An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserve

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INTRODUCTION

Lindsay Graham is a colonel in the Air Force Reserves. As such, Graham has done three "minitours" in Iraq since 2006.[1] On these tours, he carried a firearm, bunked with another colonel, and served under the direct command of a general.[2] What makes Graham unusual is that he is also a United States Senator.

The Constitution prohibits members of Congress from holding "any office under the United States."[3] Since World War II, however, numerous congressmen have been officers in the Armed Forces Reserve.[4] While this apparent contradiction has provoked a lawsuit,[5] no scholarly literature addresses the contradiction,[6] and thus, it has never been reconciled.

This Note will take up the question of the constitutionality of members of Congress holding reserve commissions. Part I will examine the constitutional text, history, and precedent, concluding that the practice is likely unconstitutional. Part II will provide an overview of the two principle defenses that have

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1. *Capitol Notes*, PITTSBURGH POST-GAZETTE, Feb. 17, 2008, at C-2.

2. James Rosen, *Air Force Reservist Sen. Lindsey Graham Served in Afghanistan*, MCCLATCHY, Sept. 2, 2006, http://www.mcclatchydc.com/staff/james_rosen/v-print/story/14567.html ("Graham traveled with Maj. Gen. Jack Rives, who as Air Force judge advocate general is his boss in the Air Force Reserve.").

3. U.S. CONST. art. I, § 6, cl. 2.

4. Broadly speaking, the Armed Forces Reserve is broken down into three categories: the Ready Reserve, the Standby Reserve, and the Retired Reserve. OFFICE OF THE SEC'Y OF DEFENSE FOR RESERVE AFFAIRS, RESERVE COMPONENTS OF THE ARMED FORCES: RESERVE COMPONENT CATEGORIES 2 (2005), http://www.defenselink.mil/ra/documents/RC101%20Handbook-updated%2020%20Sep%2005.pdf. All members of the reserve can be called up by the executive branch unilaterally. Members of the Ready Reserve are the first to be called up in time of need and, consequently, have the strictest continuing training regime. *See id.* at 3–11. Pursuant to statute, the reserves can be called up by the executive branch unilaterally. *See* 10 U.S.C. §§ 688, 12301–12302, 12306 (2006). All reserve officers are appointed by the President: lieutenant colonel or commander and below, unilaterally; colonel or captain and higher, with the advice and consent of the Senate. *Id.* § 12203.

5. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

6. *See* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1049 (1994) (noting the general dearth of scholarship on the Incompatibility Clause). The aforementioned lawsuit did result in three case comments, but they only analyze the judicial decisions and not the underlying question. *See* Note, *Constitutional Law—Members of Congress May Not Hold Commissions in Armed Forces Reserves*.—Reservists Committee to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971)*, 50 TEX. L. REV. 509 (1972); Recent Case, *Constitutional Law—Separation of Powers—In Citizen Suit, Congressmen Declared Constitutionally Ineligible to Hold Military Reserve Commissions.*—Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971), appeal docketed, No. 71-1535, D.C. Cir., July 7, 1971*, 85 HARV. L. REV. 507 (1971); Recent Decision, *Constitutional Law—Separation of Powers—Article 1, Section 6, Clause 2 Renders a Commission in the Armed Forces Reserve Incompatible with Membership in the Congress*—Reservists Comm. to Stop the War v. Laird, *323 F. Supp. 883 (D.D.C. 1971)*, 40 GEO. WASH. L. REV. 542 (1972); *see also* Michael C. Dorf, *The Nation's Top Military Court Rules that a Senator Cannot Wear Two Hats: Does the Ruling Call Into Question Reserve Duty by Members of Congress?*, FindLaw.com, Sept. 25, 2006, http://writ.news.findlaw.com/dorf/20060925.html (discussing Incompatibility Clause and possible constitutional problems with members of Congress serving in reserves).

been mounted in favor of the practice—Senator Goldwater's floor statements and Solicitor General Bork's brief in *Schlesinger v. Reservist Committee to Stop the War*. Part III will then evaluate those defenses in light of constitutional text, history, and precedent, concluding that the defenses provided by Senator Goldwater and Solicitor General Bork ultimately are not persuasive and that the longstanding practice is unconstitutional.

I. THE PRACTICE IN LIGHT OF CONSTITUTIONAL TEXT, HISTORY, AND PRECEDENT

The Constitution prohibits members of Congress from "holding any office under the United States."[7] In evaluating the constitutionality of congressmen holding officer commissions in the reserves, the essential question is whether an officer in the reserves is an "officer under the United States." Both text and history strongly suggest that a reserve officer is an officer under the United States. Early congressional precedent confirms this answer, although later congressional action cuts against it. Executive and judicial precedents do not contradict this conclusion.

A. TEXT

The longstanding practice of congressmen having reserve commissions violates the clear text of the Constitution. Article I, Section 6, Clause 2 of the Constitution provides that

> [1] 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: [2] and no Person holding any office under the United States, shall be a Member of either House during his Continuance in Office.[8]

There are two separate, but related, prohibitions. The first, the Emoluments Clause, prohibits congressmen from creating offices, or raising the salary or emoluments for existing offices, that they themselves are then appointed to fill. The second, the Incompatibility Clause, prohibits "office[rs] under the United States" from simultaneously being members of Congress.

The clause as a whole is aimed at preventing executive corruption of the legislature or, more specifically, the reduction of the legislature to the control of the executive.[9] The first prohibition prevents Congress from creating lucrative executive branch offices to which its own members are then appointed. The danger here seems to be the executive prompting legislative largess (by promising individual congressmen a part of that largess), resulting in an expanded, and

7. U.S. CONST. art. I, § 6, cl. 2.
8. U.S. CONST. art. I, § 6, cl. 2 (numbers in brackets added).
9. *See, e.g.*, *infra* note 39 & accompanying text.

more powerful, executive branch. The first prohibition only applies to civil offices; thus if war breaks out, Congress can create military offices or increase the pay for military officers, and individual members of Congress can be appointed to these positions.

The second prohibition is more absolute: "any office" is incompatible with congressional membership. Moreover, this incompatibility is not limited (textually) to appointments.[10] Although the second prohibition, like the first, is undoubtedly concerned about the possibility of executive corruption of the legislature (by corrupting individual legislators), it seems also to enunciate a broader separation of powers principle designed to ensure the separateness of both the legislature and the executive;[11] for example, the second prohibition makes parliamentary government formally unconstitutional.[12]

The crux of the second prohibition is the constitutional meaning of an "office under the United States." The Constitution (excluding amendments[13]) mentions the term "office" or "officer" thirty-three times. The formulation of an office or officer "under the United States" occurs twice.[14] The formulation of an office or officer "under the Authority of the United States" occurs once.[15] A variation on the formulation of an office or officer of "honor, Trust or Profit under the United States" occurs thrice.[16] The formulation of an office or officer "of the United States" (not including the presidency) occurs four times.[17] (The presidency is characterized similarly as the "Office of President of the United States,"[18]

10. This aspect of the clause—the difference between limiting "appointments" for newly created offices and complete incompatibility with all offices—seems to pose a serious problem for Seth Barrett Tillman's reading of it, which would permit the same person to be both senator and president. Tillman never addresses this point and collapses his reading of the clause. *See* Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 4–10 (2008), http://www.law.duke.edu/journals/DJCLPP/index.php?action=downloadarticle&id=79. This is only one of many serious problems with Tillman's piece. *See* Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 35 (2008), http://www.law.duke.edu/journals/DJCLPP/index.php?action=downloadarticle&id=77; Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134 (2008), http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf.

11. *But see* Calabresi & Larsen, *supra* note 6, at 1050–51 (arguing that the Incompatibility Clause was conceived primarily as an anti-corruption tool).

12. *Id.*

13. I excluded amendments for the sake of simplicity. No amendment changes this analysis.

14. U.S. CONST. art. I, § 6, cl. 2; *id*. art. VI, cl. 3.

15. U.S. CONST. art. I, § 6, cl. 2. Interestingly, two variants of the phrase appear in the Incompatibility Clause itself. *Id.*

16. U.S. CONST. art. I, § 3, cl. 7 ("of honor, Trust or Profit under the United States"); *id.* art. I, § 9, cl. 8 ("of Trust or Profit under the United States"); *id.* art. II, § 1, cl. 2 ("of Profit or Trust under the United States").

