In the

Supreme Court of the United States

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JAMES R. SCHLESINGER, Secretary Defense, et al.,

Petitioners,

vs

RESERVISTS COMMITTEE TO STOP THE WAR, et al.,

Respondents.

No. 72-1188

Washington, D. C.
January 14, 1974

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v.	:	No. 72-1188
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Washington, D. C.
Monday, January 14, 1974

The above e-titled matter came on for argument at 10:54 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Petitioners.

WILLIAM A. DOBROVIR, Esq., 2005 L Street, N.W., Washington, D. C., 20036; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1188, Schlesinger against Reservists Committee.

Mr. Solicitor General, you may proceed whenever you are ready. Let me say at the outset that I am not sure just what considerations impelled us to enlarge the time to an hour and a half here. I want to assure both counsel that there will be no penalty imposed if you confine yourself to one hour total, half hour each or something near that.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BORK: Mr. Chief Justice, may it please the Court:

I will try to please the Court in just that regard, if I can.

This was a suit brought by the respondents, the Reservists Committee to Stop the War and several named members of the military reserve, in order to compel the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force to remove active--to remove Congressmen now in office from the military reserves and to reclaim pay and for other remedies not now in issue.

The theory of the case is that Article I, Section 6, Clause 2, which--the second half of that clause, which states, "No Person holding any Office under the United States, shall

be a Member of either House during his Continuance in Office." The theory of the case is that that clause places an obligation upon the executive branch, enforceable by the courts, to purge from the reserve ranks all Congressmen then in office.

The court of appeals held for the plintiffs, the respondents here, in a summary judgment, denying the government summary judgment, and issued a declaratory judgment only. I am sorry, the district court did that. The court of appeals affirmed that opinion except for one remark concerning standing, which we will come to.

The government will urge reversal here upon each of three grounds. We will urge first that under no theory of standing have these respondents standing to maintain this action either as taxpayers or as citizens.

We will argue, second, that the question of whether a reserve commission is an office that disqualifies its holder from membership in Congress is an issue of qualification for membership of Congress and therefore by Article I, Section 5, Clause 1, is committed to the exclusive determination of the House in which the member sits. It is a political question and therefore non-justiciable.

We will contend finally that membership in the reserves, particularly of the type involved here, is under no construction of the word "office" an office within the

meaning of the constitutional provision in play.

We have discussed standing at length in our brief, and in October, in the Richardson case, it was discussed at length, and I think it is possible to be fairly brief about the standing issue here. It is a straightforward one.

Respondents' complaint claims standing as citizens and taxpayers and the injury alleged is that the presence of Congressmen in the military reserves deprives respondents of a right to unbiased consideration--this is a quotation from their brief--of measures before the Congress affecting the military establishment and appropriations therefor and measures relating to military action, war, and peace.

The district court, as I say, denied taxpayer standing but granted citizenship standing. The court of appeals in affirming, cited Flast v. Cohen and thus seemed to say that perhaps there was taxpayer standing here as well as citizenship standing.

I think it is clear that no standing exists under either theory.

Our brief discusses cases such as the students' challenge to the regulatory agency procedures, the SCRAP case; and we discuss at some length the fact that this Court has extended the concept of standing by adding to the kinds of injury that may be considered. But, so far as we know, there has never been a case that says there need not be direct

injury, specific and perceptible harm. It has never been enough in this Court for a plaintiff to allege an interest in good government or in constitutional principles, and we think that is absolutely clear from the brief and from Frothingham v. Mellon, the Sierra Club case, the SCRAP case, Ex Parte Levitt, and so on.

Respondents attempt to evade this body of law with the contention that their complaint alleges very specific injuries, and those very specific injuries turn out to be their inability to influence Congress, which is not specified; we do not know exactly how they were unable to influence Congress. And an inability, let us say, to join with others in an effort to make political advocacy effective.

Q I suppose that the theory is that the 117 or whatever number of members who hold reserve commissions are not receptive to the arguments, political arguments, that they want to advance, that they are not as open-minded as Congressmen generally.

MR. BORK: I think that is part of the allegation, Mr. Chief Justice. I think it is an allegation that fails because it is entirely speculative. We do not know specifically what measures were affected by this attitude. We do not even know in fact that the attitude exists. Respondents assume a one-way relationship between membership in the reserves and a political attitude. Respondents

themselves are reservists who appear to hold political attitudes not in conformity with those they allege that Congressmen hold who are in the reserves.

The other point about that statement, however, is that the citation that NAACP v. Button is utterly beside the point because there is no allegation here--indeed, there could be none--that anybody and most particularly not Congress has taken any action which prevents respondents from joining together to make their political advocacy effective. The only claim is an attitudinal claim they claim about the attitudes of Congress or about congressional reservists.

So that for these reasons they have alleged no specific injury, no specific action. Secondly, they are really complaining about attitudes that do not correspond to their own and assume, as I say, a simple one-way relationship that is not shown and I do not think could be shown. And indeed it occurs to me, as I think about that, that I do not know how one would try an issue like that if you tried to make a question of congressional attitudes, a question of fact to show injury, you would have to try the issue of congressional motivation on particular pieces of legislation, the motivation of individual Congressmen, and that is an issue which this Court has been loathe to get into, at least since Fletcher v. Peck in 1810.

Finally, I think it is clear that respondents are

asserting no more than the iterest of citizens in the conduct of government, and that is precisely the interest that this Court has again and again--in Baker v. Carr and in Ex Parte Levitt--said does not suffice to confer standing.

I think the political nature of respondents' theory of standing and what they--the breadth of that theory really appears at page 10 of their brief, in which they discuss the fact that this Court, by expanding the concept of standing, has done much to permit grievances of private citizens against something described as an increasingly all-powerful government to be litigated in the courts, not fought in the streets.

So, I take it, it is a general right of petition by citizens directly to the Court that is advocated here for political grievance, and that is a theory of standing the Court has never accepted and I I think should not accept for obvious Article III policy reasons.

