No. 23-719

# In the Supreme Court of the United States

DONALD J. TRUMP,

*Petitioner,*

*v.*

NORMA ANDERSON, *et al.*,

*Respondents.*

**On Writ of Certiorari to the Colorado Supreme Court**

# BRIEF OF *AMICUS CURIAE* MICHAEL T. WORLEY SUPPORTING RESPONDENTS

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1858 Inauguration of SC Governor, The Charleston Daily Courier (Dec. 15, 1858), *available at https://www.newspapers.com/embed/138077880/* . . . . . . . . .21

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Abraham Lincoln, Proclamation (Dec. 8, 1863), *available at: https://history.state.gov/historicaldocuments/frus1863pl/message1* . . . . . . .34

Andrew Johnson, *A Proclamation*, Burlington Times (June 3, 1865), *available at http://tinyurl.com/2pp5r27x* . . . . . . . . . . . . . . . . . . . . . . . . .33

Andrew Johnson, *Appointment of Lewis E. Parsons Provisional Governor of Alabama*, Alabama Beacon (July 7, 1865), *available at http://tinyurl.com/4xw2euzc*. . . . . . . . . . . . . . . . . . .33

Andrew Johnson, *Official*, Evening Star (June 19, 1865), *available at http://tinyurl.com/y4rtujpe* . . . .33

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Andrew Johnson, *Official–Department of State—By the President of the United States of America–A Proclamation*, Camden Journal (July 28, 1865), *available at http://tinyurl.com/475bases* . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .33

Andrew Johnson, *Reconstruction!*, The Philadelphia Inquirer (June 14, 1865), *available at http://tinyurl.com/yuavvd4r* . . . . . . . . .33

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) . . . . . . . . .11

James A. Heilpern and Michael T. Worley, *Evidence that the President is an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment*, available at https://bit.ly/HeilpernS3. . . . 1, 4, 5, 6, 16, 17, 24, 25, 28, 30, 31, 34

Jed Handelsman Shugerman, The People's Courts 105 (2012) . . . . . . . . . . . . . . . . . . . . . . . . . . . .24

Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018). . . .7, 8, 9

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Kate Galbraith, *Sam Houston, Texas Secession — and Robert E. Lee*, The Texas Tribune, available at https://www.texastribune.org/2011/02/01/sam-houston-texas-secession--and-robert-e-lee/ . . . . . . . . . . . . . . . . . . . . . . . . . . . .22

Kurt T. Lash, The Reconstruction Amendments: Essential Documents Vol. 2 (2021) . . . . . . . . . . . . . . . .28

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President Johnson's Amnesty Proclamation (May 29, 1865), available at https://www.loc.gov/resource/rbpe.23502500/?st=text. . . . . . . . .34

Roger Parloff, *What Justice Scalia Thought About Whether Presidents Are 'Officers of the United States*,' Lawfare (Jan. 24, 2024), available at https://www.lawfaremedia.org/article/what-justice-scalia-thought-about-whether-presidents-are-officers-of-the-united-states . . . . . .13

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Samuel Bray, "'*Officer of the United States' in Context*," The Volokh Conspiracy (Jan. 22, 2024), available at https://reason.com/volokh/2024/01/22/officer-of-the-united-states-in-context/ . . . . . . . . . . . . . . . . . . . . . . .19, 20, 23

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Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097 (2004) . . . . . . . . . . . . . . . . .13

## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Petitioner Donald Trump and certain of his amici contend that, despite being President of the United States for four years, he was never an "officer of the United States." That argument defies common sense and simply cannot withstand historical analysis.

*Amicus* Michael T. Worley is a co-author of a recent manuscript, *Evidence that the President is an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment.*[2] This article was cited several times in the Anderson Respondents' Brief (pp. 39-40), and also in the amici briefs of J. Michael Luttig, *et al.*, (p. 22) and Professors Orville Vernon Burton, *et al.* (pp. 7, 8). *Amicus* has an interest in advancing an historically accurate understanding of Section Three of the Fourteenth Amendment, particularly the original meaning of "officer of the United States."

*Amicus's* paper, summarized in this brief, has these key conclusions: "officer of the United States" is not a term of art. It applies to all "officers of the United States," as a standard textualist interpretation of the phrase implies. Evidence from the Constitution's text

1. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus or his counsel made a monetary contribution to its preparation or submission.

2. James A. Heilpern and Michael T. Worley, *Evidence that the President is an 'Officer of the United States' for Purposes of Section 3 of the Fourteenth Amendment*, available at https://bit.ly/HeilpernS3.

and history overwhelmingly supports this conclusion. There is no doubt that the person elected as President becomes an "officer of the United States" upon taking the Presidential Oath. President Trump was an "officer of the United States," and thus is subject to the disqualification clause in Section Three.

## SUMMARY OF ARGUMENT

The argument by President Trump and certain of his amici that the President is not an "officer of the United States" under Section Three of the Fourteenth Amendment is both counterintuitive and historically inaccurate. A wide variety of evidence demonstrates this.

1. Corpus linguistic evidence demonstrates that the phrase "officer of the United States" was not a term of art when the Constitution was adopted. Instead, it referred broadly to almost all federal officials whose positions were established by law – be that the Constitution or a federal statute. And it was broad enough to encompass both elected officials generally and the President specifically. The text of the Constitution repeatedly identifies the Presidency as an "office," and at the time of the Nation's Founding the President was commonly referred to as an "officer of the United States" or an "officer."

