3, 1969, was $35,000, set at that figure by Public Law 89–554, passed on September 6, 1966. S. 2673 is designed to remove the question of the impact of the quoted constitutional provision on the nomination of Senator Saxbe to be Attorney General of the United States.

There are two precedents for the proposed action. First, Lot M. Morrill was appointed to serve as Secretary of the Treasury in 1876 after having been elected to the Senate in 1871. Cabinet officers' salaries had been raised in 1873 from $8,000 to $10,000 and returned in 1874 to $8,000. Senator Morrill's nomination was nevertheless confirmed by the Senate.

Second, a measure with the same purpose as the bill under consideration today was passed by the Congress in 1909 in order to permit the nomination of Senator Philander Knox to be Secretary of State.

Senator Knox had been elected in 1905 for a term expiring on March 3, 1911. In 1907 the compensation of the Secretary of State had been increased from $8,000 to $12,000. An unofficial opinion of Assistant Attorney General Russell commenting on the bill which reduced the compensation of the Secretary of State to $8,000 states that the purpose of the constitutional provision was "to destroy the expectation a Representative or Senator might have that he would enjoy the newly created office or newly created emoluments." 43 Cong. Rec. 2403, February 15, 1909. After passage of the remedial legislation, Senator Knox was nominated and confirmed as Secretary of State.

The purpose of the constitutional provision is clearly met if the salary of an office is lowered after having been raised during the Senator's or Representative's term of office. The Senators and Representatives know that, because of the constitutional provision, they cannot be appointed to an office with a higher salary than was provided at the beginning of their current term of office, so the expectation of a higher salary cannot influence their votes on legislation to raise salaries of Federal officers.

S. 2673 should remove any constitutional question which may be raised concerning the appointment of Senator Saxbe to be Attorney General of the United States. I urge its early consideration by this Committee and prompt enactment by the Senate in order to facilitate consideration of Senator Saxbe.

OFFICE OF THE ATTORNEY GENERAL.
Washington, D.C., November 5, 1973.

PRESIDENT PRO TEMPORE,
U.S. Senate,
Washington, D.C.

DEAR MR. PRESIDENT PRO TEMPORE: Enclosed for your consideration and appropriate reference is a legislative proposal to provide that the compensation and other emoluments attached to the Office of Attorney General are those which were in effect on January 1, 1969.

Article I, Section 6, Clause 2 of the Constitution provides: "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; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

When Senator William B. Saxbe of Ohio began his term of service in the United States Senate on January 3, 1969, the salary for the Office of Attorney General was established by P.L. 89-554 (80 Stat. 460, September 6, 1966) at $35,000. On January 15, 1969, the President transmitted to the Congress pursuant to P.L. 90-206 (81 Stat. 642, December 16, 1967) a recommendation increasing the annual salary for the Office of Attorney General to $60,000.

The accompanying legislation is designed to remove the question concerning the impact of Article I, Section 6, Clause 2 on the President's nomination of Senator William B. Saxbe to be Attorney General of the United States.

I urge prompt consideration and enactment of this legislation.

The Office of Management and Budget has advised that enactment of this proposal is in accord with the Program of the President.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

O

THE WHITE HOUSE

WASHINGTON

December 18, 1974

To: Bill Timmons

From: Phil Buchen P.W.B.

Attached is a copy of a memorandum previously sent to Jack Marsh by Phil Areeda. By all means, we should support the new bill that will repeal P. L. 93-178.

Attachments

December 13, 1974

MEMORANDUM FOR: JACK MARSH

FROM: PHIL AREEDA

SUBJECT: SALARY OF ATTORNEY GENERAL

When Saxbe was made Attorney General, the Congress enacted P. L. 93-178 reducing the compensation of that office in order to comply with Article I, Section 6 of the Constitution. That Section precludes the appointment of a Senator to an office whose salary was increased during the period for which that Senator was elected.

Saxbe's Senatorial term would have ended this year. And, as you know, there will soon be a new Attorney General.

Accordingly, it is appropriate to repeal P. L. 93-178 and to provide that the Attorney General's compensation should be the same as that of other Cabinet members. A draft bill is attached for that purpose. Perhaps this is a matter on which Congress could act routinely and expeditiously before it adjourns.

