No. 09-797

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

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

This case presents substantial issues, and neither summary dismissal nor affirmance is appropriate. Congress provided for mandatory, expedited review in this Court so that these issues can be heard. As demonstrated in Plaintiff's jurisdictional statement ("J.S."), this appeal was properly taken from a three-judge court order and probable jurisdiction should be noted.

I. THIS COURT HAS JURISDICTION.

This case is properly before this Court because Congress specifically provided for mandatory and expedited review. Pub. L. 110-455, 122 Stat. 5036 (codified at 5 U.S.C. § 5312 note) ("Joint Resolution"). Congress was unequivocal in directing that the Court "shall" accept jurisdiction, "advance the appeal on the docket," and "expedite the appeal." *Id.* at § 3(B).

Defendants claim that the Court should decline to hear this case because the three-judge court did not reach the merits of Plaintiff's claim under the Ineligibility Clause. Motion to Dismiss or Affirm ("Defs.' Mot.") at 5-6. This case is unique, however, in that Congress specifically directed that the weighty issues raised in this case be accorded prompt and direct review by this Court. *Cf.* 28 U.S.C. § 1253 (containing no such expedited consideration).

Defendants do not dispute that the Court has the authority to grant discretionary review of the order of the three-judge court. The questions raised

concerning the proper interpretation of the Ineligibility Clause, and who has standing to raise them, were fully briefed and argued below, and again set forth in Defendants' brief to this Court. A three-judge court below already has fully heard the issues. Granting review at this time is the only way to comply with Congress' clear intent for prompt review.

Moreover, Plaintiff's standing, derived from *Board of Education v. Allen*, 392 U.S. 236 (1968), is intertwined with the substantial question raised regarding the proper interpretation of U.S. Const., art. I, § 6, cl. 2 (the "Ineligibility Clause"). Plaintiff's oath-based standing is directly related to the harm he has suffered as a result of being required to serve under, take direction from, and report to a constitutionally ineligible superior. It is entirely appropriate to address these interrelated issues now, as Congress intended.[1] At the end of the day, Congress placed appellate review directly in this Court for precisely a case like this one.

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[1] In the event that the Court declines to hear this case at this time, the practice of the Court is to vacate the order of the district court and remand the case to that court, so that a new order may be entered, in order that Plaintiff may take a timely appeal to the circuit court of appeals. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (vacating order of district court to allow timely appeal); *Mengelkoch v. Industrial Welfare Comm'n*, 393 U.S. 84, 84 (1968) (same).

II. THE MOTION FOR SUMMARY AFFIRMANCE SHOULD BE DENIED.

A. Plaintiff Has Demonstrated Standing.

Defendants assert Plaintiff lacks standing because of the "abstract nature" of his injury and that he has not been "aggrieved" by an action of the Secretary of State. Defs.' Mot. at 8-17. Like the district court, Defendants fundamentally misconstrue the nature of Plaintiff's allegations demonstrating standing and the nature of this Court's clear precedent.

It is undisputed, and Defendants do not try to dispute, that "oath of office" standing is a viable and entirely sufficient basis for establishing standing, as demonstrated by *Board of Education v. Allen*, 392 U.S. 236 (1968). Strikingly, Defendants make only a cursory attempt to distinguish *Allen*, asserting that Plaintiff lacks the necessary "personal stake" to establish standing. Defs.' Mot. at 13-14. Plaintiff's injury, however, is more distinctly personal, and even more compelling than the injuries suffered by the board members in *Allen*. The officials in *Allen* had no property right to their elected, public office. *Taylor v. Beckham*, 178 U.S. 548 (1900). By contrast, foreign service officers such as Plaintiff clearly enjoy a property right in their continued federal employment. *Colm v. Vance*, 567 F.2d 1125, 1129, n.3 (D.C. Cir. 1977). Mrs. Clinton's appointment and continuance in office, which places Plaintiff in the untenable position of violating his oath of office or facing possible

disciplinary action, including removal, for insubordination or other, related grounds, constitutes a material, adverse change in Plaintiff's continuing federal employment and causes injury to his property interest in that employment. Such a dilemma is far more than mere "psychic harm" as suggested by Defendants. Defs.' Mot. at 13.

