The original documents are located in Box 11, folder "Supreme Court Nomination - Letters to the President" of the Richard B. Cheney Files at the Gerald R. Ford Presidential Library.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 10, 1975

~~CONFIDENTIAL~~

Dear Mr. President:

Against the possibility that a vacancy may occur on the Court there are certain factors, not always present when vacancies occur, that deserve consideration and I venture to submit them to you privately for such utility as they may have.

(1) Rarely have the geographical factors been as neutral as at present. As you know, the two youngest Justices are from the West (White and Rehnquist); there are three from the Midwest (Burger, Stewart, Blackmun); one from a border state, Maryland (Marshall); one from the Northeast (Brennan); and one from the South (Powell).

(2) The average age of the nine Justices is now 65 years.

(3) For more than ten months past we have been functionally only a Court of eight, and this has placed us under substantial handicaps.

(4) Since I took office in June 1969, the Court has been functionally eight Justices for more than two years.

(5) All indications are that our work will continue to increase both in the volume and in the complexity and novelty of issues; a number of crucial cases have been set for reargument due to the absence of Justice Douglas last year. To resolve them with a Court of eight Justices is highly undesirable, for many reasons.

(6) In my considered judgment, the next vacancy should be approached with the following factors in mind:

(a) It must be a nominee of such known and obvious professional quality, experience and integrity that valid opposition will not be possible.

(b) Given the present difficult condition of the Court's work -- a condition that has prevailed for more than 10 months -- a nomination should be made swiftly upon the occurrence of any vacancy before rival "candidacies" develop that could engender divisiveness and delay confirmation. We need nine Justices without delay.

(c) A nominee with substantial judicial experience would have several marked advantages; the adjustment to the work of the Court would be expedited because of familiarity with the enormous amount of "new law" in recent decades; insulation from controversy and partisanship by reason of judicial service is also likely an advantage (as it was to Justice Blackmun and to me). This does not rule out a non-judge but it emphasizes that a general practitioner, no matter of what legal capacity, has very likely had little occasion to keep up with the great volume and complexity in the evolution in criminal law and public law matters that now compose the bulk of the Court's work. In fairness I should say that a lawyer with substantial governmental experience, of course, has much of the kind of exposure to the large issues we face that judges deal with.

I cannot emphasize too strongly that we desperately need nine Justices to carry on our work. The situation could develop in a way not unlike that which arose when the Haynsworth and Carswell nominations were rejected.

I do not undertake to make specific recommendations for at this stage, with time being a critical factor, I tender no more than "specifications" which I draw from 20 years experience on the Bench and more than 20 as a practitioner.

I have hesitated to communicate with you but I conclude that my obligation to the Court compels me to share my views of the overall

problem since few outside the Court can have an appreciation of all these elements. I would, of course, be happy to pursue these points in more depth with you.

If there is a significant delay in confirming a nominee, the Court and the country will suffer severely. For my part, I am compelled to be candid in saying that we have had all we can sustain of functioning with a "crippled court" since 1969. The delays in 1969-1970 hurt the Court and the country.

I have not emphasized the crucial factor of age; three of the four Justices appointed since 1969 were over 60 when they took office, being respectively 61, 60 and 64, with only Justice Rehnquist being under 60. He is now 50. If the average service of the three over 60 finally amounts to 10 years each, we will have occasion to be grateful.

It goes without saying that I speak for myself, not for the Court.

Cordially and respectfully,

Warren E. Burger

The President

The White House

Office of the Attorney General

Washington, D. C. 20530

November 10, 1975

MEMORANDUM FOR THE PRESIDENT

At your request, I compiled some time ago a list of potential candidates I thought worthy of consideration for the Supreme Court. In compiling this list I had in mind various standards, including an age limitation. The list was as follows:

Judge Arlin M. Adams, born in 1921, U.S. Court of Appeals for the 3rd Circuit (from Philadelphia).

Philip Areeda, born in 1930; a graduate of Harvard Law School, who is a Professor at Harvard Law School, and, among other things, was Counsel to the President.

Robert Bork, born 1927, presently Solicitor General of the United States.

Bennett Boskey, of Washington, D.C., born in 1916, a practicing lawyer, highly regarded.

Judge Alfred T. Goodwin, born in 1923, U.S. Court of Appeals for the 9th Circuit (from Oregon).

Robert P. Griffin, born 1923, United States Senator from Michigan; a graduate of Central Michigan College and the University of Michigan Law School.

Philip Kurland, born 1921, a Professor of Law at the University of Chicago, and editor of the Supreme Court Review.

Vincent Lee McKusick, of Portland, Maine, born in 1921, a highly respected and active lawyer; a graduate of the Harvard Law School, a former president of the Harvard Law Review.

Dallin H. Oaks, of Utah, born in 1932, now President of Brigham Young University.

Judge Paul H. Roney, born in 1921, U.S. Court of Appeals for the Fifth Circuit (now from Florida).

Antonin Scalia, born in 1936, presently Assistant Attorney General in charge of the Office of Legal Counsel; he is a graduate of the Harvard Law School and has taught at the University of Virginia.

Judge John Paul Stevens, born in 1920, U.S. Court of Appeals for the 7th Circuit (from Chicago).

Judge Philip Tone, born in 1923, U.S. Court of Appeals for the 7th Circuit (from Chicago).

Judge J. Clifford Wallace, born in 1928, U.S. Court of Appeals for the 9th Circuit (from California).

Judge William H. Webster, born in 1924, U.S. Court of Appeals for the 8th Circuit (from St. Louis, Mo.).

Charles E. Wiggins, born 1927, Congressman from the 25th District of California; received undergraduate and law degrees from the University of Southern California.

Judge Malcolm R. Wilkey, born in 1918, U.S. Court of Appeals for the District of Columbia (originally from Texas).

James H. Wilson, Jr., of Atlanta, Georgia, born in 1920, a highly respected tax lawyer; a graduate of the Harvard Law School and former president of the Harvard Law Review.

In my original conversation with you on this matter, I mentioned Edward Gignoux, of Portland, Maine, U.S. District Judge for the District of Maine. Judge Gignoux is one of our most distinguished judges, but he was born in 1916. I had in mind also Carl McGowan, who is the outstanding member, in my view, of the United States Court of Appeals for the District of Columbia and surely one of the outstanding judges in the federal system. But Judge McGowan was born in 1911.

In addition, a name frequently mentioned is that of Phil C. Neal, now professor of law and formerly dean of the University of Chicago Law School. (His name has been mentioned in the past--some years ago--for this kind of consideration by Justice Powell.) He is an outstanding lawyer and legal scholar, but if you decide you might be interested in him, there are some matters I would wish to discuss with you. He was born in 1919.

At your suggestion, I have now pared down the list, and I have provided short biographies for those remaining on the list.

I have removed from this shorter list Philip Areeda, Bennett Boskey, Philip Kurland, Antonin Scalia, Judge Philip Tone, Judge Malcolm Wilkey and James H. Wilson, Jr. In addition, to get the list down to ten names, I would have removed the names of Judge Paul Roney and Judge Alfred T. Goodwin. I have not included biographies of Senator Griffin or Congressman Wiggins, since they are well known to you. I should say I have a high regard for their legal ability. I have included biographies of Judge Roney and Judge Goodwin, but I do not believe they would be appointments up to the high standard you have suggested.

In my view, looking at the top of the list which I am submitting, I would place the greatest emphasis on Dallin Oaks, Judge John Paul Stevens, and Robert Bork. After these three, I would place Judge Arlin Adams and Vincent McKusick. I would place Judge Webster and Judge Wallace next.

Edward H. Levi
Attorney General

DALLIN H. OAKS

Mr. Oaks, 43 years old, graduated from Brigham Young University (B.A. 1954) and the University of Chicago Law School (J.D. 1957), where he was editor-in-chief of the law review and a member of the Order of the Coif. He served as law clerk to Chief Justice Earl Warren during 1957-58; he later practiced law in Chicago from 1958 to 1961 with the Kirkland, Ellis firm. He became an associate professor at the University of Chicago Law School in 1961 and a full professor in 1964. Between 1970-1971, he served as Executive Director of the American Bar Foundation. Since 1971 he has been president of Brigham Young University, also serving as a professor at the Brigham Young Law School. His subjects are criminal procedure and trusts and estates. He has published numerous articles in the field of criminal justice, including a most highly regarded analysis and critique of the exclusionary rule of the Fourth Amendment. ("Studying the Exclusionary Rule in Search and Seizure," 37 University of Chicago Law Review 665 (1967)). Other publications include "The 'Original' Writ of Habeas Corpus in the Supreme Court," 1962 Supreme Court Review 153, and "Legal History in the High Court-Habeas Corpus," 64 Michigan Law Review 451 (1966). He is the co-author of a casebook on Trusts; a co-author of a book on A Criminal Justice System and the Indigent, and of The Criminal Justice System in the Federal District Courts. He was the editor of a volume on The Wall Between Church and State. Since 1971, he has been a member of the editorial board of Judicature and the Journal of Legal Studies. Mr. Oaks has also served on the American Bar Association Committee to Survey Legal Needs since 1971, and as counsel to the Bill of Rights Committee of the Illinois Constitutional Convention in 1970.

JUDGE JOHN PAUL STEVENS

Judge Stevens, 55 years old, graduated from the University of Chicago (A.B. 1941) and Northwestern University Law School (J.D. 1947), where he was co-editor of the Law Review. His academic record was outstanding both at Chicago and Northwestern. From 1942 to 1945, he served in the Navy from which he was honorably discharged with the rank of lieutenant. Following his graduation from law school Judge Stevens was law clerk to Supreme Court Justice Wiley Rutledge. He then entered private practice, specializing primarily in antitrust and commercial law matters, first in the firm of Poppenhusen, Johnson, Thompson & Raymond, and later as a partner in the firm of Rothschild, Stevens, Barry and Myers in Chicago. He served as associate counsel of the House Judiciary Committee's Subcommittee on the Study of Monopoly Power in 1951. From 1953 to 1955 he was a member of the Attorney General's National Committee to Study the Antitrust Laws. His combined periods of practice before being elevated to the U.S. Court of Appeals for the Seventh Circuit was ten years. From 1952 to 1956, he taught part time, first at Northwestern, then at the University of Chicago Law School. He was appointed to the Court of Appeals in 1970. The ABA Committee on Judicial Qualification rated him well qualified.

One of his recommendations for appointment to the Court of Appeals came from Justin Stanley, who is the President-Elect of the ABA.

Judge Stevens has proved a judge of the first rank, highly intelligenct, careful and energetic. He is generally a moderate conservative in his approach to judicial problems, and in cases involving the attempted expansion of constitutional rights and remedies. He has shown particular ability in antitrust and other matters of federal economic regulation and would add strength to the Court in this area. Overall he is a superb, careful craftsman. His opinions lack the verve and scope of Judge Adams' but are more to the point and reflect more discipline and self restraint.

In U.S. ex rel. Allum v. Twomey, 484 F.2d 740 (1973), Judge Stevens held that defense counsel's failure to raise a constitutional objection at the state trial or on appeal, even though without the defendant's knowledge or express consent, may constitute a "deliberate by-pass" or waiver, precluding federal collateral attack. In U.S. v. Smith, 440 F.2d. 521 (1971), Judge Stevens dissented from a holding by the Court that a trial court's failure, in accepting a guilty plea, to inform the defendant that he would be ineligible for parole was grounds for collateral attack.

In Kirby v. Sturges, 510 F.2d 397 (1975), Judge Stevens held that an eyewitness's identification, which was concluded to be reliable despite an unnecessarily suggestive showup, should not be excluded.

In U.S. v. Ramsey, 503 F.2d 524 (1973), Judge Stevens upheld the constitutionality of Title III of the Omnibus Crime Control Act. The opinion reflects careful workmanship and a critical appraisal of the Supreme Court's opinion in Berger v. New York, 388 U.S. 41.

ROBERT H. BORK

Solicitor General Bork, 48 years old, received both B.A. (1948) and J.D. (1953) degrees from the University of Chicago. While at the law school, Mr. Bork was managing editor of the Law Review. For one year following his graduation, he remained at the law school as a resident associate. After a year in private practice in New York, Mr. Bork became associated with the Kirkland, Ellis firm in Chicago, where he remained until 1962. He then joined the faculty of Yale Law School where he taught constitutional law and antitrust. Mr. Bork has written extensively in both fields. He was appointed Solicitor General of the United States in 1973.

Before his appointment, Mr. Bork was generally known in the profession as one of the foremost conservative critics of the prevalent interpretation and enforcement of the antitrust laws. In constitutional law, Mr. Bork's work and views were perhaps less well known, except for his prominent role, in the first term of President Nixon's administration, as one of the draftsmen and proponents of proposed legislation to eliminate busing as a judicial remedy for school segregation. In his work as Solicitor General, Mr. Bork has the highest reputation, especially among close observers of the Court, for ability and integrity. If Mr. Bork was appointed to the Court, there would be little doubt of his intellectual capacity for the work. There would be equally little doubt that, on the Court, Mr. Bork would provide strong reenforcement to the Court's most conservative wing--particularly in the sense of a need to limit the extended role of the courts.

JUDGE ARLIN M. ADAMS

Judge Adams, 54 years old, received undergraduate and graduate degrees from Temple University (B.S. 1941; M.A. (economics) 1950) and his law degree from the University of Pennsylvania Law School (LL.B. 1947) where he was editor-in-chief of the Law Review, graduated with honors, and was elected to Order of the Coif. After graduation, he served as law secretary to Chief Justice Horace Stern of the Pennsylvania Supreme Court. He served in the Navy from 1942 to 1946, when he was honorably discharged with the rank of lieutenant. From November 1947 to 1963, and from 1966 to 1969, Judge Adams was in private practice in Philadelphia with the firm of Schnader, Harrison, Segal & Lewis. He was a highly respected member of the Philadelphia bar; he served a term as Chancellor of the Philadelphia Bar Association and also was a member of the House of Delegates of both the Pennsylvania and American Bar Associations. From 1963 to 1966 Judge Adams worked in Governor Scranton's administration as Secretary of Public Welfare. He was appointed to the U.S. Court of Appeals for the Third Circuit in 1969. He was active in various civic and charitable endeavors prior to becoming a member of the U.S. Court of Appeals.

The ABA Committee on Judicial Qualifications rated him well qualified for the appointment to the Court of Appeals; all but one member of the Committee thought him exceptionally well qualified. The Chairman of the ABA Committee was Lawrence E. Walsh who is now president of the ABA. Adams was recommended for the Court of Appeals appointment by Senators Scott and Schweiker, and former Governor Scranton.

Judge Adams has proven himself an able, highly energetic judge, generally conservative in judicial philosophy, especially with respect to the scope of federal jurisdiction and remedies. He was the author of the majority opinion in United States v. Butenko, 494 F.2d 593 (1974), holding that, so long as the primary purpose of electronic surveillance is to obtain foreign intelligence, the Fourth Amendment does not require the Executive to secure a judicial warrant, and moreover, the surveillance meets the Fourth Amendment's reasonableness test. His positions on substantive constitutional issues are generally conservative. His opinions demonstrate considerable energy, broad scope of interest and an underlying judicial philosophy, which includes a concern with limiting the role of the federal courts and of clarifying and to some extent limiting the right of standing to sue. In his six years on the Third Circuit he has written about two hundred opinions, one third of which are concurrences and dissents.

His opinions have considerable flair and reach, which gives them interest and can suggest an influential member of the Court, but revealing a certain weakness, not so much in analytical skill--which he has--but in being willing to sometimes by-pass or go beyond the most careful analysis. This is the ultimate question about a judge, of course, but my guess is that he has the potential to be a strong and good appointment.

VINCENT LEE MCKUSICK

Mr. McKusick, 54 years old, attended Bates College, where he received an A.B. in 1943, Massachusetts Institute of Technology where he received an S.B. and an S.M. in 1947, and Harvard Law School, where he received an LL.B. in 1950. He was President of the Harvard Law Review in 1949-50. He served as law clerk to Chief Judge Learned Hand during 1950-51, and as law clerk to Justice Frankfurter during 1951-52. He then joined the Portland, Maine law firm of Pearce, Atwood, Scribner, Allen & McKusick and is presently a partner in that firm. Mr. McKusick has been a Commissioner on Uniform State Laws since 1968, a Fellow of the American Bar Foundation, and a member of the council of American Law Institute since 1968. He is also a member of the National Panel of Arbitrators of the American Arbitration Association, a member of the Supreme Judicial Court Advisory Committee on Maine Rules of Civil Procedure, and the chairman of that committee since 1966. He is a past director of the American Judicature Society. He has been a member of several other legal and civic groups and governmental commissions. Mr. McKusick has also published articles in various legal publications, most of which concern civil procedure. He is a co-author of Maine Civil Practice and the author of Patent Policy of Educational Institutions (1947).

Mr. McKusick has had an extremely distinguished and active career in the practice. His legal publications and membership on prestigious legal and governmental committees are impressive. He is a highly respected member of the profession.

