
DEBATE

THE GREAT DIVORCE: THE CURRENT UNDERSTANDING OF SEPARATION OF POWERS AND THE ORIGINAL MEANING OF THE INCOMPATIBILITY CLAUSE

In this lively Debate, Seth Barrett Tillman and Professor Steven Calabresi consider the possibility of a joint senate-presidential office-holding. Tillman makes the bold assertion that there is no constitutional bar to President-elect Obama retaining his Senate seat. Though the President-elect has, in fact, relinquished his seat in the Senate, Tillman argues that this debate is about more than incompatible office-holdings because “it also has clear implications for our understanding of the reach of” several related constitutional provisions. Treating the text formalistically, Tillman carefully parses the Constitution’s Incompatibility Clause (which restricts a member of either house of Congress from “holding any Office under the United States”), other related clauses, and the meaning of the words “officer” and “office,” to reach the conclusion that the presidency is not “an Office under the United States.” Thus, Tillman maintains, the Incompatibility Clause poses no bar to a joint office-holding.

Citing other constitutional provisions that are understood to refer to the President as an “officer” of the United States (such as the Necessary and Proper Clause), Professor Calabresi counters that Tillman has “made an ingenious argument for an utterly implausible proposition” that “is contrary to the plain meaning of the constitutional text and to the way we have done things for eight hundred years.” Calabresi argues that, under an originalist reading, the terms “office” and “officer” should be read according to “what the ordinary citizen on the street would have thought words meant.” Because Tillman’s reading is “too subtle by half,” Calabresi asserts that it would create “a bizarre conflict of interest—a conflict of interest unprecedented in the last eight hundred years.”

OPENING STATEMENT

*Why President-Elect Obama May Keep His Senate Seat
After Assuming the Presidency*Seth Barrett Tillman[†]

If there was any doubt before, there can be no doubt now, post-*Heller*, we are all originalists now—at least those of us who wish to remain relevant and within the mainstream of our ever-evolving judicial culture. Originalism—as I conceive it—is about connecting the issues posed by today’s controversies to our historical and textual constitutional past. What that “past” says is, of course, highly contested. In the next few pages I will argue that our modern understanding of separation of powers is *not* connected to 1787–1789. (Rather, it was an invention of commentators and jurists at the beginning of the Era of Good Feeling.) Today, for example, any number of influential modern commentators (i.e., Akhil Reed Amar, Vikram David Amar, John C. Harrison, John F. Manning, and my interlocutor here, Steven G. Calabresi) have written that the Constitution’s Incompatibility Clause precludes joint senate-presidential office-holding. That is wrong—at least, as a matter of original public meaning. Rather, the Incompatibility Clause precludes a Senator from holding an office subject to the President’s appointment (and removal) power, but not from *being* President. See Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 779 (2008) (“The Incompatibility Clause sets a limit both on membership in Congress and on holding an *appointed* office—namely, that the same person cannot do both at the same time.” (emphasis added)). With the inauguration in only a few days, the question is unusually relevant, and the intellectual stakes here are potentially quite high. The debate here is about incompatible office-holding, but it is about more than that. It also has clear implications for our understanding of the reach of related constitutional provi-

[†] Law clerk to the Honorable Malachy E. Mannion, Magistrate Judge, Middle District of Pennsylvania. The views expressed here are solely my own. An expanded version of this article appears at: 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 SIDEBAR 1 (2008), available at <http://www.law.duke.edu/journals/djclpp/index.php?action=downloadarticle&id=79>.

sions, including: the Impeachment Clause, the Commissions Clause, the Appointments Clause, the Foreign Emoluments Clause, the Presidential Compensation Clause, the Elector Incompatibility Clause, and the Succession Clause—all of which use language similar to that of the Incompatibility Clause. But at a higher level of generality, this is really a debate about America's (constitutional and intellectual) past and who owns it: the modern purposivists or more traditional formalists—and where the intellectual loyalties of self-styled (left, right, and center) originalists really do lie.

