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.

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

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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

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]

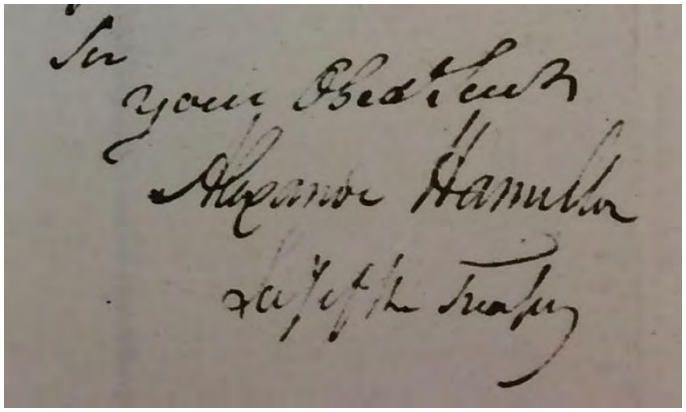


Figure 1

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]

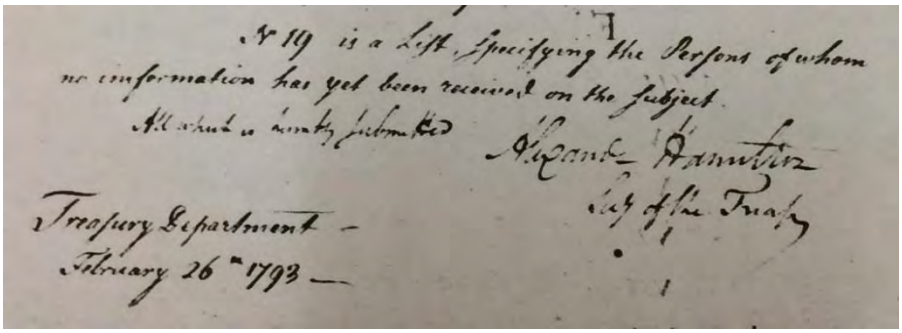


Figure 2

Figure 3 depicts Hamilton's signature in Annex X of the *1793 Complete Report*.[175]

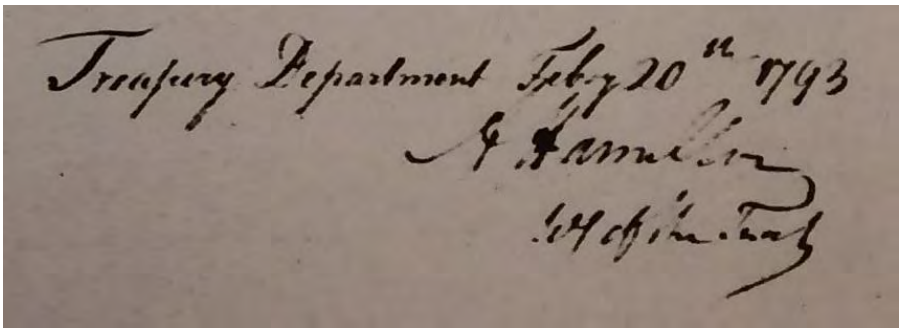


Figure 3

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]

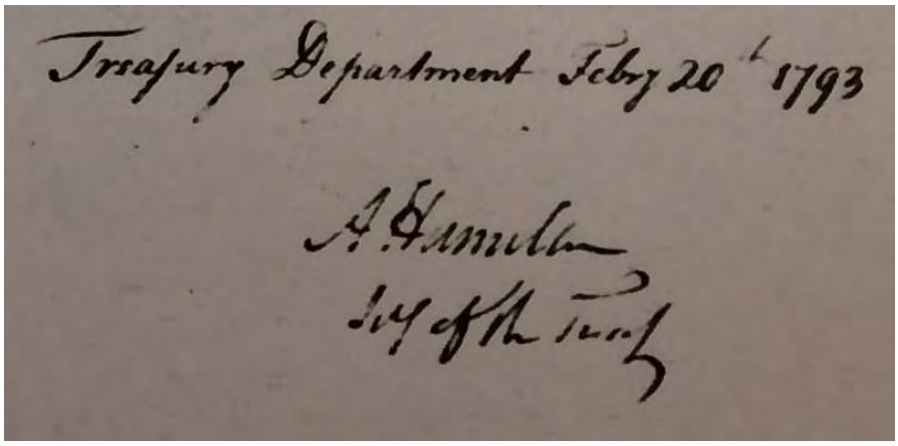


Figure 4

Figure 5 depicts Hamilton's signature in Annex XII of the *1793 Complete Report*.[177]

