OFFICES AND OFFICERS OF THE CONSTITUTION PART II: THE FOUR APPROACHES

SETH BARRETT TILLMAN[†] AND JOSH BLACKMAN[††]

This Article is the second installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series. In this second installment, we will identify four approaches to understand the Constitution's divergent "office"- and "officer"-language.

First, under Approach #1, the Intermediate View, the Constitution's references to "offices" and "officers" extend exclusively to positions in the Judicial Branch and in the Executive Branch—whether appointed or elected. But the Constitution's references to "offices" and "officers" do not extend to positions in the Legislative Branch—whether appointed or elected.

Second, under Approach #2, the Maximalist View, the Constitution's divergent "office"- and "officer"-language is used synonymously. And, under this approach, these phrases refer to positions in *all* three branches, whether appointed or elected.

Third, under Approach #3, the Minimalist View, the Constitution's divergent "office"- and "officer"-language has different meanings. The phrase "Officers *of* the United States" extends exclusively to *appointed* positions in the Executive and Judicial Branches. And the phrase "Office . . . *under* the United States" extends exclusively to *appointed* positions in all three branches. (The ellipses refer to different words the Framers placed after *office* but before *under*: "profit," "trust," and/or "honor"). For more than a decade, Tillman has advanced Approach #3. Blackman was first piqued by Tillman's position shortly after he became a law professor, and he was thereafter persuaded.

---

† Seth Barrett Tillman, Associate Professor, Maynooth University Department of Law, Ireland. Roinn Dlí Ollscoil Mhá Nuad.

†† Josh Blackman is a professor at the South Texas College of Law Houston. The authors thank the student editors at *South Texas Law Review*, the student and faculty organizers and participants at the South Texas College of Law symposium on *The Foreign Emoluments Clause—From President Washington to President Trump*, and the faculty organizers at 11th Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference, University of San Diego School of Law.

Finally, we consider Approach #4, which we refer to as the Clause-Bound View. Under this approach, the "office"- and "officer"-language in each provision of the Constitution should be interpreted in isolation, without regard to how the same or similar language is used elsewhere in the Constitution. For example, the phrase "Officers of the United States" in one clause may have a different meaning than the phrase "Officers of the United States" in another clause.

This Article—at more than 30,000 words in length—is incomplete. Here, we simply introduce our taxonomy. If all goes to plan, the planned ten-part series will be completed circa Spring 2023. At that point, our project will be substantially complete. And, we hope, any remaining significant lingering questions will have been answered.

INTRODUCTION

The Constitution's original seven articles include twenty-two provisions that refer to "offices" and "officers." Some clauses use the words "office" or "officer," standing alone and unmodified. Other clauses use the word "office" or "officer" followed by a modifier, such as "of the United States," "under the United States," or "under the Authority of the United States." We refer to the language in these twenty-two provisions as the Constitution's *divergent* "office"- and "officer"-language.

This Article is the second installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series.[1] In this second installment, we will identify four approaches to understand the Constitution's divergent "office"- and "officer"-language.

First, under Approach #1, the Intermediate View, the Constitution's references to "offices" and "officers" extend exclusively to positions in the Judicial Branch and in the Executive Branch—whether appointed or elected. But the Constitution's references to "offices" and "officers" do not extend to positions in the Legislative Branch—whether appointed or elected. We refer to Approach #1 as the Intermediate View because some elected positions

1. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021).

(i.e., the President and Vice President) are "offices," but other elected positions (i.e., Representative and Senator) are not "offices." Generally, under Approach #1, the Constitution's divergent "office"- and "officer"-language is used synonymously.

Second, under Approach #2, the Maximalist View, the Constitution's divergent "office"- and "officer"-language is also used synonymously. But, under this approach, these phrases refer to positions in *all* three branches, whether appointed or elected. The President and Vice President are covered by this language, as are Representatives and Senators. Appointed officers in *all* three branches, including appointed positions in Congress, are also covered by this language.

Third, under Approach #3, the Minimalist View, the Constitution's divergent "office"- and "officer"-language has different meanings. The divergent phrases that reference "offices" and "officers" are *not* used synonymously. The phrase "Officers *of* the United States" extends exclusively to *appointed* positions in the Executive and Judicial Branches. And the phrase "Office *under* the United States" extends exclusively to *appointed* positions in all three branches. These two phrases do not embrace *elected* officials, such as the President or members of Congress. Additionally, the phrase "Office or public Trust under the United States" appears in the Religious Test Clause.[2] This phrase encompasses two categories of positions: "Office[s] . . . under the United States" and "public Trust[s] under the United States." The former category includes appointed positions in all three branches. The latter category includes a different group of positions: federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties. In this series of articles, we will use the word "position" as a higher-level category—which includes both elected *officials* and appointed *officers*.

For more than a decade, Tillman has advanced Approach #3.[3] Blackman was first piqued by Tillman's position shortly after he became a law

2. U.S. CONST. art. VI, cl. 3.

3. *See, e.g.*, Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95, 110–12 (2016) (peer reviewed); Seth Barrett Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 71–72 (2014) (part of a special issue on this topic); Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13 ELECTION L.J. 336, 342–43 (2014); Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, & the Religious Test Clause–A Response to Professor Josh Chafetz's* Impeachment & Assassination, 61 CLEV. ST. L. REV. 285, 319 (2013); Seth Barrett Tillman, Citizens United *& the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 11–14 (2012) (part of a 4-part exchange with Professor Teachout),

professor,[4] and he was thereafter persuaded. Between 2017 and 2020, we advanced Approach #3 in several amicus briefs filed in the Emoluments Clause litigation.[5]

Finally, we consider Approach #4, which we refer to as the Clause-Bound View. Under this approach, the "office"- and "officer"-language in each provision of the Constitution should be judged by itself, without regard to how the same or similar language is used elsewhere in the Constitution. For example, the phrase "Officers of the United States" in one clause may have a different meaning than the phrase "Officers of the United States" in another clause.

Throughout this article, we attempt to complete theories put forward by others. We can only try to fairly explicate these positions. Their theories are in many regards incomplete because they were not trying to develop a systematic taxonomy of the Constitution's "office"- and "officer"-language. Moreover, we do not agree with these theories. Still, we try to follow the implications of their theories in the most favorable light.

This Article, Part II of a planned ten-part series, proceeds in five sections. In Section I of Part II, we categorize nineteen total federal positions to illustrate the different offices and officers of the Constitution. Four of these

---

http://ssrn.com/abstract=2012800 [https://perma.cc/LTW7-8865]; Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107, 111–19 (2009) (part of an exchange with Professor Prakash); Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers & the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 146–48 (2008) (4-part debate with Professor Steven G. Calabresi).

4. Josh Blackman, *Are Supreme Court Justices "Officers of the United States"?*, JOSH BLACKMAN'S BLOG (June 4, 2013), https://joshblackman.com/blog/2013/06/04/are-supreme-court-justices-officers-of-the-united-states/ [https://perma.cc/T59C-RJ3F] ("So, with the answer less than clear, I did what everyone should do to resolve obscure, but fascinating questions about the meaning of 'office under the United States.' I asked Seth Barrett Tillman. Within a matter of hours, Seth provided me with a five-page reply, which he has posted on SSRN. Remarkable. Seth offers a number of ways to distinguish an 'Officer under the United States' [sic] from a holder of a 'Public trust,' including the manner in which the person obtains that position (election v. appointment), how the position is created (not by statute), and whether the person is subject to supervision in their normal course of duties . . . . I don't know that I'm persuaded by his arguments, or even my own . . . but, the answer isn't as open and shut as I previously thought."). Blackman mistakenly wrote "Officer under the United States," a phrase that does not appear in the Constitution. *See also* Seth Barrett Tillman, *Are Supreme Court Justices "Officers of and under the United States"?: A Proposed Answer for Professor Blackman*, SSRN (June 4, 2013), https://ssrn.com/abstract=2274039; *see generally* Jay Wexler, *Scott Brown Violated the Constitution!!!! (maybe)*, ODD CLAUSES WATCH (Sept. 6, 2011, 12:22 PM), http://oddclauses.wordpress.com/2011/09/06/scott-brown-violated-the-constitution-maybe/ [https://perma.cc/CLW6-8YSN] ("[] I decided instead to pose this question to one of the world's biggest experts in the Constitution's odd clauses. Seth Barrett Tillman . . . .").

5. *See* Josh Blackman, *Emoluments Clauses Litigation*, GOOGLE DRIVE (May 23, 2020), https://bit.ly/2LUUTiY [https://perma.cc/G9C3-VTZY]. All three cases were closed by 2021.

positions serve in the Executive Branch: (1) the President, (2) the Vice President (who also serves as the President of the Senate), (3) the Secretary of State, and (4) the Assistant to the Secretary of the Treasury. Eight of these positions serve in the Legislative Branch: (5) Representatives, (6) Senators, (7) the Speaker of the House, (8) the Senate President pro tempore, (9) the President of the Senate (the Vice President), (10) the Chief Justice (who presides at the president's impeachment trial), (11) the Clerk of the House, and (12) the Secretary of the Senate. Four of these positions serve in the Judicial Branch: (13) the Chief Judge of the Supreme Court (who also serves as the Chief Justice), (14) the Associate Judges of the Supreme Court, (15) the Circuit Judges of the inferior courts, and (16) the Clerk of the Supreme Court. We will address and explain our terminology for the judiciary in Section I.C. Finally, we selected three positions that do not exist within the three branches in any customary sense: (17) holders of letters of marque and reprisal, (18) Presidential Electors, and (19) transitional officers. There are nineteen total positions because two individuals wear two hats: the Vice President also serves as the President of the Senate, and the Chief Justice who presides at the president's impeachment trial also traditionally serves as the Chief Judge of the Supreme Court. These nineteen positions include posts that are appointed and elected; are principal and inferior "Officers of the United States"; are apex and subordinate officers; and are inside and outside the three branches. Two of these positions (the Vice President and the Chief Justice) overlap in two branches. This broad cross-section of the federal government will be used to illustrate how Approaches #1, #2, #3, and #4 differ.

Section II parses Approach #1, the Intermediate View. Professors Akhil Reed Amar and Vikram David Amar drew a global distinction between "officers" and legislative positions. We start with Approach #1, the Amars' position, because we suspect that it is now the one with the deepest support in legal academia. In short, members of Congress cannot be "officers" or hold any "office." The words "office" and "officers" only refer to positions in the Executive and Judicial Branches. And the Amars argued that the phrases "Officers of the United States" and "Office . . . under the United States" are synonymous.[6] But the Amars' position is conclusory. They have never explained why "[a]s a textual matter," these varied references to "[O]fficers of the United States" and "[O]ffice[s] . . . under the United States" "seemingly describe[] the same stations."[7] The Amars' position has several important implications. For example, if Approach #1 is correct, then the

6. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 115 (1995).

7. *Id.* at 114–15.

Presidential Succession Act of 1947 is unconstitutional. And under the Intermediate View, members of Congress are neither subject to impeachment, nor are they covered by the Foreign Emoluments Clause's "Office . . . under the United States"-language.

Section III considers Approach #2, the Maximalist View. Professor Zephyr Teachout is the leading modern advocate of the Maximalist View.[8] But she has not advanced this view as part of any broad theory of the Constitution's text. Rather, she has primarily discussed the phrase "Office . . . under the United States" in the Foreign Emoluments Clause. This language, she argued, extends the scope of the anti-corruption provision to all federal positions, appointed and elected. This position was advanced in *Blumenthal v. Trump*—one of the three Foreign Emoluments Clause cases.[9] And in *District of Columbia v. Trump*, another such case, Judge Peter J. Messitte accepted the Maximalist View.[10] Proponents of the Maximalist View have contended that the phrase "Office . . . under the United States"

8. Tillman and Teachout debated these issues in three separate fora. *See* Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, *supra* note 3; Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012), http://ssrn.com/abstract=2081879; Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013), http://ssrn.com/abstract=2012803; Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200 (2014), http://ssrn.com/abstract=2383385; *see also* Zephyr Teachout & Seth Barrett Tillman, *Common Interpretation—The Foreign Emoluments Clause: Article I, Section 9, Clause 8*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/759 [https://perma.cc/A7LL-M23R]; Seth Barrett Tillman, *Matters of Debate—The Foreign Emoluments Clause Reached Only Appointed Officers*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/759#the-foreign-emoluments-clause-reached-only-appointed-officers [https://perma.cc/UZT4-84SU]; Zephyr Teachout, *Matters of Debate—The Foreign Emoluments Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/759# the-foreign-emoluments-clause-by-zephyr-teachout [https://perma.cc/SBN8-6APZ]. *Compare* Zephyr Teachout, Room for Debate, *Trump's Foreign Business Ties May Violate the Constitution*, N.Y. TIMES (Nov. 17, 2016), https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/trumps-foreign-business-ties-may-violate-the-constitution [https://perma.cc/3HFZ-RNV6], *with* Seth Barrett Tillman, Room for Debate, *Constitutional Restrictions on Foreign Gifts Don't Apply to Presidents*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/constitutional-restrictions-on-foreign-gifts-dont-apply-to-presidents [https://perma.cc/8T6G-BGHV].

9. Plaintiffs' Supplemental Memorandum at 6, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17-1154), https://bit.ly/2LHBXUK [https://perma.cc/G9C3-VTZY].

10. District of Columbia v. Trump, 315 F. Supp. 3d 875, 882–86 (D. Md. 2018), *vacated*, 838 F. App'x. 789 (4th Cir. 2021).

extends to all federal positions, appointed and elected.[11] This litigation did not concern the phrase "Officers of the United States." Still, we draw a reasonable inference from the position put forward by office-maximalists: the phrase "Officers of the United States" would likewise extend to all federal positions, appointed and elected. Approach #2 yields three practical consequences different from Approach #1. First, under Approach #2, the Presidential Succession Act would be constitutional. Second, members of Congress would be subject to the Foreign Emoluments Clause. Third, under the Maximalist View, members of Congress are "Officers of the United States"; therefore, they can be impeached.

Section IV turns to our view: Approach #3, the Minimalist View. We address our view third because it highlights deficiencies with Approaches #1 and #2. Our preferred view does not treat the Constitution's "office"- and "officer"-language as synonymous. We count six distinct categories of the Constitution's offices and officers. First, the phrase "Officers of the United States" refers to appointed positions in the Executive and Judicial Branches. Second, the phrase "Office . . . under the United States" refers to appointed positions in the Executive and Judicial Branches, and non-apex appointed positions in the Legislative Branch. Third, the phrase "Office under the Authority of the United States" includes all "Office[s] . . . under the United States" and extends further to include a broader category of irregular offices. Fourth, the phrase "Officer" of "the Government of the United States" refers to the presiding officers identified in the Constitution. Fifth, the word "Officer," standing alone and unmodified, as used in the Succession Clause, refers to those who hold "Office . . . under the United States" and those who are "Officer[s]" of "the Government of the United States." Sixth, the phrase "Office or public Trust under the United States" encompasses two categories of positions: "Office[s] . . . under the United States" and "public Trusts under the United States." The former category includes appointed positions in all three branches; the latter category includes federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties.

Section V explains Approach #4, the Clause-Bound View. We address the Clause-Bound View last because it rejects the reasoning behind Approaches #1, #2, and #3. Under Approach #4, the "office"- and "officer"-language in every clause of the Constitution should be judged standing alone, without regard to how the same or similar language is used elsewhere.

---

11. *See, e.g.*, RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 226 n.11 (1974) (arguing, sarcastically, that "[i]f a Senator holds no 'office [under the United States],' it follows that he is exempt from th[e] prohibition [of the Foreign Emoluments Clause], so that we may have a Duke of Oklahoma serving in the Senate").

***

This Article—at more than 30,000 words in length—is incomplete. Here, we simply introduce our taxonomy. At various junctures, you may ask yourself, *What evidence do Tillman and Blackman have to support this claim*? We understand your frustration. Unfortunately, we cannot present everything at once. The bulk of our evidence will be put forward in the remaining eight installments. Our work in this Article is the culmination of more than a decade worth of scholarship. We considered whether we could cram everything into a single article, but decided that task would be unwieldy. Instead, we chose a serialized approach. And we are grateful to the *South Texas Law Review* for committing to this ambitious endeavor.

The first installment introduced the project.[12] This second installment lays out our taxonomy. The third installment will analyze the phrase "Officers of the United States." The fourth installment will trace the history of the "Office . . . under the United States" drafting convention. The fifth installment will consider the meaning of the phrase "Office . . . under the United States," which appears in the Incompatibility Clause, the Impeachment Disqualification Clause, the Foreign Emoluments Clause, and the Elector Incompatibility Clause. The sixth installment will analyze the phrase "Office under the Authority of the United States." The seventh installment will parse the phrase "any Office or public Trust under the United States." The eighth installment will analyze the phrase "Officer" of the "Government of the United States." The ninth installment focuses on the word "Officer," standing alone and unmodified, in the Succession Clause. Finally, the tenth installment will revisit Approach #4, the Clause-Bound view.

If all goes to plan, the planned ten-part series will be completed circa Spring 2023. At that point, our work will be complete. And, we hope, any remaining significant lingering questions will have been answered.

I. OFFICES AND OFFICERS THAT ARE INSIDE AND OUTSIDE THE THREE BRANCHES OF THE FEDERAL GOVERNMENT

To illustrate the different theories of the Constitution's "office"- and "officer"-language, we will focus on nineteen total positions. We selected these positions to provide a fair cross-section of people who serve inside and outside the three branches of the federal government. They include elected officials; "principal" officers appointed by the President; "inferior" officers appointed by the "Heads of Departments" and the "Courts of Law"; officers appointed by the House and the Senate; and Presidential Electors who are

12. *See supra* Part I; *supra* note 1.

appointed by the states. Two of these positions, the Vice President and the Chief Justice, overlap in two branches.

Four of these positions serve in the Executive Branch: (1) the President, (2) the Vice President (who also serves as the President of the Senate), (3) the Secretary of State, and (4) the Assistant to the Secretary of the Treasury.

Eight of these positions serve in the Legislative Branch: (5) Representatives, (6) Senators, (7) the Speaker of the House, (8) the Senate President pro tempore, (9) the President of the Senate (the Vice President), (10) the Chief Justice (who presides at the president's impeachment trial), (11) the Clerk of the House, and (12) the Secretary of the Senate.

Four of these positions serve in the Judicial Branch: (13) the Chief Judge of the Supreme Court (who also serves as the Chief Justice), (14) the Associate Judges of the Supreme Court, (15) the Circuit Judges of the inferior courts, and (16) the Clerk of the Supreme Court. We address and explain our terminology for the judiciary in Section I.C.

Finally, we selected three positions that do not exist within the three branches in any customary sense: (17) holders of letters of marque and reprisal, (18) Presidential Electors, and (19) transitional officers. There are nineteen total positions because two individuals wear two hats: the Vice President also serves as the President of the Senate, and the Chief Justice who presides at the president's impeachment trial also traditionally serves as the Chief Judge of the Supreme Court.

These positions represent a broad cross-section of the federal government. We will use these positions to illustrate how Approaches #1, #2, #3, and #4 differ.

A. Executive Branch Positions: The President, the Vice President, the Secretary of State, and the Assistant to the Secretary of the Treasury

In the Executive Branch, we will focus on the two officials who are elected by a nationwide vote: the President and the Vice President. They hold their positions "together . . . for the same Term" of four years.[13] Article II states that "[t]he executive Power shall be vested in a President of the United States of America."[14] And the Vice President will also succeed to the presidency in the case of the President's "Death, Resignation, or Inability to discharge the Powers and Duties of the said Office."[15] The Constitution identifies both the President and Vice President as *apex* presiding officers.

13. U.S. CONST. art. II, § 1, cl. 1.
14. *Id.*
15. *Id.* art. II, § 1, cl. 6.

Second, we consider the Secretary of State. This "principal Officer"[16] within the Executive Branch is appointed pursuant to the procedure described in the Appointments Clause.[17] We selected this position because it was the first cabinet post created by statute.[18] Third, we discuss the Assistant to the Secretary of the Treasury. This "inferior officer" is appointed by a "Head[] of Department."[19] We selected this position because of its longstanding history: In 1789, Congress established this position and authorized the Secretary of Treasury to appoint his Assistant.[20] All appointed positions in the Executive Branch are *non-apex* positions.

The Vice President wears two hats. The Vice President serves in the Executive Branch, and she also serves in the Legislative Branch in her capacity as the President of the Senate.[21] We discuss this alternate role in Section I.B.

B. Legislative Branch Positions: Representatives, Senators, the Speaker of the House, the Senate President Pro Tempore, the President of the Senate, the Chief Justice, the Clerk of the House, and the Secretary of the Senate

The Constitution refers to six specific positions within, associated with, or that preside over the Legislative Branch. First, "[t]he House of Representatives shall be composed of Members," who are also known as *Representatives*.[22] Second, "[t]he Senate of the United States shall be composed of two *Senators* from each State."[23]

16. The Appointments Clause does not use the phrase "principal officer," but the Opinions Clause does. *Id.* art. II, § 2, cl. 1 (stating that the President "may require the Opinion, in writing, of the *principal Officer* in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (emphasis added)).

17. *Id.* art. II, § 2, cl. 2 ("The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.").

18. *See* An Act establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789) (establishing the position of Secretary of State).

19. U.S. CONST. art. II, § 2, cl. 2 ("[T]he 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* . . . ." (emphasis added)).

20. *See* An Act to establish the Treasury Department, ch. 12, § 1, 1 Stat. 65 (1789) (establishing the position of Assistant to the Secretary of the Treasury).

21. U.S. CONST. art. I, § 3, cl. 4 ("The Vice President of the United States shall be *President of the Senate*, but shall have no Vote, unless they be equally divided." (emphasis added)).

22. *Id.* art. I, § 2, cl. 1. Senators are also characterized as members. *See id.* art. I, § 6, cl. 2.

23. *Id.* art. I, § 3, cl. 1 (emphasis added).

Third, the House Officers Clause provides that "[t]he House of Representatives shall chuse their *Speaker* and other Officers . . . ."[24] This Clause empowers the House of Representatives to choose the position commonly referred to as the *Speaker of the House*, or simply, the Speaker. The President plays no role in choosing the Speaker.

Fourth, the Senate Officers Clause empowers the Senate to "chuse their other Officers, and also a *President pro tempore*, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States."[25] The Senate Officers Clause differs from the House Officers Clause in one very important regard. The House can choose its own speaker. In the Senate, however, "[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless [the Senate is] equally divided."[26] The Senate Officers Clause allows the Senate to provide for the contingency when the Vice President is absent, "or when [the Vice President] shall exercise the Office of President of the United States." In preparation for, or during such circumstances, the Senate can choose a Senate President pro tempore. The President plays no role in choosing the Senate President pro tempore.

The Constitution identifies two positions that serve in the Legislative Branch and that also serve elsewhere. We already discussed the first such position, the Vice President, in Section I.B. The Vice President serves in the Executive Branch and in the Legislative Branch. The Vice President presides over the Senate in the capacity as President of the Senate. There is a second officer who wears two hats. The Chief Justice regularly serves in the Judicial Branch. However, when the President is impeached and "tried [in the Senate], the Chief Justice shall preside" in the Senate trial proceedings.[27]

We will also consider two *appointed* positions in the Legislative Branch that are not expressly identified in the Constitution: the Clerk of the House of Representatives and the Secretary of the Senate. The Clerk serves at the pleasure of the House. The Clerk of the House is a *non-apex* appointed position in the House. By contrast, the Constitution identifies the Speaker of the House as the *apex* presiding officer of the House.[28] Both the Speaker and the Clerk are chosen pursuant to the House Officers Clause, but only the former holds an *apex* position.

---

24. *Id.* art. I, § 2, cl. 5 (emphasis added).
25. *Id.* art. I, § 3, cl. 5 (emphasis added).
26. *Id.* art. I, § 3, cl. 4.
27. *Id.* art. I, § 3, cl. 6.
28. *See infra* Section IV.E.3 (discussing the Speaker's powers, as presiding apex officer of the House, to receive communications from other branches of the federal government).

Modern separation of powers scholars might think that the clerk is a somewhat insignificant position. But this role was the subject of some controversy in the English Parliament and later in the British Parliament. Historically, the crown had a significant role in selecting the clerk, who, on some occasions, served in parliament for life.[29] The clerk's power and tenure varied from monarch to monarch. By contrast, the members of the House of Commons selected the speaker from among their own ranks. Yet, the Commons' choice of speaker was still presented "to the monarch for formal approval."[30] As a result, the speaker would have had to rely on the clerk, a subordinate, who was not selected by Commons and, apparently, could not be removed by Commons.[31] And in the British New World colonies, colonial assemblies and governors disputed who had the power to appoint, confirm, and administer the oath to the assembly's members and to its clerk.[32]

Similar conflicts over control of the choice of speaker occurred in the colonies.[33] The popular legislative assemblies selected a speaker and presented him to the colonial governor for formal approval.[34] A governor's objection to an elected assembly's choice of speaker and clerk created friction.[35]

The Framers avoided the dilemmas faced by the colonial assemblies. First, the executive would have no role in choosing the presiding legislative officers. Second, the executive would have no role in choosing those officers

29. 1 ANDREW THRUSH, *The Officers and Servants of the House, in* THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1604–1629 (Andrew Thrush & John P. Ferris eds., 2010), https://www.historyofparliamentonline.org/volume/1604-1629/survey/viii-officers-and-servants-house [https://perma.cc/2ZUP-8MUS] ("Described as the 'usefullest man of the House' by Sir James Bagg in 1628, the clerk of the Commons was appointed by the king and held office for life by virtue of a grant under the great seal.").

30. MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 61 (1943); 2 JOSEF REDLICH, THE PROCEDURE OF THE HOUSE OF COMMONS 162–63 (A. Ernest Steinthal trans., 1908) (explaining competing claims of the Commons and monarch—with the former claiming a free choice in selecting speaker and the latter claiming the power to set aside the Commons' choice—but the "legal basis for the free choice of a Speaker had . . . been firmly laid" by George III).

31. *Cf.* THRUSH, *supra* note 29 (describing the clerk as a "royal appointee").

32. *See* CLARKE, *supra* note 30, at 167–68 (describing disputes relating to the scope of the governor's power to administer the oath to members); JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689–1776, at 207–11 (1963).

33. Colonial practice differed among the British New World colonies, and, not surprisingly, also varied in the same colony over the course of time. Often this practice depended on contingencies, such as the force of character of the assembly's leadership, the force of character of the particular governor, and whether he was well supported by the Board of Trade. *See* GREENE, *supra* note 32, at 206–07.

34. CLARKE, *supra* note 30, at 61–92; *see also* GREENE, *supra* note 32, at 206–07.

35. CLARKE, *supra* note 30, at 61–92.

the chamber as a whole appointed as legislative staff, such as the Clerk or Secretary. The House Officers Clause provides that the House can appoint "other Officers." Such positions are appointed by the House, pursuant to "the Rules of [the House's] Proceedings."[36] That is, the House can adopt orders by which such officers can be appointed, removed, and supervised. The President plays no role in the appointment, supervision, and removal of such officers. Moreover, under the Constitution of 1788 neither house plays any role in the appointment of the other house's subordinate officers. At the same time, pursuant to the Twenty-Fifth Amendment, a vacancy in the vice presidency shall be filled by presidential nomination upon confirmation of *both* houses.[37]

This intra-Legislative Branch separation reflects the principle of *unicameral autonomy*.[38] The House and the Senate establish their own rules, discipline their own members,[39] and—as relevant here—choose their own presiding officers and functionaries. For example, on April 1, 1789, the first House chose the first Clerk of the House of Representatives.[40] But this position was not entirely new. The Continental Congress, and later the Congress under the Articles of Confederation, had already established the position of secretary. And that secretary was the unicameral Congress's chief appointed administrative officer. The Clerk of the House under the federal Constitution was the successor to this already-extant position. On June 1, 1789, Congress regularized the Clerk position through the first federal statute.[41] We use the term *regularized* to refer to the process by which an irregularly-created or irregularly-filled position is later validated or ratified by statute. Consider the chronology. The Articles Congress's chief appointed administrative officer was its secretary. The Clerk of the U.S. House of Representatives is the successor position to the Secretary of the Articles Congress. We explained above that on April 1, 1789, the Clerk position was created or filled when the House of Representatives chose its first clerk. And,

36. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

37. U.S. CONST. amend. XXV, § 2.

38. *See* Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 996–1007 (2007) (developing principle of "cameral autonomy").

