No.

In The

Supreme Court of the United States

DAVID C. RODEARMEL, Appellant,

v.

HILLARY RODHAM CLINTON, et al., Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(1) Whether an Officer of the United States, when placed in a position where he must either violate his oath of office or risk substantial, adverse consequences to his employment, has standing to maintain a challenge to the appointment of a constitutionally ineligible superior.

(2) Whether members of Congress who are otherwise ineligible for appointment to an office in the Executive Branch under the plain language of Article I, section 6 of the Constitution, can have their eligibility restored by an act of Congress.

PARTIES TO THE PROCEEDINGS

David C. Rodearmel, a commissioned U.S. Foreign Service Officer employed by the U.S. Department of State, is the appellant ("Plaintiff"). The appellees are Hillary Rodham Clinton, U.S. Secretary of State, and the U.S. Department of State ("Defendants"). In addition, participating as amicus curiae before the district court was a group of professors of linguistics, who submitted a brief on possible interpretations of the constitutional provision at issue.

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OPINIONS BELOW

The opinion of the district court (App., infra, 1a – 17a) is not yet reported.

JURISDICTION

The district court had exclusive jurisdiction over this action pursuant to Public Law No. 110-455, 122 Stat. 5036, which allows any person aggrieved by an action of the U.S. Secretary of State to contest "the constitutionality of the appointment and continuance in office of the Secretary of State on the grounds that such appointment and continuance in office is in

violation of article I, section 6, clause 2, of the U.S. Constitution." Pub. L. No. 110-455, 122 Stat. 5036, § 1(b)(1) (2008). This same statute provided that any such challenge be heard and determined by a three-judge panel in accordance with 28 U.S.C. § 2284. Id. at 1(b)(2).

The district court issued an order (App., infra, 18a – 19a) dismissing this action on October 29, 2009. A notice of appeal to this Court (App., infra, 20a – 21a) was filed on November 3, 2009. The jurisdiction of this Court is invoked under Public Law No. 110-455, 122 Stat. 5036 (codified at 5 U.S.C. § 5312 note), which provides:

> (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 fo 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 6, clause 2 of the United States Constitution provides, in relevant part:

> 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.

U.S. Const., art. I, § 6, cl. 2 (App. 23a).

The U.S. Congress adopted a Joint Resolution on December 10, 2008, effective at noon on January 20, 2009, reducing the "compensation and other emoluments" of the office of the U.S. Secretary of State to those in effect on January 1, 2007:

> Section 1. COMPENSATION AND OTHER EMOLUMENTS ATTACHED TO THE OFFICE OF THE SECRETARY OF STATE.
>
> (a) In General. -- The compensation and other emoluments attached to the office of Secretary of State shall be those in effect January 1, 2007, notwithstanding any increase in such compensation or emoluments after that date under any provision of law, or provision which has the force and effect of law, that is enacted or becomes effective during the period beginning at noon of January 3, 2007, and ending at noon of January 3, 2013.

See Public Law No. 110-455, 122 Stat. 5036. App., infra, at 23a (hereafter referred to as the "Joint Resolution").

STATEMENT

This appeal presents the important question of whether the political branches of government can evade the clear and precise language of a provision of the Constitution through the use of a legislative "fix." The Ineligibility Clause (Art. I, sec. 6, cl. 2) prohibits members of Congress from being appointed to a civil office, such as a cabinet post, during the term for which they were elected, if the "emoluments" for that office increased during that term. In this case, the salary of the U.S. Secretary of State was increased

three times during Mrs. Clinton's second term in the U.S. Senate. A subsequent "rollback" of the salary by Congress does nothing to remedy this ineligibility for office, as no such "work around" is authorized by the Constitution and cannot alter the fact that these increases in salary occurred.

As provided for by Congress in the Joint Resolution, this significant issue was reviewed on an expedited basis before a three-judge district court. The district court concluded that Plaintiff lacked standing to challenge Mrs. Clinton's appointment, despite ample allegations that Plaintiff had been placed in a position where he must either violate his oath of office or risk substantial, adverse consequences to his employment. In so doing, the district court adopted an unduly constricted view of "oath of office" standing, as recognized by this Court in Board of Education v. Allen, 392 U.S. 236 (1968). The district court then denied Plaintiff's cross-motion for summary judgment without ruling on the question raised regarding the Ineligibility Clause.

In addition to the issue of standing, the key question before the district court and now this Court is whether the Joint Resolution "fixes" Mrs. Clinton's constitutional ineligibility. This Court should note probable jurisdiction and resolve these important questions.

