

# An Exchange on the Disqualification Clause

FOREWORD

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A few years ago the Chief Justice was quoted as suggesting a disconnect between the typical law review article (“you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something”) and the more immediate problems faced by the practicing bar.<sup>1</sup> No doubt the casual reader may ask whether the same can be said about Benjamin Cassady’s “*You’ve Got Your Crook, I’ve Got Mine*”: *Why the Disqualification Clause Doesn’t (Always) Disqualify*,<sup>2</sup> and the four responsive articles by Peter Charles Hoffer, Brian C. Kalt, Buckner F. Melton, Jr. and Seth Barrett Tillman, which appear in this issue.

After all, much of the discussion revolves around two eighteenth-century figures: (1) John Wilkes, a radical and controversial member of Parliament who was expelled multiple times by the House of Commons for seditious libel yet continually re-elected by his constituents; and (2) William Blount, a U.S. Senator who was expelled by the Senate and

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<sup>1</sup> See Debra Cassens Weiss, *Law Professor Responds After Chief Justice Roberts Disses Legal Scholarship*, ABA JOURNAL (July 7, 2011, 10:29 AM), <http://tinyurl.com/lwbjfu6>. The Chief Justice John Roberts made this remark at the Fourth Circuit Appeals Court Annual Conference. *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), <http://tinyurl.com/mbw845k>.

<sup>2</sup> Benjamin Cassady, “*You’ve Got Your Crook, I’ve Got Mine*”: *Why the Disqualification Clause Doesn’t (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209 (2014).

subsequently impeached by the House for involvement in a conspiracy to assist the British in wresting certain lands from Spain, in violation of U.S. neutrality at the time.

It is unlikely that the typical lawyer will have a client stroll in with a legal question that turns on the correct interpretation of the *Wilkes* or *Blount* cases. For the courts and the lawyers who practice before them, therefore, these cases may seem only slightly more relevant than the 18<sup>th</sup> century Bulgarian laws of evidence. But for legislators, their legal advisors and members of the “legislative bar,” these matters are (or should be) of more than purely academic interest.

Cassady argues that an “electoral pardon principle” explains why the Disqualification Clause should not be interpreted to apply to seats in Congress.<sup>3</sup> The “electoral pardon principle” holds that voters should be able to make the final decision as to whether to elect a particular candidate to Congress, even if that candidate has previously been impeached, removed from office and disqualified from holding any future “Office of honor, Trust or Profit under the United States.”<sup>4</sup> Cassady derives this principle from the widespread backlash, particularly in America, against Parliament’s perceived abuse of power in the *Wilkes* case. If the voters decide to elect a “crook” such as Wilkes with full knowledge of his alleged misdeeds, the theory goes, popular sovereignty demands that their verdict be respected and their chosen representative seated.

The *Blount* case also supports this theory, according to Cassady, by establishing that members of Congress are not subject to impeachment in the first place.<sup>5</sup> After the House impeached him for offenses he committed while serving in the Senate, Blount argued that the Senate lacked jurisdiction to try the case because senators (and congressmen) are not “civil officers” subject to the Impeachment Clause.<sup>6</sup> Blount’s counsel argued that members of Congress are subject only to expulsion, not impeachment (with the possible sentence of disqualification), because the people themselves control the decision as to whether an expelled member should be returned to office. Thus, unlike “civil officers” serving in the executive or judicial branches, who are not answerable directly to the people, there is no need for members of Congress to be subject to the remedy of disqualification. Cassady argues

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<sup>3</sup> See *id.* at 222–65.

<sup>4</sup> U.S. CONST. art. I, § 3, cl. 7.

<sup>5</sup> See Cassady, *supra* note 2, at 265–294.

<sup>6</sup> See U.S. CONST. art. II, § 4.

that by rejecting jurisdiction over Blount's case, the Senate implicitly validated the electoral pardon principle.

The four responsive pieces herein take on various aspects of Cassady's thesis. First, Peter Hoffer warns that it may suffer from the danger of "presentism," in which "history is valued not for its own sake, but explicitly for its power to illuminate some present question or quarrel."<sup>7</sup> (This is essentially the reverse of the Chief Justice's concern about the non-utilitarian nature of law review articles.) Hoffer contends that there is no historical evidence that the *Wilkes* case actually played a role in the Framers' thinking about the Impeachment and Disqualification Clauses. Although the *Wilkes* case was cited by the Blount defense in 1799 and later congressional expulsion cases as establishing the "electoral pardon principle," can this view be projected back to the 1787 Philadelphia Convention without specific supporting evidence?

