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# Extract from Jay Wexler's The Odd Clauses: Understanding the Constitution through Ten of Its Most Curious Provisions (2011), citing Prakash-Tillman exchange, and citing the Kalt-Tillman exchange

Seth Barrett Tillman

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If the United States Constitution were a zoo, and the First, Fourth, and Fourteenth amendments were a lion, a giraffe, and a panda bear, respectively, then *The Odd Clauses* would be a special exhibit of shrews, wombats, and bat-eared foxes. Past the ever-popular monkey house and lion cages, Boston University law professor Jay Wexler leads us on a tour of the lesser-known clauses of the Constitution, the clauses that, like the yeti crab or platypus, rarely draw the big audiences but are worth a closer look. Just as ecologists remind us that even a weird little creature like a shrew can make all the difference between a healthy environment and an unhealthy one, understanding the odd clauses offers readers a healthier appreciation for our constitutional system. With Wexler as your expert guide through this jurisprudence jungle, you'll see the Constitution like you've never seen it before.

Including its twenty-seven amendments, the Constitution contains about eight thousand words, but the well-known parts make up only a tiny percentage of the entire document. The rest is a hodgepodge of provisions, clauses, and rules, including some historically anachronistic, some absurdly detailed, and some crucially important but too subtle or complex to get popular attention. This book is about constitutional provisions like Section 2 of the Twenty-first Amendment, the letters of marque and reprisal clause, and the titles of nobility clauses—those that promote key democratic functions in very specific, and therefore seemingly quite odd, ways. Each of the book's ten chapters shines a much-deserved light on one of the Constitution's odd clauses—its history, its stories, its controversies, its possible future.

*The Odd Clauses* puts these intriguing beasts on display and allows them to exhibit their relevance to our lives, our government's structure, and the integrity of our democracy.

(2011)

# The Odd Clauses

## Understanding the Constitution through Ten of Its Most Curious Provisions

Jay Wexler

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According to the clause, if you are a member of Congress, then you cannot at the same time also be a "Person holding any Office under the United States." Usually, the meaning of this phrase is pretty self-explanatory. Cabinet members, for example, hold offices under the United States. So do federal judges. Many important positions in the executive branch that don't quite make it to cabinet level are also covered by the clause. The undersecretary of agriculture for vegetables would be covered, for example, if there were such a thing. The Supreme Court has said, in other contexts, that "officers" are those government employees who exercise "significant governmental authority" and whose tenure, duties, and salary are set by statute. This covers a lot of top government employees, but not all of them. Your typical line attorney or policy wonk or maintenance worker probably does not "hold an office under the United States." If Senator John Kerry wanted to take a job as a dessert chef in the Department of Transportation's employee cafeteria, for instance, and if his pastry-making skills were good enough to land him the job, nothing in the Constitution would stand in his way.

What about the president, though? Could a senator who wins the presidential election choose to remain a senator even after taking the presidential oath of office? Nobody has ever tried it, but some of the top legal scholars in the country have spent a lot of time arguing about the question. The main instigator of this debate is Seth Barrett Tillman, who is not himself a professor (at the time of this writing) but who has written more journal articles than most law professors will ever write in their lifetimes. Tillman is a master at parsing the precise wording of various odd constitutional clauses and coming up with ingenious and often counterintuitive arguments about their meaning. In a series of articles published in the journals of top law schools, he has compellingly (though by no means conclusively) argued that the president "presides *over*" the executive branch rather than being an officer *in* it, and therefore cannot be described as "holding an office *under* the United States," which is what the incompatibility clause actually says. In response, a leading constitutional scholar named Sai Prakash from the University of Virginia's School of Law has argued that the president "occupies an office under the United States because he occupies an office created under the authority of the United States."



From time to time, the issue of whether someone is an "officer" does find its way to some court. Indeed, the question once made it as far as the highest court in the land. Back in the early 1970s, an association of military reserve officers opposed to the Vietnam War sued more than one hundred members of Congress who were also reservists in the armed forces. The question under the incompatibility clause was whether somebody who held a commission in the military reserves was holding an "office under the United States." The federal trial judge who heard the case held that a reservist position was an office and enjoined the members of Congress from continuing to hold commissions in the reserves. Among other things, the judge thought that, "given the enormous involvement of Congress in matters affecting the military, the potential conflict between an office in the military and an office in Congress is not inconsequential." An appellate court agreed with the trial judge, and then the Supreme Court took the case to resolve the issue.