They do attempt to analogize their case to Baker v. Carr. That, however, was a case in which underrepresented citizens could prove arithmetically that their votes were devalued as much as if their ballots had been burned or the voting age had been raised selectively for their counties. And we have already seen the reasons why that kind of perceptible, calculable injury is not present in this case.

I should say about Ex Parte Levitt the respondents say of it in their brief at page 16 that Levitt's only

interest in seeking the disqualification of Mr. Justice Black on the first section of Article I, Section 6, Clause 2, about senators not being appointed to civil office if the emoluments have been increased during the time he was a senator--they say of that that Mr. Levitt's status was only that of a member of the bar, and he did not assert that Justice Black's alleged ineligibility could in any way deprive him, Levitt, of unbiased consideration by the Court.

The moving papers in that case, as a matter of fact, state only that Mr. Levitt was a member of the bar of this Court. However, the Court took it in the opinion as both a citizenship claim and a member-of-the-bar claim, and disallowed standing in the case. I think it would be instructive to--

Q Ex Parte Levitt, a motion filed originally in this Court, was it not?

MR. BORK: That is correct, Mr. Justice Stewart.

Q It was not a lawsuit filed in the district court.

MR. BORK: No, a petition filed directly in this Court.

Q That was the original action?

MR. BORK: That is correct. It was not a complaint, Mr. Justice Douglas. It was just a motion.

Q It was a motion to file an original action.

MR. BORK: Right.

Q It was a motion, period, was it not?

MR. BORK: Yes.

Q Was not the motion to start a suit in the district court?

MR. BORK: No, Mr. Justice Douglas, it was a motion to have the Court issue an order to show cause why Mr. Justice Black should not be disqualified from sitting on this Court.

Q But it did not invoke the original jurisdiction of this Court as such.

MR. BORK: Not as such.

Q It was a motion filed here.

MR. BORK: Yes.

It would be instructive, I think, to imagine whether the result would have been any different in that petition had Mr. Levitt alleged that this clause was designed to eliminate bias and that Mr. Justice Black's service in the Senate was likely to bias him in favor of broad national powers, a position which Mr. Levitt did not like.

I cannot believe that that allegation, which would make this case, which would make the Levitt case, just like the case before us, would have been enough to get Mr. Levitt standing in that case.

Q Was not the main burden of Mr. Levitt's

complaint that one of the nine members of the Court was not legally here at all?

MR. BORK: That is correct, Mr. Chief Justice.

Q And as a member of the bar or as a potential litigant, if he had a case here, and it might otherwise be equally divided without the vote of that ninth member. It would be quite important to him, would it not?

MR. BORK: It would indeed, Mr. Chief Justice. I think in that sense he would have had a much better claim to standing than respondents here have. But if you turn to it as citizenship standing in the Levitt case and make the additional allegation that I have supposed, that as a citizen he was disturbed by the judicial attitudes of Mr. Justice Black and that the Court would perhaps do things that he disapproved of politically or judicially or some other way, I do not think that allegation would have conferred stadning in the Levitt case. And yet that allegation makes the standing issue there precisely the same as it is in this case.

Of Flast v. Cohen I will say only that taxpayer standing here does not exist, because Flast v. Cohen lays down two requirements. The first is that the congressional action challenge must have been an action taken under the taxing and spending clause; and the second is that the action must be in derogation of the constitutional provision which was intended to operate as a reatriction upon the taxing and

spending power. Neither of those is true here obviously because the status of Congressmen as reservists is not congressional action under the taxing and spending clause. And the second test is not met for the reason that this Article I, Section 6, Clause 2, is obviously, as I think both sides in this case agree, designed to prevent executive domination of the legislative branch. It is not designed to limit the taxing and spending power.

The district court denied taxpayer standing on precisely this ground, and I would refer the Court, if I may, to pages 29 and 30 of the government's petition for certiorari where the district's reasoning on that point is contained.

I will not dwell upon I think the Article III reasons, why standing remains a crucial concept to the function of constitutional review or judicial review, a concept that requires that cases come up in specific factual contexts which are instructive as to what general principles mean and to prevent the federal courts from being drawn into philosophic debates immediately after the passage of legislation before anybody can show any direct specific harm or how the legislation works.

I would like instead to pass, if I may, to the second of our arguments, which is that this claim is a political question, which is therefore non-justiciable. As Baker v. Carr tells us, a political question arises among other

ways when there is a demonstrable commitment of an issue to a coordinate branch of government. And the qualification clause under Article I, Section 5, Clause 1, states that each House shall be the judge of the elections, returns, and qualifications of its own members. The only question, therefore, is whether the second half of Article I, Section 6, Clause 2, states a qualification for membership in Congress. If it does, I think that it is clear that it is a non-justiciable issue.

Q I thought that the remedy sought against Schlesinger was to remove them from the list of reservists, not for us to remove them from Congress.

MR. BORK: That is quite true, Mr. Justice Douglas, but if Congress is the exclusive judge of this issue, then I think--pardon me?

Q It depends on what you mean by "this issue."

MR. BORK: That is correct, but in order to--

Q This is not a challenge to their power to sit in Congress.

MR. BORK: That is quite correct, it is not.

Q Not like the Powell case.

MR. BORK: That is quite correct. That is quite correct. However, the issue of the qualifications would have to be decided by the Court in order to issue an order to the executive branch to remove these Congressmen from the

reserve rolls, so that the Court would necessarily have to judge the issue which we think is committed exclusively to Congress.

Q If a man has been seated by Congress and he is still there, we do not have to go any further, do we?

MR. BORK: Mr. Justice Marshall, if by that you mean if he has been seated by Congress and he is still there, that Congress is therefore, in that sense, to judge the issue, I think you need go no further, because I think the issue is solely for Congress to decide.

Q Is that not what is involved here?

MR. BORK: That is correct.

Q Would you think it might be different if after a man was elected either House you were then confronted with a situation of a new commission emanating from the executive branch to the member of Congress for the first time?

MR. BORK: Mr. Chief Justice, I do not think that would be different, and the reason I do not is that it seems to me if the issue were exclusively committed to Congress, then distinctions like that are not for the courts. They might be for Congress.

