

WHY OUR NEXT PRESIDENT MAY KEEP HIS OR HER SENATE SEAT: A CONJECTURE ON THE CONSTITUTION'S INCOMPATIBILITY CLAUSE

SETH BARRETT TILLMAN*

In a few months, "We the People" will go to the polls and elect the electors who will elect (or, at least, have an opportunity to elect¹) the next President of the United States. Short of an act of God or an act of war, the next President will be a sitting United States Senator.² The expectation is that a Senator/President-elect resigns his or her legislative seat (or that resignation of the Senate seat happens by operation of law) some time prior to (or in consequence of) taking the presidential oath of office. The widely held view in large and influential academic circles,³ and among the educated public generally,

* Seth Barrett Tillman is a law clerk to the Honorable Malachy E. Mannion, Magistrate Judge, United States District Court for the Middle District of Pennsylvania. The views expressed are solely my own. I would like to thank Christine S. Patrick, Associate Editor at *The Papers of George Washington*, and the editors at the *First Federal Congress Project* who have generously given me the benefit of their time and advice. Furthermore I thank Dean Essary and the faculty at the Campbell University School of Law and Dean Saxton and the faculty at the Quinnipiac University School of Law for having given me the opportunity to present earlier versions of this paper.

1. See U.S. CONST. art. II, § 1, cl. 3, *amended* by U.S. CONST. amend. XII (discussing House contingency election procedure in the event no candidate receives the requisite electoral college majority).

2. At the time this Article was drafted, Senators Clinton, McCain, and Obama were the leading announced candidates participating in Democratic and Republican party primaries. Senator Clinton's senate term terminates in 2013. Hillary Clinton—Biography, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C001041> (last visited Sept. 19, 2008). Senators McCain and Obama's terms expire in 2011. John McCain—Biography, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000303> (last visited Sept. 19, 2008); Barack Obama—Biography, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=O000167> (last visited Sept. 19, 2008). The next quadrennial presidential term starts in 2009. See *infra* note 66 (discussing the congressional and presidential election calendars in detail).

3. E.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 131 (2006) [hereinafter AMAR, BIOGRAPHY] ("Article I, section 6 barred a sitting president from serving in

is that the Constitution requires this result by expressly precluding simultaneous Legislative Branch-Executive Branch office-holding.

I respectfully dissent. I believe the conventional view is mistaken as a matter of the original public meaning of the Constitution. Although the idea of a sitting Senator holding the office of President is somewhat counter-intuitive,⁴ I intend to show that the conventional view, by contrast, is merely an unexamined and unfounded intuition. True, the Constitution does preclude joint Legislative Branch-Executive Branch service. But for incompatibility purposes, the

Congress”); *id.* at 171 (stating that the incompatibility bar on members of Congress becoming “acting” or “interim” President was “textually explicit”); *id.* at 625 n.38 (“In order to conform with the Article I, section 6 incompatibility clause, the 1947 statute requires a legislative leader to resign from Congress before assuming duties as acting president.”); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 118–19 (1995) [hereinafter Amar & Amar, *Presidential Succession Law*] (describing, in the context of presidential succession, joint service as Speaker and President as “a patent violation of the Incompatibility Clause”); *id.* at 119 n.34 (“[T]he anti-Walpolian spirit underlying the Incompatibility Clause would have barred, for example, President George Washington from simultaneously serving as a Virginia Senator.”); Steven G. Calabresi, Response, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 165 (1995) (“To combine the most powerful legislative office in the land, the Speakership, with the most powerful executive office in the land, the Presidency, is to ignore a core structural feature of our whole system of government.”); John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853, 1863 n.25 (2006) (“[T]he Incompatibility Clause, which bars Senators and Representatives from holding any other office in the government, *not just the presidency.*”) (emphasis added); John F. Manning, Response, *Not Proved: Some Lingered Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 146 (1995) (“[O]ne could hardly interpret the Incompatibility Clause to allow a Representative or Senator to retain a seat in the Congress after being elected and inaugurated as President.”); *cf.* Aaron-Andrew P. Bruhl, Response, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL’Y 349, 362 (2007) (“[S]uch consensus should lead us to question whether we are correct in embracing a novel interpretation.”).

4. See *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1371 (Fed. Cir. 2006) (Gajarsa, J., concurring in part and concurring in the *en banc* judgment) (“The Constitution repeatedly designates the Presidency as an ‘Office,’ which surely suggests that its occupant is, by definition, an ‘officer.’”) (citations omitted). Perhaps the President is not an *officer* at all, rather, the President is an *official*, a *magistrate*, an *officeholder*, or the holder of an Article VI *public trust*? See, e.g., *id.* at 1365 (“[T]he President of the United States [is] a constitutional *official* who is plainly not an ‘officer of the United States’ for Appointments Clause purposes but whose office is [instead] created by the Constitution itself.”) (emphasis added) (emphasis in the original omitted); AMAR, BIOGRAPHY, *supra* note 3, at 558 n.10 (“Note the use of the juristic word ‘Magistracy’ to describe the executive, a common mode of expression and thought in 1787.”); THE FEDERALIST NO. 70, at 379 (Alexander Hamilton) (J.R. Pole ed., 2005) (“[E]very *magistrate* ought to be personally responsible for his behaviour in office”) (emphasis added); Bruhl, *supra* note 3, at 350 (denominating Representatives, Senators, and the President as *officeholders*, not *officers*); *infra* notes 25, 26, 39, 61 and accompanying text (arguing that the President is the holder of an Article VI *public trust*); *cf.* HAROLD BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 76, 487 (2006) (indicating that incompatibility principles apply to the “personnel” of the branches of the government). Professor Bruff’s description arguably excludes those elected officials presiding over the branches.

President is not part *of* the Executive Branch; rather, the (elected) President presides *over* it,⁵ as opposed to (appointed) Executive Branch officers—who are *under* or part *of* it. Therefore, a sitting Senator can keep his or her seat while serving as President.

Unlike some of the state constitutions drafted during the Revolution or during the period of the Articles of Confederation, namely constitutions that embraced straightforward inter-branch separation of personnel principles,⁶ the Constitution of 1787 does not, as a textual matter, mandate strict separation of personnel among the three branches of the federal government. Executive Branch-Judicial Branch service is not precluded. Similarly, State-Federal service is not precluded. Even House-Senate service is not precluded. As a textual matter, supposed legislative-presidential incompatibility arises by operation of Article I, Section 6, Clause 2—the Ineligibility Clause and the Incompatibility Clause (the latter in italics):

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.*⁷

5. Similarly, the Vice President presides *over* the Senate, although he or she is not a member of it. See U.S. CONST. art. I, § 2, cls. 1, 4; cf. AMAR, BIOGRAPHY, *supra* note 3, at 131–32 (“Thus, the old [confederation] president merely presided in Congress, while the new president [under the Constitution of 1787] would preside over America generally . . .”).

6. Compare THE FEDERALIST NO. 47, at 264 (James Madison) (J.R. Pole ed., 2005) (“If we look into the constitutions of the several states we find that notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept *absolutely* separate and distinct.”) (emphasis added), and *id.* NO. 48, at 268–69 (James Madison) (suggesting that state constitutions erred in their application of separation of powers principles, and that in applying such principles the drafters of the Constitution of 1787 correctly focused on “[t]he legislative department[, which] is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.”), with Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1061 (1994) (concluding that prior to 1787, “the idea of providing for some measure of interdepartment incompatibility had become something of an American constitutional tradition. Interestingly, it was a tradition that existed independently of the contemporaneous devotion to the separation of powers.”) (emphasis added).

7. U.S. CONST. art. I, § 6, cl. 2 (emphasis added). What is here denominated the Ineligibility Clause is in academic literature frequently styled the Emoluments Clause. See, e.g., Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 121 & n.52.

Query: Does the Ineligibility Clause preclude joint Senate-Presidential service? No. The office of President was not created during the Senate term of any of the presidential contenders. It was created by the Constitution. Nor have the emoluments of the presidency been increased in the relevant period.⁸ Even if the emoluments had been increased, it would pose no difficulty in regard to joint Legislative Branch-Executive Branch office-holding. The Ineligibility Clause only imposes disabilities on "appointed" officers. Presidents (and Vice Presidents), by contrast, are "elected" or "chosen,"⁹ not "appointed."¹⁰

8. See BARBARA L. SCHWEMLE, CONG. RESEARCH SERV. REPORT FOR CONGRESS, ORDER CODE 98-53 GOV, SALARIES OF FEDERAL OFFICIALS: A FACT SHEET, at CRS-2 & n.a (Jan. 11, 2005) (noting that the President's salary was last raised in 2001); see also 3 U.S.C. § 102 (controlling presidential compensation—last amended January 23, 2004, i.e., prior to the start of Senator McCain and Obama's current terms—in regard to technical changes to the tax treatment of presidential compensation). For a discussion of the structural implications arising from the Ineligibility Clause, see *infra* notes 63–70 and accompanying text.

9. Compare U.S. CONST. art. II, § 1, cl. 1 (mandating presidential selection by "elect[ion]" of the electors), with *id.* amend. XII (mandating elector participation by "votes," and presidential selection by "choice" of the House when electoral college mode fails).

10. E.g., Colloquy, *Administrative Law & Regulation: Presidential Oversight and the Administrative State*, 2 ENGAGE 11, 18 (2001) (Professor Peter Strauss: "[T]he thing to pay attention to about the vice presidency is that he is *elected*. He's not *appointed*.") (emphasis added); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 19 n.17 (2001) ("The distinction *appears* to be that the President and Vice President are *elected* [rather than *appointed*] . . .") (emphasis added); *infra* note 70 (discussing Senator McGovern's 1972 presidential candidacy, notwithstanding the Ineligibility Clause difficulty); cf. AMAR, BIOGRAPHY, *supra* note 3, at 435–36, 622 n.10 (suggesting that even though the Twenty-Second Amendment "bar[s] a person from being '*elected*'" to a third presidential term, a two-term President might succeed to a third term under a constitutionally valid succession statute) (emphasis in the original); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, 142 (Ronald Kahn & Ken I. Kersch eds., 2006) (distinguishing "appoint[ed]" Article III judges from "elected" partisans); DAVID MCCULLOUGH, JOHN ADAMS 222 (2001) ("[I]t was the establishment of an independent judiciary, with judges of the Supreme Court *appointed*, not *elected* . . . that Adams made one of his greatest contributions not only to Massachusetts but to the country, as time would tell.") (emphasis added); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 897 (1990) ("[I]t seems obvious that territorial statutes can be enforced only by properly *appointed* officers of the United States, not by locally *elected* or *appointed* officials.") (emphasis added); Sanford Levinson, Comment, *Assuring Continuity of Government*, 4 PIERCE L. REV. 201, 203 (2006) (suggesting that "election is the exclusive path to membership in the House," based on the "*Writs of Election*" language in Article I, Section 2, Clause 4) (emphasis in Levinson's article); Manning, *supra* note 3, at 147 ("Some of the founding generation might have questioned whether cabinet officials (*mere appointees*) . . . would be appropriate political leaders.") (emphasis added); Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 969 (2005) (distinguishing "candidates for *elected* office" from "nominees for *appointed* office") (emphasis added); *infra* note 30 (discussing debate in the First Congress that distinguished *appoint* from *elect* in regard to officers). But see Calabresi & Larsen, *supra* note 6,

Query: Does the Incompatibility Clause preclude joint Senate-Presidential service? That depends. If a President "hold[s] an[] Office under the United States," in the sense this expression is used in the Constitution, then joint Senate-Presidential service is precluded. But, if the President does not "hold[] an[] Office under the United States," then the Incompatibility Clause, on its face, does not apply. (And, neither does any other clause imposing any such disability.)

Query: Is the President an "officer under the United States"? Or, to put it another way, who are the "officers under the United States"? In a 1995 article in *The Stanford Law Review*, Professor John Manning asserted that "[t]he Presidency is surely an 'Office under the United States.'"¹¹ In the same issue of *The Stanford Law Review*, Professors Akhil Reed Amar and Vikram David Amar expressly equated "Office[rs] under the United States,"¹² as used in the Incompatibility Clause, with "Officers of the United States,"¹³ as used

at 1083 (listing President George Bush and Vice President Al Gore as persons "recently appointed to executive . . . offices") (emphasis added); John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 104 n.73 (1995) (arguing that a future court would hold that the Ineligibility Clause applies to a Senator appointed to fill a vacant seat in the Senate, notwithstanding the Clause's textual limitation to elected Senators and Representatives); but cf. David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 623 n.96 (1996) ("Whether the assumption of presidential powers [by an acting President] under the [Succession] statute would constitute an 'appointment' to a 'civil office under the Authority of the United States' within this clause is not clear . . ."); 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' . . .").

