in the

## NOV 22 1974

Rugh M. Durham Chief, Legislative & Legal Section Office of Legislative Affairs

Antonin Scells Assistant Attorney General Office of Legal Counsel

Proposed bill to increase the pelary of the Attorney General

Prior to the nomination of Senator William B. Saxbe to be Attorney General, a statute was enacted which raduced the salary and other emoluments of the Attorney General to those in effect on January 1, 1959. See Public Law 93-178 (December 10, 1973). You have orally requested our views on a proposed bill which would repeal that reduction, effective at noon, January 2, 1975.

The proposal raises two separate issues. Our conclusions are as follows: (1) Enactment of the proposed bill during the current term of Congress would not affect the legality of Mr. Saxba's appointment or tenure. (2) Payment of the increased salary would apparently not be prohibited by Article I. section 5, clause 2 of the Constitution.

1. Effect of proposal upon Mr. Samba's holding office

Article I, section 6, clause 2 provides in part that;

No Senator or Representative shall, during the Time for which he was elected, he appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time.

We are unawate of any court decision construing this provision, although two suits challenging the constitutionality of Mr. Saxbe's appointment have been brought under section 2 of Public Lew 93-178 and remain pending.1/

<sup>1/</sup> Cerdarett v. Sarbe, Civ. Action no. 73-4289-M. D. Mass.; Committee for Fair Play to Voters v. Sarbe, Civ. Action No. 74C1v942, S.D.H.Y.

المؤالة

It might be argued, in view of the language of the emoluments clause, that enactment during 1974 of an increase in the Attorney General's salary would have the effect of (retrospectively) invalidating Hr. Sambe's appointment. This position is in our view unsound.

It is clear that the mere fact that the appointee was not a member of the Congress when the legislative change was effected will not prevent application of Article I, section 5, clause 2. See 17 Ops. A.G. 365 (1882) (attempted appointment of former Senator Kirkwood to the Tariff Commission, which was legislatively established after his resignation from the Senate). It would not be sound constitutional interpretation, however, to apply the provisions when the law in question is enacted not merely after the affected person's departure from the Congress but also after his appointment to the position in question. 2/ Otherwise, in contravention of the President's power of removal, the Congress might, by the simple act of passing a pay raise, accomplish the removal of a former Congressman.

A similar conclusion follows from a strict grammatical reading of the language of the constitutional provision. By using the future tense when referring to the appointment ("no Senator or Representative shall . . . be appointed") and the future perfect tense to refer to the emoluments ("the Emoluments whereof shall have been encreased") the provision displays the intention of voiding the appointment only when the increase of emoluments precedus it.

Finally, the inability of this legislation to affect the Artorney General's appointment is supported by the course of action taken with respect to appointment of Secretary of Defense Laird and Attorney General McGrath. The 1969 Attorney General's opinion dealing with the former and the 1949 Office of Legal Counsel memorandum dealing with the latter concluded that Article I, section 6, clause 2 has no applicability whatever (much less any retroactively invalidating effect) in the case of post-appointment salary increases. Since the details of these cases are more relevant to the second point considered in this memorandum, discussion of them will be reserved for that section.

<sup>2/</sup> Of course this is only possible with respect to the "increase of emcluments" portion of Article I, section 6, clause 2, and not the "creation of office" portion, since a person cannot be appointed to an office before it has been created.

of course, there may be situations involving actual collusion between Nambers of the Congress and the President to increase the employments of a particular post after one of the Nambers of Congress shall have been appointed to it. In such a case, where actual connection between the appointment and the subsequent increase can be shown, the employment clause might possibly be held to render the appointment invalid, as having been infected with unconstitutionality from its inception. But at least absent such connection between the appointment and the increase, it is our firm view that inticle I, section 5, clause 2, cannot be held retroactively to invalidate an appointment.

## 2. Validity of the proposed bill

Aside from the question whether the proposed legislation will invalidate Mr. Saxbe's appointment, there is the question whether the legislation itself is fueffective because it violates a prohibition implicit in Article I, section 6, clause 2. In our view, the salary increase is constitutionally permissible, although the matter is not as free of doubt as the point first discussed.