Q Suppose a reservist is not paid and he is in the service and he is not paid and he sues to recover his salary, and the defense is that being in Congress he is not lawfully a member of the reserve. Is that a justiciable

controversy?

MR. BORK: Mr. Justice Douglas, that is a very good question. If he is sued for his salary--

Q Depending on he takes the other position that he is not entitled to it.

MR. BORK: I think I would say that probably would not be a justiciable issue.

Q We have a case in our Court involving American soldiers who were taken prisoner during the Korean hostilties saying that that is no defense anyway, that until or unless you are terminated from the service, there is an obligation to pay your salary.

MR. BORK: I would suppose so.

Q Even though you were a deserter or a prisoner of war or anything else. So, that simply would not be a defense.

MR. BORK: I would suppose so, but I think that if the Court, Mr. Justice Stewart, reached that--

Q That is the Bell case.

MR. BORK: --went the other way, I think in fairness to Mr. Justice Douglas's question, I would have to say, should a court decide it were a defense, I would think it would not be a justiciable issue.

Q I suppose there is a certain element, speculative and hypothetical element in that question, as it

was attempted to be, because if that was the attitude of the military establishment, it would not have these commissions outstanding.

MR. BORK: That is quite right, Mr. Chief Justice. It was a question, however, to test the limits of my theory, I must say. But I think it would be non-justiciable if it were a defense. But I think it is easy to demonstrate that this is a qualification for Congress. This Court has never passed upon that precise--

Q Congress would still retain the right to--not to exclude but to expel a member on this ground, would they not?

MR. BORK: Congress, Mr. Chief Justice, has vacated seats and expelled members upon the ground that other kinds of commissions in the armed services were incompatible with membership in the House and did constitute--

Q So that the matter is not closed when they are seated in the first instance, by any means.

MR. BORK: Mr. Chief Justice, the matter is not closed. Repeatedly Congress has acted under this clause to vacate seats. And as recently as 1963 the Senate passed a resolution which was not acted upon requesting the Senate Judiciary Committee to consider the issue of reserve memberships.

I think the issue is too clear actually for much

discussion. I think the facts of the kinds of reserve commissions that these Congressmen hold are such that nobody would conclude that they were officers under the United States. So that I think Congress's recent inaction is entirely explicable. But I would like to reserve the facts of those for the moment to a demonstration that in fact this does state a qualification. The text and structure of this statute, no person holding any office shall be a member, sounds very much like a qualification for membership in Congress and indeed that is precisely the same structure that the Contstitution uses in Article I, Section 2 and 3, when it states no person shall be a member of the House and states the age and the residence requirements and so forth.

In addition to that, if you look at the two parts of Article I, Section 6, Clause 2, the first part says no senator or representative shall be appointed to office under certain circumstances. The second half says no person who is in office shall be a member of either House.

So that obviously the first part states a qualification for office and the second part states a qualification for memberhip in the House. And we know that that the age and residence requirements of Article I, Section 2 and 3, for the House and Senate are not the exclusive statements of qualifications, because the case of Roudebush v. Hartke is where it is stated that indeed the

Seventeenth Amendment states a qualification.

I think the history of the adoption of this clause is adequately treated in our brief at pages 34 and 35. I think that history of the way this clause came into being demonstrates that it was intended as a qualification for membership in the House and that this different way of stating the two halves of the clause was intentional, and indeed I would refer the Court particularly to the quotation on page 35 of our brief of No. 52 of The Federalist in which James Madison listed this precise part of Article I, Section 6, Clause 2, as a qualification for Congress.

Q I take it you suggest then that being in Congress is not a disqualification for holding another office?

MR. BORK: Yes, I think that it is, Mr. Justice White.

Q So, the President or the services could terminate anybody holding a reserve commission when he was elected to Congress?

MR. BORK: I am sorry, Mr. Justice White, I thought we were discussing the first half of the clause.

Q You are saying that it is a qualification for--it states a qualification for being a member of the House as though that is all it did.

MR. BORK: I think that is all it does do,

Mr. Justice White.

Q So, you do say that it is not a disqualificatio- for holding another office?

MR. BORK: No, Mr. Justice White. I think it is optional with the executive, should he decide that it is bad policy to have two offices of any kind. I do not think this is an office with two positions of any kind combined. But I do not think he is under any obligation to refuse reserve membership to Congressmen. I think both because I think this is not an office under the United States but, more importantly in the present context, because it is a political question committed to Congress.

Q When passing on the Levitt case back in the thirties, the Court assumed that there was direct violation of the constitutional provision, did it not?

MR. BORK: Mr. Chief Justice, I do not believe so. I do not believe so. Oh, you mean necessarily assumed it?

Q Yes, necessarily assumed it.

MR. BORK: It depends on which issue you reach first, Mr. Chief Justice. I would think I could not honestly answer that in the affirmative, that it necessarily affirmed that. I think it just did not get to the--

Q Assumed it arguendo, so to speak.

MR. BORK: So to speak.

Q At least for the purposes of the courts of

opinion there, the Court would have ruled the same way, even if it had satisfied itself that there had been a direct violatio of the Constitution, because that affected in no way its determination of the standing.

MR. BORK: That is entirely correct, Mr. Justice Rehnquist.

Q The remedy there is that the President in 1937, the Court was saying impliedly, should not have nominated and the Senate should not have confirmed but having done so, the Court was not going to get into it.

MR. BORK: That is entirely correct if one takes that as an arguendo position; that is entirely correct, Mr. Chief Justice.

We have in addition in our brief, which I shall not recapitulate on, a lengthy history of Congress's treatment of Article I, Section 6, Clause 2, as a qualification over which it has exclusive control. The earliest case which is cited is that of, in 1803, of Representative Van Ness. Respondents cite that case to argue that the militia commission there involved was like a reserve commission today. I do not know about that. I do not know the historical record well enough, and the record I have does not disclose enough about that militia commission.

