No. 09-797

In the Supreme Court of the United States

DAVID C. RODEARMEL, APPELLANT

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
NEAL K. KATYAL
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
MARK B. STERN
ANISHA S. DASGUPTA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal.

2. Whether the three-judge district court correctly concluded that appellant lacks standing to bring this suit.

3. Whether, because there was no net increase in the emoluments of the office of Secretary of State during Secretary Clinton's Senate term, her appointment as Secretary of State is consistent with the Ineligibility Clause of the United States Constitution, Art. I, § 6, Cl. 2.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Argument 5
I. The Court lacks jurisdiction over this appeal 5
II. Appellant lacks standing to bring this suit 8
III. Secretary Clinton's appointment did not violate the Ineligibility Clause 17
Conclusion 27

TABLE OF AUTHORITIES

Cases:

Aguayo v. *Richardson*, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974) 14
Alden v. *Maine*, 527 U.S. 706 (1999) 18
Allen v. *Wright*, 468 U.S. 737 (1984) 9, 16
Bell v. *Maryland*, 378 U.S. 226 (1964) 19
Board of Educ. v. *Allen*, 392 U.S. 236 (1968) 4, 13, 14
Clarke v. *United States*, 705 F. Supp. 605 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990) 4, 14
Cole v. *Richardson*, 405 U.S. 676 (1972) 12, 13
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 7
Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 8, 16
Fairchild v. *Hughes*, 258 U.S. 126 (1922) 10
Gonzalez v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974) 6, 8
INS v. *St. Cyr*, 533 U.S. 289 (2001) 12

Cases—Continued: Page

Lance v. *Coffman*, 549 U.S. 437 (2007) 9, 11
Lévitt, Ex parte, 302 U.S. 633 (1937) 4, 11, 12
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 9, 11, 15
MTM, Inc. v. *Baxley*, 420 U.S. 799 (1975) 7
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 19
McClure v. *Carter*, 513 F. Supp. 265 (D. Idaho), aff'd, 454 U.S. 1025 (1981) 4, 15
McClure v. *Reagan*, 454 U.S. 1025 (1981) 15
Montana-Dakota Utils. Co. v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951) 16
Raines v. *Byrd*, 521 U.S. 811 (1997) 8, 9, 10, 11, 12, 15
Regents of the Univ. of Minn. v. *NCAA*, 560 F.2d 352 (8th Cir. 1977) 14
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 9, 10, 11, 13
Tel-Oren v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) . . . 16
United States v. *Classic*, 313 U.S. 299 (1941) 19
United States v. *Richardson*, 418 U.S. 166 (1974) 11
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 13
Warth v. *Seldin*, 422 U.S. 490 (1975) 15

Constitution, statutes and rule: Page

U.S. Const.:
Art. I:
§ 6, Cl. 2 . . . . . 2, 9, 17, 24
Incompatibility Clause 9
Ineligibility Clause . . . . . *passim*
Art. III . . . . . *passim*
Amend. V 3
Amend. XIX 10
Act of Feb. 26, 1907, ch. 1635, 34 Stat. 948 22
Act of Mar. 4, 1909, ch. 297, 35 Stat. 861 22
Act of Dec. 31, 1975, Pub. L. No. 94-195, 89 Stat. 1108 . . . 23
Act of Oct. 12, 1979, Pub. L. No. 96-86, § 101(c)(1), 93 Stat. 657 15
Act of May 3, 1980, Pub. L. No. 96-241, 94 Stat. 343 23
Act of Jan. 19, 1993, Pub. L. No. 103-2, 107 Stat. 4 24
Joint Resolution on Compensation and Other Emoluments Attached to the Office of Secretary of State, Pub. L. No. 110-455, 122 Stat. 5036 1
§ 1(a), 122 Stat. 5036 . . . . . 3, 26
§ 1(b)(1), 122 Stat. 5036 . . . . . 3, 4, 8, 16, 17
§ 1(b)(3), 122 Stat. 5036 . . . . . 5, 6, 7
§ 1(b)(3)(A), 122 Stat. 5036 . . . . . 1, 2, 5, 6, 7
§ 1(b)(3)(B), 122 Stat. 5037 7
Line Item Veto Act, 2 U.S.C. 691 *et seq.* 10
5 U.S.C. 5303(a) 2, 21
5 U.S.C. 5303(b) 2
26 U.S.C. 9010(c) 7
28 U.S.C. 1253 6

Statutes and rule—Continued: Page

28 U.S.C. 1291 8
28 U.S.C. 1331 . . . . . 3, 16
42 U.S.C. 1971(g) 7
42 U.S.C. 1973b(a)(5) 7
42 U.S.C. 1973c 7
42 U.S.C. 1973h(c) 7
42 U.S.C. 1973aa-2 7
42 U.S.C. 1973bb(a)(2) 7
Fed. R. Civ. P.:
Rule 12(b)(1) 6, 16
Rule 12(b)(6) 16

Miscellaneous:

43 Cong. Rec. (1909):
p. 2205 22
pp. 2390-2415 22
pp. 2402-2403 25
p. 2415 22
44 Cong. Rec. 6-7 (1909) 22
119 Cong. Rec. (1973):
pp. 37,017-37,026 23
pp. 38,315-38,348 23
p. 38,316 . . . . . 22, 24
p. 38,317 22
pp. 38,347-38,348 23
pp. 39,234-39,245 23
p. 39,245 23
p. 42,018 23

