UNITED STATES OF AMERICA

Congressional Record

PROCEEDINGS AND DEBATES OF THE 93d CONGRESS
FIRST SESSION

VOLUME 119—PART 28

NOVEMBER 6, 1973 TO NOVEMBER 15, 1973

(PAGES 35989 TO 37438)

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON, 1973

times as great for Americans in the 19 to 65 age category.

The harsh reality is that the elderly now pay more in out-of-pocket payments for medical care than the year before medicare became law. In fiscal 1972 their per capita direct payments amounted to $276, or $42 more than in fiscal 1966. These out-of-pocket payments, moreover, do not include the part B premium, which now amounts to $75.60 per year for an individual.

Quite clearly, true security in retirement can never be a reality until our Nation overcomes the mounting health care costs which still pose a serious threat to the economic well-being of the elderly.

For these reasons, I strongly urge the adoption of this amendment to freeze the part A deductible at $72 for 1974.

REFORMING CIVIL SERVICE LEAVE

Mr. MOSS. Mr. President, this morning the Senate Post Office and Civil Service Committee unanimously reported out H.R. 1284, a bill that would be an important step in reforming the leave system for our Federal employees. It makes no changes in the manner by which Federal employees accrue annual leave but it does make several important changes in the administration and application of the leave system.

In the past we have, in effect, penalized persons who lost annual leave through clerical error. There have also been occasions when employees have taken annual leave in excess of their allotted amounts and the Federal Government has had no recourse. This bill provides a mechanism by which both inequities would be corrected.

Another problem that would be alleviated by this bill is the occurrence of illness during a scheduled annual leave. Surely employees should not be penalized when illness occurs during their leave, but should have that leave available for use at a later date. Another section of this bill would provide that civilian employees or their survivors who are missing or held captive would still be able to receive remuneration for leave which they, quite obviously, are unable to utilize. Certainly we can find it within ourselves to award remuneration to these people who have suffered both mentally and physically in the course of their duties as employees of the Federal Government.

In my view, one of the most significant provisions of this bill is one that would apply to a large number of NASA employees. As chairman of the Aeronautical and Space Sciences Committee, it has come to my attention that, in these days of extended space flights, many employees are unable to take leave because they simply cannot be spared. Under present provisions of law, annual leave is lost if the employees is unable to take it because of the press of business. So we are faced then with a situation wherein we penalize our employees for their dedication and success in the establishment of America as the preeminent nation in space. It is time that this situation be amended. This bill provides for the solution—the leave which cannot be taken because of the exigencies of business would not be canceled.

The Federal Government should be the most progressive employer in the Nation, and should set an example for the private sector of our economy. It behooves for us to correct the inequities in our present civil service leave system through the passage of this bill. I hope that the Senate will act promptly on H.R. 1284, and that it will be signed into law before the end of this session.

WILKES COLLEGE HONORS SENATOR SAM J. ERVIN, JR.

Mr. ROBERT C. BYRD. Mr. President, at its commencement in June 1973, Wilkes College of Wilkes-Barre, Pa., honored our colleague, Senator SAM J. ERVIN, JR., of North Carolina, by conferring upon him the honorary degree of doctor of humane letters. The citation accompanying the award of the degree read as follows:

In recognition of his years of distinguished service as a lawyer, judge, and United States Senator, of the years of quiet dedication to difficult assignments that made him an eminent authority on the Constitution of the United States, and of his steadfast support of that Constitution, and of his unhearalded service that gained him the unprecedented bipartisan respect of his colleagues.

APPOINTMENT OF A SPECIAL PROSECUTOR

Mr. MONDALE. Mr. President, much discussion has taken place in the past several days as to the power of the Congress to vest the appointment of a special prosecutor in a Federal court. The discussion has arisen as a result of the discharge of Archibald Cox as Special Prosecutor on October 20, 1973, and the introduction of several bills which would establish a new Special Prosecutor to be appointed by the judiciary.

I have received a memorandum prepared by Prof. Lee C. Bollinger, Jr., of the University of Michigan Law School. Professor Bollinger is a constitutional scholar and a former Supreme Court law clerk. I believe that my colleagues will find Professor Bollinger's views on the power of the Congress most informative.

I ask unanimous consent that Professor Bollinger's memorandum be printed in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

CAN CONGRESS VEST THE APPOINTMENT OF A SPECIAL PROSECUTOR IN A FEDERAL COURT?

OCTOBER 29, 1973.

In the wake of President Nixon's decision to order the Attorney General to discharge Mr. Cox as the Watergate Special Prosecutor, many individuals and groups have called for legislation creating a new independent prosecutor who would be immune from presidential removal. Early last week, for example, the deans of 17 law schools signed a petition urging Congress to vest the power to appoint a special prosecutor in a federal court. The deans, along with many others of like mind, asserted that Congress was empowered to enact such a law by virtue of Article II, Section 2, of the Constitution. That Section reads in relevant part:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.*" (emphasis added.)

The purpose of this short memorandum is to discuss whether the language, history and judicial interpretation of Article II, Section 2, support the position that Congress can, if it chooses to do so, vest the power to appoint a special prosecutor in a federal court.

