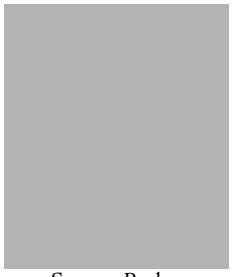
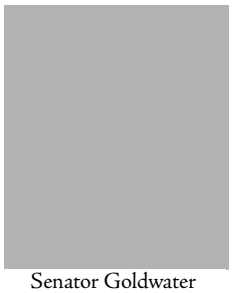
Running for the White House from the Hill

The incompatibility clause of Article I, Section 6 prohibits individuals from simultaneously serving in both the Congress and the Executive Branch. It says nothing, however, about an officer in one branch *campaigning* for office in another.

Federal law forbids sitting Cabinet officers from seeking a seat on Capitol Hill (5 U.S.C. § 7323). Yet nothing prohibits sitting members of Congress from pursuing the White House. Moreover, such a law might be held unconstitutional under *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and *Powell v. McCormick*, 395 U.S. 486 (1969), on the theory that the enumeration of qualifications for Congressional office in Article I precludes the addition of other conditions.



Senator Bagby



Senator Goldwater

A constitutional amendment may be the only way, then, to forbid sitting members of Congress from running for President. Indeed, such amendments have been proposed. In 1846, Senator Arthur Pendleton Bagby of Alabama proposed that no member of Congress could pursue the Presidency while serving in Congress, or within four years of such service (S. Res. 8, 29th Cong.). Two similar proposals were introduced in 1872 – one with a two-year ban (H. Res. 81, 42nd Cong.), and one that restrained only current members (H. Res. 149, 42nd Cong.). In 1976, a two-year ban was introduced by House Minority Leader John Rhodes (H.J. Res. 821, 94th Cong.) and Senator Barry Goldwater (S.J. Res. 171, 94th Cong.) – who was personally familiar with the problems of running for the White House from the Hill.

A good idea? On the one hand, Congressional operations might be dramatically disrupted if Presidential elections are essentially fought on the floor of the House or Senate. On the other hand, why deter our nation's leading statesmen from pursuing the Presidency?

Another potential incompatibility has recently received attention. Both Article II and the 12th Amendment give the President of the Senate a prominent (if ambiguous) role in the counting of Electoral College ballots. Yet under Article I, the President of the Senate is the Vice President of the United States – an office that has produced Presidential candidates with even greater frequency than the Senate.

The potential for conflicts of interest is obvious. Luckily, we have avoided actual problems in recent years. In January 1989, Vice President George H.W. Bush supervised the ballot count that installed him as President – without incident. Twelve years later, Vice President Albert Gore supervised an only slightly noisier ballot count – one that put his opponent in the White House.

The risk of conflict is very real, however. Indeed, Bruce Ackerman and David Fontana have recently suggested that our third Vice President, Thomas Jefferson, may have behaved irregularly in exercising his supervisory responsibilities under Article II, en route to becoming our third President. *See* Bruce Ackerman & David Fontana, *How Jefferson Counted Himself In*, Atlantic Monthly, March 2004, at 84.

So our current Constitutional framework leaves many opportunities for conflicts of interest in the pursuit of Presidential power. But who really wants to amend the Constitution to address all of them? Perhaps it is better to rely on statesmanship – and if not that, then the watchful eyes of the press and the American people – rather than on Article V.

– *James C. Ho*