



# The Emoluments Clause: History, Law, and Precedents

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## Summary

With the announcements by President-elect Barack Obama that he intends to nominate several Members of Congress to various positions in the Executive Branch, questions regarding their constitutional eligibility in light of the plain language of the Emoluments Clause have been raised. This report provides an historical review of the Emoluments Clause, focusing on the debates at the time the clause was drafted, as well as the precedents adopted by Congress and the executive branch with respect to nominations where the issue has arisen.

The report also contains a legal analysis of the issues raised by the clause and the so-called “Saxbe Fix” — whereby Congress enacts a statute reducing the salary of the executive branch position to the amount that was paid before the nominee with a potential conflict assumed his legislative office. Application of the clause to the President-elect’s current designated appointments indicates that “Saxbe Fix” legislation has been adopted for Senator Clinton, is pending for Senator Salazar, and may be required for Representative Solis before they can receive their respective positions.

The report also addresses the issue of Article III standing to bring a court challenge to either an appointment, confirmation, or the “Saxbe Fix” legislation. Finally, the report raises an argument based on the fact that the emoluments increase for Cabinet-level positions has been consistently issued via Executive Order, and implements a preexisting statutory system authorizing regular annual pay adjustments for government employees. As such, it may be possible to argue that the salary increase is not the type of increase in emoluments that ought to trigger application of the constitutional provision.

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## Introduction

In light of the announcements by President-elect Barack Obama that he intends to nominate several Members of Congress to various positions in the Executive Branch,<sup>1</sup> questions regarding their constitutional eligibility in light of the plain language of the Emoluments Clause have been raised.<sup>2</sup> This report first provides an historical review of the Emoluments Clause, focusing on the debates at the time the clause was drafted, as well as the precedents adopted by Congress and the Executive Branch with respect to nominations where the issue has arisen.

The report follows with a legal analysis of the issues raised by the clause and the so-called “Saxbe Fix” — whereby Congress enacts a statute reducing the salary of the executive branch position to the amount that was paid before the nominee with a potential conflict assumed his legislative office. Next, the report focuses on applying the clause to the President-elect’s current designated appointments, noting that “Saxbe Fix” legislation has been adopted for Senator Clinton, and that it may be adopted for other potential nominees as well.

The report also addresses the issue of Article III standing to bring a court challenge to either an appointment, confirmation, or the “Saxbe Fix” legislation. Finally, the report raises an argument based on the fact that the emoluments increases for Cabinet-level positions have been consistently issued via Executive Order and implement a preexisting statutory system authorizing automatic annual pay adjustments for government employees. As such, it may be possible to argue that the salary increase is not the type of increase in emoluments that ought to trigger application of the constitutional provision.

## History of the Emoluments Clause

A review of the debates of the Constitutional Convention in 1787 reveals a nearly universal agreement with respect to the general purpose of the Emoluments Clause. The delegates believed that express protection against possible corruption of members of the legislature from the lure of civil office was necessary. Specifically, the delegates feared that election to Congress would be seen merely as a stepping stone to more lucrative public office and, that Members would use their legislative positions to create or increase the compensation of such offices. In addition, the delegates feared the growth of an overly powerful executive branch that could use the enticement of public office to influence members of the legislature.

The text of the clause itself represents a compromise over an issue on which there was agreement that disqualification from office was the proper method of redress, but disagreement with respect to the proper duration of the disqualification. Initially, the prohibition was introduced as part of the Virginia Plan, and would have rendered members of both houses “ineligible to any office

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<sup>1</sup> See, e.g., Jeff Mason and Caren Bohan, “Obama Names Clinton, Gates to Lead Foreign Policy,” *Washington Post*, December 1, 2008, p. A1; Abdon M. Pallasch, “Obama Taps LaHood for Transportation Secretary,” *Chicago Sun Times*, December 19, 2008, available at, <http://www.suntimes.com/news/politics/obama/1340477,barack-obama-ray-lahood-transportation-121908.article> (last visited Jan. 5, 2009).

<sup>2</sup> See Al Kamen, “A Democratic Cabinet With a Liberal Return Policy,” *Washington Post*, November 20, 2008, p. A21; see also FoxNews.com, Problem with Clinton as Secretary of State?, <http://www.foxnews.com/story/0,2933,460724,00.html> (last visited Dec. 3, 2008).

established by a particular state, or under authority of the United States, except those peculiarly belonging to the functions of [each branch], during the term of service and for the space of [unspecified years] after its expiration.”<sup>3</sup> Opposition arose to the proposal and an amendment was offered to limit the prohibition by excluding those offices that were created “under the national government.”<sup>4</sup> The amendment generated considerable debate, with those, like Alexander Hamilton,<sup>5</sup> who favored a strong executive, in support, while those fearful of too much power being allocated to the executive, such as George Mason,<sup>6</sup> opposed. A compromise was drafted by James Madison, who proposed that disqualification attach only in situations where an office was created or the compensation of an existing office was increased.<sup>7</sup> Ultimately the matter was referred to the Committee on Detail, who reported out the following language:

The Members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected; and the Members of the Senate shall be ineligible to, and incapable of holding, any such office for one year afterwards.<sup>8</sup>

Limited debate followed the introduction of this language, but the proposal was tabled pending further developments related to the distribution of power between the Senate and the Executive with respect to the appointment power.<sup>9</sup> When debate resumed, new language had been drafted by the “Committee of Eleven”<sup>10</sup> stating that

The Members of each House shall be ineligible to any civil office under the authority of the United States during the time for which they shall respectively be elected — And no Person holding any office under the United States shall be a Member of either House during his continuance in office.<sup>11</sup>

By the time this draft was introduced, it had been decided that the appointment power would be divided with the President having the authority to make appointments, subject to the “advice and consent” of the Senate. The new language addressed two issues: First, by continuing the ban against the appointment of members of the legislature it addressed the issue of undue executive influence; and, second, it introduced a new provision — namely, a prohibition against dual office holding.<sup>12</sup> The debate focused largely on the incapacity language, with amendments introduced to limit the effect of the clause on only those offices “created during [a Member’s] respective term[] of office.” Further compromise was sought with an amendment to the amendment urging that the “incapacity ought at least to be extended to cases where salaries should be increased, as well as

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<sup>3</sup> 1 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 217, 228-229 (1911) [hereinafter Farrand].

<sup>4</sup> 2 Farrand, *supra* note 3, at 379.

<sup>5</sup> *Id.* at 377 (quoting Alexander Hamilton as being against “all exclusions and refinements, except only in this case; that when a member takes his seat he would vacate every other office”).

<sup>6</sup> *Id.* at 380-81 (quoting George Mason as arguing that the ineligibility clause “is the cornerstone on which our liberties depend”).

<sup>7</sup> *Id.* at 380.

<sup>8</sup> *Id.* at 180

<sup>9</sup> See Daniel H. Pollitt, *Senator/Attorney-General Saxbe and the “Ineligibility Clause” of the Constitution: An Encroachment Upon Separation of Powers*, 53 N.C. L. REV. 111, 120 (1974) [hereinafter Pollitt].

<sup>10</sup> *Id.* (noting that the “Committee of Eleven” was composed of one member from each state).

<sup>11</sup> 2 Farrand, *supra* note 3, at 483.

<sup>12</sup> See Pollitt, *supra* note 9 at 120.

created, during the term of the member.”<sup>13</sup> Both of these amendments were adopted by a vote of five states in favor and four against, with one state divided.<sup>14</sup> The resulting language as ratified by the states reads as follows:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.<sup>15</sup>

From these debates, it may be fairly concluded that the consensus of the delegates was that it was necessary to enact some prohibition on the eligibility of Members of Congress for executive office to guard against the possibility of both office seeking and executive influence. It is also clear that the compromise that was reached was based largely on a fear that a complete disqualification during a term of office and for one year thereafter would materially affect not only the supply of able men available to assume executive positions, but also the ability of the legislature to attract capable individuals to run for office.

Moreover, the debates provide a strong indication that the prohibition ultimately agreed to was intended to be absolute, as there is no indication of a contrary position. The debates indicate that, at a minimum, what was sought to be prevented was a direct and blatant grant of legislative or executive favor. Although the final language in the Constitution represents a compromise to prevent total and permanent exclusion of worthy men from office, it was clearly intended to prohibit the use of the appointment power by the executive to gain influence over the members of the legislature.

Additional support for the position that executive influence in the form of offers for civil office would not be effective during the term of individual Members is found in several post-convention documents, including the Federalist Papers. For example, in Federalist No. 55, Madison sought to meet the argument that the proposed House of Representatives had too few members to be entrusted with the great powers it was granted. Madison utilized the purpose of the Emoluments Clause in rebutting this contention as follows:

The Members of the Congress are rendered ineligible to any civil offices that may be created or of which the emoluments may be increased, during the term of their election. No offices therefore can be dealt out to the existing members but such as may become vacant by ordinary casualties; and to suppose that these would be sufficient to purchase the guardians of the people, selected by the people themselves, is to renounce every rule by which events ought to be calculated, and to substitute an indiscriminate and unbounded jealousy with which all reasoning must be in vain.<sup>16</sup>

Alexander Hamilton, defending, in Federalist No. 76, the integrity of the Senate in the nomination and confirmation process against speculation that undue influence would be brought upon it by the President, relied in part upon the Emoluments Clause language. Hamilton wrote that

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<sup>13</sup> 2 Farrand, *supra* note 3, at 490.