Despite the importance of the question, however, the Court never answered it. Instead, it dismissed the suit for lack of "standing." The legal doctrine of standing has to do with whether a court thinks a particular plaintiff has suffered a concrete-enough injury to justify letting it bring the action. If this book were about "The Most Depressing Legal Doctrines" instead of "The Odd Clauses," then there might be an entire chapter in here about this "standing" thing. Luckily for you, however, it isn't. Suffice to say that before the Supreme Court will let somebody sue the government, it must be con-

ment. Three years later, Pryor wrote the majority opinion in *Pelphrey v. Cobb County,* a 2–1 decision holding that it was okay for public commissions to start their meetings by praying to specific religious figures like Jesus and Mohammed.

At least at this point in our nation's history, then, the president can make a recess appointment either between the sessions of the Senate or when the Senate takes a break during a session. What if the Senate doesn't like the president's recess appointment though? Is there anything it can do to punish the president or to deter the president from making another controversial recess appointment?

Enter once again Seth Barrett Tillman, the scholar who suggested, back in chapter 1, that a senator could remain in the Senate even after ascending to the office of president. In a recent article, Tillman suggests that although most people have assumed that the Senate is stuck with the recess appointee until the natural end of its next session, in fact nothing in the Constitution prevents the Senate from getting rid of a recess appointee by reconvening, immediately adjourning its session, and then starting a new session. Or, alternatively, if the recess appointment in question occurred during an intrasession break, the Senate could reconvene, adjourn its session, begin a new session, adjourn that session, and then start a new session, all with a couple of swings of the gavel. In support of his so-called Tillman Adjournment, Tillman argues that the procedure would give the president an incentive to make recess appointments who are amenable to the Senate and would ensure that the Senate remains accountable to the people by giving it an active role in deciding whether to keep the president's recess appointments.

Tillman's proposal occasioned a response from Brian Kalt, a Michigan State University professor who is one of



the country's preeminent experts on the Constitution's odd clauses. A few years back, Professor Kalt gained some much-deserved fame for a brilliant article in which he pointed out that as a result of the interaction between a couple of constitutional provisions and a weird statute, there's a tiny area of land in the Idaho portion of Yellowstone National Park where the government cannot constitutionally prosecute anyone for committing a crime (note to those who would like to try to harass a black-footed ferret: this may be the place for you). Kalt raises a number of legal and practical concerns with Tillman's proposal, pointing out, for instance, that there are much easier ways for the Senate to deal with an overreaching president, including using its power over government money to refuse to pay the salary of questionable recess appointments, something the Senate has in fact already done.

Kalt also argues that if the Senate did what Tillman suggests, the president would fight back. Specifically, Kalt says that the president could reappoint his recess appointments in the constructive recess between the Senate's constructive adjournment and constructive reconvening, and then use his authority under Article II, Section 3, to convene an extraordinary session of the Senate which only the president could adjourn, thus ensuring that his recess appointments would remain in office until he decided to adjourn his special session. I presume that if the president tried such a maneuver, the Senate might respond by saying that it had constructively reconvened before the president had a chance to convene his special session and that therefore his special session never really existed. If this happened, I have no idea what would take place next. Perhaps someone would bring a lawsuit, and an irate Supreme Court would send both the president and the Senate to bed without supper. This, of course, is all quite absurd, but it's in fact not too different from the kind of standoff that occurred at the end of the Bush admin-

istration, when Senate Majority Leader Harry Reid kept the Senate in pretty much continuous pro forma session to keep Bush from making any more recess appointments.



When we as citizens think about how the Constitution should be interpreted, usually it's in the context of some highly emotionally charged issue on which we already have very strong feelings. It is inevitable that our views on the underlying issue will affect how we think the Constitution should be interpreted. It is hard, for example, to think dispassionately about the proper method of constitutional interpretation when abortion rights or affirmative action or religious freedom are at stake. I would guess that most people who strongly believe that the government should not interfere with the reproductive choices of women are also inclined to argue that the Constitution prohibits the government from making abortion illegal. But there is a big difference between a policy conclusion that the government *shouldn't* do something and a constitutional conclusion that the government *can't* do something, and it is important to keep these two inquiries separate when thinking about what principles courts should use to interpret the Constitution. After all, principles of constitutional interpretation apply to all cases, not just the one you're thinking about, and if you conclude that the Supreme Court should read text like the due process clause (no state may "deprive any person of life, liberty, or property, without due process of law") very broadly to stop the government from prohibiting abortion, then in the next case some judge who doesn't share your policy views might use your "read the text broadly" principle to conclude that the takings clause of the Fifth Amendment (no state shall "take private property" without "just compensation") prohibits the government from passing environmental legislation that will interfere with the rights of private property owners.



