

CLOSING STATEMENT

An “Utterly Implausible” Interpretation of the Constitution

Seth Barrett Tillman

When I was in law school, I saw able academics bob and weave, rejecting outliers, distinguishing counterauthority, attempting to tie disparate authorities into a coherent whole. It was very entertaining, and I recognize that to do it well requires great intellectual dexterity. But it is a skill that serves a limited purpose. When divided political institutions interpret a fixed multi-article document over many years, disparate and rival officials will naturally come to different conclusions as to contested meaning. When predicting how adjudicators will decide an unsettled question in the future, one naturally draws on all sources of authority. Legal academics train students to make such predictions and to shape decision makers' decisions. Bobbing and weaving is a necessary skill coextensive with legal practice. But abstract inquiry into original public meaning is substantially different. Here, bobbing and weaving a lot is a strong indication that you do not have a coherent theory, a theory with bottom. Professor Calabresi's response—as I intend to show—is all bobbing and weaving. His view is a universe of epicycles and unfalsifiable hypotheses. In choosing between his view and my own, the reader should watch for this: Who is saying the Founders were reasonably competent legal draftspersons, and who is saying they were unaccountably sloppy? Who is making exceptionally subtle distinctions—the person arguing that disparate language raises an inference of disparate meaning or the person arguing that different language has identical meaning? Who puts forward positions that are capable of validation and falsification, and who claims that he is correct in spite of uncontested presidential, vice presidential, and senate practice from 1789 contradicting his position?

Here, I briefly restate and hopefully clarify my position: as a textual matter, the Incompatibility Clause applies to any offices under the United States. My view is that this category does not encompass the President and Vice President. There are two conventions in regard to the use of “office” and “officer.” It is difficult to get people to see this; it is something like explaining the meaning of “is” or “the.” When

one is outside a hierarchical relationship, all the persons inside the relationship are equally officers. From the point of view of citizens (i.e., “We the People”), the President and his subordinates all equally hold office; they are all equally officers. But for those inside the hierarchy or describing it, the convention is somewhat different. In that situation, only the subordinates are called officers, and the person or persons at the apex of authority are given some other title: board members, trustees, chief magistrates, members of Congress. The Constitution uses both conventions. When it varies from one convention to the other, it varies its language. The Succession Clause, for example, using “officer” unmodified, makes use of the outside convention. The Impeachment Clause (using “Officer of the United States” language), the Commissions Clause, the Religious Test Clause, and the Incompatibility Clause use the inside view. When the Incompatibility Clause textually precludes members of Congress from being officers under the United States, it means that members are precluded from taking statutory or *appointed* office—not from being the President, and not from holding *elected* office at the apex of Executive Branch authority. See, e.g., Letter from George Washington to Eléonor François Élie, Comte de Moustier (May 25, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON 333, 334 (John C. Fitzpatrick ed., 1939) (“The impossibility that one man should be able to perform all the great business of State, I take to have been the reason for instituting the great Departments, and appointing *officers* therein, to assist the supreme *Magistrate* in discharging the duties of his *trust*.” (emphasis added)). “Officers,” not “other officers”; “Magistrate,” not “officer”; “trust,” not “office.” See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 637 (1994) (quoting from the same passage of the Washington-to-Élie letter); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1475-76 (1997) (same). Even modern academics write this way. Professor Saikrishna Prakash writes that the Appointments Clause “establish[es] the requirement of senate confirmation for *all* officers, but permitting Congress, by law, to vest the appointment of inferior officers with the President, heads of departments, and courts.” Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 41 n.224 (1998) (emphasis added). Everyone understands what Prakash and Washington meant; in this context, “officers”—yes, even “all officers”—refers to those appointed by the President, but not *to* the President. Thus, notwithstanding Professor Calabresi’s view that the “any office” language of the Incompatibility Clause must refer to the presidency, such lan-

guage frequently does *not* include the presidency. To determine what convention was being used in a particular constitutional clause, one looks to context, and to what people did when faced with this language—which after some 219 years is ambiguous to *us*, but perhaps was not to *them*.

