

**Who are “Officers of the United States”?**Jennifer L. Mascott<sup>\*</sup>

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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 proven difficult to apply to major categories of officials, leading to a circuit split this past December over whether certain administrative law judges need Article II appointments. This article challenges whether “significant authority” is even the proper standard, using two distinctive tools: (i) “corpus linguistics”-style analysis of Founding Era documents and (ii) examination of appointments practices in the Continental Congress and the First Federal Congress. Both strongly suggest 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 historical meaning of “officer” likely would extend to thousands of officials not currently appointed as Article II “officers,” such as tax collectors, disaster relief officials, federal inspectors, customs officials, and administrative judges. This conclusion might at first seem destructive to the civil service structure. 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 candidates and hire them. These feasible but significant changes would restore a critical mechanism for democratic accountability and transparency intended by the Framers.

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### ***Introduction***

Article II, section 2, clause 2 of the U.S. Constitution, known as “the Appointments Clause,” is an important and 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.<sup>1</sup>

The Appointments Clause gives the authority to select officers to only three entities: the President, department heads, and courts of law. By involving a limited number of entities in “officer” selection, Article II aims to ensure the identity of the nominating official is clear. This provides a direct line of accountability for any poorly performing officers back to the actor who appointed them.<sup>2</sup>

The Appointments Clause requirements apply only to “Officers of the United States.” Current Supreme Court doctrine defines these officers as officials who wield “significant authority.”<sup>3</sup> 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 official is an Article II “officer” examine factors like (i) the importance of the issues in the official’s portfolio, (ii) the finality of the official’s actions, and (iii) the amount of discretion the official has in reaching his or her determinations.<sup>4</sup>

Proper application of this multi-factor standard is fraught with uncertainty. Just in December 2016, the U.S. Court of Appeals for the Tenth Circuit split from the D.C. Circuit’s August 2016 holding that the category of Article II “officers” excludes administrative law judges (ALJs) in the Securities and Exchange Commission.<sup>5</sup> The Tenth Circuit disagreed with the D.C. Circuit’s reliance on

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<sup>1</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>2</sup> See *infra* Part IV.B.1. See also Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 766 (2008).

<sup>3</sup> Buckley v. Valeo, 424 U.S. 1, 125-26 (1976).

<sup>4</sup> See, e.g., Freytag v. Comm’r, 501 U.S. 868, 881-82 (1991); Tucker v. Comm’r of Internal Revenue, 676 F.3d 1129, 1133 (D.C. Cir. 2012).

<sup>5</sup> Compare *Bandimere v. SEC*, No. 15-9586, slip op. at 17-18 (10th Cir. Dec. 27, 2016), with *Raymond J. Lucia Companies, Inc. v. SEC*, No. 15-1345, slip op. at 2, 11-18 (D.C. Cir. Aug. 9, 2016) (holding the SEC ALJs are not Article II “officers”).

finality as a factor relevant to one’s “officer” status.<sup>6</sup> The Tenth Circuit concluded instead that the ALJs are “officers” merely because their positions and duties are established by statute and they “exercise significant discretion” in “carrying out . . . important functions.”<sup>7</sup>

Both federal circuit courts applied the Supreme Court’s general “significant authority” benchmark, but measured it by different factors leading to contradictory results. Under first principles, both courts applied the wrong standard.

Extensive evidence suggests the original public meaning of the Article II term “officer” related to neither discretion nor final decision-making authority. In contrast, historical evidence suggests the most likely 18th-century meaning of “officer” was significantly broader than the modern “significant authority” test. In the Founding Era, the term “officer” commonly was understood to encompass any individual who had ongoing responsibility for a governmental duty.<sup>8</sup> This included even individuals with more “ministerial” statutory duties like keeping records. The only continuing positions excluded from the category of “officer” were (i) positions more like those of “servants” or “attendants”<sup>9</sup> or (ii) “deputies” acting as agents in place of the officer who was subject to personal legal liability for the deputy’s actions.<sup>10</sup>

The phrase “Officers of the United States” pre-existed the drafting of the Constitution. Evidence of early usage indicates it was not a special legal term of art<sup>11</sup> unlike other constitutional phrases such as “Habeas Corpus”<sup>12</sup>—at least not with respect to the level of authority an official must have.<sup>13</sup> The qualifier, “of the United

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<sup>6</sup> Bandimere, *supra* note 5, at 24.

<sup>7</sup> *Id.* at 17-18 (internal quotation omitted).

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* notes 230-32 and accompanying text; see also, e.g., 2 JOURNALS OF THE CONTINENTAL CONGRESS 209 (July 27, 1775) [hereinafter JCC] (providing for the appointment of “officers and other attendants” at an army hospital).

<sup>10</sup> See *infra* Part III.B.

<sup>11</sup> See *infra* Part II.B.2; see also Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 116 (1995) (“the term ‘Officer’ in the Succession Clause [is] shorthand for ‘Officers of the United States’”); Steven G. Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 154-55 (2008) (in “original public meaning” analysis, “[i]t must be presumed that ordinary citizens” would give words like “office” their “commonsense meaning”). *But see*, e.g., Seth Barrett Tillman, *id.* at 136-38, 149 (the Constitution’s various formulations of “officer” have distinct meanings).

<sup>12</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>13</sup> Cf. 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 STUDIES 95, n.10 at 99-100 (2016) (presenting evidence that the phrase “Officers of the United States” excludes elected officials like the President); 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).

States,” clarifies that Article II references federal officers<sup>14</sup> 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.<sup>15</sup>

The original meaning of the term “officer” in the Appointments Clause and its implications for the proper selection of mid-level federal officials has been under-examined in legal academic scholarship. Several scholars have analyzed constitutional phrases including 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.<sup>16</sup> For example, Seth Barrett Tillman has extensively studied constitutional formulations such as the Emoluments Clause’s<sup>17</sup> application to people holding “Office . . . under” the United States<sup>18</sup> and presented strong arguments that numerous constitutional references to “officers” do not apply to elected officials.<sup>19</sup> 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 appointed by courts of law, department heads or the president alone.<sup>20</sup>

In contrast, this article analyzes the dividing line between (i) “officers” subject to any of the Appointments Clause selection mechanisms versus (ii) lower-level, non-Article II officials known as employees under modern law.<sup>21</sup> A number of scholars have addressed whether the Article II term “officer” reaches particular contemporary officials such as ALJs<sup>22</sup> or IRS Appeals Officers.<sup>23</sup> But these scholars typically use the “significant authority” test as a starting point or incorporate the historical analysis from a 2007 Executive Branch memorandum interpreting

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<sup>14</sup> See *infra* Part II.B.2.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *supra* note 11.

<sup>17</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>18</sup> Seth Barrett Tillman, Editorial, *Constitutional Restrictions on Foreign Gifts Don’t Apply to Presidents*, N.Y. TIMES, Nov. 18, 2016.

<sup>19</sup> William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), <http://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/> (reviewing Professor Tillman’s work).

<sup>20</sup> See, e.g., Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233 (2008); cf. Gary Lawson, *The ‘Principal’ Reason why the PCAOB is Unconstitutional*, 62 VAND. L. REV. EN BANC 73 (2009).

<sup>21</sup> See *Freytag v. Comm’r*, 501 U.S. 868, 880-81 (1991). Cf. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 30-31 (2012) (in his landmark work on many intricacies of the first 100 years of American administration, indicating the shortage of excavated evidence on the Appointments Clause by wryly observing, “‘inferior Officers’ (whoever they might be)”).

<sup>22</sup> See, e.g., Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 809-14 (2013).

<sup>23</sup> 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, 1178-80 (2011); see also, e.g., Kevin Sholette, *Note: The American Czars*, 20 CORNELL J.L. & PUB. POL’Y 219 (2010).

“officer.”<sup>24</sup> A 2007 Office of Legal Counsel (“OLC”) Memo relies heavily on 19th-century sources;<sup>25</sup> its “officer” definition is both under- and over-inclusive in relation to the 18th-century understanding of the term.<sup>26</sup>

Methodologically, this article in contrast focuses on historical sources up through the 18th century. To uncover the original public meaning of the Article II term “officer” the article adapts “corpus linguistics”-style analysis to review of traditional originalist historical sources—a set of techniques that legal scholars and jurists just recently have started applying to statutory and constitutional interpretation.<sup>27</sup> In particular this article uses a form of the technique known as “key words in context” (KWIC) to analyze the context surrounding thousands of uses of the term “officer” in the time period just prior to and including ratification of the Constitution.

In addition, the article looks in-depth at early practice regarding officer appointments. By reviewing early federal payroll lists and examining First Federal Congress statutory provisions regarding government personnel, the article analyzes the dividing line between early officials appointed under the Appointments Clause and those treated as non-officers. The article also examines several ordinances and resolves issued by the Continental Congress, which confirm a similar understanding of the term “officer” in the era immediately preceding the Constitution.

This evidence suggests 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 particular task or exercise a particular power, the individual who maintains ongoing responsibility for the task is an “officer.” Under this definition, many non-“officer” positions in the modern administrative state 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:<sup>28</sup> (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) administrative judges.

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

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<sup>24</sup> See *supra* notes 22-23.

<sup>25</sup> See “Officers of the United States Within the Meaning of the Appointments Clause,” Opin. of the Office of Legal Counsel, Apr. 16, 2007, 2007 OLC Lexis 3, at 12-37 [hereinafter OLC Opinion].

<sup>26</sup> See *infra* notes 66-70 and accompanying text.

<sup>27</sup> 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 (2011).

<sup>28</sup> See *infra* Part IV.A.

officials qualifying as “officers” under modern doctrine.<sup>29</sup> Much less the thousands of officials who would fall within the broader 18th-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. As part of that reorganization, the Federal Emergency Management Authority (FEMA) became a subunit within the newly created Homeland Security Department.<sup>30</sup> Nonetheless, Congress has continued to make significant positions within FEMA subject to appointment by the FEMA Administrator rather than the new department head, the Homeland Security Secretary. In particular, in 2006 following fallout from Hurricane Katrina, Congress authorized the FEMA Administrator to appoint ten Regional Administrators<sup>31</sup> to oversee regional preparedness for terrorist attacks and natural disasters.<sup>32</sup> Under even modern doctrine, it seems regional administrators with such “significant authority” should be appointed by the department head—the Homeland Security Secretary—and not by the FEMA Administrator. Such a change might seem like a technicality. But making the Secretary ultimately responsible rather than the Administrator places significant hiring decisions one step closer to the democratic accountability of an elected President.<sup>33</sup>

Current procedures governing the selection of officials with likely “officer” status 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.<sup>34</sup> Second, some officials with officer-level duties as a historic matter are subject to competitive civil service procedures where their final appointing official is someone other than an Article II department head.<sup>35</sup> Finally—this is a close case, but arguably even competitively selected officers subject to final appointment by a department head undergo unconstitutional appointments procedures. Subject to certain exceptions, competitive procedures typically restrict the appointing authority to filling a position from a list of several pre-selected candidates.<sup>36</sup> At least in cases where members of the competitive examining board are not themselves appointed by

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<sup>29</sup> *Cf.* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539-541 (2010) (Breyer, J., dissenting).

<sup>30</sup> *See* Section 503, The Homeland Security Act (HSA) of 2002, (Pub.L. 107–296, 116 Stat. 2135, 2213, enacted November 25, 2002).

<sup>31</sup> *See* The Post-Katrina Emergency Management Reform Act of 2006, P.L. 109-295, 120 Stat. 1355, 1401 (2006).

<sup>32</sup> *See infra* Part IV.A.1. *See also* “Federal Emergency Management Policy Changes After Hurricane Katrina: A Summary of Statutory Provisions,” CRS Report No. RL33729 (2007).

<sup>33</sup> *Cf.* *Free Enter. Fund*, 561 U.S., at 495-98 (explaining the relevance of direct, uninsulated accountability).

<sup>34</sup> *See infra* notes 450-53 and accompanying text.

<sup>35</sup> *See infra* Part IV.A.2.a.

<sup>36</sup> *See infra* notes 429-52 and accompanying text.

a department head, this seems inconsistent with the Article II objective of ensuring departmental 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 for 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 under the Articles of Confederation<sup>37</sup> because the Framers believed individual actors must maintain accountability for their nomination choices.<sup>38</sup>

This article will proceed in four parts. Part I will explain the importance of properly clarifying the term “officer” in light of governing case law and modern practice. Part II will present 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 will lay out how the First Federal Congress’s practice of appointing officers and hiring non-officers confirms the “corpus linguistics”-style analysis. Finally, Part IV will explain the possible implications of the original meaning of “officer” for government today. It will identify several categories of modern government officials currently treated as “employees” who in fact are most likely “officers” under the historical meaning of Article II. But Part IV then will show how values of accountability, transparency, and excellence can be addressed even if compliance with Article II means modifying the selection process for hundreds of thousands of federal officials.

## **I. Article II’s Role within the Constitutional System and Current Doctrine**

Today the federal government employs as many as 2.1 million civilian personnel.<sup>39</sup> The government fills as few as 9,000 of these positions using noncompetitive appointments procedures.<sup>40</sup> In stark contrast, Article II selection mechanisms were used for more than ninety percent of officials listed on the 1792 payroll for central offices within the three major executive departments.<sup>41</sup>

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<sup>37</sup> Compare U.S. CONST. art. II, § 2, cl. 2, with ARTICLES OF CONFEDERATION art. IX.

<sup>38</sup> See, e.g., No. 77 (Alexander Hamilton), in *THE FEDERALIST* 398-99 (Gideon Edition, Liberty Fund reprint, 2001).

<sup>39</sup> “Hiring Spree: Agencies adding 72,000 employees in 2015,” Andy Medici, *FED. TIMES*, Feb. 17, 2015, <http://www.federaltimes.com/story/government/management/agency/2015/02/17/hiring-agencies-2015/23299037/>.

<sup>40</sup> United States Government Policy and Supporting Positions (The “Plum Book”) (Dec. 1, 2016), at iii.

<sup>41</sup> See List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the



From the nation’s earliest days, America’s leaders have sought to ensure the selection of government officials is efficient,<sup>42</sup> free from patronage,<sup>43</sup> and implemented via mechanisms identifying the most qualified person for the job.<sup>44</sup> Toward that end, the U.S. Constitution expressly specified in Article II the proper methods for appointing those members of the federal workforce who qualify as “officers.”<sup>45</sup>

Article II, Section 2 expressly contemplates two categories of government officials, and implicitly may leave room for a third. (i) First, there are some government officials of such significance that only the President can select them, with the advice and consent of the Senate.<sup>46</sup> (ii) Second, there is a set of “inferior Officers” whose method of hiring may be established by Congress “by Law.”<sup>47</sup> Congress may enact laws that create “inferior Officer[]” positions, granting appointment authority for those positions to the President alone, the Heads of Departments, or courts of law, or leaving in place the default procedure of presidential nomination with Senate consent.<sup>48</sup> (iii) Third, and finally, there may be government officials whose responsibilities are sufficiently minor that these officials fail to rise to the level of “officer.” Article II appointments requirements would not

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Year Ending October 1, 1792, in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 57-68 (W.S. Hein 1998) (1861) [hereinafter 1792 Civil Officer List] (calculating officials in the State Department’s Domestic Branch, the Treasury Department, and the Secretary’s Office within the War Department). These figures represent only a small portion of federal officials at the time; historian Leonard White has noted that the vast majority of early federal employees were out in the field, not in agency central offices. See, e.g., LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 123 (1948).

<sup>42</sup> See, e.g., U.S. 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”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627-28 (Max Farrand ed., 1937) [hereinafter FARRAND’S RECORDS].

<sup>43</sup> See, e.g., Letter from the Federal Farmer to the Republican, No. 14 (Jan. 17, 1788), reprinted in 4 THE FOUNDERS’ CONSTITUTION 98-99 (Kurland & Lerner eds., 1987) (contending that “impartial and judicious appointments of subordinate officers will, generally, be made by the courts of law, and the heads of departments”).

<sup>44</sup> See, e.g., 1 FARRAND’S RECORDS, *supra* note 42, at 120 (Madison noted “any numerous body” would be ill-suited for appointments); 2 *id.* 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. . . .”). But see 2 *id.* at 542 (Dr. Franklin: “We seemed . . . too much to fear cabals in appointments by a number, and to have too much confidence in those of single persons.”).

<sup>45</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>46</sup> *Id.* See also, e.g., Edmond v. U.S., 520 U.S. 651, 662-63 (1997) (contrasting inferior officers with principal officers).

<sup>47</sup> U.S. CONST. art. II, § 2, cl. 2. See also Letter from the Federal Farmer to the Republican, *supra* note 43 (Congress’s ability to create new offices is a positive counterbalance to the President’s nomination and appointments duties).

<sup>48</sup> See U.S. CONST. art. II, § 2, cl. 2; see also Samahon, *supra* note 20, at 253.

apply to this third group.<sup>49</sup>

One of the most pressing questions these provisions raise is who constitutes an “officer” for purposes of the Appointments Clause. The Supreme Court has required strict adherence to Appointments Clause procedures.<sup>50</sup> 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 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 that exercise “significant authority pursuant to the laws of the United States.”<sup>51</sup> 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 a Postmaster first class and a district court clerk, both of whom are inferior officers under the Appointments Clause.<sup>52</sup> The Commissioners engaged in “significant” duties like enforcement of election law through judicial procedures, so the Court concluded the Commissioners likewise are Article II “Officers.”<sup>53</sup>

The Court reexamined the meaning of “officer” in *Freytag v. Commissioner*, which held that special trial judges within the Tax Court are inferior officers.<sup>54</sup> But *Freytag* did not definitively provide a comprehensive list of which factors give an official sufficiently “significant authority” to be an “Officer.” The Court in that case described as relevant several factors like an official (i) exercising “significant discretion,” (ii) “perform[ing] more than ministerial tasks” like ruling on evidence admissibility, and (iii) serving in a position whose duties and salary are “specified by statute.”<sup>55</sup> 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.<sup>56</sup>

This multi-factor analysis of officer status has proven tough to apply. Lower courts consequently often evaluate officer status not by applying a clear standard but

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<sup>49</sup> See U.S. CONST. art. II, § 2, cl. 2; *Buckley*, 424 U.S. at 126 n.162 (referring to a category of “lesser functionaries subordinate” to Article II officers).

<sup>50</sup> *Buckley*, 424 U.S. at 125-26.

<sup>51</sup> *Id.*

<sup>52</sup> See *id.* at 126.

<sup>53</sup> See *id.* at 138-41.

<sup>54</sup> *Freytag*, 501 U.S. at 882.

<sup>55</sup> *Id.* at 881-82.

<sup>56</sup> *Id.* at 882.

by conducting intricate, fact-bound analysis of whether an official’s duties are more or less significant than those of government personnel previously categorized as “officers.”<sup>57</sup> Litigants impacted 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.<sup>58</sup> Congress lacks clarity about the reach of the Appointments Clause when creating new government positions or restructuring preexisting agencies.<sup>59</sup>

Legal scholarship has underexplored identification of the constitutional dividing line between federal “officers” and employees.<sup>60</sup> Legal scholarship also has undertheorized the consequences of an improperly constrained definition of “Officer” for administrative efficiency and accountability. Much scholarship instead has focused on the related issue of accountability for the job performance of officials already defined as officers under current law.<sup>61</sup>

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,<sup>62</sup> more than one Supreme Court Justice has raised questions about the proper scope of Article II.<sup>63</sup> Moreover, recent studies suggest that efforts to restructure civil service tenure provisions<sup>64</sup> could be less useful than hiring the right person in the first place.<sup>65</sup>

In 2007 the Office of Legal Counsel offered guidance to the Executive Branch to put more flesh on the bones of *Buckley*’s “significant authority” standard.<sup>66</sup> The OLC defined an “officer” to be anyone holding a position (i) “to which is delegated by legal authority a portion of the sovereign powers of the federal Government” and

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<sup>57</sup> See, e.g., *Raymond J. Lucia Companies, Inc.*, slip op. at 11-18; *Tucker*, 676 F.3d at 1133-35; see also Andrew Owen, *Note: Toward A New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536, 537 (1992).

<sup>58</sup> See Carlton M. Smith, *Does Collection Due Process Violate the Appointments Clause?* 126 TAX NOTES 777 (2010).

<sup>59</sup> Cf. John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 906 (2009) (discussing the unconstitutional selection structure for administrative patent judges, which Congress has since changed through legislation).

<sup>60</sup> See *supra* notes 21-26 and accompanying text.

<sup>61</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014).

<sup>62</sup> See *supra* notes 5-7 and accompanying text.

<sup>63</sup> See *Dept of Transp. v. Ass’n of Am. R.R.*, 135 S.Ct. 1225, 1238-39 (Alito, J., concurring); *Free Enter. Fund*, 561 U.S., at 540-41 (Breyer, J., dissenting).

<sup>64</sup> See *Veterans Access, Choice, and Accountability Act of 2014*, Pub. L. No. 113-146, § 707, 128 Stat. 1754, 1798-99 (Aug. 7, 2014) (Senior Executive Service removals).

<sup>65</sup> See generally Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913 (2009).

<sup>66</sup> See OLC Opinion, *supra* note 25.