JUDGE WILLIAM H. WEBSTER

Judge Webster, 51 years old, graduated from Amherst College (A.B. 1947) and Washington University (St. Louis) Law School (LL.B. 1949). During the Second World War and the Korean Conflict, he served as a lieutenant in the Naval Reserve. After he graduated from law school, Judge Webster entered private practice, becoming, in 1956, a partner in the St. Louis firm of Armstrong, Teasdale, Kramer and Vaughn. From 1959 to 1961, he served as United States Attorney for the Eastern District of Missouri. He returned to private practice in April 1961, and continued in private practice until December, 1970, when he was appointed United States District Judge for the Eastern District of Missouri. At that time the Standing Committee on Federal Judiciary of the American Bar Association rated him as "exceptionally well qualified." Judge Webster was appointed to the U.S. Court of Appeals for the Eighth Circuit in 1973 at which time he was rated again by the ABA Committee on Judicial Qualifications as"exceptionally well qualified."

Judge Webster has proven to be a very competent judge--energetic, careful and intelligent. He is generally conservative, especially in criminal law matters and reluctant to intrude the federal judiciary into state law and government problems.

In Evans v. Swenson, 332 F. Supp. 360 (1971), Judge Webster held that Miranda warnings, once given, need not be repeated in full before every attempt to question by the police, so long as the defendant has been given the warnings once and so long as his confession to the police several hours later was otherwise voluntary.

In Evans v. Janing, 489 F.2d 470 (1973), he held that where the prosecutor's failure to disclose arguably exculpatory evidence has not been deliberate and the defense has failed to request it, due process is not violated unless the undisclosed evidence was highly material--not merely useful--to the defense. In Williams v. Brewer, 509 F.2d 227 (1975), Judge Webster dissented from a majority holding, in a habeas corpus case, that a convicted state defendant did not knowingly waive his right to have counsel present during police interrogation.

JUDGE J. CLIFFORD WALLACE

After serving in the Navy from 1946 to 1949, Judge Wallace, aged 46, graduated from San Diego State College (B.A. 1952) and the University of California Law School (Berkeley) (LL.B. 1955). At law school, he was a member of the Board of Editors of the University of California Law Review. He became associated with the law firm of Gray, Cary, Ames & Frye (in San Diego) in 1955, became a member of that firm as a partner in 1962 and continued with that firm until 1970 when he was appointed District Judge for the Southern District of California. The ABA Committee found him well qualified for this appointment. As District Judge, he published six opinions in his two years. In 1972, Judge Wallace was appointed to the U.S. Court of Appeals for the Ninth Circuit. The ABA Committee rated him well qualified.

Prior to his appointment to the Bench, Judge Wallace was active in various professional bar organizations, and also he has been prominent in work for the Mormon Church.

Judge Wallace is an able, intelligent judge and is markedly conservative, especially in criminal law matters. In his three years on the Ninth Circuit, Judge Wallace has, with a few notable exceptions, seldom written the opinion for the Court in particularly difficult or important cases. His opinions are usually brief, clear and to the point. One of his more important cases was Jones v. Breed, 497 F.2d 1160 (1974), holding that, once jeopardy attaches in a juvenile court adjudication hearing, a minor may not be retried for the same offense as an adult. Judge Wallace wrote the opinion for the Court in U.S. v. Bowen, 500 F.2d 960 (1974), holding that Almeida-Sanchez v. United States, 413 U.S. 266 (1973), (which held invalid searches without a warrant by roving border patrols) was not retroactive as applied to fixed check points. Judge Wallace dissented from that part of the majority which held Almeida-Sanchez applicable to invalidate a fixed checkpoint search without warrant or probable cause.

JUDGE PAUL H. RONEY

Judge Roney, 53 years old, received his B.S. degree from the University of Pennsylvania in 1942 and, after serving as an Army Reserve staff sergeant during World War II, received an LL.B. from Harvard Law School in 1948. From 1948 to 1950, Judge Roney worked for the predecessor of the Dewey, Ballantine firm in New York, and then moved to St. Petersburg, Florida, where he engaged in private practice, mostly involving state court litigation. He was active in local bar and community affairs. He was appointed to the U.S. Court of Appeals for the Fifth Circuit in October, 1970. The ABA Committee on Judicial Qualifications rated him well qualified.

Since he has been on the Court of Appeals, Judge Roney has written around 200 opinions, including relatively few concurrences and dissents.

Judge Roney's views in criminal matters, especially those involving constitutional issues, are generally conservative. In West v. Louisiana, 478 F.2d 1026 (1973), Judge Roney dissented from a holding that a state prisoner may challenge his state criminal conviction on grounds that his retained (as distinguished from appointed) counsel failed to provide an effective defense.

In U.S. v. Allison, 474 F.2d 286 (1973), Judge Roney reversed a criminal conviction, holding that large portions of the defendant's grand jury testimony read by the prosecutor at the trial were irrelevant and inadmissible.

In Hawkins v. Town of Shaw, 461 F.2d 1171 (1972), Judge Roney dissented from an en banc holding that gross disparities in the municipal services provides between white and black neighborhoods, though not clearly motivated by evil purpose or intent, were apparently the product of neglect with "clear overtones of racial discrimination." Judge Roney's dissent was on the basis that the city must be allowed to show in rebuttal that the disparities were in fact the product of rational judgments based on factors other than race.

JUDGE ALFRED T. GOODWIN

Judge Goodwin, 52 years old, received both his undergraduate and law degrees from the University of Oregon (B.A. 1947; J.D. 1951). At law school, Judge Goodwin was student editor of the Oregon Law Review. Judge Goodwin served in the Army from 1943 to 1946, when he was honorably discharged with the rank of captain. After law school, Judge Goodwin engaged in private practice in Eugene, Oregon from 1951 to 1955. During that time, for one year, he taught a course in equity at the Oregon Law School. From 1960 to 1969, Judge Goodwin was a highly respected judge of the Oregon Supreme Court. He was appointed District Judge for the District of Oregon in 1969. The ABA Committee ranked him as "well qualified." In his two years on the district court, Judge Goodwin wrote over forty published opinions. A substantial portion of these were in diversity actions and reflect Judge Goodwin's extensive state judicial experience. In November, 1971, Judge Goodwin was appointed to the U.S. Court of Appeals for the Ninth Circuit. The ABA Committee then rated him exceptionally well qualified for the appointment.

Prior to his appointment to the Federal bench, Judge Goodwin was active in a variety of religious, cultural, educational and professional organizations and endeavors.

Since his appointment to the Ninth Circuit, Judge Goodwin has written somewhat over ninety opinions. A large share of his opinions have been in standard criminal appeals, and a substantial number in tax and diversity cases.

In U.S. v. Bowen, Judge Goodwin wrote the en banc opinion holding the Almeida-Sanchez ruling applicable to fixed checkpoint searches. (Almeida-Sanchez held invalid searches without a warrant by roving border patrols.) He rejected law enforcement necessity as a justification for modification of the probable cause requirement.

In Hayse v. Van Hoomison, 321 F.Supp. 642 (1970), Judge Goodwin held a Portland obscenity ordinance incorporating the Roth-Memoirs test unconstitutional, on the ground that under intervening Supreme Court decisions, the state may not prohibit obscene literature based on obscene content, but may deal only with pandering, obtrusive advertising or with the placing of material in an "environment in which it is likely to fall into the hands of children." In In re Naron, 334 F.Supp. 1150 (1971), Judge Goodwin held the $50 filing fee for petitions in bankruptcy violative of due process.

In Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (1974), Judge Goodwin took the position that the use of high school grades as the criterion for admission to a public, college-prepatatory high school, even without discriminatory purpose, raised serious constitutional questions if the standard operated to exclude a disproportionate number of black and Spanish-American students.

ROBERT P. GRIFFIN
MICHIGAN

United States Senate

OFFICE OF
THE ASSISTANT MINORITY LEADER
WASHINGTON, D.C. 20510

November 24, 1975

The President
The White House
Washington, D.C.

Dear Mr. President:

As you know, Article I, Section 6 of the U. S. Constitution provides:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such Time; ..."

Enclosed is an article which appeared in the November 1974 North Carolina Law Review. One need not agree with the conclusions of author Pollitt to recognize that his article entitled, "Senator/Attorney General Saxbe and The Ineligibility Clause," provides a useful collection and analysis of the limited authorities available concerning the meaning and purpose of this provision of the Constitution.

However, if the strict and inflexible interpretation urged by Professor Pollit were accepted as the law of the land, it means, among other things, that a President could not appoint a Member of Congress to fill the office of Vice President under the 25th Amendment if Congress happened to have increased the salary of the Vice President during the term for which the particular Congressman or Senator was elected.

Furthermore, in a situation where Congress has not significantly raised the salary of one office, but has merely raised the salaries of all offices by a modest, uniform percentage, (e.g., the 5% increase for all judges, Congressmen

and most Executive officials was less than the cost of living increase for the preceding year), surely the kind of mischief which concerned the Founding Fathers is not present.

Nevertheless, until and unless something is done, the argument made by Professor Pollitt will continue to be available as an obstacle in situations not contemplated by the drafters of the Constitution. This could prove to be a very discriminatory and most unfortunate circumstance if, for example, the office of Vice President should become vacant, or in other situations where the special qualifications of a particular Member of Congress are really needed in the Executive or Judicial branch.

I am convinced that it would serve the interest of the Executive, the Congress and the best interests of the Nation as a whole to examine and clarify this question -- at a time when no important vacancy is pending.

I suggest that the Attorney General might be requested to study the matter and to explore and recommend ways to clarify it. During such a review process, I would urge consultation with Congressional leaders and with Chairmen and Ranking Members of the appropriate Committees of Congress.

If I can be of assistance in any way, please let me know.

With best wishes, I am

Sincerely,

Robert P. Griffin
U. S. Senator

RPG:tb

Senator Bob Griffin would have been an excellent choice for the Court. I can say that the A.B.A. found him qualified for the appointment.

However, Bob Griffin is an able and important leader in the Senate, and I think he is performing a very valuable service there.

In addition, there is a technical legal problem which made it difficult to consider any Member of Congress. One provision of the Constitution (Art. I, Sec. 6, Clause 2) seems to disqualify any Member of Congress for appointment to an office if the salary for that office has been increased during the term for which the Congressman was elected. During this session, the salary of all Federal judges was raised 5 per cent, along with the salaries of most other Federal officials.

I believe Congress and the Executive branch should take a close look at this provision of the Constitution and its purpose. Perhaps some legislative action can be taken while no vacancy is pending to assure that this provision will not operate as a discriminatory bar for all Members of Congress under circumstances not envisioned by our Founding Fathers.

THE WASHINGTON STAR 11/22/75

Will the Court swing into retrogression?

There's a vacancy on the Supreme Court. Where's the Holmes, Brandeis or Marshall to fill it? Will Mr. Ford find such a giant? We doubt it, unless by accident, as Eisenhower found Earl Warren for chief justice, whom later he called his "biggest damfool mistake." Presidents never can tell how these lifetime appointees will turn out.

Richard Nixon knew precisely what kind of judge he wanted and left the nation four of them to whom Mr. Ford presumably now adds a fifth. Nixon told a television audience he wanted men who "share my conservative philosophy," "judicial conservatives," who supported his desire to defend the "peace forces." He ran against "permissive" judges who "coddled criminals" and had the audacity to send up for confirmation two glaringly unqualified nominees with a record of insensitivity to racial justice. Only contempt for the court as a rival power could explain those selections.

With Justice Douglas' departure and with a new selection by Mr. Ford the prospect is that any Democratic liberal president elected in 1976 will face as conservative a court as Franklin Roosevelt faced in 1933. This is the more significant since the upcoming age after our current recession-inflation is apt to be an activist, tumultuous age, churning with change in religious, ethical and constitutional ideals. What will be the attitude of the holdover Nixon court?

Looking down implacably on the Roosevelt New Deal were vindictive conservatives Van Devanter, McReynolds, Sutherland and Pierce Butler; Brandeis, Stone and Cardozo on the liberal side; and Chief Justice Hughes and Owen Roberts holding the balance. They hurled legal thunderbolts at New Deal laws and in June 1936, for instance, declared the New York minimum wage act invalid 5 to 4. The Founding Fathers, you see, had fixed it so you couldn't guarantee a working man or woman a minimum wage constitutionally.

Could it happen again? Not quite like that, but enough like it so that with Mr. Ford's new appointee to the court, it's worthwhile knowing what the ancient struggle is all about. The job of the United States Supreme Court, unique on earth, is to guarantee change without revolution — the indispensable instrument to adapt the majestic generalities of the American Constitution to the emergent needs of the time, and thereby to prevent it from becoming an irrelevant historical parchment. Sitting loftily there behind their immense mahogany bar in their Corinthian marble temple, the nine robed justices seem like a judicial priesthood removed from partisan politics, enunciating almost divinely inspired law. Nonsense.

They are intensely human beings; half of the 100 men who have so far served have not had previous judicial experience, 19 have been culled from cabinet or near-cabinet rank, two secretaries of state (John Jay and John Marshall), a presidential candidate or two (Taft, Hughes and Warren) and so on. Behind the judicial masks burn passionate convictions about politics and policy.

TRB is the traditional signature on a weekly column appearing in The New Republic *magazine, written by Richard L. Strout, Washington correspondent for* The Christian Science Monitor.

Mr. Ford's selection can be measured against the criterion enunciated by 65 law school deans and professors of law, history and political science three years ago who found 12 "great" justices. Names? — Chronologically, Marshall, Story, Taney, Harlan, Holmes, Hughes, Brandeis, Stone, Cardozo, Black, Frankfurter and Warren. They found eight "failures," Van Devanter, McReynolds, Butler, along with Byrnes, Burton, Vinson, Minton and Whittaker. (Three of these faced FDR in 1933.)

What are the criteria for a successful judge? Previous judicial experience? — not at all, says Felix Frankfurter, who wrote, "the correlation between prior judicial expeience and fitness for the functions of the Supreme Court are zero." The need is breadth of view. Though it is called a court, it is also a quasi-political body in the noblest sense. The biographies of the "great and near-great" emphasize broad intelligence and wide-ranging interests. They are informed beyond the narrow field of law; steeped in literature, history, political science, economics, the physical sciences, philosophy and religion. They have a love of learning and a capacity to assimilate and digest. They are men of resourcefulness and imagination. They must also have courage. The departing William O. Douglas had many of these attributes; the Senate will hope to find them in his successor.

A central debate since the court began is the degree of intervention or self-restraint it should use on the tough frontier issues. It is the ancient struggle between the individual and constituted authority; judicial activism and judicial restraint.

This week a Senate committee told how the FBI tried to destroy Martin Luther King Jr. in its counterintelligence (Cointel) program, including sending a letter interpreted as a suggestion that he commit suicide. The FBI used 16 electronic bugs and eight wiretaps. King got the anonymous letter just 34 days before he received the Nobel Peace Prize in 1965. The prize appears to have upset Hoover as much as Nobel prizes to Russians upset Moscow. (The biggest structure on Pennsylvania Avenue is still the J. Edgar Hoover Building.)

What does the Supreme Court do in matters like this? Why, if cases growing out of such things reach it, it decides whether to intervene or not. Most cases are far more subtle. Firebrand James Otis denounced George III's writs of assistance used for harassing search and seizures of the colonists, and the Fourth Amendment today guarantees Americans the right of privacy: "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ." Or does it? Can evidence obtained illegally by bugging or wiretapping be used against a citizen before a grand jury? The Burger court this January in the *Calandra* case ruled that it could, despite the Fourth Amendment; the so-called "exclusionary rule" (excluding tainted evidence) notwithstanding. The vote, 6 to 3, with the four Nixon judges, plus White and Potter Stewart, in the majority.

Dozens of such issues fill the field of criminal law alone. The Warren court for 15 years decided them in favor of individual rights; the Burger court generally comes down the side of constituted authority.

Opening a law center here, Chief Justice Burger declared that Americans should not look to the courts to innovate and reshape their society — what he called "the alluring prospect that our world can be changed in the courts." The Burger court is against "activism," presumably it would have kept hands off government snooping, left schools segregated, and rejected the one-person, one-vote rule.

THE WHITE HOUSE
WASHINGTON

TO: The President

FROM: MILDRED LEONARD

FOR: Information _____

Appropriate Handling _____

Senator Griffin asked me to get this to you by noon but it didn't come till 12:05 p. He is leaving from his office at 1:30 pm

ML

DATE: 11/24/75

SENATOR/ATTORNEY-GENERAL SAXBE AND THE "INELIGIBILITY CLAUSE" OF THE CONSTITUTION: AN ENCROACHMENT UPON SEPARATION OF POWERS

DANIEL H. POLLITT†

The generation of men who framed and established our Constitution was well aware that "the votes of members of Parliament had been bought, with money *or office* by nearly every minister who had been at the head of affairs"; and that this practice of "parliamentary corruption" was freely and sometimes shamefully applied throughout the American war."[1] The framers did not want this practice to continue here, and consequently wrote an "ineligibility" and an "incompatibility" clause into article 1, section 6 of the Constitution.