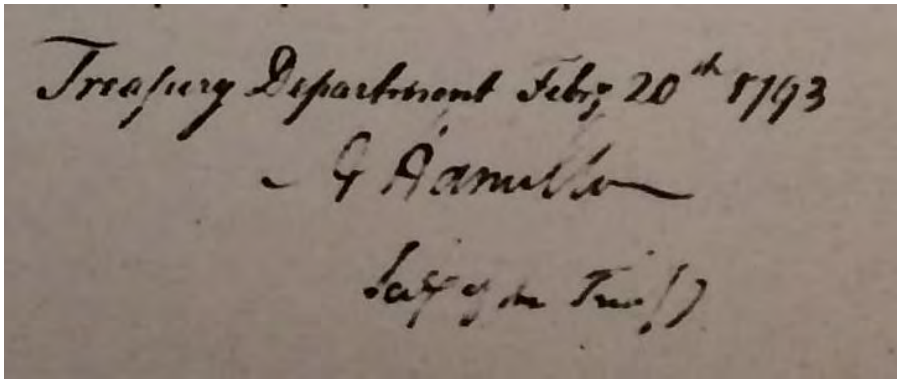


Figure 5

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).

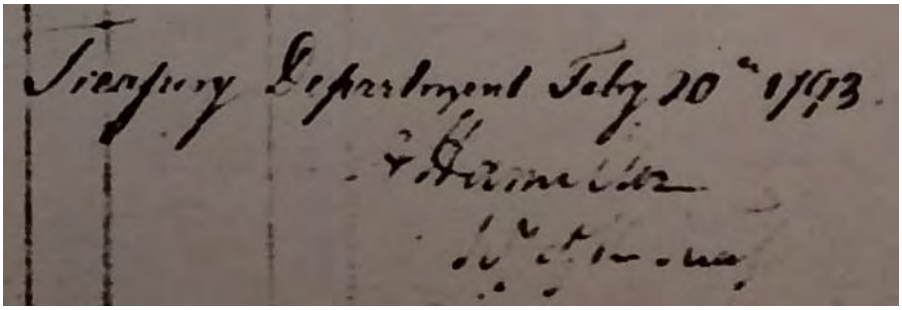
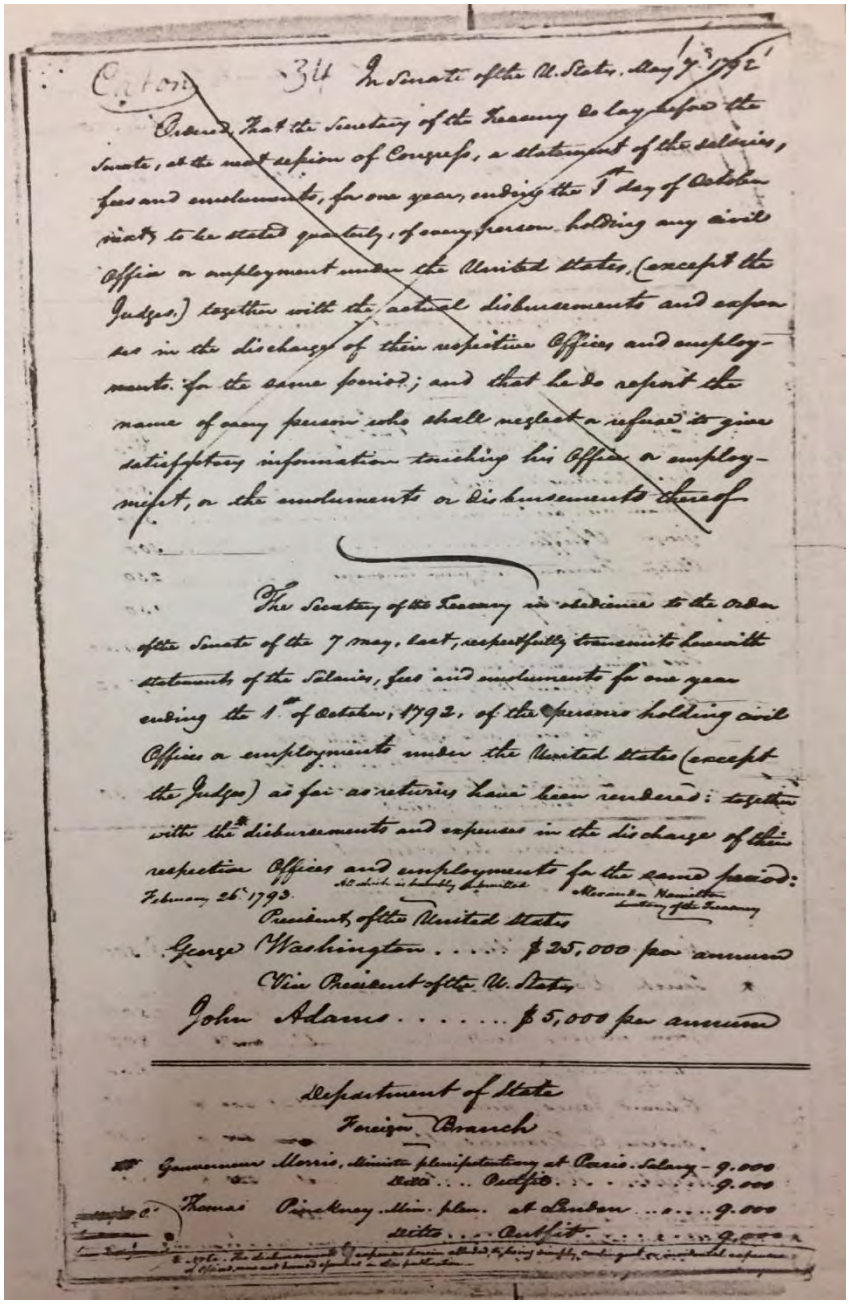


