WHY THE INCOMPATIBILITY CLAUSE APPLIES TO THE OFFICE OF THE PRESIDENT

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In *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, Seth Barrett Tillman argues that a sitting President may serve simultaneously as a member of Congress.[1] The Incompatibility Clause speaks to this very matter. It specifies that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[2] Mr. Tillman asserts that the President is neither an officer nor holds an office "under the United States."[3] Though he cites many different law review articles and constitutional provisions,[4] Mr. Tillman has done little to dislodge conventional wisdom. The President occupies an "Office under the United States." Hence, no sitting member of Congress may concurrently serve as President.

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1. 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, 108–09 (2009).

2. U.S. CONST. art. I, § 6, cl. 2.

3. Tillman, *supra* note 1, at 138.

4. *See, e.g.*, *id.* at 108 n.3 (collecting the conventional wisdom); *id.* at 119–20 n.33 (noting commentators equation of the President with other civil officers); *id.* at 119–29 (discussing various constitutional clauses and their differing interpretations).

I. DOES THE PRESIDENT OCCUPY AN "OFFICE"?

The Constitution leaves no room for cavil. Article II, Section 1 provides that the President "shall hold his Office during the Term of four Years."[5] It also limits who may hold that office:

> No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the *Office* of President; neither shall any Person be eligible to that *Office* who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.[6]

The now-superseded provisions dealing with presidential succession repeatedly refer to the President's office.[7] Furthermore, the Presidential Oath Clause dictates that before he enters on the "Execution of his Office," the President must take an oath promising to "faithfully execute the Office of President of the United States."[8] Finally, the text of numerous amendments—the Twelfth, Twenty-Second, and Twenty-Fifth—confirms that the President occupies an office.[9]

Curiously, Mr. Tillman never discusses these provisions fatal to his first claim. He argues instead that the President is not an officer, but "a holder of an Article VI public trust—a public fiduciary."[10] Hence, Mr. Tillman apparently believes that the office of the President is not filled by an officer but by a holder—a holder of a public trust. From the corporate law field, Mr. Tillman tries to conjure up evidence of such officer-less offices. He argues that corporate directors occupy offices and yet are not regarded as corporate officers.[11] Unfortunately, none of his examples indicate that, though directors hold offices, they are not officers. At most, Mr. Tillman demonstrates that in the corporate context, "officers" typically refers to Treasurers, Chief

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5. U.S. CONST. art. II, § 1, cl. 1.
6. *Id.* at art. II, § 1, cl. 5 (emphasis added).
7. *Id.* at art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV (referring to "the Removal of the President from *Office*" and "the Powers and Duties of the said *Office*") (emphasis added).
8. U.S. CONST. art II, § 1, cl. 8.
9. *See id.* at amend. XII (discussing Constitutional ineligibility "to the office of President"); *id.* at amend. XXII, § 1 (referring multiple times to the "office of the President"); *id.* at amend. XXV (discussing "the removal of the President from office" and referring multiple times to the "powers and duties of his [the President's] office").
10. Tillman, *supra* note 1, at 117 (citation omitted).
11. *Id.* at 116–17 & n.24.

Executives, etc.[12] This hardly establishes that directors are not officers, but instead merely suggests that individuals often use "officers" in a more limited sense to encompass only some corporate officers. If directors occupy offices, as Mr. Tillman claims, they are also officers, albeit not the ones who immediately come to mind.

Regardless, whether our world currently abounds with officer-less offices, Mr. Tillman cites no founding-era usage suggesting that this was the case then. Such evidence is probably unavailable. Consider in this respect an eighteenth-century dictionary that defines "officer" as "one who is in an Office."[13] Given this definition and general eighteenth-century usage, an office was officer-less only when no person occupied the office.

At any rate, Mr. Tillman's attempt to conjure up evidence for the concept of an officer-less office is rather beside the point, for the Incompatibility Clause uses the term "Office" not "Officer." So even if officer-less offices were possible, even common, when the Constitution was ratified, it does not advance Mr. Tillman's ball. Mr. Tillman focuses on extraneous matters, and pays too little attention to the text of the Incompatibility Clause.