39. U.S. CONST. art. I, § 5, cl. 2 ("Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

40. 1 ANNALS OF CONG. 100 (1789) (Joseph Gales ed., 1834).

41. *See* An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, §§ 1–2, 1 Stat. 23 (1789) (establishing the constitutional oath for the "clerk of the House of Representatives"); *id.* § 5, at 24 (establishing the clerk's specific oath of office).

afterwards, on June 1, 1789, the Clerk position was *ratified* by statute of the new federal government.

The position of the Secretary of the Senate has a history similar to that of the Clerk of the House. And we explained above, prior to the ratification of the Constitution, the unicameral Articles Congress had already chosen a secretary. On April 8, 1789, the U.S. Senate under the federal Constitution created or filled the position of Secretary of the Senate.[42] And, afterwards, on June 1, 1789, this already-extant position was *regularized* by the first federal statute.[43] This law *ratified* the Secretary of the Senate position.

The process of *regularization* was not limited to holdover positions from the Articles of Confederation government. Any irregularly-created or irregularly-filled position could be regularized by subsequent legislation.[44]

Finally, we will consider the second appointed position in the Legislative Branch that is not identified in the Constitution: the Secretary of the Senate. Generally, the Senate Officers Clause operates in a similar fashion as does the House Officers Clause.[45] The Senate, pursuant to "the Rules of [the Senate's] Proceedings,"[46] can select its "other Officers." And, like with House officers, the President plays no role in the appointment of these "other [Senate] Officers." The Articles Congress had already chosen a secretary, and the first Senate chose the Secretary of the Senate on April 8, 1789.[47] This already-extant position was also regularized by the first statute, enacted two months later on June 1, 1789.[48]

Like the Clerk of the House, the Secretary of the Senate is also a *non-apex* position; the Secretary serves at the pleasure of the Senate. By contrast, the Constitution provides that the Senate President pro tempore may serve as

---

42. 1 ANNALS OF CONG., *supra* note 40, at 18.

43. An Act to regulate the Time and Manner of Administering certain Oaths, *supra* note 41, § 1, at 23 ("establishing the constitutional oath for the "secretary of the Senate"); *id.* § 5, at 24 (establishing the secretary's specific oath of office).

44. *See, e.g.*, United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice) ("A legislative recognition of the actually existing regulations of the army [even in regard to creating offices] must be understood as giving to those regulations the sanction of the law . . . .").

45. *See* Josh Blackman & Seth Barrett Tillman, *Could Justice Thomas Preside over President Trump's Impeachment Trial?*, BALKINIZATION (Nov. 17, 2019, 1:10 PM), https://balkin.blogspot.com/2019/11/could-justice-thomas-preside-over.html [https://perma.cc/VCM7-AYLK] (discussing Senate Officers Clause in the context of presidential impeachment trials).

46. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

47. 1 ANNALS OF CONG., *supra* note 40, at 18.

48. *See supra* note 43 (providing two oaths for the Secretary of the Senate); *see also supra* note 41 (providing two oaths for the Clerk of the House).

the *apex* presiding officer of the Senate.[49] Both the Senate President pro tempore and the Secretary are chosen pursuant to the Senate Officers Clause, but only the former is considered *apex*.

C. *Judicial Branch Positions: the Chief Judge of the Supreme Court, the Associate Judges of the Supreme Court, the Circuit Judges of the Inferior Courts, and the Clerk of the Supreme Court*

The Chief Justice, like the Vice President, wears two hats. The Constitution identifies the Chief Justice as the *apex* presiding officer over Senate impeachment trials of the President.[50] The Chief Justice also serves as Chief Judge of the Supreme Court. It may be somewhat jarring to read the phrase *Chief Judge of the Supreme Court*. Today the position is commonly referred to as the *Chief Justice of the United States*.[51] Indeed, during oral argument in *Teague v. Lane*,[52] Chief Justice Rehnquist chastised an advocate who referred to him as "Judge."[53] Rehnquist interjected, "Yes, I'm the Chief Justice, I'm not a judge."[54] By modern standards, Rehnquist was correct. But as a textual matter, he was not *entirely* correct. The Appointments Clause uses the phrase "Judges of the Supreme Court," not *Justices* of the Supreme Court. Therefore, the presiding officer would be the Chief *Judge* of the Supreme Court. By contrast, the Senate Impeachment Trial Clause states that the "Chief *Justice*" shall preside at Senate impeachment trials of the President. But the Constitution "is silent about how the Chief Justice" is selected.[55]

In early statutes, usage of the titles "judges" and "justices" was uneven. On September 23, 1793, the President approved a statute that set the compensation for federal judges. The bill referred to "judges of the Supreme

49. *See* discussion *infra* Section IV.E.3 (discussing the Senate President pro tempore's powers, as apex presiding officer of the Senate, to receive communications from other branches of the federal government).

50. U.S. CONST. art. I, § 3, cl. 6 (stating that "[w]hen the President of the United States is tried, the Chief Justice shall preside").

51. *See Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/N67U-H4TL] ("John G. Roberts, Jr., Chief Justice of the United States, was born in Buffalo, New York, January 27, 1955.").

52. Teague v. Lane, 489 U.S. 288 (1989).

53. *See* Jeffrey L. Fisher, *Of Facts & Fantasies: Justice Stevens and the Judge/Justice Story*, 14 GREEN BAG 2D 53, 55–56 (2010).

54. *Id.* at 56.

55. Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court*, 22 J.L. & POL. 231, 233 (2006) (noting that "[t]he Constitution says nothing about how the Chief Justice is to be chosen").

and other courts of the United States."[56] The phrase "judges of the Supreme Court" expressly tracks the language used in the Appointments Clause. That same bill also referred to the "Chief Justice" and the "justices of the Supreme Court."[57] The phrase "Chief Justice" tracks the language used in the Senate Impeachment Trial Clause. Four years earlier, the Judiciary Act of 1789 stated that "the supreme court of the United States shall consist of a chief justice and five associate justices."[58] On the same day the Judiciary Act was enacted, President Washington sent a communication to the Senate, which was recorded in the Senate Executive Journal.[59] Washington made nominations for the "Supreme Court of the United States."[60] He selected John Jay for "Chief *Justice*," and John Rutledge, James Wilson, William Cushing, Robert Harrison, and John Blair as "Associate *Judges*."[61] Washington's usage tracks precisely the terminology used in the Constitution: "Chief Justice" (as used in the Senate Impeachment Trial Clause) and Associate "Judges of the supreme Court" (as used in the Appointments Clause).

Moreover, the precise term or phraseology used for the "Chief Justice" position has varied. In some documents, the position was referred to as simply the "Chief Justice."[62] Elsewhere, the title "[C]hief [J]ustice of the [S]upreme [C]ourt" was used.[63] And in some places, the phrase "Chief Justice of the United States" was used. For example, President Adams's nomination of John Marshall used the title "Chief Justice of the United States."[64]

---

56. *See* An Act for allowing certain Compensation to the Judges of the Supreme and other Courts, and to the Attorney General of the United States, ch. 18, § 1, 1 Stat. 72 (1789), http://bit.ly/2VUmzuA [https://perma.cc/GK85-XR8Y].

57. *Id.*

58. The Federal Judiciary Act, ch. 20, § 1, 1 Stat. 73 (1789), https://www.ourdocuments.gov/doc.php?flash=false&doc=12&page=transcript [https://perma.cc/D4KC-D6XL].

59. *See* S. EXEC. JOURNAL, 1st Cong., 1st Sess. 29 (Sept. 24, 1789), https://bit.ly/33inx9L [https://perma.cc/B5UC-8JE2] (transcribing President Washington's Communication to the Senate).

60. *Id.*

61. *Id.*

62. *See* An Act for allowing certain Compensation to the Judges of the Supreme and other Courts, and the Attorney General of the United States, ch. 18, § 1, 1 Stat. 72 (1789), http://bit.ly/2VUmzuA [https://perma.cc/GK85-XR8Y] (allowing compensation for "judges of the Supreme and other courts of the United States").

63. *See, e.g.*, An Act to regulate Processes in the Courts of the United States, ch. 21, § 1, 1 Stat. 93 (1789), https://tinyurl.com/ysvjmxvt [https://perma.cc/8FCM-MUAT] (discussing authority of the chief justice of the supreme court); *see* S. EXEC. JOURNAL, 1st Cong., 1st Sess. 29 (Sept. 26, 1789), http://bit.ly/38wMYS0 [https://perma.cc/8NUZ-765B] (discussing Senate advice and consent to the President's nomination to the post: "Chief Justice of the Supreme Court of the United States").

64. Daniel Rice, *John Marshall – Chief Justice Nomination (1801)*, WORDPRESS: RICE ON HISTORY (Aug. 19, 2011), https://riceonhistory.wordpress.com/2011/08/19/john-marshall-chief-justice-nomination/ [https://perma.cc/X8K8-AA3R].

Apparently, the phrase "Chief Justice of the United States" did not come into consistent and widespread usage until the tenure of Chief Justice Salmon P. Chase.[65] Historically, the phrase "Chief Justice" did not always refer to the head of an appellate court. William Murray, the First Earl of Mansfield, held the position of Lord Chief Justice of England from 1756 to 1788.[66] As Lord Chief Justice, he was the presiding officer of the King's Bench, which was primarily a trial court, as opposed to an appellate court.[67]

In this Article, we will use the phrase *Chief Justice* to refer to the person who presides over the President's impeachment trial. And we will use the phrase *Chief Judge* to refer to the person who presides over the Supreme Court. Historically, both positions have been held by the same person. But the Constitution's text does not squarely command that result.[68]

This Article will also consider the *Associate Judges* (not Justices) of the Supreme Court and discuss the circuit judges of the "inferior" courts.[69] And finally, we include one other "inferior" officer, the Clerk of the Supreme

65. JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 20 (2011) ("Perhaps motivated by the hope that he would one day be elected president, Chase assumed the more imposing title of 'Chief Justice of the United States,' a title that Congress began to use in subsequent legislation and that has been used by all of Chase's successors.").

66. *William Murray, Lord Mansfield*, WESTMINSTER ABBEY, https://www.westminster-abbey.org/abbey-commemorations/commemorations/william-murray-lord-mansfield [https://perma.cc/8DWG-D3FY] (describing Murray as "Lord Chief Justice of England from 1756-88"); *see also* Karl Nickerson Llewellyn, *William Murray, 1st earl of Mansfield*, ENCYCLOPEDIA BRITANNICA (June 20, 1998), https://www.britannica.com/biography/William-Murray-1st-Earl-of-Mansfield [https://perma.cc/VVC9-9QRS] (describing Murray as "chief justice of the King's Bench of Great Britain from 1756 to 1788").

67. *Queen's Bench Division*, ENCYCLOPEDIA BRITANNICA (July 20, 1998), https://bit.ly/2NhrtML [https://perma.cc/W29K-5FGX] (explaining that the "Queen's Bench Division, also called (during a kingship) King's Bench Division, formerly Court of Queen's Bench, in England and Wales . . . obtained its own chief justice" in 1268, and was a division of the "High Court of Justice"); *see also High Court of Justice*, ENCYCLOPEDIA BRITANNICA (July 20, 1998), https://bit.ly/3dnjyYW [https://perma.cc/2FDC-ZUKU] (explaining that the High Court ranks below the Court of Appeal).

68. *Cf.* Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. PA. L. REV. 1709, 1724 (2006) (speculating that Congress could "retain[] a 'Chief Justice,' selected as at present, to do the only thing mentioned in the Constitution—preside over impeachment of the President—and creating a different officer (say, the 'Principal Justice'), selected on seniority, to discharge all the other responsibilities presently assigned to the Chief").

69. *See generally* U.S. CONST. art. I, § 8, cl. 9 ("To constitute Tribunals *inferior* to the supreme Court." (emphasis added)); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and *inferior* Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." (emphasis added)).

Court. By statute,[70] the clerk is appointed by a "Court[] of Law,"[71] that is, by the Supreme Court.

D. Irregular Positions: Holders of Letters of Marque and Reprisal, Transitional Officers, and Presidential Electors

Finally, we will focus on three irregular positions that do not squarely fit *within* the three branches of the permanent government. These positions can be irregularly-created or irregularly-filled. These types of irregular positions differ from those positions that are created by federal statute and are subsequently filled pursuant to procedures in the Appointments Clause. First, Congress has the authority to "grant Letters of Marque and Reprisal."[72] These letters authorize private parties (known as "privateers") to engage in limited hostilities against foreign states and their citizens.[73] With such authority, the privateers can, in certain circumstances, lawfully seize foreign citizens' property, including their ships and cargo.[74] The holders of such letters have an irregular type of federal position, particularly by modern conceptions.[75] Such holders have a special, limited authority conferred upon them, even if their positions are outside the regular or permanent government.

Second, we will consider certain *transitional* positions. These positions were previously appointed under the Articles of Confederation government and continued to serve, for a limited period of time, under the government of the Constitution.[76] For some of these positions, Congress created a statute to formally bring them under the auspices of the new government. At that point, the holder could be re-appointed pursuant to the Appointments Clause. But

---

70. Act To establish the Judicial Courts of the United States, ch. 20, § 7, 1 Stat. 73, 76 (1789) ("[T]he Supreme Court, and the district courts shall have power to appoint clerks for their respective courts . . . .").

71. U.S. CONST. art. II, § 2, cl. 2 ("[T]he 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." (emphasis added)).

72. *Id.* art. I, § 8, cl. 11.

73. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 205–06, 250–52 (1996).

74. *See* John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1188 (1999).

75. *See* Paris Declaration Respecting Maritime Law, Apr. 16, 1856, 111 C.T.S. 1 ("Privateering is, and remains, abolished."). *See generally* Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MARITIME L. & COM. 221, 244–51 (2009) (discussing the Paris Declaration).

76. Saikrishna Bangalore Prakash, *Double Duty Across the Magisterial Branches*, 44 J. SUP. CT. HIST. 26, 28 (2019) ("This gap between ratification and Congress's first legislative enactments created a transition issue.").

until these positions were *regularized* by a federal statute,[77] these office holders occupied something of an uncertain position. It was not precisely clear what their status was. Professor Prakash suggested that these transitional positions were "not strictly lawful."[78] This category of positions is no longer particularly relevant, but it was important shortly after ratification. Indeed, the Constitution makes two express references to treaties that were previously "made" by the Articles of Confederation government.[79] These references in the Constitution to then still-extant treaties created by the prior Articles government are analogous to the then-extant offices created by the prior government.

Third, we will consider the status of Presidential Electors. These individuals are appointed by the states to elect the President.[80] Unlike irregular and transitional positions, the centrally important role played by Presidential Electors remains very relevant today.

E. Summary

The nineteen total positions discussed in Part I are depicted in Figure 1.[81]

77. *See supra* Section I.B (discussing regularization of irregularly-created positions, like the Clerk of the House).

78. Prakash, *supra* note 76, at 28.

79. U.S. CONST. art. III, § 2 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties *made*, or which shall be made, under their Authority." (emphasis added)); *id.* art. VI, cl. 2 (affirming that "all Treaties *made*, or which shall be made" are the "supreme Law of the Land" (emphasis added)).

80. *Id.* art. II, § 1, cl. 2 ("[The President] shall . . . together with the Vice President, chosen for the same Term, be elected, as follows: 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 Congress.").

81. Figure 1 is available at https://perma.cc/852S-8GFD. All of the figures are available in a single document at https://perma.cc/QS8M-XNH3.

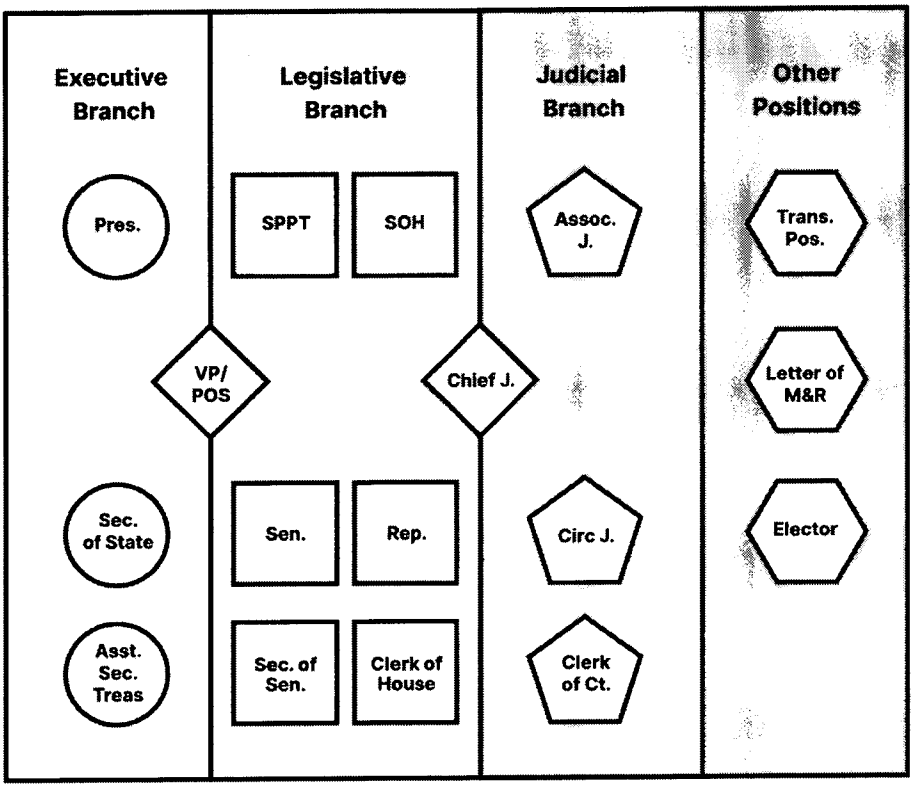


Figure 1

The Executive Branch positions are the President, the Secretary of State, and the Assistant to the Secretary of the Treasury. The Legislative Branch positions are the Senate President pro tempore (SPPT), the Speaker of the House (SOH), Senators (Sen.), Representatives (Rep.), the Secretary of the Senate, and the Clerk of the House. The Judicial Branch positions: Associate Judges of the Supreme Court, Circuit Judges on the inferior courts, and the Clerk of the Supreme Court. The other positions are transitional positions, holders of Letters of Marque and Reprisal, and Presidential Electors. The Vice President/President of the Senate (VP/POS) and Chief Justice/Chief Judge (Chief J.), who serve in two branches, are depicted separately.

For the balance of this Article, we will consider how each of these nineteen total positions would be categorized under Approaches #1, #2, #3, and #4.

II. APPROACH #1: THE INTERMEDIATE VIEW

We refer to Approach #1 as the *Intermediate View*. This interpretation treats as synonymous the following words and phrases: (1) "office" and "officer," standing alone and unmodified; (2) "Officers of the United States;" and (3) "Office . . . under the United States."[82] Under Approach #1, these words and phrases extend exclusively to positions in the Judicial Branch and to positions in the Executive Branch—whether appointed or elected.[83] However, this language does not extend to any positions in the legislative branch, whether appointed or elected.[84]

The leading proponents of the Intermediate View are Professors Akhil Reed Amar and Vikram David Amar.[85] They draw a global distinction between "officers" and legislative positions.[86] The former category of "officers" includes all appointed and elected positions in the Executive and Judicial Branches.[87] The latter category of legislative positions includes all elected positions in the Legislative Branch.[88] Even though the Amars have not spoken on this issue with clarity, we can still draw an inference from their argument: they would also include as legislative positions the appointed subordinate positions in the Legislative Branch, such as the Clerk of the House and the Secretary of the Senate. Under the Intermediate View, as a general matter, legislative positions are not "officers." However, within the category of legislative positions, the Amars acknowledge that there are certain presiding *legislative* "officers."[89] For example, under the Intermediate Approach, the Speaker of the House and the Senate President pro tempore are *legislative* "officers."[90] But under the Intermediate Approach, these positions are not "Officers of the United States," nor do they not hold an "Office . . . under the United States" or an "Office under the Authority of the United States." Furthermore, the Amars maintain, such positions cannot be "officers" for purposes of the Succession Clause. Why? Because "officers," as that word is used in the Succession Clause, can *only* exist in the Executive

82. Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, *supra* note 3, at 72–73.

83. *Id.* at 73.

84. *Id.* at 103 (arguing that this "language extends exclusively to executive branch and judicial branch officers").

85. Amar & Amar, *supra* note 6, at 136.

86. *See id.* at 115.

87. *Id.*

88. *Id.*

89. *Id.* at 116.

90. *Id.* (acknowledging that "the Speaker is . . . an 'Officer' of the legislature" because "Article I, Section 2 provides that 'the House of Representatives shall chuse their Speaker and other Officers'").

and Judicial Branches.[91] Approach #1 will be depicted in Table 1, as well as Figures 2, 3, 4, 5, 6, and 7.

Adopting Approach #1 has several practical consequences. First, the Presidential Succession Act, which places the Speaker in the line of succession, would be unconstitutional. Second, Congress could create by statute lucrative offices in the Legislative Branch that are beyond the scope of the President's appointment power. And the House and Senate could then appoint their current and former members to those posts, notwithstanding the Incompatibility Clause and Ineligibility Clause. Third, appointed legislative officers, like the Clerk of the House, could serve as Presidential Electors. Fourth, members of Congress and appointed legislative officers would not be subject to the Foreign Emoluments Clause. As a result, they could accept foreign state gifts without seeking congressional consent. However, under Approach #1, the President would be subject to the Foreign Emoluments Clause.

Here, we attempt to explicate the Intermediate View. In doing so, we endeavor to extend theories developed by other scholars, in different contexts, at different times. And we try to follow the implications of their theories in the most favorable light. We ultimately reject their positions, but we try in good faith to fairly explicate them.

A. The Offices and Officers of the Constitution under Approach #1

Approach #1, the Intermediate View, divides all of the positions within the Federal government into two broad categories: (1) legislative positions and (2) Executive and Judicial Branch officers. This view is depicted in Figure 2.[92]

91. *Id.*
92. Figure 2 is available at https://perma.cc/5PCH-57Q3.

Approach #1 – Intermediate View

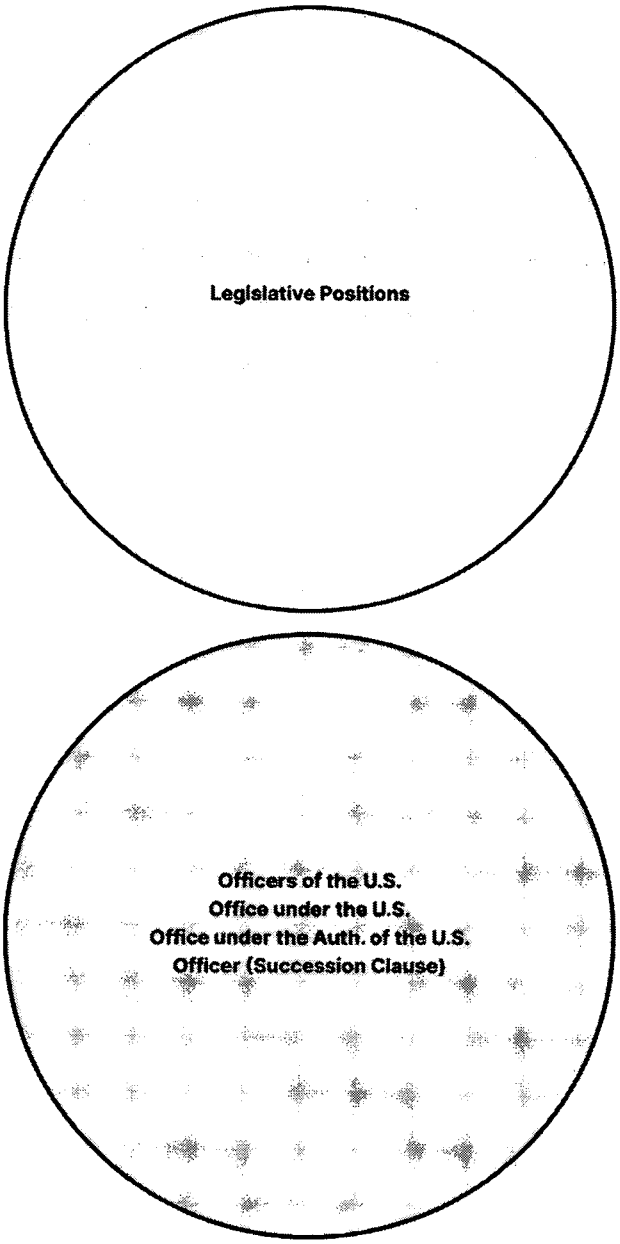


Figure 2

1. Legislative Positions: Legislative Officers and the Members

Under Approach #1, the Intermediate View, there are two general categories of legislative positions: Legislative Officers and the Members. The first category, Legislative Officers, would include the Speaker of the House, the Clerk of the House, the Senate President pro tempore, and the Secretary of the Senate. Generally, these officers are chosen pursuant to the House Officers Clause and the Senate Officers Clause, respectively. The second category, the Members, includes Senators and Representatives.

In addition, two legislative positions fall outside these two general categories: the Chief Justice, as well as the Vice President in her capacity as President of the Senate. These two positions are presiding officers in the Legislative Branch, but they are not chosen by the members. The President of the Senate and the Chief Justice are neither members nor legislative officers who are chosen pursuant to the House Officers Clause or the Senate Officers Clause. The Constitution does countenance a rare situation: if the Presidential Electors fail to elect a Vice President, the Senate chooses the Vice President/President of the Senate.[93] In 1837, the only one circumstance in which the electors failed to elect a Vice President, the Senate selected the Vice President.[94]

a. Legislative Officers

In two places, the Constitution refers to "Officers" within the Legislative Branch. The House Officers Clause states, "The House of Representatives shall chuse their Speaker and other *Officers* . . . ."[95] And the Senate Officers Clause states, "The Senate shall chuse their other *Officers*, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States."[96]

Approach #1, the Intermediate View, treats legislative officers as a subset of legislative positions. These legislative positions include the Speaker of the House and the Senate President pro tempore. Both positions are

93. U.S. CONST. amend. XII ("The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, *the Senate shall choose the Vice-President* . . . ." (emphasis added)); *see also id.* amend. XXV, § 2 (providing for filling vacancies in the vice presidency).

94. *The Senate Elects a Vice President, February 8, 1837*, UNITED STATES SENATE, https://www.senate.gov/about/officers-staff/vice-president/senate-elects-vice-president.htm [https://perma.cc/67KJ-MGE3] (recounting the Senate's election of Representative Richard M. Johnson (Ky.) as Vice President).