Miscellaneous—Continued: Page

121 Cong. Rec. (1975):
p. 40,811 23
p. 42,158 23
126 Cong. Rec. (1980):
pp. 10,272-10,273 23
p. 10,279 23
139 Cong. Rec. 388-389 (1993) 24
155 Cong. Rec. S693 (daily ed. 2009) 26
Hearing Before the Comm. on the Judiciary on S. 2673, 93d Cong., 1st Sess. (1973) 22, 25
Hearing Before the Comm. on Post Office and Civil Service on S. 2673, 93d Cong., 1st Sess. (1973) 25
Memorandum Opinion for the Att'y Gen. from David J. Barron, Acting Asst. Att'y Gen., Off. Legal Counsel, U.S. Dep't of Justice, *Validity of Statutory Rollbacks as a Means of Complying with the Ineligibility Clause* (May 20, 2009), http://www.justice.gov/olc/2009/ineligibility-clause.pdf ... 18, 25, 26
Memorandum for the Counselor to the Att'y Gen. from Charles J. Cooper, Asst. Att'y Gen., Off. Legal Counsel, *Ineligibility of Sitting Congressman to Assume a Vacancy on the Supreme Court* (Aug. 24, 1987) 25
17 Op. Att'y Gen. 365 (1882) 24
21 Op. Att'y Gen. 211 (1895) 24
3 Op. Off. Legal Counsel (1979):
p. 286 25
p. 298 25
S. Rep. No. 499, 93d Cong., 1st Sess. (1973) 25

Miscellaneous—Continued: Page

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911):
Vol. 1 . . . . . 19, 20, 21
Vol. 2 20

In the Supreme Court of the United States

No. 09-797

DAVID C. RODEARMEL, APPELLANT

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-17a) is reported at 666 F. Supp. 2d 123.

JURISDICTION

The judgment of the district court was entered on October 29, 2009. A notice of appeal (J.S. App. 20a-21a) was filed on November 3, 2009. The jurisdictional statement was filed on December 31, 2009. The jurisdiction of this Court is invoked under Section 1(b)(3) of the Joint Resolution on Compensation and Other Emoluments Attached to the Office of Secretary of State (Emoluments Act), Pub. L. No. 110-455, 122 Stat. 5036.[1]

[1] Section 1(b)(3)(A) provides, in relevant part, for a direct appeal to this Court from any "final judgment, decree, or order upon the validity of the appointment and continuance in office of the Secretary of State

STATEMENT

1. The Ineligibility Clause of the United States 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.

U.S. Const. Art. I, § 6, Cl. 2.

By statute, the basic rate of pay for federal employees is automatically increased when private-sector wages show an increase during the preceding year, unless the President directs otherwise "because of national emergency or serious economic conditions affecting the general welfare." 5 U.S.C. 5303(a) and (b).

2. On January 3, 2007, Hillary Rodham Clinton began her second six-year term as an elected United States Senator for the State of New York. On January 7, 2007, the basic rate of pay for federal employees, including the Secretary of State, was increased pursuant to 5 U.S.C. 5303(a). A further pay increase under Section 5303(a) took effect in January 2008. J.S. App. 3a & n.2.

In December 2008, in view of the likelihood that then-Senator Clinton would be nominated to serve as Secretary of State, President George W. Bush signed

---

under article I, section 6, clause 2, of the Constitution, entered in any action brought under this subsection." Emoluments Act § 1(b)(3)(A), 122 Stat. 5036. As discussed later (pp. 5-8, *infra*), the Court lacks jurisdiction over this appeal because the judgment below did not address "the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution," but rather dismissed the action for lack of standing.

into law a joint resolution of Congress that lowers the emoluments of the Secretary of State to the amount in effect on January 1, 2007, and fixes the Secretary's compensation at that level until January 3, 2013. See Emoluments Act § 1(a), 122 Stat. 5036. The statute also provides that "[a]ny person aggrieved by an action of the Secretary of State may bring a civil action * * * to contest the constitutionality of the appointment and continuance in office of the Secretary of State on the ground that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution." Emoluments Act § 1(b)(1), 122 Stat. 5036.

On January 21, 2009, Hillary Clinton resigned her Senate seat and was sworn in as Secretary of State. J.S. App. 3a.

3. Appellant is a Foreign Service Officer employed by the United States Department of State. J.S. App. 1a. On January 29, 2009, he filed a complaint against Secretary Clinton and the State Department (appellees here) in federal district court pursuant to Section 1(b)(1) of the Emoluments Act and 28 U.S.C. 1331. Compl. ¶ 1. Appellant alleged that Secretary Clinton's appointment and continuance in office violates the Ineligibility Clause and violates the Fifth Amendment by depriving him of his right to continued employment without due process. *Id.* ¶¶ 21, 25. Appellant further alleged that he has been aggrieved because he "is being required to serve under, take direction from, and report to Defendant Clinton," *id.* ¶ 16, and because Secretary Clinton's constitutional ineligibility to be Secretary of State "materially and fundamentally changes the terms and conditions of [his] employment" by placing his service "in direct and unequivocal conflict with the oath [he] took to defend * * * the U.S. Constitution," *id.* ¶¶ 17-18.

4. On October 29, 2009, the three-judge district court granted appellees' motion to dismiss and denied appellant's cross-motion for summary judgment. J.S. App. 1a-17a.

