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# OFFICES AND OFFICERS OF THE CONSTITUTION

## PART I: AN INTRODUCTION

SETH BARRETT TILLMAN<sup>†</sup> AND JOSH BLACKMAN<sup>††</sup>

In this Essay, we introduce our planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. This series will explain the original public meaning of twelve clauses of the Constitution that refer to six categories of offices and officers. First, the phrase “Officers of the United States” refers to appointed positions in the Executive and Judicial Branches. Second, the phrase “Office . . . under the United States” refers to appointed positions in the Executive and Judicial Branches and also includes non-apex appointed positions in the Legislative Branch. Third, the phrase “Office under the Authority of the United States” includes all “Office[s] . . . under the United States,” and extends further to include a broader category of irregular positions. Fourth, the phrase “Officer” of “the Government of the United States” refers to the presiding officers identified in the Constitution. Fifth, the word “Officer,” as used in the Succession Clause, refers to those who hold “Office . . . under the United States” and those who are “Officer[s]” of “the Government of the United States.” Sixth, the phrase “Office or public Trust under the United States” encompasses two categories of positions: “Office[s] . . . under the United States” and “public Trusts under the United States.” The former category includes appointed positions in all three branches; the latter category includes federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties.

Our categorization excludes elected officials from the categories “Officers of the United States” and “Office[s] . . . under the United States.” Not everyone agrees with our Minimalist View. Professors Akhil Reed Amar

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and Vikram David Amar have put forward an Intermediate View: the elected President is an “officer of the United States,” but members of Congress are not. Professor Zephyr Teachout advances a Maximalist View: elected and appointed positions, in all three branches, are “offices” and “officers.” And some scholars may embrace a fourth approach. Under a Clause-Bound View, fine variations in the Constitution’s text should not be used to distinguish different kinds of offices and officers. Rather, this view purports to be guided by the specific purposes that animate each individual clause.

As a general matter, it is impossible to reject any of these four approaches with 100% certainty. Instead, we make a limited claim: our approach, the Minimalist View, is better than its known rivals. The Framers chose different “office”- and “officer”-language in different clauses of the Constitution. These provisions were altered throughout the Convention to standardize and harmonize how the Constitution refers to offices and officers. And the conduct of President Washington, his cabinet, and the First Congress was consistent with the Minimalist View. This evidence undermines the Intermediate, Maximalist, and Clause-Bound Approaches.

Part I, this Essay, introduces our planned ten-part series. Part II will expound on the four approaches to understand the Constitution’s “office”- and “officer”-language. Part III will analyze the phrase “Officers of the United States,” which appears in the Appointments Clause, the Commissions Clause, the Impeachment Clause, and the Oath or Affirmation Clause. Part IV will trace the history of the “Office . . . under the United States” drafting convention. Part V will consider the meaning of the phrase “Office . . . under the United States,” which appears in the Incompatibility Clause, the Impeachment Disqualification Clause, the Foreign Emoluments Clause, and the Elector Incompatibility Clause. Part VI will turn to the phrase “Office under the Authority of the United States,” which appears in the Ineligibility Clause. Part VII will study the Religious Test Clause, which uses the phrase “Office or public Trust under the United States.” Part VIII will focus on the phrase “Officer” of “the Government of the United States” in the Necessary and Proper Clause. Part IX will elaborate on the word “Officer,” standing alone and unmodified, in the Succession Clause. Part X will conclude the series.

## INTRODUCTION

Pop quiz!

The Foreign Emoluments Clause requires those who hold “Office[s] . . . under the United States” to obtain congressional consent before accepting foreign state gifts, including diplomatic gifts.<sup>1</sup> A member of the House of Representatives accepts a foreign diplomatic gift and refuses to seek congressional consent. Did the Representative violate the Foreign Emoluments Clause?

- (A) No. Members of Congress do not hold “offices.” Therefore, the Representative is not covered by the Foreign Emoluments Clause.
- (B) Yes. All positions in the federal government, whether appointed or elected, hold “offices.” Therefore, the Representative is covered by the Foreign Emoluments Clause.
- (C) No. Only appointed positions hold “Office[s] . . . under the United States.” The elected Representative, therefore, is not covered by the Foreign Emoluments Clause.
- (D) Yes. Members of Congress are covered by the Foreign Emoluments Clause because the Framers intended to prevent this form of foreign “corruption.”