17. U.S. CONST. art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 2; *id.* art. II, § 4; *id.* art. VI, cl. 3.

18. *Id.* art. I, § 3, cl. 5; *id.* art. II, § 1, cl. 9. The simple term "President of the United States" appears twice. *Id.* art. I, § 7, cl. 3; *id.* art. II, § 1, cl. 1.

implying that the presidency is an "office of the United States."[19])

The question, then, is this: apart from modifiers like "civil" or "inferior," are these different phrasings—"under," "of," "under the Authority of" —different categories of "office" (or "officer"), or are they simply stylistic variations on a single concept? The best reading is that they are simply stylistic variations because there is no consistent, principled distinction that can be drawn from the text. Any reading that attempts to distinguish between "officers of" and "officers under," for example, suffers from an inability to account for what that distinction actually means.[20] Thus, just as the Constitution variously refers to the "the Office of the President of the United States," "the President of the United States," and simply "the President" all to describe the one concept of the presidency, so do the various formulations of an office "of" or "under" the United States describe a single concept.[21]

An office is "[a] position of duty, trust, or authority, esp. one conferred by a governmental authority for a public purpose."[22] An office under the United States can describe either an executive office or a judicial office.[23]

There is one other category of "officers," namely congressional officers.[24] This category includes the Speaker of the House and the Senate President Pro Tempore. These officers are not, however, "under the United States" because they are not subordinate to executive (or judicial) authority, but answer to their respective houses of Congress.[25]

With this understanding of the Incompatibility Clause established, the text clearly prohibits congressmen from holding reserve commissions. While the first part of the clause only applies to civil offices, the second part applies to "any office." The second prohibition, then, encompasses military offices.

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19. This would also imply that the President himself is an "officer of the United States." *See* BLACK'S LAW DICTIONARY 1117 (8th ed. 2004) (defining an "officer" as "[a] person who holds an office of trust, authority, or command"). *But see* Tillman, *supra* note 10, at 10–12 (arguing that the president is not an "officer" and distinguishing between an "officer" and an "officeholder").

20. For an example of drawing out numerous minor textual differences without any meaningful distinctions, see Tillman, *supra* note 10, at 10–12. Tillman relies on such differences to attempt to show that the President is an *officeholder*, but not an *officer*. *Id.*

21. This is the consensus view. *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114–15 (1995) (arguing that all of these varied formulations, apart from the civil and military distinctions, "seemingly describe[] the same stations" and that "the modifying terms 'of,' 'under,' and 'under the Authority of' are essentially synonymous"); *see also* Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 288 (2003) (characterizing "officers of the United States" and "officers under the United States" as synonymous terms).

22. BLACK'S LAW DICTIONARY 1115 (8th ed. 2004). An officer is simply "[a] person who holds an office of trust, authority, or command." *Id.* at 1117.

23. Amar & Amar, *supra* note 21, at 114–16.

24. *See* U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers . . . ."); *id.* art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers . . . .").

25. *See* Amar & Amar, *supra* note 21, at 115–16 (1995); *see also* A Native of Virginia (James Madison), Observations Upon the Proposed Plan of Federal Government (1788), *in* 2 THE FOUNDERS' CONSTITUTION 160 (Philip B. Kurland & Ralph Lerner eds., 1987) (positing that offices of the United States means executive and judicial, not legislative).

A reserve officer is a military officer who holds a "position of duty, trust, [and] authority" that is "conferred by a governmental authority for a public purpose."[26] A reserve officer is subject to the command of his military superiors,[27] and his position is conferred on him by the President, who appoints reserve officers.[28] Indeed, reserve officers fall under the same general organizational umbrella as regular, active duty soldiers.[29]

Congressmen who are also reserve officers are officers under the United States.

B. HISTORY

History confirms that a reserve commission is incompatible with congressional membership. The debate over drafting and ratifying the clause reveals a consensus on the meaning of the clause: congressmen were prohibited from holding executive office; executive offices included military offices; and reserve officers—although a relatively modern creation—are officers as that term was understood.[30]

First, there was a widespread consensus over the meaning of the clause. Debate at the Constitutional Convention focused on how best to prevent corruption[31] without deterring the most capable men from serving in Congress or disabling them, if they did serve in Congress, from serving in other positions where they were subsequently needed.[32] No one questioned the need for some form of prohibition on congressmen holding executive office. Early proposals would have prevented members of Congress from holding state office while in Congress and federal office while in Congress and for an additional year after leaving Congress.[33] The prohibition on state office holding concurrent with congressional membership was quickly eliminated[34] as the cost-benefit ratio was deemed too high.[35] Likewise, the additional year of disability on holding federal offices was also changed[36] to instead prohibit members from holding new offices or offices where the "emoluments whereof" were increased, and

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26. *See* BLACK'S LAW DICTIONARY 1115, 1117 (8th ed. 2004) (defining "officer"); *see also id.* at 1118 (defining "military officer" as "[o]ne who holds a commission in the armed services . . . .").

27. *See* 10 U.S.C. §§ 12301(a), 12302 (2000) (Ready Reserve); 10 U.S.C. § 12203 (2006) (Standby Reserve).

28. *See* 10 U.S.C. § 12203 (2006).

29. OFFICE OF THE SEC'Y OF DEFENSE FOR RESERVE AFFAIRS, *supra* note 4.

30. Reserve officers are a subset of military officers. *See id.* The difference between active and reserve officers is a difference of degree, not of kind. *See infra* notes 110–16 and accompanying text.

31. *See* Records of the Federal Convention, *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 346–52.

32. *See, e.g.*, *id.* at 348 (comment by James Madison).

33. *See id.* at 346.

34. *See id.* at 347–49.

35. *See id.* at 347 ("[Pinckney] argued from the inconveniency to which such a restriction would expose both the members of the 1st. branch, and the States wishing for their services; from the smallness of the object to be attained by the restriction.").

36. *See id.*

only for the duration of the term for which a member was elected.[37] Concern that the ablest military leaders would be ineligible to leave Congress for military appointment if war broke out resulted in the word "civil" being inserted.[38]

The ratification debates reflect this basic theme. Supporters of the Constitution emphasized the balance the clause struck between preventing corruption and allowing able men to serve where they were most needed. In the Virginia ratifying debate, James Madison defended the clause as being a "mean between two extremes":

> It guards against abuse by taking away the inducement to create new offices, or increase the emolument of old offices; and it gives them [i.e., members of Congress] an opportunity of enjoying, in common with other citizens, any of the existing offices which they may be capable of executing. To have precluded them from this, would have been to exclude them from a common privilege to which every citizen is entitled, and to prevent those who had served their country with the greatest fidelity and ability from being on a par with their fellow-citizens. I think it as well guarded as reason requires; more so than the constitution of any other nation.[39]

Madison also raised the prospect of war and the need for the President to be allowed to appoint the ablest men to command the military, even if the military offices were created while those men served in Congress:

> Suppose America was engaged in war, and the man of the greatest military talents and approved fidelity was a member of either house; would it be right that this man, who could lead us to conquer, and who could save his country from destruction, could not be made general till the term of his election expired?[40]

In Pennsylvania, James Wilson emphasized the anti-corruption effects of the clause. Although he conceded that corruption cannot be entirely rooted out from government, he stated, "All that can be done, upon this subject, is done in the Constitution before you."[41]

The gravamen of the Antifederalist complaint was that the clause was insufficient to prevent actual corruption. Luther Martin lamented that congressmen were eligible to be appointed to offices at all. He dismissed the efficacy of the

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37. *See* U.S. CONST. art. I, § 6, cl. 2.

38. *Compare* Records of the Federal Convention, *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 346 (comment by James Wilson), *with* U.S. CONST. art. I, § 6, cl. 2.

39. Debate in Virginia Ratifying Convention (June 14, 1788), *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 355 (statement of James Madison).

40. *Id*. at 356 (statement of James Madison).

41. Debate in Pennsylvania Ratifying Convention (Dec. 4, 1787), *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 352 (statement of James Wilson).

