

Chapter V.

THE OATH.

1. Provisions of the Constitution and statutes. Sections 127, 128.¹
 2. Form of at organization of First Congress. Section 129.
 3. Administration to the Speaker. Sections 130–133.²
 4. Limited discretion of the Speaker in administering. Sections 134–139.³
 5. Challenging the right of a Member to be sworn. Sections 140–150.⁴
 6. Disposal of cases of challenge. Sections 151–159.
 7. Delays in taking the oath. Sections 160–161.
 8. Administration before arrival of credentials. Sections 162–168.⁵
 9. Administration to Members away from the House. Sections 169, 170.
 10. Relations to the quorum, reading of the Journal, etc. Sections 171–181.
 11. Status of the Member-elect before taking. Sections 183–185.⁶
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127. Senators and Representatives are bound by oath or affirmation to support the Constitution.—Article 6 of the Constitution provides:

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; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

128. The Member's oath, its form, and the constitutional requirement.—The Constitution, in article 6, provides that “the Senators and Representatives * * * shall be bound by oath or affirmation, to support this

¹The iron-clad oath. (Secs. 449, 455 of this volume.) Senate declines to permit administration of the oath until after choice of a President pro tempore. (Sec. 118 of this volume.)

²See also sections 81, 232, and 233 of this volume. Oath administered to Speaker by Member oldest in continuous service. (Sec. 220 of this volume.)

³The Speaker consults the House as to administering the oath in doubtful cases. (Secs. 396, 519, 520 of this volume.) In later practice oath is administered to Delegates. (Secs. 400, 401 of this volume.) Right of a contestant to be sworn is complete as soon as his case is decided favorably. (Secs. 622, 623 of this volume.)

⁴The procedure in challenging the right of Brigham H. Roberts to be sworn. (Sec. 474 of this volume.)

⁵Instance wherein a Member-elect did not present his credentials pending a contest. (Sec. 44 of this volume.)

⁶The oath as related to qualifications. (Chap. XIV, Secs. 441–463 of this volume.)

Constitution;” and the statutes direct that “at the first session of Congress after every general election of Representatives the oath of office shall be administered by any Member of the House of Representatives to the Speaker; and by the Speaker to all the Members and Delegates present, and to the Clerk, previous to entering on any other business; and to the Members and Delegates who afterwards appear, previous to their taking their seats.”¹

The oath is also prescribed by the statutes,² in the following form:

I, A B, do solemnly swear (or affirm) that 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.

129. At the organization of the first House an order prescribed the oath to be taken by Members until a law should be enacted.

Administration of oath to Members and Clerk in the First Congress.

On April 6, 1789,³ it was, on motion—

Resolved, That the form of oath to be taken by the Members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: “I, A B, a Representative of the United States in the Congress thereof, do solemnly swear (or affirm, as the case may be), in the presence of Almighty God, that I will support the Constitution of the United States. So help me God.”

On April 8, in accordance with an order adopted on the previous day, the chief justice of New York attended and administered the oath, first to Mr. Speaker in his place, and then to the Members.⁴

On April 6, previous to adopting the form of oath, leave had been granted to bring in a bill to regulate the taking the oath. This was the first bill to become a law, the President affixing his signature June 1, 1789.⁵

On June 2 the Speaker administered the oath required by the act to Members who had not taken a similar oath, and to the Clerk.⁶

130. The act of 1789 provides that at the organization of the House and previous to entering on any other business the oath shall be administered by any Member to the Speaker and by the Speaker to the other Members and the Clerk.—Section 30 of the Revised Statutes, reenacting the act of June 1, 1789, provides:

At the first session of Congress after every general election of Representatives, the oath of office shall be administered by any Member of the Home of Representatives to the Speaker; and by the Speaker

¹ Revised Statutes, section 30.

² Revised Statutes, section 1757. The requirements of section 1759 of Revised Statutes in regard to the preservations of the oaths are not observed in regard to Members or Delegates or the elected officers of the House. In the Senate, however, the practice has varied, the subscribing of the oath being required at times. (First session Forty-eighth Congress, Record, p. 171.)

³ First session First Congress, Journal, p. 7. (Gales and Seaton ed.)

⁴ Journal, p. 11.

⁵ Journal, p. 43.

⁶ Journal, p. 44.

to all the Members and Delegates present, and to the Clerk, previous to entering on any other business; and to the Members and Delegates who afterward appear, previous to their taking their seats.¹

131. It has long been the practice for the Member of longest continuous service to administer the oath to the Speaker.—On December 22, 1849,² the oath was administered to Speaker Howell Cobb by Mr. Linn Boyd, of Kentucky, the oldest Member. The Speaker descended from his seat to take the oath.³

132. On December 5, 1853,⁴ the oath of office was administered to Mr. Speaker Boyd by Mr. Joshua R. Giddings, of Ohio, “the oldest consecutive Member of the House.”

133. On February 1, 1860,⁵ Mr. John S. Phelps, of Missouri, “the oldest consecutive Member of the House,” administered the oath to Mr. Speaker Pennington.

134. The Speaker possesses no arbitrary power in the administration of the oath, and if there be objection the majority of the House must decide.—On January 24, 1871,⁶ Mr. P. M. B. Young, of Georgia, presented the credentials of Stephen A. Corker, of the Fifth Congressional district of Georgia, and asked that the oath be administered to him.

Mr. Benjamin F. Butler, of Massachusetts, objected to the administration of the oath.

Mr. James Brooks, of New York, made the point of order that, when credentials in regular form were presented, they did not form a subject of discussion.

The Speaker⁷ said:

In the organization of the House Members who have credentials from the governors of their respective States are entered upon the Clerk’s list, and no man is prejudiced, of course. The House is organized upon the list so made up. But gentlemen coming subsequently are sworn in by the Chair, if there is no objection. The Chair administers the oath in cases where there is no objection; but if there be objection, of course it is a matter which must be determined by the majority of the House. The Chair possesses no arbitrary power in the matter whatever. It is a matter which must be determined by a majority of the House. If it were previous to the organization of the House, of course the gentleman’s credentials would be entered on the Clerk’s list and he would be sworn in with the other Members.

¹ Statutes at Large, p. 23, gives the form of oath at that time as follows: “I, A B, do solemnly swear or affirm (as the case may be), that I will support the Constitution of the United States.”

On January 21, 1884, the House passed the bill (H.R. 3926) repealing the act of July 2, 1862, and such sections of the Revised Statutes of the United States as perpetuated the oath prescribed in that act. This was the repeal of the “test oath,” so called. The bill became a law. (First session Forty-eighth Congress, Journal, pp. 375, 1233; Record, pp. 551, 1420.) On July 27, 1867 (first session Thirty-ninth Congress, Journal, p. 1168; Globe, pp. 4267–4273), the House laid on the table by a vote of 87 to 31 a joint resolution of the Senate for the purpose of allowing David T. Patterson, of Tennessee, to take his seat in the Senate without taking the whole of the test oath required by law.

The subject of subscribing to the oath by Senators and Representatives was discussed somewhat in the Senate on December 19, 1883, when a rule was adopted to enforce the provisions of the Statute. It was stated in the debate that Senators had not until recently subscribed to the oaths. (First session Forty-eighth Congress, Record, p. 171.)

² First session Thirty-first Congress, Globe, p. 67.

³ But this is not the present practice. The Speaker stands in his place at his desk, while the Member administering the oath stands in the area in front of the Clerk’s desk.

⁴ First session Thirty-third Congress, Globe, p. 2.

⁵ First session Thirty-sixth Congress, Journal, p. 165; Globe, p. 655.

⁶ Third session Forty-first Congress, Globe, p. 703.

⁷ James G. Blaine, of Maine, Speaker.

135. If a Member object the Speaker does not administer the oath to a Member-elect without the direction of the House, even though the credentials be regular in form.—On September 10, 1850,¹ Mr. Linn Boyd, of Kentucky, presented the credentials of Edward Gilbert and George W. Wright, Member-elect from the State of California. Mr. Boyd stated that the Members-elect were present and were ready to take the usual oath.

Mr. Abraham W. Venable, of North Carolina, objected to the administration of the oath, and moved that the credentials be referred to the Committee of Elections.

Mr. James Thompson, of Pennsylvania, made the point of order that it was the duty of the Speaker to administer the usual oath upon the presentation of their credentials.

The Speaker² decided that, inasmuch as the fifth section of the first article of the Constitution constituted “each House the judge of the elections, returns, and qualifications of its own Members,” whenever objection was made it was the duty of the House, and not of the Speaker, to determine whether or not the oath should be administered. He therefore overruled the point of order.

Mr. Thompson having appealed, the appeal was laid on the table.

136. On July 3, 1867,³ after the organization of the House, the credentials of eight Members from Kentucky were presented and the gentlemen presented themselves to be sworn.

Mr. Robert C. Schenck, of Ohio, at this point presented a protest against the administration of the oath to one of the gentlemen, Mr. John D. Young, on the ground that he had been disloyal to the Government during the war.

Mr. Charles A. Eldridge, of Wisconsin, having raised a question of order, the Speaker⁴ said:

The Chair rules, in accordance with the uniform usage of the present occupant of the chair and of every occupant of the chair, that it is for the House to determine what action it will take when a gentleman, claiming to have been elected a Representative, presents himself to be sworn. It is for the House to determine.