Calabresi's Constitutional Concatenation. Professor Calabresi and I agree that the Incompatibility Clause precludes members of either House from holding any office under the United States. To make out his argument that the latter phrase extends to the presidency, he can point to no language expressly describing the President as an “officer of the United States” or an “officer under the United States,” nor to any language describing the presidency as an “office of the United States” or an “office under the United States.” Rather, he points to language describing the presidency as an “office,” and he could have also pointed to language describing the President as “hold[ing] his office.” See U.S. CONST. art. II, § 1, cl. 1. As to “under the United States,” he argues that that language is implied because the presidency, as all officers *created* by the Constitution, are under “We the People.” This latter constitutional just-so story makes pleasant reading, but it also makes gibberish of the actual text of the Constitution.

For example, the Speaker is described as an “officer.” Does the Speaker have an “office”? The answer is clearly yes: “‘Officer’ is inseparably connected with ‘office,’ and there can be no officer without an office.” 67 C.J.S. *Officers and Public Employees* § 1 (2002) (footnotes omitted). (The reverse is not equally true: it is possible—at times—to have or hold *office*, but not be an *officer*: trustees, directors, and those at the apex of a chain of legal authority hold office (i.e., Chief Magistrates), but they are not at all times and for all purposes officers.) Like the President, the Speaker is nowhere described as holding an office under the United States, but he is described as an officer of the House of Representatives of the Congress of the United States. If the President holds an office under the United States because he holds federal office and works for “We the People,” then the Speaker by the same reasoning holds an office under the United States too. On Calabresi’s reading, both the Speaker and the President hold an office under the United States; i.e., both work for “We the People,” and both offices are expressly created by the Constitution. That reading—Calabresi’s reading—of the key disputed language within the Incompatibility Clause would exclude members of Congress from the presi-

dency, but it would also equally exclude House members from the speakership. That result is contradicted by uniform Anglo-American practice and that indicates that the meaning of “office under the United States” cannot be determined by concatenating the separate meanings of “office” and “under” and “the United States.” The alternative view is that “office under the United States” is a term of art. Professor Calabresi chides me for this position by noting that “office under the United States”—unlike the phrase “ex post facto”—does not appear in Blackstone or in the English Bill of Rights of 1689. So what? Even he has acknowledged that “Officer of the United States” is a “term of art.” Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 161 (1995). And “officer of the United States” does not appear in Blackstone or in the English Bill of Rights either (and how could it given the underlying dates involved!). If “officer of the United States” can be a term of art, surely so can “office under the United States.” Any other result cuts against Calabresi’s newly discovered canon against constitutional subtlety.

The Oaths and Affirmations Clause. Professor Calabresi affirms that “when the Oath Clause of Article VI requires that all federal and state *executive* and judicial officers take oaths to uphold the Constitution the Clause is *clearly* referring to the *President*, the *Vice President* and to state governors” (emphasis added). Not only is that result not clear, it is entirely wrong. See *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 n.9 (Fed. Cir. 2006) (Gajarsa, J., concurring in part and concurring in the en banc judgment) (arguing that the President’s separate Article II Oath suggests that the President is “not among the ‘executive officers’ governed by Article VI, clause 3”). First, it is because the Article VI oath reaches federal executive officers (i.e., officers appointed to statutory offices) that the Constitution had to provide the President with his own free-standing Article II oath. Furthermore, the statutory oath imposed by the first statute of the first Congress applied to the Vice President, but *not* as an executive branch officer. Rather, the statute compelled the Vice President to take the oath in his role as President of the Senate. Textually, the Oaths Clause applies to senators and representatives and to federal executive officers, not to the President of the Senate, who is neither a member nor senator. Yet, if the Vice President is so clearly a federal executive officer, as Professor Calabresi states, then why did the first Congress jump through all these unnecessary—if not downright constitutionally suspect—hoops? Perhaps they believed that the Vice President was not a federal executive officer? Who better understood the Oaths Clause and the Consti-

tution's use of office and officer—Professor Calabresi or the first Congress?

