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OFFICES AND OFFICERS OF THE CONSTITUTION PART III: THE APPOINTMENTS, IMPEACHMENT, COMMISSIONS, AND OATH OR AFFIRMATION CLAUSES

SETH BARRETT TILLMAN[†] AND JOSH BLACKMAN[††]

This Article is the third installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series. The second installment identified four approaches to understand the Constitution's divergent "Office"- and "Officer"-language. This third installment will analyze the phrase "Officers of the United States," which is used in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

This Article proceeds in six sections. Section I describes our methodology, which includes textualism, original public meaning originalism, original methods originalism, and consideration of historical practices during the founding-era and later-in-time. Section II explains that the phrase "Officers of the United States" is defined by the Appointments Clause. This phrase refers to appointed positions in the Executive and Judicial Branches. Our position here is consistent with the drafting history of the Appointments Clause, and is also supported by Supreme Court precedent. Section III turns to the Impeachment Clause, which applies to "civil Officers of the United States." This latter category refers to non-military appointed positions in the Executive Branch and Judicial Branch. Members of Congress, as well as appointed positions in the Legislative Branch, are not

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"civil Officers of the United States," and therefore such positions cannot be impeached.

Section IV considers the Commissions Clause, which requires the President to commission "all the Officers of the United States." There is a longstanding practice of the President's commissioning appointed positions in the Executive Branch and Judicial Branch. But there is no evidence the President has ever commissioned an elected official, including himself. Section V analyzes the Oath or Affirmation Clause, and its text suggests that Senators and Representatives, as well as the President, are not "Officers of the United States." Finally, Section VI focuses on the Recess Appointments Clause. This provision does not use the phrase "Officers of the United States," and it is not clear whether recess appointees are "Officers of the United States."

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INTRODUCTION

The Constitution of 1788's original seven articles include twenty-two provisions that refer to "Offices" and "Officers." Some clauses use the words "Office" or "Officer," standing alone and unmodified. Other clauses use the word "Office" or "Officer" followed by a modifier, such as "of the United States," "under the United States," or "under the Authority of the United States." We refer to the language in these twenty-two provisions as the Constitution's *divergent* "Office"- and "Officer"-language.

This Article is the third installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series.[1] The second installment identified four approaches to understanding the Constitution's divergent "Office"- and "Officer"-language.[2] This third installment, Part III, will analyze the phrase "Officers of the United States," which is used in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

This Article proceeds in six sections. Section I of Part III of our series introduces our methodology. First and foremost, we rely on textualism. Second, we follow original public meaning originalism with respect to the Appointments Clause: this clause defines the phrase "Officers of the United States." Third, we rely on original methods originalism with respect to the phrase "Office . . . under the United States." Fourth, we give precedence to founding-era practices by the Washington Administration and the First Congress. Fifth, we only turn to the framers' purpose when the relevant constitutional text remains ambiguous.

Section II explains that the phrase "Officers of the United States" is defined by the Appointments Clause. This phrase refers to appointed positions in the Executive and Judicial Branches. The drafting history of the Appointments Clause is consistent with our position. The "Officers of the United States" can only be appointed and cannot be elected. Supreme Court precedent, including *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, provides additional support for our position.

Section III turns to the Impeachment Clause. The only positions that are subject to impeachment are the President, the Vice President, and "civil Officers of the United States." This latter category refers to non-military appointed positions in the Executive Branch and Judicial Branch. Members of Congress, as well as appointed positions in the Legislative Branch, are not

1. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021).

2. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. TEX. L. REV. 321 (2021).

"civil Officers of the United States," and therefore such positions cannot be impeached. The history of the Impeachment Clause is consistent with our view that members of Congress are not subject to impeachment. However, at the time of the framing—and even today—there was and remains a minority position with some support: members of Congress are "civil Officers of the United States" and are thus subject to impeachment.

Section IV considers the Commissions Clause. This provision obligates the President to commission "all the Officers of the United States." The phrase "Officers of the United States" has the same meaning in the Commissions Clause as it does in the Appointments and Impeachment Clauses: appointed positions in the Executive Branch and Judicial Branch, but not positions in the Legislative Branch. There is a longstanding practice of the President's commissioning appointed positions in the Executive Branch and Judicial Branch. But there is no evidence that any incumbent president has ever commissioned himself, his successor, or other elected officials, such as his vice president, his vice president's successor, or members of Congress.

Section V analyzes the Oath or Affirmation Clause. This provision requires "executive and judicial Officers . . . of the United States" to be bound by oath or affirmation. Once again, this phrase has the same meaning as "Officers of the United States" in the Appointments Clause, the Impeachment Clause, and the Commissions Clause. The text of the Oath or Affirmation Clause is limited to "executive and judicial Officers." Still, the text of the clause suggests that Senators and Representatives are not "Officers of the United States." And the Oath or Affirmation Clause, read in conjunction with the Article II Presidential Oath Clause, suggests that the elected president is not an "Officer[] of the United States." We also address the status of the Vice President.

Section VI focuses on the Recess Appointments Clause, which allows the President to temporarily fill certain positions. Are recess appointees "Officers of the United States"? This provision does *not* use the phrase "Officers of the United States." The text of the Recess Appointments Clause does not expressly address this issue, and other clauses do not offer clarity on this point. Supreme Court precedents point in opposite directions. Through a methodology we refer to as *interclausalism*, we discuss whether recess appointees are "Officers of the United States." Ultimately, the precise status of recess appointees is uncertain. But in any event, the precise status of recess appointees does not alter our broader conclusion: elected officials are not "Officers of the United States," and they do not hold "Office[s] . . . under the United States."

I. OUR METHODOLOGY

Our approach is premised on several different but closely related methodologies. First and foremost, we rely on textualism. We view the Constitution as a reasonably-cohesive document. Our default position is that the framers intentionally employed the same or similar language in different clauses to convey the same or a similar meaning. When the framers intended to convey substantially different meanings, they used different language. We avoid readings of the Constitution that would render text surplusage, redundant, or incoherent. Our first methodology should not be particularly controversial.

Second, we follow original public meaning originalism with respect to the Appointments Clause: this clause defines the phrase "Officers of the United States." A reasonable member of the public who read the Constitution would understand this meaning, even if such a person was not a lawyer and was not familiar with British drafting conventions.

Third, we rely on original methods originalism with respect to the phrase "Office . . . under the United States." We analyze British statutory drafting conventions that the educated public, attorneys, and parliamentarians in the framers' generation were familiar with. Under this approach, the phrase "Office under . . ." referred to appointed positions but not to elected positions. Thus, the Constitution did not define the phrase "Office . . . under the United States," nor did the Constitution need to do so to make this "Office . . . under"-language comprehensible. The general public would have understood this phrase. Or they would have understood that this phrase had a technical meaning because they did not know its precise contours.

Fourth, we give precedence to founding-era practices from the Washington Administration and the First Congress. These practices are entitled to more weight than the practices of later administrations and Congresses.

Fifth, and finally, we adopt a specific approach with respect to the framers' general purposes. We consider the framers' purposes only: (1) after exhausting textualism and the canons of legal interpretation; (2) after employing the customary tools for ascertaining original public meaning; and (3) after weighing competing historical practices. If the relevant constitutional text remains ambiguous after these three preliminary steps, then we will turn to purpose.

A. Our Approach is Textualist

Our approach is first and foremost textualist. And we rely on the traditional canons of legal interpretation. The *presumption of consistent*

usage suggests that "[a] word or phrase is presumed to bear the same meaning throughout a text[.]"[3] Justice Scalia and Bryan Garner explained, "The preparation of a legal instrument has traditionally been seen as a solemn and deliberative act that requires verbal exactitude."[4] Our approach starts from this basic premise. We think the Constitution's original seven articles formed a reasonably-cohesive document. The same or similar language used in different clauses conveys the same or a similar meaning. Moreover, the words of the Constitution should not be read as mere surplusage; each word and every provision should be given effect where it is possible to do so.

Critics may counter that the Constitution was not drafted with verbal exactitude. Rather, the argument goes, the Constitution was hastily cobbled together by people with wide-ranging agendas. Moreover, different committees, staffed by different framers, inserted or removed language, often with little recorded debate. These ad hoc alterations, critics argue, undermine any argument that the Constitution should be read as a cohesive document with consistent usage. And this disjointed drafting process may lead to some surplusage or redundancies. As a result, critics assert, the same word or phrase may have different meanings in different clauses. This position, which is contrary to our own, lends support to what we refer to as the Clause-Bound View.[5]

We offer three primary textualist rejoinders to this criticism. First, we develop the canon against surplusage. Second, the framers were consistent with how they referred to specific "Offices" and "Officers." Third, the framers' committees made specific alterations to standardize how the Constitution referred to specific "Offices" and "Officers." This evidence amply supports our position: the Constitution's consistent usage across provisions using "Office" and "Officer" supports the inference that the Constitution is a reasonably-cohesive document.

1. The Canon Against Surplusage

In *Marbury v. Madison*, Chief Justice John Marshall established an important rule: courts should avoid any reading of the Constitution that renders constitutional text "mere surplusage" or "entirely without meaning."[6] That canonical case considered whether Congress had the authority to expand

3. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012).

4. *Id.*

5. *See* Tillman & Blackman, *supra* note 2, at 425 (discussing the clause-bound view).

6. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). We illustrate the canon against surplusage through Chief Justice Marshall's canonical decision in *Marbury v. Madison*. Nothing in our argument is contingent on other aspects of *Marbury* having been correctly decided.

the Supreme Court's original jurisdiction. Chief Justice Marshall focused on the words of Article III, Section 2, Clause 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the [S]upreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[7]

The first sentence establishes the Supreme Court's original jurisdiction. The second sentence provides that Congress can modify the Supreme Court's appellate jurisdiction. Marbury argued that "the power remains to the [L]egislature[] to assign original jurisdiction to that [C]ourt in other cases than those specified in the article which has been recited[,] provided those cases belong to the judicial power of the United States."[8] In other words, Marbury contended, Congress could expand the Supreme Court's original jurisdiction.

Chief Justice Marshall rejected Marbury's argument. If the framers had "intended" to give Congress the power to modify the Supreme Court's original jurisdiction, Marshall reasoned, then "it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested."[9] Why would the Constitution spell out with clarity that Congress can modify the appellate jurisdiction if Congress had the general power to modify all facets of the Supreme Court's jurisdiction? Marbury's preferred reading, Marshall concluded, would render the second sentence of Article III, Section 2, Clause 2 as "mere surplusage" and "entirely without *meaning*."[10] (We think Marshall would have been clearer had he written that the second sentence would have been "entirely without *function*" or, perhaps, "without *purpose*.") Chief Justice Marshall then concluded, "It cannot be presumed that any clause in the [C]onstitution is intended to be without effect[,] and therefore such a construction is inadmissible, unless the words require it."[11] Here, *Marbury* articulated the canon against constitutional surplusage. Marshall articulated a similar principle in *Sturges v. Crowninshield*: "It would be dangero[u]s in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation."[12]

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7. U.S. CONST. art. III, § 2, cl. 2.
8. *Marbury*, 5 U.S. at 174.
9. *Id.*
10. *Id.* (emphasis added).
11. *Id.*
12. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

Courts have adhered to this principle for more than two centuries.[13] And commentators have followed suit. Thomas M. Cooley wrote, "[T]he courts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory."[14] In *Reading Law*, Justice Scalia and Bryan Garner described the surplusage canon this way: "[i]f possible, every word and every provision is to be given effect[.]"[15] And three decades ago, Akhil Reed Amar observed, "Where possible, each word of the Constitution is to be given meaning; no words are to be ignored as mere surplusage."[16] We agree that the canon only applies "where possible." Where it is possible, the canon supplies a strong presumption against surplusage. What happens after a court considers all relevant interpretive principles, and there still appears to be surplusage? Then the surplusage canon does not apply.

Supreme Court justices continue to adhere to the canon against surplusage. For example, in *Seila Law LLC v. Consumer Financial Protection Bureau*, Justice Kagan embraced the canon against surplusage. Kagan, a self-described textualist,[17] was troubled by a reading of the

13. *See* United States v. Butler, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."); Myers v. United States, 272 U.S. 52, 151 (1926) ("[T]he usual canon of interpretation of [the Constitution] . . . requires that real effect should be given to all the words it uses."); Prout v. Starr, 188 U.S. 537, 544 (1903) ("It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."); Hurtado v. California, 110 U.S. 516, 534 (1884) ("According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous."); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added . . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning[.]"); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842) ("No Court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them."); *cf*. Kungys v. United States, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (calling it a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

14. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 57 (Boston, Little, Brown & Co. 1868).

15. SCALIA & GARNER, *supra* note 3, at 174.

16. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242 (1985).

17. *See* Bryan A. Garner, *Old-fashioned textualism is all about interpretation, not legislating from the bench*, ABA JOURNAL (Apr. 1, 2019, 1:15 AM), https://www.abajournal.com/magazine/article/textualism-means-what-it-says [https://perma.cc/SW9M-JF93] ("As Justice Elena Kagan said famously a few years ago, 'We're all textualists now.'").

Constitution that rendered the Opinion Clause "redundant" or "inexplicable."[18] Again, she relied on a deeply-rooted and, perhaps, implied methodological norm: the courts should reject a reading of the Constitution that renders other parts of the Constitution "redundant" or "inexplicable." This principle is neither novel nor controversial. We know of no Supreme Court decision where the canon was expressly rejected.

Even critics of textualism seem to recognize that text must have *some* meaning. We think Judge Bork's analogy of the Ninth Amendment as an "inkblot" is an outlier.[19] Indeed, we suggest his "inkblot" remark created a backlash, even among non-textualists, precisely *because* it threatened to offend a deeply-rooted legal principle: Bork's approach would have nullified a constitutional amendment in violation of the surplusage canon. In this regard, the canon against surplusage reinforces the separation of powers. When a judge treats statutory language as a nullity, legislative primacy is threatened. When a judge treats constitutional language as a nullity, constitutional supremacy itself is at risk.

The canon against surplusage plays an important role in our methodology: we should not presume that precisely crafted "Office"- and "Officer"-language was without meaning. Rather, the presumption should be that each variant of the Constitution's "Office"- and "Officer"-language was drafted to convey a specific meaning and, likewise, divergent "Office"- and "Officer"-language refers to specific, identifiable, and distinguishable categories of positions.

2. The Framers Consistently Used the Phrases "Officers of the United States" and "Office . . . under the United States"

The framers' usage of "Offices" and "Officers" is consistent across the text of the Constitution of 1788. This usage is particularly consistent regarding the phrases "Officers of the United States" and "Office . . . under the United States."

Four provisions of the Constitution use the phrase "Officers of the United States": the Appointments Clause, the Commissions Clause, the Impeachment Clause, and the Oath or Affirmation Clause. The word

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18. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2227 n.3 (2020) (Kagan, J., dissenting).

19. Kurt T. Lash, *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. DIALOGUE 219, 220 (2013) ("I do not think you can use the [N]inth [A]mendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the [C]ourt can make up what might be under the inkblot if you cannot read it." (quoting *The Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, H. before the Comm. on the Judiciary*, 100th Cong. 249 (1987) (statement of Robert H. Bork))).

"Officers," when used in conjunction with "of the United States," is always used in the plural. The Constitution nowhere refers to an "*Officer* of the United States" in the singular. Similarly, the Constitution nowhere speaks of an "*Office* of the United States" or "*Offices* of the United States." The usage is consistent.

Four provisions of the Constitution use the phrase "Office . . . under the United States": the Impeachment Disqualification Clause, the Foreign Emoluments Clause, the Elector Incompatibility Clause, and the Religious Test Clause. This phrase is always singular. The Constitution never uses the phrase "*Offices* under the United States" in the plural. Similarly, the framers' text nowhere references an "*Officer* under the United States" or "*Officers* under the United States."

Finally, the Constitution never refers to an "Office *in* the United States" or an "Office *within* the United States." However, contemporaneous state constitutions used such terminology. For example, the North Carolina Constitution of 1776 used the phrase "any office or place of trust or profit *in* the civil department within this State."[20] The United States Constitution of 1788, however, only and consistently refers to an "Office . . . *under* the United States." In other words, where a preposition follows "Office," the only preposition used is "under." Likewise, where a preposition follows "Officers," the only preposition used is "of."

This precise terminology, used across eight provisions of the Constitution, suggests some degree of intentionality and deliberation. The language was not used indiscriminately. More likely than not, the phrase "Officers of the United States" in one provision was understood as having the same meaning as the phrase "Officers of the United States" in the other provisions. Likewise, the phrase "Office . . . under the United States" in one provision was likely understood as having the same meaning as the phrase "Office . . . under the United States" in the other provisions.

3. The Committee of Style Modified Three Provisions to Standardize the Constitution's "Office"- and "Officer"-Language

On September 8, 1787, the Constitutional Convention elected "a Committee of five to revise the style of and arrange the articles agreed to by the House."[21] Gouverneur Morris of Pennsylvania would serve on the Committee of Style.[22] Morris was joined by Alexander Hamilton of New

20. N.C. CONST. of 1776, art. XXXII (emphasis added).

21. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]; William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 4 (2021).

22. *See* Treanor, *supra* note 21, at 13.

York, William Johnson of Connecticut, Rufus King of Massachusetts, and James Madison of Virginia.[23] These prominent framers were attorneys or had legal training. The full extent of the Committee's work is far beyond the scope of this Article. Rather, we focus on three specific alterations the Committee made to the Constitution's "Office"- and "Officer"-language. These alterations involved: the Religious Test Clause, the Succession Clause, and the Impeachment Clause. Specifically, these changes standardized how the Constitution refers to offices and officers. We can reasonably infer there was some intentionality and deliberation to their decisions.

a. The Religious Test Clause

On Aug. 30, 1787, Charles Pinckney moved to insert into the draft constitution what would become the Religious Test Clause.[24] His draft proposal provided, "[B]ut no religious test shall ever be required as a qualification to any office or public trust under *the authority of* the U. States."[25] Pinckney's motion was seconded by Gouverneur Morris, and after a brief debate, was passed unanimously.[26] That provision, however, would soon be amended. The Committee of Style, which included Gouverneur Morris, removed the phrase "the authority of" from Pinckney's proposed language.[27] In its place, the Committee reported the version that was ultimately ratified: "office or public trust under the United States."[28]

That same Committee of Style reported out the Ineligibility Clause, which included the "under the *Authority*"-language.[29] That provision applies to "any civil Office *under the Authority* of the United States." In other words, the Committee retained the phrase "under the Authority" in the Ineligibility Clause but removed it from the Religious Test Clause. "[A] material variation in terms suggests a variation in meaning."[30] For this reason, it is fair to conclude that Morris and the members of his committee drew a distinction between the phrase "office or public trust under *the authority of* the United States" and the phrase "office or public trust under the United States."

William M. Treanor discussed Tillman's scholarship about this particular revision made to the Religious Test Clause by the Committee of Style.[31] Treanor wrote that "Tillman's thesis . . . concerns technical changes

23. *Id.* at 8.
24. 2 FARRAND'S RECORDS, *supra* note 21, at 468.
25. *Id.* (emphasis added).
26. *Id.*
27. *Id.* at 603.
28. *Id.*
29. *Id.* at 593 (emphasis added).
30. SCALIA & GARNER, *supra* note 3.
31. Treanor, *supra* note 21, at 47 n.275.

using terms of art with accepted meanings that created a coherent framework of office holding."[32] Treanor concluded that "[t]he changes [Tillman] describes are consistent with the mandate of a committee of style and arrangement."[33]

b. The Succession Clause

On September 7, 1787, Edmund Randolph proposed what would become the Succession Clause.[34] Randolph's draft provision provided, "The Legislature may declare by law what *officer of the U.S.*—shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until the time of electing a President shall arrive."[35] Here, the text referred to an "officer of the United States." Madison moved to amend the proposal, from "until the time of electing a President shall arrive" to "until such disability be removed, or a President shall be elected."[36] Madison did not object to the phrase "officer of the United States." Madison observed that some delegates objected "that the Legislature was restrained in the temporary appointment to '*officers*' of the *U. S*[.]"[37] These objectors "wished it to be at liberty to appoint others than such" officers of the United States.[38] Randolph's proposal, as modified by Madison, passed by a vote of 6-to-4, with one state divided.[39]

Subsequently, the Committee of Style would alter the Succession Clause's language. The Committee stripped the words "of the United States," leaving the word "officer" standing alone and unmodified. As a result, the text then provided, "[T]he Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such *officer* shall act accordingly, until the disability be removed, or the period for chusing another president arrive."[40] Recently, Treanor wrote that Morris

32. *Id.*
33. *Id.*
34. 2 FARRAND'S RECORDS, *supra* note 21, at 535.
35. *Id.* (emphasis added).
36. *Id.*
37. *Id.* (reporting Madison's original notes).
38. *Id.* (reporting Madison's original notes as subsequently modified by Madison, sometime after the constitutional convention had ended).
39. *Id.*
40. *Id.* at 599 (emphasis added) (citation omitted). The language reported in the main text was not the clause's final language. But the "Officer"-language relevant to the discussion in this Article remained unchanged.

"was the author of the change" to the Succession Clause.[41] It is fair to conclude that Morris, and by implication, his committee, understood that these two terms—"Officer of the U.S." and "Officer"—were not synonymous.

Our position is that Morris and his committee understood that the word "Officer" and the phrase "Officer of the United States," as they appeared in early drafts, had two distinguishable meanings. This position is met with two common objections. First, some scholars argue that the Committee of Style transcended its stylistic charter by making substantive changes that altered the Constitution's meaning. Therefore, the handiwork of Morris and his committee should be entitled to less weight. John Manning countered that "even if the Committee of Style acted ultra vires by making substantive changes to the text, the ratifiers accepted them."[42] Moreover, the Committee of Style did not have the final say. Morris and the committee simply reported to the Convention and all its members. And the members were free to debate, accept, amend, or reject the committee's changes—whether those changes had been properly authorized or not. The Succession Clause, as ratified, uses the word "Officer," standing alone and unmodified, and not "Officer of the United States."[43] And, we think it likely that other ratifiers had the same understanding that Morris and his committee shared: the word "Officer" and the phrase "Officer of the United States," as they appeared in early drafts, had two distinguishable meanings.

Second, Akhil Reed and Vikram Amar argued that "officer" was a "shorthand" for "officer of the United States."[44] We disagree with the Amars' position for reasons discussed in Part II of this ten-part series.[45] Moreover, Treanor explained that "Morris was consistently a careful drafter, which suggests that the change was intentional."[46] We agree. Morris and his committee likely understood that "Officer" had a different meaning than "Officer of the United States." And this understanding provides further proof for our position: the Committee of Style made specific alterations to standardize how the Constitution referred to specific "Offices" and "Officers." The Committee changed the language from "Officer of the United States" to "Officer" precisely because the latter accommodated a wider meaning.

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41. Treanor, *supra* note 21, at 78 ("When rearranging the Constitution's text on presidential succession, Morris changed 'officer of the United States' to 'officer.'").

42. John F. Manning, Response, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 144 (1995).

43. 2 FARRAND'S RECORDS, *supra* note 21, at 595.

44. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 116 (1995).

45. *See* Tillman & Blackman, *supra* note 2, at 343–44, 357–69.

46. Treanor, *supra* note 21, at 82.

c. The Impeachment Clause

As late as September 8, 1787, the Impeachment Clause only extended to the President. That day, a motion was made to add "[t]he [V]ice-President and *other* Civil officers of the U. S." to the scope of the clause.[47] The motion was passed unanimously.[48] The use of the word "other" suggests that the President and Vice President are properly characterized as "Civil officers of the United States."

Here again, Morris and the Committee of Style changed the text. The amended text stated: "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment . . . ."[49] The phrase "and *other* Civil officers of the U.S." was changed to "and *all* civil officers of the United States." The word *other* was not merely dropped; it was changed to *all*.

We have no good reason to believe that the Committee dropped the word "other" by accident or happenstance. On the contrary, omitting the word "other" provides some evidence that the meaning was altered. Arguably, Morris and his committee recognized that the President and Vice President were excluded from the category of "Civil officers of the U.S." Why else remove the word "other"?

* * *

We think the work of Morris and the Committee of Style shows that they intended to standardize how the Constitution refers to offices and officers. Morris maintained "Office . . . under the Authority of the United States"-language in the Ineligibility Clause but replaced that language in the Religious Test Clause with different "Office"-language. In the Succession Clause, Morris changed the phrase "Officer of the United States" simply to "Officer." And in the Impeachment Clause, the Committee changed the phrase "and other Civil officers of the U.S." to "and all civil officers of the United States."[50] These precise, almost surgical, textual changes cannot be described as random. The available evidence suggests that these framers' choices were intentional and deliberate. And if these choices were intentional and deliberate, then it is reasonable to infer that committee members intended the text-as-modified to be understood by the whole membership of the Convention and, ultimately, by those who would ratify the Constitution, as well as by the wider public.

47. 2 FARRAND'S RECORDS, *supra* note 21, at 552 (emphasis added).
48. *Id.* at 545, 552.
49. *Id.* at 600.
50. *Id.*

B. We Use Original Public Meaning Originalism to Understand the Phrase "Officers of the United States"

Our approach is also premised on original public meaning originalism. We think the phrase "Officers of the United States" is defined by the Appointments Clause.[51] The phrase "Officers of the United States" was *not* a fixed term of art.[52] It did not draw on any specific prior drafting conventions. The Articles of Confederation used the phrase "office . . . under the United States" in two provisions, but it did not use the phrase "Officers of the United States."[53] A study of the Corpus of Founding Era American English (COFEA) supports our position.[54] The phrase "Officers of the United States" had no apparent "specialized meaning attached to its use."[55] It was rarely used between 1787 and 1799, outside the context of the Constitution, in contrast with other more widely used "Officer"-language.[56]

Moreover, the general public would not have needed to be steeped in parliamentary practice to understand the phrase "Officers of the United States." Rather, the meaning of "Officers of the United States" would have been conveyed to a reasonable person who read the text of the Constitution. Had the framers not defined the phrase "Officers of the United States" in the Appointments Clause, its meaning would have been less than clear. And in that situation, the meaning of that phrase may have extended to elected officials. But the meaning of the phrase "Officers of the United States" was defined by the Constitution.

C. We Use Original Methods Originalism to Understand the "Office . . . under the United States" Drafting Convention

In our view, the meaning of the phrase "Officers of the United States" in the Constitution was defined by the Constitution. In contrast, our position

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51. *See infra* Section II.A (discussing the Appointments Clause).

52. A decade ago, Tillman had referred to "Officers of the United States" and "Office . . . under the United States" as "terms of art *as used in the Constitution of 1787*." *See* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. 180, 191 (2013) (emphasis added). The phrase "term of art" is generally understood to extend beyond the document under examination. We now think that Tillman's use of the phrase "term of art" was less than entirely precise, particularly with regard to the phrase "Officers of the United States." This Article offers further clarity, and a substantial number of points raised here had already been developed in our amicus briefs and other scholarship.

53. ARTICLES OF CONFEDERATION of 1781, art. V, para. 2.

54. Brief of Amici Curiae Scholars of Corpus Linguistics at 18, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130) [https://perma.cc/GA6E-B5NA].

55. *Id.*

56. *Id.* ("The phrase 'Officer(s) of the United States' appears in COFEA just 109 times between 1787 and 1799, with just over a third of those being direct quotations of the Constitution. This is a tiny minority of the 5,353 times the word 'officer' appears in the data-base overall during this same period . . . ." (citation omitted)).

is that the Constitution's "Office . . . under the United States"-language draws on prior British statutory drafting conventions. These drafting conventions were well-known and well-established. In our view, the framers inherited a legal genealogical understanding of "Office under . . . ."

Part IV of this ten-part series will demonstrate how the framers used the "Office under" drafting convention.[57] Here, we will explain why members of the Philadelphia Convention would likely have been familiar with British statutory drafting conventions.[58] In particular, Morris and his committee, whose members were lawyers or otherwise had legal training, were likely to have been familiar with these conventions. Additionally, some of the framers read English law and were educated at the Inns of Court in London. Indeed, several of the most prominent attorneys in the founding generation trained at Middle Temple, one of the four Inns of Court that could call members to the English Bar. According to Chief Justice Roberts, the Middle Templars "included five signers of the Declaration of Independence, the president of the first Continental Congress, four of the drafters of the Articles of Confederation, and seven drafters of the Constitution."[59] This latter group of seven framers included three South Carolinians: John Rutledge, General Charles Cotesworth Pinckney, and Charles Pinckney.[60] This roster also included John Blair of Virginia, John Dickinson of Delaware, Jared Ingersoll, Jr. of Pennsylvania, and William Livingston of New Jersey.[61] Dickinson served on the Committee of Eleven, which proposed the near-final version of the Appointments Clause. Rutledge and Blair would both serve on the United States Supreme Court. The educational background and reputations of these

57. *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part IV: The "Offices . . . under the United States" Drafting Convention,* 62 S. TEX. L. REV. 455, 461–65 (explaining that the framers adapted the "Office under the Crown" British drafting convention to refer to appointed positions under the federal constitution).

58. Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 HARV. J.L. & PUB. POL'Y 629, 646 (2015) ("American political leaders knew something of the British Parliament. During the colonial era, Parliament produced much of the law affecting British America, and Parliament's overreach provoked the Revolution. Some American leaders learned about Parliament from direct experience.").

59. John G. Roberts, Jr., *Foreword* to ERIC STOCKDALE & RANDY J. HOLLAND, MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION, at xv–xvi (2007); E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT 21–22, 61–63, 102, 104, 134–35, 170–72 (1924) (listing, as members of the Inns of Court, seven framers of the Constitution, including, John Dickinson, John Blair, William Houston, Jared Ingersoll, William Livingston, Charles Pinckney, and Charles Cotesworth Pinckney).

60. STOCKDALE & HOLLAND, *supra* note 59, at 31 (identifying the three South Carolinians).

61. *Id.* at xvi, 31; Natelson, *supra* note 58, at 647 (observing that Dickinson, who studied in Middle Temple, wrote letters "from London to his father [that were] filled with reflections on parliamentary politics" (citing John Dickinson, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756*, PA. MAG. HIST. & BIO. 417–20 (H. Trevor Colbourn ed., 1962))) [https://perma.cc/624D-3TUK].

lawyers provide some reason to believe that they would have been familiar with these drafting practices and adapted them for the federal Constitution.

Were members of the state ratifying conventions aware of these drafting practices? Perhaps. Some ratifiers were also connected to the Inns of Courts.[62] John Blair attended the Philadelphia Convention, as well as Virginia's ratifying convention.[63] Chief Justice Thomas McKean of Pennsylvania, a member of Pennsylvania's ratifying convention, was a Middle Templar.[64] And Thomas Pinckney, the President of the South Carolina ratification convention, studied law at Inner Temple.[65]

We can cite one piece of evidence, in particular, which suggests that the framers' generation was familiar with the "Office under" drafting convention. In 1775, Jean Louis De Lolme published the first English edition of *The Constitution of England; Or, An Account of the English Government*.[66] De Lolme wrote a thorough account of the English system of government. But most relevant for our purposes, he discussed the British drafting convention. He explained that one holding a "new *office under the Crown* [is] incapable of being elected [a] Member[]" of the House of Commons. Likewise, he wrote, "if any Member [of the Commons] accepts any *office under the Crown*, except it be an Officer in the army or navy accepting a new commission, his seat becomes void; though such Member is capable of being re-elected."[67] For the last three centuries, "Office under the Crown," a phrase

62. JONES, *supra* note 59, at x (discussing framers and ratifiers who studied in London's Inns of Court). A fully comprehensive study would also include framers and ratifiers educated at the King's Inns in Dublin, Ireland, the Scottish Faculty of Advocates, and the coordinate and contemporaneous institutions of legal education in the Isle of Man (if any), and the Channel Islands (if any). The influence of these latter legal traditions on the framers and ratifiers is obscure. *See also* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *was Rightly Decided, and Why* INS v. Chadha *was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1332 n.141 (2005) (suggesting the possibility that framers and ratifiers were familiar with legislative practices from the Isle of Man and Channel islands).

63. *See John Blair, Jr.*, SUPREME COURT HISTORICAL SOCIETY, https://supremecourthistory.org/associate-justices/john-blair-jr-1790-1796/ [https://perma.cc/SJ4N-PGYX].

64. STOCKDALE & HOLLAND, *supra* note 59, at 132.

65. *Thomas Pinckney*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=P000357 [https://perma.cc/6C2E-LKZH]; 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 325 (Jonathan Elliot ed., 1876) (reporting South Carolina's ratification papers) [hereinafter ELLIOT'S DEBATES].

66. *See* JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT ix (David Lieberman ed. & trans., Liberty Fund, Inc. 2007) (1784) ("In 1771, De Lolme published a French version of the book.").

67. J. L. DE LOLME, THE CONSTITUTION OF ENGLAND; OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 98 (London, G. Robinson and J. Murray 4th ed. 1784) (emphases added) [https://perma.cc/G8ZT-RH7K]. The Incompatibility Clause in the United States Constitution differs from its English predecessor. The Incompatibility Clause of the United States Constitution

commonly used in English, British, and United Kingdom statutes, has not extended to elected positions.[68] Here, De Lolme invoked the commonly-used drafting convention, "Office under. . ." to refer to appointed officers. And he used this phrase to draw a contrast with elected officials in Parliament, who could not hold these appointed offices. De Lolme repeated this same claim about the "Office under" drafting convention in the canonical 1784 edition of his treatise.[69]

De Lolme's book was widely read. It "was a major contribution to eighteenth-century constitutional theory and enjoyed wide currency in and beyond the eras of the American and French Revolutions."[70] In 1781, De Lolme had already sent a copy of his book to Benjamin Franklin.[71] In 1787, John Adams described the book as "the best defence of the political balance of three powers that ever was written."[72] Alexander Hamilton quoted De Lolme in *Federalist No. 70*: "I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be 'deep, solid, and ingenious,' that 'the executive power is more easily confined when it is ONE[.]'"[73] David Wootton wrote that De Lolme's book was "admired by [John] Adams and [Alexander] Hamilton."[74] Wootton observed that "[i]t would be difficult to overemphasize the extent to which the key ideas of the *Federalist* were already present in [D]e Lolme."[75] Decades later, De Lolme's work remained influential. Indeed, Joseph Story, in his 1836 publication, *Commentaries on Equity Jurisdiction,* wrote favorably about De Lolme's book.[76] This praise of De Lolme's learned treatise provides some reason to believe that Hamilton, Adams, and other framers and founders were familiar with De Lolme's discussion of the "Office under" drafting convention. Robert Natelson observed that "[m]any Founders who had not spent time in

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did not create an exception for military positions, and would not permit a member to subsequently hold an otherwise incompatible positions based on his re-election.

68. *See* Tillman & Blackman, *supra* note 57.

69. *See* DE LOLME, *supra* note 67, at 98; *see also* DE LOLME, *supra* note 66, at ix, 79.

70. *See* DE LOLME, *supra* note 66, at ix.

71. Letter from Jean Louis De Lolme, writer on constitutional matters, to Benjamin Franklin, U.S. Minister to France (May 20, 1784) [https://perma.cc/HWX4-LV9V].

72. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 70 (1787).

73. THE FEDERALIST NO. 70, at 457 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

74. David Wootton, *Introduction* to ALEXANDER HAMILTON ET AL., THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS xxxiii (David Wootton ed., 2003) (1787).

75. *Id.*

76. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISDICTION 22 n.3 (Boston, Hilliard, Gray & Co. 1836) ("De Lolme, in his work on the Constitution of England, has presented a view of English Equity Jurisprudence, far more exact and comprehensive, than many of the English text writers on the same subject.").

London were exposed to parliamentary institutions and procedures from popular writings[,]"[77] such as De Lolme's treatise.

This statutory drafting convention played a role in several important pieces of parliamentary legislation. Were members of the general public who read the Constitution cognizant of this drafting convention? We cannot be sure. Such a question is difficult to answer with certainty. But even if the general public did not widely understand the finer technical points of the Constitution, the ratifiers and the general public would have recognized that the phrase "Office . . . under the United States" was the sort of technical language known to the bench and bar. In other words, this language had a specific technical meaning, even if they did not know the exact content of that language.

In any event, we do not need to show that the ratifiers and the wider educated public shared a contemporaneous, widespread, and unified understanding of these technical concepts. Rather, they would have found this drafting convention comprehensible following the standard interpretive methodologies known to judges and members of the bar at the time. Our goal is to use the same methods to interpret the Constitution that the framers, ratifiers, and the contemporaneous general public would have used. This approach is known as *original methods originalism*.[78]

The 1798 Supreme Court decision in *Calder v. Bull* provides guidance about how to understand the Constitution's specific provisions that had a technical, legal meaning.[79] *Calder* involved a dispute over the meaning of the State Ex Post Facto Clause.[80] The question presented was whether Connecticut violated this clause when the state legislature "set aside a decree" of a probate court and "granted a new hearing[.]"[81] Did the State Ex Post Facto Clause apply only to criminal laws, or did it apply to civil laws as well?

As was common practice in appellate courts at the time, *Calder* was decided with a series of *seriatim* opinions. Justice Samuel Chase, who was a

77. Natelson, *supra* note 58, at 647 (citation omitted).

78. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–52 (2009); *see also, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131 (2017).

79. *See generally* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

80. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."); *see also id.* art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed [by Congress]."). *See generally Calder*, 3 U.S. (3 Dall.) at 386.

81. *Calder*, 3 U.S. (3 Dall.) at 386.

member of Maryland's ratification convention,[82] wrote the first opinion in *Calder*. He acknowledged that "[t]he prohibition, 'that no state shall pass any *ex post facto law*,' necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing."[83] Justice Paterson, who was a delegate to the Constitutional Convention from New Jersey,[84] wrote the second opinion in *Calder*. He agreed with Chase, and wrote that "[t]he words, *ex post facto*, when applied to a law, have a *technical meaning*, and, in legal phraseology, refer to crimes, pains, and penalties."[85]

We agree with the methodological approach taken in *Calder* by Justices Chase and Paterson regarding the Constitution's "ex post facto"-language. And we use this methodology to understand the Constitution's "Office . . . under the United States"-language. Following this methodology, the phrase "Office . . . under the United States" should be read in a similar fashion as the State Ex Post Facto Clause: it "requires some explanation; for, naked and without explanation, it is unintelligible[.]"[86] The British drafting convention clothes the otherwise-naked phrase "Office . . . under the United States" and made it intelligible to the framers' generation.

However, American judges, lawyers, and the public would not long remain cognizant of the framers' understanding of the British "Office . . . under" drafting convention. Around the time the Constitution was ratified, this older legal culture was quickly displaced. The American legal system was rapidly sundered from British courts and the wider British legal system. The Revolution terminated appeals from American courts to the Judicial Committee of the Privy Council. Moreover, some states formally precluded their courts from citing English judicial decisions.[87] Additionally, during and

82. *The Samuel Chase Impeachment Trial*, https://law.jrank.org/pages/5152/Chase-Samuel.html [https://perma.cc/7ZE5-UV6G] ("When the U.S. Constitution came before the Maryland Convention for ratification Chase was in the minority of delegates who voted against it. He was an ardent Anti-Federalist at the time and argued that the Constitution concentrated power in the hands of the central government at the expense of the common individual."); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 244 (2010) ("The three leading members of the opposition raised no objection because, amazingly, they had not yet arrived. Samuel Chase, a prominent Annapolis lawyer, and Luther Martin, the disgruntled delegate who had left the federal Convention early, took their seats only on Thursday morning, about halfway through the convention's short life and after the rules of procedure were settled.").

83. *Calder*, 3 U.S. (3 Dall.) at 390 (emphasis added) (quoting U.S. CONST. art. I, § 10, cl. 1).

84. *William Paterson*, OYEZ, https://www.oyez.org/justices/william_paterson [https://perma.cc/F2R8-7CJN].

85. *Calder*, 3 U.S. (3 Dall.) at 396 (emphasis added).

86. *Id.* at 390.

87. *See, e.g.*, Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 806 (1951) ("During the latter part of the 18th century and continuing until well into the 19th century, there was manifest a general hostility to England and all that was English. Pennsylvania, New Jersey and Kentucky legislated against the citation of English decisions in the courts, and New Hampshire had a rule of court against it." (citations omitted)).

after the Revolution, it became less frequent for American lawyers to have received their university-level legal education at Oxbridge—that is the elite institutions of Oxford and Cambridge—and it was less likely for them to have received their legal training at London's Inns of Court. English parliamentary law, and to a lesser extent, English law, were displaced from American post-independence legal and political institutions and training.[88] Because of this displacement, among Americans the meanings of this and other British statutory drafting conventions were lost to the sands of time. However, we can use the framers' methods, and tune to American and other sources from the common law world. By doing so, we can recover the meaning of the phrase "Office . . . under the United States," a term that was not expressly defined by the text of the Constitution. In contrast, the phrase "Officers of the United States" was defined by the Constitution's text, and therefore, this latter phrase can be well understood through textualism and original public meaning originalism.

D. Founding Era Practices by the Washington Administration and the First Congress Are Entitled to More Weight Than Practices by Later Administrations and Congress

In large part, our approach draws on the practices of the Washington Administration and the First Congress. Specifically, we contend that our understanding of the phrase "Office . . . under the United States" is consistent with their actions. However, we acknowledge that later presidents and Congresses may not have acted consistently with this original understanding. Still, these earlier and later streams of authority should not be treated as entirely equal; the former should be given priority.

How should we consider or weigh competing lines of historical precedents and practices? *McPherson v. Blacker*, a seminal separation-of-powers decision from 1892, provides the relevant framework: later historical practices, even if widespread, do not undercut the practices established by the political branches during the Early Republic.[89] We agree with this judicially established framework.

McPherson considered whether Michigan voters could choose presidential electors based on individual congressional districts instead of on

88. *See* 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 29 (1965) ("In Pennsylvania several statutes were passed to repress not only the legal profession but also the common law of England, including the existing system of courts.").

89. McPherson v. Blacker, 146 U.S. 1, 24–25 (1892). In *NLRB v. Noel Canning*, Justice Breyer cited *McPherson* third chronologically in his string citation of canonical separation of powers decisions, following *Stuart v. Laird* and *McCulloch v. Maryland*. *See Noel Canning*, 134 S. Ct. 2550, 2560 (2014). And *McPherson* was cited in Chiafalo v. Washington, 140 S. Ct. 2316, 2324 (2020).

a statewide basis. (Today, forty-eight states use the statewide "general ticket" approach, but Maine and Nebraska award some of their electoral votes based on the "district" approach at issue in *McPherson*.[90]) Could a state award its electors using a district-based approach? The Constitution did not provide a clear answer. Justice Thomas would later observe that the text of the Constitution was "ambiguous on this score."[91] Because the constitutional text was ambiguous, the *McPherson* Court resolved the case based on practice—but not based on the majority practice that prevailed in 1892. Instead, the Court found "decisive" the practices of only a slim minority of states from the early years of the Republic.[92] These states bucked what became the national trend and, instead, asserted the authority to select electors by district.[93] In the event that "there is ambiguity or doubt," the *McPherson* Court noted, "or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight."[94]

McPherson illustrates why practices during the Early Republic are *more* probative than later-in-time practices. When *McPherson* was decided in the late Nineteenth Century, the statewide ticket approach was the *majority* approach. By contrast, the "district" approach was the *minority* practice in the Early Republic for choosing electors. Nevertheless, in 1892, the Court approved these states' Early-Republic minority practice.

Similarly, President Washington and the First Congress *established* the very first precedents with respect to the Constitution's "Office"- and "Officer"-language. Following the reasoning of *McPherson*, later-in-time practices concerning the Constitution's "Office"- and "Officer"-language are less probative than earlier practices. The original Washington Administration-era government practices are the better authority between these two streams of competing historical practices. And these Washington-era formative practices lend some support to our position. Later in this

90. *See Chiafalo*, 140 S. Ct. 2316, 2321 n.1 (2020) ("Maine and Nebraska . . . developed a more complicated system in which two electors go to the winner of the statewide vote and one goes to the winner of each congressional district. So, for example, if the Republican candidate wins the popular vote in Nebraska as a whole but loses to the Democratic candidate in one of the State's three congressional districts, the Republican will get four electors and the Democrat will get one. Here too, though, the States use party slates to pick the electors, in order to reflect the relevant popular preferences (whether in the State or in an individual district)." (citations omitted)).

91. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 864, 904 (1995) (Thomas, J., dissenting) ("More than a century ago, this Court was asked to invalidate a Michigan election law because it called for Presidential electors to be elected on a district by district basis rather than being chosen by 'the State' as a whole. Conceding that the Constitution might be ambiguous on this score, the Court asserted that 'where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction[s] are entitled to the greatest weight.'" (quoting *McPherson*, 146 U.S. at 27) (citation omitted)).

92. *McPherson*, 146 U.S. at 36.

93. *Id.*

94. *Id.* at 27.

Article, we will discuss how practices from the Washington Administration and the First Congress inform the meaning of the Commissions Clause and the Oath or Affirmation Clause, which both use the phrase "Officers of the United States."[95] And in Part V of this ten-part series, we will discuss how practices from the Washington Administration inform the meaning of the Foreign Emoluments Clause, which uses the phrase "Office . . . under the United States."[96]

We agree with the *McPherson* Court's approach. We also put forward another well-established methodology for weighing competing lines of historical practice. In our separation of powers system, one branch of the federal government often takes some action of doubtful constitutionality. And that action may arguably invade the constitutional sphere of a second branch. For example, the Executive Branch can encroach on the Legislative Branch's sphere of authority, or the Judicial Branch can intrude on the Executive Branch's sphere of authority. In response, the second branch, confronted with such an invasion of its constitutional powers, has a choice: it can push back or acquiesce. If the second branch pushes back, then the ongoing contest between the two branches leaves historical practice unsettled. But what if push-back was possible, but the second branch acquiesces? That acquiescence has the effect of ratifying the propriety of the contested action taken by the first branch. Leading separation of powers decisions have reflected this principle.[97]

In other situations, one branch of the federal government will take some action of doubtful constitutionality, but that act does not invade the constitutional sphere of a second branch. Rather, the first branch has surrendered its own powers. We accord little weight to such self-abnegation. Why? Because surrender by the first branch is less likely to occasion public discussion or pushback by a second branch. Decisions of the Supreme Court

95. *See infra* Section IV.C (noting that there is no evidence that President Washington commissioned himself, the Vice President, or members of Congress); *see also infra* Section V.C (discussing the first federal oath statute enacted in 1789).

96. Seth Barrett Tillman & Josh Blackman*, Offices and Officers of the Constitution, Part V: The Elector Incompatibility, Impeachment Disqualification, Incompatibility, and Foreign Emoluments Clauses,* 63 S. TEX. L. REV. (forthcoming 2023) (discussing foreign diplomatic and state gifts President Washington accepted).

97. *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature."); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952) (noting that "Congress ha[d] taken no action[]" after President Truman, absent legislative sanction, seized the steel mills); Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) ("We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.").

have also reflected this principle.[98] The second branch may choose not to respond merely because it did not think its own powers had been invaded. As a result, the second branch might not have considered the legality of the actions of the first branch.

Acquiescence after an invasion—where pushback is possible—suggests an agreement between or among the branches. But where pushback is not possible or unlikely because the second branch's powers have not been invaded, historical practice—even a long enduring practice—does not suggest agreement between the political branches. Moreover, where the first branch surrenders its own powers, the precedential force of historical practice is relatively weak.

Again, actions that *assert* powers should be given more weight than actions that *relinquish* powers.[99] Consider the historical practice concerning the Foreign Emoluments Clause.[100] Presidents Washington and Jefferson accepted diplomatic gifts without seeking congressional consent.[101] And we have found no record that anyone, including their contemporaneous and subsequent critics, objected to these practices.[102] In contrast, President Jackson and his successors may have acted under the belief that the President must seek congressional consent before accepting foreign diplomatic gifts.[103] Between these two streams of competing historical precedents, *McPherson* teaches that the earlier practices from the Washington and Jefferson administrations should be entitled to greater weight. Why? Washington and Jefferson arguably invaded Congress's power to grant consent under the Foreign Emoluments Clause. By contrast, Jackson arguably surrendered the President's power to accept foreign gifts without seeking congressional consent. In this clash, the earlier encroaching practices should count for more than the later, self-abnegating practices—traditions of defiance trump traditions of surrender. We will discuss these foreign gifts at length in Part V of this ten-part series.

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98. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010) ("The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own." (citations omitted)); *cf.* Clinton v. City of New York, 524 U.S. 417, 451–52 (1998) (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand . . . . Abdication of responsibility is not part of the constitutional design.").

99. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 173 (Boston, H. Sprague 9th ed. 1802) ("[O]ne precedent in favor of power is stronger than [a] hundred against it.").

100. *See generally* Josh Blackman, *Defiance and Surrender*, 59 S. TEX. L. R. 157 (2018).

101. *Id.* at 158–62.

102. *Id.* at 159–62.

103. *Id.* at 162–64.

E. The Framers' Purpose or Intentions Should Only Be Considered After Exhausting Principles of Textualism and Originalism, and Weighing Competing Historical Practices

Critics offer a common response to our approach. They contend that the meaning of much eighteenth-century constitutional language is unknown at the present day. They infer the meaning of the constitutional language is no longer discoverable or that it never had an identifiable linguistic content to the framers, the ratifiers, and their contemporaries. This response was wrong when *Calder* was decided in 1798, and it is still wrong today.

Likewise, critics have argued that the practical consequences of our approach are undesirable by modern standards. For example, the framers would have never intended to allow the President to serve as an elector. And the framers would have never intended to exclude the President from the scope of the Foreign Emoluments Clause. Moreover, an impeached and disqualified President, Vice President, or civil officer of the United States should not be allowed to serve as an elector, a member of Congress, or a second term in the White House. In other regards, the clause even might be *underinclusive*. And this underinclusiveness undermines the critics' argument. For example the clause omits United States military officers and highly placed state officials who had engaged in treason, bribery, or high crimes and misdemeanors against the United States.

We disagree with the critics' framework because it inverts the usual mode of constitutional analysis. When interpreting constitutional text, courts should first consider "text and history."[104] Generally, we think this process has three steps, as discussed above. First, we start with the basic principles of textualist interpretation. Second, we turn to the original public meaning, including original methods originalism, based on pre-ratification materials and history. Some constitutional inquiries can be resolved with these initial two steps: textualism and original public meaning.