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such Time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This clause had its origin in a strong desire to avoid the example of England and in an even stronger belief in the principle of separation of powers.[2] George Mason pronounced during the constitutional convention that this curb on the Executive power to appoint was "the cornerstone on which our liberties depend—and if we strike it out we are erecting a fabric for our destruction."[3]

Despite the passion and heated debate that preceded the enactment of this clause, it has lain practically dormant for almost two hundred years.[4] Interest was revived in 1973 when President Nixon ap-

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1. 2 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 242-43 (1858) (emphasis added).

2. Reservists Comm. To Stop War v. Laird, 323 F. Supp. 833, 835 (D.D.C. 1971).

3. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 381 (1911).

4. *Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam) is the only case arising under the "ineligibility" clause, and there the Supreme Court avoided decision on the merits by dismissing it for lack of "standing." *See* text accompanying notes 66-70 *infra*.

pointed Senator William Saxbe to be his fourth Attorney General. On the face of the Constitution, Saxbe was "ineligible" for the appointment. He was elected to the Senate from Ohio in 1968, and, during his term of office, Congress had increased the salary of the Attorney General from 35,000 dollars to 60,000 dollars per annum.[5] However, there was an "end run" around the Constitution. Congress rolled back the Attorney General's salary to 35,000 dollars and the Senate then confirmed the nomination by the overwhelming vote of seventy-five to ten.[6] Reference was repeatedly made during the Senate debate to the 1909 appointment of Senator Philander Knox to be the Secretary of State. Congress had increased the salary of that office during the time for which Senator Knox was elected, and the Congress oblingly rolled back the salary to pre-existing levels to remove any impediment to his appointment. An Assistant Attorney General gave the "unofficial opinion" that the ineligibility clause did not bar the appointment. He reasoned that "the sole purpose" of the clause was to destroy the expectation of a legislator that "he would enjoy the newly created emoluments" and that, if "no such hope can exist" because the increased salary "is made and then unmade," the case "falls outside of the purpose of the law and is not within the law."[7] In other words, those who

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Reservists Comm. to Stop War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), was the first case filed under the "incompatability" clause. Legal scholars, apparently, have had no interest in the clause, as the law reviews are barren of any discourse on the subject.

5. The increase came into effect under the provisions of 2 U.S.C. § 359 (1970). This provision allows a salary increase to take effect thirty days after recommendation by the President. President Nixon recommended the increase on January 15, 1969. 34 Fed. Reg. 2241 (1969).

6. N.Y. Times, Dec. 18, 1973, at 35, cols. 4-8. This was not the first time the Nixon Administration ran afoul of the ineligibility clause of the Constitution. Donald Rumsfeld was appointed from the House of Representatives to be Director of the Office of Economic Opportunity, despite the fact that the salary for the director had been increased while Mr. Rumsfeld was a legislator. President Nixon sought to avoid the issue by paying Mr. Rumsfeld nothing as Director of the Office of Economic Opportunity, and 42,500 dollars as an "assistant to the President." *Id.*, Nov. 2, 1973, at 22, cols. 5-6.

Melvin R. Laird took the oath of office as a member of the House of Representatives on January 3, 1969. President Nixon appointed him Secretary of Defense, despite the fact that a salary increase for that office was to take effect on March 1 of that year unless vetoed by the Congress. Attorney General Ramsey Clark advised that the appointment was lawful (despite the increase in emoluments "during the time" for which Laird "was elected") because the salary increase was tentative as of the time of the appointment. 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969); *see* text accompanying notes 90-95 *infra*.

7. 43 CONG. REC. 2403 (1909). *But see* text accompanying notes 40-42 *infra*. Apart from the merits of this "unofficial opinion" by an assistant attorney general, the Philander Knox situation is of limited precedential value. President Taft, unlike President Nixon, made no public announcement of his intention to nominate the Senator prior to the enactment of the law rolling back the increased emolument. This permitted

favored Saxbe (and earlier, Philander Knox) would accommodate a presidential appointment by reading the clause to mean that a Congressman or Senator may [instead of "shall not"], during the time for which he was elected," 'be appointed to any civil office . . . the emoluments whereof shall have been increased during such time' *provided only* that the increase in emolument is not available to the appointee 'during such time.' "[8]

This is a far too narrow reading of the Constitution. "Parliamentary corruption" is a two-way street; for every "corruptee" there must be a "corruptor."[9] The ineligibility clause does indeed destroy the expectation that a Representative or Senator might have that he would enjoy the newly created office or the newly created emoluments, but the Constitution does far more. Legislators are incapacitated from promotion to executive offices because otherwise "their eligibility to offices would give too much influence to the executive."[10] The ineligibility clause is aimed at incapacitating the Executive, not the individual members of the Congress, all for the underlying purpose of preserving the independence of the Congress and the President, each from the the other."[11]

Those who framed the Constitution knew from the British experience that, if the Executive was left at liberty to purchase votes "by the inducements of money or office," conscience might become "false to duty, and corruption, having once entered the body politic, may be

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Taft supporters in the House to maintain that there was no constitutional issue involved, that the issue was simply an economy measure.

Despite this, and all of the pressures that a newly elected President and a majority party could command, the bill reducing the salary passed the House by a vote of 173 to 116, with 90 Representatives abstaining. 43 CONG. REC., *supra*, at 2415. In the Senate, the issue was never raised during the enactment of the "roll back bill" or during the subsequent confirmation. This prompted Congressman Clark in the House to proclaim that "senatorial courtesy, . . . overrides the Constitution, laws, and every other thing known among men." *Id.* at 2415.

8. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 20 (1948).

9. "Public morality . . . condemns with equal severity and equal justice both the giver and the receiver in every transaction that can be regarded as a purchase of votes upon particular measures or occasions, whatever may have been the consideration or motive of the bargain." 2 G. CURTIS, *supra* note 1, at 244-45.

10. The words are those of Roger Sherman of Connecticut during the debate on this Clause. A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 764 (1968).

11. Corwin writes that the clause derives from a repudiation of the British "Cabinet System" in which the executive power is placed in the hands of the leaders of the controlling party in the House of Commons. In contrast, the "ineligibility" and "incompatibility" clauses confirm and support the doctrine of the separation of powers in which the business of legislation and that of administration proceed largely in formal independence of each other. *See* E. CORWIN, *supra* note 8, at 20-21.

employed to effect bad ends as well as good."[12] On the other hand, the Framers did not want to penalize those who served in the legislative bodies by totally denying them opportunity for higher office. This total bar, it was thought, might deny Congress the services "of the most capable citizens" by eliminating the possibility of subsequent appointment to "the higher or more lucrative offices of state." The history of the constitutional debate is an effort to prevent the evils of these opposite mischiefs.[13]

I. THE CONSTITUTIONAL DEBATES

On May 25, 1787, delegates from the original states organized a Constitutional Convention in Philadelphia and remained in almost constant session until September 17 to frame our Constitution. Work began in earnest on May 29 when Edmund Randolph submitted the so-called Virginia Plan for organizing a federal government. Most of the subsequent discussion concerned alternatives and amendments to the Virginia Plan.

Randolph's fourth and fifth resolutions provided that the members of the National Legislature would be ineligible to hold "any office," be it state or federal, during the elected "term of service" and for an undetermined period of time thereafter.[14] Debate began on these proposals on June 22 when Nathaniel Gorham of Massachusetts moved to strike out the ineligibility clause insofar as it barred appointment to offices created "under the national government."[15] He considered the

12. 2 G. CURTIS, *supra* note 1, at 247. In addition to the British experience, the Framers also were aware of the experiences of the Congress that had the sole power of appointment to offices under the Articles of Confederation. Complaints had been made of the frequency with which the Congress had filled these offices with its own members. The original drafts of the Constitution provided that the legislative body would have the power of appointment; thus, there was a need to guard against the potential abuse if the members of the Congress were left at liberty to appoint each other to offices of their own creation. *Id.* at 248-50.

13. *Id.* at 248.

14. The Randolph Resolutions read as follows:

> 4. Resd. that the members of the first branch of the National Legislature . . . be ineligible to any office establ'shed by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of ———— after its expiration.
>
> 5. Resd. that the members of the second branch of the National Legislature . . . be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of ———— after the expiration thereof.

1 M. FARRAND, *supra* note 3, at 20-21.

15. 2 *id.* at 379.

ban on appointments to be both "unnecessary and injurious."[16]

George Mason of Virginia rose in opposition to this motion. He pointed out that in England the "power of the crown" had "remarkably increased" during the last century through "the sole power of appointing the increased officers of government," and he concluded that this ineligibility clause is "the cornerstone on which our liberties depend."[17] Pierce Butler of South Carolina echoed the sentiment that it was the Executive power of appointment that caused and resulted in parliamentary "venality and corruption."[18]

Rufus King of Massachusetts spoke for the Gorham amendment and against the Randolph "ineligibility" resolution. He thought this "restriction on the members would discourage merit" and that it "would also give a pretext to the Executive for bad appointments, and he might always plead this as a bar to the choice he wished to have made."[19]

James Wilson of Pennsylvania also rose to support the proposed Gorham amendment, because "[s]trong reasons must induce me to disqualify a good man from office."[20] Admitting the potential for "cabal and intrigue between the executive and legislative bodies" that could exist without the ineligibility clause, he nonetheless thought it more important "to hold forth every honorable inducement for men of abilities to enter the service of the public." He then put this case: "Suppose a war break out and a number of your best military characters were members; must we lose the benefit of their services? Had this been the case in the beginning of the war, what would have been our situation?—and what has happened may happen again."[21]

Alexander Hamilton also spoke in support of the Gorham amendment. He too confessed to a danger "where men are capable of holding two offices." But he saw the need for a strong Executive, with

16. *Id.* at 375. Mr. Gorham remarked that "[i]t was true abuses had been displayed in G.B. [Great Britain] but no one cd. [could] say how far they might have contributed to preserve the due influence of the Gov't nor what might have ensured in case the contrary theory had been tried." *Id.* at 375-76.

17. *Id.* at 380-81. Mr. Mason asked: "Why has the power of the crown so remarkably increased the last century? A stranger, by reading their laws, would suppose it considerably diminished; and yet, by the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom." *Id.*

18. *Id.* at 379. Mr. Butler said in full: "We have no way of judging of mankind but by experience. Look at the history of the government of Great Britain, where there is a very flimsy exclusion—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption." *Id.*

19. *Id.* at 376.

20. *Id.* at 379.

21. *Id.* at 380.

the power to appoint Congressman and Senators to high office, because, as he put it, "[o]ur prevailing passions are ambition and interest" and the Executive might need "to avail himself of those passions" to induce the legislature to act "for the public good." He was against "all exclusions and refinements, except only in this case; that, when a member takes his seat, he would vacate every other office."[22] The Gorham motion was put to a vote, and defeated, four states in favor, four states against, and three states divided.[23]

James Madison of Virginia then offered a compromise resolution, precluding a member of the legislature only from those offices "which may be created or augmented while he is in the legislature."[24] He "supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced" and that if the "door was shut agst. [against] them" it might properly be left open for the appointment of members to other offices "as an encouragement to the Legislative service."[25] He described his amendment "as a middle ground" between an eligibility in all cases and an absolute disqualification in all cases. He stressed the need for securing the services of "the most capable citizens" and argued "from experience" that the Legislature of Virginia would have been without its best members had "they been ineligible to Congress, to the Government and honorable offices of the State."[26]

There was immediate opposition to Madison's proposed "middle ground," largely based on fear of an all-powerful Executive. Elbridge Gerry of Massachusetts pointed out that "we have . . . endeavored to keep distinct the three great branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators . . . to be too much influenced by the executive, in looking up to him for offices."[27] Pierce Butler of South Carolina agreed that the Madison proposal "does not go far enough," and then expounded how George II had won his way over Parliament: "To some of the opposers he gave pensions—others offices, and some, to put them out of the house

22. *Id.* at 381-82. Earlier in the debates Benjamin Franklin had remarked in a similar vein that "there are two passions which have a powerful influence on the affairs of men. They are ambition and avarice; the love of power, and the love of money." *Id.* at 82.

23. *Id.* at 377.

24. *Id.* at 380.

25. *Id.* at 386.

26. *Id.* at 388-89.

27. *Id.* at 393.

of commons, he made lords."[28] George Mason of Virginia also "enlarged on the abuses & corruption in the British Parliament, connected with the appointment of its members, He cd. [could] not suppose that a sufficient number of Citizens could not be found who would be ready, without the inducement of eligibility to offices, to undertake the Legislative service."[29] Daniel Jenifer also opposed the Madison motion because, in Maryland "senators are appointed for 5 years and they can hold no other office. This circumstance gives them the greatest confidence of the people."[30]

Charles Pinkney of South Carolina then moved to strike that part of the clause which disqualified a member of the federal legislature from appointment to an office "established by a particular state." He argued "from the inconvenience" which such a restriction would expose the states wishing for the services, as well as "from the smallness of the object to be attained by the restriction."[31] Sherman of Connecticut seconded the motion with the comment that "it wd. [would] seem that we are erecting a Kingdom at war with itself." The motion was adopted by a vote of eight states in favor with three opposed.[32]

At that stage of the debate, it was not yet determined whether federal appointments would be made by the legislative, by the Executive, or by both acting together; and many opposed the Madison "middle ground" because it would do nothing to eliminate "the shameful partiality of the legislature to its own members."[33] Rutledge of South Carolina, for example, "was for preserving the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption."[34] The Madison amendment was put to a vote, and defeated with eight states opposed, two in favor, and one state divided.[35]

A final motion was then made to amend the clause by eliminating the Provision that would have made legislators ineligible for appointment not only during their elected term, but also "for the space of one year after its expiration." Mason spoke against this amendment, because "places may be promised at the close of their duration, *and*

28. *Id.* at 391.
29. *Id.* at 387.
30. *Id.* at 394.
31. *Id.* at 386.
32. *Id.*
33. *Id.* at 387 (statement of George Mason).
34. *Id.* at 386.
35. *Id.* at 390.

. . . *a dependency may be made.*"[36] Hamilton spoke against the motion because "the clause may be evaded many ways. Offices may be held by proxy—they may be procured by friends, etc." Rutledge admitted the possibility of evasion, but said "this is no argument against shutting the door as close as possible." The motion was defeated by a vote of six states to four, with one divided.[37]

The original Randolph Resolutions thus survived all proposed amendments, other than the one that permitted members of the federal legislative bodies to accept appointments to offices "established by a particular state." In late June the amended version was sent to the Committee of Detail for "Stylistic Changes," and that Committee reported the clause back to the Convention as proposed article VI, section 9 of the Constitution: "The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the senate shall be ineligible to, and incapable of holding any such office for one year afterwards."[38]

The debate that resumed on August 14 closely paralleled the earlier discussions. Mr. Pinkney of South Carolina began with the observation that the ineligibility clause was "inconvenient, because the Senate might be supposed to contain the fittest men" and he "hoped to see that body become a School of Public Ministers, a nursery of Statesmen."[39] His immediate proposal, however, was a substitute resolution which would bar legislators from office only when "they . . . receive any salary, fees, or emoluments of any kind" with the further provision that "the acceptance of such office shall vacate their seats respectively."[40] This proposal would have minimized the "parliamentary corruptions" caused by those legislators whose votes can be bought by "avarice, the love of money," but would have done nothing to ease the problem concerning those legislators whose votes can be purchased by "ambition, the love of power."[41] The Pinkney substitute was defeated by a vote of five states in favor, five opposed, and one state divided.[42]

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36. *Id.* at 394 (emphasis added).

37. *Id.*

38. *Id.* at 180. The Committee on Style thus eliminated the ineligibility of members of the House "for one year" after their term of office expired.

39. *Id.* at 283.

40. *Id.* at 284.

41. *See* the discussion by Benjamin Franklin and Alexander Hamilton at text accompanying note 22 *supra.*

42. 2 M. FARRAND, *supra* note 3, at 283. The defeat of the Pinkney proposal is certainly relevant to the argument made during the Philander Knox (and the William

General debate then resumed on the clause, with the opponents speaking against any limitation whatsoever on the power of the Executive to appoint members of the Legislature to high office. John Mercer of Maryland thought this power was absolutely necessary for effective government. "Governm[en]ts," he said, "can only be maintained by *force or influence*" and since the "Executive has not *force*" the clause depriving him of influence "by rendering the members of the [Legislature] ineligible to Executive offices" would make him "a mere phantom of authority."[43] James Wilson of Pennsylvania also spoke against any limitation which would render the members of Congress "ineligible to Natl. [National] offices," and he was "far from thinking the ambition which aspired to Offices of dignity and trust, an ignoble or culpable one."[44] On the other hand, Hugh Williamson commented that "he had scarcely seen a single corrupt measure in the Legislature of N. Carolina which could not be traced up to office hunting,"[45] and Roger Sherman of Connecticut stoutly maintained that "the Constitution shd. [should] lay as few temptations as possible in the way of those in power."[46]

Gouverneur Morris of Pennsylvania then "put the case of a war, and the Citizen the most capable of conducting it, happening to be a member of the Legislature." He moved to insert a provision which would except from the ban on appointment "offices in the army or navy: but in that case their offices shall be vacated."[47] Edmund Randolph, who authored the original Virginia Plan, spoke generally against "opening a door for influence or corruption," but admitted great weight to the argument which related to the case of war, and a co-existing incapacity of the fittest commanders to be employed." He agreed to the exception proposed by Mr. Morris.[48]

Mr. Pinkney then urged a general postponement of further debate on the clause pending further refinement in the Constitution concern-

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Saxbe) debate that the "sole purpose" of the clause was to deny any expectation that the legislator might enjoy an increased emolument. *See* text accompanying note 7 *supra*.

