SPEECH

OF

HON. J. A. BAYARD, OF DELAWARE,

ON THE

BILL TO MODIFY THE JUDICIAL SYSTEM OF THE UNITED STATES.

DELIVERED

IN THE SENATE OF THE UNITED STATES, JANUARY 10, 1855.

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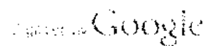

SPEECH

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Senate of the United States.

JANUARY 19, 1864.

THE VICE-PRESIDENT. The special order of the day, which is now before the Senate, is the resolution submitted by the Senator from Massachusetts, [MR. SUMNER,] which will be read.

The SECRETARY read it, as follows:

Resolved, That the following be added to the rules of the Senate:

The oath or affirmation prescribed by act of Congress of July 2, 1862, to be taken and subscribed before entering upon the duties of office, shall be taken and subscribed by every Senator in open Senate before entering upon his duties. It shall also be taken and subscribed in the same way by the Secretary of the Senate; but the other officers of the Senate may take and subscribe it in the office of the Secretary.

The VICE-PRESIDENT. To this resolution an amendment is offered by the Senator from Delaware, [MR. SAULSBURY,] to strike out all after the word "resolved," and insert the following:

That the Committee on the Judiciary be instructed to inquire whether Senators and Representatives in Congress are included within the provisions of the act of Congress entitled "An act to prescribe an oath of office, and for other purposes," approved July 2, 1862, and whether the said act is in accordance or in conflict with the Constitution of the United States.

The question being on agreeing to this amendment—

MR. BAYARD said:

MR. PRESIDENT: The resolution now before the Senate was proposed by the honorable Senator from Massachusetts [MR. SUMNER] in March last, and afterwards withdrawn. As I am the only member of the Senate present at this session who has not taken the oath, it is but a rational inference that the rule now proposed is intended to operate personally upon me, although I was sworn in at the special session and acted as a Senator, both on committees and in the Senate, since my re-election in March last, for the term of six years, ending on the 3d of March, 1869. In the objections, however, which I have to present to this proposed rule, I shall consider it without reference to any personal effect it may have upon my own action.

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but that two grounds do appear in the resolutions which were negatived by the Senate, and especially the one which I have stated as the most material; that a Senator is not a civil officer under the United States, and *therefore* cannot be impeached, and he neither expresses nor intimates any opinion for or against the correctness of the decision on this question.

The error of Judge STORY is one not uncommon with the compilers of legal treatises. Judge STORY himself expresses no dissent from the opinion; he states the facts as he supposed them to exist, but must have examined the authorities he cited with less than his usual care. There is no doubt the Senate was divided; there is no doubt that it was a subject on which different conclusions might be arrived at; but if there ever was a case to which the maxim *stare decisis* is applicable, it is precisely this decision. That decision involves the very question that a Senator is not a civil officer under the United States; and of course if not a civil officer he cannot hold a civil office under the United States. If such a precedent as that is not to control, acquiesced in as it has been for more than half a century without question, then no precedent can have weight in this body.

Let Senators reflect for a moment on the difference of importance in the the two cases. In the case in which the Senate decided on an impeachment they gave a construction to an article on the Constitution which prevented the future impeachment of any member of Congress, either of the House of Representatives or of the Senate. What I contend for now as the necessary result of the principle decided by the Senate in that case, is merely that where Congress meant to include the members of either body within any law, be it penal or otherwise, they must name them as members of Congress or as Senators and Representatives. All that is asked is that in the construction of any act of Congress the words "office" or "officer" shall be held to mean an office or officer within the language and meaning of the Constitution. This rule of construction has been adhered to in past legislation; and even at the same session in which the act under discussion was passed, in an act prescribing penalties in relation to obtaining contracts, the words "members of Congress" and "all officers of the Government" are used in contradistinction.

It will be recollected that at the time of the decision the Senate had among its members some of the ablest jurists of the country; and unless you entirely disregard judicial decisions it stands as the judgment of the court of the highest jurisdiction known to our laws. The question how great the majority is in a court, certainly cannot destroy the effect of its decisions. You would hold the Senate bound by it beyond all question if articles of impeachment were now preferred against any member of Congress; you would hold the Senate bound to dismiss the impeachment founded on the precedent established at that time and adhered to ever since, and as to which I hazard nothing in the assertion that no commentator on the Constitution has expressed his dissent from the propriety of the decision, though I freely

admit that minds differently constructed might have arrived, on a controverted question, at different conclusions.

I propose now to sustain by reference to the Constitution itself the determination made by the Senate in Blount's case as applicable to the present. The decision in Blount's case, it is said, was merely that a Senator was not impeachable. Not so, sir. The resolution adopted was that a Senator is not a civil officer, and *therefore* not impeachable. No other reason can be assigned for his not being impeachable. If he was a civil officer he must have been impeachable, because you find that in the clause of the Constitution which authorizes impeachment, section four of article two, it is provided that "the President, Vice President, and all civil officers, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Therefore the very question was in issue. There could be no doubt that if a Senator was a civil officer, holding a civil office under the United States, he might be impeached, and might be removed from office. The whole struggle throughout the argument on both sides was to show whether he was or was not a civil officer within the meaning of the Constitution.

