May 12, 2009

Trust or Profit: How Military Officers are Bound by the Constitution

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I. Introduction

Many officers serve in the United States active duty and reserve military forces. The Constitution prohibits federal officers from engaging in certain political activities, and with so many officers in the military, the opportunity to violate constitutional prohibitions is a real issue. Before one can determine where these limits for military officers lie, several important questions must be answered. Is a military officer in an office of trust or profit under the Constitution? If so, does that apply to reserve military officers as well? What are the ramifications for members of Congress or presidential electors?

The purpose of this Comment is to answer these questions and provide a reference for military officers to use when faced with constitutional issues regarding their service. Part II examines the constitutional language and common law interpretation of the three clauses dealing with the restrictions of officers appointed under the Constitution.¹ Part III defines what exactly constitutes an office of trust or profit.² Part IV looks at the difference in restrictions between

¹ See infra Part II (analyzing the Incompatibility Clause, Emoluments Clause, and electors selected under Article II).
² See infra Part III (breaking the analysis down into what
the active duty and reserves.\textsuperscript{3} Part V provides a final opinion on the abilities and restrictions of military officers.\textsuperscript{4} Part VI talks about the timing of taking federal office and concludes.

**II. Constitution**

This section examines the constitutional meaning of the phrase “Office of Trust of Profit” through its use in three sections of the Constitution. Section A below will examine history and interpretation of the Incompatibility Clause of the U.S. Constitution. Section B looks at the understanding of the phrase within the Emoluments Clause. Finally, Section C examines the incompatibility language applied to the qualifications of presidential electors under Article II.

**A. The Incompatibility Clause Places Prohibitions on Federal Officers From Serving in Elective Office.**

The Constitution provides that: No Senator or Representative shall, during the Time for which he was elected, be appointed to constitutes an office and what defines trust or profit).

\textsuperscript{3} See infra Part IV (examining constitutional law, federal statutes, and military regulations to determine what restrictions apply to which classification of military officer).

\textsuperscript{4} See infra Part V (discussion what active duty and reserve military officers can and cannot do within the confines of the Constitution).
any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.\textsuperscript{5} This phrase prevents parliamentary government from forming in America and attempts to keep legislators from first creating cushy new offices then receiving immediate appointments to them.\textsuperscript{6} As Steven Calabresi and Joan Larson point out in their article, “One Person, One Office: Separation of Powers or Separation of Personnel?”

The sentence structure, beginning with the key words “no person” and moving on to the phrase “holding any Office under the United States,” clearly indicates that “Officers of the United States” are the suspect bad apples here. They are in the same position as Bills of Attainders, ex post facto laws, and Titles of Nobility: They are mentioned in the Incompatibility Clause

\textsuperscript{5} See U.S. Const. art. I, sec. 6, cl. 2.

\textsuperscript{6} See Wilson, Committee Government or Cabinet Government? in Parliamentary Versus Presidential Government 72, 72-74 (Arend Lijphart ed., 1992) (writing that the type of government particularly excluded is the “semi-presidentialism” of the Fifth French Republic; a system which combines presidential and parliamentary features).
immediately after the constitutional commandment “No.”

The legislative intent for the language of this article shows that Alexander Hamilton in particular was concerned with preventing undue influence on the legislature by the executive. Also of note is the distinction between “civil office” in the first half of the quote and “office” in the second. The presence of the word “civil” in one part and the absence in the second may imply that members of Congress can be appointed to non-civil or military offices which have been created or which have had their salaries increased but that both civil and military officers are forbidden from becoming members of Congress.

7 See Steven G. Calabresi and Joan L. Larson, One Person, One Office: Separation of Powers or Separation of Personnel?, 79 CNLLR 1045, 1063 (1994) (arguing that the first clause places the disability on “Officers of the United States” and not members of Congress).

8 See The Federalist No. 76 at 459 (Alexander Hamilton); The Federalist No. 55 at 345 – 46 (James Madison) (proclaiming that the clause was designed to prevent the President from undermining the “virtue” of the House of Representatives.”).

