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Extract from Mike McNeerney, Trust or Profit: An Examination of Whether Military Officers may Serve as Members of Congress or Presidential Electors (2012) (unpublished manuscript), citing the Calabresi-Tillman exchange and the Prakash-Tillman exchange

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**TRUST OR PROFIT: AN EXAMINATION OF WHETHER MILITARY
OFFICERS MAY SERVE AS MEMBERS OF CONGRESS OR PRESIDENTIAL
ELECTORS .**

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in turn receives its authority from the federal Constitution.²⁹ This clause is designed to ensure the financial and personal disinterestedness of people charged with electing the chief executive.³⁰

It should also be noted that some have argued Presidential Electors and even the President are not officers at all but rather holders of public trust.³¹ This discussion is interesting

officials than members of the state legislatures are when selecting senators) (1890).

²⁹ See *Ray v. Blair*, 72 S. Ct. 654 (1952) (noting that the states have certain rights and responsibilities regarding the choosing of electors under the Twelfth Amendment); *Irish v. Democratic-Farmer-Labor Party of Minn.*, 287 F. Supp. 794 (D. Minn. 1968), *judgment aff'd on other grounds*, 399 F.2d 119 (8th Cir. 1968) (finding that state legislatures have the constitutional option of allowing a presidential primary election or not).

³⁰ See Calabresi, *supra* note 8, at 1065 (commenting that persons with a direct, financial, personal, or political stake in who won the presidency were disqualified from being electors).

³¹ See, e.g., 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, 139 (2008) (arguing that George

but makes little difference for the purposes of this paper because the constitutional prohibitions in this clause fall on the officers seeking to be electors, not the other way around.³²

III. What is the Definition of an "Office of Trust or Profit"?

After examining the constitutional requirements of the clauses above, this Comment now turns to finding a definition of the phrase "Office of Trust or Profit." Section A first examines whether a job constitutes an office or mere employment. Section B then looks at the actual phrase to determine what constitutes trust or profit.

A. An Office Under the Constitution Requires Special Characteristics and Responsibilities Regular Federal Employment Does not Possess.

"Although an office is 'an employment,' it does not follow that every employment is an office."³³ Scholars tend to agree that the qualities that make a position an office are: (1) it is created by statute; (2) with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned; and (3)

Washington possibly viewed himself as a holder of public trust rather than the mere "creature" of a federal officer).

³² See Calabresi, *supra* note 10.

³³ United States v. Maurice (1823) 2 Brock. 96, Fed. Cas. No. 15,747 (quoting Marshall, Ch., J.).

seems little room to argue that the phrase "trust or profit" expands the definition of "office" under the clause.⁵⁰ If anything, the phrase "trust or profit" is a term of art which serves to narrow the definition of the word "office" to those who, while serving in an office, receive pay or exercise some extra degree of authority.⁵¹ Some legal scholars have also argued that the phrase "Under the United States" itself modifies the phrase "Office of Trust or Profit," which it sometimes follows.⁵² However, this discussion holds little relevance for the purposes of this Comment because the three clauses being examined all contain the "Under the United States" modifier.

IV. Active Duty and Reserves Have Different Restrictions When it Comes to Serving as Members of Congress or Presidential Electors.

kind).

⁵⁰ See OLC, *supra* note 37, at 6.

⁵¹ See *In re Corliss*, 11 R.I. 638, 642 (1876) (finding that a position of profit must receive compensation and that an office of trust could be entrusted with large supervisory and regulative control).

⁵² See, e.g., 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 1-34 (2008).