I

Looking first at the language of Article II, Section 2, one is immediately struck by its clarity. Unlike the rather general phrasing found throughout much of the Constitution, this clause speaks with precision, without qualification or caveat. It says in plain terms that the Congress may, "as they think proper," vest the appointment of "Inferior Officers" in "the President alone, in the Courts of Law, or in the Heads of Departments." By all appearances the individuals who penned this language intended to leave the delegation of the appointment power of lesser federal officials to the unfettered discretion of the legislative branch. If there be any limitation on this discretion, it must be implied, for it surely is not explicit.

We all recognize, of course, that language is an imperfect medium. What may appear clear on the surface, often becomes murky upon further study. Any inquiry into meaning, therefore, must wherever possible go beyond the literal text to an examination of the circumstances under which the words were written or spoken. In instances like this, that means looking at the available records of the Constitutional debates.

When the relevent debates are examined, one finds nothing to suggest that the framers intended to say anything different than they did. The clause was proposed without discussion by Governor Morris. James Madison raised the only recorded objection. His criticism, however, was not that the clause would vest too much power in Congress, but that it did "not go far enough if it be necessary at all." Documents of the Formation of the Union of the American States, House Doc. No. 398, 69th Cong., 1st Sess., (1927). Madison thought that "Superior officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." Id. Governor Morris responded: "There is no necessity. Blank commissions can be sent." Id. After this brief exchange, the amendment was agreed to on the second vote.

When we next turn to the judicial decisions interpreting the pertinent clause in Article II, Section 2, we again find nothing to make us doubt Congress' authority to empower a federal court to appoint a special prosecutor. On the contrary, the one relevent Supreme Court decision strongly supports such an interpretation of congressional power. See *Ex parte Siebold*, 100 U.S. 371 (1879). At issue in *Siebold* was a congressional statute authorizing the judges of federal Circuit Courts to appoint supervisors of congressional elections and marshalls to assist those supervisors. Writing for the Court, Justice Bradley rejected the argument that "no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government." Id. at 397. Citing Article II, Section 2, the Court held that the "selection of the appointment power, as between the functionaries named, is a matter resting in the discretion of Congress."

Id. at 397–98. This result seemed to make eminent good sense to the Court:

"And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise." Id. at 398.

The Court in *Siebold* was also unpersuaded by another line of constitutional argument: that the statute was inconsistent with Article III in that it delegated powers to the courts that were nonjudicial in nature. This is not a case, the Court said, where Congress had sought to impose duties on the judicial branch that were not authorized by the Constitution; on the contrary, here "the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts" by virtue of Article II, Section 2. Id. at 398.

The *Siebold* decision is not the only precedent on Article II, Section 2, though it certainly is the most authoritative. For example, Congress long ago enacted a provision now contained in 28 U.S.C. § 546, which provides:

"The district court for a district in which the office of United States attorney is vacant, may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court."

This statute was upheld as constitutional in *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). The district court there relied on Article II, Section 2, in rejecting an argument that the provision violated the Doctrine of Separation of Powers.

Similarly, a three judge court relied on Article II, Section 2, in upholding a congressional statute under which judges of the United States District Court for the District of Columbia were authorized to appoint members of the District of Columbia Board of Education. See *Hobson v. Hansen*, 265 F. Supp. 902, 911–16 (D.C. 1967).

II

The foregoing review of the relevant legal authorities would seem to indicate that there is strong support for the proposition that Congress could under Article II, Section 2, place the power of appointment of a special prosecutor in the federal courts. Before accepting that conclusion as sound, however, we must consider the one major argument which can be anticipated in rebuttal: that it would be an impermissible usurpation of executive powers for Congress to delegate the appointment of executive officials to the judicial branch. Surely, it might be argued, the last clause of Article II, Section 2, should not be interpreted to mean that Congress may authorize a federal court to appoint the Under Secretary of State. Such a construction would give rise to a serious breach in the wall of separation of powers. And, if that is so, then a line must be drawn somewhere between "excutive inferior officers" and other inferior officers. A special prosecutor, the argument would conclude, falls into the formed category; his role would be to see that the laws are enforced, historically an executive function.

While this line of argument cannot be lightly dismissed, it contains several flaws which make it ultimately unpersuasive. First, insofar as the argument suggests that Congress may never vest courts with the power to appoint any official who will perform a nonjudicial, or an "executive," function, it is squarely refuted by the Supreme Court's decision in *Siebold*, as well as by the other lower federal court decisions mentioned previously. Congress itself, moreover, has rejected the suggestion; as we have seen, 28 U.S.C. § 546 provides for the interim appointment of United States attorneys by federal district courts. Second, even if it is conceded that a court could not appoint an inferior officer whose duties would be *exclusively* executive in nature, that concession would not necessarily preclude judicial appointment of a special prosecutor. It has long been recognized that a prosecutor is intimately involved in the judicial, as well as executive, functions of the government. As an officer of the court, subject to the supervisory power of the federal courts, the U.S. attorney performs a dual function within the overall scheme of government. He is, in short, markedly different for these purposes than the Under Secretary of State.