Which answer is correct? It depends on who you ask. Professors Akhil Reed Amar and Vikram David Amar would answer (A). They contend that the words “office” and “officer” in the Constitution refer only to positions in the Executive and Judicial Branches—whether appointed or elected.<sup>2</sup> Positions in the Legislative Branch, the Amars argue, are not “offices” or “officers.” We refer to the Amars’ position as Approach #1, the Intermediate View—under this approach, the words “office” and “officer” include some, but not all, elected federal positions.

Professor Zephyr Teachout would answer (B). She draws no distinction between “offices” and “officers” in the three branches of the federal government. In her view, elected and appointed positions alike are all “offices” and “officers.”<sup>3</sup> We refer to this position as Approach #2, or the

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1. U.S. CONST. art. I, § 9, cl. 8 (“And no Person holding any *Office of Profit or Trust under [the United States]*, 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.” (emphasis added)).

2. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 136 (1995).

3. See Zephyr Teachout, *Gifts, Office, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 41 (2012) (arguing that using the phrases “Office . . . under the United States” and “Officers of the United States” can refer to both elected and appointed officials).

Maximalist View—under this approach, the words “office” and “officer” include all elected federal positions, such as the President, Vice President, Senators, and Representatives.

We would answer (C). In our view, the phrase “Office . . . under the United States,” as used in the Foreign Emoluments Clause and elsewhere in the Constitution, refers to appointed positions in all three branches of the federal government. In our view, elected members of Congress are not covered by this language. We refer to Approach #3 as the Minimalist View—under this approach, the phrase “Office . . . under the United States” does not include any elected federal positions.

We are not aware of anyone who has squarely, consistently, and publicly advocated for (D), but we suspect that support for this position is fairly deep—largely because more than a few scholars decline to put much weight on the precise phrasings used by the Framers.<sup>4</sup> To support this approach, some of these scholars argue that the Constitution was hastily cobbled together by different committees. On this view, fine textual variations should not be used to distinguish between different kinds of offices and officers. Rather, the purpose behind a specific clause should shape the interpretation of that particular clause. Under this view, the Foreign Emoluments Clause should be interpreted without regard to how the phrase “Office . . . under the United States” was used elsewhere in the Constitution. Rather, this provision should be interpreted based on the clause’s purpose. We refer to Approach #4 as the Clause-Bound View.

As a practical matter, the answer to the pop quiz is not terribly important. There are no pending investigations against members of Congress for accepting unauthorized foreign diplomatic gifts. Moreover, both the House and the Senate have enacted rules that restrict when, and in what circumstances, their members can accept foreign diplomatic gifts.<sup>5</sup> But other questions concerning the offices and officers of the Constitution are extremely important and timely. For example, the federal courts were asked to decide whether President Trump held an “Office . . . under the United States” for purposes of the Foreign Emoluments Clause.<sup>6</sup> Likewise, these

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4. See generally Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 407 (2001) (“I build accounts of particular constitutional rules in a *clause-bound* style from particular provisions and their associated history and precedent; I eschew holistic comparison across clauses until the localized inquiry has independently fixed their meanings.” (emphasis added)).

5. See, e.g., U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . . .”); STANDING RULES OF THE SENATE, RULE XXXV GIFTS, S. DOC. NO 113-18, at 46 (2013); RULES OF THE HOUSE OF REPRESENTATIVES, RULE XXV LIMITATIONS ON OUTSIDE EARNED INCOME AND ACCEPTANCE OF GIFTS, H.R. DOC. No. 112-161, at 951 (2013).

6. See, e.g., *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 882–86 (D. Md. 2018), *vacated*, 838 Fed. Appx. 789 (4th Cir. 2021).

issues relating to the scope of the Constitution's "office"- and "officer"-language implicate foundational, long-simmering separation of powers disputes on which the Supreme Court has never clearly opined. Consider three examples.

