

Statement on S. 2673, a bill to ensure that the compensation and emoluments of the Office of the Attorney General are those which were in effect on Jan 1, 1969

Senator Hiram L. Fong Papers

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Statement by U. S. Senator Hiram L. Fong

On S. 2679 a bill to insure that the Compensation and Emoluments of the Office of the Attorney General are those which were in effect on January 1, 1969

In the Senate

November 28, 1973

The proposed nomination of our colleague, Senator William Saxbe, to the office of Attorney General has once again raised the question of the eligibility of a member of Congress for appointment to a high executive office.

Senator Saxbe was elected Senator from the State of Ohio. He took his oath January 4, 1969 and commenced his term of office. Prior thereto, P. L. 90-206, effective December 16, 1967, had been enacted. That bill set up a Commission on Executive, Legislative, and Judicial Salaries. The Commission, at four year intervals, recommends rates of pay for such officials. The President then sets forth his recommendations in the next budget he submits to Congress. These recommendations become effective 30 days after transmittal of the budget, unless other rates are fixed by law or either House disapproves all or part of the President's recommendations.

The President transmitted to Congress on January 15, 1969 recommendations which included the increase of the salary of the Attorney General from \$35,000 to \$60,000 a year. On February 4, 1969, the Senate defeated Senate Resolution No. 82, which would have

disapproved the Presidential recommendation. Senator Saxbe voted with the majority.

The pay raise, including that of the Attorney General, become effective shortly thereafter.

This is the increased emolument now making Senator Saxbe ineligible for appointment to the office of Attorney General.

S. 2673 is designed to reduce the emolument of the office of Attorney General to what it was at the time Senator Saxbe took office as Senator in 1969 and thus remove his ineligibility for appointment to that office.

Constitution -- Article 1, Section 6, Clause 2

Article 1, Section 6, Clause 2 of the Constitution, as we are all aware, states:

"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."

Let us examine the instances in which this clause has come into play.

1. Appointment to Newly Created Office.

First, as to newly created offices:

Senator Paterson had been elected Senator from New Jersey for a four year term in 1789. In November 1790, he resigned to become Governor of New Jersey. In 1793, President Washington sent up his nomination to the newly created office of Associate Justice of the Supreme Court. When this section of the Constitution was called to President Washington's attention, he withdrew the nomination on February 28, 1793. Senator, or then Governor, Paterson was not deemed eligible for this newly created office until the term for which he was elected to the Senate expired on March 4, 1793.

Second, similar in result is the case of Senator Kirkwood who had been elected a Senator from Iowa for a term expiring March 4, 1883. Senator Kirkwood had resigned from the Senate in 1881 to become Secretary of Interior. Later in 1881, Senator Kirkwood resigned as Secretary of Interior and returned to private life. In 1882 and after his second resignation, the position of Tariff Commissioner was created. It was the opinion of Attorney General A. G. Brewster, 17 Op. Atty. Gen. 365 (1882), that Senator Kirkwood was ineligible for the newly "created" office of Tariff Commissioner until the term for which he had been elected to Congress expired on March 4, 1883.

Insofar as newly created offices are concerned, the consistent practice appears to have been to hold that a person is not eligible to hold such office until after the term for which he has been elected to Congress has expired -- whether or not the individual occupied the Congressional Office at the time of his proposed nomination to any newly created "civil Office under the Authority of the United States".

2. Appointment to Office where Emolument Increased.

The relevant portion of the clause where an emolument has been increased states:

"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...the Emoluments whereof shall have been encreased during such time;..."

What has been permissible under this portion of this clause?

First, in 1871, Senator Morrill became the Senator from the State of Maine. In 1873, all cabinet officers were given a raise in salary from \$8,000 to \$10,000 a year. Under the Retrenchment Act, in 1874 the salary of all cabinet officers was returned to \$8,000.

In 1876 and "during the Time for which he was elected," Senator Morrill's nomination to be Secretary of the Treasury was confirmed by the Senate. The proceeding, I understand, took about six minutes and there was no challenge to Senator Morrill's eligibility to serve as Secretary of the Treasury.