The Impeachment Clause. The Impeachment Clause applies to “The President, Vice President and *all civil officers of the United States.*” U.S. CONST. art. II, § 4 (emphasis added). Because the word “other” does not appear between “all” and “civil,” Justice Story argued that the President and Vice President were not officers of the United States. Judge Gajarsa and Professor Kalt have arrived at the same conclusion. I would argue that the Impeachment Clause is ambiguous. Faced with ambiguous language, I turned to the Convention record. I pointed out that the Clause initially made use of “other,” but it was dropped by the Committee of Style, and I concluded by noting that this sequence of events is consistent with Story’s position. Professor Calabresi accuses me of erring by relying on the “secret legislative history” of the Federal Convention. That is wrong. My use of legislative history in this manner—turning to extrinsic evidence in the face of ambiguous text—is standard practice. See Calabresi & Prakash, *The President’s Power to Execute the Laws*, *supra*, at 554 (“If the text standing alone would have been clear to an ordinary user of the language at the time of enactment, one cannot consult the legislative history to that text in order to create an ambiguity.”). Nor did I use the legislative history to contradict the text. *Cf. id.* (“Legislative history should be used only to clarify linguistic ambiguity by shedding light on which of several possible textual meanings was in fact the one that was ‘intended.’”). It is important for the reader to understand Calabresi’s interpretive maneuver. If the only person disagreeing with Calabresi were Tillman, then he could say the text is clear (i.e., Tillman’s view is idiosyncratic), and, therefore, my turn to extrinsic evidence was illegitimate. But the simple truth is, the text is not clear—the fact that Story, Gajarsa, and Kalt arrive at a position diametrically opposed to Professor Calabresi’s proves at least that much. Calabresi’s problem is not with my use of legislative history, but with Story’s very “wooden” (i.e., Anglo-American, traditional, eighteenth-century, literalistic) textualism. Original public meaning?

Calabresi’s position is that “other” was dropped as “redundant.” That strains credulity. Why? In Calabresi’s view, the President and Vice President are obviously officers of the United States. So if the drafters dropped “other” because it was redundant, why did they not go further (in the interest of avoiding redundancy) and also drop

“The President” and “Vice President?” (Indeed such additional editing to the Impeachment Clause would have made it textually consistent with the Commissions Clause.) Furthermore, in his 1995 *Stanford Law Review* article, Professor Calabresi (and a cast of thousands) argued that “officer” and “officer of the United States” were coextensive on the theory that where the Constitution meant to include state officers, it did so expressly. So in Calabresi’s view, “the President, Vice President, and all *other* civil officers of the United States” is coextensive with “the President, Vice President, and all civil officers of the United States” is coextensive with “all civil officers of the United States” is coextensive with “all civil officers.” Yet Calabresi argues that in order to avoid redundancy, the Founders just dropped “other.” So Calabresi’s position boils down to this—by dropping “other,” the Founders aimed to avoid redundancy, but they were too incompetent to actually achieve it.

The Commissions Clause. The Commissions Clause mandates that the President “shall commission all the officers of the United States.” U.S. CONST. art. II, § 3. Here the Constitution used exactly the simple language the draftspersons failed to use in the Impeachment Clause. The Founders did not expressly include the President and Vice President. Thus, in my childlike simplicity, I conclude this clause excludes the President and Vice President. Professor Calabresi believes otherwise. Were Calabresi’s position correct, Presidents and Vice Presidents should have been commissioned since 1789.

What was the original practice, contemporaneous with ratification? No commissions. How does Professor Calabresi explain the discrepancy?

Our practice of not commissioning Presidents and Vice Presidents is thus a function of the fact that, like Kings, they take office in a public ceremony with elements of coronation, and there is a magic moment when the powers of office become invested in them which is when they take the oath of office. There is simply no need for a signed commission Washington’s failure to commission thus looks far more like an understandable oversight

Oversight? Vice President Adams presided over the Senate for two months and authenticated Congress’s first statute—all prior to taking his Article VI oath. If the “magic moment” of oath taking is an obvious substitute for an officer’s commission, then Washington should have issued Adams a commission promptly. Why didn’t Adams complain in regard to its absence? Why is there no record of any (anti-administration or anti-Adams) Senator—or anyone else in the United States—lodging a complaint about Washington’s oversight? Is

it not far more reasonable to suggest that everyone believed that Presidents and Vice Presidents do not fall under the aegis of the Commissions Clause, and that Washington, Adams, and the first Senate acted correctly, but it is Professor Calabresi's analysis which errs? First Justice Story, now Washington and Adams. Exactly how much constitutional text and how many Founders will Professor Calabresi throw under the bus to accommodate his position? How is it that *he* is so *right*, and *they* are all so *wrong*?

