Evidence that the President is an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment

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INTRODUCTION

In 1868, three years after the conclusion of the Civil War and the assassination of Abraham Lincoln, the 14th Amendment was ratified and became part of the United States Constitution. The Amendment officially overturned the notorious *Dred Scott* decision and was designed to grant citizenship and ensure equal protection under the law for recently freed slaves. But Section 3 of the Amendment also contained a provision that limited the ability of a small class of a former Confederates—those that had previously taken oaths to support the U.S. Constitution—from holding public office in the future:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Six months ago, William Baude and Michael Stokes Paulsen made headlines by publishing an article on SSRN, *The Sweep and Force of Section Three*,[3] in which they argued that Donald Trump's actions on January 6, 2021 qualified as an insurrection and that Section 3 therefore disqualified him from being elected President again. At the time, Trump was (and

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[2] Attorney, Provo, UT. The work of this paper should not be attributed for good or ill to my employer or any other entity. These entities had nothing to do with this paper, which was written off the clock..

[3] William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 118-22), https://ssrn.com/abstract=4532751.

Our primary focus for this article is answering whether the President is an "officer of the United States." We do not purport to cite every piece addressing the meaning of Section 3, nor do we purport to address every topic relating to Section 3. Specifically, it appears to us that enforcement of Section 3 was lax, and we do not view this fact as probative of the original meaning of the text. For additional reading on these topics related to Section 3, the reader is directed to Baude and Paulsen's article. For an alternative view, see Kurt T. Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment 42 (Oct. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4591838; *but see id.* at 2-3 *n.5* (declining to discuss whether the President is an "officer of the United States" under Section 3).

remains) the front runner for the Republican nomination for President in 2024. Baude and Paulsen's paper inspired lawsuits in 21 states, seeking to remove President Trump from the upcoming primary ballots.

Most of the media attention has focused on whether Trump actually "engaged in insurrection." This paper focuses on a far less titillating question. In order for Section 3 to apply to Donald Trump, he must have been an "officer of the United States" prior to committing the alleged insurrection. Baude and Paulsen argue that, as President of the United States, Trump was an officer of the United States.[4] In making that argument, Baude and Paulsen disagreed with an earlier piece by Josh Blackman and Seth Tillman, *Is President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*[5] Blackman and Tillman examined the original 1789 constitution and concluded that the founding generation understood that the President was not an "officer of the United States."[6] Their analysis focused on the text of the constitution and subsequent sources. Based on this conclusion, Blackman and Tillman "contend that the phrase 'officer of the United States' has the same meaning in Section 3 as it does in the Constitution of 1788."[7] This implies that "the elected President is not an 'officer of the United States.'"[8]

The answer to this dispute has undeniable urgency: On December 19, 2023, the Colorado Supreme Court concluded that Donald Trump is ineligible to be on the Colorado Republican primary ballot for President because he is disqualified under Section 3.[9] The opinion reversed a trial court judge who had found Trump did commit insurrection but that Section 3 did not apply because Presidents are not officers of the United States.[10] Rejecting Trump's contention that "officer of the United States" was a term of art, the state supreme court concluded that "[i]f members of the Thirty-Ninth Congress and their contemporaries all used the term 'officer' according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three."[11] The

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[4] *Id.* at 109; U.S. CONST. amend. XIV, § 3.
[5] Josh Blackman &Seth Barrett Tillman, *Is President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 NYU J.L. & Liberty 1 (2021).
[6] *Id.* at 21–24.
[7] *Id.* at 24.
[8] *Id.*
[9] *Anderson v. Griswold*, — P.3d —, No. 23SA300, 2023 Colo. LEXIS 1177, at *141-42 (Co. Dec. 19, 2023) (holding that "because President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot.").
[10] *Anderson v. Griswold*, No. 23CV32577, ¶¶ 241, 298, 313 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023) ("The Court finds that Petitioners have established that Trump engaged in an insurrection on January 6, 2021 . . . [Here] the Court is persuaded that 'officers of the United States' did not include the President of the United States . . . As a result, [Section 3 of the 14th Amendment] does not apply to Trump."). None of the dissenting Justices at the Colorado Supreme Court addressed this issue, leaving the majority's conclusion that the President is an officer of the United States unchallenged. *See Anderson,* No. 23SA300, at *142-228.
[11] *Id.*

court cited examples of the contemporaries of the Fourteenth Amendment referring to the President as an officer,[12] but only cited limited evidence about the use of the full term "officer of the United States."[13] Baude and Paulsen similarly cite limited historical evidence, spending under ten pages on this issue, which they spend discussing logical reasoning more than historical evidence.[14]

This article attempts to fill the gap in historical evidence and provide a more detailed theoretical foundation. Part I reviews Blackman and Tillman's article and the use of its arguments in the Colorado litigation.[15] In Part II, we respond to these arguments as a textual matter, ultimately concluding that "officer of the United States" was not a term of art at the time of the Founding. In Part III and IV, we then turn to the meaning of the phrase at the time of the ratification of the Fourteenth Amendment. In Part III, we discuss and confirm that historical records including the text, legislative history and ratification debates of the Fourteenth Amendment, the legislative history of the Fifteenth Amendment, and popular sources such as contemporary newspapers demonstrate that elected officials can be "officers of the United States."[16] Part IV then discusses specific evidence that the President is not just an officer, but is an "officer of the United States" as contemporaries of the 14th Amendment would have understood that term, relying on numerous texts, including legislative history, newspapers, and proclamations from President Andrew Johnson himself.[17] Part V reexamines case law that Blackman and Tillman rely on. We then conclude.

The intention of this article is to marshal some evidence that shows that at the time of the ratification of the 14th Amendment, the President was regularly thought to be and talked about as an officer of the United States. Blackman and Tillman acknowledge that it is "conceivable" that the meaning of the phrase *officers of the United States* experienced "linguistic drift" between 1788 and 1868.[18]

> But until proponents of the view that Section 3's "officer of the United States"- language includes the presidency put forward evidence as probative as *Mouat* and *Hartwell*, we will maintain that the original public meaning did not shift between 1788 and 1868. The President is not an "officer of the United States" for purposes of Section 3's jurisdictional element.[19]

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[12] *Id.* at 83–84 (using one quote from the first session of the 39th Congress and one Supreme Court decision).
[13] *See generally id*
[14] Baude and Paulsen, *supra* note 3, at 104-112.
[15] *See* infra Part I.
[16] *See* infra Part III.
[17] *See* infra Part III.
[18] Blackman & Tillman, *supra* note 5, at 22.
[19] *Id.*

Our goal is to respond to both this invitation and correct assumptions that underlie it.

Our conclusion is simple: the President was an officer of the United States as originally understood both at the Founding and the ratification of the Fourteenth Amendment. Numerous sources confirm that "officer of the United States" was not a term of art, which by itself settles the matter. Regardless, founding-era sources also refer to the President as an officer of the United States. This includes the Postal Act of 1792, which lists the President with officers of the United States. Additionally, there is strong probative evidence that, in 1868, President *was* considered an officer of the United States.

I. Summary of the Tillman-Blackman Interpretation and its use in the Colorado proceedings

This section attempts to fairly familiarize the reader with Blackman and Tillman's points, and walk through how their article informed the proceedings in the Colorado case regarding President Trump's eligibility to appear on the Colorado Republican Primary ballot.

A. Summary of Blackman & Tilman

Blackman and Tillman argue that Section 3 of the 14th Amendment cannot bar President Trump from holding future office because the only office he has held is that of President, and the President is not an officer of the United States. They compare the text of the 14th Amendment to the text of the original constitution and infer that (1) "Section 3's 'officer of the United States' language was imported from the Oath or Affirmation Clause[,]"[20]and (2) "[i]n 1788, the President was not an 'officer of the United States.'"[21] They also tentatively state a third conclusion: "[W]e do not think linguistic drift occurred with respect to the phrase 'officer of the United States'" between the founding in 1788 and the enactment of the Fourteenth Amendment in 1868.[22]

Blackman and Tillman first look at the constitution's text, specifically the use of the term "officers of the United States" in the Appointments Clause, the Commission Clause, the Impeachment Clause, and the Oath and Affirmation Clause. They claim that none of these clauses suggest the existence of officers who are elected, only officers who are appointed.

- First, Blackman and Tillman emphasize that the Appointments Clause states that the President shall appoint "Ambassadors, other public Ministers and

[20] Blackman & Tillman, *supra* note 5, at 22.
[21] *Id.* at 24.
[22] *Id.* at 25.

Consuls, Judges of the supreme Court, and *all* other Officers of the United States."[23] Because the President does not appoint himself, they reason that he cannot be an officer of the United States.

- Next, they rely on the Impeachment Clause's reference to "The President, Vice President and *all* civil Officers of the United States."[24] From this language, they conclude that "the president and vice president's [express] enumeration in the Impeachment Clause in addition to 'all civil Officers of the United States' shows that the president and vice president are not deemed 'officers of the United States' themselves. Otherwise, the Framers would have stated that 'all *other* civil officers' were subject to impeachment."[25]
- Third, they cite the Oath or Affirmation Clause, which requires the "Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States"[26] to take an oath to "support the Constitution." But because the President takes a different oath specified at the end of Article II, they conclude he must not be an officer of the United States.
- Finally, they note that Article II, Section 3, states that the President "shall Commission all the Officers of the United States."[27] Here, they argue, "All means all. This structure explains why appointed executive-branch and judicial-branch officers receive commissions, but there is no record of any elected official, whether a president, vice president or a member of Congress, ever receiving a [presidential] commission."[28]

Based on their analysis, Blackman and Tillman claim that "Section 3's 'officer of the United States' language was imported from the Oath or Affirmation Clause."[29] They make this claim because both clauses "reference the same four categories of office holders who swore an oath to support the Constitution: [1] Senators and Representatives, [2] members of the state legislatures, [3] executive and judicial officers of the United States, and [4] executive and judicial officers of the states."[30] Based on the parallel structure of these clauses, they conclude that because the President is not mentioned in the Oath or Affirmation Clause, the parallel language of Section 3 excludes him.

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[23] *Id.* at 22 (citing U.S. CONST. art. II, § 2, cl. 2). They fail to quote the entire relevant language, see nn. ___ - ____ and accompanying text here.
[24] *Id.* at 22 (citing U.S. CONST. art. II, § 4).
[25] *Id.* (emphasis in original)
[26] U.S. CONST. art. VI, § 3.
[27] U.S. CONST. art. II, § 3.
[28] Blackman &Tillman, *supra* note 5, at 22 (quoting U.S. CONST. art. II, § 3).
[29] *Id.* at 23.
[30] *Id.* at 11

Blackman and Tillman next argue that "[i]n 1788, the President was not an 'officer of the United States.'"[31] To support this conclusion, they first state that "[e]lected officials like the president are not 'Officers of the United States.'"[32] Second, they rely on the drafting process surrounding the original Constitution:

> For example, in the Succession Clause, the phrase "officer of the United States" was changed to "officer." In the Impeachment Clause, the phrase "[President, Vice President,] and other Civil officers of the U.S." was changed to "President, Vice President, and Civil Officers of the U.S." And in its final form, the Impeachment Clause became: "President, Vice President, and all civil Officers of the United States." The Framers changed the word that preceded "Civil Officers of the United States" from "other" to "all."[33]

From these changes, they conclude:

> This and other similar alterations to the draft constitution's "office"- and "officer"-language were significant. First, these revisions show that this language was not modified indiscriminately. The Framers paid careful attention to the words they chose. Second, the use of "other" in the draft constitution shows that at a preliminary stage, the Framers used language affirmatively stating that the President and Vice President were "Officers of the United States." But the draft constitution's use of "other" was, in fact, rejected in favor of "all." The better inference, arising in connection with the actual Constitution of 1788, is that the President and Vice President are not "Officers of the United States."[34]

Finally, Blackman and Tillman tentatively conclude: "[W]e do not think linguistic drift occurred with respect to the phrase 'officer of the United States'" between the founding in 1788 and the enactment of the Fourteenth Amendment in 1868.[35] They cabin this conclusion carefully, noting repeatedly that this conclusion was based on the lack of "direct, clear, or compelling evidence."[36] They cite two cases—*United States v. Mouat* (1888) and *United States v. Hartwell* (1867)—as evidence.[37] They also cite to statements from two individuals who viewed the President as not an officer of the United States:

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[31] *Id.* at 24.
[32] *Id.* at 23.
[33] *Id.* at 10 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791, at 260 (Boston, Hilliard, Gray, and Co. 1833)).
[34] *Id.* at 9–10.
[35] *Id.* at 25.
[36] *Id.* at 24.
[37] *Id.* at 26 (citing United States v. Mouat, 124 U.S. 303 (1888) and United States v. Hartwell, 73 U.S. 385 (1867)).

> In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States." Instead, Booth stated, the President is "part of the Government."
>
> Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'[38]

However, Blackman and Tillman admit that they "do not suggest that there is no counter-authority" but ask for evidence "as probative as" their own before they accept the proposition of linguistic drift.[39] We do not suggest that, if Blackman and Tillman were right about these core points, that they would be wrong in the conclusion they draw: that a President who had not otherwise served as an officer of the United States would not be subject to the Fourteenth Amendment.[40] Instead, we believe they are wrong on these points.[41]

Blackman and Tillman have written a more recent article, *Sweeping and Forcing the President into Section 3*, where they respond directly to Baude and Paulsen at length.[42] Much of their substantive discussion is indistinguishable from their earlier discussion as they focus their attention on their existing scholarship on the term "officer of the United States." As they did in their original article, they cite Senator Booth and David

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[38] *Id.* at 30 (citing Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War, on the Articles of Impeachment Exhibited by the House of Representatives 145; David A. McKnight, The Electoral System of the United States: A Critical and Historical Exposition of Its Fundamental Principles in the Constitution, and of the Acts and Proceedings of Congress Enforcing It 346 (Philadelphia, J.B. Lippincott & Co. 1878).

[39] *Id.* at 31.

[40] We, however, note that Blackman and Tillman concede that, had President Trump served as a member of Congress or been a governor prior to being elected president, he would be subject to Section 3. Id. at 47. Indeed, they note President Trump is "the only President in American history to have never held prior state or federal, civilian or military, public office." *Id.* Correct.

But this precedent has a bite. Accept that every President prior to Trump indeed had previously served " as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State" until President Trump. Did the drafters of the Fourteenth Amendment really both anticipate that some future President would not have held such a position, and specifically intend to exclude him— but not the other Presidents— from the disability anticipated by Section 3?

[41] See Sec. II, III, IV, infra.

[42] Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3*, 28 Tex. Rev. L. & Pol. 350 (forthcoming 2024).

McKnight.[43] They discuss the other Clauses their first paper discussed, and spend time critiquing Baude and Paulsen's discussion of this issue.[44]

But they continue to convey a commendable level of humility about their position: "Maybe Booth and McKnight were right, or maybe they were wrong. No doubt, there are other competing authorities."[45] "We do not say this question has an obvious answer. Rather, we say it does not have an obvious one. If so, ambiguity leans against extending disqualifications."[46] In discussing if there was linguistic drift regarding "Office … under the United States," they say, "[w]e would prefer to add to the body of scholarship and be correct, rather than overreach and be wrong."[47]

In their response to Baude and Paulsen, Blackman and Tillman point to the Oath and Affirmation Clause as the source of the meaning of terms in Section 3, suggesting that "[i]f we are correct, it illustrates that constitutional draftspersons, in 1789–1788 and 1866–1868, closely adhered to parliamentary drafting conventions," and critique the legal academy for not understanding those conventions.[48] They also repeat an argument made in the Colorado litigation: that because the Presidential Oath says "preserve, protect and defend" and the Article VI oath says "support," Section 3 includes the latter and excludes the former.[49] Blackman and Tillman also cite contemporary opinions by Attorneys General and others that link Article VI and Section 3.[50]

B. Reliance by Lower Colorado Court

In late 2022, Donald Trump announced he would run for President again.[51] In September 2023, five Colorado residents sued Colorado's Secretary of State, arguing that Trump was ineligible to be on the ballot in Colorado because he had violated Section 3.[52] Obviously, Trump intervened.[53] Trump cited Blackman and Tillman in support of the proposition that the President was not an officer of the United States.[54] Trump quoted the examples Blackman and Tillman gave: Senator Booth and Treatise writer David McKnight

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[43] *Id.* at 535. (internal cites)
[44] *Id.* at 535-36.
[45] *Id.* at 537.
[46] *Id.* at 543.
[47] *Id.* at 551 (italics removed).
[48] *Id.* at 541.
[49] *Id.* at 542.
[50] *Id.* at 543–46.
[51] Federal Election Commission, FEC Form 2; Statement of Candidacy, FEC-1661552 (2023), https://docquery.fec.gov/cgi-bin/forms/C00828541/1661552/.
[52] Anderson v. Griswold, No. 23SA300, 2023 Colo. LEXIS 1177, at *5 (Co. Dec. 19, 2023).
[53] *Id.*
[54] Anderson v. Griswold, Intervenors' Proposed Findings of Fact and Conclusions of Law, 43, 57, Nov. 11, 2023.

stating that the President was not an officer of the United States.[55] He also cited recent Supreme Court precedent, including the statement by Chief Justice Roberts that "[t]he people do not vote for the 'Officers of the United States.'"[56] Finally, Trump cited the Appointments Clause, the Impeachment Clause, the Commission Clause, and the Oath and Affirmation Clause, closely tracking Blackman and Tilman in some detail as to why each Clause supports the idea that the President is not an officer of the United States.[57]

The trial court ultimately ruled against Trump on every dispositive issue except whether the office of the President was an officer of the United States.[58] While the court did not cite Blackman and Tillman, it did cite to the same four clauses that Blackman and Tillman and Trump's briefing rely on—the Appointments Clause, the Commission Clause, the Impeachment Clause, and the Oath and Affirmation Clause.[59] The trial court also noted that the President takes a different oath than Article VI officers, suggesting that his oath was not covered by Section 3.[60]

However, part of the reason for the trial court's decision was the implications of an alternative conclusion. The court stated:

> To be clear, part of the Court's decision is its reluctance to embrace an interpretation which would disqualify a presidential candidate without a clear, unmistakable indication that such is the intent of Section Three. As Attorney General Stanbery again noted when construing the Reconstruction Acts, "those who are expressly brought within its operation cannot be saved from its operation. Where, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 160 (1867) (emphasis added). Here, the record demonstrates an appreciable amount of tension between the competing interpretations, and a lack of definitive guidance in the text or historical sources.[61]

C. Rejection by Colorado Supreme Court

Trump's core argument at the Colorado Supreme Court was that the catch-all phrase "officer of the United States" excludes the President as "no case, no statute, no

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[55] *Id.* at 43.
[56] *Id.* (citing Free Enterprise Fund v. Public Company, Accounting Oversight Board, 561 U.S. 477, 497-98 (2010)).
[57] *Id.* at 44-46
[58] Anderson v. Griswold, No. 23SA300, 2023 Colo. LEXIS 1177, at *14 (Co. Dec. 19, 2023).
[59] Anderson v. Griswold, No. 23CV32577, ¶ 311 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023)
[60] *Id.* ¶¶ 311, 313 n.19
[61] *Id.* at 314.

record of Congressional debate, no common usage, no attorney general opinion" supports the conclusion that the President is an officer and by contrast, three Constitutional provisions—the Appointments Clause, Impeachment Clause, and Commissions Clause in Article II—all distinguish the President from 'officers of the United States.' And 'officers of the United States' in Article VI take an oath different from the Presidential oath in Article II."[62] Trump also argued that the Presidential oath does not qualify as an oath under Section 3's requirements for disqualification.[63]

The Colorado Supreme Court disagreed. The court concluded:

- "[T]he normal and ordinary usage of the term 'officer of the United States' includes the President."[64]
- "Section Three's drafters and their contemporaries understood the President as an officer of the United States."[65]
- Trump was incorrect to argue that "'officer of the United States,'... is a constitutional term of art" because the court "perceive[d] no persuasive contemporary evidence demonstrating some other, technical term-of-art meaning."[66] In other words, if "officer of the United States" was a term of art, someone would have said so.
- Attorney General Stanbery's opinions on the subject suggest that the term "officer of the United States was to be broadly understood.[67]

However, the Colorado Supreme Court did not cite much historical evidence referring to the President by the term "officer of the United States." Many of the examples concerned referring to the President as an officer.