Emoluments Clause, calling it "of little consequence" because it could be "easily evade[d]" by creating new offices for existing officeholders, thus allowing the congressmen who created those new offices to fill the now vacant existing offices.[42] Likewise, the Incompatibility Clause, he argued, would only serve to create a cycle of members leaving their congressional seats for offices, creating room for new congressmen to ascend to power and then seek offices themselves: "it would be only driving away the flies who were *filled*, to make room for the [sic] those that were *hungry* . . . ."[43] The Federal Farmer joined this chorus, arguing that "pretty clearly a majority of the federal legislators, if not excluded, will be mere expectants for public offices."[44]

All those debating the ratification, then, agreed on the basic meaning and operation of the clause: congressmen were eligible to be appointed to existing offices (and newly created military offices), but accepting such an appointment vacated their seats. The disagreement was over its efficacy in preventing corruption.

Second, "office" meant (and was understood to mean) "[a] particular duty, charge or trust conferred by public authority and for a public purpose; an employment undertaken by commission or authority from government or those who administer it."[45] An "officer" was "[a] person commissioned or authorized to perform any public duty."[46]

Third, the category "officer under the United States"[47] was universally recognized to include "military officers," whom the president appointed.[48] Justice Joseph Story, for instance, noted that "[t]he president is by law invested, either solely, or with the senate, with the appointment of all military and naval officers, and of the most important civil officers . . . ."[49]

Thus, though the modern reserves did not formally exist until the twentieth century,[50] reserve officers fall within the category of "officers under the United States." Reserve officers are "commissioned" by the United States (under the authority of the President) "to perform" the "public duty" of defending the

42. Luther Martin, Genuine Information (1788), *in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 353.

43. *Id.*

44. FEDERAL FARMER, NO. 13 (Jan. 14, 1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 354.

45. NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (reprint 1970) (1828).

46. *Id.*

47. A review of the primary sources vindicates the textual analysis above that all the variants on "office under the United States" are essentially synonymous. *See, e.g.*, Debate in North Carolina Ratifying Convention (July 24, 25, 28, 1788), *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 160–66 ("office of," "office under," and "office of Authority under" all used interchangeably).

48. *See* FEDERAL FARMER, NO. 11 (Jan. 10, 1788), *in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 41 (officers includes both military and civil); LUTHER MARTIN, GENUINE INFORMATION (1788), *in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 98 (officers include both military and civil).

49. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833), *in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 119.

50. RICHARD B. CROSSLAND & JAMES T. CURRIE, TWICE THE CITIZEN 14, 17 (1984).

nation and waging war. As a result, congressmen, who are prohibited from holding "any office under the United States," violate the clause by holding reserve commissions while maintaining their seat in Congress.

C. PRECEDENT

No constitutional actor has answered the precise question of incompatibility in regard to reserve officers. The substance of the precedent[51] touching on the issue, however, indicates that the practice is unconstitutional. This section examines legislative, executive, and judicial precedents relevant to the question.

1. Legislative Precedent

Although no legislative precedent authoritatively settles the question,[52] the weight of congressional tradition suggests that reserve commissions are incompatible with congressional membership. According to published congressional precedents, Congress historically has policed the clause carefully, most frequently in the context of military offices.

The official legislative precedents are recorded chronologically in three separate collections, each named after the parliamentarian who compiled them: Asher C. Hinds, Clarence Cannon, and Lewis Deschler. This section will systematically work its way through the relevant precedents organized by parliamentarian.

a. Hinds's Precedents: 1789–1907. From 1789 through 1907, Congress addressed the question of military commissions and the Incompatibility Clause at least ten times[53] (out of twenty-two total times considering the Incompatibility Clause[54]). In eight precedents, Congress either declared vacant the seats of members who had accepted commissions,[55] the member resigned,[56] Congress refused to seat the member-elect who had a commission,[57] or the member-elect did not attempt to be seated.[58] Congress seated the member in the other two instances. In one, Congress seated a member-elect who, through a complicated set of circumstances, had been appointed to a commission that did not legally exist (and who did not continue in that commission upon taking his seat in

51. I use "precedent" here to describe authoritative acts or opinions issued by the respective branches of government. This is, of course, broader than the normal use of "precedent" to describe only decisions issued by courts.

52. 2 LEWIS DESCHLER, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 14, at 781 (1997) ("An unresolved issue relating to incompatible offices and military service is the status of Members of Congress who hold reserve commissions in branches of the armed forces.")

53. *See* 1 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 486–92, 494, 500, 504, at 592–603, 612–21, 628–32, 634–35 (1907).

54. *Id.* §§ 485–506, at 592–636.

55. *Id.* §§ 486–87, 489–90, 494, 504, at 592–94, 595–599, 612–21, 634.

56. *Id.* § 488, at 594–95.

57. *Id.* § 492, at 601–03.

58. *Id.* § 500, at 628–32.

Congress);[59] and in the other, Congress seated a member-elect who resigned his commission in the interim between being elected to Congress and taking his oath of office.[60]

The first, and most prominent, precedent occurred in 1803. That year, Representative John P. Van Ness was appointed an officer in the District of Columbia militia by the President during the recess between the first and second session of Congress.[61] The House, following the report of Representative John Bacon, found this to be "an office under the United States," determined Van Ness was in violation of the Incompatibility Clause, and declared his seat vacant.[62] Representative Van Ness, attempting to keep his seat in Congress,

> urged that the provision of the Constitution was intended to apply only to civil officers; that he was an officer only of a dependent, or colonial district, of the United States; that his exclusion would mean the exclusion of militia officers of the States, since they were subject to the command of the United States; and that there were no emoluments to the office which he had accepted, and therefore could be no danger of corruption.[63]

The rejoinder was simple: "[T]he Constitution used the expression 'any office,' and the committee [on elections] felt themselves bound by its terms."[64] Representative John Randolph then "called for the yeas and nays, and asked the House, in the important precedent which it was about to establish, to vote unanimously to exclude even the shadow of Executive influence."[65] The House voted 88 to 0 to declare Representative Van Ness's commission incompatible with his congressional seat.[66]

The Van Ness precedent is significant for three reasons. First, Congress recognized that military offices fall within the prohibition of the Incompatibility Clause. Second, Congress recognized that officers of reserve forces created under and controlled by federal authority are officers under the United States. Long before the Armed Forces Reserves were formally created, organized state militias served as the principal reserve force.[67] The state militias were under the authority of the state, albeit subject to federalization in the event of a national emergency,[68] and the Incompatibility Clause does not apply to state offices.[69] The one exception is the District of Columbia, which is a federal district over

59. *Id.* § 491, at 599–601.
60. *Id.* § 492, at 601–03.
61. *Id.* § 486, at 592–93.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. CROSSLAND & CURRIE, *supra* note 50, at 1–7 (detailing the early history of reserve forces in colonial America and the United States).
68. U.S. CONST. art. I, § 8, cl. 15–16; *id.* art. II, § 2, cl. 1.
69. *See supra* section I.B.

which Congress has plenary power.[70] The D.C. militia, then, is an analogue to the modern reserves. Thus, the Van Ness case established that reserve officers serve in offices of the United States. Third, subsequent Congresses repeatedly relied on the Van Ness precedent.[71]

b. Cannon's Precedents: 1908–1936. From 1908 to 1936, Congress dealt with incompatibility issues six times;[72] three of these involved military offices.[73] Unlike earlier Congresses, these precedents are mixed. Although Congress continued, in its official pronouncements, to hold military commissions—even in reserve forces—incompatible, it also undercut its own precedents by refusing to act against members who accepted commissions (and even, after the fact, paid members who had taken commissions during the First World War).

In 1916, the House Judiciary Committee took up the question of whether a commission in the National Guard constitutes an office under the United States. Formerly consisting of the organized state militias, the National Guard was reorganized by the National Defense Act of 1916. The reorganized National Guard received more federal funding, but was also subject to greater federal oversight.[74] Defining "public office" as embodying "the ideas of tenure, duration, emoluments, and duties," and specifying that the duties are "continuing and permanent, not occasional and temporary," the committee examined the nature of an office in the National Guard.[75] After extensively cataloguing the status of the National Guard and reviewing the duties of commissioned officers therein, the committee summarized:

> [A] commissioned officer serves under an act of Congress, he takes an oath that he will obey the orders of the President of the United States (see sec. 73, act June 3, 1916), and will act under such rules and regulations as may be prescribed by the President and Secretary of War, perform the duties prescribed by the President and Secretary of War, and will be entitled to receive such compensation from the Federal Government for his services as may be prescribed and appropriated by Congress.[76]

Therefore, the committee concluded, an office in the National Guard met the definition of a public office, and thus, "acceptance of commission in the National Guard by a Member vacates his seat."[77] Despite the strong language of

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70. U.S. CONST. art. I, § 8, cl. 17.

