Chapter CLIV.[1]

REMOVAL OF OFFICERS.

1. A proposition to remove an officer a question of privilege. Section 35.
2. Instances of removal, arraignment, and investigation. Section 36.
3. In the Senate. Section 37.

35. A proposition to remove an officer of the House presents a question of privilege.

Instance wherein the Speaker, following a vote upon an essential question indicating a change in the party control of the House, announced that under the circumstances it was incumbent upon the Speaker either to resign or to recognize for a motion declaring vacant the office of Speaker.

A resolution declaring vacant the office of Speaker is presented as a matter of high constitutional privilege.

On March 19, 1910,[2] the House having declined by a yes and nay vote to sustain a decision[3] by the Speaker from which appeal had been taken, the Speaker[4] made the following statement:

Gentlemen of the House of Representatives: Actions, not words, determine the conduct and the sincerity of men in the affairs of life. This is a Government by the people acting through the representatives of a majority of the people. Results cannot be had except by a majority, and in the House of Representatives a majority, being responsible, should have full power and should exercise that power; otherwise the majority is inefficient and does not perform its function. The office of the minority is to put the majority on its good behavior, advocating, in good faith, the policies which it professes, ever ready to take advantage of the mistakes of the majority party, and appeal to the country for its vindication.

From time to time heretofore the majority has become the minority, as in the present case, and from time to time hereafter the majority will become the minority. The country believes that the Republican Party has a majority of 44 in the House of Representatives at this time; yet such is not the case.

The present Speaker of the House has, to the best of his ability and judgment cooperated with the Republican Party, and so far in the history of this Congress the Republican Party in the House has been enabled by a very small majority, when the test came, to legislate in conformity with the policies and the platform of the Republican Party. Such action of course begot criticism—which the Speaker does not deprecate—on the part of the minority party.

The Speaker can not be unmindful of the fact, as evidenced by three previous elections to the Speakership, that in the past he has enjoyed the confidence of the Republican Party of the country and of the Republican Members of the House; but the assault upon the Speaker of the House by the

[1] Supplementary to Chapter VII.

[2] Second session Sixty-first Congress, Record, p. 3436.

[3] For proceedings relating to this decision which was subsequently overruled by the House, see sec. 889 of this work.

[4] Joseph G. Cannon, of Illinois, Speaker.

minority, supplemented by the efforts of the so-called insurgents, shows that the Democratic minority, aided by a number of so-called insurgents, constituting 15 per cent of the majority party in the House, is now in the majority, and that the Speaker of the House is not in harmony with the actual majority of the House, as evidenced by the vote just taken.

There are two courses open for the Speaker to pursue—one is to resign and permit the new combination of Democrats and insurgents to choose a Speaker in harmony with its aims and purposes. The other is for that combination to declare a vacancy in the office of Speaker and proceed to the election of a new Speaker. After consideration, at this stage of the session of the House, with much of important legislation pending involving the pledges of the Republican platform and their crystallization into law, believing that his resignation might consume weeks of time in the reorganization of the House, the Speaker, being in harmony with Republican policies and desirous of carrying them out, declines by his own motion to precipitate a contest upon the House in the election of a new Speaker, a contest that might greatly endanger the final passage of a legislation necessary to redeem Republican pledges and fulfill Republican promises. This is one reason why the Speaker does not resign at once; and another reason is this: In the judgment of the present Speaker, a resignation is in and of itself a confession of weakness or mistake or an apology for past actions. The Speaker is not conscious of having done any political wrong. The same rules are in force in this House that have been in force for two decades. The Speaker has construed the rules as he found them and as they have been construed by previous Speakers from Thomas B. Reed's incumbency down to the present time.

Heretofore the Speakers have been members of the Committee on Rules, covering a period of sixty years, and the present Speaker has neither sought new power nor has he unjustly used that already conferred upon him.

There has been much talk on the part of the minority and the insurgents of the "czarism" of the Speaker, culminating in the action taken to-day. The real truth is that there is no coherent Republican majority in the House of Representatives. Therefore, the real majority ought to have the courage of its convictions, and logically meet the situation that confronts it.