The court first held that appellant lacks "prudential standing" to sue under the Emoluments Act, which "requires that [appellant] be 'aggrieved *by an action* of the Secretary of State.'" J.S. App. 8a (quoting Emoluments Act § 1(b)(1), 122 Stat. 5036). It reasoned that "nowhere does [appellant] allege that [Secretary] Clinton has given him any specific order or direction or taken any other action that has aggrieved him." *Ibid.*

The court also held that appellant lacks constitutional standing, on the ground that he failed to demonstrate a cognizable injury-in-fact. J.S. App. 9a-17a. The court analogized this case to previous ones in which challenges to Presidential appointments under the Ineligibility Clause have been dismissed for lack of an injury-in-fact sufficient to confer Article III standing, observing that appellant "points to no specific duty or responsibility he has as a Foreign Service Officer that has been impaired—or even affected—by Clinton's appointment." *Id.* at 12a (citing *Ex parte Lévitt*, 302 U.S. 633 (1937) (per curiam), and *McClure* v. *Carter*, 513 F. Supp. 265 (D. Idaho), aff'd, 454 U.S. 1025 (1981)). It further noted that appellant had not "alleged that he has been required to take any action that he believes is * * * unconstitutional and that would therefore lead him to violate his oath of office," thereby distinguishing appellant from the plaintiffs in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Clarke* v. *United States*, 705 F. Supp. 605 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990). J.S. App. 15a.

The court did not reach "the causation or redressability elements of standing or the merits of [appellant's] Ineligibility Clause challenge." J.S. App. 17a n.10.

ARGUMENT

As a threshold matter, this Court lacks jurisdiction over the present appeal because it is not taken from a judgment or order "upon the validity of the appointment and continuance in office of the Secretary of State under" the Ineligibility Clause. Emoluments Act § 1(b)(3)(A), 122 Stat. 5036. The Court should thus dismiss this appeal. Alternatively, the Court should summarily affirm the judgment of the three-judge district court that appellant lacks standing both under Article III and under the terms of the statute. Even if the Court were to reach appellant's Ineligibility Clause claim, it should affirm the judgment because that claim fails on the merits.

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL

Appellant contends (J.S. 2) that this Court possesses jurisdiction over the present appeal under Section 1(b)(3) of the Emoluments Act. That provision states:

> (3) APPEAL.—
>
> (A) DIRECT APPEAL TO SUPREME COURT.—An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order upon the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution, entered in any action brought under this subsection. Any such appeal shall be taken

> by a notice of appeal filed within 20 days after such judgment, decree, or order is entered.
>
> (B) JURISDICTION.—The Supreme Court shall, if it has not previously ruled on the question presented by an appeal taken under subparagraph (A), accept jurisdiction over the appeal, advance the appeal on the docket, and expedite the appeal.

Emoluments Act § (1)(b)(3), 122 Stat. 5036-5037.

The district court in this case, however, did not issue a judgment or order "upon the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution." Emoluments Act § (1)(b)(3)(A), 122 Stat. 5036. Indeed, the district court expressly stated that it did "not reach * * * the merits of [appellant's] Ineligibility Clause challenge." J.S. App. 17a n.10; see J.S. 21 (acknowledging that "the district court did not reach the merits"). Rather, the district court's decision was limited to the threshold issue of standing and dismissed the suit for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). J.S. App. 17a. Because the plain text of Section 1(b)(3)(A) of the Emoluments Act extends this Court's direct-appeal jurisdiction only to district court orders that decide the Ineligibility Clause question, it does not provide for jurisdiction over this appeal.[2]

---

[2] This Court has found its direct-appeal jurisdiction lacking in nearly identical procedural circumstances under 28 U.S.C. 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." See *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 91, 101 (1974) (no direct-appeal jurisdiction under 28 U.S.C. 1253

Section 1(b)(3)(B)'s mandate that the Court, "if it has not previously ruled on the question presented," accept jurisdiction over "an appeal taken under subparagraph (A)" is inapplicable for the same reason. Because the district court did not reach the Ineligibility Clause claim, this is not an appeal properly "taken under subparagraph (A)." Emoluments Act § 1(b)(3)(B), 122 Stat. 5037.[3]

That result, commanded by the text of Section 1(b)(3), also serves an important purpose. As this Court has oft noted, it is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Congress presumably did not intend for this Court to use its limited resources to hear a case on direct appeal from the district court in which the merits of the Ineligibility Clause issue had not been addressed, let alone decided,

---

over three-judge district court's dismissal of case for lack of standing); see also *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975) ("[A] direct appeal will lie to this Court under [28 U.S.C.] 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.").

[3] In other statutes permitting direct appeal to this Court from a decision of a three-judge district court, Congress has used broader language in its jurisdictional grant—not tied to the basis of the district court's decision—providing, for example, that "any appeal shall lie to the Supreme Court." *E.g.*, 26 U.S.C. 9010(c); 42 U.S.C. 1973b(a)(5), 1973c, 1973h(c), 1973aa-2, 1973bb(a)(2); see, *e.g.*, 42 U.S.C. 1971(g) ("[a]n appeal from the final judgment of [the three-judge district] court will lie to the Supreme Court"). Congress's use of the narrower, qualified language in Section 1(b)(3)(A) is thus particularly conspicuous and should be accorded due weight.

below. Accordingly, the Court should dismiss the appeal for lack of jurisdiction.[4]

II. APPELLANT LACKS STANDING TO BRING THIS SUIT

To the extent this Court exercises jurisdiction over the appeal, it should summarily reject appellant's contention (J.S. 11-21) that the district court erred in dismissing his suit for lack of standing. The decision below is clearly correct. Appellant lacks Article III standing given the abstract nature of his injury and also fails to meet the prerequisite specified in Section 1(b)(1) of the Emoluments Act—that he be "aggrieved by an action of the Secretary of State"—for bringing a suit like this one. 122 Stat. 5036.