<sup>14</sup> *Id.* at 492.

<sup>15</sup> U.S. CONST. Art. 1, § 6, cl. 2.

<sup>16</sup> THE FEDERALIST NO. 55 (James Madison), at [http://avalon.law.yale.edu/18th\\_century/fed55.asp](http://avalon.law.yale.edu/18th_century/fed55.asp).

A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate to rest satisfied, not only that it will be impracticable to the executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation in the business of appointments will be a considerable and salutary restraint upon the conduct of that magistrate. Nor is the integrity of the Senate the only reliance. The Constitution has provided some important guards against the danger of executive influence upon the legislative body. It declares that “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”<sup>17</sup>

Finally, Joseph Story, in his *Commentaries on the Constitution of the United States*, described the purpose of the Emoluments Clause as “to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness.”<sup>18</sup> Story, however, criticizes the prohibition on the grounds that it did not go far enough in restricting a Member from appointment to civil office during his term in the legislature. According to Story, this left “in full force every influence upon his mind if the period of his election is short, or the duration of it is approaching its natural termination.”<sup>19</sup> Thus, if evasions of the clause are to take place they would have to take place after a Member’s term expired.

## Precedents Related to the Emoluments Clause

CRS research has discovered at least 12 instances of appointments in which issues related to the Emoluments Clause have been raised.<sup>20</sup> We will discuss each in chronological order.

### William Paterson

The earliest identified instance of an Emoluments Clause issue arose when President George Washington appointed then-Governor of New Jersey William Paterson to be an Associate Justice of the United States Supreme Court. Governor Paterson had been a Member of the Senate when the law creating the position was adopted, and although he had resigned from the Senate to become Governor of New Jersey, 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 “[i]t 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 been null by the Constitution.”<sup>21</sup>

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<sup>17</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), at [http://avalon.law.yale.edu/18th\\_century/fed81.asp](http://avalon.law.yale.edu/18th_century/fed81.asp).

<sup>18</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 864 (Da Capo Press Reprint ed., 1970).

<sup>19</sup> *Id.*

<sup>20</sup> There appear to be two instances where Emoluments Clause issues existed but were never raised. They are, therefore, not included in the list of precedents. The two instances are the appointment of Secretary of the Treasury Lot M. Morrell in 1876 and Secretary of Transportation Brock Adams in 1977. See John F. O’Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 124 (1995) [hereinafter O’Connor].

<sup>21</sup> 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).

The President resubmitted the nomination on March 4, 1793, thereby avoiding any conflict with the Emoluments Clause.<sup>22</sup>

## **Samuel J. Kirkwood**

Samuel Kirkwood was elected a United States Senator from Iowa for a term which was due to expire on March 3, 1883. Mr. Kirkwood resigned from the Senate in March of 1881, to accept the position of Secretary of the Interior. In 1882, Mr. Kirkwood resigned that office to return to the private sector. Congress, on May 15, 1882, created the Office of Tariff Commissioner,<sup>23</sup> to which Mr. Kirkwood was appointed by President Chester A. Arthur. An opinion was issued by Attorney General Benjamin Harris Brewster concluding that Mr. Kirkwood was ineligible to receive the appointment under the Emoluments Clause because the office was created “during the time for which he was elected.”<sup>24</sup> The fact that Mr. Kirkwood had resigned from the Senate prior to the passage of the legislation did not, in the opinion of the Attorney General, absolve the appointment of its constitutional infirmity.<sup>25</sup>

## **Matthew W. Ransom**

Matthew Ransom was elected to the Senate in 1888 from North Carolina for a term that was due to expire on March 3, 1895. During his term in the Senate, the Congress increased the salaries for individuals serving in the diplomatic and consular service.<sup>26</sup> On February 23, 1895, President Grover Cleveland nominated Senator Ransom to service as Ambassador to Mexico<sup>27</sup> and the Senate confirmed. On March 4, 1895, the day after his Senate term expired, Senator Ransom took the oath of office and his commission was presented the next day. Questions arose from the “Auditor for the State and other Departments” regarding Senator Ransom’s qualification for office and, therefore, his ability to draw a salary. Attorney General Holmes Conrad issued an opinion stating that because Mr. Ransom’s appointment was made while he was a Senator in Congress and it was “during that time the emoluments of the office of minister to Mexico were increased, Mr. Ransom was not, in my opinion, eligible to appointment to that office.”<sup>28</sup>

## **Philander Chase Knox**

Philander Knox was elected to the Senate for a term that was scheduled to expire on March 4, 1911. In 1907, while Senator Knox was a member of the Senate, Congress increased the salary of the Secretary of State from \$8,000 to \$12,000 annually.<sup>29</sup> In 1909, President Taft expressed interest in appointing Knox to the post of Secretary of State. Prior to any formal announcement of

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<sup>22</sup> *Id.* at 91.

<sup>23</sup> See Act of May 15, 1882, chapter 145.

<sup>24</sup> See 17 OP. ATT’Y GEN. 365 (1882) (stating that “[t]he 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 its application in this case.”).

<sup>25</sup> *Id.*

<sup>26</sup> See 26 Stat. 1053 (increasing the salaries from \$12,000 to \$17,500 per annum).

<sup>27</sup> At this time these positions were still formally titled “envoy extraordinary and minister plenipotentiary.”

<sup>28</sup> 21 OP. ATT’Y GEN. 211 (1895).

<sup>29</sup> See Pollitt, *supra* note 9 at 131.



the appointment, legislation was introduced in the Senate that, upon enactment, would reduce the salary of the Secretary of State to \$8,000 per annum. Records of the floor debate in the House of Representatives include an unofficial opinion from Assistant Attorney General Charles Russell examining the question of the legislation's compatibility with the Emoluments Clause.<sup>30</sup> The opinion notes that, according to the commentaries on the Constitution and the convention debates the "sole purpose, of [the Emoluments Clause], was to destroy the expectation a Representative or Senator might have that he would enjoy the newly created office or the newly created emoluments."<sup>31</sup> Therefore, the unofficial opinion concludes that because the proposed legislation would destroy any hope for a greater emolument than was available at the commencement of his service in Congress the appointment carrying an unimproved salary "falls outside the purpose of the law and is not within the law."<sup>32</sup>

## **William S. Kenyon**

In 1912, William Kenyon was elected to the Senate from Iowa for a term that was to expire on March 4, 1919. During that term of office, Congress adopted legislation that increased the salaries for circuit court judges. Senator Kenyon was reelected in 1918 to a term that was to expire March 4, 1925. In 1922, Senator Kenyon was nominated by President Warren G. Harding to be a United States Circuit Judge on the Eighth Circuit Court of Appeals. After his confirmation, the President requested an opinion from the Attorney General concerning Senator Kenyon's qualifications for office, specifically whether the Emoluments Clause made it impossible for Senator Kenyon to serve on the court of appeals.<sup>33</sup> Attorney General Harry Daugherty concluded that because the emoluments of the judges were not increased during the same term of office in which Senator Kenyon was appointed, but rather during a subsequent term, the Constitution did not preclude the appointment.<sup>34</sup>

## **Hugo L. Black**

Hugo Black was initially elected to the Senate in 1926 for a term due to expire on March 4, 1933. He was reelected in 1932 for a term that was due to expire on March 4, 1939. In 1937, Congress changed the law with respect to judicial pensions, raising the pension amount for Justices that retired at age 70. Shortly thereafter, President Roosevelt nominated Senator Black to be an Associate Justice of the Supreme Court. During Senator Black's confirmation hearings, it was argued that since retirement benefits for Supreme Court Justices over 70 had recently been increased, he was constitutionally barred by the Emoluments Clause from taking the post. The Senator's supporters responded that he would not receive the increased pension until he turned 70, which, given that Senator Black was age 51, would be long after his senatorial term would have expired. A lawsuit was filed in the United States Supreme Court challenging the

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<sup>30</sup> 43 CONG. REC. 2402-03 (Feb. 15, 1909).

<sup>31</sup> *Id.* at 2403.

<sup>32</sup> *Id.*

<sup>33</sup> See Pollitt, *supra* note 9 at 128.

<sup>34</sup> See 33 OP. ATT'Y GEN. 88 (1922) (stating that "[i]f the framers of the Constitution had intended that in case the emoluments of any office were increased during a term then being served by a United States Senator such Senator would be precluded from being appointed to such office during a subsequent term to which he had been elected, more apt language would have unquestionably been adopted.").

constitutionality of the appointment.<sup>35</sup> It was dismissed by the Court, in a *per curiam* opinion, for lack of standing.<sup>36</sup>

## **Melvin R. Laird**

Melvin Laird had been a Member of Congress since 1953 and had been reelected to serve in the 91<sup>st</sup> Congress that was to begin on January 3, 1969. President-elect Richard M. Nixon, whose term was to begin on January 20, 1969, had announced his intention to appoint Representative Laird to the position of Secretary of Defense. An Emoluments Clause issue arose because in 1967 Congress had enacted the Postal Revenue and Federal Salary Act of 1967,<sup>37</sup> which required the President to make recommendations regarding federal salaries a part of his annual Budget message, due to the Congress by January 17<sup>th</sup> of every year.<sup>38</sup> Any recommended salary increases, pursuant to the act, would automatically take effect on March 1<sup>st</sup>, unless Congress formally disapproved prior to the effective date.<sup>39</sup> Outgoing President Lyndon Johnson had recommended salary increases for cabinet level appointees that were expected to be permitted by the Congress. Thus, the question was put to the Attorney General, if Representative Laird took his seat in the 91<sup>st</sup> Congress on January 3, resigned and was formally appointed, confirmed, and commissioned Secretary of Defense after January 20, but before March 1, would the Emoluments Clause prevent his ability to assume that office?