Every one knows that the word "office" may be applied to a trustee, to an executor, even to the relation of a friend. The question to be determined in this case is whether the position, trust, and station of a Senator is a civil office, or an office within the meaning of the Federal Constitution. If the Federal Constitution does not characterize it as an office, and has excluded that term from its provisions in relation to members of Congress, then of course a law passed in pursuance of that Constitution, which does not name Senators and Representatives as included within it, must by necessary inference be held to exclude them.

Let us look at the different provisions of the Constitution to show that it is incompatible with the language used, to suppose that its framers intended to treat the station of a Senator as an office or as coming within the word "office." Take first the clause as to the executive powers vested in the President; the first section of article two:

"He shall hold his *office* during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

"He shall hold his office"—the language is plain and explicit—"during the term of four years." Turn to the second section, first article, of the Constitution, and you find:

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

So for the Senate:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years."

Why not use the same language as is applied to the President—"who shall hold their office for the term of six years"—if it was intended to treat it as an office under the Constitution?

"Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year.

If the position of a Senator was regarded as an office, why not say "the term of office of Senators of the first class shall expire at the expiration of the second year," &c.? The language used in reference to the President is that he shall hold his office for the term of four years.

But again the provision is:

"And if vacancies happen by resignation or otherwise during the recess of the Legislature of any State, the Executive thereof may make temporary appointments.

Why not "temporary appointments to office?" It is seduously shunned.

"until the next meeting of the Legislature, which shall then fill such vacies."

A vacancy in what? The word "vacancy" refers to the former word "seat;" to fill the vacancy in the seat. So you find throughout, that whereever a senator or representative is alluded to, the term "office" or "officer" is sedulously excluded, as applicable to him.

But, sir, there are other clauses more important than these, to which I shall now refer. In the second clause of the first article of section six it is provided that

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House of Congress during his continuance in office."

Can it be doubted that the words must have been "other office" if the Constitution meant to treat the station of a Senator as an office? Identity is incompatibility, and if the trust and station of a Senator is held to be an office it involves an absurdity in the language of the Constitution when providing that a person holding office shall not be a member of Congress.

Again, it is provided in article two, section one, that—

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Why should this language have been used in the Constitution unless it

was necessary to exclude senators and representatives from being electors by an express designation of them by name in addition to the words "person holding an office of trust or profit?" Does it not negative, is it not utterly inconsistent with the idea that a senator or representative holds an office under the United States, within the meaning of the Constitution? The men who framed the Constitution understood the meaning of language, and had they intended to treat the position and trust of a senator as an office, the intention would have been clearly expressed.

There are other clauses of the Constitution to which, if I were not so exhausted, I could refer in support of this construction, to show that throughout the whole instrument its framors sedulously avoid giving the appellation of "office" to the station and trust of a Senator; and not only that, but the language employed by fair inference excludes any idea that the terms "officer of the United States," or "holding office under the United States," were intended to include a Senator or Representative.

If that be so, I may be asked what is the position of a Senator. My answer is, a station, a trust, not an office within the meaning of the Constitution. It is perfectly immaterial what it might be considered otherwise. If the Constitution does not mean that they shall be considered officers, then the language "officers of the United States" will not include them, and the words "persons holding office under the United States" will not include them. This construction also is in accordance with the theory and form of our Government. It is a representative Government. The people are present, not in masses or in numbers, for that is impracticable, but it is the people who make the laws through their representatives or proxies, and members of Congress are the proxies of the people. That is their position. It is a high trust and station; but it is not, within the meaning of the Federal Constitution, an office under the United States.

Further, they are elected by a paramount power, the power that formed the Constitution—Senators by the Legislature, as representing the political community or State, and members of the House of Representatives by the people in districts, in each State, and not by the people of the United States. This view strengthens the inference that they are not included in any such expression as "officers of the United States" or "persons holding office under the United States."

This same idea is corroborated in part by Judge Story's own language in the portion of section seven hundred and ninety-one subsequent to that cited by the honorable Senator from Massachusetts. He does not question the decision made in Blount's case, but, speaking of the precedent, he says:

"The reasoning by which it was sustained in the Senate does not appear, their deliberations having been private."