1. a. It is axiomatic that "the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). Where a suit challenges the constitutionality of actions "taken by one of the other two branches of the Federal Government," this Court's "standing inquiry [is] especially rigorous." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997). For that reason, the Court has invariably declined to consider the merits of a suit challenging executive or legislative action until the plaintiff has estab-

---

[4] Although the Emoluments Act does not provide direct appellate jurisdiction in this Court over the present appeal, that does not mean that appellant had no avenue for appellate review at all. The three-judge district court's judgment dismissing the case on standing grounds, like any other final judgment of a district court lacking direct-review jurisdiction in this Court, would have been subject to review in the court of appeals pursuant to 28 U.S.C. 1291. Cf. *Gonzalez*, 419 U.S. at 101 ("[W]hen a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, * * * review of the denial is available only in the court of appeals.").

lished that his "claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 820; see *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process * * * [and] distort the role of the Judiciary in its relationship to the Executive and the Legislature.").

A plaintiff may not satisfy Article III's constitutional standing requirement of injury-in-fact by "raising only a generally available grievance about government—claiming only harm to his * * * interest in proper application of the Constitution and laws.'" *Lance* v. *Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 (1992)). The Court has consistently held that "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable." *Lujan*, 504 U.S. at 575; see *Allen* v. *Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

The Court has applied these principles to dismiss suits for lack of standing in several contexts analogous to the present one. In *Reservists Committee to Stop the War*, *supra*, the Court dismissed a citizen suit contending that the reservist status of certain Members of Congress violated the Incompatibility Clause of the Constitution. The Incompatibility Clause, a companion to the Ineligibility Clause, prohibits a Member of Congress from "holding any Office under the United States" during his or her tenure in Congress. U.S. Const., Art. I,

§ 6, Cl. 2. The Court held that the constitutional violation claimed by plaintiffs "affect[s] only the generalized interest of all citizens in constitutional governance, and that is an abstract injury." *Reservists Comm. to Stop the War*, 418 U.S. at 217; see, *e.g.*, *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922) (dismissing citizen suit challenging the ratification of the Nineteenth Amendment where plaintiff's "interest in the question submitted" boiled down to a desire "that the Government be administered according to law").

Beyond the context of suits brought by private persons, the Court has rigorously scrutinized assertions by federal officials that Executive Branch or congressional action impaired the performance of their duties. In *Raines*, *supra*, for example, the Court concluded that Members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, 2 U.S.C. 691 *et seq.*, based on allegations that the bill would dilute their voting power and divest them of their constitutional role. The Court observed that the plaintiffs in that case "have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies" and "do not claim that they have been deprived of something to which they *personally* are entitled." *Raines*, 521 U.S. at 821. Rather, the Court explained, their claim of standing rested solely on an alleged "institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Ibid.* The Court concluded that because plaintiffs "have alleged no injury to themselves as individuals * * * [and] the institutional injury they allege is wholly abstract and widely dispersed," they lacked "a sufficient 'personal stake' in [the] dispute and [had] not alleged a suffi-

ciently concrete injury to * * * establish[] Article III standing." *Id.* at 829-830.

In *Ex Parte Lévitt*, 302 U.S. 633 (1937) (per curiam), the Court applied the injury-in-fact requirement in the context of a challenge, like the one in this case, to a Presidential appointment under the Ineligibility Clause. The Court dismissed a suit, brought by a member of the Supreme Court bar, contending that the appointment of Justice Hugo Black (a former Senator) violated the Ineligibility Clause. The Court noted that the plaintiff's pleadings "disclose no interest * * * other than that of a citizen and a member of the bar of this Court" and that this interest was "insufficient." *Id.* at 634. The Court has subsequently "reaffirm[ed] *Lévitt* in holding that standing to sue may not be predicated upon an interest * * * which is held in common by all members of the public, because of the necessarily abstract nature of the injury." *Reservists Comm. to Stop the War*, 418 U.S. at 220; see *Lance*, 549 U.S. at 440 (relying on *Lévitt* to hold the same); *Lujan*, 504 U.S. at 574-575 (same); *United States* v. *Richardson*, 418 U.S. 166, 177-178 (1974) (same).

b. Applying the principles articulated in the Court's precedents, petitioner lacks Article III standing to bring this suit. Appellant alleges that he is "a commissioned U.S. Foreign Service Officer," Compl. ¶ 6, who "serves under, takes direction from, and reports to the U.S. Secretary of State," *id.* ¶ 15. He further alleges that Secretary Clinton's constitutional ineligibility to be Secretary of State places his service "in direct and unequivocal conflict with the oath [he] took to defend and bear true faith and allegiance to the U.S. Constitution and to faithfully discharge the duties of his office," *id.* ¶ 17, thereby "materially and fundamentally chang[ing] the terms and

conditions of [his] employment," *id.* ¶ 18. And he alleges that "[s]hould [he] refuse to serve under, take direction from, or report to Defendant Clinton, [he] would be at substantial risk of disciplinary action, including removal." *Id.* ¶ 17.

