

A BRIEF HISTORY OF THE OFFICES AND OFFICERS OF THE CONSTITUTION

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SETH BARRETT TILLMAN
(2008-PRESENT)



In the Constitution of 1788:

- The President is not an “Officer of the United States”
- The Presidency is not an “Office under the united States”

JOSH BLACKMAN
TILLMANIZED CIRCA 2013

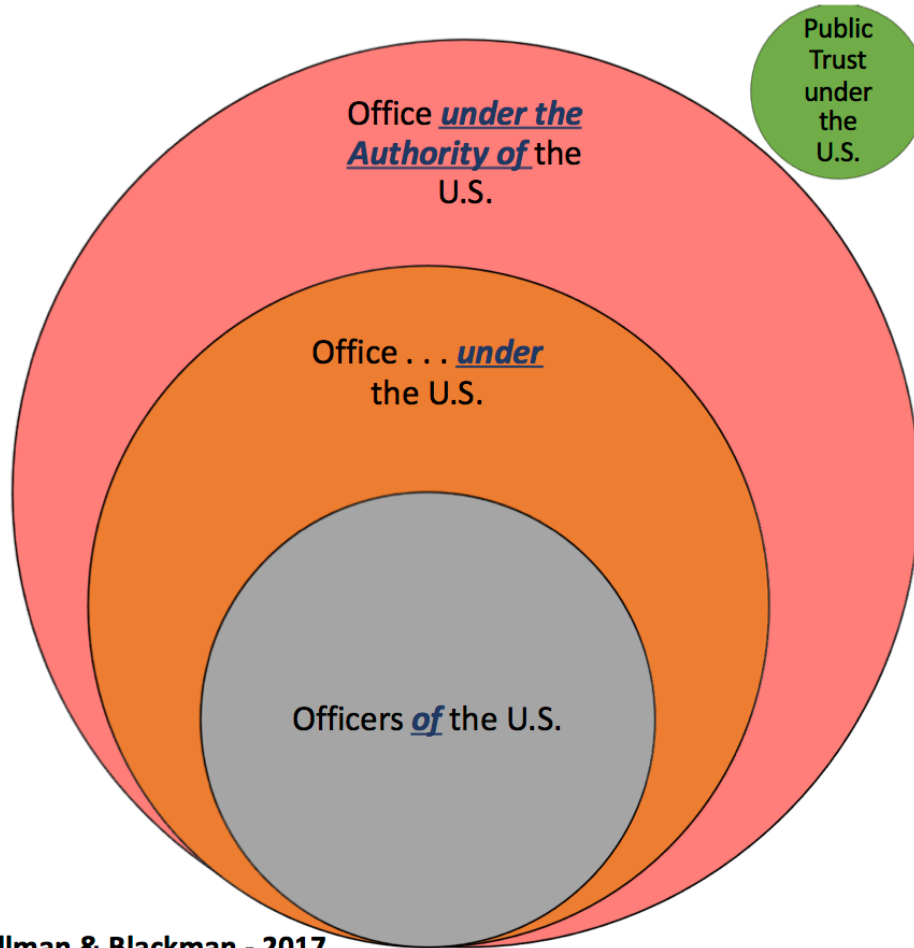


So, with the answer less than clear, I did what everyone should do to resolve obscure, but fascinating questions about the meaning of “office under the United States.” I asked Seth Barrett Tillman. Within a matter of hours, Seth provided me with a five-page reply, which he has posted on SSRN. Remarkable.

WILL BAUDE – JOTWELL (2016)



Next time you confront a separation of powers problem or read through parts of the Constitution, keep Professor Tillman's chart in hand. Suddenly, it will be hard to assume that the Constitution's textual variations are meaningless. Indeed, Professor Tillman's theory makes sense of patterns that most of us never saw. It brings order out of chaos. That is not to say that his position has been conclusively proven. But at this point, I think he has singlehandedly shifted the burden of proof.



Public Trust under the U.S.

Public Trust under the U.S.

- Religious Test Clause (Art. VI)

Office under the Authority of the U.S.

- Ineligibility Clause (Art. I, §6)

Office . . . under the U.S.

- Incompatibility Clause (Art. I, §6)
- Impeachment Disq. Clause (Art. I, §3)
- Foreign Emoluments Clause (Art I, § 9)
- Elector Incompatibility Cl. (Art. II, § 1)

Officers of the U.S.