95. U.S. CONST. art. I, § 2, cl. 5 (emphasis added).

96. *Id.* art. I, § 3, cl. 5 (emphasis added).

identified in the Constitution. The Intermediate View would also treat the Clerk of the House and the Secretary of the Senate as Legislative Officers. These positions are not created by the Constitution, but rather, they are created by the House and Senate.[97] The Legislative Officers under Approach #1, are depicted in Figure 3.[98]

Approach #1 – Intermediate View

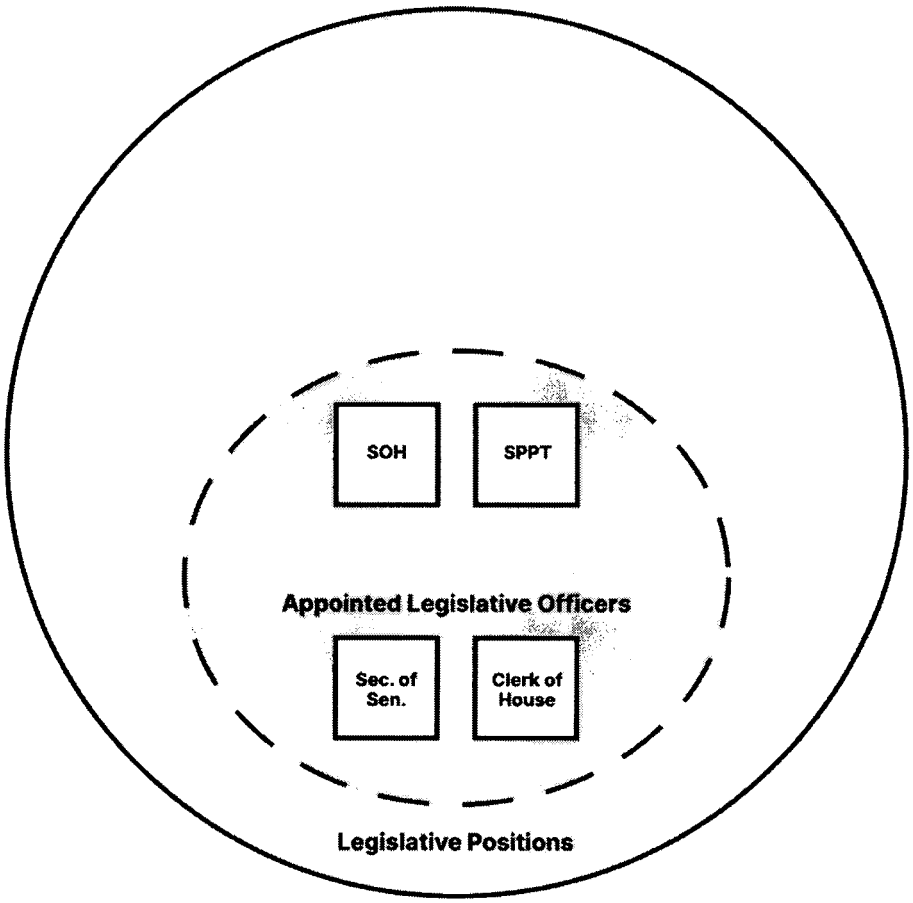


Figure 3

97. *See supra* Section I.B (discussing selection of House and Senate officers).
98. Figure 3 is available at https://perma.cc/5668-2JVV.

b. Members

The Intermediate View does not treat members of Congress (Representatives and Senators) as legislative officers. Those positions are mentioned in the Constitution, but they are not deemed "officers" of any kind. Historically, the Speaker of the House has been a Representative. As a result, the Speaker appears in *both* the Member category and the Legislative Officers category. However, there is no express requirement that the Speaker must be a member of Congress.[99] For the same reasons, the Senate President pro tempore also appears in both the Member category and the Legislative Officers category. There is no express requirement that the Senate President pro tempore must be a Senator. Figure 4 depicts the intersection of Members and Legislative Officers.[100]

99. *See Speaker of the House*, UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Origins-Development/Speaker-of-the-House/ [https://perma.cc/S52H-YHY4] ("[T]he Speaker—who has always been (but is not required to be) a House Member . . . .").

100. Figure 4 is available at https://perma.cc/3WY2-6CWT.

Approach #1 – Intermediate View

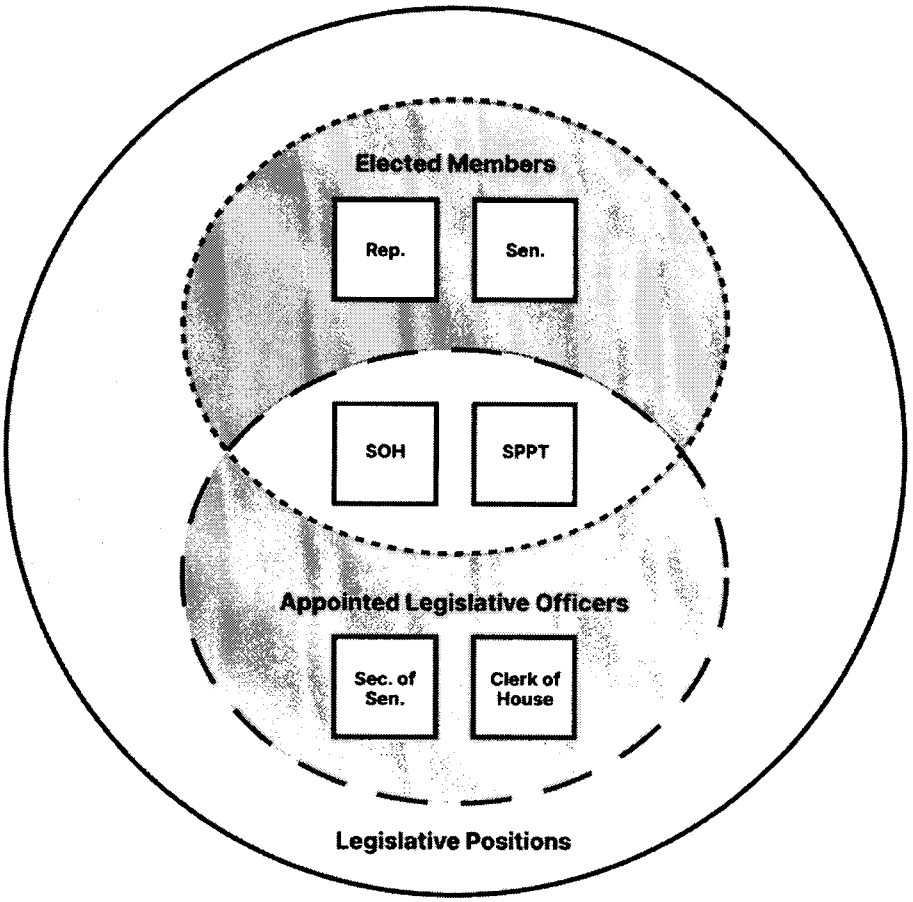


Figure 4

c. Legislative Positions that are neither Appointed Legislative Officers nor Members

Under Approach #1, the Intermediate View, there are at least two legislative positions that are not members, and that are not legislative officers appointed by virtue of the House Officers Clause or the Senate Officers Clause. First, the Vice President also serves as the "President of the Senate" and can cast a "Vote" when the Senate is "equally divided."[101] When the President of the Senate presides over the Senate, the Vice President holds a

101. U.S. CONST. art. I, § 3, cl. 4.

Legislative Position; this function is exercised as a constituent part of the legislature. Second, the Chief Justice can serve as the presiding officer of the Senate during the impeachment trial of the President.[102] Figure 5 depicts the President of the Senate and the Chief Justice when they serve in Legislative Positions.[103]

102. *Id.* art. I, § 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside[.]").

103. Figure 5 is available at https://perma.cc/SQ4X-YM3D.

Approach #1 – Intermediate View

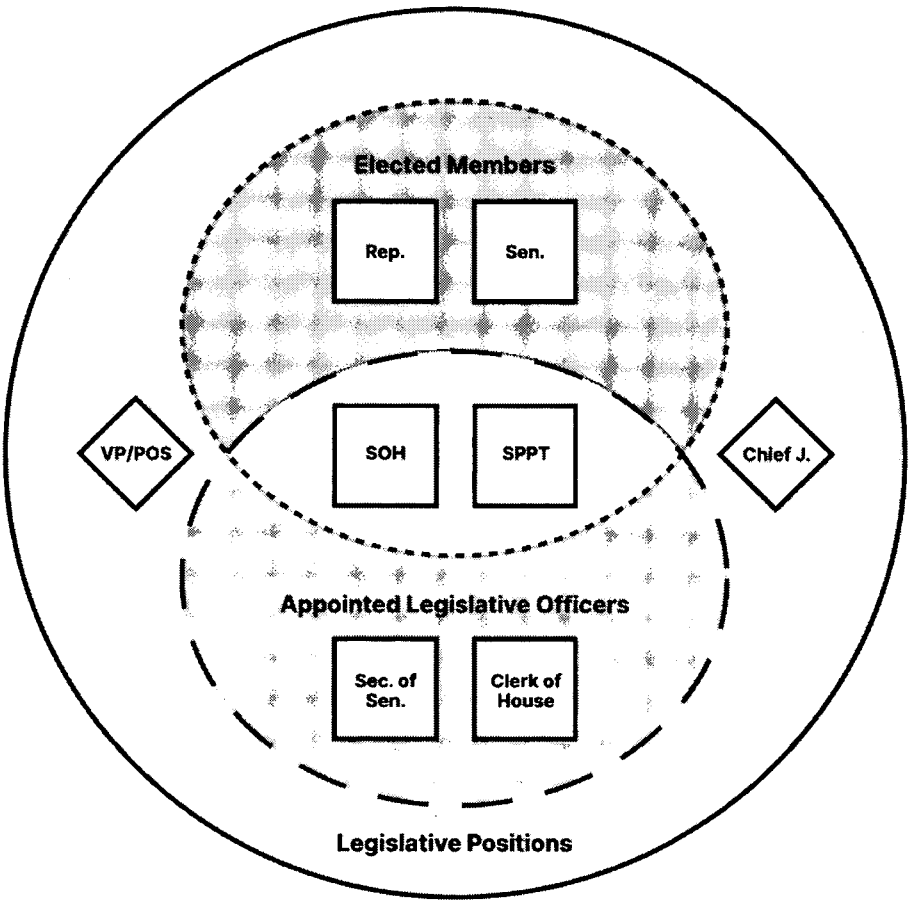


Figure 5

2. "Offices" and "Officers" in the Executive and Judicial Branches

Some provisions of the Constitution refer to "Officers of the United States." Other provisions refer to an "Office . . . under the United States." One provision applies to an "Office under the Authority of the United States." And some provisions, like the Succession Clause, refer to an "Officer," in which that word stands alone without any modifiers.[104] Approach #1, the

104. U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of

Intermediate View, treats these categories as interchangeable. Regardless of the precise language chosen, these categories extend to positions in the Judicial Branch and in the Executive Branch—whether appointed or elected. However, these categories do not extend to positions in the Legislative Branch, whether appointed or elected.

Figure 6 depicts the Office/Officer category under Approach #1, the Intermediate View.[105] This grouping would include the following positions: the President, the Vice President,[106] the Secretary of State, the Assistant to the Secretary of the Treasury, the Chief Justice/Chief Judge of the Supreme Court, the Associate Judges of the Supreme Court, the Circuit Judges of the inferior courts, and the Clerk of the Supreme Court.

Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." (emphasis added)).

105. Figure 6 is available at https://perma.cc/Y4LJ-YWEE.

106. *See, e.g.*, Amar & Amar, *supra* note 6, at 122 n.55 ("During debates over the Constitution, considerable controversy arose over the 'amphibious' nature of the Vice President, an *impeachable executive branch officer* . . . with legislative duties . . . ." (emphasis added)).

Approach #1 – Intermediate View

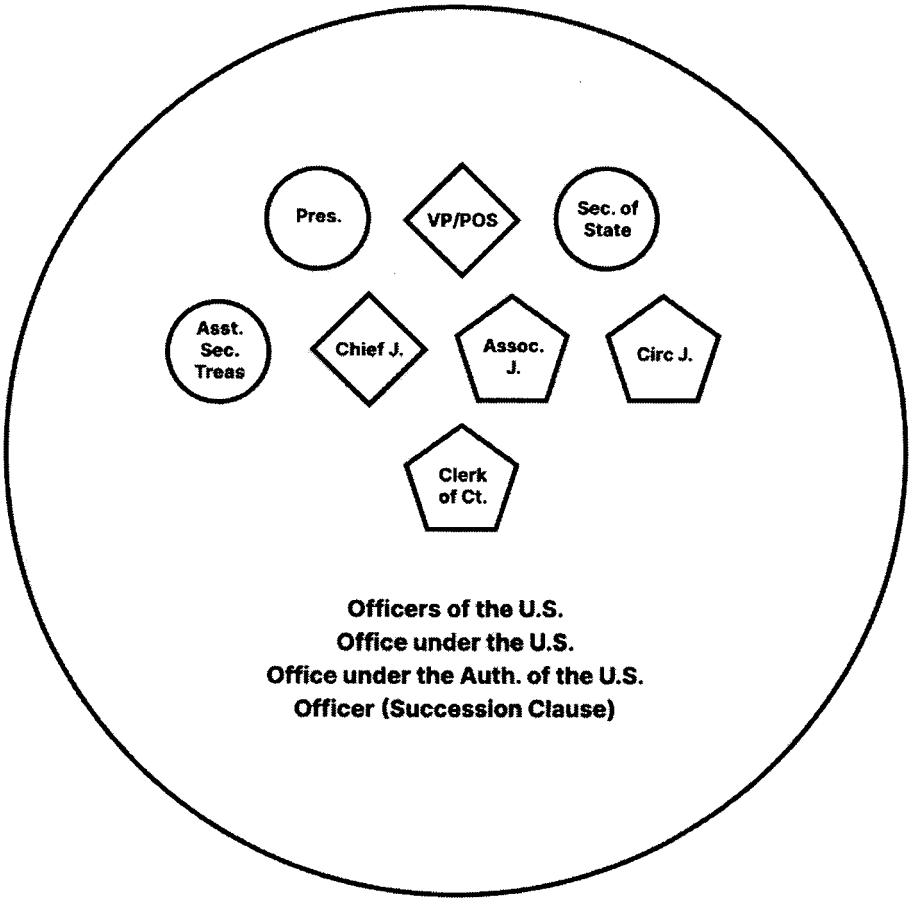


Figure 6

3. Summary of Approach #1

Figure 7 depicts the full scope of Approach #1, the Intermediate View.[107] It is unclear how Approach #1 would classify three positions that do not fit within the three branches of the permanent government: transitional positions, holders of letters of marque and reprisal, and Presidential Electors. We have already indicated the uncertain status of those positions.[108] Again, Approach #1, the Intermediate View, is incomplete. Moreover, we do not

107. Figure 7 is available at https://perma.cc/3X5Y-KBVW.
108. *See supra* Section I.D (discussing irregular positions).

agree with the Intermediate View. We can only try to fairly explicate the Intermediate View in the best possible light.

Approach #1 – Intermediate View

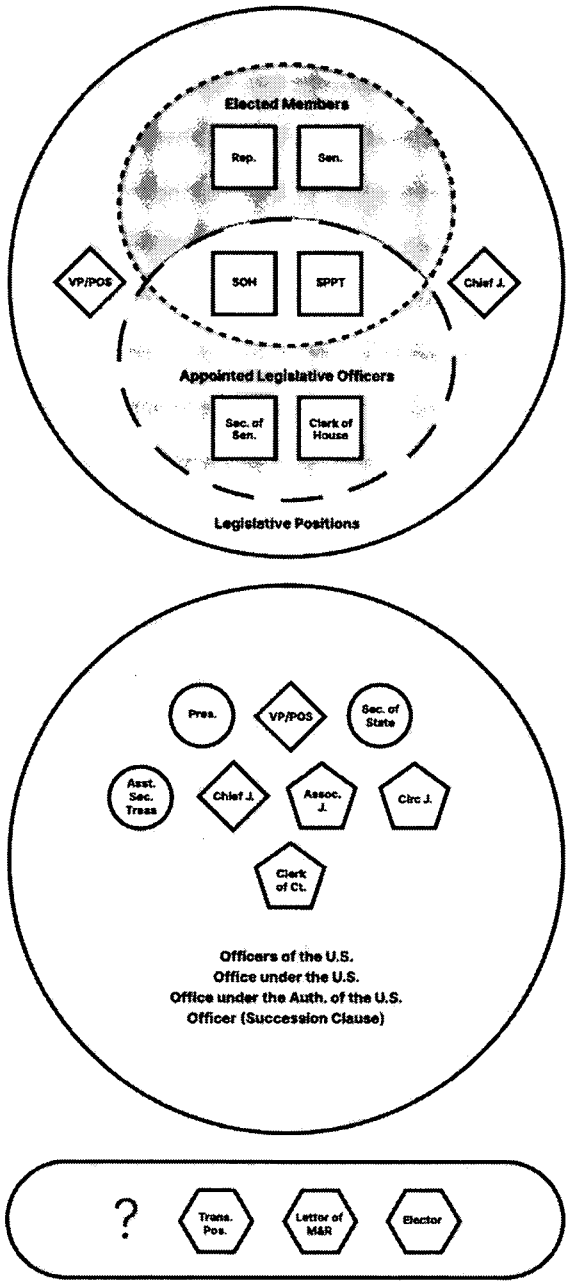


Figure 7

Table 1 explains how each of the nineteen total positions is classified under Approach #1, the Intermediate View.

Table 1

Position	Legislative Position	Appointed Legislative "Officer"	"Office" or "Officer"
President	No	No	Yes
Vice President/President of the Senate	Yes	No	Yes
Secretary of State	No	No	Yes
Assistant to the Secretary of the Treasury	No	No	Yes
Speaker of the House	Yes	Yes	No
Senate President Pro Tempore	Yes	Yes	No
Representative	Yes	No	No
Senator	Yes	No	No
Clerk of the House	Yes	Yes	No
Secretary of the Senate	Yes	Yes	No
Chief Judge/Chief Justice	Yes	No	Yes
Associate Judges	No	No	Yes
Circuit Judges	No	No	Yes
Clerk of the Supreme Court	No	No	Yes
Transitional Positions	?	?	?
Letter of Marque & Reprisal	?	?	?
Presidential Electors	?	?	?

B. The Amars concluded that Legislative Positions are not "Officers" for purposes of the Succession Clause

The Amars announced, articulated, and defended the Intermediate View in an influential 1995 article about the Presidential Succession Act of 1947.[109] This statute places the Speaker of the House next in line of succession immediately after the Vice President.[110] The Amars argued that this statute is unconstitutional. Their analysis begins with the text of the Succession Clause. It provides:

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such *Officer* shall act accordingly, until the Disability be removed, or a President shall be elected.[111]

If the Speaker in her role as Speaker is an "Officer," for purposes of the Succession Clause, then there is no constitutional problem. Likewise, if the Speaker, in her role as a rank-and-file member, is an "Officer" for purposes of the Succession Clause, then there is still no problem. The Constitution expressly empowers Congress to place an "Officer" in the line of succession. If the Speaker is not an "Officer" for purposes of the Succession Clause, then the Presidential Succession Act is unconstitutional.

The Amars wrote that the word "Officer," as used in "the Succession Clause[,] is merely shorthand for any of the[] . . . longer formulations" of the Constitution's "office"- and "officer"-language, such as "Officers of the United States" and "Office . . . under the United States."[112] The Amars explained that "[a]s a textual matter," the varied references to *officers of the United States* and *office under the United States* "seemingly describe[] the same stations."[113] The Amars did entertain the possibility that the Framers drew a "civil/military distinction" among different types of officers.[114] But they posited that "the modifying terms 'of,' 'under,' and 'under the Authority

109. Amar & Amar, *supra* note 6, at 115.

110. 3 U.S.C. § 19(a)(1) ("If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the *Speaker of the House of Representatives* shall, upon his resignation as Speaker and as Representative in Congress, act as President." (emphasis added)).

111. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

112. Amar & Amar, *supra* note 6, at 115.

113. *Id.* at 114.

114. *Id.* at 114–15.

of' are essentially synonymous."[115] In short, the Amars concluded that the Constitution's divergent "office"-language creates a "global officer/legislator distinction."[116] The "global" category of officers, according to the Amars, extends only to positions in the Executive and Judicial Branches. This "distinction" is depicted in Figure 2.

By contrast, elected Representatives and Senators reside in the Legislative Branch. Specifically, the Amars explained, "[F]ederal legislators are neither 'Officers under the United States,' [sic] nor (to the extent that there is any difference) 'Officers of the United States.'"[117] Accordingly, the Amars reasoned, rank-and-file "[l]egislators are not 'Officers' under the Succession Clause."[118]

C. The Amars acknowledged that some Legislative Positions are "Officers" for purposes of the House and Senate Officers Clauses

The Amars carved out an exception to their general rule that the Constitution's "office"-language refers exclusively to positions in the Executive and Judicial Branches. In two places, the Constitution expressly refers to "Officers" within the Legislative Branch. The House Officers Clause states, "The House of Representatives shall chuse their Speaker and other *Officers*. . . ."[119] And the Senate Officers Clause states, "The Senate shall chuse their other *Officers*, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the *Office* of President of the United States."[120]

According to the Amars, the Speaker of the House and the Senate President pro tempore are "Officers" for purposes of the House Officers Clause and the Senate Officers Clause. Are they also "Officers" for purposes of the Succession Clause? According to the Amars, the answer is "no." These congressional officers are not the same type of "Officer" referred to in the Succession Clause. How do the Amars reconcile this argument with their general theory that the Constitution's "officer"-language is used synonymously and extends only to positions in the Executive and Judicial Branches?

---

115. *Id.* at 115.

116. *Id.* at 117.

117. *Id.* at 115–16. The phrase "Officers under the United States" appears nowhere in the Constitution; the phrase "Office . . . under the United States" is used in four clauses." For that reason, we placed a "[sic]" within the quotation from the Amars.

118. *Id.* at 136.

119. U.S. CONST. art. I, § 2, cl. 5 (emphasis added).

120. *Id.* art. I, § 3, cl. 5 (emphasis added).

The Amars squared this circle: they dubbed legislative officers a special type of "officer," that is, "'officers' *of the legislature*."[121] Under their view, "the Speaker is an 'Officer' in at least one constitutional sense—an 'Officer' of the legislature."[122] We think their view is faithfully depicted by Figure 4.

Again, under Approach #1, the Speaker is not an "Officer" for purposes of the other provisions of the Constitution that refer to "office" and "officer," like the Succession Clause. Likewise, the Amars would likely also reach a similar conclusion about two other positions in the Legislative branch: the Clerk of the House and the Secretary of the Senate are also not "Officers" for purposes of the Succession Clause. In other words, even if they are special "'Officer[s]' of the legislature"[123] for purposes of the House Officers Clause and the Senate Officers Clause, these positions are not "Officers" for purposes of the Succession Clause. However, the Amars have not specifically addressed the status of the Clerk of the House and the Secretary of the Senate, so we cannot be certain of their position.

The Amars' view has some support, but it also faces some difficult problems. The Succession Clause refers to "Officer," alone and unmodified. Some scholars may argue that the phrases "Officers of the United States" or "Office . . . under the United States" are fairly distinguishable from the word "Officer." This word, "Officer," standing alone without modifiers, might refer to a broader category of positions. Thus, the word "Officer" could include congressional officers, such as the Speaker or Senate President pro tempore.[124] But the Amars do not reach this conclusion; rather, they take the position that "Officer," standing alone, is "merely shorthand" for "officers of the United States" and "officers under the United States."[125] And the Amars contend, the divergent language of these two phrases extends exclusively to Executive and Judicial Branch positions.

Ultimately, under the Amars' theory, the Speaker of the House—*qua* legislator—is not an "Officer," and thus cannot stand in the line of presidential succession. To the extent that the Speaker is an "Officer," the Amars argued that she is only an *officer of the legislature* or an *officer of the House*. As a result, the Speaker is neither an "Officer[] of the United States," nor does she hold an "Office . . . under the United States." Similarly, the Speaker is not an "Officer" as that word is used in the Succession Clause. According to the Amars, the phrases "Officer," "Officer[] of the United

121. Amar & Amar, *supra* note 6, at 115 n.11 (emphasis added).

122. *Id.* at 116.

123. *Id.*

124. *See* John Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 142–43 (1995).

125. Amar & Amar, *supra* note 6, at 115–16.

States," and "Office . . . under the United States" are coextensive. Akhil Amar restated this position nearly two decades later in his magisterial tome, *America's Unwritten Constitution*: "A member of the Congress, such as the House speaker, is simply not an eligible 'Officer' within the meaning of the [S]uccession [C]lause . . . ."[126]

We note that Akhil Amar did not strictly adhere to this view in some of his earlier writings.[127] Moreover, Akhil Amar, on at least one occasion, took a less-categorical position on whether the Speaker can be an "Officer" for purposes of the Succession Clause. In 2004, Akhil Amar testified before a House committee about the constitutionality of the Presidential Succession Act. He stated that "in very, very highly unusual situations" legislative succession may be permissible.[128] During such a dire time where all cabinet officials are "gone," he explained that "only a real constitutional zealot, maybe without good judgment, would say you can't have congressional leaders in that circumstance because the Constitution really isn't a suicide pact."[129] Yet, in May 2021, Amar wrote that placing the Speaker in the line of succession "was unconstitutional."[130] He maintained, "Only judges and executive officials—those who acted upon private persons, and were not mere lawmakers—were proper 'officers' for succession purposes."[131]

We try to articulate Akhil Amar's view as he explained it in the *Stanford Law Review*. But we recognize he may now hold a different view than what he held in the past. We cannot be certain. In any event, contemporary discussions of legislative succession still rely on Akhil and Vikram Amar's original 1995 article.[132] This important academic article warrants careful scrutiny, even if Akhil Amar no longer holds the positions announced therein.

---

126. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 404 (2012).

127. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1061 n.67 (1988) ("[I]t should be noted that if [Article V] Delegates can be considered 'officers of the United States'—and it is not implausible to view them as such . . . ."); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447 n.87 (1987) ("[This provision in the Articles of Confederation states *any office*,] [n]ot '*any other*,' suggesting that congressional delegates were state [as opposed to federal] officers." (emphasis added)).

128. *Presidential Succession Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 108th Cong. 52 (2004), https://www.govinfo.gov/content/pkg/CHRG-108hhrg96287/html/CHRG-108hhrg96287.htm [https://perma.cc/RX6G-BR4N] (statement of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale Law School).

129. *Id.*

130. AKHIL REED AMAR, THE WORDS THAT MADE US 473 (2021).

131. *Id.* Amar does not address the status of the clerks of the federal courts.

132. *See* Jack Goldsmith & Ben Miller-Gootnick, *A Presidential Succession Nightmare*, LAWFARE (Mar. 25, 2020, 1:38 PM), https://www.lawfareblog.com/presidential-succession-nightmare [https://perma.cc/3T4A-GBSE] ("Serious constitutional questions about legislative succession have been raised since the Founding . . . . Akhil and Vikram Amar responded with an

Several other scholars have adopted the Amars' position, the Intermediate View, at least in part: e.g., Professors Steven G. Calabresi, Saikrishna Prakash, and Josh Chafetz, as well as Benjamin Cassady and Vasan Kesavan.[133]

D. The Amars found textual support for their position in the text of the Incompatibility Clause

The Incompatibility Clause provides, "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[134] This clause, the Amars argued, "makes clear that sitting members of Congress cannot hold '*any* Office under the United States.'"[135] If members of Congress held an "Office under the United States," then the Incompatibility Clause would bar them from serving in "either House." In other words, members of Congress could not be members of Congress! That reading can't be right, the Amars imply.

Therefore, the Amars concluded, the phrase "Office under the United States" referred to *any* position in the Judicial or Executive Branches, including the presidency. And members of Congress could not hold such positions. But there are other conclusions that can be drawn from this clause's text. Under Approach #3, the Minimalist View, the phrase "Office under the United States" includes *appointed* positions in all three branches.[136] A

---

article making the case that legislative succession was unconstitutional."); Jesse Wegman, *Nancy Pelosi Should Not Be President*, N.Y. TIMES (Nov. 3, 2019), https://www.nytimes.com/2019/11/03/opinion/trump-impeachment-pelosi.html [https://perma.cc/FM3N-5DM4] ("The succession law is also probably unconstitutional. Under Article II of the Constitution, only 'officers' are eligible to serve as president. The framers almost surely intended to exclude legislators from that definition, as two constitutional scholars, Akhil Amar and Vikram Amar, pointed out nearly a quarter-century ago."). *But cf.* Seth Barrett Tillman, *Why Strict Cabinet Succession Is Always Bad Policy: A Response to Professor Jack Goldsmith and Ben Miller-Gootnick*, HARV. NAT'L SEC. J. ONLINE (Apr. 8, 2020), https://harvardnsj.org/wp-content/uploads/sites/13/2020/04/Tillman_Why-Strict-Cabinet-Succession-Is-Always-Bad-Policy.pdf [https://perma.cc/ZKR5-YLRB] (arguing that the "long-standing policy objection" to legislative succession is "dangerously misguided").

