National University of Ireland, Maynooth

From the SelectedWorks of Seth Barrett Tillman

January 15, 2011

Extract from Jay Wexler's The Odd Clauses: Understanding the Constitution through Ten of Its Most Curious Provisions (2011), citing Prakash-Tillman exchange, and citing the Kalt-Tillman exchange

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Available at: https://works.bepress.com/seth_barrett_tillman/132/
If the United States Constitution were a zoo, and the First, Fourth, and Fourteenth amendments were a lion, a giraffe, and a panda bear, respectively, then the Odd Clauses would be a special exhibit of shrews, wombats, and bat-eared foxes. Past the ever-popular monkey house and lion cages, Boston University law professor Jay Wexler leads us on a tour of the lesser-known clauses of the Constitution, the clauses that, like the yeti crab or platypus, rarely draw the big audiences but are worth a closer look. Just as ecologists remind us that even a weird little creature like a shrew can make all the difference between a healthy environment and an unhealthy one, understanding the odd clauses offers readers a healthier appreciation for our constitutional system. With Wexler as your expert guide through this jurisprudence jungle, you'll see the Constitution like you've never seen it before.

Including its twenty-seven amendments, the Constitution contains about eight thousand words, but the well-known parts make up only a tiny percentage of the entire document. The rest is a hodgepodge of provisions, clauses, and rules, including some historically anachronistic, some absurdly detailed, and some crucially important but too subtle or complex to get popular attention. This book is about constitutional provisions like Section 2 of the Twenty-first Amendment, the letters of marque and reprisal clause, and the titles of nobility clauses—those that promote key democratic functions in very specific, and therefore seemingly quite odd, ways. Each of the book's ten chapters shines a much-deserved light on one of the Constitution's odd clauses—its history, its stories, its controversies, its possible future.

The Odd Clauses puts these intriguing beasts on display and allows them to exhibit their relevance to our lives, our government's structure, and the integrity of our democracy.
According to the clause, if you are a member of Congress, then you cannot at the same time also be a “Person holding any Office under the United States.” Usually, the meaning of this phrase is pretty self-explanatory. Cabinet members, for example, hold offices under the United States. So do federal judges. Many important positions in the executive branch that don’t quite make it to cabinet level are also covered by the clause. The undersecretary of agriculture for vegetables would be covered, for example, if there were such a thing. The Supreme Court has said, in other contexts, that “officers” are those government employees who exercise “significant governmental authority” and whose tenure, duties, and salary are set by statute. This covers a lot of top government employees, but not all of them. Your typical line attorney or policy wonk or maintenance worker probably does not “hold an office under the United States.” If Senator John Kerry wanted to take a job as a dessert chef in the Department of Transportation’s employee cafeteria, for instance, and if his pastry-making skills were good enough to land him the job, nothing in the Constitution would stand in his way.

What about the president, though? Could a senator who wins the presidential election choose to remain a senator even after taking the presidential oath of office? Nobody has ever tried it, but some of the top legal scholars in the country have spent a lot of time arguing about the question. The main instigator of this debate is Seth Barrett Tillman, who is not himself a professor (at the time of this writing) but who has written more journal articles than most law professors will ever write in their lifetimes. Tillman is a master at parsing the precise wording of various odd constitutional clauses and coming up with ingenious and often counterintuitive arguments about their meaning. In a series of articles published in the journals of top law schools, he has compellingly (though by no means conclusively) argued that the president “presides over” the executive branch rather than being an officer in it, and therefore cannot be described as “holding an office under the United States,” which is what the incompatibility clause actually says. In response, a leading constitutional scholar named Sai Prakash from the University of Virginia’s School of Law has argued that the president “occupies an office under the United States because he occupies an office created under the authority of the United States.”