(ii) that is “continuing.”<sup>67</sup> The OLC further observed that one indication of sovereign power is when an official exercises “power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit.”<sup>68</sup>

But the 18th-century evidence suggests the OLC’s definition is both under- and over-inclusive. (i) The requirement that an officer hold power to bind third parties makes the test under-inclusive. For example, the First Federal Congress appointed as officers the clerks who engaged merely in tasks like recording the receipt of registration certificates from merchant ships importing goods.<sup>69</sup> That task and others like it did not immediately impact a third party’s rights.<sup>70</sup> (ii) At the same time the OLC’s test is also over-inclusive. The First Federal 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 legally responsible, for the deputies’ misdeeds. Nonetheless the OLC standard would seem to classify deputies as “officers” because their actions bound third parties when they issued writs and collected import duties.

## II. “Corpus Linguistics” and the Original Public Meaning Analysis

This article’s “original public meaning” analysis of the phrase “Officers of the United States” 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,”<sup>71</sup> 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 19th century.<sup>72</sup> Rather than

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<sup>67</sup> See *id.* at 1. This formulation reflects the definition of “officer” in a leading late 19th-century treatise. See *id.* at 29-30 (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 1, at 1-2 (1890)).

<sup>68</sup> OLC Opinion, *supra* note 25, at 37-43 (referencing the authority to arrest criminals, enter judgments, seize property, issue regulations, and receive and oversee public funds).

<sup>69</sup> See *infra* Part III.A.

<sup>70</sup> See OLC Opinion, *supra* note 25, at 44 (citing favorably a prior OLC opinion that concluded “purely 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 non-officers).

<sup>71</sup> See, e.g., *Freytag*, 501 U.S. at 880-81 (evaluating whether special trial judges are “inferior Officers” or “lesser functionaries” known as employees).

<sup>72</sup> OXFORD ENGLISH DICTIONARY, <http://www.oed.com> (last accessed Feb. 8, 2017) (recording the earliest usage of the term “employee” in 1814). The related term “employment” existed in the late 18th century but was used in reference to both officers and non-officers. See, e.g., WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (1788) (defining an “officer” to be “one in office” and an “office” as “a public employment”); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (18th ed. 1781) (“Employ”: “to set a person about doing something; also to make use of a thing”).

characterizing non-officers as “employees,” the Framers most likely would have thought of people below the level of “officer” as “servants” or “attendants.”

### A. “Corpus Linguistics” Methodology

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.”<sup>73</sup> The Supreme Court has also used this interpretive approach in recent opinions.<sup>74</sup> This approach 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?”<sup>75</sup>

More interpretive tools than ever before are at the disposal of “original public meaning” interpreters with the recent adaptation of “corpus linguistics” techniques to constitutional and statutory interpretation.<sup>76</sup> Corpus linguistics is the “study of language function and use by means of an electronic collection of naturally occurring language called a corpus.”<sup>77</sup>

Within a corpus of “real world” texts showing how words were “actually used in written or spoken English”<sup>78</sup> during the relevant time period, one linguistics technique is to examine the context surrounding uses of the term or phrase under review.<sup>79</sup> This technique is known as KWIC, or studying “key words in context.”<sup>80</sup> Members of the Utah Supreme Court have used KWIC in statutory interpretation cases to identify which of several alternative plausible meanings of a term was the most likely meaning employed by a particular statutory text.<sup>81</sup> And Professor 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

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<sup>73</sup> See, e.g., Lawrence B. Solum, We Are All Originalists Now, in CONSTITUTIONAL ORIGINALISM: A DEBATE (2011).

<sup>74</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (explaining the relevance of the meaning “known to ordinary citizens in the founding generation”).

<sup>75</sup> Solum, *supra* note 73, at 3.

<sup>76</sup> See, e.g., *State v. Rasabout*, 356 P.3d 1258, 1271, 1278-79 (Utah 2015) (Lee, J., concurring); 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 (1998), as a corpus linguistics interpretive technique).

<sup>77</sup> Mouritsen, *supra* note 27, at 190.

<sup>78</sup> *Rasabout*, 356 P.3d at 1276 (opinion of Lee, J., concurring).

<sup>79</sup> TONY MCENERY AND ANDREW HARDIE, CORPUS LINGUISTICS: METHOD, THEORY AND PRACTICE § 1.1 (2012).

<sup>80</sup> See James C. Phillips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 20, 24 (2016).

<sup>81</sup> See, e.g., *Rasabout*, 356 P.3d at 1275-82 (opinion of Lee, J., concurring).

newspaper records—concluding the 18th-century term “commerce” had a narrow meaning.<sup>82</sup>

The employment of corpus linguistics techniques in constitutional interpretation has particular relevance for unearthing the original public meaning of the Article II term “officer.” The leading typical 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.” For example, *The Federalist*<sup>83</sup> and the Borden collection of *Anti-Federalist Papers*<sup>84</sup> 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,”<sup>85</sup> or employee. Similarly, examination of every use of the phrases “officer(s) of the United States” and “office(s) of the United States” in state ratification debates edited by Jonathan Elliot<sup>86</sup> also yielded no discussion of the precise scope of this Appointments Clause phrase.<sup>87</sup> In addition, Farrand’s *Records of the Constitutional Convention* did not directly define the term “officer” or the phrase, “Officer of the United States.”<sup>88</sup>

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.<sup>89</sup> The record of consideration of the “inferior Officer[.]” clause extends for just half a page<sup>90</sup> out of the more than 1200 pages of Farrand’s two volumes of debate records.

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. Early congressional debate statements suggest the

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<sup>82</sup> See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856-62 (2003).

<sup>83</sup> THE FEDERALIST, *supra* note 38.

<sup>84</sup> See generally THE ANTI-FEDERALIST PAPERS, edited by Bill Bailey, available at <http://www.thefederalistpapers.org/wp-content/uploads/2012/11/The-Anti-Federalist-Papers-Special-Edition.pdf> [hereinafter THE ANTI-FEDERALIST PAPERS]; *id.* at 2 (collecting “85 of the most significant [anti-Federalist] papers”).

<sup>85</sup> See *supra* note 9 & *infra* notes 230-32 and accompanying text.

<sup>86</sup> See generally JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836), available at <http://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-5-vols> [hereinafter ELLIOT’S DEBATES].

<sup>87</sup> *But see* 4 *id.* at 454-55 (excerpting an early congressional debate statement discussing the commonly held understanding of the term “officer” and observing that government contractors fell outside its scope).

<sup>88</sup> See 1-2 FARRAND’S RECORDS, *supra* note 42.

<sup>89</sup> 2 *id.* at 627, 649.

<sup>90</sup> 2 *id.* at 627.

term had a “common and known acceptance” and “[a]n extensive meaning ha[d] been given to the word.”<sup>91</sup> 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. Part II begins with the more traditional originalist interpretive approach of examining the relevant constitutional text, the drafting history of the Appointments Clause, and Founding Era ordinary-language and legal dictionary definitions of “officer.” Part II then turns to a KWIC-style analysis by examining (i) every use of the word “officer” in one popular 18th-century dictionary, *The Federalist* and *The Anti-Federalist Papers*, and Farrand’s *Records* of the drafting debates, and (ii) every use of the phrase “Officer(s) of the United States” in the ratification debates. Part II also examines every use of the phrase “Officer(s) of the United States” in the *Journals of the Continental Congress* and a Readex database of early newspaper records, which suggest that the phrase was not a new term of art establishing an especially significant class of officers. Finally, Part II employs a corpus linguistics analysis of collocation, identifying terms closely associated with the word “officer” in 16,000 eighteenth-century files provided by scholars associated with the Corpus of Founding-Era American English.<sup>92</sup>

## B. Constitutional Text: “Officers of the United States”

The relevant portion of Article II, Section 2 states:

***The President . . . shall have Power . . . to 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.<sup>93</sup>

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<sup>91</sup> See 4 ELLIOT’S DEBATES, *supra* note 86, at 454-55 (statement from congressional debate on Mar. 23, 1806); 8 Annals of Congress 2294, 2306 (remarks of Rep. Robert Goodloe Harper during prosecution of the William Blount impeachment describing the “universally received signification of the term ‘office’”).

<sup>92</sup> See Phillips, *supra* note 80, at 31.

<sup>93</sup> U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

**1. Evidence of Meaning within the Constitution Itself.** The Constitution does not self-define the phrase, “Officers of the United States.” But the use of the qualifier “all other” indicates the phrase encompasses a broader group than the immediately previously referenced “Ambassadors, other public Ministers and Consuls, [and] Judges.”<sup>94</sup> The Constitution permits Congress to “establish by Law” other officers—some of whom may include “inferior Officers” that Congress may subject to a more streamlined appointment process. 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.” 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.” For example, “Officers of the United States” must receive commissions from the President.<sup>95</sup> And civil “Officers of the United States” may be subject to impeachment.<sup>96</sup>

**2. Is “Officer[] of the United States” an indivisible term of art?** Evidence suggests the phrase “Officers of the United States”<sup>97</sup> is not a term of art creating a new especially significant class of government officers. Rather, evidence suggests “of the United States” in Article II, like in several other constitutional provisions,<sup>98</sup> is a descriptive phrase indicating 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 the term “Officer[]” is severable from the larger phrase. First, to designate a subset of the group described

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<sup>94</sup> *See id.*

<sup>95</sup> *Id.* § 3.

<sup>96</sup> *Id.* § 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)” 30 additional times (excluding the art. I, § 8 reference to “Post Offices”). 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 any Department or Officer thereof.” U.S. CONST. art. I, § 8 (emphasis added). *Cf.* Calabresi, *supra* note 11, at 160 (suggesting the “Officer” formulation in the Necessary and Proper Clause has the same meaning as “Officers of the United States”). This provision suggests federal “officers” are those in whom at least some type of federal power is vested.

<sup>97</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>98</sup> *See, e.g.,* U.S. CONST. art. VI, cl. 3 (Oath Clause: “and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution”) (emphasis added); 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).



by the phrase “Officers of the United States,” Article II identifies the relevant officials simply as “inferior Officers,”<sup>99</sup> suggesting “Officers” is shorthand for the longer phrase. Moreover, even before Article II, Section II, clause 2 makes the first constitutional reference to “Officers of the United States,” the immediately preceding clause—Article II, Section II, clause 1—provides that the president may require written opinions from the “principal Officer in each of the executive departments.”<sup>100</sup> 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.

*b. Drafting History:* The drafting history of the Appointments Clause confirms this analysis. At the start of the Convention the drafters began working on one of the original constitutional proposals submitted to the Convention known as the Virginia Plan.<sup>101</sup> Resolution 7 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.<sup>102</sup> Presumably Resolution 7 implicitly authorized appointment of executive officers when it empowered the executive magistrate to “enjoy the Executive rights vested in Congress by the Confederation,”<sup>103</sup> which had included appointment authority.<sup>104</sup> In contrast, the power to select judges—today embodied in the Article II Appointments Clause—at the time had been explicitly allocated to the proposed “National Legislature.”<sup>105</sup> 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.”<sup>106</sup> Nonetheless, the legislature at the time continued to maintain the authority to appoint judges.

Drafts of the appointments clause did not include the expanded phrase, “Officers of the United States,” until September 4, 1787—during the late stages of the convention proceedings.<sup>107</sup> By that time, the original Virginia Plan had been

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<sup>99</sup> See U.S. CONST. art. II, § 2 cl. 2.

<sup>100</sup> *Id.* § 1.

<sup>101</sup> See generally 1 FARRAND’S RECORDS, *supra* note 42, at 20-22 & n.10.

<sup>102</sup> *Id.* at 21 (Resolution 7).

<sup>103</sup> *Id.*; *cf. id.* at 65-66 (Wilson: “The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature.”).

<sup>104</sup> ARTICLES OF CONFEDERATION art. IX.

<sup>105</sup> See 1 FARRAND’S RECORDS, *supra* note 42, at 21 (Resolution 9).

<sup>106</sup> *Id.* at 62-63, 66-67 (June 1, 1787: approving in the Committee of the Whole Madison’s proposed amendment to the Virginia Plan).

<sup>107</sup> See 2 *id.* at 495; 2 *id.* at 539-40 (voting to agree to this language); see also 2 *id.* at 23 (July 17, 1787: Convention approving Committee of the Whole’s earlier draft language—“appoint to offices in cases not otherwise provided for”); 2 *id.* at 405 (members still debating appointments clause that referenced just “officers” rather than “officers of the United States”). That said, earlier constitutional drafts had previously used the full phrase “Officers of the United States” when granting the President

extensively amended by a Committee of Detail and a “Committee of eleven” had recommended further changes—which included the new Appointments Clause phrasing.<sup>108</sup> 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.”<sup>109</sup>

In addition to this draft stating that the President would nominate “Officers of the United States” rather than “to offices,” this draft for the first time authorized the president to nominate judges and ambassadors.<sup>110</sup> Intermediate drafts of the Constitution had empowered the Senate alone to appoint judges and ambassadors.<sup>111</sup> Therefore, the change in terminology from “offices” to “Officers of the United States”<sup>112</sup> likely indicated just that the President now had the added power to nominate certain non-Executive Branch officers, in addition to the executive officers previous drafts had already authorized him to appoint.

*c. Founding Era Debates:* Further, when referring to the officers described by Article II, section 2, 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*, Alexander Hamilton discussed removal of the “officers of the government” rather than “Officers of the United States.”<sup>113</sup> The Anti-Federalist writer known as “The Federal Farmer” used the phrase “officers of the union” to describe Article II officers.<sup>114</sup> And during the First Federal Congress, Representative Roger Sherman used interchangeably the phrases “officers of the Federal Government” and “Officers of the United States”<sup>115</sup>—apparently equating the phrase “Officers of the United States” with the

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commissioning power. For example, a draft considered by the Committee of Detail, 2 *id.* at 171, and then referred to the Convention, *see* 2 *id.* at 176, provided: “he shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution.” 2 *id.* at 171, 185. *See also* 2 *id.* at 420. This draft, like the ones before it, authorized the Senate to appoint ambassadors and judges. *Id.* at 169, 183.

<sup>108</sup> *See* 2 *id.* at 493-96.

<sup>109</sup> 2 *id.* at 495, 539-40.

<sup>110</sup> *Compare id., with, e.g.,* 2 *id.* at 389 n.8 (describing Article IX, Section 1 of the Committee of Detail draft: “The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.”).

<sup>111</sup> *See* 2 *id.* at 493-95 (indicating this draft would replace the earlier Article IX, Sect. 1, which had authorized the Senate to appoint judges and ambassadors, *supra* note 110).

<sup>112</sup> *See* 2 *id.* at 495, 498-99, 539-40, 574-55, 599.

<sup>113</sup> No. 77, THE FEDERALIST, *supra* note 38, at 396.

<sup>114</sup> No. 76-77 (Federal Farmer XIII), THE ANTI-FEDERALIST PAPERS, *supra* note 84, at 294.

<sup>115</sup> *See* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 120-21

category of federal officer.

Moreover, if “Officers of the United States” were a special term of art, one might expect to see that precise phrase utilized more frequently in key Founding Era documents. For example, in the Federalist and Anti-Federalist essays debating the merits of the Constitution, there were more than 600 uses of the terms “office(s)” and “officer(s).” Only eight of these references included the full phrase “Officers of the United States,” none of which was accompanied by an explicit definition of the phrase. The Members of the First Federal Congress also 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, includes only 25 references to the phrase “Officer(s) of the United States”<sup>116</sup> in the more than 3700 pages it devotes to those debates.<sup>117</sup>

*d. Continental Congress Era Uses of the Phrasing, “Officers of the United States”*: Finally, evidence from the decade prior to the Constitution’s ratification demonstrates the phrase “Officers of the United States” did not originate with the Constitution and thus was not an entirely new term of art crafted in Article II.

*i. Articles of Confederation*: For example, several months after the States ratified the Articles of Confederation in March 1781, the Continental Congress tasked a committee to prepare a plan that would carry into effect the Confederation.<sup>118</sup> 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.”<sup>119</sup> This oath requirement would have built upon the Articles’ original prohibition, “nor shall any person holding any *office of profit or trust under the United States*, or any of them, accept any present, emolument, office or title of any kind whatever from any king,

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[hereinafter DHFFC].

<sup>116</sup> These search results were compiled by using the limited search function on [hathitrust.org](https://catalog.hathitrust.org/Record/000277242) for the Documentary History of the First Federal Congress. See, e.g., <https://catalog.hathitrust.org/Record/000277242>. The Hathitrust search feature lists only the relevant page numbers, so the print volumes themselves must also be accessed.

<sup>117</sup> See vv. 10-14 DHFFC, *supra* note 115. The one occasion where the First Federal Congress discussed the scope of the phrase “Officer(s) of the United States” (or “of the U.S.”) was during debate over which officers may be in the presidential line of succession. For example, during debate Mr. Smith (S.C.) said succession alternatives were very limited because in his view the succession clause applied to only “officer(s) of the United States” which “narrow[ed] the discussion . . . very much.” See 14 *id.* at 271. But this view is contradicted by numerous alternative 18th-century statements suggesting the Founding Era generation believed there would be many federal officers. See *infra* Parts II.D-E.

<sup>118</sup> 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 143.

<sup>119</sup> *Id.* at 144 (brackets in original) (emphasis added) (Recommendation 8). “There is no evidence that Congress ever considered the report” containing this recommendation. *Id.* at 143.

prince, or foreign State.”<sup>120</sup>

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 these two distinct phrases referred to the same group—again indicating “Officers of the United States” was not its own new unique legal category. Second, the immediate context of the phrase “Officers of the U.S.” within the committee recommendation suggests the qualifier “of the United States” merely denotes the officers are national and not state-level officers. The congressional committee suggested an oath requirement for “all Officers of the U.S. or any of [them].” In other words, the proposal would have imposed an oath requirement on federal officers or officers of any State.<sup>121</sup>

*ii. Journals of the Continental Congress, 1774-1789:* The *Journals* included scores of references to the phrase “officer(s) of the United States,”<sup>122</sup> which in the main support the conclusion that the phrase was not a term of art for “significant” officials. To be sure, sometimes the phrase described a group of officials executing specific types of governmental duties, which could indicate 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.<sup>123</sup> But on multiple other occasions, the context surrounding the phrase indicated it was just another way to describe continental military officers or identify continental-level, as opposed to state-level, officers.<sup>124</sup> 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 this same group.<sup>125</sup> The *Journals*

<sup>120</sup> ARTICLES OF CONFEDERATION art. VI, cl. 1 (emphasis added).

<sup>121</sup> Cf. *supra* note 98 (similar to the U.S. Constitution’s Oath Clause).

<sup>122</sup> See generally vols. 1-34 of the *Journals of the Continental Congress*, searchable online through the Library of Congress (<https://memory.loc.gov/ammem/hlawquery.html>) (41 references to “officer(s) of the United States,” excluding instances where the phrase is part of a title, such as “Commanding Officer of the United States”; 2 occurrences of “officer(s) of the U.S.”).

<sup>123</sup> See 32 JCC, *supra* note 9, at 160, 164 (Apr. 9, 1787); see also, e.g., 33 *id.* at 399-400 (July 23, 1787) (committee report on territorial tracts of land being surveyed “by the geographer or some other officer of the United States”).

<sup>124</sup> See, e.g., 23 *id.* at 626 (Sept. 30, 1782) (reprinting a letter 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).

<sup>125</sup> 10 *id.* at 139-40 (Feb. 9, 1778).

also included three uses of the very similar phrase, “officer(s) of *these* United States” to describe government officials,<sup>126</sup> suggesting 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 1690-1876.<sup>127</sup> Within that series there were 20 uses of the phrase “officer(s) of the United States” prior to the signing of the Constitution on September 17, 1787.<sup>128</sup> The first use of the phrase occurred in 1780 in a description of traitor Benedict Arnold as a “general officer of the United States”;<sup>129</sup> the phrase again referenced continental officers in 1783, the next time it appeared in the database.<sup>130</sup> This is consistent with use of the phrase by the *Journals of the Continental Congress*, which first referenced it in 1778 as a description of military officers in the continental army.<sup>131</sup> 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.<sup>132</sup>

Like in the *Journals of the Continental Congress*, several times the phrase was used with slight variations, suggesting “Officers of the United States” may not be a precise term of art.<sup>133</sup> 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”<sup>134</sup> and a

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<sup>126</sup> 20 *id.* at 621 (June 11, 1781) (emphasis added) (“the Officers of these United States in Captivity”); 32 *id.* at 50 (Feb. 14, 1787) (ordinance permitting “any officer of these United States” to authorize mail delivery involving official business); 15 *id.* at 1242 (Nov. 5, 1779) (resolution regarding plans for a board to investigate possible delinquency by “officers of these United States”).

<sup>127</sup> See Readex Newspaper database description, at <http://www.readex.com/content/early-american-newspapers-series>.

<sup>128</sup> This search was last conducted in February 2017. There were 20 uses of the phrase distributed throughout 17 newspaper records prior to September 17, 1787.

<sup>129</sup> See CONNECTICUT GAZETTE, Oct. 17, 1780, p. 2.

<sup>130</sup> See THE CONNECTICUT JOURNAL July 9, 1783, p. 1 (reprinting a proclamation by the President of Congress that all “officers of the United States, civil and military,” must assist in preserving the dignity of the United States against mutinous armed military officers).