Be that as it may, what it does show is that Congress thought it had control of that issue as a

qualification issue, and that these early cases, which in our brief are really quite important, because they are very close to the time of the Constitutional Convention and the Congress clearly thought it was in control of this issue. And I should stress that Congress also has thought that it deicdes the meaning of this clause as well as the facts. As we show in our brief on page 39 that in 1806, for example, the Congress decided that a government contractor was not an officer within the meaning of this clause.

I should say that respondents' brief on this point seems to me to contain a non sequitur. At pages 28 and 29, the respondents argue from the purpose of the incompatibility clause, which is to insure the separation of the executive and the legislative branches.

Then in the middle of page 29, they say the purpose is obviously equally well served, and the incompatibility eliminated, whether the one office or the other is vacated. Hence the incompatibility clause operates as a restraint on both the executive and the legislative. Both are under an equal obligation.

I think that is a non sequitur. Of course, if there is an incompatibility, which I think there is not, it would be cured equally, whether the legislature or the executive operated. But that kind of argument means that there is no issue in the exclusive control of another

coordinate branch of government, because you could always say whatever is troublesome is cured equally well if the Court acts instead of the Congress or if the executive acts instead of the Congress.

So, the statement that the incompatibility, if it exists would be eliminated if the executive were required to act, in no way demonstrates that the issue in fact is committed to the executive or to the courts, and the Constitution we think in fact demonstrates the contrary.

I think it would be well to say just a word in conclusion about what these reserve commissions are, because I think they have been overstated.

We have here in the active standby reserve, which I think is the only reserve status that even arguably could be called an office, 20 members of Congress. In the inactive standby reserve we have 12 members of Congress. I will not mention the inactive standby reserve again because an inactive standby reserve receives nothing and may not train even if he volunteers for it. It is an honorary status.

Then there are 58 members of Congress who are retired without pay, and I take it one ought not to include them in this--they are in the 107 Congressmen we are talking about, but there certainly is--it could hardly be called an office to be retired without pay.

There are 16 Congressmen retired with pay, of whom

six are retired for disability, ten for after a period of service. So, we have 20 reservists in the active standby. I think it is demonstrable that in the active standby, that is not only not an office under the United States, but there is no executive control over these men. And recall the Hartwell case, which is discussed in both briefs, which suggests that an office under the United States is defined by tenure, duration, emolument, and duties.

None of these categories, except the active standby, has any possibility of falling within that definition. An active standby reserve may apply for training, but it is entirely voluntary. He is not called up. He receives no pay while he is in training. He receives no allowances. He pays for his own food. He pays for his own uniform. He pays for his own travel. The only expense to the government involved, I suppose, if he went to the firing range and used up ammunition.

The one thing he can do is by training regularly at his own expense, is acquire training points toward retirement. He gets one training point if he volunteers for this training for each four-hour drill, and one training point for each day of summer activity. And if he gets a minimum of 50 for 20 years, he then gets a relatively small pension at the age of 60. But that is the entire financial connection that any of these reservists have and it is very

small, and very Congressmen indeed go through that training.

The respondents have cited on pages 40 and 41 of their brief elements of executive control over these reservists. I think I have shown that there is very little, but let me take them by category.

The respondents state that these reservists are subject to call by the President. That is true only with respect to the ready reserve, which is not involved in this case. There is one Congressman in the ready reserve. He can be removed from that only with the consent of the governor of his state, because it is a National Guard position. He is not involved in this case, because the case is not against the governor or him.

Of the active standby reserves, they can be called by the President only if Congress declares a national emergency or war under 10 United States Code, Section 672. So, they are not subject to call by the President unless Congress authorizes the call.

As to salaries and expenses, there are none. There is a very small possibility for some of them of a small pension at the end of 20 years.

Yet respondents say that they are subject to the Uniform Code of Military Justice. The only time any of these reserves is so subject is when he has voluntarily gone into training and voluntarily submitted himself to the Code. The

retired reservist is subject to the Code only when he is receiving hospitalization.

There is mention of the enlistment term and the oath. Unless one of these Congressmen is in the reserves because he has a remaining obligation after having been drafted, he has no term and can resign at any time; and the oath he takes is simply the one we all take to support and defend the Constitution.

I think it is entirely plain from what I have said that out of the 107 Congressmen in the reserves, only 20 are in any status where they can do anything to gain any benefit. Very few of them do. They train at their own expense, and I do not think under the definitions in the cases it could in any sense be called an office under the United States.

Q Are you suggesting, Mr. Solicitor General, that as to the vast bulk of these men, they are something like Kentucky colonels in terms of--

MR. BORK: Well, Mr. Chief Justice, I guess I would suggest precisely that. The inactive standby is really an honorary status.

Q As long as we do not quote you.

MR. BORK: Yes, I would prefer that. The retired reserve is 58 of them without pay. Very few of these Congressmen have any substantial connection with the military. And such as it is is purely voluntary at their own expense.

MR. CHIEF JUSTICE BURGER: Mr. Dobrovir?

ORAL ARGUMENT OF WILLIAM A. DOBROVIR, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. DOBROVIR: Mr. Chief Justice and Justices, may it please the Court:

The question before this Court today is the interpretation of the incompatibility clause of the Constitution, Article I, Section 6, Clause 2, which prohibits the same individual from holding at the same time an executive branch office and a seat in the Congress.

The Solicitor General has stated the three issues which are raised before this Court. First of all, it seems to us whether or not this kind of reserve commission is an office which the clause prohibits a member of Congress from holding while he remains a member. Secondly, whether the plaintiffs here have standing or that we are proper parties to raise that issue. And, thirdly, even if the answer to the first two questions is yes, whether this is a political question that the Court should not decide.

The clause is older than our Constitution. It appeared first in the Articles of Confederation, and I believe was first proposed eight days after our nation was born on July 12, 1976 [sic] in the Continental Congress.

Q The entire clause or just the latter half of it?