Attorney General Ramsey Clark concluded that the “constitutional language prohibits the appointment of a legislator to an office the compensation of which ‘shall have been’ increased prior to the making of such appointment. The ban clearly does not apply to an increase in compensation which is proposed subsequent to the appointment.”<sup>40</sup> Moreover, according to the Attorney General, the Emoluments Clause is “inapplicable where, as here, it is possible but not certain at the time of the appointment that a proposed salary increase for the appointee may receive final approval at a future date.”<sup>41</sup>

## **William B. Saxbe**

William Saxbe was elected to the Senate from Ohio in 1968 for a term that was to expire on January 3, 1974. In December 1973, Senator Saxbe was appointed U.S. Attorney General by President Nixon. Saxbe was to assume the position for Robert Bork, who had served as interim Attorney General during the two months since the firing of Attorney General Eliot Richardson and Deputy Attorney General William Ruckelshaus in the so-called “Saturday Night Massacre.” During Senator Saxbe’s term in the Senate, as a result of the Postal Service Revenue and Federal Salary Act of 1967, the salary for the Attorney General had increased from \$35,000 to \$60,000,

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<sup>35</sup> See *Ex parte Levitt*, 302 U.S. 633 (1937).

<sup>36</sup> *Id.* (stating that “[i]t 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 that he has merely a general interest common to all members of the public.”).

<sup>37</sup> Postal Revenue and Federal Salary Act of 1967, P.L. 90-206, 81 Stat. 642 (1967).

<sup>38</sup> *Id.* at § 225.

<sup>39</sup> *Id.*

<sup>40</sup> 42 OP. ATT’Y GEN. 381-82 (1969).

<sup>41</sup> *Id.*

thereby raising Emoluments Clause concerns.<sup>42</sup> Legislation was introduced by the Nixon Administration that sought to reduce the salary of the Attorney General to that which the office commanded in 1969, the start of Senator Saxbe's term. According to Acting Attorney General Robert Bork, "[t]he purpose of the constitutional provision is clearly met if the salary of an office is lowered after having been raised during the Senator's or Representative's term of office."<sup>43</sup> After contentious floor debate, the bill passed both the House and Senate by wide margins.<sup>44</sup>

## **Robert R. Casey**

Robert Casey was elected to the House of Representatives in 1958, and served consecutive terms until 1975, when he was appointed to the Federal Maritime Commission by President Gerald Ford. Because the salary for members of the Federal Maritime Commission had been increased during Representative Casey's most recent term, Attorney General Edward Levi submitted proposed legislation intended to reduce the salary and qualify him for the seat.<sup>45</sup> Unlike the legislation qualifying Secretary of State Knox and Attorney General Saxbe, the version for Representative Casey was more narrowly tailored to the specific appointment.<sup>46</sup> Specifically, it reduced the salary of only the Commission seat that Representative Casey was to assume and the reduction was only temporary, expiring conterminously with Casey's House term.<sup>47</sup> After adoption of the remedial legislation, Representative Casey was appointed and confirmed by the Senate with no further discussion of the Emoluments Clause.<sup>48</sup>

## **Abner J. Mikva**

Abner Mikva was elected to the United States House of Representatives for a term that was due to expire on January 3, 1981. On May 29, 1978, Representative Mikva was appointed to the United States Court of Appeals for the District of Columbia Circuit by President Jimmy Carter. Subsequent to his appointment, but before his confirmation, President Carter notified Congress of a salary schedule change that included a pay raise for federal judges.<sup>49</sup> Pursuant to the Postal Revenue and Federal Salary Act of 1967, the pay raise was scheduled to take effect on October 1, 1979, unless Congress disapproved of the increase by joint resolution.<sup>50</sup> Relying on previous opinions of the Attorney General, the Office of Legal Counsel (OLC) issued an opinion determining that Representative Mikva was constitutionally eligible to receive the appointment.<sup>51</sup> The rationale provided by OLC was that the plain language of the Emoluments Clause, through the use of the phrase "shall have been increased," requires the increase in emoluments to have

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<sup>42</sup> See generally, S. Rep. No. 499, 93d Cong. (1973).

<sup>43</sup> *Id.* at 6.

<sup>44</sup> See P.L. 93-178, 87 Stat. 697 (1975). The bill passed the House by a vote of 261-129, and the Senate by a vote of 75-10. 119 CONG. REC. 39,245 (1974) (House vote); 121 CONG. REC. 42,018 (1975) (Senate vote).

<sup>45</sup> 121 CONG. REC. 40,811 (1975).

<sup>46</sup> Act of Dec. 31, 1975, P.L. 94-195, 89 Stat. 1108 (1975).

<sup>47</sup> See *id.*; see also O'Connor, *supra* note 20 at 132.

<sup>48</sup> See O'Connor, *supra* note 20 at 132.

<sup>49</sup> 125 CONG. REC. 26,035 (1979).

<sup>50</sup> *Id.* at 23,036.

<sup>51</sup> See 3 Op. Off. Legal Counsel 286, 288 (1979); see also 3 Op. Off. Legal Counsel 298 (1979) (responding specifically to arguments made by the National Rifle Association to Senator Joseph Biden).

occurred before the appointment.<sup>52</sup> Since Representative Mikva's appointment was made prior to the increase in salary either being announced by the President or actually taking effect, he was not barred from accepting his appointment. The OLC opinion also discusses the possibility of a legislative fix; namely, exempting the judgeship to which Representative Mikva was appointed from receiving the proposed salary increase. The opinion favorably cited the examples of both Senators Knox and Saxbe for the proposition that such legislation is constitutionally permissible.<sup>53</sup>

## **Edmund Muskie**

Edmund Muskie was elected to the United States Senate from Maine in 1976 for a term that was due to expire on January 3, 1983. In 1980, following the resignation of Secretary of State Cyrus Vance, Senator Muskie was appointed Secretary of State by President Jimmy Carter. Because the salary of the Secretary of State had been increased during Senator Muskie's term, legislation was adopted to reduce the salary and remove the disqualification.<sup>54</sup> The legislation was consistent with the precedents of Senators Knox and Saxbe as well as the 1979 OLC opinion related to the appointment of former-Representative, then Judge Mikva.

## **Lloyd Bentsen**

Lloyd Bentsen was elected to the United States Senate from Texas in 1988 for a term that was due to expire on January 3, 1995. In 1993, President William Clinton indicated that he intended to nominate Senator Bentsen to be the Secretary of the Treasury. During Senator Bentsen's term in the Senate, however, the salary of the position had been increased pursuant to the procedures of the Ethics and Government Reform Act of 1989.<sup>55</sup> Legislation was adopted by the Congress that reduced the salary of the Secretary of the Treasury to the level that it was in 1989 at the beginning of Senator Bentsen's term.<sup>56</sup> The reduction was effective until either Senator Bentsen ceased his service or the end of his Senate term, whichever came first.<sup>57</sup> Rather than wait until President Clinton was sworn into office on January 20<sup>th</sup>, the legislation was signed into law on January 19<sup>th</sup> by outgoing President George H.W. Bush.

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<sup>52</sup> *Id.* at 288 (stating that “[b]y using the future tense in referring to an appointment, while employing the future perfect tense to refer to an increase in emoluments, the provision on its face plainly shows an intention of preventing an appointment only when an increase in the emoluments of an office precedes an appointment to that office.”).

<sup>53</sup> *Id.* at 289-90 (stating that “[i]t should be further noted that, contrary to the view expressed in the memorandum, even if a salary increase for Federal judges generally were to occur, Congress could, by legislation, exempt from coverage the office to which Representative Mikva may be appointed.... Accordingly, even if a salary increase were to become effective prior to the appointment of Representative Mikva, which is not the situation presently existing, he would not thereby be necessarily barred from appointment.”).

<sup>54</sup> See Act of May 3, 1980, P.L. 96-241, 94 Stat. 343 (1980).

<sup>55</sup> Ethics and Government Reform Act of 1989, P.L. 101-194 § 703(a)(1), 103 Stat. 1748 (1989).

<sup>56</sup> See Act of Jan. 19, 1993, P.L. 103-2, 107 Stat. 4 (1993).

<sup>57</sup> *Id.* at § (a)(2).

## Interpretations of the Emoluments Clause

A review of the historical documents indicates that the Emoluments Clause has traditionally been interpreted in two ways. Prior to the appointment of Senator Knox, the dominant interpretation was a strict textual basis reading of the clause and its requirements. During the debate over the Knox confirmation and throughout subsequent appointments that have required a “Saxbe Fix,” the preferred method of interpretation has centered around a more functional, purpose-based approach. This report will discuss each of these interpretations.