But a third step is needed to determine the meaning of other constitutional texts. Specifically, if that meaning cannot be settled based on "text and history"—both of which were determined *before* ratification—then

104. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008); *see also* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022) ("The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's *text and historical* understanding." (emphasis added)); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022) ("As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the *Constitution's text or in our Nation's history*." (emphasis added)); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) ("An analysis focused on *original meaning and history*, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'" (emphasis added) (citations omitted)).

courts should turn to historical practices that developed *after* the constitutional text was ratified. In *Youngstown*, Justice Frankfurter explained that there may be "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and *never before questioned*, engaged in by Presidents who have also sworn to uphold the Constitution[.]"[105] In such cases, this "exercise of power [becomes] part of the structure of our government, [and] may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."[106] Critically, this exercise of power must have "never before [been] questioned[.]"[107] But if the practice had been questioned, or more importantly, if there were competing historical practices, then *McPherson* and other Supreme Court cases provide the judicially-approved framework to weigh those competing practices. If these three steps—text, original public meaning, and historical practices—cannot resolve the meaning of ambiguous constitutional text, only then should one turn to "purpose."[108]

Scholars should not start with a purported purpose and then use that purpose to deem a text ambiguous. For example, a common argument we have seen is that the framers would never have intended the President to serve as an elector.[109] Some critics use that purpose to declare as ambiguous, or even determine the meaning of, the phrase "Office of Trust or Profit under the United States" in the Elector Incompatibility Clause.[110] This approach puts the cart before the horse. We cannot use purpose to challenge a text's original public meaning. If a text is still ambiguous after the first three steps in our methodology—textualism, original public meaning, and historical practices—then, and only then, should purpose be considered. But we cannot leapfrog constitutional interpretation by beginning the analysis with a preordained result.

105. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (emphasis added).

106. *Id.* at 610–11.

107. *Id.*

108. *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014) ("The constitutional text is thus ambiguous. And we believe the Clause's purpose demands the broader interpretation.").

109. Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 DUKE J. CONST. L. & PUB. POL'Y 35, 42 (2009) (available on Westlaw and other electronic platforms); *see* Asher Steinberg, *The Textual Argument That the President Does Not Hold an "Office Under the United States,"* THE NARROWEST GROUNDS, http://narrowestgrounds.blogspot.com/2017/09/the-textual-argument-that-president.html [https://perma.cc/AF86-LS6P] (noting skepticism in regard to any claim that the President can also serve as an elector).

110. U.S. CONST. art. II, § 1, cl. 2 ("[B]ut no Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector." (emphasis added)).

II. THE PHRASE "OFFICERS OF THE UNITED STATES" WHICH IS DEFINED BY THE APPOINTMENTS CLAUSE, REFERS TO APPOINTED POSITIONS IN THE EXECUTIVE AND JUDICIAL BRANCHES

In our view, the phrase "Officers of the United States" refers to appointed positions in the Executive and Judicial Branches. This language does not refer to appointed positions in the Legislative Branch, such as the Clerk of the House of Representatives or the Secretary of the Senate. The Appointments Clause defines the phrase "Officers of the United States" and, generally, how those officers are appointed: all such appointments are made to positions established by federal statute in the Executive and Judicial Branches. This category includes principal officers and inferior officers. Each of these positions must be created, authorized, or regularized "by law"; that is, by statute through bicameralism and presentment. And all of these positions are filled by appointment, not election. Positions created by the Constitution, including elected officials like the President and Members of Congress, are not created "by law." Therefore, they are not "Officers of the United States."

Our approach is consistent with the drafting history of the Appointments Clause: "Officers of the United States" can only be appointed, not elected. And our approach is also consistent with Supreme Court precedent. We acknowledge that some framers and ratifiers, on some occasions, argued that members of Congress were "Officers of the United States." However, we do not know how widespread this view was. And at the time, prominent framers and ratifiers opposed this view. On balance, the weight of evidence supports our position that "Officers of the United States" are appointed, not elected.

A. The Structure of the Appointments Clause

The Appointments Clause provides:

> [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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[111]

The structure of the Appointments Clause is, admittedly, not a perfect model of clarity. The clause is an overly-long single sentence, and its structure is grammatically complex. Moreover, its various sub-clauses can be read in different ways. Two centuries ago, Chief Justice Marshall labored to

111. *Id.* art. II, § 2, cl. 2.

interpret this clause in *United States v. Maurice*. This criminal prosecution turned on whether James Maurice, an "agent of fortifications[,] [was] an officer of the United States."[112] Marshall wrote, "I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause."[113]

We agree that determining the original public meaning of the Appointments Clause is not without some difficulty. Still, in our view, the text conveys a simple concept: all "Officers of the United States" are appointed positions that must be created by federal statute. Apex officials, who are elected, cannot be "Officers of the United States." This section will carefully parse the text of the Appointments Clause.

1. "And which shall be established by Law"

The Appointments Clause refers to positions that "shall be established by law." The phrase "shall be established by law" refers to post-ratification positions that *will* or *would* be established by future federal statutes. And these statutes must be created through bicameralism and presentment.[114] These positions were not established by the Constitution itself. The word "shall" here indicates futurity.[115] The Constitution does not mandate what particular positions Congress will create, in the future, by statute; however, the Constitution does mandate that all such positions—i.e., these future "Officers of the United States"—will be authorized by future statutes.[116]

Beyond the Appointments Clause, the Constitution of 1788 uses the phrase "by law" in eight other provisions—in each provision that phrase refers to the enactment of federal statutes.[117] Let us start with the second half of the Appointments Clause, sometimes referred to as the Inferior Officers Appointments Clause. The Inferior Officers Appointments Clause states, "Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads

112. United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.).

113. *Id.* at 1213.

114. *See* U.S. CONST. art. I, § 7, cl. 2 (laying out the requirements for bicameralism and presentment). *But cf*. *id*. art. I, § 7, cl. 3 (laying out requirements for an order, resolution, or vote to have legal effect).

115. Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on* Shall *and* May, 50 AM. J. LEGAL HIST. 453, 455 (2008–2010).

116. *See* Richbourg Motor Co. v. United States, 281 U.S. 528, 534 (1930) ("Undoubtedly, 'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action.").

117. *See* U.S. CONST. art. I, § 2, cl. 3; *id*. art. I, § 4, cl. 1; *id.* art. I, § 4, cl. 2; *id.* art. I, § 6, cl. 1; *id.* art. I, § 9, cl. 7; *id.* art. II, § 1, cl. 6; *id.* art. II, § 2, cl. 2 (Appointments Clause); *id.* art. II, § 2, cl. 2 (Inferior Office Appointments Clause); *id.* art. III, § 2, cl. 3; *see also id*. amend. III; *id*. amend. VI; *id*. amend. XIV, § 4.

of Departments."[118] Congress can enact statutes that empower the President, the courts of law, or the heads of departments, to appoint "Inferior Officers" without the need to obtain Senate advice and consent. The phrase "by law" has the same effect for both principal and inferior "Officers of the United States": only Congress has the power to create both types of positions by statute. This action must comply with the requirements of bicameralism and presentment—both houses of Congress must enact a statute, which is then presented to the President.[119]

There are seven other clauses in the original Constitution of 1788 that use the phrase "by law." First, the Appropriations Clause ensures that "Money" can only be "drawn from the Treasury" following "Appropriations made *by Law*."[120] The Supreme Court observed that "[m]oney may be paid out only through an appropriation made *by law*; in other words, the payment of money from the Treasury must be authorized by a statute."[121]

Second, the Enumeration Clause provides that Congress may regulate how to take the census "in such Manner as they shall *by Law* direct."[122] That is, by statute.

Third, the Election Regulation Clause provides that "Congress may at any time *by Law* make or alter such Regulations" concerning the "Times, Places and Manner of holding Elections for Senators and Representatives[.]"[123] Here, Congress can enact statutes to preempt certain state election laws.

Fourth, the Meeting of Congress Clause empowers Congress to "appoint" "*by Law* . . . a different Day" to "assemble[.]"[124] Again, "by law" refers to federal statutes.

Fifth, the Congressional Compensation Clause allows Congress to "ascertain[] *by Law*" the "compensation" that "Senators and Representatives shall receive . . . for their Services[.]"[125] Compensation must be set by law.

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118. *Id.* art. II, § 2, cl. 2 (emphasis added).
119. *See* INS v. Chadha, 462 U.S. 919, 948–49 (1983).
120. U.S. CONST. art. I, § 9, cl. 7 (emphasis added).
121. Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990) (emphasis added).
122. U.S. CONST. art. I, § 2, cl. 3 (emphasis added).
123. *Id.* art. I, § 4, cl. 1 (emphasis added).
124. *Id.* art. I, § 4, cl. 2 (emphasis added).
125. *Id.* art. I, § 6, cl. 1 (emphasis added). Congress's power regarding the control of congressional compensation was subsequently limited by the Twenty-Seventh Amendment. This amendment limited when statutes varying the compensation of Senators and Representatives could go into effect. Now, a "law, varying the compensation for the services of the Senators and Representatives, shall take effect," only after "an election of [R]epresentatives shall have intervened." *Id.* amend. XXVII.

Sixth, the Presidential Succession Clause allows Congress to declare "*by Law*" what "Officer[s]" can succeed to the presidency in the event of a double-vacancy.[126] Successors must be set by statute.

Seventh, the Criminal Trials Clause empowers Congress to "direct[]" "*by Law*" where to hold jury trials for crimes "not committed within any State[.]"[127] Again, the location of jury trials must be established by statute.

In the Appointments Clause, the Inferior Officers Appointments Clause, and the seven other provisions listed above, the phrase "by law" refers to Congress enacting a statute, after ratification of the Constitution, through the process described in Article I, Section 7, Clause 2: bicameralism and presentment.[128] This provision is known as the Presentment Clause or the Veto Clause. This provision controls how a bill becomes a law, statute, or act of Congress.[129] This understanding of "by law" is settled doctrine in the federal system,[130] as well as in state government.[131] The phrase "by law" does not refer to any and every legal action or procedure taken under general authority provided by the Constitution. Where a constitutional provision grants Congress powers, and the clause has a "by law" limitation, then congressional action by concurrent or single house resolution is unquestionably insufficient. "By law" refers to statutes.

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126. *Id.* art. II, § 1, cl. 6 (emphasis added); *see* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 170 (2006) (stating that "by Law," as used in the Succession Clause, means "by a statute presumably enacted in *advance*" (emphasis added)).

127. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

128. *Id.* art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

129. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1215 (2010) (explaining that a "statute" or "public law . . . is also called an Act of Congress" (internal quotation marks omitted)).

130. Harris L. White, Comment, *Constitutional Law: Joint Resolutions: Effect upon Statutes*, 22 CORNELL L. Q. 90, 92 (1936) ("It is understood by all authorities that when the words 'by law' or 'by statute' are used, the legislature means that the matter can be done only by a bill passed by the legislature and signed by the chief executive [or over his veto] . . . . The words 'by law' or 'by statute' are conspicuous by their absence." (citation omitted)).

131. *See* Case Comment, *Constitutional Law: Apportionment Bills Subject to Governor's Veto*, 50 MINN. L. REV. 1131, 1132 (1966) ("Where [a] constitution provides that certain items be 'prescribed by law' or that passage be 'by law,' the full lawmaking process clearly is required—passage by both houses plus the governor's approval or re-passage in case of veto." (citation omitted)).

However, where a constitutional provision grants Congress powers, and the clause lacks a "by law" limitation, then congressional action is not strictly limited to the procedures in the Presentment Clause. Rather, in such circumstances Congress can enact a traditional statute, or instead, satisfy the *alternative* procedural scheme in Article I, Section 7, Clause 3, which we refer to as the Order, Resolution, and Vote (ORV) Clause.[132] In 1789, the First Congress made use of this alternative procedural scheme in the Act to Establish the Treasury Department. This statute prospectively authorized each house of Congress, acting separately, to request information from the Secretary of the Treasury, and the statute made it the secretary's duty to report.[133]

Apparently, under the authority of the 1789 Act, in 1792, the Senate issued an order directing Secretary of the Treasury Alexander Hamilton to produce a financial statement listing the "salaries, fees, and emoluments" of "every person holding any civil office or employment under the United States, (except the judges)."[134] Hamilton responded to the Senate's order.[135] We do not have any direct evidence that President Washington approved the single-House request.

Hamilton and the Treasury Department took more than nine months to draft, sign, and submit a response, which spanned some ninety manuscript-sized pages.[136] The manuscript included several documents, which we refer to collectively as the *1793 Complete Report*. Hamilton listed appointed or

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132. U.S. CONST. art. I, § 7, cl. 3 ("Every [single-house] Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

133. An Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65–66 (1789).

134. *Id.*

135. *See Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States* (Feb. 26, 1793), *in* 14 THE PAPERS OF ALEXANDER HAMILTON: FEBRUARY–JUNE 1793, at 157 (Harold C. Syrett & Jacob E. Cooke eds., 1969); *see also Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States* (Feb. 26, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-14-02-0051 [https://perma.cc/B88K-AA99]; Amicus Curiae Scholar Seth Barrett Tillman's and Proposed Amicus Curiae Judicial Education Project's Motion for Leave to File Response to Amici Curiae by Certain Legal Historians at 79–168, Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-GBD), ECF No. 85 [https://perma.cc/FQ83-4JDF].

136. During the Emoluments Clauses litigation, we published a copy of the *1793 Complete Report*, which was drafted in long hand. *See id.* Many years before Trump was in office, Tillman had already posted extracts from the *1793 Complete Report* and the *Condensed Report* on his personal Bepress website. *See* Seth Barrett Tillman, *Hamilton, the Secretary of the Senate, and Jefferson: Three (or Four) Views of the Cathedral and the Mysterious Identity of the 'Officers Under the United States*,*'* BEPRESS (Mar. 30, 2011), https://ssrn.com/abstract=1694172 [https://perma.cc/R46N-KFAQ].

administrative personnel in *each* of the three branches of the federal government. However, Hamilton did not include all positions in the federal government; his carefully worded response did *not* include the President, the Vice President, Senators, or Representatives. We will discuss the relevance of the *1793 Complete Report* in Part IV of this ten-part series.[137]

Tillman first articulated this view of the ORV Clause in 2005.[138] Other scholars have largely endorsed Tillman's view.[139] However, we acknowledge that our reading of the ORV Clause conflicts with *INS v. Chadha*.[140] In *Chadha*, Chief Justice Burger wrote that the ORV Clause was added to "assure" that the presentment requirement for all bicameral legislation, per the Presentment Clause, "could not be circumvented."[141] Here, Burger articulated the view that the ORV Clause was merely an anti-circumvention device. In other words, the ORV Clause was a device to ensure that Congress did not evade the requirements mandated by the Presentment Clause.

In our view, as a matter of original public meaning, *Chadha* was incorrect regarding the meaning of the ORV Clause.[142] But more importantly, Burger's analysis cannot explain why the Appointments Clause, Inferior Officers Appointments Clause, and seven other provisions in the Constitution of 1788 include a "by law" limitation, but the Constitution's remaining substantive grants of congressional power lack that limitation. In our view, the "by law" limitation is functional. It restricts Congress to the law-making processes set down in the Presentment Clause. Moreover, it appears that none of the litigants in *Chadha* flagged in their briefs to the Supreme Court the

137. *See* Tillman & Blackman, *supra* note 57, at 482–94.

138. *See generally* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

139. *See, e.g.*, Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1374 (2005) ("Mr. Tillman is quite likely correct about the original meaning of the ORV Clause. It does not merely prevent Congress from circumventing the presentment requirement for bills through clever labeling, though it certainly does at least that much. Instead, it also subjects to presentment a range of legislative action that is not subject to presentment under Article I, Section 7, Clause 2. The ORV Clause is not merely an anticircumvention device; it also has independent substantive bite."); Thomas A. Smith, *The Future of Article I, Section 7*, NAT'L CONST. CTR.: INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/766#the-future-of-article-i-section-7-by-thomas-smith [https://perma.cc/CVV8-EKA8] ("What Tillman uncovered was that Madison's interpretation of the ORV Clause is actually inconsistent with the constitutional text. Tillman's 2005 research suggests that the ORV Clause is not merely an anti-circumvention device, but also subjects to presentment certain legislative actions not addressed in the Presentment Clause. These actions include a range of single-house actions authorized by prior, bicameral legislation.").

140. INS v. Chadha, 462 U.S. 919, 946–47 (1983).

141. *Id.* at 947.

142. Tillman, *supra* note 138, at 1344 ("Notwithstanding its feigned textualism, *Chadha* had no intellectual legs on which to stand.").

1789 statute that established the Treasury Department. That statute, which delegated limited law-making authority to a single house, conflicts with how the *Chadha* Court understood the Constitution's bicameralism requirement.[143] Again, the phrase "by law" refers to statutes. But for other constitutional provisions that do not include a "by law" limitation, Congress has a broader range of procedures to make binding legal relations. For the many constitutional provisions lacking a "by law" limitation, Congress is not limited strictly to enacting statutes; rather, Congress can use *either* the procedural mechanisms in the well-known Presentment Clause or in the more-obscure ORV Clause. And, in 1789, the First Congress made use of the latter, alternative procedural scheme in the Act to Establish the Treasury Department.

2. "Whose Appointments are not herein otherwise provided for"

The Appointments Clause states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[144]

The Appointments Clause enumerates, or "provides," four categories of specific positions: "[1] Ambassadors, [2] other public Ministers and [3] Consuls, [and] [4] Judges of the supreme Court." But that list is not exclusive. The Appointments Clause also generally references "all *other* Officers of the United States." This list of positions is subject to two limitations: "whose Appointments are not herein otherwise provided for, and which shall be established by Law."

That phrase, "whose Appointments are not herein otherwise provided for," is, admittedly, a mouthful. We think this phrase tells the reader that the appointment of "Officers of the United States" is limited to the processes announced in Article II, Section 2.[145] This sub-clause directs the reader *not*

143. *See Chadha*, 462 U.S. at 951 ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

144. U.S. CONST. art. II, § 2, cl. 2.

145. *See infra* Section VI (discussing the interaction between the Appointments Clause and the Recess Appointments Clause). Like the Appointments Clause, the Recess Appointments Clause also appears in Article II, Section 2.

to scour the remainder of the Constitution for other provisions that provide authority to fill other federal "Officers of the United States" positions—by election or by appointment. In other words, the Appointments Clause's "not herein otherwise provided for"-language is not an invitation to search for other constitutional provisions providing authority to create or fill federal offices; rather, this language puts the reader on notice that no such constitutional provisions exist beyond the textual bounds of Article II, Section 2. We think any alternative reading that leads readers to look for other constitutional mechanisms to fill "Officers of the United States" positions is mistaken. The "Officers of the United States" are only those positions that are filled by Article II, Section 2 processes.

Thomas Merrill took a different position. He wrote that "[t]he most likely referent of 'herein otherwise provided for' would be the Members of Congress, whose method of appointment is detailed in Article I."[146] Chad Squitieri responded that Merrill's analysis "is not the best interpretation" of the Appointments Clause.[147] Squitieri observed, "Article I does not speak to the 'appointment' of Members of Congress—it speaks to their *election*."[148]

In our view, Squitieri is correct. The positions of President, Vice President, Senator, and Representative are, in the regular course, filled by *election*, and not by *appointment*.[149] Only appointed positions can be "Officers of the United States," i.e., positions "whose *Appointments* are not herein otherwise provided." Therefore, it would be a mistake to scour the Constitution for positions that are filled by election. The existence of these elected positions supports the exact opposite conclusion that Merrill drew: the Constitution provides for a class of elected officials that are not "Officers of the United States."

The Appointments Clause's reference to "Appointments" should not be read to refer to elected officials. Squitieri reached a similar conclusion that we do: "the use of 'herein' in Article II, Section 2, Clause 2 is best understood

146. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2136 n.157 (2004).

147. Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1262 (2021).

148. *Id.* (citation omitted).

149. Membership in the House is determined exclusively by election. Any vacancy can only be lawfully filled by a new election. Membership in the Senate is determined, in the regular course, by election. But governors, in certain circumstances, can make "temporary appointments" to fill Senate vacancies until the seat is filled via election. *See* U.S. CONST. art. I, § 3, cl. 2, *amended by, id*. amend. XVII, cl. 2. And "[i]n case of the removal of the President from office or of his death or resignation, the Vice President shall become President." *Id.* art. II, § 1, cl. 6; *see also* Presidential Succession Act 1947, 3 U.S.C. § 19. This process occurs without an election. And "Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress." Here too, the Constitution eschews "election"-language. *Id.* amend. XXV § 2.

as a reference to Article II, Section 2, Clause 2 itself."[150] And what are these positions? The "Officers of the United States" are "the types of appointed officers mentioned within the very same clause."[151] The phrase "whose Appointments are not herein otherwise provided for" in the Appointments Clause "refer[s] the reader to a specific article, not the Constitution generally."[152]

Our reading of "whose Appointments are not herein otherwise provided for" applies to both principal and inferior officers. The Inferior Officers Appointments Clause, which appears immediately after the Appointments Clause in Article II, Section 2, Clause 2, provides: "but the Congress may by Law vest the Appointment of *such inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[153] In our view, the phrase "such inferior Officers" refers back to the phrase "Officers of the United States" in the Appointments Clause. And those positions must be established by federal statute—that is, positions "established by law." All Officers of the United States must be appointed—not elected—and they can only be appointed pursuant to Article II, Section 2 procedures. These procedures include the paths of appointment enumerated in Article II, Section 2: the Principal Officers Appointments Clause, the Inferior Officers Appointments Clause, and potentially the Recess Appointments Clause.

We will revisit the meaning of the phrase "not herein otherwise provided for" with regard to the Recess Appointments Clause in Section VI.C.

3. All "Officers of the United States" Positions Must Be "established by law"

"Officers of the United States" are positions created, authorized, or regularized by federal statute. We use the term *regularized* to refer to the process by which an irregularly-created or irregularly-filled position is later validated or ratified by statute.[154] We use the term *authorized* to refer to positions that Congress funds, but otherwise generally leaving it to the President's, or other authority's, discretion to specify the character and duties of those posts. Congress enacted such a statute in 1790 that allowed President Washington to spend up to $40,000 to fund diplomatic posts at his discretion.[155] We acknowledge that other scholars have taken the position that

150. Squitieri, *supra* note 147, at 1262–63 (citation omitted).
151. *See id.* at 1263.
152. *Id.* at 1262–63.
153. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).
154. *See* Tillman & Blackman, *supra* note 2, at 335.
155. An Act providing the means of intercourse between the United States and foreign nations, 1 Stat. 128 (1790).

the President can create diplomatic posts absent direct congressional authorization.[156]

The positions of "Officers of the United States" can be terminated by federal statute—that is, the offices are entirely *defeasible*.[157] We acknowledge that complex problems arise concerning the statutory termination of Article III posts, particularly positions on the Supreme Court. The same or similar difficult problems arise from the interplay between Congress's powers over the inferior courts and good behavior tenure. But these difficult problems extend to any theory acknowledging congressional primacy.

By contrast, apex presiding federal officials, including the most significant elected positions, are not created by statute. Rather, these positions are mandated by the Constitution. Such positions include the President, Vice President, Speaker of the House, Senate President Pro Tempore, and Chief Justice.[158] Moreover, these positions are not entirely *defeasible*. Courts and scholars have long considered Congress's power to regulate such apex positions. But these latter positions cannot be *entirely* stripped of their constitutional powers, nor can Congress terminate such positions by statute.

Consider a hypothetical in which Congress regulates the President's pardon power: Congress enacts a statute requiring the President to sign pardons and to do so in permanent ink rather than in pencil, which could be easily erased. The President's pardon power is *partially* defeasible. But Congress cannot *entirely* strip the President of his pardon power or transfer this power to itself or even to a third-party entity. Nor can Congress and the President pass a statute stripping the Vice President of his tie-breaking vote

156. *See* James Durling & E. Garrett West, *Appointments Without Law*, 105 VA. L. REV. 1281, 1284 (2019) ("Based on this theory, the President has long appointed diplomatic officers (i.e., 'Ambassadors,' 'other public Ministers,' and 'Consuls') without Congress first establishing the offices by statute."); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 309 (2001) ("[President Washington] also effectively created [diplomatic posts]. Congress never created foreign diplomatic posts. Rather, Washington erected all of America's diplomatic postings by merely nominating individuals to serve as a U.S. minister or agent to a foreign court. If the Senate confirmed the nominee, Washington had created a foreign post."); Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 920 (2019) ("[P]arts of Article II [of the Constitution] other than the Appointments Clause supply the president with power to appoint ad hoc diplomats on his own authority."); *But cf.* Prakash & Ramsey, *supra,* at 309 n.336 ("We are not sure whether the Constitution permits the President to appoint to a diplomatic post in the absence of a statute first creating that diplomatic post . . . . Some scholars may assume that the President can only appoint diplomatic officers to posts that have been created by statute because that is the familiar rule in the domestic context.").

157. *Defeasible*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "defeasible" as "(Of an act, right, agreement, or position) capable of being annulled or avoided").

158. *See* Tillman & Blackman, *supra* note 2, at 408–11 (discussing "officers" of the "government of the United States" that were created by the Constitution itself).

in the Senate. These elected apex presiding positions are not *entirely defeasible* by federal statute.

B. The Drafting History of the Appointments Clause Is Consistent with Our Approach

The drafting history of the Appointments Clause is, admittedly, complex. But it is consistent with our approach.

On May 29, 1787, James Madison introduced the Virginia Plan.[159] The Virginia Plan would have empowered the "National Legislature" to choose judges.[160] In contrast, at this juncture, the appointment of "executive branch officers" "inhered in the 'Executive rights'" of the "National Executive."[161] A later proposal put forward this text: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."[162]

On July 17, 1787, the Committee of the Whole modified what would become the Appointments Clause.[163] The new text provided that the "National Executive" would have the power "to appoint to offices in cases *not otherwise provided for*[.]"[164] What are the "offices . . . not otherwise provided for"? At this juncture, the text could be read in two fashions. First, those other "offices" are certain positions that would be *chosen* by the National Legislature, such as judges and the Treasurer. Second, those other "offices" are certain apex *elected* officials that would not be appointed. Or perhaps both readings were possible in July of 1787. But the Convention would soon foreclose both of these readings.

On August 6, 1787, the Committee of Detail reported on a draft provision in which Congress had the power "[t]o Appoint a Treasurer by ballot[.]"[165] On August 17, 1787, there was a motion to remove Congress's powers to appoint the Treasurer.[166] This motion failed.[167]

On September 4, 1787, the Committee of Eleven moved the power to appoint judges from Congress to the President, in conjunction with Senate

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159. *The Virginia Plan*, U.S. SENATE, https://www.senate.gov/civics/common/generic/Virginia_Plan_item.htm [https://perma.cc/KL74-W8XP].

160. 1 FARRAND'S RECORDS , *supra* note 21, at 21–22.

161. Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 472 (2018) (citing 1 FARRAND'S RECORDS, *supra* note 21, at 20–22, 20 n.10).

162. 2 FARRAND'S RECORDS, *supra* note 21, at 183 (Aug. 6, 1787), 389 n.8 (Aug. 23, 1787); 392–93 (same).

163. *Id.* at 21.

164. *Id.* at 23 (emphasis added).

165. 2 FARRAND'S RECORDS, *supra* note 21, at 177, 181–82.

166. *Id.* at 315.

167. *Id.*

advice and consent.[168] That draft text now provided, "The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U.S. whose appointments are not otherwise herein provided for."[169] It appears that with this revision, the phrase "officers of the U.S." was added to the Appointments Clause.[170] And ten days later, on September 14, John Rutledge of South Carolina moved to strike out Congress's power to appoint the Treasurer.[171] That officer, Rutledge explained, should be "appointed in the same manner with other officers[]"—that is, by the President.[172] The motion passed, 8 to 3.[173]

Even if the phrase "not otherwise provided for" in the draft Appointments Clause had referred to elected officials before September 4, that possible meaning was foreclosed after September 4. Now, the phrase "other officers of the U.S." would not refer to positions filled by persons chosen by the Legislature, nor could those "other officers of the U.S." refer to elected officials. These revisions restricted the "provided for" language to those positions that would be appointed through Article II, Section 2 procedures.

Prior to the end of the Convention, two final alterations were made to the Appointments Clause. First, a comma was added between "all other officers of the U.S." and "whose appointments." Second, an additional clause was added at the end: "and which shall be established by Law." This table represents the final two revisions made to the Appointments Clause, with the changes emphasized with bold and underline.

168. *Id.* at 493, 495; Mascott, *supra* note 161, at 473.

169. 2 FARRAND'S RECORDS, *supra* note 21, at 495, 539–40.

170. Mascott, *supra* note 161, at 472 ("Drafts of the Appointments Clause did not include the expanded phrase 'officers of the U.S.' until September 4, 1787—during the late stages of the Convention.").

171. 2 FARRAND'S RECORDS, *supra* note 21, at 612, 614.

172. *Id.* at 614. Rutledge stated that the position of the Treasurer should be filled in the same manner as other officers. He did not say that the position of the Treasurer should be filled in the same manner as the position of the President is filled through the electoral college. Here, Rutledge seems to draw a distinction between the other officers and the President. We draw the inference from Rutledge's statement that he did not think the President was an "officer." *See also infra* note 408 (making a similar point about James Madison's use of "office"-language at the Federal Convention).

173. *Id.*

Before the end of the Convention	**At the conclusion of the Convention**
[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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.	[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**: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause now provided in its entirety: "[a] [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [b] Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, [c] whose Appointments are not herein otherwise provided for, [d] *and which shall be established by Law*." We have divided the Clause into four sections: [a], [b], [c], and [d].

The word "and" is highly significant. That conjunction suggests that clauses [c] and [d] *both* modify clause [b]. Stated differently, clauses [c] *and* [d] define which positions can be an "Officer[] of the United States." Clause [c] tells us that "all other Officers of the United States" must be appointed pursuant to Article II, Section 2. The word "all" is not surplusage.[174] And clause [d] tells us these "Officers of the United States" must be "established by law." In other words, those positions—"Officers of the United States"—would be created by statute after the new Constitution came into effect. It follows that these clauses cannot refer to elected officials because such apex positions were created by the Constitution, and not by statute. Indeed, the first President, the first Vice President, and all the members of the First Congress were—quite obviously—all elected *prior* to the enactment of any federal statutes.

The addition of the comma between clauses [b] and [c], and the addition of clause [d], provide some further support for our construction of the Appointments Clause. Had these alterations not been made, we still think our

174. *See supra* Section I.A.1 (discussing surplusage canon).

reading of the Appointments Clause would be the better one. But these changes bolster our construction.

We acknowledge that the drafting history of the Appointments Clause is complicated and messy. Ultimately, we think that drafting history leans towards our position. But even if we were wrong about that history, it is the final, printed Constitution that was sent to the States for ratification, which is "our" law, not the prior drafts.[175]

C. "Officers of the United States" Can Only Be Appointed, Not Elected

Many of the Constitution's provisions that reference "Offices" and "Officers" are seldom, if ever, litigated. By contrast, the Appointments Clause has played a central role in the Supreme Court's leading separation of powers precedents. Many leading cases turn on the interaction of the Appointments Clause and the Inferior Officers Appointments Clause. *Morrison v. Olson*, for example, asked whether Alexia Morrison, as independent counsel, was a "principal officer" who must be appointed by the President and confirmed by the Senate.[176] Or, was Morrison an "inferior Officer" who could be appointed by "the Courts of Law" without Senate confirmation?[177] Additionally, *Buckley v. Valeo* considered the status of a mere "employee"—one who is neither a "principal" nor an "inferior" officer.[178] Here, however, we do not focus on the fine lines between these different types of positions.[179] Instead, we make a more foundational point: the Appointments Clause defines who are the "Officers of the United States" and, generally, how they are appointed. "Officers of the United States" can only be appointed; they cannot be elected.

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175. Manning, *supra* note 42 ("Relying on the limited mission of the Committee of Style 'would constrain us to say that the *second to last draft* [of the Constitution] would govern in every instance where the Committee of Style added an arguably substantive word.' We would be mistakenly discarding the ratified Constitution for a prior draft." (quoting Nixon v. United States, 113 S. Ct. 732, 737 (1993))).

176. Morrison v. Olson, 487 U.S. 654, 659–60 (1988).

177. *Id.* at 670–71.

178. Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) ("'Officers of the United States' does not include all employees of the United States, but there is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States, whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority." (citations omitted)); *cf. Morrison*, 487 U.S. at 671 n.12 ("It is clear that [the independent counsel] is an 'officer' of the United States, not an 'employee.'").

179. *See* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018, 2:50 PM), https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states [https://perma.cc/XK32-Q3JW] (concluding that under current precedent, Special Counsel Mueller was not an "Officer[] of the United States," but a mere "employee of the United States").

The Appointments Clause lists several examples of the types of "Officers of the United States" that the President can nominate, all of which are in the Executive Branch or in the Judicial Branch: "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*." Here, we rely on the *ejusdem generis* canon: "Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."[180] The phrase "all other *Officers of the United States*" should be read to reference the same kind of Executive- and Judicial-Branch officers that the clause enumerates. All of these positions are appointed, not elected. Furthermore, the clause does not list any appointed Legislative Branch positions, such as the Clerk of the House or the Secretary of the Senate.

Elected officials created by the Constitution—such as the President, Vice President, Senators, and Representatives—are not "Officers of the United States" per the Appointments Clause. Article II, Section 2 is exclusive—no other provision in the Constitution authorizes the appointment of "Officers of the United States." The Constitution hardwired this distinction between appointment and election.

Critics may conflate the method by which a person becomes an "Officer[] of the United States" and the way that a person becomes President, Senator, or Representative. These three positions are not filled by appointment; they are in the regular course filled by elections.[181] First, Presidents are "elected" or "chosen" by electors, and the electors "vote by ballot."[182] In other words, election is the regular mechanism for filling the presidency. Members of the House are elected.[183] Indeed, election is the exclusive mechanism for filling the position of Representative. There is no lawful mechanism by which House seats can be temporarily filled by the state executive authority. Under the Constitution's original design, Senators, though "chosen by the [state] Legislature[s,]"[184] were nonetheless still described as "elected[.]"[185] Here too, election was and remains the regular mechanism for filling the position of Senator. The Constitution distinguishes between "Officers of the United States," who are appointed to positions that are created "by law," and officials whose positions were mandated by the Constitution and are filled by election. The Seventeenth Amendment

180. SCALIA & GARNER, *supra* note 3, at 199.

181. *See supra* note 149 (discussing how the positions of the Presidency, Vice Presidency, and Senators can be temporarily filled).

182. U.S. CONST. art. II, § 1, cls. 1–3; *see supra* Section II.A.1 (discussing how the President is elected and not appointed). Between regularly scheduled elections, presidential vacancies can be filled via succession. *See, e.g.*, *id.* art. II, § 1, cl. 6; Presidential Succession Act 1947, 3 U.S.C. § 19.

183. U.S. CONST. art. I, § 2, cls. 1–2.

184. *Id.* art. I, § 3, cl. 1, *amended by, id*. amend. XVII, cl. 2.

185. *Id.* art. I, § 3, cl. 3.

confirmed this linguistic practice; now, Senators are directly "elected by the people."[186]

D. Supreme Court Precedent on the Phrase "Officers of the United States"

Our position is consistent with Supreme Court precedent. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[187] Rather, the Appointments Clause requires appointment of these individuals. Chief Justice Roberts reaffirmed this position in *Seila Law LLC v. CFPB*.[188] He wrote, "Article II distinguishes between two kinds of officers—principal officers (who *must be appointed* by the President with the advice and consent of the Senate) and inferior officers (whose *appointment* Congress may vest in the President, courts, or heads of Departments)."[189]

Here, we think Roberts was not precise. The Constitution does not expressly say that "principal officers . . . *must be appointed* by the President with the advice and consent of the Senate." Indeed, the text of the Appointments Clause does not distinguish between principal and inferior officers, generally. The Appointments Clause does refer to "inferior Officers," which are "Officers of the United States" but, the phrase "principal Officer" does not appear in the Appointments Clause. The phrase "principal Officer" appears in the Opinion Clause—Article II, Section 2, Clause 1.[190] When read together with the Opinion Clause, the Appointments Clause creates an inference that the Appointments Clause refers to the appointment of *principal* "Officers of the United States." However, it is not self-evident that the officers referred to in the Appointments Clause are "principal Officers."

In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, also known as the *PROMESA* case, the Supreme

186. *Id.* amend. XVII.

187. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (citation omitted) (first quoting U.S. CONST. art. II, § 2, cl. 2; then citing THE FEDERALIST NO. 72, *supra* note 73, at 463); *see* United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

188. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2199 n.3 (2020).

189. *Id.* (emphasis added).

190. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the *principal officer* in each of the executive departments, upon any subject relating to the duties of their respective offices . . . ." (emphasis added)).

Court stated that "Officers of the United States" are appointed.[191] Justice Breyer's majority opinion observed, "[T]he *Appointments Clause governs the appointments of all officers of the United States*, including those located in Puerto Rico."[192] The majority opinion repeated this conclusion in three other places.[193]

This decision largely—but not fully—supports our position. We hesitate only slightly because Justice Breyer's phrasing was less-than-unequivocal. These statements could be consistent with an alternate reading of the Appointments Clause: that there are some "Officers of the United States" who are not appointed. In other words, the Appointments Clause only refers to those "Officers of the United States" who are appointed, but there are other elected "Officers of the United States." Still, we do not think Justice Breyer was hinting at this alternate view. Instead, the Court seemed to be saying that all "officers of the United States" must be appointed pursuant to the Appointments Clause. This reading of Justice Breyer's opinion is consistent with *Free Enterprise Fund* and *Seila Law*.

Moreover, Justice Breyer largely rejected another possible reading of the phrase "Officers of the United States." He wrote that "[t]he language at issue" in the Appointments Clause "does not offer us much guidance for understanding the key term 'of the United States.'"[194] He explained, "The text suggests a distinction between federal officers—officers exercising power of the National Government—and nonfederal officers—officers exercising power of some other government."[195] But the Court rejected that simplistic distinction.[196] Rather, the dividing line between who is and is not an "Officer[] of the United States" is not a mere federal-versus-state dichotomy. We are not entirely certain what line Justice Breyer drew.

Ultimately, three precedents from the Roberts Court—*Free Enterprise Fund*, the *PROMESA* case, and *Seila Law*—partially confirm that our position is correct. And our position has deep roots in federal case law. For

191. *See generally* Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

192. *Id.* at 1654 (emphasis added).

193. *Id.* at 1656 ("But, like the Court of Appeals, we believe the *Appointments Clause restricts the appointment of all officers of the United States*, including those who carry out their powers and duties in or in relation to Puerto Rico." (emphasis added)); *id.* at 1657 ("That text [of the Appointments Clause] firmly indicates that it *applies to the appointment of all 'Officers of the United States.'* And history confirms this reading." (emphasis added)); *id.* at 1658 ("Given the Constitution's structure, this history, roughly analogous case law, and the absence of any conflicting authority, we conclude that *the Appointments Clause constrains the appointments power as to all 'Officers of the United States,'* even when those officers exercise power in or related to Puerto Rico." (emphasis added)).

194. *Id*. at 1658.

195. *Id.*

196. *Id.* at 1661.

example, in 1888, Justice Miller reached a similar conclusion with respect to a statute that used the phrase "officers of the United States."[197] He wrote,

> Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, an *officer of the United States*.[198]

Longstanding Supreme Court precedent suggests that all "Officers of the United States" are appointed, not elected.[199] We are unaware that any of these cases have ever been criticized for supporting this view: i.e., that "Officers of the United States" are appointed and not elected.

In short, all "Officers of the United States," including both principal officers and inferior officers, are always appointed. This view, which the courts have regularly supported, may seem obvious and uncontroversial. But other scholars maintain that the President and the Vice President are *elected* "Officers of the United States." The position that elected federal officials are "Officers of the United States" is not new. Indeed, this alternate perspective, which we disagree with, has been articulated by some people since the framing. We will discuss this alternate perspective in the context of the Impeachment Clause.

III. THE IMPEACHMENT CLAUSE ALLOWS CONGRESS TO IMPEACH "OFFICERS OF THE UNITED STATES" (THAT IS, APPOINTED POSITIONS IN THE EXECUTIVE AND JUDICIAL BRANCHES) BUT NOT ELECTED POSITIONS OR APPOINTED POSITIONS IN THE LEGISLATIVE BRANCH

The Impeachment Clause provides that "[1] The President, [2] Vice President and [3] *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."[200] Without question, the first two positions—the President and the Vice President—can be impeached. Who falls into the third category? In our view, the phrase "Officers of the United States" has the same meaning in the Impeachment Clause as in the

197. *See generally* United States v. Mouat, 124 U.S. 303 (1888).

198. *Id.* at 307 (emphasis added).

199. *See* United States v. Smith, 124 U.S. 525, 532 (1888) ("An officer of the United States can only be appointed by the [P]resident, by and with the advice and consent of the [S]enate, or by a court of law or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the [C]onstitution . . . . What we have here said is but a repetition of what was there authoritatively declared." (citations omitted)).

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

Appointments Clause: appointed positions in the Executive and Judicial branches.

From the text of the Impeachment Clause, we conclude that the President and Vice President are not "civil Officers of the United States." The text of the Impeachment Clause, however, does not squarely foreclose the possibility that members of Congress are "civil Officers of the United States." In this section, we contend that elected federal officials, including members of Congress, are not "civil Officers of the United States" as that phrase is used in the Constitution of 1788. Thus, we argue that members of Congress are not subject to impeachment. This position is consistent with the Impeachment Clause's drafting history and practice in the Early Republic.

Our analysis begins with the text of the Impeachment Clause. Next, this section will consider the views of George Mason and Edmund Randolph at the Virginia Ratifying Convention, as well as the response from James Monroe in a Ratification-Era pamphlet. This section will also discuss the impeachment proceedings of Senator William Blount. Finally, this section will turn to a recent Supreme Court case that indirectly addressed the scope of the Impeachment Clause.

A. The Text of the Impeachment Clause

The Impeachment Clause has five elements: "[1] The President, Vice President and all civil Officers of the United States, [2] shall be removed from [3] Office [4] on Impeachment for, and Conviction of, [5] Treason, Bribery, or other high Crimes and Misdemeanors."[201] Let us consider the elements in reverse order.

The fifth element defines the types of offenses for which a person can be impeached and convicted: "Treason, Bribery, or other high Crimes and Misdemeanors." The fourth element refers to the two-step impeachment process: "The House of Representatives . . . shall have the sole Power of Impeachment[,]"[202] and "[t]he Senate shall have the sole Power to try all Impeachments."[203]

"Office," the third element, appears in the Impeachment Clause alone and without modifiers: "removed from *Office*." We think this usage of "Office" refers not only to "all civil Officers of the United States" but also refers back to "[t]he President" and the "Vice President." In other words, "Office," as used in the Impeachment Clause, refers to two categories of positions: the *elected* President and Vice President, as well as the *appointed* "Officers of the United States" in the Executive and Judicial Branches. The

201. *Id.*
202. *Id.* art. I, § 2, cl. 5.
203. *Id.* art. I, § 3, cl. 6.

word "Office," standing alone and without modifiers, has a sufficiently-wide scope to include both the expressly enumerated elected apex federal positions and appointed civilian federal positions.

We think the same interpretation applies to the word "Officer," standing alone and unmodified, in the Presidential Succession Clause. It provides, "the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such *Officer* shall act accordingly, until the Disability be removed, or a President shall be elected."[204] As used in the Succession Clause, the phrase "Officer" can refer to both elected apex federal positions and appointed federal positions. For that reason, the Speaker of the House may be placed in the statutory line of succession of the Presidency.[205] The word "Office," standing alone and unmodified, also appears in the Impeachment Disqualification Clause: "Judgment in Cases of Impeachment shall not extend further than to removal from *Office*, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States[.]"[206] We think the word "Office," standing alone and unmodified, in the Impeachment Disqualification Clause also refers to both elected apex federal positions and appointed federal positions.[207] The word "Office" in the Impeachment Disqualification Clause refers to those elected and appointed positions otherwise subject to impeachment: the President, Vice President, and "civil Officers of the United States."

The second element of the Impeachment Clause spells out the consequences for a president, a vice president, or a civil officer of the United States who is impeached and convicted: he "shall be removed from Office." Under this interpretation, if the defendant is still in his position when convicted by the Senate, then he *must* be removed. (It is impossible to remove a person from an office that he no longer holds.)

We acknowledge that there is, and has been, a long-standing, alternate, minority view—the Impeachment Clause only requires the remedy of removal for the three expressly-listed classes of positions: "[1] The President, [2] Vice President and [3] all civil Officers of the United States."[208] In other

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204. *Id.* art. II, § 1, cl. 6.

205. *See* Tillman & Blackman, *supra* note 2, at 417–24 (discussing the word "Officer" in the Succession Clause).

206. U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

207. We will study the Impeachment Disqualification Clause in more detail in Part V of this series.

208. *See* Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 66 & n.49, 98 & n.207 (1999); *see also* TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 436 (Boston, Little, Brown, & Co. 3d ed. rev. 1872) ("The general power of impeachment and trial may extend to others besides civil

words, beyond the three enumerated classes of positions, there are other categories of positions that can be impeached. These impeachable positions could include: (i) current federal officials and officers beyond the three enumerated classes; (ii) former federal officials and officers beyond the three enumerated classes; (iii) state officers; and (iv) even private persons who never held any federal position.

Under the minority view, if a person in these other categories is impeached and convicted, removal is not mandatory. Specifically, for those positions that are not expressly listed by the clause's language, the Senate has two options if a defendant is convicted: first, the Senate may remove that official if the official holds an office at the time of conviction; second, the Senate may impose a lesser punishment, such as discipline, suspension, censure, or even no punishment. For example, under this minority view, if a member of Congress were impeached and convicted, the Senate may impose removal as a punishment, but it need not do so. We think this minority view is not correct; rather, we adhere to the standard view: the Impeachment Clause should be read jurisdictionally. The provision limits the scope of impeachment to the three listed classes of positions. In any event, our discussion of the scope of the Impeachment Clause's "Office"-language is unaffected by the debate over the jurisdictional scope of the clause's language.

Again, the first element is jurisdictional—the scope of the clause extends impeachment to the President and the Vice President. Those positions are enumerated. The Impeachment Clause also extends impeachment to "all civil Officers of the United States."

We draw one more inference from the text of the Impeachment Clause. The language shifts from "Officers of the United States" to "Office," standing alone and without modifiers.

We repeat the clause in its entirety:

> 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.[209]

This shift in "Office"-language is not explained. The clause does not provide "all Civil Offices shall be removed from the Civil Office that they hold." Nor does the clause say, "all Civil Officers of the United States shall be removed from Civil Offices of the United States that they hold." It certainly does not provide, "The President, Vice President and *all other*

officers, as military or naval officers, or even persons not in office, and to other offences than those expressly requiring a judgment of removal from office . . . .").

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

Officers, shall be removed from the civil *Offices of the United States which they hold*." We think this shift in language is meaningful: there is a reason why the language changes. (Likewise, the Impeachment Disqualification Clause uses a similar linguistic shift with its "Office"-language.) The Impeachment Clause reaffirms our conclusion that "Officers of the United" is not synonymous with "Office"—the two categories used in the text of this clause. The framers used these phrases to refer to different and distinct categories of positions. Simply put, the word "Office" is broad. This word encompasses the expressly enumerated elected apex federal positions, such as the President and the Vice President, which are expressly referenced in the Impeachment Clause. The word "Office" also encompasses "civil Officers of the United States." The latter language, which appears in the Impeachment Clause, includes appointed civilian federal positions.

Akhil Reed Amar and Vikram David Amar took a different position. They concluded that the word "Officer," as used in "the Succession Clause, is merely shorthand for any of the[] . . . longer formulations" of the Constitution's "Office"- and "Officer"-language, such as "Officers of the United States" and "Office . . . under the United States."[210] The Amars' position is in tension with the text of the Impeachment Clause, as read in conjunction with the Succession Clause. This latter provision uses "Officer," standing alone and without modifiers. The unmodified words "Office" and "Officer" are not coextensive, much less shorthand for "Officers of the United States" and "Office . . . under the United States." Textually, these unmodified phrases refer to a *broader* category of positions that can include elected and appointed federal positions.

B. The President and Vice President Are Not "Civil Officers of the United States" for Purposes of the Impeachment Clause

Our position is that the President and Vice President are not "Officers of the United States." The text of the Impeachment Clause provides further support for our view. If the President were an "Officer[] of the United States," there would have been no need to enumerate that position separately. It would have been sufficient to simply write that "all civil Officers of the United States" can be impeached. But the framers specifically enumerated the President and Vice President. That precise text should be given meaning. We should avoid any reading of the Impeachment Clause that renders the enumeration of the President as surplusage.[211] This same reasoning applies to the Impeachment Clause's enumeration of the vice presidency.

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210. Amar & Amar, *supra* note 44, at 115.

211. *See* Section I.A.1 (discussing surplusage canon).

Our textualist argument here is not novel. Justice Story advanced it two centuries ago.[212] Story explained in his *Commentaries on the Constitution* that if the President and Vice President were "Officers of the United States," then the framers should have written the Impeachment Clause differently: "The President, Vice President and all *other* civil Officers of the United States."[213] But the framers did not choose this construction. According to Story, the exclusion of the word *other* "lead[s] to the conclusion, that [the President and the Vice President] were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States."[214] The Latin maxim *Expressio unius est exclusio alterius* is apt: the expression of one thing is the exclusion of the other. Stated simply, the enumeration of the President and Vice President implies that they were not embraced in the term "Officers of the United States."

Story published his *Commentaries on the Constitution* in 1833. At the time, Madison's records of the federal convention had not yet been made public. These documents, which recorded the Constitution's drafting history, would be published in 1840, a few years after Madison's death.[215]

Today, we know what Story did not know in 1833. According to Madison's records and other records from the Convention, Story's inference is well supported by the Constitution's drafting history. We now know that early drafts of the Impeachment Clause included the word "other" at precisely this location, but that word was removed by the Committee of Style.[216]

The Impeachment Clause also limits what types of "Officers of the United States" can be impeached. Not all "Officers of the United States" are subject to impeachment. Rather, the provision refers to "all *civil* Officers of the United States."[217] The limitation to "civil" officers reflects the fact that military officers cannot be impeached; instead, they are subject to court martial. Again, Justice Story explained in his *Commentaries on the Constitution* that the phrase "*civil* Officers" in the Constitution "seems to be in contradistinction to military."[218] Both the President and Vice President are

212. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791, at 260 (Boston, Hilliard, Gray, & Co. 1833).