First of all, it might be well to climinate an apparent misconception which the bill contains: The delay of its effectiveness until noon, January 2, 1975 is evidently intended to prevent any increase in salary with respect to the term for which Mr. Saxhe was elected to the Senate. It is not our view. however, that the 93d Congress expires at noon, January 2, 1975. The pertinent provisions of the Constitution, the Twentieth Amendment, and 2 U.S.C. section 1, appear to indicate that the dividing line is noon, January 3. This point done not seen to as conclusive of the bill's invalidity in its present form both for the ressons set forth below and also because in our view the crucial factor is not the period with respect to which the salary is increased but rather the period during which the increase is voted by the Congress. That relevant period will be the term for which former Senator Saxbe was elected, whither or not the legislation has a Japuary 3 effective date. The constitutional ban would apply, for example, if the present Congress were to vote a salary increase for a particular office effective next February, and if a present Representative were then appointed to the post before the current Congress expires. Or to put the point another way, the phrase "shall have been encreased" in the constitutional provision refers to the enactment of the increase rather than to its entering into effect. Nonetheless, since it is certainly argueble that this factor is

14 G

relevant, 3/ we strongly recommend that the effective date be changed to January 3, 1975.

الحور وأنو

In support of the permissibility of the proposed legislation, the following points can be made:

## (a) The language of the constitutional provision

Article I, section 6, clause 2 is directed against appointments, not increases in salary. The statute would not constitute any violation of the tarms of the constitutional provision, since Attorney General Saxbe will not be appointed to any position for which the 93d Congress "shall have" (previously) exacted a salary increase (assuming, as we are for purposes of this memorandum, that section 1 of Public Law 93-178 avoided that sutcome with respect to the 1969 increase) . It should be noted that a rigid adherence to the technical language of the constitutional provision was adopted in the first Attorney General's opinion relating to it -the opinion discussed above dealing with the Mirkwood appointment. There Attorney General Breveter absolutely declined to "consider the question of the policy which occasioned this constitutional prohibition," finding that his decision "must be controlled exclusively by the positive terms of the provisions of the Constitution. The language is precise and cleer . . . . 17 Ope. A.G. et 356.

## (b) Barlier opinions of the Attorney General and the Office of Legal Counsel

In 1969, Representative Melvin Laird asked Attorney General Clark for an opinion as to whether Mr. Laird's commencement of a term as Member of the House of Representatives for the 91st Congress would preclude his appointment as Secretary of Defense, in view of the possibility that the salary payable to the Secretary of Defense might be increased early in that session pursuant to section 225 of the Federal Salary Act of 1967, 81 Stat. 642. Under the statutory plan of section 225, the President includes

<sup>3/</sup> See, for example, the testimony of Professor William Van Alstyne supporting exactment of Public Law 93-178, Bearing on S. 2673 before the Senate Justiciary Committee, 93d Cong., Lat Sess. (1973) pp. 59-60.

recommendations for salary increases in his hudget nemsare (which by law must be transmitted within the first 15 days of the session, 31 U.S.C. 11(a)); the recommendations become effective no cerlier them 30 days following the transmittal in the budget message unless they are disapproved by Congress. Under the assumptions set forth in the opinion. Mr. Laird would have been a Hember of the 91st Congress when the recommendations were transmitted, but Secretary of Defease when they begane affective. On this besis (which is if anything less favorable than the fact situation here presented) Attorney General Clark concluded that the appointment would be valid, and apperently assoldered the sclery increase valid as wall. The crux of his opinion is that "the ban [of Article I, section 6, clause 2] clearly does not apply to an increase in compensation which is proposed subsequent to the appointment." We have no reason to believe that, efter his appointment, Secretary Laird accepted enything less than the increased salary which the law provided; indeed, it would probably have been unleviul for him to do so. MacMath v. United States, 248 U.S. 151, 152 (1918). It is interesting to note that the salary increase at issue in the Laird case was procisely the one which prevented Hr. Sambe's appointment in absence of Public Lew 93-178. The only difference was that Mr. Laird's appointment preceded. whereas Mr. Saxbe's would have followed, the salary incresse.