9 See U.S. Const. art. I, sec. 6, cl. 2.

10 See generally, FINDLAW, THE NATION'S TOP MILITARY COURT RULES THAT A
B. The Emoluments Clause Places Strong Prohibitions on Federal Officers From Receiving pay From Foreign Governments.

The Emoluments Clause of the Constitution provides that “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”11 While the origin of this clause seems obscure, most scholars believe it to be an ethics clause.12 With this in mind, it becomes easier to examine the case law covering this clause. Fortunately for the purposes of this Comment, a great deal of the case law regarding this clause applies to the military. This may be because of the sheer

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11 U.S. CONST. art. I, sec. 9, cl. 8.
12 See, e.g., Calabresi, supra note 8, at 1064 (proclaiming the Emoluments Clause to be an attempt at a foreign anti-bribery measure).
number of military officers, the frequency of their contacts with foreign governments, and reality that junior or mid-level military officers may not be cognizant of the limitations imposed upon them by the Emoluments Clause in the way that a member of Congress or Cabinet official would.

For purposes of this clause, all military members, including the enlisted corps, seem to be judged “officers” under the language of the Constitution. For example, an enlisted military member facing court-martial for refusing to wear a United Nations insignia on his uniform attempted to use the Emoluments Clause as a defense.\textsuperscript{13} The court found against the defendant and upheld his discharge in part because they found the argument that the insignia fell within the clause “a stretch.”\textsuperscript{14} In another case, a retired Coast Guard member was denied retirement benefits by his service because he taught school in Tasmania after he left the service.\textsuperscript{15} Ultimately, the


\textsuperscript{14} See id. (deciding that the United Nations insignia was neither a gift from a foreign government nor received by a foreign government, and that Congress had approved it anyway).

\textsuperscript{15} See Ward v. U.S., 1 Cl. Ct. 46 (1982).
court found the retiree was equitably due the withheld funds because the Coast Guard had originally approved the job he took overseas.\textsuperscript{16} The law further provides that the prohibition against the receipt of payments “of any kind whatever” to a retired military member from a foreign government includes forms of compensation other than salary, such as free transportation, household goods shipments, and housing allowances.\textsuperscript{17}

In another case, an enlisted member of the Navy who accepted employment with a foreign government was judged to be holding an “office of profit and trust” under the United States and thus ineligible for foreign employment.\textsuperscript{18} The authority for

\textsuperscript{16} See id. at 48 (deciding that there was no reason to consider whether a claim was both legal and equitable in order to satisfy a congressional statute authorizing Mr. Ward to receive his retirement pay).

\textsuperscript{17} See 1979, 58 Comp. Gen. 487 (remarking that military retirees must receive permission from the Secretary of State and secretary of the service concerned before accepting payment from a foreign government).

\textsuperscript{18} See 1964, 44 Comp. Gen. 227; see also 1964, 44 Comp.Gen. 130 (finding that a military retiree who accepts foreign employment without Congressional approval forfeits his retirement benefits in proportion to the illegal compensation received).
acceptance of foreign employment by reserve military members
when approved by the Secretary, is Congressional consent to
overcome the Constitutional prohibition.\(^{19}\) Therefore, if a
Retired Reserve member receives approval from the aforementioned
authority, he or she does not forfeit his or her retirement
pay.\(^{20}\) Basically, this clause does not forbid the acceptance of
emoluments from a foreign government under an arrangement duly
authorized by an act of the Congress.\(^{21}\)

C. Federal Officers are Prohibited From Serving as
Presidential Electors Under Article II.

The constitution provides that the President and Vice
President of the United States shall be elected to office by a
group of electors rather than directly by the citizens.\(^{22}\) These

\(^{19}\) See 1962, 41 Comp. Gen. 715; 10 U.S.C.A. sec. 1032 (providing
that any reservist may accept foreign employment subject to the
approval of the service secretary).

\(^{20}\) See id.

\(^{21}\) See 1947, 40 Op.Atty.Gen. April 17 (mentioning that even
simple gifts such as photographs may fall under the clause).