213. *Id.*

214. *Id.*

215. *See* 1 FARRAND'S RECORDS, *supra* note 21, at xv.

216. *See supra* Section I.A.3.c (discussing drafting history of the Impeachment Clause).

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

218. 2 STORY, *supra* note 212, at 258 ("The sense, in which the term [civil] is used in the constitution, seems to be in contradistinction to *military*, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government.").

civil officers.[219] Even as Commander in Chief, the President is still a civilian official with control over the military. And in no sense is the Vice President a military officer. Indeed, we are unaware of any early source that characterized the Vice President as a military officer.

There is a symmetry between the Appointments Clause and the Impeachment Clause. Officers of the United States appointed through the Appointments Clause can be impeached through the Impeachment Clause. But positions which are not filled through Article II, Section 2 procedures are not "Officers of the United States," and such officers cannot be impeached through the Impeachment Clause. The President and Vice President are not appointed at all; they are elected. As such, they are not "Officers of the United States." The President and Vice President can only be impeached *because* their positions are expressly enumerated in the Impeachment Clause. They cannot be impeached under the aegis of the Impeachment Clause's "Officers of the United States"-language.

C. Congressional Impeachment Practice During the Early Republic is Consistent with Our View That Members of Congress Are Not "Officers of the United States" and, Therefore, Are Not Subject to Impeachment

The Constitution provides a specific mechanism to expel members of Congress. The Rules of Proceedings Clause states, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, *with the Concurrence of two thirds, expel a Member*."[220] In the normal course of House business, the Rules of Proceedings Clause does not permit the House to discipline a Senator. Nor can the Senate, in the

219. *See id.* at 259–60 (noting, e.g., that the President, even as Commander in Chief, is still a civil officer). In the Early Republic, the Treasury prepared rolls of federal officials and officers with their compensation. The President was included in the "civil list" and not in the military list. *See e.g., Report on the Estimate of the Expenditure for the Civil List and the War Department to the End of the Present Year* (Sept. 19, 1789), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-05-02-0162-0001 [https://perma.cc/EY2C-867F].

220. U.S. CONST. art. I, § 5, cl. 2 (emphasis added). The text of the Constitution suggests that the House can expel a Representative if two-thirds of the members voting cast a vote for expulsion, provided that a quorum is present. And the Senate can vote to expel a Senator with the same two-thirds vote. Nonvoting members, such as those who indicate that they are "present," do not count in the "denominator." By contrast, pursuant to the Senate Trial Clause, "two thirds of the Members *present*" are required to convict; thus, members who indicate that they are present would count in the "denominator." In other words, conviction under the Senate Trial Clause requires a higher threshold than does expulsion under the Rules of Proceedings Clause. Under the Senate Trial Clause, nonvoting members, such as those who indicate that they are "present," *do* count in the denominator, thereby increasing the number of votes necessary to convict. By contrast, under the Rules of Proceedings Clause, nonvoting members *do not* count towards expulsion, nor do they affect the number of votes necessary to expel. Thus, it is easier to expel than to convict. In other words, all things being equal, the Senate will require more votes to convict than to expel.

normal course of business, discipline a Representative. Perhaps in an unusual circumstance, a member of one house could be sanctioned by the other house; for example, if a Representative entered the Senate chamber and violated Senate rules. Perhaps the most famous such incident occurred in 1856 when Representative Preston Brooks caned Senator Charles Sumner in the Senate chamber.[221] Following that infamous altercation, the Senate took no action against Brooks, and the expulsion vote in the House failed.[222] But such a breach of rules has been exceedingly rare. Generally, there is a separation of powers between the two houses. This separation reflects the principle of cameral autonomy—each house manages its own affairs and its own members.[223]

Since the Framing, a minority view has maintained that there is an alternate path by which members of Congress can be removed: impeachment and conviction. Under this view, Representatives and Senators are "civil Officers of the United States." And, under this view, the House, by a majority vote, could impeach a Representative or a Senator. Then, following this impeachment vote, the Senate would hold an impeachment trial, trying a member of its own house or the other house.

This section will consider two episodes in American history that bear on two related questions. First, is a member of Congress an "Officer[] of the United States"? Second, can a member of Congress be impeached? To answer these questions, we will study statements made by George Mason and Edmund Randolph during the Virginia Ratifying Convention. Next, we will revisit the impeachment proceedings for Senator William Blount—the first and only time a House majority impeached a member of Congress. On balance, the history of the Impeachment Clause and the history of early impeachment practice are consistent with our view: members of Congress are not "Officers of the United States," and members of Congress are not subject to impeachment.

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221. *See The Caning of Senator Charles Sumner,* U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [https://perma.cc/R5KX-H3SP].

222. *Roll Call Tally on the Expulsion of Preston Brooks*, U.S. HOUSE OF REP., https://history.house.gov/HouseRecord/Detail/15032449726 [https://perma.cc/4YAH-ZCFA] ("[T]he House did not achieve the two-thirds vote necessary to strip Brooks of his seat, with 121 Members voting to expel him and 95 voting against removal.").

223. *See* United States v. Munoz-Flores, 495 U.S. 385, 395 (1990) ("Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty."); *id*. at 394 ("What the Court has said of the allocation of powers among branches is no less true of such allocations within the Legislative Branch." (citing INS v. Chadha, 462 U.S. 919, 948–51 (1983))). Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 1001 (2007) ("[C]ameral autonomy is likewise a critical structural feature of our plan of government.").

1. George Mason, Edmund Randolph, and James Monroe's Positions During the Ratification Era

In 1787, George Mason and Edmund Randolph both attended the Philadelphia Convention. But neither delegate signed the Constitution.[224] In 1788, both Mason and Randolph attended Virginia's state ratifying convention.[225] At the state convention, Randolph stated that Senators "may also be impeached. There are no better checks upon earth."[226] Mason noted that the House of Representatives should impeach a Senator who ratified a treaty because of "bribery and corruption."[227]

Neither Virginian expressly stated that members of Congress were "civil Officers of the United States." But we can reasonably infer they held this view. The two Virginians likely contended that the Constitution's "Office"- and "Officer"-language referred to appointed and elected positions, including Representatives and Senators, and by implication, to the President and the Vice President.[228]

The Virginians also contended that the President was subject to the Foreign Emoluments Clause. That provision extends to those who hold an "Office . . . under the United States." Mason worried that foreign governments could exert pressure on the American President. He said, "This very executive officer may, by consent of Congress, receive a stated pension from European potentates."[229] In other words, Mason understood that the President was subject to the Foreign Emoluments Clause because the presidency was an "Office . . . under the United States." Randolph expressed a similar view. He added that the President "is restrained from receiving any present or emolument whatever. It is impossible to guard better against corruption."[230] Like Mason, Randolph assumed that the President held an "Office . . . under the United States." Again, in their view, the Constitution's "Office"- and "Officer"-language referred to appointed and elected positions. (We will revisit the scope of the Foreign Emoluments Clause in Part V of this series.) Randolph and Mason were early proponents of what we describe as the Maximalist View.[231]

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224. Martin Kelly, *Constitutional Convention: The History and Delegates Who Attended,* THOUGHTCO. (Jan. 2, 2021), https://www.thoughtco.com/constitutional-convention-105426 [https://perma.cc/748C-PP2E].

225. *See* 3 ELLIOT'S DEBATES, *supra* note 65, at 402.

226. *Id.* at 202.

227. *Id.* at 402.

228. *See id.* at 486 (Mason and Randolph asserted that the President was subject to the Foreign Emoluments Clause, from which one may infer that they believed the President held an "Office . . . under the United States").

229. *Id.* at 484.

230. *Id.* at 486.

231. *See* Tillman & Blackman, *supra* note 2, at 369–85 (discussing the Maximalist View).

The office-maximalist views of Mason and Randolph did not pass unnoticed. At the time, one prominent critic saw their view as inconsistent with the constitutional text. James Monroe objected in 1788. This ratifier and future president observed "that the Senators are not impeachable, and therefore Governor Randolph's objection falls to the ground."[232] Monroe concluded, "I am surprised that a man of that gentleman's abilities should have fallen into this mistake."[233]

Mason's and Randolph's views were not frivolous. But we do not think that Mason and Randolph exemplify the best view of the Constitution's original public meaning. In some regards, they were outliers. They both attended the Philadelphia Convention, but neither was willing to sign the Constitution. Mason said that "he would sooner chop off his right hand than put it to the Constitution as it now stands."[234] In particular, he objected to the "aristocratic" Senate.[235] Pauline Maier wrote that Mason was the "[o]nly . . . delegate [who] left the convention with a tarnished reputation[,]" as he "was said to have behaved with less good temper than [Patrick] Henry."[236] Randolph agreed with Mason and "thought the Senate was too powerful[.]"[237] Perhaps it is not surprising, then, that Mason and Randolph both thought Senators could be impeached. Mason ultimately voted against ratification at the Virginia convention; Randolph voted in favor of ratification.[238]

A decade later, Congress would consider whether a Senator could be impeached.

2. The Blount Impeachment Proceedings

In nearly 250 years of American history, only one member of Congress has been impeached. In 1797, the House of Representatives impeached Senator William Blount. During the Senate impeachment trial proceedings, one of Blount's attorneys argued that the phrase "Officers of the United States" did not encompass members of Congress. The attorney argued that Senators, who were not appointed pursuant to the Appointments Clause, could not be impeached.

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232. JAMES MONROE, *nom de plume* A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (Hunter & Prentis 1788), *in* 1 THE WRITINGS OF JAMES MONROE: 1778–1794, at 361 (Stanislaus Murray Hamilton ed., N.Y.C., G.P. Putnam's Sons 1898).

233. *Id.*

234. 5 ELLIOT'S DEBATES, *supra* note 65, at 502.

235. MAIER, *supra* note 82, at 43.

236. *Id.* at 311 (comparing Henry's and Mason's temperament). Patrick Henry was not at the Constitutional Convention, and Maier did not suggest otherwise.

237. *Id.* at 44.

238. DAVID L. PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 37–38 (1901).

After the lawyers concluded their opening speeches, the Senate, sitting as a court of impeachment, terminated the proceedings on a pure question of law. The Senate determined that "this Court ought not to hold jurisdiction."[239] And the Senate voted down a resolution stating that "Blount was a civil officer of the United States within the meaning of the Constitution of the United States, and therefore liable to be impeached by the House of Representatives[.]"[240] On balance, the Senate's vote—among all senators, framers, and ratifiers—was broadly consistent with our view that members of Congress are not "civil Officers of the United States."

a. The House of Representatives Impeached Senator Blount

In 1797, the House of Representatives impeached Senator William Blount of Tennessee.[241] Though this vote was held barely a decade after the Constitution was signed, only three Representatives in the Fifth Congress had attended the Philadelphia Convention: Abraham Baldwin of Georgia, Jonathan Dayton of New Jersey, and Richard Dobbs Spaight of North Carolina.[242] (Fifty-five delegates attended the Philadelphia convention, of whom only thirty-nine signed the Constitution.[243]) Dayton was the Speaker of the House, and the House selected Baldwin as an impeachment manager, but he was later excused.[244]

The House did not record a roll call vote on the final vote to impeach Blount. Buckner F. Melton, Jr. observed that "House votes by roll are so scarce as to make quantitative analysis of them meaningless."[245] Therefore, we do not know how each member actually voted on the resolution. It is reasonable to infer most of the Representatives concluded that Senators were "Officers of the United States." However, there may be another way to understand the proceedings.

The House did not vote on whether a senator was a "civil Officer[] of the United States." Indeed, the House's articles of impeachment did not refer to Blount as an "Officer[] of the United States." Instead, the articles of impeachment referred to Blount as a "senator" or one who holds a "trust and

239. *See* 8 ANNALS OF CONG. 2319 (1799) (adopting resolution on January 11, 1799).

240. *Id.* at 2318.

241. 7 ANNALS OF CONG. 459–62 (1797).

242. *See* CLIFFORD P. REYNOLDS, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774–1961, at 58–60 (U.S. Govt. Print Off. 1962).

243. *Meet the Framers of the Constitution*, NAT'L ARCHIVES (Mar. 16, 2020), https://www.archives.gov/founding-docs/founding-fathers [https://perma.cc/QYH6-ULK4].

244. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 651 (1907).

245. BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT, app. 3 (1999).

station."[246] We think this language indicates the House may have punted on the precise question of whether a Senator was an "Officer[] of the United States"—in effect, the House let the Senate determine the legal issues: the precise status of a Senator and the amenability of a Senator to impeachment. In 1864, Senator James Asheton Bayard Jr. of Delaware understood the articles of impeachment in the same fashion.[247] The House may have left the legal determination for the Senate to make. It is common enough for a prosecutor to bring a prosecution based on the facts, where the law is unsettled, and leave the legal determination for the courts and, perhaps, a jury. Here, the Senate was constituted as a High Court of Impeachment.

b. The Blount Proceedings Begin in the Senate

Adversarial Senate impeachment trial proceedings with counsel began in 1798.[248] One of Senator Blount's defense attorneys, Jared Ingersoll, argued that members of Congress are not "Officers of the United States" and also opined on the presidency. Our view is generally consistent with Ingersoll's view: the phrase "Officers of the United States" did not refer to elected officials.

First, Ingersoll endorsed the position that the President is not an "Officer[] of the United States." He remarked, "that the President, in the constitution, is always designated by the appropriate term of office, and never

246. 7 ANNALS OF CONG. 499–502 (1798). There is another possibility. Some House members voted in favor of Blount's impeachment because they adhered to the minority view: the House Impeachment Clause is not jurisdictional, but only provides for mandatory removal of defendants convicted by the Senate for those holding the expressly enumerated positions. Positions that are not enumerated could be impeached, but would not be subject to mandatory removal, and could receive some lesser sanction. Members of the House are not enumerated in the House Impeachment Clause. Thus, under the minority view, representatives would be subject to impeachment, regardless of whether they were "Officers of the United States." If this were the House members' position, then they need not have considered the issue raised here: Are members of Congress "Officers of the United States"? *See supra* note 208 (collecting authority).

247. CONG. GLOBE, 38th Cong., 1st Sess. 37 (1864) (statement of Sen. Bayard: "Each article, after alleging the act which was charged as a misdemeanor, concluded in this form—that it was contrary to the *trust and station of a Senator*. The House of Representatives did not venture in their articles of impeachment, formally drawn by so able a lawyer, to designate the position of a Senator as an office. Is that no authority? Is it not entitled to some weight? The articles were skillfully drawn, with technical accuracy and precision in the statement of the alleged misdemeanor, and every article concluded with the allegation that the act was contrary to the duties of *his trust and station as a Senator of the United States*." (emphasis added)). We will revisit Bayard's arguments with respect to the phrase "office . . . under the United States" in more detail in Part IV of this series.

248. *Impeachment Trial of Senator William Blount, 1799*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-blount.htm [https://perma.cc/TY7Z-S8NS].

included under the expression of officer of the United States, or any generic term."[249]

Second, Ingersoll contended the phrase "Officers of the United States" is different from the phrase "Office . . . under the United States." He explained, "[t]he expression [in the Appointments Clause] is not, that the President shall appoint all officers holding *under* the United States, but all officers *of* the United States."[250] Ingersoll did not view "Officers *of* the United States" and "Office *under* the United States" as synonymous.

Finally, Ingersoll stated the phrase "civil Officers of the United States" in the Impeachment Clause referred to the *same* "Officers of the United States" referenced in the Appointments Clause. He noted, "Three characteristics distinguish the objects of impeachment"[251]—that is, the "civil Officers of the United States." Ingersoll excluded from those "objects of impeachment" the "President and Vice-President, who are specially designated, instead of being included under any general denomination."[252] First, the "objects of impeachment . . . are appointed by the President, with the advice of the Senate." That is, the same "Officers of the United States" who are appointed pursuant to the Appointments Clause are also the "civil Officers of the United States" who are subject to impeachment. Second, the "objects of impeachment," the "Officers of the United States," are "commissioned by the president." The Commissions Clause, which we will analyze in Section IV, provides the President "shall Commission all the *Officers of the United States*."[253] Under Ingersoll's reading of the constitutional text, only those appointed pursuant to the Appointments Clause receive commissions. It would seem to follow that Ingersoll understood the phrase "Officers of the United States" to have the same meaning in the Appointments Clause, the Impeachment Clause, and the Commissions Clause. Third, the "objects of impeachment," the "Officers of the United States," are "civil, in contradistinction to military officers." Justice Story reached similar conclusions in his *Commentaries on the Constitution*.[254] Story understood the *Blount* proceedings to support the conclusion that

249. PROCEEDINGS ON THE IMPEACHMENT OF WILLIAM BLOUNT, A SENATOR OF THE UNITED STATES FROM THE STATE OF TENNESSEE, FOR HIGH CRIMES AND MISDEMEANORS 70 (Philadelphia, Joseph Gales 1799).

250. *Id.* (emphases added).

251. *Id.*

252. *Id.*

253. U.S. CONST. art. II, § 3 (emphasis added).

254. *See supra* Section III.A (discussing Joseph Story's views and how the President holds a civil office).

members of Congress were not "civil officers" and were not subject to impeachment.[255]

Ingersoll's position, like Monroe's response to Randolph, provides a textual rejoinder to the office-maximalist view. More importantly, Monroe, Ingersoll, and Story put forward reasoned arguments showing how their reading flowed from the constitutional text. On the other hand, Mason and Randolph only offered a conclusion, with no analysis, voiced in a single, fast-moving ratification debate. Additionally, the House of Representatives did not expressly vote on whether a senator was an "Officer[] of the United States."

Ingersoll's arguments should carry some weight. Ingersoll was a delegate to the Continental Congress and attended the Philadelphia Convention.[256] After ratification, Ingersoll served in Congress and chaired the House Judiciary Committee.[257] Ingersoll later served as Pennsylvania Attorney General and U.S. Attorney for the Eastern District of Pennsylvania.[258] He also served as counsel in two landmark Supreme Court cases: *Chisholm v. Georgia*[259] and *Hylton v. United States*.[260] More importantly, in our view, Ingersoll finished his legal education at the Middle Temple in London.[261] He was likely familiar with British drafting conventions like "office under the Crown."[262] We are not surprised that Ingersoll distinguished between the phrase "Officers of the United States" and the phrase "Office . . . under the United States."

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255. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 578 (Melville M. Bigelow ed., Boston: Little, Brown, & Co. 5th ed. 1891) (1833).

256. *See Ingersoll, Jared*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://history.house.gov/People/Listing/I/INGERSOLL,-Jared-(I000018)/ [https://perma.cc/8GGZ-5J2P].

257. *Id.*

258. *Id.*

259. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) ("And now Ingersoll, and Dallas, presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause; but, in consequence of positive instructions, they declined taking any part in arguing the question.").

260. *See* Hylton v. United States, 3 U.S. (3 Dall.) 172 (1796) ("The cause was argued at this term, by Lee, the Attorney General of the United States, and Hamilton, the late Secretary of the Treasury, in support of the tax; and by . . . Ingersoll, the Attorney General of Pennsylvania, in opposition to it.").

261. Gordon Lloyd & Jeff Sammon, *The Educational Background of the Framers*, TEACHING AMERICAN HISTORY, https://teachingamericanhistory.org/resource/convention/delegates/education/ [https://perma.cc/UYV6-EEGU].

262. *See supra* Section I.C (discussing prominent framers who attended the four Inns of Court in London).

We do not put forward Ingersoll as a high authority. After all, he was a litigator defending a client. Rather, we discuss his statements to show that shortly after the founding, prominent attorneys in important proceedings made sophisticated arguments based on the Constitution's divergent "Office"- and "Officer"-language. We approach the phrase "Officers of the United States" the same way Ingersoll and others have approached this phrase. Our view is not a new one.

c. The Blount Proceedings Concludes in the Senate

Senate proceedings concluded in 1799. Sitting as a court of impeachment, the Senate terminated the proceedings on a pure question of law, finding that "this Court ought not to hold jurisdiction."[263] Prior to terminating the case, the Senate considered a resolution that addressed the precise question that the House declined to address: was "William Blount . . . a civil officer of the United States within the meaning of the Constitution of the United States, and therefore liable to be impeached by the House of Representatives[.]"[264] On January 10, 1799, the resolution was rejected by a vote of 11 to 14.[265] The *aye* votes were from Senators Nathaniel Chipman (VT), Franklin Davenport (NJ), Benjamin Goodhue (MA), Henry Latimer (DE), Samuel Livermore (NH), James Lloyd (MD), Elijah Paine (VT), James Ross (PA), Theodore Sedgwick (MA), Richard Stockton (NJ), and Uriah Tracy (CT).[266] The *no* votes were from Senators Joseph Anderson (TN), William Bingham (PA), Timothy Bloodworth (NC), John Brown (KY), Theodore Foster (RI), Ray Greene (RI), James Gunn (GA), James Hillhouse (CT), John Eager Howard (MD), John Langdon (NH), Humphrey Marshall (KY), Alexander Martin (NC), Stevens T. Mason (VA), and Jacob Read (SC).[267]

Two of those twenty-five Senators had attended the Philadelphia Convention: John Langdon of New Hampshire[268] and Alexander Martin of North Carolina.[269] Both framers voted *no*. Senator William Blount also had attended the Philadelphia Convention as a delegate from North Carolina and presumably would have opposed the resolution had he voted.

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263. *See* 8 ANNALS OF CONG. 2319 (1799).
264. *Id.* at 2318–19 (adopting resolution on January 11, 1799).
265. *Id.* at 2318.
266. *Id.*
267. *Id.*
268. ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., SOLDIER-STATESMEN OF THE CONSTITUTION 100–02 (John W. Elsberg ed., 1987).
269. *Meet the Framers of the Constitution*, NAT'L ARCHIVES (Mar. 16, 2020), https://www.archives.gov/founding-docs/founding-fathers [https://perma.cc/T6X4-FKYU].

Six of those twenty-five Senators were members of their state's ratification conventions. Four of the six ratifiers voted against the resolution: Humphrey Marshall and Stevens T. Mason of Virginia,[270] Timothy Bloodworth of North Carolina,[271] and (once again) John Langdon of New Hampshire.[272] (Alexander Martin of North Carolina, who attended the federal convention, was not a member of his own state's convention.[273]) Two of the six ratifiers voted for the resolution: Samuel Livermore of New Hampshire[274] and Theodore Sedgwick of Massachusetts.[275]

To summarize, sitting as a court of impeachment, the Senate terminated the proceedings on a pure question of law, finding that "this Court ought not to hold jurisdiction."[276] A majority of the Senate voted against the resolution stating that a Senator was an "officer of the United States." The two attendees of the Philadelphia Convention in the Senate voted against the resolution. And among the six Senators who attended state ratification conventions, four voted against the resolution.

To this day, there remains an academic debate about whether Senators or Representatives can be impeached. There is also some debate about what precisely the *Blount* Senate impeachment trial proceedings resolved. We need not weigh in on those disputes. Today, the consensus view is that Representatives and Senators are not "civil Officers of the United States" and cannot be impeached precisely because the *Blount* case settled this issue. We cannot find even one court that has suggested otherwise or suggests that this issue might be or should be reopened. We think the current consensus view is correct as a matter of original public meaning. Moreover, arguably, this position has been liquidated. Since the *Blount* case (1797–1799), a House majority has not successfully impeached a member of the House or Senate.[277] Perhaps efforts in the other direction have been attempted, but we are not aware of any instances in which a member, post-*Blount*, launched even an

270. *See* VIRGINIA RATIFYING CONVENTION JOURNAL 1–2 (Aug. Davis ed., 1788).

271. *See* JOURNAL OF THE CONVENTION OF N.C., 1789, *reprinted in* 22 THE STATE RECORDS OF NORTH CAROLINA 36–38 (Walter Clark ed., 1907).

272. *See* RATIFICATION OF THE CONSTITUTION BY THE STATE OF NEW HAMPSHIRE, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1024–27 (1927).

273. *See* Jonathan Murray, *Alexander Martin (1740–1807)*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/alexander-martin-1740-1807/ [https://perma.cc/9SSL-HNQL].

274. 6 THE DIARIES OF GEORGE WASHINGTON, JANUARY 1790–DECEMBER 1799, at 2–4 (Donald Jackson & Dorothy Twohig eds., 1979).

275. *Representative Theodore Sedgwick*, FIRST FED. CONG. PROJECT, https://www2.gwu.edu/~ffcp/exhibit/p1/members/reps/sedgwick.html [https://perma.cc/N57Q-T6LE].

276. 8 ANNALS OF CONG. 2318–19 (1799) (adopting resolution on January 11, 1799).

277. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3, 5 (2019).

unsuccessful effort to impeach a Representative or Senator, and if that effort resulted in a recorded vote. The modern consensus view, based on more than two centuries of uninterrupted practice, is that members of Congress are not subject to impeachment.

Then, and now, reasonable people can disagree about who is an "Officer[] of the United States" for purposes of the Impeachment Clause.[278] But we need not resolve this robust and longstanding debate about the *Blount* case here. Instead, on balance, our view is broadly consistent with the Senate's vote—among all senators, framers, and ratifiers—that members of Congress are not "civil Officers of the United States."

D. The Supreme Court and the Impeachment Clause

The Supreme Court has not directly opined on the meaning of the phrase "Officers of the United States" in the Impeachment Clause. Still, the Supreme Court has indirectly addressed this issue. In 2020, the Supreme Court decided the *PROMESA* case concerning the Puerto Rico Oversight, Management, and Economic Stability Act.[279] This case held that certain territorial officers were not "Officers of the United States" and thus were not subject to the requirements of the Appointments Clause.[280] The Court interpreted the phrase "Officers of the United States" in the Appointments Clause in isolation. In other words, the Court *only* considered the meaning of the phrase "Officers of the United States" in the Appointments Clause.[281]

Justice Breyer wrote the majority opinion in the *PROMESA* case. He did not read the phrase "Officers of the United States," which appears in several clauses of the Constitution, *intratextually*. Akhil Reed Amar identified this methodology.[282] With intratextualism, Amar explained, "the interpreter [should] tr[y] to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same

278. *See* MELTON, JR., *supra* note 245, at 428 (arguing that *Blount* proceedings did not conclusively determine that members of Congress were not impeachable); *see also* Kat Eschner, *This 1797 Impeachment Has Never Been Fully Resolved,* SMITHSONIAN MAGAZINE (July 7, 2017), https://www.smithsonianmag.com/smart-news/1797-impeachment-has-never-been-fully-resolved-180963926/ [https://perma.cc/FX7E-RXZS].

279. *See generally* Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020); *see also supra* note 191 and accompanying text.

280. *See Fin. Oversight & Mgmt. Bd.*, 140 S. Ct. at 1665 ("We conclude, for the reasons stated, that the Constitution's Appointments Clause applies to the appointment of officers of the United States with powers and duties in and in relation to Puerto Rico, but that the congressionally mandated process for selecting members of the Financial Oversight and Management Board for Puerto Rico does not violate that Clause.").

281. *Cf. id*. at 1658 ("If they are not officers of the United States, but instead are some other type of officer, the Appointments Clause says nothing about them.").

282. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 747 (1999).

(or a very similar) word or phrase."[283] We agree with this general approach. We think intratextualism is consistent with original public methods originalism. Moreover, Amar illustrates that early Supreme Court decisions relied on this methodology. These practices support the conclusion that the Constitution's framers, ratifiers, and the wider public, would have likely expected the federal judiciary to use intratextualism.

The *PROMESA* Court did not consider how its decision would affect the interpretation or scope of other provisions of the Constitution that also use the phrase "officers of the United States."[284] We describe the Court's approach as the Clause Bound View.[285] Justice Breyer's majority opinion effectively narrowed the scope of the Impeachment Clause. That clause also applies to "Officers of the United States." As a result of the majority's analysis, certain presidentially-appointed territorial officers would not be considered "officers of the United States" and thus could not be impeached for bribery, treason, or any other high crime or misdemeanor.[286]

We suspect the members of the *PROMESA* Court did not recognize how their decision would limit the scope of the Impeachment Clause.[287] The Court did not consider other constitutional provisions. Therefore, it is unsurprising that the *PROMESA* Court put forward no analysis whether these territorial officers were subject to the Impeachment Clause. Indeed, the Court's holding is in tension with a 1796 Attorney General Opinion, which concluded that territorial judges could be impeached.[288] The Court failed to consider the full implications of its decision to distinguish so-called "territorial officers" from "Officers of the United States."

Had the Court considered the interplay between the Appointments Clause and the Impeachment Clause—that both clauses apply to "Officers of the United States"—the Court may have hesitated before concluding that certain territorial officers were not "Officers of the United States." The Court

283. *Id.* at 748.

284. *See* Josh Blackman & Seth Barrett Tillman, *The PROMESA Board Members Are Not "Officers of the United States." So What Are They?*, VOLOKH CONSPIRACY (June 10, 2020, 2:31 PM), https://reason.com/volokh/2020/06/10/the-promesa-board-members-are-not-officers-of-the-united-states-so-what-are-they/# [https://perma.cc/FRC6-AE3V].

285. *See* Tillman & Blackman, *supra* note 2, at 425–29 (discussing Clause Bound view).

286. *See* U.S. CONST. art. II, § 4 ("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." (emphasis added)).

287. *See* Josh Blackman & Seth Barrett Tillman, *Justice Breyer made it impossible for Congress to impeach territorial officers for accepting bribes*, BALKINIZATION (July 14, 2020), https://balkin.blogspot.com/2020/07/justice-breyer-made-it-impossible-for.html [https://perma.cc/UTL2-9VBY].

288. Letter from Charles Lee, Att'y Gen., to the U.S. House of Representatives (May 9, 1796), *in* 1 AM. STATE PAPERS: MISCELLANEOUS 151 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales and Seaton 1834).

brought about these results by using a clause-bound approach that ignored intratextual consequences. The Constitution's text has a Newtonian quality to it. Every action has an equal and opposite reaction. The Court should not focus on a single provision at a time.[289] In short, excluding an officer position from the scope of the Appointments Clause will, by implication, exclude that position from the scope of the Impeachment Clause.

IV. THE COMMISSIONS CLAUSE

Article II, Section 3 provides that the President "shall Commission all the *Officers of the United States*."[290] This provision imposes an obligation on the President: to issue a commission that memorializes the completed appointment. In our view, the phrase "Officers of the United States" in the Commissions Clause has the same meaning as the phrase "Officers of the United States" in the Appointments Clause and in the Impeachment Clause. The "Officers of the United States" appointed pursuant to the Appointments Clause are commissioned by the President pursuant to the Commissions Clause. And all of those "Officers of the United States" can be impeached pursuant to the Impeachment Clause. Over the course of nearly 250 years, presidents have consistently commissioned appointed positions in the Executive and Judicial Branches that the President has personally appointed. However, there is not a similarly consistent tradition of presidents' commissioning those inferior officers who are appointed by the heads of departments or the courts pursuant to the Inferior Officers Appointments Clause.

But there is no evidence that the President has ever commissioned any elected officials. The President has never commissioned himself—the incumbent President—or his successor. The President has never commissioned the Vice President with whom he was elected or that Vice President's successor. The President has never commissioned any members of Congress.

The text and history of the Commissions Clause support our view that the phrase "Officers of the United States" does not extend beyond the appointed positions in the Executive and Judicial Branches. Moreover, this text and history further support our view that the phrase "Officers of the United States" does not include any elected or appointed positions in the Legislative Branch.

289. *Id.*
290. U.S. CONST. art. II, § 3 (emphasis added).

A. The Text of the Commissions Clause Obligates the President to Grant Commissions to "All" Officers of the United States

The Constitution does not define what a "Commission" is. The term commission, as used in the Commissions Clause, is generally understood to mean some act taken by the President, or, perhaps, under his direction, that produces a written record or evidence of an appointment. *Black's Law Dictionary* offers a definition of "commission" that traces to the Fourteenth Century: "A warrant or authority, from the government or a court, that empowers the person named to execute official acts[.]"[291] *Marbury v. Madison* teaches that the President's obligation to commission "all the officers of the United States" does not require actual delivery of that document.[292] Rather, "[t]he last act to be done by the President," according to that canonical case at least, "is the signature of the commission."[293] Congress can, by law, specify a different "last act" to memorialize the completed appointment.[294] The term "Commission" is also used in the Recess Appointments Clause.[295] For a recess appointment, the commission is the appointment. For a "regular" appointment, the appointment precedes the commission. We will discuss the Recess Appointments Clause in more detail in Section VI.

The Commissions Clause does not appear in the same section of the Constitution as the Appointments Clause, Article II, Section 2, which establishes the mechanism to appoint "Officers of the United States."[296] Rather, the Commissions Clause appears in the following section, Article II, Section 3, which lists some of the President's other significant responsibilities, duties, and powers.[297] For example, the President "shall from time to time give to the Congress Information of the State of the Union."[298] We do not think the word "shall" in the Commissions Clause necessarily imposes a mandatory duty. In other words, this provision may not mandate that the President must commission every position that can be fairly

291. *Commission*, BLACK'S LAW DICTIONARY (11th ed. 2019).

292. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156–57 (1803).

293. *Id.* at 157.

294. *Id.* at 158 (stating Congress has the power to chart a "precise course accurately marked out by law," to complete the appointment); *see* Brief of the Mil. Officers Ass'n of Am. and the Flag & Gen. Officers' Network as Amici Curiae in Support of Petitioner at 3, Schwalier v. Carter, 576 U.S. 1035 (2015) (No. 14-1189) ("Congress can also establish the process that finalizes the appointment following confirmation.") [https://perma.cc/S4B3-9BET].

295. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting *Commissions* which shall expire at the End of their next Session." (emphasis added)).

296. *See id.* art. II, § 2.

297. *Id.* art. II, § 3.

298. *Id.*

characterized as an "Officer[] of the United States." Instead, the word "shall," as used in the Commissions Clause, may have a different meaning. Here the word "shall," as originally understood, may have simply described a course of action that the President was empowered to take in the future.[299] But at a minimum, the word "shall" in this provision suggests the President has an important responsibility: commissioning appointed officers.

Moreover, the framers added the Commissions Clause at the tail-end of this section, coupled with one of the most significant provisions of the Constitution, the Take Care Clause: "he shall take Care that the Laws be faithfully executed, *and* shall Commission all the Officers of the United States."[300] However you quantify the obligation of the Commissions Clause, its placement alongside the Take Care Clause suggests its importance.

Finally, "all" means "all." This straightforward language suggests that the President will grant Commissions to every Officer of the United States. We acknowledge that the Executive Branch has not strictly followed this practice. The Office of Legal Counsel concluded that not all Officers of the United States must receive a commission: "although the holder of an office usually receives a commission, that characteristic too, like an oath or pay, is incidental rather than essential."[301] We take no position on whether, as an original matter, an appointment of an "Officer[] of the United States" absent a commission is invalid. Under modern doctrine, what is the status of any acts or work performed by a commission-less "Officer of the United States," whose appointment is questioned merely because the officer lacks a commission? It would appear that the legal validity of such acts or work would be saved by the *de facto* officer doctrine. The Supreme Court has explained that the "*de facto* officer doctrine . . . confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment to office is deficient."[302] Rather, our work focuses on the meaning of the phrase "Officers of the United States" in the Commissions Clause.

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299. *See* Tillman & Tillman, *supra* note 115.

300. U.S. CONST. art. II, § 3 (emphasis added). Upon further reflection, Blackman now doubts his prior, mandatory reading of the Take Care Clause. *Cf.* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEX. REV. L. & POL. 215, 220–21 (2015) ("The [Take Care Clause of the] Constitution does not simply vest the President with powers concerning his own office, but imposes a *duty* on the President to [personally] *execute* the laws of Congress with those powers." (first emphasis added)).

301. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 122 (2007).

302. Nguyen v. United States, 539 U.S. 69, 77 (2003) (quoting Ryder v. United States, 515 U.S. 177, 180 (1995)); *see also In re* Griffin, 11 F. Cas 7, 27 (C.C.D. Va. 1869) (No. 5,815) (Chase, C.J.) ("This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they

B. The Commissions Clause Obligates the President to Commission "all the Officers of the United States," Which Are Appointed Positions in the Executive and Judicial Branches, but Not Positions in the Legislative Branch

Article II, Section 3 provides that the President "shall Commission all the *Officers of the United States*."[303] In our view, the phrase "Officers of the United States" in the Commissions Clause has the same meaning as the phrase "Officers of the United States" in the Appointments Clause and in the Impeachment Clause. The Appointments Clause defines the phrase "Officers of the United States." Only those positions appointed pursuant to Article II, Section 2 are "Officers of the United States" for purposes of the Commissions Clause. And this linkage makes sense. The Appointments Clause and the Commissions Clause are the bookends for the appointment process for "Officers of the United States." The Appointments Clause spells out the paths by which an "Officer[] of the United States" can be appointed. *Principal* "Officers of the United States" are appointed and subject to Senate advice and consent. *Inferior* "Officers of the United States," in some circumstances, may be appointed without the need for Senate advice and consent. And, to memorialize that the appointment process was completed, both types of "Officers of the United States" will receive a commission.

Of course, nothing would prevent the President from issuing a commission to someone who was not an "Officer[] of the United States." But those commissions would be issued without regard to the Commissions Clause. The Commissions Clause covers only those positions that are appointed pursuant to the Article II, Section 2.

If the phrase "Officers of the United States" referred to appointed *and* elected positions, then the President would be obligated to commission "all" appointed *and* elected positions. Indeed, if the President were an "Officer[] of the United States," then the President would have to commission himself and, arguably, his successor. The President would also be required to commission the Vice President and, arguably, his Vice President's successor. And the President would have to commission *all* members of Congress.

In our view, the President's duty under the Commissions Clause only extends to commissioning appointed positions in the Executive and Judicial Branches and, perhaps, only to the officers he has personally appointed.

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unanimously concur in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus."). For the modern-day relevance of *Griffin's* Case, see Josh Blackman & S.B. Tillman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html [https://perma.cc/8FG9-9DCG].

303. U.S. CONST. art. II, § 3 (emphasis added).

There is an unbroken tradition going back to the Washington Administration of the President's commissioning the "Officers of the United States" that he appoints. For example, on September 11, 1789, President Washington nominated Alexander Hamilton as Secretary of the Treasury.[304] That same day, the Senate confirmed Hamilton,[305] and Washington promptly issued a commission to Hamilton.[306] From the outset of the Republic, the commissioning process was diligently executed.

Of course, there is William Marbury, who was perhaps the most famous appointed officer that never received his commission. But Marbury's circumstances were very unique in light of the Election of 1800 and the change in presidential administrations. Finally, we do not doubt that a successor president or administration *could* commission a commission-less appointee from the immediately-prior administration. Secretary James Madison could have lawfully issued William Marbury's commission.

C. There is No Evidence the President Has Ever Commissioned a President, Vice President, or Any Members of Congress

Over the past two centuries, there is no evidence that the President has ever commissioned a President, Vice President, or any members of Congress. Saikrishna Prakash wrote that the President holds an "office under the United States."[307] A decade ago, he stated that Tillman's position to the contrary was "fanciful."[308] Prakash suggested that the President should commission himself and that such commissions may exist.[309] Prakash argued that the burden was on Tillman to show that no such commissions exist.[310] Long-

304. S. EXEC. JOURNAL, 1st Cong., 1st Sess. 25 (1789).

305. *Id.* ("H's appointment was approved by the Senate on the same day it was submitted by Washington.").

306. *Appointment as Secretary of the Treasury,* FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-26-02-0002-0147 [https://perma.cc/MS9G-JQZ4] ("Know Ye, that reposing special Trust and Confidence in the Patriotism, Integrity, and Abilities of Alexander Hamilton of the City of New York in the State of New York, Esquire, I have nominated, and by and with the Advice and Consent of the Senate, do appoint him Secretary of the Treasury of the said United States, and do authorize and empower him to execute and fulfil the Duties of that Office according to Law; and to have and to hold the said Office, with all the Powers, Privileges, and Emoluments to the same of Right appertaining, during the Pleasure of the President of the United States for the Time being.").

307. Prakash, *supra* note 109, at 43.

308. *Id.*

309. *See id.*

310. *Id.* ("Tillman further declares that Presidents have never commissioned either themselves or their corresponding Vice-Presidents. Unfortunately, he offers no evidence to support any of these propositions, but merely asserts them as fact. He neither cites any of Washington's contemporaries nor cites any historians who claim that Washington never commissioned himself. That no physical evidence of such a commission exists, however, certainly does not prove that the President never

standing congressional practice, however, established that the Commissions Clause "does not mean that [the President] is to commission Members of Congress . . . and he does not commission himself, nor does he commission the Vice-President[.]"[311] Prakash's position warrants reconsideration.

Steven Calabresi also considered the President an "Officer[] of the United States."[312] He acknowledged that there is no evidence that the President has commissioned either himself or a Vice President. Instead, Calabresi wrote, "Our practice of not commissioning Presidents and Vice Presidents is thus a function of the fact that, like Kings, they take office in a public ceremony with elements of a coronation, and there is a magic moment when the powers of office become invested in them which is when they take the oath of office."[313] He added, "There is simply no need for a signed commission to prove that Presidents and Vice Presidents have been invested with power while there is often such a need as to lesser officials."[314] Thus, Calabresi concluded, "Washington's failure to commission thus looks far more like an understandable oversight on his part than it does like a deliberate decision in favor of the highly implausible conclusion that Presidents and Vice Presidents are not officers of the United States."[315]

We have offered substantial evidence to support the conclusion that the President and Vice Presidents are not "officers of the United States." This conclusion is far from "implausible." The text of the Appointments Clause supports our position. Further, we have seen no evidence that Washington considered his inauguration akin to a regal coronation. We think Washington would have rejected any notion that his inauguration was a regal affair. George Washington was the President who would not be king.[316]

Moreover, John Adams began presiding over the Senate on April 21, 1789.[317] He would not take the oath of office until June 3. In other words, he presided over the Senate for nearly two months. And during that period, Adams authenticated Congress's first statute.[318] All of these acts were

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issued one. Indeed, if there were no evidence of a commission granted to the first Secretary of State, that would hardly establish that Washington never commissioned Thomas Jefferson. The same must be said about whether Washington commissioned himself and John Adams.").

311. *See* 1 HINDS, *supra* note 244, at 547; *see also* Case of Brigham H. Roberts, of Utah, H. REP. No. 56-85, pt. 1, at 36 (1900).

312. Seth B. Tillman & Steven G. Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. 134, 145 (2008).

313. *Id.*

314. *Id.*

315. *Id.*

316. *See generally* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2020).

317. *See* 1 ANNALS OF CONG. 22 (1789) (Joseph Gales ed., 1834).

318. *See id.*

performed *before* the "magic moment" of his taking the Article VI oath established by Congress.[319] During this time, Adams had not yet taken an Article VI oath. Under Calabresi's theory, before engaging in his official role, Adams would have first needed to have received a commission, in lieu of any public inauguration with its concomitant oath of office. But there is no evidence that President Washington ever commissioned Vice President Adams. And members of Congress take their oath in a moment far short of a regal coronation. Yet, President Washington never commissioned the members of the First Congress.

Finally, not a single president or vice president has commissioned himself in over two centuries. Nor has anyone lodged a complaint for their failure to be commissioned. Defending the position that the presidency is an "Officer[] of the United States" requires disregarding well-known history and speculating about alternative history.[320] Calabresi's argument, like Prakash's, warrants reconsideration. The far more likely conclusion is that the President is not an "Officer[] of the United States," as that phrase is used in the Constitution.

We acknowledge a potential weakness in our position. Article II distinguishes between "principal Officer[s]" and "inferior Officers." Under early practice, it appears that some inferior "Officers of the United States" who were not appointed by the President did not receive commissions.[321] Why did these positions not receive commissions? One possible rejoinder is that there was less urgency to ensure compliance for these lesser positions. If that view were true, we would still expect a stronger commitment to ensure compliance for important elected positions—especially for prominent individuals who are close at hand in the Capitol, such as members of Congress, the Vice President, and the President himself. It is also possible that something like the *de facto* officer doctrine could save the work performed by inferior officers who did not receive commissions.[322] We readily concede that our approach is not perfect. No theory is perfect. But our approach to the Commissions Clause provides a better fit in regard to history and early practice than those other approaches which maintain that the President is an "Officer[] of the United States."

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319. An Act to regulate the Time and Manner of administering certain oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

320. Tillman & Calabresi, *supra* note 312, at 152 (Tillman stating, "First Justice Story, now Washington and Adams. Exactly how much constitutional text and how many Founders will Professor Calabresi throw under the bus to accommodate his position? How is it that [Calabresi] is so *right*, and *they* are all so *wrong*?").

321. *See generally* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 158–60 (Maeva Marcus & James R. Perry eds., 1985) (describing the appointment of the first clerk of the Supreme Court).

322. *See supra* Section IV.A (discussing de facto officer doctrine).

V. THE OATH OR AFFIRMATION CLAUSE

The Oath or Affirmation Clause in Article VI provides, "The 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, shall be bound by Oath or Affirmation, to support this Constitution."[323] This Clause applies to four categories of positions: [1] "The Senators and Representatives;" [2] "Members of the several State Legislatures;" [3] "all executive and judicial Officers . . . of the United States;" and [4] "all executive and judicial Officers . . . of the several States."[324] The Oath or Affirmation Clause is the only provision in the Constitution in which some text appears between "Officers" and "of the United States"—the word "both."

These four categories of positions take an oath to support the Constitution. In *Federalist No. 27*, Hamilton explained that the Oath or Affirmation Clause performs an important unifying function: "the legislatures, courts, and magistrates, of the respective [state] members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and it will be rendered auxiliary to the enforcement of its laws."[325]

In our view, the phrase "Officers . . . of the United States" in the Oath or Affirmation Clause refers to the same "Officers of the United States" in the Appointments Clause, in the Impeachment Clause, and in the Commissions Clause. The text of the Oath or Affirmation Clause suggests that Senators and Representatives are not "Officers of the United States." The Oath or Affirmation Clause, read in conjunction with the Article II Presidential Oath Clause, suggests that the elected president is not an "Officer[] of the United States."

The analysis for the Vice President is more complex. The first federal statute indirectly established an oath for the Vice President, not in his capacity as Vice President, but in the Vice President's capacity as President of the Senate. This statute also created oaths for other positions. In light of this statute, we conclude that the Vice President is not an "Officer[] of the United States" for purposes of the Oath or Affirmation Clause.

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323. U.S. CONST. art. VI, cl. 3.

324. The federal constitution is agnostic about how state judicial and executive officers are chosen. A state governor may be elected or appointed under state law. But for purposes of the federal constitution, he is still an executive officer of the state, and is subject to the Oath or Affirmation Clause. *See* Tillman & Calabresi, *supra* note 312, at 143 (Calabresi explaining: that the Article VI Oath or Affirmation Clause extends to state governors).

325. THE FEDERALIST NO. 27, *supra* note 73, at 221–22 (emphasis omitted).

A. The Text of the Oath or Affirmation Clause Suggests That Senators and Representatives Are Not "Officers . . . of the United States"

The text of the Oath or Affirmation Clause separately lists "Senators and Representatives" and "Officers . . . of the United States." If Senators and Representatives were "Officers of the United States," there would be no need to enumerate them separately. If Senators and Representatives were "Officers of the United States," then the enumeration of "Senators and Representatives" would be superfluous. Once again, we should avoid readings of the Constitution that render the text of the Constitution as "mere surplusage."[326] In our view, Senators and Representatives are not "Officers of the United States." Our approach avoids that surplusage.

The text of the Oath or Affirmation Clause also suggests that the framers knew how to extend a constitutional provision to Senators and Representatives: by listing them expressly. By contrast, the Impeachment Clause does not expressly refer to Senators and Representatives. Had the framers sought to subject members of Congress to impeachment, Senators and Representatives would have been expressly enumerated. But members of Congress were not expressly enumerated in the Impeachment Clause. Likewise, the Commissions Clause does not expressly refer to Senators and Representatives. Had the framers sought to require or authorize the President to commission members of Congress, then Senators and Representatives would have been expressly enumerated. But members of Congress were not expressly enumerated in the Commissions Clause.

Moreover, the Oath or Affirmation Clause specifically refers to "executive and judicial . . . officers . . . of the United States." We think the *expressio unius est exclusio alterius* canon applies here as it does with the Impeachment Clause.[327] The expression of one thing is the exclusion of the other.[328] The fact that the framers expressly referred to executive and judicial positions suggests that they intended to exclude legislative positions. The framing of the Oath or Affirmation Clause strongly supports our conclusion that "officers of the United States" are positions in the Executive and Judicial Branches.

We acknowledge a contrary argument. The Oath or Affirmation Clause refers to "*executive and judicial* Officers . . . of the United States." If

326. *See supra* Section I.A.1 (discussing canon against surplusage).

327. *See supra* Section III.B (discussing the *expressio unius est exclusio Alterius* canon with respect to the Impeachment Clause).

328. *See id.*

"Officers of the United States" had to be "executive and judicial" positions, adding that descriptor would be redundant. This construction may suggest that there could also be "Officers of the United States" who are not properly characterized as executive or judicial.[329] In other words, if the only types of "Officers of the United States" were executive and judicial, there would be no need to clarify that this provision applied to executive and judicial "Officers of the United States." Under this view, "Senators and Representatives" might be considered *legislative* "Officers of the United States." Thus, the framers would have had to enumerate these two positions separately.

Although we generally find this sort of reasoning effective—and often invoke the canon against surplusage[330]—we disagree with its application here. Such a construction conflicts with the Appointments Clause, which defines the scope of the phrase "Officers of the United States." Senators and Representatives are not, in any sense, appointed pursuant to Article II, Section 2 procedures. To accept the conclusion that there are *legislative* "Officers of the United States," one would likely have to also conclude that the phrase "Officers of the United States" has a broader meaning in the Oath or Affirmation Clause than it does in the Appointments Clause. We find it very unlikely that the exact same phrase has distinct meanings in different clauses.

We think there is a likely reason why the framers included the express reference to "executive and judicial" in the Oath or Affirmation Clause. This addition was not designed to clarify who are federal "Officers of the United States." The Appointments Clause takes care of that function. Rather, the addition of "executive and judicial"-language helped to clarify who are the "Officers . . . of the several States." The Constitution's Appointments Clause defines the phrase "Officers of the United States" and, by implication, it excludes legislative positions from the category of "Officers of the United States." By contrast, there is no comparable text in the Constitution that defines the scope of "Officers . . . of the several states." The Oath or Affirmation Clause is the only place in the Constitution of 1788 that references the "Officers . . . of the several states." We know that this category includes executive and judicial positions because the Oath or Affirmation Clause expressly tells us so. Moreover, the Oath or Affirmation Clause also separately enumerates "Members of the several State Legislatures." Thus, the Constitution's "executive or judicial"-language in the Oath or Affirmation Clause gives that otherwise undefined expression (i.e., "Officers of . . . the

329. *See generally* David J. Shaw, Note, *An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserves*, 97 GEO. L.J. 1739 (2009).