He could hardly have adverted to the resolution that was negatived, or this passage would not have been written:

"But it was probably held that 'civil officers of the United States' meant

such as derived their appointment from and under the national Government, and not those persons who, though members of the Government, derived their appointment from the States or the people of the States. In this view the enumeration of the President and Vice-President as impeachable officers was indispensable; for they derive, or may derive, their office from a source paramount to the national Government. And the clause of the Constitution now under consideration does not even affect to consider them officers of the United States. It says 'the President, Vice-President, and *all civil officers* (not all *other* civil officers) shall be removed,' &c. The language of the clause, therefore, would rather lead to the conclusion that they were enumerated as contradistinguished from, rather than as included in the description of, civil officers of the United States. Other clauses of the Constitution would seem to favor the same result; particularly the clause respecting the appointment of officers of the United States by the Executive, who is to 'commission all the officers of the United States;' and the sixth section of the first article, which declares that 'no person *holding any office under the United States*, shall be a member of either House during his *continuance in office*;' and the first section of the second article, which declares that 'no Senator or Representative, or *person holding an office of trust or profit* under the United States, shall be appointed an elector.'"

If, on a question of impeachment, which goes to the construction of the Constitution, you cannot impeach a Senator or Representative because he is not a civil officer, though all civil officers are made impeachable by the Constitution, on what principle is it that in a law which prescribes an oath for all persons holding offices of trust or profit under the United States you can include members of Congress when they are not named?

Mr. President, there is one other authority to which I will refer, though I admit that it is only an authority inferentially. Early in the history of the country, on the 7th of May, 1792, an order was made by the Senate—

"That the Secretary of the Treasury do lay before the Senate, at the next session of Congress, a statement of the salaries, fees, and emoluments for one year ending the 1st day of October next, stated quarterly, of every person holding any civil office or employment under the United States, except the judges, together with the actual disbursements and expenses in the discharge of their respective offices and employments for the same period."

To that resolution, in February following, ALEXANDER HAMILTON made his return, and in that return of the persons holding civil offices under the United States, except the judges, he included the President, the Vice-President, all the different officers of the Government from tide-waiters upward; he included the Commissioner of Loans; he included persons holding every species of employment; he included officers of the Senate and officers of the House of Representatives with their emoluments; but he did not include members of Congress. What then is the inference? ALEXANDER HAMILTON was certainly, as a jurist, as one familiar with the language of the Constitution, and with the mode in which it ought to be interpreted, a man whose opinions would be entitled to great weight; and in obeying an order of the Senate, which required him to return the emoluments of all civil offices whatever, though he gave the officers of the Senate, the Secretary, all the clerks, the Doorkeeper, and also all the officers of the House of Representatives in the same way, he made no return of members of Congress, for the simple reason

that they did not, in the language of the resolution, hold a civil office under the United States.

There is still another authority. The articles of impeachment which were propounded against Blount by the House of Representatives consisted of five articles. They were drawn by one of the ablest lawyers of the country, Mr. SITGREAVES, who was chairman of the committee of impeachment. Each article, after alleging the act which was charged as a misdemeanor, concluded in this form—that it was contrary to the trust and station of a Senator. The House of Representatives did not venture in their articles of impeachment, formally drawn by so able a lawyer, to designate the position of a Senator as an office. Is that no authority? Is it not entitled to some weight? The articles were very skillfully drawn, with technical accuracy and precision in the statement of the alleged misdemeanor, and every article concluded with the allegation that the act was contrary to the duties of his trust and station as a Senator of the United States. Sir, that is the position of a Senator.

But, sir, it has been said that the oath is required, by the act of July 2, 1862, to be filed in both Houses of Congress, and, therefore, it is evident, though members of Congress are not included by name as Senators and Representatives, that it must have been intended to include them in the law. The words, however, are amply satisfied by the fact that you have officers, both in the Senate and House of Representatives, who must, under the provisions of that act, if constitutional, take the oath prescribed. The provision for recording it is entirely satisfied by its application to those officers. There is, however, from the language of this part of the act, reason to infer that the provision applied to the officers of each House, but not to its members. The language is, "which said oath so taken and filed shall be preserved among the files of the court, House of Congress, or Department to which the office may appertain." I do not think it can be held that the office of members of Congress appertains to the House of which they are members. It is at least singular phraseology. It may be appropriate to speak of your Secretary, your clerks, your Sergeant-at-Arms, as appertaining to the Senate; but scarcely appropriate to use the same language in reference to its members. At all events, the order or direction to file the oath is entirely satisfied by the fact that there are officers of each body who, if the law is valid, are required to take it. The exercise of either judicial or legislative powers does not necessarily constitute the person exercising them an officer. You have the illustration in the case of an English peer. The powers he exercises, both legislative and judicial, are quite equal and more than equal judicially to our own, yet it was never held that a peer of England was an officer of the Crown; nor would he be included in any law by the terms "officer," or "person holding an office of honor or profit."

Mr. President, I have now concluded my argument against the validity of the act of July 2, 1862, and the rule proposed under it. The oath prescribed in that act has been frequently designated as the "oath of loyalty;"