<sup>131</sup> 10 JCC, *supra* note 9, at 61 (Jan. 19, 1778) (describing captured continental officers); *id.* at 136-37 (Feb. 6, 1778) (discussing the quarter master general and other “officers of the United States” in the army).

<sup>132</sup> From September 19, 1787, through the end of the First Federal Congress on March 4, 1791, the newspaper database includes well over 100 uses of the relevant phrase spread throughout 81 newspaper records. At least 15 of these newspaper records were printings of the Constitution.

<sup>133</sup> See, e.g., PENNSYLVANIA PACKET (Oct. 21, 1785), p. 2 (announcing a prominent funeral procession that includes the “Clerks of the Public Offices of the United States”); MASSACHUSETTS SPY (Aug. 5, 1790), at p.2 (reporting a gathering of Native American chiefs with General Knox and “officers of the United States government”).

<sup>134</sup> PENNSYLVANIA PACKET (Oct. 21, 1785), p. 2.

ratification celebration toasting “Judicial Officers of the United States.”<sup>135</sup> One paper reprinted a House floor speech about certificates of debt given out by “commissaries and other officers of the United States” under the Articles of Confederation.<sup>136</sup>

*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 analysis of the isolated term “officer” generally is relevant to 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,” perhaps calling into question this approach. The first relevant category is that of military officers. There have been non-commissioned military officers under both the Continental Congress and the U.S. Congress. But the U.S. Constitution requires the President to commission all “Officers of the United States,”<sup>137</sup> suggesting that by definition non-commissioned officers are not part of this Article II group. That said, at the Founding this category of non-commissioned military officers was relatively small, consisting only of “officers” low in the ranks such as sergeants and corporals.<sup>138</sup> The second example is the category of deputy officials. Statutes enacted by the U.S. Congress at times referred to deputy officials as “officers”<sup>139</sup> even though the First Federal Congress did not subject several types of deputies to Article II appointments requirements. But this may be simply because the deputies were viewed as agents carrying out the responsibilities and duties of the primary officer.<sup>140</sup>

### C. Dictionaries and Commentaries

Scholars have criticized Founding Era dictionaries for illegitimate practices like plagiarism<sup>141</sup> or including incorrect information.<sup>142</sup> Nonetheless, dictionaries were

<sup>135</sup> PENNSYLVANIA MERCURY (Dec. 31, 1789), p.3.

<sup>136</sup> FEDERAL GAZETTE (June 16, 1790), p. 2.

<sup>137</sup> U.S. CONST. art. II, § 3.

<sup>138</sup> See *infra* Part III.D.2. See also N. BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed. 1783) (“corporal”: “an inferior officer in a company of foot-soldiers”).

<sup>139</sup> See, e.g., *infra* notes 296-97 and accompanying text.

<sup>140</sup> See *infra* Part III.B.

<sup>141</sup> 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, 367-81, 383-84 (2014) (noting the likelihood that Samuel Johnson and Bailey’s dictionaries plagiarized each other). But see *id.* at 366 (commending the use of dictionaries in conjunction with other Founding Era sources).

<sup>142</sup> See Robert G. Natelson, *The Origins & 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 139, at 383 (noting modern praise for Bailey’s “efforts to include common words and to define words as they were actually used”).

“intended for a wide current readership”<sup>143</sup> and likely would have influenced the understanding of terms used by the general public and constitutional drafters and ratifiers even if their definitions were incorrect in some technical way.<sup>144</sup>

To help account for each dictionary’s potential idiosyncrasies, I surveyed the definition of “officer” in ten well-known Founding Era dictionaries<sup>145</sup> and consulted Founding Era legal dictionaries<sup>146</sup> and commentaries. Then I moved beyond this standard approach and examined the dictionary itself as a specialized mini-corpus. Specifically, I examined every use of the term “office” or “officer” throughout Nathan Bailey’s *The New Universal Etymological English Dictionary* (25th ed. 1783)—looking at the context of the term “officer” in defining other terms. Scholars indicate Bailey’s dictionary “may have been the bestselling dictionary of the eighteenth century.”<sup>147</sup> 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 uses of the terms “office(s)” and “officer(s).”<sup>148</sup> On numerous occasions Bailey used the terms “office” and “officer” to describe positions under British law that involved ministerial duties—the kind that would not seem to measure up to the Supreme Court’s current “significant authority” standard.

## 1. Survey of Founding Era Dictionaries: Founding Era dictionaries and

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<sup>143</sup> Carey McIntosh, *Eighteenth-Century English Dictionaries and the Enlightenment*, 28 THE YEARBOOK OF ENGLISH STUDIES: EIGHTEENTH-CENTURY LEXIS AND LEXICOGRAPHY (1998), at pp. 3-4 (“[B]ooksellers who offered dictionaries to the public would not have printed one that seemed completely out of touch with current usage.”).

<sup>144</sup> Cf. Stephen G. Calabresi and Gary Lawson, 107 COLUM. L. REV. 1002, 1017 (2007) (observing that some of the best starting places for public meaning originalist analysis are dictionaries along with the constitutional text); McIntosh, *supra* note 141, at 3 (finding dictionaries to be “representative of their times”).

<sup>145</sup> FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (1765); JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775); BAILEY, *supra* note 136; BARCLAY’S UNIVERSAL ENGLISH DICTIONARY (1792); FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772); DYCHE & PARDON, *supra* note 72; SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); WILLIAM KENRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (1773); PERRY, *supra* note 64; THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789).

<sup>146</sup> MATTHEW BACON, 3 A NEW ABRIDGMENT OF THE LAW 718-44 (4th ed. 1778); RICHARD BURN & JOHN BURN, 2 A NEW LAW DICTIONARY 168-69 (1792); T. CUNNINGHAM, 2 A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771); GILES JACOB, A NEW LAW DICTIONARY (10th ed. 1773).

<sup>147</sup> See Maggs, *supra* note 139, at 383.

<sup>148</sup> Based on searching for the term “office” in the 1783 edition of Bailey’s dictionary through the Eighteenth Century Collections Online (“ECCO”) database.

commentaries suggest an “officer” was a public official responsible for a governmental duty of any level of significance. The entries for “officer” in the majority of Founding Era dictionaries surveyed by this article essentially defined an “officer” to be either a “man employed by the public(k)” or a person with a “public charge.”<sup>149</sup> On the surface these definitions are not very informative, but defining the subsidiary terms like “public,” “charge,” and “employment” provides more insight. “To Employ” meant “[t]o busy” or “to intrust with the management of any affairs.”<sup>150</sup> And “publick” simply meant “[b]elonging to a state or nation.”<sup>151</sup>

One could thus have understood the term “officer” to describe one “intrust[ed] with the management of any [of the nation’s] affairs.”<sup>152</sup> The term “management” may sound fairly high level to the modern reader, but Thomas Sheridan, for example, defines “management” more modestly as “conduct, administration; practice, transaction, dealing.”<sup>153</sup> “To intrust” meant “[t]o treat with confidence.”<sup>154</sup> So an officer under the Sheridan definitions was one in whom confidence was placed—an official with some measure of responsibility. But this responsibility could regard governmental “conduct, administration, [or] practice” of any level of importance.

Nathan Bailey’s definitions of the terms “officer,” “office,” “duty,” and “employ”<sup>155</sup> similarly suggest an “officer” was “anyone with the duty to complete some task or responsibility.” These definitions parallel descriptions of “officers” in American sources several decades later. For example, the 1828 edition of Webster’s landmark dictionary<sup>156</sup> defined “Officer” as “A person commissioned or authorized

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<sup>149</sup> See, e.g., ALLEN, BARCLAY’S, BARLOW, S. JOHNSON & KENRICK’S dictionaries; see also SHERIDAN, *supra* note 143 (“Officer”: “A man employed by the publick; a commander in the army; one who has the power of apprehending criminals”). Two dictionaries defined “officer” more simply as a person “in office” but then defined “office” as a “public employment,” see PERRY, or a “public charge,” see ASH. The only dictionary with a materially different definition was DYCHE & PARDON’S, which said the term officer “in general signifies any person that has a peculiar post or business appointed him . . . .”

<sup>150</sup> SHERIDAN, *supra* note 142 (“To Employ”: “To 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.”).

<sup>151</sup> *Id.* (“Publick”: “Belonging to a state or nation; open, notorious, generally known; general, done by many; regarding not private interests, but the good of the community; open for general entertainment”).

<sup>152</sup> *Cf. id.*

<sup>153</sup> *Id.* (“Management”: “Conduct, administration; practice, transaction, dealing.”); (“To Manage”: “To superintend affairs, to transact.”).

<sup>154</sup> *Id.* (“To Intrust”: “To treat with confidence, to charge with any secret.”)

<sup>155</sup> BAILEY, *supra* note 136 (“Officer”: “one who is in an office”); (“Office”: “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”: “any thing that one is obliged to do; a public tax”); (“Employ”: “to set one at work, or about some business; to make use of”).

<sup>156</sup> NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); see also Maggs, *supra* note 139, at 389 (calling this particular dictionary Webster’s “greatest work”).



to perform any public duty.”<sup>157</sup> And an early 19th-century opinion by Chief Justice Marshall defined an “officer” to be one with a public duty.<sup>158</sup> Numerous public statements from the 1770s-80s also associated “officers” with the concept of duty.<sup>159</sup>

**2. Founding Era 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.<sup>160</sup> For example, Matthew Bacon’s legal dictionary entry on “the Nature of an Office”<sup>161</sup> explains “that the Word *Officium* principally implies a Duty, and [the] . . . Charge of such Duty.” Bacon continues on to explain 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.”<sup>162</sup>

Bacon’s detailed explanation of relevant British law significantly undermines the modern doctrine that constitutional “officers” must have discretion<sup>163</sup> and more than ministerial duties.<sup>164</sup> He clearly describes a category of “Ministerial Offices”<sup>165</sup> and categorizes as “offices” several positions that involved just record-keeping duties. For example, Bacon references the “Office of Register of Policies of Assurance,”

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<sup>157</sup> See WEBSTER, *supra* note 154 (“Duty”: “that which a person is bound, by any natural, moral or legal obligation, to pay, do or perform”); (“Authorized”: “Warranted by right; supported by authority; derived from legal or proper authority; having power or authority.”).

<sup>158</sup> See *U.S. v. Maurice*, 2 MARSHALL’S C.C. 96 (C.C.D.Va. 1823) (“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.”).

<sup>159</sup> See, e.g., 1 Stat. 49 (1789) (authorizing the Board of Commissioners for the settlement of accounts to appoint “such other clerks as the duties of their office may require”); U.S. CHRONICLE, Aug. 2, 1787, at 2 (obituary praising a “civil officer of the United States” who had “discharged his duty” with “diligence and fidelity”); 27 JCC, *supra* note 9, at 470 (May 28, 1784) (ordinance for the Department of Finance that referred to commissioners and clerks “entering on the duties of their several offices”).

<sup>160</sup> Of the four 18th-century dictionaries I surveyed, see *supra* note 144, examination of only two of them is relevant. The discussion of “officer” in Giles Jacob’s dictionary is essentially identical to the analysis of “officer” by Timothy Cunningham. And Burn & 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.”

<sup>161</sup> See 3 BACON, *supra* note 144, at 718-44; see also *King v. Burnell*, 5 Mod. 431 (British case) (finding that a censor of the College of Physicians was an “officer” 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 “the word officium principally implies a duty, and in the next place the charge of such duty”).

<sup>162</sup> 3 BACON, *supra* note 144, at 719.

<sup>163</sup> See *supra* notes 4, 55 and accompanying text.

<sup>164</sup> Cf., e.g., *Freytag*, 501 U.S. at 881-82; 2007 OLC Opinion, *supra* note 25, at 44.

<sup>165</sup> 3 BACON, *supra* note 144, at 719 (distinguishing these offices from those that are judicial).

which “required only the Skill of Writing after a Copy.”<sup>166</sup> Bacon also describes as “offices” the positions of Chirographer and Remembrancer.<sup>167</sup> 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.”<sup>168</sup> A chirographer was “a clerk in the court of Common Pleas,” who copied onto parchment “those fines that [we]re acknowledged in that court.”<sup>169</sup> 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.”<sup>170</sup>

Blackstone’s *Commentaries* also indicate that English 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.”<sup>171</sup> Several of the earliest American constitutional commentaries include implicitly relevant discussion such as James Monroe’s observation that establishment of a federal system of revenue necessarily would involve a large quantity, or “a train of officers”<sup>172</sup>—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 19th century in 1803.<sup>173</sup>

**3. Nathan Bailey’s 18th-Century Dictionary as a Corpus:** The analysis of the terms “office” and “officer” utilizing the popular 18th-century Nathan Bailey’s dictionary<sup>174</sup> as a corpus<sup>175</sup> is informative principally because it provides evidence of the breadth of British officials that were understood to be “officers.” The dictionary’s more than 500 references to the terms “office” and “officer”

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<sup>166</sup> See *id.* at 734.

<sup>167</sup> See *id.*

<sup>168</sup> See BAILEY, *supra* note 136.

<sup>169</sup> DYCHE & PARDON, *supra* note 72.

<sup>170</sup> 2 CUNNINGHAM, *supra* note 144.

<sup>171</sup> WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 327-46 (1765) (chapter titled “Of Subordinate Magistrates”).

<sup>172</sup> James Monroe, *Observations on the Constitution* ¶ 12 (May 25, 1788), available at <http://teachingamericanhistory.org/library/document/observations-on-the-constitution/>.

<sup>173</sup> ST. GEORGE TUCKER, NOTES OF REFERENCE APPENDED TO BLACKSTONE’S COMMENTARIES (1803) 203 & 209 notes 283-84 (Appendix, Note D, Part 7), available at <http://www.lonang.com/downloads>. Other early American commentaries do not directly address whether the scope of “Officers of the United States” extends to less significant government officials. See, e.g., WILLIAM SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS (1796); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1518-1553 (1833) (Appointments Clause).

<sup>174</sup> Maggs, *supra* note 139, at 383.

<sup>175</sup> See *Rasabout*, 356 P.3d at 1277 (opinion of Lee, J., concurring) (describing dictionaries as potentially useful corpora).

encompassed numerous record-keepers, assistants, and other officials with duties of a menial nature.

*a. Record-Keepers:* Several examples of record-keepers that Bailey described as “officers” include: (i) the “Corrector [of the Staple]” who recorded bargains made by merchants in the public store-house;<sup>176</sup> (ii) the purser on a king’s ship who tracked each crew member’s pay and provided supplies like food and bedding to people on the ship; 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.<sup>177</sup>

*b. Assistants:* 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 and the OLC’s modern officer definitions, which suggest officers have either a final or direct impact on third parties.<sup>178</sup> For example, several of the British “officers” defined as having assistance-oriented roles include: “messengers [of the Exchequer]” who “attend the Lord Treasurer, and carry his letters and orders”; “Satellites [and] Life-Guards” who “attend[ed] upon a Prince”; and sword-bearers who “carrie[d] the sword of state before a magistrate.” 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.<sup>179</sup>

*c. Menial Duties:* 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; (ii) the “Chafe-Wax” who “fit[ted] the wax for the sealing of writs”; (iii) the “Expenditor,” “a steward or officer, who look[ed] after the repairs of the banks of [a] [m]arsh”; (iv) “Gauger[s]” for the measurement of liquids carried on a merchant ship; (v) “Searcher[s]” “whose business [was] to examine, and by a peculiar seal to mark the defects of woollen cloth”; and (vi) “Swabber[s],” “an inferior officer on board a ship or war, whose

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<sup>176</sup> BAILEY, *supra* note 136; *id.* (“staple”: “a city or town where merchants jointly lay up their commodities for the better vending of them by the great; a public store-house; . . .”).

<sup>177</sup> *See also, e.g., id.* (i) “Clerk of the Ordinance”: “an officer, whose business is to record the names of all officers, and all orders and instructions given for the government office”; (ii) “Clerk of the Peace”: “an officer who draws up the processes, reads the indictments, and enrolls the acts in a session of peace”; (iii) “Clerk of the Pells”: “an officer of the Exchequer, who enters every bill in a parchment roll called Pellis receptorum”).

<sup>178</sup> *See supra* notes 4, 68-70 and accompanying text.

<sup>179</sup> *See, e.g.,* WHITE, *supra* note 41, at 27 (quoting George Washington in a letter to the French minister: “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.”) (internal quotation omitted).

office it [was] to take care that the ship be kept clean.”<sup>180</sup>

To be sure, the American system did not specifically incorporate many of these British officer positions.<sup>181</sup> The characterization of these officials as “officers” nonetheless would have informed the American 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.”<sup>182</sup> American practice addressed concerns about the King’s ability to amass too much power by (i) permitting only limited mechanisms for appointing officers and by (ii) imposing the constitutional requirement that new officer positions must be “established by Law”<sup>183</sup> rather than through a King-like custom of the head magistrate unilaterally creating new offices.<sup>184</sup>

Under the British system, the entitlement to appoint subordinate officers had 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.<sup>185</sup> In contrast, Article II restricts the appointments power to a limited set of actors.<sup>186</sup> Distinct from the Constitution’s break with British practice regarding appointments *methodology*, however, the drafting and ratification debates give no indication the phrase “Officers of the United States” represented a break from the common understanding of the term “officer.”<sup>187</sup>

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<sup>180</sup> See also BAILEY, *supra* note 136 ((i) “Ale-Conner/Ale-Taster”: “an officer appointed in every court-leet, to look to the assize and goodness of bread, ale, beer, &c.”; (ii) “Assay Master”: “an officer of the Mint, who weights the bullion, and takes care that it be according to the national standard”; (iii) “Beadle”: “a forest officer, that makes garnishments for the courts of the forest”; (iv) “Botiler/Butler”: “officer that provides the king’s wines”; and (v) “Sewer”: “an officer who comes in before the meat of a King or Nobleman, and places it upon the table”).

<sup>181</sup> *But see, e.g.*, An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels, § 6, 1 Stat. 145, 154 (1790) (gaugers in the First Federal Congress); 31 JCC, *supra* note 9, at 876 (Assay Masters during the Continental Congress).

<sup>182</sup> DECLARATION OF INDEPENDENCE, par. 12.

<sup>183</sup> 2 FARRAND’S RECORDS, *supra* note 42, at 405-06 (Roger Sherman framed debate over the Appointments Clause’s inclusion of the phrase “established by Law” by describing the British king’s outsized influence via his ability to “model the . . . Government”); 1 *id.* at 380-81 (George Mason: “If not checked we shall have ambassadors to every petty state in Europe . . .”); *but see* 1 *id.* at 381 (Nathaniel Gorham stating that Parliament was the real cause of British corruption).

<sup>184</sup> Compare U.S. CONST. art. II, § 2, cl. 2, with No. 69 (Hamilton), THE FEDERALIST, *supra* note 38, at 360-61 (“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 . . .”).

<sup>185</sup> See JACOB, *supra* note 144 (“Where-ever one office is incident to another, such incident office is regularly grantable by him who hath the principal office . . .”).

<sup>186</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>187</sup> See *infra* Part II.D.

#### D. Farrand’s *Records* & The Ratification Debates

In addition to Bailey’s dictionary, the specialized Founding Era corpus examined by this article also included Farrand’s *Records of the Constitutional Convention* and Elliot’s records of the state ratification debates. I looked at the context surrounding every use of the words “office(s)” and “officer(s)” in Farrand’s *Records* of the constitutional drafting debates<sup>188</sup> and every use of the phrase “officer(s) of the United States” in Elliot’s records along with the immediately surrounding uses of “officer.”<sup>189</sup>

**1. Elliot’s Debates:** First, Elliot’s *Debates* included references in the North Carolina ratifying convention to “petty officers.”<sup>190</sup> In debating the Article II Impeachment Clause,<sup>191</sup> Mr. Maclaine contended the Clause should not be interpreted to extend to “inferior officers of the United States,” which he characterized as petty officers with “trifling” duties.<sup>192</sup> Although Mr. Maclaine’s interpretation indicates 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 he would understand the Appointments Clause to extend to such government officials.<sup>193</sup> This is evidence of an understanding of Appointments Clause “officers” to include more officials than the “significant authority” standard required for Article II status today.<sup>194</sup>

In addition, Elliot’s *Debates* recorded a relevant resolution 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

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<sup>188</sup> 1-2 FARRAND’S RECORDS, *supra* note 42 (The records of the actual drafting debates are contained within the first two volumes of Farrand’s *Records*.)

<sup>189</sup> In Elliot’s 2 1/2 volumes recording the State ratification debates (volumes 2, 3, and the first half of volume 4 recording the North Carolina and South Carolina debates), I examined the 31 references to the phrase “Officers of the United States.” *See supra* note 86. I also examined usages of the terms “office(s)” and “officer(s)” in the immediate context surrounding these 31 references.

<sup>190</sup> 4 ELLIOT’S DEBATES, *supra* note 86, at 43 (remarks by Mr. Maclaine).

<sup>191</sup> U.S. CONST. art. II, § 4.

<sup>192</sup> 4 ELLIOT’S DEBATES, *supra* note 86, at 43-44.