Later the Speaker referred, in support of his ruling, to the precedent of July 24, 1866, when Mr. William B. Stokes, of Tennessee, was challenged when he appeared to take the oath, and his credentials were referred to the Committee on Elections.

137. On March 7, 1867,⁵ Mr. William E. Niblack, of Indiana, presented the credentials of A. B. Greenwood, claiming a seat as a Member from Arkansas, and moved that the same be referred to the Committee on Elections.

Mr. Thaddeus Stevens, of Pennsylvania, moved that the credentials be laid on the table, and the motion was agreed to.

A question being made as to whether or not Mr. Greenwood might not be sworn in on the presentation of the credentials, the Speaker⁴ said that the oath would not be administered if there was objection, and that objection had been indicated by the motion to lay on the table.

¹ First session Thirty-first Congress, Journal, p. 1442; Globe, pp. 1789, 1790.

² Howell Cobb, of Georgia, Speaker.

³ First session Fortieth Congress, Globe, pp. 470, 471.

⁴ Schuyler Colfax, of Indiana, Speaker.

⁵ First session Fortieth Congress, Journal, p. 21; Globe, p. 25.

138. On December 6, 1869,¹ at the beginning of the second session of the Congress, a question being raised as to the administration of the oath to certain Members, Mr. Speaker Blaine said:

The Chair did not propose to administer the oath to any gentleman to whose admission a single Member on the floor might make objection. The usage has always been, when there was no objection, to allow a Member to be sworn in without any further ceremony.

139. In 1866 the Speaker declined to administer the oath to persons whose credentials were regular, but who came from States declared by the two Houses not entitled to representation at the time.—On July 23, 1866,² Mr. Lawrence S. Trimble, of Kentucky, proposed, as a question of privilege, that the oath be administered to Messrs. N. G. Taylor, J. W. Leftwich, and Edward Cooper, Members-elect from the State of Tennessee.

The Speaker³ said:

The Constitution does declare that each House shall be the judge of the elections, returns, and qualifications of its own Members; but the House of Representatives has decided, with the concurrence of the Senate, that certain States, not represented during the last four years in the Congress of the United States, shall not be entitled to representation again until by concurrent action of both branches they shall be declared to be entitled to representation. The House therefore declared it had no constitutional right so to judge. The Chair overrules the demand that the gentlemen claiming seats from Tennessee shall be sworn in.

Mr. Trimble having appealed, the appeal was laid on the table—yeas 119, nays 30.

140. The Members-elect having denied to certain of their number a right to participate in the organization, the Speaker declined, without instruction of the House, to administer the oath to those thus debarred, although they presented certificates in proper form.

In 1839 the House refused to direct the Speaker to administer the oath to certain persons having regular credentials as Members-elect, and as organ of the House he declined to administer the oath.

In 1839 the House declined to adopt rules until the Members had been sworn in according to the Constitution and law of 1789.

On December 9, 1839, at the organization of the House,⁴ when the clerk, in calling the roll, had reached the State of New Jersey and had called the name of Mr. Joseph F. Randolph, he paused and explained that as to the other five members from that State there was conflicting evidence as to who were entitled to the seats. Messrs. John B. Aycrigg, John P. B. Maxwell, William Halstead, Charles C. Stratton, and Thomas J. Yorke had certificates from the governor of the State. On the other hand, the Clerk had in his possession certificates from the secretary of state of New Jersey showing that Messrs. Philemon Dickerson, Peter D. Vroom, Daniel B. Ryal, William R. Cooper, and Joseph Kille had received the greatest number of votes.⁵ The controversy over these New Jersey seats was prolonged until December

¹ Second session Forty-first Congress, Globe, p. 9.

² First session Thirty-ninth Congress, Journal, pp. 1088, 1089; Globe, pp. 4055, 4056.

³ Schuyler Colfax, of Indiana, Speaker.

⁴ First session Twenty-sixth Congress, Globe, pp. 1, 30, 56, 48; Journal, p. 80.

⁵ Section 31, Revised Statutes, under which the Clerk is now directed to place on the roll such Members as have credentials showing them to be regularly elected, is made up of laws passed in 1863 and 1867, dates later than the events above recorded.

16 before a Speaker was elected. In the election of Speaker the contestants on neither side voted, the other Members present having formally voted that the five holding the governor's certificate should not vote. The Speaker having delivered his address and the Journal of the previous session having been read, Mr. George C. Dromgoole, of Virginia, moved that the rules of the last House be adopted as the rules of the present House. Mr. Lewis Williams, of North Carolina, moved that this motion lie on the table until the "Members of the House shall have been sworn into office, as required by the Constitution, and by the act of June 1, 1789."¹ This motion was carried by a vote of 117 yeas to 116 nays, the Speaker voting aye. In the debate the point was made that under the law of 1789 the oaths should be administered to Members before business could begin.

The oaths having been administered to all the Members and Delegates, the Speaker² informed the House³ that the five gentlemen from New Jersey holding the governor's certificate had presented themselves at the desk and demanded to be sworn into office. The Speaker further stated that, in consequence of the proceedings which had already taken place in relation to the rights of these gentlemen to seats in this House and which were to be found in the Journals, he had declined to administer to them the oath of office, although his own opinion, heretofore expressed in another situation that they were entitled to qualify, was unchanged. He therefore submitted their demand to be sworn to the House.

Various motions having been submitted and withdrawn during several days of debate, on December 20 Mr. George Evans, of Maine, finally offered the following:

Resolved, That the Representatives of the Twenty-sixth Congress of the United States now present do advise and request the Speaker to administer the oath required by law to the five gentlemen from the State of New Jersey who have presented their credentials to the Speaker and demanded to be sworn.

This resolution was defeated, yeas 112, nays 116.⁴ In the course of the debate⁵ the case of Mr. Landon (Lanman), in the Senate of 1825,⁶ was referred to; also the case of Claiborne and Gholson in 1837,⁷ in the House. The Speaker, in the course of the debate,⁸ said that in regard to the duty of the Chair in swearing in the New Jersey Members he would say that he was merely the organ of the House, and whether it was a House de facto or de jure was not a question for him to decide; but being its organ, he was bound to carry out the decisions that it had made and which were staring him in the face.

Mr. John Quincy Adams, during the debate, contended⁸ that it was not competent for the House to entertain the previous question or any other motion while the question of the right of the New Jersey Members to be sworn was pending.

¹ Now section 30, Revised Statutes.

² Robert M. T. Hunter, of Virginia, Speaker.

³ Journal, p. 87.

⁴ Journal, p. 92.

⁵ Globe, p. 59.

⁶ This occurred March 4, 1825. See *Contested Elections in Congress, 1789 to 1834*, p. 871.

⁷ First session Twenty-Fifth Congress, Journal, pp. 3, 4, 71, 91, 106, 110, 117, 137, 139. The election of these men was questioned at the organization, but they were sworn in.

⁸ Globe, p. 65.

Mr. Evans's resolution having been defeated, a resolution adopting rules was agreed to,¹ and then the organization of the House was completed by the election of a Clerk and other officers. The cases of the New Jersey Members were referred to the Committee on Elections, and ultimately the delegation, headed by Mr. Dickerson, was seated.²

141. The fact that a Member-elect has not taken the oath does not debar him from challenging the right of another Member-elect to be sworn.—On March 4, 1871,³ while the Speaker was administering the oath to the Members-elect at the organization of the House the name of Mr. Alfred M. Waddell, of North Carolina, was called.

Mr. Horace Maynard, of Tennessee, upon his authority as a Member of the House, charged that Mr. Waddell was disqualified, and objected to the administration of the oath to him.

Mr. Charles A. Eldridge, of Wisconsin, raised the question of order that Mr. Maynard had not been sworn, and therefore might not make the objection.

The Speaker⁴ said:

He is a Member of the House. If he were not, the Chair would of course not recognize him. * * * The gentleman from Tennessee clearly has the right to raise this question.

142. On a question raised while the oath is being administered to Members the right to vote is not confined to those already sworn in.—On March 4, 1869,⁵ at the organization of the House, after a Speaker had been elected and while the Members-elect were taking the oath, a question was raised as to the qualifications of Messrs. Boyd Winchester and John M. Rice, of Kentucky, and a motion was made to refer their credentials to the Committee on Elections with instructions. On this motion the previous question was ordered and the vote was about to be taken when Mr. Charles A. Eldridge, of Wisconsin, raised the question of order that none but those sworn in had the right to vote.

The Speaker⁴ said:

The Chair overrules the point of order. The uniform usage of the House is otherwise.

143. It has been held, although not uniformly, that in cases where the right of a Member-elect to take the oath is challenged the Speaker may direct the Member to stand aside temporarily.—On March 4, 1869,⁶ at the organization of the House and while the Speaker was administering the oath to Members-elect, objection was made to the swearing in of Mr. Patrick Hamill, of Maryland. Mr. Hamill was asked to step aside until other Members, about whom there was no question, should be sworn.

Mr. J. Proctor Knott, of Kentucky, made the point of order that the duty devolved upon the Speaker by law to swear in each Member as he presented him-

¹ Journal, p. 95.

² Globe, p. 256; Journal, p. 1297.

³ First session Forty-second Congress, Globe, p. 6.