While three Justices dissented from the holding of the majority, none of them argued that the President was not an officer of the United States.[68]

D. The Colorado GOP's Petition for Certiorari

The Colorado Republican Party has filed for certiorari, represented by Jay Sekulow, a long-time ally of Trump who has argued fourteen 14 or more cases at the Supreme Court.

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[62] Anderson v. Griswold, Intervenors' Opening-Answer Brief, 11.
[63] *Id.* at 12.
[64] Anderson v. Griswold, No. 23SA300, 2023 Colo. LEXIS 1177, at *83 (Co. Dec. 19, 2023)
[65] *Id.*
[66] *Id.* at 84.
[67] *Id.* at 111.
[68] *Id.* at 155, 200-01 n.1 (using the term "officer of the United States" to reincorporate the language from Section 3 of the Fourteenth Amendment and from the holding of the majority). In his dissent, Justice Samour recognized the "vital need for definitional counsel" on questions such as who is an "officer of the United States." *Id.* at 186. Yet Justice Samour declined to consider this issue. *Id.*

The leading question presented concerns whether the President is an officer of the United States.[69] Their brief for certiorari reads like a merits brief.

In arguing that the President is not an officer of the United States, the brief makes the following core points: First, the President is not an officer because officers are commissioned by the President under the Commissions Clause, not elected.[70] Second, "officers of the United States" is a term of art that is only used in three places in the Constitution: Section Three of the Fourteenth Amendment, the Commissions Clause, and the Appointments Clause.[71] Trump argues that, "The Constitution uses a distinct, specific term, 'officer of the United States.' Generic references to the term officer do not overcome the more specific meaning evidenced by the constitutional language."[72] Third, they rely on the same sources of Senator Booth and David McKnight that were previously explained.[73] Fourth, they make a distinction between the Presidential oath and the Article VI oath, relying on Attorney General Stanberry's discussion of the Article VI oath.[74] Finally, they posit that this exclusion of the President from Section 3 makes sense as a policy matter:

> Every Senator or Representative represents a geographic area where sympathy for insurrection was (at the time of the post-Civil War era) a real and legitimate concern. Lower federal officers, meanwhile, are not elected and thus do not face national electoral scrutiny. Only the President (and Vice-President) face nationwide electoral accountability. And if an electoral majority of the voters determine that they want a certain individual as Chief Executive, regardless of alleged or even actual past transgressions, that is their national choice under the Constitution.[75]

(This last argument appears poorly reasoned; if a President had previously served as a Senator, Governor, or General, as many Presidents have, it would not matter that "an electoral majority of the voters determine that they want [that former President] as Chief Executive" if that President committed insurrection; they would be ineligible to run for a second term. This argument does not explain why the Fourteenth Amendment's drafters would have wanted to exclude only Presidents who had never held offices such as Senator, Governor, or General.)

II. "Officer of the United States" is not a term of Art.

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[69] Anderson v. Griswold, Petition for Writ of Certiorari, No. 23-696,(Dec. 27, 2023), i.
[70] *Id.* at 11-12.
[71] *Id.* at 12.
[72] *Id.* at 13.
[73] *Id.*
[74] *Id.* at 14.
[75] *Id.* at 15.

Despite Blackman and Tillman's articles being an impressive piece of careful scholarship, there are at least three reasons we remain skeptical of their conclusion that the original public meaning of "officers of the United States" did not include the President or Vice President: (1) corpus linguistics evidence—including our own past research—demonstrates that at the time of the Founding, "officer of the United States" was not a term of art but instead referred to any federal official; (2) the specific identification of the Presidency as an "office" in the text of the Constitution; and (3) additional contextual considerations that complicate Blackman and Tillman's otherwise straightforward textual analysis. While this topic merits an article of its own, we will address each reason briefly below.

A. Corpus Linguistics Evidence Supports that the President is an Officer of the United States.

First, the argument that the President is not an officer of the United States is built on the assumption that the phrase "officer of the United States" is a term of art[76]—an assumption that our past research refutes. In 2018, we co-authored an amicus brief on behalf of fifteen scholars of corpus linguistics, which we submitted to the U.S. Supreme Court in the case *Lucia v. SEC*.[77] As part of that brief, we performed a corpus linguistic analysis of the phrase, from which we drew the following conclusions:

> The phrase "Officer(s) of the United States" appears in [BYU's Corpus of Founding Era American English ("COFEA")] just 109 times between 1789 and 1799, with just over a third of those being direct quotations of the Constitution. This is a tiny minority of the 5,353 times the word "officer" appears in the database overall during this same period—even though 59.8% of the time the word "officer" appears in COFEA it is clearly referencing a federal [official].
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> While the relative obscurity of the longer phrase does not prove that it was *not* a legal term of art at the time of the Founding, we perceive no specialized meaning attached to its use [to suggest that it was]. Instead, the appellation was often used simply to clarify that the agent was in the employ

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[76] *See id.* at 12; *see also* Steve Calabresi, *Donald Trump Should be on the Ballot and Should Lose*, The Reason (Sep. 16, 2023), available at: https://reason.com/volokh/2023/09/16/ steve-calabresi-donald-trump-should-be-on-the-ballot-and-should-lose/ ("Thirty-three years of academic research and writing on the presidency has persuaded me that the words 'officer of the United States' are a legal term of art, which does not apply to the President"). While Blackman and Tillman never make this assertion explicitly, it is implicit in their arguments.

[77] Brief Submitted by Scholars of Corpus Linguistics as Amici Curiae, Lucia v. SEC, Supreme Court Case (filed by James Heilpern, Gene Schaerr, and Michael Worley). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132688.

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

We did not then—and do not see now—any evidence to suggest that the term excluded the President or was limited to some special subclass of federal officials. To the contrary, it applied broadly to all government officials—"civil and military"—exercising any non-trivial federal authority. For instance, in his Eighth Annual Address to Congress at the end of 1797, George Washington called for "legislative revision" of "[t]he compensation to the officers of the United States," particularly "in respect to the most important stations." Congress responded the following March, raising the salaries of sundry government officials, starting with "the President and Vice President of the United States."[78] The fact that Congress did not use the phrase "officers of the United States" in this appropriations bill, but instead referred generally to "officers," "offices," and "persons employed," even when referring to positions such as the Secretary of State, Attorney General, Secretary of the Treasury, Secretary of War, Chief Justice, and Consuls—positions that neither Blackman and Tillman nor President Trump would dispute are "officers of the United States" —further demonstrates that the larger phrase was not considered a term of art.

In fact, a corpus search of BYU's Corpus of Early Statutes at Large—which we created for our *Lucia* brief and which contains all of the Statutes at Large from the first five Congresses—reveals that Congress almost *never* used the phrase "officer(s) of the United States" during this time period, despite being an era when Congress was constantly exercising its power to "establish[] by law"[79] such positions within the new government. In its first decade, Congress used the phrase just thirteen times, while using the word *officer* or *officers* 1,481 times and office or offices 630 times. This would be baffling if "officer of the United States" was a legal term of art but makes perfect sense if the phrase merely designated a federal official—after all it was the Congress *of the United States* creating the positions, what other type of office would we expect? One for Virginia? Japan? In the absence of clear textual clues to the contrary—such as perhaps territorial officers—the default assumption should be that all of such positions created by Congress are officers of the United States.

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[78] Act of March 19, 1798, ch. 18, 5 Stat. 542.
[79] U.S. Const., art. II, sec. 2.

In addition, of the thirteen times the full phrase appears, one—a postal bill specifying which "officers of the United States" should be granted a franking privilege—specifically listed both the President and Vice President as officers of the United States.[80] So Trump is wrong in his conclusion that "not one authority holds that the President is an "officer of the United States"—no case, no statute, no record of Congressional debate, no common usage, no attorney general opinion."[81]

The conclusion that the phrase "officer of the United States" was *not* a term of art at the time of the Founding is further buttressed by the research of Professor Jennifer Mascott, who used aspects of corpus linguistics to demonstrate that the phrase was in use *prior* to the creation of the Constitution.[82] Using a corpus of 340,000 issues of early American newspapers, she found twenty uses of the phrase "prior to the signing of the Constitution on September 17, 1789."[83] The first reference was in 1780, describing Benedict Arnold as a "general officer of the United States."[84] It appeared again in 1783 referring simply to continental officers. Other uses included "Judicial Officers of the United States" and "commissaries and other officers of the United States" who gave out certifications of debt under the Constitution.[85]

Mascott also performed a corpus analysis of the Journals of the Continental Congress, "a highly relevant source for identifying the well-understood meaning of legally relevant terms and phrases in the time period just prior to… the drafting and ratification of the Constitution."[86] The Journals contain forty-one references to "officer(s) of the United States." Often the phrase was "just another way to describe continental military officers or to identify continental- level, as opposed to state-level, officers."[87] For example, one letter distinguished between the time a military officer served as an "officer of the United States" and the time he served as a captain for his State.[88]

Taken together, this evidence refutes the notion that the phrase "officers of the United States" created a special subcategory of federal officials. References to the President as an "officer" generally — which Blackman and Tillman and Trump dismiss —are therefore highly relevant for understanding whether the original public meaning of the full phrase

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[80] Act to Establish the Post Office of the United States, 5 Stat. 733.
[81] Anderson v. Griswold, Intervenors' Opening-Answer Brief, 11.
[82] Jennifer L. Mascott, *Who Are "Officers of the United States*"? 70 Stan. L. Rev. 443 (2018).
[83] Id. at 478.
[84] Id.
[85] Id. at 479.
[86] Id. at 477.
[87] Id. at 477- 78.
[88] Id. at 478 n.175.

included the President. And at least one bill, the Postal Act, squarely identifies the President as an "officer of the United States."

B. The Text of the Constitution Identifies the Presidency as an *Office*

Second, the original Constitution of 1789 repeatedly refers to the Presidency as an "Office" — a fact that is undisputed. For example, in Article I, it states "The Senate shall chuse . . . a President pro tempore, in the absence of the Vice President, or *when he shall exercise the office of President of the United States.*"[89] Likewise, in Article II, it states that the President "shall hold his Office during a Term of four Years" and limits eligibility "to the Office of President" to "natural born citizens" who have "attained the age of thirty-five years."

In an amicus brief submitted to the Colorado Supreme Court, Tillman acknowledges this. But he claims that "although the President holds an 'office,' he is not an 'Officer of the United States.'"[90]

We find this distinction difficult to square with early case law. In *United States v. Maurice*—an important Appointments Clause case Chief Justice John Marshall heard while riding the Circuit—Chief Justice Marshall concluded that "an office is defined to be a public charge or employment, and he who performs the duties of the office, is an officer. If employed on the part of the United States, *he is an officer of the United States.*"[91] While not binding precedent, *Maurice* was frequently cited by lower courts both before and after the ratification of the 14th Amendment and has been cited approvingly by the U.S. Supreme Court seventeen times, including in the majority opinion of *Metcalf & Eddy v. Mitchell*,[92] and more recently in Justice Thomas' concurring opinion in *Lucia v. SEC*. Blackman and Tillman have repeatedly quoted Justice Felix Frankfurter's quip that when language is "obviously transplanted from another legal source"---as the phrase "Officers of the United States" in Section 3 clearly is—"it brings the old soil with it."[93] We see no reason why that soil should not include Chief Justice Marshall's early definition of an officer of the United States explicitly linking offices with officers.

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[89] U.S. Const., art I, sec. 3.

[90] Seth Barrett Tillman, Brief Submitted by Professor Seth Barrett Tillman as Amicus Curiae in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump, Anderson v. Griswold, Supreme Court Case No. 2023SA300 (Colo. Nov. 27, 2023, 1:13 PM) (filed by Reisch Law Firm, LLC and Josh Blackman et al.), 2023 WL 8188397, Available at SSRN: https://ssrn.com/abstract=4644676

[91] 26 F.Cas. 1211 (No. 15,747) (C.C.D.Va. 1823) (emphasis added).

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

[93] Blackman & Tillman, *supra n.* 5, at 23 (citing United States v. Castleman, 572 U.S. 157, 176–77 (2014) (Scalia, J., concurring) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947))).

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

Third, we find Blackman and Tillman's textual analysis of the original meaning of the phrase "officers of the United States" to be incomplete because it overlooks important contextual details. The phrase appears in the original Constitution of 1789 four times: in the Appointments Clause, the Impeachment Clause, the Oath and Affirmation Clause, and the Commission Clause. Context leads us to disagree with Blackman and Tillman's readings of three out of four of these clauses. Along the way we critique the argument recently presented that suggests the President is not an Officer of the United States because he does not take an oath that has the words "support the Constitution" drawn from Article VI of the Constitution.

1. Appointments Clause

With respect to the Appointment Clause, it is *not* true that the Constitution empowers the president to appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all* other Officers of the United States," as has been asserted by Trump. He only has the authority to 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*."

Other scholars have puzzled over this phrase. Some individuals suggest that there are no officers of the United States outside Article II, Section 2. To explain what to do with "whose Appointments are not herein otherwise provided for," a proponent of this view, Professor Chad Squiteri, explains:

> Article II, Section 2, Clause 2's reference to "Appointments . . . not herein otherwise provided for" should not be understood as a reference to [other positions such as] Members of Congress. Instead, the use of 'herein' in Article II, Section 2, Clause 2 is best understood as a reference to Article II, Section 2, Clause 2 itself. Specifically, when Article II, Section 2, Clause 2 states "herein," it references the types of appointed officers mentioned within the very same clause – i.e., "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court."[94]

Key to Squiteri's argument is the distinction between individuals who are appointed, and individuals who are elected: "Article I does not speak to the 'appointment' of Members of Congress – it speaks to their election."[95]

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[94] Chad Squitieri, Towards Nondelegation Doctrines, 86 MO. L. REV. 1239, 1263 (2021).
[95] *Id.* at 1262.

Not everyone embraces this theory. One of the original[96] students of the Constitution, Alexander Hamilton, paraphrased the Appointments Clause for Federalist 67 as follows:

> The second clause of the second section of the second article empowers the President of the United States "to nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other OFFICERS of United States whose appointments are NOT in the Constitution OTHERWISE PROVIDED FOR, and WHICH SHALL BE ESTABLISHED BY LAW."[97]

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

Hamilton has a few other modern allies, although none who cited him in support of their views. In a 2004 Article, Professor Thomas Merrill took the position that:

> This Appointments Clause provides that the President shall appoint ambassadors, judges, "and all other Officers of the United States, whose Appointments are not herein otherwise provided for. .. ." *Id.* (emphasis added). The most likely referent of "herein otherwise provided for" would be the Members of Congress, whose method of appointment is detailed in Article I.[98]

But this is the extent of Merrill's analysis, which was tucked into a footnote in an article otherwise about Article I, Section 1 (which also contains the term 'herein').[99]

Another ally of Hamilton is the late Justice Antonin Scalia. Writing a concurrence in *Noel Canning v. NLRB,* Justice Scalia explained:"Except where the Constitution or a valid federal law provides otherwise, all 'Officers of the United States' must be appointed by the President 'by and with the Advice and Consent of the Senate.'"[100] Thus, Justice Scalia stated that there are Officers of the United States listed in the Constitution but not appointed by the President. Tillman actually wrote the Justice to ask what he meant by this statement. Justice Scalia surprised him by responding and left no doubt as to his position:

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[96] We have not found a reading of Article II Section II from the founding period that explicitly agrees with Squiteri. Please write us if there is one.

[97] Federalist 67 (Capitalization in original)

[98] Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2136 n.157 (2004). Merrill relegated his analysis to a footnote.

[99] Squitieri's piece is also largely about Article I, Section 1.

[100] *NLRB v. Noel Canning*, 573 U.S. 513, 569 (2014) (Scalia, J., concurring)

> I meant exactly what I wrote. The manner by which the President and Vice President hold their offices is "provide[d] otherwise" by the Constitution. As is the manner by which the Speaker of the House and the President Pro Tempore of the Senate hold theirs.[101]

So, if Merrill, Hamilton, and Scalia are right, who are these other officers alluded to in the Appointments Clause? As the Table 1 makes clear, the potential universe is small:

Position	**Appointment Mechanism**
Members of the House of Representatives	"Chosen every second Year by the People of the Several states"[102]
Electors [of Members of the House]	"Shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[103]
Speaker and other Officers of the House[104]	Chosen by House
Senators	"[C]hosen by the Legislature [of each state]"[105]
President Pro Tempore and "Other Officers" of the Senate	Chosen by the Senate[106]
President of the United States	Electoral College[107]
Vice President	Electoral College[108]
Electors for President and Vice President	"[I]n such Manner as the Legislature thereof my direct."[109]

It should be noted that all but one of these positions is selected by a *vote* taken either by the people (in the case of members of the House of Representatives) or a representative body (in the case of Senators, the President, Vice President, and members of the Electoral

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[101] Letter from Hon. Antonin Scalia, U.S. Sup. Ct. J., to Seth Barrett Tillman, Lecturer at Nat'l University of Ireland Maynooth, available at: https://perma.cc/JX3Z-DDYB.
[102] U.S. Const., art. I, sec. 2.
[103] *Id.*
[104] *Id.*
[105] U.S. Const., art. 1, sec. 3.
[106] *Id.*
[107] U.S. Const., art. 2, sec. 1
[108] *Id.*
[109] *Id.*

College). That is why Squiteri objects to *any* of these being considered "officers of the United States." But what other choice do we have? If officers cannot be elected, there would be no officers "whose appointments are . . . otherwise provided for" elsewhere in the Constitution.

