



# Service by a Member of Congress in the U.S. Armed Forces Reserves

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## Summary

The Incompatibility Clause of the U.S. Constitution states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” This provision is generally understood to ensure the separation of powers by preventing Members of Congress from serving in two government posts at one time. The prohibition on simultaneous service in multiple offices of the government prevents the individual from exercising influence of one branch while serving in the office of another. To avoid related constitutional violations, Members generally are required to resign their previous offices before being seated in Congress.

The Incompatibility Clause often raises questions of the propriety of Members’ conduct in the context of military service, particularly service in the U.S. Armed Forces Reserves, and whether service in the Reserves would disqualify the Member from simultaneously serving in Congress. The Constitution also provides that “each House shall be the judge of the elections, returns and qualifications of its own Members.” In some cases, the House and Senate have exercised their authority under this provision to determine the eligibility of their Members to hold commissions in the military, including the Reserves.

The central issue in determining whether a Member may simultaneously serve in the Reserves is whether a position in the Reserves constitutes an “Office under the United States.” This issue has been litigated in the courts and made its way to the U.S. Supreme Court in *Schlesinger v. Reservists Committee to Stop the War*. The Court resolved the case on procedural grounds, finding that the Reservists Committee did not have standing to raise the matter in court, and did not address the substantive constitutional claim. Other courts have dealt with related issues, including what positions constitute offices of the United States.

Although Congress has taken action in some instances of Members’ service in the Reserves and courts have resolved some related challenges, the issue of whether a Member may serve in Congress and the Reserves simultaneously has never been clearly resolved. This report will analyze the legal issues related to Members of Congress serving in the Armed Forces Reserves during their congressional tenure. It will discuss previous congressional action regarding Members’ simultaneous service as well as federal legislation addressing the status of Reservists. It will also analyze court decisions related to challenges to simultaneous service.

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The Incompatibility Clause of the U.S. Constitution states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”<sup>1</sup> This provision is generally understood to ensure the separation of powers by preventing Members of Congress from serving in two government posts at one time.<sup>2</sup> The prohibition on simultaneous service in multiple offices of the government prevents the individual from exercising influence of one branch while serving in the office of another. To avoid constitutional violations under the Incompatibility Clause, Members generally are required to resign their previous offices before being seated in Congress.

The Incompatibility Clause often raises questions of the propriety of Members’ conduct in the context of military service, particularly service in the Armed Forces Reserves, and whether service in the Reserves would disqualify the Member from simultaneously serving in Congress. The Constitution also provides that “each House shall be the judge of the elections, returns and qualifications of its own Members.”<sup>3</sup> In some cases, the House and Senate have exercised their authority under this provision to determine the eligibility of their Members to hold commissions in the military, including the Reserves.

The central issue in determining whether a Member may simultaneously serve in the Reserves is whether a position in the Reserves constitutes an “Office under the United States.” This issue has been litigated in the U.S. Supreme Court in *Schlesinger v. Reservists Committee to Stop the War*. The Court resolved the case on procedural grounds, finding that the Reservists Committee did not have standing to raise the matter in court, and did not address the substantive constitutional claim. Other courts have dealt with related issues, including what positions constitute *offices* of the United States.

Although Congress has taken action in some instances of Members’ service in the military and courts have resolved some related challenges related to service in the Reserves, the issue of whether a Member may serve in Congress and the Reserves simultaneously has never been clearly resolved.

## Congressional Authority to Judge the Qualification of Its Members

The U.S. Constitution provides that “each House shall be the judge of the elections, returns and qualifications of its own Members.”<sup>4</sup> Thus, Congress is empowered to determine whether a Member is eligible or qualified to serve in the seat for which he or she was elected. Because the Incompatibility Clause prohibits a Member from simultaneously serving in another office of the United States, Congress has the prerogative to determine if a Member’s role in another governmental capacity would disqualify him or her from serving in Congress. Congress has acted specifically with respect to individual Members’ simultaneous service and generally by enacting legislation that addresses the status of Reservists in the government.