⁴ James G. Blaine, of Maine, Speaker.

⁵ First session, Forty-first Congress, Globe, p. 6.

⁶ First session Forty-first Congress, Journal, p. 7; Globe, pp. 6, 13.

self for that purpose; it was not for the Speaker to decide whether he could properly take the oath or not. Moreover, the House could not discharge any of its functions, either legislative or quasi judicial, which were conferred on it by the Constitution, until it was organized. Therefore there was no power, either in the Speaker or the House, at present to exclude a Member-elect from taking the oath.

The Speaker¹ replied that the Chair had not assumed to exclude any Member-elect from taking the oath. But the gentleman from Maryland, in order to relieve the embarrassment of the House, voluntarily withdrew, as he had a right to do, from those who had presented themselves to take the oath.

144. On March 4, 1869,² at the organization of the House objection was made to the taking of the oath by Messrs. Boyd Winchester and John M. Rice, of Kentucky. When the Speaker¹ requested them to step aside until the remaining Members had taken the oath, objection was made. The Speaker thereupon stated that the question must be met at once, and a resolution, reciting the allegations against the two gentlemen and providing that they should not be sworn in until after an investigation had been made, was presented.

145. On December 5, 1881,³ at the organization of the House the Speaker was administering the oath to Members, and the State of Alabama had been called. As Mr. Joseph Wheeler presented himself to be sworn Mr. George W. Jones, of Texas, objected, and asked that Mr. Wheeler stand aside.

The Speaker having directed Mr. Wheeler to stand aside, Mr. Samuel J. Randall, of Pennsylvania, raised the point of order that the stepping aside of a gentleman who had been thus challenged was a voluntary act, and in support of this point he cited the proceedings in the Forty-first Congress.

After debate the Speaker⁴ said:

The Chair is inclined to hold that he has the power to designate the order in which Members may be called and sworn in. Unquestionably the Chair has no right to decide upon the title of any Member. * * * If any gentleman is objected to, for mere convenience of proceeding the Chair will ask the gentleman objected to to stand aside. He having stood aside, and all others not objected to having been sworn in, the Chair will at once require the roll to be called for those persons who have been objected to and will swear them in, unless there shall be some good reason given upon which the House may act and direct the Chair otherwise. * * * This is a matter of order, wholly within the control of the Chair for the convenience of procedure.

A resolution relating to Mr. Wheeler's case having been presented and laid on the table, the Speaker said:

The Chair will state, there being no motion before the House, in the absence of instructions he will regard it his duty to proceed to swear in the Member.

Accordingly the oath was administered to Mr. Wheeler.

146. At the organization of the House on March 4, 1871,⁵ after the Speaker had been elected and while he was administering the oath to the Members, the name of Mr. Alfred M. Waddell, of North Carolina, was called. Mr. Waddell's name was on the roll and he had participated in the election of Speaker. Mr. Horace

¹James G. Blaine, of Maine, Speaker.

²First session Forty-first Congress, Journal, p. 7; Globe, p. 6.

³First session Forty-seventh Congress, Record, pp. 9-13.

⁴J. Warren Keifer, of Ohio, Speaker.

⁵First session Forty-second Congress, Globe, pp. 7, 11.

Maynard, of Tennessee, challenged his right to be sworn, on the ground that he was ineligible under section 3 of article 14 of the Constitution, since after taking an oath as a civil officer of North Carolina to support the Constitution of the United States he had subsequently participated in the war of secession, thereby becoming disqualified for a seat in Congress.

When this objection was made the Speaker said that he would first swear in those Members against whom there was no objection.

This was done, and later on the same day the House voted to allow Mr. Waddell to take the oath, and referred his credentials to the Committee on Elections.¹

147. When, at the organization of the House, several Members-elect are challenged and stand aside, the question is first taken on the Member-elect first required to stand aside.—On October 15, 1877,² at the time of the organization of the House, objection was made to the swearing in of several Members, and they stood aside. On October 16 their cases were considered, and Mr. Eugene Hale, of Maine, called up, as a question of privilege, the case of James B. Belford, of Colorado.

Mr. Samuel S. Cox, of New York, made the point of order that the question must first be taken on the case of the Member first required to stand aside.

The Speaker³ sustained the point of order. (Journal, p. 15; Record, p. 60.)

148. On December 6, 1875,⁴ at the time of the organization of the House, objection was made to the swearing in of several Members. During the proceedings Mr. James A. Garfield made the point of order that in the consideration of these cases the question should be first taken on the one who was first called on to stand aside.

The Speaker³ sustained the point of order.

149. When Members-elect are challenged at the time of taking the oath motions and debate are in order on the questions involved in the challenge; and in a few cases other business has intervened by unanimous consent.—On July 4, 1861,⁶ the Speaker had been elected and was about to proceed to administer the oath to Members when Mr. Thaddeus Stevens, of Pennsylvania, moved that such names upon the roll as should be objected to, when called, be passed over until other Members should be sworn in. Mr. Schuyler Colfax, of Indiana, proposed an amendment by inserting the words “as may be contested” in place of “as should be objected to.” Mr. Colfax explained that he did this because there was a question as to one or more of the Virginia delegation, although their seats were not contested.

Mr. Samuel R. Curtis, of Iowa, made the point of order that both the motion and the amendment were out of order, as the House was still in an unorganized condition. The first business was to perfect the organization, and until that was done such motions were not in order.

¹The Journal indicates that there was at this time no contest for this seat.

²First session Forty-fifth Congress, Journal, p. 15; Record, p. 60.

³Samuel J. Randall, of Pennsylvania, Speaker.

⁴First session Forty-fourth Congress, Record, pp. 167–171.

⁵Michael C. Kerr, of Indiana, Speaker.

⁶First session Thirty-seventh Congress, Journal, p. 12; Globe, p. 5.

The Speaker¹ overruled the point of order.

Mr. Stevens's motion was then amended, and as amended was agreed to.

The names of all those whose seats were not contested having been sworn in, Mr. Ellihu B. Washburne, of Illinois, moved that the rules of the last House of Representatives be adopted as the rules of this House.

The Speaker said:

The first business to be done is the qualification of Members, and until that business is disposed of the Chair thinks it is not proper to do any other business.

150. On March 4, 1869,² at the organization of the House, the Speaker was administering the oath to the Members-elect, when the right of Mr. Patrick Hamill, of Maryland, to take the oath was challenged. Debate having begun upon Mr. Hamill's case, Mr. Ebon C. Ingersoll, of Illinois, made the point of order that debate was not in order on the question.

The Speaker³ held that debate was entirely in order, as the House was considering a question of the highest privilege.

Mr. John F. Farnsworth, of Illinois, made the point of order that as the Members had not all been sworn in there was no House to vote on the question.

The Speaker overruled the point, saying that the present mode of procedure was that warranted by all the precedents. He also said in connection with a similar point of order raised later that he considered the House in its present state competent to enforce the previous question. Such was the case even in the preliminary stage of the proceedings for organization on that day before the Clerk had called the roll for the election of Speaker. The House had certainly lost none of its powers by the election of Speaker and by its proceeding so far in the business of organization.

151. By unanimous consent the House has proceeded to legislative business pending decision as to the right of a Member to be sworn in.—

On October 15, 1877,⁴ at the time of the organization of the House, objection was made to the swearing in of several Members, and they stood aside. Before the determination of the right of these challenged Members-elect to be sworn the organization of the House was completed and seats were drawn. On October 16 the House considered the cases of two of those challenged, and then the reading and reference of the President's message intervened before the disposal of the remaining cases. It does not appear that unanimous consent was formally asked for these interruptions.

152. On March 18, 1879,⁵ at the time of the organization of the House, objection was made to the swearing in of Mr. Noble A. Hull, of Florida. The consideration of Mr. Hull's case was about to begin when Mr. William P. Frye, of Maine, requested that it be postponed until the next day.

¹ Galusha A. Grow, of Pennsylvania, Speaker.

² First session Forty-first Congress, Journal, p. 7; Globe, p. 6.

³ James G. Blaine, of Maine, Speaker.

⁴ First session Forty-fifth Congress, Journal, p. 20; Record, p. 69.

⁵ First session Forty-sixth Congress, Record, pp. 6, 27.

Mr. Fernando Wood, of New York, objected.

The consideration of the case thereupon proceeded, but later, by unanimous consent, the matter was postponed until the next day.¹

153. Questions as to the credentials and qualifications of Members-elect may, by general consent, be deferred until after the election of Speaker and swearing in of Members.—On July 4, 1861,² at the time of the organization of the House, while the Clerk was calling the names of the Members-elect by States, several questions were raised as to the credentials and qualifications of Members-elect, but by general consent the determination of these matters was waived until after the election of a Speaker and the administration of the oath to Members.

154. In 1861 it was held that the House might direct contested names on the roll to be passed over until the other Members-elect were sworn in.—On July 4, 1861,³ at the organization of the House, after the Speaker had taken the chair, and before administering the oath to such of the Members as were present, it was voted, on motion made by Mr. Thaddeus Stevens, of Pennsylvania, as amended on motion of Mr. Schuyler Colfax, of Indiana, that such names on the roll as might be contested should, when called, be passed over until the other Members were sworn in.

The Speaker⁴ overruled a question of order that the motion was not in order prior to the completion of the organization.

