

The only recorded debate upon the provision preceded the rejection of an 1864 amendment excepting the position of justice of the peace from "office of profit".

Article I, Section 6 of the United States Constitution provides:

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

This narrow provision closely follows Article III, Section 11 of the Maryland Constitution which states:

"[N]o person holding any civil office of profit, or trust, under this State, except Justices of the Peace, shall be eligible as Senator, or Delegate."

THE COURT OF APPEALS

1. THE TEST OF OFFICE OF PROFIT:

The Maryland Court of Appeals has said that "In general, the facts and circumstances in each case and the nature and effect of the particular provision of law by which the office was created, govern the determination as to whether the office in question is one of profit."⁴

Among the "circumstances" of the office which the Court considers are:

- a. Is the office created *by law*?
- b. Are the office's duties *continuing* and not occasional?
- c. Does the office include the exercise of "some portion of the *sovereign power of the State*"?
- d. Is there a *commission*?
- e. Is *bond* required?
- f. Is an *oath* prescribed?

⁴ Moser v. Howard County Bd., 235 Md. 279, 281 (1963).

g. Is the office one "of *dignity and importance*"?

h. May the officer be penalized for *misfeasance*?

i. Are *tenure and compensation* fixed by law?

The public officer is distinguished from the "servant," "employee," or "sub-agent" who is under the direction of superiors and does not partake of the exercise of the State's sovereign power.

2. OFFICES OF PROFIT:

The Court of Appeals has held the following to be offices of profit: supervisor of elections, municipal councilman, justice of the peace, clerk to the county commissioner, the mayor of Baltimore, the comptroller and city council of Baltimore, county commissioner, city manager, county metropolitan commissioner, county treasurer and notary public (prior to the 1964 amendment).

The following were held not to be offices of profit: deputy state auditor, the chief of the right-of-way department of the State Roads Commission, the chief of the alcoholic beverages division in the office of comptroller of the treasury, and superintendent of public instruction.

3. ARTICLE 35 LITIGATION:

Article 35 has been utilized in attempts to enjoin supervisors of elections; as a basis to fill the first office held by an individual who has taken upon himself the duties of a second office; to invalidate a commission's acts; and to remove an individual from office.

4. OTHER RELATED CONSTITUTIONAL REFERENCES:

Article 36 of the Declaration of Rights: regarding oath for office of "profit or trust".