11. Manning, *supra* note 3, at 146 (emphasis added).

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

13. U.S. CONST. art. II, § 2, cl. 2 (emphasis added); see AMAR, BIOGRAPHY, *supra* note 3, at 568 n.53 (explaining that "Congress members . . . are not and cannot be 'Officers of the United States,' thanks to the Article I, section 6 incompatibility clause"—but failing to note that the latter clause, by contrast, makes use of "Office[rs] . . . under the United States" language) (emphasis added); Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 114-15 ("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.") (emphasis added). But see AMAR, BIOGRAPHY, *supra* note 3, at 323 ("[W]e need to understand how all the words of the amendment fit together and also how they dovetailed with other words in the Constitution.") (emphasis added); *id.* at 469 (noting an "aspiration to holism . . . to see how various textual provisions . . . fit together"); *infra* note 17 (supporting a rejection of the Amars' *Presidential Succession Law* position based upon the Convention record); but cf. *infra* notes 42-51 and accompanying text (discussing alternative readings of the Appointments Clause). Taking an approach similar to the Amars, Mr. Vasani Kesavan, a modern commentator, has identified "Person(s) holding an Office of Trust or Profit under the United States" with "executive and judicial Officers . . . of the United States." Vasani Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 129 (2001) (emphasis added); *id.* at 129 n.28 ("The textual argument is incredibly straightforward: A 'Person holding an Office of Trust or Profit under the United States' holds an 'Office . . . under the United States' and is

in the Appointments Clause, and implied that the President falls within both categories.¹⁴ Again, in the same issue of *The Stanford Law Review* and in other publications, Professor Steven G. Calabresi has adopted both positions: he and his co-author, Professor Larsen, have equated "Officers of the United States" with "Office[rs] under the United States,"¹⁵ and Professor Calabresi has expressly taken the position that the President is an "Officer of the United States."¹⁶

therefore an 'Officer of the United States.'") (emphasis added). Kesavan's last analytical step assumes that "Officer of the United States" is not a term of art defined by the Appointments Clause. Likewise, Professor Howard M. Wasserman has suggested that "officers of the United States" and "officers under the United States" are "synonymous terms." Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 288 (2003) (emphasis added).

14. See AMAR, BIOGRAPHY, *supra* note 3, at 131 ("Article I, section 6 barred a sitting president from serving in Congress . . ."); *id.* at 171 ("The instant such a [legislative leader] became acting president, he would thereby 'hold[]' an 'Office under the United States' . . .") (emphasis added); *id.* at 625 n.38 (same); Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 119 n.34 ("A quibbler might try to argue that the President does not, strictly speaking, 'hold[]' . . . Office under the United States' . . .") (emphasis added). What the Amars call a quibble is, in my view, the very core of the Incompatibility Clause as it was understood in 1787. The Incompatibility Clause's purpose is to prevent the President from dominating or bribing members of Congress, and, concomitantly, to prevent members from extracting benefits from the President pursuant to his or her appointment power. See AMAR, BIOGRAPHY, *supra* note 3, at 78 ("Article I, section 6 . . . sought to prevent presidents from seducing congressmen with government sinecures . . ."); *id.* at 182 (same). This purpose is not at play when the *same* individual holds both offices. *But compare* Calabresi, *supra* note 3, at 165 ("To combine the most powerful legislative office in the land, the Speakership, with the most powerful executive office in the land, the Presidency, is to ignore a core structural feature of our whole system of government."), with U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any *other* Emolument from the United States . . .") (emphasis added). Professor Calabresi has even written that a *temporary* combination of Speaker and acting President during a succession crisis would leave "our Madisonian system . . . in ruins." Calabresi, *supra* note 3, at 165. Professor Calabresi, however, misconceives the question. The Madisonian system would indeed lie in ruins. But the question is whether the Constitution of 1787 is the Madisonian system upon which his analysis focuses. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 14 (1956) (distinguishing "Madison" from "successors who out-Madisoned Madison").

15. See Calabresi & Larsen, *supra* note 6, at 1062–63 (noting that the Incompatibility Clause refers to "Office under the United States," but stating—without an explanation—that it "impos[es] a disability on 'Officers of the United States'" (emphasis added); see also Calabresi, *supra* note 3, at 165–66 (identifying "office under the United States" with "Officer of the United States") (emphasis added).

In fact, some post-ratification materials do (weakly) suggest that *officers of the United States* and *officers under the United States* are identical. For example, Justice Chase, in a letter, took the position that the two categories were coextensive. Chase wrote: "[T]he Constitution . . . directs the President to commission all the Officers of the United States. I apprehend that, no one can hold any Office under the United States, without a Commission to hold such office." Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 THE PAPERS OF JOHN MARSHALL 109, 114–15 (Charles F. Hobson ed., 1990) (emphasis added) (emphasis in the original omitted). Chase's statement, though apparently on-point, is not strong support for the

Oddly, none of these modern commentators offer any evidence or authority, or even marshal any substantial argument to support their atextual and ahistorical¹⁷ position—i.e., the modern or the

argument that the two categories are the same. Chase gives *no* reason to accept his (contratextual) view nor *any* indication that he even considered the precise question posed here. More importantly, Chase did not suggest that the President is in either category, and therefore, subject to the strictures of the Incompatibility Clause—the question that interests us here.

Mr. Kesavan argues that the two categories are coextensive:

History strongly confirms this reading [equating *officers of the United States* with *officers under the United States*]. Senator Charles Pinckney, Framers and leading delegate to the South Carolina ratifying convention, interpreted the Elector Incompatibility Clause in exactly this way. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 387 (Max Farrand ed., 1937) (remarks of Sen. Charles Pinckney, Mar. 28, 1800) (“The disqualifications against any citizen being an Elector, are very few indeed; they are two. The first, that *no officer of the United States shall be an Elector*” [notwithstanding that the Elector Incompatibility Clause uses *officers under the United States* language]; and the other, that no member of Congress shall [be an elector].”).

Kesavan, *supra* note 13, at 129 n.28 (emphasis added, bracketed language Tillman’s); 6 ANNALS OF CONG. 131 (Washington, Gales & Seaton, 1851) (reporting in 1851 the Pinckney speech from 1800; this is the document on which Farrand relied). See generally *infra* notes 71–78 and accompanying text (discussing the Elector Incompatibility Clause). The above critique of the Chase letter applies equally to the extract of the Pinckney debate. Importantly, Pinckney stated in the very same paragraph: “[E]very officer of the United States is nominated by the President, and (except Judges) removable at his pleasure.” 6 ANNALS OF CONG., *supra*, at 131 (purportedly quoting debate from 1800) (emphasis added). Obviously, neither Presidents nor Vice Presidents (pre-Twenty-Fifth Amendment) are nominated by the President. Thus, there is simply no way to square Pinckney’s position with the conclusion that the President or the Vice President is an officer of the United States—which is the unexamined position of the modern commentators. Furthermore, Pinckney is simply wrong: not *every* officer of the United States is nominated by the President. Some inferior officers are appointed by “the Courts of Law” or by “the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2 (the Inferior Officer Appointments Clause). Finally, to the extent that Pinckney is to be understood as suggesting that the position of elector is constitutionally limited to citizens of the United States (or of any State), his position makes no textual sense. At the end of the day, one must ask whether it is sensible to rely on the Pinckney debate extract as evidence of the original public meaning of *officers of or under the United States*.

16. See Calabresi, *supra* note 3, at 159 n.24 (“The best reading is that the President and the Vice President are the ‘Officers of the United States’ contemplated by this language in the Appointments Clause.”) (emphasis added); *id.* at 165–66 (suggesting that a “normal” President, unlike an “Acting President,” is an “Officer of the United States”); see also *infra* notes 42–51 and accompanying text (critiquing Calabresi’s view); cf. Friedman, *supra* note 10, at 1720 & n.72 (arguing that the vice presidency is an “Office under the United States,” and supporting that position with an argument to the effect that the Vice President is an “officer of the United States”) (emphasis added).

17. The Amars, for example, assert that *officers of the United States* and its variants (including *of*, *under*, and *under the Authority of*) refer exclusively to Executive Branch and Judicial Branch officers, including the President. See *supra* notes 3, 13, 14 (reporting the Amars’ position). The Convention record, however, tells a somewhat different story. On June 13, 1787, the Convention’s Committee of the Whole House reported Randolph’s amended resolutions. The Convention’s *Journal* reports that Resolution 3, the predecessor to Article I, Section 6, Clause 2, provided:

Resolved that the Members of the first branch of the national Legislature ought . . . to

be ineligible to any Office established by a particular State or under the authority of the United-States (*except those peculiarly belonging to the functions of the first branch*) during the term of service, and under the national government for the space of one year after it's [sic] expiration.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 228 (Max Farrand ed., 1911) [hereinafter FARRAND] (emphasis added); *id.* at 228–29 (same, but applying to the second branch, i.e., the future Senate); *id.* at 235 (same, as reported in Madison's *Notes*); *id.* at 20–21 (reporting Randolph's original resolutions as presented on May 29, 1787, using nearly identical language); *id.* at 419 (reporting the Convention's June 26 adoption of strikingly similar language by a vote of eleven-to-zero). That the italicized language was included indicates that *Office under the authority of the United States* embraces legislative officers, as a matter of original public meaning. And if that is true, then the Amars' textual position must fail, notwithstanding their structural arguments to the contrary. Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 114–15 (“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.”) (emphasis added). See also *supra* note 15 (quoting (and critiquing) post-ratification sources suggesting an identity between *officers of the United States* and *officers under the United States*).

Furthermore, Luther Martin reported Randolph's resolutions to the Maryland legislature on November 29, 1787. So, on this point, the Constitution's drafting history was not secret: it was public at the very time ratification was debated. See 3 FARRAND, *supra* at 172 n.3, 175 (reproducing Luther Martin's *Genuine Information* (Nov. 29, 1787)). Martin reported the resolutions just as the *Journal* and Madison's *Notes* reported them, but substituted “particularly” for “peculiarly.” *But cf.* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1207–08 (2003) (suggesting that “there is good reason to believe that” *officer*, standing alone, as used in the Presidential Succession Clause—Article II, Section 1, Clause 6—is coextensive with *officer of the United States*—notwithstanding that the Committee of Style dropped the latter formulation in favor of the former). This is, of course, Professor Akhil Amar's position. See AMAR, BIOGRAPHY, *supra* note 3, at 170–71 (“A style committee later shortened the clause with no apparent intention of changing its meaning.”); Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 116 (same).

This is not the place for an extended critique of Professor Akhil Amar's position. Suffice to say, Professor Amar has relied heavily on a letter from James Madison to Edmund Pendleton, and he further asserted that Madison, in that letter, took the position that legislative officer succession is unconstitutional. *E.g.*, Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 133 (“Madison doubted the constitutionality of legislative [officer] succession . . .”); *id.* at 120 n.48 (calling such a view the “Madisonian reading”); *id.* at 136 n.143 (suggesting that Madison was making “constitutional arguments” in his letter); *Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 20 (2004) [hereinafter Amar, *Subcommittee Testimony*] (testimony of Professor Akhil Amar) (“House and Senate leaders are not officers within the meaning of the Succession Clause. . . . This is not merely my personal reading of [A]rticle II. It is also James Madison's view, which he expressed forcefully while a Congressman in 1792.”) (emphasis added). Professor Amar relied, not upon a congressional floor speech by Madison, but upon the *Letter from James Madison to Edmund Pendleton* (Feb. 21, 1792), in 14 THE PAPERS OF JAMES MADISON 235–36 (Robert R. Rutland et al. eds., 1983) [hereinafter *Letter*]. See also Calabresi, *supra* note 3, at 161 n.37 (affirming that Madison “thought” the word “‘Officer’ . . . had the original [public] meaning the Amars attribute to it . . .”). *Madison's letter says no such thing.* The letter says only that Congress's 1792 succession statute, a statute implementing legislative officer succession, “certainly err[ed]” and that the statute's constitutionality “may be questioned.” *Letter*, *supra*, at 235. Whether Madison's assertion of “err[or]” is coextensive with an assertion of unconstitutionality requires evidence, or, at the very least, argument: Professor Amar puts forward none. Madison's objection, by contrast, may have been rooted in policy or

conventional view. Instead, the conventional view is (as I understand it) supported by a widely-shared, but rarely stated, linguistic intuition. Article II describes the President as "hold[ing] his office."¹⁸ If the President holds "office," then it seems to follow that the President is an "officer."¹⁹ If one assumes that the President is not a state officer, and if one further assumes that under our system of dual sovereignty all public officers are either state or federal officers,²⁰ then it follows that the President is an *officer of the United States*. To put the argument in slightly different terms, the President holds public authority, i.e., the "executive Power."²¹ Given that the President is not a private person, it follows that the President is a public officer. Given

impracticality, as opposed to contested constitutionality. Likewise, Madison's assertion in a private letter that the 1792 statute's constitutionality "may be questioned" is clearly not an unequivocal assertion that he believed the statute to be unconstitutional, much less a "forceful[]" assertion of such unconstitutionality. *See* Amar, *Subcommittee Testimony*, *supra*. In other words, an assertion using the third-person and the passive voice to the effect that some idea "may be questioned" does not, without more, mean that the speaker, here Madison, questioned it. Furthermore, Madison offered four separate arguments in the alternative against legislative officer succession. We, however, do not know which of these arguments were arguments that Madison himself believed, adopted, or accepted. *But see* Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 120 ("Madison . . . insisted that an ascending officer [succeeding to the presidency] not only could, but must retain his predicate office in order to become and remain Acting President.") (emphasis added) (emphasis in the original omitted). If Madison had only been reporting (and explaining) prior House floor debate to Pendleton, then it is impossible to know which, if any, of the multiple positions reported by Madison were positions with which he agreed. There is some reason to believe that is all Madison was doing: reporting prior debate. *Viz.*, each of "Madison's" four arguments in his letter to Pendleton had already been expressed on the floor of the House by speakers *other than Madison* in prior debate.

