

National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

February 10, 2009

Extract from Rotunda & Nowak, Treatise on Constitutional Law § 9.1(b)(i) & n.6.1 (4th ed. Supp. 2009) citing the Calabresi-Tillman exchange and the Prakash-Tillman exchange on the Incompatibility Clause

Seth Barrett Tillman, *None*



Available at: https://works.bepress.com/seth_barrett_tillman/113/

TREATISE ON CONSTITUTIONAL LAW

SUBSTANCE AND PROCEDURE

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by

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Chapters 9-16

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CHAPTER 9
CONSTITUTIONAL LIMITATIONS ON THE
ASSUMPTION OF PUBLIC OFFICE

**§ 9.1 Qualifications for Membership in
Congress**

§ 9.1(b) The Incompatibility and Ineligibility Clauses

§ 9.1(b)(i) The Incompatibility Clause

**When a Senator or Member of the House Assumes
the Presidency**

Former Senators have become Presidents over a dozen times since our nation's founding. However, it is rare when a *sitting* Senator or Member of the House is elected to the Presidency, but it does happen. Senator Barack Obama, a sitting Senator of Illinois, was elected President in 2008. Before that, Senator John F. Kennedy of Massachusetts was elected President in 1960. And before that, Senator Warren G. Harding of Ohio was elected President in 1921. In fact, Harding was the first sitting Senator to become President.

The historical practice has been that the sitting member of Congress must resign that office when assuming the Presidency and most commentators would come to that conclusion. Attorney Seth Barrett Tillman has made an argument to the contrary,^{6.1} though it is unlikely that a court would adopt it, or that the President would remain in office as a member of the Senate while acting as President. As one commentator has argued, "The Constitution does not contemplate a weird distinction between 'Officers of the United States' [as used in the Appointments Clause] and 'Officers of the Government of the United States' [as used in the Necessary and Proper Clause]."^{6.2}

**When a Senator or Member of the House Assumes
the Presidency**

^{6.1}Seth Barrett Tillman, Opening Statement, Why President-Elect Obama May Keep His Senate Seat After Assuming the Presidency, 157 U. Pa. L. Rev. PENnumbra 135 (2008), available at <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>, also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292359;

Steven G. Calabresi, Opening Statement, Does the Incompatibility Clause Apply to the President?, 157 U. Pa. L. Rev. PENnumbra 141 (2008), available at <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>, also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1294671; Seth Barrett Tillman, Closing

Statement, An "Utterly Implausible" Interpretation of the Constitution: A Reply to Professor Steven G. Calabresi, 157 U. Pa. L. Rev. PENNumbra 146 (2008), available at <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>, also available at <http://papers.ssrn.com/sol3/>

[papers.cfm?abstract_id=1292334](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292334); Steven G. Calabresi, Closing Statement, A Term of Art or the Artful

Reading of Terms?, 157 U. Pa. L. Rev. PENNumbra 154 (2008), available at <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>, also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1294671.

⁶²Calabresi, Response, The Political Question of Presidential Succession, 48 Stan. L. Rev. 155, 160 (1995).