I have coordinated this matter with Silberman, Ebner and Walker. They all agree. I have not consulted anyone else. Phil Buchen also agrees.

Attachment

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cy to Mr. Buchen

..... CONGRESS
..... SESSION

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(Note.—Fill in all blank lines except those provided for the date and number of bill.)

IN THE SENATE OF THE UNITED STATES

Mr. .....

introduced the following bill; which was read twice and referred to the Committee on

A BILL

Compensation and other emoluments attached to the Office of the Attorney General.

(Insert title of bill here)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the Act entitled "An Act To insure that the compensation and other emoluments attached to the Office of the Attorney General are those which were in effect on January 1, 1969" (Public Law 93-178; 87 Stat. 697) is repealed effective as of January 3 , 1975, and the compensation and other emoluments attached to the Office of the Attorney General shall, on and after that date, be those that now or hereafter attach to offices and positions at level I of the Executive Schedule (5 U.S.C. 5312).

THE WHITE HOUSE
WASHINGTON

11/25/75

Eva:

Ken asked whether Mr. Buchen wants him to draft a bill re the attached.

Thanks!

dawn

Refer in "Congressman's Appointment to Other Office"

Congressional Reg
Appointment of Congressman Sawhill position

November 15, 1975

DICK:

Attached is a copy of the legislation that Griffin gave us that would be a general statute. I have given it to you and given it to Lynn in the past but nothing has happened on it. It strikes me that someone ought to do something about it.

DR

cc T. C.

Notwithstanding any other provision of law, if a Member of Congress resigns to accept appointment to any other civil office under the authority of the United States, the compensation and emoluments available during the remainder of the time for which he was elected shall not exceed the level of compensation and emoluments which would have been available for service in such office at the beginning of the time for which he was elected.

(See Article I, Sec. 6, Clause 2 of the U. S. Constitution.)

8. Civil arrest or process

United States Senator while serving in official capacity is not exempt from service of civil process in District of Columbia under constitutional privilege from "arrest." Long v. Ansell, 1934, 69 F.2d 386, 63 App.D.C. 68, 94 A.L.R. 1466 affirmed 55 S.Ct. 21, 293 U.S. 76, 79 L.Ed. 208.

The privilege given by the last clause of this section does not protect from liability for libel based on the distribution by him of copies of the Congressional record containing a report of a defamatory speech made on the floor of the Senate. Id.

A member of Congress is entitled to exemption from service of process upon him, although it is not accompanied with the arrest of his person. Miner v. Markham, C.C.Wis.1886, 28 F. 337.

Defendant, who willfully failed to obey subpoena in supplementary proceedings, though a United States Representative, was guilty of civil contempt, and he would be fined $250 and would be sentenced to 30 days in jail, but he would be excused from imprisonment if he should appear for examination. James v. Powell, 1966, 274 N.Y.S.2d 192, 26 A.D.2d 295, affirmed 277 N.Y.S.2d 135, 18 N.Y.2d 931, 223 N.E.2d 562, motion granted 279 N.Y.S.2d 972, 19 N.Y.2d 813, 226 N.E.2d 705.

In view of provision giving to Senators and Representatives immunity from arrest, except in certain cases, during attendance at sessions and in going to and returning therefrom, member of Congress must respond to civil process and is liable for all consequences of disregarding civil process except that he cannot be subjected to arrest, and consequently there is no immunity from service of subpoena, since a subpoena is not an "arrest." Id.

Immunity under this clause giving to Senators and Representatives immunity from arrest, except in certain cases, during attendance at sessions and in going to and returning therefrom is immunity from civil arrest, and there is no exemption from civil process short of arrest. Id.

Congressman's immunity from arrest did not make him immune from service of summons based on claim that he had diverted certain payments to his wife to hinder, delay and defraud creditors. People on Complaint of James v. Powell, 1963, 243 N.Y.S.2d 555, 40 Misc.2d 593.

Immunity of Congressman from arrest does not render him immune from service of process. Id.

9. Status of Congressman

Count of indictment charging defendants with conspiracy to defraud United States by having defendant Congressman make speech in Congress was unconstitutional as applied to defendant Congressman because of this clause providing that for any speech or debate in either House, Senators and Representatives shall not be questioned in any other place, but this clause did not apply to defendants who were not members of Congress. U. S. v. Johnson, C.A. Md.1964, 337 F.2d 180, affirmed 86 S.Ct. 749, 383 U.S. 169, 15 L.Ed.2d 681, certiorari denied 87 S.Ct. 44, 134, 385 U.S. 846, 889, 17 L.Ed.2d 77, 117.