18. U.S. CONST. art. II, § 1, cl. 1.

19. *See supra* note 4; *see also* *United States v. Maurice*, 26 F. Cas. 1211, 1214 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747) ("An office is defined to be a public charge or employment, and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States.") (quotation marks omitted). The Chief Justice's position, proffered in 1823, has a certain surface attractiveness. But, when examined in depth, difficulties appear. As stated, Chief Justice Marshall's position would seem to apply to both the presidency and the vice presidency. But if it did, then the Recess Appointments Clause would apply to the vice presidency. *Id.* at 1213 ("This power [of the President to fill vacancies] is *not* confined to vacancies which may happen in offices created by law.") (emphasis added). Of course, such a position, *vis-à-vis* the vice presidency, is an unviable one. Likewise, to the extent that a President can fill vacancies anticipatorily, the President should be able to recess appoint his own successor, especially when the vice presidency is vacant and no statutory successors exist. *Cf.* Matthew Madden, Note, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1137 (2007) ("This vacancy prerequisite [which triggers the Recess Appointments Clause] is generally quite broad, however, as a matter of constitutional understanding and historical practice. It often, but not always, includes what can be called anticipated vacancies—offices that will be vacant in the future.")

20. *See, e.g.*, Kesavan, *supra* note 13, at 131 ("If Electors are not officers or agents of the United States, they must, in a constitutional system of dual sovereigns, be officers or agents of the several States or occupy no offices of constitutional significance at all.")

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

that the office of President was one created by the United States Constitution, it seems to follow that the President is an *officer of the United States*.

At the outset, I note two alternative linguistic intuitions in opposition to the conventional view put forward by the modern commentators. *First*, although the President unarguably holds "office,"²² the President is nowhere in the Constitution of 1787 expressly described as an "officer."²³ Although this might strike the educated generalist (or even the expert in public or administrative law) as a distinction without a difference, it is possible that those who wrote the Constitution were making use of drafting conventions akin to those in (modern, or, perhaps, contemporaneous?) private law, where the office-officer distinction, in fact, plays a role. For example, directors of corporations hold "office," but they are not—in the language of some corporate law organic statutes—"officers" of the corporation.²⁴ "Officers" are the people appointed by, work for,

22. *Id.*

23. *See id.* arts. I to VII.

24. *Cf.* In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 46 n.38 (Del. 2006) (Jacobs, J.) ("To the extent [plaintiff's] argument is advanced against [director] Russell, it also is not grounded in fact, because Russell was not an officer of Disney."); Jackson v. County Trust Co. of Md., 6 A.2d 380, 382 (Md. 1939) (Sloan, J.) (holding "[a] director is not an officer of a corporation"); 18b AM. JUR. 2D *Classification as officer or employee* § 1171 (2004) ("Directors have, at times, been regarded as corporate officers . . .") (emphasis added); 2 CAROL A. JONES, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 271, at 35 (perm. ed., rev. vol. 2006) ("[W]hile a director is ordinarily considered an officer, the director is not always such an officer as is contemplated by certain statutes or bylaws.") (collecting authority); A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 216 (1992) ("Even a director is not ordinarily an officer for the corporation."). *Compare, e.g.*, DEL. CODE ANN. tit. 8, § 211(b) (2008) (providing for the election of directors by stockholders), with DEL. CODE ANN. tit. 8, § 142(b) (2008) (providing that officers are chosen by the board or as prescribed by the by-laws). *But cf.* In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 777 n.588 (Del. Ch. 2005) (Chandler, C.) (referring to "non-director corporate officers"); Bruch v. Nat'l Guar. Credit Corp., 116 A. 738, 741 (Del. Ch. 1922) (Wolcott, C.) ("A director is an officer chosen by the stockholders."). Trust law appears to be the same: it distinguishes *trustees* from *officers* of the trust. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3806(b)(7) (2008) ("Except to the extent otherwise provided in the governing instrument of a statutory trust, the *trustees* shall choose and supervise such *officers*, managers, employees and other persons . . .") (emphasis added); *see also, e.g.*, Eric Lichtblau, *Conflict of Interest Is Raised in Eavesdropping Ruling*, N.Y. TIMES, Aug. 23, 2006, at A19 ("The federal judge who ruled last week that President Bush's eavesdropping program was unconstitutional is a *trustee* and an *officer* of a group that has given . . . to the American Civil Liberties Union . . .") (emphasis added). Other legal systems may have been similar: distinguishing those at the top of the chain of responsibility from mere officers. *Compare* Deuteronomy 16:18 (The Jerusalem Bible 232) (Harold Fisch ed. 1989) (translating *Deuteronomy* 16:18 as: "Judges and officers shalt thou make thee in all thy gates . . ."), and Deuteronomy 16:18 (The New Oxford Annotated Bible 236) (Herbert G. May & Bruce M. Metzger, eds., rev. std. vers. 1973) (translating *Deuteronomy* 16:18 as: "You shall *appoint* judges and officers in all your towns . . .") (emphasis

accountable to, and removable by directors. Directors, by contrast, are fiduciaries or holders of private trusts. In this sense, the word "officer" connotes that the holder possesses delegated authority and is subservient to the highest discretionary authority within the legal entity. If the Founders' constitutional design followed this private law linguistic convention, then the President is not an *officer of the United States* simply because the President is not an *officer*. What then is the President? I suggest the President is a holder of an Article VI public trust²⁵—a public fiduciary.²⁶

Second, the proponents of the conventional view do not systematically consider whether such phrases as *officer of the United States* (and which, if any, of its variants) are hard-wired into or lexicographically defined by the Constitution itself. If the phrase is, as suggested, hard-wired into the Constitution, then the meaning of *officer of the United States* cannot be properly determined by an individual examination of the phrase's component words or subphrases. In other words, the semantic content of *officers of the United States* cannot be determined by looking to the 1787 meaning of the words "officers," "of," and "the United States," any more than meaning of *ex post facto* can be determined by looking to the then-prevailing meaning of "ex," "post," and "facto." Both phrases are legal terms of art: it is just a question of which source or sources one

added), with 5 R. ABRAHAM BEN ISAIAH & R. BENJAMIN SHARFMAN, *THE PENTATEUCH AND RASHI'S COMMENTARY: A LINEAR TRANSLATION INTO ENGLISH 157* (1977) (recording Rashi's commentary explaining *Deuteronomy* 16:18 as: "[J]udges who decide the law; and officers are those who govern the people after their command (i.e., of the judges) . . ."). I am not suggesting that any of the Founders believed this material, but only that it was a literary tradition that they would have understood.

25. See *infra* note 61 (collecting authority discussing the Constitution's use of "public trust"); see also *supra* note 4 and accompanying text; *infra* notes 26, 39 and accompanying text (discussing public trust concept).

26. See generally Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502 (2006); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 *UCLA L. REV.* 117 (2006); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *CASE W. RES. L. REV.* 243 (2004); Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077 (2004); John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 *WM. & MARY L. REV.* 1025 (2006) (citing corporate law conventions regarding the Constitution's meeting and quorum requirements and suggesting that the former are analogous to those applicable to public legislative bodies). These private law linguistic and intellectual traditions are not widely known to those immersed in modern public and administrative law. Compare *supra* note 24 (describing non-officer directors), with Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 136 n.143 (rejecting the description of the President as "a nonofficer officer").

should turn to in order to determine the semantic content—the original public meaning—of the phrase as a whole.²⁷

Between the two linguistic intuitions outlined immediately above and the contrary linguistic intuition of the commentators putting forward the modern view, the reasonable reader is left without any decisive, principled means to choose between the competing positions. This is not surprising. Our deeply-held (legal) intuitions, although frequently quite useful, can only take us so far when we seek to determine the Constitution's semantic meaning or when we seek to convince those whose intuitions veer from our own. For that reason, the remainder of this paper relies upon more traditional methods of legal analysis. I propose to show that there are several substantial grounds upon which to fairly conclude that the President is neither an "officer of the United States" nor an "officer under the United States,"²⁸ from which it follows that the Incompatibility Clause does

27. See Lawrence B. Solum, *Semantic Originalism*, at 53–54 (Illinois Public Law Research Paper No. 07-24), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244; see also Calabresi, *supra* note 3, at 161 n.37 (“Consulting these sources [including secret legislative history] may be essential here since dictionaries in use at the time could not possibly have defined a term that is internal to a system of government.”); cf. *United States v. Maurice*, 26 F. Cas. 1211, 1214 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747) (exploring the semantic content of the terms “office” and “officer”).

28. This is not to suggest that the term “Officers of the United States” is coextensive with “Officers under the United States.” Cf. AMAR, BIOGRAPHY, *supra* note 3, at 572 n.21 (noting that the “eighteenth-century world [was] sensitive to fine gradations of formal title”). It is likely that the former is a subset of the latter, although the President is in neither. See generally Seth Barrett Tillman, *Legislative Officer Succession: Part I and Part II* (working paper 2008), available at http://works.bepress.com/seth_barrett_tillman/29/; Seth Barrett Tillman, *Legislative Officer Succession: Part III—A Constitutional Conjecture* (working paper 2008), available at http://works.bepress.com/seth_barrett_tillman/30/ (arguing that “Officers under the United States” encompasses both “Officers of the United States” and subordinate officers chosen by each house of Congress). *But cf.* *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam) (suggesting that “officers of the United States” is either coextensive or broader than “officers under the government”). In this short paper, the distinction is largely left aside and the two categories are treated the same, as it is not relevant to the inquiry at hand. *But compare* Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 115–16 (“Thus, federal legislators are neither ‘Officers under the United States,’ nor (to the extent that there is any difference) ‘Officers of the United States.’”) (emphasis added), with Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) [hereinafter Amar, *Intratextualism*] (“In deploying this technique [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”) (emphasis added), and *infra* note 80 (critiquing intratextualism).

The exclusion of the President from the categories of “officers of the United States” and of “officers under the United States” does not imply that the President is not an officer of “the government of the United States” per the Sweeping Clause. See U.S. CONST. art. I, § 8, cl. 18. *But see* Calabresi, *supra* note 3, at 160 (“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

not apply to the President. This counter-conventional or pre-modern position goes back, at least, to Story's *Commentaries*,²⁹ to at least one member of the First Federal Congress,³⁰ and, I believe, to George Washington's first administration.³¹ This argument is supported by the Constitution's text, history, and structure, to which I now turn.

I. THE TEXTUAL ARGUMENT

A. *The Impeachment Clause.*

Article II, Section 4 of the Constitution 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."³² As Justice Story and Professor Brian C. Kalt have explained, this clause does not say "and all *other* civil Officers of the United States."³³

Clause]."). By "weird," Professor Calabresi means that the text of the Constitution, as drafted, does not conform to his preconceptions. *Cf.* AMAR, BIOGRAPHY, *supra* note 3, at 471 ("America's Constitution deserves careful study and still has much to teach us, if we would but listen.").

29. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791 (photo. reprint 1999) (1833) (stating affirmatively that "the language of the [Impeachment] [C]lause . . . lead[s] to the conclusion, that they [the President and the Vice President] were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States"). *But cf. id.* § 787 (implying that the President is a civil officer of the United States).