155. A Member-elect challenged as he is about to take the oath is not thereby deprived of any right, and the determination of his case has priority of those of persons claiming seats but not on the Clerk's roll.—On October 15, 1877,⁵ at the time of the organization of the House, while the oath was being administered to the Members-elect, several Members-elect were challenged and required to step aside.

On October 16, after the organization of the House had been perfected, the cases of these challenged Members were taken up.

Mr. Eugene Hale, of Maine, proposed to call up the case of the Representative from Colorado, from which State no name had been placed on the roll.

Mr. Samuel S. Cox, of New York, raised the question of order that those first challenged should be first considered.

After debate, the Speaker⁶ said:

In the opinion of the Chair, the proposition that before taking up the case of any gentleman whose name was not upon the roll at all the House shall consider the qualifications of Members upon the roll who were asked to step aside is reasonable and right and in accord with the practice. Any other ruling would work great hardship. These gentlemen were placed upon the roll by the Clerk under the law, and upon the objection of an individual Member, which in its nature is arbitrary and might be factious, they were prevented from being sworn in. The Chair stated yesterday that such a single objection did not deprive those gentlemen of any right which they possessed, and if the occasion had presented

¹ See also the Roberts case in the Fifty-sixth Congress. (See. 474 of this work.)

² First session Thirty-seventh Congress, Globe, p. 3.

³ First session Thirty-seventh Congress, Journal, p. 12; Globe, p. 5.

⁴ Galusha, A. Grow, of Pennsylvania, Speaker.

⁵ First session Forty-fifth Congress, Record, pp. 59, 60.

⁶ Samuel J. Randall, of Pennsylvania, Speaker.

itself these gentlemen, in the opinion of the Chair, would have had the right to vote, as they did in fact vote, upon the election of Speaker, in the same manner as though they had been sworn in. For these reasons the Chair sustains the point of order of the gentleman from New York.

156. Members-elect challenged for alleged disqualifications have in several cases been sworn in at once, the question of their qualifications in some cases being referred to a committee for examination.—On July 4, 1861,¹ at the organization of the House, the Speaker² was administering the oath to the Members-elect. When the State of Virginia was called, Mr. Henry C. Burnett, of Kentucky, offered this resolution:

Resolved, That the question of the right of Charles H. Upton, William G. Brown, R. V. Whaley, John S. Carlile, and E. H. Pendleton, to seats upon this floor, be referred to the Committee on Elections, when formed, and that they report to this House thereon.

It appears from the debate that there was a question as to whether or not Mr. Upton was a citizen of Virginia, it being alleged that he was a citizen of Ohio and that he had voted there at the last election.

Both Mr. Upton and his associates were among those whose names were on the roll as made up by the Clerk and they had voted in the election of Speaker.

On motion of Mr. John A. McClernand, of Illinois, the resolution was laid on the table, and the Virginia Members took the oath.

157. On March 4, 1869,³ the Speaker having been elected and having addressed the House, the swearing in of the Members was proceeding, and the name of Mr. Patrick Hamill, of Maryland, had been called, when Mr. Benjamin F. Butler, of Massachusetts, objected to Mr. Hamill on the ground that he had been disloyal during the war. Mr. Butler proposed a resolution that Mr. Hamill be not allowed to take the oath until his case should be investigated by the Committee on Elections.⁴

On March 5, when the case was again taken up, Mr. Butler stated that he had examined the case carefully and was of the opinion that the prima facie case, as made out by the certificate of the governor, ought at the present time to prevail, and that Mr. Hamill ought to be admitted to his seat.

A resolution was therefore presented and agreed to that Mr. Hamill be now sworn in and that the papers submitted in this case be sent to the Committee on Elections when appointed. Mr. Hamill therefore took the oath. Mr. Hamill had previously participated in the proceedings of organization, having answered to his name on the vote for Speaker.

158. On March 4, 1869,⁵ at the organization of the House, objection was made to administering the oath to Messrs. Boyd Winchester and John M. Rice, of Kentucky, who were on the roll and had voted for Speaker. It was alleged that they were disloyal during the war. A resolution was presented reciting the allegations against them and providing that the oath should not be administered to them.

¹First session Thirty-seventh Congress, Journal, p. 12; Globe, pp. 6, 7, 13.

²Galusha A. Grow, of Pennsylvania, Speaker.

³First session Forty-first Congress, Journal, pp. 4, 5, 10; Globe, pp. 6, 10, 13.

⁴The Journal indicates that there was no contest for Mr. Hamill's seat (First session Forty-first Congress, p. 291). It does not appear that Mr. Hamill was afterwards disturbed in the possession of his seat.

⁵First session Forty-first Congress, Journal, pp. 4, 6, 10; Globe, pp. 10, 13.

Explanations of the charges being made, the resolution was withdrawn, and on March 5 the oath was administered to them by order of the House.¹

159. On December 3, 1889,² during the organization of the House, as the Speaker was administering the oath to the Members, and as the State of Kansas was called, Mr. William M. Springer, of Illinois, asked that Mr. S.R. Peters, of Kansas, stand aside.

The Speaker³ directed Mr. Peters to stand aside. Mr. Springer then presented a memorial from the governor and State officers of Kansas reciting that Mr. Peters, who had been elected judge for the four years ending January, 1884, was disqualified by the terms of the constitution of that State from holding any other office under the State or United States, and proposed a resolution referring the case to the Committee on Elections for examination as to whether Mr. Peters was entitled to the seat, and also to examine the claims of Mr. S. N. Wood, who contested the seat.

The Speaker suggested that the swearing in of a Member being a matter of the very highest privilege, the oath should be first administered, and then the resolution might be offered.

This was accordingly done. Mr. Peters's qualifications were afterwards examined and he was declared entitled to the seat.

160. Under exceptional circumstances the House admitted to a seat a Member-elect who failed to present himself until near the expiration of the Congress.—On February 25, 1868⁴ the House voted to admit to his seat Mr. George W. Bridges, of Tennessee, who had been elected at the regular Congressional election in his State in 1861, but who had been unable to appear in his place when Congress met in December of that year because he had been captured by the Confederates and detained a prisoner. As soon as he could escape he made his way, arriving at Washington so as to appear in the House February 25, a few days before final adjournment.

161. Instance wherein a Member-elect appeared and took the oath several months after the organization of the House.—On April 19, 1906,⁵ Mr. Malcolm R. Patterson, of Tennessee, appeared and took the oath. He had been regularly elected in November, 1904, as a Member of this Congress, but had not appeared at the organization of the House on the first Monday of December, 1905, nor thereafter until this date. No question was raised as to his right to qualify.

162. Although the House has emphasized the impropriety of swearing in a Member without a certificate, it has sometimes been done by unanimous consent.—On April 20, 1871,⁶ Mr. Omar D. Conger, of Michigan, proposed a resolution providing that Wilder D. Foster, Member-elect from the Fourth Congressional district of Michigan, be sworn in. Mr. Conger explained

¹The Journal (first session Forty-first Congress, p. 291) indicates that there was a contest for Mr. Rice's seat, but not for Mr. Winchester's.

²First session Forty-eighth Congress, Record, p. 6. 3 John G. Carlisle, of Kentucky, Speaker.

⁴Third session Thirty-seventh Congress, Journal, pp. 489, 490; Globe, pp. 1295, 1296.

⁵First session Fifty-ninth Congress, Record, p. 5523.

⁶First session Forty-second Congress, Globe, p. 833.

that the official certificate of Mr. Foster had not been received, but it was apparent from telegraphic reports of the canvass that he had been elected by a majority of several thousand.

A question arose, and while it was generally assumed that by unanimous consent Mr. Foster might properly be admitted to take the oath, yet it was objected that admission should be as a matter of right, and that it was improper to admit without a certificate of some kind. Because of the objection Mr. Conger withdrew the resolution.

163. On December 1, 1879,¹ Mr. Waldo Hutchins, of New York, was sworn in without the presentation of the regular certificate required by law, which had not been issued because the State canvassers would not meet under the law for several days. But the county canvassers had shown his election unmistakably, and there was no contest or question. Therefore, by unanimous consent, the House allowed Mr. Hutchins to be sworn in, although distrust of the precedent was expressed.

164. On December 6, 1886² at the beginning of the second session Mr. Abram S. Hewitt, of New York, as a question of privilege, presented a letter from the secretary of state of New York stating that the returns officially received showed the election of Mr. Samuel S. Cox to fill the vacancy caused by the resignation of Mr. Joseph Pulitzer, of the Ninth Congressional district of New York, and that the proper certificate of election would be issued as soon as the board of canvassers should meet.

There being no objection, the Speaker administered the oath to Mr. Cox.

On the same day and under similar circumstances the oath was administered to Mr. Henry Bacon, of New York.

165. On December 1, 1890,³ after several Members presenting regular certificates of election had been sworn in, the request was made that Mr. John S. Pindar, of the Twenty-fourth district of New York, be sworn in. The official certificate from the secretary of state of New York had not arrived, but the certificate of the county canvassers showing the result of the election was presented at the Clerk's desk. By unanimous consent the oath was administered to Mr. Pindar.