133. *See* JOSHUA A. CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 280 n.68 (2007); Tillman & Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, *supra* note 3, at 141–45, 154–59 (Calabresi's Rebuttal and Closing Statement); Saikrishna Bangalore Prakash, Response, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 35, 41–42 (2009); *see also* Benjamin Cassady, *"You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209, 287–94 (2014); Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 129 n.28 (2001).

134. Amar & Amar, *supra* note 6, at 115 n.9 (quoting U.S. CONST. art. I, § 6, cl. 2).

135. *Id.* at 115.

136. *See infra* Section IV.B.

member of Congress would not hold such an *appointed* position. Our reading avoids the contradiction in which members of Congress cannot be members of Congress. By contrast, Approach #2, the Maximalist View, mandates that contradiction.[137]

In a footnote, the Amars addressed the issue of whether the President holds an "Office under the United States."[138] They acknowledged that "[a] quibbler might try to argue that the President does not, strictly speaking, 'hold[ ] . . . Office under the United States,' and is instead a *sui generis* figure."[139] The Amars responded to the hypothetical quibbler that the President would hold such an office. How? Article II refers to the presidency as an "Office" in three provisions.[140] This response assumes the conclusion that the word "Office" in Article II is coextensive with the phrase "Office under the United States" in the Incompatibility Clause and elsewhere. The Amars did not acknowledge that these phrases, using different words, may have different meanings.

Nevertheless, the Amars concluded, "'Officers' of or under the United States . . . mean[] certain members of the executive and judicial branches, but [does] not [mean] legislators."[141] In short, an *Officer of the United States* is synonymous with an *Office under the United States*. Both phrases extend to the President, but neither phrase refers to members of Congress.

As a textual matter, the Amars elide over any potential distinction among *Officers of the United States, Office under the United States, Office*, and *Officer*. And they do not address how the Constitution uses "office"- and "officer"-language across the seven original articles. We think this position is inconsistent with Akhil Amar's *intratextualist* approach.[142] This technique asks "interpreter[s] . . . to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."[143]

We approach the Constitution's divergent "office"- and "officer"-language in a more fully-developed textualist fashion. In our view, the same "office"- and "officer"-language has the same meaning across the Constitution's original seven articles. By contrast, different "office"- and

137. *See infra* Section III.A.

138. Amar & Amar, *supra* note 6, at 119 n.34 (citing U.S. CONST. art. I, § 6, cl. 2).

139. *Id.*

140. *Id.* ("But Article II provides that the President shall '*hold his Office*' for a four-year term, U.S. CONST. art. II, § 1, cl. 1 (emphasis added), prescribes an oath for 'the *Office* of President of the *United States*,' *id.* art. II, § 1, cl. 8 (emphasis added), and further provides that the President 'shall be removed from *Office* on Impeachment . . . and Conviction,' *id.* art. II, § 4 (emphasis added).").

141. *Id.* at 115.

142. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

143. *Id.*

"officer"-language has different meanings across the Constitution's original seven articles.

E. Practical Consequences of the Intermediate View

Approach #1, the Intermediate View, has at least four practical consequences. First, according to the Amars, the Presidential Succession Act is unconstitutional. Second, under Approach #1, the House and Senate could create lucrative offices in the Legislative Branch. In those circumstances, the two houses—and not the President—could appoint current and former Representatives and Senators to those lucrative offices. Third, under the Intermediate View, appointed legislative officers—who serve at the pleasure of each house—can vote in the Electoral College. And fourth, under Approach #1, members of Congress are not subject to the Foreign Emoluments Clause.

1. Under the Intermediate View, the Presidential Succession Act is unconstitutional

Under the Intermediate View, if the presidency and vice presidency become vacant—a so-called "double vacancy"—we would face a constitutional crisis. The Speaker of the House would claim the presidency by virtue of the Presidential Succession Act of 1947. But under the Intermediate View, succession by the Speaker would be unconstitutional because she is not an "Officer." Thus, the Secretary of State—the next-in-line non-legislative officer—would also be likely to claim the presidency with some legitimacy. This theory, if correct, risks throwing the United States into a state of chaos. The worst-case-scenario aftermath of *Bush v. Gore* would be tame by comparison.[144]

This concern is warranted. During the past three decades, two presidents have been impeached, creating the potential for a "single vacancy." Moreover, the recent pandemic has placed this concern in greater focus. In May 2020, White House staffers who tested positive for COVID-19 placed *both* the President and Vice President at risk.[145] And in October 2020,

144. Bush v. Gore, 531 U.S. 98 (2000).

145. Kaitlan Collins and Kevin Liptak, *White House scrambles after staffers test positive as new mask mandate takes effect*, CNN (May 11, 2020), https://www.cnn.com/2020/05/11/politics/katie-miller-contract-tracing-coronavirus/index.html [https://perma.cc/TQ7H-FSS3]; *see also* Jeremy Diamond et al., *Pence will not self-quarantine and plans to be at the White House Monday*, CNN (May 11, 2020), https://www.cnn.com/2020/05/10/politics/mike-pence-self-isolate-coronavirus/index.html [https://perma.cc/UWU9-3HVK] ("Vice President Mike Pence is not planning to enter self-quarantine after his press secretary tested positive for coronavirus on Friday and plans to be at the White House on Monday . . . .").

President Trump was hospitalized for three days due to the coronavirus.[146] According to reports, President Trump's blood oxygen levels were "extremely depressed," and doctors worried that he may have needed "to be put on a ventilator."[147] Even worse, Vice President Pence was in contact with President Trump. The dreaded "double vacancy" could have become a reality.

At the time, leading constitutional scholars endorsed the Amars' 1995 view, and some suggested that the Presidential Succession Act was unconstitutional. Professor John Yoo found the Amars' view "persuasive[]."[148] Yoo wrote that neither the Speaker of the House (Rep. Nancy Pelosi) nor the Senate President pro tempore (Sen. Chuck Grassley) "could become acting president . . . ."[149] As a result, "if Messrs. Trump and Pence were both unable to serve as president, [Secretary of State] Mr. Pompeo would become acting president."[150] The *New York Times* observed that other "legal scholars argue that [the Presidential Succession Act] may not be consistent with the Constitution, posing potentially disastrous problems if the nation's top two leaders could no longer serve."[151] Professor Jack Goldsmith likewise observed "that Ms. Pelosi and Secretary of State Mike Pompeo, the next executive branch official in line, could make competing claims to the presidency."[152] He added, "These are all nightmare scenarios because these points of constitutional law have really never been tested."[153] During this potential constitutional crisis, the Amars were silent about the implications of their quarter-century old theory.[154]

146. Christina Morales et al., *A Timeline of Trump's Symptoms and Treatments*, N.Y. TIMES (Oct. 14, 2020), https://www.nytimes.com/2020/10/04/us/trump-covid-symptoms-timeline.html [https://perma.cc/3HZM-7WS6].

147. Noah Weiland et al., *Trump Was Sicker Than Acknowledged With Covid-19*, N.Y. TIMES (Feb. 28, 2021), https://www.nytimes.com/2021/02/11/us/politics/trump-coronavirus.html [https://perma.cc/H773-RRUR].

148. John Yoo, *A Winding Constitutional Path From Trump to Pence to Pompeo*, THE WALL STREET JOURNAL (Oct. 2, 2020), https://www.wsj.com/articles/a-winding-constitutional-path-from-trump-to-pence-to-pompeo-11601677891?mod=opinion_lead_pos8 [https://perma.cc/N9AF-N9ZJ].

149. *Id.*

150. *Id.*

151. Nicholas Fandos & Nick Corasaniti, *What if Trump Can't Run? Many Steps Are Clear, but Some Are Not*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/10/02/us/politics/trump-succession-constitution.html [https://perma.cc/A4DG-3834].

152. *Id.*

153. *Id.*

154. Josh Blackman, *Do Professors Akhil and Vikram Amar Still Think the Presidential Succession Act is Unconstitutional?*, REASON–VOLOKH CONSPIRACY (Oct. 3, 2020), https://reason.com/volokh/2020/10/03/do-professors-akhil-and-vikram-amar-still-think-the-presidential-succession-act-is-unconstitutional/ [https://perma.cc/H9GT-LU93] ("I hope the Amars

Heads of government are not immune from pandemics.[155] In other countries, transfer of power plans seem more predictable. On Tillman's side of the Atlantic, U.K. Prime Minister Boris Johnson handed off his duties to a deputy after testing positive for the coronavirus.[156] But in the United States, constitutional doubts about legislative officer succession linger. These doubts must be taken seriously.

Legislative officer succession is constitutional under Approach #2. The Maximalist View treats the Speaker as an "Officer." All other appointed and elected positions in the federal government are also "Officers."

Likewise, under Approach #3, the Minimalist View, the Presidential Succession Act of 1947 is constitutional. Under our view, the Speaker, as well as the Senate President pro tempore, are "officers" for purposes of the Succession Clause.[157]

2. Under the Intermediate View, the House and Senate could create offices and then appoint their current and former members to those lucrative posts

The Amars' view yields a second practical consequence: it creates a potential risk of self-aggrandizement with respect to two provisions of the Constitution—the Incompatibility Clause and the Ineligibility Clause, which is also known as the Sinecure Clause. First, the Incompatibility Clause provides: "[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office."[158] Second, the

---

can answer a simple question. Who is in line for the Presidency after Vice President Pence: Speaker Pelosi or Secretary of State Mike Pompeo?").

155. Kaly Soto & Elian Peltier, *Leaders Who Caught Virus: Boris Johnson, Jair Bolsonaro and Now Trump*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/2020/10/02/world/trump-covid-world-leaders.html [https://perma.cc/WLL2-8Q8W] (noting that several heads of state were hospitalized due to COVID-19).

156. *Cf.* Mark Landler & Stephen Castle, *With Boris Johnson in Intensive Care, U.K. Faces a Leadership Quandary*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/world/europe/boris-johnson-coronavirus.html [https://perma.cc/4PX4-TFNA] ("The British government hurtled into uncharted territory on Tuesday, with its foreign secretary, Dominic Raab, taking up the day-to-day duties of Prime Minister Boris Johnson, who was being treated in an intensive care unit as he battled a worsening case of the coronavirus. Britain, with no written constitution, does not have a codified order of succession.").

157. *See* Josh Blackman & Seth Barrett Tillman, *The Weird Scenario That Pits President Pelosi Against Citizen Trump in 2020*, THE ATLANTIC (Nov. 20, 2019), https://www.theatlantic.com/ideas/archive/2019/11/2020-election-could-pit-pelosi-against-trump/602308/ [https://perma.cc/NY6U-QG66] ("The term *officer* in the succession clause, standing by itself, is broader than the modified phrase *officer of the United States*. This category of positions includes the speaker of the House and the president pro tempore of the Senate. Both are elected officials whose positions are expressly created by the Constitution, as opposed to appointed officers created by mere federal statute.").

158. U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

Ineligibility Clause provides that "[n]o 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 [i]ncreased during such time . . . ."[159]

Under Approach #1, the Intermediate View, appointed positions in the Legislative Branch, like the Clerk of the House or the Secretary of the Senate, do not hold "Office[s] under the United States" or "Office[s] under the Authority of the United States." According to Approach #1, these positions are a special type of "officer"—that is, "'officers' *of the legislature*."[160] The Amars have not commented on the precise status of these positions. But we can reasonably infer that under Approach #1, the Intermediate View, the Clerk of the House and the Secretary of the Senate would not be "Officers *of* the United States" or "Office[s] *under* the United States."

The Amars, we surmise, would allow a Representative to be appointed as Clerk of the House and a Senator to be appointed as Secretary of the Senate. The Incompatibility Clause would not bar the same person from holding two federal legislative positions *concurrently*.

Likewise, under Approach #1, the Intermediate View, the Ineligibility Clause would not prohibit self-dealing: the House and Senate could create legislative offices by statute with the potential for lucrative emoluments. Once these positions are created, each house—and not the President—could appoint current or former members to those posts. Consider an example: if the emoluments of the Clerk position were raised during a member's term, then under Approach #1, that member could still be appointed as Clerk. Indeed, that member could even vote to increase the salary of the Clerk, and then be appointed to that very position. Moreover, the Incompatibility Clause, as understood by Approach #1, would not bar a person from serving concurrently as *both* (1) a member and (2) a house-appointed officer, such as the Clerk of the House.

The concern about self-aggrandizement would have been understood in the eighteenth century. For example, after Samuel Adams was admitted to the Massachusetts lower house in 1766, "he was chosen clerk."[161] Indeed, it was the "practice to take that officer from among the members."[162] Adams would hold both positions concurrently for several years. And he received an

159. *Id.* art. I, § 6, cl. 2 (emphasis added).

160. Amar & Amar, *supra* note 6, at 115 n.11 (emphasis added).

161. WILLIAM TUDOR, LIFE OF JAMES OTIS, OF MASSACHUSETTS 270–71 (1823), https://bit.ly/33klMFV [https://perma.cc/XK2C-FN9U].

162. *Id.* at 271; *see also* JOHN A. SCHUTZ, LEGISLATORS OF THE MASSACHUSETTS GENERAL COURT, 1691–1780: A BIOGRAPHICAL DICTIONARY 65 (1997).

annual salary of 90£ for serving as clerk.[163] Likewise, in 1740, Roland Cotton was elected to the lower house of Massachusetts legislature.[164] The chamber subsequently chose him as its clerk.[165]

One can fairly infer from the Amars' position that this form of self-dealing was and remains permissible under the original Constitution. They wrote, "The clear purpose of [the Ineligibility Clause] was to remove the direct, immediate, and personal conflict of interest federal legislators might otherwise have when enacting laws creating (or making more lucrative) any federal *executive or judicial* offices."[166] But we do not think the Amars were similarly worried about the creation of lucrative positions in the Legislative Branch.

3. Under the Intermediate View, appointed legislative officers can serve in the Electoral College and choose the President

We can fairly infer a third practical concern based on the Amars' position: appointed legislative officers can serve in the Electoral College and choose the President. The Elector Incompatibility Clause states, "[N]o Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector."[167] Under the Amars' view, appointed positions in the legislative branch do not hold an "Office . . . under the United States." Therefore, such legislative officers could serve as Presidential Electors. This category would include the Clerk of the House and the Secretary of the Senate.

The Constitution expressly bars Senators and Representatives from serving as Presidential Electors. With good reason. Vikram Amar observed, "[T]he framers wanted the President ordinarily to have a power base independent of Congress, so he could stand up to the legislature; that is why Congresspersons cannot serve as presidential electors in the so-called

163. *See* JOHN K. ALEXANDER, SAMUEL ADAMS: THE LIFE OF AN AMERICAN REVOLUTIONARY 50, 60, 126 (2011) (indicating that the clerk made 90£ per year); *Samuel Adams*, UNITED STATES HOUSE OF REPRESENTATIVES (Sept. 4, 2021), https://history.house.gov/People/Detail?id=8317 [https://perma.cc/9X2C-P5RB] (listing Adams as member of the Massachusetts state house between 1765 and 1774).

164. JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1740–1741, at 4–5 (1942) (indicating Roland Cotton was elected as the single member for Woburn in Middlesex County); J. L. Bell, *Roland Cotton's "Circumstances and Contrivances,"* BOSTON 1775 BLOG SPOT (Aug. 22, 2009), https://boston1775.blogspot.com/2009/08/roland-cottons-circumstances-and.html [https://perma.cc/RQP5-JPJQ]; *see also Samuel Adams*, NATIONAL PARK SERVICE, https://www.nps.gov/bost/learn/historyculture/samuel-adams.htm [https://perma.cc/G5N7-PEDH].

165. Bell, *supra* note 164.

166. Amar & Amar, *supra* note 6, at 121 (emphasis added).

167. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

'electoral college.'"[168] This argument should apply with even more force to holders of appointed legislative positions, who serve at the pleasure of members of Congress. They lack the independence from Congress needed to select the President.[169] But under the Intermediate View, these subordinate officers can serve as electors. If it makes sense to exclude members of Congress from being electors, it makes even more sense to exclude their placemen. But we think the Amars' Intermediate View would allow these placemen to choose the President.

4. Under the Intermediate View, members of Congress are not subject to the Foreign Emoluments Clause

Finally, Approach #1 has practical consequences for the Foreign Emoluments Clause. It provides, "[N]o Person holding any *Office of Profit or Trust under* them [the United States], 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."[170] Under the Amars' view, the President holds an "Office . . . under the United States," and thus is covered by the Foreign Emoluments Clause. However, under the Intermediate View, Representatives and Senators, as well as appointed legislative officers, do not hold "Office[s] . . . under the United States." As a result, these positions are not subject to the Foreign Emoluments Clause. Thus, members of Congress could freely accept foreign state gifts without seeking congressional consent.

Under Approach #2, the Maximalist View, *both* the President and members of Congress are subject to the Foreign Emoluments Clause. By contrast, under Approach #3, the Minimalist View, *neither* the President nor members of Congress are subject to the Foreign Emoluments Clause. We defend this position—the elected branches are subject to other political checks. Moreover, the President in particular has a unique role in foreign affairs. The President's acceptance of foreign state gifts may implicate that role and the powers associated with that role.[171]

The dividing line of Approach #1, the Intermediate View, treats Senators and the President differently with respect to the Foreign

168. Vikram David Amar, *The TV Drama "Commander in Chief" and the Constitution: Is the Federal Presidential Succession Statute Unconstitutional?*, FIND LAW (Dec. 8, 2005), https://supreme.findlaw.com/legal-commentary/the-tv-drama-commander-in-chief-and-the-constitution-is-the-federal-presidential-succession-statute-unconstitutional.html [https://perma.cc/72S5-Z46F].

169. By contrast, state appointed officers can serve as Presidential Electors, even though they would lack independence from state governments. The Constitution does not prohibit this, and many other, potential conflicts of interest.

170. U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

171. We will discuss the Foreign Emoluments Clause in Part V of this ten-part series.

Emoluments Clause. It is hardly obvious that this line is the correct line to draw—the line between those positions that the Foreign Emoluments Clause applies to and those positions that the clause does not apply to. After all, Senators, like the President, play an important role in foreign affairs. Senators approve treaties and confirm American diplomats. These elected officials—Senators and Presidents—are both at risk of foreign influence. From a practical perspective, one which seeks to minimize foreign influence, a policy exempting Senators from the Foreign Emoluments Clause, while subjecting the President to that clause, is difficult to justify.

Even if one were to adopt the Intermediate View, and contend that Senators are exempt from the Foreign Emoluments Clause, it makes considerably less sense to exempt the Secretary of the Senate from that provision. Elected Senators face some political accountability for their actions. By contrast, the appointed Secretary serves at the pleasure of the Senate, and is not accountable to the electorate or to the wider public.

The plaintiffs in the Foreign Emoluments Clause litigation did not embrace the Amars' theory of the Constitution's "office"-language.[172] Rather, some of the litigants have adopted Approach #2. Under the Maximalist View, the President *and* members of Congress hold an "Office . . . under the United States" and are subject to the Foreign Emoluments Clause. We will consider Approach #2 in Section III.

III. APPROACH #2: THE MAXIMALIST VIEW

We refer to Approach #2 as the Maximalist View. Under Approaches #1 and #2, the phrases "Officers of the United States" and "Office . . . under the United States" are synonymous. But Approach #2 differs from Approach #1. Under Approach #1, the Intermediate View, the phrases "Officers of the United States" and "Office . . . under the United States" refer only to positions in the Judicial and Executive Branches, whether appointed or elected.

By contrast, under Approach #2, the Maximalist View, the phrases "Officers of the United States" and "Office . . . under the United States" refer to positions in all three branches, whether appointed or elected. For example, the President, Vice President, and members of Congress—all elected positions—are "Officers of the United States" and hold "Office[s] . . . under the United States." In addition, appointed positions in Congress, such as the Clerk of the House and the Secretary of the Senate, are also "Officers of the United States" and hold "Office[s] . . . under the United States."

172. *See infra* Section III.C.

Professor Zephyr Teachout, and, on occasion, Professor Lawrence Lessig, have advanced the Maximalist View. This position was also advanced in the Foreign Emoluments Clause litigation by some of the Plaintiffs and by U.S. District Court Judge Peter J. Messitte.[173]

Approach #2 avoids several of the practical consequences that follow from Approach #1, the Intermediate View. First, the Presidential Succession Act would be constitutional. Second, the House and Senate could not appoint their members to lucrative offices in the Legislative Branch. Third, appointed legislative officers, like the Clerk of the House, cannot serve as Presidential Electors. Fourth, the President, as well as members of Congress, are subject to the Foreign Emoluments Clause.

On the other hand, the Maximalist View leads to other practical problems. For example, members of Congress can be impeached. Furthermore, the Maximalist View has textual problems. Approach #2 cannot be easily reconciled with the text of three provisions of the Constitution: the Religious Test Clause, the Elector Incompatibility Clause, and the Incompatibility Clause.

A. The Offices and Officers of the Constitution under Approach #2

We refer to Approach #2 as the Maximalist View. Approach #2 does not draw a line between Legislative Positions and Officers, as does Approach #1, the Intermediate View. Rather, under Approach #2, all federal positions—whether appointed or elected—fall into a single category. The Maximalist View treats as synonymous the phrases "Officers of the United States," "Office . . . under the United States," "Office under the Authority of the United States," and "Officer," standing alone and unmodified. These phrases include all positions—appointed and elected—in all three branches.

Figure 8 depicts the Maximalist View.[174] The diagram is something of a mishmash. Fourteen of the positions we identified fall within the omnibus "office" and "officer" category: the President, the Vice President, the Secretary of State, the Assistant to the Secretary of the Treasury, the Speaker of the House, the Senate President pro tempore, Representatives, Senators, the Clerk of the House, the Secretary of the Senate, the Chief Justice, the Associate Judges of the Supreme Court, Circuit Judges of the inferior courts, and the Clerk of the Supreme Court.

173. *See infra* Section III.C.

174. Figure 8 is available at https://perma.cc/S29Y-48SG.

Approach #2 – Maximalist View

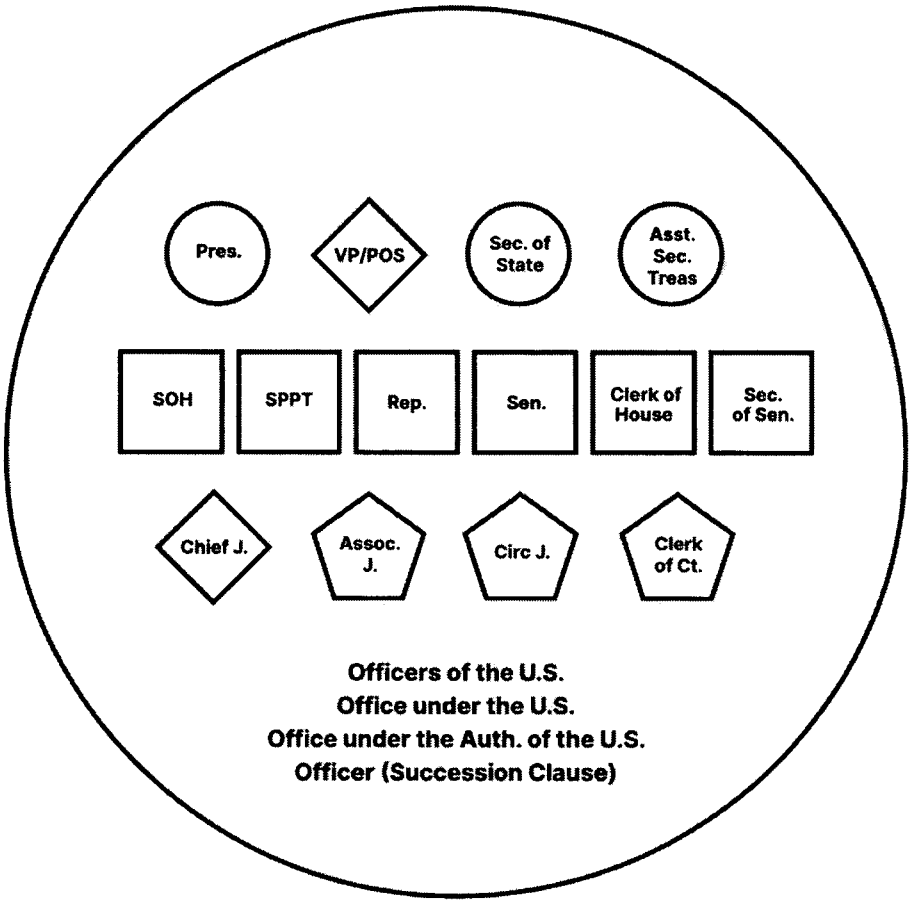


Figure 8

The Maximalist view maintains that each of these positions is an "Officer[] of the United States," an "Office . . . under the United States," an "Office under the Authority of the United States," and an "Officer." Under Approach #2, the different phrases in the Constitution do not distinguish between different kinds of positions. These phrases are all interchangeable.

Figure 9 depicts the full scope of Approach #2, the Maximalist View.[175] It is unclear how Approach #2 classifies three positions that are outside the three branches: transitional positions, holders of letters of marque and reprisal, and Presidential Electors. We have indicated the uncertain status of

175. Figure 9 is available at https://perma.cc/GG2Q-F6XF.

those positions. Once again, we are attempting to complete a theory, put forward by others, in the best possible light.

Approach #2 – Maximalist View

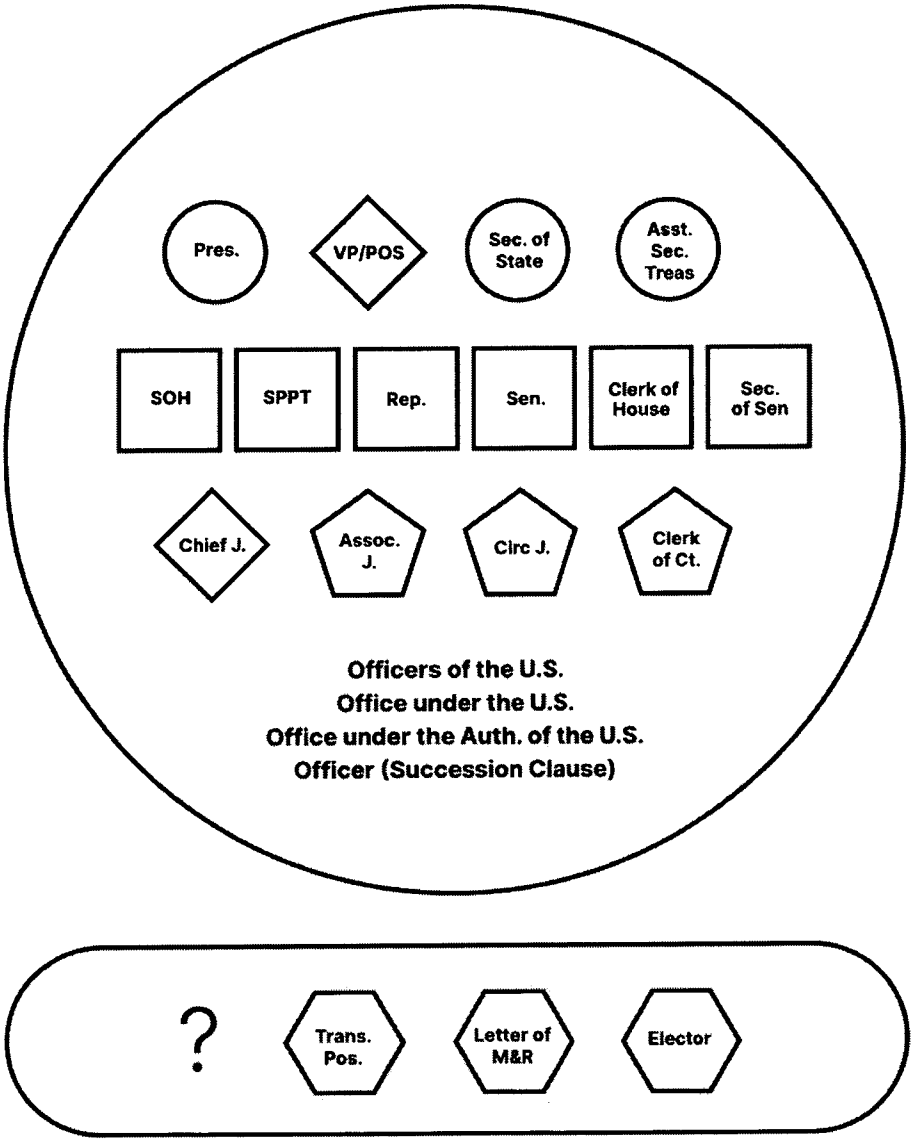


Figure 9

Table 2 explains how each of the nineteen total positions is classified under Approach #2, the Maximalist View.

