Volume I: Issue 10

The BEACON OF LIBERTY

A Structured Curriculum of Constitutional Study

Clause Discussed:
- Article I, Section 2, Clause 5

Concepts Discussed:
- Officers
- Impeachment

Article I, Section 2, Clause 5 of the Constitution directs that:

> "The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."

Among the primary duties performed on the first day of any first session of Congress is the choosing of the House officers.

The opening day of the First Session of the 107th Congress (as outlined in the *Congressional Record*) provides insight as to events which now normally occur.

The House of Representatives of the 107th Congress was *called to order* on January 3, 2001 (in accordance with Article I, Section 4, Clause 2 & the 20th Amendment) by the Clerk of the House of Representatives. Another of the House Officers chosen during the previous (106th) Congress, the *Chaplain*, next offered the opening *Prayer*. Following this, the Clerk led the members in a recitation of *The Pledge of Allegiance*.

Certificates of Election were received showing the names and the *credentials* of persons regularly elected according to the laws of their respective States.

A *roll call* was then performed (actually done electronically) noting the members *present*.

After a few short announcements, the election process began for the *Speaker* of the House for the 107th Congress, according to the command of Clause 5 above. The Chairman of the Republican Conference gave the conference's nomination to the Clerk. The Chairman of the Democratic Caucus then gave the caucus' nomination. Further nominations were next requested by the Clerk.

After *Tellers* were appointed to monitor and count the votes, the members voted for the *Speaker*. Once elected by a simple majority of the members voting, and having been administered the oath of office, the newly-elected Speaker was announced and escorted to the *Chair*.

After giving a short speech, the Speaker administered the following **oath** to the newly-elected Representatives:

> "Do you solemnly swear that you will support and defend the Constitution of the United States against all enemies, foreign and domestic; that you will bear true faith and allegiance to the same; that you take this obligation freely, without any mental reservation or purpose of evasion; and that you will well and faithfully discharge the duties of office on which you are about to enter. So help you God."

Shortly thereafter, other elections took place as also directed by Article I, Section 2, Clause 5. The *Clerk* of the House; the *Sergeant at Arms*; the *Chief Administrative Officer*; and the *Chaplain* were elected to their respective offices and were promptly sworn in as the other House officers of the 107th Congress.

Nowhere in Clause 5 is there any mandate that any of these House *officers* first be Legislative *Members*. Historically, the *Speaker* has always been a *member* of Congress; the other *officers* chosen from *non-members*.

Notification was then provided to inform the Senate that the House had lawfully assembled in a quorum. Another resolution was passed to notify (with the Senate) the President that a quorum of each House had assembled. The House further resolved that the President be notified of the election of the Speaker and the Clerk of the House of Representatives.

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Rules of the House were dealt with and approved next. Of current interest are Rules I & II.

Rule Number I listed the duties of the *Speaker* of the House. These *duties* of the Speaker include:

> To call the House to order; To approve of the House Journal; To preserve order and decorum; To have control of the Hall of the House; To subscribe House Documents requiring his signature; To decide questions of order; To formulate a question coming to vote; To appoint committee members; To suspend business for a short time; and to vote when his vote is decisive or when the House votes by ballot.

Rule Number II lists the duties also of the *other Officers*.

The responsibilities of the *Clerk* include:

> To call to order the House members at the commencement of the first session of each Congress and record their presence; To preserve order and decorum and decide questions of order until the Speaker is elected; To maintain the House Journal; To act as custodian of the Seal of the House; To present properly enrolled bills and resolutions personally to the President of the United States; To appoint employees in the Clerk's department; To keep the House calendar; To keep a library of documents and books therein deposited; To receive messages from the President or from the Senate when the House is not in session; To supervise the staff and manage the office of a deceased Member; and To maintain financial reports of the Clerk's office.

The responsibilities of the *Sergeant-at-Arms* include:

> To serve as the chief law enforcement officer (under the Speaker); To maintain order throughout the Capitol grounds (with powers of arrest) along with the Capitol Police; To bear the *mace* (the ceremonial *staff*, which is also the *symbol* of his office); To execute processes; and To serve as the ceremonial and protocol officer of the House.