330. *See supra* Section I.A.1 (discussing the canon against surplusage).

several states") a more concrete definition by bringing it into general alignment with its federal analog ("Officers of the United States").

Indeed, we think the language referencing state executive officers is arguably broad enough to include *elected and appointed* governors, even if "Officers of the United States" includes only appointed officers and not the elected President and Vice President.[331] The terms "officers . . . of the United States" and "officers . . . of the several states" need not be read to refer to the exact same types of positions. When the Constitution was drafted and ratified, the structure of state governments were varied. Some state officials were chosen by popular election and others were chosen by state legislative houses.[332] To reflect the different types of state governments, the more capacious phraseology in the Oath or Affirmation Clause would ensure a broader application of the constitutional oath. Rather than looking to specific state laws to define local governmental structure, the framers adopted loose federal constitutional language that would embrace many different types of state positions. Moreover, the language in the Oath or Affirmation Clause was forward-looking. This loose federal constitutional language would also accommodate future changes to state governmental structures.

The very first act of Congress supports this interpretation of the Oath or Affirmation Clause. This law, which we will discuss in Section V.C, established the oath for "members of the several State legislatures[] and all executive and judicial officers of the several States."[333] The statute covered these positions, which could be "chosen or appointed."[334] That is, elected or appointed.

We draw one more conclusion from the text of the Oath or Affirmation Clause: the framers knew how to extend a constitutional provision to positions in the states. Zephyr Teachout has suggested that the phrase "Office . . . under the United States," which is used in the Foreign Emoluments

331. Calabresi suggested that Tillman's theory could not account for state governors. Tillman & Calabresi, *supra* note 312, at 142–43 ("Thus when the Oath Clause of Article VI requires that all federal and state executive and judicial officers take oaths to uphold the Constitution the Clause is clearly referring to the President, the Vice President and to state governors as well as to all federal and state judges. There is no sense here that Presidents, Vice Presidents, or governors are trustees and not officers in the way the words are used.").

332. *See* WILLIAM LOUGHTON SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS OF THE SEVERAL STATES WITH EACH OTHER, AND WITH THAT OF THE UNITED STATES 9 (Philadelphia, John Thompson 1796); *see also* MARYLAND CONST. of 1776, art. XXV, available at *Constitution of Maryland–November 11, 1776*, THE AVALON PROJECT, https://avalon.law.yale.edu/17th_century/ma02.asp [https://perma.cc/AQD2-HS4V].

333. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 3, 1 Stat 23, 23–24 (1789).

334. *Id.*

Clause, may embrace positions in state governments.[335] We think this conclusion is unlikely. Instead, a clear statement rule ought to apply—the Constitution only extends to state positions when those positions are expressly described. This drafting convention was also used in Section 3 of the Fourteenth Amendment which, for example, expressly refers to state positions.[336]

B. The Article VI Oath or Affirmation Clause, Read in Conjunction with the Article II Presidential Oath Clause, Suggest That the Elected President Is Not an "Officer[] of the United States"

In our view, the better reading of the Oath or Affirmation Clause distinguishes members of Congress from "Officers of the United States." And the text strongly suggests that "Officers of the United States" are appointed to the "executive and judicial" Branches but not to the Legislative Branch. But does the Oath or Affirmation Clause, standing by itself, demonstrate that the elected President is not an "Officer[] of the United States"? Not directly, at least.

To answer this question, we turn to the Presidential Oath Clause. Article II provides a special oath that only the President takes: "Before he enter on the Execution of His *Office*, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the *Office of President of the United States*, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"[337] There is some overlap between the Presidential Oath Clause in Article II and the Oath or Affirmation Clause in Article VI—both provisions require taking an oath to support the Constitution. But we know of no historical evidence that the President has ever taken a separate oath pursuant to the Article VI Oath or Affirmation Clause, in addition to his presidential oath prescribed by Article II.

This unbroken practice—or perhaps nonpractice—that started with George Washington suggests the President is not an "Officer[] of the United States" per Article VI. This unbroken practice is also consistent with the

335. *See* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 33, 36–38 (2012).

336. U.S. CONST. amend. XIV, § 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, 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, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability." (emphases added)).

337. *Id.* art. II, § 1, cl. 8 (emphasis added).

President's not commissioning himself or his successor—such self-commissions would be required if the President were an "Officer[] of the United States."[338] Again, history supports our position that the President is not an "Officer[] of the United States."

C. The Article VI Oath or Affirmation Clause, Read in Conjunction with the First Federal Statute, Suggest That the Elected Vice President Is Not an "Officer[] of the United States"

The separate presidential oath in Article II provides further evidence that the President is not an "Officer . . . of the United States" for purposes of the Oath or Affirmation Clause. However, the analysis for the Vice President is more complicated. The text of Article VI, standing by itself, cannot rule out the possibility that the Vice President is an "Officer . . . of the United States." (We think the Appointments Clause, the Impeachment Clause, and the Commissions Clause textually foreclose the Vice President's characterization as an "Officer[] of the United States.") Rather, to assess the status of the Vice President, we consider the first statute enacted by Congress, which established oaths for different positions, but not for the President. This statute supports our position, though we acknowledge that there is some ambiguity.

1. The Oath for President Washington, Vice President Adams, and the First Congress

The United States Senate was supposed to assemble on March 4, 1789, but on that date, it lacked a quorum.[339] The Senate would finally achieve a quorum on April 6, 1789.[340] The House of Representatives was also supposed to convene on March 4, 1789.[341] The House would finally achieve a quorum on April 1, 1789.[342] But when both houses first established a quorum, the Representatives and Senators had not yet taken the Article VI oath of office. The text of that oath would be set by statute—and no statutes had yet been passed. On April 6, 1789, the House took one of its first official actions: "Ordered, That leave be given to bring in a bill to regulate the taking the oath or affirmation prescribed by the Sixth article of the Constitution."[343] Five

338. *See supra* Section II.C (noting that "Officers of the United States" can only be appointed).

339. S. JOURNAL, 1st Cong., 1st Sess. 5 (1789).

340. *Id.* at 7.

341. H.R. JOURNAL, 1st Cong., 1st Sess. (1789).

342. *Id.* at 6.

343. *Id.* at 7.

Representatives, including James Madison, were assigned to a committee to prepare the bill.[344]

However, the House would not wait for the statute to be enacted for Representatives to take an oath. Rather, the House simply established an oath for its own members.[345] We think the House could adopt this single-house resolution pursuant to the Rules of Proceedings Clause.[346] The House Journal reported:

> That the form of the oath to be taken by the members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: "I, A B a Representative of the United States in Congress thereof, do solemnly swear (or affirm as the case may be) in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me GOD."[347]

On April 8, "[t]he Chief Justice of the State of New York attended" the House Session "and administered the oath required by the Constitution" in the form proposed, "first to Mr. Speaker in his place, and then to the other Members of the House present."[348] In our view, at that point other positions in the House, such as the Clerk of the House, did not take an oath. On its face, the House resolution only applied to the members.

The Senate, however, chose a different path. It seems that "[t]he House of Representatives held a different view of its duty" than the Senate.[349] The members of the Senate, and Vice President Adams, would not take their oath of office until the oath statute was signed into law, nearly two months later. On April 6, 1789, when the Senate convened, Vice President Adams was not yet introduced to the Senate. Indeed, Adams did not formally participate in the April 6 joint session of Congress to count the electoral votes.[350] Rather, Senator John Langdon of New Hampshire was "elected [Senate President pro tempore] for the purpose of counting the [electors'] votes[.]"[351] And it was at that joint session that the electoral votes were counted, and Washington and Adams became President and Vice President.[352] Following the joint session,

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344. *Id.*

345. *Id.*

346. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

347. H.R. JOURNAL, 1st Cong., 1st Sess. 7 (1789).

348. *Id.* at 11.

349. LOUIS CLINTON HATCH, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES 12 n.1 (1970).

350. S. JOURNAL, 1st Cong., 1st Sess. 7 (1789); *see* U.S. CONST. art. II, § 1, cl. 3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.").

351. S. JOURNAL, 1st Cong., 1st Sess. 7–8 (1789).

352. *Id.* at 8.

Congress notified Washington and Adams that they had been chosen as President and Vice President.[353]

On April 20, 1789, two Senators were appointed to "a committee to wait on the Vice President, and conduct him to the Senate Chamber."[354] The next day, on April 21, 1789, Senator John Langdon, the Senate President Pro Tempore, met the Vice President on the floor of the Senate Chamber, addressing him as follows: "Sir: I have it in charge from the Senate, to introduce you to the chair of this House . . . ."[355]

However, according to the *Journal of the Senate*, Langdon did not issue Adams an oath of office on April 21, 1789.[356] Again, Langdon and the other Senators had not yet taken an oath at that point. Rather, the *Journal of the Senate* recounted that "Mr. Langdon conducted the Vice President to the chair, when the Vice President addressed the Senate."[357] Adams then gave a speech, and the Senate adjourned. We acknowledge some secondary sources state that Adams took a non-statutory oath of office on April 21, 1789.[358] We disagree with these sources because they are not consistent with the contemporaneous record from the *Journal of the Senate* and persuasive secondary sources.

Nine days later, on April 30, 1789, President George Washington took the oath of office pursuant to the Article II Presidential Oath Clause.[359] Still, at that point, Vice President Adams and the Senators had not yet taken any Article VI oath of office because no such oath existed.

The House of Representatives passed the oath bill on April 27, 1789.[360] On April 29, 1789, the Senate assigned the oaths bill to a committee of five,

353. *Id.* at 8–9.

354. *Id.* at 14.

355. *Id.*

356. *Id.*; *see* Stephen W. Stathis & Ronald C. Moe, *America's Other Inauguration*, 10 PRESIDENTIAL STUD. Q. 550, 551 (1980) ("Adams, however, like the distinguished Senators seated before him, would continue to transact business for several weeks before Congress framed a specific oath of office for Federal officers other than the President."); CALVIN TOWNSEND, ANALYSIS OF CIVIL GOVERNMENT 315 (New York, Am. Book Co. 1869) ("John Adams of Massachusetts entered on the duties of his office as Vice-President, and president of the Senate, April 21, 1789, but did not take the oath of office until June 3, 1789.").

357. S. JOURNAL, 1st Cong., 1st Sess. 14 (1789).

358. *Vice Presidential Inaugurations,* ARCHITECT OF THE CAP., https://www.aoc.gov/what-we-do/programs-ceremonies/inauguration/vice-president [https://perma.cc/8NF5-KKJ9] (stating that John Langdon, President pro tempore of the Senate, issued the oath of office to John Adams on April 21, 1789); Lindsay M. Chervinsky, *The Households of President John Adams,* THE WHITE HOUSE HIST. ASS'N (Jan. 3, 2020), https://www.whitehousehistory.org/the-households-of-john-adams [https://perma.cc/TN8D-FHMM] ("On April 21, 1789, John Adams took the oath of office to become the first Vice President of the United States.").

359. S. JOURNAL, 1st Cong., 1st Sess. 18 (1789).

360. H.R. JOURNAL, 1st Cong., 1st Sess. 18–21 (1789).

including Senator William Paterson of New Jersey, who would later serve on the Supreme Court.[361]

On May 2, Senator Strong, one of the committee members, "reported sundry amendments" would be made to the House Bill.[362] Two days later, on May 4, the Senate proposed amendments to the House bill.[363] For example, the bill clarified when and how the oaths should be taken by "the members of the several state legislatures, and all executive and judicial officers of the several states[.]"[364] On May 5, the Senate approved the bill with several proposed Senate amendments.[365] On May 6, the House proposed further amendments, which the Senate agreed to.[366] On May 19, a joint committee was formed to present the bill to the President.[367] On May 22, the "committee did . . . wait on the President, and present him with the said engrossed bill, for his approbation."[368] The First Congress took its responsibility under the Presentment Clause literally.[369]

On June 1, 1789, President Washington signed into law *An Act to regulate the Time and Manner of administering certain Oaths*.[370] Again, according to the *Journal of the Senate,* John Adams had not yet taken an Article VI oath as prescribed by statute when this law was enacted. On June 3, 1789, two days after the oaths statute was enacted, Vice President Adams took the Article VI oath.[371] The *Senate Journal* recounts, "Ordered. That Mr. Langdon administer the oath to the Vice President; which was done accordingly."[372] Next, "the Vice President administered the oath, according to law" to the Senators, including Langdon.[373] As the events played out, Langdon issued an oath to Adams before Langdon himself had taken an oath. After Adams issued the oath to the Senators, "[t]he same oath was, by the

361. S. JOURNAL, 1st Cong., 1st Sess. 18 (1789).
362. *Id.* at 21.
363. *Id.*
364. *Id.*
365. *Id.* at 22.
366. H.R. JOURNAL, 1st Cong., 1st Sess. 19 (1789) (indicating that the House amended the bill); S. JOURNAL, 1st Cong., 1st Sess. 28 (1789) (indicating that the Senate agreed to the House's amendments).
367. H.R. JOURNAL, 1st Cong., 1st Sess. 38 (1789).
368. *Id.* at 40.
369. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be *presented* to the President of the United States . . . ." (emphasis added)).
370. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789). We will parse this statute in *infra* Section V.C.2.
371. S. JOURNAL, 1st Cong., 1st Sess. 34 (1789); Stathis & Moe, *supra* note 356, at 551–52 ("Only after the passage of that legislation was the Vice President elect permitted to take his oath from President *pro tempore* Langdon within the three day period required by the new.").
372. S. JOURNAL, 1st Cong., 1st Sess. 34 (1789).
373. *Id.*

Vice President, administered to the Secretary [of the Senate], together with the oath of office."[374] That same day, the *House Journal* reported that the Senate relayed a message to the House, which the Speaker read aloud:

> The Senate are about to proceed to take the oath to support the Constitution of the United States, pursuant to the act, entitled "An act to regulate the time and manner of administering certain oaths," and request that the said act, to which the President of the United States has affixed his signature, may be sent to them for that purpose.[375]

Finally, by June 3, 1789—nearly three months after both Houses first assembled—the President, Vice President, Representatives, and Senators had all taken an oath of office. Yet, Representatives and Senators transacted business and voted on a bill before taking their Article VI oath. Likewise, as President of the Senate, John Adams authenticated the first statute before taking his Article VI oath.

In 1790, Congress determined that "the terms for which the President, Vice President, Senators, and Representatives . . . were respectively chosen, did, according to the [C]onstitution, commence on the 4th day of March, 1789 . . . ."[376] Congress would incorporate this finding into the Presidential Succession Act of 1792. Section 12 of that statute provided that "the term of four years for which a President and Vice President shall be elected shall in all cases commence on the fourth day of March."[377] We think this history shows that the constitutional terms for all these elected positions did not begin when those first holding these positions took their Article VI oath. Instead, their terms began prior to this time.

2. The Text of the First Oaths Statute

The *Act to regulate the Time and Manner of administering certain Oaths* has five sections. Section 1 provides, in part, that "the oath or affirmation required by the sixth article of the Constitution of the United States [the Oath or Affirmation Clause], shall be administered in the form following, to wit: 'I, A. B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.'"[378] This oath had to be "administered

374. *Id.*

375. H.R. JOURNAL, 1st Cong., 1st Sess. 44–45 (1789).

376. 1 ANNALS OF CONG. 1010–11 (1790) (Joseph Gales ed., 1834).

377. An Act relative to the Election of a President and Vice President of the United States, ch. 8, § 12, 1 Stat. 239, 241 (1792).

378. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789). This oath differed from the oath taken by the members of the House on April 8, 1789, which was made "in the presence of Almighty GOD." H.R. JOURNAL, 1st Cong., 1st Sess. 7 (1789).

within three days after the passing of this act."[379]And, indeed, Vice President Adams and the Senate took their oaths two days after Washington signed the bill. Section 1 further provided that this oath "shall be administered . . . to the President of the Senate, and by him to all the members and to the secretary [of the Senate]."[380] Thus, under the terms of the statute, Senate President Pro Tempore Langdon issued the oath to President of the Senate Adams, then Adams issued the oath to the Senators. The statute does not expressly mention the President. Nor do we think his position is referenced impliedly. We think the statute does not mention the President because Article VI reaches "Officers of the United States" and that category does not include the presidency. Moreover, there was no need to reference the President because he had his own oath in Article II. This statute also made no express mention of the Vice President; instead this statute refers to the Vice President strictly in his capacity as "President of the Senate."

Section 1 also provided that the same oath would be administered "by the Speaker of the House of Representatives, to all the members who have not taken a similar oath, by virtue of a particular resolution of the said House, and to the clerk [of the House]."[381] The statute referred to the House members who, on April 8, had already taken an oath pursuant to a single-house resolution.[382]

Section 2 of the statute provided that in subsequent Congresses, the oath would be administered to Representatives and Senators.[383] Section 3 stated that "members of the several State legislatures . . . and all executive and judicial officers of the several states" would take the same oath.[384] Section 4 required "all officers appointed, or hereafter to be appointed under the authority of the United States" to take the same oath.[385]

Finally, Section 5 created a second and separate oath of office for the "secretary of the Senate, and the clerk of the House of Representatives."[386] It provided, "I, A. B. secretary of the Senate, or clerk of the House of Representatives (as the case may be) of the United States of America, do

379. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

380. *Id.*

381. *Id.*

382. *See id.* ("particular resolution of the said House"); *see also supra* Section V.C.1 (discussing oath taken by Representatives).

383. *See* An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789); *see also* An Act to establish the Judicial Courts of the United States, ch. 20, § 17, 1 Stat. 73, 83 (1789) ("[A]ll the said courts of the United States . . . shall have the power to impose and administer all necessary oaths and affirmations.").

384. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23–24 (1789).

385. *Id.* at 24.

386. *Id.*

solemnly swear or affirm, that I will truly and faithfully discharge the duties of my said office, to the best of my knowledge and abilities."[387] Again, prior to the statute's enactment, on April 8, 1789, some members of the House had already taken an oath, but the clerk of the House had not taken an oath.[388]

3. The Constitutional Authority for the Oaths Statute with Respect to the Clerk of the House and the Secretary of the Senate

The Article VI Oath or Affirmation Clause enumerated the following positions: [1] Senators and Representatives, [2] Members of the State Legislatures, [3] "executive and judicial Officers . . . of the United States," and [4] "executive and judicial Officers . . . of the several States." We think this provision provides the constitutional authority for Congress to specify the oaths of these four categories of positions. But what about the Clerk of the House and the Secretary of the Senate? They are not expressly enumerated in Article VI. Nor are these positions "executive and judicial Officers" of any stripe—they are *legislative* officers.

Furthermore, the specialized Section 5 oath for "the secretary of the Senate, and the clerk of the House" departs from the text of the Oath of Affirmation Clause.[389] The Section 5 statutory oath makes no reference to supporting the Constitution; it only requires the clerk and secretary to "truly and faithfully discharge the duties of [their] said office, to the best of [their] knowledge and abilities." The Oath or Affirmation Clause in Article VI, standing by itself, does not grant Congress the power to impose an oath on the Clerk of the House and the Secretary of the Senate. Congress could not have relied solely on its Article VI powers to enact these provisions.

We think that the statutory oath for the Clerk of the House and the Secretary of the Senate was authorized by three provisions of the Constitution. First, the statute was authorized by the House Officers Clause, which provides that "[t]he House of Representatives shall chuse their Speaker and other Officers[.]"[390] The Clerk of the House is a House officer. Second, the statute was authorized by the Senate Officers Clause, which states, "The Senate shall chuse their other Officers[.]"[391] The Secretary of the Senate is a Senate officer. Third, the statute was authorized by the Rules of Proceedings Clause, which provides that "[e]ach House may determine the Rules of its Proceedings[.]"[392] These three provisions, working in tandem, allowed the

387. *Id.*
388. H.R. JOURNAL, 1st Cong., 1st Sess. 7 (1789).
389. *See* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995).
390. U.S. CONST. art. I, § 2, cl. 5.
391. *Id.* art. I, § 3, cl. 5.
392. *Id.* art. I, § 5., cl. 2.

House and Senate to establish the oaths for their own officers. This action could have been taken by single-house resolution, but it can also be accomplished through bicameralism and presentment.

4. The Constitutional Authority for the Oaths Statute with Respect to the Vice President

The Article VI Oath or Affirmation Clause does not expressly refer to the Vice President. When the First Congress met, there may have been some uncertainty about the scope of Congress's power to enact an oath for the Vice President.[393]

The Oath or Affirmation Clause provides Congress with the power to establish an Oath for "executive . . . Officers of the United States." If the Vice President is an "executive . . . Officer[] of the United States," then the Oath or Affirmation Clause provides a clear source of constitutional authority for the oath statute. But there are many problems with deeming the Vice President an "Officer[] of the United States."

In our view, the Vice President is not an "Officer[] of the United States" appointed pursuant to Article II, Section 2 procedures.[394] And the Impeachment Clause expressly lists the Vice President separate from the category of "civil Officers of the United States"—precisely because the Vice President is not an "Officer[] of the United States."[395] Finally, there is no evidence that the Vice President has ever received a commission under the Commissions Clause as an "Officer[] of the United States."[396] In our view, the *elected* Vice President is not an "Officer[] of the United States" in his capacity as Vice President or President of the Senate.

As President of the Senate, the Vice President could be considered a legislative officer. If so, then the Oath or Affirmation Clause would not provide a clear source of constitutional authority for the Oath Statute. The Vice President would be in a similar position as the Clerk of the House and the Secretary of the Senate. Specifically, the Vice President, like the Clerk and the Secretary, are not expressly covered by the Oath or Affirmation Clause. Furthermore, there is a is a long-standing academic debate about whether the Vice President is properly characterized as an executive branch

393. *See supra* Section V.C.1 (discussing the oath for Vice President Adams).

394. *See supra* Section II.C (finding that the Vice President is not appointed pursuant to the Appointments Clause).

395. *See supra* Section III.B (finding that the Vice President is not a "civil Officer[] of the United States" for purposes of the Impeachment Clause).

396. *See supra* Section IV.C (finding that the Vice President has never received a commission pursuant to the Commissions Clause).

officer, or a legislative branch officer, or both, or neither.[397] That debate is beyond the scope of this Article.

For Congress to establish an oath for the Vice President in his role as President of the Senate, the statute would have had to rely on some constitutional authority other than Article VI. Congress could not rely on the Senate Officers Clause because the Senate cannot "chuse" the Vice President as one of "their other Officers" pursuant to the Senate Officers Clause.[398] The House Officers Clause also has no bearing on the status of the Vice President.

Congress relied on non-Article VI authority to impose an oath on the clerk and secretary; that is, Congress relied on the Rules of Proceedings Clause. Likewise, we think Congress relied on that latter authority to impose an oath on the Vice President in his capacity as President of the Senate. That analysis accounts for the fact that the statute does not expressly refer to the Vice President but instead uses the phrase "President of the Senate." The Rules of Proceeding Clause provides the requisite authority to control how the Senate, and its presiding officer, conducts its business, not the vice presidency per se.

Longstanding history lends some support for this reading of the Oath or Affirmation Clause. Under senate practice before 1937, the vice-presidential oath was generally administered inside the Senate Chamber, usually by the highest-ranking Senate officer—either the outgoing Vice President or the Senate President pro tempore.[399] In 1789, the Senate President Pro Tempore issued the oath to Vice President Adams in the Senate chamber. After the newly-sworn Vice President took his oath, he delivered his inaugural address and called the Senate into an extraordinary session. At that time, the Senators took their Article VI oaths. Only then would the procession go outside for the President's swearing-in ceremony. The Vice President's oath had been an essential element of the commencement of the Senate's session until fairly modern times. These swearing-in practices are consistent with the first statute, which imposed an oath on the Vice President in his capacity as President of the Senate. In 1937, following the ratification of the Twentieth

397. *See* Tillman & Blackman, *supra* note 2, at 332 (discussing the Vice Presidents "two hats"); Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531, 547 (2009) ("[The] most compelling . . . instance of the fusion of personnel [across branches] in the American presidential system is embodied in the Vice Presidency."). Recently, a federal district court held that the Vice President, who presides over the Joint Session of Congress, is considered a Senator for purposes of the Speech or Debate Clause. https://www.politico.com/news/2023/03/28/judge-says-pence-must-testify-to-jan-6-grand-jury-00089222 [https://perma.cc/B5N9-SVES].

398. U.S. CONST. art. I, § 3, cl. 5.

399. *Vice President's Swearing-In Ceremony*, JOINT CONG. COMM. ON INAUGURAL CEREMONIES, https://www.inaugural.senate.gov/vice-presidents-swearing-in-ceremony/ [https://perma.cc/2XMB-UZD3].

Amendment, the Vice President began to take his oath outside the Capitol on the presidential inauguration platform.[400]

Still, we acknowledge that our answer here is not perfect. No theory is. And the Constitution had gaps—particularly regarding the Vice President. For example, the original Constitution did not expressly impose *any* qualifications on the Vice President. As ratified, the Constitution did not require the Vice President to be a natural-born citizen, a citizen of the United States, or even a resident of the United States.[401] The President had to be thirty-five years old, but the vice presidency did not have an express age requirement.[402] The omission of these qualifications was significant since the primary purpose of the Vice President was to succeed the President. The Twelfth Amendment filled this gap by imposing the same eligibility requirements on the Vice President as on the President.[403] As a general matter, the vice presidency, which was added to the Constitution fairly late in the Convention, was ill-defined. Vice President Adams famously derided his position in a letter to his wife Abigail: "my Country has in its Wisdom contrived for me, the most insignificant Office that ever the Invention of Man contrived or his Imagination conceived."[404] Ultimately, it is not entirely unreasonable to think that the framers simply forgot to account for the Vice President in the Oath or Affirmation Clause.

D. The Article VI Oath or Affirmation Clause Does Not Expressly Extend to "Office[s] . . . under the United States" and "Office[s] under the Authority of the United States"

The Oath or Affirmation Clause extends to "Officers of the United States." But this provision does not expressly extend to two broader

400. *Id.*

401. *Cf.* U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

402. *Id.*

403. *See* U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."). *See generally* BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 133–57 (2012) (discussing competing views regarding vice presidential qualifications); Bruce G. Peabody & Scott E. Gant, *The Twice and Future President*, 83 MINN. L. REV. 565, 620 (1999) (discussing limited scope of vice presidential eligibility requirements).

404. *John Adams to Abigail Adams, 19 December 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/04-09-02-0278 [https://perma.cc/9S6J-3DJ6]; *see* Lin-Manuel Miranda, *Take A Break*, *Hamilton An American Musical*, GENIUS (Sept. 25, 2015), https://genius.com/Phillipa-soo-anthony-ramos-lin-manuel-miranda-and-renee-elise-goldsberry-take-a-break-lyrics [https://perma.cc/DHV3-HTDZ] ("Eliza: Angelica, tell this man John Adams spends the summer with his family. Hamilton: Angelica, tell my wife John Adams doesn't have a real job anyway.").

categories of positions: "Office[s] . . . under the United States" and "Office[s] . . . under the Authority of the United States." In our view, these two latter categories are broader than the "Officers of the United States" category. In our view, the phrase "Office . . . under the United States" refers to appointed positions in all three branches of the federal government but not to any elected federal positions.[405] As relevant here, the Secretary of the Senate and the Clerk of the House hold "Office[s] . . . under the United States" but are not "Officer[s] of the United States."[406] We think this "Office . . . under the United States" category is not expressly covered by the Article VI Oath or Affirmation Clause.

Similarly, the Oath or Affirmation Clause also does not expressly extend to those who hold an "Office . . . under the Authority of the United States." In our view, this phrase includes all "Office[s] . . . under the United States" and extends further to include a broader category of officers. For example, the category of "Office . . . under the Authority of the United States" would include holdover officers from the outgoing Articles of Confederation government.[407] This category would also include privateers holding letters of marque and reprisal authorized by statute. Section 4 of the Oath Statute required "all officers appointed, or hereafter to be appointed *under the authority of the United States*" to take the same oath as the previously enumerated positions. In short, the relatively wide and varied "Office"-language of the Oaths Act can be distinguished from the narrower and more specific "Officer"-language in Article VI's Oath or Affirmation Clause.

Why did the drafters of the Oaths Act not use the same language that the Framers of the Oath or Affirmation Clause used? We cannot know for certain. But we do know that text of the Oath or Affirmation Clause did not limit the positions that a future oaths act could apply to. The Oath or Affirmation Clause mandated a constitutional oath for the listed positions. Article VI did not preclude Congress from mandating oaths for *other* positions created by statute or by single-house resolution. Accordingly, the drafters of the Oaths Act had a valid reason to extend the statutory oath to a broader category of positions. Specifically, there are some statutory offices that would not fall under the aegis of the Oath or Affirmation Clause: appointed positions that are not "Officers of the United States." For these appointed positions, Congress was under no obligation to mandate a constitutional oath. But, through the Oaths Act, Congress *chose* to establish an oath for these positions.

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405. *See* Tillman & Blackman, *supra* note 2, at 392–93 (discussing the phrase "Office . . . under the United States").

406. *See id.* at 332–37 (discussing appointed positions in the legislative branch).

407. *See id.* at 394–95 (discussing the phrase "office under the Authority of the United States").

Stated differently, Congress has the power to create and define appointed federal offices by statute.[408] And incidental to that power to create offices, Congress could establish an oath for those positions.[409] By contrast, for statutory positions that do fall under the aegis of the Oath or Affirmation Clause, Congress was *required* to impose a statutory oath or affirmation. After all, the Constitution specified that those positions were required to take a constitutional oath.

The analysis above can help account for the textual distinctions between Article VI's Oath or Affirmation Clause and the first federal statute. The former provision uses limited "Officers of the United States"-language" and the latter provision uses more expansive "Office . . . under the Authority of the United States"-language. And this distinction reflects the fact that Congress could establish oaths for a larger number of positions that are not under the aegis of the Oath or Affirmation Clause.

VI. THE RECESS APPOINTMENTS CLAUSE

The Recess Appointments Clause provides, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[410] It is unclear from the text of the Constitution whether recess appointees are "Officers of the United States." We are not entirely sure. The clause's text does not expressly refer to an "Office" or "Officer" of any type.

Our analysis starts with Supreme Court precedent. In *NLRB v. Noel Canning*, the Supreme Court suggested that recess appointees are "Officers

408. During the Constitutional Convention, James Madison proposed an amendment to what would become the Necessary and Proper Clause. Under Madison's proposal, Congress would have the express power to "establish all offices." Madison suggested that it appears "liable to cavil" that this power was not already included in the Constitution. Gouverneur Morris, James Wilson, and others disagreed. They "urged that the amendment could not be necessary." Madison's motion failed by a 9-to-2 vote. 2 FARRAND'S RECORDS, *supra* note 21, at 345. The Constitution of 1788 established the presidency and the Congress. Moreover, the first President would elected without any action by the Congress created by the Constitution of 1788. If "all offices" were to be created by Congress under Madison's proposal, and the President was created by the Constitution, then the presidency could not be an "office." We draw an inference from Madison's statement: he did not think that the phrase "all offices" referred to the presidency. *See also supra* note 172 (making a similar point about Rutledge's use of "officer"-language at the Federal Convention).

409. *See* HENRY B. HOGUE, CONG. RESEARCH SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 3 (2015) (explaining that the "power of Congress to specify qualifications for a particular office is generally understood to be incident to its constitutional authority to establish the office"), https://crsreports.congress.gov/product/pdf/RL/RL33886/12 [https://perma.cc/N9ZP-FPNT]; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819) (explaining "[y]et he would be charged with insanity who should contend that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest").

410. U.S. CONST. art. II, § 2, cl. 3.

of the United States." But in *Lucia v. SEC*, the Supreme Court suggested that recess appointees cannot be "Officers of the United States." These precedents are difficult to reconcile. Next, we consider the relationship between, on the one hand, the Recess Appointments Clause and, on the other hand, the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause. To assess these related provisions, we use a methodology we describe as *interclausalism*.

A. The Supreme Court and the Recess Appointments Clause

In *NLRB v. Noel Canning*, the Supreme Court endorsed the view that recess appointees are "Officers of the United States."[411] This case considered whether President Obama's selections for the National Labor Relations Board were validly appointed pursuant to the Recess Appointments Clause.[412] Specifically, the case turned on whether the circumstances of President Obama's appointments fell within the ambit of the Recess Appointments Clause. The question of whether recess appointees were "Officers of the United States" was not necessary to the Court's holding. Still, the Court opined on this issue. Justice Breyer's majority opinion stated that "the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing *officers of the United States*."[413] Critically, the phrase "Officers of the United States" does *not* appear in the Recess Appointments Clause.

In *Noel Canning*, Justice Breyer assumed that recess appointees were "Officers of the United States." This result is not obvious, and the text of the clause does not expressly address it. Moreover, there was no need to decide the precise status of recess appointees in *Noel Canning*. Yet, the majority reached out to decide an important constitutional question and announced that recess appointees were "Officers of the United States."

Justice Scalia's concurring opinion also seemed to assume that recess appointees were "Officers of the United States[.]"[414] He wrote, "Except where the Constitution or a valid federal law provides otherwise, all 'Officers of the United States' must be appointed by the President 'by and with the Advice and Consent of the Senate.'"[415] Scalia seemed to agree with Breyer that the Recess Appointments Clause was a subsidiary means for the President to appoint "Officers of the United States" in the absence of Senatorial advice and consent.

411. *See* NLRB v. Noel Canning, 573 U.S. 513, 522–26 (2014).
412. *Id.* at 518–19, 557.
413. *Id.* at 522 (emphasis omitted).
414. *Id.* at 569 (Scalia, J., concurring) (quoting U.S. CONST. art. II, § 2, cl. 2).
415. *Id.*

In *Federalist No. 67*, Hamilton articulated a similar view. Hamilton wrote that the Appointments Clause is the "general mode of appointing officers of the United States."[416] And the Recess Appointments Clause is "nothing more than a supplement" or an "auxiliary method of appointment" when "the general method was inadequate"—that is, when "vacancies might happen IN THEIR RECESS."[417] Hamilton reasoned that for the Recess Appointments Clause to be "supplementary" to the Appointments Clause, the "*vacancies* of which . . . [the Recess Appointments Clause] speaks must be construed to relate to the 'officers' described in the" Appointments Clause.[418] In any event, Hamilton's language strongly suggests that he held the view that recess appointees were "Officers of the United States."

Four years later, in *Lucia v. SEC*, the Supreme Court would indirectly address the Recess Appointments Clause. *Lucia v. SEC* held that administrative law judges of the Securities Exchange Commission are not "Officers of the United States."[419] Therefore, they do not need to be confirmed by the Senate. This case did not involve the Recess Appointments Clause. Yet, language in Justice Kagan's majority opinion in *Lucia* was in considerable tension with language in Justice Breyer's majority opinion in *Noel Canning*.

Noel Canning described the Recess Appointments Clause as a "*subsidiary*" method of appointing "Officers of the United States."[420] In contrast, *Lucia* held that "[t]he Appointments Clause prescribes the *exclusive* means of appointing 'Officers.'"[421] Which one is it? "Subsidiary" or "exclusive"? Justices Kagan and Kennedy were the only members of the Court who joined both majority opinions. In doing so, they took conflicting positions on this narrow issue. We do not know if *Lucia* (2018) intended to supersede *Noel Canning* (2014). In fact, we suspect that few commentators even noticed this conflict.

Some of the other votes in *Noel Canning* and *Lucia* are difficult to explain. Justice Scalia concurred in *Noel Canning*, joined by Chief Justice Roberts and Justices Thomas and Alito. Justice Scalia wrote that the Recess Appointments Clause was "an *exception*" to the "general rule" by which "Officers of the United States" are appointed pursuant to the Appointments

416. THE FEDERALIST NO. 67, *supra* note 73, at 348.

417. *Id.* Here, Hamilton has endorsed the view later put forward by Justice Scalia's concurrence in *Noel Canning* that the Recess Appointments Clause only applies to those vacancies that actually arise, or happen, *during* the Recess of the Senate. *See Noel Canning*, 573 U.S. at 594 (Scalia, J., concurring) ("I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled[.]").

418. THE FEDERALIST NO. 67, *supra* note 73, at 348.

419. Lucia v. SEC, 138 S. Ct. 2044, 2044 (2018).

420. *Noel Canning*, 573 U.S. at 522.

421. *Lucia*, 138 S. Ct. at 2051 (emphasis added).

Clause.[422] Is an "exception" equivalent to a "subsidiary" approach? Did Justice Scalia agree with Justice Breyer's majority opinion in *Noel Canning*? Here, Justice Scalia's language was less than clear. Notably, Justice Scalia did not endorse the position the Court would announce subsequently in *Lucia*: that the Appointments Clause was the "exclusive" means of appointing "officers of the United States." In *Noel Canning*, Scalia may have hedged to avoid reaching this specific position.

When *Lucia* was announced in 2018, Justice Scalia was no longer on the Court, but Chief Justice Roberts and Justices Thomas and Alito joined the *Lucia* majority. They all agreed with Justice Kagan's majority opinion, which held that "[t]he Appointments Clause prescribes the exclusive means of appointing '*Officers*.'"[423] Justice Thomas stated this rule even more categorically in his concurrence, which Justice Gorsuch joined: "The Appointments Clause provides the exclusive process of appointing '*Officers of the United States*.'"[424] The votes of Chief Justice Roberts and Justices Thomas and Alito across these two cases, decided just four years apart, are in tension with one another.

Ultimately, these precedents are not entirely helpful to determine whether recess appointees are "Officers of the United States." These precedents are also not entirely helpful determining what kinds of positions the President can fill under the Recess Appointments Clause.

B. What Types of Vacant Positions Can the President Fill Pursuant to the Recess Appointments Clause?

The text of the Recess Appointments Clause does not specify which positions the President can fill. The provision does not expressly refer to "Officers of the United States," "Office[s] . . . under the United States," or even "Officer[s]." The text merely states, "The President shall have Power to fill up *all Vacancies* that may happen during the Recess of the Senate." In *Noel Canning*, the Supreme Court sharply divided about when "Vacancies that may happen during the Recess of the Senate" occur. The majority found that the vacancies could arise before or during the Senate recess; Justice Scalia's concurrence found that the vacancies could only arise during the Senate recess. But the Court did not have to determine what types of vacant positions the President could temporarily fill. Can the President fill a temporary Senate vacancy pursuant to the Recess Appointments Clause? During the ratification debates, this question arose.

422. *Noel Canning*, 573 U.S. at 569 (Scalia, J., concurring) (emphasis added).
423. *Lucia*, 138 S. Ct. at 2051 (emphasis added).
424. *Id.* at 2056 (Thomas, J., concurring) (emphasis added).

Under the original Constitution, before the Seventeenth Amendment, the state legislatures would choose the Senators.[425] However, "if Vacancies [of a Senator] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."[426] We think the "Executive" referenced in the Senatorial Vacancies Clause was the state executive, such as the governor. During the ratification process, there was some debate on this point.

Cato was a pseudonymous Anti-Federalist who wrote in opposition to the ratification of the Constitution. Cato is believed to have been New York Governor George Clinton.[427] In his fifth paper, Cato criticized the organization of the Senate under the proposed Constitution.[428] He wrote that the framers gave "the executive the unprecedented power of making temporary Senators, in case of vacancies, by resignation or otherwise."[429] We think the better reading of Cato's statement is that he was referring to the state executive, like a governor. Still, Cato's use of "executive" is not entirely clear.

Alexander Hamilton, however, wrote that Cato was arguing that the President—that is, the *federal* "Executive"—could fill a temporary Senate vacancy pursuant to the Recess Appointments Clause. In *Federalist No. 67*, Hamilton wrote that Cato "ascribe[d] to the President of the United States a power, which by the instrument reported is *expressly* allotted to the executives of the individual States. I mean the power of filling casual vacancies in the Senate."[430]

Hamilton explained why the President could *not* appoint temporary Senators—a power that belonged to state executives. We do not flag this debate to contend that Cato was correct—albeit, we think Cato was correct that the state executive could make a temporary appointment to a vacant Senate seat during the recess of the state legislature.[431] Rather, we highlight this disagreement to illustrate which types of positions may be filled under the authority of the Recess Appointments Clause. To fully understand

425. U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

426. *Id.* art. I, § 3, cl. 2.

427. *The Anti-Federalist Papers*, HIST. SOC'Y OF THE N.Y. COURTS, https://history.nycourts.gov/about_period/antifederalist-papers/ [https://perma.cc/729T-LTVF].

428. *See Cato V, New York Journal, 22 November 1787*, CTR. FOR THE STUDY OF THE AM. CONST., https://archive.csac.history.wisc.edu/Cato_V(1).pdf [https://perma.cc/AG75-FEM6].

429. *Id.*

430. THE FEDERALIST NO. 67, *supra* note 73, at 347.

431. *See* U.S. CONST. art. I, § 3, cl. 2 ("[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.").

Hamilton's response to Cato, we next turn to the relationship between the Recess Appointments Clause and the Appointments Clause.

C. The Appointments Clause and the Recess Appointments Clause

Pursuant to the Appointments Clause, the President can appoint "Officers of the United States." And, pursuant to the Recess Appointments Clause, the President can make recess appointments. Are recess appointees a type of "Officer[] of the United States" referenced in the Appointments Clause? This section will explain why recess appointees may or may not be "Officers of the United States" for purposes of the Appointments Clause. There are arguments to be made on both sides.

1. Recess Appointees May Be "Officers of the United States" for Purposes of the Appointments Clause

The Appointments Clause and the Inferior Officers Appointments Clause appear in Article II, Section 2, Clause 2 of the Constitution. In the very next clause—Article II, Section 2, Clause 3—is the Recess Appointments Clause. We present the three provisions, side-by-side, in this table:

The Appointments Clause Art. II, § 2, Cl. 2	**The Inferior Officers Appointments Clause Art. II, § 2, Cl. 2**	**The Recess Appointments Clause Art. II, § 2, Cl. 3**
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"	"but the Congress may by Law vest the Appointment of *such inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."	"The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The Inferior Officers Appointments Clause is an exception to the Appointments Clause. The Constitution empowers Congress to "by Law"—

that is, by statute[432]—"vest the Appointment of such *inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Here, "such inferior Officers" refers to a limited group of "Officers of the United States" who need not be confirmed by the Senate and who need not be appointed by the President. The word "Officers" provides a textual linkage between the Appointments Clause and the Inferior Officers Appointments Clause. The Inferior Officers Appointments Clause is an exception to the general manner in which "Officers of the United States" are appointed—that is, through the Senate "advice and consent" process.

The Recess Appointments Clause may function in a similar fashion. This provision, which follows in the clause immediately after the Inferior Officers Appointments Clause, may also be a textual exception to the Appointments Clause. Under that reading, recess appointees would be "Officers of the United States."

Another possibility is that recess appointees are a type of "inferior Officer" that could be appointed without Senate confirmation. For example, recess appointees could fill a position that would otherwise be a "principal Officer," if that position had been filled by presidential nomination and Senate consent.[433] One such position is the Secretary of the Treasury. A recess-appointed Secretary of the Treasury might nonetheless be considered an inferior officer who could be appointed without Senate confirmation. Under this reading, the Recess Appointments Clause does provide an alternate path by which "Officers of the United States" can be appointed. If this view is correct, then inferior officers and recess appointees would be the *only* textual exceptions to the general appointment process described in the Appointments Clause.

There are other potential ways to characterize recess appointees. For example, it is possible that a recess appointee filling a position customarily characterized as a principal officer is a *temporary* type of principal "Officer[] of the United States." Or, perhaps, a recess appointee may not be an "Officer[] of the United States" at all. This conclusion is not as odd as it may appear. After all, the Recess Appointments Clause does not use any "Office" or "Officer"-language in characterizing such recess appointees. We will address this point in the next subsection.

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432. *See supra* Section II.A.1 (explaining that the phrase "by law" means by statute, pursuant to the Presentment Clause).

433. *See supra* Section II.D (observing that the phrase "principal Officer" appears in the Opinion Clause, and not the Appointments Clause).

2. Recess Appointees May Not Be "Officers of the United States" for Purposes of Article II, Section 2

There is a significant textualist reason to conclude that recess appointees are not "Officers of the United States." The Inferior Officers Appointments Clause references "such inferior *Officers*." However, there is no textual linkage that uses the language of "Office" or "Officer" between the Appointments Clause and the Recess Appointments Clause. The Recess Appointments Clause does not expressly refer to an "Office" or "Officer" of any type. Instead, the Recess Appointments Clause refers to "Vacancies." Cato, the pseudonymous Anti-Federalist made use of this lack of textual linkage in his fifth paper.[434] According to Hamilton, Cato argued that the President could fill Senate vacancies pursuant to the Recess Appointments Clause.[435] However, there may be an *indirect* textual linkage between the Appointments Clause and the Recess Appointments Clause.

The Appointments Clause provides that the President "shall appoint . . . all other Officers of the United States, *whose Appointments are not herein otherwise provided for*, and which shall be established by Law[.]"[436] Are recess appointees a type of "Officer[] of the United States, whose Appointments are not herein otherwise provided for" in the Appointments Clause?

Asher Steinberg, for example, drew an implication from the text. He inferred one possible meaning of the Appointments Clause: the phrase "not herein otherwise provided for" could be an invitation to scour the remainder of the Constitution for other provisions that provide authority to fill federal "Officers of the United States" positions.[437] These "Officers of the United States" would be outside the process of Presidential nomination and Senate confirmation. Among these positions might be recess appointees. Steinberg wrote,

> Further, to the extent otherwise-herein-provided appointed officers of the United States are implied, it is possible that these could be found in the *Recess Appointments Clause* (an exception to the normal Appointments Clause procedure) or the inferior officers discussed in the Appointments Clause, or the members of the Electoral College, who the states "appoint." And it is also possible that they can be found in the "Officers" of the militia, the appointment of which Article 1, section 8, clause 16 leaves to the states, even though the state militias could be, under that clause, "employed in the Service of the United

434. *See Cato V*, *supra* note 428.

435. *See supra* Section VI.B (discussing Cato's position with respect to Recess Appointments Clause).

436. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

437. *See* Steinberg, *supra* note 109.

> States," and thus might be viewed as containing officers of the United States that are appointed in a manner "otherwise herein provided."[438]

For Steinberg, the phrase "not herein otherwise provided for" could reference any other *appointed* officer in the Constitution. In other words, Steinberg reads this phrase as an invitation to scour the remainder of the Constitution for other provisions that provide authority to fill "Officer" positions by *appointment*. In Steinberg's view, if the Constitution describes a federal position as one filled by *appointment*, then that position is an "Officer of the United States."

Let's assume that Steinberg is correct, and some other positions in the Constitution may be characterized as "Officers of the United States." And let's also assume that the implication Steinberg draws from the constitutional text is correct: the Appointment Clause is an invitation to scour the constitutional text for other positions created by the Constitution. If both of these assumptions are correct, then the phrase "Officers of the United States" might also include positions that are *elected*. For example, members of Congress and the President could be "Officers of the United States" who are "not herein otherwise provided for" in the Appointments Clause. However, in order to reach this latter conclusion, the interpreter must reject the distinction we drew between *elected* and *appointed* federal positions.

Thomas Merrill reached just this conclusion. His conclusion elided over the significance of any textual distinction between constitutionally-mandated *elected* federal officials and officers *appointed* to statutory officers that are created, authorized, or regularized at Congress's discretion. Merrill contended that the phrase "whose Appointments are not herein otherwise provided for" in the Appointments Clause "clearly suggests that the referent is the Constitution as a whole, not a single article," that is, Article II.[439] And Merrill wrote, "The most likely reference of 'herein otherwise provided for' would be the Members of Congress, whose method of appointment is detailed in Article I."[440]

However, in our view, the phrase "not herein otherwise provided for" directs the reader *not* to scour the remainder of the Constitution for other provisions that provide authority to fill "Officers of the United States" positions.[441] We developed this analysis above in Section II.A.2.

To clarify our disagreement with Steinberg, let us revisit *Federalist No. 67*, in which Hamilton responded to Cato concerning the Recess

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438. *Id*. (emphasis added).
439. Merrill, *supra* note 146, at 2136.
440. *Id.* at 2136 n.157.
441. *See supra* Section II.A.2 (discussing the meaning of "whose Appointments are not herein otherwise provided for").

Appointments Clause.[442] In this paper, Hamilton included a quotation from the Appointments Clause, but Hamilton modified the Constitution's text:

> The first of these two clauses, it is clear, only provides a mode for appointing such officers, "whose appointments are *not otherwise provided for* in the Constitution, and which *shall be established by law*"; of course it cannot extend to the appointments of senators, whose appointments are *otherwise provided for* in the Constitution, and who are *established by the Constitution*, and will not require a future establishment by law.[443]

Hamilton modified the phrase "not herein otherwise provided for" to "not otherwise provided for in the Constitution." We do not know for certain why Hamilton made this modification to the text of the Appointments Clause. Nor can we be sure that Hamilton intended this revision to advance any substantive arguments. It is possible to read Hamilton's revision as supporting Steinberg's position: that the officers "not herein otherwise provided for" may be found throughout the entire Constitution and not just within Article II, Section 2. But Hamilton does not expressly adopt this position. Hamilton does not affirmatively state that Senators are "Officers of the United States." Indeed, Hamilton draws the opposite inference. Nowhere does Hamilton point to any positions, which he characterizes as "Officers of the United States," that are filled beyond the ambit of Article II, Section 2. In short, Hamilton does not tell us his position on the meaning of "not herein otherwise provided for."

There is another, prominent supporter of the position that the phrase "not herein otherwise provided for" was an invitation to scour the Constitution for other "Officers of the United States" who take office outside the aegis of Article II, Section 2. But this position has not been made public—until now.

3. Justice Scalia's Letter to Tillman

Justice Scalia's concurrence in *Noel Canning* began with this sentence: "*Except where the Constitution* or a valid federal law *provides otherwise*, all 'Officers of the United States' must be appointed by the President 'by and with the Advice and Consent of the Senate.'"[444] Scalia's specific phrasing—"Except where the Constitution . . . provides otherwise"—mirrors the language used in the Appointments Clause: "whose Appointments are not herein otherwise provided for." Scalia's restatement of the constitutional text is subject to multiple interpretations. Under one interpretation, Scalia meant

442. *See* THE FEDERALIST NO. 67, *supra* note 73, at 347.