### Textual Analysis

A textual analysis of the meaning or application of the Emoluments Clause should begin with a close examination of the plain text of the provision. Where those words are clear, unambiguous, and not in conflict with any other provision of the document, the search for meaning does not proceed further. As the Supreme Court stated in *Lake Country v. Rollins*,<sup>58</sup>

The object of construction, applied to the constitution, is to give effect to the intent of the framers and of the people in adopting it. This intent 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. ...

There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the later is passed by a deliberative body of small numbers, a large portion of whose members are more or less conversant with the niceties of construction and discrimination and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions are yet created by the votes of the entire body of electors in a State the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution if in itself sensible, is the most likely to be meant by the people in the adoption.<sup>59</sup>

A plain text reading of the Emoluments indicates that ineligibility for appointment to a civil office attaches to all Members of Congress during the remainder of their term if a new office is created, or if the compensation of an existing office increased during the term in which they are serving. The text provides for no exceptions to this rule. Indeed, reference to the last clause of section 2, “and no person holding any office under the United States shall be a member of either House during his continuance in office,”<sup>60</sup> lends further support to this construction. Taken in its entirety, the Article I, section 6 reads as a consistent, unqualified prohibition against office holding under strictly specified circumstances. When those circumstances are satisfied, a strict reading of the clause renders the person ineligible for the appointment.

Early conflicts involving the Emoluments Clause support a strong textual application. As discussed above, President Washington’s withdrawal of Justice Paterson’s appointment until his term expired was based on a strict reading of the clause’s text.<sup>61</sup> Moreover, several opinions by

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<sup>58</sup> 130 U.S. 662 (1889).

<sup>59</sup> *Id.* at 670-71.

<sup>60</sup> U.S. CONST., Art. 1, § 6, cl. 2.

<sup>61</sup> 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) (quoting President Washington as stating that “[i]t has (continued...)”).

various Attorneys General also adhered to a strict interpretation of the clause's text. For example, in ruling that the resignation of then-Governor Kirkwood from the Senate prior to the passage of legislation creating an office nevertheless does not cure the ineligibility, Attorney General Benjamin Harris Brewster indicated that there was no need to go further than the text of the Emoluments Clause.<sup>62</sup> According to Attorney General Brewster,

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.<sup>63</sup>

A similar textually based analysis was relied upon by Acting Attorney General Holmes Conrad when advising as to whether the fact that Senator Ransom's term had expired prior to his receipt of his commission and his assumption the office of Ambassador to Mexico absolved him of any conflict with the Emoluments Clause.<sup>64</sup> Supporters of Senator Ransom's appointment argued that because the President did not actually sign the commission until after the Senator's term had expired, there was no conflict with the Emoluments Clause. The Acting Attorney General disagreed, referring directly to the text he noted that, "it must be observed that the language of the Constitution is that 'no Senator shall, during the term for which he was elected, be *appointed* to any civil office under the authority of the United States.'"<sup>65</sup> Thus, the relevant fact for Emoluments Clause analysis is not when the commission was signed by the President, but rather when the appointment was made. In the case of Senator Ransom, because the appointment was made during his term as a Senator in which the emoluments of the office were increased, he was, according to the Acting Attorney General, ineligible to serve as Ambassador to Mexico.<sup>66</sup>

Textually based analyses have been used to preserve Presidential appointments in the face of Emoluments Clause challenges as well. In two instances after the enactment of the Postal Revenue and Federal Salary Act of 1967,<sup>67</sup> the Member receiving the appointment in question has resigned from Congress after a emoluments increase has been announced, but prior to it becoming law and taking effect. In the first instance, Attorney General Ramsey Clark utilized a strict reading of the text of the Emoluments Clause to argue that Representative Melvin Laird was eligible to be appointed Secretary of Defense.<sup>68</sup> This interpretation prevailed despite the fact that

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(...continued)

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 been null by the Constitution.").

<sup>62</sup> 17 OP. ATT'Y GEN. 365 (1882).

<sup>63</sup> *Id.* at 366.

<sup>64</sup> 21 OP. ATT'Y GEN. 211 (1895).

<sup>65</sup> *Id.* at 213 (emphasis in original).

<sup>66</sup> *Id.* at 214 (stating that "I am of opinion, then, that Mr. Ransom's appointment as [Ambassador] to Mexico was made on February 23, 1895; that that was during the time for which he was elected a Senator in Congress, and it appearing from your letter that it was during that time the emoluments of the office of [Ambassador] to Mexico were increased, Mr. Ransom was not, in my opinion, eligible to appointment to that office.").

<sup>67</sup> Postal Revenue and Federal Salary Act of 1967, P.L. 90-206, 81 Stat. 642 (1967). The act required the President to make recommendations regarding federal salaries a part of his annual Budget message, which was due to the Congress annually by January 17<sup>th</sup>. *Id.* at § 225. Any recommended salary increases, pursuant to the act, would automatically take effect on March 1<sup>st</sup>, unless Congress formally disapproved prior to the effective date. *Id.*

<sup>68</sup> 42 OP. ATT'Y GEN. 381-82 (1969).

the President had included in his annual budget submission, while Representative Laird was still serving as a Member, an increase in the salary for all Cabinet members. According to Attorney General Clark, the “constitutional language prohibits the appointment of a legislator to an office the compensation of which ‘shall have been’ increased prior to the making of such appointment. The ban clearly does not apply to an increase in compensation which is proposed subsequent to the appointment.”<sup>69</sup> Given that Congress still legally possessed the power to disapprove of the salary increases, the mere fact of their proposal prior to appointment created no constitutional concerns.<sup>70</sup> Therefore, the Attorney General concluded that the Emoluments Clause is “inapplicable where, as here, it is possible but not certain at the time of the appointment that a proposed salary increase for the appointee may receive final approval at a future date.”<sup>71</sup>

In a similar situation, after Representative Abner Mikva’s appointment to the federal bench the President announced that he was seeking an increase in the salaries for federal judges pursuant to the Postal Revenue and Federal Salary Act of 1967. Relying on previous opinions of the Attorney General, the Office of Legal Counsel (OLC) issued an opinion determining that, despite the fact that he was still a Member of Congress when the salary increases were announced, Representative Mikva was constitutionally eligible to receive the appointment.<sup>72</sup> The rationale provided by OLC was that the plain language of the Emoluments Clause, through the use of the phrasing “shall have been increased,” requires the increase in emoluments to have occurred before the appointment.<sup>73</sup> Since Representative Mikva’s appointment was made prior to the increase in salary either being announced by the President or actually taking effect, he was not barred from accepting his appointment.

Commentators have concurred with the textual reading employed by the Attorney General and Office of Legal Counsel in the Laird and Mikva cases, but nevertheless point out that such a reading of the clause leaves the door open for potential abuse.<sup>74</sup> The concern involves the fact that it is the appointment that is the disqualifying event. Despite the fact that a plain reading of the clause suggests that the disability lasts for the duration of a Member’s elected term, the gap in time between the announced salary increase and its effective date created by the Postal Revenue and Federal Salary Act of 1967 has created a situation where resignation from Congress is possible to avoid an Emoluments Clause conflict. Specifically, the commentators point to the appointment of Representative James F. Battin to be U.S. District Court Judge as an example.<sup>75</sup> Because Representative Battin’s appointment preceded the effective date of the salary increase, he was able to resign from Congress, receive his commission, and take office all prior to the salary increase taking effect. Thus, the Emoluments Clause was never applied to Representative Battin because he was appointed before the disqualifying salary increase occurred. Had the salary increase taken effect prior to his appointment, resignation would not have cured Representative

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (stating that “the salaries in question will not ‘have been increased’ within the meaning of the constitutional prohibition so long as Congress may still exercise its power of disapproval.”).

<sup>71</sup> *Id.* at 382.

<sup>72</sup> See 3 Op. Off. Legal Counsel 286, 288 (1979); see also 3 Op. Off. Legal Counsel 298 (1979) (responding specifically to arguments made by the National Rifle Association to Senator Joseph Biden).

<sup>73</sup> *Id.* at 288 (stating that “[b]y using the future tense in referring to an appointment, while employing the future perfect tense to refer to an increase in emoluments, the provision on its face plainly shows an intention of preventing an appointment only when an increase in the emoluments of an office precedes an appointment to that office.”).

<sup>74</sup> See O’Connor, *supra* note 20 at 119.

<sup>75</sup> *Id.* at 119-20

Battin's disability. Comparing this to the situation of Governor Kirkwood discussed above, leads to an apparent conflict over the effect of resignation on a Member's ineligibility.<sup>76</sup> In that situation, Governor Kirkwood had resigned from the Senate prior to the passage of the law which created the office for which he was then appointed. Because the creation of the office occurred during the term for which Governor Kirkwood was elected to the Senate, his resignation was of no moment and he was held to be ineligible to have received his appointment.<sup>77</sup>

No resolution has ever been sought to these conflicting results. This appears to be largely because after the questions raised by the Mikva appointment, the President and Congress have sought to avoid the application of the Emoluments Clause adopting a more flexible approach to its interpretation, which has led to the enactment of legislation designed to cure any ineligibility.