It should be pointed out that although the emolument of the office to which he was appointed had been increased, then decreased and that thereafter his confirmation took place "during the Time for which he was elected;" the emolument of the "civil Office under the Authority of the United States" to which he was appointed was, at the time of his appointment, not "increased" over what it had been at the time he was elected.

Second, Senator Ransom of North Carolina was elected for a term to begin March 4, 1889 and took his seat in the Senate. In 1891, the salary of the Ambassador to Mexico was increased. On February 23, 1895, during his term of office and at a time when the salary of the Ambassador to Mexico was at the increased rate, Senator Ransom was nominated to be Ambassador to Mexico. He was confirmed the same day. On March 4, 1895, Senator Ransom took his oath of office to be Ambassador and received his commission

on March 5, 1895 -- after "the Time for which he was elected" had expired. The State Department auditor refused to pay his salary because of the "appointment" -- that is the confirmation -- having taken place on February 23, 1895, during Senator Ransom's Senatorial term. It was the opinion of Acting Attorney General Conrad, 21 Op. Atty. Gen. 211 *1895) that Senator Ransom's appointment having taken place on February 23, 1895, during his Senatorial term, it was a nullity and was not saved by his taking the oath or being issued his commission subsequent to "the Time for which he was elected".

But, let us not forget that at the time of his appointment, the emolument of the office to which he was appointed was at the increased rate and not at the emolument at "the Time for which he was elected".

Third, in 1904, Senator Knox was elected Senator from the State of Pennsylvania for a term ending March 1911. In 1907 the compensation of the Secretary of State had been increased from \$8,000 to \$12,000 a year. In 1909, President Taft announced that he intended to appoint Senator Knox as Secretary of State. As the situation then stood, Senator Knox was ineligible for appointment as the emolument of the office to which he was to be appointed was

at a rate in excess of what it had been at the time he was elected, having "been encreased during such time" of his office.

Remedial legislation, similar to S. 2673, the bill now under consideration, which Senator McGee and I introduced on November 9, 1973, was introduced to reduce the salary in question to what it had been when Senator Knox' term commenced and before the increase in emolument was approved. The constitutionality of the 1909 action was vigorously debated.

Robert G. Dixon, Jr., Assistant Attorney General testified on November 19, 1973 before the Senate Judiciary Committee, of which Committee I am a member, in support of S. 2763. Appropos of the Justice Department's position as to the legality of the 1909 bill, Mr. Dixon stated (at p. 11 of his statement before the Judiciary Committee):

"An unofficial opinion of Assistant Attorney General Russell (commenting on the bill reducing the Secretary of State's compensation to \$8,000) reasoned that because the sole purpose of the prohibition was to destroy the expectation a Representative or Senator might have that he would enjoy the newly increased emolument, that purpose would be fully satisfied. He argued that, 'if the increase is made...and then unmade, he cannot get, or hope for, anything more than if there had been no such increase.' 43 Cong. Rec. 2403. This reasoning prevailed."

The bill passed the Senate without debate. After heated debate in the House, the bill passed by a vote of 178-123. The law became effective on March 4, 1909 (35 Stat. 626).

Thereafter, Senator Knox was nominated to the office of Secretary of State, at the reduced salary existent at the time he was elected to the Senate; was confirmed by the Senate; and served as Secretary of State.

Fourth, there is only one other situation of which I am aware involving Article I, Section 6, Clause 2. That involved the appointment of Senator Black of Alabama to the Supreme Court in 1937, shortly after Congress had improved the annuity benefits available to Justices retiring after the age of 70. Mr. Black had been elected to the Senate in 1932.

An attempt to test the validity of his appointment to be an Associate Justice gave rise to the case of Ex parte Albert Levitt, 302 U.S. 633 (1937), an action brought originally in the Supreme Court of the United States. The argument in support of Mr. Black's eligibility to be an Associate Justice of the Supreme Court was based on the fact that he was only 51 years old at the time. He would be ineligible for the increased emolument for 19 years. Hence, it was argued that it was not "as to him" an increased emolument. The

The Supreme Court rejected the petition because the petitioner lacked standing.