The Speaker does now believe, and always has believed, that this is a Government through parties, and that parties can act only through majorities. The Speaker has always believed in and bowed to the will of the majority in convention, in caucus, and in the legislative hall, and to-day profoundly believes that to act otherwise is to disorganize parties, is to prevent coherent action in any legislative body, is to make impossible the reflection of the wishes of the people in statutes and in laws.

The Speaker has always said that, under the Constitution, it is a question of the highest privilege for an actual majority of the House at any time to choose a new Speaker, and again notifies the House that the Speaker will at this moment, or at any other time while he remains Speaker, entertain, in conformity with the highest constitutional privilege, a motion by any Member to vacate the office of the Speakership and choose a new Speaker; and, under existing conditions would welcome such action upon the part of the actual majority of the House, so that power and responsibility may rest with the Democratic and insurgent Members who, by the last vote, evidently constitute a majority of this House. The Chair is now ready to entertain such motion.

Thereupon, Mr. Albert S. Burleson, of Texas, offered as privileged the following resolution:

Resolved, That the office of Speaker of the House of Representatives is hereby declared to be vacant, and the House of Representatives shall at once proceed to the election of a Speaker.

The Speaker said:

The Chair desires to say this is a question of high constitutional privilege.

36. While the House may by simple resolution establish or abolish offices in its service, a joint resolution is required for such action affecting offices in the joint service of the House and Senate.

The effect of the adoption of such Resolution is automatically to separate from the service of the House on the date adopted incumbents of the offices affected.

Salaries already appropriated for such offices are thereby in effect covered back into the Treasury.

It is within the power of the officers of the House to remove at will employees subject to appointment by them, and to refrain from appointing their successors.

One Congress may not, even by statute, provide officers or employees for the service of its successor. One House may continue the tenure of an officer after the Congress for which he was appointed has expired, but a subsequent House may remove such officer and appoint another in his stead.

On May 9, 1911,[1] Mr. John C. Floyd, of Arkamsas, from the Committee on Accounts, submitted a report[2] on a resolution declaring vacant on May 15, 1911, certain offices and employments in the service of the House. In the course of this report the committee includes the following discussion of the rights of the House in providing for its service:

> [The] House of Representatives has constitutional power at will to dispense with offices in its own service and to create other offices it may deem necessary by simple resolution of the House regardless of what the House in a previous Congress may have provided for its own service either by statute or resolution. Therefore we recommend the adoption of a simple resolution declaring certain offices vacant on and after May 15, 1911, and another resolution substituting therefor certain new offices, fewer in number.

As to the effect of such resolutions upon incumbents of offices affected, the report holds:

> The effect of the adoption of this resolution will be to separate on said date from the service of the House the present incumbents of the offices made vacant and to abolish such offices.

On the question of salaries in such cases, the report holds:

> The salaries already appropriated for such offices for the balance of this fiscal year, ending June 30, 1911, and for the entire fiscal year ending June 30, 1912, will be covered back into the Treasury; in fact, they will not be withdrawn from the Treasury, for the Clerk of the House, in executing the resolution, will not make requisition on the Secretary of the Treasury, and consequently no warrant willissue. The Clerk's annualreport of expenditures will show unexpended balances for the remainder of the present and for the whole of the next fiscal year under the heading "Salaries, officers, and employees." Then, at the ensuing regular session, when the legislative appropriation bill is formulated for the fiscal year ending June 30, 1913, the salaries of the offices now made vacant will be, in accordance with the resolution, omitted altogether from the bill. This method your committee recommenda. It is direct, and admits of no delay in its execution. Then, if thought necessary or advisable, the House may follow up this action and leisurely pass a joint resolution repealing the provisions of the legislative, executive, and judicial appropriation acts of June 17, 1910, and March 4, 1911, making appropriations for the specific offices in question. This course was suggested instead of that we recommend as being the only legalmethod whereby the House may act in the matter. But we are convinced that it is perfectly competent for the House to follow the method first outlined. Moreover, concurrence of the Senate and the approval of the President is necessary for the passage of a joint resolution, and that body may not act at once, if it acts at all.

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[1] First session Sixty-second Congress, Record, p. 1148.