If Approach #1, the Intermediate View, is correct, then rank-and-file members of Congress are not "officers." The Impeachment Clause provides that "[t]he President, Vice President and all civil *Officers of the United States*" can be impeached.<sup>7</sup> If members of Congress are not "officers," then they are not impeachable. The Succession Clause empowers Congress to place an "officer" in the line of succession.<sup>8</sup> The Presidential Succession Act of 1947 places the Speaker of the House and the Senate President pro tempore in the line of presidential succession. But if members are not "officers," then it would be unconstitutional to place rank-and-file members in the line of presidential succession. The Speaker and Senate President pro tempore, who are the presiding officers of their respective bodies, have historically always been members of Congress. So, under Approach #1, the issue boils down to one of two possibilities. First, if the Speaker and Senate President pro tempore, apart from their membership in their legislative chamber, are "Officer[s]," as that word is used in the Succession Clause, then Congress may place the Speaker and Senate President pro tempore in the line of succession. If the Speaker and Senate President pro tempore are not "Officer[s]," as that word is used in the Succession Clause, and given that rank-and-file members are not officers in any event, then Congress may not place the Speaker and Senate President pro tempore in the line of succession. The issue of presidential succession has recently become especially urgent. The forty-fifth president, Donald J. Trump, was impeached twice and was hospitalized due to COVID-19, and Trump's vice president, Mike Pence, was potentially exposed to COVID-19. (On a related note, Joe Biden, the forty-sixth president, is the oldest elected President.) In these situations, the issue of the constitutionality of the line of presidential succession was and is squarely placed before the public.<sup>9</sup>

Alternatively, if Approach #2, the Maximalist View, is correct, then members of Congress would be considered "Officers of the United States." Under the Maximalist View, Senators and Representatives can be impeached. Likewise, the Speaker of the House and the Senate President pro tempore, like any other member, can stand in the line of presidential succession.

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7. U.S. CONST. art. II, § 4 (emphasis added).

8. *Id.* art. II, § 1, cl. 6.

9. See Josh Blackman & Seth Barrett Tillman, *The Weird Scenario That Pits President Pelosi Against Citizen Trump in 2020*, THE ATLANTIC (Nov. 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/2020-election-could-pit-pelosi-against-trump/602308/> [<https://perma.cc/R5YB-KYYW>].

By contrast, under Approach #3, the Minimalist View, the Speaker is an “officer” for purposes of the Succession Clause, and it follows that the Speaker can stand in the line of presidential succession. But rank-and-file members are not “officer[s]” or “Officers of the United States.” Therefore, rank-and-file members cannot stand in the line of presidential succession, and they cannot be impeached. Moreover, under the Minimalist View, elected federal officials do not hold “Office[s] . . . under the United States.” The Foreign Emoluments Clause applies to those who hold an “Office . . . under the United States.”<sup>10</sup> If our Minimalist View is correct, then the President and members of Congress cannot violate the Foreign Emoluments Clause. This issue was raised by three lawsuits, which alleged that President Trump violated the Foreign Emoluments Clause. We submitted amicus briefs in each case, arguing that the President is not subject to that provision.<sup>11</sup> The District Court of Maryland held that the President was subject to the Foreign Emoluments Clause, but an order of the Fourth Circuit subsequently vacated that decision.<sup>12</sup>

Approach #3 categorizes six different “office”- and “officer”-related phrases used in twelve provisions of the original Constitution. Here is a brief summary of our Minimalist View:

1. The phrase “Officers of the United States” is used in the Appointments Clause, the Commissions Clause, the Impeachment Clause, and the Oath or Affirmation Clause. This phrase refers to appointed positions in the Executive and Judicial Branches.
2. The phrase “Office . . . under the United States” is used in the Incompatibility Clause, the Impeachment Disqualification Clause, the Foreign Emoluments Clause, and the Elector Incompatibility Clause. This phrase refers to appointed positions in the Executive and Judicial Branches, as well as non-apex appointed positions in the Legislative Branch.
3. The Ineligibility Clause, also known as the Sinecure Clause, uses the phrase “Office under the Authority of the United States.” This phrase includes all “Office[s] . . . under the United

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10. U.S. CONST. art. I, § 9, cl. 8.

11. See Josh Blackman, *Emoluments Clauses Litigation* (May 23, 2020), <https://bit.ly/2LUUTiY> [<https://perma.cc/G9C3-VTZY>]. All three cases were closed by 2021.

12. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 882–86 (D. Md. 2018), *vacated*, 838 Fed. Appx. 789 (4th Cir. 2021).

States,” and extends further to include a broader category of irregular positions.