Blackman and Tillman argue that that is precisely the point. In their third article in their ten-part series on *Office and Officers,* they address the phrase "whose appointments are not herein otherwise provided for" head on:

> The phrase . . . is admittedly a mouthful. We think this phrase tells the reader that the appointment of "Officers of the United States" is limited to the processes announced in Section 2. This sub-clause directs the reader *not* to scour the remainder of the Constitution for other provisions that provide authority to fill other federal "Officers of the United States" positions—by election or appointment. In other words, the Appointments Clause's "not herein otherwise provided for"-language is not an invitation to search for other constitutional provisions providing authority to create or fill federal offices; rather this language puts the reader on notice that no such constitutional provisions exist beyond the textual bounds of Article II, Section 2.

In their view, anyone advocating for an "alternative reading that leads readers to look for other constitutional mechanisms to fill 'Officers of the United States' positions is mistaken." They critique the statements of both Hamilton and Scalia mentioned above, calling the former unclear[110] and the latter wrong.[111] But why? Because as Table 1 shows, any other reading violates the rigid distinction between appointed officers and elected officials.

Except . . . there was no rigid distinction between "appointment" and "election" at the time of the Founding. The words appear to have been used interchangeably, at least to the extent that an election was considered a mode of appointment. A simple search of the Corpus of Founding Era American English reveals dozens of examples of individuals, offices, and officers being "*appointed* by the people."[112] For example, in a speech given during the Constitutional Convention, James Madison discussed different options for

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[110]Seth Barrett Tillman and Josh Blackman, Offices and Officers of the Constitution, Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses, 62 S. TEX. L. REV. 349, 444 (2023); ("We do not know for certain why Hamilton made this modification to the text of the Appointments Clause. Nor can we be sure that Hamilton intended this revision to advance any substantive arguments.")

[111] *Id/* at 448. ("We have some trepidation with stating that Justice Scalia, whose correspondence is sorely missed, was mistaken. But on balance, Scalia's short statement does not hold up. Even Homer sometimes nods.")

[112] To recreate our results, search for "appoint* by the people" in the Corpus of Founding Era American English.

selecting the President: "The option before us then lay between an appointment by Electors chosen by the people — and an immediate appointment by the people."[113] Likewise, during the impeachment trial of Senator William Blount, Congressman Robert Harper of South Carolina—one of the House Impeachment Managers—stated, "[T]he President himself is liable to be impeached, as well as the officers whom he appoints. So also is the Vice President. And yet these two great officers are *appointed by the people themselves,* in a manner far more direct and immediate than Senators, and removable at shorter periods."[114]

This fluidity can be seen in the first constitutions of the thirteen original states, as demonstrated in Appendices A and B. At the time, popular elections for chief executives and judges were almost unheard of.[115] Instead, executive and judicial officers were typically chosen by a state's General Assembly. But while some of the states used the word *elect* to describe this process,[116] others used the word *appoint*.[117] Often the same Constitution would use *both* words to describe the same process, often in the same sentence! For example, under the Georgia Constitution of 1776, the Governor was "cho[sen] . . . by ballot" by the legislature—that the drafters of Constitution considered this process to be both an election and an appointment is demonstrated by the governor's Constitutionally-mandated oath of office: ""I, A B, *elected* governor of the State of Georgia, by the representatives thereof, do solemnly promise and swear that I will, during the term of my *appointment*, to the best of my skill and judgment, execute the said office faithfully and conscientiously' according to law . . ." Likewise, the Maryland Constitution states that "a person of wisdom, experience, and virtue, shall be chosen as Governor . . . by the joint ballot of both houses." The ballots were to be counted by "a joint committee of both Houses" and the results then reported to the rest of the Assembly so "that the *appointment* may be entered." However, the Constitution then specified that if after two

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[113] "Method of Appointing the Executive, [25 July] 1787," *Founders Online,* National Archives, https://founders.archives.gov/documents/Madison/01-10-02-0072. [Original source: *The Papers of James Madison*, vol. 10, *27 May 1787–3 March 1788*, ed. Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, and Frederika J. Teute. Chicago: The University of Chicago Press, 1977, pp. 115–117.]

[114] 8 Annals of Cong. 2315 (1799) (Gales and Seaton ed., 1851). V

[115] *But see*, Const. of Mass. (1780).

[116] See, Const. of N.J., art. VII (1776) ("That the council and assembly jointly in their first meeting after each annual election, shall by a majority of votes, *elect* some fit person with the Colony to be a governor for a year.").

[117] Const. of Del., art. 12 (1776) ("The president and general assembly shall by joint ballot appoint three justices of the supreme court for the State, one of whom shall be chief justice, and a judge of admiralty, and also four justices of the courts of common pleas and orphans' courts for each county, one of whom in each court shall be styled *"chief justice,"* (and in case of division on the Ballot the president shall have an additional casting voice,); Const. of Va. (1776) (""The two Houses of Assembly shall, by joint ballot, *appoint* Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, and the Attorney-General.").

rounds of voting, two or more candidates received the same number of votes, "then the *election* of the Governor shall be determined by lot."

With these state constitutions as precedent, it should not be difficult to accept *any* of the federal positions listed above in Table 1—especially the President of the United States—as officers of the United States. Which brings us to Chief Justice Roberts statement in *Free Enterprise* which Blackman and Tillman frequently invoke to support their conclusion that officers of the United States cannot be elected: "*[t]he people do not vote for the 'Officers of the United States,*'"[118] However, even if the Chief is right, that would only strike Members of the House of Representatives from our list in Table I. After all, the people do not actually vote for the President of the United States—the electoral college does. The state constitutions identified in Appendix A show that there was a long history of multi-member bodies appointing chief executives (and other officers) by ballot. That is *exactly* the process followed by the Electoral College. If the 152-member Virginia Legislature could "appoint" a judge, surely the Electoral College—which in 1789 had only 69 members—could "appoint" a President and Vice President as well.

There is a second reason we disagree with Blackman and Tillman's reading: it would limit the scope of the word *herein* to just that specific clause. And while that may not sound totally absurd when looking at the Appointments Clause alone, it makes no sense in the two other places the word appears in the Constitution. Take for example, the direct tax clause in Article I, Section 9: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration *herein before directed to be taken."* There are only two other references to an enumeration or census in the 1789 Constitution, neither of which is in Article I, Section 9. They're earlier, side-by-side in Article I, Section 2! The third and final use of the word *herein* is in the first sentence in the Constitution following the Preamble: "All legislative Powers herein granted shall be vested in a Congress of the United States[.]" Surely, Blackman and Tillman are not suggesting that there might be some legislative powers reserved for the President in Article II, so we are not sure why they insist on such a narrow construction of the inverse phrase in the Appointments Cause.

2. Impeachment Clause

We likewise are unpersuaded by Blackman and Tillman's reading of the impeachment clause. While their conclusion that the "the president and vice president's [express] enumeration in the Impeachment Clause in addition to 'all civil Officers of the United States' shows that the president and vice president are not deemed 'officers of the United States' themselves" is a *plausible* reading of the clause, we do not think it is the best reading. In English, this grammatical construction is often used to highlight the most

[118] Even if Chief Justice Roberts was wrong in his conclusion that "officers of the United States" cannot be voted upon, this would not undermine his conclusion that the Constitution forbids the granting of executive power without the Executive's oversight.

important or most famous member of a broader group. Consider the following actual line from a 1963 speech given by Congressman Hale Boggs of Louisiana on the floor of the House of Representatives: "He leads the orchestra when his records are playing. He's Dave Seville and Alvin *and all the Chipmunks*. He dances the twist like his life depended on it."[119] Was Representative Boggs *really* suggesting that Alvin was not a chipmunk? Or consider this line from an article from the Detroit Free Press: "[Vice President] Pence told Hannity Monday that all of his discussions with Zelensky, and all of the administration's contacts, 'were based upon proper considerations of how we support Ukraine."[120] Surely, the article wasn't suggesting that President Zelensky was *not* one of the Trump administration's contacts.

Nor is this construction a modern development. It appears frequently in documents from the Founding Era. Consider the closing line from a letter sent from General Charles Lee to his Commander-in-Chief: "My love to Mrs. Washington and all the Ladies– Adieu."[121] General Lee and General Washington may have had their differences, but Lee was clearly not suggesting that his commanding officer's wife was not a "lady." Likewise, one set of General Orders signed by Washington in 1777 stated, "The Commander in Chief thanks the Majors General Sullivan and Greene, and all the officers, and soldiers, engaged this day, to pursue the enemy, for their alacrity and zeal manifested in that service."[122] Per Blackman and Tillman's logic, we would have to conclude that Washington was suggesting that neither Sullivan—one of the heroes of the Battle of Trenton—nor Greene—the Continental Army's Quartermaster-General—were "officers." We think not.

Context matters here. And we think that context points to the best reading of the Impeachment Clause being that the President and Vice President being the two most important members of the broader category "officers of the United States" — the Alvin among the proverbial Chipmunks.

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[119] 109 Cong. Rec. A7410 (Dec. 4, 1963).

[120] It should be noted that the "Alvin and the Chipmunks" convention was employed at the time of the 14th Amendment, as well. For example, in a dispatch, Secretary of War Edwin M. Stanton stated "The duties of the President, his Secretary, and every officer of the Government and especially in the War Department and military service, are at this moment urgent and solemn duties." If not for the Chipmunk convention, one might be forced to conclude that the Secretary of War was not an officer of the Government! Edwin M. Stanton, *Arrest of a Newspaper Spy*, Boston Evening Transcript, Pg. 2 (Feb. 11, 1862). Likewise, Senator Timothy O. Howe of Wisconsin quoted and summarized a letter from W.L Sharkey to Secretary of State William H. Seward "in which he tells him that the *Governor and all the officers elected by the people* had been duly installed, qualified, and taken possession of their offices." 1866 Cong. Globe 3042. Context makes clear that the governor was an officer "elected by the people" in the same way that the President is an "officer of the United States."

[121] Letter from Major General Charles Lee to Geroge Washington (Feb. 19, 1776), available at https://founders.archives.gov/documents/Washington/03-03-02-0242.

[122] George Washington, General Orders (June 22. 1777), available at https://founders.archives.gov/documents/Washington/03-10-02-0104.

3. The Presidential Oath and the Article VI Oath

In their latest article, Blackman and Tillman pick up an argument from the litigation. The argument begins with the premise that the President takes an oath to "preserve, protect, and defend" the Constitution, found in Article II, and does not take the oath to "support" the Constitution, found in Article VI. Because Section 3 refers to officers who have "previously taken an oath … to support the Constitution of the United States," the President, the argument goes, has not taken such an oath and is not in the scope of Section 3.

This argument does not persuade us. In the first place, we are confident that one cannot take an oath to "preserve, protect, and defend" the Constitution without implicitly swearing to "support" the Constitution. By swearing to preserve, protect and defend the constitution, one swears to support it more.

Evidence from the time of the 14th Amendment supports our view. Recall that Section 3 extended to any "person… who, having previously taken an oath, … as an executive or judicial officer of any State, to support the Constitution of the United States" and subsequently engaged in insurrection.[123] Thus, no one doubts that executive officers in the Southern states— for example, South Carolina— who had taken an oath prior to the rebellion, were covered by Section 3.

But when you look at the oath South Carolina officers were required by the South Carolina Constitution to take, the language mirrors the Presidential Oath, not the Article VI Oath:

> Every person who shall be chosen or appointed to any office of profit or trust; before entering on the execution thereof, shall take the following oath: "I do solemnly swear, (or affirm), that I will be faithful, and true allegiance bear to the State of South Carolina, so long as I may continue a citizen thereof; and that I am duly qualified, according to the constitution of this State, to exercise the office to which I have been appointed; and that I will, to the best of my abilities, discharge the duties thereof, and *preserve, protect, and defend* the *constitution* of this State, *and of the United States*: So help me God.[124]

Given no one doubts Section 3 was to apply to South Carolina rebels, it is clear that the drafters of the 14th Amendment viewed an oath to "preserve, protect, and defend" the United States Constitution as an oath to "support" the United States Constitution. Any other reading of Section 3 appears absurd to us.

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[123] U.S. Const. Amend. XIV, s 3.

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

And South Carolina is not the only state. As documented in Appendix C, it appears Florida also had an oath that mirrored the Presidential oath, not the Article VI oath. Georgia's oath for its governor likewise mirrored the Presidential oath, while other officers received an oath that mirrored the language of Article VI.[125]

We also note that, in Florida, the constitution was drafted as a prerequisite to admission into the union. Thus, Congress viewed Florida's antebellum Constitution, complete with its "preserve, protect and defend" language, as acceptable language to satisfy Article VI''s "support" requirement. The Presidential oath, just like the oaths in Florida, Georgia, and South Carolina, qualifies as an oath under Section 3 of the Fourteenth Amendment

For the sake of completeness, we cite the Texas Constitution's oath, again approved by Congress prior to Texas' admission. Ignoring a section about dueling, the oath reads in full: "I, (A. B.) do solemnly swear (or affirm) that I will faithfully and impartially discharge and perform, all the duties incumbent on me as ----------, according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State[.]"[126]

If we were writing on a blank slate, we would doubt that an oath to "discharge and perform all the duties… agreeably to the Constitution" has the same vigor as an oath to either "support" or "preserve, protect, and defend" the Constitution. But this is not a blank slate: several Texans took an oath under their state Constitution to "discharge and perform all the duties… agreeably to the Constitution" and then forced Governor Sam Houston (who was loyal to the union) out of office as a part of joining the confederacy.[127] They were obviously covered by Section 3. There is no basis for arguing the President is not covered by Section 3 because his oath is, if anything, *more* rigorous than the requirement to "support" in Article VI: "preserve, protect, and defend."

Blackman and Tillman also rely on parallels between the structure of the Oath and Affirmation Clause of Article VI and Section 3 to suggest that the drafters used the Oath and Affirmation Clause as a model for Section 3. We have no quarrel with that. But because the presidential oath, like oaths of some state officers, *is* an oath to support the

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[125] We note here Georgia appears lax in enforcing Section 3. Georgia Governor Joseph E. Brown took an oath as governor prior to the war, participated in the rebellion, rapidly regained favor with the Union, and then served as Georgia Supreme Court Chief Justice before and after the enactment of the Fourteenth Amendment. Given the totality of the evidence, we believe this was likely a result of political favoritism towards him or a resistance to the amendment in the deep south, rather than revealing anything about the meaning of Section 3. (The resistance in Georgia to the Union was obvious: Georgia elected Alexander H. Stephens, former member of the US House of Representatives and then Vice President of the Confederacy, to the Senate in 1866. The Senate refused to seat him even before the ratification of the 14th Amendment. He later served as Governor of Georgia after the passage of the Amnesty Act of 1872.)

[126] Tex. Const. Art. XII (1869).

[127] *See*, *e.g.*, Kate Galbraith, *Sam Houston, Texas Secession — and Robert E. Lee*, The Texas Tribune

constitution through the language "preserve, protect, and defend," we make two suggestions. First, it is entirely possible that the President *is* mentioned as an officer in Article VI, as the President is "bound by Oath or Affirmation, to support this Constitution[.]"[128] He simply takes the more specific presidential oath to do so. Second, because we've already shown that oaths to "support" include oaths to "preserve, protect, and defend" and oaths to act "agreeably" we should be slow to read terms in Section 3 narrowly because they were (supposedly) used narrowly in the Oath and Affirmation Clause.

4. Commission Clause

Blackman and Tillman's best evidence comes from the Commission Clause. It is true that Section 3 of Article II of the Constitution states that the President "shall Commission *all* the Officers of the United States." If viewed alone, this might be a silver bullet. But as mentioned above, the Appointments Clause indicates that there *are* other Officers of the United States whose appointment mechanisms are provided for elsewhere in the Constitution. But none of the officials listed in the table above receive presidential commissions. This produces a bit of a conundrum. If Blackman and Tillman are right that officials that do not receive commissions cannot be "officers of the United States," then the Appointments Clause contains a meaningless surplusage. By contrast, if the phrase "*whose Appointments are not herein otherwise provided for"* is not surplusage, then either all does *not* mean all or the Commission Clause has not been liquidated appropriately and other officials—including the President and Vice President—should receive a Commission.

One way out of this Mexican standoff is to not read the Commission Clause literally. As Professor Lawrence Solum has noted, originalism is not literalism.

> [A] grave misunderstanding of contemporary formalism is the idea that formalists are seeking the literal meaning of legal texts, and nothing could be further from the truth. And that's because once we become acquainted with the philosophy of language, we realize that verbal communication, oral communication, written communication does not rely on words and punctuation marks alone to convey meaning, it also relies on context.
>
> We almost never say, explicitly, everything we wish to convey. Instead, we rely on a mutual recognition of reader or listener and author or speaker of the context of communication to fill in the gaps.
>
> So a famous example from the philosophy literature, Jack and Jill are married. And most of the time, we fill in that utterance with to each other.

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[128] U.S. Const. Art. VI.

> Because usually, when you say Jack and Jill are married, you mean to each other, although there are contexts where you might say those words in order to convey that Jack and Jill are actually married to other people [i.e. "I saw Jack and Jill coming out of the hotel room together, but Jack and Jill are married!"]
>
> In the law, it is the same. Context does much of the work of legal communication.

We think that the context suggests that the Commission clause should be understood to read the President "shall commission all the officers of the United States" *other than himself* or perhaps "shall commission all of the officers of the United States" *that he appoints*. While critics will argue that this is circular reasoning, we think it is superior to the alternative reading promoted by Blackman and Tillman and President Trump which views a whole clause of the Constitution as a mere "inkblot."[129]

* * * * *

In sum, we believe context matters, and the added context we've added here calls into question the conclusion that the 1789 Constitution implies that the President was not an Officer of the United States.