In August 1949, then Senator J. Howard McGrath was under consideration for appointment to be Attorney General. There was then pending in the Senate a pay raise bill which would have included that office. An OLC memorandum addressed to the issue concluded (without substantial explanation other than the explicit terms of the Constitution):

There can be no question that if Scuttor McGrath receives his appointment as Attorney General before the pending Executive Pay Bill becomes law, the Senator will be estitled not only to hold the office of Attorney General but also to receive any increase in pay that the Congress votes for that office.

of course, Senator McGrath was appointed Attorney General in August of 1949. The pay raise bill was passed in October of that year, and Attorney General McGrath was in fact paid at the increased level.

In opposition to the validity of the present legislation, a respectable argument can be derived from the apparent purpose

Name !

of the constitutional proscription. As pointed out in Assistant Attorney General Diron's testimony on S. 2673 (which became Public Law 93-178), the purpose of the empluments clause was to protect the public against the correptive and spendthrift effects of executive-legislative collusion. It is clear from the language of the provision and its legislative history that the rick of collusion was seen to exist not nevely while a legislator was still in the Congress, but also after he had left, until the term for which he was elected expired. It scene aboutd to permit this post-carvice disability to be evoided by the simple device of having the former Member's colleagues vote the increase the day after, rather than the day before, his appointment is made. Accordingly, while the appointment itself may not be voided by such legislative action (since that would provide a dangerous device for legislative interference with the executive removal power) it is nevertheless reasonable to essert that such legislative setion is fundamentally contrary to the purposes of Article I. section 6, clause 2, and therefore invalid.

I think the most effective answer to this policy argument is that the constitutional provision does not avoid some degree of abserdity in any event, no matter what imaginatively constructed extensions are devised; and that therefore it is best to restrict the provision to its clear, literal meaning, It is not apparent, for example, why the possibility of Ex. Saxba's collusion with former colleagues should be less after the end of the last year of his essigned term (at which time one-third of his colleagues might be replaced) then it would have been at the end of the fourth year of his assigned term (at which time one-third of his colleagues might have been replaced). As for a means of easy evesion, nothing could be easier than having the Cougress create a new post, to be filled by an existing appointee, and then appointing the favored Member to the vacated office. In light of the essentiel incohesiveness of the constitutional provision, I de not regard the policy argument set forth above -- which assumes a well-thought-out arrangement -- as persussive. On balance, and perticularly in light of the opinions and prectice discussed above, I am inclined to read the Constitutional provision literally, and thus regard the present legislation as walid.

The counter ergument must be weighted, however, in accessing the legislative prospects for the proposal. It unquestionably appears to do what the Constitution seems to disfavor. And though the same has been done before, the legislative climate is now drastically different. It is clear that unconstitutionality will be asserted by some members of Congress. Buring the heatings and the floor debate on Public Law 93-178, several persons, including proponents of the bill, expressed the view that an effort to increase Mr. Saxbe's salery after his appoint-

ment but before expiration of the Sanate term for which he was elected would be an "evasion" of the encluments clause and would be wholly or partly invalid. See, e.g., Rearing on S. 2673 before the Sanata Judiciary Committee, 93d Cong., 1st Sees. (1973) p. 69 (Professor William Van Alstyne): 119 Cong. Rec. 8 21298 (delly ed., New. 28, 1971) (Remator Hart, a proponent); S 21279 (Sanator Robert Syrd, an opponent).

I might also note that the proposed bill would leave intact section 2 of Public Law 93-178, authorizing civil suits to challenge the constitutionality of the Attorney General's "appointment and sectionance in office." One of the factors which should be considered in deciding whether to seek the estary increase now, rather than in the 94th Congress, is the possibility of eliminating that troublesome provision if the latter course is adopted.