MR. DOBROVIR: The basic principle that a member of the Continental Congress should not hold any office at that time under any of the states, because we had a very rudimentary national government, was in Article V, I believe, of the Articles of Confederation. And the clause was stated in the Articles of Confederation as in terms that no member of the Continental Congress shall hold any office as to which there are salaries, emoluments, or other--Article V, Clause 2, of the Articles of Confederation: "Nor shall any person being a delegate be capable of holding any office under the United States for which he or any other for his benefit receives any salaries, fees, or emoluments of any kind."

The matter was debated at considerable length during the Constitutional Convention, and the debates are recorded in our brief and also in the Solicitor General's brief. I will not repeat them. But it is quite clear from the statements of Mr. Elbridge Gerry, Mr. George Mason, Madison, Hamilton, and others, that the purpose of the clause was to prevent an evil, which was quite palpable and obvious to the framers, an evil that they saw rife in the English parliamentary system under which the officers of the Crown, by holding out the possibility of office and appointing members of Parliament to office, was able to control votes in the Parliament.

And so they erected an inflexible and absolute barrier, as they thought, against any member of the legislative

branch, the Hose or the Senate, having before him the possibility, possibly dangled before him--in the words, I think, of George Mason--by the executive of an office which might then influence his vote or influence his activities in a manner favored by the executive.

Q Would you say that the bar was any more absolute than the bar that the Court was dealing with in the Levitt case, the appointment of a member of the House or Senate who had voted for an increase in salary or voted for the creation of the office?

MR. DOBROVIR: If I had a different purpose, as I--

Q It is equally explicit, is it not?

MR. DOBROVIR: It is equally explicit, but there was--I do not know if I can find the right word, but I think there was more of an effect beforehand in the first half of Article I, Section 6, in which they were speaking directly to the members of Congress to say, "You shall not create offices, you shall not create or increase the emoluments of offices to which you then may seek appointment." And this was rather something more directly aimed at preventing any activity by the members of Congress.

The second half of the clause, the debates made quite clear, were aimed not only at the Congress but indeed primarily, according to the debates, at the executive branch to prevent the executive branch from encroaching upon, from

influencing the Cokgress. The bar is more or less absolute, but I think it is important to note there were these two different evils that they were aiming at.

The clause had a curious history and in attempting to find why it ended up with the language it presently has, we found that as it came out of the committee of detail on August 6th, and this is in the district court's opinion in the appendix to the petition for certiorari at page 19, it said the members of each House shall be ineligible to and incapable of holding any office under the authority of the United States during the time for which they shall respectively be elected, and the members of the Senate shall be ineligible to and incapable of holding any such office for one year afterwards.

This was the incompatibility clause on that date. It then came out of the committee--it went into the committee of eleven, and this is quoted on page 34 of the government's brief: "The members of each House shall be ineligible to any civil Office under the authority of the United States during the time for which they shall respectively be elected--And no person holding any office under the United States shall be a Member of either House during his continuance in office."

In that form the clause stated two things. It said no member shall hold any office while he remains a member, and

no person holding any office shall be a member.

In the committee of eleven, according to Farrand, that language was amended by the insertion after the words "United States" the following words: "...created or the emoluments whereof have been created." Because the clause, as it stood, did not have within it the prohibition that you, Mr. Chief Justice, just referred to against--the one that was involved in Levitt--against the Congress creating offices and then obtaining their own appointments to them. And the way in which this was accomplished was by insertion of that language. The rest of the clause remained the same.

We cannot speculite, because there is nothing in the debates as to what the framers had in mind in doing this. It seems to me that it would be wrong to say that by doing that they intended to make the clause expressly applicable only to a member, only to say that a person holding an office shall not be a member, which is the interpretation that the government has urged upon this Court.

It seems to me that what happened to the clause during the debates does not, cannot lead us to that conclusion, and that the history of it and its final language does support our contention that the clause is intended as an absolute bar against members holding any office.

This is in turn supported by the later history of the clause and in particular I would refer the Court to the

1899 House report, House Report 2205, which is cited and portions of which our quoted in our brief. But on page 57 of that report the Congress refers to the interpretation of the provision by James Wilson, who was one of the framers. Indeed who was one of the framers who himself argued against the insertion of the incompatibility clause in the Constitution and who also was one of the first members of this Court.

And the report states that in lectures he delivered in 1790 and 1791, he took the view and stated with respect to this clause that it is a provision by which members of the legislature will be precluded while they remain such from offices. And then he said that this provision finds with great propriety a place in the Constitution of the United States. And in this important particular, it has a decided superiority over the constitution of Great Britain.

Q Where is that in your brief?

MR. DOBROVIR: That provision is not quoted in our brief. I only found it yesterday afternoon, Your Honor.

So, I think it is quite clear that the intention of the framers was that members of Congress, while they remain members of Congress, shall not hold any other office.

There is a second principle which is likewise expanded at great length in the same report, beginning on page 64 and going on over to page 69 of that report, in which many, many cases decided by the state courts of the United States and

by the courts of Great Britain were cited by as establishing the proposition that when there are incompatible offices, when the same person is appointed to an office which is incompatible with an office which he already holds, that when he qualifies and accepts the second office, he automatically vacates the first, that the proposition as stated in shorthand in the district court's opinion, the second office office vacates the first.

In this case, as I understand it, every member who is a reservist, was in the reserves prior to his election to the Congress, and the application of that principle would require that when accepting and qualifying as a member of Congress, he should automatically have vacated his office as a member of the reserves.

Q That he should have or that by being sworn into the Congress that automatically vacates it; which?

MR. DOBROVIR: As we read these authorities, it seems to say automatically.

Q What you are suggesting then is that when each of these members of Congress took his seat, automatically his reserve commission disappeared, terminated, or whatever?

MR. DOBROVIR: Yes, Your Honor, Mr. Justice Brennan, I would say that. Of course, that did not occur because there had to be some further action by one or the other of the parties, either the person holding the commission who had just

been elected to Congress, or the executive branch which continued to maintain him in that status in order in fact for the status to end. But in law it would seem, according to these authorities, that he should be held to have vacated the office and all that remains is that that vacation be declared by a body competent to declare it, which brings us to the question whether or not the clause establishes a qualification which is exclusively committed to the Congress. The Solicitor General has argued that it speaks as a qualification; and just like the qualifications of age and inhabitancy and citizenship, it is the kind of qualification which this Court in Powell v. McCormack said was committed only to the Congress and which could not be adjudicated by a court.