<sup>193</sup> *See 4 id.* at 43-45; *see also 4 id.* at 36-37 (several individuals debating the reach of this Impeachment Clause: Mr. Davie observed that the Clause would not extend to “petty offices”—i.e., petty duties—but just to the more significant “cases under the Constitution”; Mr. Taylor and Mr. Spaight contended the Impeachment Clause would apply to less-significant officers like “tax-gatherers” but that the Impeachment Clause would not be the only way of punishing these officers for misbehavior; Mr. Maclaine rejoined that “poor, insignificant, petty officer[s]” have never been subject to impeachment; this comment by Mr. Maclaine occurs the day before his statement that the Impeachment Clause should not reach “inferior officers of the United States,” *see supra* note 191).

<sup>194</sup> *See supra* notes 3-5 and accompanying text.

Constitution expressly authorized it to do.<sup>195</sup> Specifically, the resolution stated: “no 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 power is given by the Constitution for those purposes.”<sup>196</sup> Implicitly this resolution assumes “officer[s] of the United States” will have power to impact 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*—included remarks suggesting the Framers understood the term “officer” to include people with relatively insignificant responsibilities. During Convention debate over the appropriate range of Executive power, Mr. Gouverneur Morris stated, “It is the duty of the Executive to appoint the officers,” including “ministerial officers for the administration of public affairs.”<sup>197</sup> James Wilson indicated the Appointments Clause covered a range of officers extending all the way to “tide-waiter[s]”<sup>198</sup>—a type of “officer who watche[d] the landing of goods at the customhouse.”<sup>199</sup> 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 waters &c.”<sup>200</sup> And at another point during debate, Gouverneur Morris referenced “tax-gatherers & other officers.”<sup>201</sup>

During the minimal, one-half page of debate on Article II’s “inferior Officer” provision, James Madison initially protested the draft provision, saying the Clause “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.”<sup>202</sup> His remark, “if it be necessary at all,” appeared to suggest 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 actually took on, such as nationwide tax collection.<sup>203</sup>

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<sup>195</sup> 3 ELLIOT’S DEBATES, *supra* note 86, at 576 (Gov. Randolph remarking on the purpose of the resolution: “[W]e should be at liberty to consider as a violation of the Constitution every exercise of a power not expressly delegated therein.”).

<sup>196</sup> 3 *id.* at 653 (emphasis added).

<sup>197</sup> 2 FARRAND’S RECORDS, *supra* note 42, at 52.

<sup>198</sup> 2 *id.* at 523.

<sup>199</sup> See JOHNSON, *supra* note 143.

<sup>200</sup> 2 FARRAND’S RECORDS, *supra* note 42, at 537-38.

<sup>201</sup> 2 *id.* at 403-04.

<sup>202</sup> 2 *id.* at 627.

<sup>203</sup> See *infra* notes 220-23 and accompanying text; cf. 1 FARRAND’S RECORDS, *supra* note 42, at

Evidence does not suggest he believed that just a small category of government officials qualified as “officers.”

The motion to insert the “inferior Officers” Clause was defeated on a tie vote the first time around.<sup>204</sup> But the Convention agreed to the Clause on the second vote after an unidentified speaker urged the provision was “too necessary, to be omitted.”<sup>205</sup> 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 appointments,<sup>206</sup> indicated the Founders in fact believed “inferior Officers” constituted a large group.

Finally, material supplemental to the actual drafting debates—contained in Volume 3 of Farrand’s *Records*—recorded Luther Martin’s remarks to the Maryland legislature in which he contended the officers in the “civil department for the Union” will be “very numerous.”<sup>207</sup> This statement suggests that Martin believed “officer” status had a wide reach.

In contrast, there are two passages in Farrand’s *Records* that may provide evidence some Founders believed 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.*”<sup>208</sup> Second, Rufus King seemed to believe the scope of the Appointments Clause was sufficiently narrow that the requirement of Senate approval of officers would not pose that great a burden.<sup>209</sup> 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 the United States.”<sup>210</sup> Nonetheless, King’s view apparently did not prevail. Eight days later the Convention approved an amendment authorizing alternative appointment modes for “inferior Officers,” apparently concerned that the President and Senate would be overburdened by Article II as previously written.<sup>211</sup>

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311 (Hamilton: “Interference of officers not so great, because the objects of the general government and the particular ones will not be the same . . . the administration of private justice will be carried home to men’s doors by the particular governments.”).

<sup>204</sup> 2 FARRAND’S RECORDS, *supra* note 42, at 627.

<sup>205</sup> 2 *id.* at 627-28.

<sup>206</sup> 2 *id.* at 627 (“*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)).

<sup>207</sup> 3 *id.* at 172, 218.

<sup>208</sup> 2 *id.* at 535 (emphasis in original).

<sup>209</sup> 2 *id.* at 539 (King: “He 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.”).

<sup>210</sup> *See id.* at 539-40.

<sup>211</sup> *See supra* notes 202-04.

### E. Federalist Papers and the Anti-Federalist Essays

The specialized corpus that this article analyzes also includes *The Federalist*<sup>212</sup> and the well-known Borden collection of 85 Anti-Federalist essays.<sup>213</sup> These two essay collections contain more than 600 uses of the terms “office(s)” and “officer(s).” I examined each of those uses and their surrounding context.

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 too much interpretive weight on these documents, as their analysis might include biased attempts to influence the votes on constitutional ratification.<sup>214</sup> That said, constitutional understandings shared by both sides of the feuding essayists would seem to be telling and persuasive.

As Part II.A mentions, the Federalist and 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.<sup>215</sup> But the authors’ use of the term “officer” as they discuss other issues is highly informative.

The Anti-Federalist essays contain more than twice as many references to the terms “office(s)” and “officer(s)” as *The Federalist* contains, even though both collections consist of 85 essays. This may be due to the Anti-Federalists’ impassioned antipathy toward the idea of a robust federal officer corps. For example, Richard Henry Lee 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.”<sup>216</sup> 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.”<sup>217</sup>

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<sup>212</sup> See *supra* note 38.

<sup>213</sup> See THE ANTI-FEDERALIST PAPERS, *supra* note 84, at 2-3 (editor’s introduction).

<sup>214</sup> Cf., e.g., Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W.V. L. REV. 601 (2003) (finding technical errors).

<sup>215</sup> See *supra* notes 83-85 and accompanying text.

<sup>216</sup> No. 76-77 (Federal Farmer XIII), THE ANTI-FEDERALIST PAPERS, *supra* note 84, at 293 (emphasis added); see also No. 29 (from Address by Melancton Smith, Oct. 23, 1787, *excerpted in* *Objections to National Control of the Militia*), *id.* at 102 (“[I]t wilt be the policy of this government to multiply officers in every department; judges, collectors, tax-gatherers, excisemen.”).

<sup>217</sup> No. 32 (Federal Taxation and the Doctrine of Implied Powers (Part I), Dec. 13, 1787, by Robert Yates, Brutus) THE ANTI-FEDERALIST PAPERS, *supra* note 84, at 107.



On numerous occasions the Anti-Federalist essayists suggested there would be a vast number of officers in the constitutional system. In addition to his statements described above, Richard Henry Lee 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.”<sup>218</sup> Lee later refers to “many thousand officers solely created by, and dependent upon the union,” when he discusses the federal taxation powers under the Constitution.<sup>219</sup> On one level this characterization arises from the author’s arguably exaggerated fears about the Constitution’s expansive federal powers.<sup>220</sup> But the author’s intention to alarm readers about dangerously vast federal power is not the only reason he describes a large number of federal officers. He also references “many thousand officers” involved in state revenue collection<sup>221</sup>—a word picture suggesting “officer” did not connote some selective, especially significant position.

In contrast, James Madison in *The Federalist* suggested there would be relatively few federal officers. In particular, he stated, “The number of individuals employed under the constitution of the United States, will be much smaller than the number employed under the particular states.”<sup>222</sup> But this is in part because Madison believed the federal government was unlikely to engage in tasks like collecting internal taxes and therefore would not need revenue collectors.<sup>223</sup> Even if the federal government established federal revenue collectors (as Part III of this paper reports it did in the very First Federal Congress), Madison still thought there would be at least “thirty or forty, or even more [state] officers” for every one federal collector.<sup>224</sup> This is because Madison believed so many types of officials were “officers,” including “ministerial officers of justice.”<sup>225</sup> Madison, like many other Founders, identified as “officers” numerous officials with relatively small-scale roles.

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<sup>218</sup> No. 76-77, *id.* at 293; *see also, e.g.*, No. 33 (Brutus), *id.* at 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”); No. 66 (Joseph Taylor), *id.* at 262 (“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.”).

<sup>219</sup> No. 41-43, *id.* at 149.

<sup>220</sup> *See id.* at 156 (claiming “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”).

<sup>221</sup> *See id.* at 149.

<sup>222</sup> No. 45 (Madison), *THE FEDERALIST*, *supra* note 38, at 240.

<sup>223</sup> *See id.* at 241.

<sup>224</sup> *Id.*

<sup>225</sup> *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.”).

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 offices.”<sup>226</sup> Hamilton contended merely that this should engender no opposition to the Constitution because federal revenue officers simply will replace state officers already collecting taxes.<sup>227</sup>

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, Alexander Hamilton referred to clerks as having “offices.”<sup>228</sup> And Richard Henry Lee provided a detailed list when explaining the extensive influence of “public officers” in our national system: “[T]hese necessary officers, as judges, state’s attorneys, clerks, sheriffs, &c. in the federal supreme and inferior court, 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.*”<sup>229</sup>

Then additional statements by Federalists and anti-Federalists suggest officer duties and responsibilities were not necessarily significant. For example, James Madison referred to “the ministerial offices generally.”<sup>230</sup> 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.”<sup>231</sup> Finally, in an essay discussing establishment of the federal capital city, Richard Henry Lee (“The Federal Farmer”) suggested the only non-officer personnel category was that of “servant” or “attendant.” 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.”<sup>232</sup> He continued on to describe, “This city will not be established for productive labour, for mercantile, or mechanic industry, but for the residence of government, its officers and attendants.”<sup>233</sup> If in fact the only non-officers are “servants” or “attendants,” any official who does more than “wait[] or attend[] upon another” would be an

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<sup>226</sup> No. 84, THE FEDERALIST, *supra* note 38, at 450.

<sup>227</sup> *See id.* at 449-50.

<sup>228</sup> *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.”).

<sup>229</sup> No. 76-77, THE ANTI-FEDERALIST PAPERS, *supra* note 84, at 294.

<sup>230</sup> No. 39 (Madison) THE FEDERALIST, *supra* note 38, at 195-96.

<sup>231</sup> 2 JOHNSON, *supra* note 143; *see also* PERRY, *supra* note 72 (“Ministerial”: “acting under authority”).

<sup>232</sup> Nos. 41-43, THE ANTI-FEDERALIST PAPERS, *supra* note 84, at 162. *See also id.* (“[U]nder the Confederation, Congress has no power whereby to govern its own officers and servant[s] . . .”).

<sup>233</sup> *Id.*

“officer.”<sup>234</sup>

## F. Founding Era Corpus Analysis

Scholars are developing a Corpus of Founding-Era American English that will contain diaries, letters, legal documents, and other materials providing examples of written and spoken English during the Founding Era. The corpus is not yet complete, but for this project developers provided an advance of more than 16,000 files formatted for empirical analysis in corpus linguistics software. These files contain letters, speeches, memoranda, and other writings from 1783-1789 downloaded from the Papers of John Adams, Benjamin Franklin, Alexander Hamilton, Thomas Jefferson, James Madison, and George Washington, available at the National Archives site, Founders Online.<sup>235</sup> Although these documents represent a small portion of the files that 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 there was little Founding Era discussion about the development of a new term of art, “Officers of the United States.” These 16,000 files comprise a corpus containing close to 7.7 million words. The files contain 5,897 uses of the terms “office(s)” and “officer(s)”—showing how common those terms were at the time. For comparison purposes, the word “the” appeared only eight times more frequently than the two terms “office(s)” and “officer(s).”<sup>236</sup> In stark contrast, the corpus of Founders Papers contained only 10 uses of the phrase “officer(s) of the United States.”<sup>237</sup> Finally, examination of the “collocates”<sup>238</sup> 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 20 terms that most frequently directly preceded the terms “office(s)” and “officer(s)” included “auditors,” “registers,” “clerks,” “ministerial,” “surveyors,” and “subordinate.”<sup>239</sup>

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<sup>234</sup> See DYCHE & PARDON, *supra* note 72 (“Servant”: “Any one that serves, waits, or attends upon another”); *id.* (“Attendant”: “one who waits upon another”).

<sup>235</sup> The original source for these files is <https://founders.archives.gov>. The appendix to this article, available on SSRN, provides instructions about how to access the files for use in corpus linguistics analytical software.

<sup>236</sup> Specifically, “the” occurred 47,251 times.

<sup>237</sup> All ten uses occurred during the drafting debates or in essays from *The Federalist* and therefore were duplicates from this article’s earlier analysis. Four additional uses of the phrase occurred as part of the proper noun, “Loan Officer of the United States.”

<sup>238</sup> See Carolina Nuñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 B.Y.U. L.REV. 1517 (2013) (studying collocation).

<sup>239</sup> Selected according to statistical frequency, rather than actual frequency of uses, the top 20

### III. Confirmatory Evidence from Practice During the First Congress

Examination of the implementation of the Constitution in the First Federal Congress<sup>240</sup> confirms 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 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.”<sup>241</sup>

For example, clerks maintaining statutorily required records were selected in conformity with Article II even though statutes assigned the record-keeping requirements generally to an executive department or to a higher-level officer.<sup>242</sup> In contrast, positions such as doorkeeper, office-keeper, and messenger apparently were not Article II offices. Such positions appeared on federal civil payroll lists or in other early documentary records, but no statute “established” their positions or required the president and department heads to appoint them. These officials engaged in tasks incidental to the executive officers’ performance of their duties, such as delivering information from one location to another; no federal statute specifically required completion of the tasks in which these officials engaged.

One category of government official that did not fit this pattern was that of deputy positions created by the First Congress. In the First Federal Congress deputies who engaged in significant tasks like authorizing merchant ships to enter ports were hired by the primary officer under whom they served without the approval

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collocates appearing one word to the left of “office(s)” and “officer(s)” are: subaltern, carmarshens, naval, commanding, bons, auditors, registers, loan clerks, artillery, post, revolutionary, ministerial, surveyors, commissioned, brave, senior, insurance, subordinate, and printing. (This list includes only those collocates with a minimum frequency of five.)

<sup>240</sup> Cf., e.g., DHFFC, *supra* note 115, at Introduction (explaining the special relevance of the practice of the First Federal Congress).

<sup>241</sup> Because the First Federal Congress engaged in next to no debate about the “officer” status of particular officials, Congress did not specify it felt *constitutionally* compelled to require Article II selection procedures when it chose to do so by statute. Thus, it’s possible, for example, that Congress may have voluntarily chosen to require a department head to hire a particular official even though it did not believe the official was an “inferior Officer.” Nonetheless, the First Federal Congress’s use of Article II selection procedures for many officials below the level of modern-day “officers” is persuasive evidence that Article II requires appointments procedures to apply to a much wider range of contemporary officials than we apply them to today. The practice of the earliest Federal Congress, in conjunction with numerous Founding Era descriptions of low-level officials as “officers,” strongly suggests the category “inferior Officer” extends far beyond just those with “significant authority.”

<sup>242</sup> See *infra* Part III.A.

of any department head—not in accordance with the Appointments Clause. 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. The treatment of these deputies as non-officers confirms the second prong of the original meaning of “officer” as one with *responsibility* for a governmental duty.

This section explores the contours of the dividing line between Article II-appointed officers and non-officers 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.<sup>243</sup> In researching this section, I read and examined every statute enacted by the First Federal Congress to identify the appointments procedures for each position established by those Acts. Subsequently I cross-referenced these positions with personnel expenditures identified by Treasury Secretary Hamilton in his reports to Congress.<sup>244</sup> 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.”<sup>245</sup> Identification of lower-level federal positions appointed in compliance with Article II, contrasted with others not subject to Article II, offers meaningful evidence of the First Federal Congress’s understanding of the dividing line between “officer” and non-officer.

### A. Typical Executive Departmental Structure

The First Federal Congress created only three major executive departments<sup>246</sup>—the Department of War,<sup>247</sup> the Treasury Department,<sup>248</sup> and the Department of

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<sup>243</sup> 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 consent) appoint the officer.

<sup>244</sup> See No. 6, Public Credit (Jan. 9, 1790), in 1 AMERICAN STATE PAPERS: FINANCE 33-36 [hereinafter 1790 Report]; No. 21, Estimates for 1791 (Jan. 6, 1791), in 1 AMERICAN STATE PAPERS: FINANCE 82-88 [hereinafter 1791 Report]; 1792 Civil Officer List, *supra* note 41, at 57-68. The 1792 civil officer list described two offices—the Mint and the Office of the Commissioner of the Revenue—that Congress did not establish until the Second Congress in 1792. *Id.* at 58, 59.

<sup>245</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>246</sup> The First Congress authorized numerous other officers and administrative entities like multi-member commissions, see *infra* Parts III.B-E, but there were only three executive departments. See DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 42 (1997); An Act for establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks, § 2, 1 Stat. 67, 68 (1789) (describing salaries for executive officers in three departments).

<sup>247</sup> An Act to establish an Executive Department, to be denominated the Department of War, 1 Stat. 49 (1789).

Foreign Affairs,<sup>249</sup> later renamed the Department of State.<sup>250</sup> At the time, the central offices of these departments included few officials.<sup>251</sup> Each department followed a similar pattern.<sup>252</sup> Congress provided for a department head<sup>253</sup> whom the president appointed with the Senate’s advice and consent.<sup>254</sup> 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.<sup>255</sup> Congress also specifically authorized the “heads of the three departments” to “appoint” such additional clerks “as they shall find necessary.”<sup>256</sup>

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,<sup>257</sup> suggesting Congress considered the clerks to be Article II officers.<sup>258</sup> But Treasury Secretary Hamilton’s annual appropriations reports also list the distinct positions of “copyist” and “messenger/office-keeper,” which are not authorized by statute. The absence of statutory authorization for the copyist and messenger/office-keepers indicates that Congress believed they were non-officers; the Constitution requires that all “officers” be “established by Law.”<sup>259</sup> The dividing line between

<sup>248</sup> An Act to establish the Treasury Department, 1 Stat. 65 (1789).

<sup>249</sup> An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, 1 Stat. 28 (1789).

<sup>250</sup> An Act to provide for the safe-keeping of the Acts, Records and Seal of the United States, and for other purposes, § 1, 1 Stat. 68, 68 (1789).

<sup>251</sup> See WHITE, *supra* note 41, at 199 (noting that field service officials “far outnumbered those in the central establishment”); 1792 Civil Officer List, *supra* note 41, at 57-58.

<sup>252</sup> That said, the Treasury Department was somewhat 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 Treasury Secretary. § 1, 1 Stat. at 65; An Act for establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks, 1 Stat. 67, 67-68 (1789) (“*And be it further enacted*, That the heads of the three departments first above mentioned shall appoint such clerks therein respectively as they shall find necessary . . .”).

<sup>253</sup> See § 1, 1 Stat. at 29 (Foreign Affairs); § 1, 1 Stat. at 50 (War); § 1, 1 Stat. at 65 (Treasury).

<sup>254</sup> 1 SENATE EXECUTIVE JOURNAL 25 (Sept. 11, 1789) (nominations for Secretary of War and Treasury Secretary).

<sup>255</sup> See § 2, 1 Stat. at 29 (Foreign Affairs); § 2, 1 Stat. at 50 (War); *cf.* § 7, 1 Stat. at 67 (establishing an “Assistant” to the Treasury Secretary who, instead of a chief clerk, would keep charge of department records if the position of Treasury Secretary were vacant); § 1, 1 Stat. at 65 (authorizing the Secretary to appoint the Assistant).

<sup>256</sup> § 2, 1 Stat. at 68.

<sup>257</sup> See *supra* note 253 and accompanying text. See also *Germaine*, 99 U.S. at 511 (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).

<sup>258</sup> *But see supra* note 239.

<sup>259</sup> Compare U.S. CONST., art. II, § 2, cl. 2, with, e.g., 1792 Civil Officer List, *supra* note 41, at 57-59 & 1791 Report, *supra* note 242, at 84 (copyist).

departmental “clerks” and non-“officer” messengers thus helps outline the contours of the scope of Article II.

In contrast to modern law that associates “discretion” with “officer” status,<sup>260</sup> evidence indicates the late eighteenth-century clerks had duties involving little or no discretion.<sup>261</sup> For example, the Treasury Department employed two clerks “to count and examine the old and new emissions of continental money.”<sup>262</sup> Treasury Secretary Hamilton also included on his list of estimated expenditures for 1791 one clerk responsible “for keeping the accounts of the registers of ships.”<sup>263</sup> 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.”<sup>264</sup> Secretary Hamilton’s report for Congress 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, for the interest accounts on the registered debt,” and (iii) “the books, transfers, &c. of . . . deferred stock.”<sup>265</sup>

In addition, some of the appointed clerks had duties that did not directly impact third-party rights, seemingly putting these clerks outside the scope of the OLC’s “officer” definition.<sup>266</sup> For example, Secretary Hamilton recorded salary payments for two clerks whose duties included just “transcribing” and maintaining “the old treasury books.”<sup>267</sup> In addition, one Treasury Department clerk in 1790 was engaged in “journalizing and posting into the Ledger” of the agency’s “principal books.”<sup>268</sup> Another Treasury Department clerk that year “cop[ied] fair statements of the public accounts and other transcripts, as required, from the treasury books.”<sup>269</sup>

So, if many “officer” clerks engaged in non-discretionary duties, what distinguished their duties from those of the *non*-officer messengers and office-keepers? For one thing, messengers and office-keepers and the Treasury Department’s “copyist for taking receipts”<sup>270</sup> just may have engaged in tasks that

<sup>260</sup> See *supra* notes 55-56 and accompanying text.