43. 2 M. FARRAND, *supra* note 3, at 284. Mr. Mercer continued as follows: "All Gov. must be by force or influence. It is not the King of France—but 200,000 janisaries of power that govern that Kingdom. There will be no such force here; influence then must be substituted; and he would ask whether this could be done if the members of the Legislature should be ineligible of offices of State. . . ." *Id.* at 289.

44. *Id.* at 288.

45. *Id.* at 287. The actual wording of this proposal is unclear; *see* 1 *id.* at xvii-xix.

46. 2 *id.* at 287.

47. *Id.* at 289.

48. *Id.* at 290.

ing the distribution between the Senate and the Executive of the appointive power. This was agreed to, and the Randolph proposal was sent to a Committee of Eleven (composed of one member from each state) along with other unfinished business.

On September 1 the Committee of Eleven reported for further consideration the following draft, expressing the sentiment of the states: "The Members of each House shall be ineligible to any *civil* office under the authority of the United States during the time for which they shall respectively be elected—And no Person holding any office under the United States shall be a Member of either House during his continuance in office."[49]

By this stage of the convention, it was established that the significant appointive power would be lodged in the Executive with certain lesser appointive power reserved to the Congress.[50] The proposed draft was significant then, in that it continued the ban against the appointment of "The Members of each House" during the time for which they shall be elected. This clearly reflects the expressed fears against "Executive influence." The proposed draft was also significant in that it eliminated the ban against appointment to military office, with the new provision against dual office holding—the so-called "incompatibility clause."[51]

Mr. Pinkney was the first to speak on the proposals. He favored the "incompatibility clause," but thought this insufficient to cure the mischief. He proposed, for a second time,[52] his amendment that the members of each House should be incapable of holding *only those offices* for which they received "any salary, fees, or emoluments," and made reference to the "policy of the Romans, in making the temple of virtue the road to the temple of fame."[53] This proposal was defea-

49. *Id.* at 483 (emphasis added).

50. U.S. CONST. art. II, § 2 provides that the President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counselors, 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. . . ." This takes care of all of the important officers. The Constitution then continues to read: "but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

51. This juxtaposition of exclusions and inclusions clearly contemplates that a member of either House who accepts the appointment to a military office, thereby forfeits his membership in that House. *See* Reservists Comm. To Stop War v. Laird, 323 F. Supp. 833 (D.D.C. 1971).

52. *See* text accompanying note 40 *supra.*

53. 2 M. FARRAND, *supra* note 3, at 489-90.

ted by a vote of eight states to two.[54]

Rufus King of Massachusetts then proposed an amendment that would bar the members of each House only from those offices *created during their respective terms of office.* He said that this would make only a slight inroad into the principle of "incapacity," because his amendment would "exclude the members of the first Legislature" and "most of the Offices wd. [would] then be created."[55] Sherman of Connecticut was in principle still "for entirely incapacitating members of the Legislature" as their eligibility to offices "would give too much influence to the Executive." But apparently sensing that the King amendment might pass, he urged that "incapacity ought at least to be extended to cases where salaries should be *increased,* as well as *created,* during the term of the member."[56] The King amendment, as thus modified by Sherman, was restated by Williamson of North Carolina and enacted by a vote of five states in favor, four states against, and one state divided.[57] This was the "middle ground" earlier proposed by Madison, and then decisively rejected.[58] In any event, the Framers quickly agreed to the "last clause rendering a Seat in the Legislature and an office incompatible,"[59] and the debate was at an end.

The Constitution then was sent to the states for ratification or rejection. The recorded debate, while limited, supports the conclusion that the clause was entered to affirm and reinforce the doctrine of separation of powers by denying the Executive a power to influence the legislators with promises of appointment to high office.

In Virginia, the opponents thought the clause "entirely imperfect," and reference was made to the British House of Commons in which "dependents and fortune-hunters . . . are willing to sell the interest of their constituents to the crown."[60] These opponents proposed a total ban on appointment of legislators to any office, during or after their terms. Patrick Henry argued that the "hope or expectation of offices" is the "principle source of corruption" and that the ban on appoint-

54. *Id.* at 490.
55. *Id.*
56. *Id.*
57. *Id.* at 492.
58. *See* text accompanying notes 24 & 33 *supra.* Curtis attributes the shift in sentiment to the fact that "the mischiefs most apprehended at the time of Mr. Madison's proposition were in a great degree prevented by taking from the legislature the power of appointing to office; and that this modification" made the compromise possible. 2 G. CURTIS, *supra* note 1, at 251.
59. 2 M. FARRAND, *supra* note 3, at 492.
60. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 375 (1836).

ment only during the term of office was inadequate because the legislators might experience "hope or expectation of offices or emoluments" after their term of office expired.[61] James Madison admitted that the clause was "a mean between two extreme," but argued that "ineligibility" limited to a term of office was necessary, because otherwise the Henry proposal for a permanent ban on appointment would "prevent those who had served their country with the greatest fidelity and ability from being on a par with their fellow-citizens."[62]

In the New York debate, Alexander Hamilton argued that the ineligibility clause was adequate, even "admitting, in the president, a disposition to corrupt." He reasoned that the President would have few such opportunities, because "[m]en who have been in the Senate once, and who have a reasonable hope of a re-election, will not be easily bought by offices."[63] In Massachusetts, the clause was described as a "check to ensure the independence of the legislative branch from the executive branch";[64] and in Pennsylvania, as a useful tool to prevent "undue influence" by the Executive on the legislators. Throughout the debates it was admitted that members of the Congress *might* be corrupted by the Executive power of appointment, but that it is "an objection against human nature" and "[t]he danger is certainly better guarded against in the proposed system than in any other yet devised."[65]

The history of the ineligibility and incompatibility clauses shows that the original purpose of the clause was to protect against legislative corruption by the executive's appointment power. Although the final language in the Constitution represents a compromise to prevent total and permanent exclusion of worthy men from office, it was clearly intended to bar the use of the appointment power to gain influence. It is designed to prevent the offering of high position as an inducement

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61. *Id.* at 368-69. Mr. Justice Story agreed with the Patrick Henry philosophy when he wrote that,

> the reasons for excluding persons from office who have been concerned in creating them, or increasing their emoluments are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. *The actual provision, however, does not go to the extent of the principle;* for his appointment is restricted "*only during the time for which he was elected,*" thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination.

1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 867 (1858) (emphasis added).

62. 3 J. ELLIOT, *supra* note 60, at 370.

63. 2 *id.* at 321.

64. *Id.* at 85-86.

65. *Id.* at 508-09.

to legislators, and was never contemplated as a technicality of salary scales.

The paucity of authoritative discussion of the clause necessitates that great weight be placed on its history in determining its application. The few occasions when the clause was called into question will now be examined.

II. Ex Parte Albert Levitt: The Case of Mr. Justice Hugo L. Black

The Supreme Court has been asked to interpret the clause twice, once under the ineligibility clause, and once under the incompatibility clause. In both cases, the Court refused to reach the merits of the case.

Hugo L. Black was elected to the Senate of the United States in 1932 for a six-year term. In March 1937 Congress by law gave to Justices of the United States Supreme Court the right to *retire* at age seventy at a pension equal to their then-existing salary.[66] Prior to this Act of Congress, Justices who *resigned* at age 70, but not those who retired, received a pension equal to the salary they then received. But there is a difference between retirement and resignation. The pension of a Justice who resigned (but not the pension of a Justice who retired) was then subject to income taxation. Moreover, a retired Justice (but not a Justice who resigned) might be called upon to perform certain voluntary judicial duties.[67] In August 1937 Senator Black was appointed to the Supreme Court. The appointment was defended by the argument that the Act of Congress did not "increase the emoluments" of the office, and, even if it did, Mr. Black was then only fifty-one years old, the "emoluments" would not be available to him for nineteen years, if at all.[68]

Albert Levitt filed an original suit in the Supreme Court requesting that Mr. Justice Black be required "to show cause" why he should be permitted to serve as an Associate Justice.[69] The Supreme Court did not reach the merits of the case but dismissed for the lack of a "justiciable controversy." It wrote, briefly:

> The motion papers disclose no interest upon the part of the petitioner [Albert Levitt] other than that of a citizen and a member

66. Act of March 1, 1937, ch. 21, §§ 1-2, 54 Stat. 24 (codified as amended, 28 U.S.C. § 371 (1970)).

67. Note, *Legality of Justice Black's Appointment to Supreme Court*, 37 Colum. L. Rev. 1212 (1937).

68. E. Corwin, *supra* note 8, at 18-19.

69. *Ex parte* Levitt, 302 U.S. 633 (1937).

> of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[70]

Ex parte Levitt was decided in 1937, and the "law of standing" has evolved greatly during the intervening years.[71] Indeed, the *Levitt* rationale was challenged in the first suit ever filed under the incompatibility clause, *Reservists Committee to Stop War v. Laird.*[72] There, an association of reservists filed suit against the Secretary of Defense, and the Secretaries of the Army, Navy and Air Force. Plaintiffs asked that the various Secretaries be required to remove from the reserve rolls the 117 Senators and Representatives then holding commissions in the various reserve components.

On the merits, the issue is a simple one. Membership in a military component is "incompatible" with membership in Congress because of the inherent tension between the loyalty a reserve officer owes to the President as his Commander in Chief and the dispassionate duty a Congressman owes to the constituents who elected him. Under the precedents the issues seem totally free from doubt. In 1803 Representative John Van Ness was forced to select between his seat in the House and a commission in the District of Columbia Militia.[73] In 1846 Representative Edward Baker had to choose between his seat in the House and a commission as a colonel of volunteers from Illinois.[74] In 1864 Representative Frank Blair had to choose between his seat in the House and a major-generalship in the Tennessee Volunteers.[75] In 1916 the House Judiciary Committee, upon a directive from the House, undertook a careful review of the situation and reported that membership in the House was "incompatible" with holding a commission in any National Guard.[76]

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70. *Id.* at 634.

71. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

72. 323 F. Supp. 833 (D.D.C. 1971), *noted in* 40 GEO. WASH. L. REV. 542 (1972); 85 HARV. L. REV. 507 (1971) *and* 40 U. CIN. L. REV. 620 (1971).

73. 1 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 592-93 (1907).

74. *Id.* at 594-95.

75. *Id.* at 601-03.

76. H.R. REP. No. 885, 64th Cong., 1st Sess. (1916).

The more difficult and relevant questions are whether the Reservists Committee (or its members) has "standing" to raise this issue and whether the issue is "justiciable." District Judge Gesell held that the plaintiffs did have standing. He reasoned that the incompatibility clause was designed "to ensure the integrity of a particular form of government, by preventing encroachments upon the separation of powers,"[77] and hence, "any violation of the Clause" is an injury to all citizens of the United States. Elaborating somewhat, he wrote that

> the interest in maintaining independence among the branches of government is shared *by all citizens equally,* and since this is the primary if not the sole purpose of the bar against Congressmen holding executive office, the interest of plaintiffs *as citizens* is undoubtedly one which was intended to be protected by the constitutional provision involved.[78]

The District of Columbia Court of Appeals affirmed this holding without an opinion. The Supreme Court, however, reversed without reaching the merits, on the grounds that the plaintiffs lacked "standing." The Court ruled that the plaintiffs raised only a "generalized grievance about the conduct of Government," and expressly reaffirmed *Levitt* "in holding that standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public."[79]

It is thus doubtful that anyone has the necessary standing to challenge the Saxbe appointment as violative of the ineligibility clause,[80] with the possible exception of the ten senators who voted against his confir-

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77. 323 F. Supp. at 837.

78. *Id.* at 841 (emphasis added).

79. Schlesinger v. Reservists Comm. to Stop War, 94 S. Ct. 2925, 2930, 2932 (1974).

80. The title of a de facto officer cannot be attacked directly or collaterally. One is an officer de facto if, like Attorney General Saxbe, he exercises the duties of office *under color of an election or appointment.* Note, 37 COLUM. L. REV., *supra* note 64, at 1215. Thus, a defendant in a criminal case cannot attack the validity of his conviction on the theory that both the jury and the judge were appointed in violation of a statute, McDowell v. United States, 159 U.S. 596 (1895); that the presiding judge was appointed in violation of the Constitution, *Ex parte* Ward, 173 U.S. 452 (1899); or that the prosecuting attorney was illegally appointed under state law, United States *ex rel.* Doss v. Lindsley, 148 F.2d 22 (7th Cir. 1944), *cert. denied,* 325 U.S. 858 (1945). Nor will the defendant in a criminal prosecution under the Selective Service Act be heard to argue that the members of the local draft board which ordered his induction were serving illegally because of the statutory prohibition against more than twenty-five years of service. United States v. Groupp, 333 F. Supp. 242 (D. Me. 1971), *aff'd on other grounds,* 459 F.2d 178 (1st Cir. 1972). "The result of the authorities" as the Supreme Court once held, "is that the title of a person acting with color of authority, even if he be not a good officer in point of law," is not subject to attack. *Ex parte* Ward, *supra,* at 456.

mation.[81] However, the issue might be raised administratively by a challenge to the payment of the Attorney General's salary by the General Accounting Office.[82]

III. Opinions of the Attorney General

On several occasions, the effects of the ineligibility clause on presidential appointments have been considered by the Attorney General. In the majority of the reported opinions, a strict construction of the clause was adopted, forcing rejection of a proposed appointment.

A. Governor Kirkwood. The first such ruling was made by Attorney General Benjamin Brewster in 1882.[83] Governor Kirkwood of Iowa had been elected to the Senate for a term that expired on March 3, 1883. In March 1881, two years before his term expired, Kirkwood resigned from the Senate to accept the position of Secretary of the Interior. He subsequently resigned from that office in 1882 to retire to private life. Thereafter, but prior to March 3, 1883, Congress created the office of tariff commissioner, and President Chester Arthur desired to appoint Governor Kirkwood to that position. Attorney General Brewster advised the President that Governor Kirkwood was disabled from receiving that appointment because of the bar against the appointment of a Senator to any civil office which shall have been created "during the time for which he was elected." The Attorney General recited that:

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81. *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939), in which Mr. Chief Justice Hughes wrote for the Court that the dissenting members of the Kansas Senate had "a plain, direct and adequate interest in maintaining the effectiveness of their votes" sufficient to challenge the legality of Kansas' ratification of the "child labor" amendment to the Constitution. *Id.* at 438.

Without discussion, the federal courts have assumed the "standing" of the incumbent to an appointive position, Padron v. Puerto Rico *ex rel.* Castro, 142 F.2d 508 (1st Cir. 1944), *cert. denied*, 323 U.S. 791 (1945), and the "standing" of the opposing candidate for elected office to challenge the "eligibility" of a legislator for those offices, Kederick v. Heintzleman, 132 F. Supp. 582 (D. Alas. 1955). In each of these cases, the territorial organic act contained prohibitions that "no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected . . . ." *Id.* at 583. In *Padron* the emoluments of the office had been increased while the new appointee was a member of the legislature. In *Kederick* the office had been created while the rival opponent had been a member of the legislature. In each the federal court held that the ineligibility clause was a bar to the office sought.

82. *See* text accompanying notes 86, 87, 91 *infra*.

83. 17 Op. Att'y Gen. 365 (1882). The Attorney General wrote that he gave the subject "a serious consideration and a thorough examination" because of the President's "desire to appoint Governor Kirkwood" and "the hope of all the members of the Cabinet that he would be appointed. . . ."

> It is unnecessary to consider the question of the policy which occasioned this constitutional prohibition. I must be controlled exclusively by the positive terms of the provision of the Constitution. The language is precise and clear, and, in my opinion, disables him from receiving the appointment. The rule is absolute, as expressed in the terms of the Constitution, and behind that I can not go . . . .[84]

B. Matthew W. Ransom. The second ruling was written by Acting Attorney General Holmes Conrad in 1895.[85] Matthew W. Ransom was elected from North Carolina to the Senate for a term of office which expired on March 3, 1895. In 1891, early in his term, the Congress increased the salary for those serving in the diplomatic and consular service. On February 23, 1895, near the end of his term, President Grover Cleveland nominated Senator Ransom as minister plenipotentiary to Mexico. The Senate confirmed the nomination the same day. Senator Ransom took the oath of office on March 4, the day *after* his Senatorial term had expired, and his commission was delivered to him the following day.