\(^{22}\) See U.S. CONST. art. II, sec. 1, cl. 2 (“Each State shall
appoint, in such Manner as the Legislature thereof may direct, a
Number of Electors, equal to the whole Number of Senators and
Representatives to which the State may be entitled in the
electors are chosen by the states in a manner prescribed by their respective legislatures. This means that Presidential electors are technically state officers rather than federal officers or agents. They act by authority of the state, and it, in turn, receives its authority from the federal Constitution. This clause is designed to ensure the financial

Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

See id.

See Chenault v. Carter, 332 S.W.2d 623, 626 (deciding that, in this jurisdiction, electors are state officers) (Ky. 1960); see also Ray v. Blair, 72 S. Ct. 654, 658 (1952) (proclaiming the intention of the Founders was that each state would select electors who would exercise their independent judgment in voting for President); Burroughs v. U.S., 54 S. Ct. 287, 290 (explaining that, while electors do exercise federal functions in the discharge of their duties, they are not federal officers) (1934); Fitzgerald v. Green, 10 S. Ct. 586, 587 (finding that electors may exercise federal functions but are no more federal officials than members of the state legislatures are when selecting senators) (1890).

See Ray v. Blair, 72 S. Ct. 654 (1952) (noting that the states
III. What is the Definition of an “Office of Trust or Profit” Under the Constitution?

After examining the constitutional requirements of the clauses above, this Comment now turns to finding a definition of the phrase “Office of Trust or Profit.” Section A examines whether a job constitutes office or mere employment. Section B then looks at this phrase to determine what constitutes trust or profit.

A. An Office Under the Constitution Requires Special Characteristics and Responsibilities Regular Federal Employment Does not Possess.

"Although an office is ‘an employment,’ it does not follow
that every employment is an office." Scholars tend to agree that the qualities that make a position an office are: (1) it is created by law; (2) with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned; and (3) which also are continuing in their nature and not occasional or intermittent. Employment lacks one or more of these criteria. Strictly speaking, an office must have the authority to exercise some portion of sovereign power. State courts have adjudicated this issue many times and some of the positions held to be offices include legal examiners, notary publics, educational board members, the chief of police, and even prison guards.


28 L.B.K., Distinction Between Office and Employment, 53 ALR 595 (1928).

29 Id.


31 See Patton v. Board of Health, 127 Cal. 388 (1899); Re Opinion of Justices, 73 N.H. 621 (1906); State ex rel. Barnhill v. Thompson, 29 S.E. 720 (N.C. 1898); Russell v. Williamsport, 9 Pa. Co. Ct. 131 (1890); Page v. O'Sullivan, 169 S.W. 542 (Ky.
The court in *U.S. v. Germaine* further expanded the definition of what constitutes an officer to include any position nominated by the President and confirmed by the Senate.\(^{32}\) The Court again extended this definition to include all the inferior offices in which Congress invested the President with the sole power of appointment.\(^{33}\)

All other positions not appointed in such a fashion were held to be employments rather than offices.\(^{34}\) In *Scully v. United States*, the court found that one who serves the United States for a salary or for wages under a contract is an employee, and not an officer.\(^{35}\) The current distinction of what constitutes an office also includes such elements as permanence, oath-taking, or method of succession.\(^{36}\) Finally, a purely advisory position cannot constitute an office under the meaning

\(^{32}\) See 99 U.S. 508 (1879) (noting the constitutional requirement that the Senate provide advice and consent for the appointment of federal officers).

\(^{33}\) See *id*.

\(^{34}\) See *id*.

\(^{35}\) See 193 Fed. 185, 186 (C.C. 1910).

\(^{36}\) See *Lasher v. People*, 103, 55 N.E. 663 (Il. 1899); *People ex rel. Throop v. Langdon*, 40 Mich. 673 (1879).
of the clause.\textsuperscript{37}

\textbf{B. The Phrase “Trust or Profit” Only Serves to Narrow the Definition of “Office” under the Constitution.}

According to the Office of Legal Counsel, the phrase “trust or profit” probably serves to limit the definition of “office.”\textsuperscript{38} This becomes apparent when one compares the first part of the Emoluments Clause with the second. The first part reads “any Office of Profit or Trust under [the United States],” and the second reads “any present, Emolument, Office, or Title, of any kind whatever.”\textsuperscript{39} The Office of Legal Counsel understands this to mean that “the second reference—to ‘any ... Office ... of any kind whatever’—suggests that the first reference—to ‘any Office of Profit or Trust under [the United States]’—is narrower, not

\textsuperscript{37} See Application of the Emoluments Clause to a Member of the President’s Council on Bioethics, 2005 WL 2476992 (O.L.C.) (March 9, 2005) (writing that members of the council perform purely advisory roles and have no authority to issue subpoena or exercise any government powers).

