



ARTICLE

Who Are “Officers of the United States”?

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Abstract. For decades courts have believed that only officials with “significant authority” are “Officers of the United States” subject to the Constitution’s Article II Appointments Clause requirements. But this standard has proved difficult to apply to major categories of officials. This Article examines whether “significant authority” is even the proper standard, at least as that standard has been applied in modern practice. To uncover whether the modern understanding of the term “officer” is consistent with the term’s original public meaning, this Article uses two distinctive tools: (i) corpus linguistics-style analysis of Founding-era documents and (ii) examination of appointment practices during the First Congress following constitutional ratification. Both suggest that the original public meaning of “officer” is much broader than modern doctrine assumes—encompassing any government official with responsibility for an ongoing governmental duty.

This historic meaning of “officer” would likely extend to thousands of officials not currently appointed as Article II officers, such as tax collectors, disaster relief officials, customs officials, and administrative judges. This conclusion might at first seem destructive to the civil service structure because it would involve redesignating these officials as Article II officers—not employees outside the scope of Article II’s requirements. But this Article suggests that core components of the current federal hiring system might fairly readily be brought into compliance with Article II by amending who exercises final approval to rank and hire candidates. These feasible but significant changes would restore

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a critical mechanism for democratic accountability and transparency inherent in the Appointments Clause.

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Introduction

Article II, Section 2, Clause 2 of the U.S. Constitution, known as the Appointments Clause, is an important yet insufficiently studied provision governing how federal officers must be selected. It states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹

The Appointments Clause empowers only three entities to select officers: the President, department heads, and courts of law.² By involving a limited number of entities in officer selection, Article II aims to ensure that the identity of the nominating official is clear.³ This provides a direct line of accountability for any poorly performing officers back to the actor who selected them.⁴

The Appointments Clause requirements apply only to “Officers of the United States.”⁵ Current Supreme Court doctrine defines these officers as appointees who wield “significant authority.”⁶ Because this definition by its terms is vague, subsequent Supreme Court and lower court opinions have attempted to flesh out a more detailed test that examines several factors. Under current law, courts evaluating whether a particular official⁷ is an Article II officer examine factors like (i) the importance of the issues in the official’s

1. U.S. CONST. art. II, § 2, cl. 2.

2. *See id.*

3. *See infra* notes 55-60 and accompanying text; *see also* Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 765-66 (2008) (noting that one of the primary objectives of the Appointments Clause was to ensure “that a single person or entity [was] accountable for the performance of an officer” on the theory that “if an incompetent person was appointed to the post, the electorate should be able to understand who was responsible for appointing the person”).

4. *See* Volokh, *supra* note 3, at 765-66; *see also infra* Part IV.B.1.

5. *See* U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

6. *See Buckley*, 424 U.S. at 125-26 (per curiam).

7. This Article uses the term “official” as a generic term to describe individuals holding any kind of governmental position—both officers and employees. In contrast, this Article reserves the legal designation “officer” for Article II-level officials.

portfolio, (ii) the finality of the official’s actions, and (iii) the degree of discretion the official has in reaching her determinations.⁸

Proper application of this multifactor standard is fraught with uncertainty. Recently, for example, the application of the standard to administrative law judges (ALJs) within the Securities and Exchange Commission (SEC) has resulted in a circuit split. In December 2016, the Tenth Circuit issued an opinion creating a split with the D.C. Circuit, which had held in an August 2016 panel opinion that the category of Article II officers excludes these ALJs.⁹ In particular, the Tenth Circuit disagreed with the D.C. Circuit’s reliance on final decisionmaking authority as an essential factor for officer status.¹⁰ The Tenth Circuit concluded instead that SEC ALJs are officers merely because their positions and “duties, salary, and means of appointment” are established by statute and because they “exercise significant discretion” in “carrying out . . . important functions.”¹¹ In May 2017 the D.C. Circuit sat en banc to reconsider its 2016 panel decision and evaluate whether it properly relied on final decisionmaking authority as a factor relevant to the Article II officer analysis.¹² In June 2017 an evenly divided D.C. Circuit issued a judgment denying the petition for review of the SEC order originally before the court and affirming the earlier August 2016 panel decision.¹³ The two circuits consequently

8. See, e.g., *Tucker v. Comm’r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012) (explaining that “[a]lthough the cases are not altogether clear,” these three factors are “the main criteria for drawing the line between inferior Officers and employees not covered by the [Appointments Clause]”); see also *Freytag v. Comm’r*, 501 U.S. 868, 881-82 (1991) (considering the “significance of the duties and discretion” of the officials whose Article II status was before the Court). The *Freytag* Court also referred to final decisionmaking authority in its discussion of factors indicating constitutional officer status, see 501 U.S. at 881-82, but lower courts have disagreed about whether the opinion made this factor an essential requirement for an official to qualify as an Article II officer.

9. Compare *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016) (holding that SEC ALJs are Article II officers), *petition for cert. filed*, No. 17-475 (U.S. Sept. 29, 2017), with *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 283-89 (D.C. Cir. 2016) (holding that SEC ALJs are not Article II officers), *aff’d mem. by an equally divided court*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc), *cert. granted sub nom. Lucia v. SEC*, No. 17-130, 2018 WL 386565 (U.S. Jan. 12, 2018).

10. See *Bandimere*, 844 F.3d at 1182.

11. *Id.* at 1179 (alteration in original) (quoting *Freytag*, 501 U.S. at 881-82).

12. See Order at 1-2, *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (No. 15-1345), 2017 U.S. App. LEXIS 2732, at *2-3 (granting en banc consideration of the question whether the court should overrule *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)). *Landry* had indicated that final decisionmaking authority was a necessary factor for establishing constitutional officer status. See 204 F.3d at 1134.

13. See *Raymond J. Lucia Cos.*, 868 F.3d at 1021; see also D.C. CIR. R. 35(d) (“If the en banc court divides evenly, a new judgment affirming the decision under review will be issued.”).

resumed their direct conflict, and on January 12, 2018, the Supreme Court granted certiorari in the D.C. Circuit case.¹⁴

Although the two federal courts of appeals examined a somewhat different set of factors leading to contradictory results, both courts nonetheless attempted to apply the Supreme Court’s general “significant authority” benchmark—at least as that benchmark has been fleshed out in recent cases.¹⁵ In light of evidence about the broad meaning of the word “officer” when the Constitution was adopted in the late eighteenth century, however, both courts were likely applying the wrong benchmark—at least as a historical matter.

This Article is not primarily a theoretical piece contending that originalism is the best interpretive theory or that one type of originalism should be favored over another.¹⁶ Rather, the research set forth in this Article reflects an awareness that many judges and scholars consider the Constitution’s original meaning relevant to constitutional questions.¹⁷ In cases involving the

14. See *Lucia*, 2018 WL 386565.

15. See *Bandimere*, 844 F.3d at 1173-82; Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 280, 284-89 (D.C. Cir. 2016), *aff’d mem. by an equally divided court*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc), *cert. granted sub nom. Lucia*, 2018 WL 386565; see also *infra* notes 105-08 and accompanying text (discussing *Freitag* and the lower courts’ interpretation, and arguable alteration, of the open-ended *Buckley* standard).

16. Compare, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) (“[T]he Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it.”), with, e.g., Lawrence B. Solum, *Semantic Originalism* 3, 69, 77-81 (Apr. 21, 2009) (unpublished manuscript), <https://perma.cc/DT3L-GBTY> (focusing on the original public semantic meaning of a term and characterizing the application of historical interpretive rules as a distinct act called “construction”). These methods may be more closely aligned than they appear to be at first. For example, McGinnis and Rappaport have contended that attention to historical interpretive rules should frame even the most straightforward original public meaning interpretive approach. As they explain, “[A] competent and reasonable speaker at the time of the Constitution’s enactment” would have “recognize[d] that his understanding of the language depend[ed] [both] on conventions for word meaning and grammatical rules” and on “specific interpretive rules.” See McGinnis & Rappaport, *supra*, at 761.

17. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560-61 (2014) (Breyer, J.) (turning to early dictionaries and the records of the Constitutional Convention as the first step in analyzing the Recess Appointments Clause, U.S. CONST. art. II, § 2, cl. 3, before finding ambiguity); *District of Columbia v. Heller*, 554 U.S. 570, 576-603 (2008) (Scalia, J.) (engaging in textual and historical analysis to uncover the meaning of the Second Amendment); Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown Univ. Law Ctr., Testimony at the Senate Judiciary Committee Hearings on the Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States 1, 3-5 (Mar. 23, 2017), <https://perma.cc/H3AL-ZTSJ> (describing now-Justice Gorsuch’s adherence to originalism and describing originalism’s place in the mainstream of constitutional interpretive philosophy as well as originalism’s relevance for interpreters from a wide spectrum of political backgrounds).

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Appointments Clause in particular, the Supreme Court has indicated that the historical understanding of the Clause is key to its contemporary interpretation and application.¹⁸

An accurate historical understanding of the meaning of the word “officer” in the Appointments Clause consequently provides a relevant data point for properly applying the Clause to our modern administrative governmental structure. In that vein, extensive evidence suggests that the original public meaning of the Article II term “officer” related to neither discretion nor final decisionmaking authority. Rather, historical evidence suggests that the most likely eighteenth century meaning of “officer” was significantly broader than the modern “significant authority” test implies. In the Founding era, the term “officer” was commonly understood to encompass any individual who had ongoing responsibility for a governmental duty.¹⁹ This included even individuals with more ministerial duties like recordkeeping.²⁰ The only continuing positions excluded from the category of “officer” were (i) positions more like those of “servants” or “attendants”²¹ and (ii) “deputies” acting as agents in place of an officer, where the officer was subject to personal legal liability for the deputy’s actions.²²

The phrase “Officers of the United States” predates the drafting of the Constitution.²³ Evidence of early usage indicates that it was not a special legal

18. See *Buckley v. Valeo*, 424 U.S. 1, 128-31 (1976) (per curiam) (analyzing the plain language and drafting history of the Appointments Clause to support the Court’s conclusion that the phrase “Officers of the United States” “embrace[s] all appointed officials exercising responsibility under the public laws of the Nation”), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); see also *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946-48 (2017) (Thomas, J., concurring) (referring to “the probable original meaning of the [Appointments] Clause and this Court’s precedents” in analyzing whether the National Labor Relations Board’s general counsel is a principal “Officer of the United States”).

19. See *infra* Part II.

20. See *infra* Parts II.B.2, III.A.

21. See *infra* notes 334-39 and accompanying text; *infra* Part III.A (describing the distinctions between officer clerks and nonofficer messengers who engaged in assistant-level tasks not specifically assigned to the executive branch by congressional statute or any other source of federal law); see also 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 209 (Worthington Chauncey Ford ed., 1905) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS] (referring to “officers and other attendants” at an army hospital). *But see infra* note 599 (explaining that the appointment methods for many of these army hospital “officers” appear to be in some conflict with the method later prescribed by the Articles of Confederation).

22. See *infra* Part III.B.

23. See *infra* Parts II.A.2.d-e.

term of art,²⁴ unlike other constitutional phrases such as “the Writ of Habeas Corpus”²⁵—at least not with respect to the level of authority an official must have.²⁶ The qualifier “of the United States” clarifies that Article II refers to federal officers²⁷ rather than state or local governmental actors. The phrase “Officers of the United States” thus incorporated the well-accepted meaning of the term “officer” at the time, consistent with contemporaneous and longstanding British law.²⁸

The original meaning of the term “officer” in the Appointments Clause and its implications for the proper selection of midlevel federal officials have been underexamined in legal academic scholarship.²⁹ Several scholars have analyzed

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24. See *infra* Part II.A.2; cf. Akhil Reed Amar & Vikram David Amar, Essay, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 116 (1995) (“There is considerable historical evidence that the Constitution’s drafters used the term ‘Officer’ in the Succession Clause as shorthand for ‘Officer of the United States.’”); Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 154-55 (2008) (closing statement of Steven G. Calabresi) (arguing that in original public meaning analysis, “[i]t must be presumed that ordinary citizens would have given words like . . . ‘office’ . . . their commonsense meaning”). But see, e.g., Tillman & Calabresi, *supra*, at 137-38 (opening statement of Seth Barrett Tillman) (examining whether the Constitution’s various formulations of “officer” have distinct meanings); *id.* at 149 (closing statement of Seth Barrett Tillman) (arguing that the similarly worded constitutional phrase “Office under the United States,” see U.S. CONST. art. I, § 6, cl. 2, is a term of art).
25. U.S. CONST. art. I, § 9, cl. 2; see also John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law* 33 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, No. 17-262, 2017), <https://perma.cc/NRW7-3YZ6> (listing the phrase as one of numerous “unambiguously legal terms” in the Constitution whose “legal meaning would be unknown to most nonlawyers”).
26. Cf. Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 159-62 (1995) (reasoning that the “term of art ‘Officer of the United States’” excludes legislative officers); 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, 99 n.10 (2016) (presenting evidence that the phrase “Officers of the United States” excludes elected officials like the President).
27. See *infra* notes 154-56 and accompanying text.
28. See *infra* Part II.
29. Administrative law scholar Gary Lawson has suggested that the Appointments Clause, like “[m]any of the Constitution’s most important structural provisions,” involves “circularity” and that the term officer “pretty clearly” just “means anyone who is important enough to be an officer.” See Steven G. Calabresi & Gary Lawson, Essay, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1019 n.92 (2007). The one preexisting in-depth historical analysis of “officer” Lawson refers to in his work is a 2007 opinion by the U.S. Department of Justice’s Office of Legal Counsel (OLC). See, e.g., Gary Lawson, *The “Principal” Reason Why the PCAOB Is Unconstitutional*, 62 VAND. L. REV. EN BANC 73, 82-83 (2009) (citing Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007)). But as discussed below, the OLC opinion focused more on
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constitutional phrases containing the term “officer” in order to analyze the *lateral* issue of the meaning of the Constitution’s various officer formulations in relation to each other.³⁰ For example, Seth Barrett Tillman has extensively studied constitutional formulations such as the Foreign Emoluments Clause’s application to people holding “Office . . . under” the United States,³¹ contending that numerous constitutional references to “officers” do not apply to elected officials.³² Scholars have also analyzed the related, but distinct, *vertical* issue of identifying the proper dividing line between (i) principal officers subject to nomination by the President with Senate advice and consent and (ii) inferior officers who may also in the alternative be appointed by courts of law, department heads, or the President alone.³³

In contrast, this Article analyzes the dividing line between (i) officers subject to any of the Appointments Clause selection mechanisms and (ii) lower-level, non-Article II officials known as employees under modern law.³⁴ A number of scholars have addressed whether the Article II term “officer” reaches particular contemporary officials such as ALJs³⁵ or IRS appeals officers.³⁶ But

nineteenth century history than the eighteenth century evidence that is most relevant to originalist constitutional analysis. *See Officers of the U.S.*, 31 Op. O.L.C. at 78-87. This Article attempts to fill a gap in the literature by closely examining the use of the term “officer” in the late eighteenth century to see whether in-depth historic study of the term sheds more light on the proper scope of Appointments Clause requirements as of the time of the Constitution’s drafting and ratification.

30. *See supra* notes 24, 26.

31. U.S. CONST. art. I, § 9, cl. 8.

32. *See* William Baude, *Constitutional Officers: A Very Close Reading*, CONST. L. JOTWELL (July 28, 2016), <https://perma.cc/59PE-4G95> (reviewing Tillman, *supra* note 26; and Seth Barrett Tillman, *Originalism & the Scope of the Constitution’s Disqualification Clause*, 33 QUINNIPIAC L. REV. 59 (2014)).

33. U.S. CONST. art. II, § 2, cl. 2; *see, e.g.*, Lawson, *supra* note 29, at 75-77 (contending that members of the Public Company Accounting Oversight Board are principal, not inferior, officers); Tuan Samahon, *Are Bankruptcy Judges Unconstitutional?: An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 234-36 (2008) (examining whether bankruptcy judges are inferior or principal officers).

34. *See* Freytag v. Comm’r, 501 U.S. 868, 880-81 (1991) (labeling as employees the group of officials who have less authority than inferior officers); *cf.* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 30-31 (2012) (indicating the shortage of excavated evidence on the Appointments Clause in a landmark work on the many intricacies of the first hundred years of U.S. administration by wryly referring to “inferior Officers’ (whoever they might be)”).

35. *See, e.g.*, Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 809-14 (2013).

36. *See, e.g.*, Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed*, 76 MO. L. REV. 1143, 1182-86 (2011); *see also, e.g.*, Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL’Y 219, 235-40 (2010) (analyzing the officer status of various “czars” within the Obama Administration, such as the “Pay Czar,” who approved the compensation levels

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these scholars typically use the “significant authority” test as a starting point or incorporate the historical analysis from a 2007 executive branch opinion interpreting the term “officer.”³⁷ This 2007 opinion drafted by the Office of Legal Counsel (OLC) relies heavily on nineteenth century sources;³⁸ its “officer” definition is both under- and overinclusive relative to the eighteenth century understanding of the term.³⁹

Methodologically, this Article instead focuses on eighteenth century historical sources. To uncover the original public meaning of the Article II term “officer,” this Article reviews traditional originalist historical sources using an adaptation of corpus linguistics-style analysis—a set of techniques that legal scholars and jurists have only recently started applying to statutory and constitutional interpretation.⁴⁰ In particular this Article uses a form of the technique known as Key-Word-in-Context (KWIC) analysis⁴¹ to analyze the context surrounding thousands of uses of the term “officer” in the time period just prior to and during the debates over ratification of the Constitution.

In addition, this Article looks in depth at early practice regarding officer appointments. By reviewing early federal payroll lists and examining the First Congress’s statutory provisions regarding government personnel, this Article analyzes the dividing line between early officials appointed under the Appointments Clause and those treated as nonofficers. This Article also examines the use of the term “officer” in several ordinances and resolutions issued by the Continental Congress, which may suggest a similar understand-

for certain executives at companies receiving government funding under the Troubled Asset Relief Program).

37. See, e.g., Barnett, *supra* note 35, at 811-13 (analyzing ALJs’ Article II status under the “significant authority” doctrine); Lindstedt, *supra* note 36, at 1149-51, 1177-82, & 1177 n.266 (discussing historical evidence relevant to the meaning of “officer” as included in the 2007 OLC opinion, see *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73 (2007), and then proposing a new standard for defining officer status based on a combination of the OLC’s proposed standard, modern administrative standards defining final agency action, and the “significant authority” test); Sholette, *supra* note 36, at 229-40 (analyzing the officer status of the Pay Czar in accordance with the 2007 OLC opinion’s historical analysis as well as several nineteenth century Supreme Court opinions).

38. See *Officers of the U.S.*, 31 Op. O.L.C. at 78-87.

39. See *infra* notes 93-98 and accompanying text.

40. See, e.g., Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 161-62, 162 n.21 (2011) (noting that as of 2011, corpus-based techniques had “rarely been brought to bear on the legal question of ordinary meaning”); see also *infra* notes 124-26 and accompanying text (discussing some of the first judicial opinions to employ corpus linguistics techniques in statutory interpretation cases).

41. See *infra* text accompanying notes 127-30.

ing of the term in the era immediately preceding the ratification of the Constitution.⁴²

This evidence indicates that the most likely original public meaning of “officer” is one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance. If a statute authorizes the federal government to complete a task or exercise a power, the individual who maintains ongoing responsibility for the task or power is an officer. Under this definition, many employees of the modern administrative state currently considered to hold nonofficer positions should more properly be classified as “Officers of the United States” subject to Article II. Officials likely falling within the original public meaning of “officer” include, among others: (i) officials overseeing federal disaster relief preparations; (ii) tax collectors; (iii) officials authorizing federal benefits payments; (iv) contract specialists; (v) federal law enforcement officers; (vi) officials responsible for government investigations, audits, or cleanup; and (vii) ALJs.⁴³

Proper understanding of the correct scope and democratic significance of Appointments Clause restraints is so far from the consciousness of contemporary policymakers that statutes fail to require Article II appointments even for many officials qualifying as officers under modern doctrine—much less for the thousands of officials qualifying under the broader eighteenth century understanding. For example, Congress reconfigured executive branch agencies to improve homeland defense after the 9/11 terrorist attacks, placing certain agencies that used to be more independent under the direction of a new Secretary of Homeland Security.⁴⁴ As part of that reorganization, the Federal Emergency Management Agency (FEMA) became a subunit within the newly created Department of Homeland Security.⁴⁵ Nonetheless, Congress has continued to make significant positions within FEMA subject to appointment by the FEMA Administrator rather than the new department head, the Secretary of Homeland Security. In particular, in 2006, in the fallout from Hurricane Katrina, Congress authorized the FEMA

42. This Article uses the term “First Congress” to refer to the first session of the United States Senate and House of Representatives from 1789 to 1791. “Continental Congress,” in turn, refers both to the legislative body governing the colonies and the early United States in the preconstitutional period from 1774 to 1789.

43. See *infra* Part IV.A.

44. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 101-102, 116 Stat. 2135, 2142-43 (codified as amended at 6 U.S.C. §§ 111-112 (2016)) (establishing the Department of Homeland Security, headed by the Secretary of Homeland Security, to help “prevent terrorist attacks within the United States”); see also, e.g., *id.* § 403, 116 Stat. at 2178 (codified at 6 U.S.C. § 203) (transferring to the new Department of Homeland Security the functions of entities including the U.S. Customs Service and the Transportation Security Administration).

45. See *id.* § 503, 116 Stat. at 2213 (codified as amended at 6 U.S.C. § 313).

Administrator to appoint ten regional administrators to oversee regional preparedness for terrorist attacks and natural disasters.⁴⁶ Even under modern doctrine, it seems that regional administrators with such “significant authority” should be appointed by the department head—the Secretary of Homeland Security—and not by the FEMA Administrator.⁴⁷ Such a change might seem like a technicality. But making the Secretary ultimately responsible places significant hiring decisions one step closer to the democratic accountability of an elected President.⁴⁸

Current procedures governing the selection of officials with likely officer status may raise Article II problems in three possible ways. First, some fairly high-level officials, like the FEMA regional administrators, are appointed by heads of executive branch entities that are not independent Article II-level departments.⁴⁹ Second, some officials with officer-level duties as a historic matter are subject to competitive civil service procedures in which their final appointing official is someone other than an Article II department head.⁵⁰ Even if some form of a competitive service process for selecting Article II officers in general may be constitutional,⁵¹ Article II would require final appointment by an Article II actor like the President or a department head.⁵² Finally, though this is a close case, arguably even competitively selected officers subject to final appointment by a department head undergo unconstitutional appointment procedures.⁵³ Subject to certain exceptions, competitive procedures typically restrict the appointing authority to filling a position from a list of several preselected candidates.⁵⁴ At least in cases where members of the competitive

46. See Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, tit. VI, sec. 611, § 507, 120 Stat. 1355, 1401 (codified as amended at 6 U.S.C. § 317); see also KEITH BEA, CONG. RESEARCH SERV., RL33729, FEDERAL EMERGENCY MANAGEMENT POLICY CHANGES AFTER HURRICANE KATRINA: A SUMMARY OF STATUTORY PROVISIONS 10, 15 tbl.1 (2007); *infra* Part IV.A.1.

47. For example, the Supreme Court has indicated that tasks such as taking testimony and enforcing discovery compliance involve a degree of discretion and importance sufficient to give an official Article II officer status. See *Freytag v. Comm’r*, 501 U.S. 868, 881-82 (1991). The FEMA regional administrators’ oversight of preparation efforts for possible terrorist attacks arguably reaches a similar level of importance. See *infra* Part IV.A.1 (analyzing FEMA officials’ responsibilities under both the historical duty standard and the modern “significant authority” doctrine).

48. Cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495-98 (2010) (explaining the importance of direct, uninsulated accountability).

49. See *infra* text accompanying notes 628-31.

50. See *infra* Part IV.A.2.a.

51. See *infra* notes 655-60 and accompanying text.

52. See U.S. CONST. art. II, § 2, cl. 2.

53. See *infra* notes 661-66 and accompanying text.

54. See *infra* notes 649-54 and accompanying text.

examining board are not themselves appointed by a department head, this seems inconsistent with the Article II objective of ensuring department head accountability for selecting the best officers.

Both scholars who view Article II more formalistically and those who take a more purposive or functionalist approach to constitutional interpretation have reason to consider the historical standard for defining “officer.” The underlying purpose of the Appointments Clause counsels in favor of the same expansive interpretation of “officer” as does the more textualist evidence related to original meaning. The Framers pointedly rejected the congressional appointment of officers the Articles of Confederation had authorized⁵⁵ because the Framers believed that individual actors must maintain accountability for their nomination choices.⁵⁶ In writing Federalist No. 76 to convince state delegates to ratify the draft Constitution, Alexander Hamilton said of Article II: “It is not easy to conceive a plan better calculated to promote a judicious choice of men for filling the offices of the union”⁵⁷ In particular, the Framers believed that making single actors responsible for appointment choices would give those actors the motivation to select highly qualified officers because they would face the blame if a government appointment did not pan out.⁵⁸ From as early as the time of the drafting and ratification of the Constitution, the Framers were concerned about patronage.⁵⁹ They selected the transparency of the Appointments Clause as a safeguard against it.⁶⁰

55. Compare U.S. CONST. art. II, § 2, cl. 2 (omitting any congressional appointment mechanism), with ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5 (“The united States, in Congress assembled, shall have authority . . . to appoint such . . . civil officers as may be necessary for managing the general affairs of the united states under their direction . . .”).

56. See, e.g., THE FEDERALIST NO. 77, at 398-99 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

57. THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 56, at 392.

58. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 70 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Mr. Wilson: “If appointments of Officers are made by a sing. Ex he is responsible for the propriety of the same. [N]ot so where the Executive is numerous.”). But see 2 *id.* at 539 (Mr. Gerry: “The idea of responsibility in the nomination to offices is chimerical—The President can not know all characters, and can therefore always plead ignorance.”).

59. See *infra* Part IV.B.1.

60. See, e.g., 2 FARRAND’S RECORDS, *supra* note 58, at 42 (Mr. Ghorum: “As the Executive will be responsible in point of character at least, . . . he will be careful to look through all the States for proper characters.”); cf. WILLIAM SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS OF THE SEVERAL STATES WITH EACH OTHER, AND WITH THAT OF THE UNITED STATES 27 (Philadelphia, John Thompson 1796) (contrasting the federal constitutional system with state constitutional practices requiring the executive to act in consultation with a multimember council and noting that “in general, a constitutional council may be considered, either as a cloak to the Executive to shelter him when he does wrong, or as a clog to impede his motions when he wishes to do right”);
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Numerous scholars today similarly maintain concerns about the need for accountability and transparency in the exercise of decisionmaking within the executive branch. Such concerns range from (i) a desire to ensure that administrative agencies adequately inform the public about rulemaking and adjudicative efforts⁶¹ to (ii) acknowledgment that powerful executive entities like the Office of Management and Budget (OMB) may exert significant influence on agency spending decisions under a cloak of opacity⁶² to (iii) Jennifer Nou’s recent proposal to require more disclosure of nontraditional types of information like the structure of “intra-agency coordination mechanisms” that agencies use to further their agendas.⁶³ Analogously, ensuring that civil servants are hired under a clear line of authority right up to the department head would be another critical step in the right direction for accountability through transparency.

This Article proceeds in four Parts. Part I explains the importance of properly clarifying the term “officer” in light of governing case law and modern practice. Part II presents evidence regarding the most likely original public meaning of the term “officer” based on the term’s usage in various corpora around the time of the Constitution’s drafting and ratification. Part III lays out how the First Congress’s practice of appointing officers and hiring nonofficers confirms the corpus linguistics-style analysis. Finally, Part IV explains the possible implications of the original meaning of “officer” for government today. It identifies categories of modern government officials currently treated as employees who in fact are most likely officers under Article II’s historical meaning. Part IV then shows that it may be feasible to reclassify large groups of civil servants as Article II officers⁶⁴ and that such a

id. at 32 (“The Executive, by its unity, is completely responsible; a chief magistrate, for his own reputation, will search for the best men . . .”).

61. For example, the Administrative Conference of the United States recently published recommendations for how agencies can provide more online accessibility to adjudication materials and better engage the public in rulemaking efforts. *See* Adoption of Recommendations, 82 Fed. Reg. 31,039 (July 5, 2017); *see also* Emily Bremer, *ACUS Adopts Two Recommendations at the 67th Plenary (ACUS Update)*, YALE J. ON REG.: NOTICE & COMMENT (June 30, 2017), <https://perma.cc/H2UE-KN78>.

62. *See* Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2271-87 (2016) (suggesting ways that the OMB’s efforts can be made more transparent to “mitigat[e] the system’s problematic lack of accountability”).

63. *See* Jennifer Nou, *Intra-agency Coordination*, 129 HARV. L. REV. 421, 423-30, 478-82, 490 (2015).

64. *See infra* Part IV (suggesting that significant portions of the current competitive service procedures might be compatible with Article II appointment requirements); *cf.* Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1624-27 (2015) (discussing scholarship regarding the delays in filling high-level posts that require Senate confirmation—positions distinct from the lower-level officer positions at issue in this Article); Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 921-22, 927 (2009) (similar).

restructuring would be consistent with the values of democratic accountability and transparency.

I. Article II’s Role Within the Constitutional System and Current Doctrine

From the nation’s earliest days, its leaders have sought to ensure that the selection of government officials is efficient,⁶⁵ free from patronage,⁶⁶ and implemented via mechanisms identifying the most qualified person for the job.⁶⁷ Toward that end, the U.S. Constitution expressly established the mechanism of Article II Appointments Clause procedures to ensure that federal officers were selected for their expertise, free from the improper influence of patronage.⁶⁸

Article II, Section 2 expressly contemplates two categories of government officials and implicitly may leave room for a third. First, there are some government officials of such significance that only the President can appoint them with the advice and consent of the Senate.⁶⁹ Second, there is a set of “inferior Officers” whose method of hiring Congress may “establish[] by Law.”⁷⁰ Congress may enact laws that create “inferior Officer[]” positions,

65. See, e.g., 2 FARRAND’S RECORDS, *supra* note 58, at 627-28 (Madison recording that the Framers ultimately voted to include the provision permitting alternate modes of appointment because it was “too necessary . . . to be omitted”); see also *United States v. Germaine*, 99 U.S. 508, 509-10 (1879) (observing that the Framers established three alternate modes of appointment for inferior officers because they foresaw that the primary mode of appointment “might be inconvenient” when “offices became numerous”); Samahon, *supra* note 33, at 252-54 (explaining that the inferior officers provision was adopted for the purpose of efficiency, after little debate).

66. See, e.g., *The Federal Farmer*, Anti-Federalist No. 69: The Character of the Executive Office (Federal Farmer XIV) (1788) [hereinafter *Federal Farmer XIV*], in *THE ANTI-FEDERALIST PAPERS* 269, 269 (Bill Bailey ed., n.d.), <https://perma.cc/XM7Q-XV4B> (contending that “impartial and judicious appointments of subordinate officers will, generally, be made by the courts of law, and the heads of departments”).

67. See *infra* Part IV.B.1; see also, e.g., 1 FARRAND’S RECORDS, *supra* note 58, at 120 (Madison noting that “any numerous body” would be ill suited for selecting judges in particular because of “the danger of intrigue and partiality” and because many members of the legislature would be poorly suited to assessing a candidate’s “requisite qualifications”). *But see 2 id.* at 542 (Madison’s notes: “We seemed [Dr. Franklin] said too much to fear cabals in appointments by a number, and to have too much confidence in those of single persons.”).

68. See *infra* Part IV.B.1.

69. U.S. CONST. art. II, § 2, cl. 2; see also, e.g., *Edmond v. United States*, 520 U.S. 651, 662-63 (1997) (contrasting inferior with principal officers).

70. U.S. CONST. art. II, § 2, cl. 2; see also *Federal Farmer XIV*, *supra* note 66, at 269 (observing that Congress’s power to decide which actor may appoint each inferior officer provides a positive counterbalance to the President’s nomination and appointment duties in that “a feeble executive may be strengthened and supported by placing in its hands more

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granting appointment authority for those positions to “the President alone,” “the Heads of Departments,” or “the Courts of Law,” or leaving in place the default procedure of presidential nomination with Senate advice and consent.⁷¹ Third, there may be government officials whose responsibilities are sufficiently minor that these officials fail to rise to the level of officers. For example, research on the historical meaning of the word “officer” and early practice suggests that at the Founding, this group would have included government workers like messengers who did not carry out any task that Congress had assigned the government to perform.⁷² Article II appointment requirements would not apply to this third group.⁷³

One of the most pressing questions these provisions raise is who constitutes an officer—that is, where the second category of “inferior Officers” ends and any third nonofficer category begins. When interpreting Article II in previous cases, the Supreme Court has required strict adherence to Appointments Clause procedures.⁷⁴ It is critically important, then, to determine what makes certain government officials “officers” subject to Article II and others mere employees outside the bounds of its requirements. Is there a bright-line definition for the term “officer” in the Constitution? Are there certain factors that make an official more or less likely to be an officer? Does the practice in the early Republic of appointing some officials, but not others, provide insights that are relevant today?

Modern jurisprudence offers few clear answers to these questions. The governing Supreme Court case establishing a dividing line between officers and employees is *Buckley v. Valeo*, which concluded that officers are those government officials who “exercis[e] significant authority pursuant to the laws of the United States.”⁷⁵ To apply this test to the Federal Election Commissioners at issue in the case, the Court resorted to a fact-bound analysis, comparing the Commissioners to postmasters first class and district court clerks, whom

numerous appointments” while “an executive too influential may be reduced within proper bounds, by placing many of the inferior appointments in the courts of law, and heads of departments”).

71. See U.S. CONST. art. II, § 2, cl. 2.

72. See *infra* Part III.A.

73. Cf. U.S. CONST. art. II, § 2, cl. 2 (mandating proper procedures only for the appointment of “Officers of the United States” or “inferior Officers”); *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam) (describing a category of employees who “are lesser functionaries subordinate to officers of the United States”), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

74. See, e.g., *Buckley*, 424 U.S. at 125-26 (per curiam).

75. *Id.* at 126.

the Court had characterized as Article II officers in earlier cases.⁷⁶ The Commissioners engaged in duties like enforcing election law through judicial procedures.⁷⁷ The Court found that these tasks were at least as “significant” as the duties of postmaster and court clerk,⁷⁸ so the Court concluded that the Commissioners likewise were Article II officers.⁷⁹

The Court reexamined the meaning of “officer” in *Freytag v. Commissioner*, which held that special trial judges within the U.S. Tax Court are inferior officers.⁸⁰ But *Freytag* did not definitively provide a comprehensive list of which factors give an official sufficiently significant authority to be an officer. The Court described as relevant several factors: that an official (i) “exercise[s] significant discretion,” (ii) “perform[s] more than ministerial tasks” like ruling on evidence admissibility, and (iii) serves in a position whose duties and salary are “specified by statute.”⁸¹ In the alternative the Court noted that special trial judges issue “final decision[s]” in some cases, so they must be officers even if their other duties were insufficiently significant.⁸²

The Supreme Court’s multifactor analysis of officer status has proved tough to apply.⁸³ Consequently, lower courts often evaluate officer status not by applying a clear standard but by conducting an intricate, fact-bound analysis of whether an official’s duties are more or less significant than those of government personnel previously categorized as officers.⁸⁴ Litigants affected by agency determinations cannot easily predict whether a court will find the official whose actions underlie the case to be an officer subject to Article II requirements.⁸⁵ And Congress lacks clarity about the reach of the Appoint-

76. See *id.* (citing *Myers v. United States*, 272 U.S. 52 (1926); and *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839)).

77. See *id.* at 137-41.

78. See *id.* at 126.

79. See *id.* at 137-41.

80. 501 U.S. 868, 882 (1991).

81. See *id.* at 881-82.

82. See *id.* at 876-77, 882.

83. See Andrew Owen, Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 537 & n.7 (1992) (arguing that the Court has applied a “functional methodology” to Appointments Clause questions that “examines the nature, tenure, and duties of the office in question” and that this methodology “invites an ad hoc and standardless classification . . . of various federal officials”).

84. See, e.g., *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 285-89 (D.C. Cir. 2016), *aff’d mem. by an equally divided court*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc), *cert. granted sub nom. Lucia v. SEC*, No. 17-130, 2018 WL 386565 (U.S. Jan. 12, 2018); *Tucker v. Comm’r*, 676 F.3d 1129, 1133-35 (D.C. Cir. 2012).

85. See, e.g., Carlton M. Smith, Viewpoint, *Does Collection Due Process Violate the Appointments Clause?*, 126 TAX NOTES 777, 777-79 (2010) (identifying nine separate factors that the
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ments Clause when creating new government positions or restructuring preexisting agencies.⁸⁶

Legal scholarship has underexplored the constitutional dividing line between federal officers and employees.⁸⁷ Legal scholarship has also undertheorized the consequences of an improperly constrained definition of “officer” for administrative efficiency and accountability. Much scholarship has instead focused on the related issue of accountability for the job performance of officials already defined as officers under current law.⁸⁸

Reexamination of whether the modern executive branch is properly selecting governmental officials is a timely endeavor. In addition to the current circuit split over the status of ALJs under the Appointments Clause,⁸⁹ more than one Supreme Court Justice has raised questions about the proper scope of Article II.⁹⁰ Moreover, recent studies suggest that efforts to restructure civil service tenure provisions to make it easier to remove poorly performing officials⁹¹ could be less useful than effectively and efficiently hiring the right person in the first place.⁹²

litigant in *Tucker*, 676 F.3d 1129, had to address in his brief regarding the possible officer status of the IRS appeals officers who conduct collection due process hearings).

86. Cf. John F. Duffy, Essay, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 904-06 (2009) (arguing that the previous selection structure for administrative patent judges serving on the Board of Patent Appeals and Interferences was “almost certainly unconstitutional”). Congress has since changed the selection process Duffy discusses. See Act of Aug. 12, 2008, Pub. L. No. 110-313, 122 Stat. 3014 (2008) (codified as amended at 15 U.S.C. § 1067 (2016), 35 U.S.C. § 6 (2016)).

87. See *supra* notes 29-39 and accompanying text.

88. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252-53 (2001) (exploring issues related to how closely the President may supervise and direct actions taken by administrative officials); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1207-08 (2014) (analyzing the role played by the power to remove principal officers in “the exercise of presidential control over administrative agencies”).

89. See *supra* notes 9-13 and accompanying text.

90. See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1238-39 (2015) (Alito, J., concurring); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 540-41 (2010) (Breyer, J., dissenting).