Thereafter, the "Auditor for the state and other Departments" ruled that Ambassador Ransom was not entitled to a salary because of the ineligibility clause, and the Secretary of State requested the advice of the Attorney General on the matter.[86] Attorney General Conrad agreed with the Auditor that the presidential appointment of a Senator to any civil office, the emoluments whereof have been increased *during the time for which he was elected*, is "a nullity." The Attorney General then wrote as follows:

> It is suggested in your letter that the commission of Mr. Ransom was not actually signed by the President until the 5th of March, which was after the expiration of the time for which Mr. Ransom was elected a Senator in Congress.
>
> But it must be observed that the language of the Constitution is that "no Senator shall, during the term for which he was elected, *be appointed* to any civil office under the authority of the United States."
>
> The vital question here, then, would seem to be, not when was Mr. Ransom *commissioned*, but when was he *appointed*? . . .
>
> . . . .
>
> I am of opinion, then, that Mr. Ransom's appointment as envoy extraordinary and minister plenipotentiary to Mexico was

84. *Id.* at 366.
85. 21 OP. ATT'Y GEN. 211 (1895).
86. *Id.*

> made on February 23, 1895; that that was during the time for which he was elected a Senator in Congress, and it appearing from your letter that it was during that time the emoluments of the office of minister to Mexico were increased, Mr. Ransom was not, in my opinion, eligible to appointment to that office.[87]

C. William S. Kenyon. The third opinion was written by Attorney General Harry M. Daugherty, and he too gave the constitutional language a very strict construction.[88] William S. Kenyon was elected to the Senate for a term that expired on March 4, 1919. During his first term in office, Congress increased the salary of the Judges of the Circuit Court. In 1918 Senator Kenyon was reelected to a *second term of office* which began on March 4, 1919. In 1922, during Kenyon's second term in the Senate, President Harding nominated him to be a United States Circuit Judge for the Eighth Circuit, and the appointment was confirmed by the Senate. Thereafter, President Warren Harding requested an opinion from the Attorney General "as to whether or not the provisions of the Constitution make it impossible for" Senator Kenyon "to qualify" for that office. Attorney General Daugherty ruled that the appointment was *not* barred by the Constitution and wrote as follows:

> two things must concur in order to deprive a Senator or a Representative of his right to appointment to a civil office under the above-quoted Section of the Constitution, to wit:
>
> (a) Increasing the emoluments of an office; (b) appointing a Senator or Representative to an office the emoluments of which had been increased, *both occurring during the term which the Senator or Representative was then serving.*
>
> There is no such concurrences of events in the case of Mr. Kenyon. The emoluments of the office to which he has been appointed were not increased "during the time for which he was elected" *at the time of his appointment.*
>
> If the framers of the Constitution had intended that in case the emoluments of any office were increased during a term then being served by a United States Senator such Senator would be precluded from being appointed to such office *during a subsequent term* to which he had been elected, more apt language would have unquestionably been adopted.[89]

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87. *Id.* at 213-14. On September 6, 1895, the Treasury Department handed former Senator Ransom a further setback when it refused to pay his salary from March 4 to June 30 because "such appointment was prohibited by Section 6, Article 1 of the Constitution, and Mr. Ransom's salary cannot be paid." 2 COMP. GEN. 129-30 (1895).

88. 33 OP. ATT'Y GEN. 88 (1922).

89. *Id.* at 89 (emphasis added).

D. Melvin R. Laird. The final opinion by an Attorney General was issued on January 3, 1969.[90] Melvin Laird was reelected to the ninety-first Congress, which was to commence on January 3, 1969. Prior thereto, President-elect Nixon (whose term was to begin on January 20, 1969) announced that he would appoint Laird to be his Secretary of Defense. Laird first wrote the Comptroller General and then to Attorney General Ramsey Clark, inquiring advice "as to whether commencing [his] term as a Member of the House of Representatives for the 91st Congress would preclude [his] appointment as Secretary of Defense."[91] The problem arose under the Federal Salary Act of 1967. Under this law, President Lyndon B. Johnson was required to make any recommendations regarding salary increases for various federal offices in his Budget message, which was required to reach Congress by January 17. The recommended salary increase, if any, would take effect on March 1, 1969, unless disapproved by Congress prior to that time. Under normal practice at the beginning of a new administration,[92] Melvin Laird would be nominated, confirmed, and appointed as Secretary of Defense within a few days following the inauguration of President Nixon, *i.e.* shortly after January 20; "during the period in which it remains uncertain whether Congress may disapprove the Presidential salary recommendations."[93]

Attorney General Clark advised Secretary of Defense-designate Laird that taking his seat in Congress would *not* preclude the appointment. He wrote that "[t]he constitutional language prohibits the appointment of a legislator to an office the compensation of which '*shall have been*' increased prior to the making of such appointment," and consequently "the ban clearly does not apply to an increase in compensation which is proposed *subsequent to the appointment.*"[94] *A fortiori*, ruled Attorney General Clark, the ban "is also inapplicable where, as here, it is possible but not certain at the time of the appointment that a proposed salary increase for the appointee may receive final approval at a future date."[95]

If Attorney General Clark was correct, the whole controversy over the appointment of Hugo Black was wasted motion,[96] and Attorney

90. 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969).
91. *Id.* at 1.
92. *Id.* at 2.
93. *Id.* at 2-3.
94. *Id.* at 1-2.
95. *Id.* at 2.
96. *See* text accompanying note 66 *supra.*

General Brewster was incorrect when he ruled that Governor Kirkwood was "disabled" from holding a position created after his resignation from the Senate but during the time for which he was elected. Attorney General Clark, however, seems to have been in error when he asserted that "the constitutional language" prohibits the appointment of a legislator to an office the compensation of which shall have been increased "*prior to the making of such appointment.*" To the contrary, the "constitutional language" prohibits the appointment of a legislator to an office, the compensation of which shall have been increased "during the time for which he was elected."[97]

Until the very closing days of the Constitutional Convention, the drafts contained a total ban on the appointment to any office during the time for which the members of each House "shall respectively be elected." At that time the Framers adopted two amendments: the first limited the "ineligibility" to those offices "created during their respective terms of office"[98] and the second extended the incapacity "to cases in which salaries should be increased, *as well as created*, during the term of the member."[99] This relaxation of the ineligibility clause was passed by the narrow vote of five states to four, with one state divided.[100] Surely the Framers never contemplated that a legislator would be eligible for Presidential appointment during his term of office if the emoluments of that office were increased during the term for which he was elected but after he had resigned from his legislative functions.[101] It was simply bad politics and worse law for Melvin Laird to take his seat in the Congress when he knew he would be appointed to be the Secretary of Defense within a matter of days and that the emoluments of that office would be increased by Congress within a matter of weeks.

E. Philander Chase Knox. The Attorney General did not issue an opinion in this case. Assistant Attorney General Russell wrote what he styled an "unofficial opinion." It is not contained in the bound volumes of the Opinions of the Attorney General, but is found only as

97. *See* text accompanying note 84 *supra.*
98. 2 M. FARRAND, *supra* note 3, at 490-92.
99. *Id.*
100. *Id.*
101. During the debates, George Mason spoke especially against the "dependency" which "may be made" if legislators may be promised offices to take effect at the close of their offices. *See* text accompanying note 37 *supra.* Mason also stressed the need for the clause barring appointment during "the time for which they shall respectively be elected" so as to "guard against evasions by resignations." 2 M. FARRAND, *supra* note 3, at 755.

an "appendix" to the floor debate in the Congress.[102]

Senator Knox was elected to the Senate for a term that expired on March 4, 1911. Early in his term, in 1907, Congress increased the salary of the Secretary of State from 8,000 dollars to 12,000 dollars per year. President Taft wanted to appoint Knox his Secretary of State; so without formal annnouncement, the administration spokesmen introduced a bill to "roll back" the salary of the Secretary to the pre-existing level. During the debate on this measure, Assistant Attorney General Russell wrote its sponsors that this measure would permit the appointment of a member of the present Senate, "after the 4th of March next, but prior to the expiration of the period for which he was elected, to the Office of Secretary of State."[103] The Assistant Attorney General reasoned, as discussed earlier,[104] that "the sole purpose" of the ineligibility clause is to destroy the expectation of a Senator or Congressman that he might enjoy "the newly created emolument." But, also, as expressed earlier,[105] the purpose of the ineligibility clause has much deeper and broader roots that go to the very heart of our system of government.

IV. Conclusion

To recapitulate, the men who drafted our Constitution were practical men, well aware that the twin passions of "ambition and avarice; the love of power and the love of money"[106] might lead to "office hunting," to "cabal and intrigue between the executive and the legislative bodies,"[107] to the "probable abuses" that result when appointment to high office is "within the gift of the Executive."[108] They agreed that the Constitution "should lay as few temptations as possible in the way of those in power";[109] and that it should "keep distinct the three great branches of government."[110] To this end, they agreed that the appointive power within the Executive should be curbed by making the members of both houses ineligible for appointment to other offices. They disagreed only as to the extent of this necessary limitation.

At one extreme, Patrick Henry would have rendered the Legisla-

102. 43 Cong. Rec. 2402-03 (1909).
103. *Id.* at 2403; *see* text accompanying note 7 *supra.*
104. *See* text accompanying note 7 *supra.*
105. *See* text accompanying note 10 *supra.*
106. 2 M. Farrand, *supra* note 3, at 284.
107. *Id.* at 380.
108. *See* text accompanying notes 21, 22, 26 *supra.*
109. 2 M. Farrand, *supra* note 3, at 287.
110. *Id.* at 393.

tors ineligible for any other office during and after their terms of elected service.[111] At the other, Alexander Hamilton and John Mercer feared that, without the appointive power and the potential for appeal to the "ambition which aspired to Offices of dignity and trust,"[112] the President might become "a mere phantom of authority."[113] The effort "for preserving the Legislature as pure as possible" by "shutting the door against appointments"[114] ended in a compromise.

Edmund Randolph spoke for the overwhelming majority when, originally he proposed that the members of both houses be ineligible for all other offices, but only during their elected term.[115] Then, as the debate wore on, it was agreed that the members of both houses would be eligible for appointment to offices "established by a particular state";[116] would be eligible for appointment as "officers in the army or navy: but in that case their offices shall be vacated";[117] and finally under the Madison middle ground, eligible for all civil offices established under the authority of the United States other than those "which may be created or augmented" during the elected term of office.[118] Members of the legislative bodies were not to escape this limitation by the simple act of resignation; and the Framers steadfastly rejected proposals that the members of both houses be eligible *at any time* for appointment to any office, provided only that upon acceptance of such office they "vacate their seats," and that they not receive "any salary, fees, or emoluments of any kind" in the new office.[119]

But why all this fuss over Bill Saxbe? During the confirmation debate, Senators "from both sides of the aisle" were quick to speak in favor of their colleague. Even Senator Sam Ervin of North Carolina, who voted against Mr. Saxbe for constitutional reasons, said that "he thought the nominee was a fine lawyer and very qualified" for the office of Attorney General.[120]

James Madison gave us the answer: "Because, it is proper to take

111. *See* text accompanying note 61 *supra.*
112. M. FARRAND, *supra* note 3, at 288.
113. *Id.* at 284.
114. *Id.* at 386.
115. *See* text accompanying note 14 *supra.*
116. 2 M. FARRAND, *supra* note 3, at 386; *see* note 47 *supra.*
117. 2 M. FARRAND, *supra* note 3, at 289.
118. *See* text accompanying notes 24, 57-58 *supra.*
119. 2 M. FARRAND, *supra* note 3, at 489-90; *see* text accompanying notes 40 & 52 *supra.* See in this connection President Nixon's appointment of Congressman Rumsfeld to the Directorship of the OEO; paying him no salary for that position, and 42,500 dollars as an "assistant to the President." *See* note 6 *supra.*
120. N.Y. Times, Dec. 18, 1973, at 35, col. 6.

alarm at the first experiment on our liberties."[121] Or, as Mr. Justice Bradley wrote almost a century ago about a "little" search and seizure: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[122] Finally, Mr. Justice Brandeis reminds us that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. . . . Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[123]

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121. Madison, *Memorial and Remonstrance Against Religious Assessments*, in Everson v. Board of Educ., 330 U.S. 1, 65 para. 3 (1947) (appendix to dissent of Rutledge, J.).

122. Boyd v. United States, 116 U.S. 616, 635 (1886).

123. Olmstead v. United States, 277 U.S. 438, 479 (1928). Mr. Justice Brandeis concluded his famous dissent in that "wiretapping" case with these words:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 485.

THE WASHINGTON STAR 11/22/75

Will the Court swing into retrogression?

There's a vacancy on the Supreme Court. Where's the Holmes, Brandeis or Marshall to fill it? Will Mr. Ford find such a giant? We doubt it, unless by accident, as Eisenhower found Earl Warren for chief justice, whom later he called his "biggest damfool mistake." Presidents never can tell how these lifetime appointees will turn out.

Richard Nixon knew precisely what kind of judge he wanted and left the nation four of them to whom Mr. Ford presumably now adds a fifth. Nixon told a television audience he wanted men who "share my conservative philosophy," "judicial conservatives," who supported his desire to defend the "peace forces." He ran against "permissive" judges who "coddled criminals" and had the audacity to send up for confirmation two glaringly unqualified nominees with a record of insensitivity to racial justice. Only contempt for the court as a rival power could explain those selections.

With Justice Douglas' departure and with a new selection by Mr. Ford the prospect is that any Democratic liberal president elected in 1976 will face as conservative a court as Franklin Roosevelt faced in 1933. This is the more significant since the upcoming age after our current recession-inflation is apt to be an activist, tumultuous age, churning with change in religious, ethical and constitutional ideals. What will be the attitude of the holdover Nixon court?

Looking down implacably on the Roosevelt New Deal were vindictive conservatives Van Devanter, McReynolds, Sutherland and Pierce Butler; Brandeis, Stone and Cardozo on the liberal side; and Chief Justice Hughes and Owen Roberts holding the balance. They hurled legal thunderbolts at New Deal laws and in June 1936, for instance, declared the New York minimum wage act invalid 5 to 4. The Founding Fathers, you see, had fixed it so you couldn't guarantee a working man or woman a minimum wage constitutionally.

Could it happen again? Not quite like that, but enough like it so that with Mr. Ford's new appointee to the court, it's worthwhile knowing what the ancient struggle is all about. The job of the United States Supreme Court, unique on earth, is to guarantee change without revolution — the indispensable instrument to adapt the majestic generalities of the American Constitution to the emergent needs of the time, and thereby to prevent it from becoming an irrelevant historical parchment. Sitting loftily there behind their immense mahogany bar in their Corinthian marble temple, the nine robed justices seem like a judicial priesthood removed from partisan politics, enunciating almost divinely inspired law. Nonsense.

They are intensely human beings; half of the 100 men who have so far served have not had previous judicial experience, 19 have been culled from cabinet or near-cabinet rank, two secretaries of state (John Jay and John Marshall), a presidential candidate or two (Taft, Hughes and Warren) and so on. Behind the judicial masks burn passionate convictions about politics and policy.

TRB is the traditional signature on a weekly column appearing in The New Republic *magazine, written by Richard L. Strout, Washington correspondent for* The Christian Science Monitor.

Mr. Ford's selection can be measured against the criterion enunciated by 65 law school deans and professors of law, history and political science three years ago who found 12 "great" justices. Names? — Chronologically, Marshall, Story, Taney, Harlan, Holmes, Hughes, Brandeis, Stone, Cardozo, Black, Frankfurter and Warren. They found eight "failures," Van Devanter, McReynolds, Butler, along with Byrnes, Burton, Vinson, Minton and Whittaker. (Three of these faced FDR in 1933.)

What are the criteria for a successful judge? Previous judicial experience? — not at all, says Felix Frankfurter, who wrote, "the correlation between prior judicial expeience and fitness for the functions of the Supreme Court are zero." The need is breadth of view. Though it is called a court, it is also a quasi-political body in the noblest sense. The biographies of the "great and near-great" emphasize broad intelligence and wide-ranging interests. They are informed beyond the narrow field of law; steeped in literature, history, political science, economics, the physical sciences, philosophy and religion. They have a love of learning and a capacity to assimilate and digest. They are men of resourcefulness and imagination. They must also have courage. The departing William O. Douglas had many of these attributes; the Senate will hope to find them in his successor.

A central debate since the court began is the degree of intervention or self-restraint it should use on the tough frontier issues. It is the ancient struggle between the individual and constituted authority; judicial activism and judicial restraint.

This week a Senate committee told how the FBI tried to destroy Martin Luther King Jr. in its counterintelligence (Cointel) program, including sending a letter interpreted as a suggestion that he commit suicide. The FBI used 16 electronic bugs and eight wiretaps. King got the anonymous letter just 34 days before he received the Nobel Peace Prize in 1965. The prize appears to have upset Hoover as much as Nobel prizes to Russians upset Moscow. (The biggest structure on Pennsylvania Avenue is still the J. Edgar Hoover Building.)