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<sup>1</sup> U.S. CONST. art. I, § 6, cl. 2.

<sup>2</sup> See *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

<sup>3</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>4</sup> *Id.*

## **Previous Congressional Action Regarding Specific Members’ Simultaneous Congressional and Military Service**

Both the House and Senate, pursuant to their constitutional power to judge the qualifications of their Members, have considered the eligibility of their Members to hold commissions in the military.<sup>5</sup> The precedents seem to indicate that a Member of Congress may, upon entry into the Armed Forces by enlistment, commission, or otherwise, cease to be a Member of Congress, provided the House or Senate chooses to act.<sup>6</sup>

Congress’s enforcement of the Incompatibility Clause appears to have first occurred in the seventh Congress, when Representative John Van Ness accepted an office in the militia during the recess between the first and second sessions. The House unanimously voted in support of a resolution that Van Ness had “thereby forfeited his right to a seat as a Member of this House.”<sup>7</sup> The unanimous vote was apparently intended to set “the important precedent ... to exclude even the shadow of Executive influence.”<sup>8</sup>

In some cases, however, the House or Senate has not acted. Congress has not acted in any case of an individual Representative or Senator regarding simultaneous service in the Reserves.<sup>9</sup> Although there appears to be no precedent regarding such circumstances, Congress has attempted, as discussed below, to clarify the status of Members serving as Reservists through legislation.<sup>10</sup>

## **General Federal Legislation Related to Service in the Reserves**

Although Congress has considered the eligibility of several individual Members on active duty specifically and may continue to do so, it has also addressed the status of Reservists by general legislation.<sup>11</sup> It appears that the question of the propriety of simultaneous service of an individual in the Congress and in the Reserves may now be clarified by 5 U.S.C. § 2105, which defines “employee” for purposes of Title 5 of the U.S. Code, which contains laws relating to government employment. Section 2105(d) provides that

a Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.<sup>12</sup>

Under this definition, it appears that a Member serving as a Reservist would likely not be acting in violation of the Incompatibility Clause. As a statute, § 2105(d) cannot define the terms of the

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<sup>5</sup> See U.S. CONST. art. I, § 5, cl. 1 (“each House shall be the Judge of the Elections, Returns and Qualifications of its own Members”).

<sup>6</sup> See 1 Hinds’ Precedents §§ 486—492, 494, 500, 504.

<sup>7</sup> *Id.* at § 486.

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

<sup>9</sup> See 2 Deschler’s Precedents § 14; see also 6 Cannon’s Precedents § 62.

<sup>10</sup> See 2 Deschler’s Precedents §§ 14.1—14.2.

<sup>11</sup> See *id.*

<sup>12</sup> 5 U.S.C. § 2105(d).

Constitution and thus would not resolve the constitutional question, but it may be used as an indication of the sense of Congress regarding the status of Reservists. Because Congress has the power to determine the qualifications of its own Members, the limitations that it has imposed on what constitutes an employee holding an office of the United States may be significant to courts considering the constitutional limitations.

## Litigation Regarding Members' Serving in the Armed Forces Reserves

The central issue in the debate over the legality of simultaneous service is the definition of an *office* of the United States. If an appointment in the Reserves is not deemed to be an office of the United States, the Incompatibility Clause would provide no basis to prohibit simultaneous service in Congress.

Some have argued that the issue of simultaneous service is nonjusticiable, meaning that the issue is not one that courts should adjudicate.<sup>13</sup> Under this argument, because the Constitution gives Congress the authority to judge the qualifications of its Members, courts should not weigh in on the propriety of simultaneous service. On the other hand, the courts are empowered to interpret the meaning of the Constitution and may assert that authority to hear Reservists' cases.