[2] House Report No. 25.

Relative to the power of the House to create and discontinue the services of its own officers, the report further says—

Is is inconceivable that the House can not independently of both the Senate and President regulate its internal affairs to the extent of abolishing and creating its own offices and employees. Because a former House chose to maintain and appropriate for certain offices in the service of the House is no good reason why this present House should be bound by that action, any more than that the rules of the last Congress are orshould be the rules of this Congress. Under the Constitution each House may determine the rules of its proceedings. (Art. I, see. 5, par.).

The Constitution (Art. 1, see. 2, par. 5) also declares: "The House of Representatives shall choose their Speaker and other officers."

The rule of the House (Rule II) provides that each officer elected by the House "shall appoint all of the employees of his department provided for by law." Judge William Lawrence, for many years Comptroller of the Treasury, and a Member of this House, whose legal learning and experience made him an authority on questions of constitutional and parliamentary law, in commenting on this rule (which has been the rule for many yews), said:

"It is well settled that when authority is granted to a designated officer to appoint any person in his discretion to an office, and the law does not give the incumbent a right to hold the same for any specified period, the power of removal and of filling the vacancy thereby made is incidental to the authority to appoint." (Judge Lawrence cited 2 Story Const., 4th ed., par. 1537. First Comptroller's Decisions, Vol. V, p. 4.)

We believe that according to this principle it would be entirely within their power for the Speaker, the Clerk, the Sergeant-at-Arms, and the Doorkeeper to remove from office the incumbents of the offices now in question, and to refrain from appointing their successors. The object sought could thus be accomplished in a very simple way. But we believe the transaction should be by order of the House and publicly recorded, as we propose.

Judge Lawrence, in the same decision, says:

"The Revised Statutes (sec. 53) have created certain officers of the House. But each House has power to appoint other officers of its own creation, and to remove, and even to refuse to employ those provided for by a statute of a previous Congress. The right to create appropriate offices, and to appoint officers, is given by the Constitution, and can not be taken away by a statute not assented to by the Congress affected thereby. A right or power given by the Constitution can not be taken away by a statute."

And further on in the same decision:

"* * * the House of the Forty-seventh had no power to provide a Speaker or any other officer of the House of the Forty-eighth Congress, because the Constitution gives to the House of each Congress the sole, uncontrolled, and independent power to choose and remove all its own officers at pleasure. Even a statute enacted by the Fortyseventh Congress could not take from the House of the Forty-eighth Congress its power to choose all its own officers. Such statute would be void. This appears so clearly by the words of the Constitution that no argument seems necessary to prove it. Neither the House of the Forty-seventh Congress, nor even a statute, could continue Grayson in office during any part of the Forty-eighth Congress against the choice or direction of the House of the latter Congress. If this could be done, a Speaker could equally, by the same forms, be imposed on the present House. The attempt to do so would be absurd."

The case under discussion at that time and decided by Judge Lawrence January 11, 1884 (1–48), was that of Davidson, appointed to succeed Grayson, whose employment by name was authorized by a resolution adopted by the House in the Forty-seventh Congress, known as "House appointees' case," and the question raised was as to "the authority of the House of Representatives of one Congress to remove a person holding his appointment under a statute enacted by or under color of a resolution of the House of a prior Congress." The syllabus, paragraphs 5 and 6, says:

"An act of Congress may continue the existence of such office or employment for either House of Congress, and may provide for the payment of the officer or employee so appointed, even after the Congress during which he was appointed has expired.

"But the House of Representatives of a subsequent Congress may remove any officer or employee so continued, and appoint another in his stead, or, by rule, authorize any proper officer to do so."

This decision has not been reversed by any succeeding comptroller.

It will be observed that Judge Lawrence throughout applies the term "officers" to other than those elected by the House, i.e., those commonly called "employees." In this he seems to have been fully justified and sustained.

Again, in Ordway's cam, Judge Lawrence, comptroller, says:

"The House resolution of June 18, 1878, does not per se give a continuing authority to select or employ a person to prepare an index. It could not give authority to a committee of a subsequent House." (First Comptroller's Decisions, Vol. IV, p. 529.)