What does the Supreme Court do in matters like this? Why, if cases growing out of such things reach it, it decides whether to intervene or not. Most cases are far more subtle. Firebrand James Otis denounced George III's writs of assistance used for harassing search and seizures of the colonists, and the Fourth Amendment today guarantees Americans the right of privacy: "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ." Or does it? Can evidence obtained illegally by bugging or wiretapping be used against a citizen before a grand jury? The Burger court this January in the *Calandra* case ruled that it could, despite the Fourth Amendment; the so-called "exclusionary rule" (excluding tainted evidence) notwithstanding. The vote, 6 to 3, with the four Nixon judges, plus White and Potter Stewart, in the majority.

Dozens of such issues fill the field of criminal law alone. The Warren court for 15 years decided them in favor of individual rights; the Burger court generally comes down the side of constituted authority.

Opening a law center here, Chief Justice Burger declared that Americans should not look to the courts to innovate and reshape their society — what he called "the alluring prospect that our world can be changed in the courts." The Burger court is against "activism," presumably it would have kept hands off government snooping, left schools segregated, and rejected the one-person, one-vote rule.

Senator Bob Griffin would have been an excellent choice for the Court. I can say that the A.B.A. found him qualified for the appointment.

However, Bob Griffin is an able and important leader in the Senate, and I think he is performing a very valuable service there.

In addition, there is a technical legal problem which made it difficult to consider any Member of Congress. One provision of the Constitution (Art. I, Sec. 6, Clause 2) seems to disqualify any Member of Congress for appointment to an office if the salary for that office has been increased during the term for which the Congressman was elected. During this session, the salary of all Federal judges was raised 5 per cent, along with the salaries of most other Federal officials.

I believe Congress and the Executive branch should take a close look at this provision of the Constitution and its purpose. Perhaps some legislative action can be taken while no vacancy is pending to assure that this provision will not operate as a discriminatory bar for all Members of Congress under circumstances not envisioned by our Founding Fathers.

ROBERT P. GRIFFIN
MICHIGAN

United States Senate

OFFICE OF
THE ASSISTANT MINORITY LEADER
WASHINGTON, D.C. 20510

November 24, 1975

The President
The White House
Washington, D.C.

Dear Mr. President:

As you know, Article I, Section 6 of the U. S. Constitution provides:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such Time; ..."

Enclosed is an article which appeared in the November 1974 North Carolina Law Review. One need not agree with the conclusions of author Pollitt to recognize that his article entitled, "Senator/Attorney General Saxbe and The Ineligibility Clause," provides a useful collection and analysis of the limited authorities available concerning the meaning and purpose of this provision of the Constitution.

However, if the strict and inflexible interpretation urged by Professor Pollit were accepted as the law of the land, it means, among other things, that a President could not appoint a Member of Congress to fill the office of Vice President under the 25th Amendment if Congress happened to have increased the salary of the Vice President during the term for which the particular Congressman or Senator was elected.

Furthermore, in a situation where Congress has not significantly raised the salary of one office, but has merely raised the salaries of all offices by a modest, uniform percentage, (e.g., the 5% increase for all judges, Congressmen

and most Executive officials was less than the cost of living increase for the preceding year), surely the kind of mischief which concerned the Founding Fathers is not present.

Nevertheless, until and unless something is done, the argument made by Professor Pollitt will continue to be available as an obstacle in situations not contemplated by the drafters of the Constitution. This could prove to be a very discriminatory and most unfortunate circumstance if, for example, the office of Vice President should become vacant, or in other situations where the special qualifications of a particular Member of Congress are really needed in the Executive or Judicial branch.

I am convinced that it would serve the interest of the Executive, the Congress and the best interests of the Nation as a whole to examine and clarify this question -- at a time when no important vacancy is pending.

I suggest that the Attorney General might be requested to study the matter and to explore and recommend ways to clarify it. During such a review process, I would urge consultation with Congressional leaders and with Chairmen and Ranking Members of the appropriate Committees of Congress.

If I can be of assistance in any way, please let me know.

With best wishes, I am

Sincerely,

Robert P. Griffin
U. S. Senator

RPG:tb

SENATOR/ATTORNEY-GENERAL SAXBE AND THE "INELIGIBILITY CLAUSE" OF THE CONSTITUTION: AN ENCROACHMENT UPON SEPARATION OF POWERS

DANIEL H. POLLITT†

The generation of men who framed and established our Constitution was well aware that "the votes of members of Parliament had been bought, with money *or office* by nearly every minister who had been at the head of affairs"; and that this practice of "parliamentary corruption" was freely and sometimes shamefully applied throughout the American war."[1] The framers did not want this practice to continue here, and consequently wrote an "ineligibility" and an "incompatibility" clause into article 1, section 6 of the Constitution.

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such Time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This clause had its origin in a strong desire to avoid the example of England and in an even stronger belief in the principle of separation of powers.[2] George Mason pronounced during the constitutional convention that this curb on the Executive power to appoint was "the cornerstone on which our liberties depend—and if we strike it out we are erecting a fabric for our destruction."[3]

Despite the passion and heated debate that preceded the enactment of this clause, it has lain practically dormant for almost two hundred years.[4] Interest was revived in 1973 when President Nixon ap-

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† Kenan Professor of Law, University of North Carolina. The author would like to express appreciation for the research assistance of John F. Mitchell, a third-year law student at the University of North Carolina.

1. 2 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 242-43 (1858) (emphasis added).

2. Reservists Comm. To Stop War v. Laird, 323 F. Supp. 833, 835 (D.D.C. 1971).

3. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 381 (1911).

4. *Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam) is the only case arising under the "ineligibility" clause, and there the Supreme Court avoided decision on the merits by dismissing it for lack of "standing." *See* text accompanying notes 66-70 *infra*.

pointed Senator William Saxbe to be his fourth Attorney General. On the face of the Constitution, Saxbe was "ineligible" for the appointment. He was elected to the Senate from Ohio in 1968, and, during his term of office, Congress had increased the salary of the Attorney General from 35,000 dollars to 60,000 dollars per annum.[5] However, there was an "end run" around the Constitution. Congress rolled back the Attorney General's salary to 35,000 dollars and the Senate then confirmed the nomination by the overwhelming vote of seventy-five to ten.[6] Reference was repeatedly made during the Senate debate to the 1909 appointment of Senator Philander Knox to be the Secretary of State. Congress had increased the salary of that office during the time for which Senator Knox was elected, and the Congress oblingly rolled back the salary to pre-existing levels to remove any impediment to his appointment. An Assistant Attorney General gave the "unofficial opinion" that the ineligibility clause did not bar the appointment. He reasoned that "the sole purpose" of the clause was to destroy the expectation of a legislator that "he would enjoy the newly created emoluments" and that, if "no such hope can exist" because the increased salary "is made and then unmade," the case "falls outside of the purpose of the law and is not within the law."[7] In other words, those who

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Reservists Comm. to Stop War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), was the first case filed under the "incompatability" clause. Legal scholars, apparently, have had no interest in the clause, as the law reviews are barren of any discourse on the subject.

5. The increase came into effect under the provisions of 2 U.S.C. § 359 (1970). This provision allows a salary increase to take effect thirty days after recommendation by the President. President Nixon recommended the increase on January 15, 1969. 34 Fed. Reg. 2241 (1969).

6. N.Y. Times, Dec. 18, 1973, at 35, cols. 4-8. This was not the first time the Nixon Administration ran afoul of the ineligibility clause of the Constitution. Donald Rumsfeld was appointed from the House of Representatives to be Director of the Office of Economic Opportunity, despite the fact that the salary for the director had been increased while Mr. Rumsfeld was a legislator. President Nixon sought to avoid the issue by paying Mr. Rumsfeld nothing as Director of the Office of Economic Opportunity, and 42,500 dollars as an "assistant to the President." *Id.*, Nov. 2, 1973, at 22, cols. 5-6.

Melvin R. Laird took the oath of office as a member of the House of Representatives on January 3, 1969. President Nixon appointed him Secretary of Defense, despite the fact that a salary increase for that office was to take effect on March 1 of that year unless vetoed by the Congress. Attorney General Ramsey Clark advised that the appointment was lawful (despite the increase in emoluments "during the time" for which Laird "was elected") because the salary increase was tentative as of the time of the appointment. 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969); *see* text accompanying notes 90-95 *infra*.

7. 43 CONG. REC. 2403 (1909). *But see* text accompanying notes 40-42 *infra*. Apart from the merits of this "unofficial opinion" by an assistant attorney general, the Philander Knox situation is of limited precedential value. President Taft, unlike President Nixon, made no public announcement of his intention to nominate the Senator prior to the enactment of the law rolling back the increased emolument. This permitted

favored Saxbe (and earlier, Philander Knox) would accommodate a presidential appointment by reading the clause to mean that a Congressman or Senator may [instead of "shall not"], during the time for which he was elected," 'be appointed to any civil office . . . the emoluments whereof shall have been increased during such time' *provided only* that the increase in emolument is not available to the appointee 'during such time.' "[8]

This is a far too narrow reading of the Constitution. "Parliamentary corruption" is a two-way street; for every "corruptee" there must be a "corruptor."[9] The ineligibility clause does indeed destroy the expectation that a Representative or Senator might have that he would enjoy the newly created office or the newly created emoluments, but the Constitution does far more. Legislators are incapacitated from promotion to executive offices because otherwise "their eligibility to offices would give too much influence to the executive."[10] The ineligibility clause is aimed at incapacitating the Executive, not the individual members of the Congress, all for the underlying purpose of preserving the independence of the Congress and the President, each from the the other."[11]

Those who framed the Constitution knew from the British experience that, if the Executive was left at liberty to purchase votes "by the inducements of money or office," conscience might become "false to duty, and corruption, having once entered the body politic, may be

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Taft supporters in the House to maintain that there was no constitutional issue involved, that the issue was simply an economy measure.

Despite this, and all of the pressures that a newly elected President and a majority party could command, the bill reducing the salary passed the House by a vote of 173 to 116, with 90 Representatives abstaining. 43 CONG. REC., *supra*, at 2415. In the Senate, the issue was never raised during the enactment of the "roll back bill" or during the subsequent confirmation. This prompted Congressman Clark in the House to proclaim that "senatorial courtesy, . . . overrides the Constitution, laws, and every other thing known among men." *Id.* at 2415.

8. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 20 (1948).

9. "Public morality . . . condemns with equal severity and equal justice both the giver and the receiver in every transaction that can be regarded as a purchase of votes upon particular measures or occasions, whatever may have been the consideration or motive of the bargain." 2 G. CURTIS, *supra* note 1, at 244-45.

10. The words are those of Roger Sherman of Connecticut during the debate on this Clause. A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 764 (1968).

11. Corwin writes that the clause derives from a repudiation of the British "Cabinet System" in which the executive power is placed in the hands of the leaders of the controlling party in the House of Commons. In contrast, the "ineligibility" and "incompatibility" clauses confirm and support the doctrine of the separation of powers in which the business of legislation and that of administration proceed largely in formal independence of each other. *See* E. CORWIN, *supra* note 8, at 20-21.

employed to effect bad ends as well as good."[12] On the other hand, the Framers did not want to penalize those who served in the legislative bodies by totally denying them opportunity for higher office. This total bar, it was thought, might deny Congress the services "of the most capable citizens" by eliminating the possibility of subsequent appointment to "the higher or more lucrative offices of state." The history of the constitutional debate is an effort to prevent the evils of these opposite mischiefs.[13]

I. THE CONSTITUTIONAL DEBATES

On May 25, 1787, delegates from the original states organized a Constitutional Convention in Philadelphia and remained in almost constant session until September 17 to frame our Constitution. Work began in earnest on May 29 when Edmund Randolph submitted the so-called Virginia Plan for organizing a federal government. Most of the subsequent discussion concerned alternatives and amendments to the Virginia Plan.

Randolph's fourth and fifth resolutions provided that the members of the National Legislature would be ineligible to hold "any office," be it state or federal, during the elected "term of service" and for an undetermined period of time thereafter.[14] Debate began on these proposals on June 22 when Nathaniel Gorham of Massachusetts moved to strike out the ineligibility clause insofar as it barred appointment to offices created "under the national government."[15] He considered the

12. 2 G. CURTIS, *supra* note 1, at 247. In addition to the British experience, the Framers also were aware of the experiences of the Congress that had the sole power of appointment to offices under the Articles of Confederation. Complaints had been made of the frequency with which the Congress had filled these offices with its own members. The original drafts of the Constitution provided that the legislative body would have the power of appointment; thus, there was a need to guard against the potential abuse if the members of the Congress were left at liberty to appoint each other to offices of their own creation. *Id.* at 248-50.

13. *Id.* at 248.

14. The Randolph Resolutions read as follows:

> 4. Resd. that the members of the first branch of the National Legislature . . . be ineligible to any office establ'shed by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of ———— after its expiration.
>
> 5. Resd. that the members of the second branch of the National Legislature . . . be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of ———— after the expiration thereof.

1 M. FARRAND, *supra* note 3, at 20-21.

15. 2 *id.* at 379.

ban on appointments to be both "unnecessary and injurious."[16]

George Mason of Virginia rose in opposition to this motion. He pointed out that in England the "power of the crown" had "remarkably increased" during the last century through "the sole power of appointing the increased officers of government," and he concluded that this ineligibility clause is "the cornerstone on which our liberties depend."[17] Pierce Butler of South Carolina echoed the sentiment that it was the Executive power of appointment that caused and resulted in parliamentary "venality and corruption."[18]

Rufus King of Massachusetts spoke for the Gorham amendment and against the Randolph "ineligibility" resolution. He thought this "restriction on the members would discourage merit" and that it "would also give a pretext to the Executive for bad appointments, and he might always plead this as a bar to the choice he wished to have made."[19]

James Wilson of Pennsylvania also rose to support the proposed Gorham amendment, because "[s]trong reasons must induce me to disqualify a good man from office."[20] Admitting the potential for "cabal and intrigue between the executive and legislative bodies" that could exist without the ineligibility clause, he nonetheless thought it more important "to hold forth every honorable inducement for men of abilities to enter the service of the public." He then put this case: "Suppose a war break out and a number of your best military characters were members; must we lose the benefit of their services? Had this been the case in the beginning of the war, what would have been our situation?—and what has happened may happen again."[21]

Alexander Hamilton also spoke in support of the Gorham amendment. He too confessed to a danger "where men are capable of holding two offices." But he saw the need for a strong Executive, with

16. *Id.* at 375. Mr. Gorham remarked that "[i]t was true abuses had been displayed in G.B. [Great Britain] but no one cd. [could] say how far they might have contributed to preserve the due influence of the Gov't nor what might have ensured in case the contrary theory had been tried." *Id.* at 375-76.

17. *Id.* at 380-81. Mr. Mason asked: "Why has the power of the crown so remarkably increased the last century? A stranger, by reading their laws, would suppose it considerably diminished; and yet, by the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom." *Id.*

18. *Id.* at 379. Mr. Butler said in full: "We have no way of judging of mankind but by experience. Look at the history of the government of Great Britain, where there is a very flimsy exclusion—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption." *Id.*

19. *Id.* at 376.

20. *Id.* at 379.

21. *Id.* at 380.

the power to appoint Congressman and Senators to high office, because, as he put it, "[o]ur prevailing passions are ambition and interest" and the Executive might need "to avail himself of those passions" to induce the legislature to act "for the public good." He was against "all exclusions and refinements, except only in this case; that, when a member takes his seat, he would vacate every other office."[22] The Gorham motion was put to a vote, and defeated, four states in favor, four states against, and three states divided.[23]

James Madison of Virginia then offered a compromise resolution, precluding a member of the legislature only from those offices "which may be created or augmented while he is in the legislature."[24] He "supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced" and that if the "door was shut agst. [against] them" it might properly be left open for the appointment of members to other offices "as an encouragement to the Legislative service."[25] He described his amendment "as a middle ground" between an eligibility in all cases and an absolute disqualification in all cases. He stressed the need for securing the services of "the most capable citizens" and argued "from experience" that the Legislature of Virginia would have been without its best members had "they been ineligible to Congress, to the Government and honorable offices of the State."[26]

There was immediate opposition to Madison's proposed "middle ground," largely based on fear of an all-powerful Executive. Elbridge Gerry of Massachusetts pointed out that "we have . . . endeavored to keep distinct the three great branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators . . . to be too much influenced by the executive, in looking up to him for offices."[27] Pierce Butler of South Carolina agreed that the Madison proposal "does not go far enough," and then expounded how George II had won his way over Parliament: "To some of the opposers he gave pensions—others offices, and some, to put them out of the house

22. *Id.* at 381-82. Earlier in the debates Benjamin Franklin had remarked in a similar vein that "there are two passions which have a powerful influence on the affairs of men. They are ambition and avarice; the love of power, and the love of money." *Id.* at 82.

23. *Id.* at 377.

24. *Id.* at 380.

25. *Id.* at 386.

26. *Id.* at 388-89.