## Functional Interpretation and The "Saxbe Fix"

As described by one commentator, the so-called "Saxbe Fix" is "legislation whereby Congress purports to remove the disability of a Member for appointment to federal office by reducing the emoluments of the office to the level the office commanded at the time the prospective nominee's term in Congress began."<sup>78</sup> Although named for its 1973 recipient, Senator William Saxbe, the notion that Congress could cure an Emoluments Clause-based ineligibility by legislation was first employed in 1909 with the appointment of Philander Knox to be Secretary of State.<sup>79</sup>

The rationale for such a legislative solution is based on focusing the analysis on the word "increased" in the clause itself. As the unofficial opinion from the Assistant Attorney General in the Knox situation stated, "the sole purpose, of [the Emoluments Clause], was to destroy the expectation a Representative or Senator might have that he would enjoy the newly created office or the newly created emoluments."<sup>80</sup> Thus, if ineligibility is triggered by increases in emoluments, then it stands to reason that subsequently reducing the emoluments, thereby removing any benefit that the Member might receive by assuming the office, resolves the issue.

Such a focus on the "purpose" of the clause, as opposed to its text, was the basis for the opinions expressed by President Nixon's Department of Justice regarding the appointment of Senator Saxbe to be Attorney General. According to statements made to the Senate by Acting Attorney General Robert Bork, the Senate traditionally did not consider a Member of Congress to be disqualified from a federal office unless the emoluments of that office were higher at the time of appointment than they were at the start of the Member's term of office.<sup>81</sup> According to Acting Attorney General Bork, "[t]he purpose of the constitutional provision is clearly met if the salary of an office is lowered after having been raised during the Senator's or Representative's term of office."<sup>82</sup> Additional arguments made on behalf of the "Saxbe Fix" focused on the elimination of

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<sup>76</sup> See *supra* notes 5-6 and accompanying text.

<sup>77</sup> See 17 OP. ATT'Y GEN. 365 (1882).

<sup>78</sup> O'Connor, *supra* note 16 at 122 (citing To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the Senate Comm. on the Judiciary, 93d Cong., 2-3 (1973) (discussing whether constitutional disqualification can be removed by legislation); *id.* at 53, 58 (remarks of Prof. Van Alstyne); *id.* at 69-74 (statement of Asst. Att'y Gen. Robert G. Dixon, Jr.)).

<sup>79</sup> See *supra* notes 29-32 and accompanying text.

<sup>80</sup> 43 CONG. REC. 2403 (Feb. 15, 1909).

<sup>81</sup> S. Rep. No. 499, 93d Cong., 5-6 (1973) (statement of Acting Attorney General Robert C. Bork).

<sup>82</sup> *Id.* at 6.



corruption in the appointment process. According to Assistant Attorney General Robert G. Dixon, Jr., because the administration was pushing for all of the benefits to be removed prior to Senator Saxbe assuming office, it could not use the increased salary as a basis for attempting to influence or corrupt Senator Saxbe's vote.<sup>83</sup> Moreover, Assistant Attorney General Dixon argued that failure to permit the legislation to pass would itself be a violation of one of the Emolument Clause's purposes, as it would result in the disqualification of a otherwise qualified Member of Congress to serve in a civil office.<sup>84</sup>

Duke University Professor of Law William Van Alstyne has argued that the only way to fully effectuate the meaning of the Emoluments Clause is to abandon a literal reading of the text in favor of an interpretation based solely on the clause's purpose and intent. Specifically, Professor Van Alstyne asserts that the purpose of the clause was to prevent any "improperly motivated executive-legislative collaboration" that would result in a spoils system.<sup>85</sup> Read literally, however, the clause does not prevent such a system from being created by collusion between the two branches. One way for the scheme to work would be for Congress and Executive to conspire to permit an appointment of a Member of Congress and then, after the appointment, provide for a lucrative emoluments increase.<sup>86</sup> The only way, according to Professor Van Alstyne, to remedy this concern is to permit the person to retain the office but not retain any of the "spoils" of post-appointment increases in emoluments.<sup>87</sup> The "Saxbe Fix" achieves this goal as it not only prevented Senator Saxbe from taking advantage of any increase in emoluments that were in effect prior to his appointment, but it prevented him from benefiting from any post-appointment increases as well until his term as a Senator would have expired.<sup>88</sup>

It appears that the "Saxbe Fix" has not always been regarded as a remedy to an ineligibility caused by the Emoluments Clause. As evidence, commentators point to the events that preceded the appointment of then-Judge Robert Bork to fill the seat vacated when Associate Justice Louis F. Powell, Jr. retired from the Supreme Court in 1987.<sup>89</sup> According to the commentators, prior to Judge Bork's nomination, Senator Orrin Hatch was seriously considered to fill the vacancy, however, he faced an Emoluments Clause conflict because the salaries of the Associate Justices had been increased during the Senator's current term.<sup>90</sup> As part of the vetting process, President Reagan's Office of Legal Counsel apparently rendered an opinion that concluded "the Saxbe fix could not erase that fact that the salary of Associate Justices had been increased during [Senator] Hatch's term, making him ineligible for appointment until his term ended in 1989."<sup>91</sup> The opinion has never been made public and, as recounted by one commentator, a Freedom of Information Act

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<sup>83</sup> *See id.* at 71 (statement of Assistant Attorney General Robert G. Dixon, Jr.)

<sup>84</sup> *Id.* at 68 (stating that "[n]either the public, the executive branch, nor the legislative branch is well served by a prohibition so broad that it over corrects and needlessly deprives Members of Congress of opportunities for public service in appointive civil offices.").

<sup>85</sup> *Id.* at 50 (statement of Prof. William Van Alstyne).

<sup>86</sup> *Id.* at 54.

<sup>87</sup> *Id.* at 53.

<sup>88</sup> *See Act of Dec. 10, 1973, P.L. 93-178, 87 Stat. 697 (1973).*

<sup>89</sup> *See Michael Stokes Paulsen, Is Lloyd Bentsen Unconstitutional?*, 46 *STAN. L. REV.* 906, 911-12 (1994) [hereinafter Paulsen]; *see also* O'Connor, *supra* note 20 at 134.

<sup>90</sup> *See Paulsen, supra* note 89 at 912.

<sup>91</sup> O'Connor, *supra* note 20 at 134 (citing Paulsen, *supra* note 89 at 912).

request for the memorandum was unsuccessful.<sup>92</sup> In responding to the request, however, the Department of Justice did indicate that such a document exists.<sup>93</sup>

No court has ruled on the constitutional effect that a “Saxbe Fix” may have on an appointment or confirmation, however, most of legal literature appears to take the position that the such legislation does not cure the ineligibility.<sup>94</sup> The primary basis for such arguments is that the meaning of the clause’s text is clear and, thus, should be respected and applied literally. Phrased another way, in this view, the clause does not permit Congress to create an exception to the ineligibility created by an increase in the emoluments of a civil office during a Member’s term. Note that none of these arguments suggest that the legislation itself is unconstitutional, rather they question the effect that its passage has on the constitutional eligibility of the appointment. Congress clearly has the constitutional authority, pursuant to the Appropriations Clause,<sup>95</sup> to amend or adjust the salaries of government employees for any reason it desires.<sup>96</sup> The constitutional question that the courts have yet to resolve is whether such an action by Congress cures the apparent defect in the appointment created by the Emoluments Clause.

## **Application of the Emoluments Clause to President-Elect Obama’s Designees**

President-elect Barack Obama has announced his intention to nominate five individuals who were serving in the 110<sup>th</sup> Congress to senior positions in the Executive Branch to which Emoluments Clause issues may arise. They include the following: Senator Hillary Rodham Clinton as Secretary of State; Senator Ken Salazar as Secretary of the Interior; Representative Ray LaHood as Secretary of Transportation; Representative Hilda Solis as Secretary of Labor; and Representative Rahm Emanuel as White House Chief of Staff.

### **Senator Hillary Rodham Clinton**

Senator Clinton was elected to the Senate from the State of New York in 2006 for a term that began on January 3, 2007 and is due to expire on January 3, 2013. In both 2007 and 2008 Cabinet officials received a pay increase pursuant to Executive Order.<sup>97</sup> As a result, the emoluments of the

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<sup>92</sup> See Paulsen, *supra* note 89 at 913-14.

<sup>93</sup> *Id.*

<sup>94</sup> See Pollitt, *supra* note 9 at 120; see also Paulsen, *supra* note 89 at 908 (1994) (stating that “[t]he unconstitutional appointment of Lloyd Bensten is a rather disappointing parable about Our Inconvenient Constitution”); O’Connor, *supra* note 20 at 135 (hypothesizing that “[i]f the Supreme Court, or any court for that matter, were to consider the merits of an appointment made under the auspices of the Saxbe fix, it probably would find the appointment unconstitutional under the Emoluments Clause.”).

<sup>95</sup> See U.S. CONST. Art. I, § 9, cl. 7 (stating that “No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

<sup>96</sup> See *United States v. Price*, 116 U.S. 43 (1885) (holding that when Congress directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it); see also *Allen v. Smith*, 173 U.S. 389, 393 (1899); *United States v. Realty Company*, 163 U.S. 427, 439 (1896).