91. See, e.g., Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, sec. 201, § 713, 131 Stat. 862, 868-69 (to be codified at 38 U.S.C. § 713) (enhancing the authority of the Secretary of Veterans Affairs to suspend, demote, or remove senior executives within the Department of Veterans Affairs).

92. See Lisa Rein, *The Top Five Reasons Federal Managers Fail to Fire Their Low Performers*, WASH. POST (Aug. 6, 2015), <https://perma.cc/G729-SEK3> (discussing an August 2015 study by the Merit Systems Protection Board finding that 82% of federal supervisors who were unsure whether they would rehire a subordinate if they could make the choice again nonetheless would not fire that person during the federal probationary period); see also O’Connell, *supra* note 64, at 921-22 (contending that theorists and

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In 2007 the OLC offered guidance to the executive branch, putting more flesh on the bones of *Buckley’s* significant authority standard.⁹³ The OLC concluded that the Appointments Clause applies to anyone holding a position (i) “to which has been delegated by legal authority a portion of the sovereign powers of the federal government” and (ii) “which is ‘continuing.’”⁹⁴ The OLC further suggested that the key indication of “delegated sovereign authority” is when an official exercises “power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit.”⁹⁵

But the eighteenth century evidence suggests that the OLC’s definition is both under- and overinclusive in relation to the original public meaning. The requirement that an officer hold power to bind third parties makes the test underinclusive. For example, the First Congress appointed as officers the clerks who engaged merely in tasks like recording the receipt of registration certificates from merchant ships importing goods.⁹⁶ That task and others like it did not immediately affect a third party’s rights.⁹⁷ At the same time the OLC’s test is overinclusive. The First Congress did not subject deputy marshals and deputy customs collectors to Appointments Clause requirements, perhaps because their primary officers were subject to personal liability—and thus were legally responsible—for the deputies’ misdeeds.⁹⁸ Nonetheless, the OLC standard would seem to classify deputies as officers because their actions bound third parties when they executed writs and collected import duties.

scholars should devote less attention to analyzing removal restrictions and focus more on the expeditious staffing of positions subject to presidential nomination and appointment).

93. See *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 86-87 (2007).

94. *Id.* at 122. This formulation is worded similarly to the definition of “officer” in a leading treatise of the late nineteenth century. See *id.* at 84 (citing FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 1 (Chicago, Callaghan & Co. 1890)). In relying on the treatise definition, the OLC indicated that it “[r]eflect[ed] the understanding from the first hundred years of American law, including pre-Founding English law.” *Id.*

95. See *id.* at 87; see also *id.* at 88-90 (providing examples of “delegated sovereign authority,” including the authority to arrest criminals, enter judgments, seize property, issue regulations, and receive and oversee public funds).

96. See *infra* Part III.A.

97. *But cf. Officers of the U.S.*, 31 Op. O.L.C. at 89-90 (citing favorably a prior OLC opinion that concluded that “[p]urely ministerial and internal functions” that “neither affect the legal rights of third parties . . . nor involve the exercise of significant policymaking authority[] may be performed by” nonofficers (quoting Constitutional Limits on “Contracting Out” Dep’t of Justice Functions Under OMB Circular A-76, 14 Op. O.L.C. 94, 99 (1990))).

98. See *infra* text accompanying notes 189-93; see also *infra* Part III.B.

Even though the duty standard this Article proposes may sound radical in light of current practice, application of that standard is in fact consistent with the outcome of numerous Supreme Court decisions evaluating Article II officer status.⁹⁹ A duty-related standard for measuring “officer” status has even at times been explicitly incorporated into Supreme Court cases interpreting Article II. For example, in 1879, the Court in *United States v. Germaine* relied on the understanding that the term “officer” “embraces the ideas of tenure, duration, emolument, and duties.”¹⁰⁰ The element of duty was significant to the outcome of the case: The official under consideration had only “occasional and intermittent” duties; thus he was not an officer.¹⁰¹ The Court expressed no concern with whether the relevant duties were significant or involved discretion or final decisionmaking power. Rather, the opinion seemed to intimate that if the relevant official had maintained “continuing and permanent” duties, the Court would have considered him an Article II officer.¹⁰²

99. See Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 139-48 (1996) (describing the history of key opinions defining the category of Article II officers). Most of the Appointments Clause cases discussed in the 1996 OLC document’s subsection defining “Officers of the United States” resulted in judgments consistent with the conclusion that the official under consideration was an Article II officer or found that the official was not an officer for reasons consistent with the historical responsible-for-a-continuing-duty standard. See *id.*; see also, e.g., *Auffmordt v. Hedden*, 137 U.S. 310, 326-29 (1890) (analyzing the officer status of individuals hired to perform discrete acts); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 (9th Cir. 1993) (analyzing the distinct issue of the constitutionality of *qui tam* actions); *Techworld Dev. Corp. v. D.C. Pres. League*, 648 F. Supp. 106, 115-17 (D.D.C. 1986) (analyzing, as did several other cases discussed in the OLC opinion, the important but separate question whether certain nonfederal actors exercised sufficient federal power to constitute an Appointments Clause violation), *vacated per curiam as moot*, No. 86-5630, C/A/86-00252, 1987 WL 1367570 (D.C. Cir. June 2, 1987). One notable exception is *Burnap v. United States*, 252 U.S. 512, 519-20 (1920), which held that a “landscape architect in the Office of Public Buildings and Grounds was an employee, not an officer,” see *Constitutional Separation of Powers*, 20 Op. O.L.C. at 143. See also *Steele v. United States No. 2*, 267 U.S. 505, 506-10 (1925) (implying in dicta that prohibition agents were not Article II officers but finding that challenge barred and irrelevant under the meaning of the statute at issue in the case).

100. See 99 U.S. 508, 511 (1879); see also *id.* at 511-12 (attributing this understanding of the term to the Court’s earlier decision in *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1868), and relying on this definition to conclude that the surgeon before the Court in *Germaine* was not an officer). In a recent essay, Garrett West provides an informative discussion of several key cases in the history of Appointments Clause jurisprudence that helps shape this Article’s discussion. See E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J.F. 42, 46-50 (2017) (analyzing *Germaine*, *Hartwell*, and *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747)).

101. See *Germaine*, 99 U.S. at 511-12.

102. See *id.*

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An even earlier circuit court decision, written by Chief Justice Marshall, stated that anyone in “a public charge or employment” who performed a “continuing” duty was an officer.¹⁰³ As the Tenth Circuit recently observed in *Bandimere v. SEC*, the Supreme Court throughout history has concluded that numerous lower-level officials are Article II officers, including an assistant surgeon, thousands of clerks in executive branch departments, and a cadet engineer in the Navy.¹⁰⁴

Thus, it is primarily late twentieth century Supreme Court opinions, and some court of appeals decisions applying and extending those opinions, that seem to diverge from the eighteenth century duty standard.¹⁰⁵ Further, even the “officer” definition set forth in the best-known modern Appointments Clause decision—*Buckley*—is arguably consistent with the historic meaning of the word “officer.” The *Buckley* opinion left “significant authority” sufficiently undefined that one could contend that the standard in the abstract is compatible with a statutory duty standard.¹⁰⁶ The federal government, in exercising authority over private parties, inherently wields so much power that, arguably, anyone carrying out a statutory duty necessarily exercises “significant authority” in some sense.¹⁰⁷ Under such a reading of *Buckley*, it may be just the Court’s subsequent application of the *Buckley* standard in *Freitag*

103. See *Maurice*, 26 F. Cas. at 1214; see also West, *supra* note 100, at 46-47 (discussing *Maurice*).

104. See 844 F.3d 1168, 1173-74 (10th Cir. 2016), *petition for cert. filed*, No. 17-475 (U.S. Sept. 29, 2017).

105. See, e.g., *Tucker v. Comm’r*, 676 F.3d 1129, 1133 (D.C. Cir. 2012) (setting forth three “main criteria” for defining officer status—“(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions”—without clearly indicating each criterion’s level of importance in relation to the others or whether all or just some of the criteria must be met); *Landry v. FDIC*, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000) (concluding that an FDIC ALJ’s ability to issue a final decision is a necessary precondition of Article II officer status).

106. See *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976) (per curiam) (explaining only that officers “exercis[e] significant authority pursuant to the laws of the United States” and that nonofficer employees “are lesser functionaries subordinate to officers of the United States”), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); see also *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 86 (2007) (“The Court’s reference in *Buckley* (and subsequent cases) to the exercise of ‘significant authority’ does vary somewhat from the well-established historical formulation, but nothing in the Court’s opinion suggests any intention to break with the longstanding understanding of a public office or fashion a new term of art. On the contrary, the Court favorably discussed and cited several of the cases from the 1800s reflecting that understanding” (citation omitted)).

107. *Cf. Buckley*, 424 U.S. at 131 (per curiam) (contending that from the time the phrase “Officers of the United States” first appeared in earlier drafts of the Constitution it “had been taken by all concerned to embrace all appointed officials exercising responsibility under the public laws of the Nation”).

that diverges from the historic meaning of “officer” by emphasizing discretion and the importance of an officer’s duties. Or taking the analysis one step further, perhaps even *Freytag* is not irreconcilably inconsistent with the historic officer standard. The Court in *Freytag* did not purport to provide a definitive new list of factors for evaluating officer status.¹⁰⁸ *Freytag* itself (in contrast to its application by the D.C. Circuit¹⁰⁹) could be interpreted as expressing factors that are merely sufficient, but not necessary, for officer status. If so, a return to the eighteenth century statutory duty standard may be consistent with Supreme Court case law, in substance even if not in form.

II. Corpus Linguistics and the Original Public Meaning Analysis

This Article’s original public meaning analysis of the phrase “Officers of the United States”¹¹⁰ suggests that an “Officer[]” is anyone entrusted with ongoing responsibility for a federal statutory duty, regardless of the duty’s significance. In contrast to modern understanding, which classifies federal officials as either officers or employees,¹¹¹ the Founders would not have subdivided governmental positions by such a distinction. According to *The Oxford English Dictionary*, the term “employee” did not come into use until the early nineteenth century.¹¹² Rather than characterizing nonofficers as employees, the Framers most likely would have thought of people below the level of officer more as “servants” or “attendants.”¹¹³

108. See *Freytag v. Comm’r*, 501 U.S. 868, 881-82 (1991) (reiterating the “significant authority” standard and indicating that the special trial judges’ significant functions and discretion satisfy the standard without explicitly requiring these factors for Article II officer status). *But see id.* (noting that special trial judges “perform more than ministerial tasks,” a consideration that would have been irrelevant had the Court understood officer status to exist independent of the level of importance of one’s governmental duties).

109. See *supra* text accompanying notes 9-13.

110. U.S. CONST. art. II, § 2, cl. 2.

111. See, e.g., *Freytag*, 501 U.S. at 880-82 (evaluating whether special trial judges are “inferior Officer[s]” or “lesser functionaries” known as employees (quoting *Buckley*, 424 U.S. at 126 n.162 (per curiam))).

112. *Employee*, OXFORD ENG. DICTIONARY, <https://perma.cc/F9ZK-XUPF> (archived Nov. 13, 2017) (recording the earliest usage of the word “employee” in 1814). The related terms “employment” and “employ” existed in the late eighteenth century but were used in reference to both officers and nonofficers. See, e.g., *Office*, WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (Worcester, Mass., Isaiah Thomas 1st American ed. 1788) (defining an “office” as “a public employment”); *Officer*, PERRY, *supra* (defining a nonmilitary “officer” as “one in office”); see also *Employ*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, Toplis & Bunney 18th ed. 1781) (defining “employ” to mean “to set a person about doing something; also to make use of a thing”).

113. See *infra* notes 334-39 and accompanying text.

To uncover the historical meaning of the Appointments Clause at the time of the Constitution’s ratification, this Article employs techniques generally associated with originalism. Modern theorists who emphasize the meaning of the text as the cornerstone of constitutional interpretation typically prioritize recovery of the text’s original public meaning.¹¹⁴ The Supreme Court has recently used this interpretive approach,¹¹⁵ and both Justice Thomas and Justice Gorsuch have publicly expressed support for an original public meaning approach to interpreting the Constitution.¹¹⁶

Original public meaning analysis requires asking of the Constitution: “How would an ordinary American citizen fluent in English as spoken in the late eighteenth century have understood the words and phrases that make up its clauses?”¹¹⁷ John McGinnis and Michael Rappaport have proposed that this analysis be built upon to explicitly acknowledge that “as a legal document,” the Constitution at times incorporates legal terms of art and employs background legal interpretive principles that must be taken into account.¹¹⁸ They describe the most precise interpretive approach as recognizing that the Constitution uses ordinary English “as a foundation and builds on top of it.”¹¹⁹ McGinnis and Rappaport refer to this interpretive approach as “original methods originalism.”¹²⁰ This Article blends both approaches by first examining the constitutional text for internal clues about the meaning of the Appointments Clause and then conducting research to determine whether the Article II phrase “Officers of the United States” was a newly created legal term of art. After concluding that it was not, this Article proceeds to an analysis of the original meaning of the word “officer.”

More tools than ever before are at the disposal of originalist interpreters with the recent adaptation of corpus linguistics techniques to constitutional

114. See, e.g., Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 1-3 (2011).

115. See *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (explaining the relevance of the meaning “known to ordinary citizens in the founding generation”).

116. See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (suggesting that the Court should “take a fresh look at [its] regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment”); *Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (noting that the Constitution is “a carefully drafted text judges are charged with applying according to its original public meaning”).

117. Solum, *supra* note 114, at 3.

118. See McGinnis & Rappaport, *supra* note 25, at 4-5, 48.

119. See *id.* at 5.

120. See McGinnis & Rappaport, *supra* note 16, at 751-52.

and statutory interpretation.¹²¹ “[C]orpus linguistics is the study of language function and use by means of an electronic collection of naturally occurring language called a corpus.”¹²² The idea is to more empirically examine a corpus of “real-world” texts showing how words were “actually used in written or spoken English” during a particular time period.¹²³ In recent years legal theorists have begun analyzing the best way to incorporate these empirical techniques into statutory and constitutional interpretation.¹²⁴ Courts have also started using these techniques in statutory interpretation. Associate Chief Justice Thomas Lee of the Utah Supreme Court has drafted multiple concurring opinions employing corpus linguistics in statutory interpretation,¹²⁵ and in 2016 the Michigan Supreme Court issued a majority opinion employing this set of techniques.¹²⁶

One corpus linguistics technique particularly relevant to statutory and constitutional interpretation is KWIC analysis—looking at key words in context.¹²⁷ The core idea underlying KWIC analysis is to examine the context surrounding uses of the term or phrase under review as the term was actually employed in spoken or written English during the relevant time period.¹²⁸ As part of his use of corpus linguistics, Associate Chief Justice Lee has used forms of KWIC analysis in statutory interpretation cases to identify which of several alternative plausible meanings of a term was the most likely meaning

121. See, e.g., *State v. Rasabout*, 356 P.3d 1258, 1271, 1278-79 (Utah 2015) (Lee, Assoc. C.J., concurring in part and concurring in the judgment) (using Google News as a corpus to determine whether the context in which the word “discharge” appeared in news articles suggested that the word more likely describes “a single firing of a gun” or “a complete emptying of a gun’s magazine”); Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2059 (2005) (characterizing “Justice Breyer’s use of computerized databases to discover the ordinary meaning of ‘carry’” in *Muscarello v. United States*, 524 U.S. 125, 129 (1998), as a corpus linguistics interpretive technique).

122. See Mouritsen, *supra* note 40, at 190.

123. See *Rasabout*, 356 P.3d at 1275 (Lee, Assoc. C.J., concurring in part and concurring in the judgment).

124. See James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 27-29 (2016) (describing the development of some of these efforts); see also Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. (forthcoming 2018) (manuscript at 5), <https://perma.cc/6RLA-LRV6> (contending that empirical, computer-aided linguistic methods should be imported into legal interpretation).

125. See *Rasabout*, 356 P.3d at 1275-82 (Lee, Assoc. C.J., concurring in part and concurring in the judgment); *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702, 723-31 (Utah 2011) (Lee, J., concurring in part and concurring in the judgment).

126. See *People v. Harris*, 885 N.W.2d 832, 838-42 (Mich. 2016).

127. See Phillips et al., *supra* note 124, at 24-25.

128. See TONY MCENERY & ANDREW HARDIE, *CORPUS LINGUISTICS: METHOD, THEORY AND PRACTICE* 1-3 (2012).

employed by a particular statutory text.¹²⁹ And Randy Barnett engaged in a form of KWIC analysis when he examined the context surrounding more than 1500 uses of the term “commerce” throughout decades of newspaper records, concluding that the eighteenth century term “commerce” had a narrow meaning.¹³⁰

The employment of corpus linguistics-style techniques in constitutional interpretation has particular relevance for unearthing the original public meaning of the Article II term “officer.” The leading Founding-era sources for information about the meaning of constitutional phrases contain little direct discussion defining the precise breadth of governmental positions that fall within the scope of the term “officer.”¹³¹ One possible explanation for this shortage of debate among the Founders over requisite officer characteristics might be that the term had a generally well-accepted meaning at the time.

129. See, e.g., *Rasabout*, 356 P.3d at 1275-82 (Lee, Assoc. C.J., concurring in part and concurring in the judgment).

130. See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856-62 (2003).

131. For example, the Federalist Papers and the Borden collection of eighty-five Anti-Federalist essays together include more than 600 references to the terms “office” and “officer” and their variants. Not one of these references includes a statement directly defining the scope of the category of officer in contradistinction to a lesser category such as servant, attendant, or employee. See generally THE FEDERALIST, *supra* note 56; THE ANTI-FEDERALIST PAPERS, *supra* note 66; *id.* at 2-3 (explaining that the collection is based on Morton Borden’s collection of “85 of the most significant [Anti-Federalist] papers,” replacing Borden’s excerpts with complete essays “when possible”). For further discussion of the uses of the terms “office(s)” and “officer(s)” in the Federalist Papers and the Anti-Federalist essays, see Part IID below. For instructions on accessing the corpus files underlying the analysis in this Article, see Jennifer L. Mascott, Methodological Supplement (2018), <https://perma.cc/W2SR-Q67Z> [hereinafter Methodological Supplement].

Similarly, examining every use of the phrases “officer(s) of the United States” in the two-and-one-half volumes of state ratification debates edited by Jonathan Elliot also yields no discussion of the precise scope of this Appointments Clause phrase. See generally 2-3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., Washington, Jonathan Elliot 2d ed. 1836) [hereinafter ELLIOT’S DEBATES]; 4 *id.* at 1-340. But see *Opinions, Selected from Debates in Congress, from 1789 to 1836, Involving Constitutional Principles* [hereinafter *Debates in Congress*], in 4 ELLIOT’S DEBATES, *supra*, at 343, 454-55 (statement of Rep. Eppes) (discussing, in an early congressional debate, the commonly held understanding of the term “officer” and observing that government contractors fell outside its scope). In addition, the constitutional drafting debates as set forth in *Farrand’s Records* did not include a direct definition of the term “officer” or the phrase “Officers of the United States.” See generally 1-2 FARRAND’S RECORDS, *supra* note 58. Moreover, the specific clause authorizing the President, department heads, and courts of law to appoint “inferior Officers” originated only during the very final stages of the Constitutional Convention, two days before the Framers signed the final draft. See 2 *id.* at 627-28, 648-49. The record of consideration of the “inferior Officers” clause extends for just half a page out of the more than 1200 pages of Farrand’s two volumes of debate records. See *id.* at 627-28.

Early congressional debate statements suggest that the term had a “common and known acceptance” and that “[a]n extensive meaning ha[d] been given to the word.”¹³² Therefore, researching the context of uses of the word “officer” is likely to be more informative than searching for Founding-era statements directly explaining the word’s meaning.

Consequently, this Article engages in, but then extends beyond, the traditional originalist methodology of examining Founding-era sources for relevant statements explaining constitutional terms. This Part begins with the typical originalist interpretive approach of starting with the constitutional text itself, seeking to ascertain whether the document contains internal clues relevant to the meaning of the phrase “Officers of the United States” in the Appointments Clause. This Part then assesses whether the full phrase “Officers of the United States” was a newly created term of art that has relevant constitutional meaning only as a complete phrase. To conduct that assessment, this Part moves beyond the constitutional text to an examination of the drafting history of the Appointments Clause. This Part also employs KWIC-like techniques, (i) contrasting the shortage of uses of the full Article II phrase with the frequent use of the terms “office” and “officer” within Founding-era debate records and (ii) examining the context surrounding every use of the phrase “Officer(s) of the United States” in both the *Journals of the Continental Congress* and an early newspaper database.

After concluding that “Officers of the United States” was not a new phrase specially created to set aside a particularly important group of officers, this Part turns to an examination of the isolated term “officer” to determine which types of government officials would have fallen within the scope of the meaning of the Appointments Clause in the late eighteenth century. To interpret the isolated term “officer,” this Part briefly returns to the traditional interpretive technique of consulting commentaries and ordinary and legal dictionary entries that define the term itself. Next, this Part turns back to a KWIC-style analysis. It first consults a popular eighteenth century dictionary as a specialized mini-corpus, explaining the research results from examining every use of the terms “office” and “officer” in the course of the dictionary’s definition of other terms. This Part then explains the results of examining every use of the word “officer” in the Federalist Papers, the Borden collection of Anti-Federalist essays, and Farrand’s records of the drafting debates, as well as every use of the phrase “Officer(s) of the United States” in the ratification debates. Finally, this Part employs a corpus linguistics analysis of collocation, identifying terms closely associated with the word “officer” in more than

132. *Debates in Congress*, *supra* note 131, at 454-55 (statement of Rep. Eppes); *see also* 8 ANNALS OF CONG. 2294, 2306 (1799) (statement of Rep. Harper) (describing, during the prosecution of the William Blount impeachment, the “universally received signification of the term ‘office’”).

16,000 eighteenth century files provided by scholars associated with the Corpus of Founding-Era American English (COFEA).¹³³

A. Orienting the Appointments Clause Within the Constitutional Text

The relevant portion of Article II, Section 2 states:

*[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*¹³⁴

1. Evidence of meaning within the Constitution

The Constitution does not define the phrase “Officers of the United States.” But the use of the qualifier “all other” indicates that the phrase encompasses a broader group than the immediately preceding reference to “Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court.”¹³⁵ The Constitution permits Congress to “establish[] by Law” other officers—including “inferior Officers” whom Congress may subject to a more streamlined appointment process.¹³⁶ The Constitution does not by its terms specify what these lesser positions are.

The Constitution includes three references to the precise phrase “Officers of the United States.”¹³⁷ The two uses of the full phrase outside of the Appointments Clause do not further define the phrase but just establish certain consequences following from one’s status as an “Officer[] of the United States”: “Officers of the United States” must receive commissions from the President.¹³⁸ And “civil Officers of the United States” may be subject to impeachment.¹³⁹

133. See Phillips et al., *supra* note 124, at 31 (describing plans for COFEA); see also *infra* notes 345-46 and accompanying text.

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

135. See *id.*

136. See *id.*

137. *Id.*; *id.* art. II, § 3; *id.* art. II, § 4.

138. *Id.* art. II, § 3.

139. *Id.* art. II, § 4. In addition to the three instances of the phrase “Officers of the United States,” the Constitution uses the terms “officer(s)” and “office(s)” thirty additional times (excluding the reference to “Post Offices,” see *id.* art. I, § 8, cl. 7). Most of those references give no indication whether there is a minimal level of authority qualifying one as an officer. But the Necessary and Proper Clause empowers Congress to “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 States, or in

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2. Is “Officer[] of the United States” an indivisible term of art?

Evidence suggests that the phrase “Officers of the United States” is not a term of art creating a new, especially significant class of government officers.¹⁴⁰ Rather, evidence suggests that “of the United States” in the Appointments Clause, as in several other constitutional provisions,¹⁴¹ is a descriptive phrase indicating that the officers are federal, and not state or private, actors. Therefore, one can evaluate the scope of the phrase “Officers of the United States” by studying the original public meaning of the isolated term “officer.”

a. Clues within the constitutional text

Looking first at clues within the constitutional text, the wording of Article II itself suggests that the term “Officer[]” is severable from the larger phrase. First, to designate a subset of the group described by the phrase “Officers of the United States,” Article II identifies the relevant officials simply as “inferior Officers,” suggesting that “Officers” is shorthand for the longer phrase.¹⁴² Moreover, even before Article II, Section II, Clause 2 makes the first constitutional reference to “Officers of the United States,” the immediately preceding clause provides that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments.”¹⁴³ If “Officers of the United States” identified some special type of significant officer, surely the Constitution’s first reference to the “principal” officers of that kind would include the full term of art.

any Department or Officer thereof.” *Id.* art. I, § 8, cl. 18 (emphasis added); *cf.* Tillman & Calabresi, *supra* note 24, at 156 (closing statement of Steven G. Calabresi) (suggesting that the “Officer” formulation in the Necessary and Proper Clause has the same meaning as “Officers of the United States”). This provision suggests that federal officers are those in whom at least some type of federal power is vested.

140. *But cf. supra* note 26 (citing sources contending that the phrase is a term of art in a lateral rather than vertical sense and interpreting the phrase to exclude elected officials like legislators and the President).

141. *See, e.g.,* U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy *of the United States*, and of the Militia *of the several States*, when called into the actual Service *of the United States . . .*” (emphasis added)); *id.* art. VI, cl. 3 (“[A]ll executive and judicial Officers, both *of the United States* and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .” (emphasis added)).

142. *See id.* art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . but the Congress may by Law vest the Appointment of *such inferior Officers*, as they think proper . . .” (emphasis added)).

143. *Id.* art. II, § 2, cl. 1.

b. Drafting history

The drafting history of the Appointments Clause confirms this analysis. At the start of the Constitutional Convention the drafters began working on one of the original constitutional proposals submitted to the Convention, known as the Virginia Plan.¹⁴⁴ Resolution Seven of the Virginia Plan had given “a National Executive” the “general authority to execute the National laws” without explicitly authorizing the Executive to appoint executive branch officers.¹⁴⁵ Presumably Resolution Seven implicitly authorized appointment of executive officers when it empowered the executive magistrate to “enjoy the Executive rights vested in Congress by the Confederation,”¹⁴⁶ which had included appointment authority.¹⁴⁷ In contrast, the power to select judges—today embodied in the Appointments Clause—at the time had been explicitly allocated to the proposed “National Legislature.”¹⁴⁸ This explicit allocation of judicial appointment power suggests that the drafters at the time had thought about who should appoint which officials. Also, they knew how to specifically provide for such appointments—indicating that the absence of any explicit reference to appointment of executive branch officers was indeed due to the understanding that such appointments inhered in the “Executive rights” mentioned by the early Virginia Plan.

Nonetheless, soon after the Convention began, in June 1787 the Committee of the Whole amended the Virginia Plan to clarify that the national executive should “be instituted with power . . . to appoint to offices in cases not otherwise provided for.”¹⁴⁹ The legislature at the time retained the authority to appoint judges.¹⁵⁰

Drafts of the Appointments Clause did not include the expanded phrase “officers of the U.S.” until September 4, 1787—during the late stages of the Convention.¹⁵¹ By that time, the original Virginia Plan had been extensively

144. See generally 1 FARRAND’S RECORDS, *supra* note 58, at 20-22, 20 n.10.

145. *Id.* at 21.

146. See *id.*; *cf. id.* at 65-66 (“The only powers [Mr. Wilson] conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.”).

147. See ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 4-5.

148. See 1 FARRAND’S RECORDS, *supra* note 58, at 21-22.

149. See *id.* at 62-63, 66-67 (approving in the Committee of the Whole Madison’s proposed amendment to the Virginia Plan).

150. See *infra* notes 154-55 and accompanying text.

151. See 2 FARRAND’S RECORDS, *supra* note 58, at 493, 495; *id.* at 539-40 (voting to agree to this language); see also *id.* at 23 (approving the Committee of the Whole’s earlier draft language, that is, “appoint to offices in cases not otherwise provided for”); *id.* at 405 (debating a draft of the Appointments Clause that referred just to “officers” rather than “Officers of the United States”). That said, earlier constitutional drafts had used the full
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amended by the Committee of Detail, and then Committee of Eleven had recommended further changes—which included the new phrasing of the Appointments Clause.¹⁵² The Committee of Eleven’s draft included an appointments provision fairly similar to the Clause as it stands in the Constitution today. The September 1787 draft provided: “The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U.S. whose appointments are not otherwise herein provided for.”¹⁵³

In addition to this draft’s statement that the President would nominate “Officers of the United States” rather than nominating people “to offices,” this draft for the first time explicitly authorized the President to nominate judges and ambassadors.¹⁵⁴ Intermediate drafts of the Constitution had empowered the Senate alone to appoint Supreme Court judges and ambassadors.¹⁵⁵ Therefore, the change in terminology from “offices” to “Officers of the United States” likely denoted just that the President now had the added power to nominate certain nonexecutive officers, in addition to the executive officers that previous drafts had already authorized the President to appoint. As such, the Appointments Clause’s reference to officers “*of the United States*” is a reference to the general category of federal officers, as opposed to state officers—similar to the Article VI Oath or Affirmation Clause’s reference to federal officers (“all executive and judicial Officers, both *of the United States*”) in

phrase “Officers of the United States” when granting the President commissioning power. For example, the draft referred by the Committee of Detail to the Convention, *see id.* at 171, 176, provided that the President “shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution,” *id.* at 185. *See also id.* at 420 (summarizing McHenry’s August 25th report of this early Appointments Clause). This draft, like the ones before it, authorized the Senate to appoint ambassadors and judges. *See id.* at 169, 183.

152. *See id.* at 493-95.

153. *Id.* at 495, 539-40.

154. *Compare id.* at 495 (Committee of Eleven’s draft), *with, e.g., id.* at 389 n.8 (“The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court.”). For additional background on the Committee of Eleven’s decision to shift the power to appoint judges and ambassadors from the Senate to the President, see Michael W. McConnell, The Logical Structure of Article Two 34-35 (unpublished manuscript), <https://perma.cc/8FU5-UNW3>. *But see id.* at 22, 26-27 (noting that the Committee of Detail previously had apparently indirectly given the President the power to appoint lower court judges by reducing the Senate’s power to appoint judges from all judges to just Supreme Court judges while retaining the President’s power “to appoint all other officers”).

155. *See* 2 FARRAND’S RECORDS, *supra* note 58, at 493-95 (indicating that the Committee of Eleven’s draft would replace the earlier Article IX, Section 1, which had authorized the Senate to appoint Supreme Court judges and ambassadors); *supra* note 154.

contradistinction to the separate category of state officers (“and of the several States”).¹⁵⁶

c. Founding-era debates

Further, when referring to the officers described by Article II, several of the Framers on multiple occasions used their own distinct phrasing—rather than the phrase “Officers of the United States.” This could suggest that the precise phrase “Officers of the United States” did not create a specialized, new legal category of officer. For example, in the Federalist Papers, Alexander Hamilton discussed removal of the “officers of the government” rather than “Officers of the United States.”¹⁵⁷ The Anti-Federalist writer known as the Federal Farmer used the phrase “officers of the union” to describe Article II officers.¹⁵⁸ And during the First Congress, Representative Roger Sherman used interchangeably the phrases “officers of the Federal Government” and “officers of the United States”—apparently equating the phrase “officers of the United States” with the category of federal officer.¹⁵⁹

Moreover, if “Officers of the United States” were a special term of art, one might expect to see that precise phrase used more frequently in key Founding-era documents. For example, in the Federalist Papers and the Borden collection of Anti-Federalist essays debating the merits of the Constitution, there were more than 600 uses of the terms “office(s)” and “officer(s).”¹⁶⁰ Only thirteen of

156. U.S. CONST. art. VI, cl. 3 (emphasis added) (“[A]nd all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation”); see also *id.* art. IV, § 3, cl. 2 (providing that “nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State”—that is, federal claims or state claims (emphasis added)); *infra* notes 169-70 and accompanying text (explaining how similar wording in a recommended amendment to the Articles of Confederation indicated that the phrase “of the United States” was referring to the group of national- as opposed to state-level officers).

157. See THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 56, at 396.

158. See The Federal Farmer, Anti-Federalist No. 76-77: An Anti-Federalist View of the Appointing Power Under the Constitution (Federal Farmer XIII) (1788) [hereinafter Federal Farmer XIII], in THE ANTI-FEDERALIST PAPERS, *supra* note 66, at 293, 294.

159. See 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 120-21 (William Charles diGiacomantonio et al. eds., 1995) [hereinafter DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS]; see also BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 45 (2005) (listing Representative Roger Sherman of Connecticut as a member of the First Congress).

160. See Methodological Supplement, *supra* note 131, at 4 (including screenshots of a search using the AntConc corpus linguistics research platform that found 608 “concordance hits” from a search of the terms “office(s)” and “officer(s)” in the Federalist Papers and the Borden collection of Anti-Federalist essays (capitalization altered)); see also *id.* at 1-2 (providing instructions on how to recreate the analysis using publicly available data and software).

these references included the full phrase “Officer(s) of the United States,” none of which was accompanied by any definition of the phrase.¹⁶¹

The members of the First Congress similarly engaged in little discussion over the meaning of the full phrase “Officer(s) of the United States.” The *Documentary History of the First Federal Congress*, which provides the most comprehensive coverage available of the first congressional debates in the U.S. House of Representatives,¹⁶² includes only twenty-four references to the phrase “Officer(s) of the United States”¹⁶³ in the more than 3700 pages it devotes to those debates.¹⁶⁴

d. Continental Congress-era uses of “Officers of the United States”

Finally, evidence from the decade prior to the Constitution’s ratification demonstrates that the phrase “Officers of the United States” did not originate

161. See *id.* at 5 (including a screenshot of the search results for the phrase “Officer(s) of the United States” in the Federalist Papers and the Borden collection of Anti-Federalist essays).

162. The Senate debates were not systematically recorded because “the Legislative as well as Executive sittings of the Senate were held with *closed doors* until the second session of the third Congress, with the single exception of the discussion of [a] contested election.” See 1 ANNALS OF CONG. 16 (Joseph Gales, Sr. ed., 1834).

163. These search results were compiled by using the limited search function on HathiTrust for the *Documentary History of the First Federal Congress*, which shows only the number of uses of the phrase “officer(s) of the United States” and the numbers of the pages on which the phrase appears. See *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791*, HATHI TRUST DIGITAL LIBR., <https://perma.cc/3NJ7-V3LR> (archived Nov. 13, 2017) (to locate, select “View the live page,” and then click “Limited (search only)” for the volume you wish to search). For screenshots depicting these search results, see Methodological Supplement, *supra* note 131, at 12-21.

164. See generally 10-11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS (Charlene Bangs Bickford et al. eds., 1992), *supra* note 159; 12-13 *id.* (Helen E. Veit et al. eds., 1994); 14 *id.* (William Charles diGiacomantonio et al. eds., 1995). The one occasion on which the First Congress discussed the scope of the phrase “Officer(s) of the United States” was during debate over which officers may be in the presidential line of succession. For example, Representative Smith of South Carolina said that succession alternatives were very limited because in his view the Succession Clause permitted only “an officer of the United States” to act as President if both the presidency and vice presidency were vacant, which “narrow[ed] the discussion . . . very much.” See GAZETTE OF THE UNITED STATES, Jan. 15, 1791, in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 271, 271; see also U.S. CONST. art. II, § 1, cl. 6 (“[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President . . .”). But this view is contradicted by numerous other eighteenth century statements suggesting that the Founding generation believed there would be many federal officers. See *infra* Parts II.C.-D.

with the Constitution, suggesting that the phrase was not a term of art crafted in Article II.

For example, several months after the States ratified the Articles of Confederation in March 1781,¹⁶⁵ the Continental Congress tasked a committee to prepare a plan that would carry the Confederation into effect.¹⁶⁶ One of the committee’s recommendations was “instituting an Oath to be taken by the *Officers of the U S.* or any of [them] against presents, Emoluments Office or title of any kind from a [King?] Prince or foreign State.”¹⁶⁷ This oath requirement would have built upon the Articles’ original prohibition: “[N]or shall any person holding any *office of profit or trust under the united states*, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign State.”¹⁶⁸

The committee’s proposed implementation of the Articles is informative for two reasons. First, the quoted provisions within the committee’s proposal and within the original Articles have striking similarities; both attempt to preclude officers from accepting foreign titles and emoluments. But to accomplish this policy the phrases used two distinct wordings to identify the relevant class of officers—(i) “officers of the U S.” in the committee recommendation versus (ii) “any person holding any office of profit or trust under the United States” in the Articles. The fact that the committee recommendation attempted to bring into effect the earlier Articles of Confederation provision suggests that these two distinct phrases referred to the same group—again indicating that the constitutional phrase “Officers of the United States” did not create a new, distinct legal category. Second, the immediate context of the committee recommendation’s phrase suggests that the qualifier “of the U S.” merely denotes that the officers are federal- and not state-level officers: The congressional committee suggested an oath requirement for “all Officers of the U S. or any of [them].”¹⁶⁹ In other words, the proposal would have imposed an oath requirement on federal officers and on the officers of any state.¹⁷⁰

165. See Minutes of Mar. 2, 1781, in 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 223 (Gaillard Hunt ed., 1912) (referring to the ratification of the Articles of Confederation on March 1, 1781).

166. See Committee Report on Carrying the Confederation into Effect and on Additional Powers Needed by Congress (1781), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 143, 143 (Merrill Jensen ed., 1976) [hereinafter 1781 Committee Report].

167. *Id.* at 144 (brackets in original) (emphasis added). “There is no evidence that Congress ever considered the report” containing this recommendation. See *id.* at 143.

168. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1 (emphasis added).

169. See 1781 Committee Report, *supra* note 166, at 144 (brackets in original) (emphasis added).

170. The draft provision’s intent to describe both federal- and state-level officers is even clearer when one compares this draft Articles of Confederation amendment with the
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Another helpful Continental Congress-era source is the *Journals of the Continental Congress*, which recorded the business undertaken by the Continental Congress from 1774 to 1789, during the Revolutionary War and the subsequent years when the Articles of Confederation governed the country.¹⁷¹ The *Journals* represent a highly relevant source for identifying the well-understood meaning of legally relevant terms and phrases in the time period just prior to the drafting and ratification of the Constitution.¹⁷² Relevant to this Article’s analysis, the thirty-four-volume *Journals* included scores of references to the phrase “officer(s) of the United States.”¹⁷³ In the main, these references support the conclusion that the phrase was not a term of art for “significant” officials. To be sure, the phrase sometimes described a group of officials executing specific types of governmental duties, which could indicate that the phrase was identifying a special class of government official. For example, a Board of Treasury report recommended that “a proper Officer of the United States” handle inspection of the coining of copper.¹⁷⁴ But on multiple other occasions, the context surrounding the phrase indicated that it was just another way to describe continental military officers or identify

Oath or Affirmation Clause in the Constitution. Very similar to the phrasing of the drafted, but never approved, Articles amendment, the Oath or Affirmation Clause requires officers “both of the United States and of the several States” to be bound by oath or affirmation to support the Constitution. See U.S. CONST. art. VI, cl. 3. In both provisions, the phrase “of the United States” is used to denote the category of federal, as opposed to state, officer. See also *supra* note 156 (discussing similar language in Article IV).