\textsuperscript{38} See id. at 2 (commenting that it is clear the phrase “trust or profit” does not expand the definition of office under the Emoluments Clause).

\textsuperscript{39} See U.S. CONST. art. I, sec. 9, cl. 8.
broader, than the second.”  

Furthermore, the Framers mentioned in their discussions that the phrase “trust or profit” was synonymous with the word “office.”  

In fact, the early U.S. Congress seemed to equate the phrase “Office of Trust or Profit” with the phrase “Office under the United States.”  

Courts likewise have seen little substance added by the phrase “trust or profit” to the word “office.”  

With this in mind, there  

40 OLC, supra note 37, at 2.  

41 See 3 Max Farrand, The Records of the Federal Convention of 1787 at 327 (rev. ed. 1966) (quoting Governor Randolph) (“It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.”).  

42 See 8 Annals of Congress 1582, 1583 (1798) (statement of Rep. Bayard) (“though persons holding offices were forbidden to receive presents, the moment their office ceased, and they became private individuals, they were no longer prohibited from receiving any presents which might be offered to them”).  

43 See, e.g., State ex rel. Gilson v. Monahan, 84 P. 130, 133 (Kan. 1905) (deciding that the director of a drainage district did not hold an “office of public trust” because he did not hold a “public office” and that the words “office of public trust” are equivalent to “public office”); Opinion of the Justices, 3
seems little reason doubt whether the phrase “trust or profit” expands the definition of “office” under the clause. If anything, the phrase “trust or profit” serves to narrow the definition of the word “office” to those who, while serving in an office, receive pay or exercise some extra degree of authority.

**IV. Active Duty and Reserves Have Different Restrictions When it Comes to Holding Federal Office.**

Using the previous definitions for what constitutes an “Office of Trust or Profit”, one can see how an active duty military officer would be considered to be in an office under the United States because of their ability to command armed forces, the permanence of their position, and the obligation or

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Me. (Greenl.) 481, 481-82 (1822) (finding that an “agent for the preservation of timber on the public lands” did not hold an office of profit because he did not occupy an office of any kind).

44 See OLC, supra note 37, at 6.

45 See In re Corliss, 11 R.I. 638, 642 (1876) (finding that a position of profit must receive compensation and that an office of trust could be entrusted with large supervisory and regulative control).
responsibility of duty. When the question turns to reserve military officers, the issue becomes murkier. Reserve officers often serve intermittently, can receive little or no pay, and may not discharge any duties at all. Therefore, Part IV of this Comment examines if military officers are considered to be in an office of trust or profit under the Constitution if they are either active duty or the reserves. Section A examines whether the term “officer” applies to reserve military officers under the three previously examined sections of the Constitution. Section B looks at the commissioning process and Senate procedure. Finally, Section C reviews Department of Defense regulation in an attempt to draw a distinction between active duty and reserve officers.

A. The Constitution Restricts the Actions of Active Duty

46 See West Point Cadets, 7 Op. Att’y Gen. 323, 329 (1855) (describing military cadets commissioned by President as ‘inferior officers’ of the Constitution); People v. Duane, 121 N.Y. 367, 373 (1890) (announcing that it is difficult to conceive of a military office without the “power of command, the right of promotion, or the obligation to perform some duty”); Separation of Powers, 20 Op. O.L.C. at 144 n.54 (“Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat.”)
Military Officers More Than Reserve Officers.

From the previous section of this Comment dealing with the Constitution, it seems as though there may be some doubt as to whether reserve military officers are covered under the restrictions meant for “officers.” This section will attempt to sort out this question through an analysis of the Incompatibility Clause, Emoluments Clause, and Article II of the Constitution.