Your committee adopts the view so clearly expressed by Judge Lawrence that each House has power to remove, and even refuse to employ, officers provided for by a statute of a previous Congress, and that each House has the sole, uncontrolled, and independent power to choose and remove all its own officers at pleasure, and therefore recommends that certain officers be declared vacant.

37. Instance wherein the Senate by resolution removed its Sergeant at Arms.

An officer of the Senate being charged with authorship of a magazine article prejudicial to the reputations of Members of Congress, was suspended pending an investigation

In response to charges made in open session, an officer of the Senate appeared voluntarily at the bar and being arraigned declined counsel.

In arraigning one of its officers the Senate declined to require that questions be reduced to writing, and elected to interrogate him orally.

The Senate having dismissed its Sergeant at Arms for cause, declined to take further punitive action.

On the removal of the Sergeant at Arms, the Deputy Sergeant at Arms succeeded to the duties of the office as Assistant Sergeant at Arms, without action by the Senate.

On February 3, 1933,[1] Mr. James E. Watson, of Indiana, rising in the Senate, called attention to an article appearing in the current number of a magazine under the title "Over the Hill to Demagoguery" and purporting to be written by David S. Barry, Sergeant at Arms of the Senate, from which he read the following excerpt:

Contrary, perhaps, to the popular belief, there are not many crooks in Congress, that is, out-and-out grafters or those who are willing to be such. There are not many Senators or Representatives who sell their vote for money, and it is pretty well known who those few are.

Mr. Watson alluded to the long service of the Sergeant at Arms in that capacity and his previous experience as a newspaper correspondent, and moved that he be brought before the Senate for the purpose of answering under oath such questions as might be asked him touching the article, and be afforded an opportunity of offering such explanation as he might desire to make in that connection.

The President pro tempore[2] entertained the motion, as privileged, and it was unanimously agreed to.

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[1] Second session, Seventy-second Congress, Record, p. 3269.

[2] George H. Moses, New Hampshire, President pro tempore.

Whereupon Mr. David A. Reed, of Pennsylvania, being recognized, said:

I observe that Mr. Barry is now in the Chamber. I move that the oath be now administered to him by the Presiding Officer.

The motion being put was decided in the affirmative, when the President pro tempore said:

This is a unique proceeding. The Senate is about to put on hearing one of its officers. The oath is about to be administered to that officer under a vote of the Senate. The manner of proceeding with the hearing is wholly unknown to the Senate. It has occurred to the Chair that at least the matter of procedure might be referred to the Committee on Rules, so that the Senate might establish a precedent in the event that hereafter some of its officers should possibly transgress the proprieties.

No action was taken on the suggestion of the President pro tempore relative to reference of the matter to the Committee on Rules, and following brief debate on procedure, the President pro tempore announced:

The Chair is about to administer the oath to the Sergeant at Arms.

Sergeant at Arms Barry rose and raised his right hand. The President pro tempore administered the oath:

You do solemnly swear, in reference to the cause now on hearing before the Senate, that you will tell the truth, the whole truth, and nothing but the truth, so help you God?

The President pro tempore then asked:

Does the Senate ask that any time be given Mr. Barry in which to consider his answer?

Mr. William E. Borah, of Idaho, responded:

Mr. President, I suggest that Mr. Barry state whether or not he desires to proceed at this time. If he desires time to consult counsel, the Senate ought to give it to him. After that we can determine how we will question him, if he does not desire time.

The President pro tempore rejoined:

Very well; the Senate will hear the Sergeant at Arms.

The Sergeant at Ams said:

I have no desire to have counsel. There is no real explanation to make. The article stands for what it says. Any further statement that is desired I will be glad to make about it, but I have no desire to make one.

Mr. Henry F. Ashurst, of Arizona, moved that all questions propounded to the Sergeant at Arms be submitted in writing.

The motion was rejected.

Whereupon, the President pro tempore announced:

The Chair assumes that the Senate for the minute has resolved itself into a court of inquiry, and, having rejected the motion of the Senator from Arizona that questions to the Sergeant at Arms be propounded in writing, the Chair holds that any Senator may rise and orally propound to the Sergeant at Arms any question which he has in mind.