2. There is no support for the notion that an "officer of the United States" refers solely to someone appointed, rather than elected, to office. Indeed, at the time the Constitution was ratified, the terms "appoint" and "elect" were largely used interchangeably. Nor is there any merit to the contention that because the Presidential Oath in Article II does not refer to "support[ing]" the Constitution, the President is exempted from Section Three. Indeed,

many state officers in Confederate states took an Oath similar to the Presidential Oath under Article II and were unambiguously covered by Section Three despite not having taken an Oath that tracked the "support" language of Article VI of the Constitution.

3. There is ample evidence at the time of ratification of the Fourteenth Amendment that the President was considered not just an officer, but an "officer of the United States." This evidence includes the text and legislative history of the Fourteenth Amendment, references to "officers" in the impeachment trial of President Andrew Johnson, President Johnson's Appointment Proclamations, and the Amnesty Proclamations of Presidents Lincoln and Johnson.

## ARGUMENT

### I. At the time of the Founding, the Phrase "officer of the United States" Included the President

As discussed below, a corpus linguistics analysis of thousands of Revolutionary Era documents and statutes reveals that the phrase "officer of the United States" was not a term of art at that time. Founding Era documents, including The Federalist Papers and the Postal Act of 1799, show that "officer of the United States" was not confined narrowly to Presidential appointees, but instead also included the President and other elected officers. The 1789 Constitution refers repeatedly to the Presidency as an "office," and the Constitution's various references to the phrase "officer of the United States" lend no support to the inference drawn by President Trump and his amici that this phrase did not include the President at the time of the Founding.

### A. Corpus Linguistics Evidence Demonstrates that "officer of the United States" Was Not a Term of Art at the Founding

Many who argue that the President is not an "officer of the United States" as that phrase issued in Section Three of the Fourteenth Amendment rely on the assumption that those words are a term of art. However, a corpus linguistics analysis refutes that assumption.[3] As former Utah Supreme Court Justice Thomas R. Lee and Stephen Mouritsen put it, "[c]orpus linguistics is an empirical approach to the study of language that involves large, electronic databases of text," which are used to "draw inferences about language from data gleaned from 'real-world' language in its natural habitat—in books, magazines, newspapers, and even transcripts of spoken language."[4] Because judges—like linguists and lexicographers—are interested in the "original public meaning" of historic texts and the "ordinary meaning" of modern texts, these databases can be invaluable in resolving questions of constitutional and statutory interpretation.

An analysis of the Brigham Young University Law School's Corpus of Founding Era American English ("COFEA") – a database containing approximately 150,000 documents from the Revolutionary War era – reveals that the phrase "Officer(s) of the United States" appears in COFEA just 109 times between 1787 and 1799, with just over a third of those being direct quotations of the

3. Heilpern & Worley, 13-17.

4. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 828 (2018).

Constitution.[5] These references do not reflect that any specialized meaning was attached to this phrase. Instead, it was often used simply to clarify that an agent was employed by the federal government.

For example, in a letter to George Washington, General Arthur St. Clair expressed concern that the Attorney General of the new Ohio territory "would be an Officer of the Territory only, whereas he should be an Officer of the United States."[6] Likewise, Alexander Hamilton wrote to New York merchant William Seton, requesting he purchase public debt on behalf of the federal government since the government had yet to "employ some officer of the United States" for the task.[7]

The corpus linguistics analysis of the voluminous COFEA database did not adduce *any* evidence to suggest that "officer of the United States" excluded the President or was limited to some special subclass of federal officials, much less that it was a term of art. To the contrary, it applied broadly to *all* government officials—"civil and military"—exercising any non-trivial federal authority. For instance, in his Eighth Annual Address to Congress at the end of 1797, George Washington called for "legislative revision" of "[t]he compensation to the officers of the United States," particularly "in respect to the most important stations."[8] Congress responded the following March, raising the salaries of sundry government

5. Heilpern & Worley, 14.

6. *Id.*

7. *Id.*

8. *Id.* at 14-15.

officials, starting with "the President and Vice President of the United States."[9] The fact that Congress did not use the phrase "officers of the United States" in this appropriations bill, but instead referred generally to "officers," "offices," and "persons employed," even when referring to positions such as the Secretary of State, Attorney General, Secretary of the Treasury, Secretary of War, Chief Justice, and Consuls—positions that are unquestionably "officers of the United States" —further demonstrates that the larger phrase was *not* considered a term of art.

In fact, a corpus linguistics search of Brigham Young University's Corpus of Early Statutes at Large—which contains all of the Statutes at Large from the first five Congresses—reveals that Congress almost never used the phrase "officer(s) of the United States" during this time period, despite being an era when Congress was constantly exercising its power to "establish[] by law"[10] such positions within the new government. In its first decade, Congress used the phrase just thirteen times, while using the word "officer" or "officers" 1,481 times and "office" or "offices" 630 times.[11] This would be baffling if "officer of the United States" was a legal term of art but makes perfect sense if the phrase merely designated a federal official—after all, it was the Congress of the United States creating the positions, so what other type of office would we expect? In the absence of clear textual clues to the contrary, the default assumption should be

9. Act of March 19, 1798, ch. 18, 5 Stat. 542.

10. U.S. Const., art. II, sec. 2.

11. Heilpern & Worley, 15.

that *all* such positions created by Congress are "officers of the United States."