171. See JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21; see also Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 404 (2017) (describing the information available in the *Journals* regarding the formation of the Articles of Confederation and the governance of the country during the Revolutionary War and the few years thereafter).
172. See Maggs, *supra* note 171, at 404 (noting that the *Journals* also “reveal important details about . . . the call for the Constitutional Convention and the replacement of the Articles of Confederation with the new Constitution”).
173. See generally JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21 (containing forty-one references to either “officer(s) of the United States” or “officer(s) of the U.S.,” excluding instances where the phrase is part of a title, such as “Commanding Officer of the United States,” or where the *Journals* reprinted the text of the Constitution). For details on how to replicate this research, see Methodological Supplement, *supra* note 131, at 2.
174. See Samuel Osgood & Walter Livingston, Report of Board of Treasury on Proposals for Coining Copper (1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 160, 164 (Roscoe R. Hill ed., 1936); see also, e.g., Report Amended of Committee on Memorial of S.H. Parsons (1787), in 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 399, 400 (Roscoe R. Hill ed., 1936) (reprinting a committee report on territorial tracts of land being surveyed “by the geographer or some other officer of the United States”).

national- as opposed to state-level officers.¹⁷⁵ For example, a congressional resolution authorizing state executives to oversee the conduct of “all continental officers, civil or military” within their borders subsequently used the phrase “officer of the United States” to describe the officers subject to oversight.¹⁷⁶ The *Journals* also included three uses of the very similar phrase “officer(s) of these United States” to describe government officials,¹⁷⁷ suggesting that there was no precise legal significance to the exact phrase “Officers of the United States.”

e. Early American newspapers

Review of early American newspapers confirms this analysis. Series I of the Early American Newspapers database maintained by Readex includes 340,000 newspaper issues from 1690 to 1876.¹⁷⁸ Within that series there were twenty uses of the phrase “officer(s) of the United States” prior to the signing of the Constitution on September 17, 1787.¹⁷⁹ The first use of the phrase in this newspaper series occurred in 1780 in a description of traitor Benedict Arnold as a “general officer of the United States”;¹⁸⁰ the phrase again referred to continental officers in 1783, the next time it appeared in the database.¹⁸¹ This is

175. See, e.g., War Office, Report (1782), in 23 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 626, 626 (Gaillard Hunt ed., 1914) (reprinting a report suggesting that a military officer should not receive pay “as an officer of the United States” during the time he served as a captain for his state).

176. See Minutes of Feb. 9, 1778, in 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 138, 139-40 (Worthington Chauncey Ford ed., 1908).

177. Minutes of Nov. 5, 1779, in 15 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 1240, 1242 (Worthington Chauncey Ford ed., 1909) (noting a resolution regarding plans for a board to investigate possible delinquency by “officers of these United States”); Minutes of June 11, 1781, in 20 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 620, 621 (Gaillard Hunt ed., 1912) (emphasis added) (discussing “the Officers of these United States in Captivity”); An Ordinance for Regulating the Post Office of the United States of America (1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 46, 50 (Roscoe R. Hill ed., 1936) (reprinting an ordinance permitting “any officer of these United States” to authorize mail delivery involving official business).

178. See *Early American Newspapers: By Series*, READEX, <https://perma.cc/R2B9-3NY2> (archived Nov. 13, 2017). For instructions about how to duplicate my research in the relevant Readex database, see Methodological Supplement, *supra* note 131, at 2.

179. As of February 2017, this Readex series contained twenty uses of the phrase distributed throughout seventeen newspaper records prior to September 17, 1787. See also 2 FARRAND’S RECORDS, *supra* note 58, at 648-49 (recording the signing of the Constitution).

180. See CONN. GAZETTE & UNIVERSAL INTELLIGENCER, Oct. 17, 1780, at 2.

181. See Elias Boudinot, *A Proclamation*, CONN. J., July 9, 1783, at 1, 1 (reprinting a proclamation by the President of Congress that all “officers of the United States, civil
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consistent with use of the phrase by the *Journals of the Continental Congress*, in which it first appears in 1778 as a description of military officers in the continental army.¹⁸² Newspaper references to “officers of the United States” increased dramatically after publication of the draft Constitution, although many of these uses arose in newspaper reprints of otherwise publicly available documents like statutes or the text of the Constitution.¹⁸³ Those references consequently do not provide evidence of additional distinct uses of the relevant phrase.

As in the *Journals of the Continental Congress*, several times the phrase was used with slight variations, suggesting that “Officers of the United States” may not have been a precise term of art.¹⁸⁴ But on other occasions the newspapers’ use of the phrase merely provided insight about the role of officers in society or described specific governmental responsibilities handled by officers. Such references included a funeral announcement listing “Military Officers of the United States”¹⁸⁵ and a ratification celebration toasting “Judicial Officers of the United States.”¹⁸⁶ One paper reprinted a House of Representatives floor speech about certificates of debt given out by “commissaries and other officers of the United States” under the Articles of Confederation.¹⁸⁷

and military,” must assist in preserving the dignity of the United States against mutinous armed military officers).

182. See Minutes of Jan. 19, 1778, in 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 60, 61 (Worthington Chauncey Ford ed., 1908) (describing captured continental officers); see also Minutes of Feb. 6, 1778, in 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 127, 136-37 (Worthington Chauncey Ford ed., 1908) (discussing the quartermaster general and other “officers of the United States” in the army).
183. From September 19, 1787, through the end of the First Congress on March 3, 1791, 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1 (Linda Grant De Pauw ed., 1972), the newspaper database includes well over 100 uses of the relevant phrase spread throughout 79 newspaper records. At least 15 of these newspaper records were reprintings of the Constitution.
184. See, e.g., MASS. SPY, Aug. 5, 1790, at 2 (reporting a gathering of Native American chiefs with General Knox and “officers of the United States government”); PA. PACKET & DAILY ADVERTISER, Oct. 21, 1785, at 2 (announcing a prominent funeral procession that would include the “Clerks of the Public Offices of the United States”).
185. PA. PACKET & DAILY ADVERTISER, *supra* note 184, at 2.
186. PA. MERCURY & UNIVERSAL ADVERTISER, Dec. 31, 1789, at 3.
187. Representative Fisher Ames, Speech Before the House of Representatives (May 25, 1790), in FED. GAZETTE & PHILA. DAILY ADVERTISER, June 16, 1790, at 2, 2; see also BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 45 (2005).

f. Evidence to the contrary?

The extensive evidence that the phrase “Officers of the United States” did not create a new subcategory of important officers suggests that analysis of the isolated term “officer” generally is relevant to interpreting Article II. But there are at least two categories of officials historically described as “officers” who were not treated as Article II “Officers of the United States.” This apparent contradiction might at first seem to suggest that “Officers of the United States” must be a term of art not encompassing all executive officers after all. But as constitutional theorists John McGinnis and Michael Rappaport have pointed out, even constitutional phrases that are not precise legal terms of art are subject to commonly accepted background understandings and interpretive principles in place when the Constitution was written.¹⁸⁸ Background understandings related to both military structure and a special eighteenth century legal relationship between certain principals and their deputies help to explain the non-Article II treatment of two late eighteenth century categories of officials.

The first relevant category is that of deputy officials. Statutes enacted by the First Congress sometimes referred to deputy officials as officers¹⁸⁹ even though the First Congress did not subject several types of deputies to Article II appointment requirements.¹⁹⁰ But this likely is because the deputies were viewed as agents carrying out the responsibilities and duties of their primary officers.¹⁹¹ Not only does the late eighteenth century evidence suggest such an understanding, but a nineteenth century executive branch opinion also proffers the same analysis. An 1871 opinion by Attorney General Amos Akerman posited that Congress may have provided non-Article II selection methods for positions like deputy marshal and deputy clerk based on the understanding “that the office was substantially in the principal.”¹⁹² The deputies were the “representatives” of the principal, and the principal was, “in some particulars, . . . responsible for [the deputies’] conduct.”¹⁹³

The second example is the category of military officers. There have been noncommissioned military officers under both the Continental Congress and

188. See McGinnis & Rappaport, *supra* note 25, at 5, 27-28 (noting that in addition to using distinctive legal terms the Constitution also embraced “legal interpretive rules”; “[l]ike any technical language,” this “language of the law” used eighteenth century English language “as a foundation and buil[t] on top of it rather than creating a wholly new language”).

189. See, e.g., *infra* note 434 and accompanying text.

190. See *infra* Part III.B.

191. See *infra* Part III.B.

192. See Civil-Serv. Comm’n, 13 Op. Att’y Gen. 516, 521 (1871).

193. See *id.*

the U.S. Congress. But the U.S. Constitution requires the President to “Commission all the Officers of the United States,”¹⁹⁴ suggesting that by definition, noncommissioned officers are not part of this Article II group. At the Founding this category of noncommissioned military officers was relatively small, consisting only of officers low in the ranks, such as sergeants and corporals.¹⁹⁵ Nonetheless it would seem that even these lower-level officers should come within the scope of Article II.

The 1871 Attorney General opinion offered a possible theory for why in early practice the category of commissioned military personnel excluded sergeants, corporals, and privates—even though the individuals serving in these positions engaged in statutory tasks and thus seemed to meet the threshold requirement for Article II officer status.¹⁹⁶ The opinion reports that congressional authority for structuring military appointments had been justified, at least on occasion, as arising under Congress’s Article I, Section 8 power to regulate the land and naval forces,¹⁹⁷ rather than falling within the scope of Appointments Clause requirements.¹⁹⁸ The idea under such a theory would be that Congress acquired authority to regulate “military and naval appointments” under Article I¹⁹⁹—a source of authority wholly separate and distinct from the Article II strictures limiting nonmilitary appointments. In other words, nineteenth century proponents of that view were resting military appointment authority on “grounds not applicable to civil appointments.”²⁰⁰

Caleb Nelson has written about the analogous question whether Article III strictures apply to the establishment of military tribunals and observed that

194. U.S. CONST. art. II, § 3.

195. See *infra* Part III.D.1 (describing, among other things, the 1790 statute indicating which officials were commissioned as opposed to noncommissioned officers, Act of Apr. 30, 1790, ch. 10, 1 Stat. 119 (repealed 1795)); see also *Corporal*, N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, J. Murray 25th ed. 1783) (defining “corporal” as “an inferior officer in a company of foot-soldiers”).

196. See, e.g., Act of Apr. 30, 1790, § 1, 1 Stat. at 119 (providing that commissioned officers, noncommissioned officers, musicians, and privates “shall be raised for the service of the United States”).

197. U.S. CONST. art. I, § 8, cl. 14 (granting Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces”).

198. See *Civil-Serv. Comm’n*, 13 Op. Att’y Gen. at 522. In the opinion, the Attorney General nonetheless declined to take a position on the constitutionality of this interpretation. See *id.* (“Unless controlled by authority, I should not take this power to embrace the subject of appointments, and I only refer to it for the purpose of showing that the claim made for Congress in relation to military and naval appointments has been put on grounds not applicable to civil appointments.”).

199. See *id.*

200. See *id.*

early jurists believed that they did not.²⁰¹ He reports in particular that Article III was “deemed inapplicable to military tribunals, such as courts-martial . . . and military commissions.”²⁰² By the time of the Framing, “it was already common for nations to organize military tribunals that stood apart from the ordinary civilian courts, and the United States itself had done so.”²⁰³

Neither Article III nor the Article II Appointments Clause expressly delineates that it is to be applied any differently to civil than to military entities. But just as Article III strictures were seen to limit “only the civilian judicial power” and not military tribunals,²⁰⁴ perhaps Appointments Clause limitations similarly were understood not to restrain Congress’s Article I power to structure the “land and naval Forces.”²⁰⁵ For example, an 1822 statement discussing the constitutionality of an 1821 statute regulating military discharges contended that this statute, along with congressional regulation of military promotions and appointments, was authorized pursuant to Congress’s Article I power “to make rules for the government and regulation of the land and naval forces.”²⁰⁶ Moreover, a 1790 statute authorizing the commissioned and noncommissioned officer categories under the new Constitution²⁰⁷ also provides at least some indication that Congress may have believed that it was acting in light of its Article I, Section 8 authority to regulate the “land and naval Forces.” The 1790 law was titled “An Act for regulating the Military Establishment of the United States”—phrasing that calls to mind the pertinent Article I, Section 8 clause.²⁰⁸

The First Congress also may have been operating in light of a background understanding that military structure would continue as it had under the

201. See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 576 (2007).

202. *Id.*

203. *Id.*

204. See *id.* (emphasis omitted).

205. U.S. CONST. art. I, § 8, cl. 14.

206. See *Executive Proceedings*, 22 NILES’ WKLY. REG. 417, 418 (1822) (quoting U.S. CONST. art. I, § 8, cl. 14) (discussing a statute that declined to provide “three months’ additional pay” to discharged officers). The 1871 Attorney General opinion cites this statement, labeling it as a report of the Senate Committee on Military Affairs dated April 25, 1822. See Civil-Serv. Comm’n, 13 Op. Att’y Gen. 516, 522 (1871).

207. Act of Apr. 30, 1790, ch. 10, § 1, 1 Stat. 119, 119 (repealed 1795); see also *supra* notes 195-96.

208. Compare Act of Apr. 30, 1790, 1 Stat. at 119 (titling the statute “An Act for regulating the Military Establishment of the United States”), with U.S. CONST. art. I, § 8, cl. 14 (giving Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces”).

Continental Congress.²⁰⁹ Under the Continental Congress there had existed a grouping of commissioned officers, noncommissioned officers, and privates similar to the subdivision of military rankings under the new government.²¹⁰ In 1789, the First Congress enacted a statute expressly continuing the establishment of the military authorized two years earlier by the Continental Congress.²¹¹ Evidence suggests that the Founding generation viewed military and civil officers as distinct classifications²¹² as well as that the constitutional system imported a preexisting understanding of military structure divided into categories of commissioned officer, noncommissioned officer, and enlisted men. This preconstitutional understanding and practice may provide insight into why the Founding generation may have imposed a distinct dividing line between civil and military officers and nonofficers.

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209. Cf. McGinnis & Rappaport, *supra* note 25, at 39, 43 (contending that the Constitution should be interpreted in light of “the background of preexisting legal rules” and citing as one supportive example the interpretive practices of early judges who “used the legal background of a provision to disambiguate it” by, for example, looking to history relevant to the development of the provision).
210. See, e.g., Minutes of June 25, 1778, in 11 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 642, 643 (Worthington Chauncey Ford ed., 1908) (reprinting a report that categorized sergeants, corporals, and drummers as noncommissioned officers and the remainder of listed military officials, other than privates, as commissioned officers).
211. See Act of Sept. 29, 1789, ch. 25, §§ 1-2, 1 Stat. 95, 95-96 (continuing under the new government the military establishment authorized by the Continental Congress in 1787 and continuing the troop pay approved in 1785); see also Act of Apr. 30, 1790, §§ 13-14, 1 Stat. at 121 (repealing the 1789 statute but including a new provision specifying that the commissioned officers, noncommissioned officers, and privates should continue to “be governed by the rules and articles of war” established under the Articles of Confederation).
212. See, e.g., ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 4-5 (addressing in two separate paragraphs the appointments of military and civil officers); *id.* art. IX, para. 4 (“The united states, in congress assembled, shall also have the sole and exclusive right and power of . . . appointing all officers of the land forces in service of the united States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states—making rules for the government and regulation of the said land and naval forces, and directing their operations”); *id.* para. 5 (“The united States, in congress assembled, shall have authority . . . to appoint such . . . civil officers as may be necessary for managing the general affairs of the united states under their direction . . .”); see also, e.g., *The King v. Burnell* (1741) 90 Eng. Rep. 875, 875-76; Carthew 478, 478-79 (clarifying in a case involving a civil officer that “Officers are distinguished into civil and military, according to the nature of their several trusts; and every man is a publick officer who hath any duty concerning the publick; and he is not the less a public officer where his authority is confined to narrow limits because ’tis the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority”); *Officer*, FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London, J. Wilson & J. Fell 1765) (providing three distinct definitions for the term “officer”: “a man employed by the publick,” “a commander in an army,” and “one that has the power of apprehending criminals, and arresting debtors”).

B. Dictionaries and Commentaries as Both a Standard Interpretive Tool
and a Corpus

During the Founding era, dictionaries were “intended for a wide current readership.”²¹³ Scholars have questioned overreliance on Founding-era dictionaries in part due to the possibility that the dictionaries’ information may be incomplete²¹⁴ or incorrect.²¹⁵ Nonetheless, dictionaries would likely have influenced the understanding of terms used by the general public and constitutional drafters and ratifiers in a profound way. They are a relevant starting data point for assessing the original public meaning of a constitutional term even if their definitions were somehow imperfect.²¹⁶

To help account for each dictionary’s potential idiosyncrasies, I surveyed the definition of “officer” in ten well-known Founding-era dictionaries²¹⁷ and consulted several commentaries and Founding-era legal dictionaries²¹⁸

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213. See Carey McIntosh, *Eighteenth-Century English Dictionaries and the Enlightenment*, in 28 THE YEARBOOK OF ENGLISH STUDIES: EIGHTEENTH-CENTURY LEXIS AND LEXICOGRAPHY 3, 4 (Andrew Gurr ed., 1998) (“[B]ooksellers who offered dictionaries to the public would not have printed one that seemed completely out of touch with current usage.”).
214. See Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 361, 367-81 (2014). *But see id.* at 365-66 (arguing that Founding-era dictionaries can be a particularly helpful resource when used in conjunction with other Founding-era sources).
215. See Robert G. Natelson, *The Origins and Meaning of “Vacancies That May Happen During the Recess” in the Constitution’s Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL’Y 199, 227 n.137 (2014). *But see* Maggs, *supra* note 214, app. at 383 (noting modern praise for Bailey’s “efforts to include common words and to define words as they were actually used”).
216. See Calabresi & Lawson, *supra* note 29, at 1017 (observing that some of the best starting places for public meaning originalist analysis are dictionaries along with the constitutional text); *see also* McIntosh, *supra* note 213, at 3 (finding dictionaries to be “representative of their times”).
217. ALLEN, *supra* note 212; 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly 1775); BAILEY, *supra* note 195; JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (London, J.F. & C. Rivington corrected & improved ed. 1792); 2 FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London, Frederick Barlow c. 1772); DYCHE & PARDON, *supra* note 112; 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington 6th ed. 1785); WILLIAM KENRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (London, John & Francis Rivington 1773); PERRY, *supra* note 112; THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly 2d ed. 1789).
218. 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW *718-44 (London, C. Bathurst 4th ed. 1778); 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY (London, T. Cadell 1792); 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (London, W. Flexney 2d ed. 1771); GILES JACOB ET AL., A NEW LAW-DICTIONARY (Dublin, James Williams 10th ed. 1773).

commonly used in constitutional research.²¹⁹ Then I moved beyond this standard approach and examined a dictionary itself as a specialized mini-corpus. Specifically, I examined every use of the term “office” or “officer” throughout the twenty-fifth edition of Nathan Bailey’s *The New Universal Etymological English Dictionary* published in 1783 in London,²²⁰ looking at the context of the term “officer” in defining other terms. Scholars indicate that Bailey’s dictionary “may have been the bestselling dictionary of the eighteenth century.”²²¹ Therefore, whether or not Bailey’s definitions were “accurate” in some technical sense, the dictionary was a widely available source that could have influenced the Founders’ understanding of the terms they included in the Constitution.

Bailey’s dictionary includes more than 500 total uses of the terms “office(s)” and “officer(s).”²²² On numerous occasions Bailey used the terms “office” and “officer” to describe positions under British law that involved ministerial duties²²³—the kind that would not seem to measure up to the Supreme Court’s current “significant authority” standard.²²⁴ The use of the word “officer” to refer to positions associated with duties of any level of importance suggests that the eighteenth century public meaning of “officer” was significantly broader, and encompassed more low-level government positions, than the term as it has been applied in modern practice.

1. Standard interpretive use of Founding-era dictionaries and commentaries

Founding-era dictionaries and commentaries suggest that an “officer” was a public official responsible for a governmental duty of any level of significance.

219. See, e.g., Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 81 (2007) (citing the Bacon, Cunningham, and Jacob et al. law dictionaries in analyzing the meaning of the words “office” and “officer”); Maggs, *supra* note 214, app. at 390-92 (listing the Burn and Burn, Cunningham, and Jacob et al. dictionaries as Founding-era legal dictionaries relevant to constitutional interpretation).

220. BAILEY, *supra* note 195.

221. See Maggs, *supra* note 214, app. at 383.

222. This number is based on searching for the root word “office” in the 1783 edition of Bailey’s dictionary through Gale’s Eighteenth Century Collections Online database. For information on replicating my search, see Methodological Supplement, *supra* note 131, at 2.

223. See *infra* Part II.B.2.

224. See *supra* note 8 and accompanying text (noting that courts today evaluate “officer” status based on whether the official’s duties involve finality, discretion, and important issues).

a. Dictionaries

The entries for “officer” in the majority of Founding-era dictionaries surveyed for this Article²²⁵ essentially defined a civil “officer” as a “man employed by the public(k)”²²⁶ and an “office” as a “public charge” or “public employment.”²²⁷ Unlike many terms in contemporary dictionaries that may list many different possible meanings—or senses—of a given term, the eighteenth century dictionary definitions for the word “officer” listed only a few senses. For example, Thomas Sheridan’s dictionary listed only three possible senses for the term “officer”: (i) “[a] man employed by the publick,” (ii) “a commander in the army,” and (iii) “one who has the power of apprehending criminals.”²²⁸ The sense of most relevance to this Article, of course, is “man employed by the publick,” as it is the only sense listed that relates to general governmental positions like civil offices.

On the surface, the definition of “officer” as one with a “public charge” or one “employed by the publick” is not very informative. But defining the

225. See *supra* note 217 and accompanying text.

226. See, e.g., *Officer*, ALLEN, *supra* note 212; *Officer*, BARCLAY, *supra* note 217; *Officer*, 2 BARLOW, *supra* note 217; *Officer*, 2 JOHNSON, *supra* note 217; *Officer*, KENRICK, *supra* note 217; *Officer*, SHERIDAN, *supra* note 217. Rather than using the phrase “employed by the public(k),” three dictionaries defined “officer” more simply as a person “in [an] office” but then included among their definitions for “office” the phrases “public employment,” a “public charge,” or “a place or employment.” See *Office*, 2 ASH, *supra* note 217; *Officer*, 2 ASH, *supra* note 217; *Office*, BAILEY, *supra* note 195; *Officer*, BAILEY, *supra* note 195; *Office*, PERRY, *supra* note 112; *Officer*, PERRY, *supra* note 112. The only dictionary I examined that used a materially different definition was Dyché and Pardon’s, which said that the term “officer” “in general signifies any person that has a peculiar post or business appointed him.” *Officer*, DYCHE & PARDON, *supra* note 112 (emphasis omitted); see also *id.* (listing a second definition of “officer” as “in War, signif[ying] those that have the command, rule or management, and more strictly, only those that have commissions, viz. all from the general to the ensign or cornet, and are thus distinguished” (emphasis omitted)).

227. See, e.g., *Office*, ALLEN, *supra* note 212; *Office*, 2 ASH, *supra* note 217; *Office*, BARCLAY, *supra* note 217; *Office*, 2 BARLOW, *supra* note 217; *Office*, KENRICK, *supra* note 217; *Office*, PERRY, *supra* note 112; *Office*, SHERIDAN, *supra* note 217; see also *Office*, BAILEY, *supra* note 195 (“a place or employment”); *Office*, 2 JOHNSON, *supra* note 217 (“[a] publick charge or employment; magistracy”). “Public charge” and “public employment” typically were one of multiple senses of the term “office” in these dictionaries; they represent the sense of the term relevant to the concept of civil officer examined in this Article.

228. See *Officer*, SHERIDAN, *supra* note 217. Six additional dictionaries also included three very similar senses in defining the term “officer.” See *Officer*, ALLEN, *supra* note 212; *Officer*, 2 ASH, *supra* note 217; *Officer*, BARCLAY, *supra* note 217; *Officer*, 2 BARLOW, *supra* note 217; *Officer*, 2 JOHNSON, *supra* note 217; *Officer*, KENRICK, *supra* note 217; see also *Officer*, PERRY, *supra* note 112 (defining “officer” as “one in office; a commander in the army”). From the constitutional context, it seems clear that Article II is concerned principally with the public officer definition, not the sense involving military commanders and criminal arrests.

subsidiary terms like “publick,” “charge,” and “employment” provides more insight. “To Employ” meant “[t]o busy” or “to intrust with the management of any affairs.”²²⁹ And “publick” simply meant “[b]elonging to a state or nation.”²³⁰

One thus could have understood the term “officer” to describe one “in-trust[ed] with the management of any [of the nation’s] affairs.”²³¹ The term “management” may sound fairly high level to the modern reader, but Sheridan, for example, defined “management” more modestly as “[c]onduct, administration; practice, transaction, dealing.”²³² “To intrust” meant “[t]o treat with confidence.”²³³ So an officer under the Sheridan definitions was one in whom confidence was placed—an official with some measure of responsibility. But this responsibility apparently could regard governmental conduct, administration, or practice of any level of importance. The Sheridan definition did not include any suggestion that entrusting one with the management of affairs necessarily included high-level supervisory authority, in contrast to the contemporary meaning of “management,” which connotes authority to provide oversight and direction.²³⁴

Bailey’s definitions of the terms “officer,” “office,” “duty,” and “employ” similarly suggest that an officer was anyone with the duty to complete some task or responsibility.²³⁵ These definitions parallel descriptions of officers in

229. *Employ*, SHERIDAN, *supra* note 217 (defining “to employ” as “[t]o busy, to keep at work, to exercise; to use as an instrument; to commission, to intrust with the management of any affairs; to fill up with business; to pass or spend in business”).

230. *Publick*, SHERIDAN, *supra* note 217 (defining “publick” as “[b]elonging to a state or nation; open, notorious, generally known; general, done by many; regarding not private interest, but the good of the community; open for general entertainment”).

231. *See Employ*, SHERIDAN, *supra* note 217.

232. *See Management*, SHERIDAN, *supra* note 217; *see also Manage*, SHERIDAN, *supra* note 217 (defining “to manage” as, *inter alia*, “[t]o superintend affairs, to transact”). In contrast, today *The Oxford English Dictionary* defines “management” as “[o]rganization, supervision, or direction; the application of skill or care in the manipulation, use, treatment, or control (of a thing or person), or in the conduct of something”; “[a] governing body of an organization or business, regarded collectively”; or “[t]he responsibility for and control of the resources of a company, department, or other organization.” *Management*, OXFORD ENG. DICTIONARY, <https://perma.cc/JYA9-4S9J> (archived Jan. 9, 2018). Other definitions for “management” listed by the *Oxford English Dictionary* either are for a more specialized usage of the word or are characterized as obsolete. *See id.*

233. *Intrust*, SHERIDAN, *supra* note 217 (defining “to intrust” as “[t]o treat with confidence, to charge with any secret”).

234. *See supra* note 232.

235. *Officer*, BAILEY, *supra* note 195 (defining “officer” as “one who is in an office”); *Office*, BAILEY, *supra* note 195 (defining “office” as “the part or duty of that which befits, or is to be expected from one; a place or employment; also a good or ill turn”); *Duty*, BAILEY, *supra* note 195 (defining “duty” as “any thing that one is obliged to do”); *Employ*, BAILEY, *supra* note 195 (defining “to employ” as “to set one at work, or about some business; to make use of”).

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U.S. sources several decades later. For example, the 1828 edition of Webster’s landmark dictionary²³⁶ defined “officer” as “[a] person commissioned or authorized to perform any public duty.”²³⁷ And an early nineteenth century circuit court opinion by Chief Justice Marshall defined “officer” as one with a public duty.²³⁸ Numerous public statements from the 1770s to the 1780s also associated officers with the concept of duty.²³⁹

b. Legal dictionaries and commentaries

Legal dictionaries provide further illumination, making it even clearer that the position of “officer” involved responsibility for a governmental duty—no matter how minor in scope.²⁴⁰ For example, Matthew Bacon’s legal dictionary entry on “the Nature of an Office” explains that “the Word *Officium* principally implies a Duty, and . . . the Charge of such Duty.”²⁴¹ Bacon further

236. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828); see also Maggs, *supra* note 214, app. at 389 (calling this particular dictionary Webster’s “greatest work”).

237. *Officer*, 2 WEBSTER, *supra* note 236; see also *Authorized*, 1 WEBSTER, *supra* note 236 (defining “authorized” as “[w]arranted by right; supported by authority; derived from legal or proper authority; having power or authority”); *Duty*, 1 WEBSTER, *supra* note 236 (defining “duty” as “that which a person is bound, by any natural, moral or legal obligation, to pay, do or perform”).

238. See *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (“An office is defined to be ‘a public charge or employment; and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States.”); see also *supra* text accompanying note 103.

239. See, e.g., Act of Aug. 5, 1789, ch. 6, § 2, 1 Stat. 49, 49 (amended 1790) (authorizing the Board of Commissioners for the settlement of accounts to appoint “such other clerks as the duties of their office may require”); An Ordinance for Putting the Department of Finance into Commission (1784), in 27 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 469, 470 (Gaillard Hunt ed., 1928) [hereinafter Department of Finance Ordinance] (referring to the “duties” of the “respective offices” of commissioners and clerks); U.S. CHRON. (Providence, R.I.), Aug. 2, 1787, at 2 (praising “a civil officer of the United States” who had “discharged his duty” with “diligence and fidelity”).

240. Of the four eighteenth century legal dictionaries I surveyed, see *supra* note 218, only two warrant discussion. Giles Jacob’s discussion of “officer” is essentially identical to Timothy Cunningham’s. Compare *Office*, 2 CUNNINGHAM, *supra* note 218 (discussing types of offices and considering a set of four questions), with *Office*, JACOB ET AL., *supra* note 218 (same). And Burn and Burn’s legal dictionary addressed only the obligations of officers such as taking oaths; it did not address the elements qualifying one as an officer. See 2 BURN & BURN, *supra* note 218, at 168-69.

241. See 3 BACON, *supra* note 218, at *718-19 (margin note omitted); see also *The King v. Burnell* (1741) 90 Eng. Rep. 875, 875-76; Carthew 478, 478-79 (finding that a censor of the College of Physicians was an “officer” as that word was used in a statute in part because “he is an officer subordinate, who hath any part of the King’s publick care delegated to him by the King,” and noting that “the word officium principally implies a duty, and in the next place the charge of such duty” (emphasis added)).

explains that an officer “is not the less a Public Officer, where his Authority is confined to narrow Limits; because it is the Duty of his Office, and the Nature of that Duty, which makes him a Public Officer, and not the Extent of his Authority.”²⁴²

Bacon’s detailed explanation of relevant British law significantly undermines the modern doctrine that constitutional officers must have discretion²⁴³ and more than ministerial duties.²⁴⁴ He clearly describes a category of “Ministerial Offices”²⁴⁵ and categorizes as “offices” several positions that involved just recordkeeping duties. For example, Bacon refers to the “Office of Register of Policies of Assurance,” which “required only the Skill of Writing after a Copy.”²⁴⁶ Bacon also describes as “offices” the positions of remembrancer and chirographer.²⁴⁷ A remembrancer was an officer of the King “who enters into his office all recognizances taken between the Barons for any of the King’s debts.”²⁴⁸ A chirographer was “a clerk in the court of Common Pleas” who copied onto parchment “those fines that [we]re acknowledged in that court.”²⁴⁹ Similar to these positions described by Bacon, Timothy Cunningham’s dictionary describes the “ministerial office” of “under-clerks, who have so much a sheet for copying.”²⁵⁰

Blackstone’s *Commentaries* also indicate that British law considered the term “officer” to encompass positions like those of “sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor.”²⁵¹ Several of the earliest U.S. constitutional commentaries include implicitly

242. 3 BACON, *supra* note 218, at *719.

243. *See supra* notes 8, 81 and accompanying text.

244. *Cf., e.g.,* Freytag v. Comm’r, 501 U.S. 868, 881-82 (1991) (relying in part on special trial judges’ performance of “more than ministerial tasks” as justification for these judges’ Article II officer status); Tucker v. Comm’r, 676 F.3d 1129, 1134 (D.C. Cir. 2012) (treating the “more than ministerial” factor as mandatory for Article II status (quoting Freytag, 501 U.S. at 881)); Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 90 (2007) (quoting a 1990 OLC opinion that found that “[p]urely ministerial and internal functions . . . , which neither affect the legal rights of third parties outside the Government nor involve the exercise of significant policy-making authority, may be performed by persons who are not federal officers or employees” (quoting Constitutional Limits on “Contracting Out” Dep’t of Justice Functions Under OMB Circular A-76, 14 Op. O.L.C. 94, 99 (1990))).

245. *See* 3 BACON, *supra* note 218, at *719 (distinguishing these offices from judicial offices).

246. *See id.* at *734.

247. *See id.*

248. *See Remembrancer*, BAILEY, *supra* note 195.

249. *See Chirographer*, DYCHE & PARDON, *supra* note 112.

250. *Office*, 2 CUNNINGHAM, *supra* note 218.

251. 1 WILLIAM BLACKSTONE, COMMENTARIES 339 (Ri. Burn ed., London, W. Strahan 9th ed. 1783).

relevant discussion such as James Monroe’s observation that establishing a federal system of revenue necessarily would involve “a train of officers”²⁵²—suggesting an interpretation of the word “officer” that encompassed more than just high-level officials. St. George Tucker similarly commented that it was “astonishing” how many “thousand[s]” of officers Congress had authorized the President to select by just the very start of the nineteenth century.²⁵³

2. Nathan Bailey’s eighteenth century dictionary as a corpus

Analyzing the terms “office” and “officer” using Nathan Bailey’s popular eighteenth century dictionary²⁵⁴ as a corpus²⁵⁵ is informative principally because it provides evidence of the breadth of British officials who were understood to be “officers.” The dictionary’s more than 500 references to the terms “office(s)” and “officer(s)” encompassed numerous recordkeepers, assistants, and other officials with duties of a menial nature.

Several examples of recordkeepers whom Bailey described as “officers” include: (i) the “Corrector [of the Staple],” who recorded bargains made by merchants in the public storehouse;²⁵⁶ (ii) the purser on a king’s ship, who tracked each crew member’s pay and provided supplies like food and bedding

252. See James Monroe, *Some Observations on the Constitution* (1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 166, at 844, 853 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

253. 1 GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 341-42, 42 nn.*, † (Philadelphia, William Young Birch & Abraham Small 1803). Several early U.S. commentaries do not directly address the precise reach of the phrase “Officers of the United States” in contradistinction to any potential lower-level category of mere employees. See, e.g., SMITH, *supra* note 60, at 18, 27-28, 30, 32-33 (describing the method under various state constitutions for appointing higher-level officers like treasurers, judges, chancellors, and sheriffs without addressing the separate issue of the scope of government positions that are considered to be offices); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1518-1553 (Boston, Hilliard, Gray & Co. 1833) (discussing the Appointments Clause); *id.* § 1530 (including no definition of the phrase “Officers of the United States” but suggesting that lower-level officials like executive department clerks and court clerks and reporters were “inferior officers” (emphasis omitted)).

254. See Maggs, *supra* note 214, app. at 383-84 (discussing Bailey’s dictionary).

255. Cf. *State v. Rasabout*, 356 P.3d 1258, 1276 (Utah 2015) (Lee, Assoc. C.J., concurring in part and concurring in the judgment) (describing dictionaries as potentially useful corpora).

256. See *Corrector*, BAILEY, *supra* note 195 (defining “Corrector [of the Staple]” as “an officer of the staple, who recordeth the bargains of merchants made there” (brackets in original) (capitalization altered)); *Staple*, BAILEY, *supra* note 195 (defining “staple” as “a city or town where merchants jointly lay up their commodities for the better vending them by the great; a public store-house”).

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to people on the ship;²⁵⁷ and (iii) various clerks such as the Clerk of the Acts, who received the Lord Admiral’s commissions and warrants and registered the orders of the Commissioners of the Navy.²⁵⁸

Bailey also described as “officers” several types of British officials whose responsibilities amounted to assisting a higher-level government officer in some way. As such, they would appear to have fallen outside the scope of both the D.C. Circuit’s and the OLC’s modern officer definitions, which suggest that officers have final decisionmaking authority that directly affects regulated parties.²⁵⁹ For example, several of the British “officers” defined as having assistance-oriented roles included: “Messengers [of the Exchequer],” who “attend[ed] the Lord Treasurer, and carr[ied] his letters and orders”;²⁶⁰ “Satellites,” who “attend[ed] upon a Prince”;²⁶¹ and “Sword-Bearers,” who “carrie[d] the sword of state before a magistrate.”²⁶² Bailey’s characterizations of these assistants as officers is consistent with the Founding-era conception that all executive branch officers existed to assist the President in some way.²⁶³

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257. *Purser*, BAILEY, *supra* note 195 (defining the “Purser [in a King’s Ship]” to be “an officer who has the charge of the victuals, and is to see that they be good, well laid up, and stored” and who “keeps a list of the ship’s company, and sets down exactly the day of each man’s admittance into pay” (brackets in original) (capitalization altered)).
258. *Acts*, BAILEY, *supra* note 195 (defining “Clerk of the Acts” as “an officer who receives and enters the Lord Admiral’s commissions and warrants, and registers the act and orders of the Commissioners of the Navy” (capitalization altered)); *see also, e.g., Peace*, BAILEY, *supra* note 195 (defining “Clerk of the Peace” as “an officer who draws up the processes, reads the indictments, and enrolls the acts in a session of peace” (capitalization altered)); *Pells*, BAILEY, *supra* note 195 (defining “Clerk of the Pells” as “an officer of the Exchequer, who enters every bill in a parchment roll called *Pellis receptorum*” (capitalization altered)); *Ordinance*, BAILEY, *supra* note 195 (defining “Clerk of the Ordinance” as “an officer, whose business is to record the names of all officers, and all orders and instructions given for the government office” (capitalization altered)).
259. *See supra* notes 8, 93-97 and accompanying text.
260. *See Messengers*, BAILEY, *supra* note 195 (brackets in original) (capitalization altered) (defining “Messengers [of the Exchequer]” as “officers belonging to that Court, who attend the Lord Treasurer, and carry his letters and orders”) (brackets in original) (capitalization altered)).
261. *See Satellites*, BAILEY, *supra* note 195 (defining “satellites” as “Life-Guards, or Officers attending upon a Prince”).
262. *See Sword*, BAILEY, *supra* note 195 (defining “Sword-Bearer” as “an officer who carries the sword of state before a magistrate, particularly before the Lord Mayor of London” (capitalization altered)).
263. *See, e.g.,* LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 27 (2d prtng. 1956) (“The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust.” (quoting Letter from George Washington to Eléonor François Élie, Comte de Moustier (May 25, 1789), in 30 *THE WRITINGS OF GEORGE WASHINGTON* 333, 334 (John C. Fitzpatrick ed., 1939))).