A. A Primer on Linguistic Drift

While our own review of the evidence from the Founding Era leads us to firmly conclude that the original public meaning of the term "officer of the United States" included the President and Vice President, we agree with Blackman and Tillman that "it is the sort of question on which dispassionate, reasonable minds can disagree after having reviewed competing streams of authority, argument, and evidence."[130] As we noted above, at a minimum the Appointments Clause and Commission Clause are in tension with each other, and *some* sort of saving construction is necessary to harmonize the two.

We likewise appreciate Blackman and Tillman's open mindedness about the possibility that the phrase "officer of the United States" could have undergone "some linguistic drift or slippage between the 1788 ratification of the Constitution and the 1868 ratification of the Fourteenth Amendment." As they explain in their 2021 article:

> Let's assume that the President is not an "officer[] of the United States" for purposes of the 1788 Constitution. Under that assumption, it is still possible

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[129] *The Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary,*100th Cong, 1st Sess 249 **(1987)** (statement of Robert H. Bork) (discussing the Ninth Amendment).

[130] Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (forthcoming 2024) (manuscript at 189).

> that the President might be an "officer of the United States" for purposes of Section 3. Thus, a reader might take the limited position that the President is an "officer of the United States" for the purposes of Section 3's jurisdictional element.
>
> This position is conceivable. Indeed, more than a decade ago, Tillman suggested that linguistic drift may have occurred with respect to this phrase between 1788 and 1868. He wrote that "[t]he stretch of time between the two events [1788 and 1868] was more than half a century. . . . It is hardly surprising that in the post-bellum epoch new meanings *might* have accrued to older language. Such linguistic slippage is common." . . . Absent contrary evidence, [however] the default presumption should be one of linguistic continuity, rather than a presumption of linguistic drift. In other words, the proponents of the view that Section 3's jurisdictional element applies to the presidency have the burden to prove two propositions. First, proponents must show that the particular linguistic drift involving the Constitution's "officer of the United States"-language had actually occurred. And second, proponents must show that Section 3's "officer of the United States"-language, in fact, drifted to include the presidency. In other words, even if the meaning shifted over time, it is not self-evident that the shift would embrace the presidency. Both propositions must be proven.[131]

Although we continue to respectfully disagree with Blackman and Tillman about the original meaning of the phrase "officer of the United States" in the original Constitution—and therefore believe that "linguistic continuity" favors holding that the President is an "officer of the United States" —we will devote the remainder of our article to marshaling evidence to demonstrate that even if they are correct about the meaning of the phrase in 1788, by 1865 the phrase had morphed to include elected officials, including the President of the United States.

But first, it is important to understand what we mean by "linguistic drift." The phrase was coined by Edward Sapir—an American anthropologist and linguist—back in 1921 when he observed:

> The drift of a language is constituted by the unconscious selection on the part of its speakers of those individual variations that are cumulative in some special direction. This direction may be inferred, in the main, from the past history of the language. In the long run any new feature of the drift becomes part and parcel of the common, accepted speech, but for a long

[131] Blackman &Tillman, *supra* n.5, at 25-26.

> time it may exist as a mere tendency in the speech of a few, perhaps of a despised few.[132]

It is difficult to be able to discern exactly when a word reaches its "tipping point," the moment in which the meaning that was favored initially by just "a despised few" becomes the prevailing norm. There is an analogy here to the difficulty courts face in determining when a registered trademark has gone generic. Even though many people use the word "coke" to refer to any soda, it is still largely a reference to the principal product of the Coca-Cola company. But the same is true *after* the tipping point has been reached. Even after the word "trampoline" and "escalator" reached a point of genericide, there were likely still those who used those words in their branded sense for some time.

Thus, we are not surprised that Blackman and Tillman have identified a few sources from around the time that the Fourteenth Amendment was ratified that use the phrase "officer of the United States" in a way that excludes the President. Whether these are vestiges of an earlier understanding of the phrase—as Blackman and Tillman suggest—or early-adopters of a linguistic innovation doesn't matter. As the subsequent sections will show, we think that at the time the 39th Congress convened to draft the 14th Amendment, the public meaning of the phrase included the President of the United States.

III. Evidence that Officers of the United States May Be Elected

Blackman and Tillman assert that one of the principal reasons that the President cannot be an officer of the United States is because officers are *appointed*, not elected.[133] They are not alone in this view. Professor Steven Calabresi—a long-time Trump critic—has advanced similar arguments.[134] However, as shown in Sections II.B and II.C above, this position is based on a linguistic anachronism. At the time of the Founding, the strict dichotomy between "appointments" and "elections" that we employ today did not exist. Rather, an election—either by the people or a multi-member body such as a legislature or the electoral college—was viewed as one potential mode of appointment.

That officers could be elected at the time the 14th Amendment was ratified was even more clear. In the following section, we will detail evidence gleaned from the text of the Amendment itself, legislative history of the 14th and 15th Amendments, the ratification debates in the states, and other sources that show that people regularly talked of officers being "elected."

A. Evidence from the text of the Fourteenth Amendment

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[132] (Sapir 1921:147).
[133] Blackman & Tillman, *supra* note. 5, at 26, 29, 32; Blackman & Tillman, *supra* note 42, at 548; Tillman, *supra* note ___, at 22-23; Blackman & Tillman, *supra* note 110.
[134] Calabresi, supra note 76.

The best evidence that at the time of the ratification of the Fourteenth Amendment the word "officers" was understood to encompass elected officials is the text of Section 3 itself:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, *or as an executive or judicial officer of any State*, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

Most of the scholarship about the scope of Section 3 of the Fourteenth Amendment has focused exclusively on federal officers, without considering the analogous state positions.[135] But having shown that "officers of the United States" was *not* a legal term of art at the time of the Founding,[136] the selection mechanism for the parallel state officials mentioned in Section 3 is equally valid evidence for whether "officers" can be elected as a general matter. This is especially true if Blackman and Tillman are right that "Section 3 was modeled after the structure and language of the Oath and Affirmation Clause."[137] The parallel structure and language of the Oath and Affirmation Clause presents Officers of the United States and Officers of the several states as closely analogous positions: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, *both of the United States and of the several States*, shall be bound by Oath or Affirmation, to support this Constitution."[138]

As noted above and shown in detail in Appendix A, at the time the original Constitution was ratified, few states had a Governor elected directly by the people. The rest had their governors selected by the state's General Assembly, usually through a ballot process that resembled (and perhaps inspired) the Electoral College. However, by the time the 14th Amendment was ratified, these facts had changed considerably. By 1865 the vast majority of states had governors elected directly by the people!

A similar evolution took place with respect to judicial officers. As shown in Appendix B, at the time of the Founding, judicial elections—at least as we conceptualize them today—were unheard of. Instead, judges were typically selected by the General Assembly, appointed by Governors, or were themselves legislators wearing a separate hat. But as Harvard Law Professor Jed Handelsman Shugerman has noted, beginning in the

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[135] CITE
[136] *Infra nn.* ____-____ and accompanying text.
[137] Blackman & Tillman, *supra* note 5, at 6.
[138] U.S. Const., art. VI.

1840s, America experienced something of a Constitution-writing renaissance, with many states adopting amendments or rewriting their constitutions entirely, introducing judicial elections in the process as part of a broader set of anti-legislative reforms.

> The constitutional revolutionaries of the time believed elected judges were more likely to enforce limits against legislative excesses. From 1846 to 1851, twelve states adopted judicial elections for their entire court systems, and five states adopted partially elective systems. By 1860, out of thirty-one states in the Union, eighteen states elected all of their judges, and five more elected some of their judges. There were also proposals to subject federal judges to election, but the federal constitution was far more difficult to change.[139]

In fact, the language of Section 2 of the 14th Amendment acknowledges this evolution explicitly. Section 2 abolished the Three-Fifths Compromise of the original Constitution, replacing it with a fairer calculation for representation: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." In an effort to prevent Southern states from disenfranchising African Americans, the Amendment then ties future representation to the number of eligible voters.

> But when the *right to vote at any election for the choice* of electors for President and Vice-President of the United States, Representatives in Congress, *the Executive and Judicial officers of a State*, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[140]

"The right to vote at any election for the choice of . . . the Executive and Judicial officers of a state" . . . it's difficult to be more explicit that officers can be elected than that.

Thus even if Blackman and Tillman were right about officers not being elected at the time of the Founding, we think these seismic changes of state constitutional law between 1789 and the outbreak of the Civil War would have necessitated an evolution of the meaning of "officers" generally to include elected officials.

B. Evidence from the Legislative History of the Fourteenth Amendment

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[139] Jed Handelsman Shugerman, THE PEOPLE'S COURTS 105 (2012).
[140] U.S. Const., Amend. XIV, Sec. 2.

Another rich source of evidence that the officers mentioned in the Fourteenth Amendment included elected officials is the legislative history produced by Congress while debating the merits of the Amendment. In citing this evidence, we are well aware—and agree with—much of the criticism about over-reliance on legislative history.[141] But in this and subsequent sections, we are not invoking legislative history in an attempt to divine Congressional *intent*. Instead, we are looking for clues about the way Congress used certain words and phrases. As Judge Frank Easterbook, one of the great critics of the use and abuse of legislative history once stated, "Clarity depends on context, which legislative history may illuminate. The process is objective; the search is not for the contents of the authors' heads but for the rules of language they used."[142] (In re Sinclair, 1989: 1343).

In total, we found statements from at least ten Senators and six Congressmen that suggest that according to "the rules of language they used" the word "officer" included elected officials. One of these statements included explicit references to "Officers of the United States." Senator Thomas A. Hendricks of Indiana proposed a change to the language of Section 3 that would have limited those barred from holding office in the future to those who entered the rebellion while they were still officers of the United States or one of the States. The reason was because he felt that a individual's Oath of Office expired at the end of each term:

> Everybody, by virtue of his allegiance, is bound to obey the Constitution of the United States, to stand by the Union. But this oath of itself is an oath of office binding upon him as an officer, else why is it that if a Senator taking this oath, serves six years and is reelected, he is sworn again? For the simple reason that he is entering upon another term of service, and for that term of service he must take this official oath to obey the Constitution of the United States. I presume this oath means as if it read, "*Senators and Representatives and all other officers in the United States* and in the States shall be bound by an oath or affirmation to support the Constitution of the United States in their offices." I know of no other purpose that there can be to require a special oath from an officer."[143]

By sweeping Senators and Representatives into the category of "officers of the United States," he made clear that he believed the category to be broad enough to include positions elected by multi-member bodies (such as Senators) or directly by the people (as with Congressmen).[144]

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[141] For a summary of criticisms of legislative history, see Brett Hashimoto and James Heilpern, *Solving the Cherry-Picking in Legislative History Use*, 12 J. L. & Language 48, 51-54 (2023).
[142] *In re* Sinclair, 870 F.2d 1340 (7th Cir. 1989).
[143] 1866 Cong. Globe 2898 (emphasis added).
[144] Some may object to this example because Senator Hendricks uses the phrase "officers in the United States" rather than "officers of the United States." The difference only makes a difference if the

Other statements made clear that the speakers thought that federal officers could be elected, even if they did not use the full phrase "officers of the United States." Since we have debunked the notion that "officers of the United States" was a legal term of art at the time of the Founding, these synonyms are equally valuable clues as to the intended meaning of the full phrase. Senator Luke Poland of Vermont stated that he felt the Amendment as written was more merciful than the rebels deserved because it preserved their right to vote: "we leave the great mass [of Southerners] utterly untouched, and the leaders with their lives, their property, the full enjoyment of all their civil rights and privileges, with *the right of voting for all officers, both State and national,* with the single restriction they shall not hold office."[145]

A number of these statements came during the debate in the House over an ultimately rejected section which would have stripped former Confederates of the right to vote until 1870.[146] For example, future president James A. Garfield—then a Congressman from Ohio—stated: "If the proposition had been that those who had been in rebellion should be ineligible to any office under the Government of the United States, and should be ineligible to appointment as electors of the President and Vice President of the United States, or if all who had voluntarily borne arms against the United States had been declared *forever incapable of voting for a United States officer,* it would, in my judgment, be far more defensible.[147] Congressman Robert C. Schenck, also from Ohio, used similar language while supporting the ultimately rejected proposal, claiming that it

> does not disfranchise, but refuses to enfranchise. If you say that the people of these States, because of their having been engaged in the rebellion, *shall not vote for Federal officers*, there is nothing taken from them, because they have already divested themselves of that privilege, voluntarily abandoned, given it up, flung it away by breaking loose from the rest of the Union, as far as by their act, disposition, and power they could do so.[148]

Likewise, Congressman Henry J. Raymond of New York, stated that the rejected section "proposes to exclude the great body of the people of those States from the exercise of the *right of suffrage in regard to Federal officers*."[149] Representative Rufus P. Spalding of

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Constitutional phrase is a term of art, which we feel the evidence clearly demonstrates it is not. As such, minor variations in the phrase is exactly what you would expect. To dismiss such examples runs the risk of circular reasoning.

[145] 1866 Cong. Globe 2964 (emphasis added).

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

[147] 1866 Cong. Globe 2463 (emphasis added).

[148] 1866 Cong. Globe 2470 (emphasis added).

[149] 1866 Cong. Globe 2502 (emphasis added).

Ohio supported this proposal to "disqualif[y] active and known rebels from participating *in the election of Federal officers*."[150]

There were also a number of other statements that discussed electing officers in general.[151] For instance, while arguing that Section 3 would not impose a punishment on former Confederates, but merely withhold a privilege, Senator Edgar Cowan of Pennsylvania stated that "[a]n elector is one who is chosen by the people to perform that function, just the same as an officer is one *chosen by the people* to exercise the franchises of an office."[152] Later in the debates he returned to this distinction, asking "is not the elector just as much *the choice of the community* as an officer is the choice of it, except that the electors are chosen by a class and described by a general designation, whereas the officer is chosen by name to perform certain functions?[153]

The widespread understanding that officers could be elected was repeatedly highlighted in the back and forth between Senator John B. Henderson of Missouri and Senator William Pitt Fessenden of Maine, as the pair debated an amendment to Section 2 proposed by Henderson. At the time, the language of Section 2 stated that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."[154] Henderson wanted to make the section more explicit, changing the language to read "But whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State, is denied to any of the male inhabitants of such State, &c."[155] He stated that "the inference [of this amendment] will be that it applies *only to those general elections at which political officers are elected,* members of the Legislature, Governor, judges, &c.*"*[156] While Fressenden disputed whether the amendment was really necessary, he clearly agreed that officers could be elected, stating that he believed that the

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[150] 1866 Cong. Globe 2509 (emphasis added).

[151] In highlighting these, we recognize that Blackman and Tillman (and President Trump) do not dispute that some officers can be elected, they just do not believe that officers of the United States specifically can be. But because we do not believe that the full phrase is a term of art, we believe that the contours of the word officer standing along informs the ordinary meaning of the word in the phrase officers of the United States. *See also* Brief Submitted by Scholars of Corpus Linguistics as Amici Curiae, Rimini Street v. Oracle, Supreme Court Case (filed by James Heilpern, Gene Schaerr, and Michael Worley). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3288811 ("In layman's terms, this means that in the relationship between adjectives and their nouns, the noun is king—[a modifier's] meaning and scope is always relative to the noun it is modifying").

[152] 1866 Cong. Globe. 2890 (emphasis added).

[153] 1855 Cong. Globe 2987 (emphasis added).

[154] 1866 Cong. Globe 3010 (emphasis added).

[155] *Id.*

[156] *Id.* (emphasis added).

original language was "intended to cover the election of officers generally."[157] Some time later, Senator George Williams of Oregon proposed his own amendment to Section 2 along the same lines, adding words which were ultimately ratified—"But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or members of the Legislature thereof"[158]—in order to (in his words) "specif[y] particularly *the officers for which these people must be allowed to vote* in order to be counted."[159]

Finally, we found a number of statements that support the proposition that *state* officers could be elected. While this proposition is hardly controversial—as shown in the last section the language of the 14th Amendment itself acknowledges it as fact—these statements are still relevant evidence for showing that officers as a class—be they federal or state—can be elected. Senator Henderson, after acknowledging that any effort to strip ex-Confederates of the right to vote would be unworkable, stated that under the Amendment, "Lee, Johnston, Wade Hampton, Moseby, and even Jeff Davis, are left as qualified electors, *competent to vote for State officers* and members of Congress."[160] Congressman John A. Bingham—the father of the Fourteenth Amendment—made a similar statement in the House,

> This amendment does not disqualify any rebel or aider of the rebellion from *voting at all the State elections for all State officers,* nor does it disqualify them from being appointed presidential electors. It amounts, therefore, to this: though it be adopted, and made part of the Constitution, yet all persons "who voluntarily adhered to the late insurrection, giving it aid and comfort," may *vote at all the State elections for State officers*, and, being largely in the majority in every insurrectionary State, may elect the State Legislature, which may appoint electors for President and Vice President of the United States, and from aught in the amendment may appoint rebels as such electors.[161]

Another example came during a debate over whether Confederate officials who had taken advantage of President Johnson's general pardon should be barred from holding future office under Section 3. Senator James Doolittle of Wisconsin believed that they should not. To demonstrate that the Amendment would still punish those most culpable, he noted that a number of "prominent rebel officials" remained unpardoned—535 of them—including thirty-seven "cabinet officers and *governors of States*."[162] Senator Hendricks likewise

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[157] *Id.* (emphasis added).
[158] 1866 Cong. Globe 3029
[159] *Id.* (emphasis added).
[160] 1866 Cong. Globe 3036 (emphasis added).
[161] 1866 Cong. Globe 2543 (emphasis added).
[162] 1866 Cong. Globe 2917 (emphasis added).

spoke of "judicial officers" being "elected."[163] Senator Henderson spoke of the people "elect[ing] . . . members of the Legislature, Governor, judges, &c*"*[164] as "polical officers."[165] And Senator Timothy O. Howe of Wisconsin quoted and summarized a letter from W.L Sharkey to Secretary of State William H. Seward "in which he tells him that the *Governor and all the officers elected by the people* had been duly installed, qualified, and taken possession of their offices."[166] Senator Henderson, Senator Fessenden, and Senator Daniel Clark of New Hampshire even briefly discussed the election of "municipal officers" and "town officers" such as mayors and recorders.[167]

Taken together, these statements reveal a consistent speech pattern among the Framers of the 14th Amendment of referring to elected officials at all levels of government—federal, state, and local— as "officers." It is also worth noting that while there may be examples suggesting the contrary—examples that could be revealed by a future corpus linguistics analysis of the Congressional Globe—we did not find any.