Mr. Justice Black served on the Supreme Court with great distinction for a period in excess of 34 years -- his "retirement" came only about a week before his death in 1971 at the age of 85 -- after several increased in annuity benefits by laws subsequent to "the Time for which he was elected" to the Senate.

What do the Morrill, Ransom, Knox and perhaps Black appointments to civil offices after an increase in the emoluments of the civil office during their respective terms as Senators delineate as a pattern for us?

1. When at the time of appointment, the emolument was at the rate to which it had been increased during the appointee's term of office, such as in the case of Senator Ransom, the appointment was deemed a nullity.

2. When at the time of appointment, the emolument was at the same rate at which it had been at the time the appointee began his term of office, whether returned to the original rate by general legislation as in the case of Senator Morrill, or returned to the original rate by special remedial legislation, as in the case of Senator Knox -- or as proposed to be done by S. 2673 for Senator Saxbe

-- the appointee has been confirmed by the Senate and served at the original emolument during the time for which he had been elected to office.

In the case of Senator or Mr. Justice Black, all we can deduce is that the person who brought the case to test Mr. Justice Black's eligibility to the appointment because of the increase in retirement pay applicable at the time of his appointment to the Supreme Court lacked standing to bring the action.

3. Appointment To Office While Serving in Congress.

Interesting interpretations of the balance of this portion of Article I, Section 6, Clause 2 of the Constitution providing:

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

also may be gleaned from legislative precedents.

1 Hinds' Precedents of the House of Representatives, §493 (1907) and Cannon's Precedents of the House of Representatives, §63, §64 (1936) make it clear that visitors to academies, regents, directors and trustees of public institutions, and members of temporary commissions who receive no compensation as such are not officers within this constitutional inhibition.

Government contractors and federal officers who resign before presenting their credentials may be seated as Members of Congress under 1 Hinds' Precedents of the House of Representatives §§ 496-499 (1907).

Apparently, where no financial benefit enures to a member of Congress from his service de hors the Congress, that service is permissible.

CONSTITUTIONAL CONSTRUCTION AND PRECEDENT

These are our "precedents":

Concededly, under the rationale of Powell v. McCormack,
395 U.S. 486, 546-547 (1969):

' That an unconstitutional action
has been taken before. . . does
not render that same action any
less unconstitutional at a later
date.'

The Powell case involved the right of the House to ex-
clude Congressman Powell from taking his seat in the House even
though he met the requirements of Article I, Section 2, Clause 1
of the Constitution -- that is, he was over 25 years of age, had
been a citizen for over 7 years and when elected had been an in-
habitant of New York, the State in which he was chosen.

Under Article I, Section 5, Clause 2 giving each House
the right to "punish its Members for disorderly behavior, and,
with the concurrence of two thirds, expel a Member," he might
have been expelled for his behavior, but the Court found that he
could not be excluded for his behavior.

After reviewing various conflicting actions of Congress in excluding members for other than the prescribed grounds, the Court stated, at p. 547:

"The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787. See Myers v. United States, 272 U.S. 52, 175 (1926)."

Our precedents on the bill before us, S. 2673, go back almost 100 years, to 1876 in the case of Senator Morrill and to 1909 in the case of Senator Knox.

In any event, as the Supreme Court stated in Lake County v. Rollins, 130 U.S. 662, 670 (1889) (a case involving an interpretation of a county debt ceiling limitation in a state constitution):

"The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it."

True, the opinion continued, at page 670:

"This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

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Nonetheless, we must remember that the Constitution does not have, nor should it have, the specificity of a statute.

As Chief Justice Marshall stated in McCulloch v. Maryland, 17 U.S. 316, 406 (1819):

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . [W]e must never forget that it is a constitution we are expounding."

And, Chief Justice Marshall continued, at p. 406:

"Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting [these] powers for the public good, the intention of impeding their exercise, by withholding a choice of means?"

