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Constitutional Ineligibility: What Does the Emoluments Clause Mean?

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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 have been encreased during such time....

—U.S. Constitution, Article I, Section 6, Clause 2

Determined to avoid corruption and self-dealing in the legislative process, the Framers kept all appointive powers out of the hands of Congress. (*See* Article II, Section 2, Clause 2.) But corruption could come not only from self-dealing but also from the blandishments of the executive. Consequently, in order to prevent a repetition of the British Crown's practice of "buying" support by creating offices and sinecures to give to members of Parliament, Robert Yates proposed to the Constitutional Convention a ban on Members of Congress from "any office established by a particular State, or under the authority of the U. States...during the term of service, and under the national Government for the space of one year after its expiration."

All the delegates in Philadelphia agreed that no Member of Congress should serve in an appointive position while he was sitting, but Nathaniel Gorham, James Wilson, and Alexander Hamilton wanted no bar at all, once a person was no longer in Congress. Hamilton argued that since passion drives all men, the executive should be able to satisfy the desires of the better qualified men by inducing them to serve in appointive offices.

James Madison proposed a solution that sought to reconcile the divergent concerns of the Framers: "that no office ought to be open to a member, which may be created or augmented while he is in the legislature." For some time, the delegates debated whether this idea was too restrictive or not restrictive enough. Madison responded that "the unnecessary creation of offices, and increase of salaries, were the evils most experienced, & that if the door was shut agst. them, it might properly be left open for the appointt. of members to other offices as an encouragmt. to the Legislative service." Eventually, the delegates accepted Madison's view, but they deleted the prohibition from holding state office (the state might need the Member's services) and the one-year bar after leaving office (it was not long enough to be of any significant effect). They also limited the bar to "civil" offices so that the military could have the service of all when the country was in danger.

As adopted, the relatively limited bar of this clause reinforces the separation of powers and the federal structure of the union. Of the separation of powers, Madison famously wrote in *The Federalist*

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No. 51: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." The clause puts an obstacle to the President's ability to shift a Congress Member's ambition from the legislative to the executive. Of the federal structure of the union, Madison had warned of "the unnecessary creation of offices"—obviously beyond what was appropriate for the central government—that could occur if the clause were not adopted.

The clause establishes a number of formal requirements: (1) It applies to those Members who have actually taken their seats, not to those who were elected but not yet sworn in. (2) "Appointed" means at the moment of nomination for civil office, not at the time of approval. *Marbury v. Madison* (1803). (3) The bar cannot be evaded by resignation from Congress. In a written opinion of Attorney General Benjamin Brewster in 1882, the clause applies for the term "for which he was elected," not the time during which the member actually holds office. (4) "Civil office" is one in which the appointee exercises an authoritative role. It does not apply to temporary, honorific, advisory, or occasional postings. United States v. Hartwell (1868). (5) "Emoluments" means more than salary, *McLean v. United States* (1912), but it is unclear how much more. In 1937, the Senate approved the appointment of Hugo L. Black to the Supreme Court even though Congress had passed legislation significantly augmenting the pensions of Supreme Court justices during the Senate term in which Black served. Later, under Presidents Lyndon B. Johnson and James Earl Carter, the Department of Justice opined that it did not matter when Congress passed legislation increasing the salary for an office, so long as the former Member of Congress was nominated before the salary increase went into effect. The courts have dismissed suits contesting the appointments of Justice Hugo L. Black and Judge Abner Mikva on lack of standing grounds. *Ex parte Levitt* (1937); *McClure v. Carter* (1981).

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story, even in his panegyric, was hesitant about the clause: "It has been deemed by one commentator as admirable provision against venality, though not perhaps sufficiently guarded to prevent evasion." For well over a century, Presidents and their attorneys general had rigorously followed the formal requirements of the clause. In 1973, however, Congress and the executive devised an effective stratagem to avoid the limitations of the clause. Termed the "Saxbe fix," it copied an idea invented during the Taft administration. President Richard M. Nixon appointed Senator William Saxbe to be Attorney General even though Saxbe had been a Senator when Congress raised the Attorney General's salary from $35,000 to $60,000. Under an opinion from acting Attorney General Robert H. Bork, the Congress "fixed" the violation of the clause by returning the Attorney General's salary to the $35,000 level.

Presidents Gerald R. Ford, Carter (appointing Senator Edmund Muskie as Secretary of State), and William Jefferson Clinton (appointing Senator Lloyd Bentsen as Secretary of the Treasury) went further and utilized "temporary Saxbe fixes," persuading Congress to reduce the salary of a position to which a Member had been appointed but only until the date when the Member's term would have ended. Only under Attorney General Edwin Meese III did the Department of Justice eschew this end run around the formal requirements of the Sinecure Clause. In 1987, the Office of Legal Counsel issued an opinion that Senator Orrin Hatch would be ineligible for nomination to the Supreme Court because Congress had raised the salaries for Associate Justices during Hatch's term. President Ronald Reagan chose to nominate Judge Robert H. Bork, whom the Senate did not approve.

Justice Joseph Story had also written, "It has sometimes been a matter of regret, that the disqualification had not been made co-extensive with the supposed mischief; and thus to have for ever excluded members from the possession of offices created, or rendered more lucrative, by themselves." Yet he still adds ambivalently: "Perhaps there is quite as much wisdom in leaving the provision, where it now is." The upshot is that fidelity to the Constitution by any of the branches of the government is as much a function of internal commitment as it is of external constraint.

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See Also

Article II, Section 2, Clause 2 (Appointments Clause)

Suggestions for Further Research

3 Op. Off. Legal Counsel 286 (1979)

17 Op. Att'y Gen. 365 (1882)

33 Op. Att'y Gen. 88 (1922)

42 Op. Att'y Gen. 381 (1969)

John F. O'Connor, *The Emoluments Clause: An Anti Federalist Intruder in a Federalist Constitution*, 24 Hofstra L. Rev. 89 (1995)

Michael S. Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907 (1994)

Significant Cases

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868)

McLean v. United States, 226 U.S. 374 (1912)

Ex parte Levitt, 302 U.S. 633 (1937)

McClure v. Carter, 513 F. Supp. 265 (D.C. Idaho 1981), *aff'd*, 454 U.S. 1025 (1981)