Table 2

Position	"Office" or "Officer"
President	Yes
Vice President/President of the Senate	Yes
Secretary of State	Yes
Assistant to the Secretary of the Treasury	Yes
Speaker of the House	Yes
Senate President Pro Tempore	Yes
Representative	Yes
Senator	Yes
Clerk of the House	Yes
Secretary of the Senate	Yes
Chief Judge/Chief Justice	Yes
Associate Judges	Yes
Circuit Judges	Yes
Clerk of the Supreme Court	Yes
Transitional Positions	?
Letter of Marque & Reprisal	?
Presidential Electors	?

B. Professor Zephyr Teachout adopted the Maximalist View

Professor Zephyr Teachout is the leading modern advocate of the Maximalist View. She wrote, "I do not believe that the words 'under' and 'of' add much precision[]" to the phrases "Officers of the United States" and "Office . . . under the United States."[176] Teachout added that "these words . . . may have generally accompanied descriptions of appointed office, [but] they did not always do so."[177] We can draw an inference from Teachout's Maximalist View: these words may also accompany descriptions of elected officials. To Teachout, the phrase "under" in the Foreign Emoluments Clause was not "a critical, signaling preposition."[178] Rather, that provision could refer to "elected and appointed officials."[179] We think her view is faithfully depicted by Figure 9.

The Maximalist View has one limitation: these provisions do not extend to state positions. Approach #2 is limited to federal positions. However, Professor Teachout has suggested something of a *super*-maximalist position, in which state officers might also be covered by the Foreign Emoluments Clause.[180]

Professor Lawrence Lessig agreed with Professor Teachout, at least with respect to the Foreign Emoluments Clause. He concluded that Representatives and Senators were covered by this provision.[181] But Lessig did not specifically, much less systematically, address the meaning of the Constitution's divergent "officer"- and "office"-language with any clarity.

---

176. Teachout, *Gifts, Offices, and Corruption*, *supra* note 8, at 41.

177. *Id.*

178. *Id.* at 47; *see also* David J. Shaw, Note, *An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserves*, 97 GEO. L.J. 1739, 1743 (2009) ("[A]part from modifiers like 'civil' or 'inferior,' are these different phrasings—'under,' 'of,' 'under the Authority of [sic]—different categories of 'office' (or 'officer'), or are they simply stylistic variations on a single concept? The best reading is that they are simply stylistic variations because there is no consistent, principled distinction that can be drawn from the text.").

179. Teachout, *Gifts, Offices, and Corruption*, *supra* note 8, at 47.

180. *Id.* at 37–38 ("In short, even if states were intentionally excluded [from the Foreign Emoluments Clause], the shift does not constitute an intentional grant of greater power to state officials to accept foreign gifts when representing the country, simply because they cannot represent the country. Without this intention, even if the 'Constitution of 1787 liberalized the foreign government gift-giving regime in regard to state offices,' this liberalization does not reflect a lack of concern about corruption." (quoting Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, *supra* note 3)).

181. Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 70 (2012), https://harvardlawreview.org/2012/12/a-reply-to-professor-hasen [https://perma.cc/56JP-UZNT] (asserting that "the Framers banned members [of Congress] from receiving 'any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State'").

C. *In the Emoluments Clauses litigation, the* Blumenthal v. Trump *Plaintiffs and Judge Peter J. Messitte adopted the Maximalist View*

Article I, Section 9, Clause 8 of the Constitution includes the Titles of Nobility Clause and the Foreign Emoluments Clause. They provide: "No Title of Nobility shall be granted by the United States: And no Person holding *any Office of Profit or Trust under them* [the United States], 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."[182] Here, the word "them" refers back to the phrase "the United States" in the Titles of Nobility Clause. In 1788, "the United States" was viewed as a plural entity, that is a grouping of states, rather than a single collective entity.[183] It was commonplace to say, "the United States of America *are*" rather than "the United States of America *is*."[184]

For much of American history, the Foreign Emoluments Clause remained obscure—until 2017. Shortly after President Trump's January 2017 inauguration, he was sued for violating the Foreign Emoluments Clause in three primary cases. First, *CREW v. Trump* was brought by private parties. Second, *Blumenthal v. Trump* was brought by members of Congress. And third, *District of Columbia and Maryland v. Trump* was filed by the District of Columbia and Maryland Attorneys General on behalf of the District of Columbia and Maryland. Each case alleged that the acceptance of profits from foreign governments by President Trump or by Trump-affiliated commercial entities violated the Foreign Emoluments Clause. And the plaintiffs in these cases argued that the presidency is covered by the phrase "Office of Profit or Trust under" the United States, the language used in the Foreign Emoluments Clause. The Department of Justice, which defended the

182. U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

183. U.S. Term Limits v. Thornton, 514 U.S. 779, 846 n.1 (1995) (Thomas, J., dissenting) ("In the Constitution, after all, 'the United States' is consistently a plural noun."); Minor Myers, *Supreme Court Usage and the Making of an 'Is,'* 11 GREEN BAG 2D 457, 458 (2008), http://www.greenbag.org/v11n4/v11n4_myers.pdf [https://perma.cc/JFM3-MZCQ] ("Only in the beginning of the twentieth century did the singular usage [of the United States *is*] achieve preeminence and the plural usage [the United States *are*] disappear almost entirely.").

184. For example, the Treaty of Paris did not squarely treat the United States as a single country. Rather, the Treaty provided, "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and independent states, that he treats with them as such . . . ." The Definitive Treaty of Peace between the United States and Great Britain, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, https://www.ourdocuments.gov/doc.php?flash=false&doc=6&page=transcript [https://perma.cc/JQ8N-ZW3V].

President in his official capacity, declined to take a position on whether the President was subject to the Foreign Emoluments Clause.

The plaintiffs' argued that the President is covered by the Foreign Emoluments Clause. This view could be consistent with either Approach #1 or Approach #2. Under the Intermediate and Maximalist Views, the President holds an "Office . . . under the United States." However, under Approach #3, the phrase "Office . . . under the United States" extends only to appointed federal officers and not to any elected federal officials. As a result, under the Minimalist View, the President, as well as members of Congress, do not fall within the ambit of the phrase "Office . . . under the United States" in the Foreign Emoluments Clause. We filed amicus briefs that advanced the Minimalist View in *CREW v. Trump*, *District of Columbia and Maryland v. Trump*, and *Blumenthal v. Trump*.[185] We discuss each case in turn.

1. *CREW v. Trump*

In *CREW v. Trump*, the plaintiffs alleged that the acceptance of profits from foreign governments by President Trump or by Trump-affiliated commercial entities violated the Foreign Emoluments Clause. The plaintiffs were a hotelier who had an ownership interest in New York-area hotels and a nonprofit that owned a restaurant in Manhattan. The Citizens for Responsibility and Ethics in Washington (CREW), the original named plaintiff in the case, was one of several plaintiffs in the district court. CREW joined the notice of appeal. Subsequently, however, CREW withdrew from the appeal of the district court's final order, which had granted the defendant's motion to dismiss.

The plaintiffs argued that President Trump—the only defendant—was subject to the Foreign Emoluments Clause.[186] The Department of Justice represented the President in his official capacity. DOJ did not "concede[] that the President is subject to the Foreign Emoluments Clause," but also declined to affirmatively state that [the President] was not subject to that Clause.[187]

185. *See* Josh Blackman, Emoluments Clauses Litigation, GOOGLE DRIVE (May 23, 2020), https://bit.ly/2LUUTiY [https://perma.cc/G9C3-VTZY].

186. Second Amended Complaint at 64, Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-RA), ECF No. 28, https://bit.ly/2WW5CzU [https://perma.cc/CR3M-Z9U7] ("Defendant [President Trump] is a 'Person holding any Office of Profit or Trust' under the Foreign Emoluments Clause.").

187. Letter from Department of Justice Counsel to Judge Daniels at 1, Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-GBD), ECF No. 98, https://bit.ly/3gg1Xor [https://perma.cc/N68R-PUA7].

The U.S. District Court for the Southern District of New York ruled that the plaintiffs lacked standing.[188] The court thus had no occasion to rule on whether the President was subject to the Foreign Emoluments Clause.[189] On appeal, a divided panel for the Second Circuit reversed; the court found that the plaintiffs had standing.[190] The panel also did not have occasion to address the merits question of whether the President is subject to the Foreign Emoluments Clause. Later the panel amended its opinion,[191] and afterwards, the Second Circuit denied rehearing en banc.[192]

Judge Menashi dissented from the denial of rehearing en banc, and he was joined by Judges Livingston and Sullivan. Judge Menashi only "assum[ed]" that the President "may" be subject to the Foreign Emoluments Clause.[193] Judge Menashi cited our amicus brief and indicated that the applicability of the Foreign Emoluments Clause to the presidency is unclear.[194]

On January 25, 2021—five days after President Biden's inauguration—the Supreme Court vacated the Second Circuit's judgment and remanded the case "to the United States Court of Appeals for the Second Circuit with instructions to dismiss the case as moot."[195] On March 2, 2021, the Second Circuit "ORDERED that the case is DISMISSED."[196] More than four years after the case began, it came to an end.

2. *Blumenthal v. Trump*

In *Blumenthal v. Trump*, more than two hundred members of Congress, led by Senator Richard Blumenthal of Connecticut, alleged that President

188. Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 179 (S.D.N.Y. 2017).

189. *Id.* at 182 n.2 ("For purposes of this motion, Defendant has conceded that he is subject to the Foreign Emoluments Clause. (*See* Tr. of Oral Arg., ECF No. 99, at 94:11–13; Ltr. to the Ct. from Brett A. Shumate dated October 25, 2017, ECF No. 98.).").

190. Citizens for Resp. & Ethics in Wash. v. Trump, 939 F.3d 131, 138 (2d Cir. 2019).

191. Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178 (2d Cir. 2019).

192. Citizens for Resp. & Ethics in Wash. v. Trump, 971 F.3d 102 (2d Cir. 2020).

193. *Id.* at 111 n.16 (Menashi, J., dissenting) (opposing the majority's denial of rehearing en banc).

194. *Id.* ("That is, assuming the Foreign Emoluments Clause applies to the President. *Compare* Amici Br. of Former National Security Officials at 13–17 (arguing the clause applies to the President), *with* Amici Br. of Seth Barrett Tillman & the Judicial Education Project at 16–25 (arguing it does not)." (citing Brief of Scholar Seth Barrett Tillman and the Judicial Education Project as Amicus Curiae Supporting Appellee and Affirmance at 16–25, Citizens for Resp. & Ethics in Wash. v. Trump, 939 F.3d 131 (2d Cir. 2019) (No. 18-0474-cv), ECF No. 135, https://bit.ly/2X1kFZv [https://perma.cc/9JZJ-38W4])).

195. Trump v. Citizens for Resp. & Ethics in Wash., 141 S. Ct. 1262 (2021).

196. Order to Dismiss, Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178 (2d Cir. 2019) (No. 18-474), https://bit.ly/33mNOk7 [https://perma.cc/FC84-QWXF].

Trump violated the Foreign Emoluments Clause. They sued the President in the U.S. District Court for the District of Columbia.

In this case, the *Blumenthal* plaintiffs took a position consistent with the Maximalist View. Here too, the Department of Justice represented the President in his official capacity. And once again, DOJ did not take a clear position about whether the President was subject to the Foreign Emoluments Clause. In a supplemental brief, DOJ stated that "the President has assumed that he is subject to the Foreign Emoluments Clause on the assumption that he holds an 'Office of Profit or Trust' within the meaning of the Clause."[197] The district court in *Blumenthal* found that the President was subject to the Foreign Emoluments Clause, but it did not consider the Maximalist View.

a. The *Blumenthal* Plaintiffs took a position consistent with the Maximalist View

The *Blumenthal* plaintiffs, like the plaintiffs in *CREW v. Trump* and the plaintiffs in *District of Columbia and Maryland v. Trump*, argued that the President was subject to the Foreign Emoluments Clause.[198] Indeed, the *Blumenthal* plaintiffs took a position consistent with the Maximalist View. These were the only parties who attempted to brief the full scope of the Foreign Emoluments Clause's "office"-language. We have no reason to believe that the plaintiffs in the other two cases would disagree with the *Blumenthal* plaintiffs.

In *Blumenthal*, we filed an amicus brief that articulated the Minimalist View.[199] We contended that the President was not subject to the Foreign Emoluments Clause. Later, the district court ordered the plaintiffs and defendant to respond "to any arguments raised by amici that have not been addressed by the parties in their briefs."[200] We had filed the lone amicus brief that supported the defendant. And the plaintiffs chose to file a forty-page brief that responded exclusively to our amicus brief.

The *Blumenthal* plaintiffs' supplemental brief explained that "[t]he phrase 'under the United States' likewise had (and has) a straightforward

197. Defendant's Supplemental Brief in Support of His Motion to Dismiss and in Response to the Briefs of Amici Curiae at 21, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17-1154), ECF No. 51, https://bit.ly/2M6sBSZ [https://perma.cc/HAU4-YCZV].

198. First Amended Complaint at 21, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17-1154) ("Defendant Donald J. Trump is the President of the United States of America and thus holds an 'Office of Profit or Trust' under the United States."), ECF No. 14, https://bit.ly/2ZwyhNZ [https://perma.cc/4TQL-QQSW].

199. Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curae* in Support of the Defendant at 2, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17-1154-EGS), ECF 16-1, https://bit.ly/2Syzm6q [https://perma.cc/7UXX-98D9].

200. Minute Order, 335 F. Supp. 3d 45 (Mar. 30, 2018) (No. 17-1154-EGS).

meaning: under the federal government of the United States of America."[201] The congress members' brief contended that this interpretation flows from a "plain reading" of the Constitution.[202] What role did the "Office . . . under the United States"-language play? The plaintiffs argued that this term was used to distinguish between federal positions and state positions.[203] The Foreign Emoluments Clause, they wrote, would prevent "federal officials [from being] corrupted by foreign powers," and it would "leav[e] the states to regulate the conduct of their own officials."[204] In other words, plaintiffs' position suggests that all positions within the federal government are covered by the phrase "Office . . . under the United States." This broad reading of the Constitution's "office"- and officer-language is consistent with Approach #2, the Maximalist View.

The *Blumenthal* plaintiffs could have taken something of a middle position: the President holds an "Office . . . under the United States," but Senators and Representatives are excluded from the scope of the Constitution's "office"- and "officer"-language. That is, they could have pivoted towards Approach #1, the Intermediate View. Like the Amars, the *Blumenthal* plaintiffs could have cited the fact that although the Constitution expressly refers to the President as an "office,"[205] the Constitution does not use any such language for rank-and-file members of Congress. The *Blumenthal* plaintiffs would then have had to argue that the Constitution's "office"- and "officer"-language does not reach members of Congress, even by implication. We doubt the *Blumenthal* plaintiffs would distinguish members of Congress from the President in this fashion. Such a critical concession would wholly abandon their "plain reading" approach, in which all federal positions are presumptively "officers."

The *Blumenthal* plaintiffs adopted a textualist, "plain reading" approach to interpreting the Constitution. By contrast, the Amars concluded that the varied references to "Officers of the United States," and "Office[s] . . . under the United States," "seemingly describe[] the same stations."[206] The Amars, who disregarded the precise words chosen by the Framers, did not employ a "plain reading" of the Constitution.

There is another reason why the *Blumenthal* plaintiffs were unlikely to adopt the Intermediate View. We can reasonably infer from the *Blumenthal*

201. Plaintiffs' Supplemental Memorandum, *supra* note 9, at 6.

202. *Id.* at 6–7.

203. *Id.* at 6 ("That phrase thus serves to specify which officials—federal and/or state—are regulated by the Foreign Emoluments Clause.").

204. *Id.* at 7.

205. Amar & Amar, *supra* note 140.

206. *Id.* at 114.

brief that members of Congress *would* be subject to the Foreign Emoluments Clause. For example, the *Blumenthal* plaintiffs adopted a very broad definition of the word "office" in the Foreign Emoluments Clause: a position that is "a public charge or employment."[207] Senators and Representatives, like the President, draw a salary from the Treasury.[208] Each of these three elected federal positions are a public charge. Senators and Representatives, like the President, all have duties under the Constitution. These elected officials all have an employment-like relationship with the federal government.

Under the *Blumenthal* plaintiffs' "plain reading" approach, there is no principled way to distinguish between members of Congress and the President. Plaintiffs argued, in effect, that "Office" means position, and "Office . . . under the United States" extends to any federal position. Plaintiffs could have argued that the word "Office," as it is used in the Foreign Emoluments Clause, has a limited or technical meaning. Plaintiffs might have adopted such a limited, technical meaning for "Office." Such an interpretation for "Office" may have excluded Senators and Representatives from the scope of the Foreign Emoluments Clause. However, a limited, technical meaning for "office" may also have excluded the President from the clause's scope.

The *Blumenthal* plaintiffs had no occasion to opine on the phrase "Officers of the United States." That language does not appear in the Foreign Emoluments Clause. We do not think they would draw a distinction between "Officers *of* the United States" and "Office[s] *under* the United States" using their "plain reading" approach. Indeed, as a purely textual matter, between the two phrases, the phrase "Officers of the United States," would appear to be *broader* language. The Constitution's "Officers of the United States"-language, at least, would encompass every position encompassed by the Constitution's "Office . . . under the United States"-language, if not more. Why? The word "of" in the phrase "Officers of the United States" suggests that the officer is connected or related to the United States. The "under" in the phrase "Office . . . under the United States," however, is a more limited, directional term: "under" excludes positions that are "over" or are correlative

207. Plaintiffs' Supplemental Memorandum, *supra* note 9, at 5 (quoting United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice)).

208. U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."); *id.* art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . . .").

with the United States.[209] In short, if the phrase "Office . . . under the United States," as used in the Foreign Emoluments Clause, includes elected officials, such as the President, then the textually broader phrase "Officers of the United States" should also include elected officials.

Perhaps the *Blumenthal* plaintiffs would admit that "Officers of the United States" has a more limited meaning as defined by the Appointments Clause. If they make this concession, then a more measured reading of "Office . . . under the United States" should likewise be entertained. *If* the meaning of "Officers of the United States" is fixed by the language of the Appointments Clause, then the plaintiffs' "plain reading" approach has no claim to an interpretive monopoly. And if we can reject a "plain reading" approach for "Officers of the United States," then we should consider approaches other than a "plain reading" approach for related phrases such as "Office . . . under the United States" in the Foreign Emoluments Clause.

For all these reasons, the best reading of the *Blumenthal* plaintiffs' supplemental brief would support Approach #2, the Maximalist View.

b. The Department of Justice filed a Schrödinger's Brief

The Department of Justice (DOJ) also responded to our amicus brief in *Blumenthal v. Trump*.[210] DOJ did not disagree with Amici—nor did it agree. It stated: "For purposes of his motion to dismiss, the President has assumed that he is subject to the Foreign Emoluments Clause on the assumption that he holds an 'Office of Profit or Trust' within the meaning of the Clause. U.S. Const. art. I, § 9, cl. 8."[211] The government's position here emulates Schrödinger's cat: "Maybe the Foreign Emoluments Clause applies to the President—maybe it doesn't. Don't ask—we won't tell." DOJ did not advance Approach #1, #2, or #3, or any view for that matter on how to read the Constitution's "office"- and "officer"-language.

The plaintiffs and the defendant were not adverse with respect to the applicability of the Foreign Emoluments Clause to the presidency. DOJ's uncharacteristic uncertainty is particularly unexpected in light of its prior positions. In 2009, the Office of Legal Counsel ("OLC") opined that "[t]he President surely 'hold[s] an Office of Profit or Trust'" under the United States

209. Hashim, Comment to *Coda on Dual Service in Congress and as VP: Seth Barrett Tillman Replies*, DORF ON LAW (Aug. 23, 2012, 2:55 PM), http://www.dorfonlaw.org/2012/08/coda-on-dual-service-in-congress-and-as.html [https://perma.cc/N7CA-2JLD] (arguing that "office . . . under the U.S. . . . is arguably more narrow and consistent w/ [Professor Tillman's] interpretation, because 'under' is more likely than 'of' to connote *statutory* [that is, subordinate] offices").

210. Defendant's Supplemental Brief in Support of his Motion to Dismiss and in Response to the Briefs of Amici Curiae, *supra* note 197, at 21–26.

211. *Id.* at 21.

for purposes of the Foreign Emoluments Clause.[212] If this position were "surely" true, then the government would not have filed briefs that were undecided on a point that is central to the resolution of plaintiffs' claims. Moreover, DOJ raised a red flag. Its supplemental brief contended that OLC had reached its 2009 conclusion "without discussion."[213] The 2009 opinion spanned thirteen pages in length. However, the Department of Justice's Civil Division pointed out the obvious: the memorandum's analysis about the scope of the Foreign Emoluments Clause and its application to the presidency was only one word long—"surely."[214] From our perspective, the adversity that was very much lacking between the actual parties in this litigation was very much present within the Department of Justice. The Trump Justice Department withdrew an Obama-era OLC opinion on immigration policies,[215] but did not withdraw the OLC opinion on the Foreign Emoluments Clause.

c. The District Court found that the President was subject to the Foreign Emoluments Clause, but did not consider the Maximalist View

The U.S. District Court for the District of Columbia ruled the Plaintiffs had standing to proceed with the claim. The Court did not expressly decide whether the President was subject to the Foreign Emoluments Clause because the parties did not dispute the question.[216] However, the Court found persuasive the analysis from the federal trial court in *District of Columbia and Maryland v. Trump*, which we discuss in the next section.[217] On appeal,

212. Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C., 2009 WL 6365082, at *4 (Dec. 7, 2009).

213. Defendant's Supplemental Brief in Support of his Motion to Dismiss and in Response to the Briefs of Amici Curiae, *supra* note 197, at 21.

214. *Id.*

215. Letter from William P. Barr, Att'y Gen., to Chad Wolf, Acting Secretary of Homeland Security (June 30, 2020) (on file with the U.S. Dep't of Homeland Sec.), https://www.dhs.gov/sites/default/files/publications/20_0630_doj_aj-barr-letter-as-wolf-daca.pdf [https://perma.cc/29MU-VL6R] ("I also have directed the Office of Legal Counsel at the Department of Justice to withdraw an opinion that addressed the legality of DACA and related deferred-action policies, *see* The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op O.L.C. (Nov. 19, 2014), as well as any other guidance it has provided to DHS on that topic.").

216. Blumenthal v. Trump, 373 F. Supp. 3d 191, 196 n.3 (D.D.C. 2019) ("The parties do not dispute that the Clause applies to the President.").

217. *Id.* ("The Court therefore declines to reach the question despite the argument to the contrary of one amicus brief and based on Judge Peter J. Messitte's persuasive analysis of that argument and conclusion that the Clause does indeed apply to the President in the only other judicial opinion construing the Clause. *See* District of Columbia v. Trump, 315 F. Supp. 3d 875, 882–87 (D.

the D.C. Circuit reversed.[218] The panel held that the plaintiffs—all members of Congress—lacked standing.[219] On October 23, 2020—three weeks before the Presidential election—the Supreme Court denied the plaintiffs' petition for a writ of certiorari.[220]

3. *District of Columbia and Maryland v. Trump*

The third Foreign Emoluments Clause case was *District of Columbia and Maryland v. Trump*. The district court decision in this case provided the most extensive discussion of the scope of the Foreign Emoluments Clause. This case was brought by the District of Columbia and Maryland Attorneys General on behalf of the District of Columbia and Maryland. The plaintiffs argued that the President was subject to the Foreign Emoluments Clause.[221] However, they did not expressly advance the textualist arguments underlying the Maximalist View.[222] Once again, DOJ merely assumed that the President was subject to the Foreign Emoluments Clause.[223]

U.S. District Court Judge Peter J. Messitte presided over this case. Even though no party expressly advanced the Maximalist View, Judge Messitte adopted it, at least in part. Judge Messitte wrote a five-page response to the amicus brief that we had filed.[224] He posited that the phrase "under the United States" "is used in the Constitution to distinguish between" officers in "the federal and state governments."[225] A "federal officer holder" such as the "President[,] holds his office 'under the United States.'"[226] Judge Messitte seemed to agree with the Maximalist View advanced by the *Blumenthal* plaintiffs. However, Judge Messitte was not presented with the question of

---

Md. 2018); *see also* Br. for Scholar Seth Barrett Tillman and Judicial Education Project as Amici Curiae in Supp. of the Def., ECF No. 16-1."). *But see* District of Columbia v. Trump, 373 F. Supp. 3d 191 (D.D.C. 2019) (Messitte, J.), *vacated*, 838 F. App'x 789 (4th Cir. 2021).

218. Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020).

219. *Id.* at 16.

220. Blumenthal v. Trump, 141 S. Ct. 553 (2020).

221. District of Columbia v. Trump, 315 F. Supp. 3d 875, 877 (D. Md. 2018).

222. Amended Complaint at 43, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-1596-PJM), ECF No. 90-2, https://bit.ly/3eeLzmo [https://perma.cc/LA6W-DZ84] ("The phrase 'Person holding any Office of Profit or Trust,' as used in the clause, includes the President . . . .").

223. Statement of Interest at 4 n.2, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-1596-PJM), ECF No. 100, https://bit.ly/3buaPFM [https://perma.cc/ND6F-26LP] ("We assume for purposes of this Statement that the President is subject to the Foreign Emoluments Clause.").

224. *See District of Columbia*, 315 F. Supp. 3d at 882 (citing Motion for Leave to File Brief of Scholar Seth Barrett Tillman and Judicial Education Project as *Amici Curiae* in Support of the Defendant, ECF No. 27, https://bit.ly/3BwOFgO [https://perma.cc/GW2G-L69K]).

225. *District of Columbia*, 315 F. Supp. 3d at 884.

226. *Id.*

whether officials *other* that the President are subject to the Foreign Emoluments Clause. Still, we can reasonably infer from Judge Messitte's decision that members of Congress would also be officers "under" the federal government who are subject to the Foreign Emoluments Clause. If the distinguishing characteristic of an "Office . . . under the United States" is its connection to the federal government, rather than to a state government, then both members of Congress and the presidency can be fairly characterized as holding "Office[s] . . . under the United States." In other words, it appears that under Judge Messitte's analysis, if the presidency holds an "Office . . . under the United States," then members of Congress likewise hold an "Office . . . under the United States."