Brian Kalt agrees with Cassady that the Disqualification Clause is inapplicable to members of Congress, but Kalt argues that the constitutional text, not the "electoral pardon principle," is the firmer ground for reaching this conclusion.<sup>8</sup> Kalt stresses that the constitutional policy embodied in the "electoral pardon principle" does not necessarily lead to the outcome that he and Cassady agree is called for by the text. For example, one could argue that senators, who were originally chosen by the state legislatures, were no more directly accountable to the people than executive or judicial appointees, who are also indirectly accountable to the people by virtue of being nominated by the president and confirmed by the Senate. Why should the Disqualification Clause then apply to the latter but not the former?

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<sup>7</sup> Peter Charles Hoffer, *The Pleasures and Perils of Presentism: A Meditation on History and Law*, 33 QUINNIPIAC L. REV. 1, 1 (2014). Professor Hoffer has also written extensively on impeachment. See PETER C. HOFFER & N. E. H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805* (1984); N.E.H. Hull & Peter Charles Hoffer, *Historians and the Impeachment Imbroglia: In Search of a Serviceable History*, 31 RUTGERS L.J. 473 (2000); see also, e.g., Peter C. Hoffer & N. E. H. Hull, *Power and Precedent in the Creation of an American Impeachment Tradition: The Eighteenth-Century Colonial Record*, 36 WM. & MARY Q. (3d ser.) 51 (1979); Peter C. Hoffer & N. E. H. Hull, *The First American Impeachments*, 35 WM. & MARY Q. (3d ser.) 653 (1978).

<sup>8</sup> See Brian C. Kalt, *The Application of the Disqualification Clause to Congress: A Response to Benjamin Cassady*, "You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify, 33 QUINNIPIAC L. REV. 7, 26–30 (2014); see also BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* (2012); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13 (2001).

Buckner Melton takes issue with the traditional interpretation of the *Blount* case, arguing that “nowhere in the *Blount* proceedings did the Senate establish any rule or precedent that Senators cannot be impeached.”<sup>9</sup> He bases this claim on the fact that Blount asserted more than one objection to the Senate’s jurisdiction and the Senate’s order of dismissal did not specify on which ground the Senate relied. Melton’s argument in this regard raises fundamental questions about how one interprets a legislative precedent. Is it to be read like a judicial precedent, relying only on such reasoning as is formally adopted by the legislative body? If so, valid legislative precedents will be few and far between.

Last but not least, Seth Tillman argues that Cassady fails to take the “electoral pardon principle” far enough. While Melton suggests that perhaps disqualification should apply to the Senate but not the House (on the theory that the Senate was in the original constitutional design more like an executive council than a popularly elected representative body), Tillman argues that disqualification should not apply to any elected position, whether in the legislative or executive branch.<sup>10</sup> If notions of popular sovereignty require that the Disqualification Clause not interfere with the ability of voters to send whomever they choose to Congress, shouldn’t the same be true of their right to choose a president or vice-president?

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<sup>9</sup> Buckner F. Melton, Jr., *Let Me Be Blunt: In Blount, the Senate Never Said that Senators Aren’t Impeachable*, 33 QUINNIPIAC L. REV. 33, 36 (2014); see also BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION’S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* (1998).

<sup>10</sup> Seth Barrett Tillman, *Originalism & The Scope of the Constitution’s Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 71–72, 74–108 (2014). Tillman’s contribution to this exchange is one of a series of academic papers he has authored on the Constitution’s use of “office” and “officer” and their textual variants. See, e.g., Seth Barrett Tillman, *Why Professor Lessig’s “Dependence Corruption” Is Not a Founding-Era Concept*, 13 ELECTION L.J. 336 (2014); Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a “New” Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz’s Impeachment & Assassination*, 61 CLEV. ST. L. REV. 285 (2013); Seth Barrett Tillman, *Opening Statement, Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399 (2012); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013), available at <http://tinyurl.com/pxm8mm3>; see also, e.g., Steven G. Calabresi & Seth Barrett Tillman, *Debate, The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENUMBRA 134 (2008), available at <http://tinyurl.com/nm6vgqa>; cf., e.g., Seth Barrett Tillman, *Member of the House of Representatives and Vice President of the US: Can Paul Ryan Hold Both Positions at the Same Time?*, JURIST-FORUM (Aug. 23, 2012, 2:20 PM), <http://tinyurl.com/p7bsl55>.

I will not go into my own views on these questions; the interested reader can find them at *Point of Order*,<sup>11</sup> a blog dedicated to the proposition that congressional legal issues merit careful attention and analysis, though it sometimes can be hard to persuade Congress of that. Congress's constitutional decision-making is different than that of a court (even when it acts in a quasi-judicial capacity on questions such as impeachment and disqualification), but that does not mean it is free to make constitutional determinations without responsibility.<sup>12</sup>

Congress implicitly or explicitly makes these determinations all the time. May the delegate from the District of Columbia vote in the Committee of the Whole? Does a tax measure originate in the House of Representatives if the operative language is added by the Senate to a wholly unrelated measure? Is Congress obligated to count applications of state legislatures seeking a convention for proposing amendments under Article V? Can a witness who invokes her Fifth Amendment right against self-incrimination be held in contempt? If questions such as these are answered without serious consideration of the governing legal text, relevant precedent or logical consistency, respect for the rule of law, not to mention Congress itself, will be (further) undermined.