Appellant's allegations that he serves under the Secretary and has sworn an oath to defend the Constitution are insufficient to transform his abstract, generalized injury into the "personal, particularized, [and] concrete" injury required for Article III standing. *Raines*, 521 U.S. at 820. In *Raines* (see pp. 10-11, *supra*), the Court determined that several Members of Congress, subject to the operation of the Line Item Veto Act as well as an oath to uphold the Constitution (see *INS* v. *St. Cyr*, 533 U.S. 289, 300 n.12 (2001)), had no "personal stake" in the act's constitutionality. *Raines*, 521 U.S. at 830. Similarly, in *Lévitt* (see p. 11, *supra*), the Court concluded that a member of the Supreme Court bar, subject to the Court's rules of practice and an oath to support the Constitution of the United States (see *Cole* v. *Richardson*, 405 U.S. 676, 681 (1972)), had no "direct" interest in the constitutionally proper appointment of a Supreme Court Justice. *Lévitt*, 302 U.S. at 634. Appellant's alleged injury is not meaningfully distinguishable from the injuries alleged by the plaintiffs in those cases. *E.g.*, *Raines*, 521 U.S. at 821 (noting plaintiffs' failure to allege that they had "been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies" or "deprived of something to which they *personally* are entitled").

As this Court has observed, an oath to "support" and "defend" the Constitution does not "impose obligations of specific, positive action on oath takers," but simply assures that they are "willing to commit themselves to

live by the constitutional processes of our system." *Cole*, 405 U.S. at 684. Moreover, as the district court recognized (J.S. App. 8a), "nowhere does [appellant] allege that [Secretary] Clinton has given him any specific order or direction or taken any other action that has aggrieved him." Nor does appellant allege that the Secretary has changed the terms of his employment in any tangible way. At best, appellant's asserted injury amounts to the psychic harm produced by his belief that the Secretary's presence in office violates the Constitution. An injury to one's interest in the Government's observance of the Constitution, however, is both too generalized and too abstract to support Article III standing. See, *e.g.*, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982) ("[T]he psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."); *Reservists Comm. to Stop the War*, 418 U.S. at 217 ("[T]he claim advanced by respondents is one which presents injury in the abstract. Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens.").

Appellant's reliance (J.S. 14) on *Board of Education* v. *Allen*, 392 U.S. 236 (1968), is misplaced. In *Board of Education*, the Court determined that school board members had a "personal stake in the outcome" of their challenge to a state law requiring them to take a specific action. *Id.* at 241 n.5 (citation omitted). The Court explained that if the plaintiffs, "in reliance on their interpretation of the Constitution, failed to lend books to pa-

rochial school students," they would be removed from office. *Id.* at 240. "[T]o prevent this, [plaintiffs] were complying with the law." *Ibid.* In contrast, as the district court found, appellant has not identified any new duty imposed on him by Secretary Clinton, any specific action that she has required him to undertake, or any "constitutional violation that he believes he would be committing by remaining under her supervision." J.S. App. 15a-16a.

The decision of the district court is also consistent with the lower court decisions cited by appellant. See J.S. 14-16. Like the plaintiffs in *Board of Education*, and unlike the appellant in this case, the plaintiffs in those cases challenged a requirement that they take an expressly identified action alleged to be unconstitutional. In *Clarke* v. *United States*, 705 F. Supp. 605 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990), city council members challenged a law requiring them to "enact [a] specified amendment to the city's Human Rights Act." 886 F.2d at 409. In *Regents of the University of Minnesota* v. *NCAA*, 560 F.2d 352 (8th Cir. 1977), university administrators sought review of a policy requiring them to make a summary finding that certain students were ineligible to play college basketball. *Id.* at 354. And in *Aguayo* v. *Richardson*, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974), the object of dispute was a welfare law that one set of plaintiffs (the City of New York and the Commissioner of its Department of Social Services) had been required to enforce against another set of plaintiffs (a group of potentially affected women suing on behalf of their minor children). *Id.* at 1093, 1099. Appellant in this case alleges no such affirmative obligation.

2. Congress's enactment of a "right-to-sue" provision does not cure the deficiency in Article III standing, and, in any event, appellant does not satisfy the terms of the relevant provision in this case.

In *McClure* v. *Carter*, 513 F. Supp. 265 (D. Idaho 1981), aff'd, 454 U.S. 1025 (1981), the relevant statute provided that "[a]ny Member of Congress" could bring a civil action to challenge the appointment of "any judge appointed during the 96th Congress to the United States Court of Appeals for the District of Columbia * * * on the ground that such appointment and continuance in office is in violation of Article I, section 6, clause 2 of the Constitution." Act of Oct. 12, 1979, Pub. L. No. 96-86, § 101(c)(1), 93 Stat. 657. The plaintiff, a United States Senator, contended "that his special duties and responsibilities as senator gave him standing" to challenge, under the statute, the appointment of former Representative Abner J. Mikva to the United States Court of Appeals for the District of Columbia. *McClure*, 513 F. Supp. at 266, 270. The three-judge district court dismissed the suit for lack of standing. The court emphasized that even when Congress grants an express right of action, "the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Id.* at 269 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)). This Court summarily affirmed. *McClure* v. *Reagan*, 454 U.S. 1025 (1981). See also *Raines*, 521 U.S. at 815-816, 830 (holding that Members of Congress lacked Article III standing despite statute authorizing suit); *Lujan*, 504 U.S. at 573 (rejecting a court of appeals holding that the plaintiffs' "injury-in-fact requirement had been satisfied by congressional conferral," through a citizen-suit provision, "of an abstract, self-contained, noninstru-

mental 'right' to have the Executive observe the procedures required by law").