Direct legal challenges to simultaneous service in Congress and the Reserves have not been resolved on the merits. When the issue came before the U.S. Supreme Court in 1973 in *Schlesinger v. Reservists Committee to Stop the War*, as discussed below, the Court decided the case on procedural grounds and no opinion was issued on the substantive claims under the Incompatibility Clause.<sup>14</sup> Courts have heard other cases under the Incompatibility Clause that did not directly challenge simultaneous service as an officer in the Reserves, including a 2005 decision by the Court of Appeals for the Armed Forces. In that case, *United States v. Lane*, also discussed below, the court addressed the substantive claim of whether a Member of Congress could also serve as a judge in military court proceedings under his service as a Reservist.<sup>15</sup>

### *Schlesinger v. Reservists Committee to Stop the War*

The U.S. Supreme Court considered a challenge to simultaneous membership in the Reserves and in Congress as a violation of the Incompatibility Clause in 1973. In *Schlesinger v. Reservists Committee to Stop the War*, an association of officers and enlisted members of the Reserves and several individual members of the association alleged that Members of Congress who simultaneously served in the Reserves were acting in violation of the U.S. Constitution's prohibition on "holding any Office under the United States" while also serving as a Member of

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<sup>13</sup> See Brief for the Petitioners at 8-9, *Schlesinger v. Reservists Committee to Stop the War*, No. 72-1188 (U.S. August 9, 1973). Then-Solicitor General Robert Bork argued that "there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department,' and ... raises a political question which the courts should not and do not adjudicate." *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 217; *Powell v. McCormack*, 395 U.S. 486, 517, 518).

<sup>14</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

<sup>15</sup> *United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2006).

Congress.<sup>16</sup> Although the district court held and the U.S. Circuit Court of Appeals for the District of Columbia affirmed that “Article I, Section 6, Clause 2 of the Constitution renders a member of the Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office,” the Supreme Court reversed the decision on other grounds, finding that the committee lacked standing to raise the claim.<sup>17</sup>

The Court’s decision has limited citizens and taxpayers from raising the issue of simultaneous service in Congress and the Reserves. The Reservists Committee asserted their claims on the basis that as citizens and taxpayers, they were injured by the threat simultaneous service created for “the possibility of undue influence by the Executive Branch, in violation of the concept of independence of Congress implicit in Art. I of the Constitution.”<sup>18</sup> The Court held that the alleged injury was abstract, speculative, and generalized, and therefore was not a litigable matter for the courts to decide.<sup>19</sup>

The government raised several arguments to support the claim that simultaneous service in Congress and the Reserves did not violate the Incompatibility Clause. First, according to the government, simultaneous service in the Reserves was not the problem intended to be addressed by the Incompatibility Clause. The “intent was to avoid the possibility of improper influences upon and corruption of members of the legislative branch that could result from the power of the executive branch to appoint members to office.”<sup>20</sup> Furthermore, the government argued that “the minor and infrequent contacts these Reservists have with the military authorities as a result of their membership in the Reserves pose none of the dangers of domination and corruption of the legislative branch by the executive branch that the Framers sought to guard against.”<sup>21</sup>

To support its position, the government also cited other court cases that considered the definition of offices and officers of the United States. For example, the U.S. Supreme Court has held that an employee whose “duties were continuing and permanent, not occasional or temporary” was an officer of the United States.<sup>22</sup> According to the Court, “the term [office] embraces the ideas of tenure, duration, emolument, and duties.”<sup>23</sup> This definition was used by the U.S. Court of Claims in a case challenging the status of a Reservist. The court held that an inactive Reservist was not also an officer of the United States.<sup>24</sup> The court reasoned that “an officer of the Reserve Corps has no salary or emolument of office. He is not in time of peace, except perhaps while discharging

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<sup>16</sup> *Schlesinger*, 418 U.S. at 209 (internal quotations omitted).

<sup>17</sup> *Id.* (internal citations omitted). Standing is the legal term used to indicate that the person has an individualized interest that has actually been harmed under the law or by its application. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>18</sup> *Schlesinger*, 418 U.S. at 212 (internal citations omitted).