71. *See* 1 HINDS, *supra* note 53, §§ 490, 491, 492, 499, 500, at 596–603, 624–32; 6 CLARENCE CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 60, at 64–67 (1921).

72. 6 CANNON, *supra* note 71 §§ 60–65, at 64–79.

73. *Id.* §§ 60–62, at 64–69.

74. *Id.* § 60, at 65 (limiting the question of incompatibility to a "commission in the National Guard under the provisions of the act of Congress mentioned," i.e., the National Defense Act of 1916).

75. *Id.* § 60, at 65 (relying on United States v. Hartwell, 73 U.S. 385 (1868), for the definition of "public office").

76. *Id.* § 60, at 66.

77. *Id.* § 60, at 64.

the committee, the House did not act on the report, although the Speaker of the House did refuse to pay the salaries of members who did accept commissions.[78]

Three years later, Representative Mann offered an amendment that the House pay the salary of, and provide staff for, "Members who had accepted such commissions in the military service,"[79] including members who had accepted commissions in the reorganized National Guard. After the amendment was agreed to, Representative Finis J. Garrett spoke. He recalled the Judiciary Committee's report on offices in the National Guard and the Incompatibility Clause and noted without a doubt that those who accepted such commissions ought to have "forfeited their seats as Members of the House of Representatives."[80] For Congress to have done so, however, would have been "an ungracious act."[81] Representative Garrett went on to state that, for the record, he had not approved of the amendment just passed, but did not oppose it at the time it was considered because it would have been an "ungracious thing to do."[82] In reply, Representative Richard Wayne Parker stated that he did not believe the question of forfeiture to be so clear. He suggested that, perhaps, if the office proved temporary (if the war proved short), then a member's seat might only be suspended rather than forfeited.[83]

Despite the disagreement between Representative Garrett and Representative Parker over the appropriate remedy for an Incompatibility Clause violation (Representative Garrett for the traditional forfeiture versus Representative Parker for the novel idea of suspension), both agreed that a military office is an office under the United States, and by accepting one, a member of Congress transgresses the constitutional line.

After the Garrett-Parker exchange, Representative Mann modified his original amendment and moved to pay the congressional salaries of members who had accepted commissions but to subtract from their congressional pay an amount equal to their army salary.[84] The motion passed.[85]

In 1921, in the final relevant precedent, the House faced for the first time the question of incompatibility and the modern reserve.[86] Representative Simeon D. Fess "asked unanimous consent that leave of absence be granted Mr. R. G. Fitzgerald, of Ohio, holding a commission in the Reserve Corps of the United States Army, in order to permit him to comply with orders to report for camp

78. *Id.* § 61, at 68 (quoting Representative Parker: "[I]t was ruled by the Speaker . . . that he would sign no warrants for pay while they were away as officers of the Army, and while their offices continued they received Army pay, but no payment was made to any Member of Congress who went into the Army of his salary as Member during his absence.").

79. *Id.* § 61, at 67.

80. *Id.*

81. *Id.*

82. *Id.* § 61, at 68.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* § 62, at 69.

duty."[87] Representative Thomas L. Blanton objected, presumably on Incompatibility Clause grounds, and a resolution was offered instructing the House Judiciary Committee

> to ascertain and report to the House whether any Member of the House is at present holding a commission as an officer in the service of the Army of the United States; and if so, whether the holding of such commission vacates the seat of the Member holding the same.[88]

The resolution passed unanimously, but "[t]he Committee on the Judiciary made no report thereon."[89]

c. Deschler's Precedents: 1937–Present. Since 1937, the precedents are divided into two categories: "Incompatible Offices"[90] generically and "Military Service"[91] specifically. The first category ranges from state offices[92] to the now (semi) famous[93] "Saxbe fix"[94]—none of which concern this Note's inquiry. The second category, "Military Service"—which does concern this Note's inquiry—is significantly shorter than the first.[95] Moreover, these precedents stand in sharp contrast to earlier ones. The precedents recorded in Hinds's and Cannon's compilations involve Congress (or a committee) engaging in a searching examination of the meaning of the Incompatibility Clause. The precedents since 1937, however, are simply the unratified acts of individual members[96] (and, bizarrely, one executive action related to Congress[97]). However, Congress did not fail to examine the meaning of the Incompatibility Clause for lack of opportunity. In 1963, Senator Goldwater repeatedly urged the Senate to examine the constitutionality of congressmen holding commissions in the reserves.[98] Although Senator Goldwater eventually researched the issue himself and an-

87. *Id.*
88. *Id.*
89. *Id.*
90. 2 DESCHLER, *supra* note 52, § 13, at 771–80.
91. *Id.* § 14, at 780–85.
92. *Id.* § 13.1, at 775.
93. *See, e.g.*, Editorial, *Hillary and the Constitution*, WALL ST. J., Dec. 4, 2008, at A16 (discussing, and decrying, the "Saxbe fix" in the context of Secretary of State nominee Hillary Clinton).
94. 2 DESCHLER, *supra* note 52 § 13.7, at 780.
95. Five pages compared to ten.
96. *See, e.g.*, 2 DESCHLER, *supra* note 52 § 14.1, at 781–82 (Sen. Goldwater requesting the Senate Judiciary Committee to evaluate the constitutionality of the practice of congressmen holding Reserve commissions and then announcing the results of his "independent[] investigat[ion]"); *id.* § 14.2, at 782–83 (Sen. Cannon proposing, and then withdrawing, an amendment); *id.* § 14.4, at 784 (individual congressmen serving in the Reserves during World War II). Although the House granted unanimous consent for these congressmen to take a leave of absence, *see id.*, I think that this is best understood as congressional courtesy rather than approval.
97. *Id.* § 14.3, at 783 (recording the opposition of Secretaries of War and the Navy to sitting congressmen enlisting or taking commissions).
98. *Id.* § 14.1, at 781–82.

nounced his finding on the floor,[99] Congress itself took no official action and created no real precedent.

In sum, the strongest legislative precedents, such as Van Ness, support the proposition that congressmen who hold reserve commissions violate the Incompatibility Clause. Subsequent congressional failure to act does not obscure the clarity with which early Congresses spoke.

2. Executive Precedent

A review of executive branch materials suggests that a commission in the reserves is incompatible with congressional membership. Although the executive has declined to opine on the specific issue of congressmen holding reserve commissions, the executive branch has determined that military offices are incompatible with congressional membership, and executive branch opinions suggest that reserve officers are "officers under the United States."

First, the executive branch has never formally opined on the constitutionality of members of Congress holding officer commissions in the reserves. The closest it came was in 1977, when the White House Counsel asked the Office of Legal Counsel (OLC) to give an opinion on the practice. OLC declined to decide the issue for itself and replied that "[i]t is our opinion that the exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress."[100] OLC based its conclusion on the authority of each house of Congress to judge the "[q]ualifications of its own members,"[101] and that, "as far as we know, the President has never undertaken to enforce the second portion of the [Incompatibility] [C]lause, which disqualifies individuals who have already been appointed from assuming or retaining seats in Congress."[102]

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99. *See infra* section II.A.

100. Members of Congress Holding Reserve Commissions, 1 Op. Off. Legal Counsel 242, 242 (1977). In a subsequent opinion, OLC backed away from this claim of exclusive congressional authority to interpret the Incompatibility Clause, calling it an "overstatement." *See* The Constitutional Separation of Powers Between the President and Congress, 1996 OLC LEXIS 89, at *106. OLC has not, however, revisited the question of congressmen in the Reserves.

101. 1 Op. Off. Legal Counsel at 244 (quoting U.S. CONST. art. I, § 5, cl. 1.).

102. *Id.* OLC also noted the ineffectuality of the executive branch deciding the issue:

> Moreover, we suggest that it would be undesirable for the President himself to attempt to confront the problem. If he were to inform the Congressman [who asked the President's opinion on the matter] that in his view the holding of reserve commissions by Members of Congress did violate Article I, § 6, clause 2, that determination certainly would not bind the Congress. Conversely, if he stated that the practice was permitted by the Constitution, Congress could enforce the clause against its Members notwithstanding.

