The original documents are located in Box 62, folder "Supreme Court - Vacancy General" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Some items in this folder were not digitized because it contains copyrighted materials. Please contact the Gerald R. Ford Presidential Library for access to these materials.

[Nov. 1975?]

J. P. Coleman - Judge, Fifth Circuit

Born: Mississippi, 1914

Education: attended University of Mississippi (1932-35); L. L. B., George Washington University, 1939.

Personal: Married, 1 son; Democrat

Experience:

1. Secretary to Rep. Arin Ford (1935-39).
2. Admitted to Miss. bar, 1937.
3. Private practice, Miss. 1939-40.
4. County prosecutor, Miss. 1940-46.
5. County judge, Miss., 1946-50.
6. AG of Miss. 1950-60.
7. Commissioner, Miss. Supreme Court, 1950.
8. Governor of Miss. 1956-60.
9. Rep. from Miss. 1960-65.
10. U.S. Court of Appeals 1965.

1. The relationship of competency to previous court experience.

2. Personal integrity, having had a history of independent thought.

3. The relevancy of experience:

   a. judicial
   b. legislative
   c. academic

   A point was made that the Court is now lacking a person with a background in legislation and in the academic field.

4. Age - should be 50 plus or minus

Two possible candidates that were considered "dark Horses"

Oakes-President of Brigham Young University, clerked for Justice Warren, graduate of Chicago University; Democrat.

Cliff Wallace of San Diego.

Both men are very highly regarded by ABA and others.

It was felt that a background in the practice of law was inconsequential.

THE WHITE HOUSE
WASHINGTON

[Nov. 1975?]

TO: Phil Buchen

FROM: Ken Lazarus

For your information_____

For appropriate handling_____

Per your request_____

Remarks:

Per your request, attached is the biographical information on John Danforth.

DANFORTH, JOHN CLAGGETT, atty. gen. Mo., lawyer; b. Louis, Sept. 5, 1936; s. Donald and Dorothy (Claggett) D.; A Princeton, 1958; B.D., Yale, 1963, LL.B., 1963; L.H.D., Lindenw Coll., 1970; LL.D., Drury Coll., 1970; m. Sally B. Dobson, Sept 1957; children—Eleanor, Mary Dorothy, Johanna. Admitted to N

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 10, 1975

~~CONFIDENTIAL~~

Dear Mr. President:

Against the possibility that a vacancy may occur on the Court there are certain factors, not always present when vacancies occur, that deserve consideration and I venture to submit them to you privately for such utility as they may have.

(1) Rarely have the geographical factors been as neutral as at present. As you know, the two youngest Justices are from the West (White and Rehnquist); there are three from the Midwest (Burger, Stewart, Blackmun); one from a border state, Maryland (Marshall); one from the Northeast (Brennan); and one from the South (Powell).

(2) The average age of the nine Justices is now 65 years.

(3) For more than ten months past we have been functionally only a Court of eight, and this has placed us under substantial handicaps.

(4) Since I took office in June 1969, the Court has been functionally eight Justices for more than two years.

(5) All indications are that our work will continue to increase both in the volume and in the complexity and novelty of issues; a number of crucial cases have been set for reargument due to the absence of Justice Douglas last year. To resolve them with a Court of eight Justices is highly undesirable, for many reasons.

(6) In my considered judgment, the next vacancy should be approached with the following factors in mind:

(a) It must be a nominee of such known and obvious professional quality, experience and integrity that valid opposition will not be possible.

(b) Given the present difficult condition of the Court's work -- a condition that has prevailed for more than 10 months -- a nomination should be made swiftly upon the occurrence of any vacancy before rival "candidacies" develop that could engender divisiveness and delay confirmation. We need nine Justices without delay.

(c) A nominee with substantial judicial experience would have several marked advantages; the adjustment to the work of the Court would be expedited because of familiarity with the enormous amount of "new law" in recent decades; insulation from controversy and partisanship by reason of judicial service is also likely an advantage (as it was to Justice Blackmun and to me). This does not rule out a non-judge but it emphasizes that a general practitioner, no matter of what legal capacity, has very likely had little occasion to keep up with the great volume and complexity in the evolution in criminal law and public law matters that now compose the bulk of the Court's work. In fairness I should say that a lawyer with substantial governmental experience, of course, has much of the kind of exposure to the large issues we face that judges deal with.

I cannot emphasize too strongly that we desperately need nine Justices to carry on our work. The situation could develop in a way not unlike that which arose when the Haynsworth and Carswell nominations were rejected.