1. Active Duty Officers are Covered by the Incompatibility Clause but Reserve Officers are not.

The most notable case brought to the Supreme Court to challenge the military status of members of Congress under the Incompatibility Clause was Schlesinger v. Reservist Comm. to Stop the War.47 In this case, several former military members challenged the simultaneous reserve military service of several members of Congress.48 The petitioners correctly noted that the Constitution makes no distinction between active duty and reserve officers.49 The court ultimately determined that the petitioners lacked standing (which may mean that everyone lacks

47 See 94 S.Ct. 2925, 2932 (1974) (finding that the injury to the former military members too abstract to warrant justiciability).
48 See id. at 2927.
49 See id. at 2928.
standing) and dismissed the case.\textsuperscript{50} However, in his dissenting opinion, Justice Douglas agreed with the petitioners and would have barred all military service by members of Congress.\textsuperscript{51}

Another recent case involving the reserve military service of a member of Congress is \textit{U.S. v. Lane}.\textsuperscript{52} In this case, an enlisted Air Force member challenged the legality of Senator Graham to sit in judgment of his case because he was both a member of Congress and a reserve military judge.\textsuperscript{53} The Court of Appeals for the Armed Forces determined that Senator Graham could not hold a position as a military judge because his status as a member of Congress was inconsistent with his service as a judge.\textsuperscript{54} The court did not mention how the position of military

\textsuperscript{50} See \textit{id.} at 2935 (noting that the assumption if the petitioners lacked standing no one would is insufficient to justify hearing the case).

\textsuperscript{51} See \textit{id.} at 2938 (Douglas, J. dissenting) (writing that a decision for the petitioner would not create a new political order, but would merely direct the Secretary of Defense to remove members of Congress from his list of Standby Reservists).

\textsuperscript{52} See 64 M. J. 1 (U.S. Armed Forces 2006).

\textsuperscript{53} See \textit{id.}

\textsuperscript{54} See \textit{id.} at 7 (finding that one of the purposes of the separation or powers was that members of the military would not
judge could be a constitutionally incompatible office if the office that allowed for it, reserve military officer, was not. By ducking the issue of whether a reserve military officer could be a member of Congress, the court left Senator Graham and other members of Congress like him free to continue to serve as reserve military officers, just not judges.\textsuperscript{55}

\textbf{2. Both Active Duty and Reserve Military Officers are Subject to the Emoluments Clause.}

As demonstrated above, the Emoluments Clause most clearly applies to both active duty and reserve military officers. In addition to the several court cases and executive opinions previously cited, federal legislation clearly states that members of the military reserves may only accept foreign emoluments with the approval of the secretary of the service concerned.\textsuperscript{56}

\textsuperscript{55} See \textit{id.} (deciding that being a judge and not military status was the issue in this case).

3. Active Duty Officers may not Serve as Presidential Electors but Reserve Officers may.

Case law and legal scholarship are remarkably silent on the issue of whether military officers can serve as presidential electors under Article II, sec. 1, cl. 2. It seems fairly clear from the reasoning above that an active duty military officer could not serve as an elector. To determine if reserve military officers can serve as electors, an examiner would have to draw from either the Incompatibility Clause or the Emoluments Clause. If the analysis above is correct and intention of the Founders in the Emoluments Clause was to prevent foreign corruption of the executive, then the Incompatibility Clause would provide better guidance than the Emoluments Clause.\(^\text{57}\) The

\(^{57}\) Compare The Federalist No. 76 at 459 (Alexander Hamilton) (asserting his concern about the influence of the executive on the legislature); The Federalist No. 55 at 345 - 46 (James Madison) (proclaiming that the clause was designed to prevent the President from undermining the “virtue” of the House of Representatives.”) with Calabresi supra note 8, at 164
Incompatibility Clause has much more to do with the separation of powers, whereas the Emoluments Clause is about avoiding foreign influence on American officers.\textsuperscript{58} Therefore, since under the Incompatibility Clause members of Congress are allowed to serve as reserve military officers, a reserve military officer would probably also be able to serve as an elector.

