NORTH CAROLINA LAW REVIEW

Volume 53 | Number 1 Article 5

11-1-1974

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Recommended Citation

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 (1974).
Available at: http://scholarship.law.unc.edu/nclr/vol53/iss1/5

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SENATOR/ATTORNEY-GENERAL SAXBE AND THE "INELIGIBILITY CLAUSE" OF THE CONSTITUTION: AN ENCROACHMENT UPON SEPARATION OF POWERS

DANIEL H. POLLITT†

The generation of men who framed and established our Constitution was well aware that "the votes of members of Parliament had been bought, with money *or office* by nearly every minister who had been at the head of affairs"; and that this practice of "parliamentary corruption" was freely and sometimes shamefully applied throughout the American war."[1] The framers did not want this practice to continue here, and consequently wrote an "ineligibility" and an "incompatibility" clause into article 1, section 6 of the Constitution.

> 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.

This clause had its origin in a strong desire to avoid the example of England and in an even stronger belief in the principle of separation of powers.[2] George Mason pronounced during the constitutional convention that this curb on the Executive power to appoint was "the cornerstone on which our liberties depend—and if we strike it out we are erecting a fabric for our destruction."[3]

Despite the passion and heated debate that preceded the enactment of this clause, it has lain practically dormant for almost two hundred years.[4] Interest was revived in 1973 when President Nixon ap-

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1. 2 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 242-43 (1858) (emphasis added).

2. Reservists Comm. To Stop War v. Laird, 323 F. Supp. 833, 835 (D.D.C. 1971).

3. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 381 (1911).

4. *Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam) is the only case arising under the "ineligibility" clause, and there the Supreme Court avoided decision on the merits by dismissing it for lack of "standing." *See* text accompanying notes 66-70 *infra.*

pointed Senator William Saxbe to be his fourth Attorney General. On the face of the Constitution, Saxbe was "ineligible" for the appointment. He was elected to the Senate from Ohio in 1968, and, during his term of office, Congress had increased the salary of the Attorney General from 35,000 dollars to 60,000 dollars per annum.[5] However, there was an "end run" around the Constitution. Congress rolled back the Attorney General's salary to 35,000 dollars and the Senate then confirmed the nomination by the overwhelming vote of seventy-five to ten.[6] Reference was repeatedly made during the Senate debate to the 1909 appointment of Senator Philander Knox to be the Secretary of State. Congress had increased the salary of that office during the time for which Senator Knox was elected, and the Congress oblingly rolled back the salary to pre-existing levels to remove any impediment to his appointment. An Assistant Attorney General gave the "unofficial opinion" that the ineligibility clause did not bar the appointment. He reasoned that "the sole purpose" of the clause was to destroy the expectation of a legislator that "he would enjoy the newly created emoluments" and that, if "no such hope can exist" because the increased salary "is made and then unmade," the case "falls outside of the purpose of the law and is not within the law."[7] In other words, those who

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Reservists Comm. to Stop War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), was the first case filed under the "incompatability" clause. Legal scholars, apparently, have had no interest in the clause, as the law reviews are barren of any discourse on the subject.

5. The increase came into effect under the provisions of 2 U.S.C. § 359 (1970). This provision allows a salary increase to take effect thirty days after recommendation by the President. President Nixon recommended the increase on January 15, 1969. 34 Fed. Reg. 2241 (1969).

6. N.Y. Times, Dec. 18, 1973, at 35, cols. 4-8. This was not the first time the Nixon Administration ran afoul of the ineligibility clause of the Constitution. Donald Rumsfeld was appointed from the House of Representatives to be Director of the Office of Economic Opportunity, despite the fact that the salary for the director had been increased while Mr. Rumsfeld was a legislator. President Nixon sought to avoid the issue by paying Mr. Rumsfeld nothing as Director of the Office of Economic Opportunity, and 42,500 dollars as an "assistant to the President." *Id.*, Nov. 2, 1973, at 22, cols. 5-6.

Melvin R. Laird took the oath of office as a member of the House of Representatives on January 3, 1969. President Nixon appointed him Secretary of Defense, despite the fact that a salary increase for that office was to take effect on March 1 of that year unless vetoed by the Congress. Attorney General Ramsey Clark advised that the appointment was lawful (despite the increase in emoluments "during the time" for which Laird "was elected") because the salary increase was tentative as of the time of the appointment. 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969); *see* text accompanying notes 90-95 *infra*.

7. 43 CONG. REC. 2403 (1909). *But see* text accompanying notes 40-42 *infra*. Apart from the merits of this "unofficial opinion" by an assistant attorney general, the Philander Knox situation is of limited precedential value. President Taft, unlike President Nixon, made no public announcement of his intention to nominate the Senator prior to the enactment of the law rolling back the increased emolument. This permitted

favored Saxbe (and earlier, Philander Knox) would accommodate a presidential appointment by reading the clause to mean that a Congressman or Senator may [instead of "shall not"], during the time for which he was elected," 'be appointed to any civil office . . . the emoluments whereof shall have been increased during such time' *provided only* that the increase in emolument is not available to the appointee 'during such time.' "[8]

This is a far too narrow reading of the Constitution. "Parliamentary corruption" is a two-way street; for every "corruptee" there must be a "corruptor."[9] The ineligibility clause does indeed destroy the expectation that a Representative or Senator might have that he would enjoy the newly created office or the newly created emoluments, but the Constitution does far more. Legislators are incapacitated from promotion to executive offices because otherwise "their eligibility to offices would give too much influence to the executive."[10] The ineligibility clause is aimed at incapacitating the Executive, not the individual members of the Congress, all for the underlying purpose of preserving the independence of the Congress and the President, each from the the other."[11]

Those who framed the Constitution knew from the British experience that, if the Executive was left at liberty to purchase votes "by the inducements of money or office," conscience might become "false to duty, and corruption, having once entered the body politic, may be

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Taft supporters in the House to maintain that there was no constitutional issue involved, that the issue was simply an economy measure.