<sup>261</sup> See also 1790 Report, *supra* note 242, 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 . . . .”)

<sup>262</sup> 1791 Report, *supra* note 242, at 83.

<sup>263</sup> *Id.* at 84.

<sup>264</sup> *Id.* at 83.

<sup>265</sup> *Id.*; see also *id.* (listing under the Register: “One for the books of the registered debt, or unsubscribed stock, transfers, &c.”); *Id.* at 84 (Board of Commissioners clerks: (i) “arranging and liquidating the charges of individual States for disbursements made in the quartermaster’s, commissary’s, clothing, &c. &c. departments” & (ii) “employed on the accounts of depreciation and militia of the respective States”).

<sup>266</sup> See *supra* notes 68-70 and accompanying text.

<sup>267</sup> 1791 Report, *supra* note 242, at 84.

<sup>268</sup> 1790 Report, *supra* note 242, at 34.

<sup>269</sup> *Id.*

<sup>270</sup> See 1791 Report, *supra* note 242, at 84.

were more minute and inconsequential than the clerk’s responsibilities. A “copyist,” for example, may have been tasked with transcribing a document “word for word.”<sup>271</sup> Messengers were defined to be those “who carrie[d] an errand” or came “from another to a third.”<sup>272</sup> 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 19th century.<sup>273</sup> 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.”<sup>274</sup> It specifically prohibited any messengers from performing tasks reserved to clerks.<sup>275</sup>

The 18th-century executive department clerks in contrast engaged in formal record-keeping procedures that were necessitated by statute. The statutory code did not precisely specify that it was the clerks who had to serve as record-keepers. But the tasks the clerks in fact carried out were part of implementing statutory record-keeping mandates.<sup>276</sup> 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.””<sup>277</sup> Under that act, ships belonging to U.S. citizens had to be registered as “a ship or vessel of the United States.”<sup>278</sup> Customs collectors then were to transmit copies of the registration certificates to the Treasury Department.<sup>279</sup>

Concluding that clerks were “officers” because they maintained responsibility for duties necessitated by statute is consistent with the original public meaning of “officer.” As one congressman explained in the Fifth Congress, the term “officer” signified “duty, charge, or employment.”<sup>280</sup> Therefore, an “office” is a “post, place, or employment, which requires the performance of some duty of a public nature.”<sup>281</sup>

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<sup>271</sup> BARCLAY’S, *supra* note 143 (“To Copy”: “to transcribe a book or writing word for word”); *see also* WEBSTER, *supra* note 154 (defining a “copyist” as “a copier” or “transcriber” and “to copy” as “To write, print, engrave, according to an original”).

<sup>272</sup> *See* JOHNSON, *supra* note 143.

<sup>273</sup> “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,” Microfilm Record Group M800, National Archives (College Park, MD).

<sup>274</sup> *Id.* at 5.

<sup>275</sup> *See id.* The document earlier had described these clerk tasks as including actions such as entering State Department communications into a Register, forwarding despatches to Consuls and Ministers, and writing letters. *Id.* at 4-5.

<sup>276</sup> *See, e.g.*, 1791 Report, *supra* note 242, 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”).

<sup>277</sup> *Id.*

<sup>278</sup> *See* An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes, § 1, 1 Stat. 55, 55 (1789).

<sup>279</sup> *See id.* § 2.

<sup>280</sup> 8 Annals of Congress 2294, 2304 (remarks of Rep. Robert Goodloe Harper during prosecution of the William Blount impeachment).

<sup>281</sup> *Id.* (internal quotation omitted).



The level of significance of the duty is irrelevant.<sup>282</sup> “Wherever a man holds a place which requires from him the performance of a duty of a public nature, we call him an officer.”<sup>283</sup> 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.”<sup>284</sup> 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.”<sup>285</sup>

## B. Deputies

One additional type of government official that the First Federal Congress treated as a non-Article II officer was the category of deputy official. The First Federal Congress authorized marshals,<sup>286</sup> collectors, naval officers, and surveyors<sup>287</sup> to appoint their own deputies. The marshals, naval officers, and surveyors were not heads of any department, so their deputies were not appointed pursuant to the Article II Appointments Clause.

As deputies for officers like marshals and customs collectors, these officials would have engaged in acts that significantly impacted the rights of non-governmental parties. For example, the marshals and their deputies maintained custody over federal prisoners.<sup>288</sup> Collectors and their deputies had authority to grant permits for ships to unload imported goods.<sup>289</sup> Naval officers, surveyors, and their deputies could board and search ships and open and examine packages when they suspected a ship was engaged in customs-related fraud.<sup>290</sup>

Therefore, these deputies carried out governmental duties that would seem to place them within the scope of the original meaning of the Article II term “officer.”<sup>291</sup> And their acts more directly impacted third parties than the ministerial

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<sup>282</sup> *Contra Buckley*, 424 U.S. at 126; *Tucker*. 676 F.3d at 1133.

<sup>283</sup> 8 Annals of Congress at 2305.

<sup>284</sup> *Id.* (emphasis added).

<sup>285</sup> See also MASHAW, *supra* note 21, at 63 (“Every instance of administrative authority was a delegation from Congress . . .”).

<sup>286</sup> See An Act to establish the Judicial Courts of the United States, § 27, 1 Stat. 73, 87 (1789).

<sup>287</sup> § 7, 1 Stat. at 155 (authorizing collectors, naval officers and surveyors, “in cases of occasional and necessary absence, or of sickness” to “respectively exercise and perform their several powers, functions and duties, by deputy duly constituted under their hands and seals respectively”).

<sup>288</sup> See § 28, 1 Stat. at 88.

<sup>289</sup> See § 1, 1 Stat. at 152.

<sup>290</sup> See § 31, 1 Stat. at 164.

<sup>291</sup> See *supra* Part II (describing “officers” as responsible for a governmental duty).

acts of lower-level “officers” like clerks.<sup>292</sup> 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—for the related 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*<sup>293</sup> for misdeeds by their deputies.<sup>294</sup> Congressional statutes making the primary officer answerable for the deputy suggest that deputies authorized by the First Federal Congress were not officers because the appointing officer remained the one directly liable to private parties for proper performance of the governmental duty.

**1. Deputy Customs Officials:** The statute authorizing customs officers to hire deputies indicated deputies did not acquire their own duties. They served just as a vehicle for the primary officer to exercise his own powers. Deputies acted under the “hands and seals” of their primary officers who were “answerable” for a deputy’s execution of his officer’s trust.<sup>295</sup>

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<sup>296</sup> but the primary officer remained responsible for his deputy’s conduct. The estate of a disabled or deceased collector could be held liable for the deputy’s missteps.<sup>297</sup>

**2. Deputy Marshals:** In contrast to the deputy customs positions, several facets of the deputy marshal position made that position seem somewhat more like an Article II officer position. For example, the Judiciary Act required each deputy marshal

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<sup>292</sup> Because the deputies impacted third-party rights, these officials also would appear to come within the OLC’s 2007 standard for defining officers. *See supra* notes 68-70 and accompanying text.

<sup>293</sup> *See MASHAW, supra* note 21, at 36-38 (discussing common law liability for collectors: “Congress presumed that a common law action would lie for any improper seizure or excessive duties charged” but officials could plead relevant statutory authority “as a defense”); *id.* at 73-78 (explaining in depth the early judicial review accountability framework for federal officials: “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.”).

<sup>294</sup> *See infra* notes 294-96 and 303-08 and accompanying text.

<sup>295</sup> § 7, 1 Stat. at 155.

<sup>296</sup> *Id.* § 8 (“And the 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 . . .”).

<sup>297</sup> *Id.* (“That in 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) . . .”).

along with the marshals to take an oath that the deputy would faithfully perform the duties of “the office of . . . marshal’s deputy.”<sup>298</sup> So this oath provision directly refers to the deputy marshal position as an office and suggests the deputies on some level maintain their own duties.<sup>299</sup> A statute enacted by the Second Congress in 1792 similarly refers to the marshals and their deputies as having “powers” in executing federal law.<sup>300</sup> Moreover, although the marshal hired his own deputies, the deputies were removable by district court judges<sup>301</sup>—suggesting the deputies had their own identity and their own measure of accountability apart from the primary marshals.<sup>302</sup>

That said, distinct from the oath-related statutory language suggesting deputy marshals had their own duties, other language in the relevant statutory provisions indicates instead that at bottom the deputies in fact were carrying out the marshal’s duties. For example, the very purpose for which the Judiciary Act authorizes each marshal to hire deputies is so they can assist him “in the execution of his duty.” And the “lawful precepts” that the marshal and deputies were to execute were precepts directed to the marshal himself.<sup>303</sup> 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.<sup>304</sup>

Further, similar to the customs officials’ answerability for their deputy’s 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 deputy. Specifically, the marshal became bound, “jointly and severally, with two good and sufficient sureties . . . in the sum of twenty thousand dollars.”<sup>305</sup> Even after a

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<sup>298</sup> § 27, 1 Stat. at 87.

<sup>299</sup> *Id.* (requiring the marshal and “his deputies, before they enter on the duties of their appointment” to take a prescribed “oath of office”).

<sup>300</sup> An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions, § 9, 1 Stat. 264, 265 (1792) (providing that “the 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”).

<sup>301</sup> § 27, 1 Stat. at 87.

<sup>302</sup> *See also* An Act for Regulating Processes in the Courts of the United States, § 1, 1 Stat. 275, 278 (1792) (imposing potential criminal penalties on deputies who demanded fees greater than statutes allowed); *Meade v. Deputy Marshal*, 16 F. Cas. 1291 (1815) (showing writs could be issued ordering deputy marshals to take certain action). Although, in *The Lawmen*, “the first historian for the U.S. Marshals Service” suggests that judges had removal authority over deputies to prevent the marshals and deputies from improperly colluding “to defraud the Treasury” in their handling of federal funds for the court system. FREDERICK S. CALHOUN, *THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES*, 1789-1989 x, 21 (1989).

<sup>303</sup> § 27, 1 Stat. at 87.

<sup>304</sup> *Id.* § 28.

<sup>305</sup> *Id.* § 27. *See also* “Suits Against Marshals,” 1 Op. Atty. Gen. 92 (1800) (“If the marshal or his deputy commit a misfeasance in office to the injury of the United States, compensation may be

marshal’s death, his estate still was bound by a deputy’s actions. A deputy’s “defaults or misfeasances in office” were considered breaches of the condition of the bond originally given by the marshal.<sup>306</sup> The executor of the deceased marshal in turn could recover against the deputy for any liability that the estate had incurred for breach of the bond.<sup>307</sup> Nonetheless the marshal’s estate was the entity against which the wronged private party would recover.<sup>308</sup> The potential imposition of personal liability on marshals for misdeeds by their deputies suggests deputies were seen as agents acting on behalf of the primary marshal—who in fact was the actual Article II officer.<sup>309</sup> Finally, Secretary Hamilton’s 1792 list of government officials excluded any entry for deputy marshals—despite listing 16 federal marshals as officers.<sup>310</sup>

**3. Other “deputy” references in First Congress statutes:** Along with the deputy customs and deputy marshal positions, statutes enacted by the First Federal Congress referenced the term “deputy” in two additional contexts. (i) One context suggests that statutes at times permitted officers to depute non-officer agents to complete discrete tasks on their behalf without undergoing Article II procedures. (ii) The other suggests certain deputy and assistant officials may in fact have been “Officers of the United States.”

*a. Deputies for discrete tasks:* In a 1791 act imposing duties on whiskey distilled

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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 300, 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.”).

<sup>306</sup> § 28, 1 Stat. at 87-88.

<sup>307</sup> *Id.*

<sup>308</sup> See Case Note, 36 GEO. L.J. 713 (1948) (indicating this practice of imposing liability for deputy misdeeds on marshals or their executors continued into the 20th century).

<sup>309</sup> *But see* Proceedings of the Legislature of Massachusetts, May 31, 1791, WORCESTER GAZETTE (June 9, 1791) (state legislative committee suggesting a federal deputy marshal could not serve as a state legislator because he held a federal “office” similar to the state offices subject to the Massachusetts Constitution’s Incompatibility Clause). This conclusion arguably was atextual because the relevant state constitutional provision banned state legislators only from serving in the *state-level* offices specifically listed in the state constitution. Mass. Const. of 1780, ch. VI, art. II. The full Massachusetts legislature never had to reach the constitutional question because the relevant state legislator indicated he had resigned as a federal deputy marshal before starting his state service.

<sup>310</sup> 1792 Civil Officer List, *supra* note 41. The American State Papers’ printing of Secretary Hamilton’s list also omitted the assistant marshals that the First Congress had authorized the marshals to hire to complete a census. An Act providing for the enumeration of the Inhabitants of the United States, § 1, 1 Stat. 101, 101 (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. *Id.* at 101-03. 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 *infra* Part III.E.

within the United States, Congress authorized internal revenue supervisors to assign a deputy to administer oaths on their behalf.<sup>311</sup> In addition, the distilled spirits act permitted officers in charge of inspecting casks for exportation to carry out the inspection through a deputy.<sup>312</sup> Also, a 1791 law regulating duties on tea authorized an inspector, if he so chose, to “depute” some other person to keep the key for storehouses of imported tea and unlock those storehouses as needed.<sup>313</sup> The context of these references suggests the relevant officer merely was authorized to utilize an agent to complete a particular duty.<sup>314</sup> Neither provision indicates the primary officer is hiring a permanent deputy official.

*b. Deputies as Article II Officers? The Post Office:* One of the first statutes enacted by Congress was legislation temporarily authorizing the post office. In the Act, Congress authorized the Postmaster General to appoint deputies and an assistant without further explanation.<sup>315</sup> One possible explanation is that Congress was just continuing the Articles of Confederation post office structure where the Postmaster General bore personal legal accountability for the actions of his deputies and personal assistant<sup>316</sup>—like with the First Congress’s non-officer deputy marshals and customs officials. Or, as the Supreme Court observed in *Free Enterprise Fund*, the Postmaster General may very well have been a Department Head and thus constitutionally able to appoint inferior officers.<sup>317</sup> Several aspects of the 1792 statute that permanently authorized the Post Office suggest deputy postmasters in fact were Article II officers. For example, the 1792 statute assigned deputies their own duties, such as “keep[ing]” their own post office,<sup>318</sup> demanding and receiving funds for the postage of the mail,<sup>319</sup> and publishing in newspapers a list of unclaimed letters in their post office.<sup>320</sup>

Throughout the remainder of the first ten years of the new government, the First Congress practice of subjecting primary officers to possible personal liability for deputy misdeeds was not routinely replicated. The Second through Fifth Congresses referenced numerous deputy positions compliant with Article II appointments procedures—positions that very well may have constituted Article II offices. For

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<sup>311</sup> § 50, 1 Stat. 199, 210.

<sup>312</sup> § 52, 1 Stat. at 211.

<sup>313</sup> An Act making further provision for the collection of the duties by law imposed on Teas, § 1, 1 Stat. 219, 219 (1791).

<sup>314</sup> Cf. PERRY, *supra* note 72 (“Depute”: “to empower, act, send”); *id.* (“Deputy”: “who officiates in the name of another”); *id.* (“Deputation”: “act of deputing commission”).

<sup>315</sup> See 1 Stat. 70.

<sup>316</sup> See *infra* notes 444-48 and accompanying text.

<sup>317</sup> See 561 U.S. at 511 (apparently adopting Justice Scalia’s earlier reasoning in his *Freytag* concurrence that the assistant and deputy postmasters likely were inferior officers so their selection by the Postmaster General must mean he is a “Head[] of Department[]”).

<sup>318</sup> § 7, 1 Stat. at 234.

<sup>319</sup> § 9, 1 Stat. at 235.

<sup>320</sup> § 18, 1 Stat. at 237.

example, the Third Congress described the position of “deputy quartermaster” as a type of commissioned military officer.<sup>321</sup> And a 1799 act provided for the appointment of an “apothecary-general, and one or more deputies”<sup>322</sup> as “officers of the United States,” charging them with the safe-keeping of the army’s medical equipment.<sup>323</sup>

These examples of post-First Congress deputy officials suggest the moniker “deputy” is not dispositive in determining whether the official is an Article II officer. The first several Congresses at times treated deputies as officers and other times did not. The telling distinction seemed to involve the relationship between the deputy and his principal: Where the primary officer was personally subject to liability for the deputy’s misdeeds, the deputy official was not treated as an Article II officer. The existence of both an “officer” and a “non-officer” category of deputy is consistent with Dyche & Pardon’s multiple definitions of the word “deputy”:<sup>324</sup> (i) one who is an “officer” albeit a lieutenant or a second in command, like many deputy secretaries and deputy directors in modern practice today<sup>325</sup> and (ii) one who merely executes specific tasks for a principal.

### C. Officers of the Customs

Although the small size of the three central executive departments might suggest the first federal bureaucracy was minute, there in fact was a relatively thriving early administrative state.<sup>326</sup> But rather than serving in departmental headquarters and issuing regulations or conducting adjudications like many of today’s government officials, most early officials worked in local districts throughout the country collecting duties to pay off wartime debt.<sup>327</sup> The primary “officers of the customs”

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<sup>321</sup> An Act for continuing and regulating the military establishment of the United States, and for repealing sundry acts heretofore passed on that subject, § 11, 1 Stat. 430, 431 (1795).

<sup>322</sup> An Act to regulate the Medical Establishment, § 1, 1 Stat. 721, 721 (1799).

<sup>323</sup> *Id.* §§ 1, 3. This same statute also demonstrates the continuing categorization of low-level officials as “officers.” Hospital mates, for example, had to observe the surgeons’ directions and perform “all reasonable duties” the surgeons required them to perform for the recovery of wounded patients. *Id.* § 1. These officials were listed among the “officers”; they were appointed by the physician-general, with the “eventual approbation and control of the President.” *Id.* § 3.

<sup>324</sup> DYCHE & PARDON, *supra* note 72 (“deputy”: “[i] an ambassador, or person appointed to negotiate affairs for another; [(ii)] a sub-governor or lieutenant; [(iii)] and 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*”) (second emphasis added). *See also* MECHEM, *supra* note 67 (noting some deputies are officers and others are not).

<sup>325</sup> *See, e.g.*, 6 U.S.C. § 113(a)(1)(A) (Deputy Secretary of Homeland Security).

<sup>326</sup> But in contrast to today’s administrative state, the early executive branch engaged in more tightly constrained tasks. For example, Congress viewed its commerce powers more narrowly and consequently did not establish many executive departments.

<sup>327</sup> *See supra* note 41.

were the collectors, naval officers, and surveyors—all of whom were appointed by the President with the advice and consent of the Senate.

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 officers.<sup>328</sup> The weighers, gaugers, and measurers in particular had duties involving very little discretion and thus likely would not qualify as modern-day “officers.”<sup>329</sup> By statute, the duties on imported goods were based on the quantity of the goods.<sup>330</sup> For example, there was a duty of two cents per gallon of molasses<sup>331</sup> and a duty of ten cents per pound of black tea.<sup>332</sup> The weighers, gaugers, and measurers determined the quantity of each type of good on ships entering the country.<sup>333</sup> Their calculations formed the basis for the amount of duties the importer owed. The position of inspector was of somewhat greater consequence. Inspectors boarded ships to investigate suspected fraud or smuggling.<sup>334</sup>

Even though the weighers, gaugers, and measurers performed nondiscretionary tasks, they—along with the inspectors—appear to 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 Act regulating the collection of duties on tonnage and on goods, wares, and merchandise.<sup>335</sup> In that Act, Congress authorized customs collectors to employ these four types of officials.<sup>336</sup> Congress did not require Treasury Secretary approval for the collector’s hiring decisions even though the very provision authorizing these appointments required Secretary approval for decisions like the purchase of storehouses for imported goods.<sup>337</sup> The absence of any role for the head of the Treasury Department suggests Congress at the time did not

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<sup>328</sup> See, e.g., § 6, 1 Stat. at 154. Lists of government officials compiled by Secretary Hamilton also described a handful of “boatmen” employed along with the weighers, gaugers, measurers and inspectors. See 1792 Civil Officer List, *supra* note 41, at 63-66. No statute specifically authorizes the position of “boatmen” so these individuals apparently were non-officers.

<sup>329</sup> See *supra* notes 55-56 and accompanying text.

<sup>330</sup> See, e.g., An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States, 1 Stat. 24 (1789).

<sup>331</sup> *Id.* at 25.

<sup>332</sup> *Id.*

<sup>333</sup> See An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels, § 53, 1 Stat. 145, 172 (1790) (authorizing payment to weighers, gaugers, and measurers based on the quantity of goods they measured).

<sup>334</sup> See § 1, 1 Stat. at 152.

<sup>335</sup> See An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, § 5, 1 Stat. 29, 36-37 (1789).

<sup>336</sup> See *id.* at 37.