From time to time, the issue of whether someone is an “officer” does find its way to some court. Indeed, the question once made it as far as the highest court in the land. Back in the early 1970s, an association of military reserve officers opposed to the Vietnam War sued more than one hundred members of Congress who were also reservists in the armed forces. The question under the incompatibility clause was whether somebody who held a commission in the military reserves was holding an “office under the United States.” The federal trial judge who heard the case held that a reservist position was an office and enjoined the members of Congress from continuing to hold commissions in the reserves. Among other things, the judge thought that, “given the enormous involvement of Congress in matters affecting the military, the potential conflict between an office in the military and an office in Congress is not inconsequential.” An appellate court agreed with the trial judge, and then the Supreme Court took the case to resolve the issue. Despite the importance of the question, however, the Court never answered it. Instead, it dismissed the suit for lack of “standing.” The legal doctrine of standing has to do with whether a court thinks a particular plaintiff has suffered a concrete enough injury to justify letting it bring the action. If this book were about “The Most Depressing Legal Doctrine,” instead of “The Odd Clauses,” then there might be an entire chapter in here about this “standing” thing. Luckily for you, however, it isn’t. Suffice to say that before the Supreme Court will let somebody sue the government, it must be con-
ment. Three years later, Pryor wrote the majority opinion in
Pejpry v. Cobb County, a 2−1 decision holding that it was
okay for public commissions to start their meetings by pray-
ing to specific religious figures like Jesus and Mohammed.

At least at this point in our nation’s history, then, the presi-
dent can make a recess appointment either between the ses-
sions of the Senate or when the Senate takes a break during a
session. What if the Senate doesn’t like the president’s recess
appointment though? Is there anything it can do to punish
the president or to deter the president from making another
controversial recess appointment?

Enter once again Seth Barrett Tillman, the scholar who
suggested, back in chapter 1, that a senator could remain in
the Senate even after ascending to the office of president. In
a recent article, Tillman suggests that although most peo-
ple have assumed that the Senate is stuck with the recess
appointee until the natural end of its next session, in fact
nothing in the Constitution prevents the Senate from get-
ning rid of a recess appointee by reconvening, immediately
adjourning its session, and then starting a new session. Or,
alternatively, if the recess appointment in question occurred
during an intrasession break, the Senate could reconvene, ad-
journ its session, begin a new session, adjourn that session,
and then start a new session, all with a couple of swings of the
gavel. In support of his so-called Tillman Adjournment,
Tillman argues that the procedure would give the president
an incentive to make recess appointments who are amenable
to the Senate and would ensure that the Senate remains ac-
countable to the people by giving it an active role in deciding
whether to keep the president’s recess appointments.

Tillman’s proposal occasioned a response from Brian
Kalt, a Michigan State University professor who is one of

the country’s preeminent experts on the Constitution’s odd
clauses. A few years back, Professor Kalt gained some much-
deserved fame for a brilliant article in which he pointed out
that as a result of the interaction between a couple of con-
istutional provisions and a weird statute, there’s a tiny area
of land in the Idaho portion of Yellowstone National Park
where the government cannot constitutionally prosecute
anyone for committing a crime (note to those who would
like to try to harass a black-footed ferret: this may be the
place for you). Kalt raises a number of legal and practical
concerns with Tillman’s proposal, pointing out, for instance,
that there are much easier ways for the Senate to deal with
an overreaching president, including using its power over
government money to refuse to pay the salary of question-
able recess appointments, something the Senate has in fact
already done.

Kalt also argues that if the Senate did what Tillman sug-
gests, the president would fight back. Specifically, Kalt says
that the president could reappoint his recess appointments
in the constructive recess between the Senate’s constructive
adjournment and constructive reconvening, and then use his
authority under Article II, Section 3, to convene an extraor-
dinary session of the Senate which only the president could
adjourn, thus ensuring that his recess appointments would
remain in office until he decided to adjourn his special ses-
sion. I presume that if the president tried such a maneuver,
the Senate might respond by saying that it had constructively
reconvened before the president had a chance to convene his
special session and that therefore his special session never
really existed. If this happened, I have no idea what would
take place next. Perhaps someone would bring a lawsuit,
and an irate Supreme Court would send both the presi-
dent and the Senate to bed without supper. This, of course,
is all quite absurd, but it’s in fact not too different from the
kind of standoff that occurred at the end of the Bush admin-
istration, when Senate Majority Leader Harry Reid kept the Senate in pretty much continuous pro forma session to keep Bush from making any more recess appointments.

