U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR THE COUNSELOR TO THE ATTORNEY GENERAL

Re: Ineligibility of Sitting Congressman to Assume A Vacancy on the Supreme Court

This memorandum is to confirm advice previously given to you orally that Article I, section 6 of the Constitution prohibits in all circumstances the appointment of those now serving as Senators and Members of the House of Representatives to the current vacancy on the Supreme Court.

I.

The Ineligibility Clause of the 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 encreased 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 (emphasis added).

Art. I, sec. 6, cl. 2.

The salaries of all Associate Supreme Court Justices were increased on February 4, 1987 to $115,000.[1] Therefore, whatever the ultimate fate of the salary applicable to the Supreme Court seat now vacant, it is plain that the "Emoluments" of that "civil Office" were "encreased" during the "Time for which" each now-seated congressman "was elected." The plain meaning of this clause thus disqualifies those now serving in Congress from being appointed to the Supreme Court.

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[1] Proposed increases in judicial salaries are transmitted to Congress by the President, based upon the recommendations of the Commission on Executive Salaries, which was created by Public Law 99-190. Congress may then take action to block the proposed increases. If it does not, the increases go into effect automatically. The increase in the salaries of Associate Supreme Court Justices was included in the President's Fiscal Year 1988 Budget Message, and Congress allowed the increase to take effect.

Although this would seem to end the matter, in fact a number of past administrations have circumvented the effect of this clause. This has been accomplished by having Congress restore the salary of the office to which the President sought to appoint a sitting congressman to the amount paid for that office when the prospective nominee assumed his seat in Congress. (For the sake of clarity and convenience I will refer to the salary applicable at the time the congressman took his congressional seat as the "original salary" and the office to which the President seeks to nominate a congressman as the "vacant office.") It is therefore necessary to examine this practice to determine if it comports with either the letter or the spirit of the Constitution. We conclude that it does not, and therefore recommend against the use of such a device.

Although the Records of the Constitutional Convention do not directly address this specific issue, they nonetheless provide valuable guidance in two ways: they reveal the concerns of the Founders prompting their inclusion of this clause in the Constitution, and they show that the artifice of reducing the salary of a particular vacant seat was in no way contemplated. Specifically, they reveal that the Framers' concerns extended beyond merely the precise amount that would be paid a congressman assuming a vacant office.

The language first proposed at the Constitutional Convention would have permanently barred all members of the House from assuming any seat created during their tenure in Congress. Many supported that proposal. For example, James Madison stated unequivocally: "I am . . . of the opinion that no office ought to be open to a member, which may be created or augmented while he is in the legislature." 1 M. Farrand, The Records of the Federal Convention of 1787 380 (1966)(hereinafter "Farrand"). Roger Sherman was "for entirely incapacitating members of the Legislature. He thought their eligibility to offices would give too much influence to the Executive. He said the incapacity ought at least be extended to cases where the salary should be increased, as well as created, during the term of the member. He mentioned also the expedient by which the restriction could be evaded to wit: an existing officer might be translated to an office created, and a member of the Legislature be then put into the office vacated (emphasis in original)." 2 Farrand at 490. Edmund Randolph "was inflexibly fixed against inviting men into the Legislature by the prospect of being appointed to offices." Id. at 491. George Mason agreed as well.

In the end, the motion to bar all legislators from ever taking offices created or for which the salaries were increased during their term in Congress was defeated. In large part this was due to the fact that the "first Legislature [would] be composed of the ablest men to be found," id. (remarks of Pinkney), whom they did not wish to prevent forever from holding the many offices that would be created during that term of Congress. But the serious consideration given to the idea of a

complete bar helps to put in perspective the Founders' concern on this question, and their view of its importance in maintaining the proper balance between the three coordinate branches.

Opinions of the Attorney General going back over one hundred years further demonstrate the force of the Ineligibility Clause. For example, Attorney General Benjamin Harris Brewster held that Senator Kirkwood, who had been elected to a term expiring 1883, could not assume the post of tariff commissioner in 1882. That Kirkwood had not been a Senator when the office was created, having resigned in March of 1881 to serve as Secretary of the Interior, did not change Harrison's analysis. 17 Op. Att'y Gen. 365 (1882). He there opined:

> I must be controlled . . . 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 . . . Constitution, and behind that I can not go, but must accept it as it is presented regarding its application in this case.