- Appointments Clause (Art. II, § 2)
- Commissions Clause (Art. II, § 3)
- Impeachment Clause (Art II, § 4)
- Oath Clause (Art. VI)



TRUMP
INTERNATIONAL HOTEL

TRUMP INTERNATIONAL HOTEL

The Foreign Emoluments Clause

“No Title of Nobility shall be granted by the United States: And no Person holding **any Office of Profit or Trust under them** [i.e, 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.”

EMOLUMENTS CLAUSES LITIGATION (2017-2021)

- The Foreign Emoluments Clause applies to an “Office under the United States”
- The Presidency is not an “Office under the united States”
- The President is not subject to the Foreign Emoluments Clause





On motion,

Ordered, That the Secretary of the Treasury do lay before the Senate, at the next session of Congress, a statement of the salaries, fees, and emoluments, for one year, ending the first day of October next, to be stated quarterly, of every person holding any civil office or employment under the United States, (except the judges,) together with the actual disbursements and expenses in the discharge of their respective offices and employments for the same period; and that he do report the name of every person who shall neglect or refuse to give satisfactory information touching his office or employment, or the emoluments or disbursements thereof.

The Senate adjourned until 6 o'clock this evening.

The Foreign Emoluments Clause

“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them [i.e, 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.”

The Secretary of the Treasury, in obedience to the order of the Senate of the 1th of May last, respectfully transmits herewith sundry Statements of the Salaries fees and Emoluments for one Year ending the first of October 1792, of the Persons holding civil offices or employments under the ~~the~~ united States (except the Judges) as far as Returns have been rendered - together with the disbursements and Expences in the discharge of their respective offices and employments for the same Period - ...

N^o I, relating to the Department of State

N^o II - Treasury Department

A Office of the Secretary of the Treasury

B Ditto Comptroller

C Ditto Commissioner of the Revenue

D Ditto Auditor

E Ditto Register

F Ditto Treasurer

N^o III - Department of War



POLITICS | 'Lonely Scholar With Unusual Ideas' Defends Trump, Igniting Legal Storm

'Lonely Scholar With Unusual Ideas' Defends Trump, Igniting Legal Storm

Sidebar

By ADAM LIPTAK SEPT. 25, 2017



N^o 19 is a List, specifying the Persons of whom
no information has yet been received on the subject.

All which is hereby submitted

Alexander Hamilton
Secy of the Treasury

Treasury Department -

February 26th 1793 -

11th Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference

DATE AND TIME

This event occurred in the past

- Friday, February 21, 2020 from 2:30 p.m. to 5:30 p.m.
- Saturday, February 22, 2020 from 9:00 a.m. to 5:45 p.m.

LOCATION

Joan B. Kroc Institute for Peace and Justice, C/D

DETAILS

Sponsored by the Center for the Study of Constitutional Originalism, the conference will involve the presentation of a variety of new works concerning originalism. All scholars who are interested in originalism are invited to attend. This conference is made possible through support from the Hugh & Hazel Darling Foundation.



[MORE INFORMATION](#)

Offices, Officers, and the Constitution

Seth Barrett Tillman and Josh Blackman

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WE THOUGHT WE WERE DONE





SECTION 3 OF THE FOURTEENTH AMENDMENT

- [3] No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who,
- [1] having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States,
- [2] shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.
- [4] But Congress may by a vote of two-thirds of each House, remove such disability.

Bill Murray

He's having the day of his life...
over and over again.

Groundhog
Day



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NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

**IS THE PRESIDENT AN “OFFICER OF
THE UNITED STATES” FOR PURPOSES
OF SECTION 3 OF THE FOURTEENTH
AMENDMENT?**

Josh Blackman^{*} & Seth Barrett Tillman^{}**

INTRODUCTION


On January 13, 2021, the House of Representatives voted to impeach then-President Donald J. Trump for inciting an insurrection.¹ The sole impeachment article invoked Section 3 of the Fourteenth Amendment.² But the House’s impeachment article



SIDEBAR

Conservative Case Emerges to Disqualify Trump for Role on Jan. 6

Two law professors active in the Federalist Society wrote that the original meaning of the 14th Amendment makes Donald Trump ineligible to hold government office.