C. Evidence from the Ratification Debates of the Fourteenth Amendment in the States

Next, we turn to the ratification debates of the Fourteenth Amendment in the States. While not as well documented as the debates in Congress, they can still be a valuable source of evidence about how particular words or phrases were understood by the broader public at the time. Research into these debates has been greatly aided by a recently published collection published by Professor Kurt Lash.[168] It includes transcripts of state legislative history as well as contemporary newspaper articles reporting on these debates. Here, too, we see a consistent pattern—mined from the debates in Alabama, Louisiana, and North Carolina—of the word "officer" being broad enough to include elected officers.

- **Alabama:** On the day Alabama ratified the 14th Amendment (reversing its earlier rejection), the Alabama Senate Journal recorded the following two statements. First, "The Senate met at 12 m. and *elected officers.* The 14th amendment was ratified and the Senate adjourned until to-morrow."[169] And second, "In the House, *officers were elected* and the 14th amendment ratified."[170] Although these are legislative officers—as opposed to general state

[163] 1866 Cong. Globe 2899.
[164] *Id.*
[165] *Id.*
[166] 1866 Cong. Globe 3042 (emphasis added).
[167] 1866 Cong. Globe 3010.
[168] Kurt T. Lash, THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS, VOL. 2. (2021).
[169] *Id.* (emphasis added).
[170] *Id.* (emphasis added).

officers—the statements still show that officers can be elected as a general principle, not to mention elected by a multi-member body.

- **Louisiana:** An article reporting on the ratification of the 14th Amendment by Louisiana, which was published by the *Boston Daily News*, contained the following order from General Buchanan, the Commanding General of Union forces in the state: "All civil officers acting under military appointment will transfer their offices and everything pertaining thereto to their successors, *who have been duly elected*, and who are qualified under the laws of the State."[171]
- **North Carolina:** A Joint Committee Report Rejecting the Fourteenth Amendment contained the following statement: "A leading feature of this second section is, that, virtually, it makes the basis of representation to consist of the voters only, which is manifestly inconsistent with the theory of our political system. *The voters are merely the appointing power*, whose function is to select the representative; but his true constituency is the whole population. *It is a great fallacy to maintain that an officer represents only those who vote for him*."[172] Not only does this show that officers are elected, but demonstrates that Founding Era understanding of election being a type of appointment continued into the 1860s.

The Lash collection also contains a proposed "compromise" amendment—reported in the *New York Times*—which was proposed by Southern Governors to President Johnson after a number of Southern legislatures initially refused to ratify the 14th Amendment. The language of the Compromise Amendment's Section 4—which relates to apportionment of representatives—is particularly relevant for our purposes:

> SEC. 4. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when any State shall, on account of race or color, or previous condition of servitude, deny the exercise of the elective franchise at any election for the choice of Electors for President and Vice President of the United States, Representatives in Congress, Members of the Legislature and *other officers elected by the people*, to any of the male inhabitants of such State, being 21 years of age and citizens of the United States, then the entire class of persons so excluded from the exercise of the elective franchise shall not be counted in the basis of representation."[173]

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[171] *Id.* (emphasis added).
[172] *Id.*; see also *Journal of the Senate of the General Assembly of the State of North Carolina* 91 (1866-67) (Raleigh: Wm. E. Pell, State Printer, 1867) available online at https://bit.ly/2C9wRva.
[173] Lash, *supra* note 154 (emphasis added).

This statement not only shows that officers can be elected, but the phrase "officers elected *by the people*" suggests that officers can be elected in other ways, such as by multi-member bodies such as legislatures or the Electoral College.

D. Evidence from Legislative History of the Fifteenth Amendment

We also looked at the legislative history of the Fifteenth Amendment, which was passed by the 40th Congress. Although one Congress removed from the cohort that passed the 14th Amendment, it is still a valuable source of evidence of the linguistic conventions used in the 14th Amendment, especially since so many of the members of the 40th Congress were also members of the 39th Congress. As with the legislative history and ratification debates of the 14th Amendment and the Impeachment Trial of Andrew Johnson, we found a consistent linguistic pattern of referring to elected officials—including federal ones—as both "officers" and "officers of the United States."

- **Senator Frederick Theodore Frelinghuysen of New Jersey:** "The consequences, therefore, of adopting any separate system of qualifications for the right of voting under the Constitution of the United States would have been that in some of the States there would be persons capable of voting for the highest State officers, and yet not permitted *to vote for any officer of the United States*; and that in the other States persons not admitted to the exercise of the right under the State constitution might have enjoyed it *in national elections.*"[174]
- **Representative Samuel Shellaburger of Ohio**: "I understood the first proposition of the gentleman's argument to be substantially this: that if the Constitution had reposed in the States the unlimited power to *regulate the matter of voting for Federal officers* it would involve this mischief, to wit: that thereby the power would be placed in the States to withhold from the Government the election of Federal officers at all, and that that mischief might be fatal to the Government itself. Am I right in that statement?"[175]
- **Representative Charles A. Eldridge of Wisconsin**: "If the power exists in the Federal Government to pass this bill, whether under any one or all the provisions referred to, *then I admit that Congress has the right to control the whole question of suffrage and the qualification of electors for all officers*, *State and national*. There can be no reason for its entering the State and determining the qualification of those who are to elect the officers named in the bill that will

[174] *Cong. Globe*, 40th Cong., 3d Sess., 978-999 (February 8, 1869) (emphasis added); *id*. at Appendix, 153-54; *Cong. Globe*, 40th Cong. 3d Sess., 999 (February 8, 1869).
[175] *Cong. Globe*, 40th Cong., 3d Sess., 555-61 (January 23, 1869).

not apply to every officer of the State so far as the question of power is concerned. The electors of President and Vice President are not named in section four of the first article. The power claimed, therefore, under the word "manner" in this section can no more apply to them than to the Governor of the State or any other State officer. So that if it covers electors it may as well cover, and does as necessarily cover, all that is contemplated by the amendment proposed by the joint resolution."[176]

- **Representative James Burnie Beck of Kentucky**: "It is contended by the gentleman from Massachusetts that this is only a political punishment to be imposed on such States as refuse to obey the mandates of the first section till such time as Congress can enforce its provisions, which he asserts provides *that the right to vote for certain officers* cannot be denied or abridged."[177]

E. Evidence from Popular Sources that Officers are Elected.

Finally, we looked at popular sources such as newspapers and found numerous references to "officers of the United States," "federal officer," "national officers," and "officers of the general government" being elected. Searching the Newspapers.com database for the years 1850-1870, we found examples from almost every state and several territories. While our search was by no means exhaustive—we hope to perform a more comprehensive corpus linguistic analysis of the subject at some point in the future—it demonstrates the ubiquitousness of referring to "officers of the United States" in a way that includes elected officials.

- **Arkansas:** "To every marshall or duy elected officer of the United States. — You, and each of you are hereby commanded to bring up the body of J.W. Brown, said to be held in unlawful confinement on board the steamer Commodore . . ."[178]
- **Illinois:** "The right of loyal States to decide for themselves the suffrage question does not in our opinion, give them power to prevent citizens of the United States from voting for officers of the United States . . ."[179]
- **Kentucky:** "That a faithful execution of the fugitive save law—a non-interference with slavery where it exists in the States, by citizens of the non-slaveholding States—a non-interference with the slave owner in te Territories while Territories, and the condemnation and rejection for office of politicians

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[176] *Cong. Globe*, 40th Cong., 3d Sess., 638-58 (January 27, 1869).
[177] *Cong. Globe*, 40th Cong., 3d Sess., 686-96 (January 28, 1869).
[178] *The Best Joke of the Season*, Wash. Telegraph (July 12, 1854), *available at http://tinyurl.com/2458t5zh*.
[179] *The Negro Suffrage Plank in the Chicago Platform*, The Aegis (Jun. 26, 1868), *available at http://tinyurl.com/8wkzwuuz*.

ot [sic] a parties who shall hereafter attempt to agitate the subject of slavery, or make it a question in elections for officers of the United States, would restore peace and harmony to the States and people thereof."[180]

- **Massachusetts:** "If they are not citizens of the United States, then they have no right to vote for officers of the United States."[181]
- **New York:** "Charles C. Burleigh supported the resolutions against allegiance to the Constitution, and opposed voting for officers of the United States."[182]
- **Ohio:** "[S]upposing that no one should vote for a United States' officer, only for State officers, the General Government would cease to be, in four years."[183]
- **Pennsylvania:** "The unprecedented position of the legally elected officers of the United States should have at least gained for them the generosity of their former political foes."[184]
- **Vermont:** "The people of the States of California will sustain and uphold the constitutionally elected officers of the United States government, in all constitution efforts to preserve the integrity of the Union."[185]
- **Alabama:** "The South, for the humble privilege of being alowed to have a hand in the election of federal officers, has permitted her rights to be assailed and our leading politicians have compromised their principles for the sake of currying favor with their Northern allies."[186]
- **Connecticut:** "Mr. Blaine asked Mr. Stevens if the third section would not be considered objectionable, as it excluded from the right to vote for national officers all who have voluntarily aided rebellion, and asked if the amnesty would exempt such."[187]

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[180] *Orders of the Day*, The Louisville Daily Courier (Jan. 22, 1858), *available at http://tinyurl.com/2ru9ept6*.
[181] *The Dred Scott Decision*, The Liberator (July 31, 1857), *available at http://tinyurl.com/2rmxy44r*.
[182] *New England Anti-Slavery Convention*, The N.Y. Times (May 26, 1853), *available at http://tinyurl.com/4hhsh8x3*.
[183] Till P., *The Sacredness of an Oath*, Anti-Slavery Bugle (April 23, 1859), *available at http://tinyurl.com/bychkna4*.
[184] *An Old Town Hero*, The Adams Sentinel, Nov. 10, 1863, at 2.
[185] Vermont Christian Monitor (April 13, 1861) *available at http://tinyurl.com/8my63ktt*; (Reprinted in *The Sacramento Bee* (March 9, 1861); the Civilian *and Telegraph* (April 11, 1861)).
[186] *Trouble in the Camp*, Spirit of the South (Dec. 16, 1851), *available at http://tinyurl.com/y39c436y*.
[187] *XXXIXth Congress-First Session*, Hartford Courant (May 9, 1866), *available at http://tinyurl.com/ypu79kxv*.

- **Delaware:** "A universal suffrage bill has been prepared for presentation at the next session of Congress. It does not extend the suffrage beyond the eection of Federal officers."[188]
- **Georgia:** "However desirable it may be, in the minds of many, to abrogate the unjust discrimination on account of color which prevails in the qualification for voters in most of the States, and to establish a uniform rule in that respect, particularly in the *election of Federal officers*, the loyal people of the land have recently made too great a struggle for the maintenance of the Constitution, to seek to accomplish the object by Congressional enactment, at a sacrifice of the obvious meaning and spirit of that instrument."[189]
- **Idaho:** "It will be remembered a bill was some time ago prepared and introduced in Congress, in anticipation of this so-called ratification of the establishment of a depotism upon the ruins of the Republic, taking the management and control of elections of all Federal officers entirely away from the States, and subjecting the whole to the dictation and control of Congress."[190]
- **Indiana:** "While conservative and law-abiding citizens, who are deprived of the privilege of voting, may obey the law, others, with no characters to sustain and no reputation to lose—lawess in person and purse—such as are found in all our large cities, will vote for national officers in defiance of the law."[191]
- **Iowa:** "They know that the present Rebellion is the unprovoked work of bad, ambitious Demagogues, who have made a legal election of National officers an assumed justification for the worst of crimes."[192]
- **Kansas:** "It was then resolved that all who participated in the rebellion should be disfranchised from voting for Federal officers, and that the rebel debt should be repudiated."[193]
- **Louisiana:** "A radical member of Congress, now here, has prepared a bill, which will be presented at the opening of Congress, providing for national

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[188] *Congressional*, Smyrna Times (Jan. 15, 1868), *available at http://tinyurl.com/2jf22btd*.
[189] *The Age of Reason Returning*, The Weekly Telegraph (Sept. 13, 1867), *available at http://tinyurl.com/ykf8b4ap*.
[190] *Worth Thinking Seriously About*, The Idaho World (March 31, 1870), *available at http://tinyurl.com/3zpwxnd2*.
[191] *Reconstruction*, The Evansville Daily Journal (May 14, 1866), *available at* http://tinyurl.com/494m9xby.
[192] *The Responses,* The Weekly Times (March 14, 1861), *available at* http://tinyurl.com/3efb4par.
[193] *Reconstruction*, The Atchison Daily Champion, May 2, 1866, at 2.

suffrage. It differs very materially from similar bills presented by Mr. Sumner last session, and confines the suffrage to elections for national officers."[194]

- **Maine:** "In the coming campaign for the election of the officers of the national government, let the watchwords be the rights of the people, the rights of humanity."
- **Maryland:** "Third–all persons who participated in the rebellion to be disenfranchised until after 1870, so far as voting for federal officers is concerned."[195]
- **Minnesota:** "He said that one singular thing in the report was comparing Minnesota to Wisconsin in regard to the election of her federal officers. Wisconsin elects her officers and pays them out of the State Treasury; and it would be inconsistent for Minnesota to elect her federal officers and then have them paid out of the U.S. Treasury."[196]
- **Missouri:** "Mr. Raymond, of New York, while not willing to accept it as a condition precedent to Southern representation was willing that all of the amendment, but the third section, depriving those who voluntarily aided in the rebellion, from voting for Federal officers."[197]
- **Nevada**: "We do not believe that it is one of the rights of any State to deny any citizen of the United States a voice in the election of officers of the general government[.]"[198]
- **New Jersey:** "This act gives United States officers power to make arrests at the polls, and to inspect all records of elections for Federal officers[.]"[199]
- **North Carolina:** "Mr. Lincoln distinctly contends for the right of any State to confer upon negroes citizenship and the right to vote for Federal officers."[200]

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[194] *The National Suffrage Scheme*, The Times-Picayune (Nov. 7, 1867), *available at* http://tinyurl.com/mteva26b.

[195] *Reconstruction*, The Democratic Advocate (May 3, 1866), *available at* http://tinyurl.com/bddhjr47.

[196] *Legislative Assembly*, Saint Paul Weekly Minnesotan (Jan. 26, 1856), *available at http://tinyurl.com/5n8a4fnh*. We admit that we are not entirely sure what the author of this one is saying, although we note that at the time this article was written, Minnesota was still a territory, which blurs the lines between state and federal officers.

[197] *Another Day on Reconstruction—Another Day "Heading" Andy Johnson—Legislation in the District—Radical Dodge of the Negro Suffrage Issue*, Daily Missouri Republican (May 10, 1866), *available at http://tinyurl.com/44pdzyvh*.

[198] *The National or Federal Idea*, The Carson Daily Appeal (June 18, 1867), *available at http://tinyurl.com/3bcs3r4h*.

[199] *Our Washington Letter*, Monmouth Democrat (Aug. 4, 1870), *available at* http://tinyurl.com/yc8nch2k.

[200] *Mr. Lincoln and the "Peace Congress,"* The Daily Journal (Feb. 18, 1861), *available at* http://tinyurl.com/4jcrwsae.

- **Oregon:** "There was an informal meeting of a good many Republican Senators and Representatives to-day , to see if some action could not be had in the Senate to strike out the third section of the Constitutional Amendment, which disfranchises rebels from voting for Federal officers."[201]
- **South Carolina:** "To make out the inconsistency, he leaves out all the State elections 'so often recurring,' and Mr. Calhoun's influence, and represents me as having attributed our unanimity solely to the *election of Federal officers.*"[202]
- **Tennessee:** "Hence all the arrangements for the election of Federal officers by the people were necessarily based upon the rule that the persons entitled by law of the States to vote for members of the popular branch of the State Legislature should be the persons who would have the right to vote for representatives to Congress and for the presidential electors."[203]
- **Texas:** "The evils that follow from the concentration of the attention of the people to national offices are extravagance in expenditures, an intense excitement pending the election of national officers, and a neglect of the people and their representatives to look to their own home as calculated to benefit them in all the relations of life, and to make them a happy and prosperous community."[204]
- **Virginia:** "Mr. Boutwell reported a bill declaring who may vote for Federal officers, which he gave notice he would call up for action in ten days."[205]
- **Wisconsin:** "He has not only sought no office, but has been so scrupulous that, feeling it might be inconsistent and dishonorable to take any part in a government which he considered in league with injustice and wrong, he has for years abstained from voting for federal officers."[206]

When viewed collectively, we think it is beyond dispute that at the time of the ratification of the 14th Amendment, the ordinary meaning of the word "officer" in general and "officers of the United States" in particular included elected officials.

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[201] *General News*, Albany Democrat (May 19, 1866), *available at http://tinyurl.com/bde2hys3*.
[202] General Ayer, *Gen. Ayer's Reply to Col. Owens,* The Charleston Daily Courier (Oct. 20, 1859), *available at http://tinyurl.com/5n985j2u*.
[203] *The Fifteenth Amendment*, Nashville Union and American (July 15, 1869), *available at http://tinyurl.com/3x52c9er*.
[204] *Patriotic States Rights Sentiments*, The Texas Republican (Feb. 26, 1853), *available at http://tinyurl.com/y9k36dru*.
[205] *Second Dispatch*, Richmond Dispatch (Jan. 12, 1869), *available at* http://tinyurl.com/y78k5nuc.
[206] *Mob Violence in Cincinnati–Wendell Phillips*, Wisconsin State Journal (March 25, 1862), *available at http://tinyurl.com/u57r9392*.

IV. Evidence that the President is an Officer of the United States

Having shown the text, drafters of the 14th Amendment, ratifiers of the 14th Amendment, and others understood the word officers—including "officers of the United States"---to encompass elected officials, we now turn to the precise question of whether *the President of the United States* is an officer of the United States. In some respects, this is overkill. Having shown that the full phrase "officer of the United States" was not a legal term of art, President Trump's concession that the President is an "officer" is lethal to his case. However, in the following sections we will amass additional evidence to show that at the time of the drafting of the Fourteenth Amendment, it was a common linguistic convention to refer to the President as an officer of the United States.