I do not undertake to make specific recommendations for at this stage, with time being a critical factor, I tender no more than "specifications" which I draw from 20 years experience on the Bench and more than 20 as a practitioner.

I have hesitated to communicate with you but I conclude that my obligation to the Court compels me to share my views of the overall

problem since few outside the Court can have an appreciation of all these elements. I would, of course, be happy to pursue these points in more depth with you.

If there is a significant delay in confirming a nominee, the Court and the country will suffer severely. For my part, I am compelled to be candid in saying that we have had all we can sustain of functioning with a "crippled court" since 1969. The delays in 1969-1970 hurt the Court and the country.

I have not emphasized the crucial factor of age; three of the four Justices appointed since 1969 were over 60 when they took office, being respectively 61, 60 and 64, with only Justice Rehnquist being under 60. He is now 50. If the average service of the three over 60 finally amounts to 10 years each, we will have occasion to be grateful.

It goes without saying that I speak for myself, not for the Court.

Cordially and respectfully,

Warren E. Burger

The President

The White House

November 13, 1975

Supreme Ct.

Questions and Answers

Q: What qualifications are you going to look for in selecting a nominee to be Associate Justice of the Supreme Court?

A: I shall take very seriously the need to have a person highly respected for professional quality, for intellectual capacity, and for integrity. Also, I am looking for an energetic person and preferably one of middle age who can be expected to contribute effectively for a substantial period of years to the important work of the Court.

Q: Are you going to call upon the American Bar Association to evaluate prospective nominees for a position on the Supreme Court?

A: Yes, I expect the ABA and other groups as well to make recommendations and to express opinions on the qualifications of various possible candidates.

Q: How soon will you act on the nomination?

A: I will act as soon as I reasonably can, because it is widely recognized that the workload of the Court and the extremely important issues to be decided require, as soon as possible, a full Court of nine Justices. With only eight Justices, there is too much risk of an equal 4 to 4 division of opinion in critical cases.

Phil Buchen

Office of the Attorney General
Washington, D. C. 20530

November 13, 1975

MEMORANDUM FOR: PHILIP W. BUCHEN
COUNSEL TO THE PRESIDENT
THE WHITE HOUSE

FROM: EDWARD H. LEVI
ATTORNEY GENERAL

The names I have submitted to the American Bar Association (through Lawrence Walsh) last evening are the ones listed on the attached memorandum.

You have a copy of the previous memorandum to the President of November 11, 1975.

Names Given to American Bar Association Committee for Comment at 6:00 p.m. on November 12, 1975 with Request that Comments be Given Us by November 17.

ARLIN M. ADAMS

ROBERT H. BORK

ALFRED T. GOODWIN

ROBERT P. GRIFFIN

VINCENT LEE MCKUSICK

DALLIN H. OAKS

PAUL H. RONEY

JOHN PAUL STEVENS

J. CLIFFORD WALLACE

WILLIAM H. WEBSTER

CHARLES E. WIGGINS

ROBERT H. BORK

Solicitor General Bork, 48 years old, received both B.A. (1948) and J.D. (1953) degrees from the University of Chicago. While at the law school, Mr. Bork was managing editor of the Law Review. For one year following his graduation, he remained at the law school as a resident associate. After a year in private practice in New York, Mr. Bork became associated with the Kirkland, Ellis firm in Chicago, where he remained until 1962. He then joined the faculty of Yale Law School where he taught constitutional law and antitrust. Mr. Bork has written extensively in both fields. He was appointed Solicitor General of the United States in 1973.

Before his appointment, Mr. Bork was generally known in the profession as one of the foremost conservative critics of the prevalent interpretation and enforcement of the antitrust laws. In constitutional law, Mr. Bork's work and views were perhaps less well known, except for his prominent role, in the first term of President Nixon's administration, as one of the draftsmen and proponents of proposed legislation to eliminate busing as a judicial remedy for school segregation. In his work as Solicitor General, Mr. Bork has the highest reputation, especially among close observers of the Court, for ability and integrity. If Mr. Bork was appointed to the Court, there would be little doubt of his intellectual capacity for the work. There would be equally little doubt that, on the Court, Mr. Bork would provide strong reenforcement to the Court's most conservative wing--particularly in the sense of a need to limit the extended role of the courts.