<sup>97</sup> Executive Order, Adjustment of Certain Rates of Pay, *available at*, <http://www.whitehouse.gov/news/releases/2008/01/>

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Office of Secretary of State have increased during Senator Clinton's current term of office. Congress has already acted to address Senator Clinton's situation by adopting S.J.Res. 46, which reduces the pay of the Secretary of State to the level that it was on January 1, 2007, just prior to the start of Senator Clinton's term of office. Consistent with the Lloyd Bentsen precedent the outgoing President, George W. Bush, signed S.J.Res. 46 into law on December 19, 2008.<sup>98</sup>

## **Senator Ken Salazar**

Senator Salazar was elected to the Senate from Colorado in 2004 for a term that began on January 3, 2005 and is set to expire on January 3, 2011. Pay increases for Cabinet appointees have been awarded in 2007 and 2008, thus, the emoluments of the Office of Secretary of the Interior have increased during Senator Salazar's term of office. Therefore, legislation that reduces the salary of the Secretary of the Interior to the level that it was on January 1, 2005 is seen as necessary before Senator Salazar can assume the office. As of the writing of this report, "Saxbe Fix" legislation for Senator Salazar has been passed by both the House and the Senate and is currently being prepared for the signature or veto of the President.<sup>99</sup>

## **Representative Rahm Emanuel**

Representative Emanuel was elected to the House of Representatives from Illinois in 2008 for a term that was to commence on January 3, 2009 and expire on January 3, 2011. Although the position of White House Chief of Staff is not a cabinet position, it is a "civil office" and, therefore, arguably the Emoluments Clause applies. On December 18, 2008, President Bush signed an Executive Order that raised the salaries of individuals in the Senior Executive Service, which includes the position of White House Chief of Staff.<sup>100</sup> Pursuant to the Executive Order, this increase took place on the first full pay period of 2009, which was January 4, 2009. According to media reports, Representative Emanuel resigned his office effective January 3, 2009, prior to the pay raise becoming effective and prior to his term commencing.<sup>101</sup> Therefore, it appears that the Emoluments Clause will not affect his ability to assume office at all.

## **Representative Ray LaHood**

Representative LaHood was elected to the House of Representatives from Illinois in 2006 for a term that commenced on January 3, 2007 and expired January 3, 2009. Representative LaHood did not seek election to the 111<sup>th</sup> Congress. Because his term of office will have expired before President-elect Obama is inaugurated on January 20<sup>th</sup> and has the legal authority to make his

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<sup>98</sup> See P.L. 110-455, \_\_\_ Stat. \_\_\_ (2008).

<sup>99</sup> See S.J.Res. 3, 111<sup>th</sup> Cong. (2009).

<sup>100</sup> See Executive Order, Adjustment of Certain Rates of Pay, § 2, *available at*, <http://www.whitehouse.gov/news/releases/2008/12/20081218-3.html> (Dec. 18, 2008).

<sup>101</sup> See, e.g., Carl Hulse, "Emanuel Formally Resigns from House Seat," *The New York Times*, Dec. 29, 2008, *available at*, <http://thecaucus.blogs.nytimes.com/2008/12/29/emanuel-formally-resigns-from-house-seat/> (last visited Jan. 6, 2009).

appointment, it appears that the Emoluments Clause will not apply as there will have been no increases of salary while Representative LaHood was a Member of Congress.

## **Representative Hilda Solis**

Representative Hilda Solis was elected to the House of Representatives from California in 2008 for a term that was to commence on January 3, 2009 and expire on January 3, 2011. On December 18, 2008, President Bush signed an Executive Order that raised the salaries of Cabinet officials.<sup>102</sup> Pursuant to the Executive Order this increase took place on the first full pay period of 2009, which was January 4, 2009. Because Representative Solis has not resigned her congressional seat, it may be argued that a pay increase will have taken place during her term and prior to her appointment. Although Congress adopted a public law declaring that the first day of the 111<sup>th</sup> Congress to be January 6, 2009,<sup>103</sup> the Twentieth Amendment sets the official start date for congressional terms to be January 3.<sup>104</sup> Members' terms run from that date and not the date which they take the oath of office and are officially seated. Thus, it appears that an argument can be made in favor of the Emoluments Clause's application to Representative Solis and, therefore, "Saxbe Fix" legislation reducing the salary of the Secretary of Labor to the level it was as of January 1, 2009 may seem to be required. On the other hand, it appears possible to argue that because all of the official actions related to the increase in the emoluments occurred during the 110<sup>th</sup> Congress (i.e., the passage of legislation authorizing the pay increase and the signing of the Executive Order) and the appointment will not be effective until the 111<sup>th</sup> Congress, that the clause does not apply and no "Saxbe Fix" legislation is necessary.

## **Standing to Challenge Appointment or Confirmation**

Much of the above discussion may ultimately prove to be "academic," as it is unlikely that, should an appointment and/or confirmation in violation of the Emoluments Clause occur, anyone would have the requisite constitutional standing to bring a lawsuit challenging the action as unconstitutional. The doctrine of standing is a threshold procedural question that does not turn on the merits of a plaintiff's complaint, but rather on whether the particular plaintiff has a legal right to a judicial determination on the issues before the court.<sup>105</sup> The law with respect to standing is a mix of both constitutional requirements and prudential considerations.<sup>106</sup> Article III of the

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<sup>102</sup> See Executive Order, Adjustment of Certain Rates of Pay, § 2, *available at*, <http://www.whitehouse.gov/news/releases/2008/12/20081218-3.html> (Dec. 18, 2008).

<sup>103</sup> See P.L. 110-430, 122 Stat. 4846 (2008).

<sup>104</sup> See U.S. Const. Amend. XX (stating that "the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin").

<sup>105</sup> See *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

<sup>106</sup> See *Department of Commerce v. House of Representatives*, 525 U.S. 316, 328-29 (1999). By law, Congress can grant a right to sue to a plaintiff who would otherwise lack standing. According to the Court, however, such a law can eliminate only prudential, but not constitutional, standing requirements. See *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). For example, in the Line Item Veto Act, which was the statute at issue in *Raines*, Congress had granted standing to sue to "any Member of Congress or any individual adversely affected by" the act. See Line Item Veto Act, P.L. 104-130, § 692(a)(1), 110 Stat. 1200 (1996). Of particular relevance to this inquiry, Congress has also statutorily granted standing to challenge the use of statistical sampling methods in the census. See *Department of Commerce v.* (continued...)

Constitution specifically limits the exercise of federal judicial power to “cases” and “controversies;”<sup>107</sup> thus, it has been said that “the law of Article III standing is built on a single basic idea — the idea of separation of powers.”<sup>108</sup> According to the Supreme Court, to satisfy the constitutional standing requirements of Article III, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>109</sup>

In addition to the constitutional questions posed by the doctrine of standing, federal courts have also adhered to a well developed set of prudential principles that are relevant to a standing inquiry.<sup>110</sup> Similar to the constitutional requirements, these “judicially self-imposed limits on the exercise of federal jurisdiction,” are “founded in concern about the proper — and properly limited — role of the courts in a democratic society.”<sup>111</sup> However, unlike their constitutional counterparts, prudential standing requirements “can be modified or abrogated by Congress.”<sup>112</sup> The prudential components of the doctrine of standing require that (1) a plaintiff assert his own legal rights and interests rather than those of third parties; (2) a plaintiff’s complaint be encompassed by the “zone of interests” protected or regulated by the constitutional or statutory guarantee at issue; and (3) courts decline to adjudicate “abstract questions of wide public significance which amount to generalized grievances pervasively shared and most appropriately addressed in the representative branches.”<sup>113</sup>

There have been two attempts to bring cases alleging violations of the Emoluments Clause. The first such case, *Ex Parte Levitt*,<sup>114</sup> arose from the appointment of Senator Hugo Black to be an Associate Justice of the United States Supreme Court. At the time of Senator Black’s appointment, Congress had increased the amount of pension available to Justices who retired at age seventy. As Mr. Black’s Senate term had not yet expired prior to his appointment, it was asserted that the increased pension was an emolument which made him constitutionally ineligible. Defenders of the appointment argued that inasmuch as Mr. Black was only fifty-one years of age at the time, he would be ineligible for the “increased emolument” for nineteen years and, therefore, as applied to him, it was not an increased emolument. A motion was filed in the United States Supreme Court requesting that cause be shown as to why the appointment was not a violation of the Emoluments Clause. The Court, in a *per curiam* opinion, dismissed stating that the plaintiffs’ interest was insufficient as all they could demonstrate was that they were citizens and members of the Supreme Court bar.<sup>115</sup> The Court noted that

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*House of Representatives*, 525 U.S. at 328-29.

<sup>107</sup> U.S. CONST. Art. III, § 2 (stating that “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made under their Authority, or ... — to Controversies to which the United States shall be a Party;— to Controversies between two or more States;.... ”)(emphasis added).

<sup>108</sup> *Raines*, 521 U.S. at 820 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

<sup>109</sup> *Department of Commerce v. United States House of Representatives*, 525 U.S. at 329 (internal quotations omitted).

<sup>110</sup> *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 474 (1982) (internal quotations omitted).

<sup>114</sup> 302 U.S. 633 (1937)

<sup>115</sup> *Id.* at 634.