A. Evidence from the Legislative History of the Fourteenth Amendment

As noted above, we looked to the legislative history of the Fourteenth Amendment not to determine the intended meaning of the Fourteenth Amendment, but to look for evidence of how the legislators used the phrase "officer of the United States" and its synonyms in the course of their duties.[207] Unfortunately, we did not find any explicit references to the President (or Vice President) as an "officer of the United States." We suspect that Blackman and Tillman would argue that this proves their point. As Tillman explained in his amicus brief to the Colorado Supreme Court, "These references to the President may have been made in a more colloquial sense, but they did not state the President was an 'Officer of the United States.'"[208] But that is exactly *our* point. The phrase "Officer of the United States" is *not* a term of art, and therefore its original public meaning is the "colloquial sense."

As noted in Section ____, even during the first few years of the Republic, when Congress was busy creating positions within the new government, Congress almost never used the full phrase "officer of the United States." The same is true of the debates over the Fourteenth Amendment. We found only twelve explicit uses of the phrase "officer of the United States" and one use of "officers of the United States." Of these, ten were quotations of the exact language of the proposed amendment and two were close paraphrases. But they did refer to the President as an "officer of the government," "executive officer," and "officer." This is exactly what you would expect if the full phrase was *not* a term of art, and such is still probative.

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[207] *See* Introduction to section III.

[208] Tillman, *supra* note ___ ("These references to the President may have been made in a more colloquial sense, but they did not state the President was an "Officer of the United States.").

For example, in discussing who had the power to declare the insurrection over, Senator Davis referred to the President as an "officer of the Government":

> [T]here was a necessity for some power, *some officer of the Government* to declare when the insurrection was suppressed. There is such a power and such an officer to execute it; and who is he? The Constitution had been attacked by an armed resistance to the execution of the laws, and an attempt to set up an independent power and government within the United States. *It is made the duty of the President*, by the Constitution, to the best of his ability to preserve, protect, and defend that Constitution, and to take care that the laws be faithfully executed throughout the United States."[209]

Senator Doolittle used the same phrase to discuss the relationship between the President and other officers within the Executive Department. He had been accused by Senator Trumbal of Illinois of suggesting that inferior officers were "officers of the President." Doolittle disagreed: "I stated that executive officers were responsible to the *President as the chief executive officer of the Government*. My friend from Illinois seems to think that because I made this statement that they are responsible to the President, because he under the Constitution has placed upon him the responsibility of seeing that the laws are faithfully executed, I intended to say that these men were subject merely to the will of the Executive and not to the laws of the land. Not at all, sir."[210]

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

- **Senator Howe**: "It was argued, I recollect, by the Senator from Pennsylvania [Mr. Cowan] some time since that the President had a peculiar gift, or a peculiar right, for doing these things *because he was an executive officer*.[211]
- **Senator Davis**: "We now see, though, that this majority, lately the friends of the President, are engaged in a war upon him, and that war manifests itself in various aspects and modes. They denounce him; they denounce his measures, his policy. He is a coordinate branch of the Government; or at least the executive department is, and *he is the chief executive officer*."[212]
- **Senator Davis:** "The powers of a Government are unavoidably augmented and energized during war, and then there is generally an accord between the legislative and executive branches, produced by the active presence of a

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[209] 1866 Cong. Globe 2914 (emphasis added).
[210] 1866 Cong. Globe 2914.
[211] 1866 Cong. Globe 3042 (emphasis added).
[212] 1866 Cong. Globe (June 6, 1866).

> common danger and a mutual effort to avert it, that makes the *chief executive officer* the instrument to give effect to their common policy and purposes."[213]

We found this language particularly probative given the connection identified by Blackman and Tillman between the Oaths and Affirmation Clause and Section 3.

We also found a fourth reference by Senator Davis to the President as simply an "officer." He referenced a debate back at the start of the Civil War about whether to seat the Senators elected from the loyal portions of Virginia—i.e. What would become West Virginia—after the rest of the state had voted to secede. The question was whether "notwithstanding the State of Virginia had passed an ordinance of secession and was in the condition of armed and active insurrection against the United States, still she was one of the United States and in the Union." Senator Davis said that the Senate decided that the question was a "political question" and '[t]hat *the President is the proper officer* and power to decide" it.[214]

B. Evidence from the Impeachment Trial of Andrew Johnson

We were unsatisfied with the relatively few references we found in the legislative history of the Fourteenth Amendment, especially since four of the six references we found came from a single Senator. Afterall, individuals can be linguistic rebels, part of the "despised few" Sapir discussed. We therefore looked at the transcript of the impeachment trial of President Andrew Johnson for more examples of legislative speech.[215]

Following the assassination of Abraham Lincoln, his Vice-President, Andrew Johnson, became President. Johnson, a loyal southern Democrat, had replaced a Republican, Hannibal Hamlin, as Lincoln's running mate in 1864. Given the Republican majorities in the House and Senate, conflict with Johnson soon occurred. Relevant to our discussion, Congress passed a law over President Johnson's veto that restricted his ability to fire officers appointed with the advise and consent of the Senate.[216] When Johnson ignored that law and removed Edwin Stanton as Secretary of War, he was impeached.

We selected the transcript of the trial as a document to examine because it involves frequent use of the word "officer" by the Congress after the Congress that passed the

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[213] 1866 Cong. Globe 2285 (emphasis added).
[214] 1866 Cong. Globe (emphasis added).
[215] One PDF of the transcript is found here: https://upload.wikimedia.org/wikipedia/commons/e/ed/Trial_of_Andrew_Johnson_-_president_of_the_United_States%2C_before_the_Senate_of_the_United_States%2C_on_impeachment_by_the_House_of_Representatives_for_high_crimes_and_misdemeanors_%28IA_trialofandrewjohn03john%29.pdf
[216] Tenure of Office Act of 1867.

Fourteenth Amendment. We view this transcript as a resource to answer multiple questions about the term "officer of the United States."

A search for the term "officer of the United States" reveals a limited number of hits like during the debates over the 14th Amendment, but several actually use that term to refer to the President. For example, during a lengthy speech explaining his views on the impeachment, Senator George Edmunds of Vermont said that "To this tribunal, sworn to impartiality and conscientious adherence to the Constitution and the laws, they [the founding fathers] committed the high powers indispensable to such a frame of government, of sitting in judgment upon the crimes and misdemeanors *of the President, as well as all other officers of the United States*."[217]

A statement of Senator Joseph Fowler of Tennessee is likewise evidence that the term "officer of the United States" includes the President. In explaining the Impeachment Clause of the Constitution he stated: "The framers of the Constitution" "defined in their great charter the offences for which a President or *other officer* could be impeached and divested of his office. The Constitution says that 'the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.'"[218] Here, the parallel structure of these sentences plainly indicates (1) that Senator Fowler viewed the President as an officer under the Impeachment Clause, and (2) that he did not see a distinction between "officer" and "civil officer of the United States."[219]

In addition, the trial transcript twice quotes an article[220] by John C. Hamilton, the son of Alexander Hamilton, which specifically identifies the *Vice* President as an officer of the United States, while discussing how the Constitutional Convention decided to have the Senate try impeachments. In this discussion, Hamilton recounts that on

> the 8th of September, Roger Sherman raised the objection that the Supreme Court was "improper to try the President because the judges would be appointed by him." This objection prevailed, and the trial was entrusted to the Senate by the vote of all the States with one exception; and thus, on the same day, immediately after, the subjects of impeachment were extended from treason and bribery to 'other high crimes and misdemeanors,' and thus

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[217] Johnson Impeachment Trial, 95 (emphasis added). Sen. Edmunds referred to the drafters of the Constitution as simply "the fathers"; bracketed text added for clarity.
[218] Johnson Impeachment Trial, 193-194.
[219] See nn. ___ — ___, and accompanying text, supra, for a discussion of why the text of the Impeachment Clause does not suggest the President is not an officer of the United States.
[220] We have unfortunately been unable to find the original article.

entrusted and thus enlarged, it was on the same day made to embrac*e 'the Vice-President and other civil officers of the United States.'*"[221]

Obviously, the inclusion of the word "other" in the phrase *"the Vice-President and other civil officers of the United States" implies that the Vice President is a civil officer of the United States.* Thus, the trial reveals that John Hamilton viewed the Vice President as a civil officer of the United States. Since all of Blackman and Tillman's arguments apply with equal force to the Vice President as to the President, we think that evidence that the Vice President is an officer of the United States is equally probative for the President, and vice versa. (We also note that if "officer of the United States" was understood at the time of the founding or subsequently to be a term of art that excluded certain officials including the President and Vice-President, one would imagine John Hamilton, as a son of one of the writers of the Federalist Papers, would have understood that.[222]

While these are the only direct references to the President as an officer of the United States, several Senators referred to the President as an officer. We reproduce them below:

- **Senator Davis:** "The Constitution has no provision declaring a violation of any of its provisions to be a crime ; that is a function of the legislative power, and it has passed no law to make violations of the Constitution, or of official oaths, *by the President or any other officers,* crimes."[223]
- **Senator Reverdy Johnson of Maryland**: "...but the Constitution for wise purposes says that in the contingency of an impeachment of a President of the United States *or any other officer falling within the clause* authorizing an impeachment, they are to become, as I understand, a court. So have all our predecessors ruled in every case; and who were they?"[224]
- **Senator Charles Beckalew of Pennsylvania:** "The Constitution provides that when there is no President or Vice-President to discharge the duties of the presidential office, such duties shall be discharged by some other *officer* to be designated by law, until a new President shall be chosen."[225]

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[221] Johnson impeachment trial 356 (emphasis added). The same source is apparently read at page 254 as well.

[222] Cf. New Prime v. Oliveira, 586 U.S. —, 139 S. Ct. 532, 539 (2019) (" Of course, statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law … But nothing like that exists here. ") (Emphasis added)).

[223] Johnson Impeachment Trial, 161.

[224] Johnson Impeachment Trial, 370.

[225] Johnson Impeachment Trial, 221.

- **Senator John Sherman of Ohio:** "The power of removal is expressly conferred by the Constitution only in cases of impeachment, and then upon the Senate, and not upon the President. The electors may elect a President and Vice-President, but the Senate only can remove them. The President and the Senate can appoint judges, but the Senate only can remove them. *These are the constitutional officers*, and their tenure and mode of removal are fixed by the Constitution."[226]
- **Senator Thomas Tipton of Nebraska:** "It appears that while General Emory was acting under a commission requiring him to observe and follow such orders and directions as he should receive from the *President and other officers* set over him by law, an order reached him embodying a section of law, which law had been previously approved by the President himself. However, as it provided that orders from the President and Secretary of War should be issued through the General of the army, or next in rank, and the President being engaged to remove the Secretary of War and thwart the action of the Senate, in a discussion with General Emory, as to his duty as an officer, said, 'This' (meaning the order) 'is not in conformity with the Constitution of the United States, which makes me Commander-in-chief, or with the terms of your commission.'"[227]

We must confess we have not examined the House proceedings on the impeachment of President Johnson at this time. We hope to be able to investigate it in future research. However, searching through Newspapers for Section IV.D below, did yielded this quote by Congressman John Bingham[228] from the house floor in the final days before President Johnson was impeached:

> "Did not the gentlemen know that it is written in the constitution that the President, the Vice President, and every other civil officer of the United States shall be removed from office on impeachment for and conviction of high crimes and misdemeanors."[229]

This is yet another example illustrating that the President and Vice-President were officers of the United States.

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[226] Johnson Impeachment Trial, 33.
[227] Johnson Impeachment Trial, 192. We note that the reference to "other officers set over him *by law*" is reminiscent of the Appointments Clause, further proof that an "officer" is an "officer of the United States."
[228] While we cite this quote for linguistic understanding, we note that Representative Bingham was a key drafter of the Fourteenth Amendment.
[229] Cong. Globe, 40th Cong., 2nd Sess. 1341 (1868).

Taken together, we believe that the legislative history of the Fourteenth Amendment and the Impeachment Trial of President Andrew Johnson demonstrates a consistent linguistic practice of identifying the President as an officer generally, and "Officer of the United States," specifically.

C. Evidence from President Andrew Johnson's Appointment Proclamations

We also found that Andrew Johnson—the President at the time the 14th Amendment was ratified—referred to himself as an "officer of the United States" in numerous official proclamations appointing individuals to important posts in the former Confederate states. For example, consider this May 29, 1865 Proclamation appointing William W. Holden Provisional Governor of North Carolina:

> *Whereas*, The President of the United States is by the Constitution made Commander-in-Chief of the army and navy as well as chief Executive officer of the United States and is bound by solemn oat, faithfuly to execute the office of President of the United States, and to take care that the laws be faithfully executed . . . I, Andrew Johnson, President of the United States and commander-in-chief of the army and navy of the United States, do hereby appoint Wm. W. Holden provisional governor of the State of North Carolina[.][230]

We found similar proclamations by Johnson appointing governors over Alabama,[231] Georgia,[232] Mississippi,[233] Texas,[234] and South Carolina.[235] In each of them, he referred to himself as an "officer of the United States." While these proclamations were largely formulaic, using almost word-for-word language, there were some interesting variations. In the Alabama, Mississippi, and North Carolina proclamations, he refers to himself as the "chief executive officer of the United States," but in the ones for Georgia, Texas, and South Carolina he adds a word, identifying himself as the "chief *civil* executive officer." This tiny difference persuades us that the terms that "chief," "civil," and "executive" were all just

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

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

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

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

[234] *Id.* (Johnson refers to himself here as the chief civil executive officer of the United States).

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

adjectives modifying "officers of the United States" —lest anyone try to argue that that a "chief executive officer of the United States" or "executive officer of the United States" is somehow different from an "officer of the United States" for purposes of Section 3.

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

A fourth strain of evidence that at the time the Fourteenth Amendment was ratified, the phrase "officers of the United States" included the President are the amnesty proclamations issued by Presidents Abraham Lincoln and President Andrew Johnson, pardoning confederates. On December 8, 1863, President Lincoln "issued a full pardon" which "restor[ed] all rights of property" to "all persons who have, directly or by implication, participated in the existing rebellion," provided that they willingly took an oath to "support, protect and defend the Constitution of the United States, and the union of States thereunder" and respect all laws and proclamations issued by Congress and the President respecting slavery during the Civil War.[236] Then in May 1865, President Andrew Johnson issued his own amnesty proclamation "grant[ing] to all persons who have directly or indirectly participated in the existing rebellion . . . amnesty and pardon, with restoration of all rights of property, except as to slaves."[237] Both of these proclamations contained a long list of exemptions—-individuals participating in the rebellion that were not covered by the general pardon—chief among them "all who are, or shall have been, civil or diplomatic officers or agents of the so-called Confederate government" as Lincoln put it, or in the words of Johnson "All who are, or shall have been, pretended civil or diplomatic officers, or otherwise, domestic or foreign agents, of the pretended Confederate Government."[238]

Subsequent history demonstrates that Confederate President Jefferson Davis and Vice President Alexander H. Stephens were not covered by either of these amnesty proclamations. Davis was dogged with prosecutions for years. As for Stephens, he was elected to the U.S. Senate in 1866, but prohibited from taking his seat due to restrictions on former Confederates.[239] While he would go on to serve as a Congressman from the

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[236] Abraham Lincoln, *Proclamation* (Dec. 8, 1863), available at: https://history.state.gov/historicaldocuments/frus1863p1/message1

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

[238] While we have placed this argument in Section IV, the Amnesty Proclamations are equally good evidence for establishing that officers may be elected as a general matter. Jefferson Davis was elected President of the Confederacy in 1862.

[239] Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Constitutional Commentary 87 (2021) (citing Edward McPherson, *The Political History of the United States of America During the Period of Reconstruction* 107–09 (Washington, Solomons & Chapman 1875)).

State and Georgia's fiftieth governor, both were after Congress passed the Amnesty Act of 1972.

But why were they excluded from Lincoln and Johnson's amnesty proclamation? Obviously because they were "civil officers . . . of the pretended Confederate Government." It's the only exemption that could possibly apply. And yet, the Confederate Constitution was modeled after the U.S. Constitution, and the four clauses that Blackman and Tillman cite to support their thesis that the President and Vice President are not officers of the United States, are copied word-for-word as shown below, with the exception that "Confederate States" is substituted in place of "United States," and some tweaks to capitalization.[240]

United States Constitution	**Confederate States Constitution**
"[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 . . ."	"[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 Confederate States whose appointments are not herein otherwise provided for . . . "
"[The President] shall . . . Commission all the Officers of the United States."	"The President shall . . . commission all the officers of the Confederate States."
"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."	"The President, Vice President, and all civil officers of the Confederate States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."
"The Senators and Representatives before	"The Senators and Representatives before

[240] While the Confederate States Constitution is not legal authority, it can serve as evidence of linguistic conventions of the day. The capitalization in the Confederate Constitution looks closer to modern conventions than that of the U.S. Constitution. The fact that the Confederate Constitution never capitalizes the word officers in the full phrase "officers of the Confederate States" is at least weak evidence that at the time of the ratification of the Fourteenth Amendment, the full phrase was not considered to be a term of art. It is also worth noting that the word is not capitalized in the 14th Amendment. We do not feel that the fact that word "Officer" is capitalized throughout the Constitution of 1789 suggests the contrary, any more than the fact that they capitalized the "C" but not the "s" in "supreme Court" tells us something about the original public meaning of Supreme Court.

mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;"	mentioned, and in the members of the several State Legislatures, and all executive and judicial officers, both of the Confederate States and of the several States, shall be bound by oath or affirmation to support this Constitution."

Yet, surely no one in the North would have allowed Alabama to elect Jefferson Davis to the Senate on grounds that he was just the *President*, not an officer, of the Confederate States.

Critics might quibble that neither Amnesty Proposal used the phrase "officers of the Confederate States" or at least "officers of the so-called Confederate States," and that the broader term "officers of the so-called Confederate government" was more all encompassing. But does anyone really believe that it would have made a difference if it did? We've already shown that the phrase "officers of the United States" was not a term of art, so why would it's counterpart be? An "officer of the so-called Confederate government" was the same thing as an "officer of the so-called Confederate States."

Others might argue that this line of reasoning is irrelevant because the Confederate Constitution was never recognized by the United States as valid law due to the Confederate States never recognized as a legitimate country. But it is still evidence of the linguistic norms of the day for at least twelve states—twelve states that ultimately ratified the 14th Amendment. Davis and Stephens were therefore officers only in "the colloquial sense."[241] But that is exactly the point. The colloquial understanding—or to put it in legal terms, public meaning—of the officers of a country, pretended or otherwise, included the President and Vice President.

F. Evidence from Other Contemporary Sources

Having shown that the President was frequently referred to as an officer of the United States, federal officer, and officer in various legal sources, we turn now to other more popular sources as evidence of the original public meaning of the Fourteenth Amendment.