A. The Ineligibility Clause and the Appointment of Mrs. Clinton.

On January 21, 2009, Hillary Rodham Clinton was sworn in as U.S. Secretary of State. Prior to this, Mrs. Clinton served as a U.S. Senator from the State of New York, re-elected to a second, six-year term in November 2006. Her second term began in January 2007 and does not expire until January 2013. During Mrs. Clinton's second term in the U.S. Senate, the compensation paid to the U.S. Secretary of State increased three times by Executive Order: (i) by Executive Order 13420, issued December 21, 2006, the U.S. Secretary of State's salary was increased to $186,600, effective on or after January 1, 2007; (ii) by Executive Order 13454, issued January 4, 2008, the U.S. Secretary of State's salary was increased to $191,300, effective on or after January 1, 2008; and (iii) by Executive Order 13483, issued on December 18, 2008, the U.S. Secretary of State's salary was increased to $196,700, effective on or after January 1, 2009.

The U.S. Constitution states, in pertinent part:

> 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.

The office of the U.S. Secretary of State is a "civil Office under the Authority of the United States" as described in article I, section 6, clause 2 of the U.S. Constitution, and the "emoluments" of that office increased during the time Mrs. Clinton was elected to serve and did serve as U.S. Senator from the State of New York.

The U.S. Congress recognized the restrictions that article I, section 6, clause 2 of the U.S. Constitution placed on Mrs. Clinton's eligibility to serve as Secretary of State, when, on December 10, 2008, it passed the Joint Resolution, effective at noon on January 20, 2009, reducing the "compensation and other emoluments" of the office of the U.S. Secretary of State to those in effect on January 1, 2007. See Pub. L. No. 110-455, 122 Stat. 5036 (App. 23a). The Joint Resolution was signed by President Bush and became law on December 19, 2008. However, the Joint Resolution did not and cannot change the historical fact that the "compensation and other emoluments" of the office of the U.S. Secretary of State increased during Mrs. Clinton's tenure in the U.S. Senate.

As Plaintiff demonstrated before the district court, Mrs. Clinton is constitutionally ineligible to serve as the U.S. Secretary of State by reason of article I, section 6, clause 2 of the U.S. Constitution. She will not be eligible to hold that civil office under the authority of the United States until the second, six-year term to which she was elected expires in January 2013.

B. Plaintiff's Background.

As a commissioned U.S. Foreign Service Officer, Plaintiff serves under, takes direction from, and reports to the U.S. Secretary of State. Plaintiff has been a commissioned U.S. Foreign Service Officer at the U.S. Department of State since 1991. He currently holds the rank of FSO O-2, and also is a retired U.S. Army Judge Advocate General Reserve Officer with the rank of Lieutenant Colonel. Prior to becoming a Foreign Service Officer, Plaintiff served as a military lawyer and an intelligence officer in the U.S. Army. Plaintiff has received numerous awards and commendations from both the U.S. Department of State and the U.S. military. Plaintiff also has had numerous teaching assignments, including serving as an Assistant Professor of Political Science at the U.S. Air Force Academy, and as an Instructor of International Law, U.S. Constitutional Law, and other legal areas for the Defense Institute of International Legal Studies and the University of Maryland Berlin Education Center. Plaintiff holds a Bachelor of Arts degree from Brigham Young University in Provo, Utah, a Juris Doctorate from the University of Washington in Seattle, Washington, a Master of Laws from the Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and a Master of Arts degree from the U.S. Naval War College in Newport, Rhode Island.

Plaintiff is being aggrieved by the actions of Mrs. Clinton and the U.S. Department of State. Namely, Plaintiff is being required to serve under,

take direction from, and report to Mrs. Clinton, who is constitutionally ineligible to be appointed to or serve as U.S. Secretary of State until at least 2013, when her current U.S. Senate term expires.

Plaintiff's complaint alleged that he is being injured in his employment by being required to serve under, take direction from, and report to a constitutionally ineligible superior, Mrs. Clinton. Plaintiff further alleged that this requirement is in direct and unequivocal conflict with his oath and that he cannot serve under Mrs. Clinton without violating his oath. Plaintiff also alleged that, should he refuse to serve under, take direction from, or report to Mrs. Clinton, he will be at substantial risk of disciplinary action, including removal, for insubordination or other, related grounds. Finally, Plaintiff alleged that being required to serve under, take direction from, and report to a constitutionally ineligible superior materially and fundamentally (and adversely) changes the terms and conditions of his employment as a U.S. Foreign Service Officer.

Defendants moved to dismiss the complaint, arguing that Plaintiff lacked standing to raise his claims or, in the alternative, that Mrs. Clinton's appointment does not violate the Ineligibility Clause. Plaintiff cross-moved for summary judgment on the grounds that an increase in the salary of a civil office disqualifies Mrs. Clinton from being appointed to that office under the Ineligibility Clause, despite Congress' subsequent legislation to "roll back" the salary of the office to the time Mrs. Clinton's term began. In an

opinion issued on October 29, 2009, the three-judge district court dismissed the complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. App. 1a – 17a. The court ruled that Plaintiff lacked Article III standing on the basis that Plaintiff did not adequately allege an injury in fact. The district court also concluded that Plaintiff did not have prudential standing because Mrs. Clinton is not alleged to have "given [Plaintiff] any specific order or direction or taken any other action that has aggrieved him." Id. at 8a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The substantial nature of the questions presented are made plain by Congress' express provision for expedited direct review in this Court. Pub. L. No. 110-455, 122 Stat. 5036 (App. 22a – 25a). The Joint Resolution specifically provides that

> 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.