443. *Id.* at 348.

444. NLRB v. Noel Canning, 573 U.S. 513, 569 (2014) (Scalia, J., concurring) (emphases added).

that the Appointments Clause was an invitation to scour the Constitution for other "Officers of the United States" who take office outside the aegis of Article II, Section 2. Under a second interpretation, Scalia was just rephrasing the language of the Article II, Section 2, and left unclear whether he believed there were "Officers of the United States" who are not appointed under the aegis of the Article II, Section II.

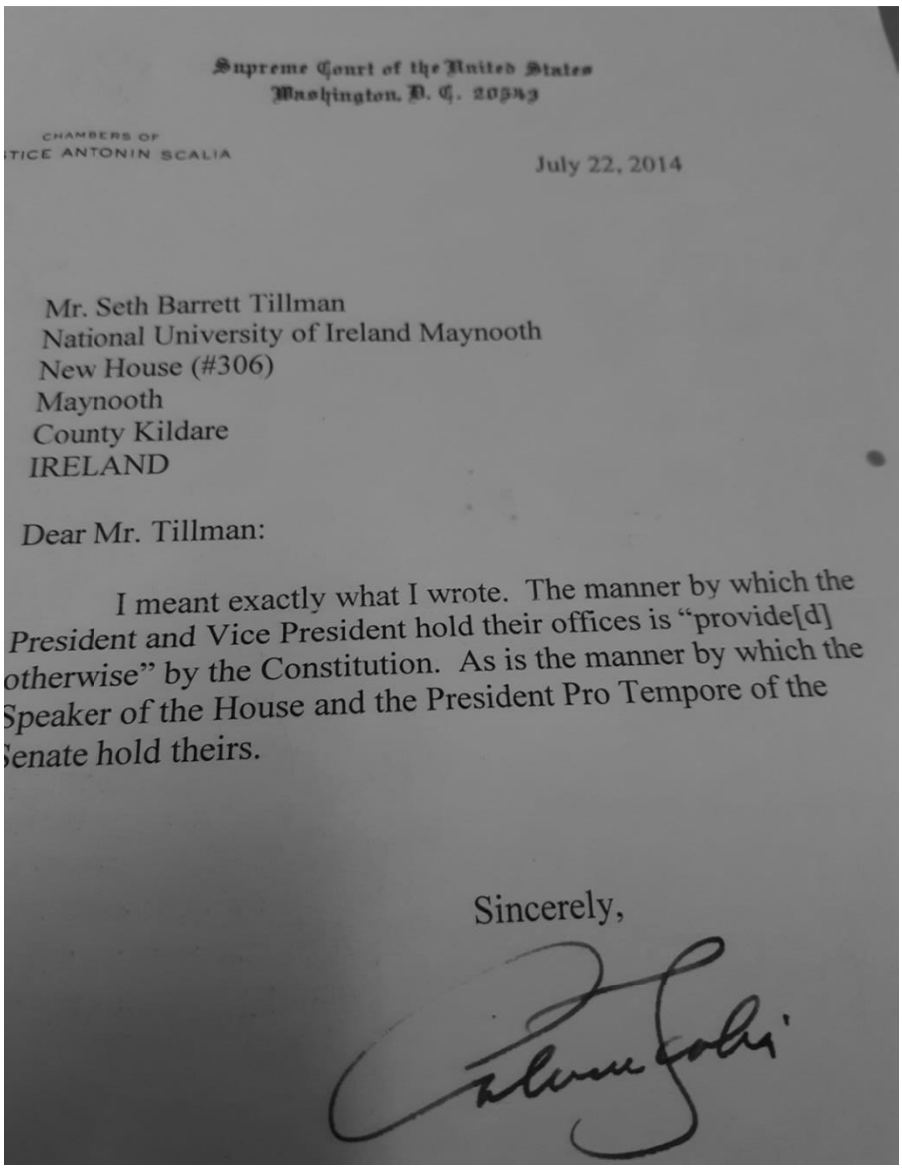
Shortly after *Noel Canning* was decided, Tillman wrote to Justice Scalia, and asked him to explain this sentence. At the time, Blackman told Tillman that Scalia would never reply. Blackman was wrong. On July 22, 2014, Justice Scalia wrote a terse note to Tillman.[445]

Dear Mr. Tillman:

> I meant exactly what I wrote. The manner by which the President and Vice President hold their offices is "provide[d] otherwise" by the Constitution. As is the manner by which the Speaker of the House and the President Pro Tempore of the Senate hold theirs.

Sincerely
/s/ Antonin Scalia

445. Letter from Hon. Antonin Scalia, U.S. Sup. Ct. J., to Seth Barrett Tillman, Lecturer at Nat'l University of Ireland Maynooth [https://perma.cc/JX3Z-DDYB].



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
TICE ANTONIN SCALIA

July 22, 2014

Mr. Seth Barrett Tillman
National University of Ireland Maynooth
New House (#306)
Maynooth
County Kildare
IRELAND

Dear Mr. Tillman:

I meant exactly what I wrote. The manner by which the President and Vice President hold their offices is "provide[d] otherwise" by the Constitution. As is the manner by which the Speaker of the House and the President Pro Tempore of the Senate hold theirs.

Sincerely,

Here, Scalia adopted the first interpretation: the Appointments Clause was an invitation to scour the Constitution for other "Officers of the United States" who take office outside the aegis of Article II, Section 2. Indeed, he

thought that the President and Vice President were "Officers of the United States" who "hold their offices" in a "manner" that was "'provide[d] otherwise' by the Constitution." And Scalia thought that the Speaker of the House and the President Pro Tempore of the Senate were also "Officers of the United States" who "hold their offices" in a "manner" that was "'provide[d] otherwise' by the Constitution."

We are hesitant to treat a brief correspondence from Justice Scalia as a definitive statement of his jurisprudence. Indeed, this short letter lacks the sort of thorough legal analysis that Justice Scalia would employ in his legal opinions. Still, Justice Scalia's position suffers from many of the problems that face scholars who argue that the President is an "Officer[] of the United States."

First, and foremost, the Appointments Clause does not merely speak to how certain officers "hold" their positions, as Scalia wrote. The language used is "appointments." Did Scalia think the President is "appointed"? The text of the Constitution repeatedly refers to the President and Members of Congress as "elected."[446] Steinberg, discussed earlier, limits his reading of this provision to *appointed* positions, and not to *elected* positions. Merrill, by contrast, thought that members of Congress would be among those *appointed* officers referenced in the Appointments Clause. Moreover, the Appointments Clause refers to positions that "shall be established by law"—that is, by statute.[447] Did Scalia think the presidency and members of Congress were "established by law"? These positions were created by the Constitution, not by statute. Scalia's argument, like that of Merrill, cannot be squared with the text of the Appointments Clause.[448]

Second, Antonin Scalia circa-1974 cast doubt on the position of Antonin Scalia circa-2014. During the Ford Administration, Scalia served as Assistant Attorney General of the Office of Legal Counsel. In December 1974, he wrote a memorandum to the President's Associate Counsel. Scalia explained that when "the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President."[449] Scalia then cited seven provisions of the Constitution, *including* the Appointments Clause. He added that "The Supreme Court, moreover, has interpreted Article II, Section 2, Clause 2, as being the *exclusive* means by which one may become an 'officer.'"[450] And Scalia observed that "[t]his use of the word 'officer' in the

446. *See supra* Section II.C.

447. *See supra* Section II.A.1.

448. *See supra* Section II.A.2.

449. Memorandum from Antonin Scalia, Asst. Att'y Gen, Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President, to Kenneth A. Lazarus, Assoc. Couns. to the President, at 2 (1974) [https://perma.cc/2PUP-2ZVQ].

450. *Id.* (emphasis added).

Constitution has led the Department of Justice consistently to interpret the word in other documents as not including the President or Vice President unless otherwise specifically stated."[451] We agree with everything Scalia wrote in 1974. These principles in the memorandum, if applied to the Appointments Cause, suggest that the President is not an "Officer of the United States" whose appointment is not otherwise provided for beyond the text of the Appointments Clause. Rather, the better answer is that the phrase "whose Appointments are not herein otherwise provided for" does not refer to the elected President. Four decades is a long time. It is possible Justice Scalia reconsidered the view he expressed while working for the Executive Branch.

Third, we can point to other evidence throughout this Article that refutes Scalia's position. Supreme Court precedent that Scalia joined, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, recognized that "[t]he people do not vote for the 'Officers of the United States.'"[452] Plus there are many difficulties that arise if the President is an "officer of the United States" with regard to the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

We have some trepidation with stating that Justice Scalia, whose correspondence is sorely missed, was mistaken. But on balance, Scalia's short statement does not hold up. Even Homer sometimes nods.[453]

D. Interclausalism and the Recess Appointments Clause

Section III.D discussed the concept of *intratextualism*. With intratextualism, Amar explained, "the interpreter [should] tr[y] to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."[454] Here, we introduce a related but different concept we call *interclausalism*: When the Supreme Court interprets one provision of the Constitution, it should consider how that provision interacts with other

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451. *Id.*

452. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (citation omitted) (first quoting U.S. CONST. art. II, § 2, cl. 2; then citing THE FEDERALIST NO. 72, *supra* note 73, at 463); *see* United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

453. *See even Homer sometimes nods,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/even-homer-sometimes-nods [https://perma.cc/474D-9MKN] ("[U]sed to say that even an expert sometimes makes mistakes: The famous aphorism about human fallibility is that even Homer nods.").

454. Amar, *supra* note 282, at 748.

related provisions where they share common or closely similar language—or, even if the provisions are related, but there is no precise textual overlap. When should the Court consider this interplay? First, in situations where clarifying the original public meaning of one provision clarifies the original public meaning of another provision. Second, in situations where modifying the judicially-approved scope of one provision will likely modify the judicially-approved scope of another provision. We refer to this methodological approach as *interclausalism*. Our approach is similar to what prior commentators have described as the harmonious-reading canon.[455]

In this section, we will use interclausalism to interpret the Recess Appointments Clause with regard to the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

1. Interclausalism and the Impeachment Clause

Let us revisit *Noel Canning* in light of interclausalism. Had Justice Breyer broadened his analysis beyond the single provision at issue in the case, the Court would have considered how its broad reading of the Recess Appointments Clause would affect the scope of other related provisions. If the Court had followed our methodological approach, it would have been more hesitant to reach out and decide an unnecessary issue: the status of recess appointees as "Officers of the United States." This methodological approach serves as a safeguard and prevents the courts from resolving unnecessary issues, thereby avoiding unintended and potentially undesirable consequences. Interclausalism functions as something of a precautionary or avoidance principle: courts should hesitate before unnecessarily deciding a constitutional issue unless the judges have considered the possible collateral consequences in connection with the meaning and scope of other clauses. In other words, before what is, in effect, an unnecessary holding is injected into the case law, the Court should consider where that holding might lead.

For example, whether recess appointees can be impeached is an open question. If recess appointees are not "Officers of the United States," then they cannot be impeached. We are not aware of any prior efforts to impeach one of these temporary appointees, but this specific issue has never been judicially settled. Let's assume that in the future, the House impeaches a recess appointee. During her trial, she could argue that she was not an "Officer[] of the United States" because she was not appointed pursuant to the Appointments Clause. (Senator Blount made that same argument more than two centuries ago.[456]) Maybe the answer ought to be "yes"; maybe the

455. *See* SCALIA & GARNER, *supra* note 3, at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

456. *See supra* Section III.C.2 (discussing *Blount* impeachment proceedings).

answer ought to be "no." Before *Noel Canning* was decided, it would have been up to Congress, in the first instance, to decide this question based on concrete facts and focused briefing from the parties.

However, in *Noel Canning*, the Court may have resolved that issue. If recess appointees are "Officers of the United States," then they are subject to the Impeachment Clause. In effect, the Court *implicitly* decided an important structural question without any substantive analysis. We say implicitly because Justice Breyer's statement about "Officers of the United States" might be understood as dicta or otherwise nonbinding. In *Noel Canning*, the only question presented was whether the President's appointments were valid. The Court did not need to resolve whether recess appointees were "Officers of the United States." For that reason, among others, Congress could, in theory, treat the issue as unsettled. But before *Noel Canning* was decided, Congress could consider the issue on a blank slate. Now, there is some Supreme Court precedent for Congress to contend with—as it is likely to do in the impeachment context. Had the Court followed our preferred approach, red flags would have been raised, and the Justices would have likely avoided reaching this issue.

If Justice Breyer had relied on interclausalism, our preferred methodology, he could have avoided this situation. First, he should have recognized that the Recess Appointments Clause does not specifically use the language "Officers of the United States." As a result, there was already some reason to be cautious before linking the Recess Appointments Clause to the language used in the Appointments Clause and elsewhere in the Constitution. Second, Justice Breyer apparently deemed recess appointees as "Officers of the United States." If he did make that decision, then he brought recess appointees under the aegis of the Impeachment Clause. Likewise, if Justice Breyer had decided that recess appointees were not "Officers of the United States," then that decision would have taken recess appointees out of the scope of the Impeachment Clause. Third, he should have recognized that the impeachability of recess appointees would remain unsettled but for this decision. The Court should always hesitate before deciding important constitutional questions that are not necessary to decide the precise question presented—all the more so in cases where the parties did not fairly raise and brief such issues. These three reasons should have led Justice Breyer to return to step one and not to announce that recess appointees were "officers of the United States."

Section III.D also discussed the relationship between the Appointments Clause and the Impeachment Clause. In the *PROMESA* case, the clause-bound reading of the Appointments Clause narrowed the scope of the

Impeachment Clause.[457] As a result, territorial officers cannot be impeached—again, we assume that future Congresses are likely to follow the Supreme Court's precedent in the impeachment context. If Congress chooses to evade that precedent, then a territorial officer defendant convicted in Senate impeachment proceedings could seek judicial review in collateral judicial proceedings.

By contrast, in *Noel Canning*, the clause-bound reading of the Recess Appointments Clause expanded the scope of the Impeachment Clause. Now, a congressional impeachment of a recess appointee will be consistent with Supreme Court precedent, but a congressional impeachment of a territorial officer will not be consistent with Supreme Court precedent. These two cases illustrate the unintended consequences that flow from the Justices' failure to consider the relationship among related provisions—whether or not the related provisions have overlapping language. *Noel Canning* deemed recess appointees "Officers of the United States" for purposes of the Appointments Clause. In doing so, the Court indirectly included those positions in the scope of the Impeachment Clause. Again, the Constitution's text has a "Newtonian quality" to it.[458] Every action has an equal and opposite reaction.

2. Interclausalism and the Commissions Clause

Under one interpretation of the Commissions Clause, which we do not fully embrace, interclausalism may cast some doubt on the conclusion that recess appointees are "Officers of the United States." Those appointed pursuant to the Appointments Clause receive Commissions under the Commissions Clause, which obligates the President to "Commission *all* the Officers of the United States."[459] In contrast, recess appointees receive their commissions under the Recess Appointments Clause, which empowers the President to "grant[] Commissions which shall expire at the End of their next Session."[460] In other words, Recess Appointees receive their commissions under an express provision of the Constitution. They do not need to rely on the more general Commissions Clause and their being "officers of the United States." This relationship might suggest that recess appointees are not "Officers of the United States" for purposes of the Commissions Clause. Arguably, this textual linkage would weaken the argument that recess appointees are "Officers of the United States" for purposes of the Appointments Clause and the Impeachment Clause.

457. *See supra* Section III.D (discussing the *PROMESA* case and the Impeachment Clause).
458. *See supra* Section III.D.
459. U.S. CONST. art. II, § 3 (emphasis added).
460. *Id.* art. II, § 2, cl. 3.

3. Interclausalism and the Oath or Affirmation Clause

The relationship between the Recess Appointments Clause and the Commissions Clause might support the alternate reading that recess appointees are not "Officers of the United States." However, the relationship between the Recess Appointments Clause and the Oath or Affirmation Clause might support the reading that recess appointees are "Officers of the United States." The Oath or Affirmation provides, "The 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, shall be bound by Oath or Affirmation, to support this Constitution." If recess appointees are "executive . . . Officers . . . of the United States," then they are squarely covered by the Oath or Affirmation Clause. Alternatively, if recess appointees are not "Officers of the United States," then Congress would have to enact a statute that establishes their separate oath—outside the ambit of Article VI. In this regard, the recess appointees would resemble appointed legislative positions, such as the Clerk of the House and the Secretary of the Senate.[461]

History shows that Congress, through its first statute, created an oath for the Clerk of the House and the Secretary of the Senate.[462] But that statute did not specify a separate oath for recess appointees. And we are not aware of any statutes that expressly created a separate oath for recess appointees. In 1795, President Washington recess-appointed John Rutledge as Chief Justice of the Supreme Court.[463] He took both the judicial and constitutional oaths.[464] As far as we know, Rutledge took the same oath that other appointed-and-confirmed Justices of the Supreme Court took. This early practice could suggest that Rutledge, and perhaps Congress, viewed recess appointees as "Officers of the United States."

E. What Are Recess Appointees?

In dicta, the Supreme Court has suggested, that recess appointees both are and are not "Officers of the United States." The Appointments Clause suggests that recess appointees may or may not be "Officers of the United States." The relationship between the Recess Appointments Clause and the

461. *See supra* Section V.C.3 (discussing the oath for the Clerk of the House and the Secretary of the Senate).

462. An Act to regulate the Time and Manner of administering certain oaths, ch. 1, §§ 1–5, 1 Stat. 23, 23–24 (1789).

463. *Oaths Taken by the Chief Justices*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/oath/oathsofthechiefjustices.aspx [https://perma.cc/ZC69-TSNN].

464. *Id.*

Commissions Clause suggests that recess appointees are not "Officers of the United States." However, the relationship between the Recess Appointments Clause and the Oath or Affirmation Clause suggests that recess appointees are "Officers of the United States." Ultimately, we are not entirely certain about the status of recess appointees.

Perhaps the better way to think of recess appointees is that they are federal agents acting under a special, limited, and temporary authority, but because they lack duration in their position, they are not *bona fide* officers. Stated differently, such recess appointees might be construed as officers *pro tem*, like the Senate President Pro Tempore. Under that view, recess appointees might be classified as "Office[s] under the Authority of the United States," the language used in the Ineligibility Clause. Indeed, the first statute expressly provided an oath for officers "appointed under the Authority of the United States."[465] (In Part VI of this ten-part series, we will discuss the Constitution's "Office under the Authority of the United States"-language.)

In any event, the precise status of recess appointees does not alter our broader conclusion: elected federal officials are not "Officers of the United States."

CONCLUSION

Our goal in this third installment was to show that the phrase "Officers of the United States" has a consistent meaning in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause. In each provision, this phrase refers to appointed positions in the Executive and Judicial Branches of the federal government. This phrase does not refer to elected officials like the President and members of Congress. We think the text of each provision supports our position. Moreover, our position is supported by, or is at least consistent with, history and a wide swath of case law.

We acknowledge that some people have long contended that elected officials like the President and, even, members of Congress are "Officers of the United States." But this contrary position conflicts with the Constitution's text and is inconsistent with historical practice.

In the fourth installment of this ten-part series, we will show that the phrase "Office . . . under" is a British statutory drafting convention that was well-established when the Constitution was ratified in 1788. To do so, we will trace the history of this drafting convention from English and British sources, to the Articles of Confederation, to the Washington Administration,

465. An Act to regulate the Time and Manner of administering certain oaths, ch. 1, §§ 1–5, 1 Stat. 23, 23–24.

through the Antebellum Era, to the Civil War, and, finally, through the end of the Nineteenth Century. In the Anglo-American legal tradition, the phrase "Office under . . ." was, and remains, a commonly used drafting convention that refers to appointed officers. Like the phrase "Officers of the United States," the phrase "Office . . . under the United States" does not refer to elected officials. In our view, the phrase "Officers of the United States" is a subset of the phrase "Office . . . under the United States." The phrase "Office . . . under the United States" includes every position within the scope of the phrase "Officers of the United States." The phrase "Office . . . under the United States" *also* extends to appointed positions in the Legislative Branch, such as the Clerk of the House and Secretary of the Senate.[466]

466. *Cf.* TENCH COXE, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA 13 (Philadelphia, Zachariah Poulson 1788) ("The house of representatives is not, as the senate, to have a president chosen for them from without their body, but are to *elect* their speaker from their own number—They will also *appoint* all their other officers." (emphases added)).

OFFICES AND OFFICERS OF THE CONSTITUTION PART IV: THE "OFFICE . . . UNDER THE UNITED STATES" DRAFTING CONVENTION

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This Article is the fourth installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series. The second installment identified four approaches to understand the Constitution's divergent "office"- and "officer"-language. The third installment analyzed the phrase "Officers of the United States," which is used in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause. This fourth installment will trace the history of the "Office . . . under the United States" drafting convention.

This Article proceeds in eight sections. Section I introduces the British drafting convention: "Office under the Crown." For the last three centuries, this phrase has referred to appointed positions. And, in our view, this English and British legal tradition crossed the Atlantic—ultimately becoming part of a wider Anglo-American legal tradition. Section II considers the use of the "Office . . . under" drafting convention in the Articles of Confederation, which was ratified in 1781. Section III turns to the four clauses in the Constitution that use the phrase "Office . . . under the United States," albeit with some variations: the Elector Incompatibility Clause, the Impeachment Disqualification Clause, the Incompatibility Clause, and the Foreign Emoluments Clause. In our view, the phrase "Office . . . under the United States" refers to appointed positions in the Executive and Judicial Branches, as well as non-apex appointed positions in the Legislative Branch.

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Section IV analyzes several reports prepared during President Washington's administration by the Treasury Department under its first Secretary of the Treasury, Alexander Hamilton. These documents support our position: the British "Office . . . under" drafting convention, which was used to distinguish between appointed and elected positions, had been adopted by Hamilton, a framer, and some of his contemporaries. Section V reviews an anti-bribery statute enacted by the first Congress. This 1790 statute, and other similar early federal statutes, provide further support for our position that the First Congress and early congresses adhered to the British "Office under" drafting convention. Section VI considers how the phrase "Office under the United States" was used during the American Civil War. At that time, more than seven decades after the framing, Hamilton's understanding of the "Office . . . under" drafting convention, as well as the documents he and his department had drafted, were still remembered and remained influential. Section VII surveys other nineteenth-century commentators, including Joseph Story, who recognized the "Office . . . under" drafting convention. Section VIII revisits an 1809 state legislative debate concerning the 1776 North Carolina Constitution. Some participants in that debate, including a future state supreme court justice, recognized that the state constitution's "office"-language distinguished between appointed and elected positions.

These eight parts support our position: in the Anglo-American legal tradition, the phrase "Office under the . . ." was, and remains, a commonly-used drafting convention that refers to appointed officers. This phrase does not refer to elected officials.

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INTRODUCTION

The Constitution of 1788's original seven articles include twenty-two provisions that refer to "offices" and "officers." Some clauses use the words "office" or "officer," standing alone and unmodified. Other clauses use the word "office" or "officer" followed by a modifier, such as "of the United States," "under the United States," or "under the Authority of the United States." We refer to the language in these twenty-two provisions as the Constitution's *divergent* "office"- and "officer"-language.

This Article is the fourth installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series.[1] The second installment identified four approaches to understanding the Constitution's divergent "office"- and "officer"-language.[2] The third installment analyzed the phrase "Officers of the United States," which is used in the Appointments Clause,[3] Impeachment Clause,[4] Commissions Clause,[5] and Oath or Affirmation Clause.[6] This fourth installment, Part IV, will trace the history of the "Office . . . under the United States" drafting convention.

Section I of Part IV of our series introduces the British drafting convention, "Office under the Crown." For the last three centuries, "Office under the Crown," a phrase commonly used in English, British, and United Kingdom statutes, has not extended to elected positions. In the Anglo-American legal tradition, the phrase "Office under the . . ." was, and remains, a commonly-used drafting convention that refers to appointed officers. Our position is that this interpretation of *Office under* crossed the Atlantic.

Section II considers the use of the "Office under" drafting convention in the Articles of Confederation, which was ratified in 1781. Pursuant to the Articles' Incompatibility Clause, delegates to the Articles Congress could not be appointed to an "office under the United States." Here, the Articles of Confederation drew a distinction between delegates and "office[s] under the United States." Likewise, the Articles of Confederation imposed a limitation on those holding "office[s] of profit or trust under the united states." They could not accept "any present, emolument, office, or title of any kind

1. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021).

2. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. TEX. L. REV. 321 (2021).

3. U.S. CONST. art. II, § 2, cl. 2.

4. *Id.* art. II, § 4.

5. *Id.* art. II, § 3.

6. *Id.* art. VI, § 3. *See generally* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TEX. L. REV. 349 (2023).

whatever, from any king, prince, or foreign state." The Articles' Foreign Emoluments Clause would only apply to appointed positions—that is, "office[s] . . . under the united states." The Foreign Emoluments Clause would not apply to delegates because rank-and-file delegates do not hold "office[s] under the United States." Finally, the Articles of Confederation did not use the phrase "officer of the United States." The now-familiar "officer of the United States" phrase was used in the United States Constitution, which was ratified in 1788.

Section III turns to the United States Constitution. The framers of the Constitution would continue the American tradition of adhering to the "Office . . . under" drafting convention. Four clauses in the Constitution use the phrase "Office . . . under the United States," albeit with some variation. First, the Elector Incompatibility Clause provides "no Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector."[7] Second, the Impeachment Disqualification Clause provides, "[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any *Office of honor, Trust or Profit under the United States*[.]"[8] Third, the Incompatibility Clause provides "no Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office."[9] Fourth, the Foreign Emoluments Clause provides:

> No Title of Nobility shall be granted by the United States: And no Person holding any *Office of Profit or Trust under them* [*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.[10]

In our view, the phrase "Office . . . under the United States" refers to appointed positions in the Executive and Judicial Branches, as well as non-apex appointed positions in the Legislative Branch.

Section IV analyzes several reports prepared during President Washington's administration by the Treasury Department under its first Secretary of the Treasury: Alexander Hamilton. Through these reports, Secretary Hamilton provided Congress with rolls of the salaries paid to different positions within the federal government. In 1792, the Senate

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7. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).
8. *Id.* art. I, § 3, cl. 7 (emphasis added).
9. *Id.* art. I, § 6, cl. 2 (emphasis added).
10. *Id.* art. I, § 9, cl. 8 (emphasis added). Why does the Impeachment Disqualification Clause lists *Trust* first and *Profit* second, while the Foreign Emoluments Clause lists *Profit* first and *Trust* second? We suspect the ordering may have followed how British and state progenitor provisions were drafted, but we have no certain answer. Alternatively, the order may vary precisely because it was not particularly important.

directed Secretary Hamilton to produce a financial statement listing the "salaries, fees, and emoluments" of "every person holding any civil office or employment under the United States, (except the judges)." In Hamilton's 1793 response (the "*1793 Complete Report*"), he listed appointed or administrative personnel in *each* of the three branches of the federal government. However, Hamilton did *not* include the President, Vice President, Senators, or Representatives. In our view, Hamilton accurately responded to the precise language in the Senate's order: elected officials do not hold *office under the United States*, so they were not listed. This Hamilton-signed document supports our position: the framers had adopted the British "Office under" drafting convention to distinguish between appointed and elected positions. Section IV also discusses several other financial reports, including two other financial reports issued by the Treasury Department during Hamilton's service as Secretary of the Treasury: [i] Hamilton's *1789 Civil and Military List*, and [ii] Hamilton's *1792 Statement and Account*.

Section V reviews an anti-bribery statute enacted by the first Congress. The 1790 statute declared that a defendant convicted of bribing a federal judge "shall forever be disqualified to hold any *office of honor, trust or profit under the United States*."[11] If the President, Vice President, or members of Congress held an "Office of Profit or Trust under [the United States]," then this anti-bribery statute purports to add a new qualification for elected federal positions. However, Congress does not have the power, by statute, to amend or to add new qualifications to any of these positions. The better view is that the first Congress did not understand the phrase "Office . . . under the United States" as extending to elected officials. In other words, because the statute only reached *appointed* positions in the federal government, the statute was not understood as imposing new qualifications for *elected* federal positions. This statute, and other similar early federal statutes, provide further support for our position that the First Congress and early congresses adhered to the British "Office under" drafting convention.

Section VI fast-forwards to debates during the American Civil War. In 1862, Congress imposed a loyalty oath on "every person" holding "any office of honor or profit *under* the government of the United States."[12] Senator James Asheton Bayard, Jr. of Delaware argued that members of Congress did not hold "office . . . under the United States." He relied, in part, on a subsequent reproduction of Hamilton's *1793 Complete Report* that had amended the original report signed by Hamilton. (We discuss this

11. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (1790) (emphasis added).

12. Act of July 2, 1862, ch. 128, 12 Stat. 502 (1862) (emphasis added) (codified as amended at 5 U.S.C. § 3331).

reproduction, known as the *Condensed Report*, in Section IV.) This incident shows that more than seven decades after the framing, Hamilton's understanding of the "Office . . . under" drafting convention, as well as the documents he and his department drafted, were still remembered and remained influential.

Section VII surveys other nineteenth-century commentators who recognized the "Office . . . under" drafting convention. Joseph Story, for example, explained why members of Congress are not "civil officers of the United States." The same reasoning that supported this conclusion, Story suggested, also extends to the phrase "Office . . . under the United States," as that phrase is used in the Incompatibility Clause and the Elector Incompatibility Clause. Story and other nineteenth-century commentators and jurists shared an understanding of the Constitution's "office"-language that was well known through the beginning of the twentieth century.

Section VIII revisits an 1809 state legislative debate concerning the 1776 North Carolina Constitution. Some participants in that debate, including a future state supreme court justice, recognized that the state constitution's "office"-language distinguished between appointed and elected positions.

These eight parts support our position: in the Anglo-American legal tradition, the phrase "Office under the . . ." was, and remains, a commonly-used drafting convention that refers to appointed officers. This phrase does not refer to elected officials.

I. THE BRITISH "OFFICE UNDER THE CROWN" DRAFTING CONVENTION REFERS TO APPOINTED POSITIONS

In the Anglo-American legal tradition, the phrase "Office under the . . ." was, and remains, a commonly-used drafting convention that refers to appointed officers. For the last three centuries, the phrase "Office under the Crown" was commonly used in English, and later in British and United Kingdom, statutes. And, for the last three centuries, this phrase has not extended to elected positions.[13] Consider the Act for the Security of Her Majesty's Person and Government. This 1707 law disqualified any person from holding a seat in the House of Commons if he held a "new *office* or place of profit whatsoever *under* the [C]rown," that is, a position created after

13. *See* J.L. DE LOLME, THE CONSTITUTION OF ENGLAND, OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 79 (Dublin, W. Wilson 1775) [https://perma.cc/7VA3-MR4Y] (explaining that one holding a "new office under the Crown" is "incapable of being elected [a] Member[]" of the Commons).

1705.[14] We believe this statute served as a legal, genealogical predecessor for the text of the Constitution of 1788's Incompatibility Clause.

The 1707 statute was not the only such statute. The English Parliament enacted another statute in 1700 that used similar language: An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject.[15] This law, also known as the Act of Settlement, provided that "no person who has an *office* or place of profit *under* the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons."[16] This statute distinguishes an "office . . . under the King" from a "pension from the crown." We think the former phrase referred to a person appointed by the current, sitting monarch, that is, "the King." Generally, one holding such a position would lose his station with the demise of the sitting monarch. The latter phrase referred to a pension that would be paid regardless of who the current monarch is—that is, a "pension from the Crown." Presumably, pensions would extend beyond the reign of the sitting monarch.

C. Ellis Stevens observed that the U.S. Constitution's Incompatibility Clause "corresponds more nearly" with the Act of Settlement of 1700 than with later-in-time analogous British statutes.[17] Our Incompatibility Clause provides, "no Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in *Office*."[18] And Benjamin Cassady observed that the Act of Settlement was a "direct forerunner to the Framers' Incompatibility Clause."[19] Parliament would use similar language in other statutes. For example, the 1705 Regency Act referred to "any new Office or Place of Profit whatsoever under the Crown."[20]

Sir S.W. Griffith, who would later become Australia's first Chief Justice, explained in 1889 that "[t]he term office of profit under the Crown was an *old phrase, well understood* in relation to parliamentary law . . . ."[21]

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14. Act for the Security of Her Majesty's Person and Government and of the Succession to the Crown of Great Britain in the Protestant Line of 1707, 6 Ann., c. 7, § 25 (Gr. Brit.) (emphasis added), [https://perma.cc/VN7A-X32T].

15. The Act of Settlement, 12 & 13 Will. III, c. 2, § 3 (1700) (Eng.).

16. *Id.* (emphasis added).

17. *See, e.g.*, C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES, CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY 109 (New York, Macmillan & Co. 1894) (explaining the history of placemen legislation from the Act of Settlement (1700), which was subsequently amended in 1705, 1707, 1742, and 1782).

18. U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

19. Benjamin Cassady, *"You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209, 279–80 (2014).

20. The Regency Act 1705, 4 Ann., c. 8, § 26 (Eng.).

21. Hodel v Cruckshank (1889) 3 QUEENSLAND L.J. 141, 141–42 (Austl.) (emphasis added); *see Former Chief Justices*, HIGH COURT OF AUSTRALIA,

In 2018, the High Court of Australia (Australia's highest court) held that an elected mayor was not appointed (and not removable) by the Crown; thus, his position was not held "under" the Crown.[22] A concurrence by Justice Edelman explained that the phrase "office . . . under the crown" did not extend to elected positions. Justice Edelman added that by 1901, this understanding had been "crystallized after two centuries of legal usage."[23]

To this day, the United Kingdom and Commonwealth countries distinguish between (1) officers who are appointed to a position "under the Crown" and (2) officials who "hold their position by virtue of their election by the people."[24] In 1941, the United Kingdom Attorney General drafted a report during and for the wartime emergency. He explained that "[i]f the Crown [the Executive Government] has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is *one under the Crown*."[25] The memorandum added that "[i]f the duties are duties under and controlled by the Government, then the office is, *prima facie* . . . an office under the Crown . . . ."[26]

The Incompatibility Clause of the Australian Constitution states that "Any person who . . . [h]olds any *office of profit under the Crown* . . . shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."[27] Professor Luke Beck explained that "an office to which a person is elected by the electors is not an office 'under the Crown . . . .'"[28] He added that "appointment to such an office is not at the will of the

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https://www.hcourt.gov.au/justices/former-justices/former-chief-justices [https://perma.cc/CE5Q-659Q] (listing Griffith as Australia's first Chief Justice).

22. Re Lambie [2018] HCA 6 (14 Mar. 2018) ¶¶ 33–34, ¶ 36 (Austl.).

23. *Id.* at [58] (Edelman, J., concurring); *see id*. ("As Sir Samuel Griffith QC said in submissions in 1889, [office . . . under the crown] was 'an old phrase, well understood in relation to parliamentary law.'" (quoting Hodel v Cruckshank (1889) 3 QUEENSLAND L.J. 141, 141 (Austl.))). Griffith would subsequently become Australia's first Chief Justice. *Former Chief Justices, supra* note 21.

24. R v Obeid (No 2) [2015] NSWSC 1380 (22 Sept. 2015) ¶ 30 (Austl.) [https://perma.cc/D94S-VASF] ("The[se] [authorities] only indicate that a[] [member of the upper house or Legislative Council] does not hold an office 'under the Crown' or 'under the Government.' Instead they hold their position by virtue of their election by the people and legally are not answerable to, or under the direction of, the 'Crown' or the 'Government.'").

25. Memorandum of the U.K. Att'y Gen., Sir Donald Somervell, to the Select Committee on Offices or Places of Profit Under the Crown 136 (May 1, 1941) (emphasis added) [https://perma.cc/S9KE-VQ44].

26. *Id.* at 136.

27. *Australian Constitution* s 44 pt. iv (emphasis added).

28. Letter from Josh Blackman, Counsel for Amicus Curiae Scholar Seth Barrett Tillman, to Peter J. Messitte, U.S. Dist. Ct. Judge (Mar. 19, 2018), at Exhibit 1, ¶ 7, District of Columbia v. Trump, 344 F. Supp. 3d 828 (D. Md. 2018) (No. 8:17-cv-01596-PJM) [https://perma.cc/K26A-Z4VS].

executive government and dismissal from that office is not dependent on the will of the executive government."[29]

The Religious Test Clauses of the United States Constitution and the Australian Constitution use similar "Office . . . under"-language. The Religious Test Clause in the U.S. Constitution provides that "no religious Test shall ever be required as a Qualification to any *Office* or public Trust *under the* United States."[30] The Australian Constitution's Religious Test Clause states, "[N]o religious test shall be required as a qualification for any *office* or public trust *under* the Commonwealth."[31] The phrase "under the Commonwealth [of Australia]," used in the Australian Constitution's Religious Test Clause, is narrower than the phrase "under the Crown," used in the Australian Constitution's Incompatibility Clause. The category of "office . . . under the Commonwealth" extends only to certain federal positions in Australia. The "office under the Crown" category is, in certain respects, more expansive. This latter category extends to Australian federal positions, Australian state and territorial positions, and, apparently, also to U.K. and other commonwealth positions—all jurisdictions in the Commonwealth sharing a common monarch.

In short, elected positions are not considered offices "under the crown" or "under the Commonwealth." This drafting convention reflects something akin to a near self-evident aspect of modern democratic government: appointed officers are generally subject to direction or supervision in the normal course of their duties by a higher public authority. By contrast, elected officials are answerable primarily through elections. Consider a related comparative example. Professor Anne Twomey commented on the legal system of New South Wales, Australia. She explained that an "elective office," which is "not generally subject to the direction or supervision of the government," is not an office held "under the Crown."[32] Twomey's position did not flow from any unique aspects of the New South Wales legal system. Rather, her conclusions relied on older U.K. legal authorities. We think Twomey's understanding of "elective office" closely corresponds with the phrase "public Trust" that is used in the Religious Test Clause in the United

29. *Id.* (citation omitted). *Compare* Luke Beck, *The Constitutional Prohibition on Religious Tests*, 35 MELB. U. L. REV. 323, 347 (2011) (opining that the distinction between "officers of the Commonwealth" and "office under the Commonwealth" can "hardly be doubted"), *and id.* ("[T]he *Australian Constitution* distinguishes between [officers] 'of the Commonwealth' and 'under the Commonwealth'."), *with* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114–15 (1995) ("As a textual matter, each of these five formulations seemingly describes the same stations (apart from the civil/military distinction)—the modifying terms 'of,' 'under,' and 'under the Authority of' are essentially synonymous.").

30. U.S. CONST. art. VI, § 3 (emphases added).

31. *Australian Constitution* s 116 (emphases added).

32. ANNE TWOMEY, THE CONSTITUTION OF NEW SOUTH WALES 438 (2004).

States Constitution.[33] For these reasons, we contend that the phrase "*Office* or *public Trust* under the United States" in the Religious Test Clause extends to the full gamut of elected and appointed positions in the federal government.

II. THE ARTICLES OF CONFEDERATION USED THE "OFFICE . . . UNDER" DRAFTING CONVENTION

For more than three centuries, the British drafting convention *Office under* has referred to appointed officers. In our view, this interpretation of *Office under* crossed the Atlantic. In 1777, the Continental Congress submitted the Articles of Confederation for ratification by the States.[34] This document would provide a frame of government for the newly-independent confederation. The Articles of Confederation required all thirteen States to ratify the document. And for nearly five years, from July 4, 1776 to March 1, 1781, as the American War of Independence was waged, the Continental Congress governed without a formal written charter. Finally, on March 1, 1781, Maryland became the final State to approve the new form of government.

The Articles of Confederation's Congress was composed of a single legislative house. Its members, who were called "delegates," were chosen by the state legislatures. The Articles of Confederation Congress had the authority to appoint certain military officers and civil officers.[35] But there were limitations on this appointment power. Pursuant to the Articles of Confederation's Incompatibility Clause, delegates could not be appointed to an "office under the united states."[36] Here, the Articles of Confederation's text drew a distinction between delegates and "office[s] under the united states."[37]

In addition to the Articles of Confederation's Incompatibility Clause, the Articles of Confederation's Foreign Emoluments Clause imposed another limitation on those holding "office[s] of profit or trust under the [U]nited

33. U.S. CONST. art. VI, § 3 ("[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States"); *see also* Tillman & Blackman, *supra* note 2, at 396–403 (explaining that a position of "public Trust" is not subject to direction or supervision by a higher authority in the normal course of his duties).

34. *See* Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), ABRAHAM LINCOLN ONLINE, http://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm [https://perma.cc/7Q35-3Z85] ("The Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774."). *See generally The Articles of Association; October 20, 1774*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/contcong_10-20-74.asp [https://perma.cc/LHA5-4LP6].

35. ARTICLES OF CONFEDERATION of 1781, arts. VII & IX.

36. *Id.* art. V, para. 2.

37. *Id.*

[S]tates." Such officers could not accept "any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."[38] The Articles of Confederation's Foreign Emoluments Clause would only apply to appointed positions—that is, "office[s] . . . under the [U]nited [S]tates," as well as any "office of profit or trust under . . . any of them [the individual States]."[39] It would appear that the Articles' Foreign Emoluments Clause's text did not apply to delegates. Indeed, as discussed *infra*, rank-and-file delegates did not hold "office" at all. Finally, the Articles of Confederation did not use the phrase "Officers of the United States"—a phrase subsequently used in the U.S. Constitution ratified in 1788.

In this section, we will carefully parse the "office"-language used in the Articles of Confederation.

A. The Delegates under the Articles of Confederation

Article I of the Articles of Confederation began, "The Stile of this confederacy shall be, 'The United States of America.'"[40] But this "league of friendship"[41] was substantially different from what would later become the structure of government under the U.S. Constitution of 1788, which is now in force. Under the Articles of Confederation, there was a unicameral congress, and each state delegation had one vote. Members, however, were not required to be elected by the people. The Articles provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct."[42] Indeed, the established practice was that state legislatures chose their state's delegates.[43]

The state legislatures may have selected delegates by single-house resolution or by a concurrent resolution of two houses—depending on whether the state legislature was unicameral or bicameral. Alternatively, a legislature may have acted by the full law-making or statute-making apparatus. And doing so may have thereby involved the state governors, where such an official had a veto power or otherwise participated in the statute-making process. Such processes could be fairly characterized as elections. We do not exclude the possibility that on one or more occasions a state may have held a popular election for its delegates. Certainly, states had

38. *Id.* art. VI, para. 1.
39. *Id.*
40. *Id.* art. I.
41. *See id.* art. III.
42. *Id.* art. VI, para. 1.
43. *Articles of Confederation*, HISTORY (Aug. 27, 2021), https://www.history.com/topics/early-us/articles-of-confederation [https://perma.cc/TLM7-YSJH] ("[A]s in the past [under the Articles Congress], each state had one vote, and delegates were elected by state legislatures.").

the authority to choose delegates by such methods, but we are not aware of any state actually having done so. In any event, even if one characterized the delegates' mode of selection as an "appointment," rather than as an "election," the delegates were not appointed or subject to removal or supervision by the Articles government. Accordingly, delegates cannot be characterized as holding "office . . . under the [U]nited [S]tates," as that term was used in the Articles of Confederation.

The Articles imposed one ostensible term limit on who could be selected as a delegate: "no person shall be capable of being delegate for more than three years, in any term of six years."[44] Beyond this term limit, the states were free to choose any person as a delegate. In other words, the Articles of Confederation laid down no traditional qualifications for delegates relating to age, citizenship, inhabitancy, residency, and other factors.[45] The Articles of Confederation's Incompatibility Clause functioned more as a qualification for holding an "office under the United States" than as a qualification for delegate to the Articles Congress. And the Articles of Confederation's Judicial Incompatibility Clause, which we will discuss below, also functioned more as a qualification for holding a judicial position than as a qualification for delegate to the Articles Congress.

Once elected, the delegates were still subject to supervision by the states. Under the Articles of Confederation, the states retained the power to "recall its delegates . . . at any time . . . ."[46] Furthermore, the states, rather than the central government, paid the salaries for the delegates. For these reasons and others, the delegates to the Articles Congress resembled ambassadors to something akin to an international assembly. The delegates served at the pleasure of their home state and could be recalled at any time, apparently absent cause. In this regard, delegates lacked independence from their state government. But the delegates were independent of control by the Articles government. Given this structure, Professor Akhil Reed Amar has characterized delegates as state officers.[47] We express no opinion about Amar's characterization.

The Articles of Confederation also provided for the appointment of military and civil officers.

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44. ARTICLES OF CONFEDERATION of 1781, art. V, para. 1.

45. Seth Barrett Tillman, *Understanding Nativist Elements Relating to Immigration Policies and to the American Constitution's Natural Born Citizen Clause*, 32 AM. CONST. STUD. 1, 11–12 (2021).

46. ARTICLES OF CONFEDERATION of 1781, art. V, para. 1.

47. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447 & n.87 (1987) ("[This provision in the Articles of Confederation states 'any office,'] [n]ot '*any other*,' suggesting that congressional delegates were *state* [as opposed to federal or national] officers." (first emphasis added)).

B. The Military Offices Under the Articles of Confederation

Article IX gave Congress the power to "appoint[] all officers of the land forces in the service of the United States, excepting regimental officers."[48] The state legislatures had the power to "appoint the regimental officers[.]"[49] Congress had the power to "appoint[] all the officers of the naval forces, and [to] commission[] all officers whatever in the service of the united states."[50] However, the states retained something of a residual appointment power: "[w]hen land forces are raised by any state, for the common defence" pursuant to Article VII, the state legislatures had the authority to appoint "all officers of or under the rank of colonel[.]"[51] In this regard, the central government and the states shared the power over the appointment of military officers.

C. The Civil Offices Under the Articles of Confederation

Article IX of the Articles of Confederation includes a mechanism by which the central government could appoint civil officers. It provides, "The United States, in congress assembled, shall have authority . . . to appoint such other committees and *civil officers* as may be necessary for managing the general affairs of the United States under their direction[.]"[52] We refer to this provision as the Civil Officers Appointments Clause. And we think these civil officers are to be contrasted with military officers.

Consider one prominent appointed civil officer. In May 1784, Thomas Jefferson was appointed by the Articles of Confederation Congress to serve as a Minister Plenipotentiary to the Court of Versailles.[53] The Articles of Confederation Congress approved instructions for Jefferson to negotiate amity and commerce with the "Commercial Powers of Europe."[54] And Thomas Mifflin, the President of the Congress, transmitted to Jefferson "the several Acts of Congress which relate to the formation of Treaties of Commerce with the Powers of Europe."[55] (More on Articles of Confederation President Mifflin later.)

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48. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.
49. *Id.* para. 5.
50. *Id.* para. 4.
51. *Id.* art. VII.
52. *Id.* art. IX, para. 5 (emphasis added).
53. David Thorson, *Minister to France*, THE JEFFERSON MONTICELLO (June 13, 2020), https://www.monticello.org/site/research-and-collections/minister-france [https://perma.cc/2APB-A4WP].
54. U.S. CONG., INSTRUCTIONS TO AMERICAN FOREIGN MINISTERS FOR NEGOTIATING TREATIES OF AMITY AND COMMERCE 1 (1784).
55. Letter from Thomas Mifflin, President of Congress, to Thomas Jefferson, Minister Plenipotentiary to the Court of Versailles (May 20, 1784) [https://perma.cc/YF83-ZULD].

In two other provisions, the Articles of Confederation refers to types of civil officers. The Incompatibility Clause of Article V refers to an "office under the united states." And the Foreign Emoluments Clause of Article VI refers to an "office of profit or trust under the united states." We do not know for certain the relationship between the phrases "civil officers" as used in the Civil Officers Appointments Clause and "office[s] . . . under the united states" as used in the Incompatibility Clause and the Foreign Emoluments Clause. Indeed, it is possible, and we think likely, that all "civil officers" also held "office[s] . . . under the united states." If that understanding is correct, then Jefferson, a "civil officer," would also have held an "office . . . under the united states."

In our view, the position of state-appointed military officers in the Articles of Confederation schema was unclear. We have found no contemporaneous materials that speak to their status. Moreover, subsequent judicial and scholarly sources are equally silent. For these reasons, we are reluctant to make bold claims regarding such legally long-moribund positions. Still, we do think it reasonably clear that those military officers the Articles Congress appointed and commissioned held an "office . . . under the united states." George Washington, the commander in chief of the Continental Army, held an "office . . . under the United States."

We acknowledge that the documentary records from this period concerning these issues lack depth and precision. The Articles government ceased to exist at around the time the First Congress of the United States met under the Constitution of 1788. To date, researchers have not yet mined these early materials for what most contemporary scholars believe are obscure and unimportant legal issues.

We will consider the Articles of Confederation's Incompatibility Clause and the Foreign Emoluments Clause in turn.

D. The Incompatibility Clause of the Articles of Confederation

In Section I.C, we introduced the Incompatibility Clause of Article V of the Articles of Confederation. It provides: "nor shall any person, being a delegate, be capable of holding any *office under the United States*, for which he, or another for his benefit receives any salary, fees or emolument of any kind."[56] We draw three conclusions from the language of this provision.

First, it can be argued that Article V's text distinguishes between a "delegate" and an "office under the united states." Delegates did not hold "office under the united states." If delegates held offices under the united states, then it would have made more sense to have written the provision as:

56. ARTICLES OF CONFEDERATION of 1781, art. V, para. 2 (emphasis added).

"nor shall any person, being a delegate, be capable of holding any [*other*] office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind."[57]

Second, the practical upshot of Article V's Incompatibility Clause is that a person could not currently hold both positions. In other words, by the provision's express language, a person serving as a "delegate" cannot concurrently hold any lucrative "office under the United States." Of course, it is possible that, in contravention to this provision, delegates were, in fact, appointed to lucrative "office[s] under the united states," and then, in violation of the Incompatibility Clause, they continued to hold both positions. Or alternatively, the Articles' Incompatibility Clause would also be violated if a state legislature chose a person holding a lucrative office under the United States as a delegate, and then that person concurrently held both positions. But we prefer to start from a different presumption: members of the Articles' central government were unlikely to knowingly and openly defy the national charter. At the very least, we expect that such violations of the Articles of Confederation would have left well-known records.