**INTENT OF FRAMERS OF THE CONSTITUTION AND
MEANS AVAILABLE TO ACHIEVE INTENT**

What was the intent of the Framers of the Constitution when they drafted Article I, Section 6, Clause 2 and what are the means available to us in Congress to achieve this intent?

BACKGROUND

The evolution of this clause and the debates thereon are set forth in Farrand, The Records of the Federal Convention of 1787, 4 vols. (Yale University Press, 1966).

The Framers of the Constitution obviously sought to avoid the corruption of political life such as they had seen in the British Empire as a result of the appointment by the Crown of members of Parliament to lucrative offices.

Accordingly, they sought to provide protection from an unscrupulous executive who might use the enticement of public office to influence members of the legislature. And secondly, they sought to avoid legislators viewing their election to Congress as a stepping stone to lucrative public office and utilizing their positions in the legislature as a means of creating offices or increasing the com-

pensation of the offices they sought.

There was opposition to total disqualification of legislators to hold any other than legislative office under the authority of the United States. It was the view of the delegates to the convention that the legislature would attract the best men in the nation and it was unwise to make ineligible for public office the most able men in the Republic.

The original version of what became Article I, Section 6, Clause 2 of the Constitution, made members of the Legislature of the United States ineligible for any but such office "during the term for which they are elected, and for one year thereafter." 2 Farrand 129-130.

The Committee on Detail reported out the provision and limited the one year thereafter disability only to Members of the Senate. 2 Farrand 180/

Final debate on the provision took place one month later in September, 1787. The result was the compromise, originally proposed by Madison in June of 1787 -- a limited disability on the eligibility of Members of Congress for executive office, i. e. "to such offices only as should be established, or the emoluments thereof,

augmented by the Legislature of the U.S. during the time of their being members."

Madison advocated not depriving the government of the services of its legislators, but at the same time making the legislature "as uncorrupt as possible." Madison "supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced, and that if the door was shut agst. them, it might properly be left open for the appointt. of members to other offices as an encouragmt. to the Legislative service" (Notes on debates of June 22 and 23, 1787).

2. Interpretation of Article I, Section 6, Clause 2 of the Constitution.

With this background, we turn to how to interpret the Constitution.

As Chief Justice Burger, in Walz v. Tax Commission, 397 U.S. 664, 668 (1970), in interpreting the Establishment and Free Exercise Clauses of the First Amendment, stated:

"The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute."

In the Walz case, the Court sustained a New York City Tax Commission grant of a property tax exemption to religious organizations for religious properties used solely for religious worship, despite what appears to be an absolute prohibition in the First Amendment to the Constitution that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..."

So, at this time we are faced with the language in Article I, Section 6, clause 2 of the Constitution:

"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 language too may, seen absolute, but its "purpose was to state an objective, not to write a statute."

The purpose of this provision was to prevent members of the legislature from creating unnecessary offices or increasing emoluments or holding another office so that they could benefit therefrom during their term in office. The purpose of this provision was not to disqualify all legislators from executive service during their term in office.

3. Means of effectuating intent of Article I, Section 6, Clause 2 of
Constitution

William Van Alstyne, William R. Perkins Professor of Law, Duke University and Assistant Attorney General Robert T. Dixon, Jr. when they testified before the Senate Judiciary Committee, in my opinion, correctly argued that enactment of S. 2673 would remove the disability presently existing to Senator Saxbe's appointment to the office of Attorney General.

Professor Van Alstyne aptly pointed out in his testimony that when a new office is created by Congress and, prior to the appointment of anyone to fill it, Congress enacts a law discontinuing that office, no new office remains to be filled and the question of eligibility is moot. Absent the statute enacted during the appointee's term of office, there is no office to which he can be appointed. Hence, as in the Paterson and Kirkwood appointments to offices created during their respective terms, this type of appointment to a newly created office is barred by Article I, Section 6, clause 2.

But, turning to the situation where a statute increases the emolument of an office, a different situation exists. If the statute increasing the emolument is repealed or another statute enacted effectuating the return to the original salary of the office, the office still exists -- but at the salary provided for at the time the legislator sought to be appointed to office entered upon his legislative office. In other words, the status quo has been restored.