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 that he has merely a general interest common to all members of the public.<sup>116</sup>

The second case, *McClure v. Carter*,<sup>117</sup> involved the appointment of Representative Abner Mikva to a seat on the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Pursuant to the Postal Revenue and Federal Salary Act of 1967, President Carter notified Congress of a salary schedule change that included a pay raise for all federal judges.<sup>118</sup> According to the terms of the act, the pay raise was scheduled to take effect on October 1, 1979, unless Congress disapproved of the increase by joint resolution.<sup>119</sup> On September 26, 1979, prior to the raise taking effect, Judge Mikva was confirmed, resigned from the House, and commissioned.<sup>120</sup> Senator McClure, who opposed the nomination on the Senate floor on the grounds that it violated the Emoluments Clause, proposed a jurisdictional statute that permitted challenges regarding judicial appointments to the D.C. Circuit during the 96<sup>th</sup> Congress to be heard in federal district court by a special three judge panel.<sup>121</sup> The three-judge district court that heard the case ruled that Senator McClure, despite the jurisdictional statute adopted by Congress, did not have Article III standing to challenge the appointment and confirmation of Judge Mikva. The court first addressed Senator McClure's standing without reference to the jurisdictional statute and concluded that the Senator lacked a sufficient personalized stake in the outcome and, therefore, "a United States Senator, suing in either his individual capacity or his official capacity as a senator, lacks standing to challenge the validity of the appointment of a federal judge."<sup>122</sup> Next, the court considered what effect, if any, the jurisdictional statute adopted by Congress had on Senator McClure's standing. According to the court,

Senator McClure, even with aid of the special jurisdictional statute on which he seeks to rely, does not have standing to bring this suit. ... The statute under which Senator McClure brings this suit casts members of Congress in the role of special attorneys general, to plead before this court for a second opinion as to whether their judgments were right in voting for or against the confirmation of Judge Mikva. Under the Constitution, it was the duty of Congress itself, in the first instance, to determine Judge Mikva's qualifications both on the merits and on the issue of whether he was constitutionally eligible to serve as a judge. To allow members of Congress to change hats, as it were, to plead the unconstitutionality of their own acts before this court on the basis of an argument already debated in the Senate but lost there by vote, would, we suggest, set a dangerous precedent.<sup>123</sup>

It should be noted that although there are two cases challenging appointments on Emoluments Clause grounds, neither was brought against appointments to positions in the Executive Branch. Rather, both cases involved appointments to the judiciary. Thus, it may be possible to distinguish these cases from the potential current situation. Depending on the specific circumstances, it may

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<sup>116</sup> *Id.* (citing *Tyler v. Judges*, 179 U.S. 405, 406; *Southern Ry. Co. v. King*, 217 U.S. 524, 534; *Newman v. Frizzell*, 238 U.S. 537, 549, 550; *Fairchild v. Hughes*, 258 U.S. 126, 129; *Massachusetts v. Mellon*, 262 U.S. 447, 488).

<sup>117</sup> 513 F.Supp. 265 (D. Idaho 1981) (three-judge court), *aff'd sub nom.*, *McClure v. Reagan*, 454 U.S. 1025 (1981).

<sup>118</sup> 125 CONG. REC. 26,035 (1979).

<sup>119</sup> *Id.* at 23,036.

<sup>120</sup> *McClure*, 513 F.Supp at 266.

<sup>121</sup> Act of October 12, 1979, P.L. 96-86, § 101(c), 93 Stat. 656 (1979).

<sup>122</sup> *McClure*, 512 F.Supp. at 269.

<sup>123</sup> *Id.* at 271.

be possible for a challenge to survive an initial standing analysis. For example, should a Member be appointed and confirmed as a cabinet Secretary, a challenge could arise if the Secretary takes an action that adversely affects the rights of an individual citizen. One example might be the denial of a passport, export license, or other international travel-related document issued by the Department of State. Thus, under those circumstances, it may be possible for an individual or company to satisfy the Supreme Court's test Article III standing analysis.

What appears more certain, however, is that Members of Congress who either vote against "Saxbe Fix" legislation, or vote not to confirm individuals on Emoluments Clause grounds would not have standing to challenge the appointments in court. In addition to the *McClure* decision, which appears to foreclose Member standing with respect to the Emoluments Clause, in 1997, the Supreme Court decided *Raines v. Byrd*,<sup>124</sup> which presented a constitutional challenge to the Line Item Veto Act.<sup>125</sup> The Court, in an opinion by Chief Justice Rehnquist, held that plaintiffs, all of whom were Members of Congress who had voted against the act, lacked standing because their complaint did not establish that they had suffered an injury that was personal, particularized, and concrete.<sup>126</sup> The majority distinguished between a personal injury to a private right and an institutional or official injury,<sup>127</sup> holding that a congressional plaintiff may have standing in a suit against the executive if it is alleged that the plaintiff(s) have suffered either a personal injury (e.g., loss of a Member's seat) or an institutional one<sup>128</sup> that is not "abstract and widely dispersed," but rather amounts to vote nullification.<sup>129</sup> As a result, it appears that a congressional plaintiff is more likely to succeed in establishing standing where there is an allegation of a particular injury, as opposed to an injury related to either a generalized grievance about the conduct of government, or an injury amounting to a claim of diminished effectiveness as a legislator.<sup>130</sup> While the Court in

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<sup>124</sup> 521 U.S. 811 (1997).

<sup>125</sup> Line Item Veto Act, P.L. 104-130, § 692(a)(1), 110 Stat. 1200 (1996).

<sup>126</sup> *Raines*, 521 U.S. at 818-20. Although the holding was based on the Court's finding that plaintiffs did not satisfy the first standing requirement (personal injury), the Court questioned whether the plaintiffs could meet the second standing requirement (that the injury be "fairly traceable" to unlawful conduct by the defendants) "since the alleged cause of ... [plaintiffs'] injury is not ... [the executive branch defendants'] exercise of legislative power but the actions of their own colleagues in Congress in passing the act." *Id.* at 830 n.11.

<sup>127</sup> Justice Souter's concurring opinion, seemed to attach less importance than the majority to the distinction between personal and official injury, but he nevertheless agreed with the majority that the plaintiffs lacked standing. *See id.* at 831. Justice Breyer, however, dissented, arguing that there is no absolute constitutional distinction between cases involving a "personal" harm and those involving an "official" harm, and would have granted standing. *See id.* at 841-843. Unlike the majority, which viewed injury to a legislator's voting power as an official injury, Justice Stevens, in his dissenting opinion, asserted that a legislator has a personal interest in the ability to vote, and stated that deprivation of the right to vote would be a sufficient injury to establish standing. *See id.* at 837 n.2

<sup>128</sup> *See Chenoweth v. Clinton*, 997 F. Supp. 36, 38-39 (D.D.C. 1998), *aff'd*, 181 F.3d 112 (D.C.Cir. 1999) (holding that personal injury claims are more likely to result in a grant of standing, but mere institutional injury is sufficient under *Raines*); *see also Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577-78 (8th Cir. 1998)(addressing the standing of state legislators).

<sup>129</sup> In 1939, the Court had held that Kansas state legislators had standing to bring suit against state officials to recognize that the legislature had not ratified a proposed amendment to the United States Constitution. *See Coleman v. Miller*, 307 U.S. 433 (1939). The plaintiffs in *Coleman* included twenty state senators whose votes against the measure would have been sufficient to defeat it, but whose votes were essentially nullified by the tie-breaking vote of the state's lieutenant governor, the presiding officer of the senate, in favor of ratification. In *Raines*, the Court distinguished the injury alleged by the plaintiffs from the injury asserted in *Coleman* and, therefore, found it unnecessary to decide whether *Coleman* might also be distinguished on other grounds. *See Raines*, 521 U.S. at 826. Therefore, *Raines* did not address the question of whether *Coleman* would warrant granting standing in a suit by federal legislators even though such an action raises separation of powers concerns not present in *Coleman*. *See id.* at 824, n.8.

<sup>130</sup> *See Raines*, 521 U.S. at 822-24; *see also Moore v. U.S. House of Representatives*, 733 F.2d 946, 951-52 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

*Raines* seemed prepared to recognize the standing of a Member based on a personal injury to a private right, it nevertheless concluded that an injury to a legislator's voting power is an official injury.<sup>131</sup>

Furthermore, it appears that the limits on Member standing established in *Raines* would likely preclude a Member from obtaining standing in a suit to challenge an act of Congress — such as a “Saxbe Fix”<sup>132</sup> — because of the availability of legislative remedies, including, but not limited to, the repeal or amendment of the act in question,<sup>133</sup> which would prevent a court from finding vote nullification. In addition, *Raines* appears to greatly restrict “standing to challenge executive action, although there may be a better opportunity to achieve standing in this setting,”<sup>134</sup> even in cases where a plaintiff Member can show the nullification of a vote by the executive and, thus, establish an institutional injury.<sup>135</sup> Decisions of the D.C. Circuit that have followed *Raines* have attempted to clarify both the meaning of “nullification,” as well as the status of pre-*Raines* Circuit rulings. Regarding the meaning of the term “nullification,” the D.C. Circuit concluded in *Campbell v. Clinton* that the availability of a legislative remedy precludes any finding of nullification.<sup>136</sup> With respect to the status of its pre-*Raines* rulings, a majority of the court of appeals in *Chenoweth v. Clinton* believed that the Court's decision in *Raines* has limited, but not overruled, its precedent.<sup>137</sup>

## Automatic Annual Pay Adjustments and the Emoluments Clause

Another potential issue that may arise is whether the fact that the salary increase in question was an annual pay adjustment — imposed by Executive Order pursuant to a previously enacted statute — is of any constitutional significance. In 2008, Cabinet appointees received a pay increase pursuant to an Executive Order dated January 4, 2008.<sup>138</sup> The Order executed provisions of the Consolidated Appropriations Act of 2008, which contained statutory language governing pay

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<sup>131</sup> See *Raines*, 521 U.S. at 820-21.

