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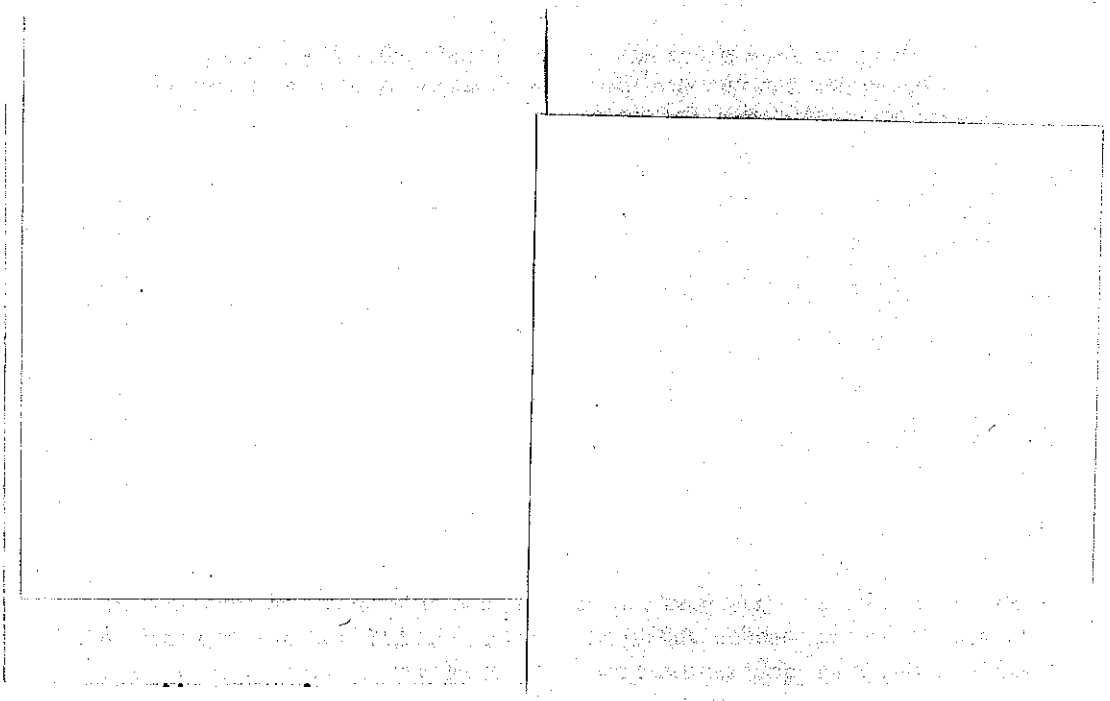
Extract from Roy E. Brownell II, Can the President Recess Appoint a Vice President?, Presidential Studies Quarterly (2012) (peer reviewed), citing Prakash-Tillman exchange, and Tillman's Interpreting Precise Constitutional Text

Seth Barrett Tillman

The Law

Can the President Recess Appoint a Vice President?

ROY E. BROWNELL II



1. John Feerick (1992, 195-96), author of the definitive study of the Twenty-Fifth Amendment, appears to be the only scholar to have written at any length on the subject. At least one other authority has mentioned the subject in passing (Tillman 2009, 115 n.19).

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> the coupling of "nomination" with "confirmation" instead of the "advise and consent" language of article II was designed to ensure that a nominee cannot act as Vice President pending congressional confirmation. Consequently, if a vacancy should occur when Congress is out of session, it could not be filled until the next regular session or at a special session. . . . confirmation is essential to filling a vice presidential vacancy. (Feerick 1992, 195-96; internal citations omitted)

Legislative history therefore indicates that the understanding of the major players behind the amendment was that both houses had to vote for the vice president as reflected in part by choice of the term "confirmation" in place of "advice and consent." This cuts against the president having authority to bypass Congress and unilaterally install his nominee.

A second important linguistic departure from article II involves the term "appoint."[3] While article II uses a variation of the expression on three separate occasions, no reference to "appoint" or "appointment" is made whatsoever in the Twenty-Fifth Amendment.[4] The term "appointment" of course carries with it a tie to Senate—not bicameral—involvement in the process of filling vacancies.[5] Nor does the word "recess" appear anywhere in the Twenty-Fifth Amendment. These omissions would greatly complicate an effort to contend that the Twenty-Fifth Amendment permits the president to *recess appoint* a vice president.

1968, 150). As a consequence, the explicit two-house requirement weighs against reading a recess appointment power into the Twenty-Fifth Amendment.

3. A conversation with Seth Barrett Tillman helped prompt this observation.

The Vice President Is Not an "Officer of the United States" and Is Therefore Not Subject to the Recess Appointments Clause

Another textual factor counseling against recess appointing vice presidents comes from a close reading of the Appointments and Recess Appointments Clauses, provisions which should be read together (Hamilton 1788a; Rappaport 2005, 1495-96). Both apply only in the case of "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." Therefore, only the officials listed therein may be recess appointed and, since the vice president does not fall into any of these categories,[6] he may not be temporarily installed.