Id. at § 3(A); (App. 24a).

Congress further stressed the significance of resolving the Joint Resolution's validity by providing for mandatory, expedited review in this Court over a ruling on that issue appealed to the Court:

> 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.

Id. at § 3(B); (App. 25a). In light of these clear directives by Congress, the Court should note probable jurisdiction and review the substantial questions presented in this case.

I. Plaintiff Has Standing To Bring This Action As He Has Been Placed In A Position Where He Must Either Violate His Oath Of Office Or Risk Substantial, Adverse Consequences To His Employment.

Plaintiff demonstrated in the district court that he is being injured in his employment by being required to serve under, take direction from, and report to a constitutionally ineligible superior, Mrs. Clinton. This is because Plaintiff has been placed in a position where he either must violate his oath of office or risk substantial, adverse consequences to his employment.

Plaintiff is one of approximately 6,500 commissioned U.S. Foreign Service officers at the U.S. Department of State. Plaintiff was nominated to this position by the President and confirmed by the U.S. Senate, as are all U.S. Foreign Service Officers.[1] See 22 U.S.C. § 3942(a)(1). The U.S. Foreign Service is distinct from other types of federal employment in that it is a corps of highly-trained, career professionals dedicated to the specific field of foreign affairs. See, e.g., 22 U.S.C. § 3901(a)(2) ("The scope and complexity of the foreign affairs of the Nation have heightened the need for a professional foreign service . . . that can provide a resource of qualified personnel for the President, the Secretary of State, and the agencies concerned with foreign affairs"). Significantly, as a U.S. Foreign Service Officer, Plaintiff also is an "Officer of the United States," a position to which is delegated a portion, albeit small, of the sovereign powers of the United States. 31 Op. O.L.C. ___ (2007); 2007 OLC LEXIS 3, **12-74 (April 16, 2007).

When Plaintiff became a commissioned U.S. Foreign Service Officer and an Officer of the United States, he took an oath to support, defend, and bear true faith and allegiance to the Constitution and to "well and faithfully discharge" the duties of his office. Having to serve under, take direction from, and report to a constitutionally ineligible superior diminishes the office to which an "Officer of the United States" has

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[1] Plaintiff was nominated by President George H. W. Bush and confirmed by the U.S. Senate in 1991.

been appointed, if not the sovereign power of the United States that has been delegated to that officer. Under the district court's cribbed view of standing, however, not even an "Officer of the United States" can maintain a challenge to violation of the Constitution that affects his or her own office, which is the injury Plaintiff seeks to remedy here.

Plaintiff is being harmed in his employment because he is being required to serve under, take direction from, and report to a constitutionally ineligible superior in direct and unequivocal conflict with the oath that Plaintiff took to defend and bear true faith and allegiance to the U.S. Constitution and to faithfully discharge the duties of his office. Because Mrs. Clinton is constitutionally ineligible to serve as U.S. Secretary of State, Plaintiff cannot serve under Mrs. Clinton without violating his oath. Should Plaintiff refuse to serve under, take direction from, or report to Mrs. Clinton, Plaintiff would be at substantial risk of disciplinary action, including removal, for insubordination or other, related grounds. Requiring Plaintiff to serve under, take direction from, and report to Mrs. Clinton materially and fundamentally changes the terms and conditions of Plaintiff's employment as a U.S. Foreign Service Officer at the U.S. Department of State. Not only does being required to serve under, take direction from, and report to Mrs. Clinton violate Plaintiffs' oath if he is to continue in his employment as a U.S. Foreign Service Officer at the U.S. Department of State, but it constructively discharges him from his employment as

a U.S. Foreign Service Officer if he is to remain faithful to his oath.

This Court has recognized that placing a plaintiff in a position where he either must violate his oath of office or risk substantial, adverse consequences constitutes a direct, personal, and concrete injury for purposes of standing. In Board of Education v. Allen, 392 U.S. 236 (1968), a local school board brought an action challenging the constitutionality of a state statute that required local public school authorities to lend textbooks free of charge to private parochial schools. The Court found there could be "no doubt" that the school board members had a personal stake in the outcome of litigation sufficient to confer standing:

> Appellants have taken an oath to support the United States Constitution. Believing [the state statute] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step – refusal to comply with [the state statute] – that would be likely to bring their expulsion from office . . . .

Allen, 392 U.S. at 241, n.5.

