

December 21, 1978

**78-99 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Judges—Members of Congress—Constitutional
Restriction on Appointment (Article I, § 6, cl. 2)—
Omnibus Judgeship Bill (28 U.S.C. § 133, as
amended)**

This responds to your inquiry concerning any legal restriction against the appointment of former or sitting Members of Congress to civil offices created by Congress at the time such persons were Congressmen. Specifically, the issue concerns the appointment of former members of the 95th Congress to the new judgeships created by the Omnibus Judgeship Bill; 28 U.S.C. § 133, as amended by 92 Stat. 1630.

The relevant legal provision is Article I, § 6, cl. 2, of the Constitution:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This provision poses no obstacle with respect to any current member of the House of Representatives since each member's term will expire, under the Twentieth Amendment, at noon on January 3, 1979.¹ The same cannot be said for each current Senator. A Senator is, under the Seventeenth Amendment, elected for a term of 6 years. However, under the Constitution, Article I, § 3, cl. 2, the terms of Senators are staggered so that one-third are chosen every second year. Accordingly, only those whose terms expire at noon on January 3, 1979, will be eligible under Article I, § 6, cl. 2, for appointment to the subject

¹Even if a member of the House of Representatives were reelected to a new term in the past election he would not be disqualified for appointment to one of the judgeships because the judgeships were created during the term expiring at noon on January 3, 1979, the term that constitutes the period of disqualification.

judgeships at that time. While other Senators will not be eligible in 1979 for appointment to the judgeships, their disqualification will lapse upon the expiration of their elected terms.

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