In the face of the textual evidence arrayed against his thesis, Mr. Tillman supplies no sound historical reasons to support his argument that the President does not occupy an office. The first bit of evidence he presents fails to stand up to much scrutiny. Mr. Tillman recounts that President George Washington received a key to the Bastille as a gift from Marquis de Lafayette, an officer of the French government.[14] Had Washington occupied an office under the United States, his unauthorized receipt of this gift would have been unconstitutional, or so Mr. Tillman argues.[15] After all, the Foreign Emoluments Clause provides that, in the absence of congressional consent, persons holding offices under "these United States" may not accept gifts from "any King, Prince, or foreign State."[16] Despite his evident devotion to the Constitution, Washington never sought congressional consent to keep the key.[17] According to Mr. Tillman, Washington's unilateral

12. *Id.*
13. NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY 592 (1757).
14. Tillman, *supra* note 1, at 130–31.
15. *Id.* at 129–132.
16. U.S. CONST. art. I, § 9, cl. 8.
17. *See* Tillman, *supra* note 1, at 130–132 & n.58 (noting Washington's failure to notify Congress and the lack of documentation indicating that he ever did).

acceptance of this gift reveals that Washington did not believe that the Foreign Emoluments Clause applied to the President and that Washington could have reached that conclusion only if he believed that he did not occupy an office under the United States.[18]

Mr. Tillman has overplayed his hand. Lafayette was neither a King nor a Prince. So the only question is whether the gift came from a foreign state via Lafayette. Given that Washington considered Lafayette his adopted son, Washington likely did not regard the key as anything more than a personal gift from an extremely close friend. Indeed, Mr. Tillman provides absolutely no evidence that either Washington or Lafayette viewed the key as a gift from Lafayette as a representative of the French government rather than from Lafayette in his personal capacity. To the contrary, Mr. Tillman quotes Washington's letter to Lafayette, which speaks of the key as a "testimonial[] of [Lafayette's] friendship."[19] Had Mr. Tillman dug deeper, he would have discovered that Lafayette's letter speaks of the key as a "tribute which *I* owe as a son to my adopted father, as an aid-de-camp to my general, as a missionary of liberty to its patriarch."[20] Moreover, though Thomas Paine's letter to Washington about the Bastille Key mentions the French government at length, Paine claims that the key is a personal present from Lafayette.[21] Given this context, why on earth would Washington suppose that a gift from his adopted son was a gift from the French government? In the absence of real evidence that Washington inexplicably thought that Lafayette gave the gift on behalf of a foreign government,[22] this episode does nothing to advance Mr. Tillman's argument.

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18. *Id.* at 130–32, nn. 58, 61.

19. *See id.* at 130–31 & n.58 (citing Letter from George Washington to the Marquis de Lafayette (Aug. 11, 1790), *in* 31 THE WRITINGS OF GEORGE WASHINGTON 86 (John C. Fitzpatrick ed., 1939)).

20. Letter from George Washington to the Marquis de Lafayette (Aug. 11, 1790), *in* 31 THE WRITINGS OF GEORGE WASHINGTON 85 n.56 (John C. Fitzpatrick ed., 1939) [hereinafter WRITINGS] (quoting the Marquis de Lafayette's March 17 letter to Washington) (emphasis added).

21. Letter from Thomas Paine to George Washington (May 1, 1790), *in* 10 THE WRITINGS OF GEORGE WASHINGTON 104–06 (Jared Sparks ed., 1847).

22. Mr. Tillman ominously asks how Lafayette came to possess the Bastille Key, speculating that he may have received it from the French government. He also notes that sovereigns act only through their officers, implying that Lafayette's act was an act of the French government. Tillman, *supra* note 1, at 130–31 n.58. But this is rather silly. The question is not whether Lafayette obtained the key from someone in the French government. The question is whether Washington had any reason to believe the key was a gift from the French government. Mr. Tillman supplies no reason for any such notion. Moreover, that governments always act

Mr. Tillman makes an additional historical claim meant to defeat the argument that the President is an officer under the United States. He asserts that although the Constitution provides that the President "shall Commission all the Officers of the United States," Washington never commissioned himself or John Adams.[23] This supposedly indicates that neither Washington nor Adams were officers. Mr. Tillman further declares that Presidents have never commissioned either themselves or their corresponding Vice-Presidents.[24] Unfortunately, he offers no evidence to support any of these propositions, but merely asserts them as fact. He neither cites any of Washington's contemporaries nor cites any historians who claim that Washington never commissioned himself. That no physical evidence of such a commission exists, however, certainly does not prove that the President never issued one. Indeed, if there were no evidence of a commission granted to the first Secretary of State, that would hardly establish that Washington never commissioned Thomas Jefferson.[25] The same must be said about whether Washington commissioned himself and John Adams.

When founding-era evidence is considered, an avalanche buries the fanciful claims that the President neither occupies an office nor is an officer. The Federalist Papers repeatedly refer to the President both as an occupier of an office and as an officer.[26] George Washington himself used the phrase the "President and other public officers"[27] thereby indicating that the President was an officer. He also observed that he served in the "[o]ffice of President."[28] Other

through their officers hardly means that *every* act an officer takes is an act of the government. Officers of government have personal lives too. *See, e.g.*, Clinton v. Jones, 520 U.S. 681 (1997).