First, we found dozens of newspaper articles[242] written between 1850 and 1870 that refer to the President explicitly as an officer of the United States. These articles—which we found by searching the Newspapers.com database—came from more than two-thirds of

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[241] Seth Barrett Tillman, Brief Submitted by Professor Seth Barrett Tillman as Amicus Curiae in Support of Intervenor-Appellant/Cross-Appellee Donald J. Trump, Anderson v. Griswold, Supreme Court Case No. 2023SA300 (Colo. Nov. 27, 2023, 1:13 PM) (filed by Reisch Law Firm, LLC and Josh Blackman et al.), 2023 WL 8188397, Available at SSRN: https://ssrn.com/abstract=4644676

[242] *See, e.g.*

the states that were part of the Union when the Fourteenth Amendment was ratified. They included newspapers from the Deep South, the far West, the mid-Atlantic, the midwest, and New England; papers in large cities like New York and Philadelphia and small towns like Rock Island, Illinois; papers that were Pro-Union and Pro-Confederacy. Some of the articles were actually reprintings of official government documents or Congressional speeches, while others were written by letters-to-the-editor or mere gossip; some were written by local authors, while other articles we saw reprinted in papers in multiple states. Through it all, we noticed a consistent linguistic pattern of using the phrase "officer of the United States" in a way that included the Presidency.[243] A fraction of the quotations are listed below:

- **Alabama:** "On the 20th of June, the day of his letter, there were a President of the United States, a Cabinet, Judges of the Supreme Court, and thousands of other civil officers of the United States."[244]
- **Arkansas:** "This creature [i.e. Brigham Young] and his deluded followers are in the constant habit of denouncing the President and all the other officers of the United States in the most indecent terms."[245]
- **California:** "Great power is contided [sic] to the President, Vice President, and othhr [sic] civil officers of the United States"[246]
- **Connecticut:** "[T]he President of the United States is by the Constitution made Commander-in-Chief of the Army and Navy, as well as chief executive officer of the United States, and is bound by solemn oath faithfully to execute the office of President of the United States . . ."[247]
- **District of Columbia:** "Mr. Fillmore . . . has been a faithful and honest President. . . . No chief executive officer of the United States ever displayed more wisdom, moderation, and conciliation."[248]
- **Georgia:** "[W]hereas, the President of the United States is, by the Constitution, commander-in-chief of the army and navy, as well as chief civil executive officer of the United States . . . I, Andrew Johnson, President of the United

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[243] To be sure, this was not a formal corpus linguistics analysis. Neither time, nor the Newspapers.com interface, allowed us to be quite so precise. There may be some newspaper articles that cut the other way, but the understanding that the President was an "officer of the United States" appears to be widely shared.

[244] Headquarters*, Department of Ala. Mobile, Ala., Sept. 20th 1865,* Montgomery Daily Mail (Sept. 26, 1865), *available at* http://tinyurl.com/szdtb46m.

[245] *The Mormons*, Weekly Arkansas Gazette (Nov. 28 1851), *available at http://tinyurl.com/3pd5jnp6*.

[246] *What is the Union?*, The Mountain Democrat, Nov. 21, 1863, at 2.

[247] Oliver Morton, *Senator Morton's Speech*, Litchfield Enquirer (Feb. 6, 1868), *available at http://tinyurl.com/2fm2sc7a*.

[248] *Mr. Fillmore*, The Daily Republic (Aug. 27, 1851), *available at* http://tinyurl.com/2mv5bpab.

States . . . do hereby appoint James Johnson, of Georgia, whose duty it shall be . . .to prescribe such rules and regulations as may be necessary."[249]

- **Idaho:** "The president and other officers of the United States receives a very small salary compared to the crowned heads of Europe."[250]
- **Illinois:** "Their contest has been one of principle alone—a principle which, if Mr. Lincoln is the chief executive officer of these United States for the next four years, he will be compelled to carry out."[251]
- **Indiana: ""**"Now, the President is an officer of the United States . . ."[252]
- **Iowa**: "This vain old man was made to believe that he was in communication with the Secretary of State, the President, and other important officers of the United States."[253]
- **Kansas:** "Jefferson Davis . . . personally advised and assisted in maturing the plan for the cowardly murder of the President and other officers of the United States government."[254]
- **Kentucky:** "The 'august master' of Russia, in his letter to President Lincoln, has given the Chief Executive officer of the United States some wholesome advice."[255]
- **Louisiana:** "No provision of this nature has ever been made for the widows or families of any one of the Presidents or other civil officers of the United States."[256]
- **Maine:** "Whereas the President of the United States is by the Constitution made commander-in-chief of the army and navy, as well as chief Executive officer of the United States . . . I, Andrew Johnson, President of the United States, do

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[249] Andrew Johnson, *Appointment of James Johnson as Provisional Governor of Georgia, and Andrew J. Hamilton as Provisional Governor of Texas—Proclamation by the President,* The Macon Telegraph (June 29, 1865), *available at* http://tinyurl.com/4zxevudb.

[250] *Small Salary*, The Idaho Statesman (May 12, 1868), *available at http://tinyurl.com/527ptzzf.*

[251] *The Vote of Rock Island*, The Rock Island Argus (Nov. 9, 1860), *available at http://tinyurl.com/ye6epyby*.

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[253] *Santa Anna,* Nashville Union and American, June 27, 1867, at 4.

[254] *Jefferson D. and his Friends–What Shall We Do With Them?*, The Atchison Daily Free Press (May 20, 1865) , *available at* http://tinyurl.com/3rux28jz.

[255] *Russia's Advice to President Lincoln*, The Louisville Daily Courier (Sept. 16, 1861), *available at* http://tinyurl.com/35e4nrnz.

[256] *Abraham Lincoln's Widow*, Detroit Free Press (May 13, 1870), *available at* http://tinyurl.com/2ceenr4v.

hereby appoint William W. Holden, Provincial Governor of the State of North Carolina."[257]

- **Michigan**: "No provision of this nature has ever been made for the widows or families of any one of the Presidents or other civil officers of the United States."[258]
- **Minnesota:** "The Post argues editorially that the plot for the murder of *Lincoln*, Johnson, Seward, Stanton and Grant, was known and approved by Jeff. Davis and other rebel leaders. It says that the very time when the assassins in Washington were preparing to do their work, Davis opened negotiations with Sherman, in which he dealt with that General as if Sherman were in fact *chief officer of the United States Government, the others [including Lincoln] being supposed to be killed*."[259]
- **Mississippi:** "At the instance of *President Johnson*, and to facilitate his patriotic work of reconstruction, the people of the South elected members [to] Congress. Without this invitation from *the Chief Executive officer of the United States*, they would not have afforded the radical majority in Congress an opportunity for perpetrating an outrage which virtually defeats the end for which so much blood and treasure were expended during the past four years."[260]
- **Missouri:** "Then the clause after being so amended so as to include besides the President, the Vice President, and other civil officers of the United States . . . was agreed to as now found in article 4, section 2 of the Constitution."[261]
- **New York:** "[T]he result was that neither the President, Vice President, nor other civil officer of the United States could lawfully do an act . . . contrary to the good morals . . . of the office he holds."[262])

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[257] Andrew Johnson, *A Proclamation*, Bangor Daily Whig and Courier, (May 30, 1865), *available at* http://tinyurl.com/ycmfywn7.
[258] *Mrs. Lincoln's Pension—Adverse Report of the Senate Committee*, The Times-Picayune (May 11, 1870), *available at* http://tinyurl.com/34cjp86j.

[259] *Mustering Out*, The Weekly Pioneer and Democrat (May 12, 1865), *available at http://tinyurl.com/bdhb5j34*.
[260] *Our Condition–Our Future*, The Vicksburg Herald (Jan. 20, 1866), *available at* http://tinyurl.com/24nwmy9c.
[261] *Impeachment*, Daily Missouri Democrat (March 3, 1868), *available at* http://tinyurl.com/48yaudvb.
[262] *Impeachment,* The Brooklyn Union (Dec. 7, 1867), *available at* http://tinyurl.com/4juaa9fy.

- **North Carolina:** "Here the President decares, not merely as Commander-in-chief, but as "Chief Executive officer of the United States, that under the Constitution of the United States it is his duty to enforce the laws . . . ."[263]
- **Ohio:** "The design of the provision undoubtedly was to prevent the juncture of executive and legislative authority in the same individual; and unless its force is destroyed by some other provision, it is evident that neither the President nor any other officer of the United States . . . can legally be a member of either House."[264]
- **Pennsylvania:** "The official papers of Davis captured under the guns of our victorious army in the Rebel capitol identified beyond question or shadow of doubt, and placed upon your record, together with the declarations and acts of his conspirators and agents, proclaim to all the world that he was capable of attempting to accomplish his treasonable procuration of the murder of the late President, and other chief officers of the United States."[265]
- **South Carolina:** "[T]he Provisional Governor is hereby authorized and empowered to appoint a competent agent . . . and also as Agent of the Governor of this State in all matters which he may desire to bring through such Agent before the President or other officers of the United States Government"[266]
- **Tennessee:** "[T]he President is an officer of the United States"[267], available at
- **Vermont:** ". . . no less so in respect to Senators or Representatives than in respect to the President or any other officer of the United States."[268]
- **Virginia:** "All persons who shall have knowledge of such plot, and shall not disclose the same to the President or some other officer of the United States, shall be guilty of misprison of treason . . ."[269]
- **Wisconsin**: ". . . bill declaring the effect of impeachment by the House of Representatives, on the President and other officers o[f] the United States."[270]

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[263] *Chief Justice Ruffin against the New Constitution–He denounces President Johnson as a Despot and Usurper!*, The Weekly Standard (Aug. 1, 1866), *available at* http://tinyurl.com/52suh9yv.
[264] *Who Shall Succeed Mr. Johnson—Mr. Wade Not Entitled*, The Cincinnati Enquirer, April 13, 1868.
[265] *The Great Trial*, The Philadelphia Inquirer (June 29, 1865), *available at http://tinyurl.com/5n6juyhj*.
[266] W.M. Henry Trescott, *Report of Mr. Trescot,* The Charleston Daily News, Nov. 4, 1865, at 1.
[267] *Who Shall Vote for President*, The Tennessean (July 28, 1868), *available at* http://tinyurl.com/bdzm87pn.
[268] Mr. Foot, *Speech of Mr. Food of Vermont*, Rutland Weekly Herald (Nov. 14, 1856), *available at http://tinyurl.com/y733fj28.*
[269] *Senate, Monday, January 16,* Alexandria Gazette (Jan. 17, 1860), *available at* http://tinyurl.com/3h5d83cf.
[270] *Impeachment of Andrew Johnson*, The Telegraph-Courier (Nov. 28, 1867), *available at* http://tinyurl.com/5trub2t7.

It is worth noting that at least a few of these articles were reprintings of the official proclamations mentioned above, where he explicitly identified himself as the "Chief Executive Officer of the United States" or "chief civil executive officer of the United States."

Other newspaper accounts clearly referred to the President as a federal officer without explicitly using the phrase "officer of the United States." A few are shown below:

- **Connecticut:** "Mr. Covode on Monday also moved a resolution inquiring into the outlay of money for the purpose of electioneering, &c.,---and also inquiring whether the President or any other officer of government has with the use of money, patronage, or any other improper means, sought to influence Congress[.]"[271]
- **Delaware:** "This left me [James Buchanan] no alternative, as the chief executive officer under the Constitution of the United States, but to collect the public revenue and protect the public property, so far as might be practicable under the existing laws."[272]
- **Maine**: "While at Washington, subsequent to his escape from Richmond, the loyalty of Mr. Starrett was abundantly substantiated to the satisfaction of the President and other officers of the Government."[273]
- **Maryland:** "Hon. John Cochrane accompanies the officers of the Seventh Regiment to the President's House this morning, and introduced them to the President and other officers of the Government."[274]
- **Massachusetts:** "It declares the title of all abandoned lands to be in the United States, and forbids the President or any other officer of the Government from surrendering it or doing any act to impair or affect the title of the United States."[275]
- **New Jersey:** "The Embassy first landed at Washington and will be received by the President and other officers of the Government with great ceremony."[276]

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[271] *News of the Week*, Litchfield Enquirer (March 8, 1860), *available at* http://tinyurl.com/3m36yncw.
[272] James Buchanan, *A Message From the President*, Weekly Delaware State Journal and Statesman (Jan. 11, 1861), *available at* http://tinyurl.com/bdfw682u.
[273] *Arrest of Loyal Refugee*, Bangor Daily Whig and Courier (Aug. 12, 1864), *available at* http://tinyurl.com/2z2nypak.
[274] *The Seventh Regiment of New York*, The Daily Exchange (Feb. 24, 1860), *available at* http://tinyurl.com/555cyxhf.
[275] *Congress*, The Recorder (Jan. 20, 1868), *available at* http://tinyurl.com/y35n8bcv.
[276] *The Japanese Embassy*, West-Jersey Pioneer (May 19, 1860), *available at http://tinyurl.com/y28a36ty.*;

- **Pennsylvania:** "He was the President, the chief officer of the government[.]"[277]
- **West Virginia:** "[T]hey not only often call it requisition, but find it to answer the end desired, which is proven by their nomination for President, and other officers of the government."[278]

We also found evidence in legal treatises of the day. In *Commentaries on American Law,* the great American jurist James Kent stated, "The President is the great responsible *officer* for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it."[279] And Calvin Townsend in his educational reader, *An Analysis of Civil Government*, was even more explicit: "The Vice-President is an Officer of the United States."[280] Because all of Blackman and Tillman's arguments apply equally to the Vice President as it does to the President, we find this to be relevant as well.

Finally, in the Republican Party Platform of 1868, we found the following statement that explicitly identifies the President as as an officer, "We profoundly deplore the untimely and tragic death of Abraham Lincoln, and regret the accession of Andrew Johnson to the Presidency, who has acted treacherously to the people who elected him and the cause he was pledged to support; has usurped high legislative and judicial functions; has refused to execute the laws; has used his high office to induce *other officers* to ignore and violate the laws."

IV. *Hartwell* and *Mouat* revisited

Having marshaled significant evidence to that the original public meaning of the phrase "officer of the United States" —both at the time of the Founding and the ratification of the Fourteenth Amendment—was broad enough to include elected officials generally and the President, in particular, we now look with fresh eyes at the two cases Blackman and Tillman cite in support of their conclusions, *United States v. Hartwell* and *United States v. Mouat*.

A. United States v. Hartwell Supports Our Conclusion that the President is an Officer of the United States.

United States v. Hartwell was a criminal case brought under the Act of June 6, 1846, which criminalized embezzlement of public funds. The Defendant was a clerk in the

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[277] *The President's Re-Construction Policy as Illustrated by the Washington Chronicle*, Bradford Reporter, Aug. 3, 1865), at 2.
[278] *For the Mirror*, American Union (April 24, 1852), *available at* http://tinyurl.com/4zaydc99.
[279] 1 Kent. Com. 310, quoted in Veto Message, 425, https://www.presidency.ucsb.edu/documents/veto-message-425 and page 330 of the Johnson impeachment trial
[280] Calvin Townsend, Analysis of Civil Government 139 (1869).

office of the assistant treasurer stationed at Boston. The case focused on whether as a clerk, Hartwell was an "officer" within the meaning of the statute. The Supreme Court said that he was. Blackman and Tillman's summarized the Court's holding as follows:

> Justice Noah Swayne wrote the majority opinion. He offered a two-part definition of an office. First, "[a]n office is a public station, or employment, *conferred by the appointment of government*." Second, "[t]he term [office] embraces the ideas of tenure, duration, emolument, and duties."
>
> In *Hartwell*, the clerk "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." The court did not expressly connect the term "officer" in the embezzlement statute with the phrase "officer of the United States" in the Appointments Clause. However, the court's discussion of the appointment being made by the head of the department suggests the two concepts were closely related—rightly so, in our view.

They then conclude that because "Presidents are not appointed by the government" but are instead "elected by the people," they cannot be Officers of the United States.

As an initial matter, it bears repeating that Presidents are *not* "elected by the people." They are elected by the Electoral College, which is as much an organ of the government as Congress or the Supreme Court is. Furthermore, as we showed in Section ___, at the time of the Founding, the words "elect" and "appoint" were used interchangeably. Remember James Madison's comment at the Constitutional Convention about the Electoral College we quoted above? "The option before us then lay between an appointment by Electors chosen by the people — and an immediate appointment by the people." The Constitutional Convention chose the prior. The Joint Committee Report from North Carolina which we quoted in section ____, shows that this understanding of the word "appoint" continued at the time Justice Swayne was writing: "*The voters are merely the appointing power*, whose function is to select the representative." In light of this linguistic insight, we think Presidents easily satisfy the *Hartwell* test.

We think the opinion supports our conclusion in at least two additional ways. First, as Blackman and Tillman note, the opinion does not use the full phrase "officer of the United States," instead using the words "officer" and "public officer." Yet it is clear that the Court is analyzing Hartwell's position under the Appointments Clause. If there was an understood legal or colloquial distinction between "officers" and "officers of the United States," we think Justice Swayne would have felt it necessary to use the latter phrase. Instead, we think the *Hartwell* opinion strengthens our view that all references to the President as an "officer" is evidence that he is an "officer of the United States."

Second, we think the opinion supports our reading of the Impeachment Clause. This actually comes from Justice Miller's dissenting opinion which argued that the Defendant

fell outside the contours of the embezzlement statute because he had not been explicitly entrusted with the money by an act of Congress. But in reaching that conclusion, we couldn't help but notice one of the sections that he quoted:

> That the Treasurer of the United States, the treasurer of the mint of the United States, the treasurers and those acting as such of the various branch mints, all collectors of customs, all surveyors of customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters, *and all public officers of whatever character*, be, and they are hereby, required to keep safely . . . all the public moneys collected by them.

Surely, Congress was not suggesting that the Treasurer of the United States, the treasurer of the mint of the United States, and other enumerated positions were not *public officers*. This is yet another example of the Alvin and the Chipmunks rule.