 Share full article



Two prominent conservative law professors have concluded that Donald J. Trump is ineligible to be president under a provision of the Constitution that bars people who have engaged in an insurrection from holding government office. The professors are active members of the Federalist Society, the conservative legal group, and proponents of originalism, the method of interpretation that seeks to determine the Constitution's original meaning.

The professors — [William Baude](#) of the University of Chicago and [Michael Stokes Paulsen](#) of the University of St. Thomas — studied the question for more than a year and detailed their findings in [a long article](#) to be published next year in The University of Pennsylvania Law Review.

“When we started out, neither of us was sure what the answer was,” Professor Baude said. “People were talking about this provision of the Constitution. We thought: ‘We’re constitutional scholars, and this is an important constitutional question. We ought to figure out what’s really going on here.’ And the more we dug into it, the more we realized that we had something to add.”

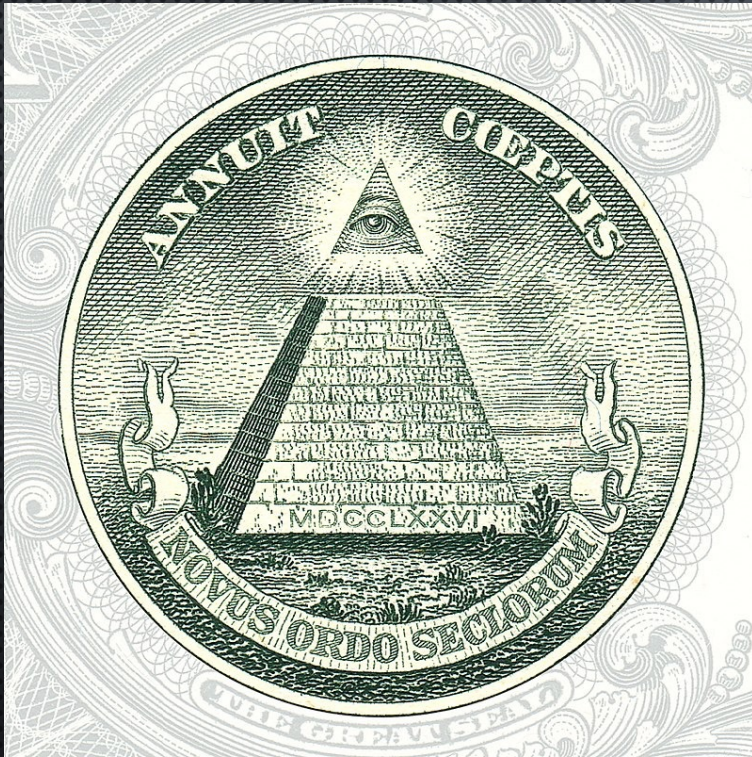


Will Baude



Michael Stokes Paulsen

Baude & Paulsen



The Tillman-Blackman “textualist approach is ‘hidden-meaning hermeneutics’ that renders Section 3 “a ‘secret code’ loaded with hidden meanings discernible only by a select priesthood of illuminati.”





Akhil Reed Amar

“Let me be clear, this is a genuinely stupid argument on the merits, I'm going to demolish it. It's embarrassing . . . This is very wrong. It's silly. It's so silly And I was laughing, because I actually couldn't resist because to even hear these formulations elicits laughter from me.”

**DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO**

1437 Bannock Street
Denver, CO 80202

Petitioners:
NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER, KATHI
WRIGHT, and CHRISTOPHER CASTILIAN

v.

Respondent:
JENA GRISWOLD, in her official capacity as
Colorado Secretary of State

and

Intervenors:
COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE and DONALD J. TRUMP

Δ COURT USE ONLY Δ

Case No.: 2023CV32577

Division: 209

FINAL ORDER

311. On the other hand, Intervenor argues that five constitutional provisions show that the President is not an “officer of the United States.”

- The Appointments Clause in Article II, Section 2, Clause 2 distinguishes between the President and officers of the United States. Specifically, the Appointments Clause states that the President “shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST. art. II, § 2, cl. 2.
- The Impeachment Clause in Article II, Section 4 separates the President and Vice President from the category of “civil Officers of the United States:” “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.” U.S. CONST. art. II, § 4.
- The Commissions Clause in Article II, Section 3 specifies that the President “shall Commission all the Officers of the United States.” U.S. CONST. art. II, § 3.
- In the Oath and Affirmation Clause of Article VI, Clause 3, the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution. The list includes “[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States.” US. CONST. art. VI, cl. 3.
- Article VI provides further support for distinguishing the President from “Officers of the United States” because the oath taken by the President under Article II, Section 1, Clause 8 is not the same as the oath prescribed for officers of the United States under Article VI, Clause 3.