<sup>337</sup> See *id.*

view these officials as subject to Article II requirements.<sup>338</sup>

That said, at least one First Congress statutory provision addressing customs inspectors characterized those officials as “officers.” A 1789 act 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. And the original 1789 Act regulating the collection of duties on imports suggested that weighers, gaugers, and measurers served in an “office”; the Act required each of these officials to take an oath before “execut[ing] the duties of his *office*.”<sup>339</sup>

Numerous non-statutory documents commensurate with the time period of the First Federal Congress also indicated weighers, gaugers, measures, and inspectors were considered “officers.”<sup>340</sup> Several dictionaries from the late eighteenth century characterized gaugers as “officers.”<sup>341</sup> 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,”<sup>342</sup> a term that Congress used to describe customs inspectors.<sup>343</sup> Correspondence to George Washington requested consideration for the “office” of gauger or measurer.<sup>344</sup> An August 1789 letter to Massachusetts Congressman Benjamin Goodhue evaluated whether the fees paid to inspectors and measurers were adequate to keep them “in Office.”<sup>345</sup> Congressman Goodhue himself then wrote a letter to Surveyor Michael Hodge in September 1789, referring to the “office” of Inspector.<sup>346</sup> Notes on the House version of the Impost Bill, written “in an unknown hand,” refer to an Inspector as the “Officer” who

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<sup>338</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>339</sup> § 8, 1 Stat. at 38 (emphasis added).

<sup>340</sup> See also 8 ANNALS OF CONGRESS 2305 (Remarks of Representative Harper in the Fifth Congress addressing the Impeachment of William Blount and the definition of “officer”: “We apply the term 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 . . .”).

<sup>341</sup> See, e.g., DYCHE & PARDON, *supra* note 72 (Gauger: “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.”); BAILEY, *supra* note 136 (Gauger: “an officer employed in gaging”).

<sup>342</sup> 16 DHFFC, *supra* note 112, at 1198-2000 (“William Grayson, List of Candidates for Offices”).

<sup>343</sup> 1 Stat. at 35 (“And in 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 . . .”); 1 Stat. at 152 (same language).

<sup>344</sup> “To George Washington from Nathaniel Smith,” July 10, 1789, 3 PAPERS OF GEORGE WASHINGTON 176 & n.1.

<sup>345</sup> 16 DHFFC, *supra* note 115, at 1436-37 (“William Pickman to Benjamin Goodhue”).

<sup>346</sup> 17 *id.* at 1476 (“Benjamin Goodhue to Michael Hodge,” Sept. 6, 1789); 17 *id.* at 1814 (biography of Michael Hodge).



provides security against Smuggling on vessels.<sup>347</sup> A letter from Philadelphia Merchants to their Congressmen referred repeatedly to measurers, weighers, and gaugers as “Officers.”<sup>348</sup> And a September 1789 letter to newly appointed U.S. Treasurer Samuel Meredith<sup>349</sup> described inspectors, weighers, and gaugers as officers.<sup>350</sup> This September 1789 letter further indicated that weighers and gaugers had been “officers” in England.<sup>351</sup>

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 selection mode for these four positions, requiring the “approbation” of the Treasury Secretary for their appointment.<sup>352</sup> That change would have brought the selection process for the lower-level customs officials into compliance 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 writes to Treasury Secretary Gallatin requesting his approval of the collector’s recommended candidate for the “office” of “Weigher and Measurer.”<sup>353</sup>

#### D. Other Officials

During the First Federal Congress there were many other federal officials. This section will address those particular positions that provide further insight about the dividing line between Article II “officers” and non-officers around the time of the Constitution’s ratification.<sup>354</sup>

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<sup>347</sup> 16 *id.* at 1050, 1052.

<sup>348</sup> 16 *id.* at 1042, 1047 (“Philadelphia Merchants to the Pennsylvania Delegation,” July 16, 1789).

<sup>349</sup> See 17 *id.* at 1843 (biographical entry).

<sup>350</sup> 17 *id.* at 1483 (“Thomas Fitzsimons to Samuel Meredith”: “I am not yet informed what mode is pursued by your Weighers & Gaugers. In England the 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 gauger.”).

<sup>351</sup> *Id.*

<sup>352</sup> § 27, 1 Stat. 642.

<sup>353</sup> Letter from Charles Simms, Dec. 8, 1803, Record Group M178 (Correspondence of the Secretary of the Treasury), National Archives (College Park, MD).

<sup>354</sup> Officials referenced in First Federal congressional statutes not analyzed in this section include, for example, post office officials discussed previously, *supra* Part III.B.3.b; legislative officers whose appointments are governed by Article I, U.S. Const. art. I, § 2, cl. 5; *id.* § 3, cl. 5; lighthouse superintendents and keepers whose selection was signed off on by the Treasury Secretary, see § 3, 1 Stat. at 53-54; the presidentially appointed Attorney General and U.S. attorneys, 1 SENATE EXEC. J. 29, 32 (1789); court-appointed clerks, § 7, 1 Stat. at 76; and Northwest and Ohio Territory officials (territorial governors also superintended “Indian affairs”), 1 Stat. 68, § 1; 1 Stat. 123 § 1; 1 Stat. 137-

**1. Officers on Revenue Cutters:** The federal government employed ships known as revenue cutters to help enforce the customs duties. The ship master and the first, second, and third mates were appointed in compliance with Article II.<sup>355</sup> The ships also employed “mariners” and “boys” who apparently were not considered “officers.”<sup>356</sup>

**2. Military Structure:** Military commanders all the way down to lieutenants were appointed as “officers.”<sup>357</sup> The commissioned officers included officials like majors, captains, lieutenants, ensigns, surgeons, and even surgeon’s mates.<sup>358</sup> In contrast, those with lower-ranked positions such as sergeants and corporals were considered “non-commissioned officers.” Privates and musicians were not classified as officers.<sup>359</sup> Congressional statutes referred to the “enlist[ment]”<sup>360</sup> of sergeants, corporals, and privates.<sup>361</sup> Perhaps their “enlisted” status explains why they were not “officers” commissioned under Article II, even though sergeants and corporals would appear to have significant duties and responsibilities.<sup>362</sup> The First Federal Congress also empowered the President alone to appoint one or two inspectors to inspect and muster the troops.<sup>363</sup> And the President with Senate consent could

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38). For major officials in the Territories the First Congress explicitly changed the mode of appointment from the former Congress, under the Articles of Confederation, to the President with Senate consent. (*E.g.*, governor, secretary, “general officers” of the militia). *See* 1 Stat. 50-53 (preamble & sec. 1); 1 Stat. 123 § 1. In contrast, the 1789 Act 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. Perhaps this is because those officers were seen as local, rather than national, officers.

<sup>355</sup> *See* §§ 63-64, 1 Stat. at 175 (“officers” of the boats were appointed by the President).

<sup>356</sup> *See id.* (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”).

<sup>357</sup> 1 Stat. 119.

<sup>358</sup> *See* § 7, 1 Stat. 119, 120 (specifying the rations for commissioned officers and then referencing each of these positions in particular).

<sup>359</sup> *See* § 1, 1 Stat. at 119. Treasury Secretary Hamilton’s report of estimated military expenditures in 1790 also lists the position of “matross”—a position not referenced in statutes enacted by the First Federal Congress and apparently not an officer position. 1790 Report, *supra* note 242, at 35. *See also* An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States, § 4, 1 Stat. 271, 272 (1792) (characterizing matrosses similarly to “privates”). A “matross” assisted gunners in firing and loading. DYCHE & PARDON, *supra* note 72.

<sup>360</sup> *See* § 2, 1 Stat. at 119.

<sup>361</sup> *See* § 5, 1 Stat. at 120 (referring to “the pay of the non-commissioned officers” and then describing the pay for sergeants and corporals).

<sup>362</sup> *See, e.g.*, BARCLAY’S, *supra* note 143 (“Corporal”: “in the army, an inferior, and the lowest officer in the foot, who commands one of the division, places and relieves centinels, keeps good order, and receives the word of the inferiors that pass by his corps”).

<sup>363</sup> § 4, 1 Stat. 119, 120.

appoint a major-general, brigadier-general, quartermaster, or a chaplain, if he deemed those positions to be “essential to the public interest.”<sup>364</sup> Several additional war department positions referenced in Treasury reports but not “established by Law” included artificers, “[l]aborers,” and “[c]oopers, armorers, and carpenters.”<sup>365</sup> These workers were “employed occasionally” at arsenals<sup>366</sup> and thus likely were considered non-officer contractors.<sup>367</sup>

Military storekeepers, a paymaster general, and a commissioner of army accounts and clerks also were listed on early Treasury reports without express establishment by law during the First Federal Congress.<sup>368</sup> But this likely was due to the pre-existence of the paymaster general and commissioner positions under the authority of the Continental Congress.<sup>369</sup>

**3. National Bank:** Congress provided that the President should appoint three bank superintendents to oversee subscriptions to bank stock.<sup>370</sup> But once the bank was up and running, numerous individuals involved with its operation were not subject to Article II appointments methods. For example, there was an annual election of bank directors.<sup>371</sup> The probable explanation is that Congress saw the bank as a public-private, nongovernmental entity.<sup>372</sup>

**4. Various Commissioners:** In addition to establishing three executive departments, the First Congress also at times employed the use of commissioners or multi-member

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<sup>364</sup> § 5, 1 Stat. 222, 222 (1791). 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 pre-existing military positions. *Id.* at 223. 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. U.S.*, 147 U.S. 282, 301 (1893). Similarly, the First Federal Congress provided for adjutants, quartermasters, and paymasters to be “appointed from the line of subalterns.” § 3, 1 Stat. at 120.

<sup>365</sup> 1790 Report, *supra* note 242, at 36.

<sup>366</sup> *Id.*

<sup>367</sup> *See* Part III.E.

<sup>368</sup> *Id.* at 34; 1792 List of Civil Officers, *supra* note 32, at 58.

<sup>369</sup> *See* An Act making provision for the [payment of the] Debt of the United States, §§ 3, 13, 1 Stat. 138, 140, 142 (1790). *See also* An Act making alterations in the Treasury and War Departments, § 1, 1 Stat. 279, 280 (1792) (referring to the “late office of the paymaster general and commissioner of army accounts”). The First Federal Congress authorized appropriations for the clerks in the office of the commissioner of army accounts, indicating payment for these clerks was to be treated similarly to that of Treasury Department clerks who were officers. *See* Resolution III, 1 Stat. 187 (1790).

<sup>370</sup> 1 Stat. 191.

<sup>371</sup> 1 Stat. 192.

<sup>372</sup> *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[.]”).

boards. In contrast to the major departments, commissioners handled more discrete tasks. One early statute in August 1789 authorized the appointment of commissioners to manage negotiations and treaties with the Indian tribes.<sup>373</sup> 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 U.S. government.<sup>374</sup> That same year Congress also established the position of loan commissioner for each state. Finally the first Congress extended until July 1, 1792,<sup>375</sup> the multi-member board of Commissioners that the former Congress had created in 1787 to settle accounts between the individual States and the United States.<sup>376</sup> Consistent with the current Supreme Court’s definition of “Heads of Departments” in *Free Enterprise Fund*, the first Congress apparently considered the Board to be a department head for Appointments Clause purposes. The 1789 Congress required presidential nomination with Senate consent for any vacancies on the Commission itself but permitted the Board to appoint such clerks “as the duties of their office may require.”<sup>377</sup>

**5. Internal Revenue Officers:** These officers collected revenue from domestic distillers of spirits. The administrative requirements on distilleries were very burdensome<sup>378</sup>—down to precise rules regarding the types of signs a building must display when it housed a still.<sup>379</sup> For example, federal officers had to mark each cask of spirits with a distillery manager’s name and the quantity of spirits inside. 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 the cask.<sup>380</sup>

These internal revenue provisions demonstrate the existence of tough federal regulatory requirements as far back as the first session of Congress under the new Constitution. But in contrast to the vast majority of officials exercising federal power today, these customs officers, supervisors, and inspectors were selected via the accountability mechanisms of Article II.<sup>381</sup> In particular, the President with

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<sup>373</sup> An Act providing for the Expenses which may attend Negotiations or Treaties with the Indian Tribes, and the appointment of Commissioners for managing the same, § 2, 1 Stat. 53, 53 (1789).

<sup>374</sup> An Act for establishing the temporary and permanent seat of the Government of the United States, § 2, 1 Stat. 130, 130 (1790).

<sup>375</sup> An Act to provide more effectually for the settlement of the Accounts between the United States and the individual States, § 1, 1 Stat. 178 (1790).

<sup>376</sup> An Act for settling the Accounts between the United States and individual States, § 1, 1 Stat. 49, 49 (1789).

<sup>377</sup> *Id.* § 2.

<sup>378</sup> See 1 Stat. 199-214 (1791); MASHAW, *supra* note 21, at 37 (noting many “detailed and complex” requirements).

<sup>379</sup> See, e.g., § 25, 1 Stat. at 205.

<sup>380</sup> § 19, 1 Stat. at 203-04.

<sup>381</sup> *Cf.* § 18, 1 Stat. at 203 (providing that revenue supervisors “shall appoint proper officers to

Senate consent appointed the supervisor over each of 14 revenue districts<sup>382</sup> and as many revenue inspectors as the President judged necessary.<sup>383</sup> Illustrating the difference between Article II revenue supervisors and inspectors and the non-officer deputy customs officials and deputy marshals previously discussed—these revenue officers could be made subject to personal liability for neglecting their duties, improperly seizing goods, or engaging in other misconduct.<sup>384</sup>

**6. Foreign Officers:** 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,<sup>385</sup> and a non-Article II office-keeper.<sup>386</sup> In addition, a 1790 appropriations act authorized a salary for a French interpreter “employed in the department of state.”<sup>387</sup> Treasury Secretary Hamilton’s civil officer report suggests this French interpreter was a statutorily authorized clerk “officer” assigned to the specific task of language interpretation.<sup>388</sup>

Secretary Hamilton’s 1792 civil officer list also described the “Foreign Branch” of the State Department. Within this “foreign branch” Secretary Hamilton listed foreign affairs officials such as ministers plenipotentiary, *chargés des affaires*, residents, and agents. 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.”<sup>389</sup> This appropriations act established a maximum salary for positions like ministers plenipotentiary and their secretaries and *chargés des affaires*—without ever specifically authorizing the appointment of particular types of foreign officers to particular foreign nations.<sup>390</sup> Congress’s lack of specificity may

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have the charge and survey of the distilleries within the same, assigning to each, one or more distilleries as he may think proper”; even though this provision may seem to suggest the supervisors were appointing new officers, the context of the entire distilled spirits act suggests the supervisors were just assigning specific distilleries to the care of various already-appointed inspectors). *See also* § 35, 1 Stat. at 207 (permitting revenue supervisors to select persons for the discrete tasks of delivering blank accounting books to distillers for the purpose of recordkeeping); § 58, 1 Stat. at 213 (describing revenue supervisors, inspectors, and “the deputies and officers by them to be appointed and employed”; apparently referring to the supervisors’ & inspectors’ periodic use of deputies or assignment of already-appointed officers to particular new stations); DYCHE & PARDON, *supra* note 72 (“appoint” can mean just to “set a person something to do”).

<sup>382</sup> § 4, 1 Stat. at 199-200.

<sup>383</sup> *Id.*

<sup>384</sup> *See* §§ 38, 41, 1 Stat. at 208-09.

<sup>385</sup> *See* 1 Stat. 28, 29 (providing for a chief clerk); 1 Stat. 67, 68 (authorizing the heads of the three major departments to “appoint such clerks . . . as they shall find necessary”).

<sup>386</sup> *See* 1792 Civil Officer List, *supra* note 41, at 57.

<sup>387</sup> An Act making certain Appropriations therein mentioned, 1 Stat. 185, 185 (1790).

<sup>388</sup> *See* 1 Stat. at 68. *Compare* 1 American State Papers: Miscellaneous 57 (“clerk for foreign languages”), *with* 1 Stat. at 185 (1790) (“interpreter of the French language”).

<sup>389</sup> § 1, 1 Stat. 128, 128.

<sup>390</sup> *See generally* 1 Stat. 128.

be related to a unique interrelationship between the Article II Appointments Clause and the President’s diplomatic responsibilities.<sup>391</sup>

### E. Contractors/“Ongoing” Nature of Officer Positions

Both under the Articles of Confederation and during the First Federal Congress, there was a category of contractors<sup>392</sup> or other non-officer persons whom officers hired for services outside of the Article II appointments process.<sup>393</sup> Therefore, one additional requirement for federal “officer” status appears to be responsibility for *ongoing* duties. That said, one did not necessarily need to be *continuously* employed or remunerated to qualify as an “officer.”<sup>394</sup> Professor Nicholas Parillo’s in-depth study of early American administration demonstrates that many 18th-century government positions were not paid regular salaries.<sup>395</sup> A number of the individuals receiving fees for services performed or for each day worked were considered “officers” by the first Congress.<sup>396</sup>

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 provide estimates of the value of certain goods for the purpose of calculating the relevant import duties.<sup>397</sup> In the same statute, Congress authorized collectors, naval officers, and surveyors to appoint persons to board ships suspected of fraud.<sup>398</sup> The government also entered contracts for the building of lighthouses<sup>399</sup> and purchased printing services required for the

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<sup>391</sup> See *infra* notes 405-10 and accompanying text.

<sup>392</sup> Cf. 4 ELLIOT’S DEBATES, *supra* note 86, at 454-455 (Mar. 23, 1806) (remarks from Congressman Eppes concluding that “all contractors are not officers”; observing, in contrast, that a mail carrier “approaches very near an officer” because he “takes an oath [and] is subject to penalties, the remission of which depends on the executive”);

<sup>393</sup> See OLC Opinion, *supra* note 25, at \*74-\*111 (discussing constitutional practice).

<sup>394</sup> See *id.* at \*102.

<sup>395</sup> See generally NICHOLAS PARILLO, AGAINST THE PROFIT MOTIVE (Introduction). Many federal positions also were salaried, however. See 1792 Civil Officer List, *supra* note 41, at 57-59 (listing many annual salaries).

<sup>396</sup> See, e.g., § 53, 1 Stat. at 171-72 (authorizing fee payments to collectors, naval officers, and surveyors); § 1, 1 Stat. at 217 (authorizing payment to clerks and marshals for days they attended court).

<sup>397</sup> 1 Stat. 167. Cf. *Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (concluding an appraiser valuing goods for the customs service was not an Article II officer because he “has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case”).

<sup>398</sup> 1 Stat. 170.

<sup>399</sup> An Act for the establishment and support of Lighthouses, Beacons, Buoys, and Public Piers, § 3, 1 Stat. 53, 54 (1789).

maintenance of government records.<sup>400</sup> The Continental Congress similarly authorized officers to hire laborers to perform particular tasks. For example, the 1786 ordinance establishing the pre-constitutional 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.”<sup>401</sup>

It would seem, however, that some duties involve such a significant exercise of governmental power that performing them would merit “officer” status even if one’s position is not ongoing. Or duties that are so significant they simply cannot be assigned to non-Article II officers. 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 claim Senate consent is unnecessary because the position is not ongoing.<sup>402</sup>

Nonetheless, both the OLC’s 2007 memo analyzing “officer” status and Professor David Currie’s *Constitution in Congress: The Federalist Period* discuss instances when government officials conducted discrete high-level diplomatic missions without being commissioned as foreign affairs officers.<sup>403</sup> For example, Professor Currie observed, “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.”<sup>404</sup> 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 “officer” positions must be ongoing.<sup>405</sup> Professor Currie further suggested the Morris mission is evidence that some “public servants could be appointed although their offices had never been created by law.”<sup>406</sup>

But the early practice of permitting diplomatic missions without Article II appointments might be attributable to different legal principles. Article II, section 2’s requirement that offices be “established by Law” arguably applies just to “Officers of the United States” other than the “Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court”<sup>407</sup> whose positions the Constitution

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<sup>400</sup> 1791 Report, *supra* note 242, at 86.

<sup>401</sup> 31 JCC, *supra* note 9, at 876 (Oct. 16, 1786).

<sup>402</sup> Cf. OLC Opinion, *supra* note 25, at \*105 (surmising 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 \*\*110-11 (explaining the Independent Counsel position was an office because it was indefinite and not transient).

<sup>403</sup> CURRIE, *supra* note 244, at 43-47; OLC Opinion, *supra* note 25.

<sup>404</sup> CURRIE, *supra* note 244, at 44.

<sup>405</sup> OLC Opinion, *supra* note 25, at \*77-\*83.

<sup>406</sup> CURRIE, *supra* note 244, at 43.