ROBERT P. GRIFFIN

Robert P. Griffin, of Traverse City, Michigan; born in Detroit, Michigan, November 6, 1923; educated in public schools of Garden City and Dearborn, Michigan; graduate of Central Michigan University with A.B. and B.S. degrees; graduate of University of Michigan Law School with J.D. degree; honorary degrees from several Michigan colleges and universities; served as enlisted man in 71st Infantry Division during World War II; practiced law in Traverse City, Michigan, 1950-56; named one of the Ten Outstanding Young Men of the Nation in 1959 by the U.S. Junior Chamber of Commerce; elected November 6, 1956, a Representative from Michigan's 9th district to 85th Congress; reelected to 86th, 87th, 88th, and 89th Congresses; appointed May 11, 1966, to U.S. Senate to fill unexpired term of the late Senator Patrick McNamara; elected November 8, 1966, to the U.S. Senate for full 6-year term; reelected November 7, 1972; elected October 1, 1969, Minority Whip of the Senate and reelected unanimously on opening day of the 92d and 93d Congresses.

DALLIN H. OAKS

Mr. Oaks, 43 years old, graduated from Brigham Young University (B.A. 1954) and the University of Chicago Law School (J.D. 1957), where he was editor-in-chief of the law review and a member of the Order of the Coif. He served as law clerk to Chief Justice Earl Warren during 1957-58; he later practiced law in Chicago from 1958 to 1961 with the Kirkland, Ellis firm. He became an associate professor at the University of Chicago Law School in 1961 and a full professor in 1964. Between 1970-1971, he served as Executive Director of the American Bar Foundation. Since 1971 he has been president of Brigham Young University, also serving as a professor at the Brigham Young Law School. His subjects are criminal procedure and trusts and estates. He has published numerous articles in the field of criminal justice, including a most highly regarded analysis and critique of the exclusionary rule of the Fourth Amendment. ("Studying the Exclusionary Rule in Search and Seizure," 37 University of Chicago Law Review 665 (1967)). Other publications include "The 'Original' Writ of Habeas Corpus in the Supreme Court," 1962 Supreme Court Review 153, and "Legal History in the High Court-Habeas Corpus," 64 Michigan Law Review 451 (1966). He is the co-author of a casebook on Trusts; a co-author of a book on A Criminal Justice System and the Indigent, and of The Criminal Justice System in the Federal District Courts. He was the editor of a volume on The Wall Between Church and State. Since 1971, he has been a member of the editorial board of Judicature and the Journal of Legal Studies. Mr. Oaks has also served on the American Bar Association Committee to Survey Legal Needs since 1971, and as counsel to the Bill of Rights Committee of the Illinois Constitutional Convention in 1970.

JUDGE PAUL H. RONEY

Judge Roney, 53 years old, received his B.S. degree from the University of Pennsylvania in 1942 and, after serving as an Army Reserve staff sergeant during World War II, received an LL.B. from Harvard Law School in 1948. From 1948 to 1950, Judge Roney worked for the predecessor of the Dewey, Ballantine firm in New York, and then moved to St. Petersburg, Florida, where he engaged in private practice, mostly involving state court litigation. He was active in local bar and community affairs. He was appointed to the U.S. Court of Appeals for the Fifth Circuit in October, 1970. The ABA Committee on Judicial Qualifications rated him well qualified.

Since he has been on the Court of Appeals, Judge Roney has written around 200 opinions, including relatively few concurrences and dissents.

Judge Roney's views in criminal matters, especially those involving constitutional issues, are generally conservative. In West v. Louisiana, 478 F.2d 1026 (1973), Judge Roney dissented from a holding that a state prisoner may challenge his state criminal conviction on grounds that his retained (as distinguished from appointed) counsel failed to provide an effective defense.

In U.S. v. Allison, 474 F.2d 286 (1973), Judge Roney reversed a criminal conviction, holding that large portions of the defendant's grand jury testimony read by the prosecutor at the trial were irrelevant and inadmissible.

In Hawkins v. Town of Shaw, 461 F.2d 1171 (1972), Judge Roney dissented from an en banc holding that gross disparities in the municipal services provides between white and black neighborhoods, though not clearly motivated by evil purpose or intent, were apparently the product of neglect with "clear overtones of racial discrimination." Judge Roney's dissent was on the basis that the city must be allowed to show in rebuttal that the disparities were in fact the product of rational judgments based on factors other than race.