Moreover, I really wonder how many *PENNumbra* readers will understand what sort of intellectual climbdown has taken place here. Professor Calabresi has argued in numerous scholarly articles that the Constitution's use of "shall" (i.e., the verb in the Commissions Clause) is mandatory language and that the precedents of Washington's administration are constitutionally sound precedents, exemplars of the original public meaning of constitutional text. Mandatory does not mean it is okey-dokey to skip obeying the command if you believe (in this case wrongly) on functional grounds that no purpose will be served by obedience to the text. But if the Washington-administration-era precedents are so unsound, if *Calabresi* is *right* and *Washington* was *wrong*, then what—if anything—is left of Professor Calabresi's unitary executive thesis?

Space considerations leave me unable to address the remainder of Professor Calabresi's interesting counterarguments. I sum up by noting that I have argued that the President is neither an officer of the United States nor an officer under the United States. If these two related claims are correct, then the Incompatibility Clause does not apply to the President. Professor Calabresi is sure I am wrong; he chides me for attempting to interpret the placement of the word "government" in the Sweeping Clause, the *only* clause discussing officers making use of the phrase "Government of the United States." Am I the first to attempt to interpret obscure language? Compare Calabresi & Prakash, *The President's Power*, *supra*, at 567 (finding "*no significance . . . [in the] slight variations in wording between [the Article I and Article III] clauses that vest Congress with the power to create inferior courts to the Supreme Court*" (emphasis added)), with Steven G. Calabresi & Gary S. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1028-29 (2007) (distinguishing the same two clauses, and arguing that the Article I Tribunals Clause, unlike its Ar-

title III counterpart, permits Congress to designate state courts inferior to the Supreme Court). He describes my (a/k/a Story's) position as "utterly implausible," by which he means, it was (prior to reading my paper) unknown to him and to his modern academic colleagues. But Professor Calabresi's position was unknown to John Adams and to his eighteenth-century Senate colleagues. To paraphrase the greatest constitutional scholar to hail from Illinois (himself relying on other, older Authority), better a live dog, than a dead lion.

CLOSING STATEMENT

A Term of Art or the Artful Reading of Terms?

Steven G. Calabresi

Seth Barrett Tillman's rebuttal claims that when the Incompatibility Clause says that "no Person holding any Office under the United States, shall be a Member of either House" of Congress it does not apply to the President. Tillman's position is that Presidents can serve simultaneously as members of Congress even though in eight hundred years of English and American history no King, Queen, colonial governor, or President has ever served simultaneously in the legislature. Tillman concedes that the word "any" as used in the Incompatibility Clause means "any," that the presidency is an "office" as that term is used in the Clause, and that the Necessary and Proper Clause uses the words "officer" of "the Government of the United States" to describe the President, but he persists in denying that the presidency is an "office under the United States." He argues that the phrase "office under the United States" is a term of art, like the phrase "officer of the United States," and that Justice Joseph Story was right when he said many years after the founding that the President was not an officer of the United States.

Tillman's argument is too subtle by half. The questions a constitutional interpreter must answer are: first, what was the widely held original public meaning of the words in question; second, how have those words been understood over the course of our history; and third, what reading of the language leads to the most normatively plausible and thus, most likely, the intended result. Of these questions, by far the most important is the first.