30. *See Philadelphia, Jan. 25. House of Representatives of the United States. Friday, January 14, GENERAL ADVERTISER*, Jan. 25, 1791, at 3 (noting that in floor debate in the First Congress Representative Tucker distinguished the Constitution's use of *appoint* from *elect* in regard to officers); *see also supra* note 10 (collecting related authority).

31. *See, e.g., infra* notes 38–41 and accompanying text (discussing early Commissions Clause practice); *see also* Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part and concurring in the *en banc* judgment) ("It is plain that the President is not an 'officer of the United States' for *Appointments Clause*, *Commission Clause*, or *Oath of Office Clause* purposes.") (emphasis in the original).

32. U.S. CONST. art. II, § 4 (emphasis added).

33. *See* Kalt, *supra* note 10, at 19 n.17 (suggesting that "the Constitution distinguishes the President and Vice President from civil officers. Article II, [Section] 4 [the Impeachment Clause] does not say 'all *other* civil officers,' after all") (emphasis in original); *supra* note 29 (same) (quoting Story's *Commentaries*). *But see* AMAR, BIOGRAPHY, *supra* note 3, at 202 (taking the position that "*only* federal 'Officers' [are] subject to impeachment") (emphasis added); *id.* at 198–99 (noting that the House could impeach the President or "any *other* executive or judicial 'Officer[]'"—but failing to note that impeachment does not apply to military officers) (emphasis added); *id.* at 568 n.53 ("Textually [!], only 'Officers of the United States' are impeachable."); Akhil Reed Amar, *Reflections on the Process, the Results, and the Future: On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 322 (1999) (stating, in a discussion on the Impeachment Clause, as part of a symposium on the impeachment of Bill Clinton, "if a president (or *other* civil officer)") (emphasis added); Vikram David Amar, *The Truth, the Whole*

Moreover, the word "other" was known to the Founders—it is used throughout the Constitution, and even in another phrase of the Impeachment Clause itself. If, as Professors Akhil Amar, Vikram Amar, and Steven Calabresi suggest, the phrases "Officers of the United States" and "Officers under the United States" are

Truth, and Nothing but the Truth About "High Crimes and Misdemeanors" and the Constitution's Impeachment Process, 16 CONST. COMMENT. 403, 407 (1999) ("Remarkably, Ms. Coulter never carefully parses the provision in the Constitution that is most closely on point—Article II's statement that the President (and *other* civil officers) can be impeached, convicted and removed for 'bribery, treason and other high crimes and misdemeanors.'") (emphasis added) (reviewing ANN COULTER, HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON (1998)); George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 BRANDEIS L.J. 17, 103 (2000) (misquoting the Impeachment Clause as: "The President, Vice President and all *other* civil officers of the United States, shall be removed from Office on Impeachment . . .") (emphasis added); Ariel L. Bendor, *Investigating the Executive Branch in Israel and in the United States: Politics as Law, the Politics of Law*, 54 U. MIAMI L. REV. 193, 216 (2000) ("[T]he Constitution only empowers the Senate to remove the President, the Vice-President, and *other* civil officers of the United States from office if these persons are found guilty of the criminal offenses of 'treason, bribery, or other high crimes and misdemeanors.'") (emphasis added); Frank O. Bowman, III & Stephen L. Sepinuck, "*High Crimes & Misdemeanors*": *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1519 (1999) ("The Constitution confers on the House of Representatives the sole power to impeach a president (and *other* 'civil Officers of the United States') . . .") (emphasis added); Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 851 n.44 (1993) ("[The] President, Vice President, and *other* Civil Officers of the United States [are] subject to impeachment for 'Treason, Bribery, or other high Crimes and Misdemeanors' . . .") (emphasis added); Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 326 (1999) (describing the Impeachment Clause as applying to "the President, Vice President, and *other* civil officers") (emphasis added); William R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA is Constitutional and the President's Terrorist Surveillance Program is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 543 (2007) (referring to "the power to impeach a President and *other* officers of the United States") (emphasis added); Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 64 (1999) ("Placed at the end of Article II, this clause says peremptorily that if the President and *other* civil officers are convicted of certain bad acts, Congress must throw them out.") (emphasis added); John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 664 (1999) ("For the President or any *other* civil officer, this kind of shaming punishment by the legislature is precluded, because the impeachment provisions permit Congress only to remove an officer of another branch and to disqualify him from office.") (emphasis added); Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 93 (2005) ("Article 2, Section 4 says that the president and *other* civil officers may be impeached for 'high crimes and misdemeanors' . . .") (emphasis added); Laurence H. Tribe, *Defining 'High Crimes and Misdemeanors': Basic Principles*, 67 GEO. WASH. L. REV. 712, 715 (1999) ("Article II, Section 4, tell[s] us that the offenses for which presidents or any *other* civil officers of the United States may be impeached . . .") (emphasis added); Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1182 (2003) ("The text of the Constitution does not support different standards for impeachment of the President and of *other* civil officers . . .") (emphasis added); *but cf. Motions Sys. Corp.*, 437 F.3d at 1372 n.10 (Gajarsa, J., concurring in part and concurring in the *en banc* judgment) (suggesting that the Impeachment Clause is ambiguous on this point).

coextensive,³⁴ then the structure of the Impeachment Clause is some evidence 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 used in the Incompatibility Clause.

Admittedly, the absence of the word "other" from the opening phrase of the Impeachment Clause is weak evidence of the proposition put forward in this Article. Where, as here, the text is ambiguous, it is natural to turn to legislative history. In fact, in early drafts of the Impeachment Clause the word "other" immediately preceded "civil Officers,"³⁵ but it was taken out by the Committee of Style.³⁶ Thus, the absence of the word "other" from the final draft does not appear to be accident or happenstance.³⁷ Rather, it appears to be a distinct choice. Nothing could have been simpler than leaving well enough alone.

34. See *supra* notes 12–17 and accompanying text (suggesting that the distinction between *officers of the United States* and *officers under the United States* may be relevant to constitutional discourse). *But cf. supra* note 28 (noting the same distinction but suggesting that the President is in neither category).

35. On September 8, 1787, after the Convention agreed on the general contours of the impeachment power, and that that power would extend to the presidency, the Convention added the following language: "The vice-President and *other* Civil officers of the U. S. shall be removed from office on impeachment and conviction as aforesaid" 2 FARRAND, *supra* note 17, at 552 (emphasis added); see also 2 FARRAND, *supra* note 17, at 545 (same).

36. The Impeachment Clause as reported by the Committee of Style on September 12, 1787, is nearly identical to the version of the clause appearing in the final draft, which is the Constitution as we know it today. See 2 FARRAND, *supra* note 17, at 600 ("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."). The Impeachment Clause as reported by the Committee of Style differs from the final version only in regard to punctuation and capitalization.

37. *But see* Friedman, *supra* note 10, at 1720 n.72 ("There is no indication that the changed language [in which the word 'other' was dropped] was meant to suggest that the president and vice-president were not 'officers of the United States.'). In opposition to Professor Friedman's view, I suggest that the changed text itself is some substantial indication that neither the President nor the Vice President is an "officer of the United States." *Cf. infra* note 77 and accompanying text (describing how the language of the Elector Incompatibility Clause was changed from *officers of the United States* to *officers . . . under the United States*). My own view is that this is a carefully choreographed pattern, rooted in private law drafting norms. Compare *supra* notes 22–27 and accompanying text (describing private law drafting norms), with *supra* notes 17–21 and accompanying text (describing the intuitions supporting the conventional view).

B. *The Commissions Clause.*

Article II, Section 3 of the Constitution provides: "[The President] . . . shall Commission all the Officers of the United States."³⁸ *All* means *all*.³⁹ If the Vice President were an officer of the United States, then Vice President John Adams should have received a commission from George Washington, and subsequent Vice Presidents should have received commissions from either the outgoing or the incoming President. Likewise, 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 *never* has been the practice. Nor does there appear to be any eighteenth-century source suggesting that it *should be* the practice.

38. U.S. CONST. art. II, § 3 (emphasis added). An alternative view of the Commissions Clause might suggest that *shall* is not mandatory, but rather is an expression of who will have the power to grant commissions in the future (i.e., post-ratification). See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.) (opining that the President has no duty to commission statutory officers within the President's removal power); Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on "Shall" and "May"* (working paper 2008), available at http://works.bepress.com/seth_barrett_tillman/21/ (distinguishing eighteenth century use of *shall* and *may* and *will*). This view, however, is inconsistent with Madison's views. See, e.g., *House of Representatives of the United States*, *supra* note 30, at 3 (recording 1791 House debate in which Madison suggested that *shall* was mandatory, rather than directory); see also AMAR, BIOGRAPHY, *supra* note 3, at 236 ("In the Article III vesting clause and roster, 'shall' and 'all' meant what they said."); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 178-79 (2004) (taking the position that the use of *shall* in the Sweeping Clause (and elsewhere in the Constitution) creates a mandatory obligation which is "presumptively enforceable by the other branches of government, including the courts").

39. See AMAR, BIOGRAPHY, *supra* note 3, at 236 ("In the Article III vesting clause and roster, 'shall' and 'all' meant what they said."); cf. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1792 (2002) ("The word 'every' . . . means every and not some.").

Professors Akhil and Vikram Amar have argued that historical practice under the Commissions Clause "confirms" that neither federal legislators nor federal legislative officers are officers of the United States because none has ever received a presidential commission. Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 115 & n.11; Calabresi, *supra* note 3, at 159 (arguing that the conclusion that legislative officers are not officers of the United States "is confirmed by the fact that legislative officers traditionally have not received commissions") (emphasis added). Of course, the same is true for the President and Vice President: they too have never received presidential commissions. By a parity of reasoning, it would seem to follow that the President is also not an officer of the United States. But the Amars never reach or even discuss that possibility. Cf. Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 136 n.143 (asking rhetorically "[i]f an acting President . . . is not an 'Officer of the United States,' what is he?"). Perhaps, a President or Acting President is the holder of an Article VI public trust? See *supra* notes 4, 25, 26 and accompanying text; *infra* note 61 and accompanying text.

Professor Calabresi realizes that this poses a problem for his position and writes: "Presidential practice with respect to issuing commissions is highly unreliable for purposes of determining who qualifies as an 'Officer of the United States.'"⁴⁰ Of course, if one looks for commissions where none exist, while positing that they should exist, then one will find the practice unreliable.⁴¹ The absence of *any* historical examples, much less a historical pedigree, of commissions granted to Presidents is some significant evidence from early Executive Branch practice, roughly contemporaneous with ratification, against believing that Presidents are "Officers of the United States." Again, if the term "Officers of the United States" is coextensive with "Officers under the United States," then it seems to follow that the Incompatibility Clause does not apply to the President.

C. *The Appointments Clause.*

Article II, Section 2, Clause 2 provides:

[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 . . .*⁴²

40. Calabresi, *supra* note 3, at 161 n.33 (paraphrasing *The Book of Common Prayer* and citing undocumented conversations with Professors Gary Lawson and John Harrison); *see also* Calabresi, *supra* note 3, at 159 n.24 (suggesting that the failure to commission Presidents was "an oversight"). Professor Calabresi, I think, errs here. The possibility that early administrations did not know whether they should commission low level employees, contractors, and special agents in irregular service to the government does not mean that their practice toward the presidency was equally inconstant or careless. Executive Branch officials most likely would have focused on the issue of presidential commissions if it were even remotely possible that the President were an officer of the United States. *See* Bruhl, *supra* note 3, at 361 ("[S]urely the absence of a controversy can be somewhat illuminating too.")

41. *See* Bruhl, *supra* note 3, at 362 ("Absence of evidence is sometimes evidence (which is not to say conclusive evidence) of absence, notably when the evidence is expected.")