<sup>407</sup> U.S. CONST. art. II, § 2, cl. 2.

directly establishes.<sup>408</sup> And the President was seen as having a uniquely important role in foreign affairs.<sup>409</sup> Article II, section 3 empowers the President to “receive Ambassadors and other public Ministers,” which “has long been understood . . . [to] empower[] the President to decide with which governments the United States shall have diplomatic relations.”<sup>410</sup> Professor Currie notes this interpretation of the Reception Clause could suggest Congress lacks the power to tell the President where to send diplomats and establish diplomatic offices.<sup>411</sup>

Consequently, the early practice of authorizing foreign affairs missions outside of the Article II appointments process may not necessarily prove that all discontinuous positions are non-officer positions. British practice contains at least one example where a non-foreign-affairs-related official with discontinuous duties 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.”<sup>412</sup>

## F. Pre-Constitutional Practice Under the Continental Congress

Examination of several major administrative entities during the Continental Congress suggests that pre-constitutional “officers” also included 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 *the entire Congress* to appoint officers.<sup>413</sup> And under the Articles, Congress created the offices themselves as well as appointing the officers who filled them. But despite the Constitution’s innovation of key separation of powers distinctions from the Articles of Confederation,<sup>414</sup> there is no indication the Constitution altered the meaning of the term “officer.”<sup>415</sup> Without evidence that the Constitution redefined either the term “officer” or the pre-existing phrase,

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<sup>408</sup> See CURRIE, *supra* note 217, at 44.

<sup>409</sup> Cf. James Monroe to James Madison, May 10, 1822, in 6 WRITINGS OF JAMES MONROE 285-86 (opining that a “foreign mission is not an office” because foreign affairs involves a different kind of executive power, uniquely held by the President).

<sup>410</sup> CURRIE, *supra* note 217, at 45.

<sup>411</sup> See *id.*

<sup>412</sup> BAILEY, *supra* note 136.

<sup>413</sup> See *supra* note 37 and accompanying text.

<sup>414</sup> See, e.g., 10 DHFFC, *supra* note 115, at 718 (record of Rep. Boudinot speaking during House Floor debate: “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.”).

<sup>415</sup> See *supra* notes 179-85 and accompanying text.



“Officers of the United States,”<sup>416</sup> the meaning of these terms under the Continental Congress is informative.

Administrative officer positions under the Continental Congress and the First Federal Congress have numerous striking similarities, down to details like the \$500 annual salary that both Congresses provided for many of their clerks.<sup>417</sup> (i) Similar to practice during the First Congress, ordinances and resolutions issued by the Continental Congress indicate that the pre-constitutional understanding of “officer” embraced officials engaged in ministerial duties as low-level as that of account-keeping clerks.<sup>418</sup> Also, as under the First Congress, there were some even lower-level workers like messengers, apparently not considered “officers.”<sup>419</sup> (ii) 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.<sup>420</sup> (iii) Evidence suggests the Continental Congress’s responsibility for appointing officers may have been satisfied by Congress just approving officials selected in the first instance by superior officers. (iv) Resolutions and ordinances related to the Board of Treasury<sup>421</sup> and the Post Office suggest that officials who might otherwise be officers nonetheless were treated as non-officers if their superior maintained accountability for their actions,<sup>422</sup> similar to the First Federal Congress deputy marshals and deputy collectors. (v) And non-officers at times were hired for discrete governmental tasks.<sup>423</sup>

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<sup>416</sup> See *supra* Part II.B.2.d (discussing evidence of the meaning of “Officers of the United States” in the Journals of the Continental Congress).

<sup>417</sup> Compare An Act for establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks, § 2, 1 Stat. 67, 68 (1789), with, e.g., 27 JCC, *supra* note 9, at 470 (1784) (authorizing the Board of Treasury to set the annual salaries for its clerks as high as \$500). But see 32 JCC, *supra* note 9, at 128-29 (1787) (shortage of revenue reduced annual clerk salaries to a maximum of \$450).

<sup>418</sup> See, e.g., 2 JCC, *supra* note 9, at 209 (including among the list of officer duties the duty of an army hospital clerk “[t]o keep accounts for the director and store keepers”); 10 *id.* at 350 (resolution authorizing the Treasury Board to appoint “Commissioners, Auditors and Clerks” to “their respective offices”).

<sup>419</sup> See National Archives documents (titled “Officers & c.” when lists include lower-level positions like “messenger” & “waiter” in contrast to other lists titled just “officers”).

<sup>420</sup> See, e.g., 2 JCC, *supra* note 9, at 210 (1775) (“duty of the above officers”); 14 *id.* at 904 (1779) (“the duties of the several offices”); 21 *id.* at 949 (1781) (describing the comptroller’s “immediate duty” to see the public accounts are safely kept and describing the treasurer’s “duty” to keep all U.S. moneys); 27 *id.* at 470 (1784) (referring to “the duties” of the commissioners and the clerks’ “several offices”).

<sup>421</sup> See *infra* Part III.F.3 (1779 Treasury ordinance).

<sup>422</sup> See *infra* Part III.F.3-4.

<sup>423</sup> See, e.g., 23 JCC, *supra* note 9, at 670, 676 (1782) (authorizing the Postmaster General or his deputies “to hire occasional expresses” to carry the mail at non-fixed times and routes when there is danger of robbery); 31 *id.* at 876 (authorizing the “Master coiner” to “procure proper workmen to execute the business of coinage”); 2 *id.* at 210-11 (1775) (listing “Labourers occasionally” in a report on hospital “officers and other attendants”).

The Continental Congress existed from 1774 to 1789. The Articles of Confederation governing the Congress’s practice were drafted during 1776 and 1777 when they were sent to the states, which finally ratified the Articles on March 1, 1781. The Continental Congress’s creation of various boards and agencies before and after the Articles’ ratification offers illuminating insight into the historical understanding of the term “officer.”

**1. Handwritten “Officer” Lists on File at the National Archives:** Several lists of departmental officers on file at the National Archives indicate that at least some officials with less significant responsibilities nonetheless were considered “officers” during the Continental Congress. For example, a handwritten record titled “Officers in the department of foreign affairs” listed a clerk and an interpreter along with the higher-level officers like ministers plenipotentiary and departmental under secretaries. A separate National Archives record titled “Officers appointed” included a commissary, a surgeon, and a storekeeper along with majors, colonels, and brigadier generals. These titles’ references just to “officers” appear to be pointed because other archives records instead were labeled “Officers &c.”—suggesting those lists included some non-officers. The title of the document listing officials in the Treasury department used such a description, for example, when introducing a list of officials that included the position of “messenger.”<sup>424</sup>

**2. Military Hospitals:** A 1778 resolution regulating military hospitals provides further evidence that the late 18th-century understanding of “officer” included officials engaged in lower-level tasks.<sup>425</sup> In the course of assigning duties to “officers,” the resolution implied the following positions were of officer status: the deputy director general over the hospitals, the physician general, and the surgeon general.<sup>426</sup> The resolution continued on to characterize as officers “the apothecaries, mates, stewards, [and] matrons.”<sup>427</sup> Contrary to contemporary standards for Article II “officer” status, these officers had duties that were nondiscretionary and not related to important policy issues. An earlier 1775 Continental Congress resolution indicated that the apothecaries and mates helped to “visit and attend the sick.”<sup>428</sup> Matrons superintended the nurses and bedding.<sup>429</sup>

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<sup>424</sup> See “A List of the Officers &c. Employed in the Department of the Treasury with their Annual Salaries.”

<sup>425</sup> See 10 JCC, *supra* note 9, at 128-30 (1778) (resolution for “better regulating the hospitals of the United States”).

<sup>426</sup> 10 *id.* at 129 (referring to the powers “herein assigned to other officers” before describing the responsibilities of these officials).

<sup>427</sup> 10 *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 . . .”).

<sup>428</sup> 2 JCC *id.* at 209, 210 (1775).

<sup>429</sup> 2 *id.* at 210.

That same 1775 resolution also characterized as “officers” the surgeons, nurses, clerks, and storekeepers.<sup>430</sup> 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 law indicated that nurses “attend the sick, and obey the matron’s orders.” Clerks were “[t]o keep accounts for the [hospital] director and storekeepers.” The storekeepers in turn were to “receive and deliver the bedding and other necessaries by order of the director.”<sup>431</sup>

**3. Board of Treasury:** The May 1784 ordinance changing the leadership of the Treasury from “Superintendent of Finance” Robert Morris to a three-commissioner board suggests that (i) pre-constitutional clerks were considered “officers,” (ii) the Continental Congress believed 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 non-officers if their superiors are legally accountable for their actions. The 1784 ordinance authorized Congress to appoint three commissioners to head “The Board of Treasury.”<sup>432</sup> The ordinance then gave the Board authority to “employ as many clerks therein 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.”

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.<sup>433</sup> Nonetheless, the Articles of Confederation established that Congress would appoint all civil officers,<sup>434</sup> the 1784 ordinance in contrast authorized commissioners to employ the clerks.<sup>435</sup> 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 it to require the reporting of clerk names.<sup>436</sup> This appointments structure could reflect an early

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<sup>430</sup> See *id.* (listing those positions and a description of their responsibilities following the description: “The duty of the above officers”).

<sup>431</sup> *Id.*

<sup>432</sup> 27 *id.* at 469 (May 28, 1784).

<sup>433</sup> See 27 *id.* at 470 ((i) referring to commissioners and clerks “entering on the duties of their several offices”; (ii) requiring commissioners and clerks to take an oath to properly execute “the duties of their respective offices”; (iii) instructing that clerk salaries should start when “the said officers shall enter on the duties of their Office”).

<sup>434</sup> ARTICLES OF CONFEDERATION art. IX, par. 5.

<sup>435</sup> 27 JCC, *supra* note 9, at 470.

<sup>436</sup> 27 *id.* at 438 & n.1.

understanding that the appointing authority must merely sign off on 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].”<sup>437</sup> But it also authorized higher-level officers—not Congress—to appoint clerks without requiring Congress to even receive the names of clerk appointees.<sup>438</sup>

Finally, one additional Treasury ordinance from 1779 is informative,<sup>439</sup> even though the drafted Articles of Confederation had not yet been ratified and the 1779 officer positions were terminated in 1781.<sup>440</sup> This 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 the 1779 ordinance, Congress selected the clerks serving in the chambers of accounts.<sup>441</sup> In contrast, the auditor general and treasurer selected their own clerks.<sup>442</sup> But the ordinance required the auditor general, treasurer, and auditors to “be respectively accountable for the conduct of their clerks.”<sup>443</sup> The ordinance omitted any similar language making higher level officials accountable the chambers of accounts clerks that Congress appointed directly. Similar to the non-officer deputies in the First Federal Congress, the officer status of these pre-constitutional clerks appeared to turn on whether a superior maintained accountability for the clerks’ actions.

**4. Post Office:** The 1782 ordinance regulating the pre-constitutional post office<sup>444</sup> 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.<sup>445</sup> In turn, however, the Postmaster General was to “be accountable” for their “fidelity.”<sup>446</sup> One

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<sup>437</sup> See, e.g., 21 JCC, *supra* note 9, at 949 (1781) (including on the list of “officers” to aid the finance superintendent of finance “a comptroller, a treasurer, a register, auditors and clerks”).

<sup>438</sup> 21 *id.* at 950 (authorizing both the comptroller and the register to appoint clerks).

<sup>439</sup> See generally Ordinance for establishing a Board of Treasury, and the proper officers for managing the finances of these United States, 14 *id.* at 903-08 (1779).

<sup>440</sup> See 21 *id.* at 948-49 (1781).

<sup>441</sup> See 14 *id.* at 903 (1779).

<sup>442</sup> See *id.*

<sup>443</sup> *Id.*

<sup>444</sup> An Ordinance for Regulating the Post Office of the United States of America, 23 *id.* at 669, 670-78 (1782). A pre-Articles resolution in 1775 authorized the “postmaster General” to appoint a secretary, Comptroller, and deputies, with no language addressing their “officer” status. 2 *id.* at 208-09. The 1782 ordinance voided this resolution. 23 *id.* at 678.

<sup>445</sup> 23 JCC, *supra* note 9, at 670.

<sup>446</sup> *Id.*; DYCHE & PARDON, *supra* note 72 (“fidelity”: “trustiness, faithfulness, honesty, integrity”). The Postmaster General or his deputies also had authority to “from time to time” appoint “necessary

factor confirming that Congress did not consider any of these officials to be “officers”<sup>447</sup> is their required oath did not reference the term “officer.” In contrast to other oaths referring to the duties of office,<sup>448</sup> the post office oath obligated officials simply to “fulfil every duty required” of them.<sup>449</sup>

#### IV. The Historic “Officer” Definition in the Modern Administration

This section will first address which present-day officials currently treated as “employees” may in fact qualify as “officers” under the historical scope of Article II. The section will next explain why a return to the early practice of selecting a greater percentage of officials via Article II could (i) enhance accountability, transparency, and excellence (ii) without necessarily harming efficiency or leading to frequent rotation in lower-level offices.

(i) *Accountability*: The Framers believed putting one actor in charge of appointments would ensure that actor took great care in nominating qualified individuals. If the appointing official instead selected an under-qualified officer for improper motivations such as patronage, the appointing officer would suffer reputational and perhaps political consequences.

(ii) *Efficiency*: Even though compliance with the original meaning of Article II may require a significant portion of civil service employees to undergo officer appointment, efficiency in selection of officials can be maintained. The original meaning of the Constitution as evidenced by early practice and the constitutional text requires only that the president or department head give final approbation to appointments of inferior officers. Article II constraints may be satisfied as long as the department head signs off both on (i) a lower-level officer’s hiring decision and (ii) the selection of civil service board members who evaluate candidates using objective criteria. Moreover, in early practice the president and department heads frequently permitted officers serving the previous administration to remain in office. Redesignating civil service employees as officers does not need to lead to more frequent rotation in government or a loss of expertise.

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

As explained above, the most likely “original public meaning” of the term “officer” is anyone with ongoing responsibility for a federal statutory duty. Duties

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post-riders, messengers and expresses.” 23 JCC, *supra* note 9, at 670.

<sup>447</sup> Cf. 23 JCC, *supra* note 9, at 670, 674 n.2 (referring, in text struck from a draft of the ordinance, to the “respective duties of office” of “the Postmaster General, or his clerk or assistant”).

<sup>448</sup> See *supra* notes 297-98 & 337 and accompanying text.

<sup>449</sup> See 23 JCC, *supra* note 9, at 670, 671.

as ministerial as record-keeping would qualify.<sup>450</sup>

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

**1. Federal Emergency Management Agency (FEMA)**: 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 as “officers” under *Buckley*’s “significant authority” standard.<sup>451</sup> For example, the FEMA Administrator, rather than the President or Homeland Security Secretary, appoints FEMA’s Regional Administrators and Disability Coordinator.<sup>452</sup>

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 subordinate to or contained within any other such component.”<sup>453</sup> In contrast, FEMA is contained within the Homeland Security Department;<sup>454</sup> the FEMA Administrator reports to the Homeland Security Secretary.<sup>455</sup>

Therefore, appointment by the FEMA Administrator is insufficient for Article II compliance where the appointed official is an “inferior officer.” At least several Administrator appointees seem to qualify. For example, the Administrator has the authority to appoint ten Regional Administrators<sup>456</sup> who have responsibility for,<sup>457</sup> among other things, ensuring effective regional preparedness for natural disasters

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<sup>450</sup> This was true even if a statute did not state precisely which official had to perform the duty. *See supra* notes 239-40 and accompanying text. This is a clear distinction from modern “officer” analysis, which ties officer status in part to whether a statute explicitly assigns a particular official to perform specific tasks. *See, e.g., Freytag*, 501 U.S. at 881 (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”).

<sup>451</sup> *See supra* notes 30-33 and accompanying text.

<sup>452</sup> *See* CRS Report No. RL33729, *supra* note 32.

<sup>453</sup> *Free Enter. Fund*, 561 U.S. at 511.

<sup>454</sup> 6 U.S.C. §§ 313(a), 316(a).

<sup>455</sup> *Id.* § 313(c)(3).

<sup>456</sup> 6 U.S.C. § 317(b)(1).

<sup>457</sup> Congress has vested in the Homeland Security Secretary “[a]ll functions of all officers, employees, and organizational units of the Department.” 6 U.S.C. § 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.

and terrorism.<sup>458</sup> 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.<sup>459</sup>

Also, the Administrator appoints FEMA’s Disability Coordinator<sup>460</sup> who has the statutory charge “to ensure that the needs of individuals with disability are being properly addressed in emergency preparedness and disaster relief.”<sup>461</sup> The Coordinator’s responsibility for such a duty would seem to qualify for “officer” status under Article II’s original public meaning. Congress also charges the 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*.<sup>462</sup> 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 post-evacuation relocations, and ensuring the national preparedness system addresses relevant needs.<sup>463</sup>

If these several FEMA positions are in fact Article II offices, Article II compliance presumably could be satisfied by a statutory change requiring the Homeland Security Secretary 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.<sup>464</sup> That said, the statutory remedy for such a problem seems relatively straightforward.

**2. The Competitive Service:** There are many positions covered by the competitive service system that may qualify as Article II offices under a broad historic 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. (a) 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 like a department head. (b) Second—and this is a much closer case as a constitutional matter—selection through the competitive service arguably causes constitutional problems even where

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<sup>458</sup> *Id.* § 317(c)(2)(A).

<sup>459</sup> *Id.* § 317(c)(2)(C)-(D).

<sup>460</sup> 6 U.S.C. § 321b(a).

<sup>461</sup> *Id.*

<sup>462</sup> *Cf. Tucker*, 676 F.3d at 1133 (concluding that “the issue of a person’s tax liability is substantively significant enough” to count as an important issue in the Article II officer analysis).

<sup>463</sup> 6 U.S.C. § 321b(b)(8)-(10).

<sup>464</sup> *See, e.g., Barnett, supra* note 22, at 809-11.

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 would seem to address this concern.

If Article II compliance does in fact require department heads to sign off on board members ranking candidates and to sign off on the final selection of many civil service officials, there would need to be a systematic review of hiring procedures for each specific civil service position constituting an Article II office. Agencies do not necessarily all have identical hiring procedures.<sup>465</sup> Following is just a sample of some of the present-day civil service positions that likely fall within the original meaning of “office” but right now do not appear to be filled in conformity with Article II.

*a. IRS Chief Counsel’s Office/Non-Department Head Appointing Authority:* Certain officials within the IRS Chief Counsel’s office may qualify as Article II officers. The IRS hiring manual indicates that the Chief Counsel is the final appointing authority for hires within the office at the level of GS-15 or lower.<sup>466</sup> The General Counsel for the Treasury Department is the final appointing official for members of the Senior Executive Service (SES) within the Chief Counsel’s office.<sup>467</sup> Neither the General Counsel nor the Chief Counsel<sup>468</sup> heads a department; thus neither has Article II appointing authority. But they select officials with responsibilities ranging from the interpretation of internal revenue laws<sup>469</sup> to representation of the IRS in legal proceedings.<sup>470</sup> Under the original meaning of “officer,” appointment of these officials should be subject to the Treasury Secretary’s final authority, just like the selection of customs officers from early practice.<sup>471</sup>

*b. Customs Officials/Competitive Service Ranking System:*

*i. Department Head as the Final Appointing Authority:* In contrast to the attorneys in the IRS Chief Counsel’s office, a department head gives the final signoff to selection of customs and border protection personnel. These officials have governmental responsibilities ranging from “search[ing] persons, baggage, cargo, and carriers for contraband” to “exercis[ing] sound judgment necessary to apprehend, detain, or arrest persons at the point of entry” who are violating federal agriculture, customs, or other laws.<sup>472</sup> In comparison to the 1790s internal revenue

<sup>465</sup> Cf. *id.* at 805, 810.

<sup>466</sup> Internal Revenue Manual § 30.4.1.2.1 [hereinafter IRM].

<sup>467</sup> *Id.*

<sup>468</sup> See 26 U.S.C. § 7803.

<sup>469</sup> IRM § 1.1.6.2 (Deputy Chief Counsel (Technical)).

<sup>470</sup> IRM § 1.1.6.9 (Associate Chief Counsel, General Legal Services).

<sup>471</sup> See *supra* note 350-51 and accompanying text.

<sup>472</sup> OPM Classification and Qualification Standards, Customs and Border Protection Series, 1895, available at <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/1800/customs-and-border-protection-series-1895> (last accessed Feb.



officers checking for the quantity of spirits at a distillery<sup>473</sup> or the customs inspectors whose appointments were approved by the Treasury Secretary starting in 1799,<sup>474</sup> the customs and border officials seem to measure up as officers. The Homeland Security Secretary is the ultimate appointing authority<sup>475</sup> charged with selecting these officials from a list of eligible competitive candidates.<sup>476</sup>

*ii. Competitive Service Ranking/Fine-Tuning the Civil Service?:* Despite the Secretary’s titular role as these officials’ appointing authority, arguably the competitive service selection process nonetheless still diverges from Article II—at least in spirit. In the competitive service Congress by statute requires many government employees to be selected on the basis of merit judged on factors such as “relative ability, knowledge, and skills, after fair and open competition.”<sup>477</sup> For each competitive service position the Office of Personnel Management (OPM) then either crafts the particular criteria on which the candidates will be judged or delegates that authority to the specific agency hiring for the position.<sup>478</sup>

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.<sup>479</sup> These scores are calculated by a review board in accordance with the relevant criteria for that particular position.<sup>480</sup> The appointing official—sometimes a department head and sometimes a lower-level official—must fill the open position from a list of at least three top-scoring candidates<sup>481</sup> or candidates qualifying for certain preferences. In some circumstances, appointing officials may request OPM

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<sup>473</sup> See *supra* Part III.D.5.

<sup>474</sup> See *supra* note 350 and accompanying text.