It is amply clear that a member of the Legislature is not disqualified from an existing office -- unless the office was created during his term which is inapplicable in the case of Senator Saxbe, or, -- unless "the Emoluments... shall have been increased..." which is the present situation facing Senator Saxbe and which this bill seeks to correct.

Mr. Justice Story, in his Commentaries on the Constitution, (Vol. 1, p. 633, 5 ed. 1891), stated:

"The reason for excluding persons from offices who have been concerned in... increasing their emoluments (is) to take away, as far as possible, any improper bias in the vote of the representative...".

Surely, a Legislator cannot be deemed to have increased the emoluments of an office for his own benefit, which was the situation feared by the Framers of the Constitution, if in order for him to be eligible for nomination and appointment to that office, the emolument of the office is reduced by statute to that existing at the time "the Time for which he was elected" to the Senate or House commenced.

The evils of corruption feared by our Founding Fathers are clearly ensured against under a provision such as in S. 2673, which reads:

"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."

Mr. Justice Goldberg in a concurring opinion in Bell v. Maryland, 378 U. S. 266, 288-289 (1964), as to constitutional construction, observed:

"Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purposes of the Framers. We must, therefore, consider the history and circumstances indicating what the (provisions in question) were in fact designed to achieve."

The provision in question -- that is Article I, Section 6, clause 2, insofar as the emolument provision is concerned, as I previously indicated, was intended mainly to prevent two evils:

First: To protect legislators from unscrupulous executives using the enticement of public office to influence the actions of the legislators, and

Secondly: To avoid legislators viewing their election to Congress as a stepping stone to lucrative public office and utilizing their positions in the legislature as a means of creating offices or increasing the compensation of the offices they seek.

This being so, clearly the intent was not to prevent able and qualified Members of Congress from taking civil office. Surely the action of this Congress in reducing the emolument of the office of Attorney General from \$60,000 to \$35,000 cannot be said to be corruptive of the Members of this Congress nor can it be said that Senator Saxbe used his \$42,500 Senate office as a stepping stone to a \$35,000 office of Attorney General!

The essence of this Constitutional provision being to prevent corruption of or by our Legislators, S. 2673 cannot be deemed corruptive of either this Congress or Senator Saxbe, who would be assuming a most difficult office at a particularly crucial time in our Nation's

history, at considerable personal financial sacrifice, rather than benefit to himself.

4. Effect of statute reducing emolument of office.

I now turn to what S. 2673 is intended to accomplish with regard to P.L. 90-206, the act under which increased executive, legislative and judicial salaries became effective on December 16, 1967 and after Senator Saxbe assumed office, and what effect it will have on the present ineligibility of Senator Saxbe to be confirmed to the office of Attorney General resulting from this increase in such salaries.

S. 2673 provides:

"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 Congress on January 15, 1969. Sec. 2. This Act shall take effect upon enactment."

It is a caveat of statutory construction that the fact that an act does not contain a general or a specific repealing clause does not prevent it from repealing by implication the whole or a portion of a statute. Heffron v. Bank of America National Trust & Savings Assoc., 113 F.2d 239 (CA9).

Whether S. 2673 or any other statute works as an implied repeal of an existing statute is a question of legislative intent. Our

intent to repeal that portion of the January 15, 1969 recommendation for a salary increase under P.L. 90-206, insofar as the increase is applicable to the salary of the Attorney General is clear. It is the sole purpose of S. 2376.

The effect this "repeal" can be analogized to that resulting from the repeal of a criminal statute. In the later case, the extinction or repeal of the statute is understood to indicate that the sovereign power no longer desires the former crime to be punished or even regarded as criminal. The general rule at common law is that all proceedings pending are nullified.

When a criminal statute is repealed, 50 Am. Jur 570 indicates "it is as if it never existed except for the purpose of proceedings previously commenced, prosecuted, and concluded," citing United States v. Tynen, 11 Wall. (US) 88; Norris v. Crocker, 13 How (US) 429; Yeaton v. United States, 5 Cranch (US) 281; and United States v. Passmore (CC) 4 Dall (US) 372, among other cases.