Finally, Bailey describes as “officers” many officials responsible for tasks that would appear too menial to qualify for officer status under modern U.S. law. Several of these positions included that of: (i) the “Agistator,” who took cattle into the forest;²⁶⁴ (ii) the “Chafe-Wax,” who “fit[ted] the wax for [the] sealing of writs”;²⁶⁵ (iii) the “Expenditor,” “a steward or officer, who look[ed] after the repairs of the banks of [a] [m]arsh”;²⁶⁶ (iv) the “Gauger,” who measured the contents of vessels;²⁶⁷ (v) the “Searcher,” “whose business [was] to examine, and by a peculiar seal to mark the defects of woollen cloth”;²⁶⁸ and (vi) the “Swabber,” “an inferior officer on board a ship of war, whose office [was] to take care that the ship be kept clean.”²⁶⁹

To be sure, the U.S. system did not specifically incorporate many of these British officer positions.²⁷⁰ The characterization of these officials as “officers” nonetheless would have informed the U.S. understanding of the term.

One of the grievances justifying the colonists’ call for independence had been that the King “erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.”²⁷¹ Early American practice addressed concerns about the King’s ability to amass too much power by (i) permitting only limited mechanisms for appointing officers and (ii) imposing the constitutional requirement that new officer positions be

264. See *Agistator*, BAILEY, *supra* note 195 (defining “agistator” as an “officer that takes cattle into the forest”).

265. See *Chafe*, BAILEY, *supra* note 195 (defining “chafe-wax” as “an officer belonging to the Lord Chancellor, who fits the wax for sealing of writs”).

266. See *Expenditor*, BAILEY, *supra* note 195.

267. See *Gager/Gauger*, BAILEY, *supra* note 195 (defining “gager” or “gauger” as “an officer employed in gaging”); see also *Gage/Gauge*, BAILEY, *supra* note 195 (defining “to gage” or “to gauge” as “to measure with a gauge, to find what any vessel contains”).

268. See *Searcher*, BAILEY, *supra* note 195.

269. See *Swabber*, BAILEY, *supra* note 195; see also *Ale-Conner/Ale-Taster*, BAILEY, *supra* note 195 (defining “ale-conner” or “ale-taster” as “an officer appointed in every court-leet, to look to the assize and goodness of bread, ale, beer, &c.” (capitalization altered)); *Assay*, BAILEY, *supra* note 195 (defining “Assay-Master” as “an officer of the Mint, who weighs the bullion, and takes care that it be according to the national standard” (capitalization altered)); *Beadle*, BAILEY, *supra* note 195 (defining “beadle” as “a forest officer, that makes garnishments for the courts of the forest”); *Botiler/Butler*, BAILEY, *supra* note 195 (defining “botiler” or “butler” as “an officer that provides the king’s wines”); *Sewer*, BAILEY, *supra* note 195 (defining “sewer” as “an officer who comes in before the meat of a King or Nobleman, and places it upon the table”).

270. *But see, e.g.*, Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154 (repealed 1799) (appointing gaugers during the First Congress); An Ordinance for the Establishment of the Mint of the United States of America, and for Regulating the Value and Alloy of Coin (1786), in 31 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 876, 876 (John C. Fitzpatrick ed., 1934) [hereinafter *Mint of the U.S. Ordinance*] (appointing assay masters during the Continental Congress).

271. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

“established by Law”²⁷² rather than through a King-like custom of the head magistrate unilaterally creating new offices.²⁷³

Under the British system, the entitlement to appoint subordinate officers was sometimes passed along with an appointment to higher-level office. For example, British sheriffs gained the right to appoint county clerks when the sheriffs themselves were named to office.²⁷⁴ Bacon’s dictionary also gives as an example the right to appoint an individual to “the Office of Chamberlain of the King’s Bench Prison,” which had passed along inherent in the “Grant of the Office of Marshal.”²⁷⁵ In other words, once one became a marshal or a sheriff, that officer also acquired the inherent right to appoint someone to fill the incident office.²⁷⁶ Further, under British practice offices at times were held as property interests that then passed down to the officeholder’s heirs.²⁷⁷ During Britain’s rule over the American colonies, there was a “tendency to regard public office as a form of personal property.”²⁷⁸ The “colonists came to harbor resentments toward the perceived repressiveness” of this “British colonial administration,” and they desired to limit officers’ unrestrained authority.²⁷⁹ Article II consequently became a vehicle in the Constitution to prevent officeholders and those who appointed officers from gaining too much power. In contrast to the British system, the U.S. constitutional system restricted the appointment power to a limited set of actors. Also, it subjected officer

272. U.S. CONST. art. II, § 2, cl. 2; see 2 FARRAND’S RECORDS, *supra* note 58, at 405-06 (recording how Roger Sherman, in arguing to include the phrase “or by Law” in the Appointments Clause, noted that “[i]f the Executive can model the army, he may set up an absolute Government”); 1 *id.* at 380 (Mr. Mason: “If not checked we shall have ambassadors to every petty state in Europe . . .”). *But see* 1 FARRAND’S RECORDS, *supra* note 58, at 381 (quoting Nathaniel Gorham as arguing that Parliament was the real cause of British corruption).

273. See THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 56, at 360-61 (comparing the Appointments Clause’s requirements to British practices); see also *id.* at 360 (“The king of Great Britain is emphatically and truly styled, the fountain of honour. He not only appoints to all offices, but can create offices.”).

274. See 3 BACON, *supra* note 218, at *720 (“Where-ever one Office is incident to another, such incident Office is regularly grantable by him who hath the principal Office . . .” (margin note omitted)).

275. See *id.*

276. See *id.*

277. See *Office*, GILES JACOB, A NEW LAW-DICTIONARY (Savoy, London, D. Midwinter 4th ed. 1739) (defining “office” and referring to the existence of an “Office in Fee, which a Man hath to him and his Heirs: And Offices may be granted in Fee-simple, Fee-tail, for Life, Years, &c.”).

278. See SUBCOMM. ON MANPOWER & CIVIL SERV., H. COMM. ON POST OFFICE & CIVIL SERV., 94TH CONG., HISTORY OF CIVIL SERVICE MERIT SYSTEMS OF THE UNITED STATES AND SELECTED FOREIGN COUNTRIES TOGETHER WITH EXECUTIVE REORGANIZATION STUDIES AND PERSONNEL RECOMMENDATIONS 14 (Comm. Print 1976).

279. See *id.*

appointments to separation of powers protections, giving the authority to create offices to Congress and leaving the executive the power to select specific individuals to fill those offices. Distinct from the Constitution’s break with British practice regarding appointment methodology, however, the drafting and ratification debates give no indication that the phrase “Officers of the United States” represented a break from the common understanding of the concept of “officer.”

C. *Elliot’s Debates and Farrand’s Records*

In addition to Bailey’s dictionary, the *Journals of the Continental Congress*, the Readex newspaper database, and the Federalist Papers and the Anti-Federalist essays discussed in Part II.D below, the specialized Founding-era corpus I examined for this Article included Max Farrand’s *The Records of the Federal Convention of 1787* (*Farrand’s Records*) and Jonathan Elliot’s *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* (*Elliot’s Debates*). I looked at the context surrounding every use of the words “office(s)” and “officer(s)” in *Farrand’s Records*²⁸⁰ and every use of the phrase “officer(s) of the United States” in *Elliot’s Debates* along with the immediately surrounding uses of “officer(s)” and “office(s).”²⁸¹

On previous occasions when legal interpreters have used corpus linguistics techniques, the interpreters have employed empirical corpus analysis to evaluate which of a *limited set of meanings* is the most likely meaning of the term under review. For example, in a case before the Utah Supreme Court, Associate Chief Justice Lee used corpus linguistics to evaluate whether the statutory term “discharge” more likely meant just one shot or a burst of shots.²⁸² He concluded that the relevant corpus almost exclusively used the word “discharge” to refer to one shot and relied in part on that empirical assessment to conclude that the statutory meaning of “discharge” encompassed one single shot.²⁸³ Barnett used a similar approach when attempting to discern the eighteenth century meaning of the word “commerce” from an eighteenth

280. The records of the actual drafting debates are contained within the first two volumes of *Farrand’s Records*. See generally 1-2 FARRAND’S RECORDS, *supra* note 58.

281. In Elliot’s two-and-a-half volumes recording the state ratification debates (volumes two, three, and the first portion of volume four recording the North Carolina and South Carolina debates, see 2-3 ELLIOT’S DEBATES, *supra* note 131; 4 *id.* at 1-340), I examined the thirty-one instances of the phrase “Officer(s) of the United States.” See Methodological Supplement, *supra* note 131, at 3 (including a screenshot of these search results). I also examined uses of the terms “office(s)” and “officer(s)” in the immediate context surrounding these references.

282. See *State v. Rasabout*, 356 P.3d 1258, 1277-80 (Utah 2015) (Lee, Assoc. C.J., concurring in part and concurring in the judgment).

283. See *id.* at 1278-79.

century database of newspapers.²⁸⁴ Similar to Associate Chief Justice Lee, Barnett was engaged in a binary analysis.²⁸⁵ He was attempting to discern whether “commerce” meant just the exchange of goods or whether it also encompassed agriculture and manufacturing.²⁸⁶ Both interpreters started their inquiry with a limited set of two possible meanings in mind and coded the data they examined to identify which of those two meanings was associated with each use of the term in the relevant database.²⁸⁷

In contrast, I attempted to uncover the eighteenth century meaning of the word “officer” from the ground up. Rather than simply trying to answer “yes” or “no” as to whether the “significant authority” standard is the right one, for example, I sought to answer a much more open-ended set of inquiries for a potentially open-ended term: What did the word “officer” mean in the late eighteenth century? Which types of public officials fell within its scope?

To try to answer those questions, within my specialized corpus I examined the context surrounding every use of “officer(s)” (or in some cases just the more specific phrase “officer(s) of the United States”²⁸⁸). As part of that study I typically read the entire relevant document, article, essay, or debate statement to discern exactly how the word “officer” was being used. I then observed any particular instance of the word that, from the surrounding context, provided material information about its meaning. I then attempted to catalog every use of “officer” or “officer of the United States” that in context seemed to provide material information about the meaning of those terms. This includes uses that support this Article’s thesis as well as any use that might at first appear to suggest that the phrase “Officers of the United States” has a narrower scope than the statutory duty standard. Taken together, the corpus uses of “officer(s)” and “officer(s) of the United States” overwhelmingly support the contention that the term “officer” had a very wide reach in the Founding era.

284. See Barnett, *supra* note 130, at 856-58 (explaining his analysis of the 1594 uses of the word “commerce” in the *Pennsylvania Gazette* from 1728 to 1800).

285. See *id.* at 856-57 (explaining the efforts of research assistants to assess whether the term commerce “was being used in its narrower or broader sense”); *id.* at 853 (explaining the relevant interpretive analysis of the meaning of the term “commerce” as a binary choice between two possible definitions). *But see* Mouritsen, *supra* note 40, at 204-05 (noting that “[n]ot every case of legal interpretation presents a neat, binary question of lexical ambiguity and ordinary meaning” and that in such cases other interpretive strategies may be warranted).

286. See Barnett, *supra* note 130, at 854-55 (explaining the various possible meanings of the word “commerce”).

287. See *Rasabou*, 356 P.3d at 1278-79 (Lee, Assoc. C.J., concurring in part and concurring in the judgment); Barnett, *supra* note 130, at 857-58 (explaining how research assistants coded the relevant data).

288. See *supra* note 281 and accompanying text.

The proper methodology for applying corpus linguistics-style techniques to originalism is still being operationalized.²⁸⁹ Application of corpus linguistics to originalism is in only the earliest stages, in large part because there is not yet any broad-based corpus of Founding-era texts, in contrast to the robust corpora available for contemporary statutory interpretation.²⁹⁰ Scholars nonetheless have started to assess ways in which corpus linguistics can be adapted to Founding-era interpretation. Lee Strang, for example, has suggested that interpreters should begin by looking for a “stable” of possible definitions for the word they wish to interpret and should then determine which of those conventions occurs most frequently in the corpus.²⁹¹ This Article resists that approach, at least for a more open-textured term like “officer.” Rather than coding each use of “officer” based on which one of several predetermined meanings the use seemed to best resemble, I read each use in context to see if that particular use revealed information adding to the interpretive understanding of the word. The principal aspects of corpus linguistics-style analysis that undergird this Article are (i) the principle of looking at every use of a particular word in a neutrally compiled corpus, (ii) the effort to glean interpretive information from how the key word (here, “officer” and “office”) is being used naturally in the context of documents and statements not made for the express purpose of influencing the meaning of the word; and (iii) the provision of a transparent, replicable research trail for future researchers.²⁹²

Examining the context surrounding every use of the full phrase “Officers of the United States” in *Elliot’s Debates* and every use of “officer” and “office” in *Farrand’s Records* suggests that these terms were understood to have a broad scope encompassing a large number of officials.

1. *Elliot’s Debates*

First, *Elliot’s Debates* includes references in the North Carolina ratifying convention to “petty officers.”²⁹³ In debating the Article II Impeachment

289. See Phillips et al., *supra* note 124, at 30 (observing that “scholars have not adequately operationalized original public meaning” and have not yet clarified whether the best way to establish original public meaning is “by finding the most frequent usage between competing senses of the word or phrase in question”).

290. See *id.* at 30-31.

291. See Lee J. Strang, *How Big Data Can Increase Originalism’s Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1207-08 (2017).

292. Part II.E below additionally engages in some more traditional empirical corpus linguistics techniques like examining collocation within the early release of files I acquired from developers working to assemble the first Founding-era corpus.

293. *Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution* [hereinafter *North Carolina Convention Debates*], in 4 ELLIOT’S DEBATES, *supra* note 131, at 1, 43 (statement of Mr. Maclaine).

Clause,²⁹⁴ Mr. Maclaine contended that the clause should not be interpreted to extend to “inferior officers of the United States,” which he characterized as petty officers with “trifling” duties.²⁹⁵ Although Mr. Maclaine’s interpretation indicates that he thought the Impeachment Clause phrase “civil Officers of the United States” should not extend to petty officers, his specific reference to “inferior officers” suggests that he would understand the Appointments Clause to extend to such government officials.²⁹⁶ This is evidence of an understanding of Appointments Clause “officers” that includes more officials than the “significant authority” standard required for Article II status today.²⁹⁷

In addition, *Elliot’s Debates* records a relevant resolution that the Virginia convention submitted along with its ratification of the Constitution. The resolution expressed Virginia’s belief that the Constitution authorized only a limited federal government—empowering the federal government to do nothing other than what the Constitution expressly authorized it to do.²⁹⁸ Specifically, the resolution stated: “[N]o right, therefore, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress . . . or any department or *officer of the United States*, except in those instances in which

294. U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

295. See *North Carolina Convention Debates*, *supra* note 293, at 43-44 (statement of Mr. Maclaine).

296. See *id.* at 43-45; see also *id.* at 36-37 (recording several individuals debating the reach of the Impeachment Clause). During the North Carolina convention discussion of the Impeachment Clause, Mr. Davie contended that the Clause would not extend to “petty offices”—that is, petty duties—but just to the more significant “cases under the Constitution.” See *id.* at 36 (statement of Mr. Davie). (Because the eighteenth century term “office” was used to refer to duties as well as positions, see, e.g., *Office*, BAILEY, *supra* note 195 (defining “office” to include “the part or duty of that which befits, or is to be expected from one”), Mr. Davie’s comment was likely referring to insignificant tasks rather than insignificant positions.) Subsequently, Mr. Taylor and Mr. Spaight suggested that the Impeachment Clause would nonetheless apply to less significant officers like “tax-gatherers.” See *North Carolina Convention Debates*, *supra* note 293, at 36 (statement of Mr. Taylor); *id.* at 36-37 (statement of Mr. Spaight). But Mr. Spaight clarified that less significant wrongdoing by such “officer[s] of the United States” could be redressed through suits at law rather than through impeachment. See *id.* at 36-37 (statement of Mr. Spaight). Mr. Maclaine rejoined that “poor, insignificant, petty officer[s]” had never been subject to impeachment. See *id.* at 37 (statement of Mr. Maclaine). This comment by Mr. Maclaine occurred the day before his statement that the Impeachment Clause should not reach “inferior officers of the United States.” See *id.* at 7, 37, 43-44.

297. See *supra* notes 6-8 and accompanying text.

298. See *The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution*, in 3 ELLIOT’S DEBATES, *supra* note 131, at 1, 653-56; see also *id.* at 576 (statement of Gov. Randolph) (“[W]e should be at liberty to consider as a violation of the Constitution every exercise of a power not expressly delegated therein.”).

power is given by the Constitution for those purposes”²⁹⁹ Implicitly this resolution assumes that “officer[s] of the United States” will have power to affect people’s rights, although the resolution does not state that holding power to abridge rights is a *necessary* condition for officer status.

2. *Farrand’s Records*

Several “officer” references in *Farrand’s Records* provide relevant insights for discerning the range of government personnel within the scope of Article II. For example, *Farrand’s Records*—like *Elliot’s Debates*—includes remarks suggesting that the Framers understood the term “officer” to include people with relatively insignificant responsibilities. During a debate at the Convention over the appropriate range of executive power, Gouverneur Morris stated: “It is the duty of the Executive to appoint the officers,” including “ministerial officers for the administration of public affairs.”³⁰⁰ James Wilson indicated that the Appointments Clause covered a range of officers extending all the way to “tide-waiter[s]”³⁰¹—a type of “officer who watche[d] the landing of goods at the customhouse.”³⁰² George Mason echoed that observation when he shared that he “considered the Senate as too unwieldy & expensive for appointing officers, especially the smallest, such as tide waiters &c.”³⁰³ And at another point during debate, Gouverneur Morris referred to “tax-gatherers & other officers.”³⁰⁴

During the minimal debate on Article II’s “inferior Officers” provision, James Madison initially protested the draft provision, saying that the provision “does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.”³⁰⁵ His remark “if it be necessary at all” appeared to suggest that he did not think there would be many federal officers to appoint—in contrast to some of the other drafters’ earlier remarks. But this statement by Madison may have been based on a misimpression that state—not federal—officers would perform some of the functions the federal government ultimately took on, such as nationwide tax collection.³⁰⁶ Evidence suggests

299. *Id.* at 656 (emphasis added) (reproducing the resolution).

300. 2 FARRAND’S RECORDS, *supra* note 58, at 52.

301. *See id.* at 522-23.

302. *See Tidewaiter*, 2 JOHNSON, *supra* note 217.

303. 2 FARRAND’S RECORDS, *supra* note 58, at 537-38.

304. *Id.* at 404.

305. *Id.* at 627 (including just half a page of debate on the “inferior Officers” provision).

306. *See infra* notes 326-29 and accompanying text; *cf.* 1 FARRAND’S RECORDS, *supra* note 58, at 311 (“Interference of officers not so great, because the objects of the general government and the particular ones will not be the same [T]he administration of
footnote continued on next page”).

Madison believed that more than just a small category of government officials qualified as “officers.”

The motion to insert the “inferior Officers” provision was defeated on a tie vote the first time around.³⁰⁷ But the Convention agreed to the motion on the second vote after an unidentified speaker urged that the provision was “too necessary, to be omitted.”³⁰⁸ The Convention’s ultimate inclusion of alternative appointment modes and James Madison’s suggestion that perhaps even officers subordinate to department heads must be able to make appointments³⁰⁹ indicated that the Founders in fact believed “inferior Officers” constituted a large group.

In contrast, there are two passages in *Farrand’s Records* suggesting that some Founders believed that the Appointments Clause would have a narrow scope. First, debate on the Presidential Succession Clause indicated that some Convention members thought the Legislature would be too confined by having to pick a temporary presidential successor from among “*officers*’ of the U. S.”³¹⁰ Second, Rufus King seemed to believe that the scope of the Appointments Clause was sufficiently narrow that the requirement of Senate approval of officers would not pose that great a burden.³¹¹ This observation was particularly telling because at the time the Appointments Clause had permitted only the principal mode of appointment requiring Senate approval for all “officers of U.S.”³¹² Nonetheless, King’s view apparently did not prevail. Eight days later the Convention approved an amendment authorizing alternative modes of appointment for “inferior Officers,” apparently concerned that the President and Senate would be overburdened by Article II as previously written.³¹³

private justice will be carried home to men’s doors by the particular governments.” (quoting an outline of Hamilton’s June 18, 1787 speech to the Convention)).

307. See 2 FARRAND’S RECORDS, *supra* note 58, at 627.

308. See *id.* at 627–28.

309. *Id.* at 627 (Mr. Madison: “*It does not go far enough* if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.” (emphasis added)).

310. *Id.* at 535.

311. See *id.* at 539 (Madison’s notes: “[Mr. King] differed from those who thought the Senate would sit constantly. He did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but by the higher officers of the departments to which they belong.”).

312. See *id.* at 539–40.

313. See *supra* notes 305–09 and accompanying text.

D. The Federalist Papers and the Anti-Federalist Essays

The specialized corpus this Article analyzes also includes the Federalist Papers³¹⁴ and the well-known Borden collection of eighty-five Anti-Federalist essays.³¹⁵ These two essay collections contain more than 600 uses of the terms “office(s)” and “officer(s).”³¹⁶ I examined each of those uses and their surrounding context. The Federalist Papers and the Anti-Federalist essays do not contain statements explicitly defining the term “officer” or identifying a clear line between “officers” and those with less significant governmental status.³¹⁷ But the authors’ use of the term “officer” as they discuss other issues is highly informative and evinces the understanding that the term had a broad scope encompassing many officials that are not thought of as Article II officers in modern practice.

Because the Anti-Federalists wrote for the express purpose of opposing constitutional ratification and the Federalist essayists passionately supported it, both groups had competing incentives to characterize constitutional provisions in a manner that supported their contrasting goals. Therefore, multiple scholars have cautioned against placing undue interpretive weight on these documents,³¹⁸ as their analysis might include biased attempts to influence the votes on constitutional ratification. That said, constitutional understandings shared by both sides of the feuding essayists would seem to be telling and persuasive.³¹⁹ And on the whole, the understanding shared by both the Federalist and Anti-Federalist authors seems to be that the concept of “officer” was broad in scope.

The Anti-Federalist essays contain more than twice as many references to the terms “office(s)” and “officer(s)” as do the Federalist Papers, even though both collections consist of eighty-five essays. To be sure, this focus on the role of “officers” may be due to the Anti-Federalists’ impassioned antipathy toward

314. See THE FEDERALIST, *supra* note 56.

315. See THE ANTI-FEDERALIST PAPERS, *supra* note 66; *see also supra* note 131.

316. See *supra* note 160.

317. See *supra* note 131.

318. See, e.g., Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 603-615 (2003) (alleging that there are numerous technical errors or imprecisions in the Federalist Papers); *cf.*, e.g., Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 804 (2007) (noting that criticism of originalists’ reliance on the Federalist Papers has “some merit” but nonetheless is not “so overwhelmingly strong that it should prevent any reliance” on them).

319. See Maggs, *supra* note 318, at 839 (suggesting that examining Anti-Federalist essays alongside the Federalist Papers “seems likely to negate any possible political biases in language usage”).

the idea of a robust federal officer corps. For example, the Anti-Federalist writer known as the Federal Farmer warned: “We all agree, that a large standing army has a strong tendency to depress and enslave the people; it is equally true that a large body of selfish, unfeeling, unprincipled civil officers has a like, *or a more* pernicious tendency to the same point.”³²⁰ Nonetheless the Anti-Federalists’ use of the term “officer” demonstrates not just a concern that there would be many federal officers but also their belief that the term encompassed rank-and-file officials. For example, the author writing under the pseudonym Brutus pessimistically predicted that the Constitution’s taxation powers would lead to “the appointment of a swarm of revenue and excise officers to pray [sic] upon the honest and industrious part of the community.”³²¹

On numerous occasions the Anti-Federalist essayists suggested that there would be a vast number of officers in the constitutional system. In addition to his statements described above, the Federal Farmer also observed: “To discern the nature and extent of this power of appointments, we need only to consider the vast number of officers necessary to execute a national system in this extensive country.”³²² The essayist later referred to “many thousand officers solely created by, and dependent upon the union” in discussing the federal taxation powers under the Constitution.³²³ On one level this characterization arises from the author’s arguably exaggerated fears about the Constitution’s expansive federal powers.³²⁴ But the author’s intention to alarm readers about

320. See Federal Farmer XIII, *supra* note 158, at 293 (emphasis added); see also Melancton Smith, The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (1787), in THE ANTI-FEDERALIST PAPERS, *supra* note 66, at 101, 102 (“[I]t wilt be the policy of this government to multiply officers in every department; judges, collectors, tax-gatherers, excisemen . . .”).

321. Brutus, Anti-Federalist No. 32: Federal Taxation and the Doctrine of Implied Powers (Part I) (Brutus V) (1787), in THE ANTI-FEDERALIST PAPERS, *supra* note 66, at 105, 107.

322. Federal Farmer XIII, *supra* note 158, at 293-94; see also, e.g., Brutus, Anti-Federalist No. 33: Federal Taxation and the Doctrine of Implied Powers (Part II) (Brutus VI) (1787), in THE ANTI-FEDERALIST PAPERS, *supra* note 66, at 110, 112 (explaining the possibility that “a great number of officers must be employed, to take account of the cider made, and to collect the duties on it”); Anti-Federalist No. 66: “From North Carolina”; Debate During North Carolina Ratifying Convention, in THE ANTI-FEDERALIST PAPERS, *supra* note 66, at 262, 262 (Joseph Taylor: “I conceive that, if this Constitution be adopted, we shall have a large number of officers in North Carolina under the appointment of Congress. We shall undoubtedly, for instance, have a great number of tax-gatherers.”).

323. The Federal Farmer, Anti-Federalist No. 41-43 (Part I): The Quantity of Power the Union Must Possess Is One Thing; The Mode of Exercising the Powers Given Is Quite a Different Consideration (Federal Farmer XVII) (1788) [hereinafter Federal Farmer XVII], in THE ANTI-FEDERALIST PAPERS, *supra* note 66, at 148, 149.

324. See The Federal Farmer, Anti-Federalist No. 41-43 (Part II): The Quantity of Power the Union Must Possess Is One Thing; The Mode of Exercising the Powers Given Is Quite a
footnote continued on next page

dangerously vast federal power is not the only reason he describes a large number of federal officers. He also refers to “many thousand officers” involved in state revenue collection³²⁵—a word picture suggesting that “officer” did not connote some selective, especially significant position.

In contrast, James Madison in the Federalist Papers suggested that there would be relatively few federal officers. In particular, he wrote, “The number of individuals employed under the constitution of the United States, will be much smaller than the number employed under the particular states.”³²⁶ But this is in part because Madison believed the federal government was unlikely to play a primary role in governmental tasks like collecting internal revenue and therefore would have fewer positions to fill than the states.³²⁷ Even if the federal government established federal revenue collectors (as Part III below reports that it did in the First Congress), Madison still thought there would be at least “thirty or forty, or even more[, state] officers” for every one federal collector.³²⁸ This is because Madison believed that so many types of officials were “officers,” including “ministerial officers of justice.”³²⁹ Madison, like many other Founders, identified as “officers” numerous officials with relatively small roles.

Further, Alexander Hamilton explicitly conceded to the Anti-Federalists: “As to persons to be employed in the collection of the revenues, it is unquestionably true that these will form a very considerable addition to the number of federal officers”³³⁰ Hamilton contended merely that this should

Different Consideration (Federal Farmer XVIII) (1788) [hereinafter Federal Farmer XVIII], in THE ANTI-FEDERALIST PAPERS, *supra* note 66, at 156, 156 (“[A] federal head never was formed, that possessed half the powers which it could carry into full effect . . . as the one, the convention has proposed, will possess.”).

325. See Federal Farmer XVII, *supra* note 323, at 149.

326. THE FEDERALIST NO. 45 (James Madison), *supra* note 56, at 240.

327. See *id.* at 241 (“It is true that the confederacy is to possess, and may exercise[,] the power of collecting internal as well as external taxes throughout the states: but it is probable that this power will not be resorted to except for supplemental purposes of revenue; that an option will then be given to the states to supply their quotas by previous collections of their own; and that the eventual collection under the immediate authority of the union, will generally be made by the officers, and according to the rules appointed by the several states.”); see also *id.* (“The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite.”).

328. See *id.*

329. See *id.* at 240 (“The members of the legislative, executive, and judiciary departments of thirteen and more states; the justices of peace, officers of militia, ministerial officers of justice, with all the county, corporation, and town officers, for three millions and more of people, intermixed, and having particular acquaintance with every class and circle of people, must exceed beyond all proportion, both in number and influence, those of every description who will be employed in the administration of the federal system.”).

330. THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 56, at 450.

engender no opposition to the Constitution because federal revenue officers would simply replace state officers already collecting taxes.³³¹

Various Anti-Federalist and Federalist statements also provide an indication of some of the particular types of positions the writers understood to be “offices.” For example, Hamilton referred to clerks as having “offices.”³³² And the Federal Farmer provided a detailed list when explaining the extensive influence of “public officers” in our national system:

[T]hese necessary officers, as judges, state’s attornies, clerks, sheriffs, &c. in the federal supreme and inferior courts, admirals and generals, and subordinate officers in the army and navy, ministers, consuls, &c. sent to foreign countries; officers in the federal city, in the revenue, post office departments, &c. &c. must, probably, amount to several thousand, *without taking into view the very inferior ones.*³³³

Additional statements by Federalists and Anti-Federalists suggest that officers’ duties and responsibilities were not necessarily significant. For example, Madison referred to “the ministerial offices generally.”³³⁴ At least two Founding-era dictionaries define ministerial as “[a]ttendant; acting at command” or “[p]ertaining to ministers of state, or persons in subordinate authority.”³³⁵ Finally, in an essay discussing establishment of the federal capital city, the Federal Farmer suggested that the only nonofficer personnel category was that of “servant” or “attendant.”³³⁶ For example, he listed the three groups of people who would work in the capital city as the government’s “own members, officers, and servants.”³³⁷ He continued: “This city will not be established for productive labour, for mercantile, or mechanic industry; but for the residence of government, its officers and attendants.”³³⁸ If in fact the only nonofficers are servants or attendants, any official who does more than “wait[] or attend[] upon another” would be an officer.³³⁹

331. *See id.* at 449-50.

332. *See id.* (“It is evident that the principal departments of the administration under the present government, are the same which will be required under the new. There are now a secretary at war, a secretary for foreign affairs, a secretary for domestic affairs, a board of treasury consisting of three persons, a treasurer, assistants, clerks, &c.”).

333. Federal Farmer XIII, *supra* note 158, at 294 (emphasis added).

334. THE FEDERALIST NO. 39 (James Madison), *supra* note 56, at 195-96.

335. *See, e.g., Ministerial*, 2 JOHNSON, *supra* note 217; *see also* PERRY, *supra* note 112 (defining “ministerial” as “acting under authority”).

336. *See* Federal Farmer XVIII, *supra* note 324, at 162-63.

337. *Id.* at 162; *see also id.* at 163 (“[U]nder the confederation congress has no power whereby to govern its own officers and servant[s] . . .”).

338. *Id.* at 162.

339. *See, e.g., Servant*, DYCHE & PARDON, *supra* note 112 (defining “servant” as “any one that serves, waits, or attends upon another”); *see also Attendant*, DYCHE & PARDON, *supra* note 112 (defining “attendant” as “one who waits upon another”).

There is one statement in the Anti-Federalist essays appearing at first to suggest that the speaker believes that the “Officers of the United States” may be only those with important positions.³⁴⁰ The speaker expressed concern that congressmen would “appoint their friends to all offices.”³⁴¹ He then continued: “These officers will be great men, and they will have numerous deputies under them” who will “oppress me.”³⁴² The description “great men” connotes importance, but the reference to deputies suggests that the speaker believes there will be numerous additional government officials. Deputy positions were at times treated as “offices” during the Founding era—even though there were certain categories of deputies who were merely agents for Article II officers.³⁴³ Moreover, earlier in his statement the speaker had observed that “we shall have a large number of officers in North Carolina” such as “a great number of tax-gatherers,” further suggesting his belief that the group of federal officers would be large and include more mundane positions.³⁴⁴

E. Correspondence and Writings from Founding-Era Figures

Scholars are developing COFEA,³⁴⁵ a corpus that will contain diaries, letters, legal documents, and other materials providing examples of written and spoken English during the Founding era.³⁴⁶ The corpus is not yet complete, but for the benefit of this Article its developers provided an advance of more than 16,000 files specifically formatted for empirical analysis in corpus linguistics software. These files contain letters, speeches, memoranda, and other writings from 1783 to 1789 downloaded from the papers of John Adams, Benjamin Franklin, Alexander Hamilton, Thomas Jefferson, James Madison, and George Washington, all available at the National Archives site *Founders Online*.³⁴⁷ Although these documents represent a small portion of the files that

340. See Anti-Federalist No. 66, *supra* note 322, at 263 (excerpting a statement by Joseph Taylor during the North Carolina Convention).

341. *Id.*

342. *Id.*

343. See *infra* Part III.B.

344. See Anti-Federalist No. 66, *supra* note 322, at 262; *supra* note 322 (discussing this tax-gatherers reference).

345. See *supra* text accompanying note 133.

346. See, e.g., Phillips et al., *supra* note 124, at 31 (describing Brigham Young University Law School’s efforts to build COFEA, a corpus of Founding-era materials from 1760 to 1799); see also Lee & Mouritsen, *supra* note 124 (manuscript at 39 & n.175) (describing efforts to develop COFEA and explaining the difficulties inherent in creating a Founding-era corpus).

347. The original source for these files was *Founders Online*, NAT’L ARCHIVES, <https://perma.cc/KM2L-GWNW> (archived Nov. 12, 2017). Developers and scholars working with the Brigham Young University Law School to develop COFEA downloaded the files from *Founders Online* and formatted them for use in corpus
footnote continued on next page

will be available once the new corpus database is complete, these documents provide a helpful sampling of real-world written communication around the time of the Constitution’s ratification. As such they provide additional insight into the original public meaning of “officer.”

In particular, these files confirm that there was little Founding-era discussion indicating that “Officers of the United States” was a new term of art. These more than 16,000 files constitute a corpus containing close to 7.7 million words.³⁴⁸ The files contain a total of 5897 uses of the terms “office(s)” and “officer(s)”—showing how common those terms were at the time.³⁴⁹ For comparison purposes, this group of files contains 81,069 distinct words.³⁵⁰ Among that set of words, the word “office” ranked 301st in the frequency of its use in the corpus, occurring 2820 times—right around the frequency of words like “commerce” and “liberty.”³⁵¹ If one were to combine the terms “office(s)” and “officer(s)” and count all of their 5897 uses as if the four terms represented one word, the combined uses would appear about as frequently as such common words as “its” and “America.”³⁵² In stark contrast, the corpus contained only ten uses of the phrase “officer(s) of the United States.”³⁵³ Finally, examining the “collocates”³⁵⁴ appearing in close proximity to the terms “officer(s)” and “office(s)” indicated that “officer” was associated with numerous terms that do not necessarily connote significant responsibility or authority. The list of the top twenty terms that most frequently directly preceded the terms “officer(s)” and “office(s)” included “auditors,” “registers,” “loan clerks,”

linguistics analytical software. The COFEA developers downloaded these files in fall 2015, so the files do not reflect any materials that may have been added to the *Founders Online* site after that time. For instructions about how to access a copy of the files for replicating my findings in this Subpart, see Methodological Supplement, *supra* note 131, at 1.

348. See Methodological Supplement, *supra* note 131, at 7.

349. See *id.* at 6.

350. See *id.* at 7.

351. See *id.*

352. See *id.* at 8.

353. See *id.* at 9. All ten uses occurred during the drafting or ratification debates or in the Federalist Papers and therefore were duplicates from this Article’s earlier analysis. See *id.* at 9 & n.22 (explaining how to access the spreadsheet identifying the origin of each of the files appearing in the corpus). Four additional uses of the phrase occurred as part of the proper noun “Loan officer of the United States” or “Loan officer of the U.S.” See *id.* at 9.

354. See generally D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1523-25, 1523 nn.28-29 (discussing the study of collocation as a tool to help analyze which words and concepts are most strongly associated with the underlying term the researcher is studying).

“ministerial,” “surveyors,” and “subordinate.”³⁵⁵ Examining the words appearing most frequently with the term under review “provides helpful clues to the [term’s] meaning and usage” by indicating which terms have a particularly strong association with the underlying term.³⁵⁶

F. Is Corpus Analysis Relevant for Widely Used, Open-Ended Constitutional Terms?

As the above corpus analysis indicates, the terms “officer” and “office” were very widely used in the late eighteenth century.³⁵⁷ One might question, because they were such common words, why an interpreter would place any great constitutional significance on their everyday use. Perhaps the Framers meant to use the word “officer” in a kind of special legal sense in the Appointments Clause, whereas some of the documents this Article examines, like newspaper articles and letters, might just use an ordinary sense of the term.

