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From the SelectedWorks of Seth Barrett Tillman

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Extract from Brian C. Kalt's Constitutional Cliffhangers: A Legal Guide for Presidents and Their Enemies (2012), citing the Calabresi-Tillman exchange, and the Prakash-Tillman exchange, and Two Tillman Working Papers

Seth Barrett Tillman, *None*

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dent waiting to happen." Even if one thinks that these experts are wrong, their arguments cast a dark shadow of uncertainty over presidential succession.[1]

Uncertainty and presidential succession are a frightening combination, especially in an era marked by terrorist attacks. One congressional report worried that if a Speaker or PPT ever assumed the presidency,

at 43–48 (statement of Rep. Sherman); 2003 Senate Hearing, *supra*, at 3 (statement of Sen. Lott); *id.* at 4 (statement of Sen. Cornyn).

The definitive article arguing that the current succession law is unconstitutional is Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995); *see* Seth Barrett Tillman, *Legislative Officer Succession: Part I and Part II*, at 3–4 (working paper 2008), *available at* http://works.bepress.com/seth_barrett_tillman/29 (according Amars' article canonical status and noting prominent citations of it). Some others include Ruth C. Silva, Presidential Succession (1951); and John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 Cath. U. L. Rev. 993 (2004).

Not everyone is so sure. *See, e.g.*, Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 Stan. L. Rev. 155 (1995) (arguing that Constitution precludes legislative officials from being in line of succession, but that it is a nonjusticiable question); John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141, 153 (1995) (conceding "substantial constitutional concerns" but preferring deference to Congress on this ambiguous question); Tillman, *supra*, at 3–4 (disagreeing with Amars outright); Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 Ky. L.J. 345 (2002) (assuming that current law is constitutional, though arguing that it violates structural principles).

2. H.R. Rep. No. 49-26, at 1 (1886).

The Constitution distinguishes members of Congress from officers "of" and "under" the United States in other places as well. For instance, a member of the electoral college cannot be a "Senator or Representative, *or* Person holding an Office of Trust or Profit under the United States." Similarly, the Fourteenth Amendment refers to people who have "taken an oath, as a member of Congress, *or* as an officer of the United States." There are several more such examples.[16]

In other areas, the Constitution is less direct but is still helpful to the secretary of state. The Appointments Clause explains that the president appoints

clauses); *see also supra* note 10 (listing some unsuccessful uses of this argument in debate over 1947 act). Three other examples are U.S. Const. art. I, § 6, cl. 2 (Emoluments Clause); *id.* art. VI, cl. 3 (Oath Clause); *id.* amend. XIV, § 2 (regulating state elections). Seth Tillman has made a good case that officers "under the authority of the United States" in the Emoluments Clause are not the same set as officers "under" or "of" the United States, and that people should be careful about treating these different phrasings as though they are necessarily identical. *See* Tillman, *supra* note 1, at 11–23.

17. U.S. Const. art. II, § 2, cl. 2 (appointments); *id.* § 3 (commissions); *id.* § 4 (impeachment); *see* Amar & Amar, *supra* note 1, at 115–16 (discussing clauses); *see also supra* note 10 (listing some unsuccessful uses of this argument in debate over 1947 act). The non-impeachability of members of Congress is discussed further in Chapter 5.

"Office." Even putting the Incompatibility Clause aside—the Speaker might quibble about whether an acting president "holds" the office*—it is hard to imagine a more stunning violation of the separation of powers than for the nation's chief executive and legislative leaders to be the same person.[26]

* Seth Tillman has argued that the presidency is not an "office under the United States." If Tillman is right, then there is no Incompatibility Clause problem with the Speaker or PPT simultaneously serving as president. *See* Seth Barrett Tillman, *Why One New President May Keep His or Her Senate Seat*, 4 Duke J. Const. L. & Pub. Pol'y 107 (2009) (arguing that elected offices are not "under the United States"); Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. Pa. L. Rev. PENNumbra 134, 137–40, 146–53 (2008). For strong contrary views, see Tillman & Calabresi, *supra*, at 141–45, 154–59 (response to Tillman by Steven Calabresi); Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 Duke J. Const. L. & Pub. Pol'y 143 (2009) (responding directly to Tillman, *supra*). In any case, Tillman's argument does not speak directly to the issue at the heart of this chapter: whether the Speaker and PPT count as "officers" under the Succession Clause.