23. Tillman, *supra* note 1, at 122–23 (quoting U.S. CONST. art. II, § 3).

24. *Id.*

25. For a previous project, I examined Washington-era commissions in the National Archives. The Archives contain very few commissions even though it is likely that hundreds were issued during the Washington era. That there is no record of other commissions does not lead to the conclusion that Washington issued no other commission.

26. *See* THE FEDERALIST NO. 39 (James Madison), NOS. 66, 68, 69, 72 (Alexander Hamilton).

27. Letter from George Washington to Alexander White (Mar. 25, 1798), *in* 36 WRITINGS, *supra* note 20, at 190.

28. *See, e.g.*, Letter from George Washington to Solomon Bush (Nov. 24, 1789), *in* 30 WRITINGS, *supra* note 20, at 465–66; Letter from George Washington to Eleonor Francois Elie, Comte de Moustier (May 25, 1789), *in* 30 WRITINGS, *supra* note 20, at 333–35.

founding-era contemporaries, such as Alexander Hamilton[29] and members of Congress, spoke of the President as occupying an office.[30]

Possibly recognizing that his argument that the President does not occupy an office has a legion of difficulties, Mr. Tillman shifts tack in a footnote. He suggests that perhaps the President does not occupy an office for Incompatibility Clause purposes but rather for the purposes of other provisions, such as the Necessary and Proper Clause.[31] Under this reading of the Constitution, the President occupies an office for the purposes of Article II, is an officer for the purposes of Article I, Section 8, Clause 18, yet neither occupies an office nor is an officer for the purposes of the Foreign Emoluments, Incompatibility, and Commissions Clauses. But Mr. Tillman supplies no reason why the meaning of "office" would differ depending upon the provision in question or why "office" sometimes includes the President and at other times excludes him. Absent a plausible explanation supported by historical evidence, there is no reason for supposing that the Constitution uses a common term—"office"—in multiple ways.

II. "UNDER THE UNITED STATES"

Like a good lawyer, Mr. Tillman argues in the alternative. Besides asserting that the President holds a public trust rather than an office, he also claims that the President does not occupy an office "under the United States" because the President is not a "creature" under the United States.[32]

To occupy an office under the United States is to occupy an office created under the authority of the United States. Because the President occupies an office created under the authority of the United States, he occupies an "Office under the United States." The Constitution uses the phrase "Office under the United States" or its equivalents multiple times to distinguish federal officers from officers

29. *See* Letter from George Washington to Alexander Hamilton (Oct. 3, 1788), *in* 30 WRITINGS, *supra* note 20, at 110 n.31 (referring to Washington's "acceptance of the office of President") (quoting letter from Hamilton, source unknown).

30. *See* Letter from George Washington to David Stuart (July 26, 1789), *in* 30 WRITINGS, *supra* note 20, at 363 n.61 (mentioning Senate Committee appointed to determine the "style or tides" attached to "offices of President and Vice President of the United States") (quoting citation unclear).

31. *See* Tillman, *supra* note 1, at 118–19 n.28.

32. Tillman, *supra* note 1, at 131–32; *see also id.* at 133–38.

under the authority of a state,[33] not to distinguish, in a highly obscure manner, the President from other officers. All federal officers, executive and judicial, occupy "offices under the United States" and are "officers of the United States."

Mr. Tillman obviously believes otherwise. But the precise basis of his disagreement is rather puzzling. First, he never quite specifies the meaning of "Office under the United States." Yet this is absolutely crucial, for if he cannot define this phrase, he cannot claim that the President does not fit within its boundaries. Second, although he does not directly say so, Mr. Tillman must believe that a second category of federal offices exists that neither arises from nor answers to the United States. Yet, once again, Mr. Tillman does not flesh out this second category. For instance, he never discusses which, if any, other federal offices are likewise *not* "under the United States." Finally, Mr. Tillman never explains why the Constitution embodies this hidden and abstruse distinction between one explicit category of offices under the United States and a second category of offices that exists neither under the United States nor under any individual state.

Even if Mr. Tillman could explain his second category of offices and the reason why it serves some useful purpose, his distinction generates fairly odd conclusions about the scope of some rather familiar clauses. First, executive and judicial officers could be impeached and removed from their respective offices but could not be barred from serving as President or Vice President. Article I prohibits impeached officers from ever serving in offices "under the United States."[34] But if the President and Vice President do not occupy offices "under the United States," then the Senate through the impeachment process could not prevent a convicted officer from later serving as President or Vice President. As such, a President or Vice President could be impeached, convicted, removed and barred from serving in all other offices. Yet these dishonored individuals, if they ran for national office again, could still serve as President or Vice President. Even worse, a President could vote on whether he ought to be impeached and on whether he ought to be convicted, for under Mr.

33. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 200–01 (Max Farrand ed., 1911) [hereinafter FARRAND] (reporting on Luther Martin's Genuine Information); *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 49–50 (Jonathan Elliot ed., 2d. ed. 1936) [hereinafter ELLIOT'S DEBATES] (reporting the comments of Archibald Maclaine at the North Carolina ratifying convention).

34. *See* U.S. CONST. art. I, § 3, cl. 7.

Tillman's reading of the Incompatibility Clause, Presidents can simultaneously serve as members of Congress.

Second, Presidents and Vice Presidents could freely accept presents, emoluments, offices and titles from foreign states because the constitutional bar applies only to offices under the United States,[35] and, according to Mr. Tillman, those two offices are not under the United States. But the provision barring Presidents from accepting foreign emoluments was arguably added to prevent Presidents from being corrupted by foreign bribes, as occurred when Charles II accepted money from France's Louis XIV.[36] To read Article I, Section 9 as if it permitted the President to receive foreign bribes, without any congressional oversight or check, makes little sense.

Third, Presidents and Vice Presidents may serve as presidential electors because, though the Constitution bars persons who hold offices "under the United States" from serving as presidential electors,[37] Mr. Tillman's reading suggests that sitting Presidents and Vice Presidents are not officers "under the United States." This would bar the Secretary of Treasury and the local federal collector of customs from serving as electors while simultaneously allowing the President and Vice President to serve as electors and to vote for themselves or their successors, a rather incongruous result.

Fourth, although the Constitution prohibits religious tests, the prohibition applies only to offices or to public trusts "under the United States."[38] Hence the prohibition on religious tests would not apply to the President and Vice President, at least per Mr. Tillman's view, because neither occupies an office or public trust "under the United States."[39] During the ratification fight, Tench Coxe discussed the bar against religious tests as it applied to the President, thus implying that the President does serve under the United States.[40]

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35. *See* U.S. CONST. art. I, § 9, cl. 8.

36. *See* 2 FARRAND, *supra* note 33, at 68–69 (reporting Madison's notes of Gouverneur Morris's statement).

37. *See* U.S. CONST. art. II, § 1, cl. 2.

38. *See* U.S. CONST. art. VI, cl. 3.

39. Mr. Tillman argues that the President occupies a public trust. Tillman, *supra* note 1, at 116–17 & n.25. But because this public trust is not "under the United States," (at least according to Mr. Tillman's argument, *id.* at 132–38) the Religious Test Clause cannot apply to the President.

40. *See* TENCH COXE, AN EXAMINATION OF THE CONSTITUTION (1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 146 (Paul L. Ford ed., Da Capo Press 1968) (1888). *See also* 4 ELLIOT'S DEBATES, *supra* note 33, at 215 (reporting comments by William Lancaster

Indeed, I am aware of no evidence from the founding suggesting that the prohibition on religious tests does not apply to the President. Moreover, to prohibit a religious test for army generals, district attorneys, or postmasters, but to permit one for the President and Vice President is nonsense. Assuming that Congress could create a religious test, it could then also require that Presidents be Protestants or that no Catholic serve as President. Essentially, Congress would be able to mimic the English restrictions on who may serve as the English monarch.

Finally, the Fourteenth Amendment's waivable bar against supporters of the Confederacy who had previously taken an oath to the Constitution[41] would not apply to rebels who sought the office of President or Vice President because, once again, that bar would have applied only to offices "under the United States." Jefferson Davis and Robert E. Lee could have served as President of the United States without a congressional waiver of the bar against oath-breaking confederates. Reading this Amendment to require a congressional waiver for former confederates serving as postmasters or corporals but to not require such a waiver when a turncoat wished to serve as President would be rather strange.

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A reexamination of accepted orthodoxy is often useful, for sometimes it weakens that orthodoxy, causing it to crumble. Other times, it leads to a stronger, sounder orthodoxy, much like a vaccination makes a person healthier. Regardless of the conclusion reached about the soundness of the Incompatibility orthodoxy, Mr. Tillman has done us a service.

The President occupies an office under the United States because he occupies an office created under the authority of the United States. Per the Incompatibility Clause, a Representative or Senator cannot serve as President while retaining his or her seat in Congress. Mr. Tillman tries his best to escape the clutches of this inescapable conclusion, but his arguments are unavailing. Neither Senator Obama nor Senator McCain could simultaneously remain in the Senate and serve as President.

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at the North Carolina ratifying convention that a Catholic or a Muslim may become President because there can be no religious test for the Presidency).

41. U.S. CONST. amend. XIV, § 3.