Significantly, a postal bill specifying which "officers of the United States" should be granted a franking privilege *expressly listed both the President and Vice President as "officers of the United States*.". The Postal Act of 1799 stated:

> Sec. 17. And be it further enacted, That letters and packets to and from *the following officers of the United States*, shall be received and conveyed by post, free of postage. Each postmaster . . .; each member of the Senate and House of Representatives of the Congress of the of the United States; the Secretary of the Senate and Clerk of the House of Representatives . . .; *the President of the United States; Vice President*; the Secretary of the Treasury; Comptroller; Auditor; Register; Treasurer; Commissioner of the Revenue. [12]

The conclusion that the phrase "officer of the United States" was *not* a term of art at the time of the Founding is further buttressed by the research of Professor Jennifer Mascott, who used aspects of corpus linguistics to demonstrate that the phrase was in colloquial use prior to the signing of the Constitution.[13] Using a corpus of 340,000 issues of early American newspapers, she found twenty

12. Act to Establish the Post Office of the United States, 5 Stat. 733 (emphasis added).

13. Jennifer L. Mascott, *Who Are "Officers of the United States"*?, 70 Stan. L. Rev. 443 (2018).

uses of the phrase "prior to the signing of the Constitution on September 17, 1789."[14] The first reference was in 1780, describing Benedict Arnold as a "general officer of the United States."[15] It appeared again in 1783 referring simply to continental officers. Other uses included "Judicial Officers of the United States" and "commissaries and other officers of the United States" who gave out certifications of debt under the Constitution.[16]

Mascott also performed a corpus analysis of the Journals of the Continental Congress, "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."[17] The Journals contain forty-one references to "officer(s) of the United States." Often the phrase was "just another way to describe continental military officers or to identify continental- level, as opposed to state-level, officers."[18] For example, one letter distinguished between the time a military officer served as an "officer of the United States" and the time he served as a captain for his State.[19]

In *Lucia v. SEC*, 585 U.S. ___, 138 S.Ct. 2044 (2018), Justice Thomas wrote a concurring opinion, joined by

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14. *Id*. at 478.

15. *Id.*

16. *Id*. at 479.

17. *Id.* at 477.

18. *Id*. at 477-78.

19. *Id*. at 478 n.175.

Justice Gorsuch, which relied on the Mascott article. Justice Thomas explained first that "[*t*]*he Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty*." *Id*. at 2056 (emphasis added). Justice Thomas then observed that "'[o]fficers of the United States' was probably not a term of art that the Constitution used to signify some special type of official." *Id.* Rather, "[b]ased on how the Founders used it and similar terms, the phrase 'of the United States' was merely a synonym for 'federal,' and the word 'Office[r]'"carried its ordinary meaning," which was "anyone who performed a continuous public duty." *Id.* at 2056–2057, *citing* Mascott at 484-507; *United States v. Maurice*, 26 F. Cas. 1211, 1214, F. Cas. No. 15747 (No. 15,747) (CC Va. 1823) (defining officer as someone in "'a public charge or employment'" who performed a "continuing" duty); 8 Annals of Cong. 2304-2305 (1799) (statement of Rep. Harper) (explaining that the word officer "is derived from the Latin word *officium*" and "includes all persons holding posts which require the performance of some public duty").

In sum, a corpus linguistic analysis demonstrates that the phrase "officer of the United States" was not a term of art at the time of the Founding. Thus, the many references to the Presidency as an "office" and the President as an "officer" in the Constitution and elsewhere are extremely important and support the argument that the President falls within the ambit of Section Three's reference to "officer of the United States."

### B. The Text of the Constitution Repeatedly Identifies the Presidency as an "Office"

The original Constitution of 1789 repeatedly refers to the Presidency as an "Office."[20] For example, in Article I, it states "The Senate shall chuse… a President pro tempore, in the absence of the Vice President, or *when he shall exercise the office of the President of the United States*."[21] Likewise, in Article II, it states that the President "shall hold his Office during a Term of four Years" and limits eligibility "to the Office of President" to "natural born citizens" who have "attained the age of thirty-five years.[22]

In *United States v. Maurice*, Chief Justice Marshall, riding Circuit, concluded that "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*."[23] While not binding precedent, *Maurice* was frequently cited by lower courts both before and after the ratification of the Fourteenth Amendment and has been cited approvingly by this Court seventeen times, including in the majority opinion of *Metcalf & Eddy v. Mitchell*,[24]

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20. As noted by the Colorado Supreme Court, "[t]he Constitution refers to the Presidency as an 'Office' twenty-five times." App. 64a ¶ 133.

21. U.S. Const., art. I, sec. 3 (emphasis added).

22. U.S. Const., art. II, sec. 1, cl. 5.

23. 26 F.Cas. 1211 (No. 15, 747) (C.C.D. Va. 1823) (emphasis added).

24. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520 (1926) ("The term 'officer' is one inseparably connected with an office.").

and more recently in Justice Thomas' concurring opinion in *Lucia v. SEC*, 138 S. Ct. at 2057. When language is "obviously transplanted from another legal source" —as the phrase "officer of the United States" in Section Three clearly is—"it brings the old soil with it."[25] That "old soil" includes Chief Justice Marshall's early definition of an "officer of the United States" which links offices with officers.

### C. Additional context about the original meaning of "officer of the United States" in the 1789 Constitution

The phrase "officer of the United States" appears in the original Constitution of 1789 four times: in the Appointments Clause, the Impeachment Clause, the Oath and Affirmation Clause, and the Commission Clause. Context matters, and contrary to the arguments by President Trump and certain of his amici, none of these references, when read and understood in context, support their unwarranted inference that the President was not considered an "officer of the United States" at the Founding.

#### 1. Appointments Clause

The Appointments Clause empowers the President to appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, *whose Appointments are*

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25. *Hall v. Hall*, 584 U.S. ___, 138 S. Ct. 1118, 1128 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

*not herein otherwise provided for*, and which shall be established by Law..."[26] The most natural reading of this Clause is that the President appoints the "Officers of the United States" whose manner of appointment, unlike the President and Vice President, is not "otherwise provided for" elsewhere in the Constitution. Other provisions of the Constitution prescribe the manner of choosing the President, Vice President, Speaker of the House, and President Pro Tempore of the Senate. They are all "Officers of the United States" who are not appointed by the President, and their appointments are "otherwise provided for" in the Constitution.