Let's start with the text. Article I, Section 6, Clause 2 provides:

[*The Ineligibility Clause:*] No Senator or Representative shall, during the Time for which he was *elected*, be *appointed* to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and

[*The Incompatibility Clause:*] [N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6, cl. 2 (emphasis added). As for the Ineligibility Clause, it simply does not apply to President-elect Obama. First, the office of President was not created during the Senator's current term. It was created circa 1788–1789. Second, the emoluments have not been raised since 2001, that is, a time prior to the start of Senator Obama's current term. And, third, the Ineligibility Clause only precludes a Senator from holding "appointed" office; Presidents, by contrast, are "elected" or "chosen," not "appointed." See U.S. CONST. art. II, § 1, cls. 1, 3; *id.* amend. XII. If you think the latter is a distinction without a difference, that might be because our judicial and law school culture has *miseducated* the largest swathe of our citizens to undervalue democratic institutions and the very language of democratic culture. Compare, e.g., U.S. CONST. art. I, § 6, cl. 2 (distinguishing "elected" members from "appointed" officers), with Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1083 (1994) (listing President George Bush and Vice President Al Gore as persons "recently appointed to executive . . . offices"), and Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1720 n.72 (1988) ("Probably not much weight should be put on the term 'appointment' . . .").

Whether the Incompatibility Clause precludes joint legislative-presidential office-holding is a closer question. Simply put, if the presidency is an “Office under the United States,” then joint senate-presidential office-holding is precluded, but if the presidency is not an “Office under the United States,” then there is no (express) prohibition against such joint office-holding, and President Obama may keep his Senate seat.

Here, because of space considerations, I am going to touch upon only three clauses to make the case that the presidency is not an “Office under the United States.” However, I maintain that the view presented here is consistent with each and every other clause of the Constitution of 1787.

The Impeachment Clause. Article II, Section 4 provides: “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.” U.S. CONST. art. II, § 4 (emphasis added). As Justice Story explained in his *Commentaries*, this clause does not say “all *other* civil Officers” of the United States. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791 (1833). Moreover, the word “other” was known to the Founders—it is used throughout the Constitution, and even in another phrase in the Impeachment Clause itself. *If*, as Professors Akhil Amar, Vikram Amar, and Steven Calabresi have suggested, i.e., the phrases “Officers of the United States” and “Officers under the United States” are coextensive, then the language of the Impeachment Clause suggests that the President and the Vice President are neither “Officers of the United States,” as used in the Impeachment Clause, nor “Office[rs] under the United States,” as that phrase is used in the Incompatibility Clause. *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114-15 (1995) (“As a textual matter, each of these five formulations seemingly describes the same stations (apart from the civil/military distinction)—the modifying terms ‘of,’ ‘under,’ and ‘under the Authority of’ are essentially synonymous.”); Calabresi & Larsen, *One Person, One Office*, *supra*, at 1062-63 (noting that the Incompatibility Clause refers to “Office under the United States,” but stating that it “impos[es] a disability on ‘Officers of the United States’”); *cf.* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 160 (1995) (“The Constitution does not contemplate a weird [!] distinction between ‘Officers of the United States’ [as used in the Appointments Clause] and ‘Officers of the Government of the United States’ [as used in the Necessary and Proper Clause].”).

Furthermore, when one stops to consider that in early drafts of the Impeachment Clause the word “other” immediately preceded “civil Officers,” but it was taken out by the Committee of Style, then the absence of the word “other” from the final draft does not appear to be accidental or happenstance. Rather it appears to be a distinct choice.

The Commissions Clause. Article II, Section 3 provides: “[The President] . . . shall Commission all the Officers of the United States.” U.S. CONST. art. II, § 3 (emphasis added). *All* means *all*. If the President were an officer of the United States, then President George Washington should have self-commissioned, and Presidents starting with John Adams should have received commissions from their predecessors. Simply put, that is *not* the practice and has *never* been the practice. Nor does there appear to be any eighteenth-century discussion suggesting that it should be the practice.

Again, *if* the term “Officers of the United States” is coextensive with “Officers under the United States,” as suggested by modern commentators including the Amars and Professor Calabresi, then it (again) seems to follow that the Incompatibility Clause does not apply to the President.