Third, Article V's drafters were concerned about potential conflicts of interest. Under the Articles government, Congress could establish lucrative "offices under the united states," which drew compensation from the central treasury. (By contrast, delegates drew their regular salary from their home state—not from the central treasury.) In the absence of Article V, delegates could appoint themselves to lucrative positions created by and responsible to the Articles Congress, and then concurrently hold both positions. Moreover, in the absence of Article V, delegates could even appoint themselves to positions such delegates personally voted to create, and then concurrently hold both positions. Article V prohibits these sorts of self-dealing—at least where the office carries compensation. And this concern about self-dealing continued through the Philadelphia Convention. Article V served as a precursor of the Constitution of 1788's Incompatibility Clause, which provides, "no Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office."[58] Indeed, the framers of the Constitution of 1788 maintained the "Office under the United States"-language previously used in the Articles of Confederation. However, the 1788 provision was in one respect more restrictive. Under the United States Constitution, a member of Congress was barred from holding an appointed federal office, even if that position carried no compensation.

57. *Cf.* Amar, *supra* note 47 ("[This provision in the Articles of Confederation states 'any office under the United States,'] [n]ot '*any other*,' suggesting that congressional delegates were *state* officers [and not *federal* officers—that is, officers under the United States]" (first emphasis added)).

58. U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

However, in another regard the Incompatibility Clause of the Articles of Confederation was more restrictive than the 1788 provision: the former provision barred a delegate from holding an "office under the United States" if "another" person received the prohibited salary for the "benefit" of the delegate. For example, Article V would bar a delegate from holding an office under the United States if the office had compensation that would be paid to the delegate, or if the office's compensation would be paid to another person, such as the delegate's spouse, for the delegate's benefit.

Some modern scholars view the Incompatibility Clause in the Constitution of 1788 as a separation of powers provision.[59] Under this perspective, members of Congress have to be separated from the executive branch, including the presidency and vice presidency. And this separation is necessary to ensure the lawmaking power is kept distinct from the executive power. But at least under the Articles of Confederation, the Incompatibility Clause was not designed to bolster the separation of powers. Indeed, there was no separation of powers in the sense of three independent branches—that is, the traditional legislative, executive, and judicial branch triad. The Articles government lacked any separate, independent executive branch. Under the Articles of Confederation, what were in effect executive officers were appointed by Congress, and they were responsible to that unicameral legislature. Likewise, under the Articles of Confederation, there was no free-standing, independent, permanent judiciary.[60] The Incompatibility Clause of the Articles of Confederation was not designed to facilitate the separation of powers between or among branches of government; rather, it was drafted to prevent conflicts and self-aggrandizement involving lucrative office. And, we think, it was these purposes that largely animated the coordinate Incompatibility Clause in the Constitution of 1788.[61]

Our position is that the "office under" drafting convention used in the Articles of Confederation referred to a category of positions that were appointed by the national government. We are not entirely certain which positions in the national government did and did not hold "office under the United States." We acknowledge that there are difficult and borderline cases in which the answer is unclear. Still, we are confident that the category of "office[s] under the United States" only included positions appointed by the central Articles government, and those positions were subject to the central

59. *See* Steven G. Calabresi & Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1050–51 (1994) ("[T]he [Incompatibility] Principle seems to have been grounded less in separation-of-powers theory than in the Framers' vivid memory of the British Kings' practice of 'bribing' Members of Parliament . . . with joint appointments to lucrative executive posts.").

60. *See infra* Section II.E (noting that the Articles Congress could create ad hoc courts).

61. *See infra* Section II.D (discussing the Articles' Incompatibility Clause).

Articles government's direction and supervision in the normal course of their duties.

E. The Judicial Incompatibility Clause Under the Articles of Confederation

The Articles of Confederation lacked a free-standing, independent, permanent judiciary. However, the Articles Congress could create ad hoc trial courts to settle disputes between states, as well as disputes over private rights involving land grants from different states.[62] The Articles Congress would sit as the court of appeal for these interstate disputes.[63] Likewise, the Articles Congress could create ad hoc "courts for the trial of piracies and felonies committed on the high seas[.]"[64] Congress could also create ad hoc courts "for receiving and determining finally appeals in all cases of captures[.]"[65] While the delegates would serve as the court of appeals for interstate disputes, the delegates could not participate in disputes over piracies, felonies on the high seas, and captures. Article IX provides, "no member of congress shall be appointed a judge of any of the said courts" concerning piracies, felonies on the high seas, and captures.[66] To avoid confusion with the Incompatibility Clause of Article V, we refer to the provision in Article IX as the Judicial Incompatibility Clause.

The Judicial Incompatibility Clause of Article IX prohibits members of Congress from appointing themselves to ad hoc judicial positions, which potentially carried compensation. This provision resembles the Incompatibility Clause of Article V discussed earlier. However, it is unclear if judges on these piracy-related courts would hold "office[s] under the United States." Presumably, the answer is no because these *ad hoc* positions lacked permanence. Arguably those who held such temporary positions did not hold "office." The United States Supreme Court would later hold that

62. ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 2 & 3.

63. *Id.* ("All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.").

64. *Id.* art. IX, para. 1.

65. *Id.*

66. *See Articles of Confederation*, *supra* note 42–44 (discussing durational limitations on a member's service in the Articles Congress).

positions lacking permanence were not officers at all.[67] The Supreme Court recently reaffirmed this principle.[68]

There is another textual reason to conclude that these piracy-related judges were not "office[s] under the united states." The Incompatibility Clause of Article V already bars delegates from holding an "office . . . under the united states." If these piracy-related judges were "office[s] under the united states," delegates would have already been excluded from this position. There would be no need to specify in a separate provision that delegates were barred from holding these judicial positions. By contrast, the Articles expressly authorized Congress to sit as a court of appeals for certain interstate disputes. And the delegates who served as judges on these specialized appellate courts were likewise not subject to the Incompatibility Clause.

We draw two conclusions from the Judicial Incompatibility Clause. First, in cases involving interstate disputes, delegates could serve as judges-in-appeal. The Articles did not express a generalized concern based on the separation of powers. In those interstate disputes, the delegates-as-judges would not draw an additional salary from the national treasury. Rather, the delegates-as-judges would only receive their regular salary from their states. Second, by contrast, the delegates could not serve as judges in piracy-related

67. *See, e.g.*, United States v. Germaine, 99 U.S. 508, 511–12 (1879) ("If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are not continuing and permanent, and they are occasional and intermittent." (citing United States v. Hartwell, 73 U.S. 385, 393 (1868))).

68. Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) ("Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that 'civil surgeons' (doctors hired to perform various physical exams) were mere employees because their duties were 'occasional or temporary' rather than 'continuing and permanent.' Stressing 'ideas of tenure [and] duration,' the Court there made clear that an individual must occupy a 'continuing' position established by law to qualify as an officer." (citations omitted)). It was for this reason we wrote that Special Counsel Robert Mueller, who held a temporary position, was not an officer at all. *See* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018), https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states [https://perma.cc/Q69U-N96K] ("Once [Mueller's] job is complete, the office dissolves. However, under *Lucia*, Mueller's ephemeral position is likely not an 'officer' at all, because it fails one of the two factors put forth by Justice Kagan. Indeed, per Justice Sotomayor's dissent, Mueller flunks one of the two 'prerequisites.'"); *see also* Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. J.L. & PUB. POL'Y 837, 848–49 (2022) ("This possibility was envisioned by scholars Josh Blackman and Seth Barrett Tillman in relation to Special Counsel Robert Mueller . . . . In writing about this noncontinuous position, Blackman and Tillman suggested that if a role's temporary nature character could free it from constitutional 'officer' requirements, then even a powerful, albeit temporary, role like that carried out by a Department of Justice Special Counsel could be exercised free from any appointments requirements.").

cases. For these disputes, the Congress could authorize salaries that would be paid from the national treasury. These conclusions would indicate that the Articles of Confederation's Incompatibility Clause served a limited purpose: i.e., to prevent conflicts involving delegates and those holding lucrative offices in which compensation was paid out of the national treasury.

F. The Foreign Emoluments Clause of the Articles of Confederation

The Articles of Confederation imposed some restrictions on those holding an "office . . . under the United States."[69] Article VI of the Articles of Confederation contains a Foreign Emoluments Clause, which provides: "nor shall any person holding any *office of profit or trust under the United States*, or any of them [i.e., any state], [shall] accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."[70] The Foreign Emoluments Clause of Article VI bears some similarities with the Incompatibility Clause of Article V but differs in four ways.

First, the Incompatibility Clause and the Foreign Emoluments Clause use slightly different "office"-language. The Incompatibility Clause refers to an "office under the united states," while the Foreign Emoluments Clause refers to an "office *of profit or trust* under the united states." In the latter provision, as a textual matter, the drafters of the Articles used more limited language that would appear to refer to a narrowed subset of offices under the United States. The presumption should be that the words "profit or trust" were not added unthinkingly. Moreover, we can draw another inference: there were "office[s] . . . under the united states" that were not "of profit" or "of trust." For example, the Constitution of 1788's Impeachment Disqualification Clause refers to "any Office of *honor*, Trust or Profit under the United States."[71]

Second, the Articles of Confederation's Foreign Emoluments Clause does not merely impose limitations on those holding an "office of profit or trust under the united states." Article VI also includes an extension: "or any of them." In other words, an "office of profit or trust under . . . any of them" refers to the offices of profit or trust associated with the member states of the Articles of Confederation. Thus, this Foreign Emoluments Clause applied to certain positions in the central government and also to certain positions in the state governments. The Articles of Confederation's Foreign Emoluments Clause extended to state positions, unlike the Articles of Confederation's Incompatibility Clause, which only reached positions associated with the

69. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.
70. *Id.* (emphasis added).
71. U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

national government. The Articles of Confederation prohibited the acceptance of foreign emoluments by *both* those holding certain "office[s] . . . under the united states" and those holding certain "office[s] . . . . under the states." By contrast, the Incompatibility Clause only barred delegates from concurrently holding "office[s] . . . under the united states."

Consider two scenarios. First, notwithstanding the Articles' Incompatibility Clause, both a state legislator and a state officer could concurrently serve as a delegate to the Articles Congress. Such an officeholder would not draw any compensation from the national government, and would, at most, draw compensation from his State's treasury. Second, notwithstanding the Articles of Confederation's Incompatibility Clause, both a state legislator and a state officer could concurrently hold an appointed "office . . . under the United States." In this second scenario, if state law authorized compensation or other emoluments, that person would receive state emoluments for holding the state position. And that same person, if compensation or other emoluments were authorized by the Articles Congress, would receive emoluments for holding the "office under the United States." Thus, such an officeholder had the possibility of double-dipping: by drawing compensation from both his State's treasury and the national treasury. Of course, in a situation involving at least one state position, it was possible that state law may have imposed restrictions barring such a state office-holder from concurrently holding additional federal, state, and municipal positions and/or offices.[72]

Third, under the Articles of Confederation's Incompatibility Clause, a delegate could not concurrently hold an "office under the united states." This text would seem to indicate that a delegate's position should not be characterized as an "office under the United States." Therefore, it would seem to follow that a delegate, who does not hold an "office . . . under the united states," would not have been subject to the Articles of Confederation's Foreign Emoluments Clause. Why? Because the latter clause reached "office[s] of profit or trust under the United States," and that language does not reach the position of delegate. Likewise, in our view, under the Constitution of 1788, members of Congress, as well as the elected President, are not subject to the Constitution of 1788's Foreign Emoluments Clause. Our position in regard to the Constitution of 1788's Foreign Emoluments

72. *See* Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 199 (2013) ("[T]he Incompatibility Clause [of the Constitution of 1788] did not bar Charles Carroll of Carrollton from simultaneously sitting in the Maryland [state] senate and the United States Senate between 1789 and 1792. Apparently, he and his contemporaries did not believe that joint service was either barred by the federal Incompatibility Clause or by its state analogue." (footnotes omitted)).

Clause finds some support with how the Articles of Confederation's Foreign Emoluments Clause operated.

Fourth, Article VI further suggests that the phrase "office under the united states" was limited to appointed officers generally subject to direction or supervision in the normal course of their duties by the Articles government. If the phrase "office under the united states" did include positions in the state government, it would not have been necessary to add the extension, "or any of them"—that is, any of the states. The Foreign Emoluments Clause in the Articles of Confederation expressly applied to certain state officers, but that restriction was not expressly placed in the Constitution of 1788's Foreign Emoluments Clause. By contrast, the Incompatibility Clause in both the Articles of Confederation and the Constitution of 1788 *only* referred to "office[s] under the united states" and not to "office[s] under the states." These drafting decisions go some way to illustrate that the drafters of the Articles of Confederation, like their successors, the framers of the Constitution of 1788, were sensitive to the varying scope of the "office"-language in these provisions.

Collectively, the Articles of Confederation's divergent text regarding "office" may indicate that its drafters took some care when specifying which positions were covered by specific provisions.

G. General George Washington and the Foreign Emoluments Clause

When the Articles of Confederation was ratified by the thirteenth and last necessary consenting State in 1781, George Washington was already serving as the commander in chief of the Continental Army. Washington would serve in this position until he resigned his commission on December 23, 1783, in Annapolis, Maryland.[73]

While he was commander in chief during the American War of Independence, Washington owned stock in the Bank of England. The Bank of England was a foreign state-chartered trading company. Later, the Bank of the United States would be structured along similar lines.[74] Washington had acquired shares in the Bank of England by virtue of his marriage to Martha Custis.[75] And he received dividends from the Bank of England. Indeed, during the American War of Independence, and while the Articles of

73. *General George Washington Resigned his Commission in Annapolis, Maryland*, HIST., ART, & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES (Dec. 23, 1783), https://history.house.gov/Historical-Highlights/1700s/General-George-Washington-resigning-his-commission-in-Annapolis,-Maryland/ [https:perma.cc/AU92-RKB9].

74. *National Banks—English and American*, XIV AM. Q. REV. 493, 504 (Sept. & Dec. 1833).

75. *Id.*

Confederation was in force, Washington's account was paid dividends by the Bank of England, an instrumentality of a foreign government.

Did Washington violate the Foreign Emoluments Clause under the Articles of Confederation? As a threshold matter, was Washington even subject to that provision? The Foreign Emoluments Clause only applied to those who held an "office of profit or trust under the united states." Washington was not an appointed civil officer. He was an appointed military officer. It is not self-evident that a military officer held an "office of profit under the united states." But the Articles' Foreign Emoluments Clause—unlike the Articles' Appointments Clause—did not distinguish between civil and military officers. The better reading is that the Articles' Foreign Emoluments Clause applied to all appointed "office[s] . . . under the united states," civil and military alike. Moreover, we are unaware that anyone has ever argued that Washington was not subject to the Articles of Confederation's Foreign Emoluments Clause. The better position, in our view, is that Washington would have been subject to the Foreign Emoluments Clause. Therefore, Washington would have been barred from accepting any "emolument . . . of any kind whatever, from any . . . foreign state."

So did Washington violate the Foreign Emoluments Clause? It is conceivable. This position, however, is difficult to sustain. Washington was a leading figure in the Americas and was a model of integrity for the confederation. We find it unlikely that he would have engaged in recorded financial transactions that flatly violated his government's charter. Moreover, no contemporaries raised any objections to Washington's receiving dividends from a foreign state-chartered commercial entity. At the time, the Bank of England functioned akin to a state instrumentality, even if not an actual arm of the official government apparatus. Albeit, it is possible that his contemporaries were not aware of these transactions. Still, no subsequent legal historian or constitutional scholar who had studied Washington's records ever raised any Foreign Emoluments Clause-related objections or even any doubts. Indeed, we are unaware that anyone has ever connected Washington's stock ownership in and distributions from the Bank of England with the Foreign Emoluments Clause in the Articles of Confederation. However, following the 2016 presidential election, some scholars and others raised such objections in connection with the Emoluments Clauses litigation.

In our view, Washington did not violate the Articles' Foreign Emoluments Clause because the dividends he received were not "emoluments." If these payments were not emoluments, then Washington complied with the clause. This mode of reasoning may seem unfamiliar, but such reasoning based on historical practice is standard practice. And we employ this framework throughout much of our work. In order to determine the meaning of pre-modern ambiguous text, we look at the practices of those

in government, particularly the practices when it was first put into effect. If we start from the presumption that luminaries like Washington generally tended to comply with the law, then we should favor an interpretation of the text that would leave Washington in compliance with the law. This presumption is bolstered in circumstances where contemporaries, as well as subsequent historians and legal commentators, also failed to raise any objections to allegedly illegal conduct. In this manner, we can determine the meaning of the word "emolument"—a somewhat obscure term—in part, based on formative early practices. We conclude that commercial payments, such as those arising under private contract law, like dividends, that were unrelated to holding public office and employment, were not "emoluments."

George Washington would later become the first President of the United States. But he was not the first person in the United States to hold the title of President.

H. The President Under the Articles of Confederation

Under the Articles of Confederation, there was no separate executive branch. Generally, the central government's powers resided in its unicameral legislature. But, there was a President of the Articles Congress. Article IX included what we call the President Clause. Pursuant to the President Clause, Congress could "appoint one of their number to preside[]" over proceedings.[76] The Articles of Confederation refers to this position as the "office of president."[77] (Of course, the root of the word *president* is *preside*.) The Articles imposed a limitation on the presidency: "no person" could "serve in the office of president more than one year in any term of three years[.]"[78] But this Articles-era position lacked the executive powers that President George Washington would have under the federal Constitution of 1788. Generally, the President of the Articles Congress performed the sorts of duties that a presiding officer would perform over a legislative body. The President was perhaps akin to the Speaker of the House.

Article IX imposed another limitation on the President: he must be "*appoint*[ed]" from among the "number" of the delegates.[79] Thus, the person who fills the "office of president" must be a delegate.[80] Practice supports this point. When the Articles of Confederation went into effect in March 1781, delegate Samuel Huntington of Connecticut had been serving as President of

76. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5.
77. *Id.*
78. *Id.*
79. *Id.* (emphasis added).
80. *Id.* art. IX, para. 6. By contrast, the House Officers Clause does not expressly require that the Speaker of the House must be a Representative. *See* U.S. CONST. art. I, § 2, cl. 5.

the Continental Congress.[81] Huntington transitioned to serving as the President of the Articles of Confederation Congress.[82] In July 1781, Thomas McKean, a delegate from Pennsylvania, was appointed to that position.[83] And in November 1781, John Hanson, a delegate from Maryland, became the President.[84] Hanson is sometimes described as the first President,[85] but Huntington and McKean served earlier. The fourth President was Elias Boudinot of New Jersey, and the fifth President was Thomas Mifflin of Pennsylvania, whom we mentioned earlier.

The President Clause of Article IX interacts with the Incompatibility Clause of Article V. Recall that the Incompatibility Clause provides "nor shall any person, being a delegate, be capable of holding any *office under the United States*, *for which he, or another for his benefit receives any salary, fees or emolument of any kind.*"[86] There is a potential tension between the President Clause and the Incompatibility Clause. The President must be a delegate. And a delegate generally cannot hold an "office under the united states." The question thus arises: is the President an "office under the United States"?

We think there are two ways to approach this Articles of Confederation-related question. First, if the central government did not award the president "any salary, fees or emolument[s]," then a delegate could serve as president without violating the Articles' Incompatibility Clause. There is some evidence that the Articles government provided the president with household expenses, as opposed to salary or other general compensation which the delegate-president could spend as he chose.[87] We are not certain if these payments, in the form of expenses, would have been considered "salary, fees or emolument[s]." Hamilton, for one, distinguished between an office's emoluments and an office's expenses. In the cover letter to the *1793 Complete Report*, Hamilton drew a line between (a) the "Salaries fees and Emoluments" of those "holding civil offices or employments under the [U]nited States (except the Judges)" and (b) "the disbursements and

81. *Samuel Huntington (July 16, 1731–January 5, 1796) The First President of the United States?*, STATE OF CONN. JUD. BRANCH: L. LIBRARY SERVICES, https://www.jud.ct.gov/lawlib/history/samhuntington.htm [https://perma.cc/JSV7-4PLK].

82. *Id.*

83. *Signers of the Declaration of Independence, Thomas McKean*, U.S. HIST., https://www.ushistory.org/declaration/signers/mckean.html [https://perma.cc/25V5-TJXX].

84. *The John Hanson Story*, CONST. FACTS, https://www.constitutionfacts.com/us-articles-of-confederation/john-hanson-story [https://perma.cc/W2RK-MCZY].

85. *John Hanson, So-Called First President, Dies*, HISTORY (Nov. 18, 2021), https://www.history.com/this-day-in-history/john-hanson-so-called-first-president-dies [https://perma.cc/46MP-5P46].

86. ARTICLES OF CONFEDERATION of 1781, art. V, para. 2 (emphasis added).

87. 34 JOURNAL OF THE CONTINENTAL CONGRESS 623 (Roscoe R. Hill ed., 1937) (1787).

Expences in the discharge of their respective offices and employments for the same Period."[88] To this day, courts in the United States and in other common law countries divide about whether reimbursed expenses are emoluments. It is far from clear what the majority view was in 1788.

There is a second way to approach this Articles of Confederation-related question of whether the President is an "office under the United States." Article IX characterized the President as holding an "office." But perhaps he did not hold an "office under the United States." (Indeed, in our view, the President of the United States, under the Constitution of 1788, holds an "office," but he does not hold an "office under the United States."[89]) It was possible that not all "office[s]" in or connected to the Articles government were "office[s] under the united states." In other words, the word "office" refers to a broader category of positions than the phrase "office under the united states." (Similarly, in our view, under the Constitution of 1788, the word "officer" in the Succession Clause refers to a broader category of positions than the phrase "Office . . . under the United States" in the Incompatibility Clause). If the "office" of the President of the Articles government was not an "office under the united states," then a delegate could concurrently serve as president without violating the Incompatibility Clause. It is true that the Congress chose the Articles' President, but whether he was subject to its supervision in the normal course of his duties is not clear.

The President Clause of Article IX also interacts with the Incompatibility Clause and the Foreign Emoluments Clause of Article VI. Under the Incompatibility Clause, a delegate cannot hold an "office under the United States, for which he or another for his benefit receives any salary, fees or emolument of any kind." But the Foreign Emoluments Clause only applied to one holding an "office of profit or trust under the united states." And the President must be selected from among the delegates. In our view, delegates did not hold "office[s] . . . under the United States." Therefore, rank-and-file delegates did not fall under the restrictions of the Foreign Emoluments Clause. And as such, that clause did not preclude delegates' accepting presents from foreign states. Therefore, the President, in his role as a delegate, could also accept presents from foreign states. But the President was not just a rank-and-file delegate—the President also held a separate position: the "office of president."

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88. *See* Amicus Curiae Scholar Seth Barrett Tillman's and Proposed Amicus Curiae Judicial Education Project's Motion for Leave to File Response to Amici Curiae by Certain Legal Historians, at Exhibit I, Citizens for Resp. & Ethics in Wash. v. Trump, in his official capacity as President of the United States of America (S.D.N.Y. 2017) (No. 17 Civ. 458 GBD) [https://perma.cc/BK2L-EBJQ] [hereinafter Tillman and Blackman's Response to the Legal Historians' Brief].

89. See *infra* Section III (discussing the phrase "office under the United States" as used in the U.S. Constitution).

If the "office of president" was not an "office . . . under the United States," then the position of delegate and president were not incompatible, and, likewise, the President was not encumbered by the Foreign Emoluments Clause. If this understanding is correct, then this result remains unchanged even if the President, in connection with his holding the "office of president," drew "salary, fees, or emolument[s]" from the Articles government.

Alternatively, if the President held an "office . . . under the United States," but the office of President drew no "salary, fees or emolument[s]" from the Articles government, then (again) the position of delegate and President were not incompatible. But in this situation, the President would fall squarely under the restrictions of the Articles of Confederation's Foreign Emoluments Clause.

In short, the positions of President and delegate were incompatible if the answer to three questions are *yes*: [i] Is the President's position an "office"?; [ii] Is the President's position also an "office . . . under the united states"?; and [iii] Did that position come with compensation authorized by the Articles government? If the answer to all three questions is *yes*, then the two positions are incompatible. However, if the answer to the first two questions is *yes*, and the answer to the third question is *yes* or *no*, then the presidency is still encumbered by the Foreign Emoluments Clause.

We acknowledge another possible interpretation of these textual difficulties: there is a conflict between two provisions in the Articles. Unlike the Constitution of 1788, the Articles were drafted and ratified amidst ongoing hostilities during the American War of Independence. It would not be particularly surprising if a drafting or structural error crept into the text. If such a textual conflict was present, it is unclear how the members of the Articles government would have resolved it. Perhaps the president could have resigned as delegate to avoid any incompatibility. Of course, the Articles government lacked free-standing, independent, and permanent courts. Thus, we have no body judicial decisions that might have shed light on this and other unresolved textual issues arising from the Articles of Confederation's text.

I. The Articles of Confederation Did Not Refer to "Officers of the United States"

One final note on the "office"-language used in the Articles of Confederation. The Incompatibility and Foreign Emoluments Clauses of the Articles of Confederation both use the phrase "office . . . under the united states." The Articles of Confederation does not use the phrase "Officers of the United States," which would be used throughout the U.S. Constitution of 1788. We think the phrase "Officers of the United States" was defined by the

Constitution and differs from the phrase "office . . . under the united states." Furthermore, the Constitution's Appointments Clause defined the meaning of the phrase "Officers of the United States." By contrast, usage regarding the Articles of Confederation's "office . . . under the United States"-language drew on a preexisting British drafting convention.

III. THE FRAMERS OF THE CONSTITUTION OF 1788 USED THE "OFFICE . . . UNDER" DRAFTING CONVENTION

The framers of the Constitution of 1788 would continue the American tradition of adhering to the "Office . . . under" drafting convention. Four clauses in the Constitution use the phrase "Office . . . under the United States" with some variants. First, the Elector Incompatibility Clause provides that "no Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector."[90] Second, the Impeachment Disqualification Clause provides, "Judgment in Cases of Impeachment shall not extend further than to removal from *Office*, and disqualification to hold and enjoy any *Office of honor, Trust or Profit under the United States*."[91] Third, the Incompatibility Clause provides, "[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in *Office*."[92] Fourth, the Foreign Emoluments Clause provides, "No Title of Nobility shall be granted by the United States: 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."[93]

In Part V of this series, we will analyze the phrase "Office . . . under the United States" using original methods of originalism. This phrase refers to appointed positions in the Executive and Judicial Branches, as well as non-apex appointed positions in the Legislative Branch. Appointed positions in the Legislative Branch, such as the Clerk of the House of Representatives and the Secretary of the Senate, 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."

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90. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

91. *Id.* art. I, § 3, cl. 7 (emphases added).

92. *Id.* art. I, § 6, cl. 2 (emphases added).

93. *Id.* art. I, § 9, cl. 8 (emphases added). Why does Impeachment Disqualification Clause list *Trust* first and *Profit* second, while the Foreign Emoluments Clause lists *Profit* first and *Trust* second? We suspect the ordering may be based on how British and state progenitor provisions were drafted, but we have no certain answer. The order may vary precisely because it was not particularly important.

The Incompatibility and Foreign Emoluments Clauses in the Articles of Confederation were progenitors of the Incompatibility and Foreign Emoluments Clauses in the United States Constitution of 1788. All of these provisions use the phrase "Office . . . under the United States." Obviously, the forms of government shifted from the Articles of Confederation to the United States Constitution. But in both national charters, this language followed the preexisting British drafting convention "Office under the Crown." And this drafting convention referred to appointed positions as opposed to elected positions.

Our arguments concerning "Office under the Crown" are often met with a common objection. For example, a group of legal historians dismissed our position as monarchical. In an amicus brief, they wrote that we "offer[ed] no supporting historical evidence that the founders, whose criticism of the British monarchy is no secret, equated the president with the king in this way."[94] The "office under . . ." drafting convention was not a statement about political sovereignty but was, and is still today, a mere parliamentary shorthand, i.e., a statutory drafting convention with roots in parliamentary law. Here, we do not address the purposes for which that linguistic convention was used. For example, in this Article, we are not addressing whether the "office under . . ." linguistic convention was used to make a powerful king-like or weak ceremonial head-of-state-like President.

Following independence, American lawyers and statesmen, steeped in the English and British legal tradition, did not instantly forget and jettison everything they had learned about British parliamentary practice and statutory drafting conventions.[95] On the contrary, many of the practices in the First Congress derived from these longstanding English parliamentary and legal conventions and customs. For example, consider Section XLIX of Thomas Jefferson's *A Manual of Parliamentary Practice for the Use of the Senate of the United States*. It provided that "each petition, memorial or paper, presented to the Senate, [should] be also inserted on the journals."[96] This rule was not new. Jefferson did not fashion it out of whole cloth. Rather, this rule was a matter of established *lex parliamentaria*.[97] We do not doubt,

94. Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs at 22 n.82, Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 68 Civ. 458) [https://perma.cc/SLV8-PQZP] [hereinafter Legal Historians' Amicus Brief]. The Legal Historians abandoned this argument in subsequent amicus briefs.

95. *See* Tillman & Blackman, *supra* note 6, at 365–71 (discussing impact of London's Inns of Court on the framers and ratifiers).

96. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES (Washington City, Samuel Harrison Smith 1801), *reprinted in* S. DOC. NO. 103–08 (1993).

97. *See* E-mail from Martyn Atkins, U.K. House of Commons Clerk, to Seth Barrett Tillman, Lecturer, Maynooth University (Sept. 11, 2017) [https://perma.cc/BV8C-84EM] ("The requirement

and have never doubted, that the framers rejected the concept of British monarchical sovereignty as a model for the presidency.[98] They also rejected many aspects of the British constitution as a model for the new national government. But they also retained many of our shared common-law traditions. Likewise, the framers did not throw overboard everyday English usage or technical meanings of English words and phrases connected to their developing, independent legal system.[99]

Disregarding this drafting convention leads to interpretive difficulties. Legal commentator Asher Steinberg observed, "This settled British legal and linguistic tradition of understanding office under the Crown to exclude elected office explains how the framers and ratifiers could have coordinated around the otherwise cryptic and [what appears to modern observers as a] novel phrase, 'office under the United States.'"[100] He added, "Something like a practice of this kind is almost necessary to explain how such coordination was possible."[101] We agree. And there was coordination. The framers of the Articles of Confederation and of the Constitution used the phrase "Office . . . under the United States" without any apparent material inconsistency or variation between the two documents.[102] Indeed, absent this drafting convention, it is nearly impossible to explain the Constitution's "office"- and "officer"-language.

Next, we will consider how the "office . . . under" drafting convention was understood during the Washington Administration.

IV. PRESIDENT WASHINGTON'S SECRETARY OF THE TREASURY, ALEXANDER HAMILTON, ADHERED TO THE "OFFICE . . . UNDER" DRAFTING CONVENTION

During the Washington administration, Secretary of the Treasury Alexander Hamilton issued dozens of circulars, memoranda, and reports. Some of these reports were mandated by statute. The Act to establish the Treasury Department stated that:

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on the Clerk to record in the Journal the presentation to the House of each account and paper—which persists in essence to this day—is of very long standing, but the authority for the requirement cannot be readily traced to a particular order of the House.").

98. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 456 (1793) ("Under that Constitution there are citizens, but no Subjects.").

99. *See generally* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

100. Asher Steinberg, *The Textual Argument That the President Does Not Hold an "Office Under the United States,"* NARROWEST GROUNDS BLOG (Sept. 21, 2017), https://narrowestgrounds.blogspot.com/2017/09/the-textual-argument-that-president.html [https://perma.cc/MS3J-6MKL].

101. *Id.*

102. *See* Seth Barrett Tillman & Josh Blackman*, Offices and Officers of the Constitution, Part X,* 63 S. TEX. L. REV. (forthcoming 2024).

> it shall be the duty of the Secretary of the Treasury . . . [t]o make report, and give information to either branch of the legislature, in person or in writing (as he may be required) respecting all matters referred to him by *the Senate or House* of Representatives, or which shall appertain to his office . . . .[103]

President Washington signed this bill into law on September 2, 1789. Through these reports, Secretary Hamilton provided Congress with rolls of the salaries paid to different positions within the federal government.

For example, in 1792, the Senate directed Secretary Hamilton to produce a financial statement listing the "salaries, fees, and emoluments" of "*every* person holding *any* civil office or employment under the United States, (except the judges)."[104] Hamilton and the Treasury Department took more than nine months to draft, sign, and submit a response, which spanned some ninety manuscript-sized pages.[105] The manuscript included several documents, which we refer to collectively as the *1793 Complete Report*.[106] Hamilton listed appointed or administrative personnel in *each* of the three branches of the federal government. However, Hamilton did not include all

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103. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65–66 (emphasis added). The statute's "Senate or House"-language authorizes either house independently to impose a legal obligation on the Secretary of the Treasury to produce or generate information. This provision is in tension with *INS v. Chadha*, 462 U.S. 919 (1983). This case held that the Constitution's bicameralism requirement precludes a statute from delegating authority to a single house. *Id.* at 948–59. To our knowledge, none of the *Chadha* litigants' briefs flagged § 2 of the Treasury Act to the Supreme Court.

104. 1 S. JOURNAL, 1st Cong., 1st Sess. 441 (1789) (emphases added).

105. *See* Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88, at Exhibits K–O. Many years before Trump was in office, Tillman had already posted extracts from the *1793 Complete Report* and related materials on his personal Bepress website, where these extracts remain available to this day. *See* Seth Barrett Tillman, *Hamilton, the Secretary of the Senate, and Jefferson: Three (or Four) Views of the Cathedral and the Mysterious Identity of the "Officers under the United States,"* BEPRESS: SELECTED WORKS OF SETH BARRETT TILLMAN (Jan. 10, 2010), https://works.bepress.com/seth_barrett_tillman/203/ [https://perma.cc/2LXL-DZQ8] (click files listed under "Related Files").

106. The *1793 Complete Report* is partially reproduced in the *Papers of Alexander Hamilton*. *See Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States* (Feb. 26, 1793), *in* 14 THE PAPERS OF ALEXANDER HAMILTON: FEBRUARY–JUNE 1793, at 157 (Harold C. Syrett & Jacob E. Cooke eds., 1969) [https://perma.cc/XT8X-442J]; *see also Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States* (Feb. 26, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-14-02-0051 [https://perma.cc/B88K-AA99] [hereinafter *Papers of Alexander Hamilton*]. The original Hamilton-signed document, on which the *Papers of Alexander Hamilton* reproduction is based, remains in the vaults of the National Archives & Records Administration (Record Group #46). Tillman has posted extracts from the *1793 Complete Report* on his personal Bepress website. *See* Tillman, *supra* note 105. The entire complete report has been uploaded online as exhibits to an amicus brief we filed. *See* Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88. The Transmittal Letter of the *1793 Complete Report* appears in *id.* at Exhibit K. The Cover Letter of the *1793 Complete Report* appears at *id.* at Exhibit L. Annexes I, II, and IV–XVIII of the *1793 Complete Report* appear in *id.* at Exhibit M. Annex III of the *1793 Complete Report* appears in *id.* at Exhibit N. Lastly, Annex XIX of the *1793 Complete Report* appears in *id.* at Exhibit O.

positions in the federal government. His carefully-worded response did *not* include the President, the Vice President, Senators, or Representatives. Indeed, Hamilton's response did not include any elected positions in the federal government.

In our view, Hamilton and his *1793 Complete Report* accurately responded to the precise language in the Senate's order: elected officials do not hold *office under the United States*, so they were not listed. Hamilton and the Treasury Department's response lends some substantial confirmation to our position: the framers had adopted the British "office under" drafting convention to distinguish between appointed and elected positions.

In contrast to the *1793 Complete Report*, Hamilton's 1789 report (hereinafter the "*1789 Civil and Military List*") included the President, Vice President, and members of Congress.[107] This report was a response to a House request for, among other things, the "civil list."[108] Similarly, Hamilton's 1792 financial statement (hereinafter the "*1792 Statement and Account*") included the President's salary.[109] This financial statement was a response to a House request for "an accurate statement and account of the receipts and expenditures of all public monies."[110]

In addition to the *1793 Complete Report*, there is an entirely different physical document that lists the salary of President Washington and Vice President Adams, along with the appointed officers included in Hamilton's original report, i.e., the *1793 Complete Report*. This document, which revised the *1793 Complete Report*, is reproduced in *American State Paper*, and we refer to it as the *Condensed Report*.[111] However, the *Condensed Report* was not signed by Hamilton and was prepared by Senate functionaries in the early 1830s—long after Hamilton's death. (Aaron Burr had shot and killed

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107. *Report on the Estimate of the Expenditure for the Civil List and the War Department to the End of the Present Year* (Sept. 19, 1789), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-05-02-0162-0001 [https://perma.cc/EY2C-867F] [hereinafter *1789 Civil and Military List*] ("For the compensation to the President of the U. States, [$]25,000. That of the Vice-president, [$]5,000. That of the members of Congress, computing the attendance of the whole number from the 3d of March to the 22d Sept. both days inclusive, 204 days, say 81 members, at 6 dollars per day, [$]99,144.").

108. H.R. JOURNAL, 1st Cong., 1st Sess. 113 (1789).

109. *See Report on an Account of the Receipts and Expenditures of the United States for the Year 1792*, *in* 15 PAPERS OF ALEXANDER HAMILTON: JUNE 1793–JANUARY 1794, at 474, 498–510 (1969) [https://perma.cc/VYA8-JQ7N] [hereinafter *1792 Statement and Account*]. *See also*, *Report on an Account of the Receipts and Expenditures of the United States for the Year 1792*, 18 December 1793, (Dec. 18, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-15-02-0395-0001 [https://perma.cc/298G-3TV4].

110. H.R. JOURNAL, 2d Cong., 1st Sess. 484 (1791).

111. *See* 1 AM. STATE PAPERS: MISCELLANEOUS 57, 57–68 (Walter Lowrie & Walter S. Franklin, eds., Washington, Gales & Seaton 1834). What appears in the *American State Papers* is a reproduction of the *Condensed Report*. The *Condensed Report* can be found at [https://perma.cc/EJK3-ANHH].

Hamilton in 1804.[112]) The *Condensed Report* should not be accorded the same weight as the *1793 Complete Report*. Hamilton signed the *1793 Complete Report*, and he transmitted it to the Senate as an official Executive Branch communication in response to a Senate order. And that order was issued pursuant to express statutory authority. Thus, Hamilton may even have had (and believed that he had) a statutory obligation to comply with the Senate order.

The next several subsections of Section IV will discuss the *1793 Complete Report*, the *Condensed Report*, Hamilton's *1789 Civil and Military List*, and Hamilton's *1792 Statement and Account*. Section IV will also discuss a report prepared by Secretary of the Treasury Albert Gallatin in 1802.

A. Hamilton's 1793 Complete Report Did Not List the President, the Vice President, and Members of Congress as "office[s] . . . under the United States"

In 1792, the Senate issued an order to Secretary of the Treasury Alexander Hamilton. The Senate directed Hamilton to produce a financial statement listing the "salaries, fees, and emoluments . . . of *every* person holding *any* civil office or employment under the United States, (except the judges)."[113] Nine months later, Hamilton and the Treasury Department drafted, signed, and submitted a response. That document spanned some ninety manuscript-sized pages.[114] The manuscript included several documents, which we refer to collectively as the *1793 Complete Report*. The documents included a transmittal letter, a cover letter, and nineteen annexes.

First, the transmittal letter, dated February 27, 1793, was addressed "to the Vice President from the Secretary of the Treasury."[115] The transmittal letter indicated that the report would provide "statements of the salaries, fees, emoluments, [etc.] of persons holding civil office under the United States." The transmittal letter, a separate cover letter, as well as other documents in the *1793 Complete Report*, included Hamilton's signature.

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112. *Aaron Burr Slays Alexander Hamilton in Duel*, HISTORY (Nov. 24, 2009), https://www.history.com/this-day-in-history/burr-slays-hamilton-in-duel [https://perma.cc/HL6H-LB5L].

113. S. JOURNAL, 1st Cong., 1st Sess. 441 (1789) (emphases added).

114. *See* Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88. During the course of the Emoluments Clauses litigation, we published a copy of the *1793 Complete Report*, which was drafted in long hand. We also published a copy of the typescript, modern reproduction of the *1793 Complete Report* which had appeared in the *Papers of Alexander Hamilton*. *See id.* at Exhibits K–O.

115. *See id.* at Exhibit K.

During the course of the Emoluments Clauses litigation, we submitted declarations by five experts concerning the *1793 Complete Report*. (In Section IV.C *infra*, we will explain the context in which these declarations were submitted.) First, John P. Kaminski has edited *The Documentary History of the Ratification of the Constitution* since 1969. Kaminski's role in academic and professional settings regularly calls upon him to determine whether documents are authentic.[116] He also has written dozens of books and articles on the Founding Era. Second, Professor Kenneth R. Bowling of George Washington University has published several books that discuss Hamilton and Hamilton-related documents, and he authenticated one of the *original* thirteen copies of the Bill of Rights.[117] Third, Professor Robert W.T. Martin of Hamilton College has written several books and articles on Hamilton.[118] Fourth, Michael E. Newton is a historian who specializes in the American Revolution and Founding Era, and he has discovered some of the oldest known Hamilton documents.[119] Fifth, Professor Stephen F. Knott of the United States Naval War College is a political scientist who specializes in the American founding and has studied Hamilton for more than twenty-five years. The first four experts uniformly agreed that Hamilton signed the *1793 Complete Report*.[120] Professor Knott generally supported Tillman's position, but he took no position in regard to the authenticity of Hamilton's signature.

Second, in addition to the transmittal letter, the *1793 Complete Report* included a cover letter dated February 26, 1793. The cover letter indicated that the report would include "statements of the salaries[,] fees[,] and Emoluments . . . of the Persons holding civil offices or employments under the united States (except the Judges)."[121] The cover letter listed eighteen annexes that would follow.[122] The annexes included: Annex I "relating to the

116. *See id.* at Exhibit G, ¶ 8.

117. *See id.* at Exhibit H, ¶¶ 5, 7.

118. *See id.* at Exhibit J, ¶¶ 5–6.

119. *See id.* at Exhibit E, ¶¶ 2, 4.

120. *See id.* at Exhibit G, ¶ 16 ("The Complete Report was signed by Alexander Hamilton himself. I base this opinion in substantial part on my professional judgment as to what Hamilton's signature looked like."); *see also id.* at Exhibit H, ¶ 10 ("[T]he signature in the *Complete Report* is Alexander Hamilton's signature [including the transmittal letter,] cover letter, and in Annexes X, XI, XII, and XIII."); *id.* at Exhibit E, ¶ 8 ("I conclude that the Alexander Hamilton signatures in the *Complete Report* are original signatures. (This includes the signatures in the cover letter and several others in the annexes, including Annex X, XI, XII, and XIII)."); *id.* at Exhibit F, ¶¶ 8–9 ("I visited the National Archives and . . . personally reviewed the actual *Condensed Report* and the actual *Complete Report* . . . Having reviewed the document at the National Archives, I re-affirm all the statements and conclusions which I made in my prior declaration."); *id.* at Exhibit J, ¶ 11, ("I conclude that the signature in the *Complete Report* is Alexander Hamilton's signature.").

121. *See supra* note 106.

122. *See Papers of Alexander Hamilton, supra* note 106 (dividing the annexes into separate files).

Department of State;" Annex II for the "Treasury Department;" Annex III for the "Department of [W]ar;" Annex IV for the "Board of Commissioners;" Annex V for the "Mint Establishment;" Annex VI for the "Office of the Secretary of the Senate;" Annex VII for the Office of the "Clerk of the House of Representatives;" Annex VIII was a "Letter from the Governor of the Territory of Northwest of the Ohio;" Annex IX was a "Letter from the Attorney General;" Annex X for the "District Attorn[eys];" Annex XI for the "Marshalls [sic] of the Districts;" Annex XII for the "Clerks of the District Courts;" Annex XIII for the "Offices of the Commissioners of Loans;" Annex XIV for the "Collectors of the Customs;" Annex XV for the "Supervisor of the Revenue;" Annex XVI for the "Inspectors of the Revenue for Surveys;" Annex XVII for the "Superintendents of Lighthouses;" and Annex XVIII for the "Keeper of Lighthouses."[123] There would be a nineteenth annex, "specifying the Persons of whom no information has yet been received on the subject."[124] The cover letter, and several annexes in the *1793 Complete Report*, also included Alexander Hamilton's signature.[125]

Hamilton's cover letter to his *1793 Complete Report* stated that the enclosed annexes included "statements of the salaries[,] fees[,] and Emoluments . . . of the Persons holding civil offices or employments under the united States (except the Judges)." Hamilton's *1793 Complete Report* listed the "compensation or pecuniary profit derived from a discharge of the duties"[126] of "every person holding any civil office or employment under the United States." Hamilton was asked to report the emoluments of the persons holding office, and not just the emoluments attached to the federal offices held. If a broad understanding of "emoluments" was controlling, then Hamilton should have reported *all* private financial benefits officeholders received by private contract or through private commercial transactions. Hamilton's report did not list any such financial gains arising from private business transactions precisely because such gains were not in any meaningful sense "emoluments." Here, the language of "emoluments" was tied to the compensation related to holding government "office" and "employment." Indeed, the word "emolument" was commonly used in this manner at the time of the ratification.[127]

Hamilton's *1793 Complete Report* listed appointed or administrative personnel in *each* of the three branches of the federal government. The report,

123. *Id.* (listing the names of the annexes).
124. *Id.*
125. *See* Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88.
126. *See* Hoyt v. United States, 51 U.S. (10 How.) 109, 135 (1850) (emphasis added).
127. *See* James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760–1799,* 59 S. TEX. L. REV. 181, 195 (2018).

which Hamilton personally signed, included positions from the Legislative Branch, including the Secretary of the Senate, the Clerk of the House, and their respective staffs. Hamilton also included the clerks of the federal courts, even though the Senate's order expressly excepted judges as beyond the scope of the report it sought. However, Hamilton did not include all positions in the federal government. His carefully worded response did *not* include the President, the Vice President, Senators, or Representatives.[128] The Senate asked for a list of "*every* person holding any civil *office* or employment *under the United States*," and that is precisely what Hamilton delivered. He excluded all elected federal officials—as well as all elected and appointed state officials, officers, and employees. It should also come as no surprise that the *1793 Complete Report* did not have an entry or set of entries for the electors of President and Vice President.

If the phrase "Office . . . under the United States" reached elected federal officials, then Hamilton's *1793 Complete Report* was under-inclusive. We should not assume that Hamilton misunderstood this frequently used and long-established language. After all, the phrase "civil office . . . under the United States" was repeated in both the cover letter and the transmittal letter that he signed. And very similar "office"-language appears in the Constitution of 1788 that Hamilton helped to draft and ratify. Moreover, the language in the Senate order reached *both* offices and employments, whereas the coordinate language in the Constitution only reached "offices." Here, the Senate's inquiry used broader language than the language found in the Constitution. If the profits or gains connected to private commercial transactions were not responsive to the Senate's 1792 order that used broad "office or employment"-language, then it is difficult to see why such profits or gains would be covered by the Constitution's narrower "office"-only language.

The better view is that Hamilton accurately responded to the precise language in the Senate's order: elected officials do not hold *Office under the United States*, so they were not listed. Hamilton and the Treasury Department's response lends some substantial confirmation to our position: the framers had adopted the British "office under" drafting convention to distinguish between appointed and elected positions.

Several leading experts on Hamilton support our position. First, Professor Kenneth R. Bowling, Ph.D., shared our understanding of the Hamilton 1793 roll of officers. Bowling explained:

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128. Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88. The editors of the *Papers of Alexander Hamilton* marked this document "DS," meaning "document signed," which indicates that this document was signed by Hamilton. *See Papers of Alexander Hamilton, supra* note 106.

> In Hamilton's day, some, perhaps many (but certainly not all) understood and used the phrase *office under the United States* (and its close textual variants) to include those officers who went through the Appointments Clause process of presidential nomination, Senate advice and consent, and presidential appointment, or to other lesser officers, such as those who only received presidential commissions (e.g., inferior officers). *Office under the United States* did not extend to elected officials. In my professional judgment, Hamilton's [1793] roll of officers, *The Complete Report* [which is reproduced in part in the *Papers of Alexander Hamilton*], is consistent with what was one strand (perhaps the prevailing strand) of the contemporaneous (that is, circa 1793) public understanding of *office under the United States*.[129]

Additionally, Professor Stephen F. Knott explained that it was very unlikely that Hamilton had inadvertently excluded the President from the *1793 Complete Report*. Knott explained:

> Hamilton was a careful lawyer, and he was inherently incapable of leaving the President and Vice President off a list as an oversight. When Hamilton examined and reported on an issue, he left no stone unturned. He simply would not have left individuals off of a list by accident. That notion is contrary to everything I have learned about the man through decades of research. Hamilton was meticulously detailed in any directive he wrote throughout his career as a staff officer for General Washington or during his tenure as Secretary of the Treasury. When Hamilton was asked to report to General/President Washington or to Congress he never responded in an under inclusive manner. Clarity, directness, and a fastidious attention to detail characterize all of Hamilton's reports. In my professional opinion, Tillman is correct to declare that Hamilton intended to leave the President and the Vice President off the list of "officers." Hamilton would never have made a "mistake" of such magnitude. That is simply unfathomable.[130]

Professor Robert W.T. Martin drew a conclusion from the *1793 Complete Report*: it was unlikely that Hamilton understood the President as holding a "civil office . . . under the United States." Martin wrote:

> Had Hamilton thought that [the] Senate order's language of "Persons holding civil office . . . under the United States" included the President and Vice-President, their salaries would properly be listed with [Annexes] No. X to XVIII, as based on "accounts which have been received from the officers to which they respectively relate." The fact that Hamilton did not include their salaries is some substantial

129. Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88, at Exhibit H, ¶ 16.

130. *Id.* at Exhibit I, ¶ 7.

> indication that Hamilton did not believe that this information [i.e., the President's salary] was responsive to the Senate's order.[131]

We acknowledge that there has been some criticism of our position. Michael Stern, who served as Senior Counsel for the House of Representatives,[132] raised several questions about the Hamilton list.[133] We will respond to each objection in turn.

First, Stern speculated that Hamilton "may have questioned the Senate's authority to *compel* him [(i.e., Hamilton)] to make inquiry of the president."[134] This supposition is unfounded. The Senate's inquiry was expressly authorized by a statute that President Washington had signed.[135] There is no hint in extant records that *anyone* suspected that Congress's inquiry was unconstitutional or otherwise unauthorized. Congress did not seek records of internal deliberations. Nor did Congress request confidential communications or advice between the President and his subordinates.