\textbf{B. The Commissioning Process Yields More Evidence That Active Duty Officers are Treated Differently Under the Constitution.}

After looking to the Constitution and relevant case law, anyone attempting to judge whether a military officer is an officer under the United States would have to look at federal statute. This Section looks at the federal statutes to see if anything in the procedures for confirming military officers marks a difference between the active duty and reserves.

\begin{enumerate}
\item \textbf{1. The law Requires More Active Duty Officers to be Confirmed by the Senate Than Reserve Officers.}
\end{enumerate}

The Appointments Clause of the Constitution requires Senate approval for the officers nominated by the President.\textsuperscript{59} The (proclaiming the Emoluments Clause to be an attempt at a foreign anti-bribery measure).

\textsuperscript{58} See id.

\textsuperscript{59} See U.S. Const. art. II, sec. 2, cl. 2 (“he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the
Constitution does provide an exception, however, for officers which Congress deems minor enough so as to not warrant Senate confirmation.\textsuperscript{60} These officers may be directly appointed by the President.\textsuperscript{61} Since military officers are indeed officers under the United States, they too are subject to the Appointment Clause. The law governing the appointment of military officers pursuant to the Constitution is Title 10.\textsuperscript{62} Under this law, original active duty officers below the grade of O-3 may be appointed by the President alone.\textsuperscript{63} Original officers above

\begin{flushright}

\textsuperscript{60} See id. ("whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.")

\textsuperscript{61} See id.

\textsuperscript{62} See 10 U.S.C.

\textsuperscript{63} See 10 U.S.C. 531 (a) ("Original appointments in the grades of second lieutenant, first lieutenant, and captain in the Regular Army, Regular Air Force, and Regular Marine Corps and in the grades of ensign, lieutenant (junior grade), and lieutenant in the Regular Navy shall be made by the President alone."); "Original appointments in the grades of major, lieutenant
those grades must be confirmed by the Senate. Reserve officers below the grade of O-5 may be appointed directly by the President but officers above that must receive Senate confirmation.64

2. The Rules of the U.S. Senate Allow for Uncontroversial Military Officers to be Confirmed Quickly.

After the President provides his military nominations to the Senate, that institution’s own internal rules and procedures take-over.65 The Senate Committee on Rules and Administration

See generally, Elizabeth Rybicki, Senate Consideration of Presidential Nominations: Committee and Floor Procedure, CRS

REPORT FOR CONGRESS, May 24, 2005 (providing the rules and
directs that all nominations must be referred to the appropriate committees for review, except when waived by unanimous consent. The Senate Committee on the Armed Services has jurisdiction over military commissions and may receive thousands of nominations per year. Once in committee, the members will investigate, conduct hearings, and take some action. When it comes to non-controversial appointments, like most military officers, the committees and Senate will approve all the nominations at once.

C. Federal Regulations Restrict Political Activity by Military Officers, Which can Further Limit Active Duty Members.

1. Active Duty Officers may not Engage in Partisan procedures governing the Senate’s confirmation process).

66 See Senate Standing Rule 31.


68 See Rybicki, supra note 66 at CRS-6 (writing that the committee may take the following actions: (1) report the nomination out favorably; (2) report the nomination out unfavorably; (3) make no recommendation; or (4) do nothing).

69 See id. at CRS-1 (mentioning that the Senate may approve en banc hundreds of military commissions and promotions at one time).
Activities but Reserve Officers may While not on Duty.

Once a person is confirmed as a military officer, federal regulations govern their activity. When it comes to political activity, such as running for Congress or serving as an elector, the Hatch Act governs.\textsuperscript{70} The Hatch Act of 1939 forbids certain political activity by employees of the executive.\textsuperscript{71} However, in the case of the military, departmental regulations really determine what members can and cannot do. The regulation governing political activity by members of the armed forces sets out several activities which are prohibited to active duty members.\textsuperscript{72} Among these prohibitions are participating in a political campaign and running for a U.S. civil elective office.\textsuperscript{73} These prohibitions do not apply to reserve members on

\textsuperscript{70} See 5 U.S.C. 7323.