Various Senators propounded questions, all of which were answered by the Sergeant at Arms. At the conclusion of the examination, Mr. Reed said:

Mr. President, it is perfectly clear that Mr. Barry has charged some of the Members of the Senate and some of the Memebers of the House with bribery. It is also clear that he says under

oath that that charge is unsupported by any evidence, and that he is unable to give the name of any Senator or any Member of the other House whom he knows or believes to be guilty of bribery. I move that the Sergeant at Arms be suspended from office until further action of the Senate; and that at 4 o'clock on February 7 the Senate proceed to final disposition of this matter.

Mr. George W. Norris, of Nebraska, proposed as a substitute:

That David S. Barry be, and he is hereby, removed from the office of Sergeant at Arms of the Senate.

The question being taken on the substitute, and the yeas and nays being ordered, the substitute was rejected—yeas 31, nays 40.

The President pro tempore submitted the pending question as follows:

The Chair understands the question before the Senate to be this: The Senator from Pennsylvania has moved that the Sergeant at Arms be suspended from office until further action of the Senate and that at 4 o'clock on Tuesday, February 7, the Senate proceed to the final disposition of the matter, in the meantime the whole subject to be referred to the Committee on the Judiciary.

The motion was agreed to.

Mr. Thomas J. Walsh, of Montana, sent to the desk the following resolution which, on his request, was received and referred to the Committee on the Judiciary:

Resolved, That the proceedings of the Senate this day had in the matter of the Sergeant at Arms be certified to the district attorney of the District of Columbia with a view to prosecution under section 38 of title 6 of the Code of the District of Columbia, as follows: "Whoever publishes a libel shall be punished by a fine not exceeding $1,000 or imprisonment for a term not exceeding five years, or both." And also to the district attorney for the southern district of New York for appropriate action by him.

No further action on the resolution appears.

On February 7,[3] Mr. Norris, rising to submit a privileged report from the Committee on the Judiciary, said:

The Committee on the Judiciary have had under consideration the matter which the Senate referred to them regarding what action, if any, should be taken upon the case of the Sergeant at Arms for the writing of an article published in the February issue of the New Outlook. After due consideration the committee have directed me to report to the Senate that we recommend to the Senate the adoption of the resolution which I send to the desk.

The Clerk read the resolution as follows:

Resolved, That David S. Barry be, and he is hereby, removed from the office of Sergeant at Arms, and Doorkeeper of the Senate.

After debate, Mr. Otis F. Glenn, of Illinois, offered this substitute:

Whereas David S. Barry, when Sergeant at Arms of the Senate, caused to be published in the New Outlook, a magazine of general circulation, an article which reflects upon the integrity of Members of both Houses of the Congress;

Whereas upon a hearing the said Barry admits he does not have in his possession any facts substantiating such statements made in said article;

Whereas the said article impugns the honor of the Members of Congress;

Resolved, That such conduct upon the part of an employee of the Senate be, and the same is hereby, condemned; and the fact that Mr. Barry has in the Senate and before the committee

[3] Record, p. 3511.

repeatedly disavowed any intention of reflecting upon the honor of the Congress makes any further punishment unnecessary.

Further resolved, That said David S. Barry be, and he is hereby, reinstated as Sergeant at Arms of the Senate.

The question being put, and the yeas and nays being ordered, the yeas were 15, the nays were 56, and the substitute was not agreed to.

Mr. L. J. Dickinson, of Iowa, moved as a substitute for the pending resolution:

That the pending resolution be referred to the Committee on Rules, with power to reconsider the complaint against Sergeant at Arms David S. Barry, to reinstate, reprimand, or dismiss said official of the Senate.

The question being taken, on a yea and nay vote, there were 10 yeas and 58 nays and the substitute was rejected.

The question recurring on the original resolution, and being taken by yeas and nays, there were yeas 53, nays 17, the resolution recommended by the Committee on the Judiciary was adopted, and the Sergeant at Arms was removed from office.

Thereupon, J. Mark Trice, the Deputy Sergeant at Arms, automatically succeeded to the duties of the office without action by the Senate and for the remainder of the session executed official papers as "Deputy Sergeant at Arms."