The duties of the *Chief Administrative Officer* are:

> To perform operational and financial administrative functions of the House and To perform audits and reviews.

The *Chaplain's* duties are:

> To serve as the religious officer; To open sessions with prayer; and To counsel any that desire his services (or, specifically, *His* services).

Oath of Office

Of the topics covered above regarding the opening day of the first session, one item contravenes principles covered thus far in *The Beacon of Liberty*: *members* taking an oath of *office*.

If the difference between Legislative *members* and Executive *officers* can be minimized, then the difference between their *powers* and *abilities* can likewise be minimized. With members referred to as officers, it is easier for officers to be treated equivalent to members. This makes it less apparent that principles of republican government are discarded when officers "enact" that which is treated as law.

Due to such serious consequences, it is not improper to here further delve into the curiosity of *Members* taking an Oath of *Office*.

As covered in *The Beacon of Liberty*, (Volume I, Issue 2), *Congressmen* hold legislative *seats* as *Members*; they do not hold *offices*, nor are they *officers*. It is therefore inappropriate and even contradictory for a Congressional *Member* to take an "oath of *office*" for his legislative *seat*.

Article I, Section 6, Clause 2 reads:

> "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."

The clause is divided into two portions. The first portion prohibits members from accepting offices (under the United States) under one of two conditions. The first condition is that when offices are *created* during the term for which the member was elected; if so, then the member is expressly prohibited from accepting such office under any circumstances during the remainder of his legislative term.

The second condition is when an existing office has its *emoluments* (pay and benefits) increased by Congress, then every member similarly cannot accept such office (during the time for which he was elected).

The second portion of the Clause 2 prevents any person holding any office under the United States from being a member of either the Senate or House of Representatives while he remains in office.

It is true that Clause 2 does not *directly* prevent any *member* from holding any *office*. Indirectly, though, since *officers* are expressly prohibited from being *members*, the corollary is also true; *members* cannot be *officers*.

There are no express limitations which prevent a member from accepting an office under the authority of the United States which was not recently created nor where the pay was recently increased. However, due to the prohibition of officers being members, *a member must vacate his legislative seat to accept such office*.

A further look into offices and officers is necessary to better understand them.

Article II, Section 2, Clause 2 gives the President the power to *nominate* and, with assistance, *appoint* the (superior) officers of the United States. Specifically:

> "and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law..."

Article II, Section 3 requires the President to "Commission all the Officers of the United States" to give them their authority.

Article II, Section 4 of the Constitution mandates:

> "The President, Vice President and all civil *Officers* of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Article I, Section 2, Clause 5 grants the exclusive power of impeachment to the House of Representatives. *Impeachment* is the power to *accuse* officers of misconduct to begin the process to remove them from office (once convicted by the Senate).

Article I, Section 3, Clauses 6 & 7 grant to the Senate the sole power to try all impeachments while also listing further impeachment parameters.

Article II, Section 2, Clause I denies the President the authority to *pardon* persons for their impeachment.

William Blount, Senator

Early in the history of the Republic, the question of the extent of the authority of Impeachment came before the Senate. Senator William Blount of Tennessee (a constitutional convention delegate from North Carolina who had also been Governor of the Territory Northwest of the River Ohio) enjoyed speculating in land.

Blount desired to rid Florida of Spanish rule to stimulate settlement and therefore demand for and profit from his lands.

Blount sought President John Adams' aid to oust the Spanish for America, but was rebuffed by him (Adams was following the course of Washington's *Farewell Address* to "steer clear of permanent Alliances" and the "mischiefs of foreign Intriegue").

Blount set in motion *plan number 2,* which was to aid the British to oust the Spanish with help from the Creek and Cherokee Indians.

Blount's second plan, as was later detailed in the *Articles of Impeachment* against him, compromised the American position of neutrality, "in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof".