JUDGE J. CLIFFORD WALLACE

After serving in the Navy from 1946 to 1949, Judge Wallace, aged 46, graduated from San Diego State College (B.A. 1952) and the University of California Law School (Berkeley) (LL.B. 1955). At law school, he was a member of the Board of Editors of the University of California Law Review. He became associated with the law firm of Gray, Cary, Ames & Frye (in San Diego) in 1955, became a member of that firm as a partner in 1962 and continued with that firm until 1970 when he was appointed District Judge for the Southern District of California. The ABA Committee found him well qualified for this appointment. As District Judge, he published six opinions in his two years. In 1972, Judge Wallace was appointed to the U.S. Court of Appeals for the 9th Circuit. The ABA Committee rated him well qualified.

Prior to his appointment to the Bench, Judge Wallace was active in various professional bar organizations, and also he has been prominent in work for the Mormon Church.

Judge Wallace is an able, intelligent judge and is markedly conservative, especially in criminal law matters. In his three years on the Ninth Circuit, Judge Wallace has, with a few notable exceptions, seldom written the opinion for the Court in particularly difficult or important cases. His opinions are usually brief, clear and to the point. One of his more important cases was Jones v. Breed, 497 F.2d 1160 (1974), holding that, once jeopardy attaches in a juvenile court adjudication hearing, a minor may not be retried for the same offense as an adult. Judge Wallace wrote the opinion for the Court in U.S. v. Bowen, 500 F.2d 960 (1974), holding that the Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (which held invalid searches without a warrant by roving border patrols) was not retroactive as applied to fixed check points. Judge Wallace dissented from that part of the majority which held Almeida-Sanchez applicable to invalidate a fixed checkpoint search without warrant or probable cause.

CHARLES E. WIGGINS

Charles E. Wiggins, of West Covina, California; born in El Monte, California, on December 3, 1927; attended public schools in El Monte; graduate of the University of Southern California with a B.S. degree in Business Administration and Finance; graduate of the University of Southern California School of Law; former member and chairman of the city of El Monte Planning Commission; former councilman and mayor of the city of El Monte; recipient of the Junior Chamber of Commerce "Young Man of the Year" award; practicing attorney in the city of El Monte; member of the Advisory Board to the District Attorney of Los Angeles County; veteran of 4 1/2 years, U.S. Army, Infantry; 32 months overseas, World War II and Korea; first elected to the Congress November 8, 1966; member of the House Judiciary Committee and House Select Committee on Crime.

THE WHITE HOUSE

WASHINGTON

November 17, 1975

MEMORANDUM FOR: RICHARD B. CHENEY

FROM: DOUGLAS P. BENNETT

SUBJECT: Supreme Court Nomination

In view of the critical nature and importance of this appointment, it is absolutely clear to me that the President and you should maintain total control over the selection and processing of this appointment. However, it also strikes me that the many issues and problems with which you must deal each day will make it physically impossible for you to track it as closely as you would like. Clearly the qualifications of the candidate will be superb. Therefore, substance is not an issue but superb handling of the processing of the appointment is of utmost importance. I recommend, therefore, that this handling be done by the Office of the Counsel to the President, perhaps by Phil Buchen or in part delegated to Ed Schmults. Since my office is equipped and has experience in the processing of appointments (identification of appointee, working with Ron Nessen from a press standpoint, legislative strategy, etc.), I suggest that I assist the Counsel's office during this processing.

Since the ABA determination respecting the people on the Attorney General's list will be available on Tuesday, it is at that point where some crucial decisions must be made. The constituencies with which we must deal to effect excellence in processing include the candidates themselves, the legal community, the press, the Congress and ultimately the American public. With respect to each of these constituencies, I think it wise to consider the following options available to the President at each stage of the processing.

Candidates

The initial decision to be made is whether or not the American Bar Association ratings together with the full list of names submitted by the Attorney General should be made public. It seems to me there are four options (1) release the whole list, (2) pare down the list and release it, (3) do not release any of the names, and (4) release the names on the Attorney General's list plus any other names the President wishes to add. The obvious determination to be made is whether or not to release the American Bar Association ratings. I would guess that one way or another the ratings will leak

to the press just as did the names. The question is whether or not it would be fair to any of the candidates to release names and ratings. It strikes me that from the candidates standpoint, any attorney in the country would love to have his name suggested in the press as being under consideration for this the most eminent of legal posts. It is a difficult question respecting these ratings. If I am not mistaken, a precedent was set when a list of names was given to the American Bar Association and ratings on those listed were requested. Since that determination was made last week, the question is, how do we handle additional names. If the names continue to be all excellent ones, there should be favorable press. If the names include women there could be an enormous swell of support for a particular woman or for the appointment of a woman. My particular instincts are that the White House release no names and in particular no ABA ratings.