4. The Religious Test Clause uses the phrase “Office or public Trust under the United States.” This phrase encompasses two categories of positions: “Office[s] . . . under the United States” and “public Trust[s] under the United States.” The former category includes appointed positions in all three branches; the latter category includes federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties. Elected federal officials, as well as Presidential Electors, hold public trusts under the United States.
5. The Necessary and Proper Clause refers to an “Officer” of “the Government of the United States.” This phrase refers to the presiding officers identified in the Constitution.
6. The Succession Clause refers to an “officer,” with that word standing alone and unmodified. This word refers to both appointed and elected presiding positions in all three branches. But this word extends further. It encompasses those who hold “Office[s] . . . under the United States” and those who are “Officer[s]” of “the Government of the United States.”

Our work here is systematic. Some scholars have advanced partial theories to account for specific clauses of the Constitution in narrow contexts. For example, the Amars introduced the Intermediate View in an article that casted doubt on the constitutionality of the Presidential Succession Act. By contrast, Teachout advocated the Maximalist View as part of her anti-corruption reading of the Constitution. But no one has categorically analyzed each of the provisions of the Constitution that refer to different types of offices and officers. No one has offered a reasoned and consistent explanation why the Framers used different “office”- and “officer”-language in different provisions. And no one has reconciled the Constitution’s references to offices and officers with the practices of the Washington Administration and the First Congress. Our goal is to analyze each of these provisions and their specific “office”- and “officer”-related language, to provide a reasoned and consistent explanation why that language was chosen, and to reconcile the Constitution’s text with early practices. We concede that no approach can be perfect. And we acknowledge that our view can be subjected to reasonable



criticisms. Still, we conclude that our approach has largely achieved each of these goals.

In this Essay, Part I, we introduce our planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution.

In Part II, we will elaborate on each of the four approaches. Here, we attempt to complete otherwise incomplete theories put forward by others, and we follow the implications of their theories in the most favorable light. Three of these positions are ones which we do not agree with: we can only try to fairly explicate these three positions.

We start with Approach #1, the Amars' position, because we suspect that it is now the one with the deepest support in legal academia. Under Approach #1, the Intermediate View, the words "office[s]" and "officers" in the Constitution extend exclusively to positions in the Judicial Branch and in the Executive Branch—whether appointed or elected—but not to positions in the Legislative Branch. The proponents of this approach treat the phrases "Officers of the United States" and "Office . . . under the United States" as synonymous.

Under Approach #2, the Maximalist View, the words "Office[s]" and "Officers" refer to positions in all three branches, whether appointed or elected. This approach also treats the phrases "Officers of the United States" and "Office . . . under the United States" as synonymous.

Under Approach #3, the Minimalist View, the phrases "Officers of the United States" and "Office . . . under the United States" are not synonymous. Furthermore, we distinguish these two phrases from four other distinct office-related phrases in the Constitution. We briefly explained our position in the summary above.

Finally, under Approach #4, the Clause-Bound View, the "office"- and "officer"-language in each provision of the Constitution should be judged by itself, without regard to how the same or similar language is used elsewhere in the Constitution. For example, the phrase "Officers of the United States" in the Appointments Clause may have a different meaning than the phrase "Officers of the United States" in the Impeachment Clause.

We spend considerable effort in discussing Approach #3. We posit that Approach #3 has deep support in both pre-1788 British materials and Early Republic materials. However, this approach is not well developed in modern scholarship and case law. Thus, more extensive development seems proper because readers are less likely to be already familiar with the scope of this approach's strengths and weaknesses.

Part III will analyze the phrase "Officers of the United States" through the lens of original public meaning originalism. The Appointments Clause defines this phrase, and a reasonable member of the public would have

understood that definition: it referred to appointed positions in the Executive and Judicial Branches. This language does not include appointed positions in the Legislative Branch, such as the Clerk of the House of Representatives and the Secretary of the Senate. The structure of the Appointments Clause, as well as its drafting history, precludes an alternate reading that treats elected federal officials as “Officers of the United States.” The Appointments Clause provides that “Officers of the United States” are positions that “shall be established by law”—that is, by federal statutes, which would be enacted after the Constitution came into effect.<sup>13</sup> By contrast, elected federal positions are not “established by law”; rather, they are mandated by the Constitution. We will also study three other clauses that refer to “Officers of the United States”: the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

Part IV will trace the history of the “Office . . . under the United States” drafting convention. This historical analysis relies in substantial part on prior usage and practices. The Constitution did not define this phrase. Rather, this phrase was based on a British parliamentary drafting convention—i.e., “Office under the Crown”—that excluded elected officials. Attorneys and parliamentarians at the time of the framing would have been familiar with this technical meaning.