Likewise, Congress did not demand secret or confidential communications between the President and foreign diplomats or other officials. Rather, the President's and Vice President's compensation were set by statute in 1789.[136] Statutes are not state secrets. This statute did not provide for the President's expenses. It is conceivable that some other statute, impliedly or expressly, granted the President expenses. Or perhaps the President was paid expenses under the authority of some sort of tradition or common law principle in connection with government service. Still, any such reimbursements would ultimately be paid to the President by the Treasury Department as a warrant or draft against the federal treasury. As a result, Hamilton and his Treasury Department staff would have had *all* the relevant presidential expenses records, assuming there were any. Hamilton would not have needed to ask President Washington for any such information.

Second, Stern suggested that "interpreting the resolution to apply to members of the House would have resulted in a serious breach of comity between the two houses."[137] He added, "[I]t is not at all obvious that the

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131. *Id.* at Exhibit J, ¶ 16 n.2.

132. Michael Stern, *About*, POINT OF ORDER: A DISCUSSION OF CONG. LEGAL ISSUES, https://www.pointoforder.com/about/ [https://perma.cc/5EDC-C4J2].

133. *See generally* Michael Stern, *Why Tillman's Experts Show He is Wrong*, POINT OF ORDER: A DISCUSSION OF CONG. LEGAL ISSUES (Oct. 22, 2017), https://www.pointoforder.com/2017/10/22/why-tillmans-experts-show-he-is-wrong/ [https://perma.cc/U57W-FGUA].

134. *Id.*

135. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65–66.

136. *See* Act of Sept. 24, 1789, ch. 19, § 1, 1 Stat. 72, 72 (setting the President's and Vice President's compensation at $25,000 and $5,000 per year respectively, in "*full* compensation for their respective services." (emphasis added)).

137. Stern, *supra* note 133.

Senate has the constitutional authority to interrogate members of the House, either directly or through the Secretary of the Treasury."[138] This argument is not supported by history. Hamilton could complete the report without "interrogat[ing]" anyone. The Secretary of the Treasury had easy access to the compensation for members of Congress and congressional officers. Those salaries were also set by statute.[139] That law explained that all such payments shall be "certified" by the presiding officer and "shall be passed as public accounts, and paid out of the public treasury."[140]

Moreover, it is not customarily deemed an "interrogation" to ask elected and appointed public officials and officers to supply information about their public compensation. It is certainly not an "interrogation" where such compensation is fixed by statute, as opposed to compensation subject to discretionary authority. Here, a senior Executive Branch officer requested information on behalf of the Senate: a house of Congress. Public officials should have some substantial reason to disregard that request. Finally, there is no indication that the Clerk of the House and Secretary of the Senate objected to Hamilton's request. Indeed, the Clerk and Secretary supplied the information as requested by Hamilton. We see no evidence that anyone at any time had any concerns based on the separation of powers or comity. Certainly, the Clerk of the Senate could not object to Hamilton's inquiry, which was founded on an order of the Senate.

Third, Stern offered another reason why Hamilton excluded the President from the list: he "may have determined that the use of the word 'civil' [in the Senate order] created an ambiguity because the president serves as commander in chief."[141] This argument is wrong, even on its own terms. The word "civil" excludes members of the military from the scope of this provision.[142] The President is also "Commander in Chief." But he still holds a "civil" office. Finally, assume for argument's sake that the President, as Commander in Chief, did not hold a "civil" office. In that scenario, Stern's position is still wrong. Hamilton's list also excluded the Vice President, who cannot be considered a military officer in any meaningful sense. Members of

138. *Id.*

139. *See* Act of Sept. 22, 1789, ch. 17, § 1, 1 Stat. 70, 70.

140. *Id.* at 71; *see also infra* notes 209–12 (illustrating the 1789 roll of officers listing members of Congress, their staff, and their compensation in the "civil list").

141. Stern, *supra* note 133; *see also infra* notes 209–12 (illustrating the 1789 roll of officers listing the President and his compensation in the "civil list").

142. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 258 (Boston, Hilliard, Gray, & Co. 1833) [https://perma.cc/R2GB-ULUW] ("The sense, in which the term [civil] is used in the constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government.").

Congress were also excluded from Hamilton's list. Senators and Representatives are in no sense military officers.

Other commentators may come up with different reasons to attack our reading of the Hamilton list. We do not doubt that creative minds can try to pick holes in any theory. It is also possible that Hamilton was simply wrong or erred. Still, following Occam's razor, we posit that the simplest explanation is also the best and most likely explanation. The Senate made a specific request of the Secretary of the Treasury. Alexander Hamilton, a meticulous lawyer, carefully responded to that request. And his response excluded the salaries of the President, Vice President, and Members of Congress. We see no concrete reason to believe that Hamilton's exclusion of elected positions was anything but thoughtful and deliberate. Simply put, Hamilton's exclusion of elected positions cohered with the then-contemporaneous public meaning of "Office . . . under the United States." In short, our position is supported by the better reading of the *1793 Complete Report*: Hamilton followed the British *office under* drafting convention to distinguish between appointed and elected positions.

B. The Condensed Report Was a Scrivener's Copy Drafted Long After Hamilton's 1804 Death

In 2017, the United States District Court for the Southern District of New York considered *Citizens for Responsibility and Ethics in Washington* ("*CREW*") *v. Trump*. This suit alleged that President Donald Trump violated the Foreign Emoluments Clause.[143] That clause provides, "[N]o Person holding any *Office of Profit or Trust under* them [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."[144] The language used in the Foreign Emoluments Clause is very similar to the language used in the Senate's 1792 order, which directed Hamilton to produce a list including "*every* person holding any civil *office* or employment *under the United States*, (except the judges[])."[145]

In June 2017, we filed an amicus brief in *CREW*.[146] We argued that President Trump did not hold an "Office of Profit or Trust under" the United States and therefore was not subject to the Foreign Emoluments Clause. In support of our position, we cited Hamilton's *1793 Complete Report*, which

143. *See infra* Section IV.C (discussing the Emoluments Clauses litigation).

144. U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

145. S. JOURNAL, 1st Cong., 1st Sess. 441 (1789) (emphasis added).

146. *See* Brief for Scholar Seth Barrett Tillman as Amicus Curiae in Support of Defendant, Citizens for Resp, & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 GBD) [https://perma.cc/8XJW-FCQG] [hereinafter Brief for Scholar Seth Barrett Tillman].

did not list President Washington or his salary or any other compensation. We wrote that "[t]his official and meticulous correspondence is not consistent with Plaintiffs' claim that the Foreign Emoluments Clause's 'office . . . under the United States' language encompasses the presidency."[147] Our statement here was direct, clear, and consistent with prior scholarship—including Tillman's prior scholarship. Extracts from the *1793 Complete Report* appear in a typescript reproduction in the modern *Papers of Alexander Hamilton* series.

Our brief acknowledged that there is an entirely different physical document that lists President Washington and Vice President Adams and their salaries, along with the appointed officers that had been included in Hamilton's original report (i.e., the *1793 Complete Report*).[148] We refer to this other document as the *Condensed Report*, which is set to type and reproduced in *American State Papers*. The *American State Papers* version of Hamilton's report was reproduced in this 1834 publication. This is a typescript reproduction of the *Condensed Report*, which had been drafted in long hand after Hamilton died in 1804. The *Condensed Report* was most likely drafted in the early 1830s. The *Condensed Report* was based upon the *1793 Complete Report*.

To summarize, the *1793 Complete Report* was an annual statement for the fiscal year ending October 1, 1792. Both reports were initially drafted in longhand. Subsequently, both reports were reproduced in a typescript format: in the *Papers of Alexander Hamilton*, which reproduced extracts from the *1793 Complete Report*; and in *American State Papers*, which reproduced the *Condensed Report*. However, only the *1793 Complete Report* was signed by Hamilton. The words "Alexander Hamilton" appear in the *Condensed Report* at the location where a signature might appear. But the words "Alexander Hamilton" were merely copied from the *1793 Complete Report*—they were not an actual signature.

Tillman came to the conclusion, circa 2012, that the *Condensed Report* was a scrivener's copy—the antebellum equivalent of a photocopy—that was not signed by Hamilton.[149] In his pre-Trump publications, Tillman postulated

147. *Id.* at 19.

148. *See* 1 AM. STATE PAPERS: MISCELLANEOUS, *supra* note 111.

149. *See* Seth Barrett Tillman, *Who can be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL. STUD., 95, 106, 109–10 n.25, n.33 (2016), https://ssrn.com/abstract=2679512 ("reporting a nearly identical document in *American State Papers*"); *see also* Seth Barrett Tillman, *Six Puzzles for Professor Akhil Amar*, LOY. UNIV. CHI. L. SCH. ANN. CONST. L. COLLOQUIUM, CONFERENCE PAPER, at 14 n.60 (2012), https://ssrn.com/abstract=2173899 (referring to "the original Hamilton-authored document and its subsequent reproductions"); Seth Barrett Tillman, Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Reconciliation 65–70 & n.117 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970909.

that the handwritten *Condensed Report* was originally drafted in the 1830s for publication in *American State Papers*. The Clerk of the House and the Secretary of the Senate served as editors of *American State Papers*.[150] Tillman contended that they drafted or supervised those who drafted the handwritten *Condensed Report*. This scrivener's *Condensed Report* was subsequently set to type and reproduced in 1834 in a miscellaneous volume of *American State Papers*.

Unlike the *1793 Complete Report*, the *Condensed Report* included entries for President Washington and Vice President Adams and their salaries. Why did the editors of the *1793 Complete Report* add these line entries for the President and Vice President? The editors did not leave any record of their thinking or purposes. But we have a theory.

In 1816, Congress authorized the biennial publication of the *Official Register of the United States*, also known as the *Blue Book*,[151] to record the "compensation, pay, and emoluments" of "all the officers and agents, civil, military, and naval, in the service of the United States."[152] (The *Blue Book* is the predecessor of the modern-day *Plum Book*, which "is used to identify presidentially-appointed positions within the Federal Government."[153]). The first edition of the *Blue Book*, published in 1818, listed the salaries of President Monroe and Vice President Tompkins, followed by the salaries of appointed officers in all three branches; elected members of Congress were not listed.[154] Hamilton's 1793 roll of officers, i.e., the *1793 Complete Report*, did not include the salaries of President Washington and Vice President Adams. The editors of *American State Papers* nonetheless expressly identified the *Condensed Report* in the index to *American State Papers* as the "'Blue Book,' or list of civil officers of the United States" and as the "First 'Blue Book'" from "1793."[155] That is, the editors viewed Hamilton's original document as a 1793 progenitor of, or the best analog to, the *Blue Book*, which was first published in 1818.

150. 1 AM. STATE PAPERS: FOREIGN RELATIONS (Clerk of the House of Representatives and Secretary of the Senate eds., Gales & Seaton 1833).

151. John P. Deeben, *The Official Register of the United States, 1816-1959*, NAT'L ARCHIVES, https://www.archives.gov/publications/prologue/2004/winter/genealogy-official-register.html [https://perma.cc/RJD6-S232].

152. *See, e.g.*, DEPARTMENT OF STATE, A REGISTER OF OFFICERS AND AGENTS, CIVIL, MILITARY, AND NAVAL, IN THE SERVICE OF THE UNITED STATES ON THE THIRTEENTH DAY OF SEPTEMBER, 1817 (Washington, E. De Krafft 1818) [hereinafter BLUE BOOK], http://hdl.handle.net/2027/loc.ark:/13960/t7rn3xm5w [https://perma.cc/A3FF-D2UM].

153. *United States Government Policy and Supporting Positions (Plum Book)*, GOVINFO, http://bit.ly/3zhYtMN [https://perma.cc/FV5W-D5NR].

154. BLUE BOOK, *supra* note 152, at 9, 16–17.

155. 1 AM. STATE PAPERS: MISCELLANEOUS, *supra* note 111, at ii, index at ii, vi, xix.

However, there was one significant difference between the format of the 1818 *Blue Book* and Hamilton's *1793 Complete Report*: the latter had omitted the salaries of the President and the Vice President. To conform Hamilton's roll of officers to the format of the *Blue Book*, an unknown Senate functionary inserted entries for President Washington and Vice President Adams, along with their statute-authorized, regular salary compensation. Because their salaries had been set by statute,[156] this information would have been readily available to Hamilton and the Treasury Department staff in 1793; nevertheless, Hamilton and his Treasury Department staff chose to exclude this information from the *1793 Complete Report*. Likewise, this information was also readily available to senate researchers and editors in the 1830s, who chose to include this information in the *Condensed Report*. Once these additions were made, the *Condensed Report* closely tracked the format of the *Blue Book*. Even the sequencing was identical: President, Vice President, Department of State, Treasury Department, Department of War, etc. When viewed in the context of the *Blue Book*, the addition of the President and Vice President makes sense; it was a formatting or editorial decision made in the 1830s. There is no reason to believe that the editors of *American State Papers*, a project of the 1830s, were interpreting or re-interpreting the phrase "Office . . . under the United States." Likewise, there is no reason to believe that the editors were affirming that Hamilton thought the President and Vice President held "Office[s] . . . under the United States." And just to be clear, Hamilton had no connection to the *Condensed Report*. It was prepared decades after his death in 1804. Therefore, its editorial content could not reflect the views of Hamilton and the Treasury Department during the Washington administration about the meaning of the phrase "office . . . under the United States."

Our views on the *Condensed Report* would be contested—and subsequently vindicated.

C. Disputes About the Condensed Report in the Foreign Emoluments Clause Litigation

In *CREW v. Trump*, we filed an amicus brief before the U.S. District Court for the Southern District of New York. Our brief addressed the *1793 Complete Report* and the *Condensed Report*. In footnote 76, we wrote:

> *See Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States* (Feb. 26, 1793), in 14 The Papers of Alexander Hamilton ("PAH"), 157, 157–59 (1969),

156. *See* Act of Sept. 24, 1789, ch. 19, § 1, 1 Stat. 72, 72 (setting the President's and Vice President's compensation at $25,000 and $5,000 per year respectively, in "*full* compensation for their respective services." (emphasis added)).

> perma.cc/49RT-TTGF. The editors of PAH marked this document "DS," meaning "document signed," which indicates that this document was the original signed by Hamilton. The original Hamilton-signed document, on which the PAH reproduction is based, remains in the vaults of the National Archives & Records Administration (Record Group #46). An excerpt of the original Hamilton signed document is available at bit.ly/2rQCDxX [https://perma.cc/FQ83-4JDF]. Amicus notes that an entirely different document (but bearing a similar name) can be found in American State Papers ("ASP"). *See List Of Civil Officers Of The United States, Except Judges, With Their Emoluments, For The Year Ending October 1, 1792, in* 1 American State Papers/Miscellaneous 57 (1834). The document in ASP was not signed by Hamilton. The undated ASP document was drafted by an unknown Senate functionary. Unlike Hamilton's manuscript, the record in ASP includes the President and Vice President. Both documents are probative of the legal meaning of *Office . . . under the United States* as used in the Senate order. But the two documents are not equally probative. There is no reason to favor a document of unknown provenance over the Hamilton-signed original which was, in fact, an official communication from the Executive Branch responding to a Senate order.[157]

A group of professors, stylizing themselves as "Legal Historians," submitted an amicus brief in *CREW v. Trump*.[158] The Legal Historians were Professor Jack N. Rakove (Stanford University), Jed Handelsman Shugerman (Fordham University School of Law), John Mikhail (Georgetown University Law Center), Gautham Rao (American University), and Simon Stern (University of Toronto, Faculty of Law).

The Legal Historians' brief addressed our brief's discussion of the *1793 Complete Report* and the *Condensed Report*. In footnote 82, they wrote:

> Others have questioned the research upon which this brief [i.e., the Tillman/Blackman amicus brief in *CREW*] is based. *See* Brianne Gorod, "What Alexander Hamilton Really Said," https://takecareblog.com/blog/what-alexander-hamilton- really-said[159]; and Joshua Matz, "Foreign Emoluments, Alexander Hamilton, and a Twitter Kerfuffle," https://takecareblog.com/blog/foreign-emoluments-alexanderhamilton-and-a-twitter-kerfuffle#_ftn1.[160]

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157. Brief for Scholar Seth Barrett Tillman, *supra* note 146, at 19 n.76.

158. *See, e.g.*, Legal Historians' Amicus Brief, *supra* note 94, at 22 n.80.

159. Brianne J. Gorod, *What Alexander Hamilton Really Said*, TAKE CARE BLOG (July 6, 2017), https://takecareblog.com/blog/what-alexander-hamilton-really-said [https://perma.cc/D2HT-4JD8].

160. *See* Joshua Matz, *Foreign Emoluments, Alexander Hamilton & a Twitter Kerfuffle*, TAKE CARE BLOG (July 12, 2017) https://takecareblog.com/blog/foreign-emoluments-alexander-hamilton-and-a-twitter-kerfuffle [https://perma.cc/3L7V-N9RR]; *see also Contributors*, TAKE

> Problematically, the brief overlooks a key Hamilton manuscript that undercuts its thesis and belies its description of archival material. *See* Brianne Gorod, "A Little More on Alexander Hamilton and the Foreign Emoluments Clause," https://takecareblog.com/blog/a-little-more-on-alexander-hamilton-and-the-foreign-emoluments-clause.[161] Gorod offers a persuasive explanation for why the 1792 [*sic*[162]] document did not include the president: It was a preliminary list summarizing the letters providing the salary information, and there was no letter needed to provide the president's salary. We have confirmed these archival findings with a separate visit to the archive: the 1793 signed Hamilton manuscript was in the same box, in the folder immediately next to the folder holding the 1792 [*sic*] manuscript

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CARE BLOG, https://takecareblog.com/contributors/joshua-matz [https://perma.cc/64D8-K5CM]; Marcia Coyle*, Maybe Not an 'Anti-Trump Firm,' but Still Suing the White House Often*, NAT'L L.J. (Aug. 22, 2017, 10:18 AM), http://at.law.com/2rZbiF [https://perma.cc/G6UV-MNSJ].

161. Gorod, *supra* note 159. In *CREW v. Trump*, Gorod served as counsel for Amicus Senator Richard Blumenthal and Representative John Conyers, Jr. [ECF No. 63]. Gorod also served as counsel for the plaintiffs, including Blumenthal and Conyers, in *Blumenthal v. Trump*. There was extensive commentary on blogs and on social media about this issue. *See, e.g.*, Jed Shugerman, *Questions about the Emoluments Amicus Brief on Behalf of Trump UPDATED*, SHUGERBLOG (Aug. 31, 2017), https://shugerblog.com/2017/08/31/questions-about-the-emoluments-amicus-brief-on-behalf-of-trump-and-its-use-and-misuse-of-historical-sources/ ("I'm not deleting this Aug. 31 [2017] post because it's important to acknowledge my error, *not to erase it*." (emphasis added)). *See, e.g.*, Gorod, *supra* note 159 ("[A]fter months of *pretending* like this document didn't exist, [Tillman] finally acknowledged it—and was forced to describe it in grossly *misleading* terms in order to discount its significance." (emphases added)); Joshua Matz, *Foreign Emoluments, Alexander Hamilton & a Twitter Kerfuffle* TAKE CARE BLOG (July 12, 2017), https://takecareblog.com/blog/foreign-emoluments-alexander-hamilton-and-a-twitter-kerfuffle [http://perma.cc/66Z7-VY76] ("It's hardly an impressive defense to *mislead so dramatically* in the *NYT* but then say that it's all okay, since a few years ago I had a footnote in a law review article alluding vaguely to this contrary material." (emphasis added)); *id.* (noting that Tillman's publications are "low-profile academic articles"); Mark Joseph Stern (@MJS_DC), TWITTER (Aug. 1, 2017, 11:36 AM), https://twitter.com/mjs_DC/status/892454064532934658 [https://perma.cc/4DRT-WD5G] ("@BrianneGorod went to the National Archives to *debunk* the claim that the Emoluments Clause doesn't apply to Trump[.]" (emphasis added) (showing that the tweet was subsequently deleted with the link now indicating: "Sorry, that page doesn't exist!")); Laurence Tribe (@tribelaw), TWITTER (Sept. 1, 2017, 7:20 PM), https://twitter.com/tribelaw/status/903804726717841409 [https://perma.cc/GS65-VAYA] ("Another devastating critique of *Tillmania* by @jedshug[.]" (emphasis added)).

162. The Senate's order directing Hamilton to produce financial information was issued in 1792, but Hamilton's response was sent to the Senate in 1793. The legal historians incorrectly stated that the Hamilton response was dated 1793 twice in the same footnote. Two of the legal historians, Rao and Shugerman, made this same error in their 2017 *Slate* publication. *See* Gautham Rao & Jed Shugerman, *Presidential Revisionism: The New York Times Published the Flimsiest Defense of Trump's Apparent Emoluments Violations Yet*, SLATE (July 17, 2017, 5:42 PM), https://slate.com/news-and-politics/2017/07/the-new-york-times-published-the-flimsiest-defense-of-trumps-apparent-emoluments-violations.html [https://perma.cc/7LNV-9QBH] ("Ultimately, the central piece of documentary evidence for this emoluments argument is a manuscript version of a *1792 document* by Secretary of the Treasury Alexander Hamilton." (emphasis added)).

> upon which they relied. Even before the discovery [*sic*[163]] of this original manuscript, Amicus incorrectly described the ASP print as "unsigned" and "undated." See Tillman Amicus Brief at p. 19 n.76. The original manuscript confirms the print's date, its signature by Hamilton, and its reference to the president and vice president as "offices under the United States." We have identified a second signed document in the same folder, a cover letter for the condensed version, also dated Feb. 27, 1793, which appears to be drafted and signed by Hamilton. Letter from Hamilton to the Vice President of the United States and President of the Senate, Feb. 27, 1793, RG 46, Box 10, Folder X (unnamed introductory folder, the first in the box), National Archives and Records Administration. For images of both documents and others from the archive with transcriptions, see "The Foreign Emoluments Clause: Evidence from the National Archives," https://sites.google.com/view/foreignemolumentsclause.[164]

After the Legal Historians filed their amicus brief, Professor Jed Shugerman wrote a blog post that addressed the Tillman/Blackman amicus brief in *CREW*. He characterized our brief as providing the court with a "misleading interpretation of evidence."

> One might expect that when a brief before a court contains significant factual errors or misleading interpretations of evidence, the authors of that brief will offer to correct their briefs or retract the sections if they are no longer supported by the evidence. Fortunately, Professor Tillman still has ample time to address these questions and correct the record. As the Emoluments cases progress, I look forward to continuing to engage with his legal and historical arguments. However, it is vital that we all describe our historical sources clearly, accurately, and openly, and that we are careful to make sure our arguments are fairly supported by the historical evidence.[165]

Professor Shugerman also tweeted that Tillman and Blackman "misused sources," and added, "#Emoluments amicus for Trump by @SethBTillman & @JoshMBlackman misused sources. They need to address questions."[166]

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163. Both the *1793 Complete Report* and the *Condensed Report* have been reproduced in whole or in part in collections of easy-to-find primary materials. It was well-known that the original longhand versions of both reports are in the possession of the National Archives. And Tillman posted extracts from all four documents (i.e., the two longhand documents and the two typescript reproductions) on his Bepress website many years ago. Indeed, the extracts are still posted there. We do not understand how Gorod or anyone else (including any historian) could claim to have "discovered" any of these documents.

164. Legal Historians' Amicus Brief, *supra* note 94, at 22 n.82.

165. Jed Shugerman, *Questions About the Emoluments Amicus Brief on Behalf of Trump*, TAKE CARE BLOG (Aug. 31, 2017), https://takecareblog.com/blog/questions-about-the-emoluments-amicus-brief-on-behalf-of-trump [https://perma.cc/S8VX-JVAW].

166. Jed Shugerman (@jedshug), TWITTER (Aug. 31, 2017, 6:42 AM), https://twitter.com/jedshug/status/903221539750936577 [https://perma.cc/U3GP-RLZH].

Tillman would later respond that Shugerman's claim was "not a statement of opinion" but was "stated as fact."[167] Tillman also wrote that "this bold falsehood [was] a direct attack on [his] professionalism and honesty with regard to court filings (which I approved and continue to approve), and it was posted absent any due diligence)."[168]

In response to the Legal Historians' amicus brief, we submitted a responsive amicus brief to the U.S. District Court for the Southern District of New York.[169] Such a responsive filing by an amicus is very unusual. The purpose of the filing was to explain to the court and, just as importantly, to the wider public that our description of the *1793 Complete Report* and the *Condensed Report* was entirely accurate. To support our position, we submitted declarations from leading experts in the field of authenticating Founding Era documents and other scholars with Hamilton expertise. (We referenced these declarations *supra* in Section IV.A with regard to the *1793 Complete Report*.) We sought out these experts to convince the court, our peers, and the wider public that our position was correct. But we also had a more practical reason to seek out these experts. We were personally criticized by the Legal Historians, by litigators in *CREW v. Trump* and in related cases, e.g., Brianne J. Gorod, Esq., and Joshua Matz, Esq., other academics, and many others, in court filings, social media, and elsewhere. This criticism led us to believe that whatever arguments and evidence we personally marshaled would not be fully believed or trusted. In our view, we could defend our position in the public sphere only by relying on third-party experts.

Ultimately, the experts agreed with Tillman's position: Hamilton signed the *1793 Complete Report*.[170] Professor Kenneth R. Bowling stated:

> I have seen Alexander Hamilton's signature thousands of times over the course of fifty years of editing original manuscripts and other documents. I recognize Hamilton's signature well. The signature on *The Condensed Report*, which was subsequently reported and reproduced in *American State Papers*, is not in Hamilton's hand. It is not his signature.[171]

Michael Newton, a scholar with Hamilton expertise, offered a detailed explanation of how he reached his conclusion:

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167. Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88, at Exhibit D, ¶ 15.

168. *Id.* at Exhibit D, ¶ 15.

169. *See id.*

170. *See id.* at Exhibit E, ¶ 9 ("I conclude that the signature in the *Condensed Report* is not Alexander Hamilton's signature."); *see also id.* at Exhibit G, ¶ 11 ("I conclude that the signature in the *Condensed Report* is not Alexander Hamilton's signature.").

171. *Id.* at Exhibit H, ¶ 13.

> Alexander Hamilton's authentic signature contains several characteristics which can be used to identify whether other Hamilton signatures are original or copies. In Alexander Hamilton's authentic signature, the "x" in "Alexander" drops below the other letters, the "H" and "a" in Hamilton are connected in the middle or towards the top of the "a," and the "l" in Hamilton is taller than or approximately the same height as the "t" that immediately follows it. The signatures contained in the *Complete Report* bear these characteristics. In contrast, the signature in the *Condensed Report* displays none of these characteristics. Based on these specific characteristics and my knowledge of Hamilton's handwriting based on my extensive experience examining many Hamilton-signed documents, I conclude that the signatures in the *Complete Report* are original Alexander Hamilton signatures. By contrast, the signature in the *Condensed Report* is a copy. Accordingly, the cover letter in the *Complete Report* is clearly a Hamilton document; by contrast, the signature in the cover letter in the *Condensed Report* was produced by an unknown person.[172]

Figure 1 depicts Hamilton's signature on the transmittal letter of the *1793 Complete Report*.[173]

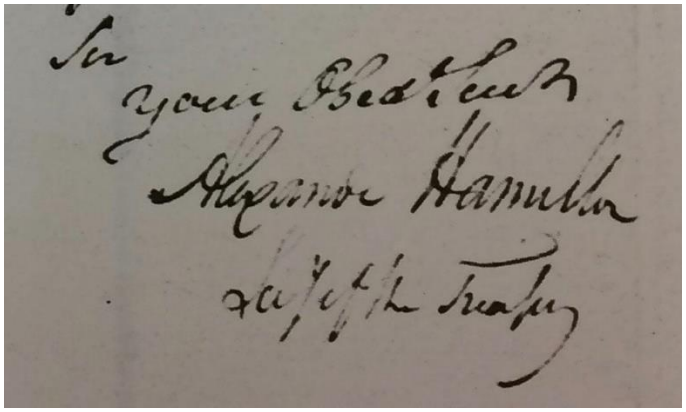


Figure 1

172. *Id.* at Exhibit E, ¶ 11.
173. *See id.* at Exhibit K.

Figure 2 depicts Hamilton's signature on the cover letter of the *1793 Complete Report*.[174]

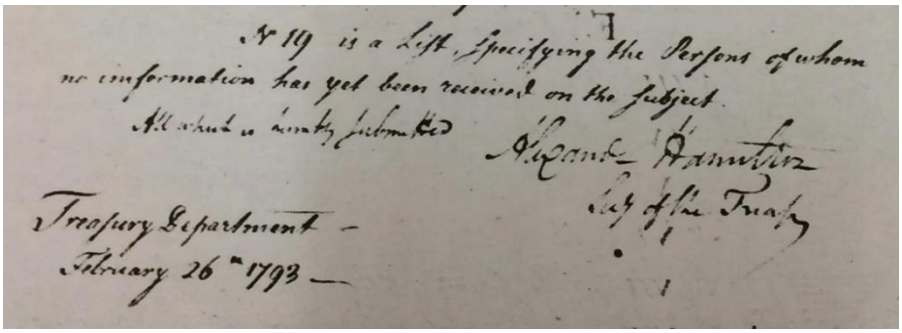


Figure 2

Figure 3 depicts Hamilton's signature in Annex X of the *1793 Complete Report*.[175]

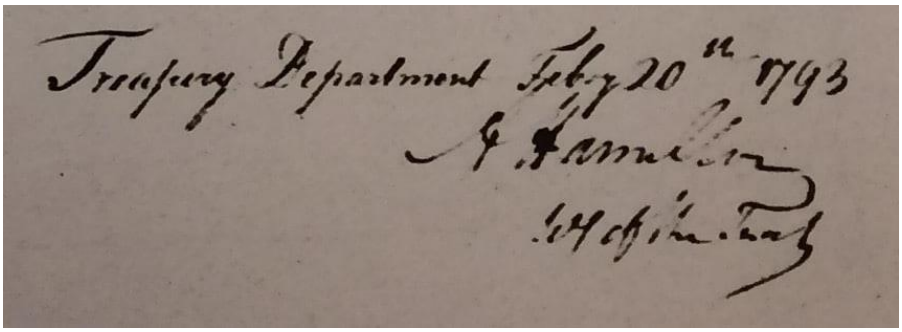


Figure 3

174. *See id.* at Exhibit L.
175. *See id.* at Exhibit M (discussing Annex X).

Figure 4 depicts Hamilton's signature in Annex XI of the *1793 Complete Report*.[176]

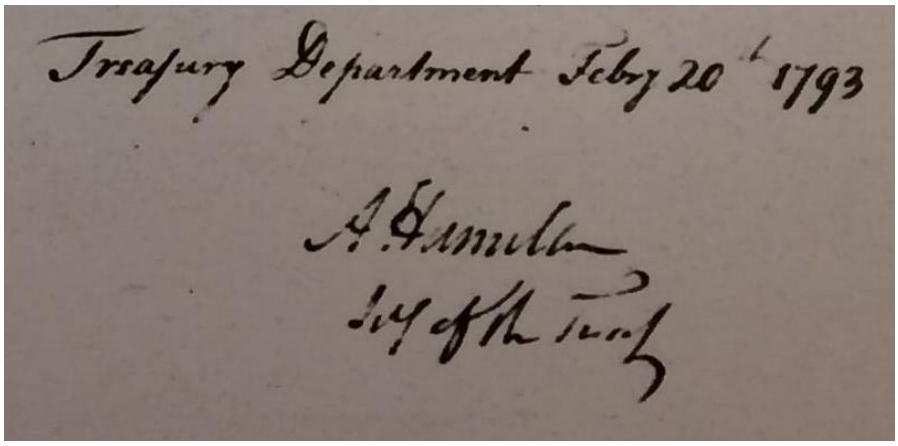


Figure 4

Figure 5 depicts Hamilton's signature in Annex XII of the *1793 Complete Report*.[177]

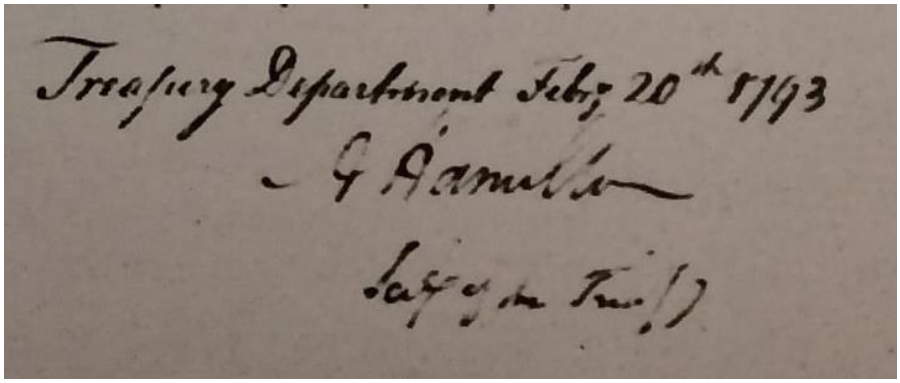


Figure 5

Figure 6 depicts Hamilton's signature in Annex XIII of the *1793 Complete Report*.[178]

176. *See id.* at Exhibit M (discussing Annex XI).
177. *See id.* at Exhibit M (discussing Annex XII).
178. *See id.* at Exhibit M (discussing Annex XIII).

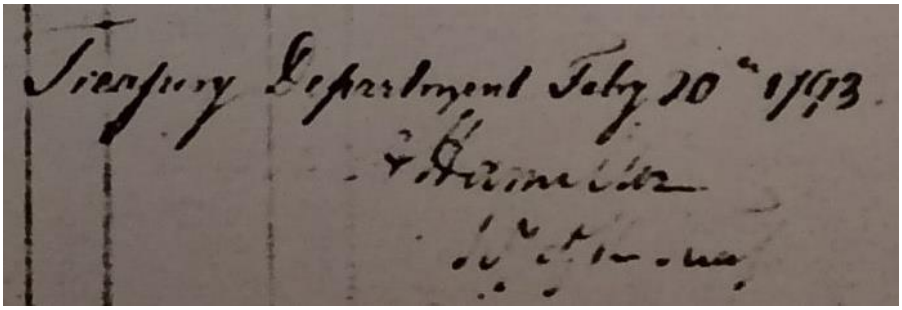
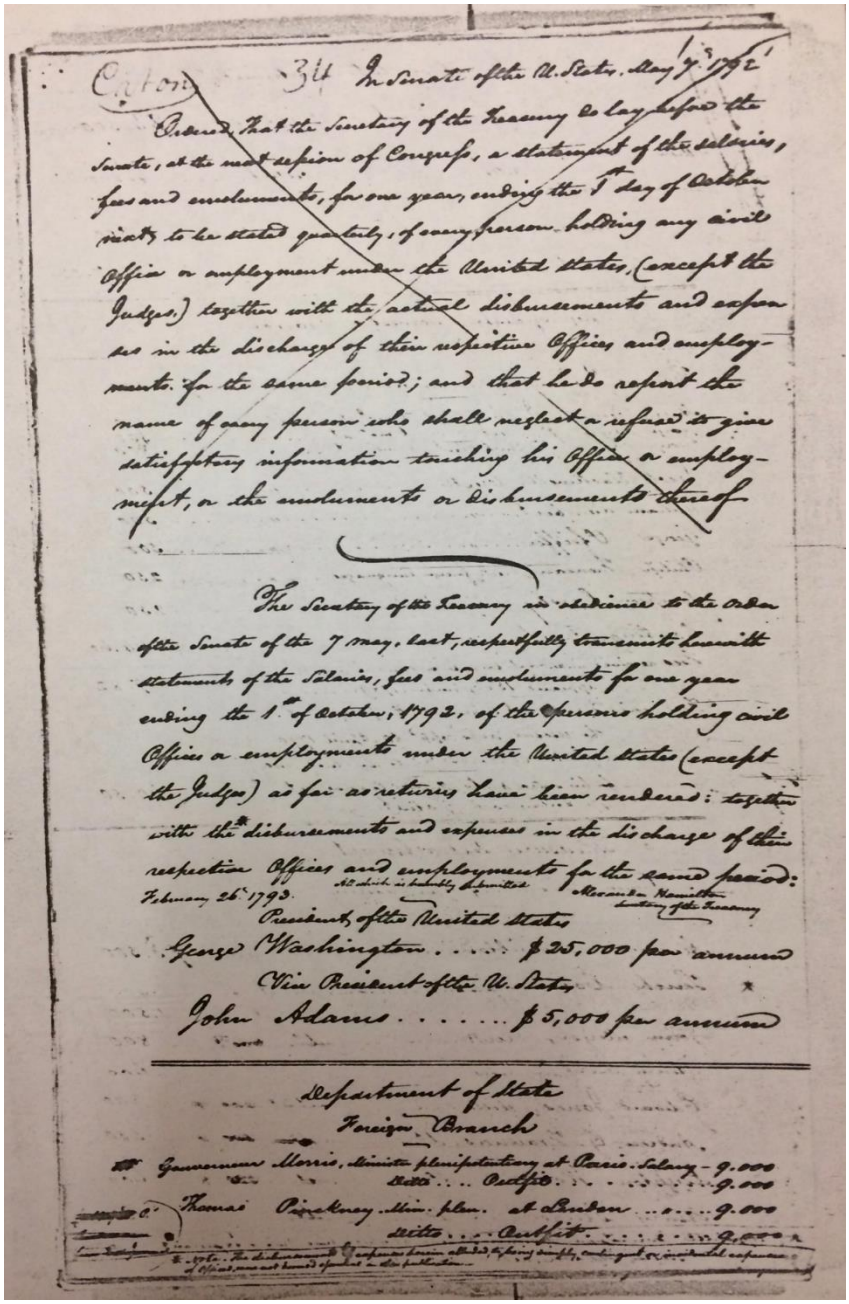


Figure 6

We now turn to the *Condensed Report*.

Figure 7 depicts the first page of the *Condensed Report*.[179] Our view is that an unknown Senate functionary wrote the words "Alexander Hamilton" on the document. It appears about five lines above the double-horizontal line on the right side of the page. The words "Alexander Hamilton" are written in a much smaller size than the surrounding text and appear squeezed between two paragraphs.

179. *See id.* at Exhibit P.



Orders 34 In Senate of the U. States. May 7th 1792

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 1st 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 Secretary of the Treasury in obedience to the order of the Senate of the 7 May, last, respectfully transmits to Congress statements of the Salaries, fees and emoluments for one year ending the 1st of October, 1792, of the persons holding civil offices or employments under the United States (except the Judges) as far as returns have been rendered: together with the disbursements and expenses in the discharge of their respective offices and employments for the same period:

February 26th 1793. As clerk in the Treasury Department. Alexander Hamilton Secretary of the Treasury

President of the United States

George Washington . . . . . $25,000 per annum

Vice President of the U. States

John Adams . . . . . $5,000 per annum

Department of State

Foreign Branch

Gouverneur Morris, Minister plenipotentiary at Paris. Salary - 9.000

ditto . . . Outfit 9.000

Thomas Pinckney, Min. plen. at London 9.000

ditto . . . Outfit 9.000

Figure 7

Figure 8 zooms into Figure 7 and depicts the words "Alexander Hamilton" on the *Condensed Report*.

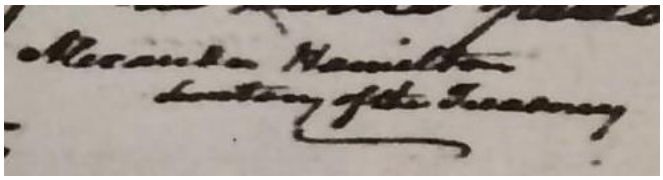


Figure 8

Moreover, the experts agreed that the *Condensed Report* was, in fact, a scrivener's copy of the *1793 Complete Report*, "albeit with substantive changes."[180] John Kaminski stated:

> The *Condensed Report* also contains the words "Alexander Hamilton" where a signature might appear, but this "signature" was clearly not written by Hamilton himself. Rather, the words "Alexander Hamilton" were written by the same scrivener who transcribed The *Condensed Report*.[181]

Kaminski and Bowling agreed with us that the *Condensed Report* was drafted long after Hamilton's death.[182] Newton and Martin suggested it could have been produced after Hamilton's death, or it may have been produced contemporaneously with the *1793 Complete Report*.[183] Still, the experts agreed that Tillman's general assessment of the signature and provenance of the *1793 Complete Report* and *Condensed Report* was correct.[184]

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180. *Id.* at Exhibit E, ¶ 9 (noting that the *Condensed Report* "is a scrivener's copy of the *Complete Report*, albeit with [some] substantive changes. It may have been a copy . . . .").

181. *Id.* at Exhibit G, ¶ 11.

182. *See id.* at Exhibit G, ¶ 17 ("These markings clearly indicate that sometime after 1820 (probably near 1833), the Secretary of the U.S. Senate ordered that a condensed version of The *Complete Report* be made. Transcribed by a clerk of the Senate, the *Condensed Report* was then printed in the first miscellaneous volume of *American State Papers*, published in 1834. Hamilton was long since dead by 1820. Thus, Alexander Hamilton had no direct connection with *The Condensed Report*."); *see also id.* at Exhibit H, ¶ 15 ("In my professional judgment, *The Condensed Report* was drafted after 1830.").

183. *See id.* at Exhibit E, ¶ 9 (noting that the *Condensed Report* "may have been a copy produced contemporaneously with the *Complete Report*, or it may have been produced later, if not substantially later"); *see also id.* at Exhibit J, ¶ 11 (stating that the *Condensed Report* "may have been produces contemporaneously with the *Complete Report*, or it may have been produced as late as 1834 when *ASP* [*American State Papers*] was published.").

184. *See id.* at Exhibit E, ¶ 10; *see also id.* at Exhibit G, ¶ 12; *id.* at Exhibit H, ¶ 12; *id.* at Exhibit J, ¶ 12; *id.* at Exhibit I, ¶ 7 (taking the position that Hamilton would not have inadvertently left the President and Vice President off his list if Hamilton had believed that either position was an "office . . . under the United States").

Beyond the authenticity of Hamilton's actual and purported signatures, there were at least three very good reasons to reject the Legal Historians' position.

First, the handwritten *Condensed Report* does not resemble an official government correspondence. Look at Figure 7. At the top of the page, an entire paragraph is crossed out with a large *X*. Yet, the Legal Historians believed, and encouraged the court and others to believe, that this document was transmitted as an official, signed communication from Secretary of the Treasury Alexander Hamilton to the United States Senate in response to a Senate order. Indeed, that Senate order was issued under prior statutory authority. Moreover, this document is a financial statement. For both of these reasons, the Senate would expect a certain minimal level of tidiness and care in the document's preparation and presentation. This document is better described as sloppy, as opposed to polished. This red flag should put the reasonable reader, and *any* historian, on notice that this document was not an "original" document transmitted in official government-to-government communications.

Second, Senate functionaries added certain markings to the endorsement of the Cover Letter of the *1793 Complete Report*. These markings guided the editors of the *Condensed Report*. Kate Mollan, an archivist at the National Archives, described these marks: "Written faintly in pencil below the ink endorsement is '*No. 10 To be condensed & printed*. *See page Journal 441 & 497* [*1793 May 7*].'"[185] These markings are depicted in Figure 9.

185. *Id.* at Exhibit C.

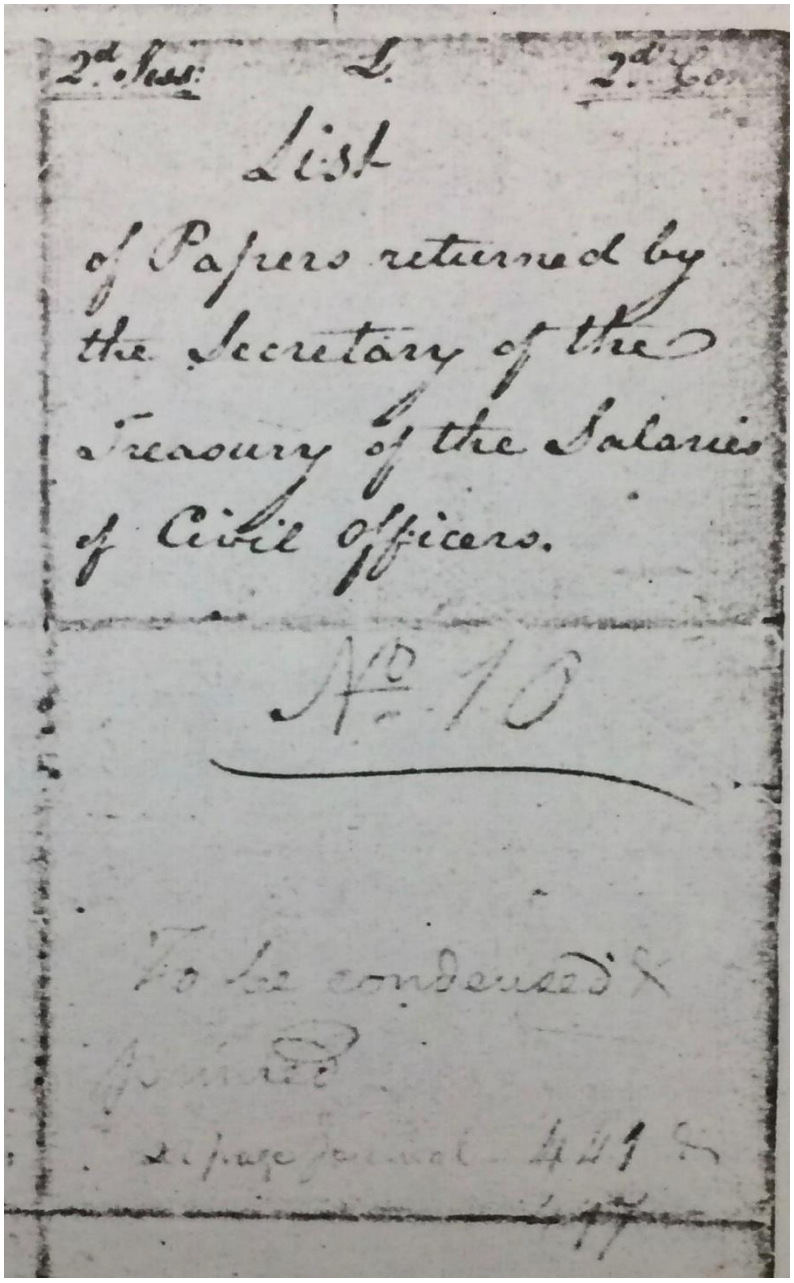

Figure 9

We do not think Hamilton or his Treasury Department staff wrote this marginalia on the endorsement. It makes no sense to suggest that Hamilton

would send an original document in both ink and pencil. Rather, the pencil notations were added by the recipients on the Senate side. The Senate received this two-page cover letter on February 27, 1793. At some later point in time, someone at the Senate, writing in pencil, marked up the document. The penciled notation states: "to be condensed," which indicates that it would happen in the future—after the Senate received the *1793 Complete Report*.

The pencil notation expressly references pages 441 and 497 of the *Senate Journal*. In our view, "Journal 441" refers to the May 7, 1792 entry in the *Senate Journal*, where the Senate originally ordered Hamilton to produce the very report being discussed here.[186] And, in our view, the reference to "Journal . . . 497" refers to the February 27, 1793 entry in the *Senate Journal* where the Senate indicated that it had received the *1793 Complete Report*.[187] However, this pagination appeared in the Gales & Seaton reproduction of the *Senate Journal*, which had an 1820 publication date.[188] It would have been *impossible*, in 1793, for Secretary Hamilton or someone in the Treasury Department during Hamilton's tenure as Secretary to reference the Gales & Seaton 1820 pagination.

In our view, a Senate functionary wrote these markings on the original document at least 27 years after the submission of the bona fide Hamilton-signed *1793 Complete Report*. According to standard authorities, in the 1830s, congressional functionaries who were preparing *American State Papers* made markings *directly* on original documents.[189] These markings were provided as guidance for the printers engaged in producing the typeset reproduction of the *Condensed Report* appearing in *American State Papers*. The editors' markings directed the printers to incorporate materials from the Gales & Seaton edition of the *Journal of the United States Senate*. John Kaminski agreed that these "marginalia" are references to the Gales & Seaton-edited 1820 edition of the *Journal of the Senate*, and they "assist [modern investigators] in determining the genesis of the *Condensed Report*."[190]

This reference to the Gales & Seaton edition provides strong, if not conclusive, evidence that the *Condensed Report* was drafted after 1820—long after Burr killed Hamilton in 1804. The *1793 Complete Report*'s marginalia to the Gales & Seaton edition of the *Senate Journal* is the sort of detail that anyone could miss. We do *not* fault the Legal Historians for failing to catch these references in the midst of litigation. Indeed, as memory serves,

186. *See* S. JOURNAL, 2d Cong., 1st Sess. 441 (1792).
187. *See* S. JOURNAL, 1st Cong., 1st Sess. 497 (1789).
188. *See* S. JOURNAL, 1st Cong., 1st Sess. (1789) (Gales & Seaton ed., 1820).
189. *See* Tillman and Blackman's Response to the Legal Historians' Brief, *supra* note 88, at Exhibit D, ¶ 46 n.58.
190. *Id.* at Exhibit G, ¶ 16.

Tillman, who had examined these documents many times over many years, only came across this particular line of reasoning shortly before filing his declaration responding to the Legal Historians.

We will close with a third and perhaps the most obvious reason to reject the Legal Historians' position. The *Papers of Alexander Hamilton* (*Papers*) expressly indicates that Hamilton signed the *1793 Complete Report*. The *Papers*' reproduction of the *1793 Complete Report* is marked "DS"—an editors' note indicating that the document was signed by Hamilton.[191] The *Papers* also flagged the *Condensed Report* to the reader, but the *Papers* did not reproduce the *Condensed Report*, nor did the *Papers* indicate that Hamilton signed the *Condensed Report*. The *Papers*' editors' affirming that Hamilton signed the *1793 Complete Report*, but not doing likewise for the *Condensed Report*, was also a red flag. The editors of the *Papers* were the modern historians with the greatest specific expertise in relation to Hamilton-drafted and Hamilton-signed documents. Their decision not to characterize the *Condensed Report* as signed by Hamilton was a red flag—a substantial reason to conclude that Hamilton did not sign the *Condensed Report*. Here, the Legal Historians' error did not relate to history, or to misreading a faded handwritten archived primary document, or even to reading a typescript reproduction of an archived primary document; rather, their error involved misunderstanding the conventions of a collected papers series assembled by professional historians. To be sure, we do not fault the Legal Historians for failing to catch these obscure references in a collected papers series. Indeed, this line of argument was only first flagged to Tillman by Michael E. Newton in 2017.