Id. at 245. Curiously, this paragraph ignores that the President has the authority to appoint individuals to Reserve commissions in the first place and to promote existing reserve officers to positions of higher rank. *See* 10 U.S.C. § 12203 (2006). Every time the President appoints (or promotes) a member of Congress, the Incompatibility Clause is potentially implicated. If the President believes that holding both a reserve commission and a congressional seat violates the Incompatibility Clause, and knows that the congressman he is appointing (or promoting) will not resign his seat, then the President is party to a constitutional wrong. Moreover, the President (either personally or through his subordinates) has the authority to remove reserve officers. If he believed the practice unconstitutional, he could unilaterally

Second, the executive branch has opined that "[a]n officer of the Army or the Navy is, in general, a person holding office under the United States" and is thus incompatible with congressional membership.[103] In 1943, President Franklin D. Roosevelt asked Attorney General Francis Biddle for an opinion "concerning the legality of acceptance of commissions in the armed forces by Members of the Congress."[104] The Attorney General reviewed the Incompatibility Clause and the House precedent of *Byington v. Vandever*.[105] In that precedent (which itself relies on the Van Ness precedent[106]), the House determined that Representative Vandever had disqualified himself by accepting a commission as a colonel.[107] Quoting from the precedent extensively, the Attorney General then stated:

> The required conclusion is that under the practice (which appears to have long prevailed and which I see no occasion to disturb) Members of Congress may enter the armed forces by enlistment, commission or otherwise. Upon entry into such service the individual ceases to be a Member of the Congress provided the House or the Senate, as the case may be, chooses to act. There have, of course, been cases in which the congressional body affected did not choose to raise the question.[108]

In light of this, the Attorney General recommended that the President "refrain from commissioning or otherwise utilizing the services of Members of the Congress in the armed forces."[109]

Third, executive branch opinions indicate that reserve officers are "officers under the United States." In a recent opinion, OLC articulated two main criteria for determining whether a position constitutes an "office of the United States."[110] First, the position must be "invested by legal authority with a portion of the

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remove from the reserves all members of Congress holding reserve commissions. *See* Myers v. United States, 272 U.S. 52, 161 (1926) ("The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power.").

103. Members of Congress Serving in the Armed Forces, 40 Op. Att'y Gen. 301, 302 (1943).

104. *Id.* at 301–02.

105. *Id.* The opinion cites to House and Senate Miscellaneous Documents, but the substance is codified in 1 HINDS, *supra* note 53, § 490, at 596–99.

106. 1 HINDS, *supra* note 53, § 490, at 598 ("The cases of Messrs. Van Ness and Yell were cited as conclusive precedents.").

107. *Id.* § 490, at 596–99. The specific controversy was over whether Representative Vandever had simply accepted a commission in the Iowa militia (which would be a state office) or in the regular army (which would be an office under the United States). The Committee on Elections determined that since the Iowa militia was "mustered into the service of the United States" the question was irrelevant, and the office was incompatible. *Id.* § 490, at 597.

108. 40 Op. Att'y Gen. at 303.

109. *Id.*

110. Officers of the United States Within the Meaning of the Appointments Clause, 2007 OLC LEXIS 3, at *1.

sovereign powers of the federal Government."[111] Second, the position must be "continuing."[112] Reserve officers meet both criteria. That reserve officers meet the first requirement is evident: reserve officers exercise (under the authority of the Commander in Chief) the sovereign power to defend the country and make war.[113] Whether reserve officers meet the second requirement is less obvious. What is meant by "continuing"? The quintessential example of a non-continuing position, offered by the opinion, is someone who performs a single, discrete task. Even if that same discrete task is repeated by the same person at some other time, the person's obligation only extends at any given point in time to do that one discrete task. An example is a physician hired to evaluate the claims of pensioners.[114] Another is a private plaintiff authorized to sue *qui tam*.[115] Yet another is a "merchant appraiser," who an importer disputing a customs appraisal could appoint to make a reappraisal.[116] These examples stand in stark contrast to a reserve officer. Although a reserve officer may not put a uniform on every day, he is under a continuing obligation. His office is created by law, he is appointed by the President, he is subject to military discipline, and he has continuing training obligations. Thus, a reserve officer appears to meet the criteria for being an officer of the United States as OLC defines the term.

Executive precedent, then, supports the proposition that congressional membership and reserve commissions are constitutionally incompatible.

3. Judicial Precedent

No court has definitively addressed the question. The two closest cases are *Schlesinger v. Reservists Committee to Stop the War*[117] and *United States v. Lane*,[118] but in both cases the courts avoided deciding the issue. In *Schlesinger*, the issue came up when citizens sued to stop the practice.[119] Although the plaintiffs prevailed on the merits in the lower court,[120] the Supreme Court reversed, holding that the plaintiffs lacked standing.[121] In *United States v. Lane*, the Armed Forces Court of Appeals[122] concluded that Senator Lindsay Graham's appointment to the Air Force Court of Appeals violated the Incompatibility Clause.[123] The court concluded that a judge on the Air Force Court of

111. *Id.*
112. *Id.*
113. *Cf. id.* at *15 (noting that military officers are legally invested with a portion of the sovereign power).
114. *Id.* at *29 (citing United States v. Germaine, 99 U.S. 508 (1878)).
115. *Id.* at *33–34.
116. *Id.* at *29–30.
117. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).
118. United States v. Lane, 64 M.J. 1 (C.A.A.F. 2006).
119. Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971).
120. *Id.* at 843. The circuit court affirmed without an opinion.
121. *Schlesinger*, 418 U.S. at 209.
122. The Armed Forces Court of Appeals is an Article I court, but it is analyzed here for convenience.
123. United States v. Lane, 64 M.J. 1, 7 (C.A.A.F. 2006).

Appeals was an "officer under the United States" because of the significant authority he possesses.[124] The court specifically reserved the question of whether the Incompatibility Clause was also violated by Senator Graham's status as a reserve officer.[125]

Other cases provide fodder for defining an "officer of the United States." The definition provided in these cases parallels the OLC opinion defining "officer." For example, in *United States v. Hartwell*,[126] the Supreme Court defined an "officer of the United States" as possessing tenure, duration, emoluments, and duties that are continuing and permanent, not temporary or occasional.[127] A reserve officer meets this definition. First, tenure: a reserve officer holds office subject to following orders—the same as any other officer of the United States. Second, duration: a reserve officer continues to hold office over time; he serves at the pleasure of the President, which is the essence of most executive branch service. Third, emoluments: reserve officers are paid when called up and provided for during training. Fourth, duties: Ready Reservists have training commitments; both Standby and Ready Reservists are liable to be called up at any time and, if so called, are obligated to serve. Fifth, continuing and permanent: reserve officers are continuously part of the reserves and have an obligation thereto; the reserve commission is as permanent as any other executive branch position. Sixth, not temporary or occasional: although the actual exercise of office may be "occasional," the office itself is not. It is created by law, and the reserve officer holds it for as long as he remains a reserve officer. By contrast, a field assistant to the U.S. Geological Survey, circa 1911,[128] or a physician on retainer to evaluate the medical claims of pensioners[129] is truly a "temporary and occasional" employee. The field assistant and physician on retainer perform discrete and isolated functions, both in terms of time and authority. There is no continuing obligation or general vesting of authority.

Judicial precedent then, while not speaking directly on the question, lends support to the proposition that congressional membership and reserve service (as a commissioned officer) are incompatible.

II. DEFENSES OF THE PRACTICE

As already noted, no constitutional actor has spoken definitively on the precise question of congressmen serving in the reserves. Two significant constitutional defenses of the practice, however, have been mounted: the first by Senator Barry Goldwater on the Senate floor; the second by Solicitor General

124. *See id*. at 6.
125. *See id.* at 7.
126. United States v. Hartwell, 73 U.S. 385 (1867).
127. *Id*. at 393.
128. 28 Op. Att'y Gen. 598 (1911) (opining that a field assistant is not an "officer of the United States").
129. United States v. Germaine, 99 U.S. 508, 512 (1878) (holding that a physician on retainer to examine pensioners is not an "officer of the United States").

Robert Bork in a brief before the Supreme Court. This section will reconstruct those two defenses.