As described above, however, there just is no significant evidence affirmatively suggesting that the Framers intended to use the specific word “officers” in any special sense within the Appointments Clause. The weight of the evidence suggests that the full phrase “Officers of the United States” was not a newly created term of art denoting a particularly important group of officers.³⁵⁸ There simply is no discussion in the typical Founding-era sources indicating that the phrase was supposed to change the otherwise typical meaning of the standalone word “officers.”³⁵⁹ Moreover, the eighteenth century legal dictionary entries for the term “officer” describe a term with just

355. Ranked according to the terms’ statistically significant co-occurrence, rather than according to the actual number of uses of each word combination, the top twenty collocates appearing one word prior to the terms “officer(s)” and “office(s)” are: “subaltern,” “carmarthens,” “naval,” “commanding,” “bons,” “auditors,” “registers,” “loan,” “clerks,” “artillery,” “post,” “revolutionary,” “ministerial,” “surveyors,” “commissioned,” “brave,” “senior,” “insurance,” “subordinate,” and “printing.” See Methodological Supplement, *supra* note 131, at 10. This list includes only those collocates with a minimum frequency of five—meaning it ranks only the words that immediately precede officer at least five times within the corpus. Further, the collocates are ranked according to a statistical measure of how frequently they co-occur with the studied terms rather than by the raw frequency with which they occur. Ranking the collocates according to raw frequency would have caused the search results to be weighted heavily toward everyday words like “the” or “an.” See *id.* at 11 (showing the ranking of collocates according to number of uses with no weighting based on statistical significance).

356. See Núñez, *supra* note 354, at 1523-24.

357. See *supra* notes 349-52 and accompanying text (discussing the frequency of use of the terms “office” and “officer” in comparison to other common words).

358. See *supra* Part II.A.2.

359. See *supra* Parts II.C-E.

as broad and encompassing a scope³⁶⁰ as the typical ordinary language dictionary meaning of “officer.” Further, even if the word “officer” were to have been used differently by learned lawyers of the age than by the average member of the public,³⁶¹ many of the sources this Article examines most closely are legal sources. And the uses of the words “officer” and “office” in even those specialized sources substantially suggest that the term included anyone responsible for carrying out a continuing governmental duty.

The entire enterprise of ordinary public meaning analysis suggests that interpreters should expect at least some terms in the Constitution to be used in the typical sense in which the public would have understood those terms.³⁶² Other brands of historical constitutional interpretive approaches, such as “original methods originalism,”³⁶³ also acknowledge that numerous constitutional terms may have just the same meaning in that legal document as they have in ordinary usage.³⁶⁴ Not all terms in a legal document necessarily are specialized legal terms. If the eighteenth century term “officer” was very broad in scope, and the evidence surrounding the structure and text of the Constitution suggests that the document employed the word in no special legal sense, then the weight of the evidence indicates that the constitutional use in fact imported the far-reaching ordinary meaning of the term.

III. Confirmatory Evidence from Practice During the First Congress

Examining how the First Congress implemented the Constitution³⁶⁵ confirms the evidence that the original public meaning of “officer” is anyone with ongoing responsibility for a statutory duty. In contrast to the modern “significant authority” analysis, lower-level officials responsible for

360. See, e.g., 3 BACON, *supra* note 218, at *719 (characterizing a “Public Officer” as one with a duty even “where his Authority is confined to narrow Limits”); see also *supra* Part II.B.1.b (analyzing legal dictionaries’ definitions of “officer”).

361. Cf. McGinnis & Rappaport, *supra* note 25, at 4 (contending that because “the Constitution is written, like many other documents with legal force, in the language of the law,” understanding it completely “requires legal as well as ordinary linguistic knowledge”).

362. See Lawrence B. Solum, Essay, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 275-76 (2017) (observing that “[t]he key idea” of public meaning originalism “is that the participants in the complex process of authorship intended to make the communicative content of the constitutional text accessible to the public” even though the document also contains many terms and phrases with special legal meanings).

363. See McGinnis & Rappaport, *supra* note 25, at 60.

364. See *id.* at 4-5.

365. Cf., e.g., Volokh, *supra* note 3, at 774-75 (“The practices of the First Congress are often considered to be of extra importance in constitutional interpretation because they reflect the understanding of the Framers and the public at the time of the Founding.”).

performing nondiscretionary governmental duties created by statute apparently were considered “officers.” This was true even where the statute did not explicitly specify which official had to perform the duty. If the official had responsibility for completing a duty that Congress by statute required the executive branch to perform, the official was selected in accordance with Article II and thereby treated as an “officer.”³⁶⁶

For example, clerks maintaining statutorily required records were selected in conformity with Article II even though statutes assigned the recordkeeping requirements generally to an executive department or to a higher-level officer.³⁶⁷ In contrast, positions such as office-keeper and messenger apparently were not Article II offices. Such positions appeared on federal civil payroll lists or in other early documentary records,³⁶⁸ but no federal statute specifically required completion of the tasks in which these officials engaged.³⁶⁹

366. Because the First Congress engaged in next to no debate about the officer status of particular officials, Congress did not specify that it felt *constitutionally* compelled to require Article II selection procedures when it chose to do so by statute. That is, it’s possible that Congress may have voluntarily chosen to require a department head to hire a particular official even though it did not believe that the official was an inferior officer. Nonetheless, the First Congress’s use of Article II selection procedures for many officials below the level of modern officers is persuasive evidence that Article II requires appointment procedures to apply to a much wider range of contemporary officials than we apply them to today. The practice of the First Congress, in conjunction with numerous Founding-era descriptions of low-level officials as “officers,” strongly suggests that the category of inferior officers extends far beyond just those with “significant authority.”

367. *See infra* Part III.A.

368. *See, e.g.*, Alexander Hamilton, U.S. Sec’y of the Treasury, List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending October 1, 1792 (1793), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 57 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834) [hereinafter Hamilton, 1792 Civil Officer List] (listing messengers and office-keepers); *see also* 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 exhibits K-O, Citizens for Responsibility & Ethics in Wash. v. Trump, No. 17 Civ. 458 (GBD), 2017 WL 6524851 (S.D.N.Y. Dec. 21, 2017) (reproducing scanned versions of excerpts of the original handwritten lists of “persons holding civil offices or employments under the United States” submitted on behalf of Secretary Hamilton to the Senate); Alexander Hamilton, U.S. Sec’y of the Treasury, Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States (1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 157, 157-59 (Harold C. Syrett ed., 1969) (reproducing Hamilton’s transmittal letter for these lists).

369. *See infra* notes 409-11 and accompanying text. The tasks performed by these nonofficers, such as arranging newspapers or delivering information from one location to another, *see infra* notes 403-08 and accompanying text, appear to be merely incidental to the tasks Congress assigned to the executive branch by statute. No statute “established” the positions of messenger or office-keeper or required the President or department heads to appoint them.

One category of government official that did not fit this pattern was that of deputy positions created by the First Congress. Deputies engaged in tasks established by statute such as authorizing merchant ships to enter ports.³⁷⁰ But they were hired by the primary officer under whom they served without the approval of any department head—not in accordance with the Appointments Clause.³⁷¹ The most probable reason for this apparent exception is that the law viewed these deputies as the mere representatives, or agents, of the primary officers who both appointed them and faced *personal legal liability* for their misdeeds.³⁷² The treatment of these deputies as nonofficers confirms the second prong of the original meaning of “officer” as one with *responsibility* for a governmental duty.

This Part explores the contours of the dividing line between Article II-appointed officers and nonofficers in the First Congress by sketching an outline of the first executive branch agencies and identifying officials on federal payroll lists or other documentary records who were not appointed in compliance with Article II.³⁷³ In researching this Part, I examined every statute enacted by the First Congress to identify the appointment procedures for each position established by those acts. I then cross-referenced these positions with personnel expenditures identified by Secretary of the Treasury Alexander Hamilton in his reports to Congress.³⁷⁴ This enabled me to identify those individuals who received federal funds either (i) without undergoing appointment by one of the four Article II procedures or (ii) without serving in a position “established by Law.”³⁷⁵ Article II requires that any “Officer[.]” position be both subject to one of the appointment mechanisms specified in

370. See *infra* notes 425-27 and accompanying text.

371. See *infra* notes 423-24 and accompanying text.

372. See *infra* notes 430-33 and accompanying text.

373. Article II requires both that (i) a statute “establish[.]” the existence of a particular position and that (ii) a department head, a court, or the President (sometimes with Senate advice and consent) appoint the officer. See U.S. CONST. art. II, § 2, cl. 2.

374. For Hamilton’s reports, see Alexander Hamilton, U.S. Treasury Dep’t, Public Credit (1790), in 1 AMERICAN STATE PAPERS: FINANCE 15, 33-36 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832) [hereinafter Hamilton, 1790 Report]; Alexander Hamilton, U.S. Treasury Dep’t, Estimates for 1791 (1791), in 1 AMERICAN STATE PAPERS: FINANCE, *supra*, at 82 [hereinafter Hamilton, 1791 Report]; and Hamilton, 1792 Civil Officer List, *supra* note 368. Hamilton’s 1792 list described two executive branch entities—the Department of the Mint and the Office of the Commissioner of the Revenue—that Congress did not establish until the Second Congress in 1792. See Hamilton, 1792 Civil Officer List, *supra* note 368, at 58-59; see also Act of May 8, 1792, ch. 37, § 6, 1 Stat. 279, 280-81 (amended 1803) (establishing the Office of the Commissioner of the Revenue); Coinage Act of 1792, ch. 16, § 1, 1 Stat. 246, 246 (amended 1794) (establishing the Mint).

375. U.S. CONST. art. II, § 2, cl. 2.

Article II and “established by Law.”³⁷⁶ So if either of those requirements was not followed in creating a governmental position, that omission suggests that the First Congress did not believe that the position constituted an Article II office.³⁷⁷ Identification of lower-level federal positions filled in compliance with Article II and created by Congress “by Law,” contrasted with others not subject to Article II, offers meaningful evidence of the First Congress’s understanding of the dividing line between officer and nonofficer.

A. Typical Executive Departmental Structure

The First Congress created only three major executive departments³⁷⁸—the Department of War,³⁷⁹ the Treasury Department,³⁸⁰ and the Department

376. *See id.* The Constitution uses the term “Law” in at least two different ways. For example, the Supremacy Clause states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .” *Id.* art. VI, cl. 2. The clause’s first reference to “Laws” refers to statutes made pursuant to the lawmaking procedures prescribed in Article I, Section 7. *See id.* art. I, § 7, cl. 2. The second reference, to “supreme Law,” clearly has a broader scope—referring back to the Constitution, statutes, and treaties. So for example, ambassadors arguably might be a category of “Officers of the United States” provided for directly “by Law” in the text of the Constitution itself. *See id.* art. II, § 2, cl. 2 (directly authorizing the appointment of certain officers like “Ambassadors” and “other public Ministers and Consuls”). Nonetheless, in the vast majority of cases, “Officers of the United States” are “established by Law” by Congress via constitutionally mandated procedures. *See infra* Parts III.A-D (describing the First Congress’s creation of the executive branch along with the establishment of its officers). The absence of any statutory authorization for a particular position means that the position has not been created pursuant to Article II procedures and thus is unconstitutional if it falls within the scope of the Article II term “officers.”

377. This Part incorporates the assumption that as the Congress closest to constitutional ratification, the First Congress would have had a better sense than twenty-first century interpreters of who qualified as an officer under the eighteenth century meaning of that term. Also, this Article assumes that the First Congress likely would have tried to comply with the Constitution that had just been ratified. Therefore, this Article considers the dividing line between those positions the First Congress treated as offices and those it did not as at least informative evidence of the meaning of “officer” at that time. It is not dispositive evidence—even members of the Founding generation held what turned out to be mistaken views on aspects of the Constitution. *See Maggs, supra* note 318, at 837 (indicating that Hamilton and Madison made “some mistakes” in their statements in the Federalist Papers). But the earliest practice, in conjunction with the linguistic evidence in Part II above, provides significant evidence relevant to the likely meaning of the Appointments Clause at the time of ratification.

378. The First Congress authorized numerous other officers and administrative entities like multimember commissions, *see infra* Parts III.B-E, but there were only three executive departments. *See* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 42 (1997); *see also* Act of Sept. 11, 1789, ch. 13, § 2, 1 Stat. 67, 68 (amended 1792) (establishing maximum salaries for clerks in the three departments).

379. *See* Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (amended 1798).

380. *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (amended 1791).

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of Foreign Affairs,³⁸¹ soon renamed the Department of State.³⁸² At the time, the central offices of these departments included relatively few officials.³⁸³ Each department followed a similar pattern.³⁸⁴ Congress provided for a department head³⁸⁵ whom the President appointed with the Senate’s advice and consent.³⁸⁶ Congress then authorized the Secretary, or department head, to hire several clerks. One clerk in each department was to be the chief clerk, a fairly significant position that involved having charge over departmental records in the event of a vacancy in the position of Secretary.³⁸⁷ (This position was titled “assistant secretary” in the Treasury Department.)³⁸⁸ Congress also specifically authorized the “heads of the three departments” to “appoint” such additional clerks “as they shall find necessary.”³⁸⁹

Analysis of these rank-and-file clerks is highly relevant to identifying the scope of Article II. Congress provided for department-head appointments to these clerk positions, suggesting that Congress considered the clerks to be

381. See Act of July 27, 1789, ch. 4, 1 Stat. 28 (amended 1789).

382. See Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68, 68 (amended 1799).

383. See WHITE, *supra* note 263, at 199 (noting that field service officials “far outnumbered those in the central establishment”); Hamilton, 1792 Civil Officer List, *supra* note 368, at 57-59 (listing, in contrast to the larger number of officials out in the field, fewer than 200 total officials in the central offices of the three executive departments established by the First Congress).

384. That said, the Treasury Department was broader in scope than the other two executive departments. In addition to the position of Secretary, the Treasury’s organic act also created the positions of Comptroller, Auditor, Treasurer, and Register—all of whom had their own clerks, appointed by the Secretary. See Act of Sept. 2, 1789, §§ 1, 3-6, 1 Stat. at 65-67 (creating these offices and prescribing their duties); Act of Sept. 11, 1789, ch. 13, § 2, 1 Stat. 67, 68 (amended 1792) (granting department heads the authority to appoint each department’s clerks); Hamilton, 1792 Civil Officer List, *supra* note 368, at 57-58 (listing clerks under the Secretary of the Treasury as well as clerks apparently working for each of the other four key Treasury officers).

385. See Act of Sept. 2, 1789, § 1, 1 Stat. at 65 (Treasury); Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 49-50 (amended 1798) (War); Act of July 27, 1789, § 1, 1 Stat. at 28-29 (Foreign Affairs).

386. See S. EXEC. JOURNAL, 1st Cong., 1st Sess. 25 (1789) (recording nominations for Secretary of the Treasury and Secretary of War made on September 11, 1789).

387. See Act of Aug. 7, 1789, § 2, 1 Stat. at 50 (War); Act of July 27, 1789, § 2, 1 Stat. at 29 (Foreign Affairs); *cf.* Act of Sept. 2, 1789, §§ 1, 7, 1 Stat. at 65, 67 (establishing an “Assistant” to the Secretary of the Treasury, appointed by the Secretary, who, instead of a chief clerk, would keep charge of department records if the position of Secretary were vacant).

388. See Act of Sept. 2, 1789, §§ 1, 7, 1 Stat. at 65, 67; see also Hamilton, 1792 Civil Officer List, *supra* note 368, at 57 (listing an “assistant secretary”).

389. Act of Sept. 11, 1789, § 2, 1 Stat. at 68.

Article II officers.³⁹⁰ But Hamilton’s annual appropriations reports also list the distinct positions of “copyist” and “messenger/office-keeper,” which were not established by statute.³⁹¹ The absence of statutory authorization for the copyists and messengers/office-keepers indicates that Congress believed that they were not officers; the Constitution requires that all offices be “established by Law.”³⁹² The dividing line between departmental clerks and nonofficer messengers thus helps outline the contours of Article II’s scope.

In contrast to modern law that associates officer status with “discretion,”³⁹³ evidence indicates that many late eighteenth century clerks had duties involving little or no discretion.³⁹⁴ For example, the Treasury Department employed two clerks “to count and examine the old and new emissions of continental money.”³⁹⁵ Hamilton also included on his list of estimated expenditures for 1791 one clerk responsible “for keeping the accounts of the registers of ships.”³⁹⁶ One clerk working for the Register of the Treasury was responsible for “filling up certificates for signature of the several kinds of stock and transfers.”³⁹⁷ And Hamilton’s report identified several registry clerks responsible for areas such as (i) “the accounts and books of the revenue”; (ii) “the books of the General Loan Office, and the several State Loan Offices”; (iii) “the interest accounts on the registered debt”; and (iv) “the books, transfers, &c. of . . . deferred stock.”³⁹⁸

In addition, some of the appointed clerks had duties that did not directly affect third-party rights, seemingly putting these clerks outside the scope of the

390. *Cf.* *United States v. Germaine*, 99 U.S. 508, 511 (1879) (implying that it has been “very well understood” that executive department clerks are Article II officers and thus must be appointed by the heads of their executive departments).

391. *See, e.g.*, Hamilton, 1791 Report, *supra* note 374, at 84 (copyist); Hamilton, 1792 Civil Officer List, *supra* note 368, at 57-59 (messenger and office-keeper).

392. *See* U.S. CONST. art. II, § 2, cl. 2; *see also supra* notes 376-77 and accompanying text.

393. *See supra* text accompanying notes 80-82.

394. *See, e.g.*, Hamilton, 1790 Report, *supra* note 374, at 34 (listing twelve clerks who “have the settlement of the accounts [sic] which arose under the Confederation, in the quartermaster, commissary, clothing, hospital, and marine departments, and ordnance stores”).

395. *See* Hamilton, 1791 Report, *supra* note 374, at 83.

396. *See id.* at 83-84.

397. *See id.* at 83.

398. *See id.*; *see also id.* (listing under the Register: “One for the books of the registered debt, or unsubscribed stock, transfers, &c.”); *id.* at 84 (listing Board of Commissioners clerks (i) “employed in arranging and liquidating the charges of individual States for disbursements made in the quartermaster’s, commissary’s, clothing, &c. &c. departments” and (ii) “employed on the accounts of depreciation and militia of the respective States”).

OLC’s “officer” definition.³⁹⁹ For example, Hamilton recorded salary payments for two clerks whose duties included “transcribing” and maintaining “the old treasury books.”⁴⁰⁰ In addition, one Treasury Department clerk in 1790 was engaged in “journalizing and posting into the Ledger” of the agency’s “principal books.”⁴⁰¹ Another Treasury Department clerk that year “cop[ied] fair statements of the public accounts and other transcripts, as required, from the treasury books.”⁴⁰²

So if many officer clerks engaged in nondiscretionary duties or duties that did not immediately affect third-party rights, what distinguished their duties from those of the nonofficer messengers and office-keepers? For one thing, messengers and office-keepers and the Treasury Department’s “copyist for taking receipts”⁴⁰³ may just have engaged in tasks that were more minute and inconsequential than a clerk’s responsibilities. A “copyist,” for example, may have been tasked with transcribing a document “word for word.”⁴⁰⁴ “Messengers” were defined to be those “who carri[e]d an errand” or came “from another to a third.”⁴⁰⁵ A State Department document on file at the National Archives sheds further light on the job description of messengers, at least as of the early nineteenth century.⁴⁰⁶ It assigned one assistant messenger to “putting up and packing despatches and other papers for transmission by mail” and “arranging and preserving the newspapers, and the printed copies of the laws and documents of Congress.”⁴⁰⁷ It specifically prohibited any messengers from performing tasks reserved to clerks.⁴⁰⁸

That said, if the only distinction between the officer clerks and the nonofficer messengers is that the messengers’ tasks were just one step less

399. See *supra* notes 95-97 and accompanying text.

400. Hamilton, 1791 Report, *supra* note 374, at 84.

401. Hamilton, 1790 Report, *supra* note 374, at 34.

402. *Id.*

403. See Hamilton, 1791 Report, *supra* note 374, at 84.

404. See *Copy*, BARCLAY, *supra* note 217 (defining “to copy” as “to transcribe a writing or book word for word”); *Copyist*, 1 WEBSTER, *supra* note 236 (defining “copyist” as “[o]ne who copies; . . . a transcriber”); see also *Copy*, 1 WEBSTER, *supra* note 236 (defining the verb form of “copy” as “[t]o write, print, or engrave, according to an original; to form a like work or composition by writing, printing or engraving; to transcribe”).

405. See, e.g., *Messenger*, 2 JOHNSON, *supra* note 217.

406. Louis McLane, *The Following Arrangement of the Gentlemen Employed, the Distribution of Their Duties, and Rules for Their Performance, Are Directed to Be Observed in the Department of State, from and After the 30th June, 1833* (1833), *microformed on M800, Roll 1, Vol. 1A* (Nat’l Archives & Records Serv.).

407. *Id.* at 5.

408. See *id.* The document earlier had described these clerk tasks as including actions such as entering State Department communications into “the Register of letters,” forwarding dispatches to Consuls and Ministers, and writing letters. See *id.* at 4-5.

consequential, this would present a line-drawing problem similar to the modern difficulty with identifying which tasks involve the exercise of “significant authority.” But there is an additional meaningful and legally significant distinction between the jobs performed by the messengers and the tasks done by clerks and other officers. Officers engaged in tasks assigned to the executive branch by law through statute; messengers engaged in tasks that no statute required the executive branch to perform.⁴⁰⁹

In contrast to the messengers, for example, the eighteenth century executive department clerks engaged in formal recordkeeping procedures that were necessitated by statute. The statutory code did not precisely specify that it was the clerks who had to serve as recordkeepers.⁴¹⁰ But the tasks the clerks in fact carried out were part of implementing statutory recordkeeping mandates.⁴¹¹ For example, one of the Register’s clerks kept “the accounts of the registers of ships” required by the act “for registering vessels [and] regulating the coasting trade.”⁴¹² Under that act, among other requirements, ships built in the United States “belonging wholly or in part to the subjects of foreign powers” had to be “recorded in the office of the collector of the district in which such ship or vessel was built.”⁴¹³ Customs collectors then had to give a certificate to the ship’s master, record the certificate, and send a duplicate of the certificate to the Secretary of the Treasury “to be recorded in his office.”⁴¹⁴ The certificate granted by the collector, and bearing his seal,⁴¹⁵ qualified the ship as

409. *Cf.*, e.g., Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154 (repealed 1799) (providing for the collection of import duties); Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (amended 1791) (establishing the Treasury Department); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (amended 1798) (establishing the Department of War); Act of July 27, 1789, ch. 4, 1 Stat. 28 (amended 1789) (establishing the Department of Foreign Affairs). These acts represent several examples of key statutes from the First Congress assigning tasks to the executive branch or providing for the organization of executive departments. None of these statutes describes or specifically assigns to the executive branch responsibility for conducting the tasks performed by the messengers, see *supra* text accompanying notes 403-08.

410. *See*, e.g., Act of Sept. 1, 1789, ch. 11, §§ 16-17, 1 Stat. 55, 59 (repealed 1792) (requiring recordkeeping without assigning a specific official to the task).

411. *See*, e.g., Hamilton, 1791 Report, *supra* note 374, at 84 (listing two clerks as responsible for “registering and keeping the books and accounts of certificates . . . loaned under the act making provision for the debt of the United States”).

412. *Id.* (paraphrasing the title of the September 1, 1789 act); *see* Act of Sept. 1, 1789, 1 Stat. at 55 (“An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes . . .”).

413. *See* Act of Sept. 1, 1789, § 16, 1 Stat. at 59.

414. *See id.* §§ 16-17, 1 Stat. at 59 (requiring the Secretary’s office to record the duplicates of the relevant certificates without specifying that the Secretary’s clerks were the particular officials who were to keep those records).

415. *Id.* § 17, 1 Stat. at 59.

having been “recorded in pursuance of the act.”⁴¹⁶ Consequently it seems that the duplicate recording by the Secretary’s office did not change the legal registration status of foreign-owned ships. Nonetheless the statute imposed a requirement, or duty, on the Secretary’s office to keep a copy of the registration records.

Concluding that clerks were officers because they maintained responsibility for duties necessitated by statute is consistent with the original meaning of the term “officer.” As one congressman explained in the Fifth Congress, the term “office” “is derived from the Latin word *officium*, which signifies duty, charge, or employment.”⁴¹⁷ Therefore, the congressman concluded, an “office” is “a post, place, or employment, which requires the performance of some duty of a public nature.”⁴¹⁸ The level of significance of the duty is irrelevant.⁴¹⁹ “Wherever a man holds a place which requires from him the performance of a duty of a public nature,” the congressman explained, “we call him an officer.”⁴²⁰ Further, “There can be no doubt,” in the “common and received application” of the term “officer,” that “it includes *all* persons holding posts which require the performance of *some* public duty.”⁴²¹ The connection between officer status and the concept of *statutory* duties in particular comports with the text of the Appointments Clause, which provides that Congress must establish offices “by Law.”⁴²²

B. Deputies

One additional type of government official the First Congress treated as a non-Article II officer was the category of deputy official. The First Congress authorized marshals, collectors, naval officers, and surveyors to appoint their own deputies.⁴²³ The marshals, collectors, naval officers, and surveyors do not

416. See *id.* § 20, 1 Stat. at 60 (requiring ship masters to “produce the certificate” itself to entitle the ship to the privileges of recorded vessels); see also *id.* § 18, 1 Stat. at 59-60 (referring to collectors as the officials granting the certificates of record).

417. See 8 ANNALS OF CONG. 2304 (1799) (statement of Rep. Harper) (delivering remarks during a debate regarding the William Blount impeachment); see also *supra* note 132.

418. 8 ANNALS OF CONG. 2304 (1799) (statement of Rep. Harper).

419. *But see* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); Tucker v. Comm’r, 676 F.3d 1129, 1133 (D.C. Cir. 2012).

420. 8 ANNALS OF CONG. 2305 (1799) (statement of Rep. Harper).

421. *Id.* (emphasis added).

422. See U.S. CONST. art. II, § 2, cl. 2; see also MASHAW, *supra* note 34, at 63 (“Every instance of administrative authority was a delegation from Congress . . .”).

423. See Act of Aug. 4, 1790, ch. 35, § 7, 1 Stat. 145, 155 (repealed 1799) (authorizing collectors, naval officers, and surveyors, “in cases of occasional and necessary absence, or of
footnote continued on next page”).

appear to have been heads of any department,⁴²⁴ so their deputies were not appointed through Appointments Clause procedures.

As deputies for officers like marshals and customs collectors, these officials would have engaged in acts that significantly affected the rights of nongovernmental parties. For example, marshals had the power to appoint deputies to assist them in their duties, which included maintaining custody over federal prisoners.⁴²⁵ Collectors had authority to grant permits for ships to unload imported goods, and a collector could authorize a deputy to perform this function in the collector’s “occasional and necessary absence.”⁴²⁶ Collectors, naval officers, surveyors, and their “occasional and necessary” deputies could also board and search ships and open and examine packages when they suspected customs-related fraud.⁴²⁷

Therefore, these deputies at times carried out governmental duties that would seem to place them within the scope of the original meaning of the

sickness,” to “respectively exercise and perform their several powers, functions and duties, by deputy duly constituted under their hands and seals respectively,” indicating that collectors held positions superior to those of other officers); Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (authorizing marshals to appoint deputies “as there shall be occasion”).

424. See Judiciary Act of 1789, § 27, 1 Stat. at 87 (authorizing the appointment of marshals without suggesting that the marshals are part of any executive department); *infra* notes 502-07 and accompanying text (demonstrating that collectors were unlikely to have been considered department heads because collectors were apparently seen as falling under the supervision of the Secretary of the Treasury); *cf.* Act of Aug. 4, 1790, § 5, 1 Stat. at 153-54 (authorizing collectors to take the oaths of the other customs officers in their districts, indicating that collectors held positions superior to those of other officers); *id.* § 6, 1 Stat. at 154-55 (subjecting the surveyor to the “control of the collector”); Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65 (amended 1791) (authorizing the Secretary of the Treasury—as opposed to the collector—to “superintend the collection of the revenue”); WHITE, *supra* note 263, at 120-23 (describing customs collections as under the Treasury Department’s authority).
425. See Judiciary Act of 1789, § 27, 1 Stat. at 87 (“[A] marshal shall be appointed . . . to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies . . .”); *id.* § 28, 1 Stat. at 87-88 (referring to prisoners in the custody of a marshal); see also *United States v. Mundell*, 27 F. Cas. 23, 24 (C.C.D. Va. 1795) (No. 15,834) (involving a federal defendant resisting a deputy marshal’s attempt to take him into custody).
426. See Act of Aug. 4, 1790, § 1, 1 Stat. at 152 (authorizing collectors to grant permits for ships to unload their goods); *id.* § 7, 1 Stat. at 155 (“[E]very collector, naval officer and surveyor, in cases of occasional and necessary absence, or of sickness, and not otherwise, may respectively exercise and perform their several powers, functions and duties, by deputy duly constituted under their hands and seals respectively, for whom in the execution of the trust they shall respectively be answerable.”).
427. See *id.* § 31, 1 Stat. at 164 (authorizing collectors, naval officers, surveyors, and other officers to enter ships for inspections).

Article II term “officer.”⁴²⁸ And their acts more directly affected third parties than did the ministerial acts of lower-level officers like clerks.⁴²⁹ So why did Congress provide for their appointment by the primary official they represented rather than following a selection method explicitly listed in Article II?

One possible explanation is that deputies were not considered to be officers of their own accord. Instead, in several ways congressional statutes treated the deputies as merely agents—or representatives—of the primary Article II officer who had appointed them. In particular, the primary officers represented by deputy marshals and deputy customs officials could be held personally liable for their deputies’ misdeeds.⁴³⁰ Congressional statutes making primary officers answerable for their deputies may suggest that deputies authorized by the First Congress were not officers because their appointing officers remained the ones directly liable to private parties for proper performance of their governmental duties.

1. Deputy customs officials

The statute authorizing customs officers to hire deputies indicated that deputies did not acquire their own duties. They served just as a vehicle for primary officers to exercise their own powers. Deputies acted “under the[] hands and seals” of primary officers who were “answerable” for the deputies’ execution of the officers’ trust.⁴³¹

The collections act even more particularly addressed customs collectors and their deputies. If a collector became disabled or died, the collector’s duties would devolve on his deputy,⁴³² but the primary officer remained responsible

428. See *supra* Part II (describing officers as responsible for a governmental duty).

429. Because the deputies at times engaged in actions directly affecting third-party rights, these officials would also appear to come within the OLC’s 2007 standard for defining officers. See *supra* notes 93-95 and accompanying text.

430. See MASHAW, *supra* note 34, at 36-38 (noting that “Congress presumed that a common law action would lie [against collectors] for any improper seizure or excessive duties charged,” but officials could plead relevant statutory authority “as a defense”); *id.* at 76 (“Federalist practice turns . . . contemporary understandings inside out. Actions were personal, against the individual; damages were a normal remedy, and office-holding carried no special immunity from suit.”). For an in-depth explanation of the early framework for holding federal officials accountable through judicial review, see *id.* at 73-78.

431. See Act of Aug. 4, 1790, § 7, 1 Stat. at 155.

432. See *id.* § 8, 1 Stat. at 155 (“[T]he authorities of the persons hereby empowered to act in the stead of those who may be disabled or dead, shall continue until successors shall be duly appointed . . .”).

for his deputy’s conduct. The estate of a disabled or deceased collector could be held liable for the deputy’s missteps.⁴³³

2. Deputy marshals

In contrast to the deputy customs positions, several facets of the deputy marshal position made it seem somewhat more like an Article II officer position. For example, the Judiciary Act of 1789 required each deputy marshal, along with the marshals, to take an oath that the deputy would faithfully perform the duties of “the *office* of . . . marshal’s deputy.”⁴³⁴ As such, this oath provision directly refers to the deputy marshal position as an office and suggests that the deputies on some level maintain their own duties. A statute enacted by the Second Congress in 1792 similarly refers to the marshals and their deputies as having “powers” in executing federal law.⁴³⁵ Moreover, although marshals hired their own deputies, the deputies were removable by district court judges⁴³⁶—suggesting that the deputies had their own identity and their own measure of accountability apart from the primary marshals.⁴³⁷

That said, distinct from the oath-related statutory language suggesting that deputy marshals had their own duties, other language in the relevant statutory provisions indicates instead that at bottom the deputies were in fact carrying out the marshal’s duties. For example, the Judiciary Act indicated that marshals had the power to hire deputies to acquire assistance in executing their duties.⁴³⁸

433. See *id.* (“[I]n case of the disability or death of a collector, the duties and authorities vested in him shall devolve on his deputy . . . (for whose conduct the estate of such disabled or deceased collector shall be liable) . . .”).

434. See Ch. 20, § 27, 1 Stat. 73, 87 (emphasis added) (requiring marshals and their “deputies, before they enter on the duties of their appointment” to take a prescribed “oath of office”).

435. Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (repealed 1795) (“[T]he marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.”).

436. Judiciary Act of 1789, § 27, 1 Stat. at 87.

437. Cf. Act of May 8, 1792, ch. 36, § 7, 1 Stat. 275, 278 (amended 1821) (imposing potential criminal penalties on deputies who demanded fees greater than statutes allowed); *Meade v. Deputy Marshal*, 16 F. Cas. 1291, 1293 (C.C.D. Va. 1815) (No. 9,372) (suggesting, by the case caption, that actions could be brought against deputy marshals, although the court directed its instructions for the petitioner’s release to the marshal, not the deputy). And in *The Lawmen*, the U.S. Marshals Service’s first historian suggests that judges had authority to remove deputies from office to prevent marshals and deputies from improperly colluding “to defraud the Treasury” in their handling of federal funds for the court system. See FREDERICK S. CALHOUN, *THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789-1989*, at 21 (1989).

438. See Judiciary Act of 1789, § 27, 1 Stat. at 87 (giving each marshal the “power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies”).

And the “lawful precepts” that the marshals and deputies were to execute were precepts directed to the marshals themselves.⁴³⁹ Even when a marshal died while in office, the deputy marshal continued to execute writs and precepts in the name of the deceased marshal rather than in the deputy’s own name.⁴⁴⁰

Further, similar to the customs officials’ answerability for their deputies’ conduct, the marshals had to assume personal liability for the misdeeds of their deputies. Before entering “the duties of his office,” each marshal had to “become bound for the faithful performance” of those duties by both himself and his deputies.⁴⁴¹ Specifically, the marshal became bound, “jointly and severally, with two good and sufficient sureties, . . . in the sum of twenty thousand dollars.”⁴⁴² Even after marshals died, their estates were bound by their deputies’ actions.⁴⁴³ A deputy’s “defaults or misfeasances in office” were considered breaches of the condition of the bond originally given by the marshal.⁴⁴⁴ The executor of the deceased marshal’s estate in turn could recover against the deputy for any liability the estate had incurred for breach of the bond.⁴⁴⁵ Nonetheless, the marshal’s estate was the entity against which the wronged private party would recover.⁴⁴⁶ The potential imposition of personal liability

439. *See id.*

440. *Id.* § 28, 1 Stat. at 87.

441. *Id.* § 27, 1 Stat. at 87.

442. *Id.*; *see also* Suits Against Marshals, 1 Op. Att’y Gen. 92, 92 (1800) (“If the marshal or his deputy commit a misfeasance in office to the injury of the United States, compensation may be obtained for the United States by an action of debt upon the bond given by the marshal in pursuance of the 27th section of the judicial act, which suit may be brought against the marshal and his sureties jointly, or either of them.”); CALHOUN, *supra* note 437, at 21 (“Because marshals handled the funds of the courts, the Judiciary Act of 1789 required each nominee to post a \$20,000 bond before taking the oath of office. Normally, the candidate asked local businessmen and friends to pledge portions of the total. These bondsmen were financially liable for any mistakes or malfeasance of the marshal The marshal’s bond also covered the actions of his deputies.”).

443. *See* Judiciary Act of 1789, § 28, 1 Stat. at 87-88 (“And in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed; and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn: And the defaults or misfeasances in office of such deputy or deputies in the mean time, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them . . .”).

444. *Id.*

445. *See id.* (“[T]he executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life and in the exercise of his said office . . .”).

446. *See* *Colpoys v. Foreman*, 163 F.2d 908, 908-09 (D.C. Cir. 1947) (demonstrating that this practice of imposing liability for a deputy’s misdeeds on the marshals or their estates continued into the twentieth century). In *Colpoys*, a D.C. resident brought an action against a federal marshal “and his surety” for a deputy marshal’s wrongful entry into the resident’s home and subsequent use of physical force. *See id.* at 908. A brief analysis
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on marshals for misdeeds by their deputies suggests that deputies were seen as agents acting on behalf of the primary marshal—who was the actual Article II officer.⁴⁴⁷ Finally, Hamilton’s 1792 list of government officials excluded any entry for deputy marshals—despite listing sixteen federal marshals as officers.⁴⁴⁸

Blackstone’s *Commentaries* indicate that there was a similar relationship between British sheriffs and their “servants,” the “gaolers.”⁴⁴⁹ The sheriffs were responsible for the gaolers’ conduct.⁴⁵⁰ If any of a gaoler’s prisoners escaped, the sheriff was liable—either to the King in a criminal case or to the injured party in a civil case.⁴⁵¹ To answer for this responsibility, the sheriff had to “have lands sufficient within the county to answer the king and his people.”⁴⁵²

3. Other “deputy” references in statutes enacted by the First Congress

Along with the deputy customs and deputy marshal positions, statutes enacted by the First Congress referred to the term “deputy” in two additional contexts. One context suggests that statutes at times permitted officers to depute nonofficer agents to complete discrete tasks on their behalf without undergoing Article II procedures.⁴⁵³ The other suggests that certain deputy and

of the case in the *Georgetown Law Journal’s* 1948 summary of recent court decisions suggested that the marshal was liable for the deputy’s actions based on a kind of master-servant relationship generated by the marshal’s statutory responsibility to bond the deputies he appoints. See John J. Burke, Jr., Recent Decision, 36 GEO. L.J. 713, 713 (1948).

447. Nonetheless, in Massachusetts, a state legislative committee characterized a federal deputy marshal as holding a federal “office” similar in nature to the types of state offices the Massachusetts Constitution had rendered incompatible with state legislative service. See *Proceedings of the Legislature of Massachusetts*, WORCESTER GAZETTE, June 9, 1791, at 2, 2. But the full Massachusetts legislature never had to definitively address the constitutional question whether service in a deputy marshal “office” should be incompatible with state legislative service because the relevant state legislator indicated that he had already resigned as a federal deputy marshal. See *id.* The legislature ultimately tabled its discussion. See *id.*

448. Hamilton, 1792 Civil Officer List, *supra* note 368, at 59-60. The *American State Papers’* printing of Hamilton’s list also omitted the marshals’ “assistants,” which the First Congress had authorized the marshals to hire to complete a census. See Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101, 101 (amended 1790). Like Article II officers, these assistants took oaths to faithfully perform *their own* duties; no statutory provision made the marshals accountable for the assistants’ actions. See *id.* Nonetheless, these assistants were not hired in compliance with Article II. The best explanation is the temporary nature of their duties—a nine-month census. See *id.*; *infra* Part III.E.