This interpretation is supported by Justice Scalia's concurrence in *NLRB v. Noel Canning*, which was joined by Chief Justice Roberts and Justices Thomas and Alito, where Justice Scalia explained: "*Except where the Constitution or a valid federal law provides otherwise*, all 'Officers of the United States' must be appointed by the President 'by and with the Advice and Consent of the Senate.'"[27] Thus, Justice Scalia concluded that there are "Officers of the United States" listed in the Constitution but not appointed by the President. Thereafter, Professor Tillman sent a letter to Justice Scalia asking for clarification of his opinion, which elicited this response:

> I meant exactly what I wrote. *The manner by which the President and Vice President hold their offices is "provide[d] otherwise" by the Constitution.* As is the manner by which the

26. U.S. Const., art. II, sec. 2, cl. 2 (emphasis added).

27. *NLRB v. Noel Canning*, 573 U.S. 513, 569 (2014) (Scalia, J., concurring) (emphasis added).

> Speaker of the House and the President Pro Tempore of the Senate hold theirs.[28]

The same view was taken by Professor Thomas Merrill.[29]

Remarkably, the amicus brief of Professor Tillman, which argues that "[t]he text of the Appointments Clause demonstrates that the President is not an 'Officer of the United States'" (p. 21), *omits* from its truncated quotation of the Appointments Clause the key words "whose Appointments are not herein otherwise provided for," using an ellipsis instead.[30] *Id*. The briefs by Respondent Colorado Republican State Central Committee (pp. 6, 7) and amici U.S. Senator Ted Cruz, *et al.* (p. 14) likewise omit these key words from their abbreviated quotations of the Appointments Clause.

Alexander Hamilton paraphrased the Appointments Clause for The Federalist No. 67 as follows:

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28. Letter from Hon. Antonin Scalia to Seth Barrett Tillman, available at: https://perma.cc/JX3Z-DDYB (emphasis added).

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

30. *See* Roger Parloff, *What Justice Scalia Thought About Whether Presidents Are 'Officers of the United States*,' Lawfare (Jan. 24, 2024) (emphasizing that Tillman's amicus brief doesn't "mention or discuss those eight words," and Tillman's law review article "assert[s] that they mean exactly the opposite of what they appear to say"), available at https://www.lawfaremedia.org/article/what-justice-scalia-thought-about-whether-presidents-are-officers-of-the-united-states

> The second clause of the second section of the second article empowers the President of the United States "to nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other OFFICERS of United States whose appointments are NOT in the Constitution OTHERWISE PROVIDED FOR, and WHICH SHALL BE ESTABLISHED BY LAW.'[31]

The capitalization—which was in the original—shows that Hamilton viewed the phrase "whose appointments are not herein otherwise provided for" as a modifier of "officers," and that the phrase is making reference to officers mentioned elsewhere in the Constitution outside of the Appointments Clause.

The Appointments Clause was also discussed in The Federalist No. 69 and The Federalist No. 76, and each supports the position that "officer of the United States" is not confined to Presidential appointees. In The Federalist No. 69, Hamilton wrote that "[t]he President of the United States would be an officer elected by the people…"[32] Hamilton also wrote:

> The President is to nominate, and, WITH THE ADVICE AND CONSENT OF THE SENATE, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the

31. https://avalon.law.yale.edu/18th_century/fed67.asp (capitalization in original).

32. https://avalon.law.yale.edu/18th_century/fed69.asp

> United States established by law, and *whose appointments are not otherwise provided for by the Constitution.*[33]

In The Federalist No. 76, Hamilton once again used the same language as in The Federalist Nos. 67 and 69 ("whose appointments are not otherwise provided for in the Constitution.'")[34]

The other "officers of the United States" whose appointments are "otherwise provided for" in the Constitution include officers who are elected, as shown below:

| **Position** | **Appointment Mechanism** |
|---|---|
| President of the United States | Electoral College[35] |
| Vice President | Electoral College[36] |
| President Pro Tempore and "other Officers" of the Senate | Chosen by the Senate[37] |
| Speaker and "other Officers" of the House | Chosen by the House[38] |

33. *Id.* (italics added).

34. https://avalon.law.yale.edu/18th_century/fed76.asp.

35. U.S. Const., art. 2, sec. 1.

36. *Id.*

37. U.S. Const., art. 1, sec. 3.

38. U.S. Const., art. 1, sec. 2.

The artificial distinction that some amici have sought to draw between elected and appointed federal positions for purposes of Section Three simply did not exist at the time of the Founding.

For example, under the Electors Clause,[39] each state shall "appoint" presidential electors. In the first Presidential election in 1789, four of the ten states which chose electors selected them by popular vote, demonstrating that being elected was a form of "appointment."[40]

The Articles of Confederation, Journals of the Continental Congress, state constitutions, and statements to and from various Founding Fathers, including George Washington, John Adams, and James Madison—not to mention the text of the Constitution itself—demonstrate a consistent linguistic pattern of using the terms "appoint" and "elect" interchangeably, at least to the extent that an election was a valid form of appointment.[41]

For example, in a speech given during the Constitutional Convention, James Madison discussed different options for selecting the President: "The option before us then lay between an appointment by Electors chosen by the people — and an immediate appointment by the people."[42]

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39. U.S. Const., art. 2, sec. 1.

40. Those four states were Virginia, Pennsylvania, Delaware, and Maryland. Heilpern & Worley, 19-20.

41. Heilpern & Worley, 19-25.

42. "Method of Appointing the Executive, [25 July] 1787," Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-10-02-0072

Both potential forms of presidential election – through an electoral college or directly by the people – were forms of "appointment."