Moreover, Plaintiff has standing as he has been "aggrieved by an action of the Secretary of State," specifically being required to serve under, take direction from, and report to Mrs. Clinton. Plaintiff is a U.S. Foreign Service Officer, appointed by the President with the advice and consent of the Senate, and thus 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). Being required to serve under, take direction from, and report to a constitutionally ineligible superior certainly diminishes the office to which an "Officer of the United States" has been appointed, if not the sovereign power of the United States that has been delegated to that officer. Under Defendants' cribbed theory of standing, however, not even an "Officer of the United States" can maintain a challenge to a violation of the Constitution that affects his or her own office, which is the injury Plaintiff seeks to remedy here.

Hence, oath-based standing under *Allen* is a more than sufficient basis for Plaintiff to maintain this action. Contrary to Defendants' claim, Plaintiff's

standing in this case is not based on a "generally available grievance about government" (Defs.' Mot. at 9-11), but rather a direct, personal, and concrete injury. Plaintiff's injury is nothing like the generalized harm alleged by the reservists in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). In *Schlesinger*, a group of reservists opposed to the Vietnam War sought to prevent Members of Congress from serving in the Armed Forces Reserves, citing the Incompatibility Clause. The reservists argued that membership in the Armed Forces Reserves by Members of Congress "deprives or may deprive the individual and all other citizens and taxpayers of the United States of the faithful discharge by [M]embers of Congress who are members of the Reserves of their duties as [M]embers of Congress, to which all citizens and taxpayers are entitled." *Schlesinger*, 418 U.S. at 212. The Court found the reservists lacked standing:

> The very language of respondents' complaint . . . reveals that it is nothing more than a matter of speculation whether the claimed nonobserveance of that Clause deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.

Id. at 217. Again, Plaintiff has alleged far more than a mere generalized injury common to all citizens or simply taxpayer standing. He has alleged direct injury to the oath he took as a U.S. Foreign Service Officer and an Officer of the United States, as well as fundamental, material, and adverse changes to the terms and conditions of his employment at the Department of State. Defendants' reliance on *Ex Parte Levitt*, 302 U.S. 633 (1937) is similarly inapt because, as Plaintiff previously explained, Plaintiff's relationship to the Secretary of State is not at all analogous to a member of the Supreme Court bar and a justice of this Court. *See* Defs.' Mot. at 11; J.S. at 18-19.

Defendants wander particularly far afield in their reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), and their superficial analogy that, because oath-takers in *Raines* (and *Levitt*) did not have standing, then oath-based standing is unavailable to Plaintiff. Oath-based standing, however, was never even asserted or ruled upon in *Raines*. 521 U.S. at 819-27. Moreover, unlike the legislators in *Raines*, Plaintiff has a far more "personal stake in the outcome" of this challenge, as the requirement to serve under, take direction from, and report to a constitutionally ineligible superior impairs his effectiveness as a U.S. Foreign Service Officer and Officer of the United States. This requirement to serve under a constitutionally ineligible superior is in direct conflict with Plaintiff's oath. This is the concrete, personal injury that, under *Allen*, provides standing in the case.

The continuing viability of oath-based standing, in a case in which Congress has mandated review of the appointment of a constitutionally ineligible member of Congress, presents a substantial question.

B. Mrs. Clinton's Appointment is Contrary to the Plain Language of the Ineligibility Clause.

As demonstrated in the Jurisdictional Statement, and fully briefed and argued below, the emoluments of the office of the Secretary of State increased during the Senate term to which Mrs. Clinton was elected (January 2007 through January 2013). It is undisputed that 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.

The substantial question underlying this case is whether a subsequent legislative "fix" by Congress restored Mrs. Clinton's constitutional eligibility for office. Notably, Defendants offer no explanation as to why, if Framers had intended to allow for such a legislative remedy, no such provision exists. As discussed in the Jurisdictional Statement, the Framers plainly knew how to provide for Congress to make "exceptions" and allow Congress to remove otherwise strict Constitutional prohibitions. *See* J.S. at 25-26. The Ineligibility Clause, in striking contrast, does not provide for any such legislative "fixes" to cure a Member's ineligibility.

A plain language application of the Ineligibility Clause is entirely proper and also consistent with the purposes underlying the Clause. In response, Defendants only offer an extra-textual interpretation of the Ineligibility Clause, claiming that the words "on net" should be read into the otherwise unambiguous language of the provision. Defs.' Mot. at 17-18. Defendants identify no ambiguity in the plain language of the Ineligibility Clause to justify such a modification.

