Dual Office Holding and Status Acquisition Requirements/Prohibitions in the Federal Constitution: The Logic of Aspirations Introduced

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ABSTRACT.
The federal constitution addresses a number of situations in which an aspirant to office or status must abide by requirements/prohibitions regarding dual office holding and status acquisition. The pertinent provisions are reviewed and logical aspects of this issue are introduced.

KEY WORDS. federal constitution, dual offices, eligibility to hold federal office

A. INTRODUCTION. The federal convention crafted four distinct bodies of text to address situations in which an aspirant to an office or claimant to a status must abide by prohibitions or requirements pertinent to fulfillment of the aspiration.

B. THE FOUR PROVISIONS: In order of appearance:

   First, Article I, Section 3, Clause 7 of the Constitution provides: “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

   Second, Article I, Section 6, Clause 2 provides: “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 encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

   Third, Article I, Section 9, Clause 8 provides: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

   Fourth, Article II, Section 1, Clause 2 provides: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

C. SUMMARIZING THE ABOVE. There are actually six operative rules packed into these four constitutional provisions.

   One: an impeached President, Vice-President or federal judge cannot aspire to any of these offices or any other federal office; an impeached judge is eligible to run for Congress, if the impeachment judgment did not bar him from seeking such office.

   Two: the Emoluments Clause bars Congressmen and Senators from seeking appointments in the executive or judicial branch after voting to increase compensation for the office aspired to; this has a (currently acceptable) escape clause, named the Saxbe sanction.

   Third: no person employed by the judicial or executive branches may aspire to serve in Congress while so employed; this has important exceptions which cover military (active duty and reserve) service members.

   Fourth: no person – anywhere on this planet – may aspire to obtain a title of nobility from Congress.

   Fifth: no person employed by the federal government may receive a title of nobility – indeed, receive any “present, Emolument, Office, or Title”
–from any “King, Prince, or foreign State” without Congressional approval.

Sixth: no person employed by the United States and no Congressman or Senator may serve as an elector in the ‘electoral college,’ in which body Article II vests the power to elect the President and Vice-President.

D. PROPOSED AMENDMENTS REGARDING DUAL OFFICE HOLDING. Many ratifying conventions proposed amendments to the constitution which sought to prevent senators, representatives, and federal judges from holding other offices, despite what would seem pretty comprehensive coverage in the clauses quoted in ¶B above.

The conventions in New York, Virginia, and North Carolina proposed amendments to keep senators and representatives from holding another federal office. Virginia and North Carolina’s amendments were identical: “That the members of the Senate and House of Representatives shall be ineligible to, and incapable of holding, any civil office under the authority of the United States, during the time for which they shall respectively be elected.”

Maryland and New York proposed amendments restricting offices for federal judges. Maryland’s majority proposed: “That the federal judges do not hold any other office of profit, or receive the profits of any other office under Congress, during the time they hold their commission.” New York’s language: “That no Judge of the Supreme Court of the United States shall hold any other Office under the United States, or any of them.”

George Mason’s proposed text for a Bill of Rights in the Virginia convention also included versions addressing dual office holding by Senators, Congressmen and federal judges.

1. There is currently no law that forbids the chief justice or an associate justice of the Supreme Court from holding another office.

   For example, John Jay was appointed Chief Justice in September, 1789 while already serving as the nation’s first Secretary of Foreign Affairs and continued to serve while Jefferson returned to Monticello from Paris and then moved to New York in the spring of 1790.

   Jay also served as an Envoy Extraordinary to Great Britain while he was Chief Justice. He also ran for Governor of New York while in office although he resigned from the Supreme Court before his gubernatorial inauguration.

   Chief Justice Oliver Ellsworth served as Envoy Extraordinary to France while Chief Justice. Justice Robert Jackson served as prosecutor at the Nuremburg war crimes trials.

   More recently, Chief Justice Earl Warren chaired the commission of inquiry following the assassination of President Kennedy.

2. Department of Defense Directive 1344.10 prohibits active duty military personnel from holding public office. More generally, 10 U.S.C. Section 973 provides: “An officer … may not hold, or exercise the functions of, a civil office in the Government of the United States (i) that is an elective office; (ii) that requires an appointment by the president by and with the advice and consent of the Senate; or (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.” Military personnel may run for office after they retire.

3. Reservists can hold political office so long as they are not active at the time. President Harry Truman was a reservist while President. Many members of Congress members were or are reservists during their terms of office.

G. LOGICAL IMPLICATIONS. The table might inspire a naïve unraveling: types of aspirants charted against titles/status worthy of aspirations. Is there a larger lesson? What is it?

   Follow the naïve thread: indirect democracy runs on a division of labor; six thousand adult male citizens of Athens could gather in the bouleterion to make decisions and rules for the polis. But once that’s no longer feasible, the few making decisions and rules for the many becomes the norm. So if you have only the few, one must protect those few from
dissipating their energies by trying to do two jobs at the same time.

And, by the same token, the division of responsibility, a parallel axiom, explains that the many expect the few to take the first ‘hit’ for government rules and decisions, leaving the many to second guess the efforts of the few.

Assigning responsibility for rules and decisions would be more difficult – even impossible – if dual office holding were permitted. How do you impeach justices of the Supreme Court if they’re all Senators? How do you mount a political campaign to call on the President to fire his cabinet if they’re serving as powerful chairs of House committees?

Of course, British-style political incest is what’s at stake, in the largest picture. If the executive branch is occupied by legislators then assigning responsibility for executive decision-making – much less the legislature’s rule-making – is stifled if not strangled utterly.

If these points (even remotely) put us on the right track, then a logic of aspirations exists anterior to the effort of crafting constitutional text; at this remove it would be useful to sort out how many different ways people and offices may intersect, treating the human being as ‘object’ and the office/status as a ‘space’ to be occupied or not; or vacated if occupied; or reoccupied, upon vacation.

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