First of all, there is a difference in that those qualfications are not as--as we said in our brief--not as a pre-existing fact which no one can change. And I suppse that even the doctrine that these are matters which are exclusively committed to the Congress, cannot be absolute. That, for example, if the Congress were all of a sudden by vote to say that a senator who was 60 years old was only 20 years old and thereby expel him from the Congress, that one way or another that senator would have the right to have some court, a federal court and ultimately this Court, somehow or other review that determination.

Q What is the relief you asked for in this case?

MR. DOBROVIR: The relief we asked for in this case, Mr. Justice Marshall, was a mandamus or an injunction extended to the Secretary of Defense and the thee service secretaries, requiring them first of all to strike from the rolls of the reserves any member of Congress--

Q What is the qualification that Congress has got to do with that? You are not asking Congress to put them out.

MR. DOBROVIR: No, we are not, sir.

Q You are not asking them to resign from Congress.

MR. DOBROVIR: We are not, sir.

Q What have the qualfications got to do with it?

MR. DOBROVIR: I do not believe that the qualification matter--

Q Has anybody raised the question if one of these people here is not a Congressman?

MR. DOBROVIR: No, sir, by no means.

Q Again I ask, what is the point?

MR. DOBROVIR: We do not believe that the qualification matter is a significant issue in this case, but it has been raised and it has been argued effectively by government, and we felt that we should respond to it in the way in which we felt it could be best answered. I think Your Honor's answer is perhaps the simplest and the best answer.

Q In connection with the language of Baker v. Carr having to do with textually committed to another branch by the language of the Constitution, and that is the argument of the government on one leg here, that this whole subject was textually committed and therefore it is not a justiciable question.

MR. DOBROVIR: That is the argument, that it is a textual and demonstrable commitment of the matter to a coordinate branch of the government.

Q Your standing argument is dependent to a certain extent, is it not, on the question Mr. Justice Marshall asked you about, about the fact these people are Congressmen? I doubt that you would claim standing to go into the district court and say Mr. X, who is not a member of Congress really should not be on the reserve rolls because he has got bad eyesight. Your standing argument is dependent on the fact that these people are not only disqualified from the reserve but that they are Congressmen.

MR. DOBROVIR: Our standing argument is premised upon the fact that this clause was intended to prevent this duality of office in order to benefit the citizens of this nation as a body politic, in order to prevent an influence upon the Congress that the executive branch might exercise.

Q Which a normal garden variety reserve requirement that a guy have corrected 20/20 vision would not be anything

like.

MR. DOBROVIR: That is correct, Mr. Justice Rehnquist.

Q Mr. Levitt had much the same thing in mind when he came here, that he was going to try to enforce for all the people of the United States the very explicit provisions in the forepart of that clause that absolutely precluded the appointment of a member of the Senate or the House to this Court under those circumstances.

MR. DOBRIVIR: Any litigant who comes to this Court, who comes into the federal courts, raising a constitutional issue is going to seek and, if he prevails, obtain the enforcement of that constitutional provision generally for all of the people of the United States.

What this Court has said, However, is that a litigant must himself show some particularized injury. And I think contrary to the characterization of the record made in the government's papers, we have shown that kind of particularized injury. We have shown as much injury as a person damaged by the violation of this clause could show, we have alleged in our complaint that our attempts to influence members of Congress in connection with particular kinds of issues have been inhibited because these members of Congress, because of their reserve connection, which we allege is absolutely barred by the Constitution, are biased, biased not in any corrupt or fraudulent sense but biased by reason of this reserve

connection, a connection which, we submit, was intended by a prophylactic kind of rule never to exist, intended by the framers never to exist.

Those allegations were made in our complaint, and there was never any answer filed to the complaint. And therefore under Rule 8D of the Federal Rules of Civil Procedure, those allegations must stand admitted.

Q You did not get your injunction from the district court, I take it.

MR. DOBROVIR: The district court did not issue an injunction. The district court issued a declaratory judgment.

Q Did you appeal that?

MR. DOBROVIR; No, Your Honor, we did not appeal it becasue the Declaratory judgment Act expressly provides that if the defendants against whom a declaratory judgment has issued do not comply with it, the district court retains continuing jurisdiction, and we could go back and ask for further equitable relief.

Q So, you have never asked any other court to overturn the district court's refusal of an injunction?

MR. DOBROVIR: We have not because we do not feel it is yet an issue in this case. The district court stated in its opinion that it was of the opinion that it had no doubt that the executive branch and the members of Co-gress affected by the declaratory judgment would be able to accommodate themselves to

the declaration of the legal principle, and we have no doubt that if this Court affirms the district court and affirms the declaration of the meaning of the constitional clause as stated by the district court, that the executive branch will comply and that the members of Congress will comply.

We have gotten into the question of--

Q If they do not, however--take your hypothetical case--if they simply say the court has no power, even if the court says it has, then you have the confrontation that was discussed to some extent in Baker v. Carr and several other earlier cases, do you not?

MR. DOBROVIR: I would be--let me say this very seriously: It would almost be the end of our Constitution if the ex4cutive branch failed to follow an order of the district court.

Q Let us pursuit and say the executive branch follows it, that Congress passes an act unanimously reinstating the commissions of these officers. Is that not the type of confrontation that the framers talked about and the courts have talked about from time to time?

MR. DOBROVIR: I would have thought that that kind of confrontation was the very thing dealt with very specific- in Marbury v. Madison and Kilbourn v. Thompson and is established principle of our jurisprudence. But if Congress passes an act which turns out to be unconstitutional, the

courts declare it to be unconstitutional--

Q But Baker v. Carr then went into some specific details about that, did it not?

MR. DOBROVIR: I am afraid I do not have in my mind the passages in Baker v. Carr you refer to, sir.

Q No matter. I do not want to interrupt your argument any further.