Id. at 366.[2]

Acting Attorney General Holmes Conrad echoed Harrison's words twelve years later in the face an attempted circumvention of the Ineligibility Clause. In that case Senator Matthew W. Ransom was appointed to be ambassador to Mexico, despite his having voted to increase the salary of that position in 1891. His term was scheduled to end on March 4, 1895. He was nominated and confirmed as of February 23rd, but his commission was not signed until March 5, 1895. Acting Attorney General Conrad could not have been clearer: "Mr. Ransom was not, in my opinion, eligible to appointment to that office." 21 Op. Att'y Gen. 211, 214 (1895).

In 1922 Attorney General Harry Daugherty articulated the two events that must coincide for a congressman to be disqualified from assuming an office because of the Ineligibility Clause.

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[2] The next year Attorney General Brewster opined that the Ineligibility Clause prohibits even the nomination and confirmation of a sitting congressman to an office created or for which the salary has been increased during his term in office, even if the commission is not signed until after his ineligibility ceases. Under this analysis, President Reagan could not nominate a congressman in the fall of 1988 -- even assuming that the Senate would confirm the candidate -- and sign the congressman's commission on January 4, 1989, after the congressman's term (and thus ineligibility) has ended, but before the President's term ends on January 20, 1989. See 21 Op. Att'y Gen. 211, 214 (1895)("Although he might have been commissioned on the 5th day of March, yet if he was nominated and confirmed on the 23rd of

> (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 (emphasis in original).

33 Op. Att'y Gen. 88, 89 (1922). Both are present with respect to currently-sitting congressmen. The salaries of the Supreme Court Justices were increased during the most recent term. This should disqualify all those congressman now in office from being appointed to the current vacancy on the Supreme Court.[3]

II.

First in 1876, then again in 1909, and most recently in 1973, congressmen who were constitutionally disabled from serving in certain offices were nominated and confirmed after Congress reduced the salaries of the vacant offices to the salary applicable when the prospective nominees first began their congressional terms.[4] In 1876 Lot M. Morrill was appointed to serve as Secretary of the Treasury after having been elected to the Senate in 1871. Cabinet officers' salaries had been raised in

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[2] (Cont.) February, that, under the rule stated, would seem to be the date of [the] appointment.")

[3] Attorney General Daugherty's statement that "[t]here is a dearth of authority on this question and no decided cases" remains true today. He, however, like his predecessor Acting Attorney General Conrad, was strongly influenced by the thoughts of Judge Story on this question:

> The reasons for excluding persons from offices 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 [on] his mind, if . . . [the] election is short or the duration of it is approaching its natural termination.

Id. at 88-89.

[4] The following historical background is drawn in large part from the testimony of Acting Attorney General Robert H. Bork in 1973. To Insure that the Compensation and Other Emoluments Attached to the Office of Attorney General Are Those Which Were In Effect on January 1, 1969: Hearings on S. 2673 Before the Senate Committee on Post Office and Civil Service, 93rd Cong., 1st Sess. 8-16 (1973).

1873 from $8,000 to $10,000 and reduced in 1874 back down to $8,000. Senator Morrill's nomination was nonetheless confirmed by the Senate.[5]

In 1909, Senator Philander Knox, who had been elected in 1905 for a term expiring in 1911, was nominated to be Secretary of State. In 1907 the Secretary of State's compensation had been increased to $12,000 from $8,000. A bill reducing the compensation payable to the Secretary of State was introduced to get around the constitutional problem. Assistant Attorney General Russell opined unofficially that the purpose of the constitutional provision was "to destroy the expectation a Representative or Senator might have that he would enjoy the newly created office or newly created emoluments." 43 Cong. Rec. 2403, February, 15, 1909 quoted in S. Rep. No. 499, 93rd Cong., 1st Sess. 6 (1973) (Statement of Acting Attorney General Robert H. Bork) (hereinafter "Bork Statement"). Thus, a reduction in the salary of the office was thought to destroy that expectation, and satisfy the concerns of the Ineligibility Clause.

Most recently, in 1973, Congress reduced the salary of the Office of Attorney General from $60,000 to $35,000 to enable Senator Saxbe to assume that office.[6]

Although some authorities have defended this practice, including an opinion of this Office, the weight of authority seems to believe that the practice is unconstitutional. The thrust of the arguments supporting the practice was that it did not undermine the general purposes of the Framers in drafting the Ineligibility Clause. As Robert G. Dixon, then Assistant Attorney General of the Office of Legal Counsel, opined:

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[5] It is worth noting that this first example is not quite like the subsequent two cases. The salary of the office had been raised and then lowered prior to Senator Morrill's nomination. Thus, it is possible that the issue was not discussed at length. Even if it was noticed, it is one thing to say an independent change in salary does not disqualify a congressman from assuming an office at the same salary as was applicable when he took his congressional seat, but it is quite another to introduce legislation with the express aim of circumventing a constitutional prescription. The former may still not be permissible, but the latter is constitutionally far more suspect.