In 1781, George Washington wrote to a protégé of Alexander Hamilton informing him of the "prospect of … [his] *election*" as Minister of War for the Continental Congress.[43] Four years later, Washington congratulated Henry Knox on his "*appointment*" to the same position.[44] He used the words "election" and "appointment" interchangeably. In 1779, after the Continental Congress chose John Adams to be "Minister Plenipotentiary" to negotiate with Great Britain, he wrote a letter to the President of the Continental Congress to thank him for "*appointing* me," and wrote a separate letter to a French official stating that Congress "did me the honor to *elect* me" to that position.[45]

During the impeachment trial of Senator William Blount, Congressman Robert Harper of South Carolina—one of the House Impeachment Managers—stated, "[T]he President himself is liable to be impeached, as well as the officers whom he appoints. So also is the Vice President. *And yet these two great officers are appointed by the people themselves….*"[46]

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43. Heilpern & Worley, 22 n. 115 (emphasis added).

44. *Id.* at n. 116 (emphasis added).

45. *Id.* at n. 117 (emphasis added).

46. 8 Annals of Cong. 2315 (1799) (Gales and Seaton ed., 1851) (emphasis added).

### 2. Impeachment Clause

President Trump and some amici have argued that the express reference to the President and Vice President in the Impeachment Clause in addition to "all civil Officers of the United States" shows that the President and Vice President are not included among the "Officers of the United States." President Trump's brief contends that "[t]here is no need to separately list the president and vice president as permissible targets of impeachment if they fall within the phrase 'all civil Officers of the United States.'" (p. 21).

However, as with the unfounded argument based on the Appointments Clause discussed above, this assertion again disregards context as well as the common convention of identifying a group while simultaneously highlighting its most prominent or important constituent member or members. For example, Petitioner opened his 2019 State of the Union address by addressing "Madam Speaker, Mr. Vice President, Members of Congress, the First Lady of the United States, and my fellow Americans."[47] Obviously, he was not suggesting that then-Speaker Pelosi was not a member of Congress. The most plausible, contextually sound reading of the Impeachment Clause is that the President and Vice President are the two most important members of the group of "civil officers of the United States" subject to removal from office pursuant to that Clause.

Notre Dame University Law School Professor Samuel Bray recently refuted President Trump's argument that the Impeachment Clause shows he is not an "officer of the United States:"

47. https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-state-union-address-2/

> [I]n the Impeachment Clause it is not even the case that the phrase excludes the President, since it merely has an overlap with a very good reason for the additional specification. It is so important to make clear that the President and Vice President may be impeached – no small point against the background of royal prerogative power in England – that they are spelled out specifically. That does not mean they are not officers, and the [Trump] brief's suggestion that "all *other* civil officers" would have to be used does not fit the legal drafting culture of the late eighteenth and nineteenth centuries.[48]

**3. The Presidential Oath and the Article VI Oath**

President Trump, Respondent Colorado Republican State Central Committee, and certain amici have noted that the President takes an oath pursuant to Article II to "preserve, protect, and defend" the Constitution, and does not take the oath to "support" the Constitution, found in Article VI. They point out that Section Three of the Fourteenth Amendment refers to officers who have "previously taken an oath … to support the Constitution of the United States," and argue that because the Article II oath does not refer to "support," the President is exempt from Section Three. Professor Bray has dismissed this as a "risible" argument that "should be treated with derisive

48. Samuel Bray, "'*Officer of the United States' in Context*," The Volokh Conspiracy (Jan. 22, 2024) (emphasis in original), available at https://reason.com/volokh/2024/01/22/officer-of-the-united-states-in-context/

scorn by everyone who encounters it."[49] Historical practice reinforces Professor Bray's conclusion.

In the first place, one cannot take an oath to "preserve, protect, and defend" the Constitution without implicitly swearing to "support" the Constitution. By swearing to "preserve, protect and defend" the Constitution, one necessarily also swears to support it. *See* Anderson Respondents' Brief at 44. The Presidential Oath in Article II is plainly more rigorous than the oath to "support" the Constitution in Article VI, so it necessarily follows that those who take the Presidential Oath must be encompassed within Section Three's ambit.

Evidence from the time of the Fourteenth Amendment confirms this common sense interpretation. Section Three extended to any "person… who, having previously taken an oath, … *as an executive or judicial officer of any State*, to support the Constitution of the United States" subsequently engaged in insurrection.[50] No one doubts that executive officers in the Southern states— for example, South Carolina— who had taken an oath of office prior to the rebellion, were intended to be covered by Section Three.

The oath that South Carolina officers were required to take pursuant to the South Carolina Constitution mirrored the Presidential Oath, not the Article VI Oath:

> Every person who shall be chosen or appointed to any office of profit or trust; before entering on

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49. *Id.*

50. U.S. Const. Amend. XIV, Sec. 3 (emphasis added).

> the execution thereof, shall take the following oath: "I do solemnly swear, (or affirm), that I will be faithful, and true allegiance bear to the State of South Carolina, so long as I may continue a citizen thereof; and that I am duly qualified, according to the constitution of this State, to exercise the office to which I have been appointed; and that I will, to the best of my abilities, discharge the duties thereof, and *preserve, protect, and defend the constitution of this State, and of the United States*: So help me God."[51]

A newspaper transcript confirms this is the one and only oath that Governor William Henry Gist took in 1858.[52] Governor Gist went on to sign South Carolina's Ordinance of Secession.[53]

Given that no one doubts that Section Three of the Fourteenth Amendment was intended to apply to Governor Gist and other South Carolina rebels, it is clear that the drafters viewed an oath to "preserve, protect, and defend" the United States Constitution as encompassing an oath to "support" the United States Constitution. Any other reading of Section Three is implausible.