27. *Id.* at 393.

of commons, he made lords."[28] George Mason of Virginia also "enlarged on the abuses & corruption in the British Parliament, connected with the appointment of its members, He cd. [could] not suppose that a sufficient number of Citizens could not be found who would be ready, without the inducement of eligibility to offices, to undertake the Legislative service."[29] Daniel Jenifer also opposed the Madison motion because, in Maryland "senators are appointed for 5 years and they can hold no other office. This circumstance gives them the greatest confidence of the people."[30]

Charles Pinkney of South Carolina then moved to strike that part of the clause which disqualified a member of the federal legislature from appointment to an office "established by a particular state." He argued "from the inconvenience" which such a restriction would expose the states wishing for the services, as well as "from the smallness of the object to be attained by the restriction."[31] Sherman of Connecticut seconded the motion with the comment that "it wd. [would] seem that we are erecting a Kingdom at war with itself." The motion was adopted by a vote of eight states in favor with three opposed.[32]

At that stage of the debate, it was not yet determined whether federal appointments would be made by the legislative, by the Executive, or by both acting together; and many opposed the Madison "middle ground" because it would do nothing to eliminate "the shameful partiality of the legislature to its own members."[33] Rutledge of South Carolina, for example, "was for preserving the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption."[34] The Madison amendment was put to a vote, and defeated with eight states opposed, two in favor, and one state divided.[35]

A final motion was then made to amend the clause by eliminating the Provision that would have made legislators ineligible for appointment not only during their elected term, but also "for the space of one year after its expiration." Mason spoke against this amendment, because "places may be promised at the close of their duration, *and*

28. *Id.* at 391.
29. *Id.* at 387.
30. *Id.* at 394.
31. *Id.* at 386.
32. *Id.*
33. *Id.* at 387 (statement of George Mason).
34. *Id.* at 386.
35. *Id.* at 390.

. . . *a dependency may be made.*"[36] Hamilton spoke against the motion because "the clause may be evaded many ways. Offices may be held by proxy—they may be procured by friends, etc." Rutledge admitted the possibility of evasion, but said "this is no argument against shutting the door as close as possible." The motion was defeated by a vote of six states to four, with one divided.[37]

The original Randolph Resolutions thus survived all proposed amendments, other than the one that permitted members of the federal legislative bodies to accept appointments to offices "established by a particular state." In late June the amended version was sent to the Committee of Detail for "Stylistic Changes," and that Committee reported the clause back to the Convention as proposed article VI, section 9 of the Constitution: "The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the senate shall be ineligible to, and incapable of holding any such office for one year afterwards."[38]

The debate that resumed on August 14 closely paralleled the earlier discussions. Mr. Pinkney of South Carolina began with the observation that the ineligibility clause was "inconvenient, because the Senate might be supposed to contain the fittest men" and he "hoped to see that body become a School of Public Ministers, a nursery of Statesmen."[39] His immediate proposal, however, was a substitute resolution which would bar legislators from office only when "they . . . receive any salary, fees, or emoluments of any kind" with the further provision that "the acceptance of such office shall vacate their seats respectively."[40] This proposal would have minimized the "parliamentary corruptions" caused by those legislators whose votes can be bought by "avarice, the love of money," but would have done nothing to ease the problem concerning those legislators whose votes can be purchased by "ambition, the love of power."[41] The Pinkney substitute was defeated by a vote of five states in favor, five opposed, and one state divided.[42]

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36. *Id.* at 394 (emphasis added).

37. *Id.*

38. *Id.* at 180. The Committee on Style thus eliminated the ineligibility of members of the House "for one year" after their term of office expired.

39. *Id.* at 283.

40. *Id.* at 284.

41. *See* the discussion by Benjamin Franklin and Alexander Hamilton at text accompanying note 22 *supra.*

42. 2 M. FARRAND, *supra* note 3, at 283. The defeat of the Pinkney proposal is certainly relevant to the argument made during the Philander Knox (and the William

General debate then resumed on the clause, with the opponents speaking against any limitation whatsoever on the power of the Executive to appoint members of the Legislature to high office. John Mercer of Maryland thought this power was absolutely necessary for effective government. "Governm[en]ts," he said, "can only be maintained by *force or influence*" and since the "Executive has not *force*" the clause depriving him of influence "by rendering the members of the [Legislature] ineligible to Executive offices" would make him "a mere phantom of authority."[43] James Wilson of Pennsylvania also spoke against any limitation which would render the members of Congress "ineligible to Natl. [National] offices," and he was "far from thinking the ambition which aspired to Offices of dignity and trust, an ignoble or culpable one."[44] On the other hand, Hugh Williamson commented that "he had scarcely seen a single corrupt measure in the Legislature of N. Carolina which could not be traced up to office hunting,"[45] and Roger Sherman of Connecticut stoutly maintained that "the Constitution shd. [should] lay as few temptations as possible in the way of those in power."[46]

Gouverneur Morris of Pennsylvania then "put the case of a war, and the Citizen the most capable of conducting it, happening to be a member of the Legislature." He moved to insert a provision which would except from the ban on appointment "offices in the army or navy: but in that case their offices shall be vacated."[47] Edmund Randolph, who authored the original Virginia Plan, spoke generally against "opening a door for influence or corruption," but admitted great weight to the argument which related to the case of war, and a co-existing incapacity of the fittest commanders to be employed." He agreed to the exception proposed by Mr. Morris.[48]

Mr. Pinkney then urged a general postponement of further debate on the clause pending further refinement in the Constitution concern-

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Saxbe) debate that the "sole purpose" of the clause was to deny any expectation that the legislator might enjoy an increased emolument. *See* text accompanying note 7 *supra*.

43. 2 M. FARRAND, *supra* note 3, at 284. Mr. Mercer continued as follows: "All Gov. must be by force or influence. It is not the King of France—but 200,000 janisaries of power that govern that Kingdom. There will be no such force here; influence then must be substituted; and he would ask whether this could be done if the members of the Legislature should be ineligible of offices of State. . . ." *Id.* at 289.

44. *Id.* at 288.

45. *Id.* at 287. The actual wording of this proposal is unclear; *see* 1 *id.* at xvii-xix.

46. 2 *id.* at 287.

47. *Id.* at 289.

48. *Id.* at 290.

ing the distribution between the Senate and the Executive of the appointive power. This was agreed to, and the Randolph proposal was sent to a Committee of Eleven (composed of one member from each state) along with other unfinished business.

On September 1 the Committee of Eleven reported for further consideration the following draft, expressing the sentiment of the states: "The Members of each House shall be ineligible to any *civil* office under the authority of the United States during the time for which they shall respectively be elected—And no Person holding any office under the United States shall be a Member of either House during his continuance in office."[49]

By this stage of the convention, it was established that the significant appointive power would be lodged in the Executive with certain lesser appointive power reserved to the Congress.[50] The proposed draft was significant then, in that it continued the ban against the appointment of "The Members of each House" during the time for which they shall be elected. This clearly reflects the expressed fears against "Executive influence." The proposed draft was also significant in that it eliminated the ban against appointment to military office, with the new provision against dual office holding—the so-called "incompatibility clause."[51]

Mr. Pinkney was the first to speak on the proposals. He favored the "incompatibility clause," but thought this insufficient to cure the mischief. He proposed, for a second time,[52] his amendment that the members of each House should be incapable of holding *only those offices* for which they received "any salary, fees, or emoluments," and made reference to the "policy of the Romans, in making the temple of virtue the road to the temple of fame."[53] This proposal was defea-

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49. *Id.* at 483 (emphasis added).

50. U.S. CONST. art. II, § 2 provides that the President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counselors, 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. . . ." This takes care of all of the important officers. The Constitution then continues to read: "but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

51. This juxtaposition of exclusions and inclusions clearly contemplates that a member of either House who accepts the appointment to a military office, thereby forfeits his membership in that House. *See* Reservists Comm. To Stop War v. Laird, 323 F. Supp. 833 (D.D.C. 1971).

52. *See* text accompanying note 40 *supra.*

53. 2 M. FARRAND, *supra* note 3, at 489-90.

ted by a vote of eight states to two.[54]

Rufus King of Massachusetts then proposed an amendment that would bar the members of each House only from those offices *created during their respective terms of office*. He said that this would make only a slight inroad into the principle of "incapacity," because his amendment would "exclude the members of the first Legislature" and "most of the Offices wd. [would] then be created."[55] Sherman of Connecticut was in principle still "for entirely incapacitating members of the Legislature" as their eligibility to offices "would give too much influence to the Executive." But apparently sensing that the King amendment might pass, he urged that "incapacity ought at least to be extended to cases where salaries should be *increased*, as well as *created*, during the term of the member."[56] The King amendment, as thus modified by Sherman, was restated by Williamson of North Carolina and enacted by a vote of five states in favor, four states against, and one state divided.[57] This was the "middle ground" earlier proposed by Madison, and then decisively rejected.[58] In any event, the Framers quickly agreed to the "last clause rendering a Seat in the Legislature and an office incompatible,"[59] and the debate was at an end.

The Constitution then was sent to the states for ratification or rejection. The recorded debate, while limited, supports the conclusion that the clause was entered to affirm and reinforce the doctrine of separation of powers by denying the Executive a power to influence the legislators with promises of appointment to high office.

In Virginia, the opponents thought the clause "entirely imperfect," and reference was made to the British House of Commons in which "dependents and fortune-hunters . . . are willing to sell the interest of their constituents to the crown."[60] These opponents proposed a total ban on appointment of legislators to any office, during or after their terms. Patrick Henry argued that the "hope or expectation of offices" is the "principle source of corruption" and that the ban on appoint-

54. *Id.* at 490.
55. *Id.*
56. *Id.*
57. *Id.* at 492.
58. *See* text accompanying notes 24 & 33 *supra*. Curtis attributes the shift in sentiment to the fact that "the mischiefs most apprehended at the time of Mr. Madison's proposition were in a great degree prevented by taking from the legislature the power of appointing to office; and that this modification" made the compromise possible. 2 G. CURTIS, *supra* note 1, at 251.
59. 2 M. FARRAND, *supra* note 3, at 492.
60. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 375 (1836).

ment only during the term of office was inadequate because the legislators might experience "hope or expectation of offices or emoluments" after their term of office expired.[61] James Madison admitted that the clause was "a mean between two extreme," but argued that "ineligibility" limited to a term of office was necessary, because otherwise the Henry proposal for a permanent ban on appointment would "prevent those who had served their country with the greatest fidelity and ability from being on a par with their fellow-citizens."[62]

In the New York debate, Alexander Hamilton argued that the ineligibility clause was adequate, even "admitting, in the president, a disposition to corrupt." He reasoned that the President would have few such opportunities, because "[m]en who have been in the Senate once, and who have a reasonable hope of a re-election, will not be easily bought by offices."[63] In Massachusetts, the clause was described as a "check to ensure the independence of the legislative branch from the executive branch";[64] and in Pennsylvania, as a useful tool to prevent "undue influence" by the Executive on the legislators. Throughout the debates it was admitted that members of the Congress *might* be corrupted by the Executive power of appointment, but that it is "an objection against human nature" and "[t]he danger is certainly better guarded against in the proposed system than in any other yet devised."[65]

The history of the ineligibility and incompatibility clauses shows that the original purpose of the clause was to protect against legislative corruption by the executive's appointment power. Although the final language in the Constitution represents a compromise to prevent total and permanent exclusion of worthy men from office, it was clearly intended to bar the use of the appointment power to gain influence. It is designed to prevent the offering of high position as an inducement

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61. *Id.* at 368-69. Mr. Justice Story agreed with the Patrick Henry philosophy when he wrote that,

> the reasons for excluding persons from office who have been concerned in creating them, or increasing their emoluments are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. *The actual provision, however, does not go to the extent of the principle;* for his appointment is restricted "*only during the time for which he was elected,*" thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination.

1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 867 (1858) (emphasis added).

62. 3 J. ELLIOT, *supra* note 60, at 370.

63. 2 *id.* at 321.

64. *Id.* at 85-86.

65. *Id.* at 508-09.

to legislators, and was never contemplated as a technicality of salary scales.

The paucity of authoritative discussion of the clause necessitates that great weight be placed on its history in determining its application. The few occasions when the clause was called into question will now be examined.

II. Ex Parte Albert Levitt: The Case of Mr. Justice Hugo L. Black

The Supreme Court has been asked to interpret the clause twice, once under the ineligibility clause, and once under the incompatibility clause. In both cases, the Court refused to reach the merits of the case.

Hugo L. Black was elected to the Senate of the United States in 1932 for a six-year term. In March 1937 Congress by law gave to Justices of the United States Supreme Court the right to *retire* at age seventy at a pension equal to their then-existing salary.[66] Prior to this Act of Congress, Justices who *resigned* at age 70, but not those who retired, received a pension equal to the salary they then received. But there is a difference between retirement and resignation. The pension of a Justice who resigned (but not the pension of a Justice who retired) was then subject to income taxation. Moreover, a retired Justice (but not a Justice who resigned) might be called upon to perform certain voluntary judicial duties.[67] In August 1937 Senator Black was appointed to the Supreme Court. The appointment was defended by the argument that the Act of Congress did not "increase the emoluments" of the office, and, even if it did, Mr. Black was then only fifty-one years old, the "emoluments" would not be available to him for nineteen years, if at all.[68]

Albert Levitt filed an original suit in the Supreme Court requesting that Mr. Justice Black be required "to show cause" why he should be permitted to serve as an Associate Justice.[69] The Supreme Court did not reach the merits of the case but dismissed for the lack of a "justiciable controversy." It wrote, briefly:

> The motion papers disclose no interest upon the part of the petitioner [Albert Levitt] other than that of a citizen and a member

66. Act of March 1, 1937, ch. 21, §§ 1-2, 54 Stat. 24 (codified as amended, 28 U.S.C. § 371 (1970)).

67. Note, *Legality of Justice Black's Appointment to Supreme Court*, 37 Colum. L. Rev. 1212 (1937).

68. E. Corwin, *supra* note 8, at 18-19.

69. *Ex parte* Levitt, 302 U.S. 633 (1937).

> of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[70]

Ex parte Levitt was decided in 1937, and the "law of standing" has evolved greatly during the intervening years.[71] Indeed, the *Levitt* rationale was challenged in the first suit ever filed under the incompatibility clause, *Reservists Committee to Stop War v. Laird.*[72] There, an association of reservists filed suit against the Secretary of Defense, and the Secretaries of the Army, Navy and Air Force. Plaintiffs asked that the various Secretaries be required to remove from the reserve rolls the 117 Senators and Representatives then holding commissions in the various reserve components.

On the merits, the issue is a simple one. Membership in a military component is "incompatible" with membership in Congress because of the inherent tension between the loyalty a reserve officer owes to the President as his Commander in Chief and the dispassionate duty a Congressman owes to the constituents who elected him. Under the precedents the issues seem totally free from doubt. In 1803 Representative John Van Ness was forced to select between his seat in the House and a commission in the District of Columbia Militia.[73] In 1846 Representative Edward Baker had to choose between his seat in the House and a commission as a colonel of volunteers from Illinois.[74] In 1864 Representative Frank Blair had to choose between his seat in the House and a major-generalship in the Tennessee Volunteers.[75] In 1916 the House Judiciary Committee, upon a directive from the House, undertook a careful review of the situation and reported that membership in the House was "incompatible" with holding a commission in any National Guard.[76]

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70. *Id.* at 634.

71. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

72. 323 F. Supp. 833 (D.D.C. 1971), *noted in* 40 GEO. WASH. L. REV. 542 (1972); 85 HARV. L. REV. 507 (1971) *and* 40 U. CIN. L. REV. 620 (1971).

73. 1 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 592-93 (1907).

74. *Id.* at 594-95.

75. *Id.* at 601-03.

76. H.R. REP. No. 885, 64th Cong., 1st Sess. (1916).

The more difficult and relevant questions are whether the Reservists Committee (or its members) has "standing" to raise this issue and whether the issue is "justiciable." District Judge Gesell held that the plaintiffs did have standing. He reasoned that the incompatibility clause was designed "to ensure the integrity of a particular form of government, by preventing encroachments upon the separation of powers,"[77] and hence, "any violation of the Clause" is an injury to all citizens of the United States. Elaborating somewhat, he wrote that

> the interest in maintaining independence among the branches of government is shared *by all citizens equally*, and since this is the primary if not the sole purpose of the bar against Congressmen holding executive office, the interest of plaintiffs *as citizens* is undoubtedly one which was intended to be protected by the constitutional provision involved.[78]

The District of Columbia Court of Appeals affirmed this holding without an opinion. The Supreme Court, however, reversed without reaching the merits, on the grounds that the plaintiffs lacked "standing." The Court ruled that the plaintiffs raised only a "generalized grievance about the conduct of Government," and expressly reaffirmed *Levitt* "in holding that standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public."[79]

It is thus doubtful that anyone has the necessary standing to challenge the Saxbe appointment as violative of the ineligibility clause,[80] with the possible exception of the ten senators who voted against his confir-

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77. 323 F. Supp. at 837.

78. *Id.* at 841 (emphasis added).