Despite this, and all of the pressures that a newly elected President and a majority party could command, the bill reducing the salary passed the House by a vote of 173 to 116, with 90 Representatives abstaining. 43 CONG. REC., *supra*, at 2415. In the Senate, the issue was never raised during the enactment of the "roll back bill" or during the subsequent confirmation. This prompted Congressman Clark in the House to proclaim that "senatorial courtesy, . . . overrides the Constitution, laws, and every other thing known among men." *Id.* at 2415.

8. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 20 (1948).

9. "Public morality . . . condemns with equal severity and equal justice both the giver and the receiver in every transaction that can be regarded as a purchase of votes upon particular measures or occasions, whatever may have been the consideration or motive of the bargain." 2 G. CURTIS, *supra* note 1, at 244-45.

10. The words are those of Roger Sherman of Connecticut during the debate on this Clause. A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 764 (1968).

11. Corwin writes that the clause derives from a repudiation of the British "Cabinet System" in which the executive power is placed in the hands of the leaders of the controlling party in the House of Commons. In contrast, the "ineligibility" and "incompatibility" clauses confirm and support the doctrine of the separation of powers in which the business of legislation and that of administration proceed largely in formal independence of each other. *See* E. CORWIN, *supra* note 8, at 20-21.

employed to effect bad ends as well as good."[12] On the other hand, the Framers did not want to penalize those who served in the legislative bodies by totally denying them opportunity for higher office. This total bar, it was thought, might deny Congress the services "of the most capable citizens" by eliminating the possibility of subsequent appointment to "the higher or more lucrative offices of state." The history of the constitutional debate is an effort to prevent the evils of these opposite mischiefs.[13]

I. THE CONSTITUTIONAL DEBATES

On May 25, 1787, delegates from the original states organized a Constitutional Convention in Philadelphia and remained in almost constant session until September 17 to frame our Constitution. Work began in earnest on May 29 when Edmund Randolph submitted the so-called Virginia Plan for organizing a federal government. Most of the subsequent discussion concerned alternatives and amendments to the Virginia Plan.

Randolph's fourth and fifth resolutions provided that the members of the National Legislature would be ineligible to hold "any office," be it state or federal, during the elected "term of service" and for an undetermined period of time thereafter.[14] Debate began on these proposals on June 22 when Nathaniel Gorham of Massachusetts moved to strike out the ineligibility clause insofar as it barred appointment to offices created "under the national government."[15] He considered the

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12. 2 G. CURTIS, *supra* note 1, at 247. In addition to the British experience, the Framers also were aware of the experiences of the Congress that had the sole power of appointment to offices under the Articles of Confederation. Complaints had been made of the frequency with which the Congress had filled these offices with its own members. The original drafts of the Constitution provided that the legislative body would have the power of appointment; thus, there was a need to guard against the potential abuse if the members of the Congress were left at liberty to appoint each other to offices of their own creation. *Id.* at 248-50.

13. *Id.* at 248.

14. The Randolph Resolutions read as follows:

> 4. Resd. that the members of the first branch of the National Legislature . . . be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of ——— after its expiration.
>
> 5. Resd. that the members of the second branch of the National Legislature . . . be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of ——— after the expiration thereof.

1 M. FARRAND, *supra* note 3, at 20-21.

15. 2 *id.* at 379.

ban on appointments to be both "unnecessary and injurious."[16]

George Mason of Virginia rose in opposition to this motion. He pointed out that in England the "power of the crown" had "remarkably increased" during the last century through "the sole power of appointing the increased officers of government," and he concluded that this ineligibility clause is "the cornerstone on which our liberties depend."[17] Pierce Butler of South Carolina echoed the sentiment that it was the Executive power of appointment that caused and resulted in parliamentary "venality and corruption."[18]

Rufus King of Massachusetts spoke for the Gorham amendment and against the Randolph "ineligibility" resolution. He thought this "restriction on the members would discourage merit" and that it "would also give a pretext to the Executive for bad appointments, and he might always plead this as a bar to the choice he wished to have made."[19]

James Wilson of Pennsylvania also rose to support the proposed Gorham amendment, because "[s]trong reasons must induce me to disqualify a good man from office."[20] Admitting the potential for "cabal and intrigue between the executive and legislative bodies" that could exist without the ineligibility clause, he nonetheless thought it more important "to hold forth every honorable inducement for men of abilities to enter the service of the public." He then put this case: "Suppose a war break out and a number of your best military characters were members; must we lose the benefit of their services? Had this been the case in the beginning of the war, what would have been our situation?—and what has happened may happen again."[21]

Alexander Hamilton also spoke in support of the Gorham amendment. He too confessed to a danger "where men are capable of holding two offices." But he saw the need for a strong Executive, with

16. *Id.* at 375. Mr. Gorham remarked that "[i]t was true abuses had been displayed in G.B. [Great Britain] but no one cd. [could] say how far they might have contributed to preserve the due influence of the Gov't nor what might have ensured in case the contrary theory had been tried." *Id.* at 375-76.

17. *Id.* at 380-81. Mr. Mason asked: "Why has the power of the crown so remarkably increased the last century? A stranger, by reading their laws, would suppose it considerably diminished; and yet, by the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom." *Id.*

18. *Id.* at 379. Mr. Butler said in full: "We have no way of judging of mankind but by experience. Look at the history of the government of Great Britain, where there is a very flimsy exclusion—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption." *Id.*

19. *Id.* at 376.

20. *Id.* at 379.

21. *Id.* at 380.

the power to appoint Congressman and Senators to high office, because, as he put it, "[o]ur prevailing passions are ambition and interest" and the Executive might need "to avail himself of those passions" to induce the legislature to act "for the public good." He was against "all exclusions and refinements, except only in this case; that, when a member takes his seat, he would vacate every other office."[22] The Gorham motion was put to a vote, and defeated, four states in favor, four states against, and three states divided.[23]

James Madison of Virginia then offered a compromise resolution, precluding a member of the legislature only from those offices "which may be created or augmented while he is in the legislature."[24] He "supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced" and that if the "door was shut agst. [against] them" it might properly be left open for the appointment of members to other offices "as an encouragement to the Legislative service."[25] He described his amendment "as a middle ground" between an eligibility in all cases and an absolute disqualification in all cases. He stressed the need for securing the services of "the most capable citizens" and argued "from experience" that the Legislature of Virginia would have been without its best members had "they been ineligible to Congress, to the Government and honorable offices of the State."[26]

There was immediate opposition to Madison's proposed "middle ground," largely based on fear of an all-powerful Executive. Elbridge Gerry of Massachusetts pointed out that "we have . . . endeavored to keep distinct the three great branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators . . . to be too much influenced by the executive, in looking up to him for offices."[27] Pierce Butler of South Carolina agreed that the Madison proposal "does not go far enough," and then expounded how George II had won his way over Parliament: "To some of the opposers he gave pensions—others offices, and some, to put them out of the house

22. *Id.* at 381-82. Earlier in the debates Benjamin Franklin had remarked in a similar vein that "there are two passions which have a powerful influence on the affairs of men. They are ambition and avarice; the love of power, and the love of money." *Id.* at 82.

23. *Id.* at 377.

24. *Id.* at 380.

25. *Id.* at 386.

26. *Id.* at 388-89.

27. *Id.* at 393.

of commons, he made lords."[28] George Mason of Virginia also "enlarged on the abuses & corruption in the British Parliament, connected with the appointment of its members, He cd. [could] not suppose that a sufficient number of Citizens could not be found who would be ready, without the inducement of eligibility to offices, to undertake the Legislative service."[29] Daniel Jenifer also opposed the Madison motion because, in Maryland "senators are appointed for 5 years and they can hold no other office. This circumstance gives them the greatest confidence of the people."[30]

Charles Pinkney of South Carolina then moved to strike that part of the clause which disqualified a member of the federal legislature from appointment to an office "established by a particular state." He argued "from the inconvenience" which such a restriction would expose the states wishing for the services, as well as "from the smallness of the object to be attained by the restriction."[31] Sherman of Connecticut seconded the motion with the comment that "it wd. [would] seem that we are erecting a Kingdom at war with itself." The motion was adopted by a vote of eight states in favor with three opposed.[32]

At that stage of the debate, it was not yet determined whether federal appointments would be made by the legislative, by the Executive, or by both acting together; and many opposed the Madison "middle ground" because it would do nothing to eliminate "the shameful partiality of the legislature to its own members."[33] Rutledge of South Carolina, for example, "was for preserving the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption."[34] The Madison amendment was put to a vote, and defeated with eight states opposed, two in favor, and one state divided.[35]

A final motion was then made to amend the clause by eliminating the Provision that would have made legislators ineligible for appointment not only during their elected term, but also "for the space of one year after its expiration." Mason spoke against this amendment, because "places may be promised at the close of their duration, *and*

28. *Id.* at 391.
29. *Id.* at 387.
30. *Id.* at 394.
31. *Id.* at 386.
32. *Id.*
33. *Id.* at 387 (statement of George Mason).
34. *Id.* at 386.
35. *Id.* at 390.

. . . *a dependency may be made.*"[36] Hamilton spoke against the motion because "the clause may be evaded many ways. Offices may be held by proxy—they may be procured by friends, etc." Rutledge admitted the possibility of evasion, but said "this is no argument against shutting the door as close as possible." The motion was defeated by a vote of six states to four, with one divided.[37]

The original Randolph Resolutions thus survived all proposed amendments, other than the one that permitted members of the federal legislative bodies to accept appointments to offices "established by a particular state." In late June the amended version was sent to the Committee of Detail for "Stylistic Changes," and that Committee reported the clause back to the Convention as proposed article VI, section 9 of the Constitution: "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."[38]

The debate that resumed on August 14 closely paralleled the earlier discussions. Mr. Pinkney of South Carolina began with the observation that the ineligibility clause was "inconvenient, because the Senate might be supposed to contain the fittest men" and he "hoped to see that body become a School of Public Ministers, a nursery of Statesmen."[39] His immediate proposal, however, was a substitute resolution which would bar legislators from office only when "they . . . receive any salary, fees, or emoluments of any kind" with the further provision that "the acceptance of such office shall vacate their seats respectively."[40] This proposal would have minimized the "parliamentary corruptions" caused by those legislators whose votes can be bought by "avarice, the love of money," but would have done nothing to ease the problem concerning those legislators whose votes can be purchased by "ambition, the love of power."[41] The Pinkney substitute was defeated by a vote of five states in favor, five opposed, and one state divided.[42]

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36. *Id.* at 394 (emphasis added).

37. *Id.*

38. *Id.* at 180. The Committee on Style thus eliminated the ineligibility of members of the House "for one year" after their term of office expired.

39. *Id.* at 283.

40. *Id.* at 284.

41. *See* the discussion by Benjamin Franklin and Alexander Hamilton at text accompanying note 22 *supra.*

42. 2 M. FARRAND, *supra* note 3, at 283. The defeat of the Pinkney proposal is certainly relevant to the argument made during the Philander Knox (and the William

General debate then resumed on the clause, with the opponents speaking against any limitation whatsoever on the power of the Executive to appoint members of the Legislature to high office. John Mercer of Maryland thought this power was absolutely necessary for effective government. "Governm[en]ts," he said, "can only be maintained by *force or influence*" and since the "Executive has not *force*" the clause depriving him of influence "by rendering the members of the [Legislature] ineligible to Executive offices" would make him "a mere phantom of authority."[43] James Wilson of Pennsylvania also spoke against any limitation which would render the members of Congress "ineligible to Natl. [National] offices," and he was "far from thinking the ambition which aspired to Offices of dignity and trust, an ignoble or culpable one."[44] On the other hand, Hugh Williamson commented that "he had scarcely seen a single corrupt measure in the Legislature of N. Carolina which could not be traced up to office hunting,"[45] and Roger Sherman of Connecticut stoutly maintained that "the Constitution shd. [should] lay as few temptations as possible in the way of those in power."[46]

Gouverneur Morris of Pennsylvania then "put the case of a war, and the Citizen the most capable of conducting it, happening to be a member of the Legislature." He moved to insert a provision which would except from the ban on appointment "offices in the army or navy: but in that case their offices shall be vacated."[47] Edmund Randolph, who authored the original Virginia Plan, spoke generally against "opening a door for influence or corruption," but admitted great weight to the argument which related to the case of war, and a co-existing incapacity of the fittest commanders to be employed." He agreed to the exception proposed by Mr. Morris.[48]

Mr. Pinkney then urged a general postponement of further debate on the clause pending further refinement in the Constitution concern-

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Saxbe) debate that the "sole purpose" of the clause was to deny any expectation that the legislator might enjoy an increased emolument. *See* text accompanying note 7 *supra.*

43. 2 M. FARRAND, *supra* note 3, at 284. Mr. Mercer continued as follows: "All Gov. must be by force or influence. It is not the King of France—but 200,000 janisaries of power that govern that Kingdom. There will be no such force here; influence then must be substituted; and he would ask whether this could be done if the members of the Legislature should be ineligible of offices of State. . . ." *Id.* at 289.

44. *Id.* at 288.

45. *Id.* at 287. The actual wording of this proposal is unclear; *see* 1 *id.* at xvii-xix.

46. 2 *id.* at 287.

47. *Id.* at 289.

48. *Id.* at 290.

ing the distribution between the Senate and the Executive of the appointive power. This was agreed to, and the Randolph proposal was sent to a Committee of Eleven (composed of one member from each state) along with other unfinished business.

On September 1 the Committee of Eleven reported for further consideration the following draft, expressing the sentiment of the states: "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."[49]

By this stage of the convention, it was established that the significant appointive power would be lodged in the Executive with certain lesser appointive power reserved to the Congress.[50] The proposed draft was significant then, in that it continued the ban against the appointment of "The Members of each House" during the time for which they shall be elected. This clearly reflects the expressed fears against "Executive influence." The proposed draft was also significant in that it eliminated the ban against appointment to military office, with the new provision against dual office holding—the so-called "incompatibility clause."[51]

Mr. Pinkney was the first to speak on the proposals. He favored the "incompatibility clause," but thought this insufficient to cure the mischief. He proposed, for a second time,[52] his amendment that the members of each House should be incapable of holding *only those offices* for which they received "any salary, fees, or emoluments," and made reference to the "policy of the Romans, in making the temple of virtue the road to the temple of fame."[53] This proposal was defea-

49. *Id.* at 483 (emphasis added).

50. U.S. CONST. art. II, § 2 provides that the President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counselors, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law. . . ." This takes care of all of the important officers. The Constitution then continues to read: "but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

51. This juxtaposition of exclusions and inclusions clearly contemplates that a member of either House who accepts the appointment to a military office, thereby forfeits his membership in that House. *See* Reservists Comm. To Stop War v. Laird, 323 F. Supp. 833 (D.D.C. 1971).

52. *See* text accompanying note 40 *supra.*

53. 2 M. FARRAND, *supra* note 3, at 489-90.

ted by a vote of eight states to two.[54]

Rufus King of Massachusetts then proposed an amendment that would bar the members of each House only from those offices *created during their respective terms of office.* He said that this would make only a slight inroad into the principle of "incapacity," because his amendment would "exclude the members of the first Legislature" and "most of the Offices wd. [would] then be created."[55] Sherman of Connecticut was in principle still "for entirely incapacitating members of the Legislature" as their eligibility to offices "would give too much influence to the Executive." But apparently sensing that the King amendment might pass, he urged that "incapacity ought at least to be extended to cases where salaries should be *increased,* as well as *created,* during the term of the member."[56] The King amendment, as thus modified by Sherman, was restated by Williamson of North Carolina and enacted by a vote of five states in favor, four states against, and one state divided.[57] This was the "middle ground" earlier proposed by Madison, and then decisively rejected.[58] In any event, the Framers quickly agreed to the "last clause rendering a Seat in the Legislature and an office incompatible,"[59] and the debate was at an end.

The Constitution then was sent to the states for ratification or rejection. The recorded debate, while limited, supports the conclusion that the clause was entered to affirm and reinforce the doctrine of separation of powers by denying the Executive a power to influence the legislators with promises of appointment to high office.

In Virginia, the opponents thought the clause "entirely imperfect," and reference was made to the British House of Commons in which "dependents and fortune-hunters . . . are willing to sell the interest of their constituents to the crown."[60] These opponents proposed a total ban on appointment of legislators to any office, during or after their terms. Patrick Henry argued that the "hope or expectation of offices" is the "principle source of corruption" and that the ban on appoint-

54. *Id.* at 490.
55. *Id.*
56. *Id.*
57. *Id.* at 492.
58. *See* text accompanying notes 24 & 33 *supra.* Curtis attributes the shift in sentiment to the fact that "the mischiefs most apprehended at the time of Mr. Madison's proposition were in a great degree prevented by taking from the legislature the power of appointing to office; and that this modification" made the compromise possible. 2 G. CURTIS, *supra* note 1, at 251.
59. 2 M. FARRAND, *supra* note 3, at 492.
60. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 375 (1836).

ment only during the term of office was inadequate because the legislators might experience "hope or expectation of offices or emoluments" after their term of office expired.[61] James Madison admitted that the clause was "a mean between two extreme," but argued that "ineligibility" limited to a term of office was necessary, because otherwise the Henry proposal for a permanent ban on appointment would "prevent those who had served their country with the greatest fidelity and ability from being on a par with their fellow-citizens."[62]

In the New York debate, Alexander Hamilton argued that the ineligibility clause was adequate, even "admitting, in the president, a disposition to corrupt." He reasoned that the President would have few such opportunities, because "[m]en who have been in the Senate once, and who have a reasonable hope of a re-election, will not be easily bought by offices."[63] In Massachusetts, the clause was described as a "check to ensure the independence of the legislative branch from the executive branch";[64] and in Pennsylvania, as a useful tool to prevent "undue influence" by the Executive on the legislators. Throughout the debates it was admitted that members of the Congress *might* be corrupted by the Executive power of appointment, but that it is "an objection against human nature" and "[t]he danger is certainly better guarded against in the proposed system than in any other yet devised."[65]

The history of the ineligibility and incompatibility clauses shows that the original purpose of the clause was to protect against legislative corruption by the executive's appointment power. 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 bar the use of the appointment power to gain influence. It is designed to prevent the offering of high position as an inducement

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61. *Id.* at 368-69. Mr. Justice Story agreed with the Patrick Henry philosophy when he wrote that,

> the reasons for excluding persons from office who have been concerned in creating them, or increasing their emoluments are 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. *The actual provision, however, does not go to the extent of the principle;* for his appointment is restricted *"only during the time for which he was elected,"* thus leaving 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.

1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 867 (1858) (emphasis added).

62. 3 J. ELLIOT, *supra* note 60, at 370.

63. 2 *id.* at 321.

64. *Id.* at 85-86.

65. *Id.* at 508-09.

to legislators, and was never contemplated as a technicality of salary scales.

The paucity of authoritative discussion of the clause necessitates that great weight be placed on its history in determining its application. The few occasions when the clause was called into question will now be examined.

II. Ex Parte Albert Levitt: The Case of Mr. Justice Hugo L. Black

The Supreme Court has been asked to interpret the clause twice, once under the ineligibility clause, and once under the incompatibility clause. In both cases, the Court refused to reach the merits of the case.

Hugo L. Black was elected to the Senate of the United States in 1932 for a six-year term. In March 1937 Congress by law gave to Justices of the United States Supreme Court the right to *retire* at age seventy at a pension equal to their then-existing salary.[66] Prior to this Act of Congress, Justices who *resigned* at age 70, but not those who retired, received a pension equal to the salary they then received. But there is a difference between retirement and resignation. The pension of a Justice who resigned (but not the pension of a Justice who retired) was then subject to income taxation. Moreover, a retired Justice (but not a Justice who resigned) might be called upon to perform certain voluntary judicial duties.[67] In August 1937 Senator Black was appointed to the Supreme Court. The appointment was defended by the argument that the Act of Congress did not "increase the emoluments" of the office, and, even if it did, Mr. Black was then only fifty-one years old, the "emoluments" would not be available to him for nineteen years, if at all.[68]

Albert Levitt filed an original suit in the Supreme Court requesting that Mr. Justice Black be required "to show cause" why he should be permitted to serve as an Associate Justice.[69] The Supreme Court did not reach the merits of the case but dismissed for the lack of a "justiciable controversy." It wrote, briefly:

> The motion papers disclose no interest upon the part of the petitioner [Albert Levitt] other than that of a citizen and a member

66. Act of March 1, 1937, ch. 21, §§ 1-2, 54 Stat. 24 (codified as amended, 28 U.S.C. § 371 (1970)).

67. Note, *Legality of Justice Black's Appointment to Supreme Court*, 37 Colum. L. Rev. 1212 (1937).

68. E. Corwin, *supra* note 8, at 18-19.

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

> of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[70]

Ex parte Levitt was decided in 1937, and the "law of standing" has evolved greatly during the intervening years.[71] Indeed, the *Levitt* rationale was challenged in the first suit ever filed under the incompatibility clause, *Reservists Committee to Stop War v. Laird.*[72] There, an association of reservists filed suit against the Secretary of Defense, and the Secretaries of the Army, Navy and Air Force. Plaintiffs asked that the various Secretaries be required to remove from the reserve rolls the 117 Senators and Representatives then holding commissions in the various reserve components.

On the merits, the issue is a simple one. Membership in a military component is "incompatible" with membership in Congress because of the inherent tension between the loyalty a reserve officer owes to the President as his Commander in Chief and the dispassionate duty a Congressman owes to the constituents who elected him. Under the precedents the issues seem totally free from doubt. In 1803 Representative John Van Ness was forced to select between his seat in the House and a commission in the District of Columbia Militia.[73] In 1846 Representative Edward Baker had to choose between his seat in the House and a commission as a colonel of volunteers from Illinois.[74] In 1864 Representative Frank Blair had to choose between his seat in the House and a major-generalship in the Tennessee Volunteers.[75] In 1916 the House Judiciary Committee, upon a directive from the House, undertook a careful review of the situation and reported that membership in the House was "incompatible" with holding a commission in any National Guard.[76]

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70. *Id.* at 634.

71. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

72. 323 F. Supp. 833 (D.D.C. 1971), *noted in* 40 GEO. WASH. L. REV. 542 (1972); 85 HARV. L. REV. 507 (1971) *and* 40 U. CIN. L. REV. 620 (1971).

73. 1 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 592-93 (1907).

74. *Id.* at 594-95.

75. *Id.* at 601-03.

76. H.R. REP. No. 885, 64th Cong., 1st Sess. (1916).

The more difficult and relevant questions are whether the Reservists Committee (or its members) has "standing" to raise this issue and whether the issue is "justiciable." District Judge Gesell held that the plaintiffs did have standing. He reasoned that the incompatibility clause was designed "to ensure the integrity of a particular form of government, by preventing encroachments upon the separation of powers,"[77] and hence, "any violation of the Clause" is an injury to all citizens of the United States. Elaborating somewhat, he wrote that

> the interest in maintaining independence among the branches of government is shared *by all citizens equally,* and since this is the primary if not the sole purpose of the bar against Congressmen holding executive office, the interest of plaintiffs *as citizens* is undoubtedly one which was intended to be protected by the constitutional provision involved.[78]

The District of Columbia Court of Appeals affirmed this holding without an opinion. The Supreme Court, however, reversed without reaching the merits, on the grounds that the plaintiffs lacked "standing." The Court ruled that the plaintiffs raised only a "generalized grievance about the conduct of Government," and expressly reaffirmed *Levitt* "in holding that standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public."[79]

It is thus doubtful that anyone has the necessary standing to challenge the Saxbe appointment as violative of the ineligibility clause,[80] with the possible exception of the ten senators who voted against his confir-

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77. 323 F. Supp. at 837.

78. *Id.* at 841 (emphasis added).

79. Schlesinger v. Reservists Comm. to Stop War, 94 S. Ct. 2925, 2930, 2932 (1974).

80. The title of a de facto officer cannot be attacked directly or collaterally. One is an officer de facto if, like Attorney General Saxbe, he exercises the duties of office *under color of an election or appointment.* Note, 37 COLUM. L. REV., *supra* note 64, at 1215. Thus, a defendant in a criminal case cannot attack the validity of his conviction on the theory that both the jury and the judge were appointed in violation of a statute, McDowell v. United States, 159 U.S. 596 (1895); that the presiding judge was appointed in violation of the Constitution, *Ex parte* Ward, 173 U.S. 452 (1899); or that the prosecuting attorney was illegally appointed under state law, United States *ex rel.* Doss v. Lindsley, 148 F.2d 22 (7th Cir. 1944), *cert. denied,* 325 U.S. 858 (1945). Nor will the defendant in a criminal prosecution under the Selective Service Act be heard to argue that the members of the local draft board which ordered his induction were serving illegally because of the statutory prohibition against more than twenty-five years of service. United States v. Groupp, 333 F. Supp. 242 (D. Me. 1971), *aff'd on other grounds,* 459 F.2d 178 (1st Cir. 1972). "The result of the authorities" as the Supreme Court once held, "is that the title of a person acting with color of authority, even if he be not a good officer in point of law," is not subject to attack. *Ex parte* Ward, *supra,* at 456.

mation.[81] However, the issue might be raised administratively by a challenge to the payment of the Attorney General's salary by the General Accounting Office.[82]

III. Opinions of the Attorney General

On several occasions, the effects of the ineligibility clause on presidential appointments have been considered by the Attorney General. In the majority of the reported opinions, a strict construction of the clause was adopted, forcing rejection of a proposed appointment.

A. Governor Kirkwood. The first such ruling was made by Attorney General Benjamin Brewster in 1882.[83] Governor Kirkwood of Iowa had been elected to the Senate for a term that expired on March 3, 1883. In March 1881, two years before his term expired, Kirkwood resigned from the Senate to accept the position of Secretary of the Interior. He subsequently resigned from that office in 1882 to retire to private life. Thereafter, but prior to March 3, 1883, Congress created the office of tariff commissioner, and President Chester Arthur desired to appoint Governor Kirkwood to that position. Attorney General Brewster advised the President that Governor Kirkwood was disabled from receiving that appointment because of the bar against the appointment of a Senator to any civil office which shall have been created "during the time for which he was elected." The Attorney General recited that:

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81. *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939), in which Mr. Chief Justice Hughes wrote for the Court that the dissenting members of the Kansas Senate had "a plain, direct and adequate interest in maintaining the effectiveness of their votes" sufficient to challenge the legality of Kansas' ratification of the "child labor" amendment to the Constitution. *Id.* at 438.

Without discussion, the federal courts have assumed the "standing" of the incumbent to an appointive position, Padron v. Puerto Rico *ex rel.* Castro, 142 F.2d 508 (1st Cir. 1944), *cert. denied*, 323 U.S. 791 (1945), and the "standing" of the opposing candidate for elected office to challenge the "eligibility" of a legislator for those offices, Kederick v. Heintzleman, 132 F. Supp. 582 (D. Alas. 1955). In each of these cases, the territorial organic act contained prohibitions that "no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected . . . ." *Id.* at 583. In *Padron* the emoluments of the office had been increased while the new appointee was a member of the legislature. In *Kederick* the office had been created while the rival opponent had been a member of the legislature. In each the federal court held that the ineligibility clause was a bar to the office sought.

82. *See* text accompanying notes 86, 87, 91 *infra.*

83. 17 Op. Att'y Gen. 365 (1882). The Attorney General wrote that he gave the subject "a serious consideration and a thorough examination" because of the President's "desire to appoint Governor Kirkwood" and "the hope of all the members of the Cabinet that he would be appointed. . . ."

> It is unnecessary to consider the question of the policy which occasioned this constitutional prohibition. I must be controlled exclusively by the positive terms of the provision of the Constitution. The language is precise and clear, and, in my opinion, disables him from receiving the appointment. The rule is absolute, as expressed in the terms of the Constitution, and behind that I can not go . . . .[84]

B. Matthew W. Ransom. The second ruling was written by Acting Attorney General Holmes Conrad in 1895.[85] Matthew W. Ransom was elected from North Carolina to the Senate for a term of office which expired on March 3, 1895. In 1891, early in his term, the Congress increased the salary for those serving in the diplomatic and consular service. On February 23, 1895, near the end of his term, President Grover Cleveland nominated Senator Ransom as minister plenipotentiary to Mexico. The Senate confirmed the nomination the same day. Senator Ransom took the oath of office on March 4, the day *after* his Senatorial term had expired, and his commission was delivered to him the following day.

Thereafter, the "Auditor for the state and other Departments" ruled that Ambassador Ransom was not entitled to a salary because of the ineligibility clause, and the Secretary of State requested the advice of the Attorney General on the matter.[86] Attorney General Conrad agreed with the Auditor that the presidential appointment of a Senator to any civil office, the emoluments whereof have been increased *during the time for which he was elected,* is "a nullity." The Attorney General then wrote as follows:

> It is suggested in your letter that the commission of Mr. Ransom was not actually signed by the President until the 5th of March, which was after the expiration of the time for which Mr. Ransom was elected a Senator in Congress.
>
> But 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."
>
> The vital question here, then, would seem to be, not when was Mr. Ransom *commissioned,* but when was he *appointed*? . . .
>
> . . . .
>
> I am of opinion, then, that Mr. Ransom's appointment as envoy extraordinary and minister plenipotentiary to Mexico was

84. *Id.* at 366.
85. 21 OP. ATT'Y GEN. 211 (1895).
86. *Id.*

> 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 minister to Mexico were increased, Mr. Ransom was not, in my opinion, eligible to appointment to that office.[87]

C. William S. Kenyon. The third opinion was written by Attorney General Harry M. Daugherty, and he too gave the constitutional language a very strict construction.[88] William S. Kenyon was elected to the Senate for a term that expired on March 4, 1919. During his first term in office, Congress increased the salary of the Judges of the Circuit Court. In 1918 Senator Kenyon was reelected to a *second term of office* which began on March 4, 1919. In 1922, during Kenyon's second term in the Senate, President Harding nominated him to be a United States Circuit Judge for the Eighth Circuit, and the appointment was confirmed by the Senate. Thereafter, President Warren Harding requested an opinion from the Attorney General "as to whether or not the provisions of the Constitution make it impossible for" Senator Kenyon "to qualify" for that office. Attorney General Daugherty ruled that the appointment was *not* barred by the Constitution and wrote as follows:

> two things must concur in order to deprive a Senator or a Representative of his right to appointment to a civil office under the above-quoted Section of the Constitution, to wit:
>
> (a) Increasing the emoluments of an office; (b) appointing a Senator or Representative to an office the emoluments of which had been increased, *both occurring during the term which the Senator or Representative was then serving.*
>
> There is no such concurrences of events in the case of Mr. Kenyon. The emoluments of the office to which he has been appointed were not increased "during the time for which he was elected" *at the time of his appointment.*
>
> If 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.[89]

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87. *Id.* at 213-14. On September 6, 1895, the Treasury Department handed former Senator Ransom a further setback when it refused to pay his salary from March 4 to June 30 because "such appointment was prohibited by Section 6, Article 1 of the Constitution, and Mr. Ransom's salary cannot be paid." 2 COMP. GEN. 129-30 (1895).

88. 33 OP. ATT'Y GEN. 88 (1922).

89. *Id.* at 89 (emphasis added).

D. Melvin R. Laird. The final opinion by an Attorney General was issued on January 3, 1969.[90] Melvin Laird was reelected to the ninety-first Congress, which was to commence on January 3, 1969. Prior thereto, President-elect Nixon (whose term was to begin on January 20, 1969) announced that he would appoint Laird to be his Secretary of Defense. Laird first wrote the Comptroller General and then to Attorney General Ramsey Clark, inquiring advice "as to whether commencing [his] term as a Member of the House of Representatives for the 91st Congress would preclude [his] appointment as Secretary of Defense."[91] The problem arose under the Federal Salary Act of 1967. Under this law, President Lyndon B. Johnson was required to make any recommendations regarding salary increases for various federal offices in his Budget message, which was required to reach Congress by January 17. The recommended salary increase, if any, would take effect on March 1, 1969, unless disapproved by Congress prior to that time. Under normal practice at the beginning of a new administration,[92] Melvin Laird would be nominated, confirmed, and appointed as Secretary of Defense within a few days following the inauguration of President Nixon, *i.e.* shortly after January 20; "during the period in which it remains uncertain whether Congress may disapprove the Presidential salary recommendations."[93]

Attorney General Clark advised Secretary of Defense-designate Laird that taking his seat in Congress would *not* preclude the appointment. He wrote that "[t]he 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," and consequently "the ban clearly does not apply to an increase in compensation which is proposed *subsequent to the appointment.*"[94] *A fortiori,* ruled Attorney General Clark, the ban "is also 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."[95]

If Attorney General Clark was correct, the whole controversy over the appointment of Hugo Black was wasted motion,[96] and Attorney

90. 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969).
91. *Id.* at 1.
92. *Id.* at 2.
93. *Id.* at 2-3.
94. *Id.* at 1-2.
95. *Id.* at 2.
96. *See* text accompanying note 66 *supra.*

General Brewster was incorrect when he ruled that Governor Kirkwood was "disabled" from holding a position created after his resignation from the Senate but during the time for which he was elected. Attorney General Clark, however, seems to have been in error when he asserted 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."* To the contrary, the "constitutional language" prohibits the appointment of a legislator to an office, the compensation of which shall have been increased "during the time for which he was elected."[97]

Until the very closing days of the Constitutional Convention, the drafts contained a total ban on the appointment to any office during the time for which the members of each House "shall respectively be elected." At that time the Framers adopted two amendments: the first limited the "ineligibility" to those offices "created during their respective terms of office"[98] and the second extended the incapacity "to cases in which salaries should be increased, *as well as created*, during the term of the member."[99] This relaxation of the ineligibility clause was passed by the narrow vote of five states to four, with one state divided.[100] Surely the Framers never contemplated that a legislator would be eligible for Presidential appointment during his term of office if the emoluments of that office were increased during the term for which he was elected but after he had resigned from his legislative functions.[101] It was simply bad politics and worse law for Melvin Laird to take his seat in the Congress when he knew he would be appointed to be the Secretary of Defense within a matter of days and that the emoluments of that office would be increased by Congress within a matter of weeks.