When we as citizens think about how the Constitution should be interpreted, usually it's in the context of some highly emotionally charged issue on which we already have very strong feelings. It is inevitable that our views on the underlying issue will affect how we think the Constitution should be interpreted. It is hard, for example, to think dispassionately about the proper method of constitutional interpretation when abortion rights or affirmative action or religious freedom are at stake. I would guess that most people who strongly believe that the government should not interfere with the reproductive choices of women are also inclined to argue that the Constitution prohibits the government from making abortion illegal. But there is a big difference between a policy conclusion that the government shouldn't do something and a constitutional conclusion that the government can't do something, and it is important to keep these two inquiries separate when thinking about what principles courts should use to interpret the Constitution. After all, principles of constitutional interpretation apply to all cases, not just the one you're thinking about, and if you conclude that the Supreme Court should read text like the due process clause (no state may "deprive any person of life, liberty, or property, without due process of law") very broadly to stop the government from prohibiting abortion, then in the next case some judge who doesn't share your policy views might use your "read the text broadly" principle to conclude that the takings clause of the Fifth Amendment (no state shall "take private property" without "just compensation") prohibits the government from passing environmental leg-

islation that will interfere with the rights of private property owners.

It makes sense, then, when starting to think about how the Constitution should be interpreted, to do so in the context of some part of the Constitution that does not raise your blood pressure too much. A few years ago, a professor at the Cardozo School of Law in New York City named Michael Herz wrote a terrific article that deserves to be read by more than the fourteen people in legal academia who probably read it, in which he suggests that the recess-appointments clause is a great clause to use to think about how the Constitution should be interpreted. Why? Herz explains:

There are stakes, but they are not too high; there is substantial text to work with, but no shortage of interpretive issues. In considering the scope of the clause, moreover, one is perforce behind a sort of Rawlsian veil of ignorance. A given interpretation may be good for your team at one point in history and bad at another. Therefore, ideology and the appeal of desired outcomes in the short-term can more easily be set aside here than when considering many substantive constitutional issues.

Now, although the word "perforce" is a little too fourteenth century for my taste, Herz's point remains a solid one. Since sometimes the president will be liberal and sometimes the president will be a Republican, your interpretation of the recess-appointments clause is unlikely to be swayed by your policy or political leanings. What's good for George W. Bush one year is good for Barack Obama a few years later. So, when I was talking earlier about the various interpretive problems with the clause, what did you think? On the "happen" issue, where the text of the clause and its purpose seemed to be at odds, which one did you think should trump? On the in-


tion's strict adherence to the text of the ineligibility clause, perhaps *Roe v. Wade* might have been overruled, since it is unlikely that Orrin Hatch would have joined any sort of opinion upholding the earlier case, as Justice Anthony Kennedy did in the case *Planned Parenthood v. Casey* in 1992. The two commentators who think the incompatibility clause is responsible for keeping our government from becoming parliamentary-like are Calabresi and Larsen, cited above. To read the views of the separation-of-powers critics, see Donald L. Robinson, ed., *Reforming American Government: The Bicentennial Papers of the Committee on the Constitutional System* (Boulder, CO: Westview, 1985). To read an excellent critique of these views, see Thomas O. Sargentich, "The Limits of the Parliamentary Critique of the Separation of Powers," *William and Mary Law Review* 34, no. 3 (1993): 679-739.

**CHAPTER 2: THE WEIGHTS AND MEASURES CLAUSE**


CHAPTER 3: THE RECESS-APPOINTMENTS CLAUSE


CHAPTER 4: THE ORIGINAL-JURISDICTION CLAUSE

The Ellis Island case is New Jersey v. New York, 533 U.S. 767 (1998). The case where a federal appellate court ruled that New York law applied on the island is Collins v. Promark Products, 966 F.3d 38 (and Cir. 1993). The "judicial review" case is Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The statute that gives district courts concurrent jurisdiction over most of the types of cases that fall under the Supreme Court's original jurisdiction is 28 U.S.C. § 133. The most comprehensive source for information about state-versus-state cases, and a book on which I draw heavily for my information and categorization of the various cases, is Joseph F. Zimmerman, Interstate Disputes: The Supreme Court's Original Jurisdiction (Albany: State University of New York, 2006). Cites for all of the state-versus-state cases discussed in the chapter can be found in Zimmerman's book, but here are citations for a few of the cases discussed here: Texas v. Florida, 306 U.S. 398 (1939); New Mexico v. Texas, 275 U.S. 279 (1927); Missouri v. Illinois, 200