<sup>132</sup> See WRIGHT, MILLER, AND COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11, at 1 (2001 Supp.) [hereinafter Wright & Miller].

<sup>133</sup> See *Raines*, 521 U.S. at 824.

<sup>134</sup> See Wright & Miller, *supra* note 132, at 1.

<sup>135</sup> Congressional plaintiffs may name executive branch officials as defendants in suits alleging vote nullification by the executive. See, e.g., *Coleman v. Miller*, 307 U.S. 433 (1939), *aff'd* 146 Kan. 390 (1937) (among the named defendants were executive and legislative branch officials, including William M. Lindsay, “as Lieutenant Governor and President ex officio of the Senate”); see also *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). Congressional plaintiffs may also name executive branch officials as defendants in suits challenging the constitutionality of an act of Congress. See, e.g., *Riegle v. Federal Open Market Committee*, 656 F.2d 879, n. 6 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981) (stating that “[w]hen a plaintiff alleges injury by unconstitutional action taken pursuant to a statute, his proper defendants are those acting unconstitutionally under the law ..., and not the legislature which enacted the statute.”).

<sup>136</sup> See generally, *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).

<sup>137</sup> 181 F.3d 112 (D.C. Cir. 1999).

<sup>138</sup> Executive Order, Adjustment of Certain Rates of Pay, *available at*, [http://www.whitehouse.gov/news/releases/2008/01/](http://www.whitehouse.gov/news/releases/2008/01/20080104-6.html)

20080104-6.html



increases for FY2008.<sup>139</sup> Rates of pay for Cabinet officials are a part of the Senior Executive Service (SES), and are set directly by Executive Order, not fixed by statute.<sup>140</sup> Nevertheless, pursuant to statute, members of the SES are entitled to annual pay adjustments.<sup>141</sup> Given the manner in which the pay for Cabinet officials is determined, there is an argument that the increase in salary was not subject to a vote in Congress and was not increased with any involvement directly or indirectly by a sitting Member of Congress. Applying the less textually-based interpretations that have guided the Congress with respect to the “Saxbe Fix,” it would seem possible to argue that because the annual pay increases are automatic and based on a law passed well before the 110<sup>th</sup> Congress, the purpose of the Emoluments Clause is not violated.

The treatment of annual pay adjustments with respect to other parts of the Constitution would also appear to be relevant to a discussion of their constitutional implications. Specifically, annual pay adjustments and their effect on the 27<sup>th</sup> Amendment provide a potential analogous situation. The 27<sup>th</sup> Amendment, commonly referred to as the “Madison Amendment,”<sup>142</sup> which was not ratified until May of 1992, provides that “[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened.”<sup>143</sup> According to the Amendment’s author, its purpose was “to ensure that a congressional pay increase ‘cannot be for the particular benefit of those who are concerned with determining the value of the service.’”<sup>144</sup> Thus, the Amendment does not prohibit the passage of laws that adjust congressional pay, but instead governs the implementation of such laws by requiring that they not take effect until after the next election of Members of the House.

To date, there appear to have been only two cases addressing the specifics of the 27<sup>th</sup> Amendment. In the first, *Boehner v. Anderson*, 28 Members of Congress, 108 defeated congressional candidates, and others, challenged provisions of the Ethics Reform Act of 1989 (ERA),<sup>145</sup> including the annual pay provision, as violating the 27<sup>th</sup> Amendment.<sup>146</sup> The Federal District Court for the District of Columbia held that the ERA, “in providing a methodology for automatic annual adjustments to Congressional salaries meets both the language and the spirit of the 27<sup>th</sup> amendment.”<sup>147</sup> In addition, the court found that “any pay raises stemming from” the act satisfy the terms of the Amendment.<sup>148</sup> Furthermore, the district court questioned whether the “constitutionally-required delay” mandated by the 27<sup>th</sup> Amendment was applicable to the ERA, which was enacted more than two years before the Amendment was ratified.<sup>149</sup> Specifically with respect to the annual pay provision, the court held that the ERA complied with the text of the

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<sup>139</sup> Consolidated Appropriations Act of 2008, P.L. 110-161 § 740, 121 Stat. 2031 (2007).

<sup>140</sup> See 5 U.S.C. § 5382 (2006).

<sup>141</sup> See 5 U.S.C. § 5303 (2006).

<sup>142</sup> The amendment “was proposed to the Congress in 1789 by James Madison—along with eleven other amendments, of which ten became the Bill of Rights....” *Boehner*, 30 F.3d at 159. For a detailed historical account of the Amendment, see Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497 (1992).

<sup>143</sup> U.S. CONST. Amend. XXVII.

<sup>144</sup> *Id.* (quoting James Madison, Speech in the House of Representatives, reprinted in, *The Congressional Register* (June 8, 1789)).

<sup>145</sup> Ethics Reform Act of 1989, P.L. 101-194, 103 Stat. 1769 (1989).

<sup>146</sup> *Boehner v. Anderson*, 30 F. 3d 156, 158 (D.C. Cir. 1994).

<sup>147</sup> *Boehner v. Anderson*, 809 F. Supp. 138, 144 (D.D.C. 1992).

<sup>148</sup> *Id.* at 142.

<sup>149</sup> *Id.* at 142, n.3.

Amendment because the November 1990 congressional election “intervened” between the enactment of the law in November 1989, and the effective date of the first annual pay adjustment pursuant to the law, January 1991.<sup>150</sup> Finally, the court held that each annual pay adjustment “becomes effective by the terms of the 1989 Act” and “is not a law ... subject to the requirements of the 27th amendment.”<sup>151</sup> The Court of Appeals for the District of Columbia Circuit affirmed, holding that “because the annual [pay adjustment] provision took effect after the 1990 election of Representatives, it did not violate the twenty-seventh amendment.”<sup>152</sup>

Several years later, in *Schaeffer v. Clinton*,<sup>153</sup> a district court for the district of Colorado dismissed a lawsuit similar to *Boehner* in that it also alleged that annual pay adjustments granted under the ERA are subject to the 27<sup>th</sup> Amendment and, therefore, unconstitutional. The district court adopted the reasoning of the *Boehner* court with respect to the merits, stating that

Adjustments to congressional salaries under the Ethics Reform Act are not discretionary acts of Congress. The adjustments are calculations performed by non-legislative administrative staff, following a specific formula provided by Congress in the Act. Members of Congress do not participate in the calculation of pay increases. In removing Members of Congress from the pay adjustment process, the Ethics Reform Act accomplishes the goal of the Founding Fathers manifested in the Twenty-Seventh Amendment. The Act eliminates the possibility that Congress will grant itself a new pay raise during its current session.<sup>154</sup>

The Court of Appeals for the Tenth Circuit affirmed the district court’s decision to dismiss not on the merits, but rather on the ground that plaintiffs lacked the constitutionally required standing to bring the suit.<sup>155</sup>

Using this same rationale, namely, that automatic annual pay adjustments are non-legislative, administrative increases following a preexisting formula, it appears possible to argue that they do not present the same threat that the drafters of the Emoluments Clause feared. No vote is taken in Congress and, therefore, no corruption or collusion with the Executive Branch is possible. Moreover, the argument could be made that because the system of automatic annual pay adjustments was adopted prior to the 110<sup>th</sup> Congress, it is a violation of the clause’s compromise to hold present Members ineligible based on a system they did not vote to establish, much less vote to implement. In other words, to hold Members ineligible for mere annual pay increases to other offices in the government acts as the very type of permanent disqualification that the drafters of the Emoluments Clause so famously compromised to avoid.<sup>156</sup>

Conversely, a committed textual interpretation of the Emoluments Clause would lead to the argument that the plain language of the provision does not distinguish between legislatively

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<sup>150</sup> *See id.* at 142.

<sup>151</sup> *Id.* at 143.

<sup>152</sup> *Boehner*, 30 F.3d at 163; see also *id.* at 162.

<sup>153</sup> 54 F. Supp. 2d 1014 (D.Col. 1999), *aff’d on other grounds*, 240 F.3d 878 (10th Cir. 2001), *cert. denied sub nom.*, *Schaeffer v. O’Neill*, 534 U.S. 992 (2001).

<sup>154</sup> *Id.* at 1024.

<sup>155</sup> *See Schaeffer v. Clinton*, 240 F. 3d 878, 886 (10th Cir. 2001) ), *cert. denied sub nom.*, *Schaeffer v. O’Neill*, 534 U.S. 992 (2001).

<sup>156</sup> Harvard Professor and noted constitutional scholar Lawrence Tribe, in a weblog posting, has proposed a similar type argument regarding the anticipated appointment of Senator Clinton to be Secretary of State. *See* Balkinization, available at, <http://balkin.blogspot.com/2008/12/is-hillary-clinton-unconstitutional.html> (last visited Dec. 18, 2008).

enacted increases in emoluments and administrative increases. The clause clearly states that any increase in emoluments “[d]uring the time for which he was elected” triggers a disqualification. Thus, the fact that the increase was automatic or merely administrative is of no consequence. The only factors that matter are that it occurred during the term and prior to the appointment.

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