MR. DOBROVIR: I am happy to try to anwer the questions, if perhaps you could help me.

Q The confrontation problem is theirs, is it not, just as the confrontation problem was inherent in the Levitt case? In the Levitt case the President of the United States in the 1930's had nominated and the Senate had confirmed as a member of this Court a person in, according to the allegations, direction violation of the explicit provisions of the Constitution. So that the Court then was confronted among other factors, standing and other questions, was confronted with making a decision which the other two branches had already passed on, had they not?

MR. DOBROVIR: I see Your Honor's point. I will only say this, that--

Q The Supreme Court said this is the kind of question that courts will not get into.

MR. DOBROVIR: There are some kinds of questions the courts will not get into. If the Congress were to enact the

statute putting all these reserve commissions back into effect after the executive branch had removed them from this office, you would have an act of Congress which presumably was unconstitutional. In Kilbourn v. Thompson, which has been quoted often and recently by the Court, the Court said that the declaration of a constitutional provision is the province and the duty of this Court. And while I suppose in those early days too the Court may have had in mind the possibility that there would be a direct confrontation, nevertheless the Court had to do its duty and presumably the Congress would do its duty. And I do not suppose there is much difference between an act of Congress that would declare in effect reserve commissions that have been declared unlawful and any other act of Congress insofar as it may be declared unconstitutional by this Court and the executive prohibited from enforcing it.

We are not asking for any relief against the Congress, and an all of the cases in which acts of Congress are declared unconstitutional no relief is sought against the Congress. Relief runs to the executive branch which is thereby prohibited from taking action or enforcing the unconstitutional act of Congress. And what we would have here then would be an act of Congress, abusive legislation, unconstitutional by the previous declaration of this Court, which the executive would be prevented from enforcing because

the writs of this Court do run to the executive and the act of Congress would sit there in the books ineffective like those other acts of Congress which have been declared unconstitutional. I think that would be the resolution under our governmental system of this conflict.

I would like to close with some discussion of standing. The principles of Flast v. Cohen are not, I do not think, a procrustean bed. It does not say if you have 18 different items and if you have 16 of them, you have standing; but if you only have 15 of them, you do not. Flast v. Cohen is a very subtle exposition of constitutional principles under Article III, what makes a case a controversy and, secondly, what then, assuming there is a case or controversy, should make this Court stay its hand as a matter of self-restraint.

And I do not think we can talk in terms of that was only a taxpayer's case. The Court was expounding on what kind of specific relationship between the litigant and two things, the matter he was challenging, the specific action of the government that he was challenging, on the one hand, and a constitutional provision that he was invoking on the other. If those two relationships were sufficiently specific, then that established the clear controversy which give this Court jurisdiction under Article III. And I think without trying to push the facts of this case into a specific channel, I think

we can say that as citizens who have attempted to petition the Congress, who have attempted to persuade and to convince members of Congress, we have an interest in the matter we are challenging, a specific interest in the matter we are challenging, which is--

Q Do you have reserve officers in your committee?

MR. DOBROVIR: Yes, Your Honor, there are reserve officers in the committee.

Q Then how do you assume that all the reserve officers on the Hill are opposed to what you say?

MR. DOBROVIR: We do not assume it, Your Honor. This is the experience that our members have had insofar as they have exercised their lobbying function with respect to the Congress.

Q I think you have to show how you are being injured. I am not sure whether you have been injured at all yet. How does this group of reserve officers stop you from lobbying? The answer is they do not stop you, right?

MR. DOBROVIR: That is right.

Q Your question is they might impede you?

MR. DOBROVIR: No, Your Honor.

Q What co-crete allegation do you have that they do impede you?

MR. DOBROVIR: Our concrete allegation is very simply this, that by reason of their reserve membership, they

have views, they are influenced by the executive branch because of this reserve connection in ways which are opposed--

Q Why are not the reserve members of your committee influenced?

MR. DOBROVIR: The reserve members of our committee, I suppose, could be called a dissident faction in the reservists.

Q And all of them in Congress could also be in the dissident faction.

MR. DOBROVIR: I suppose they could, Your Honor.

Q So, you are really hoping or imagining.

MR. DOBROVIR: I do not think it is imagining, Your Honor. I would say this, that we would rely on the allegations in our complaint. We think that they are--

Q I am talking about the allegations or lack of them.

MR. DOBROVIR: Yes, Your Honor.

Q Would it be relevant if you went to trial on the merits? This is highly hypothetical now. If the 117 members of Congress showed that in 99 percent of the time they voted just the way your committee has been advocating that they vote, would that be a relevant inquiry?

MR. DOBROVIR: If we went to trial on the merits and that turned out to be the proof, then we would lose. Those allegations of our complaint--we would lose on that

point, and I suppose we would then--no, we would not have standing if there were a trial on the merits on this assue. The point is that the government did not choose to challenge these allegations and there was no trial on the merits. So, they stand uncontroverted in the record.

But I suppose I should conclude by just replying very briefly to the question raised by my brother, that this office is so minor and so tenuous an office that it is not intended to be prohibited by the clause.

I think in response to this I will--

Q This is also very relevant from the standing point, is it not?

MR. DOBROVIR: That is right, Your Honor.

I quote again from the 1899 report in which it was said, "It may be said that there are many offices under the United States of little importance and carry little or no pay and that it cannot be possible that the framers of the Constitution contemplated forbidding a member of the national legislature to hold one of these small offices. This is not the question. No line could be drawn between the large and the small office. The principle declared was that a member of the Congress of the United States shall not hold any office under the United States and retain his seat as a national legislator."

Q Would you say that if a member of Congress is

appointed to presidential commission, that he suffers this same bar?

MR. DOBROVIR: That was one of the matters that was considered by the Congress in this very comprehensive 1899 report. As I read the language, I think they at least felt that any kind of office, however tenuous it may be, was barred by the courts.

It is important, I think, to note that in 1899, even though the report was very specific--

MR. CHIEF JUSTICE BURGER: We will resume there after lunch, and you may think of some points you want to complete at that point.

[A luncheon recess was taken at 12:00 o'clock noon.]