42. U.S. CONST. art. II, § 2, cl. 2 (emphasis added). A key difficulty, if not the key difficulty, in regard to interpreting the Appointments Clause is the meaning of "herein." Does it refer to Article II, Section 2, or to Article II, or to the Constitution as a whole? *See, e.g.*, BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 402 (2d ed. 1995) (defining "herein" as "a vague word in legal documents, for the reader can rarely be certain whether it means in this subsection, in this section . . . [or] in this document") (emphasis omitted). That the "herein" refers either to Article II, Section 2 or to Article II generally is consistent with what here will be referred to as Calabresi's *Except Those* position. *See infra* notes 43–46 and accompanying text (describing Calabresi's position). On the other hand, the view that it refers to the whole of the Constitution is consistent with the view that the italicized language in the main text functions as an appositive. *See infra* notes 47–51 and accompanying text (arguing that the italicized language

Clearly, the President is not an ambassador, public minister, consul, or judge of the Supreme Court. But is the President one of the "other Officers of the United States"? In all candor, I must admit that the text is not pellucidly clear here. Professor Calabresi takes the position that "[t]he best reading is that the President and the Vice President are the 'Officers of the United States' contemplated by this language in the Appointments Clause."⁴³ Although he did not explicitly explain how his position coheres with the text,⁴⁴ it appears that Professor Calabresi reads the clause this way:

is an appositive). Some, but by no means all, persuasive early sources took the latter view. *See, e.g.,* THE FEDERALIST NO. 67, at 360 (Alexander Hamilton) (J.R. Pole ed., 2005) ("The second clause of the second section of the second article empowers the president of the United States 'to nominate, and by and with the advice and consent of the senate to appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not in the constitution otherwise provided for, and which shall be established by law.'") (underscore added) (emphasis omitted). Hamilton replaced "herein" with "in the constitution," notwithstanding the fact that he was purporting to quote the actual text of the Constitution. Indeed, Hamilton repeated the substitution in the first sentence of the next paragraph, *see id.* at 361, and elsewhere, *see id.* NO. 76, at 403 (Alexander Hamilton). I certainly am not suggesting that Hamilton was actively trying to mislead the unwary reader. I imagine that he merely thought that this position, his position, was true beyond peradventure. Subsequent responses by anti-federalists did not contest his position.

43. Calabresi, *supra* note 3, at 159 n.24; *cf. id.* (agreeing that the meaning of the italicized language is "unclear"); *see also* United States v. Maurice, 26 F. Cas. 1211, 1213 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747) ("I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause.").

44. Professor Calabresi also suggests that the italicized language might refer to the treasurer of the United States, who, in earlier drafts of the Constitution, was an appointee of Congress. *See* Calabresi, *supra* note 3, at 159 n.24 (relying on a letter from Professor John Harrison) (reported as on file with *The Stanford Law Review*, but no longer available). This conjecture strikes me as somewhat ahistorical. The underscored language of the Appointments Clause, i.e., "and which shall be established by Law," was added *after* the treasurer, *qua* congressional appointee, had already been struck from the draft Constitution. *Compare* 2 FARRAND, *supra* note 17, at 611, 614 (recording the September 14, 1787 8-to-3 vote striking the treasurer's appointment by congressional joint ballot), *with id.* at 621, 628 (recording the September 15, 1787, vote adding "and which shall be established by Law" language to the Appointments Clause). Moreover, Calabresi's proposed solution does not cohere with the text. A treasurer, *qua* congressional officer, is not an officer whose office is established by law, but one that, like the President, is established by the Constitution (or was so established in earlier drafts). *Cf. infra* note 48 (noting the position taken by Professor Clark to the effect that "Laws of the United States" in the Supremacy Clause refers exclusively to congressional action under the aegis of Article I, Section 7).

Lastly, Professor Calabresi suggests that the underscored language was "there to prepare for the contingency of future amendments that contemplate some special appointing authority for an office to be created by statute." Calabresi, *supra* note 3, at 159 n.24 (relying on a letter from Professor John Harrison) (reported as on file with *The Stanford Law Review*, but no longer available). The Calabresi/Harrison position is a very fine example of founder-centric hagiography. The Founders may very well have been drafting for the "ages," but, in my view, not at this level of detail. *Cf.* FORREST McDONALD, RECOVERING THE PAST: A HISTORIAN'S

[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, [EXCEPT THOSE] *whose Appointments are not herein otherwise provided for, and which shall be established by Law*

In other words, Professor Calabresi seems to be suggesting that there exists some (non-inferior) "Officers of the United States" whose appointments do not fall under the aegis of the President's appointment power. Arguably, that would include the President and the Vice President, as they are not appointed by the President (or, by anyone else for that matter⁴⁵). Nonetheless, Calabresi's position fails in regard to the underscored part of the text. The office of the President is not "established by Law," nor is the process by which the President is appointed "established by Law." Thus, adding "except those" does not solve this interpretive difficulty (even assuming it is generally permissible to add text in this manner).⁴⁶

MEMOIR 186 (2004) ("The Framers . . . used old materials to create a new order for the ages."). And certainly they would have been loathe to introduce confusing language surrounding offices and officers. As Madison, in a speech on the House floor, explained:

If there is any point in which the separation of the legislative and executive powers ought to be maintained with greater *caution*, it is that which relates to officers and offices. . . . The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases.

1 ANNALS OF CONG. 604 (Washington, Gales & Seaton, 1834) (publishing in 1834 Madison's speech from 1789); *id.* at 583 (Congressman Sylvester: "[P]articuliar offices are not mentioned in the Constitution; they are to be created by law"—which (although not precisely correct) would seem to exclude elected officeholders). Madison and Sylvester's description seemingly precludes describing the President and the Vice President as officers.

45. This was certainly the case under the Constitution of 1787, but under the Twenty-Fifth Amendment, vice presidential vacancies may be filled by presidential nomination upon confirmation by both Houses of Congress. This process can be fairly characterized as an appointment. *See* U.S. CONST. amend. XXV, § 2; *see also* AMAR, BIOGRAPHY, *supra* note 3, at 622 n.9 (suggesting that distinct legal consequences attach to an elected Vice President, as opposed to a Vice President nominated and confirmed under the Twenty-Fifth Amendment); *supra* note 10 (collecting sources discussing the *appoint* versus *elect* distinction).

46. I do not mean to suggest that the *Except Those* position is frivolous. *See Maurice*, 26 F. Cas. at 1214 (Marshall, Circuit Justice) ("The constitution then is understood to declare, that all officers of the United States, *except* in cases where the constitution itself may otherwise provide, shall be established by law"—but failing to identify those constitutional officers falling under the exception.) (emphasis added). *Cf.* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (*per curiam*) (noting that "[u]nless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the [Appointments] Clause"—but failing to explain who those other officers could be) (emphasis added). *But cf.* United States v. Mouat, 124 U.S. 303, 307 (1888) (Miller, J.) ("Unless a person in the service of the Government, therefore holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."). Rather I only suggest that the *Except Those*

I submit that a better reading is that the italicized language within the Appointments Clause functions as an appositive⁴⁷:

understanding of the Appointments Clause cannot apply to the President or to the Vice President, as those (non-inferior) offices are not established “by Law,” that is, by statute under the aegis of Article I, Section 7, Clause 2. *See infra* note 48 (discussing meaning of “by Law”).

To put it another way, although the *Except Those* understanding of the Appointments Clause is not frivolous, and it might cohere with the Recess Appointments Clause and the Inferior Officer Appointments Clause, there is no way to make *any* of those three clauses apply directly to the presidency and the vice presidency. *See* U.S. CONST. art. II, § 2, cl. 3 (the Inferior Officer Appointments Clause); *id.* cl. 4 (the Recess Appointments Clause); *Maurice*, 26 F. Cas. at 1213 (Marshall, Circuit Justice) (“This power [of the President to fill vacancies] is *not* confined to vacancies which may happen in offices created by law.”) (emphasis added).

On the other hand, the Chief Justice of Article I is an office whose appointment is not provided for in the Constitution. *See* Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court*, 22 J.L. & POL. 231, 233 (2006) (noting that “[t]he Constitution says *nothing* about how the Chief Justice is to be chosen”—which thereby, implies either that the Chief Justice is not an “officer of the United States” or that the *Except Those* position is correct and refers (at least) to the Chief Justice) (emphasis added); Edward T. Swaine, *Hail, No: Changing the Chief*, 154 U. PA. L. REV. 1709 *passim* (2006) (same). This, of course, assumes that the Chief Justice of Article I need not be a “judge of the Supreme Court” or a judge on any other Article III court or federal tribunal. *Compare* U.S. CONST. art. I, § 3, cl. 6 (referring to the “Chief Justice”), *with id.* art. II, § 2, cl. 2 (referring to the “Judges of the supreme Court”), *with id.* art. III, § 1 (referring to the “supreme Court” and to “inferior Courts”), *with id.* art. I, § 8, cl. 9 (referring to “Tribunals inferior to the supreme Court”—although it is debated whether this clause refers to federal or state tribunals, or both).

47. *Cf., e.g.,* *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 1782 WL 5, at *1 (1782) (noting that Attorney General Edmund Randolph, later the first Attorney General of the United States, took the position that a clause in a constitutional provision could function parenthetically); *id.* at *4 (Wythe, C.) (same); *id.* at *8 (Pendleton, President J.) (same). *But cf.* 2 DAVID JOHN MAYS, *THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734–1803*, at 424 (1967) (noting, but rejecting, the parenthetical position).

Does the appositive, i.e., “whose Appointments are not herein otherwise provided for, and which shall be established by Law,” modify only the immediately prior “all other Officers of the United States,” or does it also reach back and modify all the named offices, i.e., “Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court”? The intervening comma is some reason to believe the appositive reaches back and modifies the named offices, although any such argument depends on the fine points of eighteenth-century usage. Early practice also seems to confirm the “reach back” position. For example, the First Congress established *by statute* the number of judicial officers serving on the Supreme Court. *See* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (Sept. 24, 1789) (creating a six member Supreme Court). For a novel reinterpretation of the clause suggesting that the appositive does *not* reach back (at least to the “Judges of the supreme Court”), see Peter Nicolas, “*Nine, of Course*”: *A Dialogue on Congressional Power to Set by Statute the Number of Justices on the Supreme Court*, 2 N.Y.U. J.L. & LIBERTY 86 (2006). Professor Nicolas argues that the President and the Senate can cooperatively expand the size of the Supreme Court via the Senate’s advice and consent power and the President’s appointment power, even absent vacancies as determined by statutory authority. *Id.* at 105–06.

I argue in the main text of this Article that the appositional view is superior to the *Except Those* position. *See infra* notes 48–51 and accompanying text. The best view, however, is that the *Except Those* position applies strictly to “whose Appointments are not [in this Article] otherwise provided for,” and that the remainder of the clause, “which shall be established by Law,” functions as an appositive. This view is too complex to develop here. Suffice to say, this reading of the Appointments Clause excludes from the category of *officers of the United States*

[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 . . .*

In this view, the named and unspecified "Officers of the United States" are coextensive with those "whose Appointments are not [in the Constitution] otherwise provided for, and which shall be established by Law." In other words, the point of the italicized language is to indicate that *all* (non-inferior) officers of the United States fall under the President's appointment power without exception, and that *all* offices of the United States must be established by statute, i.e., "by Law"⁴⁸ (as opposed to, for example, by single-

both the President and the Vice President.

48. My own view is that "by Law" is a term of art referring exclusively to statutory processes. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (Kennedy, J.) ("Money may be paid out only through an appropriation made *by law*; in other words, the payment of money from the Treasury must be authorized by a statute.") (emphasis added); AMAR, BIOGRAPHY, *supra* note 3, at 170 (stating that "by Law," as used in the Succession Clause, means "by a statute presumably enacted in advance"); see also Case Comment, *Constitutional Law: Apportionment Bills Subject to Governor's Veto*, 50 MINN. L. REV. 1131, 1132 (1966) ("Where [a] constitution provides that certain items be 'prescribed by law' or that passage be 'by law,' the full lawmaking process clearly is required—passage by both houses plus the governor's approval or re-passage in case of veto."); Harris L. White, Note and Comment, *Constitutional Law: Joint Resolutions: Effect upon Statutes*, 22 CORNELL L.Q. 90, 92 (1936) (same); J. Alexander Fulton, *Presidential Inability*, 24 ALB. L.J. 286, 286 (1881) (same). Modern commentators agree. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334 (2001) ("The constitutional text contains distinct evidence that the term 'Laws' in the Supremacy Clause is limited to those 'Laws' adopted pursuant to Article I, Section 7."); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1315 (1996) ("Although there is a good linguistic argument for regarding court judgments as laws, in almost every other place where the Constitution speaks of 'law' or 'the laws,' it clearly means 'statutes.'") (footnote omitted). But see J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1168 (1989) ("But the conventional notion of Congress's 'power of the purse' rests on an unstated (and unsubstantiated) assumption that 'by Law' envisions only legislation."); but cf. Motion for Leave to File Brief of American Bar Association as *Amicus Curiae* at 11, *INS v. Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171) ("Used in one sense, law is the body of governmental prescriptions binding upon the public, including agency rules Used in another sense, law connotes only those prescriptions that are the work of Congress") (submitted by Professor Antonin Scalia et al.); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105 (1980) ("'[L]aw' only arguably includes administrative orders or congressional investigations."). But compare Sujit Choudhry & Kent Roach, *Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability*, 41 OSGOODE HALL L.J. 1, 8 (2003) ("The [Canadian] Supreme Court has adopted a rather generous interpretation of th[e] ['prescribed by law'] limb, holding that not only statutes, but also regulations and even common law rules, count as laws that can, in principle, justifiably limit *Charter* rights [by satisfying the statutory 'prescribed by law' test]."), with U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under

house or concurrent congressional "order, resolution, or vote,"⁴⁹ or by executive order⁵⁰). Of course, this would exclude the President from the category of "Officers of the United States," as that office is established by the Constitution, not "by Law." Indeed, it was for precisely this reason that Hamilton excluded Senators from the category of "Officers of the United States."⁵¹ Again, if the President is not an "Officer of the United States," and if the term "Officers of the United States" is coextensive with "Officers under the United States," then it seems to follow that the Incompatibility Clause does not apply to the President.

the Laws thereof, escaping into another, shall, in Consequence of any *Law* or *Regulation* therein, be discharged from such Service or Labour . . .") (emphasis added), *amended* by U.S. CONST. amend. XIII.