With respect to additional names the President may wish to consider, it would seem inadvisable to release those names which will become known as "the President's list". I am inclined to think that we should let the press speculate on the Attorney General's list and I do not believe that it would be harmful to any of those candidates already known to the press. Meanwhile, if so desired, the President can review additional names and this information can be held very close.

Legal Community

The legal community will be critically eyeing the speculated candidates under consideration. Since the American Bar Association has already rated the Attorney General's candidates, it would seem that if and when the President determines another list that it would be advisable to let the ABA do a check on those individuals. We may rest assured that the ABA will publicly disclose its ratings of the potential nominee and will certainly testify at that person's hearings. It would seem prudent, therefore, not to approach the ABA until the President has determined a final list of potential nominees. At that time because of the ABA's de facto influence on the process, I guess we will have to submit those names for consideration by the ABA.

The Press

The handling of the press is, of course, one of the most critical elements in this whole process. I strongly recommend that all press inquiries be handled solely by the White House Press Office - Ron Nessen or Bill Greener. The Justice Department should not be commenting and clearly no one else in the White House should be commenting with the sole exception of Philip Buchen. Perhaps a short space of time should be set aside each morning before the press briefing so that Ron is fully prepared on this issue. Questions and answers should be prepared each day in anticipation of what may be forthcoming from the White House press corps. Since any information should be maintained very confidential, it would seem to me that a meeting between

you and Ron and anyone else you consider appropriate would be the best way to prepare Ron. We should attempt to build to a crescendo at the time of the announcement. Getting there, and from a press standpoint, is very important to be capped by the quality of the nominee.

The Congress

This is, as always, a very difficult question to resolve; namely the extent of consultation with Members of Congress. Quite obviously, the more people aware of who is under consideration, the more likely there is a premature release of information. We could consult on process, receive suggestions and divulge names if so desired. Normal congressional clearances, in my opinion, are not required nor, I believe, are expected. But, our leadership will expect some consultation and some foreknowledge of the nominee. A way to accomplish this might be for the President to call a Republican and Democrat Leadership Meeting in a matter of hours before the nomination is made and advise them of the final candidates and seek their advice. This could be done even though the President has made his decision. He may wish to consult further with the top leaders before such a meeting but it strikes me that the final consultation should be of a bi-partisan nature.

The American Public

This, the most important of all the constituencies, would be affected by the manner in which the preceding constituencies are handled and in the final analysis, the quality of the nominee. It would seem that the remaining question is how the actual nomination is made. Options include the President himself, Phil Buchen or Ron Nessen. It might make sense for the President to go on the air alone or with the Counsel to the President or the Attorney General going with him. There are all sorts of options here but I think because of the importance of this appointment, the President may wish to announce it himself.

Many names are coming to me and I will turn them over to Phil Buchen and you on a daily basis. I will also keep a running account. As I suggested before, all recommendations in writing, I think, should be responded to be Phil Buchen. The question of FBI investigations and conflict-of-interest examinations of the candidate or candidates needs also to be addressed. In particular, the FBI investigations trigger widespread speculation. For that reason it might be smart to do it for all on a final list of candidates. An option is to wave the FBI investigations.

This is a rather lengthy collection of thoughts and I feel a further discussion is merited so that some decisions can be made at the earliest opportunity.

Monday 11/24/75

11:13 Kathy Berger in Cheney's office advises the President talked with Senator Griffin twice on Sunday.

Comment at 6:00 p.m. on November 12, 1975 with Request that Comments be Given Us by November 17.

[ca. 11/13/75]

ARLIN M. ADAMS

ROBERT H. BORK

ALFRED T. GOODWIN

ROBERT P. GRIFFIN

VINCENT LEE MCKUSICK

DALLIN H. OAKS

PAUL H. RONEY

JOHN PAUL STEVENS

J. CLIFFORD WALLACE

WILLIAM H. WEBSTER

CHARLES E. WIGGINS

Monday 11/10/75

will not be sent

1:55 Mr. Schmults:

Checked with the Chief Justice's secretary.

The letter was sent in to the Justice in Chambers, and he sent word to hold up on the letter until he came out.

They will give us a call when Mark Cannon leaves to bring it to us.

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"

November 15, 1975

Buchen

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

v kc ?. 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. 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 §§ 13, 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. 318.

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