\textsuperscript{71} See id. (prohibiting employees of the executive from running for a partisan political office).

\textsuperscript{72} See Department of Defense Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty, February 19, 2008.

\textsuperscript{73} See id. at sec. 4 (listing prohibitions and forbidding active duty military members from serving in elective office unless otherwise provided for by law).
temporary active duty.\textsuperscript{74}

In addition to Defense Department regulations, each service has its own as well.\textsuperscript{75} These regulations mirror Defense Department regulations but add that military members called to active duty for less than thirty days must only refrain from political activity while on duty or in uniform.\textsuperscript{76} The punishment for disobeying any of these regulations is authorized under the Uniform Code of Military Justice Article 92, Failure to Obey a Lawful Regulation.\textsuperscript{77} However, these regulations take care to include only active duty military members and reserve members called to active duty. Therefore, it seems as though reserve members are basically free to pursue political activity so long as they are not in uniform or assigned to active duty.

\textsuperscript{74} See id. (allowing reservists to serve in civil office so long as their military duties do not conflict).

\textsuperscript{75} See, \textit{e.g.}, Air Force Instruction 51-902, \textit{Political Activities by Members of the U.S. Air Force}, January 1, 1996 (covering active duty members and reservist called to active duty).

\textsuperscript{76} See id. at 8 (ordering military members to pay their military duties first attention).

\textsuperscript{77} See 10 U.S.C. 892 (providing that any person subject to this chapter who fails to obey a military regulation shall be subject to such punishment as a court-martial shall direct).
2. Federal law Created a Special Category of Reserve Officers who may Serve in key Federal Positions as well as the Military.

Not only are the members of the military separated into active duty and reserves, but the reserves themselves are further divided into sub-categories. The categories which are important for the purposes of this Comment are the Standby, Retired, and Ready reserve. Members of the Ready Reserve are those members who are most able to be called into active service should the need arise.\(^{78}\) By regulation, these members may not hold key positions within the federal government.\(^ {79}\) The Retired Reserve is comprised of members who receive retired pay on the basis of their previous military service.\(^ {80}\) Members of the

\(^{78}\) See 10 U.S.C. 10149(a) (proclaiming that members of the Ready Reserve are "screen[ed]" on a continuous basis to ensure, among other things, that the Ready Reserve does not retain (1) members with "critical civilian skills" in greater numbers than necessary, or (2) members "whose mobilization in an emergency would result in an extreme. . . community hardship.").

\(^{79}\) See 32 C.F.R. 44.3(e) (defining key positions as those "that cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the parent Federal agency or office to function effectively").

\(^{80}\) See 10 U.S.C. 10154.
Retired Reserve under the age of sixty are considered mobilizable and members over sixty are only considered mobilizable if they possess special skills on a case-by-case basis.\textsuperscript{81}

The Standby Reserve is managed by Defense Department regulations.\textsuperscript{82} This category contains people who maintain their military affiliation without being in the Ready Reserve, who have been as designated key civilian employees, or who have a temporary hardship or disability.\textsuperscript{83} They are not required to undergo continuous training and are not assigned to units, but create a group of trained individuals who could be mobilized if necessary to fill manpower needs in specific skills.\textsuperscript{84} However, a Standby Reserve member cannot be ordered to active duty involuntarily unless the secretary concerned, with the approval of the Secretary of Defense, decides that there are not enough qualified members of the Ready Reserve who are readily available.\textsuperscript{85} A sub-category of the Standby Reserve; the Active

\textsuperscript{81} See id.


\textsuperscript{83} See 10 U.S.C. 10151-53.

\textsuperscript{84} See id.

\textsuperscript{85} See 10 U.S.C. 12306.
Status List are those members temporarily assigned to the Standby Reserves for hardship or other cogent reason, those not having fulfilled their military service obligation or those retained in active status when provided for by law, or members of Congress and others identified by their employers as “key personnel” and who have been removed from the Ready Reserve because they are critical to the national security in their civilian employment. 86 One prominent example of these key national personnel are FBI Special Agents, who may only serve in the Standby Reserve. 87 A further possible justification for placing members of Congress in the Standby Reserves could be that it makes them less likely to be judged federal officers according to the criteria mentioned above. Limiting service time and duration and offering no pay makes Standby Reserve officers much less likely to fit the category of federal officers forbidden from serving in Congress.