> from office, so once someone is out of office, there is nothing left for Congress to do. This is all just politics—a bunch of partisans trying to drum up votes before the election, and abusing the Constitution to do it.
>
> —EX-PRESIDENT MARTIN'S SPOKESMAN

Those who believe that late impeachment is unconstitutional rely on a particular reading of Article II, Section 4 of the Constitution. They say that when Section 4 limits impeachment to "[t]he President, Vice President, and all civil Officers," it excludes former occupants of those posts. As one lawyer put it during an actual late-impeachment case: "A half-grown boy reads in a newspaper that *the* President occupies the *White House*; if he would understand from that that all Ex-Presidents are in it together he would be considered a very unpromising lad."[12]

12. Belknap Trial, *supra* note 6, at 71 (argument of defense counsel); *see id.* at 132 (opinion of Sen. Boutwell) (making similar argument); Souss, *supra* note 1 ("The word 'President' appears 14 other times in Article II, and in every single case it is undisputed that it refers to the person serving as President, not to a former President."). Seth Tillman has argued to me privately that it is inconsistent to say that "officers" include ex-officers here, but not to say so in the Succession Clause, where some people say (as discussed in Chapter 4) that the "officer" acting as president must not be forced to resign from the previous office.

The Argument for Late Impeachability: Text and Structure

Text

As seen already, the text of the Constitution specifies several limits on the impeachment power. Article II, Section 4, is generally interpreted as allowing impeachment to reach only "the president, vice president, and all civil officers" (which, to oversimplify, I'll lump together as "officers"). But knowing that impeachment only applies to "officers" leaves questions about the possible timing of the offense and the possible timing of the impeachment proceedings.[15]

other hand, the Constitution refers repeatedly to the president and vice president as holding "office." *See, e.g., id.* art. I, § 3, cl. 5; *id.* art. II, § 1, cls. 1, 5, 8; *id.* amend. XII; *see also* Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. Pa. L. Rev. PENNumbra 134 (2008) (debating whether president is an "officer under the United States").

16. *See* Kalt, *supra* note 1, at 58–63 (considering and dismissing Radical interpretation, and narrow view of Article II, Section 4, in more detail). In a debate over an actual late impeachment, several senators espoused the Radical interpretation, arguing that the only limits on Congress's impeachment powers were those inherent in the definition of "impeachment." *See* Belknap Trial, *supra* note 6, at 34, 49–50, 80, 86, 88, 136 (argument of House impeachment managers and Sens. Wallace, Sherman, Edmunds, and Saulsbury); *see also* Seth Barrett Tillman, *The Originalist Who Came in from the Cold: A Response to Professor Josh Chafetz's Impeachment and Assassination* 17 n.34 (Oct. 11, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1622441 (noting how Senate Impeachment Trial Clause speaks of "person[s]" and not officers). More recently, Joseph Isenbergh has argued that impeachment is not limited to removals for high crimes and misdemeanors; to him, Article II, Section 4, merely requires that *if* the impeachment is for a high crime or misdemeanor, the target must leave office if convicted. *See* Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 Yale L. & Pol'y Rev. 53 (1999).

offenders or offenses. While that is technically true, and while the Radical view has had public proponents, there is ample authority and precedent for reading Article II, Section 4, as the constitutional definition of impeachability. Regardless, impeachments must be "impeachments," and pursuing a private citizen for a private act would not be an "impeachment." Some people conflate the Radical interpretation with the Late interpretation and consider the Late interpretation equally untenable. But as the chart here makes clear, the Radical and Late interpretations are distinct.[16]

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