

Constitutional Officers: A Very Close Reading

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- 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 Studies** 95 (2016), available at [SSRN](#)
- Seth Barrett Tillman, *Originalism & the Scope of the Constitution's Disqualification Clause*, 33 **Quinnipiac L. Rev.** 59 (2014), available at [SSRN](#)

Everybody should read [the Constitution](#). But some of us find more in its text than others. In a series of underappreciated pieces,¹ Professor Seth Barrett Tillman may have found an intricate and startlingly coherent set of principles about government structure — as well as a reminder to take the Constitution's words more seriously than we do.

Much of the Constitution (especially the original 1789 document) deals with structure. It creates government institutions, defines their powers, and regulates their membership. In the course of doing so, many of the Constitution's provisions deal with individuals who hold government office — officers. Indeed, if you start ticking off references to “office” and “officers” as you read through the Constitution, you may notice two things: There are a lot of them, and many of them are phrased differently.

Consider some examples (emphasis added in each):

- “Officer.” See, e.g., Article II, Section 1 (“[T]he 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.”)
- “Officer of the United States.” See, e.g., Article II, Sections 2-3 (“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 ... and shall Commission all the **Officers of the United States.**”)
- “Officer under the [...] United States.” See, e.g., Article I, Section 6 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil **Office under the Authority of the United States** which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any **Office under the United States**, shall be a Member of either House during his Continuance in Office.”)
- “Public Trust under the United States.” See Article VI (“[N]o religious Test shall ever be required as a Qualification to any ... **public Trust under the United States.**”).

As detailed below, there are many more. Most people, even most sophisticated scholars, have assumed that these textual variations are basically the same. Or, if they differ from clause to clause, people assume that the differences depend on the purpose of the provision, not the differences in wording. But what if that widespread assumption is wrong? One of Professor Tillman's projects — I am tempted to call it a crusade — is to take these textual differences seriously, and show that the different office-related phrases have distinct meanings.

This isn't just technicality for its own sake. The debate has important practical consequences. Consider the problem of presidential succession. Article II, Section 1, empowers Congress to decide “what Officer shall then act as President,”

if both the President and VP are gone, and current law chooses the Speaker of the House. (Think of the Season Four finale of *The West Wing*.)

But the Speaker is not an “Officer of the United States.” The Speaker is elected by the people, and Article II, Sections 2 and 3, says that “Officers of the United States” are to be appointed and commissioned by the President. So if “Officer” and “Officer of the United States” are the same thing, the presidential succession statute is unconstitutional (an argument made by James Madison, and later by Professors Vikram and Akhil Amar). But if Professor Tillman is right, i.e., if “Officer” and “Officer of the United States” are different, the statute is fine. And if the dispute is unresolved, it is a recipe for constitutional crisis.

The evidence that Professor Tillman amasses is wide-ranging. Much of it is circumstantial or based on post-ratification practice. But some of it makes powerful points. For instance, so far as we can tell, no President has ever given himself or the Vice President a commission. That suggests that the President and Vice President are not “Officers of the United States,” and raises questions about whether other “Officer” formulations apply to the President.

Here are two more historical examples. First, President George Washington publicly received gifts from French officials (the key to the French Bastille and a [portrait of Louis XVI](#)) without asking Congress’s permission. This suggests that he was not subject to the Foreign Emoluments Clause, which applies to a “Person holding any Office of Profit or Trust under [the United States].” Second, in 1792, Treasury Secretary Alexander Hamilton was instructed to report to the Senate “every” person holding “office ... under the United States” and their salaries. His ninety-page list included every appointed officer, including those in the legislature, such as the Clerk of the House, but excluded elected officials such as the President, Vice President, and members of Congress. This suggests that some definitions of office will turn on whether one is elected rather than which branch one is in.

Now, there may be alternative explanations for each of these points. Taken as a whole, however, they start to suggest that most of us have been too quick to assume that there is no logic to the Constitution’s varying terminology. Across his publications, Professor Tillman puts forth a systematic, intricate account of each of these terms, which makes sense of the historical examples and provides a consistent and coherent account of the text.

As I understand it, here is a synthesis of the Professor Tillman position:

Phrase	Meaning	Constitutional Provisions
Officer (simpliciter)	Holds an office – includes those holding “office ... under the United States” as well as those holding elected positions: The President, Vice President, and Speaker of the House and Senate President Pro Tem	Succession Clause, Art. II, sec. 1
Officer of the United States	Appointed officers in the executive and judicial branches – subset of those holding “Office ... under the United States”	Appointments Clause, Art. II, sec. 2 Commissions Clause, Art. II, sec. 3 Impeachment Clause, Art. II, sec. 4 Oaths Clause, Art. VI
Office ... under the United States	All positions created, regularized, or defeasible by federal statute including (nonelected) legislative branch positions	Incompatibility Clause, Art. I, sec. 6 Rebellion Disqualification Clause, Amdt. XIV, sec. 3 Religious

		Test Clause, Art. VI
Offices of Honor/Trust/Profit under the United States	Subsets of "Office ... under the United States" Honor: Honorary offices with no regular duties, salary, or other emoluments Trust: Offices with regular duties that are not delegable, e.g., an Article III judge Profit: Offices holding regular salary or other emoluments	Disqualification on Impeachment Clause, Art I, sec. 3 Foreign Emoluments Clause, Art. I, sec. 9 Elector Disqualification Clause, Art. II, sec. 1
Public Trust under the United States	Elected positions and constitutionally created offices – i.e., the President, Vice President, Members of Congress, and Members of an Article V national convention	Religious Test Clause, Art. VI
Office under the Authority of the United States	A superset of "Office ... under the United States." It also includes federally supervised offices, even if not federally created (such as mobilized militia officers)	Domestic Emoluments Clause, Art. I, sec. 6

(Thanks to Margo Uhrman for her assistance in compiling this table.)

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*.

We need more scholars like Seth Barrett Tillman.

1. These two recent works advance a longer sequence of research, including: Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13 **Election L.J.** 336 (2014), available at [SSRN](#); Seth Barrett Tillman, [Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz's Impeachment & Assassination](#), 61 **Clev. St. L. Rev.** 285 (2013); Seth Barrett Tillman, *Six Puzzles for Professor Akhil Amar* (2013), available at [SSRN](#); Seth Barrett Tillman, [Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle](#), 107 **Nw. U. L. Rev.** 399 (2012); 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 (2009), available at [SSRN](#); and Seth Barrett Tillman, [The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause](#), 157 **U. of Pa. L. Rev. Pennumbra** 134 (2008) (debate with Steven G. Calabresi). [2]

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