

Q & A: Rodarmel v. Clinton

Q: Why is Hillary Clinton ineligible to serve as Secretary of State?

A: The Constitution's "Disability Clause," also known as the "Emoluments Clause" (Article 1, Section 6, Clause 2), states:

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.

The Constitution thus prohibits members of Congress from being appointed to a civil office (such as a cabinet post) during the term for which they were elected (even if they have resigned), if the salary for that post was increased during that term. The salary for Secretary of State has been increased three times during Mrs. Clinton's second elected term, therefore she is not eligible for that office until her term expires in January 2013.

Q. Didn't Congress fix this problem when it voted on December 10, 2008 to lower the Secretary of State's salary to the level it was at the beginning of Mrs. Clinton's second term?

A. This "work-around" is not authorized by the Constitution. Other clauses do provide for removing a Constitutional ineligibility by Congressional action. For example, Art. 1, Sec. 9, Cl. 8 provides that "no Person holding any Office of Profit or Trust under them [the United States] shall, *without the Consent of the Congress*, accept of any present, Emolument, Office or Title, of any kind whatever, from any King, Prince, or foreign State" (emphasis added). Another example is Amendment XIV, Sec. 3, which prohibits holding federal office by any person who, having served in a federal or state office under oath to support the Constitution, engages in insurrection, rebellion, or aiding the enemies of the United States, but providing that "Congress may by a vote of two-thirds of each House, remove such disability." There is no provision for Congress to remove the disability set forth in the Disability (or "Emoluments") Clause.

Q. Haven't other cabinet secretaries served after Congress passed similar fixes?

A. Yes. The salary-lowering "work-around" is known as the "Saxbe Fix," named after Ohio Senator William Saxbe who was appointed Attorney General in the Nixon administration. Despite earlier Attorney General opinions warning that it is unconstitutional, the "Saxbe Fix" has been used four times since 1909 by administrations of both parties. The Obama administration has now nominated four more members of Congress to cabinet positions which will require the "Saxbe Fix" to attempt to avoid the Constitution's Disability Clause: Senators Hillary Clinton

(State), Ken Salazar (Interior), Judd Gregg (Commerce), and Representative Hilda Solis (Labor).

Q. Why hasn't this question been decided before?

A. The courts have never ruled on whether the Saxbe Fix can avoid the Constitution's Disability Clause, because earlier challenges have been dismissed on procedural grounds without reaching the issues. But Congress is apparently inviting judicial resolution of the question, as "Saxbe Fix" bills for both Senators Clinton and Salazar include provisions facilitating legal standing and providing for expedited trial and direct appeal to the U.S. Supreme Court.

Q. Why doesn't the lawsuit include the other nominees?

A. The plaintiff is a Foreign Service Officer in the State Department, not in the other departments. But with four nominations now in violation of the Disability Clause, other plaintiffs will likely come forward, whether from within those departments, or from other persons aggrieved by actions of those nominees (for example, Mr. Salazar's February 3 cancellation of oil and gas leases sold at auctions in December 2008).

Q. Why does the Constitution even have the Disability Clause?

A. The founders included it as a measure to ensure the separation of powers among the branches of the Government and to prevent corruption. See The Founders' Constitution: http://press-pubs.uchicago.edu/founders/tocs/a1_6_2.html.

Q. But if the salaries are lowered and there is no question of corruption, why not work around the Disability Clause?

A. If it is no longer useful, it must be changed by Constitutional means, not by evasion. Ignoring the Constitution when some deem it "inconvenient" is not a viable solution if we intend to continue as a society under rule of law.

Q. Why is this important enough to file a lawsuit?

A. The Constitution is the supreme law of the land. If politicians or lawyers disregard portions they consider "inconvenient," or take actions that lack lawful authority because they believe no one has standing to challenge them in court or can prove a violation beyond a reasonable doubt, we are on a slippery slope that will negate the rule of law.

Q. What will happen if the courts rule in your favor?

A. Mrs. Clinton and these other three distinguished public servants will in all likelihood be called upon to serve the American people again, but in other positions authorized by the Constitution.