In this case, the district court considered appellant's ability to invoke Section 1(b)(1) of the Emoluments Act under the rubric of prudential standing. J.S. App. 7a-8a. Distinct from constitutional standing, "prudential standing encompasses ' * * * the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Elk Grove*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751). But regardless whether Section 1(b)(1) of the Emoluments Act is analyzed as part of the standing inquiry or as the conferral of a cause of action or both, it does not benefit appellant in this case.[5]

Section 1(b)(1) provides:

> Any person aggrieved by an action of the Secretary of State may bring a civil action in the United States District Court for the District of Columbia to contest the constitutionality of the appointment and continuance in office of the Secretary of State on the ground

[5] Section 1(b)(1) of the Emoluments Act, while relevant to the prudential standing inquiry, may properly be viewed as the conferral of a cause of action for an Ineligibility Clause challenge (as well as establishing exclusive jurisdiction in the United States District Court for the District of Columbia). Although appellant brought his suit under both Section 1(b)(1) and 28 U.S.C. 1331, Section 1331 is simply a basis of federal court jurisdiction and not a cause of action. See, *e.g.*, *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 811 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). Accordingly, appellant's failure to satisfy the terms of Section 1(b)(1) supports a dismissal under Federal Rule of Civil Procedure 12(b)(6), in addition to the dismissal for lack of standing under Rule 12(b)(1).

> that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution. The United States District Court for the District of Columbia shall have exclusive jurisdiction over such a civil action, without regard to the sum or value of the matter in controversy.

Emoluments Act § 1(b)(1), 122 Stat. 5036. Appellant's inability to identify any specific harm resulting from the Secretary's actions (see pp. 11-14, *supra*) places him outside the plain terms or zone of interests protected by Section 1(b)(1), which, as the district court correctly observed, grants the right to sue only to individuals "aggrieved *by an action* of the Secretary of State." J.S. App. 8a. Section 1(b)(1) therefore does not provide a basis for appellant's suit or overcome his lack of Article III standing.

III. SECRETARY CLINTON'S APPOINTMENT DID NOT VIOLATE THE INELIGIBILITY CLAUSE

If the Court were to reach it, the substance of appellant's Ineligibility Clause challenge—which has not been adjudicated by any tribunal—fails on the merits.

1. The Ineligibility Clause, in relevant part, 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 * * * the Emoluments whereof shall have been encreased during such time.

U.S. Const. Art. I, § 6, Cl. 2. On its face, the phrase "shall have been encreased" could be read in two different ways. Under appellant's reading (J.S. 21-26), the phrase means "shall have *ever* been encreased," *i.e.*, the Clause prohibits a Member's appointment to a federal

civil office whenever the emoluments for that office were raised at any point during the Member's term, even if any increases in compensation for the position were rolled back before the Member's appointment. The other reading, interpreting the phrase to refer to whether the emoluments "have been encreased" on net, is that the Clause permits a Member of Congress to be appointed to a federal civil office as long as the emoluments for that position are no greater than when the Member assumed congressional office, regardless whether Congress had passed (and later repealed) any increases during the relevant period.

As a matter of plain language, the latter reading is more natural. As the Office of Legal Counsel (OLC) has explained by analogy in a recently published opinion: "If a potential investor asked for a prediction at the beginning of a year whether a stock index 'shall have been encreased' during the year, the question would call for a prediction whether the index would be higher at the year's end as compared to the year's beginning, rather than whether the index would go up at any point during that year." Memorandum Opinion for the Att'y Gen. from David J. Barron, Acting Asst. Att'y Gen., OLC, U.S. Dep't of Justice, *Validity of Statutory Rollbacks as a Means of Complying with the Ineligibility Clause* 4 (May 20, 2009), http://www.justice.gov/olc/2009/ineligibility-clause.pdf (*2009 OLC Op.*). At the very least, contrary to appellant's suggestion (J.S. 23-26), the plain text of the Ineligibility Clause does not compel his alternative reading.

As to any alleged textual ambiguity, the history, purpose, and practice of the Ineligibility Clause establish that the government's construction is correct. *E.g.*, *Alden* v. *Maine*, 527 U.S. 706, 741 (1999) (interpreting

constitutional text in light of "history, practice, precedent, and the structure of the Constitution"); *United States* v. *Classic*, 313 U.S. 299, 316 (1941) ("If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose.") (citation omitted); *Bell* v. *Maryland*, 378 U.S. 226, 288-289 (1964) (Goldberg, J., concurring) ("Our sworn duty to construe the Constitution requires * * * that we read it to effectuate the intent and purposes of the Framers."); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 418-419 (1819) (declining to attribute a "strict and rigorous meaning" to the "necessary and proper" clause that would have conflicted with "the intention of the convention" that framed the Constitution). In particular, they demonstrate that the Framers would not have intended to preclude appointment of a Member of Congress to an Executive Branch position without regard to whether she actually benefits from an increase in compensation that occurred during her congressional term.

The first version of what would become the Ineligibility Clause, set out in the Virginia Plan's fourth and fifth resolutions at the Constitutional Convention, would have categorically barred Members of Congress from holding other federal office during and for some period following their term of election. 1 *The Records of the Federal Convention of 1787*, at 20-21 (Max Farrand ed., 1911) (*Records*). That proposal reflected the desire to "shut the door against corruption," lest Members of Congress "make or multiply offices, in order to fill them." *Id.* at 380.