Relying upon Allen, other courts have reached substantially similar conclusions regarding oath-based standing. For example, in Clarke v. United States, 705 F. Supp. 605 (D.D.C. 1988), the members of the City Council of the District of Columbia brought suit

to challenge a federal statute that required them to adopt an amendment to the District of Columbia Human Rights Act or face a loss of federal funding. The court found that the members had "oath" standing, citing this Court's ruling in Allen:

> Alternatively, the court finds plaintiffs have oath of office standing, under the principles recognized by the Supreme Court in [Allen]. In Allen, the Court found that legislators who had taken an oath to uphold the Constitution had standing to challenge the constitutionality of a law when they risked a concrete injury by refusing to enforce the law. In that case, plaintiffs faced a choice of violating their oaths by enforcing a law which they believed to be unconstitutional or risk expulsion from their jobs. Plaintiffs here are similarly placed. Because Congress has conditioned all District funds on the Council's vote, the Council members must either vote in a way which they believe violates their oaths, or face almost certain loss of their salaries and staffs as well as water, police and fire protection.

Clarke, 705 F. Supp. at 608 (internal citations omitted); see also Regents of the Univ. of Minn. v. NACC, 560 F.2d 352, 363-64 (8th Cir. 1977), cert. dismissed, 434 U.S. 978 (1977); Aguayo v. Richardson,

473 F.2d 1090, 1100 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

If anything, Plaintiff's injury is more concrete and compelling than the circumstances of the board members in Allen because Plaintiff's injury is far more directly and inextricably intertwined with his employment. Because Plaintiff is a U.S. Foreign Service Officer and an employee of the Department of State, he must serve under, take direction from, and report to Mrs. Clinton.[2] Requiring Plaintiff to serve under, take direction from, and report to a constitutionally ineligible superior in violation of his oath is a fundamental and material change in the terms and conditions of Plaintiff's employment. Mrs. Clinton and the Department of State have placed Plaintiff in the position of either violating his oath or disregarding his chain of command, an action which would result in almost certain disciplinary action, including removal, being taken against Plaintiff. While the school board members in Allen eventually may have had to face dissatisfied voters or lawsuits brought against them in their official capacities, such a circumstance is not nearly as personal or direct as the injury Plaintiff has suffered to his employment at the Department of State. If Plaintiff remains true to his oath, he faces the very real risk of being discharged from his highly specialized, chosen profession. If the

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[2] By way of example, one of Plaintiff's duties includes preparing numerous Eastern Europe country reports for the Secretary of State's annual International Religious Freedom Report to Congress.

plaintiffs in Allen had standing, then Plaintiff surely does.

The district court's contention that Plaintiff has not been required to take any particular action in violation of the Constitution (App. 15a) simply belies the reality of the conflict raised by Mrs. Clinton's appointment. It is undisputed that Plaintiff is required to serve under, take direction from, and ultimately report to Mrs. Clinton. Like the plaintiffs in Allen, Plaintiff is being required to engage in conduct – in this instance, to serve under, take direction from, and ultimately report to a constitutionally ineligible superior – that clearly is contrary to his oath. In fact, Plaintiff is required under federal law to serve under, take direction from, and report to the Secretary of State. See, e.g., 22 U.S.C. § 2651a(a)(3)(A) ("The Secretary shall administer, coordinate, and direct the Foreign Service of the United States"); § 3904 ("Members of the Service shall, under the direction of the Secretary, represent the interest of the United States . . . "); § 3921 (". . . the Secretary of State shall administer and direct the Service and shall coordinate its activities with the needs of the Department of State and other agencies."); and § 4010(1)(a) ("The Secretary may decide to separate any member from the Service for such cause as will promote the efficiency of the Service."). Just as the school board members in Allen had taken an oath that they believed was inconsistent with the state law's commands, Plaintiff has taken an oath that is inconsistent with these acts of serving under, taking direction from, and reporting to a constitutionally

ineligible superior. Plaintiff has alleged a direct injury to the oath he took as a U.S. Foreign Service Officer and an Officer of the United States and fundamental, material, and adverse changes to the terms and conditions of his employment at the Department of State.

The district court's reliance upon two previous, and entirely different, cases challenging presidential appointments under the Ineligibility Clause is misplaced. App. 9a – 13a. In Ex Parte Levitt, 302 U.S. 633 (1937), in a one paragraph opinion, the Court held:

> The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member 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 he has merely a general interest common to all members of the public.

Id. Again, Plaintiff has demonstrated much more than a general interest common to all members of the public. In addition, members of the bar of the Supreme Court obviously are not employees of this

Court nor do they receive pay checks from this Court. They do not serve under, take direction from, or report to the justices of the Court in anything like the way a U.S. Foreign Service Officer serves under, takes direction from, and reports to the Secretary of State. Hence, Plaintiff's relationship to the Secretary of State is not at all analogous to the relationship between a member of the Supreme Court bar and a justice of this Court.

McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981), also is inapposite. That lawsuit concerned the efforts by a U.S. Senator to invoke the Ineligibility Clause to challenge the appointment of former Congressman Abner J. Mikva to the D.C. Circuit. The Senator did not invoke his oath of office, but instead contended that his special duties and responsibilities as a senator gave him standing. McClure, 513 F. Supp. at 270. The court found that the appointment of Congressman Mikva to the federal bench did not impair the effectiveness of the Senator's vote and, therefore, that the Senator lacked standing. Id. By contrast, requiring Plaintiff to serve under, take direction from, and report to a constitutionally ineligible superior impairs Plaintiff's effectiveness as a U.S. Foreign Service Officer and an Officer of the United States because doing so is in direct conflict with Plaintiff's oath. It also fundamentally, materially, and adversely alters the terms and conditions of Plaintiff's employment at the Department of State. Consequently, Plaintiff more than adequately demonstrated that he is suffering a

concrete, personal injury by reason of Defendants' conduct.

Finally, while the district court did not rule on the redressability component of standing, Plaintiff's injury can be redressed through the issuance of a declaratory judgment and an appropriate injunction. This Court clearly has the authority to "say what the law is" (Marbury v. Madison, 5 U.S. 137 (1803)), and declare Mrs. Clinton constitutionally ineligible to serve as Secretary of State until the period of her ineligibility expires and to enjoin her from serving in that capacity. An appropriate injunction enjoining the U.S. Department of State from requiring Plaintiff to serve under, take direction from, or report to a constitutionally ineligible superior also is well within the authority capability of the judiciary.

In sum, Plaintiff demonstrated a concrete injury to his continued employment as an Officer of the United States in that he is being required to serve under, take direction from and report to a constitutionally ineligible superior, Mrs. Clinton, in violation of the oath he has taken to support, defend, and bear true faith and allegiance to the Constitution of the United States. Moreover, Plaintiff's injuries are fully redressable by this Court, which, consistent with its power to "say what the law is" and to give effect to its rulings, can and should declare that Mrs. Clinton is constitutionally ineligible to serve as Secretary or State, enjoin her from continuing to serve in that capacity, and enjoin the U.S. Department of State from

requiring Plaintiff to serve under, take direction from and report to her.

This Court should note probable jurisdiction and decide whether oath-based standing remains available to a plaintiff that has been placed in a position where he must either violate his oath of office or risk substantial, adverse consequences to his employment. This is a substantial issue.

II. Mrs. Clinton's Appointment Is Contrary to the Ineligibility Clause And Cannot Be Fixed By An Act of Congress.

At the core of this case is the casual disregard of a clear and unambiguous directive of the Constitution. As Plaintiff demonstrated before the district court, Mrs. Clinton's appointment as Secretary of State was contrary to the plain language of the Ineligibility Clause of the Constitution. The purported legislative "fix" enacted by Congress – reducing the salary of the office – does not remedy the constitutional violation.

While Plaintiff recognizes that the district court did not reach the merits, the issue of Mrs. Clinton's ineligibility was fully briefed and argued before the court. Most importantly, the expanding use of legislative "fixes" to evade the plain language of a provision of the Constitution is a question worthy of review by this Court. Plaintiff respectfully submits that if our government and courts will not observe even the plain and unambiguous provisions of the

Constitution, then we are cut adrift from the anchor of law and liberty and the rule of law is in jeopardy. The question presented, the proper interpretation of the Ineligibility Clause and workability of a "legislative fix," is substantial and should be set for plenary consideration by this Court.

It was undisputed before the district court that the emoluments of the office of the Secretary of State increased during the second Senate term to which Mrs. Clinton was elected (January 2007 through January 2013). This increase rendered Mrs. Clinton ineligible for appointment to any "civil office under the Authority of the United States" under Art. I, sec. 6, cl. 2. There is no dispute that the office of U.S. Secretary of State is a "civil Office under the Authority of the United States" and that the "emoluments" of that office increased during the time Mrs. Clinton was elected to serve and did serve as U.S. Senator from the State of New York.[3] Accordingly, under the plain language of the Ineligibility Clause, Mrs. Clinton is ineligible to serve as U.S. Secretary of State until January 2013.

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[3] The pay of the Secretary of State increased as a result of a series of cost of living adjustments implemented in 2006 through 2008. The Ineligibility Clause renders a Member ineligible for appointment to a federal office even if the Member did not vote for a particular increase or even after the Member has resigned her seat, if the increase occurs during the term for which the Member was elected. See 17 Op. Att'y Gen. 365 (1882) (former senator ineligible for appointment because office was created "during the time for which he was elected.").

Before the district court, Defendants claimed that this violation of the Ineligibility Clause was "fixed" by the Joint Resolution. Specifically, this legislative "rollback" of the salary of the office of Secretary of State allegedly remedied the violation because, according to Defendants, the emoluments of the office will not have increased "on net."

The validity of the legislative "fix" meant to restore Mrs. Clinton's eligibility is at odds with the plain language of the provision. A rollback of a salary increase cannot alter the historical fact that the increase occurred.