On July 7, 1797, the House of Representatives *Impeached* Blount for High Crimes and Misdemeanors. The following day, the Senate, finding Blount guilty of a High Misdemeanor, *expelled* him from the Senate by a vote of 25:1.

The Senate shortly thereafter adjourned from their First Session. The Second Session of the Fifth Congress began on March 1, 1798. Thomas Jefferson, Vice-President to Adams, as the President of the Senate, commanded Blount, by *summons*, to appear before the Senate on the "third Monday of December next" (1798) for his Impeachment trial.

In the 3re Session of the 5th Congress (December 17, 1798), the Senate formally postponed their normal duties and formed into a "High Court of Impeachment".[1] The Senators, according to the directive in **Article I, Section 3, Clause 6**, subscribed to an oath:

> "*I, A. B., solemnly swear* (or affirm, as the case may be)*, that in all things appertaining to the trial of the impeachment of William Blount, I will do impartial justice, according to law.*"

The House of Representatives prosecuted their case before the Senate through *Managers* chosen to conduct the impeachment. The Managers demanded Blount answer as to being the author of a letter showing his complicity in the international intrigue. Blount, through his counsel (Jared Ingersoll and A. J. Dallas), refused to answer, laying his defense on the position that:

> "a Senator is not an officer of the United States; and that no persons but the President, Vice President and civil officers are liable, by the Constitution, to impeachment."[2]

Blount's plea rested on the authority of **Article II, Section 4** of the Constitution; which only specifies "the President, Vice President and all civil Officers of the United States" as those who shall be removed from office on impeachment. Blount refused to answer the charge given by the House (actually, he refused to even show up in court — his counsel represented him in his absence).

Since he challenged the jurisdiction of the Senate to hear the case, the particulars of his case were set aside and discussion centered on whether Senators and Representatives, as members of Congress, were officers holding offices.

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1. Vol. 8, *Annals of Congress,* Senate, pg. 2245.
2. Ibid, pg. 2251.

James Bayard, Chairman of the Managers, outlined his impeachment position against Blount, which was:

> "1. That all persons, without the supposed limitation, are liable to impeachment.
>
> "2. That in order to carry into effect the general intent of the Constitution, a Senator must be considered as a civil officer." [3]

Mr. Bayard, evidently understanding the difficulty of his position, admitted:

> "I shall not affect to disguise, that there are passages in the Constitution, the aspect of which is opposed to the opinion I state." [4]

With Article I, Section 6, Clause 2 opposing Bayard's position, he needed a novel approach, which he found by concentrating on the word "*under*" from Clause 2:

> "Now, it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be *under* it. Besides, a Senator does not derive his authority from the Government. The senatorial power is an emanation of the State sovereignties; it is coordinate with the supreme power of the United States; in its aggregate, it forms one of the highest branches of the Government. Giving every effect to this section, it would only prove that a Senator is not an officer *under* the Government of the United States, but still he may be an officer *of* the United States." [5]

Bayard chose "officer *of* the United States" due to the reference in **Article II, Section 4**. Bayard claimed that this section merely required that the President, Vice President and all civil Officers *of* the United States simply must be removed from office when impeached.

All others (Senators, Representatives, individuals, and military officers) are, by Bayard's theory, held to a lesser command by Article I, Section 3, Clause 7 that judgment shall not extend *further* than to removal from office (and disqualification to hold future offices).

In other words, the persons left unmentioned may simply be censured, i.e., they do not *have to* be removed from any office they may hold.

An oddity that presents itself from such a twisted view is that a private citizen who is impeached and convicted cannot obviously be *removed from office* as he does not have one. Therefore, he could only conjecturally be temporarily or permanently *disqualified* from some (or all) possible *future* offices. This counters Bayard's contention that non-specified persons are held to a *lesser* principle.

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3. Ibid, pg. 2251.
4. Ibid, pg. 2256.
5. Ibid, pg. 2258.

The most illogical of the extensions of Bayard's propositions is that if a Senator was an officer *of* the United States and not an officer *under* the United States; then officers *under* the United States have impeachment procedures different than officers *of* the United States.