A counter-proposal offered by Nathaniel Ghorum of Massachusetts would have eliminated the Ineligibility

Clause altogether, out of concern that a bar on the appointment of Members of Congress to other offices would limit the number of capable persons who could serve in government. 1 *Records* 375-376. James Wilson, a delegate from Pennsylvania and an original Member of this Court, opposed the measure on the basis that it would "disqualify a good man from office," *id.* at 379, when "we ought to hold forth every honorable inducement for men of abilities to enter the service of the public," *id.* at 380. Alexander Hamilton, expressing the view that the interests of government would be positively served by the appointment of Senators and Representatives to high office, declared himself to be "against all exclusions and refinements, except only in this case; that when a member takes his seat, he should vacate every other office." *Id.* at 382; see 2 *Records* 286 (Gouverneur Morris was "ag[ainst] rendering the members of the Legislature ineligible to offices. He was for rendering them eligible ag[ain] after having vacated their Seats by accepting office."); *id.* at 283-284 ("Mr. Pinkney argued that * * * making the members ineligible to offices was * * * improper as their election into the Legislature implied that they had the confidence of the people; that it was *inconvenient*, because the Senate might be supposed to contain the fittest men[;] * * * that it was *impolitic*, because the Legislature would cease to be a magnet to the first talents and abilities.")

James Madison argued for a "middle ground between an eligibility in all cases, and an absolute disqualification." 1 *Records* 388. As Madison explained:

> Some gentlemen give too much weight and others too little to this subject. If you have no exclusive clause, there may be danger of creating offices or augmenting the stipends of those already created, in order to

> gratify some members if they were not excluded. Such an instance has fallen within my own observation. I am therefore of opinion, that no office ought to be open to a member, which may be created or augmented while he is in the legislature.

Id. at 380. In Madison's view, "the unnecessary creation of offices, and increase of salaries, were the evils most experienced," so "if the door was shut ag[ainst] them, it might properly be left open for the appoint[ment] of members to other offices as an encouragm[ent] to the Legislative service." *Id.* at 386. Like Hamilton, Madison was of the view that "an absolute disqualification" based on legislative service "would be an objection with the most capable citizens." *Id.* at 389.

The Constitutional Convention thus sought to avoid a temptation to legislate the creation of unnecessary offices or to increase executive salaries in order to "gratify" Members who might then gain appointment. At the same time, the Convention sought to avoid a regime that would broadly disqualify Members of Congress from appointment to executive office. Those dual purposes are served if a Member of Congress does not become the beneficiary of an increase in emoluments for an Executive Branch office that took effect but was then rescinded during her Congressional term. In light of the customary (indeed automatic, see 5 U.S.C. 5303(a)) nature of cost-of-living salary adjustments, the construction advocated by appellant would risk creating the categorical bar from Executive Branch service that the Convention rejected—especially for Senators given their six-year terms.

The historical practice of the political Branches reinforces this understanding. On at least seven occasions since the Civil War, Congress has rolled back the salary

of an office, and a Member of Congress has been nominated and confirmed to a position that the Ineligibility Clause otherwise would have barred him or her from assuming. In 1876, Senator Lot Morrell was nominated and confirmed as Secretary of the Treasury following the rollback of the annual salary for that office, which, during his Senate term, had been raised from $8000 to $10,000 and then returned to $8000. See 119 Cong. Rec. 38,317 (1973).

In 1909, Congress reduced the salary of the Secretary of State so that Senator Philander Knox could be appointed to the office. During Knox's term in the Senate, Congress had raised the annual salary of cabinet positions from $8000 to $12,000. Act of Feb. 26, 1907, ch. 1635, 34 Stat. 948. After President Taft expressed an intention to nominate Knox, legislation was introduced in Congress to reduce the salary of the Secretary of State to $8000. See Act of Mar. 4, 1909, ch. 297, 35 Stat. 861. After a vigorous debate over the meaning of the Ineligibility Clause, the view that Knox was constitutionally eligible to serve at the lower salary prevailed. 43 Cong. Rec. 2390-2415 (1909); *id.* at 2205 (Senate); *id.* at 2415 (House). Knox was confirmed unanimously. 44 Cong. Rec. 6-7 (1909).

In 1973, President Nixon expressed his intent to nominate Senator William Saxbe to be Attorney General. 119 Cong. Rec. at 38,316. During Saxbe's Senate term, the annual salary of the Attorney General had increased from $35,000 to $60,000. *Id*. at 38,317. The President sought legislation to reduce the salary to $35,000, which Senator Robert Byrd opposed on the ground that it would be insufficient to satisfy the Ineligibility Clause. See *Hearing Before the Comm. on the Judiciary on S. 2673*, 93d Cong., 1st Sess. (1973) (*1973*

Judiciary Comm. Hearing); 119 Cong. Rec. at 37,017-37,026; see also *id.* at 38,315-38,348 (Senate debate); *id.* at 39,234-39,245 (House debate). After debate of the Ineligibility Clause issue, Congress passed the legislation by overwhelming majorities. See *id.* at 39,245 (House); *id.* at 38,347-38,348 (Senate). The Senate confirmed Saxbe by a 75-10 vote. *Id.* at 42,018.

In 1975, when President Ford appointed Representative Robert Casey to a seat on the Federal Maritime Commission, Congress passed legislation that reduced the salary of Casey's seat, but not the other Commission seats, for the duration of Casey's congressional term. Act of Dec. 31, 1975, Pub. L. No. 94-195, 89 Stat. 1108; 121 Cong. Rec. 40,811 (1975). Casey was confirmed by voice vote with recorded opposition from only Senator Byrd. *Id.* at 42,158.