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51. S.C. Const. of 1790, art. IV (emphasis added). This oath was written in 1790 and was modified in 1834. Both versions have "preserve, protect, and defend," not "support."

52. 1858 Inauguration of SC Governor, The Charleston Daily Courier (Dec. 15, 1858), available at https://www.newspapers.com/embed/138077880/

53. The Ordinance of Secession for the state of South Carolina (Dec. 20, 1860) https://www.gilderlehrman.org/collection/glc00395 (signed as Wm. H. Gist).

The 1838 Florida Constitution and 1845 Texas Constitution also preceded the enactment of the Fourteenth Amendment. Like South Carolina, Florida prescribed an oath that mirrored the Presidential Oath, not the Article VI oath.[54] The Texas Constitution's oath required office-holders to swear to discharge their duties "agreeably to the Constitution and laws of the United States and of this State."[55] Several Texas rebels took that oath and then forced Governor Sam Houston (who was loyal to the Union) out of office as a part of Texas joining the Confederacy.[56] Like South Carolina Governor Gist, they too were obviously covered by Section Three.

The problems with the argument that the President is exempt from Section Three disqualification simply because the Article II oath does not use the word "support" did not die with the Confederacy. Today, South Carolina[57], Georgia[58], and Texas[59], all administer a "Preserve, Protect, and Defend" oath to at least some of their officers, and these oaths do not include the word

54. Article VI, sec. 11, available at http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1838con.html

55. Article VII, sec. 1, available at https://tarlton.law.utexas.edu/c.php?g=787754&p=5639730

56. *See*, *e.g.*, Kate Galbraith, *Sam Houston, Texas Secession — and Robert E. Lee*, The Texas Tribune, available at https://www.texastribune.org/2011/02/01/sam-houston-texas-secession--and-robert-e-lee/

57. South Carolina Const. Art. Ill sec. 26.

58. GA Code § 45-12-4 (2022).

59. Texas Const. Art. 16 sec. 1.

"support." Surely it cannot be contended that these state officials today would be exempt from disqualification under Section Three if they participate in an insurrection.

### 4. Commission Clause

Some amici supporting President Trump have relied on Section Three of Article II of the Constitution, which states that the President "shall Commission all the Officers of the United States," to argue that this means the President cannot be an "officer of the United States." Once again, they are ignoring context. As Professor Bray has written, "[i]n the Appointments Clause and the Commissions Clause, it is *the context* that makes clear that the President is not in view, because the President is not appointing or commissioning himself. It is not the semantic content of 'officer of the United States.'"[60]

## II. At the time of the Ratification of the Fourteenth Amendment, "officers of the United States" Included Elected Officials Such as the President

Common usage of the term "officer of the United States" at the time of the Fourteenth Amendment confirms that the term included elected officials.

### A. State Officers Included Elected Officials

Most of the scholarship about the scope of Section Three of the Fourteenth Amendment has focused exclusively on federal officers, without considering the analogous state positions. But having shown above that

60. Bray, *supra* (emphasis in original).

"officer of the United States" was not a legal term of art at the time of the Founding, the selection mechanism for the parallel state officials mentioned in Section Three is equally valid evidence for whether "officers" include persons who were elected to office rather than appointed.

At the time the original Constitution was ratified, few states had a Governor elected directly by the people. The rest had their governors selected by the state's General Assembly, usually through a ballot process that resembled (and perhaps inspired) the Electoral College. However, by the time the Fourteenth Amendment was ratified, the vast majority of states had governors elected directly by the people.[61]

A similar evolution took place with respect to judicial officers. At the time of the Founding, judicial elections were unheard of. Instead, judges were typically selected by the General Assembly, appointed by Governors, or were themselves legislators wearing a separate hat. But, beginning in the 1840s, America experienced something of a Constitution-writing renaissance, with many states adopting amendments or rewriting their constitutions entirely, introducing judicial elections in the process as part of a broader set of anti-legislative reforms.[62]

In fact, the language of Section Two of the Fourteenth Amendment acknowledges this evolution explicitly. Section Two abolished the Three-Fifths Compromise of the original Constitution, replacing it with "[t]he right to

61. Heilpern & Worley, 40.

62. Jed Handelsman Shugerman, The People's Courts 105 (2012).

vote at any election for the choice of . . . the Executive and Judicial officers of a state."[63]

Thus, the meaning of "officers" when the Fourteenth Amendment was ratified included elected officials.

### B. Evidence from the Legislative History of the Fourteenth Amendment

Another rich source of evidence that the officers mentioned in the Fourteenth Amendment included elected officials is the legislative history of the Amendment. Statements from at least ten Senators and six Congressmen demonstrate that the word "officer" included elected officials. [64] Senator Thomas A. Hendricks of Indiana proposed a change to the language of Section Three that would have limited those barred from holding office in the future to those who entered the rebellion while they were still officers of the United States or one of the States:

> I presume this oath means as if it read, "*Senators and Representatives and all other officers in the United States* and in the States shall be bound by an oath or affirmation to support the Constitution of the United States in their offices." I know of no other purpose that there can be to require a special oath from an officer."[65]

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63. U.S. Const., Amend. XIV, Sec. 2.

64. Heilpern & Worley, 41-45.

65. 1866 Cong. Globe 2898 (emphasis added).

By sweeping Senators and Representatives into the category of "officers of the United States," he made clear that he believed the category to be broad enough to include positions elected by multi-member bodies (such as Senators) or directly by the people (as with Congressmen).