A. SENATOR BARRY GOLDWATER'S DEFENSE ON THE SENATE FLOOR

Senator Goldwater raised the issue on May 15, 1963.[130] In a floor speech, Senator Goldwater noted the apparent tension between the Incompatibility Clause and congressmen holding reserve commissions. "I feel," he said, "that the time has come for us to either lay this subject on the floor or make a decision as to whether those of us who are active in the reserve forces of the United States can actually serve in the Senate."[131]

Senator Goldwater then launched into an historical overview of the "problem": he noted that "[i]t was in 1916 that the last real effort was made to decide this question."[132] The 1916 inquiry by the House Judiciary Committee uncovered *United States v. Hartwell*,[133] which defines an "office."[134] That definition includes that the duties "are continuing and permanent, not occasional and temporary."[135] This language, Senator Goldwater suggested tentatively, allows reserve officers to serve in the Senate "because their duties are not continuing and permanent; they are occasional and temporary."[136] Senator Goldwater noted that "[o]nly at times when the reservist is called to duty may he wear his uniform with propriety," and "[the reserve officer] is not entitled to any of the prerogatives of the rank he holds, unless he is on active duty."[137]

At this point, Senator Gore took the floor and expressed interest in the inquiry. For Senator Gore, initially, the central question was "whether Members of the Senate who are at one and the same time members of the military reserve are subject to the command and discipline of the Armed Forces of the United States."[138] If so, the offices seemed incompatible to Senator Gore.[139] Secondarily, Senator Gore alluded to the potential conflict of interest, citing a specific instance where "a memorandum entitled 'The views of the Three Generals of the Senate' was circulated on the floor of the Senate."[140]

Senator Goldwater replied that reservists are "not under the command or discipline of the branch of the military in which we serve, except at that particular time of the year when we elect to take our 2 weeks of active duty training."[141] Senator Goldwater continued to elaborate on some of the various

130. 109 CONG. REC. 8715–18 (1963).
131. *Id.* at 8715.
132. *Id.*
133. United States v. Hartwell, 73 U.S. 385 (1868).
134. 109 CONG. REC. 8715–16 (1963).
135. *Id.* at 8716 (quoting *Hartwell*, 73 U.S. at 393).
136. *Id.*
137. *Id.*
138. *Id.* (statement of Sen. Gore).
139. *Id.* (statement of Sen. Gore).
140. *Id.* (statement of Sen. Gore).
141. *Id.* (statement of Sen. Goldwater).

reserve officer classifications and categories, noting in the end that "[i]f M-day [i.e., the day the entire army is mobilized] occurs and the Nation goes to war and I am ordered to duty, I am supposed to report the next day; I cannot take 15 days to have someone replace me."[142] Senator Gore replied: "If a Senator is subject to call to active duty, which seems to me to be the very purpose of the Reserve, it would appear that he is subject to the command and disposition of the executive branch of the Government."[143]

Senator Gore also repeated his concern about the propriety and potential for a conflict of interest. He noted a time when he criticized a high ranking military officer; in turn, he himself was criticized by "certain Senators, who likewise held the rank of general . . . ."[144] Senator Goldwater seemed to bristle at this suggestion:

> If we assume that there is incompatibility because of a conflict of interest, that characterization can be applied with a broad brush across the whole Chamber, forgetting the status of Reserve officers, but remembering that we come into this body with some impact having been made upon our lives before we came here. We are lawyers, bankers, merchants. Some of us are in the cattle business. We cover a pretty broad spectrum. I have yet to see in this body a Member voting by preconceived or previously felt forces that might act upon him.[145]

Senator Goldwater then continued, noting that "[w]henever I have remarks to make about the Defense Department," they are prompted "by deep concern for the Government" more than anything else.[146]

Clarifying, then, that his concern was solely the constitutionality of the practice—not the propriety—Senator Goldwater submitted a resolution directing the Committee on the Judiciary "to conduct a full and complete inquiry to determine whether" a reserve commission is incompatible with being a sena-

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142. *Id.* (statement of Sen. Goldwater).

143. *Id.* (statement of Sen. Gore).

144. *Id.* (statement of Sen. Gore).

145. *Id.* at 8716–17 (statement of Sen. Goldwater).

146. *Id.* at 8717. In addition to the exchange between Sen. Goldwater and Sen. Gore concerning conflict of interest, Sen. Hickenlooper voiced his opinion on the subject:

> Mr. President, from my personal viewpoint, I would give no great validity to the argument that a Member of Congress who holds a commission in the Reserve Forces or who serves in some other capacity in the Reserve Forces is subject to undue influence in his thinking, merely because of that service, any more than a person who owns a farm and raises cattle, hogs, corn, and feed grains—a subject we are now considering—should, because of that fact, be barred from membership in this Senate.
>
> I believe that if membership in this body were to be limited to persons who have nothing, never had anything, have no economic interests of any kind, it would be necessary to go to the lower Bowery [note: a lower Manhattan slum] to find persons to serve in these legislative halls.

Id. (statement of Sen. Hickenlooper).

tor.[147] The resolution was then referred to committee.[148]

Several weeks later, on June 4, 1963, Senator Goldwater again spoke on the Senate floor. He referenced his previous remarks and then entered into the record a letter he himself wrote and sent to each member of Congress who was also a reservist.[149] The letter outlined Senator Goldwater's research into the matter, including a law stating that a reserve officer not on active duty "is not considered to be an officer of trust or profit or discharging any official function under it, or in connection with, the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowance received in that capacity."[150] Senator Goldwater then stated that he had come across no specific reference to the Incompatibility Clause in the legislative history of the statute, but "[n]evertheless, the statute constitutes a strong precedent to the effect that being a Reserve officer is not incompatible with holding a seat in the House or the Senate under the Constitution."[151]

After Senator Goldwater spoke, Senator Holland took the floor and entered into the record an editorial from the *Officer*, the magazine of the Reserve Officers Association.[152] The editorial excoriated those who would raise questions about possible conflicts of interest stemming from being both a reserve officer and a congressman.[153] Senator Holland noted that he "strongly support[s] the sentiments expressed" in the editorial.[154]

A week later, on June 11, 1963, Senator Goldwater again addressed the Senate on the subject. This time he entered into the record a study compiled by the Legislative Reference Service of the Library of Congress[155] surveying the legal history of "incompatible offices."[156]

Finally, on July 24, 1963, Senator Goldwater addressed the Senate one last time. Noting that the Judiciary Committee had failed to act so far on the resolution, Senator Goldwater announced the results of his independent research on the issue.[157] Senator Goldwater had discovered a statute passed by Congress in 1930 that defined reserve officers (not on active duty) as not officers of the United States.[158] In the debate over this provision, Senator Couzens made statements connecting the language of the bill to the Incompatibility Clause and stated that its purpose was to "relieve the officers who are in the Reserves Corps and who are holding other governmental offices, from possible liability under

147. *Id.* at 8717–18.
148. *Id.*
149. *Id.* at 10,000.
150. *Id.* (quoting 5 U.S.C. § 30R(d), current version at 5 U.S.C. § 2105(d) (2006)).
151. *Id.*
152. *Id.*
153. *Id.* at 10,000–01.
154. *Id.* at 10,000.
155. The precursor to the Congressional Research Service.
156. 109 CONG. REC. 10,574 (1963).
157. *Id.* at 13,211.
158. *Id.* at 13,211 (citing 5 U.S.C. § 30R(d), current version at 5 U.S.C. § 2105(d) (2006)).

the Constitution."[159] Seizing on this language, Senator Goldwater then stated:

> Thus, Mr. President, the legislative history of the statute which has resulted in the language of title V, section 30R. (d), indicates that the law was intended to permit Members of Congress to serve in the Reserves free from constitutional inhibitions. I should point out, in addition, that this statute, as amended, has not been held to violate the Constitution by our courts. The presumption, as all my colleagues know, is that any law passed by the Congress is constitutional unless and until the courts rule otherwise.[160]

Satisfied that congressmen holding reserve commissions was not incompatible, Senator Goldwater placed into the record the legislative history of the statute[161] and ceased further inquiry.

In sum, Senator Goldwater offered two arguments, one tentative, the other definitive, for the constitutionality of the practice. His tentative argument was that reserve officers are "temporary and occasional," not "continuing and permanent." His definitive argument was that Congress had affirmatively made reserve officers not officers under the United States, and thus had relieved congressmen of any constitutional "inhibitions."