The original public meaning of the constitutional text is the starting point for constitutional analysis because it was the voters in the thirteen original states who elected the ratifying conventions who had the authority to make the Constitution law. Voters and members of the ratifying conventions read the framers' Constitution, and it was their shared public understanding of what the Constitution meant that led to its becoming law. Original meaning is thus about what the ordinary citizen on the street would have thought words meant. It is

not about the understanding of someone as erudite as Justice Story. It must be presumed that ordinary citizens would have given words like “any,” “office,” or “officer” of “the government of the United States” their commonsense meaning of including the President of the United States. It is highly unlikely that the American people in the 1780s would have understood the phrase “office under the United States” to be a specialized term of art that did not include the President notwithstanding the plain public meaning of all of these other words. This is especially the case because for Tillman to be right, the American people would have to have thought that Presidents could serve simultaneously as members of Congress even though no King, Queen, or colonial governor has ever, to my knowledge, served simultaneously as a member of the legislature.

Tillman claims the President, unlike the Chief Justice or Associate Justices of the Supreme Court, is not an officer “under the United States,” because the framers thought of him and sometimes described him in private correspondence as our “Chief Magistrate.” Tillman thus postulates that the President has a different status from the justices of the Supreme Court such that the presidential office is not an “office *under* the United States.” Forgive me, but this argument smacks of the claim that the President is a monarch, while it ignores the fact that even monarchs could not serve simultaneously in the legislature. The Constitution repeatedly refers to the presidency as an “office,” and it describes him as an “officer” of the “Government of the United States.” Nowhere, however, does the Constitution call the President a “Chief Magistrate” or a “trustee.” The framers may or may not have thought of him that way, but what counts in constitutional law is what they said in the text and not what they thought. They said he held an office and that he was an officer of the Government of the United States and that is all we need to know to settle this matter.

Tillman notes that the Constitution did describe the Speaker of the House as an officer, and yet the Incompatibility Clause has never been thought to preclude members of Congress from serving as Speakers, committee chairs, or legislative officers. That is true, but the Constitution specifically says the House and Senate shall “chuse” “the Speaker and *their other officers*.” Speakers and Committee Chairs are thus not officers of the United States but are only officers of the House of Representatives or the Senate. Surely Tillman would not confound the United States with the House or the Senate! Moreover, the fact is that there was a long tradition in 1787 of members of Parliament serving simultaneously as Speaker, while there was no tradition at all of members of Parliament simultaneously being Monarchs.

Such traditions counsel in favor of reading the phrase “office under the United States” as including the President while excluding officers who are officers only of the House or of the Senate.

Tillman objects that the President is not an “officer *of* the United States” for purposes of the Appointments, Impeachments, or Commissions Clauses, and he therefore claims he cannot be said to hold “any Office *under* the United States.” Both phrases according to Tillman must be synonymous. To begin with, this simply is not true. The phrase “any Office under the United States” is potentially broader than the phrase “officer of the United States” both because it uses the word “any” and because the word “under” could be broader than “of.”

Moreover, most readers of ordinary English in 1787 would likely have thought that the phrase “officer” of the “Government of the United States” in the Necessary and Proper Clause and the phrase “officer of the United States” in the Appointment Clause meant the same thing. The phrases are simply too similar to permit different meanings, and Tillman provides no evidence whatsoever of such different meanings. Ordinary speakers of English might have thought the President was an officer whose appointment was “herein otherwise provided for” because he is selected by the Electoral College and because the word “herein” refers to the rest of the whole Constitution here as it obviously does in the Vesting Clause of Article I. *See* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”). Tillman’s inability to differentiate the Necessary and Proper Clause is thus fatal to his thesis. Congress has enacted lots of legislation over two centuries predicated on the idea that it can carry into execution the President’s executive power because he is an “officer” of “the Government of the United States.”

This brings us back to the Impeachment Clause which says that “[t]he President, Vice President, and all civil Officers of the United States” are liable to removal by impeachment. Tillman claims it is portentous that this clause lists the President and Vice President separately from “all civil officers of the United States,” and he notes that the word “other” appeared between “all” and “civil” in early drafts of the Constitution and was deliberately omitted from the final text. With all due respect, Tillman here has made a mountain out of a molehill. The reason the Impeachment Clause separately refers to the President and the Vice President is not because the framers did

not think they were civil officers of the United States, but is rather because the framers wanted to be clear that Presidents and Vice Presidents, unlike Kings and Queens, were impeachable. In England, this had not been the case, and since the framers were departing here from the English practice, they thought they needed to be especially clear about what they were doing lest they be misunderstood.