49. The only instrument that the Presentment Clause—Article I, Section 7, Clause 2—describes as one that may become a "Law" is a "Bill." See Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1376 (2005). Congressional orders, resolutions, and votes, by contrast, under the terms of the Orders, Resolutions, and Votes Clause, do not become "laws;" rather, they "take Effect." U.S. CONST. art. I, § 7, cl. 3. For other authority denominating this clause the Orders, Resolutions, and Votes Clause, as opposed to the Presentment or Residual Presentment Clause, see CONGRESSIONAL RESEARCH SERVICE AND THE LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, 2006 SUPPLEMENT, S. DOC. NO. 110-6, at 1, 127 (2007), available at <http://www.gpoaccess.gov/constitution/pdf2002/2006supplement.pdf>; 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 10.8(b) n.8 (4th ed. 2008); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 650 n.52 (2005); Jack Michael Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 126 n.306 (2006); Jacob E. Gersen & Eric A. Posner, *Soft Law*, 61 STAN. L. REV. (forthcoming 2009) (manuscript at 38, 40, available at <http://works.bepress.com/jgersen/10/>); David O'Neil, *Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1120 n.178 (2007); Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 TEX. L. REV. 1265 *passim* (2005).

50. Treaties, as opposed to statutes, may be a special case. *Cf.* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. Off. Legal Counsel, at 26 n.13, 2007 WL 1405459, at *24 n.13 (Apr. 16, 2007) (Bradbury, Steven G., Acting Asst. Att'y Gen.) (taking no position in regard to whether or not an office of the United States, per the Appointments Clause, may be validly created by treaty, as opposed to by statute). *But see supra* note 48 (rejecting implicitly the possibility of offices of the United States created under the aegis of the treaty power). *But compare, e.g.*, U.S. CONST. art. III, § 2 (distinguishing "Laws of the United States" from "Treaties" made under the authority of the United States), *with id.* art. VI, § 2 (denominating treaties as part of the "supreme Law of the Land").

51. See THE FEDERALIST NO. 67, at 360–62 (Alexander Hamilton) (J.R. Pole ed., 2005) (explaining that Senators, and by implication Representatives, are not "officers of the United States").

II. THE HISTORICAL ARGUMENT

President George Washington, Commander de Lafayette, and the Key to the Bastille.

The Foreign Emoluments Clause provides: "[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."⁵² A separate Emoluments Clause applies only to the President: "The President shall, at stated Times, receive for his Services, a Compensation . . . and he shall not receive within that Period [for which he was elected] any other Emolument from the United States, or any of them."⁵³ On one hand, the fact that there is an independent emoluments clause applying exclusively to the President may indicate that the President does not fall under the orbit of the Foreign Emoluments Clause.⁵⁴ On the other hand, if, as many learned commentators argue, the President is an "officer under the United States," then both the Foreign Emoluments Clause and the

52. U.S. CONST. art. I, § 9, cl. 8. My analysis assumes, for the purpose of this Article, that "Office of Profit or Trust under the United States," *id.*, is coextensive with the potentially more general "Office under the United States." See generally Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 29 Op. Off. Legal Counsel, at 4, 2005 WL 2476992, at *3 (Mar. 9, 2005) (Francisco, Noel J., Dep'y Asst. Att'y Gen.) ("The early applications of the Emoluments Clause likewise reflect the assumption that an 'Office of Profit or Trust [under the United States]' is synonymous with the term 'Office under the United States.'"). But cf. *supra* note 28 (suggesting that certain fine textual distinctions in the Constitution are worthy of notice).

53. U.S. CONST. art. II, § 1, cl. 7.

54. See *infra* note 79 (making a similar argument in regard to the Oaths or Affirmations Clause, i.e., the existence of the President's free-standing Article II oath is a structural indication that the more general Article VI oath reaching executive officers, among others, does not also reach (and was not intended to reach) the President). Some authors have made a similar argument in regard to the impeachment process and the congressional member expulsion process, i.e., the existence of the unicameral power of each House to expel its own members is a structural indication that the separate impeachment process does not reach (and was not intended to reach) members of the legislature. See, e.g., Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 49 (1989) ("It would have been illogical for the framers to have given Congress two separate methods to expel its own members."); Jason J. Vicente, *Impeachment, A Constitutional Primer*, 3 TEX. REV. LAW & POL. 117, 133 (1998) ("Providing two methods for removing a legislator seems redundant and illogical.") (citing Gerhardt, *supra*); cf., e.g., Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 115 n.14 ("To remove unfit legislators from government, the Constitution provides a *specialty* tailored alternative to impeachment: expulsion by a two-thirds vote of one's own House.") (emphasis added). To be clear, this Article has not adopted (or rejected) this view or its broader interpretive position. See *infra* note 55.

Presidential Emoluments would seem to apply to the President.⁵⁵ However, this proposition is easily tested.

In 1790, the Marquis de Lafayette, an officer of the French revolutionary government,⁵⁶ sent President George Washington a gift: the main key to the Bastille.⁵⁷ There is no record of Washington ever having asked for Congress's consent to keep the gift. Why? One possibility is that Washington forgot or that he never read the Constitution. Another, more reasonable, possibility is that he considered the gift to be a personal gift from Lafayette,⁵⁸ his adopted

55. See, e.g., AMAR, BIOGRAPHY, *supra* note 3, at 182 (“The [Presidential Emoluments] [C]lause also prohibited individual states from greasing a president’s palm, and the 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.”) (emphasis added). Professor Akhil Amar believes *both* the Foreign and the Presidential Emoluments Clauses apply to the President. See *id.* On the other hand, he has also taken the position that the single-house member expulsion process applies to members of Congress, although the impeachment process does not. See *supra* note 54 (quoting the Amars’ *Presidential Succession Law*). His two positions are not incoherent, but they are not models of interpretive consistency either. Reading the Constitution as the Amars suggest, should one believe that the President’s Article II oath trumps the more general Article VI oath (as the Amars suggest the member expulsion process trumps the impeachment process) or, instead, that both Oath Clauses have independent constitutional bite vis-à-vis the President (as with the two Emoluments Clauses)?

56. See, e.g., ANDRÉ MAUROIS, ADRIENNE: THE LIFE OF THE MARQUISE DE LA FAYETTE 160 (Gerard Hopkins trans., 1961) (noting Lafayette’s 1789 appointment as Vice President of the National Assembly); *id.* at 162–63 (noting Lafayette’s 1789 appointment (by the King) and subsequent election (by the Paris electorate) as commander of the National Guard, formerly known as the bourgeois militia).

57. See THE LETTERS OF LAFAYETTE TO WASHINGTON 1777–1799, at 347–48 (Louis Gottschalk ed., 1976) (reproducing March 17, 1790, letter from Lafayette to Washington giving the key to the Bastille).

58. How could Lafayette send the key to the Bastille to Washington in a personal capacity? Did the key belong to the Marquis or to the French State? Cf. *Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (Strong, J.) (“[The government] can act only through its officers and agents.”). The Marquis’s March letter took some months to reach Washington, who responded on August 11, 1790. Cf. 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) (denominating the key a “testimonial[] of [Lafayette’s] friendship”). That same day Washington wrote to the Senate, Letter from George Washington to the Senate, in 31 THE WRITINGS OF GEORGE WASHINGTON, *supra*, at 88–90 (reproducing Washington’s letter to the Senate), and the next day he wrote the Attorney General, Letter from George Washington to the Attorney General, in 31 THE WRITINGS OF GEORGE WASHINGTON, *supra*, at 90 (reproducing Washington’s letter to the Attorney General). Washington neither asked for congressional consent, nor did he seek a legal opinion justifying his “inaction” in this regard. I do not suggest that the historical record here is resoundingly clear, but “historical evidence [need not be] black-or-white to have any value.” Brian C. Kalt, Rejoinder, *Keeping Tillman Adjournments in Their Place*, 101 NW. U. L. REV. COLLOQUY 108, 110 (2007); AMAR, BIOGRAPHY, *supra* note 3, at 560 n.22 (rejecting position as inconsistent with “much of actual executive practice going back to George Washington”); *id.* at 470 (according “special heed to the practices of President Washington”).

son in all but law, and therefore, arguably, not subject to the requirements of the Emoluments Clause. But even if that were the case, Washington was very sensitive in matters relating to procedural regularity and appearance.⁵⁹ And after all, surely Congress would have consented had Washington asked. Moreover, even if he considered it a personal gift, others, including his handful of political opponents in Congress, may not have. Yet I have found no record of a complaint lodged against the President in a House floor speech or in a popular pamphlet.⁶⁰

The better view, I believe, is that Washington never asked for Congress's consent because he never thought that third-parties could confuse the elected Chief Magistrate, the holder of a public trust,⁶¹

59. See, e.g., Letter from George Washington to James Madison (May 5, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 58, at 310–11 (“As the first of every thing, in our situation will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles.”) (emphasis in the original); Letter from George Washington to Thomas Jefferson (July 15, 1790), in 17 THE PAPERS OF THOMAS JEFFERSON 193 (Julian P. Boyd ed., 1965) (seeking opinion on the constitutionality of the bill for relocating the seat of government); *id.* at 193–99 (reproducing Jefferson’s three separate written responses, each dated July 15, 1790). Professor Akhil Amar has explained:

I have paid special heed to the practices of President Washington. This seemed particularly appropriate because the American people in 1787–1789 understood that the Constitution was designed for Washington, whose precedent-setting actions would surely help concretize its meaning—especially the meaning of its open-textured Executive Article.

AMAR, BIOGRAPHY, *supra* note 3, at 470.

60. See Bruhl, *supra* note 3, at 361 (“[T]he absence of a controversy can be somewhat illuminating too.”).

61. See U.S. CONST. art. VI, cl. 3 (distinguishing officers under the United States from holders of public trusts under the United States); *cf.* 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); Letter from George Washington to Eleonor F. Elie, Comte de Moustier (May 25, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 58, at 334 (“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*.”) (emphasis added); Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 THE PAPERS OF JAMES MADISON 235–36 (Robert R. Rutland et al. eds., 1983) (suggesting that statutory presidential succession is “an annexation of one *office* or *trust* to another office”) (emphasis added); AMAR, BIOGRAPHY, *supra* note 3, at 301 (noting that the Religious Test Clause of Article VI extends to “any federal office or post,” but without clarifying if it extends to the President and Vice President); see also *supra* notes 4, 25, 26, 39. But compare U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 903 (1995) (Thomas, J., dissenting) (“But the only reason for extending the [Religious Test] Clause to the States would be to protect Senators and Representatives from state-imposed religious qualifications; I know of no one else who holds a ‘public Trust under the United States’ yet who might be subject to state disqualifications.”), with Kesavan, *supra* note 13, at 133 n.45 (“Justice Thomas was right, but not completely right—as I shall try to convince you, Electors also occupy a ‘public Trust under the United States.’”). I

with a mere creature, an officer under the United States (i.e., an appointed officer). He never asked for Congress's consent because he never subjectively imagined that he was an officer under the United States. Simply put, this incident 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,⁶² has no application to Presidents.