The request was then made that Mr. E. R. Hayes, of Iowa, be sworn in. It was stated by a Member of the Iowa delegation, Mr. David B. Henderson, that there was no question of Mr. Hayes's election, but by some error the certificate had not been transmitted. He presented the letter in which the certificate was supposed to have been transmitted, but in which by mistake another paper had been inclosed.

Pending the request for unanimous consent, it was suggested by Mr. Charles F. Crisp, of Georgia, "that the House sometimes accepts, in lieu of a formal certificate (as in the case of the gentleman from New York, Mr. Pindar, to which consent has just been given), the certificate of the local boards of county canvassers. But so far as I know a Member presenting himself to be sworn in must have some kind of

¹Second session Forty-sixth Congress, Journal, p. 8; Record, p. 10.

²Second session Forty-ninth Congress, Journal, p. 9; Record, p. 14.

³Second session Fifty-first Congress, Journal, p. 5; Record, p. 11. Thom B. Reed, of Maine, Speaker.

a certificate or some authority from some source having charge of the election to warrant the granting of the request." No objection was made, however, and Mr. Hayes was sworn in.

In a similar manner the oath was administered to Mr. Robert H. Whitelaw, of the Fourteenth district of Missouri, whose certificate had not arrived. In this case a semiofficial statement from the secretary of state of Missouri, giving the figures of the election, was presented by a colleague.

On May 5, 1896,¹ at the request of Mr. Charles Daniels, of New York, and by unanimous consent, the oath was administered to Mr. Rudolph Kleberg, of Texas, who presented an informal statement to the Speaker, signed by the governor, secretary of state, and attorney-general of Texas, who stated "upon general and reliable unofficial information" that Mr. Kleberg had been elected.

On December 19, 1896,² on motion of Mr. Henry G. Turner, of Georgia, and by unanimous consent, the oath was administered to Mr. Charles R. Crisp, of Georgia, who presented an informal letter from the governor of Georgia to the Speaker, informing him that there was only one candidate at the election and that the commission would be forwarded as soon as the returns were received.³

166. On March 2, 1894,⁴ Mr. William S. Holman, of Indiana, announced that Mr. Galusha A. Grow, of Pennsylvania, had been elected a Member of the House from Pennsylvania, but that his credentials had not yet arrived. After remarks on the public career of Mr. Grow in earlier years in the House, Mr. Holman asked unanimous consent that the oath be administered to him. There being no objection, it was so ordered, and Mr. Grow took the oath.

167. On January 15, 1902,⁵ the House, by unanimous consent, authorized the Speaker to administer the oath to Mr. Montague Lessler, of New York, on the following statement of fact made by Mr. Lucius N. Littauer, of New York:

Mr. Speaker, I ask unanimous consent that Mr. Montague Lessler, elected to this House at a special election held in the Seventh district of New York to fill a vacancy caused by the resignation of Mr. Muller, be sworn in. The certificate of the secretary of state of New York is not yet at hand, but there is no contest over the result of this election. The vote has been canvassed by the board of county canvassers, and Mr. Lessler is now here ready to be sworn in.

168. On December 3, 1906,⁶ at the beginning of the second session of the Congress, after the roll of the Members had been called by States, and when several Members elected to fill vacancies had presented credentials and taken the oath, Mr. James Hay, of Virginia, said:

Mr. Speaker, I ask unanimous consent that Mr. E. W. Saunders, a Member elect from the Fifth Virginia district, be sworn in. His credentials have not arrived, but there is no question of his election, and I have been in communication with the secretary of state of Virginia, who tells me that the canvass of the votes has been made and that Mr. Saunders has been declared duly elected.

¹First session Fifty-fourth Congress, Record, p. 4846.

²Second session Fifty-fourth Congress, Record, p. 301. Thomas B. Reed, of Maine, Speaker.

³It is a safe usage to permit the oath to be administered under such circumstances only by unanimous consent; but manifestly in a case of such high privilege the House might act by majority vote.

⁴Second session Fifty-third Congress, Record, p. 2533.

⁵First session Fifty-seventh Congress, Journal, p. 223; Record, p. 692.

⁶Second session Fifty-ninth Congress, Record, p. 13.

On this statement the House gave consent, and the oath was administered to Mr. Saunders. Under similar conditions the oath was administered to Mr. Daniel J. Riordan, of New York.

169. Instance wherein the House authorized the Speaker to administer the oath to Members away from the House.—On January 6, 1890,¹ Mr. John G. Carlisle, of Kentucky, having announced that there were three Members of the House who by reason of illness had been unable to attend and take the oath of office, offered the following resolutions, which were adopted:

Whereas Samuel J. Randall, a Representative for the State of Pennsylvania from the Third district thereof, David Wilber, a representative for the State of New York from the Twenty-fourth district thereof, and W. C. Whitthorne, a Representative for the State of Tennessee from the Seventh district thereof, have been unable from sickness to appear in person to be sworn as Members of the House, and there being no contest or question as to their election: Therefore,

Resolved, That the Speaker be authorized to administer the oath of office to said Samuel J. Randall at his residence in Washington, D. C.; and that the said David Wilber and W. C. Whitthorne be authorized to take the oath of office before an officer authorized by law to administer oaths; and that said oaths, when administered as herein authorized, shall be accepted and received by the House as the oaths of office, respectively, of Samuel J. Randall, David Wilber, and W. C. Whitthorne.

Resolved, That the oaths of office administered to the said David Wilber and W. C. Whitthorne shall be certified to the House of Representatives by the officers administering the same, authenticated by their official signatures and seals.

On the following day the Speaker announced:

The Chair desires to announce that in compliance with the resolution yesterday adopted the Speaker administered the oath of office at his residence to Hon. Samuel J. Randall, a Representative from the State of Pennsylvania, and the Clerk will make a record in the Journal.

On January 15² the Speaker laid before the House the oaths of Messrs. Wilber and Whitthorne, and they were ordered to be filed in the office of the Clerk.

170. By authority of the House the oath may be administered to a Member away from the House and by another than the Speaker.

As to the competency of a Speaker pro tempore to administer the oath to Members.

On January 22, 1887, Mr. Nathaniel J. Hammond, of Georgia, from the Committee on the Judiciary, submitted a report³ on the case of Representative D. Wyatt Aiken, of South Carolina, who, by reason of illness, seemed likely not to be able to appear in the House during the Congress, and to whom it was proposed to administer the oath away from the House by a judicial officer of his State. The committee quoted the third section of Article VI of the Constitution, which requires that the Representatives "shall be bound by oath or affirmation to support the Constitution," and section 30, Revised Statutes.⁴

The committee considered two questions arising under this statute: (1) Whether any officer but the Speaker can administer that oath, and (2) whether it can be administered until the Member is "present" or "appears" in the House, or elsewhere than in the House.

¹ First session Fifty-first Congress, Journal, pp. 89, 103; Record, pp. 399, 432.

² Journal, p. 124.

³ House Report No. 3745, second session Forty-ninth Congress. (Record, p. 1157.)

⁴ See section 14, this volume.

The committee say that a construction which might require that none but the Speaker can swear in a Member might prove seriously inconvenient in case of his absence. It is a rule of the House only which authorizes him temporarily to appoint a Speaker pro tempore to the chair. Such a construction would give to the Speaker the dangerous power to refuse to administer the oath and thereby exclude Members from the House. No such construction should be allowed. The committee here quote an English precedent where, out of abundant caution, such act by a deputy speaker was ratified by action of Parliament subsequently.

In regard to the second inquiry the committee cite the case of William Rufus King, elected Vice-President in 1855, and who, being detained in Habana, was allowed by special act to take the oath there. This was a precedent merely for swearing in a Member away from the House. The statute was needed to authorize the officer abroad to administer the oath.

The committee say that no provision has been made by statute for administering this oath by any but the Speaker, nor elsewhere than in the House. As to absent Members it is *casus omissus*. It does not require the oath to make one a Representative. Mr. Aiken was already on committees and had been granted leave of absence. The statutes¹ require that the Speaker certify the salaries and amounts of Members and approve the employment of the reporters. Yet these things may be done by a "Deputy Speaker" named by him, with the approval of the House. That Deputy Speaker² swears in Members also, not by statute, but only by our rule, which authorizes him to "perform the duties of the Chair."

The Constitution provides that when sitting to try impeachments Senators "shall be under oath or affirmation." No statute prescribing the form and method of taking the oath, the Senate has determined it itself. The question of how the oath of office in each House shall be taken is so near akin to the "election returns and qualifications of its own Members" and so like one of the "rules of its own proceeding," which constitutionally belong to "each House" to "judge" and "determine" for itself, that in the opinion of the committee no statute was necessary. The committee concluded by recommending the adoption of a resolution as follows:

Whereas D. Wyatt Aiken, Representative for the State of South Carolina from the Third district thereof, has been and in all probability will remain until the end of this Congress unable from sickness to appear in person to be sworn as a Member of this House, but has sworn to and subscribed the oath of office before an officer authorized by law to administer oaths, and the said oath of office has been presented in his behalf to the House,³ and there being no contest or question as to his election: Therefore,

Resolved, That the said oath be accepted and received by the House as the oath of office of the said D. Wyatt Aiken as a Member of this House.

This resolution, after debate, was adopted by the House January 29, 1887.⁴

¹ Sections 47 and 54, Revised Statutes.