The Department of Justice sought mandamus from the Fourth Circuit to vacate Judge Messitte's ruling. A three-judge panel granted mandamus, finding that the plaintiffs lacked standing.[227] Subsequently, the en banc Fourth Circuit reversed the panel's ruling by a 9-to-6 vote.[228] However, all fifteen judges seemed to agree that the President was subject to the Foreign Emoluments Clause. Judge Motz wrote the majority opinion. She wrote that "[i]ndeed, as the dissenters acknowledge, the Founders themselves recognized that the Foreign Emoluments Clause constitutes a restraint" on the President.[229] Judge Wilkinson's dissent also stated that the Foreign Emoluments Clause constrains the President.[230] However, none of the judges on the Fourth Circuit analyzed the scope of the phrase "Office . . . under the United States." On January 25, 2021—five days after President Biden's inauguration—the Supreme Court vacated the Fourth Circuit's en banc decision and remanded the case "to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss the case as moot.[231]

***

Throughout the four years of the Emoluments Clauses litigation, Judge Messitte was the only judge to advance the Maximalist View, or indeed, to put forward any substantive discussion of the scope of the phrase "Office . . . under the United States." Now that all three cases have been terminated, it is

227. *See In re* Trump, 928 F.3d 360, 379 (4th Cir. 2019).

228. *In re* Trump, 958 F.3d 274 (4th Cir. 2020).

229. *Id.* at 288 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 465 (Jonathan Elliot ed., 2d ed. 1836) ("The [Foreign Emoluments Clause] restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state." (citations omitted)).

230. *Id.* at 305 (Wilkinson, J., dissenting) ("Congress may also impeach a President for his non-compliance with the [Emoluments] Clauses. . . . Randolph recognized that if the President is 'discovered' to have received forbidden emoluments, 'he may be impeached.' 3 Elliot's Debates 486." (citations omitted)).

231. Trump v. District of Columbia, 141 S. Ct. 1262 (2021).

unclear if the Supreme Court will ever have an opportunity to resolve these issues.

D. Practical Consequences of the Maximalist View

Approach #2, the Maximalist View, avoids some of the practical consequences of Approach #1, the Intermediate View.[232] First, under the Maximalist View, the Presidential Succession Act would be constitutional. The Speaker of the House would be an "Officer" for purposes of the Succession Clause and could succeed to the presidency.[233] Second, members of Congress cannot be appointed by either house to serve in legislative positions, such as the Clerk of the House and Secretary of the Senate. Such legislative positions would be considered "Office[s] . . . under the United States."[234] Therefore, the Incompatibility Clause would bar members of Congress from serving in these roles. Third, these appointed positions in the legislative branch could not serve as electors; they hold "Office[s] of Trust or Profit under the United States" for purposes of the Electoral Incompatibility Clause.[235] Finally, under Approach #2, the Maximalist View, the President, as well as Representatives and Senators, are covered by the Foreign Emoluments Clause.[236] By contrast, under Approach #1, members of Congress can accept foreign state gifts without seeking congressional consent, but the President cannot accept such gifts.[237]

Approach #2 does lead to one practical consequence that Approach #1 avoids. Under the Maximalist View, members of Congress would be "Officers of the United States."[238] Therefore, members of Congress could be

232. *See supra* Section II.E.

233. U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." (emphasis added)).

234. *Id.* art. I, § 6, cl. 2.

235. *Id.* art. II, § 1, cl. 2.

236. Lessig, *A Reply to Professor Hasen*, *supra* note 181, at 70 (stating that the Constitution's Foreign Emoluments Clause bans members of Congress from accepting gifts or titles from foreign powers); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 354, 361–62 (2009) (same).

237. *See supra* Section II.E.4.

238. U.S. CONST. art. II, § 4 ("The President, Vice President and *all civil Officers of the United States*, shall be removed from *Office* on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." (emphasis added)).

impeached.[239] By contrast, under the Intermediate View,[240] Representatives and Senators cannot be impeached because members are not "Officers of the United States."

E. Approach #2 cannot be reconciled with the plain text of the Religious Test Clause, the Elector Incompatibility Clause, and the Incompatibility Clause

The Maximalist View creates textual problems that are not obviously present with the Intermediate View. Approach #2 conflicts with the plain text of three provisions of the Constitution.

First, the Religious Test Clause provides that "no religious Test shall ever be required as a Qualification to any *Office or public Trust* under the United States."[241] This clause refers separately to two categories of positions: "Office[s] . . . under the United States" and "public Trust[s] under the United States."[242] Under Approach #2, the Maximalist View, the phrases "Office," "Office . . . under the United States," and their textual variants include every position—appointed and elected—in the federal government. If Approach #2 is correct, then what role could the Religious Test Clause's "public Trust under the United States"-language serve? The Maximalist View renders the phrase "public Trust under the United States" as surplusage. And we should avoid any reading of the Constitution that renders the text of the Constitution "mere surplusage" or "entirely without meaning."[243]

Second, the Maximalist View renders text redundant in the Elector Incompatibility Clause. It provides, "no Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector."[244] If Senators and Representatives held "an Office of Trust or Profit under the United States," there would be no need to list them separately. Moreover, the Framers did not write, "Senator or Representative,

---

239. *Id.*

240. Amar & Amar, *supra* note 6, at 115–16.

241. U.S. CONST. art. VI, cl. 3 (emphasis added).

242. We acknowledge an alternate way to splice this provision: an "office" and a "public Trust under the United States." We think our reading is preferable, but under either reading, there are two categories of positions. *See infra* Section IV.D (discussing the Religious Test Clause).

243. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) (noting that under the surplusage canon, "[i]f possible, every word and every provision is to be given effect"); *see also* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242 n.121 (1985) ("Where possible, each word of the Constitution is to be given meaning; no words are to be ignored as mere surplusage." (citing *Marbury*, 5 U.S. (1 Cranch) at 174)).

244. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

or *any other* Person holding an Office of Trust or Profit under the United States." The absence of the phrase "any other" is significant.[245] Once again, we should avoid any reading of the Constitution that renders text as surplusage.

Third, the Maximalist View renders the Incompatibility Clause incoherent. It provides that "no Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in *Office*."[246] If a member of Congress holds an "Office under the United States," then this clause's text precludes a member of Congress from being a member of Congress. The Amars recognized this contradiction.[247] For that reason, they concluded that the phrase "Office under the United States" does not encompass members of Congress.[248]

The Maximalist View creates another problem with the Incompatibility Clause: if the Speaker of the House holds an "Office under the United States," then the Speaker cannot also be a member of the House. Such a result would be inconsistent with more than two centuries of Anglo-American and congressional practice: Speakers have always been members.[249] The same analysis under the Maximalist View with respect to the Incompatibility Clause would forbid a Senator from serving as the Senate President pro tempore. But, throughout American history, the Senate President pro tempore has *always* been a senator.[250]

Approach #3, the Minimalist View, avoids these textual and historical problems. For example, our view is consistent with historical practice: the Speaker of the House can be, and, indeed has in every case been, a member of the House. Under our position, the text of the Constitution is not rendered surplusage, redundant, or incoherent. Moreover, Approach #3 avoids several of the practical consequences described above. First, under our view, the Presidential Succession Act is constitutional because officers of the House or Senate are "Officers" for purposes of Succession Clause, even though they are not "Officers *of* the United States" or "Office[s]. . . *under* the United

245. *See also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791, at 260 (1833), http://bit.ly/2RlUwhX [https://perma.cc/2M8L-3FLD]; Amar, *Of Sovereignty and Federalism*, *supra* note 127, at 1447 n.87 ("[This provision in the Articles of Confederation states *any office*,] [n]ot '*any other*,' suggesting that congressional delegates were *state* [as opposed to federal] officers." (emphasis added)).

246. U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

247. *See* Amar & Amar, *supra* note 6, at 115 (citing U.S. CONST. art. I, § 6, cl. 2).

248. *Id.* at 116–17.

249. *See List of Speakers of the House*, UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/People/Office/Speakers-List/ [https://perma.cc/V8CS-G6RJ].

250. *See also, e.g.*, *About the President Pro Tempore*, UNITED STATES SENATE, https://www.senate.gov/about/officers-staff/president-pro-tempore.htm [https://perma.cc/E6SY-BAAZ] ("Since the mid-20th century, tradition has dictated that the senior member of the majority party [in the Senate] serve as President pro tempore.").

States." Second, under our view, members of Congress cannot concurrently serve as subordinate appointed legislative officers, like the Clerk of the House. Such positions are "Office[s] . . . under the United States." Third, under our view, subordinate appointed legislative officers, like the Secretary of the Senate, cannot serve as electors. Such positions are "Office[s] . . . under the United States." And fourth, under our view, members of Congress cannot be impeached because they are not "Officers of the United States."

On the other hand, Approach #3 does lead to some arguably undesirable consequences. For example, defendants in impeachment proceedings who are tried, convicted, removed, and disqualified can be elected or re-elected to serve in the Executive and Legislative Branches. Additionally, the President and members of Congress are not subject to the Foreign Emoluments Clause. We discuss these issues in Part IV.

IV. APPROACH #3: THE MINIMALIST VIEW

Approaches #1 and #2, the Intermediate and Maximalist Views, treat the Constitution's "office"- and "officer"-language as largely synonymous. Approach #3, the Minimalist View, does not. Rather, our preferred position accounts for the divergent "office"- and "officer"-language that appears in the Constitution's text. We count six categories of the Constitution's offices and officers:

1. The phrase "Officers of the United States" is used in the Appointments Clause, the Commissions Clause, the Impeachment Clause, and the Oath or Affirmation Clause.

2. The phrase "Office under the United States" is used in the Incompatibility Clause. Close variants of that phrase are used in the Impeachment Disqualification Clause, the Foreign Emoluments Clause, and the Elector Incompatibility Clause. We describe the language in these four provisions, collectively, as "Office . . . under the United States." The ellipses refer to different words the Framers placed after *office* but before *under*: "profit," "trust," and/or "honor."

3. The Ineligibility Clause uses the phrase "Office under the Authority of the United States."

4. The Religious Test Clause uses the phrase "Office or public Trust under the United States."

5. The Necessary and Proper Clause refers to an "Officer" of "the Government of the United States."

6. The Succession Clause refers to an "Officer," with that word standing alone and unmodified.

These six categories are depicted in Table 3.

Table 3

Officers of the U.S.	• Appointments Cl. (Art. II, § 2) • Commissions Cl. (Art. II, § 3) • Impeachment Cl. (Art II, § 4) • Oaths Cl. (Art. VI)
Office . . . under the U.S.	• Incompatibility Cl. (Art. I, § 6) • Impeachment Disq Cl. (Art. I, § 3) • Foreign Emoluments Cl. (Art I, § 9) • Elector Incompatibility Cl. (Art. II, § 1)
Office under the Authority of the U.S.	• Ineligibility Cl. (Art. I, § 6)
Office or Public Trust under the U.S.	• Religious Test Cl. (Art. VI)
Officer of the Dept. of the Gov. of the U.S.	• Necessary & Proper Cl. (Art. I, § 8, Cl. 18)
Officer	• Succession Cl. (Art. I, § 1, Cl. 6)

We discuss each category with respect to the Minimalist View.

A. "Officers of the United States"

Under Approach #3, the Minimalist View, the phrase "Officers of the United States" refers to *appointed* positions in the Executive and Judicial Branches. This language does not include appointed positions in the Legislative Branch, such as the Clerk of the House and the Secretary of the Senate. The Appointments Clause defines the term "Officers of the United States" and, generally, how these positions are appointed: such appointments are made to positions that have already been established by federal statute in the Executive and Judicial Branches. This category includes principal officers and inferior officers.[251]

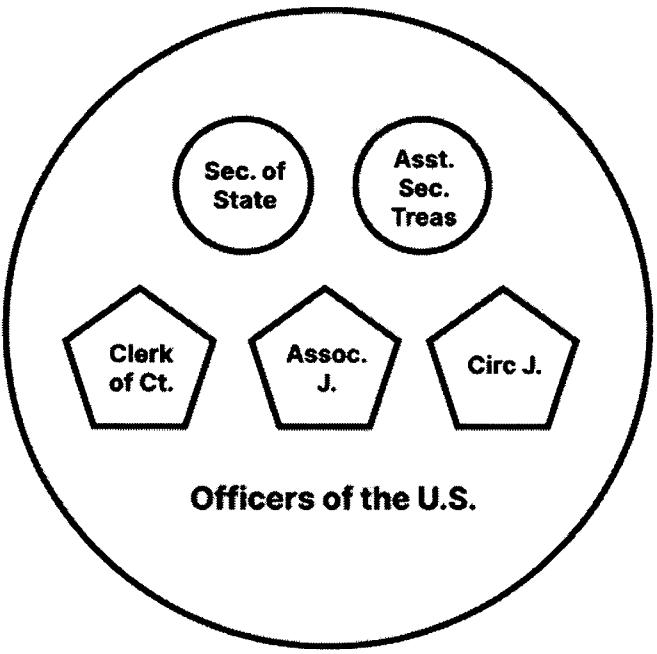
Figure 10 depicts five "Officers of the United States."[252] The *principal* Officers of the United States include the Associate Judges of the Supreme Court, the Circuit Judges of the inferior courts, and the Secretary of State.

251. *See supra* Section I.A (distinguishing between "principal officer[s]" and "inferior officers"). We acknowledge there is some debate about whether Article III circuit court judges and district court judges are *principal* officers. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring) (suggesting that judges on the "inferior" Article III courts are principal officers); *see also* Amar, *supra* note 243, at 235 n.103 ("An argument could be made that lower federal judges might be 'inferior Officers' whose appointment could be vested by Congress in other Article III judges.").

252. Figure 10 is available at https://perma.cc/X75S-K96T.

The *inferior* Officers of the United States include the Assistant to the Secretary of the Treasury and the Clerk of the Supreme Court.

Approach #3 – Minimalist View
Officers of the U.S.



Officers of the U.S.

Appointments Cl. (Art. II, § 2)

Commissions Cl. (Art. II, § 3)

Impeachment Cl. (Art. II, § 4)

Oath Cl. (Art. VI)

Figure 10

Under the Minimalist View, the Chief Judge of the Supreme Court could be fairly considered a *principal* Officer of the United States.[253] This position fits within the bounds of the Appointments Clause: he is nominated by the President and is confirmed by the Senate. But the Chief Judge wears two hats. He also serves as Chief Justice during impeachment trials for the President. We think the Chief Justice holds a "public Trust under the United States."[254] To avoid any confusion, we do not list the Chief Judge or the Chief Justice in Figure 10.

B. "Office . . . under the United States"

Under Approach #3, the Minimalist View, the phrase "Officers of the United States" refers to appointed positions in the Executive and Judicial Branches. The category of "Office . . . under the United States" is broader than the category of "Officers of the United States." Under the Minimalist View, the phrase "Office . . . under the United States" refers to appointed positions in the Executive and Judicial Branches, as well as to *non-apex* appointed positions in the Legislative Branch. These non-apex positions can be appointed in the Legislative Branch pursuant to the House Officers Clause and the Senate Officers Clause.[255] These non-apex positions may also be appointed pursuant to the Rules of Proceedings Clause.[256]

All "Officers of the United States" necessarily hold an "Office . . . under the United States." However, not all holders of an "Office . . . under the United States" are also "Officers of the United States." For example, the Clerk of the House holds an "Office . . . under the United States," but he is not an "Officer[] of the United States." Conversely, the Secretary of State, an Executive Branch principal officer, is *both* an "Officer[] of the United States," and he also holds an "Office . . . under the United States." Figure 11 depicts the relationship between the "Officers of the United States" and "Office[s] . . . under the United States."[257]

253. *See supra* Section I.C (distinguishing between the Chief Judge of the Supreme Court and the Chief Justice).

254. *See infra* Section IV.D.1 (concluding that the Chief Justice is best viewed as a "public Trust under the United States"). *See generally* Seth Barrett Tillman, *A Religious Test in America?: The 1809 Motion to Vacate Jacob Henry's North Carolina State Legislative Seat—A Re-Evaluation of the Primary Sources*, 98 N.C. HIST. REV. 1, 19 n.74 (2021), https://ssrn.com/abstract=3498217 (explaining the difficulties involved in properly characterizing supreme court judges).

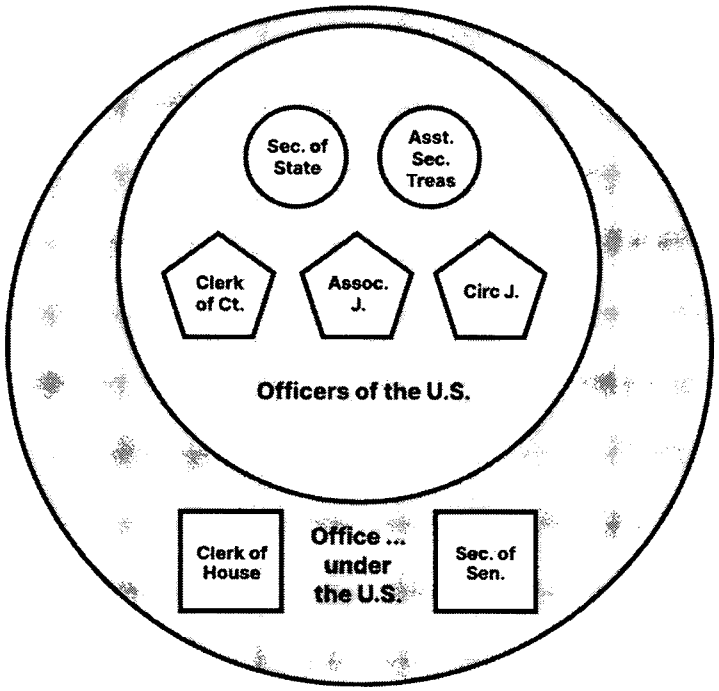
255. *See supra* Section I.B (discussing selection of House and Senate officers).

256. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

257. Figure 11 is available at https://perma.cc/9X4W-9J4D.

Approach #3 – Minimalist View

Officers of the U.S. and Office ... under the U.S.



Officers of the U.S.

Appointments Cl. (Art. II, § 2)

Commissions Cl. (Art. II, § 3)

Impeachment Cl. (Art. II, § 4)

Oath Cl. (Art. VI)

Office . . . under the U.S.

Incompatibility Cl. (Art. I, § 6)

Impeachment Disq. Cl. (Art. I, § 3)

Foreign Emoluments Cl. (Art. I, § 9)

Elector Incompatibility Cl. (Art. II, § 1)

Figure 11

C. *"Office under the Authority of the United States"*

The Ineligibility Clause, also known as the Sinecure Clause, states that "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 [i]ncreased during such time . . . ."[258] Under Approach #3, the Minimalist View, the phrase "civil Office under the Authority of the United States" includes all civilian "Office[s] . . . under the United States," and extends further to include a broader category of irregular civilian offices.[259] Justice Story explained that the word *civil* is "used in contradistinction to military . . . ."[260]

All "Officers of the United States," and those who hold "Office . . . under the United States," fall within the ambit of the Ineligibility Clause's "Office under the Authority of the United States"-language. But certain "Office[s] under the Authority of the United States" are not "Office[s] . . . under the United States," and they are also not "Officers of the United States."

Figure 12 depicts two positions covered by the Ineligibility Clause's "Officer under the Authority of the United States"-language: transitional positions and holders of letters of marque and reprisal.[261] We do not list Presidential Electors in this category. Instead, we think the better view is that Presidential Electors hold "public Trust[s] under the United States."[262]

---

258. U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

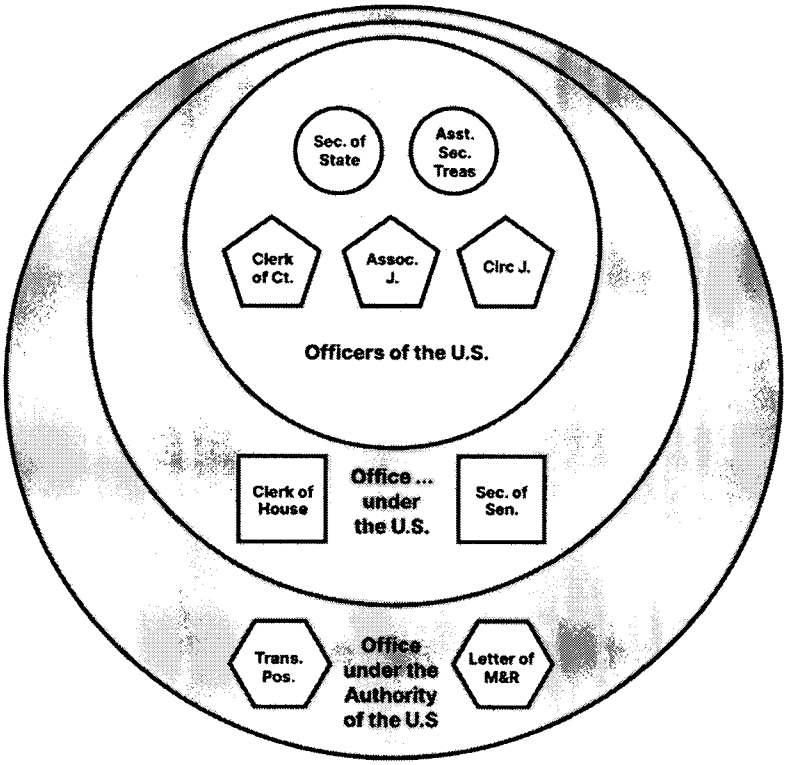
259. *See supra* Section I.D (discussing irregular positions, including holders of letters of marque and reprisal, Presidential Electors, and transitional officers).

260. *See* 2 STORY, *supra* note 245, § 789, at 258 ("The sense, in which the term [civil] is used in the constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government.").

261. Figure 12 is available at https://perma.cc/Z62U-DMNW. We have shared our initial thoughts about the best characterization of territorial officers. *See, e.g.*, Josh Blackman & Seth Barrett Tillman, *Justice Breyer made it impossible for Congress to impeach territorial officers for accepting bribes*, BALKINIZATION (July 14, 2020, 1:45 PM), https://balkin.blogspot.com/2020/07/justice-breyer-made-it-impossible-for.html [https://perma.cc/C829-W7JH]; Josh Blackman & Seth Barrett Tillman, *The PROMESA Board Members are not "Officers of the United States." So what are they?*, REASON–VOLOKH (June 10, 2020, 2:31 PM), https://reason.com/volokh/2020/06/10/the-promesa-board-members-are-not-officers-of-the-united-states-so-what-are-they/ [https://perma.cc/KFV7-RQKW].

262. *See infra* Section IV.D.1 (concluding that Presidential Electors are best characterizing as holding "public Trust[s] under the United States").

Approach #3 – Minimalist View
Officers of the U.S., Office ... under the U.S., and Office under the Authority of the U.S.



Officers of the U.S.

Appointments Cl. (Art. II, § 2)

Commissions Cl. (Art. II, § 3)

Impeachment Cl. (Art. II, § 4)

Oath Cl. (Art. VI)

Office . . . under the U.S.

Incompatibility Cl. (Art. I, § 6)

Impeachment Disq. Cl. (Art. I, § 3)

Foreign Emoluments Cl. (Art. I, § 9)

Elector Incompatibility Cl. (Art. II, § 1)

Office under the Authority of the U.S.

Ineligibility Cl. (Art. I, § 6)

Figure 12

D. "Office or Public Trust under the United States"

The Religious Test Clause provides that "no religious Test shall ever be required as a Qualification to any *Office or public Trust under the United States*."[263] To be precise, this phrase refers to two separate categories: "Office[s] . . . under the United States" and "public Trust[s] under the United States."[264] Under Approach #3, the Minimalist View, the former category includes appointed positions in all three branches. The latter category includes federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties. Elected federal officials, as well as Presidential Electors, hold "public Trust[s] under the United States."

1. "Public Trust under the United States"

The category "public Trust under the United States" can be understood in three different, but closely related ways. First, this category could include all elected federal officials, but would not include appointed federal officers.

Second, this category could include positions that are mandated by the Constitution. These positions are expressly identified in the Constitution, such as the President, Senators, and Representatives.

However, this category excludes positions that are not mandated by the Constitution. These non-mandated positions can be created by federal statute. Or these positions can be *regularized* by federal statute.[265] This category would include positions that were created under the Articles of Confederation government, but were later *converted* to permanent positions under the new federal government. Finally, these non-mandated positions are entirely *defeasible*[266] by federal statute—in other words, Congress can entirely eliminate their powers by federal statute. These non-mandated positions would not hold a "public Trust under the United States."

There is a third way to understand the category "public Trust under the United States." This category could include officials that are not subject to direction or supervision by a higher federal authority in the normal course of their duties. The President, Senators, and Representatives would fall in this category. No one regularly supervises them in the performance of their duties. Nor can anyone direct them to exercise their core constitutional

263. U.S. CONST. art. VI, cl. 3 (emphasis added).

264. *See supra* note 242 (acknowledging an alternate way to read language in the Religious Test Clause).

265. *See supra* Section I.B (discussing regularization of irregularly-created and irregularly-filled positions).

266. *Defeasible*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("an act, right, agreement, or position . . . capable of being annulled or avoided.").

powers in a particular fashion. And this rule extends to the judiciary. Federal courts routinely issue orders that run against elected officials. But we doubt any Article III judge would order a member of Congress to vote for or against a specific bill. Nor would a federal judge order the President to sign or veto a particular bill. These elected officials are all *apex* positions who hold "public Trusts under the United States." By contrast, a *non-apex* position is not a "public Trust under the United States." For example, the President can supervise and direct the Secretary of State. And the House can supervise and direct the Clerk of the House. Both of these non-apex positions are not "public Trusts under the United States."

The consequences that flow from each of these three interpretations are nearly, if not entirely, identical. In other words, the same categories of positions would, or would not be, considered "public Trust[s] under the United States." Still, we think the third method is the best one for understanding the phrase "public Trust under the United States." We will explain our reasoning in Part VII of this series, which will focus on the Religious Test Clause and its "public Trust under the United States"-language.

Figure 13 depicts the positions that are "public Trust[s] under the United States": the President, the Vice President, the Chief Justice/chief judge of the Supreme Court, the Speaker of the House, the Senate President pro tempore, Representatives, Senators, and Presidential Electors.[267] The Constitution empowers these *apex* positions to exercise their core constitutional power(s) without direction or supervision by a higher federal authority in the normal course of their duties.