Due to rule provided in **Article I, Section 3, Clause 7** ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit *under* the United States"), then the absence of such a rule for officers *of* the United States means they are not subject to similar disqualifications (they are simply removed from office).

If this were true, this would mean officers *of* the United States would always be eligible to *future* office (which would seem to limit much of the primary reason the President was denied the ability to *pardon* impeached officers).

Article II, Section 4 specifically listed the President, Vice President and all civil Officers of the United States as impeachable persons. Logic would dictate that when a list contained multiple parties, others not listed *would likely be excluded*: such as Senators, Representatives, private citizens, military officers, and officers of the separate States.

The President and Vice-President are not "civil officers" in the ordinary sense. The person elected to the office of the President has multiple capacities — he is also the *Commander-in-Chief* — the supreme *military* officer. With roles outside *civil* government, it was necessary to specifically list the President (and Vice President) in Article II, Section 4, as the term "civil office" would not necessarily include him (them).

Likewise, since legislative members have roles different from officers, they had to be specifically listed as ineligible from being Presidential *Electors* to be so excluded in the second portion of **Article II, Section 1, Clause 2**:

> "No Senator or Representative, *or* Person holding an *Office* of Trust or Profit under the United States, shall be appointed an *Elector*."

Clearly, Senators and Representatives are held in this clause as an alternative to persons "holding an *Office* of Trust or Profit under the United States".

If it was necessary to specifically list Senators and Representatives to prohibit them from being an Elector, it would seem logical and even lawfully necessary to likewise specifically list them as impeachable (especially considering they may be *expelled*).

On January 7, 1799, the Senate began to debate the **motion** the House issued initially, which was:

"That William Blount was a civil officer of the United States, within the meaning of the Constitution of the United States, and, therefore, liable to be impeached by the House of Representatives;

"That, as the Articles of Impeachment charge him with high crimes and misdemeanors, supposed to have been committed while he was a Senator of the United States, his pleas ought to be overruled." [6]

After several days of thorough discussion, the Senate decided the House's motion in the *negative*; meaning that the Senate *disagreed* with the position that a *Senator* was a civil *officer*.

On January 14th, the President of the Senate (the Vice-President of the United States, Thomas Jefferson) issued to following judgment:

"Gentlemen, Managers of the House of Representatives, and Gentlemen, Counsel for William Blount:

"The Court, after having given the most mature and serious consideration to the question, and to the full and able arguments urged on both sides, has come to the decision which I am now about to deliver.

"The Court is of opinion, that the matter alleged in the plea of the defendant is sufficient in law to show that this Court ought not hold jurisdiction of the said impeachment, and that the said impeachment is dismissed." [7]

The Court authoritatively concluded, by agreeing with Blount's plea, that legislative *members* are not *officers*.

Due to the impeachment of Senator Blount by the House of Representatives, it would appear that this House concluded they had proper authority to impeach him.

Numerous Representatives actually challenged the ability of the House to so impeach a legislative member. The House passed on the determination, reasoning that first they should determine *if* Blount *should* be impeached (for if not, the question was not yet *ripe*).

In other words, it was determined that it would be better to ignore the question of their ability to reach the person and concentrate on whether the actions of the accused warranted impeachment.

This question could only be fully determined by looking into the affairs and then voting for actual impeachment. With a vote for impeachment, it was conclusive that they *should* vote for impeachment.

Of course, once voting occurred showing that he *should* be impeached, he was impeached by that vote. In effect, they deferred the question to the Senate.

6. Ibid, pg. 2318.
7. Ibid, pg. 2319.

Contradictory Oath

Article I, Section 6, Clause 2 commands that:

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

Senators and Representatives yet take an oath to:

"well and faithfully discharge the duties of the *office* on which I am about to enter."

This command and oath are therefore mutually incompatible. The issue of a *member* today taking an *oath of office* therefore presents itself as a legal dilemma. When an action violates a principle, the action *must* succumb. A mere action of Congress necessarily yields to the superior commands of the Constitution when the two are at odds.