It makes sense, then, when starting to think about how the Constitution should be interpreted, to do so in the context of some part of the Constitution that does not raise your blood pressure too much. A few years ago, a professor at the Cardozo School of Law in New York City named Michael Herz wrote a terrific article that deserves to be read by more than the fourteen people in legal academia who probably read it, in which he suggests that the recess-appointments clause is a great clause to use to think about how the Constitution should be interpreted. Why? Herz explains:

> There are stakes, but they are not too high; there is substantial text to work with, but no shortage of interpretive issues. In considering the scope of the clause, moreover, one is perforce behind a sort of Rawlsian veil of ignorance. A given interpretation may be good for your team at one point in history and bad at another. Therefore, ideology and the appeal of desired outcomes in the short-term can more easily be set aside here than when considering many substantive constitutional issues.

Now, although the word "perforce" is a little too fourteenth century for my taste, Herz's point remains a solid one. Since sometimes the president will be liberal and sometimes the president will be a Republican, your interpretation of the recess-appointment clause is unlikely to be swayed by your policy or political leanings. What's good for George W. Bush one year is good for Barack Obama a few years later. So, when I was talking earlier about the various interpretive problems with the clause, what did you think? On the "happen" issue, where the text of the clause and its purpose seemed to be at odds, which one did you think should trump? On the in-

States, 272 U.S. 52 (1926). The case where the Court approved of a statute creating the independent counsel is Morrison v. Olson, 487 U.S. 654 (1988). The phrase "bankrupts, bullies, and blockheads," is reported from Calabresi and Larsen's "One Person, One Office," p. 1057, which itself quotes from the classic historical work Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1969), which in turn quotes a March 26, 1778, issue of the *Boston Independent Chronicle.* For the debate over whether the president must step down from a congressional seat upon taking the oath of office, see the following: Seth Barrett Tillman, "Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause," *Duke Journal of Constitutional Law & Public Policy* 4 (2009): 107–41; Saikrishna Bangalore Prakash, "Why the Incompatibility Clause Applies to the Office of the President," *Duke Journal of Constitutional Law & Public Policy* 4 (2009): 143–51. For the lower federal-court case on the military reservists, see Reservists Committee to Stop War v. Laird, 323 F. Supp 833 (1971). For the Supreme Court case, see Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). For historical discussions of the executive branch's meandering interpretation of the ineligibility clause, see Daniel H. Pollitt, "Senator/Attorney-General Saxbe and the 'Ineligibility Clause' of the Constitution: An Encroachment Upon Separation of Powers," *North Carolina Law Review* 53, no. 1 (1974): 111–33, and Michael Stokes Paulsen, "Is Lloyd Bentsen Unconstitutional?", *Stanford Law Review* 46, no. 4 (1994): 907–18. For the last two OLC opinions on the ineligibility clause, see Memorandum Opinion for the Attorney General from David J. Barron, Acting Assistant Attorney General, "Validity of Statutory Rollbacks as a Means of Complying with the Ineligibility Clause," May 20, 2009, available on the Web site of the Office of Legal Counsel, www.justice.gov/olc/. The Cooper memorandum on Orrin Hatch had not previously been released until the release of the May 2009 memorandum, although at least one scholar—Michael Paulsen, whose aforementioned piece on Lloyd Bentsen is a fascinating and entertaining read that I rely on for the story about Bork, Hatch, and Kennedy—had suspected that such a memorandum existed. Paulsen speculates that if it weren't for the Reagan administration's strict adherence to the text of the ineligibility clause, perhaps *Roe v. Wade* might have been overruled, since it is unlikely that Orrin Hatch would have joined any sort of opinion upholding the earlier case, as Justice Anthony Kennedy did in the case *Planned Parenthood v. Casey* in 1992. The two commentators who think the incompatibility clause is responsible for keeping our government from becoming parliamentary-like are Calabresi and Larsen, cited above. To read the views of the separation-of-powers critics, see Donald L. Robinson, ed., *Reforming American Government: The Bicentennial Papers of the Committee on the Constitutional System* (Boulder, CO: Westview, 1985). To read an excellent critique of these views, see Thomas O. Sargentich, "The Limits of the Parliamentary Critique of the Separation of Powers," *William and Mary Law Review* 34, no. 3 (1993): 679–739.



## CHAPTER 2: THE WEIGHTS AND MEASURES CLAUSE

On the Mars climate orbiter fiasco, see the following: John Noble Wilford, "Mars Orbiting Craft Presumed Destroyed by Navigation Error," *New York Times,* September 24, 1999; Andrew Pollack, "Two Teams, Two Measures Equaled One Lost Spacecraft," *New York Times,* October 1, 1999. The case involving the California toad is Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (DC Circuit 2003). The citation for *Lopez* is 514 U.S. 549 (1995). The Violence Against Women Act case is United States v. Morrison, 529 U.S. 598 (2000). The case involving medical marijuana is Gonzalez v. Raich, 545 U.S. 1 (2005). The article that suggests Congress had exercised all of its powers before it ever exercised its weights and measures power is David P. Currie, "Weights and Measures," *Green Bag* 2, no. 3 (1999): 261–66. This article also discusses the early history of the weights and measures clause, including the various commissioned reports of Jefferson and Adams. The report of the academic committee from New York, which includes Adams's famous report, is Charles L. Davies, *The Metric System, Considered with Reference to Its Introduction into the United States; Embracing the Reports of the Hon. John Quincy Adams, and the Lecture of Sir John Herschel* (New York and Chicago: A. S. Barnes & Co., 1871). For the story about how the official kilogram is shedding a tiny