In order to sustain the power of Congress to provide for judicial appointment of a new Watergate special prosecutor, however, one need not go so far as to assert that judicial appointment of all United States attorneys would be proper. For the situation now facing the country is unique and clearly calls for extraordinary solutions. The highest officials in the executive branch are the subjects of criminal investigations. That hard fact means that if the executive branch is to control the investigation of alleged wrongdoing by its own members, the very integrity of the government will be called into question. It would seem entirely unreasonable in this instance, therefore, to give a crabbed interpretation of Congress' constitutional powers, especially when the constitutional language is so explicit and the judicial decisions so favorable to a broad reading of congressional authority.

I therefore conclude that it would be constitutionally permissible for Congress to designate a court of law to appoint a special prosecutor, having limited powers of investigation and prosecution and holding office only for a limited period of time.

LEE C. BOLLINGER, Jr.,
Assistant Professor of Law, University of Michigan Law School.

GRAVITY ASSISTS SPACE EFFORT

Mr. MOSS. Mr. President, the mysteries of the universe that are locked in the neighboring planets of our solar system have long puzzled mankind. Investigation of these secrets has been restricted by the expense involved in exploration and the limited operating parameters of present-day rockets.

Fortunately, research at NASA's Jet Propulsion Laboratory has provided a method for overcoming these restrictions and limitations.

The idea is to use the gravitational field of one planet to change the flight path of a spacecraft so that it may journey to another planet—without any additional use of rocket power. Thus, by applying this "gravity assist," it is possible for a single rocket to fly by several planets.

Application of this concept is one of the goals of Mariner 10, which is presently streaking toward Venus. After investigating that planet, the craft will change trajectory by "gravity assist" and hurtle toward Mercury for an additional assignment.

The promises held for future space exploration by utilization of this technique are limitless. NASA, and those responsible for development of the "gravity assist" concept, are to be commended for their efforts.

I call to the attention of the Senate, an article in the November 4 edition of the New York Times, which describes in detail the development and operation of this system and ask unanimous consent that it be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

CRAFT SPEEDS TOWARD MERCURY ON THE WINGS OF STUDENT'S IDEA

(By John Noble Wilford)

CAPE CANAVERAL, FLA., November 3.—Spacecraft used to get where they were going by brute rocket force alone. Now, a spacecraft, Mariner 10, is speeding toward Venus and eventually Mercury to demonstrate that the gravity of one planet can provide a free ride to a more distant planet.

It is an idea that should greatly expand man's thrust out into the solar system without any appreciable advance in rocket power. It is an idea, once practiced and proved, that should enable another Mariner, embarking in 1977, to bounce off the gravitational field of Jupiter and reach out for the first reconnaissance of Saturn.

If budget cuts had not intervened, it would have been the basis for a "grand tour" of all the outer planets, from Jupiter out to Pluto, starting in the late nineteen-seventies and extending for more than a decade.

The idea is to use the gravitational field of one planet—Venus, in the case of Mariner 10—to change the speed and flight path of a spacecraft so that it can, without any additional major use of rocket power, reach a more distant planet—Mercury, in this case. In this way, it is possible to fly by several planets in the solar system on the strength of present-day rockets.

MISSION IS DESCRIBED

Some call the concept a "gravity-assist" trajectory and describe it as a "bank shot" in interplanetary billiards.

The first trial got under way here early today with the successful launching of Mariner 10, an unmanned camera-bearing spacecraft. Its mission is to return scientific data and the first television pictures of Venus and Mercury.

Flight controllers reported some difficulty late today in attempting to switch on heaters for the spacecraft's television cameras. A mission spokesman said that the problem was not viewed as serious at this time. All other systems on the 1,100-pound spacecraft appeared to be functioning normally.

Mariner 10 is scheduled to fly within 3,300 miles of Venus in February and within 621 miles of Mercury in late March, traveling closer toward the sun than any previous man-made object.

The evolution of gravity-assist spaceflight as a practical concept began in 1961 when a graduate student at the University of California at Los Angeles took a summer job at the Jet Propulsion Laboratory at Pasadena, Calif.

The student, Michael A. Minovitch, was 24 years old at the time, an intense and imaginative young mathematician. He had already taken all the graduate mathematics and physics courses U.C.L.A. offered. But he couldn't bring himself to complete his Ph.D. requirements and leave school. He was, as his associates recall, "a professional student."

A SUMMER TASK

At the Jet Propulsion Laboratory, which directs most planetary explorations for the National Aeronautics and Space Administration, Mr. Minovitch was handed the summer task of developing multiplanet trajectories for spacecraft. Theoreticians had earlier suggested such missions but had not done the detailed mathematics.

And in all their theories, the theoreticians had "consistently overlooked" the gravity-assist possibilities, according to a study of the evolution of the concept prepared by Dr. Norris S. Hetherington of the University of Kansas, for the NASA historical office.

Victor C. Clarke, Jr., a trajectory analyst at the laboratory and Mr. Minovitch's supervisor, recalled in an interview: