The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution

John F. O'Connor
THE EMOLUMENTS CLAUSE: AN ANTI-FEDERALIST INTRUDER IN A FEDERALIST CONSTITUTION

John F. O'Connor*

As to the exception that [Senators and Representatives] cannot be appointed to offices created by themselves, or the emoluments of which are by themselves increased, it is certainly of little consequence, since they may easily evade it . . . .

Luther Martin1

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I. INTRODUCTION

The Emoluments Clause provides that "[n]o 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 encreased during such time." At the risk of oversimplification, whenever a federal office is created, or has its compensation increased, the Emoluments Clause makes all Senators and Representatives ineligible for appointment to that office until their current congressional term ends. This ineligibility lasts only from the time of a disqualifying event until the natural expiration of the particular person's term in Congress; once the elected term has ended, the disqualification ceases for that person, though it remains for persons whose seat in Congress has not been the subject of a regular election since enactment of the disqualifying law.

Perhaps more than any substantive constitutional provision, the Emoluments Clause is notable for its lack of judicial and scholarly treatment. Two appointments to the federal judiciary have been the subject of legal challenges based upon the Emoluments Clause, only to

4. A "disqualifying event" is the creation of a federal office or the increase in emoluments of an existing federal office.
5. The use of "persons" instead of "Members of Congress" to describe individuals disqualified under the Emoluments Clause is intentional. A person need not be serving in Congress at the time of a disqualifying event to become ineligible for appointment under the Emoluments Clause. See infra notes 69-73 and accompanying text.
6. See U.S. CONST. art. I, § 6, cl. 2; see also 33 Op. Att'y Gen. 88, 89 (1922) (stating that the Emoluments Clause did not prohibit the appointment of Senator William Kenyon to the Court of Appeals for the Eighth Circuit because the increase in emoluments for that office had occurred in a senatorial term prior to the one Kenyon currently was serving).
have both cases dismissed for lack of standing.\(^7\) Constitutional treatise writers accord the Emoluments Clause only cursory treatment, or ignore it totally.\(^8\) Most law review articles discussing the Emoluments Clause do so only tangentially; many pertain to citizen and congressional standing, and merely recite that the Emoluments Clause was the substantive issue in \textit{Levitt} and \textit{McClure}.\(^9\) Other writers touch briefly on the Emoluments Clause only in discussing other constitutional issues.\(^10\) The only law review article dealing with the Emoluments Clause in any substantial way is a very short, expository piece by Professor Michael Stokes Paulsen which uses the Emoluments Clause to illustrate what the author perceives as a lack of governmental respect for the Constitution.\(^11\)

The Emoluments Clause has received more extensive examination in Congress, where the issue arises occasionally when the President nominates, or contemplates nominating, a Member of Congress to his Cabinet or to the federal judiciary.\(^12\) The pervasive intrusion of partisan politics, however, has deprived such congressional debate of any real


\(^{8}\) Professor Tribe does not consider the substantive meaning of the Emoluments Clause in his treatise; he quotes the language of the Clause, without more, in discussing \textit{Ex parte Levitt}. \textit{Laurence H. Tribe, American Constitutional Law} 125 (2d ed. 1988); \textit{see also I Ronald D. Rotunda \emph{et al.}, Treatise on Constitutional Law: Substance and Procedure} § 9.1(b) (1986) (devoting less than one page of a three-volume work to the Emoluments Clause); \textit{I Westel W. Willoughby, The Constitutional Law of the United States} § 232 (1910) (devoting three sentences of text to the Emoluments Clause).


\(^{10}\) \textit{See, e.g., Akhil R. Amar, The Bill of Rights as a Constitution}, 100 \textit{Yale L.J.} 1131, 1145 (1991) (discussing unratified parts of the original Bill of Rights); Calabresi & Larsen, \textit{supra} note 2, at 1063-64 (discussing the Incompatibility Clause).

\(^{11}\) Michael S. Paulsen, \textit{Is Lloyd Bentsen Unconstitutional?}, 46 \textit{Stan. L. Rev.} 907 (1994). Professor Paulsen’s article essentially uses the Emoluments Clause as a vehicle for the argument that the plain meaning of the Constitution often takes a back seat to political exigencies when its provisions prove “inconvenient.” As a proponent of strict literalism, Paulsen makes no inquiry into the policies underlying the Emoluments Clause or the Framers’ intentions in including such a prohibition in the Constitution. \textit{See id}. at 911 (“It is not sufficient to satisfy the perceived ‘spirit’ of a constitutional provision. The letter of the law must be observed as well.”). Furthermore, the tone of Paulsen’s article butresses the view that his piece was intended to be more of a denouncement of the constitutional corruptibility of government than a scholarly overview of the Emoluments Clause. \textit{See, e.g., id}. at 910, 913 & n.18 (sarcastically calling Robert Bork “that notable loose constructionist” and lightheartedly chiding Attorney General Janet Reno for refusing his request for Office of Legal Counsel documents pertaining to the Emoluments Clause).

\(^{12}\) \textit{See, e.g., 119 Cong. Rec.} 37,017-26 (1973); 43 Cong. Rec. 2390-403 (1909).
value as constitutional discourse.\textsuperscript{13}

The absence of judicial and scholarly treatment of the Emoluments Clause has contributed to a profound misunderstanding of the Clause by Congress, the media, and by legal writers.\textsuperscript{14} This Article is an attempt to fill that scholarly void. In Part II, I will examine the plain language of the Emoluments Clause and discuss some of the prominent issues that have arisen thereunder. This discussion will provide a basic framework of the Emoluments Clause that will facilitate examination of the most persistent—and controversial—Emoluments Clause issue, the constitutional efficacy of the so-called “Saxbe fix.”

The Saxbe fix is a procedure whereby Congress purports to remove a Member’s disability to hold a particular federal office by reducing the emoluments of that office to the level it commanded at the beginning of the potential nominee’s current term in Congress.\textsuperscript{15} In Part III, I will argue that the Emoluments Clause does not permit a reduction in emoluments to cure the constitutional disability imposed upon Members of Congress by a previous increase in emoluments.

One aspect of the Saxbe fix that has not been controversial has been the extent to which it conforms to the “spirit” of the Emoluments Clause.\textsuperscript{16} Both supporters and opponents of the Saxbe fix generally agree that such a procedure is quite consistent with the spirit of the Emoluments Clause, with opponents of the Saxbe fix arguing instead that “spirit” is irrelevant when faced with a clear constitutional prohibition.\textsuperscript{17} In Part IV, I will argue that those opposed to the Saxbe fix concede far too much in limiting their opposition to strict constructionism. The respective merits of strict constructionism and intentionalism aside, the Saxbe fix is inconsistent with both the language and the purpose of the Emoluments Clause. The general consensus that the spirit of the Emoluments Clause would permit the Saxbe fix rests upon a fundamental misreading of the Emoluments Clause as primarily an anticorruption

\textsuperscript{13} See infra notes 474-87 and accompanying text.
\textsuperscript{14} As an example, many writers and Members of Congress erroneously have stated that the Emoluments Clause prohibits a Member of Congress from being appointed to offices for which that Member voted a pay raise. See, e.g., 81 CONG. REC. 9101 (1937) (remarks of Sen. Johnson); Theodore Y. Blumoff, Judicial Review, Foreign Affairs and Legislative Standing, 25 GA. L. REV. 227, 313 (1991); Girardeau A. Spann, Deconstructing the Legislative Veto, 68 MINN. L. REV. 473, 533 n.229 (1984). The language of the Clause makes clear, however, that whether the Member voted for the pay raise is irrelevant. See 1 ROTUNDA ET AL., supra note 8, § 9.1(b).
\textsuperscript{15} See Paulsen, supra note 11, at 910-11.
\textsuperscript{16} See infra text accompanying notes 238-52.
\textsuperscript{17} See infra text accompanying notes 238-52.
measure concerned with preventing Members of Congress from reaping short term financial benefit from increasing the emoluments of federal offices. Re-assessing the Emoluments Clause in light of the larger, institutional policies underlying it; it becomes clear that its spirit would not allow for a Saxbe fix, and that opposing the Saxbe fix is defensible on both literalist and intentionalist grounds.

II. THE PLAIN LANGUAGE OF THE EMOLUMENTS CLAUSE

The starting point for an examination of the meaning and scope of the Emoluments Clause must be the language of the provision itself. Virtually every term in the Emoluments Clause has been the topic of debate at one time or another. The value of these debates, and the merits of their resolution, have varied markedly from one controversy to the next, perhaps in part due to the overlay of politics, senatorial courtesy, and the absence of judicial involvement. As such, the degree of certainty as to the meaning of each of the terms in the Emoluments Clause varies accordingly. In order to facilitate the examination of each of the Emoluments Clause’s terms, I will divide the Clause into five parts: (1) “No Senator or Representative shall, during the time for which he was elected”; (2) “be appointed”; (3) “to any civil Office under the Authority of the United States”; (4) “which shall have been created . . . during such time”; and (5) “or the Emoluments whereof shall have been encreased during such time.” A rudimentary understanding of the plain meaning of each of these components is a necessary prerequisite to any discussion.

18. See infra text accompanying notes 224-33.

19. See 1 JOSPEH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 401, at 296 (Thomas M. Cooley ed., 4th ed. 1873) (“Where the words are plain and clear . . . there is generally no necessity to have recourse to other means of interpretation.”); Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 189 (1986) (“In our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them.”). The Supreme Court and several eminent commentators have recognized the text as the starting point in the related area of statutory interpretation. See Caminetti v. United States, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . .”); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992) (describing the “plain meaning” rule of statutory interpretation); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 535 (1947) (“The text.—Though we may not end with the words in construing a disputed statute, one certainly begins there.”); Richard A. Posner, STATUTORY INTERPRETATION—in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 807 (1983) (“[I]n interpreting a statute you should begin, though maybe not end, with the words of the statute.”).
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of the more complex constitutional issues arising under the Emoluments Clause.

A. "No Senator or Representative shall, during the Time for which he was elected"

This first part of the Emoluments Clause establishes the class of persons that can be temporarily disqualified from appointment to certain federal offices—"Senator[s] or Representative[s]"—and sets out the duration of the temporary disqualification—"during the Time for which he was elected." The contours of the class "Senator[s] or Representative[s]" has not been an issue in any appointment to federal office and, for the most part, all three branches of government have dealt with analogous matters satisfactorily enough to make it unlikely that it will be an issue of contention in the future. Similarly, the duration of the disability has been interpreted in a uniform, and correct, manner by the branches of government and constitutional commentators alike.

1. "No Senator or Representative shall"

Article I of the Constitution establishes three basic qualifications for Members of Congress: minimum age, length of citizenship, and residency. A Senator must be thirty years of age, and have been a United States citizen for nine years. A Representative need only have attained the age of twenty-five and have been a United States citizen for seven years. Both Senators and Representatives must be inhabitants of the state they represent at the time of their election. Article I also establishes each House as the judge of its Members’ qualifications; the courts have interpreted this clause as prohibiting judicial review of a Member of Congress’s satisfaction of constitutional qualifications for office.

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21. See infra text accompanying notes 238-52.
22. See infra text accompanying notes 55-73.
24. Id. § 2, cl. 2.
25. Id. § 3, cl. 3 (referring to Senators); id. § 2, cl. 2 (referring to Representatives).
26. Id. § 5, cl. 1.
27. See Reed v. County Comm’rs, 277 U.S. 376, 388 (1928) ("The Senate is the judge of the elections, returns and qualifications of its members. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department." (citation omitted)); Sevilla v. Elizalde, 112 F.2d 29, 38 (D.C. Cir. 1940) (holding that only a House of Congress may pass on the qualifications of its Members); In re James, 241 F. Supp.
Based upon the Constitution’s commitment to Congress of the authority to pass on its Members’ qualifications, it appears that the earliest a Member-elect could become a Member of Congress, and therefore fall under the purview of the Emoluments Clause, is after the House to which she was elected has reviewed her credentials and satisfied itself that she meets the age, citizenship, and inhabitancy requirements of Article I. Absent a determination by the applicable House that a person elected to that House meets the qualifications of office, that person retains the status of Member-elect, a status that cannot be changed except by action of the applicable House, or by withdrawal of the Member-elect.

Article I, by itself, prevents a Member-elect from becoming a Member of Congress any earlier than when the pertinent House of Congress determines that the Member-elect has met all of the qualifications for office. Article VI, however, creates another hurdle to achieving the status of a Member of Congress: completion of the oath of office. There is no case law on whether the oath required by Article VI is a fourth “qualification” for membership in Congress, joining the age, citizenship, and inhabitancy qualifications set out in Article I. Thus, it is uncertain whether a House of Congress is the sole judge of whether

858, 860 (S.D.N.Y. 1965) (“[T]he federal courts have no jurisdiction to pass on the qualifications and the legality of the election of any member of the House of Representatives.”). Nevertheless, this textual commitment to the legislative branch extends only to its determination of whether a prospective member has met the qualifications as set out in the Constitution; the courts can intercede in order to prevent Congress from creating additional qualifications for office. See Powell v. McCormack, 395 U.S. 486, 550 (1969).

28. U.S. Const. art. I, § 5, cl. 1; see also 2 Lewis Deschler, Deschler’s Precedents of the United States House of Representatives ch. 7, § 9, at 95 & n.15 (1977).

29. See 1 Deschler, supra note 28, ch. 2, § 1, at 87.

30. Because each House is the sole judge of its Members’ constitutional qualifications, the mere fact that a Member-elect satisfies the qualifications for office, or even a judicial determination to that effect, would be ineffective in transforming a Member-elect to a full-fledged Member of Congress. See supra notes 26-27 and accompanying text.

31. U.S. Const. art. VI, cl. 3 (“The Senators and Representatives... shall be bound by Oath or Affirmation, to support this Constitution...”).

32. See 1 Deschler, supra note 28, ch. 2, § 5, at 116. In Powell v. McCormack, 395 U.S. 486 (1969), the Supreme Court held that the House of Representatives could not refuse to seat a duly elected person on grounds other than those set out in the Constitution. Id. at 550. The Powell Court, however, did not enumerate a list of constitutionally-mandated qualifications, leaving unanswered the question of whether the oath requirement is a constitutional “qualification.” Id.; see also 2 Deschler, supra note 28, ch. 7, § 9, at 99 (“The Powell case did not discuss, however, other constitutional provisions which may give rise to disqualifications, such as the requirement to swear an oath...”).
persons elected to its ranks have complied with the oath requirement;\(^3\) the placement of the oath requirement in Article VI, as opposed to Article I, suggests, however, that the Framers considered the oath requirement of a different character than the age, citizenship, and inhabitancy requirements.\(^4\)

Justiciability issues notwithstanding, the oath does appear to be a condition precedent to assumption of the office of Senator or Representative. Article VI provides that “[t]he Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution.”\(^5\) The implication of that language is that persons who have not taken the oath of office cannot become Members of Congress because they would not have been “bound by Oath or Affirmation.”

Congressional practice buttresses the view that Members-elect do not become Senators or Representatives in the constitutional sense until they have taken the oath of office. As the sole arbiter of its Members’ qualifications,\(^6\) Congress has treated the age and citizenship qualifications—qualifications required of every “Senator”\(^7\) and “Representative”\(^8\)—as needing to be satisfied only by the time the oath is administered.\(^9\) Thus, Congress has permitted persons not meeting the age and citizenship requirements at the time of election, or even at the time the Congress for which they are elected has begun, to delay taking their oath.

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34. Because the oath requirement is not contained in the same Constitutional Article, as are the other three qualifications for office and the grant of fact-finding power to Congress, determination concerning whether a prospective Member has satisfied the oath requirement might allow for judicial intervention. In a case analogous to Powell, the Supreme Court determined that the Georgia House of Representatives lacked the power to impose a loyalty requirement upon one of its members in addition to those contained in the Georgia Constitution and Article VI of the U.S. Constitution. See Bond v. Floyd, 385 U.S. 116, 132 (1966).

35. U.S. CONST. art. VI, cl. 3.

36. See supra notes 26-27 and accompanying text.

37. U.S. CONST. art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States . . .”).

38. Id. § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . .”).

39. See 2 DESCHLER, supra note 28, ch. 7, § 10, at 110. On the other hand, Congress requires that the inhabitancy requirement be met at the time of election; a requirement which is consistent with the language of the Constitution. See U.S. CONST. art. I, § 2, cl. 2 (referring to requirements for a Representative); id. § 3, cl. 3 (referring to requirements for a Senator); see also 2 DESCHLER, supra note 28, ch. 7, § 10, at 110. The Constitution states that a person must meet age and citizenship qualifications in order to be a Senator or Representative; the inhabitancy qualification, however, is a prerequisite to the election. See U.S. CONST. art. I, § 3, cl. 3; id. § 2, cl. 2.
of office and assuming their seat until satisfying those qualifications. Therefore, pursuant to its constitutional authority to adjudicate issues pertaining to its Members’ qualifications, Congress has determined that one does not become a Senator or Representative until taking the oath of office.

Besides being the time at which a Member-elect must meet all qualifications for office, the oath of office confers substantive privileges on Members as well. Though congressional practice has been to allow Members-elect, before taking the oath, to participate in preparatory matters set out in the Constitution, such as voting for Speaker of the House, being called for the quorum, and demanding the yeas and nays, persons elected to Congress have not been permitted to be placed on the roll call or to vote until they have completed their oath of office. Thus, persons elected to Congress occupy a gray area between private citizens and Members of Congress until they take their oath of office; they can caucus with Members of Congress and can participate in some congressional activities, but cannot participate in the very essence of membership: the right to vote on the passage of legislation. Absent this most important right of membership, one could not be called a full-fledged Senator or Representative.

40. For example, John Y. Brown did not take the oath of office or his seat in the House until the second session of the term for which he was elected, at which time he had reached the age of 25. See 2 Deschler, supra note 28, ch. 7, § 10, at 110 n.1. In the Senate, Rush D. Holt’s elected term in the Senate began on January 3, 1935, when he was just 29 years of age. On June 21, 1935, after Holt had turned 30, the Senate permitted him to take the oath of office and occupy his seat on the grounds that he met all the constitutional qualifications for becoming a Senator. See S. Rep. No. 904, 74th Cong., 1st Sess. 1-7 (1935), reprinted in 79 Cong. Rec. 9651-53 (1935); 79 Cong. Rec. 9841-42 (1935).

As for the citizenship requirement, in 1934 the House of Representatives allowed Representative-elect Henry Ellenbogen to take the oath of office and occupy his seat only after he had satisfied the citizenship requirement, which was 10 months into the session for which he had been elected. See S. Rep. No. 904, supra, reprinted in 79 Cong. Rec. 9651-53 (1935); 2 Deschler, supra note 28, ch. 7, § 10, at 112.

41. 1 Deschler, supra note 28, ch. 2, § 2, at 91.
42. 1 id. ch. 2, § 2.2.
43. Former Speaker of the House Henry T. Rainey perhaps best stated the rite of passage conferred by the taking of the oath of office in response to a parliamentary inquiry by Congressman Bertrand H. Snell:

MR. SNELL: In what way does it change the status of a Member-elect to have the oath administered to him?
THE SPEAKER: He then becomes a full-fledged Member of the House of Representatives, without question.
MR. SNELL: Is he not enjoying all the rights and privileges even at the present time?
THE SPEAKER: The Chair thinks he enjoys many of the privileges, but in order to become a Member he must take the oath prescribed by law.
Perhaps the most telling congressional treatment of Members-elect is in conjunction with the Incompatibility Clause, contained in the same sentence as the Emoluments Clause. In 1816, Samuel Herrick was elected to the House of Representatives, but was not permitted to take his seat pending the House’s adjudication of a challenge to his election. Between October 1816 and December 1817, the first time the House met after declaring Herrick qualified for his seat, he continued to serve as a United States District Attorney. In determining that Herrick’s continuation in that office had not operated as a vacation of his seat in Congress, the House Committee on Elections stated that “the act of becoming in reality a member of the House depends wholly upon the will of the person elected and returned. Election does not, of itself, constitute membership, although the period may have arrived at which the congressional term commences.” The House’s view that one does not become a Member of Congress for purposes of Article I, Section 6 of the Constitution until taking the oath of office has been concurred with at various times by the Executive Branch, and both the Senate and the courts have found the oath to be the determinative event in related contexts.

Mr. SNELL: It bestows on him actual membership.

The SPEAKER: He then has actually become a Member.

77 Cong. Rec. 283 (1933); see also 1 Deschler, supra note 28, ch. 2, § 5, at 116 (“[A]ppearing to be sworn is a mandatory step to bestow full membership on persons elected to Congress . . . .”).

44. The combined Emoluments Clause/Incompatibility Clause provides:

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.

U.S. Const. art. I, § 6, cl. 2.


47. See Dietrich, 126 F. at 683.

48. Id. (emphasis added) (quoting the House Committee on Ethics).

49. See, e.g., 15 Op. Att’y Gen. 280, 281 (1877) (holding that a Delegate-elect to the House of Representatives does not become a member of that body “until he accepts the duties of the office and takes the appropriate oath”); 14 Op. Att’y Gen. 406, 408 (1874) (holding that “a Representative in Congress . . . does not become a member of the House until he takes the oath of office as such Representative; therefore he may lawfully hold any office from his election until that time”).

50. See, e.g., Dietrich, 126 F. at 681 (holding that a person does not become a Member of Congress until taking the oath of office). The Dietrich court held that a Senator-elect who had not yet taken the oath of office could not be prosecuted under an anticorruption statute applying to “every member of Congress,” id. at 677, even though the term for which he had been elected had
The distinction between having the applicable House accept a Member-elect’s credentials and the taking of the oath might seem unimportant in light of legislation requiring that administering the oath of office be the first order of business of each Congress. Nevertheless, the issue could arise if a Member-elect presented her credentials but, for whatever reason, was unable to take the required oath of office at the beginning of the first session. Congress might, for example, create a federal office after accepting this Member-elect’s credentials, but before she took the oath of office. In such a case, the Member would not be disqualified from appointment to that office because she had never become a “Senator or Representative,” and therefore never became subject to the Emoluments Clause.

This result, however, depends on the Member-elect being appointed before ever taking the oath of office for the term in which Congress created the federal office. Changing the facts slightly, suppose that a Member-elect did not take the oath of office at the beginning of the session and Congress created a new federal office on the first day of the session. Suppose that, sometime thereafter, the Congresswoman appeared on the House floor and took the oath of office. Even though she was not a Representative at the time Congress created the federal office, the plain language of the Emoluments Clause would make this Congresswoman...
ineligible for the office because: (1) she would in fact be a "Representative," bringing her under the purview of the Emoluments Clause; and (2) the office was created during the time for which she was elected.\footnote{See infra text accompanying notes 55-73.}

2. "During the Time for which he was elected"

After defining the class of persons to whom the Emoluments Clause applies—Senators or Representatives—the Emoluments Clause next establishes the duration of any disqualification for federal office. At first glance, the language "during the Time for which he was elected"\footnote{U.S. CONST. art. I, § 6, cl. 2.} might seem to attach an ineligibility to a Member of Congress until she no longer is a Member of Congress and after all terms for which she was elected have expired. Nevertheless, a closer examination of the language in the Emoluments Clause suggests a more moderate period of disqualification.

The last two words of the language addressing the duration of ineligibility—"was elected"—imply a singular event, one election. Thus, Members are ineligible for appointment only until the natural expiration of their term that was running at the time the federal office was created or had its emoluments increased. This subtle, but important, difference becomes apparent when comparing the Emoluments Clause to the Incompatibility Clause,\footnote{See id.} a provision designed to carry ineligibility for office from one term to the next. The Incompatibility Clause uses language explicitly encompassing the entire duration of a Member's service in Congress—"during his Continuance in Office."\footnote{Id.} Had the Framers desired to accomplish a similar goal with the Emoluments Clause, they likely would have chosen language better connoting their desire for a disability applying for longer than the Member's current term.\footnote{33 Op. Att'y Gen., supra note 6, at 89 (noting that the Framers would have chosen "more apt language" had they desired the ineligibility to extend beyond a Member's current term). Language such as "during any term for which he was elected," for example, would have been effective to evidence an intent for the disability to extend beyond terms running at the time of the disqualifying event.}

Justice Story, in his seminal constitutional treatise, seemed to share the view that the duration of any Emoluments Clause disability lasts only until the term for which a person was elected reaches its natural
expiration. \(^{58}\) Justice Story noted that the disability “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.” \(^{59}\) Several of the Framers expressed a similar concern during the debates over the Emoluments Clause at the Constitutional Convention. \(^{60}\) The significance of these criticisms is their implicit assumption that a Member of Congress facing the expiration of her term would have an unmitigated incentive to create new federal offices or to increase the emoluments of existing offices, with either an agreement or an expectation that she would be appointed to the office after her term ended. That assumption is true, however, only if the period of disability terminates with the natural expiration of the Member’s term. If the disability extended to the Member’s current term and to any subsequent terms in Congress, then a Member of Congress facing the expiration of her term would have a personal interest in creating new offices or increasing the emoluments of existing offices only if she were not seeking re-election. A Member nearing the end of her term, but seeking re-election, would be ambivalent to the creation of a new office because she would be ineligible for the office as long as she continued to be returned to Congress by her constituents.

Historical practice has followed Justice Story’s interpretation of the length of the disability. In 1912, William S. Kenyon was elected to the Senate for a term that expired on March 4, 1919. \(^{61}\) During that term in office, Congress increased the salary of circuit court of appeals judges. \(^{62}\) In 1918, Senator Kenyon was re-elected to a second term which began

\(^{58}\) See 1 STORY, supra note 19, § 867.

\(^{59}\) 1 id.

\(^{60}\) See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 390 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand]. In arguing that the duration of the ineligibility should extend one year past the term for which a Member of Congress was elected, George Mason argued that such a provision was “essential to guard [against] evasions by resignations, and stipulations for office to be fulfilled at the expiration of the legislative term.” 1 id. (emphasis added). John Rutledge recognized that Members facing expiration of their terms could evade the Emoluments Clause by creating offices and assuming them after their terms expired, and Elbridge Gerry remarked that he knew of one such occurrence. 1 id. On the other hand, Alexander Hamilton remarked that Mason’s plan would not solve the problem of possible legislative corruption: offices could be kept available by political allies until the additional year expired. 1 id.


on March 4, 1919.\(^{63}\) In 1922, President Coolidge appointed Senator Kenyon as a United States Circuit Judge for the Eighth Circuit.\(^{64}\) After Kenyon’s confirmation by the Senate, the President called upon the Attorney General for a formal opinion as to the effect of the Emoluments Clause on Kenyon’s appointment.\(^{65}\) Relying on Justice Story’s interpretation of the duration of the ineligibility,\(^{66}\) and the Clause’s apparent reference to a single electoral term,\(^{67}\) Attorney General Harry M. Daugherty held that Kenyon was eligible for appointment to the Eighth Circuit Court of Appeals.\(^{68}\)

Finally, note that the duration of the disability is tied to the term for which the Senator or Representative was elected, not to the Member’s continuance in office.\(^{69}\) This plain meaning of the Emoluments Clause was espoused by Attorney General Benjamin H. Brewster as early as 1882, when he held that Governor Kirkwood of Iowa was ineligible for appointment to the Tariff Commission even though he had resigned his Senate seat over a year before he was considered for this appointment.\(^{70}\)

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64. See id.
65. See id.
66. Id. at 89. Attorney General Daugherty stated:

   It seems clear from the foregoing that Judge Story was of the opinion that two things must concur in order to deprive a Senator or a Representative of his right to appointment to a civil office under the [Emoluments Clause], 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.

   Id.

67. Id. Attorney General Daugherty noted:

   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.

   Id.

68. Id. Attorney General Daugherty’s view was reaffirmed by President Carter’s Justice Department, in assessing the effect that the commencement of a new Congress would have on House Members’ eligibility for federal judgeships created during the preceding Congress:

   Even if a member of the House of Representatives were reelected to a new term in the past election he would not be disqualified for appointment to one of the judgeships because the judgeships were created during the term expiring at noon January 3, 1979, the term that constitutes the period of disqualification.

   Id.

69. 1 ROTUNDA ET AL., supra note 8, § 9.1(b).
The rationale for Attorney General Brewster's opinion was that Kirkwood had been elected to the Senate in 1876 for a term that was not to expire until 1883. Kirkwood was ineligible for appointment as Tariff Commissioner—an office created in 1882—until March 1883, when his elected term would naturally expire. Therefore, a Member of Congress cannot evade the Emoluments Clause by resigning her seat before appointment to federal office.

**B. The Meaning of “Be Appointed”**

The Emoluments Clause goes one step further than prohibiting Members of Congress from holding federal offices that were created or had their emoluments increased during the Member's current term; it literally proscribes the appointment to such offices, which in turn makes holding such offices impossible. The key, then, is determining exactly when a person is "appointed" to federal office.

The timing of a presidential appointment was the issue the very first time the Emoluments Clause interfered with the appointment process. On February 27, 1793, President Washington nominated William Paterson to the Supreme Court to fill a vacancy caused by the resignation of

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**SUPREME COURT OF THE UNITED STATES, 1789-1800, at 89, 89 (Maeva Marcus et al. eds., 1985); Letter from George Washington to the United States Senate (Feb. 28, 1793), in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, supra, at 90, 90.**


72. Id. at 365-66. For a more comprehensive discussion of the facts and Emoluments Clause issues surrounding Kirkwood's eligibility for appointment to the Tariff Commission, see infra text accompanying notes 107-19.

73. See 1 ROTUNDA ET AL., supra note 8, § 9.1(b). A far greater possibility for frustration of the Emoluments Clause exists in the Clause's use of the term "elected." In recent years, several persons have been appointed to Congress to fill a vacancy caused by the death or resignation of a Member of Congress; Senators John Seymour of California and Bob Krueger of Texas are recent examples. See Anne M. Kilday, Bentsen Admits Mixed Emotions on Leaving Senate, DALLAS MORNING NEWS, Jan. 6, 1993, at 8A (stating that Senator Krueger had been appointed by Governor Ann Richards); Seymour Sworn in to Congress, L.A. TIMES, Jan. 10, 1991, at P2 (noting that Senator Seymour had been appointed to the Senate when Governor Pete Wilson resigned). A person in that situation conceivably could advocate fiercely for the creation of a new office with the expectation that she would fill it immediately; by its literal terms, the Emoluments Clause applies only to Members of Congress serving elected terms, and might not touch appointed Members of Congress. Nevertheless, a court facing such an issue likely would find the Emoluments Clause applicable, holding either that even "appointed" Members are elected for purposes of the Emoluments Clause, or that a Member availing herself of the privileges of membership is estopped from arguing that she is not an elected official. Cf. United States v. Dietrich, 126 F. 676, 681-82 (C.C.D. Neb. 1904) (dicta) (holding that a person exercising the duties of a Senator would be estopped to deny he was a Senator for purposes of avoiding criminal prosecution).

74. U.S. CONST. art. I, § 6, cl. 2.
Justice Thomas Johnson. Paterson, however, previously had been elected to the Senate for a term that was not to expire until March 3, 1793, a term during which Congress created the Associate Justice office to which Paterson was being appointed. One day after nominating Paterson, Washington withdrew the nomination on the grounds that his nomination was an "appointment" for purposes of the Emoluments Clause. Washington resubmitted his nomination of Paterson on March 4, 1793, the day after Paterson's term expired.

In Marbury v. Madison, Justice Marshall interpreted appointments as being a three-step process: (1) the nomination by the President; (2) the appointment, which encompasses the President's nomination and the advice and consent of the Senate; and (3) the delivery of the commission. Thus, Marshall appears to have agreed with Washington that the nomination is part of the appointment. On four occasions since Marbury, Attorneys General have agreed that an appointment for purposes of the Emoluments Clause commences upon nomination, regardless of when the Senate confirms an appointment or when the commission actually is delivered.

76. See id. at 806; Letter from George Washington to the United States Senate (Feb. 28, 1793), supra note 70, at 90. Paterson, incidentally, had resigned his Senate seat in 1790 to become governor and chancellor of New Jersey. Witt, supra note 75, at 807.
77. Letter from George Washington to the United States Senate (Feb. 28, 1793), supra note 70, at 90.
78. Id. The letter reads in full:
I was led, by a consideration of the qualifications of William Paterson, of New Jersey, to nominate him an Associate Justice of the Supreme Court of the United States. It has since occurred that he 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.
Id. (citation omitted).
80. 5 U.S. (1 Cranch) 137 (1803).
81. Id. at 155-56. In particular, the Marbury Court found the act of delivering the commission to be irrelevant to the question of when an appointment has occurred. "The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution." Id. at 156.
82. In 1895, Acting Attorney General Conrad, relying on Marbury v. Madison, held that Senator Matthew W. Ransom's appointment as envoy to Mexico was null and void because his appointment—consisting of the nomination and confirmation—occurred at a time when he was ineligible for the office under the Emoluments Clause. 21 Op. Att'y Gen. 211, 213-14 (1895).
C. "To any civil Office under the Authority of the United States"

The Emoluments Clause only disqualifies appointment to "civil Offices under the Authority of the United States"; if the office in question does not so qualify, then a Member of Congress may be appointed to it even if the office was created, or had its emoluments increased, during her current term. The early drafts of what became the Emoluments Clause did not limit the prohibition to "civil" offices. During the course of the debates, however, the Framers came to see the danger in having the Emoluments Clause prohibit what might be the most able military men from serving their country in time of war based upon their previous service in Congress. Though acceptance of military office vacates a Member's seat in Congress under the Incompatibility Clause, which does not limit its prohibition to civil offices, the Emoluments Clause does not prevent a Member from choosing military service over membership in Congress. Therefore, the only real issue under this part of the Emoluments Clause is the meaning of the term "office."

In determining the characteristics of the term federal "officer," the

Conrad explicitly held that Ransom's receipt of his commission after his ineligibility had ceased was irrelevant. Id. at 214. In 1973, Acting Attorney General Bork informed the Senate that President Nixon could not nominate Senator William B. Saxbe for Attorney General while he was ineligible by virtue of the Emoluments Clause. See S. Rep. No. 499, 93d Cong., 1st Sess. 2 (1973); see also id. at 3-4 (letter from President Nixon to Senator McGee stating that he was withholding Saxbe's nomination until his ineligibility ceased). See generally 2 Op. Off. Legal Counsel 359, 360 & n.2 (1977) (stating that, for purposes of the Emoluments Clause, the Attorney General continued to adhere to the view that appointment commenced upon nomination). Using a different rationale to get to the same result, in 1883 Attorney General Brewster contended that appointment occurs at some point after nomination and confirmation, but that nomination and confirmation must occur while the prospective appointee is eligible for appointment or else the appointment is void. 17 Op. Att'y Gen. 522, 522-23 (1883) ("The nomination and confirmation of an ineligible person must be treated as null, and not as acts upon which an appointment of the person may be afterwards made when his disqualification ceases.").

84. See BURDICK, supra note 46, § 75, at 177; 1 Farrand, supra note 60, at 282, 289; see also Calabresi & Larsen, supra note 2, at 1077 n.156 ("[The Framers' limitation of the Emoluments Clause to 'Civil offices' eased the fears of some of the delegates that, in war time, the greatest military men might also be [Members of Congress] who would be prohibited from defending their country.").
85. BURDICK, supra note 46, § 75, at 179.
86. Id.
Supreme Court held in *United States v. Hartwell*\(^8\) that "[a]n office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."\(^8\) Conversely, a person whose duties to the federal government are "occasional or temporary," as opposed to "continuing and permanent," is not an officer.\(^8\)

Relying in part on *Hartwell*, the House of Representatives has determined that visitors to academies, and directors and trustees of public federal institutions are not officers for purposes of the Ineligibility and Incompatibility Clauses, even if appointed by law to those positions.\(^9\) The House also determined that Members of Congress constitutionally could serve as representatives to the United Nations as long as they did not receive any compensation for such service.\(^9\) Similarly, Presidents often have called upon Members of Congress to serve as temporary, unpaid envoys, impliedly asserting that such assignments are not offices.\(^9\)

The congressional and judicial precedents suggest that the question of whether a person is a federal officer turns not on the importance or prestige of the office, or even on whether the person was appointed to the office. Instead, the inquiry properly rests upon the nature, rather than the significance, of the duties.\(^9\) This distinction was best addressed during the establishment of the Commission on the Bicentennial of the Constitution. The Reagan Justice Department determined that Members of Congress could serve on the Commission only if their duties were

\(^{87}\) 73 U.S. (6 Wall.) 385 (1868).

\(^{88}\) Id. at 393 (holding that a clerk in the office of the assistant treasurer of the United States was an officer of the United States for purposes of an anti-embezzlement statute).

\(^{89}\) Id.; see *Burdick*, *supra* note 46, § 75, at 179 & n.3.

\(^{90}\) See H.R. REP. NO. 2205, 55th Cong., 3d Sess. 48 (1899). The House Report stated: It is not contended that every position held by a member of Congress is an office within the meaning of the Constitution, even though the term office may usually be applied to many of these positions. . . . All of these appointees were but instruments to procure detailed information for the better information and guidance of Congress and are wholly lacking in the essential elements of an office within the meaning of the Constitution. *Id.*, quoted in *Willoughby*, *supra* note 8, § 231, at 528-29.


purely advisory and ceremonial in nature. The Justice Department held that only persons vested with the authority to bind the Commission would be officers in a constitutional sense, and that divesting Members of Congress from this executive authority would allow them to serve on the Commission.

In establishing the Bicentennial Commission, the Reagan administration took great pains to comply with the Hartwell Court’s definition of federal officers. The same is true of the traditional handling of trustees and academy visitors. Ceremonial or advisory membership on various committees lends them credibility and enhances congressional access to information, without conferring on Members the regular executive or judicial duties that the Framers sought to prevent through the Emoluments and Incompatibility Clauses. Certainly, such duties are “occasional or temporary,” embodying none of the responsibilities commonly associated with federal officers.

On the other hand, Congress’s attempt to exempt United Nations Representatives from being officers by denying them compensation is troubling from a policy standpoint and inconsistent with the Constitution. First and foremost, Congress’s premise that denying pay to a position precludes it from being a federal office rests upon a misinterpretation of Hartwell. In Hartwell, the Court did not create a list of the necessary components of a federal office; the Court merely stated that an office “embraces the ideas of tenure, duration, emolument, and duties.”

94. See id.; see also 13 Op. Off. Legal Counsel 299, 300-01 (1989) (holding that Members of Congress appointed to commemorative commissions may perform only advisory functions, and that if Members of Congress comprise a majority of the commission, then the commission itself may perform only advisory functions).
95. See 8 Op. Off. Legal Counsel, supra note 93, at 259. The Justice Department’s solution was to establish an Executive Committee within the Commission, comprised only of non-Members of Congress, that would have the sole authority to make binding decisions for the Commission. Id.
96. 8 Op. Off. Legal Counsel, supra note 93, at 251 (limiting the Commission’s duties, duration and tenure to coordinating a limited number of events to celebrate the bicentennial of the Constitution); see Hartwell, 73 U.S. (6 Wall.) at 393 (defining federal offices based upon duration, duties, tenure, and emolument).
97. See Calabresi & Larsen, supra note 2, at 1078 (characterizing the purpose of the Incompatibility Clause as to “stop the President from using certain kinds of patronage appointments to build support for his programs in Congress”); see also infra notes 433-61 and accompanying text (discussing the purpose of the Emoluments Clause).
98. Hartwell, 73 U.S. (6 Wall.) at 393.
99. Id. (holding that a federal officer’s term embodies both tenure and duration).
100. See United Nations Participation Act § 2.
101. Hartwell, 73 U.S. (6 Wall.) at 393 (emphasis added).
EMOLUMENTS CLAUSE

strates that the Court was being descriptive, rather than prescriptive, as to the attributes of federal offices. By stating the common attributes of federal offices, the *Hartwell* Court treats federal appointments on a continuum, with each position having its own degree of office-likeness. For instance, a position characterized by substantial tenure, duration, emoluments, and duties is the paradigmatic office; conversely, a position possessing none of these attributes would reside at the other end of the continuum as clearly a non-office. Positions characterized by some, but not all, of the attributes of offices reside at a point somewhere in between, but nearer to one of the poles depending on the totality of its own attributes. Therefore, an office such as United Nations Representative, a position with substantial tenure, duration, and duties, \(^{102}\) could not escape being an office simply because the position did not receive pay. \(^{103}\) Instead, such a position rests at a point away from the paradigmatic offices, based upon its lack of emoluments, but still far closer to the paradigmatic offices than the paradigmatic non-offices. Furthermore, Congress’s determination that United Nations Representatives generally shall be compensated demonstrates that the office embraces “the idea of emoluments,” even if a particular appointee might be denied emoluments based upon her status as a Member of Congress. \(^{104}\) The essentially unanimous view that ceremonial appointees are not officers for purposes of the Emoluments and Incompatibility Clauses is well-taken, considering that these constitutional provisions are aimed at offices with substantive power and the authority to act in the name of the United States. Where Congress and the President have erred, however, is in crossing the line and submitting that appointees with substantial official responsibilities may evade the Constitution simply by a statutory denial of compensation. The more substantive the duties and privileges become, the more a position appears office-like, bringing it under the purview of the Emoluments and Incompatibility Clauses.

\(^{102}\) Considering that United Nations Representatives must be confirmed by the Senate, they serve at the pleasure of the President, and their authority includes speaking definitively for the United States, such representatives possess all of the duties and privileges associated with federal officers. See 22 U.S.C. § 287(a) (1988) (describing the office of United Nations representative).

\(^{103}\) Taken to its most absurd result, Congress’s assertion that a denial of emoluments precludes a federal position from being an office would permit a Member of Congress to serve simultaneously as President as long as she did not receive the compensation generally due to the holder of that office. That result would be directly contrary to the policies underlying the Incompatibility Clause.

D. “Which shall have been created . . . during such time”

The very beginning of the Emoluments Clause establishes the class of persons subject to disqualification from certain federal offices and the duration of such a disqualification. The language “which shall have been created . . . during such time” sets out the first of two events that will disqualify Senators and Representatives from appointment to federal offices.\textsuperscript{105} Whenever Congress creates a federal office, persons elected to Congress for a term that has not expired at the time the office is created are disqualified from appointment to that newly-created office until their elected term expires.\textsuperscript{106}

The most illustrative example of the operation, and potential harshness, of this provision is the case of Governor Kirkwood of Iowa. In 1876, Kirkwood was elected to the Senate for a term that was to expire on March 4, 1883.\textsuperscript{107} In March 1881, Kirkwood resigned his Senate seat to become Secretary of the Interior, an office for which he was constitutionally qualified.\textsuperscript{108} Later in 1881, Kirkwood resigned as Secretary of the Interior to return to the private sector.\textsuperscript{109} In 1882, Congress created the office of Tariff Commissioner,\textsuperscript{110} and President Arthur desired to appoint Kirkwood to this new office.\textsuperscript{111} Arthur’s Attorney General, Benjamin Harris Brewster, gave Arthur his official opinion that Kirkwood was ineligible for such appointment by virtue of the Emoluments Clause.\textsuperscript{112} Though Kirkwood had not been an active Member of Congress when the Tariff Commission was created, the Emoluments Clause applied to him because the office had been created during the time for which he had been elected.\textsuperscript{113} Moreover, Kirkwood’s disqualification from appointment lasted not until he ceased being a Member of Congress, but until the term for which he had been elected expired.\textsuperscript{114} Therefore, in Attorney General Brewster’s eyes,
Kirkwood was ineligible for appointment to the Tariff Commission until March, 1883.\textsuperscript{115}

Attorney General Brewster's view of the plain meaning of the Emoluments Clause has been universally accepted,\textsuperscript{116} and clearly is a correct reading of the clause. Whether in order to prevent evasion by resignation,\textsuperscript{117} or out of a desire to create a rule that would not cause an undignified inquiry into a Member's subjective motives,\textsuperscript{118} the language of the Emoluments Clause deals with elected terms, and not periods of active service in Congress. This same strain of reasoning—choosing an impersonal standard over a subjective inquiry—can be seen in the lack of a requirement that the prospective appointee have voted to create the office; simple membership is enough to trigger the disqualification.\textsuperscript{119}

Not surprisingly, the question whether Congress has in fact created a new office rarely has surfaced; statutes creating new federal offices generally are clear enough to settle the matter. On one occasion, however, the question arose concerning whether a presidential nominee was being appointed to a new office, which would trigger Emoluments Clause analysis, or, rather, was being appointed to a previously-existing office, which would not. This issue was raised as one of several arguments made by Senators opposing the nomination of Senator Hugo L. Black to the Supreme Court.\textsuperscript{120} In 1932, Black had been elected to the Senate for a term that would not expire until 1939.\textsuperscript{121} In 1937,
Congress enacted a law that permitted sitting Supreme Court Justices to retire at full salary from active service at age seventy. On August 12, 1937 President Roosevelt nominated Senator Black to fill a vacancy on the Court occasioned by the retirement of Associate Justice Willis Van Devanter. Because the Supreme Court had held that federal circuit judges retiring under a similar law continued to hold their offices, some Members of Congress argued that Justice Van Devanter had retained his seat on the Court, albeit in a different status, and that Senator Black’s appointment was to a newly-created office.

The case of a Supreme Court Justice retiring, however, differed from that of circuit judges in that retiring circuit judges could be called upon to perform judicial duties of a kind similar to those performed while in active service, and the statute providing for their retirement explicitly stated that they retained their office. The retirement law for Supreme Court Justices permitted a retired Justice to hear cases within a judicial circuit, but did not permit retirees to hear cases before the Supreme Court. A majority of the Senate, by confirming Black, recognized that the substantial change in Justice Van Devanter’s duties, and Senator Black’s assumption of the exact duties surrendered by Van Devanter, indicated that if anyone had entered a new office, it was Van Devanter and not Black. Therefore, the language in the Emoluments Clause relating to the creation of offices during a Member of Congress’s elected term did not create a constitutional impediment to Black’s appointment to the Court.

123. WITT, supra note 75, at 860.
124. Booth v. United States, 291 U.S. 339, 350 (1934) (“By retiring pursuant to the statute a judge does not relinquish his office.”).
125. See, e.g., 81 CONG. REC. 9075 (1937) (statement of Sen. Burke); id. at 9078-79 (statement of Sen. Tydings); id. at 9080 (statement of Sen. Wheeler).
128. See, e.g., 81 CONG. REC. 9079 (1937) (remarks of Sen. Connally); id. at 9081 (statement of Sen. McGill) (“I will not contend whether there was or was not a new office created, but if any new office was created, it was the office of a retired Justice . . . now held by Mr. Justice Van Devanter.”).
129. Though the law permitting the retirement of Justices did not create a new office, other than possibly the office of retired Justice, the statute was an increase in emoluments and properly should have disqualified Black from appointment until his senatorial term expired in 1939. See infra notes 138-55 and accompanying text.
E. "Or the Emoluments whereof shall have been encreased during such time"

The second disqualifying event, an increase in the emoluments of a federal office, rests in parallel construction with the language pertaining to the creation of a new federal office; therefore, several of the same conventions govern both provisions. As with the creation of federal offices, a Senator or Representative can be disqualified from appointment to a federal office that was the subject of increased emoluments long after the Member resigned her seat, as long as the increase occurred during the natural duration of her elected term. Likewise, the Senator or Representative need not have voted for the increased emoluments.

Nevertheless, two legal issues do arise under the "emoluments" language that do not come into play when discussing the creation of new offices: the meaning of the term emoluments, and the effect of an increase in emoluments that occurs subsequent to a Member’s appointment to federal office.

1. The Meaning of the Term "Emoluments"

Black’s Law Dictionary defines emoluments as “[a]ny perquisite, advantage, profit, or gain arising from the possession of an office.” Courts attempting to define the term have recognized that, at a minimum, emoluments include more than simply salary. In McLean v. United States, the Supreme Court interpreted a statute directing the payment of “all back pay and emoluments” to a reinstated Army officer as including not only back salary and rations allowances, but also the value of forage and servants’ pay to which the appellant’s husband would have been entitled. In so holding, the Court noted that Congress’s grant of back emoluments included “indirect or contingent remuneration” that Major McLean would have enjoyed had he been in actual service. Thus, it seems clear that emoluments include a class of benefits broader...
than salary. Less certain, however, is the line of demarcation between benefits that, though not salary, still are emoluments, and those benefits too attenuated to qualify as emoluments.

The definition of emoluments first arose as a constitutional issue during the confirmation of Senator Black as an Associate Justice of the Supreme Court in 1937. During Black’s Senate term, Congress passed legislation establishing a pension for Justices who retired at or after age seventy. In addition to arguing that Black was ineligible because he was being appointed to a newly-created office, opponents of the Black nomination also contended that he was ineligible for appointment because the pension was an increased emolument.

Senator Edward R. Burke characterized McLean as holding that emoluments included “everything that makes the office attractive.” Supporters of the Black nomination countered Burke’s characterization by noting the absurd results that would occur under Burke’s interpretation of increased emoluments, and suggested that the term emoluments was limited to salary and little else. Additionally, Black’s supporters argued that the pension was not an emolument because a retiring Justice did not receive additional pay upon retirement, only a reduction in duties. In the end, the Senate rejected the two Emoluments Clause claims against Senator Black’s nomination, as well as a host of nonconstitutional issues, and confirmed him as an Associate Justice by a wide margin.

137. Id. at 382-83; cf. Barr v. Blackstone, 13 A.2d 449, 451 (Del. 1940) (noting that Webster’s defined “emoluments” as “the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office as salary, fees and perquisites; advantage; gain, public or private”).
138. See generally 81 CONG. REC. 9076-86 (1937).
139. Act of March 1, 1937, ch. 21; see also WITT, supra note 75, at 860.
140. See supra notes 120-29 and accompanying text.
141. 81 CONG. REC. 9076 (1937).
142. Senators Minton and Connally noted that Burke’s expansive reading of McLean would have made Members of Congress ineligible for appointment to the Supreme Court upon the following events: construction of a new Supreme Court building, giving a Justice an additional secretary, replacing an uncomfortable chair with a soft chair, and installing air conditioning in the Supreme Court building. 81 CONG. REC. 9076, 9086 (1937). Senator Burke responded to this assault by retreating slightly, arguing instead that the McLean Court, in defining emoluments, “meant practically everything that would make the office more attractive.” Id. at 9077 (emphasis added).
143. Id. at 9086 (statement of Senator Connally that he could not think of any way other than raising salary for an office to have its emoluments increased).
144. Id. at 9083 (statement of Sen. Connally).
145. See id. at 9103; see also infra text accompanying note 484.
146. 81 CONG. REC. 9076, 9103 (1937) (confirming Black by a 63-16 vote).
tionality of Black's appointment, the Supreme Court held that the petitioner lacked standing to prosecute his claim.\textsuperscript{147}

While Senator Burke's expansive definition of emoluments is extreme, it is hard to justify the Senate's apparent position that a pension is not an emolument of office. Perhaps the proper test for emoluments is the degree to which the benefit is financial, though not necessarily direct, and personal, as opposed to professional. Unlike an additional secretary, construction of a new office building, or the installation of air conditioning, a pension is both highly financial and highly personal. Pensions do not enhance the professional efficiency of an office, but enrich the recipient financially.

Equally specious is the argument that a pension is not an increased emolument because it is a diminishment of duties rather than an increase in pay. Courts in other contexts have recognized that pension plans are part of an officeholder's compensation, distinct from the salary itself.\textsuperscript{148} There can be little doubt that the existence of a full-salary pension makes an office more attractive in purely financial terms; otherwise employers would not suffer the financial and administrative burdens of establishing such programs. Yet, as Black's supporters argued on the Senate floor, the Retirement Act did not increase Justice Van Devanter's salary.\textsuperscript{149} The question was not whether the pension was an increased emolument to him but, rather, whether the existence of such a generous pension made the office more financially attractive to Senator Black. The right to collect full salary without performing any duties, as opposed to having to resign and forgo the right to collect a full salary during good behavior, is a significant personal financial benefit arising from holding federal office, a benefit that had been conferred upon the office of Associate Justice during Black's term in the Senate.

Though those supporting Black's nomination primarily contended that pensions in general were not an emolument of office, some commentators have characterized the Senate as determining only that the pension was not an emolument as to Senator Black.\textsuperscript{150} The argument

\textsuperscript{147} Ex parte Levitt, 302 U.S. 633, 634 (1937) (per curiam).

\textsuperscript{148} See, e.g., Schieffelin v. Berry, 216 N.Y.S. 367, 374 (App. Div.) ("It is established that pensions and retirement allowances are part of the compensation of public officials."), aff'd, 154 N.E. 623 (N.Y. 1926); Wright v. Craig, 195 N.Y.S. 391, 394-95 (App. Div.) (citing precedent in holding that pensions are consideration for continued employment over a specified period), aff'd, 138 N.E. 441 (N.Y. 1922).

\textsuperscript{149} 81 CONG. REC. 9083 (1937) (statement of Sen. Connally).

\textsuperscript{150} See, e.g., CORWIN'S CONSTITUTION, supra note 92, at 32; CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA:
is that because Black was only fifty-one years of age at the time of his nomination, and would not be eligible for the pension unless he served on the Court for nineteen years, the likelihood of his receiving the pension was too uncertain for it to be an increased emolument.\textsuperscript{151} Admittedly, Congress could create a financial benefit of office that takes effect so far in the future that current nominees could foresee no realistic financial benefit arising from it. For instance, if Congress had created a pension in 1937 that did not become effective for several decades, or became effective upon reaching the age of 100, certainly Senator Black could not have viewed such a pension as a financial benefit to him. The Retirement Act, however, created a financial benefit that was reasonably attainable for Justice Black.\textsuperscript{152}

Despite his questionable definition of emoluments, during the Black controversy Senator Burke developed perhaps the most thoughtful test for determining whether an increase in emoluments was too remote to apply to a particular nominee.\textsuperscript{153} Senator Burke suggested that the pension was an increased emolument as to Senator Black because its existence significantly increased the present value of the stream of financial benefits flowing from an appointment to the Court.\textsuperscript{154} This actuarial formulation makes sense in that it considers both the size of the emolument and the likelihood that an appointee could someday receive that emolument. Considering that emoluments measure the financial attractiveness of an office, this test gauges the extent and the likelihood of an increased financial benefit, the very considerations that would inform the decision of a prospective nominee who viewed an office in purely financial terms.

If Senator Black had viewed his nomination strictly in financial terms, he could not have helped seeing the pension as enhancing the attractiveness of appointment to the Court. Though he was not certain to reach the age of seventy, he at least enjoyed a fair probability of doing so; and the remuneration available at age seventy to a Justice who no longer desired active service had increased significantly—from zero to full salary—under the Retirement Act. This enhanced financial package

\textsuperscript{151} \textit{Corwin's Constitution}, \textit{supra} note 92, at 32.

\textsuperscript{152} In fact, Justice Black did retire pursuant to the 1937 Retirement Act, though it was only after he suffered a debilitating stroke and only eight days before he died. \textit{Witt}, \textit{supra} note 75, at 860. Moreover, considering that Justice Black lived to the age of 85, he could have availed himself of a pension under the Retirement Act for a full 15 years had he retired at age 70. \textit{Id.}

\textsuperscript{153} \textit{See} 81 \textit{Cong. Rec.} 9076 (1937) (remarks of Sen. Burke).

\textsuperscript{154} \textit{Id.}
made the office of Associate Justice more attractive than it had been, creating a disability under the Emoluments Clause that should have prevented Black’s appointment until his Senate term ended in 1939.\textsuperscript{155}

\section{Emoluments Increases Subsequent to Appointment}

While the debate over Justice Black’s appointment surrounded an emolument that had been enacted into law, but was not certain to actually bestow benefits on Justice Black, a different situation arises for other types of arguably “uncertain” emoluments—those emoluments that might be enacted into law after the Member of Congress has been appointed to the federal office. This situation has arisen most frequently under the Postal Revenue and Federal Salary Act of 1967.\textsuperscript{156} That Act created a commission that recommends to the President salary adjustments for federal officeholders.\textsuperscript{157} After receiving the commission’s recommendations, the President transmits a proposed salary schedule to Congress, which may or may not mirror the commission’s recommendations.\textsuperscript{158} Until amended in 1989, the Act provided that the President’s proposed salary schedule became law if Congress did not disapprove it within thirty days of its transmittal;\textsuperscript{159} pursuant to the 1989 amendment, the President’s proposed schedule takes effect only after Congress enacts a bill or joint resolution approving the President’s recommendations.\textsuperscript{160}

Particularly before the 1989 amendment, once the President transmitted a salary schedule to Congress, it was extremely likely that the recommended salaries would become law thirty days after transmittal. The question became whether a recommended salary increase was an increased emolument before expiration of the thirty day period during which Congress could disapprove the increase. In response to an inquiry

\textsuperscript{155} Even if Justice Black did not intend to retire at age 70, or to retire at all, the Emoluments Clause should have prevented his appointment. For whatever reason, the Emoluments Clause was drafted to preclude inquiry into the subjective motives of Members of Congress. See infra text accompanying notes 362-63.


\textsuperscript{157} Id. § 225(g).

\textsuperscript{158} Id. § 225(h).

\textsuperscript{159} As originally enacted, Congress could cancel all or part of the President’s recommended salary schedule if either house passed a disapproving resolution. Id. § 225(i)(1). In 1977, Congress amended the section to provide that Congress could disapprove the President’s recommendations only by joint resolution. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § 401, 91 Stat. 39, 45 (codified as amended at 2 U.S.C. § 359 (1994)).

from Secretary of Defense-designate Melvin Laird, Ramsey Clark, President Johnson's Attorney General, determined that the Emoluments Clause applied only to emoluments actually increased prior to the Member's appointment to federal office. Proceeding on the assumption that Laird would be confirmed during the first few days of the Nixon administration, before President Johnson's salary recommendations became law, Clark found the Emoluments Clause to be no bar to his appointment. The Senate, apparently agreeing with Clark's opinion, confirmed Laird on January 20, 1969, without discussion of the Emoluments Clause.

The Carter administration came to the same conclusion during the contentious confirmation of Representative Abner J. Mikva to the United States Court of Appeals for the District of Columbia Circuit. Mikva had been nominated by President Carter on May 29, 1979. On August 31, 1979, Carter transmitted to Congress a recommended salary schedule that included a pay raise for federal judges. By the terms of the Postal Revenue and Federal Salary Act, the pay raise for federal judges would take effect on October 1, 1979, unless Congress disapproved it by joint resolution. The Carter Justice Department determined that Mikva was eligible for appointment if he was appointed before the pay raise became law, in this case before October 1, 1979. In so holding, the Carter administration made two arguments that increased emoluments occurring subsequent to appointment had no bearing on eligibility to hold the office. First, the grammatical construction of the Emoluments Clause requires that the increased emoluments precede appointment. The Emoluments Clause refers to the act of appointment in the future tense, "shall . . . be appointed," while referring to increased emoluments in the future perfect tense, "shall have been

162. Id. at 382-83.
165. 125 CONG. REC. 26,035 (1979).
166. See id. at 26,036.
167. See id.
168. 3 Op. Off. Legal Counsel, supra note 164, at 288. In the alternative, President Carter's Office of Legal Counsel argued that, if Mikva were not confirmed before the pay raise became law, Congress could remove any disability under the Emoluments Clause by virtue of the Saxbe fix, a procedure by which Congress would exempt Mikva's office from the pay raise. See id. at 289-90; see also infra notes 272-73 and accompanying text.
The use of the future perfect tense, which refers to completed action, for the language pertaining to the increased emoluments, in conjunction with the future tense for the appointment plainly evinces a desire on the part of the Framers that increased emoluments be a bar to holding office only if they occur prior to the appointment. As a second argument, the Carter administration noted that if increased emoluments occurring after appointment of a Member of Congress to the federal judiciary could make her ineligible for that office, then the Emoluments Clause would permit the removal of federal judges in contravention of their constitutionally granted right to hold office during good behavior.

Plainly, the Laird and Mikva controversies were decided correctly by the Johnson and Carter administrations. The use of differing tenses for increased emoluments and appointment, one tense describing completed action, the other not, indicates that increased emoluments occurring after appointment have no legal effect on eligibility for office. Moreover, it is highly unlikely that the Framers sought, through the Emoluments Clause, to undermine constitutional provisions granting federal judges lifetime tenure and granting the President sole power to remove purely executive officers.

The fact that the Johnson and Carter administrations correctly interpreted the Emoluments Clause does not mean that their interpretation is a complete bar to potential abuses. The case of Representative James F. Battin’s appointment as a United States District Judge illustrates how the Emoluments Clause’s treatment of post-appointment pay raises can frustrate other components of the Clause. Pursuant to the Postal Revenue and Federal Salary Act, the salaries of district judges were to increase on March 1, 1969, unless Congress passed a joint resolution canceling the raise. On February 27, 1969, Representative Battin resigned from the House and was sworn in as a United States District Judge in order to take office, and be out of Congress, before the pay raise took effect.
The Emoluments Clause was drafted so that a disability would last for the elected term; resignation from Congress could not remove an ineligibility imposed by the Emoluments Clause. Therefore, if there was an increase in emoluments, Battin would be ineligible for appointment to the federal judiciary until his term expired in 1971, his willingness to resign from the House notwithstanding. Nevertheless, the Emoluments Clause never applied to Battin. Unlike the case of Governor Kirkwood, Battin was appointed before the occurrence of a disqualifying event, in this case the salary increase. Thus, the interplay between appointment and an increased emolument allows a Member of Congress to evade the grasp of the Emoluments Clause through resignation, provided that the Member resigns and is appointed to the federal office before the increased emolument becomes law.

In opposing the appointment of Senator William Saxbe as Attorney General, Professor, now Justice, Stephen G. Breyer made an interesting argument that directly contradicts the Justice Department’s opinions in the Laird and Mikva cases. Breyer did not quarrel with the view that an increased emolument must occur before appointment in order for the Emoluments Clause to apply. Instead, he based his argument on a different definition of the timing of an emoluments increase. Breyer stated that an enhanced likelihood that Congress would raise the salary of a federal office made an office more attractive, and was therefore an increased emolument entirely separate from the actual pay raise legislation. Applying Breyer’s reasoning to the Laird, Mikva, and Battin appointments, it would be irrelevant whether they were appointed before their salary increases were enacted into law. Once the commission established under the Postal Revenue and Federal Salary Act recommended a pay raise to the President, the increased likelihood that a pay raise of some sort would become law would increase the attractiveness of appointment to that office, disqualifying Members of Congress.

The major failing of the Breyer position is the same weakness in the definition of emoluments offered by Senator Burke during the Black

178. See supra notes 55-73 and accompanying text.
179. Governor Kirkwood resigned from the Senate before Congress created the office of Tariff Commissioner. After Congress created the office, President Arthur desired to appoint Kirkwood to the office. However, because the office had been created during his elected term, the Emoluments Clause made Kirkwood ineligible for appointment. See supra notes 107-15 and accompanying text.
180. See 119 Cong. Rec. 38,331 (1973) (letter from Professor Stephen G. Breyer to Senator Robert C. Byrd (Nov. 21, 1973)).
181. See id.
182. See id.
confirmation debates.\textsuperscript{183} Both theories would lead to absurd results that essentially would make it impossible for a sitting Member of Congress to be appointed to federal office under any circumstances, in direct contravention to the intent of the Framers.\textsuperscript{184} Just as issuing new, soft chairs to Supreme Court Justices would be an increased emolument under Burke’s definition,\textsuperscript{185} Breyer’s view would have an emoluments increase occur upon equally ridiculous occasions. The very existence of inflation certainly increases the likelihood that the pay of federal offices will be increased, as would unsubstantiated rumors that the commission intended to recommend a pay increase to the President. In fact, Breyer’s letter concerning the Saxbe nomination confirms that his view leaves no logical stopping point for his all-encompassing definition of increased emoluments. Before Saxbe was nominated for Attorney General, the pay of the Attorney General had been increased pursuant to the Postal Revenue and Federal Salary Act.\textsuperscript{186} Saxbe’s supporters advocated the reduction of the Attorney General’s pay to the amount the office commanded when Saxbe’s term in the Senate began, the so-called Saxbe fix.\textsuperscript{187} Breyer argued that, the constitutional efficacy of the Saxbe fix aside, Saxbe was ineligible in any event because a pay raise, accompanied by a reduction to accommodate Saxbe, increased the likelihood that Congress would restore the pay raise at some later date.\textsuperscript{188} Breyer pointed to no evidence that Congress would increase the Attorney General’s pay apart from the fact that Congress previously had done so.\textsuperscript{189} This view of previously repealed legislation as an increased emolument demonstrates that Breyer’s standard would leave the question of the onset of increased emoluments very much in the eye of the

\begin{itemize}
\item \textsuperscript{183} Senator Burke argued that any factor that makes an office more attractive to prospective nominees is an emolument. See supra notes 141-43 and accompanying text.
\item \textsuperscript{184} See supra notes 138-43 and accompanying text.
\item \textsuperscript{185} See supra notes 141-43 and accompanying text.
\item \textsuperscript{186} See 119 CONG. REC. 37,017 (1973).
\item \textsuperscript{187} Id. at 37,688 (statement of Asst. Att’y Gen. Robert G. Dixon, Jr.).
\item \textsuperscript{188} See 119 CONG. REC. 38,331 (1973). In his letter, Breyer wrote:
\begin{quote}
[A]n office for which Congress has once voted a pay increase has been made more attractive through a pay increase even if Congress passes remedial legislation. The reason is simply that in such a case Congress is infinitely more likely to re-vote the pay increase as soon as the Senator’s disqualification expires than if Congress had never voted a pay increase for the office.
\end{quote}
\item \textsuperscript{189} See id.
\end{itemize}
beholder, an amorphous inquiry absolutely devoid of judicially cognizable standards.\(^\text{190}\)

### III. THE CONSTITUTIONAL EFFICACY OF THE SAXBE FIX

The Saxbe fix is a procedure 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.\(^\text{191}\) Similar to the questions raised during the appointments of Senator Black and Congressmen Laird, Mikva, and Battin, the Saxbe fix is based upon an interpretation of the language “or the Emoluments whereof shall have been encreased.”\(^\text{192}\) Unlike those controversies, however, the Saxbe fix deals with the interpretation of the word “encreased,” instead of “emoluments.” Essentially, proponents of the Saxbe fix argue that the emoluments of a federal office have not been increased if the emoluments at the time of appointment are equal to or lower than they were at the time the nominee’s congressional term began, regardless of whether the office commanded higher emoluments in the interim.

The constitutional effect of the Saxbe fix has been a controversial question ever since President Taft first invoked it in appointing Senator Philander Knox as Secretary of State.\(^\text{193}\) Of course, at that time the procedure was not known as the Saxbe fix, that term coming later with the appointment of Senator William Saxbe as Attorney General in 1973.\(^\text{194}\) The arguments offered by both proponents and opponents of various nominees taking office under the auspices of the Saxbe fix offer a rich source for analyzing the respective merits of literalism and intentionalism, as well as insight into various theories of the Framers’ intent and the policies underlying the Emoluments Clause.

\(^{190}\) In fairness, Breyer stated that “[h]e did] not offer this as an expert opinion, for [h]e had] not researched the question.” \textit{Id.} Therefore, it is uncertain whether, upon reflection, Breyer would find his initial view persuasive.

\(^{191}\) \textit{See Saxbe Hearing, supra} note 116, at 2-3 (discussing whether constitutional disqualification can be removed by legislation); \textit{id.} at 53, 58 (remarks of Prof. Van Alstyne); \textit{id.} at 69-74 (statement of Asst. Att’y Gen. Robert G. Dixon, Jr.).

\(^{192}\) \textit{U.S. Const.} art. I, § 6, cl. 2; \textit{see also supra} text accompanying notes 130-90.

\(^{193}\) \textit{43 Cong. Rec.} 2390-403 (1909).

\(^{194}\) \textit{See Paulsen, supra} note 11, at 910-11.
A. The History of the Saxbe Fix

1. The Progenitor: The Case of Philander C. Knox

Ironically, the Saxbe fix was first employed by President William H. Taft, who later served as Chief Justice of the United States.195 After being elected President in 1908,196 Taft decided to nominate Senator Philander C. Knox as Secretary of State.197 Knox was ineligible for appointment at the time, however, because he had begun serving his Senate term in 1905198 and Congress had increased the salary of the Secretary of State from $8,000 to $12,000 in 1908.199 Therefore, the pay increase disqualified Knox from appointment as Secretary of State until his Senate term ended on March 3, 1911.200 Nevertheless, the Taft administration concluded that Congress could remove Knox's disability under the Emoluments Clause by passing legislation reducing the Secretary of State's compensation back to $8,000.201 The rationale for such a position was that the Emoluments Clause touches only upon emoluments increases; therefore, if the salary at the time of Knox's appointment was the same as it had been at the start of his Senate term, the emoluments of the office would not have increased during such time.202 As an alternative to its literal reading of the Emoluments Clause, the Taft administration argued that the Emoluments Clause should be interpreted in accordance with the general purpose underlying it.203 According to Knox's supporters, "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."204 Because the Emoluments Clause prohibited Knox from receiving the benefit of the pay raise, there was no

195. See Witt, supra note 75, at 855.
196. Id.
198. See id. at 2392.
199. See id. at 2392 (remarks of Rep. Clark) (stating that Senator Knox's current term in the Senate had commenced on March 4, 1905); id. (noting that the annual salary of the Secretary of State was raised from $8,000 to $12,000); see also Act of May 22, 1908, ch. 186, 35 Stat. 184, 197 (raising the annual salary of the Secretary of State to $12,000).
201. Id. at 2402-03 (unofficial opinion of Asst. Att'y Gen. Charles W. Russell).
202. Id.
204. Id. at 2403 (citing 1 Story, supra note 19, § 867, at 612).
possibility that his vote could have been influenced by an expectation of receiving such benefits.

In opposing legislation to reduce the pay of the Secretary of State from $12,000 to $8,000, House Democrats filed a minority report arguing that, the necessity of an Emoluments Clause aside, Congress had an obligation to follow the express language of the Constitution. The House Democrats determined that the express language of the Emoluments Clause disqualified Knox from appointment at the moment the 1908 pay raise became law, and that no subsequent reduction in the office’s emoluments could erase the fact that it had been the subject of an increase in emoluments during Knox’s term.

In the end, the House Democrats’ view of the Emoluments Clause did not prevail. Congress passed legislation repealing that part of the 1908 law which increased the pay of the Secretary of State, thereby clearing the way for the Senate to confirm Senator Knox to that office.

2. The Confirmation of Senator William Saxbe

Although the Knox confirmation was contentious, it did not provide the wealth of Emoluments Clause analysis which was produced during the acrimonious confirmation of Senator William Saxbe as President Nixon’s Attorney General in 1973. Saxbe, like Knox before him, faced an Emoluments Clause bar to his appointment because, during Saxbe’s current Senate term, the salary of the office of Attorney General had been increased pursuant to the Postal Revenue and Federal Salary Act. President Nixon’s Acting Attorney General, Robert H. Bork, submitted a bill to Congress to reduce the annual salary of the Attorney General’s office to $35,000, the salary the office commanded at the start of Saxbe’s Senate term in 1969.

Bork supported his position that reducing the Attorney General’s
salary would remove any constitutional impediment to Saxbe's appoint-
ment by relying heavily upon the Knox precedent. Additionally, Bork invoked the case of Senator Lot M. Morrill. Morrill began serving
a six year Senate term in 1871. In 1873, Congress increased cabinet
officers' annual salaries from $8,000 to $10,000, but returned the salaries
back to $8,000 per year in 1874. In 1876, Morrill was appointed
Secretary of the Treasury without the Emoluments Clause ever being
raised as a possible constitutional impediment. Bork used the Morrill
precedent to argue that the Senate traditionally has not considered a
Member of Congress to be disqualified from a federal office unless the
emoluments of that office are higher at the time of appointment than they
were at the time the Member's term began. Thus, the Bork view was
that increased emoluments occurring after a Member's term began, but
repealed at the time of appointment, are irrelevant for purposes of the
Emoluments Clause.

Bork, however, did not base his constitutional argument solely on
congressional precedent. Ironically, Bork, an unapologetic textualist,
used the Knox and Morrill cases to argue that previous Congresses had
recognized that the spirit of the Emoluments Clause is satisfied if the
nominee receives none of the increased emoluments occurring during her
current congressional term. Nevertheless, in making his intentionalist
argument, Bork did not explicitly state his vision of the spirit of the
Emoluments Clause or the intent of the Framers in adopting such a
provision.

Two other supporters of the Saxbe nomination offered their views of
the intent of the Emoluments Clause. According to Assistant Attorney

211. See id. at 5-6 (letter from Acting Attorney General Bork to the Senate Post Office and
Civil Service Committee).
212. See id. at 5.
213. See id.
214. See id.
215. See id. at 6.
216. See generally Robert H. Bork, The Tempting of America: The Political Seduction
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.”). Professor Paulsen noted that
Bork never explicitly stated that satisfaction of the spirit of the Emoluments Clause satisfies the
Constitution, though he was making such an argument at least implicitly. See Paulsen, supra note
11, at 910-11. Additionally, Paulsen suggests that perhaps Bork, as Acting Attorney General, was
“merely serving as a mouthpiece for the President's legal views rather than espousing his own.” Id.
at 911.
General Robert G. Dixon, Jr., the Framers included the Emoluments Clause in the Constitution in order to eliminate, as best as possible, corruption in the appointment process. According to Dixon, the Framers were influenced by the corruption that pervaded the British political system, where the Crown routinely bought support in Parliament by promising Members of Parliament lucrative executive appointments. Additionally, the Framers feared that Congress would create new offices or increase the emoluments of existing offices with the expectation that favored Members would be appointed to such posts.

Dixon argued that permitting the Saxbe fix would frustrate none of these objectives, and that a strict literal interpretation should not be adopted for procedures consistent with the purpose of a constitutional provision. Saxbe, after all, would reap none of the benefits accruing from the increase of the Attorney General's salary in 1969. Further, because all of these benefits had been removed, the Nixon administration could not use the promise of the increased salary to corrupt Senator Saxbe's vote. Moreover, Dixon stated that the Framers restricted the reach of the Emoluments Clause to offices made more attractive during Members' current terms because the Framers wanted to avoid needlessly disqualifying Members of Congress absent the possibility of corruption or self-dealing. Dixon argued that, since the pay reduction would remove all possibility of executive or legislative corruption, failure to permit the Saxbe fix would actually frustrate one of the purposes of the Emoluments Clause by unnecessarily disqualifying an otherwise competent Member of Congress.

William Van Alstyne, a Professor of Law at Duke University,

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219. See id. at 70.
220. See id. at 67-68.
221. See id. at 68, 69.
222. See id. at 71.
223. See id.
224. See id. at 68. Dixon stated:

There is a concurrent consideration . . . by Mr. Pinkney [sic] and also by Mr. Madison and Mr. Wilson and one perhaps more relevant to the present day than the question of improper motivation for salary increases.

Neither 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.

Id.

225. Id. at 69.
testified before the Senate Judiciary Committee that the meaning of the Emoluments Clause must be determined in light of its underlying purposes. Like Dixon, Van Alstyne noted that the draft version of the Emoluments Clause had been amended in order to qualify Members of Congress for appointive office where there was no possibility of corruption. Dixon made the limited argument that, although the major purpose of the Emoluments Clause—prevention of executive and legislative corruption of the appointive process—could be met through literal interpretation, that purpose would not be offended by the Saxbe fix. Van Alstyne, however, went one step further and argued that the purpose of the Emoluments Clause could not be achieved by a literal interpretation, necessitating resort to intentionalism.

Van Alstyne illustrated the general inefficacy of the Emoluments Clause's text by considering post-appointment emoluments increases. To Van Alstyne, the purpose of the Emoluments Clause was to prevent excessive practice of a spoils system and "improperly motivated executive-legislative collaboration." Taken literally, however, the Emoluments Clause would not prevent the President and Congress from conspiring to appoint a Member of Congress to an office and then, after appointment, awarding that office a lucrative emoluments increase. According to Van Alstyne, permitting such a series of events completely destroys the efficacy of the Emoluments Clause because Congress and the President would be able to frustrate the purpose of the Clause—prevention of improper executive-legislative collusion—through increased exercise of improper executive-legislative collusion. Van Alstyne's remedy for this problem was to read the Emoluments Clause as allowing a federal officer to retain her office in the event of a post-appointment emoluments increase, but as prohibiting her from collecting the increase, even though the text of the Emoluments Clause creates no such rule.

Having determined that the Emoluments Clause could be effective
only if interpreted in light of its underlying spirit, Van Alstyne considered how the spirit of the Emoluments Clause would be impacted by the Saxbe fix. Because Senator Saxbe would not be enriched by the pay raise, this was not a perpetuation of a spoils system. Fully aware of the constraints of the Emoluments Clause, Saxbe could not have been corrupted by the possibility that he might enjoy the pay raise. Because the Emoluments Clause must be interpreted according to its spirit, and because that spirit was not offended by the Saxbe fix, Professor Van Alstyne testified that Saxbe’s appointment would be fully constitutional.

Democratic Senator Robert C. Byrd led the opposition to the appointment of Senator Saxbe. Senator Byrd argued that unambiguously drafted provisions, such as the Emoluments Clause, do not invite constitutional interpretation and instead should be applied literally. Byrd acknowledged that some constitutional provisions, such as the Fourteenth Amendment, granted Congress amorphous powers or protected civil liberties, and therefore should be interpreted functionally. The Emoluments Clause, however, is more akin to explicit limiting provisions such as prohibitions against the suspension of the writ of habeas corpus and the acceptance of titles of nobility. In such cases, Byrd argued, the Framers intended that the prohibitory clauses be applied literally. Moreover, Byrd argued that the Framers made

234. See id. at 53-54.
235. See id. at 53 (“The plain sense and the history of [the Emoluments Clause] persuades me that the proper answer is... [Saxbe] would not be automatically disqualified, but he would be precluded from realizing any personal benefit during the balance of the term for which he was elected to the Senate.”).
236. Id.
237. Id. at 65-66. Additionally, constitutional scholar Edward L. Barrett, Jr., Professor of Law at the University of California, Davis, submitted a letter to the Senate Judiciary Committee generally sharing Professor Van Alstyne’s view of the constitutionality of the Saxbe fix. See 119 CONG. REC. 38,094 (1973) (letter from Professor Barrett to the Senate Judiciary Committee (Nov. 15, 1973)).
238. 119 CONG. REC. 38,330 (1973) (“[T]he language of the clause is clear and unambiguous; hence, the rule of statutory construction is to give effect to the intent of the Framers of the Constitution as evidenced in the positive and plain words stated by the Framers.”).
239. See id. at 38,329-30.
240. “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2 (emphasis added).
241. “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” Id. cl. 8 (emphasis added).
explicit exceptions to the general rule of prohibition where they felt such exceptions were necessary." In that sense, the Emoluments Clause resembles the requirement that the President be at least thirty-five years of age. Both unambiguously restrict a class of citizens' freedom to take federal office, and neither clause provides for congressional waiver of the prohibition.

Willard D. Lorensen, Dean of the West Virginia University College of Law, and Professor William F. Swindler of the Marshall-Wythe School of Law, William and Mary College, testified similarly before the Senate Judiciary Committee. Dean Lorensen likened the Emoluments Clause to a law requiring motorists to stop at stop signs. Obviously, the spirit of such a law is "to assure that automobiles proceeding along the favored street will not be run into by cars approaching from the controlled street." Nevertheless, motorists cannot avoid a traffic ticket by arguing that they satisfied the spirit of the law by making sure there were no cars approaching when they crossed the intersection. Rather, motorists violate the law by failing to stop, whether they are involved in an accident or not. Dean Lorensen even conceded that the Saxbe fix was consistent with the spirit of the Emoluments Clause. Lorensen, however, stressed that when the words of the constitutional provision are clear, there should be no resort to consideration of the spirit of the provision. Professor Swindler similarly testified that it is beyond the power of Congress and the President to consider the spirit of a clause that is as unambiguously stated as the Emoluments Clause.

While Byrd, Lorensen, and Swindler as much as admitted that the spirit of the Emoluments Clause would not be offended by the Saxbe fix, Professor Philip Kurland of the University of Chicago Law School took a different course in testifying against the Saxbe nomination before the Senate Judiciary Committee. Kurland agreed with the literalists that the

243. See id.
244. "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States." U.S. Const. art. II, § 1, cl. 5.
247. See id.
248. Id. at 41 ("[T]here is considerable evidence to suggest that the intent of the framers of the Constitution would not be offended by this undertaking and the 'spirit' of the prohibition would be left uncorrupted by reducing the salary and confirming the appointment of Senator Saxbe.").
249. See id.
250. See id. at 39 (statement of Prof. William F. Swindler).
Emoluments Clause, being clear and unambiguous, should be applied according to its literal terms.\textsuperscript{251} Where Kurland parted company with the literalists, however, was in his argument that, if one were to go beyond the language of the provision, the Saxbe fix also offended the spirit of the Emoluments Clause. Professor Kurland testified that the purpose of the Emoluments Clause was to "prevent Congress from [enacting] special legislation for the benefit of one of its own Members."\textsuperscript{252} Kurland then noted that this was exactly what was happening with the Saxbe fix.\textsuperscript{253} Everyone agreed that, in the absence of remedial legislation, the Emoluments Clause rendered Senator Saxbe ineligible for appointment.\textsuperscript{254} Thus, by reducing the salary, Congress would be enacting special legislation for the purpose of conferring a benefit upon one of its Members in order to qualify Senator Saxbe for an office to which he aspired.\textsuperscript{255}

The third argument advanced against the efficacy of the Saxbe fix came in the form of a letter from Harvard University Professor Stephen G. Breyer to Senator Byrd.\textsuperscript{256} Senator Byrd and Professor Kurland had acknowledged that the Saxbe fix would return the emoluments of the Attorney General's office to the level commanded at the beginning of Senator Saxbe's term; they argued that increased emoluments occurring during Saxbe's term disqualified him even if the increase were repealed at the time of appointment.\textsuperscript{257} Professor Breyer did not reach this question, arguing instead that the emoluments of the office would be higher at the time of appointment even if the pay raise were repealed by Congress.\textsuperscript{258} To Breyer, the fact that Congress previously had determined that $60,000 was the appropriate compensation for the Attorney General made it extremely likely that Congress would return the Attorney General's salary to that level in the future.\textsuperscript{259} When Saxbe's Senate term began in 1969, there was no indication that Congress believed that

\begin{thebibliography}{99}
\bibitem{251} See id. at 8 (statement of Prof. Philip Kurland).
\bibitem{252} Id. at 6.
\bibitem{253} See id.
\bibitem{254} See id. at 7 (noting that Kurland, moreover, did not believe that legislation could cure the defect).
\bibitem{255} See id. at 6.
\bibitem{256} See 119 Cong. Rec. 38,331 (1973).
\bibitem{257} See supra notes 242-55 and accompanying text.
\bibitem{258} See 119 Cong. Rec. 38,331 (1973) (noting that "an office for which Congress has once voted a pay increase has been made more attractive through a pay increase even if Congress passes remedial legislation").
\bibitem{259} See id. The reference to the future is when Saxbe's term, as well as his disqualification, expires. See id.
\end{thebibliography}
the Attorney General should be paid more than the $35,000 the office commanded at that time. The 1969 pay raise from $35,000 to $60,000, which came after Saxbe’s Senate term began, indicated that Congress believed the Attorney General should be compensated at a level much higher than $35,000. Thus, even if the Attorney General’s salary were reduced back to $35,000, Saxbe would be assuming an office that he knew Congress believed was under-compensated. Therefore, in 1973 there was a much greater expectation that Congress would raise the office’s compensation in the future than there had been in 1969. Breyer believed that there was “no way that the present Congress could disable the future Congress from voting the pay increase” back into law once Saxbe’s Senate term expired. This enhanced probability of a future pay raise made the office more attractive financially, meaning that there was an increased emolument even if the Attorney General’s salary were returned to $35,000.

Though the debate over the Saxbe appointment had been heated, producing a wealth of divergent views on constitutional interpretation and the purpose of the Emoluments Clause, the final outcome was anticlimactic. The bill to reduce the Attorney General’s salary passed the House by a wide margin. The Senate, without a recorded vote, amended the House bill to provide for expedited judicial review, and the House concurred in the Senate amendment. Saxbe was confirmed by the Senate by a vote of seventy-five to ten. There was no legal challenge to Saxbe’s appointment, despite the Senate amendment conferring jurisdiction and requiring expedited judicial review of any such challenges.

3. Post-Saxbe Treatment of the Emoluments Clause

Though the Saxbe fix has been invoked successfully by three Presidents since the Saxbe confirmation in order to qualify a Member of Congress for appointment to federal office, the Saxbe debate might have been the last stand of congressional opponents of the Saxbe fix. In 1975, Edward H. Levi, President Ford’s Attorney General, transmitted legislation designed to remove Representative Bob Casey’s disability.

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260. *Id.*
261. *See id.*
262. The final vote was 261 to 129 in favor of the bill. *Id.* at 39,245.
263. *See id.* at 40,091.
264. *See id.* at 40,266.
265. 121 CONG. REC. 42,018 (1975). Saxbe answered “present.” *Id.*
from appointment to the Federal Maritime Commission.\textsuperscript{266} While the legislation designed to qualify Senators Knox and Saxbe for appointment clearly was designed for the benefit of one particular Member of Congress, the Casey legislation was even more personalized, a sort of modified Saxbe fix. In purporting to qualify Casey for appointment, Congress reduced the salary of only the Commission seat held by George Henry Hearn, the Commissioner whose seat Casey would be nominated to fill.\textsuperscript{267} The salary reduction also was not permanent; the salary of the holder of that Commission seat would be restored to $39,900 on January 3, 1977, when Casey's current House term would expire.\textsuperscript{268} Finally, the salary reduction would end earlier than January 3, 1977, if the next holder of that seat, Casey, ceased to hold that office.\textsuperscript{269} After passage of the remedial legislation, President Ford nominated Representative Casey to the Commission, and the Senate confirmed him by voice vote, without discussion of the constitutionality of the Saxbe fix.\textsuperscript{270} Senator Byrd was the only recorded vote against confirmation and, after Casey was confirmed, Byrd stated that he voted against confirmation because of his belief that the Emoluments Clause made Casey ineligible for appointment.\textsuperscript{271}

In arguing that a post-appointment pay raise would not disqualify Representative Abner Mikva from appointment to the federal judiciary,\textsuperscript{272} the Carter administration argued in the alternative that Congress could employ the Saxbe fix in any event to ensure Mikva's eligibility.\textsuperscript{273} Consistent with this position, the Carter administration employed a modified Saxbe fix in order to qualify Senator Edmund Muskie for appointment as Secretary of State. Because the salary of the Secretary of State had been increased during Muskie's term, Congress passed legislation similar to the Casey legislation in order to remove Muskie's disqualification.\textsuperscript{274} The salary reduction applied only to the next

\textsuperscript{266}. See id. at 40,811. Representative Casey was ineligible for appointment because the annual salary of members of the Federal Maritime Commission had been increased from $38,000 to $39,900 during Casey's current term in the House. See id.


\textsuperscript{268}. See id.

\textsuperscript{269}. Id. § 1(b).

\textsuperscript{270}. See 121 CONG. REC. 42,158 (1975).

\textsuperscript{271}. See id.

\textsuperscript{272}. See supra notes 164-72 and accompanying text.

\textsuperscript{273}. 3 Op. Off. Legal Counsel 286, 289 (1979) ("It should be further noted that . . . 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.").

Secretary of State, which would be Muskie, and provided that the
reduction would be effective only until January 3, 1983, when Muskie’s
Senate term was scheduled to expire. On May 7, 1980, the Senate
confirmed Muskie as Secretary of State with only Senators Helms and
Humphrey voting against confirmation.

Similarly, the Clinton administration has, on two occasions,
confirmed its belief that the Saxbe fix is effective to remove a constitu-
tional disqualification. In 1993, President Clinton nominated Senator
Lloyd Bentsen as Treasury Secretary after Congress passed legislation
reducing that office’s compensation to its level at the time Bentsen’s
Senate term began in 1989. Again, the salary reduction was effective
only until either Bentsen ceased holding that office or Bentsen’s Senate
term expired, whichever occurred first.

In 1994, Senate Majority Leader George Mitchell generally was
thought to be the front-runner for nomination to the seat on the Supreme
Court vacated by retiring Associate Justice Harry Blackmun. One
potential obstacle to Mitchell’s appointment was that Congress had
increased the salary of the office of Associate Justice during the Senate
term Mitchell was then serving. White House Counsel Lloyd N.
Cutler stated his belief that something could “be worked out” to make
Senate Majority Leader George Mitchell eligible for appointment to the
Supreme Court, meaning enactment of remedial legislation. Senate
Republicans, including Minority Leader Bob Dole and ranking member
of the Judiciary Committee, Orrin Hatch, agreed with the Clinton
administration that the Emoluments Clause would be no bar to Mitchell’s

275. See id. § 1(b).
not vote). Senators Helms and Humphrey both voted in favor of the Saxbe nomination. See 121
remedial legislation was necessitated by increases in the salary of the Treasury Secretary under the
279. See Mitchell Loein & Elaine S. Povich, Once Again, President Searches For New Nominee,
Chi. Trib., Apr. 13, 1994, at 1 (“Administration officials had made it clear that
appointment to the seat being vacated later this year by Justice Harry Blackmun was
Mitchell’s . . . .”).
280. See Stephen Chapman, Constitution: Mitchell Ducks Violation On Court, Phoenix
Gazette, Apr. 18, 1994, at B7.
281. See id. Mitchell was, at the time, ineligible for appointment to the Court because the salary
of Associate Justices of the Supreme Court had been increased during Mitchell’s term by § 703(a)(3)
appointment. Eventually, Mitchell withdrew his name from consideration for the appointment, stating that his decision to withdraw had nothing to do with the Emoluments Clause.

Only once since the birth of the Saxbe fix in 1909 has the Executive Branch determined that it could not remove an Emoluments Clause disability through remedial legislation. When Justice Lewis F. Powell Jr. announced his intention to retire from the Supreme Court in 1987, the Reagan administration focused its search for a replacement on two candidates, Judge Robert F. Bork and Senator Orrin G. Hatch. Bork, advocate of the Saxbe fix in 1973 as Acting Attorney General, faced no constitutional bar to appointment. Senator Hatch, meanwhile, faced an Emoluments Clause disqualification because the salary of Supreme Court Associate Justices had been increased during Hatch’s current Senate term. The Reagan administration’s Office of Legal Counsel determined that the Saxbe fix could not erase the fact that the salary of Associate Justices had been increased during Hatch’s term, making him ineligible for appointment until his term ended in 1989. Subsequently, the Reagan administration unsuccessfully nominated Judge Bork for the seat, and then Judge Douglas Ginsburg, before the Senate finally confirmed Judge Anthony Kennedy to replace Justice Powell on the Court.

282. See Ann Devroy & Al Kamen, Ruling Sought on Whether Salary Issue Bars Mitchell as High Court Candidate, WASH. POST, Apr. 9, 1994, at A5 (quoting Senator Hatch as stating that the Emoluments Clause is “easily gotten around”); Locin & Povich, supra note 279, at 10 (stating that Senator Dole “had no problem” with employment of the Saxbe fix to qualify Mitchell for appointment).
283. See loc. cit. note 279, at 10.
284. See Paulsen, supra note 11, at 911-12; Ann McDaniel et al., Will the Court Turn Right?, NEWSWEEK, July 6, 1987, at 17.
285. See Paulsen, supra note 11, at 912 (noting that the big advantage Bork had over Hatch was the absence of a constitutional disqualification).
286. See id. (explaining that Hatch’s disqualification was a problem which “overwhelmed” all of his advantages).
287. See Stephen Chapman, A History of Bending the Constitution for Political Purposes, CHI. TRIB., Apr. 14, 1994, at 27; Devroy & Kamen, supra note 282, at A5. The Office of Legal Counsel opinion has never been released to the public, despite efforts made under the Freedom of Information Act, though the Clinton administration has admitted that such a document exists. See Paulsen, supra note 11, at 912-13.
288. See Paulsen, supra note 11, at 913-14.
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B. The Constitutionality of Appointments

Pursuant to the Saxbe Fix

For the most part, advocates on both sides of the debate over the efficacy of the Saxbe fix have grounded their arguments on whether literalism or intentionalism is the appropriate method for interpreting the Emoluments Clause. Proponents of the Saxbe fix as much as admit that the literal terms of the Emoluments Clause do not countenance the Saxbe fix; they instead argue that it should be tolerated because it does not offend the purpose underlying the Emoluments Clause. On the other hand, with the notable exception of Professor Kurland, opponents of the Emoluments Clause have conceded that the Saxbe fix is fully consistent with the spirit of the Emoluments Clause, but argue that the underlying spirit is irrelevant when the text of the Clause is clear.

If 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. There is a great deal of strength behind the arguments that the Emoluments Clause should be interpreted according to its literal language. The precision of the Emoluments Clause's language, the nature of its substantive command, and the Court's treatment of analogous constitutional provisions all argue strongly against permitting evasion of the Emoluments Clause's literal terms by the Saxbe fix.

1. The Language and Nature of the Emoluments Clause

The courts most frequently resort to consideration of a constitutional provision's spirit when the provision is couched in language that is amorphous or otherwise incapable of precise definition. The Fifth Amendment's Due Process Clause and the Necessary and Proper Clause of Article I are excellent examples of clauses employing

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289. See supra notes 216-37 and accompanying text.
290. See supra notes 251-55 and accompanying text.
291. See, e.g., Paulsen, supra note 11, at 911 ("It is not sufficient to satisfy the perceived 'spirit' of a constitutional provision. The letter of the law must be observed as well."); see also supra notes 238-50 and accompanying text.
292. The Due Process Clause of the Fifth Amendment provides, "[N]or shall any person be ... deprived of life, liberty, or property, without due process of law ...." U.S. CONST. amend. V.
293. The Necessary and Proper Clause of Article I provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing..."
amorphous language. The Emoluments Clause, however, is written in precise terms that adequately delineate the line between permissible and unconstitutional conduct. Of course the Emoluments Clause has terms, such as “appointed” and “office,” that require interpretation; nevertheless, these terms have historical legal meanings that have remained largely unchanged since adoption of the Constitution.

Professor Kurland and Dean Lorensen testified during the Saxbe hearing that the Emoluments Clause was a provision that did not require resort to its underlying spirit. In countering Kurland’s and Lorensen’s assertions, Professor Van Alstyne argued that the simplicity with which the spirit of the Emoluments Clause could be evaded demonstrated the necessity of a functional interpretation. Once the Clause was viewed functionally, Van Alstyne argued, it became clear that the Saxbe fix was consistent with the purpose of the Emoluments Clause and therefore was constitutional. Van Alstyne’s argument, however, is based upon an initial premise that is questionable at best.

For Van Alstyne’s model of interpretation to work, he had to find a scenario that would be a clear evasion of the intent of the Emoluments Clause; otherwise, there is no justification for looking at the spirit of an unambiguous constitutional provision. Van Alstyne selected the case of post-appointment emoluments increases as an instance of such a clear evasion. His argument was that, by the literal terms of the Emoluments Clause, Congress and the President could collude to appoint a

Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Id. art. I, § 8, cl. 18.

294. See Saxbe Hearing, supra note 116, at 8 (testimony of Prof. Kurland) (“There are certain provisions of the Constitution, as Mr. Justice Frankfurter was fond of saying, which do not leave any room for construction. . . . I think this is one of them, that [does] not call for construction.”). During the Saxbe hearing, Dean Lorensen stated:

Certainly there are many instances in which a search beyond the bare words of a constitutional phrase is not only convenient but necessary. . . . What is commerce, what is due process, what is “right to counsel” are all questions that demand continuing review in the light of contemporary demands and experience. . . .

But in the present case, we simply are not faced with an instance in which the need for such interpretation is present.

Id. at 42-43.

295. See id.

296. See supra notes 75-104 and accompanying text.

297. See supra notes 246-51 and accompanying text.

298. See Saxbe Hearing, supra note 116, at 54 (testimony of Prof. Van Alstyne).

299. See id.

300. See id. at 53-54.

301. See id.
Member of Congress to a federal office and then, after appointment, bestow lavish emoluments on that office. Because such a series of events contradicts the Emoluments Clause’s purpose—to prevent improper executive-legislative collusion—Van Alstyne argued that the spirit of the Emoluments Clause would have to be invoked to prevent the federal officer from collecting the pay increase. Van Alstyne errs, however, in his assumption that post-appointment emoluments increases, even when accompanied by corrupt motives, are something the Framers conceived the Emoluments Clause as preventing. Earlier in his testimony, Van Alstyne noted that the Emoluments Clause was drafted so as to be applied impersonally, so that Members of Congress would not suffer the embarrassment of having to defend their motives in a public forum. Professor Kurland also has noted this feature of the Emoluments Clause. Accepting this premise as true, it cuts directly against Van Alstyne’s subsequent argument that post-appointment emoluments increases violate the spirit of the Emoluments Clause. In drafting an impersonal rule, the Framers could not draft a rule that would prohibit all bad conduct while leaving all innocent conduct unaffected; the only method of accomplishing that would have been a rule based upon subjective motive. Thus, the Emoluments Clause is a set of rules that, in the judgment of the Framers, would prohibit most of the undesirable conduct without being unnecessarily overbroad or resorting to a subjective inquiry. If the Framers were intent on fashioning an impersonal prohibition, as Van Alstyne suggested, it is quite likely that the Framers determined that post-appointment emoluments increases are more often than not innocent, and not worthy of a blanket prohibition. Such a determination would justify leaving post-appointment emoluments increases outside the reach of the Emoluments Clause because there would be no impersonal way to separate improperly-motivated increases from the corrupt ones. Limiting the Emoluments Clause to conduct that is most often improperly motivated made additional sense in light of the Framers’ concerns that the rule already operated in some cases to exclude innocent but qualified Members of Congress from serving their country.

302. See id. at 54.
303. See id.
304. See id. at 50.
305. See id. at 9 (testimony of Prof. Kurland).
306. See id. at 65; see also 1 Farrand, supra note 60, at 376 (remarks of Rufus King); 1 id. at 379 (remarks of James Wilson) (“Strong reasons must induce me to disqualify a good man from office.”); 1 id. at 381-82 (remarks of Alexander Hamilton); 2 id. at 283 (remarks of Charles Pinckney).
Therefore, Van Alstyne’s argument is self-contradictory. He noted that the Framers intended the Emoluments Clause to be applied impersonally, without regard to the appointee’s subjective motives, but he then justified deviation from the language of the Emoluments Clause for post-appointment emoluments increases because the impersonal application would allow some bad conduct to escape the Clause’s prohibitions. Rejecting Van Alstyne’s premise that the Framers intended to prohibit post-appointment emoluments increases eliminates his justification for resort to the Clause’s underlying purpose, destroying his argument in favor of permitting the Saxbe fix.

Even if Van Alstyne could point to a scenario where the Emoluments Clause’s language would permit conduct directly contravening its purpose, his next step—that the Saxbe fix therefore should be permitted—does not follow. If one were to deviate from the text in such a case, it seems that disregarding explicit textual commands should be limited to those instances where the result under the text would be inconsistent with the purpose of the Clause. It would be illogical to argue that a counter-intentional result under one part of the Clause should cause a free-for-all within the entire Clause such that any activity that would not be inconsistent with the Clause’s purpose should be permissible, text notwithstanding.

For instance, if a court were to find that the sole purpose of the Emoluments Clause is to prevent congressional self-dealing and improper executive-legislative collusion, then it is arguable that the Saxbe fix is not inconsistent with these goals. But it also is arguable that prohibiting the Saxbe fix is not inconsistent with these goals. In such a case, the court would have to choose between two options, neither of which is inconsistent with the Emoluments Clause’s purpose. If one were to accept Van Alstyne’s model to this point, then perhaps the tie-breaker in such a situation should be resort to the text, an odd result indeed.

307. Van Alstyne himself admitted in his testimony that these were the overriding purposes of the Emoluments Clause. He stated:

It is also true that while article I, section 6, clause 2 meant to deal with the problem of a spoils system (or with the problems of improperly motivated executive-legislative collaboration), it did not mean to do so by allowing Congress or the courts latitude to determine whether a person appointed to a particular office may not in fact have been influenced by any improper consideration . . . .

Saxbe Hearing, supra note 116, at 50.

308. Cf. Frankfurter, supra note 19, at 543 (“Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute.”).
Even under such a model, the Saxbe fix would be unconstitutional because the tie-breaking procedure—resort to the text—favors prohibition of the Saxbe fix.

Van Alstyne attempted to buttress his view somewhat by suggesting that perhaps one of the secondary purposes of the Saxbe fix was to maintain the eligibility for appointment of Members of Congress. Therefore, the Saxbe fix is not only consistent with the Emoluments Clause, but is necessary to achieve this secondary purpose. While this model—that the text of the Clause should be disregarded when the result would frustrate one of its purposes—is more satisfying than the view that an inconsistent result anywhere suddenly permits all actions not inconsistent with the Clause’s purpose, Van Alstyne’s application is faulty. If the Constitution did not contain an Emoluments Clause, then Members of Congress would be eligible for appointment to any federal office, as long as they resigned their seat in Congress. The Emoluments Clause places a restriction on this freedom. Van Alstyne supports his argument by suggesting that the Emoluments Clause was in part enacted to protect the right of Members of Congress to assume federal office. This suggestion is based largely on the fact that the Emoluments Clause was watered down in the course of the Constitutional Convention from an earlier version that had disqualified all Members of Congress from appointment to any federal office. Though Van Alstyne was correct that the scope of the Emoluments Clause had been restricted during the course of the constitutional debates, it is difficult to see how this fact makes the Clause one designed to enhance the eligibility of Members of Congress for appointment to federal office. Rather, a better view of the Emoluments Clause is that it was designed to set out limited prohibitions on appointment to federal office, rather than to enhance the eligibility of Members of Congress, and that the Clause should be read so as not to prohibit any more than was explicitly stated in the text. That view of the Emoluments Clause, of course, also undercuts Van Alstyne’s suggestion that post-appointment emoluments increases—an event outside the scope of the Clause—should be prohibited.

Apart from the precise language used to delineate the scope of the Emoluments Clause, the functional nature of the Clause also argues for

309. See Saxbe Hearing, supra note 116, at 51 (testimony of Prof. Van Alstyne).
310. See id.
311. See id.
312. See id.; see also 1 Farrand, supra note 60, at 235.
313. See supra notes 229-33 and accompanying text.
a literal interpretation. The Emoluments Clause is a restriction on the power of government, not a broad policy statement or a protection of civil liberties.\textsuperscript{314} In that sense, the Emoluments Clause is akin to age restrictions on the President and Members of Congress, constitutional provisions that restrict eligibility for office.\textsuperscript{315} The obvious purpose of the requirement that the President be at least thirty-five years of age is to ensure a certain level of maturity in the holder of that office. Despite that purpose, there is no doubt that an extraordinarily mature thirty-year-old could not successfully contend that the restriction did not apply to him because he satisfied the purpose of the provision by being sufficiently mature.\textsuperscript{316} During the Saxbe hearing, supporters of the Saxbe appointment attempted to weaken the power of this analogy by noting historical cases where the age restrictions on Members of Congress had been violated, suggesting that such rules were not as ironclad as opponents of the Saxbe fix would submit.\textsuperscript{317} Professor Kurland noted, however, that the Constitution grants each House of Congress the sole power to judge its members' qualifications, so that any evasion of the Constitution's text in those cases occurred because the issue was nonjusticiable, rather than as a result of judicial recognition that the restrictions were not absolute.\textsuperscript{318} Congress has no such constitutionally committed power over the Emoluments Clause; therefore, it is not free to interpret the Emoluments Clause in any manner it chooses.

An additional argument in favor of the literal construction of provisions regulating governmental powers is the Framers' frequent, explicit creation of exceptions to provisions where they thought it necessary. The Constitution prohibits any person holding federal office from accepting any emolument, office or title from a foreign state \textit{"without the Consent of the Congress."}\textsuperscript{319} It also prohibits states from laying imposts or duties except as required for executing its inspection laws \textit{"without the Consent of the Congress."}\textsuperscript{320} States cannot enter into compacts with another state or with a foreign power \textit{"without the

\begin{footnotes}
\item[314] See Saxbe Hearing, supra note 116, at 8 (testimony of Prof. Kurland); \textit{id.} at 41 (statement of Dean Lorensen).
\item[315] See \textit{id.} at 8 (testimony of Prof. Kurland).
\item[316] See Paulsen, supra note 11, at 908-09. Similarly, and perhaps regretfully, the presidential age requirement could not be used to disqualify an inordinately immature 40 year old.
\item[317] See Saxbe Hearing, supra note 116, at 18 (statement of Sen. Scott) (noting that Rush Holt, of West Virginia, was elected to the Senate before he turned 30).
\item[318] See \textit{id.} (testimony of Prof. Kurland).
\item[319] U.S. CONST. art. I, § 9, cl. 8 (emphasis added).
\item[320] \textit{id.} § 10, cl. 2 (emphasis added).
\end{footnotes}
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Consent of Congress." Article III grants the Supreme Court appellate jurisdiction over several categories of cases "with such Exceptions, and under such Regulations as the Congress shall make." Though its value in interpreting constitutional provisions adopted eight decades earlier might be somewhat limited, the Fourteenth Amendment disqualifies certain persons from office, like the Emoluments Clause, but also explicitly permits Congress to remove the disability. The implication of these exceptions to textual rules concerning federal powers is that the Framers intended that such provisions be applied literally and that they, not Congress or the courts, would supply the exceptions where the result under the literal rule required revision.


In interpreting unambiguous constitutional provisions regulating the power of government, the courts have tended to apply such provisions literally. For example, there seems to be judicial unanimity that each House is the sole judge of the elections, returns, and qualifications of its members, even though history has shown congressional partisanship to result in a lack of impartiality in the exercise of this judicial function. Similarly, the Supreme Court has held that the Senate’s constitutionally committed sole power to try all impeachments precludes judicial review of the methods by which the Senate conducts such a trial.

321. Id. cl. 3 (emphasis added).
322. Id. art. III, § 2, cl. 2 (emphasis added).
323. The Fourteenth Amendment provides in pertinent part:
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath... to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Id. amend. XIV, § 3 (emphasis added).
325. See, e.g., Sevilla v. Elizalde, 112 F.2d 29, 38 (D.C. Cir. 1940); In re James, 241 F. Supp. 858, 860 (S.D.N.Y. 1965); see also Powell v. McCormack, 395 U.S. 486, 548 (1969) (dicta) (concluding that Article I, § 5, of the Constitution reflects "at most a ‘textually demonstrable commitment’ to Congress to act as the sole power to judge its members’ qualifications but explaining that Congress lacks power to add qualifications beyond those set out in the Constitution). Though the Powell Court did look extensively at the history of the provision, it did so only in addressing the textually ambiguous question concerning whether Congress could add to the constitutional qualifications for office, not toward determining whether Congress was the sole judge of its Members’ qualifications. See id. at 523-47.
Although this judicial tendency toward strict construction in such cases is helpful to the literalist argument, the most fruitful analogy is the Supreme Court’s treatment of alleged diminution of federal judges’ compensation. Article III of the Constitution provides that federal judges shall hold office during good behavior and that their compensation “shall not be diminished during their Continuance in Office.”

On March 27, 1925, Wilbur F. Booth took office as a United States Circuit Judge for the Eighth Judicial Circuit. At the time of his appointment, Judge Booth’s salary was $8,500 per year. In 1932, Judge Booth retired pursuant to section 260 of the Judicial Code, which allowed circuit judges to retire at full salary upon reaching age seventy. Between his appointment in 1925 and his retirement in 1928, Congress had increased the annual salary of circuit judges from $8,500 to $12,500; therefore, Judge Booth received a salary of $12,500 per year upon his retirement. In 1933, while Judge Booth retained the status of a retired circuit judge, Congress passed the Independent Offices Appropriation Act, which reduced the pay of retired judges by fifteen percent. Judge Booth brought suit in the Court of Claims, protesting that the reduction in his retired pay was an unconstitutional diminution of his compensation. The Supreme Court took the question on certification from the Court of Claims and held unconstitutional that portion of the statute which reduced the salary of a retired judge.

The second issue addressed by the Court, and the one bearing on the Saxbe fix, was whether Judge Booth’s salary had in fact been dimin-

329. See id. at 347.
330. See id. at 346-47. Though Judge Booth had been a circuit judge for only six years at the time of his retirement, he had served continuously as a district or circuit judge for the preceding seventeen years, thereby satisfying the longevity requirement of the Judicial Code. Id.
331. See id. at 347.
333. See Booth, 291 U.S. at 347.
334. See id. at 352.
335. Id. at 348-51. The Court did not hold that retired judges are inherently still federal judges. Rather, the Court pointed to the terms of the statute under which Judge Booth retired. The Retirement Act distinguished retirement from resignation, and provided for continued service by retired judges. Id. Therefore, judges retiring under that statute continued to hold the office of federal judge. Id.
ished. According to the Court, the question was whether “a diminution after an increase [is] banned [under Article III], if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office.” That is, can Congress reduce a federal judge’s salary as long as the salary never falls below the level it commanded at the time of appointment? The Court held that Congress could not do so; that a diminution in salary for purposes of Article III occurred any time Congress passed legislation that reduced the salary of a federal judge below the amount to which the judge was entitled prior to the legislation. Even though Judge Booth’s salary at the time of his suit was higher than it had been upon his appointment, his salary had been diminished because his current salary was lower than the highest level he had received during his continuation in office.

Booth is directly applicable to the effect of the Saxbe fix because it demonstrates the Court’s interpretation of relative changes in the salary of federal officers. The salary of a federal judge must, from the time of her appointment, always move upward; the judge’s current salary must at all times be the highest to which she was ever entitled during her continuance in office. The Emoluments Clause applies not to reductions in compensation, but to increases in compensation; the Booth reasoning, however, remains the same. Applying Booth to the Emoluments Clause, it seems that the salary of a federal office must have always moved downward during the prospective nominee’s current congressional term; otherwise the office has been subject to increased emoluments.

Thus, under Booth, federal judges’ salary decreases are not determined by reference to the salary received upon appointment. Rather, decreases are viewed relative to the level of compensation that would exist without the legislation in question. As to the Emoluments Clause, Booth supports the view that federal offices’ compensation increases occur any time legislation gives the office more emoluments than it would receive without the legislation; the amount of the salary at appointment relative to the amount at the beginning of the appointee’s congressional term is irrelevant. Therefore, when an office is the subject of a salary increase, that office’s emoluments have been increased for

336. Id. at 352.
337. See id.
338. See id. at 347, 352.
339. See id. at 352.
340. See id.
purposes of the Emoluments Clause, and a subsequent reduction in salary is just that—a reduction of an increase in salary.\textsuperscript{341} Because an emoluments reduction under the Saxbe fix does not change the fact that the office in question was the subject of an emoluments increase, the Saxbe fix is ineffective at curing a disqualification from appointment under the Emoluments Clause.

Though it is clear that under \textit{Booth} a federal judge’s salary has been diminished any time legislation assigns the office a lower compensation than it would receive without the legislation, supporters of the Saxbe fix have some plausible arguments for distinguishing Article III from the Emoluments Clause. In \textit{Booth}, the Court resolved the issue in just two sentences. The first sentence stated that any reduction in compensation violated Article III, previous pay raises notwithstanding.\textsuperscript{342} In the second sentence, the Court cited with approval three state court opinions resolving state constitutional provisions similarly, and noted that “the Solicitor General with commendable candor admits that a contrary construction would be subversive of the purpose of [section one] of Article III.”\textsuperscript{343}

Intentionalists reasonably could argue that the method by which the \textit{Booth} Court arrived at its decision demonstrates that Article III and the Emoluments Clause must be analyzed in the context of their individual purposes, weakening any analogy between the two provisions. The three state cases cited by the Court all discuss the purpose behind the state constitutions’ prohibition on diminution of judges’ salaries. In \textit{Commonwealth ex rel. Hepburn v. Mann},\textsuperscript{344} the Pennsylvania Supreme Court faced the question concerning whether the state legislature constitutionally could repeal an act that had increased the annual salary of state court judges.\textsuperscript{345} The court, in holding that such a reduction was unconstitutional, stated that the framers of the Pennsylvania Constitution included this provision in order to prevent the legislature, as holder of the purse strings, from coercing the judicial branch.\textsuperscript{346} In holding that state taxes unconstitutionally diminished the compensation of state court judges, the high courts of both Louisiana and North Carolina stated that the purpose of their state constitutional provisions was to ensure the independence of

\textsuperscript{341} See Paulsen, supra note 11, at 908-09.
\textsuperscript{342} 291 U.S. at 352.
\textsuperscript{343} Id.
\textsuperscript{344} 5 Watts & Serg. 403 (Pa. 1843).
\textsuperscript{345} See id. at 404-05.
\textsuperscript{346} See id. at 409.
the state judiciary. Therefore, *Booth* could be read as approving the decision of these state courts to resort to consideration of the purpose of the constitutional provisions, weakening the literalist argument. Furthermore, the *Booth* Court’s recognition of the Solicitor General’s concession as to the purpose underlying Article III fuels the argument that the purpose of the provision dictates its interpretation. From there, it is a very easy argument to make that the purpose of Article III, Section 1—protection of the judiciary’s independence—is served by preventing Congress from ever reducing the compensation of federal judges. A federal judge who has her compensation reduced from its current level to the lower level the office commanded upon her appointment surely has been punished, allowing Congress to wield its power over the purse strings in a coercive manner. Conversely, most constitutional authorities have accepted Justice Story’s statement of the Emoluments Clause’s purpose: The Emoluments Clause was adopted in order to prevent Members of Congress from benefitting personally from the creation of offices or the augmentation of existing offices’ salaries. Unlike the case of a sitting federal judge, who feels the effect of a salary reduction even if the salary remains higher than her salary upon appointment, a Member of Congress appointed to federal office pursuant to the Saxbe fix does not enjoy any of the benefits of the previous, and subsequently repealed, salary increase. Therefore, the argument goes, *Booth* stands for the proposition that constitutional provisions—even unambiguous ones—must be interpreted in light of their purpose, and the Saxbe fix is fully consistent with the purpose of the Emoluments Clause.

The major fallacy of this argument is that it reads too much into the *Booth* opinion. Though the Court in *Booth* explicitly approved of the results reached by the three state courts, it did not explicitly approve of the courts’ methodology. Moreover, the circumstances surrounding

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347. *See City of New Orleans v. Lea*, 14 La. Ann. 194, 194 (1859) (“The object, however, of this Article was to secure the independence of the judiciary.”); *Long v. Watts*, 110 S.E. 765, 769 (N.C. 1922) (“The primary purpose of the prohibition against diminution was not to benefit the judges, but to attract good and competent men to the bench and to promote that independence of action and judgment so essential to the preservation of our governmental polity.”).

348. *See 1 Story, supra* note 19, § 867 (“The reasons for excluding persons from offices 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 . . . .”).

349. The *Booth* Court stated, “In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the affirmative. Several courts, in well-considered decisions, have so interpreted analogous provisions of state constitutions . . . .” *Booth*, 291 U.S. at 352.
each of the three cases make their methodologies inapplicable to an analysis of the Emoluments Clause. For instance, the Long and Hepburn courts’ discussion of the purpose of their state constitutions was dicta, as the courts stated the provisions’ purpose only in supporting their application of the literal command of the text. The same is true of the Solicitor General’s concession that permitting reduction of federal judges’ salaries would offend the purpose of Article III. The Lea court resorted to its state constitution’s purpose because it found the constitutional provision ambiguous as to whether state taxation of judges’ salaries was a reduction in their compensation. It is one thing to support the literal application of the text, or to give meaning to ambiguous text, through resort to the provision’s purpose; it is quite another to use the purpose to disregard the Constitution’s text. At most, Booth legitimizes the former; proponents of the Saxbe fix, to the extent they might rely on Booth, illegitimately would be using that case to argue for the latter.

IV. INTENTIONALIST INTERPRETATION OF THE EMOLUMENTS CLAUSE

If a court were to find pure literalism inappropriate for interpreting the Emoluments Clause, whether that meant totally disregarding the text or just considering the text and the purpose in tandem, the first step in such an analysis would be articulation of the purpose underlying the Emoluments Clause. An intentionalist analysis of the Emoluments Clause requires a two-step examination of any purpose alleged to underlie the Clause. The first step is a factual determination of the extent to which the proposed purpose actually conforms to the intent of the Framers. If the proposed purpose actually conforms to the Framers’ intent, the second step is determining whether that purpose would be served or disserved by the Saxbe fix. The accepted purpose of the Saxbe fix, originally offered by Justice Story, is that the purpose of the Emoluments Clause was to limit the conflict of interest facing Congress as the creator of federal offices—and the regulator of offices’ salaries—to which Members

350. See Long, 110 S.E. at 769 (“It was the evident purpose and intent of the people . . . to prohibit any and every kind of diminution . . . . Any other construction would do violence to the plain purport of the language employed, and render the clause meaningless.”); Hepburn, 5 Watts & Serg. at 406 (“These words [of the state constitutional provision] are unambiguous, and are so plain that it seems to me very difficult to misapprehend them.”).
351. See Booth, 291 U.S. at 352.
of Congress might be appointed.\textsuperscript{353} Accepting Justice Story’s formulation for the moment, it becomes clear that, contrary to the general view, this purpose actually is disserved by the Saxbe fix. Of course, all that means is that proponents of the Saxbe fix would have to characterize the Emoluments Clause’s purpose differently, in a manner consistent with the Saxbe fix. Thus, in order to properly consider intentionalist arguments in favor of the Saxbe fix, one must begin anew and determine whether Justice Story is correct in his view of the Emoluments Clause’s purpose. Such a reexamination does in fact demonstrate that Justice Story was overly simplistic in his view of the Clause’s purpose. A refinement of Justice Story’s formulation, however, actually strengthens the argument against condoning the Saxbe fix on intentionalist grounds.

\textit{A. The Saxbe Fix and Justice Story’s View of the Emoluments Clause}

In his seminal constitutional treatise, Justice Story wrote that the purpose of the Emoluments Clause was “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.”\textsuperscript{354} There has been some subtle re-characterization of Justice Story’s view, re-characterization that would make the Clause more or less friendly to the Saxbe fix. For instance, in opposing the appointment of Senator Saxbe, Professor Kurland stated that the purpose of the Clause was to prevent Congress from enacting special legislation for the benefit of its Members.\textsuperscript{355} Professor Van Alstyne, a supporter of the Saxbe fix, viewed the Emoluments Clause as being designed to ensure that Members of Congress receive no profit from the creation of offices or the augmentation of existing offices during their elected term.\textsuperscript{356} Whatever the subtleties of the spin subsequently put on Story’s definition, his notion that the Clause is designed to avoid corruption and collusion on the part of Congress and the President has been widely accepted. Additionally, apart from Professor Kurland, both supporters and opponents of the Saxbe fix have agreed that the procedure is consistent with the purpose underlying the Emoluments Clause, however it is defined.\textsuperscript{357} This near

\textsuperscript{353} 1 \textit{STORY, supra} note 19, § 867.
\textsuperscript{354} 1 \textit{id.}
\textsuperscript{355} \textit{Saxbe Hearing, supra} note 116, at 6.
\textsuperscript{356} \textit{id.} at 56 (“IT]hat is the purpose, no profit.”).
\textsuperscript{357} Of course, supporters of the Saxbe fix necessarily must argue that it is consistent with the purpose of the Emoluments Clause; otherwise, they would have no argument for disregarding the
unanimity notwithstanding, a close examination of the Saxbe fix demonstrates that it is not consistent with the Emoluments Clause's purpose, even if one were to accept the purpose as that defined by Justice Story and accepted by both proponents and opponents of the Saxbe fix.

Justice Story's formulation of the Emoluments Clause's purpose seems logical from the text of the Clause. The Emoluments Clause touches only upon offices made more attractive during the prospective nominee's term. The Emoluments Clause, unlike the Incompatibility Clause, does not apply to all federal offices; therefore, it cannot be viewed as a measure designed primarily for purposes of separation of powers or separation of personnel. Accepting, for the time being, Story's definition of the purpose of the Emoluments Clause, as most commentators have, an intentionalist consideration of the Clause would consider the extent to which the Saxbe fix serves that purpose, or the extent to which the Saxbe fix disserves it.

In analyzing the compatibility of the Saxbe fix with Justice Story's view of the Emoluments Clause's purpose, two aspects of the Emoluments Clause must be kept in mind. First, both proponents and opponents of the Saxbe fix have conceded that the Emoluments Clause was written to be a prophylactic rule that the Framers intended to be applied literal terms of the Clause. See, e.g., Saxbe Hearing, supra note 116, at 49 (testimony of Prof. Van Alstyne); id. at 70 (statement of Asst. Att'y Gen. Robert G. Dixon, Jr.); S. REP. No. 499, supra note 82, at 6 (statement of Acting Att'y Gen. Bork) ("The 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."); 43 CONG. REC. 2391 (1909) (remarks of Sen. Clayton); BURDICK, supra note 45, § 75, at 178 ("It is believed that [the appointment of Philander Knox pursuant to the Saxbe fix] was within the letter, as well as being clearly within the spirit of the constitutional regulation."). Surprisingly, opponents of the Saxbe fix, other than Professor Kurland, have been quite forthright in conceding that the Saxbe fix is consistent with the Emoluments Clause's purpose. See, e.g., Saxbe Hearing, supra note 116, at 41 (statement of Dean Lorensen) ("I reach this conclusion [that the Saxbe fix cannot cure Senator Saxbe's ineligibility] despite the fact that there is considerable evidence to suggest that the intent of the framers of the Constitution would not be offended by this undertakng and the 'spirit' of the prohibition would be left uncorrupted . . . ."); Paulsen, supra note 11, at 911 ("Bork is right that the rationale of the Emoluments Clause was probably satisfield by the Saxbe Fix.").

358. See 119 CONG. REC. 38,331 (1973) (letter from Prof. Stephen B. Breyer to Senator Robert C. Byrd (Nov. 21, 1973)).
359. See generally Calabresi & Larsen, supra note 2, at 1045 (discussing how the Incompatibility Clause reinforces separation of powers).
360. See supra text accompanying note 348.
361. See PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 41 (1975). Professor Brest also devotes a significant part of his book to a consideration of the Saxbe appointment and the various possible methods of interpreting the Emoluments Clause. See id. at 15-31.
Because the Framers wished to avoid an embarrassing and undignified inquiry into the prospective nominee’s motives, the Emoluments Clause was drafted to impute the worst motives on Members of Congress in cases falling within the purview of the Emoluments Clause. For that reason, a Member of Congress whose case falls within the reach of the Emoluments Clause cannot use her honorable motives during Congress’s consideration of pay raise legislation to avoid the Clause’s prohibition. Second, the Story conception of the Emoluments Clause’s purpose is centered on activity at the time of the creation of the federal office or the augmentation of its emoluments. According to Story, the Emoluments Clause was drafted to eliminate the biases upon the minds of Members of Congress when Congress considered legislation that would be a disqualifying event. Therefore, any discussion of the effect of the Saxbe fix on the purpose of the Emoluments Clause would have to consider how the Saxbe fix affected the mindset of Members of Congress at the time of a potential disqualifying event, not the effect on a Member at the time she becomes a likely candidate for nomination to federal office.

Supporters of the Saxbe fix have argued at various times that the procedure is consistent with the purpose of the Emoluments Clause under either of two theories. First, the Saxbe fix denies Members of Congress the benefit of the increased emoluments, so even a Member of Congress with the worst motives would not reap the benefit of her malfeasance. Second, Members of Congress know that the Emoluments Clause prevents them from receiving the benefit of increased emoluments during their current term. Because Members of Congress know they cannot receive these increased emoluments, they have no improper incentive to support a pay raise for a federal office. The Saxbe fix, therefore, does nothing more than qualify for appointment a Member of Congress who never had an expectation that she would reap the benefit of the increased emoluments. Neither of these arguments, however, withstands close examination.

The nomination of Senator Lloyd Bentsen as Treasury Secretary in

362. See, e.g., Saxbe Hearing, supra note 116, at 50 (statement of Prof. Van Alstyne); id. at 9 (testimony of Prof. Kurland).
363. See supra text accompanying notes 304-05.
364. See 1 STORY, supra note 19, § 867.
365. 1 id.
367. See, e.g., id. at 53-54 (testimony of Prof. Van Alstyne).
1993, the most recent appointment under the Saxbe fix, illustrates how the Saxbe fix diserves the Emoluments Clause’s goal of removing improper biases from the minds of Members of Congress. Although Senator Bentsen distinguished himself as a man of integrity while in the Senate, the Emoluments Clause, as a prophylactic rule, requires that Senator Bentsen’s case be viewed as if he had the worst motives at the time Congress increased the Treasury Secretary’s salary. Bentsen was re-elected to his Senate seat in 1988 and began serving that term in 1989. In 1989, Congress considered and passed the Ethics Reform Act of 1989, which substantially increased the salary of the Treasury Secretary. Because the Senate passed the Ethics Reform Act without a recorded vote, there is no record regarding how Senator Bentsen voted on the bill; yet, how Bentsen voted is irrelevant for purposes of the Emoluments Clause.

Looking at the situation from Senator Bentsen’s perspective in 1989, if he were interested in a future appointment as Treasury Secretary, he could foresee two possible scenarios. The first possibility was that the pay raise would become law and a President desired to appoint him Treasury Secretary during his current term. In such a case, Bentsen could expect Congress to repeal the pay raise and he could take office at the lower salary. However, in such a case, Bentsen would run the risk of having Congress be unwilling to enact remedial legislation on his behalf. Of course, as Senator Bentsen was a popular Senator from the party controlling both Houses of Congress, this was highly unlikely. Furthermore, Congress never has refused a President’s request for such remedial legislation, even during the Saxbe appointment, when President Nixon faced a Democratic Congress seething from the firing of Archibald Cox as Watergate Special Prosecutor. Therefore, the worst case scenario for Senator Bentsen would have been his appointment as Treasury Secretary during his current term without the benefit of the pay raise.

The second possible scenario was for a President to want to appoint Bentsen Treasury Secretary sometime after his current term ended in 1995. In this case, Bentsen would get the full benefit of the pay raise.

368. See supra text accompanying notes 362-63.
369. See Paulsen, supra note 11, at 907.
370. § 703(a)(1), 103 Stat. at 1768.
371. Paulsen, supra note 11, at 908 & n.3.
372. See, e.g., 119 CONG. REC. 38,335 (1973) (remarks of Sen. Cranston) (“But now is not the time to rub the administration’s nose in its folly. Now is not the time to point the finger at how incredibly inept this administration can be, but rather to save it—and the Nation—from the conservancy of its latest ineptitude.”).
because the term he was serving at the time of the emoluments increase would have ended.\textsuperscript{373} Faced with these two possible outcomes, a malevolent Senator Bentsen would have had an unmitigated incentive to support the pay raise. At worst, he would not get the benefit of the raise. At best, he would get the benefit of the pay raise upon a post-1995 appointment. Thus, a malevolent Senator Bentsen would have found himself in a no-lose situation in 1989, one that would give him a financial incentive to support the pay raise.

If the Saxbe fix were unconstitutional, however, Senator Bentsen's calculation would have changed drastically. The best-case scenario still would have existed; if he were appointed Treasury Secretary after 1995, he would get the benefit of the pay raise.\textsuperscript{374} The real difference is in the worst-case scenario. Where before, the worst-case scenario was the status quo—receipt of the pre-increase salary—now Bentsen would be faced with an irretrievable disability from appointment until 1995. This would put Bentsen in a worse situation than he would have been in if the pay raise had never become law. In some cases, particularly when a Member of Congress nears the end of her term, there still would be a selfish incentive to support the pay raise.\textsuperscript{375} There are cases, however, where the worst-case scenario is more likely, such as when a Member has a long time to run on her term, or expects to be nominated to a federal office in the near future. In such a situation, the Member might actually have a disincentive to support pay raise legislation, so as not to risk disqualification from appointment.

The Saxbe fix allows for two scenarios, one favorable and one break-even. If the Saxbe fix were not permissible under the Emoluments Clause, there still would be two possibilities; but instead there would be one favorable possibility and one unfavorable possibility. The Saxbe fix creates a world where the Member of Congress always has an overall incentive to support pay raise legislation. Depending on the remaining length of the Member's term, a world without a Saxbe fix would leave the Member sometimes with an incentive to raise federal offices' pay and sometimes with a disincentive to do so, but the incentive would always be less than it would if the Saxbe fix were available. Therefore, if the purpose of the Emoluments Clause is "to take away, \textit{as far as possible},

\textsuperscript{373} See supra notes 55-73 and accompanying text.

\textsuperscript{374} See supra notes 55-73 and accompanying text.

\textsuperscript{375} See 1 Story, supra note 19, § 867, at 612 ("[A]ppointment 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.").
any improper bias in the vote of the representative," then it is clear that this purpose is disserved by the Saxbe fix.

Supporters of the Saxbe fix could make two possible rejoinders. First, they could argue that, in assessing a Member’s potential biases, it is improper to consider a Member’s expectation of post-term appointment. The basis for such an assertion is that benefits arising from post-term appointment are beyond the purview of the Emoluments Clause. If the Emoluments Clause does not reach the evil of receipt of emoluments post-term, then that possibility is not one of the evils that the Emoluments Clause is designed to prevent. Because the Emoluments Clause guarantees that a Member of Congress will not receive any increased emoluments during her current term, then the Member could not be swayed by an improper bias in supporting a pay increase. There is a certain attractiveness to this argument; after all, the Emoluments Clause does not prohibit the appointment of a Member of Congress to a federal office after her congressional term ends, even if the emoluments of that office were increased while the appointee served in Congress. That premise, however, rests on the assertion that limiting the disability to Members’ current terms demonstrates that the Framers were unconcerned with Members’ receipt of increased emoluments after their terms ended. That assertion, however, does not withstand a study of the records of the Constitutional Convention.

The Framers’ first few drafts of what became the Emoluments Clause provided that Members of Congress were ineligible for appointment to all federal offices for either the length of their elected term or until one year after their term expired. While essentially all the delegates to the Constitutional Convention recognized the conflict of

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376. 1 id. (emphasis added).
377. If post-term receipt of benefits is beyond the realm of fair consideration, then the intentionalist argument would consider only the extent to which the Saxbe fix would affect a Member’s improper expectation that she might reap the benefits of the pay raise during her current term. This brings us back to the original intentionalist argument. Members of Congress, being aware of the Emoluments Clause, never have an expectation that they will reap the benefit of increased emoluments during their current term because they know they cannot be appointed to the federal office during their current term as long as the increased emoluments remain in effect. Therefore, the existence of the Saxbe fix has no effect on the minds of Members of Congress considering pay raises for federal offices, at least in terms of their expectation of receiving the benefit of the pay raise during their current term. With or without the existence of the Saxbe fix, Members of Congress know that they will not get the benefits of the pay raise during their current term. See supra notes 55-73 and accompanying text.
378. See supra notes 55-73 and accompanying text.
379. See, e.g., 1 Farrand, supra note 60, at 20, 228.
interest inherent in allowing Congress to create offices, and augment offices' salaries, while being eligible to fill those offices, the Framers disagreed over how greatly the nature and extent of the ineligibility outweighed the costs.\textsuperscript{380} In the end, James Madison offered a compromise provision that, after being amended, limited disqualification to the cases of offices which "shall have been created, or the Emoluments whereof shall have been encreased"\textsuperscript{381} during the Member's current term.\textsuperscript{382} Madison explained that his proposal was intended as a "middle ground" that would recognize the dangers of having Congress control the purse strings of offices to which its members could be appointed, while also recognizing the danger in excluding the most qualified citizens—Members of Congress—from service in federal offices.\textsuperscript{383}

Thus, Madison’s amendment does not support the inference that the Framers were concerned only with increased emoluments received during a Member’s current term. Such an argument confuses the purpose of the Emoluments Clause with the pragmatic limitations the Framers placed on their ability to achieve that purpose. Throughout the Constitutional Convention, the Framers desired that the Constitution limit to the maximum extent possible the conflict of interest inherent in Congress’s authority to augment the salaries of federal offices.\textsuperscript{384} Limiting the

\begin{quote}
380. See 1 Story, supra note 19, § 867 ("This clause does not appear to have met with any opposition in the convention, as to the propriety of some provision on the subject, the principal question being as to the best mode of expressing the disqualifications.").

381. U.S. Const. art. I, § 6, cl. 2.

382. See 1 Farrand, supra note 60, at 386.

383. 1 id. at 388-89.

384. See 1 id. at 376-77. Before offering his "middle ground" compromise, James Madison fell on the side of those desiring that Members of Congress be banned for life from appointment to offices created or augmented during their service in Congress:

If you have no exclusive clause, there may be danger of creating offices or augmenting the stipends of those already created, in order to gratify some members if they were not excluded. . . . I am therefore of opinion, that no office ought to be open to a member, which may be created or augmented while he is in the legislature.

1 id. at 380. Delegate James Wilson saw the Madison "middle ground" as remedying the corruptive practices of "creating unnecessary offices, or granting unnecessary salaries." 1 id. at 387. Wilson did not distinguish between increased emoluments received before a Member's term ended and those received afterward. See 1 id. Perhaps the most telling statement of the Framers’ concern with conflicts of interest, regardless of whether the benefits therefrom accrued during or after a Member’s congressional term, was a statement by convention delegate James McHenry to the Maryland House of Delegates:

Whether any Members of the Legislature should be Capable of holding any Office during the time for which he was Elected created much division in Sentiment in Convention; but to avoid as much as possible every motive for Corruption, was at length Settled in the form it now bears by a very large Majority.

3 Farrand, supra note 60, at 148 (1937) (emphasis added).
\end{quote}
ineligibility period said absolutely nothing about that purpose; rather, the limitation merely was a recognition that the most effective cure for the conflict of interest—lifetime eligibility of Members of Congress—was too costly to justify its virtues. This restriction of the remedy did not mean that the Framers abandoned their desire to limit the conflict of interest as it pertained to post-term receipt of increased emoluments. In that sense, the Emoluments Clause performs a dual function. It is a direct attack on the expectation of increased emoluments during a Member’s term because the Member knows she cannot be appointed during her current term to an office that receives increased emoluments. The Emoluments Clause, as drafted, also discourages Members from increasing offices’ emoluments in the expectation of post-term appointment, albeit indirectly. Obviously, the best method of removing this expectation would have been a lifetime ineligibility, which the Framers eschewed because of its countervailing costs. The Emoluments Clause, however, addresses the expectation of post-term appointment indirectly by imposing a severe cost on Members—ineligibility during the Member’s current term—when Congress increases an office’s emoluments. Because the Emoluments Clause was concerned with any improper biases of members of Congress, whether they went to current term or post-term expectations, we must consider the allure of post-term receipt of increased emoluments in determining whether the purpose of the Clause is disserved by the Saxbe fix. Because, as noted above, an Emoluments Clause without a Saxbe fix best serves the purpose of restraining Congress’s inherent conflict of interest, the Saxbe fix cannot be said to be consistent with Justice Story’s statement of the Emoluments Clause’s purpose.

The argument just addressed accepted Justice Story’s statement of the Emoluments Clause’s purpose but contended that the Saxbe fix did not offend that purpose. The major weakness in that argument is that the Saxbe fix guarantees that a Member of Congress always has a selfish incentive to support pay raises for offices to which she might be appointed. Because the literal terms of the Emoluments Clause, without a Saxbe fix, better limit the general conflict of interest, the Saxbe fix is inconsistent with Justice Story’s view of the Clause’s purpose. A second argument, one alluded to by Professor Van Alstyne and made at various times by Members of Congress, is based upon a rejection of Justice

385. See id. at 386-88.
The real purpose of the Emoluments Clause, they argue, is not to affect Members’ mindsets upon considering pay raise legislation, but to prevent Members of Congress from reaping the benefit of increased emoluments. If the Emoluments Clause is not designed to affect Members’ thinking at the time they consider pay raise legislation, but rather is to prevent receipt of increased emoluments, the argument goes, the Saxbe fix serves this purpose by guaranteeing that the increased emoluments are eliminated before appointment.

There are two major problems with this formulation of the Emoluments Clause’s purpose. First, the Emoluments Clause was drafted to provide an ineligibility to office, not an ineligibility to increased emoluments. If the Framers’ purpose were as Professor Van Alstyne alleged, then the Emoluments Clause logically would have regulated the amount of pay which a Member would be eligible to receive upon appointment to federal office, and it would not have regulated the very eligibility for appointment to that office.

Second, this formulation neglects the possibility that Members of Congress might be tempted to increase the emoluments of offices to which they might be appointed after their term ends. The Emoluments Clause, as written, better controls this conflict of interest because it, unlike the Saxbe fix, provides a harsh penalty during the current term that might, on occasion, outweigh the benefit a Member could expect from post-term appointment. Of course, this difficulty can be sidestepped by amending the Van Alstyne purpose of the Emoluments Clause to claim that the Framers adopted the Clause in order to prevent Members of Congress, during their current term, from collecting emoluments that had been increased during that term. This formulation at least makes sense logically. If that were the Framers’ purpose, then the Saxbe fix would be reasonable from an intentionalist viewpoint. The Saxbe fix certainly prevents a Member of Congress from collecting increased emoluments in the same term that those emoluments became law. Additionally, the Emoluments Clause does in fact affect a Member’s eligibility for appointment only for the term during which Congress increased the office’s emoluments.

Of course, there are difficulties with this argument from a factual standpoint. The evidence suggests that the Framers were concerned with

387. See 1 Farrand, supra note 60, at 379.
388. See supra text accompanying note 375.
more than receipt of increased emoluments during the Members' current terms; post-term receipt occupied the purpose, if not the remedy, of the Emoluments Clause.\textsuperscript{389} Nevertheless, this argument in favor of the Saxbe fix is at least not frivolous. Additionally, there are dozens of possible ways to restate Justice Story's formulation of the Emoluments Clause's purpose, some more favorable to the Saxbe fix and others less favorable. Therefore, in order to fully determine the degree to which the Saxbe fix is consistent with the spirit of the Emoluments Clause, we must begin with a critical reevaluation of the Framers' purpose in including the Clause in the Constitution.

B. Reexamining the Purpose of the Emoluments Clause

An examination of the Saxbe fix demonstrates that the procedure is inconsistent with Justice Story's view of the Emoluments Clause's purpose. This point, however, misses the larger issue in the debate over the Saxbe fix. Justice Story's conception of the Emoluments Clause's purpose, though correct as far as it goes, only tells half of the story. The same can be said about Professor Kurland's view that the Emoluments Clause was designed to prevent Congress from enacting special legislation for its Members' benefit,\textsuperscript{390} and Professor Van Alstyne's view that the Framers included the Clause in order to prevent Members of Congress from receiving increased compensation.\textsuperscript{391} Of course the Emoluments Clause was designed to prevent all of these things, but why? Did the possibility of Congress increasing offices' salaries in the expectation of Members' future appointments so offend the Framers that they considered a constitutional prohibition necessary? A more sophisticated statement of the purpose of the Clause, one that takes into account the Framers' purpose in discouraging congressional self-dealing, makes it even clearer that the Saxbe fix is fundamentally inconsistent with the goals the Framers sought to achieve by including the Emoluments Clause in the Constitution.

1. The Emoluments Clause as an Anti-Federalist Bulwark

Though the Constitution, as enacted in 1787, was a triumph of Federalist ideals, the Emoluments Clause became part of the document

\textsuperscript{389} See supra notes 379-85 and accompanying text.
\textsuperscript{390} See supra notes 251-55 and accompanying text.
\textsuperscript{391} See supra notes 386-89 and accompanying text.
much to the chagrin of the Federalists, save Madison.\textsuperscript{392} The supporters of the Emoluments Clause, men such as George Mason, Luther Martin, and Elbridge Gerry, were for the most part strongly in the Anti-Federalist camp.\textsuperscript{393} Therefore, the purpose of the Emoluments Clause must be determined in light of the goals and ideology of the Anti-Federalists, and not the Federalists who so strenuously objected to inclusion of the Clause. Because the Emoluments Clause was so clearly an Anti-Federalist provision, it is useful to consider the Anti-Federalist ideology in determining its purpose in restricting the appointment of Members of Congress to federal office.

a. The Anti-Federalist Ideology

To the layperson, very little is known about Anti-Federalist thought, except perhaps that they were against a strong national government.\textsuperscript{394} The central ideology of the Anti-Federalists was that the people, and not some aristocratic or governing class, should be the sovereigns of any free nation.\textsuperscript{395} To them, the colonies had revolted against British rule because of Great Britain’s suffocating control over every aspect of colonial life.\textsuperscript{396} Additionally, the Anti-Federalists believed that the British Crown was so far removed, both physically and in perspective, from the American colonists that the colonists’ views were utterly ignored.\textsuperscript{397} The colonists’ denunciation of taxation without representation was an outgrowth of this view.\textsuperscript{398} Thus, the Anti-Federalists feared that the new American government might simply replace the British hegemon with an American hegemon.\textsuperscript{399} For that reason, the Anti-Federalists, while recognizing defects in the Articles of Confederation, felt that the Articles served an important function in limiting the power

\textsuperscript{393} See id.
\textsuperscript{398} See id.
\textsuperscript{399} See 2 Farrand, supra note 60, at 286.
of the national government.\textsuperscript{400}

The Anti-Federalists believed that government became more oppressive and less responsive to the desires of its constituents as the population it represented increased in size.\textsuperscript{401} For that reason, the Anti-Federalists were extremely suspicious of centralized government.\textsuperscript{402} Anti-Federalists were enamored of local government because that was the only forum at which ordinary citizens could participate in government; as a result, local government invariably is the most concerned with protecting its constituents' civil liberties.\textsuperscript{403} At the other extreme, under British rule, ordinary colonists did not have the means to participate in a dialogue with the Crown or Parliament.\textsuperscript{404} Because the participation of ordinary citizens in government was so difficult, the British government became oblivious to colonists' needs. Consistent with this ideology, the Anti-Federalists favored stronger local and state governments, in which the people could participate, over national government.\textsuperscript{405} Also, because the national legislature would be composed of representatives from national subdivisions—states and districts—while the President would represent the entire nation, the Anti-Federalists tended to favor granting power to the legislature over granting power to the President.\textsuperscript{406}

\textsuperscript{400} THE ESSENTIAL ANTIFEDERALIST, supra note 395, at viii.

\textsuperscript{401} Id. at xiii; see also, e.g., LETTER FROM THE FEDERAL FARMER TO THE REPUBLICAN (Jan. 14, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 1, at 301, 302 ("We all agree, that a large standing army has a strong tendency to depress and enslave [sic] the people; it is equally true that a large body of selfish, unfeeling, unprincipled civil officers has a like, or a more pernicious tendency to the same point."). The Federal Farmer is thought by most to have been Richard Henry Lee, an Anti-Federalist leader from Virginia who had declined appointment to the Constitutional Convention. See 2 THE COMPLETE ANTI-FEDERALIST, supra note 1, at 214-16 & n.5. While some historians recently have disputed Lee's authorship, it is generally agreed that the Federal Farmer was a leading proponent of Anti-Federalist principles. 2 id. at 214-16.

\textsuperscript{402} Amar, supra note 397, at 111-12; Edwin Meese III, Introduction to Panel IV: The Anti-Federalists After 200 Years: Pundits or Prophets?, 16 HARV. J.L. & PUB. POL'Y 109, 109 (1993); see also BRUTUS, ESSAY TO THE CITIZENS OF THE STATE OF NEW-YORK (Oct. 18, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 1, at 363, 371. "Brutus" generally is believed to have been Robert Yates, a leading Anti-Federalist and Constitutional Convention delegate from New York, though that view is not unanimous. See 2 THE COMPLETE ANTI-FEDERALIST, supra note 1, at 358.

\textsuperscript{403} See BRUTUS, supra note 402, at 371; Amar, supra note 397, at 113.

\textsuperscript{404} See Amar, supra note 397, at 112.

\textsuperscript{405} See id. at 113-17; Charles J. Cooper, "Independent of Heaven Itself": Differing Federalist and Anti-Federalist Perspectives on the Centralizing Tendency of the Federal Judiciary, 16 HARV. J.L. & PUB. POL'Y 119, 126-28 (1993).

Thus, the Anti-Federalists attending the Constitutional Convention viewed it as their duty to place checks on the power of the national government and, in particular, on the President. For example, the Anti-Federalists were the impetus behind the Framers’ placement of several typically executive powers within Congress’s province, such as the powers to declare war and to coin money.\(^\text{407}\) Additionally, the Anti-Federalists were the main supporters of the Bill of Rights, which restricted the federal government’s ability to infringe on citizens’ civil liberties.\(^\text{408}\)

Despite the structural limitations that the Constitution would place on the national government, the Anti-Federalists still feared that the national government would assume an all-encompassing role in American life.\(^\text{409}\) They had seen how the British Crown could evade these restrictions through “the most insidious and powerful weapon of eighteenth-century despotism—the power of appointment.”\(^\text{410}\) Although the 1688 Revolution had placed significant restrictions on the power of the British Crown, the Crown had been able to evade these limitations and perhaps even increase its power through its right of appointment, and the result was an erosion of the rights of British subjects.\(^\text{411}\) “With the unforeseen and prodigious multiplication of offices, places, favors, and perquisites, created by the vast increase in revenues, the eighteenth-century Crown, it appeared, had been given nothing less than the power to structure the society as it saw fit.”\(^\text{412}\) Blackstone himself lauded the British Crown for ingeniously maintaining its hegemony through the appointive process:

The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers, created by and removeable [sic] at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners, and the multitude of dependents on the customs, in every port of the kingdom; the commissioners of

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\(^{407}\) Id. at 29.
\(^{408}\) See MAIT, supra note 395, at 158-62.
\(^{409}\) See LETTER FROM THE FEDERAL FARMER TO THE REPUBLICAN (Jan. 7, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 1, at 281, 285.
\(^{410}\) WOOD, supra note 396, at 143.
\(^{411}\) Id.; see also STEPHEN S. WEBB, THE GOVERNORS-GENERAL: THE ENGLISH ARMY AND THE DEFINITION OF THE EMPIRE, 1569-1681, at 4 (1979) (“The officers and governors who ruled British towns and American colonies were the instruments of an overweening prerogative power, the agents of an actual executive conspiracy.”).
\(^{412}\) WOOD, supra note 396, at 145.
excise, and their numerous subalterns, in every inland district; the
postmasters, and their servants, planted in every town, and upon every
public road . . . . All which put together gives the executive power so
persuasive an energy with respect to the persons themselves, and so
prevailing an interest with their friends and families, as will amply
make amends for the loss of external prerogative.\textsuperscript{413}

Anti-Federalist leaders were great students of history and were well
aware of the Crown's subtle expansion of royal prerogative through
appointive patronage.\textsuperscript{414} Thus, the Anti-Federalists believed that the
appointive process, which would be shared by the legislative and
executive branches, was the one means by which the national government
could circumvent constitutional limits on its powers.\textsuperscript{415} As the Anti-
Federalists saw it, the national legislature would, at least initially, be
more responsive to the people than would the President, owing to their
relatively smaller constituencies.\textsuperscript{416} Once Members of Congress
reported to the national capital, however, the sheer geographic separation
from their constituents would erode the loyalty of the Member to her
state and locality.\textsuperscript{417} Because of the distances between the national
capital and most Members' home districts, Members of Congress likely
would move their families to the capital.\textsuperscript{418} Thus, the tendency would
always exist for Members of Congress to become more concerned with
the welfare of the national capital and the surrounding localities than
with their home district.\textsuperscript{419} Unfettered appointive power would only

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\begin{itemize}
\item \textsuperscript{413} 1 WILLIAM BLACKSTONE, COMMENTARIES *324-25.
\item \textsuperscript{414} See WOOD, supra note 396, at 144-45.
\item \textsuperscript{415} See id. at 146-50.
\item \textsuperscript{416} See MCDONALD, supra note 406, at 27-28.
\item \textsuperscript{417} See ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL
AND STATE CONVENTIONS (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED
STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 2, 12 (Paul L. Ford ed.,
Da Capo Press 1968) (1888) (noting that Elbridge Gerry authored the pamphlet under the name the
"Columbian Patriot"); Martin, supra note 1, at 46-47; MELANCTON SMITH, SPEECHES BY
MELANCTON SMITH DELIVERED IN THE COURSE OF DEBATE BY THE CONVENTION OF THE STATE
OF NEW YORK ON THE ADOPTION OF THE FEDERAL CONSTITUTION (June 25, 1788), reprinted in 6
THE COMPLETE ANTI-FEDERALIST, supra note 1, at 148, 168.
\item \textsuperscript{418} See Martin, supra note 1, at 46-47.
\item \textsuperscript{419} Id. In opposing ratification of the Constitution, Convention delegate Luther Martin stated:
If [a Senator] has a family, he will take his family with him to the place where the
government shall be fixed, that will become his home, and there is every reason to
expect, that his future views and prospects will centre in the favours and emoluments
either of the general government, or of the government of that State where the seat of
empire is established:—In either case, he is lost to his own State.
\end{itemize}
EMOLUMENTS CLAUSE

exacerbate this largely inevitable tension between nationalism and localism. If federal offices were available to Members of Congress, the Anti-Federalists believed Members would find them to be a financially attractive and stable alternative to resuming their civilian careers in their home districts. Thus, a permanent political class, a governing aristocracy, would congregate around the national capital, seeking federal offices, and thereby excluding ordinary citizens throughout the nation from the opportunity to participate in the federal government.

As Members of Congress become more national politicians, and less the representatives of state and local constituencies, there would be a natural tendency to want to expand the power of that national government. Congress, according to the Anti-Federalists, would insist on keeping large armies and navies, establishing embassies and ministries throughout the world, and taxing the nation to pay for this expansion of the national government's role. As governmental minimalists, the Anti-Federalists saw all government to be a drain on the wealth of a nation, and the more the national government increased the scope of its activities, the more it would resort to inordinate taxation to pay for these excesses.

420. See id. at 46-47, 52-53.

421. At the Constitutional Convention, delegate James Mercer stated,

It is a first principle in political science, that whenever the rights of property are secured, an aristocracy will grow out of it. Elective Governments also necessarily become aristocratic, because the rulers being few can & will draw emoluments for themselves from the many. The Governments of America will become aristocracies.

2 Farrand, supra note 60, at 284. Several modern commentators have noted that Anti-Federalist fears of a governing aristocracy centered at the national capital may have been justified. See, e.g., Calabresi & Larsen, supra note 2, at 1081-85 (compiling a list of former Members of Congress, relatives of Members of Congress, and former congressional staffers who recently have served as federal officers); Roger J. Miner, Advice and Consent in Theory and Practice, 41 AM. U. L. REV. 1075, 1077 (1992) (remarks) (noting that eight Supreme Court nominees were serving on the D.C. Circuit or in the Justice Department when nominated, and that “[i]t is rare indeed to find a former Member of Congress who does not continue to reside in Washington, D.C. in a new incarnation”).

422. See BRUTUS, supra note 402, at 371.

423. See LETTER FROM THE FEDERAL FARMER TO THE REPUBLICAN (Jan. 7, 1788), supra note 409, at 285; see also 1 Farrand, supra note 60, at 380 (remarks of George Mason); 2 id. at 285 (remarks of Elbridge Gerry).

424. See LETTER FROM THE FEDERAL FARMER TO THE REPUBLICAN (Jan. 14, 1788), supra note 401, at 302.
b. The Connection Between the Emoluments Clause and Anti-Federalist Ideology

The Emoluments Clause fit into the Anti-Federalist vision of the United States in two ways. First, because Members of Congress typically would be interested in appointment to federal offices, Congress had an inevitable interest in expanding the size of the national bureaucracy and increasing the compensation of each federal office. The President, essentially unresponsive to the people and perhaps the greatest benefactor of a bloated national government, would be a willing accomplice in this endeavor. Increasing the compensation of existing offices would not only increase the level of taxation, but also would lead the national government to expand the scope of officeholders’ duties in order to justify their generous compensation. The result would be increased intermeddling by the national government in the citizens’ affairs, infringing on local and state governments, the only entities truly concerned with the desires of their constituents. The Anti-Federalists viewed this seduction of the Congress to be somewhat inevitable; the allure of federal offices, along with the physical separation of Members from their districts, could not help but make Members more concerned with national affairs and the local affairs of the national capital. To the Anti-Federalists, the Emoluments Clause, however, could partially mitigate this fact of centralized government by creating a disincentive on the part of Congress to increase federal offices’ emoluments. When Congress increased an office’s emoluments, it would automatically reduce the pool of offices to which Members of Congress could move during their current terms. Thus, the Emoluments Clause could use Members’ ambition against them. If Members wanted to be appointed to federal offices during their terms, they would have to keep the salaries of those offices from being increased. If the salaries of federal offices maintained some semblance of reasonableness, the national government would not feel obliged to expand the offices’ duties and the national treasury could be maintained at a lower level. Also, by discouraging the increase of offices’ compensation, those offices would be less attractive to ambitious Members of Congress, thus placing a further check on the governing aristocracy that

425. See Martin, supra note 1, at 52-53.
426. See BRUTUS, supra note 402, at 371; Amar, supra note 397, at 112-13; Meese, supra note 402, at 109-10.
427. See Martin, supra note 1, at 46-47.
would likely develop in the capital.\textsuperscript{428}

The use of the Emoluments Clause to restrain the national government’s encroachment on citizens’ liberty would be accomplished by reducing the incentive of Congress to expand the size and scope of the national government. The second manner in which the Emoluments Clause fits in with Anti-Federalist thought is its protection of Congress from executive branch intrigue. One means by which the British Crown had ensured Parliament’s complicity in its despotism was by plying key Members of Parliament with the promise of appointment to royal offices.\textsuperscript{429} Though the Anti-Federalists thought it only a matter of time before Members of Congress became unresponsive to their constituents, Congress, as representatives of the states, would be less of a threat to local government and citizens’ rights than would be the President.\textsuperscript{430} The appointive process, if not checked by a constitutional provision, would give the President, who nominated federal officers, a powerful perquisite to offer Members of Congress in return for their acquiescence in his oppression of the people. The Emoluments Clause, however, restricts the President’s ability to collude with Congress whereby Congress would create an office in return for the President’s promise to nominate a favored Member of Congress.\textsuperscript{431} Furthermore, the Emoluments Clause denies the President the opportunity to buy congressional complicity by having Congress make an existing office more lucrative, with a Member of Congress to be appointed to that office.\textsuperscript{432} In that sense, the Emoluments Clause mitigated the President’s ability to use his appointive process as a carrot with which to buy congressional support. Therefore, the Emoluments Clause would give Congress, whether it wanted it or not, a shield from presidential intrigue and corruption, better enabling Congress to remain representatives of the people.

Thus, we have seen that the major tenet of the Anti-Federalists was a fear of centralized government, owing to the tendency of such governments to oppress the people. Because of this belief, Anti-Federalists favored state and local governments over national governments, and favored legislatures over the executive branch. Traces of both of these themes can be seen in the Emoluments Clause. The Emoluments

\textsuperscript{428} See id. at 46 (explaining that the Senate would become “a permanent body, constantly residing at the seat of government” (emphasis omitted)).

\textsuperscript{429} See \textit{WOOD}, supra note 396, at 143-48.

\textsuperscript{430} See \textit{McDONALD}, supra note 406, at 28.

\textsuperscript{431} See supra notes 106-29 and accompanying text.

\textsuperscript{432} See supra notes 131-32 and accompanying text.
Clause restricts Congress’s incentive to create lucrative federal offices, thereby placing a check on the tendency of national governments to expand their role and oppress the people. The Emoluments Clause also mitigates the President’s ability to use his power of appointment to buy congressional acquiescence in his policies, which invariably would tend toward despotism.

Though the Emoluments Clause is consistent with the major tenets of Anti-Federalism, it would be premature to state at this point that the purposes of the Emoluments Clause were to control the expansion of the size and role of the national government and to protect Congress against presidential overreaching. Rather, apart from being consistent with Anti-Federalist thought, the proper question is the degree to which these proposed purposes actually occupied the minds of the supporters of the Emoluments Clause at the Constitutional Convention.

2. The Framers’ Remarks at the Constitutional Convention

The records of the Constitutional Convention demonstrate that none of the Framers who spoke of their support of the Emoluments Clause saw it primarily as a general anticorruption device. That is, the Framers did not impose the ineligibility for appointive offices merely to prevent Members of Congress from profiting by their own immorality or avarice. Consistent with the language of the text, the Framers were not overly concerned with the actual receipt of increased emoluments; rather, the Framers were concerned with influencing the method by which Congress considered legislation that would raise an office’s emoluments. It appears that two strains of reasoning occupied the minds of the Framers in considering the Emoluments Clause. The Framers, consistent with contemporary Anti-Federalist thought, saw the primary purpose of the Emoluments Clause as constricting the growth of the national government, accomplished through the means of restricting Congress’s ability to self-deal. Second, the Framers, to a much lesser degree, believed that the Emoluments Clause would restrain intrigue within the national government.

a. Controlling the Expansion of the National Government

By moderating Congress’s inherent incentive to create a lucrative federal bureaucracy, the Framers hoped to keep the national government from supplanting state and local governments as the major force in Americans’ lives. George Mason, perhaps the Constitutional Convention’s strongest proponent of an ineligibility provision, spoke of
witnessing the "venality and abuses" wrought by the unfettered British appointment system.\textsuperscript{433} Mason also noted "the multiplicity of foreign Embassiess [sic] by Cong[ress],"\textsuperscript{434} even under the Articles of Confederation:

Are we not struck at seeing the luxury and venality which has already crept in among us? If not checked we shall have ambassadors to every petty state in Europe—the little republic of \textit{St. Marino} not excepted. We must in the present system remove the temptation. . . . Why has the power of the [British] crown so remarkably increased the last century? . . . [B]y the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom. . . . I consider [the Emoluments Clause] as the corner-stone on which our liberties depend—and if we strike it out we are erecting a fabric for our destruction.\textsuperscript{435}

To Mason it was largely irrelevant whether appointments to such offices were acquired through corruption; the overriding evil was not in the acquisition of these offices, but in the existence of these offices and their effect on Americans' liberty.\textsuperscript{436} Elbridge Gerry, another noted Anti-Federalist, agreed wholeheartedly with Mason. Gerry argued that the national government did not need Ministers and Ambassadors, and that the Emoluments Clause would reduce Congress's temptation to create them for its members' benefit.\textsuperscript{437} At the Convention, Gerry stated, "It is the opinion of a great many that [such offices] ought to be discontinued . . . .\textsuperscript{438} Again, Gerry's concern was not corrupt acquisition but the existence of the offices and the effect they would have on the balance of power between the national and state governments.\textsuperscript{439} Again touting classic Anti-Federalist themes, Mason later rejected the notion that Members of Congress should not be punished for aspiring to federal office. To that, Mason responded that the proper course of events would be for Members of Congress to return to their home states and refine their skills there before advancing to federal office.\textsuperscript{440} Thus, Mason saw the disqualification as a means of discouraging the formation of a

\begin{itemize}
\item \textsuperscript{433} Farrand, \textit{supra} note 60, at 376.
\item \textsuperscript{434} \textit{id.}
\item \textsuperscript{435} \textit{id.} at 380-81.
\item \textsuperscript{436} See \textit{id.}
\item \textsuperscript{437} See 2 \textit{id.} at 285.
\item \textsuperscript{438} 2 \textit{id.}
\item \textsuperscript{439} See 2 \textit{id.}
\item \textsuperscript{440} See 1 \textit{id.} at 389.
\end{itemize}
governing aristocracy centered at the national capital; if Members of Congress typically returned home after congressional service, that would reduce further the tendency of the national government to expand.\textsuperscript{441} James Wilson did not see the Emoluments Clause as speaking to the evil of corruption at all; he felt that corruption was prevented sufficiently by the Incompatibility Clause.\textsuperscript{442} To Wilson, the evil addressed by the Emoluments Clause was “that of creating \textit{unnecessary} offices, or granting \textit{unnecessary} [sic] salaries.”\textsuperscript{443}

Additionally, the Framers’ focus on \textit{federal} offices reveals their concern with the size of the national government, as opposed to a concern with corruption. The initial version of the Emoluments Clause prohibited Members of Congress from serving in state offices during their congressional term.\textsuperscript{444} While many of the alterations to the Emoluments Clause during the course of the convention had been on pragmatic grounds, or a fear of overbreadth, the prohibition on holding state offices was removed strictly on substantive grounds.\textsuperscript{445} Though Members of Congress could obtain state appointments through corruption, the Framers did not think that worthy of a prohibition. Delegate Luther Martin noted that “[t]hat was said, and in my opinion justly, that no good reason could be assigned why a senator or representative should be incapacitated to hold an office in \textit{his own} government, since it can only bind him more closely to his State.”\textsuperscript{446} Thus, Martin, like Mason, did not view the Emoluments Clause as being any significant obstacle to corruption. Instead, Martin viewed the Emoluments Clause as a mechanism by which the Framers could keep a Member of Congress’s loyalty oriented toward his state instead of the national government.\textsuperscript{447}

Finally, Madison’s “middle ground” compromise demonstrated that the Framers were primarily concerned not with possible governmental corruption, but the expansion of the national government that would flow from that corruption. At the Convention, Madison defended his position by stating that “the unnecessary creation of offices, and increase of

\textsuperscript{441} See 1 id. At one point during the debate, “Col. Mason ironically proposed to strike out the whole section, as a more effectual expedient for encouraging that exotic corruption which might not otherwise thrive so well in the American Soil—for compleating [sic] that Aristocracy which was probably in the contemplation of some among us.” 2 id. at 284 (emphasis added).
\textsuperscript{442} See 1 id. at 387.
\textsuperscript{443} 1 id. (emphasis added).
\textsuperscript{444} See 1 id. at 20-21.
\textsuperscript{445} See 1 id. at 386.
\textsuperscript{446} Martin, \textit{supra} note 1, at 52.
\textsuperscript{447} Id.
salaries, were the evils most experienced." All federal offices—even those that had neither been created nor been the subject of increased emoluments—were a potential spoil that the President and Congress could distribute corruptly. By carving away from the Emoluments Clause’s prohibition the vast majority of these offices, the Framers as much as conceded that preventing corruption was not their primary goal. Looking at the two categories of offices remaining under the Emoluments Clause’s purview—those newly-created and those the recent subjects of increased emoluments—their shared characteristic is that both affect an increase in the size, cost, and likely scope of the national government. If a Member of Congress obtained a federal office through corruption, the Framers did not think that worthy of a constitutional prohibition as long as the effect of the corruption was not likely to expand the national government.