bit of its weight every year, see Otto Pohl, "Scientists Struggling to Make the Kilogram Right Again," *New York Times,* May 27, 2003. For a history of the United States Metric Board, see United States Metric Association, *History of the United States Metric Board,* http://lamar.colostate.edu/~hillger/laws/usmb.html. Also see David Bjerklie, "What Ever Happened to Metric?" *Time,* July 6, 1987. For the most recent case on the "intelligible principle" doctrine, see Whitman v. American Trucking Association, 531 U.S. 457 (2001). For Mankiewicz's account of his conspiracy with Nofziger to get rid of the Metric Board, see Frank Mankiewicz, "Nofziger: A Friend with Whom It Was a Pleasure to Disagree," *Washington Post,* March 29, 2006.

### CHAPTER 3: THE RECESS-APPOINTMENTS CLAUSE

The controversial appointee who was accused of being racially insensitive was Charles Pickering. For more on his nomination, see Neil A. Lewis, "Bush Seats Judge after Long Fight, Bypasses Senate Democrats," *New York Times,* January 17, 2004. The judge who was proud of ruling against children with birth defects was Priscilla Owens. For more on her nomination, see David D. Kirkpatrick, "For Judge Owen, Self-Reliance in Life and Law," *New York Times,* May 26, 2005. On Pryor, see Sheryl Gay Stolberg, "A Different Timpanist," *New York Times,* June 10, 2005. The following are excellent academic articles on the recess-appointments clause; I relied on these sources for much of my discussion of the clause, its history, and the issues it has raised: Edward A. Hartnett, "Recess Appointments of Article III Judges: Three Constitutional Questions," *Cardozo Law Review* 26, no. 2 (2005): 377–442; Michael Herz, "Abandoning Recess Appointments? A Comment on Hartnett (and Others)," *Cardozo Law Review* 26, no. 2 (2005): 443–62; and Michael B. Rappaport, "The Original Meaning of the Recess Appointments Clause," *UCLA Law Review* 52, no. 5 (2005): 1487–1578. Another excellent source of information is Henry B. Hogue, *CRS Report for Congress—Recess Appointments: Frequently Asked Questions* (Washington, DC: Congressional Research Service, 2008). The commentator who talks about vacations as "happening" is Hartnett, "Recess Appointments of Article III Judges," at pp. 382–83. The *New York Times* editorial was published on December 8, 1903. The Knox opinion is "President—Appointment of Officers—Holiday Recess," *Official Opinions of the Attorney General of the United States* 23 (December 24, 1901). The Daugherty opinion is "Executive Power—Recess Appointments," *Official Opinions of the Attorney General of the United States* 33 (August 27, 1921). The opinion about public committees starting off their sessions with sectarian prayers is Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008). On the issue of whether the Senate can terminate the president's recess appointments, see Seth Barrett Tillman, "Senate Termination of Presidential Recess Appointments," *Northwestern University Law Review Colloquy* 103 (January 2009): 286–91, and Brian Kalt, "Keeping Recess Appointments in Their Place," *Northwestern University Law Colloquy* 103 (January 2009): 292–97. These two have written other articles on the subject, but I'll spare you. Kalt's article about Idaho is "The Perfect Crime," *Georgetown Law Journal* 93, no. 2 (2005): 675–88. The court of appeals decision in the Pryor case is Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004).



### CHAPTER 4: THE ORIGINAL-JURISDICTION CLAUSE

The Ellis Island case is New Jersey v. New York, 523 U.S. 767 (1998). The case where a federal appellate court ruled that New York law applied on the island is Collins v. Promark Products, 956 F.2d 383 (2nd Cir. 1992). The "judicial review" case is Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The statute that gives district courts concurrent jurisdiction over most of the types of cases that fall under the Supreme Court's original jurisdiction is 28 U.S.C. § 1251. The most comprehensive source for information about state-versus-state cases, and a book on which I draw heavily for my information and categorization of the various cases, is Joseph F. Zimmerman, *Interstate Disputes: The Supreme Court's Original Jurisdiction* (Albany: State University of New York, 2006). Cites for all of the state-versus-state cases discussed in the chapter can be found in Zimmerman's book, but here are citations for a few of the cases discussed here: Texas v. Florida, 306 U.S. 398 (1939); New Mexico v. Texas, 275 U.S. 279 (1927); Missouri v. Illinois, 200