² On June 15, 1898 (second session Fifty-fifth Congress), Mr. John Dalzell, of Pennsylvania, by designation of the Speaker, in writing, acting as Speaker pro tempore, administered the oath to Mr. Greene, of Massachusetts.

³ The oath had been presented in the House on January 10 as a question of privilege (Journal, p. 200; Record, p. 493), the case of Mr. Haskell, of Kansas, being cited as a precedent.

⁴ Second session Forty-ninth Congress, Record, pp. 1156–1158.

171. An adjournment taking place after the election of a Speaker, but before the Members had taken the oath, the Journal was read on the next day, but was not approved until the oath had been administered.

It has been held that the administration of the oath to a Member takes precedence of a motion to amend the Journal.

On December 22, 1849,¹ after many ballotings, Mr. Howell Cobb, of Georgia, was elected Speaker. After the oath had been administered to him the House adjourned.

On the next legislative day, December 24, the Speaker called the House to order, and the Journal of the preceding legislative day was read.

Mr. David S. Kaufman, of Texas, claimed the floor on a privileged question—a motion to amend the Journal.

The Speaker held that no question was in order until the Members of the House had been sworn in. A motion to amend the Journal or any other privileged question would then be in order.

The Speaker then proceeded to administer the oath to the Members.

172. Members have been sworn in before the reading of the Journal.—From the Journal of December 14, 1840,² it seems to have been the usage at that time to swear in new Members before the reading of the Journal.

173. Instance wherein, at the organization of the House, the oath was administered to a Member-elect during the call of the roll on a motion to agree to rules.—On December 4, 1905,³ at the organization of the House, the yeas and nays were ordered on a motion for the previous question on a resolution agreeing to rules. After the roll had been called once, Mr. Albert S. Burleson, of Texas, presented himself and took the oath. The roll call was then completed, Mr. Burleson voting.

174. Members have been sworn in when a roll call had just disclosed the absence of a quorum.—On March 29, 1897⁴ on a motion that the Journal be approved, the Speaker⁵ announced the result of the roll call—yeas 164, nays 2, present 2, a total of 168; not a quorum. The Speaker then announced that under the rule⁶ the doors of the House would be closed preparatory to the can of the House.

At this point Mr. James D. Richardson, of Tennessee, announced that Messrs. Rudolph Kleberg, of Texas, and William A. Jones, of Virginia, were present, ready to take the oath, and asked that it be administered to them.

The Speaker said that a question arose as to whether or not, the body not being constituted to do business and the roll call having been ordered by the rule of the House, the proceedings might be interrupted. Therefore he advised that unanimous consent should be obtained.

This having been done, the oath was administered to the two Members.

¹ First session Thirty-first Congress, Globe, p. 67.

² Second session Twenty-sixth Congress, Journal, p. 31.

³ First session Fifty-ninth Congress, Record, p. 43.

⁴ First session Fifty-fifth Congress, Record, p. 428.

⁵ Thomas B. Reed, of Maine, Speaker.

⁶ Section 4 of Rule XV. (See see. 3041 of this work.)

175. At the beginning of a second session of Congress unsworn Members-elect were taken into account in ascertaining the presence of a quorum, but in the absence of the Speaker they were not sworn until the next day.—On December 6, 1830,¹ at the beginning of the second session of the Congress, there appeared, besides those who answered the roll, several new Members. These Members-elect, as appears in the Journal, were taken into account in ascertaining the presence of a quorum, but the Speaker being absent, the oath was not administered to them.

On December 7, the Speaker being in attendance, the oath was administered to these and other new Members immediately after the reading of the Journal.

176. Instance at the beginning of a second session wherein the oath was administered to a Member-elect before the ascertainment of a quorum.

By unanimous consent the oath may be administered to Members-elect whose regular certificates have not arrived.

On December 7, 1903,² at the beginning of the second session of the Congress, the Speaker called the House to order, and the Chaplain offered prayer.

Thereupon Mr. John H. Stephens, of Texas, announced that Mr. J. M. Pinckney, of Texas, a Member-elect, was present and desired to be sworn. The Speaker thereupon laid before the House the following telegram:

AUSTIN TEX., *December 6, 1903.*

HON. JOSEPH G. CANNON,

Speaker House of Representatives, Washington, D.C.:

I am reliably informed that at a special election held in the Eighth Congressional district of Texas on the 17th of November last Hon. J. M. Pinckney was elected as Member of Congress to succeed Ron. Thomas Ball, resigned. I am also advised that Pinckney's election is conceded by his opponents. Under our laws, the official returns can not be opened and counted until forty days after the election.

S. W. T. LANHAM, *Governor of Texas.*

Thereupon, by the unanimous consent of the House, the oath was administered to Mr. Pinckney.

Then the Speaker directed the call of the roll by States to ascertain the presence of a quorum.

177. On December 31, 1834,³ as soon as the roll of Members had been called by States, several new Members appeared and were qualified and took their seats. Then the Journal announces the presence of a quorum.

178. On December 7, 1840,⁴ the first day of the second session of the Congress, the Speaker called the House to order, and the Clerk called the roll by States. Then six new Members appeared and took the oath and their seats; but even with these there was no quorum present, and so the House adjourned.

179. In the absence of the Speaker a Member-elect has produced his credentials and taken his seat, but was not sworn until the oath could be administered by the Speaker.

¹ Second session, Twenty-first Congress, Journal, p. 7; Debates, p. 350.

² Second session Fifty-eighth Congress, Record, pp. 15, 16.

³ Second session Twenty-third Congress, Journal, p. 7; Debates, p. 751.

⁴ Second session Twenty-sixth Congress, Journal, p. 5; Globe, p. 1.

In the earlier years of the House the absence of the Speaker caused adjournment and the postponement of the orders of the day.

On December 1, 1797,¹ the Speaker being absent, a new Member, Joseph Heister, returned to serve in the House as a Member from the State of Pennsylvania, in the room of George Egge, who had resigned his seat, "appeared, produced his credentials, and took his seat in the House."

The Speaker being indisposed (the Clerk so informed the House), the orders of the day were postponed and the House adjourned.

On the next legislative day, December 4, the oath was administered to Mr. Heister by the Speaker.

On February 22, 1798,² the Speaker being absent, the orders of the day were postponed and the House adjourned.

180. It was held in 1881 that the administration of the oath to Delegates was of higher privilege than the adoption of rules.—On December 5, 1881,³ after the Members-elect had been sworn in, and after the officers of the House had been elected, but before the oath had been administered to the Delegates, Mr. Dudley C. Haskell, of Kansas, presented resolutions providing for the adoption of rules.

The House having adjourned pending action on these resolutions, Mr. Haskell, on December 6, called them up for consideration.

Mr. Samuel J. Randall, of Pennsylvania, made the point of order that under the law other business of higher privilege, viz, the swearing in of the Delegates, as provided by section 30 of the Revised Statutes, which provided for the administration of the oath, as follows:

At the first session of Congress after every general election of Representatives, the oath of office shall be administered by any Member of the House of Representatives to the Speaker, and by the Speaker to all the Members and Delegates present, and to the Clerk, previous to entering on any other business, and to the Members and Delegates who afterward appear, previous to their taking their seats.

The Speaker⁴ sustained the point of order, and directed the Clerk to call the Delegates to be sworn.

181. The presiding officer of the Senate being present, the oath of office was administered to Senators-elect, although no quorum was present.—On December 6, 1804,⁵ the second day of the second session of the Congress, a quorum did not appear, but the President of the Senate administered the oath to Messrs. William B. Giles and Andrew Moore, of Virginia, who appeared with credentials showing their appointment by the governor of the State to fill vacancies.

182. On December 6, 1802,⁶ in the absence of the Vice-President, a Member-elect appearing in the Senate with credentials, but there being no quorum, took his seat, but was not sworn until December 14, after a quorum had appeared and a President pro tempore had been elected.

¹ Second session Fifth Congress, Journal, P. 95 (Gales & Seaton ed.); Annals, p. 670.

² Journal, p. 191; Annals, p. 1062.

³ First session Forty-seventh Congress, Journal, pp. 16, 18; Record, p. 33.

⁴ J. Warren Keifer, of Ohio, Speaker.

⁵ Second session Eighth Congress, Senate Journal, p. 411. Aaron Burr, Vice-President and President of the Senate.

⁶ Second session Seventh Congress, Senate Journal, pp. 241, 243.

183. Discussion of the status of a Member-elect who has not taken the oath, with a conclusion that it is distinguished from that of a Member who has qualified.—On June 13, 1864, Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, made a report¹ relating to the rights of Messrs. Robert C. Schenck, of Ohio, and Frank P. Blair, Jr., of Missouri, to seats in the House. In the course of this report the following discussion was given of the status of a Member-elect:

No one can be a "Member" against his will. He may be elected without his consent or knowledge, for he may be in a foreign land; but to become a "Member" he must not only be elected but he must take the oath of office. The Constitution says: "Each House shall be the judge of the elections, returns, and qualifications of its own Members"—that is, of those who have qualified and taken their seats. Again: "A majority of each shall constitute a quorum, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent Members." But the attendance of a Representative-elect was never yet compelled. And, again: "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." The committee are not aware of any attempt to punish a Representative-elect, and of but one instance of an attempt to expel one. A resolution was adopted by the last House, under the previous question, to expel a person who was a Representative-elect, but had never signified his acceptance of the office or qualified, or even appeared in Washington for the purpose of taking his seat. But when the Constitution uses the word "Representative," it is in this connection: "The times, places, and manner of holding elections of Senators and Representatives shall be," etc. "No person shall be a Representative who shall not have attained to the age of 25 years." In the clause now under consideration the language is: "No person holding any office under the United States shall be a Member of either House during his continuance in office." No one doubts that the object of the Constitutional inhibition was to guard the House against Executive influence. This object is attained so far as it can be by this provision, if the inhibition attaches the moment the Member enters upon the discharge of his duties as such, and nothing is gained by an earlier application of it.