312. The Court agrees with Intervenors that all five of those Constitutional provisions lead towards the same conclusion—that the drafters of the Section Three of the Fourteenth Amendment did not intend to include the President as “an officer of the United States.”

313. Here, after considering the arguments on both sides, the Court is persuaded that “officers of the United States” did not include the President of the United States. While the Court agrees that there are persuasive arguments on both sides, the Court holds that the absence of the President from the list of positions to which the Amendment applies combined with the fact that Section Three specifies that the disqualifying oath is one to “support” the Constitution whereas the Presidential oath is to “preserve, protect and defend” the Constitution,¹⁹ it appears to the Court that for whatever reason the drafters of Section Three did not intend to include a person who had only taken the Presidential Oath.²⁰

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 63

Supreme Court Case No. 23SA300
Appeal Pursuant to § 1-1-113(3), C.R.S. (2023)
District Court, City and County of Denver, Case No. 23CV32577
Honorable Sarah B. Wallace, Judge

Petitioners-Appellants/Cross-Appellees:

Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi
Wright, and Christopher Castilian,

v.

Respondent-Appellee:

Jena Griswold, in her official capacity as Colorado Secretary of State,

and

Intervenor-Appellee:

Colorado Republican State Central Committee, an unincorporated association,

Intervenor-Appellee/Cross-Appellant:

Donald J. Trump.

¶145 First, the normal and ordinary usage of the term “officer of the United States” includes the President. As we have explained, the plain meaning of “office . . . under the United States” includes the Presidency; it follows then that the President is an “officer of the United States.” See *Motions Sys. Corp. v. Bush*,

¶147 President Trump concedes as much on appeal, stating that “[t]o be sure, the President is an officer.” He argues, however, that the President is an officer of the Constitution, not an “officer of the United States,” which, he posits, is a constitutional term of art. Further, at least one amicus contends that the above-referenced historical uses referred to the President as an officer only in a “colloquial sense,” and thus have no bearing on the term’s use in Section Three. We disagree.

¶148 The informality of these uses is exactly the point: If members of the Thirty-Ninth Congress and their contemporaries all used the term “officer” according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three. We perceive no persuasive contemporary evidence demonstrating some other, technical term-of-art meaning. And in the absence of a clear intent to employ a technical definition for a common word, we will not do so. *See Heller*, 554 U.S. at 576 (explaining that the “normal and ordinary as distinguished from technical meaning” should be favored (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

FRIDAY, JANUARY 5, 2024

CERTIORARI GRANTED

23-719 TRUMP, DONALD J. V. ANDERSON, NORMA, ET AL.

The petition for a writ of certiorari is granted. The case is set for oral argument on Thursday, February 8, 2024.

Petitioner's brief on the merits, and any *amicus curiae* briefs in support or in support of neither party, are to be filed on or before Thursday, January 18, 2024. Respondents' briefs on the merits, and any *amicus curiae* briefs in support, are to be filed on or before Wednesday, January 31, 2024. The reply brief, if any, is to be filed on or before 5 p.m., Monday, February 5, 2024.

No. 23-719

In the
Supreme Court of the United States

Donald J. Trump, *Petitioner*,

v.

Norma Anderson, et al., *Respondents*.

**On Writ of Certiorari to the
Colorado Supreme Court**

**BRIEF FOR PROFESSOR SETH BARRETT
TILLMAN AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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The Framers were not omniscient. They had no reason to think about a person who: (1) was elected as President; (2) but had never before taken any other constitutional oath; (3) then is alleged to have engaged in insurrection; and (4) then sought re-election.

“Should we consider the expectations of those who had no reason to give a particular application any thought ...?” *See Bostock*, 140 S.Ct. at 1751. No. Rather, “the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a [text] give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law.” *See id.* at 1737. In 1868, under the written word of the Constitution, the President was not an “Officer of the United States.”

No. 23-719

In the
Supreme Court of the United States

Donald J. Trump, *Petitioner*,

v.