449. See 1 BLACKSTONE, *supra* note 251, at 346.

450. See *id.*

451. See *id.*

452. *Id.*

453. See, e.g., Act of Mar. 3, 1791, ch. 26, § 1, 1 Stat. 219, 219 (amended 1799) (authorizing inspectors to “depute” someone to hold the key for unlocking tea storehouses); Act of
footnote continued on next page

assistant officials may in fact have been “Officers of the United States.” For example, one of the first statutes enacted by Congress was legislation temporarily authorizing the Post Office.⁴⁵⁴ In the Act, Congress authorized the Postmaster General to appoint deputies and an assistant without further explanation.⁴⁵⁵ As the Supreme Court observed in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Postmaster General may very well have been a department head and thus constitutionally able to appoint inferior officers.⁴⁵⁶ Several aspects of the Postal Service Act of 1792—a later statute that reauthorized the Post Office⁴⁵⁷—suggest that deputy postmasters were in fact Article II officers. For example, the Postal Service Act assigned deputies their own duties, such as “keep[ing]” their own post offices,⁴⁵⁸ demanding and receiving funds for the postage of the mail,⁴⁵⁹ and publishing in newspapers a list of unclaimed letters in their post offices.⁴⁶⁰

Throughout the remainder of the first ten years of the new government, the First Congress’s practice of statutorily subjecting primary officers to possible personal liability for deputy misdeeds was not replicated.⁴⁶¹ In contrast, the Second through Fifth Congresses referred to numerous deputy positions that complied with Article II appointment procedures—positions that very well may have constituted Article II offices. For example, the Third Congress described the position of “deputy quartermaster” as a type of

Mar. 3, 1791, ch. 15, § 50, 1 Stat. 199, 210 (amended 1792) (authorizing internal revenue supervisors to assign deputies to administer oaths); *id.* § 52, 1 Stat. at 211 (authorizing internal revenue officers to carry out inspections through deputies); *cf.* *Deputation*, PERRY, *supra* note 112 (defining “deputation” as the “act of deputing, commission”); *Depute*, PERRY, *supra* note 112 (defining “depute” as “to empower, act, send”); *Deputy*, PERRY, *supra* note 112 (defining “deputy” as one “who officiates in the name of another”).

454. See Act of Sept. 22, 1789, ch. 16, 1 Stat. 70, 70 (amended 1790).

455. See *id.* § 1, 1 Stat. at 70.

456. See 561 U.S. 477, 510-11 (2010) (appearing to adopt Justice Scalia’s earlier reasoning in his *Freytag* concurrence that the assistant and deputy postmasters likely were inferior officers, and thus their selection by the Postmaster General must mean he is a “Hea[d] of [a] Departmen[t]” (alteration in original) (quoting U.S. CONST. art. II, § 2, cl. 2) (citing *Freytag v. Comm’r*, 501 U.S. 868, 917-18 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

457. See Ch. 7, § 3, 1 Stat. 232, 234 (amended 1794).

458. See *id.* § 7, 1 Stat. at 234-35.

459. *Id.* § 9, 1 Stat. at 235.

460. *Id.* § 18, 1 Stat. at 237.

461. This conclusion is based on searching for the use of the term “deputy” in enacted statutes through 1799. Over the course of that time no statutory provision appeared to replicate the personal liability relationship binding the First Congress’s marshals and customs officers to their deputies.

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commissioned military officer.⁴⁶² And an act of the Fifth Congress provided for the appointment of an “apothecary-general, and one or more deputies,” as “officers of the United States,” charging them with the safekeeping of the army’s medical equipment.⁴⁶³ Incidentally, this same statute also demonstrates the categorization of several additional lower-level officials as officers. Hospital mates, for example, were to follow the directions of the surgeons and were charged with “diligently perform[ing] all reasonable duties” that the surgeons required them to perform for the recovery of wounded and sick patients.⁴⁶⁴ These subordinate officials were listed in the statute among the “officers”;⁴⁶⁵ they were “appointed by the authority, and at the direction of[,] the . . . physician-general, subject to the eventual approbation and control of the President.”⁴⁶⁶

These examples of post-First Congress deputy officials suggest that the moniker “deputy” is not dispositive in determining whether an official is an Article II officer. The first several Congresses at times treated deputies as officers and at other times did not. The telling distinction seemed to involve the relationship between deputy and principal: Where the primary officer was personally subject to liability for the deputy’s misdeeds, the deputy was not treated as an Article II officer. The existence of both an officer and a nonofficer category of deputy is consistent with Dyche and Pardon’s multiple definitions of the word “deputy”⁴⁶⁷: (i) one who is an officer albeit a lieutenant or a second in command, like many deputy secretaries and deputy directors in modern practice,⁴⁶⁸ as compared to (ii) one who merely executes specific tasks for a principal, such as the deputy marshals acting in the stead of their marshal.⁴⁶⁹

462. See Act of Mar. 3, 1795, ch. 44, § 11, 1 Stat. 430, 431 (amended 1796).

463. See Act of Mar. 2, 1799, ch. 27, §§ 1, 3, 1 Stat. 721, 721 (amended 1802).

464. *Id.* § 1, 1 Stat. at 721.

465. *Id.*

466. *Id.* § 3, 1 Stat. at 721. *But see id.* (authorizing, in contrast, the surgeons to appoint the nurses and other hospital “attendants” subject to the authority of the physician-general or a hospital surgeon).

467. See *Deputy*, DYCHE & PARDON, *supra* note 112 (defining “deputy” as an “[i] an ambassador, or person appointed to negotiate affairs for another; [(ii)] a sub-governor or lieutenant; and [(iii)] in a *Law Sense*, one who executes any office, &c. for or in the right of another, upon whose misdemeanor or forfeiture the principal is subject to lose his office” (emphasis added)); see also MECHEM, *supra* note 94, § 38 (noting that some deputies are officers and others are not).

468. See, e.g., 6 U.S.C. § 113(a)(1)(A) (2016) (providing for the appointment of a Deputy Secretary of Homeland Security).

469. See *supra* Parts III.B.1-2.

C. Officers of the Customs

Although the small size of the three central executive departments might suggest that the first federal bureaucracy was minute, there was in fact a relatively thriving early administrative system.⁴⁷⁰ But rather than serving in departmental headquarters and issuing regulations or conducting adjudications like many of today’s government officials, most early nonpostal civil officials worked in local districts throughout the country collecting revenue or customs duties to pay off wartime debt.⁴⁷¹ The primary “officers of the customs” were the collectors, naval officers, and surveyors—all of whom were appointed by the President with the advice and consent of the Senate.⁴⁷²

The positions of most interest for purposes of this Article were the individuals titled “weighers, gaugers, measurers and inspectors” who performed tasks assisting the more significant customs officials.⁴⁷³ The weighers, gaugers, and measurers in particular had duties involving very little discretion and thus likely would not qualify as modern officers.⁴⁷⁴ By statute, the duties on imported goods were based on quantity;⁴⁷⁵ the weighers, gaugers, and measurers measured those quantities,⁴⁷⁶ which in turn formed the basis for

470. See, e.g., Hamilton, 1792 Civil Officer List, *supra* note 368 (listing hundreds of federal officers and employees).

471. See *id.* at 58-68 (listing officials like storekeepers, assistant storekeepers, district attorneys, marshals, district court clerks, customs officials, revenue inspectors, and lighthouse superintendents working in local districts throughout the country); see also WHITE, *supra* note 263, at 123 (noting that the vast majority of early federal employees were out in the field, not in agency central offices).

472. See, e.g., S. EXEC. JOURNAL, 1st Cong., 1st Sess. 9-13 (1789) (recording that the Senate gave its approval to the President’s nomination of a list of collectors, naval officers, and surveyors).

473. See, e.g., Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154 (repealed 1799) (authorizing collectors to “employ proper persons as weighers, gaugers, measurers and inspectors” and instructing surveyors to “superintend and direct all inspectors, weighers, measurers and gaugers, within [their] district[s]”); see also *id.* § 53, 1 Stat. at 172 (authorizing collectors to pay inspectors, measurers, weighers, and gaugers for their services and indicating that these officials performed tasks like measuring and computing the quantities of imported goods). Lists of government officials compiled by Hamilton also described a handful of “boatmen” employed along with the weighers, gaugers, measurers, and inspectors. See, e.g., Hamilton, 1792 Civil Officer List, *supra* note 368, at 63-66. No statute specifically authorizes the position of “boatmen,” so these individuals apparently were not officers. Or perhaps the term “boatmen” here was a generic reference to the various types of officers working on the revenue cutters used to help enforce the customs laws, discussed in Part III.D.2 below.

474. See *supra* text accompanying notes 80-82.

475. See, e.g., Tariff Act of 1789, ch. 2, § 1, 1 Stat. 24, 24-26 (repealed 1790) (creating import duties on a variety of goods).

476. See Act of Aug. 4, 1790, § 53, 1 Stat. at 172 (authorizing payment to weighers, gaugers, and measurers based on the quantity of goods they measured).

the amount of duties owed by the importer. As an example, one early statute imposed a duty of two and a half cents per gallon of imported molasses and a duty of ten cents per pound of black tea imported from India or China on ships owned by U.S. citizens.⁴⁷⁷ (The position of inspector was of somewhat greater consequence. Inspectors boarded ships to investigate suspected fraud or smuggling.)⁴⁷⁸

Even though the weighers, gaugers, and measurers performed nondiscretionary tasks, they—along with the inspectors—may have been considered officers early in the nation’s history. This analysis is not immediately straightforward, however. Congress initially established the positions of weighers, gaugers, measurers, and inspectors in a July 1789 statute regulating the collection of duties on tonnage and on goods, wares, and merchandise.⁴⁷⁹ In that statute, Congress authorized customs collectors to employ these four types of officials.⁴⁸⁰ Congress did not require the Secretary of the Treasury’s approval for the collector’s hiring decisions even though the very provision authorizing these appointments required the Secretary’s approval for decisions like the purchase of storehouses for imported goods.⁴⁸¹ The absence of any role for the head of the Treasury Department suggests that Congress at the time did not view these officials as subject to Article II requirements.

That said, at least one First Congress statutory provision referred to customs inspectors as officers. A 1789 statute regulating vessels with imported goods provided that “the inspector, or other officer attending the unloading of [the] goods,” should deliver a certificate listing the goods and a permit to the commander of the ship.⁴⁸² And the original 1789 statute regulating the collection of duties on imports suggested that weighers, gaugers, and measurers served in an “office”; it required each of these officials to take an oath before “execut[ing] the duties of his *office*.”⁴⁸³

477. Tariff Act of 1789, § 1, 1 Stat. at 25.

478. See Act of Aug. 4, 1790, §§ 30-31, 1 Stat. at 164-65 (authorizing collectors and surveyors to put inspectors on ships to examine the ship’s contents, prevent the unloading of goods without a permit, and properly mark and seal the containers on board the ship); *id.* § 65, 1 Stat. at 175 (authorizing collectors to employ boats as “necessary for the use of the surveyors and inspectors in going on board of ships and vessels and otherwise, for the better detection of frauds”).

479. See Act of July 31, 1789, ch. 5, §§ 1, 5, 1 Stat. 29, 29, 36-37 (repealed 1790).

480. See *id.* § 5, 1 Stat. at 36-37.

481. See *id.*; see also Notes on the Collection Bill (HR-11) (n.d.), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1050-52 (Charlene Bangs Bickford et al. eds., 2004) (notes written “in an unknown hand” indicating that “two Officers” had been given a role in appointing inspectors and gaugers and might thus disagree on which people to appoint).

482. See Act of Sept. 1, 1789, ch. 22, § 1, 1 Stat. 94, 94 (repealed 1793).

483. Act of July 31, 1789, § 8, 1 Stat. at 38 (emphasis added).

Numerous nonstatutory documents from the time period of the First Congress also indicate that weighers, gaugers, measurers, and inspectors were considered officers.⁴⁸⁴ Several dictionaries from the late eighteenth century characterized gaugers as “officers.”⁴⁸⁵ In addition, several items of private correspondence described weighers, gaugers, inspectors, or measurers as officers. For example, the *Documentary History of the First Federal Congress* includes a list of candidates for the “office[]” of “searcher,”⁴⁸⁶ a term Congress used to describe customs inspectors.⁴⁸⁷ Correspondence to President George Washington requested consideration for the “office” of gauger.⁴⁸⁸ An August 1789 letter to Representative Benjamin Goodhue of Massachusetts evaluated whether the fees paid to inspectors and measurers were adequate to keep them “in Office.”⁴⁸⁹ Goodhue himself then wrote a letter to Surveyor Michael Hodge in September 1789, referring to “the office of Inspector.”⁴⁹⁰ Notes on the House version of the impost bill, written “in an unknown hand,” refer to an inspector as the “Officer” who provides security against smuggling on vessels.⁴⁹¹ A letter from Philadelphia merchants to their congressional delegation referred

484. Cf. 8 ANNALS OF CONG. 2305 (1799) (statement of Rep. Harper) (“We apply the term [“officer”] to a constable, or the cryer of a court . . . ; to a midshipman in the Navy, an ensign in the Army, or a weigher in the custom-house . . .”).

485. See, e.g., *Gager/Gauger*, BAILEY, *supra* note 195 (defining “gager” or “gauger” as “an officer employed in gaging”); *Gager or Gauger*, DYCHE & PARDON, *supra* note 112 (defining “gager” or “gauger” as “any person that measures, or finds out the capacity of liquid measures or vessels, and is commonly spoken of [as] an officer of excise upon ale, beer, &c.”).

486. William Grayson, List of Candidates for Offices (1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1198, 1198-2000 (Charlene Bangs Bickford et al. eds., 2004) (capitalization altered).

487. See, e.g., Act of Aug. 4, 1790, ch. 35, § 1, 1 Stat. 145, 152 (repealed 1799) (“[I]n each of the said districts it shall be lawful for the collector . . . to appoint or put on board any ship or vessel for which a permit is granted, one or more searchers or inspectors . . .”); Act of July 31, 1789, § 1, 1 Stat. at 35 (similar).

488. See Letter from Nathaniel Smith to George Washington (July 10, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON 176, 176 (Dorothy Twohig ed., 1989).

489. See Letter from William Pickman to Benjamin Goodhue (Aug. 31, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1436, 1437 (Charlene Bangs Bickford et al. eds., 2004); see also BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 45 (2005) (listing Representative Benjamin Goodhue of Massachusetts as a member of the First Congress).

490. See Letter from Benjamin Goodhue to Michael Hodge (Sept. 6, 1789), in 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1476, 1476 (Charlene Bangs Bickford et al. eds., 2004); *Biographical Gazetteer*, in 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1751, 1814 (Charlene Bangs Bickford et al. eds., 2004) (biographical entry for Michael Hodge).

491. See Notes on the Collection Bill (HR-11), *supra* note 481, at 1052.

repeatedly to measurers, weighers, and gaugers as “Officers.”⁴⁹² And a September 1789 letter to newly appointed U.S. Treasurer Samuel Meredith described inspectors, weighers, and gaugers as officers.⁴⁹³ This letter further indicated that weighers and gaugers had been “officers” in England.⁴⁹⁴

Legislation enacted in the Fifth Congress seems to reconcile the early disconnect between the characterization of these officials as “officers” and their non-Article II selection. In 1799, the Fifth Congress altered the mode of selection for these four positions, requiring the Secretary of the Treasury’s “approbation” for their appointment.⁴⁹⁵ That change would have brought the selection process for the lower-level customs officials into conformity with Article II through approval by a department head. An 1803 letter by a customs collector on file at the National Archives further evidences the officer status of the lower-level officials; the collector wrote to Secretary of the Treasury Albert Gallatin requesting approval of the collector’s recommended candidate for the “office” of “Weigher and Measurer.”⁴⁹⁶ An 1843 opinion by Attorney General Hugh S. Legaré explicitly concludes that the Secretary’s approval of a collector’s initial recommendation (or nomination, as he puts it) constitutes appointment by the Secretary in compliance with Article II.⁴⁹⁷ Further, the opinion finds that officials like permanent customs inspectors are “officers of the government of the United States” subject to Article II and that any law that instead gave the appointment authority to customs collectors would be “null and void under the constitution.”⁴⁹⁸

One additional explanation for the First Congress’s decision to authorize collectors to appoint the weighers, gaugers, measurers, and inspectors—although admittedly a less plausible one, at least under modern doctrine—is

492. See Letter from Philadelphia Merchants to the Pennsylvania Delegation (July 16, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1042, 1047 (Charlene Bangs Bickford et al. eds., 2004).

493. See Letter from Thomas Fitzsimons to Samuel Meredith (Sept. 7, 1789), in 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 159, at 1482, 1483 (Charlene Bangs Bickford et al. eds., 2004) (“I am not yet informed What mode is pursued by your Weighers & Guagers in England. [T]he weighing is attended by some person on the part of the owner Who Keeps an Acct. and Compares with the Officer the same is the Case with the Guager.”); see also *Biographical Gazetteer*, *supra* note 490, at 1843 (biographical entry for Samuel Meredith).

494. See Letter from Thomas Fitzsimons to Samuel Meredith, *supra* note 493, at 1483.

495. See Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642 (amended 1811).

496. Letter from Charles Simms, Collector, to Albert Gallatin, U.S. Sec’y of the Treasury (Dec. 8, 1803), *microformed on* Microcopy No. 178, Roll 1 (Nat’l Archives & Records Serv.).

497. See Appointment & Removal of Inspectors of Customs, 4 Op. Att’y Gen. 162, 164-65 (1843).

498. See *id.* at 163-64.

that perhaps Congress saw collectors as heads of departments authorized to appoint officers under Article II.⁴⁹⁹ (The 1843 Attorney General opinion concludes that collectors were not department heads.⁵⁰⁰ But one of the constitutional questions prompting the opinion was the then-Secretary of the Treasury’s quandary about whether a collector could appoint officers as a department head⁵⁰¹—suggesting, perhaps, that this issue may not have been settled at the time.) Hamilton’s 1792 list of civil officers includes “collectors of the customs” as their own separate entity, not contained within the Treasury Department.⁵⁰² And collectors were the most senior officers within their collection districts.⁵⁰³

That said, this second explanation is unlikely. Collectors do not appear to be department heads under Justice Scalia’s historical analysis in *Freytag*,⁵⁰⁴ apparently adopted by the Supreme Court in 2010 in *Free Enterprise Fund*.⁵⁰⁵ The Court’s analysis based on historical understanding and the constitutional text suggests that Article II department heads include only agency heads immediately subordinate to the President.⁵⁰⁶ Evidence suggests that the customs offices were subordinate to the Secretary of the Treasury,⁵⁰⁷ indicating that customs collectors did not head their own independent departments.

499. *But see* Civil-Serv. Comm’n, 13 Op. Att’y Gen. 516, 521 (1871) (suggesting that the early non-Article II selection of certain lower-level officials may have been due, in the Attorney General’s view, to the fact that “[m]any employments now universally held to be offices were not esteemed such at the outset, but with the growth of the Government were raised to that rank”).

500. *See Appointment & Removal of Inspectors of Customs*, 4 Op. Att’y Gen. at 164.

501. *See id.* at 162-63 (asking whether the collector’s employment of an inspector with the Secretary’s approval would constitute an act of appointment by the collector or the Secretary).

502. *Compare* Hamilton, 1792 Civil Officer List, *supra* note 368, at 57-58 (listing the Treasury Department officials), *with id.* at 60-61 (listing the customs collectors).

503. *See supra* note 424.

504. *See Freytag v. Comm’r*, 501 U.S. 868, 917-18 (1991) (Scalia, J., concurring in part and concurring in the judgment).

505. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510-11 (2010); *supra* note 456.

506. *See Free Enter. Fund*, 561 U.S. at 511; *Freytag*, 501 U.S. at 917-22 (Scalia, J., concurring in part and concurring in the judgment) (“A number of factors support the proposition that ‘Heads of Departments’ includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch.”).

507. *See* Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 155 (repealed 1799) (requiring collectors to keep records in such “form as may be directed by the proper department, or officer having the superintendence of the collection of the revenue”); Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65 (amended 1791) (directing the Secretary of the Treasury “to superintend the collection of the revenue”); *see also* WHITE, *supra* note 263, at 120-23 (describing the Treasury Department as presiding over customs collection).

D. Officials in other contexts

The First Congress created many other positions. This Subpart will address those positions that provide further insight into the dividing line between Article II officers and nonofficers around the time of the Constitution’s ratification.⁵⁰⁸

1. The military

Military commanders all the way down to lieutenants were appointed in a manner consistent with Article II as “commissioned officers.”⁵⁰⁹ The

508. Officials referred to in First Congress statutes not analyzed in this Subpart include, for example, post office officials discussed in Part III.B.3 above; legislative officers whose appointments are governed by Article I, *see* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 5; lighthouse superintendents and keepers whose selection was signed off on by the Secretary of the Treasury, *see* Act of Aug. 7, 1789, ch. 9, § 3, 1 Stat. 53, 54 (amended 1798); the presidentially appointed Attorney General and attorneys for the United States, *see* S. EXEC. JOURNAL, 1st Cong., 1st Sess. 29-33 (1789); *see also* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (referring to the appointment of “attorney[s] for the United States”); court-appointed clerks, *see* Judiciary Act of 1789, § 7, 1 Stat. at 76; and Northwest and Ohio Territory officials, including territorial governors also responsible for superintending “Indian affairs,” *see* Act of May 26, 1790, ch. 14, §§ 1-2, 1 Stat. 123, 123; Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 68 (amended 1792); *cf.* Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137 (amended 1793) (barring “trade or intercourse with the Indian tribes” without a license granted by a superintendent or “such other person as the President . . . shall appoint for that purpose”). For major officials in the Territories—such as governor, secretary, and “general officers” of the militia—the First Congress explicitly changed the mode of appointment from the Continental Congress under the Articles of Confederation to the President with Senate advice and consent. *See* Act of Aug. 7, 1789, ch. 8, § 1, 1 Stat. 50, 53 (amended 1800) (requiring presidential appointment with Senate consent for all territorial officers who had been appointed by the Continental Congress under the Articles of Confederation); *id.* at 51 n.a (reprinting the Northwest Ordinance, which had called for the Continental Congress to appoint the Northwest Territory’s governor, secretary, and “general officers” of the militia); Act of May 26, 1790, § 1, 1 Stat. at 123 (extending provisions governing the Northwest Territory to additional territories).

In contrast, the First Congress’s 1789 statute did not require presidential or department head appointment for the territories’ militia officers below the rank of “general officer” or magistrates and “other civil officers” within each county and township. *Compare* Act of Aug. 7, 1789, § 1, 1 Stat. at 53 (providing for presidential appointment with Senate consent only for officers previously appointed by the Continental Congress under the Northwest Ordinance), *with id.* at 51 n.a (providing for the Northwest Territory’s governor to appoint militia officers “below the rank of general officers” as well as “magistrates and other civil officers”). Perhaps this is because those officers were seen as local, rather than national, officers. *Cf.* Nelson, *supra* note 201, at 575-76 (observing that territorial courts may not have been subject to Article III requirements for exercise of the judicial power because they were seen as exercising power over just “a particular territory” rather than “the whole of the United States” (quoting *United States v. More*, 7 U.S. (3 Cranch) 159, 163 n.* (1805) (reproducing the circuit court dissenting opinion of Chief Judge Kilty))).

509. *See* Act of Apr. 30, 1790, ch. 10, § 5, 1 Stat. 119, 120 (repealed 1795) (specifying pay deductions for just the sergeants, corporals, privates, and musicians in a provision
footnote continued on next page

commissioned officers included officials like majors, captains, lieutenants, ensigns, surgeons, and even surgeon’s mates.⁵¹⁰ In contrast, those with lower-ranked positions such as sergeants and corporals were considered “non-commissioned officers.”⁵¹¹ Privates and musicians were not classified as officers.⁵¹² Congressional statutes referred to the “enlistment[]” of sergeants, corporals, and privates.⁵¹³ Perhaps their enlisted status helps explain why they were not officers commissioned under Article II, even though sergeants and corporals would appear to have been carrying out statutory duties.⁵¹⁴ Also, as Part II.A.2 above explains, there is reason to believe that the Constitution incorporated legal background principles under which the structure of military combat appointments operated under different rules than the

describing the sums that “shall be deducted from the pay of the non-commissioned officers, privates and musicians”); *see also, e.g.*, S. EXEC. JOURNAL, 1st Cong., 1st Sess. 34-35 (1789) (recording the presidential appointment and Senate confirmation of numerous commissioned military officers such as captains, lieutenants, ensigns, and surgeon’s mates).

510. *See* Act of Apr. 30, 1790, § 7, 1 Stat. at 120 (specifying the rations for commissioned officers and then identifying each of these positions in particular).
511. *See id.* § 1, 1 Stat. at 119 (referring to four categories: “commissioned officers,” “non-commissioned officers, privates and musicians”). *Compare id.* § 7, 1 Stat. at 120 (listing a lieutenant-colonel commandant, a major commandant, a major, a captain, a lieutenant, an ensign, a surgeon, and a surgeon’s mate in the provision allocating rations for commissioned officers—implying that the remaining positions other than privates and musicians made up the category of noncommissioned officers), *with id.* § 3, 1 Stat. at 119-20 (listing only two positions not falling under either the section 7 list of commissioned officers or the categories of private and musician—sergeant and corporal). The statute lists three other titles—adjutant, quartermaster, and paymaster—that are not mentioned in the provisions authorizing rations and payments for commissioned officers. *See id.* § 3, 1 Stat. at 119-20. But these titles do not represent additional, separate positions—individuals were selected from among the preexisting officer ranks to take on these three particular roles. *See id.* (authorizing the appointment of “the adjutants, quartermasters, and paymasters . . . from the line of subalterns of the aforesaid corps respectively”); *see also Subalterns*, BAILEY, *supra* note 195 (defining “subalterns” as “inferior judges or officers”).
512. *See* Act of Apr. 30, 1790, § 1, 1 Stat. at 119. Hamilton’s report of estimated military expenditures in 1790 also lists the position of “matross[],” *see* Hamilton, 1790 Report, *supra* note 374, at 35—a position not mentioned in statutes enacted by the First Congress and apparently not an officer position, *see* Act of May 8, 1792, ch. 33, § 4, 1 Stat. 271, 272 (amended 1803) (intimating that matrosses were of the same rank as privates by providing that both privates and matrosses should furnish themselves “with all the equipments of a private in the infantry,” in contrast to the officers who were to be more fully armed). A matross assisted gunners in firing and loading. *See Matrosses*, DYCHE & PARDON, *supra* note 112.
513. *See* Act of Apr. 30, 1790, § 2, 1 Stat. at 119.
514. *See, e.g., Corporal*, BARCLAY, *supra* note 217 (defining “corporal” as “in the army, an inferior, and the lowest officer in the foot, who commands one of the divisions, places and relieves centinels, keeps good order, and receives the word of the inferiors that pass by his corps”); *see also supra* note 196 and accompanying text.

Appointments Clause.⁵¹⁵ Further, Congress may have been operating under its Article I, Section 8 power to make rules for the military rather than its Article II office-creation powers when it authorized the noncommissioned officer and enlisted positions.⁵¹⁶

In addition to the combat positions the First Congress authorized, the First Congress also authorized a number of noncombat positions consistent with Article II selection requirements. For example, the First Congress empowered the President alone to appoint one or two inspectors to inspect and muster the troops.⁵¹⁷ And the President with Senate consent could appoint a major general, brigadier general, quartermaster, or chaplain if the President deemed those positions to be “essential to the public interest.”⁵¹⁸ Several additional military-related employments referred to in Treasury reports but not “established by Law” included “artificers”; “[l]aborers”; and “[c]oopers, armorers, and carpenters.”⁵¹⁹ When listing these categories of ordnance workers, Hamilton’s reports clarify in particular that the “[c]oopers, armorers, and carpenters” were “employed occasionally at the several arsenals,”⁵²⁰ suggesting that these types of craftsmen were likely considered nonofficer contractors.⁵²¹

Military storekeepers and their assistants, a paymaster general, a commissioner of army accounts, and clerks were also listed on early Treasury reports.⁵²² In apparent contradiction to Article II, these officials operated without their offices being expressly established by statutory provisions during the First Congress. But this was likely due to the fact that the Continental Congress had previously established the positions of paymaster general and commissioner.⁵²³

515. See *supra* notes 194-212 and accompanying text.

516. See *supra* notes 196-208 and accompanying text.

517. See Act of Apr. 30, 1790, § 4, 1 Stat. at 120.

518. Act of Mar. 3, 1791, ch. 28, § 5, 1 Stat. 222, 222-23 (repealed 1795). The major general in turn had authority to choose his “aid-de-camp,” and the brigadier general had authority to choose a brigade major from among officials with preexisting military positions. See *id.* The appointing authority here for the major general and brigadier general does not necessarily raise questions about the officer status of their appointees; the appointees’ acquisition of new duties would have been permissible even without a new Article II appointment, where the new duties were germane to the former duties—at least under Supreme Court doctrine. See *Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

519. See Hamilton, 1790 Report, *supra* note 374, at 36.

520. See *id.*; Hamilton, 1791 Report, *supra* note 374, at 87.

521. See *infra* Part III.E.

522. See Hamilton, 1790 Report, *supra* note 374, at 34, 36; Hamilton, 1792 Civil Officer List, *supra* note 368, at 58.

523. See Act of Aug. 4, 1790, ch. 34, §§ 3, 13, 1 Stat. 138, 139-40, 142 (amended 1790); see also Act of May 8, 1792, ch. 37, § 1, 1 Stat. 279, 279-80 (amended 1803) (referring to “the late office of the paymaster general and commissioner of army accounts”). The First
footnote continued on next page

2. Revenue cutters

The federal government employed ships known as revenue cutters to help enforce customs duties.⁵²⁴ The ship master and the first, second, and third mates apparently were appointed in compliance with Article II.⁵²⁵ The ships also employed “mariners” and “boys” who apparently were not considered officers.⁵²⁶

3. The national bank

Congress provided that the President should appoint “not less than three” bank superintendents to oversee subscriptions to bank stock.⁵²⁷ But once the Bank of the United States was up and running, numerous individuals involved with its operation were not appointed in accordance with Article II’s requirements. For example, there was an annual election of bank directors.⁵²⁸ The probable explanation is that Congress saw the bank as a public-private nongovernmental entity.⁵²⁹

4. Various commissions

In addition to establishing three executive departments, the First Congress also at times employed the use of commissioners or multimember boards. In contrast to the major departments, commissioners handled more discrete tasks. One early statute in August 1789 authorized the appointment of commissioners

Congress authorized appropriations for the clerks in the office of the commissioner of army accounts, indicating that payment for these clerks was to be treated similarly to that of Treasury Department clerks who were officers. *See* Res. 3, 1st Cong., 1 Stat. 187, 187 (1790).

524. *See* Act of Aug. 4, 1790, ch. 35, §§ 62–64, 1 Stat. 145, 175 (repealed 1799).

525. *See id.* §§ 63–64, 1 Stat. at 175 (providing for presidential appointment of these boats’ “officers”).

526. *See id.* § 63, 1 Stat. at 175 (authorizing each revenue cutter to have one master, up to three mates, four mariners, and two boys, and then describing these officials as comprising the three categories of “officers, mariners and boys”).

527. *See* Act of Feb. 25, 1791, ch. 10, § 1, 1 Stat. 191, 191–92 (amended 1791).

528. *See id.* § 4, 1 Stat. at 192–93.

529. *See, e.g.,* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1883 (2015) (characterizing the Bank of the United States as a “nongovernmental actor[.]”); *see also* Comm’rs of the Bank of the U.S., 1 Op. Att’y Gen. 19, 21 (1791) (describing the initial organization of the bank in terms suggesting it was a private business by, for example, referring to the efforts “to constitute a body for the management of business” and concluding that “the stockholders or proprietors of the capital stock” could vote to elect the bank’s directors); *id.* (describing the bank as a “corporation”); *id.* at 22 (using personal property terms like “chose in action” to describe the interest one held by having a “subscription to the Bank of the United States”).

to manage negotiations and treaties with the Indian tribes.⁵³⁰ Then in 1790 Congress enacted legislation authorizing the President alone to appoint three commissioners to define the boundaries of a location for the permanent seat of the federal government.⁵³¹ Congress also authorized appropriations for the “commissioners of loans in the several states” in their efforts to settle their accounts.⁵³² The First Congress extended until July 1, 1792 the multimember Board of Commissioners the Continental Congress had created in 1787 under the Articles of Confederation to settle accounts between individual states and the United States.⁵³³ Consistent with the Supreme Court’s current definition of “Heads of Departments” in *Free Enterprise Fund*,⁵³⁴ the First Congress apparently considered the Board to be a department head for Appointments Clause purposes. The First Congress required presidential nomination with Senate advice and consent for any vacancies on the Board itself but permitted the Board to appoint such clerks “as the duties of their office may require.”⁵³⁵

5. Internal revenue

Internal revenue officers collected revenue from domestic distillers of spirits. The administrative requirements on distilleries were burdensome⁵³⁶—down to precise rules regarding the types of signs a building had to display when it housed a still.⁵³⁷ For example, federal officers had to mark each cask of spirits with a distillery manager’s name and the quantity of spirits inside.⁵³⁸ If a cask left a distillery without these markings or a certificate of approval from a federal officer, inspections officers could seize the cask and any horse, cattle, carriage, or boat helping to transport it.⁵³⁹

530. See Act of Aug. 20, 1789, ch. 10, § 2, 1 Stat. 54, 54.

531. Act of July 16, 1790, ch. 28, § 2, 1 Stat. 130, 130 (amended 1791).

532. Act of Mar. 3, 1791, ch. 21, § 1, 1 Stat. 216, 216.

533. See Act of Aug. 5, 1790, ch. 38, §§ 1, 9, 1 Stat. 178, 178-79 (amended 1792); Act of Aug. 5, 1789, ch. 6, § 1, 1 Stat. 49, 49.

534. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510-13 (2010) (concluding that a multimember commission may be a department head within the meaning of Article II if it is “a freestanding component of the Executive Branch, not subordinate to or contained within any other such component”).

535. Act of Aug. 5, 1789, §§ 1-2, 1 Stat. at 49; see also Act of Mar. 3, 1791, § 2, 1 Stat. at 216 (authorizing appropriations for the loan commissioners to hire clerks).

536. See, e.g., Act of Mar. 3, 1791, ch. 15, §§ 1-61, 1 Stat. 199, 199-214 (amended 1792); see also MASHAW, *supra* note 34, at 37 (noting many “detailed and complex” rules governing the collection of the distilled spirits tax).

537. See, e.g., Act of Mar. 3, 1791, § 25, 1 Stat. at 205.

538. See *id.* § 19, 1 Stat. at 203-04.

539. See *id.*

These internal revenue provisions demonstrate the existence of tough federal regulatory requirements as far back as the First Congress. But in contrast to the vast majority of officials exercising federal power today, these customs officers, supervisors, and inspectors were selected via Article II appointment procedures. In particular, the President with Senate consent appointed the supervisor over each of fourteen revenue districts and as many revenue inspectors as the President judged necessary.⁵⁴⁰ Illustrating the difference between Article II revenue supervisors and inspectors and the nonofficer deputy customs officials and deputy marshals discussed above,⁵⁴¹ federal statutes provided that these revenue officers would be directly liable to the public if they neglected their duties, improperly seized goods, or engaged in other misconduct.⁵⁴²

6. The State Department

The central office, or “Domestic Branch,” of the State Department followed the typical structure of the other two major executive departments, with a Secretary over a chief clerk, rank-and-file clerks, and a non-Article II office-keeper.⁵⁴³ In addition, a 1790 appropriations act authorized a salary for a French language interpreter “employed in the department of state.”⁵⁴⁴ Hamilton’s civil officer report suggests that this interpreter was a statutorily authorized clerk “officer” assigned to the specific task of language interpretation.⁵⁴⁵

Hamilton’s 1792 civil officer list also described the “Foreign Branch” of the State Department.⁵⁴⁶ Within this foreign branch, Hamilton listed foreign affairs officials such as ministers plenipotentiary, a “chargé des affaires,”

540. *Id.* § 4, 1 Stat. at 199-200.

541. *See supra* Parts III.B.1-2.

542. *See* Act of Mar. 3, 1791, §§ 38, 41, 1 Stat. at 208-09.

543. *See* Hamilton, 1792 Civil Officer List, *supra* note 368, at 57 (providing a list of domestic branch officials); *see also* Act of Sept. 11, 1789, ch. 13, § 2, 1 Stat. 67, 68 (amended 1792) (authorizing the heads of the three major departments to “appoint such clerks . . . as they shall find necessary”); Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (amended 1789) (providing for a chief clerk).

544. Act of Aug. 12, 1790, ch. 46, 1 Stat. 185, 185.

545. *See* Act of Sept. 11, 1789, § 2, 1 Stat. at 68 (authorizing department heads to appoint “such clerks . . . as they shall find necessary” at an annual salary of up to \$500); *see also supra* note 390 and accompanying text. *Compare* Hamilton, 1792 Civil Officer List, *supra* note 368, at 57 (listing a “clerk for foreign languages” at a salary of \$250), *with* Act of Aug. 12, 1790, 1 Stat. at 185 (appropriating \$250 for a French language interpreter in the State Department).

546. Hamilton, 1792 Civil Officer List, *supra* note 368, at 57.

residents, and an agent.⁵⁴⁷ The First Congress authorized the President to spend up to \$40,000 to support “such persons as he shall commission to serve the United States in foreign parts.”⁵⁴⁸ That appropriations act established a maximum salary for positions like ministers plenipotentiary and their secretaries and “charg[és] des affaires”—without ever specifically authorizing the appointment of particular types of foreign officers to particular foreign nations.⁵⁴⁹ Congress’s lack of specificity may be related to a unique interrelationship between the Appointments Clause and the President’s diplomatic responsibilities.⁵⁵⁰

E. Contractors and the Ongoing Nature of Officer Positions

Both under the Articles of Confederation and during the First Congress, there was a category of contractors or other nonofficer persons whom officers hired for services outside the Article II appointment process.⁵⁵¹ Therefore, one additional requirement for federal officer status appears to be responsibility for *ongoing* duties.⁵⁵² That said, one did not necessarily need to be *continuously* employed or remunerated to qualify as an officer.⁵⁵³ For example, Nicholas Parrillo’s in-depth study of early U.S. administration demonstrates that many eighteenth century government positions were not paid regular salaries.⁵⁵⁴ A number of the individuals receiving fees for services performed or for each day worked were considered officers by the First Congress.⁵⁵⁵

547. *Id.*

548. Act of July 1, 1790, ch. 22, § 1, 1 Stat. 128, 128-29 (amended 1793).

549. *See id.* §§ 1-2, 1 Stat. at 128-29.