The vice president is obviously not an ambassador, public minister, consul,[7] or judge.[8] His position is not created by statute (i.e., not "established by Law"). Nor is he an "Officer of the United States," a conclusion supported by the Supreme Court's reasoning on several occasions. As the high court observed in *United States* v. *Smith*, "[a]n officer of the United States *can only* be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a department" (1888, 532; emphasis added)). The Court has issued similar statements in other decisions (*Buckley* v. *Valeo* 1976, 125-26, 132; *United States* v. *Mouat* 1888, 307; see also Tillman 2009, 125-26 n.46). Just recently, using much the same reasoning, the Supreme Court noted that "[t]he people do not vote for the 'Officers of the United States' " (*Free Enterprise Fund* v. *PCAOB* 2010, 726). Vice presidents are elected by the people through the electoral college or accede to their post following presidential nomination and bicameral confirmation; they do not achieve their position through Senate advice and consent. Thus, because the Supreme Court has concluded repeatedly that "Officers of the United States" are not elected and are instead appointed subject to Senate advice and consent, and because the vice president *is* in fact elected and is *not* elevated pursuant to Senate approval, the vice president cannot be considered an "Officer of the United States." Because he is not an Officer of the United States, the vice president is not subject either to the Appointments Clause or its twin provision, the Recess Appointments Clause, as both are limited in scope to the positions listed above. As a result, the vice president may not be recess appointed.

6. But see Friedman (1988, 1720-21 ns.72 and 73), who draws a different conclusion.

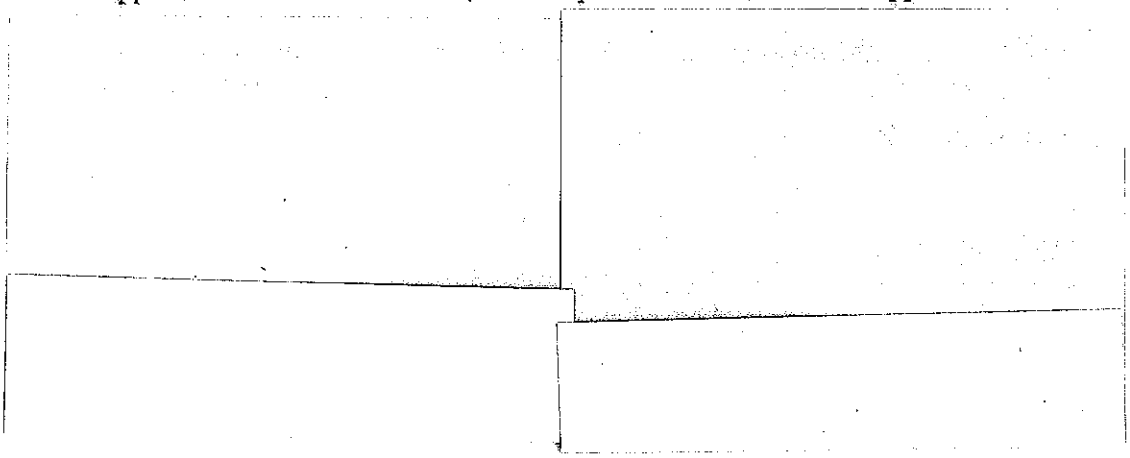
7. See Official Opinions of the Attorney General (1856) (viewing all three terms to mean diplomatic posts).

8. The vice president has no link whatsoever to the judicial branch or Article III and bears no markings of an Article I or Article II judge.

Reinforcing this view is that senior executive branch "Officers of the United States"—such as cabinet secretaries—are not only appointed subject to Senate advice and consent, but generally can be removed by the president (*Myers* v. *United States* 1926). The chief executive, however, cannot remove the vice president (*Meyer* v. *Bush* 1993, 1295). As a political matter, the president may drop him from the national party ticket and prevent the vice president from getting reelected. But the sitting vice president may not be forced from his position by the chief executive;[9] he can serve out his term.

If there were any remaining doubts as to whether the vice president is an "Officer of the United States," they are dispelled by the fact the president does not commission the vice president (Feerick 1992, 195 n.; Rosenberg 1973, 10; Tillman 2009, 122-23 and n.39). The Recess Appointments Clause, it will be recalled, provides that "[t]he President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Under article II, section 3, "all the Officers of the United States" are commissioned. As one authority has noted "*{a}ll* means *all*" (Tillman 2009, 122). Yet the vice president is not and never has been commissioned (8 *Annals of Congress* 2257, January 3, 1799 (Rep. Bayard); 8 *Annals of Congress* 2272, January 4, 1799 (counsel for former Senator William Blount); Tillman 2012, 46-47 n.52; U.S. Congress 1900, 36). Immediately following confirmation, the individual in question becomes vice president; there is no intervening status (Feerick 1992, 195 n; Tillman 2012, 46-47 n.52). This is not so with advice and consent nominees. Following Senate approval, they must still be commissioned by the president, a discretionary act on his part (Feerick 1992, 195 n.; *Marbury* v. *Madison* 1803, 155-57, 162; Morganston 1929, 114-15).

Since "all Officers of the United States" are to be commissioned, and since the vice president is not subject to such a requirement, the unavoidable conclusion to draw (yet again) is that he is not an "Officer of the United States" (Tillman 2009, 122-23). Since the vice president is not an "Officer of the United States," his elevation to the position cannot be governed by either the Appointments Clause or its close relation, the Recess Appointments Clause. Therefore, the vice president cannot be recess appointed.



9. Ironically, the vice president can play a role in the temporary (and potentially permanent) removal of the president through section 4 of the Twenty-Fifth Amendment.

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