The Foreign Emoluments Clause. “[N]o 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.” U.S. CONST. art. I, § 9, cl. 8 (emphasis added). The “under the United States” language here closely tracks the “under the United States” language of the Incompatibility Clause. And modern commentators have held that this clause applies to the presidency (notwithstanding the presence of a wholly separate emoluments clause applying exclusively to the President). *See, e.g.,* AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 182 (2005) (“[T]he more general language of Article I, section 9 barred all federal officers, from the President on down, from accepting any ‘present’ or ‘Emolument’ of ‘any kind whatever’ from a foreign government without special congressional consent.”).

However, in 1790, the Marquis de Lafayette, an officer of the French revolutionary government, sent President George Washington a gift: the main key to the Bastille. There is no record of Washington ever having asked for Congress’s consent to keep the gift. Why? One

possibility is that Washington considered the gift to be a personal gift from Lafayette, his adopted son in all but law. But even if that were the case, Washington was very sensitive in matters relating to procedural regularity and appearance. And after all, surely Congress would have consented had Washington asked. Moreover, even if he considered it a personal gift, others, including his political opponents, may not have. Where is there a record of a complaint lodged against the President in a House floor speech or in a popular pamphlet?

The better view, I believe, is that Washington never asked for Congress's consent because he never thought that he, the elected Chief Magistrate, the holder of an Article VI public trust, could be confused with a mere creature, an officer under the United States (i.e., a statutory or appointed officer). He never asked for Congress's consent because he never imagined that he was an officer under the United States. It seems Washington once expressed such a view: "The impossibility that one man should be able to perform all the great business of the 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*." 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) (emphasis added). "*Trust*," not "*office*." Interestingly, it appears that James Madison was aware of the difficulty of properly categorizing the President (or, at least, an acting President) as an officer or as a trustee. Madison was aware of the difficulty, but he took no concrete position (which for a careful man—and a nonlawyer at that—is probably not surprising). Madison wrote that statutory presidential succession is "an annexation of one *office* or *trust* to another office." Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 THE PAPERS OF JAMES MADISON 235, 236 (Robert A. Rutland et al. eds., 1983) (emphasis added). Madison aside, the distinction between an "office" and a "public trust" is one which is grounded in the very text of Article VI and is even discussed, in passing, in *The Federalist*. See U.S. CONST. art. VI, cl. 3 (distinguishing an "office" under the United States from holders of "public trust[s] under the United States"); THE FEDERALIST NO. 70, at 376 (Alexander Hamilton) (J.R. Pole ed., 2005) ("If it be a *public trust* or *office* in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity." (emphasis added)) .

Simply put, Washington's response (or, perhaps more accurately, his and his contemporaries' nonresponse) to receiving the key to the

Bastille indicates that the President is not an “Office[r] . . . under the United States,” as that phrase is used in the Foreign Emoluments Clause, and, therefore, it seems to follow that the Incompatibility Clause, using (nearly) identical operative words, has no application to Presidents. And as I indicated above, I could advance similar hyperformalistic arguments (i.e., hyperformalistic by modern standards) with regard to each and every other clause of the Constitution of 1787 that also use the language of office and officer.

Thus, it seems to follow that the Incompatibility Clause poses no bar against joint senate-presidential office-holding.

REBUTTAL

*Does the Incompatibility Clause Apply to the President?*Steven G. Calabresi[†]

Seth Barrett Tillman has made an ingenious argument for an utterly implausible proposition. He claims that Presidents of the United States can serve simultaneously in Congress as senators or representatives. As a result, Tillman claims Senator Obama need not resign his senate seat after he becomes President. Tillman is wrong, but he is wrong in the enlightening sort of way that suggests he ought to be a law professor. The problem for Tillman is the Incompatibility Clause of Article I, Section 6, Clause 2. This Clause provides that “no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” U.S. CONST. art. I, § 6, cl. 2. Tillman argues that the presidency is not included in the words “any Office under the United States.” He thinks that the President is a trustee rather than an officer as is implied by occasional references of the framers to the President as being the nation’s Chief Magistrate.