Similarly, it can be argued that the effect of S. 2376 being to "repeal" the increase in the emolument of the Office of Attorney General, it renders that increase in emolument "as if it never existed." Therefore, upon S. 2673 taking effect, there would be no existence of an emolument which "shall have been increased during such time "as

Senator Saxbe was elected to a Senator.

Hence, there would be no ineligibility on the part of Senator Saxbe, after enactment of S. 2376, to be appointed to the Office of Attorney General, since the salary increase would be "as if it never existed."

5. S. 2673 would remove ineligibility of Senator Saxbe.

Since it is clear that the Framers of the Constitution did not intend to disqualify Members of the Legislature from all civil office, it would fly in the face of the intent of Article I, Section 6, Clause 2 to say that enactment of S. 2673 would not remove the only statutory ground disqualifying Senator Saxbe from assuming the Office of Attorney General.

Knowing Senator Saxbe, I am sure we all agree that as the Framers of the Constitution foresaw if we deprive the Nation of the services of Members of Congress during their term, when disqualifying legislation no longer exists at the time of their appointment, we would be depriving the Nation of the services of one of the best men in the Nation for this position.

It would, indeed, now be unwise to fail to enact legislation making it possible for one of the most able men in the Republic to serve as Attorney General.

Since it is my belief that S. 2673 would be a constitutional removal of the disability presently existing to the eligibility of Senator Saxbe to the Office of Attorney General, it was my pleasure to cosponsor the bill with Senator McGee, at the request of the White House. This is a proper means to carry out a Constitutional intent, as envisioned in 1819 in McCulloch v. Maryland, 17 U.S. 316.

CONSEQUENCES OF DE FACTO OFFICER'S ACTIONS

But assuming the most dire consequences predicted by my able colleagues who oppose this bill on the constitutional ground that the prohibition in Article I, Section 6, Clause 2 is absolute and "No Senator... shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States...the Emoluments whereof shall have been increased during such time;...", what would be the consequences should S. 2673 be enacted and Senator Saxbe be "appointed" Attorney General?

Surely the Office of Attorney General has de jure existence, that office having been created by 1 Stat. 73, enacted September 24, 1789. Senator Saxbe would have been eligible for appointment to that office in accordance with existing law once S. 2673 is enacted.

Under the rationale of Ryan v. Tinsley, 316 F.2d 430, 432 (C.A. 10. 1963), at the worst, he would be a de facto holder of the office and his "acts are as valid as the acts of de jure officers".

A de facto officer is one who is in possession of an office and discharging its functions under color of authority or title, 43 Am. Jur. 230. One who enters possession of an office and exercises its functions even by reason of a defective appointment is also a de facto officer U.S. v. Royer, 268 U.S. 394 (1925).

As to the validity of actions of a de facto officer, 43 Am. Jur. 241-243, in pertinent part (with footnotes and case references therein omitted), reads:

"The general rule is that the acts of a de facto officer are valid as to third persons and the public until his title to office is adjudged insufficient, and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of public justice."

In short, it appears that even if my colleagues' most dire predictions should befall us and our colleague Senator Saxbe be held ineligible by the Supreme Court to hold the Office of Attorney General despite passage of S. 2673, what have we wrought?

His actions would be "valid as to third persons and the public until his title to office is adjudged insufficient." Calamity would not befall us.

As a member of both the Senate Post Office and Civil Service Committee and the Judiciary Committee, I have stated fully my reasons for concluding that enactment of S. 2673 would validly remove the present, statute-created ineligibility of Senator Saxbe to be appointed to the office of Attorney General. -- He could not be deemed to have used his Senate office to benefit from any increase in the emolument of the office to which he is to be nominated, as that emolument would be the same as it was when he assumed his Senate seat in 1969. The intent of the Framers of the Constitution would be complied with - a most capable person serving in the Legislature could be appointed to a civil office at the same emolument as when he took Legislative office; the means we are taking to achieve this intent of the Framers of the Constitution are proper. Our action, would in my opinion, be proper.

I urge my colleagues' support of S. 2673.