Unless, however, other factors come into play which keep the inferior action or rule from actually violating the supreme Rule. For the Oath not to violate Art. I:6:2, one of the following possibilities must be true:

1. The officer is not a "person".
2. The person subscribing to an oath of office will not actually hold an office.
3. The office they enter upon is not *under the United States*.
4. They are not actually a Member of either House.
5. The term of the office is not simultaneous with the Member's terms.
6. The commands of the Constitution can be superceded by mere legislative action with impunity.
7. The Constitution does not impose a distinction to sufficient degree between legislative members and executive/judicial officers; i.e., that a Congressman is a type of officer.
8. The wording of any particular Oath or Affirmation, being essentially meaningless and unimportant, is irrelevant.

The possibilities listed above are listed, not for a thorough discussion at this time, but in order to ponder under what circumstances an oath would not violate the commands of Article I, Section 6, Clause 2.

Option number 8 needs to be discussed to some degree now, because if true, further discussion later would be irrelevant and unneccesary.

Further study will show that oaths are not minor, trivial, or inconsequential relics of a bygone era, but that they are the fundamental starting point for the proper delegation of authority in representative government.

An indication of the importance of oaths and affirmations can be observed by their central prominence dealing with the delegation of authority to new members and officers.

The pertinent portion of **Article VI, Clause 3** of the Constitution mandates that:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by *Oath or Affirmation*, to support this Constitution."

This clause, coupled with the President's authority under Article II, Section 3 (to "commission all the Officers of the United States", with *commissions* involving such *oaths*), means that every person with any governmental authority must take such an oath or affirmation *before* exercising any governmental authority (or they are under the command of a superior who has).

The very *first* ***Act*** of the very *first* ***Session*** of the very *first* ***Congress*** (**Statute I, Chapter I)** was an act for the regulation of Oaths.

Section 1 of that first act prescribed to all members and officers (except the President, whose oath is specifically prescribed and fixed in Article II, Section 1, Clause 8 of the Constitution):

> "That the oath or affirmation required by the sixth article of the Constitution of the United States, shall be administered in the form following, to wit: '*I, A. B. do solemnly swear or affirm* (as the case may be) *that I will support the Constitution of the United States*'."

One does not find the wording about an "oath of office" given to the members of Congress. In **Section 5** of the 1789 act, however, a *separate* oath is provided for the *Clerk* of the House of Representatives (and the *Secretary* of the Senate):

> "That the secretary of the Senate, and the clerk of the House of Representatives…shall… each take an oath or affirmation in the words following, to wit: '*I, A. B. secretary of the Senate, or clerk of the House of Representatives* (as the case may be) *of the United States of America, do solemnly swear or affirm, that I will truly and faithfully discharge the duties of my said* ***office****, to the best of my knowledge and abilities*'."

The initial oath given by the House *Clerk* and Senate *Secretary* specifically and correctly acknowledged their positions as (legislative) officers holding offices. The Clerk is a *House* officer and the Secretary is a *Senate* officer — they are *legislative* officers — they are not *civil* officers, nor *government* officers in the proper sense of the term.

The House has no authority regarding the Secretary, as the Senate has no authority regarding the Clerk. Neither officer is *appointed* or *commissioned* by the President, nor is the Clerk *approved* by the Senate.

Article I, Section 5 makes each House independent of one another (though they act together to pass laws) and independent of the Executive. Each House, independently, determines its own rules, elects its own officers, and judges & expels its own members.

Delegation of Authority

To properly understand the importance of oath-taking, one must conceptually understand its purpose.

American government is but a delegation of authority *from* the people themselves to representatives elected by such people. The purpose for electing representatives in government is to enact laws according to delineated powers to better secure the inalienable rights of man. Government authority is used to protect persons and property from force and fraud within a framework of laws passed by legislatures who operate within confined parameters.

The delegation of authority must be provable to be fully legitimate.

In government, one should be able to trace any given *action* back to its proper *delegation of authority*. A break in a link in the chain of authority indicates a lack of delegation. Without proper delegation, there is improper authority.