Part V will consider the meaning of the phrase “Office . . . under the United States” as used in the Constitution. We will analyze the phrase “Office . . . under the United States” using original methods originalism. This phrase refers to appointed positions in all three branches of the federal government. Appointed positions in the Legislative Branch, such as the Clerk of the House of Representatives and the Secretary of the Senate, would also hold “Office[s] . . . under the United States.” However, elected officials, like the President and members of Congress, do not hold “Office[s] . . . under the United States.” Our reading of this phrase is consistent with formative early practices of the national government. Alexander Hamilton, the Secretary of the Treasury in the Washington Administration, adhered to this drafting convention, as did the First Congress. Moreover, prominent nineteenth-century commentators and jurists articulated this understanding of “Office . . . under the United States.” Part V will also survey four clauses that use the phrase “Office . . . under the United States”: the Elector Incompatibility Clause, the Impeachment Disqualification Clause, the Incompatibility Clause, and the Foreign Emoluments Clause (the subject of the pop quiz).

Part VI will turn to the Ineligibility Clause. It uses the phrase “Office under the Authority of the United States.” No other provision of the Constitution uses this phrase. Moreover, this phrase is different from the

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13. U.S. CONST. art. II, § 2, cl. 2.

phrase “Office . . . under the United States”—it adds “the Authority of.” The drafting history of the Constitution confirms that these phrases—“Office . . . under the United States” and “Office under the Authority of the United States”—are distinct. Under Approach #3, the latter phrase includes all “Office[s] . . . under the United States.” That phrase extends further; it also includes a broader category of irregular officers. For example, this phrase includes transitional positions from the old Articles of Confederation government, as well as holders of letters of marque and reprisal.

Part VII will focus on the Religious Test Clause, which uses the phrase “any Office or public Trust under the United States.” This phrase encompasses two categories of positions: “Office[s] under the United States” and “public Trusts under the United States.” The former category includes appointed positions in all three branches; the latter category includes federal officials who are not subject to direction or supervision by a higher federal authority in the normal course of their duties. Thus, this category, “public trust under the United States,” extends to apex federal positions, such as the Chief Justice. This category also includes all elected federal officials—e.g., the President, Vice President, and members of Congress.

Part VIII will consider the Necessary and Proper Clause, which is also known as the Sweeping Clause. This provision references an “Officer” of the “Government of the United States.” Under Approach #3, the Minimalist View, this category includes the presiding officers that are identified in the Constitution: the President, the Vice President, the Chief Justice, the Speaker of the House, and the Senate President pro tempore. Rank-and-file members of Congress are not included in this group.

Part IX will turn to the Succession Clause. Congress can place an “officer” in the line of presidential succession. Under Approach #3, the Minimalist View, this category would include both appointed positions in all three branches (i.e., “Office[s] . . . under the United States”) and the presiding officers that are identified in the Constitution (i.e., “Officers” of “the Government of the United States”). As a result, the Speaker of the House can stand in the line of succession. The drafting history of the Succession Clause is consistent with our Minimalist View.

Finally, Part X will conclude the series. This tenth installment will critique Approach #4. Under the Clause-Bound View, we cannot presume that the Constitution uses the same or similar language in different provisions to convey the same or similar meaning. Rather, this approach largely relies on purposivism. Consider the phrase “Office . . . under the United States” in the Foreign Emoluments Clause. Under this approach, this phrase arguably should reach the broadest range of federal positions to facilitate its ostensible anti-corruption purpose, even if the very same phrase may have a different or more limited meaning in other constitutional provisions.

As a general matter, it is impossible to reject any of the four approaches with 100% certainty. Instead, we make a limited claim: Approach #3, the Minimalist View, is better than its known rivals. The Framers used divergent and reasonably, textually precise “office”- and “officer”-language throughout the Constitution. These provisions were altered throughout the Convention to standardize and harmonize how the Constitution refers to offices and officers. And the conduct of leading figures and government institutions during the early Republic was consistent with Approach #3. In our view, this evidence is sufficient to undermine the Intermediate, Maximalist, and Clause-Bound Approaches. The weight of the evidence points to the Minimalist Approach. Indeed, upon close scrutiny, Approach #3 is the only theory left standing.