B. SOLICITOR GENERAL ROBERT BORK'S DEFENSE BEFORE THE SUPREME COURT

The second major defense of congressmen holding reserve commissions comes from Solicitor General Bork's brief in *Schlesinger v. Reservists Committee to Stop the War*.[162] Solicitor General Bork's brief contends that "[a] commission in the Armed Forces Reserve is not an office under the United States" under the Incompatibility Clause.[163] The brief makes three arguments in support. First, congressmen holding reserve commissions "does not involve the evil at which the clause is directed" because the Incompatibility Clause is concerned with executive branch domination of the legislature, and no such danger is posed by the practice.[164] Second, a reserve commission is not an office under the United States in the sense that "office" is defined by the Supreme Court.[165] Third, and finally, Congress has recognized this by statute.[166]

First, the Incompatibility Clause was designed to prevent executive corruption of the legislature. The Constitution's drafters "knew that 'for a long succession of years the votes of members of Parliament had been bought, with money or office, by nearly every minister who had been at the head of

159. *Id.* (quoting 72 CONG. REC. 11,881).
160. *Id.*
161. *Id.*
162. Brief of Petitioner, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (No. 72-1188).
163. *Id.* at 43.
164. *Id.* at 44–52.
165. *Id.* at 52.
166. *Id.* at 54.

affairs.'"[167] Despite a consensus that the British practice was corrupting and bad, there was no consensus on the best way to combat it. The initial language prohibited congressmen from serving in the executive branch both during their term in office and for a year thereafter.[168] Some thought that this was too lenient and that members of Congress—both while in office and once out—should be permanently barred from executive branch service. Others pointed to the possibility that, in time of war, the most able men would be excluded from military leadership. The result was a compromise: Congressmen were barred from holding civil offices created (or enhanced) during their time in the legislature, but were otherwise unencumbered. Likewise, current officers were prohibited from serving in Congress.[169] "In sum, the history of Clause 2 shows that the Framers' intent was to avoid the possibility of improper influences upon and corruption of members of the legislative branch that could result from the power of the executive branch to appoint members to office."[170] Likewise, officers being congressmen "pose[d] precisely the dangers that the Framers were attempt-[ing] to avoid . . . ."[171] The brief notes that the two different prohibitions "are thus complimentary [sic], and directed against the same evil: the improper interrelationship between members of the executive and legislative branches that could result if members of the latter also held office in the former."[172]

Thus, Bork argued that it is not corrupting for congressmen to hold reserve commissions because a reservist's duties are so minor and infrequent. Noting that, per a Pentagon directive, no congressman is part of the Ready Reserve, the brief emphasizes how little is required of Standby (and Retired) Reservists:

> These reservists are not required to participate in military training, they are generally not subject to military discipline, their commissions are for an indefinite time and, with certain limitations, are held during the pleasure of the President. They receive no pay or compensation, except for retirement pay which Retired Reservists receive only if they have completed a certain amount of service and have reached a certain age, which is in the nature of a pension. They are largely ineligible for promotion, their voluntary training is at their own expense, and only active duty Standby Reservists may earn credit for retirement. Active Standby Reservists are subject to being called to active duty for 15 days annually; other than that these Reservists may be mobilized only in the same situation as any other citizen: when Congress declares war or a state of national emergency.[173]

167. *Id.* at 44 (quoting 2 CURTIS, HISTORY OF THE CONSTITUTION OF THE UNITED STATES 242–43 (1861 ed.)).

168. *Id.* at 44.

169. *Id.* at 44–47.

170. *Id.* at 47.

171. *Id.* at 48.

172. *Id.*

173. *Id.* at 49–50 (internal quotation marks and footnotes omitted).

Thus congressmen as commissioned reserve officers "pose none of the dangers of domination and corruption of the legislative branch by the executive branch that the Framers sought to guard against in" the Incompatibility Clause.[174] The executive branch possesses little ability to influence, let alone dominate, reservists—even reservists in Congress.[175] As for the fact that the reservists in Congress tend to sit on committees with oversight of the military, this is of no more significance than the fact that congressmen-lawyers tend to sit on the judiciary committee: "[I]t is hardly surprising that members of Congress who have shown their interest and gained experience in military matters through service in the Reserves would be selected to serve on the committees dealing with those matters."[176]

Second, reserve officers are not "officers of the United States." The brief immediately recourses to *United States v. Hartwell* and its definition of an "officer of the United States."[177] The question in the case "was whether a clerk in the office of an Assistant Treasurer of the United States was an officer of the United States, and hence subject to criminal prosecution for violation of a statute punishing embezzlement of government funds by such officers."[178] The court offered the following definition: "the term 'office' 'embraces the ideas of tenure, duration, emolument, and duties,'" that are "continuing and permanent, not occasional or temporary."[179] The brief contrasts this definition with another case, *United States v. Germaine*,[180] which stated that where "duties are only 'occasional and intermittent' and the individual 'is only to act when called on * * * in some special cases,' he is not an officer of the United States."[181] Thus, because reservists' duties are only "occasional and temporary," because "their position lacks 'tenure' or 'duration'" (because "they serve at the pleasure of the President"), and because "they receive no 'emoluments' during their service," reservists are not officers under the United States and, therefore, are not covered by the Incompatibility Clause.[182]

Finally, Congress has recognized that reserve officers are not officers under the United States. The brief here relies on Section 37 of the National Defense Act, which states that

> A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or individual holding an office of

174. *Id.* at 50.
175. *Id.* at 50–51.
176. *Id.* at 51.
177. *See* United States v. Hartwell, 73 U.S. 385, 393 (1868). The brief notes that an "officer *under* the United States" and an "officer *of* the United States" are "in most, and perhaps all instances . . . co-extensive . . . ." Brief of Petitioner, *supra* note 162, at 52.
178. *Id.*
179. *Id.* (quoting *Hartwell*, 73 U.S. at 393).
180. United States v. Germaine, 99 U.S. 508 (1878).
181. Brief of Petitioner, *supra* note 162, at 52–53 (quoting *Germaine*, 99 U.S. at 512).
182. *Id.* at 53.

> trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed of pay or allowances received in that capacity.[183]

The brief asserts that because an "office of trust or profit" is an "office under the United States," Congress has determined "that inactive reservists—as all the Congressmen who hold reserve commissions are—do not hold offices under the United States."[184] The brief then relies on Senator Couzens's floor statements in the legislative history of the provision to link the statute specifically to Incompatibility Clause issues.[185]

The brief is careful—unlike Senator Goldwater—not to claim (or appear to claim) that Congress by statute can alter the meaning of the Constitution. Rather, the legislation is framed merely as Congress's acknowledgement of the underlying truth of the claim that reserve officers are not officers of the United States.

III. EVALUATION

Compared to the clear constitutional text, history, and precedent of the Incompatibility Clause, both Senator Goldwater's and Solicitor General Bork's arguments ultimately fail.

A. GOLDWATER'S AND BORK'S MISAPPREHENSION OF "CONTINUING"

Both Senator Goldwater and Solicitor General Bork rely on *United States v. Hartwell* to argue that reserve officers are not officers under the United States because their duties are "temporary or occasional," not "continuing and permanent." This argument fails because the "continuing" criterion applies to the duties of the office, not to its day-to-day activities. A reserve office is "continuing" because, so long as a reserve officer is in the reserves, he has a continuous obligation to respond in the event that he is called up by the President. This is perhaps best expressed in Senator Gore's formulation of a reserve officer being subject to the "command and disposition of the executive branch."[186] This echoes the language used in the congressional debate over Van Ness, where the House acted to exclude "even the shadow of Executive influence."[187] Moreover, this understanding of "continuing" is confirmed by the examples of non-continuing positions, which are all positions where there is no vesting of authority because there is no continuous responsibility.[188] A reserve officer is different from an active duty officer in degree not in kind. Accordingly, a

183. *Id.* at 54 (quoting 5 U.S.C. § 2105(d)).
184. *Id.* at 55.
185. *Id.* at 55–57.
186. *See* 109 CONG. REC. 8716 (1963) (statement of Sen. Gore).
187. HINDS, *supra* note 53, § 486, at 592–93.
188. *See supra* section I.C.2.

reserve officer is still fully an officer, even if he does not put on his uniform every day.

B. GOLDWATER'S MISPLACED EMPHASIS

Senator Goldwater places great emphasis on the statute declaring that reserve officers are not officers of the United States and on Senator Couzens's floor statements applying that statute to the Constitution. This emphasis is misplaced for two reasons.