Discussion of the original public meaning of the Incompatibility Clause starts with the word “any.” The word “any” is used at least twenty-eight times in the original Constitution, another twenty-two times in the twenty-seven amendments to the Constitution, and it is thus used for a grand total of at least fifty times in the amended document as it currently stands. The word “any” means “any,” not “some of.” It is always used in the amended Constitution as a synonym for the word “every,” and all the dictionaries old and new I have consulted give it that meaning. Consider two examples beyond the Incompatibility Clause’s ban on congressional membership for those holding “any Office.” The Supremacy Clause of Article VI makes federal law supreme, “*any* Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2 (emphasis added). “Any” certainly means “every” here. Likewise the Due Process and Equal Protection Clauses of the Fourteenth Amendment forbid deprivations of due process or equal protection to “*any*” person with “any” again plainly being a synonym for “every.”

[†] George C. Dix Professor of Constitutional Law, Northwestern University School of Law.

How about the original public meaning of the word “office”? Is the presidency an “office” or a “trust” as those words are used in the amended Constitution? The answer is that it is clearly an office. Article I, Section 3, Clause 5 thus says “[t]he 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.*” U.S. CONST. art. I, § 3, cl. 5 (emphasis added). The Presidential Oath Clause says that new Presidents must swear to “faithfully execute *the Office of President of the United States.*” U.S. CONST. art. II, § 1, cl. 8 (emphasis added). The Twenty-Second Amendment forbids citizens from being elected more than twice to “*the office of President.*” U.S. CONST. amend. XXII, § 1 (emphasis added). And, finally for good measure, the Twenty-Fifth Amendment provides for temporary acting Presidents whenever the President is unable to discharge the “duties of *his office.*” U.S. CONST. amend. XXV, §§ 3-4 (emphasis added). In contrast to the Constitution’s four references to the presidency as an office, it is not once described as being a trust.

Undeterred by this daunting evidence of original public meaning, Mr. Tillman argues that, while the presidency is an office, the President is not an officer “under the United States.” Since the Incompatibility Clause applies only to “Offices *under* the United States,” it does not, according to Tillman, apply to the President or Vice President.

To begin with, the Necessary and Proper Clause of Article I, Section 8, Clause 18 refers to the President and to all other federal executive and judicial figures as “Officers” of the “Government of the United States.” Everyone for 219 years has thought that the Necessary and Proper Clause uses these words to refer to the President. Tillman’s argument thus comes down to the incredibly subtle claim that the phrase officer “under” the United States, in the Incompatibility Clause, means something different from the phrase officer “of the Government of the United States” in the Necessary and Proper Clause. This is highly implausible because no reasonable Framers could possibly have expected the public to perceive different meanings based on such subtle changes of wording. Is the presidency not an Office “*under* the United States?” Of course it is. The United States is represented in the Constitution by the sovereign “We the People.” The presidency is as much an office “under” the power of We the People as are judgeships or the Chief Justiceship. Thus 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 as well as to all federal and state judges. There is no sense here that Presidents, Vice Presidents, or governors are trustees and not officers in the way the words are used.

But, says Tillman, phrases such as “Office under the United States” and “Officer of the United States” are legal terms of art in the document with specialized meaning, just as the phrase “ex post facto law” is a legal term of art that refers only to retroactive criminal laws and not to retroactive civil laws. This is the case even though in Latin the phrase would appear to refer to both as a matter of plain meaning.

Tillman is right about the Ex Post Facto Laws Clauses being a legal term of art with a specialized meaning because those words had their origins in the English Bill of Rights of 1689 and were so described in Blackstone’s Commentaries. By the time the Constitution was written and ratified, the phrase “ex post facto law” had indeed acquired a specialized and distinctive meaning. Nothing of the sort can be said as to “Office under the United States,” a term unmentioned in the English Bill of Rights or by Blackstone. Its original meaning quite obviously depends on the original meaning of “office,” of “under,” and of “the United States.” We have already seen that the Constitution repeatedly describes the presidency as an office. And, it is just as obvious that the presidency, which is created and given its powers in Article II, is “under the United States,” the People of which create the Constitution in the Preamble. It may well be that the King of England in 1789 was not an officer “under” the kingdom of Great Britain, but the President is most certainly an officer under the United States, the people of which are sovereign.