A. The Text of the Ineligibility Clause Is Clear and Precise.

The language of the Ineligibility Clause is clear, precise, and readily understood. The provision contains no ambiguity to justify looking beyond its plain language. Lake County v. Rollins, 130 U.S. 662 (1889) (stating that the purpose behind a provision "is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."). The fact that the language of the Ineligibility Clause is readily understood, is, of course, why the political branches have resorted to attempted "end runs" around the provision, as happened in this case, by reducing the compensation of an office after the fact.

The clarity of the Ineligibility Clause is apparent when compared to other constitutional provisions regularly interpreted by the courts. For example, because the language of the Fifth Amendment's Due Process Clause is not capable of precise definition, courts routinely must and do interpret its meaning. In contrast, the Ineligibility Clause is unambiguous and provides clear limitations on eligibility – setting forth exactly who is limited by the provision, the offices to which eligibility is limited, the events which trigger ineligibility, and the precise duration of the ineligibility.

In this way, the Ineligibility Clause is comparable to other bright line restrictions included in the Constitution, such as the minimum age requirement to be "eligible" to hold the office of President. As one commentator has noted, the obvious purpose of this provision is to ensure that only a person with a certain level of maturity can hold the office. John F. O'Connor, The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution, 24 HOFSTRA L. REV. 89, 140 (1995) (hereafter "O'Connor").[4] Presumably no one would suggest that the literal interpretation of that age limitation might be waived simply because a person younger than 35 happens to be unusually mature. Nor would an "on

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[4] See also Michael S. Paulsen, Is Lloyd Bentsen Unconstitutional?, 46 STAN. L. REV. 907 (1994) (concluding that Bentsen's appointment and attempted legislative "fix" were "flagrant and irremediable violation" of Ineligibility Clause) (hereafter "Paulsen").

net" interpretation of the 35-years-old eligibility requirement be proper. It is essentially arguing that a person is eligible to be president if the person reached the age of 35 at some point during the four-year term, and therefore "on net" satisfied the age requirement. Hence, in this instance, there is no reason to ignore the unambiguous language of the Ineligibility Clause simply because a legislative "fix" purportedly satisfies the purpose behind the provision.

Moreover, adherence to the plain language of the Ineligibility Clause is required because, as demonstrated elsewhere in the Constitution, the Framers clearly knew how to allow for "exceptions" when they intended to do so. In particular, when the Framers intended that a disqualification be removable by subsequent legislation, they allowed Congress to do so. This can be seen in a nearby provision in the Constitution, also addressing "emoluments," which provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, or any kind whatever, from any King, Prince, or foreign State. U.S. Const. art. I, § 9, cl. 8 (emphasis added). In other words, at the discretion of Congress, the Framers allowed for the possibility that this restriction on emoluments could be waived. This is notably different from the Ineligibility Clause, which includes no similar exception for Congress to act.

Other constitutional provisions with "exceptions" include the prohibition on States from

laying "Imposts or Duties" except as required for executing inspection laws "without the Consent of the Congress." Art. I, § 10, cl. 2. Similarly, no State may enter into compacts with another state or with a foreign power "without the Consent of Congress." Art. I, § 10, cl. 3. These provisions all indisputably demonstrate that the Framers knew exactly how to allow for a legislative exception to a constitutional prohibition. In this case, the Ineligibility Clause contains no such exception to a Member's ineligibility. Congress cannot add an exception that the Framers plainly understood how to include, but did not.

Hence, the language of the Ineligibility Clause is clear and precise. No legislatively enacted "exception" to restore a Member's eligibility is included in the provision.

B. A Plain Language Interpretation Without Any Legislative "Fix" Is Consistent With and Promotes the Framers' Purposes.

While reviewing the history of the Ineligibility Clause is unnecessary, in this instance the purpose of the Framers in adopting the Clause reinforces a literal interpretation of the provision. Significantly, entirely absent from the historical record is any mention of a procedure for Congress to remove or "fix" a Member's ineligibility.

The Ineligibility Clause was the result of a carefully crafted compromise between the Framers.

The initial proposal considered by the Framers would have made all Members "ineligible to any office . . . of the United States" during their terms and an unspecified number of years beyond. 1 Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 217, 228-29 (1911). While some like Alexander Hamilton opposed any limitations on eligibility, those who feared the creation of a strong Executive advocated a complete bar on movement between the legislature and other branches in order to maintain a separation and a balance between the three branches. James Madison stated that "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 Farrand, at 380. Edmund Randolph was against any movement, stating that he "was inflexibly fixed against inviting men into the Legislature by the prospect of being appointed to offices." Id. at 491.

The Framers' determination to maintain strict separation between the branches also is demonstrated by the closely related "Incompatibility Clause" that immediately follows the Ineligibility Clause. U.S. Const., art. I, § 6, cl. 2 ("and no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). When read together with the Ineligibility Clause, this further shows how the Framers sought to maintain the balance between the coordinate branches.