267. Figure 13 is available at https://perma.cc/MS4K-UDP8.

Approach #3 – Minimalist View

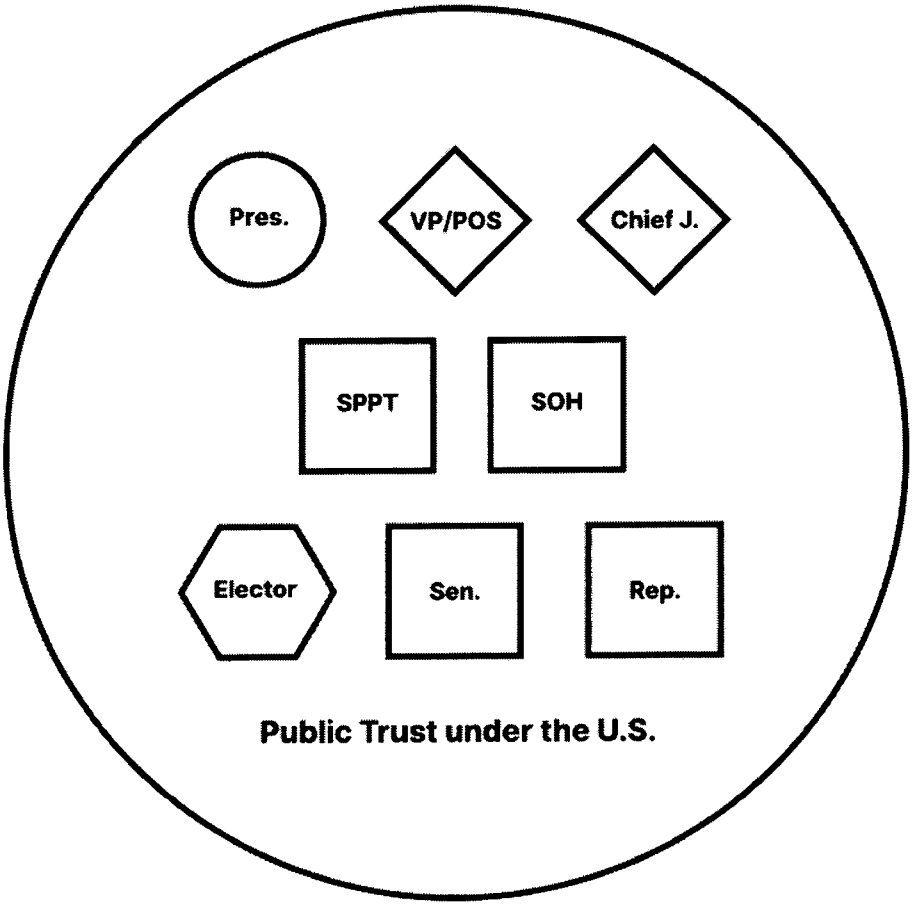


Figure 13

2. "Office or Public Trust under the United States"

The phrase "Office . . . under the United States" in the Religious Test Clause includes the *same* positions covered by the phrase "Office under the United States" in the Incompatibility Clause. This phrase includes all appointed positions in all three branches of the federal government. What did the phrase "public Trust under the United States" add? We do not think it was redundant or surplusage.[268] Rather, the phrase "public Trust under the United States" functioned as a *catch-all*. The phrase encompassed *all* of the remaining positions in the three branches that were beyond the scope of the phrase "Office . . . under the United States."

Figure 14 depicts those positions that would hold an "Office . . . under the United States": the Associate Judges of the Supreme Court, the Circuit Judges of the inferior courts, the Secretary of State, the Assistant to the Secretary of the Treasury, and the Clerk of the Supreme Court.[269] In addition, the Clerk of the House and the Secretary of the Senate are also covered by the Religious Test Clause's "Office . . . under the United States"-language. Figure 14 also depicts those positions that would hold a "public Trust under the United States." Collectively, these two categories of positions are subject to the Religious Test Clause. The Vice President/President of the Senate, as well as the Chief Justice/Chief Judge of the Supreme Court, are each counted as two positions.

268. *See supra* Section III.E (noting that Approach #2, the Maximalist View, renders as surplusage the phrase "public Trust under the United States" in the Religious Test Clause).

269. Figure 14 is available at https://perma.cc/PRR4-QJR9.

Approach #3 – Minimalist View
"Office or Public Trust under the U.S."

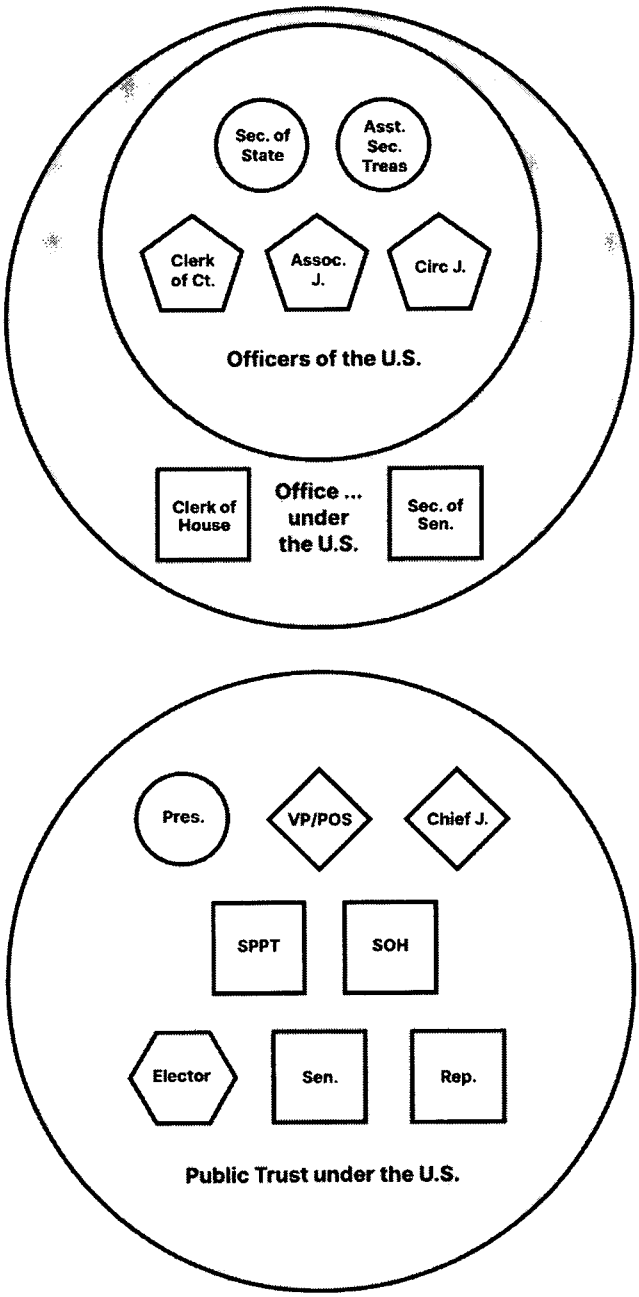


Figure 14

The phrase "Office or public Trust under the United States," however, does not include every position subject to the Ineligibility Clause's "Office under the Authority of the United States"-language. For example, transitional officers and holders of letters of marque and reprisal do not hold an "Office[s] . . . under the United States," nor do they hold "public Trust under the United States." The text of the Religious Test Clause does not squarely prohibit Congress from imposing a religious test on these positions. However, under modern doctrine, the First Amendment or the Due Process Clause might prevent the federal government from imposing a religious test for these positions.[270]

3. Summary

Table 4 explains how each of the nineteen total positions is classified under Approach #3, the Minimalist View. Again, the Vice President/President of the Senate, as well as the Chief Justice/Chief Judge of the Supreme Court, are each counted as two positions.

270. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (holding unconstitutional a religious test for state officers).

Table 4

Position	Officer of the U.S.	Office . . . under the U.S.	Office under the Authority of the U.S.	Public Trust under the U.S.
President	No	No	No	Yes
Vice President/ President of the Senate	No	No	No	Yes
Secretary of State	Yes	Yes	Yes	No
Assistant to the Secretary of the Treasury	Yes	Yes	Yes	No
Speaker of the House	No	No	No	Yes
Senate President Pro Tempore	No	No	No	Yes
Representative	No	No	No	Yes
Senator	No	No	No	Yes
Clerk of the House	No	Yes	Yes	No
Secretary of the Senate	No	Yes	Yes	No
Chief Judge/Chief Justice	Yes	Yes	Yes	Yes
Associate Judges	Yes	Yes	Yes	No
Circuit Judges	Yes	Yes	Yes	No
Clerk of the Supreme Court	Yes	Yes	Yes	No
Transitional Positions	No	No	Yes	No
Letter of Marque & Reprisal	No	No	Yes	No
Presidential Electors	No	No	No	Yes

E. The Necessary and Proper Clause

The Necessary and Proper Clause, also known as the Sweeping Clause, gives Congress additional authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the *Government of the United States, or in any Department or Officer thereof*."[271] This provision empowers Congress to regulate both government entities and governmental positions.

More specifically, the authority granted by the Sweeping Clause extends to three categories. First, the Sweeping Clause's authority extends to "the Government of the United States." Second, this authority extends to "any Department" of "the Government of the United States." This authority extends to a third category, which can be understood in two different ways: (i) an "Officer" of the "Government of the United States" or (ii) an "Officer" of "any Department" of the "Government of the United States." This third category will overlap with "public Trust[s] under the United States."

1. "The Government of the United States"

The Sweeping Clause refers to "the Government of the United States." We think this phrase encompasses the permanent government, *collectively*: the House, the Senate, the President, and the Supreme Court. What do we mean by the *permanent* government? After the Constitution was ratified, there was no need to enact a statute to establish the House, the Senate, and the President.[272] They were established by the Constitution itself.

We do not think the Constitution established the Supreme Court in precisely the same sense that the Constitution established the House, the Senate, and the President. Rather, the Constitution mandated the existence of the Supreme Court. Article III, section 1 provides that the "[t]he judicial Power of the United States, *shall be vested* in one supreme Court . . . ."[273] Here, the word "shall" suggests futurity.[274] In other words, that power "shall

271. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

272. *See id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."); *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

273. *Id.* art. III, § 1 ("The judicial Power of the United States, *shall be vested in one supreme Court*, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added)).

274. *See* Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on* Shall *and* May, 50 AM. J. LEGAL HIST. 453, 454 (2010) ("For example, legal discussions frequently focus on the alleged

be vested" at some point in the future. When? That judicial power cannot be vested until Congress acts. A statute, here, the Judiciary Act of 1789, was needed to establish the Supreme Court.[275] And the Constitution obligated Congress to establish the Court. By contrast, no federal statute was needed to elect and establish the first President, and the first Congress.

The Article III Vesting Clause does not only concern the Supreme Court. The clause also addresses the lower courts: "The judicial power . . . shall [also] be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish."[276] The Article III Vesting Clause is unique: it vests the same *constitutional* authority in the Supreme Court, which Congress *must* establish by statute with the inferior courts that Congress *may* later establish by statute. By contrast, the Vesting Clauses in Articles I and II vest constitutional authority in entities that were created by the Constitution: the Congress and the President.[277]

The phrase "the Government of the United States" refers to the House, the Senate, the President, and the Supreme Court as a single category. And Congress can enact a single statute to regulate all four entities in one fell swoop. Figure 15 depicts "the Government of the United States."[278]

distinction between the use of (the mandatory) shall and (the permissive) may in the Constitution of 1787. But this distinction may very well be a victim of presentism.").

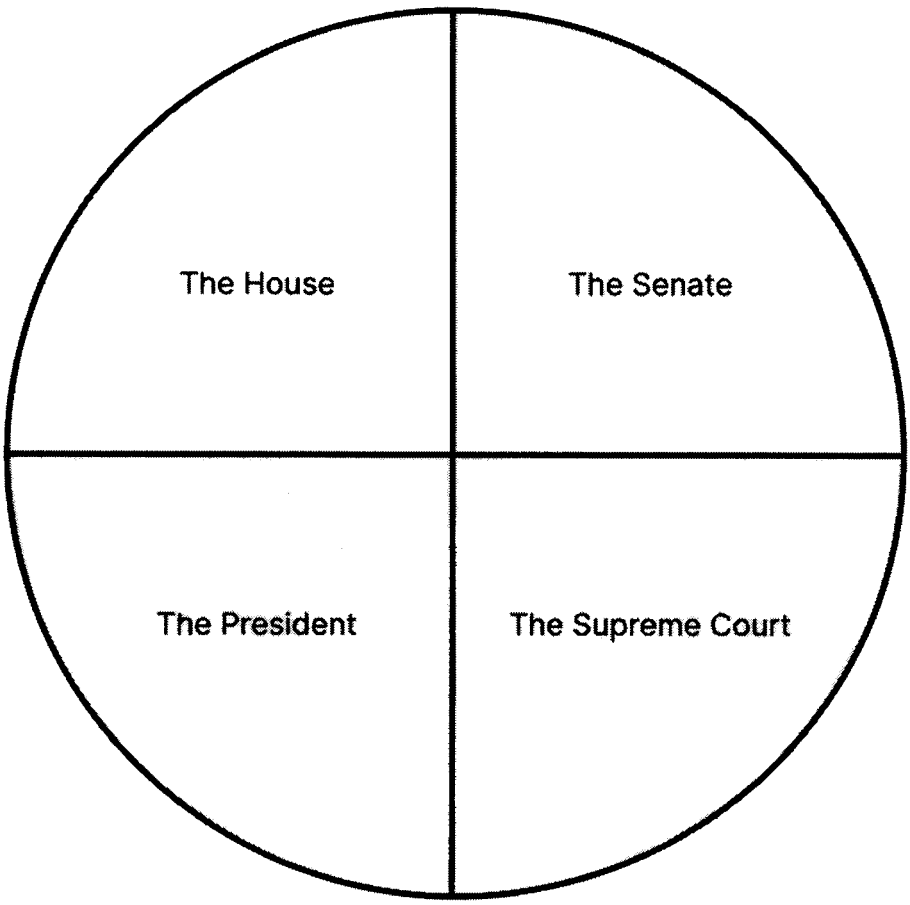
275. The Federal Judiciary Act, ch. 20, § 1, 1 Stat. 73 (1789) ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the supreme court of the United States shall consist of a chief justice and five associate justices . . . any four of whom shall be a quorum.").

276. U.S. CONST. art. III, § 1.

277. *Id.* art. I, § 1; *id.* art. II, § 2.

278. Figure 15 is available at https://perma.cc/57TU-3F79.

Approach #3 – Minimalist View
Necessary & Proper Cl. – "The Gov. of the U.S."



The Gov. of the U.S. (N&P Cl.)

"...all other Powers vested by this Constitution in
the Government of the United States,
or in any Department or Officer thereof."

Figure 15

2. "Any Department" of "the Government of the United States"

The Sweeping Clause gives Congress additional authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in *the Government of the United States*, or in any *Department or Officer thereof*."[279] Now, we will focus on the second category: "any Department" of "the Government of the United States." This category includes the components of the three branches of the federal government which are mandated by the Constitution: the Legislative Branch, the Executive Branch/President, and the Judicial Branch/Supreme Court.

The phrase "the Government of the United States" in the Sweeping Clause allows Congress to regulate all permanent elements of the government—the House, the Senate, the President, and the Supreme Court—collectively. The definite article "the" refers to all of these entities as a collective. By contrast, the "any Department"-language allows Congress to regulate each "Department" in its *separate* capacity. The indefinite pronoun "any" refers to each entity separately.

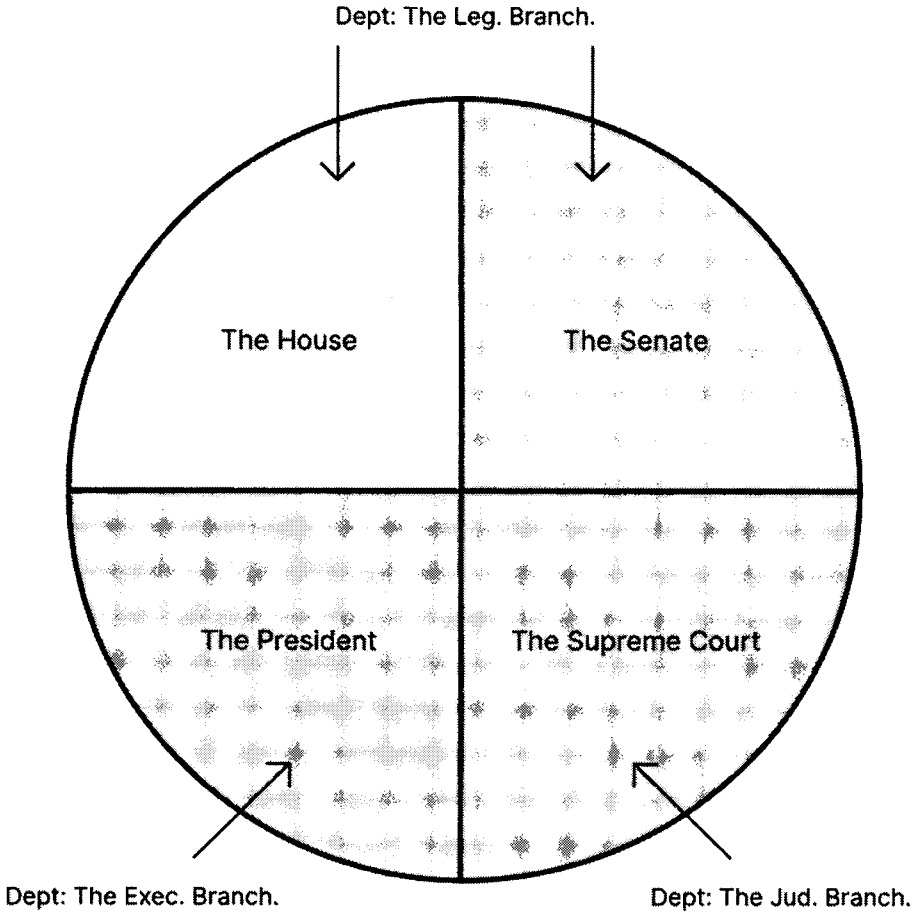
Imagine if the latter category were absent. Without the "any Department"-language, it could be argued that Congress could only promulgate general rules that apply to all the departments *collectively*. This alternate version of the Sweeping Clause would put Congress in a bind: any legislation that would govern any one entity of the permanent government must also govern all entities of the permanent government. *All for one and one for all* may work for the Three Musketeers,[280] but that maxim would not work for the three branches of government. In the absence of the "any Department"-language, it might be unconstitutional to establish different rules for Congress, the President, and the Supreme Court. Fortunately, the Constitution is not so constricting. The addition of the "any Department"-language enables Congress to enact specific legal statutory regimes for each entity, in a piecemeal fashion. That is, the Legislative Branch can be governed by one set of statutes, the President by a second set of statutes, and the Supreme Court can be governed by a third set of statues. The "any Department"-language enables this varied approach. Figure 16 depicts "any Department" of "the Government of the United States."[281]

279. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

280. ALEXANDRE DUMAS, LES TROIS MOUSQUETAIRES [The Three Musketeers] 133 (France, n.p. 1844) ("[T]ous pour un, un pour tous.").

281. Figure 16 is available at https://perma.cc/FME7-DP73.

Approach #3 – Minimalist View
"The Gov. of the U.S." and Dept. of the Gov. of the U.S.



The Gov. of the U.S. (N&P Cl.)

"...all other Powers vested by this Constitution in
the Government of the United States,
or in any **Department** or Officer thereof."

Figure 16

3. "Officer" of "the Government of the United States" or "Officer" of "Any Department" of "the Government of the United States"

The Sweeping Clause gives Congress additional authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in *the Government of the United States*, or in *any Department* or *Officer* thereof."[282] The third category of authority can be read in two different ways: (1) "Officer[s]" of "the Government of the United States" or (2) "Officer[s]" of "any Department" of "the Government of the United States." The grammar of the Sweeping Clause is unclear. We are not aware of any judicial authority that has resolved this ambiguity. There are two plausible readings: (1) the word "Officer" modifies "any Department" or (2) the word "Officer" modifies "the Government of the United States."

Admittedly, we are not sure which reading is better. But our position arrives at the same result under either of these two readings. Under Approach #3, these two readings, in effect, refer to the same positions. Specifically, this "officer"-language refers to the five *apex presiding* officers that are identified in the Constitution: the President, the Vice President, the Chief Justice, the Speaker of the House, and the Senate President pro tempore. First, the President, as the root of the title suggests, *presides* over the Executive Branch.[283] The Constitution vests this "executive power"—the power to preside—in the President. Second, the Vice President *presides* over the Senate in her capacity as President of the Senate. And the Constitution empowers her to break ties. This tie-breaking power is often held by presiding officers.[284] Third, the Constitution authorizes the Chief Justice to preside over impeachment trials for the President.[285] And, the Chief Judge has also presided over the Supreme Court, albeit, the authority to do so is not expressly enumerated in the Constitution. By contrast, Congress could not eliminate the core constitutional powers of the President, Vice President, and Chief Justice by statute. These constitutional powers within the permanent "Government of the United States" are not entirely defeasible. By contrast,

282. U.S. CONST. art. III, § 8, cl. 18 (emphasis added).

283. Selena Simmons-Duffin, *Why President? How The U.S. Named Its Leader, heard on All Things Considered*, NPR (Feb. 15, 2016), https://www.npr.org/2016/02/15/466848438/why-president-how-the-u-s-named-its-leader [https://perma.cc/LLU5-T9UK] ("[The word President] 'comes from praesidere,' which literally means 'to sit before' . . . . It referred to an officer who would sit before a gathering and would serve as the presiding officer.").

284. *See* Margaret A. Banks, *The Chair's Casting Vote: Some Inconsistencies and Problems*, 16 U.W. ONT. L. REV. 197 (1977); *see also* THE FEDERALIST No. 68 (Alexander Hamilton) (noting that the Constitution granted the Vice President a tie-breaking vote in order "to secure at all times the possibility of a definitive resolution of the body").

285. U.S. CONST. art. I, § 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside . . . .").

the powers of statutorily-created, non-permanent entities within the federal government are defeasible.

There are two other apex presiding officers identified in the Constitution: the Speaker of the House who presides over the House, and the Senate President pro tempore who presides over the Senate in the absence of the President of the Senate. The Constitution is silent about the powers of these two apex presiding officers. Our view is that these two positions possess the same authority that presiding officers generally have: they are the most obvious persons to whom communications from another branch or department should be channeled, even absent specific statutory recognition. When the Senate sends a communication to the House, it would be directed to the Speaker of the House. When the Executive Branch sends a communication to the Supreme Court, it would be directed to its Chief Judge. And when the Supreme Court sends a communication to the Executive Branch, it would be directed to the President.

This dynamic may explain one of the more significant historic inter-branch communications. In July 1793, Secretary of State Thomas Jefferson, on behalf of President Washington, wrote to "the Chief Justice and judges of the Supreme Court."[286] (Here, Jefferson did not use the phrase "Justices of the Supreme Court."[287]) Jefferson asked if the President could refer questions to Chief Justice Jay and his colleagues concerning the "construction of our treaties," "the laws of nature and nations," and "the laws of the land." Chief Justice John Jay wrote a letter back to the President directly and declined the President's request. This famous letter, which became known as the "Correspondence of the Justices," provided the basis for the advisory opinion doctrine.[288] Jay, however, did not send the message to Jefferson, who had

286. Letter from Thomas Jefferson to the Chief Justice and Judges of the Supreme Court (July 18, 1793), *in* THE THOMAS JEFFERSON PAPERS AT THE LIBRARY OF CONGRESS, SERIES 1: GENERAL CORRESPONDENCE, 1651 TO 1827, https://bit.ly/2XckYiS [https://perma.cc/NT66-Z7N8] (addressees are listed at the base of the letter).

287. *See supra* Section I.C (noting distinction between "Justices" and "Judges" of the Supreme Court); *cf.* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 808 (2021) (Roberts, C.J., dissenting) ("Five years after Hamilton wrote Federalist No. 78, Secretary of State Thomas Jefferson sent a letter on behalf of President George Washington to Chief Justice John Jay and the *Associate Justices* of the Supreme Court, asking for advice about the Nation's rights and obligations regarding the ongoing war in Europe." (emphasis added)). Chief Justice Roberts was less than exact. Washington's letter was addressed to the "Judges of the Supreme Court" and not to the "Associate Justices." *See supra* note 286.

288. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 678 (2016) (Roberts, C.J., dissenting) ("The Supreme Court politely—but firmly—refused the request, concluding that 'the lines of separation drawn by the Constitution between the three departments of the government' prohibit the federal courts from issuing such advisory opinions." (citing 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 486–89 (Henry P. Johnston ed., 1890–1893))).

initially posed the questions. Instead, Jay went over Jefferson's head. The Chief Justice sent his response to President Washington, the presiding officer of the Executive Branch.[289] As a general matter, the presiding officer of one entity will avoid corresponding with a subordinate officer of another entity.[290] Thus, if Congress does not enact a statute modifying the constitutional default rule for inter-branch communications, the Speaker of the House and the Senate President pro tempore retain this communicative authority.

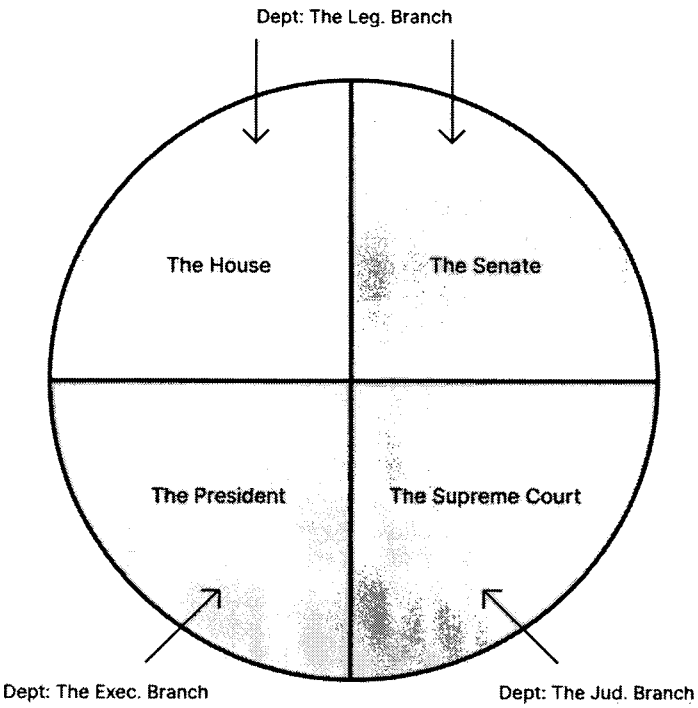
Figure 17 depicts the "Government of the United States," "any Department" of the Government" of the United States, and "Officer[s]" of "the Government of the United States."[291]

289. Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), *in* 13 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, JUNE 1 THRU AUG. 31 [1793], at 392–93 (Christine Sternberg Patrick ed., 2007), https://founders.archives.gov/documents/Washington/05-13-02-0263 [https://perma.cc/8FBL-VKRC] ("Sir, We have considered the previous Question stated in a Letter written to us by your Direction, by the Secretary of State, on the 18th of last month.").

290. *See, e.g.*, *id.*

291. Figure 17 is available at https://perma.cc/W7A2-KJKK.

Approach #3 – Minimalist View
Necessary & Proper Cl.



The Gov. of the U.S. (N&P Cl.)

"...all other Powers vested by this Constitution in
the Government of the United States,
or in any **Department** or **Officer** thereof."

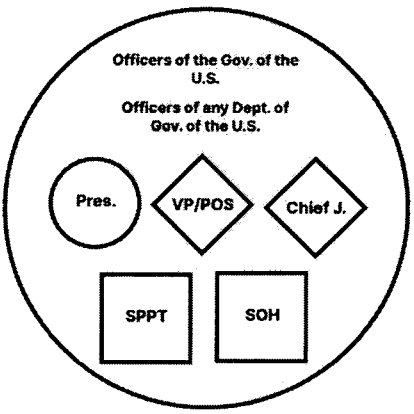


Figure 17

4. "Officers" of "the Government of the United States" will overlap with "public Trust[s] under the United States"

The five "Officers" of "the Government of the United States" are the five *apex presiding* officers identified in the Constitution: the President, the Vice President, the Chief Justice, the Speaker of the House, and the Senate President pro tempore. These five positions are *also* positions of "public Trust under the United States." This overlap is not a coincidence. The Constitution identifies these five officers. Historically, there has been no superior federal authority that has regularly instructed a holder of a "public Trust" how to exercise his core constitutional powers in the normal course of his duties. These officials hold *apex* positions.

But there are three other positions of "public Trust" that are not "Officers" of the "Government of the United States." These positions are *apex* positions, but they are not apex *presiding* officers.

First, rank-and-file members of Congress—Senators and Representatives—hold a "public Trust under the United States." But they are not included in the category of "Officers" of the "Government of the United States." The Constitution never uses the phrase "Officer" to describe rank-and-file members of the Senate and House. They are not "Officers" of any stripe. In this regard, we agree with Approach #1, the Intermediate View. Representatives and Senators hold apex positions, but they are not apex *presiding* officers.