On September 23, 2017—four days after our responsive amicus brief was filed—Professor Shugerman wrote a blog post that personally apologized to Tillman and Blackman.[192] That same day, Judge Daniels denied our motion for leave to file the response to the historians.

On September 25, 2017, Adam Liptak of the *New York Times* wrote an article about the situation titled "'Lonely Scholar With Unusual Ideas' Defends Trump, Igniting Legal Storm."[193] Liptak recounted the criticisms of our position from Shugerman and Gorod, as well as the Legal Historians' amicus brief. Liptak provided an evenhanded assessment of the imbroglio. He wrote:

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191. *See Papers of Alexander Hamilton, supra* note 106.

192. Jed Shugerman, *An Apology to Tillman and Blackman*, TAKE CARE BLOG (Sept. 22, 2017), https://shugerblogcom.wordpress.com/2017/09/23/an-apology-to-tillman-and-blackman/ [https://perma.cc/EM8K-6LBV]. We thank Professor Shugerman.

193. Adam Liptak, *'Lonely Scholar with Unusual Ideas' Defends Trump, Igniting Legal Storm*, N.Y. TIMES (Sept. 25, 2017), https://nyti.ms/2jWJy6N [https://perma.cc/Z6R4-23Z9]. We thank Adam Liptak and the *New York Times* for their evenhanded reporting.

> Mr. Tillman took none of this lightly. In a sworn statement last week, he repeated his original position. "I stand entirely behind the above footnote: behind every sentence, every phrase, every word and every syllable," he wrote. "I made no mistake, intentional or inadvertent. I retract nothing, and I do not intend to retract anything."
>
> Mr. Tillman, who is represented by Josh Blackman, an energetic law professor and litigator, rounded up declarations from experts in founding-era documents and on Hamilton. They agreed that the document said to contradict Mr. Tillman's account was not signed by Hamilton and was prepared after his death.
>
> I asked Mr. Tillman's critics for their reactions. Professor Shugerman responded with "a public and personal apology."
>
> . . . .
>
> Professor Shugerman's fellow historians—John Mikhail, Jack Rakove, Gautham Rao and Simon Stern—said they were still studying the matter.[194]

On October 3, 2017—roughly two weeks after we filed our brief—counsel for the Legal Historians submitted a letter to the U.S. District Court for the Southern District of New York.[195] The letter addressed footnote 82 of their amicus brief, which discussed the *1793 Complete Report* and the *Condensed Report*:

> Although *amici* do not believe footnote 82 bears on an issue which is disputed by the parties in this case, additional research and new information that has come to light since their brief was filed have led them to conclude that footnote 82 is mistaken in representing that Alexander Hamilton himself signed the handwritten manuscript in the National Archives (the so-called "Condensed Report") on which a published document in American State Papers is based. *See* 1 American State Papers/Miscellaneous 57 (1834). Although the provenance of this manuscript and its surrounding circumstances are not entirely clear, *amici* now believe that the signature on this manuscript is likely not Hamilton's own signature.
>
> Because *amici* relied upon this error on multiple occasions in footnote 82, they no longer believe it will be helpful to the court and respectfully file this errata withdrawing footnote 82.[196]

The substantive claims in footnote 82 were not the only things the Legal Historians withdrew. At the end of Footnote 82, the Legal Historians

194. *Id.*

195. *See* Letter from Daniel J. Walker, Couns. for Citizens for Resp. & Ethics in Wash., to George B. Daniels, U.S. Dist. Ct. Judge (Oct. 3, 2017) [https://perma.cc/MUG7-XUXC].

196. *Id.*

included a link to a Google site.[197] This online archive was researched and made public by one or more of the Legal Historians. This archive meticulously reproduced all the documents—handwritten and typescript reproductions—in full. And this archive was cited in the Legal Historians' brief. Around the same time the historians submitted their letter to the court, it would appear that one or more of the Legal Historians actively deleted this Google site, or one or more of them passively allowed the site to become inactive during the then-still ongoing Emoluments Clauses litigation. Even now, several years later, we are not entirely certain what happened to the site. The historians took these steps around the time they withdrew their allegations that we had committed errors.

In our view, the Legal Historians deserve some praise for withdrawing their allegations against Tillman's scholarship and our amicus brief. Still, they provided no explanation for how five historians independently were led to make the same substantive errors. But more importantly, at least in our opinion, they provided no explanation for why the Google site archive, which one or more of them built, was deleted or, at best, allowed to become moribund. Our view is that the loss of this archive, particularly if this was done actively, is a default in regard to scholarly standards. Customarily, historians do not and should not delete archival materials absent some good, public explanation. Fortunately, a partial version of the former Google site remains available on the Internet Archive.[198]

Also, on October 3, Professor Shugerman wrote a blog post on behalf of himself and the other Legal Historians:

> Although we acted in good faith, we now recognize that we were wrong to cite blog posts criticizing Professor Tillman's research without undertaking more extensive due diligence to determine whether those criticisms were justified. On the issue of Hamilton's signature on the so-called Condensed Report, we now believe that Professor Tillman is likely correct, and his critics—including us—were mistaken.
>
> . . . .
>
> . . . We look forward to continuing to engage the many important historical questions raised by this lawsuit.[199]

197. Here is the link to the Google site that the Legal Historians deleted from footnote 82 in their brief: [https://sites.google.com/view/foreignemolumentsclause].

198. Here is the link to the partial version of the Google site that remains available: [https://web.archive.org/web/20170904175034/https://sites.google.com/view/foreignemolumentsclause/the-documents?authuser=0].

199. Jed Shugerman, *Our Correction and Apology to Professor Tillman*, SHUGERBLOG (Oct. 3, 2017), https://shugerblogcom.wordpress.com/2017/10/03/our-correction-and-apology-to-professor-tillman/ [https://perma.cc/R9N9-S472]. We thank the legal historians.

Gorod also gave a statement to the *New York Times*, which Liptak reported:

> Ms. Gorod did not offer a direct response.
>
> "While there is a fascinating academic discussion to be had about the provenance of these particular documents, and that specific discussion will surely continue, it's ultimately immaterial to what's going on in the courts because at the end of the day, it is clear that the foreign emoluments clause applies to the president," she said in statement. "Even the Department of Justice agrees."[200]

Gorod would soon be proven wrong about the Department of Justice's position. The following month, the DOJ submitted a letter to the District Court, stating that "the government has not conceded that the President is subject to the Foreign Emoluments Clause."[201] The DOJ would further clarify its position during the course of the litigation.[202] So far as we know, Joshua Matz, who also harshly criticized our writings concerning the *1793 Complete Report* and the *Condensed Report*, has never addressed his prior comments on the *Take Care* blog in light of what subsequently transpired.

***

Our view, as supported by the documentary evidence, is that an unknown Senate functionary or functionaries drafted the *Condensed Report*. The *Condensed Report* rewrote, in part, the *1793 Complete Report* to bring it into conformity with the *Blue Book*. This creation from the 1830s should not be accorded the same weight as the 1793 original document signed by Hamilton and transmitted to the Senate as an official Executive Branch communication responding to a Senate order—a Senate order issued under statutory authority.

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200. Liptak, *supra* note 193.

201. Letter from Brett A. Shumate, Deputy Assistant Att'y Gen., to George B. Daniels, U.S. Dist. Ct. Judge (Oct. 25, 2017) [https://perma.cc/ML45-KJBF].

202. *See* Josh Blackman, *The Office of Legal Counsel Has Not Shifted Its Position on Whether the Foreign Emoluments Clause Applies to the President. But the Civil Division Has*, VOLOKH CONSPIRACY (Oct. 4, 2019, 7:00 AM), https://reason.com/volokh/2019/10/04/the-office-of-legal-counsel-has-not-shifted-its-position-on-whether-the-foreign-emoluments-clause-applies-to-the-president-but-the-civil-division-has/ [https://perma.cc/S7YN-WV2P].

D. Hamilton's 1789 Civil and Military List Included the President, Vice, President, and Members of Congress as Part of the "civil list"

In July 2017, Professors Shugerman and Rao published an article on *Slate*[203] that responded to our prior op-ed in the *New York Times*.[204] They wrote:

> Ultimately, the central piece of documentary evidence for this emoluments argument [from Blackman and Tillman] is a manuscript version of a 1792 [*sic*] document by Secretary of the Treasury Alexander Hamilton. That document omitted President George Washington from a list of "Persons Holding Civil Offices or Employments Under the United States." Yet the same document, when it was actually printed in official records of the early U.S. government, listed the president and vice president[205] under the heading of "persons holding civil offices or employments under the United States." In every subsequent report of the Treasury Department listing the employees and offices "under the United States"—from Treasury Secretary Hamilton himself and his successors—the president is included with the rest of the federal officers on the "civil list." That Tillman and Blackman bury[206] this fact while emphasizing the original Hamilton version is remarkably convenient for their argument.[207]

To this day, there is no update at the end of the article explaining to *Slate* readers that Rao and Shugerman subsequently filed a retraction in *CREW v. Trump*. On *Slate*, Rao and Shugerman also argued that "every subsequent report" from Secretary Hamilton listing "offices 'under the United States'" included the President. Rao and Shugerman have never produced even one

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203. *See* Rao & Shugerman, *Presidential Revisionism*, *supra* note 162.

204. Josh Blackman & Seth Barrett Tillman, *Yes, Trump Can Accept Gifts*, N.Y. TIMES (July 13, 2017), https://www.nytimes.com/2017/07/13/opinion/trump-france-bastille-emoluments.html [https://perma.cc/5QLV-6ERK].

205. *See generally* Gorod, *supra* note 159. Rao, Shugerman, and the other Legal Historians repeatedly cited non-historians, such as Gorod and Matz, for novel and contentious historical claims. Gorod's and Matz's research was first made in the context of adversarial litigation in which they represented parties or amici or both. In our opinion, academics' (i.e., the Legal Historians') using such materials from Gorod and Matz was a default in regard to customary standards and established norms.

206. Rao later withdrew the claim that we "buried" facts. *See* Gautham Rao (@gauthamrao), TWITTER (Jan. 17, 2019, 12:02 PM), https://twitter.com/gauthamrao/status/1085960478319411205 [https://perma.cc/FSH5-REG5] ("I'd like to take the opportunity to publicly apologize to @SethBTillman and @JoshMBlackman for language in a @Slate piece of July 17, 2017 in which I co-wrote that they 'bury' historical documents to bolster their argument. I should never have used this language. I am sorry."). We thank Professor Rao.

207. Rao & Shugerman, *supra* note 162.

such document.[208] If they do not have the support they claimed to have had, then a further retraction would still be appropriate, even if several years late.

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208. Many academics, other commentators, as well as publication venues accepted or promoted Rao and Shugerman's historical claims. *See, e.g.*, *Presidential Revisionism*, BUNK (July 17, 2017), https://www.bunkhistory.org/resources/presidential-revisionism?related=492 [https://perma.cc/8673-SRXH] (reproducing Rao and Shugerman's *Slate* article); *id*. (adding, at a much later date, an "*Editor's Note*" which linked to Rao and Shugerman's "correction" and to Adam Liptak's *New York Times* article, *supra* note 193). Similarly, Professor Bowman, a law professor, wrote: "The online magazine *Slate* has just published a more extensive, and in my view, *dispositive* critique of the Tillman-Blackman argument." Frank O. Bowman, III, *Debunking the claim that the Foreign Emoluments Clause doesn't cover Presidents*, IMPEACHABLE OFFENSES? EXAMINING THE CASE FOR REMOVAL OF THE 45TH PRESIDENT OF THE UNITED STATES (July 18, 2017), https://impeachableoffenses.net/2017/07/18/debunking-the-claim-that-the-foreign-emoluments-clause-doesnt-cover-presidents/ [https://perma.cc/T4UL-LT73] (emphasis added). Throughout the Emoluments Clauses litigation academics, journalists, and others regularly characterized our arguments as "bunk" or something to be "debunked" or in similar terms when the positions they opposed were fairly contestable (if not actually correct)—only for them to much later issue retractions and corrections. *See, e.g.*, *supra* note 161. This pattern or practice has consequences that are doubly unfortunate: it drains the term "bunk" of meaning in the small number of exceptional situations when such language might be appropriate; and, it teaches students to evade a culture of reason and respect for dissenting opinion in favor of a "culture" of invective and hyperbole. And, of course, far more people see the original wrongheaded critique, than the subsequent correction. *See, e.g.*, Frank O. Bowman, III, *Foreign Emoluments, the President & Professor Tillman*, IMPEACHABLE OFFENSES? EXAMINING THE CASE FOR REMOVAL OF THE 45TH PRESIDENT OF THE UNITED STATES (Oct. 27, 2017), https://impeachableoffenses.net/2017/10/27/foreign-emoluments-the-president-professor-tillman/ [https://perma.cc/AF3J-2Q7A] (noting that the legal historians "trumpeted this second document as conclusive disproof of an important prong of the Tillman position, only to have Tillman show that the second document almost certainly was not signed by Hamilton, but by some anonymous government functionary. Red faces abounded. And the legal historians (very graciously) issued apologies for impugning the integrity of Tillman's archival research."). Professor Glenda Gilmore, formerly a history professor at Yale, now emeritus, referred to Blackman and Tillman as "Trump lawyers" who "buri[ed]" a historical document. *See* Glenda Gilmore (@GilmoreGlenda), TWITTER (Aug. 31, 2017, 4:53 AM), https://twitter.com/GilmoreGlenda/status/903224236843704320 [https://perma.cc/53TX-VDJ5] ("Trump lawyers use 1 Hamilton letter for argument; *bury* 2nd Hamilton letter to the contrary written same day. Historians know better." (emphasis added)). Nearly 18 months later, in February 2019, Gilmore retracted her August 2017 tweet. *See* Glenda Gilmore (@GilmoreGlenda), TWITTER (Feb. 9, 2019, 11:50 AM), https://twitter.com/GilmoreGlenda/status/1094201941880643590 [https://perma.cc/J6Q5-93VR]. Gilmore stated that "Later I learned that the information in the [August 2017 tweet] that I based this [claim] on was incorrect." Gilmore added, "Lawyer Seth Tillman, whom I don't know & didn't mention in the [August 2017] tweet, has sent me 3 emails (most recently 1/29/19) demanding a retraction." Here, Tillman sets the record straight. Tillman *asked* for a retraction, but he did not *demand* one. For example, on January 29, 2019, Tillman sent an email to Gilmore that stated, in part:

> You [Gilmore] entered the fray during this debate, before I [Tillman] had an opportunity to respond, and you criticized my scholarship on your blog. See <https://twitter.com/SethBTillman/status/921389607496888321>. Since that time [Professor] Shugerman et al (the original progenitors of the claim against me) have retracted. *I would like you to do the same . . . .*

E-mail from Seth Barrett Tillman, Lecturer, Maynooth University, to Glenda Gilmore, historian (Jan. 29, 2019, 9:08 AM) (emphasis added) (on file with the authors).

In fact, there are other documents—other rolls of officers—from Hamilton's Treasury Department, but those documents support our position. For example, on September 17, 1789, the House instructed Hamilton:

> That the Secretary of the Treasury do report to this House an estimate of the sums requisite to be appropriated during the present session of Congress towards defraying the expenses of the *civil list*, and of the Department of War, to the end of the present year; and for satisfying such warrants as have been drawn by the late Board of Treasury, and which may not heretofore have been paid.[209]

Hamilton's response, the *1789 Civil and Military List*, came with a cover letter dated September 19, 1789.[210] The letter came with multiple schedules. Hamilton's cover letter explained that Schedule I contained the estimates for the civil list, and Schedule II contained the estimates for the Department of War.[211] The salaries and compensation for the President, the Vice President, and members of Congress—all appeared in the civil list, i.e., Schedule I.[212] When asked to list the compensation of those who fell within the "civil list," Hamilton included elected federal officials. He apparently concluded that the President—notwithstanding that the President is also the Commander in Chief—was part of the *civil* list. Hamilton also included the compensation for Senators and Representatives. By contrast, in 1792, Congress had asked Hamilton to list the compensation of those who held "any civil office or employment under the United States."[213] In his response, the *1793 Complete Report*, Hamilton did not include any elected federal or state officials.

In our view, Hamilton reasoned that elected federal officials belonged on the civil list because they held civilian positions. However, there is no indication that Hamilton believed that such officials held "Office[s] . . . under the United States."

E. Hamilton's 1792 Statement and Account Included the President's Salary as Part of "an accurate statement and account of the receipts and

209. S. JOURNAL, 1st Cong., 1st Sess. 113 (1789) (emphasis added).

210. *See 1789 Civil and Military List, supra* note 107.

211. *Id.; Schedule II: General Estimate of Money requisite for the War Department for the year 1789* (Sept. 19, 1789), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-05-02-0162-0003 [https://perma.cc/73ZK-68KH].

212. *See 1789 Civil and Military List*, *supra* note 107.

213. S. JOURNAL, 2d Cong. 1st Sess. 441 (1792).

expenditures of all public moneys"

Hamilton prepared a report for the year 1792.[214] He prepared this report in response to a House inquiry dated December 30, 1791. It provided:

> That it shall be the *duty* of the Secretary of the Treasury to lay before the House of Representatives, on the fourth Monday of October in *each* year, if Congress shall be then in session, or if not then in session, within the first week of the session next following the said fourth Monday of October, an accurate statement and account of the receipts and expenditures of all public moneys . . . .[215]

Hamilton and the Treasury Department issued the *1792 Statement and Account* and the *1793 Complete Report* less than one calendar year apart. The *1793 Complete Report* used the Senate's very specific "*Office . . . under the United States*"-language. However, the *1792 Statement and Account* used more general language relating to "*receipts and expenditures of all public moneys*." The *1792 Statement and Account*, in the "Civil List," included the salary of the President, the Vice President, and members of Congress. The *1793 Complete Report* did not include the salary of the President, the Vice President, or members of Congress. There is a simple explanation for this disparity: in each of the two cases, Hamilton was faithfully responding to the information requested, and he did not think elected officials, including the President, held an "Office . . . under the United States."

F. Secretary of the Treasury Albert Gallatin's 1802 Report Listed the Salaries of the President and Vice President as Part of the "Civil Establishment," but President Jefferson's Transmittal Letter Referred to "office . . . under the United States"

We offer one additional list of officers as evidence. And this evidence is something of a mixed bag. This evidence does not directly support our position. Indeed, it offers some limited counter-evidence against our position.

In December 1801, President Thomas Jefferson wrote a letter to the House of Representatives.[216] He stated, "I will cause to be laid before you an essay towards a statement of those who, under public employment of various kinds, draw money from the Treasury, or from our citizens [by way of

214. *See 1792 Statement and Account*, *supra* note 109; *see also An Account of the Receipts and Expenditures of the United States, for the Year 1792* (Dec. 18, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-15-02-0395-0002 [https://perma.cc/Y6FL-BTDZ]. This report was published by order of the House of Representatives, and printed by John Fenno, No. 3, South Fourth Street, Philadelphia, 1794. "Another copy of the covering letter for this report may be found in RG 233, *Reports of the Secretary of the Treasury, 1784–1795*, vol. IV, National Archives." *Id.*

215. H.R. JOURNAL, 2d Cong., 1st Sess. 484 (1792) (emphasis added).

216. H.R. JOURNAL, 7th Cong., 1st Sess. 7 (1801).

government-authorized fees, i.e., non-salary emoluments]."[217] Later in the letter, Jefferson said, "An account of the receipts and expenditures of the last year, as prepared by the Secretary of the Treasury, will, as usual, be laid before you."[218] Jefferson sent a follow-up communication to the House, dated December 22, 1801. He enclosed "supplementary" documents and further noted that the document "presenting a view of the offices of the Government, shall be communicated as soon as they can be completed."[219] In these communications, Jefferson does not use the phrase "office . . . under the United States." Rather, he wrote about an accounting of those who drew compensation from the Treasury or who otherwise drew government-authorized fees.

At the time, Albert Gallatin was Secretary of the Treasury. Gallatin was born in Switzerland in 1761, and it is widely thought that he became an American citizen circa 1785.[220] It appears that Gallatin was neither an attorney, nor a member of the bar. We do not know if Gallatin had any education or training concerning British parliamentary drafting conventions, such as *office under the Crown*.[221]

Gallatin and his department prepared the response promised by Jefferson. The Secretary sent it to Jefferson on February 12, 1802. Gallatin described the accounting using different language than Jefferson—as a "list of the several officers of Government, with their salaries or emoluments."[222] In the annexes, under "Civil Establishment," Gallatin listed the salaries of the President and Vice President, as well as the per diem payments made to members of Congress.[223] Here too, Gallatin did not use the phrase "office . . . under the United States." Gallatin's "Civil Establishment" list included all elected federal officials and appointed officers. Gallatin understood the civil establishment the same way Hamilton did in Hamilton's *1792 Statement and Account*. Gallatin's 1802 roll of officers, which used the phrase "Civil Establishment," included all elected and appointed federal positions on the same footing.

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217. *Id.* at 9.

218. *Id.* at 10.

219. *Id.* at 24.

220. *Friendship Hill National Historic Site*, NAT'L PARK SERV., http://npshistory.com/publications/frhi/index.htm [https://perma.cc/7DYH-86C5]. *See Gallatin, Albert (1761–1849)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=G000020 [https://perma.cc/2CL3-XHZQ]; *see also Albert Gallatin (1801-1814)*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/about/history/prior-secretaries/albert-gallatin-1801-1814 [https://perma.cc/U9JM-BFM5].

221. *See* Tillman & Blackman *supra* note 6, at 367 n.62 (discussion of London's Inns of Court).

222. *To Thomas Jefferson From Albert Gallatin* (Feb. 12, 1802), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-36-02-0372 [https://perma.cc/GP96-BJRP].

223. 1 AM. STATE PAPERS: MISCELLANEOUS, *supra* note 111, at 300–02.

Another aspect of this transmission, however, cuts against our position. On February 16, 1802, Jefferson forwarded Gallatin's response to the House. Jefferson wrote: "I now transmit . . . a roll of the persons having *office or employment under the United States*, as was proposed in my messages of December the 7th and 22nd."[224] Jefferson's usage of "office . . . under the United States" could be seen to embrace appointed as well as elected positions in the federal government. However, as far as we can tell, Jefferson was not involved with the preparation of Gallatin's document. Moreover, Jefferson did not use the phrase "office or employment under the United States" when he notified Congress that the documents were being prepared. Nor was that phrase used in the substantive documents that Gallatin and the Treasury had prepared and that Jefferson forwarded on to Congress. And that language was also not used in Gallatin's cover letter.

Jefferson's three-sentence long cover letter transmitting Gallatin's lengthy document to the House offers some evidence against our position with respect to "Office . . . under the United States." Still, on balance, the reports prepared by Alexander Hamilton are consistent with our position: that the phrase "office . . . under" did not include elected officials.

V. THE FIRST CONGRESS ADHERED TO THE "OFFICE . . . UNDER" DRAFTING CONVENTION

Our view is that members of the First Congress recognized, just as Hamilton recognized, that the phrase "Office . . . under the United States" only extends to appointed positions. In 1790, Congress enacted an anti-bribery statute; it was signed by President Washington. The law declared that a defendant convicted of bribing a federal judge "shall forever be disqualified to hold any *office of honor, trust, or profit under the United States*."[225] This language mirrors the text of the Constitution's Impeachment Disqualification Clause, which provides "Judgment in Cases of Impeachment [by the Senate] shall not extend further than to removal from Office, and disqualification to hold and enjoy any *Office of honor, Trust or Profit under the United States*[.]"[226]

If the President and Vice President hold an "Office of Profit or Trust under [the United States]," then this anti-bribery statute purports to add a new

224. *From Thomas Jefferson to the Senate and the House of Representatives* (Feb. 16, 1802), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-36-02-0388-0001 [https://perma.cc/J2JJ-9XHB].

225. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (emphasis added); *id*. at 119 (signed by the President on April 30, 1790). Here, we do not address whether this statute extended to Article III judges as potential defendants for soliciting or accepted a bribe.

226. U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

qualification for the presidency and the vice presidency. And if Representatives and Senators hold an "Office of Profit or Trust under [the United States]," then this statute also adds new qualifications for members of Congress. However, Congress does not have the power to add, by statute, new qualifications to elected federal positions, including the presidency and members of Congress. For example, a statute requiring the President to "attain[] the Age" of forty instead of thirty-five would be plainly unconstitutional.[227]

Federalist No. 60 provides some substantial originalist support for this position: Congress lacks the power to add to the qualifications for elected federal officials. In *Federalist No. 60*, Hamilton wrote, "The qualifications of the persons who may choose or be chosen [for Congress], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the [national] legislature."[228] And *Powell v. McCormack* concluded that James "Madison had expressed similar views in [*Federalist* No. 52], and his arguments at the Convention leave no doubt about his agreement with Hamilton on this issue."[229] Ultimately, *Powell* largely ratified Hamilton's position.[230]

The Supreme Court reaffirmed this historical analysis in *U.S. Term Limits v. Thornton*.[231] This case examined whether the states, as opposed to Congress, have the power to add to the Constitution's qualifications for elected federal positions. The *Thornton* Court explained that "the debates at the state conventions . . . 'also demonstrate the framers' understanding that the qualifications for members of Congress had been fixed in the Constitution.'"[232]

Justice Thomas dissented in *Thornton*. He concluded that the Constitution did not restrict a *state's* power to impose additional qualifications, through ballot access restrictions, on holding elected federal positions. But Justice Thomas did not express disagreement with *Powell*, which held that *Congress* lacks the power to impose additional qualifications on elected federal positions. Justice Thomas apparently agreed with "the

227. *See id.* art. II, § 1 (requiring the President to be thirty-five years old).

228. THE FEDERALIST NO. 60, at 308 (Alexander Hamilton).

229. Powell v. McCormack, 395 U.S. 486, 540 (1969).

230. *Id.* at 540–41, 547; *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6–35 n.51 (3d. ed. 2000) (explaining that *Powell* was a "largely historical inquiry").

231. U.S. Term Limits v. Thornton, 514 U.S. 779, 792 (1995).

232. *Id.* (quoting *Powell*, 395 U.S. at 541 (citing 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 8 (J. Elliot ed., Washington, 1836))).

detail with which the [*Thornton*] majority recite[d] the historical evidence set forth in *Powell v. McCormack* . . . ."[233]

As a matter of original public meaning, we think that Congress cannot detract from, add to, amend, or supplement the Constitution's qualifications for the House, Senate, and Presidency.[234] Following the Civil War, Congress occasionally excluded members who otherwise met the qualifications set out in the Constitution, often over "vigorous dissents."[235] These contrary practices, which developed a century after the framing, are entitled to considerably less weight than earlier sources.[236]

If the President and other elected federal officials hold "Office[s] . . . under the United States," then the 1790 anti-bribery statute would be plainly unconstitutional. The Department of Justice, which represented President Trump in this official capacity in the Emoluments Clauses litigation, agreed with this argument: "the 1790 Act enacted by the First Congress would in fact run afoul of such [constitutional] restrictions if applied to Members of Congress or the President, if such officials hold 'offices under the United States.'"[237] If Congress's 1790 act had tried to impose new qualifications on elected officials, we would expect some members to have dissented.[238] But there are no such debates recording dissents in Congress on that basis—just

233. *See Thornton*, 514 U.S. at 885 (Thomas, J., dissenting) (citation omitted). We take no position on whether the Constitution prohibits the States, rather than the federal government, from imposing additional qualifications on members.

234. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."). *See generally* Seth Barrett Tillman, *Understanding Nativist Elements Relating to Immigration Policies and to the American Constitution's Natural Born Citizen Clause*, 32(2) STUDY ON THE AMERICAN CONSTITUTION 1 (2021).

235. *Powell*, 395 U.S. at 544–46 ("From [after the Civil War] until the present, congressional practice has been erratic; and on the few occasions when a member-elect was excluded although he met all the qualifications set forth in the Constitution, there were frequently vigorous dissents." (citations omitted)).

236. *See Thornton*, 514 U.S. at 792 ("[D]uring the first 100 years of its existence, 'Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution.'" (quoting *Powell*, 395 U.S. at 542)).

237. Defendant's Supplemental Brief in Support of his Motion to Dismiss and in Response to the Briefs of Amici Curiae at 23, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 12-cv-1154-EGS) [https://perma.cc/R7J2-2C7J].

238. *Cf.* NLRB v. Canning, 134 S. Ct. 2550, 2605 (2014) (Scalia, J., concurring) ("Intra-session recess appointments . . . were not made in significant numbers until after World War II, and *have been repeatedly criticized* as unconstitutional by Senators of both parties." (emphasis added)).

as there was no contemporaneous public debate or objections suggesting that this statute was unconstitutional. Likewise, we have found no antebellum discussion making any such suggestion. The better view is that the First Congress adhered to the British drafting convention: the members used the phrase "Office . . . under the United States" to refer to appointed officers, not elected officials. As a general matter, Congress can always set qualifications for the (appointed) positions it creates by statute. (The standard for qualifications of Supreme Court justices and other Article III judges may be different.) It follows that the anti-bribery statute was constitutional precisely because its effects were limited to appointed, and not elected, positions.

The 1790 Anti-Bribery Act was hardly unique. In fact, during the Early Republic, Congress imposed other similar disqualifications against defendants convicted of certain federal crimes; those statutes also used the phrase "office . . . under the United States." For example, the Treasury Act from 1789 provided that a wrongdoer "shall upon conviction be removed from office, and forever thereafter incapable of holding any *office under the United States*."[239] These statutes could not bar a person from serving as President or as a member of Congress. And there were more than a few such statutes. In 1960, Justice Frankfurter observed that there was "a *large* group of federal statutes [which] disqualify persons 'from holding any office of honor, trust, or profit under the United States' because of their conviction of certain crimes[.]"[240] These statutes are best read as creating disqualifications *only* in relation to appointed positions.

We should hesitate before concluding that the First Congress, which included more than a few framers and ratifiers, enacted a plainly unconstitutional statute. Likewise, we should hesitate before concluding that President Washington signed a plainly unconstitutional statute. And we should be especially cautious about concluding, more than two centuries later, that the First Congress and President Washington acted unconstitutionally—when there are no known reports from that time in which anyone objected to the constitutionality of these statutes.

The Supreme Court has recognized that a special solicitude is afforded to the First Congress.[241] We recognize that early congresses took actions that the courts later disapproved of.[242] But such disputes concerned highly

239. Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67; *see* Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46–47; Act of Sept. 1, 1789, ch. 11, § 34, 1 Stat. 55, 64–65.

240. De Veau v. Braisted, 363 U.S. 144, 159 (1960) (emphasis added).

241. *See* Myers v. United States, 272 U.S. 52, 136 (1926); *see also* Schell v. Fauche, 138 U.S. 562, 572 (1891).

242. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 276 (1964).

complex, or controversial legislation, such as the Sedition Act.[243] *Marbury v. Madison*, for example, considered the Judiciary Act of 1789; this landmark statute implemented a complex organization for the nation's new judicial system.[244] There is no record indicating that the 1790 Anti-Bribery Act, much less its "Office . . . under the United States" provision, was hotly debated in Congress or by the public. And, unlike the Judiciary Act of 1789, which built a new structural "constitution" for the judiciary, the 1790 Act used a long-standing drafting convention.

These early statutes provide additional support for our position: i.e., the early congresses adhered to the British "Office under" drafting convention.

VI. DEBATES DURING THE AMERICAN CIVIL WAR RECOGNIZED THE "OFFICE . . . UNDER THE UNITED STATES" DRAFTING CONVENTION

A similar debate about the phrase "Office . . . under the United States" arose four score and six years after independence. In 1862, Congress required certain office holders to take an additional loyalty oath. This statute extended to "every person" holding "any office of honor or profit under the government of the United States."[245] This statute refers to "office . . . under the government of the United States."[246] By contrast, the Hamilton documents refer to "office . . . under the United States." In Part II of this series, we explained that the latter category is a subset of the former category.

In 1863, Senator Charles Sumner of Massachusetts put forward a resolution requiring all members of Congress to take the new loyalty oath.[247] However, Senator James Asheton Bayard, Jr. of Delaware objected. He argued that such a resolution was unconstitutional as applied to members. Bayard, a former United States Attorney, had authored an antebellum treatise

243. *See* James Madison et al., *Virginia Resolution—Alien and Sedition Acts* (1798), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/virres.asp [https://perma.cc/JBX4-YGRC]; *see also* Thomas Jefferson et al., *Kentucky Resolution—Alien and Sedition Acts* (1799), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/kenres.asp [https://perma.cc/4JR9-2AGR]; *James Madison, Report on the Virginia Resolutions*, THE FOUNDERS' CONSTITUTION, https://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html [http://perma.cc/CKQ5-L6HJ].

244. *See* Edward Corwin, Marbury v. Madison *and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 541–42 (1914); *see also* James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1573–74 (2001); *cf.* Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1321–31 (2003).

245. Act of July 2, 1862, ch. 28, 12 Stat. 502, 502 (repealed 1868).

246. *Id.*

247. CONG. GLOBE, 38th Cong., 1st Sess. 31 (1864) (reporting Senator Sumner's resolution and speech before reproducing Bayard's speech in opposition to taking the oath). We discussed this Oath statute in the context of Section 3 of the Fourteenth Amendment in Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1, 37 (2021).

on the Constitution[248] and chaired the Senate Judiciary Committee in the Thirty-Fifth and Thirty-Sixth Congresses.[249] He questioned whether the statute's "office . . . under the United States"-language could reach members of Congress. Bayard cited the *Condensed Report* as reported in *American State Papers*. That document did not "include members of Congress" in a list of "every person holding any civil office or employment under the United States."[250] Bayard then articulated an originalist methodology:

> To that [Senate] resolution, in February following, Alexander Hamilton made his return, and in that return of the persons holding civil offices under the United States, except the judges, he included the President, the Vice President, all the different officers of the Government from tide-waiters upwards; he included the Commissioner of Loans; he included persons holding every species of employment; . . . but he did not include members of Congress. What, then, is the inference [from Hamilton's exclusion of members of Congress]? Alexander Hamilton was certainly, as a jurist, as one familiar with the language of the Constitution, and with the mode in which it ought to be interpreted, a man whose opinions would be entitled to great weight; and in obeying an order of the Senate which required him to return the emoluments of all civil officers whatever, though he gave the officers of the Senate, the Secretary [of the Senate], all the clerks, the Doorkeeper, and also all the officers of the House of Representatives in the same way, he made no return of members of Congress, for the simple reason that they did not, in the language of the resolution, hold a civil office under the United States.[251]

The framework we use in this article resembles Bayard's methodology. Alas, Bayard's colleagues disagreed. Senator Sumner's resolution passed. And Bayard, a three-term Senator, resigned in protest. For Bayard, his resignation was a point of principle. The new loyalty oath would not last long.

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248. *See* JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (Philadelphia, Hogan & Thompson 1833). His treatise continues to be cited by the Supreme Court and in modern scholarship. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 981 (1991) (quoting BAYARD, *supra*); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 486 & n.263 (2017) (quoting BAYARD, *supra*).

249. *See Bayard, James Asheton, Jr. (1799–1880)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=B000248 [https://perma.cc/YHS6-S8L8]; *see also History of the District of Delaware*, U.S. DEP'T OF JUST. (Apr. 20, 2018), https://www.justice.gov/usao-de/history [https://perma.cc/NC5W-UZJZ].

250. CONG. GLOBE, 38th Cong., 1st Sess. 37 (1864) (statement of Sen. Bayard).

251. *Id.* Bayard was working from Hamilton's 1793 roll of officers as rewritten for and reproduced in *American State Papers*. *Id.*

Congress repealed the statute in 1868, the same year the Fourteenth Amendment was ratified.[252]

We do not offer this exchange to demonstrate that Hamilton's understanding of "office . . . under the United States" was monolithic in 1863 or even in 1789. Debates about the scope of the Constitution's "office" and "officer"-language are as old as the Constitution. Rather, this incident shows that seven decades after the framing, Hamilton's understanding of "office . . . under the United States" had survived. Moreover, this incident also demonstrates that long before Tillman and Blackman, others made arguments based on Hamilton's 1793 roll of officers.

We draw the same inference from Hamilton's list regarding members of Congress that Bayard drew. Our methodology is the same as Bayard's. However, Bayard did suggest that the President and Vice President held "civil offices under the United States." At the time, Bayard relied on the *Condensed Report* of Hamilton's 1793 roll of officers, which appeared in *American State Papers.* That document amended the *1793 Complete Report*—which was the original signed by Hamilton. Had Bayard reviewed the *1793 Complete Report*, we infer that he would have seen that the President and Vice President were not listed. And, we think, in those circumstances, he might have drawn the same inference we draw: that elected federal officials, i.e., the President and members of Congress, do not hold "civil offices under the United States." In any event, Bayard's speech only directly concerned a resolution that compelled members of Congress to take an oath; he was not opining on the precise status of the President.

VII. NINETEENTH-CENTURY COMMENTATORS RECOGNIZED THE "OFFICE . . . UNDER THE UNITED STATES" DRAFTING CONVENTION

Leading commentators throughout the nineteenth century recognized that the "Office . . . under the United States" drafting convention referred to appointed officers and not to elected officials. We start with Justice Joseph Story's celebrated *Commentaries on the Constitution*.[253] Section 791 discussed Senator Blount's impeachment.[254] The Impeachment Clause provides, "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."[255] Senators

252. *See generally The Senate's First Act—the Oath Act*, U.S. SENATE, https://www.senate.gov/legislative/landmark-legislation/oath-act.htm [https://perma.cc/V9B7-A6VY] (discussing the 1862 Ironclad Oath, and 1868 and 1884 repeal of that oath).

253. 2 STORY, *supra* note 142, at 259–60.

254. *See* Tillman & Blackman, *supra* note 6, at 405–10 (discussing Blount's impeachment).

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

and Representatives are not expressly enumerated in the text of the Impeachment Clause. The Blount trial considered "whether a senator was a civil officer of the United States, within the purview of the [Impeachment Clause]."[256] Story speculated that the Senate, which had acquitted Blount, "probably held, that 'civil officers of the United States' meant such, as derived their appointment from, and under the national government[.]"[257] That category did not include "those persons, who, though members of the government, derived their appointment from the states, or the people of the states."[258] Here, Story is referring to elected officials: the President, the Vice President, as well as members of Congress.

Yet, we know that the Impeachment Clause specifically provides that the President and Vice President can be impeached. Story observed, "In this view, the enumeration of the president and vice president, as impeachable officers, was indispensable[.]"[259] Had the President and Vice President not been listed, Story suggests, they would not have fallen within the category of "civil officers of the United States."[260] Why would those elected positions not fall in that category? Because those elected federal officials "derive, or may derive, their office from a source paramount to the national government[;]"[261] that is, the people. And the Impeachment Clause, Story observed, "does not even affect to consider them officers of the United States."[262]

Story then returned to a discussion of the text of the Impeachment Clause. Story explained that the Impeachment Clause: "says, 'the president, vice-president, and *all* civil officers (not all *other* civil officers) shall be removed'"[263] if convicted in a Senate impeachment trial. Story observed that "[t]he language of the [Impeachment] clause, therefore, would rather lead to the conclusion, that [the President and Vice President] were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States."[264] Stated differently, the President and Vice President did not fall within the category of "officers of the United States."[265]

Story expressly extended his analysis beyond the Impeachment Clause and its "civil Officer[] of the United States"-language. For the same reasons that the President is not an "civil Officer of the United States" in the

256. 2 STORY, *supra* note 142, at 259.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 260.
261. *Id.* at 259–60.
262. *Id.* at 260.
263. *Id.*
264. *Id.*
265. *Id.*

Impeachment Clause, Story reasoned that the President is not covered by "office"-language in three other provisions: (1) the phrase "Officers of the United States" in the Commissions Clause;[266] (2) the phrase "Office under the United States" in the Incompatibility Clause;[267] and (3) the phrase "Office of Trust or Profit under the United States" in the Elector Incompatibility Clause.[268] If Story is correct, it would follow that the presidency is also not included in the Foreign Emoluments Clause's "Office of Profit or Trust under [the United States]"-language.[269]

Story was not alone. After the American Civil War, David A. McKnight observed in his treatise, "[I]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'"[270] And in 1906, Justice John Marshall Harlan considered a statute that used the phrase "office of honor, trust, or profit under the government of the United States."[271] Justice Harlan read this latter language the same way Hamilton and Story read "Office under the United States." That is, this language in the statute referred to: offices "created by or existing under the direct authority of, the national government, as organized under the Constitution, and not to offices the appointments to which are made by the States, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument."[272] Harlan acknowledged that "the Senate, as a branch of the legislative department, owes its existence to the Constitution, and participates in passing laws that concern the entire country."[273] He continued, Senators "are chosen by state legislatures, and cannot properly be said to hold their places 'under the government of the United States.'"[274] We think Story, McKnight, and Harlan shared the same

266. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the *Officers of the United States*." (emphasis added)).

267. *Id.* art. I, § 6, cl. 2 ("[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in *Office*." (emphases added)).

268. *Id.* art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an *Office of Trust or Profit under the United State*s, shall be appointed an Elector." (emphasis added)).

269. *Id.* art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: 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." (emphases added)).

270. DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 346 (Philadelphia, J.B. Lippincott & Co. 1878).

271. Burton v. United States, 202 U.S. 344, 361 (1906).

272. *Id.* at 369.

273. *Id.* at 369–70.

274. *Id.* at 370. The phrase "office . . . under the government of the United States does not appear in the Constitution." But the Necessary and Proper Clause does refer to an "Officer" *of* "the Government of the United States." U.S. CONST. art. I, § 8, cl. 18 (providing that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the *Government of the United*

general understanding of the Constitution's "office under"-language—a view that remained well known, even if not the dominant view, into the beginning of the 20th Century.

VIII. DEBATES CONCERNING THE 1776 NORTH CAROLINA CONSTITUTION RECOGNIZED THE DISTINCTION BETWEEN APPOINTED AND ELECTED POSITIONS

A debate surrounding the 1776 North Carolina Constitution further illustrates how "office"-language drafting conventions were employed. Article 32 of this state constitution imposed a religious test against non-Protestants. It provided:

> That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding *any office or place of trust or profit in the civil department within this State*.[275]

Article 32 remained on the books, though largely unenforced, until North Carolina revisited this issue during the 1835 North Carolina Constitutional Convention.[276] This provision did not refer to an "officer of" or an "office under," but it instead used the phrase "office or place of trust or profit in the civil department within this State."

Did this language extend to elected officials? The North Carolina House of Commons debated this question in 1809. That year, Jacob Henry was elected to a state legislative seat. According to the standard narrative, Henry was Jewish. Henry had held that same seat during the prior annual legislative term. However, in 1809, another member put forward a motion to declare Henry's seat vacant. That motion was based, at least in part, on Article 32's

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States, or in any Department or Officer thereof" (emphasis added)). Our reading of the phrase "Officer" of "the Government *of* the United States" in the Constitution departs from Justice Harlan's reading of the phrase "office . . . *under* the government of the United States." As a general matter, we maintain that the precise office-language matters: an office *under* is different from an officer *of*. In our view, the "Officer[s]" of "the Government of the United States" in the Necessary and Proper Clause would include the five *apex presiding* officers identified in the Constitution: the President, the Vice President, the Chief Justice, the Speaker of the House, and the Senate President pro tempore. *See* Tillman & Blackman, *supra* note 2, at 408–10 (discussing meaning of the phrase "Officer" of the "Government of the United States" in the Necessary and Proper Clause).

275. N.C. CONST. of 1776, art. XXXII (emphasis added).

276. *See* Ronnie W. Falkner, *Constitution of 1835*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/constitution-of-1835/ [https://perma.cc/6H3M-8LM3] ("[T]he word 'Protestant' was changed [in 1835] to 'Christian' in Article 32 of the old Constitution[.]").

religious test.[277] Ultimately, the Commons adjudicated the motion, and the motion failed.[278] Henry kept his seat.[279]

William Gaston, a member from the town of New Bern,[280] defended Henry. He contended that Article 32's "office"-language did not extend to elected positions in the state legislature. Gaston asked, "Is a member of either house an officer, or does he hold a place in the civil department?"[281] He answered, "No, he is superior to all, he is the creator of offices and departments—He is the organ of the people, he stands in their place and utters their voice."[282] He concluded, "The people are not officers—a member of this House is merely their representative."[283] Gaston's usage of "office" is broadly consistent with Hamilton's understanding of "office . . . under the United States."

Several scholars have written about this debate. Leon Hühner wrote that the phrase "office or place of trust or profit in the civil department within this State" in Article 32 was "interpreted not to exclude such persons from serving in the legislature." In other words, Article 32's "office"-language did not extend to legislative seats. Why? The legislative "office," it was said, was "*above all civil offices*."[284] Another source explained, "[t]he house, which under the constitution was the judge of its members' qualifications, refused to exclude [Henry], apparently on the ground that a seat in the General Assembly was not an 'Office . . . of Trust or Profit' within the meaning of the North Carolina Constitution."[285] These scholarly secondary sources were extremely skeptical of arguments premised on the distinction between appointed officers and elected officials. Tillman has responded to this skepticism.[286]

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277. J. OF THE H. OF COMMONS OF THE STATE OF N.C. 26–28 (Gales & Seaton eds., Raleigh, 1904) [https://perma.cc/H993-T5GM].

278. Seth Barrett Tillman, *A Religious Test in America? The 1809 Motion to Vacate Jacob Henry's North Carolina State Legislative Seat—A Reevaluation of the Primary Sources*, 98 N.C. HIST. REV. 1, 3 (2021). *See generally* Seth Barrett Tillman, *What Oath (if any) did Jacob Henry take in 1809?: Deconstructing the Historical Myths*, 61 AM. J. LEGAL HIST. 349 (2021).

279. *See supra* note 278 (collecting authority).

280. *Gaston, William (1778–1844)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=G000096 [https://perma.cc/G8Q8-97VN].

281. *State Legislature Debate*, THE NORTH-CAROLINA STAR, Dec. 28, 1809, at 242 (reporting Gaston's speech, where he advanced the "officer" argument). *See generally* Tillman, *Religious Test*, *supra* note 278, at 7.

282. *Id.*

283. *Id.*

284. Leon Hühner, *The Struggle for Religious Liberty in North Carolina, with Special Reference to the Jews*, 16 PUBL'N OF THE AM. JEWISH HIST. SOC'Y 37, 52 (1907).

285. *See also* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 8 (2d ed. 2013). Newby was elected Chief Justice of North Carolina in 2020.

286. *See generally* Tillman, *supra* note 278 (collecting authority).

The motion to vacate Henry's seat failed. One of the arguments advanced to support Henry's position was that a seat in the legislature was not an "office" under Article 32 of the state constitution. Other arguments were also advanced. Nevertheless, the "office" argument clearly had some support among the members. Still, we have no reason to believe it persuaded a majority of the members to support Henry.

In 1835, during North Carolina's Constitutional Convention, Gaston offered a similar argument about Article 32. At the time, he was already serving on the North Carolina Supreme Court. Judge Gaston stated:

> [Article 32] in no degree abridges the *elective* franchise. Every citizen, however heretical his religious opinions, has a right to vote in the *choice* of those who make the laws, or who administer to the service of the State. . . . It is clear, too, and I suppose will be admitted by every legal gentleman, that the prohibitions in this Article can exclude no one from *seats in the General assembly*. Whenever the Constitution means to exclude any man from a seat in the Legislature, it says so in express terms.[287]

Gaston explained that "[a] seat in the Legislature is *above* offices or places of trust in the Civil Department, and is not comprehended impliedly within these terms."[288] We might reason that an office *under* the Civil Department excluded "a seat in the Legislature." Indeed, we have never seen the phrase "office above" in any constitution. In contrast, an office "*within* this state" or an office "in the Civil Department within this state"—the language used in Article 32—would include appointed positions. Gaston expressly referred to these non-apex positions as "*subordinate* civil employment."[289] We do not think he or anyone else could reasonably use this "subordinate civil employment" language to describe elected positions.

In other words, the state constitution's "office"-language does not reach *apex* positions; instead, it reaches "subordinate" civil positions. If Gaston were correct, the governor and his elected councilors of state—both apex positions—would not have been controlled by Article 32.[290] Under that formulation, Article 32's "office or place of trust or profit"-language could not extend to legislative seats or, indeed, to any other elected state positions. More than thirty years later, and after the American Civil War, the Supreme

287. PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA 281 (Raleigh, Joseph Gales & Son 1836) (emphasis added) [https://perma.cc/96GS-2HS5].

288. *Id.*

289. *Id* (emphasis added).

290. N.C. CONST. of 1776, art. XV (governor is "elect[ed]"); *id.* art. XIV (governor's councilors are "elect[ed]").

Court of North Carolina would address this very issue. However, the North Carolina Supreme Court's view was not *ad idem* with Gaston's.[291]

Gaston's analysis from the 1835 state constitutional convention was not limited to the North Carolina Constitution. To support his "construction" of Article 32's "office"-language, Gaston favorably cites *both* the Jacob Henry adjudication of 1809 and the *Blount* impeachment's Senate trial from 1798–1799.[292] That is, Gaston drew an analogy between the federal Constitution's "Officers of the United States"-language in the Impeachment Clause and the 1776 North Carolina Constitution's "office . . . in the civil department within this State"-language in Article 32. We infer that Gaston understood both terms to exclude elected officials. We do not opine whether Justice Gaston was correct as a matter of North Carolina law. Rather, we only offer this history to show that Gaston's public statements about the relevant state and federal constitutional texts are consistent with one another and with the longstanding British drafting convention that distinguished between appointed officers and elected officials.

CONCLUSION

Our goal in this fourth installment was limited: to show that the "Office under" British statutory drafting convention was well known in the United States around the time the Constitution was drafted and ratified in 1787 and 1788. To do so, we traced the history of this drafting convention from English and British sources, to the Articles of Confederation, to the Washington Administration, to the Early Republic and, more generally, the Antebellum Era, to the American Civil War, and, finally, through the end of the Nineteenth Century. In the Anglo-American legal tradition, the phrase "Office under the . . ." was, and remains, a commonly used drafting convention that refers to appointed officers. This phrase does not refer to elected officials.

In the fifth installment of this series, we will turn to how the phrase "Office . . . under the United States" was used in four provisions of the unamended Constitution of 1788: the Elector Incompatibility Clause, the Impeachment Disqualification Clause, the Incompatibility Clause, and the Foreign Emoluments Clause.

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291. Doyle v. Raleigh, 89 N.C. 133, 135–36 (N.C. 1883); Worthy v. Barrett, 63 N.C. 199, 201–02 (N.C. 1869).

292. PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA, *supra* note 287.