First, it misunderstands the nature of the statute and the problem it was intended to fix. The statute was never intended (to the degree legislative "intention" can be ascertained[189]) to fix constitutional meaning. At the time, federal law prohibited an "officer of the United States" from "act[ing] as an agent or attorney for prosecuting any claim against the United States."[190] Around 1930, the Secretary of the Treasury claimed that reserve officers are "officers of the Government" for the purposes of the penal code.[191] The Attorney General agreed.[192] This "prevent[ed] reserve officers, who are attorneys at law, from practicing before the Treasury Department or from performing any other work that the law forbids officers of the Government to undertake."[193] In other words, the Attorney General's interpretation of a statute threatened the livelihood of "hundreds or even thousands"[194] of reserve officers.

The statute (re)defining reserve officers as not "officers of the United States" is, then, a statutory fix for a statutory problem. Nothing in the committee report suggests that Congress was considering the Incompatibility Clause when passing the legislation.[195] The only hint that anyone considered the Incompatibility Clause is Senator Couzens's statement on the Senate floor. But this is an imprecise guide. The context of the statement suggests that Senator Couzens was confused and misspoke. First, as already noted, Senator Couzens alone made the link.[196] Second, Senator Couzens appears confused. He noted that "I am not on the Military Affairs Committee"[197] and that the chairman of that committee was not present during Senator Couzens's remarks.[198] Moreover, he evinced hesitation: "I do not believe that I misquote" the committee chairman.[199] Third, all other senators speaking on the subject discussed only the

189. *See generally* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).
190. Offenses Against the Existence of Government, ch. 321, § 109, 35 Stat. 1088, 1107–08 (1909).
191. H.R. REP. NO. 71-1884, at 2 (1930).
192. *Id.*
193. *Id.*
194. 72 CONG. REC. 11,628 (1930).
195. H.R. REP. NO. 71-1884 (1930).
196. 72 CONG. REC. 11,881 (1930).
197. *Id.*
198. *Id.*
199. *Id.*

problems noted in the committee report.[200]

Second, even if Senator Couzens's statement did represent true congressional intent, it is of no matter because Congress cannot alter constitutional meaning by statute. The Constitution is the fundamental law and is not subject to amendment by simple majority vote in Congress. As Senator Gore in his debate with Senator Goldwater pointed out, the question is whether congressmen who hold reserve commissions are "subject to the command and discipline of the Armed Forces of the United States."[201] That is, they hold a position of duty given them, under law, by the United States; this makes them officers.[202] Because of this, whatever Congress or anyone else might say, they are officers of the United States and their position is incompatible with congressional membership.[203]

C. BORK'S MISGUIDED INTENTIONALISM

Solicitor General Bork devotes a third of his argument to the proposition that the Incompatibility Clause is not aimed at preventing congressmen from holding reserve commissions, and so, it should not be read to do so. On the first part, Bork is probably right. The practice seems relatively benign—congressmen do not appear to be corrupted by receiving (or being able to receive) reserve commissions, and no President appears to have ever abused his power to call up the reserves in order to disrupt Congress or influence a given congressman. But Bork's conclusion does not follow his premise, at least not to the degree that the Constitution is law, as opposed to aspiration or expectation. The legal rule of the Incompatibility Clause—that is, the law—prohibits members of Congress from holding "any office under the United States." There is no proviso in the Constitution exempting non-corrupting offices or non-threatening ones.

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200. *See id.* at 11,628 (comment by Sen. Stafford); *id.* at 11,629 (comment by Sen. Speaks); *id.* at 11,892–93 (comments by Sen. Reed).

201. 109 CONG. REC. 8716 (1963) (statement of Sen. Gore).

202. BLACK'S LAW DICTIONARY 1115, 1117 (8th ed. 2004).

203. There is a related and more sophisticated variation on this argument available. The argument is that while Congress cannot alter unambiguous constitutional meaning by legislation, it can alter the application of that meaning on the margins by statute. The category of "officers under the United States" is never formally defined and all officers (other than the President and Vice President) exist because Congress created their offices. *See* U.S. CONST. art. II, § 2, cl. 2. Moreover, not every person employed by the executive branch is an officer of it. *See, e.g.*, GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 130 (2004) ("The Constitution does not tell us which of the millions of federal employees rise to the level of 'Officers of the United States' whose appointments much conform to [the Appointments Clause]."). Conceivably, then, Congress could alter a position that previously would have been an officer into a position that no longer was an officer. Did Congress do so here? No, it did not. First, Congress did not substantively change any of the duties of reserve officers. The nature of a reserve officer—the kind of authority necessarily vested in a military officer—is such that it would be difficult for Congress to strip him of the authority necessary to reduce him to something less than an officer. Second, a reserve officer is still appointed by the President under a procedure that conforms with the appointments clause. Third, a reserve officer is subject to be called up for active duty against his will; that is, he is under the "command and discipline of the executive branch." *See* 109 CONG. REC. 8716 (1963) (statement of Sen. Gore).

This concept of legal formality—that the law is embodied in rules that can be followed on their own—is basic to the rule of law.[204] As Professor John Harrison notes, "To look behind the obligations and the incentives to the design, however, is to misunderstand completely how the Constitution operates. The design—the outcome the designers expected the constitutional rules to produce—is not the same thing as the content of the constitutional rules."[205] Law works because it allows the legal system to "cut[] off the larger purposes and the predictions of political science from the simple content of the rules, so that it is enough to follow the rules without inquiring into whether they are serving their purpose."[206] This is not to say that society should not consider whether the legal rules are serving their intended purpose; but that inquiry is not, fundamentally, a legal one, it is political.

This reasoning above applies with equal force to Bork's point that reservists on congressional committees with oversight of the military pose no more threat than lawyers on committees with oversight of the judiciary.[207] He may be right,[208] but there is no law that limits congressmen from also being lawyers. There is a law that limits congressmen from being military officers. The law is what matters.

IV. CONCLUDING THOUGHTS

The Constitution prohibits members of Congress from "holding *any* office under the United States." Text, history, and precedent all show that this prohibition encompasses military offices, which in turn include reserve military officers. Though Senator Goldwater and Solicitor General Bork both present able defenses, their arguments ultimately fail. Any means any.

The question, as Senator Goldwater recognizes, is one of legality, not morality. No one questions the upstanding character of the congressmen who hold reserve commissions. Both Goldwater and Bork offer assurances that no one is harmed by congressmen holding reserve commissions. Professor Dorf thinks that reserve officers in Congress strengthen that branch vis-à-vis the President.[209] However, none of this matters because the text, history, and precedent

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204. *See* John Harrison, Speech (April 4, 1987) *in* THE FEDERALIST SOC'Y, WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETATIVE AUTHORITY 19 (1992).

205. *Id.*

206. *Id.*

207. Both Sen. Goldwater and Sen. Hickenlooper make similar points. *See supra* note 146 and accompanying text.

208. He may also be wrong. *See* 109 CONG. REC. 8716 (1963) (statement of Sen. Gore noting a time when he was criticized by congressmen-reservists for criticizing the military).

209. *See* Dorf, *supra* note 6 (arguing that congressmen in the reserves are more "willing to challenge the President's judgments about military necessity" and that this is good). Professor Dorf is wrong for two reasons. First, the underlying principle remains the same: congressmen in the reserves are subject to presidential abuse. The fact that no President has abused his authority over them does not fundamentally change that, and the clause was designed as a prophylactic. Second, an ancillary benefit to the clause is that it eliminates the ability for Congress to control the President by conditioning

are clear: congressmen serving as reserve officers violates the Incompatibility Clause. The law may be inconvenient, but it is more than just an inconvenience. It is the law. And as such, we are obligated to obey it.[210]

funding or other support on appointments. *See* Calabresi & Larsen, *supra* note 6, at 1048 (arguing that the Incompatibility Clause ironically strengthened the President's power with regards to Congress). Ignoring the Incompatibility Clause for "functionalist" purposes threatens to undo this.

210. Congress in its zeal to abide by the Constitution should, of course, prioritize. Incompatibility Clause violations are not necessarily the most egregious departure from the law. *See, e.g.*, Gary L. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than bloodless constitutional revolution.") (footnotes omitted); *cf.* Steven G. Calabresi, Response, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 156 n.7 (1995).