Second, Presidential Electors hold a position of "public Trust." These ephemeral positions, which exist only for purposes of a presidential and vice presidential election, are not "officers" in the permanent government. Thus, they cannot be *apex presiding officers*. But they are apex positions, at least with respect to the federal government. *Chiafalo v. Washington* provides some support for our position.[292] *Chiafalo* held that *state* governments can supervise how their Presidential Electors vote.[293] The *federal* government, however, cannot supervise how electors vote.[294] Historically, Congress has

292. Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

293. *Id.* at 2320 ("Today, we consider whether a *State* may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote. We hold that a State may do so." (emphasis added)); *see also id.* at 2329 (Thomas, J., concurring) ("The Court correctly determines that *States* have the power to require presidential electors to vote for the candidate chosen by the people of the State." (emphasis added)). We take no position on whether these holdings and conclusions from the *Chiafalo* majority and concurrence are consistent with the Constitution's original public meaning.

294. *See id.* at 2334 (Thomas, J., concurring) ("Article I, for example, enumerates various legislative powers in § 8, but it specifically limits Congress' [sic] authority to the 'legislative Powers herein granted,' § 1. States face no such constraint because the Constitution does not delineate the powers of the States.").

claimed it has the power to count or not count purported electoral votes.[295] But this limited authority is very different from the broad power to control how bona fide electors vote.

Third, members of an Article V national convention would also be positions of "public Trust." These members participate in the process of making proposals to amend the Federal Constitution. Yet, these members would not be "Officers" of the "Government of the United States." Their positions are ephemeral. Such members are not "officers" in the permanent government. Thus, they cannot be *apex presiding officers*. Given that an Article V national convention has never been held, it is unsurprising that we lack any clear judicial authority about the status of federal convention members. Yet, we suggest that the federal government cannot control what proposals Article V convention members support or vote down. In our view, members of the Article V national convention are apex positions. Here, we do not opine on the lawfulness of whether Congress can call an Article V convention that is limited to a single subject. Rather, our point is limited: even if Congress called such a limited convention, no government entity could control: how the members of the convention must vote, or how members decide if any particular proposal conformed to that single subject.

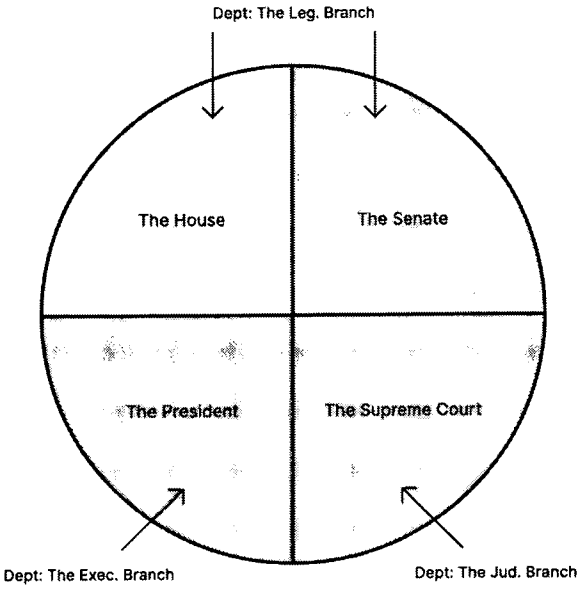
Figure 18 depicts the relationship between the Necessary and Proper Clause's "Officer" of "the Government of the United States"-language and the Religious Test Clause's "public Trust under the United States"-language.[296]

295. *Id.* at 2328 ("Congress's deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one.").

296. Figure 18 is available at https://perma.cc/P8SV-JYLE.

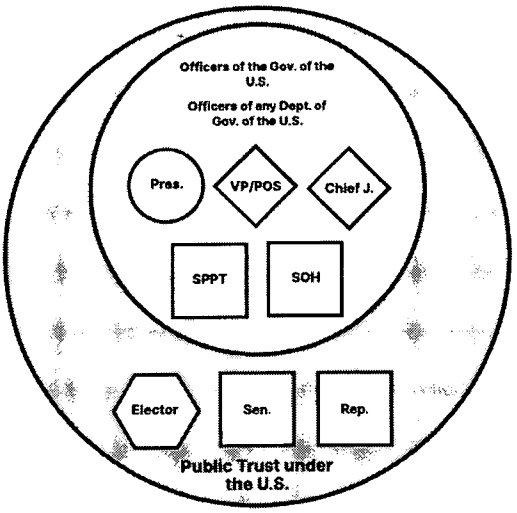
Approach #3 – Minimalist View

Necessary & Proper Cl. and "Public Trust under the U.S."



The Gov. of the U.S. (N&P Cl.)

"...all other Powers vested by this Constitution in
the Government of the United States,
or in any **Department** or **Officer** thereof."



"no religious Test shall ever be
required as a Qualification to any ...
public Trust under the United States."

Figure 18

The contrast between Figure 18 and Figure 14 (discussed *supra* in Section IV.D.2) illustrates the overlap between positions of "public Trust under the United States" and "Officers" of the "Government of the United States." The latter category is a subset of the former category.

5. Summary

Table 5 explains how each of the seventeen positions is classified under Approach #3, the Minimalist View, with respect to the Necessary and Proper Clause's "Officer" of the "Government of the United States"-language. Table 5 also identifies the four elements of the permanent "Government of the United States": the House, Senate, Supreme Court, and President. Here too, the Vice President/President of the Senate, as well as the Chief Justice/Chief Judge of the Supreme Court, are each counted as two positions.

Table 5

Position	The Gov. of the U.S.	Dept. of the Gov. of the U.S.	Officer of the Gov. of the U.S.	Public Trust under the U.S.
The House	Yes, collectively	Yes, collectively	No	No
The Senate			No	No
The Supreme Court		Yes	No	No
The President		Yes	Yes	Yes
Vice President President of the Senate	No	No	Yes	Yes
Secretary of State	No	No	No	No
Assistant to the Secretary of the Treasury	No	No	No	No
Speaker of the House	No	No	Yes	Yes
Senate President Pro Tempore	No	No	Yes	Yes
Representatives	No	No	No	Yes
Senators	No	No	No	Yes
Clerk of the House	No	No	No	No
Secretary of the Senate	No	No	No	No
Chief Justice/Judge	No	No	Yes	Yes
Associate Judge	No	No	No	No
Circuit Judge	No	No	No	No
Clerk of the Supreme Court	No	No	No	No
Transitional Position	No	No	No	No
Letter of Marque & Reprisal	No	No	No	No
Presidential Electors	No	No	No	Yes

F. "Officer" in the Succession Clause

The Succession Clause provides, "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such *Officer* shall act accordingly, until the Disability be removed, or a President shall be elected."[297] This provision contemplates what happens in the event of a *double vacancy* when both the presidency and vice presidency are vacant. In such a scenario, Congress can designate by statute an "Officer" to act as President.

Who is an "Officer" for purposes of the Succession Clause?

Under Approach #1, the Intermediate View, any appointed or elected position in the Executive and Judicial Branches can serve as an "Officer."[298] But, under the Intermediate View, Legislative Positions—including the Speaker of the House and the Senate President pro tempore—are not "Officers."[299] Thus, they cannot succeed to the presidency.

Under Approach #2, the Maximalist View, any appointed or elected position in all three branches could serve as an "Officer."[300] Thus, the Speaker of the House and the Senate President pro tempore can succeed to the presidency.[301]

Under Approach #3, the Minimalist View, two categories of positions can be considered an "Officer" for purposes of the Succession Clause. First, all holders of "Office[s] . . . under the United States" can succeed to the presidency; that is, all appointed positions in all three branches of government. Second, an "Officer" of "the Government of the United States" can succeed to the presidency. The former category includes appointed positions, and the latter category includes elected positions.

Our view is that the word "officer," as well as "office," standing alone and unmodified, simply refers to a "position" in the national government created by the Constitution, whether appointed or elected. The other two provisions of the Constitution that use the word "Officer" and "Office," standing alone and unmodified, support our understanding. The Presidential Term Clause states that the President "shall hold his *Office* during the Term of four Years, and, together with the Vice President, chosen for the same

297. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

298. *See supra* Section II.B (discussing the interpretation of the Succession Clause under Approach #1).

299. *Id.*

300. *See supra* Section III.D (discussing the interpretation of the Succession Clause under Approach #2).

301. *Id.*

Term, be elected, as follows . . . ."[302] Here, the word "Office," standing alone and unmodified, refers to an elected position. Similarly, the Impeachment Clause states: "The President, Vice President and all civil *Officers* of the United States, shall be removed from *Office* on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[303] Here, the former use of "Officers," which is modified by "of the United States," refers only to appointed positions.[304] However, the latter use of "Office," standing alone and unmodified, refers to *both* appointed *and* elected positions. Here, the category of "Office[s]" includes both the President and Vice President. Again, we think the word "officer," as well as "office," standing alone and unmodified, simply means "position" in the national government created by the Constitution, whether appointed or elected.

1. "Office[s] . . . under the United States" and "Officers of the United States" are appointed positions that can succeed to the Presidency

Appointed positions that hold an "Office . . . under the United States" can stand in the line of presidential succession. This category encompasses all of the "Officers of the United States."[305] As a result, Congress can designate by law that these *statutory* positions can succeed to the presidency. This category would include the Secretary of State, the Associate Judges of the Supreme Court, the Circuit Judges of the inferior courts, the Assistant to the Secretary of the Treasury, and the Clerk of the Supreme Court. Congress can also place in the line of presidential succession all appointed positions in the legislative branch. The Clerk of the House and the Secretary of the Senate hold "Office[s] . . . under the United States."

So far, we have discussed the phrases "Officers of the United States" and "Office . . . under the United States." Holders of these positions can stand in the line of presidential succession. But what about irregular positions in the "Office under the Authority of the United States" category, as that language is used in the Ineligibility Clause? Can Congress place in the line of presidential succession transitional positions and holders of letters of marque and reprisal? We think the answer is "no." In our view, such positions are not "Officers" for purposes of the Succession Clause. Admittedly, these positions are "Officers." Nevertheless, we doubt that Congress can put these positions in the line of presidential succession. First, there is no evidence that the drafters, ratifiers, or Congress have ever considered, or even

302. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

303. *Id.* art. II, § 4 (emphasis added).

304. *See supra* Section IV.A (concluding that the phrase "Officers of the United States" refers to appointed positions in the Executive and Judicial Branches).

305. *See supra* Section IV.B ("All 'Officers of the United States' necessarily hold an 'Office . . . under the United States.'").

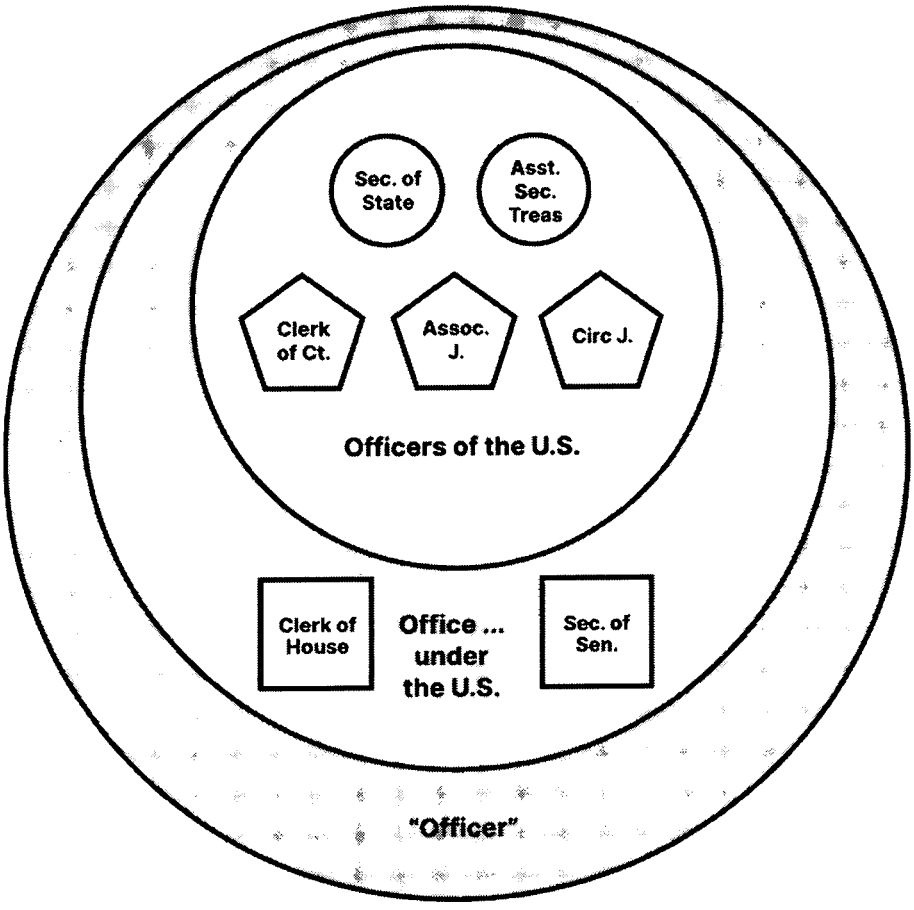
contemplated, placing such officers in the line of succession. Second, some of these positions exist outside the three branches of the government, if not outside the government itself. Third, some of these positions are, by their very nature, temporary. Transitional positions were regularized or replaced in the early years of the new government. Fourth, letters of marque and reprisal have not been issued by the federal government for more than a century. It would be a mistake to place such irregular positions in the line of succession.

Of course, the Constitution does not prohibit all poor policy choices. Likewise, we admit that the line we propose is not textually clear. Still this lack of clarity with respect to irregular positions—the "Office[s] under the Authority of the United States"—does not undermine our argument with respect to the phrase "Office[s] . . . under the United States." We put forward a holistic interpretation of the Constitution's "office"- and "officer"-language; naturally, some parts of our position will be more defensible than other parts.

Figure 19 depicts the "Officer[s]" that can succeed to the presidency.[306] This category includes the "Officers of the United States" and those who hold "Office . . . under the United States."

306. Figure 19 is available at https://perma.cc/A6DT-XHHH.

Approach #3 – Minimalist View
"Officer" in the Succession Clause



The Succession Clause

"... the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what **Officer** shall then act as President, and such **Officer** shall act accordingly, until the Disability be removed, or a President shall be elected."

Figure 19

2. "Officers" of "the Government of the United States" are also "Officers" for purposes of the Succession Clause

The "Officers of the United States" and the "Office[s] . . . under the United States" are all statutory positions that can succeed to the presidency. We also think the apex presiding officers referred to in the Constitution can succeed to the presidency: specifically the "Officers" of the "Government of the United States." This category includes the Speaker of the House, the Senate President pro tempore, and the Chief Justice. The President and Vice President are apex presiding officers, but we do not list them in this category. As a practical matter, Congress cannot designate them in the line of presidential succession. The President cannot succeed himself. And the Constitution designates the Vice President as next-in-line.[307] It would be redundant for Congress to place the Vice President in the statutory order of succession, when the Constitution already places her at the top of the hierarchy.

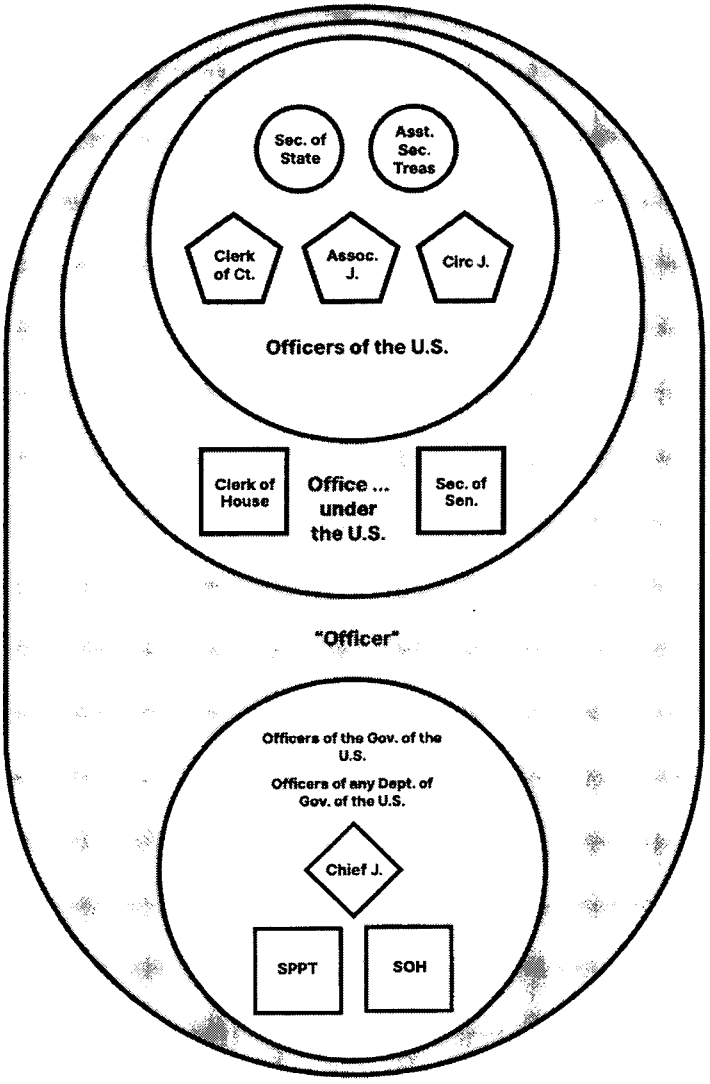
In our view, only positions that could be fairly characterized as an "Office . . . under the United States" or an "Officer" of the "Government of the United States" can succeed to presidency under the Succession Clause's "Officer"-language. We do not think that rank-and-file members of the Congress—Senators and Representatives—can succeed to the presidency. They are not apex presiding officers. Indeed, they are not "officers" of any stripe. On this point, we agree with Approach #1, the Intermediate View.

Figure 20 lists the officers of the permanent government of the United States that can succeed to the presidency.[308] We have excluded several other categories of positions from Figure 20: "officers" of domestic and foreign private entities, "officers" of foreign governments, and state government officers.

307. U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President."). Our analysis assumes, for ease of presentation, that former Presidents and former Vice Presidents are mere private citizens and are not "Officer[s]" for purposes of the Succession Clause. If our assumption is incorrect, we happily concede that former Presidents and Vice Presidents could be included in the line of statutory succession. It is no easy task to determine whether former officers would have been understood in 1788 as "Officer[s]" for purposes of the Succession Clause. At this juncture, we have not embarked on that difficult project.

308. Figure 20 is available at https://perma.cc/2JTL-2QBB.

Approach #3 – Minimalist View
"Officer" in the Succession Clause



The Succession Clause

"... the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what **Officer** shall then act as President, and such **Officer** shall act accordingly, until the Disability be removed, or a President shall be elected."

Figure 20

3. Summary

Table 6 explains how each of the seventeen positions is classified under Approach #3, the Minimalist View, with respect to the Succession Clause. Again, the Vice President/President of the Senate, as well as the Chief Justice/Chief Judge of the Supreme Court, are each counted as two positions.

Table 6

Position	Officer of the U.S.	Office . . . under the U.S.	Officers of the Gov. of the U.S.	"Officer" (Succession Clause)
President	No	No	Yes	N/A
Vice President/ President of the Senate	No	No	Yes	N/A
Secretary of State	Yes	Yes	No	Yes
Assistant to the Secretary of the Treasury	Yes	Yes	No	Yes
Speaker of the House	No	No	Yes	Yes
Senate President Pro Tempore	No	No	Yes	Yes
Representative	No	No	No	No
Senator	No	No	No	No
Clerk of the House	No	Yes	No	Yes
Secretary of the Senate	No	Yes	No	Yes
Chief Judge/Chief Justice	Yes	Yes	Yes	Yes
Associate Judges	Yes	Yes	No	Yes
Circuit Judges	Yes	Yes	No	Yes
Clerk of the Supreme Court	Yes	Yes	No	Yes
Transitional Positions	No	No	No	No
Letter of Marque & Reprisal	No	No	No	No
Presidential Electors	No	No	No	No

V. APPROACH #4: THE CLAUSE-BOUND VIEW

Finally, we turn to Approach #4 the *Clause-Bound View*. Under this view, the "office"- and "officer"-language in every clause of the Constitution should be judged by itself, without regard to how the same or similar language is used elsewhere. This approach amounts to a rejection of *intratextualism*.[309] For example, the phrase "Officers of the United States" appears in both the Appointments Clause and in the Impeachment Clause.[310] But, under Approach #4, these provisions can refer to different positions: the phrase "Officers of the United States" in the Appointments Clause may refer to only appointed positions in the Executive and Judicial Branches, but that phrase in the Impeachment Clause could include elected members of Congress.

Consider another example. The phrase "Office . . . under the United States" appears in both the Incompatibility Clause and the Foreign Emoluments Clause.[311] Under Approach #4, the phrase "Office . . . under the United States" may have one meaning in the Incompatibility Clause, but it could have another meaning in the Foreign Emoluments Clause. Under Approach #4, that phrase in the former provision may *exclude* members of Congress, but that phrase in the latter provision could *include* members of Congress. With the Clause-Bound View, each provision would be assessed on its own, without regard to how similar language is used in other provisions.

This view could be premised on the notion that the Framers and ratifiers did not distinguish among the Constitution's divergent "office"- and "officer"-language. That is, the Framers did not ascribe any systematic differences in meaning when they referred to "Officers of the United States," "Office[s] . . . under the United States," and the other categories. According

309. *See* Amar, *supra* note 142, at 748 ("In deploying . . . [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.").

310. *Compare* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." (emphasis added)), *with id.* art. II, § 4 ("The President, Vice President and all civil *Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." (emphasis added)).

311. *Compare id.* art. I, § 6, cl. 2 ("[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office." (emphasis added)), *with id.* art. I, § 9, cl. 8 ("And no Person holding any *Office of Profit or Trust under* [*the United States*], 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." (emphasis added)).

to the Clause-Bound View, even *identical* language used in different clauses was used indiscriminately. We are not aware that any jurists or scholars have openly embraced Approach #4.[312]

Figure 21 depicts Approach #4.[313] Each of the twelve clauses that uses "office"- or "officer"-language is considered an island unto itself—a separate linguistic entity.

312. *But cf., e.g.*, Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 407 (2001) ("I build accounts of particular constitutional rules in a *clause-bound style* from particular provisions and *their* associated history and precedent; I eschew holistic comparison across clauses until the localized inquiry has independently fixed their meanings." (emphasis added)). *But compare* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CAL. L. REV. 1, 27–31 (2018) (characterizing Tillman's "officer" taxonomy as interpretive "gerrymandering"), *with* Seth Barrett Tillman, *The Foreign Emoluments Clause—Where the Bodies are Buried: "Idiosyncratic" Legal Positions*, 59 S. TEX. L. REV. 237, 262–75 (2017) (responding to Professor Nourse's critique).

313. Figure 21 is available at https://perma.cc/NAF6-6SMS.

Approach #4 – The Clause-Bound View

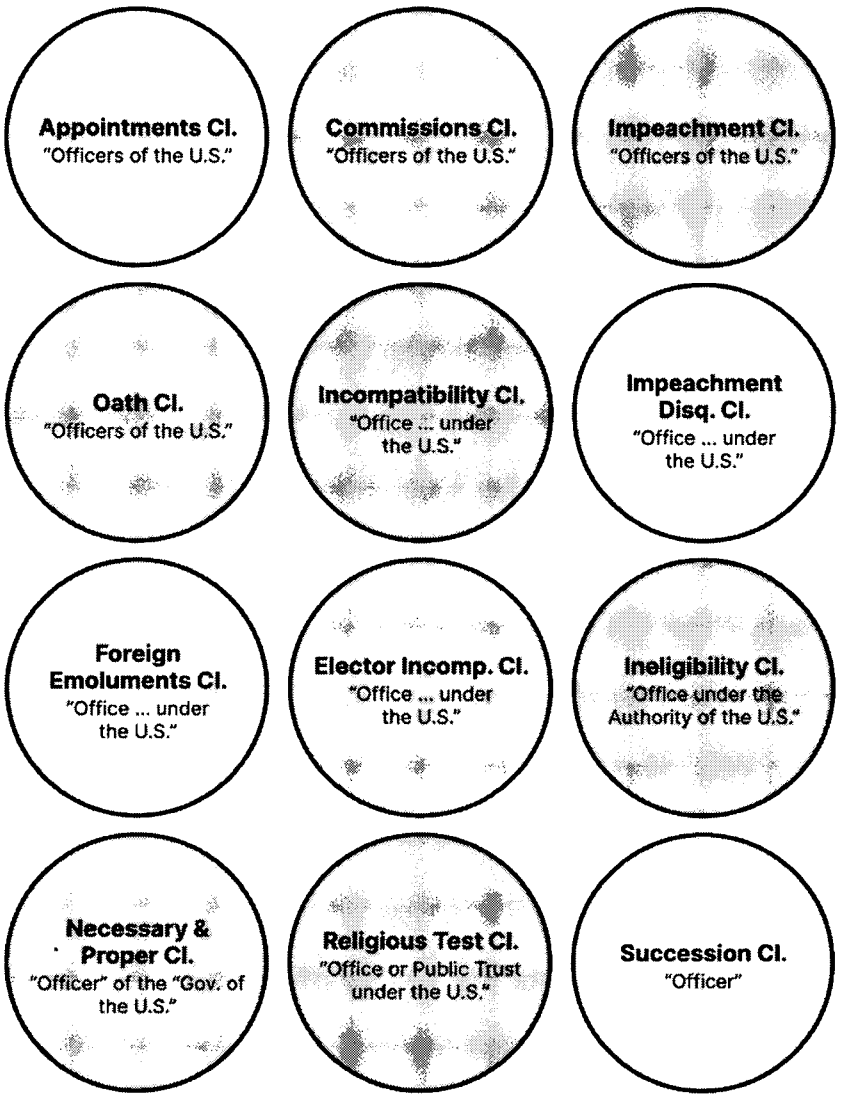


Figure 21

CONCLUSION

Our goal in this second installment was limited: to introduce four approaches to understand the Constitution's divergent "office"- and "officer"-language. This task was complicated because other scholars have advanced incomplete theories. We do not fault them. Understandably, these scholars were not trying to advance systematic taxonomies of divergent language in the Constitution. Rather, they were addressing specific contemporary issues of debate. For example, they were addressing whether the Presidential Succession Act of 1947 was constitutional, or how the Foreign Emoluments Clause should be interpreted and enforced. Our goal with this planned ten-part series is different. We advance a taxonomy that accounts for the Constitution's original seven articles, and the twenty-two provisions that refer to "offices" and "officers."

This task was further complicated due to the constraints of space. In more than 30,000 words, we were only able to introduce our taxonomy and sketch how it contrasts with three alternate views. At this juncture, we recognize that readers may not be fully persuaded. Still, we hope that readers can already see the Constitution in a new light.

In July 2016, Professor William Baude provided a cogent summary of Tillman's initial work:

> Next time you confront a separation of powers problem or read through parts of the Constitution, keep Professor Tillman's chart in hand. Suddenly, it will be hard to assume that the Constitution's textual variations are meaningless. Indeed, Professor Tillman's theory makes sense of patterns that most of us never saw. It brings order out of chaos. That is not to say that his position has been conclusively proven. But at this point, I think he has singlehandedly shifted the burden of proof.
>
> Since this is an entry in the *Journal of Things We Like Lots*, and since I am synthesizing much of Professor Tillman's work here, I feel the need to venture a final word on his research style. When you read an individual Tillman piece, you will notice exceedingly technical arguments combined with an almost urgent voice. You cannot help but think the author is brilliant, and you cannot help but wonder if the author is rather eccentric. As you read more of the pieces together, you will realize that he

> has a constitutional project, that he pursues it with great skill and knowledge, and that if he didn't do it, nobody would.[314]

This planned ten-part series will complete this decade-long project.

314. William Baude, *Constitutional Officers: A Very Close Reading*, THE JOURNAL OF THINGS WE LIKE (LOTS): CONSTITUTIONAL LAW (July 28, 2016), https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/ [https://perma.cc/Q9AX-3SJN].