E. Philander Chase Knox. The Attorney General did not issue an opinion in this case. Assistant Attorney General Russell wrote what he styled an "unofficial opinion." It is not contained in the bound volumes of the Opinions of the Attorney General, but is found only as

97. *See* text accompanying note 84 *supra.*
98. 2 M. FARRAND, *supra* note 3, at 490-92.
99. *Id.*
100. *Id.*
101. During the debates, George Mason spoke especially against the "dependency" which "may be made" if legislators may be promised offices to take effect at the close of their offices. *See* text accompanying note 37 *supra.* Mason also stressed the need for the clause barring appointment during "the time for which they shall respectively be elected" so as to "guard against evasions by resignations." 2 M. FARRAND, *supra* note 3, at 755.

an "appendix" to the floor debate in the Congress.[102]

Senator Knox was elected to the Senate for a term that expired on March 4, 1911. Early in his term, in 1907, Congress increased the salary of the Secretary of State from 8,000 dollars to 12,000 dollars per year. President Taft wanted to appoint Knox his Secretary of State; so without formal annnouncement, the administration spokesmen introduced a bill to "roll back" the salary of the Secretary to the pre-existing level. During the debate on this measure, Assistant Attorney General Russell wrote its sponsors that this measure would permit the appointment of a member of the present Senate, "after the 4th of March next, but prior to the expiration of the period for which he was elected, to the Office of Secretary of State."[103] The Assistant Attorney General reasoned, as discussed earlier,[104] that "the sole purpose" of the ineligibility clause is to destroy the expectation of a Senator or Congressman that he might enjoy "the newly created emolument." But, also, as expressed earlier,[105] the purpose of the ineligibility clause has much deeper and broader roots that go to the very heart of our system of government.

IV. CONCLUSION

To recapitulate, the men who drafted our Constitution were practical men, well aware that the twin passions of "ambition and avarice; the love of power and the love of money"[106] might lead to "office hunting," to "cabal and intrigue between the executive and the legislative bodies,"[107] to the "probable abuses" that result when appointment to high office is "within the gift of the Executive."[108] They agreed that the Constitution "should lay as few temptations as possible in the way of those in power";[109] and that it should "keep distinct the three great branches of government."[110] To this end, they agreed that the appointive power within the Executive should be curbed by making the members of both houses ineligible for appointment to other offices. They disagreed only as to the extent of this necessary limitation.

At one extreme, Patrick Henry would have rendered the Legisla-

102. 43 CONG. REC. 2402-03 (1909).
103. *Id.* at 2403; *see* text accompanying note 7 *supra.*
104. *See* text accompanying note 7 *supra.*
105. *See* text accompanying note 10 *supra.*
106. 2 M. FARRAND, *supra* note 3, at 284.
107. *Id.* at 380.
108. *See* text accompanying notes 21, 22, 26 *supra.*
109. 2 M. FARRAND, *supra* note 3, at 287.
110. *Id.* at 393.

tors ineligible for any other office during and after their terms of elected service.[111] At the other, Alexander Hamilton and John Mercer feared that, without the appointive power and the potential for appeal to the "ambition which aspired to Offices of dignity and trust,"[112] the President might become "a mere phantom of authority."[113] The effort "for preserving the Legislature as pure as possible" by "shutting the door against appointments"[114] ended in a compromise.

Edmund Randolph spoke for the overwhelming majority when, originally he proposed that the members of both houses be ineligible for all other offices, but only during their elected term.[115] Then, as the debate wore on, it was agreed that the members of both houses would be eligible for appointment to offices "established by a particular state";[116] would be eligible for appointment as "officers in the army or navy: but in that case their offices shall be vacated";[117] and finally under the Madison middle ground, eligible for all civil offices established under the authority of the United States other than those "which may be created or augmented" during the elected term of office.[118] Members of the legislative bodies were not to escape this limitation by the simple act of resignation; and the Framers steadfastly rejected proposals that the members of both houses be eligible *at any time* for appointment to any office, provided only that upon acceptance of such office they "vacate their seats," and that they not receive "any salary, fees, or emoluments of any kind" in the new office.[119]

But why all this fuss over Bill Saxbe? During the confirmation debate, Senators "from both sides of the aisle" were quick to speak in favor of their colleague. Even Senator Sam Ervin of North Carolina, who voted against Mr. Saxbe for constitutional reasons, said that "he thought the nominee was a fine lawyer and very qualified" for the office of Attorney General.[120]

James Madison gave us the answer: "Because, it is proper to take

111. *See* text accompanying note 61 *supra.*
112. M. FARRAND, *supra* note 3, at 288.
113. *Id.* at 284.
114. *Id.* at 386.
115. *See* text accompanying note 14 *supra.*
116. 2 M. FARRAND, *supra* note 3, at 386; *see* note 47 *supra.*
117. 2 M. FARRAND, *supra* note 3, at 289.
118. *See* text accompanying notes 24, 57-58 *supra.*
119. 2 M. FARRAND, *supra* note 3, at 489-90; *see* text accompanying notes 40 & 52 *supra.* See in this connection President Nixon's appointment of Congressman Rumsfeld to the Directorship of the OEO; paying him no salary for that position, and 42,500 dollars as an "assistant to the President." *See* note 6 *supra.*
120. N.Y. Times, Dec. 18, 1973, at 35, col. 6.

alarm at the first experiment on our liberties."[121] Or, as Mr. Justice Bradley wrote almost a century ago about a "little" search and seizure: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[122] Finally, Mr. Justice Brandeis reminds us that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. . . . Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[123]

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121. Madison, *Memorial and Remonstrance Against Religious Assessments*, in Everson v. Board of Educ., 330 U.S. 1, 65 para. 3 (1947) (appendix to dissent of Rutledge, J.).

122. Boyd v. United States, 116 U.S. 616, 635 (1886).

123. Olmstead v. United States, 277 U.S. 438, 479 (1928). Mr. Justice Brandeis concluded his famous dissent in that "wiretapping" case with these words:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 485.