[6] To Reduce the Compensation of the Office of the Attorney General: Hearings Before the Senate Committee on the Judiciary on S. 2673, 93rd Cong., 1st Sess. (1973)(hereinafter "Saxbe Hearings"). At those hearings, Professors Phillip Kurland, Willard Lorenson, William Swindler, and Paul Mishkin all opposed the reduction in pay of the attorney general to enable Senator Saxbe to take the office as unconstitutional. Among the academics who testified there, only Professor William Van Alstyne believed that the practice was constitutional.

> A major purpose of the Ineligibility Clause according to its originator is the prevention of the evils which would arise if legislators could benefit from the creation of new offices or increase [sic] in the emoluments of existing ones. . . Neither the public[,] nor the Executive branch, nor the Legislative branch is well-served by a prohibition so broad that it over-corrects and needlessly deprives members of Congress of opportunities for public service in appointive civil offices. S. 2673 would overcome the former evil regarding emoluments by preventing Senator Saxbe from obtaining the benefit of the 1969 increase and any other emoluments, without wastefully barring him from offering his services to the country in an appointive office.
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> Nothing in the history of the Ineligibility Clause suggests that a strict literal interpretation should be adopted in cases where the action in question is totally consistent with the purpose of the Clause.

Saxbe Hearings, at 71-72 (Statement of Robert G. Dixon, Jr. Assistant Attorney General). See also Bork Statement, at 6.

With all respect, we believe there are a number of flaws in this reasoning. First, and most important, it simply ignores the plain language of the Ineligibility Clause. In addition, it fails to account for many of the broader concerns addressed by the Founders during the Constitutional Convention. The Founders had serious reservations about the wisdom of giving to the executive the power to appoint legislators to lucrative and prestigious executive and judicial offices. They also sought to avoid the spectacle of legislators seeking an office throughout their term at the expense of their constituents. They therefore tried to limit the instances in which the executive could offer such enticements to legislators. Thus, to the extent that lowering salaries of vacant offices increases the frequency of such appointments, it serves to frustrate the intentions of the Framers.

Finally, it seems clear that the reduction in salary device does not act as a safeguard against violating either the letter or spirit of the Ineligibility Clause. This is because Congress could in all cases reduce the salary of the congressman on the day before he is nominated and restore it to its increased level the day after he is commissioned.[7] Thus, permitting this device

[7] It is worth noting, however, that such a "fix" requires the cooperation of both houses of Congress, not just that of the Senate. A bill affecting the salary of an executive or judicial office would require action by the House of Representatives. Although this fact has no constitutional implications, it may have a practical effect in the case of a controversial nominee

to circumvent the Ineligibility Clause would largely render it a nullity. That this could be accomplished is borne out by past opinions of this Office.

In 1979, Congressman Mikva was nominated to serve as a judge on the District of Columbia Circuit. The question arose whether Congressman Mikva could lawfully "be appointed to a judgeship as to which the emoluments may be increased subsequent to his appointment," but during his elected term.[8] 3 Op. O.L.C. 286, 287 (1979) (emphasis added). Based upon a close reading of the language of the constitutional provision, we concluded that "the provision on its face plainly shows an intention of preventing an appointment only when an increase in the emoluments of an office precedes an appointment of that office." Id. at 288. More important for present purposes, we determined that Congressman Mikva would not be constitutionally disqualified by a subsequent increase in salary during his congressional term. We said:

> [I]f . . . it were held that a sitting Member of Congress could not be appointed to an office the emoluments of which were increased after his appointment, then Congress, by enacting a salary increase after the President had appointed him a Federal judge, would thereby retroactively invalidate the appointment. This would, in effect, amount to his removal and thus would circumvent the constitutionally mandated process of impeachment as the only existing method for removing Federal judges.

Id. at 289 n. 1.

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[7] (Cont.) the Senate is willing to confirm who faces serious opposition in the House.