In addition to this separation of powers concern, Anti-Federalists were intent on restricting the growth of the federal government and increases in the

compensation of executive offices. See O'Connor, at 156-74. They believed that increasing compensation would tend to increase the size of the national government and thereby its involvement in citizens' affairs. The Ineligibility Clause would work to limit this tendency by reducing the attractiveness of Executive branch offices to Members by disqualifying Members from holding them. As George Mason stated:

> Are we not struck at seeing the luxury and venality which has already crept in among us? If not checked we shall have ambassadors to every petty state in Europe – the little republic of St. Marino not excepted. We must in the present system remove the temptation . . . . Why has the power of the [British] crown so remarkably increased the last century? . . . [B]y the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom . . . .

1 Farrand at 380-81. Hence, the "corruption" that particularly concerned the Anti-Federalists was the creation of offices with increasingly lavish salaries to which legislators would seek appointment and with which the Executive would reward them.

Other contemporaries confirmed this view. James Wilson noted that the purpose of the Ineligibility Clause was to prevent "that of creating unnecessary offices, or granting unnecesary [sic]

salaries." 1 Farrand at 387. Elbridge Gerry, believing that the Ineligibility Clause would reduce Members' temptation to create lucrative offices for their own benefit, even stated that "[i]t is the opinion of a great many that [such offices] ought to be discontinued . . . ." 2 Farrand at 285. Hence, it is clear that the Ineligibility Clause was intended to address "the unnecessary creation of offices, and increase of salaries, [as these] were the evils most experienced." 1 Farrand, at 386.

The Framers' primary concerns, therefore, were broad and intended to affect the behavior of the legislature as a whole. As the Department of Justice's Office of Legal Counsel has explained:

> 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.

See Mem. for the Counselor to the Atty. General, from Charles J. Cooper Re: Ineligibility to Assume a Vacancy on the Supreme Court at 6 (Aug. 24, 1987) (hereafter "1987 OLC Opinion") (attached as Exh. 2 to Defs.' Mot. to Dismiss).[5]

As the 1987 OLC opinion notes, temporarily decreasing the salary of an office actually undermines the purpose behind the Clause. By restoring eligibility for these offices through a legislative artifice, it effectively removes any incentive for Members not to pursue such offices at the "expense of their constituents." The Anti-Federalists particularly feared the emergence of a "permanent political class" which would want to increase the power and size of the central government by taxing the nation. O'Connor at 158-61. If federal offices were available to them, Members would tend to become part of this political class and detached from their local communities. Id.

Similarly, with the availability of a legislative "fix," Members have no incentive to restrain the overall growth in compensation of these offices because

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[5] A legislative "fix" also is ineffectual, and further violates the spirit of the Ineligibility Clause, because nothing prevents Congress from reducing the salary of the office the day before the Member is nominated, and then restoring the full salary the day after the Member assumes the office. See 1987 O.L.C. Op. at 6-7. This further demonstrates how a legislative "fix" effectively removes any incentive for Congress to restrain the salaries of these offices, given that a "fix" is available to remove their ineligibility for any particular office.

they know that their disqualification can be removed by Congress. As one commentator has summarized:

> The debates at the Constitutional Convention support the view that the [Ineligibility] Clause was intended to have its effect at the legislative stage, when Congress is considering legislation that would be a disqualifying event. The debates also demonstrate, however, that the predominant purpose behind reducing Congress's bias was not for general anticorruption; rather, the overriding purpose of the [Ineligibility] Clause was to restrain the inevitable growth of the national government through the means of reducing Congress's incentive to create lucrative federal offices.

O'Connor at 167. Only if the Ineligibility Clause is interpreted consistent with its plain language, disqualifying Members from holding these offices, are the broad purposes behind the Ineligibility Clause given full effect.

Finally, it is clear that the Ineligibility Clause was carefully crafted by the Framers, representing a balancing of concerns between those who wanted no restrictions on legislators holding federal offices and those who believed in a complete prohibition. Hence, a compromise provision was adopted with a limited period of ineligibility and with no exceptions. Any

legislative "fix" is nothing more than an evasion of this carefully considered compromise that resolved an issue of great concern to the Framers. A compromise of such weighty concerns should not be casually ignored or modified for current convenience.

C. Disregard of the Plain Language of the Ineligibility Clause Cannot Justify Further Violations.

It is not in dispute that the political branches have resorted to "end runs" around the Ineligibility Clause with growing frequency. The increasing use of this constitutionally suspect maneuver provides another reason why this Court should review this question.