Figure 6

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.



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 the Senate 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. 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*.

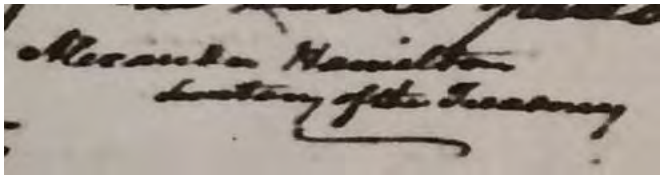


Figure 8

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.

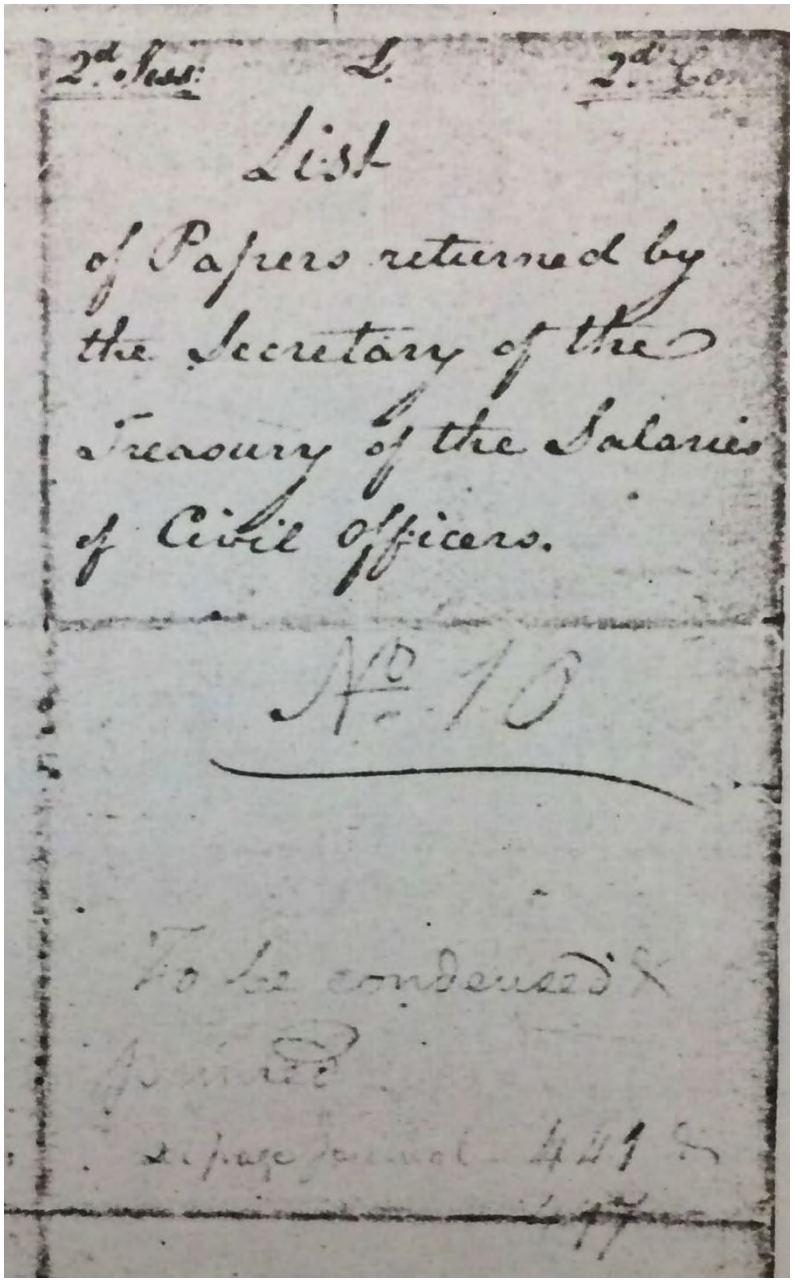

Figure 9

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]

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.