B. United States v. Mouat's test misconstrues the Appointment Clause by ignoring the modifying clause

United States v. Mouat considered whether a paymaster's clerk—appointed by a paymaster in the navy with the approval of the Secretary of the Navy—was entitled to mileage reimbursement under the Act of June 30, 1876. The Act limited reimbursement to "actual traveling expenses" and prohibited "disbursing officers of the United States" from collecting "for mileages and transportation in excess of the amount actually paid. Writing for the majority, Justice Samuel Miller stated:

> What is necessary to constitute a person an officer of the United States in any of the various branches of its service has been very fully considered by this Court in *United States v. Germaine,* 99 U. S. 508. In that case, it was distinctly pointed out that under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law or the head of a department, and the heads of the departments were defined in that opinion to be what are now called the members of the cabinet. *Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.*

But, as pointed out in Section ____ above, that is not actually what the Constitution says. The President, courts of law, and department heads do not appoint *all* of the officers of the United States. There is another category: those officers "*whose Appointments are* . . .

otherwise provided for" elsewhere in the Constitution. Words, we note, that the *Germaine* Court failed to quote.

As such, we find Justice Miller's statement that "Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States," to be simply wrong. It flies in the face of the express language of Article II. And we feel that both its rigid test—based as it was on an incomplete version of the Appointments Clause—and its suggestion that "Congress may have used the word 'officer' in some other connections in a more popular sense" should be disregarded as dicta.

As such, we actually think Blackman and Tillman are interpreting the historical record exactly backwards. *Mouat* is not a linguistic continuity of the original meaning of the phrase "officer of the United States" but rather a departure from it. As we have shown, the phrase was not a term of art at the time of the Founding. Instead, it referred broadly to almost all federal officials whose positions were established by law—be that the Constitution or a federal statute. And it was broad enough to encompass both elected officials generally and the President of the United States specifically.

That understanding—shared by Chief Justice Marshall in his opinion in *Maurice* and by Congress in the Postal Act—continued at the time of the drafting and ratification of the Fourteenth Amendment. As we have shown, the explicit text, legislative history, and ratification debates of the Fourteenth Amendment and legislative history of the Fifteenth Amendment—not to mention newspapermen across the country—consistently spoke of electing officers, including officers of the United States. And Congress, Presidential proclamations, newspapers, and academic works published around the time the Fourteenth Amendment was ratified routinely referred to the President and Vice-President as an "officer of the United States." Blackman and Tillman stated that the burden was on "proponents of the view that Section 3's 'officer of the United States'-language includes the presidency" to "put forward evidence as probative as *Mouat* and *Hartwell*."[281] We think we have more than met that challenge.

CONCLUSION

There is plenty, frankly, that we do not know. We do not know the meaning of the word "insurrection" in the Fourteenth Amendment, or how that meaning would apply to recent events. We have not done historical research on if the Amendment is "self-executing." We do not know many things about Section 3 of the Fourteenth Amendment.

[281] Blackman &Tillman, *supra* note 5, at 31.

And we emphatically take no position on pending litigation other than the issue this paper addresses. We understand this piece is entering a complex national debate accompanying a presidential election. We would bury this paper with disclaimers if needed to get this point across that we cannot and will not answer many important questions surrounding these big topics. As is, we've settled for the first paragraph of our conclusion.

But this we know: The term "officer of the United States" in the 1789 Constitution is not a term of art. It thus applies to all "officers of the United States," as a standard textualist interpretation of the phrase implies. There is no doubt that the person who holds the office of President of the United States becomes an officer of the United States when the person takes the Presidential Oath. Donald Trump was an officer of the United States.

Even assuming that was not the end of the matter, we also know this from a wide range of sources: At the time of the Fourteenth Amendment, the term "officer of the United States" included elected officials. Many references in that era refer to the President himself, as well as the Vice-President, as an "officer of the United States." The historical record in 1868 confirms what has been true since 1789: The President of the United States is an officer of the United States.

Appendix A:
Selection Mechanism for Governors in the Early States

State	Selection Mechanism	Referred to as Appointment, Election, or Both?	Relevant Passages
Connecticut	General Election	Election	Art. IV, § 1: "A general election for governor, lieutenant-governor, secretary of the state, treasurer and comptroller shall be held on the Tuesday after the first Monday of November, 1966, and quadrennially thereafter." Art. IV, § 2. Such officers shall hold their respective offices from the Wednesday following the first Monday of the January next succeeding their election . . ."
Delaware	Joint ballot of both houses	Appointment	Art 7: "A president or chief magistrate shall be chosen by joint ballot of both houses' to be taken in the house of assembly . . . and the **appointment** of the person who has the majority of votes shall be entered at large on the minutes and journals of each house,"
Georgia	Chosen by ballot by the General Assembly	Both	Art. II: "On the first day of the meeting of the representatives so chosen, they shall proceed to the choice of a governor, . . . and

			of an executive council, by ballot out of their own body."[282] Art. XXIV: "I, A B, ***elected*** governor of the State of Georgia, by the representatives thereof, do solemnly promise and swear that I will, during the term of my ***appointment***, to the best of my skill and judgment, execute the said office faithfully and conscientiously' according to law, without favor, affection, or partiality; that I will, to the utmost of my power, support, maintain, and defend the State of Georgia, and the constitution of the same."
Maryland	Joint ballot of both houses	Both	XXV: "That a person of wisdom, experience, and virtue, shall be chosen Governor . . . on the second Monday in every year forever thereafter, by the joint ballot of both Houses (to be taken in each House respectively) deposited in a conference room; the boxes to be examined by a joint committee of both Houses, and the numbers severally reported, that the **appointment** may be entered " . . . if the ballots should again be equal between two or more persons, then the

[282] Const. of Ga., art. II (177

			election of the Governor shall be determined by lot . . .”
Massachusetts	General Election	Election	Chapter 2, Art. 2: The Governor shall be chosen annually: And no person shall be eligible to this office, unless at the time of his election Chapter 2, Art. 3: Those persons who shall be qualified to vote for Senators and Representatives within the several towns of this Commonwealth, shall, at a meeting, to be called for that purpose, on the first Monday of April annually, give in their votes for a Governor[283]
New Hampshire	General Election	Election	Art. 42: The governor shall be chosen annually in the month of March . . . in case of an **election** by a plurality of votes through the state. . . And no person shall be eligible to this office, unless at the time of his **election** . . . [284]
New Jersey	Election by the Council & Assembly	Election	Article VII: “[T]he Council & Assembly jointly at their first Meeting, [] shall, by a Majority of Votes, elect some fit Person within the Colony to be a Governor for one Year, the Governor.”

[283] https://constitutioncenter.org/the-constitution/historic-document-library/detail/massachusetts-constitution#:~:text=The%20Massachusetts%20Constitution%20of%201780,the%20other%20branches%20of%20government.
[284] https://www.nh.gov/glance/constitution.htm

New York	Election by freeholders of the State	Election	XVII: ". . . [T]he supreme executive power and authority of this State shall be vested in a governor; and that statedly, once in every three years . . . shall be, by ballot, **elected** governor . . . which **elections** shall be always held at the times and places . . ."[285]
North Carolina	Joint ballot of both houses	Election	[T]he Senate and House of Commons, jointly at their first meeting after each annual election, shall by ballot elect a Governor for one year . . ."[286]
Pennsylvania	Joint ballot of the general assembly and council	Election	Sec. 19: "All vacancies in the council that may happen by death, resignation, or otherwise, shall be filled at the next general **election** for representatives in general assembly, unless a particular **election** for that purpose shall be sooner appointed by the president and council. The president and vice-president shall be chosen annually by the joint ballot of the general assembly and council."
Rhode Island	Election at the town, city, or ward meetings.	Election	Art. VII, § 1: "The chief executive power of this State shall be vested in a Governor, who, together with a Lieutenant Governor, shall be annually elected by the people." Art. 7 sec. 11 The compensation of the

[285] https://avalon.law.yale.edu/18th_century/ny01.asp
[286] https://avalon.law.yale.edu/18th_century/nc07.asp

			Governor . . . shall not be diminished during the term for which they are **elected**. Art. 8 sec. 1: The Governor . . . shall be elected at the town, city, or ward meetings, to be holden on the first Wednesday of April, annually. .
South Carolina	Joint ballot of both houses	Election	"[A]t every first meeting of the senate and house of representatives thereafter, to be elected by virtue of this constitution, they shall jointly in the house of representatives choose by ballot from among themselves or from the people at large a governor and commander-in-chief, a lieutenant-governor, That every person who shall be **elected** governor and commander-in-chief of the State. That the qualifications of president . . . shall be the same as of members of the general assembly, and on being **elected** they shall take an oath of qualification in the general assembly.[287]
Virginia	Joint ballot of both houses	Chosen/Appointment	A Governor, or chief magistrate, shall be chosen annually by joint ballot of both

[287] https://avalon.law.yale.edu/18th_century/sc01.asp

			Houses (to be taken in each House respectively) . . . who shall not continue in that office longer than three years successively . . . Thomas Jefferson, Esq. be **appointed** Governor or Chief Magistrate of this Commonwealth.[288]

[288] While we did not find reference to either appointment or election in the original constitution, we found an an excerpt from the Journal of the House of Delegates from 1779: https://encyclopediavirginia.org/entries/thomas-jeffersons-election-to-governor-an-excerpt-from-the-journal-of-the-house-of-delegates-june-1-1779/

Appendix B:
Selection Mechanism for Judges in the Early States

State	Selection Mechanism	Referred to as Appointment, Election, or Both?	Relevant Passages
Connecticut	Nomination by the governor and appointment by the general assembly for Supreme Court and lower court	Appointment *Used the term election for probate court judges and justices of the peace, but I am not sure whether you wanted this information.(Art. IV, §§ 4-5)	Art. IV, § 1:The judges of the supreme court and of the superior court shall, upon nomination by the governor, be appointed by the general assembly in such manner as shall by law be prescribed. Art. IV, § 3:Judges of the lower courts shall, upon nomination by the governor, be appointed by the general assembly in such manner as shall by law be prescribed, for terms of four years.
Delaware			Art. 12The president and general assembly shall by joint ballot **appoint** three justices of the supreme court for

			the State, one of whom shall be chief justice, and a judge of admiralty, and also four justices of the courts of common pleas and orphans' courts for each county . . .”
Georgia	General Election	Election	“The judicial powers of this state shall be vested in a superior courts . . . The judges of the superior court shall be elected for the term of three years, removable by the governor.”[289]
Maryland	Appointment by Governor with advice and consent of the Council	Appointment	XLVIII: That the Governor, for the time being, with the advice and consent of the Council, may **appoint** the Chancellor, and all Judges and Justice…
Massachusetts	Appointment by Governor with advice and consent of the Council	Appointment	Chapter 2, Art. 9: All judicial officers . . . shall be nominated and

[289] https://founding.com/founders-library/government-documents/american-state-and-local-government-documents/state-constitutions/georgia-constitution-of-1789/

			appointed by the Governor, by and with the advice and consent of the Council;
New Hampshire	Appointment by Governor and Council	Appointment	Art. 46: All judicial officers . . . shall be nominated and appointed by the governor and council. . . . no appointment shall take place, unless a majority of the council agree thereto.
New Jersey	N/A	N/A	N/A
New York	Appointment by Commission of Senators and the Governor	Appointment	XXIII: That all officers [including Chancellor, and Justices of the Supreme Court], shall be appointed in the manner following[]: The assembly shall, once in every year, openly nominate and **appoint** one of the senators from each great district, which senators shall form a council for the

			appointment of the said officers, of which the governor . . . shall be president and have a casting voice, but no other vote; and with the advice and consent of the said council, shall appoint all the said officers."
North Carolina	Appointment of the General Assembly by joint ballot of both houses	Appointment	XIII: "That the General Assembly shall, by joint ballot of both houses, **appoint** Judges of the Supreme Courts of Law and Equity, Judges of Admiralty . . . who shall be commissioned by the Governor . . . "
Pennsylvania	Appointment by the President with the council	Appoint	Sec. 20: "The president, and in his absence the vice-president, with the council, five of whom shall be a quorum, shall have power to **appoint** and commissionate judges"
Rhode Island	Election by the two	Elected	Art. X Sec. 4: "The

	Houses in grand committee		Judges of the Supreme Court shall be elected by the two Houses in grand committee."[290]
South Carolina	Chosen by ballot jointly by the general assembly and legislative council and commissioned by the president and commander-in-chief.		That all other judicial officers shall be chosen by ballot, jointly by the general assembly and legislative council, and except the judges of the court of chancery, commissioned by the president and commander-in-chief . . .
Virginia	Appointed by joint ballot of the two Houses	Appointment	The two Houses of Assembly shall, by joint ballot, **appoint** Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, In case of death . . . the Governor . . . shall appoint persons to succeed in office.

[290] https://tile.loc.gov/storage-services/public/gdcmassbookdig/constitutionof00rh/constitutionof00rh.pdf

			House of Assembly or the Privy Council.[291]

[291] https://encyclopediavirginia.org/entries/the-constitution-of-virginia-1776/

Appendix C: Oaths that State Executive Officers took in Southern/future rebel states in the antebellum era

State	Oath
Alabama	**Article VI, Section 1: The members of the General Assembly, and all officers, executive and judicial, before they enter on the execution of their respective offices, shall take the following oath or affirmation, to wit: "I solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and Constitution of the State of Alabama, so long as I continue a citizen thereof, and that I will faithfully discharge, to the best of my abilities, the duties of -------- according to law: so help me God."** **Constitution of 1819.[292]**
Arkansas	**SEC. 28. The appointment of all officers not otherwise directed by this constitution shall be made in such manner as may be prescribed by law; and all officers both civil and military acting under the authority of this State shall before entry on the duties of their respective offices take an oath or affirmation to support the Constitution of the United States and of this state and to demean themselves faithfully in office.** **Constitution of 1836[293]**
Florida	**Section 11. Members of the General Assembly, and all officers, Civil or Military, before they enter upon the execution of their respective offices, shall take the following oath or affirmation: I do swear (or affirm,) that I am duly qualified, according to the Constitution of this State, to exercise the office to which I have been elected, (or appointed) and will, to the best of my abilities, discharge the duties thereof, and preserve, protect, and defend the Constitution of this State, and of the United States.**

[292] Available at https://avalon.law.yale.edu/19th_century/ala1819.asp

[293] Available at https://digitalheritage.arkansas.gov/cgi/viewcontent.cgi?filename=1&article=1000&context=constitutions&type=additional

	Constitution of 1838.[294]
Georgia	**Article I, Sec. 19. Every member of the senate or house of representatives shall, before he takes his Seat, take the following oath or affirmation. to wit: " I, A B, do solemnly swear (or affirm, as the case may be) that I have not obtained my election by bribery, treats, canvassing, or other undue or unlawful means, used by myself, or others by my desire or approbation, for that purpose; that I consider myself constitutionally qualified as a senator, (or representative,) and that, on all questions and measures which may come before me, I will give my Vote and so conduct myself as may, in my judgment, appear most conductive to the interest and prosperity of this State; and that I will bear true faith and allegiance to the same; and to the utmost of my power and ability observe, conform to, support, and defend the constitution thereof .** **Article II, Sec. 5. The governor shall, before he enters on the duties of his office, take the following Oath or affirmation: " I do solemly swear (or affirm, as the case may be) that I will faithfully execute the office of governor of the State of Georgia; and will, to the best of my abilities, preserve, protect , and defend the said State, and cause justice to be executed in mercy therein, according to the constitution and laws thereof.'"[295]**
Louisiana	**Title VI, Article 90: "Members of the General Assembly, and all officers, before they enter upon the duties of their office, shall take the following oath or affirmation:** **"I (A B), do solemnly swear (or affirm) that I will support the Constitution of the United States and of this State, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States and of this State; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it, with a citizen of this State, nor**

[294] Available at https://www.floridamemory.com/items/show/189087?id=8

[295] Available at https://founding.com/founders-library/government-documents/american-state-and-local-government-documents/state-constitutions/georgia-constitution-of-1798/

	have I sent or accepted a challenge to fight a duel with deadly weapons with a citizen of this State, nor have I acted as second in carrying a challenge or aided, advised or assisted any person thus offending, so help me God."[296]
Mississippi	**Article VII,** **Sect. 1. Members of the legislature, and all officers, executive and judicial, before they enter upon the duties of their respective offices, shall take the following oath or affirmation, to wit: "I solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States, and the constitution of the state of Mississippi, so long as I continue a citizen thereof, and that I will faithfully discharge, to the best of my abilities, the duties of the office of_____according to law. So help me God."** **Sect. 2. The legislature shall pass such laws to prevent the evil practice of duelling as they may deem necessary, and may require all officers before they enter on the duties of their respective offices, to take the following oath or affirmation: "I do solemnly swear (or affirm, as they case may be) that I have not been engaged in a duel, by sending or accepting a challenge to fight a duel, or by fighting a duel since the first day of January, in the year of our Lord one thousand eight hundred and thirty-three, nor will I be so engaged during my continuance in office. So help me God."** **Constitution of 1832[297]**
North Carolina	**Provision not found in Constitution.**
South Carolina	**Every person who shall be chosen or appointed to any office of profit or trust; before entering on the execution thereof, shall take the following oath: "I do solemnly swear, (or affirm), that I will be faithful, and true allegiance bear to the State of South Carolina, so long as I may continue a citizen**

[296] *Available at, e.g.*, Journal of the Convention to form a new Constitution for the State of Louisiana 96 (1852) *copy apparently reproduced at https://en.wikisource.org/wiki/Louisiana_State_Constitution_of_1852.*

[297] Available at https://www.mshistorynow.mdah.ms.gov/issue/mississippi-constitution-of-1832

	thereof; and that I am duly qualified, according to the constitution of this State, to exercise the office to which I have been appointed; and that I will, to the best of my abilities, discharge the duties thereof, and preserve, protect, and defend the constitution of this State, and of the United States: So help me God." **Constitution of 1790, as amended in 1834.[298]**
Tennessee	**I. Every person who shall be chosen or appointed to any office of trust or profit, under this Constitution, or any law made in pursuance thereof, shall, before entering on the duties thereof, take an oath to support the Constitution of this State, and of the United States, and an oath of office.** **Constitution of 1835.[299]**
Texas	**Article VII, Section 1: "I, (A. B.) do solemnly swear (or affirm) that I will faithfully and impartially discharge and perform, all the duties incumbent on me as ----------, according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State: And I do further solemnly swear (or affirm) that since the adoption of this Constitution by the Congress of the United States, I being a citizen of this State, have not fought a duel with deadly weapons, within this State, nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, or aided, advised or assisted, any person thus offending -- so help me God."** **Constitution of 1845.[300]**
Virginia	**Provision not found in Constitution.**

[298] Available at https://www.carolana.com/SC/Documents/sc_constitution_1790.html
[299] Available at https://www.tngenweb.org/law/constitution1835.html
[300] Available at https://usiraq.procon.org/sourcefiles/1845_TX_Constitution.pdf