79. Schlesinger v. Reservists Comm. to Stop War, 94 S. Ct. 2925, 2930, 2932 (1974).

80. The title of a de facto officer cannot be attacked directly or collaterally. One is an officer de facto if, like Attorney General Saxbe, he exercises the duties of office *under color of an election or appointment.* Note, 37 COLUM. L. REV., *supra* note 64, at 1215. Thus, a defendant in a criminal case cannot attack the validity of his conviction on the theory that both the jury and the judge were appointed in violation of a statute, McDowell v. United States, 159 U.S. 596 (1895); that the presiding judge was appointed in violation of the Constitution, *Ex parte* Ward, 173 U.S. 452 (1899); or that the prosecuting attorney was illegally appointed under state law, United States *ex rel.* Doss v. Lindsley, 148 F.2d 22 (7th Cir. 1944), *cert. denied*, 325 U.S. 858 (1945). Nor will the defendant in a criminal prosecution under the Selective Service Act be heard to argue that the members of the local draft board which ordered his induction were serving illegally because of the statutory prohibition against more than twenty-five years of service. United States v. Groupp, 333 F. Supp. 242 (D. Me. 1971), *aff'd on other grounds*, 459 F.2d 178 (1st Cir. 1972). "The result of the authorities" as the Supreme Court once held, "is that the title of a person acting with color of authority, even if he be not a good officer in point of law," is not subject to attack. *Ex parte* Ward, *supra*, at 456.

mation.[81] However, the issue might be raised administratively by a challenge to the payment of the Attorney General's salary by the General Accounting Office.[82]

III. Opinions of the Attorney General

On several occasions, the effects of the ineligibility clause on presidential appointments have been considered by the Attorney General. In the majority of the reported opinions, a strict construction of the clause was adopted, forcing rejection of a proposed appointment.

A. Governor Kirkwood. The first such ruling was made by Attorney General Benjamin Brewster in 1882.[83] Governor Kirkwood of Iowa had been elected to the Senate for a term that expired on March 3, 1883. In March 1881, two years before his term expired, Kirkwood resigned from the Senate to accept the position of Secretary of the Interior. He subsequently resigned from that office in 1882 to retire to private life. Thereafter, but prior to March 3, 1883, Congress created the office of tariff commissioner, and President Chester Arthur desired to appoint Governor Kirkwood to that position. Attorney General Brewster advised the President that Governor Kirkwood was disabled from receiving that appointment because of the bar against the appointment of a Senator to any civil office which shall have been created "during the time for which he was elected." The Attorney General recited that:

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81. *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939), in which Mr. Chief Justice Hughes wrote for the Court that the dissenting members of the Kansas Senate had "a plain, direct and adequate interest in maintaining the effectiveness of their votes" sufficient to challenge the legality of Kansas' ratification of the "child labor" amendment to the Constitution. *Id.* at 438.

Without discussion, the federal courts have assumed the "standing" of the incumbent to an appointive position, Padron v. Puerto Rico *ex rel.* Castro, 142 F.2d 508 (1st Cir. 1944), *cert. denied*, 323 U.S. 791 (1945), and the "standing" of the opposing candidate for elected office to challenge the "eligibility" of a legislator for those offices, Kederick v. Heintzleman, 132 F. Supp. 582 (D. Alas. 1955). In each of these cases, the territorial organic act contained prohibitions that "no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected . . . ." *Id.* at 583. In *Padron* the emoluments of the office had been increased while the new appointee was a member of the legislature. In *Kederick* the office had been created while the rival opponent had been a member of the legislature. In each the federal court held that the ineligibility clause was a bar to the office sought.

82. *See* text accompanying notes 86, 87, 91 *infra*.

83. 17 Op. Att'y Gen. 365 (1882). The Attorney General wrote that he gave the subject "a serious consideration and a thorough examination" because of the President's "desire to appoint Governor Kirkwood" and "the hope of all the members of the Cabinet that he would be appointed. . . ."

> It is unnecessary to consider the question of the policy which occasioned this constitutional prohibition. I must be controlled exclusively by the positive terms of the provision of the Constitution. The language is precise and clear, and, in my opinion, disables him from receiving the appointment. The rule is absolute, as expressed in the terms of the Constitution, and behind that I can not go . . . .[84]

B. Matthew W. Ransom. The second ruling was written by Acting Attorney General Holmes Conrad in 1895.[85] Matthew W. Ransom was elected from North Carolina to the Senate for a term of office which expired on March 3, 1895. In 1891, early in his term, the Congress increased the salary for those serving in the diplomatic and consular service. On February 23, 1895, near the end of his term, President Grover Cleveland nominated Senator Ransom as minister plenipotentiary to Mexico. The Senate confirmed the nomination the same day. Senator Ransom took the oath of office on March 4, the day *after* his Senatorial term had expired, and his commission was delivered to him the following day.

Thereafter, the "Auditor for the state and other Departments" ruled that Ambassador Ransom was not entitled to a salary because of the ineligibility clause, and the Secretary of State requested the advice of the Attorney General on the matter.[86] Attorney General Conrad agreed with the Auditor that the presidential appointment of a Senator to any civil office, the emoluments whereof have been increased *during the time for which he was elected,* is "a nullity." The Attorney General then wrote as follows:

> It is suggested in your letter that the commission of Mr. Ransom was not actually signed by the President until the 5th of March, which was after the expiration of the time for which Mr. Ransom was elected a Senator in Congress.
>
> But it must be observed that the language of the Constitution is that "no Senator shall, during the term for which he was elected, *be appointed* to any civil office under the authority of the United States."
>
> The vital question here, then, would seem to be, not when was Mr. Ransom *commissioned,* but when was he *appointed*? . . .
>
> . . . .
>
> I am of opinion, then, that Mr. Ransom's appointment as envoy extraordinary and minister plenipotentiary to Mexico was

84. *Id.* at 366.
85. 21 OP. ATT'Y GEN. 211 (1895).
86. *Id.*

> made on February 23, 1895; that that was during the time for which he was elected a Senator in Congress, and it appearing from your letter that it was during that time the emoluments of the office of minister to Mexico were increased, Mr. Ransom was not, in my opinion, eligible to appointment to that office.[87]

C. William S. Kenyon. The third opinion was written by Attorney General Harry M. Daugherty, and he too gave the constitutional language a very strict construction.[88] William S. Kenyon was elected to the Senate for a term that expired on March 4, 1919. During his first term in office, Congress increased the salary of the Judges of the Circuit Court. In 1918 Senator Kenyon was reelected to a *second term of office* which began on March 4, 1919. In 1922, during Kenyon's second term in the Senate, President Harding nominated him to be a United States Circuit Judge for the Eighth Circuit, and the appointment was confirmed by the Senate. Thereafter, President Warren Harding requested an opinion from the Attorney General "as to whether or not the provisions of the Constitution make it impossible for" Senator Kenyon "to qualify" for that office. Attorney General Daugherty ruled that the appointment was *not* barred by the Constitution and wrote as follows:

> two things must concur in order to deprive a Senator or a Representative of his right to appointment to a civil office under the above-quoted Section of the Constitution, to wit:
>
> (a) Increasing the emoluments of an office; (b) appointing a Senator or Representative to an office the emoluments of which had been increased, *both occurring during the term which the Senator or Representative was then serving.*
>
> There is no such concurrences of events in the case of Mr. Kenyon. The emoluments of the office to which he has been appointed were not increased "during the time for which he was elected" *at the time of his appointment.*
>
> If the framers of the Constitution had intended that in case the emoluments of any office were increased during a term then being served by a United States Senator such Senator would be precluded from being appointed to such office *during a subsequent term* to which he had been elected, more apt language would have unquestionably been adopted.[89]

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87. *Id.* at 213-14. On September 6, 1895, the Treasury Department handed former Senator Ransom a further setback when it refused to pay his salary from March 4 to June 30 because "such appointment was prohibited by Section 6, Article 1 of the Constitution, and Mr. Ransom's salary cannot be paid." 2 COMP. GEN. 129-30 (1895).

88. 33 OP. ATT'Y GEN. 88 (1922).

89. *Id.* at 89 (emphasis added).

D. Melvin R. Laird. The final opinion by an Attorney General was issued on January 3, 1969.[90] Melvin Laird was reelected to the ninety-first Congress, which was to commence on January 3, 1969. Prior thereto, President-elect Nixon (whose term was to begin on January 20, 1969) announced that he would appoint Laird to be his Secretary of Defense. Laird first wrote the Comptroller General and then to Attorney General Ramsey Clark, inquiring advice "as to whether commencing [his] term as a Member of the House of Representatives for the 91st Congress would preclude [his] appointment as Secretary of Defense."[91] The problem arose under the Federal Salary Act of 1967. Under this law, President Lyndon B. Johnson was required to make any recommendations regarding salary increases for various federal offices in his Budget message, which was required to reach Congress by January 17. The recommended salary increase, if any, would take effect on March 1, 1969, unless disapproved by Congress prior to that time. Under normal practice at the beginning of a new administration,[92] Melvin Laird would be nominated, confirmed, and appointed as Secretary of Defense within a few days following the inauguration of President Nixon, *i.e.* shortly after January 20; "during the period in which it remains uncertain whether Congress may disapprove the Presidential salary recommendations."[93]

Attorney General Clark advised Secretary of Defense-designate Laird that taking his seat in Congress would *not* preclude the appointment. He wrote that "[t]he constitutional language prohibits the appointment of a legislator to an office the compensation of which '*shall have been*' increased prior to the making of such appointment," and consequently "the ban clearly does not apply to an increase in compensation which is proposed *subsequent to the appointment.*"[94] *A fortiori,* ruled Attorney General Clark, the ban "is also inapplicable where, as here, it is possible but not certain at the time of the appointment that a proposed salary increase for the appointee may receive final approval at a future date."[95]

If Attorney General Clark was correct, the whole controversy over the appointment of Hugo Black was wasted motion,[96] and Attorney

90. 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969).
91. *Id.* at 1.
92. *Id.* at 2.
93. *Id.* at 2-3.
94. *Id.* at 1-2.
95. *Id.* at 2.
96. *See* text accompanying note 66 *supra.*

General Brewster was incorrect when he ruled that Governor Kirkwood was "disabled" from holding a position created after his resignation from the Senate but during the time for which he was elected. Attorney General Clark, however, seems to have been in error when he asserted that "the constitutional language" prohibits the appointment of a legislator to an office the compensation of which shall have been increased "*prior to the making of such appointment.*" To the contrary, the "constitutional language" prohibits the appointment of a legislator to an office, the compensation of which shall have been increased "during the time for which he was elected."[97]

Until the very closing days of the Constitutional Convention, the drafts contained a total ban on the appointment to any office during the time for which the members of each House "shall respectively be elected." At that time the Framers adopted two amendments: the first limited the "ineligibility" to those offices "created during their respective terms of office"[98] and the second extended the incapacity "to cases in which salaries should be increased, *as well as created*, during the term of the member."[99] This relaxation of the ineligibility clause was passed by the narrow vote of five states to four, with one state divided.[100] Surely the Framers never contemplated that a legislator would be eligible for Presidential appointment during his term of office if the emoluments of that office were increased during the term for which he was elected but after he had resigned from his legislative functions.[101] It was simply bad politics and worse law for Melvin Laird to take his seat in the Congress when he knew he would be appointed to be the Secretary of Defense within a matter of days and that the emoluments of that office would be increased by Congress within a matter of weeks.

E. Philander Chase Knox. The Attorney General did not issue an opinion in this case. Assistant Attorney General Russell wrote what he styled an "unofficial opinion." It is not contained in the bound volumes of the Opinions of the Attorney General, but is found only as

97. *See* text accompanying note 84 *supra.*
98. 2 M. FARRAND, *supra* note 3, at 490-92.
99. *Id.*
100. *Id.*
101. During the debates, George Mason spoke especially against the "dependency" which "may be made" if legislators may be promised offices to take effect at the close of their offices. *See* text accompanying note 37 *supra.* Mason also stressed the need for the clause barring appointment during "the time for which they shall respectively be elected" so as to "guard against evasions by resignations." 2 M. FARRAND, *supra* note 3, at 755.

an "appendix" to the floor debate in the Congress.[102]

Senator Knox was elected to the Senate for a term that expired on March 4, 1911. Early in his term, in 1907, Congress increased the salary of the Secretary of State from 8,000 dollars to 12,000 dollars per year. President Taft wanted to appoint Knox his Secretary of State; so without formal annnouncement, the administration spokesmen introduced a bill to "roll back" the salary of the Secretary to the pre-existing level. During the debate on this measure, Assistant Attorney General Russell wrote its sponsors that this measure would permit the appointment of a member of the present Senate, "after the 4th of March next, but prior to the expiration of the period for which he was elected, to the Office of Secretary of State."[103] The Assistant Attorney General reasoned, as discussed earlier,[104] that "the sole purpose" of the ineligibility clause is to destroy the expectation of a Senator or Congressman that he might enjoy "the newly created emolument." But, also, as expressed earlier,[105] the purpose of the ineligibility clause has much deeper and broader roots that go to the very heart of our system of government.

IV. CONCLUSION

To recapitulate, the men who drafted our Constitution were practical men, well aware that the twin passions of "ambition and avarice; the love of power and the love of money"[106] might lead to "office hunting," to "cabal and intrigue between the executive and the legislative bodies,"[107] to the "probable abuses" that result when appointment to high office is "within the gift of the Executive."[108] They agreed that the Constitution "should lay as few temptations as possible in the way of those in power";[109] and that it should "keep distinct the three great branches of government."[110] To this end, they agreed that the appointive power within the Executive should be curbed by making the members of both houses ineligible for appointment to other offices. They disagreed only as to the extent of this necessary limitation.

At one extreme, Patrick Henry would have rendered the Legisla-

102. 43 CONG. REC. 2402-03 (1909).
103. *Id.* at 2403; *see* text accompanying note 7 *supra.*
104. *See* text accompanying note 7 *supra.*
105. *See* text accompanying note 10 *supra.*
106. 2 M. FARRAND, *supra* note 3, at 284.
107. *Id.* at 380.
108. *See* text accompanying notes 21, 22, 26 *supra.*
109. 2 M. FARRAND, *supra* note 3, at 287.
110. *Id.* at 393.

tors ineligible for any other office during and after their terms of elected service.[111] At the other, Alexander Hamilton and John Mercer feared that, without the appointive power and the potential for appeal to the "ambition which aspired to Offices of dignity and trust,"[112] the President might become "a mere phantom of authority."[113] The effort "for preserving the Legislature as pure as possible" by "shutting the door against appointments"[114] ended in a compromise.

Edmund Randolph spoke for the overwhelming majority when, originally he proposed that the members of both houses be ineligible for all other offices, but only during their elected term.[115] Then, as the debate wore on, it was agreed that the members of both houses would be eligible for appointment to offices "established by a particular state";[116] would be eligible for appointment as "officers in the army or navy: but in that case their offices shall be vacated";[117] and finally under the Madison middle ground, eligible for all civil offices established under the authority of the United States other than those "which may be created or augmented" during the elected term of office.[118] Members of the legislative bodies were not to escape this limitation by the simple act of resignation; and the Framers steadfastly rejected proposals that the members of both houses be eligible *at any time* for appointment to any office, provided only that upon acceptance of such office they "vacate their seats," and that they not receive "any salary, fees, or emoluments of any kind" in the new office.[119]

But why all this fuss over Bill Saxbe? During the confirmation debate, Senators "from both sides of the aisle" were quick to speak in favor of their colleague. Even Senator Sam Ervin of North Carolina, who voted against Mr. Saxbe for constitutional reasons, said that "he thought the nominee was a fine lawyer and very qualified" for the office of Attorney General.[120]

James Madison gave us the answer: "Because, it is proper to take

111. *See* text accompanying note 61 *supra.*
112. M. FARRAND, *supra* note 3, at 288.
113. *Id.* at 284.
114. *Id.* at 386.
115. *See* text accompanying note 14 *supra.*
116. 2 M. FARRAND, *supra* note 3, at 386; *see* note 47 *supra.*
117. 2 M. FARRAND, *supra* note 3, at 289.
118. *See* text accompanying notes 24, 57-58 *supra.*
119. 2 M. FARRAND, *supra* note 3, at 489-90; *see* text accompanying notes 40 & 52 *supra.* See in this connection President Nixon's appointment of Congressman Rumsfeld to the Directorship of the OEO; paying him no salary for that position, and 42,500 dollars as an "assistant to the President." *See* note 6 *supra.*
120. N.Y. Times, Dec. 18, 1973, at 35, col. 6.

alarm at the first experiment on our liberties."[121] Or, as Mr. Justice Bradley wrote almost a century ago about a "little" search and seizure: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[122] Finally, Mr. Justice Brandeis reminds us that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. . . . Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[123]

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121. Madison, *Memorial and Remonstrance Against Religious Assessments*, in Everson v. Board of Educ., 330 U.S. 1, 65 para. 3 (1947) (appendix to dissent of Rutledge, J.).

122. Boyd v. United States, 116 U.S. 616, 635 (1886).

123. Olmstead v. United States, 277 U.S. 438, 479 (1928). Mr. Justice Brandeis concluded his famous dissent in that "wiretapping" case with these words:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 485.