550. *See infra* notes 568-71 and accompanying text.

551. *Cf. Debates in Congress, supra* note 131, at 455 (statement of Rep. Eppes) (concluding that “all contractors are not officers” and observing, in contrast, that a mail carrier “approaches very near an officer” because the carrier “takes an oath [and] is subject to penalties, the remission of which depends on the executive”).

552. In other words, officials with permanent positions would qualify as officers, in contrast to people performing work for the government as just “occasional deputies, employés, or agents.” *See Appointment & Removal of Inspectors of Customs*, 4 Op. Att’y Gen. 162, 163 (1843).

553. *See Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 111-13 (2007).

554. *See* NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*, at 1-48 (2013) (describing how many government officials “in the eighteenth century and often far into the nineteenth and early twentieth centuries” received reimbursement more from “bounties” and “facilitative payments”—fees for services—than from “fixed salaries”). Many early federal positions were also salaried, however. *See, e.g.,* Hamilton, 1792 Civil Officer List, *supra* note 368, at 57-59 (listing many annual salaries).

555. *See, e.g.,* Act of Mar. 3, 1791, ch. 22, § 1, 1 Stat. 216, 216-17 (repealed 1792) (authorizing payments to clerks and marshals for days they attended court); Act of Aug. 4, 1790, *footnote continued on next page*

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In contrast, the First Congress did not apply Appointments Clause procedures to numerous persons hired to perform discrete services. For example, Congress authorized collectors to hire “reputable merchants” to appraise the value of certain goods for the purpose of calculating the relevant customs duties.⁵⁵⁶ In the same statute, Congress authorized collectors, naval officers, and surveyors to appoint persons to board ships suspected of fraud.⁵⁵⁷ The government also entered contracts for the building of lighthouses⁵⁵⁸ and purchased printing services required for the maintenance of government records.⁵⁵⁹

The Continental Congress had similarly authorized officers to hire laborers to perform particular tasks. For example, the 1786 ordinance establishing the preconstitutional Mint of the United States authorized the “Master coiner” to “procure proper workmen to execute the business of coinage” as long as he reported this hiring to the Treasury commissioners for approval of the “number and pay of the persons so employed.”⁵⁶⁰

It would seem, however, that some duties involve such a significant exercise of governmental power that performing them would merit officer status even the position were not ongoing. Or perhaps some duties are sufficiently significant that they simply cannot be privatized and assigned to non-Article II officers such as contractors. It is hard to imagine, for example, that it would be constitutional to bypass Appointments Clause requirements by hiring a string of cabinet secretaries to serve only temporary terms, week after week, and claiming that Senate consent is unnecessary because the position is not ongoing.⁵⁶¹

Nonetheless, both the OLC’s 2007 opinion analyzing officer status and David Currie’s *The Constitution in Congress* discuss instances when government

ch. 35, § 53, 1 Stat. 145, 171-72 (repealed 1799) (authorizing fee payments to collectors, naval officers, and surveyors).

556. Act of Aug. 4, 1790, § 33, 1 Stat. at 165-66; Act of July 31, 1789, ch. 5, § 22, 1 Stat. 29, 42 (1789) (repealed 1790); cf. *Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (concluding that a merchant appraiser valuing goods for the customs service was not an Article II officer because “[h]e ha[d] no general functions, nor any employment which ha[d] any duration as to time, or which extend[ed] over any case further than as he [was] selected to act in that particular case”).

557. See Act of Aug. 4, 1790, § 48, 1 Stat. at 170.

558. See Act of Aug. 7, 1789, ch. 9, § 3, 1 Stat. 53, 54 (amended 1798).

559. See Hamilton, 1791 Report, *supra* note 374, at 86.

560. See Mint of the U.S. Ordinance, *supra* note 270, at 876 (emphasis omitted).

561. Cf. Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 113 (2007) (surmising that the Appointments Clause could not be evaded by providing for the position of Attorney General to expire annually but reauthorizing it each year); *id.* at 114-15 (explaining that the independent counsel position was an office because it was indefinite and not transient).

officials conducted discrete high-level diplomatic missions without being commissioned as foreign affairs officers.⁵⁶² For example, Currie observes, “One of Washington’s first acts as President was to appoint Gouverneur Morris, entirely without statutory authority, ‘as a “special agent” to explore the possibility of a commercial treaty with Great Britain.’”⁵⁶³ It is in part because numerous diplomatic missions failed to comply with constitutional officer stipulations from our nation’s earliest history that the OLC concluded that officer positions must be ongoing.⁵⁶⁴ Currie further suggests that the Morris mission is evidence that some “public servants could be appointed although their offices had never been created by law.”⁵⁶⁵

But the early practice of permitting diplomatic missions without Article II appointments might be attributable to different legal principles. Currie has suggested that by its terms, the Appointments Clause’s requirement that offices be “established by Law” applies only to “Officers of the United States” other than “Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court,”⁵⁶⁶ whose positions the Constitution has already directly established.⁵⁶⁷ And the President was seen as having a uniquely important role in foreign affairs.⁵⁶⁸ Article II, Section 3 empowers the President to “receive Ambassadors and other public Ministers,”⁵⁶⁹ which “has long been understood . . . [to] empower[] the President to decide with which governments the United States shall have diplomatic relations.”⁵⁷⁰ Currie notes that this interpretation of the Reception Clause could suggest that Congress lacks the power to tell the President where to send diplomats and establish diplomatic offices.⁵⁷¹

Consequently, the early practice of authorizing foreign affairs missions outside the Article II appointment process may not necessarily prove that all discontinuous positions are nonofficer positions. British practice contains at least one example in which an official with discontinuous duties unrelated to

562. See *id.* at 102-04; CURRIE, *supra* note 378, at 43-47.

563. CURRIE, *supra* note 378, at 44 (quoting JOHN C. MILLER, *THE FEDERALIST ERA, 1789-1801*, at 13 (1960)).

564. See *Officers of the U.S.*, 31 Op. O.L.C. at 102-03.

565. See CURRIE, *supra* note 378, at 43-44.

566. U.S. CONST. art. II, § 2, cl. 2.

567. See CURRIE, *supra* note 378, at 44.

568. Cf. Letter from James Monroe to James Madison (May 10, 1822), in 6 *THE WRITINGS OF JAMES MONROE* 284, 285-86 (Stanislaus Murray Hamilton ed., 1902) (opining that a “foreign mission is not an office” because foreign affairs involves a different kind of executive power, uniquely held by the President).

569. U.S. CONST. art. II, § 3.

570. See CURRIE, *supra* note 378, at 45.

571. See *id.*

foreign affairs was understood to be an officer. The “Lord High Steward” was “an Officer who [was] only appointed for a time, to officiate at a Coronation, or upon the trial of some nobleman for high treason; which being ended, his commission expires.”⁵⁷²

F. Preconstitutional “Officers” Under the Continental Congress

Examining several ordinances establishing major administrative entities during the time of the Continental Congress provides evidence that preconstitutional use of the term “officer” also encompassed officials with responsibility for duties not rising to the level of the modern “significant authority” standard. In several key ways, administrative practices under the Articles of Confederation ended with the Constitution’s ratification. For example, the Articles of Confederation had authorized Congress both to appoint officers⁵⁷³ and to create the offices themselves.⁵⁷⁴ But despite the Constitution’s innovation of separation of powers provisions that the Articles of Confederation had lacked,⁵⁷⁵ there is no indication that the Constitution altered the meaning of the term “officer.”

In the absence of evidence that the Constitution redefined either the term “officer” or the preexisting phrase “Officers of the United States,”⁵⁷⁶ the meaning of these terms under the Continental Congress is informative. The Continental Congress existed from 1774 to 1789.⁵⁷⁷ The Articles of Confederation that ultimately governed the Continental Congress were drafted during 1776 and 1777 and then sent to the states, which finally ratified the Articles on March 1, 1781.⁵⁷⁸ The Continental Congress’s use of the term “officer” in its resolutions and records authorizing various boards and agencies,

572. See *Steward*, BAILEY, *supra* note 195.

573. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5; see *supra* note 55 and accompanying text.

574. Cf., e.g., Minutes of July 26, 1775, in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 208, 208-09 (noting that the Continental Congress called for the establishment of a postmaster general and appointed Benjamin Franklin to that position all on the same day—several years prior to the ratification of the Articles).

575. See, e.g., 1 ANNALS OF CONG. 383-84 (1789) (Joseph Gales, Sr. ed., 1834) (statement of Rep. Boudinot) (“The departments under the late constitution are not to be models for us to form ours upon by reason of the essential change which has taken place in the Government, and the new distribution of legislative, executive and judicial powers.”).

576. See *supra* Parts II.A.2.d-e (discussing evidence of the meaning of “Officers of the United States” in preconstitutional uses).

577. See 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 4 (Worthington Chauncey Ford ed., 1904).

578. Introduction to 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 166, at 52, 53-54, 63.

both before and after ratification of the Articles of Confederation, offers insight into the historical understanding of the term.

Administrative officer positions under the Continental Congress and the First Congress have numerous striking similarities, down to details like the \$500 annual salary that both provided for many of their clerks.⁵⁷⁹ First, similar to practice during the First Congress, ordinances and resolutions issued by the Continental Congress used terminology suggesting that the preconstitutional understanding of “officer” embraced officials engaged in ministerial duties as low-level as those of account-keeping clerks.⁵⁸⁰ Also, as under the First Congress, there were some even-lower-level workers like messengers who apparently were not considered officers.⁵⁸¹ Second, the Continental Congress frequently used the term “duty” to describe the responsibilities assigned to officer positions, providing more evidence of a close relationship between the concepts of officer and duty.⁵⁸² Third, evidence suggests that the Continental

579. Compare Act of Sept. 11, 1789, ch. 13, § 2, 1 Stat. 67, 68 (amended 1792) (authorizing clerks in the executive departments to receive a salary of up to “five hundred dollars per annum”), with, e.g., Department of Finance Ordinance, *supra* note 239, at 469-70 (authorizing the Board of Treasury to set annual salaries for its clerks as high as \$500). But see Minutes of Mar. 23, 1787, in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 127, 129-30 (Roscoe R. Hill ed., 1936) (resolving to permit no more than a maximum \$450 annual salary to clerks and departmental assistants).

580. See, e.g., Minutes of July 27, 1775, in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 209, 209-10 (including among the list of officer duties the duty of an army hospital clerk “[t]o keep accounts for the director and store keepers”); see also Minutes of Apr. 15, 1778, in 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 349, 350 (Worthington Chauncey Ford ed., 1908) (reprinting a report from the Board of Treasury suggesting that the Board be authorized to appoint “Commissioners, Auditors and Clerks” to “their respective offices” (emphasis added)). But see *infra* note 599 (describing the actual appointment practices for the army hospital officials, which entailed mid-level officials—not the full Congress—appointing their subordinates); see also Minutes of Apr. 15, 1778, *supra*, at 350 (proposing that the Board of Treasury—not the Continental Congress—have authority to appoint the commissioners, auditors, and clerks). That said, the Board of Treasury report also recommended that the Board be required to report its appointees’ names to Congress. Minutes of Apr. 15, 1778, *supra*, at 350.

581. See *infra* notes 592-95 and accompanying text.

582. See, e.g., Department of Finance Ordinance, *supra* note 239, at 470 (referring to “the duties” of the commissioners’ and the clerks’ “several offices”); An Ordinance for Regulating the Treasury, and Adjusting the Public Accounts (1781), in 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 948, 949 (Gaillard Hunt ed., 1912) [hereinafter 1781 Treasury Ordinance] (describing the comptroller’s “immediate duty to see that the public accounts are . . . safely kept” and describing the treasurer’s “duty” to keep all U.S. moneys); Ordinance for Establishing a Board of Treasury, and the Proper Officers for Managing the Finances of These United States (1779), in 14 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 903, 904 (Worthington Chauncey Ford ed., 1909) [hereinafter 1779 Treasury Ordinance] (describing “the duties of the several offices”).

Congress’s responsibility for appointing officers may have been satisfied by merely approving officials selected in the first instance by superior officers.⁵⁸³ Fourth, resolutions and ordinances related to the Board of Treasury and the Post Office suggest that officials who might otherwise be officers were nonetheless treated as nonofficers if their superior maintained accountability for their actions,⁵⁸⁴ similar to the treatment of deputy marshals and deputy collectors in the First Congress.⁵⁸⁵ And finally, nonofficers were at times hired for discrete governmental tasks.⁵⁸⁶

In contrast to the comprehensive assessment of the appointment and selection methods for every position listed on governmental records from the First Congress,⁵⁸⁷ this Subpart does not comprehensively address officer selection practices under the Continental Congress—a body that existed in some form over the fifteen-year span from 1774 to 1789.⁵⁸⁸ Rather, this Subpart summarizes information gleaned from a targeted search for preconstitutional officer lists on file at the National Archives and an examination of several examples of major ordinances structuring preconstitutional governmental departments in an attempt to gain some insight into how the term “officer” was used under the Continental Congress. Part II.A.2.d above discusses my analysis of every use of the phrase “Officers of the United States” in the thirty-four-volume *Journals of the Continental Congress* and how that usage bears on the conclusion that the phrase was not a term of art creating a new category of “important” officers in Article II of the Constitution. In contrast, I did not examine every use of the terms “officer” and “office” in the *Journals*. Further, my analysis in this Subpart also differs somewhat from this Part’s early practice analysis regarding the First Congress in that this Subpart analyzes the way in which the words “officer” and “office” were used to describe

583. See *infra* notes 606-11 and accompanying text.

584. See *infra* Parts III.F.3-4.

585. See *supra* Part III.B.

586. See, e.g., Mint of the U.S. Ordinance, *supra* note 270, at 876 (authorizing the “Master coiner” to “procure proper workmen to execute the business of coinage” (emphasis omitted)); An Ordinance for Regulating the Post Office of the United States of America (1782), in 23 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 670, 676 (Gaillard Hunt ed., 1914) [hereinafter 1782 Post Office Ordinance] (authorizing the Postmaster General or his deputies “to hire occasional expresses” to carry the mail at nonfixed times and routes when there is danger of robbery); Minutes of July 27, 1775, *supra* note 580, at 209-10 (listing “[l]abourers occasionally” in a report on hospital “officers and other attendants”).

587. See *supra* note 373-377 and accompanying text (describing the comprehensive analysis in Parts III.A-D).

588. See *supra* text accompanying note 577.

various positions rather than the actual methods the Continental Congress used for selecting people to fill those positions.⁵⁸⁹

1. Handwritten “officer” lists at the National Archives

Several of the lists of departmental officers available on microfilm at the National Archives suggest that at least some officials with less significant responsibilities nonetheless were considered officers during the Continental Congress. For example, a 1779 handwritten record titled “List of the several Officers of the Board of Treasury, Board of War, [and] Marine and Commercial Committees” listed clerks along with higher-level officers like the Auditor General and commissioners of accounts.⁵⁹⁰ A separate National Archives record titled “Officers appointed” included a surgeon, a storekeeper, and an engineer along with majors, colonels, and brigadier generals.⁵⁹¹

These titles’ references just to “officers” appear to be pointed because on other occasions archives records used phrases like “Officers &c.”—suggesting that the relevant record included some nonofficers. A set of reports submitted to Congress in 1783 listing officials in various departments used such a description, for example, when introducing a list of Treasury officials that included the position of “messenger.”⁵⁹² In contrast, the 1783 congressional record of the reports listing government officials used the distinct heading

589. The Continental Congress’s actual appointment practices seemed to diverge from the Congress’s reference to many positions as “offices.” The Articles of Confederation provided for Congress to appoint “officers.” See ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5. But Congress in fact authorized certain officers to appoint their subordinates rather than directly carrying out the appointments itself. For example, in 1775 the Continental Congress appointed Benjamin Franklin to be Postmaster General but in turn authorized the Postmaster General to appoint his secretary, comptroller, and deputies. See Minutes of July 26, 1775, *supra* note 574, at 208-09; see also *infra* note 599 (discussing the process for hiring officials in military hospitals).

590. See List of the Several Officers of the Board of Treasury, Board of War, Marine and Commercial Committees, the Salaries Allowed by Congress, the Last Settlement of Their Accounts, Respectively, Monies on Account (1779), *microformed on* Microcopy No. 247, Roll 35, Item No. 28 (Nat’l Archives & Records Serv.).

591. Officers Appointed (n.d.), *microformed on* Microcopy No. 247, Roll 195, Item No. 178 (Nat’l Archives & Records Serv.) (listing officers appointed between September 1775 and March 1776).

592. Compare A List of Officers &c. in Treasury Department (1783), *microformed on* Microcopy No. 247, Roll 22 (Nat’l Archives & Records Serv.) (listing Joseph Beaumont with no title but a pay rate lower than that of the clerks), and A List of the Officers &c. Employed in the Department of the Treasury with Their Annual Salaries (1783), *microformed on* Microcopy No. 247, Roll 149, Item No. 137 (Nat’l Archives & Records Serv.) (recording the identical list of names, titles, and salaries but with Joseph Beaumont titled as “messenger”), with source cited *supra* note 590 (using the simple label “Officers” to refer to lists including only officer-level positions), and sources cited *infra* notes 593-94 (same).

“List of the *civil Officers* in the marine department of the United States” to introduce a list including only the more highly ranked positions of agent of marine, secretary to the agent, paymaster, and commissary of prisoners.⁵⁹³ The 1783 record also used the phrase “A List of the *Officers*”—not “Officers &c.”—to introduce a list of foreign affairs department officials extending only as far down as clerk and clerk/interpreter, with no reference to lower-level messengers.⁵⁹⁴ These lists of Treasury “Officers &c.,” marine department “civil Officers,” and foreign affairs “Officers” all were reported to the Continental Congress, along with lists from several additional departments, in response to an order requesting “an account of the names and titles of all officers *and others employed* in the civil list department and in the civil and military staff.”⁵⁹⁵

2. Military hospital officials

A 1778 resolution regulating military hospitals provides further evidence that the late eighteenth century understanding of the term “officer” included officials engaged in lower-level tasks.⁵⁹⁶ In the course of assigning duties to officers, the resolution described the following positions as if they were of officer status: the deputy director general over the hospitals, the physician general, and the surgeon general.⁵⁹⁷ The resolution continued on to

593. See List of the Civil Officers in the Marine Department of the United States (1783), *microformed on* Microcopy No. 247, Roll 22 (Nat’l Archives & Records Serv.) (emphasis added).

594. See A List of the Officers in the Department of Foreign Affairs and Their Appointments (1783), *microformed on* Microcopy No. 247, Roll 22 (Nat’l Archives & Records Serv.) (emphasis added).

595. See Minutes of Feb. 18, 1783, in 24 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 139, 139 (Gaillard Hunt ed., 1922) (emphasis added). One other potential nonofficer position appearing in the 1783 congressional record was the position of “waiter” that appeared along with a superintendent, assistant, secretary, and clerks under the heading “List of persons *employed* in the Office of Finance.” See List of Persons Employed in the Office of Finance (c. 1783), *microformed on* Microcopy No. 247, Roll 22 (Nat’l Archives & Records Serv.) (emphasis added). The waiter was listed below the clerks and received a lower rate of pay. *Id.* That said, one document suggests that even the waiter may have been considered an “officer”: A letter drafted by Robert Morris describes his Office of Finance reports as listing just “the several *officers* employed in the Department of Finance and Marine.” See Letter from Robert Morris to the President of Congress (Mar. 10, 1783), *microformed on* Microcopy No. 247, Roll 149, Item No. 137 (Nat’l Archives & Records Serv.) (emphasis added). But this statement may be just a shorthand reference to the longer reports sent to Congress, which themselves include lengthier, more precise—and perhaps more telling—headings for each group of officials.

596. See Minutes of Feb. 6, 1778, *supra* note 182, at 128.

597. See *id.* at 129 (referring to the powers “herein assigned to other officers” before describing the responsibilities of these officials).

characterize as officers “the apothecaries, mates, stewards, [and] matrons.”⁵⁹⁸ Contrary to contemporary standards for Article II officer status, these officers had duties that were nondiscretionary and not related to important policy issues. The *Journals of the Continental Congress* indicate that earlier, in 1775, the Continental Congress approved a committee report that described apothecaries and mates as helping to “visit and attend the sick.”⁵⁹⁹ Matrons superintended the nurses and bedding.⁶⁰⁰

That same 1775 report and subsequent congressional resolution also characterized as officers the surgeons, nurses, clerks, and storekeepers.⁶⁰¹ Nurses in particular were responsible for duties that seemed much less significant than the discretionary, final, important nature of responsibilities necessary for Article II officer status under current doctrine. The 1775 report indicated that nurses “attend the sick, and obey the matron’s orders.”⁶⁰² Clerks were “[t]o keep accounts for the [hospital] director and store keepers.”⁶⁰³ The storekeepers in turn were “[t]o receive and deliver the bedding and other necessaries by order of the director.”⁶⁰⁴

3. Board of Treasury clerks

The May 1784 ordinance changing the leadership of the Treasury from “Superintendent of finance” Robert Morris to a three-commissioner board⁶⁰⁵

598. *See id.* at 130 (“[A]nd the apothecaries, mates, stewards, matrons, and other officers, receiving such stores and other articles, shall be accountable for the same . . .”).

599. Minutes of July 27, 1775, *supra* note 580, at 210. But after the description of the 1775 report listed the apothecaries, mates, and nurses, among others, in a section devoted to describing officer duties, *see id.*, the July 27, 1775 journal recorded a congressional resolution determining who was to appoint people to fill each type of position. Congress itself appointed only the director of the hospital. *See id.* at 211. Congress authorized the director in turn to appoint the apothecary, the clerk, the storekeepers, the nurse, and the surgeons; the surgeons then appointed the mates. *Id.* This seems in conflict with the Articles of Confederation’s subsequent authorization of the “united States, in congress assembled” to “appoint such . . . civil officers as may be necessary for managing the general affairs of the united states under their direction.” ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5. That said, the 1775 resolution was authorizing appointments prior to the Articles’ ratification in 1781. *See supra* note 578 and accompanying text.

600. Minutes of July 27, 1775, *supra* note 580, at 210.

601. *See id.* at 209-11 (including these positions when assigning salaries and duties to officers and reporting that Congress “proceeded to the choice of officers,” during which it resolved that the hospital director should appoint the surgeons, nurses, storekeepers, and one clerk).

602. *Id.* at 210.

603. *Id.*

604. *Id.*

605. *See* Department of Finance Ordinance, *supra* note 239, at 469-70.

suggests that (i) preconstitutional clerks were considered officers, (ii) the Continental Congress believed that congressional appointment of officers could be satisfied by the appointing official merely submitting appointees’ names to Congress, and (iii) officials engaging in duties that would qualify for officer status are nonetheless nonofficers if their superiors are legally accountable for their actions. The 1784 ordinance authorized Congress to appoint three commissioners to head “The Board of Treasury.”⁶⁰⁶ The ordinance then gave the Board authority to “employ as many clerks . . . as they shall find necessary, reporting their names and appointments, from time to time, to Congress, or to the Committee of the States in the recess of Congress.”⁶⁰⁷

In several instances the ordinance referred to the clerks as “officers” or to the position of clerk as an “office,” which suggests that the public understanding of the term “officer” at the time encompassed clerks.⁶⁰⁸ Nonetheless, the Articles of Confederation established that Congress would appoint all civil officers;⁶⁰⁹ the 1784 ordinance in contrast authorized the Board of Treasury commissioners to employ the clerks.⁶¹⁰ One possible explanation is that Congress thought its responsibility for appointing officers was satisfied by the commissioners employing the clerks and then reporting their appointments to Congress. The reporting requirement seemed meaningful; it was absent from the ordinance’s original draft, but Congress amended the draft to require the reporting of clerk names.⁶¹¹ This appointment structure could reflect an early understanding that the appointing authority simply must, on some level, approve of a lower-level official’s initial selection of an officer.

That said, an earlier 1781 ordinance establishing Treasury positions included mixed evidence about the officer status of clerks. On one hand, the ordinance characterized clerks as “officer[s].”⁶¹² But it also authorized higher-

606. *See id.* at 469 (emphasis omitted).

607. *Id.* at 470.

608. *See id.* (referring to commissioners and clerks “entering on the duties of their several offices,” requiring commissioners and clerks to take an oath to properly execute “the duties of their respective offices,” and instructing that clerk salaries should start when “the said officers shall enter on the duties of their Office”).

609. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5.

610. *See* Department of Finance Ordinance, *supra* note 239, at 470.

611. *See* Minutes of May 27, 1784, in 27 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 21, at 437, 438 & n.1 (Gaillard Hunt ed., 1928).

612. *See* 1781 Treasury Ordinance, *supra* note 582, at 949 (including on the list of “officers” to aid the superintendent of finance “a comptroller, a treasurer, a register, auditors and clerks”).

level officers—not Congress—to appoint clerks without requiring Congress to even receive the names of clerk appointees.⁶¹³

Finally, one additional Treasury ordinance from 1779⁶¹⁴ is informative, even though the drafted Articles of Confederation had not yet been ratified and the 1779 officer positions were terminated in 1781.⁶¹⁵ The 1779 ordinance again suggests that early officer status may have turned on whether a supervising officer bore personal accountability for a lower-level official’s actions. Under that ordinance, Congress selected the clerks serving in the chambers of accounts.⁶¹⁶ In contrast, the auditor general and treasurer selected their own clerks.⁶¹⁷ But the ordinance required the auditor general, treasurer, and “auditors for the army” to “be respectively accountable for the conduct of their clerks.”⁶¹⁸ The ordinance omitted any similar language making higher-level officials accountable for the chambers of accounts clerks that Congress appointed directly. Similar to the nonofficer deputies under the First Congress, the officer status of these preconstitutional clerks appeared to turn on whether a superior maintained accountability for the clerks’ actions.⁶¹⁹

4. Post office officials

The 1782 ordinance regulating the preconstitutional post office⁶²⁰ presents another possible example of an early understanding that *responsibility* is a required element for officer status. Even though the Articles of Confederation authorized Congress to appoint officers, the Continental Congress authorized the Postmaster General to appoint his own clerk, assistant, and deputies.⁶²¹ In turn, however, the Postmaster General was to “be accountable” for their

613. See *id.* at 950 (authorizing both the comptroller and the register to appoint clerks).

614. 1779 Treasury Ordinance, *supra* note 582.

615. See 1781 Treasury Ordinance, *supra* note 582, at 948-49.

616. See 1779 Treasury Ordinance, *supra* note 582, at 903.

617. *Id.*

618. *Id.*

619. *But see id.* (authorizing the Board of Treasury to appoint its own clerk and messenger with no language indicating that the Board was accountable for the actions of its clerk).

620. 1782 Post Office Ordinance, *supra* note 586. A pre-Articles resolution in 1775 had authorized the “postmaster General” to appoint a secretary, comptroller, and deputies, with no language addressing their officer status. See Minutes of July 26, 1775, *supra* note 574, at 208-09. The 1782 ordinance voided this resolution. See 1782 Post Office Ordinance, *supra* note 586, at 678.

621. See 1782 Post Office Ordinance, *supra* note 586, at 670.

“fidelity.”⁶²² One factor perhaps confirming that Congress did not consider these officials to be officers is that their required oath did not use the term “officer.” Unlike some of the oaths of office under the First Congress, for example, that referred explicitly to the duties of the “office,”⁶²³ the 1782 post office oath obligated officials simply to “fulfil every duty required” of them.⁶²⁴

IV. The Historic Officer Definition in Modern Administration

This Part first addresses which present-day officials currently treated as employees may in fact qualify as officers under the historical scope of Article II. It then explains how a return to the early practice of selecting a greater percentage of officials via the Article II procedure may be able to enhance accountability, transparency, and excellence without necessarily harming efficiency or leading to frequent rotation in lower-level offices. The primary question this Article has sought to address is: What is the proper scope of government officials encompassed within the eighteenth century meaning of “officer”? But answering that question is just one small step in determining how modern government officials should be selected if the historical meaning of the Appointments Clause were to be adopted in modern practice. For example, one would also need to address as a historical matter (i) which government entities constitute “Heads of Departments”; (ii) whether interbranch or interdepartmental appointments of inferior officers are permissible; and (iii) whether, and to what extent, Congress may constrain the choice of inferior officers by imposing qualifications requirements on officeholders. This Article touches only briefly on each of those questions to provide just the beginnings of a discussion of what modern appointment practices might look like under an application of the likely eighteenth century meaning of “officer.”

The Framers believed that putting one actor in charge of appointments would ensure that the actor took great care in nominating qualified individuals. If the appointing official instead selected an underqualified officer due to improper motivations such as patronage, the appointing officer would suffer reputational and perhaps political consequences.⁶²⁵

622. *Id.*; see also *Fidelity*, DYCHE & PARDON, *supra* note 112 (defining “fidelity” as “trustiness, faithfulness, honesty, integrity”). The Postmaster General or his deputies also had authority “from time to time” to appoint “necessary post-riders, messengers and expresses.” 1782 Post Office Ordinance, *supra* note 586, at 670.

623. See, e.g., Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (referring to “the duties of the office of marshal” in federal marshals’ required oath).

624. See 1782 Post Office Ordinance, *supra* note 586, at 671. *But see id.* at 674 n.2 (printing text that had been included in an earlier draft of the ordinance that referred to the “duties of office” of the Postmaster General and his clerk and assistant).

625. See *infra* notes 692-95 and accompanying text.

Even though compliance with the original meaning of Article II might require a significant portion of civil service employees to undergo Article II officer appointment, efficiency in the selection of officials may still be achievable. The original meaning of the Constitution as evidenced by early practice and the constitutional text seems to require only that the President or department head give final approval to appointments of inferior officers. Thus, Article II constraints may be satisfied as long as the department head signs off on both (i) a lower-level officer’s hiring decision and (ii) the selection of civil service board members who evaluate candidates using objective criteria.

A. Present-Day “Officers” Under Article II’s Original Meaning

As explained above, the most likely original meaning of the term “officer” is anyone with ongoing responsibility for a federal statutory duty. Duties as ministerial as recordkeeping would qualify.⁶²⁶

Adopting this view would mean that numerous officials in the modern administrative state currently considered nonofficers might in fact be subject to Article II appointment requirements. Following are several specific examples of what taking the original view of the meaning of “officer” might mean for present-day selection of government personnel.

1. The Federal Emergency Management Agency

Several high-level FEMA officials not appointed under Article II have statutory duties that would seem to qualify them as officers under the Constitution’s original public meaning—and perhaps even under *Buckley’s* “significant authority” standard.⁶²⁷ For example, the FEMA Administrator, rather than the President or Secretary of Homeland Security, appoints FEMA’s regional administrators and disability coordinator.⁶²⁸

The FEMA Administrator is not an authorized Article II appointing authority. Under the Supreme Court’s adoption of the apparent original meaning of the phrase “Head[] of Department” in *Free Enterprise Fund*, a department is “a freestanding component of the Executive Branch, not

626. This was the case even if a statute did not state precisely which official must perform the duty. See *supra* notes 366-69 and accompanying text. This is a clear distinction from modern analysis, which ties officer status in part to whether a statute explicitly assigns a particular official to perform specific tasks. See, e.g., *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991) (concluding that special trial judges in the Tax Court were officers in part because “the duties, salary, and means of appointment for that office are specified by statute”).

627. See *supra* notes 44-48 and accompanying text.

628. See 6 U.S.C. § 317(b)(1) (2016) (regional administrators); *id.* § 321b(a) (disability coordinator); see also BEA, *supra* note 46, at 15 tbl.1.

subordinate to or contained within any other such component.”⁶²⁹ In contrast, FEMA is contained within the Department of Homeland Security;⁶³⁰ the FEMA Administrator reports to the Secretary of Homeland Security.⁶³¹

Therefore, appointment by the FEMA Administrator is insufficient for Article II compliance insofar as the appointed official is an “inferior Officer[.]” as opposed to a non-Article II employee.⁶³² At least several officials appointed by the FEMA Administrator seem to qualify. For example, the Administrator has the authority to appoint ten regional administrators who have responsibility for, among other things, ensuring effective regional preparedness for natural disasters and terrorism.⁶³³ Regional administrators also coordinate the establishment of regional emergency communications capabilities and oversee regional strike teams, a focal point of initial federal efforts to respond to terrorism or natural disasters.⁶³⁴

Also, the Administrator appoints FEMA’s disability coordinator, who has the statutory charge “to ensure that the needs of individuals with disabilities are being properly addressed in emergency preparedness and disaster relief.”⁶³⁵ The disability coordinator’s responsibility for such a duty would seem to qualify for officer status under Article II’s original public meaning because the disability coordinator carries out an ongoing statutory task established by Congress.

Congress also charges the disability coordinator with the type of discretionary policymaking on important issues that would seem to satisfy at least some of the factors required to constitute “significant authority” under *Buckley* and *Freytag*.⁶³⁶ The coordinator’s specific statutory charges include ensuring accessible transportation for individuals with disabilities during evacuations, implementing policies that respect the rights of individuals with disabilities in

629. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

630. See 6 U.S.C. §§ 313(a), 316(a).

631. See *id.* § 313(c)(3).

632. See U.S. CONST. art. II, § 2, cl. 2.

633. See 6 U.S.C. § 317(a)-(c). Congress has vested in the Secretary of Homeland Security “[a]ll functions of all officers, employees, and organizational units of the Department.” *Id.* § 112(a)(3). But this seems insufficient to absolve FEMA officials from Article II-level responsibility for their governmental duties as an original matter. The Founding-era deputies outside the scope of Article II had supervising officers who were subject to personal liability for the deputies’ actions. See *supra* Part III.B.

634. See 6 U.S.C. § 317(c)(2)(C)-(D).

635. *Id.* § 321b(a).

636. Cf. *Tucker v. Comm’r*, 676 F.3d 1129, 1133-35 (D.C. Cir. 2012) (concluding that “the issue of a person’s tax liability is substantively significant enough” that an officer charged with assessing it is more likely to be deemed an Article II officer).

postevacuation relocations, and ensuring that the national preparedness system addresses relevant needs.⁶³⁷

If these several FEMA positions are in fact Article II offices, Article II’s requirements could presumably be satisfied by a statutory change requiring the Secretary of Homeland Security to give final approval to the FEMA Administrator’s appointments. Under the original public meaning of “officer” as anyone responsible for an ongoing duty, there could foreseeably be Article II problems for officials with any level of governmental responsibility who are appointed by heads of executive entities that are not independent, self-contained departments.⁶³⁸ That said, the statutory remedy for such a problem seems relatively straightforward.⁶³⁹

2. The competitive service

There are many positions covered by the competitive service system that may qualify as Article II offices under a broad historical meaning of “officer” as one responsible for an ongoing governmental duty. Submitting officials to competitive service procedures if they are in fact Article II “officers” may cause constitutional problems in one of two ways. First, sometimes the agency authority who makes the final selection from the list of permissible competitive candidates is not an Article II-authorized appointing official such as a department head. Second—and this is a much closer case as a constitutional matter—selection through the competitive service arguably causes constitutional problems even when the final appointing official is a department head. That said, ensuring that all members of the competitive service examining unit board are themselves Article II appointees might address this concern.

If Article II compliance does in fact require department head signoff on aspects of the competitive service ranking system and the final selection of many civil service officials, there would need to be a systematic review of hiring procedures for each of the civil service positions constituting Article II offices to see whether, and how significantly, those current procedures diverge from Article II appointment practices. Agencies do not necessarily all have identical hiring procedures.⁶⁴⁰ This Subpart provides just a sample of some of

637. See 6 U.S.C. § 321b(b)(8)-(10).

638. Cf., e.g., Barnett, *supra* note 35, at 809-11 (observing that some ALJs may be appointed by agencies that do not satisfy *Free Enterprise Fund*’s definition of departments).

639. See *infra* notes 701-09 and accompanying text (suggesting that Article II’s department head approval requirement can be satisfied by just requiring the department head to give the final signoff on officers selected by subordinates).

640. Cf. Barnett, *supra* note 35, at 805, 810 (describing distinct appointment procedures for ALJs across different federal agencies).

the current civil service positions that likely fall within the original meaning of “offices” but currently do not appear to be filled in conformity with Article II.

a. The IRS’s Office of Chief Counsel and non-department head appointing authority

Certain officials within the IRS Office of Chief Counsel may qualify as Article II officers. The IRS hiring manual indicates that the Chief Counsel is the “selecting official” for hires within the office at the level of GS-15.⁶⁴¹ The General Counsel for the Department of the Treasury is the official who approves the selection of members of the Senior Executive Service (SES) within the Office of Chief Counsel.⁶⁴² Neither the General Counsel nor the Chief Counsel heads a department,⁶⁴³ thus, neither has Article II appointing authority. But they select officials with responsibilities ranging from interpreting internal revenue laws⁶⁴⁴ to representing the IRS in legal proceedings.⁶⁴⁵ Under the original meaning of “officer,” appointment of these officials should be subject to the Secretary of the Treasury’s final authority, just like the selection of customs officers from early practice.⁶⁴⁶

641. IRS, INTERNAL REVENUE MANUAL § 30.4.1.2.1(1) (2017), <https://perma.cc/7YQE-L8TB>.

642. *See id.*

643. *See* I.R.C. § 7803(b)(2)-(3) (2016) (describing the duties of the Chief Counsel and providing that the Chief Counsel reports to both the IRS Commissioner and the General Counsel on various matters); *id.* § 7803(b)(3) (demonstrating the General Counsel’s subordination to the Secretary of the Treasury by the requirement that the General Counsel and Commissioner of Internal Revenue submit their disagreements on matters of tax law to the Secretary); *cf.* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

644. *See* IRS, INTERNAL REVENUE MANUAL § 1.1.6.2 (2015), <https://perma.cc/6DH3-WVPJ> (outlining the duties of the Deputy Chief Counsel (Technical)).

645. *See id.* § 1.1.6.9 (outlining the duties of the Associate Chief Counsel (General Legal Services)).