By 1980, even Senator Byrd apparently had come to accept the view that rolling back the salary of an office would prevent triggering the restrictions of the Ineligibility Clause. That year, President Carter appointed Senator Edmund Muskie to be Secretary of State. Legislation reduced the Secretary of State's salary to the level at which it had been prior to Muskie's existing Senate term. See Act of May 3, 1980, Pub. L. No. 96-241, 94 Stat. 343. The Senate confirmed Muskie with 94 votes, including that of Senator Byrd. 126 Cong. Rec. 10,279 (1980); see *id.* at 10,272-10,273 (statement of Sen. Byrd) ("[T]he State Department's gain is the Senate's loss. What matters is that the Nation continues to benefit from the services of Ed Muskie."). Only two Senators opposed Muskie's confirmation, and neither appeared to be motivated by Ineligibility Clause concerns, since both previously had voted in favor of confirming Saxbe. *Id.* at 10,279; see 119 Cong. Rec. at 42,018.

In 1993, President Clinton nominated Senator Lloyd Bentsen to be Secretary of Treasury, and Congress passed legislation reducing the salary of the Secretary to the level at which it had been at the beginning of Bentsen's term. See Act of Jan. 19, 1993, Pub. L. No. 103-2, 107 Stat. 4. Bentsen was confirmed as Secretary of the Treasury without opposition. 139 Cong. Rec. 388-389 (1993).[6]

In addition to the precedent set by Presidents Grant, Taft, Nixon, Ford, Carter, Clinton, and Obama of appointing one or more Members of Congress to Executive office under circumstances similar to the ones here, the Department of Justice has on numerous occasions en-

[6] Contrary to appellant's suggestion (J.S. 32-34), the delays in the appointments of William Paterson to the Supreme Court and of Samuel Kirkwood to the post of tariff commissioner had nothing to do with the issue presented by this case. Those nominations were to newly created offices, not to offices whose emoluments had increased. See 119 Cong. Rec. at 38,316 (noting that Paterson's nomination was withdrawn "on the ground that [he] was a member of the Senate when the law creating that Office was passed") (internal quotation marks and citation omitted); 17 Op. Att'y Gen. 365 (1882) (noting that Kirkwood "was elected and qualified as Senator * * * for a term which would expire in March, 1883," and that "[s]ince then, by act of May 15, 1882, chapter 145, the office of tariff commissioner was created: *Advised* that the second clause of section 6 of the first article of the Constitution disqualifies K. for appointment to such office"). Those examples are thus covered by the other sub-part of the Ineligibility Clause barring appointment to offices "which shall have been created" during a Member's term. U.S. Const. Art. I, § 6, Cl. 2.

Appellant's reliance (J.S. 34-35) on the example of Senator Matthew Ransom's nomination is equally inapposite. In Ransom's case, Congress had raised the salary of the office to which he had been appointed and taken no action to repeal the increase. See 21 Op. Att'y Gen. 211, 214 (1895). The emoluments of the office thus were indisputably higher at the time of Ransom's nomination than at the beginning of his Senate term. *Ibid.*

dorsed the efficacy of legislation reducing the salary of an office as a means of complying with the Ineligibility Clause. Assistant Attorney General Charles Russell took this position with respect to the prospective appointment of Senator Knox, see 43 Cong. Rec. at 2402-2403, as did Acting Attorney General Robert Bork and Assistant Attorney General for OLC Robert G. Dixon with respect to the prospective appointment of Senator Saxbe, see S. Rep. No. 499, 93d Cong., 1st Sess. 5-7 (1973); *Hearing Before the Comm. on Post Office and Civil Service on S. 2673*, 93d Cong., 1st Sess. 8-16 (1973); *1973 Judiciary Comm. Hearing* 69-74. See also 3 Op. Off. Legal Counsel 298, 300 (1979) (Opinion 79-54); 3 Op. Off. Legal Counsel 286, 289-290 (1979) (Opinion 79-51).

As appellant points out (J.S. 29-30), Assistant Attorney General for OLC Charles Cooper reached the opposite conclusion in an unpublished 1987 memorandum. See *2009 OLC Op.* attachment (Memorandum for the Counselor to the Att'y Gen. from Charles J. Cooper, Asst. Att'y Gen., OLC, *Ineligibility of Sitting Congressman to Assume a Vacancy on the Supreme Court* (Aug. 24, 1987)). OLC has since concluded, however, that the 1987 opinion "was not in accord with the prior interpretations of [the Ineligibility] Clause by the Department of Justice" and does not "reflect[] the best reading of the Ineligibility Clause." *2009 OLC Op.* 1. After an extensive analysis of the text, original understanding, and purposes of the Clause, as well as the subsequent practice in applying it, OLC's conclusion is "that, where a salary increase for an office would otherwise create a bar to appointment of a member of Congress under the Ineligibility Clause, compliance with the Clause can be

achieved by legislation rolling back the salary of the executive office before the appointment." *Id.* at 14.

2. That is precisely what has happened here. Section 1(a) of the Emoluments Act fixes the Secretary's "compensation and other emoluments" at the level in effect before Secretary Clinton began her last term as a Senator. 122 Stat. 5036. On January 21, 2009, Senator Clinton was confirmed as Secretary of State by a 94-2 vote, and neither opposing Senator cited the Ineligibility Clause as a basis for his vote. See 155 Cong. Rec. S693 (daily ed. 2009).

The Emoluments Act addresses the concerns animating the enactment of the Ineligibility Clause (see pp. 19-21, *supra*) by ensuring that the compensation for the office of Secretary of State cannot be greater than when Secretary Clinton began her most recent Senate term. Contrary to appellant's suggestion (J.S. 21-23), the issue is not whether Congress has authority to "fix" a violation of the Ineligibility Clause. Rather, by rescinding an increase in the salary for the Secretary's office, the Emoluments Act prevents a violation of the Clause in the first place.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction in this Court. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
NEAL K. KATYAL
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
MARK B. STERN
ANISHA S. DASGUPTA
Attorneys

MAY 2010