184. Discussion of the status of a Member-elect in relation to the law prohibiting the holding of two offices of certain salaries, with the conclusion that it is distinguished from the status of the Member who has qualified.—On July 19, 1866² Mr. Samuel Shellabarger, of Ohio, made a report from the select committee appointed April 30, 1866, to investigate certain statements and charges relating to Hon. Roscoe Conkling and Provost-Marshal-General Fry. In April, 1865, Mr. Conkling had accepted an appointment from the War Department to investigate frauds in the office of the provost-marshal for the western district of New York. He was at the same time a Member-elect of the House of Representatives. The special committee consisted of Messrs. Shellabarger, of Ohio, William Windom, of Minnesota, B. M. Boyer, of Pennsylvania, Burton C. Cook, of Illinois, and Samuel L. Warner, of Connecticut, and they made an unanimous report, in which they found, among other things, that Mr. Conkling had not violated the law or the Constitution by accepting the appointment.

The act of 1852³ had provided against the holding of two offices of certain salaries under the United States; and in the course of their inquiry the committee considered the status of the Member-elect, as follows:

¹ House Report No. 110, First session Thirty-eighth Congress, pp. 8, 9.

² First session Thirty-ninth Congress, Globe, pp. 3935-3942.

³ Now section 1763, Revised Statutes.

The first of these inquiries is, in the judgment of the committee, answered, so far as is necessary in deciding upon the effect of the act of 1852, by the cases of Hammond, of Earl, of Mumford, of Schenck,¹ and others, which we have already cited. These cases, as we have seen, all determine that, prior to the time when the Constitution requires the Member-elect to commence the duties of his legislative office, and before he has assumed these duties and taken the oath of office, he may receive compensation for discharging the duties of another office. As we have already said, these cases do not determine that he may also be compensated as a Member of Congress for the same time for which he was compensated in the other office. But they do determine that being a Member-elect of Congress does not make him an "officer" in such sense as to bring him within the prohibition of the act of 1852. This question, in substance, received the careful attention of the House in the Thirty-eighth Congress upon an able report of one of its committees.² The committee and House came to what your committee deem a just conclusion when it determined that one merely elected to Congress, but who had not entered upon his duties nor been qualified, was not a Member of this House—that is, did not hold an office so as to prevent him from continuing to hold another office and receive compensation therefor. The committee, in concluding their argument showing that one merely elected to Congress was not a Member of the House and not, as such, amenable to its jurisdiction, says: "The committee are not aware of any attempt to punish a Representative-elect, and of but one instance of an attempt to expel one. A resolution was adopted by the last House, under the previous question, to expel a person who was a Representative-elect, but had never signified his acceptance of the office, nor qualified, nor even appeared in Washington for the purpose of taking his seat."

In that case² the House determined, in effect, that the act of 1852 did not prohibit General Schenck while a member-elect of Congress from receiving the pay of another office—to wit, that of Major-general of volunteers.

This is the last case in which the question came before the House. But the same question received in the Fifteenth Congress, in the case of Hammond v. Herrick (Clark and Hall, Contested Elections, pp. 293, 294), a still more elaborate and exhaustive consideration. In the report in that case (which also received the sanction of the House) this doctrine was explicitly stated, and was affirmed after a thorough review of the English and American cases touching it. The case held the rule which was stated by the committee in these words: "Neither do election and return constitute membership. * * * Our rule in this particular is different from that of the House of Commons. It is also better, for it makes our theory conform to what is fact in both countries—that the act of becoming in reality a Member of the House depends wholly upon the person elected and returned. Election does not of itself constitute membership, although the period may have arrived at which the Congressional term commences."

This House has again and again determined that men elected to it who do not appear in the body and assume the constitutional oath of office are not to be reckoned as Members of the House in determining the number required to make a majority or quorum of the body.

The committee in coming to this conclusion have not overlooked the fact that Members-elect, but not qualified, are by the laws accorded certain privileges and salary. The effect of this right to enjoy these privileges before becoming qualified as a member of the legislative body has received the fullest attention both in this House and in the English Parliament. The result attained is that these special privileges are not necessarily indicia of actual official authority or station, and may by law as well be attached to one's person before and after he is an officer as during his official tenure. The Representatives after the expiration of their terms, the President of the United States after such expiration, and the widows of certain ex-Presidents, all have the franking privilege, and these are not then officers of the Government in any sense. The assumption of office in this country, as well as its relinquishment, is voluntary, and one elected to Congress is at perfect liberty to refuse to assume the office. His exercise of the franking privilege with the knowledge that he never would enter upon the duties of the office would be an act of bad faith toward his Government; but that would not render him a Member of Congress, nor would the exercise prevent him, should failure of health or other cause render it improper to enter upon his office, from rightly refusing ever to take the office.

Other and perhaps more conclusive considerations bearing upon this important inquiry might be

¹ Report No. 110, first session Thirty-eighth Congress.

² House Report, No. 110, first session Thirty-eighth Congress.

given, but it is not deemed best to pursue it further. The committee are entirely satisfied that the law of this House is fully and rightly settled as to this point, and that he is not a Member of Congress, nor one who "holds any office under the Government of the United States" who has only been elected to this House, but who has never taken any oath of office nor entered upon the duties of that position.

185. In 1901, in a divided report, the Judiciary Committee discussed the status of the Member-elect, the major opinion being that he was as much an officer of the Government before taking the oath as afterwards.— On February 4, 1901,¹ Mr. George W. Ray, of New York, from the Judiciary Committee, submitted a report on a question relating to the salary of Hon. William Richardson, who had been elected to represent the district formerly represented by Hon. Joseph Wheeler. The discussion of this question involved an examination of the status of a Member-elect.

Does a person duly elected Representative in Congress hold an office prior to the meeting of Congress at the time fixed by the Constitution, or pursuant to a special call by the President and before taking the oath required by the Constitution?

It has been strenuously urged that a person so duly elected does not hold any office until Congress assembles and the oath is taken. With this contention we can not agree. Article I of the Constitution provides:

"Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

"Sec. 2. The House of Representatives shall be composed of Members chosen every second year by the people of the several States, etc. * * * The House of Representatives shall choose their Speaker and other officers, etc.

"Representatives and direct taxes shall be apportioned, etc.

"No person shall be a Representative who shall not have attained, etc.

"Sec. 4. The time, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, etc.

"Sec. 6. The Senators and Representatives shall receive a compensation for their services to be ascertained bylaw, etc. * * *

"No Senator or Representative shall during the time for which he was elected be appointed, etc. * * * And no person holding any office under the United States shall be a Member of either House during his continuance in office."

The Constitution frequently speaks of "each House." Article VI provides:

"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, etc."

The Constitution does not prescribe the time when or the officer before whom such oath is to be taken. Taking the oath is not made a condition precedent to holding the office.

But section 1, chapter 1, of the first act or statute of the First Congress, which assembled at the city of New York March 4, 1789, prescribed the form of the oath to be taken pursuant to the Constitution, and section 2 of such act provided as follows:

"That at the first session of Congress after every general election of Representatives the oath or affirmation aforesaid shall be administered by any one Member of the House of Representatives to the Speaker, and by him to all the Members present, and to the Clerk, previous to entering on any other business, and to the Members who shall afterwards appear previous to taking their seats, etc."

Section 2 of Article I says:

"Each House may determine the rules of its proceedings, etc."

If we note carefully the language of this act of the First Congress, it is apparent that it was not considered that the oath was a prerequisite to becoming "a Member," for it says the oath or affirmation aforesaid shall be administered by any one Member of the House of Representa-

¹Second session Fifty-sixth Congress, House Report No. 2656, pp. 10-13, 17, 27-29, 42-50.

tives to the Speaker, and by him to all the Members present, and to the Clerk, previous to entering on any other business, and to the Members who shall afterwards appear previous to taking their seats.”

All duly elected are “Members” before taking the oath,² but they can not take their seats until the required oath is taken.

Then is it not true that all Representatives elected become “Members” from the very hour and minute of the commencement of the term for which elected?

The commencement of the term for which Representatives are elected was fixed and determined as follows:

After the adoption of the Constitution by the requisite number of States the Continental Congress adopted the following resolution on the 13th day of September, 1788:¹

Resolved, That the first Wednesday in January next be the day for appointing electors in the several States which before the said day shall have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective States and vote for President, and that the first Wednesday in March next be the time and the present seat of Congress the place for commencing proceedings under the said Constitution.”

The several States elected Representatives in Congress for the First Congress, and it assembled March 4, 1789, the first Wednesday of that month, pursuant to the above resolution. By the Constitution Representatives are chosen every second year, thus fixing the terms of office.