III. THE STRUCTURAL ARGUMENT

A. *Congressional Power over Presidential Compensation.*

The Presidential Emoluments Clause provides: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished *during the Period for which he shall have been elected . . .*"⁶³ In short, a contemporaneously acting Congress cannot make a *midstream* change to a sitting President's compensation.⁶⁴ Of course, Congress may make prospective changes to a future President's compensation, i.e., changes in anticipation of the start of a President's term. If Congress could not make such prospective changes, then no change in presidential compensation would ever be possible.

agree with Justice Thomas and Mr. Kesavan, but I would also add members of Article V national (and, perhaps, state) conventions to the list of holders of "public trusts under the United States," who are still otherwise subject to state disqualifications. See U.S. CONST. art. V. The impermanence of such positions, electors and Article V convention members, rests somewhat uneasily with the concept of "office." Compare Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. Off. Legal Counsel, at 24, 2007 WL 1405459, at *22 (Apr. 16, 2007) (Bradbury, Steven G., Acting Asst. Att'y Gen.) ("By the time of the Founding, an 'office' was understood in the common law 'as an *institution* distinct from the person holding it and capable of persisting beyond his incumbency,' to which 'certain frequently recurrent and naturally coherent duties [were] assigned more or less permanently.'") (quoting EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1789–1948, at 85 (5th ed. 1984)), with AMAR, BIOGRAPHY, *supra* note 3, at 152 (noting "[t]he episodic nature of the elector system, featuring ad hoc officials chosen only once in four years for a single discrete purpose"). But cf. Robert Green Ingersoll, *At His Brother's Grave*, in X THE WORLD'S FAMOUS ORATIONS: AMERICA—III, at 83 (William Jennings Bryan ed., 1906) ("And now to you who have been chosen, from among the many men he loved, to do the last sad *office* for the dead, we give his sacred dust.") (emphasis added).

62. See *supra* note 52 (discussing variants of "Officers under the United States").

63. U.S. CONST. art. II, § 1, cl. 8 (emphasis added).

64. *Id.* For an interesting discussion of constitutional conundrums relating to contemporaneous action among multiple government actors whose concurrence is required for valid official action, see Bruhl, *supra* note 3.

But other than limiting Congress to such prospective changes, Congress retains plenary power over presidential compensation. Nothing in the Constitution prevents a Congress from raising presidential compensation to take effect at the start of the next presidential term. Likewise, nothing in the Constitution prevents Congress from raising presidential compensation to take effect at the start of the next presidential term after a Senator has announced his or her candidacy for the presidency; after the general popular election; after the electors meet and vote; or even after the new Congress counts the electors' votes and after Congress announces the winner,⁶⁵ but before the new presidential term starts (which happens several days after the electoral votes are counted—assuming a winner is chosen by the standard procedure for counting electoral votes⁶⁶).

As explained, the Ineligibility Clause provides: "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 . . .*"⁶⁷ Thus, if a Senator with two or four years remaining to his or her Senate term is elected President, and the Congress raises the President's salary during that Senator's term, but prior to his or her becoming President, the Ineligibility Clause would preclude the appointment, and thereby effectively void the election. This, of course, assumes both (i) that the Ineligibility Clause reaches "elected" (rather than "appointed") offices,⁶⁸ and (ii) that the presidency is a "civil Office under the Authority of the United States" per the Ineligibility Clause.⁶⁹ There is little reason to

65. *But cf.* AMAR, BIOGRAPHY, *supra* note 3, at 181 ("Congress could, however, change the salary for future presidential terms—presumably before anyone could be certain who would be in office when the new law would take effect."). If Professor Amar means to say that Congress could *not* change the compensation of a president-elect prior to the start of his or her term, he provides no support, textual or otherwise, for his cramped position. *But cf.* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 31–54 (2007) (discussing the Constitution's frequent use of "veil" rules in the compensation context).

66. *See* U.S. CONST. amend. XX, § 1 (mandating that presidential quadrennial term start on January 20); 2 U.S.C. § 7 (mandating that congressional term start on January 3 of each odd numbered year); 3 U.S.C. § 15 (mandating that the newly-seated Congress count the electoral votes on the January 6th preceding the start of the President's term); *see also supra* note 2.

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

68. *See supra* notes 8–10 (discussing the *appoint* versus *elect* distinction) and accompanying text (discussing the Ineligibility Clause).

69. Oddly, there is near universal consensus among modern commentators that the President is a "civil Officer." *See supra* note 33 (discussing "civil Officers" as used in the Impeachment Clause).

Likewise, one might try to argue that although the President is not an "Officer[] of the

accept either assumption, particularly given the objectionable result: an interpretation that would award Congress a standing power to void otherwise properly conducted elections in the event a Senator with an unexpired term is the prevailing candidate. After all, a key reason for instituting the electoral college was to remove the choice of President (at least in the first instance) from Congress. Likewise, there is hardly a wealth of evidence from the Federal Convention, the state ratifying debates, or eighteenth-century public commentary suggesting that this distinctly odd result was the intent of the Framers or the popular understanding of the meaning of the relevant provisions. Certainly, modern commentators adhering to the consensus view present no such evidence.

United States,” per the Appointments Clause, he is an “Office[r] under the Authority of the United States,” as used in the Ineligibility Clause. *See* U.S. CONST. art. II, § 2, cl. 2; *id.* art. I, § 6, cl. 2. *But see* Amar & Amar, *Presidential Succession Law*, *supra* note 3, at 119 n.34 (“[Only] [a] quibbler might try to argue that the President does not, strictly speaking, ‘hold[] . . . Office under the United States,’ and is instead a *sui generis* figure.”). *But compare id.* at 114–15 (“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.”) (emphasis added), *with supra* note 17 (supporting a rejection of the Amars’ position based upon the Convention record). My own view is that the “appointed to any civil Office” and “Authority” language of the Ineligibility Clause was not intended to (and does not fairly) capture Presidents and Vice Presidents, but rather, the chosen language envelops officers of the United States, per the Appointments Clause, and non-presiding legislative officers, and low level employees, contractors, and special agents in irregular service to the federal government. *Cf., e.g.,* Constitutional Limitations on Federal Government Participation in Binding Arbitration, 19 Op. Off. Legal Counsel 208, nn.15 & 59, 1995 WL 917140 (Sept. 7, 1995) (Dellinger, Walter, Ass’t Att’y Gen.) (“At least where [bi-national, multinational, or international] entities are created on an *ad hoc* or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II.”). For example, officers captured by the natural reach of the “Authority” language would include, *inter alia*: (i) territorial officers created by the *ordinances* of the Congress of the Articles of Confederation prior to *statutory* reenactment by the Congress of the Constitution of 1787, *compare* The Northwest Ordinance §§ 3, 4 (July 13, 1787) (creating, by ordinance of the Congress of the Articles of Confederation, posts of territorial secretary and governor), *and* An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 52–53, § 1 (Aug. 7, 1789) (placing, by statute of the Congress of the United States, territorial officers under the control of the President of the United States), *with* AMAR, BIOGRAPHY, *supra* note 3, at 264 (noting how the new statute “adapt[ed]” the prior ordinance to the “Constitution’s apparatus of presidential appointment and removal”), *and id.* at 477 (describing the Northwest Ordinance as a “foundational American legal text[]”); (ii) holders of letters of *marqué* and reprisal, *see* U.S. CONST. art. I, § 8, cl. 11; and (iii) state militia officers when called into national service by the President, *see id.* art. II, § 2, cl. 1. Not one of these persons is an “Officer[] of the United States” under the Appointments Clause, but each is an officer under the “Authority of the United States” per the Ineligibility Clause. (However, militia officers are not the “civil officers” described in the Ineligibility Clause.)

Would anyone maintain that this Congress or the one to be seated on January 3, 2009, has the constitutional power to block Senators McCain or Obama from taking presidential office by means of an intentionally manipulative prospective salary increase?⁷⁰ And if not, does not the contrary inference rest in large part on the position that Presidents are neither "Office[rs] under the United States" nor "Office[rs] under the Authority of the United States"—from which it follows that Senate-Presidential joint office holding is of no constitutional moment?

B. The Elector Incompatibility Clause.

The Elector Incompatibility Clause provides: "[N]o Senator or Representative, or Person holding an Office of Trust or Profit *under* the United States, shall be appointed an Elector."⁷¹ The purpose of this clause, according to the standard narrative, is to ensure that the electors are *independent* decision-makers.⁷² However, if the standard narrative is correct, and if "officers *under* the United States" and "officers *of* the United States" are coextensive⁷³ as suggested by modern commentators, then the Elector Incompatibility Clause is strangely underinclusive. The modern commentators must take the

70. Certainly the Democratic Party rejected the expansive view of Senate-Presidential ineligibility in 1972, unless this was a mere oversight, which seems very difficult to believe. *See* Act of Jan. 17, 1969, Pub. L. No. 91-1, § 1, 83 Stat. 3, 3 (doubling annual presidential compensation from \$100,000 to \$200,000). The Democratic Party's presidential candidate in 1972 was George McGovern who, prior to receiving his party's presidential nomination, had been reelected to the Senate in 1968. *See* George McGovern—Biography, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000452> (last visited Sept. 19, 2008). Is it possible that no one noticed the purported ineligibility "problem," or that half the country had been relying on the so-called "Saxbe Fix," by which Congress retroactively reduces an office's emoluments to nullify any Ineligibility Clause difficulties?

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

72. *See* THE FEDERALIST NO. 68, at 364 (Alexander Hamilton) (J.R. Pole ed., 2005) ("[T]hey have excluded from eligibility to this trust, all those who from [their] situation might be suspected of too great devotion to the president in office."); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ch. 5 (Philadelphia, Philip H. Nicklin, 2d ed. 1829) ("[I]t was found expedient that [the President] should owe his election, neither directly to the people, nor to the legislatures of states, yet that these legislatures should create a select body, to be drawn from the people, who in the most *independent* and unbiased manner, should elect the president.") (emphasis added); AMAR, BIOGRAPHY, *supra* note 3, at 154 (suggesting that "federal officeholders" were excluded by the Elector Incompatibility Clause because "some of [them] were likely to have been appointed by the incumbent").

73. *See supra* notes 11–16 and accompanying text (explaining (and critiquing) the standard view: the position that *officers of the United States* and *officers under the United States* are equivalent); *cf. supra* note 28 (suggesting that the President is neither an officer *of* nor *under* the United States); *supra* note 52 (quoting Office of Legal Counsel memorandum suggesting that certain variants of "officers *under* the United States" have the same meaning).

position that the clause permits subordinate (non-presiding) legislative officers—e.g., the Secretary of the Senate, the Clerk of the House, and other congressional personnel—to be chosen by each House acting alone to become electors.⁷⁴ Yet these officers lack independence every bit as much as "Officers of the United States" selected under the authority of the Appointments Clause do, including those directly appointed by the President. Moreover, it would be odd structurally to exclude Representatives and Senators (who are, at the very least, responsible to the public), but to leave their subordinates eligible.⁷⁵ These criticisms do not prove the view of

74. The consensus view is that non-presiding legislative officers are not "Officers of the United States" per the Appointments Clause. Rather, each House has an independent power to choose such officers. *See* U.S. CONST. art. I, § 2, cl. 4 (applying to the House); *id.* art. I, § 3, cl. 3 (applying to the Senate). The First Congress chose its Clerk and Secretary even prior to any grant of statutory authority regularizing these offices or appropriating funds for their salaries or other emoluments. *See, e.g.*, 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 6 (Washington, Gales & Seaton, 1826) (noting selection of Clerk of the House by single-house action on April 1, 1789).

One commentator has defended the traditional view of separation of powers, in part, by suggesting that the minds of the Founders had not been focused on these legislative officers when drafting the Constitution. *Compare* Calabresi, *supra* note 3, at 162 ("No constitutional oath is required of [non-member subordinate] legislative officers, like the Clerk of the House of Representatives or the Secretary of the Senate, *presumably because those officers were not thought to be very important.*") (emphasis added), *with* 2 FARRAND, *supra* note 17, at 184 (recording that Article IX, Section 2 of the Constitution, as Reported by the Committee of Detail, provided that "the Clerk of the Senate shall strike [commissioners or judges to determine a controversy between two or more states] in behalf of the party absent"). When one also considers the prominent role of Otis of Massachusetts and other legislative officers at the time of the Revolution, and controversies surrounding control of their appointments, one quickly loses faith in the standard narrative of separation of powers. *See* JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689–1776*, at 207–12, 219 (1963) (discussing the appointment of the clerk and minor house officers in the House of Commons and in the British New World colonial assemblies); *see also* MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 229–31* (Leonard W. Levy ed., Da Capo Press 1971) (1943) (same).