A symposium such as this contributes to the quality of

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<sup>11</sup> See, for example, Michael Stern, *House of Cads: Legislators and the Disqualification Clause*, POINT OF ORD. (Sept. 2, 2014, 11:18 AM), <http://tinyurl.com/kycj3or>, in which I gave some immediate feedback on Cassady's article:

I think Cassady is correct in his interpretation of the Impeachment and Disqualification Clauses. He may or may not be right that the "electoral pardon" principle explains why the Constitution treats legislators differently in this regard than executive or judicial officers. I am not sure myself that this distinction, particularly with regard to disqualification, makes that much sense from a policy standpoint. One might argue that there is no more reason to disqualify an impeached official from a future appointment to an executive or judicial office than from a future election to a congressional seat. After all, if the "voters" (who, in the case of senators, would originally have been the members of the state legislature) can "pardon" a candidate for a congressional seat, why shouldn't the president and the Senate be permitted to "pardon" a nominee to an executive or judicial office? Strictly from a policy standpoint, the more logical distinction would seem to be between the presidency (and perhaps the vice-presidency), on the one hand, and all other positions, on the other. The Framers anticipated that the impeachment of a president would be a traumatic event (hence Professor Chafetz's analogy between impeachment and assassination), and it is understandable that they would not want the impeached president to be able to relitigate the Senate's verdict through a subsequent presidential campaign. Such a campaign might very well be the equivalent of a counter-revolution to restore a deposed "ancien regime," a development that would pose serious risk to the health of the body politic.

<sup>12</sup> See generally DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966).

congressional constitutional decision-making simply by taking a hard look at congressional precedent outside the context of a particular dispute. Admittedly, the narrowest issue raised by Cassady's article and the responses thereto, whether an impeached and disqualified individual may serve in Congress (or the presidency), is not likely to arise anytime soon. There is only one living person subject to a Senate judgment of disqualification, and his political future does not look bright.<sup>13</sup> But the broader issues in this discussion, such as how congressional precedents should be interpreted and applied, are matters of continuing interest to Congress and its legal staff.

Even from a narrower perspective, the issues debated here arise more frequently than might be expected. Just in the past month, two relevant cases have arisen. In one, a member of the House of Representatives who had been indicted on charges of tax evasion well before the election was re-elected by a large margin (by an electorate presumably well informed of the alleged misconduct) and then pled guilty to a single count that related solely to his life as a private citizen prior to serving in Congress.<sup>14</sup> In the other, a state legislator was convicted of corrupting a minor, was forced to resign by pressure from his colleagues, and then announced his intention to run in the special election to fill the vacancy created by his resignation.<sup>15</sup> Both these cases involved potentially vexing applications of the "electoral pardon principle." Understanding the *Wilkes* case and the limits of any "electoral pardon principle" would be essential for any conscientious legislator considering discipline or expulsion in those matters.<sup>16</sup>

Perhaps those engaged in the thankless task of expounding on Kant's influence in eighteenth-century Bulgaria should consider more fruitful endeavors. But in my view we need more scholarly attention to the types of constitutional and legal issues faced primarily or exclusively by the legislative branch, its members and staff. One obstacle to such

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<sup>13</sup> See Michael Stern, *Is Former Judge Porteous Eligible to Serve in Congress*, POINT OF ORD. (Dec. 29, 2010, 7:25 AM), <http://tinyurl.com/kycj3or>.

<sup>14</sup> See Michael Stern, *Michael Grimm, John Wilkes and the House's Power to Punish for Conduct Preceding Election*, POINT OF ORD. (Dec. 30, 2014, 10:23 AM), <http://tinyurl.com/pbg3fck>.

<sup>15</sup> See Michael Stern, *Virginia's John Wilkes Wannabe*, POINT OF ORD. (Dec. 23, 2014, 5:04 PM), <http://tinyurl.com/ohfefu5>.

<sup>16</sup> See Jennifer Steinhauer, *Virginian Politician Serves 2 Terms: In Jail and in the State Legislature*, NY TIMES (Jan. 14, 2015), <http://tinyurl.com/nhvtgku> (discussing newly sworn-in Virginia House delegate, Joseph Morrissey, a former Democrat that "ran in the special election as an independent, handily beating challengers from both parties" despite recently pleading guilty "to a misdemeanor count of contributing to the delinquency of a minor").

attention is that the study of law almost invariably centers on the courts as the final decision-makers for any legal controversy. The study of “legisprudence,” an obscure term which I ran across recently, and which I will define as “the systematic study of law from the perspective of the legislative branch as the constitutional decision-maker,” is much neglected.

So I thank all of the authors for their contribution to this area of legisprudence. Someday maybe Congress will thank them too.