Government is but a societal *contract* between Citizens and those members elected to their seats and to the officers elected or appointed to their offices.

The written Constitution was signed by the convention delegates who proposed it. The State convention deputies subscribed their signatures to documents confirming their ratification of the Constitution.

The other parties to the contract, the *direct* agents (the Representatives and the Senators), and the *indirect* agents (executive and judicial officers) must also agree to the contract for it to be fully valid.

The *oath* and *affirmation* to support the Constitution amount to the acceptance of members and officers to the express terms of the constitutional contract.

The oath and affirmation constitute express acceptance of the terms of the Constitution by those chosen to carry out its effect. As such, oaths and affirmations are vital and important aspects of the fundamental principle that all parties come to actual agreement before that agreement is valid and binding.

The *oath* and *affirmation* amount to an acceptance by members and officers to the express terms of the constitutional contract.

A study of government and history will show the fundamental importance of oaths. No governmental authority can be practiced until such oath or affirmation has been taken. This principle is very clearly stated in the Constitution in regards to the President. **Article II, Section 1, Clause 8** declares:

> "***Before*** he enter on the Execution of his Office, he shall take the following Oath or Affirmation..."

The oath, being mandatory while also easily performed, should theoretically be difficult to find an example of someone not fulfilling this requirement. Dishonest persons who have no intention of fulfilling such promises still would have no legal authority to do otherwise. Insincerity does not by itself give them power or means to do otherwise.

Insincerity of an oath does not by itself give one who has no intention to uphold such oath the power or means to do otherwise.

Government occasionally goes one step further than mere verbal promises. The principle of the *surety bond* is to provide assurance for the competent and honest performance of the duties of a position or office of special importance (often dealing with the handling of money). This requirement is more difficult to meet; therefore it is easier to find concrete examples of such requirement not being met and the repercussions of such inability to bond. The surety bond is the putting of legal teeth into the verbal oath; it is where "the rubber meets the road".

Nowhere is the importance of understanding constitutional principles more important than in dealing with money, since much of all human effort is directed at the acquisition of it (or its substitutes). The first coinage act passed by the Congress under the Constitution set up the government mint.

The **Act of April 2, 1792** (Volume I, Statutes at Large, Page 246) established a "mint for the purpose of a national coinage" and situated it at the "seat of the government of the United States" (Philadelphia, being then the Seat of the Government, was established as the site for the mint [the District of Columbia did not become the permanent Seat until 1800]).

Offices which were created by the act were listed in **Section 1** and the duties of such officers were listed in **Section 3**. Various mechanisms to ensure the officer's honest and capable execution of their offices followed.

Each and every officer, as well as the various clerks discussed in **Section 2**, were required in **Section 4** to take an *oath* or *affirmation* to "faithfully and diligently perform" their respective duties.

Talk is often cheap; in critical areas, more assurance is needed and is therefore required. **Section 5** of the Act went further and required that the Assayer, Chief Coiner, and the Treasurer become "bound to the United States of America, with one or more sureties" for the "faithful and diligent performance of the duties" of their respective offices in the sum of "ten thousand dollars" each.

Ten thousand dollars was then a very large amount of money — in fact it was twenty times greater than a good *annual* salary of the day. The Assayer and Chief Coiner received under the act an annual salary of $1,500; the Treasurer received $1,200.

The bonded amount was so large, in fact, that no officer could qualify. As the bond was a precondition for the striking of *lawful money* (as was also the taking of the oath or affirmation); without such bond, no silver or gold coins were allowed to be struck. No money was coined for the first two years after the act was enacted due to this problem.

As the intention of Congress was to coin money (with the least chance for fraud or incompetence), Congress eventually passed an Act in 1794 (I Stat. 341) that lowered the bonding requirements for the Assayer to $1,000 and the Chief Coiner to $5,000. The first silver coins (half-*dismes*) were finally struck in late 1794, gold in 1795 (copper cents, since they were not a legal tender, were coined in 1793 without the necessity of bonding).

