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From the Selected Works of Seth Barrett Tillman

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Extract from Marni von Wilpert, Preventing Corruption in the Legislature Through the Structure of the Constitution (2010) (unpublished manuscript) (on file with student author at Fordham Law School), citing Calabresi-Tillman exchange and Prakash-Tillman exchange

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## **PREVENTING CORRUPTION IN THE LEGISLATURE THROUGH THE STRUCTURE OF THE CONSTITUTION**

### **Introduction**

Preventing corruption in the Federal Government was one of the key concerns of the Founding Fathers when they created the United States Constitution in 1787. In fact, during the Constitutional Convention, the Framers discussed corruption more often than they did issues such as factions, violence, or other forms of governmental instability,<sup>1</sup> and Madison's Notes recorded that fifteen delegates utilized the term "corruption" more than fifty times throughout the debates.<sup>2</sup> The Framers used the term "corruption" in reference to the context of politics and government, and corruption was even regarded as a "technical term of political science" during the Convention.<sup>3</sup> In the eyes of the delegates, political corruption referred to the "self-serving use of public power for private ends," and specifically to a public official's use of his power to become wealthy.<sup>4</sup> Political corruption by definition is a threat to the functioning of self-government,<sup>5</sup> therefore the delegates viewed corruption as a threat against the ideals of the

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<sup>1</sup> See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009).

<sup>2</sup> See James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 177 (1994).

<sup>3</sup> See GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 32 (1969).

<sup>4</sup> Teachout, *supra* note 1, at 373-74.

<sup>5</sup> BLACK'S LAW DICTIONARY 371 (8th ed. 2004).

provision, widely known as the Ineligibility Clause<sup>128</sup> reads: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time.”<sup>129</sup> The Ineligibility Clause, however, only makes Members of Congress ineligible to hold concurrent offices within the federal government, and is silent on the concept of holding both a state and federal office at the same time.<sup>130</sup> However, the ethical notion of “one person, one office”<sup>131</sup> has become so ingrained in our country’s political consciousness that our history and tradition disfavor any plural office holding of this type.<sup>132</sup> Not only have there been very rare instances of joint state and federal office holding,<sup>133</sup> most state constitutions actually prohibit such a practice. In fact, forty-seven state constitutions include provisions that render federal office holders ineligible to serve simultaneously in their state legislatures.<sup>134</sup>

As discussed above, the goal of the first section of the Incompatibility Clause was to prevent Members of Congress from improperly deriving any personal benefits from the creation

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<sup>128</sup> See Teachout, *supra* note 1, at 361; see also Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. LAW & PUB. POL'Y 107, 110 (2009).

<sup>129</sup> U.S. CONST. art. I § 6, cl. 2.

<sup>130</sup> See Calabresi, *supra* note 21, at 1146-1149 (noting that “public utterances contemporary with ratification support the view that the Constitution was originally understood to create no incompatibility that would forbid the joint holding of federal and state office”).

<sup>131</sup> *Id.* at 1045.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1150. One rare exception was Senator Robert LaFollette of Wisconsin, who continued to act in his capacity as Governor of that State while also serving as a U.S. Senator during a special session of the Senate in 1905. *Id.* (citing I WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES 606 (2d ed. 1929)).

<sup>134</sup> *Id.* at 1151, n.536. The exceptions are Hawaii, Idaho, and North Dakota.

Presidency” multiple times throughout its text, including the Twenty-Fifth Amendment which instructs that a temporary acting President must take command whenever the President is “unable to discharge the powers and duties of *his office*.”<sup>139</sup>

On the other hand, another Constitutional scholar, Professor Tillman, has presented an alternate theory, stating that the President is not an Officer of the United States for the purposes of the Incompatibility Clause.<sup>140</sup> Instead, Professor Tillman has stated that, “the President is not part of the Executive Branch; rather, the (elected) President presides *over* it.”<sup>141</sup> He explains that the Incompatibility Clause only refers to “appointed” officers; not “elected” office holders such as the President and Vice-President, and therefore it does not apply to them.<sup>142</sup> He further explains that the President is never directly referred to in the Constitution as an “Officer”<sup>143</sup> and cites many examples such as the Impeachment Clause to illustrate this concept. For example, the Impeachment Clause of Art. II section 4 reads, “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.”<sup>144</sup> Professor Tillman points out that the phrase “President and Vice President” is separate and distinct from the grouping “all civil Officers of the United States” because this clause does not say “‘all *other* civil Officers’ of the United States.”<sup>145</sup>

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<sup>139</sup> U.S. CONST. amend. XXV, cl. 3 (emphasis added); 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, 142 (2008).

<sup>140</sup> See Tillman, *supra* note 128, at 109.

<sup>141</sup> *Id.* (Tillman at 109).

<sup>142</sup> See Tillman & Calabresi, *supra* note 139, at 136 (2008).

<sup>143</sup> Tillman, *supra* note 128, at 116.

<sup>144</sup> U.S. CONST. art. II, § 4 (emphasis added).

<sup>145</sup> Tillman & Calabresi, *supra* note 139, at 137.