First, history shows that until relatively recently the Ineligibility Clause was readily understood and applied consistent with its plain language. The earliest instance in which the Ineligibility Clause seems to have been at issue – and most contemporaneous with the drafting of the Constitution – was when President George Washington nominated then-Governor William Paterson of New Jersey as an Associate Justice of the U.S. Supreme Court. See Todd B. Tatelman, Congressional Research Service Report for Congress, The Emoluments Clause: History, Law, and Precedents at 4 (January 7, 2009) (available at www.crs.gov). Governor Paterson previously had been a member of the U.S. Senate when the law creating the new judicial office was enacted, and even though

Paterson had resigned to become governor, the term for which he had been elected to the Senate would not have ended until March 4, 1793. On February 28, 1793, President Washington notified the Senate that:

> It has since occurred that [Paterson] was a member of the Senate when the law creating that Office was passed, and that the time for which he was elected is not yet expired. I think it my duty therefore to declare, that I deem the nomination to have null by the Constitution.

See 1 The Documentary History of the Supreme Court of the United States: Part I, Appointments and Proceedings, 90 (Maeva Marcus & James R. Perry, eds. 1985). President Washington then resubmitted the nomination on March 4, 1793, thereby complying with the plain terms of the Ineligibility Clause.

Nearly one hundred years later, this plain language interpretation of the Clause again continued to be strictly followed. In one case, Senator Kirkwood of Iowa had been elected to a term expiring in 1883. Kirkwood resigned from the Senate in 1881 to become Secretary of the Interior and, after leaving that position, sought to assume the post of tariff commissioner in 1882. U.S. Attorney General Benjamin Harris Brewster issued an opinion that Kirkwood could not assume the position of tariff commissioner, even though he was no longer a member of the Senate when the tariff commissioner position was created. The Attorney General's opinion found

nothing ambiguous about the Clause and no need to review its purposes:

> 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, but must accept it as it is presented regarding it application in this case.

17 Op. Att'y Gen. 365 (1882). Again, nothing about the language (or grammar) of the Ineligibility Clause was found to be ambiguous.

This plain language interpretation was reaffirmed by a different Attorney General twelve years later. In the case, Senator Matthew Ransom had been elected to a term expiring on March 3, 1895. On February 23, 1895, President Grover Cleveland nominated Senator Ransom to be ambassador to Mexico, despite that the salary of the position had increased in 1891 during Ransom's tenure in the Senate. On March 4, 1895, the day after his Senate term expired, Senator Ransom received his commission. Acting Attorney General Holmes Conrad issued an opinion that, because Senator Ransom's

appointment was made while he was still in the Senate, "Mr. Ransom was not, in my opinion, eligible to appointment to that office." 21 Op. Att'y Gen. 211 (1895).[6]

Beginning with the nomination of Senator Philander Knox in 1909 and then, in particular, the nomination of William Saxbe as Attorney General in 1973, the employment of the "Saxbe Fix" to "work around" the Ineligibility Clause has become more frequent. It has also remained controversial.

The Saxbe nomination in 1973 was hotly debated, but the Office of Legal Counsel concluded that "the weight of authority seems to believe that the practice is unconstitutional." 1987 OLC Op. at 5 n. 6 (noting that "[a]t 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," with only Professor William Van Alstyne taking an opposite view). Another notable critic of the constitutionality of the "Saxbe Fix" was then professor, now Justice, Stephen G. Breyer.

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[6] See also 33 Op. Att'y Gen. 88 (1922). Applying strict reading of the Ineligibility Clause, Attorney General Harry Daugherty concluded that the nomination of Senator William Kenyon to a federal court of appeals was not precluded since the increase in salary occurred during the Senator's previous term in office, not the term during which he was appointed. See OLC Opinion of December 31, 1996 re: nomination of Bill Richardson as United States Ambassador to the United Nations (reaffirming prior position).

In a letter addressed to Senator Robert C. Byrd, Professor Breyer wrote:

> An office for which Congress has once voted a pay increase has been made more attractive through a pay increase even if Congress passes remedial legislation. The reason is simply that in such a case Congress is infinitely more likely to re-vote the pay increase as soon as the Senator's disqualification expires than if Congress had never voted a pay increase for the office.

See 119 Cong. Rec. 38,331 (1973).

More recently, in 1987, the possible nomination of Senator Orrin Hatch to the U.S. Supreme Court apparently was derailed because of a plain language interpretation of the Ineligibility Clause. See 1987 OLC Op.; see also Paulsen at 912-14. The 1987 OLC opinion is unequivocal in that, because of an increase in salaries of Supreme Court Justices, "all those congressmen now in office" are ineligible for "the current vacancy on the Supreme Court." 1987 OLC Op. at 4. As the 1987 OLC opinion makes clear, the historical fact that salaries of Supreme Court Associate Justices were increased cannot be altered or "fixed" by a subsequent reduction in salary.

These examples demonstrate that no "consistent constitutional practice" has been followed to justify Defendants' "on net" interpretation or any legislative

"fix" to a Member's ineligibility. On the contrary, the history shows that the plain language of the Ineligibility Clause has been readily understood, but at times circumvented for expediency by the political branches. These "end runs" around the plain language of the provision certainly do not justify any further violations.

CONCLUSION

Probable jurisdiction should be noted and consideration of the appeal expedited in accordance with Congress' wishes.

Respectfully submitted,

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