Norma Anderson, et al., *Respondents*.

**On Writ of Certiorari to the
Supreme Court of Colorado**


**Motion of Professor Seth Barrett Tillman for Leave to Participate in Oral
Argument as *Amicus Curiae* and for Divided Argument**



The New York Times

A Legal Outsider, an Offbeat Theory and the Fate of the 2024 Election

When the Supreme Court considers whether Donald J. Trump is barred from appearing on Colorado's ballot, a professor's scholarship, long relegated to the fringes, will take center stage.

 Share full article



 547









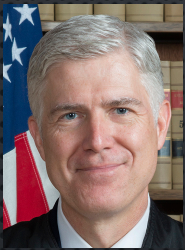
THREE APPROACHES

IS THE PRESIDENT AN “OFFICER OF THE UNITED STATES”?

IS THE PRESIDENCY AN “OFFICE UNDER THE UNITED STATES”?



Approach #1: Is the "rule a **sensible** one?"



Approach #2: "So maybe the Constitution to **us today**, to a lay reader, might look a **little odd** in distinguishing between 'office' and 'officer' . . . But maybe that's **exactly how it works.**"



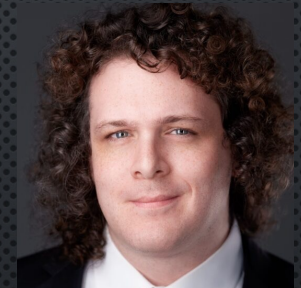
Approach #3: "The **history** of the Fourteenth Amendment actually provides the **reason** for why the presidency **may not be included.**"



Approach #1: Is the "rule a **sensible** one?"



Approach #2: "So maybe the Constitution to **us today**, to a lay reader, might look a **little odd** in distinguishing between 'office' and 'officer' . . . But maybe that's **exactly how it works.**"



Approach #3: "The **history** of the Fourteenth Amendment actually provides the **reason** for why the presidency **may not be included.**"

"Far more **sensible and straightforward** to conclude, we think, that the officeholder holding the office of President is an officer 'of' the United States who holds office under the authority of the United States."



Will Baude



Michael Stokes Paulsen

Sense and Common Sensibility

- First, the language of these provisions should be read in as **straightforward and common-sense** a manner as possible.
- The text must be read precisely, of course, but also **sensibly**, naturally and in context, without artifice or ingenious invention unwarranted by that context
- This makes little **sense**
- But that does not mean we should close our eyes to plausibility and **common sense**, especially when the proposed textual reading is such a stretch.
- So the argument must rely instead on the fine parsing of prepositional phrases. The President (perhaps?) holds an “office under” the United States but is not an “officer of” the United States. This seems to defy textual **common sense**.
- Far more **sensible and straightforward** to conclude, we think, that the officeholder holding the office of President is an officer “of” the United States who holds office under the authority of the United States.



Justice Gorsuch

“So maybe the Constitution to us today, to a lay reader, might look a little odd in distinguishing between "office" and "officer," not prepositions, nouns, a distinction. But maybe that's exactly how it works.”



Justice Gorsuch

- "You agree they are officers who don't hold an office?"
- Gorsuch observed that the Speaker and Senate President Pro Tempore are "officers," because the House Officers Clause and Senate Officers Clause "says they are."
- But, Gorsuch countered, the Speaker and Senate President Pro Tempore "don't hold an office under the United States because of the Incompatibility Clause that says they can't."



Justice Jackson

- "And do you agree [with the Respondents] that the Framers would have put such a high and significant and important office, sort of smuggled it in through that catch-all phrase?"
- "I thought that the history of the Fourteenth Amendment actually provides the reason for why the presidency may not be included.
- "I didn't see any evidence that the presidency was top of mind for the Framers when they were drafting Section 3 because they were actually dealing with a different issue. The pressing concern, at least as I see the historical record, was actually what was going on at lower levels of the government."



Kurt Lash!



Justice Gorsuch

- Justice Sotomayor objected to Mitchell's argument concerning "Officers of the United States."
- "A bit of a gerrymandered rule, isn't it, designed to benefit only your client?"
- Mitchell replied, "I certainly wouldn't call it gerrymandered. That implies nefarious intent."
- Sotomayor interrupted him. "Well, you didn't make it up. I know some scholars have been discussing it."



“Some Scholars”

“Some More Scholars”