In any event, as explained in detail in the Jurisdictional Statement, a plain language interpretation of the Ineligibility Clause is reinforced by the purposes underlying the provision. Notable by its absence from the historical record of the Constitution, as well as from Defendants' brief, is any support for an "on net" theory of constitutional interpretation. Also missing is any historical evidence in support of the proposition that the Framers contemplated that a legislator's eligibility could be restored via legislative "fix."

Furthermore, it is indisputable that the Ineligibility Clause is the product of a carefully balanced compromise between advocates of no restriction on legislators holding office and those who favored a total prohibition. While Federalists such as Alexander Hamilton generally opposed any limitation on holding office (J.S. at 26-29), advocates of ineligibility for office, including numerous prominent Anti-Federalists, believed that a prohibition was essential to maintain separation between the branches

(J.S. at 27) and to limit the growth of the national government (*Id.* at 28). The primary concerns of proponents of ineligibility, therefore, were broad and intended to affect the behavior of the legislature as a whole. Temporarily decreasing the salary of an office actually undermines the purpose behind the Clause.

As Plaintiff previously discussed (J.S. at 30-31), and unresponded to by Defendants, a legislative "fix" by which eligibility can be restored at any point for any office effectively removes any incentive for legislators not to pursue such offices at the "expense of their constituents" or increase the size of government. 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. *See* John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 158-61 (1995). If federal offices are available without any limitation, this promotes legislators becoming part of a permanent political class and becoming detached from their local communities. *Id.* Only if the Ineligibility Clause is interpreted consistent with its plain language, by disqualifying Members from holding these offices, are the broad purposes behind the Ineligibility Clause given full effect.

Finally, it is undisputed that until relatively recently, the Ineligibility Clause was readily understood and applied consistent with its plain language. In fact, the earliest application of the Ineligibility Clause – and most contemporaneous with

the framing of the Constitution – involved a nomination by President Washington that clearly demonstrated an adherence to a plain language interpretation of the Clause. J.S. at 32.

The historical examples cited by Plaintiff, and that Defendant attempts to distinguish, demonstrate that until relatively recently the Ineligibility Clause was readily understood and applied consistent with its plain language. J.S. at 32-35. For example, the opinion of U.S. Attorney General Benjamin Harris Brewster in 1882 (relied on by the 1987 OLC Opinion) found nothing ambiguous about the Ineligibility Clause and no need to review its purposes. 17 Op. Att'y Gen. 365 (1882).

Defendants are correct that deviation from the plain language of the Ineligibility Clause began with the nomination of Senator Philander Knox in 1909, continued with the nomination of William Saxbe as Attorney General in 1973, and now the appointment at issue here. The critical point, however, is that no number of violations of the Ineligibility Clause by the political branches can excuse further violations.

Hence, historical practice does not justify an "on net" interpretation of the Ineligibility Clause or any legislative "fix" to restore a legislator's eligibility. On the contrary, the historical practice indicates that the plain language of the Ineligibility Clause has been readily understood, but at times circumvented, for

personal expediency by the political branches.[2] Prior violations of the Ineligibility Clause, however, provide no principled justification for further disregard.

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. 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.

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[2] Surprisingly, the Office of Legal Counsel's longstanding legal advice on this issue apparently was altered for purposes of this specific litigation. Defs.' Mot. at 18, 25-26 (citing Mem. Op. For the Att'y Gen. from David J. Barron, Acting Asst. Att'y Gen., OLC, U.S. Dep't of Justice, *Validity of Statutory Rollback as a Means of Complying with the Ineligibility Clause* (May 20, 2009). The same day Defendants submitted their opposition in this case before the district court, OLC issued this self-serving opinion, presumably at the request of Defendants, so that Defendants could include it in their submission. This occurred despite that the Office of Legal Counsel's internal policy had been that "[a]s a prudential matter, OLC should avoid opining on questions likely to be at issue in pending or imminent litigation involving the United States as a party (except where there is a need to resolve a dispute within the Executive Branch over a position to be taken in litigation). *See Memorandum for Attorneys of the Office Re: Best Practices for OLC Opinions*, by Principal Deputy Assistant Attorney General Steven G. Bradbury (May 16, 2005). Hence, as a prudential matter, OLC's "newly minted" legal opinion should not be given any weight.

CONCLUSION

Probable jurisdiction should be noted and consideration of the appeal expedited in accordance with Congress' wishes. In the event that the Court declines to hear this case at this time, Plaintiff respectfully requests that the Court vacate the order of the district court and remand the case to that court, so that a new order may be entered, in order that Plaintiff may take a timely appeal to the circuit court of appeals.

Respectfully submitted,

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