An oath or affirmation is a solemn promise for some specified, competent action. Talk is cheap, however, and sometimes incompetence simply will not suffice. Law therefore often puts more teeth into the matter, and mandates that some public officials back up that promise with a performance bond. Just as the *jury trial* is the final bulwark against oppressive *laws*, so to are the *oath* and *bond* the final bulwark against oppressive *officials*.

Just as the *jury trial* is the final bulwark against oppressive *laws*, so to are the *oath* and *bond* the final bulwark against oppressive *officials*.

A claim against a government official which is ordered to be paid out of the bond will cause the company posting that bond to seek recovery from the officer bound by the bond. The bonding company has an extensive reach to that officer's assets and will seek and obtain recompense. This directly affects the pocketbook of the officer to give him *proper incentive* for competence and service.

Without that individual bond where the office requires it, the individual officer would be *unable* to *perform* in an *official capacity*.

The bonding requirement helps ensure honest, capable office-holders who have a vested interest in keeping their *customers* satisfied. Individual bonding of civil officers helped put the "service" in *government service*. A monetary performance bond ensures for proper performance.

As with many government practices, the oath remained unchanged from that passed by the First Congress until the Civil War era.

On **July 2, 1862**, an "*Act to prescribe an Oath of Office, and for other Purposes*" [8] was enacted by Congress. The new oath was to be taken and subscribed by:

> "every person elected or appointed to any *office* of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, excepting the President of the United States."

The "oath of office" wording followed, in part:

> *"I, A. B., do solemnly swear* (or affirm) *that I have never voluntarily borne arms against the United States since I have been a citizen thereof...And I do further swear* (or affirm) *that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."*

Only persons "elected or appointed to any *office* of honor or profit under the government of the United States" were required by the act to take this new oath.

The 38th Congress was the next new Congress to assemble after the said oath was enacted. "The oath prescribed by the Constitution of the United States, and *by the act of July 2, 1862*, was administered" to the Speaker, and by the Speaker to "the members elect".[9]

The act specifically applied only to *officers*; therefore *members* were under no obligation to subscribe to this particular oath.

Even after the 1862 act, it was officially acknowledged that members were not officers in a legal sense. Attorney General Benjamin Harris Brewster discussed the topic by stating:

> "Unquestionably the station of member of Congress (Senator or Representative) is a *public office*, taking these terms in a *broad* and *general sense*, and the incumbent thereof must be regarded as an *officer of the Government* in the same sense." [10]

Yet, on the very next page, he overrules this contention, stating that:

> "But it seems that a member of Congress is not an officer of the United States in the constitutional meaning of the term…clauses show a marked discrimination between members of Congress and officers; the latter term, in the sense in which it is there used, not including legislators."

A *broad and general sense* cannot be broad nor general when it counters a constitutional principle. It is certainly not "unquestionable" that a member of Congress is an officer in *any* sense when they are not an officer under the Constitution!

The calling of the *Seats* of the Senators and Representatives as *offices* does not make it so.

In that the Constitution separates legislative seats from government offices, a mere oath of office cannot create in the legislative seat an office.

In questions of constitutionality, the Constitution must, of course, prevail over a mere act passed by the Congress. When Congress attempts to pass a law which contravenes the Constitution, it is null and void, for no law passed by Congress can violate an express command or prohibition of the Constitution.

Of course, the catch is to know when the Constitution is actually contravened, and when other factors come into play which actually keep it from being violated. This is not as easy of a principle to understand as it might first appear.

To know what is unauthorized, however, one must first fully understand what is authorized. As there is much yet to cover to know what is authorized, the question of unauthorized action must be deferred for a later period of time.

It must be sufficient at present, unfortunately, to begin to make a list of items which are diametrically opposed to constitutional principles which flow from a logical progression of thought from the proper delegation of authority.

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8. Volume 12, Statutes at Large, pg. 502.
9. Volume 61, House Journal, pg. 11
10. Volume 17, Official Opinions of the Attorneys-General of the United States, page 419, 1882.

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