646. *See supra* text accompanying note 495. By statute, Congress has granted authority to the Commissioner of Internal Revenue “to employ such number of persons as the Commissioner deems proper for the administration and enforcement of the internal revenue laws.” I.R.C. § 7804(a) (giving this authority to the commissioner “[u]nless otherwise prescribed by the Secretary”). But even if the Chief Counsel’s hiring authority in the *Internal Revenue Manual* is interpreted to be subject to the commissioner’s ultimate statutory hiring authority under § 7804(a), the appointments are still not subject to final department head approval. The Commissioner of Internal Revenue is subordinate to the Secretary of the Treasury, *see, e.g., id.* § 7803(a)(2) (empowering the Secretary to determine whether to delegate to the Commissioner certain powers and duties); *id.* § 7803(b)(3) (requiring the Commissioner to submit certain types of disagreements with the General Counsel of the Treasury Department to resolution by the Secretary or Deputy Secretary), and thus is not a department head—at least under the *Free Enterprise Fund* standard. *See supra* notes 504-06 and accompanying text.

b. Customs officials and the competitive service ranking system

In contrast to the attorneys in the IRS’s Office of Chief Counsel, a department head apparently does provide final signoff on the selection of certain customs and border protection personnel, subject to the merit-based civil service selection system.⁶⁴⁷ By statute, customs personnel are authorized to perform duties as prescribed by a department head.⁶⁴⁸ Under the original meaning, this authority to perform statutory duties would qualify these customs officials as Article II officers.

The ultimate department head appointment of these officials would at first seem to satisfy Appointments Clause requirements even if these officials are Article II officers. But the application of the competitive service selection process to these officials may still arguably diverge from Article II—at least in spirit. Congress by statute requires many government employees to be selected based on merit, which is judged on factors such as “relative ability, knowledge, and skills, after fair and open competition.”⁶⁴⁹ For each competitive service position the U.S. Office of Personnel Management (OPM) then either crafts the

647. See 19 U.S.C. § 2072(a) (2016) (authorizing the Secretary of the Treasury to appoint “officers and employees as he may deem necessary . . . subject to the provisions of the civil service laws”). In 2002, the Secretary of the Treasury’s authority to appoint certain customs personnel was apparently transferred to the newly established position of Secretary of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 403(1), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 203 (2016)) (transferring to the Department of Homeland Security the functions of entities like the U.S. Customs Service and the Transportation Security Administration); see also 6 U.S.C. § 203(1) (transferring to the Secretary of Homeland Security the functions and personnel of “the United States Customs Service . . . , including the functions of the Secretary of the Treasury relating thereto”); *id.* § 212(a)-(b) (providing that the Secretary of the Treasury retains certain customs revenue-related functions that do not include the appointing authority described in 19 U.S.C. § 2072(a)). Regardless whether the appointing authority is the Secretary of Homeland Security or the Secretary of the Treasury, these customs officials present an example of “officers” under Article II’s original meaning who, under current statutory law, must be hired in compliance with civil service selection requirements subject to the ultimate appointment authority of a department head.

648. See 19 U.S.C. § 2072(c).

649. See 5 U.S.C. § 2301(b)(1) (2016); see also *id.* § 3301(2) (permitting the President to “ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought”). Exceptions are permitted in limited circumstances. See, e.g., *id.* § 3302 (permitting the President to make “necessary exceptions of positions from the competitive service”); *id.* § 3304(a)(3) (permitting the President to exempt openings from competitive application when the Office of Personnel Management (OPM) finds a “critical hiring need” or a “severe shortage of candidates”).

criteria on which the candidates will be judged⁶⁵⁰ or delegates that authority to the specific agency hiring for the position.⁶⁵¹

The competitive service regulations then call for the three top-scoring candidates who meet a minimum score requirement to be placed on a list of eligible candidates.⁶⁵² The appointing official—sometimes a department head and sometimes a lower-level official—must fill the open position from the list of top-scoring candidates or candidates qualifying for certain preferences.⁶⁵³ In some circumstances, appointing officials may request OPM approval to pass over the top-scoring candidates and consider someone else.⁶⁵⁴

In *The President: Office and Powers*, Edward Corwin observed that longstanding constitutional practice has permitted Congress to mandate that officer appointees satisfy very specific requirements, such as those relating to residency, education, or even political affiliation.⁶⁵⁵ The understanding seems to have been that Congress’s Article II authority to establish offices “by Law” is accompanied by the power to restrict the category of people who can fill such positions.⁶⁵⁶ This view is explicitly affirmed in an 1871 U.S. Attorney General opinion.⁶⁵⁷ Hanah Metchis Volokh similarly has provided an originalist argument that Article II permits Congress to impose qualifications on those eligible for inferior officer appointments.⁶⁵⁸

Assuming that qualifications on at least inferior officer appointments are constitutional, one way to conceptualize competitive service requirements might be that they are simply an even more detailed requirement that Congress imposes on the executive branch positions it has the power to create.⁶⁵⁹ Instead of requiring an official to reside in a particular state, for

650. See 5 C.F.R. § 337.101 (2017) (setting forth the numerical scoring system to be used by the OPM).

651. See 5 U.S.C. § 1104(a)(2) (authorizing the OPM Director to delegate authority for most competitive exams to the heads of agencies).

652. See 5 C.F.R. §§ 332.402, 337.101; see also 5 U.S.C. § 3317.

653. See 5 U.S.C. §§ 3317–3318; see also *id.* §§ 2108, 2108a, 3309 (indicating that points are added to the score of any candidate who qualifies for veterans’ hiring preferences).

654. See *id.* § 3318(a) (permitting appointing authorities to object to hiring one or more of the top three eligible candidates, subject to OPM approval).

655. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1948; HISTORY AND ANALYSIS OF PRACTICE AND OPINION* 88–89 (3d ed. 1948).

656. See *id.*; see also Volokh, *supra* note 3, at 759–60.

657. See Civil-Serv. Comm’n, 13 Op. Att’y Gen. 516, 520 (1871) (concluding that “the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them” as long as there is some room “for the judgment and will of the person or body in whom the Constitution vests the power of appointment”).

658. See Volokh, *supra* note 3, at 747–48.

659. See *id.* at 747–48, 789 (concluding that qualification requirements for the appointment of inferior officers are often permissible). *But see id.* at 753 n.39 (noting the 1871 Attorney
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example, the competitive service statutes and regulations require the official to have certain types of job experience and qualifications.⁶⁶⁰

An alternative view, in light of the Appointments Clause’s history, is that competitive service requirements—at least in their most restrictive form—stray beyond mere job qualifications to a constitutionally impermissible restriction on Article II appointment authority.⁶⁶¹ As a functional matter, if a department head is limited to a choice among a small group of referred candidates, has that department head had a meaningful role in selecting that official?⁶⁶² One of the goals motivating the Framers’ drafting of the Appointments Clause was accountability for the appointing official.⁶⁶³ The

General opinion’s conclusion that “[a] legal obligation to follow the judgment of [a nominating] board” is unconstitutional (second alteration in original) (quoting *Civil-Serv. Comm’n*, 13 Op. Att’y Gen. at 520)).

660. Corwin cites Justice Brandeis’s dissenting opinion in *Myers v. United States*, which listed hundreds of statutes qualifying the types of candidates who could be appointed to various federal positions. See CORWIN, *supra* note 655, at 416 n.19 (citing *Myers v. United States*, 272 U.S. 52, 264-74 (1926) (Brandeis, J., dissenting)). But early on, statutory officer restrictions were fairly modest. During the First Congress, the few provisions restricting which individuals could hold an officer position included requirements such as that the Attorney General be “learned in the law.” Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93; see also Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154-55 (repealed 1799) (providing that “proper persons” may be employed as weighers, gaugers, measurers, and inspectors); Act of Apr. 30, 1790, ch. 10, § 2, 1 Stat. 119, 119 (repealed 1795) (requiring noncommissioned officers and privates to be “able-bodied men” of a certain height and age); cf. Act of Aug. 7, 1789, ch. 6, § 1, 1 Stat. 49, 49-50 (authorizing the President to nominate “such person or persons as he may think proper” to serve on a Board of Commissioners for settling accounts with states). Qualifications continued to be fairly restrained through the mid-nineteenth century; officers in federal territories, for instance, were required to be from those territories, and Louisiana legislative council members were required to own real estate. See *Myers*, 272 U.S. at 265-74 (Brandeis, J., dissenting); see also Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284 (amended 1812).

661. Cf. Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 509 (2011) (explaining that courts have never ruled on the constitutionality of congressional limitations on the President’s power to nominate principal officers through statutory qualifications on such officers).

662. See Volokh, *supra* note 3, at 780-81 (positing that perhaps the more closely an officer works with the President, the less restrictive the statutory qualifications may be); cf. *Appoint*, DYCHE & PARDON, *supra* note 112 (defining “appoint” as “to authorize one person to act for another, to task, or set a person something to do: also to make an end of, or determine a matter” (emphasis added)).

663. See *infra* Part IV.B.1; see also 2 FARRAND’S RECORDS, *supra* note 58, at 539 (Madison’s notes: “Mr. Govr. Morris said that as the President was to nominate, there would be responsibility”); THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 56, at 392-93 (concluding that an “assembly of men” would be more prone to partiality-based appointments than a single individual solely responsible for high-quality appointments because individual responsibility “will naturally beget a livelier sense of duty, and a more exact regard to reputation”); James Wilson, *Government: Lectures on Law* (1791), in 4 THE FOUNDERS’ CONSTITUTION 110, 110 (Philip B. Kurland & Ralph Lerner eds.,

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competitive service framework is arguably incongruent with that end. If a department head’s appointment choice has been limited to three candidates, one can imagine the department head citing his limited options if later called into account for a misdeed of his appointee.

The 1871 Attorney General opinion expresses a similar sentiment. According to that opinion, the Appointments Clause would have been violated if the newly established civil service commission were to designate just one person for possible appointment based on that individual’s top competitive evaluation score.⁶⁶⁴ The Attorney General concluded that *requiring* an appointing official to select the one top competitive exam scorer would unconstitutionally turn the examination board into the virtual appointing power.⁶⁶⁵ According to the Attorney General, the power of appointment necessarily includes with it the use of “the judgment and will of the person or body in whom the appointing power is vested by the Constitution.”⁶⁶⁶

That said, the Attorney General’s opinion indicated that it would be acceptable for the civil service commission to provide a score to the appointing authority “as one means of information” if that authority had discretion over whether to select the top-scoring candidate.⁶⁶⁷ In other words, “[T]he test of a competitive examination may be resorted to in order to inform the conscience of the appointing power, but cannot be made legally conclusive upon that power against its own judgment and will.”⁶⁶⁸

The opinion then found that not only would it be permissible for competitive exam scores to inform the appointing authority’s selection, but also it would be constitutional to limit the appointing authority to picking from a class of candidates who were judged as having a certain minimal level of qualifications.⁶⁶⁹ The opinion expressly declined to determine how large a class of options the appointing authority must be given at the conclusion of the competitive service exam.⁶⁷⁰ Limiting the appointing authority to just the top

1987) (“The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune should be responsible.”). *But see* Letter from Roger Sherman to John Adams (July 1789), in 4 THE FOUNDERS’ CONSTITUTION, *supra*, at 108, 108 (“If the president alone was vested with the power of appointing all officers, and was left to select a council for himself, he would be liable to be deceived by flatterers and pretenders to patriotism, who would have no motive but their own emolument.”).

664. *Civil-Serv. Comm’n*, 13 Op. Att’y Gen. at 517-18; *see also* Volokh, *supra* note 3, at 781 nn.171, 173 (discussing the 1871 opinion).

665. *See Civil-Serv. Comm’n*, 13 Op. Att’y Gen. at 518-19.

666. *See id.* at 518.

667. *See id.* at 520.

668. *Id.* at 524.

669. *See id.* at 523-24.

670. *See id.* at 525.

candidate was clearly impermissible, but the opinion did not specify exactly how many qualified candidate options there must be.⁶⁷¹ The Attorney General opined that this would be a tough question of line drawing, just like many challenging constitutional questions.⁶⁷²

Congress began requiring merit-based examinations for potential federal employees in the nineteenth century.⁶⁷³ Some of the first officials subject to merit-based selection were clerks—who at the time also were considered Article II officers, providing support for the idea that merit-based selection requirements can be compatible with Article II appointments. Perhaps the longstanding nature of this practice, combined with the fact that it may not literally violate the terms of the Appointments Clause so long as the actual final appointment is made by someone specified in Article II, weighs significantly in favor of its constitutionality in at least some form.

Nonetheless, to the extent that certain positions subject to competitive service procedures are in fact Article II offices, one way to put that practice on surer constitutional footing⁶⁷⁴ may be to ensure that each official on the boards evaluating candidate credentials is herself subject to Article II appointment. (At least in some cases, under current law, board members scoring the competitive service candidates are not selected by the department head.)⁶⁷⁵ And perhaps departmental officials should have more latitude in selecting which merit-based factors they will evaluate for each position.⁶⁷⁶ Finally, appointment to

671. *See id.*

672. *See id.*

673. *See* CORWIN, *supra* note 655, at 89 (noting that the Civil Service Act of 1883 required the appointing officer to choose from candidates with the highest competitive scores and that follow-on executive orders “further restricted choice to the *three highest*”); *see also* Myers v. United States, 272 U.S. 52, 268, 270 n.45 (1926) (Brandeis, J., dissenting) (indicating that Congress imposed an exam requirement on clerk candidates in the 1850s); WHITE, *supra* note 263, at 254 (citing Act of Mar. 2, 1799, ch. 27, § 9, 1 Stat. 721, 722-23 (amended 1802)) (noting the creation of a three-member board of senior military medical officers to examine military hospital candidates).

674. *Cf.* CORWIN, *supra* note 655, at 88-89 (noting questions about whether Article II permits particularly constraining restrictions such as limiting the choice to a small group of candidates).

675. *See, e.g.*, I.R.C. § 7804(a) (2016) (authorizing the Commissioner of Internal Revenue—rather than a department head—to employ persons “for the administration and enforcement of the internal revenue laws”); IRS, *supra* note 641, § 30.4.1.2.1 (explaining the makeup of the Executive Resources Boards that review applicants for GS-15 and Senior Executive Service positions and make hiring recommendations to the IRS Chief Counsel and the Treasury Department General Counsel—the selecting officials). *But see* 5 U.S.C. § 3301(3) (2016) (authorizing the President to “appoint and prescribe the duties of individuals to make inquiries” for civil service examination).

676. *See* 5 U.S.C. § 1104(b)(3) (clarifying that even if the OPM Director has delegated some competitive examining authority to an agency head, the Director maintains ultimate
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every Article II office should be subject to at least the final approval of a department head, in contrast to officials like the IRS Chief Counsel’s employees discussed above.⁶⁷⁷

But this proposal raises an interesting question. At present the centralized OPM has responsibility for the initial merit-based ranking of candidates for many positions that may in fact constitute Article II offices⁶⁷⁸—such as ALJs, to name just one example.⁶⁷⁹ Assuming that mandatory merit-based ranking requirements in at least some form are a permissible congressional qualification on officeholding, is it nonetheless unconstitutional for the ranking to be done by executive branch officials who do not report to the department head with final appointing authority? There are reasons to believe that under first principles, at least certain *interbranch* appointments of executive officials are impermissible under the text and structure of the Constitution.⁶⁸⁰ But are *intra*branch, *interdepartmental* appointments

responsibility over the civil service laws and regulations); *id.* § 1104(c) (authorizing the OPM to require agency corrective action for any legal violations when the agency acts under delegated examining authority).

677. *See supra* Part IV.A.2.a. If a department head or the President may exercise appointing authority merely through a final signoff on the choice of a candidate, one may question whether even that final approval authority could be delegated to a properly appointed lower-level officer. If so, perhaps the IRS Chief Counsel could in fact properly appoint inferior officers in the IRS so long as the Secretary of the Treasury had delegated authority to him to do so. But Congress by statute still would have to authorize the Secretary to delegate her appointing authority. *Cf.* *Assignment of Certain Functions Related to Military Appointments*, 29 Op. O.L.C. 132, 132 (2005) (analyzing whether the President’s broad statutory authority to delegate various functions to department heads, *see* 3 U.S.C. § 301 (2016), permits the President to delegate the duty to appoint certain inferior military officers). In any event, there are reasons to believe such delegation may be constitutionally inappropriate. The executive branch has institutional incentives to advocate for the President and department heads having as broad authority as is constitutional—including the power to choose to delegate that authority. Nonetheless, in 2005, the OLC indicated that it was a difficult and unresolved constitutional question whether Congress could ever authorize the delegation of final appointment authority to an officer not listed as an appointment authority in Article II. *See Assignment of Certain Functions*, 29 Op. O.L.C. at 135. Although the OLC left open the question whether such delegation could occur for inferior officer appointments, the OLC definitively stated that Congress could never authorize the President to delegate the nomination of principal officers subject to the advice and consent of the Senate. *Id.*

678. *See supra* notes 649-54 and accompanying text.

679. *See* Barnett, *supra* note 35, at 804.

680. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 805-07 (1999); Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. U. CHI. J. REG. COMPLIANCE 22, 27-33 (2017) (observing that the Article II Vesting Clause, U.S. CONST. art. II, § 1, cl. 1; the Article II duty to “take Care that the Laws be faithfully executed,” *id.* art. II, § 3; the structure and drafting history of Article II; and early practice provide evidence that courts of law may not appoint executive branch officers). *But see footnote continued on next page*

acceptable?⁶⁸¹ And even if that answer generally is yes (that is, suppose it’s constitutional for the Secretary of Homeland Security to appoint a Department of Treasury official), is it constitutional for Congress to bifurcate inferior officer appointing authority by giving the merit-based ranking component to one department and the final appointing authority to another? If not, perhaps this complication could be addressed by establishing miniature competitive service ranking committees within each executive department.

Functional constitutionalists share with formalists certain separation of powers concerns about one branch of government attempting to aggrandize its power at the expense of another.⁶⁸² By taking on the power to define so specifically which qualifications the executive branch may or may not consider in filling civil service slots, Congress may arguably be engaging in the very self-aggrandizement that both functionalist and formalist courts have rejected.⁶⁸³ Ensuring that officials appointed under Article II’s procedures evaluate the competitive credentials of officer candidates and then submit those recommendations to the supervisory department head for final approval seems more in line with both the constitutional text and purpose as that purpose has been understood by jurists of all interpretive stripes.

Morrison v. Olson, 487 U.S. 654, 673-77 (1988) (contending that the Appointments Clause permits interbranch appointments to an extent).

681. See, e.g., Samahon, *supra* note 33, at 254 (“[T]he [inferior officer appointments provision] ‘was intended merely to make clear (what Madison thought already was clear) that those officers appointed by the President with Senate approval could on their own appoint their subordinates.’ . . . If the vested appointment authority is interpreted to extend only to appointing subordinates—such as appointees within the same branch of government who themselves are responsible to the appointing authority—political accountability for poor or excellent appointees is furthered.” (quoting *Morrison*, 487 U.S. at 720-21 (Scalia, J., dissenting))).
682. See *Mistretta v. United States*, 488 U.S. 361, 381-82 (1989) (noting that the more flexible constitutional view of separation of powers considers self-aggrandizement to be one of the central concerns animating separation of powers jurisprudence); see also, e.g., *Weiss v. United States*, 510 U.S. 163, 174 (1994) (relaxing the restrictions on giving officers new duties when Congress has not increased its own power by handpicking the officers to whom the new duties will be given).
683. Cf. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (observing that the Framers built into the three-branch government “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other”), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); see also *Weiss*, 510 U.S. at 187 (Souter, J., concurring) (“[N]o branch may aggrandize its own appointment power at the expense of another. Congress, for example, may not unilaterally fill any federal office . . .” (citation omitted)); Volokh, *supra* note 3, at 787-89, 788 n.196 (discussing this concern).

3. Other potential instances of present-day noncompliance with the original public meaning of Article II

In the event that competitive civil service procedures in their current form do not comply with Article II, following are some additional positions within the competitive service that might qualify as offices under Article II’s original public meaning and thus might need to be revisited.

First, IRS employees’ duties include, among other things, reviewing tax returns, conducting audits, and collecting overdue taxes.⁶⁸⁴ Congress by statute has authorized and mandated the collection of taxes under the internal revenue laws.⁶⁸⁵ Under the original meaning of “officer,” government officials carrying out this statutory responsibility thus qualify as Article II officers subject to Appointments Clause requirements.

Second, one competitively selected position within the Veterans Health Administration is the job of medical reimbursement technician. The duties of this position include validating benefits claims and maintaining responsibility “for all reimbursable billing activities.”⁶⁸⁶ Government officials responsible for facilitating the payment of federal funds would seem to have the kind of duty that qualifies for Article II “officer” status.

Third, the federal government also applies competitive service procedures to various positions related to contracting. For example, a competitively selected contract specialist might draft award documents in accordance with federal contract policies or “provide[] direction to personnel on analysis of procurement requests.”⁶⁸⁷ Involvement with government contracts that includes facilitating public spending or ensuring compliance with legal guidelines would seem to fit within the original meaning of “officer” as someone with the responsibility to carry out a statutory requirement.

Other officials subject to competitive consideration whose duties may measure up to historic officer status include: (i) federal law enforcement

684. See *Tax Examiners and Collectors, and Revenue Agents*, BUREAU LAB. STAT., <https://perma.cc/A9UJ-QZBT> (last updated Oct. 24, 2017); see also, e.g., IRS, INTERNAL REVENUE MANUAL § 4.10.1.2(1) (2017), <https://perma.cc/VHN9-5AZC> (“Examiners have the ongoing responsibility to ensure that all taxpayer rights are protected and observed”); IRS, INTERNAL REVENUE MANUAL § 5.1.3.1 (2014), <https://perma.cc/H73E-AEU5> (describing procedures for “collection cases” assigned to “revenue officers”); IRS, INTERNAL REVENUE MANUAL § 9.4.1 (2017), <https://perma.cc/UUU4-DKF9> (describing the efforts of special agents to conduct “information collecting activities”).

685. See I.R.C. § 6301 (2016) (“The Secretary [of the Treasury] shall collect the taxes imposed by the internal revenue laws.”).

686. See *Job Detail: Medical Reimbursement Technician (OCA)*, U.S. DEP’T VETERANS AFF., <https://perma.cc/UMG4-6DY3> (archived Nov. 13, 2017).

687. See *Contract Specialist: Department of the Navy*, USAJOBS, <https://perma.cc/T5RM-7GDY> (archived Nov. 13, 2017).

officers;⁶⁸⁸ (ii) officials responsible for government investigations, audits, or cleanup efforts;⁶⁸⁹ (iii) ALJs, who engage in adjudicative functions authorized by the Administrative Procedure Act;⁶⁹⁰ and (iv) IRS Office of Appeals officials, who conduct hearings as a prerequisite to issuing taxpayer liens.⁶⁹¹

B. Promoting Article II Values

Complying with Appointments Clause procedures in appointing civil service officials would promote rather than degrade the values of accountability, excellence, and transparency that the Framers and civil service reformers intended to achieve. This Subpart explains how that might work.

1. Accountability

The Framers adopted the Appointments Clause as a safeguard against the “diffusion of accountability”⁶⁹² that develops when multimember bodies select government officials.⁶⁹³ The allocation of appointment authority to individual actors ensures that nominators may not act under the cloak of secrecy.⁶⁹⁴ This

688. See, e.g., *Police Officer: Department of Veterans Affairs*, USAJOBS, <https://perma.cc/Q65G-NFC5> (archived Nov. 13, 2017).

689. See, e.g., *General or Environmental Engineer: Department of the Navy*, USAJOBS, <https://perma.cc/EG8E-C6AN> (archived Nov. 13, 2017) (noting that responsibilities include “[o]rversee[ing] the installation’s compliance with environmental regulatory standards” and “[r]eview[ing] abatement activities”).

690. See 5 U.S.C. § 556(b)-(c) (2016); see also Barnett, *supra* note 35, at 799-800, 812 (concluding that ALJs are “inferior Officers” under both longstanding and recent Supreme Court precedent).

691. See Lindstedt, *supra* note 36, at 1184 (concluding that IRS appeals personnel are Article II officers). *But see* Tucker v. Comm’r, 676 F.3d 1129, 1131 (D.C. Cir. 2012) (holding that these officials are not Article II officers).

692. Cf. PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 1 (1995) (capitalization altered) (using this phrase to discuss administrative accountability in a different context, namely the challenges for accountability that arise from the increasingly complex web of senior positions at the top of the administrative hierarchy).

693. See *supra* notes 57-60 and accompanying text; see also, e.g., Wilson, *supra* note 663, at 110 (observing that where one individual is responsible for appointments, appointments based on considerations other than merit “will be known by the citizens”); cf. WHITE, *supra* note 263, at 91 (noting that the Federalists generally disliked official boards, “believing them weak and irresponsible”). *But see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 513 (2010) (contending that the petitioners had no evidence the Framers were concerned about single actors appointing inferior officers and that twentieth century practice demonstrated that collective bodies may be heads of departments).

694. See THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 56, at 398-99; cf. Freytag v. Comm’r, 501 U.S. 868, 885 (1991) (“The Appointments Clause prevents Congress from

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in turn provides a direct line of accountability for any poorly performing officers back to whomever selected them.⁶⁹⁵

The ranking of competitive service applicants by a multimember board not itself selected pursuant to Article II raises similar concerns about diffuse decisionmaking. If a new hire does not pan out, no single individual is clearly to blame.

Concerns about patronage existed even prior to the Constitution’s ratification. The Framers were aware of the problem of patronage; they crafted Article II as the best way to guard against it. Their view was that transparency in the appointment process would be an effective safeguard against patronage.⁶⁹⁶ As the federal government expanded during the 1800s, concerns arose about the exchange of office positions for campaign contributions or support.⁶⁹⁷ Congress eventually responded by enacting a law requiring limited merit-based examination of prospective civil servants in 1853, followed by the more comprehensive Pendleton Civil Service Reform Act in 1883.⁶⁹⁸ The Pendleton Act required more merit-based hiring and created the United States Civil Service Commission, laying the groundwork for the civil service system as we know it under current law.⁶⁹⁹ With some modification, these civil service reform steps to evaluate federal job candidates by objective criteria may be consistent with Article II even if the employees under review are inferior officers. Ensuring that department heads sign off on inferior officers selected by competitive service criteria *and* sign off on the choice of which officers sit on civil service evaluation boards may well ensure the direct “chain of accountability”⁷⁰⁰ from appointee to department head that Article II requires.

distributing power too widely The Framers recognized the dangers posed by an excessively diffuse appointment power”).

695. See Wilson, *supra* note 663, at 110 (contending that where one individual is responsible for non-merit-based appointments, citizens “will, at the next general election, take effectual care, that the person, who has once shamefully abused their generous and unsuspecting confidence, shall not have it in his power to insult and injure them a second time”).

696. See, e.g., THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 56, at 398-99; Wilson, *supra* note 663, at 110.

697. See ARI HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883, at 8 (1968). *But see id.* at 7 (suggesting that the original anti-spoils movement was motivated in large part not by populism or the furtherance of the United States’s best interests but by privileged people out of office trying to unseat those who were currently in office).

698. See *id.* at 9; see also Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883) (amended 1978).

699. See Pendleton Civil Service Reform Act, §§ 1-3, 6-7, 22 Stat. at 403-06.

700. Cf. Dina Mishra, *An Executive-Power Non-delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1569-70 (2015) (using the phrase “chain of
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2. Efficiency

Article II appointment of an expanded class of inferior officers need not be prohibitively burdensome. The OLC’s analysis of statutory authorization for presidential appointment of certain lower-level military officers suggests that Article II may be satisfied where heads of departments give final approval to an inferior officer’s hiring decision.⁷⁰¹ The OLC first concluded that because the relevant statute (just like Article II) did not affirmatively prohibit delegation, the President could turn over much of the appointment process to the Secretary of Defense, subject to presidential supervision.⁷⁰² The opinion next concluded that the Secretary of Defense—who himself had received delegated authority—could turn over the bulk of the nominations work to yet another level of subordinates.⁷⁰³ According to the OLC, as long as the Secretary of Defense gave final approval to nominations, the “Constitution would permit much of the legwork” to be delegated to an officer reporting to the Secretary.⁷⁰⁴ Early practice confirms this determination. Statutes from as early as 1799 permitted lower-level officials to select inferior officers merely with “the approbation” of the department head.⁷⁰⁵

Delegation of substantial appointment-related duties to lower-level officials, if done properly, is also arguably consistent with the *text* of Article II. Under the historic definition of “officer” as one with ongoing responsibility for a governmental duty, officials carrying out a statutory responsibility to hire officers would themselves be subject to Article II constraints. This chain of approval—from an Article II-appointed officer engaged in the nuts-and-bolts efforts of reviewing resumes all the way up through (i) approval by intermediary officials, followed by approval of (ii) an assistant or deputy secretary and then (iii) the secretary herself—creates a direct, albeit multilayered, “chain of accountability.”⁷⁰⁶ In such a process, decisions at every

accountability” to discuss the interrelationship between removal restrictions and the President’s ability to control the conduct of government officials).

701. *See* *Assignment of Certain Functions Related to Military Appointments*, 29 Op. O.L.C. 132, 135 (2005).

702. *See id.* at 132-34 (finding that the statutory text permitted delegation, which is permissible under Article II). In contrast, the OLC has concluded that the President may not delegate authority to appoint principal officers. *See id.* at 134-35.

703. *See id.* at 135.

704. *See id.*

705. *See* Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642 (amended 1811); *see also* *Assignment of Certain Functions*, 29 Op. O.L.C. at 136 (noting that an 1821 Attorney General opinion determined that the March 1799 act was constitutional (citing *Tenure of Office of Inspectors of Customs*, 1 Op. Att’y Gen. 459, 459 (1821))).

706. *Cf.* Mishra, *supra* note 700, at 1514, 1558-59 (discussing the significance of a “chain of accountability” from executive entities up to the President).

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step of the way are made by an Article II-appointed officer subject to the ultimate approval of the department head or President whom Article II empowers for the final appointment. Also, by its terms Article II arguably suggests that the word “appoint” is not coterminous with direct engagement at every step of the selection process. The principal officer provision of the Appointments Clause instructs that the President “shall *nominate*, and by and with the Advice and Consent of the Senate, shall *appoint* . . . Officers of the United States.”⁷⁰⁷ This phrasing indicates that the nomination—or initial recommendation of the principal officer—is distinct from the final step of appointment.⁷⁰⁸ Thus presidential and department head appointment of inferior officers need not include direct engagement at all stages of the selection process.

The text of Article II, early practice, and previous executive branch interpretations thus suggest that even if a large percentage of civil service employees were classified as officers, their appointment could be accomplished by the final signoff of a department head. Further, groups of appointees could be presented to the appointing official in the form of a list to make the final signoff on large numbers of officers somewhat more manageable.⁷⁰⁹ According to the OLC, practice dating from as early as the mid-1800s suggests that “the documents evidencing an appointment by the President or the head of a department need not be signed by that person.”⁷¹⁰ And as of 2010 there were more than 210,000 active-duty commissioned military officers,⁷¹¹ suggesting that the commissioning of large numbers of officers works within our governmental system.

During the drafting of the Constitution, James Madison raised concerns about the time it might take for the President, department heads, and courts of law to be responsible for all inferior officer appointments.⁷¹² Gouverneur

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

708. See Volokh, *supra* note 3, at 752-53.

709. See *Assignment of Certain Functions*, 29 Op. O.L.C. at 137 (“Even assuming that the ultimate decision whether to make an appointment must remain the responsibility of the head of the department, approval of a list of appointments by the head of the department would satisfy this requirement.”); cf. 2 FARRAND’S RECORDS, *supra* note 58, at 627 (recording that Gouverneur Morris said that “Blank Commissions can be sent” to the appointing authority to more easily facilitate business under the Appointments Clause requirements).

710. See *Assignment of Certain Functions*, 29 Op. O.L.C. at 137-38 (citing *Relation of the President to the Exec. Dep’ts*, 7 Op. Att’y Gen. 453, 472-73 (1855)).

711. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 543 (2010) (Breyer, J., dissenting); cf. *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring) (“[C]ommissioned military officers[] are ‘inferior officers . . .’”).

712. See 2 FARRAND’S RECORDS, *supra* note 58, at 627 (Mr. Madison: “[The inferior officer appointments provision] does not go far enough if it be necessary at all—Superior
footnote continued on next page”).

Morris of Pennsylvania, who had moved to introduce the inferior officer appointments provision, replied that this was not a concern because “Blank Commissions can be sent.”⁷¹³ Madison apparently agreed: *Farrand’s Records* did not report any further debate on the matter.⁷¹⁴ That same day, the Founders approved the Article II clause establishing department head and presidential approval of inferior officers.⁷¹⁵

It might be reasonable, however, to question whether department head approval of another official’s hiring selection provides true accountability or just a rubber stamp. Perhaps a department head called to account over a poorly performing officer would try to distance herself, contending that she had not in fact selected the officer. But this claim would have less persuasive value if every officer in the hiring chain were appointed under Article II with the ultimate approval of the department head. In such a system the department head would have selected her immediate subordinates, who in turn may have helped to select even lower-level subordinates, and so on down the line. Even if a prior department head had presided over the initial hiring, the current department head and her subordinates would be responsible for having kept the bad actor on board. The Supreme Court has intimated that accountability can permeate this kind of multi-tiered federal supervision.⁷¹⁶ As Gillian Metzger points out, the President’s “duty to supervise” does not necessarily mean that the President must make each and every decision.⁷¹⁷ Rather, the President must sit at the top of the hierarchy of others who may at times themselves have the duty to supervise.⁷¹⁸ Analogously, a department head could perhaps fulfill her responsibility for high-quality appointments by sitting atop the selection structure for federal officials.

3. Tenure

By suggesting that certain government employees should instead be classified as officers and appointed pursuant to Article II, this Article does not

Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.”).

713. *Id.*

714. *See id.* at 627-28.

715. *Id.*

716. *Cf., e.g., Free Enter. Fund*, 561 U.S. at 495-96 (majority opinion) (suggesting that the President can hold a department head to account for how that department head in turn supervises other officers).

717. *See Metzger, supra* note 529, at 1875, 1880-82.

718. *Cf. id.* at 1880-82, 1880 n.190 (“The structural principle of hierarchy entails that supervision up to the President must occur; it does not require that such supervision take the form of full presidential decisionmaking control.”).

intend to speak to the proper removal procedures for these officers. Some may contend that expanding the reach of the Appointments Clause to encompass all officers under the historical definition may subject an impossibly large number of officials to political removal—leading to unworkably frequent rotation in a vast number of positions.⁷¹⁹ But this need not be the case. In the earliest administrations in U.S. history, changes in officers as powerful as customs collectors came “almost entirely by resignation or death of the incumbent” rather than by termination.⁷²⁰ Even the election of a new President did not necessarily lead to rotation in office. Thomas Jefferson, for example, retained some prominent customs collectors who had served in earlier administrations.⁷²¹ This is remarkable in that the Jeffersonian view of government was starkly different from the views held by the Federalists throughout the Washington and Adams Administrations.⁷²² Even later in the 1800s, when Andrew Jackson started favoring rotation in office, Jackson’s removals extended primarily to principal officers⁷²³—officials whose officer status is not in question and thus not affected by this Article’s analysis. According to Ari Hoogenboom’s history of civil service reform efforts from 1865 to 1883, Jackson removed “relatively few inferior officers.”⁷²⁴ Thus, even under a President strongly committed to rotation in office and political removal, the vast majority of federal officers maintained their tenure.

To be sure, in modern practice we seem to have settled on the expectation that any Article II officer appointment is necessarily a political one. Thus the expected default rule is that each new President cleans house and appoints a whole new slate of both principal and inferior officers. But perhaps a return to a properly broad view of officer status would restrain this modern trend. If there were a proper understanding of “officer” as correlated with the execution of any level of governmental duty, the concept might cease to be associated with just the highest-level government jobs—a conception that makes officer positions seem inherently political. Just by sheer numbers, new presidents would not have the time to remove, and then rehire, people to fill all the inferior officer positions under the historical standard. If even file clerks working on governmental tasks like facilitating the issuance of new regulations or keeping mandatory records had to be hired with the ultimate

719. Cf. *Free Enter. Fund*, 561 U.S. at 540-41 (Breyer, J., dissenting) (expressing concern about the potential breadth of the Court’s holding).

720. See WHITE, *supra* note 263, at 304.

721. *Id.*

722. See *id.* at 51 & n.1 (describing the Jeffersonian Republican belief that the Federalists were monarchists with too expansive a view of federal power).

723. See HOOGENBOOM, *supra* note 697, at 5-6.

724. *Id.* at 6 (observing that Jackson removed “only about 10 per cent of the civil service”).

approval of a department head, appointments may seem more about finding a person to get the job done than about pursuing a partisan agenda. And there would be more transparency in light of the department head having to take ultimate responsibility for these individuals' job performance.

Conclusion

Extensive evidence suggests that the original public meaning of “officer” in Article II includes all federal officials with responsibility for an ongoing statutory duty. This standard encompasses a substantially broader group of officials than are treated as Article II officers under current practice. Properly applying Article II requirements in light of the historical eighteenth century conception of “officer” would likely require changing the appointment methods for numerous presently serving government officials.

While this change would be far-reaching, it is achievable. Under constitutional text and early precedent, the President and department heads may satisfy Article II's requirements by providing a final signoff on a lower-level officer's selection of officials. Officials selected through civil service procedures who are Article II officers as a historical matter could likely also continue to undergo competitive selection—if certain changes were made to ensure a chain of accountability from the board members evaluating and ranking candidates up to the President or department head with the final appointment authority. One change that could lead to Article II compliance would be to ensure that with every civil service officer opening, the supervising department head signs off on both (i) the final officer selection and (ii) the selection of officers sitting on the competitive service evaluation board. This might mean, however, that instead of one centralized OPM ranking candidates, there should be boards within each department that evaluate candidates based on statutorily required criteria, subject to final approval by the department head.

Such a process would not be any more unwieldy than the current system of sending every job applicant through an extensive civil service evaluation process. Department heads could accomplish the appointment of their inferior officers by giving final approval to a list of candidates vetted and evaluated by the department heads' various subordinates. Further, realignment of Article II officer status with the original meaning of the Appointments Clause would help to bring about greater democratic accountability by making it clearer that department heads are responsible at every step of the way for properly managing their agencies in the best interest of the public. Holding department heads and the President to account for the staffing of executive agencies would improve accountability and transparency, thereby preserving the high quality of government service that our leaders intended for the United States from the beginning.