[8] Federal judges were then compensated at rates determined by the Federal Salary Act, which were adjusted pursuant to the Executive Salary Cost of Living Act. The latter Act provided that the salary rate of federal judges was to be adjusted by a percentage equal to the overall percentage of adjustments made in the rate of pay under the General Schedule. Under the Federal Pay Comparability Act of 1970, the President was to direct his agent to prepare an annual report comparing rates of pay in the public and private sectors and recommend adjustments of the former. After considering the report and findings of the Advisory Committee on Federal Pay, the President was to adjust statutory rates of pay accordingly. His adjustment would become effective in October of the applicable year. Alternatively, the President could present Congress with an alternative plan incorporating appropriate salary adjustments. That alternative was to become effective in October unless either House of Congress disapproved of the plan, in which case the initial proposal of the Advisory Committee on Federal Pay became effective. At the time Congressman Mikva was nominated, the pay raise for judges for

Thus, having concluded that there is no constitutional impediment to raising the salary of a congressman during his unexpired congressional term, but after his appointment to the office, it becomes evident that undermining the Ineligibility Clause is an extremely simple matter. The former colleagues of any congressman taking office by virtue of a reduced salary could ensure, pursuant to a prearranged agreement or otherwise, that the increased salary will be restored as soon as he takes office.[9] This would serve to diminish the degree of a congressman's impartiality -- or at least the appearance thereof -- with respect to the salaries of executive and judicial offices he covets, thus frustrating the general objective of the constitutional provision, as well as violating the precise prohibition.[10]

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[8] (Cont.) 1979 had not yet taken effect; in fact, it had not yet been transmitted to Congress.

[9] In his testimony before the Judiciary Committee in 1973, Professor Van Alstyne considered the three possibilities in the event of an increase in Senator Saxbe's salary the moment he took office: (i) the increase would be effective; (ii) the adoption would at once disqualify him as Attorney General; and (iii) he would remain as Attorney General, but would be denied the increase. Saxbe Hearings, at 53. To Professor Van Alstyne, "the plain sense and the history of [the Ineligibility Clause] persuade me that the proper answer is the last one -- he would not be automatically disqualified, but he would be precluded from realizing any personal benefit during the balance of the term he was elected to the Senate." Thus, Professor Van Alstyne's solution to this problem is to infer an implicit prohibition against post hoc salary increases to counteract the implicit "Saxbe" exception to the Ineligibility Clause's express prohibition. Although this theory certainly serves to get around the problem we raised in our opinion concerning Judge Mikva, the constitutional provision itself in no way contemplates or supports this result. In our view, it is much more logical, and much more faithful to the Framer's intent, simply to give effect to the plain language of the Ineligibility Clause.

[10] Although it does not affect our constitutional analysis, we note as well that there are policy concerns here that were not present in the previous cases discussed above. Each of the three offices for which the retroactive salary reduction device was used in the past were in the President's cabinet. Here, a judicial office is involved, thus raising policy concerns about the independence of the judiciary. There is a long and beneficial tradition that all judges of the same rank receive the same pay. This avoids inequities and jealousies among members of the bench and, more fundamentally, congressional efforts to influence judicial decision-making through differential treatment of similarly-situated judges. Indeed, similar concerns about Congress' power to influence the judiciary through manipulation of salaries led the Founders to prohibit any decrease in a

In closing, we emphasize a point that would need no emphasis were it not too often minimized or discarded. As Chief Justice Marshall said in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824):

> As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey[,] the enlightened patriots who framed our constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

For this reason, departing from the actual words of the constitutional text cannot be justified on the grounds that the departure nevertheless fairly comports with some more generalized, albeit unexpressed, purpose of the Framers. In any event, such a departure is most assuredly unjustified where, as here, it does not effectuate the Framer's broader objectives as fully as does a literal interpretation of the provision's specific terms. Thus, while the language of the Ineligibility Clause is itself a fully sufficient reason to prohibit a sitting congressman's appointment, such a prohibition also more faithfully furthers the Framer's broader concerns. Given all that, to countenance stratagems that seek to avoid the force and effect of the Constitution's own terms in this context is particularly ill-advised.[11]

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[10] (Cont.) judge's salary during his tenure on the bench. Art. II, sec. 1. While this prohibition against reducing the salary of a sitting judge is clearly not implicated here, the policy concern animating the constitutional provision nonetheless cautions against any precedent authorizing Congress to pay a particular judge less than his colleagues.

[11] "I do not regard the Constitution like the Internal Revenue Code which contemplates avoidance or evasions." Saxbe Hearings, at 9 (statement of Professor P. Kurland).

CONCLUSION

In sum, we believe that the language and purpose of the Ineligibility Clause prohibits a sitting congressman from being appointed to the Supreme Court, even if his salary as a Justice is first reduced to the amount it was when he began his most recent term.

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