Other statements likewise demonstrated that the speakers thought that federal officers could be elected, even if they did not use the full phrase "officers of the United States." Senator Luke Poland of Vermont stated that he felt the Amendment as written was more merciful than the rebels deserved because it preserved their right to vote: "we leave the great mass [of Southerners] utterly untouched, and the leaders with their lives, their property, the full enjoyment of all their civil rights and privileges, with *the right of voting for all officers, both State and national*, with the single restriction they shall not hold office."[66]

A number of these statements came during the debate in the House over an ultimately rejected section which would have stripped former Confederates of the right to vote until 1870.[67] For example, future President James A. Garfield—then a Congressman from Ohio—stated: "If the proposition had been that those who had been in rebellion should be ineligible to any office under the Government of

66. 1866 Cong. Globe 2964 (emphasis added).

67. The original language of Section Three in the House read as follows: "Sec. 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for representatives in Congress and for electors for President and Vice President of the United States."

the United States, and should be ineligible to appointment as electors of the President and Vice President of the United States, or if all who had voluntarily borne arms against the United States had been declared *forever incapable of voting for a United States officer,* it would, in my judgment, be far more defensible.[68] Congressman Robert C. Schenck, also from Ohio, used similar language while supporting the ultimately rejected proposal, claiming that it

> does not disfranchise, but refuses to enfranchise. If you say that the people of these States, because of their having been engaged in the rebellion, *shall not vote for Federal officers*, there is nothing taken from them, because they have already divested themselves of that privilege, voluntarily abandoned, given it up, flung it away by breaking loose from the rest of the Union, as far as by their act, disposition, and power they could do so.[69]

Likewise, Congressman Henry J. Raymond of New York, stated that the rejected section "proposes to exclude the great body of the people of those States from the exercise of the *right of suffrage in regard to Federal officers*."[70] Representative Rufus P. Spalding of Ohio supported this proposal to "disqualif[y] active and known rebels from *participating in the election of Federal officers*."[71]

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68. 1866 Cong. Globe 2463 (emphasis added).

69. 1866 Cong. Globe 2470 (emphasis added).

70. 1866 Cong. Globe 2502 (emphasis added).

71. 1866 Cong. Globe 2509 (emphasis added).

There were also a number of other statements that discussed electing officers in general. For instance, while arguing that Section Three would not impose a punishment on former Confederates, but merely withhold a privilege, Senator Edgar Cowan of Pennsylvania stated that "[a]n elector is one who is chosen by the people to perform that function, just the same as an officer is one *chosen by the people* to exercise the franchises of an office."[72] Later in the debates he returned to this distinction, asking "is not the elector just as much *the choice of the community* as an officer is the choice of it, except that the electors are chosen by a class and described by a general designation, whereas the officer is chosen by name to perform certain functions?"[73]

The widespread understanding that officers could be elected was repeatedly highlighted in the back and forth between Senator John B. Henderson of Missouri and Senator William Pitt Fessenden of Maine, as the pair debated an amendment to Section Two proposed by Henderson.[74]

The Fourteenth Amendment ratification debates in the States and the Congressional legislative history of the Fifteenth Amendment further demonstrate a consistent linguistic pattern of referring to elected officials – including federal officials – as both "officers" and "officers of the United States." [75]

72. 1866 Cong. Globe. 2890 (emphasis added).

73. 1855 Cong. Globe 2987 (emphasis added).

74. 1866 Cong. Globe 3010.

75. Heilpern & Worley, 46-48; Kurt T. Lash, The Reconstruction Amendments: Essential Documents Vol. 2 (2021).

Taken together, these numerous statements reveal a consistent pattern among the Framers of the Fourteenth Amendment of referring to elected officials at all levels of government—federal, state, and local— as "officers."

## III. Evidence that the President is an "officer of the United States" for Purposes of the Fourteenth Amendment

As shown above, drafters of the Fourteenth Amendment, ratifiers of the Amendment, and others at that time understood the word "officers"—including "officers of the United States" —to encompass elected officials. Additional evidence shows that at the time of the drafting of the Fourteenth Amendment, it was a common linguistic convention to refer to the President as an "officer of the United States."

### A. Evidence from the Legislative History of the Fourteenth Amendment

Several members of Congress referred to the President as an "officer" during ratification debates on the Fourteenth Amendment. In discussing who had the power to declare the insurrection over, Senator Davis referred to the President as an "officer of the Government":

> [T]here was a necessity for some power, *some officer of the Government* to declare when the insurrection was suppressed. There is such a power and such an officer to execute it; and who is he? The Constitution had been attacked by an armed resistance to the execution of the laws, and an attempt to set up an independent

> power and government within the United States. *It is made the duty of the President*, by the Constitution, to the best of his ability to preserve, protect, and defend that Constitution, and to take care that the laws be faithfully executed throughout the United States.[76]

Senator Doolittle used the same phrase to discuss the relationship between the President and other officers within the Executive Department. He had been accused by Senator Trumbull of Illinois of suggesting that inferior officers were "officers of the President." Doolittle disagreed: "I stated that executive officers were responsible to *the President as the chief executive officer of the Government*. My friend from Illinois seems to think that because I made this statement that they are responsible to the President, because he under the Constitution has placed upon him the responsibility of seeing that the laws are faithfully executed, I intended to say that these men were subject merely to the will of the Executive and not to the laws of the land. Not at all, sir."[77]

In addition, Senator Howe referred to the President as an "executive officer" and Senator Davis twice referred to him as the "chief executive officer."[78]

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76. 1866 Cong. Globe 2914 (emphasis added).

77. *Id.* (emphasis added).

78. 1866 Cong. Globe 3042; 1866 Cong. Globe (June 6, 1866); 1866 Cong. Globe 2285; Heilpern & Worley, 54-55.