In the various acts, or some of them, providing for the apportionment and election of Representatives in Congress future Congresses have been referred to as commencing on the 4th day of March.²

It seems clear that taking the oath is not a condition precedent to becoming a Member, although the Member can not take his seat in the House until the oath is taken. This is a rule of action prescribed by the House.

“Members” organize the House; “Members” elect the Speaker, and this is a most important function. Any Representative before taking the oath may administer the oath to the Speaker, and the Speaker administers the oath to whom? Representatives-elect? No; but to “Members.” “The House of Representatives shall choose their Speaker.” The House exists before a Speaker is chosen or the oath taken.

After quoting Blackstone to the effect that an office is “a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging,” and other authorities,³ in the same line, the report cites authority⁴ in support of the statement that there is nothing in the Constitution or in the statutes that makes the taking of the oath a condition precedent to taking and holding the office of Representative in Congress when elected by the people for a definite term fixed by law. Even when a statute fixes the time and it is not complied with, the person elected or appointed is in and vested with the office when the term commences unless it is declined.

The report further contends:

The word “Member-elect” was never used in any of the statutes until 1873 (as we can find) and was not intended to overthrow the Constitution, which provides that Members are elected by the people, not made such by taking an oath, but was used simply to distinguish between Members who had become entitled to a seat by taking the oath and those not entitled to sit in the House after its organization. * * *

We should also call attention to the fact that we always have a Congress—always have a Senate; always have a House of Representatives and Members of the House of Representatives.

¹ See Journal of Continental Congress.

² Revised Statutes, sec. 25.

³ Blackstone’s Commentaries, Book 2, chapter 3, p. 36; Kent’s Commentaries, p. 454; United States v. Hartwell, 6 Wall., 385–393.

⁴ Mechem’s Public Offices, see. 247; Throop, Public Offices, secs. 3 and 173; Clark v. Stanley, 66 N. C., 59.

The House may not be organized, but it exists, nevertheless. Section 2, Constitution United States, says: "The House of Representatives shall choose their Speaker." The Representatives in Congress or Members of the House may not have taken the oath of office, but they are elected, and each comes into office, if eligible, the very moment the term of his predecessor ceases.

Mr. D. H. Smith, who filed individual views, held the same opinion, saying:

When it is remembered that the Clerk of the House usually makes up the roll of the House between the election and the 4th of March following, the word "Representative-elect" used in section 31 of the Revised Statutes is perhaps as aptly used as any that could have been selected and not necessarily in conflict with the above definition. Likewise when attention is called to the fact the credentials of those elected at the regular time for electing Representatives are almost universally filed before the term begins, while they are really and truly Members-elect, it is not astonishing that this language is found in section 38, though other words less liable to confuse might have been used. But whatever influence such citations might have, it is entirely safe to say the instances in which persons elected to Congress are referred to after their terms have begun as Members are much more numerous than those where the other expression is employed.

There are many statutes prohibiting Members of Congress from doing things that might be detrimental to the best interests of the Government—such as those that forbid a Member from practicing before the Court of Claims, from taking compensation for procuring public contracts or offices, from being interested in public contracts, and a great number of similar statutes. If it be true that prior to the convening of a Congress in its first session those chosen thereto are not Members, then it is a matter of serious and urgent importance that Congress address itself to the work of amending a multitude of statutes heretofore supposed and believed to apply to a Member of Congress before he is sworn, as well as afterwards. * * * But it is said that the oath of office is not taken until Congress meets, and that one can not therefore be a Member before that. Without the Constitution or the statute makes the taking of the oath a prerequisite to becoming a Member it may be taken at a subsequent time, and in the absence of such requirement one may become a Member without it.

The First Congress of the United States met on the 4th of March, 1789, and no Member of the House took the oath until April 8, and no Senator took the oath until the 3d of June, although prior to either date much business was transacted, including the count of the electoral vote for President and Vice-President of the United States. In that Congress was many of those who had been in the convention and assisted in forming the Constitution, and while all were familiar with its provisions these no doubt possessed that thorough knowledge of the instrument in detail that could only be acquired by having participated in constructing it. By their official course they gave us an interpretation of that part requiring an oath which was in effect that the oath could be taken after the session had begun, but the statute has so far modified this as to require it to be taken at the beginning of the first session. * * * Congress can not commence without Members, hence all such persons chosen to compose the Congress who have not died, resigned, or declined, and who are eligible on the 4th of March succeeding their election, if it be at the regular time, become Members of the Congress to which they have been elected. From the commencement of the Congress to which they have been elected they are Members until they in some manner vacate their positions.

Messrs. Charles E. Littlefield, of Maine, and Julius Kahn, of California, dissented from the view taken in the report of the committee, and in the views which they jointly submitted contend that until a "Member-elect" or "Representative-elect" has taken the oath of office as a "Member" he is not a "Member" of the House. A "Member-elect" is simply a person who, by reason of possessing the requisite qualifications, having been elected therefor, is capable when the constitutional time arrives of becoming a "Member." The first mention of "Member-elect" or "Representative-elect" in the statutes was in section 31, Revised Statutes, and then in section 38. The statutes relating to salary provided that the Member-elect should draw salary without the oath; the Member only after the oath. For at least seventy-seven years the laws in relation to compensation were such that the Member-

elect received no salary, payments being made only to Members who had taken the oath. Furthermore, the "Member-elect" had none of the attributes or privileges of a "Member" except as they are specially conferred by statute. Thus the Member-elect has the franking privilege; but so also does the ex-Member for a certain time after the expiration of his term. The views of the two Members are given further:

A "Member-elect" is in no sense within the constitutional inhibition, for as a "Member-elect" he has neither power nor opportunity to do any act inconsistent with the duties of any other office. He can not vote, except for Speaker. He can not discharge any of the duties or exercise any of the powers of a "Member." He can only enjoy certain privileges specifically annexed to his status as a "Member-elect" by statute. However much the elements that inhere in an inconsistent office might control for good or ill the manner in which a "Member" might discharge his duties as such, these elements can have no effect upon the action of a "Member-elect," who can not act at all. The inhibition is based upon the idea that the inconsistent office involves considerations whose probable tendencies would be to improperly affect the discharge of public duties by a Member. When considered in connection with a "Member-elect," who has no power to discharge such duties, the reason fails.

As to the contention that the provision of section 30, Revised Statutes, shows that Members are Members before they are sworn, it is urged that—

That does not follow. The election of a Speaker is but one of the steps in the organization of the House. It is clear that Members-elect necessarily have the inherent power to take this step in order that the House may be organized of which they may become Members. You can only predicate the idea of Members upon an existing body, and to hold that you can not have an organized body unless you first have members is to beg the question. The organization of a corporation created by special act illustrates the idea. The act creates certain persons, called associates or corporators, a body corporate, but this does not organize the corporation or make the corporators stockholders or members thereof. It does confer upon the corporators power to organize a corporation of which they may afterwards become members by becoming stockholders, but the fact that they can and do exercise the indispensable power of organizing does not of itself make or tend to make them "members" of the body they organize. The same result follows as to "Members-elect."

If the right of voting for Speaker demonstrates that a person is a Member, then the objection to Roberts, of Utah, was not interposed early enough. No one thought of questioning his right to vote for Speaker. The question in his case was solely one of exclusion or expulsion. Exclude him, and prevent him from becoming a Member. Therefore he was halted at the oath. But it is now contended that the oath is not an essential prerequisite to membership for the purpose of establishing the proposition that a Representative-elect becomes a "Member" on the 4th of March of a House not in existence and so continues, and the formality of an oath, though required by the Constitution, is thus dispensed with, as under such a construction it is not essential. Still, although they have thus reasoned the oath out, they must concede that this "Member" can not draw compensation without taking the oath, while a "Member-elect" can. Such an inconsistency demonstrates the fallacy of the reasoning. Roberts, of Utah, drew salary as Member-elect until November 3, 1899, exercised the franking privilege, and voted for Speaker. Was he a "Member" from March 4, 1899? If so, his exclusion from the office nearly a year later was hardly effective. Notwithstanding this new construction it was never suggested before that he was even a Member de facto.

Moreover, on the 26th day of January, 1900, by a large majority, the House held that he was not entitled to membership therein, and excluded him therefrom. It was expressly understood that majority was necessary to exclude, while it was conceded that two-thirds were necessary to expel a "Member." Did Roberts, under this new theory of the committee, become in any legal sense, de facto, de jure, or otherwise, a "Member" March 4, 1899? If so, the proceedings were had under a curious misconception of the situation. If he did not then become a "Member," could he, on the theory of the committee, be the "predecessor," within the meaning of section 51, of his successor? Yet his successor

was elected in March, 1900, and upon the proper certificate drew compensation back to January 26, 1900, which he could hardly have done had Roberts not been his "predecessor" within the meaning of that section.

In further support of this contention the two Members quote a decision of the Comptroller of the Treasury¹ in the case of Mr. Boatner, and of Attorney-General Devens² in the case of Delegate Romero, in both of which the Member-elect was not regarded as a Member.

There was no action by the House on the report.

¹ Opinions of Comptroller of Treasury, Vol. 3, p. 20. See see. 28 of this work.

² 15 Attorneys-General Opinions, p. 280; also 14 A. G. Decisions, p. 406.