But, one might ask what the general practice was in 1787 as to kings or colonial governors serving in the legislature? Was it commonplace for kings or colonial governors to serve simultaneously in the legislature? Absolutely not! The whole point of the two houses of the British Parliament was to give the Lords temporal and spiritual a place in the House of Lords and the commoners their own distinct house—the House of Commons. It was said that when these two houses took action, together with the King in Parliament, the law could be changed. Implicit in this is the idea that Kings could not by definition be members of Parliament. If they were, they would have been parlaying or talking to themselves. Likewise, colonial governors, although advised by executive councils, did not sit as members of co-

lonial legislatures. The office of governor was distinct and separate from, for example, the office of a member of the House of Burgesses. Practice under the U.S. Constitution has never allowed sitting members of Congress to serve in the presidency. No one has ever before in 219 years held the presidency while serving as a member of Congress, and the two sitting senators elected to the presidency, Warren G. Harding and John F. Kennedy, both resigned their senate seats upon becoming President.

Original public meaning and consistent Anglo-American practice suggests that Tillman is wrong about the meaning of the phrase “Office under the United States.” What then of the three clauses he relies on to conclude most illogically that the presidency is not an “Office under the United States?”

Tillman makes much of the fact that the Impeachment Clause of Article II, Section 4 applies to “the President, Vice President and all civil officers of the United States.” He notes that the Committee of Style took the word “other” out of earlier drafts of this clause, and Tillman argues this was a deliberate attempt by the framers to show that the President was not a civil officer of the United States. Tillman’s argument fails for several reasons. First, the omission of the word “other” could easily have been made, and probably was made, for the reason that it was redundant. Since the Constitution twice referred to the presidency as an “office,” there was simply no need here to repeat that the President was a civil officer of the United States. The idea that the framers, by this very subtle omission, meant to allow Presidents to serve simultaneously as members of Congress strains credulity. And this is leaving aside the fact that we know of the omission only from notes of the Convention that were not published until long after the Constitution had gone into effect and that were not supposed to have any legal effect. Tillman’s argument here is from a secret legislative history that does not bear at all on the original public meaning of the constitutional text.

Tillman next makes much of the Commissions Clause of Article II, Section 3, which says the President “shall” (i.e., “must”) commission “all the Officers of the United States.” Tillman notes here that Washington did not commission himself, his Vice President, or his successor and that, in fact, no President or Vice President has ever received a commission. From this, Tillman infers that Presidents and Vice Presidents are not officers of the United States. This is Tillman’s best

argument. The verb commission has long been used to refer to a document that empowers some official to act.

Washington himself set our practice on this by taking his oath of office at a formal inauguration ceremony in front of members of Congress and of the general public, but it is true that he did not commission himself, his Vice President, or his successor. The most likely explanation is that English monarchs, on whom the presidency is partially modeled, issued commissions to those whom they appointed but not to themselves or their Princes of Wales. 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 a 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 to prove that Presidents and Vice Presidents have been invested with power while there is often such a need as to lesser officials. Washington's failure to commission thus looks far more like an understandable oversight on his part than it does like a deliberate decision in favor of the highly implausible conclusion that Presidents and Vice Presidents are not officers of the United States. Tillman's argument on the Commission Clause is 100% an argument from practice, and it is defeated by the observation that there is an eight-hundred-year-long Anglo-American practice of Kings and Presidents *never ever* sitting simultaneously as members of Parliament or Congress. His argument as to the Foreign Emoluments Clause is foreclosed for the same reasons.

The question whether a President is an officer or a trustee is easily answered by looking at Article II, Sections 1, 2, and 3. The President is plainly the chief executive officer of our government and not the chairman of its board of directors. The conclusion that one could simultaneously represent and respond to the people of a congressional district or state and to the people of the nation as a whole is more than just counterintuitive. It is contrary to the plain meaning of the constitutional text and to the way we have done things for eight hundred years.