As Justice Story noted, the Framers clearly intended that the Emoluments Clause reduce biases of Members of Congress in favor of creating new offices and increasing the emoluments of existing offices. The debates at the Constitutional Convention support the view that the Emoluments Clause was intended to have its effect at the legislative stage, when Congress is considering legislation that would be a disqualifying event. The debates also demonstrate, however, that the predominant purpose behind reducing Congress’s bias was not for general anticorruption; rather, the overriding purpose of the Emoluments Clause was to restrain the inevitable growth of the national government through the means of reducing Congress’s incentive to create lucrative federal offices.

An assertion that the purpose of the Emoluments Clause was to restrain the growth of the national government legitimately raises the question of why Justice Story did not make this point in his seminal treatise. In the recent case of U.S. Term Limits, Inc. v. Thornton, the four dissenting Justices raised several issues that might explain Justice Story’s failure to recognize the Emoluments Clause as a vehicle to counter Congress’s tendency to create new offices and augment those offices’ salaries. First, Justice Story “was not a member of the Founding generation .... Rather than representing the original understanding of the Constitution, [Story’s treatise] represent[s] only his own understand-

448. 1 Farrand, supra note 60, at 386.
449. See 1 Story, supra note 19, § 867.
Perhaps more telling, Justice Story's personal view was that the state governments were far too powerful in comparison to the national government. The dissenters in *U.S. Term Limits* noted that “[i]n a range of cases concerning the federal/state relation . . . [the Supreme] Court has deemed positions taken in Story’s commentaries to be more nationalist than the Constitution warrants.”

b. Prevention of Corruption in the National Government

A second, though clearly subservient, purpose of the Emoluments Clause was to limit the opportunity for corruption in the national government. The Framers hoped to accomplish this goal in two ways. First, the Emoluments Clause would restrain the President’s ability to use his appointment power to co-opt the Congress. Luther Martin explained to the Maryland legislature that restrictions on appointment of Members of Congress to federal offices were necessary because Members, who according to Anti-Federalist theory invariably would seek federal appointment, would become dependent on the President for their livelihood. Martin, however, made these remarks in the course of opposing the ratification of the Constitution. One of Martin's reasons for opposing the Constitution is that the Emoluments Clause, after Madison’s amendment, was insufficient to protect the Congress from presidential influence. Thus, Martin did not actually see the Emoluments Clause, as adopted, addressing presidential influence at all; rather, he believed that the blanket ineligibility that had been approved before the Madison amendment was the minimum prohibition necessary to protect Congress.

Though protection of the legislature from the executive was a tenet of Anti-Federalist thought, this idea was not a major force behind adoption of the Emoluments Clause at the Constitutional Convention. Not one delegate who spoke on the issue raised this as a goal of the Emoluments Clause and, apparently, even Martin did not see the Emoluments Clause, as adopted, as remedying this danger.

The second means by which the Framers believed that the Emolu-

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451. *Id.* at 1880 (Thomas, J., dissenting).
452. *Id.*
453. Martin, *supra* note 1, at 47.
454. See *id.* at 47-48.
455. See *id.* at 46-47.
456. See *id.*
457. See *id.* at 47.
ments Clause might restrain governmental corruption was by discouraging opportunists from seeking congressional seats. Unlike the protection of Congress from presidential influence, this goal received a modicum of treatment at the Convention. Delegate Pierce Butler, the major proponent of this theme, noted that, in Great Britain, citizens ran for Parliament only because of the expectation that they might obtain appointment to a royal office.\textsuperscript{458} John Rutledge echoed Butler’s sentiment.\textsuperscript{459} Butler and Rutledge, however, did not want to prevent such naked office-seeking simply because it was immoral. Their view was that the availability of lucrative offices would induce opportunistic citizens, totally lacking in concern for the nation’s welfare, to run for Congress.\textsuperscript{460} The result would be that Congress would be populated by ambitious Members who would not care about the needs of the country or its citizens.\textsuperscript{461} Thus, the Butler/Rutledge view was that the Emoluments Clause, by limiting the attractiveness of federal offices, would keep some of the worst scalawags from joining the Congress. The corruption they sought to avoid was not the corruption accompanying the appointment process, but the corruption that would ensue if corrupt people sought congressional seats in hopes of obtaining a federal appointment.

3. The Saxbe Fix and the Actual Spirit of the Emoluments Clause

Having determined that the Framers’ dominant purpose in adopting the Emoluments Clause was to restrain the size and scope of the national government, the last step in an intentionalist analysis is to determine the extent to which the Saxbe fix conforms to that purpose. If the Saxbe fix is consistent with the Emoluments Clause’s purpose, then an intentionalist would not quarrel with implementation of the procedure, though a literalist still would object. If the Saxbe fix is inconsistent with

\textsuperscript{458} See 1 Farrand, supra note 60, at 376, 379. Butler stated: 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.

\textsuperscript{459} See 1 id. at 379.\textsuperscript{460} See 1 id. at 379, 386.\textsuperscript{461} Of course, concern that the national government would become alienated from its citizens was a cornerstone of Anti-Federalist thought. See supra notes 401-06 and accompanying text.
that purpose, then both literalists and intentionalists would find the procedure unconstitutional.

Application of the Emoluments Clause's spirit to the Saxbe fix demonstrates conclusively that the Saxbe fix seriously undermines use of the Emoluments Clause to restrain the scope of the national government. The first manner in which this occurs is fairly straightforward. Resuming the use of Senator Bentsen's case as an illustration, it certainly is true that the salary Senator Bentsen received as Treasury Secretary was no higher than it had been at the commencement of his Senate term in 1989; therefore, he was not enriched monetarily by virtue of the Ethics in Government Act of 1989. Nevertheless, the fact remains that holders of the office of Treasury Secretary between 1989 and 1993 were enriched by the pay raise. Thus, the national government had to expend extra funds in order to fill the Treasury Secretary's office for those four years. If the Emoluments Clause were concerned only with Senator Bentsen's salary, then there would be no harm in permitting the Saxbe fix. However, the Emoluments Clause was drafted to restrain the size, scope, and expense of the national government. Using that purpose as a guide, it is clear that the 1989 pay raise did make government more expensive, at least for four years. If the disqualification under the Emoluments Clause is enforced as absolute, then Congress might never have raised the salary of the Treasury Secretary in order to maintain the eligibility for appointment of Senator Bentsen and any other popular Members of Congress who might have aspired to that post. To a large extent, the damage had occurred before Senator Bentsen was appointed. The salary reduction in 1993 might have mitigated the damage to four years' excess salary, but that is just the type of expense the Framers hoped to avoid. Additionally, the secondary effects of the 1989 pay raise might have been even more damaging to the Framers' purpose. For instance, in order to justify the 1989 pay raise, the government might have expanded the Treasury Secretary's duties, or given him additional subordinates, both of which would increase the national government's intrusion into its citizens' lives. Whether such a role expansion actually occurred is very much beside the point; as a prophylactic rule, the Emoluments Clause provides a disqualification for activi-

462. See supra text accompanying notes 368-71.
463. Ethics in Government Act of 1989 § 703(a)(1); see also supra notes 277-78 and accompanying text.
464. See supra notes 433-61 and accompanying text.
465. See supra notes 409-13 and accompanying text.
ties—creation of offices and the augmentation of their salaries—that have a tendency to enlarge the government’s scope.

The second way that the Saxbe fix fails to contain an expanding national government is much less obvious. The Ethics in Government Act of 1989, for example, raised by twenty-five percent the salaries of the entire cabinet, federal judges, and many other offices.\textsuperscript{466} If the Emoluments Clause were concerned only with controlling the salary of offices to which Members of Congress eventually are appointed, then the damage would have been limited to the amount of salary increase received by Treasury Secretaries between 1989 and 1993, plus any secondary effects arising therefrom.\textsuperscript{467} However, the presumed availability of the Saxbe fix left Congress with an unmitigated incentive to increase the salaries of all federal offices, with the expectation that some Members of Congress will enjoy the benefit of this congressional generosity by virtue of post-term appointments.\textsuperscript{468} Therefore, allowing Congress to reduce the Treasury Secretary’s salary in order to qualify Senator Bentsen for appointment does not eradicate the damage caused by the availability of the Saxbe fix. If it were generally understood that the Saxbe fix was constitutionally ineffective, then it is possible that Congress in 1989 would not have increased the salaries of any of the federal offices to which influential Members aspired, for fear that those Members would be ineligible for appointment during their current terms.

Therefore, it is not true that the Saxbe fix removes most of the damage caused by an increase in an office’s emoluments. Congress might, for example, increase the emoluments of a great many offices with full knowledge that the Saxbe fix will cure any ineligibility should a Member of Congress be appointed during her current term.\textsuperscript{469} In that sense, Congress would be foiled in its efforts to expand the size and scope of government only in those cases where a Member in fact is appointed to that office during her current term; Congress, however, would succeed in expanding the national government in all other cases. The Emoluments Clause, as drafted, requires Congress to consider the possibility that its eagerness to expand the size, scope, and cost of the

\textsuperscript{466} Ethics in Government Act of 1989 § 703(a).
\textsuperscript{467} See supra notes 463-65 and accompanying text.
\textsuperscript{468} See supra notes 375-76 and accompanying text.
\textsuperscript{469} Whether this consideration crosses the minds of Members of Congress is irrelevant. The Emoluments Clause was designed to provide a disincentive to augmentation of offices’ salaries. What is certain is that Members of Congress have no reason, with the availability of the Saxbe fix, to consider the possibility that pay raise legislation might effect a harsh blanket disqualification for the remainder of their elected term.
national government might come at the expense of some of its Members’ aspirations to certain federal offices. The Saxbe fix removes that consideration by ensuring that Congress can expand the national government while still retaining the means of curing its Members’ disabilities under the Emoluments Clause. In such a case, the Emoluments Clause is patently ineffective at containing the growth of the national government. Consequently, the Saxbe fix severely undermines the Framers’ desire that the Emoluments Clause provide a counterweight to Congress’s inherent incentive to erect a bloated and overpaid national bureaucracy. Therefore, the Saxbe fix is unconstitutional from a purely intentionalist perspective, in addition to its widely acknowledged inconsistency with the literal terms of the Emoluments Clause.

To the minimal extent that the Framers saw the Emoluments Clause as protecting Congress from the President’s untoward influence, the purpose is furthered slightly more by application of the literal text than by allowing the Saxbe fix. The Framers themselves did not see this purpose as being furthered much at all by the Emoluments Clause. The Emoluments Clause as originally proposed—one that provided an ineligibility for appointment to all federal offices for the duration of a Member’s term—might have provided this protection from presidential intrigue. In such a case, the President could promise to appoint a Member of Congress to office only after that Member’s term ended. Particularly in the case of a Senator who recently has begun her term, such a promise would have little value because it would not even be certain that the President would remain in office until the conclusion of the Member’s term. But Madison’s middle ground, permitting in-term appointments where the office’s emoluments were not increased, removed from the purview of the Emoluments Clause the purpose of protecting Congress from the Executive. The President currently can promise a Member of Congress appointment to any office whose creation antedated the Member’s term, as long as that office was not the subject of an emoluments increase during the Member’s term. Such offices, even without emoluments increases, are a powerful carrot to hold out to compliant Members. If the Saxbe fix were constitutional, the President could offer to appoint a compliant Member of Congress to an office antedating the Member’s term, even if it had been the subject of an emoluments increase; the only restriction is that the Member would receive the pre-increase salary. Thus, the only difference caused by the

470. See supra notes 450-57 and accompanying text.
Saxbe fix, regarding this purpose of the Clause, is that the Saxbe fix increases the number of offices available to the President for the purpose of plying Members of Congress into supporting the administration's policies. Therefore, to the extent the Saxbe fix has any impact on the Emoluments Clause's ability to protect Congress from presidential intrigue, it actually disserves this purpose by increasing the number of offices the President has at her disposal in wooing congressional support.

The Butler/Rutledge notion that the Emoluments Clause would discourage unpatriotic officeseekers from burdening Congress with their presence also is slightly undermined by the Saxbe fix. As previously noted, the Saxbe fix allows Congress to recklessly increase the salaries of all offices, and then to retract the increases when the increase stands in the way of a Member's aspiration to a particular office. The result is that Congress's incentive to maintain reasonable salaries for federal offices is restrained less than it would be if there were no Saxbe fix available. Thus, the salaries of federal offices in general presumably will be higher than they would be if Members of Congress had to consider their irrevocable disqualification to the office whose salary they were increasing. As federal offices become more lucrative, the likelihood that unprincipled citizens would seek to place themselves in a position to gain appointment to these offices increases. As the Anti-Federalists recognized, Congress is an excellent place to become acquainted with administration officials who will decide who receives appointments to vacant federal offices. Thus, if the Saxbe fix has any effect on the number of unprincipled officeseekers in Congress, logically it would encourage such citizens to seek a congressional seat.

Therefore, the Saxbe fix actually impedes the primary purpose of the Emoluments Clause by removing the Clause's ability to contain the size, expense, and intrusiveness of the national government. The secondary purposes of the Emoluments Clause, to prevent the President from co-opting the Congress and to discourage officeseekers from Congress, are also injured by the Saxbe fix, though their degree of injury is far more minimal. The only possible purpose that would be consistent with the Saxbe fix would be to prevent Members of Congress from receiving, during their current term, the benefit of emoluments increased during that term. That purpose, however, is inconsistent with the Clause's text, which points to affecting behavior not at the time of appointment, but at

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471. See supra notes 458-61 and accompanying text.
472. See 1 Farrand, supra note 60, at 389 (remarks of James Madison).
the time Congress considers pay raise legislation. Additionally, the Framers never made reference to this purported goal of the Emoluments Clause during the Constitutional Convention, rendering any justification of the Saxbe fix relying on this supposed purpose patently specious.

V. CONCLUSION

The first question that might be raised by this Article is why the Emoluments Clause even needs scholarly treatment. At first glance, the Clause appears relatively straightforward and, like similar structural provisions, one would think that Congress and the courts need only define a few terms therein in order to put any controversy to rest. The courts, however, have been loathe to hear the merits of an Emoluments Clause challenge. This reluctance, depending upon one’s viewpoint, might fairly be attributed to the insufficient standing of previous litigants or to the courts’ aversion to embarrassing Congress with a contrary ruling. The most chilling possibility is that perhaps the courts do not want to adjudicate the Emoluments Clause out of a belief that it is a provision that has outlived its usefulness. Of even more concern is the possibility that Presidents believe that the difficulty of obtaining standing justifies the Saxbe fix, whether or not it violates the Constitution.473

While the courts have remained above the fray, Congress, on the other hand, selectively has raised possible Emoluments Clause issues surrounding presidential appointments. Such challenges, however, were clearly motivated by pure partisan politics, giving the observer the uneasy sense that the advocates did not themselves believe the constitutional arguments they were making. The Saxbe nomination is the clearest example of this political gamesmanship disguised as constitutional discourse. President Richard Nixon, the champion of strict constructionism, argued that a liberal interpretation of the Emoluments Clause, one that would permit the Saxbe fix, should prevail.474 His advocate before the Congress was Acting Attorney General Robert Bork, who also made an intentionalist argument that seems disingenuous in light of his own strict constructionist views.475

Those opposed to the Saxbe nomination were just as disingenuous.

473. See Paulsen, supra note 11, at 916-17.
474. This irony was not lost on Democratic Senator Alan Cranston. See 119 CONG. REC. 38,335 (1973) (“It is ironic that if the Constitution is given a strict interpretation—as President Nixon repeatedly has insisted it should be given—we would be constitutionally compelled to vote against the pending bill and to reject the man the President has chosen to be his Attorney General.”).
475. See S. REP. NO. 499, supra note 82, at 6; see also Paulsen, supra note 11, at 911.
Senator Robert Byrd led the opposition, making a lengthy speech about the virtues of strict construction and how the Saxbe nomination clearly violated the Emoluments Clause. During the entire course of the debate over the Saxbe nomination, not one Senator made a negative remark about Senator Saxbe’s fitness for office, or raised any reason for opposing the nomination other than the constitutional question. Senator Byrd spoke of his personal affection for Senator Saxbe and, confronting charges of partisanship, stated that “were we confronted with the nomination of a Democratic Senator under the same circumstances, I would be compelled to raise the constitutional question.” In the end, ten Senators voted against the Saxbe nomination, two of which were Byrd and Edmund Muskie. Two years later, Senator Byrd cast the lone recorded vote against the nomination of Representative Bob Casey to the Federal Maritime Commission. Byrd stated after the vote that he had nothing against Casey, but voted against confirmation because of the Emoluments Clause issue.

Ironically, in 1980, Senator Muskie, one of the ten Senators opposing the Saxbe nomination, was the primary benefactor of the Saxbe fix when Congress reduced the Secretary of State’s salary in order to qualify him for appointment to that post. Senator Byrd, who had stated that he would vote against a Democrat nominated pursuant to the Saxbe fix, voted to confirm Muskie. In 1994, Republican Representative Richard Armey capsulized the opportunistic nature of congressional statements on the Emoluments Clause when the question was raised concerning whether Senator George Mitchell would be eligible for appointment to the Supreme Court. Armey stated his belief that the Emoluments Clause disqualified Mitchell, wryly remarking that Senator Byrd’s “eloquent speech” against the Saxbe nomination “seems to be a definitive foreclosure of [Mitchell’s] nomination.”

Thus, the Emoluments Clause might be the least ideological

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477. Id. at 38,324 (remarks of Sen. Byrd).
479. Id. at 42,158.
480. Id. (noting his vote against Saxbe’s nomination for Attorney General for the same reason).
481. See supra notes 274-76 and accompanying text.
482. 126 Cong. Rec. 10,279 (1980). Demonstrating that constitutional opportunism was alive on both sides of the aisle, the only two Senators voting against Muskie’s confirmation, Senators Helms and Humphrey, had voted in favor of confirming Senator Saxbe in 1973. See 121 Cong. Rec. 42,018 (1975); see also 126 Cong. Rec. 10,279 (1980).
constitucional provision. The political party holding the presidency almost invariably urges a nonliteral interpretation of the Clause that would permit the Saxbe fix. Members of Congress from the other party raise the Emoluments Clause primarily in cases where the President is weak, or where the nominee offends them on a personal or political level. For instance, those opposed to the Black nomination likely raised the Emoluments Clause question as a vehicle for defeating a nominee who had admitted to previous membership in the Ku Klux Klan. The Saxbe nomination became a *cause celebre* largely because the nomination became necessary as a result of President Nixon’s firing of the Watergate Special Prosecutor, which precipitated the resignation of Attorney General Richardson. Additionally, the fierce animosity between Nixon and the Congress made their obstructionism entirely predictable. The Emoluments Clause was urged as an obstacle to Representative Mikva’s appointment by the National Rifle Association, which spent $700,000 attempting to keep Mikva, a staunch supporter of gun control, off the federal bench. However, when popular Members of Congress, such as Edmund Muskie and Lloyd Bentsen, were nominated to federal offices, the opposition party did not press the Emoluments Clause issue.

Although executive and congressional motives have not always been exemplary, most of their interpretations of the Emoluments Clause have been correct, or at least within the realm of reasonable determinations. Unfortunately, most of the examples of reasonable interpretation of the Emoluments Clause come from the nineteenth century and before. The trend has been for political exigencies to overwhelm the Clause’s strictures. The appointment of Hugo Black to the Supreme Court gave him a vested right to a pension, one that had not existed at the start of his Senate term, clearly in violation of the Emoluments Clause. The rationale underlying the Black nomination would allow Congress to enact legislation raising an office’s salary, with that increase to take effect a

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484. See 81 CONG. REC. 9077 (1937).
487. See 125 CONG. REC. 26,032 (1979) (remarks of Sen. Laxalt) (“As is now legend, [Representative Mikva] has been the foremost advocate of gun control legislation in the House.”); Fisher, *supra* note 2, at 727 (“Because of Mikva’s longtime advocacy of gun control, the National Rifle Association (NRA) spent an estimated $700,000 to block his nomination to the United States Court of Appeals for the District of Columbia Circuit.”); see also 3 Op. Off. Legal Counsel 298, 298 (1979) (responding to memorandum on the Emoluments Clause prepared by the general counsel of the National Rifle Association).
short time later, with the President to appoint a favored Member of Congress to the office sometime before the pay raise became effective. The theoretical possibility that the Member might resign or die in office before the raise took effect would prevent the pay raise from being an emolument “as to her.”

The appointment of Philander Knox as Secretary of State gave birth to the most persistent, and pernicious, class of Emoluments Clause evasions: the Saxbe fix. The Saxbe fix does not conform to the literal text of the Emoluments Clause, a point conceded by advocates on both sides. Professor Kurland is the only constitutional authority to contend that the Saxbe fix also violates the spirit of the Emoluments Clause. Kurland was wrong in his statement that the Emoluments Clause was designed as a blanket prohibition on Congress’s enactment of special legislation for the benefit of its Members; otherwise, Congress would not have the power to determine its own salaries. Kurland, however, was correct in his framework. The purpose of a constitutional provision is never irrelevant; rather, the spirit of an unambiguous provision should be viewed as being embodied in its language. Nevertheless, even if one were to undertake an intentionalist interpretation of the Emoluments Clause, the Saxbe fix would be unconstitutional anyway. The general consensus that the Emoluments Clause was designed primarily to prevent congressional corruption is fallacious. Prevention of corruption was not the Framers' goal in adopting the Emoluments Clause. The Framers saw the evil addressed by the Emoluments Clause as being the tendency of national governments to become leviathans that eclipse local governments and oppress their citizenry. Thus, the Framers did not seek to prevent corruption for the sake of preventing corruption; rather, they sought to prevent the limited class of corruption that resulted in larger, more expensive, more oppressive government. Viewed in that light, the spirit of the Emoluments Clause is fundamentally inconsistent with the Saxbe fix.

Of course, unearthing an unconstitutional appointment is of little consequence if there exists no remedy for such a violation. Though the federal courts have twice refused to hear Emoluments Clause challenges

488. See supra notes 138-52 and accompanying text.
491. Saxbe Hearing, supra note 116, at 8 (testimony of Prof. Kurland).
492. See Meese, supra note 402, at 109.
to presidential appointments, if a plaintiff with a more personal stake in the result, such as a citizen injured by a Treasury Regulation, were to bring the legal challenge, the courts might be more willing to address the merits of an appointment. Probably the more likely road to reform is scholarly criticism, such as the type undertaken here. By critiquing the constitutional underpinnings of the Saxbe fix, the legitimacy of the procedure becomes less respectable. If the legal community and the public at large came to see the Saxbe fix as a blatant evasion of the Constitution, that probably would be incentive enough for the political branches of government to reform themselves.

493. See supra note 7 and accompanying text.
494. This possibility was first raised in Paulsen, supra note 11, at 916-17.