75. *See* Kesavan, *supra* note 13, at 130 ("The purpose of the Elector Incompatibility Clause is to ensure the independence of Electors from the Federal Government."); *cf.* AMAR, *BIOGRAPHY*, *supra* note 3, at 143 ("If, however, a president were allowed to stand for reelection, he needed to be allowed to make his case to a body of electors independent of Congress."). It strikes me that Professor Akhil Amar is between a rock and a hard place. The "office . . . under the United States" language of the Elector Incompatibility Clause would seem to embrace non-presiding legislative officers of both Houses. Any other result undermines the purpose of the clause, even as conceived by Professor Amar. *Id.* But if Professor Amar embraces the position advanced here, then he cannot simultaneously maintain *his* position that "officers under the United States" is coextensive with "officers of the United States" and identify the latter exclusively with Judicial and Executive Branch officers (with or without the President). If he concedes the latter point, i.e., that textually "officers under" and "officers of" the United States are fairly distinguishable, then his (and his co-author's) textual argument against the constitutionality of legislative officer succession would seem to fall flat. *See supra* notes 3, 13, 14.

the modern commentators wrong, but they do invite further investigation.

One place to turn for further information is the Constitution's secret drafting history.⁷⁶ When first proposed by Gerry and Morris and adopted by the Convention on July 20, 1789, the Elector Incompatibility Clause stated: "[T]he Electors of the Executive shall not be members of the Natl. Legislature, nor officers of the U. States, nor shall the Electors themselves be eligible to the <supreme> Magistracy."⁷⁷ Ultimately, the restriction against elector eligibility for the presidency was dropped, and the original "officers of the U. States" language eventually became "Office[rs] of Trust or Profit under the United States." If the latter language, the finally adopted language, was precisely coextensive with the "Office[rs] of the United States" language of the Appointments Clause, it is difficult to see why it was changed at all from the original language ("officers of the U. States"). If the "officers *under*" language is a subset of the "officers *of*" language, it is difficult to know what purpose the restriction may have served. Could an expansion have been intended? Was the "officer *under*" language intended to capture (subordinate) legislative officers not (otherwise) captured by the reach of the slightly different, but perhaps significantly different, "officers *of*" language of the Appointments Clause?⁷⁸ That hypothesis would account for the clause's final language, explain its legislative history, and exclude from the ranks of the electoral college all subordinate (and Article III judicial) officers of the government of the United States—thereby facilitating decision-making by independent electors. And if the Elector Incompatibility Clause's "Office . . . *under* the United States" language refers exclusively to all the aforementioned subordinate (and Article III judicial) officers, then it seems to follow that the Incompatibility Clause simply does not speak to joint Senate-

76. Admittedly, the sources that comprise the Constitution's secret drafting history are not always *ad idem*, and even when in agreement with one another, they are not always wholly reliable as to original public meaning.

77. 2 FARRAND, *supra* note 17, at 69 (reproducing Madison's *Notes*).

78. *But compare* Calabresi, *supra* note 3, at 162 ("No constitutional oath is required of [non-member subordinate] legislative officers, like the Clerk of the House of Representatives or the Secretary of the Senate, *presumably because those officers were not thought to be very important.*") (emphasis added), *with* An Act to regulate the Time and Manner of administering certain Oaths, ch. 1, §§ 1–2, 1 Stat. 23, 23 (June 1, 1789) (expressly subjecting the Clerk and the Secretary to an Article VI oath), *and id.* § 5 (expressly subjecting Clerk and Secretary to a second oath), *and infra* note 79 (further discussing the Clerk and the Secretary's purported Article VI oath of office).

Presidential office holding. Is this argument, standing alone, worthy of a QED? Perhaps not. But it is interesting that to date close readings of the Convention record, readings with significant implications for our legal system, have received little sustained attention from legal commentators.

IV. CONCLUSIONS

In all, there is considerable evidence supporting the position that the President is neither an officer *of* nor *under* the United States.⁷⁹ This evidence includes the text of the Constitution, across multiple articles and clauses; floor debate from the First Federal Congress; the unbroken (and unquestioned) historical practice of the Executive Branch since George Washington and John Adams; the concomitant acquiescence of the remaining Branches; the writings of ancient and modern commentators such as Justice Story and Professor Kalt; and reasonably convincing structural arguments.

On the other side there is intuitionism, intratextualism,⁸⁰ and a reading of the Appointments Clause that requires the insertion of missing words.⁸¹

79. See, e.g., *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) (suggesting that the separate Article II oath for the President supports the position that the President is distinguished from the “executive officers” of the Oaths or Affirmations Clause of Article VI, Clause 3). Although I am sympathetic to this view, it does leave the Vice President as a *sui generis* figure, one to whom the Article VI oath does not clearly apply, nor does any other separate constitutional oath (as with the President). It was perhaps in recognition of this difficulty that the First Congress imposed a statutory oath on the Vice President in his or her role as President of the Senate, not as Vice President of the United States. *But cf.* An Act to regulate the Time and Manner of administering certain Oaths, ch. 1, § 1 (defining the Article VI oath, and mandating that the President of the Senate take the oath prior to his or her swearing in the members of the Senate). If this statute reflects the “fact” that members of the First Congress contemplated that the Vice President was an officer of the United States, i.e., one subject to an Article VI oath, then that would be some evidence, contrary to the position taken in the text of this Article, to the effect that the President (like the Vice President) is an officer of the United States. My own view is that the statute is ambiguous on this point. The statute does not state that each officer mandated to take the Article VI oath (as defined by statute) is subject to the oath *because* of Article VI. The understanding may have been that only the Senators were subject to the Article VI oath *qua* Article VI, and the others (i.e., the President of the Senate, and the Secretary of the Senate—another officer made to take, but not (textually) subject to the Article VI oath) took the oath under the authority of the Rules of Proceeding Clause and the Sweeping Clause. See U.S. CONST. art. I, § 5, cl. 2; *id.* art. I, § 8, cl. 18. That would explain why the oath was assigned to the President of the Senate and not to the Vice President.

80. Intratextualism is, itself, a highly specific form of intuitionism. To say that two different words or phrases are different, yet similar enough that they may be interpreted as meaning precisely the same thing, without some independent basis for reaching that conclusion,

The better view is that the President does not hold "Office under the United States" per the Incompatibility Clause. It follows that as a matter of substantive constitutional law the next President could keep his or her legislative seat.⁸² Such a course might not be wise, but it is legal (at least, as a matter of original public meaning).⁸³

is merely a type of misdirection permitting the commentator to assume away textual and historical difficulties. *But compare* Amar, *Intratextualism*, *supra* note 28, at 748 ("In deploying [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (*or a very similar*) word or phrase.") (emphasis added), *with* Gopalan v. State of Madras, A.I.R. 1950 S.C. 27, 35 (Kania, C.J.) ("Every word of that clause must be given its true and legitimate meaning and in the construction of a Statute, particularly a Constitution, it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning."). Are you, the reasonable reader, sure that *of* as in "officers *of* the United States" is coextensive with *under* as in "officers *under* the United States"? Are you sure that that was the 1787–1789 understanding of these two prepositions? *Compare*, e.g., Joseph Hall, Sermon VII: *The Righteous Mammon* 106 (1628), in *V THE WORKS OF THE RT. REV. JOSEPH HALL* (London, Whittingham 1808) ("RICH IN THIS WORLD, not Of it.") (emphasis in the original) (underscores added), and GEORGE PETYT, *LEX PARLIAMENTARIA* 243 (photo. reprint 1978) (1689) ("The Difference between an *Act of Parliament* and an *Ordinance in Parliament* is, for that the *Ordinance* wanteth the threefold Consent, and is ordained by one or two of them.") (emphasis in the original) (underscores added), *with* EVELYN WAUGH, *BRIDESHEAD REVISITED* 21 (1945) ("In [Oxford's] spacious and quiet streets men walked and spoke as they had done in Newman's day . . .").

81. For a more recent attempt to clarify a confusing constitutional clause by adding missing words, see Tillman, *supra* note 49, at 1321; Lawson, *supra* note 49, at 1374 (same) (citing Tillman, *supra*).

82. The question of whether the Senate could *post hoc* exclude or expel a Senator-President from the Senate is a wholly different question. In this Article, I have only argued that a sitting Senator's becoming President does not work an automatic termination of that person's Senate membership by operation of law, and that a sitting Senator is not prevented from becoming President until or unless that person first resigns his or her Senate seat.

Another possibility is that the Senate majority could refuse to accept the resignation of a Senator-President (or President-elect). In this situation, where the President continues to be a member of the Senate, there are circumstances in which the Senate might be able to compel the President's attendance. See U.S. CONST. art. I, § 5, cl. 1. *But see generally* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 *DUKE L.J.* (forthcoming Nov. 2008) (manuscript at 32 n. 212, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125917) (arguing, as a matter of original public meaning, that members have the right to unilaterally resign from the Senate, but House resignation is conditional on that body's consent).

83. If the position presented in this Article is correct, at least three other startling consequences also follow.

First, an impeached, convicted, and disqualified officer, President, or Vice President can subsequently be elected to Congress *or* elected to the office of President. Disqualification poses a bar only to appointed (but not to elected) office. See U.S. CONST. art. I, § 3, cl. 7 (mandating that disqualified officers cannot hold "Office . . . under the United States"). *But see* Randall Kennedy, *A Natural Aristocracy?*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 54, 55 & n.1 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (implying that disqualification is a bar on holding presidential office); J. Peter Pham & Michael A. Krauss, *Speaker Pelosi's Impending Intelligence Failure*, *TCS DAILY*, Nov. 9, 2006, <http://www.tcsdaily.com/article.aspx?id=110906D> (suggesting that disqualification is a bar on

WILKES-BARRE, on the Susquehanna, *October–November 2008*

congressional office). Apparently, Professor McGinnis has adopted the broadest view of the consequences of Senate disqualification.

[The Disqualification Clause] shows that the Framers recognized that officials who should be impeached and convicted may not only remain popular in the face of serious charges, but even after conviction. This provision is consistent with the Framers' understanding that popularity alone is not the only qualification for office [T]he consequences of impeachment [and disqualification] expressly outlined by the Constitution perfectly fit its purpose: removing the danger to the Republic that may be caused by an official who is seriously unfit for office.

McGinnis, *supra* note 33, at 660, 663; *accord* AMAR, BIOGRAPHY *supra* note 3, at 243 (“Congress could remove a man from power, and even disqualify an officer from future officeholding”). *Contra* Professor McGinnis, I suggest that the purpose of Senate disqualification was to allow the government to protect itself from an officer or officeholder at a time when the sovereign people could not be consulted, but if the people should disagree with the Senate’s decision, they were free to ignore it in any future election and, thereby, send or return the disqualified former officer or officeholder to *elective* office. *See* U.S. CONST. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from *Office*, and disqualification to hold and enjoy any *Office* of honor, Trust or Profit *under the United States*”) (emphasis added). The removal subclause applies both to constitutionally established offices and to statutory or appointed offices, but the latter disqualification subclause only applies to statutory or appointed offices. The clause’s terminology textually coheres with the language of the Impeachment Clause. *See id.* art. II, § 4 (prescribing that impeachment reaches all officers of the United States, i.e., statutory officers appointed under the aegis of the Appointments Clause, and additionally the President and the Vice President); *see supra* notes 32–37 and accompanying text (analyzing the language of the Impeachment Clause).

Second, an incumbent President, even when a candidate for re-election, is not barred under the Elector Incompatibility Clause from being appointed (by state law processes) a presidential elector. *Compare* U.S. CONST. art. II, § 1, cl. 2 (barring Senators, Representatives, and persons “holding an Office . . . under the United States” from serving as an elector), *with* 2 FARRAND, *supra* note 17, at 61, 69 (recording draft version of the Elector Incompatibility Clause in which electors were expressly rendered ineligible for the presidency, although this language was subsequently dropped), *and* AMAR, BIOGRAPHY, *supra* note 3, at 154 (“These eligibility rules [of the Elector Incompatibility Clause] thus aimed to create a level playing field between executive incumbents and challengers.”). If Professor Amar’s level playing field metaphor is correct, then it would seem to follow that an incumbent President (even if a candidate for re-election) ought to be allowed to serve as an elector given that a non-officer candidate is allowed to serve as an elector. And if a President is not within the orbit of the “Office of Trust or Profit under the United States” language of the Elector Incompatibility Clause, it seems to follow that a President (including an incumbent candidate) may not fall within the confines of the “Office under the United States” language of the Incompatibility Clause, the particular clause which interests us most here. *See supra* note 52 (discussing variants on “Officers *under the United States*”).

Third, it follows, of course, as night follows day, that legislative officer succession to the presidency *per se* poses no constitutional difficulty at all. *But see generally supra* notes 3, 14 (reporting the positions of Professors Akhil Reed Amar, Vikram David Amar, Steven G. Calabresi, and John Manning, who generally defend the proposition that legislative officer succession is unconstitutional—as a matter of original public meaning); AMAR, BIOGRAPHY *supra* note 3, at 170–73, 340–41, 452–53, 556–57, 598, and 625 (same).