86 See 10 U.S.C. 12646.

87 See Dew v. US brief for the US in opposition No. 99-1089 (Feb. 2000) at 2. (announcing that the Attorney General and Defense Secretary have determined that FBI Special Agents may not serve in the Ready Reserve but may serve in the Standby Reserve as long as their military service does not interfere with their duties).
V. Active Duty Officers are Subject to More Restriction on Their Political Activities Than Reserve Officers.

A. Active Duty Officers are in an Office of Trust or Profit Under the Constitution and are Subject to Numerous Constraints.

Based on all this information, it seems clear that active duty military officers are in an office of trust or profit under the Constitution. They are nominated by the President and confirmed by the Senate, serve non-temporary and non-advisory billets, receive pay, and exercise the authority of the government. They are also barred from serving in Congress, receiving emoluments from foreign governments, and standing as electors for the presidency by constitutional law, federal statute, and military regulations.

B. Reserve Military Officers may Serve as Members of Congress and Presidential Electors.

Reserve military officers are not so clearly defined. They receive presidential appointments but only more senior officers stand for Senate confirmation. They can exercise the authority of the government but they can also serve temporarily and for no pay. The Emoluments Clause clearly applies to reservists by statute and opinion but the Incompatibility Clause probably does not. Federal law states that reservists shall not be considered holding an office of trust or profit solely based on their appointments but at least one Supreme Court Justice has
proclaimed ineligible to be members of Congress. Given the weight of evidence, it seems safe to conclude that members of the reserves may also serve as members of Congress and as presidential electors but may not receive foreign emoluments without approval.

VI. Conclusion

Active duty military officers may not receive emoluments from foreign governments, serve as members of Congress, or serve

88 Compare Section 246 of The Armed Forces Reserve Act of 1952, 66 STAT. 495, 50 U.S.C. 981 (1952 USED.), reenacted as section 29 (D) of The Act of August 10, 1956, 70A STAT. 632, now 5 U.S.C. 30R (D) (“When not on active duty, members of the reserve components shall not be held or considered to be officers or employees of the United States, or person holding any office of profit or trust or discharging any official function under or in connection with any department or agency of the United States, solely by reason of their appointments, oaths, commission, or status as such, or any duties or functions performed or pay or allowances received as such.”) with Schlesinger v. Reservist Comm. to Stop the War, 94 S.Ct. 2925, 2938 (Douglas, J. dissenting) (writing that he would direct the Secretary of Defense to remove members of Congress from his list of Standby Reservists).
as presidential electors. Reserve military officers also may not receive emoluments from foreign governments, but may serve as members of Congress and presidential electors.

However, since military officers often transfer between active duty and the reserves, timing of eligibility for public office must be matched with military status. Therefore, knowing when eligibility for public office is determined is the essential final step in deciding if an officer can legally hold public office. There are only two choices for determining when a person must meet the eligibility requirements for public office: either at the time of election or when the candidate enters office. The view that eligibility must exist at the time of election is the minority view. The majority rule, on the other hand, says that eligibility must be determined when the candidate enters the new office and begins to discharge his or her office.

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89 See P. H. Vartanian, Time as of Which Eligibility or Ineligibility to Office is to be Determined, 88 ALR 812 (commenting that the conditions of eligibility must exist at the time of the election, and that their existence only at the time the term begins or the entry of the candidate into office is not sufficient to qualify him for the office is the less popular view).
her official duties. Therefore, the jurisdiction in which the military officer lives will determine whether or not he or she must leave active duty by election time or by the first day of the new term of office. In either case, since an active duty officer cannot campaign, engage in partisan politics, or be an active candidate in a partisan election, it would probably be safest to separate from active duty before even running.

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See id. (writing that most jurisdictions hold eligibility to public office must be determined according to conditions existing at the time of the beginning of the term of office and assumption of official duties).