The omission of the word “other” in the Constitution’s secret drafting history counts for nothing to original-meaning textualists and in any event is explained on the ground that use of the word here was redundant. The lesson of the Impeachment Clause is that when the framers departed from English practice, they were really clear that that was what they were doing. This point obviously harms Tillman’s thesis since there was no English practice of Kings or Queens serving as members of Parliament. Moreover, the Impeachment Clause reaffirms that the President and Vice President are civil officers “under” and not “over” the United States because, unlike Kings and Queens, they are impeachable. The Clause thus hurts Tillman’s case more than it helps it.

That leaves us with Tillman’s argument about the Commissions Clause, where, as I conceded in my Opening Statement, he has a valid point. The Commissions Clause commands that the President must commission all the officers of the United States, and yet no President has commissioned himself, his successor, or his Vice President. Thus, Tillman has an argument *from practice* that Presidents and Vice Presidents either have not been regarded as being officers of the United States or at least that the question has been embarrassingly overlooked.

Several points deserve recognition in response here. First, even if Tillman were right that Presidents and Vice Presidents were not “officers of the United States” it would not necessarily follow that the presidency is not included by the different words “any Office under the United States.” The latter phrase again is arguably broader than is the former. “Any office” means any office, and the Constitution is as plain as day when it says that the presidency is an office, as Tillman himself concedes.

Moreover, Tillman’s argument about practice under the Commissions Clause runs smack into a counterargument about practice under the Necessary and Proper Clause whereby Congress has treated the President as if he is an “officer” of the “Government of the United States” in many statutes, including the Impoundment Control Act and the War Powers Resolution. It is obvious that individuals and businesses have relied far more on the practice under the Necessary and

Proper Clause than they have on the clerical practice under the Commissions Clause. Thus, if it is practice since the framing that counts in constitutional law, I win hands down.

Tillman, however, seems to think Washington's practice of not commissioning himself, his successor, or his Vice President is some kind of postenactment legislative history that suggests Washington made a considered judgment that Presidents were really more like Kings and Queens than they were holders of "any Office *under* the United States." There is no evidence, however, that Washington ever thought about the matter one way or the other or that even if he did, he interpreted the Commissions Clause correctly. Washington was fallible and made plenty of mistakes, and this was one of them.

Arguments from the original meaning of the constitutional text and from two centuries of American practice and eight hundred years of English practice suggest that there is no support for dual presidential and congressional office-holding. These arguments are bolstered by normative concerns. There is an obvious conflict of interest when a President claims simultaneously to represent the whole nation and the people of Illinois. To put it mildly, the national interest may often conflict with the interests of voters in a particular state or congressional district. A President who is also a representative or a senator will be paid in part to represent a congressional district or a state and that may influence him in serving the nation as a whole. If it does not influence him, then he might give short shrift to the interests of the state or district he is representing. The conflict of interest created by dual presidential and congressional office-holding might be tolerable if the Constitution clearly commanded it, but the reality is the opposite. Faced with such a situation, a constitutional interpreter is entitled to presume that the framers meant to do the right thing, normatively, rather than that they meant to create a bizarre conflict of interest—a conflict of interest unprecedented in the last eight hundred years.

There is one strong argument for Tillman's position which he does not make, and that is an argument from the original intentions of the framers rather than from the original public meaning of the text they wrote. The framers intended the Incompatibility Clause to prevent Presidents from bribing members of Congress by offering them lucrative public offices. They may very well have never thought about the possibility of the clause applying to the President himself.

All of this is true, but it is utterly beside the point, because what matters is not what the framers intended, but what was the original public meaning of the text that they wrote and the people ratified. The text forbids members of Congress from holding “any Office under the United States.” The presidency is plainly such an office. And that is the beginning and the end of constitutional inquiry.

Preferred Citation: Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134 (2008), <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>.