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Member of the House of Representatives and Vice President of the US: Can Paul Ryan Hold Both Positions at the Same Time?

JURIST Guest Columnist [Seth Barrett Tillman](#) of the National University of Ireland Maynooth Department of Law argues that if the US Constitution is ambiguous regarding whether it is possible to serve both as a congressman and vice president, then Paul Ryan should not be withheld from holding both positions, if elected...



If Paul Ryan carries both elections, can he retain both positions? Surprisingly, the answer is not so simple. Why? There is no on-point historical precedent where a member of Congress sought to retain his seat while assuming the vice presidency (or presidency), and the federal courts have had no occasion to speak to this precise question. However, a closely related question was addressed by the US Supreme Court in [Powell v. McCormack](#).

In 1966, Adam Clayton Powell, Jr. was elected to a twelfth consecutive term in the US House of Representatives.

Because of allegations of corruption, when the new Congress met in 1967, Powell was not sworn in with the other members-elect. Thereafter, a House committee produced a report which stated that Powell had, prior to the first meeting of the new Congress, wrongfully diverted House funds to himself and others. The House voted to exclude Powell and declared his seat vacant. Not surprisingly, Powell sued both to regain his seat and for lost salary. In *Powell*, decided in 1969, the Court held that the House's refusal to seat Congressman Powell - his exclusion - was unconstitutional. In other words, the House can only exclude a member based on qualifications expressly stated in the [US Constitution](#): e.g., age, residency, and citizenship. Allegations of corruption, even if proven, will not do.

The Court's holding was rooted in two deep structural concerns. First, ours is a written constitution. A commitment to written constitutionalism requires the courts, Congress, and other political actors to respect textual limits imposed by the Constitution. The Constitution's textual limits regarding office-holding are both ceilings and floors: Congress is not free to subtract from extant limitations, nor is it free to fashion new ones. Second, restrictions on office-holding impinge on the freedom of candidates and, more importantly, on the freedom of the People to choose their governors: a theme which runs not only back to 1787 and the framers at Philadelphia, but back to 1776 itself. The People's freedom should not be limited

by abstract policy-making concerns or common law decision-making. As Congress has no textually-granted power to exclude members-elect based on corruption, Powell's exclusion was wrongful.

What about dual-office holding? Does the Constitution speak to that? The only constitutional provision which *might* prevent Ryan from being a House member and vice president at the same time is the [Incompatibility Clause](#), which states: "[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office," (emphasis added). It basically comes down to this . . . if the vice presidency is an "Office under the United States," then Ryan may not hold both positions at the same time. But, if the vice presidency is not an "Office under the United States," then neither Congress nor the federal courts can prevent Ryan from retaining both.

Surprisingly, there are, in fact, several good grounds for believing that the vice presidency is not an "Office under the United States."

First, when the Constitution imposes limits on the presidency and vice presidency, it generally does so expressly, as opposed to relying on more general *office*-laden terminology. For example, the [Impeachment Clause](#) states: "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," (emphasis added). In his celebrated [Commentaries on the Constitution of the United States](#), Justice Joseph Story explained that if the president and vice president were "Officers of the United States," then "other" should have appeared between "all" and "civil." Thus, he concluded that the president and vice president are not "Officers of the United States." Interestingly, in early drafts of the Impeachment Clause, the word "other" immediately preceded "civil Officers," but it was taken out by the Constitution's Committee of Style. Thus, the absence of the word "other" from the final draft does not appear to be mere accident or happenstance. Rather, it might very well have been a distinct choice.

Second, the consensus view for most of our history is that representatives and senators are *not* "Officers of the United States," and they are *not* "Offices under the United States," as used in the Impeachment Clause and Incompatibility Clause respectively. When describing representatives and senators, the original Constitution consistently avoided using *office*-laden language (except for the presiding officers of each House). Similarly, the original Constitution although describing both the presidency and vice presidency as an "office" (unmodified), and, also, on one occasion describing the vice president as an "officer of the Senate," it never

described the president or vice president as holding an "Office of the United States" or an "Office under the United States." In other words, the vice president is never described using the controlling language from the Incompatibility Clause.

Third, many authorities understand the Incompatibility Clause to be motivated by separation of powers concerns. In other words, its purpose was to keep legislators out of the *other* branches. But, it is not so obvious that the vice president is in *another* branch. Historically, most authorities conceived of the vice president as a legislative branch official. There is no constitutional text precluding a House member from also sitting in the US Senate (and voting on every measure). If that is the case, it is difficult to see why a House member should be precluded from sitting as the presiding Senate officer (and voting on the rare occasions when the Senate is evenly divided).

Finally, in 1792, the Senate ordered Alexander Hamilton, the Secretary of the Treasury, to compile a list of "every person holding any civil office or employment under the United States" and their salaries. "[E]very" not "some;" "any" not "some." Nine months later, after much research, Hamilton returned a ninety-page document. He omitted the president, vice president, senators, and representatives. It appears that Hamilton understood "Office under the United States" to embrace only *appointed* or *statutory* officers, not holders of *elected* or *constitutionally-created* positions. One may reasonably conclude that Hamilton omitted the vice president from his list because the vice presidency is not an "Office under the United States."

If there is reasonable ambiguity, Ryan ought to be allowed to hold both positions. Anything less impinges on the People's freedom to choose their own governors. It is only when the text is clear that we restrict the People in the name of the Constitution. We should not confuse our current modern linguistic understanding of "Office under the United States" with what it meant in 1787-1789, and we should not confuse good politics and prudence with what is constitutionally compelled.

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