<sup>475</sup> 6 U.S.C. § 203(1) (transferring to the Homeland Security Secretary the functions and personnel of “the United States Customs Service . . . , including the functions of the Secretary of the Treasury relating thereto”); 19 U.S.C. § 2072(a) (authorizing the Treasury Secretary to appoint “officers and employees as he may deem necessary” in the former U.S. Customs Service); (providing for the Treasury Secretary to retain certain customs functions that do not include the appointments authority described in 19 U.S.C. § 2072); see also Section 403, Homeland Security Act, at 90, *updated as of* Apr. 2016 (enacted as 6 U.S.C. § 203).

<sup>476</sup> OPM Series, 1895, *supra* note 468 (indicating these officials are subject to the General Schedule (GS) scale as well as a written exam and structured interview evaluating essential qualifications).

<sup>477</sup> 5 U.S.C. § 2301(b); see also *id.* § 3302(2) (permitting the President to “ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought”). But see *id.* § 3302 (permitting the President to except certain positions); *id.* § 3304(a)(2) (permitting the President to exempt openings from competitive application when OPM finds a “critical hiring need” or a “severe shortage of candidates”).

<sup>478</sup> See 5 C.F.R. § 337.101; 5 U.S.C. § 1104(a)(2) (authorizing the OPM Director to delegate his authority for competitive exams to the heads of executive agencies).

<sup>479</sup> 5 C.F.R. §§ 332.402, 337.101. See also 5 U.S.C. § 3317.

<sup>480</sup> See also 5 U.S.C. §§ 2108, 2108a, 3309, 3317 (indicating points are added to the scores of candidates qualifying for veterans preferences).

<sup>481</sup> 5 U.S.C. §§ 3317-3318.

approval to pass over the top-scoring candidates and consider someone else.<sup>482</sup>

In *The President: Office and Powers*, Edward Corwin observed that longstanding constitutional practice has permitted Congress to require officer appointees to satisfy very specific qualifications, such as residency, educational, and even political affiliation requirements.<sup>483</sup> 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.<sup>484</sup>

One way to conceptualize competitive service requirements is that they are simply an even more detailed requirement that Congress imposes on the executive branch positions it has the power to create.<sup>485</sup> Instead of requiring an official to reside in a particular state, the competitive service statutes and regulations require the official to have certain types of job experience and qualifications.<sup>486</sup>

An alternative view, though, in light of the Appointments Clause 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.<sup>487</sup> 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?<sup>488</sup> One of the goals motivating

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<sup>482</sup> *See id.*

<sup>483</sup> EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1948*, at 88-89 (3d ed., 1948).

<sup>484</sup> *See id.*

<sup>485</sup> *See generally* Volokh, *supra* note 2 (concluding statutory qualifications on inferior officers often are permissible). But see *id.* at 753 n.39 (citing Civil Service Commission, 13 Op. Att’y Gen. 516 (1871), which concluded “[a] legal obligation to follow the judgment of [a nominating board]” is unconstitutional (internal quotation omitted)).

<sup>486</sup> Corwin cites the dissenting opinion in *Myers v. U.S.*, 272 U.S. 52, 265-74 & n.35-56 (1926), which listed hundreds of statutes qualifying the type of officer who could be appointed to various federal positions. CORWIN, *supra* note 481, at 88-89 & n.19. But early on statutory officer restrictions were fairly constrained. During the First Congress, the few provisions restricting which individuals could hold an officer position included modest requirements like that the Attorney General be “learned in the law.” 1 Stat. at 92-93; *see also* 1 Stat. 96 (president may employ a “fit person” to complete a government survey); 1 Stat. 29, 37 & 1 Stat. 154, sec. 6 (customs collectors may employ “proper persons” to serve as inspectors); 1 Stat. 49 (president may nominate such commissioner as he may think “proper” to settle accounts with the States); 1 Stat. 154 (“proper persons” may be employed as weighers, gaugers, & measurers); 1 Stat. 119, 119-21 (requiring noncommissioned officers and privates to be “able-bodied men” of a certain height and age). Qualifications continued to be fairly restrained up through the mid-19th century, such as requirements that officers in federal territories must be from those territories and Louisiana legislative council members must hold real estate. *Myers*, 272 U.S. at 265-74 (dissenting opinion).

<sup>487</sup> *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 on congressional limitations on the President’s power to nominate principal officers through statutory qualifications on such officers).

<sup>488</sup> DYCHE & PARDON *supra* note 72 (“appoint”: “to authorize one person to act for another, to

the Framers’ drafting of the Appointments Clause was accountability for the appointing official;<sup>489</sup> the competitive service framework arguably is 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.

Congress began requiring merit-based examinations for potential federal employees in the 1800s.<sup>490</sup> 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. But to the extent that certain positions subject to competitive service procedures are in fact Article II offices, one way to put that practice on more sure constitutional footing<sup>491</sup> would be to ensure that officials on the boards evaluating each candidate’s credentials are themselves subject to Article II appointment. (At least in some cases under current law, board members scoring the competitive service candidates right now are not selected by the department head.)<sup>492</sup> Also, perhaps departmental officials should have more latitude in selecting which merit-based factors they will evaluate for the hiring of each position.<sup>493</sup> Then finally, appointment to every Article II office should be subject at least to the final approbation of a department head, in contrast to officials like the IRS Chief Counsel’s employees discussed above whose appointments are made by the Chief Counsel and General Counsel. This final approval could be delegated to lower-level officers, however, to preclude a

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task, or set a person something to do: *also to make an end of, or determine a matter*”) (emphasis added).

<sup>489</sup> See *infra* Part IV.B.1.

<sup>490</sup> See CORWIN, *supra* note 452, at 89 (noting the Civil Service Act of 1883 required the appointing officer to choose from candidates with the highest competitive scores and follow-on executive orders “further restricted choice to the *three highest*”). See also WHITE, *supra* note 41, at 254 (noting creation of a three-member board of senior military medical officers; the board examined candidates for positions in the hospital department and certified their qualifications to the Secretary at War, 1 Stat. 721, 722, § 9); *Myers*, 272 U.S. at 265-74 (dissenting) (indicating Congress in the 1850s imposed an exam requirement on clerk candidates).

<sup>491</sup> *Cf. id.* at 88-89 (expressing apparent skepticism that the Article II phrase “established by Law” permits restrictions as constraining as limiting the choice to a small group of candidates).

<sup>492</sup> See, e.g., IRM § 30.4.1.2.1 (explaining the makeup of the Executive Resources Boards recommending applicants to IRS’s selecting officials); 26 U.S.C. § 7804(a) (authorizing the IRS Commissioner—rather than a department head—to employ persons “for the administration and enforcement of the internal revenue laws”). *But see* 5 U.S.C. § 3301(3) (authorizing the President to “appoint and prescribe the duties of individuals to make inquiries” for the purpose of civil service examination).

<sup>493</sup> 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 responsibility over the civil service laws and regulations); *id.* § 1104(c) (authorizing OPM to require agency corrective action for any legal violations when they act under their delegated examining authority).

prohibitive burden on the department head.<sup>494</sup>

Functional constitutionalists over the years have not necessarily been concerned about ensuring that modern government follows the precise formal meaning of textual constitutional provisions. But functionalists and purposivists have expressed concern with considerations such as Congress improperly aggrandizing its own appointments power at the expense of the Executive Branch.<sup>495</sup> Congress after all is the only branch of government given no appointments role in Article II’s “inferior officer” provision.<sup>496</sup> 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 would seem to be engaging in the very self-aggrandizement that even functionalist courts have rejected. Ensuring that Article-II appointed officials evaluate the competitive credentials of officer candidates and then submit those recommendations to the supervisory department head for final appointment seems more in line with both Article II’s text and purpose.

**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 are non-compliant 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.

*a. IRS tax collectors:* IRS agents’ duties include, among other things, reviewing tax returns, conducting audits, and collecting overdue taxes. Federal officials responsible for collecting funds on behalf of the government would seem to fit within the “original public meaning” of the term “officer.”<sup>497</sup>

*b. Officials authorizing benefits payments:* 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 for billing purposes, applying payments, and maintaining responsibility “for all reimbursable billing activities.”<sup>498</sup> 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.

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<sup>494</sup> See *infra* Part IV.B.2.

<sup>495</sup> See, e.g., *Weiss v. U.S.*, 510 U.S. 163 (1994) (relaxing the restrictions on giving officers new duties when Congress has not increased its own power by hand-picking the officers to whom the new duties will be given).

<sup>496</sup> See U.S. CONST. art. II, § 2, cl. 2; see also GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* (7th ed. 2016).

<sup>497</sup> See Bureau of Labor Statistics: Tax Examiners and Collectors, and Revenue Agents, <https://www.bls.gov/ooh/business-and-financial/tax-examiners-and-collectors-and-revenue-agents.htm> (last accessed, Feb. 13, 2017).

<sup>498</sup> Available at <https://www.federaljobsearch.com/medical-reimbursement-technician-smyrna-tn-veterans-health-administration/1560824> (last accessed, Feb. 13, 2017).

*c. Contract specialist:* 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.”<sup>499</sup> Involvement with governmental contracts that includes helping to facilitate the expenditure of public funds or ensure 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 officers;<sup>500</sup> (ii) officials responsible for government investigations, audits, or cleanup efforts;<sup>501</sup> (iii) Administrative Law Judges, who “hear evidence, decide factual issues, and apply legal principles in all formal administrative adjudications”;<sup>502</sup> and (iv) IRS Office of Appeals officials who conduct hearings as a prerequisite to issuing taxpayer liens.<sup>503</sup>

## B. Accountability; Efficiency; Tenure; Patronage?

Even if the original meaning of Article II requires department heads to appoint certain civil service officials, Appointments Clause compliance would promote rather than degrade the values of accountability, excellence, and transparency that the constitutional Framers and civil service reformers intended to achieve. This section explains how that might work.

**1. Accountability:** The Framers adopted the Appointments Clause as a safeguard against the “diffusion of responsibility”<sup>504</sup> that develops when multi-member bodies

<sup>499</sup> <https://www.usajobs.gov/GetJob/ViewDetails/455935200/#btn-how-apply> (last accessed, Feb. 13, 2017).

<sup>500</sup> “Police Officer,” Veterans Affairs. Paid on the GS scale. Announcement available at <https://www.usajobs.gov/GetJob/ViewDetails/434684500/> (last accessed, Feb. 13, 2017).

<sup>501</sup> See, e.g., Job announcement for “General or Environmental Engineer,” <https://www.usajobs.gov/GetJob/ViewDetails/455999600/>. (“Oversee the installation’s compliance with environmental regulatory standards”; “Review abatement activities”) (last accessed, Feb. 13, 2017).

<sup>502</sup> Cf. *Free Enter. Fund* (Breyer, J., dissenting); J. Randolph concurrence in *Landry v. FDIC*; Barnett, *supra* note 22, at 797, 799-803, 810-14 (concluding that ALJs are “inferior Officers” under longstanding and recent Supreme Court precedent).

<sup>503</sup> See Lindstedt, *supra* note 23, at 1158 (2011) (concluding that IRS appeals personnel are “officers”). *Contra Tucker*, 676 F.3d at 1130-31 (holding these officials are not Article II officers).

<sup>504</sup> See Gillian Metzger, *Appointments, Innovation, & the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1619 n.53 (2015) (citing PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF RESPONSIBILITY (1995), which Professor Metzger characterizes as describing the growth of bureaucratic influence, “which decreases the efficacy of administrative institutions

select government officials.<sup>505</sup> 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.”<sup>506</sup> The allocation of appointments authority to individual entities ensures nominators may not act under the cloak of secrecy.<sup>507</sup> This in turn provides a direct line of accountability for any poorly performing officers back to the entity who first selected them.<sup>508</sup>

The ranking of competitive service applicants by a multi-member board not itself selected pursuant to Article II raises similar concerns about diffuse decision-making. If a new hire does not pan out, no single individual is clearly to blame. This modern system, responsible today for the selection of the vast majority of federal officials and employees, conflicts with the “Framers’ conclusion that widely distributed appointment power subverts democratic government.”<sup>509</sup>

**2. Efficiency:** Article II appointment of an expanded class of “inferior Officers” need not be prohibitively burdensome. Office of Legal Counsel analysis of statutory authorization for presidential appointment of certain lower-level military officers suggests that Article II appointments may consist of just giving final approval to an officer selection.<sup>510</sup> 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 appointments process to the Secretary of Defense, subject to presidential

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through a diffusion of responsibility”).

<sup>505</sup> See *supra* notes 37-38 and accompanying text; cf. WHITE, *supra* note 41, at 91 (noting that the Federalists generally disliked official boards, “believing them weak and irresponsible”). *But see Free Enter. Fund*, 561 U.S. at 513-14 (contending that petitioners had no evidence the Framers were concerned about single actors appointing *inferior* officers and 20th century practice demonstrated that collective bodies may be heads of departments).

<sup>506</sup> No. 76 (Hamilton), THE FEDERALIST, *supra* note 38, at 392. See also 1 FARRAND’S RECORDS, *supra* note 42, at 70 (King’s transcription of Wilson’s remarks: “If appointments of Officers are made by a sing. Ex he is responsible for the propriety of the same. not so where the Executive is numerous”). *But see id.* (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.”).

<sup>507</sup> See No. 76 (Hamilton), THE FEDERALIST, *supra* note 38, at 398-99.

<sup>508</sup> James Wilson, Government, Lectures on Law, 1 WORKS OF JAMES WILSON 294-95, reprinted in 4 THE FOUNDERS’ CONSTITUTION (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”).

<sup>509</sup> *Freitag*, 501 U.S. at 885.

<sup>510</sup> See “Assignment of Certain Functions Related to Military Appointments,” Office of Legal Counsel Memorandum, U.S. Dept. of Justice (July 28, 2005), available at <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/28/op-olc-v029-p0132.pdf> [hereinafter 2005 OLC Memo].

supervision.<sup>511</sup> The memo 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. 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.<sup>512</sup> 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.<sup>513</sup>

Delegation of substantial appointments-related duties to lower-level officials, if done properly, arguably also is consistent with the *text* of Article II. Under the historic definition of “officer” as one with responsibility for a governmental duty, any officials carrying out a statutory responsibility to hire officers would be subject themselves 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 the (ii) approbation of an assistant or deputy secretary, and then (iii) the secretary herself, creates a direct, albeit multi-layered, chain of accountability. In such a process, decisions at every 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, arguably, by its terms Article II suggests the word “appoint” is not coterminous with direct engagement at every step of the selection process. The principal 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.”<sup>514</sup> This phrasing indicates that the nomination—or initial recommendation of the principal officer—is distinct from the final step of appointment. 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. The department head could delegate even this final signoff to a lower-level officer.

*a. Just a Rubber Stamp?:* It might be reasonable to question whether department head approval of another official’s hiring selection provides true accountability.

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<sup>511</sup> *Id.* at 134 (finding that the statutory text permitted delegation, which is permissible under Article II). In contrast, OLC has concluded that the president may not delegate his principal appointments authority. *See id.* at 134-35.

<sup>512</sup> *Id.* at 132.

<sup>513</sup> *See* Act of Mar. 2, 1799, 1 Stat. 627, 624, *discussed in* 2005 OLC Memo, *supra* note 510, at 136 (noting an 1821 Attorney General opinion finding the statute constitutional).

<sup>514</sup> U.S. CONST., art. II, § 2, cl. 2 (emphasis added).

Perhaps the department head over a poorly performing officer would try to distance himself, contending he had not in fact selected the official. But this claim would have little persuasive value if every official in the hiring chain were appointed under Article II with the approval of the department head. In such a system the department head would have selected his immediate subordinate who in turn would have selected his subordinate and so on down the line. Even if a prior department head had presided over the initial hiring, the current department head and his subordinates would be responsible for having kept on board the bad actor. The Supreme Court has intimated that accountability can permeate this kind of multi-tiered federal supervision.<sup>515</sup> As Professor Gillian Metzger points out, the President’s “duty to supervise” does not necessarily mean he must be in control of each and every decision. Rather he must sit at the top of the hierarchy of others who may at times have the duty to supervise.<sup>516</sup> Analogously, a department head could fulfill his responsibility for high-quality appointments by sitting atop the selection structure for federal officials.

*b. Group Appointments:* Along with finding that department heads and the President may delegate appointments responsibilities to lower-level officials, the OLC has concluded that final approval for appointees may be applied to *groups* of officers. According to this executive branch analysis, appointees do not have to be evaluated one by one.<sup>517</sup>

*c. Commissioning:* The constitutional requirement that the President commission each and every officer also is not necessarily inherently unwieldy. 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.”<sup>518</sup> And as of 2010 there were 210,000 active-duty commissioned military officers,<sup>519</sup> 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.<sup>520</sup> Gouverneur Morris from

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<sup>515</sup> Cf. *Free Enter. Fund*, 561 U.S. at 477 (suggesting the President can hold a department head to account for how that department head in turn supervises other officers).

<sup>516</sup> Cf. Gillian Metzger, *supra* note 370, at 1879-82 & 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.”).

<sup>517</sup> 2005 OLC Memo, *supra* note 106, at 132.

<sup>518</sup> *Id.* at 137-38 (citing Attorney General opinions from as early as 1855).

<sup>519</sup> *Free Enter. Fund*, 561 U.S. at 543 (Breyer, J., dissenting). Cf. *Weiss*, 510 U.S. at 182 (Souter, J., concurring) (concluding that “commissioned military officers, are ‘inferior officers’”).

<sup>520</sup> 2 FARRAND’S RECORDS, *supra* note 42, at 627 (Madison: “[The Excepting Clause] 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.”).



Pennsylvania, who had moved to introduce the inferior officer appointments clause, replied this was not a concern because “Blank Commissions can be sent.”<sup>521</sup> Madison apparently agreed. Farrand’s *Records of the Federal Convention* did not report any further debate on the matter. The Founders that same day approved the Article II clause establishing department head and presidential approval of inferior officers.

**3. Tenure:** By suggesting that certain government employees should instead be classified as “officers” and appointed pursuant to Article II, this article does not 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.<sup>522</sup> But this need not be the case. In the earliest administrations, changes in officers as powerful as customs collectors came “almost entirely by resignation or death of the incumbent” rather than by termination.<sup>523</sup> Even the election of a new President did not necessarily lead to rotation in office. Thomas Jefferson, for example, retained numerous prominent customs collectors who had served in earlier administrations.<sup>524</sup> This is remarkable in that the Jeffersonian view of government was distinctly different from the views held by the Federalists throughout the administrations of Adams and Washington.<sup>525</sup> Even later in the 1800s when President Andrew Jackson started favoring rotation in office, Jackson’s removals extended primarily to “principal officers”<sup>526</sup>—officials whose “officer” status is not in question and thus not impacted by this article’s analysis. According to Professor Ari Hoogenboom’s history of civil service reform efforts from 1865-1883, Jackson removed “relatively few inferior officers.”<sup>527</sup> Thus, even under a president strongly committed to rotation in office and political removal, the vast majority of federal officers maintained their tenure.

**4. Patronage:** Concerns about patronage have existed since prior to the Constitution’s ratification. The Framers were aware of the problem of patronage; they selected Article II as the best way to guard against it. Their view was that

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<sup>521</sup> *Id.*

<sup>522</sup> *Cf. Free Enter. Fund*, 561 U.S. at 541-42 (opinion of Breyer, J., dissenting) (expressing concern about the potential broad reach of the Court’s holding).

<sup>523</sup> WHITE, *supra* note 41, at 304.

<sup>524</sup> *Id.*

<sup>525</sup> *See id.* at 51 & n.1 (describing the Jeffersonian Republican belief that the Federalists were monarchists with too expansive a view of federal power).

<sup>526</sup> *See* ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883*, at 5-6 (1968).

<sup>527</sup> *Id.* at 6 (observing that Jackson removed “only about 10 per cent of the civil service”).

transparency in the appointments process would be an effective safeguard against patronage.<sup>528</sup> As the federal government expanded during the 1800s, concerns arose about the exchange of office positions for campaign contributions or support.<sup>529</sup> Congress eventually responded by enacting a law requiring limited merit-based examination of prospective civil servants in 1853 and then, later, by enacting the more comprehensive Pendleton Act in 1883.<sup>530</sup> The Pendleton Act required more merit-based hiring and it created the United States Civil Commission, laying the groundwork for the civil service system as we know it under current law. 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 should ensure the direct chain of accountability from appointee to department head that Article II requires.<sup>531</sup>

### *Conclusion*

Extensive evidence suggests the 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 the Supreme Court’s “significant authority” standard and lower courts’ application of that test. Properly applying Article II requirements with this historically correct constitutional meaning would require changing the appointments 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 give just the final sign-off to a lower-level officer’s selection of Article II officials. Congress could permit this sign-off to be delegated to an officer who reports to the department head. Officials selected through civil service competitive procedures who are Article II “officers” as a historical matter also likely could continue to undergo competitive service selection—if certain changes were made. 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.

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<sup>528</sup> See *supra* Part IV.B.1.

<sup>529</sup> See HOOGENBOOM, *supra* note 524, at 8. *But see also id.* at 7 (suggesting that the original anti-spoils movement actually was motivated in large part not by populism or the furtherance of America’s best interests but by the privileged who were out of office trying to unseat those who were currently in office).

<sup>530</sup> *Id.* at 9.

<sup>531</sup> See *supra* Part IV.B.1 (discussing accountability objective).