Constitutional privilege granted Senators and Representatives from arrest under this clause during their attendance at session of their respective houses did not apply to judgment debtor, a Congressman, against whom creditor sought order of arrest based on acts committed by debtor during period when Congress was not in session. James v. Powell, 1964, 250 N.Y.S.2d 635, 43 Misc.2d 314.

This provision applies to a delegate from a territory as well as a member from a state; he is entitled to a seat on the floor of the House as the representative of the people of the territory, elected with all the powers, rights, and privileges of a member from a state, except the power to vote, and with this exception he is a member of the House of Representatives, and entitled to the same constitutional privileges. Doty v. Strong, 1840, 1 Pinn. (Wis.) 84.

10. —— Determination

Judgment creditor of member of House of Representatives could not maintain quo warranto proceeding to determine right or title of member to office merely because of her status as judgment creditor who was unable to obtain arrest of member because of his congressional immunity. Application of James, D.C.N.Y. 1965, 241 F.Supp. 858.

Section 6, Clause 2. Holding other offices

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 encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Notes of Decisions

Library references
Officers ⇐30.3.
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The incompatibility is not limited to exercising an office and at the same time being a member of either house of Congress; but it equally extends to the case of holding—that is, having, keeping, possessing, or retaining—an office under such circumstances. Hammond v. Herrick, Cl. & H.El.Cas. 287–289.

2. Appointment during tenure

Where a person was elected and qualified as a United States senator for a term expiring in March, 1883 and in March, 1881, he resigned to accept the position of secretary to the interior, which office he soon thereafter resigned, after his second resignation the office of tariff commissioner was created by Act of Congress, and the attorney-general advised that this section of the Constitution disqualified him for appointment as commissioner. Appointment to Civil Office, 1882, 17 Op.Atty.Gen. 365.

The nomination and confirmation of a person who at the time is ineligible, for the office by force of this clause, cannot be made the basis of his appointment to such office after his ineligibility ceases. Appointment to Civil Office, 1883, 17 Op. Atty.Gen. 522.

A representative in Congress does not become a member of the House until he takes the oath of office as such representative; therefore, he may lawfully hold any office from his election until that time. 1874, 14 Op.Atty.Gen. 408.

One accepting and holding an office incompatible with that of representative in Congress is ineligible to the latter office. Bowen v. De Large, Smith El.Cas. 99.

3. Resignation and forfeiture of office

Where a person holding an office incompatible with that of senator is elected to the latter office, his resignation of the former before offering to assume the duties of the latter will remove any objection founded on this clause. Stanton v. Lane, Taft El.Cas. 205.

Continuing to execute the duties of an office under the United States after one is elected to Congress, but before he takes his seat, is not a disqualification; such office being resigned prior to the taking of the seat. Earle, Cl. & H.El. Cas. 314.

If one, after election to Congress, accepts a state office, and subsequently resigns the same before his term in Congress is to begin, he will not thereby be rendered incapable of holding his seat in Congress. Washburn v. Ripley, Cl. & H. El.Cas. 679–682.

The acceptance by any member of any office under the United States, after he has been elected to and taken his seat in Congress, operates as a forfeiture of his seat. Van Ness, Cl. & H.El.Cas. 122.

If the office to which a person is appointed does not in fact exist, such appointment will not render him ineligible to election as senator. Stanton v. Lane, Taft El.Cas. 205.

The formal resignation of an office held by a member-elect is not necessary if the duties of it have so far ceased as to have operated a virtual abolition of the office. Munford, Cl. & H.El.Cas. 316.

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It would be a sound and reasonable policy for the Executive Department to refrain from commissioning or otherwise utilizing the services of Members of Congress in the armed forces, and the Congress by exemptions in the Selective Training and Service Act of 1940, 50 U. S.C.A.App. § 305 [now covered by 50 U. S.C.A.App. § 456], has recognized the soundness of this policy. 1943, 40 Op. Atty.Gen. Dec. 23.

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