<sup>19</sup> *See id.*, at 217. “The Court has previously declined to treat ‘generalized grievances’ about the conduct of Government as a basis for taxpayer standing.” *Id.* (citing *Flast v. Cohen*, 392 U.S. 83 (1968)). The Court noted its earlier ruling in another case brought under the Incompatibility Clause, which held that private individuals must show actual or imminent danger of a direct injury resulting from the government action challenged, not “merely a general interest common to all members of the public.” *Id.* at 219 (citing *Ex parte Levitt*, 302 U.S. 633 (1937)).

<sup>20</sup> Brief for the Petitioners at 47, *Schlesinger v. Reservists Committee to Stop the War*, No. 72-1188 (U.S. August 9, 1973).

<sup>21</sup> *Id.* at 50.

<sup>22</sup> *United States v. Hartwell*, 73 U.S. 385, 393 (1867); *see also* *United States v. Germaine*, 99 U.S. 508, 511-12 (1878).

<sup>23</sup> *Hartwell*, 73 U.S. at 393.

<sup>24</sup> *Simmons v. United States*, 55 Ct. Cl. 56, 57 (1920).



some duty to which he may have been lawfully called ..., amenable to the Army regulations or court-martial. He has no defined duties to discharge.”<sup>25</sup>

### ***United States v. Lane***

The issue of the constitutionality of Members of Congress simultaneously serving as Reservists was again raised in 2005 in a lawsuit involving Senator Lindsey Graham, who was an officer in the U.S. Air Force Standby Reserve at the time. The Judge Advocate General of the Air Force assigned Senator Graham to act as an appellate judge on the Air Force Court of Criminal Appeals. One of the cases assigned to Senator Graham was that of an airman convicted of a drug use violation. The airman challenged the legality of Senator Graham’s service on a panel of the Court of Criminal Appeals that reviewed the appeal.

When the case came before the U.S. Court of Appeals for the Armed Forces (CAAF), the court limited its decision to the issue of “whether a criminal conviction and sentence, which by statute can be sustained only by an affirmative appellate decision, may be reviewed by an appellate judge who simultaneously serves as a Member of Congress.”<sup>26</sup> The CAAF noted that the Supreme Court has held that “the term ‘officers of the United States’ includes ‘all persons who can be said to hold an office under the Government.’”<sup>27</sup> The Supreme Court has also indicated that the distinction between officers and non-officers depends on whether the individual exercises “significant authority pursuant to the laws of the United States.”<sup>28</sup> The CAAF held that under this definition, military judges are officers of the United States.<sup>29</sup> The court stated that “the Incompatibility Clause—which prohibits a Member of Congress from ‘holding any Office under the United States’—precludes a Member from serving as an appellate judge on a Court of Criminal Appeals—an ‘office’ that must be filled by an ‘Officer of the United States.’”<sup>30</sup>

The CAAF limited its decision to whether a Member of Congress could serve as a judge in the airman’s proceeding. It refused to pass judgment on whether service as a Reservist constitutes “an office of the United States for purposes of qualification to serve as a Member of Congress under the Incompatibility Clause.”<sup>31</sup> Thus, the court left unresolved the propriety of simultaneous service in Congress and the Reserves.

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

<sup>26</sup> *Lane*, 64 M.J. at 3.

<sup>27</sup> *Id.* at 4 (citing *Buckley*, 424 U.S. at 125-26). *Buckley* involved issues arising under the Appointments Clause of the Constitution. The Court noted that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States.’” *See Buckley*, 424 U.S. at 126.

<sup>28</sup> *See Lane*, 64 M.J. at 5-6 (citing *Edmond v. United States*, 520 U.S. 651, 662 (1997)).

<sup>29</sup> *Id.* at 5 (citing *Weiss v. United States*, 510 U.S. 163, 170 (1994); *Ryder v. United States*, 515 U.S. 177, 179 (1995)).

<sup>30</sup> *Id.* at 6.

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



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