### B. Evidence from the Impeachment Trial of Andrew Johnson

The Senate impeachment trial of Andrew Johnson contained various references to the President as an "officer" and "officer of the United States."[79] Significantly, this trial took place less than two years after Congressional passage of the Fourteenth Amendment and while the States' ratification of the Amendment was still underway. During a lengthy speech explaining his views on the impeachment of President Johnson, Senator George Edmunds of Vermont said that "To this tribunal, sworn to impartiality and conscientious adherence to the Constitution and the laws, they [the founding fathers] committed the high powers indispensable to such a frame of government, of sitting in judgment upon the crimes and misdemeanors of *the President, as well as all other officers of the United States*."[80]

A statement of Senator Joseph Fowler of Tennessee is likewise evidence that the term "officer of the United States" includes the President. In explaining the Impeachment Clause of the Constitution he stated: "The framers of the Constitution" "defined in their great charter the offences for which a *President or other officer* could be impeached and divested of his office. The Constitution says that '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.'"[81]

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79. Heilpern & Worley, 40.

80. Johnson Impeachment Trial, 95 (emphasis added).

81. Johnson Impeachment Trial, 193-194 (emphasis added).

It must be borne in mind that Andrew Johnson became President in April 1865, more than a year before Congress passed the Fourteenth Amendment. He was a Southern-born Democrat who favored blanket amnesty for all former Confederate officials and soldiers. He immediately clashed with the Republican majorities in the House and Senate, who rebuked Johnson by providing in Section Three that a disqualification from office could only be overcome by a two-thirds vote of the House and Senate. Given that the Reconstruction Congress was directly at odds with President Johnson and believed he was jeopardizing the sacrifices of the Union soldiers by favoring amnesty for Confederates, it defies credulity that this Congress intended to exempt the President and Vice President from the insurrectionist disqualification set forth in Section Three that otherwise applied to every other "officer of the United States."

### C. Evidence from President Andrew Johnson's Appointment Proclamations

Andrew Johnson—the President at the time the Fourteenth Amendment was ratified—referred to himself as an "officer of the United States" in numerous official proclamations appointing individuals to important posts in the former Confederate states. In this May 29, 1865 Proclamation appointing William W. Holden Provisional Governor of North Carolina, he said:

> Whereas, The President of the United States is by the Constitution made Commander-in-Chief of the army and navy as well as *chief Executive officer of the United States* and is bound by solemn oath, faithfully to execute the

> office of President of the United States, and to take care that the laws be faithfully executed . . . I, Andrew Johnson, President of the United States and commander-in-chief of the army and navy of the United States, do hereby appoint Wm. W. Holden provisional governor of the State of North Carolina[.][82]

President Johnson issued similar proclamations appointing Governors over Alabama,[83] Georgia,[84] Mississippi,[85] Texas,[86] and South Carolina.[87] In each of them, he referred to himself as an "officer of the United States." In the Alabama, Mississippi, and North Carolina proclamations, he refers to himself as the "chief executive officer of the United States," but in the proclamations for Georgia, Texas, and South Carolina he adds a word, identifying himself as the "chief civil executive officer of the United States." This tiny difference shows that

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82. Andrew Johnson, *A Proclamation*, Burlington Times (June 3, 1865), *available at http://tinyurl.com/2pp5r27x.* (emphasis added).

83. Andrew Johnson, *Appointment of Lewis E. Parsons Provisional Governor of Alabama*, Alabama Beacon (July 7, 1865), *available at http://tinyurl.com/4xw2euzc.*

84. Andrew Johnson, *Official*, Evening Star (June 19, 1865), *available at http://tinyurl.com/y4rtujpe.*

85. Andrew Johnson, *Reconstruction!,* The Philadelphia Inquirer (June 14, 1865), *available at http://tinyurl.com/yuavvd4r.*

86. *Id.*

87. Andrew Johnson, *Official–Department of State—By the President of the United States of America–A Proclamation*, Camden Journal (July 28, 1865), *available at* http://tinyurl.com/475bases (chief civil executive officer of the United States).

the terms "chief," "civil," and "executive" were all just adjectives modifying "officer of the United States."

### D. Evidence from the Amnesty Proclamations of Presidents Lincoln and Johnson

Further evidence that at the time the Fourteenth Amendment was ratified, the phrase "officer of the United States" included the President is provided by the amnesty proclamations issued by Presidents Abraham Lincoln and Andrew Johnson, pardoning Confederates. Both of these proclamations contained a long list of exemptions—-individuals participating in the rebellion that were not covered by the general pardon—chief among them "all who are, or shall have been, civil or diplomatic officers or agents of the so-called Confederate government" as Lincoln put it,[88] or in the words of Johnson, "All who are, or shall have been, pretended civil or diplomatic officers, or otherwise, domestic or foreign agents, of the pretended Confederate Government."[89]

Confederate President Jefferson Davis and Vice President Alexander H. Stephens were not covered by either of these amnesty proclamations because they were "civil officers . . . of the pretended Confederate Government." It bears emphasis that the Confederate Constitution was modeled after the U.S. Constitution.[90]

88. Abraham Lincoln, Proclamation (Dec. 8, 1863), available at: https://history.state.gov/historicaldocuments/frus1863pl/message1

89. President Johnson's Amnesty Proclamation (May 29, 1865), available at https://www.loc.gov/resource/rbpe.23502500/?st=text

90. Heilpern & Worley, 61-62. Also, dozens of newspaper articles written between 1850 and 1870 expressly referred to the President as an "officer of the United States." *Id.* at 63-67.

In sum, at the time the Fourteenth Amendment was enacted, the term "officer of the United States" was understood and intended to include the President within its ambit.

## CONCLUSION

For the reasons set forth above, the Court should conclude that the President of the United States is an "officer of the United States."

Respectfully submitted,

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