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AFTERNOON SESSION - 1:00 o'clock p.m.

MR. CHIEF JUSTICE BURGER: Mr. Dobrovir, do you have something further now?

MR. DOBROVIR: Yes, Your Honor.

First, with respect to the question of justiciability, I would like to hold out very simply that the question of a conflict, which I yhink is the prevailing principle behind justiciability, what is intended to be prevented, will not exist in this case, that here as in Powell v. McCormack--and I am referring to the opinion at 395 U.S. at page 548--the determination of our claim here would require no more than an interpretation of the Constitution, and this falls within the traditional role accorded the courts to intepret the law.

To refer also to Roudebush v. Hartke in which this Court held that it did not violate the justiciability principle to permit a court to order a recount in a senatorial election because to do so would in no way impinge upon or interfere with the function of the Senate in later determining the qualification of its own members, that the Senate is free to accept or reject the apparent winner.

Q That was a personnel function in the Roudebush case, was it not?

MR. DOBROVIR: Yes, it was.

Q Not a federal matter.

MR. DOBROVIR: The Court in the case very expressly, in footnote 23, mentioned the fact that this is a qualification committed to the Senate and discussed it in those terms.

Q That function was just like counting the ballots in the first instance.

MR. DOBROVIR: I would only submit that nothing this Court does will interfere with the power of the Senate or the House itself to determine the qualifications of any of its members, and there are political considerations both ways involved in what the Congress may do, which is not what this Court does or any court does, and that this Court's determination will in no way either inhibit or impose any requirement on the Congress with respect to the qualification of a member.

Perhaps there is indeed wisdom in the courts deciding questions like this, because as this Court said in Brewster, this is not the kind of thing that--Congress perhaps should not lay aside its normal activities and take on the responsibility in the Court's words "to police and prosecute the myriad activities of its members." So, it may be that this is the kind of decision which in the separation of powers under our Constitution the courts should undertake.

With respect to standing, which is an important issue in this case, I think it is important that the injury here be viewed in light of the intent of the framers, and the intent

of the framers, I think it is clear, was to avoid even the potential of any conflict of interest, even the potential of any executive influence. And I would refer the Court to the Dixon Yates case, the United States v. Mississippi Valley Generating Company; and in particular at 364 U.S. at page 549, in which discussing another conflict of interest provision, that in a statute, the Court said that the statute is directed not only at dishonor but also at conduct that tempts dishonor, and thus as in Board of Governors v. Agnew, which was cited by the district court, at a potential. And, as the Court continued on page 551 of the opinion in Mississippi Valley, that it was intended by the Congress in that statute to establish a rigid rule of conduct, and I think that the incompatibility clause is no less rigid.

With respect further to this matter of injury, I would like to refer the Court to the recent decision in United States v. SCRAP and to point out that there where users of the environment, users of the parks, were able to show the possibility of injury by way of the littering of the areas that they use for recreational purposes. That is much like what we have here, where we have shown very clearly the potential for harm, the possibility of littering there, the potential for damage to our ability to influence members of Congress here.

And there is a further analogy, I think, in that

there the Court found that those individual plaintiffs were users of the specific recreational areas in question. Here we too have shown that we in that sense are users of the Congress, we attempt to influence the Congress, we lobby the Congress.

Finally I think in view of the emphasis the Court has put on Ex Parte Levitt, it might be well--

Q Then your standing, according to you, depends partly on the fact that you are a lobbying organization, trying to influence legislation or whatever you want to call it?

MR. DOBROVIR: That is right. That is right.

The Ex Parte Levitt is a very peculiar kind of decision in that, as the Court has pointed out, it was reached on the basis of a motion filed in this Court for permission to file a petition that Justice Black not be permitted to take his seat. And I went back and read the cases that were cited by the Court.

The first case was Tyler v. Judges, 179 U.S. 405, where the Court there, citing Chitty on pleadings, discussed the fact that a party, to have standing, must be one whose legal right has been affected.

And then Southern Railroad v. King--that one I did not undersrand, because that seemed only to involve the sufficiency of an answer to raise the issue of the

repugnance of a statute to the commerce clause.

In Newman v. Frezell, that was a suit in quo warranto to challenge the appointment of a D. C. commissioner, and the Court held that the writ quo warranto was not available to someone who himself did not claim a right to hold the office.

Fairchild v. Hughes was a suit to declare the female suffrage amendment to the Constitution null and void, and Justice Brandeis said that this was not a case or controversy because, among other things, in Mr. Fairchild's own state, New York, women had been granted the right to vote, so that the amendment did not do him any greater injury than he had already suffered by the act of his own legislature. And I think it is implicit in that case that if it had been otherwise, he might well have had standing.

And finally of course the Court cited Massachussetts v. Mellon, and I will not go into that any further. I think that what Frothingham v. Mellon means today was very carefully explained by this Court in Flast v. Cohen.

Why Levitt is important is that it has been cited by this Court in two or three recent cases, in particular in Laird v. Tatum. And there I think it is important to note the context in which it was cited, cited in the context of a situation where the individual plaintiffs in that particular case themselves had admitted that they had not been injured,

that they had suffered no inhibition of their own exercise of their First Amendment rights an the basis of the surveillance that had visited upon them.

And so I would submit that Ex Parte Levitt does not, this very brief and per curiam opinion on a motion by Mr. Levitt as a member of the bar, should not be adopted by this Court as a limiting principle and as taking away what this Court has granted in effect in Flast v. Cohen.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Solicitor General?

REBUTTAL ARGUMENT BY ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BORK: I think not, Mr. Chief Justice.

Q Is this the case years ago in which the district court said, at least in the District of Columbia Circuit, that standing was no longer anything to be taken very seriously or words to that effect?

MR. BORK: That is correct, Mr. Justice Stewart. The district court said that the concept of standing, I believe, had been almost abandoned in this circuit.

Q Something like that. I was trying to find it. I did not remember whether it was this case or another case.

MR. BORK: This is the case.

Q Fine. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:11 o'clock p.m. the case was submitted.]

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